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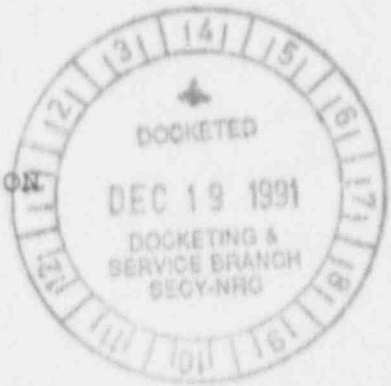


UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

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| In the Matter of | ) | |
| LONG ISLAND LIGHTING COMPANY | ) | Docket No. 50-322-OLA-2 |
| (Shoreham Nuclear Power Station, Unit 1) | ) | |

**LILCO'S OPPOSITION TO $SE_2$'S**
**APPEAL FROM LBP-91-26 AND LBP-91-39**

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December 18, 1991



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MISCELLANEOUS

LILCO, December 18, 1991

UNITED STATES OF AMERICA
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| In the Matter of<br><br>LONG ISLAND LIGHTING COMPANY<br><br>(Shoreham Nuclear Power Station, Unit 1) | Docket No. 50-322-OLA-2 |

**LILCO'S OPPOSITION TO $SE_2$'S APPEAL FROM LBP-91-26 AND LBP-91-39**

## I. Introduction

On December 3, 1991, Petitioner Scientists and Engineers for Secure Energy, Inc. ($SE_2$) noticed an appeal from the Licensing Board's order rejecting its contentions and denying its petition to intervene in the "possession only" license (POL) amendment proceeding for Shoreham. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-39, 34 NRC __ (Nov. 15, 1991). $SE_2$ also noticed an appeal from one of the Board's earlier rulings on its standing to intervene in that proceeding, Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-26, 33 NRC 537 (1991)(allowing $SE_2$ to file contentions

on issues arising under the National Environmental Policy Act (NEPA) but not on Atomic Energy Act issues, and denying fellow petitioner Shoreham-Wading River Central School District's (SWRCSD's) petition entirely). $SE_2$'s notice of appeal was accompanied by a five page brief (December 3 Appeal).

Pursuant to 10 C.F.R. § 2.714a(a), Long Island Lighting Company (LILCO or the Company) opposes $SE_2$'s appeal, whose five page supporting brief is so woefully deficient in its failure to address adequately the alleged errors in LBP-91-26 and LBP-91-39 as to warrant summary rejection. Further, the Board's decision rejecting $SE_2$'s POL amendment contentions and denying the petition to intervene is clearly correct on the merits.

## II. Background

### A. Procedural History

On January 5, 1990, LILCO submitted an application to amend Shoreham's operating license to transform it into a POL. Accompanying LILCO's request was a safety analysis report that described the plant in its defueled state.

The NRC noticed LILCO's POL amendment request in the Federal Register on August 21, 1990, and solicited public comments on the NRC's proposed determination that the amendment presented "no significant hazards consideration." 55 Fed. Reg. 34,099-100 (Aug. 21, 1990). The NRC also provided an opportunity for "any interested person whose interest may be affected" to file a

petition to intervene and request for hearing on the proposed amendment. Id. at 34,100.

On September 20, $SE_2$ and SWRCSD each submitted to the Commission a petition to intervene in the POL amendment proceeding. They alleged that the NRC would violate NEPA if it issued the POL amendment without having first prepared an environmental impact statement (EIS) that considered the "alternative" of Shoreham's operation as a nuclear facility. Petitioners also claimed that the POL amendment would violate various provisions of the Atomic Energy Act. LILCO and the NRC Staff opposed the petitions on October 12 and 24, 1990, respectively.

On January 24, 1991, the Commission referred Petitioners' requests, and LILCO's and the NRC Staff's oppositions, to the Licensing Board panel. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-91-01, 33 NRC 1 (1991). On January 28, 1991, a three-member Licensing Board chaired by Judge Margulies was established to rule on the joint petition. 56 Fed. Reg. 4310 (Feb. 4, 1991).[1/]

Earlier, on October 17, 1990, in response to separate sets of petitions to intervene in the Confirmatory Order, Physical Security Plan, and emergency preparedness amendment proceedings, the Commission had resolved the crucial threshold issue: it

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1/ Because of a scheduling conflict, Judge Margulies was later replaced as Chairman by Judge Moore. 56 Fed. Reg. 49,804 (Oct. 1, 1991).

ruled that LILCO's determination not to operate Shoreham was a private decision to which NEPA did not apply. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-90-08, 33 NRC 201 (1990). Therefore, the Commission held, any environmental review of Shoreham's decommissioning need not consider "resumed operation" of the plant as a nuclear facility. The Commission affirmed its decision on February 22, 1991, in response to a request by Petitioners for reconsideration. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-91-02, 33 NRC 61 (1991).[2/]

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[2/] Subsequently, the Licensing Board rejected Petitioners' initial petitions for hearing on the Confirmatory Order, Physical Security Plan, and emergency preparedness license amendments, but provided them an opportunity to amend. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-1, 33 NRC 15 (1991). The Board said that Petitioners' second chance to file acceptable petitions on the three licensing actions was "predicated in part on the Commission being rather liberal in permitting petitioners the opportunity to cure defective petitions to intervene." LBP-91-1, 33 NRC at 40. Yet, notwithstanding this second chance, on January 23, 1991, Petitioners tried to appeal LBP-91-1 to the Commission. Both LILCO and the NRC Staff opposed the "appeal" on the ground that, among other flaws, it was interlocutory. The Commission agreed, in Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-91-04, 33 NRC 233 (1991). While Petitioners' "appeal" from LBP-91-1 was pending, on February 2, 1991, they submitted amended petitions to intervene in all three licensing actions. The Board subsequently allowed Petitioners to file contentions on certain issues, but, following a prehearing conference on July 23, 1991, ultimately rejected the contentions. See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-23, 33 NRC 430 (1991)(allowing $SE_2$ to file contentions in all three proceedings on issues arising under NEPA and allowing both $SE_2$ and SWRCSD to file contentions in the Physical Security Plan proceeding on issues arising under the Atomic Energy Act); Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-35, 34 NRC 163 (1991)(denying all of Petitioners' contentions). On September 13, 1991, Petitioners took an appeal (continued...)

