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LILCO, February 7, 1991

UNITED STATES OF AMERICA '91 FEB -8 P4:43
NUCLEAR REGULATORY COMMISSION

Before the Commission

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

LILCO'S OPPOSITION TO PETITIONERS' APPEAL FROM LBP-91-1

I. Introduction

On January 23, 1991, Petitioners Shoreham-Wading River Central School District (SWRCSD) and Scientists and Engineers for Secure Energy, Inc. (SE_2) filed an appeal from the Licensing Board's order concerning six of Petitioners' petitions to intervene and requests for hearing on three separate NRC licensing actions involving Shoreham, Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-1, 33 NRC __ (Jan. 8, 1991). Pursuant to 10 C.F.R. § 2.717a(a), LILCO opposes Petitioners' appeal.

II. Background

On October 17, 1990, in response to six pending petitions for intervention and requests for hearing filed by Petitioners,

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the Commission issued a Memorandum and Order in which it found that neither the National Environmental Policy Act, 42 U.S.C. §§ 4321 et seq. (NEPA) nor the Atomic Energy Act, 42 U.S.C. §§ 2011 et seq., "require the NRC to consider 'resumed operation' [of Shoreham] as an alternative" to the plant's decommissioning. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-90-08, 32 NRC 201, 203 (1990). In making this determination, the Commission recognized that the "federal action" involved in the Shoreham situation was not the decision by LILCO, a private entity, to abandon the Shoreham facility. Rather, the Commission noted that the "precise Federal actions at issue here" consisted of (1) an "order requiring NRC approval prior to return of fuel to the reactor vessel," (2) an "amendment approving changes to the licensee's physical security plan," and (3) an "amendment relating to emergency preparedness." CLI-90-08, 32 NRC at 207.

The Commission continued that, while the NRC "must approve of a licensee's decommissioning plan . . ., including consideration of alternative ways whereby decommissioning may be accomplished," nowhere in its regulations was "it contemplated that the NRC would need to approve of a licensee's decision that a plant should not be operated." CLI-90-08, 32 NRC at 207 (emphasis in original). The Commission then confirmed that "LILCO is legally entitled under the Atomic Energy Act and our regulations to make, without any NRC approval, an irrevocable decision not to operate Shoreham," and held that the "alternative of 'resumed

operation' -- or other methods of generating electricity -- are alternatives to the decision not to operate Shoreham and . . . are beyond Commission consideration." Id.

Having made this finding on the scope and effect of NEPA in the Shoreham case, the Commission forwarded to the Licensing Board the six pending hearing requests "for further proceedings not inconsistent" with the Commission's Order. CLI-90-08, 32 NRC at 209. On October 18, 1990, the Chief Administrative Judge established a three-judge Licensing Board panel, chaired by Judge Margulies, to consider Petitioners' hearing requests. 55 Fed. Reg. 43,057 (Oct. 25, 1990).

On October 29, 1990, Petitioners filed with the Commission a joint petition for reconsideration of CLI-90-08. LILCO and the NRC Staff responded in opposition to the joint petition on November 13 and November 19, respectively. The Commission has not yet ruled on Petitioners' request for reconsideration.

On November 8, 1990, the Licensing Board asked the parties for their views on whether the Board should go forward and rule on the six pending petitions or wait for the Commission's decision on Petitioners' request for reconsideration of CLI-90-08. The parties responded on November 16. LILCO and the NRC Staff argued that there was no need for the Board to wait and that it should proceed to rule on the intervention petitions, consistent with CLI-90-08. For their part, Petitioners contended that the Board should wait until after the Commission had issued its decision on reconsideration.

On January 8, 1991, the Board issued LBP-91-1, finding that neither SWRCSD nor SE_2 had demonstrated standing to intervene and denying both Petitioners' requests for hearing on each of the three licensing actions. At the same time, the Board, recognizing that Petitioners had not had the "benefit of the Commission's precedential decision on decommissioning in CLI-90-08 at the time they filed their various petitions to intervene," noted that the petitions "focused on matters that the Commission subsequently determined to be beyond the scope of consideration under NEPA in any proceeding on reactor decommissioning." LBP-91-1, slip op. at 47. "[B]ecause of these circumstances," the Board said, Petitioners "should be afforded the opportunity to amend their petitions to intervene to take into account" CLI-90-08 and the deficiencies the Board identified in the petitions. Id. The Board therefore offered Petitioners the opportunity to file appropriately amended petitions within 20 days of service of its order. Id. at 48.

On January 23, 1991, Petitioners filed their appeal from LBP-91-1. That same day, Petitioners also asked the Licensing Board to stay LBP-91-1, requesting that they be relieved of their obligation to submit amended petitions until the Commission had ruled either on their request for reconsideration of CLI-90-08 or on their appeal from LBP-91-1, whichever came later. On February 4, however, Petitioners filed amended petitions as directed by the Board, thus mooting their request for a stay. On February 5, LILCO moved to dismiss the application for a stay as moot.

