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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

LILCO'S BRIEF IN OPPOSITION TO PETITIONERS' APPEAL FROM LBP-91-1, LBP-91-23, AND LBP-91-35

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I. Introduction

On September 13, 1991, Petitioners Shoreham-Wading River Central School District (SWRCSD) and Scientists and Engineers for Secure Energy, Inc. (SE_2) noticed an appeal from the Licensing Board's order rejecting their contentions and denying their petitions to intervene in the Confirmatory Order, Physical Security Plan, and emergency preparedness license amendment proceedings for Shoreham. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-35, 34 NRC __ (Aug. 29, 1991). Petitioners also noticed an appeal from the Board's two

earlier rulings on their standing to intervene in these proceedings, Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-1, 33 NRC 15 (1991)(denying Petitioners' initial petitions but providing them an opportunity to amend) and Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-23, 33 NRC 430 (1991)(allowing SE_2 to file contentions in all three proceedings on issues arising under the National Environmental Policy Act (NEPA) and allowing both SE_2 and SWRCSD to file contentions in the Physical Security Plan proceeding on issues arising under the Atomic Energy Act). Petitioners' notice of appeal was accompanied by a supporting brief (September 13 Appeal).

Pursuant to 10 C.F.R. § 2.714a(a), Long Island Lighting Company (LILCO or the Company) opposes Petitioners' appeal. The Board's decision denying the petitions to intervene is correct. There is no reason to reverse it.

II. The Heart of the Matter

Petitioners say they want evidentiary hearings on the legality of the NRC's (1) Confirmatory Order denying LILCO the right to reload Shoreham's fuel without prior NRC approval, (2) relaxation of certain requirements in Shoreham's Physical Security Plan, and (3) elimination of certain emergency preparedness requirements for the plant. But this is not what Petitioners really want. It is plain to anyone with eyes to see or ears to hear that what Petitioners really want is evidentiary hearings on

whether or not Shoreham should be operated. Or, to put it another way, whether or not Shoreham should be decommissioned. If Shoreham's decommissioning is taken as a given, Petitioners could not care less which method of decommissioning is used.

The Commission, however, has repeatedly ruled that whether or not Shoreham should be operated is a decision for LILCO to make. Once LILCO decides (as it has) not to operate the plant, the question requiring NRC review and approval is simply the method of decommissioning to be used and any necessary conditions. Petitioners may try to establish their standing to intervene in a proceeding considering how to decommission Shoreham and (if successful on standing), to try to frame justiciable contentions for evidentiary hearings on how to do the deed. But this is not what Petitioners have done. They have persisted in trying to stuff standing claims and proposed contentions relevant solely to whether Shoreham should be operated into a mold designed to hold standing claims and proposed contentions that take decommissioning as a given and then engage how it is to be done.

Petitioners' sweeping unhappiness with LILCO's decision to abandon Shoreham cannot be assuaged in the narrow confines of a proceeding concerned with how to accomplish decommissioning. No matter how hard Petitioners twist and strain, they cannot make their litigation desires fit in the available vessel.

The basic incompatibility between what Petitioners so desperately want to litigate and what they know the Commission

has told them they may litigate has left with them with no good arguments. Thus, Petitioners' brief on appeal is confusing, at times incomprehensible. It flatly fails to satisfy the Commission's requirement that Petitioners' contentions must

> at a minimum . . . offer some plausible explanation why an EIS might be required for an NRC decision approving a Shoreham decommissioning plan and how [the NRC actions at issue here] could, by foreclosing alternative decommissioning methods or some other NEPA-based considerations, constitute an illegal segmentation of the EIS process.

Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-91-04, 33 NRC 233, 237 (1991). Further, Petitioners' brief provides only sparse citations to the record, or other authority, to support its claims. And Petitioners recycle arguments made, and lost, by them before in this docket, with almost no recognition of or response to the reasons given for these arguments' prior rejection. It is not the Commission's job, or that of the other parties, to try to make sense of the conclusory helter-skelter that is Petitioners' brief. Nor is there any way to make sense of it except for what it is: a continued, monotonous insistence that some way, some how the NRC must allow Petitioners to litigate the merits of Shoreham's abandonment.[1/]

[1/] It is possible that SWRCSD, as opposed to SE_2, cares neither about plant operation nor the merits of decommissioning, but simply about preservation of its property tax payments (about $25 million a year) from Shoreham and escalation of the base upon which those payments are based. By delaying Shoreham's transfer, SWRCSD is seeking to realize a financial gain.

III. Background

A. Procedural History

Even by Shoreham standards, the procedural history of the three licensing actions at issue here is long and tedious. What that history makes undeniably clear is that Petitioners have had more than ample opportunity to make their case on the Confirmatory Order, Physical Security Plan, and emergency preparedness amendments. Petitioners' complete failure throughout this time to advance anything that might justify evidentiary hearings does not stem from inadequate opportunity to air their views or inadequate attention to them by the NRC's adjudicatory process.

The story starts in 1989, two months after the Settlement Agreement between LILCO and New York State took effect. On August 30, 1989, the NRC Staff directed LILCO to describe its plans for Shoreham in light of the Settlement Agreement. In its response, dated September 17, 1989, the Company did so, suggesting also that the NRC issue an order prohibiting LILCO from refueling and operating the plant without prior NRC permission. At the time, the NRC declined to issue such an order.