The Licensing Board ruled on Petitioners' hearing requests on the POL amendment on March 6, 1991. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-7, 33 NRC 179 (1991). The Board, identifying numerous deficiencies in the petitions to intervene, found that with respect to issues arising under NEPA and the Atomic Energy Act, both SWRCSD and $SE_2$ had "failed to establish standing, as required by 10 C.F.R. § 2.714(a)(2)." LBP-91-7, 33 NRC at 195. Nevertheless, the Board ruled that, since Petitioners had not had the "benefit of the Commission's two precedential policy decisions [CLI-91-08 and CLI-91-02] at the time they filed their petitions to intervene," Petitioners would be given an opportunity to amend their petitions to take into account those two decisions and otherwise to correct the various flaws found by the Board. Id.

Thus aided by the Board, which specified the defects in Petitioners' initial petitions and gave them another chance to try to demonstrate standing, Petitioners filed amended petitions in the POL amendment proceeding on April 8, 1991. LILCO and the NRC Staff again responded in opposition, on April 23 and April 29, 1991, respectively.

In the meantime, on April 3, 1991, the Commission issued CLI-91-04, in response to Petitioners' January 23, 1991 "appeal" from LBP-91-1. See note 2, above. While rejecting the "appeal"

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2/ (...continued)
from LBP-91-1, LBP-91-23, and LBP-91-35 to the Commission. LILCO and the NRC Staff opposed the appeal on September 25, 1991. The appeal is pending.

as interlocutory, the Commission also indicated that its ruling in CLI-90-08 was "not intended to preclude the Licensing Board, as a matter of law and jurisdiction, from entertaining properly supported contentions" that an EIS on Shoreham's decommissioning must be prepared for the three licensing actions at issue. CLI-91-04, 33 NRC at 236.

The Commission went on to explain, however, that it viewed the three licensing actions as "being wholly separate from, and independent of, decommissioning." 33 NRC at 237. The Commission said it "harbor[ed] substantial doubts that the Petitioners can make a credible showing that these actions are part of the decommissioning process." Id. But, the Commission allowed, if Petitioners were otherwise able to satisfy the NRC's standing requirements, the Board was free to consider a "properly pled contention" on NEPA issues. Id.

The Commission set out the test for a "properly pled contention." It would

> 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 these actions here could, by foreclosing alternative decommissioning methods or some other NEPA-based considerations, constitute an illegal segmentation of the EIS process.

CLI-91-04, 33 NRC at 237 (emphasis in original).

On June 13, 1991, the Board issued its ruling on SWRCSD's and $SE_2$'s amended petitions in the POL amendment proceeding. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit

1), LBP-91-26, 33 NRC 537 (1991). The Board found that $SE_2$ had, in its amended petition, demonstrated standing to intervene with respect to issues arising under NEPA and could file contentions on those issues. But the Board held that $SE_2$ did not have standing as to issues arising under the Atomic Energy Act.[3/] SWRCSD, the Board determined, did not have standing under either NEPA or the Atomic Energy Act. Consequently, SWRCSD was not allowed to file contentions and its hearing request was "wholly denied" under 10 C.F.R. § 2.714a(b).[4/]

In LBP-91-26, the Board also ruled that the Commission's guidance in CLI-91-04 regarding what constitutes a "properly pled" NEPA contention applied to the POL proceeding as well as to the proceeding on the Confirmatory Order, emergency preparedness, and Physical Security Plan license amendments. The Board said:

> The Commission, in assigning the POL to the Licensing Board, stated that the matter should be handled in accordance with CLI-90-8. The guidance CLI-91-4 is but a modification of CLI-90-8 and to the extent CLI-90-8 is applicable to the POL so is its modification.

33 NRC at 542.

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[3/] On June 25, 1991, the NRC Staff asked the Board to reconsider its ruling on $SE_2$'s standing to intervene on NEPA-based issues. LILCO supported the NRC reconsideration on July 10, 1991. The Board subsequently denied the Staff's request. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-32, 34 NRC 132 (1991).

[4/] SWRCSD took an appeal from LBP-91-26 to the Commission on June 28, 1991. LILCO and the NRC opposed the appeal on July 15, 1991. It is pending.

On July 1, 1991, $SE_2$ submitted seven contentions on the POL amendment ($SE_2$ July Supplement).[2/] Six of $SE_2$'s contentions were based generally on concerns allegedly arising under NEPA. One (Contention 5) impermissibly raised radiological health and safety issues, disregarding the Board's ruling in LBP-91-26 that $SE_2$ did not have standing under the Atomic Energy Act. LILCO and the NRC Staff opposed $SE_2$'s contentions on July 15 and July 22, 1991, respectively.

Meanwhile, as proceedings before the Licensing Board continued, on June 12, 1991, the Commission issued Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-91-08, 33 NRC 461 (1991). In CLI-91-08, the Commission approved the NRC Staff's recommendation to issue the POL amendment. At the same time, the Commission denied Petitioners' request to hold in abeyance all Shoreham-related proceedings, including issuance of the POL amendment, pending resolution of three consolidated suits

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2/ Accompanying $SE_2$'s contentions was a "suggestion" by SWRCSD that the Board erred in LBP-91-26 when it dismissed SWRCSD from the POL amendment proceeding for lack of standing. SWRCSD also attempted to adopt as its own the POL amendment contentions submitted by $SE_2$, arguing that it could do this "because the ASLB's dismissal of [SWRCSD] is on appeal and, therefore, not final." As LILCO pointed out in response, this was incorrect. SWRCSD's dismissal from the POL amendment proceeding remained in effect unless and until either the Commission reversed the Board on appeal or the Board reconsidered its ruling on SWRCSD's standing.

before the New York Court of Appeals challenging the validity of the Shoreham Settlement Agreement.[6/]

Having thus received authorization from the Commission, on June 14, 1991, the NRC Staff made a final finding that the POL amendment presented "no significant hazards consideration" and issued it. 56 Fed. Reg. 28,424 (June 20, 1991). As instructed by the Commission in CLI-91-08, the Staff issued the POL amendment subject to an administrative stay, to allow SWRCSD and $SE_2$ an opportunity to seek a further stay from the federal courts.

