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LILCO, November 13, 1990

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

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

LILCO'S OPPOSITION TO JOINT PETITION FOR RECONSIDERATION OF CLI-90-08 AND RESPONSE TO COMMENTS ON SHOREHAM'S DECOMMISSIONING BY DEPARTMENT OF ENERGY AND COUNCIL ON ENVIRONMENTAL QUALITY

I. Introduction

On October 29, 1990, Shoreham-Wading River Central School District and Scientists and Engineers for Secure Energy, Inc. (collectively, "Petitioners") submitted what they styled a "joint petition," filed ostensibly "[p]ursuant to Section 2.771(a) of the Commission's rules and regulations," requesting that the Commission "reconsider and vacate CLI-90-08 . . . insofar as that order precludes the consideration of the alternative of renewed operation" of the Shoreham Nuclear Power Station. Joint Petition at 1.

Long Island Lighting Company (LILCO) opposes Petitioners' motion. Petitioners provide no good reason for the Commission to reconsider CLI-90-08. To the contrary, the Commission's decision

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regarding the scope and effect of the National Environmental Policy Act, 42 U.S.C. §§ 4321 et seq., (NEPA) on Shoreham's decommissioning is clearly correct.

LILCO also submits herein its response to comments on the applicability of NEPA to Shoreham, filed on November 9, 1990 by the U.S. Department of Energy (DOE) and the Chairman of the Council on Environmental Quality (CEQ).

II. Background

On October 17, 1990, in response to six pending petitions for intervention and requests for hearing filed by Petitioners, the Commission issued a Memorandum and Order in which it found that neither NEPA nor the Atomic Energy Act, 42 U.S.C. §§ 2011 et seq., "require the NRC to consider 'resumed operation' [of Shoreham] as an alternative" to the plant's decommissioning. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-90-08, 32 NRC ___, slip op. at 1 (Oct. 17, 1990). The Commission accordingly rejected Petitioners' argument that the NRC Staff must prepare an environmental impact statement (EIS) on Shoreham's decommissioning that considers resumed operation of the plant as an "alternative" to decommissioning.

In making this determination, the Commission recognized that the "federal action" involved in the Shoreham situation was not the decision by LILCO, a private entity, to abandon the Shoreham facility. Rather, the Commission noted that the "precise Federal actions at issue here" consisted of (1) an "order requiring NRC

approval prior to return of fuel to the reactor vessel," (2) an "amendment approving changes to the licensee's physical security plan," and (3) an "amendment relating to emergency preparedness." CLI-90-08, slip op. at 7. While remarking that "these actions would likely not have been proposed but for LILCO's decision not to operate the facility," the Commission noted that "the NRC was not a party to that decision." Id.

The Commission continued that while the NRC "must approve of a licensee's decommissioning plan . . ., including consideration of alternative ways whereby decommissioning may be accomplished," nowhere in its regulations was "it contemplated that the NRC would need to approve of a licensee's decision that a plant should not be operated." CLI-90-08, slip op. at 7-8 (emphasis in original). The Commission then confirmed that "LILCO is legally entitled under the Atomic Energy Act and our regulations to make, without any NRC approval, an irrevocable decision not to operate Shoreham," and held that the "alternative of 'resumed operation' -- or other methods of generating electricity -- are alternatives to the decision not to operate Shoreham and . . . are beyond Commission consideration." Id., slip op. at 8.[1/]

Having made this finding on the scope and effect of NEPA in the Shoreham case, the Commission forwarded to the Licensing

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[1/] In the alternative, the Commission ruled that "even if 'resumed operation' were an alternative to decommissioning," the NRC would not be required to consider it under the NEPA "rule of reason." CLI-90-08, slip. op. at 10, citing NRDC v. Callaway, 524 F 2d 79, 92 (2d Cir. 1975).

