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LILCO, May 7, 1990

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

LONG ISLAND LIGHTING COMPANY'S OPPOSITION TO INTERVENTION PETITIONS AND REQUESTS FOR HEARING ON CONFIRMATORY ORDER AND ON AMENDMENT TO PHYSICAL SECURITY PLAN

I. Background

A. Procedural Posture

On April 18, 1990, the Shoreham-Wading River Central School District (SWRCSD) and Scientists and Engineers for Secure Energy, Inc. (SE 2)(collectively, "Petitioners"), each filed virtually identical petitions for leave to intervene and requests for hearing on the NRC's issuance of an immediately effective Confirmatory Order prohibiting Long Island Lighting Company, the licensee of the now-defueled Shoreham Nuclear Power Station, from placing nuclear fuel back in the reactor vessel without prior NRC approval. 55 Fed. Reg. 12758-59 (April 5, 1990).

On April 20, 1990, the same Petitioners again filed virtually identical petitions for leave to intervene and requests

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for hearing, this time on a pending amendment to the Shoreham Physical Security Plan.[1/]

Pursuant to C.F.R. § 2.714(c), LILCO opposes these four virtually identical petitions.[2/]

B. Facts

The present proceedings arise out certain actions taken by LILCO at Shoreham following the effectiveness of its Settlement Agreement with the State of New York. Under the Settlement Agreement, LILCO has agreed never to operate Shoreham. Instead, LILCO will cooperate with the Long Island Power Authority (LIPA) to obtain the NRC's permission to transfer the plant to LIPA, who will decommission it.

1/ Because the Physical Security Plan contains restricted Safeguards Information, it is not possible to detail the proposed changes here. It can be stated, however, that the changes fall into three general categories: (1) reduction or elimination of certain prior commitments by LILCO that exceed NRC requirements, (2) incorporation of recent regulatory changes pertaining to fitness-for-duty requirements under 10 C.F.R. Part 26, and (3) ministerial changes.

2/ Generally, in this Opposition LILCO refers jointly to "the Petitioners' arguments," as there is little or no substantive distinction in the positions that Petitioners have taken. The only differences within each pair of petitions involve their description of the respective Petitioners. The only differences between the pairs of pleadings involve cursory descriptions of the NRC actions on which Petitioners seek a hearing. Where, for purposes of citation, it is necessary to refer specifically to the separate petitions, LILCO uses the following short forms: SWRCSD April 18 Petition, SE 2 April 18 Petition, SWRCSD April 20 Petition, and SE 2 April 20 Petition.

On August 9, 1989, LILCO completed the movement of Shoreham's mildly radioactive fuel[3/] from the reactor vessel into the plant's onsite spent fuel pool. Shoreham will remain in this defueled condition until the plant is transferred to LIPA.

Following the plant's defueling, LILCO has taken steps to reduce its Shoreham-related costs, including the cutting back of staff and the reduction of certain surveillances and maintenance programs for plant systems that are not required to be kept "operable" under Shoreham's technical specifications with the plant in its present condition. Those systems are not being allowed to deteriorate, however, but are being protected from irreversible degradation under an extensive lay-up program developed and implemented by LILCO's Office of Nuclear Operations.[4/]

All of LILCO's actions at Shoreham have been consistent with NRC regulations and the terms of its operating license.[5/] In

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[3/] The plant operated at low power for the equivalent of only two effective days of full power operation, and the irradiated fuel gives off only about 550 watts of thermal energy.

[4/] LILCO's lay-up program was described generally to the NRC in a letter from Anthony F. Earley, Jr., LILCO President, to Dr. Thomas E. Murley, Director of Nuclear Reactor Regulation (Sept. 19, 1989).

[5/] Nevertheless, both SWRCSD and SE 2, in joint petitions filed with the NRC pursuant to 10 C.F.R. § 2.206 on July 14, 1989 and July 26, 1989 (subsequently supplemented on July 19, July 21, and July 31, 1989, and on January 23, 1990), have alleged that LILCO's activities at Shoreham violate the NRC's regulations, the terms and conditions of Shoreham's operating license, and the National Environmental Policy Act (NEPA). Petitioners requested, inter alia, that the NRC issue an "immediately effective order" to require LILCO to restore the "status quo ante" at Shoreham,

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those instances where NRC approval has been required before taking a certain action, LILCO has sought such approval.

On January 5, 1990, LILCO submitted, pursuant to 10 C.F.R. § 50.90, two related license amendment requests. Under the first, LILCO sought to revise its license to provide that it was authorized to "possess, use, but not operate Shoreham." Along with this request for a "defueled operating license," LILCO submitted a proposed set of revised technical specifications and a Defueled Safety Analysis Report describing the nonoperating, defueled configuration in which Shoreham would be placed if the license amendment request were approved. See Letter from William E. Steiger, Jr., LILCO Assistant Vice President-Nuclear Operations, to NRC (Jan. 5, 1990)(SNRC-1664).

LILCO's second application was to amend the Physical Security Plan for Shoreham in certain ways consistent with the defueled, nonoperating status of the plant. The plan had been substan-

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5/ (...continued)
including placing the fuel back in the reactor and returning the level of staffing back to that suitable to support full power operation. On July 20, 1989, Dr. Murley informed Petitioners that, while the NRC would take action on their § 2.206 petitions "within a reasonable time," their request that the NRC take "immediate" action was denied. On October 13, 1989, SWRCSD and SE 2 filed a petition for review of the NRC's denial of their request for immediate relief in the U.S. Court of Appeals for the District of Columbia Circuit. Both LILCO and the NRC Staff moved for dismissal of the petition on the ground that there was no final agency action. On January 22, 1990, the Court, citing Honicker v. NRC, 590 F.2d 1207 (D.C. Cir. 1978), cert. denied, 441 U.S. 906 (1979), granted LILCO's and the NRC Staff's motions "for lack of a reviewable final order." The Court also noted the "absence of any showing of imminent irreparable injury." On March 8, 1990, Petitioners sought rehearing en banc. This request was denied on April 23, 1990.

tially modified in 1982, as a means of settling issues then pending before an Atomic Safety and Licensing Board, so as to incorporate various features that substantially exceeded those necessary to comply with the NRC's regulations in 10 C.F.R. Part 73.[6/]

As is noted in the January 5, 1990 covering letter for LILCO's proposed amendment[7/] and the NRC's Federal Register notice, 55 Fed. Reg. 10540 (March 21, 1990), the amendment includes steps consistent with the plant's nonoperating and defueled status, including (though not limited to) appropriate redefinition of "vital areas." Each of the proposals is consistent with the NRC's regulations on their face: no request for an exemption from regulatory requirements was needed and none was requested. The only reason LILCO even submitted the application for prior NRC Staff evaluation was that LILCO had determined that the various plan modifications would inevitably decrease the absolute effectiveness of its better-than-required plan.[8/] Thus,

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[6/] See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), Atomic Safety and Licensing Board Memorandum and Order Canceling Hearing, Approving Final Security Settlement Agreement, and Terminating Proceeding (Dec. 3, 1982) (unpublished).