On June 26, 1991, Petitioners filed in the U.S. Court of Appeals for the District of Columbia Circuit a petition for review of the issuance of the POL amendment, as well as the four Commission decisions underlying it, namely, CLI-90-08, CLI-91-01, CLI-91-02, and CLI-91-08. Petitioners also sought review of Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), DD-90-08, 32 NRC 469 (1990), the Director's Decision denying SWRCSD's and $SE_2$'s § 2.206 petitions.[7/]

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6/ Petitioners had made their request for an anticipatory stay of all Shoreham-related proceedings on March 8, 1991. LILCO and the NRC Staff had opposed the request on March 25, 1990. On October 22, 1991, the New York Court of Appeals affirmed the validity of the Settlement Agreement in all respects. Citizens for an Orderly Energy Policy v. Cuomo, Docket No. 182-84, 78 NY 2d 398 (Oct. 22, 1991)(motion for reargument pending).

7/ Earlier, on March 25, 1991, SWRCSD and $SE_2$ had filed in the D.C. Circuit a petition for review of CLI-90-08, CLI-91-01, CLI-91-02, and DD-90-08. On June 5, 1991, the NRC moved to dismiss this petition, docketed as No. 91-1140, on the grounds that (1) the three Commission decisions were not final agency action and

(continued...)

On July 5, 1991, as the administrative stay of the POL amendment was about to expire, SWRCSD and $SE_2$ filed in the D.C. Circuit a request for a stay of the effectiveness of the POL amendment, as well as a request for an expedited briefing schedule.[8/] LILCO and the NRC responded in opposition to the stay and to expedited briefing on July 12, 1991.

The D.C. Circuit denied Petitioners' requests both for a stay and for expedited briefing on July 19, 1991. That same day, SWRCSD and $SE_2$ asked the Chief Justice of the U.S. Supreme Court, acting in his capacity as the Circuit Justice for the D.C. Circuit, for an emergency stay of the effectiveness of the POL amendment. The Chief Justice refused on July 20, 1991.

Thus rebuffed by the federal courts, the next day, July 21, Petitioners submitted to the Commission two interrelated emergency motions for a stay of the effectiveness of the POL

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7/ (...continued)
(2) the Director's Decision was action "committed to agency discretion by law," and, hence, presumptively unreviewable. LILCO filed a motion in support of the NRC on June 11, 1991. The NRC's motion to dismiss in No. 91-1140 was pending at the time the Commission handed down CLI-91-08 and the NRC Staff issued the POL amendment. SWRCSD's and $SE_2$'s June 26, 1991 petition for review, docketed as No. 91-1301, was subsequently consolidated with No. 91-1140. The motion to dismiss is still pending. Briefing on the merits in Nos. 1140 and 1301 will be completed on December 26, 1991. Oral argument is scheduled for February 7, 1992.

8/ On July 11, 1991, the U.S. Department of Justice (acting under its identity as the statutory respondent "United States") filed a response in support of the stay at the behest of the U.S. Department of Energy.

amendment. LILCO filed an opposition to the requests on July 22, 1991.

While their latest stay motions were pending before the Commission, on July 23, 1991, SWRCSD and $SE_2$ went back yet again to the U.S. Supreme Court, this time filing a stay request with Justice Stevens. Justice Stevens, in turn, referred it to the full Court.[2/]

On July 25, 1991, the Commission denied Petitioners' July 21 requests. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-91-10, 34 NRC 1 (1991). The other shoe dropped for SWRCSD and $SE_2$ on August 2, 1991, when the Supreme Court denied the stay request that had initially been filed with Justice Stevens. 112 S. Ct. 9 (1991).

On July 30, 1991, the Licensing Board held a prehearing conference on the POL amendment. Petitioners were given an

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2/ While LILCO was under no obligation to do so, as a courtesy to the Supreme Court and to allow for the orderly consideration of Petitioners' last-gasp filing, LILCO committed to take no irreparable actions under the POL amendment for several days, while the Company was engaged in various planning and preparatory activities:

> Although the Possession-Only License for the Shoreham Nuclear Power Station has been in effect since midnight July 19, the next several days will be devoted primarily to planning and organization for its effective use. LILCO will take no acts of a destructive nature at the plant, nor will there be any actions or inactions of an irreparable nature taken during this period.

Letter from LILCO counsel to Supreme Court Deputy Clerk (July 22, 1991).

opportunity to explain at length their POL amendment contentions and to respond to LILCO's and the Staff's objections to them.

On November 15, 1991, the Board issued Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-91-39, 34 NRC ___ (Nov. 15, 1991), the decision that is the subject of the instant appeal. In LBP-91-39, the Board ruled that none of the seven contentions was admissible and denied SE$_2$'s request for a hearing on the POL amendment.[10/]

## B. Legal Standard on Appeal

### 1. Threshold Standing Issues

The determination whether a petitioner has demonstrated standing to intervene is "a matter within the discretion of the Licensing Board." See, e.g., Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-107, 6 AEC 188, 193 (1973), reconsideration denied, ALAB-110, 6 AEC 247, aff'd, CLI-73-12, 6 AEC 241 (1973). A Board's standing decision will not be disturbed "unless it appears that that conclusion is irrational." Id. at 193. See also Duquesne Light Co. (Beaver Valley Power Station, Unit No. 1), ALAB-109, 6 AEC 243, 244 (1973).

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10/ The Board also refused to reconsider its ruling that SWRCSD was dismissed from the POL amendment proceeding and, hence, not authorized to submit contentions. LBP-91-39, slip op. at 2 n.3 (Nov. 15, 1991).

**2. Admissibility of Contentions**

Under NRC precedent, in an appeal from a Licensing Board's denial of contentions, the reviewing body itself (in this case, the Commission) reviews the proffered contentions. See, e.g., Mississippi Power & Light Co. (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-130, 6 AEC 423, 424-25 (1973); Louisiana Power & Light Co. (Waterford Steam Electric Station, Unit 3), ALAB-125, 6 AEC 371, 372 (1973); Duquesne Light Co. (Beaver Valley Power Station, Unit 1), ALAB-109, 6 AEC 243, 245 (1973); Northern States Power Co. (Prairie Island Nuclear Generating Plant, Units 1 and 2), ALAB-107, 6 AEC 188, 194 (1973). But as with standing, the Licensing Board "exercises substantial discretion in determining the adequacy" of contentions, and review of the Board's decision is "limited to whether the Board abused its discretion." Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 1), ALAB-868, 25 NRC 912 (1987); Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 21 (1974)(the Board exercises a "considerable amount of discretion" in determining the admissibility of contentions). In order for the reviewing body to reverse a Board on contentions, it "must be persuaded that no reasonable person could take the view" adopted by the Board. Texas Utilities Electric Co., ALAB-868, 25 NRC at 931.