As part of LILCO's effort to minimize Shoreham's costs pending its transfer to the Long Island Power Authority, on December 15, 1989, the Company submitted to the NRC a combined request for (1) an exemption from the emergency preparedness requirements of 10 C.F.R. § 50.54(q) and (2) a license amendment to suspend the effect of the emergency preparedness conditions in Shoreham's operating license. Accompanying LILCO's request was a

detailed safety analysis of the radiological risk associated with Shoreham in its defueled state, demonstrating that there was no need for LILCO to maintain an offsite emergency response capability and that a reduced onsite capability would be adequate to deal with any plausible accident.

On January 5, 1990, in conjunction with its request for a "possession only" license (POL) for Shoreham, LILCO filed an application to amend the plant's Physical Security Plan. In support of its application (part of which contained confidential "safeguards" information pursuant to 10 C.F.R. Part 73), LILCO showed that the greatly reduced risk associated with Shoreham's defueled condition justified (1) reduction of the number of "vital" areas in the plant and (2) elimination of certain plan provisions that exceeded NRC requirements.

Following discussions with the NRC, on January 12, 1990, LILCO submitted a clarification to its emergency preparedness exemption/amendment request. The Company also reaffirmed its commitment not to refuel Shoreham without prior NRC approval.

On March 21, 1990, the NRC noticed in the Federal Register a proposed finding of "no significant hazards consideration" for LILCO's Physical Security Plan amendment. 55 Fed. Reg. 10,540 (March 21, 1990). The notice solicited comments on the proposed finding and informed "interested persons" that they could seek a hearing on the proposed amendment.

About a week later, the NRC made a proposed finding of "no significant hazards consideration" on LILCO's emergency prepared-

ness license amendment and noticed it in the Federal Register. 55 Fed. Reg. 12,076 (March 30, 1990). Again, interested persons were invited to comment on the proposed finding and to seek a hearing on the amendment.

On March 29, 1990, in response to LILCO's letter of January 12, 1990, the NRC issued the Confirmatory Order, prohibiting LILCO from refueling Shoreham without first obtaining NRC permission. The Confirmatory Order was noticed in the Federal Register a week later. 55 Fed. Reg. 12,758 (April 5, 1990). While the Confirmatory Order was made immediately effective upon issuance, the NRC announced that interested persons could seek a hearing on the narrow question whether the NRC's action in imposing the restriction on LILCO should be sustained.

Petitioners filed separate petitions for hearing on the Confirmatory Order on April 18, 1990. Both alleged (incorrectly) that the NRC had violated NEPA by issuing the order without having first prepared an EIS that considered, among other things, the alleged "alternative" of Shoreham's operation as a nuclear facility. Petitioners also claimed (again, incorrectly) that the Confirmatory Order violated various provisions of the Atomic Energy Act and NRC regulations. LILCO and the NRC Staff opposed the hearing requests on May 3 and 8, 1990, respectively.

Earlier, on April 20, 1990, Petitioners had filed separate petitions for hearing on both the Physical Security Plan and the emergency preparedness license amendments. Again, they claimed that NEPA required full-blown consideration of Shoreham's opera-

tion as a nuclear facility before the NRC could approve any amendment requests not compatible with resumed operation. Again, LILCO and the NRC Staff opposed the hearing requests, on May 3 and 10, respectively.

At this point, Petitioners also took their campaign to force Shoreham's operation to the federal courts. On May 7, 1990, they filed in the U.S. Court of Appeals for the District of Columbia Circuit a petition for review of, among other things, the Confirmatory Order and the NRC's authorization on April 25, 1990, of an exemption from onsite property insurance requirements. Briefing was completed on January 18, 1991, with both LILCO and the NRC opposing the petition.

Meanwhile, as allowed under the "holly" provisions of NRC regulations, on June 14, 1990, while Petitioners' hearing requests were pending, the NRC made a final finding of "no significant hazards consideration" and issued the Physical Security Plan amendment. 55 Fed. Reg. 25,387 (June 20, 1990).

Similarly, on July 31, 1990, the NRC made a final finding of "no significant hazards consideration" and issued the emergency preparedness amendment. 55 Fed. 31,914 (Aug. 6, 1990).

A few months thereafter, the Commission took up the matter of Petitioners' three sets of requests for hearings on the Confirmatory Order, Physical Security Plan, and emergency preparedness amendments. On October 17, 1990, the Commission referred the hearing requests to the Licensing Board. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1),

CLI-90-08, 32 NRC 201 (1990). But, in so doing, the Commission also resolved the vital threshold issue; it ruled that LILCO's determination not to operate Shoreham was a "private" decision to which NEPA did not apply. Therefore, the Commission held, any environmental review of Shoreham's decommissioning need not consider "resumed operation" of the plant as a nuclear facility.

Petitioners then began their campaign to overturn this ruling. They asked for reconsideration of CLI-90-08 on October 29, 1990. LILCO and the NRC Staff opposed this request, in responses filed on November 13 and 19, 1990, respectively. On February 22, 1991, the Commission affirmed its NEPA decision. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-91-02, 33 NRC 61 (1991).