[7/] Letter from William E. Steiger, Jr., LILCO Assistant Vice President-Nuclear Operations, to NRC (Jan. 5, 1990)(SNRC-1672).

[8/] While the terms of the Physical Security Plan are not themselves part of Shoreham's operating license, NRC regulations provide that a licensee

> may make no change which would decrease the effectiveness of a security plan, or guard training and qualification plan, prepared

(continued...)

LILCO requested a license amendment and performed a "significant hazards consideration" analysis pursuant to 10 CFR §§ 50.54(p)(1) and 50.90, though the plan's relative effectiveness in the context of a nonoperative and defueled reactor was not affected and though the revised plan clearly complied with NRC regulations.

The NRC Staff subsequently issued a proposed "no significant hazards consideration" determination on the plan amendment. 55 Fed. Reg. 10540 (March 21, 1990). The Staff's notice solicited public comments on the proposed finding and provided an opportunity for an "interested person" to seek a hearing on the amendment.[9/]

8/ (...continued)

> pursuant to § 50.34(c) or Part 73 of this chapter, or of the first four categories of information (Background, Generic Planning Base, Licensee Planning Base, Responsibility Matrix) contained in a licensee safeguards contingency plan prepared pursuant to § 50.34(d) or Part 73 of this chapter, as applicable, without prior approval of the Commission. A licensee desiring to make such a change shall submit an application for an amendment to the licensee's license pursuant to § 50.90.

10 C.F.R. § 50.54(p)(1)(emphasis added). Correspondingly, § 50.54(p)(2) provides that the "licensee may make changes to the plans referenced in paragraph (p)(1) of this section, without prior Commission approval if the changes do not decrease the safeguards effectiveness of the plan."

9/ Of course, under 42 U.S.C. § 2239(a)(2)(A) and § 50.91(a)(4), the Staff, upon making a final determination of "no significant hazards consideration," may grant the requested amendment to be effective upon issuance, prior to any hearing.

In a separate action, on March 29, 1990, the NRC Staff issued an immediately effective Confirmatory Order that modified Shoreham's license to include a provision that LILCO "is prohibited from placing any nuclear fuel into the Shoreham reactor vessel without prior approval from the NRC." 55 Fed. Reg. 12759 (April 5, 1990). According to the Staff,

> the public health and safety require that the licensee not return fuel to the reactor vessel for the following reasons: (1) The 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 systems and equipment that the licensee has decided to deactivate and protect rather than maintain until ultimate disposition of the plant is determined. . . . If LILCO were to place nuclear fuel into the reactor vessel, this could result in a core configuration that could become critical and produce power without a sufficient number of adequately trained personnel to control operation. In addition, it is questionable whether necessary safety equipment would be available.

Id. at 12758. Given these considerations, and after noting that in a letter submitted to the NRC on January 12, 1990, LILCO had given its commitment not to place fuel back into the Shoreham reactor without prior permission from the NRC,[10/] the Staff stated

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[10/] See Letter from William E. Steiger, Jr., LILCO Assistant Vice President-Nuclear Operations, to NRC (Jan. 12, 1990)(SNRC-1674). LILCO submitted SNRC-1674 to support an earlier filing, on December 15, 1989, of a combined regulatory exemption and license amendment request to disband the Local Emergency Response Organization (LERO) and cease offsite emergency preparedness activities at Shoreham. LILCO stated that it would "agree[] to a requirement to never place fuel back into the Shoreham reactor, without the prior establishment of an offsite emergency response organization comparable in effectiveness" to LERO. SNRC-1674 at 1.

that it had "determined that the public health and safety" required issuance of an immediately effective order pursuant to § 2.204. Id.[11/]

In issuing the Order, the Staff allowed that "[a]ny person adversely affected by this Confirmatory Order may request a hearing within twenty days of its issuance." Id. at 12759.[12/] If a hearing were to be held, the Staff added, "the issue to be considered at such hearing shall be whether this Confirmatory Order should be sustained." Id.

C. The Context in which the Petitions Have Arisen

Petitioners complain of two pending matters: a Confirmatory Order by the NRC to maintain the shut down, defueled status of the Shoreham reactor; and a proposal by LILCO to conform Shoreham's Physical Security Plan to the circumstances of defueled shutdown. Petitioners claim that each of these actions violates the Atomic Energy Act and NEPA. But in truth, as Petitioners candidly admit, their complaint springs out of the fact that each of these actions could eventually facilitate decommissioning of Shoreham, an event neither of them favors. Because of this relationship, they argue, each of these actions can be evaluated

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[11/] The Staff stressed that issuance of the Order "in no way relieves the licensee of the terms and conditions of its operating license or of its commitments covering the continued maintenance of structures, systems, and components outlined in its letter of September 19, 1989." 55 Fed. Reg. 12759 (April 5, 1990).

[12/] By the literal terms of § 2.204, the Staff need not have provided an opportunity for hearing to anyone but LILCO.

only in the context of a decommissioning plan, and thus none of them can be approved until a complete, acceptable decommissioning plan has been prepared, submitted, and approved by the NRC.

Petitioners want, in short, to enlist this Commission's help in their effort to block implementation of the Shoreham settlement. They are clearly motivated, though for highly disparate reasons,[13/] by a desire that Shoreham operate. But they do not propose any means for LILCO to be released from its agreement never to operate the plant, nor do they offer to substitute another owner/operator. They also allege that the actions of which they complain in their petitions violate the law, though they do not seriously suggest that there is a significant safety issue associated with either of these actions, and they concede that their allegations depend on their view that these actions are merely part and parcel of eventual decommissioning, and have no independent utility.

The net effect of Petitioners' theory, if accepted, would be to require a nuclear power plant whose realistic prospects of ever operating are nil to be braced at parade rest for several

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13/ SE 2 is a broad-based group whose interests revolve around the promotion of nuclear power plants generally; they do not agree philosophically with LILCO's decision to settle with New York State. SWRCSD's motivation is less abstract: money. For nearly two decades, real estate taxes on the Shoreham plant have provided most of the School District's revenues, and now amount to about 90 percent of them. The School District is not satisfied with the transition arrangement provided by the New York State Legislature to compensate for loss of Shoreham-related tax revenues to it and other local governmental jurisdictions, and is trying, by a variety of means including this one, to slow the plant's transfer to LIPA.

years, until final decommissioning plans have been prepared, reviewed, and approved by the NRC after as many public proceedings as Petitioners' treasury and the Commission's traditionally generous jurisprudence will permit. It would prevent the NRC from granting, in the meantime, various kinds of relief routinely available to facilities in extended shutdowns, and inflict totally avoidable costs -- ranging into the tens of millions of dollars per year -- on LILCO and its ratepayers (and in the case of offsite emergency preparedness exercises, on the federal government as well).

