UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SHOREHAM-WADING RIVER CENTRAL SCHOOL DISTRICT and SCIENTISTS AND ENGINEERS FOR SECURE ENERGY, INC.,	)	
Petitioners,	)	
v.	)	No. 90-1241
UNITED STATES NUCLEAR REGULATORY COMMISSION and the UNITED STATES OF AMERICA,	)	
Respondents.	)	

RESPONDENTS' MOTION TO DISMISS
AND RESPONSE TO EMERGENCY MOTION FOR STAY

A mere two weeks after this Court denied the petitioners' Petition for Rehearing and Suggestion For Rehearing En Banc of the Court's January 22, 1990 per curiam dismissal of their petition in Shoreham-Wading River Central School District, et al., v. NRC, No. 89-1633, the petitioners have returned to court seeking essentially the same relief they sought in the dismissed petition, namely, judicial action which would force the Nuclear Regulatory Commission to, in turn, force the owners and operators of the defueled Shoreham Nuclear Power Station to maintain the plant and staff at full readiness for full power operation. The petitioners seek such action despite a legally binding agreement between the owners and the State of New York that the owners will refrain from operating the plant and will apply to the NRC to transfer ownership of the plant to a state

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agency for decommissioning, and despite the best efforts of the NRC to assure that the owners maintain the plant in a condition that would not in any way prejudice the environmental review which the National Environmental Policy Act requires the NRC to perform in response to an application to decommission the plant.

This second attempt of the petitioners virtually to force a private corporation to operate a nuclear power plant against its will takes the form of a Petition for Review and an "Emergency Motion", that is, a motion for Court action "in less time than would normally be required for this Court to receive and consider a response", see Local Rule 7(h)(2), asking the Court to stay, and then review on an expedited schedule, several NRC actions, most of which clearly are not final.[1] See section 2 of the Argument.

The Court should dismiss the petition insofar as it seeks review of agency action which is not final. The Court should also reject the Emergency Motion. As the principal basis for their Motion, the petitioners argue as they did in seeking

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[1]The petition and the Emergency Motion were filed on May 7, 1990. About 5:30 p.m. on the 7th, the Clerk of the Court notified the respondents by telephone that the Court had ordered the respondents to have their response to the Motion in the Clerk's Office by 4:00 p.m. on May 9, 1990.

For the sake of economy and logical clarity, we have combined the response with a motion to dismiss the petition in part, as we are permitted to do by Local Rule 7(d). As required by Local Rule 7(i)(1), there is attached to each copy of this motion a copy of the agency decisions which are the subjects of this litigation.

review in No. 89-1633, that the NRC is permitting the owners of Shoreham de facto to decommission Shoreham before a full environmental review of decommissioning has been performed, and that the NRC is thereby, day by day, prejudicing the consideration of alternatives during that environmental review, one of those alternatives being, according to the petitioners, full power operation. In dismissing the petition in No. 89-1633, the Court rejected this argument, noting "the absence of any showing of imminent irreparable injury." See Shoreham-Wading River Central School District, et al., v. NRC, No. 89-1633, at 1 (January 22, 1990). For the reasons given below, the Court should reject the same argument in the instant case.

BACKGROUND

The Long Island Lighting Company ("LILCO") holds an NRC license for full-power operation of Unit 1 of the Shoreham Nuclear Power Station. For a brief period of time, LILCO operated at less than 5% of its rated power. However, on June 28, 1989, LILCO's shareholders approved a settlement agreement with the State of New York in which LILCO committed to refrain from further operation of Shoreham and to transfer Shoreham to the Long Island Power Authority (LIPA) for decommissioning. Both the transfer of ownership and the decommissioning must be approved by the NRC. Applications for both are expected in the near future. In the meantime, LILCO has sought from the NRC relief from the expense of maintaining Shoreham and its staff in readiness for full power operation.

