ATTACHMENT "A"

12/16/81

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF OPPOSITION TO INTERVENOR SOC'S PROPOSED CONTENTION 7B

INTRODUCTION

On December 10, 19C1, Applicant, the NRC Staff and Intervenor Shoreham Opponents Coalition (SOC) jointly submitted a "Motion for Acceptance of a Stipulation Regarding SOC Contention 3, 6(a)(i), 7(a)(ii)[1/], 8, 9, 12 (Part 3), 15, 16, 17 and 19" (Joint Motion). The motion is dated December 2, 1981. The parties are in agreement as to the admissibility of subparts 1-6 of Contention 7A. However, as to Contention 7B, the NRC Staff and Applicant believe that the contention is not admissible (for reasons other than lack of particularity). (Joint Motion at p.18). The Joint Motion provides that Applicant and Staff will set out their views by December 18, 1981 in support of or in opposition to Contention 7B. Following is the Staff's opposition to all four subparts of Contention 7B.

1/ SOC Contention 7(a)(ii), known as the "TMI contention," is referred to in the Joint Motion and in this filing as Contention 7, parts A and B.

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DISCUSSION

The introductory portion of proposed Contention 7B states that:

> The NRC has not required LILCO to resolve for Shoreham certain items contained in NUREG-0660, NRC Action Plan Developed as a Result of the TMI-2 Accident (1980), or to resolve certain TMI related unresolved safety issues. (Joint Motion at p.22)

The first three proposed "TMI Contentions" are virtually identical to the three contentions previously proposed by SOC in its "Motion Pursuant to 10 CFR Section 2.714 to Supplement Contentions with Respect to the Application for an Operating License" (Motion to add late contentions) filed on September 24, 1981[2/]. See proposed Contention 1, "Interim Reliability Evaluation Program", (pp.27-30 of motion to add late contentions);[3/] proposed Contention 2, "Systems Interaction" (p.31 motion to add late contention); and Contention 3, "Documentation of Deviations", (pp.31-33, motion to add late contentions).

The Staff's opposition to the admissibility of these three contentions, when earlier submitted by SOC, is set forth at pages 19-22 of the

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2/ The above identified motion was Part II of a two part filing. Part 1 of the filing was designated as "Shoreham Opponents Coalition Statement of Contentions Pursuant to 10 CFR Section 2.714, with Respect to the Application for a Construction Permit Extention". The Board has not ruled on either part of the filing.

3/ The heading on this contention has now been changed to "Probalistic Risk Assessment".

"NRC Staff Response to Shoreham Opponents Coalition Statement of Contentions for Construction Permit Extension Proceeding and Motion to Add Late Contentions to the Operating License Proceeding" filed on October 15, 1981 (Staff October Response). Since the wording of the contention is virtually identical, that opposition is equally applicable to the first three restated SOC proposed contentions now contained in 7B of the Joint Motion. In lieu of setting out our previously stated opposition, a copy of the Staff's October Response, minus the attachments thereto, is attached to this filing for the convenience of the Board and parties.

In sum, our opposition to the three contentions in question then, as now, is grounded on the fact that the Commission has established the basic policy that only TMI contentions related to a specific NUREG-0737 requirement may be litigated in an operating license hearing (See p. 20, Staff October Response). As noted in our October Response, the three contentions now reraised by SOC are based on safety concerns which never resulted in NUREG-073 requirements. Accordingly, they cannot be admitted for litigation in this proceeding.

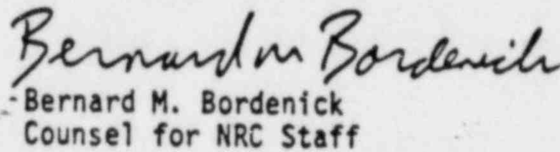
SOC's proposed Contention 7B(4), while not set forth in its motion to add late contentions, is also objectionable as a matter of Commission policy since it is not related to a specific NUREG-0737 requirement. This fourth proposed TMI contention requests that the Shoreham "equipment" be subjected to a re-evaluation of its importance to safety. TMI Action Plan Items I.F.1 and I.F.5 were not included in NUREG-0737, and thus are not within the Commission's policy statement of December 18, 1980. 45 Fed. Reg. 85236 (December 24, 1980). Like the first three

proposed TMI contentions in 7B, this is no more than a statement of SOC's opinion that a new TMI requirement is necessary. As such, it is not a litigable contention under the Commission's Policy Statement.

CONCLUSION

The four items proposed by SOC as Contention 7B in the Joint Motion of December 10, 1981 should not be admitted as contentions in this proceeding for the reasons stated above.

