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October 22, 1986

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## BY HAND

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

Re: NRC Docket No. 50-322-OL-5 (EP Exercise)

Dear Judge Cotter:

I am writing on behalf of Suffolk County and with authorization of the State of New York and the Town of Southampton ("Governments").

Your letter of October 17 is unresponsive to the Governments' letter of October 14, failing even to address the specific questions and requests set forth therein. The Governments are entitled to (1) a full explanation of the "schedule conflicts" of Judges Margulies and Kline that you claim required you to remove these judges from the Shoreham post-exercise litigation Board and (2) rescission of your Notice which removed the judges. Accordingly, enclosed is a motion of the Governments for rescission of your October 7 "Notice of Reconstitution of Board" and your October 17 "Notice of Reconstitution of Board: Clarification." The Governments request expedited consideration of this motion.

The Governments object to your removal of Judges Margulies and Kline from the Board conducting the Shoreham post-exercise litigation for the following principal reasons. First, your action was arbitrary. Judges Margulies and Kline were appointed by you to the Board following the specific directive of the Commission and the unopposed request of the Applicant. The Commission has not reversed its directive, and no party has called for the removal of Judges Margulies and Kline.

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Administrative Judge B. Paul Cotter, Jr., Chairman  
October 22, 1986  
Page 2

Second, the familiarity with the record and issues that Judges Margulies and Kline have gained by participating in the earlier phase of the emergency planning proceeding and in the pre-hearing phase of the present litigation cannot be duplicated by new judges. As the Applicant stated and the Commission recognized, these are the judges with "knowledge" of the "mammoth record" in this proceeding.

Third, your Notice and Clarification are without foundation and fail even to identify, let alone explain, the "schedule conflicts" that required removal of Judges Margulies and Kline. Moreover, you fail to explain why Judge Shon remains on the Board free of "schedule conflicts" while his similarly situated colleagues, Judges Margulies and Kline, must be removed.

Fourth, you acted to remove Judges Margulies and Kline without informing, or having the judges inform, the parties of even the slightest possibility that undisclosed "schedule conflicts" might prompt the radical act of disrupting the sitting Board. The Governments are parties in interest to this proceeding. They are therefore entitled to know any "schedule conflicts" that affect their interests as litigants and to participate in formulating an appropriate solution. Though you "consulted" with the judges, whose legal interests are not at issue in this proceeding, you chose to ignore the interests of the parties themselves.

Fifth, the Governments perceive no conceivable benefit to the public safety from your action. Indeed, the Governments submit that you cannot point to any way in which the conduct of the post-exercise litigation will be improved by removing two of the three persons best situated to conduct this litigation.

The Governments are concerned for another reason also. In March 1984, you issued an order reconstituting the licensing board for an earlier phase of the Shoreham proceeding; i.e., low power diesel litigation. That order set the stage for the later denial to the Governments of a fair hearing. Because the NRC would not listen to the Governments' due process objections, the issue escalated until the NRC was finally restrained by Order of the U.S. District Court.

Again, as in 1984, you acted on October 7 without the Governments having even a hint that action by you was being considered; and you failed to explain your action then and now. In 1984, and again this time, your action came after major rulings of the Licensing Board: then the Brenner Board's rejection of LILCO's scheme to operate at low power without

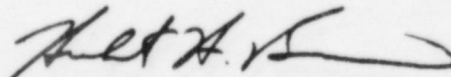
KIRKPATRICK & LOCKHART

Administrative Judge B. Paul Cotter, Jr., Chairman  
October 22, 1986  
Page 3

qualified diesels; now the Margulies Board's rulings on the Governments' contentions. Indeed, the Governments are concerned that parallels might be developing to the 1984 episode, where a scenario prejudicial to the Governments' interests was secretly drawn. While the Governments now make no allegation, there is particularly strong interest whether Judges Margulies and Kline were removed before they could rule on Objections which LILCO and the NRC Staff will file in response to the Margulies Board's rulings on the Governments' contentions.

