

Consequently, we would not consider Intervenors' motion unless the Appeal Board then considering the matter reversed LBP-88-24's dismissal of Intervenors from this proceeding.

On October 7, the Appeal Board issued ALAB-902² which reversed this aspect of LBP-88-24. LILCO and Staff filed their responses to Intervenors' motion as we had directed in our October 6 Memorandum and Order.³ Consequently we now address the merits of Intervenors' motion.

Intervenors assert three reasons to support their motion: first, that their resources have been substantially diverted following the issuance of LBP-88-24; second, that our jurisdiction over and their participation in exercise issues is in question; and third, that LILCO and FEMA have failed to provide them with documentation necessary to draft contentions. We address each of these arguments in turn.

Diversion of Intervenors' Resources

Intervenors recite the following chronology to support this argument:

Sept. 22	OL-5 schedule issued
Sept. 23	LBP-88-24 issued
Sept. 27	Intervenors file:

²28 NRC _____, October 7, 1988.

³These responses were "faxed" to the Board on October 11.

1. Notices of Appeal
 2. Motion to bifurcate appeal of OL-3 Board's jurisdiction to dismiss Intervenor from OL-5 proceeding
 3. Brief on jurisdiction
- Appeal Board grants 2. above
- Sept. 28 LILCO moves for an extension of time to brief 2. above
- Sept. 29 Intervenor's oppose LILCO's motion
- Oct. 3 Intervenor's file comments on immediate effectiveness of LBP-88-24
- Oct. 11 Motion to stay LBP-88-24 due
- Oct. 14 Response to LILCO's motion to Chief Judge Cotter to reconstitute the OL-5 Board due
- Oct. 17 Exercise contentions due
- Oct. 27 Brief on appeal of LBP-88-24 due
- Unknown Response to LILCO's petitions for Commission review of various Appeal Board decisions

LILCO asserts that neither conflicting obligations of a party, nor its lack of resources justifies relief, citing General Public Utilities Nuclear Corp. (Three Mile Island Nuclear Station, Unit 1), LBP-86-14, 23 NRC 553, 558-59 (1986) and the Commission's Statement of Policy on the Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 454 (1981). LILCO also notes the direction to us to conduct this proceeding "as expeditiously as possible consistent with fairness to all parties," ALAB-901, slip op. at 6-7, and the fact that the OL-3 Board dismissed Intervenor's for

obstructing the Commission's adjudicatory process in bad faith.

Staff agrees with LILCO that, because Intervenors were dismissed from the OL-3 proceeding for their bad faith, their efforts to overturn the consequences of that decision do not constitute good cause for an extension of time. Moreover, Staff points out that Intervenors have the resources to abide by the schedule previously set.

It is true, as LILCO and Staff point out, that the OL-3 Board dismissed Intervenors for their bad faith, and that in part Intervenors' need for more time stems from their efforts to avoid the consequences of that action. It is also true, however, that in part Intervenors have been presented with a need to protect their interests in the face of hurried attempts to take full advantage of that dismissal.⁴ Thus we find it difficult to fully embrace LILCO's and Staff's argument in this respect. Here the issue which we are called on to decide is a simple one: should a brief extension of time be granted for the filing of contentions. In these circumstances we believe that it is better to save

⁴LILCO's October 3 motion to Chief Judge Cotter to reconstitute this Board with the members of the OL-3 Board is an example. No matter what its other merits may be, it seems little more than a blatant attempt at forum shopping. That motion was denied on October 6.

issues of that bad faith and its consequences for this proceeding until such time as we are called on to decide whether Intervenors should also be excluded from this proceeding.⁵

LILCO is correct in its assertions that conflicting obligations and an asserted lack of resources do not necessarily provide justification for an extension of time. However, it is also important to consider whether that extension would work a hardship on the other parties.

