

DOCKET NUMBER 50-322-OL-3+5  
PROD. & UTIL. FAC.

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION



Before the Commission

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

LILCO'S REPLY TO INTERVENORS' MOTION FOR REVERSAL OF THE COMMISSION'S NOVEMBER 9 ORDER

On November 23, 1988, intervenors filed "Governments' Motion for Reversal of Commission Order of November 9, 1988" (hereinafter "Intervenors' Motion"), in which they assert that the Commission's November 9 order — certifying to itself intervenors' appeals from that portion of LBP-88-24 that dismissed them from the entire Shoreham proceeding — "must be reversed." Intervenors' Motion at 1. In the alternative, intervenors demand that they be provided an additional hearing and an opportunity to submit further briefs on the sanctions issue. Intervenors' Motion should be denied in its entirety, for the reasons given below.

I. The Commission's November 9 Order Does Not Identify A "New Issue" that Intervenors Have Not Previously Addressed

Intervenors' Motion hinges fundamentally on their argument that the Commission, in its November 9 Order, has identified a "new issue, which was not subject to hearing below, and which the Governments did not address in their brief on appeal of LBP-88-24." Intervenors' Motion at 2. According to intervenors, this "new issue" is found in the Commission's statement that it will decide, on appeal

whether Governments' conduct was such as to warrant their dismissal from the entire proceeding and whether, if dismissal from the entire proceeding is not warranted, what other sanctions, if any, is appropriate.

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November 9 Order at 1-2. As shown below, however, far from framing a "new" issue, this statement is a succinct description of the precise issue that Intervenors were to have addressed (and, indeed, did address) in their appeal brief filed on October 27, 1988.

A. The Commission Has Identified the Same Issue that was Addressed, but not Resolved, in ALAB-902

Intervenors argue that, due to the decision of the Appeal Board in ALAB-902, 28 NRC \_\_\_\_ (1988), vacating that portion of LBP-88-24 that dismissed Intervenors from the "OL-5" (exercise) docket, Intervenors

did not address [in their October 27 appeal brief] whether the conduct at issue before the Gleason Board warranted their dismissal from the entire Shoreham proceeding, except to note that Board's lack of jurisdiction and basis for ruling on such a question.

Intervenors' Motion at 5 (footnote omitted). Intervenors go on to assert that the November 9 Order is the "first notice that a decision maker with the authority to rule on the matter actually intends to consider imposing upon the Governments the harsh sanction of dismissal as parties from the entire Shoreham proceeding." Id.

Intervenors' argument is based on a clear mischaracterization of ALAB-902. Even assuming (contrary to fact) that Intervenors did not address in their October 27 brief the issue of whether their conduct warranted dismissal from the entire proceeding, Intervenors would have no one but themselves to blame for the omission. The Appeal Board expressly indicated in ALAB-902 that, notwithstanding its decision in Intervenors favor on the bifurcated "jurisdictional" issue raised by LBP-88-24, Intervenors still were to address, in their second appeal brief, the merits of the OL-5 Board's determination that dismissal of Intervenors "as parties to the proceeding was the only appropriate penalty"<sup>1/</sup> for their misconduct.

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<sup>1/</sup> See LBP-88-24, slip op. at 130.

Specifically, the Appeal Board stated that it agreed with LILCO that "for the purpose of deciding the discrete jurisdictional issue now before us on appeal, we must presume the correctness of the OL-3 Board's decision on the merits." ALAB-902, slip op. at 7. Accordingly, the Appeal Board assumed arguendo that intervenors

obstructed the discovery process and failed to obey certain OL-3 Board orders; that their conduct was wilful, in bad faith, and prejudicial to LILCO; and that the only appropriate sanction is dismissal, which the OL-3 Board was clearly authorized to order at least as to that part of the proceeding pending before it.