Respectfully submitted,



Bernard M. Bordenick
Counsel for NRC Staff

Dated at Bethesda, Maryland
this 16th day of December, 1981.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF RESPONSE TO SHOREHAM OPPONENTS COALITION'S STATEMENT OF CONTENTIONS FOR CONSTRUCTION PERMIT EXTENSION PROCEEDING AND MOTION TO ADD LATE CONTENTIONS TO THE OPERATING LICENSE PROCEEDING

I. INTRODUCTION

On September 24, 1981, the Shoreham Opponents Coalition (SOC) filed a two part document. The first part is a statement of its proposed contentions with respect to the application for a construction permit (CP) extension filed by Long Island Lighting Company (LILCO or Applicant) on November 26, 1980.[1/] The second part is a motion made pursuant to 10 C.F.R. § 2.714, to add late contentions to the proceedings on the application for an operating license (OL).

In this filing the NRC Staff responds to both parts of the SOC document. Briefly, the Staff takes the position that SOC has failed to

1/ The CP extention request is the second such application filed by LILCO. A copy of the NRC Staff Order granting the first LILCO request on December 18, 1978 is attached to this pleading as "Attachment A".

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raise at least one contention litigable under 10 C.F.R. § 50.55(b) in a CP extention proceeding, and therefore, that no hearing is required. Secondly, the Staff takes the position that the SOC motion to add late contentions to the OL proceeding should be denied as not meeting the criteria for late filed contentions under 10 C.F.R. § 2.714 and not setting forth contentions cognizible in these proceedings.

II. BACKGROUND

To put SOC's current requests into proper context it is important to retrace the origins of SOC's participation in these proceedings. On January 24, 1980, SOC filed a petition requesting, among other things, admission as a late Intervenor in the OL proceeding.[2/] On March 5, 1980, the Board granted the request but because of SOC's late entry, limited SOC's participation "to new issues relating to the accident at TMI or to recently discovered construction defects" (Order Ruling on Petition of Shoreham Opponents Coalition, March 5, 1980, at 12).

On November 26, 1980, the Applicant requested an extension of the latest completion date in the CP (from December 31, 1980, to March 31, 1983). On January 23, 1981, SOC filed a "Petition . . . to Institute Proceedings on Whether Good Cause Exists to Extend the Completion Date of the Shoreham Nuclear Power Station." The petition requested a hearing on the Applicant's CP extension request. Additionally, it sought to have

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2/ The OL application filed by LILCO was noticed in the Federal Register on March 18, 1976. 41 Fed. Reg. 11367 (1976).

the Shoreham CP suspended, revoked, or "in the alternative reissue(d) . . . subject to . . . conditions."

The second part of the SOC Petition was treated by the Director, Office of Nuclear Reactor Regulation, as a request under 10 C.F.R. § 2.206 for suspension of construction at Shoreham pending a hearing. In a Director's Decision (DD) dated June 26, 1981, this § 2.206 request was denied because SOC had alleged only that operation, and not continued construction of the plant, could endanger the public health and safety or be environmentally unsound (DD 81-9, 13 NRC ___, 46 Fed. Reg. 34786 (1981)). It was and is the Staff's position that questions involving safety of operation and environmental issues related to operation properly are to be heard at the OL application proceeding presently pending before this Licensing Board, and not at a CP extension hearing when the facility is well over 80 percent complete.

SOC's request for a hearing on the CP extension was referred by the Director to the Commission. On July 22, 1981, the Commission found that SOC had standing to request a hearing on the CP extension application and granted SOC's hearing request "subject to the petitioner advancing at least one litigable contention" (Order, July 22, 1981, at 2). SOC has filed its present proposed Statement of Contentions for a CP extension hearing in order to meet the Commission's requirement. The Commission has referred to this Board the question of whether SOC has raised issues litigable in the CP extension proceeding, and, if so, to decide the issues on the merits.

III. DISCUSSION

A. SOC HAS FAILED TO ADVANCE AT LEAST ONE CONTENTION WHICH IS LITIGABLE IN A CP EXTENSION PROCEEDING

1. Scope of a CP extension hearing.

As noted above, SOC originally sought to intervene in the OL proceeding three and one-half years after the noticed time for intervention had expired. Although this Board found that SOC had met the standards for late intervention prescribed in 10 C.F.R. § 2.714, it limited SOC's participation to TMI-related issues and claims of new construction defects that could not have been issued before. "Contentions which duplicate those of existing parties or otherwise plow old ground, or which relate to matters that properly could have been raised at the onset of the proceeding [in 1976] will be denied" (Order Ruling on Petition of Shoreham Opponents Coalition, March 5, 1980, at 12). Many of the contentions that SOC proposed were rejected on this basis (Id., at 13-24). Now, in the context of a CP extension proceeding, SOC is attempting to circumvent the limitation on its OL participation, and has resurrected previously rejected contentions.[3/]

3/ See for example, Order, March 5, 1980, at 13 (site suitability contention dismissed), at 23 (Class 9 accident analyses contention dismissed). See also in this regard the July 30, 1981 Answer of the NRC filed by the Commission's Office of General Counsel in Shoreham Opponents Coalition v. Nuclear Regulatory Commission, No. 81-3044, (2nd Cir. 1981), fn. 17, at 14, noting the similarity between SOC's January 1980 OL petition and its January 1981 CP extention petition. For the convenience of the Board a copy of this brief is attached as "Attachment B". The other parties already have a copy. The September 1981 Statement proposes virtually the same contentions.

