UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION '84 SEP 25 P3:07

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)	)	

OPPOSITION OF SUFFOLK COUNTY AND THE STATE OF NEW YORK TO LILCO'S MOTION FOR SUMMARY DISPOSITION OF CONTENTIONS 1-10 (THE "LEGAL AUTHORITY" ISSUES)

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LILCO has moved this Board for summary disposition of Contentions 1-10, the "legal authority" issues.1/ LILCO advances three arguments in its favor: first, that if the laws of New York prohibit implementation of LILCO's Transition Plan, those laws are preempted by the Atomic Energy Act (the "preemption" argument); second, that even if the applicable State laws are not preempted, any lack of legal authority will be "cured" because the State and County will respond if there is an emergency at Shoreham (the "realism" argument); and third, that the

1/ LILCO's Motion for Summary Disposition of Contentions 1-10 (the "Legal Authority" Issues), August 6, 1984 (hereafter, the "Motion").

activities challenged as illegal in Contentions 1-4 and 9-10 are not essential for meeting NRC regulations (the "immateriality" argument).

LILCO's motion should be dismissed. The reasons compelling dismissal are set forth briefly in the summary and are addressed in greater detail in the body of this brief.

SUMMARY OF ARGUMENT

This Board should dismiss LILCO's Motion because the New York Supreme Court already has before it for decision the so-called "legal authority" issues (i.e., that LILCO lacks legal authority under New York law to implement its Transition Plan). The State of New York, County of Suffolk and Town of Southampton took those issues to the New York Supreme Court in direct response to this Board's prompting that controlling issues of New York law should be decided by the New York courts, not by this Board.

The main issues which LILCO now asks this Board to resolve (preemption and realism) are nothing more than defenses to plaintiffs' claims in the State Court proceeding that LILCO has no authority under New York law to implement its Transition Plan. The plaintiffs have already extensively briefed the

legal authority issues, and LILCO's preemption and realism defenses, and are actively seeking summary judgment in the New York Supreme Court. Only an irrational system of justice would countenance the bifurcation of these claims and LILCO's defenses between two different forums, one judicial and one administrative. Claims and defenses to claims should be decided in one proceeding. That is elementary jurisprudence. Since the claims in this case are state law claims involving complex and novel questions of New York state law, they should be decided by the New York state courts, as this Board itself has already recognized. The reason they have not yet been judicially resolved is because LILCO itself has engaged in a strategem to delay and obstruct the State Court proceedings. A determination by this Board to consider LILCO's Motion on the merits would only reward LILCO for its obstructionist tactics.

But even if this Board determines to address the merits of LILCO's three defenses, LILCO's Motion should be dismissed because the defenses are baseless.

The First Defense -- "Preemption"

LILCO concedes, for purposes of its Motion, that the New York Supreme Court will hold that LILCO cannot lawfully implement its Transition Plan under New York law for the reasons

advanced by the State and County. These reasons include: first, that implementation of the Transition Plan will involve an exercise of the State police power; second, that the police power can only be exercised by the State or its lawful delegate (e.g., the State's political sub-divisions); third, that the police power has never been delegated to LILCO by any provision of New York law or by LILCO's charter; fourth, that a private corporation like LILCO is a creature of the State and, as such, can only exercise those powers that the State has delegated to it; fifth, that because LILCO is a private corporation, the police power could not be delegated to it under New York law; and sixth, that particular provisions of New York State and municipal law (e.g., penal laws and traffic ordinances) prohibit LILCO from performing many of the specific functions set forth in its Transition Plan. All of this is admitted by LILCO for purposes of its Motion, and therefore this Board must assume the foregoing to be true in ruling on LILCO's Motion.

LILCO argues, nevertheless, that all of the provisions of the New York State Constitution, statutes and decisional law that establish the foregoing are preempted by the Atomic Energy Act of 1954 (the "Act"). LILCO's position requires this Board to conclude that the Act renders void the organic law of New York State by which the State controls the exercise of its

central governmental power. LILCO's position suffers from multiple defects and is demonstrably indefensible.

LILCO's Motion does not identify a single section of the Act to support its preemption argument. The Act itself is silent with respect to offsite emergency planning. LILCO apparently recognizes that this is not a case of express preemption since it adduces no evidence that Congress has ever explicitly legislated that state laws impacting the area of offsite emergency planning are invalid. LILCO's case instead rests on implied preemption. The Supreme Court has squarely held, however, that where state laws involving the State's historic police powers are concerned, the party who seeks to establish implied preemption has the burden of showing that it was the "clear and manifest purpose of Congress" to supersede those laws. LILCO has not, and cannot, begin to make this showing.

Prior to the nuclear accident at Three Mile Island in March 1979, there was virtually no Congressional consideration of offsite emergency planning and, therefore, no basis in the historical record for concluding that Congress intended federal law to supersede state law in this area. Subsequently, Congress has considered offsite emergency planning in several contexts, including oversight hearings held in May 1979 and

hearings held in conjunction with the NRC's 1980 and 1982-83 Authorization Acts. The record of these hearings establishes beyond question that Congress regarded the area of offsite emergency planning to be within the province of the States' traditional police power prerogatives and not an area in which coercive federal power was to be extended.

Section 109 of the 1980 Authorization Act and Section 5 of the 1982-83 Authorization Act conferred authority on the NRC to review a "utility plan" to determine whether it provided an adequate basis for granting an operating license. But neither of these provisions vested any authority in utility applicants to implement a plan that would violate particular state laws, much less usurp a state's historical police powers, in the manner contemplated by LILCO's Transition Plan. Both of these provisions have, indeed, lapsed and can provide no basis for preemption no matter how they may be interpreted. Both the Senate and House versions of the 1984-85 Authorization Act, not yet law, continue the NRC's authorization to review utility plans. They do nothing more. In short, there is no "clear and manifest" evidence that Congress has ever intended to preempt the area of offsite emergency planning. Such evidence as exists is all to the contrary.

The NRC itself has recognized that offsite emergency planning is an area of traditional state responsibility not preempted by Congress. In August 1980, the NRC issued a final rule on emergency planning. That rule neither confers authority on a utility to exercise state police powers nor suggests that federal law authorizes a utility to implement a plan that it lacks power to implement under state law. None of the individual Commissioners has suggested, in providing testimony to the Congress, that utilities have any authority under existing federal law to implement offsite emergency plans by arrogating to themselves powers traditionally exercised only by State and local government authorities.

Certainly the federal government has plenary authority to regulate the radiological safety aspects involved in the construction and operation of nuclear plants. But technical questions relating to health and safety concerns arising from the construction and operation of nuclear plants are not here involved. The area in question -- offsite emergency planning and police power functions such as traffic control in areas removed from the plant -- are peculiarly within the competence and expertise of State and local governments. There is no evidence that when Congress gave the NRC the authority to regulate the radiological safety aspects of nuclear power plant construction

and operation, it also intended to give the NRC the power to authorize private utility companies to assume total control of the emergency response to a nuclear disaster for a distance of up to 50 miles from the licensed facility.

Preemption, moreover, is not a doctrine that can confer power on a state-chartered private corporation to do that which its own creator, the State, has not seen fit to grant. Preemption is a doctrine that deals with conflicting state laws. It provides no basis for infusing power into a private corporation that the corporation does not already have. For more than 150 years, the Supreme Court has recognized that a private corporation only has those powers which the State elects to confer upon it. While the federal government can regulate the exercise of these powers, it cannot give a state-chartered corporation the power to act in ways that are beyond its charter. A contrary ruling, according to the Supreme Court, would violate the Tenth Amendment to the United States Constitution. Federal power does not extend that far even if Congress intends it to.

The force of this reasoning is all the stronger where, as here, a private corporation seeks to do not only to do that which its charter fails to authorize, but which the laws of its state of creation flatly proscribe. LILCO's preemption argument lacks merit and, if addressed, should be rejected.

The Second Defense -- "Realism"

LILCO's so-called "realism" defense is an "even if" defense. It assumes that state law bars implementation of the Transition Plan, and that federal law does not preempt such state law. It contends that LILCO may nevertheless implement the Transition Plan because the State and County will "in reality" respond to an emergency at Shoreham, and that this governmental participation will remove any legal bar to a LILCO response.

LILCO's "realism" defense should be rejected for three reasons:

First, it raises a purely state law issue and, therefore, should be decided by the New York Supreme Court, not this Board.

Second, there is no factual basis for LILCO's claim that the State and County will participate in the implementation of the Transition Plan. The State and County have developed no plans for implementation in the event of a Shoreham emergency. At the most (and even this is disputed), the State has indicated that government resources may be provided on an unplanned, ad hoc basis. This, however, is not the kind of

"assurance" of adequate offsite preparedness that the Regulations demand as a prerequisite to granting an operating license for Shoreham. In any event, the State and County have made clear that they will not key into or help LILCO impleemnt its Transition Plan. And they have certainly made clear, by this litigation, that they do not sanction LILCO usurpation of the State's sovereign police powers in implementing its Plan. Therefore, LILCO's theory that the State and County will respond to a Shoreham emergency in any manner that is meaningful for purposes of this proceeding is not "realism"; it is fantasy.

Third, even if LILCO's factual premise were granted (i.e., that the State and County will respond), that still does not establish that such ad hoc governmental participation will provide legal sanction for LILCO's otherwise unlawful behavior. LILCO has admitted, for purposes of this Motion, that it lacks authority under New York law to exercise police powers that have never been delegated to it. For that reason, it is wholly irrelevant, as a matter of New York law, whether LILCO exercises these powers alone or with others (State and County officials) who are authorized by law to exercise the police powers. It is simply a non sequitur for LILCO to assert that, because the State and County may allegedly elect to exercise

police powers that are unquestionably theirs to exercise, therefore LILCO may also exercise the State's police power, although no one has, nor can, confer that power upon it. Even the Governor has no power to invest LILCO with authority to do that which the Constitution and laws of New York proscribe. LILCO cites no authority that supports its "realism" argument, and we are aware of no authority that would support it.

The Third Defense -- "Immateriality"

LILCO's "immateriality" defense addresses Contentions 1-4, 9 and 10. These contentions concern LILCO's plan to exercise police power functions in the areas of traffic control, removal of roadway obstacles, dispensing fuel to disabled vehicles, and providing security and other services at the EPZ perimeter and other locations. The "immateriality" defense states that the subject contentions are "immaterial" to this proceeding since, even if LILCO cannot lawfully perform these functions (and therefore will not do so), it still satisfies all NRC regulatory requirements.

The "immateriality" defense is defective on multiple grounds and therefore should be rejected.

First, it asks this Board to approve LILCO's Transition Plan on the assumption that LERO has no capability at all to provide any traffic control assistance during an emergency; no capability at all to remove any roadway obstacles; no capability at all to fuel cars which have run out of gas and thus constitute traffic impediments; no capability at all to control traffic through the EPZ boundary; and no capability at all to provide security at other locations. Approval of LILCO's Plan could not possibly be given under these assumed conditions in light of the Section 50.47(a)(1) requirement for reasonable assurance that adequate protective measures "can and will be taken" in the event of a radiological emergency.

Second, LILCO's "immateriality" defense is plainly premature because its resolution depends upon the earlier resolution of other issues and contentions which have not yet been briefed, much less decided.

Third, LILCO's "immateriality" defense raises factual issues concerning Contentions 1-4, 9 and 10 which cannot be resolved on the record as it stands. This defense therefore cannot be considered unless a further evidentiary hearing is held.

Fourth, this Board cannot properly grant summary disposition with respect to LILCO's "immateriality" defense because it

rests on disputed issues of material fact. The Regulations clearly provide that summary disposition is appropriate only where "there is no genuine issue as to any material fact." Where, as here, there are factual disputes, the Board must deny the Motion.

Finally, as discussed in the body of the brief, there are additional reasons specific to each of the various Contentions why LILCO's "immateriality" defense must be rejected due to the existence of disputed issues of fact.

ARGUMENT

I. THIS BOARD SHOULD DISMISS LILCO'S MOTION BECAUSE THE NEW YORK STATE SUPREME COURT IS PRESENTLY CONSIDERING DISPOSITIVE MOTIONS ON ALL OF THE LEGAL AUTHORITY ISSUES.

The first ground for dismissal of LILCO's motion is that it is addressed to the wrong forum. The legal authority issues are already pending for resolution in the New York State Supreme Court in Riverhead, Long Island. Because those issues involve controlling questions of New York state law, it would be inappropriate for this Board to rule upon LILCO's motion before the New York Supreme Court has had an opportunity to consider, and rule upon, such issues.

It bears emphasis, initially, that the legal authority issues were taken to the New York Supreme Court by the State and County because this Board correctly recognized that that is where they belonged, and clearly indicated to the parties that that is where they should be taken. Thus, as early as December 1, 1983, Judge Laurenson expressed the Board's view that the legal authority issues should be decided by the New York State courts:

> "[L]et's talk about the legal contentions, numbers 1 through 10. . . . What we are concerned about here is the fact that these appear to be issues of law. They are issues of New York State law." Tr. 706-07.

Judge Laurenson then suggested, at least by implication, that these "issues of New York State law" (id.) properly belonged in the New York State courts, although the parties had not yet seen fit to take them there:

> "The problem is, for your own reasons -- and I won't go into them -- neither side has taken this to the state courts yet." Tr. 715.

On January 27, 1984, Judge Laurenson expressed his continuing curiosity as to why the "legal authority" issues had still not been taken to the New York State courts. He stated:

> "I'm curious why the County has not pursued a declaratory judgment, if that is their position concerning state law. We have indicated before that this is one area where a state court would presumably be able to dispose of these legal issues." Tr. 3661-62.

Shortly thereafter, Judge Laurenson apparently determined not to leave the matter to implication or curiosity. He stated directly:

> "Turning then to the question of the legal contentions in contentions 1 through 10. The Board believes that these legal contentions are properly matters to be disposed of by the New York State courts." Tr. 3675 (emphasis added).

In response to this Board's prompting that the legal authority issues be taken to the New York State courts for decision, that is precisely what the State of New York, Suffolk County and the Town of Southampton proceeded to do. The State and County filed separate declaratory judgment actions in the New York Supreme Court on March 8, 1984. The Town of Southampton followed with a declaratory judgment action filed in the Supreme Court on May 16, 1984.2/

2/ On August 14, 1984, these three declaratory judgment actions were consolidated for decision by the Supreme Court sitting in Riverhead.

From its inception, the history of the State Court proceedings has been one of intentional delay and obstructionist tactics by LILCO. First, LILCO obtained a 30-day extension to answer the complaints. This, however, was not a bona fide move to obtain needed additional time to answer, since LILCO did not, and never has, filed any answer to the complaints. Instead, on April 6, 1984, LILCO filed a motion to dismiss the State and County suits on the grounds of federal preemption.3/ LILCO simultaneously removed the State and County actions to federal district court on the basis that its preemption defense gave the federal court original jurisdiction of the declaratory judgment actions. This asserted basis for removal was patently frivolous in light of the United States Supreme Court's previous holding in Franchise Tax Board v. Construction Laborers Vacation Trust, ___ U.S. ___, 103 S.Ct. 2841 (1983), that preemption is only an affirmative defense, not a claim, and cannot, as a matter of law, provide any basis for removal.4/

3/ LILCO's April 6 Motion was accompanied by no memorandum of points and authorities in support of its preemption argument.

4/ The County had anticipated LILCO's delaying tactic and advised LILCO in March 1984, that removal would be improper under the Franchise Tax Board decision. LILCO disregarded the County's advice, obviously not intending to allow a Supreme Court decision to stand in its way of achieving further delay.

The State and County promptly moved the district court for remand of their declaratory judgment actions back to the State Court. As anticipated, remand was accomplished by order of the district court dated June 15, 1984. In his Memorandum Opinion, District Judge Altimari squarely held, as the Franchise Tax Board decision dictated, that preemption is only an affirmative defense, and that such defense should be resolved not in a federal forum but by the New York Supreme Court in the declaratory judgment actions. The district court stated:

> "Our decision today far from ends the present lawsuits or controversy. It is likely that this matter will move speedily to resolution in State Court where LILCO may, of course, raise its defense of Federal pre-emption."5/

While LILCO lost the removal motion, its ploy had the intended effect of delaying the State Court proceedings -- by more than two months (from April 6 to June 15, 1984). This, however, was not to be the end of LILCO's delaying tactics. After remand, it was up to LILCO to respond to the plaintiffs' complaints, either by way of renewal of its April 6 motion to dismiss or by answering. LILCO did neither for yet another two months.6/ Then, on August 14, 1984, LILCO renewed its earlier

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5/ Cuomo v. LILCO; County of Suffolk v. LILCO, Nos. CV-84-1218, CV-84-1405 (E.D.N.Y. June 15, 1984), Memorandum and Order at 26.

6/ Some of this delay was due to unexplained administrative problems in having the case files returned from federal to

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Motion to Dismiss, but asserted an entirely new defense (the "realism" defense) and essentially abandoned, for purposes of the State Court proceeding, its preemption defense. LILCO advised the State Court that the preemption issue was before the ASLB and, for that reason, was not then being asserted in the State Court proceeding.7/

Suffolk County and the State of New York have resisted LILCO's State Court efforts to fragment a decision on the legal authority issues. Therefore, in a cross motion for summary judgment filed September 18, 1984, plaintiffs have briefed all pertinent issues: LILCO's legal authority under state law to implement its Transition Plan, the "realism" defense, and the preemption defense. Thus, the preemption and "realism" defenses asserted by LILCO in the present Motion are also now pending for decision in State Court.

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state court. Even these administrative delays, however, were a by-product of LILCO's frivolous attempt to remove the state action to federal court.

7/ Not wishing to burn its bridges, LILCO informed the State Court that the declaratory judgment actions "obviously implicate controlling issues of federal law [i.e., preemption]," and, therefore, LILCO expressly reserved and did not waive its affirmative defense of federal preemption. LILCO State Court Memorandum, pp. 6-7.

LILCO's present effort to have its preemption and "realism" defenses decided by this Board is merely a continuation of LILCO's overall strategy to prevent any consideration of the legal authority issues by the New York Supreme Court. Preemption, as well as what LILCO calls "realism" (the assertion that the State and County "really" will respond in an emergency), are nothing more than defenses to the claims of the State and County that LILCO has no authority under New York law to exercise the State's police powers. These defenses are not claims in their own right. As shown above, recognition of this elementary fact was the basis for Judge Altimari's decision to remand the declaratory judgment actions to State Court.

It is absolutely absurd, in terms of any rational system of judicial and administrative economy, for LILCO now to contend that its defenses to the State Court actions should be decided, not by the State Court where they are pending, but by the very Board that suggested, in the first instance, that the legal authority issues should be decided by the State Court. The concept of splitting declaratory judgment actions and the defenses to those actions between judicial and administrative forums (or between any two forums) can only be characterized as nonsensical. Defenses to claims are decided with the claims, nowhere else.

LILCO obviously recognizes that this Board lacks the expertise to decide New York State law issues. For that reason, its 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." Motion, p. 2. This "assumption," of course, has no legal effect whatever. It is not binding on LILCO (i.e., it has no res judicata effect) and, therefore, is no substitute for a decision by the New York Supreme Court as to the legality of LILCO's Transition Plan under New York law -- a decision that clearly will have res judicata effect.

But there is another problem with LILCO's "assumption." Wholly apart from questions of judicial and administrative economy, it is impossible for this Board to decide preemption issues in a vacuum without first knowing what the State law is that is to be preempted. Federal law clearly does not preempt all state law in all circumstances.8/ Until the New York

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8/ For instance, whether a state law may be preempted depends in part on whether the state law in question represents a law which is traditionally within the state's police power authority. The courts have been more reluctant to find preemption where traditional police power authority is being exercised. See Silkwood v. Kerr-McGee Corp., ___ U.S. ___, 78 L.Ed.2d 443, 452 (1983) (Court finds no preemption where alleged conflict involved "the states' tra-

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Supreme Court determines what state law is specifically applicable here, this Board cannot render any meaningful decision as to whether that state law has been preempted by the federal law LILCO relies upon. Any decision this Board could render would be nothing more than an academic exercise based on supposition and could serve no useful purpose in fairly resolving the legal issues presented by this case.

We understand the Board's desire to conclude this proceeding in a reasonable time frame. There are, however, fundamental matters of fairness and common sense at issue here: LILCO should not be rewarded for its obstructionist tactics by

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ditional authority to provide tort remedies to its citizens and the federal government's express desire to maintain exclusive regulatory authority over the safety aspects of nuclear power"); Pacific Gas & Electric Co. v. State Energy Resources & Devel. Comm., 461 U.S. 190, 75 L.Ed.2d 752, 766 (1983) (historic police powers are not superseded by federal law unless that was the "clear and manifest purpose of Congress"). Similarly, the motivation behind a state law which is alleged to be preempted is also an important consideration in deciding a preemption question. See Pacific Gas & Electric Co., supra, (Court finds no preemption where purpose of law relates to economic matters). And LILCO's "realism" defense is premised on LILCO's unsupported assertion that if the State or County "responds" to a Shoreham emergency, then any State law legal authority bar is removed. To resolve that issue, the Board would have to decide whether LILCO's unsupported assertion regarding State law is in fact accurate -- a matter of interpreting New York State law.

permitting the legal authority issues to be divided between the State Court and this Board. There is but one reason why there is as yet no State Court ruling on all of the legal authority issues, including LILCO's defenses thereto -- LILCO's strategem of delay. For the past six months, LILCO has continually dragged its feet in an obvious attempt to avoid any State Court resolution of the State law issues. By contrast, the State and County have pursued the State Court lawsuit promptly and in good faith, as first suggested by this Board. The Board should now permit the parties to bring that suit to a conclusion without needless duplicative filings before this Board. LILCO's motion should be summarily denied.

The ensuing arguments are addressed to the merits of LILCO's preemption, realism and immateriality defenses to the legal authority claims now pending in State Court. These arguments are included in this brief despite our firm conviction that this Board should not reach the merits of these defenses but should require LILCO to litigate them as part and parcel of the State Court proceeding. If the Board rejects this approach, then we request the Board to rule in our favor on the merits of LILCO's defenses, for the reasons next given.

