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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

OFFICE OF THE CLERK
DOCKETING SECTION
WASHINGTON, D.C. 20545

In the Matter of)	
)	
LONG ISLAND LIGHTING COMPANY)	Docket No. 50-322-OL-5
)	(EP Exercise)
(Shoreham Nuclear Power Station,)	
Unit 1))	

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

Suffolk County, the State of New York, and the Town of Southampton (the "Governments") hereby oppose LILCO's October 5 Petition for Review of ALAB-901 and Follow-On Orders (the "Petition").^{1/}

BACKGROUND

The complex nature of the Shoreham litigation has required the use of multiple Licensing Boards to hear different issues. While this practice usually has proved to be an effective case management tool, it necessarily limits the jurisdiction of the Licensing Boards to the discrete issues they are given to resolve, and can sometimes lead to questions regarding which Board has jurisdiction over a particular issue. In the Shoreham case, the litigation regarding the adequacy of LILCO's emergency planning for Shoreham

^{1/} The Petition is over 15 pages long and LILCO has accordingly moved to exceed the 10 CFR § 2.786 10-page limit. See Motion for Leave to Exceed Page Limit (Oct. 5, 1988). The Governments do not oppose LILCO's motion, provided that the Commission accepts this Opposition which, because of the many points raised by LILCO, slightly exceeds the Commission's 10-page limit.

has been divided since 1986 between the "OL-3" docket, which has considered the adequacy of LILCO's plan as it exists on paper, and the "OL-5" docket, handled by a separate Licensing Board, which has considered LILCO's efforts to meet the NRC's exercise requirements.

In ALAB-901,^{2/} the Appeal Board ruled that the OL-3 Board lacked jurisdiction to hear issues related to LILCO's June 1988 exercise. LILCO now seeks Commission review of that decision. LILCO also complains of certain follow-on orders in which the Appeal Board took action to resolve the procedural confusion which arose when the OL-3 Board subsequently attempted to dismiss the Governments from the entire Shoreham proceeding --including the exercise issues over which the OL-3 Board had no jurisdiction. LILCO's Petition, however, is insupportable in both law and fact.

In essence, LILCO complains that the Appeal Board has issued various procedural rulings which LILCO does not like and that, therefore, it is entitled to interlocutory review of those rulings. Implicit in LILCO's complaints is the assertion that the OL-3 Board would have ruled in a manner more to LILCO's liking. See Petition at 2 (the Appeal Board rulings "drastically affect the licensing prospects for Shoreham"). But LILCO's blatant forum shopping^{3/} provides no basis for its Petition. Rather, as demonstrated below, the Appeal Board's actions were correct and well within its jurisdiction and supervisory powers. The matters raised by LILCO do not

2/ Memorandum and Order, ALAB-901, 28 NRC ___ (Sept. 20, 1988).

3/ After issuance of ALAB-901, LILCO moved the Chief Administrative Judge to replace the OL-5 Board chaired by Judge Frye with the OL-3 Board which had ruled, in a 2-1 decision to dismiss the Governments as intervenors. After Judge Coakley rejected LILCO's motion, Judge Frye aptly described LILCO's motion as "little more than a blatant attempt at forum shopping." Memorandum and Order, (Oct. 12, 1988) at 4, n.4.

reflect "important question[s] of fact, law, or policy" (10 CFR § 2.786(b)(1)) and, accordingly, there is no reason to grant LILCO's Petition.

Before discussing the merits of LILCO's Petition, a brief synopsis of the recent procedural history of the case is necessary. On September 8, 1988, FEMA released its report on the results of LILCO's June 1988 exercise. The next day, the NRC Staff filed a proposed exercise litigation schedule with the OL-3 Board.^{4/} Because the OL-3 Board lacked jurisdiction to hear the exercise issues, the Governments promptly filed a motion with the Appeal Board, requesting the appointment of a Licensing Board with jurisdiction to hear those issues.^{5/} In addition, while not conceding the OL-3 Board's jurisdiction over the exercise issues, the Governments filed a response to the Staff's proposed schedule.^{6/}

On September 20, 1988, the Appeal Board issued ALAB-901, ruling that the OL-3 Board had no jurisdiction over exercise issues (having lost any such jurisdiction in 1986 with the creation of the separate OL-5 Board and docket), and remanding those issues "for appropriate action to the Licensing Board in

4/ NRC Staff's Motion for Schedule for Litigation of the June 1988 Exercise (Sept. 9, 1988), at 2.

