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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Administrative Judges:

Christine N. Kohl, Chairman
Alan S. Rosenthal
Howard A. Wilber

October 7, 1988
(ALAB-902)

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

E. Thomas Boyle, Hauppauge, New York, Lawrence Coe Lanpher, Karla J. Letsche, and Michael S. Miller, Washington, D.C., Fabian G. Palomino and Richard J. Zahnleuter, Albany, New York, and Stephen B. Latham, Riverhead, New York, for intervenors Suffolk County, the State of New York, and the Town of Southampton.

Donald P. Irwin, James N. Christman, K. Dennis Sisk, and Charles L. Ingebretson, Richmond, Virginia, for applicant Long Island Lighting Company.

Edwin J. Reis for the Nuclear Regulatory Commission staff.

DECISION

On September 23, 1988, the so-called "OL-3" Licensing Board issued its "Concluding Initial Decision on Emergency Planning," LBP-88-24, 28 NRC ___, in connection with Long Island Lighting Company's (LILCO) application for an operating license for its Shoreham nuclear power facility. In that decision, the Board resolved on the merits and in LILCO's favor several outstanding emergency planning issues. As to eight other issues -- the "realism" contentions -- the Board found intervenors Suffolk County, the State of New

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York, and the Town of Southampton (hereinafter "the Governments") to be in default of certain OL-3 Licensing Board discovery orders and ordered all three Governments "dismissed from the proceeding." Id. at ___, ___ (slip opinion at 89, 148). The Board determined that the realism issues were thus "no longer 'in controversy' between the parties" and that the record on all other matters was complete and warranted a decision in LILCO's favor. Id. at ___, ___ & n.3 (slip opinion at 148, 2-3 & n.3).[1] It therefore authorized the Director of the NRC's Office of Nuclear Reactor Regulation (after making the requisite findings on uncontested matters) to issue a full-power operating license for Shoreham. Id. at ___ (slip opinion at 149).

Soon thereafter the Governments filed notices of appeal from the Licensing Board's decision. They also moved

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[1] Notwithstanding its conclusion that the realism issues were no longer in controversy, the Licensing Board elected to review what it characterized as LILCO's "prima facie" case on those issues. LBP-88-24, 28 NRC at ___ (slip opinion at 131-47). On the strength of that review, it found that, "absent the sanction of dismissal, a decision on the merits of the issues would have been rendered in [LILCO's] favor." Id. at ___, ___ (slip opinion at 89, 147). The Board acknowledged, however, that, given its dismissal of the Governments from the proceeding, this finding was dicta. Id. at ___ (slip opinion at 131). Presumably for this reason the Board did not allude specifically to the finding in setting forth its conclusions of law. See id. at ___ (slip opinion at 148-49).

jointly for bifurcation of the appeal and expeditious review of one narrow "jurisdictional" issue: whether the OL-3 Licensing Board can dismiss the intervening Governments from a portion of the licensing proceeding not pending before that particular Licensing Board. Specifically, they noted that the Licensing Board in the "OL-5" phase of this proceeding has matters pending before it in connection with the recent emergency exercise conducted at Shoreham.

In an unpublished order dated September 27, 1988, we granted the Governments' request to bifurcate and to expedite their appeal on the jurisdictional question.[2] LILCO and the NRC staff oppose the Governments' appeal.[3] As

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[2] Our unpublished September 29 memorandum and order sets forth in detail and in response to a LILCO motion our reasons for considering separately and expeditiously the discrete jurisdictional issue raised by the Governments' appeal. LILCO makes much of the fact that we bifurcated the Governments' appeal without soliciting other parties' views first. The sequence and manner in which we address issues raised on appeal is, of course, a matter inherently committed to our discretion. Moreover, bifurcation of this appeal is of no greater moment than a determination to enter a stay to preserve the status quo -- action that we have also taken on an ex parte basis, where in our judgment, the circumstances warranted it. In both instances, full briefing on the merits by all parties followed.

[3] The Governments moved for leave to file a reply to LILCO. LILCO opposed their motion, but, in the alternative, tendered a response to the Governments' reply brief and requested oral argument. In view of the decision we reach here, we need not consider the Governments' further arguments, and their motion is therefore denied. LILCO's alternative response is necessarily rejected as well.

explained below, we reverse the OL-3 Licensing Board's decision in LBP-88-24 insofar as it purports to dismiss the Governments from a segment of the case pending before a different Board. Consequently, because issues remain to be resolved in this proceeding, the OL-3 Licensing Board's full-power license authorization is necessarily void and must be vacated.