Petitioners' requests are premised on one legal argument. The argument, repeated four times in nearly identical pleadings, is straightforward: This Commission, having issued an operating license, must require that licensee to maintain its reactor in full readiness to operate regardless of other circumstances (so long as the plant has not operated for its commercial lifetime or suffered some other loss of capability) unless and until a decommissioning plan meeting all pertinent regulations, primarily 10 C.F.R. § 50.82, has not only been prepared and submitted but also reviewed and finally approved. This is apparently true, in Petitioners' view, even where an irrevocable decision has been made by the licensee not to operate the reactor further, and where there is no viable candidate -- not Petitioners, not anyone else -- to succeed to the license. Petitioners apparently view the pendency of a decommissioning application as eliminating all NRC discretion to permit various alternative means of complying

with the license, or to issue normal license amendments and regulatory exemptions for the purpose of enabling the licensee to avoid unnecessary costs where there is no radiological safety issue.

As LILCO explains, under Commission and federal judicial precedent on standing to intervene, Petitioners have failed to establish that they have a right to a hearing on either the Confirmatory Order or the Physical Security Plan amendment. Beyond this threshold bar, there are additional legal considerations that, while perhaps not directly dispositive of Petitioners' standing, dictate that their attempt to enlist the Commission's adjudicatory process to obstruct the Shoreham Settlement Agreement should be cut off at the outset.

First, the actions under review are not within the scope of the decommissioning regulations. Each has independent utility. The likelihood that a decommissioning plan will be filed in the future does not bring precursor acts, each of which has independent utility, within the decommissioning regulations.

Second, the NRC Staff routinely exercises flexibility in administering its regulations so as to permit licensees to avoid unnecessary or burdensome costs, so long as safety considerations are satisfied. Petitioners' argument that no action on a continuum arguably leading to eventual decommissioning can be taken until a decommissioning plan has been finally approved would strip the Staff of that discretion. That argument is not consis-

tent either with the decommissioning regulations, principally 10 C.F.R. § 50.82, or with the NRC's regulations generally.

Third, Petitioners' basic theory presumes that this agency is no longer a radiological risk regulator but rather has become an energy policy dictator. Under their theory, the NRC is no longer charged with conditioning access to the benefits of using nuclear power on maintaining radiological risk at acceptable levels, but rather has the power and the obligation to review and override the decisions of other entities, public and private, to forbear from using nuclear plants even when these decisions do not create radiological risks. That argument in wrong. Though the NRC has certain emergency powers under the Atomic Energy Act, not applicable here, to force the operation of nuclear plants, its function ever since the Energy Reorganization Act of 1974 has been as a regulator rather than as a promoter of commercial nuclear energy. Nor does any other organic statute confer such power or obligation on the NRC.

Fourth, NEPA's requirement of evaluation of the environmental effects of a proposed federal action does not require comprehensive evaluation, in the context of reactor decommissioning, of either of the subjects of the current petitions. The environmental effects of decommissioning have been evaluated generically,[14/] and any site-specific departures from those estimates

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14/ The generic evaluation significantly overstates the likely effects of decommissioning of a plant like Shoreham, which is only mildly contamination. NUREG-0586, Final Generic Environmental Impact Statement on Decommissioning of Nuclear Facilities.

can be covered, as necessary, in a supplement in the context of a decommissioning proposal. In any event, the effects which Petitioners wish to see evaluated -- those associated operating other plants -- are not effects of the decommissioning of Shoreham, but of circumstances and decisions outside the NRC's jurisidiction. Even if discussion of such effects were properly within the scope of an evaluation of the decommissioning of Shoreham, NEPA does not impose on the NRC the burden to refrain from actions within its authority -- e.g., approving an adequate decommissioning plan -- based on the results of that discussion.

There is no reason (and Petitioners do not try to suggest any) why a decommissioning plan for Shoreham satisfying the regulations cannot and will not be prepared and approved by the NRC. The merits, from a policy standpoint, of decommissioning Shoreham and providing replacement energy from other sources, versus using Shoreham to produce electricity, does not affect that result. Thus Petitioners cannot win their argument in the long run. The only product of their efforts can be delay and unnecessary costs to LILCO and its ratepayers. The Commission should not be sympathetic to the abuse of its adjudicatory process for this purpose.

II. Summary of Legal Argument

A. The April 18 Petitions

Despite their representations, Petitioners are not truly aggrieved by the NRC Staff's issuance of the March 29 Confirmatory Order. Rather, springboarding off the opportunity for hearing presented by the Order, Petitioners seek to address at length a broad range of issues concerning the future disposition of Shoreham and thereby challenge LILCO's determination not to operate the plant.

Such issues, including Petitioners' oft-repeated (though incorrect) allegation that the Staff is allowing LILCO to engage in "de facto decommissioning" of the plant, are not within the narrow scope of the proceeding as defined by the Staff's notice of opportunity for hearing, i.e., whether the Order itself should be sustained. The NRC's authority to so define and limit the proper scope of its proceedings has been affirmed by the U.S. Court of Appeals in Bellotti v. NRC, and Petitioners' attempt to expand the scope of the proceeding beyond that established by the notice of opportunity for hearing violates the principles set forth in the Bellotti decision. It follows that, having failed to link the harms they allege to the NRC action at issue in this proceeding, Petitioners have not demonstrated that they have suffered an "injury in fact" within the "zone of interest" protected by either the Atomic Energy Act or the NEPA.

B. The April 20 Petitions

In alleging that they will be harmed by the Physical Security Plan amendment, Petitioners offer nothing but a general allegation that the amendment violates the Atomic Energy Act and NRC regulations. In so doing, Petitioners fail to confront the Staff's determination that, even as amended, the Physical Security Plan will continue to meet all applicable standards under 10 C.F.R. Part 73. Petitioners' vague complaints to the contrary are thus inadequate to allege an "injury in fact."

Equally important, as with the Confirmatory Order, Petitioners seek to use the opportunity of a hearing on LILCO's amendment to the Physical Security Plan to raise a variety of issues concerning LILCO's alleged "de facto decommissioning" of the plant. Such issues fall well outside the scope of the proceeding as defined by the Staff's notice of opportunity for hearing, and Petitioners' attempt to introduce such issues is irreconcilable with both the NRC's own NEPA-implementing regulations and the Bellotti decision.

III. Legal Standard for Intervention in NRC Proceedings

A. Statutory Provisions and Commission Precedent

The right to a hearing in an NRC proceeding flows from § 189 of the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011 et seq., which provides, in relevant part, as follows:

> In any proceeding under this chapter, for the granting, suspending, revoking, or amending of any license or construction permit, or

> application to transfer control, . . . the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding.

42 U.S.C. § 2239(a)(1)(emphasis added). Thus, the Atomic Energy Act does not prescribe a mandatory hearing to amend an operating license. Rather, a hearing need be held only if a person requests a hearing and that person establishes an interest that may be affected by the outcome of that proceeding. See, e.g., Niagara Mohawk Power Corp. (Nine Mile Point Nuclear Station, Unit 2), LBP-83-45, 18 NRC 213 (1983).

