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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF RESPONSE TO PETITIONERS' JOINT AMENDED PETITION AND SUPPLEMENT

INTRODUCTION

In LBP-91-23, 33 NRC ___ (May 23, 1991), the Licensing Board determined that the six amended petitions filed separately by Scientists and Engineers for Secure Energy, Inc. ("SE2") and Shoreham-Wading River Central School District ("School District") (collectively "Petitioners") on February 4, 1991 established, in part, their standing to intervene in the above-captioned licensing proceedings and set June 21, 1991 as the deadline to file contentions.

On June 21, 1991, Petitioners filed a single pleading to "amend their petitions to intervene and requests for hearing and file a joint supplement to their petition to intervene, including a list of [five] contentions." Petitioners' Amendment and Supplement To Petitions To Intervene, dated June 21, 1991 ("Joint Petition"), at 1. As discussed below, the Joint Petition fails to comply with LBP-91-23 and to proffer a single contention that satisfies the requirements of 10 C.F.R. § 2.714 or

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Commission *Shoreham* decisions. Consequently, Petitioners' requests for leave to intervene should be denied.

BACKGROUND

In LBP-91-1, 33 NRC 15, 40 (1991), the Licensing Board found that Petitioners' initial intervention petitions failed to establish organizational or representational standing (based on the interests of a member) to contest any of the licensing actions at issue. The defects in the petitions included (1) the failure to particularize a cognizable harm for the three actions since the only injury claimed allegedly resulted from the *de facto* decommissioning of Shoreham prior to the completion of a decommissioning plan and a failure to maintain the plant in a full power operational status, (2) the failure to show an organizational purpose and authority to represent an identified member who could be harmed by the licensing actions, (3) SE2's failure to show a particularized injury to its ability to disseminate information that is essential to its programmatic status and cognizable under NEPA, (4) the School District's noncongnizable interests as a rate payer and tax recipient, and (5), with respect to the Security Plan Amendment, the failure to identify a specific aspect of the subject matter of the proceeding. LBP-91-23, slip op. at 3-6.

In LBP-91-23, the Board ruled that: (1) only SE2 has organizational standing to file National Environmental Policy Act ("NEPA") contentions in accordance with 10 C.F.R. § 2.714(b) and Commission decisions in *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-90-8, 32 NRC 201 (1990), *aff'd on reconsideration, id.*, CLI-91-2, 33 NRC 61 (1991), and CLI-91-4, 33 NRC 233 (1991); and (2) SE2 and the School District could conditionally file Atomic Energy Act

("AEA") contentions on the Security Plan Amendment, but the Board would defer ruling on whether each had established representational standing based on the interest of SE2 members or the School District employee. LBP-91-23, at 11, 16-17, 24-28. SE2 was denied representational standing to raise NEPA issues, and the School District was denied standing to raise any NEPA issue and organizational standing to raise AEA issues. *Id.* at 11, 26.[1]

In finding that SE2 had organizational standing to raise NEPA issues, the Board held, under *Competitive Enterprise Institute v. National Highway Traffic Safety Administration*, 901 F.2d 107, 123 (D.C. Cir. 1990) ("NEPA's purpose of ensuring well-informed government decisions and stimulating public comment on agency

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[1] Petitioners argue that the Licensing Board erred "in implying that the School District's claims for standing are limited to 'organizational interests'. . . of a rate payer and tax recipient that are noncognizable economic interests and argues at length the School District is concerned with the health, safety and environmental interests of its students and that the preparation of an EIS would redress this harm because, if the "true environmental costs and benefits of the proposal to decommission Shoreham" were disclosed, the plant would not be decommissioned. Joint Petition at 2-5. These arguments only strengthen the Board's earlier finding that the harm alleged is economic injury stemming from the failure to operate the plant at full power and that the NEPA analysis desired would impermissibly consider resumed operation and the costs of replacement power. *E.g.*, LBP-91-1, 33 NRC at 31; *see* CLI-90-08, 32 NRC at 207-09. Such economic matters are not within the "zone of interests" to allow intervention to protect rights under NEPA. *See Northern States Power Co.* (Tyrone Energy Park, Unit 1), CLI-80-36, 12 NRC 523, 526 (1980); *Hazardous Waste Treatment Council v. EPA*, 861 F.2d 277, 282-84 (D.C. Cir. 1988). Even if the Board were to find that the School District is authorized to represent the interests of students and employees in this proceeding, there is no basis to conclude that an EIS on the three actions or decommissioning would reverse the underlying private decision to permanently defuel Shoreham. *See* CLI-91-08, *supra* at 5-6, 10-12. Thus, there has been no showing that reversal of the three actions would redress the School District's "injury" by restarting Shoreham and no "injury in fact" is shown. *See Tyrone*, CLI-80-36, 12 NRC at 526-27 (where injury results from licensee's decision to terminate the project and not the Commission's revocation of the construction permit, the petitioners lack standing because deferral of the revocation would not redress the harm alleged).

actions effectively lowers the threshold for establishing injury to informational interests"),[2] that the record was sufficient to find that SE2 seeks information related to NEPA protected interests since SE2 indicates a preference for a "mothballing" decommissioning alternative[3] and SE2's charter provides that it keep its members and public bodies informed regarding environmental issues. LBP-91-23, at 9-11.[4] The Board stated that acceptable NEPA contentions raised in the context of the above-captioned licensing actions would have to satisfy the specificity requirements of 10 C.F.R. § 2.714(b)(2), the requirements in CLI-90-8, *supra*, and CLI-91-4, *supra*, and specifically provide: (1) a plausible explanation why an EIS might be required for an NRC decision approving a Shoreham decommissioning plan *and* (2) how these three actions could, by foreclosing alternative decommissioning methods or some other NEPA-based considerations, constitute an illegal segmentation of the EIS process. LBP-91-23, at 8, 11.

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[2] *Cf. Lujan v. National Wildlife Federation,* 110 S. Ct. 3177, 3185-89, 3194 (1990) (denying standing on claimed need to comply with NEPA procedures where no showing of harm from the proposed Federal action); *City of Los Angeles v. National Highway Traffic Safety Administration*, 912 F.2d 478, 492 (D.C. Cir. 1990) (claim of standing based on failure to comply with NEPA procedures must show a reasonable risk that serious environmental harm will occur from the proposed Federal action).

[3] The assertion that there is a "mothball" decommissioning alternative should be rejected. None of three alternative decommissioning methods discussed in the Decommissioning Rule involve preservation of the facility for future operation. *General Requirements for Decommissioning Nuclear Facilities: Final Rule,* 53 Fed. Reg. 20418, 24022-23 (June 27, 1988). *See* note 19, *infra*. Further, since LILCO has decided to decommission the facility, non-decommissioning options need not be examined under the "rule of reason." *See* CLI-90-8, 32 NRC at 206-07; CLI-91-08, 33 NRC ___, slip op. at 10-11 (June 12, 1991); *see also Citizens Against Burlington, Inc. v. Busey,* No. 90-1373, slip op. at 8-12, 16-18 (D.C. Cir. June 14, 1991).

[4] The assertion that SE2 members have a right to meaningfully comment on the environmental aspects of decommissioning is too vague to identify a palpable injury sufficient to establish representational standing for SE2. LBP-91-23, at 11.