These resurrected issues lack a proper nexus to a CP extension application and should be denied admission as contentions.

Section 185 of the Atomic Energy Act as amended, 42 U.S.C. § 2235, provides that, should construction of a nuclear facility not be completed by the prescribed date in a construction permit "the construction permit shall expire, and all rights thereunder be forfeited, unless upon good cause shown, the Commission extends the completion date" (emphasis supplied). This proviso, is implemented in NRC regulations. 10 C.F.R. § 50.55(b) states:

> If the proposed construction or modification of the facility is not completed by the latest completion date, the permit shall expire and all rights thereunder shall be forfeited: Provided however, that upon good cause shown the Commission will extend the completion date for a reasonable period of time. The Commission will recognize, among other things, developmental problems attributable to the experimental nature of the facility or fire, flood, explosion, strike, sabotage, domestic violence, enemy action, an act of the elements, and other acts beyond the control of the permit holder, as a basis for extending the completion date.

Thus, the question to be decided by the Board is the scope of issues which may be heard in a proceeding to determine whether "good cause" exists for amending the construction permit for the Shoreham facility to extend the time for completion of construction. Under the approach taken by SOC, the CP extension hearing would become nearly as inclusive as the OL hearing.[4/] The Staff takes the position that this would be a misreading

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4/ This of course is exactly what SOC needs in order to circumvent the Board-imposed limitations on its participation at the OL stage.

of the precedents relied on by SOC which limit construction permit extension proceedings to questions of "good cause" under the standards of the statute and regulation.

In Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear 1), ALAB-619, 12 NRC 558, at 568 (1980), the Appeal Board set forth the established two-prong test for admission of contentions in a CP extension hearing:

> . . . [I]ntervenors could litigate only those safety or environmental issues which both (1) arose from the reasons assigned in justification of the request for a construction permit extension; and (2) could not, consistent with the protection of the interests of the intervenors or the public interest, "appropriately abide the event of the environmental review - facility operating license hearing." Indiana and Michigan Electric Co. (Donald C. Cook Nuclear Plant, Units 1 and 2), ALAB-129, 6 AEC 414, 420-421 (1973).

The first prong of this test requires a showing that there is nexus between the issues to be considered and the Applicant's reasons for construction delay.

The second prong is whether the issues could await litigation in the operating license proceeding. To this prong the Appeal Board in Bailly added the test of whether there was another vehicle for a petitioner to raise the concerns it wished to have considered in the construction permit extension proceeding. Finding that an avenue was open for the petitioner in that proceeding to raise their concerns through a petition under 10 C.F.R. § 2.206 to seek a halt of construction, the Board concluded that issues which had nothing to do with the need for a construction permit extension

did not provide a basis for intervention in the construction permit extension proceeding. 12 NRC at 575-573.

SOC has not attempted to show any nexus between the issues it seeks to raise in the construction permit extension proceeding and their relation to whether good cause exists to extend the construction permit. In Bailly, supra, at 573, the Appeal Board stated:

> [A] permit extension proceeding is not convened for the purpose of conducting an open-ended inquiry into the safety and environmental aspects of reactor construction and operation. Yet that is precisely what the proceeding would become were an open invitation given to those in petitioners' situation to freight it unnecessarily with matters far removed from those events which led to its commencement. [Footnote omitted.]

Petitioners make a similar attempt here. The issues sought to be raised, as we shall detail, are unrelated to the questions to be considered under 10 C.F.R. § 50.55(b), and may not be raised in this proceeding. SOC has no good contentions related to "good cause" for the construction permit extension, and its petition to intervene must be denied.

Moreover, whether SOC has a remedy under 10 C.F.R. § 2.206 is immaterial. In Bailly, supra at 570, the Appeal Board stressed the imperative of "looking at the 'totality of the circumstances' and a 'common sense' approach in determining the scope of the 'good cause' inquiry in the specific case." The key factor in the Bailly case weighing in favor of a broad interpretation of "good cause" for admission of contentions in a CP extension hearing was that virtually no construction had taken place at the Bailly site and that any OL hearing was far in the future. At that early stage of construction the Appeal Board took the view that it might

be unduly prejudicial to defer site suitability issues until the OL hearings if no opportunity for hearing existed before that time.5/

The factual setting at Shoreham is far different than that at Bailly. At the time of SOC's original January, 1981 petition to intervene in the CP extension proceeding, construction at Shoreham was more than 80 percent complete. The OL hearing will start within the next several months.6/ Under