Board the six pending hearing requests "for further proceedings not inconsistent" with the Commission's Order. CLI-90-08, slip op. at 11. On October 18, 1990, the Chief Administrative Judge established a three-judge Licensing Board panel to consider Petitioners' hearing requests 55 Fed. Reg. 43,057 (Oct. 25, 1990). The Licensing Board has not yet acted on these requests.

On October 29, Petitioners filed their "Joint Petition."[2/] In their pleading, Petitioners advance numerous reasons why the Commission "should reconsider and vacate its Order of October 17, 1990." Joint Petition at 1. As shown in part III below, none of these claims justifies Commission reconsideration.

[2/] While Petitioners assert that their "Joint Petition" has been filed "[p]ursuant to Section 2.771(a)," this provision is inapposite. It provides, in relevant part:

> A petition for reconsideration of a final decision may be filed by a party within ten (10) days after the date of the decision.

10 C.F.R. § 2.771(a)(emphasis added). Even if it is assumed that CLI-90-08 is a "final decision" as described by 10 C.F.R. § 2.770 (and the language of § 2.770 indicates that a "final decision" is, in fact, one issued at the conclusion of a full adjudicatory proceeding), it is indisputably the case that neither Petitioner is a "party" to the Shoreham proceeding. Indeed, whether they will be admitted as parties is the precise question now before the Licensing Board. Thus, by the plain terms of § 2.771(a), Petitioners cannot seek reconsideration of CLI-90-08. See, e.g., Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Units 1 and 2), CLI-89-6, 29 NRC 348, 354 (1989)("we find that Mr. Macktal does not have standing to seek . . . reconsideration of the Commission's decision . . . because he was not a party to the proceeding when the decision was issued") (emphasis in original). Rather than moving to strike the Joint Petition as misfiled, however, LILCO assesses Petitioners' pleading against the standards that govern motions for reconsideration of Licensing Board and Appeal Board decisions, having filed its Opposition within the time permitted by the NRC's regulations governing motion practice generally. See 10 C.F.R. §§ 2.730(c), 2.710.

Finally, on November 9, DOE and CEQ each filed comments on the applicability of NEPA to Shoreham's decommissioning.[3/] While neither paper expressly requests the Commission to reconsider and vacate CLI-90-08, each argues that a full-blown EIS, in which the alternative of resumed plant operation is assessed, is required before the NRC may take any action which could lead to Shoreham's decommissioning. As explained in part IV below, both DOE and CEQ misapprehend the scope and effect of NEPA in the present case.

III. None of the Reasons Petitioners Give for Reconsideration of CLI-90-08 Is Persuasive

Since the Joint Petition largely repeats many of the same themes regarding the scope and effect of NEPA that Petitioners have already sounded in their six pending intervention requests, the Commission need not consider them again. See, e.g., Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Unit 1), LBP-84-23, 19 NRC 1412, 1414 (1984)(reconsideration not warranted in the absence of new arguments, new issues, or new information); see also Nuclear Engineering Co. (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), CLI-80-1, 11 NRC 1, 5-6 (1980); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant,

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[3/] In an Order issued October 16, 1990 ("October 16 Order"), the Commission, taking note that it had already "received letters commenting on issues related to [LILCO's January 5, 1990, "possession only" license] amendment from the Chairman of the Council on Environmental Quality, dated October 9, 1990, and the Secretary of Energy, dated September 19, 1990," invited those officials to "file on the record any comments they wish the Commission to consider." October 16 Order at 2. LILCO refers to the two November 9 submissions as "DOE Comments" and "CEQ Comments," respectively.

Units 1 and 2), ALAB-844, 24 NRC 216, 217 (1986). To the extent Petitioners assert claims based on legal theories not previously offered (such as their arguments regarding the NRC's and DOE's emergency authorities), such arguments are improper. See, e.g., Tennessee Valley Authority (Hartsville Nuclear Plant, Units 1A, 2A, 1B, and 2B), ALAB-418, 6 NRC 1, 2 (1977); Central Electric Power Coop. (Virgil C. Summer Nuclear Station, Unit 1), CLI-81-26, 14 NRC 787, 790 (1981) ("[m]otions to reconsider should be associated with requests for re-evaluation of an order in light of an elaboration upon, or refinement of, arguments previously advanced," and are "not the occasion for an 'entirely new thesis'").