II. FEDERAL LAW DOES NOT PREEMPT THOSE PROVISIONS OF NEW YORK LAW THAT EITHER PROHIBIT OR FAIL TO AUTHORIZE LILCO'S ASSUMPTION AND EXERCISE OF STATE POLICE POWERS.

LILCO's Motion argues that this Board should dispose of all legal authority issues on the ground that the Atomic Energy Act preempts any New York State law that would limit LILCO's ability to implement its Transition Plan or would prevent the operation of the Shoreham plant. LILCO Motion at 2. In making this argument, LILCO "assumes, for the sake of argument, that the Intervenors . . . are correct that state law prohibits LILCO from taking the actions specified in Contentions 1-10 . . . ." Id. In essence, therefore, in order to rule on the instant Motion, this Board must accept that the state law legal authority issues now before the New York Supreme Court are decided adversely to LILCO, but to determine that the preemption doctrine supplies the legal authority that LILCO otherwise lacks.

In the discussion below, the County and State demonstrate that LILCO's preemption argument is flatly wrong. The laws LILCO would have this Board preempt are at the heart of the police powers of the State of New York. There is no evidence that Congress intended to preempt such laws. In fact, the evidence is to the contrary. Moreover, any such attempt at

preemption would violate the Tenth Amendment to the United States Constitution.

A. LILCO Challenges The Basic Governance Structure Of The State of New York.

To set LILCO's preemption argument in perspective, it is necessary to understand what must be accepted by the Board in assuming that New York law prohibits LILCO from taking the actions specified in Contentions 1-10. This Board must accept the following propositions, each of which has been argued by the State and County in the State Court proceeding as a basis for finding that LILCO has no authority under New York law to implement the Transition Plan.9/

First, LILCO intends to exercise police powers that are reserved to the States by the Tenth Amendment.10/ Police

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9/ The detailed bases of that position are set forth in the Joint Brief filed September 18 by plaintiffs in the State Court proceeding. Since LILCO's summary disposition motion assumes the correctness of our state law arguments, it is sufficient to summarize these arguments here.

10/ The Tenth Amendment to the U.S. Constitution provides as follows:

> "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

See Munn v. People of Illinois, 94 U.S. 113 (1877); Brown

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powers are an exclusive attribute and prerogative of state sovereignty. Indeed, the police power is at the very heart and center of a state's governmental authority.11/ As such, the police power may be exercised only by state governments and their lawful delegates (e.g., political subdivisions of the state).

In New York State, exercise of the police power is controlled by the State Constitution and the Municipal Home Rule Law. Article 9, Section 2 of the State Constitution and Section 10 of the Municipal Home Rule Law confer upon local governments such as Suffolk County "nearly the full measure of New York's police power."12/ However, no constitutional or

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v. Brannon, 399 F. Supp. 133, 147 (M.D.N.C. 1975), aff'd, 535 F.2d 1249 (4th Cir. 1976) ("The exercise of the police power for the general welfare of the public is a right reserved to the states by the Tenth Amendment to the Constitution.").

11/ People v. Nibbia, 262 N.Y. 259 (1933), aff'd, 291 U.S. 502 (1934); see East New York Savings Bank v. Hahn, 326 U.S. 230 (1945). The police power embraces protection of the health and safety of persons within the state's territorial domain. The United States Supreme Court has held that "[t]he protection and safety of persons and property is unquestionably at the core of the state's police power ...." Kelley v. Johnson, 425 U.S. 238, 247 (1976); see Adler v. Deegan, 251 N.Y. 467, 481 (1929) (Pound J., concurring) ("[T]he protection of the public health and safety is one of the acknowledged purposes of the police power of the state.").

12/ Hoetzer v. County of Erie, 497 F. Supp. 1207, 1215 (W.D.N.Y. 1980). Article 9, §2(c)(ii) delegates the po-

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statutory provision of New York law authorizes a private corporation such as LILCO to exercise the State's police powers.13/ In fact, the delegation of such governmental powers to a private corporation is unlawful and invalid under New York law.

LILCO is therefore precluded from lawfully undertaking the functions delineated in its Transition Plan and set forth in Contentions 1-10, because it has not been, and could not be,

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lice power as follows:

> "[E]very local government shall have power to adopt and amend local laws not inconsistent with the provisions of this constitution or any general law relating to the following subjects,
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> * * * * *
>
> "(10) The government, protection, order, conduct, safety, health and well-being of persons or property therein." N.Y. Const. Art. 9, §2(c)(ii)(10) (McKinney).

13/ LILCO has argued in the State Court proceeding that it has been delegated the authority to implement its Plan and thus to exercise the State's police powers by the policy statement of New York Executive Law 2-B, N.Y. Exec. Law §20(1)(a) (McKinney). This contention is wrong, as demonstrated in the Brief filed September 18 by plaintiffs in the State Court proceeding. In any event, this Board in dealing with LILCO's Motion must assume that Article 2-B confers no such authority.

delegated the authority to exercise powers within the exclusive preserve of New York State and its local governments. LILCO's Motion concedes the validity of this conclusion.

LILCO's preemption argument would require this Board to set aside the New York State Constitution (Article 9, Section 2), the New York Municipal Home Rule Law (Section 10), and the New York Executive Law (Article 2-B). Each of these provisions controls the delegation of police powers within New York State; none authorizes or permits LILCO, or any other private corporation, to exercise the State's police powers. In addition, LILCO's preemption argument would require this Board to set aside that body of New York decisional law that holds that sovereign governmental functions cannot lawfully be delegated to private individuals or corporations.14/

14/ See, e.g., Builders' Council of Suburban New York, Inc. v. City of Yonkers, 106 Misc. 2d 700, 434 N.Y.S. 2d 566, 567 (1979), aff'd, 79 A.D.2d 696, 434 N.Y.S. 450 (1980)(1979) ("An abdication of legislative power to a private party is unconstitutional. Delegation of sovereign power is unauthorized."); Farias v. City of New York, 101 Misc. 2d 598, 421 N.Y.S. 2d 753, 757 (1979) ("The Society is not an agency of the City of New York and there is no legislative standard for the execise or review of its power."); Podiatry Society v. Regents of University of New York, 78 Misc. 2d 731, 358 N.Y.S. 2d 276, 279 (1974) ("[T]he interpretation urged by petitioner would result in an unconstitutional delegation of governmental powers to a private corporation ...."); Fifty Central Park West Corp. v. Bastien, 302 N.Y.S. 2d 267, 271 (1969), aff'd, 64 Misc. 2d 911, 316 N.Y.S. 2d 503 (1970) ("[P]ermitting an interested

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Second, LILCO is precluded from implementing the Transition Plan by the limitations inherent in its existence as a corporation. LILCO is a State-created entity and as such possesses only those powers that have been conferred upon it by the State.15/ Unlike a natural person, a corporation does not possess all powers except those prohibited to it. On the contrary, a corporation only possesses those powers expressly conferred on it or that can reasonably be implied from the express powers granted. LILCO has no authority to carry out its Transition Plan unless New York state law has conferred that authority upon it.

In the State Court proceeding, the plaintiffs demonstrate that LILCO as a corporate entity has not been given the authority to exercise the powers which are required to implement the

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private association to possess what in effect would be legislative power is an unlawful delegation of such legislative power.").

15/ See, e.g., Schwab v. Potter Co., 194 N.Y. 409, 87 N.E. 670 (1909); Robia Holding Corp. v. Walker, 257 N.Y. 431, 438, 178 N.E. 747 (1931) ("No corporation, public or private, many exercise powers not granted by the State ...."). See also 14 N.Y. Jur. 2d, "Business Relationships," §340 (1981) ("[C]orporations, being creatures of the law, have no powers except those conferred by statute, directly or indirectly.").

Transition Plan, either expressly or by implication. Undeniably the power is not granted expressly; and, as a matter of New York law, a power may not be implied to do that which violates New York law. Again, this Board must accept these conclusions as a given for purposes of deciding LILCO's Motion.16/

16/ LILCO's powers are set forth in (i) Section 11 of the New York Transportation Corporation Law (McKinney); and (ii) Section 202 of the New York Business Corporation Law. Neither the Transportation Corporation Law nor the Business Corporation Law authorizes LILCO's Transition Plan for Shoreham or would even remotely permit LILCO's exercise of the powers it needs to implement the Plan. Section 11 of the Transportation Corporation Law grants gas and electric corporations the power to generate, acquire and supply electricity for heat or power to light public streets, places and buildings. In addition, such corporations are empowered to acquire and dispose of necessary machines and to transmit and distribute electricity through suitable wires and other conductors. Such corporations can use streets, public parks and public places to place their poles, pipes and fixtures, but only with the consent of the municipal authorities. These corporations also have power to acquire real estate, for corporate purposes, but only in the manner prescribed by the eminent domain procedure law. Thus, even in areas necessary to the conduct of their business, utilities can act only under express legislative grants of power and with the consent of municipalities.

Section 202 of the Business Corporation Law sets forth 16 "general powers" that are common to all New York corporations (e.g., the power to have perpetual duration, to sue and be sued, to make contracts, to hold property and the like). None of these general powers even remotely authorizes LILCO to perform functions necessary to implement its Transition Plan.

LILCO's argument for preemption would require this Board to set aside the applicable provisions of the Transportation Corporation Law and the Business Corporation Law that limit LILCO's powers to those expressly conferred upon it. LILCO's preemption argument would also require this Board to set aside that body of New York decisional law that holds that a corporation is a state-created entity of limited powers, precluded from exercising any power not granted to it. Finally, LILCO's preemption argument would require this Board to find that federal law grants LILCO, a state-created entity, an authority which has not been granted to LILCO by the State -- a finding which (as indicated infra) is squarely contrary to the Tenth Amendment.

Third, apart from its lack of authority, LILCO is also prohibited from performing many of the specific functions set forth in its Transition Plan by particular provisions of New York state and municipal law.17/ These provisions include numerous sections of New York's Vehicular and Traffic Law, Penal Law, the New York Transportation Corporation Law, and New York Executive Law, Article 2-B, as well as code provisions of

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17/ Many of the specific statutes that LILCO would violate by the actions stated in its Transition Plan are delineated in Contentions 1-10.

certain municipalities. The statutes in question regulate the conduct of police powers and do not permit LILCO or any private person or corporation to usurp such powers. LILCO is therefore precluded from lawfully undertaking the functions in question, because specific statutory and code provisions prohibit it from doing so. LILCO's Motion assumes the validity of this conclusion. LILCO's preemption argument therefore would require this Board to set aside each provision of New York law that restricts the exercise of police power functions.

In sum, to accept LILCO's preemption argument, this Board must conclude that Congress intended to preempt and render invalid (i) each provision of the New York State Constitution and each New York statute that fails to authorize LILCO to act in a governmental capacity and to exercise the State's police powers in a nuclear emergency; (ii) each such provision that limits LILCO's corporate powers to those conferred upon it by New York law; and (iii) each such provision that proscribes all persons, other than the State and local municipalities and their employees, from undertaking specific activities. The scope of LILCO's preemption contention cannot be overstated. Quite simply, LILCO asks this Board to find that the Atomic Energy Act renders void the organic law of New York State by which the State controls the exercise of its central governmental power.

B. LILCO's Claim Of Preemption Has No Legal Support.

LILCO's preemption defense suffers from multiple flaws. First, it ignores the applicable law regarding preemption. Second, it is inconsistent with the intentions of Congress and, if accepted, would violate the Tenth Amendment. Third, it is inconsistent with the views of the NRC. Fourth, it finds no support in the decided preemption cases. Finally, it does not make sense.

1. The Applicable Law Regarding Preemption

This is not a case of express preemption. LILCO has not and cannot point to a single provision of the Atomic Energy Act that purports to preempt state laws that affect the area of offsite emergency planning. LILCO's argument instead rests upon a claim of implied preemption.

In Silkwood v. Kerr-McGee Corp., ____ U.S. ____, 78 L.Ed 2d 443, 452 (1984), the Supreme Court set forth two tests for finding an implied preemption of state law: (1) if Congress intends exclusive occupation of a given field, state law within that field is preempted, Fidelity Federal Savings and Loan Association v. De la Cuesta, 458 U.S. 141, 153 (1982); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947); or (2) even

if federal law does not wholly occupy the field, state law is preempted if it actually conflicts with federal law, making it impossible to comply with both state and federal law, Florida Lime and Avocado Growers Inc. v. Paul, 373 U.S. 132, 142-43 (1963), or if state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress, Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

Analysis of a claim that federal law preempts an area traditionally occupied by the states necessarily starts from the principle that historic state police powers are not superseded by federal law unless that is the "clear and manifest purpose of Congress." Pacific Gas & Electric Company v. State Energy Resources Conservation & Development Commission, 461 U.S. 190, 75 L.Ed 2d 752, 766 (1983), quoting Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947). This is particularly true where the matter at issue affects the traditional relationship between federal and state governments: "[U]nless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance." U.S. v. Bass, 404 U.S. 336, 349 (1971). Moreover, the party claiming preemption has the burden of establishing such intent. Silkwood, supra, 78 L.Ed 2d at 457.

The area here at issue -- offsite emergency planning and the protection of the health, safety and welfare of the public within a 50-mile radius of the Shoreham plant -- involves the exercise of police power functions that are undisputably within the traditional prerogatives of the states. That fact has been recognized by Congress[18/] and the NRC.[19/] As demonstrated

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18/ See, e.g., the comments of Senators Hart and Simpson during debates on the emergency planning provisions of the Fiscal 1980 NRC Authorization Act:

> Senator Hart: "[T]he Senate has already rejected the idea of the Federal Government imposing its will on the States in the area of emergency planning. This is an area traditionally set aside for the States." 125 Cong. Rec. S. 9480 (July 16, 1979).
>
> Senator Simpson: "To propose that Congress now authorize the NRC to invade an area of traditional State authority in providing for the planning of the evacuation and sheltering of its citizens during times of natural or man-made disaster is against my sense of the inherent distinction between State and Federal governments." Id. at S. 9473.

19/ The NRC's release on its proposed emergency planning rule stated that state and local governments have "the primary responsibility under their constitutional police powers to protect the public." 44 Fed. Reg. 75,167 (December 19, 1979). See also the comments of former NRC Chairman, Joseph M. Hendrie:

> "In the event of a radiological emergency at a commercial nuclear station licensed by our agency, the protection of public health and safety outside the plant boundary is basically the responsibility of State and

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hereafter, neither the Atomic Energy Act nor any other law nor any NRC regulation demonstrates any "clear or manifest" intent by Congress to preempt and render void state laws affecting these traditional state powers.

2. Congress Recognized the State's Traditional Role in Emergency Planning

a. Congress Did Not Intend to Preempt the Area of Offsite Emergency Planning

In determining whether Congress had any "clear and manifest" intent to preempt state legislation affecting LILCO's proposed exercise of state police powers, there are two potential points of reference: the Atomic Energy Act itself, and the Fiscal 1980 and Fiscal 1982-83 Authorization Acts for the Nuclear Regulatory Commission. Public Law 96-295, §109 (1980) and Public Law 97-415, §5 (1983).20/

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local governments." "Emergency Planning Around U.S. Nuclear Powerplants: Nuclear Regulatory Commission Oversight Hearings before a Subcommittee of the Committee on Government Operations," 96th Cong., 1st Sess. (May 14, 1979) at 398-99.

20/ Both Authorization Acts have now lapsed. Neither Act has any present effect. Congress has not yet enacted the Fiscal 1984-85 NRC Authorization Act.

The Atomic Energy Act is silent with respect to offsite emergency planning. Indeed, prior to the nuclear accident at Three Mile Island in March, 1979, there was virtually no Congressional consideration of emergency planning or the legal issues relating thereto. Following TMI, however, Congress turned its attention to improving emergency preparedness around nuclear plants.21/ Oversight hearings were held in May, 1979 to consider various means to achieve this objective.22/ Two principal approaches were considered: (i) conditioning the licensing and operation of nuclear plants on the existence of state and local plans complying with NRC standards; and (ii) imposing mandatory emergency planning obligations on state and local governments.

Testimony concerning the latter alternative concentrated on two facts: first, that offsite emergency planning involved the states' traditional police powers and, second, that Congressional imposition of a planning duty on the states would constitute a fundamental restructuring of federal-state relations in the area.23/ Unwilling to so invade state

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21/ For the Board's convenience, the legislative and regulatory history of offsite emergency planning is summarized in some detail in an Appendix to this Brief which is submitted herewith as Attachment A (hereafter referred to as "Appendix").

22/ See Appendix, pp. 4-6.

23/ NRC Commissioner Joseph M. Hendrie testified:

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authority, Congress rejected the latter approach; the Congressional report resulting from the oversight hearings recommended that the NRC condition the grant of operating licenses upon the existence of satisfactory offsite emergency plans.24/

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> "In the event of a radiological emergency at a commercial nuclear station licensed by our agency, the protection of public health and safety outside the plant boundary is basically the responsibility of State and local governments."

Emergency Planning Around Nuclear Power Plants: Nuclear Regulatory Commission Oversight Hearings Before a Subcommittee of the Committee on Government Operations, 96th Cong., 1st Sess. (May 14, 1979) at 398-99. See also id. at 576.

> "The Congress could make a requirement of law that, in fact, we not license in a State that does not have a concurred in plan ....
>
> "It seems to me it is an additional question of whether you want to go beyond that and give the NRC some sort of authority to require States to come to NRC with their plans.
>
> "I think the latter question is a tougher one and sort of a constitutional and Federal-State relationship question."

24/ See Appendix, pp. 11-12.

Thereafter, the Fiscal 1980 NRC Authorization Act became the vehicle through which Congress addressed offsite emergency planning. Congressional deliberations again centered upon the need to resolve the tension between (i) Congress' desire to ensure that every operating nuclear plant have an adequate offsite emergency plan, and (ii) Congress' resistance to intruding upon an area of historic state prerogatives. The Senate Environmental and Public Works Committee version of the 1980 Authorization Act, as modified by Senators Hart and Simpson's floor amendment (S. 562), would have:

> (1) compelled each state within which a nuclear plant was located to submit, by a date certain, a state-wide emergency response plan to the NRC and FEMA for approval;
>
> (2) conditioned the licensure of any new facility on the existence of an offsite emergency plan deemed adequate by the NRC; and
>
> (3) terminated the operation of nuclear plants within a state that failed to correct plan deficiencies identified by the NRC within nine months thereafter.25/

25/ See Appendix, pp. 6-7.

That approach was controversial. In particular, Senator Johnston objected to the Hart-Simpson approach, contending that to require adequate state plans would provide "anti-nuclear" states with a means to block nuclear plants. Senator Johnston offered an amendment that would have established a fallback federal planning role whenever state governments were unwilling or unable to develop a plan that met NRC standards.26/

The Senate rejected Senator Johnston's amendment. Although acknowledging that some states might refuse to cooperate in emergency planning and consequently, under S. 562, might jeopardize the operation of nuclear plants, opponents of the proposed federal role stressed (i) that emergency planning was a traditional province of the states; (ii) that federal intrusion into the area would raise serious constitutional and political problems; and (iii) that states were more capable of handling the emergency planning function.27/ Thereafter, the Senate adopted the Hart-Simpson approach (S. 562).

The House version of the 1980 Authorization Act did not impose a mandatory planning duty upon states, and it did not

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26/ See Appendix, pp. 7-9.

27/ See Appendix, pp. 10-11.

condition new plant licensure on the existence of an adequate state plan. Thus, the House approach reflected even greater sensitivity to state prerogatives than did the Senate version.28/

The House and Senate Conference Committee was, therefore, faced with the need to resolve the continuing conflict between the desire to ensure adequate planning and Congressional unwillingness to invade areas of state authority or infringe upon state prerogatives. The Conferees, and ultimately Congress, decided (i) to require every utility to submit an adequate offsite emergency plan as a condition of plant licensing and/or continued operation; (ii) to require the NRC to establish emergency planning standards for emergency plans submitted to it as a part of a utility's license application; and (iii) in those cases where state or local government emergency plans did not exist or did not comply with NRC standards, to permit the NRC to examine an emergency plan developed by a utility and to determine whether that plan met NRC standards. P.L. 96-295, §109 (1980).29/ Thus, Section 109 required the existence of an

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28/ See Appendix, p. 13.

29/ Section 109 states, in pertinent part:

> "Funds authorized to be appropriated pursuant to this Act may be used by the Nu-

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adequate offsite plan as a condition of plant licensing and operation, but it provided the NRC with some flexibility to review a utility plan in the absence of an adequate state or local plan.

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> clear Regulatory Commission to conduct proceedings, and take other actions, with respect to the issuance of an operating license for a utilization facility only if the Commission determines that
>
> > "(1) there exists a State or local emergency preparedness plan which
> >
> > > "(A) provides for responding to accidents at the facility concerned, and
> >
> > > "(B) as it applies to the facility concerned only, complies with the Commission's guidelines for such plans, or
> >
> > "(2) in the absence of a plan which satisfies the requirements of paragraph (1), there exists a State, local, or utility plan which provides reasonable assurance that public health and safety is not endangered by operation of the facility concerned." Public Law 96-265, §109, 94 Stat. 783 (1980) (emphasis added).

See Appendix, pp. 13-16.

Section 109 did not confer any powers or vest any authority whatever in utilities. It did not authorize a utility to implement its plan. It did not grant a utility the power to take actions forbidden under state law. It did not grant a utility powers which the utility, a state-created entity, had never been granted by the state. It did not allow a utility to countermand state or local planning decisions. It did not empower a utility to assume state or local responsibilities in the event a state or local government either refused to act or adopted a plan that did not fully satisfy NRC standards. Section 109 authorized the NRC to review a utility plan and to determine whether that plan met NRC standards. It did nothing more.

