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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Appeal Board

In the Matter of	)	
	)	
LONG ISLAND LIGHTING COMPANY	)	Docket No. 50-322-OL-3
	)	(Emergency Planning)
(Shoreham Nuclear Power Station Unit 1)	)	
	)	

LILCO'S ANSWER TO INTERVENORS' BRIEF ON BIFURCATED APPEAL

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This is LILCO's response to the "Governments' Brief on Bifurcated Appeal from the September 23, 1988 Concluding Initial Decision in [LBP]-88-24," dated September 27, 1988 (hereinafter "Intervenors' Brief"). In their brief Intervenors argue that the Gleason Board, in the -03 docket, lacked the authority to oust them from, among other things, participation in the exercise litigation, which is conducted under the -05 docket number. The Licensing Board's decision is Concluding Initial Decision on Emergency Planning, LBP-88-24, 28 NRC ___ (Sept. 23, 1988) (hereinafter "CID").

Contrary to what Intervenors argue, the Gleason Board had not only the power but the duty to dismiss the Intervenors as it did. Indeed, to hold otherwise would do mischief to the NRC process. LILCO's argument is in five parts:

1. Because of the bifurcation of the issues on appeal, the Gleason Board's findings on the merits must be presumed correct. Hence it must be taken as true for the purpose of this appeal that Intervenors' conduct was willful, prejudicial, and in bad faith and that the "only appropriate penalty" is dismissal from the proceeding.

2. A discretionary "case management tool" -- i.e., creation of sub-dockets -- cannot be used to shield unlawful or otherwise punishable behavior.

3. Any licensing board in the 50-322-OL proceeding has the power to dismiss a party from the proceeding. Whether such dismissal is appropriate is a fact-and-circumstance issue taking into account such things as the nature and pervasiveness of the behavior being punished and the relationship of the sub-proceeding in which the disciplinary action is taken to other sub-proceedings affected by it.

4. The case law from the federal courts supports the Licensing Board's authority to dismiss a party.

5. That Intervenors are governments does not protect them from the consequences of their misdeeds.

I. The Gleason Board's Findings on the Merits Must Be Taken as Correct for the Purpose of this Appeal

The Intervenors have asked that the procedural issue of whether the Gleason Board had the power (jurisdiction) to dismiss them be separated out and heard first. The Appeal Board granted this request without hearing the views of the NRC Staff or applicant. Accordingly, no matter what the other parties may think about the bifurcation, both the Appeal Board and the parties must now be bound by the following groundrule: the Gleason Board's findings on the merits must be taken as true while the procedural issue is decided initially. A party may not have an issue split off for early decision and also take advantage of a presumption that he will succeed in having other decisions reversed in the future. (If authority for this self-evident proposition is necessary, it may be found by analogy to motions for summary disposition, for which the record must be viewed in the light most favorable to the party opposing the motion. See, e.g., Pacific Gas and Electric Co. (Stanislaus Nuclear Project, Unit 1), LBP-77-45, 6 NRC 159, 163 (1977).)

Also, federal case law indicates that a reviewing court should not substitute its judgment for the judgment of the fact finder in imposing sanctions. In National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 642 (1976) (per curiam), the Supreme Court held that, under the circumstances, the district judge had not abused his discretion in finding bad faith on the part of the plaintiff hockey club for failing to answer interrogatories on time. The Court explained as follows:

> The question, of course, is not whether this Court, or whether the Court of Appeals, would as an original matter have dismissed the action; it is whether the District Court abused its discretion in so doing.

A fortiori, then, the Appeal Board should not substitute its judgment on the merits for the Licensing Board's without even reviewing the record below or allowing the parties to brief the merits.

Since the bifurcation of the issues requires that the Licensing Board's findings on the merits be taken as correct, the following in particular must be deemed true:

1. The record reveals "a sustained and willful strategy of disobedience and disrespect for the Commission's adjudicatory processes." CID, slip op. at 129.
2. Intervenors' actions "were willful, taken in bad faith, and were prejudical to LILCO and the integrity of the Commission's adjudicatory process." Id. at 130.
3. The sanction of dismissal as parties to the proceeding "is the only appropriate penalty." Id.
4. The misbehavior for which this sanction was levied was found to have pervaded all the emergency planning proceedings: not just the recent portion of the offsite EP (OL-3) proceeding but also in the earlier onsite proceeding and during the 1986 exercise (OL-5) proceeding. Id. at 108-12.

