LILCO, October 5, 1988

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

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

LONG ISLAND LIGHTING COMPANY'S PETITION FOR REVIEW OF ALAB-901 AND FOLLOW-ON ORDERS

LILCO petitions the Commission, pursuant to 10 CFR § 2.786, to review and reverse three related Appeal Board Orders in the Shoreham emergency planning case: ALAB-901, 28 NRC ___ (September 20, 1988), and two follow-on issuances (Order, September 27, 1988; Memorandum and Order, September 29, 1988), on the ground that they are incorrect on important grounds of law and Commission policy.

The first of these orders, ALAB-901, retroactively redefines the authority of the general-jurisdiction emergency planning Licensing Board (the "OL-3 docket" Board) in the name of "effective case management," so as to oust it of authority over the 1988 Shoreham exercise; and vests that jurisdiction instead in the defunct "OL-5 docket" Board, which had disbanded (without Appeal Board dissent) in March 1988 after completing its sole, and now moot, function of hearing the 1986 exercise. LBP-88-7, 27 NRC 289 (1988).

The other two orders (September 27 and 29) draw on ALAB-901's erroneous constriction of the OL-3 Board's jurisdiction. They separate and set for expedited briefing and decision the issue of whether the OL-3 Board had authority, in its

Concluding Initial Decision of the previous week, LBP-88-24, 28 NRC ___ (September 23, 1988), to impose sanctions that had effects outside its (retroactively constricted) jurisdiction: i.e., whether the OL-3 Board had authority to dismiss governmental Intervenors (Suffolk County, New York State, Town of Southampton) from the Shoreham licensing proceedings generally.

Both of these orders, briskly issued (in one case ex parte), are ostensibly founded on the unimpeachable policy of "effective case management" in a complex proceeding. But their combined effect is to fragment this case needlessly, prejudice its outcome, and (in the case of the ex parte September 27 Order), deny due process.

The significance of these three orders becomes plain when viewed against the history of this case, including recent events. The relevant history is simple: except for the 1986 Shoreham emergency planning exercise (which the Commission provided for separately in CLI-86-11, 23 NRC 577, 582 (1986)), all Shoreham emergency planning litigation has always been and remains within the jurisdiction of one Licensing Board, that in the "OL-3" docket. (Issues relating to the 1986 exercise had been heard and decided in a separate "OL-5" sub-docket.)

The relevant recent events are equally straightforward: within the past month FEMA has issued a deficiency-free Post-Exercise Assessment of Shoreham's June 7-9, 1988 exercise and has found that the Shoreham emergency plan, as demonstrated in the June 7-9 exercise, now provides reasonable assurance of protection of the public health and safety.[1] And the general-jurisdiction OL-3 Licensing Board has issued its Concluding Initial Decision on Emergency Planning, deciding all remaining emergency planning issues favorably to LILCO on the merits, dismissing the

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[1] The Post-Exercise Assessment (September 2, 1988), and the FEMA Region 2 RAC Report on the Shoreham Offsite Emergency Plan (reviewed through Revision 10)(September 8, 1988) were forwarded to the NRC, along with FEMA's official reasonable-assurance finding, by letter from Grant C. Peterson (FEMA) to Victor Stello, Jr. (NRC) on September 9, 1988.

governmental Intervenors from the proceeding as a sanction for sustained and repeated misfeasance, and authorizing issuance of a full power operating license. LBP-88-24, supra.

Together, the three Appeal Board orders drastically affect the licensing prospects for Shoreham. Because they are incorrect as a matter of law and policy, because they misapply the concept of "effective case management," and because they have dire portents for completion of the Shoreham case, LILCO requests the Commission to review them.

1. Summary of the Actions of Which Review is Sought

ALAB-901, issued just three days before the Concluding Initial Decision in the emergency planning case, LBP-88-24, grants a motion filed directly with it by Intervenors[2] to appoint some board (other than the OL-3 Board) to try matters relating to the 1988 Shoreham exercise, even though there was pending at the time a Staff motion before the OL-3 Board to set an exercise litigation schedule. In ALAB-901 pre-emptively strips the OL-3 Licensing Board of jurisdiction over the 1988 exercise, places it

