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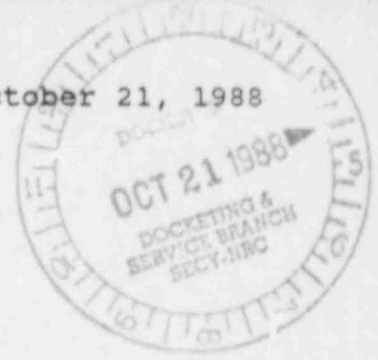
LILCO, October 21, 1988



UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

In the Matter of	)	
	)	
LONG ISLAND LIGHTING COMPANY	)	Docket No. 50-322-OL-3
	)	
(Shoreham Nuclear Power Station, Unit 1	)	

LONG ISLAND LIGHTING COMPANY'S
PETITION FOR REVIEW OF ALAB-902

Long Island Lighting Company petitions the Commission, pursuant to 10 CFR § 2.786, to review and reverse the Decision of the Appeal Board, ALAB-902, 28 NRC ___, slip op. (October 7, 1988), on the ground that the decision is incorrect on important grounds of law and policy.

I. Background

On September 23, the Licensing Board in the general ("OL-3") emergency planning docket issued its 130-page Concluding Initial Decision on Emergency Planning, LBP-88-24, 28 NRC ___ (September 23, 1988).[1] In addition to deciding all remaining emergency planning issues in LILCO's favor, it dismissed Intervenors Suffolk County, New York State and the Town of Southampton from all remaining aspects of the Shoreham emergency planning proceeding as a sanction for a years'-long course of willful, deliberate and pervasive misconduct.[2]

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[1] Since its appointment in May 1983 "to preside over the proceeding on all emergency planning issues at Shoreham," 48 Fed. Reg. 22235 (1983) (emphasis supplied), this Board has rendered a lengthy series of decisions spanning all emergency planning issues. The "OL-3" Board has presided over all emergency planning issues at Shoreham except the 1986 exercise. See LILCO's Petition to Review ALAB-901 and Follow-On Orders (October 5, 1988) at 9 note 12.

[2] The portion of LBP-88-24 which sets out the basis for imposition of the sanction of dismissal is over 40 pages long. Id. at 88-130. It recounts the repeated refusals of Intervenors to comply with discovery orders relating

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This decision, together with the deficiency-free June 7-9, 1988 Shoreham emergency planning exercise and FEMA's finding that the Shoreham emergency plan now provides reasonable assurance of protection of the public health and safety, completed the foundation for issuance of a full power operating license, which was authorized by the Licensing Board subject only to Staff resolution of matters not before it. LBP-88-24 at 149.

The Appeal Board, however, issued a curious series of orders, starting just three days before LBP-88-24, which laid the groundwork for ALAB-902 to stymie completion of this proceeding. Those orders (ALAB-901 and two follow-on orders) suddenly revived the defunct "OL-5" docket, in which the technically moot 1986 exercise had been tried; assigned the 1988 exercise to it (wrest-

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to the "realism" proceeding, which had been underway since June 1986 pursuant to CLI-86-11, 23 NRC 577. It also treats the record of a special evidentiary hearing conducted in the summer of 1988, concerning Intervenors' failure for several years to produce the comprehensive, 700-plus page Suffolk County Emergency Operations Plan, which had been in existence and use in basically current form in the County since the early 1980s. It also took account of various earlier actions by Intervenors in derogation of this proceeding. These included Suffolk County's enactment, just weeks before the 1986 emergency planning exercise, of a criminal ordinance making participation in that exercise punishable by up to a year in jail and a $1000 fine (the ordinance was held unconstitutional by the U.S. District Court. LBP-88-24 at 109 n.32; LILCO v. County of Suffolk, 628 F.Supp. 654 (E.D.N.Y. 1986). They also included Intervenors' defiance in 1982 of Licensing Board discovery orders (resulting in dismissal of their contentions) in the "onsite" portion of this proceeding. LBP-88-24 at 108-09; Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-82-115, 16 NRC 1923 (1982) aff'd ALAB-788, 20 NRC 1102, 1178 (1984). Indeed, the OL-3 Board expressly relied on Intervenors' apparent failure to take to heart the lesson of the 1982 sanction, in deciding that lesser sanctions than dismissal would not adequately address their conduct or deter it in the future. LBP-88-24 at 115. The Appeal Board asserts that it has taken the Licensing Board's sanctions determinations as correct for purposes of its present decision. ALAB-902 at 7. However, its characterization of the basis for the Licensing Board's decision as simply "default [on] certain OL-3 Licensing Board discovery orders" (id. at 2) significantly understates the record basis for the OL-3 Board's conclusions.

