UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

CHAIRMAN

November 23, 1990

Mr. D. D. Hock
Chairman, President and
Chief Executive Officer
Public Service Company of Colorado
P.O. Box 840
Denver, Colorado 80201-0840

Dear Mr. Hock:

I am responding to your letter of October 5, 1990, concerning Public Service Company of Colorado's application for a Possession-Only license for Fort St. Vrain. The Commission recognizes that the agency's review of your application and the preliminary decommissioning plan filed in June 1989 may be taking considerably longer than you originally anticipated, and we understand your interest in reducing decommissioning costs. However, the premature termination of operating licenses for Fort St. Vrain and other licensed facilities have raised some novel concerns not specifically contemplated in our decommissioning rule.

In our October 17, 1990 Memorandum and Order in the matter of Long Island Lighting Company (Shoreham Nuclear Power Station), CLI-90-08, we provided guidance on certain decommissioning issues. Enclosed for your information is a copy of CLI-90-08. This guidance should assist the staff in resolving some of the issues that have delayed the issuance of the Possession-Only License for Fort St. Vrain.

In a separate action, we have directed that the staff clarify the criteria it will use for reviewing funding and decommissioning plans at each stage in the process for plants whose operations have been prematurely terminated so that the Commission will be prepared to consider individual applications for Possession-Only licenses.

We regret that we are unable to act on your application immediately. We can assure you, however, that the delays that have occurred in processing your application have been necessary to ensure that an adequate regulatory basis exists for granting Possession-Only Licenses for prematurely shut down plants.

Sincerely,

Kenneth M. Carr

Kenneth M. Carr

Enclosure:
CLI-90-08

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Kenneth M. Carr, Chairman
Kenneth C. Rogers
James R. Curtiss
Forrest J. Remick

In the Matter of

LONG ISLAND LIGHTING COMPANY

(Shoreham Nuclear Power Station, Unit 1)

Docket No. 50-322

CLI-90-08

MEMORANDUM AND ORDER

This matter is before the Commission on six (6) "Petition[s] to Intervene and Request[s] for Hearing[s]" related to various actions taken by the NRC Staff ("Staff") and the Long Island Lighting Company ("LILCO") concerning the Shoreham Nuclear Power Station ("Shoreham"). The petitioners seek various remedies from the Commission, including an order directing the Staff to prepare an Environmental Impact Statement ("EIS") on the proposed decommissioning of the Shoreham facility and to consider in the EIS resumed operation as an alternative to decommissioning. After due consideration, we have determined that the National Environmental Policy Act ("NEPA") and the Atomic Energy Act ("AEA") of 1954, as amended, do not require the NRC to consider "resumed operation" as an alternative, at least under the facts of this situation. Accordingly, we find that at least one specific remedy sought by petitioners - publication of an Environmental Impact Statement including an

evaluation of resumed operation as an alternative to decommissioning - should not be granted. We hereby forward these petitions to the Atomic Safety and Licensing Board with directions to review and resolve all other aspects of these hearing requests in a manner consistent with this opinion.

I. Introduction

On March 29, 1990, the Staff issued a Confirmatory Order Modifying License (Effective Immediately) which modified the Shoreham full-power operating license held by LILCO. 55 Fed. Reg. 12758 (April 5, 1990). The Order prohibited LILCO "... from placing any nuclear fuel in the Shoreham reactor vessel without prior approval from the NRC." Id. at 12759. The Federal Register Notice announcing this action also provided that "[a]ny person adversely affected by this Confirmatory Order may request a hearing within twenty days of its issuance." Id. On April 18, 1990, each of two organizations, the Scientists and Engineers for Secure Energy ("SE2") and the Shoreham-Wading River Central School District ("Shoreham-Wading"), filed a "Petition to Intervene and Request for Hearing" in response to the Notice.

The Staff had previously published a Federal Register Notice announcing that LILCO had requested an amendment to the Shoreham operating license allowing changes in the physical security plan for the plant, including reclassification of the designated "Vital Areas" of the plant, various "safeguard commitments," and a proposed reduction in the security force. 55 Fed. Reg. 10528, 10540 (March 21, 1990). The Notice contained the Staff's proposed finding that the amendment "... did not involve a significant hazards consideration." Id. The Notice also provided that "any person whose interest may be affected by this proceeding and who wishes to participate as a party in

the proceeding must file a written petition to intervene." Id. On April 20, 1990, SE2 and Shoreham-Wading each filed a "Petition to Intervene and Request for Hearing."

