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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

In the Matter of LONG ISLAND LIGHTING COMPANY (Shoreham Nuclear Power Station, Unit 1)	Docket No. 50-322-OLA-2

LILCO'S OPPOSITION TO SHOREHAM-WADING RIVER CENTRAL SCHOOL DISTRICT'S APPEAL FROM LBP-91-26

W. Taylor Reveley, III
Donald P. Irwin
David S. Harlow
Counsel for Long Island
Lighting Company

Hunton & Williams
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

REGULATIONS

FEDERAL REGISTER

DECISIONS OF NUCLEAR REGULATORY COMMISSION

MISCELLANEOUS

LILCO, July 15, 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 SHOREHAM-WADING RIVER CENTRAL SCHOOL DISTRICT'S APPEAL FROM LBP-91-26

I. Introduction

On June 28, 1991, Petitioner Shoreham-Wading River Central School District (SWRCSD) noticed an appeal from its dismissal from the proceeding on the "possession only" license (POL) amendment for Shoreham. In Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-26, 34 NRC __ (June 13, 1991), the Licensing Board found that SWRCSD had no standing to intervene in the proceeding on issues arising under either the National Environmental Policy Act, 42 U.S.C. §§ 4321 et seq. (NEPA), or the Atomic Energy Act, 42 U.S.C. §§ 2011 et seq. SWRCSD's notice of appeal was accompanied by a supporting brief (June 28 Appeal).

Pursuant to 10 C.F.R. § 2.714a(a), Long Island Lighting Company (LILCO) opposes SWRCSD's appeal. The Board's ruling in LBP-91-26 is clearly correct and there is no reason for the Commission to reverse it.

II. Background

A. Procedural History

On January 5, 1990, LILCO submitted an application to amend Shoreham's operating license to transform it into a POL.[1/] The NRC Staff noticed LILCO's amendment request in the Federal Register on August 21, 1990, and solicited public comments on the Staff's proposed determination that the amendment presented "no significant hazards consideration." 55 Fed. Reg. 34,099-100 (Aug. 21, 1990). The NRC also provided an opportunity for "any person whose interest may be affected" to file a petition to intervene and request for hearing on the proposed amendment. Id. at 34,100.

On September 20, 1990, SWRCSD, along with fellow Petitioner Scientists and Engineers for Secure Energy, Inc. (SE_2), each submitted a petition to intervene in the POL proceeding. Both LILCO and the NRC Staff responded in opposition to the petitions on October 12 and October 24, 1991, respectively.

1/ See Letter from William E. Steiger, Jr., LILCO Assistant Vice President-Nuclear Operations, to NRC (Jan. 5, 1990)(SNRC-1664).

In Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-91-01, 33 NRC 1 (1991), the Commission referred Petitioners' requests, and LILCO's and the Staff's responses, to the Licensing Board panel. On January 28, 1991, a three-member Licensing Board chaired by Judge Margulies was established to rule on the joint petition. 56 Fed. Reg. 4310 (Feb. 4, 1991).

On March 6, 1991, the Licensing Board issued Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-7, 33 NRC __ (March 6, 1991). The Board, identifying numerous deficiencies in the petitions to intervene, found that with respect to issues arising under NEPA and the Atomic Energy Act, both SWRCSD and SE_2 had "failed to establish standing, as required by 10 C.F.R. § 2.714(a)(2)." LBP-91-7, slip op. at 30. Nevertheless, the Board ruled that, since Petitioners had not had the "benefit of the Commission's two precedential policy decisions [CLI-90-08 and CLI-91-02] at the time they filed their petitions to intervene," Petitioners would be given an opportunity to amend their petitions to take into account those two decisions and otherwise to correct the various flaws found by the Board. LBP-91-7, slip op. at 31.