As revised in 1989, 54 Fed. Reg. 33,168 (Aug. 11, 1989), the NRC's regulatory standard for admissible contentions in 10 C.F.R. § 2.714(b)(2) now present an even heavier burden. See, e.g.,

Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-942, 32 NRC 395, 426 n.104 (1990)(revised § 2.714(b)(2) "imposes a higher standard" than previous regulations); Vermont Yankee Nuclear Power Corp. (Vermont Yankee Nuclear Power Station), ALAB-938, 32 NRC 154, 163-64 n.5 (1990).

More recently, the Commission, strictly construing the revised regulations, explained that these requirements "demand that [] Petitioners provide an explanation of the bases for the contention, a statement of fact or expert opinion upon which they intend to rely, and sufficient information to show a dispute with the applicant on a material issue of law or fact." Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155 (1991)(emphasis added). If any of these is not met, the Commission stated, "a contention must be rejected." Id. (emphasis added).

3. **Adequacy of Briefs on Appeal**

Finally, NRC precedent establishes that simply repeating contentions and their proffered bases in an appeal from a Licensing Board decision rejecting those contentions, without explaining why the decision is erroneous, is entirely inadequate. Such an approach warrants the appeal being "summarily rejected" in its entirety. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-841, 24 NRC 64, 69 (1986).

In Perry, the Appeal Board noted that the Licensing Board had ruled that petitioners' proffered contentions were denied admission "because their bases were not set forth with reasonable specificity" as required under § 2.714(b). 24 NRC at 69. The Appeal Board continued that, on appeal, the petitioners had not "favored" it with an "explanation as to why the Board was wrong in so concluding." Id. The "short of the matter is," the Appeal Board held, "is that if [petitioners] wished us to take seriously its insistence that the Board committed error, its counsel was duty-bound to lay the foundation for that insistence." Id.

## III. Discussion

### A. The December 3 Appeal Should Be Summarily Rejected

Nearly two years after LILCO first applied for the POL amendment, and over six months after the Commission authorized its issuance, the merits of the POL amendment are now before the Commission for final resolution. In the interim, as the laborious chronology set forth above indicates, $SE_2$ (in conjunction with SWRCSD) has twice sought a stay of the POL amendment's issuance from the Commission. $SE_2$ and SWRCSD have also sought a stay of the POL amendment's effectiveness from the U.S. Court of Appeals for the D.C. Circuit, from the Chief Justice of the U.S. Supreme Court, and, finally, from the full Supreme Court. Each time, Petitioners have asserted that they were "likely to succeed on the merits" of the POL amendment's

issuance, once they were given the opportunity to brief the issues.

Now, after all those trips to the Commission, the D.C. Circuit, and the U.S. Supreme Court itself, $SE_2$ has had its opportunity to make its case on the merits of the POL amendment. And what $SE_2$ has submitted are five pages of unsupported recitation of alleged error by the Licensing Board. $SE_2$'s brief does not cite to single NRC or federal court decision, apart from the Licensing Board cases at issue.[11/] $SE_2$'s five perfunctory pages also lack anything that could be characterized as a reasoned analysis of the alleged errors in LBP-91-26 and LBP-91-39. In no respect whatsoever has $SE_2$ "illume[d] the foundation" for its insistence that the Board's rejection of (1) its POL amendment contentions and (2) its petition to intervene was improper. See Perry, ALAB-841, 24 NRC at 69. For this reason, $SE_2$'s December 3 appeal should be summarily rejected

D. The Board's Decision in LBP-91-39 Is Correct

If the Commission does not summarily reject $SE_2$'s appeal, then it should be denied on the merits. As shown below, the

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11/ Nor does the brief have a statement of the case, or some similar description of the relevant procedural history, even though it has long been settled in NRC practice that inclusion of such a statement of facts in briefs is mandatory. See, e.g., Public Service Electric & Gas Co. (Hope Creek Generating Station, Units 1 and 2), ALAB-394, 5 NRC 769 (1977); Public Service Co. of Oklahoma (Black Fox Station, Units 1 and 2), ALAB-388, 5 NRC 640 (1977).

Board's decision, finding all of $SE_2$'s contentions inadmissible, is clearly correct.[12/]

1. **Contention 1**

a. **The Contention**

The Board spent the largest part of LBP-91-39 addressing the first contention, properly recognizing that it underlay $SE_2$'s entire argument. Contention 1 alleged that, before issuing the POL amendment, the NRC was required to prepare an EIS that considered the impacts of the overall proposal to decommission Shoreham. This was so, the contention alleged, because (1) the POL amendment was within the scope of the decommissioning proposal, and (2) the decommissioning proposal was itself a "major federal action significantly affecting the quality of the human environment" for which, under NEPA, an EIS must be prepared. As support for its assertion that the POL amendment was "within the scope of the decommissioning proposal," Contention 1 quoted the NEPA regulations of the Council on Environmental Quality (CEQ) to assert that the POL amendment "is an 'interdependent [part] of [that] larger action and depend[s

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12/ $SE_2$'s appeal should be summarily rejected and LILCO urges the Commission to do so, for the reasons given above. To assist the Commission should it choose to reach the merits, LILCO provides the following discussion of $SE_2$'s arguments on appeal. Given the number of errors squeezed into it, $SE_2$'s cursory brief requires far more pages to refute than it itself contains. Further, unlike $SE_2$'s brief, LILCO's brief also describes the contentions at issue and the Board's rulings on them.

upon] the larger action for [its] justification.'" See LBP-91-39, slip op. at 3, quoting $SE_2$ July 1 Supplement at 7.

**b. The Board's Ruling**

The Board ruled that, as LILCO and the NRC Staff had pointed out, $SE_2$'s first contention did "not meet the special requirements for an admissible contention enunciated in earlier rulings by the Commission," including CLI-90-08, CLI-91-01, and CLI-91-04. LBP-91-39, slip op. at 4. After reviewing these decisions, the Board found that, "in this POL proceeding, an admissible contention must meet two tests." Id. at 7.

First, the contention must "'offer some plausible explanation why an EIS might be required for an NRC decision approving a Shoreham decommissioning plan.'" LBP-91-39, slip op. at 7, quoting CLI-91-04, 33 NRC at 237. In other words, the contention "must explain why the environmental impacts of decommissioning Shoreham fall outside the envelope of impacts already considered by the Commission in the agency's Generic Environmental Impact Statement on Decommissioning of Nuclear Facilities (GEIS)." LBP-91-39, slip op. at 7.