5/ Suffolk County, State of New York and Town of Southampton Motion for Appointment of Licensing Board with Jurisdiction to Hear Exercise Issues (Sept. 13, 1988) ("Motion for Appointment"). As the Motion for Appointment explains, the Chief Administrative Judge of the Licensing Board Panel took certain actions which divested the OL-3 Board of jurisdiction over exercise-related matters and placed that jurisdiction with a different Licensing Board in the newly-created OL-5 docket. The Governments filed the Motion for Appointment with the Appeal Board because, following the OL-5 Board's decision in LBP-88-2 (finding that LILCO's February 1986 exercise revealed "fundamental flaws" in LILCO's Plan), all jurisdiction over exercise matters passed to the Appeal Board, pursuant to the appeals filed by LILCO. See Georgia Power Co. (Vogtle Electric Generating Plant, Units 1 and 2), ALAB-859, 25 NRC 23, 27 (1987).

6/ Suffolk County, State of New York and Town of Southampton Response to NRC Staff Motion for Schedule for Litigation of the June 1988 Exercise (Sept. 19, 1988) ("Governments' Response").

[the OL-5 docket]." ALAB-901, slip op. at 10. Pursuant to ALAB-901, the OL-5 Board issued an initial exercise litigation schedule on September 22.^{7/} The very next day, however, the OL-3 Board issued a Concluding Initial Decision which not only resolved all of the substantive issues pending before the OL-3 Board in LILCO's favor, but also purported to dismiss the Governments as parties from the entire Shoreham licensing proceeding -- including the exercise issues -- and authorized the issuance of a full power license for Shoreham.^{8/}

An obvious issue raised by the CID was whether the OL-3 Board had the power to dismiss the Governments from proceeding on issues that were not before that Board. While the decision to dismiss the Governments implied a determination that the OL-3 Board had such power (in apparent conflict with ALAB-901 which had been issued three days earlier), the CID's majority opinion provided absolutely no rationale for that determination. Only Judge Shon, who dissented from the decision to dismiss the Governments from the proceeding, noted this jurisdictional conflict.^{9/}

In order to resolve this jurisdictional issue and the procedural logjam it caused as quickly as possible, the Governments immediately filed notices of appeal on September 27 and, on the same date, filed a motion with the Appeal Board to bifurcate the appeal into two parts: the first part addressing the jurisdictional issue (for which the Governments requested expedited

^{7/} Memorandum and Order (Sept. 22, 1988). That order called for the Governments to file contentions no later than noon on October 17. That date has since been changed to October 24.

^{8/} Concluding Initial Decision on Emergency Planning, LBP-88-24, 28 NRC ____ (Sept. 23, 1988) ("CID"), rev'd in part, ALAB-902, 28 NRC ____ (Oct. 7, 1988).

^{9/} CID, Judge Shon concurring in part and dissenting in part, at 12, n.3.

consideration); and the second part concerning the remaining issues raised by the CID.^{10/} Appended to the Governments' Bifurcation Motion was a short, six-page appeal brief addressing the jurisdictional issue.^{11/}

The Appeal Board granted the Governments' Bifurcation Motion on September 27, 1988 and set an expedited briefing schedule on the jurisdictional issue, calling for LILCO and the Staff to respond by September 30.^{12/} In a filing dated September 28, however, LILCO objected to the Appeal Board's expedited schedule and requested an extension of time to brief the narrow jurisdictional issue raised by the Governments' Brief.^{13/} LILCO did not object, however, to the Appeal Board's bifurcation of the jurisdictional issue. On September 29, the Appeal Board rejected the reasoning behind LILCO's extension request, but nevertheless granted LILCO an extension of time until October 4 to brief the jurisdictional issue.^{14/}

Following receipt of the parties' briefs, the Appeal Board issued ALAB-902^{15/} on October 7, 1988, which held that the OL-3 Licensing Board did not

^{10/} Governments' Motion for Bifurcation of Appeal and for Expedited Treatment of Jurisdictional Issue (Sept. 27, 1988) ("Bifurcation Motion").

^{11/} Governments' Brief On Bifurcated Appeal From the September 23, 1988 Concluding Initial Decision in LBP-88-24 (Sept. 27, 1988) ("Governments' Brief"). LILCO has accused the Governments of using "shell-game tactics" in seeking a bifurcated appeal. Petition at 14. However, the Appeal Board has rejected this allegation. See generally ALAB-902; Memorandum and Order (Sept. 29, 1988). Given its forum shopping activities (see note 3 above), it ill-behooves LILCO to make such allegations.

