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Before the Atomic Safety and Licensing Board

Docket No. 50-322-OLA

## I. Introduction

On April 8, 1991, Petitioners Scientists and Engineers for Secure Energy, Inc. (SE<sub>2</sub>) and Shoreham-Wading River Central School District (SWRCSD) each submitted amended petitions to intervene and requests for hearing on LILCO's proposed amendment to create a "possession only" license (POL) for the Shoreham Nuclear Power Station (Shoreham). Accompanying the amended petitions were affidavits from SE<sub>2</sub> members Miro M. Todorovich, Dr. John L. Bateman, Eena-Mai Franz, Andrew P. Hull, Dr. Stephen V. Musolino, Joseph Scrandis, and John R. Stehn, as well as from Dr. Albert G. Prodell, President of the SWRCSD Board of Education.

Pursuant to 10 C.F.R. § 2.714(c), LILCO opposes the amended petitions.<sup>1/</sup>

## II. Background

The procedural posture of this case is well known to the Licensing Board, which recites the background to this case in its Memorandum and Order of March 6, 1991, Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-7, 33 NRC \_\_\_, slip op. at 1-6 (March 6, 1991). That procedural history will not be repeated here.

## III. Argument

In LBP-91-7, the Board gave Petitioners an opportunity to cure the deficiencies that it had identified in their initial petitions to intervene in the POL proceeding. With respect to each petition, both Petitioners have failed to so do. As shown below, when the Board's findings in LBP-91-7 on SE<sub>2</sub>'s and SWRCSD's organizational and representational standing are contrasted with the cursory responses Petitioners offer in return, the inadequacies of their amended papers become clear.

In its response in opposition to Petitioners' other set of

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<sup>1/</sup> In this Opposition, LILCO refers to the two amended petitions, which are essentially identical but for their descriptions of the respective Petitioners, as SE<sub>2</sub> POL Petition and SWRCSD POL Petition.

amended petitions to intervene,<sup>2/</sup> LILCO argued that Petitioners' only interest is that Shoreham be operated as a nuclear-powered facility. "Beyond that," LILCO contended Petitioners "have nothing concrete to contribute to the proceedings at issue." LILCO's Opposition to Petitioners' Amended Petitions to Intervene and Requests for Hearing at 5 (Feb. 19, 1991). As Petitioners' amended petitions on the POL license amendment make evident, they have nothing worthwhile to contribute to this proceeding either. Both petitions should be dismissed and the requests for hearing denied.

**A. SE<sub>2</sub>'s Amended POL Petition**

In LBP-91-7, the Board found that SE<sub>2</sub> had failed to demonstrate standing, either organizationally or representationally. As amended, SE<sub>2</sub>'s petition continues to be fatally defective in both respects.

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<sup>2/</sup> On April 18 and April 20, 1990, Petitioners submitted petitions to intervene and requests for hearing on three NRC licensing actions concerning Shoreham: (1) the issuance on March 29, 1990 of a Confirmatory Order prohibiting LILCO from placing fuel back into the reactor vessel without prior NRC approval, (2) the approval on June 14, 1990 of an amendment to the Shoreham Physical Security Plan, and (3) the issuance on July 31, 1990 of an amendment to Shoreham's license, suspending the effect of certain conditions related to emergency preparedness while the plant remains defueled. 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 Board denied Petitioners' initial petitions to intervene in these three proceedings but provided them with an opportunity to submit amended requests. Petitioners did so on February 4, 1991.

(1) Organizational Standing

With respect to organizational standing, the Board previously ruled that SE<sub>2</sub> had "not established that it will suffer a distinct and palpable harm that constitutes an injury in fact." LBP-91-7, slip op. at 23. SE<sub>2</sub>'s "principal claim of injury," the Board pointed out, is based on the NRC Staff's "refusal to prepare an EIS [environmental impact statement] on the decommissioning of Shoreham." Id. The NRC Staff's "failure to prepare an EIS is a nonissue," however, the Board stated, given the Commission's ruling in CLI-91-01 that a POL for Shoreham "may be issued without any environmental review." Id. at 24. In this regard, the Board found that the Commission had been "very clear in CLI-91-01 in denying SE<sub>2</sub>'s claim" that

a Staff approved decommissioning plan is required prior to issuance of a POL; that prior to the issuance of a POL, the Staff must issue an EIS; and the EIS must consider resumed operation as an alternative decision to decommissioning.

