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LILCO, October 12, 1990

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

LONG ISLAND LIGHTING COMPANY'S OPPOSITION TO INTERVENTION PETITIONS AND REQUESTS FOR HEARING ON ITS JANUARY 5 REQUEST TO REMOVE OPERATING AUTHORITY FOR SHOREHAM

I. Background

A. Procedural Posture

On September 20, 1990, the Shoreham-Wading River Central School District (SWRCSD) and Scientists and Engineers for Secure Energy, Inc. (SE_2)(collectively, "Petitioners") each filed separate, though basically identical, petitions for leave to intervene and requests for hearing on the NRC's proposed issuance of a license amendment that would remove Long Island Lighting Company's (LILCO's) authority to operate the now-defueled Shoreham Nuclear Power Station. Along with its request for hearing, Petitioners submitted comments in opposition to the NRC's proposed finding that the license amendment involves "no significant hazards consideration." On October 10, 1990, Petitioners supplemented their papers to take into account two purportedly additional matters.

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Pursuant to 10 C.F.R. § 2.714(c), LILCO opposes Petitioners' requests for hearing.[1/]

B. Facts

The present proceedings arise out of certain actions taken by LILCO at Shoreham following the effectiveness of its Settlement Agreement with the State of New York.[2/] On January 5, 1990, LILCO submitted, pursuant to 10 C.F.R. § 50.90, an application to amend its license to provide that it was authorized to "possess, use, but not operate Shoreham." Along with this request, LILCO submitted a proposed set of revised technical specifications[3/]

1/ Generally, in this Opposition, LILCO refers jointly to the "Petitioners' arguments," as there is no substantive distinction in the positions that Petitioners have taken. The only difference between the two petitions involve their description of the respective Petitioners. Where, for purposes of citation, it is necessary to refer specifically to the separate pleadings, LILCO uses the following short forms: SWRCSD Petition, SE_2 Petition, SWRCSD Supplement, and SE_2 Supplement.

2/ The facts of the situation regarding Shoreham generally were described in LILCO's "Opposition to Intervention Petitions and Requests for Hearing on Confirmatory Order and on Amendment to Physical Security Plan" (May 3, 1990)("May 3 Opposition") at 2-8. Except as immediately relevant, those facts will not be repeated here.

3/ On June 27, 1990, the NRC Staff sent to LILCO a "marked up" version of the defueled Shoreham technical specifications, reflecting the Staff's comments and proposed changes to the technical specifications. See Letter from Walter R. Butler, Director, NRC Project Directorate I-2, to William E. Steiger, Jr., LILCO Assistant Vice President-Nuclear Operations. At a publicly-noticed meeting in Rockville, Maryland on August 2, 1990, the Staff and LILCO discussed the Staff's comments and came to agreement on what final form the defueled technical specifications should take. Subsequent to this meeting, LILCO retyped the finalized technical specifications and sent them to

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and a Defueled Safety Analysis Report (DSAR) describing the nonoperating, defueled configuration in which Shoreham would be placed if the license amendment request were approved. See Letter from William E. Steiger, Jr., LILCO Assistant Vice President-Nuclear Operations, to NRC (Jan. 5, 1990)(SNRC-1664).

In response to an NRC Staff request during a June 5, 1990 telephone conference, LILCO agreed that the January 5 submittal could, in the Staff's discretion, be treated either as a request for a "defueled operating license" or as a request for a "possession only license." See Letter from Stewart W. Brown, Project Manager, NRC Project Directorate I-2, to John D. Leonard, LILCO Vice President-Corporate Services and Office of Nuclear (July 13, 1990).

On August 15, 1990, the NRC Staff issued a proposed finding that LILCO's January 5 license amendment request involved "no significant hazards consideration." 55 Fed. Reg. 34,098 (Aug. 21, 1990). The Staff's notice solicited public comments on the proposed finding and provided an opportunity for an "interested person" to seek a hearing on the amendment.[4/] In its notice, the Staff stated that LILCO had previously "advised that its proposed amendments may be treated as a request for a 'possession only'

[3/] (...continued)
the NRC on August [illegible], 1990. See Letter from John D. Leonard, Jr., LILCO Vice President-Office of Corporate Services and Office of Nuclear, to NRC (SNRC-1752).

[4/] The Staff, upon making a final determination of "no significant hazards consideration," may grant the requested amendment -- to be effective upon issuance -- prior to any hearing. 42 U.S.C. § 2239(a)(2)(A); 10 C.F.R. § 50.91(a)(4).

license." Id. at 34,099. In a subsequent bi-weekly notice regarding LILCO's January 5 request, the Staff confirmed that the amendment would remove LILCO's authority to operate Shoreham "and would result in the issuance of a 'possession only' license." 55 Fed. Reg. 36,358 (Sept. 5, 1990).