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[2] Intervenors' Motion for Appointment of Licensing Board with Jurisdiction to Hear Exercise Issues was filed directly with the Appeal Board on September 13. This motion crossed and was intended by Intervenors to preempt a motion by the Staff, dated September 9, asking the OL-3 Licensing Board to set a schedule for any litigation which might be necessary on the 1988 exercise. Intervenors contended that since 1986 exercise issues still lingered before the Appeal Board it, rather than the OL-3 Licensing Board, had jurisdiction to determine the structure of litigation relating to the 1988 Exercise. The Appeal Board accepted that argument in ALAB-901. The Staff's motion with the OL-3 Board is still pending.

instead in the defunct[3] "OL-5" sub-docket, and implicitly reinstates the previous "OL-5 docket" Board's membership.[4] [5]

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[3] The OL-5 Licensing Board has been out of business as a practical matter for nearly seven months. After reaching decisions on the scope of the February 13, 1986 exercise (LBP-87-32, 26 NRC 479 (December 7, 1987)(aff'd as to results ALAB-900, 28 NRC __ (September 20, 1988)) and LILCO's performance in it (LBP-88-2, 27 NRC 85 (February 1, 1988) (appeal pending)), and after receiving comments from the parties, the OL-5 Board concluded that it lacked authority from the Commission to determine matters relating to remediation of the February 13, 1986 exercise. LBP-88-7, 27 NRC 289 (March 9, 1988). It noted that it had not been given the power to reach ultimate licensing findings. It also observed that more than two years had passed since the February 13, 1986 exercise and that that exercise could not be used, therefore, as a licensing basis absent an exemption from the two-year limit of 10 CFR Part 50 Appendix E ¶. IV.F.1. The OL-5 Board also suggested that even if an exemption could be obtained, it might be more sensible for LILCO to conduct a completely independent exercise as a basis for licensing than to try to remedy perceived defects in the 1986 exercise. In that event, the OL-5 Board concluded, the Commission could delegate to it further authority if it wished to do so. Id. 292. With that, the OL-5 Board concluded that its mandate from the Commission under CLI-86-11 did not extend to jurisdiction over remedial measures, and it ceased to function thereafter. 23 NRC at 291-92. No party appealed from that decision and the Appeal Board did not exercise its sua sponte review powers at the time. Indeed, the Appeal Board has since ventured that the "1986 exercise is apparently without significance vis-a-vis license issuance," and that issues relating to it are technically moot. ALAB-900 (slip op. at 7).

[4] The Appeal Board acknowledges that appointment of licensing boards is a matter within the discretion of the Commission and the Chairman of the Licensing Board Panel. ALAB-901 at 7 (slip op.). Apparently for that reason, ALAB-901 permits the Licensing Board Panel Chairman to "reconstituted" the OL-5 Board in his discretion. Id. at 10. Barring any such intervention by the Licensing Board Panel Chairman, however, the Appeal Board has succeeded in dictating not only the docket but the composition of the Board to hear 1988 exercise issues. The OL-5 Board consists of Judges Frye, Paris and Shon (who is also on the OL-3 Board). The Commission should note that on October 3 LILCO filed a motion with the Atomic Safety and Licensing Board Chairman, requesting him, on the condition litigation were to take place on the 1988 exercise notwithstanding LBP-88-24, to reconstitute the OL-5 Board's membership to make it the same as that of the existing OL-3 Board.

[5] The opportunity presented by ALAB-901 was not lost on the former OL-5 Board. Almost immediately, on September 22 and without awaiting any confirmation of its charter from the Chairman of the Licensing Board panel, the OL-5 Board staked its jurisdictional claim by issuing an Order setting an eight-week schedule for submitting contentions and responses and getting to a prehearing conference on November 16. The OL-5 Board's order is dated the last day before the OL-3 Board, by resolving all remaining issues in its September 23 Concluding Initial Decision, became available to hear any necessary 1988

The Appeal Board's follow-on Orders of September 27 and 29 extend the reach of ALAB-901. The ex parte September 27 Order summarily grants a motion (with attached brief on the merits) of the same date from the by-then-dismissed governmental Intervenors, for separate, radically expedited appeal of one issue from LBP-88-24, which the Appeal Board characterized as narrowly jurisdictional: whether the "OL-3" Licensing Board had authority to impose sanctions extending to the entire proceeding, or whether its sanctioning authority was confined to the diminished OL-3 docket (as narrowed a week before in ALAB-901). Under the September 27 Order, LILCO and the Regulatory Staff would have been allowed three days, until September 30, to respond to Intervenors' brief on the merits. On September 28 LILCO asked that the response period be extended to ten days.[6] On September 29, the Appeal Board issued a Memorandum and Order rejecting each of LILCO's bases for an extension and allowing LILCO and the Staff an extension only to Tuesday, October 4 to reply on the merits to Intervenors' September 27 brief.[7] The September 29 Order also criticized LILCO for failure, in its September 28 motion for enlargement of briefing time, to agree that the issue was a "narrow jurisdictional" one, and justified its September 27 actions in the name of "case management" and "the unique procedural posture of this proceeding." Id. at 5 & note 5.

