LILCO, May 6, 1991

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

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

LILCO'S OPPOSITION TO PETITIONERS' REQUEST FOR HEARING ON SHOREHAM TRANSFER AND LILCO'S RESPONSE TO COMMENTS ON PROPOSED NO SIGNIFICANT HAZARDS CONSIDERATION DETERMINATION

I. Introduction

On April 19, 1991, Petitioners Shoreham-Wading River Central School District (SWRCSD) and Scientists and Engineers for Secure Energy, Inc. (SE_2) submitted essentially identical petitions for leave to intervene and requests for hearing on the application filed jointly by Long Island Lighting Company (LILCO) and the Long Island Power Authority (LIPA) on June 28, 1990, for a license amendment transferring the Shoreham Nuclear Power Station (Shoreham) to LIPA. Petitioners also submitted comments objecting to the NRC Staff's proposed determination that the

license transfer amendment presents no significant hazards consideratic

Pursuant to 10 C.F.R. § 2.714(c), LILCO opposes Petitioners' hearing requests.[1/] As shown below, Petitioners have failed to demonstrate that they have standing to intervene in the proposed license transfer amendment proceeding.

Further, LILCO urges the Commission to exercise its inherent supervisory authority over the conduct of its proceedings to strike Petitioners' April 19 pleadings. By continuing to insist that the NRC must consider the operation of Shoreham as an "alternative" under the National Environmental Policy Act, 42 U.S.C. §§ 4321 et seq. (NEPA), Petitioners have disregarded explicit Commission guidance on the scope and applicability of NEPA to Shoreham's situation. Petitioners' refusal to accept direction from the Commission, and their clear intent -- if given the chance -- to reclamor lost issues, dictate that they be warned against further attempts to frustrate the NRC's regulatory process.

II. Petitioners Have Failed to Demonstrate Standing

The legal standard for intervention in NRC proceedings has been discussed at length in papers filed previously with the Commission concerning Petitioners' requests for hearing on the

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1/ Petitioners' hearing requests are referred to generally as "April 19 hearing requests" or "April 19 pleadings." Where it is necessary to refer specifically to the pleadings, these short forms are used: SWRCSD Transfer Petition and SE_2 Transfer Petition.

confirmatory order, physical security plan, emergency preparedness, and POL amendment proceedings. That standard is summarized briefly below. When its requirements are applied to Petitioners' April 19 hearing requests, Petitioners' lack of standing become unavoidably clear.

A. Legal Standard for Intervention

The right to a hearing in an NRC licensing proceeding, including a proposed license transfer amendment, stems from § 189 of the Atomic Energy Act:

> 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). The Atomic Energy Act does not prescribe a mandatory hearing in the case of a license amendment. Rather, under § 189, a hearing need be held only if a person requests a hearing and is able to demonstrate an interest that may be affected by the outcome of the 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 provides 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).[2/] 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.

NRC case law follows contemporaneous judicial concepts to determine standing. Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 490 (1976). Following the principles established in Sierra Club v. Morton, 405 U.S. 727 (1972), and Warth v. Seldin, 422 U.S. 490 (1975), the NRC 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. Moreover, the alleged injury must be "distinct and palpable." Vague and unparticularized allegations of harm are insufficient. See, e.g., Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-1, 33 NRC 15, 22 (1991), citing Dellums v. NRC, 863 F.2d 968, 971 (D.C. Cir. 1988); Nuclear Engineering Co. (Sheffield, Illinois Low-Level

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2/ Further, the regulation requires that, in explaining his "interest," the petitioner must give particular attention to (1) the nature of his right under the Atomic Energy 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 his interest. 10 C.F.R. § 2.714(a), (d).

Radioactive Waste Disposal Site), ALAB-473, 7 NRC 737, 743 (1978).

Second, 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 "zones of interest" protected by the Atomic Energy Act or NEPA, the petitioner will not be granted a hearing.

B. Petitioners' April 19 Hearing Requests Fail to Meet the NRC's Standard for Intervention

In their April 19 hearing requests, Petitioners spend some 40 pages trying to demonstrate that they have standing to intervene in the license transfer amendment proceeding. But, as explained more fully in part III below, their April 19 pleadings largely rehash arguments already rejected by the Commission. Petitioners have advanced only one truly new argument in the instant petitions: they contend that LIPA is not qualified -- financially, technically, or managerially -- to hold Shoreham's license. See SWRCSD Transfer Petition at 28-30; SE_2 Transfer Petition at 27-29.[3/] Even with respect to this new issue,

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3/ Petitioners do toss out, once again, a slew of other organizational and representational "interests" that they purportedly seek to protect through intervention in the proceeding. Among these now-familiar "interests," Petitioners allege that Shoreham's closure will cost SWRCSD considerable tax revenues (SWRCSD Transfer Petition at 19) and will deprive both Petitioners' represented members of an "adequate and reliable supply of electricity." SWRCSD Transfer Petition at 18-19; SE_2 Transfer Petition at 18. These allegations are easily dismissed.