On September 20, 1990, Petitioners submitted their instant comments on the Staff's proposed "no significant hazards consideration" determination and requested a hearing on LILCO's January 5 license amendment application.

On October 3, 1990, the Commission issued an order ("October 3 Order) in which it noted its receipt of Petitioners' pleadings and stated that it

> read petitioners' latest filings to argue (1) that the proposed "defueled operating license" actually constitutes a "possession only license" ("POL") and (2) that under 10 C.F.R. § 50.82, LILCO must submit and the NRC Staff must approve a decommissioning plan prior to the submission of an application for a POL.

October 3 Order at 2. The Commission then directed LILCO and the Staff to "address these matters specifically" in their responses to Petitioners' requests for hearing. Id.

Finally, on October 10, Petitioners filed what they styled as a "supplement" to their September 20 pleadings. Such a supplement is necessary, Petitioners contend, in order to "draw the Commission's attention to the significance" of two documents which, say Petitioners, only became available after September 20. SWRCSD Supplement at 2; SE_2 Supplement at 2. According to Petitioners, these two documents -- letters from LILCO to the NRC

designated as SNRC-1745 and SNRC-1752 -- identify "additional bases for denial of a no significant hazards determination," further demonstrate "the need for a prior hearing on the application," and specify "additional contentions to be considered in that hearing." SWRCSD Supplement at 8; SE_2 Supplement at 8.

II. Response to the Commission's October 3 Order: the NRC May Lawfully Consider LILCO's January 5 Amendment Request Prior to the Approval of a Full Decommissioning Plan

As noted, in its October 3 Order, the Commission directed LILCO and the NRC Staff to address specifically the allegation by Petitioners that LILCO must submit -- and the Staff must approve -- a full decommissioning plan before LILCO's January 5 license amendment request can be granted.[5/] According to Petitioners, the NRC's proposed "no significant hazards consideration" determination is "fatally premature" because no such plan has been submitted and approved. SWRCSD Petition at 10; SE_2 Petition at 10.[6/]

[5/] As for the Commission's statement that it "read petitioners' latest filings to argue . . . that the proposed 'defueled operating license' actually constitutes a 'possession only license,'" LILCO observes that the Staff itself now apparently views the January 5 license amendment application as a request for a "possession only license." See, e.g., 55 Fed. Reg. 36,358 (Sept. 5, 1990)(stating that the amendment would "remove [LILCO's] authority to operate the Shoreham facility and would result in the issuance of a 'possession only' license").

[6/] Importantly, in opposing the Staff's proposed "no significant hazards consideration" finding, Petitioners do not engage the standards the Staff uses in making such a finding under 10 C.F.R. § 50.92(c). Nor do Petitioners expressly allege that the proposed amendment itself poses a specific radiological hazard. Rather, Petitioners' opposition to the Staff's proposed finding rests solely on their assertion -- based on a faulty interpretation of the NRC's decommissioning regulations -- that the Staff cannot lawfully consider the requested amendment at this time.

Citing the Supplementary Information that accompanied the NRC's revised decommissioning regulations, 53 Fed. Reg. 24,018 (June 27, 1988), Petitioners contend that the NRC has

> interpreted its own rules to require approval of a decommissioning plan "shortly after the end of operation" and to preclude issuance of a "possession-only" [license] in the absence of an approved plan for the "ultimate disposition" of the facility in question.

SWRCSD Petition at 4; SE_2 Petition at 4. Since no such plan has been approved for Shoreham, Petitioners assert, the Staff's consideration -- much less its approval -- of LILCO's January 5 license amendment request would violate the agency's own regulations.

Petitioners' interpretation of the NRC's decommissioning rules is incorrect. To begin with, contrary to Petitioners' position, the decommissioning process regulated under 10 C.F.R. § 50.82 has not yet begun at Shoreham. Moreover, it is not true that, under the NRC's regulations, a full decommissioning plan must be submitted and approved before LILCO's January 5 amendment request can be granted.

A. The 10 C.F.R. § 50.82 License Termination and Decommissioning Process Has Not Been Initiated

Petitioners get off the track at the outset when they assert that the NRC's consideration of LILCO's January 5 license amendment request is governed by the provisions of 10 C.F.R. § 50.82. See SWRCSD Petition at 4-5; SE_2 Petition at 4-5. LILCO's request was submitted under the license amendment provisions of 10 C.F.R. §§ 50.90-50.92, not pursuant to the decommissioning rules set

forth in § 50.82. LILCO has not submitted, and does not now contemplate ever submitting itself, an application to terminate Shoreham's license and decommission the facility.[1] Accordingly, Petitioners' assertions that LILCO's January 5 request is not in conformity with the provisions of § 50.82 are beside the point.

