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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
BEFORE THE COMMISSION

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In the Matter of )  
LONG ISLAND LIGHTING COMPANY ) Docket Nos. 50-322-OLA  
(Shoreham Nuclear Power Station, Unit 1) ) (License Transfer)

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NRC STAFF RESPONSE TO PETITIONERS' INTERVENTION PETITIONS,  
REQUESTS FOR HEARING, AND NO  
SIGNIFICANT HAZARD CONSIDERATION COMMENTS

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May 17, 1991

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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)	)	(License Transfer)

NRC STAFF RESPONSE TO PETITIONERS' INTERVENTION  
PETITIONS, REQUESTS FOR HEARING, AND NO  
SIGNIFICANT HAZARDS CONSIDERATION COMMENTS

INTRODUCTION

On April 19, 1991, Scientists and Engineers for Secure Energy, Inc. ("SE2") and Shoreham-Wading River Central School District ("School District")(collectively "Petitioners"), filed petitions to intervene and requests for hearing<sup>1</sup> in the above-captioned proceeding. The Petitions respond to the March 20, 1991 *Federal Register* notice, 56 Fed. Reg. 11768,<sup>2</sup> 11781, regarding consideration of the June 28, 1990

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<sup>1</sup> Shoreham-Wading River Central School District Comment on Proposed No Significant Hazards Consideration and Petition for Leave to Intervene and Request for Prior Hearing ("School District Petition"); Scientists and Engineers for Secure Energy, Inc.'s Comment on Proposed No Significant Hazards Consideration and Petition for Leave to Intervene and Request for Prior Hearing ("SE2 Petition") (collectively "Petitions").

<sup>2</sup> The notice specified that comments on the proposed no significant hazards determination ("NSHC") be filed with the NRC Staff while intervention petitions were to be filed with the Secretary of the Commission. 56 Fed. Reg. 11768, 11769.  
(continued...)

amendment request filed jointly by the Long Island Lighting Company ("LILCO") and the Long Island Power Authority ("LIPA") proposing the transfer of the Shoreham license from LILCO to LIPA "upon or after amendment of the license to a non-operating status."

As further detailed in the discussions regarding the scope of this proceeding, Point I, *infra*, and standing requirements, Point III, *infra*, most of the interests, aspects, and claims of injury identified in the petitions relate either to Shoreham's operation as a nuclear facility, and do not relate to the proposed transfer of a possession-only license ("POL"). Moreover, the gravamen of the Petitions seeks to have the Commission consider the resumed operation of Shoreham, a matter the Commission has expressly determined not to be within its jurisdiction in the facts here presented, under either the Atomic Energy Act (AEA) or the National Environmental Policy Act (NEPA). See Point II, *infra*.

Based on these considerations, and as further discussed below, the petitions should be denied.

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<sup>2</sup>(...continued)

were to be filed with the Secretary of the Commission. 56 Fed. Reg. 11768, 11769. Instead, Petitioners filed pleadings that combined comments on the Staff's proposed NSHC determination with petitions to intervene in the license transfer proceeding. Due to the great similarity between SE2's Petition and the School District's Petitions, and for purposes of convenience, the Staff files this single response to both petitions, and also addresses the Petitioners' comments on the NSHC determination. Point V, *infra*.

### BACKGROUND

LILCO's and LIPA's joint application seeks transfer of the Shoreham license only after it has been amended to reflect the plant's defueled, non-operational status. The March 29, 1990 Confirmatory Order (55 Fed. Reg. 12758, April 5, 1990) already prohibits loading fuel back into the Shoreham reactor vessel without the NRC's prior approval.<sup>3</sup>

LILCO previously requested that its Shoreham license be amended to a POL, and the Staff has issued a proposed NSHC determination concerning the POL request. 55 Fed. Reg. 34098 (Aug. 21, 1990). The Petitioners' initial intervention petitions in the POL amendment proceeding were rejected by the Licensing Board for lack of standing. *See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-7, 33 NRC \_\_\_* (March 6, 1991). The Board is now considering the amended intervention petitions filed by Petitioners on April 8, 1991 in the POL proceeding.

The license transfer sought in this proceeding would implement certain portions of the February 28, 1989 agreement involving the State of New York,

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<sup>3</sup> The United States Court of Appeals for the District of Columbia Circuit on April 30, 1991 rejected Petitioners' recent challenge the immediate effectiveness of the Confirmatory Order. *See Shoreham-Wading River Central School District and Scientists and Engineers for Secure Energy, Inc. v. NRC*, No. 90-1241, slip op. (D.C. Cir. April 30, 1991).

LIPA,<sup>4</sup> and LILCO, which is founded upon the private, non-federal decision of the parties thereto that Shoreham will not be used to generate electricity by nuclear means.<sup>5</sup> On May 6, 1991, LILCO and LIPA filed separate opposition to the Petitions to intervene.

### DISCUSSION

#### I. The Petitions Raise Matters Not Germane To The License Amendment Application Noticed In The Federal Register

Petitioners base their claims of injury and challenges to the proposed transfer on matters that are outside the scope of this proceeding. The gravamen of the Petitions is not germane to the transfer of a possession only license (FOL). The notice of opportunity for hearing concerning the proposed transfer stated that the "amendment would authorize the transfer of ownership of the Shoreham license . . . upon or after amendment of the license to a non-operating status." 54 Fed.

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<sup>4</sup> LIPA was created pursuant to the Long Island Power Authority Act, enacted in 1986 ("LIPA Act"). New York Public Authorities Law § 1020 *et seq.* (McKinney Supp. 1990). The LIPA Act authorizes LIPA to acquire Shoreham from LILCO and, if it does acquire Shoreham, the Act further directs LIPA to close and decommission Shoreham as a nuclear facility. New York Public Authorities Law §§ 1020-h(9), 1020-t.

<sup>5</sup> Petitioners are challenging the agreement's validity in their appeal now before the Court of Appeals of New York, and argue here that a decision on the license transfer request should not be made prior to resolution by the New York courts of the agreement's validity. See School District Petition at 6; SE2 Petition at 6. The Commission already has before it Petitioners' joint stay application (and the responses thereto) which makes the same argument, and that argument should not be considered here. This is but one example of Petitioners raising the same contentions over and over again in different contexts. See estoppel, Point II, *infra*.

Reg. 11781 (March 20, 1991). The Petitioners do not concern themselves with the proposed transfer of a POL, but rather seek to litigate matters involving the qualifications needed to possess an operating license, the costs and delay associated with issuing a new operating license should Shoreham resume full power operation at some future date, and the environmental consequences of not operating the plant as a nuclear power facility. *E.g.*, School District Petition at 10, 15-16, 19-23, 49; SE2 Petition at 10, 15-16, 19-22, 48.<sup>6</sup>

NRC proceedings are limited to the matters encompassed in the notice of opportunity for hearing published in the *Federal Register*. See 10 C.F.R. §§ 2.105, 2.714(a). One may not litigate issues not germane to the permission or license amendment sought. See, *e.g.*, *Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1)*, CLI-83-25, 18 NRC 327, 331-32 (1983) (qualification of a Commissioner not germane to facility restart proceeding); *Northern Indiana Public Service Co. (Bailly Generating Station, Nuclear 1)*, ALAB-619, 12 NRC 558, 565 (1980) (notice of application to extend construction permit does not allow litigation

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<sup>6</sup> While Petitioners do raise questions involving the qualifications of LIPA to receive a license (School District Petition at 28-30; SE2 Petition at 27-29), in the context of the Petitions as a whole, these matters involve qualifications to possess a license to operate Shoreham, rather than a POL. For example, the Petitioners assert that:

[I]ssuance of a license for Shoreham to an unqualified licensee, such as LIPA would constitute a failure to properly maintain and protect the facility *in accordance with the full power Operating License . . .* and could further erode the *alternative of full-power operation* by, among other things, increasing the costs, in time and money, of *returning to full power operation*. [emphasis added]

School District Petition at 23; SE2 Petition at 22.

of health and safety issues generally); *Commonwealth Edison Co.* (Carroll County Site), ALAB-601, 12 NRC 18, 24 (1980) (notice of application for early site review does not allow litigation of issues not germane to that review). In *Wisconsin Electric Co.* (Point Beach Nuclear Plant, Units 1 and 2), ALAB-739, 18 NRC 335, 339 (1983), the Appeal Board emphasized that a Licensing Board considering a license amendment only has jurisdiction to consider matters germane to the license amendment and may not consider other matters which petitioners might wish to raise. It stated:

In a license amendment proceeding, a licensing board has only limited jurisdiction. The board may admit a party's issues for hearing only insofar as those issues are within the scope of matters outlined in the Commission's notice of hearing on the license action. *Portland General Electric Co.* (Trojan Nuclear Plant), ALAB-534, 9 NRC 287, 289 n.6 (1979); *Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167, 170-171 (1976). See *Commonwealth Edison Co.* (Zion Station, Units 1 and 2), ALAB-616, 12 NRC 419, 426 (1980). [footnote omitted]

In *Point Beach*, the proposed amendment provided for the repair of steam generator tubes by sleeving and the operation of the facility with sleeved tubes. Contentions relating to the general adequacy of the steam generator tubes and the public health and safety were held to be beyond the jurisdiction of the Licensing Board absent a basis to believe that the proposed repair would cause untoward safety consequences that would not otherwise be present.