Thus aided by the Board -- which precisely identified the defects in Petitioners' initial petitions and gave them another chance to try to demonstrate standing -- Petitioners filed amended petitions on April 8, 1991. LILCO and the NRC Staff again responded in opposition, on April 23 and April 29, 1991, respectively.

On June 13, 1991, the Board issued the decision that is the subject of SWRCSD's instant appeal, LBP-91-26. The Board found that SE_2 had, in its amended petition, demonstrated standing to intervene with respect to issues arising under NEPA, but not as to issues arising under the Atomic Energy Act.[2/] SWRCSD, the Board determined, had not demonstrated standing under either NEPA or the Atomic Energy Act.

B. The Board's Decision in LBP-91-26

(1) NEPA Issues

With respect to SWRCSD's attempt to demonstrate standing under NEPA, the Board in LBP-91-26 noted that the

> injury [SWRCSD] asserts is that without an environmental review Petitioner's right to comment and the Commission's duty to have available considered detailed information concerning significant environmental impacts before decisions are made would be violated.

LBP-91-26, slip op. at 17. The Board continued that "[a]lthough the purpose of NEPA is to ensure well-informed government decisions and stimulating public comment on agency actions," an agency's failure to prepare an environmental impact statement (EIS) does not "ipso facto result in a cognizable injury that affords standing under NEPA." Id. A petitioner, the Board found,

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[2/] The NRC Staff has asked the Board to reconsider its ruling with respect to SE_2's standing to intervene on NEPA-based issues. See "NRC Staff Motion for Reconsideration of LBP-91-26, and Memorandum in Support Thereof" (June 25, 1991). On July 10, 1991, LILCO filed a response in support of the NRC Staff's motion. The motion is pending.

also "must show that it has suffered, or will suffer a distinct and palpable harm that constitutes an injury in fact." Id.

Contrasting SWRCSD's effort to demonstrate organizational standing with that of SE_2, the Board pointed out that SE_2 had "made its case for standing on the claim that the failure to prepare an EIS" would cause its "programmatic informational activities and organizational purpose significant harm." LBP-91-26, slip op. at 17. SWRCSD, on the other hand, had "made no such showing of a distinct and palpable harm" and, therefore, "its claim for organizational standing [on] that issue must be denied." Id.

As to representational standing (which SWRCSD had sought to demonstrate in its amended petition through an affidavit from Albert Prodell, the President of the SWRCSD Board of Education), the Board found that Dr. Prodell had made the "same argument as SE_2's members did on injury." LBP-91-26, slip op. at 17. Dr. Prodell claimed that "his rights for meaningful comment on environmental considerations of decommissioning will be prejudiced or completely denied if there is no environmental review." But, said the Board, like the assertion advanced by SE_2's members, such a claim "is too vague to identify a palpable injury." Id. at 17-18.

The Board went on to find that SWRCSD's interest "continues to be that of a ratepayer and tax recipient," and that such "economic concerns fall outside the Commission's jurisdiction."

LBP-91-26, slip op. at 18. Such concerns, the Board ruled, "do not provide a basis for standing." Id.

(2) Atomic Energy Act Issues

As for standing under the Atomic Energy Act, the Board ruled that SWRCSD had not

> particularize[d] . . . a distinct and palpable harm that constitutes an injury, in fact, to itself or those it seeks to represent, nor did it trace any such injury back to the challenged action.

LBP-91-26, slip op. at 18. All that SWRCSD had proffered, the Board found, were "conclusory generalizations which do not meet the regulatory requirements for standing as provided in 10 C.F.R. § 2.714(a)(2)." Id.

C. SWRCSD's Position on Appeal

SWRCSD says that the Board has committed three errors. First, SWRCSD argues that the Board's dismissal of its amended petition was "premature." SWRCSD contends that it had a "right to be able to amend its petition for leave to intervene 'without prior approval of the presiding officer at any time up to fifteen (15) days prior to the holding of the . . . first prehearing conference.'" June 28 Appeal at 2 (emphasis in original), citing 10 C.F.R. § 2.714(a)(3). SWRCSD also alleges that it had an "absolute right to be able to 'supplement' its petition to intervene at any time prior to fifteen (15) days before the . . . first prehearing conference." Id., citing 10 C.F.R.