B. An Approved Decommissioning Plan Is Not a Prerequisite for Issuance of a "Possession Only" License Amendment

Petitioners are also wrong in their contention that, under the NRC's regulations, LILCO's January 5 submittal cannot be considered by the NRC until a formal decommissioning plan has been submitted and approved. Neither the plain text of the decommissioning provisions, nor the NRC's construction of them, supports Petitioners' position.

The term "possession only license" does not appear in the NRC's regulations. Long used in NRC guidance materials, this term is found in the Supplementary Information that accompanied

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[1] As LILCO has stressed repeatedly to the NRC, under the Settlement Agreement with New York State, the responsibility for decommissioning Shoreham rests with the Long Island Power Authority (LIPA), following the plant's transfer. LIPA, therefore, is the appropriate entity to file a § 50.82 application. This was reiterated in the "Joint Application of Long Island Lighting Company and Long Island Power Authority for License Amendment to Authorize Transfer of Shoreham," filed with the NRC on June 28, 1990 ("Joint Application"). The Joint Application states that it

> does not seek any approvals required by 10 C.F.R. § 50.82 to decommission Shoreham. LIPA will seek license termination and approval of a plan to decommission Shoreham by separate and subsequent application. That subsequent application will be accompanied or preceded by a decommissioning plan.

Joint Application at 9.

the NRC's revision to its decommissioning regulations in 1988. There, in describing the licensing scheme that would be implemented for decommissioning, the NRC stated, in relevant part:

> Normally, an amended Part 50 license authorizing possession only will be issued prior to the decommissioning order to confirm the nonoperating status of the plant and to reduce some requirements which are important only for operation prior to finalization of decommissioning plans. . . . In the past, the period of safe storage or that following entombment has been covered by an amended "possession-only" Part 50 license which does not authorize facility operation, with the term "order" used only in the case of a dismantling order, due to the more active nature of this stage of decommissioning. Except for the use of the term "decommissioning order," there has been no change from past practice. The term "decommissioning order" is used in lieu of the term "dismantling order" because, according to the amendments, the overall approach to decommissioning must now be approved shortly after the end of operation rather than an amended "possession-only" Part 50 license being issued without plans for ultimate disposition.

53 Fed. Reg. 24,024 (June 27, 1988).

In contending that a full decommissioning plan must be submitted by the licensee and approved by the Staff before a "possession only license" is issued, Petitioners assert an interpretation of the Commission's regulations that, given the language of the Supplementary Information, is clearly wrong. In that Supplementary Information, the Commission specifically and unequivocally states that "an amended Part 50 license authorizing possession only will be issued prior to the decommissioning order to confirm the nonoperating status of the plant . . . ." 53 Fed. Reg. 24,024 (June 27, 1988)(emphasis added). The point Peti-

tioners miss is that the issuance of the decommissioning order is synonymous with NRC approval of the decommissioning plan.[8/] It follows that issuance of the "possession only license" -- which precedes issuance of the decommissioning order -- cannot be contingent on the NRC's first approving the decommissioning plan.

Moreover, the NRC Staff has requested decommissioning information to accompany LILCO's January 5 submittal, determining that the application for a "possession only license" should be supported by information that provides the NRC with an accurate description of the proposed "possession only" condition and of plans for the "ultimate disposition" of the facility. LILCO, on behalf of LIPA, has now submitted such information to the NRC.[9/]

[8/] In particular, § 50.82 states that

> [i]f the decommissioning plan demonstrates that the decommissioning will be performed in accordance with the regulations in this chapter and will not be inimical to the common defense and security or to the health and safety of the public . . . , the Commission will approve the plan . . . and issue an order authorizing the decommissioning.

10 C.F.R. § 50.82(e)(emphasis added). Thus, the regulation clearly provides that issuance of the decommissioning order occurs contemporaneously with the NRC's approval of the decommissioning plan.

[9/] On April 16, 1990, LILCO submitted to the NRC, under cover of SNRC-1713, LIPA's Decommissioning Report for Shoreham. As noted in SNRC-1713, the Decommissioning Report was submitted in support of LILCO's January 5 request. LILCO further pointed out that while the "Decommissioning Report . . . [does] not constitute the decommissioning plan required by 10 C.F.R. § 50.82," the document does "furnish an accurate description of the current status of LIPA's planning for the ultimate disposition of Shoreham . . . ." SNRC-1713 at 2.

The Staff's approach is consistent with the rule and the Commission's Supplementary Information.