Petitioners' arguments ignore that the requested transfer would not permit LIPA to be the recipient of a full power operating license. The application expressly states that the request is for the transfer of the Shoreham license after issuance of a defueled facility license -- which is a separate application that the

Commission concluded is a request for a possession only license. CLI-91-1, 33 NRC 1, 4-5 (1991). The matters sought to be raised are mainly not germane to the notice of opportunity for hearing published in the *Federal Register*, 54 Fed. Reg. 11781, and should be dismissed.

It would be a waste of administrative resources to permit Petitioners to generally raise safety and environmental issues with respect to issuance of a POL in this transfer proceeding since Petitioners' claims of injury are not based on the proposed transfer of a POL, but are predicated on their view that the private, nonfederal decision to cease operations at the facility results in adverse environmental impacts associated with replacing the power the facility would have generated. See *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-90-8, 32 NRC 201, 207-08 (1990); *id.*, CLI-91-2, 33 NRC 61, 70-71 (1991). Consequently, although the Petitions raise concerns related to whether LIPA has the technical and financial qualifications to be a transferee, these concerns are raised in the context of a transfer of an operating license rather than the transfer of a POL. SE2 Petition, at 22, 25, 27-29; School District Petition at 23, 26, 28-30. Instead, the Petitions focus on such issues as LIPA's plans to eventually decommission the facility, LIPA's status as an electric utility, LIPA's technical qualifications to hold a full power license, and the environmental costs of the decision to terminate full power operations at the facility. School District Petition at 23, 49-50; SE2 Petition at 22, 48-49.

The allegations of harm do not stem from the transfer, but instead from the Licensee's decision not to operate Shoreham, and are not within the matters

noticed for hearing in the March 20, 1991, *Federal Register* Notice. The Petitioners seek to litigate matters outside the scope of this proceeding, and the Petitions should be dismissed.

II. Petitioners Are Collaterally Estopped From Litigating The Gravamen Of Their Petition

A. Collateral Estoppel Or Issue Preclusion Applies In NRC Proceedings

Under collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits involving a party to the proceeding, even if later suits are based on a different cause of action.<sup>7</sup> *Montana v. United States*, 440 U.S. 147, 153, (1979); *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n. 5 (1979); Restatement (Second) of Judgments, § 27 (1982).<sup>8</sup> The application of collateral estoppel or issue preclusion is central to the purpose for which civil courts have been established, i.e. the conclusive resolution of disputes within their jurisdictions. Precluding parties

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<sup>7</sup> Collateral estoppel requires the presence of four elements in order to be given effect: the issue sought to be precluded must be the same as that involved in the prior action; the issue must have been actually litigated; the issue must have been determined by a valid and final judgment; and the determination must have been essential to the prior judgment. *Houston Lighting & Power Co. (South Texas Project, Units 1 & 2)*, LBP-79-27, 10 NRC 563, 566 (1979); *Haize v. Hanover Ins. Co.*, 536 F.2d 576, 579 (3rd Cir. 1976); *Gulf Oil Corp. v. FPC*, 563 F.2d 588, 602 (3rd Cir. 1977)

<sup>8</sup> Section 27 of the Restatement provides:

When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.

from contesting matters that they have had a full and fair opportunity to litigate "protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions." *Montana v. U.S.*, 440 at 154-54; *Allen v. McCurry*, 449 U.S. 90, 94 (1980).

For purposes of issue preclusion, "final judgment" includes any prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect. Restatement (Second) of Judgments § 13 (1982).<sup>9</sup> The factors supporting the conclusion that a decision is final for purposes of preclusion turn on whether the parties were fully heard, whether the court supported its decision with a reasoned opinion, and whether the decision was subject to review on appeal. The test is whether the conclusion in question is procedurally definite. See e.g., *Lummas v. Commonwealth Oil*, 297 F.2d 80, 87-90 (2nd Cir. 1961), cert. denied, 368 U.S. 986 (1962); *Miller Brewing Co. v. Jos. Schlitz Brewing Co.*, 605 F.2d 990 (7th Cir. 1979), cert. denied, 444 U.S. 1102 (1980); *Sherman v. Jacobson*, 247 F. Supp. 261, 267-72 (S.D.N.Y. 1965).

The principles of collateral estoppel, like those of res judicata, are applied in administrative adjudicatory proceedings. *U.S. v. Utah Construction and Mining*

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<sup>9</sup> Section 13 of the Restatement provides:

The rules of res judicata are applicable only when a final judgment is rendered. However, for purposes of issue preclusion (as distinguished from merger and bar), "final judgment" includes any prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect.

Co., 384 U.S. 394, 421-22 (1966); *Toledo Edison Co.* (Davis-Besse Nuclear Power Station, Units 1, 2 and 3), ALAB-378, 5 NRC 557 (1977). Such principles have long been recognized in NRC proceedings. *Alabama Power Co.* (Joseph M. Farley Nuclear Plant, Units 1 and 2), ALAB-182, 7 AEC 210, *remanded on other grounds*, CLI-74-12, 7 AEC 203 (1974); *Southern California Edison Co.* (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-673, 15 NRC 688, 695 (1982).<sup>10</sup> Collateral estoppel precludes relitigation of issues of law or fact which have been finally adjudicated by a tribunal of competent jurisdiction. *Davis-Besse, supra* at 561.

B. Petitioners Are Collaterally Estopped From Raising The Issues They Seek To Litigate

The Petitions in this proceeding are predicated upon the need for the Commission to consider the resumed operation of Shoreham, and attempt to have the Commission require the operation of Shoreham. See School District Petition at 10, 15-16, 19-23, 49; SE2 Petition at 10, 15-16, 19-22, 48. On several occasions, the same Petitioners have raised the same issues concerning the need for the Commission to consider the resumed operation of Shoreham and have urged the Commission order the operation of Shoreham. On several occasions the Commission has ruled that on the facts presented it does not have the authority or

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<sup>10</sup> The doctrine of collateral estoppel must be applied "with a sensitive regard for any supported assertion of changed circumstances or the possible existence of some special public interest factors" in NRC proceedings. *Farley, supra*, ALAB-182, 7 AEC at 216; *Carolina Power & Light Co.* (Shearon Harris Nuclear Power Plant), ALAB-837, 23 NRC 525, 536-37 (1986); see also *United States Department of Energy*, (Clinch River Breeder Reactor Plant), CLI-82-23, 16 NRC 412, 420 (1982).

jurisdiction to consider the resumed operation of Shoreham and could not require the operation of the facility, as the decision of whether to operate a licensed nuclear plant rests solely with the licensee, and that, on the facts here presented, the NRC is not authorized by the statutes governing this agency to consider the resumed operation of the Shoreham facility. *Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1)*, CLI-90-8, 32 NRC 201, 207-08 (1990); *id.*, CLI-91-1, 33 NRC 1, 7 (1991); *id.*, CLI-91-2, 33 NRC 61, 70-73 (1991); *id.*, CLI-91-4, 33 NRC \_\_\_\_ (April 3, 1991, slip op. at 4, 5 n.2). The Petitioners are estopped from raising these arguments again.

