UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	
Long Island Lighting Co., Shoreham Nuclear Power Station; Confirmatory Order Modifying License (Effective Immediately) (55 Fed. Reg. 12758, April 5, 1990)	USNRC Docket No. 50-322 License No. NPF-82

SCIENTISTS AND ENGINEERS FOR SECURE ENERGY, INC.'S
PETITION FOR LEAVE TO INTERVENE AND REQUEST FOR HEARING

On March 29, 1990, the Nuclear Regulatory Commission ("NRC") issued an immediately effective Confirmatory Order ("Confirmatory Order") which modifies the full-power operating license for the Shoreham Nuclear Power Station ("Shoreham") held by the Long Island Lighting Company ("LILCO"). 55 Fed. Reg. 12758 (April 5, 1990). The Confirmatory Order prohibits LILCO "from placing any nuclear fuel into the Shoreham reactor vessel without prior approval from the NRC." Id. at 12759. In the Notice of the Order, published in the Federal Register, the NRC stated that "[a]ny person adversely affected by this Confirmatory Order may request a hearing within twenty days of its issuance." Id.

Scientists and Engineers for Secure Energy, Inc. ("SE_2" or "Petitioner") and some of its members are adversely affected by this Confirmatory Order and, therefore, pursuant to Section 2.714 of the Commission's Rules, it requests that it be granted leave to intervene as a party and a hearing be held to consider the validity of the Confirmatory Order.

The SE_2 views this Order as one part of the larger proposal to decommission Shoreham. Each step in the decommissioning proposal that moves Shoreham closer to a fully decommissioned state and further away from full-power operational status is in violation of the dictates of the Atomic Energy Act of 1954 as amended ("AEA"), and the National Environmental Policy Act of 1969 as amended ("NEPA"). Thus, while the issues directly relate to the Confirmatory Order, they necessarily include other unlawfully segmented actions taken and/or proposed by LILCO and the NRC Staff in furtherance of the decommissioning scheme.

The SE_2 submitted an enforcement request under Section 2.206 of the Commission's Rules in July 1989, and has submitted several supplements to the request since that time consolidated with the Shoreham-Wading River Central School District ("School District"). In their Section 2.206 request, the School District and SE_2 have argued that LILCO is taking the initial steps in a course of action aimed at decommissioning the Shoreham facility in violation of the terms of the operating license, the Commission's regulations, the AEA and NEPA. Technically, the request is still pending before the NRC, but the Commission's lack of meaningful response has effectively denied their request because of the continuing and significant steps toward de facto

implementation of LILCO's decommissioning proposal proceeds unhampered with the full knowledge and support of the NRC Staff.

All of the arguments advanced in Petitioner's Section 2.206 Requests and the supplements thereto are pertinent to the issues at hand and, therefore, are incorporated herein by reference as additional support for the specific aspects of the issues and contentions as to which Petitioner seeks leave to intervene and requests a hearing.

I. INTEREST OF PETITIONER AND THE RIGHT TO INTERVENE

As the NRC Staff has stated the applicable law: To determine whether a petitioner has sufficient interest to intervene in a proceeding the Commission has held that licensing board may apply judicial concepts of standing. Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610 (1976). The action sought in the proceeding will cause an injury in fact to Petitioner, and that injury is within the zone of interest protected by the Atomic Energy Act of 1954, as amended, and/or the National Environmental Policy Act of 1969. Id. at 613-614; Niagara Mohawk Power Corp., et al. (Nine Mile Point Nuclear Station, Unit 2) LBP-83-45, 18 NRC 213, 215 (1983). Petitioner will establish: (1) that it personally has suffered or will suffer a distinct and palpable harm that constitutes an injury in fact; (2) that the injury can be traced to the challenged action; and (3) that the injury is likely to be remedied by a favorable decision granting the relief sought. Dellums v. NRC, 863 F.2d 968, 971 (D.C. Cir. 1988); see also Nuclear Engineering Co., Inc., (Sheffield Illinois, Low-Level Radioactive Waste Disposal Site), ALAB-473, 7 NRC 737, 743 (1978). Petitioner has a "real stake," that is, a genuine or direct interest in the outcome, and the law allows standing even if that interest is thought by

others not to be a substantial one. Houston Lighting and Power Co., et al. (South Texas Project, Units 1 and 2), LBP-79-10, 9 NRC 439, 447-48 (1979).

SE_2 meets all of the criteria for standing in this matter. SE_2 and its members are threatened with distinct injuries in fact as a direct consequence of the Confirmatory Order. These injuries are within the zone of interests protected by both the AEA and NEPA and can be remedied by a favorable decision.

The AEA guarantees any interested person a hearing in any reactor licensing action which may affect the health and safety of the petitioner. 42 U.S.C. § 2239. Petitioner's interests, as detailed below, will be protected, and the requirements and purposes of the AEA met, if leave for it to intervene in a hearing held in this matter is granted and the remedies sought by Petitioner are granted as a result of that proceeding.

LILCO's efforts toward de facto decommissioning without an approved decommissioning plan are a per se violation of the AEA and a direct health and safety violation. LILCO's efforts to save money by shutting down all operations, slashing staff and permanently defueling the reactor ignore AEA procedure and endanger the health and safety of Petitioner's members during this unapproved

decommissioning. Petitioner seeks to have the NRC require LILCO to abide by the Shoreham Operating License until an approved decommissioning plan and an Operating License amendment are properly considered and approved under the AEA.