With respect to AEA contentions, the Board ruled that the amended intervention petitions failed to establish organizational or representational standing to assert AEA-based contentions regarding the Confirmatory Order Modification and Emergency Preparedness Amendment, but deferred a ruling on whether Petitioners had representational standing to intervene on the Security Plan Amendment.[5] *Id.* at 13-27. The Board found that the amended security plan petitions particularized the following potential injuries: (1) radiological harm caused by the theft and offsite transport of Shoreham's nuclear fuel and its placement in water supplies; (2) radiological harm arising from increased fission activities created by intentionally changing the nuclear fuel's configuration; and (3) harm from the production of weapons using nuclear fuel stolen from Shoreham. *Id.* at 17.[6] Since Petitioners' lack of access to the security plan might excuse the lack of specificity regarding the causal link between the injuries alleged and the amendment (i.e., traceability to the alleged harm), it deferred a ruling on standing and allowed Petitioners to file contentions on the specific aspect identified in the amended petition -- whether the reduction in vital areas, vital equipment and plant security staff, will offer adequate assurance of the public health and safety and meet the design basis threat of radiological sabotage.

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[5] The Security Plan Amendment was noticed on March 21, 1990 (55 Fed. Reg. 10528, 10540) and issued June 14, 1990, 55 Fed. Reg. 25387 (June 21, 1990).

[6] In Contention 5, Petitioners complain they lack access to, *inter alia*, the Staff's Safety Evaluation regarding the Security Plan Amendment. Joint Petition at 11. That Safety Evaluation was issued over a year ago, was mailed to counsel for Petitioners (*see* Amendment service list), and is otherwise publicly available in accordance with 10 C.F.R. § 2.790. The Staff also quoted and cited findings of that Safety Evaluation in its earlier response. *See* NRC Staff Response to Petitioners' Six Amended Petitions to Intervene and Requests for Hearing, dated February 25, 1991, at 10-12 nn.7-8.

Id. at 17-20, 25-26. The Board emphasized that in reviewing the contentions, it would take into account Petitioners' lack of access to the security plan and that, while it may hinder a showing that the plan amendment is the cause of the matter complained of, "it should in no way otherwise hinder [Petitioners'] ability to establish the other elements of an acceptable contention, as provided for in 10 C.F.R. § 2.714(b)." LBP-91-23, at 20, 26.[7]

Recently, the Commission denied Petitioners' motion requesting, *inter alia*, that the above-captioned proceeding and all NRC Shoreham-related activities be held in abeyance, finding that LILCO's decision not to operate Shoreham would be not be affected any court finding that the underlying Settlement Agreement was invalid. *Shoreham*, CLI-91-08, *supra* at 10-11.

DISCUSSION

A. Standards Governing The Admissibility of Contentions

In order for a proposed contention to be found admissible, it must comply with the requirements of 10 C.F.R. § 2.714(b). Subpart (2) of that regulation, which sets forth the substantive requirements for admissible contentions, was amended by the Commission on August 11, 1989, to provide:

> (2) Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner shall provide the following information with respect to each contention:
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> (i) A brief explanation of the bases of the contention.

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[7] The School District was specifically limited to filing a contention alleging that its employee, Albert Prodell, could be radiologically harmed by the Security Plan revisions. *Id.* at 26.

> (ii) A concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing, together with references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion.
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> (iii) Sufficient information (which may include information pursuant to paragraphs (b)(2)(i) and (ii) of this section) to show that a genuine dispute exists with the applicant on a material issue of law or fact. This showing must include references to the specific portions of the application (including the applicant's environmental report and safety report) that the petitioner disputes and the supporting reasons for each dispute, or, if the petitioner believes that the application fails to contain information on a relevant matter as required by law, the identification of each failure and the supporting reasons for the petitioner's belief.

54 Fed. Reg. 33168, 33180. Subsection (d)(2) further provides that a presiding officer or adjudicatory board designated to rule on the admissibility of a contention shall refuse to admit it if (a) the contention and supporting material fail to satisfy the requirements of 10 C.F.R. § 2.714(b)(2), or (b) "the contention, if proven, would be of no consequence in the proceeding because it would not entitle petitioner to relief." 10 C.F.R. § 2.714(d)(2); *see Rules of Practice for Domestic Licensing Proceedings--Procedural Changes in the Hearing Process,* 54 Fed. Reg. 33168 (August 11, 1989).

The revised 10 C.F.R. § 2.714 raised the threshold showing for the admission of contentions by requiring the proponent to supply information showing the existence of a genuine dispute of law or fact. 54 Fed. Reg. 33168; *Public Service Co. of New Hampshire* (Seabrook Station, Units 1 and 2), ALAB-942, 32 NRC 395, 426 n.104 (1990). As the Commission explained:

> Under these new rules an intervenor will have to provide a concise statement of the alleged facts or expert opinion which support

> the contention and on which, at the time of filing, the intervenor intends to rely in proving the contention at hearing, together with references to the specific sources and documents of which the intervenor is aware and on which the intervenor intends to rely in establishing the validity of its contention. This requirement does not call upon the intervenor to make its case at this stage of the proceeding, but rather to indicate what facts or expert opinions, be it one fact or opinion or many, of which it is aware at that point in time which provide the basis for its contention.
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> In addition to providing a statement of facts and sources, the new rule will also require intervenors to submit with their list of contentions sufficient information (which may include the known significant facts described above) to show that a genuine dispute exists between the petitioner and the applicant or licensee on a material issue of law or fact. This will require the intervenor to read the pertinent portions of the license application, including the Safety Analysis Report and the Environmental Report, and to state the applicant's position and the petitioner's opposing view. When the intervenor believes the application and supporting material do not address a relevant matter, it will be sufficient to explain why the application is deficient.

54 Fed. Reg. 33170.

Apart from imposing additional requirements on the threshold showing for proponents of contentions, other Commission case law under the old rule remains applicable to board determinations regarding whether a proposed contention is admissible. *See* 54 Fed. Reg. 33169-71. For example, the revised rule is fully consistent with longstanding case law holding that the contention basis requirements of 10 C.F.R. § 2.714(b)(2) are (1) to assure that the contention in question raises a matter appropriate for adjudication in a particular proceeding, (2) to establish a sufficient foundation for the contention to warrant further inquiry into the subject matter addressed by the assertion, and (3) to put the other parties sufficiently on notice of the issues so that they know generally what they will have to defend against or oppose. *See Philadelphia Electric Co.* (Peach Bottom Atomic Power

Station, Units 2 and 3), ALAB-216, 8 AEC 1.., 20-21 (1976).[8] A proffered contention must therefore be rejected whenever (1) it constitutes an attack on applicable regulatory requirements, (2) it challenges the basic structure of the Commission's regulatory process or is an attack on the regulations, (3) it is nothing more than a generalization regarding the intervenor's view of what applicable policies ought to be, (4) it seeks to raise an issue which is not proper for adjudication in the proceeding or does not apply to the facility in question, or (5) it seeks to raise an issue which is not concrete or litigable. *Id.*

The revised threshold showing necessary for the admission of contentions also did not alter the longstanding rule that proposed contentions must fall within the scope of the issues set forth in the notice of hearing, *see Public Service Co. of Indiana* (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-316, 3 NRC 167, 170-71 (1976) and that a board convened in a license amendment proceeding has jurisdiction to consider only matters germane to the amendment application noticed, and may not consider other safety improvements which petitioners may wish to have imposed on the licensed facility, *Wisconsin Electric Co.* (Point Beach Nuclear Plant, Units 1 and 2), ALAB-739, 18 NRC 335, 339 (1983).[9]

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[8] The revised rule, however, overturned those cases holding that petitioners are not required to describe facts which would be offered in support of a proposed contention. 54 Fed. Reg. 33170, *citing Mississippi Power & Light Co.* (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-130, 6 AEC 423, 425-26 (1973); *Houston Lighting & Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-590, 11 NRC 542, 546-49 (1980).