Finally, we note that some of the events which Intervenors put forward as justification for their request have fallen by the wayside since their motion was filed. Thus, it became unnecessary for them to request a stay of LBP-88-24 in light of the fact that ALAB-902 vacated the former's authorization of a full-power license or to respond to LILCO's motion to reconstitute this Board in light of the denial of that motion.⁶

In sum, our analysis of these arguments leads us to the conclusion that a brief extension of time will not be

⁵See ALAB-902, slip op. at 8-9; Staff's October 11 response, fn. 8, p. 6, in which Staff indicates that it is considering filing a motion seeking to terminate this proceeding on the basis of the conclusions reached in LBP-88-24.

⁶See footnote 4, supra.

prejudicial to the other parties and is warranted in these circumstances.

Questions Regarding This Board's Jurisdiction

Intervenors argue that it would be an enormous waste of time and resources should we proceed with this litigation only to find that Intervenors were properly dismissed from it. Staff, while recognizing that subsequent to Intervenors' motion ALAB-902 confirmed our jurisdiction, nonetheless takes a similar position. Staff urges that the deadline for filing contentions remain in place, but that no action be taken on those contentions until Intervenors status is finally determined by the Commission and the Appeal Board.

We decline to accept Staff's position. ALAB-902 is now the law of this case and, unless it is overturned, we intend to proceed with this litigation. We believe that the two-year window during which the June exercise may serve as a basis for licensing compels this result.⁷ To delay this proceeding while awaiting final Commission resolution of

⁷See 10 CFR Part 50, App. E, Par. IV. F. 1. Unlike the litigation of the 1986 exercise, which took place against the backdrop of many other issues which remained unresolved until the issuance of LBP-88-24, the litigation of the 1988 exercise is presently the only matter which must be resolved prior to the authorization of full-power operation.

this issue could well jeopardize our ability to complete the proceeding within the time allotted.⁸

Lack of Adequate Discovery

Intervenors argue that LILCO and FEMA have failed to provide them with the documents necessary to draft contentions. LILCO and Staff note that Intervenors are not entitled to discovery in advance of the filing of contentions, citing 10 CFR 2.740(b)(1); Wisconsin Electric Power Co. (Point Beach Nuclear Power Plant), ALAB-696, 16 NRC 1243, 1263 (1982); Northern States Power Company (Prairie Island Nuclear Generating Plant), ALAB-107, 6 AEC 188, 192, reconsid. den., ALAB-110, 6 AEC 247, aff'd CLI-73-12, 6 AEC 241 (1973). LILCO and Staff are clearly correct. Intervenors are not entitled to discovery to aid them in formulating contentions.

Conclusion

We conclude that the events following the issuance of LBP-88-24 justify a brief extension of time to file contentions and that such an extension will not prejudice the other parties or interfere with the Board's obligation to

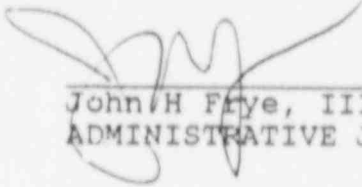
⁸Our conclusion in this regard in no way precludes Staff or LILCO, should they see fit, from seeking to exclude Intervenors from this proceeding by means of the procedure suggested by the Appeal Board. See fn. 5, supra. Any such motion will be considered on its merits.

complete this proceeding in a timely fashion. Consequently, the deadlines set in our September 22 Memorandum and Order are each extended by one week. The new schedule is set out below.

- Noon, October 24 - Contentions are to be in the hands of the Board, LILCO, and Staff.
- Noon, November 3 - LILCO's response is to be in the hands of the Board, Intervenors, and Staff.
- Noon, November 8 - Staff's response to be in the hands of the Board, LILCO, and Intervenors.
- Noon, November 15 - Intervenors' reply to be in the hands of the Board, LILCO, and Staff.
- 10:00 AM, November 23 - Conference of Counsel, NRC Hearing Room, fifth floor, 4350 East-West Highway, Bethesda, Maryland.

It is so ORDERED.

For the ATOMIC SAFETY AND
LICENSING BOARD



John H. Frye, III, Chairman
ADMINISTRATIVE JUDGE

Bethesda, Maryland

October 12, 1988