III. Argument

Petitioners' appeal from LBP-91-1 is defective both procedurally and substantively. As a threshold procedural matter, their appeal is premature under § 2.714a. This provision states, in relevant part, that an

> order wholly denying a petition for leave to intervene and/or request for a hearing is appealable by the petitioner on the question whether the petition and/or hearing request should have been granted in whole or in part.

10 C.F.R. § 2.714a(b)(emphasis added). Since the Board did not actually deny the petitions, but instead gave Petitioners an opportunity to amend their requests -- an opportunity which Petitioners have now availed themselves of -- they may not pursue a § 2.714a appeal at the present time. They must wait until the Board has considered and, if such occurs, has denied their petitions as amended.

While Petitioners' appeal is obviously premature, LILCO nevertheless addresses the few substantive points they raise in their six-page supporting brief. Only a brief response is warranted.

As shown below, Petitioners have wholly failed to confront the Board's determination that they have not demonstrated standing to intervene. Instead, Petitioners go off on a tangent, taking issue with the Board's finding that the "three license changes . . . are not impermissible segmentation of any decision to decommission." LBP-91-1, 33 NRC __, slip op. at 47. Petition-

ers argue that "there is no basis in CLI-90-08 for this holding," and claim that "a fair reading of CLI-90-08 indicates that the Commission recognizes the existence of a proposal to decommission and that the three licensing actions under review are included within the 'scope' of that proposal." Id.

Petitioners' arguments fail in two important respects. In the first place, Petitioners mischaracterize the Commission's holding in CLI-90-08. As a result, their argument, rather than truly being a claim of error by the Licensing Board, really amounts to yet another attempt to induce the Commission to reconsider CLI-90-08. Second, they offer literally nothing to contradict the Board's independent holding that Petitioners have failed to demonstrate standing to intervene.

A. The Commission Found there Was no Impermissibly Segmented Decision to Decommission at Shoreham

For all practical purposes, on appeal, Petitioners assign only one error to the Board. They assert that there is "no basis" in CLI-90-08 for the Board's finding that the decision to decommission Shoreham was not being impermissibly segmented. In short, Petitioners claim that the Board has misinterpreted CLI-90-08. But in truth, it is Petitioners who are in error.

In CLI-90-08, the Commission specifically determined that the three licensing actions at issue here do not constitute segmentation of the NRC approval process connected with the decommissioning of the Shoreham plant. After noting that the "broadest NRC action related to Shoreham decommissioning will be

approval of the decision of how that decommissioning will be accomplished," the Commission stated that "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." CLI-90-08, 32 NRC at 208 (emphasis in original). "Clearly they do not," the Commission continued, "because they have no prejudicial effect on how decommissioning will be accomplished." Id. (emphasis in original).

What Petitioners either misunderstand or refuse to accept is that its follows that, with the "federal action" in the Shoreham case is properly defined (i.e., NRC approval of the method by which the plant will be decommissioned), the NRC's separate consideration and disposition of the three licensing actions at issue here -- which plainly have no effect whatsoever on decommissioning options -- is entirely appropriate. Thus, the Board was correct in concluding that under governing Commission law, CLI-90-08, the "three license changes . . . are not an impermissible segmentation of any decision to decommission." LBP-91-1, slip op. at 47.1/

1/ Petitioners do advance a second criticism of LBP-91-1, arguing that the Board's decision to go forward in ruling on the six petitions before the Commission had issued its decision on reconsideration of CLI-90-08 is "arbitrary and capricious and waste[s] the resources of both the Commission and Petitioners." Petitioners' Brief in Support of Appeal of Atomic Safety and Licensing Board Memorandum and Order of January 8, 1991 (Jan. 23, 1991) at 4. Asserting that the Board has "relie[d] almost totally on CLI-90-08 for its findings of inadequacy" regarding the petitions, Petitioners in effect take issue with the Board's having given them a second change to submit suitable petitions. Id. This is an "obvious waste of resources," Petitioners argue,

(continued...)

B. However Petitioners Construe CLI-90-08, They Have Failed Nonetheless to Demonstrate Standing to Intervene

Petitioners apparently believe that the Board's denial of their intervention petitions turns solely on its interpretation of CLI-90-08. Yet nothing could be further from the truth. In fact, the Board's rulings in LBP-91-1 on the issue of Petitioners' standing establish an entirely separate ground, not dependent on CLI-90-08, for its conclusion that the petitions are defective.