The dismissal sanction in LBP-88-24 was dissented from by one member of the OL-3 Licensing Board, Judge Shon, but he disagreed only with the severity of the sanction.

ing it from the OL-3 docket); and granted Intervenors, ex parte, a separate, accelerated appeal of their dismissal.[3]

II. Summary of The Decision of Which Review is Sought

ALAB-902 invents the "jurisdictional" proposition that licensing boards in multi-board proceedings lack authority to impose sanctions which extend to matters before other licensing boards in the same proceeding. Thus, while at least purporting not to disagree with the OL-3 Board's dismissal of Intervenors from the OL-3 proceeding, it finds that the OL-3 Board had no "jurisdiction" to exclude Intervenors from any 1988 exercise proceedings in the freshly revived OL-5 docket. It thus reverses Intervenors' dismissal to that extent, and vacates the OL-3 Board's authorization to issue a full power license.

ALAB-902 rests not on authority but on two spurious arguments. The first -- based on the notion that a party to a proceeding has a "right to be judged independently and fairly by each board before which it appears" -- is that the imposition by any Board of sanctions extending beyond those matters directly before it is an improper "arrogation by one Board of authority legitimately vested in another." Id. at 9, 11. The Appeal Board concedes that this theory would require any party moving for dismissal in a multi-board proceeding to obtain the concurrence of each and every board in the proceeding; but it contends that any associated "burden" would be "illusory" (id. at 8-9), and that it does not undermine the effectiveness of dismissal as the ultimate sanction provided by the Commission's Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452, 454 (1981). ALAB-902 at 8-9.

Second, ALAB-902 asserts that the OL-3 Licensing Board erred, given the gravity of the sanction, in allegedly not giving

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[3] LILCO and the NRC Staff both opposed Intervenors' September 13 request for assignment of the 1988 exercise to the OL-5 docket. However, since the Appeal Board granted Intervenors' request for separate and accelerated appeal of their dismissal within half a day of its filing on September 27, neither LILCO nor the Staff had any opportunity to respond.

> any serious consideration to the relationship of its action to the proceeding pending before the OL-5 Board. The OL-3 Board knew three days before its decision (when, by happenstance, ALAB-901 was issued) that proceedings before the OL-5 Board would soon be underway with regard to the 1988 exercise.

ALAB-902 at 12. The Appeal Board concedes that it is unable to find any law it regards as being dispositive on the issue of the limits of sanctions authority. ALAB-902 at 15-17.

Ultimately, the Appeal Board appears concerned less with jurisdiction than with the result of dismissal as a sanction under the circumstances. It is "so harsh" a penalty, "particularly where, as here, the sanction directly leads to termination of the proceeding and authorization of an operating license," that "the OL-3 Board's majority opinion ... does not reflect adequate attention to all of the significant implications of its decision." ALAB-902 at 19-20.

By reopening the prospect of litigation on the 1988 exercise, ALAB-902 threatens to prolong this proceeding two more years. It also undermines the ability of the Commission to enforce standards of conduct on parties to its proceedings. For these reasons, and because it is inconsistent with NRC policy, practice and precedent, LILCO seeks review of it.

III. Errors in ALAB-902 of Which Review is Sought

1. The Appeal Board's "Jurisdictional" Limitation on the Reach of Sanctions in Multi-Board Proceedings is Baseless.

The Appeal Board's purported "jurisdictional" limitation of the reach of sanctions imposed by any licensing board to the scope of issues before it is not supported by authority and does not withstand analysis.