Even if an approved decommissioning plan were in existence, LILCO has failed to maintain the reactor at a full operational level from the moment LILCO decided to decommission Shoreham, and this continuous refusal to abide by the terms of its Operating License has severely increased the Petitioner's members radiological health and safety risks. No concern with full-power operational safety has been expressed by LILCO, or the NRC Staff, since the licensee and the NRC Staff improperly and illegally appear to have concluded that the reactor would never again operate. This premature conclusion that the reactor will never again be brought to full power operation must certainly affect the type of care, maintenance and attention to details at the facility; and the hearing process will reveal the health and safety risks caused by LILCO's de facto decommissioning efforts and the NRC Staff's apparent wholesale acquiescence to that position.

NEPA mandates preparation of an Environmental Impact Statement ("EIS") prior to agency decisionmaking on major federal actions significantly affecting the quality of the

human environment. The EIS must consider, inter alia, the environmental impacts of, and the reasonable alternatives to, the proposal. Thus, NEPA ensures that agency decisionmaking not only includes environmental consideration, but also is structured in such a way that environmental consideration is meaningful. SE_2 has determined that its responsibilities demand that it seek intervention in this instance in order to protect the interests of its members.

SE_2 is an organization dedicated to correcting the alarming degree of misunderstanding on fundamental, scientific and technological issues permeating the national energy debate, especially with respect to the balancing of environmental concerns. In pursuing these objectives, SE_2 is committed to offering its views, based on the considerable knowledge and expertise of its members, to the public and to the various governmental agencies with responsibility for the resolution of energy issues. Many of SE_2's members live and/or work on Long Island in the vicinity of the Shoreham Nuclear Power Plant and rely on electricity from its licensee, LILCO. Therefore, the organization and its members have a special interest in the radiologically safe and environmentally benign operation of Shoreham to provide them with reliable electricity and to avoid the substitution of fossil fuel plants relying on imported oil and gas, which

would contribute not only to acid rain, the greenhouse effect, and other effects adverse to the physical environment, but also to our national trade deficit and the endangerment of national energy security and other effects adverse to our society.

Members of SE_2 who have authorized the organization to represent their interests include:

Eena-Mai Franz
25 Josephine Boulevard
P.O. Box 623
Shoreham, New York 11786

Andrew P. Hull
2 Harvest Road
Shoreham, New York 11786

Stephen V. Musolino
6 Middle Cross
Shoreham, New York 11786

Joseph B. Scrandis
10 Walnut Street
Westbury, New York 11590

John R. Stehn
8 Harbor Hills Drive
Port Jefferson, New York 11777

These SE_2 members variously live and/or work within 50 miles of these Shoreham and own, lease and/or use real property within a 50 mile radius of Shoreham and have an interest in whether the Confirmatory Order provides reasonable assurance of their radiological health and safety, which is within the zone of interests to be protected under the AEA and whether the decision on this Confirmatory Order

and the larger proposal of which it is a part is made in accordance with NEPA.

The SE_2 members depend on LILCO to meet their electric energy needs at home and at work. Thus, SE_2 has a vital interest in ensuring that an adequate and reliable supply of electricity will be available to meet their needs and that the electricity provided is available at reasonable rates. As a completed and fully licensed plant, Shoreham is presently capable of meeting the growing electric energy needs of the Long Island area. Actions to dismantle the facility and build substitute oil or gas burning plants, on the other hand, delay any increase in the region's electric energy production capacity and also generate significant expenses which will inevitably be passed on to Long Island's ratepayers. SE_2 also has an interest in protecting its members from the adverse health consequences of the air pollution produced by the oil burning plants which would be necessary substitutes for Shoreham.

Aside from its authorization to represent the interests of its members located within fifty miles of the Shoreham facility, SE_2 has standing in this case based on its organizational interests. See Philadelphia Electric Co., (Limerick Generating Station, Unites 1 and 2), LBP-82-43A, 15 NRC 1423, 1437 (1982), citing, Warth v. Seldin, 422 U.S. 490,

511 (1975). SE_2 strongly supports the use of nuclear plants to provide the safe and domestically secure electricity needed in this county. This mission necessarily includes intervening in the present matter where the destruction of a new state-of-the-art nuclear reactor is sought.

As set forth in Competitive Enterprise Inst., et al. v. Nat'l Highway Traffic Safety Admin., No. 89-1278, slip op. at 27 (D.C. Cir. Jan. 19, 1990), organizational standing is established whenever the agency's action interferes with the organization's informational purposes to an extent that it is precisely the situation in the instant case: the NRC Staff refuses to conduct a NEPA study which directly deprives SE_2 of its ability to (1) comment directly on an environmental report prepared by LILCO and the Draft EIS prepared by the NRC Staff, (2) advise its members of the environmental risks involved with each alternative explored by the environmental studies, and (3) report the findings and recommendations based upon the environmental evaluations to the public and political leadership as set forth in SE_2's Charter.

II. PETITIONER'S INTERESTS WILL BE GREATLY AFFECTED BY THE ORDER AND THE PROCEEDING

The Commission's decision to issue this Confirmatory Order, violates the requirements of the AEA at the expense of the Petitioner's radiological health and safety and circumvents NEPA and the NEPA-mandated consideration of the proposal, including its reasonable alternatives. Petitioner's AEA and NEPA interests will be directly affected as described herein, and Petitioner wishes to participate in each and every aspect of the hearing which touches and concerns those interests as well as the specific aspects identified below and in any amendment of this petition hereafter filed.