[9] For example, contentions relating to the general adequacy of steam generator tubes and the public health and safety were rejected as beyond the jurisdiction of a Licensing Board considering a proposed amendment providing for the repair of steam generator tubes by sleeving and the operation of the facility with sleeved tubes. *Point Beach*, 18 NRC at 339.

The amended rule, however, requires the submission of alleged facts sufficient to demonstrate that a genuine dispute of law or fact exists. 54 Fed. Reg. 33170. The Commission noted that this requirement was consistent with *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), ALAB-687, 16 NRC 460, 468 (1982), *vacated in part on other grounds*, CLI-83-19, 17 NRC 1041 (1983), where the Appeal Board stated:

> [A]n intervention petitioner has an ironclad obligation to examine the publicly available documentary material pertaining to the facility in question with sufficient care to enable the petitioner to uncover any information that could serve as the foundation for a specific contention. Neither Section 189a of the Atomic Energy Act nor § 2.714 of the Rules of Practice permits the filing of a vague, unparticularized contention, followed by an endeavor to flesh it out through discovery against the applicant or Staff.

54 Fed. Reg. 33170.[10]

In amending § 2.714, the Commission stated that the new rule was not contrary to Section 189a of the Atomic Energy Act (AEA) since there is no absolute or unconditional right to intervene in a nuclear plant licensing proceeding and the hearing right could be subject to reasonable procedural requirements designed to further the purposes of the Act. 54 Fed. Reg. 33170. *See* 42 U.S.C. § 2239; *BPI v. AEC*, 502 F.2d 424, 428-29 (D.C. Cir. 1974). Because the right to intervene under Section 189a is conditioned upon a "request," the Commission noted that the amended regulation provides that "a 'proper request' . . . shall include a statement of the facts supporting each contention together with references and documents on

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[10] An adequate basis for a contention is not established by simply referencing a large number of documents, but requires a petitioner to clearly identify and summarize the facts on which it relies. *Commonwealth Edison Co.* (Braidwood Nuclear Power Station, Units 1 and 2), LBP-85-20, 21 NRC 1732, 1741 (1985), *rev'd and remanded on other grounds*, CLI-86-8, 23 NRC 241 (1986).

which the intervenor relies to establish those facts." 54 Fed. Reg. 33170. In addition, the Commission found that the Administrative Procedure Act "creates no independent right to intervene in nuclear licensing proceedings." *Id.*; *see* 5 U.S.C. §§ 551 et. seq.; *Easton Utilities Commission v. AEC*, 424 F.2d 847, 852 (D.C. Cir. 1970) (en banc).

In sum, to set forth an admissible contention under the new rule, a petitioner must examine publicly available information to provide some factual basis for its position and demonstrate that there exists a genuine dispute between it and the licensee. 54 Fed. Reg. 33171. The Commission's regulations preclude "a contention from being admitted where an intervenor has no facts to support its position and where the intervenor contemplates using discovery or cross-examination as a fishing expedition which might produce relevant supporting facts." *Id.*; *see also BPI v. AEC*, 502 F.2d at 429. A person or organization seeking admission to a licensing proceeding is expected to have read "the portions of the application (including the applicant's safety and environmental reports) that address any issues of concern to it and demonstrate that a dispute exists between it and the applicant on a material issue of fact or law." 54 Fed. Reg. 33171.

B. SE2's NEPA Contentions Fail To Satisfy The Requirements Of 10 C.F.R. § 2.714(b) And Prior Commission Decisions In *Shoreham*

In CLI-90-8, 32 NRC at 206-07, the Commission first considered the initial petitions to intervene alleging that the three licensing actions at issue constituted *de facto* decommissioning of Shoreham and concluded that NEPA only applies to Federal actions significantly affecting the human environment. The Commission found that the purpose of decommissioning (i.e., returning Shoreham to a condition

allowing for its unrestricted use under 10 C.F.R. § 50.2) defines the scope of alternatives that must be considered under NEPA. *Id.* at 207-08. The Commission stated:

> In summary, the broadest NRC action related to Shoreham decommissioning will be approval of the decision of how that decommissioning will be accomplished. Thus, it follows that NRC need be concerned at present under NEPA only with whether the three actions that are the subject of the hearing requests will prejudice *that* action. Clearly they do not, because they have no prejudicial effect on *how* decommissioning will be accomplished.

Id. at 208 (emphases in original). In denying reconsideration of that ruling, the Commission ruled that the broadest action subject to NEPA is the review and approval of the Shoreham decommissioning plan (which was filed on December 29, 1990), and "Petitioners' argument that we have authority over the entire agreement to decommission Shoreham is simply incorrect." *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-91-2, 33 NRC 61, 70 (1991). Despite Petitioners' assertions that an environmental impact statement ("EIS") evaluating Shoreham's decommissioning must now be prepared, the Commission concluded that the type of NEPA review to be done for Shoreham remains undetermined. *Id.* at 74.

Recently, in CLI-91-4, *supra*, which rejected Petitioners' interlocutory appeal from LBP-91-1, 33 NRC 15 (1991), the Commission reiterated its view that the instant licensing actions are "wholly separate from, and independent of, decommissioning" and expressed "substantial doubts that the Petitioners can make a credible showing that these actions are a part of the decommissioning process." 33 NRC at 237. The Commission, however, overruled the Licensing Board's holding in LBP-91-1 that claims of illegal segmentation of the Shoreham decommissioning

process were outside the scope of the notices of opportunity for hearing concerning the three licensing actions and held that, as a general proposition, a claim that an amendment requires an EIS because it is an inseparable part of a larger major federal action with a significant environmental impact is within the scope of amendment proceedings. 33 NRC at 236. Finding that such properly supported EIS contentions were not precluded as a matter of law and jurisdiction, the Commission stated that:

> A properly pled contention will at a minimum need to offer some plausible explanation why an EIS might be required for an NRC decision approving a Shoreham decommissioning plan *and* how [the three licensing actions at issue] here could, by foreclosing alternative decommissioning methods or some other NEPA-based considerations, constitute an illegal segmentation of the EIS process.