(continued...)

however, Petitioners fail to demonstrate standing, for two reasons.

First, and most important, it is impossible to separate Petitioners' assertion that LIPA is not fit to hold Shoreham's license from their argument -- already rejected by the Commission -- that, under NEPA, the NRC must consider the alternative of Shoreham's operation. Specifically, Petitioners assert that

> issuance of a license for Shoreham to an unqualified licensee, such as LIPA, would constitute a failure to properly maintain and protect the facility in accordance with the full power Operating License . . . and could further erode the alternative of full-power operation by, among other things, increasing the costs, in time and money, of returning to full power operation.

SWRCSD Transfer Petition at 23; SE_2 Transfer Petition at 22 (emphasis added). The reality that Petitioners miss is that LIPA would not be transferred a full power operating license for Shoreham.[4/] Rather, the proposed license transfer amendment

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3/ (...continued)
In the first place, such "interests" are squarely based on the loss of Shoreham as a nuclear facility, the flip-side of Petitioners' already-rejected view that the "alternative" of Shoreham's operation is a proper subject for the NRC's consideration under NEPA. Moreover, the Licensing Board has already determined that Petitioners' oft-repeated "interests" are inadequate to demonstrate standing. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-1, 33 NRC 15 (1991); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-7, 33 NRC __ (March 6, 1991).

4/ The Joint Application of Long Island Lighting Company and Long Island Power Authority for Amendment to Authorize Transfer of Shoreham (June 28, 1990)(Joint Transfer Application) states that the "fundamental purpose of the requested amendment is designation of LIPA as the NRC licensee for the Shoreham plant under a non-operating license." Joint Transfer Application at 2 & n.3 (emphasis added).

would authorize LIPA only to hold a POL for Shoreham.[5/] This distinction is crucial. It means that, in order to allege that they would suffer an "injury in fact" as a result of the proposed transfer, Petitioners must assert, with sufficient particularity, that LIPA is financially, technically, or managerially unqualified to hold a POL for Shoreham, or that LIPA's alleged lack of such qualifications poses a radiological threat, with the plant in its present (and permanent) defueled mode. But Petitioners have made no such allegations, choosing instead to focus exclusively on Shoreham's "operation," a situation that will never exist and that is irrelevant to the pending license amendment application. Petitioners' insistence on focusing on facts and law that are not at issue is fatal to their attempt to demonstrate standing.

Second, even if Petitioners' April 19 hearing requests were read as alleging that LIPA is not qualified to hold even a POL for Shoreham, Petitioners still have failed to identify a distinct and palpable "injury in fact." Their April 19 petitions -- and the accompanying affidavits of the represented members -- offer nothing but quintessentially vague and unparticularized allegations of harm. For example, SWRCSD states that it has

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5/ In its Federal Register notice of the proposed amendment, the NRC Staff made clear that the amendment "would authorize the transfer of ownership of the Shoreham license" from LILCO to LIPA "upon or after amendment of the license to a non-operating status." 56 Fed. Reg. 11,781 (March 20, 1991)(emphasis added). The Staff further noted that the amendment of the license "to a non-operating status is a separate matter which was previously noticed and is not indebted in the amendment here proposed." Id.

> an interest in protecting, and an obligation to protect, the health and environment of almost 2000 students and 500 employees, who live and/or work in close proximity to the Shoreham facility, from . . . the possible radiological impacts of the proposed amendment . . . .

SWRCSD Transfer Petition at 18. SWRCSD wholly fails to explain, however, what those "possible radiological impacts" are, or why the transfer of Shoreham's license to LIPA will give rise to such "impacts." Nor are such "impacts" apparent. Petitioners' vague allegation of harm does not demonstrate an injury in fact. See, e.g., Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-1, 33 NRC 15, 22 (1991), citing Florida Power and Light Co. (St Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329 (1989)(absent "situations with obvious potential for offsite consequences, a petitioner must allege some specific injury in fact that will result from the action taken").