SE_2, on behalf of itself and its members, desires a hearing to determine whether the order should be sustained, vacated, or modified under the AEA. The specific aspects of the Confirmatory Order as to which SE_2 wishes to intervene under the AEA are: (1) whether the Confirmatory Order is arbitrary, capricious and/or abuse of discretion and/or not supported by substantial evidence pursuant to the Atomic Energy Act and the Commission's regulations thereunder, in particular Part 2, Subpart B and Appendix C; (2) whether if a decision is made to go to full power operation at Shoreham, the Confirmatory Order gives reasonable assurance that such full power operation would be conducted with reasonable

assurance of the public health and safety and national defense and security, particularly, the reasonable assurance of their protection (including their real and personal property) from the radiological hazards of operating the facility; and (3) whether, if a decision is made to decommission Shoreham, the Confirmatory Order gives reasonable assurance that such decommissioning will be conducted in accordance with the public health and safety and the national defense and security to protect SE_2's members and their real and personal property from the radiological hazards of decommissioning the facility.

Both their personal radiological and other health, safety, and property interests would be adversely affected if the Confirmatory Order is not in accord with the AEA and/or the regulations issued thereunder and/or if it does not otherwise provide reasonable assurance of the public health and safety and the national defense and security.

SE_2 also wishes to have full and fair NEPA consideration given the decommissioning proposal, including the need for power, the cost-benefit analysis of decommissioning and operation and near-term operation alternatives for Shoreham. Any actions in furtherance of the de facto decommissioning proposal, including the Confirmatory Order, prejudice consideration of such mandatory NEPA

analysis by other things, may make the alternatives further away in time, more costly and less likely in fact.

NEPA, as detailed by regulations issued thereunder by the CEQ and the NRC, mandates that no major Federal action significantly affecting the quality of the human environment will be implemented without first receiving a full environmental review. As more fully detailed below, Petitioner's interests under NEPA will be protected, and the purposes and requirements of NEPA served, to the extent that such a review is conducted under the NRC Rules (including a hearing) and the remedies sought by Petitioner are granted in the proceeding. Petitioner's interests will be adversely affected should this petition or the relief sought herein be denied.

The remedies sought by Petitioner specifically include the correction of this presumptuous "decision" that the reactor will never return to full power operation, as well as a return to the mandates of the NRC's regulations under the AEA and NEPA which require maintenance of the full power license obligations until an informed decision is made with all appropriate environmental and economic considerations.

If a full NEPA environmental review is conducted, it may be that the factors which first led to the construction

of this $5.5 billion dollar reactor would lead the decisionmaker to favor the continued utilization of this brand new facility and reject the decommissioning proposal. But the failure to properly maintain the facility in accordance with the Operating License during this interim period could further erode the alternative of full power operation by, among other things, increasing the costs of returning to full power operation.

During the interim period, before the necessary environmental evaluations are completed, the reactor must not languish in a deactivated mode inconsistent with NRC regulations and the Operating License. Nor should the licensee be permitted by the Commission to believe and behave as though the reactor will never again operate. Significant health and safety problems will result from LILCO's failure to abide by the requirements of the operating license which requires constant efforts to maintain operational capability.

Intervention and a hearing on this Confirmatory Order, addressing the aspects identified in this Petition, is the only avenue available to Petitioner for protecting the vital interests of its members. The consolidated Requests filed pursuant to 10 C.F.R. § 2.206 in July 1989 sought redress of many similar issues, but the NRC Staff has essentially ignored that Section 2.206 request which is still

technically a pending action. The Petitioner must now address each incremental segmented step taken by the licensee and the NRC Staff which could further advance the de facto decommissioning by the licensee in violation of its Operating License, the AEA and NEPA.

Petitioner must address the de facto decommissioning at this time because the licensee obviously seeks to abrogate its obligations under its operating license before formally applying for a decommissioning license amendment thereby endangering the health and safety of Petitioner and those whom it represents, jeopardizing the future viability of the reactor and avoiding a meaningful environmental analysis pursuant to NEPA. Without Petitioner's active involvement, the NRC Staff and the licensee would simply continue to circumvent the law and regulations and thereby deny Petitioner and its members all of whom are interested in the development of a complete environmental record, the opportunity to have such full NEPA consideration before significant alternatives are, for all practical purposes, foreclosed.

Obviously, neither the NRC Staff nor the licensee appear to be in the least bit interested in representing the Petitioner's valid interests by complying with the requirements of the AEA and/or NEPA. Petitioner will bring

to light the significant regulatory, health, safety and environmental issues which form the bases for alleging the invalidity of the Confirmatory Order and for all of the licensee's actions toward de facto decommissioning. These essential issues are required by law to be addressed, and by addressing them now in this action the Petitioner will hasten their examination and appropriate resolution by the Commission.

III. SPECIFIC ASPECTS AS TO WHICH PETITIONER SEEKS TO INTERVENE

A. Specific Aspects of the Subject Matter As To Which Petitioner Seeks to Intervene Under the AEA

A license amendment and an order modifying a license are the same animal approached from different directions. Under the Commission's Rules, a license amendment is an action sought by a licensee and considered by the NRC which offers third parties a chance to request a hearing and intervene if their interests are implicated by the licensee's proposal. An order modifying a license, on the other hand, is an action taken by the Commission with or without prompting from a licensee. In fact, Section 2.204 of the Commission's rules, which governs such orders, provides that "the licensee may demand a hearing with respect to all or any part of the amendment." 10 C.F.R. § 2.204 (1989) (emphasis added).

