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RELATED CORRESPONDENCE

LILCO, October 15, 1984

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

In the Matter of	)	
	)	
LONG ISLAND LIGHTING COMPANY	)	Docket No. 50-322-OL-3
	)	(Emergency Planning
(Shoreham Nuclear Power Station, Unit 1)	)	Proceeding)
	)	

LILCO'S REPLY TO THE RESPONSES TO ITS
MOTION FOR SUMMARY DISPOSITION ON CONTENTIONS 1-10

This brief responds to the answers of Intervenors Suffolk County and New York State and of the NRC Staff in response to LILCO's August 6 Motion for Summary Disposition of Contentions 1-10 (the Legal Authority Issues). These contentions are the ones that claim that certain functions that LILCO proposes to perform under the LILCO Transition Plan are prohibited by certain state and local laws.

The framework for resolving these ten issues has become quite complicated. In its motion LILCO advanced five separate legal theories1/ why it should win. In response, however, the

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1/ They are: (1) preemption because the state has invaded a preempted field, (2) preemption because LILCO cannot comply with both state law and federal law, (3) preemption because the state laws stand as an obstacle to the accomplishment of the

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Intervenors, and to a lesser extent the NRC Staff, have introduced several additional issues, including (i) generalized "usurpation of police powers," (ii) the Tenth Amendment, (iii) the scope of a utility's powers under New York corporation law, and (iv) ripeness.

There is one central fact, however, that should not be obscured by all the arguendos and legal hairsplitting. This is that New York and Suffolk County, based on their belief that the plant cannot be operated safely, are attempting to use their state-law powers to prohibit the operation of a completed nuclear power plant which meets all federal safety requirements, including those for emergency planning. This fact cannot be denied. And it compels the conclusion that what New York and Suffolk County are attempting to do here is to effect a reverse preemption that is beyond their powers in the federal system.

Since LILCO filed its Motion, two significant events have occurred that the Board should note well. First, the Appeal Board has reaffirmed in the Diablo Canyon case that states may not impose their emergency planning preferences on NRC

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full purposes and objectives of Congress, (4) mootness, because the assumption that no government would participate in a real emergency is demonstrably false, and (5) immateriality, because even if the activities specified in Contentions 1-4 and 9-10 were prohibited, the Plan would still meet NRC regulations.

licensees. Pacific Gas & Electric Co. (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-781, 20 NRC ____, slip op. at 20-21 (September 6, 1984). Second, on October 10 and 11 both houses of the U.S. Congress once again passed legislation allowing "utility plans" to substitute for state and local government plans. These events, both of which support LILCO's consistent arguments, are discussed further below.

I. Contentions 1-10 Must be Resolved by this Licensing Board

LILCO proposed last December that this Board decide all the issues involved in Contentions 1-10. Tr. 708 (Irwin). At that time, Suffolk County agreed that this Board could decide all the issues raised by Contentions 1-10, Tr. 714 (Lanpher). However, Suffolk County later reversed position and questioned whether this Board had jurisdiction to decide state law issues raised in Contentions 1-10, Tr. 13,829 (Lanpher). The Board, leaving for another day the potential federal preemption questions involved,2/ expressed its preference that a state court

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2/ Intervenors have misrepresented in a number of material respects both the background and the current status of the state court proceedings on "legal authority".

First, the County attempts to ascribe to this Board a directive that the federal preemption issue should be decided by the state court. See Intervenors' Opposition at 13-15. LILCO does not so construe prior comments by the Board. See Tr. 3654. Certainly this Board knows better than the parties whether the Board intended that a state court should address

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decide purely state law issues in the first instance, but did

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both the threshold issue of legal authority under state law and the preemption defenses arising under federal law. Therefore, it seems somewhat absurd for the parties to be arguing to this Board about the intent of prior directives by this Board. Because the Intervenors have suggested that LILCO's response to the state court litigation have bordered on bad faith, a response is in order.

LILCO believes, and so argued to the federal court in its Petitions to Remove the state court actions, that the state law legal authority issues cannot be addressed without construing relevant federal statutes and regulations. The converse, however, is not true. Clearly one may conceed, arguendo, that the tasks in questions are prohibited by state law and thereby posture the preemption issue for immediate resolution. In this form, the preemption issue may be addressed and resolved without reference to, or construction of, any state law. This is exactly the posture of the matter now before the Board.

Second, Intervenors suggest that LILCO's efforts to remove the state court actions were "patently frivolous" and interposed solely for purposes of "delay." (Intervenor's Brief at p. 16). Nothing could be further from the truth. LILCO has labored mightily to structure this litigation so that all of the many facets of the legal authority puzzle could be put before the same tribunal. As of the time the state court actions were filed on March 8, 1984, the preemption issue was already pending before Judge Altimari in a civil action initiated by the Citizens For An Orderly Energy Policy. (Civil Action No. 83-4966, United States District Court for the Eastern District of New York). Suffolk County was and is a defendant in that action and knew very well that the preemption issue, or at least facets of it, had already been briefed to Judge Altimari. Judge Altimari noted during the May 25, 1984 hearing on the Remand Petitions that in his "judgment it's illogical to transfer (i.e., remand the cases) to either Albany or Suffolk County. I understand you've stipulated to Suffolk County, whatever that may be. But I'm going to give it further consideration. It makes more sense to me to have the cases stay here in this court. I will make that very clear to you. But I don't think that's the state of the law." (Hearing Transcript, p. 33, emphasis added; see Attachment 1.)

Although Judge Altimari granted the Remand Motions, nowhere in his 27 page MEMORANDUM AND ORDER of June 15, 1984 did he suggest that LILCO's arguments were frivolous. In fact,

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not rule out making its own decisions on matters of state law

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confirming his observations at the hearing, Judge Altimari noted that LILCO's reasoning "while not necessarily illogical is, nevertheless, not in accordance with the current state of the law, . . ." (ORDER at p. 23, attached as Attachment 2.)

The Intervenors' allegations with respect to intentional delay are equally specious when one examines the record. Approximately three months elapsed between the filing of the state court actions on March 8, 1984 and the June 15, 1984 ORDER by Judge Altimari remanding the cases to state court. After the state law cases were filed on March 8, 1984, the proceedings went forward expeditiously. The Suffolk County and New York State cases were consolidated by agreement of parties (see New York State Motions of March 29, 1984). Both cases were removed to federal court (see Removal Petitions of April 6, 1984). Motions for Remand were filed approximately two and one half weeks later on April 23, 1984. Briefs were filed by the parties on the remand issue on May 2, May 7, and May 21, 1984. Oral argument was presented to Judge Altimari on May 25, 1984. On June 15, 1984, approximately three months after the date on which the cases were initially filed in state court, Judge Altimari handed down his 27 page MEMORANDUM AND ORDER granting Intervenors' motions to remand. It can hardly be said on this record that LILCO engaged in "intentional delay and obstructionist tactics."

Thus, over four months have elapsed since Judge Altimari's order, throughout which period counsel for LILCO has cooperated fully with Intervenors' counsel in structuring the issues to be heard by the state court. That court has determined that it will resolve the state law issues presented by LILCO's Motion to Dismiss. This motion raises solely state law issues. The Intervenors urged the state court to address the preemption issue even though the issue had not been raised in that court. The state judge declined and that court will reach the preemption issue only if the LILCO Motion to Dismiss on state law grounds is denied.

It should be noted that the state judge is proceeding with the case in exactly the manner urged by the Intervenors when they were before Judge Altimari on their remand motion. On that occasion, counsel for the Intervenors argued to Judge Altimari:

> If a Court is to determine that LILCO does not have that power, then, and only

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in the event that such a decision became necessary. Nor did the Board indicate that it even felt such a decision was necessary. See Tr. 3675 (Laurenson). The NRC Staff now argues that the federal law issues must await the state court's decision on state law issues. Thus, if the Board does what the Staff recommends, LILCO may be thrust into a position where the facts have been heard, the plant is ready to operate, and yet it cannot get a decision from this Board, because the Board is

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> then, does the federal preemption issue become relevant. That issue need never be reached, and indeed is never reached until one is disposed of the threshold State Law issue, to determine that LILCO does not have the power.

(Transcript at p. 6, emphasis added).

Curiously, however, after the cases were remanded to state court, the Intervenors abruptly changed their tune. In the state court, before the preemption issue was ever raised by the pleadings, Intervenors urged the court to dispense with the formalities of pleading, and to address the preemption issue simultaneously with the state law issues. In their Brief In Opposition in the state court, Intervenors stated: "Preemption is an element of this case that must be decided as a part of the decision on the merits." (Plaintiffs' Joint Brief In Opposition, p. 67).

In summary, the preemption issue is not presently before the state court. Only if the state court denies LILCO's Motion to Dismiss on state law grounds will the preemption issue be raised in the state court. If those proceedings do evolve in this manner, then the state court would have to decide whether those tasks which this Board mandates as being essential to the LILCO Transition Plan are tasks which state law may not interdict because of federal preemption.

awaiting a suitably dispositive decision by a state court. That situation would obviously be wasteful and unnecessary.

A similar need for action by this Board arises in connection with the question of whether it is impossible to comply with both the state and federal requirements at the same time. This Board must determine which functions contested in Contentions 1-10 are necessary to meet NRC regulations. Only then can the "impossibility" aspect of the preemption issue be decided.

A. LILCO is entitled to a decision

Both the NRC Staff and Intervenors argue that the preemption issue is not ripe for resolution. See NRC Staff Answer at 6-15; SC/NYS Opposition at 13-22. Both reach this conclusion by artificially stripping this single issue from the remainder of the emergency planning proceeding. Viewed against this more expansive background, the need for prompt resolution of Contentions 1-10 becomes apparent. Given the NRC Staff's and Intervenors' arguments, this Board must choose between two alternatives:

1) the Board can accept the argument that the preemption issue is not ripe, provided it also finds that resolution of Contentions 1-10 is not a prerequisite to ultimate acceptance of the LILCO Transition Plan and hence to full power operation of the Shoreham plant, or

2) the Board can find that acceptance of the LILCO Transition Plan requires resolution of Contentions 1-10, and, contrary to the NRC

Staff's and Intervenors' assertions, that the preemption issue is ripe for decision.

To understand the construct of the ripeness debate, it is necessary to review briefly the arguments of the NRC Staff and Intervenors. The Staff argues that a decision on preemption issues would be premature since there has been no ruling that New York law proscribes the activities contemplated by the LILCO Transition Plan, see NRC Staff Answer at 6. The Staff's argument is premised in part on its interpretation of two lines of case law:

1) cases holding that preemption issues should be addressed only if a clear conflict exists between state and federal law (see id. at 6-7), and

2) cases holding that licensing boards should refrain from issuing "advisory" opinions (see id. at 12-14),

and in part on its intuitive judgment that the statutes cited in Contentions 1-10 do not proscribe the activities presented in the LILCO Transition Plan (see id. at 10-12).

Intervenors rely on this same line of reasoning (though they presumably would assert that the statutes cited do bear on LILCO's implementation of emergency planning at Shoreham). Intervenors contend that without a New York State court ruling, resolution of the preemption issue would be academic (SC/NYS Opposition at 21). In addition, they argue that Contentions 1-10 raise controlling questions of New York State law that New York State courts should decide (id. at 13). Since cases on

these issues are now pending in New York State courts, Intervenors contend that this Board should stay its hand in deciding the preemption issue which may be raised as an affirmative defense in those proceedings (id. at 13, 19). Finally, Intervenors assert that LILCO's alleged delaying those state court proceedings should act to bar LILCO from raising the preemption issues before this Board (see id. at 21-22).

It is apparent from this brief summary of NRC Staff and Intervenor arguments that neither party has considered the advanced state of these proceedings in their calculus for determining ripeness. It is a fundamental tenet of NRC law that a licensing board has a duty to resolve promptly the contentions before it. See generally Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 46 Fed. Reg. 28,533 (May 27, 1981). That duty can not be fulfilled if this Board accepts the NRC Staff's and Intervenors' arguments and places Shoreham's otherwise completed operating license into indefinite limbo, pending interpretation by an unknown succession of state and federal courts of the New York State statutes and Suffolk County ordinances which serve as the basis for the first ten contentions. Instead, the Board should discharge its duty in either of two ways: first, by concluding that the preemption issue is not yet ripe since the consistency of the LILCO Transition Plan with the requirements of 10 C.F.R. § 50.47 can be determined on the facts without first resolving

Contentions 1-10; or second, by finding that the preemption issue is ripe and then resolving that issue.

When cortentions are admitted in NRC proceedings, 10 C.F.R. § 2.732 does not automatically operate to require an applicant to disprove those contentions. Instead, the proponents of a contention bear the initial burden. This burden was explained by the Appeal Board in Louisiana Power and Light Co. (Waterford Steam Elec. Station, Unit 3), ALAB-732, 17 NRC 1076 (1983):

> The ultimate burden of proof on the question of whether the permit or license should be issued is, of course, upon the applicant. But where, as here, one of the other parties contends that, for a specific reason (in this instance alleged synergism) the permit or license should be denied, that party has the burden of going forward with evidence to buttress that contention. Once he has introduced sufficient evidence to establish a prima facie case, the burden then shifts to the applicant who, as part of his overall burden of proof, must provide a sufficient rebuttal to satisfy the Board that it should reject the contention as a basis for denial of the permit or license.

Id. at 1093, citing Consumers Power Co. (Midland Plant, Units 1 and 2), ALAB-123, 6 AEC 331, 345 (1973) (emphasis in original).3/ Thus, if the Board concludes that the preemption issues are not ripe, it need not and should not withhold its

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3/ This concept of a threshold showing was approved by the Supreme Court in Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 549-55 (1978).

judgment on the adequacy of the LILCO Transition Plan pending a suitably dispositive ruling of the New York State courts.

Intervenors in this proceeding have not carried their initial burden with regard to Contentions 1-10. They have done no more than offer contentions which allege that various New York State statutes and local ordinances proscribe activities included in the LILCO Transition Plan. None of these enactments, on its face, proscribes any activity in the LILCO Plan. See NRC Staff Answer at 10-11. Intervenors have yet to offer any State court ruling, much less a definitive one, which interprets these statutes. Indeed, they did not even undertake to seek such a ruling until some six weeks after the Licensing Board instructed them that in its absence, the Board would proceed with respect to the issues before it.4/ Tr. 3675 (Laurenson). Thus, intervenors have failed to carry their initial burden, and the first ten contentions can simply be decided in LILCO's favor. Should State courts later interpret those statutes to proscribe certain activities in the LILCO Transition Plan, then those rulings, depending on their content, can be used as a basis for reopening this proceeding as necessary. Simple fairness suggests that Shoreham's operating license should not be held hostage by unsupported assertions of state

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4/ As was discussed in note 2 above, Intervenors' attempts to excuse their failure to obtain a State court decision by alleging that LILCO has delayed such proceedings are without basis.

law that this Board is not deciding itself.5/ See Consolidated Edison Co. (Indian Point Station, Unit No. 2), ALAB-399, 5 NRC 1156, 1170 (1977).

Alternatively, this Board could find the preemption issues ripe and proceed to rule on LILCO's motion. The preemption issue is now ripe for decision because of the advanced state of

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5/ The state-law "legal authority" issues are fundamentally different from other issues in this case. Whether or not this Board has jurisdiction to resolve them as matters of State law (LILCO believes that it does as a matter of pendant jurisdiction, and so stated last January 27, 1984, Tr. 3664-67 (Irwin), the Board has chosen to consign their resolution, in state law terms, to state courts. Therefore, unlike "ordinary" contentions, this Board has no control over the state-law basis for resolution of these issues, nor over the procedures available to the parties, the record before the state-law tribunal, or the pace of the issue's resolution. Where a Board has control over those aspects of an issue and can require the parties to be put to their proof, it is not illogical or unfair to impose on the applicant the burden of proof after some other party has raised an issue that meets the initial prima facia case pleading threshold. Here, however, not only does the Board have no control over the parallel state-court proceeding, but the dignity of the allegations before it -- mere citations to state-law statutory provisions without any authorative interpretations -- does not even meet the prima facia case threshold. Under these circumstances, reflexively staying its hand until a state court has acted with sufficient definitiveness subjugates the federal proceeding to those of the states and places any license application hostage to an almost unlimitable potential variety of state and local proceedings. If this theory, being urged apparently by both Staff and Intervenors, prevails, it will certainly be a boon for intervenors. Henceforth all an intervenor would need do would be to find a few state laws or town ordinances that he could allege prohibit some aspect of plant operation. If his legal claim met some (very low) threshold of plausibility, the applicant would have to go to state court or courts to disprove the contention sufficiently definitively to enable the NRC itself to decide the ultimate issue of plant operation.

this proceeding: the factual record has been closed and proposed findings will be completed on all contentions, save Contentions 1-10, within the next month. Failure to resolve Contentions 1-10 at this time would result in those contentions' becoming the pacing items in this proceeding.

LILCO agrees that as a general proposition it is preferable not to confront preemption issues until an actual conflict between state and federal law is presented. See NRC Staff Answer at 6-7. However, this does not mean that preemption issues must always await definitive rulings on the applicability and effect of state statutes. Where resolution of a state or local law question delays a decision on an NRC permit application, licensing boards have a duty to resolve those issues, including deciding preemption issues. See Indian Point, supra, 5 NRC at 1170. This proceeding has now reached that stage. Therefore this Board must now resolve the preemption issues.

Contrary to the NRC Staff's suggestion, Appeal Board decisions (id; Consolidated Edison Co. (Indian Point Station, Unit No. 2), ALAB-453, 7 NRC 31 (1978)) do not compel a different conclusion. Those cases presented the question of whether a licensing board needed to reach preemption issues in order to prevent the shut down of an operating nuclear power plant.6/

6/ Indian Point 2 was constructed using once-through cooling; the NRC imposed an operating license condition that it be

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In declining to reach the preemption issue in each case, the Appeal Board was obviously swayed by the Licensing Board's extensions of the compliance date for the license condition, which permitted the plant to continue operating while local zoning law questions were resolved and construction activities were completed to meet the condition requirements. See 5 NRC at 1170-71; 7 NRC at 37.

By comparison, this Board does not have the luxury of extending the compliance date of a licensing condition and thus avoiding harm to the applicant. Instead, this Board is forced to choose between placing this proceeding in an indefinite state of limbo pending a suitably definitive State court ruling, and thereby requiring LILCO to incur huge financial penalties, or dealing with the preemption issues now. There really is no choice; if the Board believes that resolution of the issues raised by the "legal authority" contentions is necessary to its decision, then it must decide the preemption

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backfitted with a closed cycle cooling system by a date certain. Indian Point, supra, 5 NRC at 1158-59. A local zoning board, whose approval was necessary under New York law to authorize construction, failed to act legally in time to permit the cooling towers' completion before the date required in the NRC operating license. Id. at 1168-71. The Atomic Safety and Licensing Board twice avoided the issue's ever becoming ripe by granting extensions, first for one year and then for an additional two years, of Indian Pont's authorization to operate a once-through mode. See id. at 1163; Indian Point, supra, 7 NRC at 32.

issues now.7/

B. The state court decision may not resolve the contentions

Second, even if this Board were to follow the Intervenors' and NRC Staff's suggestion and await a state court decision, that decision would not help materially to advance the resolution of Contentions 1-10. As is shown by the table attached to this pleading (Attachment 1), two of the issues raised in the contentions are not even raised in the County's complaint in state court and thus will not be resolved by a state court decision. In addition, the state laws that are relied upon by the Intervenors in both Contentions 1-10 and the state court complaint have never been briefed by the County. When it came

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7/ Both the NRC Staff and Intervenors contend that this Board characterize any ruling on preemption issues as an "advisory" opinion. Even accepting this characterization as correct, which LILCO believes it is not, nothing in NRC case law prohibits the issuance of such opinions, and in fact, it has long been recognized that licensing boards have the authority to grant such opinions. Kansas Gas & Elec. (Wolf Creek Nuclear Generating Station, Unit No. 1), CLI-77-1, 5 NRC 1, 4-5 (1977). The Commission has stated that advisory opinions are appropriate "to terminate a controversy or to remove uncertainty." Id. In this case, compelling circumstances exist for issuing such an opinion. LILCO cannot receive a full power operating license before its emergency plan is approved; that approval requires a conclusion either that LILCO has the authority to implement it as a matter of federal law, or that such authority is not necessary. Resolution of state-law legal authority issues by state courts will not resolve the question of whether those laws, to the extent they are found to conflict with federal law, are preempted by federal law. The ultimate question in this proceeding remains one of federal preemption. This Board is eminently qualified to resolve that issue.

time to brief those issues, the Intervenors, just as they have done in this proceeding, basically ignored the state laws that they cited in their complaint and asserted a totally different legal theory for resolving the issue under state law -- that is, that the concept of police power is inherent in emergency response and has not been granted to a corporation. Thus resolution of issues now raised in New York State's and Suffolk County's papers before New York State court will not directly address the issues raised by Contentions 1-10 themselves. In that regard, it appears that Contentions 1-10, although they have many state laws cited, lack basis and specificity and should be dismissed. The NRC Staff appears to agree, stating that "[t]he statutes cited by Contentions 1-10 . . . simply do not, on their face, proscribe LILCO from taking the emergency actions which the Intervenors assert to be unlawful." NRC Staff Response at 10.

