BEFORE THE UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of Long Island Lighting Company Docket No. 50-322, Shoreham Nuclear Power Station, Unit 1, Suffolk County, New York (Application to Amend Operating License Under Exigent Circumstances to Allow Shipment of Reactor Internals to the Low-Level Radioactive Waste Disposal Repository at Barnwell, South Carolina)	USNRC Docket No. 50-322 License No. NPF-82

COMMENT ON PROPOSED NO SIGNIFICANT HAZARDS
CONSIDERATION DETERMINATION, REQUEST FOR HEARING,
NOTICE OF INTENT TO INTERVENE,
AND OPPOSITION TO ISSUANCE OF AMENDMENT
BY AND ON BEHALF OF
SHOREHAM-WADING RIVER CENTRAL SCHOOL DISTRICT
AND
SCIENTISTS AND ENGINEERS FOR SECURE ENERGY, INC.

By letter of November 19, 1990 the U.S. Nuclear Regulatory Commission ("NRC" or "Commission") Staff furnished a copy of the Public Notice of LILCO's November 8, 1990 License Amendment Request - Shipment of Fuel Support Pieces, inviting among other things, comments in writing on the proposed (preliminary) no significant hazards consideration determination by November 28, 1990.

The Shoreham-Wading River Central School District ("School District") and Scientists and Engineers for Secure for Energy, Inc. ("SE2") hereby furnish, by counsel, the requested comments, request a hearing on the proposed amendment prior to its issuance, given notice of their intent to intervene in any

hearing, and oppose the issuance of that amendment, all as detailed below.

1. BACKGROUND

After over 20 years of administrative proceedings, including intensive review under the National Environmental Policy Act of 1969 as amended ("NEPA") of the need for electric power in the area and alternatives for, and costs and benefits of, that needed supply, the Long Island Lighting Company ("LILCO" or "licensee") received a full power operating license from the NRC for the Shoreham Nuclear Power Station, Unit 1 ("Shoreham") on April 21, 1989 in the above-captioned docket.

At a June 30, 1989 meeting between LILCO officials and the U.S. Nuclear Regulatory Commission ("NRC" or "Commission") Region I Staff, LILCO's president announced, among other things, that LILCO would act in accordance with a "Settlement Agreement" with various entities of the State of New York intended to lead to the decommissioning of the Shoreham facility. By letter of July 5, 1989 to the NRC Region I Administrator, LILCO's president confirmed LILCO's intention not to operate Shoreham again, to defuel the plant and to reduce staff.

On July 14, 1989, the School District filed a Section 2.206 request with the NRC for, among other things, immediately effective orders to prevent LILCO from implementing the decommissioning plan prior to NEPA review of that proposal. Six days later, the NRC denied immediately effective orders but said, among other things, that the School District was "correct that

the decommissioning of a facility requires a license amendment necessitating the preparation of an EIS . . . ." SE2 later joined in the School District's request, and the original request has been amended and/or supplemented seven times since that date. No final reply has been issued.

Following public NRC Staff meetings with the licensee, the NRC Staff submitted SECY-89-247 (August 14, 1989) to the Commissioners for notation vote on the Staff recommendation that the positions outlined therein be adopted and that the paper "be withheld from public disclosure at this time." Among those recommendations, was a recommendation that: "Pending NRC approval of decommissioning, the Staff will require . . . that all systems required for full power operation are to be preserved from degradation." SECY-89-247 at 6. By memorandum for James M. Taylor, Acting Executive Director for Operating, from Samuel J. Chilk, Secretary, Subject: "Staff Requirements -- SECY-89-247-- Shoreham Status and Developments" (August 25, 1989) ("not for public release"), the Staff was notified that "the Commission . . . has approved, subject to the following guidance and modifications, your proposed actions in regard to the Shoreham Nuclear Power Station." In particular, the additional guidance directed the Staff to "require LILCO to submit staffing, maintenance and funding plans for preventing degradation of Shoreham pending NRC approval of its transfer to other ownership or its decommissioning" and further directed the Staff to require LILCO "to submit, in accordance with 10 C.F.R. 50.33k(2), not

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December 3, 1990

TELECOPY COVER SHEET

Total number of pages 22, including cover page.