Given these findings, which must be accepted as true for present purposes, the issue is whether the Licensing Board lacked the authority to impose "the only appropriate penalty" left to the Board under the Commission's Statement of Policy, CLI-81-8, 13 NRC 452, 454 (1981). The issue is not whether the sanction it levied was appropriate under the facts and circumstances, but whether it lacked the power to levy the sanction no matter how justified it may have been.

LILCO submits, as it has before, that Intervenors' "jurisdictional" argument goes to the very authority of a licensing board to make use of the entire spectrum of sanctions expressly made available by the Commission. The Appeal Board evidently disagrees; it has said that LILCO misunderstands the "narrow jurisdictional issue" here and

that the "instant appeal does not raise issues concerning licensing boards' authority to impose sanctions against parties generally." Memorandum and Order at 6 (Sept. 29, 1988). LILCO urges the Appeal Board to reconsider that opinion.[1/] The Commission's Statement of Policy gives licensing boards a "spectrum" of sanctions up to and including dismissal of parties from the proceeding. 13 NRC 452, 454; see also 10 C.F.R. § 2.718. If the Appeal Board rules in Intervenors' favor on this appeal, however, the ultimate sanction does not exist in a multi-board proceeding. The result will be that, whenever the Chairman of the Licensing Board Panel appoints a second board to hear part of a proceeding, he will be creating a vacuum: no board in a multi-board proceeding will retain the ultimate power to dismiss a party -- no matter how serious the party's misconduct. Thus the discretionary "case management tool" of assigning docket numbers and judges will have been used to curtail the Commission's Statement of Policy and to open each portion of a proceeding to the kind of tactics that, as the OL-3 Board found, Intervenors have engaged in for years. With all due respect, the Appeal Board and the Intervenors are wrong that the authority to impose sanctions is not at issue here.

Indeed, what Intervenors seek by their bifurcated appeal is in effect a decision on the merits of the sanctions issue, including the appropriateness of the sanction applied. If the Intervenors prevail on what they apparently have persuaded the Appeal Board is a "narrow jurisdictional issue," then the Licensing Board's decision to dismiss

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1/ Indeed, this matter is before the Appeal Board now despite the Appeal Board's admonition in Perkins that the Licensing Board has not only the right but the duty to determine its jurisdiction in the first instance. Duke Power Co. (Perkins Nuclear Station, Units 1, 2, and 3), ALAB-591, 11 NRC 741 (1980). In that case, a petitioner filed a petition to intervene in the Perkins construction permit proceeding with the Licensing Board, but the Staff filed a response with the Appeal Board because the Licensing Board had already rendered a partial initial decision. The Appeal Board declined to address the jurisdictional question and referred the Staff's response to the Licensing Board for its consideration. The situation here falls squarely within that precedent: the NRC Staff filed its scheduling request with the OL-3 board, and the Intervenors filed their response with the Appeal Board. Under Perkins the Appeal Board should not decide the jurisdictional issue in the first instance.

the parties, rather than merely dismiss the contentions, would be reversed. The prejudice to LILCO from such a decision would be severe, particularly since the bifurcation decision was made ex parte, the briefing time on the procedural issue was made so short, and briefing on the merits has not been done at all.

II. A Discretionary "Case Management Tool" Cannot Be Used to Shield Unlawful Behavior or Revise the Commission's Policies

As the Appeal Board recognized in ALAB-901, the source of the problem is "the disposition of different issues at different times in the same operating license proceeding by multiple licensing boards, through the issuance of several 'partial initial decisions' (rather than one 'initial decision')." ALAB-901, slip op. at 4 (Sept. 20, 1988). The Appeal Board noted that the Rules of Practice do not explicitly authorize or address this problem, although these practices "have become essential to effective case management." Id.; see also Appeal Board Memorandum and Order at 5 n.5 (Sept. 29, 1988) ("case management tool" of using multiple licensing boards).

