UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

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

RESPONSE OF LILCO AND LIPA TO PETITIONERS' OPPOSITION TO NRC STAFF RECOMMENDATION FOR LICENSE TRANSFER APPROVAL

As is evident from petitioners' cynical and abusive filing yesterday, their latest compendium of frivolous and recycled arguments is imposed upon the Commission in the hopes of delaying effectiveness of the proposed License Transfer past March 1, 1992. The Shoreham-Wading River Central School District ("SWRCSD") then will argue that another year of taxes, currently $82 million per year, must be paid on the Shoreham Nuclear Power Station, Unit 1 ("Shoreham"). (See Petitioners' Opposition to NRC Staff Recommendation for Approval of License Transfer (dated Feb. 20, 1992) ("Pet. Opp.").) Nowhere do petitioners deny that such is the position of the SWRCSD, or claim that the newspaper article quoting its counsel to that effect is incorrect. Instead, petitioners cynically proclaim SWRCSD's right to soak

LILCO's ratepayers. (See Pet. Opp., p. 20 ("it should be a matter of indifference" to local residents "whether they pay that amount indirectly through their electric rates or directly by increased . . . tax rates").)[1] It is time to put an end to this grotesque misuse of the Commission's regulatory processes to rob Long Island ratepayers for the benefit of the SWRCSD.

For reasons discussed below, petitioners' filing is not properly before the Commission and should be stricken in its entirety. Its rehash of arguments previously submitted and answered is duplicative and abusive. To the extent it attempts to inject different or revised arguments, it is not timely filed; given that petitioners have had nearly a year to formulate their arguments in this matter, there is no reason why they should be further indulged.

I. PETITIONERS ABUSIVELY REHASH ARGUMENTS ALREADY PRESENTED, ANSWERED, AND CONSIDERED.

Petitioners have predominantly raised arguments previously put forward in this and related Shoreham proceedings, (see, e.g., Petitioners' Motion for Stay of License Transfer (dated Dec. 17, 1991) ("Pet. Stay Motion")), and LILCO, LIPA, and the NRC Staff have responded to these arguments in full, demonstrating that petitioners raise no colorable claims and lack

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[1] Not only is this cynical, but it also is factually incorrect. Many of LILCO's ratepayers reside outside the taxing jurisdictions.

standing to participate in this proceeding.[2] Rather than wait for the resolution of their pending motion for stay and previously made arguments, petitioners have chosen to burden the Commission once again with an almost entirely duplicative filing. On that basis alone, it should be stricken. See Statement of Policy on Conduct of Licensing Proceedings, CLI-81-08, 13 NRC 452 (1981).

To further demonstrate the frivolous nature of petitioners' filing, we discuss below just a few of their arguments by way of example:

POL. Petitioners once again repeat their suggestion that the License Transfer should await resolution of their pending petition before the United States Court of Appeals for the D.C. Circuit (argued Feb. 7, 1992). (See Pet. Opp., pp. 1-2.) Petitioners made precisely the same argument just two months ago. (See Pet. Stay Motion, p. 8.) But as LIPA explained in its response to that motion, a stay would intolerably prolong NRC licensing proceedings and would be inconsistent with the NRC's practice of not delaying proceedings while a United States Court

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[2] See LIPA Answer to Intervention Petitions and Response re Hazards Consideration (dated May 6, 1991); LILCO Opposition to Request for Hearing and Response re Hazards Determination (dated May 6, 1991); NRC Staff Response to Petitions, Requests, and Hazards Comments (dated May 17, 1991); LIPA Response to Joint Supp. Petition (dated Dec. 9, 1991); LILCO Opposition to Contentions (dated Dec. 9, 1991); NRC Staff Response to Joint Supp. Petition (dated Dec. 9, 1991); LIPA Opposition to Motion for Stay of License Transfer and to Suggestion of Mootness (dated Dec. 30, 1991).

of Appeals decides an issue within the NRC's jurisdiction.[3] As further explained, even if the POL were vacated, that would have no health-and-safety implications because LIPA is forbidden from operating Shoreham not only by the terms of the POL but also by the 1989 Settlement Agreement and by New York State law.

