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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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

LONG ISLAND LIGHTING COMPANY'S OPPOSITION TO INTERVENTION PETITIONS AND REQUESTS FOR HEARING ON AMENDMENT TO EMERGENCY PREPAREDNESS LICENSE CONDITIONS

I. Background

A. Procedural Posture

On April 30, 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 Long Island Lighting Company's application for an amendment to the operating license for the Shoreham Nuclear Power Station. If granted, the amendment would suspend the effect of five conditions in Shoreham's license, NPF-82, related to offsite emergency preparedness.

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Pursuant to 10 C.F.R. § 2.714(c), LILCO opposes the petitions.[1/]

B. Facts

On December 15, 1989, LILCO, under cover of a letter from William E. Steiger, Jr., LILCO's Assistant Vice President for Nuclear Operations (SNRC-1651), submitted to the NRC a request to (1) cease all offsite emergency preparedness activities at Shoreham, including disbanding the Local Emergency Response Organization (LERO),[2/] and (2) implement a revised onsite emer-

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1/ Petitioners' April 30 pleadings essentially repeat, with minimal changes to reflect the factual context, the same arguments contained in their earlier petitions of April 18 and April 20. Those petitions concerned, respectively, (1) the NRC's Confirmatory Order of March 29, 1990, prohibiting LILCO from placing fuel back in the Shoreham reactor, and (2) LILCO's proposed amendment to its Physical Security Plan. LILCO will not repeat here all of the background or arguments on NRC standing law and other issues presented in its Opposition to Intervention Petitions and Requests for Hearing on Confirmatory Order and on Amendment to Physical Security Plan, filed on May 3, 1990 (May 3 Opposition). To the extent that those discussions remain applicable to Petitioners' April 30 pleadings, LILCO adopts and incorporates them here.

2/ LERO is an organization created by LILCO and staffed by over 3000 of its own employees and contractors in order to provide an offsite emergency response capability adequate to meet the standards of 10 C.F.R. § 50.47(b)(1)-(16), as amplified in Part 50 Appendix E, ¶ IV and NUREG-0654. LILCO was forced to develop its own offsite emergency response organization after the State of New York and Suffolk County refused to participate in emergency planning for Shoreham. The composition and function of LERO are already well known to the NRC, whose adjudicatory bodies have examined it in detail over the course of several years of litigation in the Shoreham operating license proceeding. See, e.g., Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-85-12, 21 NRC 644 (1985); LBP-88-24, 28 NRC 311,

(continued...)

gency plan that reflects Shoreham's shut down, defueled condition. LILCO requested, pursuant to 10 C.F.R. § 50.12, an exemption from the emergency preparedness requirements of 10 C.F.R. § 50.54(q), and an application to amend NPF-82, suspending the effect of five license conditions related to offsite emergency preparedness.[3/] Accompanying the application was an analysis demonstrating, pursuant to the criteria set forth in 10 C.F.R. § 50.92, that the proposed amendment involved "no significant hazards consideration."

In support of the exemption request and license amendment application, LILCO also submitted a Radiological Safety Analysis for Spent Fuel Storage and Handling. The Safety Analysis establishes that, given Shoreham's defueled condition and the negligible decay heat being generated by the plant's fuel, it is

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2/ (...continued)
377-85 (1988). Contrary to the representation of SWRCSD, SWRCSD Petition at 9, the District is not a "part of LERO." While SWRCSD has cooperated with LERO in developing emergency procedures for the District and has accepted LERO training, the District is not considered an emergency responder under the Shoreham offsite plan.

3/ Specifically, ¶ 2.C.(9) of NPF-82 requires LILCO to shut down Shoreham at least 24 hours prior to commencement of a strike by its workers. Under ¶ 2.C.(10), LILCO is required to place Shoreham into shutdown in the event of a hurricane in the Long Island area. Paragraph 2.C.(11) requires LILCO to modify its offsite emergency plan so as to provide that a knowledgeable LERO representative will be sent to the Suffolk County Emergency Operations Center (EOC) upon the declaration of an Alert or higher Emergency Classification Level (ECL). Under ¶ 2.C.(12), whenever Shoreham is operating above 5% rated power, a trained person must be available 24 hours a day to expedite conversion of LILCO's Brentwood facility into the LERO EOC upon declaration of an Alert or higher ECL. Finally, ¶ 2.C.(13) requires LILCO to conduct quarterly training drills, with full or partial participation by LERO.

not credible for an accident to occur that would require an offsite emergency response.

On March 30, 1990, the NRC Staff issued a proposed finding that the emergency preparedness license amendment involved no significant hazards consideration. 55 Fed. Reg. 12076. The Staff stated there that "any person whose interest may be affected by this proceeding and who wishes to participate as a party" could file a written petition to intervene pursuant to 10 C.F.R. § 2.714. The Staff added, however, that any contentions subsequently submitted by a party permitted to intervene must be "limited to matters within the scope of the amendments under contention." 55 Fed. Reg. 12078 (March 30, 1990).