Since the enactment of the 1980 Authorization Act, Congress has revisited the issue of emergency planning on several occasions. In September, 1982, Congress adopted the 1982-83 NRC Authorization Act, P.L. 97-415 (1983). Section 5 of the 1982-83 Act renewed the NRC's authority to review a utility plan to determine whether it provided an adequate basis for grant of an operating license. It provided no additional authority. On its face, Section 5 conferred no authority upon a utility itself.30/

30/ Section 5 is quoted in the Appendix, p. 19.

Since September, 1982, Congress has held several hearings to consider offsite emergency planning issues. In the course of those hearings, Congress has been informed that:

> (i) Certain states and localities, including New York State and Suffolk County, have not adopted offsite emergency plans;
>
> (ii) Both FEMA and the NRC have seriously questioned whether a utility plan could satisfy NRC requirements if state or local governments were not committed to implement it; and
>
> (iii) There is an unresolved question as to whether a utility has any legal authority to implement an offsite emergency plan in the face of state and local government opposition.31/

Notwithstanding these facts and the potential consequences they hold for licensing nuclear power plants, Congress has taken no further action. To date, Congress has been unwilling to extend federal authority into this area of traditional state powers. It has been unwilling to require state and local governments to adopt or implement offsite plans. Thus, both the Senate and House versions of the 1984-85 Authorization Act that is currently awaiting action continue the NRC's authority to review utility plans. They do nothing more. Specifically,

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31/ See Appendix, pp. 17-30.

they do not authorize a utility to carry out any activity which it could not otherwise perform. They confer no authority upon utilities that is greater than the authority they have under state law.

Nothing in the legislative history of the yet-to-be-enacted 1984-85 Act suggests that Congress contemplates preemption of state law in the way LILCO here suggests. Thus, for example, the House Committee report on the 1984-85 Act reflects Congress' continuing respect for state and local prerogatives concerning emergency planning and implementation:

> "[S]ection 6 allows the Commission to look at a utility plan (as it pertains to offsite emergency preparedness) in making its determination about the adequacy of offsite emergency planning. The provision, however, in no way implies that it is the intent of the committee that the NRC cite the existence of a utility plan as the basis for licensing a plant when State, county, or local governments believe that emergency planning issues are unresolved. Moreover, section 6 does not authorize the Commission to license a plant when lack of participation in emergency planning by State, county, or local governments means it is unlikely that a utility plan could be successfully carried out."32/

32/ "Authorizing Appropriations to the Nuclear Regulatory Commission," H. Rep. 98-103, Part 1, 98th Cong., 1st Sess. (May 11, 1983) at 8-9 (emphasis added); see Appendix, pp. 25-26.

There is no "clear and manifest" evidence that Congress intended to preempt the area of offsite emergency planning. In fact, "clear and manifest" evidence demonstrates that Congress intended that there not be such preemption. Given this history, it is incredible that LILCO can suggest that Congress "clearly and manifestly" intended to preempt and set aside provisions of the New York State Constitution, Municipal Home Rule Law, Executive Law (Article 2-B), and other State statutes such as the Vehicular and Traffic Law, that would preclude LILCO from carrying out the functions identified in Contentions 1-10, or fail to authorize LILCO from doing so.

In short, when Congress established emergency planning requirements, it deliberately chose not to intrude upon state prerogatives by imposing affirmative duties upon the states and not to usurp areas of state responsibility by interjecting a federal planning role. That deference to state prerogatives is a clear demonstration that the issue at hand -- police power protection of the citizenry in the offsite area -- goes to the heart of state sovereignty in a federal governmental system.

b. The Tenth Amendment Bars Acceptance of LILCO's Preemption Argument.

Notwithstanding Congress' demonstrated deference to state sovereignty, LILCO urges this Board to find that Congress impliedly intended to effect a substantially more far-reaching intrusion upon state powers than Congress has previously rejected. Thus, a decision to authorize a utility, such as LILCO, to act in the place of and, indeed, in opposition to considered state decisions, is a far more intrusive interference with state prerogatives than any of the approaches Congress so clearly rejected. Indeed, finding that two lapsed Authorization Acts preempt and render void the fundamental governance structure of the State of New York would countenance a federal intrusion upon state prerogatives of unsurpassed scope. Any such finding would require a fundamental disregard of the Tenth Amendment's reservation of unallocated powers to the state.

The preemption doctrine cannot, in keeping with the Tenth Amendment, invest LILCO with the police power which it plainly does not, as a corporate entity, have the power to exercise. In other words, a federal statutory scheme cannot, through the doctrine of preemption, infuse power into a corporation that has never been given to that corporation by its creator, the

state. In his leading treatise on corporations, Fletcher flatly states:

> "The powers conferred on a corporation by its charter and the laws of the state creating it cannot be enlarged by federal statutes."33/

The decision in Federal Land Bank of St. Paul v. Crookston Trust Co., 180 Minn. 319, 230 N.W. 797 (1930), is compelling in support of the foregoing proposition. The plaintiff, the

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33/ 6 Fletcher, Cyclopedia of the Law of Private Corporations §2477 (Rev. Ed. 1979). See also Rudolph Wurlitzer Co. v. Commissioner of Internal Revenue, 81 F.2d 971, 974 (6th Cir.), cert. denied, 298 U.S. 676 (1936), which states:

> "Not only under state decisions, but also under federal decisions, the sovereignty which determines the existence or nonexistence of power in a state corporation is the state [citations omitted]. A corporation is a mere creature of the law, and possesses only the powers conferred by the statute creating it and those necessarily implied [citations omitted]. The granting of a corporate right or privilege rests entirely within the discretion of the state, and when granted may be accompanied by such conditions as the Legislature may judge most befitting to its interests and policy [citations omitted]. The federal courts apply these rules as to state corporations with particular force when the power claimed or exercised by the state corporation constitutes a position violative of state law." 81 F.2d at 973-74 (emphasis added).

Federal Land Bank of St. Paul, made a farm loan to Ernest and Ada Lundberg. Defendant, Crookston Trust Company, guaranteed the loan. When the Lundbergs defaulted on their mortgate payments, plaintiff sued upon the guaranty, which defendant pleaded was ultra vires. Under the law of Minnesota, guarantees of promissory notes by state-chartered trust companies are ultra vires. Plaintiff claimed, however, that defendant acted as plaintiff's agent with respect to the loan and had the authority to guarantee the loan by virtue of the Federal Farm Loan Act, 12 U.S.C. §2807, which provided that "[a]ny agent negotiating any such loan shall indorse the same and become liable for the payment thereof, and for any default by the mortgagor . . . ."

The court stated that the issue before it was "whether the congress has intentionally undertaken to bestow upon state institutions added authority qualifying to act as plaintiff's agent under the federal farm loan act." 180 Minn. at 322. The court said that "[t]his would mean authorizing them to do that which under the law of their creation and existence was theretofore ultra vires." Id. The court continued:

> "The power to create state banks and trust companies has not been delegated by the United States Constitution and hence under the terms of the Tenth Amendment thereto is reserved to the states. This state has

> enacted laws under which such institutions have been created and are existing. They have been surrounded by protective measures and restrictions and subjected to state supervision. As hereinbefore stated, such institutions are not authorized to guarantee notes in which they have no interest." Id.

The court construed Congress' intent as not to enlarge upon the corporate powers of state-chartered trust companies, but to leave to the law of each individual state whether trust companies acting as agents had the authority to guarantee farm loans. The court made clear, however, that "[i]f it was the intention of congress to broaden and enlarge the power of such state institutions, we think it a futile and unconstitutional effort." Id. at 324 (emphasis added). The court added: "It seems to us that the powers of defendant rested exclusively with the state. The question is exclusively for the state." Id.

The United States Supreme Court has had several occasions to address the scope of a corporation's authority. Long ago, in the famous Dartmouth College case,34/ the Court considered whether the New Hampshire legislature had the authority to

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34/ Trustees of Dartmouth College v. Woodward, ____ U.S. ____, 4 L.Ed. 629 (1819).

amend the charter of Dartmouth College to increase the number of trustees, appoint certain government officials to the board of trustees, and create a board of overseers, all against the will of the existing trustees. The court held that Dartmouth was a private institution, that its charter was a contract, and that the New Hampshire laws caused an unconstitutional impairment of that contract. While no issue of federal/state conflict was present, the Court had occasion to analyze the nature of a private corporation, using language which is relevant to our immediate concerns. The Court (by Marshall, J.) stated:

> "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence." 4 L.Ed. at 659 (emphasis supplied).

The Court then continued in greater detail:

> "It is chiefly for the purpose of clothing bodies of men, in succession, with these qualities and capacities, that corporations were invented, and are in use. By these means, a perpetual succession of individuals are capable of acting for the promotion of the particular object, like one immortal being. But this being does not share in the civil government of the country, unless that be the purpose for which it was created. Its immortality no more confers on it political power, or a political character, than immortality would confer such

> power or character on a natural person. It is no more a state instrument than a natural person exercising the same powers would be. If, then, a natural person, employed by individuals in the education of youth, or for the government of a seminary in which youth is educated, would not become a public officer, or be considered as a member of the civil government, how is it that this artificial being, created by law, for the purpose of being employed by the same individuals for the same purposes, should become a part of the civil government of the country." Id. (emphasis added).

Some years later, the Supreme Court used much the same language in Waters-Pierce Oil Co. v. State of Texas, 177 U.S. 28 (1900), where the Court stated:

> "A corporation is the creature of the law, and none of its powers are original. They are precisely what the incorporating act has made them, and can only be exerted in the manner which that act authorizes. In other words, the state prescribes the purposes of a corporation and the means of executing those purposes. Purposes and means are within the state's control. 177 U.S. at 43 (emphasis added).

Then, in Hopkins Federal Savings & Loan Association v. Cleary, 296 U.S. 315 (1935), the Supreme Court addressed the foregoing concerns in the precise context of the Tenth Amendment and the limitations on Congress' power to preempt state law. That case involved three consolidated proceedings coming to the Supreme Court from the Supreme Court of Wisconsin. In

the first case, the Wisconsin banking commission had brought suit against Hopkins Federal Savings & Loan Association to annul proceedings whereby Hopkins, a state-chartered association, had attempted to convert itself into a federal association. In the other two cases, suits were brought by two Wisconsin building and loan associations to restrain the banking commission and the supervisor of building and loan associations from interfering with the plaintiffs in their attempt to convert themselves into federal associations.

Nothing in the statutes of Wisconsin permitted state-chartered associations to be converted into associations chartered by the federal government. The petitioners claimed, however, that such conversion was possible, without the consent of Wisconsin, by virtue of Section 5 of the Home Owners' Loan Act of 1933, 12 U.S.C. §1464, which provided in relevant part:

> "Any member of a Federal Home Loan Bank may convert itself into a Federal savings and loan association under this Act upon a vote of 51 per centum or more of the votes cast at a legal meeting called to consider such action . . . ."

Each of the petitioners was a member of the Federal Home Loan Bank of Chicago and, therefore, apparently qualified under federal law to convert from a state to a federal association under

the foregoing provision. Each held a shareholders' election and the requisite 51 percent of votes cast were cast in favor of the federal conversion.

The State of Wisconsin blocked the conversions. It took the position that Section 5 of the Home Owners' Loan Act was void under the Tenth Amendment of the United States Constitution as an unconstitutional trespass upon the powers of the states.

The Supreme Court first acknowledged that Section 5 could not reasonably be construed as conditioning the conversion upon the consent of the state concerned. "Congress had in mind to take possession of the field to the exclusion of other occupants" and "irrespective of repugnant limitations prevailing in the states." 296 U.S. at 333. In other words, there was no doubt in the Court's mind that Congress intended to preempt any conflicting state laws.35/ But the Court squarely held that the intended preemption was ineffective:

35/ Of course, as demonstrated supra, Congress evinced no such intent in the offsite emergency planning area to take possession of the field to the exclusion of state and local governments. Thus, the instant case, when compared to Hopkins, presents a far less compelling case for preemption.

> "The Home Owners Loan Act, to the extent that it permits the conversion of state associations into federal ones in controvention of the laws of the place of their creation, is an unconstitutional encroachment upon the reserved powers of the states. United States Constitution, Amendment 10." Id. at 335.

In reaching this conclusion, the Court first noted that "[a] corporation is a juristic person organized by government to accomplish certain ends, which may be public or quasi public . . . ." Id. The Court stated that "[b]y writs of quo warranto as well as through other remedial devices the state has been accustomed to keep its juristic creatures within the limits of the charters that define the purpose of their being." Id. at 339. The Court added that "[a]s against the protest of the state, asserting its public policy or the prohibition of a statute, no assent by shareholders, however general or explicit, will be permitted to prevail." Id. The Court then directly confronted the Tenth Amendment question as follows:

> "Finding them about to deviate from the law of their creation, it is met by the excuse that everything done or purposed is permitted by an Act of Congress. The excuse is inadequate unless the power to give absolution for overstepping such restrictions has been surrendered by the state to the government at Washington." Id. at 340.

The Court found no such surrender in the case at bar.

The cases subsequent to Hopkins further confirm that LILCO's preemption argument would invade the area reserved to the states by the Tenth Amendment. In National League of Cities v. Usery, 426 U.S. 833 (1976), the Supreme Court held that the 1974 amendments to the Fair Labor Standards Act were unconstitutional in attempting to extend minimum wage and maximum hour provisions to employees of states and political subdivisions. The Court stated that "our federal system of government imposes definite limits upon the authority of Congress to regulate the activities of states as states by means of the commerce power" and that "an express declaration of this limitation is found in the Tenth Amendment." 426 U.S. at 842. The Court said that "there are attributes of sovereignty attaching to every state government which may not be impaired by Congress, not because Congress may lack an affirmative grant of legislative authority to reach the matter, but because the Constitution prohibits it from exercising the authority in that manner." Id. at 845. The Court declared that Congress may not exercise its power to regulate commerce "so as to force directly upon the states its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made." Id. at 855.36/

36/ Several fairly recent district court opinions have used similar language. In Commercial Mortgage Insurance, Inc.

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The Court found in this respect that "[o]ne undoubted attribute of state sovereignty is the state's power to determine the wages which shall be paid to those whom they employ in order to carry out their governmental functions . . . ." Id. at 845. The Court stated that other traditional areas of state sovereignty included fire and police protection, public health, sanitation, and parks and recreation. Id. at 851.

A state's power to decide how the police power (including its own police forces) shall be employed in the event of a disaster potentially affecting thousands (or hundreds of thousands) of its citizens is every bit as much an "undoubted attribute of state sovereignty" as the power to establish wages for its employees. And a state power to decide what powers shall be conferred on state-created corporations is similarly

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v. Citizens National Bank of Dallas, 526 F. Supp. 510, 523 (N.D. Tex. 1981), the court stated that "[f]ederal legislation which significantly impairs a state's ability to perform functions essential to its existence as a state . . . transgresses the limits of the Tenth Amendment." And in State of Oklahoma v. Federal Energy Regulatory Commission, 494 F. Supp. 636, 656 (W.D. Okla. 1980), cert. denied, 457 U.S. 1105 (1982), the court indicated that the Tenth Amendment is transgressed where the federal impact is sufficiently great "to displace the state's freedom to structure integral operations in areas of traditional governmental functions."

an essential element of state sovereignty. If LILCO's plan is found to be authorized by federal legislation, then there will be a significant impairment of the ability of the State of New York to perform traditional functions that are essential to its existence as a State. Under those circumstances, the Tenth Amendment stands as a bar to the application of the preemption doctrine.

3. The NRC Recognizes that the Area of Offsite Emergency Planning Has Not Been Preempted.

The NRC itself has clearly indicated its view that Congress has not preempted the area of offsite emergency planning. Prior to TMI, the NRC was engaged in promoting and providing advice to State and local offsite emergency planning efforts. However, the NRC explicitly acknowledged that it had no authority to compel state or local activities in this area.37/

Following TMI, the NRC, like Congress, gave increased attention to improving offsite emergency preparedness. In the May 1979 Congressional oversight hearings, then NRC Chairman Joseph M. Hendrie addressed the issue of whether Congress should impose mandatory planning requirements on states. Chairman Hendrie testified:

37/ See Appendix, p. 1-2.

"It seems to me that we need some better way to put some muscle in the planning sequence and to be able to get on and to work with the States and localities in improving the emergency plans.

"The question is whether the NRC ought to have authority under the law to require a State or locality to do things like this. That is a question which has been raised in this context.

"I am not quite sure. I would prefer to have the Congress recognize the nature of the problem and then let you decide whether it is appropriate for the Federal Government to come down and preempt an area which previously has been regarded as a State and local prerogative."38/

Chairman Hendrie further testified that giving the NRC the authority to compel States to submit offsite emergency plans would raise constitutional questions.39/ Thus, the NRC clearly recognized that offsite emergency planning was an area of traditional State responsibility that had not been preempted by Congress.40/

38/ Emergency Planning Around Nuclear Power Plants: Nuclear Regulatory Commission Oversight Hearings Before a Subcommittee of the Committee on Government Operations Subcommittee Hearings, 96th Cong., 1st Sess. (May 14, 1979) at 534 [emphasis added].

39/ Id. at 576.

40/ See Appendix, pp. 4-6.

In December, 1979, the NRC published a proposed rule that would require NRC concurrence in state and local emergency response plans as a condition to licensure and operation of a nuclear plant. 44 Fed. Reg. 75,167 (December 19, 1979). In its discussion of the proposed rule, the NRC restated its view that state and local governments had primary responsibility for offsite emergency planning and that the NRC could not "direct any government unit to prepare a plan, much less compel its adequacy." Id. at 75,169.41/

In August, 1980, the NRC issued a final rule on emergency planning. The rule required an adequate offsite plan as a condition of plant licensure and operation. 45 Fed. Reg. 55,402 (Aug. 19, 1980) and 10 C.F.R. §50.33(g) (1984). The rule has been interpreted to permit the NRC to consider a utility plan in determining whether NRC licensing requirements had been met.42/ However, the NRC's final emergency planning rule confers no authority upon utilities nor does it suggest that

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41/ See Appendix, p. 32.

42/ On its face, Section 50.33(g) requires an applicant to submit emergency response plans of state and local governments. Notwithstanding the clear terms of that rule, the NRC has determined that it may review for adequacy a utility-sponsored plan. Long Island Lighting Co. (Shoreham Nuclear Power Plant), CLI-83-13, 17 NRC 741 (1983).

federal law authorizes any utility to implement a plan that it has no power to implement under state law.

Moreover, the NRC's discussion accompanying the final rule once again indicated that it does not believe Congress has preempted the area of offsite emergency planning. In considering the criticisms of its draft emergency planning rule, the NRC stated:

> "The Commission recognizes there is a possibility that the operation of some reactors may be affected by this rule through inaction of state and local governments or an inability to comply with these rules. The Commission believes that the potential restriction of plant operation by state and local officials is not significantly different in kind or effect from the means already available under existing law to prohibit reactor operation, such as zoning and land use laws, certification of public convenience and necessity, state financial and rate considerations . . . ."

45 Fed. Reg. at 55,404.43/

Thus, the NRC has recognized that offsite emergency planning is an area in which state actions are permissible and may well preclude the operation or licensure of a nuclear power plant. The NRC has analogized those actions to state actions

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43/ See Appendix, pp. 32-33.

in other areas that are clearly not preempted by the Atomic Energy Act. The NRC's position contradicts LILCO's contention that any law that might interfere with its ability to obtain a license intrudes upon a preempted zone and is invalid. If the Atomic Energy Act or some other federal law authorized a utility to carry out an emergency plan on its own, whether or not it had authority to do so under state law, the NRC would not have been concerned about a "potential restriction of plant operation" arising from state and local inaction or noncompliance.

Since the adoption of the emergency planning rule, the NRC Commissioners have repeatedly advised Congress that:

1. Certain states and localities have been either unwilling or unable to develop adequate offsite emergency plans.44/

2. The refusal of states or localities to develop such plans could result in denial of plant licenses or the termination of plant operation;45/ and

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44/ See Appendix, pp. 18, 22

45/ See Appendix, pp. 22-24.

3. It is highly unlikely that a utility plan can be found to be adequate in the absence of state or local participation in such plan.46/

Yet, despite these warnings, Congress has not changed the law.

In a hearing on the NCR's 1985 budget request in February, 1984, Chairman Palladino clearly indicated that the legal authority issue here in question had not been addressed or resolved by Congress. The Chairman's testimony is inconsistent with LILCO's contention that there is some existing federal law which voids state laws that fail to authorize a utility to implement an emergency plan. Chairman Palladino's testified as follows:

46/ See Appendix, pp. 22, 24. See, e.g., the remarks of Commissioner Ahearne:

> "I don't really at the moment see how at least for myself, if I were in that situation, I could agree that a utility plan generated by the utility in which neither the State or the local government agreed, and if both the State and federal government said we aren't participating in this planning process, I don't see how we could then say that is an acceptable offsite plan since the heart of the offsite plan has to be the involvement of offsite authorities." Nuclear Regulatory Commission's Budget Request for Fiscal Years 1984 and 1985, S. Rep. 98-53, 98th Cong., 1st Sess. (March 10, 1983) at 10.

"Two important new questions are whether State or local governments have an obligation to participate in emergency planning and, in the absence of State or local government participation, whether a licensee has the legal authority to carry out proposed actions that normally would be handled by State or local goverments in an actual emergency . . . .

"It is . . . important for the subcommittee to work with FEMA and NRC to come up with a solution to the problem of legal authority in the absence of State or local government participation. A possible approach would be to make available Federal resources if a Governor requested them . . . .

"We really don't have a Commission position, I believe, on whether or not there ought to be Federal help but I, speaking for myself, would heartily endorse some provision that there could be Federal help when needed particularly under circumstances when the Governor of a State would ask for it. I think the situation as it now exists, as pointed out in my testimony, raises two questions, one the extent to which State and local governments have an obligation to participate in emergency preparedness and the other is the question of legal authority of utilities to develop a plan and want to implement it and exercise it and I think addressing those issues, particularly the second one, would be something that I think the subcommittee might want to consider."47/

47/ Fiscal Year 1985 Budget Review Hearings Before the Committee on Environment and Public Works, S. Rep. 98-758, 98th Cong., 2d Sess. (February 23, 1984) at 4-5, 13-14 (emphasis added).

