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USNRC

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

30 MAY -9 P4:07

BEFORE THE COMMISSION

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

In the Matter of

LONG ISLAND LIGHTING COMPANY

(Shoreham Nuclear Power Station,
Unit 1)

} Docket No. 50-322

NRC STAFF'S RESPONSE TO PETITIONS TO INTERVENE AND
REQUESTS FOR HEARING ON CONFIRMATORY ORDER, FILED BY
SCIENTISTS AND ENGINEERS FOR SECURE ENERGY, INC. AND
BY SHOREHAM-WADING RIVER CENTRAL SCHOOL DISTRICT

Sherwin E. Turk
Senior Supervisory Trial Attorney

May 8, 1990

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On March 29, 1990, the Commission issued an immediately effective "Confirmatory Order" modifying the operating license for the Shoreham Nuclear Power Station held by Long Island Lighting Company ("LILCO" or the "Licensee"), prohibiting LILCO "from placing any nuclear fuel into the Shoreham reactor vessel without prior approval from the NRC." On April 5, 1990, notice of the Confirmatory Order was published in the Federal Register (55 Fed. Reg. 12758); the notice afforded any persons adversely affected by the Confirmatory Order an opportunity to request a hearing thereon within 20 days of its issuance, and required any such person to "set forth with particularity the manner in which his interest is adversely affected by this Order and [to] address the criteria set forth in 10 C.F.R. 2.714(a)." Id. at 12759.

In response to the aforesaid notice, on April 18, 1990, petitions for leave to intervene and requests for hearing on the Confirmatory Order were filed by Scientists and Engineers for Secure Energy, Inc. ("SE 2") and the

Shoreham-Wading River Central School District ("District"). ^{1/} Therein, the Petitioners argued that their interests would be adversely affected by the Confirmatory Order, based on their view that it constitutes "one part of the larger proposal to decommission Shoreham" (District Petition at 2; SE 2 Petition at 2). A single response in opposition to the Petitions (and to similar petitions and requests for hearings filed by these Petitioners in connection with a proposed amendment to the Shoreham physical security plan) was filed by LILCO on May 3, 1990. ^{2/}

The NRC Staff ("Staff") hereby responds to SE 2 and the District's Petitions. The Staff submits that the Petitions fail to demonstrate that the Petitioners' interests' will be adversely affected by the Confirmatory Order, or that the Petitioners are entitled to a hearing thereon. For these reasons, as more fully set forth below, the Staff opposes the Petitions and recommends that they be denied.

^{1/} "Shoreham-Wading River Central School District's Petition for Leave to Intervene and Request for Hearing", filed April 18, 1990 ("District Petition"); and "Scientists and Engineers for Secure Energy, Inc.'s Petition for Leave to Intervene and Request for Hearing", filed April 18, 1990 ("SE 2 Petition"). The two Petitions appear to be largely identical, except insofar as they describe the identity of each Petitioner and the impacts each would allegedly experience as a result of the Confirmatory Order.

^{2/} "Long Island Lighting Company's Opposition to Intervention Petitions and Requests for Hearing on Confirmatory Order and on Amendment to Physical Security Plan," dated May 3, 1990 ("LILCO's Opposition").

DISCUSSION

A. Lack of Adverse Impact Upon Petitioners' Interests.

1. Petitioners' Stated Interests.

The Petitioners assert, as they must, under Commission regulations (see discussion infra, at 6), that the Confirmatory Order will have an adverse impact upon their interests. These interests are said to consist of such factors as:

1. Petitioners' asserted "genuine or direct interest in the outcome" (presumably, the outcome of Shoreham's decommissioning) (SE 2 Petition at 4; District Petition at 4);

2. The threat of (unspecified) "distinct injuries as a direct consequence of the Confirmatory Order" (SE 2 Petition at 5; District Petition at 5);

3. The alleged "endanger[ment of] the health and safety of Petitioners' members during this unapproved decommissioning," resulting from "LILCO's efforts to save money by shutting down all operations, slashing staff and permanently defueling the reactor" (SE 2 Petition at 5-6; District Petition at 5-6);

4. "[S]everely increased . . . radiological health and safety risks" to the Petitioners and their members, allegedly caused by LILCO's "continuous refusal to abide by the terms of its Operating License" (SE 2 Petition at 6; District Petition at 6);

5. SE 2 and its members' "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," which would pose adverse effects on the environment, the trade deficit and the nation's energy security (SE 2 Petition at 7-8);

6. The District's purported interest in "the health and environment of almost 2000 students and 500 employees, who live and/or work in close proximity to the Shoreham facility, from both the possible radiological impacts of the Confirmatory Order and the adverse health and other environmental consequences of non-operation of Shoreham" such as would be caused by fossil fuel replacement plants (District Petition at 7-8);

7. Petitioners' reliance upon LILCO to meet their energy needs, and their "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" -- which interest would be adversely affected by "[a]ctions to dismantle the facility and build substitute oil or gas burning plants" (SE 2 Petition at 9; District Petition at 1);

8. The District's economic interest in preserving Shoreham's value as an operating plant, in that it allegedly provides "approximately ninety percent of the School District's tax base" (District Petition at 8-9); and

9. SE 2's interest in opposing agency actions which interfere with that organization's "informational purposes", due to the Staff's purported refusal to conduct an environmental impact statement (EIS), which allegedly deprives SE 2 of its ability to comment on such an EIS, to advise its members of the environmental risks of alternative actions, and to report the findings to its members and to political leaders (SE 2 Petition at 10).

