

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

DOCKETED
USNRC

'91 DEC -6 P12:05

In the Matter of)

LONG ISLAND LIGHTING COMPANY)

(Shoreham Nuclear Power Station,
Unit 1))

) Docket No. 50-322-OLA-2

) (Possession Only License)

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BRIEF IN SUPPORT OF APPEAL

The Atomic Safety and Licensing Board ("ASLB") initially denies the Petitioner's^{1/} first contention that the NRC must prepare an Environmental Impact Statement ("EIS") before issuing a POL on the basis that Petitioner failed to satisfy the two-prong test set out in CLI-90-8 (33 NRC at 237). LBP-90-39 at 6. First, Petitioner argues that the ASLB misinterpreted the Commission's two-prong test in saying that Petitioner must "explain how the granting of the POL involves special circumstances likely to foreclose one or more of the alternatives for decommissioning so that such agency action constitutes an illegal segmentation of the EIS process." LBP-91-39 at 9. The Commission had said that Petitioners must show "how these actions here could, by foreclosing alternative decommissioning methods or some other NEPA-base considerations, constitute an illegal segmentation of the EIS process." 33 NRC at 237 (emphasis

^{1/} The contentions herein were expressed on behalf of both SE2 and the School District pending the School District's appeal of the denial of standing.

added). The Commission explicitly allowed this second prong of the test to be met by showing an illegal segmentation of the EIS process alternatively by "some other NEPA-base considerations" which the ASLB omits from its consideration. This is reversible error requiring a remand for reconsideration.

Further, the ASLB erred in finding that the Petitioner failed to provide a "reasonable explanation why the GEIS is inapplicable to the decommissioning of Shoreham." LBP-91-39 at 9. The record is replete with Petitioner's explanation that GEIS applied only to reactors at the end of life by age or accident, that Shoreham is at the beginning of its life, and thus a full consideration of the cost benefits and alternatives of the proposal is required. This error requires reversal and remand with an order to admit the contention.

The ASLB also erred in finding that the Petitioner did not provide a plausible explanation of why issuance of the POL constituted an illegal segmentation of the process. Contrary to the ASLB's assertion (LBP-91-39 at 10), the Petitioner did not rely only on Council on Environmental Quality regulations, but also on the Commission's own discussion of the decommissioning process in the 1989 rule arguing that that statement of consideration showed that the only function of a "possession-only" license was as part of the decommissioning process. Further, the ASLB's insinuation that a purely legal claim is not sufficient to meet the appropriate standards is incorrect as a matter of law insofar as that argument is laid out with

sufficient reference to the relevant law and facts (including regulations). This error independently requires reversal.

The ASLB's rejection of Petitioners' second contention that the GEIS does not apply the proposal to decommission Shoreham because the GEIS is limited in its scope to facilities at the end of their useful life is also in error. LBP-91-39 at 11-13. The ASLB's logic fails since it denied the admissibility of the first contention for failure to show why the GEIS is not applicable and now would deny a contention explaining why the GEIS is not applicable due to Petitioners' alleged failure to show that the POL amendment "is part of the proposal to decommission Shoreham." LBP-91-39 at 13. Rather, as was argued, the two contentions can be read together to form a single contention which then could not be rejected by ASLB. This is also reversible error.

The ASLB's rejection of Petitioner's third contention (LBP-91-39 at 13-15) is also reversible error. At the prehearing conference, it was made clear that Petitioner was relying not only on regulatory guides but also on 10 C.F.R. Part 51 Appendix A, which is binding as a regulation.

In rejecting Petitioner's fourth contention (LBP-91-39 at 15-17), the ASLB relies on the fact that in that contention there is "no explanation why the GEIS is inapplicable to the decommissioning of Shoreham." LBP-91-39 at 16. However, just such an explanation was provided by the second contention. Once again, the failure to merge these contentions as a single

contention constitutes reversible error. The ASLB also erred in finding that Petitioner "has not even attempted to explain why the environmental impacts of decommissioning Shoreham fall outside the envelope of impacts already considered in the GEIS" (LBP-91-39 at 16) since there was an extended colloquy on that subject between counsel for the Petitioner and the ASLB at the prehearing conference as well as a further explanation in the second contention. Since the ASLB apparently found that Petitioner had satisfied the second prong of the Commission's test the ASLB's order should be reversed and remanded with instructions to admit the contention (as amalgamated).

Petitioner also appeals the ASLB's determination in LBP-91-26 that SE2 does not have standing to raise Atomic Energy Act issues. SE2 is a tax exempt New York State not-for-profit corporation whose purposes include promoting intelligent uses of secure energy resources within the United States and informing its members, governmental officials and others of the health and safety issues of various forms of energy, including atomic energy, and SE2 has been designated by six of its members who are dependent upon LILCO for electricity and all of whom reside and work within 50 miles of the Shoreham plant, and some of whom live and work within 10 miles of the Shoreham plant to represent and protect their interests under the AEA as described in their affidavits in those proceedings. The ASLB's rejection of the normal NRC geographical nexus standards in this respect is arbitrary and capricious, especially considering the fact that

the activities to be allowed under the POL will increase the risk of SE2's members to radiation hazards through allowing and increasing the transportation of irradiated/radioactive materials.

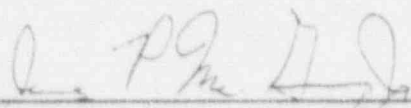
LBP-91-26 is also in error in finding that the Licensing Board should not consider the indirect affects of the decommissioning of Shoreham. Regardless of the correctness of the Commission's prior rulings as to the scope of "alternatives" to the proposal to be considered, there is no limitation on EIS consideration of "direct and indirect effects."

Finally, the ASLB errs in finding that Petitioners' seventh contention "would not entitle the Petitioner to any relief." LBP-91-39 at 20.

WHEREFORE, the Commission should consider this appeal on the basis that findings of material of facts are clearly erroneous, necessary legal conclusions are without governing precedent and are a departure from and contrary to established law, and the appeal raises substantial and important questions of law, policy and discretion which are also questions of first impression before this Commission. Upon further consideration, the Commission should reverse and remand with instructions to grant SE2 standing under the Atomic Energy Act, to allow it to file contentions under that Act, and to admit its contention(s) pursuant to NEPA.

Respectfully submitted,

December 3, 1991


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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE ATOMIC SAFETY AND LICENSING BOARD 91 DEC -6 P12:05

In the Matter of

LONG ISLAND LIGHTING COMPANY

(Shoreham Nuclear Power Station,
Unit 1)

) Docket No. 50-322-OLA-2

) ASLBP No. 91-631-03-OLA-2

) (Possession Only License)

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CERTIFICATE OF SERVICE

I hereby certify that copies of the Petitioner's Notice of Appeal and Brief in Support of Appeal the above-captioned proceeding have been served on the following by first-class mail, postage prepaid on this 3rd day of December, 1991:

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