Id. (footnote omitted). The Appeal Board added that "[i]t should go without saying that, because these assumptions are for argument purposes only, they reflect no view whatsoever on our part as to the merits of the sanctions issues," and indicated that the Appeal Board would "take that matter up in the second part of the Governments' appeal. See supra note 5." Id. at 7-8 n.7. Nowhere in ALAB-902 did the Appeal Board suggest that its ruling on the "jurisdictional" issue in any way relieved Intervenor from their obligation to brief, during the second round of appeals from LBP-88-24, the substantive question of whether Intervenor's dismissal from the entire proceeding was justified. If anything, the Appeal Board's discussion of the issue presumes that Intervenor were to discuss the full scope of dismissal sanctions.

This point is underscored by footnote 5 of ALAB-902, in which the Appeal Board took note of the fact that

[t]he Governments stress that they will challenge, on the merits, their dismissal from any part of the proceeding, as well as other parts of LBP-88-24, when they brief the unexpedited portion of their appeal.

Id. at 5 n.5 (emphasis added). Indeed, in seeking bifurcation of the "jurisdictional" issue raised by LBP-88-24, Intervenor had argued that "a ruling on the bifurcated portion of the Governments' appeal would not involve the factual or legal merits of the OL-3 Board's substantive rulings in LBP-88-24." See Governments' Motion for Bifurcation of

Appeal and for Expedited Treatment of Jurisdictional Issue" (September 27, 1988) at 3. Intervenor's are thus in no position now to argue that ALAB-902's narrow ruling had the effect of removing from consideration on appeal the key substantive issue from LBP-88-24, and the very one identified by the Commission in its November 9 Order, i.e., whether Intervenor's willful, bad-faith misconduct warranted their dismissal from the entire Shoreham proceeding.

B. Intervenor's Have Fully Addressed the Dismissal Issue in their October 27 Brief

Not only does ALAB-902 make clear that the issue of Intervenor's dismissal from the entire Shoreham proceeding was to be the focus of the second portion of Intervenor's bifurcated appeal of LBP-88-24, but, contrary to their current claims, Intervenor's addressed that issue fully in their October 27 brief. Intervenor's now assert that

[w]ith the exception of three sentences stating the Gleason Board's lack of jurisdiction and basis for dismissing the Governments from any but the OL-3 proceeding . . ., the discussion of the dismissal sanction contained in the Governments' October 27 Brief addresses the lack of basis and impropriety of dismissing the Governments from the OL-3 proceeding.

Intervenor's Motion at 5 (emphasis in original). This post hoc mischaracterization of the October 27 brief, in which Intervenor's understate the scope of their own arguments on appeal, does not withstand scrutiny.

Even a glance at Intervenor's October 27 brief is sufficient to belie their suggestion that they have not addressed the issue of their dismissal from the entire proceeding. For example, Intervenor's discussion of the "legal standards for imposing the sanction of dismissal as a party," October 27 Brief at 26-28, is not restricted solely to whether their dismissal from the OL-3 docket was justified.<sup>2/</sup> In that portion of their

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<sup>2/</sup> Moreover, in their Motion for Stay of November 21, 1988 Licensing Board Order, filed with the Appeal Board on the same day as the instant Motion for Reversal, Intervenor's cite explicitly to "pages 22-38, and to the factual background at pages 3-22" of

brief, Intervenor's address NRC and federal court cases outlining standards governing dismissal of parties from proceedings as a whole. Indeed, Intervenor's cite to, and reiterate and amplify, their previous discussion of the legal standards for dismissal contained in their August 1, 1988 Reply to July 26 Supplements Filed by LILCO and the NRC Staff Seeking Imposition of Sanctions. Significantly, in their August 1 Reply, Intervenor's discussion of the legal standards for dismissal was offered in support of their position that "LILCO's plea to have the Governments thrown out of this proceeding altogether is baseless." See August 1 Reply at 88 (emphasis added).<sup>3/</sup>

