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NUCLEAR REGULATORY COMMISSION ISSUANCES

February 1992

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NUCLEAR REGULATORY COMMISSION ISSUANCES

February 1992

This report includes the issuances received during the specified period from the Commission (CLI), the Atomic Safety and Licensing Boards (LBP), the Administrative Law Judge (ALJ), the Directors' Decisions (DD), and the Denials of Petitions for Rulemaking (DPRM).

The summaries and headnotes preceding the opinions reported herein are not to be deemed a part of those opinions or have any independent legal significance.

U.S. NUCLEAR REGULATORY COMMISSION

Prepared by the
Division of Freedom of Information and Publications Services
Office of Administration
U.S. Nuclear Regulatory Commission
Washington, DC 20555
(301/492-8925)

COMMISSIONERS

Ivan Selin, Chairman
Kenneth C. Rogers
James R. Curtiss
Forrest J. Remick
E. Gail de Planque

B. Paul Cotter, Chief Administrative Judge, Atomic Safety and Licensing Board Panel

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Commission Issuances

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Ivan Selin, Chairman
Kenneth C. Rogers
James R. Curtiss
Forrest J. Remick
E. Gail de Planque

In the Matter of

Docket No. 50-312-OLA
(Possession-Only License)

SACRAMENTO MUNICIPAL UTILITY DISTRICT
(Rancho Seco Nuclear Generating Station)

February 6, 1992

The Commission considers the Environmental Conservation Organization's appeal of a Licensing Board order that denied the organization's petition for leave to intervene in a proceeding involving an amendment that, if granted, would convert the Rancho Seco operating license into a "possession-only" license (POL). The Commission finds that the Petitioner has failed, on appeal, to demonstrate that it has standing to intervene in the proceeding. The Commission therefore directs the Staff, after it makes the findings necessary for the issuance of a license amendment, to issue the POL, subject to a two-stage administrative stay to allow orderly processing of anticipated judicial challenges to the action.

REGULATIONS: INTERPRETATION (10 C.F.R. § 2.762)

The Commission regulations in 10 C.F.R. § 2.762 apply only to appeals from "initial decisions," i.e., decisions of a licensing board that dispose of a major portion of, or conclude, the proceeding before that board, such as a decision to grant, suspend, revoke, or amend a license.

REGULATIONS: INTERPRETATION (10 C.F.R. § 2.714a)

The Commission's regulations in section 2.714a allow for an immediate appeal from decisions granting and/or denying in whole a petition for leave to intervene.

REGULATIONS: INTERPRETATION (10 C.F.R. § 2.714a)

Section 2.714a contains a completely different provision for appeal than section 2.762. Section 2.762(b) provides that the brief in support of the notice of appeal may be filed within 30 days of the notice of appeal. Section 2.714a requires the appellant's brief to be submitted *with* the notice of appeal, within 10 days of the Licensing Board's decision.

REGULATIONS: INTERPRETATION (10 C.F.R. § 2.714a)

When the Commission adopted 10 C.F.R. § 2.714a, it contemplated less stringent requirements for briefs filed under section 2.714a because these briefs must be filed in a shorter time frame and — presumably — will address much narrower issues than an appeal from the final decision of an entire licensing process.

REGULATIONS: INTERPRETATION (10 C.F.R. § 2.762)

While there is a clear benefit to the reviewing body in having the assistance of the items specified in 10 C.F.R. § 2.762 — such as a Table of Contents and a table of cases — in the brief submitted, the Commission does not find that these items are required under its rules.

REGULATIONS: INTERPRETATIONS (PLEADINGS)

Prior Commission case law requires that all briefs — including those filed under 10 C.F.R. § 2.714a — shall contain a "statement of the case" or "statement of facts" including "an exposition of that portion of the procedural history of the case related to the issue or issues presented by the appeal." *Public Service Co. of Oklahoma* (Black Fox Station, Units 1 and 2), ALAB-388, 5 NRC 640, 641 (1977). However, the Commission can exercise its discretion and waive that requirement on occasion.

REGULATIONS: INTERPRETATION (PLEADINGS)

All parties who appear before the Commission "bear full responsibility for any misapprehension of [their] position caused by the inadequacies of [their] brief . . . ." *Wisconsin Electric Power Co.* (Point Beach Nuclear Plant, Units 1 and 2), ALAB-666, 15 NRC 277, 278 (1982).

RULES OF PRACTICE: INTERVENTION PETITIONS

NRC regulations provide that "[a]ny person whose interest may be affected by a proceeding and who desires to participate as a party to [the] proceeding" should file a petition to intervene setting forth that interest and the "possible effect of any order that may be entered in the proceeding on the petitioner's interest." 10 C.F.R. § 2.714(a) and (d).

RULES OF PRACTICE: STANDING TO INTERVENE

The NRC has "long held that judicial concepts of standing will be applied in determining whether a petitioner has sufficient interest in a proceeding to be entitled to intervene as a matter of right under section 189 of the Atomic Energy Act." *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 332 (1983).

RULES OF PRACTICE: STANDING TO INTERVENE

The NRC has held that, in order to satisfy "judicial" standing, a petitioner must demonstrate that it could suffer an actual "injury in fact" as a consequence of the proceeding and that this interest is within the "zone of interests" to be protected by the statute under which the petitioner seeks to inte *See, e.g., Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Ut 1-85-2, 21 NRC 282, 316 (1985).

NEPA: SCOPE OF INTERESTS PROTECTED

It is true that NEPA does protect some economic interests; however, it only protects against those injuries that result from environmental damage.

NEPA: SCOPE OF INTERESTS PROTECTED

A petitioner's loss of employment that results directly from a licensee's decision not to operate a nuclear facility and that does not result in environmental

damage, does not fall within the "zone of interests" protected by NEPA and cannot support a petitioner's standing to challenge the agency's action.

RULES OF PRACTICE: STANDING TO INTERVENE

There is Commission precedent for rejecting an assertion of "informational interests" as grounds for standing. *Edlow International Co.* (Agent for the Government of India on Application to Export Special Nuclear Material), CLI-76-6, 3 NRC 563, 572 (1976).

NEPA: SCOPE OF INTERESTS PROTECTED

"Interest" means an interest affected by the outcome of the proceeding, not an interest in the proceeding.

RULES OF PRACTICE: STANDING TO INTERVENE

A petitioner seeking to intervene cannot demonstrate standing simply by asserting a loss of information if it is not allowed to participate in a proceeding.

REGULATIONS: INTERPRETATION (10 C.F.R. § 2.788(e))

The NRC's stay procedures apply only when there is an order in existence to be stayed. If there is no order in existence to be stayed, the proper motion is a motion to hold in abeyance.

MEMORANDUM AND ORDER

This matter is before the Commission on an appeal by the Environmental Conservation Organization ("ECO") from an order by the Atomic Safety and Licensing Board ("Licensing Board") wholly denying its petition for leave to intervene in a proceeding involving an amendment to the Rancho Seco operating license. The proposed amendment would allow the Sacramento Municipal Utility District ("SMUD"), the Licensee, to possess both the reactor and its nuclear fuel but would remove SMUD's authority to operate the Rancho Seco facility — in essence converting the operating license into a so-called "possession-only" license ("POL"). The Licensing Board found that ECO did not have standing to intervene in the proceeding and that its proposed contentions were not in accordance with our directions for proceedings of this nature. ECO challenges these findings and, in addition, alleges that the Licensing Board

denied it "due process" in the proceeding below. The NRC Staff and SMUD have responded in opposition to the appeal.

After due consideration, we find that the Petitioner has failed to demonstrate on this appeal that it has standing to intervene in the proceeding. Petitioner also recently moved for a stay of the issuance of the POL pending disposition of this appeal. In view of our resolution of this matter, that motion is now moot. However, in order to permit orderly processing of anticipated judicial challenges to this action, we have directed the Staff to institute a two-stage administrative stay, after it has made the findings necessary for issuance of the POL.

I. FACTUAL BACKGROUND

In June 1988, SMUD's ratepayers adopted a public referendum directing SMUD to cease operations at Rancho Seco. On April 26, 1990, SMUD applied for an amendment to the Rancho Seco operating license that would authorize only the "use and possession" of the facility, not its operation. This type of amended license is generally termed a possession-only license or POL. The NRC Staff published a corrected notice of the requested amendment in the *Federal Register* and proposed to issue the amendment on an immediately effective basis following a finding of "no significant hazards considerations." 55 Fed. Reg. 41,280 (Oct. 10, 1990).

On November 8, 1990, ECO filed a petition to intervene and a request for a hearing in addition to comments opposing the proposed finding of "no significant hazards considerations," and the Staff and SMUD filed opposition to ECO's petition and comments. On January 30, 1991, we referred the matter to the Licensing Board for further proceedings in accordance with our Rules of Practice. *See* 56 Fed. Reg. 6691 (Feb. 19, 1991). The Licensing Board invited ECO to file a response to the Staff's and SMUD's pleadings and ECO filed such a response on March 4, 1991. In the interim, in a similar case involving the Shoreham nuclear power plant, we issued guidance regarding the admissibility of contentions directed at challenging a Staff decision not to prepare an Environmental Impact Statement ("EIS") for actions of the sort under consideration here. *See Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-91-4, 33 NRC 233, 237 (1991) ("*Shoreham*, CLI-91-4").

On April 15, 1991, by agreement of the parties, ECO filed additional affidavits supporting its petition. Also on April 15, ECO filed a document that it termed a "Further Amendment" to its petition. The Staff and SMUD moved to strike this pleading, alleging that they had not consented to this filing and that it constituted an unauthorized "rebuttal" or "reply" pleading not allowed by our Rules of Practice.

