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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
	)	(Physical Security, Emergency
(Shoreham Nuclear Power	)	Preparedness License Condition,
Station, Unit 1)	)	Confirmatory Order)

NRC STAFF RESPONSE TO JOINT PETITION FOR RECONSIDERATION OF CLI-90-08 BY SHOREHAM-WADING RIVER CENTRAL SCHOOL DISTRICT AND SCIENTISTS AND ENGINEERS FOR SECURE ENERGY, INC.

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November 19, 1990

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INTRODUCTION

On October 29, 1990, Shoreham-Wading River Central School District and Scientists and Engineers For Secure Energy, Inc. ("Petitioners") filed a Joint Petition For Reconsideration ("Motion") of the Commission's Decision CLI-90-08, 32 NRC ___ (October 17, 1990).[1] The Commission therein held that the resumed operation of Shoreham Nuclear Power Station ("Shoreham") as a nuclear power plant need not be considered as an alternative by the NRC Staff in any Environmental Assessment ("EA") or Environmental Impact Statement ("EIS") that may

[1]Joint Petition for Reconsideration of the Commission's Decision CLI-90-08, by Shoreham-Wading River Central School District and Scientists and Engineers for Secure Energy, Inc. dated October 29, 1990. 10 C.F.R. § 2.771 governs petitions for reconsideration, which may be filed as of right after the Commission issues any "final decision." CLI-90-08 is not a final decision under 10 C.F.R. § 2.770, which refers to an "initial decision" reviewing an evidentiary record. Accordingly, Commission consideration of Petitioners' Motion may be viewed as discretionary.

be prepared in connection with the future decommissioning of Shoreham. In their Motion, Petitioners request the Commission to reconsider and vacate CLI-90-08. Petitioners, however, fail to present any relevant arguments not previously considered by the Commission. Accordingly, Petitioners' Motion should be denied for this and other reasons as set forth herein.

On October 16, 1990, before CLI-90-08 was issued, the Commission invited the Department of Energy ("DOE") and the Council on Environmental Quality ("CEQ") to file any comments they wanted the Commission to consider in the above-captioned proceeding. On November 9, 1990, DOE and CEQ filed comments,[2] and the Staff has factored those comments, to the extent pertinent to Petitioners' Motion, into this reply.

BACKGROUND

Petitioners separately filed three sets of petitions to intervene and requests for hearing regarding actions taken by the NRC Staff affecting the Long Island Lighting Company's ("LILCO's") license to operate Shoreham at full power. The actions at issue are: 1) the March 29, 1990 Confirmatory Order Modifying License (Effective Immediately)[3] issued by the NRC Staff prohibiting LILCO from

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[2]Letter from Chairman of CEQ to Commissioners, dated November 6, 1990 ("CEQ Letter"); "Amicus Submission by the United States Department of Energy," November 9, 1990 ("DOE Amicus Submission").

[3]On February 12, 1990, LILCO had informed the NRC that it would not put fuel into the Shoreham reactor without prior NRC approval. The Confirmatory Order specifies that LILCO's commitments to maintain Shoreham's structures, systems and components in a condition consistent with its defueled status, as outlined in a letter dated September 19, 1989, remain in force. 55 Fed. Reg. 12759 (April 5, 1990).

placing nuclear fuel in the Shoreham reactor without prior 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);[4] and 3) the July 31, 1990 license amendment and related exemption[5] regarding Shoreham's emergency preparedness requirements (55 Fed. Reg. 31914 and 31915, August 6, 1990).