From early on in the process of responding to LILCO's requests for relief, the NRC staff, fully aware of the agency's responsibilities under NEPA and the necessity of avoiding "segmentation" of a major action with significant environmental impacts, has sought to preserve the Shoreham plant from degradation. Describing its NEPA responsibilities, the staff told the Commission

> [u]nder Commission regulations, a decommissioning plan must be authorized by NRC. The approval of decommissioning requires an environmental assessment and, in this case, may well require an environmental impact statement. ...
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> Commission regulations do not define the point at which decommissioning starts. However, basic NEPA law imposes some constraint: The Commission cannot permit NEPA evaluation requirements to be circumvented by segmentation of a major action with significant impacts and authorizing the segments individually before (or without) completing the NEPA review of decommissioning. ...

SECY-89-247, "Shoreham Status and Developments" (J. Taylor, Acting Executive Director for Operations (EDO) to the Commissioners), August 14, 1989, at 4.[2]

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[2]The Commission's regulations on decommissioning define "decommission" as "remove ... safely from service and reduce residual radioactivity to a level that permits release of the property for unrestricted use and termination of license". 10 C.F.R. 50.2. The same regulations require a licensee to submit a plan for decommissioning "within two years following permanent cessation of operations". See 10 C.F.R. 50.82(a).

As the petitioners report in their Memorandum in Support of Emergency Motion at 3, n. 3, they filed a Freedom of Information Act request on May 3, 1990 (Petitioners' Exhibit 98) for the SECY paper from which we have just quoted. The Commission having determined that the request should be granted, we have attached the paper to this Motion and Response. See Attachment 7.

The staff recognized, and rejected, two approaches which lie at the opposite ends of the spectrum of approaches to the question of defining the point at which decommissioning begins. The first, and most extreme approach, is the approach which the petitioners have now for a second time asked the Court to adopt:

> It might be argued that any reduction from a condition of "fully ready to operate" with the intent of not returning to operation, is the commencement of decommissioning. But this would require that a plant be kept at full ready (fully staffed, fully operable, and fully surveillanced) until decomissioning is approved. ...
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> The other end of the spectrum might also be argued: that decommissioning does not commence while the licensee carries out activities not prohibited by the operating license, and conforms to the minimum requirements of the operating license and Commission regulations ... and continues to ensure adequate safety for the plant mode (i.e., adequate safety in a defueled condition).

Id. at 4.

The staff proposed that the Commission adopt a "middle ground":

> ... permitting the plant to be put into a "caretaker" non-degraded status while adequate decommissioning plans are developed and are being reviewed by the NRC. Such status would require that:
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> (1) All systems required for safety in the defueled mode are maintained in fully operable status.
>
> (2) All systems required for full-power operation of the facility are to be preserved from degradation ....
>
> (3) There shall be an adequate number of properly trained staff to ensure plant safety in the defueled state ....
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> With assurance that the plant is preserved as a physical entity capable of being returned to service without untoward resource expenditure (similar to the effort needed to return a plant to service after an extended outage), the staff believes that this provides a reasonable middle ground permitting some reduction in expenditure from the "fully

> ready to operate" condition, while not permitting the licensee to de facto decommission the facility (take irretrievable actions or permit irretrievable degradation; for example, action or degradation which is very difficult to undo) without NRC approval of the decommissioning plan.

Id. at 5

By proceeding in this way, the staff sought to avoid prejudicing the NEPA review it would do in response to an application to decommission Shoreham, no matter what alternatives that NEPA review might consider. The agency has not yet taken a position on whether the petitioners are correct that an environmental impact statement on decommissioning would, as a matter of law, have to consider full-power operation as an alternative to the applicant's proposed decommissioning plan.[3] Even if the agency concluded during a NEPA review that full-power operation of Shoreham was environmentally preferable to decommissioning it, it is not clear that the agency would have the authority to act, in effect, as a "Department of the Environment" and flat-out deny the application to decommission solely on the grounds of the environmental superiority of full-power operation. Nevertheless, the staff's proposed requirement that LILCO preserve the plant so that it could be

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[3]To be sure, NEPA statements must consider even alternatives the agency is powerless to impose, see, e.g., NRDC v. Morton, 458 F.2d 827 (D.C. Cir. 1972), but in no case is the agency required to consider any but "reasonable" alternatives, see, e.g., 40 C.F.R. 1502.14, and there exists a legitimate question whether full-power operation of Shoreham is a reasonable alternative when it would seem that under the terms of the agreement between LILCO and the State, neither LILCO nor New York is legally permitted to operate Shoreham.