The affidavit of Albert G. Prodell, the president of the SWRCSD Board of Education, is similarly vague. At his most concrete, Dr. Prodell asserts that the proposed transfer

> represents a threat to me, and the School District and its students' and employees', personal radiological health and safety and to my and the School District's real and personal property in violation of my and their rights under the Atomic Energy Act of 1954, as amended, since, among other things, LIPA lacks the financial, management, and technical qualifications to become the Shoreham Plant license transferee.

Prodell Affidavit at ¶ 10. No further description of this alleged "threat," or any rationale why LIPA's supposed lack of qualifications presents such a threat, is provided.

The nearly identical SE_2 petition, and its accompanying affidavits, suffer from the same defect. As does SWRCSD, SE_2 asserts baldly that it has an "interest in protecting" the "health and environment of its members, who live and/or work in close proximity to the Shoreham facility," from the "possible radiological impacts of the proposed amendment." SE_2 Transfer Petition at 17. The affidavits submitted by SE_2's represented members similarly fail to offer anything beyond the ritual assertion that the "transfer also represents a threat to my radiological health and safety" since "LIPA lacks the financial, technical and management qualifications to become the transferee of the Shoreham Plant license." Affidavits of Dr. John L. Bateman and John R. Stehn at ¶ 7; Affidavits of Eena-Mai Franz, Dr. Stephen V. Musolino, and Joseph Scrandis at ¶ 6.

III. Petitioners' April 19 Pleadings Should be Struck for their Disregard of Dispositive Commission Decisions

As shown in part II above, Petitioners have failed to demonstrate standing to intervene in the Shoreham license transfer amendment proceeding. Their April 19 hearing requests can be denied on that basis alone.

LILCO urges, however, that the Commission do more than simply deny Petitioners' hearing requests. The Commission should also strike the April 19 pleadings because they blatantly disregard the Commission's guidance on the scope and

applicability of NEPA to Shoreham. This is not proper advocacy, and it should not be tolerated.

A. The Commission Has Already Considered and Rejected Petitioners' NEPA-Based Claims

From the moment they first began to oppose LILCO's decision not to operate Shoreham, Petitioners' principal legal argument has been that, as part of an environmental review under NEPA, the NRC is required to consider and assess operation of Shoreham as an "alternative" to the plant's decommissioning. Petitioners first raised this NEPA argument in their § 2.206 petitions, filed on July 14, 1989 (SWRCAD) and July 26, 1989 (SE_2).[6/] Petitioners repeated this NEPA claim in their requests for hearing on (1) the NRC's issuance on March 29, 1989 of a confirmatory order prohibiting LILCO from placing fuel in the Shoreham reactor vessel without prior NRC permission, (2) LILCO's request to amend the Shoreham Physical Security Plan, (3) LILCO's request for a license amendment suspending the effect of certain license conditions relating to offsite emergency preparedness

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6/ Those § 2.206 petitions, along with six supplements, were denied on December 20, 1990. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), DD-90-08, 32 NRC 469 (1990). On March 25, 1991, Petitioners sought review, inter alia, of DD-90-08 in the U.S. Court of Appeals for the District of Columbia Circuit. Shoreham-Wading River Central School District v. NRC (D.C. Cir. No. 91-1140)

while Shoreham is in a defueled mode, and (4) LILCO's application for a POL for Shoreham.[2/]

The Commission has already considered Petitioners' NEPA argument, and, on two separate occasions, has unambiguously rejected it. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-90-08, 32 NRC 201 (1990), petition for reconsideration denied, CLI-91-02, 33 NRC __ (Feb. 22, 1991). The Commission has reiterated its rejection of Petitioners' position on two other occasions. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-91-01, 33 NRC 1, 7 (1991); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-91-04, 33 NRC __, slip op. at 4 (April 3, 1991).

In CLI-90-08, the Commission held that the "NRC Staff need not file an [environmental assessment] or an [environmental impact statement] reviewing and analyzing 'resumed operation' of

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2/ Petitioners submitted requests to intervene with respect to the confirmatory order on April 18, 1990. On April 20 and April 30, 1990, Petitioners submitted requests to intervene in the physical security plan and emergency preparedness amendment proceedings, respectively. In an order dated January 8, 1991, Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-1, 33 NRC 15 (1991), the Licensing Board denied all three sets of Petitioners' requests but provided them with an opportunity to submit amended petitions. Petitioners did so on February 4, 1991, and those amended petitions are currently pending before the Board. On September 20, 1990, Petitioners also submitted requests to intervene in the POL proceeding. (Those petitions to intervene in the POL proceeding are referred to here as SWRCSD POL Petition and SE_2 POL Petition). In an order dated March 6, 1991, Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-7, 33 NRC __ (March 6, 1991), the Board denied those initial requests for hearing on the POL amendment, but, again, provided Petitioners with an opportunity to submit amended requests. Petitioners did so on April 8, 1991, and those amended petitions are now pending.