A. The Governments' argument is brief and to the point. In ALAB-901, 28 NRC ___ (1988), issued three days before LBP-88-24, we remanded to the OL-5 Licensing Board for appropriate and expeditious action certain new matters raised in connection with the June 1988 emergency exercise at Shoreham.[4] On September 22, pursuant to our direction in

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[4] As explained in ALAB-900, 28 NRC ___, ___ (September 20, 1988) (slip opinion at 2-5), the Commission's regulations require a "full participation" emergency exercise within the two years preceding the issuance of a full-power operating license for a nuclear power facility. As a result of a court decision and a corresponding change in the Commission's rules, intervenors may litigate the issue of whether this pre-license exercise reveals any "fundamental flaws" in the emergency plan.

The June 1988 exercise is LILCO's second attempt to satisfy the pre-license exercise requirement. (The OL-5 Licensing Board found the 1986 exercise deficient in scope and we affirmed that conclusion in ALAB-900.) Following the recent issuance of the Federal Emergency Management Agency's favorable report on the 1988 exercise, the NRC staff and the Governments sought to initiate proceedings in that regard. In ALAB-901, we held that we had jurisdiction over all matters relating to LILCO's compliance with the pre-license exercise requirement, but we remanded all new matters

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ALAB-901, the OL-5 Licensing Board issued an order scheduling further proceedings in that part of the case. Thus, according to the Governments, the OL-3 Licensing Board did not have jurisdiction over the entirety of this licensing proceeding and could not therefore dismiss, or purport to dismiss, the intervenors from the proceeding as a whole.[5]

LILCO disagrees and asserts that the OL-3 Board had not only the power but the duty to dismiss the Governments from the proceeding. It makes several arguments to support this view. First, LILCO states that the OL-3 Board's findings on the merits -- i.e., that the Governments' conduct was willful, prejudicial, and in bad faith, warranting their dismissal -- must be assumed correct for the purpose of this appeal. Second, a discretionary case management tool (the use of multiple licensing boards for discrete segments of the proceeding) cannot be used to shield unlawful, punishable behavior or to revise Commission policies. Third, any licensing board has the power to dismiss a party from the entire proceeding. Fourth, federal case law

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concerning the 1988 exercise to the OL-5 Board for disposition.

[5] The Governments stress that they will challenge, on the merits, their dismissal from any part of the proceeding, as well as other parts of LBP-88-24, when they brief the unexpedited portion of their appeal.

supports the OL-3 Board's dismissal of the Governments from the proceeding.[6]

The staff, which asked the OL-3 Licensing Board to dismiss only the Governments' realism contentions, rather than the Governments themselves from the entire proceeding (see LBP-88-24, 28 NRC at ___ (slip opinion at 115)), takes a somewhat different approach in opposing the Governments' appeal. It objects to the separate and expeditious consideration of the jurisdictional issue and does not address the merits of this question at all. Instead, the staff urges us to review the record below on the merits of the sanction issue (presumably later, after full briefing by the parties) and to determine if the Governments' conduct warrants their dismissal from all or any part of the Shoreham proceeding. The staff believes that this would avoid the difficult jurisdictional issue raised here. It also urges this approach even if it would cause delay in the exercise proceeding pending before the OL-5 Board.

B. We agree with the Governments that the OL-3 Licensing Board did not have the authority to dismiss them from those portions of the proceeding that are pending

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[6] LILCO makes a fifth argument: that the intervenors' status as sovereign governmental entities does not protect them from the consequences of their misdeeds. In view of our decision, we need not reach this issue.

before another Board. Whatever the extent a licensing board's authority may be with respect to the imposition of sanctions against a party, and irrespective of whether the Governments' conduct in this proceeding warrants sanctions, there is no basis for extending that authority to matters within the purview of a different decisionmaker.