Subsequently, the Staff published another Federal Register Notice announcing (1) LILCO's request for an amendment to the Shoreham operating license removing certain license conditions regarding offsite emergency preparedness activities and (2) the Staff's proposed finding of "No Significant Hazards Consideration." 55 Fed. Reg. 12076 (March 30, 1990). Again, the Notice provided that "... any person whose interest may be affected by this proceeding and who wishes to participate as a party must file a written petition to intervene." Id. at 12077. On April 30, 1990, SE2 and Shoreham-Wading each filed a "Petition to Intervene and Request for Hearing" regarding this proposed amendment.[1]

Both the Staff and LILCO have responded to all three sets of petitions.

II. Issues Raised By Petitioners.

Briefly, the petitioners assert that the actions taken by LILCO and the Staff amount to "de facto" decommissioning of the Shoreham facility without preparing an Environmental Impact Statement ("EIS") on the decommissioning plan. Petitioners allege that an EIS is required under the National Environmental Policy Act ("NEPA"). Furthermore, petitioners argue that any such EIS must consider resumed full power operation of Shoreham as an alternative to decommissioning. Accordingly, they argue that the Confirmatory

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[1]On June 14, 1990, the Staff issued the security plan amendment. On July 31, 1990, the Staff issued the emergency preparedness amendment together with various exemptions from certain Commission regulations dealing with that issue. Accordingly, any hearings would be post-amendment hearings.

Order violates NEPA and is "arbitrary and capricious." Moreover, they argue that the two proposed license amendments, in addition to being a part of the "scheme" to decommission the plant without proper compliance with NEPA, fail to provide adequate protection of the public health and safety.

III. Background.

In order to understand the reasons for our decision today, a brief review of the background of this action is appropriate. For several years, the State of New York ("the State") opposed LILCO's application for an operating license for Shoreham. After intense and extensive negotiations, LILCO and the State reached a settlement agreement which was signed on February 28, 1989. Under the agreement, LILCO agreed, inter alia, to sell Shoreham to the Long Island Power Authority ("LIPA"), which was created by the New York State Legislature for the express purpose of acquiring either all or a portion of LILCO's assets, including Shoreham. See New York Public Authorities Law § 1020, et seq. (McKinney Supp. 1990). The law expressly prohibits LIPA from operating Shoreham. Id. at §§ 1020-h(9); 1020-t. In return, the State of New York agreed to support a series of rate increases for LILCO and to allow LILCO a tax deduction for a portion of its investment in Shoreham.

The settlement agreement became effective on or about June 28, 1989, when ratified by the LILCO Board of Directors. LILCO has now taken various actions in accordance with the settlement agreement, including agreeing to the Confirmatory Order and seeking the License Amendments described above.[2]

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[2]LILCO has also sought various exemptions to NRC regulations which petitioners have not formally challenged before the Commission and, accordingly, are not at issue here.

LILCO has removed the nuclear fuel from the Shoreham reactor vessel, along with the in-core instrumentation, core internals, and guide tubes for the control rods, and has drained the reactor vessel. In addition, LILCO has disbanded a portion of its technical staff and begun training the remaining staff for "defueled" operation only. Moreover, LILCO has initiated attempts to sell the nuclear fuel which was used for start-up activities and low-power testing to other nuclear utilities. In sum, LILCO gives every appearance of abiding by the settlement agreement.

Furthermore, the State of New York has not indicated any intention to abrogate the settlement agreement. For example, we understand that the State has agreed to, and LILCO has received, various rate increases. We also understand that LILCO has received a tax deduction for loss of the Shoreham facility. Moreover, LILCO and the State have also agreed to hold in abeyance a lawsuit against the Commission challenging our decision to dismiss the State along with Suffolk County and the Town of Southhampton from the NRC's Licensing Board proceedings and to grant LILCO an operating license for Shoreham. See County of Suffolk, et al., v. NRC, et al., Nos. 89-1184 and 89-1185, (D.C. Cir.). See generally Long Island Lighting Company (Shoreham Nuclear Power Station, Unit 1), CLI-89-02, 29 NRC 211 (1989). All parties in that case agree that the case will in all likelihood become moot with the transfer of Shoreham to LIPA. See Joint Motion To Hold The Case In Abeyance, Nos. 89-1184 and 89-1185, (D.C. Cir. June 26, 1990).

Finally, an intermediate New York state court has recently issued an opinion upholding the legislature's actions and the settlement agreement. See Citizens for an Orderly Emergency Policy, Inc. v. Cuomo, et. al, No. 59890,

and Dollard, et. al., v. LILCO, No. 59962, ___ A.D. 2d ___ (N.Y. App. Div., July 12, 1990).

