12889

DOCKET NUMBER
PROD. & UTIL. FAC. 50-322-OLA-3

DOCKETED
USNRC

LIPA May 6, 1992

'92 MAY -6 P4:34

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the Matter of	Docket No. 50-322-OLA-3
LONG ISLAND POWER AUTHORITY	(Decommissioning)
(Shoreham Nuclear Power Station, Unit 1)	

THE LONG ISLAND POWER AUTHORITY'S COMMENTS ON SECY-92-140 AND RESPONSE TO PETITIONERS' JOINT OPPOSITION TO DECOMMISSIONING ORDER

In SECY-92-140 the Staff of the Nuclear Regulatory Commission ("NRC" or "Commission") recommended that, pursuant to 10 C.F.R. Part 2, Subpart B, the Commission authorize issuance of a Decommissioning Order ("DO") approving the Decommissioning Plan ("DP") for the Shoreham Nuclear Power Station ("Shoreham"). This plan was submitted by the licensee Long Island Power Authority ("LIPA"), with the support of the then-licensee Long Island Lighting Company ("LILCO"), more than 16 months ago, in December 1990, and has been thoroughly reviewed and accepted by the NRC Staff. (See SECY-92-140, p. 1.) LIPA fully endorses the Staff's careful analysis.

LIPA's DP is a straightforward plan to decommission, using the DECON method, a minimally contaminated facility and

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thus implement the February 1989 Settlement Agreement between LILCO and the State of New York. Further, as previously explained, the NRC's prompt approval of LIPA's DP is even more urgent in light of the upcoming closure of the waste repository at Barnwell, South Carolina and Hanford, Washington on December 31, 1992. (See Letter from Richard M. Kessel, LIPA, Chairman to Commissioners (April 28, 1992) ("Kessel Letter"); Affidavit of Leslie M. Hill (April 28, 1992) ("Hill Aff.").)

As part of their scorched-earth campaign to delay or prevent the decommissioning of Shoreham for financial and philosophical reasons, the Shoreham-Wading River Central School District and Scientists and Engineers for Secure Energy, Inc., (collectively "petitioners") have submitted a 28-page opposition ("Pet. Opp.") to the Staff's recommendation for prompt approval of LIPA's DP. Notably, however, petitioners raise no colorable public-health-and-safety concerns about LIPA's DP. Rather, grasping at every conceivable straw, petitioners raise a potpourri of obscure and pettifogging objections in the obvious hope of securing even more delay and thereby imposing completely unnecessary and avoidable expenses on Long Island ratepayers, who have been bearing Shoreham's ongoing expenses for three years now while LILCO and LIPA have struggled to obtain various Commission approvals in the face of petitioners' obstructionism. If petitioners must be allowed to continue burdening the Commission's processes for their own extraneous purposes, they

should be confined to the opportunity for a post-approval hearing, as recommended by SECY-92-140, and the public interest would be served by the prompt approval of LIPA's DP.

The Commission also should reject petitioners' perfunctory request for an administrative stay. (Pet. Opp., pp. 1-2.) These very petitioners have sought emergency stays of Shoreham-related NRC orders on three prior occasions from the D.C. Circuit or the Second Circuit, but have secured no relief. See D.C. Cir. No. 90-1241 (filed May 7, 1990) & No. 91-1301 (filed June 26, 1991); Second Cir. No. 92-4034 (filed March 2, 1992). This track record amply demonstrates the lack of equity in petitioners' repeated requests for emergency judicial relief. An administrative stay is not an entitlement, and petitioners have made no showing that a stay is warranted. The Commission should not assist petitioners in their plan to burden the courts with yet another unfounded application for emergency relief.[1]

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[1] The pettifogging nature of petitioners' objections is particularly evident in the May 5, 1992 "Supplement" to their Joint Opposition, served on counsel for LIPA at 5:30 p.m. yesterday. This prolix exegesis about supposed "mischaracterization[s]" and "typographical error[s]" is reminiscent of petitioners' earlier unsuccessful arguments that the Commission could not issue the March 1990 Confirmatory Order under Part II Subpart B for similar reasons. The argument has no greater vitality in this context. The Staff states only that the notice would be "drafted in the form of an order" as used for Subpart B orders. The Staff does not imply, nor need to conclude, that the DO would be a Subpart B order. The DO is an order pursuant to 10 C.F.R. § 50.82(e). Authority for the order therefore clearly exists. Since the decommissioning rule is silent on the form of the notice, the Staff was hardly

(continued...)

I. NEITHER THE AEA NOR THE APA IMPOSES A PRIOR HEARING REQUIREMENT.

Petitioners argue at length that they are entitled to a hearing prior to issuance of a DO approving LIPA's DP because of the application of four sections of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 554, 556-558, which deal with the formal adjudicatory requirements applicable to certain federal agency hearings. (See Pet. Opp., pp. 14-22).[2] As shown below, however, these provisions of the APA do not require a formal pre-effectiveness hearing, and neither does the Atomic Energy Act of 1954, 42 U.S.C. § 2011 et seq. ("AEA").

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[1](...continued)
unreasonable in adopting a form used for orders in other contexts.

[2] Section 554(a) provides that its provisions apply "in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing."

Section 556 explains that a hearing required by Section 554 must comply with certain procedures regarding the taking of evidence, the authority of the presiding officer, the allocation of the burden of proof, and the preparation of a transcript.

Section 557 explains the requirements for decisions that are made after any hearing held pursuant to section 556, including the effect of a decision rendered by the agency, the right of the parties to submit proposed findings and conclusions, and the rule against ex parte contacts.

Section 558 explains an agency's authority under the APA to impose sanctions, determine applications for licenses, and oversee the suspension, revocation and expiration of licenses.

Atomic Energy Act. Consistent with the Commission's prior decision in Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-92-04, __ NRC __ (1992), SECY-92-140 properly recognizes that the AEA does not entitle petitioners to a pre-effectiveness hearing. (See SECY-92-140, p. 4.) In CLI-92-04, the Commission explained the limited circumstances in which such a pre-effectiveness hearing is required:

> [T]he AEA requires the Commission to hold a pre-effectiveness or "prior" hearing on certain applications for a construction permit (second sentence [of AEA § 189(a)]), and to offer a pre-effectiveness hearing on certain applications for an amendment to a construction permit, an operating license, or an amendment to an operating license (third and fourth sentences [of AEA § 189(a)]). Where applications for actions which do not fall into the four categories described above are involved, the Commission has construed section 189a(1) as not requiring the offer of a pre-effectiveness or "prior" hearing. . . . This interpretation is long-standing, and supported by the legislative history of the 1957 amendments to the AEA which added the second sentence to section 189.

See CLI-92-04 p. 9 (footnotes omitted).