1. As is evident from the preceding paragraph, we agree with LILCO that, for the purpose of deciding the discrete jurisdictional issue now before us on appeal, we must presume the correctness of the OL-3 Board's decision on the merits. Thus, we assume arguendo that the Governments obstructed the discovery process and failed to obey certain OL-3 Board orders; that their conduct was willful, in bad faith, and prejudicial to LILCO; and that the only appropriate sanction is dismissal, which the OL-3 Board was clearly authorized to order at least as to that part of the proceeding pending before it.[7] Given these assumptions of punishable conduct, the sole question raised by the Governments' bifurcated appeal is -- to repeat -- whether the OL-3 Board has the authority to dismiss the Governments from that part of the proceeding now pending before a different adjudicatory board.

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[7] It should go without saying that, because these assumptions are for argument purposes only, they reflect no (Footnote Continued)

LILCO makes several other points in connection with its "presumption of correctness" argument. It claims that, if the Governments prevail here, the use of multiple licensing boards in one proceeding will essentially eliminate the ultimate sanction of dismissal of a party from the entire proceeding, which Commission policy specifically authorizes. See Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 454 (1981) (hereinafter "Commission Policy"). It also argues that, by agreeing with the Governments' jurisdictional argument, we would be effectively reversing the OL-3 Board's decision on the merits to dismiss the parties, rather than merely their realism contentions. LILCO is wrong on both counts.

By holding that a licensing board can dismiss a party from only the part of the proceeding within that board's purview, when other parts of the proceeding are pending before a different board, in no way do we vitiate the ultimate sanction of dismissal from the entire proceeding. That result can still be accomplished by requesting the sanction of dismissal from each of the boards before which different parts of the proceeding are pending. While that may appear to be burdensome, it is an illusory burden: if

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view whatsoever on our part as to the merits of the sanctions issue. We will take that matter up in the second part of the Governments' appeal. See supra note 5.

the conduct allegedly warranting another party's dismissal from the entire proceeding is, in fact, so egregious and pervasive, the party requesting that sanction should have little difficulty in making its case before each board then presiding over different facets of the proceeding. For example, the party seeking sanctions would not be precluded from arguing to "Board B" that an opposing party's conduct -- though above reproach before "Board B" -- was so contumacious and prejudicial before "Board A" as to warrant dismissal from the "Board B" proceeding as well. This procedure assures that no particular board is "more equal" than any other board presiding in the same overall proceeding, and prevents the arrogation by one board of authority legitimately vested in another.[8] More important, it protects a party's fundamental right to be judged by each decisionmaker before whom it appears.

LILCO's other point -- that upholding the Governments' jurisdictional claim would amount to a reversal on the merits of the OL-3 Board's determination to dismiss the parties, rather than their contentions -- is equally flawed.

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[8] We previously rejected LILCO's argument that the Commission established the OL-3 Licensing Board as the "general jurisdiction" board for this proceeding. ALAB-901, 28 NRC at ___ n.6. If that had been the intent, then an appropriate notice to that effect should have been given at the outset.

Our jurisdictional holding does not affect in any respect the OL-3 Board's authority to dismiss the Governments as parties from that part of the proceeding over which the OL-3 Board presides. The OL-3 Board considered a number of issues other than the realism contentions. Although that Board resolved those other issues on the merits, its dismissal sanction appears to apply to those issues as well.[9]

2. We have no quarrel, in general, with LILCO's second argument -- that a discretionary case management tool cannot be used to shield unlawful behavior or to defeat Commission policy.[10] As discussed above, the use of multiple licensing

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[9] Thus, if we determine, on the merits, that the OL-3 Board properly dismissed the Governments from the OL-3 part of the proceeding, there will be no need to address the Governments' appeal from the Board's ruling on other issues, such as the emergency broadcast system contention.

[10] In this section of its brief, LILCO summarizes the history of this proceeding and makes arguments in support of the merits of the OL-3 Board's imposition of sanctions. See LILCO's Answer (October 4, 1988) at 5-10. As we have stressed repeatedly, the issue before us at this juncture is not about the merits of the sanctions decision; indeed, as LILCO has urged, we have assumed arguendo the correctness of that decision. See supra p. 7.