On May 1, 1991, the Licensing Board issued a Memorandum and Order on the petition to intervene. LBP-91-17, 33 NRC 379 (1991). After reviewing the filings before it, the Licensing Board found that it could not determine whether ECO had demonstrated standing to intervene in the proceeding. However, the Licensing Board believed that it would be assisted in determining the issue of standing by reviewing proposed contentions addressing the issues ECO wished to litigate. Accordingly, the Licensing Board directed ECO to file proposed contentions by June 3, 1991, and scheduled a prehearing conference to review the issue of standing for June 25, 1991.

In LBP-91-17, the Licensing Board provided several specific directions to ECO. First, the Licensing Board specifically stated that "[n]o further filings [after the June 3d date] will be permitted absent specific leave of the Board." LBP-91-17, 33 NRC at 392. Second, the Licensing Board reminded ECO to "pay particular heed" to our directions describing admissible contentions regarding the lack of proposed EIS in *Shoreham*, CLI-91-4, *supra*, and to our rulings in previous *Shoreham* cases that the scope of any EIS ordered would be limited to alternative methods of decommissioning, not alternatives to the decision to decommission. LBP-91-17, 33 NRC at 392-93. Third, the Licensing Board agreed that ECO's "Further Amendment" constituted an unauthorized reply to the responses to the petition and ordered the pleading stricken. *Id.* at 381 n.3.

ECO filed twenty-five proposed contentions on June 3, 1991, as directed. On June 10, 1991, ECO filed an additional set of six contentions. Both the Staff and SMUD responded in opposition to both sets of proposed contentions. In addition, the Staff moved to strike the second set of proposed contentions as untimely because these contentions were not filed within the time limits established by the Board's instructions in LBP-91-17. SMUD supported the Staff's motion but also requested that the Licensing Board rule on the additional contentions and dismiss them.

After reviewing the proposed contentions and the transcript of the prehearing conference, the Licensing Board dismissed the proceeding. *See* LBP-91-30, 34 NRC 23 (1991). Initially, the Licensing Board ruled that ECO's first set of contentions did not satisfy the directions contained in *Shoreham*, CLI-91-4, and in our earlier rulings. *See* LBP-91-30, 34 NRC at 26-27. Moreover, the Licensing Board found that ECO's second set of proposed contentions were untimely, i.e., filed outside the deadlines established in LBP-91-17, and that ECO had made no attempt to satisfy the five factors required for accepting late-filed contentions, found in 10 C.F.R. § 2.714(a)(1)(i)-(v). *See* LBP-91-30, 34 NRC at 27. Finally, the Licensing Board found that ECO had failed to establish standing. *See id.* at 27-28.

II. ARGUMENTS OF PARTIES

A. ECO's Arguments on Appeal

On appeal, ECO argues that: (1) it has standing to intervene in the license amendment proceeding; (2) the Licensing Board erred in dismissing its first set of proposed contentions; and (3) the Licensing Board ("ASLB") deprived it of due process by its procedural rulings and by dismissing the second set of proposed contentions. First, ECO argues that it demonstrated standing to intervene through its "informational interests" in an EIS and through its members' economic interest in employment at the plant, Appeal at 1-4. Moreover, ECO argues that the ASLB erred in finding that ECO had only a "general interest" in the proceeding, not a specific injury," *Id.* at 7-9.

Second, ECO argues that the ASLB erred in finding that any EIS need not consider the option of "resumed operation" of Rancho Seco, *id.* at 4-5; in its characterization of ECO's contentions as directed solely at that issue, *id.* at 5-6; in finding that the NRC's Generic Environmental Impact Statement ("GEIS") for decommissioning, NUREG-0586 (1988), was applicable to the Rancho Seco's proposed decommissioning, *id.* at 6-7; and in requiring that ECO's NEPA contentions be filed before SMUD had filed its environmental report. *Id.* at 9.

Finally, ECO argues that it was deprived of "due process" in the proceeding below because the ASLB issued its decision in LBP-91-30 before ECO had a chance to address arguments presented in two Staff pleadings that were not served on it, *id.* at 10-11; because the ASLB erred in striking the "Further Amendment" filed on April 15, 1991, *id.* at 11-12; because the ASLB struck the proposed contentions filed on June 10, 1991, as being untimely filed, and because the ASLB — according to ECO — dismissed the first set of proposed contentions without a specific discussion of each one, *id.* at 9-10.

B. The Staff's and SMUD's Responses

In response, the Staff and SMUD argue that ECO has not demonstrated standing to intervene because (1) prior Commission precedent has eliminated "informational interests" as a basis for standing, *citing Edlow International Co.* (Agent for the Government of India on Application to Export Special Nuclear Material), CLI-76-6, 3 NRC 563, 572 (1976), and because case law holds that ECO's members' interests in employment at the facility cannot support standing because those interests were not germane to ECO's organizational purpose, *citing Hunt v. Washington Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977).

Next, the Staff and SMUD argue that the Licensing Board correctly applied the Commission's *Shoreham* rulings when the Board held that any environmental

review of the proposed early decommissioning of Rancho Seco need not review alternatives to the decision not to operate the facility; instead whatever environmental filings were required need only address alternative methods of decommissioning. Therefore, they argue that the Licensing Board correctly dismissed the first set of proposed contentions because they were solely directed toward obtaining an EIS analyzing "resumed operation" or "mothballing" as an alternative to decommissioning. In this regard, they argue that the Commission has already held that the GEIS will apply to nuclear plants that are prematurely decommissioned. Additionally, the Staff argues that ECO has failed to brief *why* its contentions were improperly denied. *See* NRC Staff Response at 24 n.10.

Finally, the Staff and SMUD argue that ECO was not prejudiced by its lack of opportunity to respond to two pleadings that were not served upon it; that the Licensing Board correctly struck the "Further Amendment" as an improper "rebuttal" argument; and that the Licensing Board correctly rejected the second set of proposed contentions because LBP-91-17 expressly provided that there would be no filings made after the ASLB's established deadline without specific leave of the Board.

III. ANALYSIS

A. Sufficiency of ECO's Brief

First, we must address the Staff's and SMUD's ("respondents") arguments that ECO's brief is in violation of our Rules of Practice. *See* Staff Brief at 20 & n.9; SMUD Brief at 13 & n.17. Respondents argue that ECO's Brief is in violation of 10 C.F.R. § 2.762(d) which requires that all appellate briefs "in excess of ten (10) pages must contain a table of contents, with page references, and a table of cases (alphabetically arranged), statutes, regulations, and other authorities cited, with references to the pages of the brief where they are cited." 10 C.F.R. § 2.762(d). ECO failed to include these tables in its brief.

However, section 2.762 — on its face — applies only to appeals from "initial decisions," i.e., decisions of a licensing board that dispose of a major portion of, or conclude, the proceeding before that board, such as a decision to grant, suspend, revoke, or amend a license. All the cases cited by the respondents in their briefs, *supra*, were decisions of that nature. Instead, this matter is before the Commission under 10 C.F.R. § 2.714a, which allows an immediate appeal from decisions granting and/or denying in whole a petition for leave to intervene. This section contains a completely different provision for appeal in that while section 2.762 provides that the brief in support of the notice of appeal may be filed within 30 days of the notice of appeal (10 C.F.R. § 2.762(b)), section 2.714a requires the appellant's brief to be submitted *with* the notice of appeal,

within 10 days of the Licensing Board's decision. When we adopted section 2.714a, we contemplated less stringent requirements for briefs filed under section 2.714a because these briefs must be filed in a much shorter time frame and — presumably — will address much narrower issues than an appeal from the final decision of an entire licensing process.[1] Therefore, while there is a clear benefit to the reviewing body in having the assistance of the items specified in section 2.762 — with a corresponding benefit to the writer of the brief — and while organizing the pleading in this fashion also provides a discipline in assisting brief writers to organize their thoughts and ideas clearly, we do not find that it is required under our rules.[2]

B. Petitioner's Standing

1. Introduction

In its appeal, Petitioner argues that it has two alternative bases for standing to pursue this matter. First, Petitioner argues that it has standing based upon its members' loss of employment at Rancho Seco. Second, Petitioner argues that it has standing as an organization because the agency's failure to issue an EIS has deprived it of the opportunity to participate in the EIS process. We find that the Licensing Board correctly ruled that neither alleged injury provided Petitioner with standing in this matter.[3]

---

[1] Moreover, section 2.762 was omitted in adopting our new appellate procedures, *see* 56 Fed. Reg. 29,403, 29,408 (June 27, 1991), although it was retained under the interim appellate rules. *See* 55 Fed. Reg. 42,944 (Oct. 24, 1990). Meanwhile, section 2.714a was retained essentially unchanged. *See* 56 Fed. Reg. at 29,408. Thus, we have always envisioned section 2.714a as standing alone.

[2] Our prior case law requires that all briefs — including those filed under section 2.714a — shall contain a "statement of the case" or "statement of facts" including "an exposition of that portion of the procedural history of the case related to the issue or issues presented by the appeal." *Public Service Co. of Oklahoma* (Black Fox Station, Units 1 and 2), ALAB-388, 5 NRC 640, 641 (1977). In this case, Petitioner clearly failed to provide us with this information in its brief. However, we have determined to exercise our discretion and waive that requirement on this occasion. We remind all parties who appear before us that they "bear full responsibility for any possible misapprehension of [their] position caused by the inadequacies of [their] brief . . . ." *Wisconsin Electric Power Co.* (Point Beach Nuclear Plant, Units 1 and 2), ALAB-666, 15 NRC 277, 278 (1982).