II. The Intervenors' Latest Arguments on State Law Are Outside the Scope of Contentions 1-10

The Intervenors urge the Board to accept certain arguments that they are proposing in state court in order to rule on LILCO's motion for summary disposition on Contentions 1-10. SC/NYS Opposition at 4, 24-31. In fact, all that LILCO has asked this Board to assume is that a determination on the basis of state laws cited in Contentions 1-10 is adverse to LILCO.

LILCO has not accepted any of the arguments proposed by the Intervenors regarding those state law issues;8/ it has not asked the Board to determine thos state law issues; and it has not asked the Board to determine tate law issues that are not contained in Contentions 1-10.

Contentions 1-10 merely list certain statutes (set out in Attachment 3 to this pleading) which the Intervenors argue prohibit certain actions under the LILCO Plan. Nowhere in Contentions 1-10 or in their preamble appears the assertion, which the Intervenors now raise for the first time, that LILCO "intends to exercise police powers that are reserved to the States by the 10th Amendment." Similarly, Article IX, Section 2 of the State Constitution and Section 10 of the Municipal Home Rule Law, cited at pages 25 of Intervenors' response to support the proposition that LILCO is exercising police power, does not appear in Contentions 1-10. Nor does the notion that New York

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8/ Intervenors assert in their response that LILCO has admitted for the purposes of its motion for summary disposition several sweeping assertions about state law as it is applied to LILCO. See Intervenors' Opposition at 4, 94-96. LILCO has admitted no such thing. LILCO has assumed for the purposes of its motion that the state laws listed in Contentions 1-10 prohibit the activity described in the LILCO Plan, nothing more. Contrary to Intervenors' response, it does not follow from that assumption that (1) the LILCO Plan will involve an exercise of the police power, (2) the activities described in the Plan can be only undertaken by the state or its delegate, or (3) State corporation law prohibits LILCO from taking those actions. None of these broader propositions appear anywhere in Contentions 1-10 and the Board need not assume that these propositions are true in ruling on LILCO's motion.

Corporation Law prevents LILCO from taking the actions it seeks. See Intervenors' Opposition at 27-30.

The Intervenors in their response for the first time characterize Contentions 1-10 as follows:

> The State and the County do not merely contend, as LILCO implies, that LILCO's proposed actions will violate this or that specific state law or county ordinance (although they will do that too.) Rather the State and County contend -- and LILCO necessarily must admit this for present purposes -- that LILCO cannot implement its transition plan under the laws of New York because that plan calls for LILCO to exercise police powers that have never been, and cannot be, delegated to it.

That notion is not stated anywhere in Contentions 1-10 or in any other contention that has been raised before this licensing board. These arguments are outside the scope of Contentions 1-10 and should not be considered by this Board in determining whether Contentions 1-10 should be decided summarily in LILCO's favor.

In addition, as previously discussed in LILCO's Motion, the Intervenors are simply incorrect when they suggest (see SC/NYS Opposition at 30-31) that this Board is being called upon to set aside whole portions of New York state law. All LILCO is doing is asking for a judgment that matters of radiological health and safety, whether they be siting requirements, seismic design requirements, plant safety systems, or emergency planning requirements, cannot be regulated by a state

or a locality by applying state laws so as to prohibit actions required by federal law. It is only insofar as the existing laws cited in Contentions 1-10 are being applied to prevent the operation of a nuclear power plant that those laws are pre-empted.

III. The Preempted Field: Emergency Planning versus Regulating Emergency Planning

The first of the five reasons advanced by LILCO in support of its motion is that the State laws at issue invade a pre-empted field: regulation of the operation of a nuclear power plant.9/ Any state law that attempts to regulate in this field is preempted no matter what the motive behind the State law and no matter whether it actually conflicts with federal law or not.

The state laws at issue here attempt openly and unabashedly (according to Intervenors) to regulate within the preempted field. Hence the Intervenors miss the point when they argue that LILCO must show express intent on Congress' past to confer preemption.10/ The Congressional intent to

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9/ As the Brenner licensing board has observed in this proceeding, the Atomic Energy Act both explicitly and implicitly preempts the field of nuclear licensing and regulation. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-22, 17 NRC 608, 638, aff'd on other grounds, CLI-83-13, 17 NRC 741 (1983).

10/ It is the Intervenors who must show Congress's express intent:

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preempt the field of nuclear plant operation is well established already; LILCO need show nothing except that the state laws invade the field. As the Supreme Court stated in discussing the California statutes at issue in the PG&E case:11/

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> [T]he federal government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the states.

Pacific Gas & Elec., 75 L.Ed.2d at 770 (footnote omitted). As the Brenner board observed earlier in this proceeding:

> Where Congress has intended to permit state regulation of matters of radiological health and safety, it has stated this intention in clear and unambiguous terms. This was the case when Congress amended the Atomic Energy Act of 1954 by adding Section 274, 42 U.S.C. § 2021. This was demonstrated again in Congress' recent enactment of the Nuclear Waste Policy Act of 1982, 42 U.S.C. §§ 10101 et seq. Sections 101 and 116 of the Act, 42 U.S.C. §§ 10101 and 10136, specifically describe the participation of states in waste repository siting decisions, including a state's authority to submit a "notice of disapproval" of a designated site within its borders.

Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-22, 17 NRC 608, 642, aff'd on other grounds, CLI-83-13, 17 NRC 741 (1983).

11/ The Supreme Court dealt in PG&E with § 25524.2 of the California Public Resources Code, which required that before the State Emergency Commission would be allowed to issue any further certificates for construction of nuclear power plants in California, the Commission would have to find that (1) the appropriate agency of the United States Government had approved a technology or means for permanent and terminal disposition of

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> At the outset, we emphasize that the statute does not seek to regulate the construction or operation of a nuclear powerplant. It would clearly be impermissible for California to attempt to do so, for such regulation, even if enacted out of non-safety concerns, would nevertheless directly conflict with the NRC's exclusive authority over plant construction and operation.

Pacific Gas & Elec. Co., 75 L.Ed.2d 752, 770 (emphasis added).

Offsite emergency planning is inherently an area within the exclusive radiological health and safety regulation domain of the federal government. Offsite emergency planning is the final safety system in a series of safeguards beginning with seismic design (10 C.F.R. Part 100), general design and quality assurance criteria for safety-related systems (10 C.F.R. Part 50, App. A & B), and extending through emergency core cooling system performance criteria (10 C.F.R. § 50.46 & App. K),

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high-level nuclear waste, and (2) such a technology had been demonstrated. The Commission's finding was then subject to approval by the legislature. Unlike the present case, § 25524.2 applies on a generic basis, does not purport to regulate power plants on the basis of safety, and is premised on an explicitly economic rationale. 75 L.Ed.2d at 761, 770-71. A second section of the Code, § 25524.1(b), would have required case-by-case determinations by the Commission of the adequacy of spent fuel interim storage as a prerequisite to preconstruction certification. The Supreme Court found this section unripe for review since there were no pending nuclear applications in California, id. at 764-65, though it signaled its discomfort with any enactment that would look like safety regulation of nuclear power plants (id. at 765-67) or apply to federally approved individual plants on a case-by-case basis (id. at 777 note 34).

physical security requirements to design against sabotage (10 C.F.R. Part 73), and onsite emergency planning requirements (10 C.F.R. § 50.47).

The offsite emergency planning requirements of 10 C.F.R. §§ 50.47 and 50.54, and the related guidance in NUREG-0396 and -0654, are merely the final link in this unbroken chain of NRC safety requirements. These requirements are intended: (i) to ensure that commercial nuclear plants are designed, built, and operated to avoid accidents and other events that could involve unacceptable radiological risk to the general public; (ii) to mitigate postulated accidents in such a fashion as to avoid unacceptable offsite releases; and (iii) to minimize risk to the general public from any of a spectrum of accidents, however unlikely, whose consequences exceed those of design-basis licensing events.

The courts have consistently rejected substantive challenges to the NRC's requirements for and judgments concerning any of the links in this health-and-safety regulation chain, from reactor siting, United States v. City of New York, 463 F. Supp. 604 (S.D.N.Y. 1978), to normal reactor releases, Northern States Power Co. v. Minnesota, 447 F.2d 1143 (8th Cir. 1971), aff'd mem., 405 U.S. 1035 (1972), to emergency core cooling, Nader v. NRC, 513 F.2d 1045 (D.C. Cir. 1975), to safety-related aspects of waste disposal, NRDC v. NRC, 582 F.2d 166 (2d Cir. 1978).12/ There is no question that a State's attempt to

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12/ Two of these cases -- Northern States and United States v. City of New York -- involved conflicting provisions of state or local law found preempted by the Atomic Energy Act.

impose general design criteria, or seismic criteria, or emergency core cooling criteria different from those in NRC's regulations would be invalidated as an impermissible intrusion into the federally preempted area of radiological health and safety regulation associated with reactor construction and operation. The NRC's emergency planning regulations, like the other regulations, were promulgated solely for the protection of the public against radiological risks.13/ 45 Fed. Reg. 55402, 55403 (August 19, 1980).14/ In making the preemption analysis, there is no basis for treating this final link in the radiological health-and-safety protection chain any differently from the other links. It, like them, is in the occupied area.

13/ It might well be noted, in addition, that the Intervenors' opposition to emergency planning is allegedly based on their view that geography makes emergency planning for Shoreham impossible. Thus, they are challenging the NRC siting regulations as well as the emergency planning regulations.

14/ The preamble to the NRC's emergency planning regulations states, in pertinent part:

> The Commission's final rules are based on the significance of adequate emergency planning and preparedness to ensure adequate protection of the public health and safety. It is clear, based on the various official reports described in the proposed rules (44 FR 75169) and the public record complied in this rulemaking, that onsite and offsite emergency preparedness as well as proper siting and engineered design features are needed to protect the health and safety of the public.

45 Fed. Reg. at 55403.

This basic principle was restated just five weeks ago in the Diablo Canyon case, where the Appeal Board affirmed a licensing board refusal to adopt emergency planning zones larger than those specified by NRC regulations, even though the state of California had adopted the larger zones. California argued that the licensing board should have deferred to the state zones "as a matter of federal-state comity." The Appeal Board disagreed:

> Although section 274 of the Atomic Energy Act provides a framework for cooperation with, and transfers of authority to, the states for the regulation of certain byproduct, source, and special nuclear materials, that section also requires the Commission to retain all authority and responsibility for the regulation of nuclear power plants and prohibits any delegation of that authority. It should hardly need be stated that the Commission's emergency response requirements are an integral part of the agency's regulation of nuclear power plants, and compliance with those rules determines whether an applicant receives an operating license, not obedience to additional requirements that may have been adopted by state or local authorities. Even though offsite emergency planning depends upon state and local resources, the applicant cannot be denied an operating license, if, as in this case, planning within the NRC prescribed EPZs complies with the Commission's emergency response requirements.

Pacific Gas & Elec. Co., (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-781, 20 NRC ___, slip op. at 20-21 (September 6, 1984) (emphasis added) (footnote omitted).15/

15/ This was not a case of "actual conflict" preemption; the applicant could have complied with both state and federal law

(footnote continued)

The NRC Staff also has missed the point when it argues that Congress and the NRC did not preempt the field of emergency planning because obviously state and local governments everywhere (except at Shoreham) are responsible for that planning. Of course Congress contemplated that states and local governments would actually plan, or participate in carrying out emergency planning. But the Staff and the Intervenors alike overlook a crucial distinction -- the distinction between doing emergency planning, on the one hand, and regulating emergency planning, on the other.

There is no question that states are intended to participate in emergency planning. One Congressional goal, oft repeated, is that "ultimately every nuclear power plant will have applicable to it a state emergency response plan that provides reasonable assurance that the public health and safety will not be endangered." See, e.g., Conf. Report on H.R. 2330, Authorizing Appropriations to Nuclear Regulatory Commission, Fiscal Years 1982 and 1983, 128 Cong. Rec. H7677, col. 2 (daily ed. Sept. 28, 1982). And states may set rules for their own conduct of emergency planning; in Diablo Canyon, for example, the

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(footnote continued)

by simply adopting the state zone. Nor does it appear that the Appeal Board found a purpose of Congress that was being blocked (although it could be concluded that the purpose of uniform regulation was being thwarted).

Appeal Board did not say that California's expanded zones were null and void -- only that they could not be imposed on the licensee or the federal government as a condition to a federal permit. Likewise, the ultimate decision to advise the public to evacuate (for instance) is ordinarily made by the state or local government; the NRC does not attempt to direct the government how to make that decision.16/ But neither can the local government regulate the utility by directing it on what to do when, upon the government's default, the utility has responsibility for the offsite plan. This marks the dividing line between the preempted field and the field where state activity is permitted.

Within the preempted area, it makes no difference whether New York State and Suffolk County are acting with intent to regulate radiological health and safety17/ or for reasons quite

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16/ Indeed, in this very proceeding NRC Staff witnesses testified that they lack the authority to direct state and local authorities what to do. Tr. 15,242-43 (Sears), 15,243, 15,248 (Schwartz). See also Consolidated Edison Co. of New York (Indian Point, Unit No. 2), LBP-83-68, 18 NRC 811, 937 (1983), where the Board rejected the NRC Staff witness's view that licensees should have the capability to activate the warning sirens if local officials fail to do so within 10 minutes of notification by licensees. The board observed that the NRC regulations require a "capability" to inform the public promptly and presume that the responsibility to activate the system will be fulfilled by the State and local governments. The board found no justification for a reassignment of the responsibility in contradiction to the regulations.

17/ It is impossible, in any event, for Suffolk County to deny that its opposition to Shoreham's operation, in the emergency

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unrelated. In Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504 (1981), the Supreme Court, having found that ERISA intended to permit certain types of offsets against pensions, found that it preempted to that extent a New Jersey state law "ostensibly regulating a matter quite different from pension plans. The New Jersey law governs the state workers' compensation awards, which obviously are within the State's police powers." 451 U.S. 504, 524 (emphasis added). Nevertheless, having found in ERISA an intent to preempt contrary legisation, the Supreme Court found that this ostensibly unrelated New Jersey statute related to pension plans because it eliminated one method for calculation of pension benefits permitted by federal law. Id. The Court further concluded that the State should be prevented "from avoiding through form the substance" of federal requirements in the preempted area. Id. at 525.

The NRC Staff's reluctance to accept this line of reasoning is apparently based on the notion, set out in the preamble to the NRC emergency planning regulations, that:

> The Commission recognizes there is a possibility that the operation of some reactors may be affected by this rule through inaction of State and local governments or an

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(footnote continued)

planning area, is based on its belief that the NRC's regulations provide inadequate protection to the public health and safety. See LILCO's Motion at 28-33. Similarly, New York State has opposed Shoreham for reasons that dovetail with the County's.

> inability to comply with these rules. The Commission believes that the potential restriction of plant operation by State and local officials is not significantly different in kind or effect from the means already available under existing law to prohibit reactor operation, such as zoning and land-use laws, certification of public convenience and necessity, State financial and rate considerations (10 C.F.R. 50.33(f)) and Federal environmental laws.

45 Fed. Reg. 35402, 35404 (August 19, 1980). But in the context of the comments that were received and the discussions that went on while the NRC was deliberating over the then-proposed 10 C.F.R. § 50.47, this passage can only be taken as an acknowledgement that states' failures to plan could de facto interfere with plant operation, much as the failure of a state to give adequate rate relief might de facto inhibit a utility's ability to finance a nuclear plant. The preamble passage does not contemplate a de jure state veto, and, in any event, would be insufficient to establish one.

The rulemaking record shows that the Commission was warned about the possibility of a "de facto" state veto.18/ The solution to the problem was to provide § 50.47(c)(1), which permits "interim compensating actions." To be sure, this provision was

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18/ "The staff recognizes this potential for a third party defacto [sic] veto power. The Commission is also aware of this." SECY-80-275, June 3, 1980, Enclosure L, Analysis of ACRS Comments, at 8. An industry witness, Mr. Owen, also referred to a "de facto veto." Statement of Warren H. Owen, June 25, 1980, at 8, bound into transcript of NRC June 25, 1980, ff. Tr. 131.

not intended to be a guarantee that a plant would operate; obviously there might be cases where the applicant could not or would not compensate, on the facts, for the failings of local governments. But where such compensation could be effected, the regulation's clear purpose was to permit it.

In addition, the licensing board in this very proceeding has found that Suffolk County's actions amount to proscribed regulation of nuclear power. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-22, 17 NRC 608, aff'd on other grounds, CLI-83-13 (1983). The Brenner board found, in denying the County's motion to terminate this proceeding, that Suffolk County was trying to impose its will on the Nuclear Regulatory Commission regarding its views of Shoreham's safety, and that such imposition of will by a locality is preempted by the Atomic Energy Act.

Contentions 1-10 represent nothing more than an attempt to relitigate the County's motion to terminate on the grounds that only a government can do offsite emergency planning by recasting the argument in terms of state law. That issue has already been decided against the Intervenors. The NRC Staff's assertion that these laws are "materially different" from Suffolk County Resolution No. 111-1983, NRC Staff Response at 11, does not make sense; the assertion that state law prohibits offsite planning by a non-governmental entity, and the assertion that only offsite plans implemented by governmental entities would meet NRC regulations, amount to the same idea.

IV. Federal and State Law Conflict in this Case

Suffolk County and New York State argue that offsite emergency planning is outside the admittedly exclusive federal domain of radiological health and safety regulation. Thus, they contend they are entitled, in the exercise of what they amorphously refer to as their "police powers," to prohibit LILCO from implementing measures, with specific respect to the Shoreham Nuclear Power Station, necessary to comply with the NRC's requirements for offsite emergency planning. At least for purposes of this argument, Suffolk County and New York State do not quarrel with the proposition that these measures, if implemented, would be sufficient to satisfy NRC requirements. Though their present arguments depart radically from Contentions 1-10 and take many forms, they all boil down to three arguments: (1) that LILCO, as an entity of defined and limited legal powers, lacks the affirmative capacity as a matter of state law to perform the functions required to meet the NRC's offsite emergency planning regulations; (2) that even if LILCO possessed, in the abstract, the affirmative power under state law to undertake these functions, the exercise of these powers either violates specific state-law legislative enactments (Contentions 1-10) or invades general "police powers" inherently vested in the state and not preempted; and (3) if the Atomic Energy Act were found to preempt state-law restrictions

on LILCO's performance of these functions to the extent necessary to meet federal law, then that federal preemption would itself violate the 10th Amendment. The first argument is inherently and totally a state law matter, now before the New York State Supreme Court, and outside the scope of Contentions 1-10. The third argument is dealt with below. This section deals with the second argument and addresses this question: assuming emergency planning is not in the area wholly preempted by Congress, are the State and County prohibitions preempted so as to enable LILCO to perform those emergency planning functions required by federal law?

