UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of	)	
	)	
LONG ISLAND LIGHTING COMPANY	)	Docket No. 50-322-OL-6
	)	(25% Power)
(Shoreham Nuclear Power Station, Unit 1)	)	
	)	

LILCO'S ANSWER TO INTERVENORS' OCTOBER 31 RESPONSE

On October 21, 1988, LILCO submitted to the Board its Request for Immediate Authorization to Operate at 25% Power (hereinafter "LILCO Request"). On October 31, Intervenors filed a pleading entitled "Governments' Response to LILCO's Request for Immediate Authorization to Operate at 25% Power" (hereinafter "Intervenors' Response"). Included with Intervenors' Response is an affidavit from Steven C. Sholly that purports to address the technical underpinnings of LILCO's 25% power request.

As Intervenors have been dismissed from the 25% power phase of this proceeding, Intervenors' Response is an unauthorized pleading. Both it and the Sholly affidavit should be stricken. Should the Board choose, however, to entertain Intervenors' Response, then LILCO respectfully requests that the Board consider as well this response to Intervenors' three principal arguments.

I. This Board Has Jurisdiction to Act on LILCO's Request

Intervenors first pose the novel argument that this Board no longer has jurisdiction to decide LILCO's request, claiming that the OL-3 Board's decision in LBP-88-24, 28 NRC ____ (1988) to "dismiss the Governments from the entire proceeding and authorize full power operation . . ." worked to divest "this Board of jurisdiction over LILCO's 25% power request." Intervenors' Response at 2. In making this argument,

Intervenors correctly recognize that the Board's intent in LBP-88-24 was to dismiss Intervenors "from the entire proceeding," including the OL-6 subdocket. Id. Indeed, Intervenors complain explicitly of their having been dismissed from the OL-6 subdocket in their brief to the Appeal Board.[1/] But Intervenors are wrong in their assertion that jurisdiction over the 25% power issues passed to the Appeal Board with the issuance of LBP-88-24.

As LILCO pointed out in its Request, but for the Appeal Board's decision in ALAB-902 to vacate the OL-3 Board's full power license authorization, LILCO's 25% power request would, as a practical matter, have been superseded by the authorization to operate at 100% power. LILCO Request at 6. However, given the unique procedural posture of LILCO's request to operate at 25% power, and the difference between the issues involved in 25% and 100% power authorization, the Board's authorization of a full power license did not, as Intervenors assert, "subsume" LILCO's 25% power request as a matter of law.

The findings that the Board must make in order to grant LILCO's 25% power request are different from the findings that the Board made in authorizing full power operation in LBP-88-24. LILCO's 25% power application has been made under the provisions of 10 C.F.R. § 50.57(c) and is predicated on a demonstration by LILCO that the consequence and timing of accidents occurring at 25% power are so reduced that any unresolved emergency planning issues (including those related to the 1988 exercise) are

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1/ Specifically, Intervenors allege that the OL-3 Board erred to the extent that it "simply assumed . . . that it had the necessary jurisdiction, and adequate and legitimate basis, to dismiss [Intervenors] from separate proceedings pending before the Appeal Board (in the OL-3 and OL-5 dockets), the Commission (in the OL-3 docket), and even itself (in the OL-6 docket)." See Governments' Brief in Support of Appeal of September 23, 1988 Concluding Initial Decision (October 27, 1988) at 23 (emphasis added). Significantly, Intervenors' appeal brief was filed before their 25% power Response, in which Intervenors take the position that they have not been dismissed from the OL-6 subdocket. Intervenors cannot have it both ways.

"not significant for the plant in question" under § 50.47(c)(1). Once such a showing has been made, the Board may make a finding under § 50.57(a)(3) and, in turn, § 50.57(c) that existing emergency planning for Shoreham provides reasonable assurance that the public health and safety will be protected at operation restricted to 25% power.[2/] By contrast, a 100% license presumes that all emergency planning issues have been resolved.