Adequacy of Funding. Petitioners further assert a stay is appropriate because they have filed a petition in the United States Court of Appeals for the Second Circuit for review of the NRC's decision to issue a decommissioning funding exemption for Shoreham. (See Pet. Opp., p. 2.) Petitioners are misguided in thinking they should be rewarded for their forum shopping, for they have utterly failed to demonstrate any ground for a stay under the NRC's standards. See 10 C.F.R. § 2.788. Petitioners' related argument that LIPA is supposedly "not financially qualified" (Pet. Opp., pp. 13-16) is yet another repeat from numerous prior filings.[4] These groundless assertions have been fully rebutted by LIPA, LILCO, and the Staff.[5] Fatal to their

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[3] See LIPA Opposition to Motion for Stay and to Suggestion of Mootness (dated Dec. 30, 1991), pp. 7-8 (citing Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), ALAB-810, 21 NRC 1616, 1619 (1985); Uranium Mill Licensing Requirements, CLI-81-9, 13 NRC 460, 461-62 & n.4 (1981); Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-338, 4 NRC 10, 13-14 (1976).

[4] See, e.g., Motion for Stay of License Transfer (dated Dec. 17, 1991); Petitioners' Joint Supplemental Petition (dated Nov. 18, 1991), Contention 6 (pp. 13-17).

[5] See LIPA Answer to Intervention Petitions and Response re Hazards Consideration (dated May 6, 1991), pp. 39-43; LILCO Opposition to Request for Hearing and Response re Hazards Determination (dated May 6, 1991); NRC Staff Response to

argument is petitioners' failure to demonstrate that LIPA's funding is inadequate for LIPA to receive the POL through the License Transfer. Indeed, petitioners do not even dispute that LIPA's funding for decommissioning activities would be adequate.

Application of Sholly. Petitioners once again burden the Commission with their recycled argument that the Commission's Sholly procedures[6] do not apply either to a POL or to a license transfer approval. (Pet. Opp., pp. 2-3.) These groundless arguments have been treated at length by LIPA, LILCO, and the Staff.[7]

NEPA/Impermissible Segmentation. Petitioners insist that the License Transfer cannot be approved until the NRC has given final approval to the proposed Decommissioning Plan, lest the Commission foreclose its discretion to "reject

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Petitions, Requests, and Hazards Comments (dated May 17, 1991), pp. 25-27, 38-39; LIPA Response to Joint Supp. Petition (dated Dec. 9, 1991), pp. 26-36; LILCO Opposition to Contentions (dated Dec. 9, 1991); NRC Staff Response to Joint Supp. Petition (dated Dec. 9, 1991), pp. 40-42; LIPA Opposition to Motion for Stay of License Transfer and to Suggestion of Mootness (dated Dec. 30, 1991), pp. 5-6.

[6] See Atomic Energy Act, 42 U.S.C. § 2239(a)(2); 10 C.F.R. §§ 50.90-50.92.

[7] See, e.g., LIPA Opposition to Motion for Stay of License Transfer and to Suggestion of Mootness (dated Dec. 30, 1991), pp. 8-11; Answer of LIPA to Intervention Petitions Concerning Shoreham Decommissioning Plan (dated Feb. 6, 1992), pp. 18-19; NRC Staff Response to Petitioners' Intervention Petitions, Requests for Hearing, And No Significant Hazards Consideration Comments (dated May 17, 1991), pp. 32-40; NRC Staff Response to Petitioners' Petitions to Intervene (dated Feb. 11, 1992), pp. 12-16.

decommissioning" and thus, among other things, commit an "impermissible segmentation" of the NRC's NEPA responsibilities. (See Pet. Opp., p. 3.) This is a transparent effort to inject yet again into the NRC's Shoreham proceedings petitioners' assertion, long since and repeatedly rejected, that every NRC action related to Shoreham is necessarily of a piece with ultimate decommissioning and thus calls for environmental review.[8] The License Transfer -- substitution of LIPA for LILCO without any change of license authority or obligation -- manifestly has no environmental consequences, and petitioners have suggested none. Thus, petitioners' NEPA claim once again is misplaced. As for limiting the Commission's discretion, following License Transfer the NRC obviously will retain its full authority to address the Decommissioning Plan, including any revisions thereto it deems appropriate. Petitioner's NEPA arguments are merely driven by their goal to soak the ratepayers for Shoreham's tax revenues.

LIPA's Existence. The true character of petitioners' unauthorized and untimely filing may be best illustrated by their assertion (Pet. Opp., pp. 3-6) that LIPA should be presumed not to exist because LIPA has not chosen to spend even more public or ratepayer funds to address in New York courts petitioners' fanciful proposition that LIPA does not exist. LIPA has already

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[8] See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-91-4, 33 NRC 233, 237 (1991) ("we view the actions in question as being wholly separate from, and independent of, decommissioning").

demonstrated that petitioners have wrongly invoked section 2828 of the New York Public Authorities Law (McKinney Supp. 1991) to suggest LIPA's supposed imminent demise which, under petitioners' thesis, must have occurred on January 15, 1992. Nonetheless, petitioners now contend that in light of petitioners' frivolous filings, LIPA should be obliged to commence a proceeding in New York state court to prove its existence -- a proceeding which petitioners have announced they do not themselves intend to commence,[10] thereby effectively disowning their oddball interpretation of New York state law.[11]

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[9] LIPA Opposition to Motion for Stay of License Transfer and to Suggestion of Mootness (dated Dec. 30, 1991), pp. 11-19; LIPA Memorandum Concerning Supplemental Legislative History Materials (dated Jan. 3, 1993) ("Supplemental Legislative Materials"), attachment.