Petitioners in their requests for intervention have maintained that the NRC Staff actions at issue, together with LILCO's actions in defueling Shoreham, constitute a "de facto decommissioning" of Shoreham, thus triggering the need to

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[4]LILCO requested this amendment on January 5, 1990, and notice of same was published. 55 Fed. Reg. 10540 (March 21, 1990). The NRC Staff prepared a Safety Evaluation and made a final determination that the amendment involves no significant hazards consideration. 55 Fed. Reg. 25387 (June 21, 1990). The Staff further concluded that the amendment satisfies the criteria for a 10 C.F.R. 51.22(c) categorical exclusion. *Id.* Accordingly, no EA or EIS was required, and the amendment became effective on its date of issuance. *Id.*

[5]In its amendment request dated December 15, 1989, LILCO proposed that changes be made to Shoreham's Emergency Preparedness Plan which, together with an exemption from the requirements of 10 C.F.R. § 50.54(q), would allow LILCO to cease its offsite emergency preparedness activities. 55 Fed. Reg. 12076-77 (March 30, 1990). In accordance with the proposed amendment, LILCO agreed that if it later puts nuclear fuel back into the Shoreham reactor, it would be required to re-establish its offsite emergency response organization. *Id.* at 12077.

In considering the amendment and exemption requests, the NRC Staff prepared a Safety Evaluation and made a final determination that the amendment involves no significant hazards consideration. 55 Fed. Reg. 31914-15 (August 6, 1990). The Staff also prepared and published its Environmental Assessment, finding that the amendment and exemption would have no significant impact or effect on the quality of the human environment. 55 Fed. Reg. 31111-12 (July 31, 1990). Accordingly, no EIS was required, and the amendment and exemption were made effective as of their date of issuance.

prepare and file an EIS analyzing the effects decommissioning will have on the environment.[6]

As set forth more fully in CLI-90-08, slip op. at 4-6, the above-described actions came about as the result of a February 28, 1989 agreement between LILCO and New York State ("NYS").[7] LILCO agreed to sell Shoreham to the Long Island Power Authority, a body created by the NYS Legislature for the purpose of buying Shoreham from LILCO and decommissioning the facility. State law prohibits the Long Island Power Authority ("LIPA") from operating Shoreham as a nuclear facility once it acquires Shoreham from LILCO.

In furtherance of the agreement, LILCO has taken several actions, including filing requests for the license amendments discussed above, consistent with defueling Shoreham and maintaining its defueled status. LILCO intends to transfer its Shoreham operating license to LIPA. As LILCO, LIPA and NYS read the agreement, none of them can legally operate Shoreham as a nuclear facility, no matter what action the NRC may take in connection with the license transfer or decommissioning.[8]

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[6]The Commission has referred this and all other issues raised by Petitioners in their intervention requests to an Atomic Safety and Licensing Board for initial resolution. 55 Fed. Reg. 43057 (October 25, 1990).

[7] This agreement's validity has been upheld by a NYS appellate court. *See Citizens for an Orderly Energy Policy v. Cuomo,* 159 A.D. 2d 141, 559 N.Y.S. 2d 381 (3d Dept. 1990).

[8] *See* LILCO's Opposition To Joint Petition For Reconsideration of CLI-90-08 and Response to Comments by Department of Energy and Council on Environmental Quality, dated November 13, 1990, at 10-11; Response of Long Island Power Authority to (1) Joint Petition For Reconsideration of CLI-90-08 and (continued...)

DISCUSSION

A. The National Environmental Policy Act Does Not Create Substantive Obligations To Consider Alternatives Not Reasonably Feasible Or Practical Under Existing Law.

Petitioners maintain that under the National Environmental Policy Act, 42 U.S.C. § 4332(2)(C)(iii), the resumed operation of Shoreham must be examined as an alternative to decommissioning the facility. Motion at 3-11.

In *Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 551 (1978), the Court emphasized that the scope of alternatives examined under NEPA must be bounded by a consideration of what is practically possible, stating: "To make an impact statement something more than an exercise in frivolous boilerplate the concept of alternatives must be bounded by some notion of feasibility," and approvingly quoted the statement in *NRDC v. Morton*, 458 F.2d 827, 837-38 (D.C. Cir. 1972), that

> There is reason for concluding that NEPA was not meant to require detailed discussion of the environmental effects of "alternatives" put forward in comments when these effects cannot be readily ascertained and the alternatives are deemed only remote and speculative possibilities, in view of basic changes required in statutes and policies of other agencies--making them available, if at all, only after protracted debate and litigation not meaningfully compatible with the time-frame of the needs to which the underlying proposal is addressed.