The Governments are thus concerned because their experience in the Shoreham proceeding requires concern. In light of this, and in order to deal forthrightly with the present circumstances, the Governments are available to meet with you, any of your colleagues, and the other parties in open session and to address the status of both the Shoreham litigation and the post-exercise litigation board. If there is a problem that requires a solution, the Governments wish to participate in formulating the solution. It is unsatisfactory for you to make a decision of such significance to the Governments by having "consulted" merely with the members of the Licensing Board. The Governments have independent interests which are relevant, important, and worthy of your careful consideration.

Very truly yours,



Herbert H. Brown

HHB:slr

cc: Service List



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USNRC

October 22, 1986 <sup>'86</sup> OCT 24 A11:29

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

OFFICE OF THE CHIEF ADMINISTRATIVE JUDGE  
DOCKETING & SERVICE  
BRANCH

Before the Chief Administrative Judge,  
Atomic Safety and Licensing Board Panel

In the Matter of )

LONG ISLAND LIGHTING COMPANY )

(Shoreham Nuclear Power Station,  
Unit 1) )

Docket No. 50-322-OL-5  
(EP Exercise)

MOTION FOR RESCISSION OF "NOTICE OF RECONSTITUTION OF BOARD"  
AND SUBSEQUENT "CLARIFICATION" AND MOTION FOR EXPEDITED  
CONSIDERATION

By "Notice of Reconstitution of Board," dated October 7, 1986, and "Clarification" thereto, dated October 17, 1986, the Chief Administrative Judge removed Judges Margulies and Kline from the Licensing Board established by direction of the Commission to hear the Shoreham post-exercise litigation and replaced them with new judges. For the reasons set forth below, the Governments object to the "Notice of Reconstitution of Board" and the "Clarification" and move that the Notice and Clarification be rescinded.

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The Governments also move the Chief Administrative Judge to consider the instant motion on an expedited basis. To this end, the Governments are available to meet in open session with the Chief Administrative Judge for the purpose of addressing any problem that may exist concerning the status of the Shoreham proceeding or of the Licensing Board and to aid in forging a solution as may be necessary and appropriate.

I. Background

On March 13, 1986, LILCO requested the Commission to establish a Licensing Board to preside over post-exercise litigation and asked specifically, if feasible, that the Board be composed of the same Judges who had presided over the earlier emergency planning litigation, and thus who had gained "knowledge" of the "mammoth record," i.e., the Margulies Board. No other party objected to this request. Thereafter, on June 6, in CLI-86-11, the Commission directed that the Margulies Board, if available, be re-established to preside.<sup>1</sup> Because the Margulies Board members were available, the Chief Administrative Judge on June 10 issued a Notice re-establishing the Margulies Board.

Since that time, the Margulies Board has conducted the normal course of prehearing activities. The Board held two prehearing conferences (July 8 and September 24) and several

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1 "We direct the Chairman of the Atomic Safety and Licensing Board Panel to reappoint the members of the earlier Board if they are available." 23 NRC at 582.

telephone conference calls with counsel, read and considered hundreds of pages of pleadings concerning issues to be litigated, ruled on motions and numerous contentions following oral arguments of counsel, and fixed a prehearing discovery schedule. Moreover, on September 23, 25, and 26, the Margulies Board conducted limited appearance sessions at three Long Island locations (Hauppauge, Riverhead, and Mineola) at which hundreds of members of the public and scores of government officials and community leaders presented their views on the pending issues.

The Governments are unaware of any member of the Margulies Board having stated that the Board or any of its members have schedule conflicts of the sort that require reconstitution of the Board. Nevertheless, on October 7, the Chief Administrative Judge issued a "Notice of Reconstitution of Board," which replaced Judges Margulies and Kline with new Judges. The reason stated by the Chief Administrative Judge for this action was "schedule conflicts." The conflicts were neither identified nor explained.