The melange of arguments that Petitioners proffer in favor of reconsideration of CLI-90-08 fall into two general categories: (1) those hinging on Petitioners' erroneous conception of NEPA, and (2) those based on an assortment of grounds other than NEPA. Each is discussed below.

A. Petitioners' NEPA Arguments Are Based on a Flawed Understanding of the Statute

1. Petitioners' Erroneous Focus on NEPA "Alternatives" Ignores CLI-90-08's Finding Regarding "Federal Action"

The linchpin of the Joint Petition is its lengthy discussion of the "alternatives" that, under NEPA, the NRC supposedly must address in its environmental review of Shoreham's decommissioning. See Joint Petition at 3-11. Invoking both the NEPA-implementing regulations issued by CEQ and what Petitioners view as relevant federal case law, Petitioners raise two basic objections

to CLI-90-08. First, they suggest that the Commission erred by failing to take into account alternatives outside the NRC's legal jurisdiction or ability to implement. Second, they argue that the Commission failed to give proper consideration to the "no action" alternative; i.e., denial of a license amendment authorizing Shoreham's decommissioning.

Petitioners' arguments are beside the point. Even if their general discussion of the alternatives that need to be addressed in a NEPA-directed environmental review were essentially correct (which it is not), Petitioners still have failed to confront the crucial, central holding of CLI-90-08: LILCO's decision to remove Shoreham from service is not "federal action" and, hence, does not trigger NEPA review.[4/] In fact, nowhere in the Joint

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[4/] As LILCO said in its Opposition to Intervention and Requests for Hearing on Confirmatory Order and on Amendment to Physical Security Plan (May 3, 1990)("May 3 Opposition"), 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." . . . . 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. . . . The private action that has been "federalized" here is the physical act of decommissioning 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.

May 3 Opposition at 31-31 & n.25 (emphasis in original).

Petition is the term "federal action" discussed, even though the Commission's decision in CLI-90-08 expressly turned on its analysis of this key issue.

Petitioners' position collapses on this fundamental point. As the Commission has properly found, the "federal action" actually at issue in Shoreham's decommissioning is the NRC's consideration and approval of the specific plans for the plant's decommissioning per se. The decision to abandon Shoreham, on the other hand, has been made by a private entity. That decision required no federal approval and, thus, cannot be said to have been "federalized" for purposes of NEPA. It is axiomatic that where there is no "federal action," NEPA is not triggered. See, e.g., Edwards v. First Bank of Dundee, 534 F.2d 1242, 1245-46 (7th Cir. 1976); Winnebago Tribe of Nebraska v. Ray, 621 F.2d 269, 272-73 (8th Cir. 1980), cert. denied, 449 U.S. 836 (1980). Thus, any discussion of what "alternatives" to closing the plant must be considered under NEPA is pointless.[5/] While "resumed

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[5/] A recent decision by the U.S. Court of Appeals for the District of Columbia Circuit emphasizes this point. In Macht v. Skinner, No. 90-5017 (D.C. Cir. Oct. 12, 1990), the court affirmed a lower court ruling that neither (1) federal funding for preliminary design of proposed extensions to a light rail transit system nor (2) the need to obtain a wetlands permit from the Army Corps of Engineers for a portion of the transit system was sufficient to transform the otherwise private project into "major federal action" subject to NEPA review. In so ruling, the court stated that, given its threshold determination that the transit project did not involve "federal action," it was not necessary to decide "whether the district court correctly held that . . . segmentation of the Project was proper." Macht, 1990 U.S. App. LEXIS 17848, 6. As the court noted, "unless a project involves major federal action, NEPA does not apply." Id. (emphasis added). It is significant that, in this case, it was

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operation" might be thought of as an "alternative" to the decision to close the plant, such a consideration is irrelevant, since the decision to close the plant does not itself invoke NEPA.