LBP-91-7, slip op. at 24.<sup>2/</sup>

<sup>2/</sup> The Board's reading of CLI-91-01 is indisputably correct, since the Commission's decision itself is unambiguous on these points. As pertinent here, in CLI-91-01, the Commission stated that

while the [decommissioning rules] themselves included a Generic Environmental Impact Statement and required a supplemental environmental review in connection with approval of the final decommissioning plan, 10 C.F.R. 51.95(b), the categorical exclusion applicable to issuance of POLs in 10 C.F.R. 51.22(c)(9) was left unchanged. We believe that the decommissioning rules do not contemplate that a POL would, in normal

(continued...)

The Board further noted that SE<sub>2</sub>'s "organizational interest is educational and informational in nature on the subject of the 'national energy debate,'" a "broad" interest which, under Commission precedent, the Board stated, "does not establish the particularized interest necessary for participation in the adjudicatory process." Id. at 23, 24, citing Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 332 (1983).<sup>4/</sup>

Apart from claims based on the National Environmental Policy Act (NEPA), the Board noted that SE<sub>2</sub> had also advanced a

bare allegation that [LILCO], by not abiding by its full power operating license and by reducing the Technical Specifications requirements increases radiological health and safety risks.

LBP-91-7, slip op. at 25. Since, the Board said, the proposed POL license amendment is "directed at shutting down a defueled, nonoperating plant," to make such an assertion "without

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<sup>3/</sup> (...continued)  
circumstances, need to be preceded by submission of any particular environmental information or accompanied by any NEPA review related to decommissioning.

Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-91-01, 33 NRC at 1, 6-7 (1991) (emphasis added). The Commission's action, the Board found, "deprived [SE<sub>2</sub>] of the most important bases of its claim for intervention." LBP-91-7, slip op. at 24.

<sup>4/</sup> The petition was "additionally defective," the Board continued, "in that it has failed to identify any particular injury that can be traced to the challenged action." LBP-91-7, slip op. at 24, citing Dellums v. NRC, 863 F.2d 968, 971 (D.C. Cir. 1988).



identifying a particularized injury that may be caused by the proposed amendment," constitutes a "failure by [SE<sub>2</sub>] to establish the necessary elements for standing." Id.

In its amended petition, SE<sub>2</sub> still has not demonstrated organizational standing. Nowhere does SE<sub>2</sub> even attempt to confront the Board's initial finding that the broad nature of SE<sub>2</sub>'s informational interests precludes its intervention on the basis of having standing as an organization. SE<sub>2</sub> does state that

[u]nless a hearing is held on the proposed license amendments and a NEPA review conducted and completed before any decision is made, the scientific and educational interests of [SE<sub>2</sub>] . . . will be harmed.

SE<sub>2</sub> POL Petition at 2 & n.6 [sic]. But this conclusory allegation of legal harm under NEPA, lacking specifics or explanation, does not demonstrate that SE<sub>2</sub> has organizational standing to intervene.

SE<sub>2</sub> seizes upon language from the Commission's recent order, Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-91-04, 33 NRC \_\_ (April 3, 1991), to suggest that the Commission had "instructed the Board" that the Board was not "preclud[ed] . . . as a matter of law and jurisdiction, from entertaining properly supported contentions that allege that an EIS must be prepared for the license amendment actions." SE<sub>2</sub> POL Petition at 2-3. But CLI-91-04 does not help SE<sub>2</sub>'s cause. SE<sub>2</sub> fails to distinguish that, in that decision, the Commission was only discussing the applicability of NEPA to the three licensing

actions at issue in Petitioners' other set of petitions.<sup>5/</sup> Nowhere in CLI-91-04 does the Commission address the need for an environmental review in the context of issuance of a POL or suggest that it is modifying in any way its ruling in CLI-91-01 that no such review is required before a POL may be approved. Nor does the plain language of CLI-91-04 so support.<sup>6/</sup> Nowhere does SE<sub>2</sub> offer any persuasive reason why that ruling is incorrect and should be reversed.

With respect to alleged radiological harms, SE<sub>2</sub> contends, "on its own behalf," that

when combined with the increased risk of a radiological incident due to the reduced physical security and emergency plans, the elimination of license conditions and the Technical Specification requirements destroys LILCO's ability to assure a safe evacuation of the emergency planning zone in the event of a radiological incident, including an incident of radiological sabotage.