Second, the contention must "plausibly explain how the granting of the POL involves special circumstances likely to foreclose one or more of the alternatives for decommissioning Shoreham so that such agency action constitutes an illegal segmentation of the EIS process." LBP-91-39, slip op. at 8-9, citing CLI-91-04, 33 NRC at 237.

The Board continued that, in CLI-91-04, the Commission had "mandated that both these requirements must be met, making a contention's failure to meet either fatal to its admissibility." LBP-91-39, slip op. at 9. In addition, the Board said, the contention "must satisfy the pleading requirements of 10 C.F.R. § 2.714(b)." Id.

The Board found Contention 1 to be defective on all counts. The contention "fail[ed] to meet either part of the Commission's two-prong test." LBP-91-39, slip op. at 9. While Contention 1 "asserts that an EIS is required because the proposal to decommission Shoreham is a major federal action significantly affecting the quality of the human environment," that assertion was "completely inadequate to meet the first part of the test, requiring a reasonable explanation why the GEIS is inapplicable to the decommissioning of Shoreham." Id. (emphasis added). Nothing in Contention 1 "even hints at such an explanation." Id.

Nor did Contention 1 "satisfy the second requirement that it provide a 'plausible explanation' of how the POL amendment constitutes an illegal segmentation of the EIS process." LBP-91-39, slip op. at 10. While $SE_2$ had attempted to "confront this requirement by relying upon" the CEQ definitions in 40 C.F.R. § 1508.25, the Commission's direction in CLI-91-04 that a contention "contain a 'plausible explanation' requires much more than merely quoting regulatory definitions." LBP-91-39, slip op. at 10. The Board ruled that, "[i]n order to provide a sufficient explanation," Contention 1 must, at a minimum, "spell out how the

POL amendment is an interdependent part of the decommissioning process and how that amendment is unjustified except as part of that process." Id. Because these matters were "not self-evident," the Board said, "fulfillment of the Commission's test requires a much fuller explanation in order to make the proffered explanation 'plausible,' even if [$SE_2$] seeks to raise only a legal issue." Id. at 10-11.

Further, the Board found Contention 1 inadequate when judged by the stricter pleading requirements imposed by the 1989 revisions to 10 C.F.R. § 2.714(b)(2)(ii) and (iii). LBP-91-39, slip op. at 11. Since the Commission had "made it clear that the new pleading requirements of section 2.714(b) are to be enforced rigorously," the Board was "not free to assume any missing information in a contention." Id., citing Arizona Public Service Co. (Palo Verde Nuclear Generating Station, Units 1, 2, and 3), CLI-91-12, 34 NRC 149, 155-56 (1991). When "viewed in light of these strictures," the Board concluded, "it is apparent that [$SE_2$'s] first contention is inadmissible." LBP-91-39, slip op. at 11.

c. $SE_2$'s Argument on Appeal and LILCO's Response

$SE_2$ claims, without elaboration or support, that the Board made four errors when rejecting Contention 1. First, the Board "misinterpreted" the second part of the two-prong test of CLI-91-04, by "omit[ting] from its consideration" the fact that the Commission in CLI-91-04 "explicitly allowed" that the second

prong could be met by showing an "illegal segmentation of the EIS process alternatively by 'some other NEPA-based considerations.'" December 3 Appeal at 2. Although $SE_2$ implies that it had made such a showing based on "some other NEPA-based considerations," it does not identify just what those "other . . . considerations" are.

In fact, during the July 30 prehearing conference in Bethesda, $SE_2$'s counsel indicated that the "other NEPA-based considerations" upon which $SE_2$ was relying to meet the second prong of the CLI-91-04 test were the CEQ definitions. July 30 Prehearing Conference Transcript at 16. The Board clearly considered and rejected this argument in LBP-91-39, noting that "at the prehearing conference, [$SE_2$] argued that it was raising only a legal argument in attempting to meet the second prong of the Commission's test." LBP-91-39, slip op. at 10. But CLI-91-04, the Board correctly determined, "requires much more than merely quoting regulatory definitions." Id. Thus, the Board fully considered -- and properly rejected -- $SE_2$'s "other NEPA-based considerations."

Second, $SE_2$ argues that the Board erred when it found that Contention 1 did not meet the first prong of the CLI-91-04 by failing to provide a "reasonable explanation" why the GEIS is inapplicable to Shoreham's decommissioning. December 3 Appeal at 2. $SE_2$ claims (without actually citing to the record) that the "record is replete with Petitioner's explanation that [the] GEIS applied only to reactors at the end of life by age or accident,

that Shoreham is at the beginning of its life, and thus a full consideration of the cost benefits and alternatives of the proposal is required." Id.

$SE_2$ misstates the Board's ruling. In LBP-91-39, the Board indicated that in order for $SE_2$ to demonstrate that the GEIS did not apply to Shoreham, it was incumbent on $SE_2$ to "distinguish the impacts of decommissioning Shoreham from the range of impacts already considered in the GEIS." LBP-91-39, slip op. at 8 (emphasis added). $SE_2$'s cursory assertions on appeal as to why the GEIS is inapplicable to Shoreham simply do not address the fact that the radiological impacts of Shoreham are not, as the Board properly recognized, different from those evaluated in the GEIS.

Third, $SE_2$ argues that the Board erred by finding that Contention 1 relied solely on the CEQ definitions in attempting to meet the first prong of the CLI-91-04 test. December 3 Appeal at 2. $SE_2$, in conclusory fashion, says that Contention 1 also relied on "the Commission's own discussion of the decommissioning process in the 1989 rule arguing that that statement of consideration showed that the only function of a 'possession-only' license was as part of the decommissioning process." Id.

But nowhere in Contention 1 were the NRC's decommissioning rules ever mentioned. Moreover, even if Contention 1 had contained an argument that the NRC's decommissioning regulations indicate that a POL is necessarily a part of the decommissioning

process, that argument would be wrong as a matter of law. The Commission has already considered and rejected that view:

> [O]ur decommissioning regulations do not require any POL -- the Statement of Considerations merely describes the POL as something the licensee may seek in order to be relieved of requirements not necessary for safety in a "possession only" mode.

Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-91-01, 33 NRC 1, 6 (1991)(emphasis added).

