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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE COMMISSION

In the Matter of	)	
	)	
LONG ISLAND LIGHTING COMPANY	)	Docket No. 50-322-OLA
	)	
(Shoreham Nuclear Power Station, Unit 1)	)	(Confirmatory Order Modification, Security Plan Amendment and Emergency Preparedness Amendment)

NRC STAFF RESPONSE TO PETITIONERS' APPEAL OF LBP-91-1

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February 7, 1991

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	)	Modification, Security Plan
	)	Amendment and Emergency
	)	Preparedness Amendment)

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INTRODUCTION

On January 8, 1991, the Licensing Board issued a decision, LBP-91-1, 33 NRC ___, ruling on the petitions for intervention filed on behalf of Scientists and Engineers For Secure Energy, Inc. ("SE2") and Shoreham-Wading River Central School District ("District") (jointly referred to as "Petitioners"). The Board found that Petitioners failed to establish standing under 10 C.F.R. § 2.714(a)(2) with respect to each issue Petitioners sought to litigate. Slip op. at 46. In view of Petitioners' having filed their intervention petitions prior to the Commission's decision in CLI-90-8, 32 NRC 201 (1990), the Licensing Board gave Petitioners 20 days to file amended intervention petitions. Slip op. at 47-48. Petitioners filed six amended intervention petitions on February 4, 1991.

On January 23, 1991, Petitioners filed a joint appeal from LBP-91-1 pursuant to 10 C.F.R. § 2.714a.[1] Petitioners ask the Commission to vacate LBP-91-1 and reverse the Licensing Board's finding therein that the three license modifications at issue do not

[1]Notice of Appeal, dated January 23, 1991; Petitioners' Brief in Support of Appeal of Atomic Safety and Licensing Board Memorandum and Order of January 8, 1991, dated January 23, 1991 ("Petitioners' Brief").

constitute an impermissible segmentation of Shoreham's decommissioning. Petitioners' Brief at 6. On the same date, Petitioners filed with the Licensing Board an application for stay of LBP-91-1.[2] For the reasons stated below, the Commission should dismiss Petitioners' appeal as improper under 10 C.F.R. § 2.714a and § 2.730(f) or, in the alternative, affirm LBP-91-1.

STATEMENT OF FACTS

Subsequent to NRC actions affecting the license to operate Shoreham at full power, Petitioners separately filed three sets of petitions to intervene and requests for hearing. The actions contested are: (1) the March 29, 1990 Confirmatory Order Modifying License (Effective Immediately) prohibiting LILCO from placing nuclear fuel in the Shoreham reactor without prior NRC Staff approval (55 Fed. Reg. 12758, April 5, 1990); (2) the June 14, 1990 license amendment allowing LILCO to reduce the size of its security force at Shoreham (55 Fed. Reg. 25387, June 21, 1990); and (3) the July 31, 1990 license amendment regarding Shoreham's emergency preparedness requirements (55 Fed. Reg. 31914, August 6, 1990).

On October 17, 1990, the Commission forwarded the petitions to the Licensing Board for further proceedings. CLI-90-8, 32 NRC at 209. The following day, the Licensing Board below was designated to rule on the six petitions. 55 Fed. Reg. 43057, 43058 (October 25, 1990).[3]

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[2]Application For Stay of the Board's Order of January 8, 1991, dated January 23, 1991 ("Stay").

[3]To date, no prehearing or special prehearing conference has been held or scheduled.

In response to the Licensing Board's November 8, 1990 inquiry,[4] the parties submitted their views on whether the Licensing Board should proceed with its review of the intervention petitions in light of the Commission's pending reconsideration of CLI-90-8. The Licensing Board decided there was no sound reason for postponing its review. Slip op. at 4 n.1.

On January 8, 1991, the Licensing Board issued LBP-91-1, ruling that both SE2 and the District had failed to establish standing under 10 C.F.R. § 2.714(a)(2). Slip op. at 46. With respect to the Confirmatory Order, the Board found that SE2 failed to establish organizational standing because it had not shown a distinct and palpable harm to its stated organizational interest of educating the public on national energy issues. *Id.* at 23-24. SE2 also failed to connect the issue to be decided -- whether the NRC was correct in determining that the public health and safety require that fuel not be returned to the Shoreham reactor vessel without prior NRC approval -- with any injury to its organizational interest. *Id.* at 24-26.