It has been shown above that offsite emergency planning, the last link in the nuclear-safety-regulation chain, is in the zone wholly occupied by Congress. However, even if the area were not so viewed, there are still two additional specific grounds for a finding of federal preemption: impossibility of simultaneous compliance with state and federal requirements, and frustration of federal purpose. The Supreme Court recently summarized this familiar and consistent line of cases as follows in PG&E:

> Even where Congress has not entirely displaced state regulation in a specific area, state law is preempted to the extent that it actually conflicts with federal law. Such a conflict arises when "compliance with both federal and state regulations is a physical impossibility," Florida Lime & Avocado Growers, Inc. v. Paul, 373 US 132, 142-143 (1963), or where state law "stands as an obstacle to the accomplishment and execution

> to the full purposes and objectives of Congress." Hines v. Davidowitz, 312 US 52, 67 (1941).

75 L.Ed.2d at 765.

The arguments presented by Suffolk County and New York State make clear that even if the offsite emergency planning area has not been totally preempted, simultaneous compliance with federal and state schemes is impossible. Furthermore, the Intervenors' legal construct clearly would frustrate the federal purposes of developing nuclear power and demanding uniform federal regulation. As a result, the State and County restrictions must be preempted on the facts of this case.

A. Physical Impossibility

It is undeniable that LILCO cannot simultaneously comply with both federal law (which says there must be an emergency plan) and state law (which says there may not be an emergency plan), if it is to operate Shoreham.19/

The Intervenors argue that "LILCO has no obligation under federal law that it cannot comply with." This statement is patently ridiculous. LILCO must show an offsite emergency plan

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19/ The extent of the conflict-in-fact would vary with those actions found to be necessary by this Board. If various traffic functions associated with a "controlled" evacuation were considered necessary, then the conflict would include all of Contentions 1-10. In any event, the conflict would extend to exercise of command-and-control functions (accident assessment, making protective action recommendations, communicating them through EBS and siren) and thus would include Contentions 5-8.

that is adequate and can and will be implemented under 10 CFR § 50.47 in order to obtain an operating license for Shoreham. As long as the County and the State assert State laws as a bar to LILCO's showing adequate planning, those laws conflict with the federal obligation. The County means, of course, that LILCO is not obligated by federal law to operate Shoreham. But almost all cases of actual conflict could be avoided if the affected parties merely went out of business. However, that is obviously not an acceptable, or accepted, principle for resolving preemption issues.

Also, the Intervenors say that federal law does not authorize a utility to implement a plan, only that the NRC may consider a utility plan. But this does not help the Intervenors, inasmuch as their position is that a state law may prohibit an NRC board from ever reaching the merits of a utility plan.20/ To that extent, the State and County's prohibitions, no matter how characterized and no matter what their ostensible purpose, must be held preempted by federal law and thus inapplicable to Shoreham. A holding of federal exclusion of state law is inescapable and requires no inquiry into Congressional

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20/ Further, there is an internal contradiction in an argument which would permit the NRC to "consider" a utility plan which could then by prevented from being implemented by conflicts with state law. Under those circumstances, NRC "consideration" of a utility plan would be an empty gesture in the face of state preemption.

design where compliance with both federal and state regulations is a physical impossibility for and engaged in interstate commerce. Florida Avocado and Lime Growers Assn. v. Paul, 373 U.S. 132, 142-43 (1983).21/

B. Obstacle to Purposes and Objectives of Congress

There is no question that, first, Congress intended that there should be operating nuclear plants and that there should be good emergency plans. These are both sides of the same coin, because Congress's purpose was that there be good emergency plans so that nuclear plants would be safer. The Intervenors' actions are designed to, and would in fact if they have their way, prevent emergency planning altogether and prevent the operation of a nuclear power plant. There is a direct, crystal clear, unavoidable conflict with federal purposes here.

Second, Congress intended there to be uniform standards of emergency planning, to be promulgated by NRC and FEMA and

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21/ In Paul, the Supreme Court declined to find preemption holding that simultaneous compliance with both state and federal requirements at issue (U.S. criteria for shipping avocados in interstate commerce, California requirements for marketing of avocados in California) was not physically impossible. However, the Court also ventured that had the federal statute prohibited shipment in interstate commerce of avocados with an oil content above 7%, while the California statute had limited marketing in California of avocados to those with oil contents above 8%, an unavoidable conflict would have existed and federal law would have to supersede state restrictions. 373 U.S. at 143.

administered by those agencies. As the Brenner board has pointed out in this case, if the Intervenors get their way, there will be no uniform standards of emergency planning for NRC licensing purposes whatsoever. Again, there is a direct and undeniable conflict with the federal purpose.

Third, there is also a clear purpose to allow a utility to avoid being penalized by a state's failure to plan. The Atomic Energy Act contains what now three successive Authorization Acts,22/ and 10 C.F.R. § 50.47 (especially paragraph (c)(1),

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22/ The full Senate enacted S.1291, where § 108 is identical to the "utility plan" provision of the 1982-83 Authorization Act, on October 10. Congressional Record, S.14,174-78 (Daily Ed. October 10, 1984). Its purpose, as stated by the floor manager, Senator Simpson, was to

> [confirm] the authority of the NRC to issue an operating license for a nuclear power plant if, in the absence of a State or local emergency preparedness plan approved by [FEMA], the Commission determines that there exists a State, local or utility emergency preparedness plan that provides reasonable assurance that public health and safety is not endangered by operation of the plant.

Id. at 14,175 (emphasis supplied).

The House of Representatives passed S.1291 the following day. Congressional Record, H.12,193-98 (Daily Ed. October 11, 1984). The remarks of Congressman Pashayan, one of the bill's sponsors, are worth quoting from:

> One of the key features of this bill is that it confirms the Commission's authority to consider and approve emergency plans submitted by utilities in support of a li-

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which was promulgated to be consistent with the 1980-81 Authorization Act) made explicit -- that there is a clear congressional intent to allow a utility plan option to prevent penalizing utilities where a state or a locality refuses or is unable to do offsite emergency planning. The Atomic Energy Act, the Authorization Acts, and the NRC regulations show a consistent pattern from 1980 to the present of allowing offsite planning to be done by utilities.23/ We will elaborate on

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> cense application. In other words, if States and localities that normally would be expected to submit a plan are reluctant or deficient, the bill confirms that a utility may submit the plan, and the NRC is then obligated to consider that plan in deciding whether to license a plant. I applaud this provision, which I view as clearly confirming what is already the law: that a plan submitted by a utility will satisfy the Atomic Energy Act's requirements. I also view existing law as providing authority for the Federal Government to implement any utility plan submitted under this provision.
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> * * *
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> The Congress does not intend to allow States or localities, by refusing to participate in the emergency planning process, to prevent a completed facility from operating.

Id. at 12,196. The bill now awaits President Reagan's signature.

23/ The legislative history and the authorization acts are laid out in detail in LILCO's Motion at pages 13-28. The In-

(footnote continued)

these parts below.

It is clear that one of the primary purposes of the Atomic Energy Act of 1954 has always been, and continues to be, the development of the nuclear industry "to the maximum extent consistent with the common defense and security and with the health and safety of the public." 42 U.S.C. § 2013(b); PG&E, 75 L. Ed. 2d at 776-76, citing Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. at 63-67. It is also clear that one of the primary goals of the regulatory scheme under the Atomic Energy Act is the imposition of a uniform nationwide scheme of safety regulations administered by the Nuclear Regulatory Commission. These purposes are apparent in the detailed, comprehensive and uniform requirements set forth in great detail throughout the NRC's regulations.24/ This

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tervenors' argument that the language of the NRC Authorization Acts "do nothing more" than confer "authority on the NRC to review a 'utility plan' to determine whether it provides an adequate basis for granting an operating license", Intervenors' Opposition at 6, is absurd. The Authorization Act language clearly evidences Congress' intent that utilities may do offsite plans if a State or County refuses to plan. In addition, there is no reason to ask the NRC to review a utility plan if, as the Intervenors argue, offsite emergency response is inherently a police power act that can only be implemented by a State or local government and not a private entity. Finally, it is not the Authorization Acts that preempt state law. The Atomic Energy Act preempts state law. The Authorization Acts are simply indicia of Congressional intent regarding the Atomic Energy Act.

24/ This federally imposed uniformity does not extend to those areas expressly ceded to the States, see PG&E, 75 L.Ed.2d at

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pattern of uniformity in health-and-safety regulation extends to the field of emergency planning, from the postulation of standard accident mechanisms release levels and emergency planning zone size in NUREG-0396, to the detailed specification of emergency planning standards in NUREG-0654 and criteria in 10 C.F.R. § 50.47.

New York State and Suffolk County claim the right to prohibit LILCO from exercising any or all of the emergency planning functions enacted into the federal regulatory scheme for the protection of the public health and safety in the operation of individual nuclear power plants. They claim that as a matter of New York State law, both specific statutory law and inherent "police powers," they have a legal monopoly over the authority to act for the protection of the public health and safety in New York, and that LILCO cannot act in their stead even where (1) it owns and is prepared to commence operating a nuclear power plant which is acceptable under all applicable federal safety standards, (2) they have refused to perform any emergency planning functions, and (3) the emergency planning

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770, n.25 (where the court's enumeration of ceded areas does not include emergency planning authority) or to the states' "traditional authority" over non-safety related aspects of utility regulation: "the need for additional generating capacity, the type of generating facilities to be licensed, land use, ratemaking, and the like." Id. at 770. Elsewhere, however, the federal interest remains paramount.

measures proposed by LILCO would, if implemented, be adequate in fact under applicable safety standards, i.e., 10 C.F.R. § 50.47. What this amounts to is an assertion, not found in any federal statute, that they have monopoly power to perform emergency planning functions, and that since those functions are required in order to secure or maintain a federal operating license, they have a veto power over the issuance or retention of that license.

The State/County argument makes no pretense of being grounded in matters other than health and safety regulation; nor is it limited or limitable in time. What it boils down to is an assertion of a State or local veto power over nuclear power plant operation, at any time, for any reason or no reason, using the mechanism of their withdrawal from or refusal to participate in the required health-and-safety function of emergency planning. Let there be no mistake about it: the same rationale that Suffolk County and New York are asserting now as an arbitrary and absolute bar to Shoreham's commencement of operation without their consent could, if it is credited, be asserted again in five, ten or twenty years, any time either government decides that it wishes to shut the plant down. Let there also be no miscake that this argument, being asserted today in New York, could with equal validity be asserted tomorrow in Vermont, the next in New Jersey, the next day in Illinois, and the next in Florida, to shut down operating

nuclear power plants even though emergency planning is, on the facts, adequate without State or local governmental participation25/ and all other NRC safety standards are met.

The County/State preemptive argument would unquestionably frustrate the achievement of federal purposes in the Atomic Energy Act, successor legislation and implementing NRC regulations on emergency planning. Clearly, it would frustrate the goal of development of the nuclear industry in a manner consistent with protection of the public health and safety, since it would potentially prevent, or halt, the operation of fully completed nuclear plants which complied in every respect -- including the factual elements of emergency planning -- with NRC regulations.26/

The Supreme Court in PG&E stated that Congress has left the States enough room under the Atomic Energy Act to "determine -- as a matter of economics -- whether a nuclear plant

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25/ A distinguishable situation exists where, if state and/or local governments have been participating in emergency planning, their withdrawal leaves the utility, at least temporarily, unable to meet the exemption tests of §§ 50.47(c)(1) or 50.54(s)(2)(ii).

26/ In this regard, the California statute upheld in PG&E is distinguishable in important ways. That statute prohibited the issuance of further certifications of need for future nuclear plants in California until there has been developed by the United States government a demonstrated means of long-term storage of high-level nuclear wastes. The statute was prospective, was found by the Court to be couched in terms of economic regulation, and not to apply to specific nuclear power plants.

vis-a-vis a fossil plant should be built, . . . and to allow the development of nuclear power to be slowed or even stopped for economic reasons." 75 L.Ed.2d at 777. The Court did not, therefore, find an impermissible frustration of the purpose of development of nuclear power in a prospective California statute at issue, which did not relate specifically to the construction or design of nuclear power plants and was couched on an economic rationale. However, as the Court also acknowledged, "State regulations which did affect the construction and operation of federally approved nuclear power plants would pose a different case." 75 L.Ed.2d 777, n.24.

Intervenors' arguments here clearly are aimed solely at federally approved (or approvable) nuclear power plants; and do not even purport to have an acceptable, i.e., economic, rationale. They clearly frustrate the congressional goal of development of the nuclear industry since they assert an absolute and arbitrary veto power, exercisable at any time, over the commencement or continuation of operation of power plants that have met all federal safety standards. They also frustrate the goal of uniform standards of safety regulations inherent in the NRC's broad and comprehensive regulatory structure: conditioning of State cooperation on, e.g., using a 20-mile radius inhalation emergency planning zone (rather than the 10-mile radius presumed by federal regulations), would be equally offensive to the federal scheme. All else being equal, it would

require four times as much in the way of resources as a 10-mile radius plan; it might, as a practical matter, make effective planning impossible in some cases. Intervenors' argument would also frustrate the specific intent of Congress in the 1980, 1982-83 and 1984-85 NRC Authorization Acts that the NRC review utility-only emergency plans, i.e., those lacking state or local sponsorship. It also would negate an important aspect of the exemption provisions of 10 C.F.R. §§ 50.47(c)(1) and 50.54(s)(2)(ii), permitting an applicant or licensee to show why a deficiency in its emergency plan (e.g., the absence of presumed state or local sponsorship) was not significant, offset by interim compensating measures, or outweighed by other compelling circumstances.

The fact that this preemptive assertion of power by the County and State is not being made by means of laws relating specifically to Shoreham, or to nuclear power plants, is not relevant in determining whether that assertion frustrates a federal purpose. In Jones v. Rath Packing Co., 430 U.S. 519 (1977), the Supreme Court, weighing (and finding) a preempted conflict between state and federal schemes for determining the labeled weight of bacon and flour shipped in interstate commerce, noted that the inquiry involved traditional state police powers. The Court then noted that in such areas, the relevant inquiry is whether the state law stands in the way of accomplishment of the full purposes and objectives of Congress, and

that answering this inquiry requires the Court "to consider the relationship between state and federal laws as they are interpreted and applied, not merely as they are written." 430 U.S. at 526 (emphasis added).

Similarly, in Chicago & NW Transportation Co. v. Kalo Brick & Tile Co., 450 U.S. 311 (1981), the Supreme Court, in examining an asserted conflict between ICC railroad-abandonment regulations and a railroad's duty as a public utility to serve under Iowa law, and finding the state law to have been pre-empted, noted that the relevant focus is on "the nature of the activities which the States have sought to regulate rather than on the method of regulation adopted." 450 U.S. at 317-18 (citations omitted).

In short, it matters not whether New York and Suffolk County rest their opposition on the legal basis of joyriding statutes, or state corporation statutes, or an amorphous police power; and it matters not whether the means chosen consist of refusals to participate in emergency planning or enactment of clearly reverse-preemptive County resolutions, or reliance on existing state or local statutes: if the effect is to frustrate the full effectuation of a legitimate federal purpose embodied in Congressional legislation, the state or local action will be preempted. See also Perez v. Campbell, supra, 402 U.S. at 649 (conflict between Arizona driver financial responsibility statutes and federal bankruptcy act), cited at PG&E,

supra, 75 L.Ed.2d at 773, n.28 ("State law may not frustrate the operation of federal law simply because the state legislature in passing the law had some purpose in mind other than frustration.")

Intervenors repeatedly assert that the police powers in issue here are exceptionally important attributes of government. However, the relative importance of the state-law powers in issue is not relevant in determining the existence or effect of federal preemption. In yet another recent Supreme Court case, Fidelity Federal Savings & Loan Ass'n v. de la Cuesta, 458 U.S. 141 (1982), the Court reviewed a conflict between a regulation of the federal Home Loan Bank Board, permitting "due on sale" clauses allowing S&L's to make the entire amount of a loan immediately due and payable if the property securing the loan is sold or transferred without the S&L's prior written consent to be included in mortgages issued by federal savings and loan associations, and a California statute restricting the enforceability of such clauses to situations where the lender's security interest in a piece of such property was actually impaired by the sale. The Supreme Court, overruling California court decisions, found the state restriction to be overridden under traditional preemption principles. Acknowledging that such property law is "a matter of special concern to the States," 458 U.S. at 153, the Court nevertheless held that traditional preemption principles

> are not inapplicable here simply because real property is a matter of special concern to the States: "The relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail."

Id. (citations omitted). Thus the fact that Suffolk County and New York State assert that the police powers at issue are central to their value structure makes no difference with respect to the applicability or effect of federal preemption doctrine.

Finally, Intervenors and the Staff advance Pandora's box arguments against LILCO's actually implementing the utility plan contemplated by the NRC's regulations and the 1980, 1982-83 and 1984-85 NRC Authorization Acts. The argument asserts, in essence, that there is no way of limiting the powers that a utility running amok might arrogate to itself under the protective umbrella of federal preemption. The argument goes too far. What a utility is empowered to perform is that minimum number of functions, not already performed lawfully by other organizations as part of an emergency plan, that are necessary to secure or retain NRC approval of its plan. Those powers are delimited: they are bounded by the requirements of 10 C.F.R. § 50.47 and NUREG-0654. They are also uniform nationally; no utility plan performing a utility should need to (or be permitted to) exercise any powers pursuant to that plan beyond those exercised by other utilities and governments working in the partnership envisioned by the NRC's regulations.

In short, if the Intervenors' views were to prevail, LILCO will not be able to operate the Shoreham plant because of state-law prohibitions, notwithstanding the facts that (1) the plant had received all necessary approvals on issues other than emergency planning, and (2) with respect to emergency planning, the structure proposed by LILCO in the Transition Plan had been found adequate on the facts. The political fiat of Suffolk County and New York State would veto the full effect of the federal licensing process, and could have that effect at any phase in the plant's operating life. It is no remedy to suggest that conflict can be avoided by LILCO's simply not operating the plant: that is always the case with preemption conflicts. The fact is that Shoreham is built and, by definition, approved and operable. As noted above, this interposition against an operable plant is a "different case" from the prospective rule found not to be preempted in PG&E. PG&E, 77 L.Ed.2d at 777, n.34. The assertion of state law should be preempted.

V. Arguments Regarding the Tenth Amendment Are Not Pertinent to Contentions 1-10

The Intervenors assert that the Tenth Amendment bars acceptance of LILCO's preemption argument. Opposition of Suffolk County at 46-57. This argument concludes that "if LILCO's plan is found to be authorized by federal legislation, then there will be a significant impairment of the ability of the State of

New York to perform traditional functions that are essential to its existence as the State." But never has the State or County listed what those traditional functions are, or how they will be impaired.27/ They have not pointed to a single act that LILCO contemplates that would compel the State, the County, or any of their employees to do anything. A finding that LILCO can implement its plan "impairs" only the State's and County's attempt to exchange its determination of safety for the NRC. It is not the power to direct traffic or make protective action decisions that the State and County are complaining about having usurped; the LILCO Plan plainly states that they can exercise those powers whenever they want. It is rather the power to make the decision28/ whether the plant should operate. This

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27/ For example, the County and the State assert that "they have the right to 'decide how the police power (including its own police forces) shall be employed in the event of a disaster potentially affecting thousands (or hundreds of thousands) of its citizens." But no one is suggesting that the Nuclear Regulatory Commission order the State or the County to employ its police power in any way. That is doing emergency planning. All LILCO is suggesting is that the State and the County cannot regulate emergency planning, which is precisely what they are trying to do when they take State statutes and attempt to apply them to a utility so that the utility is unable to complete emergency planning where the State and the County have refused on grounds of safety to do so. That is a very different notion from the one which the County and the State repeatedly address in their brief regarding the ability of the NRC to force the County and the State to plan and to respond to an emergency.