SE<sub>2</sub> POL Petition at 8. Again, this is nothing but a bare allegation that does not show a cognizable harm to SE<sub>2</sub>'s organizational interests.

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<sup>5/</sup> See note 2, above.

<sup>6/</sup> For instance, the Commission stated that

if petitioners satisfy the NRC's standing requirements in their amended petitions, the Licensing Board is free to consider a properly pled contention on the need for an EIS for these three actions.

CLI-91-04, slip op. at 5 (emphasis added). By contrast, nowhere in CLI-91-04 is the Commission's decision in CLI-91-01 even mentioned.

Accordingly, with regard to organizational standing, SE<sub>2</sub>'s petition as amended continues to be inadequate.

(2) Representational Standing

As a threshold matter, the Board in LBP-91-7 noted that SE<sub>2</sub> had not "stated that its organizational purpose provides authority to represent members in adjudicatory proceedings." LBP-91-7, slip op. at 25-26. For an "organization to rely upon injury to the interests of its members," the Board continued, it "must provide, with its petition, identification of at least one of the persons it seeks to represent, a description of the nature of the injury to the person and demonstrate that the person to be represented has in fact authorized such representation." Id. at 26, citing Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-82-43A, 15 NRC 1423, 1437 (1982).<sup>2/</sup> With its submission of affidavits from seven of its members, SE<sub>2</sub> has cured this procedural defect. But it still has failed to demonstrate representational standing to intervene.

The Board previously stated that to satisfy representational standing requirements, it

would have to be shown by SE<sub>2</sub> that a member's particularized injury in fact results from

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<sup>2/</sup> The Board added that the mere fact that SE<sub>2</sub>'s represented members might live or work within a 50-mile radius of Shoreham does not "create a presumption of standing" because the present proceeding is not a "proceeding for a construction permit, an operating license or a significant amendment which would involve an obvious potential for offsite consequences." LBP-91-7, slip op. at 26, citing Florida Power and Light Co. (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325 (1989).



the proposed relaxed Technical Specifications that were for a full power operating license.

LBP-91-7, slip op. at 27. SE<sub>2</sub>, the Board found, had "failed to make this necessary showing for itself, or for its members." Id. Merely making "bare allegations of radiological harm," the Board said, "is legally insufficient to establish standing." Id. A litany of "bare allegations," however, is all that SE<sub>2</sub> offered in its initial petition, the Board determined,<sup>8/</sup> and that is all it offers now.

For instance, SE<sub>2</sub> contends that the

removal of the requirements currently in the license with respect to the emergency diesel generator, county liaison, Brentwood Staffing, quarterly drills, physical security, and other technical specifications previously found necessary (whether the reactor was in an operating or non-operating mode) due among other things to the presence of large quantities of special nuclear material on the site would significantly increase the radiological risk to person[s] and property represented and from that special nuclear material in derogation of personal and institutional health and safety.

SE<sub>2</sub> POL Petition at 7 (emphasis in original). SE<sub>2</sub> provides no explanation, however, as to why the proposed amendment would

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<sup>8/</sup> Specifically, the Board found that SE<sub>2</sub> had failed to demonstrate a "nexus" between the "proposed amendment and the alleged resultant construction of substitute oil burning plants and the harm that would be created." LBP-91-7, slip op. at 27. Further, the Board dismissed SE<sub>2</sub>'s effort to demonstrate standing through allegations that issuance of the POL would jeopardize its members' ability to obtain "sufficient amounts of electricity at reasonable rates," stating that "[i]t is very well settled in Commission practice that a ratepayer's interest does not confer standing in NRC licensing proceedings." Id.

"significantly increase" the radiological risk to its represented members.

As for the affidavits proffered by SE<sub>2</sub>'s represented members, they, too, consist of nothing beyond simple allegations of harm, lacking any analysis of why the POL amendment would pose a radiological threat. For example, each affiant who lives within 50 miles of Shoreham<sup>2/</sup> recites, without explanation, that the

amendment also represents a threat to my personal radiological health and safety and to my real and personal property in violation of my rights under the Atomic Energy Act of 1954, as amended, since neither the financial responsibility nor safety planning requirements of the regulations have been approved although they are prerequisites for the amendments.

Affidavits of Joseph Scrandis, Eena-Mai Franz, Dr. Stephen V. Musolino, and Andrew P. Hull at ¶ 6; Affidavits of Dr. John R. Stehn and Dr. John L. Bateman at ¶ 7. Beyond this ritual incantation, however, SE<sub>2</sub>'s represented members offer nothing to suggest that they will suffer a particularized injury to any interest under the Atomic Energy Act.