The Licensing Board further determined that SE2 failed to establish representational standing regarding the Confirmatory Order issue given that: (1) no SE2 member statements were submitted describing the nature of any personal injuries arising from issuance of the Confirmatory Order and/or that any member authorized SE2 to represent their interest regarding those injuries, *id.* at 26-27; (2) the Confirmatory Order does not involve an obvious potential for offsite consequences and there is thus no presumption of standing, *id.* at 27; (3) the fact that some SE2 members may be ratepayers does not confer standing, *id.* at 27; and (4) no nexus was shown between

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[4]*See* slip op. at 4 n.1.

issuing the Confirmatory Order and the future harm that may result from construction of substitute fossil fuel plants, *id.* at 27-28.

As to the District's claims of standing regarding the Confirmatory Order issue, the Licensing Board noted that the District's stated organizational interest -- a ratepayer and tax recipient -- was not sufficient to establish organizational standing. *Id.* at 28. The Licensing Board ruled that the District did not establish representational standing regarding the Confirmatory Order issue because (1) no supporting statements of members were submitted; (2) there is no presumption of standing due to the absence of potential offsite consequences; and (3) radiological impacts on members resulting from issuing the Confirmatory Order were not identified. *Id.* at 28-29.

Regarding the security plan amendment, the Licensing Board ruled that SE2 failed to show it had organizational standing because, in addition to certain pleading deficiencies, SE2 failed to establish that the lack of an environmental assessment of the amendment would injure its organizational interest. *Id.* at 23-26, 35. In addition, SE2 failed to show it had representational standing regarding the security plan amendment issue because (1) it failed to submit any supporting statements from its members; (2) no nexus was shown between future health effects on its members resulting from building substitute fossil fuel plants and the security plan changes authorized by the amendment; (3) no specific injuries in fact to its members were alleged as resulting from the security plan changes; and (4) it failed to show that changes in the security plan of a plant never in commercial operation constitute a distinct and palpable harm to its members. *Id.* at 35-38. For the same reasons, the Licensing Board ruled that the District failed to establish organizational or representational standing regarding the security plan

amendment issue. *Id.* at 38. Further, the Board ruled that Petitioners had not identified a specific aspect relevant to the security plan amendment proceeding on which they might be permitted to intervene. *Id.* at 37-38, 46.

Regarding the Emergency Plan amendment, which relieves the Licensee from complying with five license conditions only when the Shoreham reactor is void of all fuel assemblies and the spent fuel is stored in an approved manner, the Licensing Board ruled that SE2 failed to establish organizational standing since it failed to show that it had suffered any legally cognizable injury arising from the amendment. *Id.* at 23-28, 42-43. As to representational standing, the Licensing Board found that SE2 failed to establish it on the emergency plan amendment issue because (1) SE2 did not submit any supporting statements of its members; (2) SE2 failed to show that there are any adverse offsite radiological consequences stemming from the alleged reduced effectiveness of Shoreham's Local Emergency Response Organization given that Shoreham is a defueled, non-operating plant; and (3) SE2 failed to show any nexus between the challenged action and any particularized injury to any of its members. *Id.* at 43-44. Applying the same reasoning, the Licensing Board also ruled that the District had failed to establish organizational and representational standing regarding the emergency plan amendment issue. *Id.* at 46. The Licensing Board did not dismiss the intervention petitions, but provided Petitioners 20 days to amend their petitions and show they have standing to participate in these proceedings. *Id.* at 47-48.

On January 23, 1991, Petitioners filed the instant appeal arguing that the Licensing Board erred when it held that the three license actions contested by Petitioners "are not an impermissible segmentation of any decision to decommission." Petitioners' Brief at 2,

citing LBP-91-1, slip op. at 47. Petitioners ask the Commission to "summarily reverse this holding of the ASLB to avoid further unwarranted delay in the initiation of the NEPA process and to allow the proper scoping of environmental review of the decommissioning proposal, including review of the three preparatory licensing actions presented here." Petitioners' Brief at 3. On February 4, 1991, Petitioners filed amended intervention petitions with the Licensing Board.