28/ The Intervenors tip their hand on page 46 of their brief where it says that a decision to authorize the utility to act in the face of and "in opposition to considered state decisions" is a far more intrusive interference with state prerogatives than any of the approaches Congress so far clearly rejected. SC/NYS Opposition at 46.

is what they mean by their "police powers."29/

What are at issue here are essentially two things that LILCO plans to do: (1) the warning function and (2) the facilitating of traffic. As to the first, LILCO proposes to assess the damage at its own facility, assess what affect that will have on the neighbors of the facility, compare the predicted offsite doses to federal guidelines, and use a radio station, with which LILCO has a contract, to warn people and advise them what they should do to protect themselves. The second function involves guiding traffic, providing gasoline to stalled vehicles, removing obstacles from the road, and so forth. The first of these functions is essential to an emergency plan; the second can be eliminated, if necessary, and NRC regulations still be met.

In neither case is any force used; people do not have to evacuate when LILCO advises them to, and no one will be put in jail or forced out at gunpoint if he does not obey. If a motorist wants to go in a different direction from that indicated by the LILCO traffic guide, the LILCO traffic guide cannot

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29/ By the Tenth Amendment, the states retain all powers "not delegated to the United States . . . or to the people." U.S. Const. Amend. X. These broadly encompass the power "to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources and add to its wealth and prosperity." Barbier v. Connolly, 113 U.S. 27, 31 (1885). These powers are what are known as the "police powers" of the state.

arrest him or force him to comply, nor is the traffic guide instructed to attempt to. No government facilities are taken over; the radio stations used to broadcast LILCO's advice are privately owned and have agreed to let LILCO use their facilities. No government officials will be disobeyed by any LILCO employee. There are no situations in which an elected official orders one thing and a LILCO employee orders another.

This last point is crucial. In the case of both the functions described above, the LILCO Transition Plan expressly provides that LILCO's actions will be subordinated to those of the authorities, if the authorities choose to act. For example, the Plan calls for LILCO traffic guides to direct traffic only until the police arrive; when the police arrive, if they do, the traffic guides are to stay to assist them, at the policemen's direction. Similarly, the Plan provides that the decisionmaking function is to be handed over to the authorities as soon as the authorities ask for it. The notion of "usurping the power" of the authorities suggests that LILCO will somehow do something contrary to the orders of the authorities, but in fact LILCO is merely filling a void.

Suffolk County and New York State make two basic arguments concerning the Tenth Amendment. Both of them, and the authority used to support them, are ill-taken.

Intervenors' first argument is to the effect that the federal government cannot invest LILCO with powers to perform acts

which, as a matter of its corporate charter, it does not affirmatively possess -- acts that Intervenors loosely denominate as "police powers." SC/NYS Opposition at 46-47.30/ Understood in this fashion, Intervenors are arguing basically that LILCO lacks, as a matter of its basic corporate charter, the power through its agents, employees and contractors either to take steps to notify the affected general public of a potentially hazardous situation at a plant which it is operating pursuant to its duties as a public utility, or to assist the public in self-protection. A federal statute or license, the argument goes, cannot empower a corporation to perform acts which are ultra vires, i.e., beyond its powers as a matter of state law.

The argument has two weaknesses. First, it is totally nonspecific about the powers, actions and other forms of conduct which it implicitly asserts LILCO lacks the authority to perform or to contract for under State law: there is no analysis of LILCO's charter or by-laws, nor of New York's public utility statutes, sufficient to establish even the predicate of the argument. Merely characterizing unspecified acts as forbidden exercises of an amorphous "police power" does not prove that the acts are ultra vires. Without that demonstration, the

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30/ Unfortunately, as indicated above, Intervenors fail to set forth with any specificity exactly what acts are contemplated by them as being within the rubric of the "police powers," even though LILCO has forth its intentions with great specificity in the Transition Plan.

argument fails at the outset. Second, even if Intervenors had adequately demonstrated the absence of affirmative grants of power to LILCO to perform the functions in question, their argument is not a Tenth Amendment argument at all, or even a federal-law argument at all, but one purely of state law best suited for resolution by New York State courts. In fact, Intervenors have made this argument at length in their reply to LILCO's pending motion to dismiss their New York State suits. New York and Suffolk County should follow the same advice on this issue as they have urged on this Board with respect to other state-law aspects of the "legal authority" contentions: they should present their arguments on this purely state-law issue to the New York State courts, not this Board.

Intervenors' second argument is not that LILCO's performing the various functions and actions contemplated by the Transition Plan is ultra vires of LILCO's corporate charter, but that performance of such acts and functions by LILCO pursuant to preemptive NRC requirements involves such an intrusion into the functioning of New York State's and Suffolk County's government as to be prohibited by the Tenth Amendment's reservation to the State, or to the people, of those powers not committed to the federal government.

Intervenors' presentation of this argument fundamentally misapprehends the Supreme Court's construction of the Tenth Amendment. Not since the New Deal, in the late 1930's, has the

Tenth Amendment been routinely relied on by the Supreme Court to impose substantial limitations on Congress' exercise of its Commerce Clause powers through legislation. By 1940, the Court had reduced the Tenth Amendment to a mere "truism" of little practical importance, concluding that "there is nothing in its adoption to suggest that it was more than declaratory of the relationship between the national and state governments." U.S. v. Darby, 312 U.S. 100, 123-24 (1941). Intervenors' almost total reliance on cases predating U.S. v. Darby places their arguments at odds with the modern trends in use of the Tenth Amendment.

The only modern case relied on by Intervenors -- National League of Cities v. Usery, 426 U.S. 833 (1976) -- is not apposite. In Usery, a closely divided Court (5-4, 1 concurrence and 2 dissents) found that extension of the wage and hour provisions of the federal Fair Labor Standards Act to cover employees of state and local governments would violate the Tenth Amendment.

The Court subjected its decision in Usery to a "careful review" in Hodel v. Virginia Surface Mining and Reclamation Ass'n, 452 U.S. 264, 286 (1981). As the Court indicated there, the opportunity for a Tenth Amendment claim arises only when Congress has acted pursuant to one of its powers under the Constitution to preempt an act of state government.31/ However,

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31/ When acting pursuant to the Commerce Clause, as with he Surface Mining Act in Hodel and with the Atomic Energy Act,

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not every preemptive act, by any means, raises potential Tenth Amendment questions under National League of Cities. As the Court stated:

> It should be apparent from this discussion that in order to succeed, a claim that congressional commerce power legislation is invalid under the reasoning of National League of Cities must satisfy each of three requirements. First, there must be a showing that the challenged statute regulates the "States as States." . . . Second, the federal regulation must address matters that are indisputably "attribute[s] of state sovereignty." . . . And third, it must be apparent that the States' compliance with the federal law would directly impair their ability "to structure integral operations in areas of traditional governmental functions."

Hodel v. Virginia Surface Mining and Reclamation Ass'n, 452 U.S. at 258 (citations omitted).

Even then, not every federal action meeting these three tests violates the Tenth Amendment. The nature of the federal interest asserted may be such as to justify state submission. 452 U.S. at 258 n.29.

Applying these tests, the Supreme Court in Hodel found that challenged provisions of the Surface Mining Act of 1977, which regulated the conduct of surface mining by private

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Congress' power is "plenary" and the only requirement is that there be a "rational" relationship between Congress' action and interstate commerce. 452 U.S. at 276-77.

operators on "steep slopes," did not violate the Tenth Amendment as interpreted in Usery. In reaching this conclusion, the Court rejected the argument that, although the Act ultimately regulated the conduct of private entities, it impermissibly intruded into the State's functions of regulating land use, control of the state's economy, and allocation of state tax resources. 452 U.S. at 285. The Court considered that its only reviewing function was to determine that the means selected by Congress bore a national relationship to the goal of regulating interstate commerce, despite their asserted intrusion into areas governed by the "police power." 452 U.S. at 291. The Court continued:

> This conclusion applies regardless of whether the federal legislation displaces laws enacted under the States' "police powers." The Court long ago rejected the suggestion that Congress invades areas reserved to the States by the Tenth Amendment simply because it exercises its authority under the Commerce Clause in a manner that displaces the States' exercise of their police powers. [citations omitted.] This court has upheld as constitutional any number of federal statutes enacted under the commerce power that pre-empt particular exercises of state police power. [citations omitted.] It would therefore be radical departure from long-established precedent for this Court to hold that the Tenth Amendment prohibits Congress from displacing state police power laws regulating private activity. Nothing in National League of Cities compels or even hints at such a departure.

452 U.S. at 291-92.

The Court also found it "significant" that one of the respondents, the Commonwealth of Virginia, is "simply another regulator of surface coal mining whose regulatory program has been displaced or preempted by federal law. [T]here are no Tenth Amendment concerns in such situations." 452 U.S. at 291 n.31.

The articulation of National League of Cities v. Usery in Hodel has been followed consistently in subsequent Supreme Court cases involving Tenth Amendment challenges. E.g., United Transportation Union v. Long Island Railroad Company, 102 S.Ct. 1349, 1353 (1982); Federal Energy Regulatory Commission v. Mississippi, 102 S.Ct. 2126 (1982); Equal Employment Opportunity Commission v. Wyoming, 103 S.Ct. 1054, 1060-62 (1982). Equally noteworthy, in each of these cases the Supreme Court has rejected Tenth Amendment claims premised on National League of Cities.

In the FERC case, the Supreme Court upheld various provisions of the Public Utility Regulatory Policies Act (PURPA), requiring states to consider specified rate-making standards and to enforce standards promulgated by FERC, imposing various procedures on state rate-making commissions and authorizing FERC to exempt certain facilities from state regulation. The Supreme Court upheld these aspects of PURPA even though they arguably "coerc[e] the States into assuming a regulatory role by affecting their freedom to make decisions in areas of

'integral governmental functions.'" 102 S.Ct. 2126, 2141, citing Hodel, supra. The Court harmonized its holdings in National League of Cities and Hodel as follows:

> [I]ndividual businesses necessarily [are] subject to the dual sovereignty of the government of the Nation and the State in which they reside," National League of Cities v. Usery, 426 U.S., at 845, 96 S.Ct., at 2471; when regulations promulgated by the sovereigns conflict, federal law necessarily controls. This is true though Congress exercises its authority "in a manner that displaces the States' exercise of their police powers," Hodel v. Virginia Surface Min. & Recl. Assn., 452 U.S., at 291, 101 S.Ct., at 2367, . . .

From what has been said it is clear that permitting LILCO, in fulfillment of NRC licensing conditions, to conduct emergency planning when New York State and Suffolk County refuse to do so does no violence in the 10th Amendment as articulated in Hodel. At the outset, New York State and Suffolk County are not being regulated at all, much less as states; it is not they but LILCO that is being regulated. As with the states in Hodel and FERC, they have a choice of participating in partnership on emergency planning or not; all they cannot do is exalt their "police powers" over a legitimate federal purpose. Moreover, while control of emergency functions may be an attribute of state sovereignty, so clearly are land use planning (Hodel) and utility rate making (FERC); Congress' activity there was sustained. Finally, participating in emergency planning (or merely not interfering with the efforts of another willing party to

perform it) does not fundamentally impair New York's or Suffolk County's ability to structure integral operations in areas of traditional state functioning unless radiological emergency planning is a "traditional state function," and unless the State and the County are legally entitled to interpose their exercise of the police power over the federally required goal of emergency planning. However, radiological emergency planning is totally a function of the relatively recent, and federally supervised, nuclear industry; and in the Tenth Amendment area the states and localities have, by definition, already been preempted. In any event, federal overriding of state police powers in the exercise of a valid Congressional purpose does not violate the Tenth Amendment.

The Intervenor's Tenth Amendment arguments, therefore, are meritless.

VI. The State and County Would Respond in a Real Emergency

LILCO's fourth argument is a factual one, based on the uncontroverted evidence of record: since it is clear as a matter of fact that both State and local governments would respond in a real emergency, there could not possibly be any lack of "legal authority." To put it another way, "legal authority" can only be a problem if someone with exclusive authority refuses to act; since in a real emergency the State, local, and

federal governments (as well as LILCO) would all respond, there would be no gap in legal authority. Since everybody with authority would show up, the Board need not decide hypothetical issues of who has what authority under state law.

The basis of LILCO's argument is simply what everybody knows to be true: that if a real emergency were to occur, everyone would try to help, and everyone would try to do what was best for the public health and safety; the last thing anyone would worry about would be "legal authority." A real-life response would be a cooperative effort, not an adversary process. This is so clear that LILCO would ask the Board to take official notice of it, were there not already a solid evidentiary basis for it in the record. For example, LILCO's witnesses testified at length about the "emergency consensus" and the spirit of cooperation that prevails in communitywide disasters. See, e.g., Cordaro et al., ff. Tr. 831, at 18-20.

The Intervenors have attempted to muddy the waters with their eleventh-hour affidavits of Messrs. Palomino and Roberts, and, for the reasons stated below,32/ the Board should ignore these affidavits in reaching its decision. But even if the

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32/ One such reason is that the affidavits are an untimely effort to present evidence that is not subject to cross-examination. In addition, Inspector Roberts appears to be giving legal opinions he is unqualified to give, and it is improper for Mr. Palomino, a counsel of record in this proceeding, to be appearing now in the role of a witness.

affidavits are taken into account, LILCO is entitled to summary disposition on the ground that "legal authority" contentions raise a hypothetical problem that can never occur in real life. Notwithstanding the affidavits, the Board can make the following findings:

1. First, the State and County would in fact respond. There is ample evidence in the record that this is true and no evidence to the contrary.33/ The Intervenors, while they cannot deny that they will respond, argue that there is inadequate evidence that it is true. This argument is patently wrong. First, there is the Governor's public statement that "of course, if the plant were to be operated and a misadventure

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33/ The argument (Intervenors' Opposition at 93) that Suffolk County has forbidden itself to implement an emergency plan by County Resolution 111-1983 cannot be taken seriously. Apparently Inspector Roberts interprets "implement" to include carrying out a plan in a real emergency as well as training people, writing procedures, and otherwise preparing for an emergency in advance. The Board first has to accept this implied interpretation of the Resolution, which is not stated as such either in the Intervenors' Opposition (see p. 93) or in Inspector Roberts' affidavit. (All these documents do is recite the language of the Resolution.) The Board must then decide as a fact that the Resolution would in a real emergency prevent the County from doing something that needs to be done; the Intervenors do not specify what this might be.

Morever, LILCO submitted testimony addressing directly the question whether County Resolution 111-1983 would as a matter of fact prevent County personnel from responding. Cordaro et al., ff. Tr. 831, at 29-30. This was struck at the County's request. The Intervenors cannot now be permitted to establish by affidavit a point that they earlier prevented LILCO from addressing.

were to occur, both the State and County would help to the extent possible. No one suggests otherwise." Cordaro, et al., ff. Tr. 13,899, at 7. The Intervenors argue that "press releases are not 'evidence.'" Intervenors' Opposition at 91. But that portion of the press release is evidence;34/ it is in the record, and the County and State had the opportunity to cross-examine the LILCO witnesses who offered it. See Tr. 13,900-05.35/ In addition, as noted above, there is

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34/ The suggestion by both the Intervenors and the NRC Staff that the Governor's statement may not be relied on as "evidence" is clearly wrong. If what these parties are trying to say is that the Governor's statement is hearsay, they are correct; and, as they well know, hearsay is admissible in NRC proceedings. If what they are trying to say is that it is not reliable hearsay, since the Governor did not testify, the answers are so obvious they hardly need to be stated: first, this hearsay is reliable because no one believes the State and local government would fail to respond if people were really at risk; the hearsay simply states the obvious. See Senator Simpson's remarks set out in LILCO's Motion at 24. Second, the hearsay is reliable because presumably the Governor of the State of New York does not lightly release official statements. Third, the reason hearsay is relied on is that the parties in control of the facts have kept them from the Board; the Intervenors presented no evidence on Contention 92, and they should not be allowed to use this failure to their advantage.

35/ When the County began to cross-examine about that press release in an attempt to show that the quotation was taken out of context, LILCO suggested that the County simply place into evidence the entire press release. Tr. 13,902. The County declined to do so and did not ask any further questions. Tr. 13,902-03. The State asked no questions. Tr. 13,905. The County and the State now seek to put the press release into evidence as Attachment D to their response and to present testimony, in the form of an affidavit by Mr. Palomino, placing the release "in context." Intervenors' Opposition at 92. This is an impermissible attempt to enter additional evidence well past

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substantial evidence about the "emergency consensus."

2. Second, the resources for an adequate emergency response (developed under the LILCO plan) will be available to the State and County should they choose to use them. For example, the radio stations will be ready to broadcast the EBS messages, the tone alerts will be installed, buses and drivers will be ready to go, there will be traffic guides at major intersections to help the police if the police show up, and so on. This planning basis is the essence of the LILCO Transition Plan; the evidence is that it could incorporate a State and County response should that response be forthcoming.

3. Third, the State and County will try to do what is best for the public health and safety at the time. No one is denying this, but if someone were, there is ample evidence in the record to refute him. It is this third finding that the Intervenors' affidavits attack, but only by implication and innuendo. The Intervenors' argument boils down to the fact that

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the time when evidence on Contention 92 was due, without a showing of good cause and without giving LILCO the opportunity to cross-examine. The Board should therefore place no reliance whatsoever on the affidavit.

Of course, affidavits are ordinarily appropriate in response to a motion for summary disposition, see 10 C.F.R. § 2.749(a) (1984). But in the instant case the Intervenors are using affidavits to make a record that they declined to make when they had the opportunity.

they control the evidence and that they refuse to present it. They admit they will respond,36/ but they refuse to say exactly how. Therefore, they say, LILCO has no evidence to carry its burden of proof.

The Intervenors' argument fails. All that is required is a finding that the Intervenors would respond in a responsible manner, and that finding is justified either as a presumption or as a matter of evidence. It is justified as a presumption for two reasons. First, "[t]here is a presumption that state officials are carrying out their duties in a proper and lawful manner." Duke Power Co. (Catawba Nuclear Station, Units 1 & 2), LBP-84-37, 20 NRC ___, slip op. at 54 (Sept. 18, 1984). Second, when a party has relevant evidence within his control and fails to produce it, the inference arises that the evidence is unfavorable to him. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), ALAB-471, 7 NRC 477, 478, rev'd as to other matters, CLI-78-14, 7 NRC 952 (1978).

Moreover, the finding is supported by evidence, despite the Intervenors' best efforts. The portions of the State emergency plans in the record, Cordaro and Weismantle, ff. Tr. 13,899, Att. 10, clearly manifest the State's intent to respond to all emergencies in the State, including radiological

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36/ They qualify everything with "arguendo" and "allegedly," of course, but they do not deny that they would try to protect the public in a real emergency.

emergencies and including an emergency at Shoreham.37/ So does Article 2-B of New York State Executive Law.

Neither the Intervenors' testimony nor the Roberts and Palomino affidavits refute the finding that LILCO seeks. Although the affidavits are meant to imply that the State and local response would be ill-prepared and to imply that State and local officials would stubbornly refuse to call on available resources if LILCO provided them, LILCO does not believe the affidavits say these things. No one states, for example, that the Governor would refuse to make use of radio stations to advise the public simply because it was LILCO that had made the arrangements. And there is no question of "usurping the police power"38/ if the Governor makes the protective action decision,

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37/ Also, the testimony about the "emergency consensus" supports this finding. Of course, the Intervenors carefully refrained from presenting as witnesses any of their officials with emergency planning responsibility, but the school administrators they presented all said they would be concerned only with the students' health and safety. And no one testified for the Intervenors that in an emergency he would put politics ahead of safety, or do less than his best, or sulk on the sidelines when people were at risk.