To: Regulatory Publication Branch

Agency: U.S. Nuclear Regulatory Commission
ATTN: Betty Golden (Ext. 24268)
Room P-216

From: James P. McGranery, Jr.

Re: Per your telephone request of this morning, I hereby furnish an additional copy of the comments (including transmittal letter) submitted November 28, 1990 on the Long Island Lighting Company's license amendment application to allow the shipment of certain reactor internals to the Barnwell facility for disposal.

Telecopy No.: 301-492-8110

To Confirm: 301-492-4268

Client No.: 10342.0001

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shipment "would preclude a timely restart and should be delayed until after a possession-only license is issued to LILCO."

By letter of November 8, 1990 (SNRC-1768), Mr. John D. Leonard, Jr., LILCO Vice President for Corporate Services and Nuclear, referenced the previous exchange of correspondence and restated LILCO's intention to ship the castings and peripheral pieces to Barnwell before December 7, 1990 "as a result of (1) the Commission's October 17, 1990 decision, CLI-90-08 and (2) new information concerning the cost and availability of low-level radioactive waste disposal." Recognizing that Mr. Crutchfield's October 1 letter constituted a denial of permission to ship the castings and peripheral pieces, Mr. Leonard argued that the Commission's Order of October 17 "moots the Staff's concern regarding the effect of the shipment on the 'timely restart' of the plant" while simultaneously recognizing that the Order had determined that the Commission has an obligation to ensure that LILCO "refrains from taking any actions that would materially and demonstrably effect the methods or options available for decommissioning" prior to the submission and approval of a decommissioning plan. However, Mr. Leonard argued that "the shipment and disposal of fuel support pieces plainly would not have a materially and demonstrable effect on various available decommissioning options." Secondly, Mr. Leonard addressed the cost and availability of low-level waste disposal, but offered no discussion of the reason for LILCO's concern about the "future costs" of low-level waste disposal. However, he did reference an

October 1, 1990 letter from officials of the States of Nevada, Washington and South Carolina to Governor Cuomo directing New York State to provide "persuasive evidence by December 7, 1990 that New York's efforts are sufficient to guarantee its waste would not constitute an involuntary burden on other states," and warning that if such evidence is not provided the states would have no alternative but to invoke the sanction of denial of access to their disposal facilities with respect all New York State waste generators under the Low-Level Radioactive Waste Policy Amendments Act of 1985. Mr. Leonard concluded that because "of these uncertainties LILCO believes that its most prudent, cost-effective course of action is to ship the fuel support pieces to Barnwell while access to that facility is still assured [and alleged that delay] until after a possession-only license is issued to LILCO will result in avoidable extra costs to our ratepayers."

By letter of November 14, 1990, Mr. Seymour H. Weiss, Director, NRC Non-Power Reactor, Decommissioning and Environmental Project Directorate, responded to SNRC-1768 asserting that the shipment "requires authorization by the NRC" and determining: "In view of the time-sensitive issue reflected in your letter regarding the potential unavailability of the Barnwell facility after December 7, 1990, we are processing your letter as a request for amendment of your license under exigent circumstances."

By letter of November 16, 1990 (SNRC-1774), LILCO Vice President Leonard responded to Director Weiss, stating that "LILCO does not understand the basis for your assertion that the shipment of . . . requires NRC authorization," and providing certain "updated information." Mr. Leonard alleged as follows: First, that "it appears that Barnwell will be unavailable to any low-level waste shipped from New York which departs the Shoreham site after December 7, 1990." Second, that the availability of only one cask and thus the need for two shipments necessitates departure of the first shipment "no later than November 26, 1990" in order to "ensure departure of the second shipment by December 7." On the basis on this shipping schedule, Mr. Leonard said that "LILCO will need to commence preparing the materials for shipment on November 17, with associated costs and worker exposures, costs and exposures which will have been incurred unnecessarily if LILCO is subsequently denied permission to ship." As to costs, Mr. Leonard said that even if Barnwell is available after December 7 "the cost of disposal will increase by approximately 10% beginning next year" and, if LILCO is forced to rely on a future New York State repository rather than Barnwell, "disposal costs a such a facility are projected to be, at minimum, at least 300% of the present cost for Barnwell." Mr. Leonard also reported that the support pieces had been "removed non destructively from the reactor vessel" and are "currently being stored in boxes on the south separator/reheater roof above the turbine deck, causing the posting of the only high radiation

area now in effect at the plant" and noting that the offsite shipment of this equipment "will enable us to de-post this area."