III. Petitioners' "Supplement" Misapprehends the NRC's Process in Reviewing LILCO's Amendment Request and Provides No Basis for the Staff to Reconsider its Proposed Determination

In their October 10 Supplements, Petitioners allege that two documents sent by LILCO to the NRC Staff after the Staff had issued its proposed finding "confirm that the proposed no significant hazards determination is a nullity and that a prior hearing is needed." SWRCSD Supplement at 2; SE_2 Supplement at 2. In making this claim, Petitioners are, at best, confused.

Petitioners contend that a "proposed no significant hazards determination is an announcement that the proposed action, as it stands at the time of that proposed determination, meets the tests of 10 C.F.R. § 50.92." SWRCSD Supplement at 2; SE_2 Supplement at 2. Any "subsequent change to the proposed action after such notice is given," Petitioners continue, "nullifies any possible validity of the preceding proposed determination and necessitates a new technical review followed by a new proposed determination with a new public notice and a new opportunity to comment." Id. With this notion as their predicate, and seizing upon the fact that on August 30, 1990, LILCO transmitted to the NRC, under cover of SNRC-1752, a revised set of technical specifications for Shoreham in its defueled mode, Petitioners assert that the

> proposed no significant hazards determination issued August 15, 1990 and published August

> 21, 1990 cannot be apply [sic] to this proposed set of Technical Specifications since they were not formally submitted to the Commission until August 30, 1990.

SWRCSD Supplement at 3; SE_2 Supplement at 3.

Petitioners, at best, misapprehend the process the NRC has followed in evaluating LILCO's January 5 license amendment request. To hear Petitioners describe it, the technical specifications submitted by LILCO on August 30 constituted a "wholesale replacement" of the technical specifications previously sent to the NRC as part of LILCO's initial January 5 request. SWRCSD Supplement at 3; SE_2 Supplement at 3. This is simply not true. As SNRC-1752 itself makes clear, the set of technical specifications sent by LILCO to the NRC on August 30 was <u>not</u> an entirely new set of technical specifications, but rather a set of Staff-approved modifications to the technical specifications initially submitted on January 5.

Specifically, on June 27, 1990, the NRC Staff had sent to LILCO the Staff's initial comments and proposed changes to the defueled technical specifications that had been submitted by LILCO on January 5. On August 2, 1990, LILCO and the NRC Staff met in a publicly-noticed meeting to discuss the Staff's comments. As SNRC-1752 indicates, the technical specifications sent by LILCO to the NRC on August 30 directly reflected the "agreements reached with the NRC Staff at the August 2, 1990 meeting and subsequent discussions with Messrs. Brown and Miller." SNRC-1752 at 1.

Thus, the revisions to the Shoreham technical specifications initially submitted by LILCO on January 5, 1990 were fully considered and approved by the Staff prior to its making its proposed "no significant hazards consideration" determination on August 15 (published in the Federal Register on August 21). It is obviously insignificant that, as it so happened, the final revised set of technical specifications was not physically reproduced by LILCO and mailed back to the NRC until after the proposed determination had been issued.[10/]

With respect to Petitioners' second point, concerning SNRC-1745 (August 21, 1990), which requests separate consideration by the Staff of LILCO's proposed elimination of the Shoreham Independent Safety Engineering Group (ISEG), it is not entirely clear what it is Petitioners are complaining about. At one point, Petitioners remark that

> [w]hat is most revealing about this August 21 request is that this request for one minute (but significant) part of one of the twenty-two proposed changes is supported by a more detailed justification in terms of 10 C.F.R. § 50.92 than was previously provided for all twenty-two changes.

10/ As for Petitioners' allegation that they have not been provided an "opportunity to evaluate [the Staff's] analysis based on the final version" of the technical specifications," SWRCSD Supplement at 3-4; SE_2 Supplement at 3-4, it is telling that, although the August 2 meeting between LILCO and the Staff in Rockville, Maryland was publicly noticed, neither SWRCSD or SE_2 chose to send any representatives to this meeting. Moreover, neither SWRCSD nor SE_2 was unaware of the revision process undertaken by the Staff and LILCO; counsel for both SWRCSD and SE_2 was copied on the June 27, 1990 letter by which the Staff transmitted to LILCO the Staff's initial proposed revisions to the Shoreham technical specifications, and in which the Staff requested a meeting to resolve any differences.

SWRCSD Supplement at 5; SE_2 Supplement at 5. It is not apparent how the respective lengths of the § 50.92 analyses impugn the thoroughness or adequacy of either of those analyses. In any event, what Petitioners overlook is that the § 50.92 analysis that LILCO submitted as part of its January 5 license amendment request incorporates by reference the entire DSAR, which provides an extremely detailed technical analysis in support of the amendment application.