In the present case, petitioners concede that the proposed DO is not a license amendment, not an operating license, and not a construction permit. (See Pet. Opp., p. 4.) Thus, a straightforward application of CLI-92-04 -- which petitioners ignore in their discussion -- disposes of any claim to a mandatory pre-effectiveness hearing on AEA grounds. It is entirely within the NRC's authority in this case to issue the DO,

make it immediately effective, and offer a post-effectiveness hearing. For all the reasons articulated by the NRC Staff, (including the purely discretionary and supplementary findings that the DO involves no significant hazards consideration), this is an appropriate course.

Administrative Procedure Act. Undeterred, petitioners argue that the APA grants them a right to a hearing even though the AEA does not. That argument appears to contain four steps: (1) AEA § 189 grants a right to a hearing; (2) AEA § 181 incorporates the APA; (3) the APA requires that all § 189(a) hearings be "on the record"; and (4) all "on the record" § 189(a) hearings are required to be pre-effectiveness hearings.

There are at least two fundamental flaws in petitioners' chain of reasoning. First, as the cases described by petitioners themselves demonstrate, there is no requirement that all AEA § 189(a) hearings be "on the record" proceedings, and the legislative history cited by petitioners only confirms this conclusion. (See Pet. Opp., pp. 15-22.) Second, even if it were true that all § 189(a) hearings were to be "on the record" hearings, it does not follow that they have to be pre-effectiveness hearings.

It is a well-settled principle, which petitioners nowhere dispute, that an "on the record" hearing is required by

the APA only if the underlying statute requires it. See, e.g., United States v. Florida East Coast Ry. Co., 410 U.S. 224, 238 (1973); United States v. Allegheny-Ludlum Steel Corp., 406 U.S. 742, 757 (1972). Even the authority cited by petitioners (Pet. Opp., p. 16) confirms this critical point. See Attorney General's Manual on the APA, p. 41 (1979) ("the formal procedural requirements of the [APA] are invoked only where agency action "on the record after opportunity for an agency hearing" is required by some other statute").

This limiting principle is equally well settled with respect to the AEA. Indeed, petitioners concede (Pet. Opp., pp. 15-16 & n.9) that numerous precedents hold that, in the absence of express provision in the AEA, the APA does not require an "on the record" hearing under AEA § 189(a). See, e.g., City of West Chicago v. NRC, 701 F.2d 632, 638-39 (7th Cir. 1983) (Section 558 of the APA "does not independently provide that formal adjudicatory hearings must be held"); Union of Concerned Scientists ("UCS") v. NRC, 920 F.2d 50, 53 n.3 (D.C. Cir. 1990); UCS v. NRC, 735 F.2d 1437, 1444 nn.11-12 (D.C. Cir. 1984), cert. denied, 469 U.S. 1132 (1985).

According to petitioners, the "problem" with this overwhelming line of authority "is that the courts considering this issue have focused only on AEA §§ 181 & 189." (Pet. Opp., p. 16.) Petitioners then proffer an elaborate discussion of the

legislative history of AEA § 191, 42 U.S.C. § 2241, which provides as follows:

> Notwithstanding the provisions of [sections] 7(a) and 8(a) of the Administrative Procedure Act, the Commission is authorized to establish one or more [Licensing Boards].

42 U.S.C. § 2241 (emphasis added); see Pet. Opp., pp. 19-22.[3]

But petitioners' argument based on AEA § 191 adds nothing. That section merely restates, through negative implication, that which is stated explicitly and simply in AEA § 181 -- that the APA applies to the AEA. Poring over the legislative history of AEA § 191 is not necessary to establish this proposition. No aspect of the legislative history will change the fundamental principle that the "on the record" requirements of the APA will not be imported into the AEA unless there is clear congressional intent favoring a formal hearing.

Finally, petitioners' argument fails for a second, wholly independent reason. Even assuming arguendo that the legislative history cited by petitioners demonstrated that all hearings under AEA § 189 must comply with the formal "on the record" requirements of the APA, that would still not answer the

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[3] Sections 7(a) and 8(a), 5 U.S.C. §§ 556 and 557, as discussed above (p. 4 n.1), state the formal procedures to be undertaken in a hearing subject to the APA's formal adjudicatory procedures.

only question relevant here -- whether a prior hearing is necessary in this proceeding. Petitioners have cited absolutely no authority even addressing the question whether an "on the record" hearing must always be held before an agency action is declared effective. And the NRC's longstanding practice is entirely inconsistent with any such implication.

II. PETITIONERS' SHOLLY-RELATED CRITIQUES ARE INAPT AND PRESENT NO BASIS FOR REJECTION OF THE STAFF'S RECOMMENDATION.

Petitioners also contend that the Staff's recommendation for pre-hearing approval of LIPA's DP does not comply with the Commission's Sholly procedures. (Pet. Opp., pp. 4-13.) As shown below, petitioners' arguments are not germane and, even if they were, none of them counsels against approval of the Staff's recommendation.

A. The Commission's Sholly Requirements Are Inapplicable Because The Recommended DO Wil Not Amend The Shoreham License.

Petitioners first argue that Sholly procedures "are not available" for pre-hearing approval of a decommissioning plan. (Pet. Opp., p. 4.) But, even assuming arguendo that petitioners' assertion would have merit in the context of a DO amending the Shoreham license, the assertion is simply irrelevant here because

the Staff's recommendation involves no proposed amendment of the Shoreham license.[4]

Petitioners' argument that the Sholly procedures are unavailable could have significance only if this case involved a license amendment that could not be made effective prior to a hearing without reliance on the Sholly procedures. The Staff has amply demonstrated (and petitioners have not shown any error in such demonstration) that the DO approving LIPA's DP is a form of agency action that does not amend the existing Shoreham license and therefore presents no occasion for invocation of the Commission's Sholly procedures. (See SECY-92-140, pp. 3-4.)

It is, of course, true that the Staff references a No Significant Hazards Consideration ("NSHC") analysis in SECY-92-140. However, the Staff expressly states that it will include the NSHC analysis "in order to assure that the staff's assessment of the request [for DP approval] is documented even though not

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[4] There also is no merit to petitioners' underlying premise that prehearing approval is impermissible in connection with an amendment of Shoreham's license now that it has been downgraded to a possession - only license ("POL"). (See Pet. Opp., p. 4 & n.2.) LIPA and the NRC Staff have previously demonstrated (1) that Sholly procedures have long been followed in amending possession-only licenses and (2) that it would be absurd if amendments of an operating license could be made immediately effective but amendments to a possession-only license could not. (See LIPA Opposition to Motion for Stay of License Transfer and Suggestion of Mootness (dated Dec. 30, 1991), pp. 9-11 & nn.8-10; NRC Staff Response to Petitioners' Motion for Stay and Suggestion of Mootness (dated Jan. 6, 1992), pp. 6-8 & nn.11-17.)