§ 2.714(b)(1). Since the prehearing conference on the POL amendment proceeding was scheduled for July 30, 1991, SWRCSD concludes, it had a "unfettered" right to amend and supplement its petition up until July 15. Id. at 2-3.[2/]

As its second allegation of error, SWRCSD "suggests" that the Board made a mistake by

> implying that School District's claims for standing are limited to "organizational interests . . . of a ratepayer and tax recipient' . . . and that those interests are limited to "economic" interests . . . , finding that such "economic interests do not qualify it for standing under NEPA or the [Atomic Energy Act].

June 28 Appeal at 3. SWRCSD's challenge to the Board's ruling on this point is two-fold. First, SWRCSD states that Dr. Prodell had cited, in support of standing,

> his responsibility for decisions "in accordance with the School District's position on matters affecting both general interests and specific health, safety and environmental interests of the students and employees for whom it [is] responsible during work and school hours."

Id. at 3, quoting Prodell Affidavit at ¶ 5. SWRCSD suggests that the Board has overlooked this representation by Dr. Prodell.

[2/] SWRCSD also "proffers" that it

> had planned to amend and supplement its petition including an affidavit further specifying the interests that would be harmed by issuance of the possession only license prior to the Commission's fulfillment of its obligations under NEPA and the AEA, as well as by specification of contentions.

June 28 Appeal at 2.

Further, SWRCSD calls the Board's decision "totally insensitive" to NEPA's EIS requirement, and argues that the "denial of the availability of the information in the EIS to the School District is a 'distinct and palpable harm' to the School District within the zone of interest protected by NEPA." Id. at 5.[4/]

Second, SWRCSD asserts that, contrary to the Board's ruling, its interest as a "tax recipient" and "ratepayer" does satisfy the "injury in fact" requirement. June 28 Appeal at 6. SWRCSD claims that if the "proposal to decommission . . . Shoreham and its segmented parts is approved by the . . . NRC . . ., the School District will eventually lose over $25 million in annual income." Id. (emphasis in original). SWRCSD cites Dellums v. NRC, 863 F.2d 968, 973 (D.C. Cir. 1988), for the proposition that "inability to find work [by a single individual] constitutes injury in fact," and argues that "[c]ertainly, the much larger threatened economic injury to the School District should qualify." June 28 Appeal at 6-7 (emphasis in original). SWRCSD continues that there is

> direct causation and sure redressability of the economic injury as well as other environmental injuries flowing from the indirect (e.g., air pollution) effects of the plan to replace Shoreham with fossil fueled generating units.

[4/] At the end of its June 28 Appeal, SWRCSD tacks on the related claim that the Board has "misperceive[d] various of the harms alleged" by SWRCSD and, thus, has improperly "styled them as 'conclusory generalizations.'" June 28 Appeal at 10. SWRCSD charges that the Board has provided "no bases for its own bare conclusion," and argues that LBP-91-26 "should be reversed and remanded for lack of a rational basis on this ground [alone] under both NEPA and the [Atomic Energy Act]." Id.

Id. at 6. If the "proposal" to decommission Shoreham "were withdrawn," SWRCSD argues, this threatened harm "would be eliminated automatically." Id.

As its third claim of error, SWRCSD says that its petition should not have been dismissed before it had been provided "adequate time for discovery." June 28 Appeal at 9-10, citing Lujan v. Nat'l Wildlife Fed'n, 110 S.Ct. 3177, 3187 (1990). SWRCSD complains that it was not in "any position to submit to [its] experts the proposed possession only license requirements until those became available by virtue of SECY-91-129 in the second half of May, 1991." June 28 Appeal at 10 (emphasis added). SWRCSD says that it "should be allowed a reasonable time to examine the [POL amendment] before being summarily dismissed from the proceeding." Id.

