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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE COMMISSION

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

NRC STAFF'S MOTION TO DISMISS INTERVENTION PETITIONS

John T. Hull
Counsel for NRC Staff

February 5, 1992

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INTRODUCTION

The NRC Staff moves to dismiss the intervention petitions of the Scientists and Engineers for Secure Energy, Inc. ("SE2") and the Shoreham-Wading River Central School District ("School District")(collectively "Petitioners"), filed January 22, 1992, which request a hearing[1] in the above-captioned proceeding. The Petitions respond to the December 23, 1991 *Federal Register* notice, 56 Fed. Reg. 66459-460, regarding the

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[1] Scientists and Engineers For Secure Energy, Inc.'s Petition For Leave to Intervene and Request for Prior Hearing ("SE2 Petition"); Shoreham-Wading River Central School District Petition for Leave to Intervene and Request for Prior Hearing ("School District Petition")(collectively "Petitions"). The Petitions filed on behalf of SE2 and the School District are largely identical, except for the different descriptions used regarding their purported members. For convenience, unless otherwise indicated, all Petition cites will be to SE2's Petition.

proposed issuance of an order authorizing the decommissioning of the Shoreham nuclear power plant.[2]

Dismissing the Petitions, rather than forwarding them to an Atomic Safety and Licensing Board, will save the unwarranted expenditure of further resources by the Commission and the parties to address arguments previously resolved. The Staff recognizes that the usual procedure would be for the Commission to forward these Petitions to a licensing board for an initial determination as to whether the NRC's intervention standards are met. However, these Petitions are not filed on a clean slate. For well over a year the Petitioners have made the same arguments that they make here (albeit in the context of other licensing actions) regarding the need to consider resumed operation of Shoreham as an alternative to decommissioning. The Long Island Lighting Company ("LILCO"), the Long Island Power Authority ("LIPA"), and the Staff have filed more than a dozen responses to these arguments. The Commission and licensing boards have again and again rejected Petitioners' arguments. *See Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-90-8, 32 NRC 201 (1990); CLI-91-2, 33 NRC 61 (1991); CLI-91-8, 33- NRC 461 (1991); LBP-91-1, 33 NRC 15 (1991);

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[2] The Shoreham reactor is defueled and all spent fuel is in the spent fuel pool. *See* 56 Fed. Reg. at 66459. The order "would allow the immediate dismantlement of the reactor pressure vessel and internals, contaminated systems, and plant structures" using the DECON decommissioning method. *Id.* The environmental impacts of using the DECON method at Shoreham are analyzed in a supplement to the environmental report submitted with the decommissioning plan. *Id.* Nuclear fuel will be shipped either to Nine Mile Point for use or to Europe for reprocessing, and thus fuel disposal is not considered part of the Shoreham decommissioning actions. *Id.* The decommissioning plan, dated December 29, 1990 ("Plan") was supplemented on August 26, November 27 and December 6, 1991, in response to Staff requests for additional information. *Id.* at 66460.

LBP-91-23, 33 NRC 430 (1991); LBP-91-26, 33 NRC 537 (1991); LBP-91-35, 34 NRC 163 (1991); and LBP-91-39, 34 NRC 273 (1991).

Petitioners' arguments also concern issues beyond the scope of the matters discussed in the December 23, 1991 *Federal Register* notice, and would thus be beyond the jurisdiction of any licensing board established to consider Shoreham's decommissioning. *See Wisconsin Electric Co.* (Point Beach Nuclear Plant, Units 1 and 2), ALAB-739, 18 NRC 335, 339 (1983). The Petitions largely ignore the matters discussed in the *Federal Register* Notice.[3] Instead, the Petitioners again argue that 1) the NRC should preserve Shoreham's capability to generate electricity by nuclear means until the economic consequences and possible indirect environmental impacts (e.g., increased pollution from operation of a replacement fossil fuel plant) of LILCO's decision to close Shoreham are evaluated in an Environmental Impact Statement ("EIS"); and 2) the EIS should consider resumed nuclear operation of Shoreham as an alternative to decommissioning.