[3] Before the Licensing Board, Petitioner also asserted that it could suffer additional injuries if: (1) SMUD took action under the POL to dismantle the plant or allow it to deteriorate and then changed its mind and decided to "resume operation" without adequately restoring the plant to its current condition; (2) SMUD took action under the POL to make "resumed operation" impossible, resulting in both a shortage of electrical power and increased environmental pollution from replacement energy sources for Petitioner's members; and (3) SMUD was allowed to decommission the facility without filing a decommissioning plan under 10 C.F.R. § 50.82. The Licensing Board found that those asserted injuries did not provide Petitioner with standing to challenge the POL. *See generally* LBP-91-17, 33 NRC at 387-90. Because Petitioner does not challenge those rulings on appeal, we do not address them here.

2. Criteria Required to Establish Standing

Section 189(a) of the Atomic Energy Act provides that the Commission shall "grant a hearing upon the request of any person whose interest may be affected by the proceeding, and shall admit such person as a party to the proceeding." 42 U.S.C. § 2239(a). Accordingly, NRC regulations provide that "[a]ny person whose interest may be affected by a proceeding and who desires to participate as a party to [the] proceeding" should file a petition to intervene setting forth that interest and the "possible effect of any order that may be entered in the proceeding on the petitioner's interest." 10 C.F.R. § 2.714(a) and (d).

"We have long held that judicial concepts of standing will be applied in determining whether a petitioner has sufficient interest in a proceeding to be entitled to intervene as a matter of right under section 189 of the Atomic Energy Act." *Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-83-25, 18 NRC 327, 332 (1983). In order to satisfy "judicial" standing, we have held that a prospective petitioner must demonstrate that it could suffer an actual "injury in fact" as a consequence of the proceeding and that this interest is within the "zone of interests" to be protected by the statute under which the petitioner seeks to intervene. *See, e.g., Metropolitan Edison Co.* (Three Mile Island Nuclear Station, Unit 1), CLI-85-2, 21 NRC 282, 316 (1985); *Portland General Electric Co.* (Pebble Springs Nuclear Power Plant, Units 1 and 2), CLI-76-27, 4 NRC 610, 613-14 (1976); *Edlow International*, CLI-76-6, *supra*, 3 NRC at 572; *see generally Lujan v. National Wildlife Federation*, ___ U.S. ___, 110 S. Ct. 3177, 3185-86 (1990).

3. Petitioner's Economic-Standing Argument

The Licensing Board correctly dismissed Petitioner's economic-standing argument based upon its members' loss of employment at Rancho Seco. Petitioner argued that SMUD had been allowed to close Rancho Seco and initiate decommissioning activities without being required to perform an environmental review, and that these actions caused its members to lose their employment. The Licensing Board held that this injury was not within the scope of interests protected by NEPA. LBP-91-17, 33 NRC at 390-91.

It is true that NEPA does protect some economic interests; however, it only protects against those injuries that result from environmental damage. For example, if the licensing action in question destroyed a woodland area, those persons who would be deprived of their livelihood in a local timber industry could assert a protected interest under NEPA. *See, e.g., Jersey Central Power and Light Co.* (Forked River Nuclear Generating Station, Unit 1), ALAB-139, 6 AEC 535 (1973) (marina operators have standing under NEPA to complain of the introduction of shipworms in the vicinity of their business, resulting from

the operation of a nuclear power plant), *Pacific Gas and Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 and 2), ALAB-223, 8 AEC 241 (1974) (commercial fisherman has standing under NEPA to complain of the discharge of cooling water that may affect his catch).

Here, however, as the Appeal Board stated on an earlier occasion, Petitioner's members' loss of employment was not "occasioned by the impact that the [agency action] would or might have upon the environment." *Tennessee Valley Authority* (Watts Bar Nuclear Plant, Units 1 and 2), ALAB-413, 5 NRC 1418, 1421 (1977), *quoting Long Island Lighting Co.* (Jamesport Nuclear Power Station, Units 1 and 2), ALAB-292, 2 NRC 631, 640 (1975) (Opinion of Mr. Rosenthal). Instead, the loss of employment results directly from SMUD's decision not to operate the facility, not from any environmental damage. Therefore, Petitioner's members' loss of employment at Rancho Seco itself does not fall within the "zone of interests" protected by NEPA and cannot support Petitioner's standing to challenge the agency's action.

4. Petitioner's Informational-Standing Argument

Petitioner asserts that it has standing to contest the proposed amendment because it will suffer an injury to its "informational interests" if it is not allowed to participate in the EIS process. This alleged injury has two aspects: first, the injury of being deprived of the right to comment on the EIS; and second, the injury of being deprived of information to disseminate because of the lack of an NRC-prepared EIS. *See* LBP-91-30, 34 NRC at 27-28. The Licensing Board found that these injuries were not sufficient to establish standing by themselves because they constituted a "general interest" in the proceeding, not a "specific injury." *Id.* at 28.

This decision was consistent with prior Commission precedents. We have already rejected the assertion of "informational interests" as grounds for standing. *Edlow International, supra.* Because that case is closely analogous to the case at bar, a brief review of that case and our holding there is in order at this time.

In *Edlow*, we reviewed two applications for licenses to export "special nuclear material" intended as fuel for the Tarapur Atomic Power Station in India. Three organizations[4] petitioned for leave to intervene and requested hearings regarding these proposed licenses. *See generally id.*, CLI-76-6, 3 NRC at 565-68. The petitioners asserted "institutional" interests based upon alleged injuries that could result to their informational and educational activities in addition to "representational" interests that derived from alleged injuries to the individual members of the organizations. *Id.* at 572.

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[4] The Natural Resources Defense Council, the Sierra Club, and the Union of Concerned Scientists. *See* 3 NRC at 565.

The organizational interests asserted by the *Edlow* petitioners were almost identical to the organizational interests asserted by ECO in this case. The *Edlow* petitioners asserted an interest in " 'disseminating information' and 'promoting' wise use of technology and resources and the development of sound energy policy." *Id.* Moreover, the *Edlow* "[p]etitioners allege[d] that a 'failure of the Commission to carry out relevant analyses of the risks posed by the pending proceedings impairs petitioners' ability to fulfill their information and educational functions . . . .' " *Id.*

The interests asserted in ECO's organizational charter appear to be no different. *See* Articles of Incorporation of Environmental Resources and Conservation Organization ("Art. Incorp."), attached to Petitioner's Reply of March 4, 1991. *See generally* LBP-91-17, 33 NRC at 382. For example, ECO seeks "[t]o provide accurate technical and financial information about energy supply and demand in California in the years to come . . . ." Art. Incorp. at 1. ECO also seeks "[t]o provide expert and objective information about safety and environmental issues concerning nuclear energy in general and the Rancho Seco Nuclear Generating Station in particular . . . ." *Id.* at 2. Finally, ECO seeks "[t]o provide factual information to specific parties or organizations . . . and to petition the [NRC] to accept and consider information this organization can provide in its deliberations . . . ." *Id.*[5]

We found that the *Edlow* petitioners had failed to demonstrate that they had standing to intervene as a matter of right and that while the *Edlow* petitioners were "interested" in the proceeding, they had failed to demonstrate an "interest" affected by the outcome of the proceeding, i.e., they had failed to demonstrate that they could be harmed by the actual grant or denial of the license itself. Thus, we were

> hard pressed to see how petitioners' desire to have the Commission carry out relevant analyses (a concern directed not to the granting or denial of a particular license, but to the process of Commission action) is an "interest [which] may be affected by the proceeding." In our view, the term "proceeding" can only be interpreted to mean the outcome on the merits of the license. This is clear from the language of the license. This is clear from the initial language of Section 189(a) which speaks of proceedings "for the granting (etc.) of any license . . . ."

[5] It is clear that Petitioner's Articles of Incorporation are a "thirteenth" hour or "after-the-fact" creation, drawn up specifically for the purpose of establishing "informational standing." ECO filed its petition to intervene and request for hearing on November 8, 1990. However, ECO's Articles of Incorporation are dated on January 10, 1991. The affidavit of Mr. Rossin, ECO's president, describes these Articles as "pending," presumably before the appropriate agency of the state of California. *See* Rossin Affidavit (April 12, 1991) attached to Petitioner's pleading of April 15, 1991.

3 NRC at 572. Accordingly, we concluded that "[p]articipation in a hearing is not an end in itself, but must be related to an issue — in this case, grant or denial of a license." *Id.* at 574.

Our analysis is the same here. ECO claims to be "interested" in the proceeding because it wishes to "disseminate information" regarding the need for future energy sources in California. However, this interest is not an "interest affected by the *proceeding*" itself, i.e., it is not an injury caused by the grant or denial of the proposed license amendment. Instead, ECO simply alleges before us that it will not be able to perform its "informational" activities unless it is allowed to "participate" in the EIS process, i.e., unless the Commission "carries out its relevant analyses," *id.* at 572. As in *Edlow*, we find that this "interest" is not sufficient to confer standing on ECO as a matter of right.

Before the Licensing Board, Petitioner relied heavily upon *Competitive Enterprise Institute v. National Highway Traffic Safety Administration*, 901 F.2d 107 (D.C. Cir. 1990), for the proposition that "[o]rganizational standing is established whenever the agency's action interferes with the organization's informational purposes to the extent that it interferes with the organization's activities." Petition at 23. *See generally* LBP-91-17, 33 NRC at 382-86, 391-92. While Petitioner does not cite that case in its brief on appeal, it does raise that argument. *See* Petitioner's Brief at 2-3. However, we not only find that the *Competitive Enterprise* decision is inapposite but also that its validity has been severely compromised by a more recent decision by that same court.

