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LILCO, August 6, 1984

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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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 MOTION FOR SUMMARY DISPOSITION OF CONTENTIONS 1-10 (THE "LEGAL AUTHORITY" ISSUES)

This motion requests the Licensing Board to resolve Contentions 1 through 10 in this proceeding in LILCO's favor. The contentions allege that certain activities under the LILCO-sponsored offsite emergency plan are prohibited by state and local laws. This motion demonstrates that, even if state law prohibits these activities, summary disposition is nevertheless called for, for reasons that are either purely matters of federal law or already established on the record.

add'l Gov't OCA

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I. INTRODUCTION

A. The Purpose of this Motion Is to Resolve the "Legal Authority" Contentions

With this motion LILCO asks the Board to decide Contentions 1-10 (the "legal authority" issues) summarily in LILCO's favor.1/ The bases for the relief requested are federal preemption and the existing evidentiary record in this proceeding.

Contentions 1-10 assert that various actions called for in the LILCO offsite emergency plan (the LILCO Transition Plan) are prohibited by New York State statutes (or, in the case of Contention 9, by two local ordinances). The actions, in summary, are these:

(1) guiding traffic,

(2) blocking roadways, erecting barriers in roadways, and channeling traffic,

(3) posting traffic signs on roadways,

(4) removing obstructions from public roadways, including towing private vehicles,

(5) activating sirens and directing the broadcasting of emergency broadcast system messages,

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1/ In LILCO's view, the federal preemption doctrine, not to mention New York State law, entitles the Company to more relief than the mere resolution of the ten contentions. The scope of the relief to which LILCO is entitled need not be addressed in this proceeding. The issue is presented generally in pending court proceedings.

(6) making decisions and recommendations to the public concerning protective actions,

(7) making decisions and recommendations to the public concerning protective actions for the ingestion exposure pathway,

(8) making decisions and recommendations to the public concerning recovery and reentry,

(9) dispensing fuel from tank trucks to automobiles along roadsides, and

(10) performing access control at the EOC, the relocation centers, and the EPZ perimeter.

This motion assumes, for the sake of argument, that the Intervenors (Suffolk County and the State of New York) are correct that state law prohibits LILCO from taking the actions specified in Contentions 1-10; there will be no analysis of state law here.2/ Rather, LILCO asserts that three independent federal bases justify summary disposition in LILCO's favor, even if the Intervenors are right about state law. These bases are:

1. Preemption: Preemption by the Atomic Energy Act;

2. Realism: The single fact, already established on the record of this proceeding, that the State and County would respond in a real emergency; and

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2/ The state law issues are being presented to the Supreme Court for Suffolk County, New York, in the actions in Cuomo v. LILCO, County of Suffolk v. LILCO, and Town of Southampton v. LILCO.

3. Immateriality: The fact, already developed on the record of this proceeding, that the actions specified in Contentions 1-4, 9, and 10 are not required to meet NRC regulations.

Either of the first two of these bases, alone, is sufficient to resolve all of Contentions 1-10; the third by itself resolves Contentions 1, 2, 3, 4, 9, and 10.

B. Summary Disposition Is Appropriate

Summary disposition is governed by 10 C.F.R. § 2.749, the law of which was set out in the Board's rulings on LILCO's earlier motions for summary disposition. See Memorandum and Order Ruling on LILCO's Motion for Summary Disposition of Contentions 16.E, J, K, L and M (Public Information Brochure) 3-4 (June 28, 1984); Order Ruling on LILCO's Motions for Summary Disposition of Contentions 24.B, 33, 45, 46 and 49 at 2-3 (April 20, 1984). In brief, the moving party has the burden of showing there is no genuine issue of material fact to be heard.

In the case of Contentions 1-10, the parties have agreed that no further evidentiary hearing is needed. Tr. 13,823 (LILCO), Tr. 13,831 (Suffolk County), Tr. 13,832 (New York), 13,834 (NRC Staff). Because the few facts needed for this motion have already been established on the record, there is no need for affidavits to satisfy the summary disposition regulation, 10 C.F.R. § 2.749.3/

3/ On July 27, 1984, counsel for LILCO informed counsel for Suffolk County, in discussions concerning scheduling in the New

(footnote continued)

II. SUMMARY OF ARGUMENT

LILCO's arguments are as follows:

First: The New York State and local laws cited in Contentions 1-10 are without legal effect insofar as they may be construed by the New York courts either (1) to make LILCO's offsite emergency plan for the Shoreham Nuclear Station less effective than it would otherwise be or (2) to prohibit the operation of the station altogether. The Atomic Energy Act of 1954 preempts such state and local laws, in accordance with the recent cases Pacific Gas & Electric Co. v. State Energy Resources Conservative & Development Comm'n and Silkwood v. Kerr-McGee Corp. The laws are preempted both because they invade the field of radiological health and safety regulation, a field exclusively occupied by the federal government, and because they actually conflict with federal regulation.

(footnote continued)

York courts, that LILCO intended to file this motion. Counsel for Suffolk County then communicated with counsel for New York.

While this summary disposition motion was in preparation, LILCO received the Board's Memorandum and Order Establishing Format and Schedule of Proposed Findings of Fact and Conclusions of Law of July 27, 1984. Page 3 of the Memorandum and Order provides that the Board will establish a separate briefing schedule for Contentions 1-10. LILCO is filing this motion today to get its views before the Board promptly and, if possible, to lead the way to an earlier resolution of the issues.

Second: Even if the state laws were not preempted, all of Contentions 1-10 except Contention 3 (the only one that challenges LILCO actions in advance of an actual emergency) should be resolved in LILCO's favor because the Governor of New York has announced that both the State and County would respond in a real emergency. This response would cure any lack of legal authority.

Third. Even if neither of the above two grounds for summary disposition existed, Contentions 1-4 and 9-10 should be resolved in LILCO's favor, because the activities challenged as illegal in those contentions are not essential for meeting NRC regulations. For the most part these activities improve evacuation time if evacuation is called for, but their absence by no means makes evacuation impossible; in a few cases the activities alleged to be illegal are simply not called for in the LILCO Plan.

For these reasons, LILCO submits it is entitled to summary disposition of Contentions 1 through 10.

III. ARGUMENT

A. The application of state laws to deny an operating license or to make an emergency plan less effective is preempted by federal law.

The first basis for summary disposition, which applies to all 10 contentions, is federal preemption.4/ In particular, the federal Atomic Energy Act preempts state law insofar as it attempts either to prohibit the operation of a nuclear plant on grounds of radiological health and safety or to interfere with emergency planning so as to make people less safe. There is a considerable line of cases on preemption under the Atomic Energy Act, beginning with Northern States Power Co. v. Minnesota, 447 F.2d 1143 (8th Cir. 1971), aff'd mem., 405 U.S. 1035 (1972). The two most recent cases are Pacific Gas and Electric Co. v. State Energy Resources Conservation & Development Comm'n, 103 S. Ct. 1713 (1983) (hereinafter Pacific Gas & Electric) and Silkwood v. Kerr-McGee Corp., 104 S. Ct. 615 (1984) (hereinafter Silkwood).

The principles in these cases, as will be shown below, mandate the conclusion that to the extent the state and local laws cited in Contentions 1-10 interfere with emergency

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4/ The preemption doctrine is founded on the Supremacy Clause, U.S. Const. Art. VI, § 2.

planning or emergency response, or with the operation of a nuclear plant, they are preempted. This does not mean the New York statutes relating to traffic control (for example) are null and void in their entirety, only that their application to radiological emergency planning, in a fashion urged by intervenors, is invalid. See, e.g., United States v. City of New York, 463 F. Supp. 604, 607-14 (S.D.N.Y. 1978) (city's "siting" regulation preempted to the extent that its application regulated radiological health and safety); New Jersey Dep't of Environmental Protection v. Jersey Central Power & Light Co., 69 N.J. 102, 351 A.2d 337, 342-344 (1976) (application of state statute prohibiting the introduction of a hazardous substance of any kind into fresh or tidal waters preempted to the extent that it interferes with federal regulation of radiological health and safety).

In truth, the federal preemption question raised by Contentions 1-10 was decided the day the Commission ruled, in response to Suffolk County's motion to terminate this proceeding, that a "utility" emergency plan is lawful. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-83-13, 17 NRC 741 (1983). As will be shown below, Congress has repeatedly approved language authorizing "utility plans," and the NRC regulations permit them as well. If New York State were today to pass a law saying "no 'utility plan' for a

radiological emergency shall be lawful in New York State," can there be any doubt that it would be preempted? Clearly not. But that is precisely what the Intervenors are attempting to do through their interpretation of existing laws.

State (or local) law can be preempted by federal law in either of two general ways:

A. If Congress evidences an intent to occupy a given field, any state law falling within that field is preempted.

B. If Congress has not entirely displaced state regulation over the matter in question, state law is still preempted to the extent it "actually conflicts" with federal law, that is:

   1. When it is impossible to comply with both state and federal law, or

   2. When the state law "stands as an obstacle to the accomplishment of the full purposes and objectives of Congress."

Silkwood, 104 S.Ct. at 621 (1984); Pacific Gas & Electric, 103 S.Ct. at 1722. The state and local laws cited in Contentions 1-10 are preempted on both these grounds.

1. The state laws invade a field occupied exclusively by federal regulation

State laws are preempted, first of all, if they intrude upon a field that Congress has shown an intent to occupy. Regulation of radiological health and safety is clearly one such field:

> State safety regulation is not preempted only when it conflicts with federal law. Rather, the federal government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the states. When the federal government completely occupies a given field or an identifiable portion of it, as it has done here, the test of preemption is whether "the matter on which the state asserts the right to act is in any way regulated by the federal government." Rice v. Santa Fe Elevator Corp., supra, at 236. A state moratorium on nuclear construction grounded in safety concerns falls squarely within the prohibited field. Moreover, a state judgment that nuclear power is not safe enough to be further developed would conflict directly with the countervailing judgment of the NRC . . . that nuclear construction may proceed notwithstanding extant uncertainties as to waste disposal. A state prohibition on nuclear construction for safety reasons would also be in the teeth of the Atomic Energy Act's objective to insure that nuclear technology be safe enough for widespread development and use -- and would be preempted for that reason.

Pacific Gas & Electric, 103 S. Ct. at 1726-27 (footnote omitted; citations omitted).

Prior to the Pacific Gas & Electric decision in 1983, the controlling case regarding the relationship between federal and state regulation of the nuclear energy field under the Atomic Energy Act was Northern States Power Co. v. Minnesota, 447 F.2d 1143 (8th Cir. 1971), aff'd mem., 405 U.S. 1035 (1972). The Court in Northern States held that the Atomic

Energy Act unmistakably preempts State regulation of the radiological safety aspects of nuclear power plants. Courts have consistently adhered to the principle of federal preemption announced in Northern States, and Pacific Gas & Electric and Silkwood did not depart from it. See, e.g., County of Suffolk v. Long Island Lighting Co., 554 F. Supp. 399 (E.D.N.Y. 1983), aff'd, 728 F.2d 52 (2d Cir. 1984) (plaintiff's state law causes of action relating to the hazards and safety of the construction and operation of the Shoreham reactor preempted by the Atomic Energy Act); United States v. City of New York, 463 F. Supp. 604 (S.D.N.Y. 1978) (city's "siting" regulation preempted under the Atomic Energy Act to the extent that its application regulated radiological health and safety); City of Cleveland v. Public Utilities Comm'n, 64 Ohio St. 2d 209, 414 N.E.2d 718 (1980) (state regulation of the radiological hazards and safety relating to nuclear plants preempted except for those hazards relating to radiological emissions and other narrowly defined exceptions enumerated in Section 2021(b)); New Jersey Dept. of Environmental Protection v. Jersey Central Power & Light Co., 69 N.J. 102, 351 A.2d 337 (1976) (application of state statute prohibiting the introduction of hazardous substance of any kind into fresh or tidal waters preempted under the Atomic Energy Act to the extent it interferes with federal regulation of radiological health and safety.).

a. The state laws cited in Contentions 1-10 attempt to regulate the operation of a nuclear power plant

Emergency planning, of course, is inherently and exclusively a matter of radiological health and safety. The regulations and guidelines of the NRC and FEMA are designed to do one thing: provide reasonable assurance that the public health and safety will be protected even in the event of a radiological emergency.

In the case of Shoreham, Suffolk County and New York State are attempting, through the interpretation and application of New York laws, to regulate the radiological health and safety aspects of the operation of the Shoreham nuclear plant.5/ Some of these laws allegedly make a utility emergency plan impossible. For example, Contentions 7 and 8 claim that making protective action "decisions" and "recommendations" under a utility plan is prohibited. Other of the laws simply make the plan less effective, and thus make the public less safe. For example, the State wishes to prohibit LILCO from

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5/ "Regulation" includes "prohibition." Indeed, virtually all forms of regulation involve some sort of prohibition of private activity. The Supreme Court in Pacific Gas & Electric considered California's effort to prevent the construction of new nuclear plants to be "regulation," and so the Intervenors cannot credibly argue that its efforts to prevent Shoreham's operation do not amount to attempted regulation.

guiding traffic, a function that analyses show would enable the public to evacuate about an hour and a half faster than otherwise. Tr. 2,663 (Lieberman).