^{12/} Order (Sept. 27, 1988).

^{13/} LILCO's Motion for Enlargement of Briefing Time (Sept. 28, 1988).

^{14/} Memorandum and Order (Sept. 29, 1988).

^{15/} Decision, ALAB-902, 28 NRC ____ (Oct. 7, 1988).

have jurisdiction to dismiss the Governments from the exercise issues (as opposed to the issues in the OL-3 docket which were properly before it).

DISCUSSION

LILCO's Petition seeks review of ALAB-901 (OL-3 Board has no jurisdiction over exercise issues), the Appeal Board's September 27 Order (granting bifurcation of appeal of CID and expediting consideration of jurisdictional issue), and the Appeal Board's September 29 Memorandum and Order (granting in part LILCO's motion for extension of time). Because ALAB-902 was decided after the filing of LILCO's Petition, it is not at issue here.

LILCO has failed to explain why these rulings present "important question[s] of fact, law, or policy" worthy of review. LILCO's difficulty is understandable; the Appeal Board has ruled correctly on matters that are well within its jurisdiction, knowledge, and supervisory powers. In contrast, the issues which LILCO has raised are insupportable in law and, in many cases, based on a distorted recitation of the facts.

A. The Appeal Board Followed Appropriate Procedures

LILCO first complains that the Appeal Board erred in determining the jurisdiction of the OL-3 Board without first remanding the matter to the OL-3 Board to decide the matter in the first instance. Petition at 6-7. Here LILCO raises a red herring. The OL-3 Board did, in fact, take the opportunity to determine and assert its jurisdiction over the exercise issues when it dismissed the Governments as parties to those (and all other) issues.^{16/}

^{16/} As the Appeal Board noted in ALAB-902:

LEP-88-24 must be read as reflecting the OL-3 Board's conclusion that it possessed the jurisdiction to dismiss the Governments from
(continued...)

Thus, contrary to LILCO's complaint, the OL-3 Board has had the opportunity to determine its own jurisdiction.^{17/}

The Appeal Board's handling of the matter was not only proper, but was also based on common sense and good case management. As the Appeal Board noted, the jurisdictional issue arose largely from the use of multiple Licensing Boards in one licensing proceeding. In a case, such as the instant case, where there is an issue as to which of the multiple Licensing Boards has jurisdiction, the best procedure is to have a body with appropriate authority over those Boards, such as the Appeal Board, make the determination. The alternative is chaos, with the possibility of one Board attempting to usurp the jurisdiction of another Board, or otherwise obtain jurisdiction it does not have (as the OL-3 Board attempted to do without any explanation as to why it considered itself to have the authority to do so).^{18/}

LILCO's argument that the Appeal Board erred in justifying its determination of the jurisdictional issue based on the nexus between the 1986

^{16/}(...continued)
the entire proceeding.

ALAB-902, slip op. at 14 n.15. The Appeal Board also criticized the OL-3 Board's utter failure to explain the basis for its apparent belief that it had such jurisdiction. ALAB-902, slip op. at 12-14, 20.

^{17/} It therefore is similarly error for LILCO to allege that the Appeal Board "retroactively" redefined the OL-3 Board's jurisdiction (Petition at 1), "strip[ped] the OL-3 Licensing Board of jurisdiction" (*id.* at 3), "radically restructured" the Shoreham proceeding (*id.* at 14) or "ousted" the OL-3 Board from its rightful jurisdiction (*id.* at 11, 14). The Appeal Board simply applied the law and provided clear and well-reasoned bases for its decisions. In contrast, the OL-3 Board failed even to articulate its bases (if any) for believing it had jurisdiction. See ALAB-902, slip op. at 12-14.