III. Discussion

A. Legal Standard on Appeal

The determination whether a petitioner has demonstrated standing to intervene is "a matter within the discretion of the Licensing Board." See, e.g., Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-107, 6 AEC 188, 193 (1973), reconsideration denied, ALAB-110, 6 AEC 247, aff'd, CLI-73-12, 6 AEC 241 (1973). As such, the Board's finding will not be disturbed "unless it appears that that conclusion is irrational." Id. at 193. See also Duquesne Light Co. (Beaver

Valley Power Station, Unit No. 1), ALAB-109, 6 AEC 243, 244 (1973).

Similarly, the "acceptance of tendered amendments to a petition for leave to intervene" is a "matter within the discretion of the Licensing Board." Northern States Power Co., 6 AEC at 193. In the "absence of a showing of a gross abuse of discretion," the Board's decision should not be overturned. Id.; see also Commonwealth Edison Co. (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-20, 21 NRC 1732, 1738 (1985)(taking note of 10 C.F.R. § 2.714(a)(3)'s "express recognition . . . of the Board's discretion to permit the amendment of a petition to intervene")(emphasis added); Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), LBP-91-30, 34 NRC __ (July 1, 1991).

Each of SWRCSD's allegations of error is addressed in turn below. When those allegations are assessed against the standards set forth above, it is clear that none has any merit.

B. SWRCSD's Dismissal Was Not "Premature"

SWRCSD has misconstrued the NRC's regulations. As the plain language of 10 C.F.R. §§ 2.714(a)(3) and 2.714(b)(1) reveals, those regulations do not provide a petitioner an absolute "right" to amend a petition to intervene. For instance, § 2.714(a)(3) states, as relevant here:

> Any person who has filed a petition for leave to intervene . . . may amend his petition for leave to intervene. A petition may be amended without prior approval of the pre-

> siding officer at any time up to . . . fifteen (15) days prior to the holding of the first prehearing conference. After this time a petition may be amended only with approval of the presiding officer, based on a balancing of the factors specified in paragraph (a)(1)[concerning late-filed petitions].

Plainly, this regulation does not preclude the Licensing Board from ruling on and dismissing an intervention petition more than 15 days before the first prehearing conference. See Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), LBP-91-30, 34 NRC __, slip op. at 8 (July 1, 1991)(rejecting the argument by petitioner Environmental Conservation Organization (ECO) that, under 10 C.F.R. § 2.714(a)(3), the Licensing Board may only expand, and not contract, the 15-day deadline for amending a petition to intervene).[2/] Rather, the gist of the provision is that a petition, otherwise pending, may be amended without leave of the Board until shortly before the prehearing conference. Beyond that, to avoid the introduction of new issues on the eve of the prehearing conference, the petition may be amended only with the permission of the Board. It does not act to limit the Board's ability to rule at any time on papers before it.

Similarly, there is no basis for SWRCSD's claim that § 2.714(b)(1) gives it an "absolute" right to "supplement" its petition. This provision states, as relevant here:

2/ Before the NRC, petitioners ECO (in the Rancho Seco case) and SWRCSD (in the Shoreham case) are represented by the same counsel.

> Not later than . . . fifteen (15) days prior to the holding of the first prehearing conference, the petitioner shall file a supplement to his or her petition to intervene that must include a list of the contentions which petitioner seeks to have litigated in the hearing.