The Commission found in CLI-90-8, 32 NRC at 207, "that the NRC [generally] lacks the authority to direct a licensee to operate a licensed facility" and that "the alternative of 'resumed operation' -- or other methods of generating electricity -- are alternatives to the decision not to operate Shoreham and are thus beyond Commission consideration." Indeed, the Commission found that the broadest NRC action related to Shoreham decommissioning would be approval of the decision of how that decommissioning will be accomplished. *Id.* at 208. Because the specific actions before the Commission would have no bearing upon the decision of *how* decommissioning would be accomplished,<sup>11</sup> the Commission found that it need not be concerned with questions involving the resumed

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<sup>11</sup> In that case, the Commission disposed of petitions to intervene which had been filed on *Federal Register* notices concerning (1) an order prohibiting LILCO from placing nuclear fuel in the reactor vessel without prior NRC approval, (2) a proposed amendment permitting changes in the physical security plan for the plant, and (3) a proposed amendment removing certain license conditions regarding offsite emergency preparedness activities. 32 NRC at 203-04.

operation of Shoreham under the requirements of the Atomic Energy Act, 42 U.S.C. § 2011 *et seq.* or the National Environmental Policy Act of 1969, 42 U.S.C. § 4321, *et seq.* *Id.* at 207-08; CLI-91-2, 33 NRC at 70-74. In sum, the Commission concluded that alternatives to the decision not to operate the plant are beyond the scope of its review (and of the requirements imposed by NEPA) because the decommissioning actions ultimately to be reviewed by the NRC are directed solely at assuring safe and environmentally sound decommissioning. *Id.*

In CLI-91-1, 33 NRC at 3, 6, the Commission ruled that LILCO could be issued a possession only license without the filing of any preliminary or final decommissioning information. While the Commission noted that there could be special circumstances under which some NEPA review for a POL could be warranted (for example if the POL clearly could be shown to foreclose alternative ways to conduct decommissioning that would mitigate or alleviate a significant environmental impact), no such circumstances were evident from the papers which had been filed. *Id.* at 8. In fact, the Commission noted that the Petitioners were not concerned with alternative ways to decommission but with operation as an alternative to decommissioning, a matter which was rejected in CLI-90-8. *Id.*

In CLI-91-2, the Commission denied reconsideration of CLI-90-8 and reiterated its ruling that "the NRC action subject to NEPA is, by its broadest terms, confined to review and approval of the method of Shoreham decommissioning." 33 NRC at 70. The Commission further stated that while the decision not to operate Shoreham may necessarily precede any determination of how decommissioning should proceed, it is nevertheless a private, non-federal action.

*Id.* at 71. The Commission also reiterated that under the facts here presented it did not have authority to consider the resumed operation of Shoreham under the AEA. *Id.* at 72-74. In CLI-91-04, the Commission again reiterated that any review in connection with decommissioning or other licensing actions would not include consideration of whether Shoreham should resume operations, as that was a private decision not subject to Commission review. *Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1) CLI-91-04, 33 NRC \_\_\_*, slip op. at 4 (April 3, 1991).

The essence of the Petitions is, once again, that the NRC must consider under the AEA and NEPA the resumed operation of Shoreham, and not only the methods of decommissioning the facility. School District Petition at 10, 15-16; SE2 Petition at 10, 15-16. According to the Petitioners, the proposed amendment cannot be considered until the ultimate disposition of the plant has been approved, and approval of its ultimate disposition requires the preparation of an EIS evaluating alternatives including operation or preservation. *Id.* It is the decision not to operate Shoreham which is at the heart of Petitioners' complaints.

The specific aspects of the proposed action as to which Petitioners wish to intervene include "whether, if a decision is made to operate Shoreham, the proposed transfer would totally frustrate or significantly delay and increase the cost of returning the plant to an operational mode;" "whether the proposed transfer would constitute an irreversible and irretrievable commitment of the Shoreham resource;" and "whether the transfer would allow deterioration and dismantling of the facility, thereby undermining the reasonable assurance that full power

operation . . . could be conducted." School District Petition at 20-21; SE2 Petition at 19-20. Thus, Petitioners ask for a NEPA evaluation which includes the need for power, the cost-benefit analysis of decommissioning, and the operation and near-term operation alternatives for Shoreham. School District Petition at 21-22; SE2 Petition at 20-21.

The remedies sought by Petitioners specifically include the reconsideration of the decision not to operate the Shoreham reactor. See School District Petition at 22; SE2 Petition at 21. Petitioners claim that their interest in the continuing operation of Shoreham could be jeopardized by the transfer to LIPA because of the increase in cost, in terms of time and money, which would be required to return the plant to full operation. School District Petition at 23; SE2 Petition at 22. Accordingly, they ask for an order directing the licensee to prepare an Environmental Report which includes an evaluation of the alternative of full-power operation. School District Petition at 49; SE2 Petition at 48.

As the foregoing discussion illustrates, Petitioners are attempting to relitigate an issue which has been fully aired and decided by the Commission: whether the NRC is responsible for reviewing and approving the decision not to operate Shoreham.<sup>12</sup> The Commission definitively answered this question in CLI-90-8, and

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<sup>12</sup> All of the specific aspects Petitioners raise with respect to NEPA (School District Petition at 46-48; SE2 Petition at 45-47) are premised upon their claim that a NEPA review is required to consider whether decommissioning of Shoreham should be permitted. Petitioners make no claim that the proposed amendment would have any impact on the manner in which decommissioning would be accomplished. As the Commission has made clear, the broadest NRC action relating to Shoreham's decommissioning would be approval of the decision of the method by which

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reiterated its holding in CLI-91-2. Under the doctrine of collateral estoppel, Petitioners cannot raise this issue once again.

As recognized in *Montana v. U.S.*, *supra*, the purpose of collateral estoppel is to preserve judicial resources and to insulate parties from the vexation and expense of parties having to answer a continuous stream of lawsuits raising the same issues. The Petitioners have again and again asked the Commission to exercise jurisdiction to consider the alternative of the resumed operation of Shoreham. Policy strongly requires that decisions in proceedings (where Petitioners are parties) have repose, and that Petitioners be estopped from again attempting to litigate whether the Commission has authority to consider the resumed operation of Shoreham under NEPA or other statutory provisions.<sup>13</sup>

### III. Petitioners Lack Standing To Intervene

#### A. Legal Standards Governing Standing In NRC Proceedings

The intervention petitions, when examined in light of the legal standards governing intervention in Commission adjudicatory proceedings, fail to show that Petitioners have cognizable interests which may be adversely affected by the license transfer.

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<sup>12</sup>(...continued)

decommissioning accomplished, 32 NRC at 208, a decision which is unrelated to the proposed transfer of the license.

<sup>13</sup> It is recognized that in "highly unusual circumstances" the NRC could have authority to direct the operation of a nuclear facility. See CLI-91-2, 33 NRC at 72. However, Petitioners have not shown that such unusual circumstances are present.

Section 189a(1) of the Atomic Energy Act, 42 U.S.C. §2239(a)(1), provides, in pertinent part, that:

In any proceeding under this chapter, for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control, . . . the Commission shall grant a hearing upon the request of any person *whose interest may be affected by the proceeding*, and shall admit any such person as a party to the proceeding.

[emphasis added]. Under 10 C.F.R. § 2.714(a)(1), "any person whose interest may be affected by a proceeding and who desires to participate as a party shall file a written petition for leave to intervene." Such petition must satisfy the following requirements:

The petition shall set forth *with particularity* the interest of the petitioner in the proceeding, *how that interest may be affected by the results of the proceeding*, including the reasons why petitioner should be permitted to intervene, with particular reference to the factors in paragraph (d)(1) of this section, and the specific aspect or aspects of the subject matter of the proceeding as to which petitioner wishes to intervene.

10 C.F.R. § 2.714(a)(2) [emphasis added].<sup>14</sup>

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<sup>14</sup>10 C.F.R. § 2.714(d)(1) provides that, in considering petitions for leave to intervene, the Commission or presiding officer shall consider, among other matters, the following factors:

- (i) The nature of the petitioner's right under the Act to be made a party to the proceeding.
- (ii) The nature and extent of the petitioner's property, financial, or other interest in the proceeding.
- (iii) The possible effect of any order that may be entered in the proceeding on the petitioner's interest.