Relatedly, included in § 13.4.3 of the DSAR is the technical justification for the elimination of the ISEG with Shoreham in a defueled mode. Petitioners complain about the elimination of the ISEG, asserting that "[i]t is obvious that this change would 'involve a significant reduction in a margin of safety' by removing an engineering safeguard determined to be essential." SWRCSD Supplement at 6-7; SE_2 Supplement at 6-7. The DSAR analysis demonstrates why this is not the case.

In sum, there is no regulatory impediment to the NRC's consideration and approval of LILCO's January 5 license amendment request. The Staff should make a final finding of "no significant hazards consideration" and grant the amendment effective upon issuance.

IV. Legal Standard for Intervention in NRC Proceedings

The right to a hearing in an NRC proceeding flows from § 189 of the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011 et seq., which provides, in relevant part, as follows:

> In any proceeding under this chapter, for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control, . . . the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding.

42 U.S.C. § 2239(a)(1)(emphasis added). Thus, the Atomic Energy Act does not prescribe a mandatory hearing to amend an operating license. Rather, a hearing need be held only if a person requests a hearing and that person establishes an interest that may be affected by the outcome of that proceeding. See, e.g., Niagara Mohawk Power Corp. (Nine Mile Point Nuclear Station, Unit 2), LBP-83-45, 18 NRC 213 (1983).

The NRC's implementing regulation, 10 C.F.R. § 2.714, specifies that a petition to intervene must "set forth with particularity" the petitioner's interest in the proceeding and how that interest may be affected by its results. 10 C.F.R. § 2.714(a)(2).[11/] The petitioner is also required to identify the "specific aspect or aspects of the subject matter of the proceeding as to which the petitioner wishes to intervene." Id.[12/]

11/ The regulation further provides that, in explaining his interest, the petitioner should give particular attention to (1) the nature of his right under the Act to be made a party to the proceeding; (2) the nature and extent of his property, financial, or other interest in the proceeding; and (3) the possible effect of any order which may be entered in the proceeding on the petitioner's interest. 10 C.F.R. § 2.714(a), (d).

12/ Even if the petitioner is initially successful in demonstrating his "interest," a full-blown proceeding is not guaranteed. Under § 2.714(b), the petitioner must supplement his petition with a list of the contentions that he seeks to litigate, includ-

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Commission case law follows contemporaneous judicial concepts to determine standing. Portland General Elec. Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610 (1976). Following the principles set forth in Sierra Club v. Morton, 405 U.S. 727 (1972), and Warth v. Seldin, 422 U.S. 490 (1975), the Commission in Pebble Springs adopted a two-prong test. First,

> one must allege some injury that has occurred or will probably result from the action involved. Under this "injury in fact test" a mere academic interest in a matter, without any real impact on the person asserting it, will not confer standing.

4 NRC at 613.[13/] Second, the Commission said, one must "allege an interest 'arguably within the zone of interest' protected by the statute." 4 NRC at 613. In other words, unless the petitioner alleges that he will suffer an "injury in fact" to an interest that falls within the "zone of interest" protected by the Atomic Energy Act or the National Environmental Policy Act, 42 U.S.C. §§

12/ (...continued)
ing, as to each, an explanation of its basis, the alleged facts or expert opinion being relied upon (including documentary and other references), and a demonstration that a genuine dispute exists on a material issue of law or fact. 10 C.F.R. § 2.714(b)(2)(i)-(iii); see 54 Fed. Reg. 33,180 (Aug. 11, 1989). Significantly, if the petitioner "fails to file a supplement that satisfies the requirements of paragraph (b)(2) of this section with respect to at least one contention," the petitioner "will not be permitted to participate as a party." 10 C.F.R. § 2.714(b)(1).

13/ The test for whether a petitioner has suffered or will suffer an "injury in fact," the Commission has added, is "whether a cognizable interest of the petitioner might be adversely affected if the proceeding has one outcome rather than another." Nuclear Engineering Co., Inc. (Sheffield, Ill., Low-Level Radiological Waste Disposal Site), ALAB-473, 7 NRC 737, 743 (1978).

4321 et seq. (NEPA) -- the two pertinent statutes -- the petitioner will not be granted a hearing or otherwise allowed to intervene in a proceeding.

V. Issuance of the Amendment Would Not Cause an "Injury in Fact" to Petitioners' Interests under the Atomic Energy Act

As shown above, Petitioners have failed to demonstrate that the Staff's proposed "no significant hazards consideration" determination should be reversed. Thus, under the "Sholly" provisions of 42 U.S.C. § 2239(a)(2)(A) and § 50.91(a)(4), Petitioners have no right to a prior hearing on the amendment request.