2. Basis in Appeal Board Proceedings For Issues Under Review

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exercise issues.

[6] This is the normal period of time allowed to respond to a motion. 10 CFR § 2.730(c). Parties are normally allowed 30 days to respond to briefs on the merits from Licensing Board decisions. 10 CFR § 2.762(c).

[7] LILCO's brief, supporting the OL-3 Board's jurisdiction to protect the integrity of the Commission's process by issuing sanctions affecting an entire proceeding, if necessary, was filed on October 4. So was a brief from the Staff, which arrived at the same legal conclusion as LILCO but also urged the Appeal Board to review the sanctions imposed by the OL-3 Board on the merits.

The errors of law or policy or both of which LILCO seeks review are summarized immediately below, along with the places in the proceedings below where (to the extent opportunity was presented) they were raised:

A. The Appeal Board Erred in ALAB-901 in Not Allowing the OL-3 Licensing Board to Determine Whether It Possessed Jurisdiction over Any 1988 Exercise Proceedings

LILCO opposed Intervenors' September 13 motion on the grounds, among others, that it should have been addressed initially to the Licensing Board in the OL-3 docket, since that Board had jurisdiction over the 1988 exercise (at least in LILCO's view) and had a pending Staff motion before it, and that the Appeal Board lacks independent power to appoint licensing boards.[8]

The Appeal Board disagreed. In doing so, it erred, misapplying two previous Appeal Board cases that had not been cited anywhere by any of the parties. Citing its "inherent right" to determine in the first instance the bounds of its own jurisdiction, and its "incidental authority to direct such other action as may be appropriate in the circumstances," the Appeal Board rejected LILCO's suggestion that it dismiss the Intervenors' motion. ALAB-901, slip op. at 2-3, citing Duke Power Co. (Perkins Nuclear Station, Units 1, 2 and 3), ALAB-591, 11 NRC 741, 742 (1980); id., ALAB-597, 11 NRC 870, 874 and n.9 (1980).

The Appeal Board's action in ALAB-901 is squarely contradicted by the very rulings in Perkins that it cites. In Perkins, a prospective intervenor filed a petition to intervene with the Licensing Board. The Staff filed its response with the Appeal Board, claiming that the Licensing Board had lost jurisdiction to entertain the petition when it issued a partial initial decision. Perkins, ALAB-591, 11 NRC 742. The Appeal Board refused to

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[8] LILCO's Response to Intervenors' Motion for Appointment of a Licensing Board with Jurisdiction to Hear 1988 Exercise Issues (September 16, 1988) at 5-6, 8.

consider the Staff's "improvidently filed" response and referred it to the Licensing Board, relying on the "well-settled rule" that an appellate body should not pass initial judgment on the jurisdiction of a lower tribunal to decide a matter that has been placed before that tribunal by another party:

> it is for the Licensing Board to consider ab initio whether it is empowered to grant relief which has been specifically sought of it. Every tribunal -- whether judicial or administrative -- possesses the inherent right (indeed, the duty) to determine in the first instance the bounds of its own jurisdiction.

ALAB-591, 11 NRC 742, citing United States v. United Mine Workers, 330 U.S. 258, 292 n.57 (1947). The Appeal Board stated that "even if wholly meritorious, the staff's jurisdictional assertions must originally be given consideration by the Licensing Board."[9] Id. at 743. This is precisely what the Appeal Board precluded in ALAB-901.

Under its own precedents in Perkins, the Appeal Board should have referred the Intervenors' September 13 motion to the Licensing Board for a ruling on the jurisdiction question (and, if the Licensing Board decided it had jurisdiction, a ruling on the merits). The Appeal Board should have considered the question only upon a "no jurisdiction" determination by the Licensing Board or upon proper appeal of the Licensing Board's merits ruling.