Thus, as amended, SE<sub>2</sub>'s petition fails to demonstrate representational standing. The petition should be denied.

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<sup>2/</sup> In emphasizing that some of its members live within 50 miles of Shoreham, SE<sub>2</sub> has ignored Board's determination that the "50-mile" presumption for standing is inapplicable here. See note 7, above.

B. SWRCSD's Amended POL Petition

The Board found SWRCSD's initial petition to be "identical to that of SE<sub>2</sub> in many areas," and, "[t]o the extent that the two petitions are the same," the Board made the "same rulings [i]t did on the SE<sub>2</sub> petition." LBP-91-7, slip op. at 29. As amended, SWRCSD's petition again is little more than a rehash of SE<sub>2</sub>'s. It, too, should be denied.

(1) Organizational Standing

In LBP-91-7, the Board found that SWRCSD's organizational interest was "that of a ratepayer and tax recipient," economic concerns that are "outside of the Commission's jurisdiction." LBP-91-7, slip op. at 29. The Commission "has no regulatory responsibility for rates and tax distribution," the Board continued. As such concerns "do not confer standing in NRC licensing proceedings," the Board concluded, SWRCSD "has no basis for organizational standing." Id.

SWRCSD offers nothing in its amended petition to rebut the Board's finding. Indeed, in the accompanying affidavit of the President of the SWRCSD Board of Education, Dr. Prodell expresses SWRCSD's "concern" about the "adverse economic consequences which will automatically follow from the decommissioning of the Shoreham Plant." Prodell Affidavit at ¶ 12. This "concern," Dr. Prodell says, stems from the "terms of the existing Agreement between LILCO and the State of New York," under which the "cost

of electric energy will probably double over the next ten years."

Id. Dr. Prodell continues that these

outrageous rates combined with a drastic reduction in tax levies (the taxes levied on the operable Plant constitute approximately 90% of the District's tax base) will cause a precipitous decline in the quality of education offered to school children in the District in addition to huge tax increases for District residents.

Id. These complaints do not constitute an cognizable injury adequate to confer organizational standing in an NRC proceeding.

## (2) Representational Standing

As for representational standing, the Board previously found that SWRCSD had failed to "particularize any injury . . . that it can trace to granting of the FOL." LBP-91-7, slip op. at 30. SWRCSD's "bare allegation of employee adverse health and safety effects," the Board said, "does not establish necessary elements for standing." Id. In its amended petition, SWRCSD still has failed to provide anything beyond bare allegations of harm.

The amended petition itself, identical in all substantive respects to that of SE<sub>2</sub>, simply parrots that "when combined with the increased risk of a radiological incident due to reduced physical security and emergency plans," the proposed "elimination of license conditions and the Technical Specification requirements destroys LILCO's ability to assure a safe evacuation" in the event of a radiological incident, "including an incident of radiological sabotage." SWRCSD POL Petition at 8. In his supporting affidavit, Dr. Prodell merely offers -- without

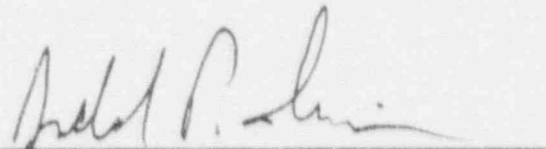
explanation -- that the POL amendment "represents a threat to my, and the School District's students' and employees', personal radiological health and safety and to my and the School District's real and personal property." Prodell Affidavit at ¶ 10. These statements are quintessentially "bare allegations."

The Board has given SWRCSD a chance to cure the deficiencies in its petition, and SWRCSD -- like SE<sub>2</sub> -- has chosen to ignore the Board's guidance. The amended petition should be denied.

#### IV. Conclusion

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

Respectfully submitted,



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DATED: April 23, 1991.



LILCO, April 23, 1991

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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OFFICE OF SECRETARY  
DOCKETING & SERVICE  
UNIT 1

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' AMENDED PETITIONS TO INTERVENE AND REQUESTS FOR HEARING ON PROPOSED "POSSESSION ONLY" LICENSE FOR SHOREHAM** 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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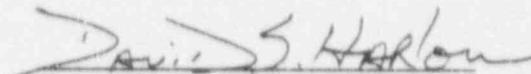
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