Thus, this Board's authorization of a 25% license depends on an affirmative finding under § 50.47(c)(1), based on LILCO's technical submittals and the Staff's recently released technical evaluation. The Board's authorization in LBP-88-24 of a full power license was based not on such a finding, but upon the resolution of all contested emergency planning issues. Accordingly, jurisdiction over the 25% power issues did not pass to the Appeal Board upon the issuance of that decision.[3/] Intervenors' sophistic

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2/ Specifically, § 50.57(c) provides, in pertinent part, that:

> An applicant may, in a case where a hearing is held in connection with a pending proceeding under this section, make a motion in writing, pursuant to this paragraph (c), for an operating license authorizing low-power testing . . . and further operations short of full power operation . . . . Prior to taking any action on such a motion which any party opposes, the presiding officer shall make findings on the matters specified in paragraph (a) . . . as to which there is a controversy, in the form of an initial decision with respect to the contested activity sought to be authorized . . . .

3/ The cases cited by Intervenors that allegedly are to the contrary are inapposite. For instance, the Appeal Board's decision in Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 1), ALAB-699, 16 NRC 1324 (1982), went solely to the question of whether the Licensing Board had jurisdiction over a motion to reopen that was filed after an initial decision had been rendered and exceptions taken. The Appeal Board stated that "jurisdiction to rule on a motion to reopen filed after exceptions have been taken . . . rests with the appeal board . . . . Once exceptions are filed, appeal board review of the merits commences." 16 NRC at 1327 (emphasis added). In the 25% power proceeding, of course, no motion to reopen has been filed. Indeed, with regard to the findings that must be made before the Licensing Board can grant LILCO's 25% power request, no merits decision has been reached. Similarly, as explained above, the findings that the Board has yet to make under § 50.47(c)(1) (and, in turn, under

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argument to the contrary notwithstanding, this Board retains jurisdiction over LILCO's 25% power request, and it should proceed to decide that request expeditiously.

II. Judges Gleason and Kline Are Not Disqualified from Acting on LILCO's 25% Power Request

Second, Intervenors assert that the Board cannot rule on LILCO's Request because "Judges Gleason and Kline have shown bias against the Governments and cannot act fairly and impartially in this matter." Intervenors' Response at 4. Intervenors have filed a separate pro forma motion to disqualify Judges Gleason and Kline, and LILCO addresses Intervenors' substantive allegations (which are incorrect) in a separate response to that motion, filed herewith.

III. LILCO's 25% Power Request Should Be Expeditiously Granted on the Merits

Finally, Intervenors seek to take issue with LILCO's Request on the merits, asserting that "LILCO's arguments lack factual support, seek to avoid established procedures, ignore Licensing and Appeal Board Orders, and constitute a transparent effort to obtain a 25% power license without the proper scrutiny of this Board, the Staff and the Governments." Intervenors' Response at 8. Intervenors offer three purported reasons why LILCO's 25% power request should be rejected on the merits. All three are incorrect.

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§ 50.57(a)(3) and § 50.57(c)) with regard to 25% power operation are substantively distinct from the findings the Board made in authorizing full power operation in LBP-88-24. Hence, contrary to Intervenors' assertion, there is no "reasonable nexus" between the 25% power issues still pending before this Board and those related to 100% operation, pending before the Appeal Board. As a result, Intervenors' reliance on Virginia Electric & Power Co. (North Anna Nuclear Station, Units 1 and 2), ALAB-551, 9 NRC 704 (1979), in order to claim that the Appeal Board properly has jurisdiction over the 25% power issues, is not well-founded.

