10982
10983

50-322 & 50-322-OLA

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DOCKETED
USNRC

BEFORE THE COMMISSION

'90 OCT 30 A10:41

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

In the Matter of Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1)	Docket No. 50-322

JOINT PETITION FOR RECONSIDERATION OF THE COMMISSION'S DECISION CLI-90-08 BY SHOREHAM-WADING RIVER CENTRAL SCHOOL DISTRICT AND SCIENTISTS AND ENGINEERS FOR SECURE ENERGY, INC.

Pursuant to Section 2.771(a) of the Commission's rules and regulations, Petitioners Shoreham-Wading River Central School District ("School District" or "Petitioner") and Scientists and Engineers for Secure Energy, Inc. ("SE_2" or "Petitioner") hereby petition the Commission to reconsider and vacate CLI-90-08 (filed and served October 17, 1990) insofar as that order precludes the consideration of the alternative of renewed operation of the Shoreham Nuclear Power Station ("Shoreham") in the context of the proposal to decommission that plant for the reasons given below.

SUMMARY OF ARGUMENT

The U.S. Nuclear Regulatory Commission ("Commission" or "NRC") should reconsider and vacate its Order of October 17, 1990, CLI-90-08 ("Order"), in the above-captioned matter to the

9011090080 901029
PDR ADOCK 05000322
G PDR

DS03

extent requested because the Order is premised on (1) a misconception of the scope of the alternatives which the National Environmental Policy Act ("NEPA") requires the Commission to consider when presented with a proposal to decommission a nuclear power reactor with a full power license at the beginning of its useful life, (2) a violation of the NRC procedural requirements for the scoping of an Environmental Impact Statement ("EIS"), (3) a violation of the deference due the Council of Environmental Quality's ("CEQ") interpretation of NEPA, (4) a violation of the requirements of the Atomic Energy Act of 1954 ("AEA") and the Administrative Procedure Act ("APA") for determinations pursuant to Sections 108, 186(c) and 188 of the AEA, (5) an abdication of the NRC's responsibility under the AEA to assure that its licensing decisions are consistent with making the maximum contribution to the national welfare, (6) an abdication of the NRC's obligation to assure that its licensing decisions are consistent with protection of the environment, (7) a violation of the regulations governing the admissability of contentions in NRC proceedings, and (8) other conclusions of fact and/or law which are both in error and made in violation of the requirements of the AEA and APA.

I. NEPA REQUIRES THE CONSIDERATION OF RESUMED OPERATION AS AN ALTERNATIVE TO DECOMMISSIONING.

In enacting NEPA, Congress directed that:

> to the fullest extent possible . . . all agencies of the Federal government shall . . . include in every recommendation or report on proposals for . . . major federal actions significantly effecting the quality of the human environment, a detailed statement by the responsible official on . . . alternatives to the proposed actions . . . [and shall] study, develop and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources; . . . .

42 U.S.C. § 4332(2)(C)(iii) & (E).

In 1977, the President issued Executive Order No. 11991, 3 C.F.R. 123 (1977 Comp.), directing the Council on Environmental Quality ("CEQ") to "[i]ssue regulations to federal agencies for the implementation of the procedural provisions of" NEPA and further directing the federal agencies to "comply with the regulations issued the by Council except where such compliance would be inconsistent with statutory requirements." The CEQ issued its NEPA regulations in 1978. 43 Fed. Reg. 55978 (November 29, 1978). With respect to the alternatives which must be considered, the regulations state:

> This section is the heart of the environmental impact statement. Based on the information and analysis presented in the sections on the Affected Environment (§ 1502.15) and the Environmental Consequences

> (§ 1502.16), it should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decision maker and public. In this section, agency shall:
>
> (a) rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly discuss the reasons for they're having been eliminated.
>
> (b) devote substantial treatment to each alternative considered in detail and including the proposed action so that reviewers may evaluate their comparative merits.
>
> (c) include reasonable alternatives not within the jurisdiction of the lead agency.
>
> (d) include the alternative of no action.
>
> (e) identify the agency's preferred alternative or alternatives, if one or more exist, in the draft statement and identify such alternative in the final statement unless another law prohibits the expression of such a preference.
>
> (f) include appropriate mitigation measures not already included in the proposed action or alternatives.

40 C.F.R. § 1502.14 (1989) (emphasis added). During the comment period on these regulations, the CEQ held one-day meetings with federal, state and local officials in the ten Environmental Protection Agency regional offices and, as a result of requests from the agencies and other participants in the rulemaking process, compiled a list of forty of the most important or most frequently asked questions and CEQ's answers to them concerning

the meaning of the CEQ regulations. Subsequently, the CEQ published these interpretations in the Rules and Regulations section of the Federal Register so they would be "generally available to concerned agencies and private individuals." 46 Fed. Reg. 18026 (March 23, 1981).