Chairman Palladino presented the issue of legal authority as a "new question," i.e., as one not previously resolved by existing statutory authority. He presented the issue as one for future consideration by Congress, i.e., as an issue that Congress has not yet resolved. He suggested that Congress consider using federal resources, where a Governor requested them, as a solution to the legal authority question; that suggestion belies any contention that utilities already have authority via the preemption of state law to carry out a utility emergency preparedness plan "in the absence of State or local government participation."48/

48/ Commissioner Bernthal joined Chairman Palladino in his suggestion that, as a means to resolve the legal authority question, Congress might adopt legislation making available Federal resources to a requesting State Governor. Commissioners Glinsky, Asselstine and Roberts expressed concern that such legislation might be a disincentive to state offsite emergency planning activites. Id. None of the Commissioners suggested that utilities had authority under existing federal law to implement offsite emergency plans. None of the Commissioners suggested that existing law resolved the issue of a utility's authority to carry out an emergency plan without state or local assistance or authority. None of the Commissioners provided any support for the position that LILCO now advances, i.e., that Congress has already resolved the legal authority by preempting state law. Moreover, Chairman Palladino's invitation notwithstanding, Congress has taken no action in this area.

In sum, the NRC has consistently recognized (i) that offsite emergency planning is an area of state and local responsibility; (ii) that the NRC has no authority to compel state or local action in the area; (iii) that states and localities may refuse to develop or implement offsite plans; and (iv) that such refusal might adversely affect nuclear plant operations. The NRC has further indicated that it does not believe that Congress has preempted the area of offsite emergency planning or empowered utilities to implement their own offsite emergency plans in the absence of state and local participation. Finally, representatives of the Commission have addressed the "new question" of legal authority; they have invited Congressional action to resolve that issue, and to date Congress has declined their invitation. Thus, LILCO's preemption argument finds no support from the NRC.

4. The Decided Cases Do Not Support LILCO's Preemption Arguments.

In Silkwood v. Kerr-McGee Corp., supra, the Supreme Court held that a state-authorized award of punitive damages arising out of the escape of plutonium from a federally licensed nuclear facility was not preempted by the Atomic Energy Act. As previously noted, the Court held that state laws are impliedly preempted only where the Court has determined either (i) that

Congress intended to occupy exclusively the area involved and preclude any state action, or (ii) that state law "actually conflicts" with federal law (i.e., that it is impossible to comply with both state and federal law or that state law blocks the accomplishment of Congressional objectives).

LILCO claims that any State law that inhibits or fails to authorize LILCO's own emergency planning efforts is preempted under both standards. Thus, LILCO argues (i) that the Atomic Energy Act entirely occupies the field of radiological health and safety as it relates to the construction and operation of nuclear power plants, and (ii) that all state laws that fail to give LILCO free rein in the area of offsite emergency planning render LILCO's compliance with federal law impossible and obstruct federal purposes. The Board must reject both arguments.

a. Congress Has Not Exclusively Occupied the Field of Offsite Emergency Planning.

LILCO's contention that Congress has exclusively occupied the field of nuclear safety insofar as it relates to offsite emergency planning is refuted by the legislative and regulatory history of offsite emergency planning and the Supreme Court's most recent pronouncements on the subject of preemption: Silkwood v. Kerr McGee Corp., ____ U.S. ____, 78 L.Ed 2d 443

(1984) and Pacific Gas & Electric Company v. State Energy Resources Conservation & Development Commission, 461 U.S. 190, 75 L.Ed. 2d 752 (1983). As recounted above and in the Appendix, Congress has consistently recognized that offsite emergency planning is an area within the states' traditional police powers. The need for offsite emergency planning is based, in part, upon issues of radiological safety. Congress' continued deference to state powers in the offsite emergency planning area squarely contradicts LILCO's apparent position that radiological safety, insofar as it is pertinent to offsite planning, is a field exclusively reserved for the federal government and is, therefore, beyond the scope of permissible state action.

Similarly, the NRC has repeatedly acknowledged the states' authority regarding offsite emergency planning. The NRC has attempted to encourage voluntary actions by state and local governments in the emergency planning area. Had Congress exclusively occupied the area of radiological safety as it relates to offsite emergency planning, the NRC would have no authority, let alone incentive, to promote state efforts in the area. Given both Congressional and NRC recognition of and deference to the states' traditional authority regarding offsite emergency planning, LILCO's contention that Congress has

preempted nuclear safety concerns as they relate to offsite emergency planning is frivolous.

Moreover, the New York laws here in question are only tangentially related to offsite emergency planning: the Municipal Home Rule Law controls which entities may exercise state police powers; the Business Corporation Law creates and empowers an artificial, state-created entity to carry out certain enumerated functions; and the Vehicular and Traffic Law governs conduct on state highways. These laws restrict the exercise of state functions and limit corporate authority; they may thereby deprive LILCO of any authority to implement the Transition Plan. But there is no evidence whatever that Congress intended to preempt bodies of law so far removed from the regulation of the construction and operation of nuclear plants.

Finally, Silkwood and Pacific Gas, the Supreme Court's most recent pronouncements on the scope of the Atomic Energy Act's preemption, completely undercut LILCO's arguments. In Silkwood, the deceased plaintiff allegedly suffered injuries that arose from radiation poisoning caused by plutonium used in a federally licensed nuclear facility that had operated in violation of NRC safety standards. The issue in Silkwood was whether a state-authorized award of punitive damages

constituted regulation of nuclear health and safety and was, therefore, preempted. The Supreme Court held that Congress had not preempted state tort remedies, including punitive damage awards that were based upon a desire to penalize safety violations and thereby influence conduct. The parallels between Silkwood and this case are striking; its analysis is dispositive.

First, the Supreme Court noted that Silkwood involved "the states' traditional authority to provide tort remedies to its citizens and the federal government's express desire to maintain exclusive regulatory authority over the safety aspects of nuclear power." Silkwood, 78 L.Ed 2d at 452. This case involves the states' traditional authority to exercise police powers in the area of offsite emergency planning and the federal government's desire to insure that adequate offsite preparedness exists as a condition of nuclear plant operation.

Second, the Supreme Court squarely held that Kerr-McGee had the burden of showing that Congress intended to limit traditional state authority and to preclude state court punitive damage awards.49/ That holding is consistent with the

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49/ The Supreme Court acknowledged the following language from Pacific Gas: "[T]he federal government has occupied the entire field of nuclear safety concerns, except the limit-

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long-established rule that state police powers are not superseded unless that is "the clear and manifest purpose of Congress." Rice, supra, 331 U.S. at 230; Pacific Gas, supra, 75 L.Ed 2d at 919. Here, the burden is squarely upon LILCO to establish Congress' "clear and manifest purpose" to preempt the area of offsite emergency planning. As noted above, Congress had precisely the opposite purpose.

Third, the Court found that Congress had assumed that state tort law remedies would be available to persons injured in nuclear accidents; that assumption reinforced the Court's conclusion that Congress had not intended to eliminate tort remedies.50/ In the present case, Congress has assumed that

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ed powers expressly ceded to the states." Silkwood, 78 L.Ed 2d at 453. LILCO relies heavily upon this statement. Notwithstanding this language, however, the Court in Silkwood found that Congress had not preempted state tort remedies even though the Act did not expressly cede tort remedies for radiation poisoning to the states. Moreover, the Court's analysis indicates that the broad language of Pacific Gas (language that is inconsistent with other language in Pacific Gas and inconsistent with established case law) has been tacitly disavowed by the Supreme Court. This view is clearly expressed throughout Mr. Justice Powell's dissent in Silkwood. See 78 L.Ed 2d at 468-76.

50/ For example, the Court noted that Congress had assumed the existence of state court tort remedies when it enacted the Price-Anderson Act which limits total liability in the event of a nuclear disaster. The Court noted that the importance of the Price-Anderson Act for the case then be-

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local governments have continued discretion to engage in or to refrain from emergency planning in the exercise of their historic police powers.

Fourth, the Court noted that Kerr-McGee was "unable to point to anything in the legislative history or in the regulations that indicate that punitive damages were not to be allowed." Silkwood, supra, 78 L.Ed 2d at 456. A similar failing exists in this case. LILCO has not pointed to anything in the Act, the legislative history of the Act or the NRC regulations that indicates that the Act limits the discretion of state and local governments to exercise their police powers in the emergency planning area as they see fit. No such limitation exists.51/ Similarly, nothing in the Act or its legislative history suggests that Congress intended to overturn (i) state laws governing the distribution and exercise of state police powers; (ii) state corporation laws that determine what authority and powers a utility such as LILCO has; or (iii) any other state

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fore it was "not so much in its substance, as in the assumption on which it was based." Silkwood, 78 L.Ed 2d at 456.

51/ Indeed, the 1980 and 1982-83 Authorization Acts on which LILCO places so much reliance have lapsed.

law that does not authorize corporations to exercise police powers or that would restrict or inhibit private parties from assuming state functions.

Fifth, the Court held that "there is no indication that Congress even seriously considered precluding the use of such [traditional state tort] remedies." Silkwood, supra, 78 L.Ed 2d at 454. Conversely, in this case, Congress actively considered restricting state prerogatives in the offsite emergency planning area by imposing state planning duties or interjecting a federal planning role. Having considered such possibilities, Congress chose to follow a different course; it chose continued deference to state prerogatives. Moreover, there is no indication that Congress seriously considered setting aside the basic municipal and corporate laws of the states when it adopted the Act or any NRC Authorization Act. That, however, is the position that LILCO advances as the foundation of its preemption claim.

Sixth, the Court in Silkwood noted Kerr-McGee's contention that an award of punitive damages constituted regulation of nuclear health and safety, because the imposition of punitive damages was intended to, and would control, conduct just as would affirmative regulation. Kerr-McGee's position had been

embraced by the Court of Appeals for the Eighth Circuit which had concluded that any state action, including a judicial award of exemplary damages, was impermissible if it competed with the NRC's regulation of radiation hazards. The Supreme Court rejected this "broad preemption analysis" and reversed, finding no basis for preemption. Silkwood, supra, 78 L.Ed 2d at 451. LILCO offers the same "broad preemption analysis." It argues that state law restrictions on its power to carry out emergency planning regulate nuclear health and safety and are, therefore, preempted. That argument cannot stand in the face Silkwood.52/

52/ Nor is the comprehensiveness of regulation in a given subject area definitive. Citing NYS Dept. of Social Services v. Dublino, 413 U.S. 405, 415 (1973), the Court in Chevron USA, Inc. v. Hammond, et al., 726 F.2d 483 (9th Cir. 1984) said:

> "We reject . . . the contention that preemption is to be inferred merely from the comprehensive character of the federal . . . provisions . . . The subjects of modern social and regulatory legislation often by their very nature require intricate and complex responses from Congress, but without Congress necessarily intending its enactment as the exclusive means of meeting the problem . . ." 726 F.2d at 492.

In Chevron, the Ninth Circuit, applying Silkwood, held that an Alaska statute regulating the discharge of ballast by oil tankers into Alaska's territorial waters was not preempted by federal regulations on the design characteristics of oil tankers. The Court found that a careful analysis of which subject matter was meant to be preempted was crucial. Id. at 487. In the present case, whereas

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Seventh, the Court in Silkwood clearly marked out the area of preemption, holding that "Congress . . . intended that the federal government regulate the radiological safety aspects involved . . . in the construction and operation of a nuclear plant." Silkwood, supra, 78 L.Ed 2d at 453. The Court observed that Congress had decided that the "technical safety considerations" relating to the handling of hazardous nuclear materials were of such "complexity" that regulation of such materials should be reserved to the NRC. Id. at 454. In the present case, however, technical questions relating to health and safety concerns arising from the construction and operation of nuclear plants or the handling of hazardous radioactive materials are not at issue. The area in question -- emergency planning and police power functions such as traffic control -- is peculiarly within the competence and expertise of state and local governments.53/ Thus, as in Silkwood, the fundamental

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> technical nuclear safety may be preempted, a state's offsite exercise of police powers in the event of a nuclear emergency is clearly not preempted nor is the State's determination as to who may exercise such police powers.

53/ See the remarks of Senator Simpson during the debates on the 1980 NRC Authorization Act:

> "I say that the reality of it is who will know better what to do with emergency State planning, which again I refer to as a form

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rationale for preemption is missing. Federal law may preempt the construction and operation of nuclear plants and technical issues of radiological safety relating thereto. However, the development of an offsite response to an emergency and the conduct of police power functions in the area within 50 miles of a nuclear plant do not fall within that field. And the New York Municipal Home Rule Law, the New York Business Corporation Law, the New York Transportation Corporation Law and other statutes of the State of New York here in question most assuredly do not regulate the construction or operation of a nuclear power plant.

Finally, the Supreme Court's concluding statement in Silkwood is pertinent here:

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> of land use in its highly emotional form. Who will be better able to determine which agency of the State government can perform, who more than the Governor and the elected officials of that State, the legislature of that State? Who will determine who is best able to determine which hospitals will be used in the evacuation procedure in the event of an onsite release? Who better than the Governor will know better when to order the evacuations? The burden is on the State government, exactly where it should be." 125 Cong. Rec. S 9476 (July 16, 1979).

> "Congress assumed that state-law remedies, in whatever form they might take, were available to those injured by nuclear accidents. This was so even though it was well aware of the NRC's exclusive authority to regulate safety matters. No doubt there is tension between the conclusion that safety regulation is the exclusive concern of the federal law and the conclusion that a state may nevertheless award damages based on its own law of liability. But as we understand what was done over the years in the legislation concerning nuclear energy, Congress intended to stand by both concepts and to tolerate whatever tension there was between them. We can do no less. It may be that the award of damages based on the state law of negligence or strict liability is regulatory in the sense that a nuclear plant will be threatened with damages liability if it does not conform to state standards, but that regulatory consequence was something that Congress was quite willing to accept." Silkwood, supra, 78 L.Ed 2d at 457.

In the present case, Congress wished to insure that adequate offsite preparedness existed for all operating nuclear plants. It recognized, however, that emergency planning was traditionally a state and local government function. It recognized that state or local inaction might impact the licensure or continued operation of nuclear plants. And it recognized that intrusion upon the state's police power authority presented substantial constitutional problems. Congress acknowledged the potential tension between these elements and the impact that tension could have upon nuclear plants. It resolved that

tension by directing the NRC to establish emergency planning standards, by requiring all plants to have an adequate plan as a condition of operation and by permitting the NRC to assess the adequacy of a utility plan where no state or local plan existed. That was Congress' choice. Congress did not authorize utilities to exercise powers they do not have under state law. In order to preserve state prerogatives, Congress was willing to accept the regulatory consequence that some plants would not operate because an adequate plan does not exist or cannot be developed.54/ That policy determination is conclusive. It must be respected by this Board and by the NRC.

If Silkwood disposes of LILCO's contention that Congress has preempted all state laws that impact upon radiological health and safety as they relate to offsite emergency planning, Pacific Gas puts to rest LILCO's argument that federal law preempts any statute that would preclude the operation of the Shoreham plant. In Pacific Gas, utilities sought a declaration that the Atomic Energy Act preempted a California statute that

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54/ The NRC accepted the same consequence: "The Commission recognizes there is a possibility that the operation of some reactors may be affected by this rule through inaction of State and local governments or an inability to comply with these rules." 45 Fed. Reg. at 55,404 (August 19, 1980).

imposed a moratorium on the construction of a nuclear facility pending a Congressional determination that adequate means of disposal were available for nuclear wastes.

The Supreme Court upheld that state moratorium. Recognizing that the state statute had an effect on nuclear plant construction, the Court determined that the moratorium had an economic purpose: it was intended to prevent investments in power plants that were likely to become white elephants because of inadequate waste storage facilities. Accordingly, the Court concluded that the statute was not preempted, because Congress never intended that the Atomic Energy Act deprive states of the right to make economic decisions concerning nuclear power.55/ Although 42 U.S.C. §2021(c) vests the NRC with exclusive authority over the construction and operation of a nuclear facility, the Court said that:

> ". . . Congress made clear that the section was not intended to cut back on preexisting state authority outside the NRC's jurisdiction." 75 L.Ed 2d at 768-9.

55/ In Pacific Gas, the Court affirmed the states' authority in other areas relating to nuclear power: ratemaking, plant need, generation, sale and transmission of electricity, utility financial qualifications, reliability, the economic question of whether a plant should be built and the environmental acceptability of a proposed facility. 75 L.Ed 2d at 767-70.

In sum, the Court determined that a state moratorium on the construction of nuclear power plants was permissible so long as the statute was grounded upon a non-safety rationale.

This case presents stronger, less ambiguous facts than Pacific Gas. Here, LILCO seeks to exercise traditional state police powers in order to carry out its Transition Plan. Such police powers are reserved to the states by the Tenth Amendment to the U.S. Constitution. Unlike the moratorium in Pacific Gas, the statutes at issue do not at all address the construction and operation of nuclear plants; they relate to the structure of state government. Here, New York state laws, already in place and unrelated to nuclear safety concerns, dictate that police powers may be exercised only by the State and its duly authorized municipalities.

The laws in question -- Article 9, Section 2 of the New York State Constitution, the Municipal Home Rule Law, Executive Law, Article 2-B, the Vehicular and Traffic Law and the like -- address the distribution of governmental functions within the system of the government of the State of New York. They do not address the construction and operation of nuclear plants; they are not intended to regulate nuclear safety; and they are grounded upon concerns wholly unrelated to nuclear power or the

operation of nuclear plants. Moreover, the powers in question concern traditional State functions (e.g., directing traffic, towing vehicles, posting signs on state highways, etc.). Local experience (e.g., the best egress, the fastest means of resolving blockages, the safest means of towing, etc.), rather than technical expertise on radiological safety, are called upon. This is not a subject area that Congress intended to preempt.56/

56/ Compare the present case with the cases relied upon by LILCO in its Motion. In every case, the challenged state action was a direct attempt to impose state requirements upon the construction or operation of a nuclear plant by way of additional radiological safety requirements. E.g., Northern States Power Co. v. State of Minnesota, 447 F.2d 1143 (8th Cir. 1971), aff'd by equally divided Court, 405 U.S. 1035 (1972) (state imposing more stringent conditions on radioactive effluents discharged from nuclear plants preempted; now incidentally overruled by the Clean Air Act Amendment of 1977 permitting state regulation); City of Cleveland v. Public Utilities Commission of Ohio, 64 Ohio St. 2d 209, 414 N.E.2d 718 (1980) (state utility commission sought to impose inspection, hearing, evacuation plan approval, drill requirements, etc. upon nuclear plant); County of Suffolk v. LILCO, 728 F.2d 52 (2d Cir. 1984) (direct state inspections and injunctions on operation of nuclear plant for safety, and enforcement of NRC regulations); United States v. City of New York, 463 F. Supp. 604 (S.D.N.Y. 1978) (city attempt to license nuclear plant for radiological health and safety). New York State law does not attempt to regulate radiological safety or the construction or operation of nuclear plants but instead attempts to preserve traditional state limitations on the delegation of police powers and to retain traditional police powers concerning emergency planning and response.

Similarly, the New York State Transportation Corportion Law and Business Corporation Laws confer specific and limited powers upon LILCO. They confer no authority upon LILCO to exercise police powers and the limited grant of powers so conferred on a corporation such as LILCO constitutes a barrier to LILCO's implementation of the Transition Plan. The rationale for these laws is wholly unrelated to nuclear safety; they are no more subject to preemption than was the moratorium statute that was sanctioned in Pacific Gas.

In sum, the decided cases provide no support for LILCO's contention that federal law preempts the laws of New York State relating to the proper exercise of State police powers. The New York State laws here in question do not intrude upon an area exclusively occupied by the federal government nor do they rest upon concerns of nuclear safety. No evidence exists that Congress has preempted or rendered unenforceable any such state laws.

b. New York State Law Does Not Conflict With The Atomic Energy Act.

Absent exclusive federal occupation of a particular field, state law will be preempted only if it "actually conflicts" with federal law. A state law actually conflicts with a federal law if compliance with both laws is a physical impossibility or if state law blocks the accomplishment of Congressional objectives. Silkwood, supra, 78 L.Ed 2d at 452. LILCO claims that any New York State or local law that would interfere with its Transition Plan is preempted on both grounds. These contentions are baseless.

First, LILCO is not subject to conflicting laws such that compliance with one requires LILCO to violate the other. LILCO is seeking a nuclear plant operating license from the federal government. The federal government requires LILCO to submit an adequate offsite emergency response plan as a condition of licensing. New York State has not chosen (and indeed could not choose) to delegate its state powers to LILCO. That fact may mean that LILCO itself cannot submit an adequate offsite emergency plan. But LILCO has no obligation under federal law that it cannot comply with, and New York State's failure to confer police powers upon private corporations does not require LILCO

to violate any obligation or duty placed upon it by federal law.

Moreover, as established above, federal law does not authorize a utility to implement its offsite emergency response plan. Federal law only authorizes the NRC to consider the adequacy of a utility plan. If an applicant meets the requisites for a nuclear plant license, including the submission of an adequate offsite emergency plan, the NRC may grant such a license. Thus, any LILCO contention that its lack of authority under New York State law conflicts with an alleged grant of authority to LILCO under federal law is baseless.

Second, State law does not stand as an obstacle to accomplishing federal purposes. As the Supreme Court in Silkwood noted, quoting Pacific Gas:

> "[T]here is little doubt that a primary purpose of the Atomic Energy Act was, and continues to be, the promotion of nuclear power." 103 S. Ct. at 1731. However, we also observed that "the promotion of nuclear power is not to be accomplished at all costs." 78 L.Ed. 2d at 626.