The *Competitive Enterprise* Court found that "a right to specific information under NEPA has so far been recognized for standing purposes only when the information sought relates to *environmental* interests that NEPA was designed to protect." 901 F.2d at 123 (citations omitted, emphasis in original). "We find that there is a critical difference between seeking an EIS for the purpose of disseminating information about potential environmental harm and seeking an EIS as a vehicle for obtaining and disseminating information on a nonenvironmental issue." *Id.* A subsequent decision has [illegible]ated that the "informational standing" concept implicitly endorsed by the *Competitive Enterprise* Court requires an allegation that the requested information relates to specific environmental issues with a direct impact on the petitioner. *City of Los Angeles v. NHTSA*, 912 F.2d 478, 495-98 (D.C. Cir. 1991).

However, ECO makes no such allegation in this appeal. Instead, we find only a generalized allegation that if the NRC issues a POL without preparing an EIS

> ECO['s] and its members' rights to participate in the development and consideration of the FEIS, to have access to the information made available through that EIS, and to be assured by the existence of that FEIS that the Commission has taken the required "hard look" at the proposal to a Commission would all have been denied.

Petitioner's Brief at 2-3. Moreover, the allegation is supported only by Petitioner's Articles of Incorporation, issued at the "thirteenth hour," well after the start of this proceeding, and clearly written with the *Competitive Enterprise* guidelines in mind. *See* note 5, *supra*.

This vague, generalized allegation supported only by the "after-the-fact" action is insufficient to satisfy the requirements of *Competitive Enterprise*. We read that decision to require an allegation that the organization has been denied access to information relating to a specific environmental issue with particular application to petitioner, not just that petitioner has been denied access to "environmental information" in general that has no specific impact on the petitioner. Furthermore, that "impact" or "application to the petitioner" must be based upon an established organizational purpose, not some justification drawn up after the fact to satisfy required guidelines not met in the original petition. Otherwise, as the Licensing Board noted, petitioner would have standing to intervene "with regard to any other power reactor," LBP-91-30, 34 NRC at 28, based upon any *post hoc* rationalization that could be devised by an ingenious mind. We do not think the *Competitive Enterprise* Court intended such a result. We certainly would not permit such a result with regard to intervention in our licensing proceedings.

Moreover, even if the *Competitive Enterprise* Court had intended such a result, that decision has been significantly undermined by the recent decision in *Foundation on Economic Trends v. Lyng*, 943 F.2d 79 (D.C. Cir. 1991). The *Lyng* Court reviewed the concept of "informational standing," 943 F.2d at 83-84, and concluded that "we have never sustained an organization's standing in a NEPA case *solely* on the basis of 'informational injury,' that is, damage to the organization's interest in disseminating the environmental data an impact statement could be expected to contain." 943 F.2d at 84 (emphasis added). The *Lyng* Court reached the logical conclusion that such a provision "would potentially eliminate any standing requirement in NEPA cases, save when an organization was foolish enough to allege it wanted the information for reasons having nothing to do with the environment." *Id.*

Additionally, the *Lyng* Court observed that "[i]t was not apparent" how the concept of "informational standing" was different from the concept of generalized "interest" in a problem that the Supreme Court had found insufficient for standing in *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972). Furthermore, the *Lyng* Court could find no difference between the concept of "informational standing" for an organization and "informational standing" for an individual, another concept that the Supreme Court had found insufficient to support standing. *United States v. Richardson*, 418 U.S. 166, 176-80 (1974). Finally, the *Lyng* Court found that such a concept "exists day in and day out whenever the federal agencies are *not* creating information a member of the public would

like to have." 943 F.2d at 85 (emphasis added). The *Lyng* Court found that this could allow

> a prospective plaintiff [to] bestow standing upon itself in every case merely by requesting the agency to prepare [an EIS], which in turn would prompt the agency to engage in "agency action" by failing to honor the request.

Id. at 85. In sum, we find that the *Competitive Enterprise* decision does not support Petitioner's standing to challenge the proposed Rancho Seco POL and that even if it did support such an argument, it would be of questionable value.[6]

C. Petitioner's Request for a Stay of the POL

On December 3, 1991, Petitioner filed a pleading asking that we "stay" issuance of the POL pending our resolution of this appeal. As we noted on a similar occasion, our stay procedures do not apply to a situation in which there is no outstanding order to "stay." *See Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-91-8, 33 NRC 461, 468 (1991) ("*Shoreham*, CLI-91-8"). *See* 10 C.F.R. § 2.788(e). Thus, we consider this a request for an "anticipatory" stay or a "motion to hold in abeyance." *Id.* In view of the fact that we have resolved this matter, that request is now moot.

Petitioner also requested an administrative stay to allow orderly processing of an anticipated request for a judicial stay of the POL. We have granted similar requests in similar situations. *See Shoreham*, CLI-91-8, 33 NRC at 471-72. We hereby direct the Staff to enter a two-stage administrative stay of the POL similar to that it issued in the *Shoreham* decision, *supra*. *See* 56 Fed. Reg. 28,424, 28,426 (June 20, 1991). When the Staff issues the POL, it shall stay the effectiveness of the amendment for 10 working days. If Petitioner files a petition for review and a motion for a judicial stay within that time with a United States Court of Appeals, the Staff shall extend the administrative stay for an additional 10 working days.[7]

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[6] Because we find that ECO has failed to demonstrate standing on this appeal, we do not reach the other issues raised. We note that ECO alleges that the Licensing Board improperly excluded various standing arguments by striking some of its pleadings. However, ECO has not been prevented from raising any standing arguments on this appeal.

[7] We remind the parties that "[m]ajor dismantling and other activities that constitute decommissioning under the NRC's regulations must await NRC approval of a decommissioning plan." *See Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-91-2, 33 NRC 61, 73 n.5. (1991).

Pursuant to its normal practice, the Staff should also review all of Petitioner's proposed contentions and satisfy itself with regard to any applicable and discernible safety or environmental issues contained therein prior to issuing the POL.

IV. CONCLUSION

In conclusion, we hereby find that (1) Petitioner has failed to demonstrate that it has standing to challenge the proposed POL amendment on this appeal; (2) the Staff may issue the POL when it makes the findings necessary for the issuance of the license amendment; and (3) the Staff should include a two-stage administrative stay in the POL when it is issued.

Commissioner de Planque did not participate in this matter.

It is so ORDERED.

For the Commission[8]

SAMUEL J. CHILK
Secretary of the Commission

Dated at Rockville, Maryland
this 6th day of February 1992.

[8] Commissioner Remick was not present for the affirmation of this Order; if he had been present, he would have approved it.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Ivan Selin, Chairman
Kenneth C. Rogers
James R. Curtiss
Forrest J. Remick
E. Gail de Planque

In the Matter of

Docket Nos. 50-424-OLA
50-425-OLA

GEORGIA POWER COMPANY, *et al.*
(Vogtle Electric Generating Plant,
Units 1 and 2)

February 12, 1992

The Commission considers the Petitioner's appeal of a licensing board decision dismissing its contentions and denying its petition to intervene on amendments to operating license requirements pertaining to emergency diesel generators. The Commission dismisses the appeal for the Petitioner's failure to file a brief supporting its appeal; however, certain technical issues related to operation of the diesel generators are referred to the NRC Staff for further review.

RULES OF PRACTICE: RESPONSIBILITIES OF PARTIES

Participants in NRC proceedings, whether acting *pro se* or represented by counsel, are expected to become familiar with the applicable rules of practice.

RULES OF PRACTICE: CONTENTIONS (APPEALABILITY OF DISMISSAL)

Appeals from a licensing board order having the effect of dismissing all of a prospective party's contentions and denying intervention lie under 10 C.F.R. § 2.714a.

RULES OF PRACTICE: BRIEFS

The necessity of a brief supporting an appeal has long been emphasized in the NRC's appellate practice; mere recitation of a party's prior position in the proceeding and its general dissatisfaction with the outcome of the proceeding is no substitute for a brief that identifies and explains the errors of the licensing board in its order below.

RULES OF PRACTICE: LICENSING BOARD REFERRAL OF ISSUES TO STAFF

If a licensing board believes from its involvement in a proceeding that serious safety issues remain to be addressed, in circumstances in which the remaining intervenor has been dismissed, the board may refer any outstanding concerns to the NRC Staff for appropriate action.

NUCLEAR REGULATORY COMMISSION: HEALTH AND SAFETY RESPONSIBILITY

If an adjudicatory proceeding is terminated, the Commission may refer remaining safety issues or potential concern to the NRC Staff for review pursuant to the Commission's general supervisory authority and responsibility for safety matters.

MEMORANDUM AND ORDER

I. INTRODUCTION

On May 25, 1991, Georgians Against Nuclear Energy (GANE) filed an appeal from the Atomic Safety and Licensing Board's Memorandum and Order, LBP-91-21, 33 NRC 419 (1991), that dismissed GANE's proffered contentions and denied its petition for leave to intervene in this proceeding on a proposed amendment to each of the operating licenses for the Vogtle Electric Generating

Plant. Because GANE was the only party seeking a hearing on the amendment, the Board's order also had the effect of terminating the proceeding. Although GANE's May 25th filing satisfied the requirement to file a notice of appeal, GANE has not filed a brief in support of its position on appeal. Both the NRC Staff and Georgia Power Company, the Licensee, have noted this deficiency and ask that we dismiss the appeal.

The Commission has jurisdiction over the appeal in accordance with the interim appellate procedures in effect at the time of the Licensing Board's decision. *See* 10 C.F.R. § 2.785, note (b) (1991). We agree that GANE should be dismissed for failing to file a brief in support of its appeal; however, we are directing the NRC Staff to provide its evaluation of certain matters related to the operation of the diesel generators and their associated instrumentation.

