

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

Before the Commissioners:

Kenneth M. Carr, Chairman  
Kenneth C. Rogers  
James R. Curtiss  
Forrest J. Remick

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In the Matter of ) Docket No. 50-322-OLA  
LONG ISLAND LIGHTING COMPANY ) ASLBP No. 91-621-01-OLA  
(Shoreham Nuclear Power Station, ) (Confirmatory Order Modifica-  
Unit 1) ) tion, Security Plan Amendment  
 ) and Emergency Preparedness  
 ) Amendment)

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PETITIONERS' BRIEF IN SUPPORT OF APPEAL  
OF ATOMIC SAFETY AND LICENSING BOARD  
MEMORANDUM AND ORDER OF JANUARY 8, 1991

Petitioners Shoreham-Wading River Central School District ("School District") and Scientists and Engineers for Secure Energy, Inc. ("SE<sub>2</sub>") (jointly "Petitioners") invoke the Commission's jurisdiction for this appeal pursuant to 10 C.F.R. §§ 7.14(A)(a) (1990) and the Commission's recent Final Rule on Interim Procedures for Agency Appellate Review, 55 Fed. Reg. 42944 (October 24, 1990).

In CLI-90-08, 32 NRC 201 (1990), the Commission held "that the NRC Staff need not file an EA or an EIS reviewing and analyzing 'resumed operation' of Shoreham as a nuclear power plant as an alternative under NEPA." 32 NRC at 209. The Commission emphasized that it were reaching "no other conclusions either regarding the need for an EIS in decommissioning situations in general or with respect to Shoreham in particular.

regarding what alternatives such an EA or an EIS must consider." *Id.* (emphasis added). The Commission recited that Petitioners assert that the actions taken by LILCO and the amount to 'de facto' decommissioning of the Shoreham facility without preparing an Environmental Impact Statement ('') on the decommissioning plan." 32 NRC at 204. But at no did the Commission contradict that characterization. Nor indicate that it was not appropriate to begin National Environmental Policy Act ("NEPA") review of the decommissioning at this time. In fact, the Commission's opinion admits tence of a proposal to decommission stating, among other that "the broadest NRC action related to Shoreham ioning will be approval of the decision of how that oning will be accomplished." 32 NRC at 208.

However, the Atomic Safety and Licensing Board ("ASLB") in its Order that "the three license changes now Board are not an impermissible segmentation of any decommission." Memorandum and Order at 47. contend that there is no basis in CLI-90-08 for this the contrary, a fair reading of CLI-90-08 indicates ssion recognizes the existence of a proposal to and that the three licensing actions under review thin the "scope" of that proposal since they are l," are "interdependent parts of [that] larger d on the larger action [the decommissioning

or regarding what alternatives such an EA or an EIS must consider." *Id.* (emphasis added). The Commission recited that "the Petitioners assert that the actions taken by LILCO and the Staff amount to 'de facto' decommissioning of the Shoreham facility without preparing an Environmental Impact Statement ('EIS') on the decommissioning plan." 32 NRC at 204. But at no point did the Commission contradict that characterization. Nor did it indicate that it was not appropriate to begin National Environmental Policy Act ("NEPA") review of the decommissioning proposal at this time. In fact, the Commission's opinion admits the existence of a proposal to decommission stating, among other things, that "the broadest NRC action related to Shoreham decommissioning will be approval of the decision of how that decommissioning will be accomplished." 32 NRC at 208.

However, the Atomic Safety and Licensing Board ("ASLB") determined in its Order that "the three license changes now before this Board are not an impermissible segmentation of any decision to decommission." Memorandum and Order at 47. Petitioners contend that there is no basis in CLI-90-08 for this holding. To the contrary, a fair reading of CLI-90-08 indicates that the Commission recognizes the existence of a proposal to decommission and that the three licensing actions under review are included within the "scope" of that proposal since they are "closely related," are "interdependent parts of [that] larger action and depend on the larger action [the decommissioning

preparedness regarding emergency preparedness  
Confirmatory Order had been issued "previously". See  
1508.25 (1989) (adopted by reference in 10 C.F.R. § 51.14(b)  
(1990)).