"returned to service without untoward resource expenditure" assures that if the agency's NEPA review on decommissioning does consider full-power operation as an alternative, that alternative will not be prejudiced by the state of Shoreham.

By a 3-1 vote, the Commission approved the staff's approach through the middle ground. See Staff Requirements Memorandum (Commission Secretary to EDO), August 25, 1989 (Attachment 7) at 1.[4] Since then, the staff has made every effort to adhere to this approach, and has received LILCO's written commitment to the same. See LILCO Letter to NRC, September 19, 1989 (Petitioners' Exhibit 23).

The petitioners do not argue that the staff has failed to implement its "middle ground" approach.[5] Rather they oppose, as they have since last summer, that approach altogether, preferring instead that the agency force Shoreham to remain fully ready for full power operation, whatever the expense. See Petitioners' Requests to the NRC, July 14 and 26, 1989

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[4] The dissenter questioned whether the Commission had "a legal basis under the existing license to require LILCO to preserve 'all systems required for full-power operation' from degradation ...." Staff Requirements Memorandum, August 25, 1989 at 2. But he agreed that "the licensee should not be permitted to take any steps that would have a material and demonstrable impact on any aspect of the decommissioning of his plant, prior to the ... approval of a decommissioning plan ...." Id.

[5] Although, as the petitioners point out, Petitioners' Memorandum in Support of Emergency Motion at 2-3, they have not been able to consult the description of this approach in SECY-89-247, the approach is fully set forth in SECY-90-084, "Shoreham Nuclear Power Station - Status and Development", which the petitioners are asking the Court to review. See Petition.

(Petitioners' Exhibits 8 and 13). When the petitioners' requests to the agency for emergency relief to force Shoreham back in the direction of full power operation were denied, see NRC Denial of Requests for Immediately Effective Orders, July 20, 1989 (Pet. Ex. 11), the petitioners came to this Court seeking expedited review of those denials, arguing, as they do now, that de facto decommissioning was prejudicing NEPA consideration of full power operation of Shoreham as a reasonable alternative to decommissioning it. See October 13, 1989 Petition and November 15, 1989 Emergency Motion in No. 89-1633.

In response, this Court dismissed the petition for review altogether, partly for lack of final agency action, but also because the Court noted "the absence of any showing of imminent irreparable injury." Shoreham-Wading River Central School District, et al., v. NRC, No. 89-1633, at 1 (January 22, 1990), reh'g den. April 23, 1990.[6]

The petitioners now return to court, this time seeking expedited review of several NRC actions, including an exemption allowing a reduction of Shoreham's onsite property insurance, a confirmatory order requiring NRC approval before Shoreham can be refueled, and proposed reductions in Shoreham's physical security plan and emergency preparedness. See Petition at 1. The Petitioners' Emergency Motion seeks stays pending appeal of all

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[6]Remarkably, nowhere in its pleadings in the present litigation do the petitioners even mention this earlier litigation.

these actions except perhaps the confirmatory order. See Emergency Motion at 1 and n. 12 below.

ARGUMENT

A judicial stay of a decision by a federal agency is an "extraordinary" remedy, and it is "the movant's obligation" to demonstrate that the four familiar factors which govern the issuance of stays pending appeal warrant relief. Cuomo v. NRC, 772 F.2d 972, 978 (D.C. Cir. 1985). Nonetheless, even though petitioners accuse the NRC of every sin conceivable in administrative law, see May 7, 1990 Petition at 3-4, they fail completely to meet their obligation to demonstrate that any NRC action should be stayed pending appeal. In particular, the petitioners, relying on sheer speculation concerning possible injury to them pending appeal, fail to demonstrate any certain or significant irreparable injury, yet such injury is the sine qua non of a stay pending appeal.[7] Therefore, their Emergency Motion should be denied.