The Confirmatory Order will certainly not be opposed by LILCO which has asked for the issuance of a creatively-designated "defueled state" operating license. See Letter from William E. Steiger, Jr. to U.S. NRC, dated January 3, 1990, SNRC-1664, and enclosures. The Commission has met this incongruity by allowing "any person adversely affected" to request a hearing in this instance. The Commission's generous invitation for hearing requests does not change the

fact that the Confirmatory Order is at least a partial granting of that license amendment application that has been made immediately effective in violation of the normal procedures for such amendments.

By pushing this license amendment through as a Confirmatory Order, the Commission made it immediately effective. The question is: Why, all of the sudden, was an immediately effective order necessary? The reasons advanced for the issuance of the Order are completely disingenuous. The Commission argues that public health and safety considerations mandate the issuance of such an order because "(1) [t]he reduction in the licensee's onsite support staff below that necessary for plant operations, and (2) the absence of NRC-approved procedures for returning to an operational status the systems and equipment that the licensee has decided to deactivate and protect rather than maintain until ultimate disposition of the plant is determined." 55 Fed. Reg. 12758 (April 5, 1990).

LILCO plainly and repeatedly made its planned staff reductions and "mothballing" ("system layups") activities known to the NRC through correspondence and at face-to-face meetings between the NRC staff and LILCO management. LILCO submitted its plans for the layup of its equipment and systems to the NRC for specific approval and received that

approval. Never once in this process did the NRC express any concern that these activities were inconsistent with the terms of LILCO's operating license or, in fact, posed a health and safety threat given LILCO's legal authorization to operate the plant. Quite the contrary, the NRC gave LILCO explicit permission to go forward with these activities. Now the Commission is attempting to use the circumstances at the plant, which it had sanctioned to this point as being at least neutral in their health and safety implications and therefore acceptable, to justify the urgent need for the instant Order. The notice of the Order is inadequate in its failure to explain this readily apparent inconsistency.

The Commission's bootstrapping is in direct violation of the Atomic Energy Act and its inadequate expression of reasons violate the Administrative Procedure Act. If these activities were inimical to health and safety, the Commission should have disallowed them at the outset and required application for and receipt of a license amendment prior to their implementation. The Commission cannot legally deny a timely hearing on a license amendment by presenting it as a fait accompli justified by the results of previous actions which the NRC Staff now must be alleging were illegally permitted. Legal process cannot be sidestepped with semantic bootstrapping.

Furthermore, given that destaffing and layup activities should not have been allowed to proceed since they are now determined to be inimical to health and safety under the AEA, the solution is not to issue a "backdoor" license amendment, but rather to require the licensee to take steps to remedy the unsafe conditions in accordance with NRC enforcement policy. See 10 C.F.R. Part 2, App. C (1989).

The NRC Staff's responsibility is not to assure that the plant does not operate but rather to take steps to remedy the problems so that it does operate safely. The NRC Staff's assertion, contained in the notice of the Order, that the NRC lacks "procedures for returning to an operational status systems and equipment that the licensee has decided to deactivate and protect rather than maintain . . ." is completely untenable. Certainly the NRC, which is charged with the regulation and supervision of construction and operation of nuclear plants under the provisions of the AEA, has mechanisms for ensuring that a licensee takes actions to correct any threats to health and safety that may exist at a plant in restoring its systems to an operational state.

The proper response in this case is to develop a schedule of affirmative steps to be taken by the licensee to meet the deficiencies. The licensee's conduct could be supervised by the NRC Staff through inspections and reports

and ensured by the threat of enforcement action by the Commission. The NRC Staff's assertion that no delineation is provided in its Rules and subsidiary guidance for the NRC to take steps to cure existing threats to health and safety at a plant, after having ignored the clear mandates of the rules by allowing those same threats to develop, is both factually and legally unacceptable. The NRC Staff's Confirmatory Order is, therefore, inadequate in that, among other things, it lacks a delineation of affirmative steps that the licensee shall take to solve the problem.

Aside from being violative of the Commission's established procedures for the implementation of a license amendment, the Confirmatory Order's effect could and should have been achieved by a confirmatory action letter, a significantly lower level administrative action, as required by the NRC Enforcement Policy. The Confirmatory Order may facilitate the issuance of the "defueled state" license presently sought by LILCO in providing a springboard for yet further actions which are otherwise inconsistent with a full-power operating license, but might be justified if that full-power license has been effectively amended to prohibit operation. By facilitating issuance of the "defueled state" license, the Confirmatory Order may also smooth the way for further actions in implementation of decommissioning,

including the transfer of the license to an entity of New York State because a "defueled state" license (which does not exist under the Commission's regulations but is presumably virtually indistinguishable from a "possession only" license) may reduce the technical qualifications issue upon application for license transfer.

The particular aspects of the Confirmatory Order as to which Petitioner wishes to intervene under the AEA are, inter alia, as follows:

1. Given that the Confirmatory Order accepts as the premise for LILCO's staff reductions and discontinuance of customary maintenance the proposition that "the terms of the Settlement Agreement . . . prohibits further operation of the Shoreham facility . . . .", does the Settlement Agreement in fact prohibit further operation of the Shoreham facility?

2. Is the licensee's reduction of staff being performed in accordance with the AEA, the regulations and guidance thereunder, the conditions specified in the license, and/or the licensee commitments relating to staffing pursuant to that license?

3. Is the licensee's discontinuance of the customary maintenance truly "in accordance with conditions specified" in the license, commitments made pursuant to the license and/or normally required of full power operating

reactor licensees, the AEA, and/or regulations and requirements and guidance thereunder?

4. Is the "plant's defueled condition" relevant to whether site staffing meets the requirements of the Shoreham Updated Safety Analysis Report and/or the Technical Specifications?