^{18/} The procedural posture here also distinguishes this case from the decision in Duke Power Co. (Perkins Nuclear Station, Units 1, 2, and 3), ALAB-591, 11 NRC 741 (1980), on which LILCO relies so heavily. Multiple Licensing Boards and the unique procedural problems they create were not at issue in Perkins.

exercise issues before it on appeal from LBP-88-2 and the 1988 exercise issues is also unavailing. Petition at 7-8. While LILCO expends much energy attempting to build a wall between the two exercises, the nexus which the Appeal Board relied upon is evident. Not only do both exercises represent LILCO's attempt to meet the NRC's exercise requirements, but the need for the 1988 exercise arose directly from LILCO's failure to meet those requirements in the 1986 exercise.^{19/} Obviously, any evaluation of the 1988 exercise will require an inquiry into whether the fundamental flaws discovered in the first exercise have been corrected. See ALAB-901, slip op. at 6. Indeed, FEMA's 1988 exercise report, which will be a focus of any exercise proceeding, is replete with references to matters from the 1986 exercise.^{20/}

B. The Appeal Board Correctly Ruled That the OL-3 Board Lacked Jurisdiction Over Exercise-Related Issues

As noted above, the OL-3 Board lost jurisdiction over exercise issues as a result of the action of the Chief Administrative Judge of the Licensing Board Panel in establishing a separate Licensing Board to hear exercise-

^{19/} See LBP-88-2, 27 NRC 85 (1988). LILCO's suggestion that the more appropriate nexus is between the exercise and the current revision of the plan is insupportable. First, an exercise is a separate and independent regulatory requirement. See 10 CFR Part 50, App. E, § IV.F.1. Second, it has been the parties' practice, FEMA's practice, and the acknowledged state of affairs in this proceeding that while issues related to the adequacy of the plan itself are unquestionably related to the exercise of the plan, the two matters are addressed separately. In short, there is a "paper plan" review and then an evaluation by way of an exercise. To say that the nexus between the issue of the adequacy of the current issue of the plan and the exercise is a stronger nexus than the one between the two exercises -- with the second exercise occurring because of fundamental flaws found as a result of the first exercise -- ignores this reality and makes it impossible for an exercise ever to be heard by a Licensing Board other than the one hearing the "paper plan" issues.

^{20/} In any event, LILCO fails to address the point raised by the Appeal Board in ALAB-901 that the Appeal Board could have brought the issue before itself anyway pursuant to its powers to certify for Appeal Board review an issue that is before a Licensing Board. See ALAB-901, slip op. at 7, n.4; 10 CFR § 2.785(b)(1).

related issues in the newly-created OL-5 docket. The pertinent facts behind the OL-3 Board's loss of jurisdiction are explained in ALAB-901 and in the Governments' Motion for Appointment (see note 5 above) and need no further illumination here. However, the Commission should be aware that in attacking ALAB-901, LILCO has resorted to revisionist history to suit its current needs.

The grossest example of this is LILCO's statement that the Appeal Board's determination that the OL-3 Board lacked jurisdiction and that the exercise issues should be heard in the OL-5 docket are "inconsistent with nearly six years of history in this proceeding." Petition at 9. LILCO neglects to inform the Commission that earlier this year, after the issuance of LBP-88-2 in which the OL-5 Board found that the 1986 exercise revealed fundamental flaws in LILCO's Plan, LILCO argued:

Given the extensive examination of the initial exercise, judicial efficiency suggests that this [OL-5] Board should retain jurisdiction to decide if the "fundamental flaws" identified in it have remedied [in a subsequent exercise].^{21/}

Thus at the time that it became clear that there would have to be another exercise, LILCO took exactly the opposite position that it now advocates before the Commission. Indeed, it never even mentioned the OL-3 Board as a possibility for hearing the exercise issues. In light of these facts, LILCO's current position, and its representations to the Commission, are misleading.

C. The Appeal Board Took Appropriate Action to Avoid Procedural Chaos by Bifurcating the Appeal From the CID and Expediting the Jurisdictional Issue

LILCO next complains that the Appeal Board was somehow in error when it took decisive action first to address the important procedural issue concerning the appropriate forum for the exercise issues and then to address

^{21/} LILCO's Views on Continuing Board Jurisdiction (Feb. 17, 1988).

the procedural quagmire which resulted from the conflict between ALAB-901 and the CID. Petition at 11-12. The first part of the Appeal Board's actions has already been addressed. With respect to the second part, LILCO seems most upset by the Appeal Board's decision to deal with the matter promptly by bifurcating the issues raised by the CID, and expediting a decision on the threshold jurisdictional question.