II. BACKGROUND

The proceeding concerns an amendment to the technical specifications for each of the Vogtle units to permit the Licensee to bypass, in emergency start conditions, the high jacket-water temperature trip of the emergency diesel generators. The intended purpose of the change is to minimize the potential for spurious trips of the diesel generators during emergency starts. The Staff and the Licensee believe that the change will enhance safety, particularly in light of a serious loss-of-power event that occurred at Vogtle Unit 1 on March 20, 1990. During that event, the Licensee had difficulty in establishing sustained operation of one of its emergency diesel generators, and investigation of the event indicated that a trip of the diesel generator was likely caused by a spurious trip signal from the high jacket-water temperature sensors.[1]

A notice of the proposed change and of opportunity for hearing was published in the *Federal Register* on June 22, 1990, and the Staff approved the change as an amendment involving "no significant hazards consideration" on July 10, 1990.[2] GANE filed a petition to intervene on July 23, which was referred to the Licensing Board for consideration. Although both the Staff and the Licensee opposed the petition, the Board declined to reject the petition on its face but scheduled a prehearing conference to further consider the petition and any supplement thereto. LBP-90-29, 32 NRC 89 (1990).

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[1] *See* NUREG-1410, "Loss of Vital AC Power and the Residual Heat Removal System During Mid-Loop Operations at Vogtle Unit 1 on March 20, 1990," at 3-21, 6-12 (June 1990). This document contains the report of the NRC's special Incident Investigation Team.

[2] 55 Fed. Reg. 25,756 (June 22, 1990) and 55 Fed. Reg. 32,337 (Aug. 8, 1990). Even prior to issuing the formal amendment, the NRC Staff gave tacit approval to the change under a "Temporary Waiver of Compliance" from the technical specifications until the amendment application could be processed. *See* Letter from G. Lainas, Office of Nuclear Reactor Regulation, to W.G. Hairston III, Georgia Power Co. (May 25, 1990).

Prior to the prehearing conference, GANE filed a set of eight proposed contentions. Both the Staff and the Licensee opposed GANE's contentions and indicated their belief, *inter alia*, that GANE had failed to provide adequate bases for its contentions. The Board summarily rejected two of the contentions for lack of relevance to the proceeding.[3] Despite the structural flaws in the remaining contentions, the Board believed that a number of safety matters derived from the contentions might be appropriate for hearing, but it deferred ruling on the contentions, largely on the strength of the Licensee's offer to provide the Board and parties additional information in an attempt to resolve potential issues informally.

The Licensee thereafter submitted a supplemental statement, which described its response to the loss-of-power incident and provided additional analysis supporting the proposed changes to the technical specifications. After considering the Staff's and GANE's initial responses to the Licensee's filing and an additional round of comments from the parties, the Board eventually dismissed GANE's remaining contentions, primarily for their lack of sufficient specificity to warrant admission, and indicated its satisfaction that any outstanding concerns over the amendment had been answered. LBP-91-21, *supra*. GANE asks us to "put aside" the Licensing Board's decision.

III. ANALYSIS

As noted at the outset of this decision, both the Licensee and the NRC Staff urge us to dismiss GANE's appeal because GANE has not filed a supporting brief. We agree that GANE has not satisfied the briefing requirement to perfect its appeal, despite GANE's urging that we consider its original May 25th filing as its brief.

In its August 8th "Acknowledgement of NRC Staff and Georgia Power Comments on GANE's Appeal," GANE asserts that it was uncertain of the "conventions" involved in an appeal and had "no prior knowledge that a brief would be expected." GANE's claimed unfamiliarity with the procedural rules does not excuse its failure to file a brief. We expect all participants in NRC proceedings, whether acting *pro se* or represented by counsel, to become familiar with the applicable rules of practice. *See Duke Power Co.* (Perkins Nuclear Station, Units 1, 2, and 3), ALAB-615, 12 NRC 350, 352 (1980). The necessity of a brief in our appellate practice has long been emphasized. *See Florida Power and Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-91-5, 33 NRC 238, 241 (1991); *Mississippi Power and Light Co.* (Grand Gulf Nuclear Station, Units 1 and 2), ALAB-140, 6 AEC 575 (1973).

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[3] Prehearing Conference Order (Filing Dates for Further Submissions) (Oct. 2, 1990, unpublished).

In this case, the Licensing Board provided specific instructions for taking an appeal. Although the Commission believes that the Licensing Board erroneously indicated that an appeal would be governed by the provisions of 10 C.F.R. §§ 2.760 and 2.762 then in effect (rather than 10 C.F.R. § 2.714a), the error was of no consequence to GANE's fundamental obligation to file a brief.[4] At most, the Board's error allowed GANE a more generous period within which to file a brief. While GANE could be excused for relying on the instructions contained in the Licensing Board's order, GANE did not heed those instructions and file a brief.

Even if we were to allow, as GANE asks, its May 25th filing to stand as GANE's "brief," that document simply does not come to grips with the Licensing Board's determination that GANE failed to meet the requirements of 10 C.F.R. § 2.714 applicable to its proffered contentions.[5] Mere recitation of GANE's prior position in the proceeding and its general dissatisfaction with the outcome of the proceeding is no substitute for a brief that identifies and explains the errors of the Licensing Board in the order below. *See Cleveland Electric Illuminating Co.* (Perry Nuclear Power Plant, Units 1 and 2), ALAB-841, 24 NRC 64, 69 (1986). We therefore dismiss the appeal in view of GANE's failure to file a brief.

Although we dismiss GANE's appeal in the adjudicatory proceeding, we are asking the Staff to give further consideration to certain matters that appear related, at least in part, to GANE's expressed concerns with operation of the diesel generators at the Vogtle plant. In this regard, GANE appears to concede that the Licensing Board, within the limits of its jurisdiction in this proceeding, ruled appropriately with respect to GANE's contentions and that, even from GANE's perspective, the change to permit bypass of the high jacket-water

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[4] Because the Board's order had the effect of dismissing *all* of GANE's contentions and denying intervention, we believe that section 2.714a governed appeals from LBP-91-21. *See Houston Lighting & Power Co.* (Allens Creek Nuclear Generating Station, Unit 1), ALAB-585, 11 NRC 469 (1980); *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), LBP-91-39, 34 NRC 275, 284 (1991). The primary significance of the distinction between section 2.714a and then applicable section 2.762 concerns the timing of the supporting brief. The brief must be filed concurrently with an appeal under section 2.714a, but is not required until 30 days after the notice of appeal if section 2.762 governs. Under the Commission's revised appellate procedures, 56 Fed. Reg. 29,403 (June 27, 1991), the distinction in procedure may have greater significance, because most appeals, except those that lie under section 2.714a, are subject to the new discretionary review procedures.

[5] Generally, the Licensing Board found that GANE had failed to refer to the legal authority under which it believed the application should be judged, to provide a brief explanation of the bases for the contentions, to set forth a concise statement of the facts, expert opinion, or sources and documents on which it intended to rely, or to provide the supporting reasons for its dispute with the Licensee. LBP-91-21, 33 NRC at 422-24; *see* 10 C.F.R. § 2.714(b)(2). As the Board notes, GANE's contentions could have been summarily dismissed. We believe that the Licensee deserves great credit here for attempting to settle or resolve GANE's concerns informally through its proffer of additional information. We do not view, however, the informal exchange of comments that followed as having had any substantial bearing on the admissibility of GANE's contentions. In the absence of the litigants' agreement to pursue informal resolution of the issues, the Board would have been bound to rule on the contentions and, having dismissed them, to refer any outstanding concerns it might have had to the Staff for appropriate action. *See Florida Power and Light Co.* (Turkey Point Nuclear Generating Plant, Units 3 and 4), CLI-91-13, 34 NRC 185, 188 (1991).

temperature trip in emergency conditions is preferable to *prior* practice.[6] Thus, we believe that GANE's "appeal" can be fairly understood to seek relief from the Commission in its broader safety oversight role, rather than to challenge the Licensing Board's disposition of GANE's contentions in the narrow amendment proceeding. Where, for any number of reasons, an adjudicatory proceeding is terminated, we may still refer safety matters of potential concern to the Staff for review. *See Turkey Point, supra* note 5, CLI-91-13, 34 NRC at 188.

Our specific direction to the Staff which describes the issues of interest to the Commission will be contained in a separate Staff Requirements Memorandum to be issued to the Staff in the near future.

IV. CONCLUSION

For the reasons stated in this decision, GANE's appeal from the Licensing Board's Memorandum and Order, LBP-91-21, is *dismissed* and the proceeding is *terminated*. The Commission is referring certain other matters to the NRC Staff for evaluation pursuant to the Commission's general supervisory authority and responsibility over safety matters.

Commissioner de Planque did not participate in this matter.

IT IS SO ORDERED.

For the Commission[7]

SAMUEL J. CHILK
Secretary of the Commission

Dated at Rockville, Maryland,
this 12th day of February 1992.

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[6] In its May 25th filing GANE states, "We understand the Board's limitations under . . . 10 C.F.R. 2.714 to take our case to a conclusion that would give us relief." GANE states in its August 8th filing, "Acknowledgement of NRC Staff and Georgia Power Comments on GANE's Appeal" at 1, that "the safety switch is not performing correctly and would pose a danger if left in place." The latter statement essentially recognizes that, as the NRC Staff and Licensee have concluded, bypass of the trip under certain circumstances is a preferable course of action.