5. Is the question of whether the plant's "site staffing" meets the requirements of the Shoreham Updated Safety Analysis Report and the Technical Specifications for the plant's defueled condition determinative of whether the licensee's overall staff and staffing actions (including hiring and training) or lack thereof is in compliance with the licensee's obligations under its license and related commitments?

6. If the licensee's on-site support staff is "below that necessary for plant operations" does the licensee have an obligation pursuant to its license, commitments related thereto, the AEA, and/or regulations and requirements and guidance thereunder to re-assign and/or hire, and train and/or re-train, additional staff?

7. If the licensee does have an obligation to transfer and/or hire, and train and/or retrain, additional staff under its existing license, does the NRC Staff have an

obligation to enforce the licensee's staffing obligation through fines and related orders?

8. Is there an "absence of NRC-approved procedures for returning to an operational status systems and equipment that the licensee has decided to deactivate and protect rather than maintain until ultimate disposition of the plant is determined"?

9. Is there a sufficient number of adequately trained personnel to control operation if the licensee were to place nuclear fuel into the reactor vessel?

10. If the licensee were to place nuclear fuel into the reactor vessel, could a core configuration credibly result that could become critical and produce power?

11. If the licensee's commitment, as set forth in its letter of January 12, 1990, has been properly determined to be acceptable and necessary and there is a proper conclusion that this commitment reasonably assures the plant's safety, is a Confirmatory Order necessary and appropriate or an abuse of discretion pursuant to Subpart B and Appendix C of Part 2 of the Commission's regulations?

12. If the Confirmatory Order is otherwise valid but "in no way relieves the licensee of the terms and conditions of its operating license . . . .", does the licensee have an obligation to re-assign and/or hire, and train and/or re-

train, staff and to maintain plant equipment in a manner ready for full power operation?

13. If the licensee has an obligation to maintain (including reassigning and/or hiring, and training and/or retraining) staff adequate for full power operation and to maintain plant equipment in a status ready for full power operation, how should those obligations be detailed?

14. If the licensee has an obligation to maintain (including reassigning and/or hiring, and training, and/or retraining) staff adequate for full power operation and to maintain plant equipment in a status ready for full power operation but fails to observe either or both of these commitments, does the NRC Staff have an obligation pursuant to the AEA and the Commission's regulations (including, in particular, Subpart B and Appendix C of Part 2 and Part 50) to issue orders to compel the licensee to observe those obligations including appropriate fines to remove any economic incentive for violation of such orders?

15. Are the licensee's "commitments covering the continued maintenance of structures, systems and components outlined in its letter of September 19, 1989" in conformance with the licensee's responsibilities pursuant to its full power Operating License, the Technical Specifications thereunder, licensee commitments related thereto, and/or

other NRC requirements of full power operating licensees pursuant to the AEA?

B. Specific Aspects of the Subject Matter As to Which Petitioner Seeks To Intervene Under NEPA.

The Commission's Confirmatory Order prohibits LILCO from placing "nuclear fuel into the Shoreham reactor vessel without prior NRC approval." 55 Fed. Reg. 12785 (April 5, 1990). This Federally-imposed operating restriction is one segmented part in implementation of a proposed major Federal action which, if approved, will significantly affect the quality of the human environment. Because preparation of an EIS and a final decision is required before any part of the decommissioning proposal may be implemented, the Confirmatory Order is in direct violation of Section 102(2)(C) of NEPA and

Petitioner's right to such NEPA review.[1/] Therefore, it

1/ Pursuant to Section 2.758(b), Petitioner hereby petitions for waiver of, or an exception to, the application of 10 C.F.R. § 51.10(d) (1989) relating to the exclusion of NRC enforcement activities from the requirements of NEPA in this case because the special circumstances of this particular enforcement action are such that the application of Section 51.10(d) would not serve the purposes for which the regulation was adopted.

These particular special circumstances will be further explained in an affidavit to be submitted with Petitioner's Amended Petition to be filed pursuant to 10 C.F.R. § 2.714(a)(3) (1989).

The NRC's "Clarifying Amendment Relating to Enforcement Activities" stated that both formal and informal enforcement actions would be excluded from the requirements of NEPA. 54 Fed. Reg. 43576 (October 26, 1989). This decision was premised on the fact that enforcement actions "are generally directed to restoring compliance with NRC regulations, thereby enabling the licensee to resume licensed activities." Id. The Commission reasoned that, because the licensed activities had already undergone extensive environmental review, the reestablishment of such activities does "not require additional environmental review." Id.

In the present case, however, the aim and effect of the enforcement action in the Confirmatory Order is not the resumption of licensed activities, but rather the opposite. This Confirmatory Order is in furtherance of the decommissioning proposal; and the decommissioning of Shoreham has not been the subject of any environmental review to date. Thus, the instant "enforcement action" should not be excluded from NEPA review; and the underlying purposes of Section 51.10(d) are not met in this case.

Further, none of the traditional bases for precluding NEPA review of "enforcement actions" apply in this case: (1) Under Appendix C of 10 C.F.R. Part 2, a need for pre-enforcement secrecy or confidentiality is not an issue in NRC practice normally, and certainly not in this case; (2) there is no demonstration of a need for urgent action in issuing the Confirmatory Order in this case, and not even an attempt to justify urgency; and (3) no statute or other legal provision requires the issuance of this Confirmatory Order on a schedule

(continued...)

cannot be sustained.

Section 102(2)(C) of NEPA provides that prior to making a decision to implement a "proposal" for a "major federal action significantly affecting the quality of the human environment," administrative agencies shall prepare an Environmental Impact Statement ("EIS") which evaluates, among other things, the "environmental impacts of," and the "alternatives to" the proposed action. 42 U.S.C. § 4332 (1982).