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5/ In Bailly the Appeal Board did not allow consideration of contentions unrelated to the licensee's reasons for delay. It stated that issues, not related to the "good cause" test in 10 C.F.R. § 50.55(b) for construction permit extension were more appropriately the subject of a petition pursuant to 10 C.F.R. 2.206. It further stated that where an issue "has no discernable relationship to any other pending proceeding (e.g., one concerned with permit extension), the Section 2.206 remedy must be regarded as exclusive." Northern Indiana Public Service Co. supra, at 570. In this case SOC had already requested a suspension of construction pending a hearing under 10 C.F.R. § 2.206 (Petition, January 23, 1981). This was denied by the Director on June 26, 1981 partly on the ground that any proper contentions could be heard in the proximate OL proceeding. Directors Decision 81-9, 13 NRC ___ (June 26, 1981, slip op. 5). The Commission did not review that decision. That decision is final.

6/ The OL hearings in this case are expected to begin during the Winter, 1982. As a practical matter any CP extension hearing held should be consolidated with the OL hearings, further eliminating the need for a separate hearing. See, Staff Paper to the Commission, "Disposition of the Petition of the Shoreham Opponents Coalition (SOC) to Institute Proceedings on Whether Good Cause Exists to Extend the Completion Date of the Shoreham Nuclear Power Station, Unit 1," June 26, 1981, a copy of which has previously been served on the Board and the parties.

Bailly, supra, and under Cook, supra, the nearness of the OL hearing prevents the raising of the subject contentions in the CP extension proceeding.[7/] SOC's proposed CP extention contentions, to the extent they raise litigable issues at all could easily abide those OL hearings.[8/]

2. SOC's CP extension contentions.

An examination of SOC's proposed contentions reveals that all four are clearly inappropriate for admission in a CP extension request hearing.

i. Class 9 Accidents

SOC's first contention (Statement, p.6-11) asserts that the Shoreham SER and FES are inadequate essentially because they do not include an analysis of the consequences of a Class 9 accident. This issue has no relation to whether the Applicant has "good cause" to seek extension of its construction permit and must be rejected for that reason alone. Moreover, this Class 9 issue had previously been been raised by SOC in its petition

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7/ If SOC cannot raise any issue at the OL hearings, that is a result of its own tardiness in intervening in the OL process and SOC should not benefit thereby. Cf., Nuclear Fuel Services, Inc., and New York State Atomic and Space Development Authority, (West Valley Reprocessing Plant), CLI-75-4, 1 NRC 273, 276 (1975).

8/ Applicant at p. 6 of its subject pleading states that "those issues which cannot abide until the operating license review should be explored now." Nowhere is there any indication that CP extension amendment hearing could take place any sooner than the OL hearing.

to intervene in the OL proceeding (Petition, January 24, 1980, contention 20(d), at 53). At that time the Board rejected its admission on the basis of Offshore Power Systems (Floating Nuclear Plants), CLI-79-9, 10 NRC 257 (1979). (Order Ruling on Petition of Shoreham Opponents Coalition, March 5, 1980, p.23). This decision by the Licensing Board reflected a long standing Commission policy that the consequences of a Class 9 accident need not be considered for land based reactors.9/ Having failed once, SOC is again attempting to raise the "Class 9" issue through the vehicle of Applicant's CP extension request.

The Commission's action since the March 5, 1980 Board Order has reinforced the conclusion that consideration of Class 9 accidents would be improper here. On June 13, 1980, the Commission published a "Statement of Interim Policy on Nuclear Power Plant Accident Considerations under the National Environmental Policy Act of 1969". 45 Fed. Reg. 40101.10/ The Staff has previously advised this Board of its position as to the effect of this Policy Statement on the Shoreham plant in the "NRC Staff's Position Regarding Consideration of 'Class 9' Accidents," (December 24, 1980).

9/ This policy was set forth in the proposed Annex to Appendix D to 10 C.F.R. Part 50. The proposed Annex was withdrawn by the later Commission Class 9 Policy Statement of March 5, 1980. 45 Fed. Reg. 40101.

10/ This policy was issued after receipt of the communications from CEQ set forth at pp. 9-11 of SOC's motion.

Basically the Commission's Policy Statement directs that the Staff:

> ***initiate treatments of accident considerations in accordance with [guidance in the Policy Statement] in its on-going NEPA reviews, i.e., for any proceeding at a licensing stage where a Final Environmental Impact Statement <u>has not yet been issued</u>. (Emphasis added) 45 <u>Fed</u>. <u>Reg</u>. 40101, at 40103.

The FES for the Shoreham OL was issued in October 1977. The Staff therefore is not required to consider "Class 9" accidents in the Shoreham case. Any contention that "Class 9" accidents must be looked at in a CP extension proceeding where the Final Environmental Impact Statement has been issued is a challenge to the Commission's "Class 9" policy statement, and must be rejected for that reason as well.[11/]

ii. <u>Liquid Pathway</u>

SOC's second contention concerns the alleged "lack of any specific discussion of the impact on the 'liquid pathway' from a serious accident or potential corrective measures for such an accident" (Statement, at 12). The Staff is of the view that admission of this contention to a CP extension hearing would be inappropriate. No showing is made of any nexus between this issue and whether Applicant has "good cause" to seek extension of its construction permit.