Further, the Appeal Board erred in concluding that its general jurisdiction over the appeals from the 1986 exercise (ALAB-901 at 4-6) gave it, rather than the Licensing Board, jurisdiction generally to establish the structure of any litiga-

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[9] In ALAB-597 the Appeal Board went even further. Upon referral of the Staff's response from the Appeal Board the Perkins licensing board had decided the jurisdictional question but not the merits, waiting instead for an Appeal Board ruling either confirming or overruling its jurisdictional determination. See ALAB-597, 11 NRC 870, 873 (1980). The Appeal Board ruled that, once the Licensing Board determined that it had jurisdiction to hear the matter, it should have proceeded to pass on the merits as well. Id.

tion on the 1988 exercise. The Appeal Board's conclusion relies on the overly broad equation of the two exercises as involving "LILCO's compliance with the agency's pre-license exercise requirement" so as to provide a "reasonable nexus" between any proceedings on the two exercises. Id. at 4-6.

The Appeal Board's finding of a "reasonable nexus" between the 1986 and 1988 exercises is without foundation either in the papers before it or in the record. Some "nexus" might exist if the 1988 exercise were cast merely as a remedial exercise to demonstrate correction of deficiencies found in the 1986 exercise. But it was not. The fact is that litigation delays stripped the 1986 exercise of utility as a basis for licensing (even with remediation), absent an exemption. The three-day 1988 exercise was designed and implemented as a stand-alone demonstration of compliance with Commission and FEMA requirements, not as a remedial for the 1986 exercise. It bears only the most general relationship to the 1986 exercise.

More basically, the fundamental analytical nexus is between the exercise and the emergency plan[10] whose then-effective version it implements. Had the Appeal Board posed to the parties the issue of the most reasonable nexus to the 1988 exercise before ruling in ALAB-901 -- which it did not -- that nexus would have been between the exercise and the Shoreham emergency plan, Revision 10.

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[10] Licenses are issued or denied on the basis of assessment of the adequacy of emergency plans. Exercises are merely tests or illustrations of the ability to implement those specific versions, or revisions, of emergency plans in effect at the time of the exercise. Exercises at different times test different revisions of those plans. The 1986 exercise, for example, was linked to Revision 6 of the Shoreham emergency plan; the 1988 exercise was linked to the substantially different Revision 10. Put another way, if the Appeal Board's "reasonable nexus" test is relevant to how to assign jurisdiction among licensing boards where more than one possibility exists, the most reasonable nexus is that between exercise and current plan revision; it is certainly more powerful than that between present exercise of present plan and moot exercise of obsolete plan. The Appeal Board's consignment of 1988 exercise litigation to the OL-5 docket based upon its finding of a "reasonable nexus" between the 1986 and 1988 exercises misapplies that test, which it set up itself in ALAB-901.

B. The Appeal Board's Holding in ALAB-901 That Licensing Board Jurisdiction over the 1988 Exercise Lies in the OL-5 Docket Conflicts with CLI-86-11 and Consistent Subsequent Guidance

In ALAB-901 the Appeal Board rejected arguments, advanced by both LILCO and the NRC Staff,[11] that the general-jurisdiction emergency planning docket, the "OL-3 Docket," was the proper forum for any litigation of the 1988 emergency planning exercise. Instead, it found that the OL-5 Docket, created in 1986 for the specific and sole purpose of hearing issues in connection with the 1986 exercise, was the proper forum. This conclusion is inconsistent with nearly six years of history in this proceeding.[12]

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[11] LILCO Response to Intervenors' Motion for Appointment of Licensing Board... (September 16, 1988) at 3-6; NRC Staff Response to Intervenors' Motion for Appointment of Licensing Board... (September 16, 1988) at 2-5.