IV. Governing Law.

The National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. 4321, et seq., as amended, requires all federal agencies, inter alia, to include in connection with proposals for "major Federal actions significantly affecting the quality of human environment, a detailed statement ... on the environmental impact of that action and alternatives to the proposed action," 42 U.S.C. 4332(2)(C), and to describe appropriate alternatives to the recommended course of action in any proposal which involves conflicts concerning alternative uses of available resources", 42 U.S.C. 4332(2)(E). An agency generally fulfills these requirements either by publishing an Environmental Assessment ("EA") determining that there is no significant impact on the environment from the proposed action or by publishing an Environmental Impact Statement ("EIS") describing and analyzing the alternatives.

Basic NEPA principles require that an agency consider "reasonable" alternatives, NRDC v. Morton, 458 F.2d 827, 834 (D.C. Cir. 1972). See also 40 C.F.R. 1502.14 (1990). While an agency may not narrow the objectives of the action artificially and thereby circumvent the requirement that relevant alternatives be considered, the range of alternatives need only be "reasonably related" to the scope and goals of the proposed action. Process Gas Consumers Group v. U.S. Department of Agriculture, 694 F.2d 728, 769 (2d Cir. 1981). See also City of New York v. United States Department of Transportation, 715 F.2d 732, 742-43 (2d Cir. 1983). The courts have also pointed out that "there

is no need to consider alternatives of speculative feasibility or alternatives which could only be implemented after significant changes in governmental policy or legislation or which require similar alterations of existing restrictions ...." NRDC v. Callaway, 524 F.2d 79, 93 (2d Cir. 1975). See also City of New York v. U.S. Department of Transportation, 715 F.2d 732, 743 (2d Cir. 1983); Sierra Club v. Lynn, 502 F.2d 43, 62 (5th Cir. 1974), cert. denied, 421 U.S. 994 (1975). Even the expansive reading of the NEPA duty to consider alternatives in NRDC v Morton, supra, was accompanied by the statement that

> the need for an overhaul of basic legislation certainly bears on the requirements of the Act. We do not suppose Congress intended an agency to devote itself to extended discussion of the environmental impact of alternatives so remote from reality as to depend on, say, the repeal of the antitrust laws.

Id. at 837.

V. Analysis.

A. Definition and Scope of Federal Action.

The precise Federal actions at issue here are described above. They consist of an order requiring NRC approval prior to return of fuel to the reactor vessel, an amendment approving changes to the licensee's physical security plan, and an amendment relating to emergency preparedness. It is fair to state that these actions would likely not have been proposed but for LILCO's decision not to operate the facility. But the NRC was not a party to that decision. Under NRC regulations, the NRC must approve of a licensee's decommissioning plan (see 10 CFR § 50.82), including consideration of alternative ways whereby decommissioning may be accomplished; but nowhere in our regulations is it contemplated that the NRC would need to approve of a

licensee's decision that a plant should not be operated. Indeed, except in highly unusual circumstances not present here (see Sections 108, 186(c), and 188 of the Atomic Energy Act), the NRC lacks authority to direct a licensee to operate a licensed facility.

Accordingly, even if we characterize these NRC actions as preparatory to some future NRC decision approving of LILCO's decommissioning plan, this is a far cry from characterizing them as preparatory to some future NRC decision approving of LILCO's decision not to operate Shoreham. Thus, this situation is not like Greene County Planning Board v. FPC, 455 F.2d 412 (2d Cir. 1972), cert. denied, 409 U.S. 849 (1972), where the Federal action is approval of a whole non-Federal program, or a Federal action is a legal condition precedent to accomplishment of an entire non-Federal project. 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. 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.[3]

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[3]At this stage of the process, matters properly within the scope of our responsibility -- and which will be the focus of the Commission's attention in this case -- include the obligation to ensure that LILCO:

1. complies with the requirements of its operating license and the regulations applicable to whatever mode or condition the plant might be in at a given time (i.e., because the plant is currently defueled, the NRC should ensure that all systems required to ensure plant safety in the defueled mode are maintained in a fully operable status and that an adequate number of properly trained and qualified staff to ensure plant safety in this mode are available); and

2. refrains from taking any actions that would materially and demonstrably affect the methods or options available for decommissioning or that would substantially increase the costs of decommissioning, prior to the submission and approval of a decommissioning plan in accordance with the requirements of the Commission's decommissioning rules.