11/ As we detailed, the requirement that "Class 9" accident analysis be performed was rejected as a contention in the OL proceeding. If SOC feels that the policy statement on "Class 9" accidents should not be applicable to the Shoreham facility, its remedy is to seek an exception to that policy for this facility under the procedures set forth in 10 C.F.R. § 2.758. <u>See also Public Service Co. of Oklahoma</u> (Black Fox Station, Units 1 and 2), CLI-80-8, 11 NRC 433 (1980).

Moreover, The Board is already considering this very issue in the context of emergency planning in the OL proceedings. SOC Contention 2, admitted by Board Order dated June 26, 1980, reads as follows:

> Intervenors contend that the emergency planning requirements for the 50-mile (radius) ingestion pathway for the Shoreham facility, . . . , are inadequate in that they do not adequately address the effects of releases through the liquid pathway.

This issue will be resolved in the context of the OL proceeding. It should not also be litigated in a CP extension.[12] See, Bailly, supra.

iii. Siting Contentions

SOC next asserts a Shoreham siting contention (Statement, p.18-22). This is an additional example of SOC's attempt to use the vehicle of a CP extension proceeding to raise issues which were previously rejected by the Board. SOC's January 24, 1980 late Petition to Intervene in the OL proceeding included a site suitability contention (Petition, January 24, 1980, Contention 1, p.37). The contention was rejected by the March 5, 1980 Board Order as "replowing old ground" (Order Ruling on Petition of Shoreham Opponents Coalition, March 5, 1980, p.13). SOC again raised the siting issues in its January 23, 1981 Petition to Intervene in the CP extension proceeding (Petition, January 23, 1981, p.17-20). Now, in its present Statement of Contentions, SOC has practically repeated verbatim

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12/ This contention is the subject of a motion for summary disposition. Applicant and Staff have taken the position that SOC has failed to show special circumstances (such as, for example, those in the Offshore Power case, supra) which would require a complete site-specific liquid pathways analysis. See, Applicant's Motion for Summary Disposition, July 13, 1981, and the NRC Staff Response Supporting Applicant's Motion, September 18, 1981. All the arguments against a liquid pathway analysis are equally applicable here.

its January 23 site suitability contention. The issue is no more appropriate now for a CP extension hearing than it was when originally asserted by SOC in the OL proceeding. This is particularly so when noted again that the Shoreham facility is substantially completed.

The Staff again emphasizes that the proposed SOC siting contention has no connection with the "good cause" test for a CP extension application set out in 10 C.F.R. § 50.55(b). Shoreham is factually distinct from the Bailly case. In Bailly, very little construction had taken place at the time the CP extension application was filed. At Shoreham construction was over 80 percent complete at the time LILCO sought a CP extention. Under the "common sense" test in Bailly, supra at 570, 573, no siting issue can be raised where the plant is over 80 percent complete at the subject site.[13/]

13/ The policy incorporated in the Commission's new regulation limiting the raising of alternate site issues in OL proceedings mitigates against the raising of any siting issue here on a plant largely complete. 10 C.F.R. § 51.21, as amended, June 21, 1981 (46 Fed. Reg. 28630) provides that "[n]o discussion of alternative sites for the proposed plant" is required in the environmental report for an operating license. In the statement of considerations the Commission stated (41 Fed. Reg. 28631, May 28, 1981):

> . . . This conclusion is grounded in the rationale and basis supporting the proposed rule, i.e., that at some point after issuance of the CP, the alternative of siting the nuclear power plant elsewhere is no longer likely to be a reasonable alternative for the purpose of NEPA. The Commission believes that this point has clearly been reached, if not passed, by the time the OL application has been submitted to the NRC staff for review. Typically, an operating license application is submitted to the NRC staff within 3 years of the estimated construction completion date. Construction is usually about 35-65 percent

FOOTNOTE CONTINUED ON NEXT PAGE

iv. Financial Considerations

SOC's final contention questions the financial qualifications of Applicant due to the delays and asserted cost overruns in the Shoreham construction project (Statement, p.22-25). This contention, however, should be rejected. The Commission's regulations do not require a showing of financial qualifications as a condition precedent to issuance of a CP extension. They are unrelated to the issue of whether the Applicant has good cause to seek extension of its construction permit. See 10 C.F.R. § 50.55(b).