Meanwhile, on January 8, 1991, the Licensing Board, chaired by Judge Margulies, denied both Petitioners' three sets of petitions. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-1, 33 NRC 15 (1991). The Board found that Petitioners had demonstrated neither organizational nor representational standing to intervene on either NEPA or Atomic Energy Act issues. As the Board explained, the Commission's decision in CLI-90-08 had "stripped away Petitioners' main arguments for standing." 33 NRC at 40. But, because "Petitioners did not have the benefit of the Commission's precedential decision . . . at the time they filed their various petitions to intervene," the Board gave them an opportunity to amend their petitions to "take into account the recent Commission decision

and the deficiencies in their petitions" that the Board had identified. Id. This second bite at the apple was "predicated in part on the Commission being rather liberal in permitting petitioners the opportunity to cure defective petitions to intervene." Id.

Notwithstanding their opportunity for a second bite, on January 23, 1991, Petitioners tried to appeal the Board's January 8 order to the Commission. Both LILCO and the NRC Staff opposed Petitioners' "appeal" on the ground that, among other flaws, it was interlocutory. LILCO and the Staff pointed out that, since the Board in LBP-91-1 had given Petitioners an opportunity to amend, LBP-91-1 had not "wholly den[ied]" their petitions for hearing, and complete denial is the predicate for an appeal under 10 C.F.R. § 2.714a(b).

On February 2, 1991, Petitioners submitted amended petitions to intervene in all three licensing actions. Included with the amended petitions were affidavits from, among others, the President of the SWRCSD Board of Education and SE_2's Executive Director. LILCO and the NRC Staff filed oppositions to the amended petitions on February 12 and 25, 1991, respectively.

On April 3, 1991, the Commission rejected as interlocutory Petitioners' January 23 "appeal" from LBP-91-1. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-91-04, 33 NRC 233 (1991). The Commission also indicated that its ruling in that CLI-90-08 was "not intended to preclude the Licensing Board, as a matter of law and jurisdiction, from entertaining

properly supported contentions" that an EIS on Shoreham's decommissioning must be prepared for the three licensing actions at issue. CLI-91-04, 33 NRC at 236.

The Commission went on to explain, however, that it viewed the three licensing actions as "being wholly separate from, and independent of, decommissioning." 33 NRC at 237. And, the Commission "harbor[ed] substantial doubts that the Petitioners can make a credible showing that these actions are part of the decommissioning process." Id. But, the Commission allowed, if Petitioners were otherwise able to satisfy the NRC's standing requirements, the Board was free to consider a "properly pled contention" on NEPA issues. Id.

The Commission set out the test for a "properly pled contention." It would

> at a minimum need to offer some plausible explanation why an EIS might be required for an NRC decision approving a Shoreham decommissioning plan and how these actions here could, by foreclosing alternative decommissioning methods or some other NEPA-based considerations, constitute an illegal segmentation of the EIS process.

CLI-91-04, 33 NRC at 237 (emphasis in original).

On April 30, 1991, the D.C. Circuit denied Petitioners' petition for review of the Confirmatory Order and property insurance exemption. Shoreham-Wading River Central School District v. NRC, 931 F.2d 102 (D.C. Cir. 1991). The court found that even if, as Petitioners alleged, a de facto decommissioning proposal for Shoreham existed, the Confirmatory Order and the property insurance exemption were not "interdependent parts of a

larger action [that] depend on the larger action for their justification." 931 F.2d at 107, quoting 40 C.F.R. § 1508.25(a)(1)(iii). The two licensing actions, the court said, "cannot possibly be seen as unlawful segmentation of a decommissioning proposal to avoid NEPA obligations." Id. at 107. Rather, they are "simply means of avoiding a waste of resources in the meantime." Id.

The next month, on May 23, 1991, the Licensing Board ruled on Petitioners' amended petitions. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-23, 33 NRC 430 (1991). The Board held that SE_2 had standing under NEPA as to all three licensing actions and allowed it to file contentions on them. While preliminarily finding that SE_2 lacked standing under the Atomic Energy Act with respect to the Physical Security Plan, the Board nonetheless allowed SE_2 to file contentions on it as well. SE_2 was said to have been "hindered in its ability to be specific" about possible harm arising from the security amendment because SE_2 lacked access to Physical Security Plan. The Board decided to "defer ruling on standing" until SE_2 had filed contentions. 33 NRC at 440. In this regard, the Board stated that

> in reviewing the merits of the contention(s), the Licensing Board [would] take into account SE_2's lack of access to the security plan. Although the lack of the security plan [might] adversely affect SE_2's ability to demonstrate that the security plan is the cause of the matter complained of, it should in no way otherwise hinder SE_2's ability to establish the other elements of an acceptable contention, as provided for in section 2.714(b).

Id. The Board denied SE_2's amended petition as to Confirmatory Order and emergency preparedness issues under the Atomic Energy Act.

As for SWRCSD, the Board denied its amended petition except for Physical Security Plan issues under the Atomic Energy Act. "Like SE_2," the Board said, it would not "finally decide [SWRCSD] standing" under the Atomic Energy Act until contentions had been filed. The Board further held that SWRCSD's "and its employees' claim of a deprivation of information mandated by NEPA is vague and does not identify a cognizable palpable injury that would provide a basis for organizational or representational standing." 33 NRC at 443. And otherwise, the Board found, SWRCSD's "organizational interests are those of a ratepayer and tax recipient." Id. These "economic interests," the Board held, "do not qualify [SWRCSD] for standing under NEPA or the [Atomic Energy Act]." Id.[2/]

On June 21, 1991, SE_2 submitted four NEPA-based contentions on the Confirmatory Order, Physical Security Plan, and emergency preparedness amendments; and SWRCSD and SE_2 jointly filed one Atomic Energy Act-based contention (with seven subparts) on the Physical Security Plan amendment. LILCO and the NRC Staff filed

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[2/] Thus, the Board's ruling in LBP-91-23 had the effect of "wholly denying" SWRCSD's petitions for hearing in the Confirmatory Order and emergency preparedness proceedings. SWRCSD did not appeal LBP-91-23's ruling on its standing in these two proceedings within the 10-day limit mandated by 10 C.F.R. § 2.714a(a).

oppositions to all of the contentions on July 3 and 11, 1991, respectively.