In its Statement of Policy On Conduct of Licensing Proceedings, CLI-81-8, 13 NRC 452 (1981), the Commission emphasized the need to efficiently conduct proceedings, thereby expediting the hearings process. *Id.* at 453. Similar considerations of preserving administrative resources and economizing are in the public interest and are applicable here, particularly since the gravamen of the Petitions -- the need for a NEPA review of

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[3]The decommissioning of nuclear power plants is governed by 10 C.F.R. § 50.82. The thirty-plus-pate Petitions fail even to cite this regulation, fail to discuss the Plan and its supplements in any detail, and fail to show that the proposed authorization to decommission Shoreham would be improper.

the indirect impacts of Shoreham's closure and the alternative of resumed operation -- runs contrary to the Commission's recent *Shoreham* decisions.

For these reasons, as discussed more fully below, the Petitions should now be dismissed.[4]

BACKGROUND

LILCO's agreement with the State of New York to terminate its operation of Shoreham as a nuclear plant became effective on June 28, 1989. The agreement specifies that LILCO will transfer ownership of Shoreham to LIPA, an entity created by the New York State Legislature. LIPA would then be in charge of Shoreham's decommissioning.

On June 28, 1990, LILCO and LIPA filed a joint amendment application requesting transfer of the Shoreham license from LILCO to LIPA "upon or after amendment of the license to a non-operating status." 56 Fed. Reg. 11768, 11781. LILCO's request for a possession-only license ("POL"), noticed in 55 Fed. Reg. 34098 (August 21, 1990), was granted and the POL was issued to LILCO on June 14, 1991.[5] The merits of the proposed POL license transfer, including LIPA's qualifications for becoming the Shoreham

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[4] If the Commission decides not to dismiss the Petitions on the collateral estoppel and the jurisdictional arguments made herein, the Staff will address the standing of the Petitioners to intervene under 10 C.F.R. § 2.714, as well as other matters in the Petitions. *See, e.g.*, NRC Staff Response To Petitioners' Intervention Petitions, Requests For Hearing, And No Significant Hazard Consideration Comments (May 17, 1991)(license transfer).

[5] The POL became effective on July 19, 1991, when the United States Court of Appeals for the District of Columbia Circuit denied a motion to stay its issuance. *See* 56 Fed. Reg. 28424 (June 20, 1991) and *Shoreham-Wading River Central School District v. NRC*, No. 91-1140 (D.C. Cir. July 19, 1991).

POL transferee, are being contested by Petitioners in the License Transfer proceeding pending before the Licensing Board in Docket No. 50-322 OLA-3.

ARGUMENT

I. Collateral Estoppel Bars Further Argument That Shoreham's Resumed Operation Must Be Considered As An Alternative To Decommissioning

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. *Gulf Oil Corp. v. FPC*, 563 F.2d 588, 602 (3rd Cir. 1977); *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). Precluding parties 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. United States*, 440 U.S. 147, 153-54 (1979) (footnote omitted).

The principles of collateral estoppel are applied in administrative adjudicatory proceedings. *U.S. v. Utah Construction and Mining 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 (1974); *Southern California Edison*

Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-673, 15 NRC 688, 695 (1982).[6] 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.

Petitioners' arguments center on the asserted need to consider the future operation of Shoreham as an alternative to its decommissioning, a position that has been rejected by the Commission three times. In *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-90-8, 32 NRC 201, 203-04 (1990), the Commission evaluated six intervention petitions filed by Petitioners concerning the March 29, 1990, Confirmatory Order Modifying License and two LILCO license amendment applications regarding physical security and emergency preparedness requirements. Those intervention petitions argued that an EIS on Shoreham's decommissioning had to be prepared and had to consider the alternative of resumed full-power operation. *See id.* at 204. In forwarding the intervention petitions to the Licensing Board,[7] the Commission ruled that while the NRC must approve a licensee's decommissioning plan pursuant to 10 C.F.R. § 50.82,

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[6] 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).

[7] In three Licensing Board decisions, the six intervention petitions were denied due to a combination of Petitioners' lack of standing and failure to file admissible contentions under 10 C.F.R. § 2.714. *See* LBP-91-1, 33 NRC 15 (1991); LBP-91-23, 33 NRC 430 (1991); and LBP-91-35, 34 NRC 163 (1991). Petitioners' appeals from these decisions are pending before the Commission.