Under the language of 10 C.F.R. § 50.33(f),a showing of financial qualifications are required only prior to the issuance of a CP or an OL. There is no requirement of a showing in order to complete construction

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13/ FOOTNOTE CONTINUED FROM PRECEDING PAGE

> complete at this time (depending upon the number of units to be built at the site) and a corresponding portion of the total construction costs have already been incurred . . . . [footnotes omitted]

See in this regard the Seabrook case, New England Coalition on Nuclear Pollution v. NRC, 582 F.2d 87, 95-96 (1st Cir. 1978), holding that in performing a cost/benefit analysis of alternative sites, the Commission may consider the fact that costs have already been incurred at the proposed site. See also Notice of Proposed Rulemaking "Licensing and Regulatory Policy and Procedures for Environmental Protection; Alternative Site Reviews", 45 Fed. Reg. 24168 (April 9, 1980).

previously authorized.[14/] Applicant was found to be financially qualified to construct Shoreham by a Licensing Board. Long Island Lighting Company (Shoreham Nuclear Power Station), LPB-73-13, 6 AEC 271, 305 (April 12, 1973).[15/] The Licensing Board Initial Decision was affirmed, in all respects, by the Appeals Board. Long Island Lighting Company (Shoreham Nuclear Power Station), ALAB-156, 6 AEC 831 (1973). Applicant's qualifications to operate Shoreham are properly a subject of the OL proceedings. This matter is addressed in the recently issued Supplement 1 to the Shoreham Safety Evaluation Report (NUREG-0420, Supp. 1, Sept. 1981).[16/]

14/ In this regard, see also, (Consumers Power Company (Midland Plant, Units 1 and 2), ALAB-458, 7 NRC 155 (1978); Portland General Electric Co., et. al.(Trojan Nuclear Plant), ALAB-531, 9 NRC 263, 266 (1979); Virginia Electric and Power Co. (North Anna Nuclear Power Station, Units 1 and 2), ALAB-584, 11 NRC 451, 456-7 (1980). Although not in the context of CP extensions, these decisions make clear that a further showing is not required in license amendment proceedings to do what had already been authorized in the original issuance of the license.

15/ LILCO's financial qualifications to construct Shoreham was not a contested issue at the CP stage.

16/ A presently pending rulemaking proposes to eliminate the financial qualification requirements for utility companies which seek a CP and/or an OL. 46 Fed. Reg. 41786 (August 18, 1981). Generally Licensing Boards should not become involved in questions pending before the Commission in rulemaking proceedings. See Potomac Electric Co. (Douglas Point Station, Units 1 & 2), ALAB-218, 8 AEC 79, 85 (1974).

Further, it should be noted that SOC's financial qualifications contention is largely based on testimony from state ratemaking proceedings. This testimony is not available to either the Staff or the Board. Furthermore, state ratemaking is irrelevant to the NRC's health, safety, and environmental reviews. Whether or not Applicant is granted a rate increase is strictly a state concern.

3. <u>NEPA requirements for a CP extention.</u>

Much of SOC's Statement of Contentions is premised on the argument that a draft and final supplemental to the FES must be prepared prior to the issuance of a CP extension. However, the National Environmental Policy Act of 1969, P.L. 91-190, 42 U.S.C. §4331 et. seq., (NEPA) does not require such a statement on a CP extension request.

NEPA provides that an environmental statement be issued for any major federal action significantly affecting the environment. 42 U.S.C. § 4332(c). Absent a major federal action significantly affecting the environment, no statement is necessary. SOC argues that the CP extension proceeding is a determination as to whether the Shoreham plant will ever be built. Just such arguments were rejected in Northern States Power Company, (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-455, 7 NRC 41, fn. 4, at 46 (1978) and Portland General Electric, et al. (Trojan Nuclear Plant), ALAB-531, 9 NRC 263, fn. 6, at 266 (1979). In each case it was argued that because the plant could not operate without the amendment requested, the amendment was a major Federal action significantly affecting the environment. In each case this argument was rejected on the ground that the original Environmental Statement authorizing the action looked at the action, and this task under NEPA need not be repeated. As stated in Prairie Island:

> The issuance of operating licenses for the two Prairie Island units was preceded by a full environmental review, including the consideration of alternatives. [footnotes omitted]. Nothing in NEPA

> . . . dictates that the same ground be wholly re-plowed in connection with a proposed amendment to those 40-year operating licenses. Rather, it seems manifest to us that all that need be undertaken is a consideration of whether the amendment itself would bring about significant environmental consequences beyond those previously assessed . . . This is true irrespective of whether, by happenstance, the amendment is necessary in order to enable continued reactor operation. Northern States Power Company, supra, at 46, n. 4.

The original FES issued prior to the CP looked at whether the Shoreham facility should be built. This review need not be repeated. All that need be reviewed now is the environmental changes caused by the CP extension which were beyond the scope of the original FES.