As the passage from Pacific Gas & Electric set out above says, the federal government has occupied the entire field of nuclear safety concerns, except the limited powers "expressly ceded" to the states. And Congress has by no means "expressly ceded" to the states the power to regulate emergency plans for nuclear power plants.6/ To the contrary, Congress has made it clear (1) that federal standards are to govern radiological emergency planning, (2) that "utility plans" may compensate for deficiencies in state or local government

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6/ A footnote in Pacific Gas & Electric listed these "limited powers" expressly ceded to the states:

> In addition to the opportunity to enter into agreements with the NRC under § 274(c), Congress has specifically authorized the states to regulate radioactive air pollutants from nuclear plants, Clean Air Act Amendments of 1977, § 122, 42 U.S.C. § 7422 (Supp. III 1979), and to impose certain siting and land use requirements for nuclear plants, NRC Authorization Act for Fiscal Year 1980, Pub. L. 96-295, 94 Stat. 780 (1980).

103 S. Ct. at 1726 n.25. Significantly, the court did not include emergency planning as having been ceded to the states, even though it was addressed in the statute immediately following the "siting and land use requirements" mentioned by the Court

planning, and (3) that nuclear plants are not to be shut down, even if there is no state or local government participation in emergency planning, so long as the public health and safety are adequately protected. The legislative history of several federal statutes makes this clear.

b. Congress has consistently authorized "utility plans"

Congress has expressly authorized utility plans without state or local government participation in order to avoid penalizing utilities where governments refuse to perform emergency planning. Suffolk County now concedes as much.7/ After the

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7/ In briefs before the United States District Court for the Eastern District of New York, Suffolk County has stated:

> [T]he regulatory scheme [footnote omitted] makes plain . . . that there are three independent routes the utility may take to satisfy NRC requirements:
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> (i) it may submit a State plan to the Federal Emergency Management Agency ("FEMA") for a determination of adequacy,
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> (ii) it may submit a local government plan to FEMA for a determination of adequacy, or
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> (iii) it may submit its own plan to the NRC for a determination of adequacy.
>
> The State and the County have both

(footnote continued)

accident at Three Mile Island evidenced the poor state of

(footnote continued)

> made considered decisions not to adopt an emergency plan. As [LILCO's] complaint makes clear (¶ 46-48), LILCO is currently pursuing route (iii), in order to fulfill its statutory duties. LILCO has submitted a plan to the NRC, and that agency is holding proceedings on it.

Memorandum of Defendants in Support of Motion to Dismiss, LILCO v. County of Suffolk (E.D.N.Y. No. 84-2698), July 10, 1984, pp. 10-11. Indeed, Suffolk County submitted an Appendix purporting to summarize relevant legislative history in which it stated:

> The Hart approach was criticized on the ground that a state opposed to nuclear plants could prevent the issuance of an operating license by refusing to develop such a site-specific plan. Id. at 16-17. See also Stenographic Transcript, April 22, 1980 at 29-32. In response to this concern, conferees agreed to add a provision that allowed use of NRC funds to issue a license if there existed a site-specific state or local emergency plan that complied with NRC guidelines or, in the absence of such a plan, if there existed "a State, local, or utility plan which provides reasonable assurance that public health and safety is not endangered by operation of the facility concerned." This provision, embodied in P.L. 96-295, sec. 109 (1980), was passed by Congress in July, 1980. In explaining the provision, the Joint Explanatory Statement of the Committee on Conference stated:
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> > The conferees sought to avoid penalizing an applicant for an operating license if a State or locality does not submit an emergency response plan to the NRC for review or if the submitted plan does not satisfy all the guidelines or rules, the com-

(footnote continued)

offsite emergency planning, Congress addressed the problem in connection with authorization acts to fund NRC activities. One

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(footnote continued)

> promise permits NRC to issue an operating license if it determines that a State, local, or utility plan, such as the emergency preparedness plan submitted by the applicant, provides reasonable assurance that the public health and safety is not endangered by operation of the facility.
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> Joint Explanatory Statement of the Committee on Conference, House Conference Report No. 96-1070 at 27-28, reprinted in 1980 U.S. Code Cong. & Ad. News at 2270-2271.

Appendix to Defendant's Memorandum in Response to Long Island Lighting Company's Memorandum in Opposition to the Motion to Dismiss, Citizens for an Orderly Energy Policy, Inc. v. Cohalan, (E.D.N.Y. No. 83-4966), May 14, 1984, pp. 14-15.

Finally, in urging the Court that its actions and its Resolutions regarding emergency planning are not preempted by the Atomic Energy Act, Suffolk County stated:

> Defendants have argued that LILCO's emergency plan does not satisfy the NRC standards. But Defendants have not prevented LILCO's planning efforts, and LILCO has, in fact, developed and submitted an emergency plan to the NRC.

Defendants' Memorandum in Response to Long Island Lighting Company's Memorandum in Opposition to the Motion to Dismiss, Citizens for an Orderly Energy Policy, Inc. v. Cohalan (E.D.N.Y. No. 83-4966, May 14, 1984), p. 9 n.8.

These assertions, of course, are startling in light of the County's contentions before this Board that state law forbids LILCO to perform emergency planning functions without State or County participation.

of the things Congress did was to require uniform federal standards of emergency planning. Under § 109(b)(1)(A) of the 1980 NRC Authorization Act, Pub. L. No. 96-295, § 109(b)(1)(A), 96th Cong. 2d. Sess., 94 Stat. 780, 784 (June 30, 1980), the NRC was required to establish by rule "standards for State radiological emergency response plans . . . [developed in consultation with FEMA and other appropriate agencies] . . . which provide for the response to a radiological emergency involving any utilization facility . . . ." Such standards have in fact been adopted in 10 C.F.R. § 50.47 and NUREG-0654.

Congress also addressed what to do about states and localities that might fail to do adequate radiological emergency planning. The Senate considered a bill that would have (1) required the shutdown of operating nuclear plants, within six months of the enactment of the bill, in states that had deficiencies in their emergency plans and (2) prohibited new operating licenses in states whose plans did not adequately protect the public health and safety. S.562, § 202(a) & (b), 124 Cong. Rec. S9464 (daily ed. July 16, 1979). Thus, under the bill considered by the Senate, state governments would have been given an effective veto over the licensing of new plants as well as the opportunity to shut down existing plants.

Senator Johnston expressly recognized this potential problem. He pointed out that a state governor might try to

prevent the operation of nuclear plants in his state by failing to make a good-faith effort to submit an emergency plan. 124 Cong. Rec. S9471-72 (daily ed. July 16, 1979). Senator Johnston proposed an amendment to the Senate bill the purpose of which was to eliminate the potential state veto. The amendment would have authorized the NRC to prepare an interim emergency plan for a state rather than shut down a nuclear plant when deficiencies in state plans were found. 124 Cong. Rec. S9471 (daily ed. July 16, 1979).

Senator Simpson, a cosponsor of the Senate bill, opposed the Johnston amendment calling for NRC-drafted plans:

> Within the amendment which is presented on this subject, there is the possibility, remote as it is, that any faction opposed to nuclear power could use the mandatory planning requirements spelled out in this bill to arbitrarily shut down the operation or construction of a nuclear powerplant.
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> I feel that we have effectively alleviated that issue by what we have done and what we are suggesting -- extending the period for NRC review of State plans, making concurrence with the plan site specific, using existing and not new guidelines as the standard for initial concurrence, and waiving the need to reexamine the existing voluntary State plans which the NRC has concurred in previously.

Id. at 9473. Senator Hart, the other cosponsor, like Senator Simpson, apparently thought it unlikely that a governor would

attempt to prevent issuance of an operating license by using the federal emergency planning requirements. Senator Hart made the following comments while discussing the proposed amendment:

> Mr. HART. . . .
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> . . . .
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> The Senator from Louisiana seems to be concerned that some Governors will use this as a device to shut down plants in their States. If he has in mind the Senator from California, the State of California has been more advanced in preparing its evacuation and emergency response plans than any other State, in terms of getting its plans prepared, having them in detail, and getting them approved. If he has a fear about that State, it is not well founded.
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> . . . .
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> [The bill] does provide, I believe, implicitly and explicitly, pressure upon the States to act, because of their need for electricity generated by the reactor. Citizens who believe that their Governor or State leaderships are not moving on this have plenty of opportunity to express their wishes and feelings on the matter.
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> . . . .
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> Mr. JOHNSTON. That is one of the principal reasons, because it may be, in effect, killed by the Governor. Jerry Brown is a perfect example, because he said as late as last night that he opposes nuclear energy in any form and wants to do away with existing plants.

> Mr. HART. Even though his State, as I have indicated, has a very workable and progressive emergency evacuation plan.

Id. at S9473, S9476, S9477.

The Johnston amendment was rejected by a vote of 40 to 37, id. at 9478, and the Senate passed the Hart-Simpson version of the bill. Id. at 9603 (daily ed. July 17, 1979). The bill, as passed by the Senate, would have expressly permitted states to prevent the continued operation of existing nuclear plants, and the operation of new ones, by failing to perform emergency planning at all or by failing to perform it adequately. The bill was sent to a Senate-House Conference Committee. That committee was responsible for reconciling the approach set forth in the Hart-Simpson bill with the approach taken in the House of Representatives. Whereas the Senate bill left open the possibility that a state could effectively veto a nuclear power plant, the House bill contained no such provision.

The reaction of the Conference Committee and of Congress as a whole to the Senate bill was dramatic and decisive. Congress flatly rejected the notion that a state or local government could shut down existing plants or veto operation of new plants by refusing to perform emergency planning. Instead, Congress authorized utilities to go forward with utility-sponsored plans if state and local governmental participation

was not forthcoming. The Conference Committee rejected the Senate language and approached the problem of the recalcitrant state, not by having the federal government write plans for the state, but by permitting utilities to do their own offsite plans; the 1980 NRC Authorization Act provided that "utility" emergency plans could compensate for deficiencies in local and state government plans. Pub. L. 96-295, § 109, 96th Cong., 2d Sess., 94 Stat. 783-84 (June 30, 1980). The House Conference Report, commenting on the bill that was reported out of the Conference Committee and then adopted by both houses of Congress, explained Congress' intent as follows:

> The conferees sought to avoid penalizing an applicant for an operating license if a State or locality does not submit an emergency response plan to the NRC for review or if the submitted plan does not satisfy all the guidelines or rules.

H.R. Rep. No. 96-1070, 96th Cong., 2d Sess. 27 (1980), reprinted in 1980 U.S. Code Cong. & Ad. News 2260.

Congress' intent could hardly be clearer. Congress made it plain that no state or local government could in any way "penalize" or hinder a utility's operation of a nuclear plant by failing to participate in emergency planning. It necessarily follows that Congress forbade states to frustrate utility emergency planning by interposing state or local laws.

The "utility plan" provision was reenacted into the NRC Appropriations Act for 1982-1983. Pub. L. 97-415, § 5, 97th Cong., 2d Sess., 96 Stat 2069 (Jan. 4, 1983). Representative Lujan put the following remarks into the Congressional Record while the 1982-1983 bill was being considered:

> Frankly, these provisions -- allowing a utility to file an onsite plan for a temporary operating license, and allowing the NRC to determine that an adequate offsite plan of a utility exists in the absence of an FEMA-approved State or local plan for a final, full power license -- were included to insure that Federal preemption in the area of nuclear power would not be frustrated in the emergency planning area by foot dragging on the part of a reluctant State or locality. The wisdom of including such Federal provisions is underscored by the situation which we understand exists in one district where a county has sued to try to enjoin its State from approving an emergency plan. The clear language of the statute and our intent throughout the legislative process was to insure that a plant could operate if there existed some plan -- State, local or utility sponsored -- providing reasonable assurance of the public health and safety.

128 Cong. Rec. E5060-61 (daily ed. Dec. 10, 1982) (emphasis added). The "situation" he referred to was that of Shoreham; Suffolk County had recently sued to enjoin the State of New York from reviewing an emergency plan submitted by LILCO. Cohalan v. New York State Disaster Preparedness Commission, No. 5145-82 (N.Y. Sup. Ct., petition filed Dec. 6, 1982).