At the time of filing this Opposition, the NRC Staff had not yet issued a final determination of no significant hazards consideration.[4/] Nor had the Staff acted on LILCO's exemption request.

II. The Amendment Does Not Cause Petitioners an "Injury in Fact" under the Atomic Energy Act

The request for a hearing on the emergency preparedness amendment should be denied. Petitioners have failed to show that if the amendment is granted they will suffer an "injury in fact"

4/ Upon making such a finding, the Staff may, of course, issue the amendment effective upon issuance, prior to the holding of any required hearing. 42 U.S.C. § 2239(a)(2)(A); 10 C.F.R. § 50.91(a)(4).

to an interest protected under the Atomic Energy Act.[5/] As in their April 18 and 20 papers, Petitioners have again voiced their displeasure with LILCO's decision not to operate Shoreham, alleging that the pending request to cease offsite emergency preparedness activities is merely an element of an ongoing scheme to "de facto decommission" the plant. But in order to demonstrate standing, Petitioners must do something more. They must specifically allege that the NRC action at issue -- granting the amendment -- presents a radiological health and safety threat cognizable under the Atomic Energy Act. As shown below, Petitioners have not done so.

A. Only the License Amendment Itself, and Not LILCO's Request to Disband LERO, Is at Issue before the NRC

The NRC's notice of opportunity for hearing extends only to LILCO's request for an amendment to suspend the effect of certain conditions in NPF-82. It does not explicitly provide an adjudicatory forum for Petitioners to challenge LILCO's overall

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5/ 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). Accordingly, in order to demonstrate standing to intervene in an NRC proceeding, one must allege, first, "some injury that has occurred or will probably result from the action involved," and, second, that this "injury in fact" falls within the "zone of interests" protected by the Atomic Energy Act or the National Environmental Policy Act (NEPA). 4 NRC at 613. Moreover, mere conclusory allegations of harm, without an attempt to demonstrate some "nexus" between the supposed injury and the action being challenged, are insufficient. See, e.g., Northern States Power Co. (Pathfinder Atomic Plant), LBP-90-3, 31 NRC 40, 42-43 (1990); see also Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325 (1989).

request to cease offsite emergency preparedness activities and disband LERO. Nor does it implicitly provide such a broader opportunity. The section of the Atomic Energy Act that deals with the public's right to a hearing provides specifically that the Commission shall grant a hearing in a

> proceeding . . . for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control, and in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees . . . .

42 U.S.C. § 2239(a). The issuance of a regulatory exemption does not fall within the limited scope of actions specified in subsection (a). Correspondingly, the NRC's regulations do not provide an opportunity for hearing on a request for an exemption filed pursuant to 10 C.F.R. § 50.12. Commission precedent has never suggested that this statute and regulation should be read any way other than literally. See, e.g., Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 328-29 (1989).

At times in their April 30 pleadings Petitioners appear to recognize the limited nature of the proceeding provided, and they properly limit their arguments to the scope and effect of the amendment itself. At other points, however, they appear to confuse the granting of the amendment with allowing LILCO to disband LERO and cease all offsite preparedness.

For example, Petitioners assert that the "proposed license amendment . . . effectively eliminates the offsite Emergency

Response Plan and disperses the organization which is charged with implementation of that Plan . . . ." SWRCSD Petition at 24; SE_2 Petition at 25 (emphasis added). This is not true. As LILCO has pointed out before, it cannot disband LERO until the NRC has granted both the license amendment and the regulatory exemption request.[6/]

The concerns raised by Petitioners that are not connected with the license amendment itself, but which are associated with LILCO's overall request to terminate emergency preparedness, fall outside the scope of the proceeding as it has been defined in the NRC's notice of opportunity for hearing. To the extent Petitioners try to raise such issues, their attempt to expand the scope of the proceeding is impermissible under the principles set forth in Bellotti v. NRC, 725 F.2d 1380 (1983).[7/]

[6/] In SNRC-1651, LILCO noted that the "entirety of LILCO's [December 15] submittal cannot be approved without LILCO's first receiving a regulatory exemption . . . ." SNRC-1651 at 4. In this regard, the only present practical effect of the license amendment is to allow LILCO to end the quarterly LERO drill program. Of the other four license conditions that would be suspended, one (¶ 2.C.(12)) applies only when the plant is operating above 5% rated power. Two others (¶ 2.C.(9) and (10)) require LILCO, in certain situations, to shut Shoreham down, the very condition that the plant is now in. The fourth condition (¶ 2.C.(11)) merely requires that LILCO modify its offsite emergency response plan to send a liaison to the Suffolk County EOC in the event of an emergency. LILCO has already performed this ministerial task. See Shoreham Nuclear Power Station Local Offsite Radiological Emergency Response Plan Implementing Procedures, OPIP 3.1.1, Att. 1 § B.7.