38/ Intervenors' argument that state law prohibits the Governor from investing LERO with the State's police powers, Intervenors' Opposition at 98, is beside the point. Even if (hypothetically) no state or local government personnel were to respond, LILCO would not propose to exercise "police powers." And LILCO certainly would not do so if the governments were involved in the response. The Intervenors' argument to the contrary rests on the implicit, unfounded theory, which pervades the Intervenors' Opposition, that it is unthinkable that government officials and LILCO would cooperate in an emergency re-

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notwithstanding that he may have taken into account information provided by the licensee, as is done under every other emergency plan in the country.

In this regard, the affidavits represent three "facts" that deserve mention. First, they say that the police would not "rely" on LILCO's traffic guides. Roberts affidavit at 4, 5. Second, they say the police and others would be untrained. Id. at 2. Third, they say that the State has put the RECS telephone in "storage." Palomino affidavit at 6. But the police do not have to "rely" on LILCO traffic guides (whatever that means); they need only do what is best under the circumstances at the time to protect the public, and that would include at least listening to the guides and perhaps using them to communicate with command and control or to do whatever else might be necessary at the time. As for training,39/ the LERO

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sponse. The Intervenors see the response as either an exclusive State-County effort, in which case the State and County would be untrained and unprepared, or an exclusive LILCO effort, in which LILCO would (Intervenors allege) lack the necessary police powers. The Intervenors miss the point; in a real emergency response, LILCO would supply the planning and trained personnel, and the governments would supply the police power. Unless the Intervenors can produce a witness willing to swear that local and state officials would refuse to use available resources even if that meant harming the public, the record cannot support the Intervenors' argument.

39/ The Intervenors have resolutely refused to say anything about what they will do if Shoreham begins to operate. The

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people are trained and available to advise the untrained governmental personnel. As to communication with the State, the RECS phone can be taken out of "storage," and there are other means of communication even if it is not. See Tr. 13,737 (Cordaro).

In short, there is ample basis for the Board to find that the State and County will make use of the LILCO planning basis if doing so at the time is the best thing for the public health and safety. If some portion of the LILCO planning is not used at the time of a real emergency, it will only be because the State decides at that time that in its judgment some other measure will better protect people. This is the case, of course, with all emergency plans. And it is the basis of LILCO's motion for summary disposition: that there is a planning basis that meets NRC requirements and that it will be used in a real emergency except insofar as judgments are made at the time that better protective measures are available.

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Board would be justified in finding that, if Shoreham operates, the State and County can be expected to join the planning effort. This finding can be based on the Intervenors' insistence that they want to protect the public and the undisputed fact that, if a plant is to operate, it is safer with an emergency plan that meets NRC regulations than without one. This finding, however, is not necessary to grant LILCO's motion for summary disposition.

VII. The Existing Record Supports the "Immateriality" Defense to Contentions 1-4, 9, and 10

LILCO's fifth and last argument, that most of the legal authority contentions challenge functions that are not required by NRC regulations, is attacked by the Intervenors on two grounds.40/ First, they argue that traffic control etc. is required as a matter of law. Intervenors' Opposition at 101-05. Second, the Intervenors claim they need more hearings to address the issue. Id. 106-07. The NRC Staff agrees that further hearings are necessary.41/ NRC Staff's Answer at 27.

Further hearings are not necessary. In the first place, the Intervenors have agreed time and again, in both this proceeding and the related lawsuits, that further evidentiary hearings are not required. And, contrary to what the NRC Staff supposes, the parties have long been on notice of LILCO's

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40/ The additional argument, in Intervenors' Opposition sections IV.B, D, and E (at 105-06, 108-09, and 110-18), that the Board cannot decide the issues without reference to the other issues and evidence in this proceeding, is not worth extended discussion. LILCO has no objection to the Board's deciding the summary disposition motion along with the other issues and resolving them all in the Partial Initial Decision.

41/ One can react only with exasperation to the NRC Staff's suggestion that after years of emergency planning proceedings LILCO should now wait for a state court decision, tailor a new plan consistent with that decision, and start all over. This suggestion is, to say the least, at odds with NRC policy of providing reasonably prompt decisions. See Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 46 Fed. Reg. 28,533 (1981).

position that Contentions 1-10 can best be decided in the context of the evidentiary record. See Tr. 3664. Also, the parties have long been on notice that an "uncontrolled" evacuation was one of the issues in this proceeding. LILCO's counsel said so back in January: "The reasoning . . . changes in no way the proposition that if, even without the kinds of measures that LILCO will be able to implement, using matters which the State disputes such as traffic guides and signs and so forth, we can still conduct a proper emergency plan. We ought to get a license." Tr. 3665.42/ The County has already presented testimony on traffic, including specific discussions of uncontrolled evacuation, both in its direct case and through cross-examination of LILCO witnesses. See Piggozzi, ff. Tr. 2909, at 37-39; Tr. 2069-70 (Weismantle), Tr. 2660-63 (Lieberman); see also Piggozzi, ff. Tr. 2909, at 37-39, Cordaro et al. (Contention 65), ff. Tr. 2337, at 41-47, 61-62; Cordaro et al. (Contention 27), ff. Tr. 7083, at 7-8).43/ Indeed, the

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42/ See also Tr. 3664, 13,822 ("The only circumstance under which an occasion other than simply issuing a license or denying a license on the basis of the record presently before the Board can arise will be the case if it is determined that the plan is unlawful as a matter of New York State law in ways that absolutely prevent its operation, such as the County's alleged command and control. In a number of cases, for instance, the traffic areas, there are fallbacks which LILCO can implement").

43/ See also, e.g., Tr. 12,818 (Keller) (no requirement that gasoline be supplied).

Intervenors' twin arguments (1) that they need an opportunity to present evidence and (2) that their witnesses presented evidence to refute LILCO's position are inconsistent. Together they amount to the argument that the Intervenors want a second opportunity to make their case.

The Intervenors cite no authority that traffic control, pathfinder signs, etc. are required as a matter of law, only their own unsupported lack of knowledge of other plans where traffic control is not used.44/ Intervenors' Opposition at 103-04. Moreover, it is clear that there is no particular evacuation time required by NRC regulations, and the record reflects that an "uncontrolled evacuation" at Shoreham results in reasonable, estimated times; more important, reasonably accurate time estimates for an uncontrolled evacuation have been prepared and defended in this proceeding. If the State of New York decides that it prefers a slower, uncontrolled evacuation and seeks to achieve that result through its laws, and if the NRC decides that such a move is not preempted, then so be it. The NRC requirement of accurate time estimates is still

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44/ This is in stark contrast to their longstanding position that it is impermissible for LILCO to present evidence of other plans: "In this proceeding, whether or not other people might have done a better job with an emergency plan than LILCO has under entirely different circumstances is just not relevant." Tr. 1342 (Letsche). See also Suffolk County Motion to Strike Portions of LILCO's Group II-A Testimony at 11-13 (March 9, 1984); Suffolk County Motion to Strike Portions of LILCO's Group II-B Testimony at 11-12 (March 28, 1984); Tr. 8301-15 (Albertin, Acquario, Knighton).

met. The State cannot have it both ways; if a traffic control plan is required by NRC regulations, then State law creates a direct conflict and is preempted; if traffic control is not required, then it can be dispensed with and, while this is unfortunate and results in a less-than-optimal plan, it does not violate NRC regulations.

VIII. Conclusion

For the reasons stated above and in LILCO's Motion for Summary Disposition, summary disposition of Contentions 1-10 in LILCO's favor should be granted.

Respecfully submitted,

LONG ISLAND LIGHTING COMPANY

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DATE: October 15, 1984

Attachment 1

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

----------x

COUNTY OF SUFFOLK,

Plaintiff, :

-against- CV 84 1405

LONG ISLAND LIGHTING COMPANY, :

Defendant.

----------x

MARIO CUOMO,

Plaintiff, :

-against-

LONG ISLAND LIGHTING COMPANY, :

Defendant.

----------x

United States Courthouse
Uniondale, Long Island,
New York

May 25, 1984
9:00 A.M.

B E F O R E:

HONORABLE FRANK X. ALTIMARI, U.S.D.J.

OWEN WICKER
OFFICIAL COURT REPORTER

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THE COURT: On the motion.

MR. BROWNLEE: I think the motion is ours, your Honor.

My name is David Brownlee. I'm representing the County in the case of Suffolk County versus LILCO which was originally filed in the State Court, and it's before you on LILCO's removal petition and our motion to remand to the State Court.

I'd like to make a couple of points briefly.

LILCO has said that our motion for remand rests almost exclusively on the Supreme Court's decision in the Franchise Tax Case. And frankly, I've always operated under the assumption where there was a 9-nothing Supreme Court opinion that had been issued within the last year which squarely controlled a case more difficult than my own -- I don't need to go too much beyond that.

Franchise Tax clearly holds that in a removal situation, even though federal preemption is asserted as a defense, and indeed even though the federal preemption question is the only issue before the Court, remand is required in an action that was initiated as a State declaratory judgment action.

In Franchise Tax, there was no question as to the terms or provisions of State Law. There was no

question that the defendants had not adhered to the State Law; had not complied with the State tax provision there in question.

In this case, there clearly is a question of State Law on which the parties disagree. LILCO has asserted that it is -- it would be complying with, it has power under State Law to carry out its emergency plan. We have asserted that it does not.

There clearly is a State Law issue upon which this case is founded. That State Law issue is quite simply whether a private corporation may exercise the kinds of powers that may perform the sorts of functions which LILCO purports to be able to perform in carrying out its emergency plan.

We have indicated in our reply brief that the fact that LILCO's authority is a State Law issue is something which has been conceded, recognized by virtually all parties to this matter, and indeed the federal authorities who are looking at LILCO's emergency plan have expressly requested, have expressly stated, it is a State Law issue, and indeed had chartered the County in January for not having sought a State Court determination of that issue.

LILCO's filings before the NRC concede that there is a State Law issue. They concede that the Federal Law question of preemption which they assert would never be reached if indeed the State Law issue were resolved in their behalf.

They clearly say if it were to be determined that LILCO has the authority to carry out these functions, the federal preemption question which they assert as a defense would never be reached.

Under those circumstances --

THE COURT: Does this preemption really permeate the air here, though?

Assuming your complaint, as it is prepared in a very artful fashion -- your complaint, whoever prepared the complaint -- assuming the complaint --

MR. BROWNLEE: -- I wish I could accept the credit for the complaint. I didn't draft the complaint.

THE COURT: Someone did, and someone was extremely artful.

Go ahead.

MR. BROWNLEE: It's clear that the federal preemption question permeates the air by way of defense --

THE COURT: That's not my question. I know

it's by way of defense and I know there is ample authority that the defense does not give this Court jurisdiction.

Let's talk about the overall picture where the preemption, the supremacy, become really the heart of the action in that you can't get to the complaint unless you first determine the "federal question."

MR. BROWNLEE: I think, with all due respect, your Honor, that's absolutely upside down.

THE COURT: Tell me why it is upside down?

MR. BROWNLEE: You don't get to the federal preemption case -- issue, until you have decided under State Law, LILCO may not perform these functions. That is the threshold question.

Can LILCO direct, control an evacuation effort under State Law? Is there anything under State Law that permits them to do that?

If a Court is to determine that LILCO has that power, that's the end of the case, period.

If a Court is to determine that LILCO does not have that power, then, and only then, does the federal preemption issue become relevant. That issue need never be reached, and indeed is never reached until one is disposed of the threshold State Law issue, to determine that LILCO does not have the power.

And then the question is if it doesn't have the power under State Law, is there some argument, some provision of Federal Law which would set aside that determination under State Law?

In arguing to the NRC panel, LILCO took the position that the issue should be eventually disposed of by the NRC, and they said, "The legal authority contentions -- nor can the legal authority contentions be resolved (except in LILCO's favor) by relegating them to a State Court."

And their justification is stated in a footnote. a decision in LILCO's favor, that is, a decision that "LILCO is not prohitibed by State Law from implementing an emergency response," would, of course, end the matter. That is to say, that if they win on the State Law issue, there is no federal issue in question.

They go on: "In that case, the federal pre-emption issue would never arise."

That seems to me a clear concession that the federal preemption issue which they raise and which is clearly, as far as I can determine, the major defense which they mount in this case, only comes up after one has made one of the two available rulings on State Law.

THE COURT: Do you agree with that, counsel?

MR. SISK: Judge, I think if the issue were decided as a matter of State Law in LILCO's favor, that is, that LILCO had authority to do these things as a matter of State Law, that could end the case.

I don't agree that you don't hit a federal question before you get there.

The important thing is that --

THE COURT: Tell me, convince me of that.

MR. SISK: Okay.

The important thing is that the County's complaint and New York's complaint raise one central issue, and that is the issue of whether the State and the locality can prevent the operation of Shoreham on grounds of radiological health and safety. And, in addition, the complaint rests on the single proposition which I will submit is of Federal Law, that the County and the State have exclusive authority to exercise police powers to protect the public health and safety, or to take those steps which aren't exercises of police power which LILCO proposes to do; to protect the public health and safety in the --

THE COURT: LILCO does not propose in its plan to exercise the police powers at all?

MR. SISK: Judge, we don't believe that LILCO purports to usurp police powers.

THE COURT: Not "usurp," act as if they'd be.

In other words, there's a problem; the evacuation becomes necessary. You're going to have to assume that you are one, a policeman; two, a fireman; three, a municipal hospital; four, an ambulance driver.

You know, there are many, many things that occur with regard to a massive evacuation.

Are you suggesting that LILCO does not intend to perform these functions?

MR. SISK: Judge, I'm suggesting LILCO intends to perform or to contract for the performance of those functions, but I don't believe that those are exercises of State police power.

What LILCO proposes to do initially is to comply with federal regulations which are cited in our brief, to alert the public if an accident occurs.

Now I'll point out in paragraph, I believe it's paragraph 17 of the County's complaint, one of the challenged actions is that LILCO cannot even advise the public that an accident is occurring; cannot make recommendations to the public as to whether they should evacuate, shelter, or perform other statements in the event of a radiological emergency.

Now, those steps are required to be performed

by NRC regulations cited in our brief 10 CFR 50.47 (b).

Those types of functions are typically performed whether a State or County does participate in an emergency response plan, and all of the other plans of the country that we are aware of by the utility-licensee.

The reason is they run the plant; they are required by the Federal regulations to make an assessment of how the accident is likely to be developed. They are required to make an assessment of what the likelihood of radiological releases are.

LILCO, in other words, is responsible and would be responsible whether the State was or wasn't participating for making those predictions, for making recommendations, and for making sure those got out to the public. That is a licensee responsibility. That is exactly what LILCO proposes to do pursuant to Federal regulations, and that is one of the things that the County is challenging in this case.

I submit to you that that is controlled exclusively by Federal Law.

If I may return to the point that the Court asks, that is, if we decide New York Law in favor of LILCO, do we not reach a federal question?

I think I explain that you have to cross a

federal question in order to decide that. But the key issue, Judge, is what is the plaintiff's claim?

Suffolk County and New York have not claimed that LILCO does have the authority to do these things. They have claimed that LILCO does not have the authority to perform certain functions after a license is granted; after the plant is operational; after the plan has received approval from the Nuclear Regulatory Commission.

That conduct, I will submit, is federal in character, and the County's challenge is to that conduct. I just don't see any way that you could resolve the complaint, the claim that the County is making and that New York is making, without hitting a federal question, because it's their claim as to LILCO's conduct.

THE COURT: Mr. Palomino.

MR. PALOMINO: Your Honor, I think it's very simple.

Whether or not this case arises or indicates Federal Law has to be determined by the face of the complaint.

If you look at the face of the complaint, it spells out certain actions -- and you've read it -- that you will direct traffic, post signs, block roads,

do other things.

The State's complaint specifically says what specific provisions of New York Law these violate? The cause of action involves that, that's all it does.

I mean, he talks about what is in his brief, talks about the County's challenge. He doesn't point to anyplace in the complaint where Federal Law is involved because it is not involved. It could only be by way of anticipating --

THE COURT: Did you prepare the complaint?

MR. PALOMINO: Yes, I prepared the State's complaint.

Your Honor, these Laws were on the books for over a century. They are done by the sovereign State of New York, under the police powers, to protect its people.

It's indifferent to whom the violator is; whether it's McDonald, LILCO, or Joe Smith. The cases are as simple as that.

The complaint is there and that's all that is involved in the case.

THE COURT: What about the simple language we read in Judge Bartels' decision? Are you familiar with that case?

MR. PALOMINO: I'm not familiar with Judge

Bartels' case. This is the only action the State is involved in. We are involved with that --

THE COURT: It's a case that went to the Circuit, and I'm wondering whether or not you are familiar with the language contained therein?

MR. PALOMINO: I think that case is clearly distinguishable --

MR. BROWNLEE: Let me speak to that, if I might --

THE COURT: Please don't interrupt him.

MR. PALOMINO: The rules are determined on the face of the complaint, and the plaintiff is entitled to plead his cause of action if he wants. And it's pleaded as a State action.

No matter how he characterizes, challenges, there's nothing in the face of this complaint which would give this Court jurisdiction. And they are talking about remote motives. Why they are violating the law, why they are engaged in this conduct, doesn't appear in the face of the complaint.

They are talking about Federal Law, and then they go into the merits.

We are not interested in the merits here. The only question is one of jurisdiction.

Under 1441 there is no basis for jurisdiction

here. I think that's clear also from the case we cite with the Tax Board. I think it's long-standing law going back to Tully, Cardozo, and other Judges down throughout the Federal system, and the purpose of a well-pled rule is to limit the number of cases that go to Federal Court. That's why you can't anticipate defenses. It's nowhere do they point to it in the complaint.

They will talk about their memorandum; they will talk about their challenge; they will talk about a nuclear -- rather regulation of the NRC. This was so clear that FEMA, if you go to the merits, the Federal Emergency Management Agency, said they violate State Laws of the State of New York. And you don't really reach a question -- they don't get a license first because they have the burden of proving they can do this all legally.

FEMA said they can't. Judge Lawrence said, "Go to the State Law," and he's right, because it should be interpreted by the State Court. And this case does turn on a State question initially.

Their statement in paragraph 16, "Nothing in New York State Law prevents the utility from performing the necessary functions to protect the public."

They didn't allege there that they had to resort

to Federal Law. They said they are complaining with State Law, and then they turn and say Executive Law 2(b) gives them that power.

So the case can turn on State Law on that situation and never reach a federal question. And that's how the complaint is phrased because that is how it arises, and it's as simple as that.

They can't convert it by interpolating in our complaint things that are not there.

MR. BROWNLEE: Let me pick up one comment there. We do have an anomalous situation there; we have the ASLB, the NRC hearing panel, which is attempting to determine the adequacy of the emergency plan, looking to both LILCO and the County, and saying, "Here's a State Law question. How are we going to resolve this? And why shouldn't it be forwarded to the State Courts for their resolution so we can be guided in our judgments by a definitive determination from the State Courts?"

Now, it seems to me that that panel ought to know a federal question when it sees it, particularly one that arises under their rec, and they are asking the parties for assistance.

Pursuant to that virtual direction, we filed an action in State Court and the argument that comes

back the other way is, "No. These are federal issues," and leaves unclear whether this issue is ever to be resolved.

Now, going to your question about Judge Bartels' opinion, it seems to me that his remand opinion falls essentially within the range of the AFCO Case, which the Franchise Tax Board Case cites and distinguishes.

THE COURT: Yes.