required by the form of the approval." (SECY-92-140, p. 6 (emphasis added).) Since an NSHC determination is "not required by the form of approval," NRC approval of LIPA's DP on a pre-hearing basis plainly cannot be defeated by petitioners' assertion that the Sholly procedures "are not available" (Pet. Opp., p. 4), nor by petitioners' subsidiary arguments that an NSHC determination would not meet all regulatory requirements. As shown below, the Staff has employed the NSHC criteria merely as a way of documenting its assessment of the regulatory action and as an additional basis for recommending immediate effectiveness of the DO. There is no requirement that the process followed in issuing the NSHC finding or Staff analysis comply with the Commission's Sholly regulations.[5]

Contrary to petitioners' suggestion (Pet. Opp., p. 13), the foregoing conclusions are not affected by LIPA's January 13, 1992 request for a license amendment approving its DP. (See LSNRC-1883, Letter from L.M. Hill, LIPA, Resident Manager to NRC (Document Control Desk) (Jan. 13, 1992) ("LSNRC-1883").) LIPA's January 13, 1992 request was made as a contingency, to avoid

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[5] This conclusion applies not only to petitioners' arguments on the technical merits of the NSHC analysis performed by LIPA and the NRC Staff, but also to petitioners' arguments on the Sholly procedures to be followed. Stated simply, the procedures of 10 C.F.R. § 50.91 that relate to an NSHC finding (e.g., the definition of "emergency" situations and the requirements related to notice and comment) simply do not apply in this case.

delay in the event the Staff concluded that a license amendment was necessary to approve LIPA's DP.

B. Pre-Hearing Approval Of LIPA's DP Presents No Significant Hazards Considerations.

Citing 10 C.F.R. § 50.92(c)(1) and (2), petitioners next contend that "[t]he NRC [c]annot [m]ake an NSHC [d]etermination for the DO" because decommissioning supposedly involves "new and different" potential accidents and increased potential for accidents. (Pet. Opp., p. 4.) For the reasons already discussed, however, this argument is beside the point. The recommended DO will not amend the Shoreham license and therefore can be issued and made immediately effective without an NSHC determination; the "fundamental provisions" of the existing license will remain in place to "govern[] the possession and use" of Shoreham. (SECY-92-140, p. 4.) Furthermore, as the Commission noted in promulgating section 50.92, a NSHC determination should be made taking into account the regulatory status of a plant. 51 Fed. Reg. 7744, 7747 col. 3 (1986). Given Shoreham's status, there can be no doubt that the Staff is fully warranted in concluding, as LIPA demonstrated, that the recommended DO involves no significant hazards considerations. (See SECY-92-140, pp. 2, 6.)

"New And Different Accidents." LIPA's DP analyzes ten areas of potential hazard for the course of decommissioning. (See DP Section 3.4.) LIPA has previously demonstrated that these matters involve no "new" or "different" accidents for NSHC purposes, and petitioners neither allege nor show error in any specific aspect of LIPA's analysis. (Compare LSNRC-1883; LSNRC-1899, Letter from L.M. Hill, LIPA, Resident Manager to NRC (Document Control Desk) (Jan. 22, 1992) ("LSNRC-1899") with Pet. Opp., pp. 4-7.)[6] Instead, citing San Luis Obispo Mothers for Peace v. NRC ("SLOMFP"), 799 F.2d 1268, 1270-71 (9th Cir. 1986), petitioners sweepingly contend that an NSHC determination is inappropriate because the potential accidents analyzed in LIPA's DP are not in every instance completely identical with accidents previously analyzed. (See Pet. Opp., pp. 4-6.) This position is meritless.

In the SLOMFP case, the licensee sought (1) to increase fivefold the number of fuel rods permitted to be stored in the Diablo Canyon spent fuel pools and (2) to replace anchored fuel pool racks with "a new rack design" of unanchored racks even though the plant is located in "an active seismic zone." 799 F.2d at 1269-70. The requested amendments thus created the

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[6] Contrary to petitioners' assertions (Pet. Opp., p. 5), LIPA's January 22, 1992 analysis does not concede that the matters analyzed in LIPA's DP constitute "new" and "different" accidents. To the contrary, LIPA's January 22 analysis demonstrated why the matters referenced in the DP did not involve "new or different" accidents. (See LSNRC-1899, App. I, pp. 3-4.)

possibility of a new accident -- unanchored racks "collid[ing] with the walls of the pools or with each other" during an earthquake, which in turn "enhanc[ed] the risk of a nuclear reaction occurring in the pools," a possibility which the NRC conceded to be "sufficiently serious to justify a later hearing." Id. at 1270. It was only on these extreme facts that the Ninth Circuit rejected the NRC's NSHC determination on the ground that prior analyses had not addressed the "specific kinds of accidents petitioners identify." Id. (emphasis added).[7]

As noted, the new-accident allegations in SLOMFP were highly specific, and the case cannot appropriately be extended beyond its facts. By contrast, petitioners here have made no specific showing whatever that any of the potential accidents referenced in LIPA's DP -- none of which involves changes in design parameters for an operating plant -- involves "new" or "different" considerations from potential accidents previously analyzed.

The current Shoreham licensing basis is defined by the Defueled Safety Analysis Report ("DSAR") that supported, among

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[7] There is nothing in the SLOMFP opinion to support petitioners' assertion that, in making an NSHC determination, the NRC may not conclude that the consequences of a potential accident "will not be greater than the consequences of a distinct accident which has been previously evaluated." (Pet. Opp., p. 6 (emphasis added).) This was not the basis of the Court's decision, which rested on the different nature of the rack-collision accident.

other amendments, the current possession-only license ("POL"). The DSAR included specific and thorough accident analyses, which in turn have been relied upon in LIPA's DP. As explained in LSNRC-1899, App. I, p. 3,

> The set of accidents contained in DP Section 3.4 have either been previously evaluated directly in approved Shoreham licensing basis documents, or are considered to be subsets of accidents previously evaluated in approved Shoreham licensing basis documents.

Thus, there is no substance to the claim that the DP presents new or different accidents from those previously analyzed.

The fuel handling accident referenced in DP Section 3.4.1.8 was previously analyzed in Section 15.1.36A of the DSAR. That analysis underpinned the prior amendment of the Shoreham Emergency Plan and downgrading of the Shoreham license to possession-only status. (See LSNRC-1899, App. I, p. 3.) Two of the other matters addressed in LIPA's DP -- effects of natural catastrophes and effects of security breaches (DP Sections 3.4.1.9 and 3.4.1.10) -- are not specific accidents at all, but rather involve broad matters that have been thoroughly addressed at Shoreham and have no special nexus to decommissioning. (See LSNRC-1899, App. I, p. 3.)

