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LILCO, October 6, 1988

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' MOTION TO FILE REPLY

On October 5, 1988, the Intervenors filed their "Governments' Motion for Leave to File Reply" (hereinafter "Motion"). Their reply, which was incorporated into the motion, was to LILCO's Answer to Intervenors' Brief on Bifurcated Appeal (October 4, 1988). This is LILCO's answer to the Intervenors' motion/brief of October 5.

LILCO opposes the Motion. The Appeal Board should deny it and disregard the included brief. In the alternative, the Appeal Board should take into account LILCO's response in Part II below. Moreover, in light of the importance attached to this "jurisdictional" issue by all parties, the Appeal Board should hear oral argument.

I. The Intervenors' Motion Should Be Denied

One of the arguments for expedition in the Intervenors' original pleadings was that the "jurisdictional" issue was simple and straightforward, as demonstrated by the shortness of their brief. Governments' Motion for Bifurcation of Appeal and for Expedited Treatment of Jurisdictional Issue at 4 (Sept. 27, 1988). Now, however, they have filed an additional brief. Meanwhile, they have petitioned the Frye Board for more time to file contentions on the 1988 exercise, based largely on their claim that they are

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busy with other things, including this appeal. Suffolk County, State of New York, and Town of Southampton Motion for Postponement of Deadline for Filing Contentions Related to June 1988 Exercise or, in the Alternative, for Extension of Time at 4-7 (Oct. 4, 1988). Their attempts to hurry the resolution of this issue, claiming it is simple and straightforward, while using the "considerable energy and resources" they have had to expend on it to justify delay in another part of the proceeding, are not well taken.

The Intervenors' reply brief is not contemplated by the regulations. See 10 C.F.R. § 2.762 (1988); Detroit Edison Co. (Enrico Fermi Atomic Plant, Unit 2), ALAB-469, 7 NRC 740 (1978). The Appeal Board should deny the Intervenors' October 5 motion and disregard the included brief. In the alternative, the Appeal Board should consider the following response to the substantive arguments in the Intervenors' Motion.

II. The Intervenors' Arguments are Incorrect

A. The Intervenors' Theory of How "Jurisdiction" Is Distributed by the Chairman of the Licensing Board Panel Is Their Own Invention

The concept of "jurisdiction" that the Intervenors ask the Appeal Board to accept has no basis in the NRC regulations. In its October 4 answer to Intervenors' original brief on bifurcation, LILCO argued that the Intervenors' theory would eliminate the power of licensing boards in a multi-board proceeding to dismiss a party, since no board would have it. The authority to dismiss a party in extreme cases such as this one became, LILCO argued, jurisdiction unaccounted for.

In their October 5 Motion Intervenors refine their theory. The power to dismiss a party still exists, they say, but it resides with the Appeal Board:

> [U]nder the Commission's rules [the Gleason Board] could have certified the sanctions issue to an entity with proper jurisdiction. See 10 CFR § 2.718(i).

Motion at 3.

The Intervenors' theory is now clearer, but it is even more unfounded than before. They claim that whenever the Chairman of the Licensing Board Panel appoints a second licensing board in a proceeding, he actually divides up "jurisdiction" three ways: he gives the power to impose sanctions up to dismissal of contentions to each licensing board, while he distributes the jurisdiction to dismiss a party up to the Appeal Board, to be invoked only by certification.

This is heavy freight to be borne by a "case management tool." Too heavy. Moreover, it is an afterthought: neither Intervenors nor anyone else sought certification of the sanctions issue. It is also contrary to the Perkins case, which holds that the Licensing Board determines its jurisdiction in the first instance. Duke Power Co. (Perkins Nuclear Station, Units 1, 2 and 3), ALAB-591, 11 NRC 741, 742 (1980). It is contrary to the Limerick case, which holds that "until exceptions are filed there is literally no appeal to invoke [Appeal Board] jurisdiction." Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), ALAB-726, 17 NRC 755, 758 (1983). Finally, it is unworkable. When, in the Intervenors' theory, does the Licensing Board certify the sanctions issue? Before it holds a hearing, or afterward? If afterward, does the Appeal Board hold the hearing, or does it remand the issue back to the Licensing Board, thereby reconferring "jurisdiction" to dismiss parties?

The Intervenors' complex "certification" theory simply has no basis in the regulations.

B. The Intervenors' Casual Dismissal of Federal Case Law Misses the Point

The Intervenors would dismiss all the federal cases cited by LILCO because, Intervenors say, each of those cases was only one "case" and presented no "jurisdictional" issue. The Shoreham OL-3 and OL-5 dockets, they argue, are two different "cases" and do present a "jurisdictional" issue.

By this argument, which is little more than an unsupported assertion based on their definition of "case," the Intervenors assert that the Appeal Board decided the sanctions issue in their favor when it resurrected the OL-5 Board in ALAB-901, when it bifurcated the issues in its ex parte Order of September 27, and when it characterized the first issue as "jurisdictional" in its September 29 Memorandum and Order.

Perhaps recognizing the unfairness of this course of events (if it is as Intervenors say it is), Intervenors imply, Motion at 2 n.1, that LILCO consented to the bifurcation of the issues because it did not seek "reconsideration" of the Appeal Board's bifurcation decision. That LILCO did not seek "reconsideration" is of no consequence; a motion for reconsideration is not a prerequisite to a petition for Commission review. See 10 C.F.R. § 2.786(b). LILCO yesterday petitioned the Commission to review the bifurcation decision. Long Island Lighting Company's Petition for Review of ALAB-901 and Follow-on Orders (Oct. 5, 1988). LILCO made clear in that petition that it would have contested the bifurcation if it had been given the opportunity before the decision was made. Id. at 11-14.

Moreover, Intervenors' claim that the cases cited by LILCO are inapposite is wrong, because they misstate the proposition for which LILCO cited the cases. LILCO has not argued that a judge in one jurisdiction can dismiss proceedings in another jurisdiction. The point is rather that in a single proceeding, even one that is complex and subdivided, a judge can dismiss an offending party from all parts of the proceeding, even a part of the proceeding that was not the basis of the offending activity. The cases LILCO cited support this proposition.

III. The Appeal Board Should Hear Oral Argument

In accordance with its custom, the Appeal Board should hear oral argument on this issue. The importance attached to this issue by LILCO and the NRC Staff (as

indicated by their briefs), the importance attached to it by the Intervenors (as shown by their attempt to get additional briefing for themselves), and the speed with which this matter is being resolved suggest that oral argument is important.

Respectfully submitted,

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DATED: October 6, 1988

LILCO, October 6, 1988

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 LILCO'S ANSWER TO INTERVENORS' MOTION TO FILE REPLY were served this date upon the following by telecopier as indicated by one asterisk, by Federal Express as indicated by two asterisks, or by first-class mail, postage prepaid.

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