Moreover, even given that NEPA applies to the NRC's ultimate approval of a license amendment authorizing the decommissioning of Shoreham (see 10 C.F.R. §§ 51.53(b), 51.95(b)), it does not follow, as Petitioners claim, that environmental review of that action by the NRC must include consideration of the "alternative" of resumed plant operation. As noted, while resumed operation may be an alternative to Shoreham's abandonment, it is not an alternative to the activity actually requiring the NRC's approval; i.e., the planning and physical methods by which the plant will be decommissioned. It is not necessary under NEPA to assess "alternatives" that are not related to or which would not achieve the goal of the proposed enterprise itself. See, e.g., Process Gas Consumers Group v. Department of Agriculture, 694 F.2d 728, 769 (D.C. Cir. 1981), modified on hearing en banc, 694 F.2d 788 (1982), cert. denied, 461 U.S. 905 (1983); Miller v. United States, 492 F. Supp. 956, 963 (E.D. Ark. 1980), aff'd, 654 F.2d 513 (8th Cir. 1981) (environmental review under NEPA need not assess an "alternative which is essentially an entirely

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undisputed that the entire light rail project had been designed as a unitary one, with federal funding from start to finish. Upon learning that this would "federalize" the project from the outset, however, the state revised the project so that the first phase would be entirely state-funded.

different project"). LILCO's goal is to see that Shoreham is decommissioned, now that the plant has been permanently close. Resumed plant operation does not allow for the achievement of that goal and, thus, is not a true "alternative" that must be considered under NEPA.

Relatedly, Petitioners are wrong in asserting that the alternative of "no action" is an appropriate consideration here. Joint Petition at 6. In the present situation, "no action" on the part of the NRC would be to deny an amendment allowing the decommissioning of the Shoreham facility. Even assuming that the NRC is authorized to refuse to issue such an amendment if the amendment request otherwise satisfied all of the NRC's pertinent health and safety requirements,[6/] such a refusal still would not lead to Shoreham's operation, since neither LILCO (which would remain bound by the Settlement Agreement not to operate the plant) nor the Long Island Power Authority (which is prohibited

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[6/] This is by no means clear. The NRC's decommissioning regulation § 50.82, states, in relevant part, that

> [i]f the decommissioning plan demonstrates that the decommissioning will be performed in accordance with the regulations in this chapter and will not be inimical to the common defense and security or to the health and safety of the public . . . , the Commission will approve the plan subject to such conditions and limitations as it deems appropriate and necessary and issue an order authorizing the decommissioning.

10 C.F.R. § 50.82(e)(emphasis added). The use of the mandatory language "will approve" suggests that the NRC is not authorized to refuse to issue a decommissioning order should the licensee demonstrate that decommissioning will be conducted in a manner that will protect the public health and safety.

by law from operating a nuclear facility) could resurrect the plan.

Thus, the true effect of a decision by the NRC not to issue an amendment authorizing decommissioning would not be to force Shoreham's operation, but to place the irradiated facility in a state of limbo, neither operating nor decontaminated. This would not vindicate NEPA. To the contrary, adoption by the NRC of the "no action" alternative at Shoreham would be an abdication on the agency's part of its paramount responsibility under the Atomic Energy Act to protect the public from radiological health and safety threats.[1] It would give rise to the incongruous result of constraining the NRC to pursue the very course of action that it forbids a licensee to undertake; i.e., to allow a closed plant to languish indefinitely, without plans for ultimate disposition, decontamination, and license termination. Cf. 53 Fed. Reg. 24,019 (June 27, 1988)(stating that "[i]nadequate or untimely consideration of decommissioning . . . could result in significant adverse health, safety and environmental impacts").