SWRCSD stands this regulation on its head. SWRCSD argues that § 2.714(b)(1) provides a petitioner with the "right" to supplement its petition, when actually the provision imposes a time-bound obligation on the petitioner to file acceptable contentions in order to obtain a hearing. Obviously, if the Board determines on the basis of the intervention petition that the petitioner has failed to demonstrate standing, it may dismiss the petition without waiting for the submission of contentions.[9/]

SWRCSD having failed to show that it had a "right" to amend, the only question left is whether the Board's dismissal of SWRCSD's petition was a "gross abuse of discretion." Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-107, 6 AEC 188, 193 (1973). Clearly, it was not. Indeed, the Board had already given SWRCSD one opportunity to submit an amended petition, after identifying precisely what was wrong with the initial defective pleading. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-7, 33 NRC __, slip op. at 31 (March 6, 1991)(the Board allows petitioners'

[9/] The Commission recognized this two-step approach in Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-91-04, 33 NRC __ (April 3, 1991), stating that "if petitioners satisfy the NRC's standing requirements in their amended petitions, the Licensing Board is free to consider a properly pled contention. . . ." CLI-91-04, slip op. at 5 (emphasis added).

to submit amended petitions on account of the "Commission being rather liberal in permitting petitioners the opportunity to cure defective petitions to intervene"). Certainly, it was reasonable for the Board not to allow SWRCSD a chance to "take another whack at it," for the third time.[1/]

C. The Board's Ruling on SWRCSD's Standing Was Correct

SWRCSD second allegation of error has two parts. First, it contends that the Board was wrong in finding that SWRCSD's only interest in the POL amendment proceeding was that of a "ratepayer" and "tax recipient." Second, it argues that, even if its sole interest is that of a "ratepayer" and "tax recipient," such interests are sufficient to establish standing in this case. SWRCSD is wrong on both counts.

(1) SWRCSD Has Not Demonstrated an Injury to its Informational Interests under NEPA

As noted above, the Board found that "the failure of an agency to prepare an EIS does not ipso facto result in a cognizable injury that affords standing under NEPA," pointing out that

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[1/] SWRCSD's claim that it "had planned to amend and supplement its petition" by submitting an affidavit "further specifying the interests that would be harmed by issuance" of the POL does not avail it here. SWRCSD does not identify this new affiant or explain why it could not have provided this further specification when it submitted its amended petition on April 8, 1991. It is curious, too, that while SWRCSD (jointly with SE_2) has asked the D.C. Circuit for a stay of the POL amendment's effectiveness, when it submitted its stay request on July 5, 1991, SWRCSD included no affidavit to attempt to demonstrate that it would suffer harm (much less, "irreparable injury") from the POL amendment's becoming effective.

a "petitioner must show it has suffered, or will suffer a distinct and palpable harm that constitutes an injury in fact." LBP-91-26, slip op. at 17. With respect to both organizational and representational standing, the Board ruled, SWRCSD had made no such showing.

On appeal, SWRCSD does not directly confront the Board's correct finding that SWRCSD had provided only "vague" allegations of harm. Rather, SWRCSD takes issue with the Board's basic view of the law of informational standing under NEPA, asserting flatly that the "denial of the availability of the information" in an EIS on Shoreham's decommissioning is a "'distinct and palpable harm' to the School District within the zone of interest protected by NEPA." June 28 Appeal at 5 (emphasis added). Significantly, SWRCSD cites no cases that discuss informational standing, but merely wails that the Board is being "totally insensitive" to NEPA.

The Board is clearly correct. To establish standing under NEPA, SWRCSD was obliged to identify specific "programmatic concerns [that] are being directly and adversely affected" by the challenged agency action. See Competitive Enterprise Inst. v. NHTSA, 901 F.2d 107, 122 (D.C. Cir. 1990); American Legal Foundation v. FCC, 808 F.2d 84, 92 (D.C. Cir. 1987). Further, even assuming that SWRCSD had identified a relevant federal action and asserted a cognizable interest under NEPA, the test for standing, as expressed in Competitive Enterprise Inst., requires more:

> To establish standing [on the basis of informational injury], petitioners must assert a

> plausible link between the agency's action, the information injury, and the organization's activities.