A. Intervenors' Arguments In Opposition to Their Dismissal From the OL-6 Subdocket Are Irrelevant or, in the Alternative, Incorrect

Intervenors argue first that LILCO's 25% power request must be rejected because LILCO has not filed a "proper" motion requesting that intervenors be dismissed from the OL-6 subdocket. See Intervenors' Response at 13. No motion to dismiss is necessary. As LILCO has argued, Intervenors are already dismissed from the 25% power phase of this proceeding. LILCO sought confirmation of this to avoid any ambiguity. See LILCO Request at 6-8.[4/] Moreover, as noted previously, Intervenors themselves have asserted to the Appeal Board that they are dismissed. See footnote 1, supra. Intervenors are estopped from arguing to the contrary here. Thus, Intervenors' arguments as to why they should not be dismissed are simply beside the point. Nevertheless, should the Board choose to view Intervenors as not having already been dismissed, then, in the alternative, the arguments that Intervenors offer in opposition to their dismissal should be rejected, and the Board should promptly issue a decision dismissing them from this phase of the proceeding.

For instance, Intervenors' attempt to equate LILCO's efforts to obtain a 25% power authorization with their own bad faith tactics is based on a interpretation of the procedural history of the 25% power proceeding that is profoundly inaccurate as a matter of fact and law.[5/] In addition, given this Board's determination that LILCO was

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4/ In its Request, LILCO argued that given the histories of the OL-3 and OL-6 subdockets, their relationship, and the identity of the Board in both matters, the Board's decision in LBP-88-24 to dismiss Intervenors from the OL-3 subdocket (a decision not disturbed by ALAB-902) necessarily resulted in Intervenors' dismissal from the OL-6 subdocket as well. LILCO's request in the alternative that Intervenors be dismissed from the OL-6 subdocket was prompted by the inherent ambiguities which LILCO perceives in the reasoning of ALAB-902 and by the consequent lack of absolute certainty that, given the rationale of ALAB-902, the "OL-3 Board" and the "OL-6 Board" would be considered a single Board.

5/ For example, while it denied LILCO's initial 25% power motion, the Commission never indicated that it believed that LILCO's filing was in "obvious derogation of the

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entitled to pursue its 25% power request under § 50.57(c),[6] the allegation by Intervenors that the request represents an "irresponsible litigation strategy" undertaken in "disregard of due process, safety and reasoned judgment," see Intervenors' Response at 10, simply illustrates Intervenors' continuing disregard for the history of this proceeding and for the Commission's adjudicatory process in general.

More importantly, Intervenors' assertion that they can be dismissed from the 25% power phase of the proceeding "only after there is adequate notice and a hearing on the record" and only if the request to dismiss has a "factual foundation in the Governments' actual conduct in the OL-6 proceeding," id. at 12, 13, is based on a fundamentally erroneous interpretation of ALAB-902 which should be rejected. First, nowhere does the Appeal Board suggest that the dismissal of a party before different Boards may be accomplished only after a hearing.[7] Indeed, the Appeal Board indicates just the opposite, asserting that the apparent burden on a party requesting the concurrent dismissal of another party in front of a separate Board is an "illusory" one. ALAB-902, slip op. at 8. In this regard, the Appeal Board notes that

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rules" or that it "show[ed] a contempt for the orderly procedures of adjudication," as Intervenors assert. Intervenors' Response at 10, 11. The Commission's decision turned primarily on its determination that the immediate relief that LILCO had sought could not be granted at that time. The Commission itself suggested that LILCO could "refile its request under § 50.57(c) with the Licensing Board when and if it believes that some useful purpose would be served thereby." CLI-87-4, 25 NRC 882, 883 (1987). Accordingly, Intervenors' claim that LILCO's filing of its initial 25% power motion was "clearly improper," Intervenors' Response at 10 n.7, is not true, and their suggestion that their opposition to that motion demonstrates that they have "worked to protect the integrity of the NRC process is this matter," id., is not supported by this "example."

6/ See Memorandum and Order (In Re: LILCO's Request for Authorization to Operate at 25% of Full Power) (January 7, 1988) (hereinafter "January 7 Order").

7/ Nor is there a requirement expressed elsewhere in NRC law that a hearing be held prior to the imposition of sanctions. See Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452 (1981).