A prehearing conference was held in Bethesda, Maryland on July 23, 1991. During the conference, Petitioners were given a lengthy opportunity to explain their contentions and to address the concerns over their admissibility raised by members of the Board.

Five weeks thereafter, and more than two years into this adjudicatory forum, the Licensing Board issued Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-35, 34 NRC __ (Aug. 29, 1991). This decision denied all of Petitioners' contentions, finding that they did not meet the requirements for basis and specificity of 10 C.F.R. § 2.714(b)(2). In addition, having scrutinized Petitioners' Physical Security Plan contention, the Board concluded that Petitioners had failed to establish standing under § 2.714(a)(2). Accordingly, the Board denied intervention to both Petitioners.

B. Legal Standard on Appeal

(1) Threshold Standing Issues

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). A Board's standing decision

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 is not 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).

(2) Admissibility of Contentions

Under NRC precedent, in an appeal from a Licensing Board's denial of contentions, the reviewing body (in this case, the Commission itself), itself reviews the proffered contentions. See, e.g., Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-130, 6 AEC 423, 424-25 (1973); Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-125, 6 AEC 371, 372 (1973); Duquesne Light Co. (Beaver Valley Power Station, Unit 1), ALAB-109, 6 AEC 243, 245

(1973); Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-107, 6 AEC 188, 194 (1973). But as with standing, the Licensing Board "exercises substantial discretion in determining the adequacy" of contentions, and review of the Board's decision is "limited to whether the Board abused its discretion." Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 1), ALAB-868, 25 NRC 912 (1987); Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 21 (1974)(the Board exercises "considerable amount of discretion" in determining the admissibility of contentions). In order for the reviewing body to reverse a Board on contentions, it "must be persuaded that no reasonable person could take the view" adopted by the Board. Texas Utilities Electric Co., ALAB-868, 25 NRC at 931.

IV. Discussion

Petitioners' September 13 appeal comes in two parts. First, they allege (a) that the Board was "premature" in ruling on their standing before they had a chance to amend or supplement their petitions, (b) that the Board erred in determining that SWRCSD's interest in the proceedings was solely as a "ratepayer" and "tax recipient," and (c) that the Board should have provided them an opportunity for discovery before ruling on the petitions. These arguments are wrong.[3/]

[3/] Further, with respect to SWRCSD in the Confirmatory Order and emergency preparedness proceedings, the allegations are (continued...)

Second, Petitioners object to the Board's rejection of their four NEPA-based contentions and their one Atomic Energy Act-based contention. Petitioners also make two miscellaneous and trivial allegations of error. Again, Petitioners are wrong.

A. The Board's Rulings in LBP-91-23 Were Correct

(1) Petitioners' Dismissal Was Not "Premature"

Petitioners claim they had a "right to be able to amend their petitions for leave to intervene 'without prior approval of the presiding officer at any time up to fifteen (15) days prior to holding of the . . . first prehearing conference.'" September 13 Appeal at 2 (emphasis in original), citing 10 C.F.R. § 2.714(a)(3). Petitioners also allege they had an "absolute right to be able to 'supplement' their petitions 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 was on July 23, 1991, Petitioners claim they had a right to amend and supplement their petitions "at any time prior to July 8, 1991." Id.

3/ (...continued)
untimely. In LBP-91-23, decided on May 23, 1991, the Board found that SWRCSD lacked standing under NEPA or the Atomic Energy Act in both of those proceedings. If SWRCSD wished to challenge this finding, it had to file a notice of appeal within 10 days after service of the Board's order. 10 C.F.R. § 2.714a(a). SWRCSD failed to do so. Thus, the attempt here to appeal the Board's denial of SWRCSD's standing in these two proceedings should be rejected as untimely. See, e.g., Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-547, 9 NRC 638 (1979).

Petitioners are wrong. 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:

> 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 presiding 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].

This regulation does not preclude a 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).[4/] Rather, the actual gist of the provision is that a petition, otherwise still 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

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[4/] Before the NRC, petitioners ECO (in the Rancho Seco case) and SWRCSD and SE_2 (in the Shoreham case) are represented by the same counsel.

amended only with the permission of the Board. But there is no bar to the Board's ability to rule at any time on papers before it.

Similarly, there is no basis for Petitioners' claim that § 2.714(b)(1) gives them an "absolute" right to "supplement" their petition. According to this provision,

> [n]ot 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.

Petitioners stand this regulation on its head. They argue that § 2.714(b)(1) provides a petitioner with the "right" to supplement its petition, when actually the provision provides 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 on a particular issue, it may dismiss the petition with respect to that issue without waiting for the submission of contentions.[2/]

Petitioners having failed to show that they had a "right" to amend, the only question left is whether the Board's dismissal of their petition with respect to certain issues was a "gross abuse

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[2/] The Commission recognized this two-step approach in Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-91-04, 33 NRC 233 (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." 33 NRC at 237 (emphasis added).