The practice of dividing the 50-322-OL proceeding among a variety of docket subnumbers and licensing board judges is, as the Appeal Board has said, a "case management tool." Dockets are renumbered and Boards reconstituted by the Chairman of the Atomic Safety and Licensing Board Panel, without prior notice to the parties, as a routine ministerial matter. Indeed, in this case Intervenors have complained bitterly about such practice. But as the Appeal Board has said, "absent Commission action, the Licensing Board Panel Chairman is free to establish and reconstitute licensing boards with whichever individual Panel Members he feels are appropriate, subject to review only for an abuse of discretion." ALAB-901, slip op. at 7. If this ministerial reconstituting of Boards affected the "jurisdiction" and basic enforcement powers of the boards involved, then it would certainly come as a surprise to litigants and at worst might deny them due process.

There is one "proceeding" here, on LILCO's application for an operating license. All the operating license issues are under Docket Number 50-322-OL, which has included the "health and safety" issues, the "Phase I" (onsite) emergency planning issues, the "Phase II" (offsite) emergency planning issues, the issues remanded by the Appeal Board and the Commission, and the issues over the February 1986 and now the June 1988 emergency planning exercises. Included at various times were issues involving the security plan and the emergency diesel generators.

For most of this proceeding the issues have been decided under the undivided 50-322-OL docket number. For example, 50-322-OL was the docket number on the Brenner Board's (Judges Brenner, Carpenter, and Morris) decision that the Intervenors were in default of a Board order (LBP-82-115, 16 NRC 1923 (1982)), the same Board's decision that the proceeding should go forward notwithstanding the County's opposition to all emergency plans (LBP-83-22, 17 NRC 608 (1983)), and the Board's (Judges Brenner, Ferguson, and Morris) decision on the health and safety issues (LBP-83-57, 18 NRC 445 (1983)).

In May 1983 the Chairman of the Licensing Board Panel established a separate licensing board, designated as sub-docket OL-3 and authorized to preside "over the proceeding on all emergency planning issues." 48 Fed. Reg. 22,235 (May 17, 1983). On February 13, 1986, LILCO conducted the first FEMA-graded exercise of the Shoreham offsite emergency response plan. One month later, responding to a pleading by Intervenors and in the interest of expediting any exercise litigation on the 1986 Shoreham exercise, LILCO filed a motion before the Commission requesting the establishment of a licensing board and expedited procedures for litigation of that exercise. See Long Island Lighting Company's Motion for Establishment of Licensing Board and Institution of Expedited Procedures for Litigation of Shoreham Emergency Planning Exercise Issues, and Response to Intervenors' March 7, 1986 "Motion Concerning Proceedings Relating

to the Sh eham Exercise" (March 13, 1986). LILCO asked the Commission to appoint a board co osed of members "who have participated in the earlier Shoreham emergency planning proceedings and thus have knowledge of the LILCO Plan and the mammoth record in the case." Id. at 11.

On June 6, 1986, the Commission issued an order to initiate a hearing on the results of the 1986 exercise and directed the Chairman of the Atomic Safety and Licensing Board Panel to "reappoint the members of the earlier Board if they are available." Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-86-11, 23 NRC 577, 582 (1986). On June 10, the Licensing Board Panel Chairman, Chief Administrative Judge B. Paul Cotter, Jr., did just that, appointing the members of the existing OL-3 docket Board -- Administrative Judges Margulies, Kline, and Shon -- to preside over litigation on the 1986 exercise. See Establishment of Atomic Safety and Licensing Board (unpublished order) (June 10, 1986). This Commission direction to appoint the members of the earlier board, if available, indicated the Commission's awareness of the obvious and important interrelationship of emergency planning and exercise issues. The OL-5 designation for exercise-related papers was made several weeks late by Judge Cotter "for more effective docket management." Change of Docket Number (July 24, 1986).