By letter of November 19, 1990, Mr. Stewart W. Brown, NRC Project Manager furnished LILCO Vice President Leonard with a copy of the NRC public notice of the instant license amendment request.

3. LEGALLY COGNIZABLE "EXIGENT CIRCUMSTANCES" ARE NOT PRESENT

There is no justification in the record for NRC's decision to process the LILCO November 8 letter "as a request for amendment of your license under exigent circumstances."

Not even LILCO alleged that the possible unavailability of Barnwell constituted "exigent circumstances;" LILCO only argued that the "uncertainities" indicate that shipment to Barnwell now while access is assured is the "most prudent, cost-effective course of action."

Further, the December 7 deadline is not a deadline for the availability of Barnwell to New York State waste generators, but a deadline for Governor Cuomo to submit "persuasive evidence" that New York's efforts to comply with the Low-Level Radioactive Waste Policy Amendments Act of 1985 are "sufficient to guarantee its waste will not constitute an involuntary burden on other states." There is no date certain after December 7, 1990 when the three states will make a decision that the evidence submitted is "persuasive," or that additional evidence is needed, and only at some indefinite time in the future is it even possible that

the states might decide that New York is not in compliance and therefore, deny access. This uncertainty presents neither the character nor the immediacy of risks which the courts have determined necessary to constitute "exigent circumstances."1/

The NRC has determined that "exigent circumstances" exist "where a net safety benefit might be lost if an amendment were not issued in a timely manner" and "where there is a net increase in safety or reliability or significant environmental benefit." Final Procedures and Standards On No Significant Hazards Considerations, 51 Fed. Reg. 7744, 7756 col. 3 (March 6, 1986).

1/ The Supreme Court of the United States has addressed the concept of "exigency." The life and death matters that the Court has found create exigency range from threats to prison security posed by violent inmate disturbances to threats to children in their public school classroom posed by other children with violent and dangerous tendencies. See, e.g., Dudley v. Stubbs, ___ U.S. ___, 109 S.Ct. 1095, 1096 (1989) (O'Conner, J., dissenting) (approach of armed prison gang constituted exigent circumstances negating any inference of deliberate indifference from correctional officer's failure to protect inmate); Honig v. Doe, ___ U.S. ___, 108 S.Ct. 592, 606 (1988)(threat posed by dangerous child may constitute exigent circumstances allowing a school to seek judicial intervention despite the school's failure to exhaust administrative processes).

When the Court has dealt with exigency created by deadlines, the cases have almost always involved Constitutionally guaranteed electoral rights which form the foundation of our democracy. See, e.g, Brown v. Chote, 411 U.S. 452, 456, 93 S.Ct. 1732, 1735 (1973) (preliminary injunction requiring that indigents seeking elected office be placed on the ballot despite their inability to pay filing fee held not in abuse of discretion given the exigent circumstances: case was presented to the lower court only one week before the deadline for filing nominating papers); Williams v. Rhodes, 89 S.Ct. 1, 2 (1968) (Stewart, J., in chambers)(fact that elections were to be held in less than one month constituted exigent circumstances necessitating interim order by Circuit Justice requiring ballots to be prepared including Independent Party candidates).