The agreements between NYS and LILCO, under which neither can legally operate Shoreham as a nuclear power plant, make operation of the plant, in the

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[8](...continued)
(2) Comments by DOE and CEQ, dated November 13, 1990 at 5-6; *see also* CLI-90-08, slip op. at 4-5.

words of *NRDC v. Morton*, "only [a] remote and speculative possiblit[y]." 458 F.2d at 838. "[B]asic changes . . . in statutes and policies of other agencies" which could only be "available, if at all, after protracted debate and litigation," *id.*, make consideration of whether Shoreham should again produce electricity foreign to this proceeding. As stated in *Vermont Yankee*, 435 U.S. at 558: "The fundamental policy questions appropriately resolved in Congress and in the state legislatures are not subject to reexamination in the federal courts under the guise of judicial review of agency action." NEPA does not enlarge an agency's jurisdiction beyond that given by the agency's organic acts. *See, e.g., Gage v. AEC*, 479 F.2d 1214, 1220 n.19 (D.C. Cir. 1973); *Winnebago Tribe of Nebraska v. Ray*, 621 F.2d 269, 272-73 (8th Cir. 1980), *cert. denied*, 449 U.S. 836 (1980); *NRDC v. EPA*, 822 F.2d 104, 129, n. 25 (D.C. Cir. 1987); *Department of Energy* (Clinch River Breeder Reactor Plant), CLI-82-23, 16 NRC 412, 421 (1982).

The Atomic Energy Act of 1954, as amended, 42 U.S.C. § 2011 et seq. ("AEA"), is the source of the nuclear regulatory authority held by the Commission. The AEA reflects the judgment of Congress that while the radiological safety aspects of nuclear power are to be carefully and exclusively regulated by the NRC, the states are left with extensive powers outside this safety area to manage and control the use of nuclear power for the generation of electricity.

In *Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Commission*, 461 U.S. 190 (1983), the Court considered whether a California statute making state approval of nuclear power plants dependent upon the availability of means for the disposal of high-level nuclear waste was

preempted by the AEA.[9] The Court held there was no preemption. Congress intended that the federal government should regulate the radiological safety aspects involved in nuclear plant operation, but the states retain "their traditional role in the regulation of electricity production." *Pacific Gas, supra,* 461 U.S. at 194. "Need for new power facilities, their economic feasibility, and rates and services, are areas that have been characteristically governed by the States." *Id.*, at 205. The NRC "was not given authority over the generation of electricity itself, or over the economic question whether a particular plant should be built." *Id.*, at 207. The Court further stated that an "NRC order does not and could not compel a utility to develop a nuclear plant." *Id.*, at 218-19. *See also Vermont Yankee*, 435 U.S. at 550; *People Against Nuclear Energy v. NRC*, 678 F.2d 222, 250-251 (D.C. Cir. 1982), *reversed on other grounds sub nom., Metropolitan Edison Co. v. PANE*, 460 U.S. 766 (1983).[10]

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[9]The Court cited, at 461 U.S. 211, n.23, the following remarks of Senator Pastore in the Congressional Record regarding the AEA's jurisdictional provision:

> We were conscious that it was not desired that the [NRC] should engage in the business of regulating electricity as such. . . . We were trying to keep the [NRC] out of the business of regulating electricity. That is what gave birth to section 271. We provided that nothing in the act would affect the local supervising authority's right to control the manufacture of electricity generated by nuclear facilities.

[10]In *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1984), the Court demonstrated its reluctance to infringe upon state authority over nuclear power even in safety-related areas. Thus, notwithstanding federal preemption of the nuclear safety field, state law may nonetheless be allowed to award damages for radiation injuries. *Silkwood*, 464 U.S. at 256. In *English v. General Electric Co.*, ___ U.S. ___, 110 S. Ct. 2270 (1990), a case involving a state-law tort claim for intentional

(continued...)