MR. BROWNLEE: -- and those are the cases in which either an express federal cause of action exists which the complaint alleging State Court claims is is essence coextensive with, and that's one side of it and nobody here suggests that the County does indeed have a federal cause of action for the determination of these State causes of action. Or the other line of the AFCO cases, which I think Judge Bartels' opinion is under, is where you have a State claim, but the affirmative claim for its substantive content looks to Federal Law. So that he determined in that case that the complaint which had been filed by the County, although it arose in State Contract and State Tort Law, had as its substantive underpinning, the provisions of the NRC regulations and was therefore, in essence, a claim under Federal Law.

THE COURT: Well, it was pled as such. There

was a pleading in that case.

MR. BROWNLEE: That is correct.

THE COURT: But beyond that, he makes gratuitous statements, I think, and maybe it is gratuitous only. It appears to me there was enough on the face of the complaint to give it federal jurisdiction, federal flavor.

But I think he went further than that, didn't he?

MR. BROWNLEE: What I remember is specifically the references to the fact that there were allegations in the complaint which related to the substantive NRC regulations, and that those were the standards of conduct which the County's State Law complaint implicated and therefore it was, in essence, a Federal Law pleading and discussed -- I don't have a fix on what you referred to as the "gratuitous comments," but gratuitous comments should never be a precedent.

THE COURT: That's an expression that should not be used. I often make gratuitous comments after having decided a case. But it's not a very good practice because it only creates havoc for the next judge down the line.

Yes?

MR. SISK: Judge, I think that may be the case what we have in terms of the statements by Judge Lawrence, as well, that the County and New York as well are referring to. But in the light of the comments that have just been made, I do need to bring some facts to the Court's attention.

THE COURT: Do you really disagree with the bold letter print, the Hornbook type statement that if indeed no jurisdiction exists in the first place, you cannot give this Court jurisdiction by interposing an answer or anticipating a federal question and answer?

T2 MR. SISK: Judge, if the federal question arose solely as a defense to a State claim, there would be no removal of jurisdiction.

THE COURT: I'm delighted that you at least agree upon something.

MR. SISK: I don't think anybody ever disagreed with that, and that's exactly what our brief says.

The Suffolk County complaint necessarily arises under Federal Law and necessitates and implicates federal questions for the reasons I've just stated.

THE COURT: I tell you that you will have to convince me of that; spend every moment convincing me of that statement.

MR. SISK: Judge, that's what I'm going to try to do right now.

The first thing I want to do is direct the Court's attention to the face of the complaint. It alleges that there is an ongoing NRC proceeding. It alleges that LILCO has to submit an emergency plan to the NRC.

It alleges that LILCO has made representations in that federal proceeding. It alleges that LILCO must have an emergency plan in order to get federal approval of that license.

It alleges that LILCO doesn't have the authority to perform certain steps in order to get an NRC license.

The face of the complaint shows that this arises in a federal context and implicates issues of Federal Law.

Judge, in addition, I think the comments by the Supreme Court in Franchise Tax Board that are quoted extensively in our brief show that if the pleading is artfully drafted in a way that says, "We are just making a claim under State Law," but it is clear from the context of the action, it is clear from the nature of the conduct that is put in issue, that there is a federal issue, then there is removal jurisdiction.

Let me distinguish Franchise Tax Board. In

Franchise Tax Board, a California State agency filed a declaratory judgment action and they said, "We want a declaration that the exercise of our taxing power, State conduct, is legal; that that exercise of our State taxing power is not preempted by the Federal statute under ERISA." That is the context in which the Supreme Court said you are anticipating a defense.

The conduct in question is your exercise of your tax power.

Now, let me contrast that with this case. In this case, Suffolk County is not claiming that Suffolk County can validly exercise police powers and direct traffic in the event of a radiological emergency. New York is not claiming that New York can validly exercise police powers in the event of a radiological emergency.

The conduct in question is not the State's conduct; the conduct that they are challenging is LILCO's conduct. It is conduct by LILCO which on the face of the complaint and as briefed by the parties, would not even occur until a federal license is granted and until LILCO takes steps to implement those pursuant to a federal license. I think that's why it's a federal question.

I do want to clarify the way, since we have gone

into the transcript of the NRC proceeding, I think it's crucial that we point out how the State and how the County have characterized this issue. Because I think what the Court is hearing today is that they are just seeking a declaration of State Law that this will be decided in the abstract by a State Court that the NRC just wants guidance and take it back to the NRC and let them ultimately resolve the issue --

THE COURT: Can't a State Court Judge handle the preemption type defense?

MR. SISK: If it were a defense, yes. The State Court would have jurisdiction.

THE COURT: Isn't it a defense?

MR. SISK: No, Judge. It's not.

It's part of their claim. They are claiming that they have the exclusive authority, that is, Suffolk County and New York have the exclusive authority to perform these functions under New York Law. And I'll submit that that question cannot be decided, and that question has to be decided before they even have a claim.

That question can't be decided without reference to the Atomic Energy Act, the Federal FEMA regulation. You can't determine Suffolk County -- and the State of New York can do those things that are necessary to

implicate an emergency response without looking to Federal Law, and that's the crux of their complaint.

If I may, Judge, I'd like to show the Court some recent correspondence between the Governor of the State of New York, the plaintiff in this lawsuit, and the Secretary of Energy Hodell, which would show you how the State -- the State has characterized its claim.

THE COURT: Come up.

MR. SISK: (Handing.)

I think this ties in really with page one of Suffolk County's reply brief where they say that "LILCO has made a statement that is a single erroneous proposition time and time again." Their reply brief says that "LILCO has stated time and time again that the lawsuits represent -- " let me quote this paragraph of LILCO's memorandum in opposition to the County's remand motion, "Operates on the assumption that if you say the world is flat often enough, the world will be flat. LILCO repeats and repeats the single erroneous proposition that the Suffolk County lawsuit seeks to veto an operating license for Shoreham on the grounds of radiological health and safety."

The trouble is that nowhere in the brief does

the County ever state why that proposition is erroneous. We believe it's absolutely correct and it's absolutely clear and that it's more analogous to saying the "world is round."

If you look at the correspondence that I've just handed to the Court, there are three letters. The first letter is dated May 15th, 1984. It bears the letterhead of the State of New York, Executive Chamber, Mario Cuomo, Governor.

At the bottom of page one, the Governor's letter, which is addressed to Senator Warren Anderson -- the addressee appears at the last page of the letter -- the end of page one says, "With respect to safety --" and remember that's the issue that is exclusively controlled by Federal Law under the Atomic Energy Act, "and your apparent support of Secretary of Energy Hodell and his honest test of an evacuation plan, let me repeat what I've told you since our first discussion of this issue.

The safety of our citizens must be our primary concern as elected office having the public trust in matters relating to health, safety and welfare."

The final sentence in that paragraph says, "To explain in more detail, my position -- " which is Secretary Hodell's -- "I'm attaching a copy of a

letter I sent him last week."

Now, the second letter which is attached to the Governor's letter, is a letter to Governor Mario Cuomo from Secretary of Energy Hodell, the Federal Secretary of Energy.

The letter from Secretary Hodell is dated May 7th, 1984. It suggests that the State participates in an exercise of the LILCO plan that has been submitted to the NRC in conjunction with the Federal Emergency Management Agency. And you will note that at the end -- that in that letter, particularly I will look to page two at the top, Secretary Hodell says, "Shoreham will not operate until the NRC determines its operation to be safe. The major remaining issue to be resolved, and it is clearly an essential one, is that of an adequate emergency plan. LILCO has developed a plan that has been reviewed under proper, legal requirements and is considered adequate with some corrections.

The Federal Emergency Management Agency is prepared to assist in the development of an off-site evacuation plan. Their approach envisions a full field exercise of the utility's plans, assuming necessary corrections are completed.

In addition, we pledge to commit the Department

of Energy's resources to assist FEMA and the State of New York in these efforts."

The letter goes on to say, "I agree that there is now an open question on the plan, and your opinion may be correct. However, we can't know if you are right without an honest test."

And he then says, "Let's give safety a try."

THE COURT: Do you really think that is before this Court? Do you really think that's the question before this Court?

MR. SISK: Judge, I do --

THE COURT: The question is jurisdiction. It's like many things my mother would say: "It's on a cold plate." Don't talk to me about the merits of the case.

MR. SISK: I'm not trying to convince you of federal motives; I'm trying to put you in federal context and point you to the last letter.

THE COURT: Jurisdiction is really something you have to discipline yourself in order to address yourself to it. You can't be confused by the merits on either side of it.

MR. SISK: Judge, I understand that --

THE COURT: It may very well be an illogical result this Court reaches, illogical to the extent this Court has indicated should not encourage lawsuits;

that if lawsuits belong in the State Courts, they ought to be in the State Courts.

But we handle $10,000 or more diversity, two automobiles that meet at an intersection and have a collision, yet we say in this case we don't have jurisdiction. It's illogical.

But the question of jurisdiction is not to be viewed in an emotional way in addressing the merits. It's a simple matter and must be addressed on a cold plate.

MR. SISK: Judge, that's exactly what I'm trying to get to you, is the jurisdictional question, and I'm just laying the context from the last letter. It's from the Governor of New York. The Governor of New York is the plaintiff in this lawsuit. It's dated May 9th, 1984, and it represents the Governor's characterization of the lawsuit pending before this Court on a motion for remand.

On the bottom of page one, "Your letter requests the State participate in a so-called 'honest test' of the LILCO off-site evacuation plan, the requirement you refer to as a mere technicality.

Two, you are apparently not aware in the State of New York and the County of Suffolk have pending lawsuits in which they are challenging the purported

plan and test as an attempted usurpation of sovereign powers reserved to the State and County under the Tenth Amendment to the Federal Constitution."

That's the Governor's characterization of this lawsuit.

THE COURT: Well, he was a good lawyer; now he's a governor.

See, it depends what hat he has on.

Go ahead.

MR. SISK: The second paragraph says, "To accede to your request --" that is, the request that New York participate in an exercise -- "when the Federal Government is in the same legal position as LILCO, would jeopardize the State's legal standing in these actions."

I'd submit that the Governor has recognized that LILCO's conduct in implementing an emergency plan puts LILCO in the shoes of the Federal Government and makes this lawsuit a challenge directly to federal authority that hinges on a federal question.

I want to make it clear to the Court, the position that the County in New York has taken before the ASLB. The County has quoted in its reply brief at length from the transcript of the hearings before the ASLB. I think it's important that the Judge have

complete copies of these transcripts that deal with the legal authority issues, so you just won't see little small bits and pieces, and it will be seen in context.

I will offer to the Court transcripts from December 1, or portions of transcripts from December 1, 1983, and January 27th, 1984, in the ASLB proceeding.

(Handing.)

In those transcripts, and particularly in the hearing on January 27th, 1984, the State of New York and the County of Suffolk took the position before the NRC that if the issues of State Law are decided in New York's favor, the NRC lacks jurisdiction to either side, whether there can be a federal license issued.

They have stated forthrightly and have taken the position that -- let me just turn to the transcript of January 27th and to quote Mr. Palomino in his statement to Judge Lawrence at page 3655.

Now, the context of this was a statement by Governor Cuomo to the effect that LILCO lacked the authority to perform the steps necessary to implement its plan.

Mr. Palomino states to Judge Lawrence, "Well, your Honor, I really feel the State has spoken

conclusively on this, that LILCO doesn't have the power, that its plan is therefore illegal, not implementable. And while you, the NRC, can't issue an order, I do think this Board could take a very responsible position. And that is since LILCO has the purpose in this case to rule that they haven't proved it and force them to go to State Court and get this issue resolved. They can come back if they win, and if they don't, that ends it."

THE COURT: Mr. Palomino, do you want to respond?

MR. PALOMINO: I was talking about burden of proof.

They have to prove, in order to get a plan, that they can implement it legally. It's one of the requirements of the NRC.

MR. SISK: I'd like to go on --

THE COURT: All right.

MR. SISK: He also says at the bottom of 3656, "I'm saying, you, the NRC, should decide since the State has spoken as a sovereign state and you can't go behind State Law, you should rule against LILCO."

"Judge Lawrence: Is it your proposal that we then decide these issues now before going further

with this hearing, or that we postpone it to the end?"

"Mr. Palomino: You can't decide other than the State's position, and since the State has taken that position, you can't go behind. You should decide that LILCO's plan is not implementable at this point."

A question then comes later on in the page by Judge Schoen (ph), also a member of the NRC panel.

"Mr. Palomino, I take it then in your view this particular issue, the notion that the State has spoken -- and we have no power to rule otherwise -- is indeed dispositive of the entire matter of the application for license."

"Mr. Palomino: Unless they go to State Court, and you can put that in your order, unless they go to State Court and get it reversed."

Mr. Palomino is stating then if a State Court or if the Governor of New York rules on an issue of State Law, the NRC has no jurisdiction to grant a license for the Shoreham Nuclear Power Plant. That is exactly how they have framed the lawsuits that are pending before this Court. It is a forthright attempt by Suffolk County and New York to preempt the NRC from having any jurisdiction, from being able to decide the question of whether the plan can adequately protect the public health and safety in

the event of a radiological emergency.

The County's position has been even more clear. Mrs. Lechy (ph), Counsel for the County, says on page 3659, "Now there isn't any question on legal authority. The State has spoken conclusively. The highest executive of the State has stated what the law is and has stated that the LILCO plan is illegal; that LILCO does not have the authority to do what it proposes to do in its plan and that therefore this plan cannot be implemented."

At the bottom of that page and carrying on to the next one, counsel for Suffolk County states: "I want to point out that the State of New York has now resolved it and said the plan is illegal."

Now, in light of that, this proceeding should end. There isn't anything to proceed on here because the plan that LILCO is proposing that this Board find can and will be implemented is illegal. It can't be implemented, and the highest authority in the State has said that.

So the only responsible action for this Board to take is to stop the proceeding because there's nothing to proceed on.

She said that two or three times, and then on page 3661, counsel for Suffolk County states, "This

Board does not have the authority, as Mr. Palomino stated, to go beyond that State Law or to go behind the State Law. And in light of that fact, there is nothing to proceed on here because the plan is illegal, and it is basically as simple as that."

THE COURT: Tell me, why can't the Supreme Court of New York make a determination in this case? Is there not an Appellate Division? Is there not a Court of Appeals? And is there no cert from the Court of Appeals? So ultimately won't it be at the doorsteps of the Supreme Court of the United States?

What is so magical about coming in before the Federal Court as distinguished from that and a State Court judge?

MR. SISK: Judge, that which is magical is the nature of the complaint, the nature of the claim that is being made by the plaintiffs, by Suffolk County and by New York.

Their claim is that Suffolk County and New York have an exclusive authority to perform certain functions, including advising the public that an accident has occurred and making recommendations to the public, not sending out the National Guard and ordering the people to evacuate.

THE COURT: See, I don't want to get into the merits because I could make comments about what you said, and I don't want to make comments about just informing the public about there has been a nuclear accident or emergency. I don't want to go into that.

T3 MR. SISK: That's not in the complaint --

THE COURT: I know that, but I tell you that this Court has not made a determination. But it may very well arrive at what I believe to be an illogical determination, but consistent with the state of law that exists, okay?

The state of law is rather clear to me.

Now, I'm going to give this every consideration, and in my judgment it's illogical to transfer to either Albany or Suffolk County. I understand you've stipulated to Suffolk County, whatever that may be. But I'm going to give it further consideration.

It makes more sense to me to have the case stay here in this Court. I will make that very clear to you. But I don't think that's the state of the law.

MR. SISK: Judge, if I may --

THE COURT: Now, if you still want to convince me that it is -- and I'm going to be receptive in that regard, so convince me now.

MR. SISK: Judge, the face of the complaint

shows that federal questions are necessarily involved. And let me just give you once again that concrete example of an area where Franchise Tax Board itself said that a case is removable. It is cited in our brief, and it states that on page 27 of our brief. "It is an independent corollary of the well-pleaded complaint rule that a plaintiff may not defeat removal by admitting to plead necessary federal questions in a complaint."

Judge, the necessary --

THE COURT: It's very strong language, isn't it?

MR. SISK: Yes.

THE COURT: Go ahead.

MR. SISK: The necessary federal question that is in the complaint -- and that falls squarely within this rule and the AFCO rule -- and that is controlled exclusively by Federal Law. Just to give you one example, the overall proposition is radiological health and safety. But one example is in paragraph 17, A,C, and D, the County says and puts this conduct in issue, "LILCO cannot make recommendations to the public as to what they ought to do if there's a radiological accident. LILCO cannot suggest to the public that --" and the word they use is "advise"

the public. That's in the complaint.

"LILCO cannot advise the public as to what it should do if there is a radiological accident."

Under NRC regulations, the ones I cited earlier -- let me quote subsection 10 CFR Section 50.47 (b)4. It states:

"A standard emergency classification and action level scheme, the basis of which include facility system and of effluent parameters is in use by the nuclear facility licensee as the utility. And State and local response plans call for reliance on information provided by facility licensees, again, the utility, for determinations of minimum initial off-site response measures."

Those regulations also, in other subsections, require that the plan provide for notification to the public.

Now, Judge, LILCO does not propose -- and the County doesn't allege -- that LILCO proposes to send out armed guards to tell the people of Suffolk County to get out or to tell them to stay. LILCO proposes to comply with that Federal regulation, to advise the public what to do, to get the advisory out on the radio and to set off sirens.

Suffolk County's complaint challenges that

conduct by LILCO.

Squarely under the rule in Franchise Tax Board, that conduct is controlled by Federal Law.

The Federal regulations say that the State and the County have to comply with the Federal regulation.

THE COURT: I understand your position.

Just briefly.

MR. PALOMINO: Very briefly. I'll do it in two sentences.

Judge, all the references in the complaint, the Federal regulations are not essential parts of our cause of action. And therefore, it still alleges solely as State action, and this Court doesn't have jurisdiction.

THE COURT: Gentlemen, thank you very much.

If I need any additional help, I'll be in touch.

MR. FARNHAM: I think, for the record, there is also pending a motion to consolidate. I have nothing to say on that.

THE COURT: I know, but that will follow as night follows day, depending on the determination of the initial motions. And they are two.

MR. PALOMINO: On the motion to consolidate,

New York State doesn't have any position on that.

I mean, we are not involved in any other actions, and it would be drawing this into something we are not involved in.

THE COURT: I can't consolidate that which doesn't exist.

But with regard to the one that does exist, I'll address myself to it when we arrive at it. That will be very simple, okay?

It will not tax my ability, I'll tell you that.

If you have any additional information -- I don't mean to encourage additional briefs, memos, etc. -- only if you think it's really important, and put it in letter form. I have enough to read. My poor eyes are collapsing; I think I have as much information as I need. I know the problem.

I have indicated to you that it makes sense to keep jurisdiction here.

I have also indicated to you that I don't think that's the state of the law. The state of the law is for better or for worse, the complaint in fact dictates and directs the serious question of jurisdiction. And that the defense, if any, can and should be addressed by the State Courts. They are perfectly competent to do so.

And if indeed they are in error, you always have the strong possibility in a case of this size, magnitude and importance, to go before the Supreme Court of the United States.

You may say, "Well, they don't grant cert very often." My feeling is this case will be considered in its most favorable light with regard to whether or not cert be granted or not, if and when that time comes. But you can obviously see that I'm torn between what I think is proper here and what I think is the state of the law. And it's not for me to do anything, except follow the state of the law if it indeed does not violate my good conscience, and this proposition does not, because I know it can be addressed in an appropriate forum.

And with that in mind, and without making any judgment one way or the other, I bid you good day and have a good weekend.

MR. PALOMINO: Thank you, your Honor.

MR. BROWNLEE: Thank you, your Honor.

MR. SISK: Good morning, your Honor.

* * * * *

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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MARIO M. CUOMO,

Plaintiff,

-against-

LONG ISLAND LIGHTING COMPANY,

Defendant.

CV-84-2328
MEMORANDUM
AND ORDER

----------x

COUNTY OF SUFFOLK,

Plaintiff,

-against-

LONG ISLAND LIGHTING COMPANY,

Defendant.