> "nowhere in our regulations is it contemplated that the NRC would need to approve of a licensee's decision that a plant should not be operated.... 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. The alternative of 'resumed operation' -- or other methods of generating electricity -- are alternatives to the decision not to operate Shoreham and thus are beyond Commission consideration."

32 NRC at 207 (footnote and citations omitted).

The Commission ruled in the alternative, that under NEPA's "rule of reason," Shoreham's resumed operation would not have to be considered in any NEPA evaluation of Shoreham's decommissioning. *See id.* at 208-09.

In CLI-91-2, 33 NRC 61 (1991), on Petitioners' motion for reconsideration of CLI-90-8, the Commission affirmed its earlier rulings, emphasizing 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 (footnote omitted). The Commission also reiterated that "we have not yet determined that an EIS will even be necessary" regarding Shoreham's decommissioning. *Id.* at 74.

In CLI-91-8, 33 NRC 461 (1991), the Commission ruled on Petitioners' motion to stay the issuance of the POL to LILCO pending the outcome of litigation then before the New York Court of Appeals. The Commission viewed Petitioners' stay request as a motion to reconsider CLI-90-8 and CLI-91-2, and again reiterated its holding "that the decision not to operate Shoreham is a private decision and that NEPA only requires the NRC to consider alternative *methods* of decommissioning." CLI-91-8, 33 NRC at 470 (emphasis in original). The Commission also reaffirmed its "rule of reason" holding

regarding consideration of the "remote and speculative" possibility of Shoreham's resumed operation. *Id.*

In light of these three Commission decisions, there is no valid reason to allow Petitioners once again to base intervention petitions on their argument, detailed below, that the resumed operation of Shoreham must be evaluated as part of any licensing action concerning Shoreham's decommissioning. Accordingly, the Petitions should be dismissed.

II. The Petitions Address Matters Outside the Scope of the *Federal Register* Notice

For any licensing action, the matters outlined in the *Federal Register* notice of opportunity for hearing define the scope of the proceeding on the action. *See Wisconsin Electric Co.* (Point Beach Nuclear Plant, Units 1 and 2), ALAB-739, 18 NRC 335, 339 (1983); *Northern Indiana Public Service Co.* (Bailly Generating Station, Nuclear-1), ALAB-619, 12 NRC 558, 565 (1980); *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), LBP-91-1, 33 NRC 15, 20, *reversed in part on other grounds*, CLI-91-4, 33 NRC 233, 236 (1991).

The *Federal Register* notice of opportunity for hearing regarding the proposed Order authorizing Shoreham's decommissioning thus defines the scope of any proceedings regarding such an Order. The *Federal Register* notice references and makes available for inspection the Plan and the supplements thereto, dated August 26, November 27, and December 6, 1991; states that LIPA "intends to remove all radioactive waste generated during decommissioning;" and briefly describes the radiological and environmental analyses contained in the Plan and its supplements. 56 Fed. Reg. 66459-60.

The Petitions raise no Atomic Energy Act (AEA) concerns regarding the radiological safety of using the DECON decommissioning alternative as described and analyzed in the Plan and supplements thereto,[8] nor do they raise any National Environmental Policy Act (NEPA) concerns regarding environmental impacts arising from use of the DECON alternative as described and analyzed in the Plan and supplements thereto. Instead, on page after page, the Petitions reference the alternative of operating Shoreham and the consequences of its non-operation -- matters outside the scope of the licensing action described in the December 23, 1991 *Federal Register* notice. For example, Petitioners reference: (1) "the adverse health and other environmental consequences of non-operation of Shoreham cognizable under NEPA" (Petition at 8); (2) a hypothetical decision "to operate Shoreham" (*id.* at 9); (3) "the radiological hazards of operating the facility" (*id.* at 10); (4) "the public interest in the plant as an operational entity" (*id.*); (5) "alternatives to allowing a plant to be prematurely decommissioned" (*id.*); (6) "the operation and near-term operation alternatives for Shoreham" (*id.*); (7) the "presumptuous 'decision' that the reactor will never return to full power operation" (*id.* at 11); (8) the need for maintaining "the full power license obligations" (*id.*); and (9) the