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 Petitioners one opportunity to submit amended petitions, after identifying precisely what was wrong with the initial defective pleadings. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-1, 33 NRC 15, 40 (1991)(the Board allows Petitioners to submit amended petitions, 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 Petitioners a third opportunity to make an adequate showing of standing.[5/]

(2) The Board's Ruling on SWRCSD's Standing Was Correct

SWRCSD "suggests" that the Board made a mistake in LBP-91-23 by

> implying that the 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]."

5/ The claim that Petitioners "had planned to amend and supplement their petitions" by submitting affidavits "further specifying the interests that are harmed by issuance" of the three amendments at issue does not help them. Petitioners do not identify these new affiants nor explain why they could not have provided this further specification when they submitted their amended petitions on February 4, 1991.

September 13 Appeal at 3. SWRCSD's allegation of error regarding the Board's ruling on its standing has two parts. First, SWRCSD says that the Board was wrong in finding that SWRCSD's only interest in the proceeding concerning issues arising under NEPA (with respect to all three licensing actions) and issues arising under the Atomic Energy Act (with respect to the Confirmatory Order and emergency preparedness amendments) 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.

a. SWRCSD Did Not Demonstrate an Injury to its Informational Interests under NEPA

In LBP-91-23, the Board found that SWRCSD's and "its employees' claim of a deprivation of information mandated by NEPA is vague and does not identify a cognizable palpable injury that would provide a basis for organizational or representational standing." 33 NRC at 443. SWRCSD does not confront the Board's finding that it provided only "vague" allegations of harm. Rather, SWRCSD simply claims that the "denial of the availability of the information" in an EIS on Shoreham's decommissioning is a "distinct and palpable" harm to SWRCSD "within the zone of interest protected by NEPA." September 13 Appeal at 5. Significantly, SWRCSD cites no authority for this proposition.

The Board is correct. To establish standing under NEPA, SWRCSD had 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. 1990); American Legal Foundation v. FCC, 808 F.2d 84, 92 (D.C. 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 NEPA may "lower[] the threshold for establishing injury to informational interests," 901 F.2d at 123, they do not eliminate the threshold requirement of a plausible connection between the challenged agency action and the alleged injury.

It was this plausible connection between the alleged harm and the NRC's issuance of the three license amendments at issue here that SWRCSD failed to establish. Nowhere in SWRCSD's petitions to intervene is any tangible, specific connection shown between agency action and alleged 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 specific guidance from the Board in LBP-91-1, 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 had no injury to a cognizable interest under NEPA.

b. SWRCSD's Interest as a "Ratepayer" and "Tax Recipient" Does Not Provide Standing to Intervene

Even if "economic injury" were 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 three licensing actions at issue here nor even from Shoreham's decommissioning. Rather, any "economic injury" SWRCSD may suffer flows from LILCO's private decision to close the plant. As the Commission has repeatedly made clear, that decision is 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).[2/]

[2/] 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, (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 the Physical Security Plan amendment (or, for that matter, the Confirmatory Order or the emergency preparedness amendment) would not lead to Shoreham's operation. Even a refusal by the NRC to allow Shoreham's transfer to LIPA would not prompt LILCO to operate the plant. The Commission has expressly recognized the irrevocable nature of LILCO's decision.[8/] SWRCSD simply has no "injury in fact" that can be "redressed" by any NRC action. 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).

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

8/ 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).

(3) Petitioners Had No Right to Discovery

Petitioners are mistaken in their suggestion that is was "improper" for the Board in LBP-91-23 to have dismissed them before they had been provided "adequate time for discovery." September 13 Appeal at 9. This claim 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 1 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").

B. The Board's Rejection of Petitioners' Contentions in LBP-91-35 Should Be Upheld

(1) SE_2's NEPA Contentions Were Properly Rejected

As noted at the outset, SE_2's arguments on appeal are difficult to confront because they are so badly stated. The one thing that is clear from SE_2's brief, however, is that SE_2 has utterly disregarded the Commission's guidance in CLI-91-04 about what constitutes a "properly pled" NEPA contention in this proceeding. The Licensing Board correctly applied that guidance in rejecting SE_2's NEPA-based contentions.

a. Contention 1

It is difficult to follow SE_2's arguments since they mischaracterize the Board's ruling and misstate the Commission's guidance in CLI-91-04. At its most concrete, SE_2 asserts that the Board's ruling that Contention 1 does not place "at issue how the three licensing actions could preclude any NEPA-based considerations and constitute an illegal segmentation of the EIS process," LPB-91-35, slip op. at 14, is "intellectually indefensible." September 13 Appeal at 12-13. The "NEPA-based consideration" relied on to "satisfy the alternative part of the second prong of the Commission's standard," SE_2 says, "is illegal segmentation." Id. at 13. SE_2 further says it has

> cited the standard adopted by the CEQ and the NRC for determining whether particular subsidiary actions may be considered or must be included within the scope of a single EIS (i.e., not illegally segmented).

Id. (emphasis in original). The Board, SE_2 concludes, "never comes to grips with this proposition." Id.