[12] On May 13, 1983 a Licensing Board was established specifically "to preside over the proceeding on all emergency planning issues" at Shoreham. 48 Fed. Reg. 22235 (1983). That Board has sat from the outset in the sub-docket designated as 50-322-OL-3. Id. The sole exception to this unitary jurisdiction evolved with respect to the February 13, 1986 exercise. There, the Commission directed appointment of a licensing board for immediate initiation of litigation of that exercise. CLI-86-11, 23 NRC 577, 582 (June 6, 1986). Even so, CLI-86-11 was issued in the OL-3 docket and directed that the Licensing Board consist of the same members as the Board that with jurisdiction over litigation of the emergency plan, if those members were available. Id. The implementing Order by the Chairman of the Licensing Board Panel, issued June 10, 1986, complied. 51 Fed. Reg. 21815 (1986). At that point the Boards for the exercise and the plan were identical: Judges Margulies, Shon and Kline. Only several weeks later, when "more effective docket management" required, was a separate "OL-5" sub-docket created by the Chairman of the Licensing Board Panel, but the panels' membership remained identical. Change of Docket Number (July 23, 1986), 51 Fed. Reg. 27296 (1986). Only later yet did schedule conflicts develop that required reconstitution of the OL-5 Board so that its membership diverged from that in the basic OL-3 docket (Judges Frye and Paris were substituted in the OL-5 docket for Judges Margulies and Kline; Judge Shon remained on both Boards). Notice of Reconstitution of Board (October 7, 1986), 51 Fed. Reg. 36619 (1986). Even then, the Licensing Board Panel Chairman made clear that "the reconstituted [OL-5] Board will preside only in the proceedings related to the emergency planning exercise ... initiated pursuant to Commission Order CLI-86-11...." The original, OL-3 Board "will continue to preside in all other proceedings pertaining to emergency

It is also inconsistent with the Commission's instructions in CLI-86-11, 23 NRC 577 (1986) on litigation of the 1986 exercise. There the Commission manifested its concern for the continuity of agency process by instituting what was then intended to be an expedited exercise proceeding in the OL-3 Docket, with a direction to "reappoint the earlier members of that Board if they were available." CLI-86-11, 23 NRC 5677, 582 (1986). CLI-86-11 was inherently limited in its direct effects to the 1986 exercise. To the extent that it addresses the subject of exercise litigation, it suggests that exercise issues were intended to be heard in coordination with, and not apart from, plan issues. And every step in the separate evolution of the OL-5 Board was predicated on the notion that its mandate was limited to the 1986 exercise.[13]

Finally, the Appeal Board's action is irreconcilable with the OL-5 Board's own views. As noted in footnote 3, supra, that Board concluded that its mandate from the Commission, deriving from CLI-86-11, did not convey jurisdiction over remedial measures from the 1986 exercise, much less any independent successor exercise; and it observed that if the Commission wished it to assume further jurisdiction, it could issue appropriate further direction. LBP-88-7, 27 NRC 289, 292 (March 9, 1988).[14] No party appealed this order. The Appeal Board did not exercise sua sponte review. All concerned had accepted the OL-5 Board's conclusion

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planning for the Shoreham Nuclear Power Station...." Notice of Reconstitution of Board: Clarification (October 17, 1986), 51 Fed. Reg. 37682 (1986).

[13] See footnote 13, supra.

[14] In the second of its two decisions on the February 13, 1986 exercise, the Board had requested the parties' views on whether it should keep jurisdiction over any litigation of remedial exercises addressed to deficiencies assessed in its decisions. LBP-88-2, 27 NRC 85, 213 (February 1, 1988). The Staff had suggested such a course in its proposed findings. Id. LILCO concurred in the proposal, explicitly premised upon the notion that an adequate remedial exercise could be held. Intervenors questioned the Board's jurisdiction but favored it as a matter of judicial economy. The Staff, having once apparently favored retention of jurisdiction, opposed it.

until the Appeal Board's abrupt reversal of it, seven months after the fact. ALAB-901 at 9 note 6 (slip op.).

C. The Appeal Board Abused the Legitimate Tools of Docket Management to Define Jurisdiction (ALAB-901, September 27 and 29 Orders)

As the Appeal Board argues in ALAB-901, the "enormous size, complexity, and duration" of NRC proceedings has created a need for the simultaneous functioning of multiple licensing boards, each with partial jurisdiction resulting in partial decisions, as "practices ... essential to effective case management." Id. at 4 (slip op.) Equally true, as the Appeal Board notes, "the Commission's Rules of Practice provide little or no aid" in resolving the "thorny" problems attendant upon such multi-board proceedings. Id.

However, there are limits on the Appeal Board's powers. The Commission possesses the initial authority to establish licensing board jurisdiction and the scope of proceedings themselves. 10 CFR § 2.704, 2.721. The Commission, and the Chairman of the Licensing Board panel, share the power to designate dockets for case management purposes and the power to name licensing boards. Id., 10 CFR Part 2, App. A. The Appeal Board serves many functions, but prime among them is not the definition of proceedings.