The CEQ's regulations and the "40 Questions" Interpretative Rule are important because the Supreme Court has repeatedly found such CEQ regulations to be "entitled to substantial deference." E.g., Robertson v. Methow Valley Citizens Council, __ U.S. ___, 109 S.Ct. 1835, 1848-49, (1989).

Against this background, the Commission must recognize and accept that, as the CEQ's determination that whether an alternative is "outside the capability of the applicant" is not the relevant question[1/] but instead "the emphasis is on what is 'reasonable' rather than on whether the proponent or applicant likes or is itself capable of carrying out a particular alternative." 46 Fed. Reg. at 18027 col. 1. The CEQ interpretative regulations states: "Reasonable alternatives include those that are practicable or feasible from the technical and economic standpoint and using common sense, rather than

---

1/ In its NEPA review of applications for the construction and operation of nuclear power plants, the Commission has also recognized its responsibility to consider alternatives beyond its jurisdiction. For example, the Commission requires the consideration of "site-plant combinations" including nuclear, fossil-fueled, hydro-electric and geothermal energy resources, as well as various transmission line issues. USNRC, Regulatory Guide 4.2, "Preparation of Environmental Reports for Nuclear Power Plants", Chapter 9 (Rev. 2, July 1976).

simply desirable from the standpoint of the applicant." Id. (emphasis in original).

And an alternative "that is outside the legal jurisdiction of the lead agency must be still analyzed in the EIS if it is reasonable. A potential conflict with local or federal law does not necessarily render an alternative unreasonable, although such conflicts must be considered. § 1506.2(d)" Id. The CEQ states that even alternatives "outside the scope of what Congress has approved or funded must still be evaluated in the EIS if they are reasonable, because the EIS may serve as the basis for modifying the Congressional approval or funding in light of NEPA's goals and policies. § 1500.1(a)." Id.

As to the "no action" alternative, CEQ mandates that the agency consider the alternative that "the proposed activity would not take place, and the resulting environmental effects from taking no actions would be compared with the effects of permitting the proposed activity or alternative activity to go forward." 46 Fed. Reg. at 18027, Col. 2. In fact, the CEQ states that the "regulations require the analysis of a no action alternative even if the agency is under a court order or legislative command to act." Id.

Against this background, the CEQ reviewed and approved the NRC's final rule implementing the CEQ regulations. 49 Fed. Reg. 9352, 9380 col. 3 (March 12, 1984). In its Statement of Consideration adopting those environmental protection regulations, the Commission recognized that:

> The primary mission of the Nuclear Regulatory Commission is to regulate civilian nuclear energy activities to ensure that they are conducted in a manner which will protect the public from a standpoint of radiological health and safety, maintain national security, comply with the anti-trust laws and, since the passage of the National Environmental Policy Act of 1969, protect the environment.

49 Fed. Reg. at 9353 col 2 (emphasis added). With respect to the scope of alternatives to be considered, the NRC Statement of Consideration says that "the available alternatives are to grant the application, grant the application subject to certain conditions, or deny the application, either with or without prejudice." Id (emphasis added). In particular, the Statement of Consideration provides that "[i]n the usual case, these alternatives include the alternative of no action (denial of the application) and reasonable alternatives outside the jurisdiction of the NRC." 49 Fed. Reg. at 9353 col. 2-3 (emphasis added).

In the framework of these CEQ and NRC regulations, the Commission's ruling that NEPA does "not require the NRC to consider 'resumed operation' as an alternative" in an EIS on "the proposed decommissioning of the Shoreham facility" is in error. Order at 1. The statements in the Order that the EIS need consider only "reasonable alternatives" (Order at 5; see 40 C.F.R. § 1502.14 (1989)) and that there is no need to consider alternatives of "speculative feasibility" (Order at 7) are

correct but do not excuse the NRC from addressing the alternative of resumed operation.[2/]

The School District and SE_2 agree with the Order that NRDC v. Morton, 458 F.2d 827 (D.C. Cir. 1972), contains relevant guidance on the scope of the alternatives required to be considered under NEPA. However, the Commission errs in relying on dicta in that decision to the effect that Congress did not intend "an agency to devote itself to extended discussion of the environmental impact of alternatives so remote from reality as to depend on, say, [an overhaul of basic legislation, such as] the repeal of the Antitrust laws." 458 F.2d at 837. The holding of that decision was that "reasonably available" alternatives are not limited "to measures the agency or official can adopt", but that the EIS at issue in that case was inadequate because it did not consider the alternative of eliminating or reducing oil import quotas which are actions "within the purview of both