On October 14, counsel for the Governments advised the Chief Administrative Judge that the Governments object to the removal of Judges Margulies and Kline, and urged that "the only appropriate course is for you to reconstitute the Margulies Board and to permit the Shoreham proceeding to move forward in accordance with NRC regulations and without further interference." The Governments also requested the Chief



Administrative Judge to respond to specific questions and to explain why Judges Margulies and Kline were so abruptly removed. Letter from Herbert H. Brown to B. Paul Cotter, Jr., October 14, 1986, p. 3, copy attached. The Chief Administrative Judge's reply, dated October 17, neither responded to the Governments' questions nor identified or explained any "schedule conflicts" of Judges Margulies and Kline. Instead, he stated:

It was my determination, in consultation with the members of the existing Board, that the expanding emergency planning-related Shoreham cases could not reasonably be handled in a timely manner by a single board. Accordingly, I established the reconstituted board to preside over the emergency planning exercise proceeding in which no evidentiary hearings have yet been conducted, and in which the record is still quite limited.

The Chief Administrative Judge enclosed with his letter a "Clarification" of the October 7 "Notice of Reconstitution of Board" that made clear the Margulies Board would be removed from the post-exercise litigation, but would continue to preside over other Shoreham-related litigation. Judge Shon was designated to serve on both Boards.

## II. Discussion

The Chief Administrative Judge has not identified, let alone explained, any "schedule conflicts" that require the removal of Judges Margulies and Kline from the post-exercise litigation Board. To the best of the Governments' knowledge, there is no such conflict and, even if there were, there would be no

justifiable basis, absent reconsideration by the Commission of CLI-86-11, to replace the Margulies Board. In short, given the directive of the Commission that the Margulies Board preside, the Applicant's unopposed request for that Board to preside, and the failure of the Chief Administrative Judge to identify the existence of any "schedule conflicts," there is no rational explanation for the Chief Administrative Judge's action.

If any schedule conflicts were to arise among the members of the Margulies Board, the appropriate course would be for the conflicts to be made known to the parties. Previously in this litigation when schedule conflicts have arisen, the Judges and parties have discussed the matter and have attempted to set accommodating schedules. There is no reason why such openness and discussion should not remain the practice now.<sup>2</sup> Indeed, there is not even the slightest suggestion of any conflict in this proceeding that would justify the abrupt removal of two Judges who have been presiding in the normal course. Even if such an extraordinary situation were to arise, the parties to the proceeding -- whose interests are being litigated -- and not merely the Board, should be consulted before any solution is considered.<sup>3</sup>

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2 This is essential because potential conflicts involving other Shoreham-related matters affect not only the Judges, but the parties, their counsel, and their witnesses as well.

3 The Governments are particularly concerned because they recall that in March 1984, the Chief Administrative Judge abruptly issued an order removing the Brenner Board from the Shoreham diesel litigation and replaced it with the Miller Board



The only appropriate remedy now is for the Chief Administrative Judge immediately to rescind the October 7 Notice and October 17 Clarification. If, for whatever reason, a genuine schedule conflict subsequently arises in this proceeding, the Judges and parties should deal with it in the normal course, just as they have done in the past. Thus, the Judges should bring it to the attention of the parties and together they should forge a solution. If, in the unlikely event a schedule conflict of extraordinary proportions arises, the Judges and parties should assess the conflict and seek a mutually satisfactory solution.

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under circumstances that later led to the impairment of the Governments' ability to prepare for trial and protect their interests. The Governments strenuously objected to this action, but the Board and Commission refused to modify it. Ultimately, the Governments obtained a restraining order from the U.S. District Court that caused the Commission to consider more meaningfully the Governments' rights.

In the present circumstances, the Governments are concerned that there may be parallels with the 1984 episode. Again, the Chief Administrative Judge acted abruptly; again there was no forewarning, no notice to the parties that a "schedule conflict" might exist, and no consultation with the parties. Significantly, again there was no explanation of the "conflict" and, even in reply to the specific request of the Governments' counsel, the Chief Administrative Judge has failed to explain his action.

In short, the Governments are concerned that just as there proved to be in 1984, behind the scenes at the NRC a secret scenario may be developing, and that the Chief Administrative Judge's Notice is merely the opening act. It is therefore of considerable importance that any "plans" being considered privately at the NRC for altering or influencing the ordinary course of litigation in the present proceeding be openly and promptly disclosed. The Governments are entitled to due process and to a fair proceeding in which matters affecting their interests are considered and resolved openly and with their participation.