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[8] With no citation to the Plan, its supplements, or any expert testimony, Petitioners state that radiation exposures will be greater if the DECON method is used at Shoreham, rather than the SAFSTOR or ENTOMB decommissioning methods. *See* Petition at 16. This bare assertion fails to meet the 10 C.F.R. § 2.714(a)(2) requirement of showing how the approval of the Plan would affect each petitioner's interests, and would provide no basis for granting intervention.

The Petition, at 16, also briefly mentions decommissioning funding concerns and questions LIPA's qualifications to be the POL transferee. Petitioners raised the identical concerns in the License Transfer proceeding and their petitions are pending before the Licensing Board.

danger of "jeopardizing the future viability of the reactor" (*id.* at 13). Such concerns are outside the scope of matters addressed in the December 23, 1991 *Federal Register* notice, and may not be considered in any proceeding on this licensing action.

The few assertions not alluding to Shoreham's resumed operation likewise provide no basis for intervention here. The vague, convoluted, "*de facto* decommissioning" arguments made by Petitioners,[9] even were they valid, have no place here and have been rejected in previous *Shoreham* license amendment proceedings. *See* LBP-91-1, 33 NRC 15 (1991); LBP-91-23, 33 NRC 430 (1991); LBP-91-26, 33 NRC 537 (1991); LBP-91-35, 34 NRC 163 (1991); and LBP-91-39, 34 NRC 273 (1991). The bald, conclusory allegations of statutory violations[10] fall so far short of the clear and precise pleading

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[9] Petitioners argue that "a proper environmental assessment" should consider the proposed decommissioning order

> "in the context of the decommissioning proposal which has been, and continues to be, implemented in a segmented fashion. Such consideration must inevitably yield the conclusion that the piecemeal implementation of the individual steps in the decommissioning process cannot continue until an EIS evaluating the environmental impacts of, and alternatives to, the decommissioning scheme as a whole has been prepared and a final decision on that proposal made.

Petition, at 25.

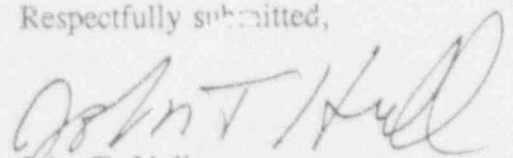
[10] Petitioners make the vague, conclusory, allegation that the licensee and Staff have proposed incremental, segmented steps in furtherance of Shoreham's *de facto* decommissioning which violate the AEA "by definition, [and] increase the risk of radiological harm" to their members. Petition, at 12. They only specifically cite the AEA in arguing "that utilization facilities such as Shoreham are licensed to serve the public interest," and that as long as "the NRC determines that the public interest is best served by an operable plant," LILCO must maintain Shoreham in an operable condition. *Id.* at 14.

standard traditionally applied to counsel experienced in NRC proceedings[11] that such allegations can form no basis for intervention.

CONCLUSION

For the above stated reasons, the Staff's Motion To Dismiss Intervention Petitions should be granted.

Respectfully submitted,



John T. Hull
Counsel for NRC Staff

Dated in Rockville, Maryland
this 5th day of February, 1992

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[11] There are "standards of clarity and precision to which a lawyer might reasonably be expected to adhere." *Wisconsin Public Service Corp.* (Kewaunee Nuclear Power Plant), LBP-78-24, 8 NRC 78, 82 (1978), *quoting Public Service Electric and Gas Co.* (Salem Nuclear Generating Station, Units 1 and 2), ALAB-136, 6 AEC 487, 489 (1973) (comparing standards to which a *pro se* litigant is held).

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	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S MOTION TO DISMISS INTERVENTION PETITIONS" in the above captioned proceeding have been served on the following by deposit in the United States mail, first class, or, as indicated by an asterisk, by deposit in the Nuclear Regulatory Commission's internal mail system, this 5th day of February, 1992:

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