---

2/ Insofar as the "range of alternatives need only be 'reasonably related' to the scope and goals of the proposed action" (Order at 6), the Order's definition of the proposed action as "decommissioning of Shoreham" is an overly-crabbed definition of the "proposed action". Rather the proposed action consists of all elements of the so-called "Settlement Agreement" including the replacement of the power otherwise to be generated from Shoreham by the construction of new fossil fuel facilities. When the proposed action is so defined, it is easy to see that resumed operation of Shoreham is an alternative to the construction such new fossil fuel facilities, and it is also easy to see (as the Asset Transfer Agreement termination clause recognizes) that approval of the proposal to decommission Shoreham, in this case is a "legal condition precedent to accomplishment of the entire project, including its non-federal elements." Order at 8; also see, Greene County Planning Board v. F.P.C., 455 F.2d 412, 424-25 (2nd Cir. 1972), cert. denied, 409 U.S. 849 (1972).

Congress and President, to whom the impact statement goes." 458 F.2d at 834-35.

Conceding that the Commission's exercise of authority pursuant to § 108 of the AEA requires a prior declaration by Congress of a national emergency, consideration of the cost and benefits of the alternative of resumed operation is required in this case, because "such action is within the purview of . . . Congress [and the] impact statement is not only for the exposition of the thinking of the agency, but also for the guidance of these ultimate decision-makers, and must provide them with the environmental effects of both the proposal and the alternatives, for their consideration along with the various other elements of the public interest." 458 F.2d at 835. That is, the EIS (including the alternative of resumed operation and the costs and benefits of all alternatives) could persuade Congress of the need to take a single discrete action (a declaration of national emergency or other legislation to preserve Shoreham) rather than requiring Congress to address the "overhaul of basic legislation", such as the repeal of all the Antitrust laws.[3]

3/ Insofar as, the Commission's reliance on the dicta in NRDC v. Morton as to the lack of a need to consider alternatives requiring "an overhaul of basic legislation" relates to sections 1020-h(9) & 1020-t of the Long Island Power Authority Act, Petitioners note that those sections are not currently relevant because LIPA is not the licensee, or a licensee, of the Shoreham facility. And even if LIPA were a licensee, a proper EIS would also inform the New York State Legislature of the need to change those two discrete sections, not requiring "an overhaul of basic

(continued...)

Insofar as the Commission's Order relies on its lack of authority to "overturn" LILCO's alleged determination that it will not operate Shoreham as a nuclear facility[4] (e.g., Order at 10), such a lack of authority does not limit the scope of alternatives to be considered in an EIS. The Court in NRDC v. Morton expressly rejected this reasoning: "While we agree . . . that the alternatives required for discussion are those reasonably available, we do not agree that this requires a limitation to measures the agency or official can adopt." 458 F.2d at 834. The CEQ regulations also explicitly require the consideration of "reasonable alternatives not without jurisdiction of the lead agency." 40 C.F.R. § 1502.14. And in adopting its environmental protection regulations, the Commission explicitly recognized the obligation to consider "reasonable alternatives outside the jurisdiction of the NRC." 49 Fed. Reg. at 9353 col. 3.

In this context the concept of "reasonable alternatives" is contrasted with "remote and speculative"

3/ (...continued)
legislation." The Commission's statement that "once LIPA gains control of Shoreham, it would require reversal of position by both the Governor and the legislature of the State of New York to allow Shoreham to operate" has a speculative premise (that the NRC will exercise its discretion under the AEA and NEPA to allow a transfer of the Shoreham license to LIPA) and, even assuming the premise, is precisely the sort of action which the Morton court found necessary and appropriate for consideration in an EIS.

4/ Petitioners respectfully disagree with the Commission's determination that it lacks authority. See Argument IV below.

alternatives. The question of whether an alternative is reasonable or remote and speculative turns on whether the alternative is "practicable or feasible from the technical and economic standpoint and using common sense, rather than simply desirable from the standpoint of the applicant." 46 Fed. Reg. at 18027 col. 1. Petitioners respectfully suggest that resumed operation of the Shoreham plant is both practicable and feasible from the "technical and economic standpoint and using common sense." The Shoreham plant is a fully licensed facility, built at the cost of billions of dollars and capable of producing 805 MWe of energy. Thus, since the investment has already been made, use of the facility is both technically and economically practicable and feasible. Destroying (decommissioning) such a facility is contrary to common sense.