First, LILCO cannot properly raise this bifurcation issue before the Commission. After the Appeal Board's September 27 Order, LILCO sought reconsideration of the Appeal Board's expedited briefing schedule.^{22/} At that time, LILCO failed to seek relief from the Appeal Board's bifurcation order. LILCO cannot be heard now to object when it failed to seek such relief below. See 10 CFR § 2.786(b)(2)(ii). Thus, LILCO's "due process" complaint is baseless.^{23/}

Second, in any event, the propriety of the Appeal Board's actions hardly needs explaining. As the Appeal Board itself noted in its September 29 Memorandum and Order, it had a duty to clarify the confusion which existed after the CID. September 29 Memorandum and Order at 4. To do any less would have been to neglect its supervisory duties and permit procedural confusion to reign at the Licensing Board level indefinitely.^{24/} The Appeal Board was well

^{22/} LILCO's Motion for Enlargement of Briefing Time (Sept. 28, 1988).

^{23/} LILCO's complaint that the Appeal Board erred when it bifurcated the Governments' appeal without seeking LILCO's and the Staff's views on the matter is unfounded for the additional reason that the Appeal Board has the inherent power to decide how and in what order it will hear issues. ALAB-902, slip op. at 3, n.2.

^{24/} Indeed, the procedural disarray, and the need for prompt action, are best illustrated by rulings from the OL-5 Board and the Chief Administrative Judge of the Licensing Board Panel that they could take no action on motions regarding the OL-5 exercise proceeding until the jurisdictional issue was

(continued...)

within its authority to deal with the procedural disarray by structuring the matter so that it could be resolved promptly. See 10 CFR §§ 2.711(a) and 2.785(b)(1). Expeditious resolution of the matter was thus appropriate and, indeed, necessary. Far from abusing the legitimate tools of case management, as LILCO asserts, the Appeal Board used them wisely and decisively.^{25/}

D. Commission Review is Not Appropriate

In ALAB-901, the Appeal Board did what it is supposed to do and what it is well-qualified to do -- deal promptly with jurisdictional questions properly before it and supervise the Licensing Boards so as to manage a case as fairly and economically as possible. The Appeal Board's prompt actions in situations such as those that recently arose in the Shoreham proceeding should not be discouraged, but rather encouraged. Second guessing by the Commission on case management decisions is generally inappropriate, especially where, as here, the Appeal Board was unquestionably correct in taking the action it did. Furthermore, while LILCO claims that alleged "delay" resulting from legitimate litigation of the 1988 exercise issues would be "totally wasteful and

^{24/}(...continued)

resolved. See Memorandum and Order (Oct. 6, 1988) (OL-5 Board); Memorandum and Order (Oct. 6, 1988) (Chief Administrative Judge, Licensing Board Panel).

^{25/} LILCO also claims that the Appeal Board erred in addressing the jurisdictional issue rather than bypassing that issue and reaching the merits of the sanctions imposed on the Governments. Petition at 13-14. Here LILCO is confusing matters. What was at issue after the issuance of the CID, and what required prompt Appeal Board action, was whether a Licensing Board can dismiss a party from proceeding on matters which are not before that Licensing Board and which, in fact, are pending before another Licensing Board. That is a straightforward jurisdictional question which has nothing to do with the propriety or impropriety of the Governments' dismissal from the OL-3 proceeding and which obviously had to be addressed before reaching the merits of the OL-3 Board's ruling. For the same reason, it would be premature for the Commission to reach the merits of the Governments' dismissal at this time, as LILCO urges. Petition at 15-16. The merits of the OL-3 Board's sanctions (as they pertain to the OL-3 proceeding) are now before the Appeal Board and will be briefed and considered in accordance with the Commission's rules.

intensely damaging to LILCO[®] (Petition at 15), that claim is supported by no explanation whatsoever.

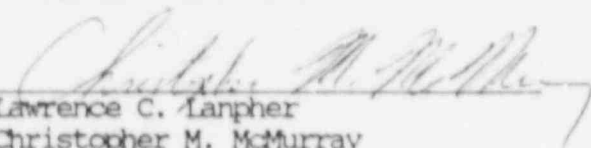
In short, the decisions at issue are simply not the kind of important questions with which the Commission should concern itself. Rather, in the interest of moving the proceeding along, the Commission should encourage the parties and the OL-5 Board to proceed to litigation of the June 1988 exercise issues so that that phase of this proceeding may be heard promptly.

CONCLUSION

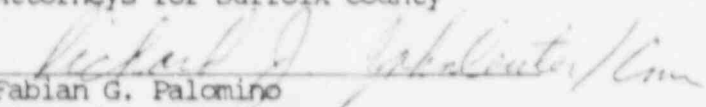
For the foregoing reasons, LILCO's Petition should be denied.

Respectfully submitted,

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