The Court in *Vermont Yankee*, 435 U.S. at 551, approvingly cited *Life of the Land v. Brinegar*, 485 F.2d 460 (9th Cir. 1973), *cert. denied*, 416 U.S. 961 (1974), where it was held that an alternative which required an action which another agency refused to take, and an alternative which would violate legal agreements, need not be considered in an EIS.[11] Thus, an alternative that is contrary to an existing legal agreement and that would require actions that the licensee and State agencies adamantly refuse to take, need not be considered. Matters relating to Shoreham's resumed operation which would violate agreements and require actions which other agencies refuse to take are indeed "remote and speculative".

In the case at bar, LILCO and NYS have entered into a legal agreement whereby Shoreham will not be operated as a nuclear power plant. Absent a declaration of an emergency and the payment of just compensation (which are discussed *infra*), the Commission has no legal authority to order a licensee to make use of its electric power generating capacity. Rather, its mandate is to

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[10](...continued)
infliction of emotional distress, the Court again held there was no preemption, stating that "for a state law to fall within the preempted zone, it must have some direct and substantial effect on the decisions made by those who build or operate nuclear facilities concerning radiological safety levels." *English*, 110 S.Ct. at 2278 (emphasis added).

[11]*See also Friends of the Earth v. Coleman*, 513 F.2d 295, 300 (9th Cir. 1975) (non-viable alternative need not be considered); *NRDC v. Callaway*, 524 F.2d 79, 93 (2nd Cir. 1971) (alternatives of speculative feasibility or those which would not meet, at least in part, goals of proposal need not be considered); *Process Gas Consumers Group v. USDA*, 694 F.2d 728, 769 (D.C. Cir. 1981) (alternatives need not extend beyond the purposes of the project and should be formulated in the context of the proposed action); *City of New York v. Department of Transportation*, 715 F.2d 732, 745 (2nd Cir. 1983) (alternatives that require a change in a national policy need not be considered).

regulate any radiological hazards that may exist in a manner that will adequately protect the public's health and safety. *Pacific Gas, supra.* The Commission has no authority to make or control a licensee's economic decisions regarding whether or not a licensee will remain in the nuclear power generating business. 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).[12]

In *Atlanta Coalition v. Atlanta Regional Council,* 599 F.2d [illegible], 1344 (5th Cir. 1979), the court stated: ". . . Congress did not intend NEPA to apply to state, local, or private actions -- [the] statute speaks only to 'federal agencies' and requires impact statements only as to 'major federal actions'". In *NAACP v. Medical Center,* 584 F.2d 619, 634 (3rd Cir. 1978), the court, after reviewing the law, stated:

> We believe that analysis of these cases reveals that in order to determine if an agency's role constitutes major action under NEPA, a court must focus its inquiry on whether the action of the federal agency demonstrates a federal "responsibility" for the action. *See Comment, Scenic Rivers, supra, 124 U.Pa.L.Rev. 266.* When the agency "enables" another to impact on the environment, the court must ascertain whether the agency action is a

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[12]In examining whether an EIS was needed for the low-power operation of Shoreham, this Commission concluded that the original EIS issued for Shoreham encompassed within it an analysis of lesser operations including the possibility of the non-generation of electricity at Shoreham. *See Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-84-9, 19 NRC 1323, 1326 (1984), *motion for stay denied sub nom. Cuomo v. NRC,* 772 F.2d 972, 974 (D.C. Cir. 1985). *See also Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), CLI-89-10, 30 NRC 1 (1989).

> legal requirement for the other party to affect the environment and whether the agency has any discretion to take environmental considerations into account before acting.