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[7]Moreover, the petitioners have not even met the procedural requirements for emergency motions for stays pending appeal. Rule 18 of the Federal Rules of Appellate Procedure provides that, although a motion for stay pending appeal may be made to the Court, "the motion shall show that application to the agency for the relief sought is not practicable, or that application has been made to the agency and denied, with the reasons given by it for denial, or that the action of the agency did not afford the relief which the applicant had requested." The petitioners' Emergency Motion makes no effort to show any of these things.

Moreover, insofar as the Petition seeks review of actions which will not become final agency actions in the near future, the petition should be dismissed.

1. Irreparable Injury

Absent a showing that the petitioners are irreparably harmed, a stay should be denied without any consideration of the three additional criteria which govern stays pending appeal: "... the established rule [is] that a party is not ordinarily granted a stay of administrative order without an appropriate showing of irreparable injury." Permian Basin Rate Cases, 390 U.S. 747, 773 (1968). See also Sampson v. Murray, 415 U.S. 61, 90-92 (1974) (irreparable injury is the "necessary predicate" for this extraordinary relief, and the key word is "irreparable").[8]

Moreover, in showing irreparable injury, the movant "is required to demonstrate that the injury is 'both certain and great.'" Cuomo v. NRC, 772 F.2d at 976, quoting Wisconsin Gas Company v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985). The petitioners in this litigation have completely failed to show either that the irreparable injuries they allege are certain or that they are great.

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[8]It is true that this Court's formulation of the stay criteria in Washington Metropolitan Area Transit Authority v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1977), permits issuance of a stay in special situations when there is a high degree of probable success and some irreparable injury. 559 F.2d at 843. However, that formulation by no means relieves a movant of the necessity of showing irreparable injury before a court can grant the extraordinary remedy of a stay.

For example, no conceivable injury is done the petitioners by the NRC's having granted LILCO a partial exemption from the requirement that holders of operating licenses carry at least 1.06 billion dollars of insurance to provide funds for onsite decontamination and stabilization in the event of a nuclear accident. Such an exemption does nothing to prejudice the Commission's NEPA review of decommissioning, since the insurance can be quickly and inexpensively reinstated. Moreover, the 337 million dollars worth of insurance that LILCO still is required to carry is fully adequate to provide funds for onsite decontamination and stabilization in the event of any accident which could occur at Shoreham under current conditions and legally permissible activities.[9] On this latter point, the petitioners give the Court absolutely no reason to second-guess the agency's expert judgment about what accidents can reasonably be considered possible at Shoreham now.

In sum, staying this exemption pending review would add to the expense of maintaining Shoreham, without any gain whatsoever to the quality of the NEPA review of an application to decommission Shoreham.

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[9]Under the Confirmatory Order which the petitioners are asking the Court to review, see Petition at 1-2, LILCO may not refuel the Shoreham reactor without the NRC's permission. The partial exemption from the insurance requirement is explicitly conditioned on the defueled state of the reactor. See 55 Fed. Reg. 18993, 18994, col. 2 (May 7, 1990) (Attachment 3 and Pet. Ex. 96).

Virtually the same conclusion must be drawn with regard to a stay of any of the other actions that the petitioners seek to stay. The irreparable injury the petitioners allege these actions would cause is in no way certain. For one thing, no certain harm can attach to these actions because, as we show in the next section, all still are under consideration and none is yet effective.

Moreover, even if these actions become effective, the petitioners have made no showing that the actions will present any increased risk to public health and safety. For instance, the staff has proposed amending LILCO's license to permit it to cease its offsite emergency planning organization. 55 Fed. Reg. 12076, 12077, col. 2 (March 30, 1990) (Attachment 5 and Pet. Ex. 81). As part of the basis for this amendment, the staff has proposed a finding that, with Shoreham defueled, "the cessation of offsite emergency preparedness activities will not increase the risk of radiological exposure to the offsite general public" even in a "worst case" radiological accident postulated by the staff. Id. at 12077, col. 2. The petitioners only make unexplained assertions to the contrary. See Emergency Motion at 6.[10] They do not even attempt to show that the staff has ignored some relevant accident scenario.