Finally, the DP addresses seven other matters -- for example, dropping of a waste container containing activated

concrete rubble resulting from decommissioning -- each of which simply represents a decommissioning-specific application of classes of accidents that have previously been analyzed on the Shoreham docket. (Id., pp. 3-4.)[8] As the Commission well knows, Shoreham is a minimally contaminated plant the decommissioning of which entails infinitesimal radiological exposures. Nothing in the SLOMFP case supports petitioners' sweeping assertion that an NSHC determination cannot be made here simply because the potential decommissioning accidents differ in minor details (for example, the source of waste in a container) from prior analyses. Further, this view of the NSHC evaluation is contrary to longstanding Staff practice and, if applied to operating reactors, would frustrate the routine license amendment process. Here, also, petitioners' insistence on complete identicality seeks to paralyze the Commission and delay as long as possible Shoreham's radiological decontamination, contrary to the public interest.[9]

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[8] The six other matters analyzed in the DP involve (1) a combustible waste fire, (2) a contaminated sweeping compound fire, (3) a vacuum filter-bag rupture, (4) an oxyacetylene explosion, (5) an explosion of liquid propane gas leaked from a forklift, and (6) a contamination control envelope rupture. (See DP Sections 3.4.1.2 through 3.4.1.7.)

[9] Petitioners' reference to NRC Information Notice 92-21 is nothing. (See Pet. Opp., p. 7 n.3.) Fuel disposition is part of decommissioning. Further, LIPA has analyzed the applicability of the Information Notice to Shoreham and has concluded that the concerns identified in the Information Notice are not applicable to the fuel stored in the Shoreham Spent Fuel Pool.

Increased Probability Of Accidents. Petitioners further contend that an NSHC determination here would not comport with 10 C.F.R. § 50.92(c)(1) because approval of LIPA's DP "will involve a significant increase in the probability of accidents." (Pet. Opp., p. 7.) But, far from creating an obstacle for the Staff's recommendation, this assertion simply demonstrates yet again the error in petitioners' approach.

Nowhere in petitioners' opposition is there a single word of analysis showing or tending to show that a fuel damage accident, a natural catastrophe, a breach of security, a waste container drop, or any of the other potential accidents would be more likely to occur during decommissioning than previously was the case. Indeed, petitioners' argument seems to be premised on the erroneous and unsubstantiated assumption -- ruled out by the absence of a license amendment -- that approval of LIPA's DP "would allow a significant reduction in the safety procedures at Shoreham." (Compare Pet. Opp., p. 7 with SECY-92-140, p. 4.) Such an assumption has no factual basis.

Even more important, the operations to be conducted during decommissioning are not substantially different in kind from those being conducted under the present POL. As explained in LSNRC-1899, App. I, p. 2,

> The fuel, radioactive waste and material will not be handled or treated in a different manner than assumed in previous safety analyses and evaluations. The small amounts of radioactive waste and materials at Shoreham are contained in systems and components specifically designed for their control. Fuel handling will be performed by certified personnel, with approved equipment and approved procedures. The low burn-up fuel is stored in the spent fuel pool. Storage of the fuel in any on-site location other than the spent fuel pool would require a further license amendment.

Therefore, the DO will not allow any activity that would significantly increase the probability (or consequences) of the accidents previously evaluated. There is no basis for the assumption that probabilities of accidents will increase simply because decommissioning would be authorized. Moreover, petitioners make no showing that any increase in the probability of any potential accident would have any significance. As amply shown in LIPA's DP and in LSNRC-1899, the potential decommissioning accidents simply do not threaten significant consequence in light of the minimally contaminated condition of Shoreham.[10]

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[10] Although lacking standing to do so, petitioners raised arguments relating to occupational radiation exposure. (See Pet. Opp., p. 8.) Contrary to petitioners' claim, LIPA's DP does analyze occupational exposures during a potential accident. (See DP §§ 3-19 through 3-27.) The construction of the accident scenarios and assumptions are drawn from the bounding scenarios postulated by the NRC for the reference BWR, except for the postulated fuel-damage accident. (See DP § 3-18). The meteorological and other parameters for Shoreham are conservative, and the off-site dose assessments are fully consistent with the procedures in NRC Regulatory Guide 1.109. (See DP § 3-19). Moreover, these parameters have been consistently applied across all accident scenarios. (See DP §§

(continued...)

C. **The DO May Be Approved Without Further Opportunity For Comment.**

Petitioners also argue that the "NRC may not exercise its AEA § 189a(2)(C) authority to dispense with prior notice and reasonable opportunity for public comment" on any hazards determination associated with the recommended DO. (Pet. Opp., p. 9.) Once again, for reasons already shown, petitioners' argument must fail because the Staff has not proposed approval of any license amendment, and hence the statutory provisions regarding notice and opportunity to comment simply do not come into play.

Moreover, petitioners are straining at gnats on the question of opportunity to comment. LIPA's DP, with its potential accident analysis, has been on file for over 16 months and was the subject of the Commission's December 23, 1991 Federal Register notice. See 56 Fed. Reg. 66459 (1991). Petitioners' 30-plus-page requests for hearing, dated January 22, 1992, contain no word of analysis concerning potential decommissioning accidents. Further, petitioners have also had access for more than three months to LIPA's January 13 and 22,

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3-21 through 3-27). Finally, any credit for HEPA filtration was taken only where appropriate, i.e., where HEPA filters are available and not damaged by the event postulated. This approach is fully consistent with the NRC analysis of the decommissioning of the reference BWR.

1992 submissions regarding the NSHC analysis and were directly served with SECY-92-140, which specifically notes the Staff's concurrence with LIPA's NSHC analysis. (See SECY-92-140, p. 2.) During that time, they certainly were free to provide technical comments on LIPA's NSHC evaluation to the NRC Staff. They did not. And, as already shown, petitioners' latest filing with the Commission is utterly devoid of any analysis showing or tending to show that a DO approving LIPA's DP would somehow create significant hazards considerations.

In short, it is abundantly clear that petitioners have said absolutely nothing on hazards considerations. Rather, petitioners once again seek to tie up the Commission -- and LIPA -- in red tape, the untangling of which will simply further delay implementation, and further increase the cost, of the 1989 Settlement Agreement between LILCO and the State of New York.[11]

The critical timing considerations here relate not to more procedures for petitioners or spurious issues, but rather to the pressing need to approve LIPA s DP now so that expenses may be minimized and, in particular, so that full advantage may be

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[11] Petitioners contend that discrepancies exist between the delay costs cited by LIPA and those earlier cited by LILCO. (Pet. Opp., p. 12 & n.8.) By any account, however, the costs of delay are very large. Moreover, LILCO's earlier submissions did not include the costs associated with physical contract laborers who will be mobilized and ready to perform decommissioning activities such as segmentation of the reactor pressure vessel.

taken of the last eight months of guaranteed availability of the waste repository at Hanford, Washington and Barnwell, South Carolina. (See Kessel Letter; Hill Aff.) Seeking to frustrate that public interest, petitioners suggest that the present need for expeditious approval of LIPA's DP is somehow a condition which was "created by LIPA" and which the Commission therefore must disregard. (Pet. Opp., p. 13 (emphasis omitted).) This is preposterous.