Moreover, Petitioners' request for a hearing after the license amendment is issued should also be denied. Petitioners have failed to show that, if the amendment were granted, they would suffer an "injury in fact" to an interest under the Atomic Energy Act. As with their previous requests for hearing on Shoreham amendments, Petitioners have again voiced their displeasure with LILCO's decision not to operate Shoreham, alleging that the January 5 request is merely a element of an ongoing scheme to "de facto decommission" the plant.[14/] But in order to

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[14/] To this argument Petitioners do add a new twist, arguing that

> [i]n obtaining the benefits that result from the license to operate a plant, a licensee also shoulders the burden of maintaining the plant operational for so long as the licensee holds the license and the NRC determines that the public interest is best served by an operable plant.

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demonstrate standing, Petitioners must do something more. They must specifically allege that the NRC action at issue -- granting the amendment -- presents a radiological health and safety threat cognizable under the Atomic Energy Act.

Petitioners have not made any such assertion. They simply advance vague, unparticularized allegations that the proposed amendment would "violate the Atomic Energy Act" and "by definition, increase the risk of radiological harm" to Petitioners. SWRCSD Petition at 26-27; SE_2 Petition at 28. Despite this and similar statements, Petitioners never explain how a license amendment that is directed toward the shutdown of the Shoreham plant increases their radiological risk. Their generalized allegation of harm, by itself, is insufficient. Cf. Sequoyah

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SWRCSD Petition at 31; SE_2 Petition at 33. Petitioners continue that the

> fact that LILCO and the State of New York may have determined that they wish Shoreham decommissioned is not the last word on the matter. The Commission must make a proper determination of the public interest, from local, state, and national perspectives weighing the environmental, economic, and other impacts and the alternatives before any operable nuclear plant is decommissioned.

SWRCSD Petition at 32; SE_2 Petition at 34 (emphasis in original). Suffice it to say that Petitioners' views -- made here without citation to any authority or precedent -- on the reach and effect of the Atomic Energy Act on the decisions made by private utilities on whether to operate a particular plant have no legal basis. As the NRC has correctly recognized, "[t]he decision as to whether a shutdown will be permanent is, of course, the licensee's." 50 Fed. Reg. 5606 (Feb. 11, 1985).

Fuels Corp. (UF_6 Production Facility), CLI-86-19, 24 NRC 508, 513 (1986)(petitioners' "conclusory assertion of 'danger' is totally inadequate to establish any adverse effect" from the terms of an order under which the licensee retained its "responsibility for conducting operations in a safe manner consistent with all license conditions and other regulatory requirements").

The only point Petitioners make that arguably might be seen as an allegation that the amendment poses a radiological threat is their "position that a proposed no significant hazards determination may not be issued before the Commission completes its technical review of the proposed changes." SWRCSD Petition at 33-34; SE_2 Petition at 35-36. But this claim misapprehends the mechanics of the NRC's license amendment process.

The Staff need not complete its technical review in order to make a proposed "no significant hazards consideration" finding on LILCO's license amendment request. The "no significant hazards consideration" finding is not a substantive safety finding for which any such technical review is required. See 51 Fed. Reg. 7746 (March 6, 1986).[15/] Thus, Petitioners' remark that the

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15/ In issuing its final rule on procedures and standards for making "no significant hazards consideration" determinations, the NRC noted that it was

> important to bear in mind as one reads this background statement and the final regulations that there is no intrinsic safety significance to the "no significant hazards consideration" standard. Neither as a notice standard nor as a standard about when a hearing may be held does it have a substantive safety significance. Whether or not an ac-

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Staff's notice "indicates that the Staff has not completed technical review of the application," SWRCSD Petition at 33; SE_2 Petition at 35 is beside the point. Before the Staff issues the amendment, it will complete such review and make the health and safety findings required under 10 C.F.R. § 50.57(a).[16/]

15/ (...continued)

> tion requires prior notice or a prior hearing, no license and no amendment may be issued unless the Commission concludes that it provides reasonable assurance that the public health and safety will not be endangered and that the action will not be inimical to the common defense and security or to the health and safety of the public. . . . In short, the "no significant hazards consideration" standard is a procedural standard which governs whether an opportunity for a prior hearing must be provided before action is taken by the Commission . . . .