LILCO also impliedly criticizes our ruling in ALAB-901, 28 NRC at ___ n.6, that the OL-5 Board had erred in certain respects in a decision it issued in March 1988, LBP-88-7, 27 NRC 289. See LILCO's Answer at 8. LILCO seems to suggest that, because the Licensing Board ruling there at issue had not been appealed, it was binding. We have long held, however, that unappealed licensing board conclusions on

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boards does neither, and effective means exist to seek redress (including dismissal from an entire proceeding) for assertedly improper conduct in an adjudication. But the corollary of LILCO's general principle is also true: a discretionary case management tool cannot be used to affect a party's right to be judged independently and fairly by each board before which it appears. Thus, one of several boards presiding in a single proceeding cannot take advantage of the multiple-board approach and expand its own authority to matters pending elsewhere through the vehicle of a discovery sanction. See infra note 21.[11]

3. LILCO next argues that any Licensing Board assigned to this proceeding has the power to dismiss a party from the entire proceeding. According to LILCO, this simply follows from the Commission's policy specifically authorizing

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legal issues do not have precedential effect. Duke Power Co. (Cherokee Nuclear Station, Units 1, 2, and 3), ALAB-482, 7 NRC 979, 981 n.4 (1978).

[11] As this case demonstrates, the use of multiple boards has both advantages and disadvantages. It permits faster resolution of increasingly complex issues in litigation that goes on for years. But it also leads to procedural anomalies that generate more disputes. On balance, however, the advantages outweigh the disadvantages, in our view. In any event, this practice is currently a necessity in NRC litigation, and the parties must take the good with the bad. (We note that multiple licensing boards, without special "OL" docket numbers, are in use in the Seabrook proceeding. There are also multiple appeal boards for different phases of both Seabrook and Shoreham.)

dismissal of a party. We have already addressed this matter, supra pp. 8-9, and conclude that there is no conflict between our jurisdictional ruling here and the Commission Policy.[12]

In connection with this argument, LILCO states that a licensing board considering dismissal as a sanction should take 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." LILCO's Answer, supra note 10, at 1 (emphasis added). We fully agree with LILCO that these are factors a licensing board should consider. The OL-3 Licensing Board majority opinion, however, fails to reflect that that Board gave any serious consideration to the relationship of its action to the proceeding pending before the OL-5 Board. The OL-3 Board knew three days before its decision (when, by happenstance, ALAB-901 was issued) that proceedings before the OL-5 Board would soon be under way with regard to the 1988 exercise.[13]

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[12] We also note that, at the time of issuance of the Commission Policy, multiple licensing boards were used rarely, if ever. In fact, this case management tool is not even mentioned in the Policy Statement. See 13 NRC at 452-59. Thus, we cannot reasonably draw any inferences as to the Commission's intent on the issue now before us.

[13] The fact that no contentions have been proffered and
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Indeed, the day before LBP-88-24 was issued, the OL-5 Board issued its scheduling order. Yet the OL-3 Board majority's sole reference to that fact is found in the following cryptic footnote.

> In regard to any challenges to an exercise recently held on the Applicant's emergency plan, an interested person can petition the Commission for a hearing on any alleged deficiencies.

LBP-88-24, 28 NRC at ___ n.39.[14] The meaning of this footnote is unclear, but no matter how it is construed, it provides no explanation for the Board's apparent attempt to extend its authority to matters pending elsewhere. This failure to provide reasons for such a significant aspect of the Board's decision would be cause alone to reverse and remand the Board's decision on the jurisdictional issue raised by the Governments' appeal. See Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-422, 6 NRC 33, 41 (1977), aff'd, CLI-78-1, 7 NRC 1,

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admitted yet in the OL-5 proceeding is irrelevant. At least until the OL-3 Board's dismissal decision, there appeared to be no dispute among the parties as to the Governments' right to the opportunity to propose litigable contentions concerning the 1988 emergency exercise. At this stage, that right is necessarily equivalent to the right to litigate an already admitted contention.