The Council on Environmental Quality ("CEQ") regulations, which are "binding on all federal agencies," further clarify the NEPA responsibilities of federal agencies. 40 C.F.R. § 1500.3 (1988). Among other things, those regulations mandate application of NEPA "at the earliest possible time to insure that planning and decisions reflect environmental values," require that actions which are "interdependent parts of a larger action" be discussed in a single impact statement, and prohibit actions which "limit the choice of reasonable alternatives" until the NEPA process is complete. 40 C.F.R. §§ 1501.2, 1508.25, & 1506.1. The NRC's own NEPA regulations, which closely parallel those of the CEQ, also prohibit any "decision on a proposed action" or

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1/ (...continued)
which prohibits full compliance with the NEPA process in this case.

actions especially one tending to "limit the choice of reasonable alternatives" pending completion of the NEPA process. 10 C.F.R. §§ 51.100 and 51.101 (1989).

While the decommissioning proposal has been advanced by LILCO, a non-federal entity, the NRC's on-going supervision of the licensee's activities and the need for NRC approval of the various steps in the decommissioning process make what otherwise might be a major private action in another industry into a "major federal action." The NRC controls whether the decommissioning proposal may proceed and, therefore, has a non-discretionary duty under NEPA to ensure that neither the Shoreham facility, itself, as the relevant part of the environment under the supervision of the NRC, nor the alternatives to its decommissioning, are adversely affected by premature implementation of the decommissioning proposal. See 40 C.F.R. § 1506.1(b) (1988). To date, the NRC Staff has failed to recognize this duty and, instead, has given LILCO tacit and explicit permissions to implement an ever increasing number of steps in the decommissioning proposal.

LILCO and the NRC claim that no steps have been taken at Shoreham which are irreversible or constitute irretrievable commitments of resources. This claim is subject to significant doubt in view of the judicial

interpretation of these concepts in the context of NEPA and the facts of this case. For example, if these concepts are stretched to their theoretical definitional limits, the same claim could be made even if the plant had been razed but "could be" rebuilt. The issue is not whether the plant and its staff might someday be put back together again, but rather over what duration and at what cost could the feat be achieved. The farther away in time and expense LILCO and the NRC move the reestablishment of operational capability, the less likely it becomes that the alternative of operating Shoreham will be pursued. In the Spring and early Summer months of 1989, when LILCO made its intention to cooperate with New York State in a plan to decommission Shoreham plainly known to the NRC, the Shoreham plant sat ready for immediate full-power operation. As a fully licensed plant with a complete staff and fully functional equipment and systems, Shoreham constitutes a valuable resource for the Long Island area in that it was capable of <u>immediately</u> generating electric energy.

The Confirmatory Order is another in a series of actions instigated by LILCO and approved by the NRC Staff in furtherance of the decommissioning proposal. As such, the Confirmatory Order would make the intended benefit and

purpose of Shoreham (the supply of 805 MWe in full power operation) more remote in time and less likely in fact.

The Petitioner first urged maintenance of the status quo, that is, full operational readiness at the Shoreham plant, pending preparation of an EIS and a final decision on the proposal to decommission the facility, in their Section 2.206 request filed in July 1989. Petitioner has reiterated the need for the Commission to take such action in supplements to the initial request and at meetings between the NRC Staff and LILCO management. The NRC Staff's response has continually been that although an EIS will have to be prepared before decommissioning can take place, no proposal for decommissioning has yet been presented to the Commission.[2/] Petitioners disagree with this proposition advanced by the NRC, and supported by LILCO, that the Commission's NEPA responsibilities are not triggered until

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2/ The NRC has stated that while:

> decommissioning of a facility requires a license amendment necessitating the preparation of an EIS, such an amendment has not yet been applied for in this case. If the Commission issues a license amendment authorizing the decommissioning of the Shoreham facility, an environmental review will be performed . . . .

Interim Reply to the initial Section 2.206 Request (dated July 20, 1989) (emphasis added).

the Commission receives an application for a license amendment to allow decommissioning.

At the heart of this disagreement is the definition of the term "decommission." The more limited the set of actions that constitute "decommissioning," the more actions LILCO can take which do not satisfy the definition and, therefore, do not trigger NEPA review. LILCO and the NRC ultimately premise their delay in initiating the NEPA process on the position that the licensee's current activities are "consistent with" its full-power license and that the term "decommission" only encompasses some narrow, but undefined, set of actions which will not be undertaken until appropriate authorization is given pursuant to a "formal" application to decommissioning some time in the future. This position ignores both the reality of the present situation, and the definition of "decommission" found in Part 50 of the Commission's own Rules.

The CEQ definition of "proposal" includes the statement: "A proposal may exist in fact as well as by agency declaration that one exists." 40 C.F.R. § 1508.23 (1988). A hard look at the reality of the of the present situation makes it abundantly clear that a decommissioning proposal exists "in fact" in this instance. LILCO has entered into a Settlement Agreement with various entities of the State of

New York that represents a decommissioning proposal. The Agreement provides that LILCO will not operate the plant, but rather will take steps to remove the plant from service in an effort to both reduce costs and facilitate the transfer of the plant to an entity of New York State which will, in turn, take the final steps in the decommissioning process.