For all of these reasons, Petitioners respectfully suggest that NEPA requires the consideration of the alternatives to decommissioning of the resumed operation of Shoreham.

II. THE ORDER VIOLATES THE SCOPING REGULATIONS UNDER NEPA.

The NRC has explicitly incorporated the CEQ definition of the "scope" of an EIS into its own regulations by reference. 10 C.F.R. § 51.14(b) incorporating 40 C.F.R. § 1508.25. The CEQ definition is: "Scope consist of the range of actions, alternatives, and impacts to be considered in environmental impact statement." 40 C.F.R. § 1508.25. With respect to the range alternatives, the CEQ states that "agencies shall consider"

three types of alternatives, namely the "no action alternative", "other reasonable courses of action", and "mitigation measures (not in the proposed action)." Id.

The CEQ regulations further define in mandatory fashion ("shall") the scoping process for determining the scope of the issues to be addressed and for identifying the significant issues related to the proposed action. 40 C.F.R. § 1501.7. As part of that process, the agency is required, among other things, to "[i]nvite the participation of affected federal, state, and local agencies, any affected Indian tribe, the proponent of the action, and other interested persons (including those who might be in accord with the action on environmental grounds) . . . ." 40 C.F.R. § 1501.7(a)(1). Those CEQ regulations also allow for the agency to adopt procedures combining its environmental assessment process with its scoping process and to hold an "early scoping meeting or meetings" in aid of the process. 40 C.F.R. § 1501.7(b)(3)&(4). In implementing these CEQ regulations, the NRC has required the publication of a notice of intent in the Federal Register as the initial step. 10 C.F.R. §§ 51.26(a) & 51.116. The NRC regulations further require ("shall") the appropriate NRC Staff Director to invite the persons specified in the CEQ regulations to participate in the scoping process, specifying that persons include "[a]ny person who has petitioned for leave to intervene in the proceeding." 10 C.F.R. § 51.28(a)(2). And the NRC's regulations establish that the scoping process is the sole means of determining "the scope of the statement." 10

C.F.R. § 51.29(a)(2). It is only "[a]t the conclusion of the scoping process" that the scope of the EIS is determined." 10 C.F.R. § 51.29(b).

Since the CEQ regulations and NRC's implementing regulations both determine that this "scoping process" is the sole means for determining the scope of an EIS, including the reasonable alternatives to be considered therein, and since that scoping process has not yet been initiated in this case, much less concluded, the Commission's Order precluding the consideration of the alternative of resumed operation has been issued in violation of the Commission's own NEPA regulations and should be vacated.

III. THE COMMISSION MUST DEFER TO THE CEQ INTERPRETATION OF NEPA'S REQUIREMENTS.

As previously mentioned, the President has directed by Executive Order that the CEQ issue regulations to federal agencies for the implementation of procedural provisions of NEPA and has ordered those agencies to "comply with the regulations issued by the Council, except where such compliance would be inconsistent with statutory requirements." Executive Order No. 11991, 42 Fed. Reg. 26967 (May 24, 1977). And the Supreme Court has repeatedly and consistently found that the CEQ directives are due "substantial deference." E.g., Robertson v. Methow Valley Citizens Council, ___ U.S. at ___, 109 S.Ct. at 1849.

With respect to this matter, the Chairman of the CEQ wrote to the Chairman of the NRC (with copies to the other Commissioners) on October 9, 1990, stating that preparation of an EIS addressing "all of the actions the agency will be called upon to take with respect to the Shoreham Nuclear Power Station" is "mandated by the National Environmental Policy Act (NEPA)."[5/] That letter 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.

In its Order, the Commission said that the CEQ letter "misperceives our authority under NEPA" and argues that "[b]ecause we have no authority to mandate operation of the facility, we have no authority over the decision <u>whether</u> to decommission the facility." <u>Order</u> at 9 n.4. This argument is falsely premised upon the conclusions that the NRC has "no authority to mandate operation of" Shoreham, that the absence of such authority to mandate operation negates the Commission's authority to deny an application to decommission the facility,

---

5/ Although the CEQ letter of October 9, 1990 refers to "application for a possession-only license [as] just the first step in a process perhaps culminating in decommissioning of the facility," the NRC itself has said that decommissioning activities "are initiated when a licensee decides to terminate license activities." General Requirements for Decommissioning Nuclear Facilities, 53 Fed. Reg. 24018, 24019 col.1 (June 27, 1988). Thus, the proposal for the decommissioning of the Shoreham Nuclear Power Station was initiated not later than June 30, 1989, when LILCO announced its intention not to operate Shoreham again, and explained the proposal to decommission that plant pursuant to the Settlement Agreement in a presentation to Regional I of the NRC.