In the past, it has been the consistent practice of the NRC to issue negative declarations as regards the extension of construction permits.17/ This reflects the Staff view that a CP extension is not a major federal action significantly affecting the environment. No reason is given to show that a CP extension amendment here would have any environmental effect beyond that of the original construction permit. No reason for a new environmental statement or a supplement to the one formerly issued is shown.18/

17/ Examples of this practice include: Georgia Power Co. (Alvin W. Vogtle Nuclear Plant), Order and Negative Declaration of November 5, 1976; Duke Power Co. (William B. McGuire Nuclear Station), Order and Negative Declaration of December 26, 1978; Virginia Electric & Power Co. (North Anna Power Station, Units 3 and 4), Negative Declaration of April 18, 1979, Order of May 14, 1979, 44 Fed. Reg. 29547 (May 21, 1979); Commonwealth Edison Co. (LaSalle County Station), Negative Declaration of December 26, 1979, Order of January 17, 1980.

18/ All environmental effects alleged by SOC in its motion, such as the effect of accidents or problems of emergency evacuation stemming from siting, do not even come from construction. An FES on operation has been prepared. See NUREG-0420 (Oct. 1977); Supplement No. 1 (Sept. 1981).

B. SOC'S MOTION TO ADD LATE "TMI CONTENTIONS" SHOULD BE DENIED

1. Procedural defects in SOC's Motion.

Part II of SOC's September 24 filing is a motion made pursuant to 10 C.F.R. § 2.714 to add late "TMI-related" contentions to the OL proceeding (Motion p. 25). The Staff believes that SOC's Motion fails to meet the requirements of §2.714 and must be denied.

When a contention is filed late in a proceeding, its admissability must be judged by a balancing of the five factors listed in 10 C.F.R. 2.714(a)(i)(i-v).[19/] The Commission has made it clear that the requirements of §2.714 are to be applied to late TMI-related contentions, just as to any other late contentions. See, Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-81-5, 13 NRC 362, 364 (April 1, 1981).[20/] Furthermore, it is incumbent upon a proponent of a late contention to address the factors to be balanced, and to affirmatively demonstrate that its contentions should be admitted. Duke Power Company,

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19/ These factors are:
1. Good cause for failure to file on time.
2. The availability of other means to protect petitioner's interests.
3. The extent to which petitioner would assist in developing a sound record.
4. The extent to which petitioner's interests may be represented by other parties.
5. The extent the issues would be broadened or the proceedings delayed.

20/ This portion was originally established by the Commission in "Further Commission Guidance for Power Reactor Operation Licenses - Revised Statement of Policy," 45 Fed. Reg 85236 (December 24, 1980).

(Perkins Nuclear Station, Units 1, 2 and 3), ALAB-615, 12 NRC 350, 352 (1980). It must be stressed that, contrary to this requirement, SOC in its Motion has not even addressed the factors of § 2.714, much less made an affirmative showing that its contentions are entitled to a favorable balance. The Staff urges that SOC's Motion be dismissed for failure to comply with the Commission's regulations.[21/]

2. Substantive defects in SOC's TMI contentions.

Even if SOC's three TMI related contentions were raised in a timely fashion, or could be admitted late under a § 2.714 balance, the Staff would oppose their admissability. The Commission has established a separate policy to determine which TMI issues may be litigated in operating license proceedings. Under this test, SOC's proposed contentions are not proper

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21/ Even assuming that SOC had followed proper procedure in its late contention motion, the Staff believes that the three proposed contentions could not be admitted under 10 C.F.R. § 2.714. There is no new information involved which would give SOC cause for not filing the contentions earlier. For example, NUREG-0600, "The TMI Action Plan," and other reports stemming from the TMI accident, on which the allegedly new contentions are premised, were published in late 1979 or the first half of 1980. Furthermore, SOC's proposed new contentions are all of a generic nature and contrary to established rules or policies of the Commission, making petitions under 10 C.F.R. § 2.802 or § 2.758 as other appropriate means of protecting SOC's interests. The Commission has specifically invited such petitions in the context of actions required as a result of the TMI accident. See NRC Statement of Policy Further Commission Guidance for Operating Licenses. 45 Fed. Reg. 85236, December 24, 1980. The addition of these issues would undoubtedly broaden and delay the proceeding. Thus, on balance there is no cause to admit them as late filed contentions. See Duke Power Co. (Perkins Nuclear Station, Units 1, 2 & 3), ALAB-615, 12 NRC 350, 352 (1980); Detroit Edison Co. (Greenwood Energy Center, Units 2 & 3), ALAB-476, 7 NRC 759, 764 (1978).

TMI issues. They are unrelated to the TMI requirements for new operating licenses as set forth in NUREG-0737, and are therefore not litigable in the OL process.

On October 28, 1980, the Commission approved NUREG-0737, "Clarification of TMI Action Plan Requirements." This document sets out the TMI related requirements to be completed by applicants for new operating licenses. On December 18, 1980, the Commission issued a Revised Statement of Policy. "Further Commission Guidance for Power Reactor Operating Licenses," 45 Fed. Reg. 85236 (December 24, 1980), addressing litigation of TMI issues in OL proceedings.[22/] The Comission concluded:

> [T]he list of TMI-related requirements for new operating licenses found in NUREG-0737 can provide a basis for responding to the TMI-2 accident. The Commission has decided that current operating license applications should be measured by the NRC Staff against the regulations, as augmented by these requirements [footnote ommitted]. In general, the remaining items of the Action Plan should be addressed through the normal process for development and adoption of new requirements rather than through immediate impostion on pending applications. Id. at 6.