But the Board did "come to grips" with this "proposition." It correctly determined that SE_2's mere recitation of the CEQ standards "neither provides the plausible explanation [why an EIS might be required for an NRC decision approving a Shoreham decommissioning plan] called for by the Commission in CLI-91-04, nor does it conform to the requirements of 10 C.F.R. 2.714(b)(2)(i), (ii) and (iii)." LBP-91-35, slip op. at 11-12. The Board's essential point -- which SE_2 steadfastly refuses to accept -- was that the allegation that the three pertinent licensing actions are part of the decommissioning process at Shoreham "presents a factual consideration." Id. at 12 (emphasis added). Accordingly, Contention 1 failed "to contain a brief explanation of the bases of the contention," or a "concise statement of the alleged facts or expert opinion which support the allegation." Id. SE_2 offers nothing in response to this finding but babble.

b. Contention 2

According to SE_2, the Board created a "straw man finding" by concluding that it had "failed to submit an admissible contention on the issue of whether the licensing actions require an EIS." September 13 Appeal at 13. "It is plain from Contentions 1 & 2," SE_2 says, "that [SE_2] do[es] not argue that the three licensing actions require an EIS, but rather argue that the proposal to

decommission (including these three licensing actions) requires an EIS." Id. (emphasis in original).

SE_2 has created the "straw man." The Board did not say that SE_2 had to show that the three actions themselves require an EIS. The Board's analysis fell within the context of Shoreham's decommissioning:

> SE_2 has failed to submit an admissible contention on the issue of whether the three licensing actions require an EIS, yet Contention 2 is premised on that assumption. Without that assumption there is no basis to discuss the applicability of the GEIS to Shoreham. The GEIS is but one form of an EIS. To debate whether the GEIS extends to the Shoreham situation, without the assumption of a requirement for an EIS, would be to engage in an irrelevant academic exercise.

LBP-91-35, slip op. at 16 (emphasis added). The Board's point that Contention 2 was "premised on that assumption" was a plain reference to the first few words of the contention: "The need for an EIS on the proposal to decommission Shoreham is established . . . ." As the Board pointed out, Contention 2 was "based on the very point SE_2 ultimately seeks to establish and is thus fallacious." Id. The Board properly rejected Contention 2, which was nothing but an effort by SE_2 to resurrect their oft-rejected assertion that an environmental review of Shoreham's decommissioning must include consideration of the alternative of "resumed operation."

c. Contention 3

SE_4 says the Board is wrong with respect to Contention 3, because the "format setout [sic] in Regulatory Guide 4.2 (Rev. 2, July 1976) has been codified and is required by 10 C.F.R. Part 51 Appendix A (1991)." September 13 Appeal at 14. But SE_2 fails to confront the Board's ruling that Contention 3 "does not present a litigable issue" because there has been no showing that an environmental report is even required for the three licensing actions at issue. LBP-91-35, slip op. at 17.[2/] The Board's rejection of Contention 3 as being of only "academic interest," and one which does not present a "genuine issue of fact or law for litigation" as required under 10 C.F.R. § 2.714(b) is clearly correct.

d. Contention 4

SE_2 did a curious thing in Contention 4. Rather than try to show how the three licensing actions at issue could foreclose consideration of a decommissioning option at Shoreham (something which SE_2 is charged to do by CLI-91-04), Contention 4 dealt entirely with how the issuance of a POL for Shoreham could foreclose consideration of such options. The Board properly determined that Contention 4 was "irrelevant to the matters at issue in this proceeding." LBP-91-35, slip op. at 19.

[2/] Petitioners' reference to 10 C.F.R. Part 51, Appendix A is irrelevant. Appendix A, by it plain terms, concerns an EIS prepared by the NRC Staff, not an environmental report prepared by a licensee.

On appeal, SE_2 characterizes the Board's determination of the self-evident irrelevance of Contention 4 as "conclusory," but, ultimately, SE_2 is left with nothing to say. SE_2 asserts that it "put in issue the question" of the connection between the three licensing actions, the issuance of the POL, and the proposal to decommission Shoreham in Contention 1. Even if that were true (it is not), SE_2 was required to do more than simply put the issue "in question." Under the NRC's regulations, SE_2 was obligated to provide a threshold showing that there is some factual support underlying its contention. It did not do that, and the Board was therefore correct in determining that Contention 4 "fails to meet the requirements of 10 C.F.R. 2.714 b)(2) and 2.714(d)(2)(i)." LPB-91-35, slip op. at 20.

(2) The Security Contention Was Properly Rejected

Petitioners race through the alleged errors in the Board's ruling rejecting their Physical Security Plan contention as if they were late to catch a bus. At no point do they stop to provide any real explanation or analysis to support their claims of error. Most of the time, they offer little more than an assertion that "we were right the first time." This is inadequate. See, e.g., Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-841, 24 NRC 64, 67 (1986)(if petitioner "wished us to take seriously its insistence that the Licensing Board committed error, its counsel was duty-bound to illume the foundation for that insistence").

First, Petitioners say the Board's "reliance on the absence of expert opinion is meaningless" because they "have not had access to either the previous or current security plan for analysis by experts." September 13 Appeal at 15. Relatedly, they complain that the "'physical plant and equipment configuration given in the final safety analysis report' . . . is irrelevant without knowledge of how the security plan (original and amended) classified those areas and equipment as 'vital' or not vital." Id. That information, they say, "is contained only in the security plan which was not available to Petitioners." Id.