On July 12, 1983, the President signed into law H.R. 3133, the HUD and the Independent Agencies Appropriations Bill, which provides funding to FEMA. It became Public Law 98-45. The House Conference Report included the following language:

> The committee expects the Federal Emergency Management Agency to review, evaluate, and render determinations on the adequacy of offsite radiological emergency preparedness plans for commercial nuclear facilities required to be licensed under section 103 or 104b of the Atomic Energy Act of 1954, as amended. This evaluation should be conducted regardless of whether the plans have been prepared or submitted, or both, by a governmental entity or by the applicant or licensee for such facility. The fact that a governmental entity cannot or will not perform a particular role or roles in the preparation, submission, or implementation of offsite emergency preparedness plans should not, by itself, constitute a sufficient basis for a determination by FEMA that the plans, or portions thereof, are inadequate -- providing a suitable alternative means of implementing the plans is available.

H.R. No. 98-223, 98th Cong., 1st Sess. 30-31 (1983).8/

A "utility plan" provision, similar to the ones in the 1980 and 1982-83 NRC authorization acts, is again before Congress in § 108 of S.2846, the proposed NRC Authorization Act for fiscal 1984 and 1985, which was reported to the full Senate

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8/ The Senate had no similar provision and did not challenge the House Report language, so the House's direction stands.

on August 1, 1984. With this bill the Senate Committee on Environment and Public Works has again confirmed Congress' authorization of utility plans and its intent to preclude interference with plant operation by state or local governments. The Committee's report on the bill reiterates that the utility plan provision is intended to reconfirm the authority of the NRC and FEMA to evaluate an emergency preparedness plan submitted by an applicant or licensee. S. Rep. 98-546, 98th Cong., 2d Sess. 14 (June 29, 1984).

It will be recalled that Senator Simpson cosponsored the 1979 Senate Bill that would have permitted states to veto plant operation by refusing to plan. At that time, Senator Simpson considered the possibility of such conduct by a state government "remote." 124 Cong. Rec. S9473 (daily ed. July 16, 1979). Apparently recognizing intervening events, Senator Simpson expressed his views, consistent with those in the Committee Report on S.2846 itself, in support of the recent 1984-85 authorization bill's provision for utility plans. In recounting the legislative history of the utility plan provision from 1980 through 1984, Senator Simpson noted that Congress had repeatedly reenacted the provision in order to avoid penalizing nuclear plant operation if a state or local government failed to perform adequate emergency planning. Succinctly summarizing Congress' intent, Senator Simpson stated:

With the adoption of section 108, this Committee has now made it clear in three successive NRC authorization bills that it is not our intention to allow a state or locality to prevent a completed facility from operating by refusing to prepare an emergency preparedness plan. It necessarily follows that the Committee did not intend to allow such governmental entities to accomplish the same result by refusing to participate in the exercise or implementation of an otherwise acceptable emergency plan. To accept such a situation would be to completely frustrate this thrice-stated authority and to ignore various other existing federal emergency response responsibilities and authorities that will, if exercised, enable the NRC and FEMA to avoid such an unfortunate and unintended result.

This Committee did not legislate the nuclear emergency response provisions in a vacuum. We passed emergency planning legislation back in 1980 with full recognition of the various existing federal and state emergency planning responsibilities and authorities. It is abundantly clear, for example, that the Governor of a state, as well as other state and local authorities, are under an obligation to act to protect the public health and safety in the event of an actual emergency. No public official to date has stated that he would not fulfill this legal duty and I would be quite surprised if such a claim were to be made in the future.

. . . .

[T]he NRC Authorization Act for fiscal year 1980 provided for a substantial expansion of the federal government's emergency response authorities. Section 109 of the Act, for example, established a pervasive and preemptive federal role for the review and approval of off-site

emergency response plans for commercial nuclear powerplants.

In addition to the foregoing, I also want to take this opportunity to clarify a number of points regarding the utility plan option over which considerable confusion has arisen in recent months.

First, this provision was originally adopted in response to Congressional concern over two potential problems: (1) the case where a state or locality submits a plan, but that plan does not satisfy all the guidelines or rules; and (2) the case where a state or locality does not submit a plan at all.

It is this latter point that has often been overlooked or misconstrued in the debate over the utility plan option and which, accordingly, the Committee has reaffirmed in this report, in once again endorsing the utility plan option. In particular, it is worth noting that we have reaffirmed the same basic rationale that was stated back in 1980, when the utility plan option was first adopted: "The conferees sought to avoid penalizing an applicant for an operating license if a State or locality does not submit an emergency response plan to the NRC for review . . ." (H. Rpt. 96-1070, p. 27, emphasis added), by permitting the NRC to issue an operating license based upon a plan prepared by the utility applicant.

This specific point is particularly evident from the context of the discussions among the various Conferees when this provision was adopted in 1980. It is apparent from the discussion that follows that the Conferees approved the "utility plan" option because of a concern over the potential for outright refusal of a state or local government to submit a plan:

Representative SYMMS. [sic] Will the Senator yield on one question. Let's say, for example, that the state doesn't cooperate, but the licensee is out there doing everything right along with the state, so this amendment would be a roadblock which would hinder going ahead with a plan that may have many millions of dollars at stake, isn't it possible?

Senator HART. I think it is possible, but not probable in the sense consumers are also voting, and if a Governor and voting staff is not taking even minimal steps to prepare for the startup of the new nuclear power plant designed to provide energy for that area, I think the people know how to get those results.

We believe, all the people talk about best governments closer to the people, I think the people know where their state capitals are and how to get ahold of their state government and let them know they are not happy.

. . . .

Representative VENTO. One of the points there, since this overall state responsibility, is there any possibility that we can include report language, if it were adopted that would permit the NRC or FEMA to work directly with the utilities? We can make clear if an individual utility is being frustrated by that, that the NRC, in the absence of state action, could

> act to approve a plan, and thereby avoid this particular problem that has been discussed. I don't know what the disposition of this is going to be. It seems to me if we do anything on that basis, it would seem to be the reasonably (sic) way to go so we don't have that impediment.
>
> Senator HART. It is not disagreeable. I think it would be put in an area where it hasn't been before; namely, emergency preparedness, civil defense. (Transcript, Joint Conference on the Nuclear Regulatory Commission, February 21, 980, pp. 16-18, emphasis added.)

As this discussion clearly indicates, the Conferees did, in fact, contemplate a situation where the utility may end up working directly with NRC and FEMA to get an emergency preparedness plan approved.

Second, I think it is worth emphasizing that, in adopting emergency planning legislation, this Committee has endeavored to ensure that states and local governments become actively involved at the earliest possible stage in both preparing and implementing emergency plans. Indeed, emergency planning has proven to be most effective in those instances where state and local governments work together closely with utilities in the development and implementation of emergency preparedness plans.

On the other hand, the extensive and important reliance on state and local governments contemplated by this approach, and their active and

> timely participation in the emergency planning process, was not, in my judgment, intended to confer upon state or local governments the authority to establish their own substantive criteria for emergency preparedness plans, to render final judgments on the adequacy of those plans when evaluated against the NRC and FEMA criteria, or to penalize applicants or licensees by refusing to submit an emergency response plan to the NRC for review.

S. Rep. 98-546, 98th Cong., 2d Sess. 22-26 (June 29, 1984) (Supplemental Views of Senator Simpson) (emphasis in original).

Consistent with the intent of Congress, the NRC emergency planning regulation permits offsite utility emergency plans without participation of state and local governments. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-22, 17 NRC 608, aff'd, CLI-83-13, 17 NRC 741 (1983).

c. New York State and Suffolk County are attempting to regulate radiological health and safety.

It is undisputed that both New York and Suffolk County are basing their actions on radiological health and safety and that their purpose is to prevent Shoreham from operating. The County has not claimed otherwise and, though it did contend while moving to terminate this proceeding, that it was not trying to "regulate" radiological health and safety, the Licensing Board found otherwise:

> We find this attempted distinction by the County to be a sophism. It is disingenuous for the County to take the position that County Legislature Resolution No. 111-1983 does not attempt to make its findings binding on the NRC.

The Board's reasoning is laid out in detail in Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-22, 17 NRC 608, 636-37, 641 (1983) (footnotes omitted), aff'd on other grounds, CLI-83-13, 17 NRC 741, 743 (1983).

If there were any doubt that the County is attempting to prohibit Shoreham's operation on the ground of radiological health and safety, it would be eliminated by the County's latest resolution on the subject, Resolution 1398-84, passed on April 10, 1984:

> WHEREAS, the Legislature has, by Resolution No. 111-1983, determined that no Radiological Emergency Response Plan for a nuclear accident at Shoreham will protect the health, welfare, and safety of Suffolk County residents; and
>
> WHEREAS, the result of such County determination means that the Shoreham facility shall not operate and must be abandoned . . . .

(emphasis added).

Likewise the Governor of New York is acting on his own policy or political decisions on radiological health and safety. The State has said that it opposes the LILCO Transition Plan (1) because "LILCO lacks the legal authority to implement

the plan for the reasons outlined in Contentions 1 through 10" and (2) because the plan is "not adequate and not implementable" and therefore "cannot assure reasonable protection of the public." Tr. 2,240 (Palomino).

The most dramatic example demonstrating the State's motive was Governor Cuomo's reaction to Department of Energy Secretary Hodel's request for state participation in a federal drill of the LILCO Plan. Secretary Hodel asked the State to participate in an "honest test" of the safety of LILCO's Plan. Letter, Secretary Donald Paul Hodel to Honorable Mario Cuomo, May 7, 1984. Governor Cuomo rejected Secretary Hodel's request with these words:

> You are apparently not aware that 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 of the Federal Constitution. . . .
>
> To accede to your request, <u>when the federal government is in the same legal position as LILCO</u>, would jeopardize the state's legal standing in these actions.

Letter, Governor Mario M. Cuomo to Secretary Hodel, May 9, 1984 (emphasis added). And why was the State challenging LILCO's legal authority? Governor Cuomo explained in a letter to New York State Senator Warren M. Anderson:

> With respect to safety, and your apparent support of Secretary of Energy Hodel and his "honest test" of an evacuation plan, let me repeat what I have told you since our first discussion of this issue -- the safety of our citizens must be our primary concern as elected officials having the public trust in matters relating to health, safety and welfare. . . .To explain in more detail my position with Secretary Hodel, I am attaching a copy of a letter I sent him last week.

Letter, Governor Cuomo to Honorable Warren M. Anderson, May 15, 1984 (emphasis added). The letter to Secretary Hodel, of course, was the one quoted above. In short, the Governor's notion of "protecting public safety" is to impose state law to prevent approval of LILCO's plan and prevent Shoreham from operating, contrary to exclusive federal authority over radiological safety.9/

Other public pronouncements of New York officials have sounded the same theme. This from a letter of July 11, 1983, from Governor Cuomo to the Chairman of the Atomic Safety and Licensing Board panel:

9/ New York cannot possibly deny that its goal in imposing state law is to forbid the operation of Shoreham. When Judge Shon asked New York counsel point blank whether the legal authority contentions were, in the State's view, dispositive of LILCO's entire license application, Mr. Palomino responded that they were, unless a state court ruled in LILCO's favor on state law. Tr. 3,657-58.

> The safety of our residents has been and continues to be my principal concern in the evaluation of nuclear power plant operations in New York.

From the "Statement by Governor Mario M. Cuomo" released December 20, 1983:

> The State will oppose any grant of a licensee to operate the plant predicated solely and entirely on the LILCO developed and LILCO implemented plan for evacuation. I have said repeatedly I believe the LILCO plan does not reasonably assure safe evacuation.

From Newsday, March 5, 1984:

> [Governor] Cuomo, who appeared on WNBC-TV "News Forum" minutes after the interview with Anderson ended, replied that safety had to be the main consideration in deciding whether to open Shoreham. "There are pregnant women out there afraid for their children's lives," he said.

From a Newsday article of May 25, 1984, entitled "Energy Chief Yields to NY, Won't 'Impose' Shoreham Drill":

> Timothy Russert, a Cuomo advisor, said that "the governor's only interest is safety."

There is, in short, no question but that Suffolk County and New York State are now attempting to prevent the operation of Shoreham on grounds of radiological health and safety by seeking to interpose state law.10/

10/ If the Intervenors respond by arguing that the original legislative purpose behind the state statutes was

(footnote continued)

(footnote continued)

nonradiological, the reply is twofold. First, the motives of the people who apply the state laws cannot be disregarded. See, e.g., United States v. City of New York, 463 F. Supp. 604 (S.D.N.Y. 1978). In 1976 the City of New York amended its Health Code to require nuclear reactors in the City not to commence operation without a certificate from the City health commissioner. 463 F. Supp. at 606. The federal government and Columbia University, which had a reactor in the city, sued to have the ordinances declared void under the doctrine of preemption. The court said this:

> The defendants' final argument is that even if Congress has preempted the regulation of nuclear reactors from the standpoint of radiological health and safety, the City ordinance in question falls outside the scope of this preemption because it regulates nonradiation hazards and the Atomic Energy Act expressly permits this type of local regulation. The Court need not tarry very long with this particular argument. Not only is it inconsistent with the purpose of the ordinance as intended at the time of its enactment, as set forth above, but it is contrary to the application of the ordinance as exemplified by the City's decision rejecting Columbia's application for a certificate of Health and Safety for Nuclear Reactor Operation. The record before the Court unequivocally indicates that the City's decision was based entirely upon the alleged possibility of injury resulting from an accidental release of radiation. In short, this argument is without merit.