Shoreham as a nuclear power plant as an alternative under NEPA." 32 NRC at 208. In reaching that conclusion, the Commission stated:

> Under NRC regulations, the NRC must approve of a licensee's decommissioning plan . . ., including consideration of alternative ways whereby decommissioning may be accomplished; but nowhere in our regulations is it contemplated that the NRC would need to approve of a licensee's decision that a plant should not be operated.

32 NRC at 207 (emphasis in original). The Commission went on to state that,

> [a]ccordingly, even if we characterize these NRC actions as preparatory to some future NRC decision approving of LILCO's decommissioning plan, this is a far cry from characterizing them as preparatory to some future NRC decision approving of LILCO's decision not to operate Shoreham. Thus, this situation is not like Greene County Planning Board v. FPC . . ., where the federal action is approval of a whole nonfederal program, or a federal action is a legal condition precedent to accomplishment of an entire nonfederal project. LILCO is legally entitled under the Atomic Energy Act and our regulations to make, without any NRC approval, an irrevocable decision not to operate Shoreham. The alternative of "resumed operation" -- or other methods of generating electricity -- are alternatives to the decision not to operate Shoreham and thus are beyond Commission consideration.

Id. (emphasis in original)(footnote omitted).

In response to Petitioners' motion for reconsideration of CLI-90-08, the Commission again expressly rejected Petitioners' NEPA-based assertion, stating that the

> fundamental flaw in petitioners' . . . arguments is their overly expansive view of the NRC actions at issue here. . . . [A]s

> we took pains to make clear in CLI-90-08, the NRC action subject to NEPA is, by its broadest terms, confined to review and approval of the method of Shoreham decommissioning. Petitioners' argument that we have authority over the entire agreement to decommission Shoreham is simply incorrect.

CLI-91-02, slip op. at 7-8 (footnote omitted). Another way to "examine petitioners' arguments," the Commission continued, is "to focus on the relative order of LILCO's decision not to operate and subsequent future NRC actions." CLI-91-02, slip op. at 9. In this regard, the Commission pointed out that

> LILCO's decision not to operate Shoreham occurs prior to . . . any "federal action" which may someday occur, i.e., a potential NRC order accepting a decommissioning plan for Shoreham under 10 C.F.R. 50.82. It may be true that "but for" the decision not to operate Shoreham, LILCO would not be able to seek permission to decommission the facility. But private, non-federal actions undertaken prior to or leading to actions which do require federal permission do not, in and of themselves, trigger NEPA requirements.

Id. at 9 (emphasis in original).

In CLI-91-01, a decision focused largely on the type of decommissioning planning information (including environmental information) that must be provided to the NRC prior to issuance of a POL, the Commission noted that "Petitioners are concerned not with alternative ways to decommission, but with operation as an alternative to decommissioning." 33 NRC at 7. The Commission stated that it had "addressed this . . . matter in CLI-90-08." Id.

Similarly, in CLI-91-04, in which the Commission dismissed as interlocutory Petitioners' "appeal" from LBP-91-1 (the

Licensing Board's denial of Petitioners' initial hearing requests on the confirmatory order, physical security plan, and emergency preparedness license amendments), the Commission again noted that its comments in CLI-90-08 were directed toward

> the narrowness of the decision to decommission Shoreham and were intended to emphasize that the focus of any NEPA alternative review that may be required would be on alternative ways to decommission rather than the alternative of operation.

CLI-91-04, slip op. at 4.

In short, on at least four separate occasions, the Commission has told Petitioners that the alternative of Shoreham's operation as a nuclear facility need not be considered under NEPA. But Petitioners refuse to listen.