In *Nuclear Engineering Co.* (Sheffield, Illinois, Low-Level Radioactive Waste Disposal Site), ALAB-606, 12 NRC 156, 161-63 (1983), it was maintained that approval of the withdrawal of an application to expand a waste disposal site could not be implemented before the preparation of an environmental statement. The Appeal Board dismissed this claim as "insubstantial" on the ground that the Commission had no authority to require expansion of the site, and, therefore, permission to permit withdrawal of the application to expand could not constitute a major Federal action requiring the preparation of an impact statement. Similarly, in *Gage v. AEC*, 479 F.2d 1214, 1220 n.19 (D.C. Cir. 1979), the court stated that "NEPA does not mandate action which goes beyond the agency's jurisdiction," and thus there was no basis for a claim that Commission regulations should bar the purchase of lands for a power plant before the issuance of a construction permit from the AEC.[13]

In *NRDC v. EPA*, *supra*, the court found that the EPA's involvement in approving applications for and issuing water discharge permits under the Clean

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[13]Commission regulation, 10 C.F.R. § 51.95(b), provides that for license amendments which "authorize the decommissioning of a production or utilization facility . . . the NRC staff will prepare a supplemental impact statement for the post operating stage or an environmental assessment, as appropriate, which will update the prior environmental review". As recognized upon publication of this amendment to the NRC's regulations, "These amendments apply to nuclear facilities that operate through their normal lifetime, as well as those that may be shutdown prematurely." 53 Fed. Reg. 24018, 24019 (June 27, 1988). *Cf.* DOE Amicus Submission, at 6-10.

Water Act did not "constitute sufficient federal involvement to 'federalize' the private act of construction." *NRDC v. EPA*, 822 F.2d at 130 (citations omitted). Similarly, in the case at bar, the Commission's future involvement in approving any Shoreham decommissioning plan does not federalize the underlying private decision not to operate Shoreham as a nuclear power facility. 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.

Here there is no NRC action which is "responsible" for or "enables" LILCO or NYS to determine not to use the Shoreham facility. There is no federal action significantly affecting the environment which requires NRC consideration of non-use of the facility.[14] Petitioners, by requesting that resumed operation of Shoreham as a nuclear power plant be considered as an alternative in an EIS, are, in effect, asking the Commission to reverse a decision made by LILCO not to operate Shoreham. While this decision may have adverse economic effects on the

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[14]It is only on a proposal for federal action that an environmental impact statement must be prepared. *See Kleppe v. Sierra Club*, 427 U.S. 390, 399 (1976); *Aberdeen & Rockfish R. v. SCRAP (SCRAPII)*, 422 U.S. 289, 320-21 (1975). Where the federal agency does not act to prevent a private or other party from acting there is no federal action. *Defenders of Wildlife v. Andrus*, 627 F.2d 1238, 1244 (D.C. Cir. 1980). Under CEQ's regulations it is only major federal actions which significantly affect the environment that require filing an EIS. 40 C.F.R. § 1502.4.

The regulations of CEQ define a "major Federal action" as one "with effects that may be major and which are potentially subject to Federal control and responsibility." 40 C.F.R. § 1508.18; 10 C.F.R. § 51.10(a). The determination not to operate Shoreham is subject neither to Federal control or responsibility, and thus is outside CEQ's definition of a "major Federal action." Although the subsequent consideration of a separate "possession-only" license amendment (which is not here involved) may be subject to Federal control, it is not this action which might cause environmental impacts, but the determination not to use the license to generate electricity.

individuals whose interests the Petitioners purportedly represent, where a decision is made not to utilize a nuclear power facility, the Commission's role is limited to ensuring that any existing radiation hazards at the facility are properly managed.