463 F. Supp. at 614.

Second, even the purest of nonradiological legislative motives will not permit what the State and County are attempting to do in this case. It is true that the state law in Pacific Gas & Electric was allowed to stand because it regulated need for power rather than radiological health and safety. But had California attempted to regulate how nuclear plants were oper-

(footnote continued)

d. The "traditional" involvement of states and localities in nonradiological emergency preparedness is irrelevant here.

The intervenors may claim that emergency planning is a "traditional" state function outside the field preempted by the Atomic Energy Act, relying on the following passage in Pacific Gas & Electric:

> "There is little doubt that under the Atomic Energy Act of 1954, state public utility commissions or similar bodies are empowered to make the initial decision regarding the need for power." Thus, "Congress legislated here in a field which the States have traditionally occupied . . . so we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."

Pacific Gas & Electric, 103 S.Ct. at 1723 (quoting Vermont Yankee Nuclear Power Corp. v. NRDC, 435 U.S. 519, 550 (1977),

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(footnote continued)

ated, even if its motive had been economic, the attempt would have been preempted. Suppose, for example, that California had directed utilities to reduce the number of operating personnel at nuclear plants in order to save money and lower electric rates; it cannot be seriously argued that such a state law would be allowed to stand, whether or not it mandated such extreme staff reductions that a utility could no longer meet NRC safety requirements and would have to shut down. Making it illegal to meet NRC safety regulations and so forcing the shutdown of plants in that backhanded fashion is preempted no matter what the state's reason.

and Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947)). The legislative history of the 1980 Authorization Act does show that some Senators regarded response to emergencies as a traditional state function.

To conclude from this that emergency planning is a traditional state field, however, does not take us very far. In the first place, a distinction has to be drawn between the state's doing emergency planning itself and the state's attempting to regulate private parties' planning. In the state's conduct of its own emergency planning, there may be Tenth Amendment problems if the federal government directs the state how to go about its business. See generally Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264 (1981). But in the Shoreham case the State has opted out of emergency planning altogether and is attempting to prevent LILCO from planning. Tenth Amendment issues do not arise here. The federal government is not telling the state how to do its business or forcing the state to plan. It is simply telling the state that it cannot interfere with private parties' efforts to protect the public as the NRC regulations require.

In the second place, even where a field has traditionally been regulated by the states, Congress obviously may preempt them. For example, in City of Burbank v. Lockheed Air Terminal, 411 U.S. 624 (1973), the control of noise, though

"deep-seated in the police power of the states," 411 U.S. at 638, was found to be preempted by the pervasive control recently vested in federal agencies. The question is whether the purpose of Congress to preempt is "clear and manifest." Here, it is.11/ As the legislative history set out above shows, Congress intended to exert pervasive federal control over radiological emergency planning, with federal standards to govern and a federal agency to judge compliance with those standards. Under those federal regulations, the states and localities may, of course, participate in the planning process. They may not, however, interpose their laws to prevent emergency planning by a utility.

11/ Silkwood is easily distinguished from the Shoreham case. There the Court found "ample evidence" that Congress did not intend to preempt state tort law. The Court found that there "is no indication that Congress even seriously considered precluding the use of [state tort] remedies" when it enacted the Atomic Energy Act. Silkwood, 104 S.Ct. at 623. Moreover, the Court found clear evidence, in the discussion preceding the enactment and later amendment of the Price-Anderson Act, that Congress assumed that persons injured by nuclear accidents were free to utilize existing state tort law remedies.

Other distinctions can be drawn between Silkwood and the present case: the punitive damages in Silkwood did not directly regulate a nuclear plant (there was no judicial or legislative order for plant operators to do something or not do something), and it certainly did not attempt to prohibit operation. Here, by contrast, Suffolk County and New York are attempting directly to forbid the performance of functions contemplated by federal regulations and to prohibit plant operation. The key to Silkwood is that the Court simply looked for indicia of Congressional intent and found them. Id.

2. The state laws "actually conflict" with federal law.

Besides invading a federally occupied field, the State laws cited in Contentions 1-10 are preempted because they "actually conflict" with federal law, particularly the Atomic Energy Act.

a. For Contentions 5-8, it is impossible to comply with both state and federal law.

In the first place, as to Contentions 5, 6, 7, and 8 (warning the public and making decisions and recommendations), if the contentions are correct then there cannot be a utility emergency plan. These functions are required by 10 C.F.R. § 50.47; state law says (according to the contentions) that LILCO is forbidden to perform them; LILCO cannot comply with both the federal mandate to perform those functions and the alleged state mandate not to perform them.

The only possible reply is that LILCO can comply with both state and federal law by simply not operating the plant. Such an argument would be absurd. Conflicts between state and federal law can almost always be avoided by going out of business.12/ A decision that there is no "actual conflict" if the

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12/ For example, in Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132 (1963), the Court gave a hypothetical exam-

(footnote continued)

regulated party could avoid it by going out of business would mean that the "physical impossibility" test for conflict would be a purely academic one that would never apply in the real world, and the Supreme Court obviously did not mean it as such. It would be an intolerable result if a state were allowed to prohibit a key safety function at a nuclear plant (suppose, for example, that a state were to ban emergency core cooling systems) and thereby make it impossible to meet NRC safety requirements without shutting down.

(footnote continued)

ple of a case in which compliance with both State and federal regulations would be a "physical impossibility":

> That would be the situation here if, for example, the federal orders forbade the picking and marketing of any avocado testing more than 7% oil, while the California test excluded from the State any avocado measuring less than 8% oil content.

Id. at 143. This, of course, presents an impossibility of dual compliance only so long as the avocado growers want to continue marketing their fruit in California.

b. For Contentions 1-10, the state laws "stand as an obstacle to the accomplishment of the full purposes and objectives of Congress"

In the second place, the state and local laws cited in all ten contentions "stand as an obstacle to the accomplishment of the full purposes and objectives of Congress." What are these "purposes and objectives"? The legislative history set out above shows that there are at least three:

1. The purpose of having effective emergency plans,
2. The purpose of having uniform standards of emergency planning, and
3. The purpose of encouraging nuclear power.

(1) The purpose of having effective emergency plans

It goes without saying that one Congressional purpose is that eventually there be an adequate emergency plan for every nuclear plant, and that the public should be protected thereby. Throughout the process of enacting the 1980 and 1982-1983 NRC Authorization Acts, Congress made clear its intent "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 . . . ." Conference 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). Congress wanted the plans to be state and local government plans but permitted utility plans, so long as the public health and safety was adequately protected.

The purpose of having good emergency plans would be thwarted by State laws that prevented a utility plan from being as effective as it could be. And that is precisely the effect of the laws, interpreted as the intervenors urge, cited in Contentions 1-4, 9, and 10.

(2) The purpose of having uniform federal standards of emergency planning

The Congressional purpose of having uniform federal standards for emergency planning and a uniform system of regulation would also be frustrated if States were permitted, first, to abandon emergency planning themselves because of their own views about the safety of a nuclear plant and, second, to prevent the utility from planning by applying to it multifarious state laws such as those aimed at "joy riding."13/

13/ The statute claimed by Contention 4 to prevent LILCO from removing obstacles from roadways, N.Y. Penal Law § 165.05 (McKinney Cum. Supp. 1983-84), is in fact a law enacted to prevent teenagers from taking other people's cars. The statute,

(footnote continued)

The viability and effectiveness of emergency plans would be determined not by the standards of NUREG-0654 but by the vagaries of local laws and the policies of local governments. This too would frustrate the purpose of Congress.

(3) The purpose of encouraging nuclear power

That Congress intends to encourage atomic energy is indisputable. As the Supreme Court has said:

> [T]here is little doubt that a primary purpose of the Atomic Energy Act was, and continues to be, the promotion of nuclear power.

Silkwood, 104 S. Ct. at 626 (quoting Pacific Gas).

To be sure, "the promotion of nuclear power is not to be accomplished 'at all costs.'" Silkwood, 104 S. Ct. at 626 (quoting Pacific Gas). Atomic energy should be developed and used only to the extent it is consistent "with the health and safety of the public." Id. (quoting 42 U.S.C. § 2013(d)). But LILCO is not proposing to operate Shoreham without

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(footnote continued)

entitled "Unauthorized use of a vehicle in the third degree," is derived from an earlier statute defining the offense commonly known as "joy riding." The present statute is drafted "to encompass certain offenses analogous to embezzlement as well as those of the ordinary trespassory taking variety." A. Hechtman, "Practice Commentaries," following N.Y. Penal Law § 165.05 (McKinney 1975).

protecting the health and safety of the public, and Contentions 1-10 do not question whether the LILCO Plan can in fact protect the health and safety of the public; they address the quite different issue of whether the state will permit LILCO to protect the public health and safety.

The short of the matter is that Congress wants nuclear plants to operate, so long as the public is adequately protected, and has authorized utilities to proceed with emergency planning, with or without state or local government participation. The Congressional purpose would be destroyed if a state could apply its laws to interfere with such compensating plans and thereby force the shutdown of nuclear plants.

B. Even of preemption does not resolve Contentions 1-10, the adequate assurance required by 10 C.F.R. § 50.47 exists for Contentions 1-2 and 4-10 because the State and the County would respond to an actual emergency

Under 10 C.F.R. § 50.47(a)(1) or (c)(1), the Board can grant summary disposition in LILCO's favor on Contentions 1-2 and 4-10 because it is an undisputed fact that Suffolk County and New York State would respond to an emergency at Shoreham, thus removing any legal bar to a LERO response.

1. Assurance under §50.47(a)(1)

Section 50.47(a)(1) of 10 C.F.R. requires the NRC to find that "there is reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency." This Licensing Board can make that finding for the LILCO Transition Plan as it currently exists -- even if state laws prohibit LILCO's taking the actions described in Contentions 1-10 (as we assume arguendo in this motion) and even if those state laws are not preempted -- because there is no question that New York State and Suffolk County would respond to an actual emergency at Shoreham. The Governor said so in a press release dated December 20, 1983, as follows:

> Of course, if the plant were to be operated and a misadventure were to occur, both the State and County would help to the extent possible; no one suggests otherwise.

Cordaro and Weismantle (State Emergency Plan), ff. Tr. 13,899, at 7.14/ Participation by the State or County would cure any lack of authority.15/

14/ Throughout this motion, citations to oral and written testimony of witnesses follow the conventions ordered in the Board's "Memorandum and Order Establishing Format and Schedule of Proposed Findings of Fact and Conclusions of Law" dated July 27, 1984.

15/ Under New York Executive Law Article 2-B, the Governor has the authority to direct the response of a locality during an

(footnote continued)

The County undoubtedly will urge the Board to ignore the evidentiary fact that Suffolk County and New York State would respond in a real emergency, arguing as they have often in the past that what is being litigated here is the LILCO Plan and nothing else, and that the LILCO Plan does not rely upon the State and County to respond. The short answer to this is that it asks the Board to base its decision on a fiction and to ignore the material fact, established on the record, that the State and County will respond. It is true that the LILCO Plan can stand alone, without the participation of local and state government. But in addition there is assurance that governmental resources -- and legal authority -- would be made available. This is the truth, and no party can reasonably expect the Board to be blind to it.

(footnote continued)

emergency if the local executive does not act. See N.Y. Exec Law Art. 2-B §28 (McKinney 1982). The Governor's powers include the authority temporarily to suspend specific provisions of any statute, local law, ordinance, or orders, rules or regulations, or parts thereof, of any agency during a state disaster emergency. N.Y. Exec. Law § 29-a (McKinney 1982). This, of course, would remove any legal obstacle to LERO's performance of emergency functions. Article 2-B need not be relied upon in determining whether summary disposition should be granted, however, because the Governor has stated that government officials will respond.