The decision on a method for decommissioning a facility - as opposed to the decision whether to decommission a facility - is a decision which requires NRC review and approval. Once a licensee decides to seek NRC approval of a plan to decommission a facility, our function is to review the plan to assure that it provides for safe and environmentally sound decommissioning. The "purpose" of such a project, i.e., the purpose of decommissioning, would be to return the facility to a condition which "permits release of the property for unrestricted use ...." 10 C.F.R. § 50.2 (1990). This purpose determines the scope of the alternatives the NRC must consider. Thus, in considering a proposed decommissioning plan, the NRC need only consider alternatives to the method of decommissioning the plan proposes.[4]

In summary, the broadest NRC action related to Shoreham decommissioning will be approval of the decision of how that decommissioning will be accomplished. Thus, it follows that NRC need be concerned at present under NEPA only with whether the three actions which are the subject of the hearing requests will prejudice that action. Clearly they do not, because they have no prejudicial effect on how decommissioning will be accomplished. Therefore, because decommissioning actions are directed solely at assuring safe and environmentally sound decommissioning, it follows that alternatives to the decision not to operate the plant are beyond the scope of our review and need

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[4]In this regard, a recent letter from the Council on Environmental Quality on a related matter misperceives our authority under NEPA. See Ltr. from Michael R. Deland, Chrm., CEQ, to Chrm. Kenneth M. Carr, NRC (October 9, 1990). Because we have no authority to mandate operation of the facility, we have no authority over the decision whether to decommission the facility. Instead, the "Federal action" in this case is the NRC approval of a method of decommissioning a facility. Therefore, if and when a licensee proposes to decommission a facility, the NRC's environmental evaluation will review the proposed method of decommissioning and any alternative decommissioning plans.

not be considered under NEPA. See NRDC v. EPA, 822 F.2d 104, 126-31 (D.C. Cir. 1987).

B. Rule of Reason

In the alternative, we also find that even if "resumed operation" were an alternative to decommissioning, we would not be required to consider it under the NEPA "rule of reason." NRDC v Callaway, 524 F.2d 79, 92 (2d Cir. 1975). First, LILCO clearly intends to abide by the settlement agreement which it entered with the State of New York. As we noted above, LILCO has taken various steps to comply with that agreement. Obviously, LILCO has determined that it will not operate Shoreham as a nuclear facility. As we noted above, we have no authority to overturn this determination.

Second, the State of New York has also indicated that it vigorously opposes operation of Shoreham. In fact, once LIPA gains control of Shoreham, it would require a reversal of position by both the Governor and the Legislature of the State of New York to allow Shoreham to operate. Furthermore, as noted above, the New York state courts have upheld the settlement agreement. Finally, both LILCO and the State are cooperating to hold in abeyance the lawsuit filed to challenge the NRC's grant of the Shoreham operating license, because both parties appear to agree that Shoreham will never be operated as a nuclear facility.

Taken together, these facts appear to us to indicate that "resumed operation" of Shoreham as a nuclear facility would require "significant changes in governmental policy or legislation," NRDC v. Callaway, supra, or the "overhaul of basic legislation," NRDC v. Morton, supra, which the courts have ruled place an alternative outside the scope of what the "rule of reason" requires an agency to consider as a part of an EIS. Accordingly, we find that

"resumed operation" of Shoreham as a nuclear facility is not a "reasonable alternative" under the "rule of reason" established by the courts in interpreting NEPA. NRDC v. Morton, supra; City of New York v. U.S. DOT, supra; NRDC v Callaway, supra.

VI. Conclusion.

We conclude that the NRC Staff need not file an EA or an EIS reviewing and analyzing "resumed operation" of Shoreham as a nuclear power plant as an alternative under NEPA. We make no other conclusions either regarding the need for an EIS in decommissioning situations in general or with respect to Shoreham in particular or regarding what alternatives such an EA or EIS must consider. Likewise, we reach no other conclusions regarding the hearing requests which this Order transmits to the Licensing Board.

These petitions are forwarded to the Licensing Board for further proceedings not inconsistent with this Order.

It is so ORDERED.

For the Commission

SAMUEL J. CHILK
Secretary of the Commission

Dated at Rockville, Maryland
this 17th day of October, 1990

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
(Hearing Petitions)

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing COMMISSION MEMO & ORDER (CLI-90-08) DATED 10/17/90 have been served upon the following persons by U.S. mail, first class, except as otherwise noted and in accordance with the requirements of 10 CFR Sec. 2.712.

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Dated at Rockville, Md. this
17 day of October 1990

Office of the Secretary of the Commission