In sum, SE 2 and the District's interests are asserted to include (a) protecting the radiological health and safety of their members, students, and/or employees; (b) protecting the environment from the effects of Shoreham's operation; (c) protecting the environment from the effects of fossil fuel replacement plants; (d) ensuring the availability of an adequate, reliable and inexpensive energy supply; (e) preserving Shoreham's tax value as an operating plant; and (f) protecting SE 2's informational capabilities.

2. Lack of Adverse Impact.

The Petitioners do not directly identify any impacts that the Order, by itself, may be expected to have upon their interests. In addition to listing the interests described above, they contend that a hearing is required to determine "whether, if a decision is made to go to full power operation at Shoreham, the Confirmatory Order gives reasonable assurance . . . [of protecting] the public health and safety and the national defense and security"; and "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" (SE 2 Petition at 11-12; District Petition at 10-11). Further, Petitioners contend that the Confirmatory Order constitutes part of Shoreham's "de facto decommissioning"; and they request a "full and fair NEPA consideration of the decommissioning proposal" (SE 2 Petition at 12; District Petition at 11).

On their face, some of Petitioners' stated interests (in particular, those involving radiological health and safety or the environmental impacts of Shoreham's operation) might be found to be sufficient to afford one or both of these Petitioners standing to participate in certain kinds of licensing actions for Shoreham -- assuming that they had properly demonstrated their authority to act in a representational capacity on behalf of their members, employees or students. ^{3/} No such action, however, can reasonably be found to be present here and, under the standards governing intervention in Commission adjudicatory proceedings, the Petitions should be denied.

Section 189(a)(1) of the Atomic Energy Act provides, in pertinent part, as follows:

^{3/} In light of Petitioners' failure to demonstrate any interests that may be adversely affected by the Confirmatory Order, as discussed infra, we do not address here the Petitioners' further failure to demonstrate, by affidavit or otherwise, their capacity to represent the interests of their members, students, or employees. See generally, Houston Lighting & Power Co. (Allens Creek Nuclear Generating Station, Unit 1), ALAB-535, 9 NRC 377, 393-97 (1979); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-87-7, 25 NRC 116, 118 (1987); Combustion Engineering Inc. (Hematite Fuel Fabrication Facility), LBP-89-23, 30 NRC 140, 149 (1989); Duquesne Light Co. (Beaver Valley Power Station, Unit 2), LBP-84-6, 19 NRC 393, 411 (1984).

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 the proceeding.

Id., 42 U.S.C. § 2239(a)(1) (emphasis added). Under 10 C.F.R.

§ 2.714(a)(1), "any person whose interest may be affected by a proceeding and who desires to participate as a party shall file a written petition for leave to intervene." Any such petition must satisfy the following requirements:

The petition shall set forth with particularity the interest of the petitioner in the proceeding, how that interest may be affected by the results of the proceeding, including the reasons why petitioner should be permitted to intervene, with particular reference to the factors in paragraph (d)(1) of this section, and the specific aspect or aspects of the subject matter of the proceeding as to which petitioner wishes to intervene.

10 C.F.R. § 2.714(a)(2) (emphasis added). ^{4/}

The Commission has long held that judicial concepts of standing will be applied in determining whether a petitioner has sufficient interest in a proceeding to be entitled to intervene as a matter of right under

^{4/} 10 C.F.R. § 2.714(d)(1) provides that, in considering petitions for leave to intervene, the Commission or presiding officer shall consider, among other matters, the following factors:

(i) The nature of the petitioner's right under the Act to be made a party to the proceeding.

(ii) The nature and extent of the petitioner's property, financial, or other interest in the proceeding.

(iii) The possible effect of any order that may be entered in the proceeding on the petitioner's interest.