Indeed, the expected participation of County and State officials is taken into account in the LILCO Transition Plan. State and County personnel could communicate with LILCO and LERO using existing systems already installed. Tr. 13,737-41 (Daverio). (If the State has unplugged the RECS telephone, it need only plug it in to communicate in an emergency.) LILCO Transition Plan, Figure 4.1.3 and pages 4.1-1, 4.1-4; Cordaro and Weismantle, (State Emergency Plan), ff. Tr. 13,899, at 8. There is space in the emergency operations facility, the emergency operations center, and the emergency news center for use by State and County officials. LILCO Transition Plan, 3.8-5, 3.8-6. And the Director of Local Response is to take into account, in making protective action recommendations, advice that may be received from local and State government officials. LILCO Transition Plan, 3.1-1 and OPIP 2.1.1, p. 5 of 79. Likewise, traffic guides are trained to assist police, should police participate in an emergency. LILCO Transition Plan, OPIP 3.6.3, p. 11 of 46; Babb et al. (Training), ff. Tr. 11,140, at Vol. 5, Attachment 20, Module 12. Consequently, while it is true that the LILCO Plan was developed to function without State and County resources, it is designed to function with government personnel participating as well. And government personnel will be available in an emergency.

In denying Suffolk County's motion to terminate this proceeding, the Licensing Board addressed the need for realism in this litigation as follows:

> The County is entitled to litigate vigorously its view that no emergency plan for Shoreham is devisable which can be implemented to meet the Commission's regulations. Perhaps part of the County's factual case would be that specific elements of its resources are not capable of performing specific aspects of necessary functions, e.g., traffic control in some locations, during a radiological emergency. This would be the proper use of the hearing process before us. This would be much different, however, from a position by the County that it will not permit its personnel and other resources to be used to assist in implementing any emergency plan, in order to effectuate its desired result that Shoreham not be found to satisfy the NRC's requirements for an operating license.
>
> . . .
>
> If the County seeks to have its findings adopted, it must litigate before us the facts which it believes support its view that it is not feasible to implement emergency preparedness actions which would meet NRC regulatory requirements in the event of a radiological emergency at the Shoreham nuclear power plant. The right of the County to litigate whether necessary emergency actions can be taken may be distinguishable from the circumstances of a governmental litigant before us which simply refuses to take otherwise feasible actions.

Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-22, 17 NRC 608, 637, 643, aff'd, CLI-83-13, 17 NRC 741 (1983). In Contentions 1-10, the County and the State are arguing precisely what was prohibited by the licensing board: that because they will not participate in emergency planning, LILCO cannot operate Shoreham. This argument should be rejected once again.

Because the emergency functions at issue in Contentions 1-2 and 4-10 arise not during the planning process but only during a real emergency, and because State and County officials would respond during a real emergency, Contentions 1-2 and 4-10 do not raise any material issue about whether adequate protective measures can and will be taken in the event of a radiological emergency at Shoreham. Therefore, LILCO is entitled to summary disposition on these contentions.

2. Assurance under §50.47(c)(1)

Even if the Board were to find that Contentions 1-10 raise issues that question whether reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency under 10 CFR §50.47(a)(1), the Board should still find that, under 10 CFR §50.47(c)(1), LILCO has demonstrated that adequate "interim compensating actions" have been taken, that "deficiencies in the Plan are not

significant for the plant in question," and that there are "other compelling reasons to permit plant operation."16/

Although thus far this proceeding has gone along on the assumption that LILCO must comply with 10 C.F.R. § 50.47(a) and with NUREG-0654 as fully as a state or local government plan at any other plant, and though LILCO believes it meets or exceeds those standards, in fact a lesser standard applies. The Transition LILCO Plan is an "interim compensating action" under 10 C.F.R. § 50.47(c). The Commission has said that such compensating actions do not necessarily have to provide the same level of protection as if there were no deficiencies:

16/ 10 CFR § 50.47(c)(1) provides as follows:

> (c)(1) Failure to meet the applicable standards set forth in Paragraph (b) of this section may result in the Commission declining to issue an operating license; however, the applicant will have an opportunity to demonstrate to the satisfaction of the Commission that deficiencies in the Plans are not significant for the plant in question, that adequate interim compensating actions have been or will be taken promptly, or that there are other compelling reasons to permit plant operation.

This provision was intended to be consistent with the 1980 NRC Authorization Act, which in turn was intended to ensure that utilities whose surrounding localities did not participate in emergency planning, for whatever reason, would not be penalized. 45 Fed. Reg. 55,403 col. 1 (1980); H. Conf. Rep. No. 96-1070, 96th Cong., 2d Sess 27 (1980), reprinted in 1980 U.S. Code Cong. & Ad. News 2260, 2270.

> [T]hough interim compensatory actions must be "adequate," this did not mean that they would necessarily provide the same level of protection that complete correction of the deficiencies would offer.

Consolidated Edison Co. of New York (Indian Point, Unit No. 2), CLI-83-16, 17 NRC 1006, 1010 (1983). Thus, failure to meet one or more of the emergency planning standards does not necessarily entail denial of an operating license. Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), LBP-82-39, 15 NRC 1163, 1174 (1982).

With the evidentiary record in this proceeding almost complete, the only "deficiency" that is left in question regarding the LILCO Transition Plan (and, incidentally, the only "unique local condition" that Suffolk County has been able to provide) is Suffolk County's and New York State's refusal to plan. Contentions 1-10 simply invoke this single fact ten different times, and allege in ten different ways that only a government can perform emergency response functions. But since the State and County governments would participate in a real emergency, the existence of the LILCO Transition Plan, which is capable of incorporating State and County resources, is an adequate "interim compensating action." For the same reason, the "deficiency" of government nonparticipation is not "significant" for Shoreham. And for the same reason, the Board should

find that there are "other compelling reasons to permit plant operation." 10 C.F.R. §50.47(c)(1). The alleged illegalities complained of in Contentions 1-10 are easily eliminated by the State and County taking part in an emergency response for Shoreham. Since, as noted above, local and State governments will respond, the issues in Contentions 1-10 do not affect the level of protection afforded the public during an emergency. Moreover, the County and the State, if they believe there is a legal problem, can eliminate it by participating in pre-emergency planning, or by authorizing LILCO to perform the allegedly illegal acts.

In short, Suffolk County and New York State ask this Board in Contentions 1-2 and 4-10 to make a fictitious prospective finding that, at the time of an emergency, LILCO will be taking certain emergency response actions illegally under state law, and therefore that LILCO's plan does not meet NRC regulations. LILCO asks the Board to make an accurate prospective finding -- that at the time of an emergency LILCO would be taking emergency response actions in conjunction with, or authorized by, government officials, and that as a factual matter any theoretical legal bar would be removed. Therefore, under § 50.47(c)(1), the "illegality" of the LILCO Plan under New York State law disappears as an obstacle to operation.

C. The Plan would be adequate even without the actions challenged in Contentions 1, 2, 3, 4, 9, and 10

Contentions 1-4 and 9 all challenge the legality of actions taken to support the traffic plan portion of the LILCO Transition Plan; Contention 10 challenges the actions to be taken to maintain security at the EOC, EPZ perimeter, and relocation centers.17/ But "directing" traffic, "channeling" traffic, putting up traffic signs, and dispensing fuel from tank trucks are not necessary for reasonable assurance that adequate protective measures can and will be taken in the event of an emergency at Shoreham. Moreover, LILCO does not plan to "tow" cars or "maintain security" in the manner apparently envisioned by Contentions 4 and 10. Therefore, the Board should find for LILCO on these issues.

First, the record developed in this proceeding18/ shows that LILCO could implement what has been referred to as

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17/ LILCO disagrees with some of the characterizations of its planned emergency response in the contentions, as explained in Part II below.

18/ Strictly speaking, some of the facts recited in this motion may not be uncontested in the way that facts in support of summary disposition motions usually are. See 10 C.F.R. §2.749 (1984). But since the evidence from both sides is already in the record, the Board can decide the few facts that may be contested without further hearings, and so summary disposition is appropriate.

an "uncontrolled" evacuation -- using no traffic guides, signs, cones, or channelization -- with an increase in evacuation times of less than 1 hour 35 minutes in normal conditions and 1 hour 55 minutes in inclement weather. Cordaro et al. (Contention 65), ff. Tr. 2,337, at 15 and Attachment 6. NUREG-0654 and the NRC regulations regarding adequate protection in an emergency at a nuclear power plant do not provide specific traffic time estimates that must be met in order to respond adequately to an emergency, but, rather, require that accurate estimates be developed so that the goal of dose minimization can be achieved. Id.; see also Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-730, 17 NRC 1057, 1069 n. 13 (1983). LILCO's evacuation time estimates, including the "uncontrolled" evacuation time estimate, are comparable to estimates for other nuclear power plants. Id. at 46-47.

No one suggests, of course, that an uncontrolled evacuation would be better planning or result in a better emergency response; but it would result in an adequate response in keeping with NUREG-0654, and the record is amply developed for this Board to so find. Cordaro et al. (Contention 65), ff. Tr. 2,337, at 71-72; Cordaro et al. (Contention 23.C, D, and H), ff. Tr. 2,337, at 17-18. Thus, the Board can dispose of Contentions 1, 2, and 3 simply by finding that an "uncontrolled" evacuation would adequately protect the public in an emergency

at Shoreham.19/

Second, as explained below, Contentions 4 and 10 allege the illegality of activities that are in fact not contemplated by the LILCO Plan. The LILCO Plan does not contemplate that LERO workers would be "towing" cars in the sense of impounding them, or "performing law enforcement functions" at the EOC, EPZ perimeter, or relocation centers in the sense of compelling any particular behavior by threat or by force. Thus, LILCO is entitled to summary disposition on Contentions 4 and 10 because as a factual matter the behavior alleged in those contentions is not a part of the LILCO Plan.

Finally, LILCO is entitled to summary disposition on Contention 9 because the dispensing of fuel is not required by NRC regulations, and in any event LILCO's evacuation time estimates are not affected if this function is not performed, as we shall show below.

19/ The Intervenors' legal contentions involving the traffic plans support LILCO's assertion that no specific evacuation time estimates are required. Contentions 1, 2, and 3 assert, not that a specific time estimate must be met, but simply that because the functions described in those contentions cannot lawfully be executed, the evacuation time estimates in the LILCO Transition Plan are unrealistically low.

IV. CONTENTION-BY-CONTENTION ANALYSIS OF THE BASES FOR GRANTING SUMMARY DISPOSITION

A. Contentions 1 and 2: Guiding Traffic Along Predetermined Routes

In Contention 1, Suffolk County characterizes the actions to be taken under the traffic portions of the LILCO Transition Plan as "directing traffic," to "ensure that evacuees follow the evacuation routes identified and prescribed by LILCO in the Plan and to 'discourage' noncompliance with those routes."20/ Contention 2 says that LILCO employees would "implement various traffic control measures" such as "roadblocks, prescribed turn movements, channelization treatment, one-way roads, and blocking lanes on the Long Island Expressway."

The record shows that LERO traffic guides will be stationed at key intersections to facilitate the movement of traffic by using hand and arm signals and thus to discourage travel in certain directions, though traffic will not be prohibited from traveling in particular directions.21/ Tr. 2,344

20/ The complete text of Contentions 1-10 is set out in Appendix A to this motion.

21/ LILCO employees will not be "directing traffic," if that phrase means compelling people to move in any particular direction. Traffic guides will not force anyone to turn in a particular direction should they choose not to do so. LILCO Transition Plan, Appendix A, IV-8; Cordaro et al. (Contention 65), ff. Tr. 2,337, at 76; Cordaro et al. (Contention 23.H), ff. Tr. 2,337, at 21-22; Tr. 2,625 (Lieberman).

(Lieberman). Cones, hand signals, and arm movements will be used to encourage the movement of traffic out of the EPZ as quickly as possible, Cordaro et al. (Contention 65), ff. Tr. 2,337, at 61-62, resulting in a traffic time estimate of 4 hours and 55 minutes for evacuation of the entire 10-mile EPZ in summer in good weather, and 6 hours in inclement winter weather. Id. at 62 and Attachment 6 (Cases 12 and 19, respectively). Only one two-way road is converted to a one-way road under the LILCO Plan. LILCO Transition Plan, Appendix A, Table XIII.

LILCO is entitled to summary disposition on Contentions 1 and 2 on three grounds. First, assuming that State law prohibits LERO workers from guiding, channeling, and facilitating traffic, that state law is preempted by the Atomic Energy Act. If Suffolk County or New York State -- or any other government with jurisdiction in the Shoreham EPZ -- passed a law that said "LERO workers, LILCO employees, and any other persons not policemen cannot direct, facilitate, guide, or channel traffic during an emergency at the Shoreham Nuclear Power Station," it would be preempted by the Atomic Energy Act for the reasons described in part I.A. of this motion. Yet this is precisely what Suffolk County and New York State are attempting to do by using existing laws and interpreting them so as to prevent or hinder a response to an emergency at Shoreham, and then arguing

that Shoreham should not receive an operating license because LILCO cannot adequately respond to an emergency.