[7] Commissioner Remick was not present for the affirmation of this Order; if he had been present he would have approved it.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Ivan Selin, Chairman
Kenneth C. Rogers
James R. Curtiss
Forrest J. Remick
E. Gail de Planque

In the Matter of

Docket No. 50-322-OLA-3
(License Transfer)

LONG ISLAND LIGHTING COMPANY
(Shoreham Nuclear Power Station,
Unit 1)

February 26, 1992

The Commission concludes that the proposed license transfer is not an "amendment" as that term is normally construed but a "license transfer," which is a separate and distinct action under the Atomic Energy Act. However, the AEA does not require a pre-effectiveness or "prior" hearing for a license transfer. In addition, the Commission determines that a pre-effectiveness discretionary hearing is not appropriate under the facts of this case. Finally, the Commission denies Petitioners' requests (1) to hold this action in abeyance pending resolution of the question of LIPA's existence under New York state law and (2) for an administrative or "housekeeping" stay pending judicial challenge. Therefore, when the Staff has conditioned the transfer as the Commission directs herein to assure that the results of any post-effectiveness hearing will not be prejudiced, the Staff may approve the immediately effective transfer of the Shoreham license from LILCO to LIPA.

AEA: INTERPRETATION

A "transfer of license" cannot be accomplished solely by an amendment to an operating reactor license.

AEA: HEARING RIGHT

A "transfer of control" invokes only the hearing rights afforded by the first sentence of section 189a(1). The AEA does not require the offer of a prior hearing on an application to transfer control of a license before the transfer is made effective.

NRC: DISCRETIONARY HEARING

Given the limited scope of activities that LIPA can undertake until a ruling on the decommissioning plan, its inability to operate the plant from both a legal and a practical standpoint, the reduced hazard from a plant that operated only at low power for a short time, and the evident availability of qualified personnel to maintain the plant in the interim, the Commission finds that the transfer does not raise any public health and safety issues that warrant a prior hearing as a matter of discretion.

AEA: POST-EFFECTIVENESS HEARING

When an action is taken subject to a post-effectiveness hearing, the action must be conditioned on reverting to its previous condition if the hearing does not ratify the action taken. In this case, the Staff should condition the transfer of the POL (1) on the license's reverting to LILCO if LIPA ceases to exist or otherwise is found to be unqualified to hold the license and (2) on LILCO's providing certification to the NRC Staff that it will retain and maintain adequate capability and qualifications to take over the license promptly in the event that either of these situations occurs.

OPERATING LICENSES: AMENDMENTS

Once a transfer is finalized through the post-effectiveness hearing process, there remains the need — for administrative purposes — to have the license changed to reflect the name of the new licensee. Such as amendment, which presumes an effective transfer, presents no safety questions and clearly involves no significant hazards considerations.

RULES OF PRACTICE: STAY OF AGENCY ACTION (CRITERIA)

Petitioners request that this action be held in abeyance until the resolution of the question of LIPA's existence under New York state law. Given the reversion of the license back to LILCO mandated here under those circumstances, and the fact that Petitioners did not immediately file such an action in state court, so

there is no indication from the state court that there could be some merit in petitioner's argument, the Commission denies Petitioners' request.

RULES OF PRACTICE: IMMEDIATE EFFECTIVENESS OF DECISIONS (STAY PENDING APPEAL)

Petitioners request that the Commission stay the transfer's effectiveness pending their expected challenge in the Court of Appeals. The D.C. Circuit has observed "that tribunals may properly stay their own orders when they have ruled on admittedly difficult legal questions . . . ." *Washington Metropolitan Area Transit Commission* v. *Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977). The Commission does not perceive a difficult legal question here, particularly in view of the Commission's prior interpretation and the deference customarily accorded an agency's interpretation of its organic statute.

RULES OF PRACTICE: IMMEDIATE EFFECTIVENESS OF DECISIONS (STAY PENDING APPEAL)

RULES OF PRACTICE: STAY OF AGENCY ACTION (IRREPARABLE HARM)

Petitioners fail to convince the Commission that they will suffer any irreparable injury should it deny the stay. LIPA cannot do anything under this license that LILCO could not do. Both the School District and LILCO may have serious economic interests at risk. The courts have held consistently that mere economic loss does not constitute irreparable injury. It is the Commission's intent to avoid making decisions based solely on economic reasons. Thus, the balance of equities in this matter does not tilt in Petitioners' favor, and the Commission denies Petitioners' request for a stay pending appeal.

MEMORANDUM AND ORDER

I. INTRODUCTION

This matter is before the Commission on two different requests. The NRC Staff has proposed to issue an immediately effective amendment to the Shoreham operating license, and the Shoreham–Wading River Central School District ("School District") and the Scientists and Engineers for Secure Energy ("SE2") (collectively "Petitioners") have asked the Commission to "stay" issuance of

the proposed amendment. The proposed amendment would transfer ownership of Shoreham from the Long Island Lighting Company ("LILCO") to the Long Island Power Authority ("LIPA").

This matter presents a true anomaly: an unprecedented situation in which one utility is transferring the license — amended to "possession-only" status — for an almost totally unused nuclear reactor, which has been defueled, to another entity that intends to decommission and dismantle it. Shoreham is not a fully operating nuclear reactor with a full radioactive inventory, and LIPA is not authorized to operate Shoreham, either by its creating charter under state law or by the license to be transferred. Thus, the action before us is not one in which a nuclear reactor is being transferred to a utility that intends to, and would be authorized to, operate the facility.

After due consideration, we have concluded that the proposed license transfer is not an "amendment" as that term is normally construed but — as the Petitioners themselves argue — a "license transfer," which is a separate and distinct action under the Atomic Energy Act ("AEA"). However, the AEA does not require a pre-effectiveness or "prior" hearing for a license transfer. In addition, we have determined that a pre-effectiveness discretionary hearing is not appropriate under the facts of this case. Finally, we have denied Petitioners' requests (1) to hold this action in abeyance pending resolution of the question of LIPA's existence under New York state law and (2) for an administrative or "housekeeping" stay pending judicial challenge. Therefore, when the Staff has conditioned the transfer as we direct herein to assure that the results of any post-effectiveness hearing will not be prejudiced, the Staff may approve the immediately effective transfer of the Shoreham license from LILCO to LIPA.

II. FACTUAL BACKGROUND[1]

On June 28, 1990, LILCO and LIPA filed a joint application to transfer the Shoreham license from LILCO to LIPA. The NRC Staff noticed receipt of the application and issued a notice of opportunity for a hearing and a proposed finding of "no significant hazards consideration" ("NSHC"). *See* 56 Fed. Reg. 11,781 (Mar. 20, 1991). Petitioners responded with comments opposing the proposed NSHC finding and petitioned for leave to intervene and requested a hearing on the proposed amendment. Administrative proceedings are now ongoing before the NRC's Atomic Safety and Licensing Board ("Licensing Board"),

[1] We have discussed at length on numerous occasions the factual background surrounding LILCO's decision not to operate Shoreham. *See, e.g.*, CLI-90-8, 32 NRC 201 (1990); CLI-91-2, 33 NRC 61 (1991); CLI-91-8, 33 NRC 461 (1991). Therefore, we will not repeat that background here.

which directed Petitioners to file proposed contentions. These contentions are now being reviewed by the Licensing Board.

On December 17, 1991, Petitioners filed a pleading with the Commission asking that it "stay" issuance of the proposed amendment pending completion of the administrative proceedings before the Licensing Board. On December 19, 1991, Petitioners filed an additional pleading "suggesting" that LIPA would cease to exist under the "sunset" provisions of New York law. By order of December 23, 1991, we directed the Staff, LILCO, and LIPA to respond to both pleadings, and they have filed responses.[2]

The Staff has also filed a paper recommending that it be allowed to issue the proposed amendment on an "immediately effective" basis under the Commission's Sholly provisions, a copy of which has been served on Petitioners. *See* SECY-92-041 (Feb. 6, 1992). Petitioners have responded to the Staff's paper and LIPA has filed a reply to Petitioners' comments. We accept both papers for filing. We have also accepted a letter submitted by Petitioners, dated January 22, 1992; two letters submitted jointly by LILCO and LIPA on January 31, 1992, and February 14, 1992; a pleading by Petitioners, dated February 24, 1992; and another pleading by Petitioners on February 26, 1992, less than 1 hour before issuance of this Order.

III. ARGUMENTS OF PARTIES

A. Petitioners' Arguments

Petitioners raise several arguments in support of their stay request. First, Petitioners argue that the Staff cannot apply the "Sholly" or "immediately effective" procedures to the proposed license transfer amendment. Petitioners argue that Congress' authorization to the Commission to issue immediately effective amendments, 42 U.S.C. § 2239(a)(2)(A), applies only to amendments to "operating" licenses and that the current Shoreham license is not an operating license because the Commission has amended it to a "possession-only" license ("POL"). *See* Petitioners' Motion ("Pet. Mtn.") at 3-4. In addition, Petitioners argue that the Atomic Energy Act distinguishes between amendments to operating licenses and requests to transfer control of a license. *See* 42 U.S.C. § 2239(a)(1). Therefore, argue Petitioners, because the Sholly provisions only apply to operating license amendments and because the transfer of control of a plant is separate from a license amendment, the Staff cannot issue the proposed amendment on an immediately effective basis. Pet. Mtn. at 4-6.

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[2] LIPA has also submitted a pleading containing supplemental authority on this question, which we have accepted for filing.

Second, Petitioners present two alternative arguments based upon LIPA's financial condition. Petitioners allege that LIPA is bankrupt and does not have the necessary management competency to perform the decommissioning of Shoreham. Thus, Petitioners argue that LIPA is neither financially nor technically qualified to hold the Shoreham license. *Id.* at 6-7. In the alternative, Petitioners filed a separate pleading entitled "Suggestion of Mootness" in which they allege that LIPA will cease to exist under the "sunset" provisions of New York State law if they have no outstanding liabilities. While Petitioners concede that LIPA has outstanding liabilities, they argue that the statute could be interpreted to require "no net liabilities." *See* Suggestion of Mootness at 3-7.