The Board took adequate consideration of Petitioners' lack of access to the Physical Security Plan before dismissing their contention, stating that it had "previously recognized that Petitioners did not have access to the amended security plan." LBP-91-35, slip op. at 23.[10/] At the same time, the Board pointed out that, in deferring its ruling on standing, it

> expected Petitioners to analyze available public information to establish at least a threshold basis for positing possible hazards to public health and safety attributable to

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[10/] It remains the case, too, that while Petitioners seek to take refuge in the fact that they have not been provided access to the Shoreham Physical Security Plan, they have never requested access to the plan. In light of the NRC's strict policy against disclosure of Safeguards Information, it was not LILCO's responsibility to have so offered. Nevertheless, as the Board in LBP-91-35 suggested, had Petitioners ever evidenced an intention to engage in anything other than a "fishing expedition" on this issue (for instance, by diligently pursuing the wealth of public information that was already available to them), the Board might have "permitted further examination of the amended security plan to determine its adequacy in preventing or reducing public risk." LBP-91-35, slip op. at 23.

> Shoreham in its present physical configuration.

Id. But "absent some adequately supported assertion of public risk (or risk to Petitioners)," the Board ruled, it saw "no basis for proceeding further." Id. In so ruling, the Board acted well within the bounds of its discretion. See, e.g., Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 1), ALAB-868, 25 NRC 912 (1987); Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 21 (1974).[11/]

Second, Petitioners dispute as "ill-founded" the Board's rejection of their argument that "relaxation" of the security requirements is "arbitrary and capricious" because similar relaxation has not been granted to other nuclear plants in extended outages. September 13 Appeal at 15. They suggest that the Board's ruling on this point is based on its "implicit

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[11/] Petitioners' subsidiary assertion that the Board never "point[ed] to any 'publicly available information' that would have been relevant" is simply not true. For example, the Board plainly noted that there was

> no reason Petitioners could not analyze or take account of information in the public record, as for example the current defueled state of the reactor, sources and location of radioactivity within the reactor complex, amount of radioactivity on site, and physical plant and equipment configuration given in the Final Safety Analysis Report, to frame a contention having the required specificity in all but [the] limited aspects previously discussed if a public hazard from fuel theft or sabotage exists at Shoreham.

LBP-91-35, slip op. at 23.

finding that Shoreham is not 'likely to be restarted.'" Id. This, in turn, Petitioners argue, is an "ultimate finding . . . that is at issue in this proceeding and cannot be assumed" by the Board. Id.

But the Board's real ruling on this point was:

> We reject that argument for two reasons. First there is no supporting basis proffered for the assertion that Shoreham, which has not operated at full power and is defueled, is in fact similarly situated with respect to other reactors in extended outage[s] but which are likely to be restarted. Second, there is no legal authority cited to suggest that the Licensing Board could impose requirements on Shoreham based on an analogous situation with other reactors rather than the provisions of 10 C.F.R. Part 73.

LBP-91-35, slip op. at 25 (emphasis added). The Board thus identified both a factual matter that Petitioners had not addressed, as well as a legal issue that Petitioners failed to resolve. On appeal, Petitioners offer nothing in response.

Third, Petitioners say that the Board "errs in faulting Petitioners for not discussing 10 C.F.R. § 73.5 relating to the possibility of exemptions from Part 73 . . . because the [Board] later recognizes that there is no 'exemption request' at issue in this proceeding." September 13 Appeal at 16.

This is just silly. Petitioners ignore completely that the Board further stated that

> [r]egardless of whether, or not, [§ 73.5] has been invoked in this case, it suggests on its face that Part 73 permits consideration of public risk in implementing its provisions and it does not inflexibly bind the Commission as the contention suggests.

LBP-91-35, slip op. at 26 (emphasis added). In other words, the Board cited § 73.5 as evidence for the proposition that the level of physical security required at a nuclear facility under Part 73 may vary given the radiological risk presented by that facility. Rather than confront this, however, Petitioners pretend that the Board was saying something altogether different.

Fourth, Petitioners argue that the Board's "treatment of [their] presentation of evidence of an attempt at sabotage on October 16, 1989, is a misunderstanding of [their] purpose." September 13 Appeal at 16. Petitioners claim that they were not asking the Board to assess the adequacy of the Shoreham Physical Security Plan prior to the amendment. Rather, Petitioners say, their argument was that the "existence of the attempted sabotage, and the licensee's poor performance in addressing it under the previous plan, indicates that there should be no relaxation of security plan requirements." Id.

There was no "misunderstanding." The Board did not reject this portion of the contention solely because Petitioners tried to raise irrelevant issues. The Board said that "[t]o the extent that [that subpart of the contention] invites such an inquiry it cannot be admitted." LBP-91-35, slip op. at 28. The Board further explained that Petitioners had "failed to support this contention with citations to publicly available information or expert opinion indicating the existence of some form of risk to public health arising from the defueled Shoreham reactor." Id.

Fifth, Petitioners dispute the Board's rejection of their subpart on the security settlement agreement between LILCO and Suffolk County. The Board held that Petitioners' "cryptic citation" to a "transcript of a management level meeting held in 1989" was "simply inadequate," since the "relevance" of the meeting was not established. LBP-91-35, slip op. at 29. Petitioners claim that "[c]ontrary to the [Board's] assertion," they "clearly identified the relevance of the information presented at the Management Meeting on July 28, 1989." September 13 Appeal at 17. According to Petitioners, a "reduction in guard force would violate the settlement agreement on security where Petitioners and the persons they represent are third party beneficiaries." Id.