Second, preemption issues aside, the adequate assurance required by 10 C.F.R. § 50.47(a)(1) exists because, as described in part I.B of this motion, public officials have stated that the State and County would respond to an emergency at Shoreham. That response is bound to include either (1) providing policemen to facilitate the movement of traffic during an evacuation or (2) conferring authority on LERO to do so.22/ The LILCO Transition Plan provides for the incorporation by its traffic guides of any police assistance offered. LILCO Transition Plan, OPIP 3.6.3, p. 11 of 46. Traffic guides are trained to explain to the police the situation existing at the time of an emergency, to turn over posts for facilitating traffic flow to the police, and to remain if necessary as assistants in coordinating the evacuation effort. Id.; Babb et al. (Training), ff. Tr. 11,140, at Vol. 5, Attachment 20, Module 12.

22/ See N.Y. Exec. Law, Art. 2-B, § 29-a (McKinney 1982). Indeed, if the County and the State participate in a response, as they have said they would, all actions mandated by government officials would be, by definition, taken pursuant to governmental authority, including the actions of traffic guides.

Third, NUREG-0654 does not require any particular type of traffic control scheme, but only that a reasonable, accurate evacuation time estimate be given in the offsite plan to meet the regulatory basis of dose minimization. NUREG-0654 Sections II.J.8, II.J.10.1. The scheme used in the present traffic plan for Shoreham could be modified to eliminate traffic guides entirely, with a resulting increase in evacuation time estimates of 1 1/2 hours. Tr. 2,663 (Lieberman); Cordaro et al. (Contention 65), ff. Tr. 2,337, Attachment 6 (Case 24). Even this scheme, which is referred to in the record as an "uncontrolled" case, produces evacuation time estimates that are reasonable when compared to time estimates at other nuclear power plant sites, and meets the accuracy standards of NUREG-0654. Id. at 46-47. Therefore, even assuming that the behavior referenced in Contentions 1 and 2 is illegal, the Board cannot find, as suggested in the contentions, that the Plan cannot be implemented. The Plan can simply be modified to delete the actions described in Contentions 1 and 2 and to substitute the "uncontrolled" evacuation time estimates for making protective action recommendations.

Again, this is not to say that an "uncontrolled" evacuation would be better than an evacuation carried out with traffic guides using special traffic control tactics. An uncontrolled evacuation would take about 1 1/2 hours longer

than a "controlled" evacuation. For the very few postulated accidents where 1 1/2 hours would change a protective action recommendation from evacuation to sheltering, a controlled evacuation might provide greater dose savings than an uncontrolled evacuation. But whether a "controlled" or an "uncontrolled" evacuation time estimate is used as the basis for protective action recommendations, the choice between evacuation and sheltering will be based on the action that affords the greatest dose savings. Cordaro et al. (Protective Actions), ff. Tr. 8,760, at 27. Thus even without the traffic guides, the LILCO Transition Plan would adequately assure that protective actions can and will be taken in an emergency.

Accordingly, LILCO is entitled to summary disposition on Contentions 1 and 2 because (1) the state laws cited in those contentions are preempted by the Atomic Energy Act; and (2) in a real emergency, government participation, which would be forthcoming, would remove any legal bars; or (3) even without the activities described in Contentions 1 and 2, the Plan is adequate under NRC regulations.

B. Contention 3: Traffic Signs

In Contention 3 the Intervenors assert that it is illegal for LILCO to post signs to mark evacuation routes. The record shows that LILCO's traffic plan does rely on "trail

blazer" signs to mark routes out of the EPZ. Cordaro et al., ff. Tr. 2,337, at 61; Clawson et al. (Public Information), ff. Tr. 10,035, at 12-13. These signs are to be located along every major road in the EPZ, id., and will contain the standard evacuation route logo used for civil defense purposes throughout the country. Tr. 2,539 (Lieberman); Tr. 2,614-19 (Weismantle, Lieberman).

LILCO is entitled to summary disposition on Contention 3. First, assuming the state law cited in Contention 3 prohibits the posting of the signs, the state law is preempted by the Atomic Energy Act. If New York State, Suffolk County, or any other government within the 10-mile emergency planning zone were to pass law that said "the posting of signs indicating evacuation routes for an emergency at the Shoreham Nuclear Power Station is hereby prohibited," that law would be preempted. Yet the State and County are merely attempting to use existing state law to accomplish the same thing. That application of state law is preempted by the Atomic Energy Act, because it is an attempt to regulate radiological health and safety.

Second, the record shows that the LILCO Plan would be adequate even without the trail blazer signs. The evacuation time estimates for an uncontrolled evacuation would not be altered if traffic signs were not posted along evacuation routes.

Cordaro et al. (Contention 65), ff. Tr. 2,337, at 68-69 and Attachment 6 (compare Case 24 (uncontrolled case assuming route compliance) with Case 34 (uncontrolled case assuming 50% noncompliance with route assignments)). Therefore, LILCO is entitled to summary disposition on Contention 3, even without federal preemption, because the traffic plan would be adequate without signs.

C. Contention 4: Towing

The Intervenors have invoked the New York "joy riding" statute to assert in Contention 4 that LILCO is prohibited by law from "towing private vehicles and removing obstacles from public roadways" and that the LILCO plan therefore does not comply with NUREG-0654, Section II.J.10.k. The LILCO Plan does provide for LERO "road crews" to remove stalled cars and other obstacles from roadways using LILCO tow trucks and line trucks. LILCO Transition Plan, OPIP 3.6.3, p. 12; Cordaro et al. (Contention 66), ff. Tr. 6,685, at 6-7.23/

Again, LILCO is entitled to summary disposition. First, if the state law means what the Intervenors claim, it is preempted, because the State and County are using it in an

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23/ These actions do not constitute "towing" in the sense of impounding a car. "Towing" as used in the LILCO Transition Plan means removing obstructions from the road, most likely by merely pushing the car to the side of the road.

attempt to regulate radiological health and safety. If the State were to pass a law prohibiting private parties from pushing stalled cars to the side of the road during an evacuation, that law would be preempted. The County and State are merely attempting to apply existing law to the same end.

Second, preemption aside, the LILCO Plan is still adequate under 10 C.F.R. § 50.47(a)(1) and (c) (as discussed in part I.B of this brief), because during an actual emergency the State and County would be participating in an emergency response. The involvement of a government would remove any legal bar to removal of disabled cars from the evacuation route. Therefore, the actions contemplated by the Plan would not be taken illegally in an emergency at Shoreham.

D. Contentions 5 and 6: Activating Sirens, Making Decisions About Protective Action Recommendations, and Broadcasting Recommendations to the Public

Contention 5 asserts that LILCO is prohibited by law from "activating sirens" to alert the public that an emergency has occurred, and from "direct[ing] the broadcast and contents of emergency broadcast system ("EBS") messages to the public"; Contention 6 argues that LILCO is "prohibited by law from making decisions on protective action recommendations." For the reasons stated below, LILCO is entitled to summary disposition of Contentions 5 and 6.

1. Activating Sirens

The prompt notification system is the primary mechanism to alert the general public of a radiological emergency; the mainstay of this system in the LILCO Transition Plan, as for most nuclear power plant emergency plans in this country, is a system of fixed sirens mounted throughout the 10-mile EPZ, as well as an emergency broadcast system and tone alert radios. LILCO Transition Plan, 3.3-4 and OPIP 3.3.4. Under the LILCO Plan, the Director of Local Response implements procedures to set off sirens at a Site Area or General emergency. LILCO Transition Plan, 3.3-4.24/ Contention 5 alleges that it is illegal for LERO to activate the sirens.

24/ The sirens are activated using the encoder at the EOC. LILCO Transition Plan, OPIP 3.3.4, p. 2 of 7. In the event that the local EOC is not activated and the initial notification from Shoreham is of a General emergency with protective action recommendations, the Customer Service Supervisor, at the direction of the Director of Local Response, instructs the Shoreham Emergency Director to activate the siren system from the Shoreham control room. LILCO Transition Plan, 3.3-5 and OPIP 3.3.4, p. 7. In addition, a backup encoder is located at the Brookhaven Substation. LILCO Transition Plan, OPIP 3.3.4, pp. 2-3 of 7. If the Customer Service Operator is unable to reach the Director of Local Response within 10 minutes of receiving notification from Shoreham of a General emergency with a recommendation for protective action, the Customer Service Supervisor notifies the Shoreham Emergency Director and requests that the control room activate the sirens. LILCO Transition Plan, OPIP 3.3.4, p. 3 of 7.

LILCO is entitled to summary disposition on this issue, because any state law that prohibited the use of sirens to warn people of a radiological emergency would be preempted by the Atomic Energy Act and the regulations thereunder. Federal regulations and guidelines require that there be the capability to notify the public within 15 minutes of the decision to implement protective action recommendations. 10 C.F.R. Part 50, Appendix E, IV.D.3; NUREG-0654, FEMA-REP 1, p. 3.3; FEMA-43: Standard Guide for the Evaluation and Notification Systems for Nuclear Power Plants, Section E.6.2.

Without notification to the public, an effective emergency response to some accidents cannot be implemented; the NRC regulations require that a licensee show that an emergency response can and will be implemented. Yet Suffolk County and New York argue that state law prohibits the actions required by federal regulations. This conflict between state and federal law requires that the state law be preempted. Therefore, LILCO is entitled to summary disposition on the portion of Contention 5 that alleges it is illegal for LILCO to activate the sirens in the Shoreham EPZ.

Further, the fact that New York will facilitate a response in an actual emergency removes any legal obstacle. Under New York Exec. Law, Art. 2-B, § 29-a, the Governor is authorized to suspend any law that would impede an emergency

response. There can be no doubt that the Governor would not impede siren activation in an emergency requiring protective actions.

2. Notifying the Public Through the EBS

Contention 5 also asserts that LILCO is prohibited by state law from "directing the broadcast and contents of the Emergency Broadcast System ("EBS") messages to the public." Under the LILCO Transition Plan, LILCO employees determine the content of EBS messages, drafts of which are part of the LILCO Transition Plan, OPIP 3.8.2, Attachment 4, and which have been explored at length in this proceeding. Cole (Credibility), ff. Tr. 10,727, at 15-19; Purcell et al. (Credibility), ff. Tr. 10,727, at 70-72; Tr. 1575-1702 (Dynes, Mileti, Sorensen, Weismantle). LILCO employees also determine when an EBS broadcast should be made and initiate the broadcast. LILCO Transition Plan, OPIP 3.3.4, p. 2 of 7.

LILCO is entitled to summary disposition of this portion of Contention 5, both because the preemption doctrine permits the activities in question, and because during a real emergency governmental officials would be involved in the emergency response. First, to the extent that existing state law is applied to prohibit LILCO from broadcasting EBS messages, it is preempted by the Atomic Energy Act and by FCC regulations.

As previously discussed, announcements to the public regarding protective action recommendations are required by NRC regulations as part of an offsite emergency plan. There is thus a clear conflict between state law, and federal law controls.

In addition, it is the Federal Communication Commission, and not the states or localities, that regulates broadcasts of information over the radio. FCC regulations permit an EBS system to be set up by any individual, 47 C.F.R. §73.913(b), and provide that station managers, without government officials' prior approval or notification, can activate any EBS system that has been set up. 47 C.F.R. §73.935(a). Thus, it is clear that under federal law, the allegations in Contention 5 regarding EBS broadcasts are wrong, and LILCO is entitled to summary disposition.

Second, the contention is wrong because government officials would in fact respond to an emergency at Shoreham. Cordaro and Weismantle (State Emergency Plan), ff. Tr. 13,899, at 7. The LILCO Plan provides that the Director of Local Response will work in conjunction with government officials in responding to an emergency, LILCO Transition Plan, 3.1-1, and therefore EBS messages would be broadcast with the cooperation of the government officials. Consequently, even assuming that the actions addressed in Contention 5 would be illegal if taken by LILCO alone, they would be taken legally in a real emergency at Shoreham.

3. Making Decisions

Contention 6 alleges that under state law it is illegal for LILCO to "make decisions and official recommendations to the public as to the appropriate actions necessary to protect the public health and safety." Under the LILCO Transition Plan, the Director of Local Response, a LILCO employee, is responsible for decisionmaking for responses to be taken pursuant to the Plan. LILCO Transition Plan, 3.1-1.

LILCO is entitled to summary disposition on Contention 6 on two grounds. The first is preemption. Contention 6 attempts to use existing state law to prohibit LILCO from making decisions and recommendations regarding what is characterized as "appropriate actions necessary to protect the public health and safety." This characterization omits a single important word -- "radiological." It is only the radiological health and safety that LILCO attempts to make protective action recommendations about, and only because State and County officials at present refuse to plan to do so. LILCO has the authority to do so, in the absence of the State's and the County's participation, pursuant to the Atomic Energy Act.