Intervenor's related argument that "there is no evidentiary record concerning any Government conduct except the production or non-production of emergency plans in 1982, 1983, and 1988 discovery in the OL-3 proceeding, upon which the Commission could rely or base a decision on the issue defined in the November 9 Order," Intervenor's Motion at 3-4, is nonsensical. Intervenor's protest that, "in the proceeding before the Gleason Board," they had "no notice, or opportunity to submit evidence concerning any other alleged Government conduct." Yet in their next breath, Intervenor's contend that in their October 27 brief they have already

demonstrated . . . , to the extent that any such actions or motives are cited to support the decision in LBP-88-24 to dismiss

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(footnote continued)

their October 27 brief to support their assertion that they "have already demonstrated their likelihood of success on the merits of their appeal" from the OL-6 Licensing Board's confirmation that Intervenor's are dismissed from the OL-6 subdocket. Intervenor's Motion for Stay at 3. Accordingly, Intervenor's have already argued to the Appeal Board that the arguments they make in their October 27 brief are sufficient to demonstrate why they should not be dismissed from dockets other than the OL-3 subdocket in the Shoreham proceeding.

<sup>3/</sup> As of August 1 the only Licensing Board active in the Shoreham proceeding was the Board chaired by Judge Gleason, since the OL-5 Board chaired by Judge Frye had terminated its efforts on March 9, 1988, following its decision on the 1986 exercise. LBP-88-7, 27 NRC 289 (1988). Thus, in their August 1 pleading, Intervenor's can only have had in mind the potential for their dismissal from all aspects of the Shoreham proceeding.

the Governments from the OL-3 proceeding (as well as from proceedings pending before other Boards), that decision is lacking in basis and constitutes reversible error.

Id. at 4 (emphasis added). Thus, by their own terms, Intervenors admit that they have already been provided an opportunity to brief this aspect of the sanctions issue that the Commission certified to itself in its November 9 Order.

Finally, Intervenors simply do not advance any reason to believe that granting the relief they demand would affect the outcome in any way except to delay it. All of the Licensing Board's bases for having dismissed Intervenors from the entire proceeding were already matters of public record existing as of July 1988. Intervenors' instant motion offers neither evidence, argument, nor proffer of either to suggest that the Licensing Board's conclusion was incorrect on the merits. Intervenors do not support the proposition that dismissal from a portion of a licensing proceeding is governed by different legal standards than dismissal from the entire proceeding. Nor do they argue that different kinds of proof are required, nor suggest how the record available to the OL-3 Board, which had had jurisdiction over emergency planning issues since early 1983, was inadequate to support its determination to dismiss them from the totality of remaining proceedings.<sup>4/</sup> Thus their argument, in the end, lacks substance.

## II. Intervenors' Motion Is An Attempt to Further Delay and Fragment the Shoreham Proceeding

As shown above, Intervenors have failed to demonstrate adequately why they have been prejudiced in any way by the Commission's decision to certify to itself Intervenors' appeal from the sanctions ruling in LBP-88-24. Indeed, Intervenors' Motion

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<sup>4/</sup> LILCO summarizes certain aspects of this record in its Brief in Opposition to Intervenors' Appeal from the Licensing Board's Concluding Initial Decision (Sanctions/Realism Issues), being filed today with the Commission. As that brief shows, the official record was more than sufficient to support the determination of the OL-3 Licensing Board — at that point the only active Board remaining in this licensing proceeding — to dismiss Intervenors from the entire proceeding.

would appear to be less a good-faith effort to protect due process rights, as they allege, than an attempt on their part to further fragment and delay the Shoreham proceeding. Intervenors' Motion should be denied on that basis as well, for the following reasons.

A. Intervenors' Motion is Grossly Out of Time

First, the Commission would be justified in dismissing Intervenors' Motion outright as being grossly out of time. Intervenors' Motion was filed on November 23, the day before a holiday weekend, only five business days before LILCO's brief to the Commission was due, and a full two weeks after the Commission had issued its November 9 Order. Intervenors offer no reasons, nor can they, why they chose to wait so long to seek relief from what they themselves characterize as a serious affront to their "due process rights."