[14] In his partial concurrence and dissent, Judge Shon (who sits on both the OL-3 and OL-5 Boards) takes note of the pending exercise proceeding and our recent decision in ALAB-901. LBP-88-24, 28 NRC at ___ (Shon slip opinion at 11-12).

aff'd sub nom. New England Coalition on Nuclear Pollution v. NRC, 582 F.2d 87 (1st Cir. 1978). See also Patton v. Aerojet Ordnance Co., 765 F.2d 604, 607-08 (6th Cir. 1985) (basis for dismissal as sanction for failure to comply with discovery order must be fully articulated).[15] Because solely a question of law is involved here, however, there is no need for a remand to the Licensing Board for further consideration of the issue.[16]

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[15] We do not suggest that the three days between the issuance of ALAB-901 and LBP-88-24 necessarily provided adequate time for the Licensing Board to address the issue of the extent to which it could impose sanctions against the Governments. There is no apparent reason, however, why the Board had to issue its decision when it did, and no reason why it could not have solicited the parties' views on this matter before it so unequivocally reached the substantive conclusions that the record on all remaining issues was complete and that no litigation obstacles to the issuance of a full-power license remained.

In this regard, we do not understand LILCO's reference to our decision in Duke Power Co. (Perkins Nuclear Station, Units 1, 2, and 3), ALAB-591, 11 NRC 741 (1980) (inherent right and duty of board to determine, in the first instance, the bounds of its own jurisdiction). See LILCO's Answer at 4 n.1. LBP-88-24 must be read as reflecting the OL-3 Board's conclusion that it possessed the jurisdiction to dismiss the Governments from the entire proceeding. The fact that the Board chose not to explain the basis for that conclusion cannot serve to relieve us of the obligation to review it on the Governments' appeal.

[16] Both LILCO and the staff note that "abuse of discretion" is the proper standard for federal appellate court review of district court orders imposing discovery-related sanctions. We are aware of no such constraint, however, on the scope of review of a jurisdictional issue like that involved here.

4. LILCO's last argument is that "federal case law makes 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." LILCO's Answer at 10-11. LILCO later acknowledges that these cases may be distinguishable from the matter here at issue. Id. at 14. They are indeed distinguishable, and on essential points.

In Branca v. Security Benefit Life Insurance Co., 773 F.2d 1158, 1164-66 (11th Cir. 1985), aff'd in part and remanded in part on other grounds, 789 F.2d 1511 (1986), the court of appeals held that a federal district court in Florida could order sanctions against a defendant in litigation pending in that court for that defendant's failure to comply with an order to compel issued by a federal district court in Kansas. The Kansas court became involved, not because it had jurisdiction over any "merits" issues in the involved Florida lawsuit concerning insurance proceeds, but because it was merely the site of a deposition taken in connection with that suit. On this basis alone, Branca is clearly distinguishable from the controversy that confronts us. More significant, however, Federal Rule of Civil Procedure 37(b)(2) explicitly authorizes the court in which an action is pending to impose sanctions against a party for failure to comply with discovery orders issued by

other courts in connection with the pending action. This rule recognizes the fact that deponents in federal litigation often reside in districts other than where the litigation is pending. These outlying district courts essentially act as agents in discovery disputes on behalf of the court presiding over the lawsuit. If the "lawsuit" court disagrees with a ruling of the "discovery" court, the former has the ultimate jurisdiction under the rule to resolve any discovery dispute. Not only is this fact pattern inapposite here, the NRC Rules of Practice contain no provision comparable to Rule 37(b)(2).

LILCO's other citations are equally unpersuasive. While each involves either multi-phase litigation, multiple claims and counterclaims, or multiple litigants, in every case the same judge presided over all aspects of the litigation. See Weisberg v. Webster, 749 F.2d 864, 869-72 (D.C. Cir. 1984); Wyle v. R.J. Reynolds Industries, Inc., 709 F.2d 585, 588-91 (9th Cir. 1983); Aztec Steel Co. v. Florida Steel Corp., 691 F.2d 480, 482 (11th Cir. 1982), cert. denied, 460 U.S. 1040 (1983). Thus, unlike here, no issue arose as to the presiding judge's authority to impose

a sanction that would affect a party's status as a litigant in a related action pending before a different judge.[17]

5. As noted above, the staff does not address the jurisdictional question raised by the Governments' appeal. Instead, it essentially asks us to reconsider our determination to answer that question separately and expeditiously. The staff believes that we can avoid the jurisdictional question entirely by reviewing the OL-3 Board's sanction decision on the merits. Citing a concern for the integrity of the NRC's adjudicatory process, the staff also asserts that that is the preferred course, even if it means staying the exercise proceeding now before the OL-5 Board.[18]

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[17] In fact, in Weisberg, 749 F.2d at 872, the court noted that the presiding district judge was "particularly close" to the overall proceeding involved there. Interestingly, the Wyle court pointed out that "'the sanction must be specifically related to the particular 'claim' which was at issue in the order to provide discovery.'" 709 F.2d at 591 (quoting Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinea, 456 U.S. 694, 707 (1982)).