Because the resumed operation of Shoreham as a nuclear power plant is not a reasonable alternative under NEPA given the facts of this case, and because the Commission's authority does not include economic regulation of nuclear power under the AEA, the Commission's decision not to require evaluation of Shoreham's resumed operation as a nuclear power plant as an alternative to decommissioning is proper and should not be vacated.[15]

Petitioners cite the CEQ regulations discussing the types of alternatives that must be considered when preparing NEPA evaluations. Motion, at 3-6.[16] As Petitioners recognize, these regulations provide only for the consideration of reasonable alternatives. *See, e.g.*, 40 C.F.R. § 1502.14(a),(c); § 1506.2(d);

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[15]Petitioners also claim that the Commission violated CEQ and NRC regulations by determining that the alternative of the resumed operation of Shoreham need not be considered before conduction of a conference to determine the "scope" of an environmental statement. Motion, at 11-12; *see also* DOE Amicus Submission, at 12. These regulations have no applicability here, as they apply only to instances where it has been determined to prepare an EIS. *See* 40 C.F.R. § 1501.7; 10 C.F.R. § 51.14(b).

[16]The Staff does not question that CEQ regulations interpreting NEPA are entitled to substantial deference (*see Robertson v. Methow Valley Citizens Council*, ___ U.S. ___, 109 S. Ct. 1835, 1848 (1989)), although these regulations 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). However, here the question is not what the CEQ regulations provide, but the scope of NRC jurisdiction -- a determination in the purview of the NRC, and not the CEQ. *See Power Reactor Development Corp. v. Electricians*, 367 U.S. 396, 398 (1961); *see also FPC v. Louisiana Power & Light Co.*, 406 U.S. 621, 647 (1972). The NRC's determination that the AEA does not provide it with jurisdiction to require the use of the Shoreham facility to generate electricity is entitled to substantial deference.

§ 1500.1(a). As Petitioners further recognize, CEQ approved the NRC's regulations implementing NEPA. Motion, at 6. Petitioners rely on the portion of the NRC Statement of Consideration accompanying the implementing regulations (Motion, at 7),[17] stating that "[i]n the usual case, these alternatives include the alternative of no action (denial of the application) and reasonable alternatives outside the jurisdiction of the NRC." 49 Fed. Reg. at 9353 (March 12, 1984). However, the "no action" alternative is not one of having Shoreham operate, but one of having a plant that will not be properly decommissioned; for as has been stated, the operation of Shoreham is not feasible in light of LILCO's refusal to operate the plant.

Shoreham's resumed operation as a nuclear power plant is not a reasonable alternative under the circumstances presented here. LILCO and NYS both oppose such operation of Shoreham. Resumed operation of Shoreham as a nuclear plant need not be considered in an environmental review.

B. Resumed Operation Of Shoreham As A Nuclear Plant Is Not A Reasonable Or Feasible Alternative.

Petitioners fail to show that Shoreham's resumed operation as a nuclear plant would be an economically practical, feasible, or reasonable alternative to decommissioning.

As Petitioners acknowledge (Motion at 7-8), the Commission correctly held in CLI-90-08 that an EIS need consider only reasonable alternatives, and need not consider alternatives of speculative feasibility. After discussing the *Morton* case,

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[17] *See* CEQ Letter at 6; DOE Amicus Submission at 15-17.

Petitioners assert that because Shoreham is fully licensed and was built at considerable cost, its use as a nuclear facility is "technically and economically practicable and feasible." Motion at 11. Assuming the accuracy of this statement, it still totally fails to address the problem of who would be able to legally operate Shoreham as a nuclear facility under existing state and federal law.[18]

In *Vermont Yankee, supra*, the Supreme Court expressed its concern that NEPA not be used as a way to encumber the administrative process in an effort to delay action viewed as undesirable by intervenors. *Vermont Yankee,* 435 U.S. at 552. Under NEPA,

> it is still incumbent upon intervenors who wish to participate to structure their participation so that it is meaningful, so that it alerts the agency to the intervenor's position and contentions . . . Indeed, administrative proceedings should not be a game or a forum to engage in unjustified obstructionism by making cryptic and obscure reference to matters that ought to be considered and then, after failing to do more than bring the matter to the agency's attention, seeking to have that agency determination vacated on the ground that the agency failed to consider matters forcefully presented.