Unquestionably, Intervenors had decided to request reconsideration of the Commission's certification decision almost immediately upon its issuance on November 9. In a letter to the Commission dated November 10, 1988, Karla J. Letsche, Esq., one of counsel for Suffolk County, stated that, in Intervenors' minds, the November 9 Order "raises several serious legal issues which the Governments will address in due course." The letter further indicated that

[t]hose issues may include the appropriateness of removing a portion of the Governments' appeal from the Appeal Board and the NRC's apparent assumption that the Governments have already been provided the opportunity to brief the issue which the NRC certified to itself in yesterday's Order.

Letter from Karla J. Letsche to Lando W. Zisch, et al. (November 10, 1988) at 1 n.1 (emphasis added). There is nothing in Intervenors' eleven-page motion to suggest that the motion could not have been filed within a very few days of the Commission's November 9 Order.

In such circumstances, Intervenors' decision to wait a full two weeks before seeking reversal of the November 9 Order raises serious doubts about their motives.

Intervenors' penchant for utilizing procedural mechanisms to promote delay in the Shoreham proceeding is one aspect of their conduct that the Licensing Board has found to be objectionable.<sup>5/</sup> The Commission should not tolerate it here. Intervenors' Motion, which can hardly be said to have been filed in "due course," should be rejected as untimely.

B. Intervenors Have No "Due Process Right" to a Hearing Prior to the Commission's Decision on their Appeal

Second, Intervenors' blatant assertion that they are entitled to further hearings, an opportunity to "contest charges" relating to their prior conduct, and an "opportunity to present evidence in their defense"<sup>6/</sup> should be rejected as a red herring argument that has no basis in fact or law. As explained in part I above, the issue identified in the November 9 Order is precisely the same issue that Intervenors were to have addressed and, in fact, did address in their October 27 brief.<sup>7/</sup> The Licensing Board's finding in LBP-88-24 with respect to sanctions was, in sum, that Intervenors had, through their litigation tactics in the Shoreham proceeding, engaged in a "sustained and willful

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<sup>5/</sup> Specifically, in its Concluding Initial Decision, the Licensing Board noted that "[t]hroughout the protracted period of this proceeding, intervenors have provided little evidence of a motivation to have this controversy . . . resolved on the merits and in a timely manner." LBP-88-24, slip op. at 109. The Board further found that "procedural mechanisms have been consistently utilized [by Intervenors] in delaying the Board and Commission in carrying out its licensing responsibilities." *Id.* at 110. Similarly, in rejecting Intervenors' request that Judges Gleason and Kline disqualify themselves from ruling on LILCO's recent request for authorization to operate Shoreham at 25% power, the Board stated that Intervenors' "disqualification request and its timing are reasonably interpretable as being simply another strategy of litigation that could have the effect of preventing or delaying a decision on LILCO's motion." Order (November 21, 1988)(unpublished) slip op. at 9.

<sup>6/</sup> Intervenors' Motion at 6.

<sup>7/</sup> Accordingly, Intervenors' implausible complaint that they "do not know what 'conduct' the Commission intends to examine in deciding the issue announced in the November 9 Order," Intervenors' Notice at 5, should be disregarded. On appeal, the Commission obviously will examine the very same Intervenor conduct that the Licensing Board evaluated in reaching its sanctions decision in LBP-88-24.

strategy of disobedience and disrespect for the Commission's adjudicatory processes." LBP-88-24, slip op. at 129. The Board stated that in evaluating the appropriate sanction for Intervenor's misconduct, the "entire record of this proceeding was reviewed for the probative significance it imports." *Id.* at 115.

In light of this, Intervenor's "due process" complaints, and the demand for further hearings, ring hollow. Indeed, just what sort of "evidence" would Intervenor wish to present in "defense" of what amounts to their own litigation strategy? They offer no clue, and none is intuitively apparent. As is noted above, all of the factors considered by the Licensing Board in LBP-88-24 were already matters of public record, compiled in six years of very public, very documented litigation. It is hard to see how any probative information about Intervenor's conduct could be brought to light through further hearings, apart from the record evidence that has already been evaluated by the Licensing Board and upon which the Commission will base its own decision.