> if 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.

Id. at 8-9. Accordingly, under the rationale of ALAB-902, a Board contemplating the dismissal of a party may reach such a decision on the basis of papers filed before it and need not convene a hearing to take evidence on matters which have already been adjudicated. Certainly, the Commission's regulations do not contemplate, and ALAB-902 does not purport to institute, anything approaching merits review by individual licensing boards over on-the-record merits decisions reached by other licensing boards sitting in the same case.

Second, Intervenors are wrong in their claim that the dismissal of a party from a phase of a proceeding must be predicated on actions taken by that party in that phase of the proceeding. As ALAB-902 makes clear, a 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.

Id. at 9 (emphasis added). Intervenors' distortion of ALAB-902 in an attempt to validate their continued participation in the OL-6 subdocket should be disregarded.

In sum, if Intervenors are not already considered dismissed, then the Board should confirm, as ALAB-902 permits, that Intervenors are dismissed from the 25% power phase of this proceeding, on the basis of their previous bad faith conduct established on the record in other facets of the case, as found by this Board sitting in the OL-3 "docket" in LBP-88-24. See LILCO Request at 8-10.

B. None of the Pending Emergency Planning Issues Are Material to LILCO's 25% Power Request

Second, Intervenors allege that LILCO's Request should be rejected because (1) the OL-5 Board has previously found "fundamental flaws" in the LERO Plan as it existed

and was exercised in early 1986, (2) there are now pending contentions related to the 1988 exercise, and (3) Intervenors must be given an opportunity to contest the validity and relevance of the technical analyses supporting LILCO's 25% power request. Intervenors' Response at 14-20. Th[illegible] allegations should be rejected.

First, LILCO has explained in prior filings why the OL-5 Board's finding of certain "fundamental flaws" in the LERO Plan are not, as Intervenors argue, "fatal to LILCO's 25% power application as a matter of logic and law . . . ." Id. at 15. The OL-5 Board assessed LERO's performance during the technically moot 1986 exercise against the level of preparedness required to make a reasonable assurance finding for operation at 100% power.[8/] As made evident in LILCO's initial 25% power motion and the Staff's technical evaluation, however, the consequences of accidents occurring at 25% power are so reduced, and their timing so extended, that the level of preparedness that must be demonstrated in order to support a "reasonable assurance" finding at 25% power is different from that at 100% power. The OL-5 Board did not make any specific findings on the question of whether LERO has demonstrated the requisite level of preparedness for 25% power operation and, therefore, its decision regarding the 1986 exercise is not determinative of the 25% power phase of this proceeding.[9/]

Similarly, Intervenors' pending contentions relating to the 1988 exercise do not raise any issues which are material to operation of Shoreham at 25% power.[10/] The

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8/ In addition, as the Appeal Board's recent decision, ALAB-903, 28 NRC ___ (1988), makes evident, the OL-5 Board's finding of certain "fundamental flaws" following the 1986 exercise was based on an incorrect interpretation of what the "fundamental flaw" standard means. See ALAB-903, slip op. at 13.

9/ See LILCO's Brief on the "Substantive Relevance" of Remaining Emergency Planning Contentions to LILCO's Motion to Operate at 25% Power (April 1, 1988) at 21-24; LILCO's Reply to Intervenors' Brief at 25% Power (April 21, 1988) at 4-6; LILCO Request at 15-16.

10/ LILCO's 25% power request is not, as Intervenors insinuate, "an effort to skirt the Appendix E exercise requirement." Intervenors' Response at 8 n.5. As LILCO has

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Staff's technical evaluation confirms LILCO's position that the amount of time that would be available to respond to the overwhelming majority of accidents occurring at 25% power is so great that even if the offsite response were undertaken totally ad hoc, the public health and safety would still be protected. See LILCO Request at 15-17.[11/] In light of this, LERO's 1988 exercise performance does not raise any issues that are substantively relevant to operation of Shoreham at 25% power. This is underscored by the fact that FEMA found no deficiencies in LERO's exercise performance and made a finding of "reasonable assurance" for full power operation. See id. at 16-17.