[10] Letter of James P. McGranery, Jr. to Charles E. Mullins (dated Jan. 22, 1992).

[11] Petitioners note that the legislative history of Section 2828 employs the term "going concern." (Pet. Opp., p. 4 n.1.) Although that language does not appear in Section 2828 itself, and thus obviously was not contemplated as a term of art, petitioners use it as a platform for a wild excursion into extraneous areas of the law, as if tax law definitions, for example, should override the explicit wording of the New York statute. In selectively quoting the legislative history previously supplied by LIPA, petitioners scrupulously avoid the Legislature's declared objective: to permit a review of "the status of any authority which, for one reason or another, is not operative at the expiration of a reasonable period," deemed to be five years. (Supplemental Legislative Materials, attachment, p. 104.) Therefore, "[i]t is recommended that all authorities hereafter created be given a preliminary period of five years in which to commence operations." (Id., p. 105.) And the means chosen to measure whether operations had commenced was whether an agency has "liabilities other than governmental advances outstanding at the end of this period." (Id.) It is indisputable that LIPA has commenced operations and has liabilities, and thus is not subject to section 2828. In the best light, petitioners' assertion is entirely meritless; viewed more realistically in the context of the Shoreham proceedings, it

II. PETITIONERS' NEWLY MADE ARGUMENTS ARE INVALID.

The balance of petitioners' latest unauthorized filing should be stricken for the reason that it amounts to either a set of late-filed contentions or late-filed supplements to their intervention petition concerning the License Transfer. See 10 C.F.R. § 2.714(a)(1).[12] In any event, none of petitioners' new arguments is valid, as discussed below.

Sufficiency of EA. Petitioners complain about the sufficiency of the NRC's proposed Environmental Assessment ("EA"), arguing, among other things, that the EA is too short and that the NRC failed to consult with other agencies. However, the regulations upon which they rely simply do not support their argument.

Equally important, petitioners ignore the fact that what is being requested here -- amendment of a license to permit its transfer to a qualified applicant -- has literally no safety or environmental consequences. It does not modify the plant, its operation or configuration one whit. Petitioners' argument on alternatives (Pet. Opp., pp. 10-11) amounts to a wishful flight

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is deliberately misleading.

[12] Petitioners' abuse is particularly notable given the Licensing Board's October 23, 1991 Scheduling Order, which (1) allowed petitioners an opportunity to amend their April 19, 1991 intervention petitions in light of answers filed by LILCO, LIPA, and the Staff and (2) directed that petitioners file the contentions they seek to litigate in connection with their petitions. Pursuant to that Order, petitioners filed on November 18, 1991 their Joint Supplemental Petition.

of fancy premised entirely on the extraneous notion of Shoreham's operation.

FONSI. Petitioners wrongly assert that the issuance by the NRC of a final "finding of no significant impact" ("FONSI"), without first having prepared a draft FONSI, is illegal. (Pet. Opp., pp. 11-12.) They support this bogus claim in two ways, in both instances badly misconstruing the NRC's regulations implementing the National Environmental Policy Act ("NEPA").

First, petitioners allege that, under 10 C.F.R. §§ 51.33 and 51.34, a draft FONSI must be prepared, since the proposed action (i.e., the Shoreham license transfer amendment) is "without precedent." (Pet. Opp., p. 12.) Relying on the Council on Environmental Quality ("CEQ") guidelines pursuant to which the NRC first adopted its NEPA rules, petitioners further claim that the "proposal in question" meets "at least six" of the seven "standards" that allegedly "require" a draft FONSI. (Id. (citing 46 Fed. Reg. 18,037).)

The NRC's NEPA regulations require nothing of the sort. The pertinent provision says only that the "[c]ircumstances in which a draft [FONSI] may be prepared" include where the proposed action is "without precedent." 10 C.F.R. § 51.33(b) (emphasis

added).[13] By the regulation's plain terms, the NRC Staff has discretion in determining whether to prepare a draft FONSI; it is never "required." Moreover, the proposed action here is not unprecedented. Indisputably, the NRC has approved license transfer amendments on numerous occasions, and petitioners make no showing whatsoever that draft FONSIs were prepared in those instances.