The basic policy, therefore, as established by the Commission, is that only TMI contentions related to a specific NUREG-0737 requirement may be litigated in an OL proceeding. A party may question compliance with a TMI requirement, or challenge the necessity for, or sufficiency of the requirement. In challenging the sufficiency of a TMI requirement, however, the scope of the inquiry is very narrow. The Commission clarified its

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22/ The TMI requirements established in NUREG-0737 superseded the NUREG-0694 "Requirements for New Operating Licenses," originally approved May 15, 1980. The Revised Statement of Policy of December 18, 1981, on NUREG-0737 superseded the "Further Commission Guidance for Power Reactor Operating Licenses; Statement of Policy," published on June 20, 1980, 45 Fed. Reg. 41738.

position in Pacific Gas and Electric Company (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-81-5, 13 NRC 361, 364-65 (April 1, 1981):

> What we had in mind was allowing a party to focus on the same safety concern that formed the basis for the NUREG requirement and litigate the issue of whether the NUREG "requirement" is a sufficient response to that concern [footnote ommited]. Contentions which address a safety concern not considered in NUREG-0694 and 0737 shall not be entertained as challenges to the sufficiency of those requirements.

The contentions raised by SOC are based on safety concerns which never resulted in a NUREG requirement. These contentions in effect seek further TMI requirements and as such are not litigable in a licensing proceeding.

SOC's first proposed TMI contention (Motion, p. 27), calls for a Shoreham-specific Interim Reliability Evaluation Program (IREP) analysis. SOC relies on TMI Action Plan Item II.C.1. as identifying a need for an improved systems - oriented approach to safety review. However, no TMI requirement has ever been adopted on IREP. This is exactly the type of contention the Commission intended to remove from the licensing process through its policy statement. The contention represents no more than a statement of SOC's opinion that a new TMI requirement is necessary. There is no showing of special circumstances that would justify singling out Shoreham for an IREP analysis.23/

The situation is exactly the same for SOC's second proposed contention. In that contention SOC calls for a Systems Interaction (SI) analysis of the Shoreham design (Motion, p. 31). While this may be the subject of an Unresolved Safety Issue, NUREG-0737 established no SI requirement. The

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23/ Cf. 10 C.F.R. § 2.758.

NUREG-0737 TMI requirements represent the culmination of a long decision-making process. Many factual, legal, and policy determinations had to be made in deciding exactly what requirements to issue and what to leave out. A reconsideration of the whole process would be impossible in an individual licensing proceeding, and for that reason contentions requesting such a reconsideration may not be admitted.

SOC's final "TMI-related" contention requests a documentation of deviations between the standards used to review the Shoreham design and current regulatory standards (Motion, p. 31). There is currently no regulation or NUREG-0737 item requiring such a documentation. The contention lacks any nexus with a safety concern addressed in the TMI requirements. This contention, as the previous two, effectively requests a new requirement, and as such is not litigable in an OL proceeding. Documentation of deviations, however, is currently the subject of a proposed rulemaking. See, "Plan to Require Licensees and Applicants to Document Deviations From the Standard Review Plan - Notice of Proposed Rulemaking," 45 Fed. Reg. 67099 (October 9, 1980). Rulemaking is the proper approach to this generic issue.[24] If and when a final documentation of deviations regulation is promulgated, those requirements, to the extent they are applicable, will be complied with for the Shoreham plant.

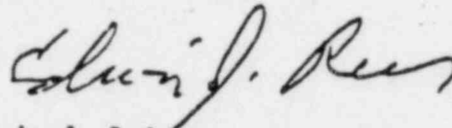
24/ See Potomac Edison Co. supra; Sacramento Municipal Utility District (Rancho Seco Nuclear Generating Station), ALAB-655, 14 NRC ___ (slip op. at 32, October 7, 1981).

IV. CONCLUSION

1. SOC has failed to raise at least one contention litigable in a construction permit extension proceeding. Therefore, no hearing is required. If a hearing were required, it must at this stage of the proceedings be merged, as a practical matter, with the operating license hearings.

2. SOC has failed to make an affirmative demonstration pursuant to 10 C.F.R. 2.714 that its motion to add late contentions should be granted. Furthermore, the TMI contentions proposed are of a type not litigable in an operating license proceeding. For either of these reasons, SOC's new "TMI" contentions must be denied.

Respectfully submitted,



Edwin J. Reis
Assistant Chief
Hearing Counsel

Dated at Bethesda, Maryland
this 15th day of October, 1981.