Id. at 122 (emphasis added); see also Community Nutrition v. Block, 698 F.2d 1239, 1254 (D.C. Cir. 1983)(petitioner's assertion of standing was rejected because petitioner "failed to establish any connection between the alleged injury and the [agency action]"). Thus, while the objectives of NFPA may "lower[] the threshold for establishing injury to informational interests," 901 F.2d at 123, they do not eliminate the threshold requirement of establishing a plausible connection between the challenged agency action and the alleged injury.

It was this "plausible link," the Board found, between the alleged harm and the NRC's issuance of the POL amendment that SWRCSD failed to establish. As a review of SWRCSD's petition to intervene reveals, the Board is correct. Nowhere does SWRCSD make any tangible, specific connection between the issuance of the POL and its allegations of harm. The Board acted well within its "discretion" in finding that SWRCSD had not demonstrated standing. See Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-107, 6 AEC 188, 193 (1973). Far from being "irrational," the Board's finding was the natural consequence of SWRCSD's having submitted, for a second time, and despite guidance from the Board in LBP-91-7, an insufficient petition. See Duquesne Light Co. (Beaver Valley Power Station, Unit No. 1), ALAB-109, 6 AEC 243, 244 (1973). Indeed, the fact that, on appeal, SWRCSD continues to make no

effort to refute the Board's finding is a compelling indication that SWRCSD cannot hope to demonstrate any injury to a cognizable interest under NEPA.[8/]

(2) Its Interest as a "Ratepayer" and "Tax Recipient" Does Not Provide SWRCSD with Standing to Intervene

SWRCSD's argument that its interest as a "ratepayer" and "tax recipient" is sufficient for standing purposes should also be rejected. Even if it were correct that "economic injury" is usually sufficient to provide standing in NRC proceedings, it would not further SWRCSD's cause. The "economic injury" (i.e., the loss of tax income) about which SWRCSD complains stems neither from the POL amendment nor even from Shoreham's decommissioning. Rather, the "economic injury" SWRCSD purportedly will suffer is a direct consequence of LILCO's private decision to close the plant. As the Commission has repeatedly made clear, that decision in not at issue. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-90-08, 32 NRC 201 (1990), aff'd on reconsideration, CLI-91-02, 33 NRC 61 (1991).[9/]

[8/] Accordingly, SWRCSD is wrong when it asserts that the Board has provided "no bases for its own bare conclusion." June 28 Appeal at 10. That the Board was able to make relatively short shrift of SWRCSD's defective petition simply reflects the weakness of SWRCSD's claim of standing.

[9/] As for SWRCSD's additional claim of environmental injury from the "indirect (e.g., air pollution) effects of the plan to replace Shoreham with fossil fueled generating units," here, too, SWRCSD seeks to raise issues that are outside the scope of any proceeding on Shoreham, as the Commission has ruled. See CLI-90-08, 32 NRC at 207 (the "alternative of 'resumed operation' -- or other methods of generating electricity -- are alternatives to

(continued...)

Expressed another way, contrary to SWRCSD's representation, there is nothing that the NRC can do to afford "redressability" of the economic injury SWRCSD alleges it will suffer. A decision by the NRC to rescind LILCO's POL amendment would not lead to Shoreham's operation. Even a refusal by the NRC to allow Shoreham's transfer to the Long Island Power Authority would not prompt LILCO to operate the plant. The Commission has expressly recognized the irrevocable nature of LILCO's decision.[10/] As a consequence, SWRCSD has not demonstrated an "injury in fact" that can be "redressed" by any action by the NRC. Cf. Northern States Power Co. (Tyrone Energy Park, Unit 1), CLI-80-36, 12 NRC 523, 526-27 (1980)(no standing found where the alleged "injury derives . . . not from the proposed revocation of the license but from the termination of the project," and the Commission "cannot fashion relief which would in any way redress the harm" to petitioners from the project's cancellation).