The Commission has long held that judicial concepts of standing will be applied in determining whether a petitioner has sufficient interest in a proceeding to be entitled to intervene as a matter of right under Section 189 of the Act. See, e.g., *Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit 1)*, CLI-83-25, 18 NRC 327, 332 (1983); *Portland General Electric Co. (Pebble Springs Nuclear Plant, Units 1 and 2)*, CLI-76-27, 4 NRC 610 (1976). The Commission has held that these judicial concepts require a showing (a) that the action will cause "injury in fact," and (b) that the injury is "arguably within the zone of interest" protected by the statutes governing the proceeding. *TMI*, 18 NRC at 332; *Pebble Springs*, 4 NRC at 613. Further, in order to establish standing, the petitioner must show (1) that he has personally suffered a distinct and palpable harm that constitutes injury-in-fact; (2) that the injury fairly can be traced to the challenged action; and (3) that the injury is likely to be redressed by a favorable decision in the proceeding. *Dellums v. NRC*, 863 F.2d 968, 971 (D.C. Cir. 1988). Cf. *Nuclear Engineering Co. (Sheffield, Illinois, Low-Level Radioactive Waste Disposal Site)*, ALAB-473, 7 NRC 737, 743 (1978) (there must be a concrete demonstration that harm could flow from the result of a proceeding).

The Supreme Court, in the recent case of *Lujan v. National Wildlife Federation*, \_\_\_ U.S. \_\_\_, 110 S. Ct. 3177, 3185-86 (1990), indicated that unless a statute provides a specific right of judicial review, one must premise his action upon the Administrative Procedure Act, 5 U.S.C. § 555 *et. seq.* (APA), and not only show that he is within the zone of interest protected by the statute involved, but that he will suffer a palpable "legal wrong" or be "adversely affected or aggrieved

[by agency action] within the meaning of the statute involved. See APA, 5 U.S.C. § 702. The Petitioners here base their intervention petitions upon the Atomic Energy Act, and the National Environmental Policy Act. See Petitions at 11. Under Section 1E of the AEA, 42 U.S.C. § 2231, the APA is applicable to all agency action under the AEA and the terms "agency" and "agency action" have the meaning specified in the APA. Similarly, a right of review under NEPA is governed by the APA. See *Lujan v. National Wildlife Federation*, 110 S. Ct. at 3185-87.

To show that one is "adversely affected or aggrieved by agency action within the meaning of a relevant statute," Petitioners must provide specific facts showing the manner in which the agency action (or here, the proposed action) will affect them. 110 S. Ct. at 3186-87. Making general averments of harm without detailing specific agency acts causing harm is not enough to establish Petitioners' standing. See 110 S. Ct. at 3186-88.<sup>15</sup>

B. Petitioners' Stated Interests Do Not Provide A Basis For Standing In This Proceeding

Petitioners' primary concern is that Shoreham be operated as a nuclear facility. The Petitions contain repeated and duplicative assertions involving Petitioners' interests in the future use of Shoreham's present potential to generate

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<sup>15</sup> Although the Court in *Lujan v. National Wildlife Federation* was dealing with a motion for summary judgment, the principles discussed there are relevant here since, in determining whether Petitioners have standing, an inquiry is made of Petitioners' rights under the AEA and how the Petitioners' interests may be affected in the NRC proceeding. See 10 C.F.R. § 2.714 (d)(1).

electricity by nuclear means.<sup>16</sup> The Commission's recent Shoreham decisions, from CLI-90-8 through CLI-91-4, have consistently held 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 that "alternatives to the decision not to operate the plant are beyond the scope of our review and need not be considered under NEPA". CLI-90-8, 32 NRC at 207-08. *See also* CLI-91-1, 33 NRC at 7; CLI-91-2, 33 NRC at 70-71; CLI-91-4, slip op. at 4. The interests and concerns of Petitioners regarding the resumed operation of Shoreham, and the related "aspects" identified by Petitioners, are thus outside the scope of this proceeding and can form no basis for granting standing to Petitioners here.

Petitioners insist that the proposed license transfer is a segment of the larger plan to decommission Shoreham, and that a major federal action significantly affecting the environment is thus taking place which requires preparation of an EIS

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<sup>16</sup> For example, SE2's interests include:

- (a) protecting the health and environment of its members from the consequences of Shoreham's non-operation. SE2 Petition at 17;
- (b) ensuring the availability of electricity at reasonable rates. *Id.* at 18; *see also id.* at 34;
- (c) preventing delay and expense in returning Shoreham to an operable mode "if a decision is made to operate Shoreham." *Id.* at 19; *see also id.* at 22, 33-34, 41;
- (d) maintaining radiological safeguards should full power operation "ultimately be pursued." *Id.* at 19-20;
- (e) promoting public and national security interests in Shoreham "as an operational entity." *Id.* at 20;
- (f) correcting LILCO's decision not to operate Shoreham. *Id.* at 21; *see also id.* at 25;
- (g) not jeopardizing "the future viability of the reactor." *Id.* at 23; and
- (h) halting "all Shoreham proceedings not related to enhancing full-power operation." *Id.* at 48-49.

and/or EA under NEPA.<sup>17</sup> How transfer of a POL license to LIPA, a political subdivision of New York State that is statutorily barred from operating Shoreham as a nuclear plant,<sup>18</sup> will significantly affect the environment, are left unexplained. Even if the license transfer is viewed as a step in the decommissioning process, the segmentation argument fails because Petitioners fail to show that the license transfer would have a "prejudicial effect on *how* decommissioning will be accomplished." CLI-90-8, 32 NRC at 208 (emphasis in original).<sup>19</sup>

While the Petitioners' affidavits establish that members live and work within 50 miles of Shoreham,<sup>20</sup> member proximity to the plant does not create a

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<sup>17</sup> See, e.g., SE2 Petition at 16-17, 31-32, 42-43.

<sup>18</sup> Petitioners admit that LIPA is forbidden by its governing statute from operating the Shoreham nuclear facility. SE2 Petition at 22; School District Petition at 23.

<sup>19</sup> Petitioners' arguments on whether the license transfer has utility independent of decommissioning (SE2 Petition at 33-34; School District Petition at 34-35), and on what guidance CEQ regulations provide (SE2 Petition at 43-45; School District petition at 44-46) are beside the point. As stated above, the Commission views the segmentation question in terms of whether the challenged action prejudices the way in which decommissioning will be accomplished. Moreover, the independent utility argument fails insofar as it rests on the contention that the alternative of resumed operation must be considered, as that matter is outside the scope of this proceeding. The Commission has also already noted the non-binding effect of CEQ regulations in NRC proceedings. CLI-91-2, 33 NRC at 72 n.3.

<sup>20</sup> With the exception of Miro Todorovich, each affiant lives and works less than 50 miles from Shoreham. The respective distances for their residence and work are: Albert Prodell, two and eight miles; John Bateman, 28 and 23 miles; Ena-Mai Franz, two and seven miles; Andrew Hull, one mile and six miles; Dr. Musoiino, two and five miles; Joseph Scrandis, 43 and 30 miles; and Dr. John Stehn, ten and seven miles. Mr. Todorovich lives in Patterson, New York, which is over 50 miles from Shoreham, and states that he authorizes the filing of the SE2 petition on behalf of that organization.

presumption of standing since the license transfer involves the *non*-operation of the Shoreham reactor with no clear potential shown for offsite consequences. See *Florida Power & Light Co.* (St. Lucie Nuclear Power Plant, Units 1 and 2), CLI-89-21, 30 NRC 325, 329 (1989).<sup>21</sup>

Petitioners assert interests in having affordable electricity, enjoying benefits of a high tax base,<sup>22</sup> and avoiding higher tax levies.<sup>23</sup> Such economic interests fall outside the AEA's zone of interest and do not confer standing in NRC adjudicatory proceedings. *Pebble Springs, supra*, 4 NRC at 614; *Three Mile Island, supra*, 18 NRC at 332 n.4.

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<sup>21</sup> Petitioners' asserted interests in obtaining information similarly fail. SE2 petition at 23, 41-42; Scrandis, Franz, Musolino affidavits at ¶ 5; Stehn and Bateman affidavits at ¶ 6; School District Petition at 24, 42-43; Prodell Affidavit at ¶ 9. See *Lujan, supra*, 110 S. Ct. at 3193-94. The right to specific information under NEPA is recognized for standing purposes only if that information relates to environmental interests within the zone of interests that NEPA protects. *Competitive Enterprise Inst. v. National Highway Traffic Safety Admin.*, 901 F.2d 107, 123-24 (D.C. Cir. 1990). Petitioners have not shown that federal approval of the proposed license transfer would significantly affect the environment or prejudice decommissioning, and Petitioners thus fail the zone of interests test.

