

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

'88 DEC -1 P4:54

Lando W. Zech, Jr., Chairman
Thomas M. Roberts
Kenneth M. Carr
Kenneth C. Rogers
James R. Curtiss

In the Matter of

LONG ISLAND LIGHTING COMPANY

(Shoreham Nuclear Power
Station, Unit 1)Docket No. 50-322-OL-5
(EP Exercise)ORDERCLI-88- 9

This order addresses the future course of the proceeding on the 1988 emergency planning exercise for the Shoreham Nuclear Power Station.¹ Although the Commission has under review the OL-3 Board's dismissal of the intervenors from the Shoreham proceeding in LBP-88-24, 28 NRC ____, 1988, the Commission believes it is prudent to establish procedures and go forward with any necessary proceedings on the 1988 exercise, at least pending the Commission's decision on its review of LBP-88-24. For the reasons set forth below, the Commission has determined that the circumstances surrounding litigation of emergency planning exercises in this case warrant Commission intervention to establish expedited procedures for the conduct of the proceeding. This action is taken under the Commission's inherent supervisory

¹ Although this Order is issued under the OL-5 Docket and directed to that Presiding Board, we have not yet completed our action on petitions for review of ALAB 901, NRC ____ (1988). This Order does not prejudice our review of that decision which we expect to complete expeditiously.

authority over the conduct of adjudicatory proceedings.

Public Service Company of New Hampshire (Seahook Station, Units 1 and 2), CLI-77-8, 5 NRC 503, 516-17 (1977); Cleveland Electric Illuminating Company (Perry Nuclear Power Plant, Units 1 and 2), CLI-86-7, 23 NRC 233 (1986).

On February 13, 1986, the Federal Emergency Management Agency ("FEMA") conducted an exercise to test LILCO offsite emergency plans for Shoreham. In response to motions filed by Suffolk County, New York State and the Town of Southampton ("Intervenors") requesting Commission direction on the parties' procedural responsibilities concerning any hearings on that exercise, the Commission on June 6, 1986, ordered "immediate initiation of the exercise hearing to consider evidence which Intervenors might wish to offer to show that there is a fundamental flaw in the LILCO emergency plan." CLI-86-11, 23 NRC 577, 579. We also directed the Board appointed to conduct the exercise proceeding to "expedite the hearing to the maximum extent consistent with fairness to the parties". Ibid at 582.

Notwithstanding that direction from the Commission, and the efforts by the Licensing Board to carry it out, litigation of the 1986 Shoreham exercise through the first level of administrative hearings consumed nearly two years. Although contentions were filed on August 1, 1986, rulings on contentions did not conclude until December 11, 1986. Following several months of discovery, the hearings began on May 13, 1987 and concluded on June 18, 1987. The Licensing Board issued a Partial Initial Decision on December 7, 1987, LBP-87-32, 26 NRC 479, concluding that the scope of the February 13, 1986, exercise of the offsite emergency plan was insufficient to comply with NRC's

emergency planning requirements. On February 1, 1988, the Board issued its Initial Decision, LBP-88-2, 27 NRC 85, finding that the 1986 Exercise demonstrated fundamental flaws in the Emergency Plan. Before briefing on LILCO's appeal from that decision was even complete, the two-year window for a pre-license exercise required by 10 C.F.R. Part 50, Appendix E, § IV.F.1, had expired. Various appeals and petitions relating to the litigation of the 1986 exercise are still pending.

Another emergency planning exercise was scheduled and conducted on June 7-9, 1988. FEMA issued its Post Exercise Assessment of the June 7-9, 1988 exercise on September 2, 1988. In ALAB-901, ___ NRC ___ (1988) the Atomic Safety and Licensing Appeal Board remanded litigation of issues associated with the 1988 exercise to the OL-5 Licensing Board for disposition as expeditiously as possible, consistent with fairness to all the parties. On September 22, 1988 the OL-5 Licensing Board issued an order scheduling further proceedings on the 1988 exercise. Intervenors filed about 100 pages of contentions on October 21, 1988. Applicant and NRC staff duly responded.