On several occasions, LILCO has made the terms of the Settlement Agreement known to the NRC. Furthermore, LILCO has sought permission in various forms including license amendment applications (some of which have been granted) since Shoreham was removed from service. Petitioner contends that those permissions implement stages of the decommissioning proposal outlined in the Settlement Agreement. LILCO began by transferring the fuel from the reactor to the spent fuel pool. The Commission found that this was not inconsistent with the terms of the operating license despite the fact that LILCO had no plans to replace the fuel and thus was defueling, an activity that is not anticipated in the Operating License, as opposed to refueling which is an activity addressed by the Technical Specifications. LILCO has also presented a plan to discontinue upgrading, maintenance, and operator training programs, and to drastically reduce the staff at the Shoreham plant, among other things. Despite the fact that these

actions were clearly inconsistent with the purpose and terms of the Operating License, the NRC Staff has made findings of consistency and allowed LILCO to go forward with these actions. Following implementation of the destaffing plan, LILCO presented a plan for "mothballing" ("system layup") of equipment and systems that make up the plant. Although LILCO holds a full-power operating license and is, therefore, committed to maintaining the plant in safe and operational condition, the NRC gave LILCO explicit permission to pursue the layup plans.

In addition to these activities, LILCO has also submitted several applications for relief from various requirements contained in the license, in the Technical Specifications and in the NRC Regulations. All of these proposals are inconsistent with the terms of LILCO's full-power Operating License and various parts (including Parts 50 and 51) of the NRC's regulations. The Settlement Agreement and LILCO's actions in pursuit of that Agreement have clearly put the NRC on notice that a decommissioning proposal exists "in fact" in this case. Thus, the NRC position that it will not consider a proposal to decommission to exist until a licensee submits a formal application for a license amendment to allow decommissioning is not tenable.

Aside from the reality of the situation which makes it abundantly clear that a proposal for decommissioning presently exists and is being prematurely implemented at the Shoreham plant, the Commission's own definition of the term "decommission" supports petitioners contention that LILCO's actions to date constitute decommissioning. The Commission defines "decommission" as meaning "to remove (as a facility) safely from service and reduce residual radioactivity to a level that permits the release of the property for unrestricted use." 10 C.F.R. § 50.2 (1989)(emphasis added). Thus, under the Commission's definition, decommissioning is a continuing process beginning with actions to remove a facility safely from service and continuing through to actions to reduce the level of residual radioactivity at the site until it is released for unrestricted use.

The NRC Staff's argument that it has not yet received a decommissioning proposal is inconsistent with its own definition in that, although no licensee has yet submitted an application for a license amendment to allow actions aimed at the reduction of residual radioactivity (dismantling the plant, for instance), LILCO has submitted several applications further confirming the removal of the facility from service. Thus, decommissioning has begun.

In the typical situation, when a plant is at the end of its useful life, by age or accident, there is no question whether the plant shall be operated further, and thus no decision whether to safely remove the plant from service. That occurrence is nothing more than a ministerial recognition of a fact which then initiates all licensee duties as to the "actual" decommissioning.

The Shoreham situation is anything but typical. The Shoreham plant is at the beginning of its useful life and the initial step in decommissioning, safely removing the plant from service, cannot be ignored as inconsequential or unrelated to the process of decommissioning.

Moreover, the Settlement Agreement between LILCO and New York State exactly parallels the Commission's definition of "decommissioning" in that it outlines a plan for decommissioning that begins with LILCO's actions to remove the plant from service and anticipates that an entity of New York State shall take the final actions necessary to complete decommissioning of the plant, while LILCO will remain financially liable for those actions. The NRC Staff's present position, that the NEPA process is not triggered until a licensee submits an application dealing with the reduction of the residual radioactivity, ignores the fact that LILCO is presently taking actions further confirming the

removal of Shoreham from service and, therefore, has not only begun decommissioning, but is aggressively implementing that proposal.

The Confirmatory Order violates Petitioner's rights under NEPA, and the NEPA regulations promulgated by the CEQ and the NRC, both (a) to have decisions on interdependent parts of a proposal for a major federal action informed by a Final EIS evaluating the proposal as a whole and also (b) to have alternatives to a proposed action preserved pending the preparation of an FEIS and the issuance of a final decision on the proposal as a whole.

The Confirmatory Order is another step in the decommissioning process in that it constitutes further NRC approval of the decommissioning steps implemented by LILCO to this point in that it depends on the results of those steps for its justification and also imposes a significant operating restriction which may rise to the level of a license amendment. In advancing the decommissioning process, the Confirmatory Order necessarily represents a decision on the part of the NRC Staff that decommissioning shall be allowed to proceed. Such a decision is unnecessary and injurious to Petitioner in that it denies its right under NEPA to have adequate consideration given to environmental factors prior to implementation of a proposal for a major

federal action. The D.C. Circuit has stated that "NEPA creates a right to information on the environmental effects of government actions; any infringement of that right constitutes a constitutionally cognizable injury . . ." Competitive Enterprise Inst., et. al. v. Nat'l Highway Traffic Safety Admin., No. 89-1278, slip op. at 28 (D.C. Cir. Jan. 19, 1990). Petitioner has thus shown an injury in fact resulting from the Confirmatory Order that is within the zone of interests protected by NEPA and that can be redressed by a decision not to sustain that Order and granting the other remedies sought.

The particular aspects of the Confirmatory Order as to which Petitioner wishes to intervene under NEPA are, inter alia, as follows:

1. Does a proposal to decommission the Shoreham Plant exist in fact?

2. Does the issuance of the Confirmatory Order violate the Commission's NEPA regulations, including without limitation, 10 C.F.R. §§ 51.100 & 51.101 (1989)?