The NRC's implementing regulation, 10 C.F.R. § 2.714, specifies that a petition to intervene must "set forth with particularity" the petitioner's interest in the proceeding and how that interest may be affected by its results. 10 C.F.R. § 2.714(a)(2).[15/] The petitioner is also required to identify the "specific aspect or aspects of the subject matter of the proceeding as to which the petitioner wishes to intervene." Id.[16/]

15/ The regulation further provides that, in explaining his interest, the petition should give particular attention to (1) the nature of his right under the Act to be made a party to the proceeding; (2) the nature and extent of his property, financial, or other interest in the proceeding; and (3) the possible effect of any order which may be entered in the proceeding on the petitioner's interest. 10 C.F.R. § 2.714(a), (d).

16/ Even if the petitioner is initially successful in demonstrating his "interest," a full-blown proceeding is not guaranteed. Under § 2.714(b), the petitioner must supplement his petition with a list of the contentions that he seeks to litigate, including, as to each, an explanation of its basis, the alleged facts or expert opinion being relied upon (including documentary and other references), and a demonstration that a genuine dispute

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Commission case law follows contemporaneous judicial concepts to determine standing. Portland General Elec. Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610 (1976). Following the principles set forth in Sierra Club v. Morton, 405 U.S. 727 (1972), and Warth v. Seldin, 422 U.S. 490 (1975), the Commission in Pebble Springs adopted a two-prong test. First,

> one must allege some injury that has occurred or will probably result from the action involved. Under this "injury in fact test" a mere academic interest in a matter, without any real impact on the person asserting it, will not confer standing.

4 NRC at 613.[17/] Second, the Commission said, one must "allege an interest 'arguably within the zone of interest' protected by the statute." 4 NRC at 613. In other words, unless the petitioner alleges that he will suffer an "injury in fact" to an interest that falls within the "zone of interests" protected by the Atomic Energy Act or NEPA (the two pertinent statutes), the petitioner

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16/ (...continued)
exists on a material issue of law or fact. 10 C.F.R. § 2.714(b)(2)(i)-(iii); see 54 Fed. Reg. 33180 (Aug. 11, 1989). Significantly, if the petitioner "fails to file a supplement that satisfies the requirements of paragraph (b)(2) of this section with respect to at least one contention," the petitioner "will not be permitted to participate as a party." 10 C.F.R. § 2.714(b)(1).

17/ The test for whether a petitioner has suffered or will suffer an "injury in fact," the Commission has added, is "whether a cognizable interest of the petitioner might be adversely affected if the proceeding has one outcome rather than another." Nuclear Engineering Co., Inc. (Sheffield, Ill., Low-Level Radiological Waste Disposal Site), ALAB-473, 7 NRC 737, 743 (1978).

will not be granted a hearing or otherwise allowed to intervene in a proceeding.

B. The Bellotti Case

Given that intervention in an NRC proceeding turns on a petitioner's "interest" in the outcome of the proceeding, the standard for intervention is necessarily governed not only by the nature of a petitioner's interest but also by the scope or range of the matters at issue in the proceeding as well. The scope of NRC proceedings is typically defined in the notice of opportunity for hearing. See 42 U.S.C. § 2241(a); Public Serv. Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167, 170-71 (1976); Portland General Elec. Co. (Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289 n.6 (1979). In Bellotti v. NRC, 725 F.2d 1380 (1983), the U.S. Court of Appeals for the District of Columbia Circuit upheld the Commission's authority under § 189 of the Atomic Energy Act to define that scope. The court's reasoning and ruling in Bellotti have significant implications for this case.

Before the court for review in Bellotti was an order by the Commission denying a petition by the Massachusetts attorney general to intervene in an NRC enforcement proceeding involving Boston Edison Company's Pilgrim nuclear plant. On January 18, 1982, the NRC's Office of Inspection and Enforcement, concerned by what it viewed as serious management deficiencies, issued an immediately effective order modifying Pilgrim's license. The

order imposed by the NRC amended the Pilgrim license to require Boston Edison to develop a plan for reappraisal and improvement of management functions. See Boston Edison Co. (Pilgrim Nuclear Power Station), CLI-82-16, 16 NRC 44 (1982). It further provided that the issue at a hearing held pursuant to the order would be limited to "[w]hether, on the basis of the matters set forth in . . . this Order, this Order should be sustained." 47 Fed. Reg. 4173 (Jan. 28, 1982).

On February 17, 1982, the Massachusetts attorney general, alleging a non-discretionary right to intervene pursuant to § 189(a) of the Atomic Energy Act, filed a petition with the Commission, asserting generally that the NRC's actions at Pilgrim did not go far enough to assure protection of Massachusetts' citizens. 16 NRC at 45-46. The Commission rejected that argument and denied the petition, noting that (1) "section 189a does not provide a non-discretionary right to a hearing on all issues arguably related to an acknowledged enforcement problem without regard to the scope of the enforcement action actually proposed or taken," and (2), under 10 C.F.R. § 2.714, "[i]n order to be granted leave to intervene, one must demonstrate an interest affected by the action." Id. at 45. Reflecting on the nature of the issues that the attorney general had indicated he wished to be heard, the Commission stated:

> These concerns are beyond the scope of the proceeding. The Attorney General does not oppose the issuance of the Order nor does he raise in his petition or brief any suggestion that it is unsupported by the facts its sets forth.

Id. at 46. The attorney general sought review of the Commission's denial of his petition, and, on appeal, the D.C. Circuit upheld the Commission's decision.

In Bellotti, the court first affirmed generally that the Commission has exclusive authority under the Atomic Energy Act to define the scope of its own proceedings. Such authority is necessary, the court said, because to

> read the statute very broadly so that any proceeding necessarily implicates all issues that might be raised concerning the facility in question would deluge the Commission with intervenors and expand many proceedings into virtually interminable, free-ranging investigations. . . . Such a reading of the statute is plainly untenable and cannot be what Congress intended.

Bellotti, 725 F.2d at 1381.

Next, the court agreed with the Commission that the attorney general's petition did not raise issues within the scope of the proceeding defined by the NRC. In so doing, the court rejected the attorney general's arguments that (1) the order had defined the proceeding in a way that clearly made the attorney general, as the legal representative of the people of Massachusetts, a "person whose interest may be affected," and (2) the content of the management reappraisal and improvement plan required under the order was necessarily an issue in the proceeding. 725 F.2d at 1381-82. The court accepted instead as "not arbitrary" the Commission's limiting of the scope of the proceeding in light of the Commission's view that the the development of the management plan was to "take[] place outside the proceeding," and that the

attorney general "would be an affected person only if he opposed issuance of the Order," which he did not. Id. at 1382 (footnote omitted).[18/]

The court then noted that the issues the attorney general wished to litigate "would result in a hearing virtually as lengthy and wide-ranging as if intervenors were allowed to specify the relevant issues themselves." 725 F.2d at 1382. Though the attorney general "intends no such result," the court remarked, "the rule for which he contends is capable of turning focussed regulatory proceedings into amorphous public extravaganzas." Id.