Id. at 553-54.[19] The usefulness of considering the alternative of operating Shoreham as a nuclear facility is comparable to the usefulness of the energy conservation alternatives discussed in *Vermont Yankee.* In their Motion, Petitioners

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[18]CEQ interprets its own regulations to provide that an alternative must be economically practical or feasible in order to be considered as reasonable. *See* 46 Fed. Reg. 18026, 18027 (March 23, 1981)

[19]In *Lower Alloways Creek Township v. Public Service Electric Co.*, 687 F.2d 732, 739-43 (3rd Cir. 1982), the court emphasized that the burden was on intervenors to demonstrate that the NRC's determination that an action was not a "major federal action" was not reasonable and that the action had an adverse effect.

conclude their first argument by stating that because substantial sums have been invested in Shoreham, its use as a nuclear facility is technically and economically feasible and decommissioning it would be contrary to common sense. Motion at 11. Yet Petitioners fail to address the question of who would operate Shoreham as a nuclear facility under the proposed alternative. No one has proposed a plausible alternative to LILCO's decision to terminate operation of the facility. No one has suggested that anyone else is seriously considering purchase of the facility and no one has seriously proposed that the federal government seize and operate the facility.

As Petitioners note, Motion at 18-19, the NRC has the authority under Sections 108, 186 and 188 of the AEA, 42 U.S.C. §§ 2138, 2236, 2238, to operate the affected facility as long as the public convenience and necessity may require, but petitioners ignore the requirement for "just compensation." *See also* AEA, § 171, 42 U.S.C. § 2221. No one has seriously proposed that NRC be appropriated the funds to pay "just compensation for use of the facility", even if the Commission could make the other findings required. Similarly, Petitioners reference to the Federal Power Act, 16 U.S.C. § 824a(c), as supporting the authority to declare a power emergency and order temporary generation of electricity (upon the payment of the required compensation), is again only speculation. Motion at 15. The fact that this option may be available in an emergency situation does not indicate that the Secretary of Energy has the funds available to issue such a directive.[20]

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[20]Similar arguments are set forth in DOE Amicus Submission, at 19-20.

Moreover, Petitioners fail to address how license revocation will help accomplish implementation of the proposed alternative -- resumed plant operation.

Alternatives so remote from reality as to require a complete revision of the national policy embodied in the AEA, or that would require the declaration of a national emergency and the seizure of the Shoreham facility (with the payment of just compensation) are not ones that require NEPA evaluation. *See Vermont Yankee; Life of the Land; NRDC v. Morton.*[21]

CONCLUSION

For the above stated reasons, Petitioners' motion for reconsideration and to vacate CLI-90-08 should be denied.

Respectfully submitted,

Edwin J. Reis
Deputy Assistant General Counsel
for Reactor Licensing

John T. Hull
Counsel for NRC Staff

Dated at Rockville, Maryland
this 19th day of November, 1990

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[21]The Petitioners also claim that their procedural rights were violated by the Commission acting on the issue concerning the scope of environmental review in CLI-90-08, which they themselves presented in their pleadings. The Petitioners were heard on this issue and thus not harmed by the Commission deciding the issue. Further, the Commission has authority to provide guidance and decide any issue that is presented to it in a proceeding before the issue is considered by one of its subordinate adjudicatory tribunals. *See Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-90-03, 31 NRC 219, 229 (1990).

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NUCLEAR REGULATORY COMMISSION

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO JOINT PETITION FOR RECONSIDERATION OF CLI-90-08 BY SHOREHAM-WADING RIVER CENTRAL SCHOOL DISTRICT AND SCIENTISTS AND ENGINEERS FOR SECURE ENERGY, INC." in the above captioned proceeding have been served on the following by express mail, or, as indicated by an asterisk, by deposit in the Nuclear Regulatory Commission's internal mail system, this 19th day of November, 1990:

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Atomic Safety and Licensing
Appeal Panel(6)*
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