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[10]The petitioners may be arguing that possession of a full power operating license requires an offsite emergency response organization and that in the absence of such an organization, public health and safety is at risk. That might be true if
(Footnote Continued)

It is far from certain that the exemptions or amendments that the NRC has given LILCO, or contemplates giving, would, even when taken together, be great enough to prejudice a NEPA analysis against full power operation and in favor of decommissioning. As recounted in the "Background" above, it is the Commission's stated aim to assure that such prejudice does not occur.

As in No. 89-1633, the petitioners offer only speculation as the basis for their claim of prejudice. They speculate that full power operation is a reasonable alternative to be considered under NEPA even though it would appear that under the agreement between LILCO and New York, neither party can legally operate Shoreham. They speculate that the cost of returning Shoreham to readiness for full power would tilt the NEPA balance toward decommissioning.[11] And they speculate that the Commission would deny an application to decommission solely on the grounds of a showing of the environmental superiority of operating Shoreham.

Nowhere in all this speculation is there any "certain and great" measure of the allegedly prejudicial costs of returning Shoreham to full power operation. It could be said with greater certainty than the petitioners muster for their

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(Footnote Continued)
Shoreham were presently authorized to operate, but it is not. See note 9.

[11]This speculation does not do credit to their claims for the environmental superiority of full power operation.

claim of prejudicial costs that the only effect of their preferred course would be to increase the cost of any alternative for the ultimate disposition of Shoreham. For example, to be effective the fines the petitioners would have the NRC assess against Shoreham, see, e.g., Emergency Motion at 4-5, must exceed the costs of maintaining Shoreham ready for full power operation. These latter costs in turn probably would exceed the costs of returning Shoreham to full power operation from its defueled, preserved, and partially staffed condition.[12] There is a considerable lack of economic realism in the petitioners' approach.[13]

2. Likelihood of Success

a. In the absence of any showing whatever of irreparable injury, the Court need not even reach the question whether the petitioners are likely to succeed on the merits of their petition. Moreover, to the extent that the petitioners'

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[12]The petitioners do not list among the actions they seek to have stayed the NRC's April 5, 1990 Confirmatory Order (Attachment 2) requiring that LILCO have NRC approval before returning to operation, but by arguing that this Order too causes irreparable injury, Petitioners' Memorandum at 13, n.19, they suggest that they would welcome a stay of it also. However, a better case could be made that they would suffer irreparable injury if this order were stayed than that they would if it were not, for it is not in the interest of public health and safety for Shoreham to be able to resume operation without NRC approval.

[13]Moreover, even if the petitioners have somehow shown that the NRC's actions entail a "certain and great" prejudice to the NEPA analysis of decommissioning Shoreham, the petitioners have not shown that this harm is "certain and great" with respect to them.

arguments concerning the likelihood of prevailing on the merits of their petition are the same as their arguments that they will be irreparably harmed without a stay, see Emergency Motion at 4-5, their arguments on likelihood of success are without merit, for the same reasons given above.

The petitioners' other arguments that they are likely to succeed also are without merit. Given the Commission's great care -- evidenced in our discussion above of emergency planning and throughout the petitioners' two large volumes of Exhibits -- that Shoreham be maintained and staffed so as to assure public health and safety against the limited residual risks posed by the few radiological activities now legally permitted at the plant, the petitioners' claim that the agency has "totally abdicated" its "health and safety obligations", Emergency Motion at 5, is inexplicable. Similarly, the petitioners' claim that the NRC has been segmenting the NEPA review of the decommissioning of Shoreham reveals only the petitioners' preference for an extreme approach that would define "decommissioning" at Shoreham as <u>any</u> departure from complete readiness for full power operation.

b. Finally, the petitioners are not likely to succeed because, of the actions they seek to have reviewed, only the reduction on onsite property insurance and the order requiring NRC approval before a refueling of Shoreham are final agency actions. Insofar as the petitioners seek review of actions which are not final, their petition should be dismissed.

The petition seeks review of SECY-90-84, Shoreham Nuclear power Station - Status and Developments, March 12, 1990

(Attachment 1 and Pet. Ex. 84) and what the petitioners view as 14 separate licensing actions relating to Shoreham approved by that document. The petitioners regard SECY-90-84 as "a final order by the Commission". See Petition at 1 and Memorandum in Support of Emergency Motion at 3. But the petitioners grossly misconstrue the nature of SECY-90-94.