As applied here, Bellotti's acceptance of the agency's authority to define the scope of issues in its notice of opportunity for hearing, and its proscription on the introduction of issues beyond them, indicates that a petitioner for intervention must do something more than simply allege an "injury in fact." The petitioner must also demonstrate that there is some plausible relationship between the harm asserted and the NRC action that is actually at issue in the proceeding. This is fully consistent with Pebble Springs, which established that one seeking to intervene must allege some injury that "has occurred or will probably result from the action involved." CLI-76-27, 4 NRC at 613 (em-

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18/ A petitioner who "wishes to litigate the need for still more safety measures" than are provided by an NRC enforcement action, the court said, is "remitted to section 2.206's petition procedures." 725 F.2d at 1383.

phasis added); see also Philadelphia Elec. Co. (Limerick Generating Station, Units 1 and 2), LBP-82-43A, 15 NRC 1423 (1982).[19/]

As is seen below, Petitioners cannot make such a showing as to either the March 29 Confirmatory Order or the Physical Security Plan amendment.

IV. The March 29 Confirmatory Order

Neither SWRCSD nor SE 2 should be granted a hearing on the NRC's March 29 Confirmatory Order. As their pleadings make manifest, Petitioners are not at all interested in participating in a hearing on the narrow issue specified in the March 29 Confirmatory Order: whether the Order itself should be sustained. Rather, Petitioners seek a hearing as a means to address at length vastly broader issues regarding the future disposition of Shoreham. Their attempt to expand the scope of issues beyond the NRC's notice of opportunity for hearing is impermissible under the D.C. Circuit's holding in Bellotti.

The very arguments Petitioners offer to support their assertion that they are "threatened with distinct injuries in fact as a direct consequence of the Confirmatory Order," SWRCSD April 18 Petition at 5; SE 2 April 18 Petition at 5, reveal that they are truly aggrieved by the issuance of the Order. Indeed, what

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19/ In Limerick, the licensing board stated that "[t]o satisfy the requirement of injury in fact, the injury must be caused by the action contemplated. There must be "a 'fairly traceable' causal connection between the claimed injury and the challenged conduct." 15 NRC at 1443, citing Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59, 72 (1978).

Petitioners are actually seeking is additional enforcement action by NRC to remedy what they allege to be both LILCO's and the NRC's violations of the Atomic Energy Act and NEPA. Petitioners themselves admit as much.

For example, Petitioners state that they

> view[] 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 . . . and the National Environmental Policy Act . . . .

SWRCSD April 18 Petition at 2; SE 2 April 18 Petition at 2. Petitioners further note that they have "submitted an enforcement request under Section 2.206 of the Commission's Rules," in which they "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." Id. Petitioners specifically note that "[a]ll of the arguments advanced" in their § 2.206 petitions are "pertinent to the issue 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[s] seek[] leave to intervene and request[] a hearing." Id. at 2-3. Petitioners also argue that 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

> 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.

SWRCSD April 18 Petition at 19-20; SE 2 April 18 Petition at 20-21.

As the above makes clear, Petitioners are not asserting that they have been adversely affected by the issuance of the Confirmatory Order itself or that, on the basis of the findings set forth in the Order, the Order should not be sustained. Instead, Petitioners are attempting, irreconcilably with Bellotti, to expand the scope of the proceeding as defined by the NRC by arguing that they are adversely affected by (1) the failure by the NRC Staff to take enforcement action against LILCO's supposed violations of the Atomic Energy Act, NRC regulations, and the terms of Shoreham's license, and (2) the NRC Staff's authorizing LILCO to take steps allegedly constituting "de facto decommissioning" at Shoreham prior to the conduct of an environmental review of the plant's decommissioning under NEPA. As explained below, in neither instance do Petitioners credibly link the "injury in fact" they allegedly have suffered or purportedly will suffer with the actual action taken by the NRC, i.e., the issuance of the Confirmatory Order.[20/]

[20/] Apart from their attempt to expand the scope of the proceeding beyond that provided by the NRC in its notices of opportunity for hearing, it is also by no means clear that either Petitioner has sufficiently demonstated that the "interests" they seek to protect are germane to their organizational purposes. Such a demonstration is necessary for an organization to establish standing. See, e.g., Houston Lighting and Power Co.

(continued...)

A. The Confirmatory Order Does Not Cause "Injury in Fact" to Petitioners' Interests under the Atomic Energy Act

Petitioners try only feebly to connect the Order with the harms they assert they will suffer from LILCO's alleged illegality. For example, Petitioners speculate that 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.

SWRCSD April 18 Petition at 11; SE 2 Petition at 12. Elsewhere, Petitioners say they want a hearing in order to explore such issues as

> whether if a decision is made to go to full power operation at Shoreham, the Confirmatory

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20/ (...continued)
(South Texas Project, Units 1 and 2), LBP-79-10, 9 NRC 439, 447 (1979), aff'd, ALAB-549, 9 NRC 644; see also Hunt v. Washington State Apple Advertising Comm'n, 432 U.S. 333, 343 (1977). With respect to SWRCSD, it is not immediately apparent that an entity whose primary, if not sole, purpose is the operation of facilities for the education of school children has an organizational interest in protecting persons from the supposed adverse radiological and environmental impacts from the non-operation of a nuclear plant. The only real interest SWRCSD would appear to have in Shoreham is an economic one. See note 13, above. This, however, is inadequate to establish standing. See, e.g., Public Serv. Co. of New Hampshire (Seabrook Station, Unit 2), CLI-84-6, 19 NRC 975 (1984); Tennessee Valley Authority (Watts Bar Nuclear Plant, Units 1 and 2), ALAB-413, 5 NRC 1418, 1421 (1977); Long Island Lighting Co. (Jamesport Nuclear Power Station, Units 1 and 2), ALAB-292, 2 NRC 631, 640 (1975). As for SE 2, it is also not clear that its asserted interest in protecting the health and safety of its members is germane to its organizational interests, which would appear to be primarily educational and informational in nature, and which are plainly not directed towards advocacy against perceived health and safety threats from any specific nuclear plant.

> 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 . . . .

SWRCSD April 18 Petition at 10-11; SE 2 April 18 Petition at 11-12.

The logic of Petitioners' position is not entirely clear. Their position would appear to be that, with issuance of the Confirmatory Order, the NRC has somehow given LILCO permission to take steps at Shoreham that are inconsistent with the plant's operating license, thus potentially presenting a present threat to Petitioners' safety, as well as a future hazard, should Shoreham ever operate at full power.