In fact, Congress did not seek to promote nuclear power at the cost LILCO seeks to impose: the wholesale transfer of State police powers from states to utilities. Congress had one clear

purpose in the area of emergency planning: to ensure that an adequate offsite plan exists for every nuclear plant before that plant is allowed to commence operation. If a utility does not submit an adequate plan that can and will be implemented, it cannot secure an operating license. Congress has accepted that fact.57/ The NRC has accepted that fact.58/ But that fact notwithstanding, Congress did not require a state to forfeit its traditional police powers to a private company in order to insure that the private company can develop an adequate plan. Thus, New York State's determination to retain its own police powers in these areas does not obstruct the purposes of the Atomic Energy Act or any other statute.

57/ See, e.g., the Committee On Interior and Insular Affairs Report on the 1984-85 NRC Authorization Act: "The committee intends that section 6 of the committee amendment to H.R. 2510 be interpreted to mean that emergency planning which is adequate to protect public health and safety is a mandatory condition of getting an operating license for a nuclear power reactor." Rept. 98-103, Part 1, 98th Cong., 1st Sess., at p. 9.

58/ See generally 45 Fed. Reg. 55,402 (August 19, 1980).

5. LILCO's Preemption Argument Makes No Sense.

Finally, and most basically, LILCO's preemption argument makes no sense. In deference to traditional concepts of federalism, Congress has refused to authorize the federal government to intrude upon state offsite emergency planning functions. In further deference to state prerogatives, Congress has refused to impose emergency planning requirements upon state or local governments. Nonetheless, LILCO now claims that Congress authorized a more far-ranging and open-ended intrusion on state powers: LILCO claims that Congress granted private corporations the power to assume all responsibility for and to perform all functions regarding the actual implementation of an offsite emergency response plan. LILCO would have this Board believe that Congress authorized each public utility that wishes to operate a nuclear facility to take on all such functions and powers as the utility itself may determine are necessary to enable it to secure an operating license from the NRC.

LILCO's argument is simply incredible.

LILCO does not identify any evidence that Congress expressly granted such powers. Congress purportedly made this grant of authority without any explicit expression of

legislative intent to do so. LILCO's contention rests upon provisions in two NRC Authorization Acts, both now lapsed and of no legal effect. Both Authorization Acts permitted the NRC to consider utility emergency plans and to assess their compliance with NRC standards. Neither Act conferred any power on utilities, let alone the broad powers that LILCO asserts. Absent such authorization, stated in the clearest terms, LILCO's claim that federal law preempts all laws that would conflict with its exercise of police powers is frivolous.

LILCO's preemption argument is nonsensical for a second reason. Preemption arises when federal government action displaces conflicting state government action. A preempting federal statute creates a zone of activity within which states may not act. But offsite emergency planning is clearly an area in which states may act. It is an area in which states are encouraged to act. Indeed, LILCO's so-called "realism" argument rests, in principal part, on the premise that the State and County will act in the offsite emergency response area. The legislative history of the NRC Authorization Acts and the NRC's emergency planning regulations establish that state and local activities regarding offsite emergency planning are recognized, respected and encouraged. LILCO's contention that Congress intended to preempt this area is absolutely baseless.

LILCO's preemption argument is nonsensical for a third reason. Preemption entails withdrawing a field of activity from state control and placing all actions in the hands of the federal government. That is not what LILCO seeks in this case. LILCO does not seek federal action. It seeks the freedom to act on its own in accordance with its best corporate judgment, in a area traditionally reserved to the states. LILCO does not seek federal control but private license. Preemption does not mean never having to consider state law in pursuing corporate ends. Preemption does not sanction wholesale disregard of state law by an applicant for a license from the federal government nor does it empower any such license applicant to assume state police powers.

LILCO's preemption argument is nonsensical for a fourth and final reason. The Atomic Energy Act does mark out a preempted area: regulation of the construction and operation of a nuclear generating facility. 42 U.S.C. §2021(c). The reason for federal preemption in this area is technical expertise. Congress created the NRC, provided it with the resources to develop expertise in the control of nuclear power, and gave it exclusive authority to regulate the construction and operation of nuclear plants.

Congress' deference to state prerogatives in the area of emergency planning had a similar basis: expertise. State and local governments are the experts in exercising police powers. Congress did not preempt the area of offsite emergency planning because the authority for that area was in the hands of the government best situated to exercise such powers: state government.

III. LILCO'S SO-CALLED "REALISM" DEFENSE, WHICH PROPERLY SHOULD BE DECIDED BY THE NEW YORK STATE COURTS, IS BASED UPON FACTUAL AND LEGAL PREDICATES THAT ARE COMPLETELY ERRONEOUS.

LILCO's "realism" defense is an "even if" defense. It assumes that state law would otherwise bar LILCO from implementing its Transition Plan and that federal law would not preempt that state law. It contends that LILCO's planned actions will nevertheless be legal under state law because, if there is an emergency at Shoreham, LILCO will be taking emergency response actions "in conjunction with, or authorized by, government officials" (LILCO Motion at 50), and this government participation will remove any legal bar to a LILCO response.

It should first be observed that LILCO's "realism" defense is purely a state law issue that, as earlier noted, is already pending for decision in the State Court proceeding.59/

59/ LILCO has asserted its "realism" defense in its pending Motion to Dismiss the State Court legal authority proceed-

(Footnote cont'd next page)

Obviously, whether the hypothesized participation by State and County officials will remove the legal bar to a LILCO response under State law depends entirely upon what state law requires and forbids and can only be answered decisively by the New York State Courts. For the reasons earlier given, this Board should defer to the State Court proceeeding already underway.

On the merits, LILCO's "realism" defense is built on two predicates, one factual and the other legal, both of which are erroneous. The factual predicate is that the State and County will respond to an emergency at Shoreham in a manner that will be meaningful for purposes of these proceedings. The legal predicate is that such alleged response will render legal that which LILCO admits for purposes of its Motion is illegal.

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ing. LILCO has there contended that Plaintiffs' actions are not justiciable because they are based upon a "hypothetical scenario [that] will never occur." LILCO State Court Memorandum at 22. That "hypothetical scenario," LILCO states, is that LILCO alone will respond to a radiological emergency at Shoreham in accordance with its Transition Plan. The "real facts," according to LILCO, are that the State of New York and Suffolk County will also respond to any emergency at Shoreham and that their participation will "cure any alleged lack of legal authority on LILCO's part" (Id. at 25), thereby "mooting the hypothetical allegations in the Complaints that LILCO would perform the contested activities by itself." Id. at 6.

A. There Is No Factual Basis For LILCO's Claim That The State And County Will Participate In The Implementation Of LILCO's Transition Plan.

In its Motion, LILCO asserts as an "undisputed fact" (LILCO Motion at 42) that the State and County will respond to an emergency at Shoreham. LILCO claims that "[t]here is no question" as to such response (id. at 43); it is "established on the record" (id. at 44); indeed, "there is assurance that governmental resources -- and legal authority -- would be made available" (id.).

This asserted "realism" is fanciful.60/ Nowhere is it established, on or off the record, that there will be a governmental response to an emergency at Shoreham that will be, in any sense, meaningful for purposes of this proceeding. As this Board well knows, the State and County have developed no emergency plans for implementation in the event of a Shoreham emergency. Merely "showing up" if such an emergency occurs is

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60/ The County and State specifically dispute LILCO's assertion. See Statement of Material Facts in Dispute, Attachment B hereto, ¶'s 1, 3. The dispute over LILCO's factual assertions clearly precludes the grant of summary disposition. See, e.g., Pennsylvania Power & Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), LBP-81-8, 13NRC 335, 337-38 (1981), and discussion infra, in Section IV.

obviously not the kind of "assurance" of adequate offsite protection that the Regulations demand as a prerequisite for granting an operating license for Shoreham. Yet, that is the most that any State or County official allegedly has offered -- to provide government resources on an unplanned, ad hoc basis, if and when an emergency at Shoreham may occur. Such ad hoc response could never be considered adequate. See Statement of Material Facts in Dispute, Attachment B hereto, ¶ 2; Affidavit of Richard C. Roberts ("Roberts Affidavit"), Attachment C hereto, ¶ 4.

The only "evidence" that LILCO has been able to adduce of any "assurance" that government resources will be available is a single, out-of-context quotation from a December 1983 press release of Governor Cuomo in which the Governor states that "[o]f 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 . . . ."

Press releases are not "evidence." We find it incredible that LILCO would ask this Board to rely upon a single sentence from one press release to conclude that there is "assurance" that adequate governmental resources will be made available if a radiological emergency occurs at Shoreham.

Moreover -- and this is the critical factual point for present purposes -- there is not even one sentence's worth of "evidence" that the State or County would key into, or help LILCO implement, its Transition Plan, much less that the State would sanction LILCO's usurpation of the State's sovereign powers (which LILCO's Motion necessarily admits that LILCO would do). On the contrary, Governor Cuomo has made his position absolutely clear that he has no intention of permitting LILCO to usurp State laws. This fact comes through with unmistakable clarity when the Governor's entire press release (not just one sentence therefrom) is read. (A complete copy of the Governor's press release, and the State Court Affidavit of Fabian G. Palomino which places that release in context, are Attachment D hereto).61/ The Governor's adamant opposition to LILCO's usurpation of State laws is also convincingly demonstrated by the fact that the Governor has sued LILCO in State Court for a ruling that LILCO's actions are, and will remain, unlawful. The Governor obviously does not derive the same meaning from his press statement that LILCO does.

61/ In the State Court case, LILCO urges a variation of the same "realism" defense, relying on the same press release. Mr. Palomino submitted his Affidavit to the State Court to emphasize that the State has no intention of permitting LILCO to usurp State laws.

It is equally clear that Suffolk County will not adopt or implement any plan, including LILCO's Transition Plan, for responding to a Shoreham emergency. That is not merely an opinion; that is the law of the County. County Resolution 111-1983 unequivocally provides: "[T]he County's radiological emergency planning process is hereby terminated, and no local radiological emergency plan for response to an accident at the Shoreham plant shall be adopted or implemented." See Attachment E hereto, p. 6. See also County Resolution 456-1982, Attachment F hereto (No County funds may be used to test or implement any plan unless it has been approved by County legislation). Indeed, County Executive Cohalan has stated: "The County could not implement a response to a Shoreham accident because County law -- particularly Resolution Nos. 262-1982, 456-1982, and 111-1983 -- prohibits that. See Roberts Affidavit, Attachment C hereto, ¶ 3 and the statement of County Executive Cohalan attached to that Affidavit.

B. There Is No Legal Basis For LILCO's Conclusion That Governmental Participation In A Shoreham Emergency Will Convert LILCO's Unlawful Actions Into Lawful Conduct Under New York State Law.

Even if we grant LILCO's factual premise, that the State and County will "respond" to an emergency at Shoreham, that still does not establish what LILCO must establish to prevail on its "realism" defense: that such ad hoc governmental participation will provide legal sanction for LILCO's otherwise unlawful behavior.

Before turning to the legal considerations, it is well to bear in mind what LILCO admits for purposes of this Motion. It admits that the State and County allegations respecting LILCO's unlawful conduct under State law are true (LILCO Motion at 2). More specifically:62/

-- LILCO admits that the actions which it proposes to undertake in implementation of its Transition Plan represent State police power functions. In carrying out the Plan and attempting to perform the actions,

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62/ Each of these points is developed in detail in the memorandum submitted on behalf of the State, County and Town of Southampton in support of their motion for summary judgment on the legal authority issues, filed on September 18, 1984, in the New York Supreme Court.

it will usurp basic police powers of the State and local governments.

-- LILCO admits that in the American constitutional system, the police power is an inherent attribute and prerogative of State sovereignty, reserved to the States by the Tenth Amendment to the U.S. Constitution.

-- LILCO admits that the police power is the State's most essential power, that it embraces protection of the health and safety of persons within the State's territorial domain, and that response to an emergency is at the core of the State's police power.

-- The police powers vested in the State of New York may be exercised only by those to whom such laws have been lawfully delegated. The police power of New York has been delegated only to local governments.

-- LILCO admits that the State of New York has not delegated the exercise of its police powers to private corporations such as LILCO. LILCO also admits that Article 2-B of the Executive Law (N.Y. Exec. Law §§ 20-29 (McKinney)), relied upon in the LILCO Plan

as an alleged State law grant of authority (LILCO Plan, p. 1.4-1), does not authorize LILCO to implement its Plan.

-- LILCO admits that if Article 2-B or any other New York law were construed to authorize LILCO to implement its Transition Plan, that law itself would be an unlawful delegation of police power to LILCO.

-- LILCO admits that under New York law, LILCO, as a private corporation, can exercise only those powers which have been conferred on it by the State. LILCO also admits that the State of New York has never granted to LILCO either the express or implied power to implement an offsite response to a radiological emergency.

It is readily apparent from a consideration of the foregoing that LILCO's "realism" argument grossly misperceives the gravamen of the legal authority contentions and the import of LILCO's own admissions. The State and County do not merely contend, as LILCO implies, that LILCO's proposed actions will violate this or that specific State law or County ordinance (although they will do that too). Rather, the State and County contend -- and LILCO necessarily must admit this for present

purposes -- that LILCO cannot implement its Transition Plan under the laws of New York because that Plan calls for LILCO to exercise police powers that have never been, and cannot be, delegated to it.

It is, therefore, irrelevant whether LILCO exercises those powers alone or with others who are authorized by law to exercise the police powers, such as officials of the State of New York or Suffolk County. As a matter of New York law, LILCO cannot exercise the State's police powers in the manner contemplated by the Transition Plan under any circumstances because it has never been given the power to do so, and, as a private corporation, cannot be given that power.

LILCO cites no authority (and we know of none) to support its claim that participation by either the State or County in an actual emergency will "cure" this admitted lack of authority on LILCO's part. Indeed, it is a total non sequitur for LILCO to assert that, because the State and County may allegedly elect to exercise police powers that are unquestionably theirs to exercise, therefore LILCO may also exercise the State's police power, although no one has, nor can, confer that power upon it.

LILCO argues that the Governor himself can (if he chooses) take action in an emergency to legitimize LILCO's usurpation of State law. Thus, LILCO asserts that, under Article 2-B of the New York Executive Law, the Governor has the power to suspend specific provisions of particular statutes and ordinances and that "[t]his, of course, would remove any legal obstacle to LERO's performance of emergency functions." LILCO Motion at 43-44, note 15.

This is both wishful thinking and fallacious. It is wishful thinking because there is no evidence that Governor Cuomo or any other New York Governor will try to invest LERO with any such temporary authority.63/ It is fallacious because the suspension of particular provisions of particular statutes and ordinances does not even address, much less cure, the overriding defect in LILCO's planned actions -- that LILCO has never been, and never can be, delegated authority, even by the Governor, to exercise the State's police powers. Nothing in Article 2-B of the Executive Law, or any other New York law, supports a contrary result.

63/ Governor Cuomo's press release (attachment to the Palomino affidavit) and his suit in state court against LILCO make unmistakably clear that the Governor has no intention of permitting LILCO to usurp police powers.

Finally, this Board is asked by LILCO to decide that, because there will allegedly be some kind of ad hoc County or State emergency response, there is a basis for making adequate protection findings (under 10 C.F.R. §50.47(a)(1)) or adequate compensating measure findings (under 10 C.F.R. §50.47(c)(1)). See LILCO Motion at 47-49. This argument is absurd. The record is barren of evidence regarding what this alleged County or State "response" would be or how it could possibly be effective. Would County personnel with no training at all take over LERO functions? How could that "response" provide adequate protection? Would State police with no training whatever be assumed to "respond" in any meaningful sense of that word?64/ Indeed, what does "respond" mean as used in LILCO's Motion? No one knows. Indeed, LILCO does not even allege what particular acts the governments would perform.65/ Accordingly, there is no possible basis for this Board to find that such unspecified "responses" could conceivably work.66/

64/ The Roberts Affidavit (Attachment C, ¶ 4) and the Statement of Material Facts in Dispute (Attachment B, ¶ 2) make clear that the adequacy of such an alleged ad hoc response is clearly a matter in dispute which precludes summary disposition.

65/ LILCO asserts various acts that the State or County could do if they so chose. See, e.g., LILCO Statement of Material Facts as to Which There is No Dispute, ¶'s 2-4, 6. The County and State dispute that the State and County could or would do such acts. See Statement of Material Facts in Dispute, Attachment B, ¶'s 3, 5-7, 9.

66/ Thus, aside from all other defects, LILCO has plainly failed, as the moving party, to show how this alleged "re-

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In conclusion, this Board should either refuse to consider LILCO's "realism" argument because it is pending for decision before the New York Supreme Court, or summarily reject that argument because it is unmeritorious and is based upon disputed facts. LILCO's license application consists of the LILCO Transition Plan -- a plan to be implemented solely by LILCO. LILCO's efforts to litigate the adequacy of other alleged plans -- plans for State, County and federal government participation with LERO -- were not accepted for litigation.67/ LILCO's effort to inject a so-called "realism" argument into this litigation at this late date is nothing more than a back door effort to relitigate the law of the case. This Board should reject

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sponse" would eliminate all genuine issues of material fact. This further defect also compels denial of the Motion. See, e.g., Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741, 752-54 (1977).

67/ See ASLB Order Limiting Scope of Submissions, June 10, 1983, where the Board stated:

> "Until such time as LILCO can establish that one or more of the governmental entities designated in its emergency plan consent to participate in such a venture, the Intervenors need not submit contentions dealing with such alternatives."

Id. at 3. Nothing has changed. Neither the State nor the County has agreed to participate in LILCO's "venture."

LILCO's argument and reaffirm that this proceeding will only determine whether an emergency plan devised and implemented by LILCO can satisfy the NRC's regulations.

IV. LILCO'S "IMMATERIALILTY" DEFENSE IS DEFECTIVE ON MULTIPLE GROUNDS AND THEREFORE MUST BE REJECTED.

Contentions 1-4, 9 and 10 concern LILCO's plan during a Shoreham emergency to exercise the following police power functions: traffic control; removal of roadway obstacles; dispensing fuel to disabled vehicles; and providing security and similar services at the EPZ perimeter and other locations. LILCO argues that even if it cannot perform these functions, the Board should still rule for LILCO on these particular contentions because such functions allegedly do not need to be performed for LILCO to satisfy NRC regulatory requirements. See LILCO Motion at 51-54. LILCO's "immateriality" defense must be rejected for the procedural and substantive reasons discussed below.

A. This Board Cannot License Shoreham With No Viable Plan For Traffic-Related And Other Protective Services.

LILCO is essentially asking this Board to license Shoreham with no plan or even capability to perform any of the traffic-related functions addressed in Contentions 1-4, 9 and

10, despite the unqualified assertions of the existing LILCO Transition Plan (which has been the focus of litigation for over one year) that those functions will be implemented. According to LILCO, all that needs to be done if there is a serious accident at Shoreham is to notify the public of the emergency and let the people take care of themselves (which allegedly will take only 95-115 minutes more than if the functions described in Contentions 1-4, 9 and 10 were implemented).

LILCO's argument necessarily also encompasses the further contention that no capability to provide active assistance to evacuees during an emergency is necessary in order to satisfy Section 50.47. Thus, even if serious traffic problems developed during a Shoreham emergency after evacuation had been recommended, and even if implementation of traffic control measures could reduce evacuees' exposure to health-threatening radiation, LILCO argues that its Plan is adequate without even the capability to implement any such actions to assist evacuees.

The NRC's regulations are not prescriptive about particular traffic control strategies and other actions that may need to be implemented to provide reasonable assurance that adequate protective actions can and will be implemented. This is

because it is impossible to predict precisely how a serious accident might proceed and thus precisely what protective actions (and supportive actions to implement those protective actions) may be necessary when the emergency occurs. But this does not mean that there need be no capability to assist evacuees in the event of an emergency. For adequate emergency preparedness to exist, there must be a dependable response capability so that protective and supportive actions can and will be implemented as necessary. See Statement of Material Facts in Dispute, Attachment B hereto, ¶ 4, Roberts Affidavit, Attachment C hereto, ¶'s 13, 15, 16, 18.

LILCO asks this Board to approve LILCO's Plan even assuming there is no capability at all for LERO to provide any traffic control assistance during an emergency; no capability at all to remove any roadway obstacles; no capability at all to fuel cars which have run out of gas and thus constitute traffic impediments; no capability at all to control traffic through the EPZ boundary; and no capability at all to provide security at other locations. Suffolk County and the State of New York contest whether such a response could be deemed adequate, thus clearly precluding summary disposition due to the existence of material facts in dispute. See Statement of Material Facts in Dispute, Attachment B hereto, ¶ 4. Further, to our knowledge,

there is no nuclear plant licensed to operate in the United States which has an offsite emergency response organization that lacks the capability to take actions to assist in evacuating the public if there is an emergency. Yet, that is what LILCO is asking the Board to approve. If this is the legal standard for adequate preparedness under the NRC's regulations, then why require an emergency plan at all?

The fact is that LILCO's argument does not represent the appropriate legal standard. Rather, Section 50.47(a)(1) requires reasonable assurance that adequate protective measures "can and will be taken" in the event of a radiological emergency. An emergency may present a multitude of possible accident scenarios, making rigid proposed protective actions unsatisfactory. Thus, it is essential for adequate preparedness that there be a flexible capability to respond to whatever events may occur, including adverse traffic conditions. Roberts Affidavit, Attachment C hereto, ¶'s 13, 15, 16, 18. This is particularly true when it is remembered that an EPZ evacuation after a Shoreham accident may involve movement of upwards of 150,000 persons (and even more when shadow evacuees are included). Roberts Affidavit, Attachment C hereto, ¶ 17. That is why it is inconceivable that this Board or the NRC could seriously consider approval of a plan where there is no

participating entity that has the authority and capability to implement traffic control measures or the other actions that are the subjects of Contentions 1-4, 9 and 10.

B. This Board Should Not Consider LILCO's "Immateriality" Defense Because It Is Premature.

This Board, moreover, should not even consider LILCO's "immateriality" defense at this stage of the proceeding because it is plainly premature. LILCO is asking the Board to make broad, sweeping conclusions regarding whether a so-called "uncontrolled" evacuation would meet regulatory requirements. But such a decision cannot be made in a vacuum. Rather, the Board's decision on issues like the evacuation shadow phenomenon (Contentions 23.A, B, and C) and LILCO's credibility or lack thereof (Contentions 11 and 15) will directly affect resolution of this "immateriality" issue.