LIPA, with LILCO's support, submitted its DP more than 16 months ago and necessarily began planning for implementation of decommissioning. It would have been fiscally and technically irresponsible of LIPA to fail to put contractual and other necessary arrangements into place in advance of the NRC's approval of the DP. In addition, LIPA's December 1990 submission of the DP can hardly be characterized as tardy when approval is sought for a date more than 16 months later. (When filed, the DP contained a schedule premised on NRC approval by September 1991.) Further, the urgency of approval has increased due to developments since December 1990. At that time, the possibility existed that Barnwell would remain open for some time after December 31, 1992 to out-of-state shipments, but the possibility appears to have diminished in recent months.[12] LIPA can hardly

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[12] On March 13, the South Carolina House of Representatives defeated proposed legislation, endorsed by Governor Carroll, which would have kept Barnwell available to (continued...)

be faulted for this development, well known to the NRC, which makes it all the more important that LIPA's DP be approved promptly so that maximum advantage can be taken of Barnwell's remaining months of operation.

Finally, petitioners plainly err in claiming (Pet. Opp., pp. 11-12) that economic considerations are irrelevant to NSHC determinations. See 51 Fed. Reg. 7744, 7756 (1986). Significantly, as noted above, in the decommissioning context, the imperatives created by Hanford and Barnwell's closure are closely analogous to the concerns involving shutdown or derating which Congress understood would constitute exigent circumstances for purposes of NSHC analysis to operating plants. (See Pet. Opp., pp. 10-11.) In light of these imperatives, and the ample procedures already afforded petitioners, there is no conceivable basis for delaying approval of the LO pending publication of yet another Federal Register notice which will serve only to bring forth yet another just-say-no filing from petitioners. Rather, even if a license amendment were sought here, the Commission would be fully entitled and empowered to make such an amendment

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[12](...continued)
receive out-of-state waste through 1995. The issue is not finally settled because other legislation is still pending. But unless the Legislature can be convinced to alter its provision, Barnwell will apparently close to out-of-state waste on December 31, 1992. See Nucleonics Week, March 19, 1992, pp. 2-3.

immediately effective in the "public . . . interest." See 10 C.F.R. § 2.204.

III. THE COMMISSION MAY AUTHORIZE THE DO ON THE BASIS OF THE STAFF'S RECOMMENDATION.

Petitioners assert that the Commission cannot approve the Staff's recommendation regarding issuance of the DO because the Commissioners have not personally reviewed the draft order or supporting documentation. (Pet. Opp., pp. 23-24.) This extraordinary contention warrants little response. Boiled down, the assertion amounts to nothing more than the obviously incorrect view that the Commissioners cannot rely on the expertise of the Staff but, instead, must themselves review all of the relevant documents and technical analysis. On this point, petitioners' complaint lies not with anything the Staff is recommending, but rather with the Commission's standard practice of relying on Staff recommendations in making informed licensing decisions. The Commissioners are, of course, perfectly entitled to rely on the Staff's recommendation in carrying out their regulatory responsibilities.

IV. THE RECOMMENDED DO IS IN FULL COMPLIANCE WITH THE NRC'S NEPA OBLIGATIONS.

Petitioners contend that the Staff's environmental assessment ("EA") and finding of no significant impact ("FONSI") on the recommended action violate the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 et seq. in two respects. (Pet. Opp., pp. 25-26.) First, they claim that the EA is "inadequate." (Id., p. 25.) Second, petitioners assert that the Staff was required to issue a draft FONSI. (Id., p. 26.) These arguments are largely identical to assertions petitioners made in challenging -- unsuccessfully -- the Staff's recommendation of approval of Shoreham's transfer to LIPA in SECY-92-041 (Feb. 6, 1992). (See Pet. Opposition to Staff Recommendation for Approval of License Transfer (dated Feb. 20, 1992), pp. 7-13.) Here, as there, neither of petitioners' arguments holds water.

Environmental Assessment. Petitioners note that the Staff has prepared an EA, but complain that there has been inadequate "participation in its development" by the public and other federal agencies. (Pet. Opp., p. 25.) The NRC is obligated to undertake such consultation, petitioners argue, under the guidelines of the Council on Environmental Quality ("CEQ") and the NRC's own NEPA-implementing rule, specifically 10 C.F.R. § 51.30(a)(2). (See Pet. Opp., p. 25.) But the Staff is under no such obligation. Section 51.30(a)(2) requires only that

the EA contain a "list of agencies and persons" that the Staff may have consulted in preparing the EA. The provision does not require that anyone be consulted.[13]

Moreover, petitioners' err in citing Fritiofson v. Alexander, 772 F.2d 1225 (5th Cir. 1985), as support for their assertion that an agency preparing an EA "must consult" with other federal agencies. In Fritiofoson, the Fifth Circuit was referring to the obligation of the Army Corps of Engineers -- under one of its organic, enabling statutes, not NEPA -- to confer with other agencies before taking action. See id. at 1235. Twist and turn as they might, petitioners just cannot find any such requirement here for consultation in the preparation of an EA.

Draft FONSI. Petitioners claim that the Staff "appears to propose violation" of the allegedly "unambiguous requirement" to prepare a draft FONSI. (Pet. Opp., p. 26.) But there is no such requirement. Rather, the pertinent provision only identifies "[c]ircumstances in which a draft [FONSI] may be prepared." 10 C.F.R. § 51.33(b) (emphasis added). By the

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[13] Indeed, over the years, the NRC has issued innumerable EA's in the Shoreham case (as well in many others) noting that "[t]he NRC staff reviewed the licensee's request and did not consult other agencies or persons." See, e.g., 57 Fed. Reg. 6860, 6861 (1992) (EA on Shoreham's transfer to LIPA); 56 Fed. Reg. 58931, 58932 (1991) (EA on decommissioning funding exemption for Shoreham). There is nothing unique about the Staff's treatment of the instant EA.

regulation's plain terms, the Staff has discretion in determining whether to prepare a draft FONSI; it is never required to do so.[14]

V. THE COMMISSION IS NOT ESTOPPED FROM ISSUING AN IMMEDIATELY EFFECTIVE DO OR FROM ISSUING AN EA, AS OPPOSED TO AN EIS.

Seeking to bootstrap themselves into rights they otherwise lack, petitioners claim that the Commission is estopped from issuing an order approving decommissioning on an immediately effective basis and also from issuing an EA, instead of an environmental impact statement ("EIS"). (See Pet. Opp., pp. 23, 27-28.) As demonstrated below, however, the Commission has not previously decided either issue, and thus there can be no estoppel effect from the Commission's prior statements.