<sup>22</sup> In this regard, the intervention petitions, at 14-15, contend that such economic injuries independently satisfy the requirement of showing injury in fact in NRC licensing actions, citing *Dellums, supra*. This contention is made in the context of arguing a NEPA harm, yet *Dellums* involved not NEPA but the Comprehensive Anti-Apartheid Act of 1986, 22 U.S.C. § 5001, *et seq.* ("CAAA"). Moreover, even though an individual's inability to find work was determined by the *Dellums* court to be a cognizable economic injury under the CAAA, standing was denied because the individual did not satisfy "the causation and redressability requirements" of standing. *Dellums*, 863 F.2d at 973.

<sup>23</sup> See Petitions at 14, 15, 18; ¶ 9 of Stehn and Bateman affidavits; ¶ 8 of Scrandis, Franz and Musolino affidavits; ¶ 12 of Prodell Affidavit.

Further, where an organization seeks to intervene to represent the interest of a member, that interest must be germane to the purpose of the organization *Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977);, see also *UAW v. Brock*, 477 U.S. 274, 287-90 (1986); *id.* at 296-97 (Powell, J. dissenting). Thus for an organization to have derivative standing; it must have as its basic purpose the same goals as those of the individual it seeks to represent. *Humane Society v. Hodel*, 840 F.2d 45, 56 (D.C. Cir. 1988). The School District has failed to make this showing. The School District is concerned with the education of children, whereas the affidavit of Mr. Prodell, attached to the School District Petition shows that his concern is that nuclear plants operate. See Prodell Affidavit, ¶¶ 8-13. It does not appear that the School District can represent the interests of Mr. Prodell.

Petitioners have failed to identify injuries to interests cognizable in NRC adjudicatory proceedings, and their intervention petitions should accordingly be denied.<sup>24</sup>

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<sup>24</sup> Contrary to Petitioners' assertions, Petitions at 39-40, decommissioning of Shoreham does not encompass all actions associated with removing the plant safely from service up through those activities that enable the release of the property for unrestricted use. As stated with respect to the final Decommissioning Rule:

Decommissioning as defined in the rule means to remove nuclear facilities safely from service and to reduce residual radioactivity to a level that permits release of the property for unrestricted use and termination of the license. Decommissioning activities are initiated when a licensee decides to terminate licensed activities. Decommissioning activities do not include the removal and disposal of spent fuel which is considered to be an operational activity or the removal and disposal of nonradioactive structures and materials beyond

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C. The Petitioners Do Not Show They Will Be Adversely Affected By The Transfer Of A POL

The failure to sufficiently identify interests that would be adversely affected by the license transfer is compounded by the failure to meet the requirement of establishing a causal connection between the challenged action and the harms alleged by Petitioners. See *Dellums v. NRC*, 863 F.2d 968, 971 (D.C. Cir. 1988); cf. *Lujan, supra*, 110 S. Ct. at 3186. The SE2 and School District Petitions, at 13-15, discuss causation requirements of standing by focusing on how granting the relief they seek will redress their alleged injuries. However, just as in their recent appeal argued in the United States Court of Appeals for the District of Columbia Circuit, Petitioners fail to satisfy the requirement of linking the challenged action to the harms asserted. See *Shoreham-Wading River Central School District v. NRC*, No. 90-1241, slip op. at 5 (D.C. Cir., April 30, 1991). The requirements of showing (a) that an injury in fact is traceable to the challenged action and (b) that the

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<sup>24</sup>(...continued)

that necessary to terminate the NRC license. Disposal of nonradioactive hazardous waste not necessary for NRC license termination is not covered by these regulations but would be treated by other appropriate agencies having responsibility over these wastes. . . . Reuse of a nuclear facility for other nuclear purposes is not considered decommissioning because the facility remains under license.

53 Fed. Reg. 24018, 24019 (June 27, 1988). The proposed Shoreham transfer, while its purpose may be to enable LIPA to possess the plant, does not constitute an act of decommissioning. Rather, the transfer would only remove LILCO as the licensee of Shoreham. Any major alteration of radiological components in the facility would not be permitted until the decommissioning plan is approved separately and a decommissioning/dismantlement order is issued. See 10 C.F.R. § 50.82(c).

injury can be redressed by a favorable decision are distinct and both must be met. *Von Aulock v. Smith*, 720 F.2d 176, 180-81 (D.C. Cir. 1983). In discussing these twin requirements, the court in *Dellums*, 863 F.2d at 971, cites *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976), which involved a question of standing to challenge a federal tax ruling removing a requirement that hospitals provide reduced cost health care to indigents in order to qualify as charitable corporations. *Id.* at 31-32. The Court ruled that the trial court erred in not dismissing the complaint filed by organizations representing indigents who were subsequently refused hospital care, even though the Court found there was injury to the indigents' interests in receiving health care. *Id.* at 40-41, 46. The Court reasoned that a federal court may only act "to redress injury that fairly can be traced to the challenged action of defendant, and not injury that results from the independent action of some third party [the hospitals] not before the court." *Id.* at 41-42. The Court further stated that such indirect injuries make it difficult to establish standing, since speculative inferences become necessary to link the injury to the challenged action. *Id.* at 44-45.

Here, Petitioners challenge the proposed license transfer and, more broadly, the decommissioning of Shoreham -- federal actions stemming from a private decision not to operate Shoreham over which the Commission had no regulatory authority. CLI-91-2, 33 NRC at 70-71. Assuming the validity of the injuries claimed, they arise neither from the proposed federal action approving the license transfer nor from any future federal actions on decommissioning, but rather from LILCO's independent decision not to operate Shoreham. Judicial review of that

decision is being pursued in the New York courts and independent administrative review of that decision here would be improper. *See id.*

An example of Petitioners' failure to link the challenged action to the harms asserted is illustrated at page 14 of their respective petitions, where it is stated that the supporting affidavits will show how approval of the transfer application would injure their AEA rights to health and safety. An examination of the affidavits reveals a single conclusory allegation<sup>25</sup> that:

The transfer also represents a threat to my personal radiological health and safety and to my real and personal property in violation of my rights under the Atomic Energy Act of 1954, as amended, since, among other things, LIPA lacks the financial, technical and management qualifications to become the transferee of the Shoreham Plant license. Thus, transfer of the license to LIPA would unreasonably endanger my health and safety.<sup>26</sup>

No explanation is provided as to how authorization of a license transfer that will only occur "upon or after amendment of the license to a non-operating status" (56 Fed. Reg. 11781, March 20, 1991) could harm Petitioners. Petitioners fail to show or even argue that the conclusions reached in LILCO's Defueled Safety

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<sup>25</sup> Conclusory allegations of injury in an affidavit are no better than such allegations in a petition for purposes of defeating a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure. *See Lujan*, 110 S. Ct. at 3188.

<sup>26</sup> ¶ 6 of Scrandis, Franz, and Musolino affidavits; ¶ 7 of Stehn and Bateman affidavits; ¶ 10 of Prodell Affidavit.

Analysis Report are flawed or invalid.<sup>27</sup> Petitioners reference the April 16, 1990 decommissioning report (SE2 Petition at 46; School District Petition at 47), but fail to indicate why the relationship between LIPA and the New York Power Authority ("NYPA"),<sup>28</sup> under which NYPA will serve as LIPA's prime contractor if LIPA becomes the licensee, will not adequately ensure safe maintenance of Shoreham during any interim period prior to decommissioning.

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<sup>27</sup> The published notice of consideration regarding the license transfer states in part:

LILCO has previously prepared and submitted a Defueled Safety Analysis Report (DSAR) containing revised safety analyses that address the defueled and permanent non-operating conditions proposed for Shoreham, and reflect the activities proposed to be conducted by LIPA under the transferred license (i.e., maintenance of the defueled facility) prior to NRC approval of a Shoreham decommissioning plan. The DSAR analyses demonstrate that the plant conditions and licensed responsibilities, to be assumed by LIPA, represent a substantially reduced radiological risk from that associated with full power operation of Shoreham as previously evaluated in the Shoreham Updated Safety Analysis Report (USAR). The DSAR basically establishes that only two events from the spectrum of accidents previously evaluated in the USAR remain relevant to the defueled plant configuration. These events are the Fuel Handling Accident and the Liquid Radwaste Tank Rupture.

The proposed license amendment will not significantly increase either the probabilities or the consequences of these two events.