[7/] The significance of the Bellotti case with respect to Petitioners' attempts to introduce matters that fall outside the scope of a proceeding as it is defined by the NRC is discussed in LILCO's May 3 Opposition at 18-22.

B. Petitioners Have Failed to Allege an Injury that Would Result from Issuance of the Amendment

As shown above, the issue that Petitioners should be addressing in their papers is whether, given Shoreham's defueled condition, the suspension of the five emergency preparedness license conditions poses a health and safety threat. Petitioners, however, make no real effort to do so. They simply advance vague, unparticularized allegations that the amendment would violate the Atomic Energy Act and NRC regulations, neither identifying any specific injuries they would suffer if the amendment were granted nor demonstrating any connection between the action they are challenging and the harms they are asserting.

For example, Petitioners allege generally that the

> relaxation and reduction in emergency planning activities by the amendment would result in an increased, and therefore impermissible, risk to them from the radiological hazard that could directly and/or indirectly result from such lack of emergency planning activities.

SWRCSD Petition at 19-20; SE_2 Petition at 20-21. In making this claim, Petitioners ignore the question at issue, i.e., whether, given Shoreham's defueled condition, granting the amendment poses a health and safety risk. By never confronting the fact that Shoreham is shut down and defueled -- and that no credible accident requiring an offsite emergency response can thus occur -- Petitioners' assertions of harm take on a legalistic tone, divorced from any suggestion that they will "in fact" suffer an injury if the amendment is granted.

For example, each Petitioner states that among the "particular aspects" of the amendment "as to which [it] wishes to intervene" under the Atomic Energy Act is whether

> the licensee's proposed amendment allowing emergency preparedness activities to be discontinued [is] in accordance with the AEA, the regulations and guidance thereunder, the conditions specified in the license, and/or the licensee commitments pursuant to that license given the existence of that full-power Operating License.

SWRCSD Petition at 20; SE_2 Petition at 21. Here, Petitioners do not connect issuance of the amendment with any specific injury they would suffer; they merely intimate that the amendment may not be in accord with applicable law. This is inadequate to show "injury in fact." See, e.g., Florida Power & Light Co. (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 330-31 (1989)("[a]bsent situations involving . . . potential for offsite consequences [such as plant construction or operation], a petitioner must allege some specific 'injury in fact' that will result from the action taken . . . .")(emphasis added).

At another point, Petitioners query whether "Shoreham's defueled condition [is] relevant to the requirement for an Offsite Emergency Response Plan under the AEA while Shoreham possesses a full power Operating License." SWRCSD Petition at 20; SE_2 Petition at 21. This does not allege an "injury" resulting from the amendment. Rather, it suggests that Petitioners, realizing that they have no case on the merits, intend to argue instead that, no matter the actual risk associated with a defueled Shoreham, LILCO's paper authorization to operate the plant

mandates maintenance of all offsite preparedness until that authorization is removed. Again, the allegation that the amendment may violate the Atomic Energy Act or NRC regulations is insufficient to demonstrate an "injury in fact." Cf. Sequoyah Fuels Corp. (UF_6 Production Facility), CLI-86-19, 24 NRC 508, 513 (1986)(finding petitioners'"conclusory assertion of 'danger'. . . totally inadequate to establish any adverse effect" from the terms of an order where the licensee was otherwise in compliance with its license and NRC regulations).

Elsewhere, Petitioners do state, with somewhat more specificity, that the amendment "would allow the cessation of certain emergency planning activities including the exercise or drill of those plans explicitly required in the license," and that

> [s]uch cessation of practice would greatly reduce the effectiveness of the 3000 person LERO organization and thus greatly delay and prejudice the ability of LILCO to return to full power operation with the same degree of reasonable assurance of the public health and safety offered by the regular practice and training currently required.

SWRCSD Petition at 13; SE_2 Petition at 14-15 (emphasis added). Even this more particularized allegation, however, does not go to the issue at hand, namely, whether the "cessation of practice" would so "greatly reduce the effectiveness of the 3000 person LERO organization" so as to pose a present health and safety threat to Petitioners. Petitioners fail completely to allege that the suspension of the quarterly drill requirement would present a health and safety threat with Shoreham defueled, fo-

cusing instead on some potential future harm should LILCO ever decide to operate the plant at full power. In so doing, Petitioners fail to carry their burden of asserting that they will suffer an "injury in fact" should the amendment be issued. See Nuclear Engineering Co., Inc. (Sheffield, Ill., Low-Radioactive Waste Disposal Site), ALAB-743, 7 NRC 737, (1978)(in order to show standing, "[t]here must be a concrete demonstration that harm to the petitioner . . . will or could flow from a result unfavorable to it -- whatever that result might be").