B. Petitioners' April 19 Requests Recycle their Already-Rejected NEPA Argument

In their April 19 requests for a hearing on the Shoreham transfer amendment application, Petitioners pretend as if the Commission never issued CLI-90-08 and CLI-91-02. Indeed, insofar as their NEPA-based argument is concerned, Petitioners' April 19 pleadings are a verbatim rehash of their earlier requests for hearing on LILCO's request for a POL, papers that were filed over a month before the Commission issued CLI-90-08.[8/] Petitioners

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8/ Moreover, in some places, Petitioners have recycled text from their petitions to intervene on the March 29 confirmatory order, physical security plan, and emergency preparedness license amendments, the very requests -- filed over a year ago -- that prompted the Commission to issue CLI-90-08 in the first place. See note 7, above.

have not engaged the legal issues here at all. Rather, they have merely engaged their word-processor to replicate literally (including the same typographical errors) the very arguments that the Commission has already read, considered, and explicitly rejected.

For example, at the outset of their April 19 requests, Petitioners assert that a

> key point here is that Shoreham's decommissioning is not a foregone conclusion. While LILCO and the State of New York wish to steer Shoreham towards decommissioning, the NRC has yet to formally approve any decommissioning plan and before any such approval . . . may issue, the NRC must complete an Environmental Impact Statement ("EIS") which includes consideration of the alternative of operating Shoreham.

SWRCSD Transfer Petition at 15-16; SE_2 Transfer Petition at 15-16 (first emphasis in original, second emphasis added). Petitioners continue that,

> [b]ecause the operation of Shoreham is a viable alternative, the consideration of which is essential to an informed decision, approval of this application before a final NRC decision on the decommissioning proposal would also increase the health and safety risk posed by the plant should the alternative of operation ultimately be pursued.

SWRCSD Transfer Petition at 16; SE_2 Transfer Petition at 16 (emphasis added). Petitioners made this very same argument, using almost exactly these words, in their requests for hearing on LILCO's "possession only" license amendment request, filed over seven months ago. See SWRCSD POL Petition at 16; SE_2 POL

Petition at 16.[9/] Since then, the Commission has ruled that any environmental review associated with Shoreham's decommissioning does not have to include consideration of the alternative of the plant's operation.

Further examples of Petitioners' refusal to recognize the Commission's NEPA holdings in CLI-90-08 and CLI-91-02 abound in their April 19 pleadings. For instance, in describing the "specific aspects" of the proposed transfer amendment as to which they wish to intervene, Petitioners include

> (2) whether, if a decision is made to operate Shoreham, the proposed transfer would totally frustrate or significantly delay and increase the cost of returning the plant to an operational mode; (3) whether the proposed transfer would constitute an irreversible and irretrievable commitment of the Shoreham resource; and (4) whether the transfer would allow deterioration and dismantling of the facility, thereby undermining the reasonable assurance that full power operation, should it ultimately be pursued, would or could be conducted with [sic] consonant with the public health and safety and national defense and security, particularly the reasonable assurance of Petitioners' protection (including their real and personal property) from the radiological hazards of operating the facility.

SWRCSD Transfer Petition at 20-21; SE_2 Transfer Petition at 19-20 (emphasis added). Apart from a few minor changes made to reflect that the regulatory action at issue here involves an amendment to effect license transfer rather than issuance of a POL, this

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9/ The only slight difference is that, in their POL Petitions, Petitioners used the words "any amendment allowing for the deterioration and/or destruction of Shoreham" in place of "approval of this application."

passage is identical to one advanced in Petitioners' POL Petitions. See SWRCSD POL Petition at 21-22; SE_2 POL Petition at 23-24.

Petitioners' disregard for the Commission's authority should not be tolerated. Their April 19 pleadings should be struck. In its Statement of Policy on Conduct of Licensing Proceedings, CLI-81-08, 13 NRC 452 (1981), the Commission stated that "[f]airness to all involved in NRC's adjudicatory procedures requires that every participant fulfill the obligations imposed by and in accordance with applicable law and Commission regulations." 13 NRC 454. When a "participant fails to meet its obligations," the Commission continued, "the imposition of sanctions against the offending party" should be considered. Id. Among the "spectrum" of available sanctions, the Commission said, is the "refus[al] to consider a filing by the offending party." Id.

Such a sanction is appropriate here. At the very time Petitioners are seeking review of CLI-90-08, CLI-91-01, and CLI-91-02 before the U.S. Court of Appeals for the District of Columbia Circuit,[10/] they have filed pleadings with the Commission that do not acknowledge that these decisions even exist, much less that they are controlling in the present case. In their hopeless quest to force Shoreham's operation -- a campaign which, most recently, the D.C. Circuit has aptly

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10/ Shoreham-Wading River Central School District v. NRC (D.C. Cir. No. 91-1140).

characterized as "counter-productive" and a "blunderbuss attack"[11/] -- Petitioners seem to recognize no authority but their own. Unless deterred, it is clear that Petitioners will seek, through the submission of frivolous pleadings like the ones at issue, to frustrate the NRC's process. They should be deterred by having their April 19 pleadings struck.