Finally, $SE_2$ argues that the Board's "insinuation that a purely legal claim is not sufficient to meet the appropriate standards" is incorrect "as a matter of law," provided that the legal claim contains "sufficient reference to the relevant law and facts (including regulations)." December 3 Appeal at 2-3. LBP-91-39, however, does not "insinuate" that a purely legal claim cannot form the basis for an acceptable contention. Rather, the Board indicated that even a contention that presents a pure issue of law was still required, under CLI-91-04, to provide some "plausible explanation" that "spell[s] out how the POL amendment is an interdependent part of the decommissioning process and how that amendment is unjustified except as part of that process." LBP-91-39, slip op. at 10. Again, "merely quoting regulatory definitions" was simply inadequate. Id. The Board exacted well within its discretion in so ruling. See, e.g., Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 1), ALAB-868, 25 NRC 912 (1987); Philadelphia

Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 21 (1974).

Finally, on appeal, $SE_2$ does not even attempt to address the Board's finding that Contention 1 did not meet the stricter pleading requirements of 10 C.F.R. § 2.714(b)(2), as revised in 1989. For this reason alone, the Board's rejection of Contention 1 should be upheld.

2. Contention 2

a. The Contention

In Contention 2, $SE_2$ asserted that the NRC's GEIS for decommissioning does not apply to the proposal to decommission Shoreham because the GEIS is limited to facilities at the end of their useful life and to plants that are closed prematurely due to an accident. Because Shoreham falls into neither category, the contention argued, the NRC should continue to apply its now abrogated regulation, 10 C.F.R. § 51.20(b)(5), that formerly required that a site-specific EIS be prepared for every decommissioning proposal. See LBP-91-39, slip op. at 11-12.

b. The Board's Ruling

The Board noted that Contention 2 was "identical to a contention [$SE_2$] filed" in the earlier proceeding on the Confirmatory Order, emergency preparedness, and Physical Security Plan amendments. That contention had been "rejected . . . on the grounds that it was premised on the erroneous and unestablished

premise that the three actions at issue required the preparation of an EIS." LBP-91-39, slip op. at 12. The same reasoning "is applicable here because [$SE_2$'s] second contention is footed on the same mistaken premise." LBP-91-39, slip op. at 12.

$SE_2$'s first POL contention, the Board noted, had alleged that the NRC was required to prepare an EIS on Shoreham's decommissioning before issuing the POL amendment "because the POL was within the scope of that decommissioning proposal." Id. at 13. Having rejected Contention 1, the Board found, Contention 2, "which deals exclusively with the need for an EIS on the decommissioning of Shoreham without mentioning the POL, has no logical foundation." Id.

Stated another way, the Board said,

> in order for the issue of Shoreham decommissioning -- the sole subject of the second contention -- to become relevant, the petitioner must first establish that the POL amendment -- the only licensing action involved in this proceeding -- is part of the proposal to decommission Shoreham.

LBP-91-39, slip op. at 13. Having "failed to establish this crucial linkage," the Board ruled, Contention 2 "is inadmissible." Id.

Additionally, the contention "contains no explanation of how the POL amendment constitutes an illegal segmentation of the EIS process by foreclosing any decommissioning methods." LBP-91-39, slip op. at 13. As a consequence, the contention "does not meet the second prong of the Commission's test for an admissible Shoreham contention" in CLI-91-04. Id.

c. **$SE_2$'s Argument on Appeal and LILCO's Response**

$SE_2$ says that the Board's

> logic fails since it denied the admissibility of the first contention for failure to show why the GEIS is not applicable and now would deny a contention explaining why the GEIS is not applicable due to [$SE_2$'s] alleged failure to show that the POL amendment "is part of the proposal to decommission Shoreham."

December 3 Appeal at 3, quoting LBP-91-39 at 13. $SE_2$ argues that the "two contentions can be read together to form a single contention which then could not be rejected" by the Board.

The Board's ruling is straightforward and clearly correct: since $SE_2$ had failed, in Contention 1, to demonstrate the need for an EIS on the POL amendment that addresses the entirety of the Shoreham decommissioning proposal, Contention 2's assertions as to why the GEIS is inapplicable to Shoreham's decommissioning have "no logical foundation." LBP-91-39, slip op. at 13. What $SE_2$ seems to be arguing -- though its logic is none too clear -- is that the Board should have read the unsupported allegations in Contention 1 in conjunction with the unsupported allegations in Contention 2 to derive a hybrid contention "which then could not be rejected." Even assuming that makes any sense, which is does not, the Board was under no obligation, on its own initiative, to read two separately inadequate contentions together in an effort to create a joint contention that would be acceptable under the regulations. See, e.g., Commonwealth Edison Co. (Zion Station, Units 1 and 2), ALAB-226, 8 AEC 381, 406 (1974).

3. Contention 3

a. The Contention

Here, $SE_2$ asserted that "LILCO's environmental report should be in the format prescribed by Regulatory Guide 4.2 (Rev. 2, July 1976)." $SE_2$'s July 1 Supplement at 8. As the Board notes, during the July 30 prehearing conference, $SE_2$ attempted to amend Contention 3 so that it focused more on the content of the environmental report, rather than its literal format. See LBP-91-39, slip op. at 15, n.31.

b. The Board's Ruling

The Board, noting that Contention 3 was "identical to one [$SE_2$] had filed in the earlier Shoreham confirmatory order and license amendments proceedings," found the contention to be "clearly inadmissible." LBP-91-39, slip op. at 14. In LBP-91-35, the Board had rejected the contention for "failing to present a litigable issue." LBP-91-39, slip op. at 14. Since regulatory guides are "not mandatory regulations," the Board in LBP-91-35 had concluded that "even if the contention was proven, it would be of no consequence in the proceeding so as to entitle [$SE_2$] to relief." LBP-91-39, slip op. at 14, citing LBP-91-35, 34 NRC at 172-73.

Such "reasoning is equally applicable" to the POL amendment proceeding. LBP-91-39, slip op. at 14. It is "well settled," the Board explained, "that regulatory guides are just that -- guides, not regulations -- and compliance with them is not

required." Id. Accordingly, Contention 3 "fails to raise a litigable issue and, pursuant to 10 C.F.R. § 2.714(a)(2)(ii), it must be rejected." Id. at 14-15. The Board added that, even as amended along the lines $SE_2$ had sought during the July 30 prehearing conference, the contention was "still woefully deficient." Id. at 15 n.31.

c. **$SE_2$'s Argument on Appeal and LILCO's Response**

$SE_2$'s position on appeal is simple. $SE_2$ again recharacterizes what it was arguing in Contention 3, now stating that "[a]t the prehearing conference, [$SE_2$] made clear that [it] was relying not only on regulatory guides but also on 10 C.F.R. Part 51 Appendix A, which is a binding regulation." December 3 Appeal at 3 (emphasis in original).