Intervenor's misplaced insistence that they are entitled to another full hearing prior to the Commission's decision on an issue that involves matters of historical record in this proceeding and that has already been fully briefed by the parties on appeal is not a good-faith effort at protecting their supposed "due process rights." It merely reveals their continuing desire to cause yet more delay in the Shoreham proceeding.

C. The Commission Properly Certified to Itself the Sanctions Issues from LBP-88-24

Finally, Intervenor's allegation that the Commission has somehow abused its discretionary authority in certifying to itself the sanctions decision from LBP-88-24 is baseless. The Commission acted properly in taking jurisdiction over the sanctions issues on appeal, in order to provide dispositive guidance and control over the Shoreham proceeding precisely at a time when such guidance is profoundly needed. Intervenor's suggestion that the Commission reverse itself is simply an invitation to sunder the Shoreham proceeding further, and indicates that Intervenor has no wish to see this proceeding resolved within the foreseeable future.

At the time of the November 9 Order, the Commission already had before it LILCO's petitions for review of ALAB-901 and ALAB-902. Not only has the full power licensing authorization in LBP-88-24 been vacated, but these decisions have the incongruous effect of allowing Intervenors to continue to oppose LILCO's license application before one licensing board, notwithstanding the fact that another board has found that Intervenors' dismissal from the entire proceeding is the only appropriate penalty for their willful misconduct. The Commission's certification of the sanctions decision on appeal is an entirely proper decision, given the need for this important issue to be resolved in a focused and consistent manner.<sup>8/</sup>

Moreover, Intervenors' argument that the "issue defined by the Commission for certification to itself does not present questions of regulatory interpretation that only the Commission can decide, or any other matter unique to Commission decision-making," Intervenors' Motion at 9, contrasts sharply with their position on appeal, in which they term the sanctions decision as the "most sweeping ruling of its kind in the history of NRC adjudication," and an "unprecedented ruling" that represents an "unauthorized challenge to the sovereignty of the Governments" as well as an "infringement upon the Governments' lawful powers." October 27 Brief at 2, 46. Pursuant to 10 C.F.R. § 2.785(d), the Commission has the authority to certify to itself "major or novel questions of policy, law or procedure." The Commission's determination that it, and not

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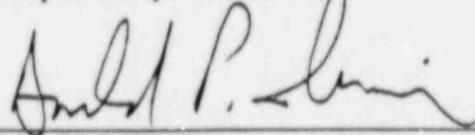
<sup>8/</sup> Events occurring since the November 9 Order, including the "OL-6" Licensing Board's confirmation that Intervenors are dismissed from the 25% power subdocket, its concomitant authorization of a 25% power license, and the Appeal Board's subsequent assertion of jurisdiction over these matters despite their direct nexus with the issues certified in the November 9 Order, underscore the need for Commission intervention and direction. On November 23, LILCO has requested the Appeal Board to certify to the Commission the issue of the Licensing Board's dismissal of Intervenors from the OL-6 phase of the proceeding. LILCO has also notified the OL-5 (1988 exercise) Board and the parties that it will not act upon the Appeal Board's apparent suggestion in ALAB-902 to seek Intervenors' dismissal from that proceeding, until the Commission has acted upon the certified sanctions issue. LILCO's Motion to Dismiss Exercise Contentions 4-20 on the Basis of ALAB-903 (OL-5R docket)(November 21, 1988) at 16 n.17.

the Appeal Board; is the more appropriate body to decide in the first instance Intervenor's appeal of their "unprecedented" dismissal was correct and should not be reversed.

**III. Conclusion**

For the reasons given above, Intervenor's Motion should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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(Shoreham Nuclear Power Station, Unit 1)  
Docket No. 50-322-OL

I hereby certify that copies of LILCO'S REPLY TO INTERVENORS' MOTION FOR REVERSAL OF THE COMMISSION'S NOVEMBER 9 ORDER 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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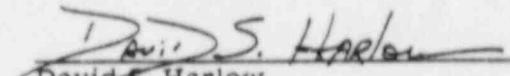
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