III. The Amendment Does Not Cause Petitioners an "Injury" under the National Environmental Policy Act

As with their April 18 and April 20 pleadings, Petitioners claim that LILCO's proposed emergency preparedness amendment is simply "one part of the larger proposal to decommission Shoreham." SWRCSD Petition at 2; SE_2 Petition at 2. The arguments they advance in support of that position are essentially identical to those in their April 18 and April 20 petitions and are flawed in the same ways. See May 3 Opposition at 29-33 & n.25, 38-39. In particular, Petitioners' NEPA-based arguments hinge necessarily on their view that issuance of the proposed amendment is tantamount to allowing LILCO to disband LERO. As was explained above, this characterization of the effect of the license amendment is erroneous. Thus, Petitioners' broad NEPA concerns are outside the narrow scope of the proceeding as defined by the NRC and their attempt to raise such issues is impermissible under Bellotti.

Moreover, as shown below, even under Petitioners' own erroneous formulation of NEPA it does not follow that LILCO -- in the absence of any health and safety need -- should be required to maintain LERO based solely on NEPA considerations. Petitioners' NEPA-based argument is succinctly expressed in their assertion that the proposed amendment

> is another step in the decommissioning process in that cessation of offsite emergency preparedness activities not only implies that LILCO and the NRC view Shoreham's decommissioning as inevitable, but also makes the alternative of operation further away in time . . . .

SWRCSD Petition at 35-36; SE_2 Petition at 36-37. Yet, in truth, the cessation of offsite emergency preparedness activities conducted by LILCO would have no effect at all on whether Shoreham ever operates, and the disbanding of LERO makes the "alternative" of Shoreham's operation no more or less likely. The offsite emergency preparedness system for Shoreham, exemplified in LERO, has two characteristics that render NEPA analysis of its dismantlement inapplicable in two further ways beyond those applicable to the plant's physical systems.

First, there is no foreclosure of alternatives from the disbanding of LERO. LERO and its capabilities are only coincidentally physical; it is at base an organization composed of people. Consequently, it cannot be "kept operable" or "protected" in any sense like equipment, but rather is staffed, paid, and trained -- or not. As a result, its disbanding does not increase the cost of restoration to operability, or tend to

foreclose options, in the sense that destruction or neglect of a major physical component does: there is nothing fixed or physically durable to preserve. Anyone intending and licensed to operate the plant can reconstruct the organization, and the only incremental cost will be training time. In the meantime, the cost of staffing and training will have been saved.

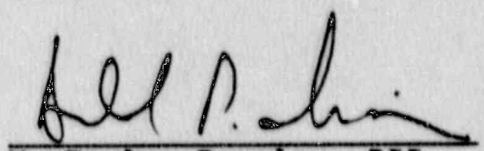
Second, and even more fundamental, LERO will never be relevant to Shoreham's future, whatever it may be. LILCO will never operate Shoreham, and has agreed to transfer the plant to the Long Island Power Authority, which is prohibited by New York State statute from operating it. Thus, if Shoreham never operates, as will be the case given current agreements and legislation, LERO is simply a costly irrelevance. Even if, hypothetically, the plant were to operate in the future, that operation would necessarily be through some entity other than LILCO. But LERO is uniquely and unavoidably a LILCO-based organization, staffed primarily by LILCO employees, directed by LILCO employees, trained by LILCO employees and agents, funded by LILCO, operating out of LILCO facilities: a creature of the peculiar circumstances of Shoreham's licensure. LILCO would not continue to fulfill these functions in connection with the operation of Shoreham by some other entity. Thus, even in the implausible theoretical scenario of Shoreham's future operation, <u>its offsite preparedness structure would have to be something other than LERO and the rest of the Shoreham-based organization.</u>

Therefore, since LERO is inherently not a part of the future of Shoreham -- either if (as is presently planned) it never operates or if (as is highly unlikely) some entity other than LILCO is the operator -- the purely administrative step of its dismantlement cannot tend to impose costs or foreclose alternatives cognizable under NEPA. As a matter of logic, it presents no basis for a proceeding under NEPA.

IV. Conclusion

For the reasons given above, the petitions should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

In the Matter of
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Docket No. 50-322

I hereby certify that copies of LONG ISLAND LIGHTING COMPANY'S OPPOSITION TO INTERVENTION PETITIONS AND REQUESTS FOR HEARING ON AMENDMENT TO EMERGENCY PREPAREDNESS LICENSE CONDITIONS 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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