For example, at the outset, the Board makes quite clear that a crucial flaw in all of the petitions is their insistent focus on issues that fall outside the scope of the proceedings. In this regard, the Board states:

> Much of the petitions are given over to the issue that the modifications of the Shoreham license are individual actions in the proposal to decommission Shoreham and that injury results from this inchoate decommissioning for which standing should be afforded and relief granted. LILCO and Staff take the position that the issue of decommissioning and its ramifications are beyond the scope of the proceeding and therefore should not be considered. The Board agrees with the position of LILCO and Staff. A reading of the hearing notices for each of the modifications fails to indicate that any decommissioning of Shoreham, in whole or in part, is at issue in any of them.

1/ (...continued)
since it allegedly sends them "barrelling ahead on the basis of a non-final order." Id. As previously noted, contemporaneously with their instant appeal from LBP-91-1, Petitioners sought a stay of this aspect of the Board's decision. They then filed as scheduled amended petitions, thus rendering moot both their request for a stay and this particular aspect of their appeal from LBP-91-1.

LBP-91-1, slip op. at 9-10 (emphasis in original). As the Board then notes, the "hearing notices are published to afford prospective participants of notice of the matters at issue." Id. at 10. If the Commission "reviewed the modifications as part of any decommissioning of Shoreham," the Board continues, "it would have said so." Id. Given the "absence of any declaration by the Commission in the notices, inferred or expressed, that decommissioning of Shoreham is an issue in the requested hearings," the Board concludes, "we shall respect the orders and consider decommissioning outside the scope of the proceedings." Id.

Nowhere in their brief on appeal do Petitioners even try to confront this key ruling from LBP-91-1. Their failure to so do is particularly significant, given that the Board's ruling on this issue is plainly not based on any interpretation of CLI-90-08. To the contrary, the Board's position is soundly predicated on long-established federal precedent. See Bellotti v. NRC, 725 F.2d 1380 (D.C. Cir. 1983). With respect to CLI-90-08, the Board points out that the Commission had, with that decision, merely "provided additional guidance that the scope of the proceedings did not involve decommissioning." LBP-91-1, slip op. at 10 (emphasis added).

As shown below, the Board found a myriad of other infirmities in each of the six petitions. Again, Petitioners make no effort whatsoever to deal with the Board's findings. This dereliction is tantamount to their neglecting to file a brief at all, a failure which is dispositive of their appeal. See, e.g.,

Mississippi Power and Light Co. (Grand Gulf Nuclear Power Station, Units 1 and 2), ALAB-140, 6 AEC 575 (1973).

(1) Confirmatory Order

a. SE_2's petition

With respect to the intervention petitions regarding the NRC's confirmatory order license modification, the Board ruled that SE_2, as an organization, had "not established that it will suffer a distinct and palpable harm that constitutes an injury in fact" from the action at issue. The Board found that SE_2's "organizational status is not unlike that of a petitioner whose 'interests lie in the development of economical energy resources, including nuclear, which have the effect of strengthening the economy and increasing the standard of living.'" LBP-91-1, slip op. at 24. Citing Commission and U.S. Supreme Court precedent, the Board found that "such broad public interest does not establish the particularized interest necessary for participation by a group in agency adjudicatory processes." Id., citing Sierra Club v. Morton, 405 U.S. 727, 739 (1972); Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 332 (1983). Yet another defect in SE_2's petition was its failure to "identify any injury that can be traced to the challenged action." LBP-91-1, slip op. at 24, citing Dellums v. NRC, 863 F.2d 968, 971 (D.C. Cir. 1988).

The Board also determined that SE_2 had failed to establish representational standing. The Board noted that SE_2 had not

"stated that its organizational purpose provides authority to represent members in adjudicatory proceedings such as this one." LBP-91-1, slip op. at 26. In order for an organization to "rely upon injury to the interests of its members," the Board said, "it must provide, with its petition, identification of at least one of the persons its seeks to represent, a description of the nature of injury to the person and demonstrate that the person to be represented has in fact authorized such representation." Id., citing Philadelphia Electric Co. (Limerick Generating Station, Units 1 and 2), LBP-82-43A, 15 NRC 1423, 1437 (1982). SE_2, the Board said, had not provided any of these things. Relatedly, the Board noted that the fact that some of SE_2's members apparently live within a 50-mile radius of Shoreham did not create a presumption of standing in the confirmatory order proceeding, because "it is not a proceeding for a construction permit, an operating license or a significant amendment which would involve an obvious potential for offsite consequences." LBP-91-1, slip op. at 27, citing Florida Power and Light Co. (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325 (1989).

SE_2 fails to challenge any of these findings, which are dispositive of its standing.

b. SWRCSD's petition

Similarly, the Board found that SWRCSD had not established either organizational or representational standing. With respect to organizational standing, the Board determined that SWRCSD's

"organizational interest is that of a ratepayer and a tax recipient," economic concerns that are "outside of the Commission's jurisdiction." LBP-91-1, slip op. at 28. Such concerns "do not confer standing in NRC licensing proceedings," the Board continued, and, therefore, SWRCSD "has no basis for organizational standing." Id.