and that the absence of authority to mandate operation, or to deny an application to decommission, eliminates the consideration of the alternative of operation from an EIS on decommissioning. Petitioners respectfully submit that all three premises are wrong: (1) the NRC in the same order, concedes that it has authority to mandate operation (Order at 8); (2) in issuing its Environmental Protection regulations, the Commission recognized that the alternatives to be considered in an EIS include "the alternative of no action (denial of the application)" 49 Fed. Reg. at 9353 col. 2-3; and (3) even if the Commission had neither the authority to mandate operation nor the authority to deny an application, the Commission has recognized that an EIS must also consider "reasonable alternatives outside the jurisdiction of the NRC." 49 Fed. Reg. at 9353 col.3. In this case, authority to mandate the resumption of operation of Shoreham also exists outside the jurisdiction of the NRC. For example, the Secretary of Energy has the authority whenever he:

> determines that an emergency exists by reason of a sudden increase in the demand for electric energy, or a shortage of electric energy or of facilities for the generation . . . of electric energy, or of fuel . . . for generating facilities, or other causes, [the Secretary of Energy] shall have authority, either upon [his] own motion or upon complaint, with or without notice, hearing, or report, to require by order such temporary . . . generation, . . . of electric energy as in [his] judgment will best meet the emergency and serve the public interest.

16 U.S.C. 824a(c).

Thus, Petitioners respectfully suggest that CEQ has not misperceived the NRC's "authority under NEPA", but rather the NRC has misperceived its responsibilities under NEPA to consider reasonable alternatives. For these reasons the Commission's Order should be vacated and a new order issued requiring the consideration of all reasonable alternatives to the decommissioning of Shoreham, including its resumed operation.

IV. THE ORDER ERRS IN ITS DETERMINATIONS OF THE COMMISSION'S AUTHORITY PURSUANT TO AEA SECTIONS 108, 186(c) AND 188.

In the Order, the Commission initially determines that "except in highly unusual circumstances not present here (see §§ 108, 186(c), and 188 of the Atomic Energy Act), the NRC lacks authority to direct a licensee to operate a licensed facility." Order at 8. The Commission's assertion that the "highly unusual circumstances [are] not present here", violates both the AEA and the Administrative Procedure Act ("APA"), because the determination has been made prematurely and not on the basis of a record after a hearing. And, even if such a determination could be made by the Commission, other than on the record after a hearing, the fact that the "highly unusual circumstances [are] not present here" at this instant of time is irrelevant to the issue of whether those "highly unusual circumstances" may be present at the time the Commission is faced with a decision whether to allow the decommissioning of Shoreham.

And, in any event, having recognized that the Commission has some authority to direct a licensee to operate a license facility (although it neglected to mention its Section 186(a) authority which is discussed below), the Commission may not conclude that "LILCO is legally entitled under the Atomic Energy Act and our regulations to make . . . an irrevocable decision not to operate Shoreham" (Order at 8), or that "the decision whether to decommission a facility --is [not] a decision which requires NRC review and approval" (Order at 9), or that "the broadest NRC decision related to Shoreham decommissioning will be the approval of the decision of how that decommissioning will be accomplished" (Id.), or that "alternatives to the decision not to operate the plant are beyond the scope of our review and need not be considered under NEPA" (Order at 9-10), or that the Commission has "no authority over the decision whether to decommission the facility" (Order at 9 n.4), or that the Commission has "no authority to overturn this determination" to decommission Shoreham (Order at 10).[6]

6/ Even assuming arguendo that the Commission has no authority on the issue of whether a licensee will operate a plant, the Commission certainly has the authority to prohibit the dismantling of that same plant. The distinction between non-operation and dismantling must be recognized by the Commission in this situation where a $5.5 billion fully licensed facility is at stake. The Commission and the Staff seem determined to gloss over this distinction by referring to the proposal as "decommissioning" and failing to recognize that the decision not to operate does not inevitably and inextricably lead to dismantling.