51 Fed. Reg. 7746 (March 6, 1986)(emphasis added).

16/ Relatedly, Petitioners also charge that the August 21 notice contains "no detailed findings" regarding whether any of the "22 proposed changes" in LILCO's license amendment request (1) involve a significant increase in the probability or consequences of an accident previously evaluated, (2) could create a possibility of a new or different kind of accident from any accident previously evaluated, or (3) involve a significant reduction in a margin of safety. SWRCSD Petition at 34-35; SE_2 Petition at 36-37. Petitioners' mere recitation of the 10 C.F.R. § 50.92(c) standards for making a "no significant hazards consideration" finding does not properly assert an "injury in fact" under the Atomic Energy Act. Indeed, the August 21 notice specifically notes that the "Commission has determined that the above significant hazards consideration analysis is applicable to each proposed change to the license." 55 Fed. Reg. 34,100 (Aug. 21, 1990). If Petitioners have some reason to believe that this proposed finding is incorrect, they are certainly free to try to so demonstrate. But, as previously noted, they make no effort to engage the § 50.92 standards, preferring instead simply to argue (wrongly) that consideration of LILCO's request is premature under the NRC's decommissioning regulations.

What Petitioners' argument ultimately boils down to are two interrelated assertions: first, that NRC consideration and approval of the license amendment request would violate the Atomic Energy Act because such consideration and approval would not be in conformity with the decommissioning regulations; and second, that the license amendment, if granted, might present a radiological health and safety threat should some future decision be made to operate Shoreham.[17/] The first part of Petitioners' argument is flawed for the same reasons given above: NRC approval of a full decommissioning plan is not a prerequisite for issuance of a "possession only license." The second part of their argument raises concerns that are not relevant to the license amendment itself, but are associated rather with the hypothetical future operation of Shoreham. To the extent Petitioners try to introduce such issues, their attempt to expand the

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17/ For instance, among the "specific aspects" as to which Petitioners state they seek to intervene is whether the

> amendment would allow deterioration and dismantling of the facility and thereby undermine the reasonable assurance that full power operation, should it ultimately be pursued, would or could be conducted with reasonable assurance of the public health and safety and national defense and security, particularly the reasonable assurance of the Petitioners' protection (including their real and personal property) from the radiological hazards of operating the facility.

SWRCSD Petition at 22; SE_2 Petition at 24. Elsewhere, Petitioners assert that, since the "alternative of operation has not been foreclosed," the changes to Shoreham's technical specifications contemplated by the license amendment "are per se threats to health and safety." SWRCSD Petition at 23; SE_2 Petition at 25.

scope of the proceeding is impermissible under the principles set forth in Bellotti v. NRC, 725 F.2d 1380.[18/]

VI. Issuance of the Amendment Would Not Cause an "Injury in Fact" to Petitioners' Interests under NEPA

Petitioners have also failed adequately to allege an injury under NEPA. In order to link the proposed license amendment with the alleged environmental harms of which they complain, they assert that the amendment is "one segmented part in implementation of a proposed major Federal action which, if approved, will significantly affect the quality of the human environment." SWRCSD Petition at 35-36; SE_2 Petition at 37-38. The "injury" asserted by SWRCSD is the

> adverse health and other environmental consequences of non-operation of Shoreham cognizable under NEPA, for example, the air pollution produced by the oil and/or gas burning plants which would be necessary substitutes for Shoreham.

SWRCSD Petition at 19. As for SE_2, they assert they have a cognizable interest under NEPA in the

> radiologically safe and environmentally benign operation of Shoreham to provide them with reliable electricity and to avoid the substitution of fossil fuel plants relying on imported oil and gas, which would contribute not only to acid rain, the greenhouse effect, and other effects adverse to the physical environment, but also to our national trade deficit and the endangerment of national

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18/ The significance of the Bellotti case with respect to Petitioners' attempts to introduce matters that fall outside the scope of a proceeding as it is defined by the NRC is discussed in LILCO's May 3 Opposition at 18-22.

> energy security and other effects adverse to our society.

SF_2 Petition at 19. Contending that "preparation of an [environmental impact statement] and a final decision is required before any part of the decommissioning proposal may be implemented," Petitioners maintain that the proposed license amendment "cannot be approved prior to NEPA review of the whole decommissioning proposal." SWRCSD Petition at 36; SE_2 Petition at 38.

Petitioners' argument fails for two reasons. First, as noted above, the § 50.82 license termination and decommissioning process has not yet begun at Shoreham, and a formal decommissioning plan has not yet been submitted. When an application under § 50.82 is made, Shoreham's licensee will also submit a supplement to the plant's environmental report to cover the post operating license stage, as required by 10 C.F.R. § 51.53(b). At that point, the NRC Staff will begin an environmental review of decommissioning as provided by § 51.95(b).[19/] In the meantime, Petitioners' call for a full environmental review of Shoreham's decommissioning in connection with LILCO's January 5 license amendment application is premature.