ARGUMENT

A. Petitioners' Appeal Should Be Dismissed As Improperly Filed Under 10 C.F.R. § 2.714a.

Generally, under NRC practice, "[n]o interlocutory appeal may be taken to the Commission from a ruling of the presiding officer." 10 C.F.R. § 2.730(f). Under 10 C.F.R. § 2.714a(b),[5] an appeal may be taken from rulings on petitions to intervene which terminate the right to participate in a proceeding. *Louisiana Power and Light Co.* (Waterford Steam Electric Station, Unit 3), ALAB-690, 16 NRC 893, 895 n.2 (1982). *See also, Houston Lighting & Power Co.* (Allens Creek Nuclear Generating Station, Unit 1),

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[5]10 C.F.R. § 2.714a states in pertinent part as follows:

> (a) Notwithstanding the provisions of § 2.730(f), an order of the presiding officer or the atomic safety and licensing board designated to rule on petitions for leave to intervene and/or requests for hearing may be appealed, in accordance with the provisions of this section, . . . by the filing of a notice of appeal and accompanying supporting brief. . . No other appeals from rulings on petitions and/or requests for hearing shall be allowed.
>
> (b) 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.

ALAB-585, 11 NRC 469 (1980); *Detroit Edison Co.* (Greenwood Energy Center, Units 2 and 3), ALAB-472, 7 NRC 570, 571 (1978); *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-828, 23 NRC 13, 18 n.6 (1986).

The Licensing Board granted Petitioners 20 days to amend their intervention petitions to cure the pleading defects described in LBP-91-1 (slip op. at 47-48), and in doing so did not terminate Petitioners' right to participate in this proceeding. Petitioners filed amended intervention petitions on February 4, 1991. The Licensing Board must still consider these amended petitions. Petitioners' appeal is now moot.

Accordingly, for the reasons stated above, the Commission should dismiss Petitioners' appeal as improperly filed under 10 C.F.R. § 2.714a.

B. Petitioners' Appeal Lacks Merit.

Should the Commission decide to look beyond the procedural problems of Petitioners' appeal and address its merits, LBP-91-1 is correct and should be affirmed.

1. The Board's findings on standing are correct.

Petitioners ignore the rulings on standing in LBP-91-1 upon which their petitions to intervene were denied. Petitioners seem to argue that the Licensing Board erred by ruling on the standing issues without considering the admissibility of their proffered contentions. This argument ignores the requirement that prior to any consideration as to the admissibility of contentions, licensing boards can properly apply judicial concepts of standing to determine whether the petitioner's interest is merely academic or whether petitioner has sustained or likely will sustain some injury related to the actions at issue. *Portland General Electric Co.* (Pebble Springs Nuclear Plant, Units 1 and 2), CLI-76-27, 4 NRC 610 (1976). This comports with the long-established view that a 10 C.F.R.

§ 2.714(a) inquiry should first focus on whether the petitioner has established an interest necessary to confer standing and, if so, whether the petitioner has asserted at least one properly supported contention. *See Mississippi Power and Light Co.* (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-130, 6 AEC 423, 424 (1973). *See also, Commonwealth Edison Co.* (Dresden Nuclear Power Station, Unit 1), CLI-81-25, 14 NRC 616, 622 (1981); *Public Service Co. of New Hampshire* (Seabrook Station, Unit 2), CLI-84-6, 19 NRC 975, 978 (1984); *Georgia Power Co.* (Vogtle Electric Generating Plant, Units 1 and 2), LBP-84-35, 20 NRC 887, 916 (1984); *Philadelphia Electric Co.* (Limerick Generating Station, Unit 1), ALAB-833, 23 NRC 257, 261 (1986).

A licensing board's findings regarding "interest" or standing issues are subject to reversal only if such findings have no rational basis. *See Duquesne Light Co.* (Beaver Valley Power Station, Unit No. 1), ALAB-109, 6 AEC 243, 244 (1973); *Northern States Power Co.* (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-107, 6 AEC 188, 193-94, *reconsid. den.*, ALAB-110, 6 AEC 247, *aff'd*, CLI-73-12, 6 AEC 241 (1973). The Petitioners have not even addressed the requirements of standing in 10 C.F.R. §§ 2.714(a)(2) and (d)(1) upon which LBP-91-1 was predicated. Having failed to indicate why the Board erred in finding that Petitioners lack standing, Petitioners present no basis for the Commission to overturn LBP-91-1.[6]