Against this background, it is useful to review the recent actions of the Appeal Board in the Shoreham emergency planning case, which, for all its subparts, is still one proceeding which must ultimately be capable of unitary resolution:

1. It ousted the general-jurisdiction emergency planning board, the OL-3 board, not only of jurisdiction over any litigation of the 1988 Shoreham exercise, but of the opportunity to determine whether it had jurisdiction. (ALAB-901)

2. It vested jurisdiction over the 1988 exercise in a defunct licensing board in a vestigial docket whose only remaining activity is a technically moot appeal, reversing the Board's self-abdication seven months earlier as "mistaken," though no party sought to appeal that action and it had not itself exercised timely sua sponte review. (ALAB-901)

3. It re-established the membership of the revived OL-5 Board, subject only to the intervention of the Chairman of the Licensing Board Panel. (ALAB-901)

4. It used its own redefinition of the OL-3 Board's jurisdiction as a basis for accepting Intervenors' September 27 motion that it decide whether the OL-3 Board lacked jurisdiction to assess sanctions beyond that recently shrunken jurisdiction. The Appeal Board's erroneous acceptance of the proposition that this question is one of jurisdiction was given ex parte, within about three hours of receipt of Intervenors' motion requesting it and without notice to or solicitation of the views of other parties. (September 27 Order)

5. It set, ex parte, a radically accelerated schedule for LILCO and the NRC Staff to respond to Intervenors' brief of this allegedly narrow jurisdictional issue. (September 27, 29 Orders)[15]

6. It relied upon a September 22 scheduling order, fleetly issued by the OL-5 Board which ALAB-901 had put back in business only on September 20, as a justification for rushing briefing and decision of its scope-of-sanctions issue. (September 29 Order)

7. It relied on the "unique procedural posture of this proceeding" (which it recently helped to complicate) to justify its acceptance of Intervenors' September 27 collateral attack on the OL-3 Licensing Board's decision to impose sanctions in LBP-88-3 rather than limiting them to seeking a stay of the Licensing Board's order. (September 29 Order at 5).

In toto, the Appeal Board's interrelated adjustments of the jurisdictions of two licensing boards, its ex parte acceptance of an issue as jurisdictional and as deserving radically accelerated review, and its apparent reliance on its own actions to justify further ones, go beyond the bounds of ordinary case management. The Commission should not permit this to happen, particularly in

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[15] LILCO and the Staff each filed their briefs on October 4, arguing that licensing boards must have authority to levy sanctions, in proper cases, that run to the entire proceeding, and not just to sub-proceedings within their direct charge. The Appeal Board has not indicated any proposed schedule for decision.

light of the progress recently made in the resolution of numerous issues in this long-delayed proceeding.

D. The September 27 and 29 Orders' Ex Parte Treatment of the Scope of the OL-3 Board's Sanctions as a Jurisdictional Rather than as a Merits Issue is Incorrect on the Merits and Denies LILCO Due Process

In its September 27 ex parte Order, as noted above, the Appeal Board separated for expedited review the question whether the OL-3 Board had "jurisdiction" to dismiss Intervenors from the NRC licensing proceeding (not just the OL-3 subdocket), rather than treating the dismissal as a merits decision to be reviewed in light of overall facts and circumstances. The Appeal Board also required LILCO and the Staff to file responsive briefs on a greatly abbreviated schedule. On September 29, in response to LILCO's motion, the Appeal Board agreed to lengthen the briefing response time by four days but also took the opportunity to issue an after-the-fact rationalization, in the name of effective case management, of its ex parte September 27 Order. September 29 Order at 5 & note 5.

The Appeal Board's actions here were substantively incorrect: both LILCO's and the Staff's briefs, filed with the Appeal Board on October 4, demonstrate that there is no jurisdictional limitation on the authority of licensing boards in multiboard proceedings to impose sanctions that impact the entire licensing docket, where facts and circumstances warrant. Thus the issue is not a "narrow jurisdictional" one, as the Appeal Board accepted on Intervenors' ex parte representation, but one of facts and circumstances where reviewing courts afford substantial deference to the trier of fact.[16]

Classification of an issue as one of jurisdiction rather than as one to be decided on the facts is important in litiga-

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[16] See LILCO's Answer to Intervenors' Brief on Bifurcated Appeal (October 4, 1988), esp. at 2-5; NRC Staff Response to Intervenors' Motion for Bifurcation of Appeal and Expedition (October 4, 1988), esp. at 9-11.

tion. It affects the arguments to be made and the likelihood that trier of fact will be sustained. The Appeal Board determined to treat the sanctions-scope issue as jurisdictional rather than as a merits issue totally without opportunity for affected parties -- LILCO and the Staff -- to be heard. When they finally were heard (in their October 4 briefs) it became clear that they both profoundly disagree with the Appeal Board's action. This type of action substantially affects the interests of the parties; it should not be taken ex parte; the Appeal Board's doing so violated LILCO's due process rights.