Second, petitioners claim that a draft FONSI is required by 10 C.F.R. § 51.34(b), because the license transfer amendment is an "action . . . subject to a hearing." (Pet. Opp., p. 12.) They argue that "independent of the other NRC and CEQ regulations requiring a draft FONSI . . . NRC Section 51.34 explicitly forecloses the option for a final FONSI in a proposal subject to hearing, such as this one." (Id., p. 12.)

This is simply not true. Section 51.34(b) does not require a draft FONSI on every NRC action "subject to" a hearing. What section 51.34(b) says is "[w]hen a hearing is held on the proposed action" the NRC Staff must prepare a draft FONSI.[14] Under petitioners' misinterpretation of section 51.34(b), a draft FONSI would be required for every proposed license amendment,

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[13] If petitioners are arguing that the NRC's NEPA-implementing regulations are themselves inconsistent with the CEQ guidelines, the time for them to have raised such complaints was when the NRC's rules were initially adopted.

[14] While petitioners have requested a hearing in the Shoreham license transfer amendment proceeding, no hearing has been held.

since, of course, every license amendment request is "subject to" a hearing under Section 189(a) of the Atomic Energy Act and 10 C.F.R. §§ 50.90-50.92.

SER Deficiencies. These allegations (Pet. Opp., pp. 16-17) go generally to issues raised by petitioners in Contention 7 of their November 18, 1991 "Supplemental Petition." To the extent that the Safety Evaluation Report ("SER") provides additional information, or to the extent that, in petitioners' view, the SER raises a basis for a new contention, the Commission's rules of practice provide opportunities for those actions. However, none of these matters raises a reason to postpone approving the transfer under Sholly.

Administrative Stay. LILCO and LIPA vigorously oppose an administrative stay. If, as LILCO and LIPA believe, approval of the transfer is justified on the merits, the Commission should make that transfer immediately effective.

Given the delays to date, any stay is likely to prevent the transfer of the Shoreham plant until after March 1. The SWRCSD has asserted that, if transfer does not occur before March 1, the date on which tax rolls are finalized in Suffolk County for 1992-93, the phasedown of tax payments will not begin until 1993-94. (See "Long Island: Shift On Shoreham Is Urged," Newsday, Feb. 13, 1992.) LILCO and LIPA dispute this assertion, but if it is sustained by New York courts, this position would

burden LILCO's ratepayers with an additional year of Shoreham taxes, currently $82 million per year. While this is not a factor to be taken into account by the Commission in determining whether to approve the transfer, it is indeed a factor to be considered in determining whether to stay a decision.[15]

The Commission's regulations governing stays, 10 C.F.R. § 2.788, mirror those used in the Courts of Appeals. Their fourfold test requires first, a strong showing by the movant for a stay of likelihood of success on the merits on appeal. 10 C.F.R. § 2.788(e)(1). For reasons that have been stated, LILCO and LIPA do not believe petitioners can make such a showing.

The second test is whether the party seeking a stay will be irreparably injured by its denial. Petitioners cannot make any such claim. Among other things, their claims remain subject to judicial review and the pending Licensing Board proceedings.

On the other hand, LILCO and LIPA will be exposed to risk of damage in the amount of approximately $82 million, consisting of an extra year's tax liabilities, if a stay is

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[15] LILCO and LIPA's initial non-opposition to a reasonable-length stay was stated over two months ago, and it was premised on a significantly earlier anticipated date of issuance of the transfer. In addition, LILCO and LIPA's position predated the revelation that SWRCSD would seek to collect, on a windfall basis, an additional year of taxes by causing delay past March 1.

issued. This is relevant under the third stay test, 10 C.F.R. § 2.788(e)(3). There is simply no reason to inflict this cost on LILCO's ratepayers.

Finally, the public interest -- 10 C.F.R. § 2.788(e)(4) -- favors denial of a stay. This case has illustrated fully the vulnerability of the Commission's generous process to being clogged by cynical rote pleading which never raises a legitimate safety or environmental issue. The Commission's resources and integrity should not be squandered on this kind of abuse.

CONCLUSION

For the foregoing reasons, petitioners' Opposition to NRC Staff Recommendation for Approval of License Transfer raises no conceivable reason to delay the License Transfer and should be stricken as not properly before the Commission.

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Dated: February 21, 1992

CERTIFICATE OF SERVICE

Pursuant to the service requirements of 10 C.F.R. § 2.712 (1991), I hereby certify that on February 21, 1992, I served a copy of the Response of LILCO and LIPA to Petitioners' Opposition to NRC Staff Recommendation for License Transfer Approval and transmittal letter via telecopier upon the following parties, except where otherwise indicated:

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