Finally, Intervenors' claim that "[t]here can be no doubt" about Intervenors' right to file contentions regarding the technical bases of LILCO's 25% power request, Intervenors Response at 18, might possibly be valid if Intervenors were not dismissed from the OL-6 subdocket.[12/] Yet Intervenors have been dismissed and thus have

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pointed out in previous filings, Intervenors fundamentally err by suggesting that Appendix E creates a set of regulatory requirements separate and distinct from those delineated in § 50.47(b)(1)-(16). LILCO's position is that, by demonstrating its compliance with § 50.47(c)(1), it will necessarily remedy any noncompliance with § 50.47(b) and the "Appendix E exercise requirement." See, e.g., LILCO's Reply to Intervenors' Brief on 25% Power (April 21, 1988) at 6-8.

11/ For example, the Staff's evaluation indicates that for approximately 80% of postulated core melt accidents, an offsite release would not occur for at least twelve hours or more from the time of the initiating event. For another 17% of accidents, offsite releases would not result for at least six to twelve hours. Staff Evaluation, Enclosure 2, Table 10. As LILCO pointed out in its Request, the evacuation time estimate for an "uncontrolled" evacuation (i.e., without LERO Traffic Guides or the police being in place to facilitate traffic flow) for the entire EPZ under normal summer weather conditions is only six-and-half hours. LILCO Request at 16 n.14.

12/ LILCO by no means concedes, however, that even if Intervenors were not dismissed that they would then have unlimited time to review the Staff evaluation or an unlimited right to file technical contentions on LILCO's 25% power request. As LILCO pointed out in its Request, Intervenors have had the technical materials which underlie LILCO's 25% power motion for over a year and a half. LILCO Request at 10. Thus, any contentions which Intervenors might seek to raise that are or could have been predicated on information available in the Shoreham 25% PRA and other available sources of

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forfeited any opportunity they may have once had to challenge the technical analyses underlying LILCO's request.[13/]

C. Intervenors Purposely Ignore LILCO's Technical Argument

Finally, Intervenors assert that LILCO's Request must be rejected because its "reliance on the Staff Review is just plain wrong." Intervenors' Response at 21. Intervenors' tactic here is to create a "straw man" argument that simply disregards the key issues that this Board needs to address in deciding LILCO's Request.

To begin with, Intervenors' insinuation that the Board has somehow "focused" the technical issues presented by LILCO's 25% power request solely on the issue of "whether the risk at 25% power is 'several orders of magnitude less than the risk at full power,'" id. at 22, is not well taken. While the Board in its January 7 Order did take note of the fact that "the Commission sanctioned 5% operation in part because Staff analyses had indicated that the risk involved were 'several orders of magnitude less than full power risk,'"[14/] the Board did not say that this was to be the key issue on which the 25% power proceeding would turn.[15/] Instead, the Board indicated that its

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information, and not solely on any new information found in the Staff evaluation, would be late-filed. Such contentions would thus have to satisfy the five-factor balancing test for late-filed contentions. See Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), CLI-83-19, 17 NRC 1041 (1983).

13/ For this reason, Intervenors' complaint that LILCO's Request "ignores this Board's clear statements that the Governments are entitled to a reasonable period of time to review and respond to the Staff's Technical Review," and thus is "contrary to Board orders," Intervenors' Response at 11, 12, is incorrect. LILCO has not "ignored" the Board's statements; LILCO has merely recognized that if Intervenors are considered dismissed from the OL-6 subdocket then their opportunity to review and respond to the Staff's technical evaluation, and to file contentions (either based uniquely on their review of the Staff evaluation or on earlier information already available to them, see footnote 12, supra), is necessarily foreclosed.