It is long-settled in NRC practice that a petitioner is bound by the literal terms of its own contentions. See, e.g., Carolina Power & Light Co. (Shearon Harris Nuclear Power Plant), ALAB-856, 24 NRC 802, 816 (1986). Since Contention 3 nowhere mentions 10 C.F.R. Part 51, Appendix A, the Board was justified in refusing to consider $SE_2$'s post hoc reconstruction. See, e.g., Texas Utilities Electric Co. (Comanche Peak Steam Electric Station, Unit 1), ALAB-868, 25 NRC 912 (1987); Philadelphia Electric Co. (Peach Bottom Atomic Power Station, Units 2 and 3), ALAB-216, 8 AEC 13, 21 (1974).

Further, even if Contention 3 were read to incorporate Appendix A, that would not save it. By its plain terms, Appendix

A addresses the format and content of EIS's prepared by the NRC Staff, not environmental reports submitted by applicants for licenses.

4. Contention 4

a. The Contention

In Contention 4, SE$_4$ tried to raise two issues. First, the contention complained that, since the decommissioning plan for Shoreham submitted by the Long Island Power Authority (LIPA) proposes the use of the DECON method, consideration of the SAFSTOR and ENTOMB options will be foreclosed. LBP-91-39, slip op. at 15-16. Second, the contention argued that, because allegedly only the DECON method involves the removal of radioactive components from the site, issuance of the POL amendment, authorizing LILCO to remove certain such components, also forecloses consideration of SAFSTOR and ENTOMB. Id. at 16.

The Board's Ruling

While Contention 4 "clearly attempts the second requirement of the Commission's two-part test" in CLI-91-04, the contention is "fatally flawed for ignoring the first requirement." LBP-91-39, slip op. at 16. The Board continued that, in Contention 4, SE$_2$ had "not even attempted to explain why the environmental impacts of decommissioning Shoreham fall outside the envelope of impacts already considered in the GEIS." Id. "Regardless of how liberally we read it," the Board said, "the contention contains

absolutely no language that can be construed as offering an explanation satisfying the first prong of the Commission's test" in CLI-91-04. Id. Further, "in view of the fact that none of [$SE_2$'s] other contentions are admissible, there is no basis for incorporating the required explanation from another contention, even if that were appropriate." Id. at 16-17.

c. **$SE_2$'s Argument on Appeal and LILCO's Response**

$SE_2$ says that the Board erred by not reading Contention 4 in conjunction with Contention 2, since the latter contention provided "just such an explanation" why the environmental impacts of decommissioning Shoreham fall outside the impacts already assessed in the GEIS. December 3 Appeal at 3. The Board's "failure to merge these contentions as a single contention constitutes reversible error." Id. at 3-4. In addition, $SE_2$ argues that during an "extended colloquy" between its counsel and the Board during the July 31 prehearing conference, $SE_2$ attempted to explain why the environmental impacts of decommissioning Shoreham fall outside those assessed in the GEIS. Id. at 4. Since the Board "apparently found that [$SE_2$] had satisfied the second prong of the Commission's test," $SE_2$ concludes, this ruling in LBP-91-39 "should be reversed and remanded with instructions to admit the contention (as amalgamated)." Id.

$SE_2$ is wrong for four reasons. First, as a matter of law, the Board's refusal to "amalgamate" Contentions 2 and 4 does not "constitute reversible error." See, e.g., Commonwealth Edison

Co. (Zion Station, Units 1 and 2), ALAB-226, 8 AEC 381, 406 (1974).

Second, $SE_2$ assumes that if the Board had "amalgamated" Contentions 2 and 4, the resulting hybrid contention would have been found admissible. This, in turn, is based on the entirely erroneous assumption that Contention 2 is itself admissible. See the discussion of Contention 2, above.

Third, $SE_2$'s reference to its "extended colloquy" with the Board (for which it provides no citation to the hearing transcript) is unavailing because, even if it were true that $SE_2$ attempted to explain why the GEIS was inapplicable to Shoreham, $SE_2$ obviously did not convince the Board that its position was correct.

Finally, there is nothing in LBP-91-39 to support $SE_2$'s assertion that the Board "apparently found" that $SE_2$ "had satisfied the second prong of the Commission's test" in CLI-91-04. December 3 Appeal at 4. At best, the Board simply noted that, in Contention 4, $SE_2$ "clearly attempts to address the second requirement." LBP-91-39, slip op. at 16. LILCO itself noted as much in its July 12 opposition to all seven of $SE_2$'s POL amendment contentions. But as the Board determined that the contention failed completely to address the first prong of CLI-

91-04, it had no need to rule on whether the second prong had been satisfied.[13/]

5. Contention 5

a. The Contention

Contention 5 was not so much a contention as it was a request that the Board reconsider its ruling from LBP-91-26 that $SE_2$ did not have standing in the POL amendment proceeding to raise issues based on the Atomic Energy Act. Specifically, $SE_2$ asserted that the NRC's action in issuing the POL amendment was arbitrary and capricious because the NRC had not provided similar relief to other licensed plants undergoing long outages. See LBP-91-39, slip op. at 17.

b. The Board's Ruling

The Board determined that $SE_2$'s request for reconsideration of LBP-91-26 was "not a proper subject for a contention as that

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13/ In fact, as LILCO explained in its July 12 opposition to $SE_2$'s POL amendment contentions, Contention 4 did not meet the first or the second prong of the Commission's test in CLI-91-04. $SE_2$'s complaint that LIPA's selection of DECON forecloses the consideration of SAFSTOR and ENTOMB, taken to its logical end, would mean that an EIS is required for every plant that is to be decommissioned. A licensee will always choose one of the NRC's three decommissioning methods and forgo the other two. As for $SE_2$'s additional concern that the NRC's allowing LILCO, on the basis of the POL amendment, to dispose of certain radioactive components constitutes de facto approval of the DECON method, $SE_2$ is mistaken as a matter of law. $SE_2$ has overlooked that NRC regulations permit the disassembly and removal of minor reactor components no matter which decommissioning option is ultimately employed. See 53 Fed. Reg. 24,025-26 (June 27, 1988).