3. Reasons Why the Commission Should Take Review

The net effect of these three orders is to threaten, without legal or policy justification, a radical restructuring of the Shoreham emergency planning proceeding. The Appeal Board's actions raise serious legal and policy issues concerning the intent and effect of the division of complex proceedings into subdockets for administrative, or "case management," purposes, and of the Appeal Board's authority to alter those administrative boundaries unilaterally. The Appeal Board's pre-emptive ouster of the OL-3 Licensing Board from the opportunity to determine its own jurisdiction over the 1988 Shoreham exercise was incorrect both procedurally and substantively: it wrongly precluded the OL-3 Licensing Board from a chance to determine its own jurisdiction, and overlooks the fact that emergency preparedness exercises are more closely related to the current plan which they implement than they are to earlier exercises based on earlier versions of the plan. And the apparent premise of its September 27 and 29 Orders -- to limit the effect of sanctions to the administrative subdockets in which they are imposed -- amends the Commission's Policy Statement on the Conduct of Administrative Proceedings and condones, if it does not legitimize, the use of shell-game tactics by parties in the very class of circumstances -- complex, multidocket proceedings -- where the authority of

licensing boards to regulate parties' conduct is both the most taxed and the most necessary.

These issues have profound effects for the future of the Shoreham licensing proceeding. If the OL-3 Board is promptly sustained as to its assessment of sanctions, Shoreham could conceivably have a full power operating license within several weeks. If, on the other hand, the Appeal Board's actions keep the Licensing Board from being sustained and Intervenors are allowed to participate again in 1988 exercise litigation, delays of at least several months in completing the proceeding are virtually inevitable. If (as LILCO believes) the Appeal Board's actions are incorrect, the delay will have been totally wasteful and intensely damaging to LILCO.

Further, the Appeal Board's orders have profound and self-evident implications for any other plant facing litigation on an exercise or any litigant before the NRC facing the possibility of serious sanctions.

CONCLUSION

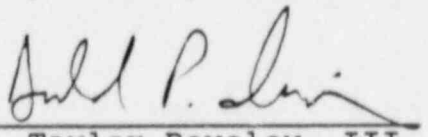
For the reasons stated above, the Commission should promptly take review of ALAB-901 and of the September 27 and 29 Orders, and reverse or modify them in the following respects:

1. The 1988 exercise litigation (if any is held) should be assigned to the licensing board with clearest knowledge of the Shoreham emergency plan, the present OL-3 Board, and the scope of the OL-3 Board's mandate expanded accordingly.

2. The Appeal Board's treatment of the issue whether the OL-3 Licensing Board had jurisdiction to impose proceeding-wide sanctions should be promptly certified by the Commission for resolution; and the Commission should engage the merits as well,

so that all parties may know whether litigation on the 1988 exercise will be required.

Respectfully submitted,



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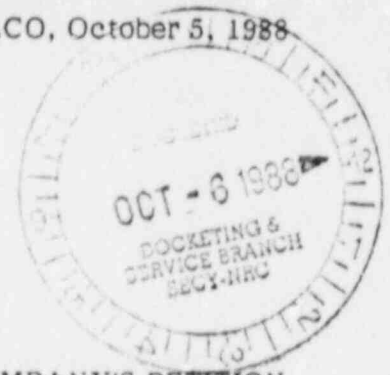

CERTIFICATE OF SERVICE

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

I hereby certify that copies of LONG ISLAND LIGHTING COMPANY'S PETITION FOR REVIEW OF ALAB-901 AND FOLLOW-ON ORDERS, MOTION FOR LEAVE TO EXCEED PAGE LIMIT and LILCO'S PETITION FOR REVIEW OF ALAB-900 were served this date upon the following Federal Express as indicated by an asterisk, or by first-class mail, postage prepaid.

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