For example, if, as the County has contended, there is a large voluntary evacuation, the adequacy of an uncontrolled evacuation will be seriously impacted because there will be a particularly great need for a traffic control capability to deal with the ensuing large numbers of evacuees. Roberts Affidavit, Attachment C hereto, ¶ 17. Similarly, if LILCO is found to lack credibility, its ability to get persons to participate

in an uncontrolled evacuation will again be highly questionable. Thus, before this Board possibly can resolve LILCO's "immateriality" defense, it must first make findings on these other issues, and many other contentions as well.68/ The Board of course cannot make such findings at this time since the briefing of these issues has not even been completed.

C. LILCO'S "Immateriality" Defense Cannot Be Considered Unless A Further Evidentiary Hearing Is Held.

Contrary to LILCO's assertion (LILCO Motion at 3), there is need for an additional evidentiary hearing even if the Board were otherwise inclined to consider LILCO's "immateriality" defense. The County and State previously expressed the view that

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68/ As discussed infra, LILCO also argues at length about how an uncontrolled evacuation allegedly would only increase evacuation times by about 90 minutes. See LILCO Motion at 51-52. This issue directly concerns Contention 65, on which there was extensive direct testimony and cross examination. It is inconceivable that this Board could reach a decision on such an issue in the context of a summary disposition motion (which does not include the complete factual briefing the Board has requested for findings, see note 69 infra). The adequacy and accuracy of LILCO's time estimates are among the most contested issues in the entire proceeding. Similarly, any decision on the immateriality issue pertaining to Contentions 4 (removal of roadway obstacles) and 9 (dispensing fuel) will be directly impacted by the Board's decision on Contention 66, where LILCO's capability to perform these functions and the need for these functions to be performed were considered.

Contentions 1-10 could be resolved as purely legal issues. See Tr. 13,831-32. This prior County/State position, however, was taken before LILCO articulated its so-called "immateriality" defense to these contentions, a defense that is essentially factual in nature, as clearly demonstrated by the arguments made at pages 51-77 of LILCO's Motion.

The existing evidentiary record deals to some degree with these issues; however, the parties have never directly addressed in testimony whether the activities set forth in Contentions 1-4, 9 and 10 are material to meeting regulatory requirements. If this issue is now to be addressed (and we make clear supra our view that this defense should be rejected outright), it cannot be done via LILCO's proposed summary disposition method. Rather, after fair notice that LILCO intends to rely on this defense and after a Board ruling that such a defense is permissible under Section 50.47, the parties' experts must be given an opportunity to present testimony on Contentions 1-4, 9, and 10 relating to the new "immateriality" defense.

D. This Board Cannot Grant Summary Disposition With Respect To LILCO's "Immateriality" Defense Because It Rests On Disputed Issues Of Material Fact.

Even without submission of testimony directly addressing the "immateriality" defense, it is clear that there are facts in dispute which preclude the resolution of these issues via summary disposition. Indeed, even LILCO recognizes that there are facts in dispute. Thus, LILCO states:

> "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." LILCO Motion at 51, Note 18.

LILCO's suggestion that the Board "decide [in the context of a summary disposition motion] the few facts that may be contested without further hearings" is demonstrably wrong. LILCO can point to no place in the NRC's regulations this proposed summary disposition procedure is authorized. Indeed, Section 2.749(d) is clear that summary disposition is appropriate only where "there is no genuine issue as to any material fact ...." Where there is a factual dispute, the Board must deny the motion. "In short, prior to granting summary disposition, [a

Board] must be convinced that there are no significant outstanding unresolved questions material to the particular issue under review." Pennsylvania Power & Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), LBP-81-8, 13 NRC 335, 337-38 (1981). Since even LILCO agrees that there are factual disputes regarding whether adequate preparedness can exist without the capability to undertake the activities set forth in Contentions 1-4, 9 and 10, and since the County and State specifically contest LILCO's Statement of Material Facts as to Which There is No Dispute (see the attached Statement of Material Facts as to Which There is Dispute, as well as the Palomino and Roberts Affidavits), the motion clearly cannot be granted.69/

69/ Further, even assuming that all facts necessary for a decision were in the record (which is not the case since LILCO's "immateriality" defense is new), LILCO's proposed summary disposition motion still would be improper for an additional reason. The hearing has already occurred on all other issues. The Board has directed the parties to file proposed findings which are "concise, fair and well reasoned . . . . [and which are] accurate [and] balanced . . . ." ASLB Memorandum and Order Establishing Format and Schedule of Proposed Findings of Fact and Conclusions of Law, July 27, 1984, at 1. LILCO's suggestion that the Board decide the disputed facts on these contentions is, in essence, an argument that the Board make final factual findings based on the summary judgment pleadings. But LILCO does not even purport to have made a concise, fair or balanced review of the existing factual record. Rather, LILCO totally ignores the great mass of evidence in the record which puts all LILCO's "immateriality" arguments into dispute. Thus, LILCO's Motion seeks to thwart

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E. There Are Additional Reasons, Specific To The Various Contentions, Why LILCO's "Immateriality" Defense Must Be Rejected.

The County and State will briefly address LILCO's specific "immateriality" arguments pertaining to Contentions 1-4, 9 and 10. LILCO has the burden of proving the absence of any genuine issue of material fact. Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741, 753 (1977). The Board on summary disposition must review the record in the light most favorable to Suffolk County and the State of New York, the parties opposing the motion. See, e.g., Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), LBP-74-36, 7 AEC 877, 879 (1974); Dairyland Power Cooperative (La Crosse Boiling Water Reactor), LBP-82-58, 16 NRC 512, 519 (1982). From this brief review, it becomes even more clear that summary disposition must be denied because material facts are in dispute.

(Footnote cont'd from previous page)

the very purpose of the ongoing briefing effort which the Board has ordered.

1. Contentions 1-3

Contentions 1-3 involve LILCO's plans to use traffic guides to direct traffic, the blocking of roads or lanes of roads, setting up barriers, channeling traffic, creating a one-way road, and installing more than 1,000 trail blazer signs. LILCO states that "the record developed in the proceeding shows that LILCO could implement what has been referred to as 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." LILCO Motion at 51-52 (footnote and citation omitted). See also id. at 57.

The County and State sharply contest LILCO's assertion about the times required to implement a so-called "uncontrolled" evacuation, as well as LILCO's suggestion that an "uncontrolled" evacuation could be carried out under LERO's auspices and could protect the public. There is extensive expert testimony in the record alleging that LILCO's time estimates are grossly inaccurate, thus creating a genuine dispute whether LILCO's time estimates are as LILCO has alleged. Similarly, LILCO's bald assertion that the public would be adequately protected by an uncontrolled evacuation (LILCO Motion

at 52-53) is disputed not only by the specific portions of the County's case contesting the "uncontrolled" time estimates, but also by almost every piece of testimony submitted by County and State experts on the traffic issues. Virtually all of this evidence contests LILCO's ability to implement any evacuation, much less an "uncontrolled" one. See, e.g., Saegert, ff. Tr. 2259; Roberts et al., ff. Tr. 2260; Herr, ff. Tr. 2909; Polk, ff. Tr. 2909; Pigozzi ff. Tr. 2909; Hartgen et al., ff. Tr. 3695.

The County's witnesses, moreover, specifically disputed LILCO's so-called "uncontrolled" time estimates, noting that they were based on inaccurate assumptions and flawed methodology. See, e.g., Pigozzi, ff. Tr. 2909, at 37-38. Finally, the Affidavit of Deputy Chief Roberts makes clear that an uncontrolled evacuation under LERO's auspices cannot succeed. Roberts Affidavit, Attachment C hereto, ¶'s 12-13, 15-18, 23, 26. All of the foregoing make clear that there is a sharp dispute regarding whether an "uncontrolled" evacuation ever could be implemented by LILCO, much less in a timely or adequate manner. See Statement of Material Facts in Dispute, Attachment B hereto, ¶'s 4, 10-12, 18-19, 21-23, 27. Therefore, summary disposition is clearly not proper.

2. Contention 4

Contention 4 involves LILCO's plan to remove obstructions from roadways. LILCO suggests that the contention involves only "'towing' cars in the sense of impounding them . . . ." LILCO Motion at 53. With this gloss on the Contention, LILCO asserts that it is entitled to summary disposition because LILCO allegedly does not intend to impound any vehicles. Id.70/

LILCO has not read the plain words of the contention. The contention alleges that "LILCO is prohibited by law from removing obstructions from roadways, including the towing of private vehicles." Contention 4 (emphasis supplied). The contention thus encompasses impoundment (if it occurs), as well as any other means (towing, pushing to side of road, etc.) by which LILCO intends to keep roadways free from obstacles. Thus, LILCO's purported argument addresses at most only a fraction of the contention -- alleged impoundment. At any rate, it is

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70/ LILCO makes the foregoing argument at page 53. When LILCO provides its contention-by-contention discussion of the issues, it relies solely on its alleged "realism" and "preemption" arguments. See LILCO Motion at 60-61. Thus, in its contention-by-contention discussion, LILCO seems to have dropped the "immateriality" defense pertaining to Contention 4.

Intervenors' contention that all such LILCO activities to remove obstacles from the road are illegal. Given LILCO's assumption for purposes of its motion that the contentions are legally correct, this Board must accept that all of LILCO's proposals to remove road obstacles are in fact illegal.

Testimony offered on behalf of Suffolk County indicates that in the event of an evacuation of the full 10-mile EPZ, there could be as many as 141 accidents. This many disabled vehicles could substantially hamper evacuation time. Thus LILCO's assertion that it is immaterial whether LILCO can perform this traffic control function is disputed. Polk, ff. Tr. 2909, at 11-12, 16; Tr. 6915 (Monteith); Monteith et al., ff. Tr. 6868, at 5; Tr. 6877-78 (Michel, Monteith, McGuire); Roberts Affidavit, Attachment C hereto, ¶ 30; Statement of Material Facts in Dispute, Attachment B hereto, ¶'s 22-23.

LILCO intends to address the roadway obstacles problem by locating 12 trucks, some of them tow trucks, at locations in and around the EPZ. These trucks will be used to push or tow obstacles out of the flow of traffic. LILCO Testimony on Contention 66, ff. Tr. 6685, at 6-7; Tr. 6709-18 (Weismantle). The County's experts testified that 12 trucks are inadequate. Monteith et al., ff. Tr. 6868, at 7; Tr. 6879-80, 6910-11,

6917, 6930-34, 6941 (McGuire, Michel, Monteith). Moreover, the testimony already in the record (Monteith et al., ff. Tr. 6868, at 23; Tr. 3418-19 (Michel)) and the Roberts Affidavit (Attachment C hereto, ¶ 30)) makes clear that an inability to remove roadway obstacles would hamper any effective evacuation.71/ Therefore, there are material facts in dispute and summary disposition must accordingly be rejected.

Finally, LILCO's argument on Contention 4 amounts to an assertion that it is no deficiency under the NRC's regulations for an emergency plan to have no capability at all to deal with road obstacles, even assuming such obstacles create traffic jams which leave motorists stranded and exposed to health threatening radiation. As noted above, this LILCO argument is factually disputed. Further, NUREG-0654, Criterion II.J.10.K, states:

> "The organizations' plans to implement protective measures for the plume exposure pathway shall include: . . . .
>
> Identification of and means for dealing with potential impediments (e.g., seasonal impassability of roads) to use of evacuation routes, and contingency measures."

71/ The County witnesses also testified that it is necessary to have a means to help stranded motorists who otherwise may not be able to evacuate. Monteith, et al., ff. Tr. 6868, at 14-15; Tr. 6920-22 (Monteith).

This planning criterion clearly covers the need to remove stalled vehicles since they would constitute impediments to the use of evacuation routes. Thus, the ability to remove roadway obstacles is relevant to any assessment of LILCO's compliance with the regulations. LILCO's inability to perform such functions compels denial of LILCO's Motion.

3. Contention 9

Contention 9 involves LILCO's authority to dispense fuel to cars alongside roadways, an action proposed by LILCO to avoid cars running out of gas and thus causing impediments to evacuation. LILCO argues:

> "[T]his 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 dispensed 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." LILCO Motion at 73.

The County and State dispute these LILCO statements. First, there clearly is a requirement for LILCO to be able to clear roadway impediments. See NUREG-0654, II.J.10.K, supra.72/ Testimony presented by the County indicated that as

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72/ Mr. Keller did not say there was no NRC requirement for dispensing fuel but rather that he was not aware of any such requirement.

many as 277 vehicles could run out of fuel in the event of an evacuation of the full EPZ. The impact of so many disabled vehicles will be to hamper the flow of traffic severely, thus causing roadway impediments. Polk, ff. Tr. 2909, at 16; Monteith, et al., ff. Tr. 6868, at 5; Tr. 6877-78 (Monteith, Michel, McGuire). The County disagrees that just pushing a car to the side of the road would eliminate impediments to evacuation. Rather, such cars would still constitute impediments to timely evacuation. Indeed, the Suffolk County Police Department witnesses testified that, in their experiences, car breakdowns, even when on the side of the road, cause an impediment to traffic, particularly due to drivers slowing down to look at the car and often due to minor accidents which result when cars slow down in that manner. Tr. 3418-19 (Michel); Roberts Affidavit, Attachment C hereto, ¶ 30. Therefore, the LILCO argument is disputed and summary disposition must be denied. See Statement of Material Facts in Dispute, Attachment B hereto, ¶'s 22, 23, 27.

4. Contention 10

Contention 10 concerns LILCO's plans for providing security at the EOC, relocation centers and the EPZ perimeter. LILCO asserts that its personnel "will not be 'performing law

enforcement functions' or requiring anyone to do anything, and will not be using force to 'maintain security.'" LILCO Motion at 76 (emphasis in original).

Suffolk County contends that the activities LILCO intends to carry out (like "discouraging people from entering the EPZ" and "channelling traffic") do constitute law enforcement and police power functions, regardless whether LILCO is "requiring" anyone to obey LERO. See Roberts Affidavit, Attachment B hereto, ¶'s 31-32. The County contends that LILCO lacks legal authority to carry out these activities. LILCO has assumed in its Motion that the County's legal allegations are true, i.e., that LILCO is barred from exercising these functions. Accordingly, since for purposes of this Motion LILCO must be deemed to be barred from performing these functions, and since LILCO does not argue that its Plan can be approved without having these functions performed, summary disposition must be denied.

CONCLUSION

For all of the foregoing reasons, LILCO's summary disposition motion must be rejected.

Respectfully submitted,

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September 24, 1984

Attachment A

APPENDIX TO SUFFOLK COUNTY AND STATE OF NEW YORK
OPPOSITION TO LILCO'S MOTION FOR SUMMARY DISPOSITION
OF CONTENTIONS 1-10 (THE "LEGAL AUTHORITY" ISSUES)

LEGISLATIVE AND REGULATORY HISTORY OF OFFSITE EMERGENCY PLANNING

The legislative and regulatory history of offsite emergency planning is set forth below.

I. LEGISLATIVE HISTORY

PRE-THREE MILE ISLAND

Prior to the nuclear accident at Three Mile Island, Harrisburg, Pennsylvania, in March, 1979:

1. There had been virtually no Congressional activity concerning offsite emergency planning around nuclear plants. Neither the original Atomic Energy Act (the "Act") nor any amendments to the Act addressed this topic.

2. There was no federal statutory or regulatory requirement that state or local governments develop or implement offsite emergency response plans.

3. The NRC had attempted to elicit voluntary cooperation from states in developing such plans. Emergency Planning Around Nuclear Power Plants: Nuclear Regulatory Commission

Oversight Hearings Before a Subcommittee of the Committee on Government Operations, 96th Cong., 1st Sess. (May 14, 1979) ("Government Operations Subcommittee Hearings") at 399. However, the NRC itself recognized that it "[did] not have statutory authority over states and local governments to require them to develop and to maintain such plans." Letter from Lee V. Gossick, Executive Director for Operations, NRC, to J. Dexter Peach, Director of Energy and Minerals Division, General Accounting Office, reprinted in Comptroller General of the U.S. Report to the Congress, Areas Around Nuclear Facilities Should Be Better Prepared for Radiological Emergencies, EMD-78-11 (March 30, 1979) ("GAO Report") at 68. See also Nuclear Regulatory Commission Authorizations for Fiscal Year 1980 Hearings before the Subcommittee on Energy and the Environment of the Committee on Interior and Insular Affairs, H.Rep. 96-5, 96th Cong., 1st Sess. (February 22 and March 2, 1979) at 503-504 (reprinting NRC Staff responses to questions from the Subcommittee regarding emergency planning.)

4. The NRC's issuance of an operating license to a nuclear plant was not conditioned upon the existence of an offsite emergency response plan. Id. at 503.

March, 1979

On March 28, 1979, the nuclear accident at TMI took place. On March 30, 1979, the Government Accounting Office ("GAO"), the investigative arm of Congress, issued the GAO Report to Congress based on its pre-TMI nationwide survey of the state of emergency preparedness around nuclear plants. The GAO Report:

1. Concluded that state and local governments were not required by federal law to develop offsite emergency plans. GAO Report at 14.

2. Concluded that state and local governments had given insufficient attention to nuclear emergency planning. Id. at 33-34.

3. Recommended that the NRC condition the operation of nuclear plants on the existence of state and local emergency-response plans meeting NRC standards. Id. at 35.

In its response to the GAO Report and its recommendations, the General Services Administration observed that "[l]inking the operation of a nuclear powerplant to adequacy of local plans may introduce a mechanism whereby opponents of nuclear power plants can prevent operation of such plants by

challenging the adequacy of the plans." Id. at 45. GAO replied to this comment by stating that "[p]ublic health and safety must be the primary consideration rather than whether this will provide intervenors with a means of preventing the operation of nuclear power plants." Id. at 45-46.

May, 1979

In May, 1979, the Subcommittee on Environment, Energy, and Natural Resources of the House Committee on Government Operations held several days of oversight hearings on what could be done at the federal level to improve emergency planning. See Government Operations Subcommittee Hearings. One of the particular areas of inquiry was the nature and extent of federal authority to compel state and local cooperation in offsite emergency plan development. Testimony received from the GAO and the NRC on this topic included:

1. Offsite emergency planning was traditionally an area of state and local responsibility. Government Operations Subcommittee Hearings at 380, 398-99, 575.

2. The states had given insufficient attention to nuclear emergency planning. Only 12 states had sought and secured NRC concurrence in their emergency plans; of the

remaining 38 states, 16 contained operating nuclear plants but had no NRC-concurred plan. Id. at 258-259.

3. The NRC had no statutory authority to compel state or local governments to cooperate with the federal government in the preparation of offsite emergency plans. Id. at 264, 380, 399, 537, 542, 559, 575-576.

4. The NRC had the authority to condition operating licenses on the existence of an offsite emergency plan meeting NRC standards. Id. at 537, 539, 540, 542, 576.

5. Congress should decide whether to preempt the area of off-site emergency planning by imposing mandatory planning responsibilities upon state and local governments. As stated by NRC Chairman Joseph M. Hendrie:

> It seems to me that we need some better way to put some muscle in the planning sequence and to be able to get on and to work with the States and localities in improving the emergency plans.
>
> The question is whether the NRC ought to have authority under the law to require a State or locality to do things like this. That is a question which has been raised in this context.
>
> I am not quite sure. I would prefer to have the Congress recognize the nature of the problem and then let you decide whether it is appropriate for the Federal Government to come down and preempt an area which previously has been regarded as a State and local prerogative.

Id. at 534. See also id. at 535, 576.

Also in May, 1979, the Senate Environment and Public Works Committee, the Senate committee with legislative jurisdiction over the NRC and the Act, reported S. 562, the Senate version of the fiscal year 1980 NRC Authorization Act. S. 562 included an amendment to Section 103 of the Act that would have required:

1. The existence of an NRC approved state plan as a condition to the licensing of any new nuclear facility;

2. States within which previously licensed nuclear plants were located to submit statewide emergency plans that met NRC standards within six months of the Authorization Act's enactment.

3. The NRC to promulgate minimum requirements against which to assess emergency plans submitted by the states. Nuclear Regulatory Commission Authorizations - Report of the Committee on Environment and Public Works, S. Rep. 96-176, 96th Cong., 1st Sess. (May 15, 1979) at 26-27.

July, 1979

On July 16, 1979, the Senate debated the emergency planning provision of S. 562. See 125 Cong. Rec. S.9463-S.9484 (daily ed. July 16, 1979). A number of amendments were offered on the Senate floor to the provision as reported by the Committee. Only two of these were given significant attention:

1. An amendment offered by Senators Gary Hart and Alan Simpson (the "Hart-Simpson amendment") would have involved the Federal Emergency Management Agency ("FEMA") in the review of state emergency plans, would have extended the deadline for such plan submissions from six to nine months and would have authorized the NRC to use its existing standards to determine the adequacy of such plans during the interim before the NRC's final standards were developed. Id. at S.9474-S.9475.

2. An amendment offered by Senator Bennett Johnston (the "Johnston-McClure amendment") would have permitted the NRC itself to develop an interim emergency plan for a power plant in a state which failed to submit an acceptable emergency plan within the statutory deadline. Id. at S.9471.

The basis for Senator Johnston's opposition to the provision reported by the Senate Committee and to the

Hart-Simpson amendment was the possibility that a state that was opposed to nuclear power plants could prevent the operation of such plants by refusing to develop an emergency plan. As support for his concern, Senator Johnston referenced the opposition of California Governor Jerry Brown to nuclear power. As stated by Senator Johnston:

> I know that there are some Governors in this country who do not want nuclear plants to operate within their States. Just last night . . . Governor Jerry Brown reiterated his desire not to have any nuclear plants, not only in California, but in the United States . . .
>
> It is not the duty, the right, of a Governor of one State to stand in the way of that nuclear license to operate . . .
>
> I do not believe . . . that the Governor ought to have that power. Hence, under [the Johnston-McClure] amendment, should he fail to submit a plan, should he fail to make a good-faith effort to submit a plan and, therefore, submit one that is obviously and clearly deficient, then under my amendment the NRC submits the plan, and puts it into effect. Under the Hart-Simpson approach, the plant shuts down.