Section 189 of the Act. See, e.g., Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 332 (1983), citing Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610 (1976). The Commission has further held that these judicial concepts require a showing (a) that the action will cause "injury in fact," and (b) that the injury is "arguably within the zone of interest" protected by the statutes governing the proceeding. TMI, 18 NRC at 332; Pebble Springs, 4 NRC at 613. Further, in order to establish standing, it has been held that the petitioner must show (1) that he has personally suffered a distinct and palpable harm that constitutes injury-in-fact; (2) that the injury fairly can be traced to the challenged action; and (3) that the injury is likely to be redressed by a favorable decision in the proceeding. Dellums v. NRC, 863 F.2d 968, 971 (D.C. Cir. 1988). Cf. Nuclear Engineering Co. (Sheffield, Ill. Low Level Radioactive Waste Disposal Site), ALAB-473, 7 NRC 737, 743 (1978) (there must be a concrete demonstration that harm could flow from the result of a proceeding).

An application of these principles to the instant Petitions demonstrates that the Petitions should be denied. The Confirmatory Order issued on March 29, 1990, did no more than confirm LILCO's voluntary commitment, as expressed in LILCO's letter of January 12, 1990, not to place fuel in the reactor core without prior Commission approval. That commitment was found to be appropriate by the Acting Director of the Office of Nuclear Reactor Regulation ("Director"), in light of certain actions which LILCO had already taken following its agreement with the State of New York to transfer the plant to an entity of the State for

decommissioning. Specifically, LILCO had completely defueled the reactor vessel and reduced its operation and support staff below the level which would be required if the plant were to return to an operating or standby mode. See 55 Fed. Reg. at 12758. The Director stated (id.):

The NRC has determined that 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. Such systems and equipment include all emergency core cooling systems, most of the plant's safety-related systems, and most of the plant's auxiliary support systems. 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.

In light of these considerations, the Director found LILCO's commitment to not place nuclear fuel in the reactor core without prior NRC approval to be "acceptable and necessary"; concluded that "with this commitment, the plant's safety is reasonably assured"; and determined that the public health and safety require confirmation of LILCO's commitment in an immediately effective Confirmatory Order. Id. Finally, the Director made it clear that "[t]his Confirmatory 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." Id. at 12759.

The Confirmatory Order cannot reasonably be found to adversely affect any interest identified by the Petitioners. It nowhere authorizes LILCO

to take any action which would affect the public health and safety (such as authorizing fuel loading or operation of the reactor), nor does it in any way alter the present status of the plant. Indeed, it does no more than recognize that certain actions already taken by LILCO could have an adverse impact upon the public health and safety if LILCO should later decide to place nuclear fuel in the reactor, unless the NRC imposes the Order. By the same token, the Confirmatory Order does not preclude LILCO from placing nuclear fuel in the reactor vessel at some future date, should it decide to do so, but only requires prior NRC approval for such an action; that effect can hardly be said to constitute "de facto decommissioning" of the plant. Most significantly, the Order does not effectuate or authorize a decommissioning of the plant, nor does it even constitute a necessary step in any decommissioning plan; it only provides that the plant may not be refueled absent the adoption of approved steps to assure the protection of the public health and safety.

In sum, Petitioners have failed to show that the Confirmatory Order may reasonably be found to have some adverse impact, i.e., some "injury in fact" upon any interest they have identified; and they have failed to show that such injury fairly can be traced to the challenged action or that such injury could be redressed by a favorable decision in this proceeding (i.e., by rescission of the Confirmatory Order).

B. Petitioners' Concerns Are Beyond the Scope of the Proceeding.

The Petitioners argue that they are entitled to a hearing in order "to determine whether the order should be sustained, vacated or modified under the AEA" (SE 2 Petition at 11; District Petition at 10). In this

regard, they identify four principal aspects of the proceeding as to which they seek to intervene:

(1) "whether the Confirmatory Order is arbitrary, caparicious and/or abuse of discretion and/or not supported by substantial evidence";

(2) "whether if a decision is made to go to full power operation at Shoreham, the Confirmatory Order gives reasonable assurance . . . [of protecting] the public health and safety and the national defense and security";

(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"; and

(4) they request a "full and fair NEPA consideration of the decommissioning proposal" (SE 2 Petition at 11-12; District Petition at 10-11).

In addition, the Petitioners identify a long list of issues they would seek to explore in hearings, premised on their belief that the Confirmatory Order constitutes one step in the de facto decommissioning of the plant (SE 2 Petition at 22-26 and 38-40; District Petition at 21-25 and 37-38). These include issues such as whether LILCO's reductions in staff and level of plant maintenance are in accordance with NRC regulations; whether there are adequate procedures and personnel to operate the plant if LILCO decides to place fuel back in the reactor vessel; whether LILCO's commitments in its September 19, 1989 letter are in accordance with its responsibilities under its license; whether LILCO's reduced level of staffing and maintenance is in compliance with NEPA; and

whether the Confirmatory Order, insofar as it recognizes LILCO's reduced level of staffing and maintenance, is in compliance with NEPA.