Petitioners urge the Commission to summarily reverse this holding of the ASLB to avoid further unwarranted delay in the initiation of the NEPA process and to allow the proper scoping of environmental review of the decommissioning proposal including review of the three preparatory licensing actions presented here. Absence such a prompt Commission reversal of the ASLB there will be a considerable waste of Commission and Petitioners' resources in pursuing a segmented environmental consideration of the three licensing actions individually and a frustration of the purposes of NEPA in providing information on the decommissioning proposal to the public and the Commission itself as the ultimate decision-maker. NEPA requires that environmental review of the proposal shall be integrated "with other planning at the earliest possible time to ensure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts." 40 C.F.R. § 1501.2 (1989). While beginning such NEPA review of the decommissioning proposal at this time is hardly the "earliest possible time" since the decommissioning

proposal] for their justification," and it is clear that the easing of physical security requirements and emergency preparedness requirements could not proceed unless the Confirmatory Order had been issued "previously". See 40 C.F.R. § 1508.25 (1989) (adopted by reference in 10 C.F.R. § 51.14(b) (1990)).

Petitioners urge the Commission to summarily reverse this holding of the ASLB to avoid further unwarranted delay in the initiation of the NEPA process and to allow the proper scoping of environmental review of the decommissioning proposal including review of the three preparatory licensing actions presented here. Absence such a prompt Commission reversal of the ASLB there will be a considerable waste of Commission and Petitioners' resources in pursuing a segmented environmental consideration of the three licensing actions individually and a frustration of the purposes of NEPA in providing information on the decommissioning proposal to the public and the Commission itself as the ultimate decision-maker. NEPA requires that environmental review of the proposal shall be integrated "with other planning at the earliest possible time to ensure that planning and decisions reflect environmental values, to avoid delays later in the process, and to head off potential conflicts." 40 C.F.R. § 1501.2 (1989). While beginning such NEPA review of the decommissioning proposal at this time is hardly the "earliest possible time" since the decommissioning

proposal was presented to the NRC on June 30, 1989, now is better than later.

Secondly, the ASLB's decision that "the pendency of the request for reconsideration [of CLI-90-08] provides no sound reason for suspending review of the petition" is arbitrary and capricious and waste the resources of both the Commission and Petitioners. Memorandum and Order at 4 n.1. The ASLB Memorandum and Order relies almost totally on CLI-90-08 for its findings of inadequacy of the Petitioners' contentions as to NEPA review, and the Board has ordered Petitioners to amend their petitions within twenty (20) days after service of that Order in accordance with its findings based on CLI-90-08. In short, the Board is sending Petitioners barrelling ahead on the basis of a non-final order. This is obvious waste of resources, given the fact that CLI-90-08 is under reconsideration and both the Chairman of the Council on Environmental Quality and the U.S. Secretary of Energy have submitted amicus briefs to the Commission in support of the Petitioners' Petition for Reconsideration..

Given the primacy of responsibility of these entities for the interpretation of NEPA and U.S. energy policy, respectively, and given the NRC's obligation to follow the CEQ's interpretation of NEPA and the deference that one should expect the Commission to give the U.S. Secretary of Energy with respect to energy policy, it is fair to assume that there is a great likelihood that the Commission is seriously reconsidering and

will change the position it originally took in CLI-90-08. This is further re-enforced by the Commission's sua sponte decision to extend the time for its review of DD-90-08 (December 20, 1990) which was similarly based on the Commission's original decision in CLI-90-08. That is, if the Commission were inclined to simply reaffirm CLI-90-08, there would be no reason for it to extend the time for its sua sponte review of DD-90-08.

In view of these circumstances there is no basis for the Petitioners, Staff or LILCO expending resources in amending the petitions and responding to those amendments until after the Commission has issued its decision on reconsideration of CLI-90-08.

CONCLUSION

WHEREFORE, Petitioners urge the Commission summarily (1) to vacate the ASLB Memorandum and Order of January 8, 1991 in the above-captioned matter and remand to the Atomic Safety and Licensing Board with instructions to reconsider that order in light of the Commission's decision on reconsideration of CLI-90-08 after that decision is issued, (2) to reverse the Licensing Board's holding that the three license changes before the Board are "not an impermissible segmentation of any decision to decommission," and (3) to grant other relief as appropriate.

Respectfully submitted,

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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

DOCKETED  
USNRC

Before Administrative Judges:

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Dr. Jerry R. Kline

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CERTIFICATE OF SERVICE

I hereby certify that copies of the Notice of Appeal of ASLB Order of January 8, 1991 and accompanying Brief in the above-captioned matter by Shoreham-Wading River Central School District and Scientists and Engineers for Secure Energy, Inc. were served upon the following by first-class mail, postage prepaid on this 23rd day of January, 1991:

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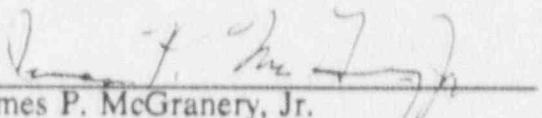
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