33 NRC at 237 (emphasis in original).

Contrary to this Commission guidance, SE2's four NEPA contentions do no more than set forth conclusory assertions regarding the need for an EIS on decommissioning and merely quote various NEPA regulations without specifying any facts or opinions relied upon to support the contentions.[11] The contentions do not cite any portions of any amendment applications or other documents submitted previously with which SE2 disagrees, and offer no plausible explanations showing: (1) why the cited regulations are applicable here; (2) how an NRC decision approving the December 29, 1990 Shoreham decommissioning plan might significantly affect the environment; (3) how any of the three licensing actions foreclose the use of alternative decommissioning methods or otherwise impact on other NEPA-based

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[11] Although Contentions 1 through 4 state the "Petitioners' contend, they must be read as SE2 contentions only. *See* LBP-91-23, at 27.

considerations; (4) how any of these licensing actions have any prejudicial effect on how decommissioning will be accomplished; (5) how any of these licensing actions may fairly be viewed as part of the decommissioning process and an illegal segmentation of the EIS process; and (6) how SE2's ability to disseminate information would be significantly harmed by that lack of a NEPA analysis on decommissioning.

For example, the Board ruled that the record was sufficient to show that SE2's informational interests would be harmed by the failure to prepare an EIS on *de facto* decommissioning. LBP-91-23, at 11. SE2's NEPA contentions, however, do not show that any of the three actions foreclose any method of decommissioning, or even future restart of Shoreham, even if that subject could be considered in this proceeding[12]. Thus SE2 fails to make a "credible showing" that the three actions are part of decommissioning that may be considered in this proceeding as required by CLI-91-4, 33 NRC at 237. *See* CLI-91-4, 33 NRC at 237, n.2. The mere fact that the Confirmatory Order was relied on as part of the basis for issuing the Emergency Preparedness and Security Plan Amendments does not show the actions are improperly segmented decommissioning or that they lack independent utility, particularly since the Order confirmed actions already taken by LILCO to defuel Shoreham. Moreover, arguments that the GEIS does not apply to decommissioning Shoreham do not show that such decommissioning is a major federal action having significant environmental impact. No EIS is required for a non-major federal action

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[12] Preservation of the plant for future use is not decommissioning and is not an alternative that need be considered here. *See* note 7 above.

and which does not have a significant environmental impact. *Sierra Club v. Hassell*, 636 F.2d 1095, 1097 (9th Cir. 1981).

SE2's contentions do not establish the existence of a genuine dispute of law or fact between it and either LILCO or LIPA. The NEPA contentions do not meet the 10 C.F.R. § 2.714(b)(2) requirements, and do nothing more than assert generalizations regarding SE2's views of what ought to be required under NEPA in the hope that a decision to terminate operations at Shoreham is reversed. *See Tyrone*, 12 NRC at 526-27. These generalized assertions fail to establish the requisite NEPA-based injury for participation in NRC licensing proceedings.[13] Judicial decisions and NRC case law hold that a petitioner does not have standing under NEPA unless it shows (1) that its "informational" interests are significantly impaired by the failure to prepare an EIS and (2) the proposed action, itself, would cause injury in fact. *Lujan, supra; Allied-General Nuclear Services* (Barnwell Fuel Receiving and Storage Station), ALAB-328, 3 NRC 420 (1976); *Sheffield*, 7 NRC at 740-41; *see Edlow International Co.* (Agent for the Government of India on Application to Export Special Nuclear Material), CLI-76-7, 3 NRC 563, 572-74 (1976).

In *Sacramento Municipal Utility District* (Rancho Seco Nuclear Generating Station), LBP-91-30, 33 NRC ___ (July 1, 1991), an organization's informational interests in having an EIS prepared on the plant's decommissioning was not sufficient

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[13] In *Nuclear Engineering Co.* (Sheffield, Illinois Low-Level Radioactive Waste Disposal Site), ALAB-473, 7 NRC 737 (1978), the Mid-America and the Chicago Section sought intervention under NEPA to help Nuclear Engineering Company obtain a license amendment authorizing expansion of its radioactive waste burial site. *Id.* at 739-40. A general interest in environmental matters, without a showing of any specific injury that the petitioners might sustain if the amendment were denied, was found insufficient to grant standing. *Id.* at 740-41.

where the organization would "not suffer a direct and palpable injury" cognizable under the AEA or NEPA. Slip op. at 8-9. The Board found that issuance of a possession-only amendment might (1) deny the organization and its members the opportunity to comment on an EIS and (2) the organization's ability to disseminate information could be injured by the failure to prepare an EIS; however, a general interest in a proceeding without any specific injury is not sufficient to initiate a hearing concerning the preparation of an EIS. As the Board stated, "Otherwise, [the organization] would have standing not only in regard to Rancho Seco, but in regard to any other power reactor which is scheduled to be decommissioned prior to the conclusion of its useful life, regardless of the plant's specific impacts on [the organization] and its members." *Id.* at 9.[14]

Like the organization in *Rancho Seco*, SE2 has not shown any cognizable injury from the three licensing actions or the decommissioning of Shoreham consistent with the rulings in CLI-90-8 or CLI-91-4. With these general observations in mind, the Staff addresses the specifics of each contention below.

1. Contention 1

Contention 1 states, in part:

> Petitioners contend that the NRC must require LILCO to prepare an environmental report and that the NRC Staff must then publish a draft environmental impact statement ("DEIS") for comment, prepare a final environmental impact statement ("FEIS"), and follow other NRC procedures for the consideration of the environmental impact of the proposal to decommission Shoreham before issuing the Confirmatory Order, Emergency Preparedness Amendment and/or Security Plan Amendment because all three of those actions are within the "scope" of

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[14] Any other view would confer a right to sue as a private Attorney General, a matter not permissible under NEPA. *See Sierra Club v. Morton*, 405 U.S. 727, 737-739 (1982); *see also Warth v. Seldin*, 422 U.S. 490, 501 (1975).

> the proposal to decommission Shoreham, which is a proposal for a major federal action significantly affecting the quality of the human environment requiring such environmental consideration before the issuance of any "form of approval" by the NRC of the proposal to decommission Shoreham or any of its subsidiary proposals, including the three actions within the scope of this proceeding. 42 U.S.C. § 4332 (1988); 10 C.F.R. 51.100(a) (1991).
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> The three actions which are the subject of this proceeding are within the scope of the proposal to decommission Shoreham because they are "interdependent parts of [that] larger action and depend [on] the larger action for their justification." 40 C.F.R. § 1508.25(a)(1). It is also clear the NRC Staff relied on the existence of the Confirmatory Order as a significant part of the basis for its approval of the emergency preparedness and security plan amendments. . . These actions also constitute cumulative actions "which when viewed with other proposed actions [both within and without the current scope of this proceeding] have cumulatively significant impacts and should therefore be discussed in the same impact statement." 40 C.F.R. § 1508.25(a)(2). Such an EIS also "shall consider . . . the "[n]o action alternative", "[o]ther reasonable courses of actions', and "[m]itigation measures (not in the proposed action)." . . . And that EIS is also required ("shall consider") 3 types of impacts, namely (1) Direct; (2) Indirect; [and] (3) Cumulative."

Contention 1, Joint Petition at 5-7, alleges that an EIS must be prepared on "the proposal to decommission Shoreham" before issuing the three licensing actions because decommissioning is "a major federal action significantly affecting the environment and" the three licensing actions are interdependent part of decommissioning and depend on decommissioning for their justification. The contention only states legal conclusions and fails to proffer adequate factual information to support either the claim (1) that decommissioning is a "major federal action" or (2) that the licensing actions are inextricably linked to decommissioning.