56 Fed. Reg. at 11781.

<sup>28</sup> NYPA has been an NRC licensee since 1975. It owns and operates the Indian Point and Fitzpatrick nuclear plants, the latter of which uses a General Electric boiling water reactor similar to the one at Shoreham.

Petitioners fail to establish that the allegedly adverse impacts they complain of are causally related to approval of a license transfer of a non-operating plant. This failure, combined with the failure to show they have cognizable interests in this proceeding, demonstrates that the 10 C.F.R. § 2.714 intervention requirements are not met by Petitioners' intervention petitions, and they should, accordingly, be denied.<sup>29</sup>

IV. Petitioners Have Not Identified Specific Aspects Within the Subject Matter of the Proceeding

Under 10 C.F.R. § 2.714(a)(2), in order for a petitioner to be granted permission to intervene in an NRC proceeding, the petitioner must "set forth with particularity . . . aspects of the subject matter of the proceeding as to which the petitioner wishes to intervene." Matters outside the scope of the proceeding provide no basis for intervention and no basis for a hearing. *Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167, 170-71 (1976); see generally *Duke Power Co.* (Catawba Nuclear Station,

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<sup>29</sup> Petitioners also refer to the Staff's July 1989 reply to their initial 10 C.F.R. § 2.206 filing, in arguments relating to what triggers the requirements to file a decommissioning plan for Shoreham and begin a NEPA evaluation of the plan. See e.g., SE2 Petition at 8 and n.4, 26, 35 and n.9, 39, 40, and 46. These arguments are irrelevant, are not within the scope of this proceeding, and are based on a false predicate because the situation as it existed in July 1989 is no longer applicable in light of the fact that in December 1990 a decommissioning plan was filed by LIPA the prospective licensee who will be responsible for decommissioning Shoreham and was adopted and filed by LILCO. See letter from John D. Leonard, Jr., LILCO Vice President-Office of Nuclear, to NRC (Jan. 2, 1991) (SNRC-1781). The Staff is in the process of reviewing the decommissioning plan and will decide what type of NEPA analysis is appropriate, but matters concerning decommissioning are not within the scope of this proceeding.

Units 1 and 2), ALAB-825, 22 NRC 785 (1985). Here, the aspects set forth by the Petitioners are not within the subject matter of the proceeding and provide no basis for intervention.

Petitioners enumerate several "specific aspects" of the proposed action on which they wish to intervene under the AEA and NEPA. SE2 Petition at 19-20; School District Petition at 20-21. The first aspect is whether the proposed transfer would be "arbitrary, capricious and/or an abuse of discretion." This statement is too general to provide a basis for intervention. It does not identify any particular *aspect* of the proceeding upon which intervention is sought. The second listed aspect involves whether the transfer would "frustrate or significantly delay and increase the cost of returning the plant to an operational mode." This aspect gives no basis for intervention, as the subject matter of the proceeding is the transfer of a POL, not an operating license. Moreover, this aspect is contrary to the Commission's prior determinations that questions involving the renewed operation of the plant are outside the jurisdiction of the NRC. *See Part II supra*. The third aspect involves whether the transfer would be "an irreversible and irretrievable commitment of the Shoreham resource." This aspect is similarly not within the scope of the noticed action, it is on the licensee who to decides if the plant should operate -- not the NRC. *Id.* The fourth aspect is also without the scope of the proceeding, as it deals with the "radiological hazards of operating the facility," whereas the application to be considered in this proceeding is one for the transfer of a POL. *See Part I, supra*.

The Petitioners also seek to predicate their intervention on a purported requirement that the NRC must make "a final decision on the proposal to decommission Shoreham" before approving the transfer. See SE2 Petition at 20; School District Petition at 21. However, no statutory or regulatory footing is set out for this purported requirement, and it does not provide an aspect that can be considered in this proceeding. Just as there is no regulatory basis to require decommissioning plan information before the issuance of a POL, so there is no regulatory basis to require decommissioning plan information before granting a license transfer. See CLI-91-1, 33 NRC at 6. The Commission has definitively determined that the operation of Shoreham is not a matter for Commission review under either the AEA or NEPA, and such an issue cannot be an aspect of this proceeding. See Point II, *supra*.<sup>30</sup>

In addition, the Petitioners set out two lists of "particular" aspects of the proceedings on which they wish to intervene under the AEA and NEPA. SE2 Petition at 25-31, 45-47; School District Petition at 26-32, 46-48. The particular AEA aspects are predicated upon the rejected argument that the NRC must act on LILCO's decision not to operate Shoreham. SE2 Petition at 25-26; School District Petition at 26-27. The first particular AEA aspect concerns the purported

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<sup>30</sup> The argument that the New York Court of Appeals might void the transfer and this might lead to Shoreham resuming operations in an unsafe manner (SE2 Petition, at 22; School District Petition at 23) is totally conjectural. In addition to the lack of foundation for a presumption that the transfer will be declared void, the Commission, of course, would have to consider whether resumed operation of Shoreham, by either LILCO or LIPA, is consistent with the health and safety of the public.

need for a decommissioning plan before granting the transfer request. SE2 Petition at 26; School District Petition at 27. As indicated above, this matter can not be raised in this proceeding as there is no regulatory requirement for that document before a transfer. See CLI-91-1, 33 NRC at 6. The next three of Petitioners' "particular aspects" under the AEA involve LIPA's qualification to be the license transferee. SE2 Petition at 27-29; School District Petition at 28-30. They are predicated, as Petitions detail in their introductions to these aspects, on an operating license being transferred to LIPA, rather than upon the transfer of a POL as stated in the *Federal Register* notice. See SE2 Petition at 20, 22, 25; School District Petition at 21, 23, 26. These aspects are thus beyond the scope of this proceeding. See 10 C.F.R. § 2.714(a)(2). "Particular aspect" 5 cites Section 105(c) of the Atomic Energy Act, 42 U.S.C. 2135(c) and questions whether the transfer is consistent with the antitrust law. SE2 Petition at 29-30; School District Petition at 30-31. However, that section only applies to "an application for a license to construct or operate a utilization or production facility." AEA § 105(c)(2), 42 U.S.C. § 2135(c)(2). It does not apply to the transfer of a POL under which the facility will not be operated. Moreover, as the application is one for the transfer of a POL under which no electricity can be produced, the antitrust laws are not germane and there is no need to consider "a need for power in the affected area" in relation to the competitive effect of the transfer. See AEA, § 105(c)(5) and (6), 42 U.S.C. § 2135(c)(5) and (6). The sixth particular AEA aspect concerns the need for a decommissioning report. As we have stated, this argument was dealt with and rejected in CLI-91-1, 3<sup>rd</sup> NRC at 6. The concluding two particular

AEA aspects concerning the common defense and security, the public health and safety and of the use of nuclear material are too generalized to identify any particular aspect of this proceeding for transfer of the license after a POL amendment has been issued, so as to support a petition to intervene. They too provide no basis for intervention. See SE2 Petition at 30-31; School District Petition at 31-32.

The Petitioners' the arguments concerning the relevance of the particular aspects" it wishes to litigate under NEPA (SE2 Petition at 31-45; School District Petition at: 32-46), were all rejected by the Commission in connection with other license Shoreham amendments in CLI-90-8, CLI-91-1, and CLI-91-2, and cannot be an aspect of this proceeding. See Points I and II, *supra*. Similarly, the list itself, of "particular aspects" upon which Petitioners wish to intervene under NEPA, do not provide a basis for a proceeding on the noticed license amendment application. See SE2 Petition at 45-47; School District Petition at 46-48. The first "particular aspect" listed is whether a proposal to decommission Shoreham exists. The Commission has recognized an intent on the part of LILCO and LIPA to decommission Shoreham, and no matter needing litigation is identified. See, e.g., CLI-90-8, 32 NRC at 204-05. The remaining "particular aspects" which Petitioners seek to litigate under NEPA have been conclusively ruled on by the Commission. The Commission has ruled that no environmental assessment of the resumed operation of Shoreham is necessary. Each of these "particular aspects" under NEPA are part of a reargument of this determination. See SE2 Petition at 34-38, 45; School District Petition at 35-39, 46. They may not be an aspect of this

proceeding. See Point II, *supra*; 10 C.F.R. § 2.714(a)(2). Further, an environmental review of the proposed license amendment will be conducted, and an appropriate environmental evaluation covering matters over which the Commission has jurisdiction will be prepared. See CLI-91-1, 33 NRC at 6-7; CLI-91-4, slip op. at 4-5. Petitioners are estopped from claiming that any environmental review need consider the determination to decommission Shoreham, in contrast to a consideration of the environmental affects of the various methods of decommissioning the facility. See Point II, *supra*; CLI-90-8, 32 NRC at 207-09; CLI-91-2, 33 NRC at 70-71. Petitioners set forth no aspect of the proceeding upon which they may intervene to protect rights under NEPA.