We now face the real prospect of another round of litigation on a pre-licensing exercise with the potential for consuming as much time as the earlier round, despite efforts to expedite the proceeding within the context of the Commission's usual Rule of Practice in Subpart G of 10 CFR Part 2. It has become apparent that if we are to avoid an endless loop of litigation brought about by the interplay of our exercise scheduling requirement and the need to offer an opportunity to contest the results of the exercise, more specific measures must be taken to accelerate this litigation. Accordingly,

to fulfill our obligation under the Administrative Procedure Act to decide cases within a reasonable time, and consistent with the suggestion in Union of Concerned Scientists v. NRC, 735 F.2d 1437 (D.C. Cir. 1984), that expedited procedures would be appropriate for exercise hearings, we are directing an approach which preserves the parties' rights under the Atomic Energy Act and the Administrative Procedure Act but which bypasses aspects of our usual procedures in 10 CFR Part 2, Subpart G which can contribute significant delay to a proceeding. The procedures set forth below reflect our consideration of several important facts in this case: 1) the real prospect of literally endless litigation noted above; 2) the extensive involvement of the Intervenors as observers during the 1988 exercise which must have given them substantial knowledge of the activities which took place²; and 3) FEMA's detailed findings on the results of the 1988 Exercise, described in the September 2, 1988 Post-Exercise Assessment have been available to the parties now for about two months. Under our regulations these findings are entitled to presumptive validity. 10 CFR § 50.47(a)(2).

In consideration of the above, the following schedule for the proceedings on the 1988 exercise is established:

1. The Licensing Board shall rule expeditiously on contentions filed in the proceeding. No requests to reconsider the Board's ruling on contentions

²See exchange of correspondence concerning arrangements for representatives of the Intervenors to monitor the 1988 exercise, e.g., Letters dated May 31, 1988, and June 3, 1988 from Michael S. Miller on behalf of the Governments to Donald F. Irwin, Counsel for LILCO; Letter dated June (Footnote Continued)

shall be entertained. The Board, however, retains the authority to reconsider its ruling sua sponte.

2. There shall be no formal discovery, whether by deposition, document production, or otherwise. However, voluntary discovery among the parties is encouraged.
3. Within 30 days of the date of the Board's Order on contentions, the proponents of admitted contentions shall file and serve testimony in support of their contentions. There will be no motions for summary disposition, but any contentions for which testimony is not filed will be considered in default by virtue of the presumption of 10 CFR § 50.47(a)(2).
4. Within 20 days of the service of testimony in support of contentions, LILCO may file and serve rebuttal testimony.
5. Within 25 days of the service of testimony in support of contentions, the NRC Staff may file and serve rebuttal testimony on any of the contentions. At a minimum, the Staff shall sponsor into evidence relevant portions of the FEMA report.

(Footnote Continued)

2, 1988 from Lawrence Coe Lanpher on behalf of the Governments to William R. Cumming, Associate General Counsel for FEMA. The detail in many of the 100 or so pages of contentions also confirms intervenors' extensive knowledge of the exercise.

6. Within 7 days after the last testimony is filed, the Licensing Board will hold a Prehearing Conference to consider the matters specified in 10 CFR § 2.752 and set the order for conduct of the hearing. The Board at this time should also entertain and hear argument on oral motions, if any, to strike irrelevant, immaterial, repetitive or cumulative testimony. Rulings on such motions shall be made within 7 days of the conclusion of the argument.
7. Within 14 days after conclusion of the Prehearing Conference, the evidentiary Hearing will begin.
8. Within 21 days of the start of the Hearing, the Hearing will end.
9. Within 20 days after the conclusion of the Hearing, the parties will file and serve any proposed findings of fact and conclusions of law. Failure to file a proposed finding on a contention admitted for litigation will result in default on that contention. Reply to proposed findings may be filed within 10 days after service of proposed findings, if a party so desires.
10. While the proponent of a contention has the burden of going forward with evidence in support of that contention sufficient to rebut the presumption created by the FEMA findings on the June 1988 emergency exercise, once that burden is met LILCO bears the ultimate burden of persuasion.

11. Service shall be by hand delivery or express mail.
12. All provisions of 10 CFR Part 2 remain applicable in accordance with their terms except to the extent they are inconsistent with this Order.


Any aspect of these procedures may be changed and the schedule extended if the parties unanimously agree and the Board approves. Moreover, the Board retains the authority to extend or reduce any of the time periods if this becomes essential for the conduct of a fair hearing; provided however, that the Commission shall be notified of any schedule extensions of more than 15 days. The parties are encouraged to negotiate informally to reduce the actual number of issues which need to be litigated during the Hearing.

Commissioner Curtiss did not participate in this matter.

It is so ORDERED.



For the Commission *



SAMUEL J. CHILK
Secretary of the Commission

Dated at Rockville, Maryland
this 1st day of December, 1988.

* Commissioner Curtiss was not present during the Affirmation of this Order