In effect, SE2 ignores repeated Commission rulings that the decision to decommission is a private decision which is not a federal action and that NRC's role is only limited to approving the method of decommissioning. *See* CLI-90-8, 32 NRC at 207-09; CLI-91-1, 33 NRC 1, 7 (1991); CLI-91-2, 33 NRC at 70-71;

CLI-91-4, 33 NRC at 236-37; CLI-91-08, *supra* at 10-12. SE2 does not provide a concise statement of alleged facts or expert opinion to support its position, or point to any information in the Environmental Report submitted by Long Island Power Authority (LIPA) to show either that environmental impacts of a particular method of decommissioning would have significant impact or that certain impacts associated with decommissioning activities have not been adequately evaluated. *See* 10 C.F.R. § 2.174(b)(2)(ii), (iii). In addition, SE2 does not fulfill the requirement in CLI-91-4 that it show how these actions, individually or jointly, would foreclose alternative methods or substantially affect decommissioning costs. By failing to comply with the Commission's ruling, the contention lacks the specificity and basis to raise a genuine issue of material fact or law.

Moreover, bare statements that the actions are interdependent parts of decommissioning, depend on decommissioning for their justification, and/or have cumulative effect, do not raise a genuine issue of material fact or law regarding the need for an EIS on decommissioning that encompasses these actions. No information is provided that would alter the Commission's earlier suggestion that the actions are wholly separate and independent of decommissioning. CLI-91-4, *supra* at 237. The actions can be reasonably viewed as consistent with a plant in a defueled status and LILCO's private decision not operate Shoreham.[15] SE2 fails to show that the actions favor any method of decommissioning or foreclose

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[15] The fact that the Confirmatory Order formed part of the basis for the other two amendments does not prevent the reasonable conclusion that each action was separate, consistent with the private decision not to operate the plant, and neither favors or prevents any decommissioning method, cost or option.

decommissioning costs methods or options. This contention should therefore be rejected.[16]

2. Contention 2

> The need for an EIS on the proposal to decommission Shoreham is established by the Commission's determination in 10 C.F.R.§ 51.20(b)(5) [1988] that a proposal to decommission a nuclear power reactor "should be covered by an environmental impact statement." That requirement continues to exist for the proposal to decommission Shoreham because the removal of the categorical requirement for EIS's on all proposals to decommission nuclear reactors was based upon the *Final Generic Environmental Impact Statement on Decommissioning Nuclear Facilities*, NUREG-0586 (August 1988) ("GEIS") which was limited in its scope to facilities where decommissioning is necessary because such facilities are either "at the end of their normal lifetimes" or where there is a "premature closure of a reactor due to an accident." GEIS at 8-1. Since Shoreham is not at the end of its "normal life" and has suffered no permanently disabling accident, the proposal to decommission Shoreham is outside the scope of the GEIS and, therefore, the categorical requirement continues in full force and effect with respect to a proposal to decommission Shoreham. Petitioners have made this assertion to the Commission repeatedly and the Commission has never denied that a proposal to decommission Shoreham is outside the scope of that GEIS.

Contention 2, Joint Petition at 7-8, asserts that an EIS is required for Shoreham's decommissioning because the GEIS is inapplicable to Shoreham since the plant was not shutdown after 40 years of operation or a disabling accident and, consequently, a prior regulation requiring an EIS on decommissioning applies to Shoreham. The contention is premised on a abrogated regulation, 10 C.F.R § 51.20(d)(5), and thus has no basis in law. *See* 53 Fed. Reg. 24052. In amending its decommissioning regulations, the Commission specifically stated that the

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[16] Contention 1 also argues that the "no action" alternative must be evaluated in any EIS prepared on decommissioning. As noted in the GEIS, the no action alternative is not considered viable for facilities since licensees would not be able to abandon the plants without taking some action to insure there is no unreasonable risk to the public health and safety. NUREG-0586, § 2.4.1.

"amendments apply to nuclear facilities that operate throughout their normal lifetime, as well as those that may be shut down prematurely." 53 Fed. Reg. 24019.

In addition, the contention provides no explanation of why an analysis of decommissioning impacts arising from prolonged plant operation would not encompass impacts of decommissioning a less irradiated plant such as Shoreham. A contention raising the same claim -- that the GEIS is inapplicable to a plant not terminating operations after its normal life or an accident -- was rejected in *Rancho Seco, supra*. The Licensing Board found that attempts to distinguish the facility from those analyzed in the GEIS were not persuasive or material, particularly since there was no showing of any site specific conditions that would place the impacts of decommissioning the facility outside the scope of the GEIS. LBP-91-30, *supra* at 6-7. Contention 2 similarly fails to raise any material issue of law or fact as the abrogated regulation is not controlling and SE2 states no facts which show that the GEIS does not encompass the environmental impacts of decommissioning Shoreham.

Thus, Contention 2 has no basis in law, fails to raise a genuine issue of material fact and should be rejected.

3. Contention 3

> Petitioners contend that LILCO's environmental report should be in the format prescribed by Regulatory Guide 4.2 (Rev. 2, July 1976) as appropriately modified for the proposal at issue as a result of the future application of the Commission's scoping procedures at 10 C.F.R. §§ 51.28 & 51.29 (1991) since that format for an environmental report on a nuclear power station has been determined by the NRC Staff to be the format "acceptable to the NRC Staff for implementing [these] specific parts of the Commission's regulations." NUREG-0099, Cover Sheet (July 1976).

Contention 3, Joint Petition at 8, asserts that LILCO should submit an environmental report on Shoreham's proposed decommissioning in a *format* that

comports with NRC guidance. This contention has no basis in fact. As recognized in Contention 4, *infra*, LIPA, the entity that will decommission Shoreham under the Settlement Agreement, submitted an Environmental Report with its Decommissioning Plan in December 1990 and that submittal was docketed on LILCO's request. The contention states no expert opinion or other information which shows that the contents of the report are inadequate or fail to address relevant environmental impacts. Even assuming that Regulatory Guide 4.2 applies to decommissioning, regulatory guides are neither regulations nor impose requirements, and noncompliance with a regulatory guide does not mean noncompliance with a regulation. *Gulf States Utilities Co.* (River Bend Station, Units 1 and 2), ALAB-444, 5 NRC 760 (1977); *Petition for Emergency & Remedial Action*, CLI-78-6, 7 NRC 400, 406-07 (1978). The general statement that the report should be in a certain format does not raise a litigable issue or a material issue of fact regarding the adequacy of the report.[17]

Moreover, the contention provides no basis to conclude there is any nexus between an environmental evaluation of decommissioning and the Confirmatory Order, the Security Plan Amendment or the Emergency Preparedness Amendment since SE2 again fails to show that the three actions will foreclose alternative decommissioning methods or other NEPA considerations. *See* CLI-91-4, *supra*.

SE2 wholly fails to raise a genuine issue of material fact since the contention lacks a regulatory basis, fails to pose a litigable issue and fails to raise an issue

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[17] Formatting guidance aids the Staff's review and is not to protect the Petitioners. *Compare* "zone of interest" concept *with Lujan*, 110 S. Ct. at 3186.

which, if proven, would entitle it to the relief requested, 10 C.F.R. § 2.714(d)(2)(ii). The contention should therefore be rejected.

