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October 30, 1986

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FILE NO.

DIRECT DIAL NO. 804 788- 8357

Administrative Judge B. Paul Cotter, Jr., Chairman
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
4350 East-West Highway
Bethesda, Maryland 20814

Long Island Lighting Company
Shoreham Nuclear Power Station, Unit 1
(Docket No. 50-322-OL-5) (EP Exercise)
(Docket No. 50-322-OL-3) (Emergency Planning)

Dear Judge Cotter:

Mr. Brown's October 22 letter and motion seek again to reclaim the October 7 Notice of Reconstitution, which expands the composition of the Licensing Board panels dealing with emergency planning issues in two related dockets in the Shoreham case.^{1/} They raise issues that are inherently within the discretion of the administering agency, and not within the scope of issues available to conventional litigation. Nevertheless, since the relief they request would, if granted, affect LILCO's interests in the Shoreham emergency planning proceedings, LILCO responds here to them.

^{1/} Mr. Brown's letter and motion seek to rehash essentially the same issues raised earlier by him in an October 14 letter (except for his misapprehension about the composition of the "-3" panel, which was resolved by the October 17 clarification Notice). There have been two distinct emergency planning dockets at Shoreham since the Commission's issuance of CLI-86-11 on June 6: the "-3" proceeding which encompasses all emergency planning issues except those specifically related to the February 13, 1986 offsite emergency planning exercise, and the "-5" proceeding set up to hear issues specifically relating to the exercise. The membership of the Boards hearing both sets of issues was, until the October 7 Notice of Reconstitution, identical (Morton Margulies, Esq., Chairman, and Dr. Jerry Kline and Mr. Frederick Shon, technical members). The sole effect of the Notice was to substitute into the "-5" Board two new members, Messrs. Frye and Paris, for two present members, Messrs. Margulies and Kline. Messrs. Margulies and Kline remain on the general-jurisdiction "-3" Board, however, and Mr. Shon, the third member of both Boards, remains on both.

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LILCO obviously has no information about the exact process or details leading to the Notice of Reconstitution. Still, that Notice seems plainly intended to accomplish one important function: applying enough decisional manpower — Licensing Board resources — to avoid foreclosing the possibility of completing two proceedings, each of them complex and one of them ordered by the Commission to be specially expedited, within a practical time frame. Action to fulfill this function is not only sensible in light of the agency's basic obligation to conduct proceedings within a reasonable time frame; it was practically compelled by a combination of the Commission's order to expedite one of these proceedings (the "-5" docket), and the rapid accretion of issues, at Intervenor's instance, in both of them.

The Notice of Reconstitution is also consistent with past practice in this case, which has involved both rotation of Board membership and simultaneous proceedings before different panels on related issues. In addition, it was taken at an appropriate time — early in the expedited proceeding — and done in a fashion which preserves continuity of Board membership. These matters, which are treated more specifically immediately below, suggest that the Order of Reconstitution was soundly within the ambit of reasonable administrative discretion.

1. The Notice of Reconstitution, or its equivalent, would have been necessary in any event in order to keep the overall Shoreham emergency planning proceeding from bogging down interminably.

On June 6, 1986, when the "-5" docket was opened by CLI-86-11 to hear exercise-related issues on a specially expedited basis, there were no issues actively pending before the general-jurisdiction "-3" panel. Given their general familiarity with emergency planning issues, it made good sense for the existing "-3" Board to take on the related exercise issues.^{2/} In the months since, two sets of developments have made

^{2/} LILCO initially proposed, in March 1986, that the "-3" Board's experience be harnessed, if it were convenient, for the "-5" proceeding. However, Mr. Brown flatly misleads in attempting to couple LILCO with any particular configuration of licensing board or boards. His citation to LILCO's proposal that the "-3" Board preside over the exercise litigation omits material facts: (1) that LILCO's request was in the context of an overall request for expedited litigation of the exercise (in the course of which the Margulies-Kline-Shon Board was requested if available); (2) that LILCO made its request on March 13, 1986, over 7 months ago; (3) that at that time neither the Chernobyl accident nor Nassau County's subsequent reversal of position on the Coliseum nor WALK radio's subsequent reversal of position on EBS participation had occurred; (4) that ALAB-832, with its various remand issues, had not yet been issued; and (5) that, as a result, there was at that time no significant amount of further trial-level litigation inevitable in the "-3" docket.