14/ January 7 Order at 6.

15/ Indeed, in this respect, it is significant that improved accident timing was one of the factors which the Commission explicitly took into account in sanctioning 5% power operation. See 47 Fed. Reg. 30233 (July 13, 1982) col. 1.

decision on LILCO's request would be fundamentally predicated on the broader question of whether LILCO had made an adequate showing under § 50.47(c)(1). January 7 Order at 6. Specifically, the Board stated that:

> [w]here only emergency planning contentions remain to be adjudicated, if an applicant submits a request under 50.57(c) for operation in excess of 5% power, and asserts that the unresolved contentions can be resolved for that power level by virtue of the "not significant for the plant in question" provision of 50.47(c)(1), we must at least give the request serious consideration. It is at least possible that the applicant may be able to comply with the regulations and obtain a low power license through this route.

Id. (emphasis added.)

More importantly, Intervenors' Response and the attached affidavit of Steven C. Sholly ignore completely the arguments that LILCO has made concerning the significance of the Staff's technical evaluation.[16/] As LILCO noted, the "most significant findings in the technical evaluation are those having to do with the speed at which accidents at 25% power would develop from the time of the initiating event to a release of radiation to the offsite environment." LILCO Request at 14. LILCO argued that the Staff report "validates LILCO's position that for the vast majority of core melt accidents at 25% power, the time that would elapse before offsite radiological release would occur is considerable." Id. at 15. Intervenors' failure to even mention this issue suggests that neither they nor their "technical expert" Mr. Sholly can refute LILCO's argument that given the lengthy amount of time that would be available to respond to an accident occurring at 25% power, any unresolved emergency planning issues

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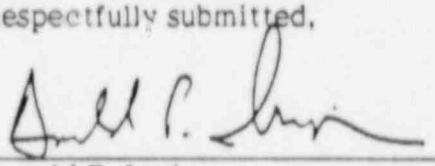
16/ The comment by Intervenors that the Staff "explicitly drew no conclusions as to whether the reduced risk at 25% power makes emergency planning issues immaterial," Intervenors' Response at 21, misses the point. In its Request, LILCO never claimed that the Staff itself had reached any ultimate safety conclusions; instead, LILCO argued that the findings in the Staff evaluation "confirm LILCO's position that it has complied with § 50.47(c)(1). . . . " LILCO Request at 12 (emphasis added). It goes without saying that it is the Board, not the Staff, that must make an ultimate finding under § 50.47(c)(1) in order to authorize operation of Shoreham at 25% power.

(including those related to the 1988 exercise) are simply not a material consideration in the Board's decision on LILCO's 25% power request. Id.[17/]

IV. Conclusion

Intervenors' Response and the attached affidavit of Steven C. Sholly should be stricken. In the alternative, should the Board choose to consider Intervenors' Response, then LILCO respectfully requests that the Board consider this answer as well and proceed to grant summarily LILCO's 25% power request.

Respectfully submitted,



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17/ Intervenors' failure to address this key point is all the more significant in light of Mr. Sholly's statement that he has now had an opportunity to review the Staff's technical evaluation, the Shoreham 25% PRA, and LILCO's initial 25% power filing. See Sholly Affidavit ¶ 2.

CERTIFICATE OF SERVICE

In the Matter of
LONG ISLAND LIGHTING COMPANY
(Shoreham Nuclear Power Station, Unit 1)
Docket No. 50-322-OL-6

I hereby certify that copies of LILCO'S OPPOSITION TO INTERVENORS' MOTION FOR DISQUALIFICATION OF JUDGES GLEASON AND KLINE; LILCO'S MOTION FOR LEAVE TO FILE ANSWER TO INTERVENORS' OCTOBER 31 RESPONSE, and LILCO'S ANSWER TO INTERVENORS' OCTOBER 31 RESPONSE were served this date upon the following by Federal Express as indicated by an asterisk, or by first-class mail, postage prepaid.

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