Although we are not obliged to do research for either a party or a licensing board, we have discovered no federal authority that would support the OL-3 Licensing Board's jurisdiction to dismiss the Governments from that part of this proceeding pending elsewhere.

[18] The staff does not suggest, however, a corresponding stay of the license authorization.

We decline the staff's suggestion that we reconsider our decision to give the Governments' jurisdictional appeal priority. Our September 29 memorandum and order already deals with that matter. See supra note 2. We add only two points in further response to the staff. First, we do not believe that consideration of the merits of the Board's sanction decision would necessarily allow us to pretermit the jurisdictional question before us.[19] In any event, because this issue might well arise in other proceedings, there is added cause to decide it now. See supra note 11. See also ALAB-900, 28 NRC at ___ (slip opinion at 8-9). Second, as a consequence of ALAB-901 and the OL-3 Board's decision in LBP-88-24, the status of the exercise litigation before the OL-5 Board is in doubt. We believe it is our responsibility to clarify the status of that litigation and to do so as promptly as possible.[20] We also reject the

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[19] As noted above (note 11), there are multiple appeal boards and several pending appeals in this proceeding, leading to the prospect of even greater procedural problems if the jurisdictional conflict between licensing boards is not resolved now.

[20] Two very recent events in this case vividly demonstrate the need for expeditious resolution of the jurisdictional issue before us. In an unpublished memorandum and order dated October 6, the Chairman of the Licensing Board Panel denied LILCO's October 3 motion for reconstitution of the OL-5 Licensing Board. One of the alternative reasons given (at 2) by the Panel Chairman for his action is that, notwithstanding the Governments' appeal,

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notion that delay of the proceeding in connection with the 1988 exercise is acceptable. As we noted in ALAB-900, 28 NRC at ___ n.5, the time actually available under the Commission's regulations to litigate and to decide any admissible exercise-related contentions does not allow for much slack.

6. Finally, even if there were no jurisdictional constraints on the OL-3 Board's imposition of sanctions, dismissal from a proceeding is "so harsh a penalty, it should be imposed only in extreme circumstances." Wyle, 709 F.2d at 589. Consistent with this guiding principle, a board should be particularly cautious in extending the scope of this sanction to matters beyond those over which it is presiding, particularly where, as here, the sanction directly leads to termination of the proceeding and authorization of an operating license.[21] The OL-3 Board's

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"there is, at this juncture, no proceeding pending for which to appoint a board." The OL-5 Board as well has issued (also on October 6) a memorandum and order denying, on a similar ground, the Governments' request for a postponement of the time for filing exercise contentions.

[21] If one of several licensing boards presiding in a single proceeding was considering the imposition of a lesser sanction -- e.g., drawing inferences on certain issues unfavorable to the party being punished -- we cannot imagine that board extending this sanction to matters pending before a different board, and certainly not without a substantial justification and explanation. No less should be required of a board seeking to impose the severest sanction of all.

majority opinion, insofar as it forecloses the Governments from the OL-5 proceeding concerned with the 1988 exercise, does not reflect adequate attention to all of the significant implications of its decision. See supra pp. 12-14.

C. Because we conclude that the OL-3 Licensing Board did not have the authority to dismiss the Governments from a portion of the proceeding pending before a different Board, all outstanding emergency planning issues have not been resolved. Thus, the stated basis for the OL-3 Board's full-power license authorization does not exist, and, a fortiori, that authorization must be vacated.[22]

Insofar as it purports to dismiss the Governments from the proceeding now before the OL-5 Licensing Board, LBP-88-24, 28 NRC ___, is reversed; the authorization of a full-power license included in LBP-88-24 is vacated.

It is so ORDERED.

FOR THE APPEAL BOARD

C. Jean Shoemaker
Secretary to the
Appeal Board

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[22] We express no view as to whether there is another basis for the authorization of a license afforded by the Commission's regulations. See, e.g., 10 C.F.R. § 50.47(c)(1).