In the instant case, the licensee has not even alleged the existence of a "net safety benefit" which might be lost if an amendment were not issued promptly, nor can there be alleged to exist any "net increase in safety or reliability or significant environmental benefit." In fact, the offsite disposal of reactor internals would prejudice the choice of decommissioning options before the licensee has even submitted a decommissioning plan for review. See 10 C.F.R. § 50.82 (1990). Since offsite disposal of reactor internals is consistent only with the DECON option and inconsistent with both the SAFSTOR and ENTOMB options, this would be plainly in violation of the Confirmatory Order, as Mr. Crutchfield's October 1 Letter to Mr. Leonard clearly and succintly recognized. 55 Fed. Reg. 12758 (April 5, 1990).[2/]

Further, the NRC regulations forbid invocation of Section 50.91(a)(6) procedures where the Commission "determines that the licensee has failed to use its best efforts to make a timely application for the amendment in order to creat exigency and to take advantage of this procedure." 10 C.F.R. § 50.91(a)(6)(vi) (1990). In these circumstances, the alleged basis of the exigency, namely, the sited states October 1 letter to Governor Cuomo had been available for over 38 days before LILCO first alleged that it provided any justification to allow

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2/ It would also be contrary to the Commission's direction to the Staff in CLI-90-08, if that order were final. However, the School District and SE2 assert that neither the Staff nor LILCO may rely on CLI-90-08 at this time, since it is not final due to the pendency of a petition for reconsideration. See, e.g., Winter v. ICC, 851 F.2d 1056, 1062 (8th Cir. 1988).

the shipment in question and 38 days had also passed since the NRC's initial denial of permission to make this shipment by its letter also of October 1, 1990. There is no justification offered for this delay by LILCO and neither the School District nor SE2 can imagine any justification that would meet the "best efforts to make a timely application" standard. This failure is highlighted by the fact that LILCO never did submit an actual formal license amendment application, but merely a letter not under oath, which the NRC Staff decided to "treat as" a license amendment application. Under these circumstances, the NRC regulations require the Staff to "use its normal public notice and comment procedures in paragraph (a)(2)."[3/] Id.

4. THE REPRESENTATIONS AS TO INCREASED COSTS ARE UNSUBSTANTIATED AND, IN ANY EVENT, IRRELEVANT

In SNRC-1760, LILCO referred to "the rapidly escalating costs of burial" as being one of the reasons that a current shipment of the reactor internals to Shoreham would be "appropriate at this time." In SNRC-1768, the only reference to increased costs is the second to last sentence of that letter, saying that delay in disposal of the support pieces "until after a possession-only license is issued to LILCO will result in avoidable extra cost to our ratepayers." And finally in SNRC-

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3/ The School District and SE2 also note that the invocation of Section 50.91(a)(6)(i)(b) procedures [to afford them only one week's notice in which to prepare comments spanning the Thanksgiving Day weekend] deprives them of their right to comment under the Administrative Procedure Act and the Due Process Clause of the Constitution.

1774, LILCO represented that "it is our understanding from Barnwell that the cost of disposal will increase by approximately 10% beginning next year" and said further that, if LILCO was forced to rely on a New York State repository the "disposal cost a such a facility are projected to be, at a minimum, at least 300% of the present cost for Barnwell."

First, these vague representations were not made under oath and, therefore, may not be relied upon. Second, these are representations of relative costs only, and therefore provide the NRC no basis to judge the significance of the total actual costs, or potential increased costs, in absolute dollar terms. Third, in issuing the current procedures and standards on no significant hazards considerations, the NRC eschewed finding that exigent circumstances can occur when the licensee can demonstrate that avoiding delay in issuance will provide a significant economic benefit.4/ 51 Fed. Reg. at 7756 col 3 (March 6, 1986). Fourth, since it is recognized in Section 8 below that an EIS on the proposal to decommission Shoreham is required in these circumstances and the NRC's regulations forbid any approval until that process is completed, NEPA does not allow economic considerations to permit approvals of proposals or parts of

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4/ In its response to the "first commenter", the Commission limited its agreement with the commenter that the "examples should be read as also covering no circumstances where there was a net increase in safety or reliability or a significant environmental benefit." 51 Fed. Reg. at 7756 col. 3 (March 6, 1986). In so doing, it denied agreement with the first commenter's recommendation that exigent circumstances can occur if the licensee can demonstrate that avoiding delay in issuance will provide a significant "economic or other benefit." Id.

proposals prior to completion of that process. "Considerations of administrative difficulty, delay or economic cost will not suffice to strip the section of its fundamental importance." Calvert Cliffs' Coordinating Committee Inc. v. U.S. Atomic Energy Commission, 449 F.2d 1109, 1115 (1971) (emphasis added).