On October 7, 1986, Judge Cotter sua sponte reconstituted the OL-5 Board by replacing Board Chairman Margulies with Judge John H. Frye, III, and Judge Kline with Judge Oscar H. Paris. (Judge Shon remained a member of both the OL-3 and OL-5 Boards.) Judge Cotter cited schedule conflicts as the basis for the Board reconstitution.[2/] On October 17, 1986 Judge Cotter issued an order clarifying the scope

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2/ On October 14, 1986, counsel for Intervenors wrote to the Licensing Board Panel Chairman demanding that the reconstitution order be rescinded. See Letter from Herbert H. Brown to B. Paul Cotter Jr., (Oct. 14, 1986). Responding to a subsequent motion filed by Intervenors, the Panel Chairman declined to rescind the reconstitution order. See Suffolk County and State of New York Motion to Rescind Reconstitution of Board by Chief Administrative Judge Cotter (Shoreham Nuclear Power Station, Unit 1), LBP-86-37A, 24 NRC 726 (1986).

of the October 7 Order. See Notice of Reconstitution of Board: Clarification (unpublished order) (Oct. 17, 1986).

The OL-5 Board issued decisions on the 1986 exercise on December 7, 1987, and February 1, 1988. See LBP-87-32, 26 NRC 479 (1987); LBP-88-2, 27 NRC 85 (1988). LILCO sought appeal from these decisions on December 17, 1987, and February 12, 1988, respectively.

On March 9, 1988, after soliciting the views of the parties,[3/] the OL-5 Board issued a Memorandum and Order in which it declined to retain jurisdiction over Shoreham exercise-related matters. See LBP-88-7, 27 NRC 289 (1988). The Board's decision, which was never appealed from, had been opposed by LILCO and Intervenors, who both asked the Frye Board to retain jurisdiction over any remedial aspects of the 1986 exercise.[4/] The Appeal Board has now held, sua sponte, that the Frye Board was incorrect almost seven months ago in LBP-88-7. ALAB-901, 28 NRC ___, slip op. at 9 n.6 (Sept. 20, 1988).

This complicated case history -- created by Intervenors' own efforts to litigate every conceivable issue -- has provided them with an opportunity. What the Intervenors have tried to do -- and will succeed in doing if the Appeal Board upholds their appeal -- is to convert the discretionary "case management tool" of board assignment

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3/ See LILCO's View on Continuing Board Jurisdiction (Feb. 17, 1988); NRC Staff Response to Board's Request for Views of Parties on Whether the Board Should Retain Jurisdiction Over LILCO Corrective Actions (Feb. 19, 1988); Governments' Views on Whether the Licensing Board Should Retain Jurisdiction of the Exercise Litigation (Feb. 23, 1988).

4/ LILCO's view was explicitly conditional on the notion that the 1986 exercise could still serve as a basis for licensing. The Appeal Board has twice expressed its view, however, that the 1986 exercise cannot serve as the basis for issuance of a license and that the appeals from the OL-5 Board's Order are technically moot and require the rendering of advisory opinions, which the Appeal Board was willing to give because of their expected precedential value. Accordingly, the only continuing vitality to the OL-5 docket has been as a vestigial avenue for technically moot appeals.

and creation of sub-dockets into a shield against the consequences of their own unlawful behavior. The Intervenors propose to divide the proceeding into watertight "jurisdictional" compartments. In each such compartment they will push the rules as far as they can be pushed and even beyond, and, if occasionally they find themselves (or merely their contentions) dismissed for improper behavior, then they can merely move on to the next compartment and start again -- with the apparent approval of the Appeal Board in this particular case. As the Appeal Board knows, the Intervenors have used this tactic before. See LBP-82-115, 16 NRC 1923 (1982).

Thus Judge Shon's observation that Intervenors' recalcitrance "did not extend to all phases of the case," CID, dissenting opinion, slip op. at 10, which he felt militated in Intervenors' favor, actually militates against them. It is part of the very insidiousness of their tactics that, as the majority put it, the "strategy of non-cooperation and obstruction was deeply entwined with legitimate practice." CID, slip op. at 129. Of course it was; that was precisely the point. The Intervenors' strategy was to obey enough of the Rules of Practice to stay in the proceeding while violating the Rules of Practice and Licensing Board orders whenever it was to their advantage. The Licensing Board majority fully understood this.