Further, an examination of the Commission's authority under the AEA is instructive. Section 108 of the AEA gives the Commission authority to order the operation of any facility, licensed under § 103 (such as Shoreham) whenever the Commission "finds its necessary to the common defense and security" whenever "the Congress declares that a state of war or national emergency exist." 42 U.S.C. § 2138. While it is clear that such a declaration does not currently exist, the Court in NRDC v. Morton (relied on by the Commission in its Order) held that it was the function of an EIS to consider alternatives requiring such Congressional action, so that Congress could be informed of the costs and benefits of taking such actions. In addition to the possibility of such Congressional action as a result of consideration of a proper EIS addressing the costs and benefits of resumed operation of Shoreham, the possibility that Congress may make such a declaration in the near future, in view of the situation in the Middle East, cannot be described as unlikely. Many members of Congress have recently discussed the possible requirement for such a declaration in view of the imminence of hostilities in the Middle East. Prudence dictates that the Commission maintain the viability of the Shoreham plant at this time to preserve the possibility of an exercise of its AEA § 108 authority.

Additionally, the Commission's Order ignored the authority provided by AEA § 186(a) to revoke any license "because of conditions revealed by . . . any report, record, or

inspection or other means which would warrant the Commission to refuse to grant a license on a original application, or for failure to . . . operate a facility in accordance with the terms of the . . . license or the technical specifications . . . or for violation of, or failure to observe any of the terms and provisions of this Act, or of any regulation of the Commission." 42 U.S.C. § 2236(a). The record in this proceeding is replete with reports, records and other documents which would warrant the Commission to refuse to grant a license on the original application, namely LILCO's current representation that it will not operate the facility, and the record also evidences that LILCO is not currently operating the facility in accordance with the terms of the full power operating license or the technical specifications of that license. Thus, the premises for such a license revocation currently exist and AEA § 188 provides authority to the Commission after license revocation pursuant to § 186 and "after consultation with the appropriate regulatory agency, state or federal, having jurisdiction [to] order that possession be taken of and such facility be operated for such period of time as the public convenience and necessity . . . may, in the judgment of the Commission, require." Of course, any revocation of a license pursuant to § 186 is subject to the provisions of § 9(b) of the Administrative Procedure Act 42 U.S.C. § 2236(b). Unless the Commission makes a determination the "public health interest or safety requires otherwise", a license may be revoked only after prior written notice and the

"opportunity to demonstrate or achieve compliance with all lawful requirements" in a judicial proceeding pursuant to 5 U.S.C. §§ 556 & 557.

Since the determination of whether the circumstances justifying revocation are or are "not present here" requires a determination on the record after an adjudicatory hearing, the Commission's determination on the basis of mere representations by a party prior to a hearing are arbitrary, capricious and abuse of discretion otherwise not in accordance with law, in excess of statutory authority and limitations without observance of procedure required by law, and unsupported by substantial evidence in a case subject to 5 U.S.C. §§ 556 and 557. 5 U.S.C. § 706(2).

V. THE ORDER CONSTITUTES AN ABDICATION OF THE NRC'S RESPONSIBILITIES UNDER THE AEA.

As a prerequisite to the issuance of any full power reactor operating license, the Commission must make determinations that, among other things, the issuance of the license will not be "inimical to common defense and security of the United States." See 10 C.F.R. § 50.40(c). And the same standards apply to a Commission approval of a proposed license amendment. 10 C.F.R. § 50.92(a). This standard is further informed by the Act's purpose of providing for a program of government regulation of Atomic Energy "directed as to make the

maximum contribution to the common defense and security and the national welfare." 42 U.S.C. § 2013(c).

The absence of any discussion, much less determinations on the record of how the proposed decommissioning of Shoreham at the beginning of its useful life would be consonant with those statutory standards constitutes, among other things, an arbitrary and capricious decision, and an abuse of discretion without observance of procedure required by law, and the decision is unsupported by substantial evidence on the record. See 5 U.S.C. § 706(2).

VI. THE ORDER ABDICATES THE NRC'S OBLIGATION UNDER NEPA TO ASSURE THAT ITS LICENSING DECISIONS ARE CONSISTENT WITH THE PROTECTION OF THE ENVIRONMENT.

As previously noted, the Commission has acknowledged that its "primary mission . . . is to regulate civilian nuclear energy activities to ensure they are conducted in a manner which will . . ., since the passage of the National Environmental Policy Act of 1969, protect the environment." 49 Fed. Reg. at 9353 col. 2. And in particular, the Commission's regulations require that an environmental report (submitted the by licensee in aid of the NRC's preparation of an EIS) include a "discussion of alternatives . . . sufficiently complete to aid the Commission in developing and exploring, pursuant to § 102(2)(E) of NEPA, 'appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning

alternative uses of available resources.'" E.g., 10 C.F.R. § 51.45(b)(3).

This consideration of alternatives is the "heart of the EIS" (46 Fed. Reg. at 18028 col. 2) and is essential to NEPA's federal policy "to use all practical means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans." 42 U.S.C. § 4322(a).