The County's assertion that LILCO cannot legally make decisions regarding protective action recommendations is simply another way of saying that if the State and the County do not participate in emergency planning, emergency planning is

prohibited by state law. Thus, Contention 6 argues that LILCO is in violation of 10 C.F.R. Part 50, Appendix E, Section IV.A, because "LILCO employees and contractors rather than 'state and/or local officials' are identified as responsible for planning, ordering, controlling, and implementing the offsite response including appropriate protective actions."

This issue was raised by Suffolk County over a year ago in its motion to terminate this proceeding because the County Legislature had decided not to adopt any emergency plan. The Licensing Board ruled then, and this Board should rule now, that the unwillingness of a locality or a state to participate in emergency planning does not, as a matter of law, prohibit a nuclear power plant from operating. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-22, 17 NRC 608, aff'd, CLI-83-13, 17 NRC 741 (1983). To rule otherwise on Contention 6 is to reverse the decision made by the Licensing Board, and affirmed by the Commission, that LILCO is permitted by law to show that it has an adequate offsite emergency plan for the Shoreham Nuclear Power Station.

The Intervenors' argument, if accepted, plainly would destroy the "utility plan" option repeatedly authorized by Congress. Every state would have the power to shut down any or all nuclear plants within (or even near) its borders. A state could simply refuse to participate in emergency planning and

then contend that the utility could not perform essential functions without the state's help.

The second ground for summary disposition is that government officials would be involved in the protective action decision-making process if an emergency were actually to occur. The LILCO Plan provides for the incorporation of "the County Executive or his designated representative" in responding to an emergency, should that official choose to participate. LILCO Transition Plan, 3.1-1. The County and the State ask this Board to continue the fiction that in a real emergency they would not participate in a response, even though the record in this case shows that the County and the State would respond to an emergency. Cordaro and Weismantle (State Emergency Plan), ff. Tr. 13,899, at 7.

Thus, because Contention 6 attempts to apply state law in a way that is preempted and that is contrary to prior decisions in this case, and because in a real emergency government officials by their own admission would respond, LILCO is entitled to summary disposition on Contention 6.

E. Contentions 7 and 8: Making Recommendations for the Ingestion Exposure Pathway and for Recovery and Reentry

Contention 7 alleges that New York State law prohibits LILCO from making decisions and recommendations to the public

concerning protective actions for the ingestion exposure pathway; Contention 8 alleges that LILCO is prohibited from making decisions and recommendations concerning recovery and reentry. LILCO is entitled to summary disposition of Contentions 7 and 8 because (1) state law, to the extent it prohibits protective action recommendations for the ingestion exposure pathway and recommendations on recovery and reentry made by non-governmental entities, is in conflict with the Atomic Energy Act and (2) because in the aftermath of a real emergency governmental participation would remove any legal bar to these actions being taken.

The LILCO Transition Plan provides that LILCO employees will make protective action recommendations for the 50-mile ingestion exposure pathway EPZ. LILCO Transition Plan, 3.6-8 and OPIP 3.6.6, Section 5.4. The Radiation Health Coordinator is responsible for communicating recommended protective actions to farms, food processors, and other food chain establishments. LILCO Transition Plan, 3.6-8. The Coordinator of Public Information is responsible for communicating the same information to the general public. Id. These recommendations would include suggestions about sheltering dairy animals, limiting or ceasing the consumption of certain foodstuffs, washing or scrubbing fruit and vegetables, and other similar precautions. See Cordaro et al. (Ingestion Pathway), ff. Tr. 13,563. In

addition, the recommendations would identify areas of concern and offer to compensate anyone with economic losses due to food being withheld from the market. LILCO Transition Plan, OPIP 3.6.6, Section 5.4.3.1; Tr. 13,769-92 (Cordaro, Daverio, Watts).

The Plan also provides that short-term and long-term recovery and reentry operations will be performed by LILCO employees. See LILCO Transition Plan, OPIP 3.10.1. The Recovery Action Committee (1) coordinates area radiological surveys, (2) evaluates data, (3) identifies areas to be reentered, (4) mobilizes required resources, manpower, and equipment for reentry, (5) determines that all utilities are functioning, that food supplies are adequate, and that evacuation effects on public health are mitigated, (6) participates with LILCO in preparing and issuing announcements specifying the areas that may be reentered, and (7) ensures establishment of an organization to estimate population exposure on a continuous basis. LILCO Transition Plan, 3.10-1 and 3.10-2.

Two states are involved in the 50-mile ingestion exposure pathway EPZ for Shoreham: New York State and Connecticut. See, e.g., Cordaro et al. (Ingestion Pathway), ff. Tr. 13,563, at 7-8. Connecticut has agreed to implement protective action recommendations when notified by LILCO of an emergency at Shoreham. Cordaro and Renz (Letter of Connecticut Supplement),

ff. Tr. 13,858, at Attachment 2. Therefore, the only portion of the ingestion exposure pathway EPZ that is covered by Contention 7 is the portion within New York State.

To the extent that the New York State law cited in Contention 7 prohibits LILCO from making protective action recommendations for the 50-mile EPZ that lies within New York State, that law is preempted by the Atomic Energy Act and the NRC regulations. In addition, the Governor of New York has said that he would respond in an emergency at Shoreham. Cordaro and Weismantle (State Emergency Plan), ff. Tr. 13,899, at 7. Protective action recommendations for the 50-mile ingestion exposure pathway need not be made immediately following the declaration of an emergency. LILCO Transition Plan, OPIP 3.6.6, p. 1 of 50; see NUREG-0396, pages 13-14. It is clear from the Governor's statement that New York State officials would be closely involved in making recommendations for the 50-mile EPZ for New York State; indeed, it is inconceivable that the Governor would not get involved in the aftermath of an accident. Therefore, even if one assumes that the actions described in Contention 7 are illegal if undertaken by LERO alone, there is still adequate assurance that protective action recommendations for the ingestion pathway EPZ will be implemented.

As to Contention 8, it is clear that, following any major emergency at a nuclear power plant, many governmental entities will step forward to determine what actions should be taken to reenter the affected area and recover it if necessary. Tr. 10,509-10 (Weismantle); Cordaro et al. (Ingestion Pathway), ff. Tr. 13,563, at 38-39; Tr. 13,702-06 (Daverio, Watts); see also Federal Radiological Emergency Response Plan, 49 Fed. Reg. 3578 (1984). Even assuming that the Atomic Energy Act does not preempt the state law cited in Contention 8, and even if recovery and reentry recommendations from LILCO were illegal under state law, many "non-utility entities with the necessary authority" would initiate and implement recovery and reentry for the area around Shoreham. It is absurd to assert otherwise. For these reasons, LILCO is entitled to summary disposition on Contentions 7 and 8.

F. Contention 9: Dispensing Fuel

Contention 9 alleges that LILCO cannot legally dispense fuel from tank trucks to automobiles along roadsides. The record shows that LILCO plans to station fuel trucks near evacuation routes to assist motorists who may run out of fuel. Cordaro et al. (Contention 66), ff. Tr. 6,685, at 14. LILCO plans to provide sufficient fuel such that three gallons of fuel per vehicle would be available. Id. at 15.

Again, LILCO is entitled to summary disposition, for two reasons. First, to the extent that the local laws cited in Contention 9 are being applied to prohibit fuel-dispensing activity to aid in an evacuation, those laws are preempted by the Atomic Energy Act. There is no question but that Contention 9 represents an attempt to construe existing laws in such a way as to inhibit LILCO from making an effective emergency response and thereby to prevent LILCO from obtaining an operating license for Shoreham.

Second, this Board should find that the LILCO Plan is adequate even without the functions referred to in Contention 9. Dispensing fuel from tank trucks is not required under the NRC emergency planning regulations, or even suggested by NUREG-0654. Tr. 12,818 (Keller). Even if fuel were not dispersed and cars were assumed to run out of gas, these cars would be able to coast off the roadway, Cordaro et al. (Contention 66), ff. Tr. 6,685, at 8, and thus not impede evacuation flow. Therefore, LILCO is entitled to summary disposition of Contention 9.

G. Contention 10: Security

The Intervenors assert in Contention 10 that LILCO is prohibited by law from performing "law enforcement functions" at the EOC, at relocation centers, and at the EPZ perimeter and

that LILCO employees will be responsible for "establishing and maintaining security and access control for the EOC, directing traffic into the relocation centers, establishing and maintaining security at the relocation centers, and establishing and maintaining perimeter/access control to evacuated areas." The record shows the following:

1. The EOC is located on LILCO property. LILCO Transition Plan, 4.1-1. The LILCO Plan does not contemplate that LILCO employees will use threats or force; LILCO employees are assigned to the EOC to identify persons entering the facility. LILCO Transition Plan, OPIP 4.1.1, p. 2 of 12.

2. LILCO traffic guides will be assigned to traffic control posts along the EPZ perimeter to discourage persons seeking to enter the EPZ. LILCO Transition Plan, Appendix A, at IV-8. The traffic guides will not prohibit anyone from entering the area. Id. Individuals will be left to choose for themselves their course of action. Id.

3. All relocation centers used for the LILCO plan will be in Nassau County. LILCO's Testimony on Phase II Emergency Planning Contentions 24.O, 74, and 75 (Relocation Centers), at 22 (hereinafter "LILCO Testimony").25/ LILCO relies upon the Red Cross to provide relocation centers. Id. at 15. LERO

25/ This testimony will be heard the week of August 20, 1984, and therefore has not yet been bound into the record.

workers will rely upon the local police to provide security at relocation centers to the extent it is necessary. Tr. 11,344 (Varley). No LERO personnel would be relied upon to maintain order at relocation centers. Tr. 11,344 (Varley); Tr. 12,069 (Mileti). LILCO personnel are assigned to relocation centers to liaison with Red Cross, provide monitoring and decontamination, and help in the parking lots of the facilities to channel people through the monitoring and decontamination process and to the relocation center. LILCO Transition Plan, 3.6-7 and OPIP 4.2.1, pp. 1-7 of 22; LILCO Testimony at 24.

LILCO is entitled to summary disposition on Contention 10 for three reasons. First, to the extent that the laws cited in Contention 10 are being applied to prevent the operation of Shoreham, they are preempted by the Atomic Energy Act. Assuming it is illegal under state law for LILCO to "maintain security and access control for the EOC, [direct] traffic into the relocation centers, [establish] and [maintain] security at the relocation centers, and [establish] and [maintain] perimeter access control to evacuated areas," the state law is being applied in an attempt to inhibit effective emergency response and interfere with the operation of the Shoreham Nuclear Power Station for the sole purpose of regulating radiological health and safety.

Second, as previously noted, New York State and Suffolk County would respond in a real emergency at Shoreham. This means that County law enforcement officials would be available to "maintain control at the EOC" were that necessary, and to "maintain perimeter access control" at the EPZ perimeter. Consequently, there is reasonable assurance that the LILCO Plan will be implemented in this regard.

Third, as noted in connection with part I.C of this motion, the LERO workers called upon to perform the activities discussed in Contention 10 will not be "performing law enforcemont functions" or requiring anyone to do anything, and they will not be using force to "maintain security." Cordaro et al. (Credibility), ff. Tr. 10,396, at 101-04; Tr. 11,344 (Varley); Tr. 12,068-69 (Mileti). They will be assigned to the EOC, relocation centers, and the EPZ perimeter to assist people. They will discourage people from entering the EPZ through the use of hand and arm movements and traffic cones. Weismantle and Lieberman (Traffic), ff. Tr. 2,337, at 62. As to relocation centers and the EOC, LERO employees will be checking identification of persons at the EOC and channelling traffic and the stream of people who may be arriving at relocation centers for assistance. Cordaro et al. (Credibility), ff. Tr. 10,396, at 101-04. If difficulties arise at the EOC, the perimeter, or relocation centers, LERO workers will call the police. Tr.

11,344 (Varley). Finally, since all relocation centers relied upon by the Red Cross to respond to an emergency at Shoreham will be beyond Suffolk County, Suffolk police will not be called to maintain order at relocation centers.

In short, LILCO is entitled to summary disposition on Contention 10 because (1) the application of state law in that fashion is preempted by the Atomic Energy Act, (2) the County will be available in a real emergency to maintain order at the EOC and EPZ perimeter, (3) no "law enforcement" functions are performed by LERO workers under the Plan, and (4) the police in other jurisdictions will maintain order at relocation centers.

IV. REQUEST TO REPLY

In addition to the other relief (that is, summary disposition) requested in this motion, LILCO hereby requests leave to file a reply to the Intervenors' answer to this motion. Ordinarily 10 C.F.R. § 2.749 does not permit replies; it says that after the opposing party answers the motion, "[n]o further supporting statements or responses thereto shall be entertained."