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[1] Cf. Final Environmental Impact Statement on Decommissioning of Nuclear Facilities, NUREG-0586 (May 1988) at 2-5 ("independent of the type of facility and its level of contamination, No Action, implying that a licensee would simply abandon or leave a facility after ceasing operations, is not a viable decommissioning alternative.")

2. Given that Petitioners' View of NEPA Is Flawed, their other NEPA-based Arguments Are not Valid

Given the fundamental flaws in Petitioners' view of the scope and effect of NEPA, it is clear that their subsidiary NEPA-based arguments have no merit as well.

First, Petitioners assert that the Commission has violated its own so-called NEPA "scoping" regulations. Joint Petition at 13. Such a claim makes no sense if NEPA does not apply to LILCO's private decision to abandon Shoreham. Moreover, Petitioners provide no authority for their claim that the scoping process is the "sole means" for determining the scope of a NEPA-required environmental review. Id. To the contrary, it is entirely appropriate for the Commission to provide dispositive guidance at this time on the crucial threshold issue of NEPA's applicability to Shoreham's decommissioning. See United States Energy Research and Development Administration (Clinch River Breeder Reactor Plant), CLI-76-13, NRCI-76/8 67, 75-76 (1976)("in the interest of orderly resolution of disputes, there is every reason why the Commission should be empowered to step into a proceeding and provide guidance on important issues of law or policy").

Second, Petitioners contend that, as a consequence of certain authority granted the Commission and DOE under various provisions of the Atomic Energy Act and the Federal Power Act to order the operation of a nuclear facility in extraordinary circumstances, the Commission "may not conclude that LILCO is legally entitled . . . to make . . . an irrevocable decision not

to operate Shoreham" or find that "alternatives to the decision not to operate the plant are beyond the scope" of the NRC's NEPA review. Joint Petition at 17. But the Commission's (or any other federal agency's) averred authority to mandate plant operation in prescribed emergency circumstances -- assuming that such authority in fact exists[8/] -- does not work to transform

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8/ Petitioners incorrectly cite two statutes -- the Atomic Energy Act and the Federal Power Act -- for the proposition that the federal government might take over and operate Shoreham despite LILCO's closure of it, and thus for the idea that evaluation of long-term operation is a reasonable alternative under NEPA or required by the Administrative Procedure Act (APA). Neither the Atomic Energy Act nor the Federal Power Act avails.

The Atomic Energy Act provides two paths to operation of a nuclear power plant at the instance of the federal government: §§ 108 and 186(c)/188 (42 U.S.C. §§ 2138, 2236(c)/2238 respectively). Both paths are narrow and unavailable here. The first, § 108, requires a prior declaration of "war or national emergency" by the Congress. The second, §§ 186(c)/188, is predicated on prior revocation of a license by the Commission for cause and on a finding, after consultation with the "appropriate regulatory agency, state or federal, having jurisdiction," that the public convenience and necessity require operation of the facility. Both constructs also require payment of just compensation.

Obviously, the factual preconditions to exercise of these provisions have not been satisfied. It is looking up the wrong end of the telescope to insist, as do Petitioners (Motion at 16-18), that it violates the APA for the Commission to recognize in its actions that Congress has not declared war, that the New York Public Service Commission has not opined that operation of Shoreham is in the public interest, and that no one has proposed any measure of compensation, much less the just compensation required, for a federal taking of the plant to operate it.

In any event, operation of the plant under <u>any</u> of these theories could never be dedicated to the commercial purposes proposed by Petitioners, given the flat prohibition of § 44 of the Atomic Energy Act:

> Nothing in [the Atomic Energy Act] shall be construed to authorize the Commission to engage in the sale or distribution of energy for commercial use except such energy as may be incident to the operation of research and

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LILCO's otherwise private decision not to operate Shoreham into "federal action" subject to NEPA review. Cf. Defenders of Wildlife v. Andrus, 627 F.2d 1238, 1244 (D.C. Cir. 1980)("there

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development facilities of the Commission, or production facilities of the Commission.