Since the Order lacks any consideration of how the decommissioning of Shoreham or the exclusion of consideration of the resumed operation of Shoreham would contribute to those policies, the Order runs afoul of 5 U.S.C. § 706(2).

VII. THE ORDER DENIES PETITIONERS THEIR SECTION 2.714 PROCEDURAL RIGHTS.

In each of the three proceedings which are the subject of the Order, both Petitioners filed requests for hearings and motions to intervene. The Commission's regulations set out the procedures for the consideration of such petitions to intervene and request for hearings at 10 C.F.R. § 2.714.

Among the procedural rights afforded the Petitioners pursuant to the Commission's regulation are the following:

> Any person who has filed a petition for leave to intervene or who has been admitted as a party to this section may amend his petition for leave to intervene. A petition may be amended without prior approval of the presiding officer at any time up to fifteen (15) days prior to the holding of the special prehearing conference pursuant to § 2.751(a), or where no special prehearing conference is held, fifteen (15) days prior to the holding of the first prehearing conference. . . . Such an amended petition for leave to intervene must satisfy the requirements of this paragraph (a) of this section pertaining to specificity.
>
> (b)(1) Not later than [the fifteen day period referred to above], the petitioner shall file a supplement to his or her petition to intervene that must include a list of the contentions which petitioners seek to have litigated in the hearing. A petitioner who fails to file a supplement that satisfies the requirements of paragraph (b)(2) of this section with respect to at least one contention will not be permitted to participate as a party. Additional time for filing the supplement may be granted based upon a balancing of the factors in paragraph (a)(1) of this section.
>
> * * * * *
>
> (2)(iii) . . . On issues arising under the National Environmental Policy Act, the petitioner shall filed contentions based on the applicant's environmental report. The petitioner can amend those contentions or file new contentions if there are data or conclusions in the NRC draft or final environmental impact statement, environmental assessment, or any supplements related thereto, that differs significantly from the data or conclusions in applicant's document.

10 C.F.R. § 2.714. Only after the procedural rights described above have been afforded, may the Commission, the presiding officer, or the Atomic Safety and Licensing Board designated to

rule on the petitions to intervene and/or requests for hearing make a decision as to whether the petitioner has standing and has identified one or more admissible contentions. See 10 C.F.R. § 2.714(d)-(h).

In the circumstances of this proceeding to date, the scoping process for the EIS has not even begun, much less been completed. There is no LILCO environmental report to allow Petitioners to amend their contentions nor file new contentions, neither a special prehearing conference or a first prehearing conference has been scheduled.

Under these circumstances, the Commission's Order limiting the scope of the alternatives to be considered in the proceeding is premature, denying the Petitioners their procedural rights, under the Commission's regulation to amend their petition. Further, the Order is not premised upon a record of evidence introduced in any prehearing conference, but merely upon some representations by LILCO and inferences therefrom by the Commission.

For these reasons, the NRC failed to observe procedure required by law, and the Order unsupported by substantial evidence in a case that must be reviewed on the record, both in violation of 5 U.S.C. § 706(2).

VIII. <u>THE ORDER IS ALSO PREMISED UPON OTHER ERRONEOUS FINDINGS OF FACT AND/OR CONCLUSIONS OF LAW MADE IN VIOLATION OF THE AEA AND APA.</u>

These proceedings for amendment to an operating license, where there is a request for hearing, as in this case, require a hearing on the record in accordance with 5 U.S.C. § 556 & 557. See 42 U.S.C. §§ 2231 & 2239.

However, in reaching a conclusion to exclude the alternative of resumed operation from NEPA consideration of the proposed decommissioning of Shoreham, the Commission has assumed a wide variety of findings of fact and conclusions of law in addition to those specified above, which Petitioners suggest are both erroneous and made in excess of the Commission's statutory authority and without observance of procedure required by law, since they are made in the absence of any evidence of record. See 5 U.S.C. § 706(2).

For example, the Commission's findings that "LILCO gives every appearance of abiding by the Settlement Agreement" and that the State of New York has not indicated an intention to abdicate the Settlement Agreement" are findings made without benefit of any evidence in the record and, even if true, are legally irrelevant. Order at 5. The continuing validity of the Settlement Agreement is dependent on various facts, including conditions subsequent relating to acts that must be taken by the New York State legislature, but which have not yet occurred, and the Asset Transfer Agreement (providing for the transfer of the

Shoreham plant from LILCO to LIPA) may be terminated by *either* LILCO *or* LIPA (a) if it has not been consummated on or before December 31, 1990, *or* (b) if any court of competent jurisdiction has issued a final decision not subject to appeal prohibiting the consummation of the transactions contemplated, *or* (c) by mutual consent of the Boards of Directors of LILCO and LIPA. Asset Transfer Agreement para. 9.1(a), (b), and (c).