4. Contention 4

> An EIS is required for Commission consideration of the proposal to decommission Shoreham because the Plan submitted by Long Island Power Authority . . . by letter of December 29, 1990 which LILCO has requested the NRC Staff to consider pursuant to 10 C.F.R. § 50.82 . . . proposes the selection of the DECON alternative (Plan at ¶ 2.1) which would foreclose the consideration of alternative decommissioning methods including SAFSTOR and ENTOMB. Also the NRC Staff has recognized that issuance of the POL allows the licensee to "ship the fuel support casting and peripheral pieces for off-site disposal . . . ." *See* SECY-91-129, Subject: Status and Developments at the Shoreham Nuclear Power Station (SNPS) at 3 (May 3, 1991). The Commission approved SECY-91-129 in [CLI-91-08]. Since DECON is the *only* alternative "in which equipment, structures, and portions of the facility and site containing radioactive contaminants are removed . . . . from the site," it is clear that allowing LILCO to proceed with the disposal of reactor internals at this time would prejudice the consideration of both SAFSTOR . . . and of ENTOMB . . . .
>
> Further, with particular reference to a boiling water reactor such as Shoreham, proceeding with DECON without a prior EIS forfeits the consideration of the NRC's recognition that SAFSTOR, "is advantageous in that it can result in reduced occupational radiation exposure in situations where urgent land use considerations do not exist." GEIS at ¶ 5.3.2. It also would deny the similar benefits of avoidance of radiation exposure available through the ENTOMB alternative . . . .

Contention 4, *id.* at 9-10, asserts that use of the DECON decommissioning alternative, as proposed in the December 29, 1990 plan, would foreclose use of the SAFSTOR and ENTOMB decommissioning alternatives. The licensing actions here, however, do not approve one method of decommissioning over another. They are limited to two specific license amendments and a Commission Order. No nexus between and the licensing actions and decommissioning is shown.[18] Moreover,

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[18] See discussion at notes 3 and 19.

contrary to CLI-91-4, 33 NRC at 237, the contention (1) provides no basis to conclude that an EIS is required for decommissioning Shoreham and (2) fails to address the question of why the three licensing actions would foreclose any decommissioning alternative. No information or expert opinion is proffered that would show that decommissioning will have a significant environmental impact or that the instant licensing actions would foreclose any decommissioning alternative.

Instead, the contention states the simple proposition that the selection of the DECON alternative forecloses other decommissioning options. This simple statement does nothing to address the pleading requirements set forth in CLI-91-4 and fails to allege facts that have any nexus to the above-captioned licensing actions.

The contention also asserts that alternative ways of disposing of the fuel casting are foreclosed by offsite shipment, however, no basis (facts, documents or expert opinion) is provided as to why offsite disposal of the pieces will have a significant environmental impact. SE2 also fails to show how the removal of the pieces would constitute "major structural changes to radioactive components of the facility or other major changes" requiring Commission approval of a decommissioning plan versus "minor component disassembly . . . permitted by the operating license and 50.59." 53 Fed. Reg. 24025-26; *see* SECY-91-129, "Status and Developments at the Shoreham Nuclear Power Station (SNPS)," dated May 13, 1991, at 3-4. SE2 further fails to provide any factual basis, through expert opinion or other information, to conclude that the occupational exposures associated with Shoreham's decommissioning would be mitigated by keeping the irradiated components onsite. Moreover, SE2 fails to explain why activities that may be taken under a possession

only license for Shoreham have any relevance or nexus to the licensing actions at issue in this proceeding.

In short, even assuming the statements in the contention were correct, the contention provides no basis to conclude that actions at issue in this proceeding would foreclose any decommissioning alternative or materially affect decommissioning costs or methods.[19] Thus Contention 4 fails to raise a genuine issue of material fact consistent with LBP-91-23 and should be rejected.

D. Petitioners' AEA Contention Does Not Meet Applicable Requirements

Contention 5 states, in part:

> Petitioners contend that the reduction in vital areas, vital equipment and plant security staff, as well as possible other changes made by the Security Plan Amendment ("Amendment") reducing the quality and quantity of the security afforded areas, equipment, and activities at Shoreham under the Site Security Plan ("Plan") are inconsistent with adequate assurance of, and create an unreasonable risk to, the public health and safety, fail to minimize danger to life or property, do not promote the common defense and security, and are inconsistent with serving a useful purpose proportionate to the quantities of special nuclear material authorized to be utilized under the *Shoreham full-power operating license*, and are thus, in violation of . . . 42 U.S.C. § 2133, and the Commission's regulations and guidance thereunder, and would

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[19] The contention also suggests that DECON, SAFSTOR and ENTOMB are not the only methods of decommissioning. Under 10 C.F.R. § 50.2, decommissioning "is defined as [removal of residual radioactivity] resulting in release of the property for unrestricted use and termination of the license." 53 Fed. Reg. 24018, 24020 (June 27, 1988). The alternative ways to accomplish decommissioning (i.e., DECON, SAFSTOR, and ENTOMB) "provide . . . alternative ways to reduce residual radioactivity to a level permitting release of the property for unrestricted use and termination of the license." 53 Fed. Reg. 24020. The use of the facility after termination of the NRC license is independent of the alternative to decommission the facility. *Id.* Rather, decommissioning alternatives "primarily consist of activities which either result in prompt dismantlement of the facility or which permit a storage period during which radioactive decay can occur prior to dismantlement of the facility." *Id.* The suggestion that "other decommissioning methods" should be considered is an apparent challenge to the Commission's rulemaking without the requisite showing under 10 C.F.R. § 2.758.

particularly constitute unreasonable risks to the health and safety of Petitioners and the persons they represent arising from the Licensees ability to meet the design basis threats to vital equipment and special nuclear material at Shoreham. [emphasis added]

* * *

(a) The Amendment does not meet the requirements prescribed by the Commission for physical protection of plants and materials in 10 C.F.R. Part 73 (1991). . . Since Shoreham is a utilization facility licensed pursuant to Part 50, the requirements of Part 73 apply in their fullness to Shoreham regardless of its current "mode." . . .

(b) Part 73 establishes the design basis threat to "be used to design safeguard systems to protect against acts of radiological sabotage and to prevent the theft of special nuclear material, including the threat of "violent external assault, attack by stealth . . . ." Petitioners submit that the Plan both before and after the Amendment is inadequate to meet the design basis threat. For example, on October 16, 1989, at 8:45 a.m., an unknown individual manually activated a fire pump and a fire suppression deluge valve onto the vertical cable trays of the reactor building where the emergency core cooling system pumps are located. . . .

(c) Petitioners contend that the Amendment does not conform with the guidance for implementation of Part 73 made mandatory by the Commission's physical protection upgrade rule, 44 Fed. Reg. 68184 (November 28, 1979), namely the "Fixed Physical Protection Ugrade Rule Guidance Companion Vols. I and II," nor with the regulatory guides published pursuant to that rule . . . .