D. **SWRCSD Had No Right to Discovery**

Finally, SWRCSD is wrong when it claims that it was "improper" for the Board to dismiss it before it had "adequate time for

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9/ (...continued)
the decision not to operate Shoreham and thus are beyond Commission consideration").

10/ See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-91-08, 34 NRC __, slip op. at 6, 11 (June 12, 1991)(the Commission "has no basis to look behind LILCO's statement" that it is "committed not to operate Shoreham under any circumstances," and does accordingly "accept LILCO's declaration at face value")(emphasis in original).

discovery." June 28 Appeal at 9-10. SWRCSD's allegation flies in the face of long-settled Commission precedent that there is no right to discovery before a petitioner must file his petition. See, e.g., Wisconsin Electric Power Co. (Koshkonong Nuclear Plant, Units 1 and 2), CLI-74-45, 8 AEC 928 (1974); Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units and 2), ALAB-107, 6 AEC 188 (1973). Indeed, a petitioner has no right to discovery before filing contentions. As the Appeal Board has noted, "[n]either Section 189a of the Atomic Energy Act nor § 2.714 of the Rules of Practice permits the filing of a vague, unparticularized contention, followed by an endeavor to flesh it out through discovery against the applicant or Staff." Duke Power Co. (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 468 (1982), vacated in part on other grounds, CLI-83-19, 17 NRC 1041 (1983). The Commission's position on this issue has been upheld by the federal courts. See, e.g., BPI v. AEC, 502 F.2d 424, 428 (D.C. Cir. 1974)(rejecting the argument that the Atomic Energy Act should be so construed "that the interested person need not articulate the issues until after having been admitted as a party to the proceeding, with consequent access to discovery").

Apart from being wrong as a matter of law, SWRCSD does not indicate what information it would have sought to obtain through discovery, had discovery been available. SWRCSD protests only that it was not in "any position to submit to [its] experts the proposed possession only license requirements" until SECY-91-129

became available in May 1991. This complaint is not well taken. SWRCSD ignores that on August 21, 1990, when LILCO's POL amendment application was first noticed in the Federal Register, the NRC Staff stated that "[f]or further details with respect to this action," an interested person could "see the application for amendment . . . which is available for public inspection at . . . the Shoreham-Wading River Public Library . . . ." 55 Fed. Reg. 34,101 (Aug. 21, 1990). The POL amendment application, readily available in SWRCSD's own backyard,[11/] contained LILCO's proposed changes to Shoreham's technical specifications. If SWRCSD and its "experts" had truly wanted to review the POL amendment, examination of the application would have provided them with useful information.[12/] The burden was on SWRCSD to make use of such material. See Duke Power Co. (Catawba Nuclear

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11/ The Staff's notice also stated that LILCO's POL amendment application was available for inspection at the NRC's Public Documents Room in Washington, D.C. 55 Fed. Reg. 34,101. SWRCSD's counsel's office is in Washington, D.C.

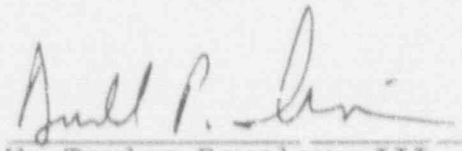
12/ Earlier in this proceeding, SWRCSD complained that it had not been given an opportunity to evaluate the NRC Staff's analysis of the final version of LILCO's proposed defueled technical specifications for Shoreham. See "Shoreham-Wading River Central School District Supplement to Comments on Proposed No Significant Hazards Determination, Petition to Intervene, and Request for Hearing" at 3-4 (Oct. 10, 1990). As LILCO pointed out in response, on August 2, 1990, LILCO and the NRC Staff met in a publicly noticed meeting at NRC headquarters in Rockville, Maryland to discuss the Staff's comments on LILCO's defueled technical specifications. SWRCSD declined to send a representative to the meeting, even though its counsel had been copied on the June 27, 1990 letter by which the Staff transmitted to LILCO the Staff's initial proposed revisions to the technical specifications, and in which the Staff requested a meeting to resolve any differences. In short, SWRCSD has not taken advantage of the opportunities it has had to review LILCO's POL amendment request.