Since one of the purposes of an EIS is to inform those decision-making parties (as well as others) whether they should exercise their unilateral or joint abilities to terminate the agreement, it is clear that the alternative of the terminating the agreement leading to the resumed operation of Shoreham should be considered in the EIS.

The Commission also determined that "[a]ll parties in [County of Suffolk v. N.R.C., Nos. 89-1184 and 89-1185 (D.C. Cir.)] agreed that the case will in all likelihood become moot with the transfer of Shoreham to LIPA." *Order* at 5. This is a particularly egregious violation of the Commission's responsibilities under both the AEA, APA and NEPA, since it puts the Commission in the position of having determined that the proposed transfer will in fact occur, although the approval of such a transfer is totally within the NRC's discretion and responsibility under AEA and NEPA, and that determination must be made on the record pursuant to the AEA and APA. There is no basis currently in the record to assume that such a transfer would occur. And if the Commission denied the license transfer,

and that denial became final after judicial review, that would provide an independent basis for LILCO or LIPA to terminate the Asset Transfer Agreement. *See* Asset Transfer Agreement at para. 9.1(c).

Likewise, the fact that an "intermediate" New York State Court has upheld the Settlement Agreement is hardly relevant to whether that agreement will ultimately be found to be legal. *Id*.

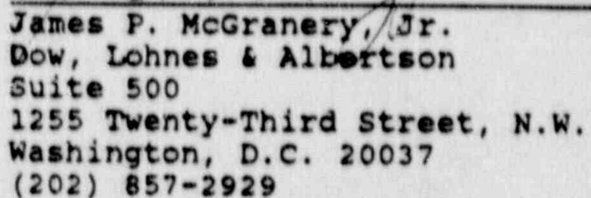
Finally, the fact that both LILCO and the State "appear to agree that Shoreham will never be operated as a nuclear facility" is irrelevant (if true); there exist a variety of possible decisions by the NRC and other agencies which could intervene to override that apparent agreement. *Order* at 10.

CONCLUSION

WHEREFORE, for all the reasons given above, Petitioners, School District and SE_2, respectfully urge the Commission to reconsider and vacate CLI-90-08 insofar as it prohibits the consideration of resumed operation in the alternatives section of the environmental review of the proposal to decommission the Shoreham Nuclear Power Station.

Respectfully submitted,

October 29, 1990



James P. McGranery, Jr.
Dow, Lohnes & Albertson
Suite 500
1255 Twenty-Third Street, N.W.
Washington, D.C. 20037
(202) 857-2929

Counsel for Petitioners
Shoreham-Wading River Central
School District and Scientists
& Engineers for Secure Energy, Inc.

CERTIFICATE OF SERVICE

Pursuant to the service requirements of 10 C.F.R. § 2.712(c)&(d) (1989), I hereby certify that one copy of the foregoing Joint Petition for Reconsideration of Commission's Decision CLI-90-08 was served first-class mail, postage prepaid upon the following on this 29th day of October 1990.

Lawrence J. Chandler, Esq.
Office of the General Counsel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Donald P. Irwin, Esq.
Hunton & Williams
707 East Main Street
P.O. Box 1535
Richmond, Virginia 23212

Carl R. Schneker, Jr., Esq.
O'Melveny & Myers
Counsel for Long Island Power Authority
555 13th Street, N.W.
Washington, D.C. 20004

Michael R. Deland, Chairman
Council on Environmental Quality
Executive Office of the President
Washington, D.C. 20500

Admiral James D. Watkins
U.S. Navy (Retired)
Secretary of Energy
Washington, D.C. 20585

Morton B. Margulies, Chairman
Administrative Judge
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Jerry R. Kline
Administrative Judge
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

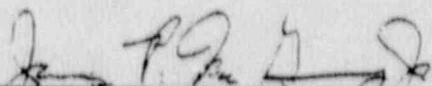
DOCKETED
USNRC
'90 OCT 30 A10:42
OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

George A. Ferguson
Aministrative Judge
5307 Al Jones Drive
Columbia Beach, MD 20764

Steven A. Wakefield, Esq.
Department of Energy
Office of General Counsel
Room 2000
825 North Capitol Street
Washington, D.C. 20426

Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Atomic Safety and Licensing Appeal Panel
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555



James P. McGranery, Jr.
Counsel for Petitioners
Shoreham-Wading River Central
School District and Scientists and
Engineers for Secure Energy, Inc.