Petitioners' position is untenable for a number of reasons. Most basically, it does not make sense to suggest that an order that merely confirms that LILCO is not to place fuel back into the Shoreham reactor could possibly pose either a current or a future threat to public health and safety.[21/]

Equally important, Petitioners' complaint is little more than a recapitulation of the allegations they have made in their pending § 2.206 requests. As such, the relief they are seeking through a hearing on the Confirmatory Order is greater enforce-

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21/ The Staff expressly stated that issuance of the Order "in no way relieves the licensee of the terms and conditions of its operating license or of its commitments covering the continued maintenance of structures, systems, and components outlined in its letter of September 19, 1989." 55 Fed. Reg. 12759 (April 5, 1990).

ment action at Shoreham than the Staff has seen fit to undertake. Petitioners themselves indicate that the "proper response" by the Staff would include the development of a "schedule of affirmative steps" to be taken by LILCO to alleviate the perceived safety threats, presumably to include returning the plant to a condition commensurate with full power operation. But given Bellotti, Petitioners may not seek such additional remedies. See, e.g., Sequoyah Fuels Corp. (UF 6 Production Facility), CLI-86-19, 24 NRC 508 (1986).[22/]

The fundamental problem for Petitioners here -- and it is a problem that, ultimately, they cannot hope to overcome -- is that they cannot credibly argue that the Confirmatory Order should not be sustained. To do so (to argue, in effect, that LILCO should be allowed to place fuel back in the reactor) would completely

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[22/] In Sequoyah, the Commission addressed a petition for intervention which alleged, inter alia, that an immediately effective enforcement order issued by the NRC gave rise to an "adverse effect" because the order -- which directed the licensee to establish third-party auditing and inspection -- failed to "discover and address the root causes" of the problem at issue. The Commission denied the petition for review, stating as follows:

> While expressed as a concern about the order, in fact, [petitioner's assertion of "adverse effect"] has nothing to do with the order's terms; rather, [petitioner] is challenging the agency's process for investigation of the accident, a challenge already expressed in its § 2.206 petition. The order has nothing to do with, and clearly does not provide, an alternative vehicle for [petitioner] to gain an agency hearing on the denial of that petition.

24 NRC at 515-16.

undercut their position, advanced in their pending § 2.206 requests and reiterated in the present petitions, that the NRC is allowing LILCO to maintain Shoreham in an unsafe condition inconsistent with NRC regulations and the plant's license. After all, placing fuel back in the reactor, if such unsafe conditions in fact existed, would presumably be even more unsafe.[23/] To avoid this self-evident incongruity, Petitioners seek to place the Confirmatory Order in an overall context of their own choosing, i.e., that the Order furthers LILCO's alleged "de facto decommissioning" of Shoreham. But not only is this allegation untrue in fact, by so arguing Petitioners seek to raise issues that are outside the narrow scope of the proceeding as defined by the NRC. This, in turn, is impermissible under Bellotti.

Finally, to demonstrate standing, Petitioners must also allege that they will be "adversely affected if the proceeding has one outcome rather than another." See, e.g., Nuclear Engineering Co., Inc., 7 NRC at 743. Petitioners cannot make such a showing, however, because the various "injuries" that Petitioners seek to avoid stem not from the issuance of the Confirmatory Order, but (as Petitioners characterize it) from the Order's supposed contribution to the non-operation of Shoreham. Yet whether or not the Confirmatory Order is sustained, LILCO

23/ Petitioners do want Shoreham's fuel back in the reactor vessel; in their § 2.206 petitions they expressly request that the NRC require LILCO to return the fuel. But Petitioners only want the fuel returned on their own terms, demanding that the NRC also order LILCO to restore the "status quo ante" by maintaining all plants systems in "operable" status and keeping plant staffing at levels suitable to support full power operation.

will not operate Shoreham. Thus, the outcome of a proceeding on whether the Order should be sustained cannot possibly affect Petitioners' interests, as they themselves have defined them.

B. The Confirmatory Order Does Not Cause "Injury in Fact" to Petitioners' Interests under NEPA

Petitioners' assertion that the Confirmatory Order has caused, and will cause, "injury in fact" to their interests under NEPA is also an attempt to introduce issues that fall far outside the scope of the proceeding offered by the NRC. In order to link the issuance of the Order with the alleged environmental harms of which they complain, Petitioners contend that 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." SWRCSD April 18 Petition at 25; SE 2 April 18 Petition at 26. The "injury" asserted by SWRCSD is the "adverse health and other environmental consequences of non-operation of Shoreham cognizable under NEPA, for example, the air pollution produced by the oil and/or gas burning plants which would be necessary substitutes for Shoreham." SWRCSD April 18 Petition at 7-8. Similarly, SE 2 contends that it 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." SE 2 April 18 Petition at 9.

Petitioners' argument fails for two basic reasons. First, as a threshold matter, Petitioners' attempt to raise supposed

NEPA-related issues in the context of a hearing on an order issued by the NRC pursuant to 10 C.F.R. Part 2, Subpart B is inconsistent with the NRC's own NEPA-implementing regulations. Specifically, 10 C.F.R. § 51.10(d) provides that

> Commission actions initiating or relating to administrative or judicial civil or criminal enforcement actions or proceedings are not subject to section 102(2) of NEPA. These actions include issuances of notices, orders, and denials of requests for action pursuant to Subpart B of Part 2 of this chapter . . . and any other matters covered by Appendix C to part 2 of this chapter.

10 C.F.R. § 51.10(d); 54 Fed. Reg. 43578 (Oct. 26, 1989). The Confirmatory Order, as the NRC Staff notes, was issued pursuant to 10 C.F.R. § 2.204. 55 Fed. Reg. 12759 (April 5, 1990). Thus, NEPA issues need not be addressed in any hearing on whether the Confirmatory Order should be sustained.[24/]

[24/] Petitioners, apparently recognizing that their attempt to introduce NEPA issues into a proceeding on the Confirmatory Order is barred by NRC regulations, have petitioned for a waiver pursuant to 10 C.F.R. § 2.758(b), on the ground that 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." SWRCSD April 18 Petition at 26 n.1; SE 2 April 18 Petition at 27 n.1. Petitioners indicate that these "special circumstances will be further explained" in an affidavit they intend to submit at some point as part of an amended petition filed pursuant to 10 C.F.R. § 2.714(a)(3). LILCO has not received any such affdavit. Without waiving its opportunity to respond either to Petitioners' affidavit or to its amended petition if such documents are filed, LILCO observes that, in light of the arguments provided in their April 18 Petitions, it is unlikely that Petitioners will be able to justify a regulatory waiver under § 2.758. For instance, Petitioners' citation to language from the Supplementary Information accompanying an October 26, 1989 Federal Register notice of the NRC's issuance of a clarifying amendment to § 51.10(d), is inapposite. When the language cited by Petitioners is quoted fully, it is clear that there the NRC was addressing

(continued...)