42 U.S.C. § 2064.

Petitioners also cite Federal Power Act § 202(c), 16 U.S.C. § 824a(c), as empowering the Secretary of Energy to order operation of Shoreham in a war or other emergency. The short answers to this argument are that the clear focus and historic application of this section are directed toward interconnection and provision of readily available generation, and that the section itself contemplates only temporary orders for the duration of the emergency. See Richmond Power & Light of City of Richmond, Ind. v. FERC, 574 F.2d 610, 614 (D.C. Cir. 1978), in which the Court of Appeals upheld the Federal Energy Regulatory Commission's (FERC's) refusal to order certain emergency remedial measures under § 202(c) in the wake of the continuing oil shortage following the 1973 oil embargo:

> [Petitioner's] second contention, that dependence on imported oil leaves this country with a continuing emergency, compels no different result. We are fully mindful, of course, that current national policy is to discourage reliance on foreign oil, but we cannot fault [FERC] for reading § 202(c) as devoid of a solution. That section speaks of "temporary" emergencies, epitomized by wartime disturbances, and is aimed at situations in which demand for electricity exceeds supply and not at those in which supply is adequate but a means of fueling its production is in disfavor. [footnotes omitted]

Section 202 was not intended, and is not suited, as a vehicle for Petitioners' goal: the long-term reactivation and operation of a closed plant, especially for reasons of fuel diversity rather than imminent capacity shortage.

is [no] 'federal action' where an agency has done nothing more than fail to prevent the other party's action from occurring").

B. Petitioners' Non-NEPA Based Arguments Are Incorrect

In addition to their NEPA-based arguments, Petitioners advance a number of other claims predicated on various different theories. None of these additional arguments is correct.

1. The NRC Will Make the "Common Defense and Security" Finding before Shoreham's Decommissioning Is Authorized

First, Petitioners assert that CLI-90-08 should be vacated because there is an "absence of any discussion, much less determinations on the record," that Shoreham's decommissioning would not be "inimical to [the] common defense and security of the United States." Joint Petition at 20, 21. Petitioners are premature. A license amendment authorizing Shoreham's decommissioning (or even converting LILCO's operating license into a "possession-only" license) has not yet been issued. When such amendments are considered and acted upon, the NRC will make the required findings about the common defense and security. 10 C.F.R. §§ 50.57(a), 50.92.

More fundamentally, in suggesting that the "proposed decommissioning of Shoreham at the beginning of its useful life" might be found to be "inimical" to the "common defense and security," Petitioners proceed under a false premise that creaks with faulty logic. While, indisputably, a determination that the "common defense and security" will not be threatened is a precondition

for plant operation under the Atomic Energy Act, it certainly does not follow that considerations regarding the "common defense and security" can themselves compel operation of a plant.

2. CLI-90-08 Does Not Deny Petitioners their Procedural Rights under § 2.714

Petitioners also assert that CLI-90-08 denies them their "procedural rights" under 10 C.F.R. § 2.714. Joint Petition at 24. According to Petitioners, only after the Commission has afforded them an opportunity to amend their pending petitions pursuant to § 2.714(a)(3) and to submit contentions pursuant to § 2.714(b)(1) may the Commission or Licensing Board rule on any aspect of Petitioners' requests for hearing. Joint Petition at 23-24.

Petitioners misstate NRC procedure. It is simply not true that, under § 2.714, the Commission or Licensing Board must wait until a petitioner has submitted contentions before ruling on whether the petitioner has standing to intervene.[2/]

[2/] The requirement that a petitioner present at least one suitable contention before being admitted as party is an additional hurdle the petitioner must clear after demonstrating his standing to intervene. Should a petitioner fail to show on the face of his petition the requisite "interest" necessary to establish standing, the petition can be denied immediately and the Commission or the Licensing Board need not await the filing of contentions. See, e.g., Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-125, 6 AEC 371, 372 (1973); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), LBP-87-7, 25 NRC 116, 119 (1987).