Moreover, as may be seen from the LBP-91-1 findings regarding the issues of Petitioners' standing, *see* pages 3-5, *supra*, the Licensing Board's decisions on standing

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[6]An issue which is not addressed in an appellate brief is considered to be waived, even though the issue may have been raised before the Licensing Board. *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), ALAB-828, 23 NRC 13, 20 n.18 (1986).

have a rational basis and should therefore be affirmed. LBP-91-1 provides ample support for the findings that Petitioners (1) failed to show any legally cognizable injuries to their stated organizational interests; and (2) failed to show any nexus between any of the three challenged actions and any particularized injuries to either their organizational interests or the interests of their individual members. Slip op. at 23-29, 34-38, 42-44. For example, with respect to the security plan amendment, the Board found that Petitioners had failed to show any connection between the amendment and any increased risk of radiological sabotage, and further found that there was no showing that the theft of Shoreham's spent fuel would result in radiological harm to individual members. Slip op. at 37. No basis exists to overturn the Licensing Board's rulings on standing.

2. The licensing actions do not constitute segmented decommissioning.

Leaving aside the issues of standing, the Petitioners' appeal still lacks merit because the contention issues argued in their brief, *see* Petitioners Brief at 1-4, have no connection with any possible radiological health and safety or environmental effects arising from the three Shoreham license modification actions at issue. The alleged harms Petitioners discuss in their brief arise instead from Shoreham's decommissioning, an action outside the scope of the instant proceeding. CLI-90-8, 32 NRC at 207-08; *see also* CLI-91-1, 33 NRC ___ (January 24, 1991), slip op. at 7-8.

The Licensing Board properly found in LBP-91-1 that the three licensing actions were not segmented decommissioning actions. Slip op. at 9-11. The Petitioners predicate their arguments on the theory that the three challenged actions constitute a segmentation of a decommissioning proposal requiring review under the National Environmental Policy Act ("NEPA"). Petitioners' Brief at 2-3. Such arguments were

rejected by the Commission in CLI-90-8, 32 NRC at 207-09.[7] The Commission stated that Shoreham's resumed operation, "or other methods of generating electricity -- are alternatives to the decision not to operate Shoreham and thus are beyond Commission consideration." *Id.* at 207 (footnote omitted). The federal action under consideration is the three challenged actions, and not the decision whether to decommission the facility. *Id.* at 207-08.[8] The Commission emphasized that the *method* of decommissioning (in contrast to whether the plant should be decommissioned) is the decision which requires NRC review and approval and is the only matter subject to review under NEPA. *Id.* at 208 n.4.[9]

Even if the three challenged actions are characterized as preparatory to a future decision approving a Shoreham decommissioning plan, they would constitute an improper segmentation of the decommissioning plan only if they had prejudicial effect on decommissioning options, methods or costs. *Id.* at 207 n.3; *see, also, Tennessee Valley Authority* (Browns Ferry Nuclear Plant, Units 1, 2, and 3), ALAB-664, 15 NRC 1, 7 (1982). The Petitioners offer no arguments or discussion as to how decommissioning will be adversely affected by the three challenged actions. Indeed, Petitioners arguments are

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[7]Petitioner, on October 29, 1990, moved for reconsideration of CLI-90-8. That motion is pending.

[8]It is only a proposal for Federal action that a Federal environmental impact statement need be prepared. *See Kleppe v. Sierra Club,* 427 U.S. at 399; *Aberdeen & Rockfish R. V. SCRAP,* 422 U.S. 289, 320-21 (1975).

[9]As indicated in *Duke Power Co.* (Amendment to Materials License SNM-1773 - Transportation of Spent Fuel from Oconee Nuclear Station for Storage at McGuire Nuclear Station), ALAB-651, 14 NRC 307, 313 (1981), the NRC may approve a portion of a plan as long as that portion has independent utility and would not affect future action on the remainder of the plan.

all predicated on the grounds that alternatives concerning the resumed operation of Shoreham must be considered. In CLI-90-8, 32 NRC at 208, the Commission rejected the position that the three challenged actions would prejudice decommissioning, and Petitioners' arguments accordingly fail. Resumed operation is an alternative extending beyond the range of alternatives that are reasonably related to how Shoreham's decommissioning will be accomplished, and need not be evaluated under NEPA. *See Trout Unlimited v. Morton*, 509 F.2d 1276, 1286 (9th Cir. 1974).