Station, Units 1 and 2), ALAB-687, 16 NRC at 468 (a petitioner has an "ironclad obligation to examine the publicly available documentary material pertaining to the facility in question with sufficient care to enable the petition to uncover any information that could serve as the foundation of a specific contention"). Given its own lack of conscientiousness, SWRCSD is in no position now to complain that it lacked information on which to base its intervention petition.

IV. Conclusion

For the reasons above, SWRCSD's appeal from LBP-91-26 should be denied.

Respectfully submitted



W. Taylor Reveley, III
Donald P. Irwin
David S. Harlow
Counsel for Long Island
Lighting Company

Hunton & Williams
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219

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CERTIFICATE OF SERVICE

I hereby certify that copies of **LILCO'S OPPOSITION TO SHOREHAM-WADING RIVER CENTRAL SCHOOL DISTRICT'S APPEAL FROM LBP-91-26** were served this date upon the following by Federal Express, as indicated by an asterisk, or by first-class mail, postage prepaid.

Commissioner Kenneth M. Carr, Chairman*
Nuclear Regulatory Commission
One White Flint North Building
11555 Rockville Pike
Rockville, Maryland 20852

Commissioner Kenneth C. Rogers*
Nuclear Regulatory Commission
One White Flint North Building
11555 Rockville Pike
Rockville, Maryland 20852

Commissioner James R. Curtiss*
Nuclear Regulatory Commission
One White Flint North Building
11555 Rockville Pike
Rockville, Maryland 20852

Commissioner Forrest J. Remick*
Nuclear Regulatory Commission
One White Flint North Building
11555 Rockville Pike
Rockville, Maryland 20852

The Honorable Samuel J. Chilk
The Secretary of the Commission
Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Administrative Judge*
Morton B. Margulies, Chairman
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
East-West Towers, Fourth Floor
4350 East-West Highway
Bethesda, MD 20814

Administrative Judge*
Jerry R. Kline
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
East-West Towers, Fourth Floor
4350 East-West Highway
Bethesda, MD 20814

Administrative Judge*
George A. Ferguson
Atomic Safety and Licensing Board
5307 Al Jones Drive
Columbia Beach, Maryland 20764

James P. McGranery, Jr., Esq.*
Dow, Lohnes & Albertson
1255 23rd Street, N.W., Suite 500
Washington, D.C. 20037

Mitzi A. Young, Esq.*
Office of the General Counsel
U.S. Nuclear Regulatory Commission
One White Flint North
11555 Rockville Pike
Rockville, Maryland 20852

Nicholas S. Reynolds, Esq.
David A. Repka, Esq.
Winston & Strawn
1400 L Street, N.W.
Washington, D.C. 20005

Stanley B. Klimberg, Esq.
Executive Director and General
Counsel
Long Island Power Authority
200 Garden City Plaza, Suite 201
Garden City, New York 11530

Charles M. Pratt, Esq.
Senior Vice President and General Counsel
22nd Floor
Power Authority of State of New York
1633 Broadway
New York, New York 10019

Carl R. Schenker, Jr., Esq.*
Counsel, Long Island Power Authority
O'Melveny & Myers
555 13th Street, N.W.
Washington, D.C. 20004

Gerald C. Goldstein, Esq.
Office of General Counsel
New York Power Authority
1633 Broadway
New York, New York 10019

Samuel A. Cherniak, Esq.
New York State Department of Law
Bureau of Consumer Frauds and Protection
120 Broadway
New York, New York 10271

David S. Harlow

Hunton & Williams
Riverfront Plaza, East To'er
951 East Byrd Street
Richmond, Virginia 23219-4074

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