term is used in 10 C.F.R. § 2.714(b)." LBP-91-39, slip op. at 17-18. In the POL amendment proceeding, $SE_2$'s contentions "must focus on the issues identified in the notice of hearing, the applicant's amendment application, and the staff's environmental responsibilities relating to that application, not on [$SE_2$'s] own standing to raise issues concerning these matters." Id. at 18. Moreover, even if Contention 5 "could be considered a contention, it still must be rejected" for having failed to raise issues based on NEPA, the only statute under which $SE_2$ had been allowed to go forward. Id.

c. $SE_2$'s Argument on Appeal and LILCO's Response

On appeal, $SE_2$ abandons Contention 5 as a contention per se. Rather, $SE_2$ says it is appealing the Board's determination in LBP-9 that it "does not have standing to raise Atomic Energy Act is s." December 3 Appeal at 4. $SE_2$ notes that it is a "tax exempt New York State not-for-profit corporation" whose purposes "include promoting intelligent uses of secure energy resources within the United States." Id. $SE_2$ continues that it has been "designated by six of its members who are dependent upon LILCO for electricity and all of whom reside and work within 50 miles of the Shoreham plant, and some of whom live and work 10 miles of the Shoreham plant to represent and protect their interests under the [Atomic Energy Act]." Id. $SE_2$ argues, without support or explanation, that the Board's "rejection of the normal NRC geographical nexus standard in this respect is

arbitrary and capricious, especially considering the fact that the activities to be allowed under the POL will increase the risk of $SE_2$'s members to radiation hazards through allowing and increasing the transportation or irradiated/radioactive materials." Id. at 4-5.

There is no reason for the Commission to overturn LBP-91-26. In LBP-91-26, the Board found that, with respect to $SE_2$'s claims arising out of the Atomic Energy Act, it had not offered "more than its bare conclusory assertion that to relieve [LILCO] of the license conditions as proposed will result in a potential injury to persons and their property." LBP-91-26, 33 NRC at 544. Further, "the potential injuries are not identified." Id. Such pleadings, the Board correctly determined, "are legally insufficient to establish standing." Id. As for $SE_2$'s attempt to rely on the "50-mile presumption," $SE_2$ had presented "[n]othing meritorious" to overcome its prior ruling (in LBP-91-1) that "the presumption was inapplicable." Id.

It is evident from the December 3 Appeal that, when it comes to demonstrating standing, $SE_2$ is still seeking to get by with "bare conclusory assertions." The appeal from LBP-91-26, masquerading as Contention 5, should be denied.

6. Contention 6

a. The Contention

In Contention 6, $SE_2$ asserted that an EIS on Shoreham's decommissioning must include consideration of the indirect effects of fossil-fuel plants (and their transmission lines) that allegedly would have to be built to replace Shoreham's lost capacity. See LBP-91-39, slip op. at 18-19.

b. The Board's Ruling

The Board found that, in submitting Contention 6, $SE_2$ had "disregarded" the Board's "earlier explicit ruling with respect to raising any issue involving the building of fossil-fuel plants and associated transmission lines." LBP-91-39, slip op. at 19, citing LBP-91-26, 33 NRC at 545. The Board held that its earlier ruling from LBP-91-26 "forecloses the admission of this contention." Id.

c. $SE_2$'s Argument on Appeal and LILCO's Response

$SE_2$ says, again without elaboration or explanation, that "[r]egardless of the correctness of the Commission's prior rulings as to the scope of the 'alternatives' to the proposal to be considered, there is no limitation on EIS consideration of 'direct and indirect effects.'" December 3 Appeal at 5.

Once again, $SE_2$ offers only a boilerplate recitation of the CEQ definitions, rather than any reasoned analysis. Moreover, Contention 6 is relevant to the POL amendment only to the extent

that it assumes that the POL amendment required preparation of an EIS addressing Shoreham's decommissioning as a whole. As has been shown, that assumption is misplaced.

7. Contention 7

a. The Contention

$SE_2$ argued that its pursuit of a judicial stay of the POL amendment did not deprive the Board of jurisdiction to enforce 10 C.F.R. §§ 51.100 and 51.101(a)(2). Under § 51.100, the NRC is prohibited from making any decision on a proposal for which an EIS is required until the EIS has been made available for public comment. Section 51.101(a)(2) provides that an applicant may be denied a license for a proposed action that requires an EIS if the applicant takes any step that has an adverse environmental impact or which limits the choice of reasonable alternatives before the EIS process is completed. See LBP-91-39, slip op. at 19-20 & n.35.

b. The Board's Ruling

$SE_2$'s last contention, though "labeled a 'contention,'" was "merely a statement to the effect that the Licensing Board has jurisdiction to enforce 10 C.F.R. §§ 51.100 and 51.101(a)(2), while the petitioner pursues a judicial stay of the POL amendment." LBP-91-39, slip op. at 20. As written, Contention 7 was "clearly inadmissible because, even if true, it would not

entitle the petitioner to any relief" under the provisions of 10 C.F.R. § 2.714(d)(2)(ii). Id.

Further, the Board held, even if Contention 7 were "somehow read to claim that the agency must enforce the cited regulations," those provisions "are only applicable to proposals requiring an EIS." LBP-91-39, slip op. at 20. Since $SE_2$ had failed to establish that the POL amendment "requires the preparation of an EIS," the Board concluded, "the contention must be rejected." Id. at 20, 21.

c. **$SE_2$'s Argument on Appeal and LILCO's Response**

$SE_2$ essentially abandons Contention 7, stating only that the Board "errs in finding that [$SE_2$'s] seventh contention 'would not entitle [$SE_2$] to any relief.'" December 3 Appeal at 5. Obviously, such a conclusory allegation of error, providing no analysis or explanation, is not sufficient. See, e.g., Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-841, 24 NRC 64, 69 (1986).

## IV. Conclusion

For the reasons above, SE$_2$'s appeal from LBP-91-26 and LBP-91-39 should be summarily rejected. If the appeal is not summarily rejected, then it should be denied on the merits.

Respectfully submitted,

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DATED: December 18, 1991

LILCO, December 18, 1991

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

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

CERTIFICATE OF SERVICE

I hereby certify that copies of **LILCO'S OPPOSITION TO PETITIONERS' APPEAL FROM LBP-91-26 AND LBP-91-39** were served this date upon the following by Federal Express, as indicated by an asterisk, or by first-class mail, postage prepaid.

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