In their estoppel claims, petitioners rely on Arizona Grocery Co. v. Atchison Ry., 284 U.S. 370 (1932). There, the Supreme Court held that the Interstate Commerce Commission ("ICC") improperly ordered a shipper to pay reparations to its customers who paid rates that were within the ICC's maximum reasonable rates in force at the time of shipment but which the ICC later found to be unreasonably high. The Court held that

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[14] In addition, petitioners' citation to 10 C.F.R. § 51.34 is inapposite. This provision says that "[w]hen a hearing is held on the proposed action," the NRC Staff must prepare a draft FONSI. While petitioners have requested a hearing on the DO, no hearing has been held.

where the ICC "declares a specific rate to be the reasonable and lawful rate for the future, it speaks as the legislature," and the carrier is entitled to rely on the ICC's pronouncement, as if it had been a law enacted by Congress. Id. at 386, 389. These facts bear no relation whatever to the claimed estoppels here.

Pre-Effectiveness Hearing. Petitioners first suggest that former Chairman Carr somehow committed the NRC to a pre-effectiveness hearing on decommissioning in a letter he sent to the Secretary of Energy, Admiral James D. Watkins (dated Sept. 15, 1989). (A copy is attached hereto as Exh. A.) In that letter, which is notably not addressed to petitioners or their counsel, Chairman Carr merely noted that "the Commission's rules require that we offer an opportunity for public hearing on any proposed license transfer and before NRC approval of decommissioning may be granted." (Id., p. 2; Pet. Opp., p. 23.)

That opportunity was offered by the Commission's December 23 Federal Register notice, and petitioners' motions to intervene show no need for a pre-effectiveness hearing. Nor has any such reason been shown in their present opposition.

Moreover, it is preposterous for petitioners to claim that Chairman Carr's statement, made to another government official (not to petitioners) over 2½ years ago, could serve under Arizona Grocery to compel a pre-effectiveness hearing not

otherwise required. Chairman Carr did not even purport to address, let alone to resolve, the question whether anyone (much less petitioners) is entitled to a pre-effectiveness hearing. For the rule in Arizona Grocery to apply, the agency must have specifically addressed the issue now at hand, must have considered the arguments on both sides, must have made its determination after creating a record based on its findings and conclusions, and an equitable basis for estoppel must exist. See Arizona Grocery, 284 U.S. at 382-83, 386-87, 389. Petitioners have not even begun to meet their burden to show that the Commission has a previously established position on the issue at hand or that petitioners have relied thereon. Furthermore, the Commission has just recently concluded that license transfer -- to which Chairman Carr's letter also referred -- could be made immediately effective, and there is no basis for treating the recommended DO differently.

EIS/EA. Petitioners also claim that the Commission has committed itself to preparing an EIS, as opposed to an EA, on decommissioning. They point to a preliminary response by Dr. Thomas Murley to a petition filed by petitioners under 10 C.F.R. § 2.206, stating "that an . . . (EIS) or supplement to an EIS should be prepared." (See Letter from Dr. Murley to James E. McGranery, Jr., Esq. (dated July 20, 1989), p. 2 (emphasis added) (attached as Exh. B).) But Dr. Murley explained elsewhere in that same letter that if the Commission "authoriz[es] the

decommissioning of the Shoreham facility, an environmental review will be performed in accordance with the Commission's regulations." (Id. (emphasis added).) An environmental review may obviously be in the form of an EA or an EIS.

There is no suggestion in Dr. Murley's July 1989 letter or in the August 1989 SECY-89-247, which petitioners also cite (Pet. Opp., p. 27), that the NRC intended to foreclose its ability to prepare an EA instead of an EIS.[15] Again, petitioners have pointed to a supposed determination that does not even purport to address the issue raised here -- whether an EIS is required, as opposed to some other environmental review. Here, too, petitioners have not met the requirements of Arizona Grocery to establish that there was a binding Commission determination.

In any event, Dr. Murley's letter and SECY-89-247 have long been superseded by the Commission's overriding guidance from the Commission on NEPA issues, in CLI-90-08, 32 NRC 201 (1990), and other decisions. Reflecting such developments, Dr. Murley's formal response to petitioners' section 2.206 request stated that

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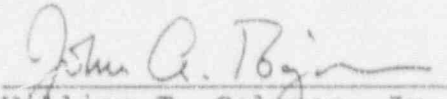
[15] This is especially true in the decommissioning context, where the EA is intended to supplement the previously prepared "Final Generic Environmental Impact Statement on Decommissioning of Nuclear Facilities" ("GEIS"), NUREG-0586. The complete environmental review of the Shoreham DO consists of the EA plus the GEIS.

"to authorize the decommissioning of [Shoreham], the NRC Staff will prepare an environmental impact statement or environmental assessment." (See DD-90-8 (dated Dec. 20, 1990), p. 22 (emphasis added).) Thus, petitioners have long been specifically forewarned that the Commission might conduct its environmental review through an EA.

CONCLUSION

For the foregoing reasons, and those shown in SECY-92-140, LIPA urges that the Commission expeditiously adopt the Staff's recommendation in SECY-92-140 and approve the Shoreham DP through an immediately effective decommissioning order. The public interest urgently requires that the radiological decontamination of Shoreham proceed now, and petitioners' dilatory tactics should not be rewarded by delay in approval.

Respectfully submitted,



William T. Coleman, Jr.
Carl R. Schenker, Jr.
John D. Holum
John A. Rogovin
O'MELVENY & MYERS
555 13th Street, N W.
Washington, D.C. 20004
(202) 383-5360

Nicholas S. Reynolds
David A. Repka
WINSTON & STRAWN
1400 L Street, N.W.
Washington, D.C. 20005
(202) 371-5726

Counsel for the
Long Island Power Authority

Of Counsel:

Stanley B. Klimberg
President of Shoreham Project
and General Counsel
Richard P. Bonnifield
Deputy General Counsel
LONG ISLAND POWER AUTHORITY
200 Garden City Plaza
Garden City, N.Y. 11530
(516) 742-2200

Dated. May 6, 1992

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

CHAIRMAN

PDR

September 15, 1989

The Honorable James D. Watkins
Secretary of Energy
Washington, D. C. 20585

Dear Mr. Secretary:

I am responding to your letter of July 27, 1989, concerning the future of the Shoreham Nuclear Power Station. The Commission is closely monitoring the activities being carried out at the Shoreham facility to ensure compliance with Commission regulations. In that connection, the Nuclear Regulatory Commission (NRC) staff, in public meetings with the Long Island Lighting Company (LILCO) on June 30 and July 28, 1989, underscored LILCO's obligations to conform to all requirements of the license issued by the Commission and all requirements of Commission regulations until such time as the Commission approves changes in the license. By letter dated August 30, 1989 (copy enclosed), the staff formally notified LILCO of the requirements that a majority of the Commission believes should be met at Shoreham until disposition of the facility is authorized by the NRC.