The authority and duty of Licensing Boards to enforce order and standards of conduct in a proceeding, including the imposition of sanctions, do not vary with the scope of substantive issues but are set by other, fixed standards: the Rules of Practice, 10 CFR §§ 2.707 (Default), 2.718(e) (Power of Presid-

ing Officer), and the Commission's Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452 (1981). The Policy Statement specifically contemplates dismissal from proceedings in severe cases. Id. at 454. There is no restriction there or elsewhere on the reach of sanctions, e.g., to a given sub-docket or sub-proceeding. Nor should there be: what is at issue is not the merits of any given substantive issue but the fitness of a particular party to participate in the NRC's process for resolution of that or any issue in a proceeding.

The considerations outlined in the Policy Statement for determining the suitability of sanctions are consistent, in fact, only with a holistic concept of a proceeding that cannot be subdivided for administrative convenience or docket management. They are:

> The relative importance of the [Intervenor's] unmet obligation; its potential harm to other parties or the orderly conduct of the proceeding; whether its occurrence is an isolated incident or a part of a pattern of behavior; the importance of the safety or environmental concerns raised by the party; and all of the circumstances.

Id. (Emphasis supplied.) There is no way a Licensing Board can implement these guidelines without looking at the totality of a proceeding, rather than confining itself to the sub-proceeding over which it has subject-matter jurisdiction.[4]

Appeal Board precedent, until ALAB-902, was also consistent with this unitary proceedings notion. In the Shoreham case itself, the Appeal Board, confirming the denial in 1983 of an untimely intervention on emergency planning issues, stated:

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[4] The Appeal Board's suggestion, ALAB-902 at 12 n.12, that the 1981 Policy Statement may not apply to multi-board proceedings because there may have been few such proceedings at the time it was issued, breaks down upon examination. Virtually all contested cases since the mid-1970s have had separate phases. There is no hint in the Policy Statement that the Commission intended the reach of a sanction imposed by a Board in any given phase of a proceeding to be limited to that specific phase.

> In October 1977 the Licensing Board authorized discovery on an emergency planning contention of two intervenors. [citation omitted.] Needless to say, the fact that a separate licensing board was recently established to consider the emergency planning issue does not suggest the institution of a new proceeding. That action was taken for administrative reasons only, i.e., because of the other demands on the time of the members of the Licensing Board that had been previously assigned to hear all issues in controversy. See, in this connection, 10 CFR Part 2 Appendix A, § I(c)(1).

ALAB-743, 18 NRC 387, 397 n.38 (1983).

In short, nothing in Commission authority or practice limits the authority of Boards in multi-board proceedings; to impose sanctions proportionate to the behavior giving rise to them.

2. The Appeal Board's Invention of a System of Concurrent Vetoes Over Sanctions in Multi-board Proceedings is not Supported by Authority, is not Tailored to Preserve Parties' Due Process Rights, and Would not Produce Consistent and Equitable Results.

The Appeal Board's so-called "jurisdictional" limitation on the effect of sanctions effectively guts the effectiveness of the Commission's authorization of dismissal as a sanction in the Policy Statement. The Appeal Board attempts to evade this fact by inventing an unworkable system of concurrent approvals (really, vetoes) by each successive licensing board. This novel proposal is not supported by logic or by Commission authority. It is not attuned to protecting the rights of parties or the achievement of consistent, fair or timely results. It would result instead in a "crazy quilt" of conflicting decisions by different licensing boards on the very same sets of facts. It should be rejected.

ALAB-902's stated concern for "a party's right to be judged independently and fairly by each board before which it appears," id. at 11, applies aptly to substantive issues within the scope

of a licensing application. However, as applied to the right of a party to participate in Commission proceedings the proposition breaks down, for the reasons outlined in Argument 1 above. Sanctions relate to the conduct of the party itself; and analysis of the consequences of conduct cannot be as readily pigeonholed as that of substantive issues.

The question of what behavior is sufficient to warrant sanctions in Commission proceedings is an a peculiarly subject to demeanor evidence. The tribunal which has been faced with the evidence of sanctionable behavior is clearly the best one to judge the propriety of a sanction.[5] That determination is of course subject to review, but the path for that should be the normal review on the record of factual determinations by the Appeal Board and the Commission, with substantial deference to the trier of fact.[6] The Appeal Board's proposal to subject any sanction which crosses administrative lines of convenience in a multi-board proceeding to successive merits reviews by each licensing board, before the final result (if one is ever reached) ultimately goes to the Appeal Board or the Commission, merely delays review of any sanctions decision with no guarantee of enhancing its quality and considerable possibility of creating inter-Board confusion or disagreement.