In two instances, first in the "Phase I" proceeding and now in the matter at hand, Intervenors pushed the Rules too far and were in effect excluded from the proceeding. But those sanctions are of little effect if the Intervenors can simply move on to a new phase of the proceeding and begin their tactics anew. The Brenner Board concluded that it was obligated to impose sanctions against Suffolk County in order to prevent future violations of the Rules:

> To allow intervenors to decline to follow our order solely because they disagree with it, would be a particularly egregious abdication of our duty under 10 CFR §2.718 to regulate the course of this proceeding. Not only would permitting such actions be contrary to Commission precedent, but it would also likely be repeated were sanctions not imposed for this breach so as to induce future compliance with Board orders.

LBP-82-115, 16 NRC 1923, 1931 (1982). The Appeal Board affirmed the Brenner Board's default ruling as "unassailable." ALAB-788, 20 NRC 1102, 1178 (1984). What has recently been made clear is that the Brenner Board's sanctions were not sufficient to prevent further deliberate violations of the Rules.

III. Any Licensing Board in the 50-322-OL Proceeding Has the Power to Dismiss a Party from the Entire Proceeding

The Commission's "Statement of Policy on Conduct of Licensing Proceedings," CLI-81-8, 13 NRC 452 (1981), provides that a "spectrum of sanctions from minor to severe is available to the boards to assist in the management of proceedings." Id. at 454. "For example, the boards could . . . in severe cases, dismiss the party from the proceeding." Id. As noted above, the Intervenors' view of jurisdiction would remove the dismissal sanction, which in this case, based on the record, is the "only appropriate penalty," from this and other multi-board cases.

It follows from what has been said that any board in this docket is empowered, in extreme cases such as the one presented here, to dismiss a party from the entire 50-322-OL proceeding. The Brenner Board could have done it; the Frye Board could have done it; and the Gleason Board could have done it (and did). Intervenors' remedy is to appeal their dismissal on the merits.

IV. The Case Law from the Federal Courts Supports the Board's Authority

The issue presently before the Appeal Board is one that has not arisen before in this Commission. However, contrary to Judge Shon's views,[5/] federal case law makes

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5/ In his partial dissent from the Licensing Board's decision, Judge Shon cites a 1971 treatise on federal practice for the suggestion that dismissal of Intervenors from the entire case might violate constitutional limitations. Dissent, slip op. at 5. He admits, however, that he was unable to find "any clear precedent" on the issue. Id. As described above, clear precedent exists to show not only that complete dismissal of a party from an entire proceeding is constitutional but also that such dismissal is sometimes necessary to preserve the integrity of the judicial process.

clear that a court's authority to impose sanctions, including dismissal from the entire case, cannot be limited by bifurcated proceedings or other "case management tools" that are typically employed in complex federal litigation.

In Branca by Branca v. Security Ben. Life Ins. Co., 773 F.2d 1158 (11th Cir. 1985), modified, 789 F.2d 1511 (1986), the appellate court rejected the defendant's "specious jurisdictional argument" concerning enforcement of sanctions from a discovery dispute that had arisen in a separate court. 773 F.2d at 1165. Plaintiff sued in a federal court in Florida to collect the proceeds from two life insurance contracts and sought discovery against defendant's employee in Kansas. When a discovery dispute arose, plaintiff obtained an order to compel from the federal district court in Kansas. The defendant refused to obey the order and appealed to the Court of Appeals for the Tenth Circuit. When the plaintiff moved in the Florida district court for sanctions, the defendant argued that the district court in Florida had no authority to grant sanctions for a discovery dispute occurring in Kansas. The Court of Appeals for the 11th Circuit disagreed and remanded the issue to the Florida district court for findings and conclusions on whether the defendant had abused discovery procedures.

In Weisburg v. Webster, 749 F.2d 864 (D.C. Cir. 1984), the court upheld the dismissal of the plaintiff's entire case, even though the discovery dispute affected only the first part of a bifurcated proceeding. After several years of Freedom of Information Act requests and appeals, during which time the FBI made available more than 200,000 pages of documents, the plaintiff filed suit challenging the government's responses. The district court divided the case into two parts, one on the adequacy of the FBI's search and another on the validity of its asserted exemptions. With regard to the adequacy of its search, the FBI sought discovery from the plaintiff. After months of delay and refusals to respond, the district court granted the government's motion to dismiss the entire case. On appeal, the plaintiff argued that it was error for the trial court to

dismiss him from the entire case when the sanctioned conduct arose only in the first proceeding. The Court of Appeals disagreed:

> If dismissal is to perform the deterrent function envisioned in National Hockey League, dismissal of the entire case will often be necessary, even when the discovery dispute is focused on a single claim. If the most that can be put at risk by recalcitrant behavior is dismissal of the disputed claim, the recalcitrant party will often have an incentive to test the court. His obstreperousness may result in some compromise on the disputed claim, which works to his benefit. If he is unlucky and suffers a limited dismissal, he only loses what he would have lost anyway--the particular point at issue. Limited dismissal may present him with nothing to lose and something to gain.

749 F.2d at 872.

In Wyle v. R.J. Reynolds Industries, Inc., 709 F.2d 585 (9th Cir. 1983), the plaintiff filed an antitrust complaint alleging, among other things, that the defendant had paid illegal rebates from 1971 through 1975. The defendant admitted that it had paid possibly illegal rebates but alleged as an affirmative defense and counterclaim that the plaintiff had paid similar rebates and had falsely denied rebating. The plaintiff denied the claim, counterclaimed, and demanded a jury trial. Id. at 588.

In addition to denying the defendant's allegations of illegal rebating, plaintiff gave sworn testimony and filed sworn answers to interrogatories denying that it had paid illegal rebates. The defendant moved for sanctions, including dismissal of the complaint, on the grounds that plaintiff had falsely claimed that it had not engaged in rebating and that it had failed to comply with court orders directing the production of documents concerning rebating. Id. at 588-89.

During a later hearing on a different issue, counsel for the plaintiff admitted that one of plaintiff's agents had engaged in illegal rebating. At about the same time, following plaintiff's bankruptcy and the appointment of a new trustee, the plaintiff filed amended answers to defendant's counterclaim admitting that it had engaged in rebating. The district court held evidentiary hearings on the defendant's motion for

sanctions and concluded that the plaintiff's entire complaint and counterclaim should be dismissed.

On appeal, the plaintiff argued that the sanction of dismissal should be lifted (1) because it was unrelated to the issue of rebating and (2) because it was disproportionate to the violation, especially in light of plaintiff's amended answers. Id. at 591. The Court of Appeals rejected both arguments. First, the court said the issue of rebating was clearly relevant to the question of whether, and to what extent, the defendant should be held liable for plaintiff's injuries. Second, the Court found that the sanction was not inappropriate:

> Unless we uphold the dismissal, PFEL [the plaintiff] will profit from its own failure to provide discovery. The district court expressly found that monetary sanctions would be insufficient because PFEL withheld 'the essential evidence needed to establish the true extent of rebating.' Additionally, the court weighed the relevant factors, and determined that the deliberate deception and the irreparable loss of material evidence justified the sanction of dismissal. Although this court might have settled on a different sanction had we considered the question originally, the district court's decision clearly falls within the acceptable range.

Id. (citations omitted).

Dismissal sanctions may be imposed to cover not only all issues in a proceeding but also all parties. In Aztec Steel Co. v. Florida Steel Corp., 691 F.2d 480 (11th Cir. 1982), cert. denied 460 U.S. 1040 (1983), plaintiffs sued Florida Steel Co., LaClede Steel Co., and Bethlehem Steel Co. alleging antitrust violations. Bethlehem and LaClede served interrogatories on the plaintiffs, but plaintiffs failed to respond adequately. The district court dismissed plaintiffs' claims against all three defendants. Plaintiffs appealed the dismissal of their claim against Florida Steel, which had not served interrogatories. The Court of Appeals upheld the dismissal, noting that appellants' argument disregarded the "institutional values" that the court was empowered to protect:

> [S]anctions are imposed not only to prevent unfair prejudice to the litigants but also to insure the integrity of the discovery process. [Plaintiffs'] contumacious conduct justified the district court's dismissal of the entire action.

Id. at 482.