3. Should an exemption or waiver, pursuant to 10 C.F.R. § 2.758 (1989), be issued because the application of 10 C.F.R. § 51.10(d) (1989) would not serve the purposes for which that rule was adopted given the special circumstances with respect to the subject matter of this proceeding?

4. Does NEPA, and the CEQ and NRC regulations promulgated thereunder, require that the licensee maintain its staff and plant in full accord with readiness for operation at full power in accordance with its full-power Operating License, the Technical Specifications and licensee commitments thereunder, as well as the Atomic Energy Act, the regulations and other normal NRC Staff requirements of a full power licensee, until such time as full NEPA review of the decommissioning proposal is completed and published and a decision on that proposal is subsequently made?

5. If NEPA requires a level of staffing and maintenance pending full NEPA review, what are the particular requirements for staffing and maintenance at Shoreham, and on the basis of those requirements, what are the remedial measures that should be ordered at this time (including retrospective and prospective fines)?

IV. REMEDIES

The Petitioner seeks the following remedies:

1. An order permitting the Petitioner's intervention as to the subject of the captioned notice.

2. An order directing a hearing on the issues presented by the captioned notice as detailed in this petition as it may be amended.

3. An order vacating the Confirmatory Order, pendente lite; and, further ordering the NRC Staff to issue a confirmatory action letter pending the Atomic Safety and Licensing Board's final decision and order in this matter.

4. An order consolidating this petition with the petition of Shoreham-Wading River Central School District insofar as the two petitioners have common interests.

5. An order consolidating this matter with related matters pending before the Commission for which notices of an opportunity for hearing have been and/or will be issued.

6. An order, pursuant to 10 C.F.R. § 2.758 (1989), waiving or making an exception for this particular proceeding with respect to 10 C.F.R. § 51.10(d) (1989) because the application of 10 C.F.R. § 51.10(d) (1989) would not serve the purposes for which that rule was adopted given the special circumstances with respect to the subject matter of this proceeding.

7. An order finding that there exists a proposal for the decommissioning of Shoreham, which is a major federal action significantly affecting the quality of the human environment and, therefore, ordering the licensee to prepare an Environmental Report on the scope of that proposal (including, inter alia, the alternatives relating to full-power operation); and, further ordering, that all Shoreham proceedings not related to enhancing full-power operation be held in abeyance pending the submission of that Environmental Report and the subsequent preparation and publication of a Draft Environmental Impact Statement by the NRC Staff.

8. An order requiring the licensee to expeditiously reassign and/or hire, and train and/or retrain, staff to meet the staffing requirements for full power operation of the Shoreham Plant in accordance with its license, related commitments thereunder, and all NRC requirements for full power licensees; and, further ordering such staff to be maintained until such time as a decision is made on the decommissioning proposal.

9. An order requiring the licensee to work with the NRC Staff to return equipment at the Shoreham Plant to a full power operating status expeditiously; and, further ordering the licensee to maintain the Shoreham Plant in accordance with readiness for immediate fuel loading, subsequent power

ascension and full-power operation in accordance with the licensee's full power Operating License, commitments related thereto, and all NRC Staff requirements of full power operating licensees until such time as a decision is made on the decommissioning proposal.

10. An order requiring the licensee, and the NRC Staff independently, to furnish this Atomic Safety and Licensing Board with reports, on Monday of each week, describing the then current progress and status of affairs pursuant to Orders 7, 8, and 9 above.

11. An order putting the licensee on notice or, in the alternative, an order requiring the NRC Staff to issue an order putting the licensee on notice, that fines of $100,000 per day shall be imposed for any violation(s) of Orders 7, 8 or 9, independently, so that such fines may accumulate to $300,000 per day.

12. An order requiring the NRC Staff and the licensee to furnish the petitioner's attorney with all future communications and/or governmental filings originated by those parties or either of them, by telecopy, express mail, or overnight courier, which communications relate to the Shoreham Plant and/or issues affecting the Shoreham Plant.

13. An order requiring the NRC Staff to issue a Notice of Civil Penalties to the licensee for violations of

(a) the AEA and/or NEPA, and/or regulations thereunder, and/or (b) its full power operating license, including commitments thereunder, and/or (c) NRC requirements of full-power reactor licensees, which violations occurred on or after April 21, 1989, or in the alternative, to show cause to this Atomic Safety and Licensing Board how a failure to issue such a Proposal of Civil Penalties can be justified under 10 C.F.R. Part 2, Subpart B and Appendix C.

14. A final decision and order finding that the Confirmatory Order must be permanently vacated because it was issued in violation of the Atomic Energy Act and the regulations issued thereunder (in particular, Subpart B and Appendix C of Part 2 of the Commission's Regulations), the Administrative Procedure Act, and the National Environmental Protection Act and regulations issued pursuant thereto and granting such other remedies and relief as may be deemed appropriate.

CONCLUSION

WHEREFORE, for the above-stated reasons, the Petition for Leave to Intervene should be granted, a hearing should be held, and the other remedies herein sought should be granted.

Respectfully submitted,

April 17, 1990

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In accordance with 10 C.F.R. §§ 2.708(e) and 2.712(b), service may be made upon the above-designated Attorneys for Petitioner.

CERTIFICATE OF SERVICE

Pursuant to the notice requirements set forth in the Federal Register (55 Fed. R. 12758, April 5, 1990) and the service requirements of 10 C.F.R. § 2.712, I, James P. McGranery, Jr., hereby certify that on April 18, 1990 the foregoing Petition For Leave To Intervene And Request For Hearing and Notice of Appearance were served, via first class U.S. mail, postage prepaid, upon the following:

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