3. The Commission Need Not Defer to CEQ's Interpretation

Next, the Joint Petition asserts that the Commission "must defer" to the interpretation of NEPA offered by the Chairman of the CEQ in an October 9, 1990 letter to the Chairman of the NRC, in which (according to Petitioners) the CEQ Chairman

> implicitly called for the consideration of the alternative of resumed operation or at least of the "no action" alternative of denying the application for decommissioning.

Joint Petition at 14.

Neither the CEQ Chairman's October 9 letter nor the supplemental comments filed on November 9 (see part IV.B below) provides any reason for the Commission to reconsider CLI-90-08. In the first place, the NRC is not required to "defer" to CEQ's view of the situation at Shoreham. When it promulgated its final NEPA-implementing regulations, the Commission specifically noted that, "as a matter of law, the NRC as an independent regulatory agency" can be

> bound by CEQ's NEPA regulations only insofar as those regulations are procedural or ministerial in nature. NRC is not bound by those portions of CEQ's NEPA regulations which have a substantive impact on the way in which the Commission performs its regulatory functions.

49 Fed. Reg. 9352 (March 12, 1984). Furthermore, CEQ is not entitled to deference in this situation because its call for an EIS considering the alternative of "resumed operation" of Shoreham is predicated in large part on its apparent misunderstanding of the NRC's authority under the Atomic Energy Act to mandate facility operation. See, e.g., CLI-90-08, slip op. at 8, 9 &

n.4. CEQ has no particular expertise -- and is thus due no deference -- in matters arising under the Atomic Energy Act.

4. CLI-90-08 Is Premised on a Correct Interpretation of NEPA, Not on any "Erroneous" Factual Findings

Finally, Petitioners protest what they view as the Commission's improper reliance on "erroneous" findings of fact in issuing CLI-90-08. Joint Petition at 25. This argument fails on at least two grounds.

First, Petitioners have misread CLI-90-08 in suggesting that the Commission has predicated its primary holding regarding the nature of the "federal action" at Shoreham on any particular factual findings. In CLI-90-08, the Commission addressed and resolved purely legal issues regarding the scope and effect of NEPA on LILCO's determination to abandon the plant. At best, the observations made by the Commission regarding the factual situation at Shoreham are important only for its secondary ruling (made in the alternative) that, if "resumed operation" were an alternative to decommissioning, such an option need not be assessed under the NEPA "rule of reason."

Second, Petitioners cite no authority to suggest that the Commission is precluded from taking consideration of such matters as New York State law, binding contractual agreements between LILCO and New York State, and representations made by LILCO regarding its irrevocable decision never to operate Shoreham. Nor do Petitioners refute the validity of those factual findings.

IV. The DOE and CEQ "Comments" Do Not Demonstrate that the Commission Has Erred in its Interpretation of NEPA

While neither DOE nor CEQ in their November 9 "Comments" expressly request the Commission to reconsider and vacate CLI-90-08, each suggest that the Commission has erred in its interpretation of NEPA. In general, each argue that a full EIS must be prepared before the NRC may approve any action that may be directed towards Shoreham's decommissioning, and that such an environmental review must include the alternative of resumed operation.

In general, neither set of "Comments" adds much to the NEPA-based arguments advanced in the Joint Petition, and the analyses offered by DOE and CEQ are similarly unpersuasive. To the extent the arguments proffered in the "Comments" overlap with those already advanced by Petitioners, LILCO's position on those points is not repeated at length here. As appropriate, LILCO responds below to certain specific points raised by DOE and CEQ.

A. DOE Comments

While DOE provides a lengthy analysis of what it views as relevant NEPA case law, DOE, like Petitioners, has nonetheless failed to confront the crucial issue on which the Commission based its primary holding in CLI-90-08: that LILCO's decision to abandon Shoreham is not "federal action," and, thus, any environmental review of the reasonable alternatives to the actual federal action -- plant decommissioning -- does not extend to its opposite; i.e., operating the plant. Indeed, the agency's No-

vember 9 paper suggests that DOE has misunderstood the fundamental rationale underlying the Commission's holding, with DOE contending that the "Commission believes that . . . its NEPA responsibilities extend no further than the narrow question of how the mechanics of a decommissioning are carried out." DOE Comments at 13, citing CLI-90-08, slip op. at 9.