5. THE PROPOSED NO SIGNIFICANT HAZARDS CONSIDERATIONS DETERMINATION IS INVALID

A no significant hazards considerations determination cannot be made if the proposed amendment would either involve a significant increase in the probability or consequences of an accident previously evaluated, or create a possibility of a new or different kind of accident from any accident previously evaluated, or involve a significant reduction in a margin of safety. 10 C.F.R. § 50.92(c) (1990). And, in evaluating the existence of these circumstances, the Commission has proclaimed that it "will be particularly sensitive to a license amendment request that involves irreversible consequences (such as one that permits a significant increase in the amount of effluence or radiation emitted by a nuclear power plant)." 10 C.F.R. § 50.92(b) (1990).

In this case, since the mode of disposal of reactor internals is integral part of the evaluation of the licensee's decommissioning plan, and since that plan has not been submitted, much less reviewed and approved, the current proposal to dispose of Shoreham's fuel support castings and peripheral pieces constitutes, by definition, the creation of the possibility of a

new or different kind of accident from any accident previously evaluated. And the shipment of these reactor internals offsite involves a significant reduction in a margin of safety as well as involving an increase in general population exposures to radiation and worker exposures as well as transportation accident risks, which constitute irreversible consequences which could be greatly reduced (by onsite decay) if such shipments are deferred if the Commission deals with the decommissioning plans in accord with its regulations in timely fashion. And such irreversible consequences could also be indefinitely deferred if the Commission were to decide either to deny the application to decommission, or if any relevant authority were to order the reactor to operate.

6. THE APPROVAL OF THE AMENDMENT WOULD BE CONTRARY TO LOW-LEVEL RADIOACTIVE WASTE POLICY AMENDMENTS ACT OF 1985

The Low-Level Radioactive Waste Policy Amendments Act of 1985 established a framework for allocating rights and responsibilities among the states for the establishment of low-level radioactive waste disposal sites under the supervision of the NRC. 42 U.S.C. § 2021b et seq. (1988) (Public Law 99-240, 99 stat. 1842 (January 15, 1986)). Under that Act, certain requirements or milestones were established for non-sited, non-member states, such as New York. 42 U.S.C. § 2021e(e) (1988). Included within this scheme of responsibilities is a scheme of penalties for failure of states, such as New York to comply,

including the right of sited states to deny access to regional disposal facilities. 42 U.S.C. § 2021e(e)(2). And the legislative history of that Act indicates that it was the legislative intent to impose a "hardship for generators" to encourage states to take action. E.g., H.R. Rep. No. 99-314, Part I, 99 Cong., 1st Sess. 31 (1985).

Thus the NRC, if it approves the instant application because of a possible determination by the sited states that New York is out of compliance, would vitiating the purpose of a penalties in that Act and abdicating its responsibility for implementation of that Act.

The School District and SE2 also note that Section 6 of the Low-Level Radioactive Waste Policy Amendments Act of 1985 totally destroys any claim by LILCO or the NRC Staff that exigent circumstances exist here because LILCO might be denied access to Barnwell. Section 6 gives explicit authority to the NRC to grant "emergency access to any regional disposal facility . . . if necessary to eliminate an immediate and serious threat the public health and safety or common defense and security." 42 U.S.C. § 2021f (1988). However, the Act also bars the NRC from authorizing emergency access on the basis of the foregoing finding, unless it also finds that the "threat cannot be mitigated by any alternative consistent with the public health and safety, including storage of low-level radioactive waste at the site of generation." 42 U.S.C. § 2021f(c)(1)(B) (1988) (emphasis added).