In sum, Petitioners have failed to identify any aspect of the proposed license amendment application providing for a transfer of the POL, which provides a basis for initiating a proceeding herein.

V. A License Transfer Is A License Amendment That May Be Issued Without A Prior Hearing Based On A No Significant Hazards Consideration Determination

The Petitioners' argue that the license amendment noticed for opportunity for hearing in the *Federal Register*, 54 Fed. Reg. 11781, is not a license amendment which may be considered under Section 189a(2) of the Atomic Energy Act, 42 U.S.C. § 2239(a)(2), and 10 C.F.R. §§ 50.90-50.92, allowing the issuance of license amendments involving no significant hazards prior to a hearing on the proposed

amendment, but a transfer of a license for which a prior hearing must be granted.

See School District Petition, at 2-3; SE2 Petition at 2-3.<sup>31</sup>

Section 184 of the Atomic Energy Act, as amended, 42 U.S.C. § 2234, states, in pertinent part:

No license granted hereunder and right to utilize or produce special nuclear material . . . shall be transferred, assigned or in any manner disposed of, either voluntarily or involuntarily, directly or indirectly, through transfer of control of any license to any person, unless the Commission shall, after receiving full information, find that the transfer is in accordance with the provisions of [the] Act, and shall give its consent in writing.

For power reactors, this statutory provision was implemented in 10 C.F.R. § 50.80, which generally provides that an application for transfer of a license must include "as much information . . . with respect to the technical and financial qualifications of the proposed transferee as . . . if the application were for an initial license, and

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<sup>31</sup>Petitioners further argue that the proposed transfer is not a minor adjustment in shares among co-owners and would likely involve significant hazards, and that a final determination must await (a) a decision by the New York State Court of Appeals as to whether the agreements underlying the transfer to LIPA are valid, Petitions at 2-6, and (b) the formal approval of the "ultimate disposition of the plant" which they argue must be accompanied by the preparation of an EIS on decommissioning that considers the alternative of operating or preserving the facility. Petitions at 6-10.

Insofar as Petitioners' concerns regarding LIPA's qualifications and the requisite NEPA review seek to challenge the propriety of the proposed NSHC determination, they are generally inappropriate for consideration in a licensing proceeding. 10 C.F.R. § 50.58(b)(6); *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), CLI-86-12, 24 NRC 1, 4 (1986), *reversed in part on other grounds*, *San Luis Obispo Mothers for Peace v. NRC*, 799 F.2d 1268 (9th Cir. 1986). In addition, "any question about [the] staff's determinations on the issue of significant versus no significant hazards consideration that may be raised in any hearings on the amendment will not stay the effective date of the amendment." *Notice and State Consultation*, 48 Fed. Reg. 14873, 14876 (April 6, 1983); see 10 C.F.R. § 2.105(a)(4)(i).

. . . the information required by § 50.33a." 10 C.F.R. § 50.80(b). The regulation further provides that public notice shall be given of the proposed transfer and the Commission may approve the transfer if the transferee is qualified, and the transfer is consistent with law and regulation. 10 C.F.R. § 50.80(c).<sup>32</sup> While the statute and its implementing regulation both state that the Commission approval of license transfers must be in writing, neither specifies or restricts the form used to grant such approval.

Section 189a(1) of the AEA, 42 U.S.C. § 2239(a)(1), provides:

In any proceeding under this Act, for the granting, suspending, revoking, or amending of any license or construction permit, or application to transfer control, and in any proceeding for the issuance or modification of rules and regulations dealing with the activities of licensees, . . . the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit any such person as a party to such proceeding.

In 1983, Section 189 was amended to generally provide that the Commission may issue license amendments without a hearing or prior notice if it determines the amendment involves a no significant hazards consideration (NSHC). Pub. L. 97-415 § 12, 96 Stat. 2073 (1983). This amendment is generally known as the "Sholly Rule" and provided the current statutory basis for the Commission's prior practice of allowing amendments not involving significant hazards considerations to become effective prior to a hearing. See *Final Procedures and Standards on No Significant Hazards Considerations*, 51 Fed. Reg. 7744-46 (March 6, 1986) ("Sholly Rule").

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<sup>32</sup> The notice of the proposed amendment to authorize the transfer, in practical terms, afforded the public the notice and issue identification required by 10 C.F.R. § 50.80 and specifically cited that regulation. See 54 Fed. Reg. 11781, 11782.

Acting under that amendment, the Commission adopted 10 C.F.R. §§ 50.91, 50.92, 50.58(b)(6) and 2.105(a)(4)(i), which permitted the issuance of license amendments involving NSHC prior to a hearing and provided a limited review of such determinations. *Notice and State Consultation*, 48 Fed. Reg. 14873 (April 6, 1983); 48 Fed. Reg. 14864 (April 6, 1983); 51 Fed. Reg. 7744. Under the final rule, where it is determined that a license amendment request involves NSHC, the NRC will issue a notice which describes the requested amendment, sets forth the proposed NSHC finding, requests comments on that proposed finding, and gives notice of an opportunity for hearing. If requests for hearing are filed pursuant to such notice, the NRC will make a final determination on whether the amendment involves a significant hazards consideration. If the final determination is that the proposed amendment involves NSHC, the NRC may (upon making the requisite health and safety findings) issue the requested amendment despite the pendency of a hearing request. The regulation explicitly provides that one may not petition to have a NRC Staff's NSHC determination reviewed. 10 C.F.R. § 50.58(b)(6); 10 C.F.R. § 2.105(a)(4)(i); *see also* 48 Fed. Reg. 14873, 14876, 51 Fed. Reg. 7744, 7746, 7759.

Consistent agency practice in interpreting and implementing its regulations is entitled to significant weight. *E.g., Ford Motor Co. v. Milhollin*, 444 U.S. 555, 566 (1980); *Udall v. Tallman*, 380 U.S. 1, 16-17 (1965); *Power Reactor Co. v. Electricians*,

367 U.S. 396, 408 (1961).<sup>33</sup> Past practice and the statements of the Commission, both before and after the adoption of the Sholly Rule in 1983, indicate that license transfers may be accomplished by amending a plant's license and making a NSHC determination. For example, in *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), CLI-78-1, 7 NRC 1, 22 (1978), the Commission stated, in connection with the sale of an interest in Seabrook, that "[a]ny transfer of ownership would require Commission approval . . . [and] the filing of an application for a license amendment."<sup>34</sup> The Commission also authorized the staff to issue an amendment to the operating license to transfer the authority to possess, use and operate Three Mile Island, Unit 1, from Metropolitan Edison Company to GPU

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<sup>33</sup> In the absence of a Congressional mandate to the contrary, the NRC's practice of effecting license transfers by means of license amendments which addresses 10 C.F.R. § 50.80 matters is not inappropriate. See *Public Service Co. of Indiana, Inc.* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-459, 7 NRC 179, 199-200 (1978); *Toledo Edison Co.* (Davis-Besse Nuclear Power Station, Unit 1), ALAB-323, 3 NRC 331, 335-37 (1976).

<sup>34</sup> The Seabrook license has been amended a number of times to reflect the changing ownership interests in the facility. E.g., *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), DD-85-3, 21 NRC 533, 536 (1985). Recently, the Commission published a proposed NSHC determination with respect to two proposed Seabrook license amendments that separately transfer the ownership and operation of the facility. 56 Fed. Reg. 9384 (March 6, 1991); 56 Fed. Reg. 8373 (February 28, 1991). Other proposed NSHC determinations were published with respect to the transfer of "control over physical construction, operation, and maintenance" of Arkansas Nuclear One and Waterford plants to Systems Energy Resources, Inc. (SERI) and its successor, Energy Operations, Inc. 53 Fed. Reg. 30126 (August 10, 1988); 54 Fed. Reg. 37041 (September 6, 1989); 54 Fed. Reg. 37047 (September 6, 1989).