Under no circumstance should the Chief Administrative Judge privately consult with anyone concerning a matter of such importance to the Governments and then, by fiat, change the status quo to the prejudice of the Governments with whom he did not consult. Elementary fairness -- and due process of law -- demand better than that.

The Governments emphasize that they consider the post-exercise litigation to be a serious proceeding of great importance to the public's welfare: an opportunity to obtain a conclusive denial of LILCO's efforts to license Shoreham. The Governments have a right to due process and to open and fair decisionmaking on the record, even when that involves actions of the Chief Administrative Judge. In this instance, the Governments are not trying to select who should judge their case. Instead, they are insisting that they not be denied the sitting decisionmakers whose knowledge of the matters at issue is undeniably better than anyone else's and whose presence on the Board was at the direction of the Commission following the unopposed request of the Applicant.

The action of the Chief Administrative Judge in abruptly removing Judges Margulies and Kline was arbitrary. The Chief Administrative Judge did not identify any "schedule conflicts" that justify his action; he has not explained why the parties were denied timely knowledge of "schedule conflicts;" he has not explained why the Commission's directive to appoint the Margulies

Board should no longer apply, nor indeed where he gets the power to reverse the Commission's directive; he has not explained how Judge Shon can have no "schedule conflicts" while Judge Shon's similarly situated colleagues on the Board are excessively burdened with "schedule conflicts;" he has not explained how it could possibly benefit the public safety by removing Judges Margulies and Kline from litigation of the very contentions which they admitted, and the scope of which they tailored for hearing; he has not explained how it could possibly be efficient to relegate Judges Margulies and Kline to a remand docket where nothing has yet happened, while taking them from the docket they have guided since June; he has not addressed whether secret plans are under way at the NRC -- as was the case in 1984 -- to impose from behind the scenes schedules or other measures that suit the result-oriented interests of parties and persons other than the Governments; and he has not responded to the specific written questions and requests of the Governments.

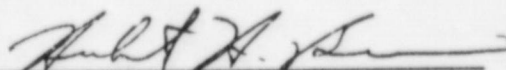
Accordingly, the Governments move the Chief Administrative Judge to remedy the present prejudicial situation that has resulted from the removal of Judges Margulies and Kline by rescinding the "Notice of Reconstitution of Board," dated October 7, 1986, and the "Clarification" thereto, dated



October 17, 1986. The present situation does not comport with the Governments' due process rights.

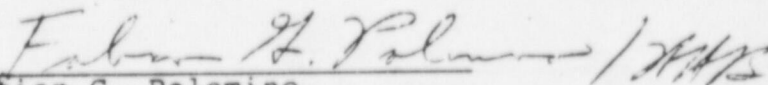
Respectfully submitted,

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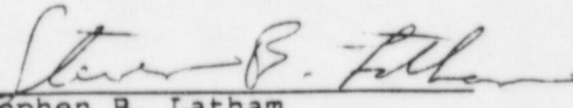
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DOCKETED  
USNRC  
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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

Before the Chief Administrative Judge,  
Atomic Safety and Licensing Board Panel

OFFICE OF SECRETARY  
DOCKETING & SERVICE  
BRANCH

In the Matter of )

LONG ISLAND LIGHTING COMPANY )

(Shoreham Nuclear Power Station, )  
Unit 1) )

Docket No. 50-322-OL-5  
(EP Exercise)

CERTIFICATE OF SERVICE

I hereby certify that copies of the LETTER TO ADMINISTRATIVE JUDGE B. PAUL COTTER, JR., CHAIRMAN and MOTION FOR RESCISSION OF "NOTICE OF RECONSTITUTION OF BOARD" AND SUBSEQUENT "CLARIFICATION" AND MOTION FOR EXPEDITED CONSIDERATION have been served on the following this 22nd day of October, 1986 by U.S. mail, first class, except as otherwise noted.

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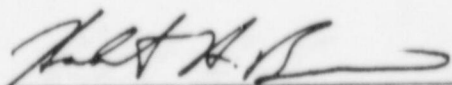
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Date: October 22, 1986