(footnote continued)

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that determination, which was still practical at the time announced, considerably less so. First, a wide range of issues has been reopened or introduced for the first time before the "-3" Board.^{3/} Second, Intervenor's have filed an extremely broad-gauged set of contentions in the "-5" docket; and the scope of issues admitted by the "-5" Board for litigation in its October 3, 1986 Prehearing Conference Order includes most of the issues desired by Intervenor's to be litigated. Thus, that proceeding shows prospects of taking the full time of a quorum of that Board.

The Notice of Reconstitution, issued only 4 days after the Prehearing Conference in the "-5" docket, responds vigorously and alertly to this obvious litigative logjam.

2. The manner in which the Board was expanded preserves continuity of experience.

Notwithstanding Mr. Brown's suggestion, there remains obvious continuity among the Shoreham emergency planning Boards. The Margulies-Kline-Shon Board (the "-3" Board) retains jurisdiction over all emergency planning matters except those specifically associated with the exercise. Judge Shon remains on both the "-3" Board and on the reconstituted "-5" Board.

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Intervening developments, outlined above, have significantly altered this picture. By now, it is already clear that LILCO will need to obtain relief from Paragraph IV.F.1 of Appendix E to 10 CFR Part 50, which requires that an emergency planning exercise be held within one year before the initial granting of an operating license to exceed 5% of rated power. This regulation, promulgated in 1981, *i.e.*, before the results of exercises became routinely thrown open to litigation by the UCS case, 735 F.2d 1437 (D.C. Cir. 1984), would otherwise condemn the parties to this proceeding to hold yet another full-scale exercise as a precondition to full power licensing since, notwithstanding the Commission's order in CLI-86-11 to expedite the "-5" proceeding, evidentiary hearings are not scheduled to begin on the February 13, 1986 exercise until early February 1987.

3/ Without attempting to be exhaustive, these issues include (1) legal-authority issues, the realism and materiality arguments (CLI-86-13, July 25, 1986); (2) the replacement facilities for the Nassau Coliseum, which was withdrawn as a reception center by the Nassau County Board of Supervisors following the Chernobyl accident (LILCO Motion to Reopen Record, September 30, 1986); (3) potential issues relating to radio station WALK, the Red Cross, and availability of congregate care centers (Intervenor's Motion to Reopen Record, October 15, 1986); and (4) miscellaneous remand issues from ALAB-832.

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Further, changes in the composition of Licensing Boards are nothing new: they have occurred throughout this case. Almost 30 members of the Atomic Safety and Licensing Board panel have rotated through the Boards sitting in the Shoreham operating license case's four principal dockets over the years. In the general offsite emergency planning area alone (the "-3" proceeding), there have been three Board chairmen (Brenner, Laurenson, Margulies). Judge Brenner had rendered important threshold rulings, including one on a motion to terminate the entire proceeding in view of the opposition of Suffolk County, before turning over the proceeding to Judge Laurenson in the spring of 1983. See LBP-83-21, 17 NRC 593 (1983). Judge Laurenson in turn conducted the hearings on all issues except the Nassau Coliseum and was on the Board during the first several months of its work on a Partial Initial Decision, LBP-85-12, 21 NRC 644 (1985), before being succeeded by Judge Margulies in the spring of 1985. Technical experts' membership on the Boards has similarly shifted over time.