These cases did not arise in NRC proceedings and may be distinguishable on one ground or another from the Shoreham case. But at a minimum they illustrate an important principle that applies fully to NRC practice: an adjudicatory body's authority to protect the integrity of its processes cannot and should not be limited by procedural devices, not even when such devices are claimed to be "jurisdictional" by the sanctioned party.[6/] They illustrate also that appellate courts defer to the discretion of trial courts in imposing sanctions -- a principle that Intervenors seek to weaken at the NRC by limiting the "jurisdiction" of licensing boards.

V. That the Intervenors Here Are Sovereign Governments Does Not Protect Them from their Misdeeds

Judge Shon in his partial dissent argues that governments should not be dismissed from a proceeding, apparently not ever and in any event not in this proceeding, simply because they are governments. Dissent, slip op. at 3. But his reasoning, LILCO submits, is unpersuasive.

6/ Federal caselaw also establishes that the absence of notice as to the possibility of dismissal does not necessarily render such a dismissal void. See Link v. Wabash Railroad Company, 370 U.S. 626, 632 (1962) (Warren, Black, and Douglas dissenting). In the Shoreham case Intervenors had ample notice of the possibility of dismissal from the entire proceeding. The Board first noted that it was considering the possibility of dismissal in a teleconference of June 24, 1988. Transcript at 20,923 (Judge Gleason). In its brief filed on July 26, 1988, LILCO urged the Board "to dismiss Intervenors from this entire proceeding for long-standing and continuous violations of basic good-faith discovery norms." LILCO's Supplement to its June 15 Brief on Discovery Sanctions in Light of Subsequent Developments at 2 (July 26, 1988). In response, Intervenors surveyed the caselaw and concluded that "federal courts reserve the ultimate sanction of dismissing a party for only those cases in which a party shows bad faith in failing to comply with discovery." Government's Reply to July 26 Supplements Filed by LILCO and the NRC Staff Seeking Imposition of Sanctions at 89 (August 1, 1988). Without question, then, Intervenors had sufficient notice of the possibility of dismissal from the entire case.

First, a violation of the rules is a violation of the rules, no matter who commits it. The harm to the NRC's process and authority is at least as severe when a government violates the rules as when a private party does.

Second, one would expect a sovereign government to have more, not less, respect for the legal process. Should not the NRC hold such governments to a higher, not a lower, standard of behavior? In this case the State has several operating nuclear plants; the County has Washington, D.C. counsel with long experience in this case and other NRC cases. Should not these governments be held to as high a standard as a private-party intervenor with no legal counsel and no technical expertise?

Judge Shon cites a regulation, 10 C.F.R. § 2.715(c), that gives state and local governments certain "special treatment." He reasons that governments should also be given special treatment when sanctions are imposed against them. But the special treatment afforded states and other governments is defined by § 2.715, not just illustrated by it. Indeed, in the River Bend case cited by Judge Shon, the Appeal Board noted that a government let in as an "interested state" must observe the procedural requirements applicable to other participants. Gulf States Utilities Co. (River Bend Station, Units 1 and 2), ALAB-444, 6 NRC 760, 768 (1977), cited in Judge Shon's dissent, slip op. at 9.[7/] There appears to be no authority for the proposition that, contrary to

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7/ While the Commission favors the involvement of interested States and local governments, this right of participation is not unconditional. See Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), CLI-86-20, 24 NRC 518, 519 (1986) aff'd sub nom. Ohio v. Nuclear Regulatory Com'n, 814 F.2d 258, 263-64 (6th Cir. 1987) (a state intervening late must take the proceeding as it finds it). An interested State seeking to participate in a proceeding under 10 CFR 2.715(c) must, once admitted, observe the procedural requirements applicable to other participants. See Gulf States Utilities Co. (River Bend Station, Units 1 and 2), ALAB-444, 6 NRC 760, 768 (1977). For example, an interested State may not complain of rulings made or procedural arrangements settled prior to its participation. See Pacific Gas and Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 and 2), . LAB-600, 12 NRC 3, 8 (1980).

The "interested State" provision in 10 C.F.R. § 2.715(c) permits an interested

(footnote continued)

River Bend, the special treatment afforded by § 2.715(c) creates other, unstated privileges for states and counties.