Notwithstanding Petitioners' lengthy enumeration of purported aspects of the proceeding in which they would seek to participate, it is apparent that those concerns are beyond the scope of any proceeding on the Confirmatory Order. As stated above, the Confirmatory Order neither permits plant operation nor forbids it; nor does it constitute part of a de facto decommissioning of the plant. In the event that LILCO or a subsequent licensee proceeds with a plan to decommission the plant, many of the issues raised by Petitioners might arguably be raised in any related license amendment proceeding. Similarly, if LILCO or a subsequent licensee should decide to operate the plant, many of Petitioners' other concerns could be raised in a petition filed under 10 C.F.R. § 2.206. The Confirmatory Order, however, does not give rise to a proceeding broad enough to consider the issues raised by Petitioners here, and those issues remain outside the scope of any proceeding on the Confirmatory Order.

The Commission has clearly indicated that it may limit and define the scope of an action which it initiates. Boston Edison Co. (Pilgrim Nuclear Power Station), CLI-82-16, 16 NRC 44, 46 (1982), aff'd, Bellotti v. NRC, 725 F.2d 1380 (D.C. Cir. 1983). See also, Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 & 2), CLI-80-10, 11 NRC 438, 441-42 (1980). In these cases, the Commission denied third party petitions for hearings and intervention on enforcement orders modifying the licenses for the facilities, on the ground that the petitions presented concerns outside the scope of the proceedings. In approving the Commission's authority to define the scope of its proceedings, that is,

their agenda and substance, the Court in Bellotti stated, "[w]e have no doubt that as a general matter, such authority must reside in the Commission". Bellotti, supra, 725 F.2d at 1381.

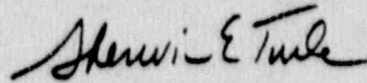
Here, the Confirmatory Order clearly limits the scope of any hearing that may be held in connection with that Order. Section V of the Order states, "If a hearing is held, the issue to be considered at such hearing shall be whether this Confirmatory Order should be sustained". 55 Fed. Reg. at 12759. In order to succeed in their request for a hearing, the Petitioners must demonstrate that their interests may be affected by the scope of the proceeding as defined by the Commission; and Petitioners' right to a hearing must be evaluated only in the context of the specific action effectuated by the Confirmatory Order.

As set forth above, any hearing on the Confirmatory Order would be limited to considering whether the Order should be sustained, that is, whether the facts regarding the facility stated in the Order are true, and whether the remedy selected by the Director is supported by the facts. Accepting, arguendo, that the Petitioners' interests are affected by the issues they propose for hearing, those issues are nonetheless outside the scope of this proceeding as defined by the Confirmatory Order. Indeed, the correctness of this conclusion is demonstrated by the "remedies" sought by Petitioners, all of which exceed the scope of the proceeding on the Confirmatory Order which was noticed in the Federal Register (see SE 2 Petition at 40-43; District Petition at 39-42).

CONCLUSION

For the reasons more fully set forth above, the Petitions should be denied for failure to demonstrate how the Petitioners' interests may be affected by the Confirmatory Order or that the Petitioners are entitled to a hearing thereon.

Respectfully submitted,



Sherwin E. Turk
Senior Supervisory
Trial Attorney

Dated at Rockville, Maryland
this 8th day of May, 1990.

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NUCLEAR REGULATORY COMMISSION

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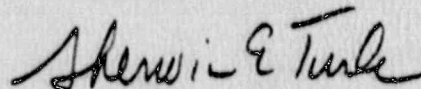
In the Matter of)
LONG ISLAND LIGHTING COMPANY) Docket No. 50-322
(Shoreham Nuclear Power Station,)
Unit 1))

NOTICE OF APPEARANCE

Notice is given that I hereby enter my appearance in the above captioned proceeding. Pursuant to 10 C.F.R. § 2.713(b), the following information is provided:

Name: Sherwin E. Turk
Address: Office of the General Counsel
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United States Court of Appeals
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District of Columbia
State of New Jersey
Name of Party: NRC Staff

Respectfully submitted,



Sherwin E. Turk
Senior Supervisory
Trial Attorney

Dated at Rockville, Maryland
this 8th day of May, 1990

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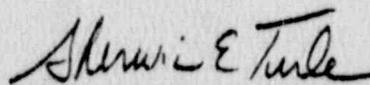
CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S RESPONSE TO PETITIONS TO INTERVENE AND REQUESTS FOR HEARING ON CONFIRMATORY ORDER, FILED BY SCIENTISTS AND ENGINEERS FOR SECURE ENERGY, INC. AND BY SHOREHAM-WADING RIVER CENTRAL SCHOOL DISTRICT" and "NOTICE OF APPEARANCE" for Sherwin E. Turk in the above captioned proceeding have been served on the following by deposit in the United States mail, first class or, as indicated by an asterisk, by deposit in the Nuclear Regulatory Commission's internal mail system, this 8th day of May, 1990:

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Sherwin E. Turk
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