Petitioners' arguments that the Commission in CLI-90-8 "admits the existence of a proposal to decommission" (Brief at 2) ignores the substance of the Commission's determination in that case. Petitioners cite the language in CLI-90-8, 32 NRC at 208, that "the broadest NRC action related to Shoreham decommissioning will be approval of the decision of how that decommissioning will be accomplished." Petitioners' Brief at 2. This statement refers to some future consideration of the proposal to decommission. The actions at issue in this proceeding, while they may be viewed as actions preliminary to decommissioning, resulted from the licensee's decision to cease operating the facility and are appropriate to reflect the plant's defueled status. *Cf.* CLI-90-8, 32 NRC at 207-08. The Commission's future involvement in approving any Shoreham decommissioning plan does not transform the underlying private decision not to operate Shoreham as a nuclear power facility into federal action requiring an environmental assessment. *Id.* Shoreham's resumed operation is an alternative only to this private decision, and is thus not an alternative to a major federal action that requires consideration under NEPA. *See NRDC v. EPA*, 822 F.2d 104, 130 (D.C. Cir. 1987).

Similarly unpersuasive are Petitioners' multiple references to the waste of resources that they say will occur absent reversal of LBP-91-1. Petitioners' Brief at 3-4. Such argument does not support interlocutory review of a licensing board order. *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-858, 25 NRC 17, 21-22 (1987).

Finally, Petitioners argue that the NRC has an obligation to follow the Council on Environmental Quality's ("CEQ") interpretations of NEPA and that because the CEQ's Chairman and the Secretary of Energy have filed comments with the Commission regarding Shoreham's decommissioning, the Commission will likely change its CLI-90-8 decision.[10] Petitioners' Brief at 4-5. Prior to October 17, 1990, when CLI-90-8 was issued, the Commission had received letters from the Secretary of Energy and CEQ's Chairman regarding Shoreham.[11] These letters urged the NRC not to take any regulatory action regarding Shoreham without first preparing a comprehensive environmental impact statement covering, among other things, the near-term operation of Shoreham as a nuclear plant. Thus, Petitioners' argument that the Commission will now reconsider CLI-90-8 in light of additional similar comments filed by CEQ's Chairman and the Department of Energy after October 17, 1990, is not a strong one. In its subsequent decision on the Shoreham possession only license issue, CLI-91-1, slip

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[10]The Staff does not question that CEQ regulations and interpretations of NEPA are entitled to substantial deference (*see Robertson v. Methow Valley Citizens Council*, ___ U.S. ___, 109 S. Ct. 1835, 1848 (1989)), but these regulations and interpretations are not binding on the NRC. 49 Fed. Reg. 9352, 9359 (March 12, 1984); *Limerick Ecology Action v. NRC*, 869 F.2d 719, 725, 743 (3rd Cir. 1989).

[11]Among such letters is one dated September 18, 1990, from the Secretary of Energy to the Chairman, Nuclear Regulatory Commission, and one dated October 9, 1990, from CEQ's Chairman to the Chairman, Nuclear Regulatory Commission.

op. at 8, the Commission particularly reiterated its conclusions in CLI-90-8 that alternatives to decommissioning need not be considered in these NRC licensing actions. Thus, the Board's intervention ruling is in accordance with the scope of the proceeding, as delineated by the Commission in CLI-90-8, and reiterated in CLI-91-1, and should be affirmed.

CONCLUSION

The Petitioners' appeal should be dismissed as improperly filed under 10 C.F.R. § 2.714a. If the Commission should decide to review the matter on the merits, the Commission should affirm the Licensing Board's findings set forth in LBP-91-1.

Respectfully submitted,

John T. Hull
Counsel for NRC Staff

Dated at Rockville, Maryland
this 7th day of February, 1991

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NUCLEAR REGULATORY COMMISSION

'91 FEB -7 P4:15

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO PETITIONERS' APPEAL OF LBP-91-1" in the above captioned proceeding have been served on the following by deposit in the United States mail, first class, or, as indicated by an asterisk, by deposit in the Nuclear Regulatory Commission's internal mail system, this 7th day of February, 1991:

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