This distorts the Commission's holding in CLI-90-08. As that decision makes clear, the Commission is cognizant of the full scope of its responsibilities under NEPA. But the Commission correctly recognizes, as DOE does not, that the "alternative of 'resumed operation' -- or other methods of generating electricity -- are alternatives to the decision not to operate Shoreham and thus are beyond Commission consideration." CLI-90-08, slip op. at 8. The Commission has properly determined that the "mechanics of decommissioning" is the only matter subject to its NEPA review, because the NRC's approval of those "mechanics" is the only "federal action" actually present here.

Elsewhere, DOE suggests, as have Petitioners, that "resumed operation" is an appropriate and necessary alternative to be considered under NEPA because "there are currently in place Federal emergency authorities . . . which could come into play and influence a decision to operate Shoreham." DOE Comments at 19-20. Among those "authorities," DOE contends, is the power of the Secretary of Energy under the Federal Power Act to "order the operation of an electrical generating facility whenever the Secretary determines that there is an energy emergency." Id. at

20. As has been explained, even assuming that DOE's view of the scope of its power under the Federal Power Act were correct (and, as explained in note 8, above, that assumption is open to serious question as applied to Shoreham), the existence of such emergency authority does not transform LILCO's decision to close the facility from a private one into "federal action," triggering NEPA.

B. CEQ Comments

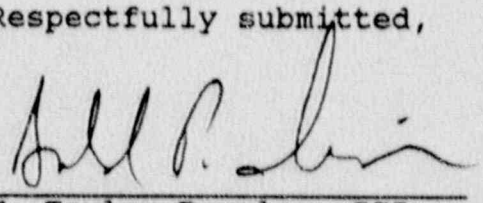
Like DOE, CEQ fails to deal with the key point that LILCO's determination to abandon Shoreham is not "federal action" and thus not subject to NEPA. Further, while the CEQ Comments address the question of what "alternatives" must be considered in a NEPA-mandated environmental review, they ignore completely the precedents establishing that a federal agency undertaking such a review need not address options that are not related to the goal of the proposed project itself. At one point, CEQ does appear to recognize that the "proposed action" here is the "decommissioning of the Shoreham facility" itself. CEQ Comments at 5. But CEQ then proceeds to argue, incorrectly, that the "environmental consequences" of that action include "increased reliance on other, perhaps less environmentally desirable, sources of energy." Id. at 5-6. The fact is, the primary "environmental consequence" of decommissioning the closed Shoreham plant will be the decontamination of the facility and, ultimately, the release of the plant site for unrestricted use. See, e.g., 10 C.F.R. § 50.82(f).

Any increased use of alternative power sources, however, is plainly not a consequence of Shoreham's decommissioning, but of the underlying decision by LILCO -- a private entity -- to abandon the plant. That decision is not "federal action," and thus, as noted, is not subject to NEPA review at all.

V. Conclusion

For the reasons given above, the Joint Petition should be denied. In addition, the suggestion by DOE and CEQ that the NRC should prepare an EIS on Shoreham's decommissioning, to include consideration of the "alternative" of resumed plant operation should be rejected.

Respectfully submitted,



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DATED: November 13, 1990

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

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

CERTIFICATE OF SERVICE

I hereby certify that copies of LILCO'S OPPOSITION TO JOINT PETITION FOR RECONSIDERATION OF CLI-90-08 AND RESPONSE TO COMMENTS ON SHOREHAM'S DECOMMISSIONING BY DEPARTMENT OF ENERGY AND COUNCIL ON ENVIRONMENTAL QUALITY 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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