Petitioners, who provide no further explanation of the relevance of the July 28, 1989 meeting, offer nothing to confront the Board determination that it was "unwilling to assume that the parties to a past settlement agreement bargained away the Licensee's entitlement under NRC regulations to seek amendments to its operating license, or that the [NRC] Staff concurred in such a settlement." Id. at 29-30. Moreover, while Petitioners claim to be "third party beneficiaries" of the settlement agreement (a post hoc invention that does not appear in the contention), they ignore the reality that "no party to the settlement has complained" about the amendment. LPB-91-35, slip op. at 30. Nor do Petitioners dispute that "it is the current regulations contained in 10 C.F.R. Part 73 by which the acceptability" of the amendment

"must be tested" and that they provided "no factual or legal basis for their assertion of invalidity of the amendment under the applicable regulation." Id.

Sixth, as to the Board's rejection of subpart 5(e), Petitioners say they "identified the appropriate criteria to be applied for allowing a reduction from 10 guards" and "asserted that those criteria had not been met." September 13 Appeal at 17. Since they did not have "access to the original and amended security plans and the justification for the reduction offered by the licensee and accepted by the Staff," Petitioners assert that they "can say nothing more." Id.

Access to the Physical Security Plan by Petitioners would not have saved this subpart. Its fundamental defect was that it ran

> contrary to the plain language of 10 C.F.R. 73.55(h)(3) which provides that the nominal number of armed guards immediately available at a facility shall be 10 "unless specifically require otherwise on a case by case basis by the Commission; however this number may not be reduced to less than five (5) guards."

LBP-91-35, slip op. at 30-31. The Board pointed out that, under this provision, the "number of armed guards required at Shoreham is permitted to be flexible under the regulation and is not fixed immutably at 10." Id. at 31. In short, subpart 5(e) is wrong as a matter of law.

Seventh, Petitioners say that the Board wrongly rejected subpart 5(f) because, "as a matter of law," the protection of equipment deemed "vital" for the operation "is essential to a

licensee with a full power operating license." September 13 Appeal at 17. Petitioners complain that neither LILCO nor the NRC Staff "presented evidence of the NRC's declassification of equipment for areas as vital in any other prior case due to the 'mode of the reactor.'" Id. at 17-18.

The Board properly characterized this allegation as nothing "but another variation on [the] often asserted and rejected claim that there can be no relaxation of security requirements that are applicable to possessors of full power operating licenses regardless of the state or mode of the reactor or the degree of risk it poses to the public." LBP-91-35, slip op. at 32. The Board again rejected that "rigid interpretation" as "conflict[ing] on its face with the definition of 'vital equipment' given at 10 C.F.R. Part 73.2." Id. Once more, the Board said, Petitioners provided "nothing in the form of citations to authority or any other bases for their novel interpretation of law." Id. On appeal, Petitioners simply protest that "the Board got it wrong." But they are obliged to do more. See Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-841, 24 NRC 64 (1986).

Eighth, Petitioners argue that the Board "misunderstood" subpart 5(g), whose "essence" is that the "normal requirements for security plans for full power operating licensees would not be subject to relaxation in the case of Shoreham because the fuel was not self-protecting and no exemption had been sought." September 13 Appeal at 18.

The Board has not misunderstood Petitioners. It just does not agree with them. The Board noted that there is no dispute that 10 C.F.R. § 73.67 is inapplicable to Shoreham, since LILCO has not sought an exemption under that provision. Since subpart 5(g) does "nothing to provide any additional basis or specificity" to the contention, the subpart fails to show that a genuine dispute exists on a material issue of law or fact, as required by 10 C.F.R. § 2.714(b)(2)(iii). LBP-91-35, slip op. at 34.

(3) Petitioners' Allegations of Other Errors Are Trivial and Baseless

Tacked on the end of Petitioners' brief are a couple of other allegations. First, they argue that the Board's rejection of their claim that they should not have been required to file NEPA contentions prior to LILCO's filing of an environmental report "must be reversed" because NRC regulations allegedly state that NEPA contentions are to be submitted "only after the submittal of the environmental report." September 13 Appeal at 18 (emphasis in original), citing 10 C.F.R. § 2.714(b)(2)(iii). But the Board rightly observed that Petitioners had failed to offer any explanation as to how they "were prejudiced or injured." LBP-91-35, slip op. at 35-36. They still have not provided any such explanation. Moreover, § 2.714(b)(2)(iii) is irrelevant unless an environmental report is, in fact, required for the three licensing actions. As the Board pointed out in its ruling on Contention 3, Petitioners never established that. LBP-91-35, slip op. at 17.

Petitioners also assert that, in refusing to consider LILCO's post-hearing filing on the Physical Security Plan filing and their response thereto, the Board abused its discretion "without explanation or attempt at reasoning." September 13 Appeal at 19. The Board acted well within its discretion. Since the Board was able to dismiss subpart 5(d) -- the sole subject of LILCO's July 29, 1991 letter and Petitioners' reply -- on the basis of the papers already before it, it was hardly obligated to take into account further information submitted by LILCO in opposition to that subpart.

V. Conclusion

For the reasons above, Petitioners' appeal from LBP-91-1, LBP-91-23, and LBP-91-35 should be denied.

Respectfully submitted,

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DATED: September 25, 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 BRIEF IN OPPOSITION TO PETITIONERS' APPEAL FROM LBP-91-1, LBP-91-23, AND LBP-91-35** 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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