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[5] Nothing illustrates better why the board imposing the sanction should initially determine its reach than the Shoreham case. Without its ability to survey Intervenors' behavior in two cognate sub-dockets as well as in its own docket (see note 2 supra), the OL-3 Licensing Board could not have put their six-year pattern of conduct into the perspective contemplated by the Policy Statement. Further, the experience and expertise of the OL-3 Board span five and one-half years and the complete spectrum of emergency planning issues; and the areas in which the behavior it found to be sanctionable were all either within its specific sub-docket or matters of public record within the related emergency planning area generally. Thus the Appeal Board's criticism of the majority opinion in LBP-88-24 for failure to evidence "any serious consideration to the relationship of its actions to the proceeding pending before the OL-5 Board," ALAB-902 at 12, is not well taken.

[6] See National Hockey League v. Metropolitan Hockey Club, Inc., 427 U.S. 639, 642 (1976)(per curiam); Weisberg v. Webster, 749 F.2d 864, 872 (D.C. Cir. 1984).

A few examples illustrate the inadequacy of the Appeal Board's proposal:

1. If ALAB-901 had been issued (and the "OL-5" docket reconstituted) on September 24 (i.e., after LBP-88-24) rather than on September 20, would the OL-3 Board have had "jurisdiction" to dismiss Intervenors from the entire emergency planning proceeding, since on the day of issuance of LBP-88-24 there would have been no other board with competing jurisdiction? [Under the logic of ALAB-902, the answer is apparently "yes." Query: does this make sense?]

2. If the "OL-3" Board's determination in LBP-88-24 to dismiss Intervenors had listed all pending dockets, including the OL-6 docket for 25% power operation, should the validity of that dismissal, or its effectiveness, depend on the composition of the licensing board in the OL-6 docket? [The OL-3 and OL-6 Boards are in fact identical; but suppose they were not?]

3. In a hypothetical proceeding with only one Board, which has before it only a subset of the issues required for issuance of a license (e.g., safety but not emergency planning), would its dismissal of a party be effective to prevent the party from re-entering later in the emergency planning phase? [The outcome here can't be predicted from ALAB-902, but common sense says that a dismissal from an entire proceeding, if justified, should not be limited by the sequencing of issues.]

4. Whatever the result in example 3, would the effect of the initial licensing board's dismissal of a party from the entire proceeding be affected if, subsequently, a different licensing board were appointed to hear emergency planning issues? [Logic says no; ALAB-902 suggests yes, at least if the initial Board dismissed the party from the entire proceeding, not just from the matters then before it.]

5. Suppose one Board in a multi-board proceeding dismisses a party from the sub-proceeding before it, but a second Board refuses, on the basis of the same evidence as was considered by the first Board, a request to dismiss the same party from the different sub-proceeding before it. What influence does the second Board's refusal have on review of the first Board's dismissal? [It should have none; would it?]

The Appeal Board's concurrent-veto proposal is unsupported and unworkable. The Commission should reject it.

3. The Criticism in ALAB-902 of the Licensing Board's Consideration of the Consequences of Imposing Dismissal as a Sanction, and of Intervenors' Governmental Role, Improperly Colors an Issue Outside the Scope of the "Limited Jurisdictional" Issue Before it.

The Appeal Board, echoing Intervenors, has characterized the question in ALAB-902 as the "narrow jurisdictional issue" of the authority of a licensing board in a multi-board proceeding to issue sanctions affecting matters before another Board. However, the Appeal Board discusses the criteria it would impose for issuance of a sanction of dismissal. In the course of doing so, it criticizes (incorrectly) the Licensing Board's degree of consideration of one factor: that the sanction leads directly to termination of a proceeding and issuance of a license. ALAB-902 at 12-14, 19-20.