Id. at S.9471-S.9472.

> [I]s it not reasonable to expect that there is a possibility that . . . [Governor Brown] could use the power under the [Hart-Simpson] amendment simply not to submit an evacuation plan or to submit one that he knew would not be acceptable and thereby effect a moratorium on the operation of the Diablo plant or any other plant for which an evacuation plan would be required to be submitted by him?

Id. at S.9473. Senator Johnston stated that the question confronting the Senate was as follows:

> The issue is narrow; the issue is clear. Do you want a moratorium on a plant where a State either refuses, as in the probable case of California, or, through inadvertence or through honest mistake or through whatever reasons, fails properly to submit a workable plan within the deadline?

Id. at S.9476.

Other Senators explicitly recognized the possibility that certain states would refuse to develop emergency plans based on their opposition to nuclear power. Though opposing the Johnston amendment, Senator Simpson admitted:

> The possibility that an operating nuclear plant can have its license suspended or that a plant under construction could have its permit terminated because the state where it is sited has failed to form a plan or to obtain concurrence by the NRC in its emergency plan surely is not a matter to which we should give only cursory attention. It has deeply concerned me.
>
> Within the [Hart-Simpson] 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 power plant.

Id. at S.9473. See also statements of Senator Randolph. Id. at S.9474.

Notwithstanding the lengthy debate about the possibility that a state might refuse to develop an emergency plan and thereby prevent the operation of a nuclear plant, the Johnston-McClure amendment was defeated, and the Hart-Simpson amendment was adopted. The principal points made in opposition to the Johnston-McClure amendment were:

1. Empowering the NRC to develop an emergency plan when a state had refused to do so would inject the federal government into an area of traditional state and local responsibility. Id. at S.9472, S.9473, S.9476-S.9477, S.9480;

2. There were significant potential constitutional problems attendant to injecting the federal government into an area squarely within the states' traditional police powers. Id. at S.9476-S.9477. As stated by Senator Hart:

> What is contemplated by the Senator from Louisiana is a fundamental shift in government authority. It is a fundamental tampering with the federal system. It would give some authority to the Federal Government which has never before been obtained by the Federal Government in this area. I think Senators who vote on this should understand that. It is a very, very fundamental political point.

Id. at S.9476.

3. The states themselves, not the federal government, have both the authority and the familiarity with local resources and needs to best perform emergency planning functions. Ibid.

4. Emergency planning by the NRC would be unnecessary since the Committee bill, as amended by the Hart-Simpson amendment, provided an incentive to states to develop emergency response plans: a state which failed to do so would lose the electricity generated by such a facility and face the political consequences of that loss of power. As stated by Senator Hart:

> [The Hart-Simpson amendment] does provide, 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.

Ibid.

August, 1979

The House Government Operations Committee issued a report on emergency planning based on the May, 1979 hearings held by the Subcommittee on Environment, Energy and Natural Resources. Emergency Planning Around U.S. Nuclear Power Plants: Nuclear Regulatory Commission Oversight, H.Rep. 96-143, 96th

Cong., 1st Sess. (August 8, 1979). The report made several findings and recommendations, including the following:

1. The NRC had no statutory authority to compel state and local governments to prepare and submit emergency plans for approval to the NRC;

2. The NRC had authority under the Act to condition the issuance of operating licenses on the existence of state and local offsite emergency response plans that met the NRC's minimum regulatory standards; new federal statutory action was not necessary to authorize the NRC to implement such a licensing condition; and

3. The NRC should exercise this licensing authority to ensure that all nuclear power plants, as a condition of licensing and operation, had applicable state and local offsite emergency response plans that met minimum regulatory guidelines to protect the public health and safety.

Id. at 47-52.

December, 1979

The House approved H.R. 2608, the House version of the NRC Authorization Act for Fiscal Year 1980. 125 Cong. Rec.

11507 (daily ed. Dec. 4, 1979). The House version would have required the NRC to:

1. Establish, by rule, standards against which to evaluate state radiological emergency plans;

2. Review and assess the adequacy of all emergency plans developed by states in which nuclear plants were already operating or under construction;

3. Report to Congress the results of its assessment within six months of the Authorization Act's enactment;

4. Report to Congress any additional federal statutory authority the NRC deemed necessary to ensure that adequate offsite emergency plans existed for every nuclear facility.

June, 1980

Since the House and Senate versions of the fiscal year 1980 NRC Authorization Act differed, members of the respective House and Senate Committees met in conference in the late winter and spring of 1980. The two most significant differences between the Senate and House versions were:

1. The Senate version would have conditioned the licensing and operation of nuclear plants on the existence of an

NRC approved state offsite emergency plan; the House version contained no similar requirement; and

2. The Senate version would have compelled states with nuclear plants to submit offsite emergency plans to the NRC for approval; the House version would not have imposed planning duties on the states.

As a compromise between the House and Senate versions, Senator Hart proposed that the Authorization Act prohibit the issuance of an operating license unless the NRC first determined that there was an adequate site-specific (as opposed to state-wide) state emergency plan for the facility. Stenographic Transcript of Hearings Before the Senate Committee on Environment and Public Works and the House Committee on Interior and Insular Affairs Joint Conference on the Nuclear Regulatory Commission ("Stenographic Transcript") (Feb 21, 1980) at 4-5.

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 29-22. In response to this concern, conferees agreed to add a provision that permitted a plant to

be licensed if there existed either a site-specific state or local emergency plan that complied with NRC guidelines or a state, local, or utility plan which provided reasonable assurance that the public health and safety was not endangered by the operation of the plant. The conferees further agreed not to impose planning duties on the states. The Conferees' provision stated, in pertinent part:

> Funds authorized to be appropriated pursuant to this Act may be used by the Nuclear Regulatory Commission to conduct proceedings, and take other actions, with respect to the issuance of an operating license for a utilization facility only if the Commission determines that
>
> (1) there exists a State or local emergency preparedness plan which
>
> (A) provides for responding to accidents at the facility concerned, and
>
> (B) as it applies to the facility concerned only, complies with the Commission's guidelines for such plans, or
>
> (2) in the absence of a plan which satisfies the requirements of paragraph (1), there exists 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 June, 1980. In explaining the provision, the Joint Explanatory Statement of the Committee on Conference stated:

> 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. In the absence of a State or local plan that complies with the guidelines or rules, the compromise 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.

Joint Explanatory Statement of the Committee on Conference, H. Conf. Rep. 96-1070, 96th Cong., 1st Sess. (June 4, 1980) at 27-28, reprinted in 1980 U.S. Code Cong. & Ad. News at 2270-2271. There is no indication in the transcripts of the Conference Committee deliberations or the Conference Committee's Joint Explanatory Statement that Section 109 authorized a utility to exercise any power it did not otherwise have under applicable state law.

April, 1981

In April, 1981, the Subcommittee on Nuclear Regulation of the Senate Committee on Environment and Public Works conducted oversight hearings on state and local offsite emergency planning and preparedness. Radiological Emergency Planning and Preparedness Hearing Before the Subcommittee on

Nuclear Regulation of the Senate Committee on Environmental and Public Works, S. Rep. 97-H13, 97th Cong., 1st Sess. (April 27, 1981). One of the subjects considered by the Subcommittee was whether state and local governments were cooperating in the development of emergency response plans. In the course of the hearings:

1. NRC Chairman Hendrie testified, as in prior hearings, that the NRC "[has] no statutory authority over. . . State and local jurisdictions and cannot force them to develop [emergency response] plans . . . ." Id. at 3. Subcommittee Chairman Alan Simpson agreed, stating that "the NRC has no authority over the State or local jurisdictions. You cannot force them to develop those plans." Id. at 14.

2. Senator Simpson repeatedly indicated that Congress recognized that states and localities might refuse to develop emergency plans. Id. at 11-15, 25-27, 30-31.

3. Senator Simpson pointed out that Congress had chosen to respond to this possibility in the 1980 fiscal year Authorization Act, P.L. 96-295, by permitting the NRC to review utility developed plans in order to determine whether such plans met NRC standards and were, therefore, an adequate basis for granting an operating license. As stated by Senator Simpson:

> Recognizing the real problems, the authentic problems, the actual problems in obtaining full cooperation from all of the States and the local governments in the vicinity of a nuclear plant, the Congress in the 1980 authorization . . . . set that up so there could be a fulfilling of the requirement by a utility plant as well as the State and local.

Id. at 12. See also id. at 31. Senator Simpson did not suggest that Congress had empowered utilities to perform functions they were not otherwise authorized to carry out.

4. Senator Simpson questioned both Chairman Hendrie and John McConnell, the Acting Director of FEMA, on whether state and local cooperation had been forthcoming. Both witnesses indicated that, although most states and localities were attempting to develop plans, the degree of willingness and the ability to develop adequate plans for all sites varied greatly from state to state. Id. at 21-15, 23-27, 31.

5. Chairman Hendrie indicated that the NRC's emergency planning regulations, 45 Fed. Reg. 55,402 (August 19, 1980), promulgated by the NRC in response to Section 109 of P.L. 96-295, were somewhat ambiguous and might not be interpreted to provide the NRC the flexibility that Congress has intended to review state, local or utility plans. Id. at 12.

September, 1982

In response to concerns that the NRC emergency planning regulations did not specify that the NRC could issue an operating license in the absence of an approved state or local emergency plan, Congress included the following provision in the fiscal years 1982-83 NRC Authorization Act passed in September, 1982:

> The Nuclear Regulatory Commission may use such [appropriated] sums as may be necessary, in the absence of a State or local emergency preparedness plan which has been approved by the Federal Emergency Management Agency, to issue an operating license . . . for a nuclear power reactor, if it determines that there exists a State, local, or utility plan which provides reasonable assurance that public health and safety is not endangered by operation of the facility concerned.

P.L. 97-415, sec. 5 (1983). The language of Section 5 was intended to confirm that the NRC has authority to issue an operating license if there exists a state, local, or utility plan which reasonably insures that the public health and safety are not endangered by plant operation. See Authorizing Appropriations for the Nuclear Regulatory Commission Conference Report, H.Rep. 97-884, 97th Cong., 2d Sess. (September 28, 1982) at 27.

March, 1983

In March, 1983, the Subcommittee on Nuclear Regulation of the Senate Committee on Environment and Public Works held a hearing on the NRC's budget request for fiscal years 1984 and 1985. Nuclear Regulatory Commission's Budget Request for Fiscal Years 1984 and 1985, S. Rep. 98-53, 98th Cong., 1st Sess. (March 10, 1983). The Subcommittee heard the following testimony regarding emergency planning:

1. Nunzio J. Palladino, the Chairman of the NRC, recommended that the 1984-85 Authorization Act continue the NRC's authority to issue an operating license in the absence of a FEMA-approved state or local plan if it finds that an adequate state, local, or utility plan exists. Id. at 9.

2. Commissioners John Ahearne and Commissioner Victor Gilinsky expressed doubt that a utility plan developed without the participation and agreement of the state and local government could be found adequate. As stated by Commissioner Ahearne:

> I don't really at the moment see how at least for myself ... I could agree that a utility plan generated by the utility in which neither the State nor local government agreed, and if both the State and local government said we aren't participating in this planning process, I don't see how we could then say that is an acceptable

offsite plan since the heart of the offsite plan has to be the involvement of the offsite authorities.

Id. at 10.

April, 1983

In April, 1983, the Subcommittee on Nuclear Regulation of the Senate Committee on Environment and Public Works held a hearing on emergency planning around nuclear plants. See Nuclear Emergency Planning Hearing Before the Subcommittee on Nuclear Regulation of the Committee on Environment and Public Works, S. Rep. 98-222, 98th Cong., 1st Sess. (April 15, 1983). The focus of the hearing was the effect that state or local government refusal to develop or implement emergency plans had on the operation of nuclear plants.

Among the witnesses testifying were NRC Chairman Palladino and NRC Commissioners Gilinsky, Ahearne, Roberts, and Asselstine. There was general agreement among the NRC representatives that:

1. Certain states and localities would refuse or be unable to develop or implement emergency plans that met NRC standards. Id. at 5-20.

2. It was unlikely, if not impossible, that a utility plan could be deemed adequate if the state and locality in which the nuclear plant was located refused to cooperate in its implementation. Id. at 5, 7, 8-9, 12. As stated by Chairman Palladino:

> What is the difficulty, I think, with the utility plan is that lacking local participation and State participation, it would be very difficult to get a workable plan.

Id. at 7. Commissioner Gilinsky asserted the same position more strongly:

> A plan, a workable plan, involves a commitment of governmental authorities to carry out certain actions in emergencies, and if there isn't that commitment, there is just no way in the world that a utility plan can compensate for it.

Id. at 12.

3. It was possible that a state or locality that had originally agreed to implement a plan might later change its mind after the nuclear plant was built. Id. at 13, 15.

4. The NRC would very likely be required to terminate the operating license of a nuclear plant as a result of any such a change in position by state or local governments. In this connection, Senator Simpson asked:

> If the NRC were to find that the only way to insure effective implementation of an emergency plan is by the cooperation of either the State or local governments or, certainly, preferably both, would the NRC be prepared to suspend a utility's operating license if, at some point during the lifetime of the facility, a county changes its mind and decides that it would not implement the emergency plan and that the county position is then supported by the State?

Id. at 13. To this question, Commissioner Ahearne responded:

> You asked a question basically: If we conclude that a particular provision is necessary to meet our regulation and that provision can't be met, then would we insist on, our regulation being met? That is really what your question is . . .
>
> Usually in our regulations, whenever we require a provision, we have also a way of waiving, an exemption category. But if we were to conclude that there is no way that you can meet that provision and there is no waiver that can be granted to meet that provision, then we would have the situations where one of our regulations which we require the plant to meet cannot be met, and, then, I think, the Commission would cite it. Since you cannot meet that regulation, which is required, then you can no longer operate.
>
> But that is true no matter what the provision is. In emergency planning, in emergency core cooling, in operators, it is an issue that it is something that if we conclude the regulation cannot be met and it cannot be met, we pull the plug.

Id. Commissioner Asselstine agreed with Commissioner Ahearne's assessment:

> If you had a local government that simply decided it would not continue to participate, and that local government enjoyed the State's support, as long as we continue to require adequate emergency planning o protect the public health and safety, there is the potential that you could end up with a disruption in the operation of plants that met all the other requirements.
>
> I think that potential at least exists, regardless of how far you go in discussing the workability of the utility plan and regardless of the motivation of local government.

Id. at 15.

5. Practically speaking, emergency planning necessitates state and local involvement if it is to be effective; the Commissioners agreed that, by making effective emergency planning a precondition of plant operation, the federal government "[has], in a sense, given [state and local governments] a certain kind of veto power over the operation of the plant." Id. at 16.

6. The loss of electric power resulting from the lack of an adequate emergency plan provides a political incentive to state and local governments to cooperate in the development and implementation of such plans. Id. at 14, 16, 17.

Chairman Palladino stated his opinion that legislation was needed to give FEMA more leverage in negotiating for

and eliciting state and local cooperation. The Chairman did not suggest that Congress had authorized utilities to perform functions not granted them by state law or that Congress had preempted and rendered unenforceable any state law that hindered a utility's offsite planning activities.

May, 1983

The House Committee on Interior and Insular Affairs began work on H.R. 2510, the House version of the fiscal years 1984-85 NRC Authorization Act. Section 6 of the House bill would continue the NRC's authority under P.L. 97-415 to issue an operating license if it determines that an adequate State, local or utility offsite emergency plan exists. In explaining the purpose of this Section, the Committee reported:

> [S]ection 6 allows the Commission to look at a utility plan (as it pertains to offsite emergency preparedness) in making its determination about the adequacy of offsite emergency planning. The provision, however, in no way implies that it is the intent of the Committee that the NRC cite the existence of a utility plan as the basis for licensing a plant when State, county, or local governments believe that emergency planning issues are unresolved. Moreover, section 6 does not authorize the Commission to license a plant when lack of participation in emergency planning by State, county, or local governments means it is unlikely that a utility plan could be successfully carried out.

Authorizing Appropriations to the Nuclear Regulatory Commission in Accordance with Section 261 of the Atomic Energy Act of 1954 and Section 305 of the Energy Reorganization Act of 1974 and for Other Purposes, H.Rep. 98-103, Part 1, 98th Cong., 1st Sess. (May 11, 1983) at 8-9.

July, 1983

H.R. 3133, the fiscal year 1984 Authorization Act for the Department of Housing and Urban Development and the Independent Agencies, including FEMA, was signed into law as P.L. 98-45. The House Committee on Appropriations Report on H.R. 3133 stated that FEMA should review and evaluate offsite emergency plans for commercial nuclear facilities regardless of their governmental or utility origin. The Report also opined that plans should not necessarily be found inadequate because a particular government entity would not participate, "providing a suitable alternative means of implementing the [plan] is available". Department of Housing and Urban Development - Independent Agencies Appropriation Bill, 1984, H.Rep. 98-223, 98th Cong., 1st Sess. (May 24, 1983) at 30-31. Neither the Senate report nor the subsequent Conference report on this bill contained similar statements. See Development of Housing and Urban Development - Independent Agencies Appropriation Bill,

S.Rep. 98-152, 98 Cong., 1st Sess. (June 14, 1983) at 53, Making Appropriations for the Department of Housing and Urban Development and for Sundry Independent Agencies, Boards, Commissions, Corporations, and Offices, H.Rep. 98-246, 98th Cong., 1st Sess. (June 23, 1983) at 12.

September, 1983

The fiscal years 1982-83 NRC Authorization Act, P.L. 97-415, expired on September 30, 1983. To date, Congress has not passed an Authorization Act for fiscal years 1984-85.

February, 1984

On February 23, 1984, the Subcommittee on Nuclear Regulation of the Senate Committee on Environment and Public Works held a hearing on the NRC's budget request for fiscal year 1985. Fiscal Year 1985 Budget Review Hearings Before the Committee on Environment and Public Works, S.Rep. 98-758, 98th Cong., 2d Sess. (February 23, 1984). The testimony regarding offsite emergency preparedness focused on two issues raised in Chairman Palladino's opening remarks:

> Two important new questions are whether State or local governments have an obligation to participate in emergency planning and, in the absence of State or local government participation, whether a licensee has the legal authority to carry out proposed actions that normally would

be handled by State or local governments in an actual emergency.

Id. at 4-5. See also id. at 14, 60.

Addressing each of these issues in turn, Chairman Palladino stated:

> In principle, the Commission believes that failure of a State or local government to plan, or to implement plans, should trigger a requirement that other alternatives for protection of the public be considered. It is therefore important for the subcommittee to preserve the language in last year's authorization bill that permits the Commission to issue an operating license for a nuclear power reactor, if it determines that there exists a State, local or utility plan which provides reasonable assurance that public health and safety is not endangered by operation of the facility.
>
> It is also important for the subcommittee to work with FEMA and NRC to come up with a solution to the problem of legal authority in the absence of State or local government participation. A possible approach would be to make available Federal resources if a Governor requested them.

Id at 5. Chairman Palladino did not suggest that existing federal law provided the requisite authority to utilities to carry out offsite planning; instead, he suggested that federal participation could cure a utility's lack of legal authority.

Indicating that members of the Subcommittee were considering various options, Senator Simpson asked each of the Commissioners whether they favored "some form of legislation to provide for a Federal response in the circumstance where State or local government refuses to participate". Id. at 13:

1. Chairman Palladino and Commissioner Bernthal indicated that they would endorse some type of legislation providing for federal involvement in such a case. Id at 14-15, 29.

2. Commissioners Gilinsky, Asselstine and Roberts indicated that they did not favor such legislation. Each expressed doubt that the federal government could respond to such an emergency effectively. Commissioners Asselstine and Roberts also indicated their concerns that the existence of a federal response capability would discourage State and local efforts to upgrade their own offsite emergency preparedness. Id. at 14-16.

To date, Congress has not provided utilities with the legal authority to implement offsite emergency plans in the absence of state or local cooperation.

June, 1984

On June 29, 1984, the Senate Committee on Environment and Public Works recommended the passage of S. 2846, a proposed NRC Authorization Act for fiscal years 1984 and 1985. Section 108 of the bill, concerning offsite emergency plans, contains the same language as P.L. 97-415. In the Report accompanying the Bill, the Committee stated that:

1. State and local emergency preparedness is improving in most areas;

2. Certain states and localities continue to refuse to participate in emergency planning;

3. The purpose of Section 108 is "to reconfirm the authority of the NRC and FEMA to evaluate an emergency response plan submitted by an applicant or licensee ...." Authorizing Appropriations to the Nuclear Regulatory Commission, S.Rep. 98-456, 98th Cong., 2d Sess. (June 14, 1984), at 13-15.

Included in the Supplementary Views section of the Report is an individual statement by Senator Simpson expressing his personal opinion as to the history and purpose of the offsite emergency provisions of the 1980, 1982-83, and proposed 1984-85 NRC Authorization Acts. Nothing in the Committee

Report itself acknowledges or adopts Senator Simpson's account or interpretation of such Congressional actions regarding emergency planning. No other Committee member joined Senator Simpson's statement.

II. REGULATORY HISTORY

Pre-Three Mile Island

Prior to the nuclear accident at Three Mile Island in March, 1979:

1. There was no federal regulation requiring the existence of an emergency response plan as a condition for plant licensing or operation;

2. There was no federal regulation requiring states or localities to participate in emergency planning activities;

3. The NRC was actually engaged in encouraging and advising voluntary state and local efforts concerning emergency planning.

July, 1979

On July 17, 1979, the NRC issued an advance notice of proposed rulemaking on the subject of state and local emergency response plans. 44 Fed. Reg. 41,483 (July 17, 1979). Among the issues on which the NRC requested comments was whether NRC concurrence in state and local emergency response plans should be a requirement for licensing and operation of a nuclear plant.