As is the case with all facility licenses issued by NRC, the plant Technical Specifications, which are conditions of the license issued to LILCO, provide a degree of flexibility with respect to such matters as staffing depending on the operational status of the facility. At present, the fuel has been removed from the reactor and placed in the spent fuel pool. This is an activity routinely carried out at other licensed facilities and is authorized under the existing operating license. With the fuel in the fuel pool, the license requirements for staffing are reduced from those required for operation in a critical or power operation mode. However, an adequate number of properly trained staff are required to ensure plant safety in the defueled state. You expressed the concern that the loss of trained staff may result in some delay before the facility could start power operation. However, provided there is sufficient staff to satisfy the requirements of the existing operating license to ensure that the plant is safe in its defueled condition, we do not believe that reduction in staff at the facility warrants enforcement or sanction.

Further, there are limitations on the changes that LILCO can make without NRC approval concerning emergency planning and the licensee's Local Emergency Response Organization (LERO). Shoreham's operating license imposes conditions relating to the LERO, and a license amendment is required in order to change these conditions. In addition, 10 CFR 50.54(q) authorizes the licensee to make changes in the emergency plan without NRC approval only if such changes do not decrease the effectiveness of the emergency plan. Although LILCO has indicated that it would like to amend the current license to permit reductions in the LERO in light of the low radiological risk, such amendments would require prior NRC approval.

The NRC staff made clear at the June 30 and July 28 meetings and in the August 30 letter that it is unacceptable to the NRC for LILCO to permit the Shoreham facility to deteriorate. The licensee will be required to maintain all systems needed for safety in the defueled mode in a fully operable condition. All other systems required for full-power operation of the facility are to be preserved from degradation, with such maintenance or custodial services as may be necessary to ensure such preservation.

Moreover, NRC regulations require LILCO to obtain Commission approval before decommissioning the facility. In evaluating any proposal for decommissioning the Shoreham facility, the Commission will carefully assess all appropriate issues in determining whether to prepare an Environmental Impact Statement in accordance with the Commission's regulations in 10 CFR Part 51. Until approval to decommission is granted, the staff has requested a commitment from LILCO to maintain the Shoreham facility as described above. If LILCO requests transfer of the facility to another person for decommissioning, approval by the Commission is required before such transfer may take place. As in all our actions, NRC will not permit any improper segmentation of the National Environmental Policy Act (NEPA) review process. Finally, as you correctly noted in your letter, the Commission's rules require that we offer an opportunity for public hearing on any proposed license transfer and before NRC approval of decommissioning may be granted.

At this time, we do not perceive a regulatory need to issue an order halting activities currently going on at the Shoreham facility. Although LILCO has indicated its intent not to operate Shoreham and the Agreement between LILCO and the State of New York indicates an intent to decommission the facility, thus far the activities that LILCO is carrying out are authorized under the existing license. The Commission will continue on-site inspections to ensure that such activities comply with the requirements of the operating license and our regulations. If necessary, NRC will issue appropriate orders or sanctions to ensure compliance with Commission regulations in the event of improper activities such as safety violations, violations of license conditions, or the start of decommissioning without Commission approval.

I want to assure you that the dismantling or degradation of the Shoreham facility will not be permitted until the Commission has authorized decommissioning. Further, the Commission will not authorize decommissioning until the safety and environmental reviews of such a proposal are carried out and the necessary opportunity for public hearing, in accordance with the Commission's regulations, has been provided.

Sincerely,

Kenneth M. Carr

Enclosure:
As stated

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

July 20, 1989

Mr. James P. McGranery, Jr., Esq.
Dow, Lohnes & Albertson
1255 Twenty-Third Street
Washington, D.C. 20037-1194

Dear Mr. McGranery:

This letter is to acknowledge receipt of the petition filed by you on July 14, 1989, on behalf of the Shoreham-Wading River Central School District. In your petition you request that the Executive Director for Operations issue an immediately effective order to Long Island Lighting Company to cease and desist from any and all activities related to the defueling and destaffing of Shoreham Nuclear Power Station, Unit 1, and return to the "status quo ante," perding further consideration by the Commission. You further request that such an order be accompanied by an announcement of the Commission's intention to fine the licensee a substantial amount per day for any violation or continuing violation of the Commission's orders.

As bases for your request, you assert that (1) the defueling of the core of the Shoreham Station involves an unreviewed safety question, because it is unnecessary and because the increased risk of accidents in the transfer of fuel to the spent fuel pool outweighs the slight additional margin of safety provided by the spent fuel pool, and, as such, requires prior Commission approval in accordance with 10 C.F.R §50.59; (2) the issuance of the full-power operating license for the facility was premised, among other things, on adequate staffing, and the licensee has now declared to the Commission its intention to willfully reduce staffing by about half, which would violate the basis of the issuance of its license and the licensee's prior commitments to the Commission; (3) the lack of maintenance activities at the facility is contrary to a March 1989 Operational Readiness Assessment Report; (4) the licensee's plan to substitute fossil-fuel-burning units for the Shoreham station is a matter that may result in a significant increase in an adverse environmental impact previously evaluated in the Final Environmental Statement for the operating license and, as such, presents an unreviewed environmental question that requires prior Commission approval; (5) such an order would allow for a full environmental review pursuant to the National Environmental Policy Act (NEPA), the Council on Environmental Quality guidelines, and the Commission's regulations in 10 C.F.R Part 51; and (6) the issuance of a license amendment authorizing decommissioning is a major Commission action significantly affecting the quality of the environment and requires an environmental impact statement or supplement to an environmental impact statement as specified in 10 C.F.R §§51.20(b)(5) and (b)(13).

Your petition has been referred to me pursuant to 10 C.F.R §2.206 of the Commission's regulations. As provided by Section 2.206, action will be taken on your request within a reasonable time. However, a preliminary review of the concerns in your petition does not indicate any need to take immediate action as you request because on the basis of current information, the licensee

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is currently in compliance with the provisions of its full-power license. The defueling of the reactor vessel is an activity permissible under the terms of Facility Operating License NPF-82. The destaffing of the plant will not be implemented until early August.

We are currently evaluating the effects of these changes in staffing level to ensure that they will not be inimical to either the common defense and security or to the public health and safety. This evaluation will be completed before the end of July, and we will take appropriate action if warranted. Furthermore, with regard to your assertion that an environmental impact statement (EIS) or supplement to an EIS should be prepared, we note that defueling the Shoreham facility is authorized by the Shoreham operating license and does not constitute a separate federal action subject to NEPA. Although you are correct that the decommissioning of a facility requires a license amendment necessitating the preparation of an EIS, such an amendment has not yet been applied for in this case. If the Commission issues a license amendment authorizing the decommissioning of the Shoreham facility, an environmental review will be performed in accordance with the Commission's regulations.