By the same token, more than one Board has operated simultaneously in related areas during the course of this proceeding. The most notable example of this was the appointment of a special additional Board to hear that subset of safety issues relating to the low power license (the "-4" Board, consisting of Judges Miller, Bright and Johnson) and the later succession of its Chairman (Judge James Kelley replaced Judge Miller) to hear security-related aspects of the low power license. Indeed, at one time during 1983-84, three different Boards -- the general-safety-jurisdiction Board (the "-2" Board), the general-jurisdiction emergency planning Board (the "-3" Board) and the low power license Board (the "-4" Board) -- were all holding proceedings simultaneously. Nor is Shoreham the only case where multiple Boards have been utilized.

3. The expansion of the Boards was done in a manner consistent with the public interest.

Mr. Brown's letter and motion suggest that the Margulies-Kline-Shon Board had acquired such unique and extensive knowledge in the "-5" exercise litigation that any change in its composition, for virtually any reason, would be unjustifiable. Such is not the case: the expansion of the Boards was taken at an early moment after the size of the impending litigation and the need for corrective action became plain, minimizes loss of institutional memory, and preserves continuity. Mr. Brown also neglects the existence of the "-3" proceeding and blinks the fact that delay in either proceeding or both, which would have been inevitable with only one Board, would seriously prejudice LILCO, whose interests are as worthy of consideration as those of his clients.

The Margulies-Kline-Shon Board, which remains on the general-jurisdiction emergency planning issues, has written two lengthy decisions on them, and is well suited to deal with remanded or reopened issues. By contrast, the exercise proceeding has only begun to take shape: contentions have just been admitted and a general schedule set, but formal discovery has just begun (and no disputes on it have yet been heard), no summary disposition motions have been filed, no testimony has been submitted, and no evidentiary sessions have been held. All of the limited appearance statements

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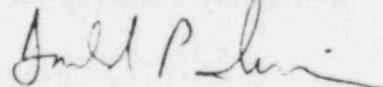
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presented to the Board have been made part of the record of the proceeding and are available to all Board members.

In short, had only one Board remained in place, substantial delays in the progress of both the "-3" and "-5" dockets would have been inevitable. LILCO, with its investment of nearly five billion dollars in the completed and low-power-tested Shoreham, is so obviously prejudiced by delay that extended discussion is unnecessary. Thus, the question facing the Licensing Board Panel realistically was not whether to modify the Licensing Board structure for the "-3" and "-5" proceedings, but how to do it with least disruption. The manner chosen, which modifies a still-young docket and keeps continuity of Board membership, appears a reasonable means of minimizing prejudice to all parties.

It is a regrettable aspect of Commission proceedings that they can be made so long and so intricate that total continuity of Licensing Boards is apparently impracticable. However, there is inherent discretion in the process to harmonize the needs of litigants and the overall administration of the agency's business. One operative fact is that the entire Board whose involvement in emergency planning proceedings forms the subject of Mr. Brown's letter is still involved in the general emergency planning proceeding; and that one of its members still sits on that portion related to the exercise itself. Another operative fact is that it is intervenors' historic insistence on litigating every available issue in the greatest possible detail which has created the need for a second Board. LILCO's concern is that the two Boards be able to use their common membership and other available means so as to coordinate their respective tasks efficiently, with the result that they will in fact be able to expedite the long-delayed completion of the "-3" and "-5" emergency planning proceedings.

Respectfully submitted,



Donald P. Irwin
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Lighting Company

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In the Matter of
LONG ISLAND LIGHTING COMPANY
(Shoreham Nuclear Power Station, Unit 1)
Docket No. 50-322-OL-5 (EP Exercise)
Docket No. 50-322-OL-3 (Emergency Planning)

OFFICE OF SECRETARY
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I hereby certify that copies of LILCO'S OPPOSITION TO "MOTION FOR RESCISSION . . . AND FOR EXPEDITED CONSIDERATION" and Letter, Donald P. Irwin to B. Paul Cotter, Jr., dated October 30, 1986 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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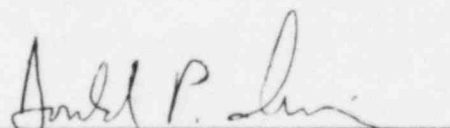
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