(d) The reduction in guard force violates the settlement agreement among the parties in the operating license proceeding for Shoreham and, therefore is invalid. [citation omitted]

(e) Insofar as the Amendment allows for a response team of less than ten armed and trained personnel immediately available at the facility at all times, it is in violation of the requirements of 10 C.F.R. § 73.55(h)(3) because, among other reasons, any reduction from the nominal number of such guards cannot be justified on consideration of the eleven factors specified by the Commission in discussion item (3) of Requirements for the Physical Protection of Nuclear Power Reactors, 42 Fed. Reg. 10836 (February 24, 1977).

(f) . . . To the extent that such Shoreham "machinery, component, or controls," by virtue of the Amendment, are no longer classified as "vital equipment" or are outside of "vital areas" and/or "protected

> areas," that Amendment is in violation of 10 C.F.R. Part 73 and the Atomic Energy Act.
>
> (g) The Amendment does not comply with the requirements of 10 C.F.R. § 73.67 (1991) and LILCO is not exempt from the requirements of that section because, according to Petitioners' expert Dr. Stephen Musolino, a significant number of the fuel elements do not have a "total external radiation dose rate in excess of 100 rems per hour at a distance of three feet from any accessible surface without intervening shielding" and those fuel elements do not otherwise meet the exemption standards of 10 C.F.R. § 73.67(b)(1) (1991). . . .

Contention 5, Joint Petition at 10-16, alleges that the Security Plan Amendment renders LILCO unable to meet a design basis threat in violation of the AEA and applicable regulations thereunder. This overall assertion is founded upon the assumption that the level of security required for full power operation is need for a nonoperating, defueled reactor. Absent from the contention, however, are facts, bases and opinions to support this assertion.

While Petitioners have been on notice for over one year as to the standards applicable to contentions proffered this proceeding, *see* 55 Fed. Reg. 10528, 10520 (March 21, 1990), they have made few attempts to examine publicly available documents on Shoreham and no attempts to request access to safeguards documents containing information which might allay their concerns regarding the Security Plan amendment. *See* LILCO's Opposition to Petitioners' Contentions on Confirmatory Order, Physical Security Plan and Emergency Preparedness License Amendments, dated July 3, 1991, at 22-28. They have not used public documents such the Licensee's Defueled Safety Analysis Report which contain information regarding the defueled facility, the Final or Updated Safety Analysis Report for Shoreham, or even Staff Safety Evaluations regarding the Security Plan Amendment and the Emergency

Preparedness Amendment. Those documents contain considerable information, including a description of Shoreham's physical layout and an evaluation of the credible accidents for a nonoperating, defueled reactor.

Like SE2's NEPA contentions, Petitioners' AEA contentions cite various regulations but do not show how the Security Plan amendment violates those regulations. There is no showing of a genuine dispute regarding a material fact regarding the amendment. Petitioners fail to cite the safety evaluation authorizing the amendment, and to identify any fact or expert opinion that disputes information in publicly available documents, particularly the Staff's Safety Evaluation on the amendment. No credible scenario is provided for how the fuel could be reconfigured to pose a radiological hazard.[20] The Petitioners instead rely on general assertions of what should be required, relying on the regulations and a prior settlement agreement, and, in Contention 5(b), baldly assert that the plan is inadequate to meet the design basis threat both before and after the Amendment.

Even without access to the specifics of the security plan, Petitioners must, at minimum, identify the areas they contend should remain vital, proffer a credible scenario for gaining undetected entry, provide specifics how the alleged acts of radiological sabotage would pose an offsite hazard at a plant with fuel stored in its spent fuel, and proffer facts, expert opinion[21] or other information to support each

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[20] Petitioners provide no basis to conclude that they would be potentially harmed by acts of radiological sabotage and thus show no "injury in fact."

[21] *See Pacific Gas & Electric Co.* (Diablo Canyon Nuclear Power Plant, Unit Nos. 1 and 2), CLI-80-24, 11 NRC 775, 777 (1980); *Duke Power Co.* (Catawba Nuclear Station, Units 1 and 2), LBP-82-51, 16 NRC 167, 177 (1982); *Philadelphia Electric Co.* (Limerick Generating Station, Units 1 and 2), LBP-84-16, 19 NRC 857, 874-75 (1984).

of their allegations. Absent such showing, they raise no disputed issue of law or fact that would warrant further inquiry into the matter.

The Security Plan Amendment reclassified certain vital areas and made other modifications which allowed the licensee to reduce the size of the security force guarding the plant. 55 Fed. Reg. 25387 (June 21, 1990).[22] 10 C.F.R. § 73.55, "Requirements for physical protection of licensed activities in nuclear power reactors against radiological sabotage," requires, in part, that the onsite physical protection system and security organization have the capability to protect against the design basis threat of radiological sabotage and thereby "provide high assurance that activities involving special nuclear material are not inimical to the common defense and security and do not constitute an unreasonable risk to the public health and safety." 10 C.F.R. § 73.55(a). The Staff's Safety Evaluation ("SE") on the security plan amendment concluded that the plan, as revised, continues to meet the 10 C.F.R.

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[22] That amendment was issued applying the categorical exclusion in 10 C.F.R. § 51.22(c) based on the Staff's finding that the amendment related solely to safeguards matters and did not involve construction impacts. Safety Evaluation at 5. Amended paragraph 2.E states that:

> The licensee shall fully implement and maintain in effect all provisions of the Commission-approved physical security, guard training and qualification, and safeguards contingency plans including amendments made pursuant to provisions of the Miscellaneous Amendments and Search Requirements revisions to 10 C.F.R. 73.55 (51 FR 27817 and 27822) and to authority of 10 C.F.R. 50.90 and 10 C.F.R. 50.54(p). The plans, which contain Safeguards Information protected under 10 CFR 73.21, are entitled: "Shoreham Nuclear Power Station Security Plan for Fuel Storage in the Spent Fuel Pool," with revisions submitted through April 5, 1990; the "Shoreham Nuclear Power Station Guard Training and Qualification Plan," with revisions submitted through December 14, 1983; and "Shoreham Nuclear Power Station Safeguards Contingency Plan," with revisions submitted through May 13, 1988. Changes made in accordance with 10 CFR 73.55 shall be implemented in accordance with the schedule set forth therein.

§ 73.55 requirements based on (1) Shoreham's defueled condition, "which reduces the potential for an act of radiological sabotage that would cause a radiological effluent release resulting in radiation doses which exceed the 10 C.F.R. Part 100 limits," and (2) the March 29, 1990 Confirmatory Order prohibiting nuclear fuel being put back into the Shoreham reactor vessel without prior NRC approval. SE at 1 and 3. The Staff found that reclassification of certain portions of vital areas and equipment allowed by the security plan amendment provides adequate protection required to support spent fuel pool storage and that the amended security plan still maintains the 10 C.F.R. § 73.55(d) access control requirements. *Id.* at 3.

The smaller security force authorized by the amendment meets the acceptance criteria of NUREG-0907, "Acceptance Criteria for Determining Armed Response Force Size at Nuclear Plants," and the related response requirements of 10 C.F.R. § 73.55(h). *Id.* Because the changes authorized by the security plan amendment create no new sabotage scenarios, result in no physical changes to Shoreham affecting a safety system, and involve no reduction in any margin of safety, the Staff made a final no significant hazards consideration determination pursuant to 10 C.F.R. § 50.92, and concluded that the amended security plan will continue to provide protection adequate to meet an act of "radiological sabotage" as defined in 10 C.F.R. § 73.2. *Id.* at 4; *see* 55 Fed. Reg. 25387.