Third, Petitioners point out that the Staff's proposal to issue the transfer on an immediately effective basis is based upon the fact that only a POL is being transferred and that the issuance of the POL is now before a federal Court of Appeals. Petitioners argue that if that court reverses the issuance of that amendment, the POL would revert to a full-power license, leaving LIPA in possession of an operating license for a plant that it would not be qualified to operate and thereby in a situation outside the Staff's proposed NSHC determination. Pet. Mtn. at 7-8. Finally, Petitioners again argue that the proposed license transfer is a part of the proposed decommissioning of Shoreham and that the Commission cannot approve the proposed transfer without an environmental review of the decommissioning of Shoreham, including the alternative of "resumed operation."

B. LIPA's Response[3]

In its response, LIPA argues as a threshold matter that Petitioners' filing is both untimely and procedurally defective. Briefly, LIPA argues that the Stay Motion does not comply with the requirements for a stay motion under 10 C.F.R. § 2.788 of the Commission's regulations and, in any event, is an unauthorized comment on the proposed NSHC finding. LIPA also argues that the motion constitutes an unauthorized supplement to Petitioners' original petition because it raises new information and allegations not previously raised. *See* LIPA Response ("LIPA Resp.") at 2-3. LIPA also argues that Petitioners are motivated by philosophical and monetary concerns, not public health and safety concerns, implying that the Commission should reject their filings for this reason alone. *See id.* at 3-4.

Turning to substantive arguments, LIPA argues that it has the requisite "financial" and "managerial" integrity to become an NRC licensee, that LIPA is not bankrupt, and that, in any event, LILCO will supply all of LIPA's Shoreham-

[3] LILCO has not filed a response on its own; instead, it has filed a short pleading adopting LIPA's filing.

related expenses. *See id.* at 5-6, *citing* LIPA's Response to Petitioners' Original Petition before the Licensing Board. In addition, LIPA argues that under Commission precedent the mere pendency of a challenge to the POL cannot bar transfer of the POL to LIPA, and that even if the Court of Appeals were to vacate the POL, LIPA is statutorily barred under New York state law from operating Shoreham. *See* LIPA Resp. at 7-8.

Next, LIPA argues that under prior NRC Staff practice, transfer of control of a facility can be accomplished by an immediately effective license amendment following an NSHC finding. *See id.* at 9, *citing* LIPA, LILCO, and NRC Staff Responses to Petitioners' Original Petition before the Licensing Board. Essentially, LIPA, LILCO, and the Staff ("Respondents") argued before the Licensing Board that in the past the Staff has issued proposed NSHC findings and immediately effective amendments to effectuate changes in ownership shares. Respondents argued that this practice established a valid Commission precedent that should be followed in this case, although apparently there has never been a challenge to this practice and the Staff itself conceded "the facial validity of Petitioners[']j arguments." *See* NRC Staff Response to Original Petition (May 17, 1991) at 38. Furthermore, LIPA argues that the Sholly procedures apply to any license issued under 10 C.F.R. § 50.52 because NRC regulations do not specifically refer to a POL; instead, the term "POL" is simply an NRC term referring to a specifically amended Part 50 license. *See* LIPA Resp. at 9-12.

Finally, LIPA argues that Petitioners have misinterpreted the applicable provisions of the New York "sunset law" which they allege may cause LIPA to cease to exist. First, LIPA argues that the law was intended to terminate agencies that were inactive, not ongoing agencies that were actively performing their duties. *See id.* at 11-12, 13-16. Second, LIPA argues that its termination would conflict with provisions of the LIPA Act and that the LIPA Act would take priority. *See id.* at 12, 16-19.

C. NRC Staff Response

First, the NRC Staff argues that no "special circumstances" exist that would justify the Commission's delaying issuance of the license transfer. Initially, the Staff argues that Commission precedent holds that pending judicial challenges do not warrant staying Commission proceedings. *See* Staff Response ("Staff Resp.") at 3-4, *citing, e.g., Consumers Power Co.* (Midland Plant, Units 1 and 2), 4 NRC 474, 475 n.1 (1976). Additionally, the Staff argues that the proposed amendment will only transfer the license as already amended, i.e., a POL. Furthermore, even if issuance of the POL is vacated by the Court of Appeals, the Staff argues that Shoreham is currently defueled, LIPA is contractually prohibited from operating the reactor, and the reactor cannot be restarted without

NRC approval. Accordingly, the Staff argues that any possible court decision vacating the POL would not affect public health and safety and should not delay the proposed transfer. *See* Staff Resp. at 4-5. Moreover, the Staff argues that Petitioners have failed to demonstrate that LIPA is not qualified to hold the Shoreham license. *See id.* at 5-6.

Second, the Staff argues that because the Atomic Energy Act does not specifically preclude use of a license amendment to transfer a license, it should be allowed to use immediately effective provisions of 10 C.F.R. § 50.91 to accomplish this task. *See* Staff Resp. at 6-7. The Staff then lists several other amendments that it argues are similar to this proposed amendment and have been issued under the Commission's Sholly provisions in recent years, and it argues that the Commission has acknowledged this practice. *See id.* at 7-8. Third, the Staff argues that not only have Petitioners failed to address the traditional stay criteria contained in 10 C.F.R. § 2.788, but that they cannot satisfy them. *See* Staff Resp. at 8-12. Finally, the Staff supports LIPA's arguments that Petitioners have misinterpreted the "sunset" provisions of New York law. *See id.* at 12-14.

IV. ANALYSIS

A. The Atomic Energy Act Does Not Require a Hearing Before Transfer of a License

Petitioners argue that the transfer of a license is a different action from a license amendment under the Atomic Energy Act ("AEA"). Section 184 of the AEA provides that

> [n]o license granted hereunder . . . shall be transferred, assigned or in any manner disposed of, either voluntarily or involuntarily, directly or indirectly, through transfer of control of any license to any person, unless the Commission shall, after securing full information, find that the transfer is in accordance with the provisions of this Act, and shall give its consent in writing.

42 U.S.C. § 2234. Section 189a(1) of the AEA provides that

> [i]n any proceeding under this Act, for the granting, suspending, revoking, or amending of any license or construction permit, or any application to transfer control, . . . the Commission shall grant a hearing upon the request of any person whose interest may be affected by the proceeding and shall admit any such person as a party to such proceeding.

42 U.S.C. § 2239(a)(1). However, this language does not indicate whether this hearing is to come before the action taken or after the action taken (i.e., a pre-effectiveness or post-effectiveness hearing).

The requirements for a pre-effectiveness or "prior" hearing are found in the second and third sentences of section 189a(1). There, the AEA requires the Commission to hold a pre-effectiveness or "prior" hearing on certain applications for a construction permit (second sentence),[4] 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).[5]

Where applications for actions that 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. For example, the Commission generally does not offer pre-effectiveness notice and hearings in actions regarding materials licenses. *See* 10 C.F.R. Part 2, Subpart L. This interpretation is longstanding, and supported by the legislative history of the 1957 amendments to the AEA which added the second sentence to section 189. *See Joint Committee on Atomic Energy Staff Report* "A Study of AEC Procedures and Organization in the Licensing of Reactor Facilities" at 8 (1957). In this case, Petitioners argue that the proposed action constitutes a "transfer of license," not an amendment to an operating reactor license. We agree. However, this agreement does not achieve Petitioners' desired result of a hearing prior to the transfer. If this action is a "transfer" rather than an "amendment" to an operating license, it is not one of the four actions for which the Commission is required to offer a pre-effectiveness hearing. Instead, a "transfer of control" invokes only the hearing rights afforded by the first sentence of section 189a(1). Thus, by their own arguments, Petitioners have effectively taken themselves outside the scope of the AEA's requirements for a pre-effectiveness hearing. Quite simply, the AEA does not require the offer of a prior hearing on an application to transfer control of a license before the transfer is made effective.[6]

B. In These Circumstances, a Discretionary Hearing Is Not Required

While we have concluded above that the Atomic Energy Act does not *require* a pre-effectiveness hearing before granting a license transfer, we must also consider whether we should direct that a hearing be held as a matter of discretion. Under section 161c of the Atomic Energy Act,

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[4] Added by Pub. L. No. 85-256, 71 Stat. 576, § 7 (1957).

[5] Added by Pub. L. No. 87-615, 76 Stat. 409, § 2 (1962).

[6] In view of this finding, we need not reach the arguments presented by the Staff and LILCO/LIPA that the license may be transferred by an immediately effective license amendment that presents no significant hazards considerations. However, once the transfer is finalized through the post-effectiveness hearing process, there remains the need — for administrative purposes — to have the license changed to reflect the name of the new licensee. Such an amendment, which presumes an effective transfer, presents no safety questions and clearly involves no significant hazards considerations.

> the Commission is authorized to . . . hold such hearings as the Commission may deem necessary and proper to assist it in exercising any authority provided in this Act . . . .

42 U.S.C. § 2201(c). We would direct the holding of a pre-effectiveness hearing regarding a proposed transfer if one were necessary or desirable because potentially significant public health and safety issues were raised.

However, such a case is not presented here. First, Shoreham was operated only during low-power testing; as a result, the radioactive inventory in the Shoreham reactor and spent fuel pool is equal to that generated by approximately 2 days of full-power operation. Thus, the public health and safety risks presented here are much reduced compared to those of a plant that has been fully operational. Furthermore, LILCO appears to have taken actions that may have effectively foreclosed operation of Shoreham without substantial reconstruction activities by any future owner.