19/ Contrary to Petitioners' claim, it is not the case that the environmental review of Shoreham's decommissioning must take the form of a full environmental impact statement. Rather, after consideration of the licensee's supplement to the environmental report and preparation of an environmental assessment the NRC Staff may determine that the environmental impacts of Shoreham's decommissioning have been adequately addressed already in the Generic Environmental Impact Statement on Decommissioning of Nuclear Facilities (NUREG-0586)(May 1988), either as is, or with a site-specific factual supplement. See, e.g., 53 Fed. Reg. 24,039 (June 27, 1988).

Second, and more important, it is not true that the environmental harms that Petitioners perceive they will suffer if Shoreham does not operate would be caused by any action of the NRC, much less by the issuance of the proposed license amendment. In arguing to the contrary, and by asserting that the NRC is allowing LILCO to engage in "de facto decommissioning," Petitioners misapply NEPA.

Even if it were assumed that Petitioners' speculation regarding the possible future construction of fossil-fired plants eventually proves true, it does not follow that the NRC's environmental review of Shoreham's decommissioning under NEPA must include either an assessment of these alleged indirect effects of the plant's abandonment or a discussion of the alternative of plant operation. The decision not to operate Shoreham -- which (rather than the plant's decommissioning per se) is the cause of any need for replacement capacity -- was made by a private entity, LILCO. This decision does not require federal approval, and, thus, is not subject to federal environmental review under § 102 of NEPA, which governs only "major federal actions." Petitioners assert, to the contrary, that,

> [w]hile the decommissioning proposal has been advanced by LILCO, a non-federal entity, the NRC's on-going supervision of the licensee's activities and the need for NRC approval of the various steps in the decommissioning process make what otherwise might be a major private action in another industry into a "major federal action."

SWRCSD Petition at 37; SE_2 Petition at 39. This extends the scope of NEPA far too broadly. It is true that, as a general

proposition, a private action may be "federalized" for purposes of NEPA if federal agency approval -- such as permits, leases, and other forms of permission -- must be obtained in order for the private party to take the action. See, e.g., Scientists' Inst. for Pub. Information v. AEC, 481 F.2d 1079 (D.C. Cir. 1973). But this general principle does not stretch as far as Petitioners would have it. The private action that has been "federalized" here is the physical act of decommissioning itself. LILCO's decision not to operate Shoreham is not "federalized," however, because no NRC (or other federal) approval is required for LILCO to decide to close the facility. Accordingly, while the physical act of Shoreham's decommissioning requires NRC approval and is subject to environmental review, see 10 C.F.R. § 51.95(b), LILCO's decision to shut down Shoreham is not. Cf. Winnebago Tribe of Nebraska v. Ray, 621 F.2d 269, 272-73 (8th Cir. 1980), cert. denied, 449 U.S. 836 (1980)("[c]ompletion of the non-federal aspects of [a] single project does not constitute a secondary or indirect effect of the federal action").

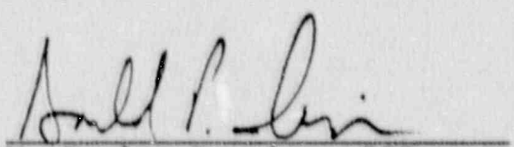
Accordingly, Petitioners' statement that the "proposed amendment would make the intended benefit and purpose of Shoreham . . . more remote in time and less likely in fact," SWRCSD Petition at 39; SE_2 Petition at 41, is a non sequitur. LILCO's January 5 license amendment request is not the reason Shoreham will not operate. Indeed, even if the amendment were not granted, LILCO still would not operate the plant.

Moreover, the adverse consequences Petitioners purportedly fear -- e.g., greater use of fossil fuels, with alleged corresponding environmental degradation -- would result (if, indeed, they result at all) not from the issuance of the amendment, or from the decommissioning of the plant, or even from LILCO's decision to abandon Shoreham itself, but from the future use of fossil-fired replacement plants. As none of the NEPA-related "injuries" that Petitioners allege stem from the NRC action that is at issue in the proceeding, Petitioners' attempt to introduce such matters is inconsistent with Bellotti.

VII. Conclusion

For the reasons given above, the petitions for leave to intervene and requests for hearing should be denied.

Respectfully submitted,



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DATED: October 12, 1990

LILCO, October 12, 1990

CERTIFICATE OF SERVICE

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

I hereby certify that copies of LONG ISLAND LIGHTING COMPANY'S OPPOSITION TO INTERVENTION PETITIONS AND REQUESTS FOR HEARING ON ITS JANUARY 5 REQUEST TO REMOVE OPERATING AUTHORITY FOR SHOREHAM were served this date upon the following by Federal Express.

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