IV. LILCO's Response to Comment on Proposed No Significant Hazards Consideration Determination

Finally, in their April 19 pleading, Petitioners submit what they style as a "comment" in opposition to the NRC's proposed determination that the license transfer amendment presents no significant hazards consideration. SWRCSD Transfer Petition at 2-11; SE_2 Transfer Petition at 2-11. As best can be determined from Petitioners' stream-of-consciousness prose, Petitioners offer four different reasons why the Staff's proposed determination is inappropriate in the present case. None hold water.

First, Petitioners assert that the

> so-called "Sholly" procedure whereby the Commission make[s] a proposed no significant hazards consideration determination on a proposed license amendment and then makes that amendment immediately effective prior to a hearing upon issuance of a final determination does not apply to a license transfer application for a facility license.

11/ Shoreham-Wading River Central School District v. NRC, No. 90-1241, slip op. at 9 (D.C. Cir. April 30, 1991).

SWRCSD Transfer Petition at 2; SE_2 Transfer Petition at 2 (emphasis in original). Petitioners suggest that the distinction between license amendments and license transfers is clear on the face of the NRC's regulation governing license transfers, 10 C.F.R. § 50.80, which provides, inter alia, that an

> application for transfer of a license shall include as much of the information described in §§ 50.33 and 50.34 of this part with respect to the identity and technical and financial qualifications of the proposed transferee as would be required by those sections if the application were for an initial license.

10 C.F.R. § 50.80(b).[12/]

Petitioners are wrong. To begin with, they overlook that LILCO's and LIPA's Joint Transfer application was filed pursuant to both 10 C.F.R. §§ 50.80 and 50.90.[13/] All of the provisions of § 50.80 -- as well as § 50.90 -- were specifically addressed in the Joint Transfer Application.[14/] Moreover, the NRC has in

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12/ Relatedly, Petitioners assert that the transfer application is not valid because no "information has been provided on the antitrust aspects of the license transfer," as required by 10 C.F.R § 50.80(b) for a Class 103 license. SWRCSD Transfer Petition at 3; SE_2 Transfer Petition at 3. See note 14, below.

13/ See Joint Transfer Application at 2 (the "present application is filed jointly by LILCO and LIPA, pursuant to 10 C.F.R. §§ 50.80 and 50.90, seeking a license amendment authorizing the transfer of Shoreham to LIPA").

14/ As for the alleged failure to provide antitrust information, in fact, the Joint Transfer Application contains a specific section entitled "Antitrust Considerations," that points out that "because the proposed licensee will not operate Shoreham as a nuclear generating station, there are no antitrust implications from the amendment that are within the scope of the (continued...)

the past authorized license transfer through the license amendment process.[15/] Further, if Petitioners mean to suggest that in all cases a prior hearing is required in the event of a license transfer, they offer no support for that proposition. Nor do the NRC's regulations, or the NRC Staff's practice, support any such suggestion.

Second, Petitioners shift from their assertion that the "Sholly procedure" cannot be used in a license transfer to argue that a "no significant hazards consideration" determination is inappropriate in this particular case. Citing a past NRC determination that a proposed minor shift in facility ownership poses no significant hazards consideration,[16/] Petitioners

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14/ (...continued)
NRC's antitrust jurisdiction." Joint Transfer Application at 36. Thus, the Joint Transfer Application concludes, "the proposed license amendment does not require statutory antitrust review pursuant to Section 105 of the Atomic Energy Act and 10 C.F.R. §§ 2.101(e) and 2.102(d)." Id. Petitioners offer nothing to rebut this conclusion, which is indisputably correct.

15/ See, e.g., Illinois Power Co. (Clinton Power Station, Unit 1), 54 Fed. Reg. 13,448 (April 3, 1989); Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), 54 Fed. Reg. 37,063 (Sept. 6, 1989). Indeed, effecting a license transfer through the license amendment process is a long-standing NRC practice. For example, the transfer of operating responsibility for the James A. FitzPatrick Nuclear Power Plant from Niagara Mohawk Power Corporation (NiMo) to the Power Authority of the State of New York was accomplished through a license amendment. See Letter from Gerald K. Rhode, Vice President-Engineering, NiMo, to Benard Rusche, Director of Nuclear Reactor Regulation (Dec. 13, 1976)(Docket No. 50-333). See also note 16, below.