CV-84-1405

----------x

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FPI—MAR—1-30-80-250M 3583

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ALTIMARI, D.J.:

Plaintiffs in two related lawsuits move to remand, pursuant to 28 U.S.C. § 1447(c), the instant actions commenced in the Supreme Court of the State of New York, Albany County, and the Supreme Court of the State of New York, Suffolk County, respectively, back from whence they came.[1] Defendant removed the actions to this Court under 28 U.S.C. § 1441(a) and (b) on the

ground that this Court has original jurisdiction under 28 U.S.C. §§ 1331 and 1337, because the actions arise under the Constitution and laws of the United States, particularly the Supremacy Clause and the Fourteenth Amendment, as well as the Atomic Energy Act, 42 U.S.C. § 2011 et seq. ("AEA") and its implementing regulations as adopted by the Nuclear Regulatory Commission ("NRC"). Defendant cross-moves pursuant to Fed. R. Civ. P. 42(a) to consolidate these actions with one presently pending before the Court, Citizens for an Orderly Energy Policy, Inc. v. County of Suffolk, No.CV-83-4966 (hereinafter the "Citizens' action").

BACKGROUND

The principal underlying dispute between the parties is whether Long Island Lighting Company's ("LILCO") Shoreham Nuclear Power Facility ("Shoreham") can be operated safely. As Judge Cardamone recently observed, "The uncertainty about whether [Shoreham] can be operated safely has stirred deep public concern. Shoreham's critics contend that as the beauty of the Acropolis symbolizes the Golden Age of ancient Greece, an unsightly, deserted nuclear power plant will symbolize Twentieth Century America. Its

defenders claim that a safe-working nuclear plant producing electricity, as in France, Britain, Japan and Germany, will free America from dependence on foreign oil and symbolize the triumph of technology over the loss of natural resources." County of Suffolk v. Long Island Lighting Co., 728 F. 2d 52, 55 (2d Cir. 1984). Like Judge Cardamone, however, "we are not called upon to answer these questions involving large benefits and risks. . . . " Id. Neither must we answer the question of whether the actions of the County of Suffolk (hereinafter the "County") in failing to participate in off-site emergency planning for Shoreham are preempted by the AEA. We need only decide whether LILCO and Mario M. Cuomo properly removed these actions to the United States District Court.

The County's complaint[2] seeks a declaration that LILCO's implemention of its radiological emergency response plan, which is referred to as the "Transition Plan" (hereinafter the "Plan"), is unlawful and in violation of the Constitution and laws of the State of New York. Citing, N.Y. Const. arts. 3, 9; N.Y. Exec. Law, art. 2-B (McKinney 1982 & Supp. 1983); N. Y. Mun. Home Rule Law § 10 (McKinney 1969 & Supp. 1983).[3]

LILCO submitted the Plan to the NRC as part of the licensing proceedings for Shoreham. The County and the Governor of the State of New York, Honorable Mario M. Cuomo,having determined that no safety evacuation plan is feasible, took no part in submitting the Plan to the NRC and state that they will not participate in implementing it. Thus, the Plan was developed and submitted to the NRC by LILCO alone.

Paragraph fifteen of the County's complaint states that LILCO has created the "Local Emergency Response Organization" (hereinafter the "LERO") for the purpose of implementing the Plan. The LERO is staffed by approximately two thousand (2,000) persons, most of whom are LILCO employees and none of whom are officials of the County or the State of New York we are told.

Paragraph seventeen of the County's complaint states in part that:

> "In the event of a nuclear accident at Shoreham, LILCO's Transition Plan provides that LILCO, through its alter ego LERO, and without consent or approval by, or participation of, Suffolk County or the State of New York, will arrogate to itself functions purporting to protect the health, welfare and safety of residents and transients within Suffolk County. The offsite emergency response to the accident for a distance of fifty

> miles from that plant will, under LILCO's Transition Plan, be under the management, direction and control of LILCO. Those public safety functions which are possessed inherently by local and state government officials for exercise through the police power will, according to LILCO's Transition Plan, be possessed and exercised by LILCO employees."

Subparagraphs of paragraph seventeen describe the functions LERO will perform in some detail.[4]

In paragraph nineteen of its complaint, the County states that "LILCO has asserted that it has the necessary legal authority to implement its Transition Plan and 'to effectively protect the safety and health of the public.'" Quoting, LILCO Transition Plan at p. 1.4-1.[5] Taking issue with LILCO's position, the County claims that under the Constitution and laws of the State of New York, "the police power is inherent in and can be possessed and exercised only by the State of New York itself or by a political subdivision of the State if there has been a proper delegation of authority from the State to such subdivision." Complaint par. 20. Further, the County claims that the State has delegated its police powers within Suffolk County only to the Government of Suffolk County, and has not delegated its police powers to LILCO.

Accordingly, the County states in paragraph twenty-one of the complaint that:

> "An actual and justiciable controversy exists between the plaintiff and the defendant concerning the legality, under the Constitution and laws of the State of New York, of LILCO implementing its Transition Plan. A resolution of this dispute is necessary because LILCO is representing that it has authority under the laws of the State of New York to implement the Transition Plan . . . which usurps the police power authority of the State of New York and Suffolk County -- and LILCO is implementing that Plan. LILCO's acts in implementing such [a plan] have violated, are violating and will violate the Constitution and laws of the State of New York." 6

The County seeks a declaratory judgment, pursuant to N.Y. Civ. Prac. Law § 3001,[7] that LILCO's implementation of its Plan is unlawful and illegal under the Constitution and laws of the State of New York.

DISCUSSION

I.

28 U.S.C. § 1441(a) and (b) provides:

> "(a) Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may

> be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending.
>
> (b) Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to citizenship or residence of the parties. Any other such action shall be removable only if none of the parties in interest properly joined and served as defendants is a citizen of the State of which such action is brought."

In the instant action, since there is no diversity of citizenship between the parties, see 28 U.S.C. § 1332, the dispositive question on the issue of whether removal was proper under section 1441, is whether the County's complaint states a claim "arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331.

On a motion to remand, the removing defendant bears the burden of establishing that the case is within the Federal Court's removal jurisdiction. Irving Trust Co. v. Century Export & Import, S.A., 464 F. Supp. 1232, 1236 (S.D.N.Y. 1979). Epecially is this so when "plaintiffs strenuously argue that they are not relying on any federal substantive right and no

reference to a federal provision is made in plaintiff's complaint." Barnett v. Faber Coe & Gregg, Inc., 291 F. Supp. 178, 180 (S.D.N.Y. 1968); Jody Fair, Inc. v. Dubinsky, 225 F. Supp. 695, 696 (S.D.N.Y. 1964).

It is hornbook law that an action can be removed from State to Federal Court only if it might have been brought there originally. See, Wright, Hornbook of the Law of Federal Courts, § 38, at 148 (3d ed. 1976); see also 14 Wright, Miller & Cooper, Federal Practice and Procedure, § 3721, at 516 (1976); 1 A J Moore, Moore's Federal Practice, par. O. 157[5], at 118 (1983); 2 Cyclopedia of Federal Procedure, § 3.12 (3d ed. 1980). Stated more precisely, and recently by a Judge of this Court to two of the parties herein, "[t]he general rule . . . is that a case can be removed from state court only if the federal court would have had original jurisdiction." County of Suffolk v. Long Island Lighting Co., 549 F. Supp. 1250, 1254 (E.D.N.Y. 1982), citing, Arkansas v. Kansas & Texas Coal Co., 183 U.S. 185, 22 S. Ct. 47 (1901); Illinois v. Kerr-McGee Chemical Corp., 677 F.2d 571 (7th Cir.) cert. denied, 103 S. Ct. 469. (1982).

In order to support removal where it is predicated on the plaintiffs stating a claim arising

under the Constitution, laws or treaties of the United States, as here, it is well established that the existence of a Federal question must necessarily appear on the face of the plaintiffs' complaint. Phillips Petroleum Co. v. Texaco, Inc., 415 U.S. 125, 127-28, 94 S. Ct. 1002, 1003-04 (1974); Gully v. First National Bank, 299 U.S. 109, 112-13, 56 S. Ct. 96, 97-8 (1936); Tennessee v. Union and Planters Bank, 152 U.S. 454, 460, 14 S. Ct. 654, 656 (1894). Thus, while "the statutory phrase 'arising under the Constitution, laws, or treaties of the United States' has resisted all attempts to frame a single, precise definition for determining which cases fall within, and which cases fall outside, the original jurisdiction of the district courts," Franchise Tax Board of the State of California v. Construction Laborers Vacation Trust For Southern California, _____U.S. _____, 103 S. Ct. 2841, 2846 (1983) (hereinafter "Franchise Tax Bd."), and "[w]hile the precise boundaries to which Federal jurisdiction extends are not matters upon which all agree," Powers v. South Central Union Food & Commercial Workers Union and Employers Health and Welfare Trust, 719 F.2d 760, 763 (5th Cir. 1983), one "powerful doctrine has

emerged" whose vitality is unquestioned - - the "well-pleaded complaint rule." See, Franchise Tax Bd., supra, ____U.S. at_____, 103 S. Ct. at 2846. In Franchise Tax Bd., supra, the Supreme Court, quoting from its prior decision in Taylor v. Anderson, 234 U.S. 74, 75-76, 34 S. Ct. 724, 724 (1914), described that doctrine as follows:

> "[W]hether a case is one arising under the Constitution or a law or treaty of the United States, in the sense of the jurisdictional statute . . . must be determined from what necessarily appears in the plaintiff's statement of his own claim in the bill or declaration, unaided by anything alleged in anticipation or avoidance of defenses which it is thought the defendant may interpose."

_____U.S. at ____, 103 S. Ct. at 2846. See, Phillips Petroleum Co. v. Texaco, Inc., supra, 415 U.S. at 127-28, 94 S. Ct. at 1003-04; Pan American Petroleum Corp. v. Superior Court, 366 U.S. 656, 663, 81 S. Ct. 1303, 1307; Gully v. First National Bank, supra, 299 U.S. at 113, 57 S. Ct. at 98; Louisville & Nashville R. Co. v. Mottley, 211 U.S. 149, 152, 29 S. Ct. 42,43 (1908); Tennessee v. Union and Planters' Bank, supra, 152 U.S. at 460-61, 14 S. Ct. at 656; Metcalf v. City of Watertown, 128 U.S. 586, 589, 9 S. Ct. 173, 174

(1888). Under the doctrine and "[f]or better or worse," "a defendant may not remove a case to Federal Court unless the plaintiffs' complaint estalishes that the case 'arises under' Federal law." Franchise Tax Bd., supra, ____U.S. at _____, 103 S. Ct. at 2847. Accordingly, a case does not arise under Federal law because of a defendant's assertion of an issue of Federal law in the pleadings or in the petition for removal, Phillips Petroleum Co. v. Texaco, Inc., supra, 415 U.S. at 127-28, 94 S. Ct. at 1003, nor may a Federal question be inferred from a defense pleaded or one expected to be made. Gully v. First National Bank, supra, 299 U.S. at 113, 57 S. Ct. at 98; Debevoise v. Rutland Railway Co., 291 F.2d 379, 380 (2d Cir.), cert. denied, 368 U.S. 876, 82 S. Ct. 123 (1961).

Taken one step further, a defense of Federal preemption, like any other defense, cannot serve as a basis for Federal jurisdiction. Franchise Tax Bd., supra, _____U.S. at ____ & n. 11, 103 S. Ct. at 2848 & n. 11, citing with approval, Trent Realty Associates v. First Federal Savings & Loan Ass'n, 657 F. 2d 29, 34-35 (3d Cir. 1981) (Home Owner's Loan Act); First National Bank of Aberdeen v. Aberdeen National Bank,

627 F. 2d 843, 850-52 (8th Cir. 1980) (National Bank Act); State of Washington v. American League of Professional Baseball Clubs, 460 F. 2d 654, 660 (9th Cir. 1972) (Federal Antitrust Laws). The cases which have embraced this view are numerous, see, cases cited above in Franchise Tax Bd., supra; Powers v. South Central Union Food & Commercial Workers Union, supra, 719 F. 2d at 764 (ERISA); Illinois v. General Electric Co., 683 F. 2d 206, 208 (7th Cir. 1982); cert. denied sub. nom Hartigan v. General Elecric Co., 103 S. Ct. 1891 (1983); Illinois v. Kerr-McGee Chemical Corp., supra, 677 F. 2d at 577-78 (AEA); Nalore v. San Diego Federal Savings & Loan Ass'n, 663 F. 2d 841, 842 (9th Cir. 1981), cert. denied, 455 U.S. 1021, 102 S. Ct. 1719 (1982) (Home Owner's Loan Act); Guinasso v. Pacific First Federal Savings & Loan Assoc., 656 F. 2d 1364, 1366 (9th Cir. 1981); cert. denied, 455 U.S. 1020, 102 S. Ct. 1716 (1982) (Home Owner's Loan Act); Madsen v. Prudential Federal Savings & Loan Assoc., 635 F. 2d 797, 801 (10th Cir. 1980), cert. denied, 451 U.S. 1018, 101 S. Ct. 3007 (1981) (Home Owner's Loan Act); Home Federal Savings & Loan Assoc. v. Insurance Department, 571 F. 2d 423, 426 (8th Cir. 1978) (Home

FPI-MAR—1-30-80-250M-3583

Owner's Loan Act); Bailey v. Logan Square Typographers, Inc., 441 F. 2d 47, 51-52 (7th Cir. 1971) (copyright),[8] and while there is authority to the contrary,[9] after the Supreme Court's decision in Franchise Tax Bd., supra, it can no longer be doubted that, as a general rule, a defense of Federal preemption does not provide a basis for Federal jurisdiction where one is otherwise lacking.

For example, in Illinois v. Kerr-McGee Chemical Corp., supra, 677 F. 2d 571, the State of Illinois filed a complaint against Kerr-McGee in the Circuit Court of Illinois for DuPage County. The complaint alleged that Kerr-McGee's operation and maintenance, under license from the NRC, of a site used to possess and store thorium ores, a nuclear source material subject to regulation by the NRC, 42 U.S.C. § 2014(2), violated the Illinois Environmental Protection Act and other state statutes pertaining to the disposal of hazardous wastes. Kerr-McGee had been working since 1975, at the NRC's direction, to formulate a plan for decommissioning and stabilizing the site, which plan Illinois had taken the opportunity to comment on.

FPI—MAR—1 37) 80 250M-3543

Kerr-McGee petitioned the District Court to remove the action from State to Federal Court on the ground that the complaint raised a Federal question. Illinois thereafter moved to remand the action to State Court, arguing that it pleaded no Federal cause of action. The District Court denied Illinois' motion, finding that the Federal regulatory scheme under the AEA had preempted state regulation of radioactive waste disposal, and that interpretation of Federal law was thus necessarily involved in the complaint. Subsequently, the District Court granted Kerr-McGee's motion to dismiss the complaint, "finding that Federal law conferred exclusive jurisdiction upon the NRC to regulate radiation hazards and, therefore, preempted state and local legislative and administrative regulatory schemes." 677 F. 2d at 574.

On appeal, the Court of Appeals stated that Illinois' complaint relied only on alleged violations of state law and regulations, and therefore raised no Federal cause of action. Id. at 576-77. As to Kerr-McGee's argument based on Federal preemption of State law, the Court stated that: "We do not agree.... that a defendant can have a state law claim removed to

federal Court merely by uttering the word preemption." Id. at 577. The Court saw no reason for treating a defense of Federal preemption differently than any other defense based on Federal law. Id. at 578. Consequently, the Court reversed the District Court's order denying Illinois' motion to remand and remanded the action to the District Court with instructions to remand it to State Court. Id. In addition, it noted that since the action was improvidently removed from State to Federal Court, the District Court's consideration of the issue of preemption was improper. Id. at 578 n. 12.

Similarly, in County of Suffolk v. Long Island Lighting Co., supra, 549 F. Supp. 1250, a case which LILCO places great reliance on, the County brought suit on behalf of itself and all similarly situated LILCO ratepayers claiming that Shoreham suffered from serious deficiencies in design and construction and that ratepayers had been wrongfully overcharged to finance the escalated construction costs. Id. at 1252. More importantly, the complaint contained many references to defendants' violations of and/or non-compliance with NRC regulations governing the construction of Shoreham.

See id. at 1253-54 & n. 5. Plaintiff pled actions sounding in negligence, strict liability, breach of warranty, breach of contract and misrepresentation and concealment. Id. After the action was removed to Federal Court, the County moved to remand.

Judge Bartels, with characteristic sound reasoning, denied the motion. After a general discussion of the law, he noted that plaintiffs' complaint relied on defendants' violation of the AEA and NRC regulations. Thus, a Federal question appeared on the face of plaintiffs' complaint and was an essential element in establishing its right to relief. Id. at 1256.

Having denied the County's motion, in dictum Judge Bartels noted that the parties had devoted much effort to the issue of preemption. Therefore, while unnecessary to his decision, he nevertheless turned to an examination of the issue. After analyzing several cases, including the decision in Illinois v. Kerr-McGee Chemical Corp., supra, Judge Bartels theorized that removal was proper where Federal law not only preempted, but also provided relief, whereas in cases where preemption served only as a defense and the

complaint set forth no claim upon which Federal relief could be granted, removal was inapproprite. Applying that principle to the case before him, Judge Bartels found that "it is readily apparent that the [AEA], as presently construed by the Courts, does not establish a preemptive remedial scheme . . . that would potentially accrue to the benefit of this plaintiff for jurisdictional purposes." Id. at 1258. Thus, while Judge Bartels denied the motion to remand, he rejected defendants' jurisdictional argument based on AEA preemption of plaintiffs' claims.

Applying the foregoing principles to the cases at hand, we are forced to conclude that the plaintiffs' actions do not arise under Federal law and were improvidently removed to this Court. Plaintiffs seek a declaration, pursuant to New York's Civil Practice Law and Rules, that certain parts of LILCO's Transition Plan are illegal under state law. The complaint does not mention or rely on defendants' failure to comply with, or its violation of, any Federal statutes or regulations. Cf., County of Suffolk v. Long Island Lighting Co., supra, 549 F. Supp. at 1256-57. Indeed, in pointing to the existence of a justifiable

controversy, the complaint cites LILCO's Transition Plan's statement that New York State law does not prohibit LILCO from performing the necessary functions to protect the public. Instead, Federal law arises only by way of defendants' assertion that the AEA preempts plaintiffs' causes of action. As the cases, in our opinion, make clear, where no Federal claim can be found on the face of plaintiffs' complaint and Federal law is not an essential element in establishing its right to relief, a defense of Federal preemption cannot serve as a basis for Federal jurisdiction. Here, a Federal claim cannot be found on the face of the plaintiffs' complaints, and Federal Law is certainly not an essential element in establishing their right to relief. In fact, under prevailing law, they could not seek relief in this Court under the AEA or its implementing regulations. Of course, we do not suggest that the fact that plaintiffs could not have originally commenced this action in this Court under the AEA, which law defendants claim preempts plaintiffs' state law claims, necessarily bars removal of their actions to the Federal Court. So long as a Federal question appears on the face of plaintiffs' complaint and

FPI—MAR—1 30 80 250M 3563

Federal law is an essential element in establishing their right to relief, removal would be proper. Such, however, is not the case here.

Recognizing, as it must, the force of the Supreme Court's decision in Franchise Tax Bd., supra, LILCO advances arguments along several fronts in seeking to persuade us that jurisdiction in this case rests on more than just its assertion of a Federal preemption defense.