Thus, in the special circumstances of the Low-Level Radioactive Waste Policy Amendments Act of 1985, Section 6 provides the appropriate definition of whether "exigent circumstances" exist in this case. The NRC has not made, and cannot make, a current determination that the temporary storage of the reactor internals at the Shoreham site constitute "an immediate and serious threat to the public health and safety or the common defense and security." Nor can the Commission currently make the second necessary determination that it would not be consistent with the public health and safety to continue storage of these reactor internals "at the site of generation." However, if such findings are appropriate in the future, the NRC can grant LILCO access to Barnwell even if the States decide to deny access. Therefore, "exigent circumstances" for approving the application do not exist at this time.

7. THE LICENSEE AND THE STAFF HAVE OTHERWISE FAILED TO COMPLY WITH 10 C.F.R. § 50.91

Section 50.91(b) requires that:

> At the time a licensee requests an amendment, it must notify the State in which its facility is located of its request by providing that State with a copy of its application and its reasoned analysis about no significant hazards considerations and indicate on the application that it has done so.

10 C.F.R. § 50.91(b)(1). LILCO has not complied with this requirement; and therefore, the application must be rejected.

Also, Sections 50.91(b)(2),(3)&(4) require the Commission to advise the State of its proposed determination about no significant hazards considerations and to consult with the state about that proposed determination. There is no evidence in the record that the Commission has fulfilled these responsibilities and, therefore, the application must be rejected.

Section 50.91(a) requires that the licensee, at the time it requests the amendment, "must provide to the Commission, in accordance with the distribution requirements specified in Section 50.04 its analysis about the issue of no significant hazards consideration using the standards in § 50.92." No such analysis was furnished and, therefore, the amendment application must be rejected.

Section 50.91(a)(2)(ii) requires that the notice must contain "the Staff's proposed determination under the standards in § 50.92." No such evaluation is contained in the notice and counsel for the School District and SE2 has been informed by the NRC Staff attorney that no documentation evaluating the significance of the hazards consideration existed at the time of the publication of the notice. Therefore, the application must be denied as being in violation of the NRC's regulations and 5 U.S.C. § 709.

8. THE ISSUANCE OF THE AMENDMENT WOULD VIOLATE NEPA

The Commission has determined first in the denial of immediately effective orders to the School District and SE2 on

July 20, 1989, and then in its adoption of SECY-89-247 that an Environmental Impact Statement on the decommissioning of Shoreham will be required under NEPA.

Under these circumstances, the NRC's regulations forbid approval of the instant amendment application, stating that "no decision on a proposed action, including the issuance of a[n] . . . amendment to [a] license or other form of permission . . . will be made and no record of decision will be issued until" the NEPA EIS process is completed. 10 C.F.R. § 51.100(a)(1) (1990).

There can be no question but that the decision on the mode of disposal of reactor internals is a part of the proposal to decommission Shoreham and, therefore, approval of an amendment authorizing such mode of disposal is barred under the NRC's regulations until after the NEPA review of the decommissioning proposal is completed.[5/] In this case, the NEPA process has not even begun by publication of notice of intent and conduct of the scoping process. See 10 C.F.R. § 51.26 (1990).

Therefore, NEPA requires decision on the instant amendment be deferred until the EIS process is completed.

5/ Approval of the amendment would probably also violate 10 C.F.R. § 51.101 on the basis of the resulting adverse environmental impacts and its limitation on the choice of alternatives. The representation that the reactor internals could be replaced on a "long lead time" basis does not disclose either the period of delay that would be incurred, or the cost. Without such information, the Commission cannot evaluate whether the current proposed disposal would constitute an "irretrievable commitment of resources" in violation of NEPA.

9. REQUEST FOR STAY

In the event that the Commission decides to approve the instant application for an amendment to Shoreham's operating license, the School District and SE2 hereby give notice of their intent to seek review in the U.S. Court of Appeals including an emergency motion for stays, expeditious consideration and other relief. Therefore, the School District and SE2 request that the NRC stay the effectiveness of any such amendment for ten (10) business days subsequent to the decision to allow for consideration of this matter by the U.S. Court of Appeals.

Respectfully submitted,

November 28, 1990

James P. McGranery, Jr.

Counsel for the Petitioners
Shoreham-Wading River Central
School District and Scientists and
Engineers for Secure Energy, Inc.