Sincerely,
Original Signed by
Thomas E. Murley

Thomas E. Murley, Director
Office of Nuclear Reactor Regulation

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[MCGRANERY LETTER]

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Sincerely,

Thomas E. Murley

Thomas E. Murley, Director
Office of Nuclear Reactor Regulation

cc:

Victor A. Staffieri, Esq.
General Counsel
Long Island Lighting Company
175 East Old County Road
Hicksville, New York 11801

W. Taylor Reveley, III, Esq.
Hunton & Williams
Post Office Box 1535
707 East Main Street
Richmond, Virginia 23212

Mr. Lawrence Britt
Shoreham Nuclear Power Station
Post Office Box 618
Wading River, New York 11792

Mr. John Scalice
Plant Manager
Shoreham Nuclear Power Station
Post Office Box 628
Wading River, New York 11792

Resident Inspector
Shoreham NPS
U.S. Nuclear Regulatory Commission
Post Office Box B
Rocky Point, New York 11778

Regional Administrator, Region I
U.S. Nuclear Regulatory Commission
475 Allendale Road
King of Prussia, Pennsylvania 19406

Ms. Donna Ross
New York State Energy Office
Agency Building 2
Empire State Plaza
Albany, New York 12223

Mr. John D. Leonard, Jr.
Vice President-Nuclear Operations
Long Island Lighting Co.
Shoreham Nuclear Power Station
P.O. Box 618, North Country Road
Wading River, NY 11792

Supervisor
Town of Brookhaven
205 S. Ocean Ave.
Patchogue, New York 11772

Town Attorney
Town of Brookhaven
3232, Route 112
Medford, NY 11763

MHB Technical Associates
1723 Hamilton Avenue
Suite K
San Jose, California 95125

Richard M. Kessel
Chairman & Executive Director
New York State Consumer Protection
Board
Room 1725
250 Broadway
New York, NY 10007

Jonathan D. Feinberg, Esq.
New York State Department
of Public Service
Three Empire State Plaza
Albany, New York 12223

Gerald C. Crotty, Esq.
Ben Wiles, Esq.
Counsel to the Governor
Executive Chamber
State Capitol
Albany, New York 12224

Herbert H. Brown, Esq.
Lawrence Coe Lanpher, Esq.
Karla J. Letsche, Esq.
Kirkpatrick & Lockhart
South Lobby - 9th Floor
1800 M Street, N.W.
Washington, D.C. 20036-5891

cc:

Dr. Monroe Schneider
North Shore Committee
Post Office Box 231
Wading River, NY 11792

Fabian G. Palomino, Esq.
Special Counsel to the Governor
Executive Chamber - State Capitol
Albany, NY 12224

Martin Bradley Ashare, Esq.
Suffolk County Attorney
H. Lee Dennison Building
Veteran's Memorial Highway
Hauppauge, NY 11788

Robert Abrams, Esq.
Attorney General of the State
of New York
ATTN: John Corwin, Esq.
New York State Department of Law
Consumer Protection Bureau
120 Broadway
3rd Floor
New York, NY 10271

Honorable Peter Cohalan
Suffolk County Executive
County Executive/Legislative Building
Veteran's Memorial Highway
Hauppauge, NY 11788

Ms. Nora Bredes
Shoreham Opponents Coalition
195 East Main Street
Smithtown, New York 11787

Chris Nolin
New York State Assembly
Energy Committee
626 Legislative Office Building
Albany, New York 12248

Mr. Charlie Donaldson
Assistant Attorney General
NYS Department of Law
Room 3-118
120 Broadway
New York, NY 10271

James P. McGranery, Jr., Esq.
Dow, Lohnes and Alberson
Suite 500
1255 23 Street, N.W.
Washington, D.C. 20037

Dr. A. David Rossin
Resources Conservation
Organization
Suite 320
101 First Street
Los Altos, CA 94022

CERTIFICATE OF SERVICE

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USNRC

'92 MAY -6 P4:34

DOCKETING & SERVICE

Pursuant to the service requirements of 10 C.F.R. § 2.712 (1991), I hereby certify that on May 6, 1992, I served a copy of the Long Island Power Authority's Comments on SECY-92-140 and Response to Petitioners' Joint Opposition to Decommissioning Order via Courier upon the following parties, except where otherwise indicated:

Commissioner Ivan Selin
Chairman
Nuclear Regulatory Commission
One White Flint North Building
11555 Rockville Pike
Rockville, Maryland 20852

Commissioner Kenneth C. Rogers
Nuclear Regulatory Commission
One White Flint North Building
11555 Rockville Pike
Rockville, Maryland 20852

Commissioner James R. Curtiss
Nuclear Regulatory Commission
One White Flint North Building
11555 Rockville Pike
Rockville, Maryland 20852

Commissioner Forrest J. Remick
Nuclear Regulatory Commission
One White Flint North Building
11555 Rockville Pike
Rockville, Maryland 20852

Commissioner E. Gail de Planque
Nuclear Regulatory Commission
One White Flint North Building
11555 Rockville Pike
Rockville, Maryland 20852

Stephen A. Wakefield, Esq.
General Counsel
U.S. Department of Energy
Forrestal Building
1000 Independence Avenue, S.W.
Washington, D.C. 20585
(First Class Mail)

The Honorable Samuel J. Chilk
The Secretary of the Commission
Nuclear Regulatory Commission
One White Flint North Building
11555 Rockville Pike
Rockville, Maryland 20852

Administrative Judge
Thomas S. Moore, Chairman
Administrative Judge
Nuclear Regulatory Commission
Washington, D.C. 20555
(First Class Mail)

Administrative Judge
Jerry R. Kline
Atomic Safety
and Licensing Board
Nuclear Regulatory Commission
Washington, D.C. 20555
(First Class Mail)

Administrative Judge
George A. Ferguson
5307 Al Jones Drive
Columbia Beach, Maryland 20764
(First Class Mail)

Edwin J. Reis, Esq.
Deputy Assistant General Counsel
for Reactor Licensing
Nuclear Regulatory Commission
One White Flint North Building
11555 Rockville Pike
Rockville, Maryland 20852

James P. McGranery, Jr., Esq.
Dow, Lohnes & Albertson
1255 23rd Street, N.W.
Suite 500
Washington, D.C. 20037

Regulatory Publications Branch
Division of Freedom of
Information & Publications
Services
Office of Administration
Nuclear Regulatory Commission
Washington, D.C. 20555
(First Class Mail)

Donald P. Irwin, Esq.
Counsel, Long Island
Lighting Company
Hunton & Williams
Riverfront Plaza, East Tower
951 East Byrd Street
Richmond, Virginia 23219-4074
(Via Federal Express)

Gerald C. Goldstein, Esq.
Office of the General Counsel
Power Authority of
State of New York
1633 Broadway
New York, New York 10019
(Via Federal Express)

Samuel A. Cherniak, Esq.
NYS Department of Law
Bureau of Consumer Frauds
and Protection
120 Broadway
New York, New York 10271
(Via Federal Express)

John A. Rogovin

O'Melveny & Myers
555 13th Street, N.W.
Washington, D.C. 20004

Dated: May 6, 1992