Second, and more importantly, it is simply not true that the environmental harms that Petitioners perceive they will suffer if Shoreham does not operate would be caused by any action of the NRC, much less by the issuance of the Confirmatory Order.[25/]

[24/] (...continued)
only "[l]icensee actions undertaken voluntarily, as documented in a confirmatory action letter" issued pursuant to 10 C.F.R. Part 2, Appendix C, ¶ V.H, and not (as is the case with Shoreham) an order modifying a license issued under § 2.204. See 54 Fed. Reg. 43577 (Oct. 26, 1989).

[25/] In arguing to the contrary, and by asserting that the NRC is allowing LILCO to engage in "de facto decommissioning," Petitioners betray a fundamental misconception of the applicability of NEPA to Shoreham's eventual decommissioning. Even if it were assumed that Petitioners' speculation regarding the possible future construction of fossil-fired plants is true, it does not follow that the NRC's environmental review of Shoreham's decommissioning under NEPA must include either an assessment of these alleged indirect effects of the plant's abandonment or a discussion of the alternative of plant operation. The decision to abandon Shoreham was made by a private entity -- LILCO. As such, this decision is not subject to federal environmental review under § 102 of NEPA, which governs only "major federal actions." Petitioners assert that,

> [w]hile 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."

SWRCSD April 18 Petition at 28; SE 2 April 18 Petition at 29. This draws the scope of NEPA far too broadly. It is true that, as a general proposition, a private action may be "federalized" for purposes of NEPA if federal agency approval -- such as permits, leases, and other forms of permission -- must be obtained in order for the private party to take the action. See, e.g., Scientists' Inst. for Pub. Information v. AEC, 481 F.2d 1079 (D.C. Cir. 1973). But this general principle does not stretch as far as Petitioners would have it. The private action that has been "federalized" here is the physical act of decommis-
(continued...)

Petitioners' statement that the "Confirmatory Order would make the intended benefit and purpose of Shoreham . . . more remote and time and less likely in fact," SWRCSD April 18 Petition at 29-30; SE 2 April 18 Petition at 30-31, is a non sequiter. The Confirmatory Order is not the reason Shoreham will not operate, and, indeed, even if the Order were not sustained LILCO still would not operate the plant.

Moreover, the adverse consequences Petitioners purportedly fear -- e.g., greater use of fossil fuels, with alleged corresponding environmental degradation -- would result (if, indeed, they result at all) not from the issuance of the Confirmatory Order, or from LILCO's decision to abandon Shoreham, or even from the decommissioning of the plant per se, but from the future use of fossil-fired replacement plants. As none of the NEPA-related "injuries" that Petitioners allege stem from the NRC action that

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25/ (...continued)
sioning itself. LILCO's decision to not operate Shoreham is not "federalized," however, because no NRC (or other federal) approval is required for LILCO to decide to close the facility. Absent extraordinary circumstances (not present in this situation), the NRC has no authority under the Atomic Energy Act to order a licensee to operate a particular facility. See 42 U.S.C. §§ 2138, 2238. The NRC itself has recognized that the "decision as to whether a shutdown will be permanent is, of course, the licensee's." 50 Fed. Reg. at 5605 (Feb. 11, 1985). Accordingly, while the physical act of Shoreham's decommissioning requires NRC approval and is subject to environmental review, see 10 C.F.R. § 51.95(b), LILCO's decision to shut down Shoreham is not. Cf. Winnebago Tribe of Nebraska v. Ray, 621 F.2d 269, 272-73 (8th Cir. 1980), cert. denied, 449 U.S. 836 (1980)(the "[c]ompletion of the non-federal aspects of [a] single project does not constitute a secondary or indirect effect of the federal action").

is at issue in the proceeding, Petitioners' attempt to introduce such matters is inconsistent with Bellotti.

It is instructive to recall that the court in Bellotti, using language that is particularly apt here, stated that the petitioner's own understanding of his intervention rights under the Atomic Energy Act would have had the effect of "expand[ing] many proceedings into virtually interminable, free-ranging investigations." 725 F.2d at 1381. The court noted that, though the petitioner in that case "intend[ed] no such result," the intervention standard for which the petitioner was arguing was "capable of turning focussed regulatory proceedings into amorphous public extravaganzas." Id. at 1382. The only difference between the present situation and Bellotti is that, unlike the Massachusetts Attorney General, an "amorphous public extravaganza," involving an ultimately irrelevant debate over whether Shoreham should operate, is precisely what Petitioners here hope to achieve. This need not and should not be allowed. Petitioners' request for a hearing should be denied.

V. The Security Plan Amendment

Neither SWRCSD nor SE 2 should be granted a hearing on the amendment to the Shoreham Physical Security Plan. As explained below, neither Petitioner adequately alleges that it will suffer an "injury in fact" to its interests under either the Atomic Energy Act or NEPA. Indeed, Petitioners' arguments on the supposed adverse effects of the proposed amendment simply rehash the

assertions they advance concerning the Confirmatory Order. In both instances, Petitioners seek to expand impermissibly the scope of the proceeding defined by the NRC in the notice of opportunity for hearing.

The March 21, 1990 notice on the Physical Security Plan amendment makes clear that the scope of a proceeding on the amendment, if any, will be narrow: Petitioners' contentions "shall be limited to matters within the scope of the amendments under consideration." 55 Fed. Reg. 10529 (March 21, 1990). But Petitioners are not interested in a hearing to explore whether the amendment should be sustained. They want to use a hearing on the plan changes as a springboard to raise a myriad of issues related not to physical security at Shoreham, but to irrelevant issues regarding the plant's abandonment and future decommissioning.

For example, Petitioners concede at the outset that they "view[] this Amendment as one part of the larger proposal to decommission Shoreham." SWRCSD April 20 Petition at 2; SE 2 April 20 Petition at 2. Though Petitioners make a passing effort to allege that they will suffer actual harm from the amendment itself, they admit that the issues presented in their Petitions related not simply to the proposed amendment itself, but "necessarily include other unlawfully segmented actions taken and/or proposed by LILCO and the NRC Staff in furtherence of the decommissioning scheme." SWRCSD April 20 Petition at 2; SE 2 April 20 Petition at 2. But with respect to their alleging an "injury in

fact" within the "zone of interests" protected by the Atomic Energy Act, Petitioners have failed to carry their burden. With respect to NEPA, Petitioners wish to engage issues that have nothing to do with the plan amendment itself.

A. The Amendment Would Not Cause "Injury in Fact" to Petitioners' Interests under the Atomic Energy Act

Petitioners' allegation that the amendment to the Physical Security Plan would cause "injury in fact" to their interests under the Atomic Energy Act is inadequate to establish their standing to intervene. While Petitioners have made passing claims that they would be injured by the amendment, what they have overlooked is that, even as amended, the Shoreham Physical Security plan will still be in full compliance with applicable NRC requirements. As the Staff stated in the March 21 notice, the amended plan "will continue to save a level of protection that is adequate to meet a test of 'Radiological Sabotage: as referred in 10 C.F.R. 73.2(a).'" 55 Fed. Reg. 10540 (March 21, 1990).