Nuclear Corporation. *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-81-17, 14 NRC 299 (1981).<sup>35</sup>

Moreover, in 1975, the Indian Point Unit 3 operating license was amended to allow the Power Authority of the State of New York (PASNY) (later renamed New York Power Authority) to purchase and acquire the complete title to the plant while retaining Consolidated Edison Company of New York, Inc. as the licensed operator under contract to PASNY, on a finding of NSHC and without a prior opportunity for hearing. 41 Fed. Reg. 828 (January 5, 1976). Subsequently, in 1978, authority to operate the facility was similarly transferred to PASNY based on a finding of NSHC. 43 Fed. Reg. 11621 (March 20, 1978).<sup>36</sup>

Even the Grand Gulf transfer amendment cited (Petitions at 4-5) states, in the notice, that the Staff's "review of the application will address those issues necessary for both the issuance of the license amendment pursuant to 10 CFR 50.90

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<sup>35</sup> GPU Nuclear Corporation was formed by combining the technical and managerial resources of Jersey Central Power & Light Company, Metropolitan Edison Company and the General Public Utilities Service Corporation. In issuing the amendment, the Staff concluded that the amendment did not involve a significant hazards consideration. Safety Evaluation Supporting Amendment No. 74 to Facility Operating License No. DPR-50 [TMI-1], dated September 23, 1981.

<sup>36</sup> A license amendment accompanied by a finding of NSHC was issued to delete Niagra Mohawk Power Corporation's authority to operate and authorizing PASNY (an owner) to operate the facility (Niagara Mohawk previously operated the facility under contract to PASNY). 42 Fed. Reg. 30699 (June 16, 1977). An opportunity for hearing was noticed with respect to the proposed transfer of the Fermi, Unit 1, possession only license from Power Reactor Development Company ("PRDC") to Detroit Edison Company. PRDC 40 Fed. Reg. 54031 (November 20, 1975). However, no hearing requests were received, 41 Fed. Reg. 4866 (February 2, 1976), and the amendment authorizing the transfer was issued with a finding of NSHC, Safety Evaluation [supporting Amendment No. 8 to License No. DPR-9], dated January 23, 1976.

and for the approval of the transfer of control of licensed activities pursuant to 10 CFR 50.80." 51 Fed. Reg. 39927 (November 3, 1986).

Thus, despite the facial validity of Petitioners arguments Commission precedent indicates that a license transfer is processed as a license amendment (whether the transfer is among co-owners or to a new entity), and may be issued under the procedures for the issuance of license amendments. These procedures permit the amendment to become effective if a final determination of NSHC is made.

Given the defueled, nonoperating status of the facility and the pendency of the application for a possession only license for Shoreham, the determination of LIPA's technical and financial qualifications will be based on a consideration of the factors pertinent to a facility that will be maintained "in the defueled condition until a decommissioning plan is approved by the NRC." 56 Fed. Reg. 11781 (March 20, 1991); Letter transmitting Joint Application of LILCO and LIPA for License to Authorize Transfer of Shoreham ("Joint Application"), dated June 28, 1990, at 1.<sup>37</sup>

The only substantive issues raised with respect to the instant transfer (versus issuance of a POL itself) are whether LIPA is qualified to be a POL transferee, the environmental review necessary,<sup>38</sup> and whether the transfer can be approved prior

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<sup>37</sup> The Applicants state that the purpose of the amendment is to effectuate several agreements that provided that Shoreham not be operated as a nuclear facility and would be transferred to LIPA for the ultimate purpose of decommissioning. Joint Application at 3.

<sup>38</sup> Petitioners also argue that the categorical exclusion does not apply to license transfers. SE2 Petition at 42-43; School District Petition at 43-44. Environmental  
(continued...)

to the approval of a decommissioning plan.<sup>39</sup> As detailed above, the Commission has already determined that a decommissioning plan is not linked to issuance of a POL. CLI-91-1, 33 NRC at 6. Similarly, apart from their legal challenge to the applicability of the Sholly Rule to transfers which runs contrary to long standing agency practice, Petitioners do not detail any health and safety concern arising from the proposed transfer of a POL to LIPA. Thus, they have shown no basis for the Commission to disturb the Staff's proposed NSHC determination, and the

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<sup>38</sup>(...continued)

considerations of transfers have been done on a case-by-case basis. An EA was prepared in connection with an amendment transferring control and performance of license activities at Grand Gulf from Mississippi Power and Light Company to SERI (51 Fed. Reg. 44395, December 9, 1986) and from SERI to Energy Operations Inc. (54 Fed. Reg. 535 (January 5, 1990)). See also *Cleveland Electric Illuminating Co.*, 55 Fed. Reg. 529 (December 24, 1990). In other instances, however, the staff has applied the categorical exclusion or, a previous regulation, 10 C.F.R. § 51.5(d)(4), and determined that no environmental impact statement, negative declaration, or environmental impact appraisal need be prepared in connection with the transfer. E.g. *Indian Point*, 49 Fed. Reg. 11621 (March 20, 1978); *Detroit Edison Co.*, 41 Fed. Reg. 4866 (February 2, 1976) (transfer of Fermi POL); Safety Evaluation [supporting Amendment No. 4 to NPF-42], dated November 1986) (transfer of authority to operate Wolf Creek).

<sup>39</sup> Inasmuch as approval of the transfer may encompass issues such as LIPA's ability to finance the cost of decommissioning Shoreham, a determination will be made as to whether LIPA can finance the proposed decommissioning method, dismantlement (the estimated cost of a permanent shutdown of Shoreham and maintenance of the site in a safe condition). The cost of the dismantlement option chosen, however, would encompass the range of decommissioning methods or options. Hence, finding LIPA financially qualified to implement this option would not require prior approval of the decommissioning plan submitted in December 1990.

amendment providing for the transfer of the Shoreham license may be issued without a prior hearing if a final NSHC determination is made.<sup>40</sup>

An amendment of the license is a logical way to implement changes in ownership and to license entities acquiring rights and duties under an existing license, regardless of whether the transferee is a co-owner or a new entity seeking to possess, use or operate the facility. In addition, it provides the means in a single administrative action to approve the transfer and revise the license by deleting the previous owner and/or operator and authorizing an entity to conduct licensed activities. In contrast to a new class 103 license, an amendment authorizing the transfer of control enables the transferee to receive only those rights and to incur such obligations as conferred by the existing license. The terms and conditions of the license remain unchanged and only the licensed entities are affected.<sup>41</sup>

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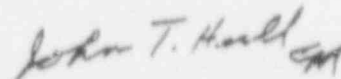
<sup>40</sup> The issue is whether there is reasonable assurance of adequate protection of the public health and safety under the proposed amendment authorizing the transfer of a POL, not whether the plant should restart or the propriety of the Staff's proposed NSHC determination. See CLI-90-8, 32 NRC at 207-08, CLI-92-2, 33 NRC at 70-74. The latter issue is irrelevant to the safety of the proposed POL transfer since its only purpose is to determine the timing of a hearing (before or after an amendment). Further, any concern about LIPA's technical, financial or managerial qualifications must relate solely to the transfer of a POL. Although difficult to discern, it would appear that Petitioners' concerns do not primarily address the limited action noticed. See Point II & IV, *supra*.

<sup>41</sup> While Sections 183.c and 184 of the AEA prohibit the transfer or assignment of licenses, including through a transfer of control of a license without Commission consent there is no mention of the need for a transferee to apply for a new license. See 42 U.S.C. §§ 2233(c), 2234, 2232. The 10 C.F.R. § 50.80(b) requirement that a prospective transferee provide such information regarding its technical and financial qualifications as would be required for an "initial license," in this instance, would mean information showing the qualifications to receive a POL.

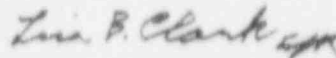
CONCLUSION

As stated above, the Petitions should be dismissed as Petitioners base their claims, including injuries, on issues outside the scope of the proceeding and issues precluded by Commission rulings. Thus, the Petitioners fail to satisfy the requirements to establish standing pursuant to 10 C.F.R. § 2.714 and the Petitions should be denied.

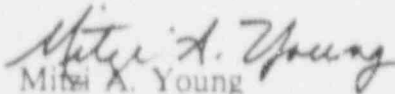
Respectfully submitted,



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Dated at Rockville, Maryland  
this 17th day of May, 1991