No SECY paper can ever constitute a final agency order, for the simple reason that a SECY paper is always a staff document to the Commission. Such a paper at most proposes final agency orders, which then may be adopted by the Commission through the device of a "Staff Requirements Memorandum" ("SRM").

In particular, SECY-90-84, on its face is a status report which proposes not 14 but only two agency actions, see SECY-90-84 at 5 (Attachment 1 and Pet. Ex. 84), and only one of these would be final, namely the confirmatory order, see id., Enclosure 3 at 1, and it is not clear that the petitioners are even seeking a stay of that order. See note 12. The other proposed action is explicitly not final because it is merely the staff's proposed draft of a Federal Register notice proposing an amendment to the Shoreham license and inviting comment on the staff's proposed determination that the amendment does not involve the consideration of any significant hazards. By an SRM dated March 27, 1990 (Pet. Ex. 77), the Commission approved only the staff's two recommendations in SECY-90-84. But not even that approval makes the proposed amendment final agency action. Although the comment period has closed, the determination that no significant hazards are involved has yet to be made.

As for the other actions discussed in SECY-90-84, none is final. Indeed for one of them, namely, "request for a defueled operating license", the staff has yet even to develop a position. See SECY-90-84, Enclosure 1 at 3 (Attachment 1 and Pet. Ex. 84).[14]

3. Harm to Other Parties

A stay pending appeal will put in Limbo for months to come[15] the NRC's carefully considered, "middle ground', approach to the decommissioning of Shoreham, forcing expenditures on LILCO which, though very likely considerable, will have no significant effect on the viability of any alternative the Commission may consider in its NEPA review of an application to decommission Shoreham.[16] How considerable those expenditures may in fact be,

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[14]The petitioners also argue that the agency de facto has taken final action on the petitions for enforcement action which they filed with the agency last year and which were the subject of the first lawsuit they brought before the Court. See Petitioners' Memorandum at 3-4. To the contrary, not only has the agency not formally issued a final decision in response to those lengthy petitions, as noted above at 6 the agency has yet to resolve how to respond to all the NEPA issues raised by those petitions.

[15]The petitioners have asked the Court to expedite their appeal, Petition at 4, but they have not provided the "strongly compelling reasons" Section VIII.B of the Court's Internal operating Procedures requires for expedition. Nonetheless, the respondents are willing to brief the issues in this case on any schedule the Court may deem appropriate.

[16]Moreover, if the petitioners are in fact seeking a stay of the NRC's Confirmatory Order, see n. 12, they raise the prospect, however remote, of harms made possible by Shoreham's being returned to operation without the approval of the NRC.

LILCO, which is intervening in this litigation, can best calculate for the Court. We simply note two things:

First, LILCO can provide the Court with some reasonable estimate of the economic cost to it of a stay, but the petitioners, in neither of the lawsuits they have brought, have been able to articulate either the probability or the extent of the harms they have alleged.

Second, the petitioners' arguments that economic harm to LILCO is not cognizable under either NEPA or the Atomic Energy Act, see Emergency Motion at 6, are without application in the circumstances of this litigation. The agency is in no way proposing to plead economic burdens to strip NEPA of its importance, or to define or redefine adequate protection.

4. The Public Interest

The public interest is best served by permitting the agency to continue, pending judicial review, an approach which has thus far avoided, and promises to continue to avoid, both an extravagant expenditure of funds to maintain Shoreham fully ready for full power operation, and any prejudicing of the treatment of any alternative, including full power operation, which the Commission may decide to consider in its environmental review of an application to decommission Shoreham. No purpose is served by a stay pending review except to add the cost of maintaining Shoreham ready for full power operation pending review to the cost of the ultimate disposition of the plant.

CONCLUSION

For the foregoing reasons, the Emergency Motion for a stay should be denied and the petition for review dismissed insofar as it seeks judicial review of actions which have not yet become final agency actions.

Respectfully submitted,

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