This discussion impugns the substance of the Licensing Board's sanction determination and prejudices review of it, even though for purposes of ALAB-902, that determination was assumed to be correct (id. at 7). Further, it merely states the obvious: in any operating license proceeding, dismissal of all active intervenors will tend to terminate the proceeding as long as the NRC Staff has satisfactorily concluded its technical analysis.[7]

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[7] The Appeal Board disclaims, in view of its jurisdictional rationale, having given any consideration to the fact that Intervenors are governmental entities. ALAB-902 at 6 note 5. Intervenors' status as governments is irrelevant not merely because of the Appeal Board's rationale; it is irrelevant, period. Governmental entities are permitted special latitude in the terms under which they enter proceedings, 10 CFR § 2.715(c). But once they are in a proceeding, they must take it as they find it and adhere to the same rules as nongovernmental parties appearing before a Licensing Board. Gulf States Utilities Co. (River Bend Station, Units 1 and 2), ALAB-444, 6 NRC 760, 768 (1977). See also, Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), LBP-83-30, 17 NRC 1132,1140 (1983)(late-filed contention); Houston Lighting and power Company (South Texas Project, Units 1 and 2), LBP-83-26, 17 NRC 945, 947 (1983)(revision of time limits). Indeed, the special comity afforded governmental participants by the Commission argues, if anything, for the imposition of higher expected standards of conduct from them than from other parties whose participation can be opposed at the outset.

IV. Why the Commission Should Take Review of ALAB-902

The Commission should take review of this appeal for three reasons. First, the Appeal Board has stitched a fabric of law concerning sanctions out of whole cloth, and that fabric is flawed for reasons stated in Part II above. Second, the effects of the Appeal Board's incorrect decision are important. They may well determine the fate of Shoreham and the ability of the Commission to discipline its own proceedings.

If the Appeal Board is upheld by the Commission, then litigation of the 1988 exercise appears inevitable. If the litigation of the 1986 exercise by the OL-5 Board is any guide, this could delay Shoreham's licensability by up to two years. This delay would be intolerable, considering that construction and low power testing of the plant have been complete for three years; that all emergency plan-related issues have been successfully concluded; and that FEMA has found that the 1988 exercise was free of deficiencies and that emergency preparedness at Shoreham affords reasonable assurance of protection of the public.[8]

Third, the issues here presented affect the powers of any licensing board in a multi-board proceedings. Further, to the extent that the Appeal Board strays beyond the "narrow jurisdictional" argument that it used to justify ALAB-902, the decision constrains any Licensing Board -- whether it is the sole Board in a proceeding or one of several -- in the event it contemplates issuance of a sanction. It is an extremely important decision to the future of sanctions litigation, before single or multiple boards.

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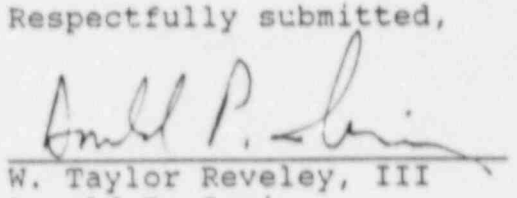
[8] Such further delay simply cannot be reconciled with the Commission's policy, expressed in its Policy Statement on Conduct of Licensing Proceedings, of emphasizing expedition and timely completion in the conduct of operating license proceedings (enabling them to be finished, ideally, before the end of construction). 13 NRC 452, 452-53, 458 (1981).

CONCLUSION

Along with ALAB-900 and ALAB-901, resolution of ALAB-902 determines whether the Commission has the ability to bring the interminable Shoreham litigation to a conclusion. The Commission should take it for expeditious review and reverse it.

Respectfully submitted,



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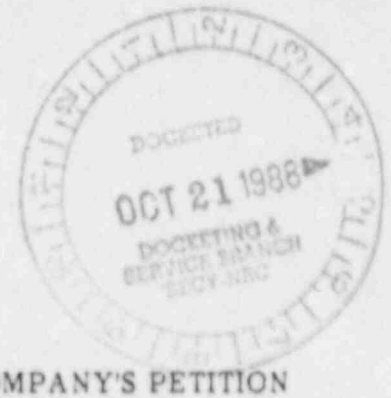

CERTIFICATE OF SERVICE

In the Matter of
LONG ISLAND LIGHTING COMPANY
(Shoreham Nuclear Power Station, Unit 1)
Docket No 50-322-OL-3

I hereby certify that copies of LONG ISLAND LIGHTING COMPANY'S PETITION FOR REVIEW OF ALAB-902 were served this date upon the following by telecopy as indicated by an asterisk, by Federal Express as indicated by two asterisks, or by first-class mail, postage prepaid.

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