Common sense would dictate that the level of security necessary for a operating facility (having fuel in both the reactor vessel and the spent fuel pool) is not required for a defueled facility. The Commission's regulations also contemplate

that the level of security may be tailored to site specific considerations posed.[23] *See* 10 C.F.R. §§ 73.55(h), 73.2; 42 Fed. Reg. 10836, 10837 (February 24, 1977). Petitioners' recitation of regulatory requirements does not provide a basis for the Board to admit the contentions. Petitioners are obliged to raise genuine issues of material fact, and because security issues are involved, should identify specific areas and equipment that they believe should remain "vital" at a defueled facility and proffer expert opinion on the security issues raised. *See* note 18, *supra*. None of the statements in the contention are supported by relevant facts or an expert opinion on security issues.

Contention 5 goes beyond the scope of the instant amendment and alleges that the plan was inadequate prior to the amendment. This is an issue beyond the Board's jurisdiction to consider. *See Point Beach, supra*. Contention 5(a) is merely a conclusory statement and provides no basis in fact or expert opinion for the assertion that Shoreham does not meet Part 73. Contention 5(b) alleges that a 1989 incident was an act of "attempted sabotage/tampering," however, both the Licensee and the NRC concluded that the event was not an act of sabotage and that it posed no serious threat to systems required to maintain fuel integrity in the spent fuel pool or radiological safety. Inspection Report No. 50-322/89-07, dated

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[23] Petitioners also assert that the Staff cannot show that reductions in physical security have been allowed at other similar facilities. While the Staff does not concede that such information is relevant, such information would not show a dispute between Petitioners and LILCO, *see* 10 C.F.R. § 2.714(b)(2)(iii), or otherwise pose an issue within the scope of the proceeding that would entitle Petitioners to relief, 10 C.F.R. § 2.714(d)(2)(ii), the Staff has approved revisions to the Fort St. Vrain security plan that deleted certain previously vital areas and equipment, systems and procedures that are unnecessary for a shutdown facility. 56 Fed. Reg. 2561 (January 23, 1991).

January 4, 1990, at 3-4; LER 89-008, dated October 16, 1989. Thus, no genuine issue of material fact is raised concerning whether appropriate procedures were followed or that the act was relevant to the plan's ability to protect against the design basis threat of radiological sabotage.

Contentions 5(c), (f) and (g) similarly allege that regulatory requirements and guidance are not met, but, contrary to 10 C.F.R. §§ 2.714(b)(2)(ii) and (iii), they fail to provide any basis or specificity regarding what areas and equipment should remain vital at a defueled reactor in order to guard against the design basis threat of radiological sabotage and offer no fact, expert opinion or other information to support Petitioners' claims.[24] Contention 5(d) and (e) allege that armed force of less than ten violates the regulations and a previous settlement agreement to which Petitioners were not a party, however, (1) they lack a regulatory basis since 10 C.F.R. § 73.55(h) indicates that a few as five armed guards may be acceptable for the design basis threat and (2) Petitioners merely state requirements without providing facts, expert opinion or other information to show how they believe the plan is deficient.

Overall, Contention 5 does not particularize the injuries which SE2 members or Albert Prodell could sustain from the amendment (LBP-91-23, at 17, 26) and

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[24] Contrary to Petitioners' assertion in Contention 5(c), the Physical Protection Upgrade Rule, 44 Fed. Reg. 68184 (November 28, 1979), does not apply to nuclear power reactors that used low enriched uranium fuel. The protection requirements and design basis threat for power reactors are contained in 10 C.F.R. § 73.55. A licensee's physical protection system is required to protect against radiological sabotage as stated in 10 C.F.R. § 73.1(a)(1). This system, which includes the use of armed guards, also provides protection against the theft of the low enriched uranium fuel and is more stringent than 10 C.F.R. § 73.67, which primarily sets forth access control requirements. In addition, Contention 5(g) provides no basis for the claim that an exemption has been granted or requested from § 73.67.

lacks the requisite basis and specificity to warrant admission in this proceeding or to inquire into the concerns further. Accordingly, the contention should be rejected.

CONCLUSION

For the reasons stated above, the Petitioners' have not filed contentions which satisfy the threshold showing for admission in this proceeding under 10 C.F.R. § 2.714(d) or the requirements of the CLI-91-4, *supra*, CLI-90-8, *supra*, or LBP-91-23, *supra*. Consequently, the petitions should be denied.

Respectfully submitted,

Mitzi A. Young
Senior Supervisory Trial Attorney

for John T. Hull
Counsel for NRC Staff

Dated at Rockville, Maryland
this 11th day of July, 1991

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO PETITIONERS' JOINT AMENDED PETITION AND SUPPLEMENT" in the above captioned proceeding have been served on the following by deposit in the United States mail, first class, or, as indicated by an asterisk, by deposit in the Nuclear Regulatory Commission's internal mail system, by express mail, indicated by double asterisks, this 11th day of July, 1991:

Morton B. Margulies, Chairman*
Administrative Judge
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Jerry R. Kline*
Administrative Judge
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, DC 20555

George A. Ferguson**
Administrative Judge
5307 Al Jones Drive
Columbia Beach, MD 20764

James P. McGranery, Jr., Esq.**
Dow, Lohnes & Albertson
1255 23rd Street, NW, Suite 500
Washington, DC 20037

Stephen A. Wakefield, Esq.
General Counsel
U.S. Department of Energy
1000 Independence Ave., SW
Room 6A245
Washington, DC 20585

W. Taylor Reveley, III, Esq.
Donald P. Irwin, Esq.**
Hunton & Williams
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, VA 23219-4074

Nicholas S. Reynolds
David A. Repka
Winston & Strawn
1400 L Street, NW
Washington, DC 20005

Stanley B. Klimberg, Esq.
Executive Director and General Counsel
Long Island Power Authority
200 Garden City Plaza, Suite 201
Garden City, NY 11530

Samuel A. Cherniak, Esq.
NYS Department of Law
Bureau of Consumer Frauds and Protection
120 Broadway
New York, NY 10271

Carl R. Schenker, Jr., Esq.**
O'Melveny & Meyers
555 13th Street, NW
Washington, DC 20004

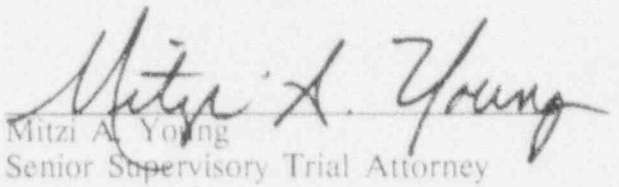
Gerald C. Goldstein, Esq.
Office of the General Counsel
New York Power Authority
1633 Broadway
New York, NY 10019

Office of the Secretary* (2)
Attn: Docketing and Service
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Atomic Safety and Licensing Board Panel* (1)
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Adjudicatory File* (2)
Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Atomic Safety and Licensing Appeal Panel* (6)
U.S. Nuclear Regulatory Commission
Washington, DC 20555



Mitzi A. Young
Senior Supervisory Trial Attorney