In the instant case, however, the issues are of great importance and first impression, and a reply should be allowed. The issues here are almost purely legal, and the pattern of pleadings used for briefs, rather than for summary disposition

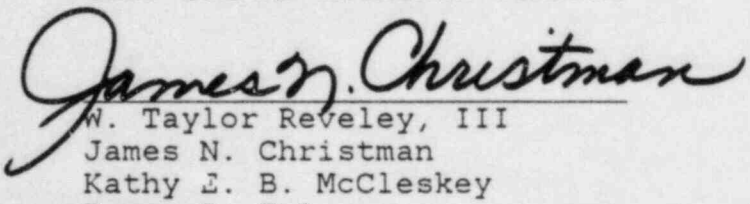
motions, is appropriate. Accordingly, LILCO asks that the Board exercise its authority under 10 C.F.R. § 2.718 to "[r]egulate the course of the hearing and the conduct of the participants" and "[d]ispose of procedural requests or similar matters," as well as its general powers necessary to conduct a fair and impartial hearing according to law, and grant LILCO leave to file a written reply.

V. CONCLUSION

For the reasons stated above, LILCO requests that the Board grant summary disposition to LILCO on Contentions 1-10.

Respectfully submitted,

LONG ISLAND LIGHTING COMPANY



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Appendix A: Text of Contentions 1-10

The preamble to Contentions 1-10 reads as follows:

> Preamble to Contentions 1-10. The LILCO Transition Plan specifies that in an emergency, the actions described in Contentions 1 through 10 below may be ordered to be taken by LILCO personnel. Contentions 1 through 10 allege that LILCO personnel do not have the authority to order or to perform those actions. Accordingly, as alleged in these contentions LILCO cannot, as a matter of law, exercise the responsibilities identified in Contentions 1-10, and therefore, contrary to 10 CFR Section 50.47(a)(1) its Plan could not and would not be implemented. LILCO's lack of legal authority to perform actions assigned to LILCO under the Transition Plan also results in noncompliance with 10 CFR Section 50.47(b)(3) and NUREG 0654, Section A.2.6, in addition to other regulatory requirements as set forth in the contentions which follow.
>
> Contention 1. LILCO is prohibited by law from directing traffic. N.Y. Veh. & Traf. Law §§1102, 1602 (McKinney); N.Y. Penal Law §§190.25(3), 195.05, 240.20(5) (McKinney); N.Y. Transp. Corp. Law §30 (McKinney). Under the LILCO Plan, LILCO employees designated "traffic guides" are expected to direct or "guide" traffic to ensure that evacuees follow the evacuation routes identified and prescribed by LILCO in the Plan and to "discourage" non-compliance with those routes. (See OPIP 3.6.3, at 6a-7 and Attachments 1 and 4 thereto; Appendix A "Traffic Control," at IV-5 et seq.). These portions of the Plan, therefore, are incapable of implementation.

Further, LILCO's lack of authority to direct traffic renders its evacuation time estimates, required under 10 CFR Part 50 Appendix E, Section IV, and NUREG 0654, Section II.J.8 and Appendix 4, inaccurate. LILCO's evacuation time estimates (Appendix A at V-3, V-8; OPIP 3.6.1, Attachment 4 2 [sic]) and the computer model from which they are derived, assume that all persons will use only the prescribed evacuation routes. (See Appendix A, at IV-19 V-2). In fact, however, since LILCO's traffic guides are prohibited by law from directing traffic, LILCO will not be able to ensure that motorists will use only the prescribed routes, rendering the LILCO evacuation time estimates inaccurate. Thus, LILCO does not comply with 10 CFR Section 50.47(b)(10), Part 50 Appendix E Section IV, and NUREG 0654 Sections II.J.8, J.9.5., J.10, and Appendix 4. Without LILCO's assumption that evacuees will follow prescribed evacuation routes, the LILCO evacuation time estimates would increase substantially.

Contention 2. LILCO is prohibited by law from blocking roadways, setting up barriers in roadways, and channeling traffic. N.Y. Veh. & Traf. Law §1114 (McKinney); N.Y. Penal Law §§190.25(3), 195.05, 240.20(5) (McKinney); N.Y. Transp. Corp. §30 (McKinney). Under the LILCO Plan, LILCO employees are expected to implement various traffic control measures, including those listed above, to ensure that evacuees follow the evacuation routes prescribed by LILCO. (Appendix A at Section IV). LILCO's evacuation time estimates assume that traffic control devices such as roadblocks, prescribed turn movements, channelization treatment, one-way roads and blocking lanes on the Long Island Expressway will be implemented and effective in directing and controlling evacuation traffic. (See

Appendix A at Section IV). Because LILCO and its "traffic guides" lack legal authority to implement such traffic controls (see also FEMA Report at 2-3, 10-11), LILCO cannot rely on the use of traffic control devices to ensure the use of prescribed evacuation routes. As a result, LILCO's evacuation time estimates are unrealistically low and the Plan fails to comply with 10 CFR Section 50.47(b)(10), Part 50 Appendix E Section IV, and NUREG 0654 Sections II.J.8, J.9, J.10, and Appendix 4.

Contention 3. LILCO is prohibited by law from posting traffic signs on roadways. N.Y. Veh. & Traf. Law §1114 (McKinney); N.Y. Penal Law §§190.25(3), 195.05, 240.20(5) (McKinney). In addition to its proposed use of signs as traffic control or channelling devices (see Contention 2), the LILCO Plan also assumes that "trail blazer" signs will be installed as permanent roadway hardware to direct the public in the use of prescribed evacuation routes in the event of an evacuation. LILCO's evacuation time estimates assume that such signs are installed. (Appendix A, at IV-70). In fact, however, such signs will not be installed by Suffolk County and it is unlawful for LILCO to install such signs. Therefore, LILCO cannot rely on such signs to ensure the use of prescribed evacuation routes, and its evacuation time estimates are, as a result, unrealistically low. Thus, LILCO fails to comply with 10 CFR 50.47(b)(10), Part 50 Appendix E Section IV, and NUREG 0654 Sections II.J.8, J.9, J.10, and Appendix 4.

Contention 4. LILCO is prohibited by law from removing obstructions from public roadways, including the towing of private vehicles. N.Y. Penal Law §165.05

(McKinney). The LILCO Plan provides that "road crews" made up of LILCO employees will remove obstacles from roadways by using LILCO tow trucks and line trucks. (Plan, at 4.4-3; OPIP 3.6.3, at 2 and Attachment 2 thereto). Because LILCO is prohibited by law from towing private vehicles and removing obstacles from public roadways, this aspect of LILCO's Plan cannot and will not be implemented. As a result, the Plan fails to comply with NUREG 0654, Section II.J.10.k.

Contention 5. LILCO is prohibited by law from activating sirens and directing the broadcast and contents of emergency broadcast system ("EBS") messages to the public. N.Y. Penal Law §§190.25(3), 195.05 (McKinney); N.Y. Exec. Law §20 et seq. (McKinney). Under the LILCO Plan, LILCO employees are expected to order that sirens be activated. They are also expected to determine the contents of EBS messages, to determine that an EBS broadcast should be made, and to direct that such broadcast occurs. (See OPIPs 3.3.4 and 3.8.2) Because LILCO employees are prohibited by law from performing such actions, the LILCO Plan cannot and will not be implemented, and the Plan fails to comply with 10 CFR Section 50.47(b)(5) and NUREG 0654 Section II.E.5 and E.6. Moreover, in assigning such functions to LILCO employees, the Plan fails to comply with 10 CFR Part 50, Appendix E, Section IV.D.3.

Contention 6. LILCO is prohibited by law from making decisions and official recommendations to the public as to the appropriate actions necessary to protect the public health and safety, including deciding upon protective actions which will be communicated to the public. N.Y. Penal Law §§190.25(3), 195.05 (McKinney); N.Y. Exec. Law §20 et seq. (McKinney).

Under the LILCO Plan, all command and control fuctions, as well as all management and coordination of the entire emergency response, are to be performed by various LILCO employees or, in the case of the "Radiation Health Coordinator," by an unidentified LILCO "Contractor." (See Plan at 3.1-1; OPIPs 2.1.1, 3.1.1, 3.6.1). Thus, contrary to 10 CFR Part 50, Appendix E, Section IV.A, LILCO employees and contractors rather than "State and/or local officials" are identified as responsible for planning, ordering, controlling and implementing the offsite response including appropriate protective actions. Because LILCO is prohibited by law from performing such functions, its Plan cannot and will not be implemented, and it fails to comply with 10 CFR Sections 50.47(b)(5), 50.47(b)(6), 50.47(b)(10), and NUREG 0654 Sections II.E.5, E.6, E.7, G, J.9 and J.10.

Contention 7. LILCO is prohibited by law from making decisions and official recommendations to the public concerning protective actions for the ingestion exposure pathway. N.Y. Exec. Law §20 et seq. (McKinney); N.Y. Penal Law §190.25(3), 195.05 (McKinney). The LILCO Plan provides that various LILCO employees and an unidentified LILCO "Contractor" will be responsible for determining, making to the public, and implementing protective action recommendations for the 50-mile ingestion exposure pathway EPZ. (See Plan Section 3.6; OPIP 3.6.6) Because LILCO employees and contractors are prohibited by law from performing these actions, the proposed ingestion pathway EPZ protective actions cannot and will not be implemented. Therefore, the Plan fails to comply with 10 CFR Section 50.47(b)(10), 50.47(c)(2), Appendix E Section IV.A.8, and NUREG 0654, Section II.J.11.

Contention 8. LILCO is prohibited by law from making decisions and official recommendations to the public concerning recovery and reentry. N.Y. Exec. Law §20 et seq. (McKinney); N.Y. Penal Law §190.25(3), 195.05 (McKinney). The LILCO Plan proposes that short-term and long-term recovery and reentry operations will be performed by LILCO personnel and contractors following a radiological emergency at Shoreham (Plan, at 3.10-1 and 3.10-2; OPIP 3.10.1). LILCO identifies no non-utility entity, with necessary authority, which has agreed to undertake the initiation or implementation of the recovery and reentry process. Since, under the LILCO Plan, command and control functions are assumed by LILCO, and under New York law, LILCO does not have the authority to perform recovery and reentry functions, recovery and reentry cannot be initiated or implemented. The Plan thus fails to comply with 10 CFR Sections 50.47(b)(1), 50.47(b)(13), and NUREG 0654 Section II.M.

Contention 9. LILCO is prohibited by law from dispensing fuel from tank trucks to automobiles along roadsides. Suffolk County Sanitary Code, Article 12; Code of the Town of Brookhaven, Chapter 30, Article X. The LILCO Plan provides that LILCO fuel tank trucks will be stationed along evacuation routes to assist motorists who run out of fuel. These trucks will dispense up to three gallons of fuel per vehicle to vehicles that have run out of fuel. (Appendix A at IV-176). However, LILCO is prohibited by law from distributing fuel to motorists on the roadsides, this aspect of the LILCO Plan cannot and will not be implemented. It is likely that many evacuees will not begin an evacuation with a full tank of gas. Many cars may run out of gas, both inside and outside the EPZ, as a result of extended operation times due to

congestion, stop-and-go conditions and time spent sitting in queues. Cars running out of gas, and the probable abandonment of vehicles which will follow, will result in obstructions and blockages on roadways in use during the evacuation. LILCO's evacuation time estimates do not take cars running out of gas and the resulting road obstructions into account. If LILCO cannot effectively prevent or remove such obstacles, its evacuation time estimates will increase. The LILCO Plan thus fails to comply with 10 CFR Section 50.47(b)(10), Part 50 Appendix E Section IV, NUREG 0654 Sections II.J.8, J.9, J.10, and Appendix 4.

Contention 10. LILCO is prohibited by law from performing law enforcement functions at the EOC, at relocation centers, and at the EPZ perimeter. N.Y. Penal Law §§190.25(3), 195.05, 240.20(5) (McKinney); N.Y. Transp. Corp. §30 (McKinney); N.Y. Veh. & Traf. Law §§1102, 1602 (McKinney); N.Y. Exec. Law §20 et seq. (McKinney). The LILCO Plan identifies LILCO employees as being responsible, during an emergency, for establishing and maintaining security and access control for the EOC, directing traffic into the relocation centers, establishing and maintaining security at the relocation centers, and establishing and maintaining perimeter/access control to evacuated areas. (OPIP 2.1.1, at 60-61; Appendix A at IV-8; OPIP 3.6.3, Attachment 4). 10 CFR Section 50.47(b)(1) requires LILCO to demonstrate that it "has staff to respond and to augment its initial response on a continual basis." LILCO must also "specify the functions and responsibilities for major elements . . . of emergency response," including law enforcement response. NUREG 0654, Section II.A.2.a. Without the ability to provide security at the EOC and relocation centers, and provide

perimeter control, the LILCO Plan and the protective actions contemplated therein could not and would not be implemented. The Plan thus fails to comply with 10 CFR Sections 50.47(b)(1) and 50.47(b)(10), and NUREG 0654, Sections II.A.2.a, J.9 and J.10.