First it argues that Federal law is the necessary source of plaintiffs' cause of action and, second, that even if State law is the source of the cause of action, it nonetheless requires resolution of a substantial question of Federal law in dispute between the parties. See LILCO Memorandum of Law in Opposition to Motion for Remand at 13, 13-26, citing Franchise Tax Bd., supra, ____U.S. at ____, 103 S. Ct. at 2848. In support, it argues that Federal law is the source of plaintiffs' cause of action since "[t]he entire field of radiological health and safety, as it relates to the construction and operation of a nuclear power plant, is preempted by the Federal Atomic Energy Act." LILCO memo at 15, citing, Pacific Gas & Electric

Co. v. State Energy Resources Conservation and Dev. Comm'n, 103 S. Ct. 1713 (1983). "Thus, any claim that Suffolk County may have to prevent the operation of Shoreham for reasons of radiological health and safety depends upon Federal law." LILCO memo at 20.

LILCO's argument is simply incorrect as a matter of law. Plaintiffs' complaint specifically asserts a claim under New York's Declaratory Judgment Act, N.Y.Civ. Prac. Law § 3001 (McKinney 1974), and relies upon alleged violations of New York State law. Whatever may be its "source" in the broad sense of the word, "the 'law that creates the cause of action' is state law, and original jurisdiction is unavailable unless it appears that some substantial disputed question of Federal law is a necessary element of one of the well-pleaded state claims. . . . " Franchise Tax Bd., supra, ____U.S. at ____ 103 S. Ct. at 2848.

We must proceed then to the second prong of LILCO's argument, namely that a substantial disputed question of Federal law is a necessary element of plaintiffs' State law claims. Here, LILCO argues that the County's complaint, which alleges that in the event of a nuclear accident LILCO will perform certain public

safety functions which are possessed inherently by local and State government officials for exercise through the police power, assumes that LILCO would have obtained a Federal operating license from the NRC. "In that context," LILCO's argument continues, "to decide whether LILCO's conduct would be legal, one would first have to determine whether LILCO had the authority under Federal law to perform those functions necessary to protect the public health and safety in the event of a radiological emergency at Shoreham." LILCO memo at 21. Having posed the question, LILCO next answers it by stating that NRC regulations require it, as licensee, to perform the safety protective actions alluded to in paragraph 17 of the County's complaint. Id. at 25, citing NRC regulations. "Thus," LILCO's argument concludes, "Suffolk County's claim that LILCO lacks legal authority to proceed with the Transition Plan depends on the proposition that, under Federal law, states and localities have the exclusive authority to protect the public health and safety in the event of a radiological emergency at a nuclear power plant." LILCO memo at 26.

Again, we must disagree with LILCO. Initially, just as a defense of Federal preemption may not serve as a basis for "arising under" jurisdiction, so may it not serve as the substantial disputed question of Federal law which is the necessary element of plaintiffs' state law claims. Under LILCO's reasoning, which while not necessarily illogical is, nevertheless, not in accordance with the current state of the law, every case where a defense of Federal preemption is raised would satisfy the "substantial disputed Federal question" requirement, rendering illusory the prohibition of basing Federal jurisdiction on a preemption defense. More specifically, LILCO's argument is based not on plaintiffs' claim that State law would be violated by LILCO's performance of certain safety functions, but on LILCO's claim that NRC regulations require it to perform these safety measures. LILCO's argument, however appealing, is in practical terms no more than a claim of a defense of Federal preemption. If the Court were to follow this argument, we would have to close our eyes to the present state of the law.

FPI—WAS—I 30-80 250M 3563

LILCO makes one final argument in support of removal. It contends that the AEA has "completely displaced state regulation of the health and safety aspects of nuclear power plant operation" and that the AEA, therefore, "completely preempts any cause of action by Suffolk County under New York law." LILCO memo of law at 26, 30. See, Franchise Tax Bd., supra, ____U.S. at ____, 103 S. Ct. at 2853-54; Avco Corp. v. Avco Lodge No. 735, Int'l Assn. of Machinists, 376 F. 2d 337, 339-40 (6th Cir. 1967), aff'd, 390 U.S. 557, 88 S. Ct. 1235 (1968). LILCO relies on the Supreme Court's statement in Franchise Tax Bd., supra, that "[i]f a federal cause of action completely preempts a state cause of action any complaint that comes within the scope of the federal cause of action necessarily 'arises under' federal law." ____U.S. at ____, 103 S. Ct. at 2854.

The "complete preemption" exception to the general rule that a defense of federal preemption may not serve as a basis for federal jurisdiction, however broad, is only applicable to those situations where the federal law that completely preempts plaintiff's state law action also provides a federal cause of action.

Otherwise the federal preemption claim is merely a defense, albeit a complete one, to a state law cause of action and under well-settled law not a sound basis for federal jurisdiction. Thus, "complete preemption," in the jurisdictional sense, connotes not only displacement of state law in a given area, but also the availability of a federal right of action in its stead.

In the instant actions, the AEA does not supply the plaintiffs with a federal cause of action to replace their allegedly preempted state law claims. See 42 U.S.C. § 2271(c); see, e.g., County of Suffolk v. Long Island Lighting Co., supra, 728 F. 2d at 59; Simmons v. Arkansas Power & Light Co., 655 F. 2d 131, 134 (8th Cir. 1981); Liesen v. Louisiana Power & Light Co., 636 F. 2d 94, 95 (5th Cir. 1981); Susquehanna Valley Alliance v. Three Mile Island Nuclear Reactor, 619 F. 2d 231, 237-39 (3d Cir. 1980), cert. denied, 449 U.S. 1096, 101 S. Ct. 893 (1981).

Thus, we do not believe that Avco supports removal jurisdiction under the circumstances of this case. See Franchise Tax Bd., supra, ____U.S. at ____, 103 S. Ct. at 2855; see generally, 14 Wright, Miller &

Cooper, Federal Practice and Procedure, § 3722, at Supp. 1983, p. 199-200 (1976 & Supp. 1983).[10]

III.

Our decision today far from ends the present lawsuits or controversy. It is likely that this matter will move speedily to resolution in State Court where LILCO may, of course, raise its defense of Federal preemption. While State Court judges are not asked to apply Federal law everyday, it is a task I well know to be within their capabilities. Indeed, I am confident they will do so with the same open mind and sense of responsibility with which this Court addresses so-called diversity cases which ask us to apply the law of the states. Further, if the State Court rejects a defense of Federal preemption, that decision may ultimately be reviewed on appeal by the United States Supreme Court. See, Franchise Tax Bd., supra, ____U.S. at ____, 103 S. Ct. at 2848 n. 12.

IV.

In light of the above discussion, LILCO's motion to consolidate the cases at bar with the Citizens' action is denied, since Rule 42(a), Fed. R. Civ. P., authorizes consolidation only of cases

"pending before the court." See, Oregon Egg Producers v. Andrew, 458 F. 2d 382 (9th Cir. 1972); Spirt v. Teachers Ins. and Annuity Ass'n, 93 F.R.D. 627 (S.D.N.Y. 1982); Senco of Florida, Inc. v. Clark, 473 F. Supp. 902 (M.D. Fla. 1979); Appalachian Power Co. v. Region Properties, Inc., 364 F. Supp. 1273 (W.D Va 1973); Facen v. Royal Rotterdam Lloyd S.S. Co., 12 F.R.D. 443 (S.D.N.Y. 1952).

CONCLUSION

Plaintiffs' motions to remand the within actions to State Court are granted. Defendants' motion to consolidate is denied.

SO ORDERED.

Dated: Uniondale, New York
June 15, 1984.

Frank X. Altimari
U.S. District Judge

FOOTNOTES

1
The action by Mario M. Cuomo against LILCO was originally commenced in the State Supreme Court, Albany County, and removed to the United States District Court for the Northern District of New York. On May 17, 1984 the Honorable Roger J. Miner ordered that the action be transferred to the Eastern District of New York. In addition, prior to removal the parties agreed to transfer the action to the State Supreme Court, Suffolk County, where it would be consolidated with the County of Suffolk's (the "County") action.

2
Mario M. Cuomo's complaint is practically identical to the County's complaint. He too seeks a judgment declaring LILCO's Plan to be violative of New York State law. For purposes of convenience and economy, we will focus on the County's complaint in addressing the instant motions. Indeed, in opposing the Cuomo motion, LILCO relies on its brief in opposition to the County's motion.

3
Paragraph seventeen of the Cuomo complaint likewise alleges that the Plan violates N.Y. Const. arts. 3, 9; N.Y. Exec. Law art. 2-B; and N.Y. Mun. Home Rule Law § 10. In addition, paragraph thirty-three alleges that LILCO's implementation of its Plan would also violate the following state laws:

N.Y. Agric. & Mkts. Law §§ 16(24), 16(27), 16(35), 71-1, 202-b (McKinney 1972 & Supp. 1983).

N.Y. Exec. Law §§ 22(3), 23(7)(b) & (c), 28(1), 28(2)(a) & (b) (McKinney 1982).

N.Y. Penal Law § 195.05 (McKinney 1975).

N.Y. Pub. Health Law §§ 201(1)(k) & (l) & (r), 206(1)(a) & (k), 1110 (McKinney 1971 & Supp. 1983).

N.Y. Veh. & Traf. Law §§ 1110, 1114, 1602 (McKinney 1970 & Supp. 1983).

4
The County's complaint states that:

> "In the LILCO Transition Plan, among other things LILCO employees, and not any local or state government official, are designated (a) to decide what actions should be taken to protect the health, welfare, and safety of persons in the EPZs; (b) to determine whether and how more than one hundred thousand Suffolk County residents and transients within the ten-mile EPZ, and several hundred thousand persons beyond that who will respond to the emergency, should be evacuated; (c) to advise Suffolk County residents and transients, through announcements on the Emergency Broadcast System, press statements and press conferences, what specific actions they should take to protect their health, welfare and safety; (d) to activate emergency sirens which LILCO has installed throughout the ten-mile EPZ to alert the public to the occurrence of a nuclear accident or radiological emergency; (e) to manage and direct the flow of traffic on roads within Suffolk County through various means including blocking lanes, altering roads to one-way flow, erecting barricades and installing road signs; (f) to control and direct the removal and displacement of more than one hundred thousand residents and transients from the ten-mile EPZ; and (g) to establish controls over drinking water, milk, food, crops and livestock in the fifty-mile EPZ, an effort which could affect millions of people."

FPI—MAR—1-30-80-250M-3563

5
More specificlly, the County quotes LILCO's Transition Plan at p. 1.4-1:

> "[N]othing in New York State law prevents the utility from performing the necessary functions to protect the public. To the contrary, Article 2-B of New York State Executive Law, § 20.1.e, makes it the policy of the State that State and local plans, organization arrangements, and response capability 'be the most effective that current circumstances and existing resources allow.'"

Complaint par. 19, quoting Lilco transition plan at p. 1.4-1. (emphasis added).

6
Paragraph twenty-two of the County's complaint states that:

> "The Chairman of the Atomic Safety and Licensing Board of the NRC, which is presently conducting hearings on the LILCO Transition Plan, has stated on the record his belief that the question of the lawfulness of the Transition Plan under the Constitution and laws of the State of New York should be resolved by the courts of the State of New York."

Paragraph twenty-three further states that:

> "Executive officials within the Federal Emergency Management Agency, which is reviewing the LILCO Transition Plan at the request of the NRC, have stated, in official correspondence to the NRC that it is essential that a determination be made as to whether LILCO has legal authority to assume management and control

FPI—MAR—1-10-80-250M 3563

> of the offsite emergency response to a nuclear accident at Shoreham under the laws of the State of New York."

See also, paragraphs nineteen and twenty of the Cuomo complaint.

7
Section 3001 of New York's Civil Practice Law and Rules provides as follows:

> "The supreme court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed. If the court declines to render such a judgment it shall state its grounds."

N.Y. Civ. Prac. Law § 3001 (McKinney 1974).

8
Further support for this proposition may be found in the following cases as well: La Freniere v. General Electric Co., 572 F. Supp. 857 (N.D.N.Y. 1983); Martin v. Wilkes-Barre Publishing Co., 567 F.Supp. 304 (M.D. Pa. 1983); Schmidt v. National Organization for Women, 562 F. Supp. 210 (N.D.Fla. 1983); Sarnelli v. Tickle, 556 F Supp. 557 (E.D.N.Y. 1983); Buice v. Buford Broadcasting, Inc., 553 F. Supp. 388 (N.D. Ga. 1983); Chappell v. SCA Services, Inc., 540 F. Supp. 1087 (C.D. Ill. 1982); Eureka Federal Savings & Loan Association of San Francisco v. Flynn, 534 F. Supp. 479 (N.D. Cal. 1982); Drivers, Chauffeurs & Helpers Local Union No. 639 v. Seagram Sales Corp., 531 F. Supp. 364 (D.C.D.C. 1981); Schultz v. Coral Gables Federal Savings & Loan Association, 505 F. Supp. 1003 (S.D. Fla. 1981); Freeman v. Colonial Liquors, Inc., 502 F. Supp. 367 (D. Md. 1980); Smart v. First Federal Savings & Loan Association of Detroit, 500 F. Supp. 1147 (E.D. Mich. 1980); Turner v. Bell Federal Savings & Loan

FPI—MAR—1-80-80 250M-3563

Association, 490 F. Supp. 104 (N.D. Ill. 1980); Long Island Railroad Co. v. United Transportation Union, 484 F. Supp. 1290 (S.D.N.Y. 1980); Eure v. NVF Co., 481 F. Supp. 639 (E.D. N.C. 1979); Mabray v. Velsicol Chemical Corp., 480 F.Supp. 1240 (W.D. Tenn. 1979); State of California v. Glendale Federal Savings & Loan Association, 475 F. Supp. 728 (C.D. Cal. 1979); State of Nevada v. King, 463 F. Supp. 749 (D. Nev. 1979); Oklahoma v. United Health & Retirement Association, 436 F. Supp. 55), (W.D. Okl. 1977); Borzello v. Sooy, 427 F. Supp. 332 (N.D. Cal. 1977); Marquette National Bank of Minneapolis v. First National Bank of Omaha, 422 F. Supp. 1346 (D. Minn. 1976); Committee of Interns & Residents v. New York State Labor Relations Board, 420 F. Supp. 826, (S.D.N.Y. 1976); Johnson v. First Federal Savings & Loan Association of Detroit, 418 F. Supp. 1106 (E.D. Mich. 1976); State of New York v. Local 115 Joint Board, Nursing Home & Hospital Employees Div., 412 F. Supp. 720 (E.D.N.Y. 1976); Lowe v. Trans World Airlines, Inc., 396 F. Supp. 9 (S.D.N.Y. 1975); Application of State of New York, 362 F. Supp. 922 (S.D.N.Y. 1973); see also, 1A J. Moore, Moore's Federal Practice, par. 0.160[4], at 237-38 (2d ed. 1983); 14 Wright, Miller & Cooper, Federal Practice and Procedure, § 3722, at 1983 Supp. p. 199-200 (1976 & Supp. 1983).

9
For a listing of such cases see, e.g., First National Bank of Aberdeen v. Aberdeen National Bank, supra, 627 F.2d at 850 (collecting cases); La Freniere v. General Electric Co., 572 F. Supp. 857, 860 (N.D.N.Y. 1983) (collecting cases); Sarnelli v. Tickle, 556 F. Supp. 557, 560 n. 6 (E.D.N.Y. 1983) (collecting cases).

10
LILCO also argues that in the context of declaratory relief, "the courts look to the nature of the threatened conduct or action to determine whether the complaint raises a Federal question," and that "[i]f the threatened action is inevitably Federal in nature, then Federal jurisdiction exists." LILCO memo of law at 12 n. 2. To the extent that LILCO asserts by this argument that removal jurisdiction is broader in the

case of state declaratory judgment actions, we reject this argument. Moreover, the threatened conduct or action in this case is LILCO's alleged violation of state law by implementing a Transition Plan which, whether consistent or not with Federal law, is claimed to violate State law.

Finally, it claims that if remand is granted, duplicative litigation will take place in State and Federal Court. However, the fact that both the resources of the State and Federal Courts, and the parties to the actions, will not be well served is not a persuasive ground for removal. Unfortunately, one side effect of strict application of the well-pleaded complaint doctrine may be a bad result. In addition, the Citizens' action and the cases at bar simply do not raise identical issues.

Contention	Statutes Allegedly Violated As Listed in Contentions	Statutes Allegedly Violated As As Listed in State Court Complaint
1. Directing traffic	N.Y. Penal Law §§ 190.25(3), 195.05, 240.20(5) N.Y. Veh. & Traf. Law §§ 1102, 1602 N.Y. Transp. Corp. Law § 30	N.Y. Penal Law § 195.05 N.Y. Transp. Corps. Law § 30 N.Y. Veh. & Traf. Law § 1602 N.Y. Veh. & Traf. Law §§ 1110, 1114
2. Blocking roadways and channeling traffic	N.Y. Penal Law §§ 190.25(3), 195.05, 240.20(5) N.Y. Veh. & Traf. Law § 1114 N.Y. Transp. Corp. § 30	N.Y. Penal Law § 195.05 N.Y. Veh. & Traf. Law §§ 1110, 1114
3. Posting "trailblazer" signs	N.Y. Penal Law §§ 195.25(3), 195.05, 240.20(5) N.Y. Veh. & Traf. Law § 1114	N.Y. Penal Law § 195.05 N.Y. Veh. & Traf. Law §§ 1110, 1114
4. Removing obstructions	N.Y. Penal Law § 165.05	Issues raised in state court, but no statutes cited.
5. Sounding sirens and broadcasting EBS messages	N.Y. Penal Law §§ 190.25(3), 195.05 N.Y. Exec. Law § 20 et seq.	N.Y. Penal Law § 195.05 N.Y. Exec. Law §§ 28(2)(a), 22(3)(b), 23(7)(b), 25, 26
6. Making decisions and and recommendations for the 10-mile EPZ	N.Y. Penal Law §§ 190.25(3), 195.05 N.Y. Exec. Law § 20 et seq.	N.Y. Penal Law § 195.05 N.Y. Exec. Law §§ 28(1) 28(2)(b); 25; 24(1),(2), & (5) 23(7)(b); 22(3)(b) N.Y. Pub. Health Law §§ 206(1)(a), 201(1)(r)
7. Making decisions and recommendations for the 50 mile EPZ	N.Y. Penal Law §§ 195.25(3), 195.05 N.Y. Exec. Law § 20 et seq.	N.Y. Penal Law § 195.05 N.Y. Pub. Health Law §§ 201(1)(1), 1110, 201(1)(r); 206(1)(a); 206(1)(k) N.Y. Agriculture and Markets Law §§ 16(35), 71-1; 16(24), 16)27), 202-b
8. Making decisions and recommendations for recovery and reentry	N.Y. Penal Law §§ 190.25(3), 195.05 N.Y. Exec. Law § 20 et seq.	N.Y. Penal Law § 195.05 N.Y. Exec. Law §§ 28-a, 23(7)(c), 22(3)(c) N.Y. Pub. Health Law § 206(1)(a), 201(1)(r)
9. Dispensing fuel to stranded vehicles	Suffolk County Sanitary Code, Art. 12 Code of the Town of Brookhaven, Ch. 30, Art. X	Issue not raised in state court.
10. Providing security at the EOC, relocation centers, and EPZ perimeter	N.Y. Penal Law §§ 190.25(3), 195,05, 240.20(5) N.Y. Exec. Law § 20 et seq. N.Y. Veh. & Traf. Law §§ 1102, 1602 N.Y Transp. Corp. § 30	Issues not raised in state court.

Attachment 3

LILCO, October 15, 1984

CERTIFICATE OF SERVICE

In the Matter of
LONG ISLAND LIGHTING COMPANY
(Shoreham Nuclear Power Station, Unit 1)
(Emergency Planning Proceeding)
Docket No. 50-322-OL-3

I certify that copies of LILCO's REPLY TO THE RESPONSES TO ITS MOTION FOR SUMMARY DISPOSITION ON CONTENTIONS 1-10 were served this date upon the following by first-class mail, postage prepaid, and on the following day by hand or (as indicated by an asterisk) by Federal Express on October 16, 1984:

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