16/ Ironically, the very example that Petitioners cite rebuts their initial claim that the § 50.90 amendment process is inappropriate in the case of license transfers. The Federal Register notice accompanying the proposed license transfer
(continued...)

claim that no such finding can be reached at Shoreham, where the "adjustment is not 'minor,' but total." SWRCSD Transfer Petition at 4; SE_2 Transfer Petition at 4.

Petitioners fail to confront the obvious fact that, unlike the example they cite, the license to be transferred to LIPA will not allow for Shoreham's operation. Plainly, far different considerations are at issue in the case where a POL is to be transferred, in contrast to a transfer where the new licensee will actually operate the facility. In this respect, Petitioners do not even try to engage the NRC Staff's analysis underlying its proposed no significant hazards consideration determination, including its finding that "because the activities to be conducted by LIPA prior to decommissioning plan approval will be limited to continued maintenance of Shoreham in the defueled condition," with "no further irradiation of the existing fuel," there will be "no reduction in any plant safety margins." 56 Fed. Reg. 11,782 (March 20, 1991).

Third, Petitioners argue that "[a]t a minimum," a final determination of no significant hazards consideration should await the outcome of the appeals now pending before the New York

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16/ (...continued)
involving the Grand Gulf Nuclear Station, Unit 1 states that the "NRC staff's review of the application will address those issues necessary for both the issuance of the license amendment pursuant to 10 C.F.R. 50.90 and for approval of transfer of control of licensed activities pursuant to 10 C.F.R. 50.80." 51 Fed. Reg. 39,927 (Nov. 3, 1986)(emphasis added). Cf. 54 Fed. Reg. 11,782 (March 20, 1991)(in addressing proposed license transfer amendment for Shoreham, NRC states "LIPA will be required to satisfy the technical and financial qualifications pursuant to the provisions of 10 C.F.R. 50.80").

Court of Appeals, challenging the validity of the Shoreham Settlement Agreement between LILCO and the State of New York. SWRCSD Transfer Petition at 6; SE_2 Transfer Petition at 6. Petitioners postulate that, subsequent to the license transfer, the New York Court of Appeals may rule that the Settlement Agreement is "legally void" and that, thus, "LIPA lacked the authority to seek that license." Id.

Petitioners' concerns are entirely speculative. Indeed, the assertion that the NRC Staff may not issue a final no significant hazards consideration determination until the New York Court of Appeals has rendered its decision echoes Petitioners' March 8, 1991 request that the Commission stay all regulatory and adjudicatory actions related to Shoreham pending the outcome of those New York state court appeals. As LILCO explained in opposing the stay request, Petitioners have made no showing at all that the New York Court of Appeals is likely to overturn the Settlement Agreement. See LILCO's Opposition to Joint Motion for Stay at 15-17 (March 25, 1991). Equally important, it is inappropriate for Petitioners to raise anew their demand for a stay in the present context.

Fourth, Petitioners argue that the proposed no significant hazards consideration determination is "fatally premature." SWRCSD Transfer Petition at 10; SE_2 Transfer Petition at 10. The "issuance of a proposed no significant hazards determination," Petitioners say, "does not allow the Commission [to] ignore the dictates of its own duly established regulations." Id. at 9. It

is none too clear what Petitioners have in mind. At one point, they seem to be arguing that the NRC cannot approve the license transfer amendment until LILCO has submitted, and the NRC has approved, a decommissioning plan for Shoreham.[17/] For instance, Petitioners claim that the

> Commission 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 Transfer Petition at 7; SE_2 Transfer Petition at 7.

Petitioners do not explain, nor is it apparent, why a license transfer amendment application filed pursuant to §§ 50.80 and 50.90 demands concomitant compliance with the decommissioning provisions of § 50.82.[18/] Moreover, the regulatory "predicate"