Thus, it is incumbent on Petitioners to allege something more than simply that they

> would be adversely affected if the proposed amendment is not in accord with the AEA and/or the regulations and subsidiary guidance issued thereunder and/or if it does not otherwise provide reasonable assurance of the public health and safety and the national defense and security.

SWRCSD April 20 Petition at 11; SE 2 April 20 Petition at 13. Indeed, this claim merely begs the question, given the Staff's

determination that the security plan as amended is "in accord" with the pertinent regulations and does provide "reasonable assurance of the public health and safety and the national defense and security." Petitioners' generalized allegation of harm, by itself, is insufficient. Cf. Sequoyah Fuels Corp. (UF 6 Production Facility), CLI-86-19, 24 NRC 508, 513 (1986) (petitioners' "conclusory assertion of 'danger' is totally inadequate to establish any adverse effect" from the terms of an order under which the licensee retained its "responsibility for conducting operations in a safe manner consistent with all license conditions and other regulatory requirements").

Thus, for Petitioners properly to allege that the Physical Security Plan amendment threatens them with an "injury in fact" under the Atomic Energy Act, they must explain why they believe that the amended plan, which otherwise continues to meet the NRC's generic standards under 10 C.F.R. Part 73, would not provide a sufficient level of protection against radiological sabotage at Shoreham. If Petitioners wish to argue that the amended plan does not provide an adequate level of protection against sabotage, they have a burden -- not met here -- to at least allege that there is something significant about the specific situation at Shoreham that mandates a continuing level of protection that is higher than is called for by the regulations for other operating plants. Cf., e.g., Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC

325, 329-30 (1989)[26/] This is particularly true considering that, as LILCO stated in its significant hazards consideration analysis of the proposed amendment, "with Shoreham in a non-operating, defueled configuration, the consequences of an act of radiological sabotage or theft, as defined in 73.1(a)(1)-(2), while not quantified, would likely be reduced." Application to Amend the Shoreham Nuclear Power Station Physical Security Plan at 4 (Jan.

[26/] In St. Lucie, the Commission was faced with a petition for a hearing on a regulatory exemption request, in which the petitioner alleged, among other things, that the NRC's approval of the exemption request (which allowed the licensee to take credit for use of a chemical absorbent -- a sorbent canister -- in its air purifiers) would cause him "injury in fact" due to the increase in the amount of low-level solid waste generated in the form of used sorbent canisters. 30 NRC at 326-328. The Commission denied the petition, stating, in relevant part, as follows:

> It is true that in the past, we have held that living within a specific distance from the plant is enough to confer standing on an individual or group in proceedings for construction permits, operating licenses, or significant amendments thereto such as the expansion of the capacity of spent fuel pool. . . . However, those cases involved the construction or operation of the reactor itself, with clear implications for the offsite environment, or major alterations to the facility with a clear potential for offsite consequences. . . . Absent situations involving such obvious potential for offsite consequences, a petitioner must allege some specific "injury in fact" that will result from the action taken . . . .

30 NRC at 329-30 (emphasis added).

5, 1990)(SNRC-1672, Att. 1); see also 55 Fed. Reg. 10540 (March 21, 1990).[27/]

B. The Proposed Amendment Would Not Cause "Injury in Fact" to Petitioners' Interests under NEPA

Petitioners's argument that they should be allowed to intervene in the license amendment proceeding because the amendment will injure their "interests" under NEPA is flawed in two respects. First, the argument rests on their assertion that the amendment "is another in a series of actions instigated by LILCO, to be approved by the NRC Staff, in furtherance of the decommissioning proposal." SWRCSD April 20 Petition at 26; SE 2 April 20 Petition at 28. Petitioners admit that among the "particular aspects of the proposed amendment" they wish to address in a hearing are such questions as whether "a proposal to decommission the Shoreham Plant exist[s] 'in fact,'" and whether "NEPA requires a level of physical protection of the plant and nuclear materials located there consistent with full power operation pending full NEPA review of the decommissioning proposal . . . ." SWRCSD April 20 Petition at 34-35; SE 2 April 20 Petition at 36-37. For the same reasons noted on pages 29-33 above,

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27/ Petitioners' burden is raised even higher when it is considered that, but for LILCO's own determination that, in an absolute sense, the proposed amendment would "decrease the effectiveness" of the plan within the meaning of 10 C.F.R. § 50.54(p)(1), it would not have even been necessary for LILCO to seek prior NRC authorization before implementing those amendments.

Petitioners' attempt to broaden the scope of issues to be addressed in the proceeding is impermissible under Bellotti.

Second, Petitioners overlook that, under its NEPA-implementing regulations, the NRC need not perform an environmental review before approving the amendment. The NRC has determined that some licensing actions "do not individually or cumulatively have a significant effect on the human environment," and has concluded that, for these "categorically excluded" actions, "neither an environmental assessment nor an environmental impact statement is required." See 10 C.F.R. §§ 51.14(a); 51.22. Specifically listed among these "categorical exclusions" is the

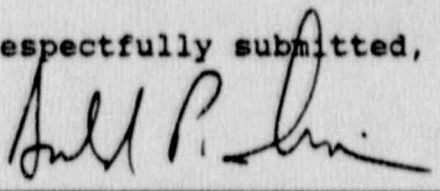
> [i]ssuance of an amendment to a license pursuant to Parts 50 . . . of this chapter relating solely to safeguards matters (i.e., protection against sabotage or loss or diversion of special nuclear material) or issuance of an approval of a safeguards plan submitted pursuant to Parts 50, 70, 72, and 73 of this chapter, provided that the amendment does not involve any significant construction impacts. These amendments and approvals are confined to (i) organizational and procedural matters, (ii) modifications to systems used for security and/or materials accountability, (iii) administrative changes, and (iv) review and approval of transportation routes pursuant to 10 CFR 73.37.

10 C.F.R. § 51.22(c)(12). The amendment that LILCO has proposed to its Physical Security Plan is of an organizational and procedural nature, and, thus, the NRC need not perform an environmental review before approving the amendment. Petitioners' attempt to raise environmental issues in a proceeding on the security plan amendment is a challenge to the NRC's regulations that, under § 2.758, should not be entertained.

VI. Conclusion

For the reasons given above, all of the petitions for leave to intervene and requests for hearing should be denied.

Respectfully submitted,



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LILCO, May 3, 1990

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CERTIFICATE OF SERVICE

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

I hereby certify that copies of LONG ISLAND LIGHTING COMPANY'S OPPOSITION TO INTERVENTION PETITIONS AND REQUESTS FOR HEARING ON CONFIRMATORY ORDER AND ON AMENDMENT TO PHYSICAL SECURITY PLAN were served this date upon the following by Federal Express, as indicated by an asterisk, or by first-class mail, postage prepaid.

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DATED: May 3, 1990