Second, LIPA is statutorily prevented by New York state law from operating Shoreham as a nuclear plant. Third, the license that is being transferred is subject to two conditions. (1) the license has been amended to allow "possession only" of the facility; and (2) the license is subject to a confirmatory order preventing LILCO from placing fuel into the Shoreham reactor core without NRC permission. By accepting the transfer of the Shoreham license, LIPA accepts it subject to those conditions. Thus, even if LIPA wished to operate the facility, as it cannot do under New York law, and even if it could physically operate the facility, which it apparently cannot do at this time because of actions taken by LILCO, it cannot legally operate the facility for two separate reasons without NRC prior approval, which would only be given after NRC review and, in the case of the POL, a prior opportunity for interested members of the public to participate.

Fourth, and perhaps more important for Petitioners' apparent goal of preventing the dismantling of Shoreham, LIPA cannot take any actions that would foreclose any decommissioning options for Shoreham until the NRC approves a decommissioning plan. Under our regulations, LILCO cannot at this time take any actions that would foreclose a decommissioning alternative. *Long Island Lighting Co.* (Shoreham Nuclear Power Station, Unit 1), CLI-91-2, 33 NRC 61, 73 n.5 (1991). As we noted above, LIPA succeeds only to the license that LILCO holds. Clearly, LIPA cannot take any action under the transferred license that LILCO could not have taken. Thus, LIPA may not take any actions that would foreclose a decommissioning alternative until approval of a decommissioning plan. Consideration of a proposed decommissioning plan has been noticed in the *Federal Register*, *see* 56 Fed. Reg. 66,459 (Dec. 23, 1991), and Petitioners will have an opportunity to challenge the proposed plan if they can demonstrate that they meet the normal prerequisites for intervention under our Rules of Practice.

Fifth, we have reviewed the Staff's safety evaluation and we are convinced that the transfer presents no public health and safety issues that need to be addressed in a hearing prior to the administrative proceeding. As we noted above, the spent fuel is stored in the spent fuel pool and cannot be returned to the reactor without NRC permission. Moreover, the total radioactive contamination is equivalent to that generated by 2 days of full-power operation. Finally, the Staff points out that in the interim LIPA has retained a number of LILCO personnel and hired a number of qualified personnel from other utilities. Given the limited scope of activities that LIPA can undertake until a ruling on the decommissioning plan, its inability to operate the plant from both a legal and practical standpoint, the reduced hazard from a plant that was operated only at low power for a short time, and the evident availability of qualified personnel to maintain the plant in the interim, we find that the transfer does not raise any public health and safety issues that warrant a prior hearing.

In summary, we find that the transfer presents no public health and safety issues requiring that we hold a prior hearing as a matter of discretion.

C. Issuance of the Transfer

We have found that the AEA does not require a prior hearing for a transfer of control. We have also found that a discretionary hearing is not required in this case. However, there are three issues that we believe need to be addressed before issuance of the license transfer, two of which require Staff action. First, Petitioners correctly point out that the license transferred is the modified "possession-only" license ("POL") and that the Staff has "conditioned" the transfer on the license being a POL. *See* 56 Fed. Reg. 11,781. The action granting the POL amendment is now before the Court of Appeals, and Petitioners argue that a decision by that court vacating the POL would undermine the basis for the license transfer. However, even if the Court of Appeals reversed the POL, the public health and safety is still protected by the Confirmatory Order preventing the Licensee from loading fuel into the Shoreham reactor. Thus, we do not find that this possibility prevents the transfer.

Second, Petitioners argue that LIPA may soon cease to exist under New York "sunset" law. We do not find Petitioners' arguments convincing at this preliminary stage, but this is a question of state law that presumably must be decided by New York state courts. Third, Petitioners have challenged the license transfer in what we now hold will be a post-effectiveness hearing. Obviously, that proceeding holds the potential for a finding that LIPA does not qualify as a licensee. Therefore, for these two reasons, before approving the license transfer, the Staff should condition the transfer (1) on the license's reverting to LILCO if LIPA ceases to exist or is otherwise found to be unqualified to hold the license and (2) on LILCO's providing certification to the NRC Staff that it

will retain and maintain adequate capability and qualifications to take over the license promptly in the event that either of these situations occurs. This action is without prejudice to Petitioners' rights in the post-effectiveness proceeding before the Licensing Board.

V. REQUEST TO HOLD IN ABEYANCE AND FOR AN ADMINISTRATIVE STAY

Petitioners request that we hold this action in abeyance pending resolution of the question of LIPA's existence under New York state law. However, at this time, they have not actually filed an action seeking such a resolution.[7] Moreover, as we noted above, Petitioners have not presented a persuasive argument on this issue at this preliminary stage. Our position might well be different had Petitioners filed such an action immediately in a New York state court and were there in turn some indication from the state courts that there could be some merit in Petitioners' argument.[8] Accordingly, we deny Petitioners' request to hold the transfer in abeyance pending action by the New York state courts. Petitioners also request that if we authorize the issuance of the transfer, we stay its effectiveness pending their expected challenge in the Court of Appeals. The Court of Appeals for the D.C. Circuit has observed "that tribunals may properly stay their own orders when they have ruled on admittedly difficult legal questions and when the equities of the case suggest that the status quo should be maintained." *Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977). We do not perceive a difficult legal question here, particularly in view of the Commission's prior interpretation and the deference customarily accorded an agency's interpretation of its organic statute.

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[7] On February 25, 1992, after this order was substantially complete, the NRC's Office of the Secretary informed counsel for the parties to the Shoreham proceedings, including counsel for Petitioners, that the Commission would affirm an order relating to this matter. In response, counsel for Petitioners advised the Secretary that he intended to file an additional pleading that evening with the Commission. At approximately 5:30 p.m., the Secretary received Petitioners' "Notice of LILCO/LIPA Exaggeration and Commencement of State Court Action."

This pleading contests several assertions regarding statements by LILCO/LIPA in letters of January 31, 1992, and February 14, 1992, *supra*, and announces Petitioners' intent to seek a declaration in New York courts that LIPA has ceased to exist under New York "sunset" law. As a result of this announced intention to file a state court action, Petitioners renew their request that the NRC not transfer the license to LIPA. LIPA and LILCO have filed a joint response in opposition.

We inquired at an earlier date to see if Petitioners would seek such an action in our belief that such an action was appropriate on Petitioners' part. *See* Letter from J.P. McGranery (January 22, 1992), *supra*. Moreover, as we noted above, we have conditioned the transfer upon (1) the license reverting to LILCO if the New York court dissolves LIPA and (2) LILCO certifying that it will retain and maintain sufficient capacity to take back the license in that eventuality. *Supra*. Accordingly, Petitioners' pleading in response to the Commission's decision to act on this issue is not sufficient to stay our decision.

[8] In addition, as a result of such a state court proceeding, we could have reviewed pleadings from parties more familiar with New York law than we are.

Second, Petitioners have failed to convince us that they will suffer any irreparable injury should we deny the stay. After all, as we noted above, this action simply transfers to LIPA that which is held by LILCO. LIPA cannot do anything under this license that LILCO could not do. LIPA cannot operate the plant, it cannot load fuel into the plant, and it cannot foreclose a decommissioning option until the Staff approves a decommissioning plan.

Both the School District and LILCO may have serious economic interests at risk. Quite simply, if LILCO holds Shoreham on March 1, 1992, it appears that LILCO may be required to make a tax payment to the School District, which LILCO naturally seeks to avoid. Presumably, the School District seeks to receive that payment, which it would lose if this order becomes immediately effective.

The courts have consistently held that "mere economic loss does not constitute irreparable injury." *Ohio ex rel. Celebrezze v. NRC*, 812 F.2d 288, 291 (6th Cir. 1987). *See, e.g., Sampson v. Murray*, 415 U.S. 61, 90 (1974); *Virginia Petroleum Jobbers Ass'n v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958); *Johnpoll v. Thornburgh*, 898 F.2d 849, 851 (2d Cir. 1990). In this case, we are not in a position to judge which economic interest is more compelling or whether the parties are able to seek redress and recovery of any funds expended or not expended in future litigation. Moreover, it is our intent to avoid making any decision based solely on economic reasons. Thus, we find that the balance of equities in this matter does not tilt in favor of the Petitioners.

As for the public interest, as we noted above, factors associated with the tax payment do not, in our view, carry the day one way or the other, based upon the record before us. Other public interest factors are subsumed in our discussion of a discretionary hearing and also do not support issuance of a stay. Thus, we deny Petitioners' request for a stay pending appeal.[9]

VI. CONCLUSION

Based upon the foregoing, we find that the Atomic Energy Act does not require a pre-effectiveness hearing before approval of a license transfer and that, under the circumstances of this case, a discretionary pre-effectiveness hearing is not required. We deny Petitioners' request to hold the transfer in abeyance pending a determination by New York state courts that LIPA will not cease to

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[9] We have issued administrative or "housekeeping" stays in previous proceedings, such as the issuance of the Shoreham POL. However, in that instance, both LILCO and LIPA did not contest such a stay. Here, they do. As we noted above, there are no public health and safety issue present in this case. In addition, LILCO submitted this application over one and a half years ago and it has been pending without resolution since that time. Finally, as we noted above, LILCO may face a potential tax payment if this order is not effective before March 1, 1992. After considering all these issues, we find that the balance of equities does not weigh in favor of a "housekeeping" stay of this matter.

exist and we deny Petitioners' request for an administrative stay. The Staff may issue an order approving the license transfer on an immediately effective basis when it has conditioned the transfer as we have specified above.

Commissioner de Planque did not participate in this Order.

It is so ORDERED.

For the Commission

SAMUEL J. CHILK
Secretary of the Commission

Dated at Rockville, Maryland,
this 26th day of February 1992.