17/ Petitioners consider the decommissioning plan submitted to the NRC by LIPA on December 29, 1990 to be "irrelevant." SWRCSD Transfer Petition at 8 & n.4; SE_2 Transfer Petition at 8 & n.4. In a startlingly recondite -- and incorrect -- reading of the NRC's decommissioning regulations, Petitioners dismiss the LIPA plan "because it is not the 'licensee' plan" called for by 10 C.F.R. § 50.82. Id. Petitioners overlook three things. First, and most obviously, at the time that Shoreham is to be decommissioned, LIPA will be Shoreham's licensee. Second, on January 2, 1991, LILCO formally requested that the NRC consider LIPA's decommissioning plan "as the one which must be submitted prior to or with an application for termination of license." Letter from John D. Leonard, Jr., LILCO Vice President-Office of Nuclear, to NRC (Jan. 2, 1991)(SNRC-1781). Third, at an April 2, 1991, meeting in Rockville, Maryland between the NRC Staff and representatives from LILCO, LIPA, and the New York Power Authority -- a meeting attended by Petitioners' counsel -- the Staff indicated that it had begun its review of LIPA's decommissioning plan.

18/ Perhaps the reason why Petitioners' argument does not make any sense is that they lifted this portion of their April 19

(continued...)

that underlies Petitioners' strange assertion (that is, that a POL cannot be issued prior to the NRC's approval of a decommissioning plan) is simply wrong. The Commission has already considered and rejected that argument. See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-91-01, 33 NRC 1, 6 (1991)("[n]either regulations, NEPA, nor policy considerations require a decommissioning plan to be submitted in conjunction with the POL").

At another point, Petitioners seem to indicate that their true complaint is that the NRC Staff has not yet conducted an environmental review of the proposed transfer amendment. For example, Petitioners argue that

> there can be little doubt but that allowing a transfer of Shoreham to LIPA prior to completion of the NEPA process is forbidden by the NRC's own regulations because such a transfer would not only have adverse environmental impact, but it would also limit the choice of reasonable alternatives, since LIPA is forbidden by its statute from operating Shoreham and, is complied [sic] its statute to decommission Shoreham.

SWRCSD Transfer Petition at 9-10; SE_2 Transfer Petition at 9-10.[19]

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[18] (...continued)
pleadings almost verbatim from their POL Petitions, which focused on a very different regulatory scheme. Compare SWRCSD Transfer Petition at 6-9 and SE_2 Transfer Petition at 6-9 with SWRCSD POL Petition at 3-6 and SE_2 POL Petition at 3-6.

[19] Elsewhere in their April 19 pleadings, Petitioners similarly argue that the NRC's NEPA regulations "mandate proparation [sic] of at least an environmental assessment . . . addressing the environmental impacts of, and alternatives to, this licensing action." SWRCSD Transfer Petition at 43-44; SE_2 Transfer Petition at 42-43.

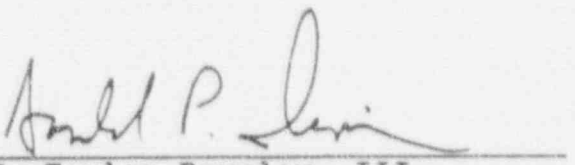
If Petitioners mean only to argue that the license transfer amendment cannot be approved until the NRC Staff completes "the NEPA process," then they merely state the obvious. Under the NRC's NEPA-implementing regulations, prior to taking a regulatory action such as approval of a license transfer amendment, the NRC Staff will either conduct an environmental assessment or identify the action at issue as falling within a "categorical exclusion" under 10 C.F.R. § 51.22. Petitioners offer no reason to believe that the Staff will not meet its NEPA responsibilities prior to taking action on the proposed amendment. On the other hand, if Petitioners are actually complaining that the NRC has refused to conduct the type of environmental review they desire -- i.e., a full-blown environmental impact statement that addresses the alternative of Shoreham's operation as a nuclear facility -- then this is just further evidence of Petitioners' refusal to accept the Commission's direction on this issue.

V. Conclusion

For the reasons given above, Petitioners' requests for hearing on the propose license transfer amendment should be denied. In addition, Petitioners' April 19 pleadings should be struck, to deter them from further ignoring the Commission's guidance on the scope and applicability of NEPA to Shoreham's situation. Finally, the NRC Staff's proposed determination that

the license transfer amendment presents no significant hazards consideration should be made final.

Respectfully submitted,



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DATED: May 6, 1991

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

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

CERTIFICATE OF SERVICE

I hereby certify that copies of **LILCO'S OPPOSITION TO PETITIONERS' REQUEST FOR HEARING ON SHOREHAM TRANSFER AND LILCO'S RESPONSE TO COMMENTS ON PROPOSED NO SIGNIFICANT HAZARDS CONSIDERATION DETERMINATION** were served this date upon the following by Federal Express, as indicated by an asterisk, or by first-class mail, postage prepaid.

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