As to representational standing, the Board found that, while the President of the Board of Education had been identified as one whose interests SWRCSD wished to protect, "[n]o supporting statement was received stating that the person had in fact authorized such representation." LBP-91-1, slip op. at 28. In addition, the Board reiterated that the "fact that the individual may reside and work in close proximity to the nuclear facility does not create a presumption of standing." Id. at 29.

Finally, as with SE_2, the Board determined that SWRCSD's petition failed to "particularize any injury that it traces to the Confirmatory Order." LBP-91-1, slip op. at 29. The Board continued that "[a]lthough [SWRCSD] claims it wants to protect the health and safety of employees from the radiological impacts of the Confirmatory Order, it does not identify what those radiological impacts are." Id.

SWRCSD fails even to address, much less refute, any of these findings documenting its lack of standing.

(2) Physical Security Plan

a. SE_2's petition

SE_2's petition on LILCO's Physical Security Plan amendment, the Board said, "fundamentally is a repeat of its petition to intervene on the Confirmatory Order Modification." LBP-91-1, slip op. at 30. The Board therefore chose not to repeat at length its reasons why SE_2 had failed to establish standing.

The Board did note, however, that, as to organizational standing, SE_2 had not established "how, in a concrete way, the lack of an environmental assessment on the Security Plan Amendment would injure its ability to disseminate information that is essential to its programmatic activities and is in the zone of interest protected by NEPA." LBP-91-1, slip op. at 35. With respect to representational standing, the Board pointed out that SE_2 had not submitted the required supporting statement, nor met its "burden of showing that a member's particularized injury in fact results from the Security Plan Amendment." Id. To the contrary, the Board said, all that SE_2 had done was to present an "abstract argument that is unconnected to the legal and factual issues in the proceeding." Id. at 36. The true issue in the proceeding, "whether the security changes for a defueled plant that has never been in commercial operation can result in harm," was, the Board continued, "never addressed by Petitioner." Id.

SE_2 fails to address at all this dispositive finding in its brief on appeal.

b. SWRCSD's petition

The Board found SWRCSD's petition to be "virtually identical to that of [SE_2] except as to organizational purpose and does not differ in any material respect." LBP-91-1, slip op. at 38. The Board therefore made the "same rulings on [SWRCSD's] petition as we o'd" on SE_2's. Id.

SWRCSD fails utterly to address this matter.

(3) Emergency Preparedness

a. SE_2's petition

Here, too, the Board noted that SE_2 had "repeat[ed] what is contained in its two petitions we previously reviewed." LBP-91-1, slip op. at 39. Organizationally, SE_2 did not show itself to have "suffered an injury in fact recognized in law." Id. at 42-43. SE_2 also failed to submit the required supporting statement to establish representational standing.

The Board further found that SE_2's "claims of injury are not organizationally and representationally related in any way to a plant which will be defueled and will have its spent fuel in storage before any of the [emergency preparedness license] conditions can be removed." LBP-91-1, slip op. at 43. Once again, the Board observed, SE_2 had merely presented an "abstract argument that is unconnected with the legal and factual issues in the proceeding." Id. No "credible showing" was made, the Board said, that "the amendment would increase the risk of radiological harm to members' health and safety." Id. at 44.

SE_2 has failed to appeal the Board's ruling on these issues.

b. SWRCSD's petition

Again, the Board noted that SWRCSD's petition was "virtually identical" to SE_2's. LBP-91-1, slip op. at 46. The Board made the "same rulings as to both petitions." Id.

Again, SWRCSD has failed to appeal.

As the above makes evident, the infirmities that the Board identifies in the six petitions are fundamental and systemic. The short of it is, the Board has determined that in all instances Petitioners have failed to demonstrate the sort of interests necessary to establish standing. Even in the face of opposition from Petitioners, the Board's findings would be entitled to substantial deference. See, e.g., Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-107, 6 AEC 188, 193 (1973)(a Board's determination as to whether a petitioner has identified a sufficient affected interest will not be disturbed on appeal "unless it appears that that conclusion is irrational"); accord, Duquesne Light Co. (Beaver Valley Power Station, Unit 1), ALAB-109, 6 AEC 243, 244 (1973). And yet, Petitioners do not even mention the Board's findings on any of these critical standing issues. It must be evident, even to Petitioners, that they have no plausible case on appeal.

IV. Conclusion

For the reasons given above, Petitioners' appeal from LBP-91-1 should be denied.

Respectfully submitted,

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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Before the Commission

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

CERTIFICATE OF SERVICE

I hereby certify that copies of LILCO'S OPPOSITION TO PETITIONERS' APPEAL FROM LBP-91-1 were served this date upon the following by Federal Express, as indicated by an asterisk, or by first-class mail, postage prepaid.

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