Judge Shon also cites governments' "expertise" in emergency planning and the Commission's statements approving the participation of state and local governments in emergency planning. Dissent, slip op. at 9. Those considerations have force, however, only where the governments are using their expertise in a good-faith effort to help the NRC find the truth. Where, as here, the Intervenors are engaged in a results-oriented effort to prove (or even render) emergency planning inadequate no matter what the facts, their "expertise" in and of itself is immaterial. The Board has found that with respect to the realism issues the Intervenors obstructed its search for facts by withholding from it witnesses who have "expertise." And it found, in the cases of hospital ETE's, school bus driver role conflict, and reception centers, that the Intervenors have pursued litigation more with an eye to dragging out the proceeding than to getting at the truth. See CID, LBP-88-24, slip op. at 82 (finding that Intervenors' assertions of uncertainty in hospital ETE's have little merit because based on flawed and misleading evidence), 85 (questioning Intervenors' good faith in pursuing litigation on hospital ETE's after it became evident there was no factual cause for controversy within the defined scope of the proceeding), 61 (criticizing as "ludicrous" Intervenors' claim that school children would be denied access to Nassau County); LBP-88-13, 27 NRC 509, 547 (1988) (State review of LILCO's traffic analysis in reception centers proceeding was not discriminating and brought into litigation every arguable fault, whether significant or

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(footnote continued)

State or local government to participate in a proceeding without taking a position on the issues. Here, the Intervenors have certainly taken a position on the issues and have been admitted, and have participated, as parties. Moreover, their participation has resulted in their dismissal from the proceeding for serious misconduct. In these circumstances, they should not be permitted to participate further notwithstanding the special status available to State and local governments pursuant to 10 C.F.R. § 2.715(c).

not), 548 (Intervenors' experts on traffic lost a measure of credibility). Earlier boards had found the same lack of candor and good faith. See LBP-83-57, 18 NRC 445, 579 (1983) (Board's task on QA issues compounded by Suffolk County's misrepresentation of the complete record); LBP-85-12, 21 NRC 644, 794 (State and County witnesses attempted to "circumvent" the quantitative problem of the effect of human behavior on the evacuation plan), 806-07 (County witness was of little assistance in resolving evacuation time estimate issues), 826-27 (State witness fell short of Board's expectations on issue of number of available buses). Sanctions have been imposed here precisely because Intervenors repeatedly refused to reveal evidence, within their "expertise," that (it must be presumed[8/]) would have weighed against their litigation position. Under these circumstances appeals to their "expertise" have no force whatsoever.

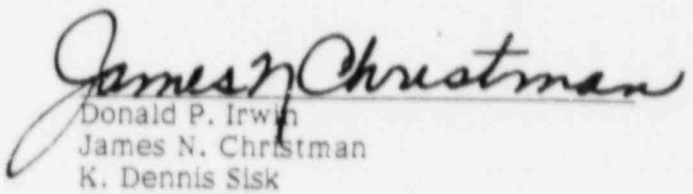
At bottom Judge Shon's argument appears to be that the NRC and FEMA cannot correctly decide emergency planning issues without the help of intervenors, even intervenors who proceed in bad faith and flout the Commission's Rules of Practice. LILCO does not understand that to be a correct view either of the facts or of the theory of NRC regulation.

8/ As a general proposition, NRC case law recognizes "that when a party has relevant evidence within his control that he fails to produce, that failure gives rise to an inference that the evidence is unfavorable to him." Public Service Company of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-471, 7 NRC 477, 498, rev'd on other grounds, CLI-78-14, 7 NRC 952 (1978), quoting International Union (UAW) v. NLRB, 459 F.2d 1329, 1336 (D.C. Cir. 1972).

VI. Conclusion

The Gleason Board had the authority to dismiss parties from the entire 50-322-OL proceeding, as does any licensing board in the docket in extreme cases. The Board's action should be affirmed.

Respectfully submitted,



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USNRC

In the Matter of
LONG ISLAND LIGHTING COMPANY
(Shoreham Nuclear Power Station, Unit 1)
Docket No. 50-322-OL-3

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I hereby certify that copies of LILCO'S ANSWER TO INTERVENORS' BRIEF ON BIFURCATED APPEAL were served this date upon the following by telecopier as indicated by one asterisk, Federal Express as indicated by two asterisks, or by first-class mail, postage prepaid.

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