December, 1979

On December 19, 1979, the NRC published a proposed rule to require NRC concurrence in state and local emergency response plans as a condition of the licensing and operation of a nuclear plant. 44 Fed. Reg. 75,167 (December 19, 1979). In its discussion of the proposed rule, the NRC stated that:

1. State and local governments have "the primary responsibility under their constitutional police powers to protect their public . . . ." Id. at 75,169;

2. The NRC "recognize[d] that it cannot direct any government unit to prepare a plan, much less compel its adequacy". Id.;

3. The NRC "can condition a license on the existence of adequate plans." Id.

August, 1980

On August 19, 1980, the NRC issued a final rule on emergency planning. 45 Fed. Reg. 55,402 (August 19, 1980). The rule:

1. Conditioned the licensing of new nuclear plants and the continued operation of existing nuclear plants on the existence of on-site and offsite emergency preparedness plans which "provide[d] reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency." Id. at 55,403.

2. Stated that FEMA would conduct the review of offsite emergency plans to determine whether such plans were adequate and could be implemented; FEMA would then provide its findings to the NRC for final determination.

In its explanatory comments, the NRC stated:

> The Commission recognizes there is a possibility that the operation of some reactors may be affected by this rule through inaction of state and local governments or an inability to comply with these rules. The Commission believes that the potential restriction of plan operation by state and

> local officials is not significantly different in kind or effect from the means already available under existing law to prohibit reactor operation, such as zoning, and land use laws, certification of public convenience and necessity, rate financial and state considerations . . .

Id. at 55,404. The Commission also acknowledged that it had received comments that, through the rule, the "NRC [was] seen as in effect giving state and local governments veto over the operation of nuclear plants." Id. at 55,405.

Attachment B

SUFFOLK COUNTY AND STATE OF NEW YORK
STATEMENT OF MATERIAL FACTS
AS TO WHICH A GENUINE DISPUTE EXISTS

1. Whether if Shoreham were to be operated and an emergency occurred, the State or County would respond to the emergency. Affidavit of Fabian G. Palomino, ¶ 8 and Press Release attached thereto; County Legislative Resolutions 456-1982 and 111-1983; Roberts Affidavit, ¶ 3 and Statement of County Executive Peter Cohalan attached thereto.

2. Assuming arguendo that if Shoreham were operated and an emergency occurred and there was some State or County response thereto, whether that "response" would be adequate or whether, for reasons such as lack of training, that "response" would need to be discounted in whole or in part. Roberts Affidavit, ¶ 4.

3. Whether the State of New York or Suffolk County would implement the LILCO Transition Plan or any portion thereof. Palomino Affidavit, ¶ 8 and Press Release attached thereto; County Legislative Resolutions 456-1982 and 111-1983: Roberts Affidavit, ¶¶ 3, 5-11, and Statement of County Executive Peter Cohalan attached thereto.

4. Whether an essential part of emergency preparedness for a Shoreham emergency is the existence of the capability to

implement actions such as those set forth in Contentions 1-4, 9 and 10 when and as the need arises. Roberts Affidavit, ¶¶ 13, 15, 16, 18.

5. Whether under the LILCO Plan, State and County personnel would communicate with LILCO and LERO using existing systems already installed. Roberts Affidavit, ¶ 5.

6. Whether State and County officials would use space in the Emergency Operations Facility, the Emergency Operation Center, and the Emergency News Cneter and whether the County Executive or his designated respresentative would act to implement or participate in the LILCO Plan at all. Roberts Affidavit, ¶¶ 6-7 and Statement of County Executive Peter Cohalan attached thereto; Palomino Affidavit, ¶ 8 and Press Release attached thereto.

7. Whether the Director of Local Response, who is instructed by the LILCC Plan to take into account in making any protective action recommendations advice that may be received from local and State government officials, would in fact receive any advice from local and State government officials. Roberts Affidavit, ¶ 8 and Statement of County Executive Peter Cohalan attached thereto; Palomino Affidavit, ¶ 8 and Press Release attached thereto.

8. Whether LERO traffic guides are adequately trained to assist police should they participate in an emergency and whether police would accept LERO traffic guide assistance if offerred and would implement LILCO's Plan. Roberts Affidavit, ¶¶ 9-10.

9. Whether, assuming arguendo, that the State of New York and the County of Suffolk participate in an emergency response, the LERO organization will coordinate its activities with State and County officials. Roberts Affidavit, ¶ 11 and Statement of County Executive Peter Cohalan attached thereto; Palomino Affidavit, ¶ 8 and Press Release attached thereto.

10. Whether LILCO could implement an "uncontrolled" evacuation, using no traffic guides, signs, cones, or channelization, with an increase of evacuation times of less than 1 hour 35 minutes in normal conditions and 1 hour 55 minutes in inclement weather. Roberts Affidavit, ¶¶ 12-13, 15-18, 23, 26.

11. Whether LILCO's evacuation time estimates, including the "uncontrolled" evacuation time estimates, are comparable to estimates for other nuclear power plants. Roberts Affidavit, ¶¶ 14, 23.

12. Whether an "uncontrolled" evacuation would result in an adequate response under the LILCO Plan. Roberts Affidavit, ¶¶ 12-13, 15-18, 26.

13. Whether LILCO employees will be "directing traffic," even if that phrase does not mean compelling people to move in a particular direction. Roberts Affidavit, ¶¶ 19, 20, 22, 31-32.

14. Whether LERO traffic guides who will be stationed at key intersections to facilitate the movement of traffic by using hand and arm signals, cones, parked vehicles, and flashing lights, will restrict traffic from traveling in a particular direction. Roberts Affidavit, ¶¶ 19-20, 22, 31-32.

15. Whether the actions of LERO's traffic guides will force anyone to turn in a particular direction should they choose not to do so. Roberts Affidavit, ¶¶ 19-20, 22, 31-32.

16. Whether the controlled evacuation contemplated under the LILCO Plan results 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. Roberts Affidavit, ¶¶ 15, 17, 23.

17. Whether traffic guides are adequately trained to explain to the police the situation existing at the time of an emergency, to turn over posts for facilitating traffic to the police, and to remain as assistants if necessary in coordinating the evacuation effort. Roberts Affidavit, ¶ 9.

18. Whether the controlled evacuation plan 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. Roberts Affidavit, ¶¶ 12-13, 15-18, 23, 26.

19. Whether what is referred to in the record as the "uncontrolled" evacuation time estimate is reasonable when compared to time estimates at other nuclear power plant sites, and meets the accuracy standards of NUREG-0654. Roberts Affidavit, ¶ 14.

20. Whether trail blazer signs are located along every major road in the EPZ. Roberts Affidavit, ¶ 25.

21. Whether the evacuation time estimates for an uncontrolled evacuation would be altered were a scheme to be developed that did not include traffic signs. Roberts Affidavit, ¶ 26.

22. Whether the LILCO Plan would be adequate if there were no means to remove stalled cars and other obstacles from roadways. Roberts Affidavit, ¶¶ 13, 30.

23. Whether the LILCO Plan, assuming arguendo it is implementable, provides adequately for removal of roadway obstacles. Roberts Affidavit, ¶ 30; Monteith, et al., ff. Tr. 6868, at 7, 14-15; Tr. 6879-80, 6910-11, 6930-34, 6941 (McGuire, Michel, Monteith).

24. Whether Connecticut has agreed to implement the LILCO Plan. Roberts Affidavit, ¶ 27.

25. Whether protective action recommendations for the 50-mile ingestion exposure pathway would need to be made immediately following the declaration of an emergency. Roberts Affidavit, ¶ 28.

26. Whether following an emergency at Shoreham, any State or local governmental entities would step forward to study the situation and to determine what actions should be taken to reenter the area affected and recover it if necessary. Roberts Affidavit, ¶ 29.

27. Whether dispensing fuel from tank trucks is required in order to have adequate protective actions. Roberts Affidavit, ¶ 30.

28. Whether LILCO employees assigned to the EPZ perimeter to discourage people from entering the EPZ through the use of hand and arm movements and traffic cones will be directing traffic. Roberts Affidavit, ¶ 31.

29. Whether LERO employees are authorized to channel traffic and the stream of people who may be arriving at relocation centers for assistance. Roberts Affidavit, ¶ 32.

Attachment C

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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

AFFIDAVIT OF RICHARD C. ROBERTS

Richard C. Roberts, being duly sworn, does say under oath the following:

1. My name is Richard C. Roberts. I am a Deputy Chief Inspector with the Suffolk County Police Department.

2. I am familiar with the LILCO Transition Plan, the radiological emergency response plan which LILCO proposes to implement in the event of a radiological emergency at Shoreham. I have appeared as a witness on behalf of Suffolk County in the ongoing Licensing Board proceeding concerning the adequacy of the LILCO Transition Plan.

3. Suffolk County Executive Peter Cohalan has stated that in the event of a radiological emergency at Shoreham, "[t]he County could not implement a response to a Shoreham accident because County law -- particularly Resolution Nos. 262-1982, 456-1982, and 111-1983 -- prohibits that." Statement of Suffolk County Executive Peter F. Cohalan Before the Governor's Shoreham Commission, September 30, 1983, at 9 (attached hereto). In addition, County Executive Cohalan stated that there is no other government in a position to respond and that the State government does not have a prompt response capability. Id. at 10.

4. Assuming arguendo that there could be some sort of ad hoc response by Suffolk County personnel to a Shoreham radiological emergency. Such personnel would not have been trained how to respond to a radiological emergency at Shoreham. Accordingly, it is my opinion, based on my experience in responding to emergency situations, that their response would be inadequate and could not be counted on to provide effective preparedness.

5. LILCO has asserted that under the LILCO Transition Plan, State and County personnel could communicate with LILCO and LERO using existing systems which are already installed.

LILCO and LERO have no dedicated emergency planning communications system link with County offices. There is no plan and there are no procedures for Suffolk County personnel to communicate with LILCO or LERO using any communication system in the event of a radiological emergency at Shoreham.

6. LILCO has stated that space exists at the Emergency Operations Facility, the Emergency Operations Center, and the Emergency News Center for use by State and County officials. As noted by County Executive Cohalan, the County could not implement a response to a Shoreham emergency and the State has no prompt response capability. See Cohalan Statement attached hereto.

7. LILCO has stated that the Transition Plan provides for the incorporation of the County Executive or his designated representative in responding to an emergency should that official choose to participate. As noted in the attached statement of County Executive Cohalan, "[t]he County could not implement a response to a Shoreham accident because County law -- particularly Resolution Nos. 262-1982, 456-1982, and 111-1983 -- prohibits that."

8. LILCO has stated that the LERO Director of Local Response is to take into account in making any protective action

recommendations advice that may be received from local and State government officials. As noted in the attached statement of County Executive Cohalan, "[t]he County could not implement a response to a Shoreham accident because County law -- particularly Resolution Nos. 262-1982, 456-1982, and 111-1983 -- prohibits that."

9. LILCO has stated that its LERO traffic guides are trained to assist police should the police participate in an emergency. LILCO also has asserted that the Transition Plan provides for the incorporation by traffic guides trained under the Plan of any police assistance that is offered during an emergency. As noted in County Executive Cohalan's attached statement, the County could not respond. Assuming arguendo that Suffolk County's police did participate in response to an emergency, they would not rely upon the assistance or advice of LERO traffic guides whom they consider inexperienced and who would be lacking in essential training. Roberts, et al., ff. Tr. 2260, at 39-44.

10. LILCO also has asserted that 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 to the police, and to remain as assistants if necessary in

coordinating the evacuation effort. To repeat, County law bars the County from implementing any response to a Shoreham emergency. See Cohalan Statement attached hereto. Assuming arguendo that the police would respond to a Shoreham emergency, the police would not rely on inexperienced and inadequately trained LERO traffic guides for assessment or other purposes.

11. LILCO has asserted that if the State of New York and Suffolk County participate in an emergency response, the LERO organization will coordinate its activities with State and County officials. The attached Cohalan statement states that the County could not implement a response and the State has no resources for a prompt response. See Cohalan Statement at 9-10.

12. LILCO has asserted that it could implement an uncontrolled evacuation, using no traffic guides, signs, cones, channelization or other traffic control devices, with an increase of evacuation times of less than one hour 35 minutes in normal conditions and one hour 55 minutes in inclement weather. I disagree. LERO does not have the capacity to implement any kind of effective evacuation of the EPZ or portions thereof due to its lack of experience in emergency evacuation operations. The evacuation time estimates proposed by LILCO are far too

low, being based on unrealistic assumptions, particularly regarding the likely congestion on the limited Suffolk County road network. Pigozzi, ff. Tr. 2909 (entire testimony and especially pages 37-39); Herr, ff. Tr. 2909, at 8-10; Polk, ff. Tr. 2909, at 3-17; Saegert, ff. Tr. 2259, at 8-10; Roberts, et al., ff. Tr. 2260, at 8 - conclusion; Hartgen, et al., ff. Tr. 3695, at 5-19. Further, the County's witnesses have specifically contested the accuracy of LILCO's so-called "uncontrolled" time estimates. Pigozzi, ff. Tr. 2909, at 37-38.

13. In my opinion, for an "uncontrolled" evacuation to have any potential to succeed, an emergency response organization would need to have traffic guides, tow trucks, etc. in place on evacuation routes during the evacuation effort so that they could respond to developing situations as the need arose. This was a concept of "uncontrolled" evacuation that the SCPD suggested during the County's planning effort. Thus, the evacuation effort would be closely supported by trained and capable response personnel to assist evacuees if, for istance, severe congestion developed at a particular location. LILCO's concept of an uncontrolled evacuation is drastically different and completely inadequate since LERO would have no capability for any response to the needs of the evacuating public when traffic congestion and similar events occurred during an emergency.

14. LILCO suggests that its evacuation time estimates, including those for an uncontrolled evacuation, are reasonable when compared to time estimates at other nuclear power plant sites and that they meet the accuracy standards of NUREG-0654. With respect to the accuracy assertion, I dispute that LILCO's time estimates are accurate. Herr, ff. Tr. 2909; Polk, ff. 2909; Pigozzi, ff. Tr. 2909; Roberts, et al., ff. Tr. 2260. Given the inaccuracy of the LILCO estimates, there is no basis to compare these estimates with those at other nuclear power plants.

15. LILCO asserts that the controlled evacuation plan used in the LILCO Transition Plan could be modified to eliminate traffic guidance completely, with a resulting increase in evacuation time estimates of about 1-1/2 hours. I disagree. If there were no traffic guides and if LILCO/LERO were in charge of the evacuation effort, it is my opinion that chaotic conditions would result. This is because LILCO does not have the institutional capabilities or experience to implement an adequate response to a radiological emergency, and the public will realize this and will react accordingly. If chaos resulted, the evacuation would take considerably longer. Further, without having the capability and authority to institute traffic control methods, there would be no effective means to

respond to the chaos that would result. This would mean that evacuees would be stranded in traffic and likely be exposed to health threatening radiation.

16. In the event of an evacuation of all or portions of the EPZ, whether under controlled or uncontrolled conditions, LILCO would need to have the capability to institute effective traffic control measures in order to have adequate preparedness. During the course of an emergency, there likely will be severe traffic congestion and also accidents. Unless the capability exists to deal effectively with such traffic contingencies, it is my opinion that no effective preparedness can exist.

17. The evacuation shadow phenomenon is expected to result in a large number of voluntary evacuees in the event of a Shoreham emergency. In order to cope with the traffic congestion caused by these evacuees (who will be in addition to the 100,000 - 150,000 evacuees from within the EPZ), there must be a capability to deal with the traffic control problems which are certain to ensue, including traffic jams, traffic going the wrong way, and roadway impediments. LILCO has inadequately considered the evacuation shadow phenomenon. Polk, ff. Tr. 2909, at 7-10; Pigozzi, ff. Tr. 2909, at 45-49.

18. An uncontrolled evacuation would not result in adequate response under the LILCO Plan. An essential attribute of adequate preparedness to respond to a radiological emergency at Shoreham is the capability to implement rapid and effective actions to assist persons attempting to leave the EPZ. Such capability is essential because the precise way an emergency may develop cannot be predicted in advance. Thus, for example, if a serious traffic tie-up occurs, it is essential that there be a capability to assist in alleviation of the resulting congestion. If LILCO lacks legal authority to implement the traffic and security-related functions contested in Contentions 1-4, 9, and 10, then there will exist no capability to take necessary actions to assist persons ordered to leave the EPZ.

19. I have reviewed the LILCO emergency plan and conclude that LERO employees, chiefly the traffic guides, will in fact will be directing traffic. One does not have to "compel" or "require" people to move in a particular direction in order to be directing traffic. The traffic guides, using hand signals and other directional devices, including parked vehicles blocking lanes, will be directing and attempting to affect the driving patterns of Suffolk County residents. This constitutes traffic direction in my opinion. See Tr. 3468-69 (Urbanik) (traffic strategy to block lanes of the LIE with vehicles to

create congestion upstream, to attempt to preclude congestion downstream).

20. Under LILCO's plan, traffic guides are to be stationed at key intersections to facilitate the movement of traffic by using hand and arm signals, traffic cones, parked vehicles and flashing lights and thus to discourage travel in certain directions. LILCO has asserted that traffic will not be restricted from traveling in a particular direction. However, in my experience as a police officer, the stationing of traffic guides using hand and arm signals and other devices (such as parked vehicles and flashing lights) will restrict traffic from traveling in particular directions and will constitute the direction of traffic, something which I, as a police officer, do not believe LILCO is permitted to do.

21. The LILCO assumption regarding the likely number of accidents during an evacuation is too low. Herr, ff. Tr. 2909, at 39-41.

22. LILCO has asserted that it will not force anyone to turn in a particular direction should they choose not to do so. However, LILCO intends to convert a two mile stretch of at least one two-way road to a one-way road. LILCO Transition Plan, Appendix A, Table XIII. LILCO will also be using

channeling techniques and concurrent continuous flow treatment, methods of traffic control which will likely require drivers to go in particular directions. Thus, LILCO traffic guides will be forcing persons to turn in a particular direction. In addition, under LILCO's Plan, LILCO traffic guides will use cones, hand signals, arm movements, parked vehicles and flashing lights to encourage the movement of traffic out of the EPZ. Such actions, taken by persons standing in or next to the roadway, will constitute the direction of traffic.

23. LILCO has asserted that the controlled evacuation contemplated under the LILCO Plan results in an evacuation time estimate of four hours and 55 minutes for evacuation of the entire 10-mile EPZ in summer and good weather and six hours in inclement weather. The time estimate is substantially inaccurate, for reasons that are described in the expert testimony of Suffolk County and New York State Department of Transportation witnesses. See also ¶ 12, supra for citations.

24. LILCO has stated that whether a controlled or uncontrolled evacuation time estimate is used as the basis for protective action recommendations, LILCO will make the choice between evacuation and sheltering based on the action that affords the greatest dose savings. This may be true, but these

recommendations will be based on a fundamentally inaccurate proposition: namely that LILCO can implement either a controlled or uncontrolled evacuation. LILCO does not have that capability. LILCO may believe that it has that capability and thus recommend evacuation, resulting in people being stranded in traffic and potentially exposed to health threatening radiation. See Pigozzi, ff. Tr. 2909, at 7-8.

25. LILCO has stated that trail blazer signs are located along every major road in the EPZ. In fact, these signs have not been located along any major road in the EPZ.

26. LILCO has suggested that the evacuation time estimates for an uncontrolled evacuation would not be altered if there are no trail blazer signs. I disagree. Based on my experience and knowledge of the roads in Suffolk County, I believe that signs providing clear guidance in an evacuation scenario would be helpful to drivers attempting to escape from the EPZ. If there were no trail blazer signs, evacuation times would increase.

27. LILCO has asserted that the State of Connecticut has agreed to implement protective action recommendations in its State when notified by LILCO of an emergency at Shoreham.

However, Connecticut has not agreed to implement the LILCO Plan. Cordaro and Renz, ff. Tr. 13,858; Tr. 13,876-77 (Renz); Tr. 13,877, 13,878 (Cordaro).

28. LILCO has asserted that protective action recommendations for the 50-mile EPZ need not be made immediately following the declaration of an emergency. While this may be true in some instances, a fast developing emergency may require protective actions in close-in portions of the 50-mile EPZ relatively soon after declaration of an emergency.

29. LILCO has stated that following an emergency at a nuclear plant, many governmental entities will step forward to study the situation and to determine what actions should be taken to reenter the area affected and to recover it if necessary. This may be the general rule, but there is no evidence that either the State of New York or Suffolk County would in fact undertake recovery and reentry actions as suggested by LILCO. Further, Executive Cohalan has stated that the County could not implement a response. See attached Cohalan Statement.

30. LILCO has asserted that dispensing fuel from tank trucks is not required under the NRC emergency planning regulations or even suggested by NUREG-0654. NUREG-0654, Section

II.J.10.K, requires that LILCO have a capability to remove road obstacles. If fuel trucks were not available to dispense fuel to cars running out of gas, these cars would be obstacles and thus there would not be compliance with NUREG-0654. Further, it is not enough just to push the disabled cars to the side of the road as LILCO has suggested. In my experience as a police officer, even cars which are pushed to the side of the road after an accident or after suffering a breakdown or running out of gas do constitute road obstacles, causing people to gawk and slow down and likely to cause traffic jams and sometimes accidents as well. Tr. 3418-19 (Michel). It is estimated that 277 cars will run out of gas in a 10 mile EPZ evacuation; the presence of so many disabled cars will impede the evacuation. Polk, ff. Tr. 2909, at 13-17. See also Roberts, et al., ff. Tr. 2260, at 55-59 (discussing vehicle breakdowns and effects on traffic movement).

31. LILCO has stated that its employees will be assigned to the EPZ perimeter to discourage people from entering the EPZ through the use of hand and arm movements and traffic cones. Such action, in my opinion as a police officer, constitutes the direction of traffic for which LILCO lacks legal authority. Further, if adequate EPZ control is not exercised, additional congestion will result and evacuation times will be increased. Roberts, et al., ff. Tr. 2260, at 67.

32. LILCO has stated that its employees will be channeling traffic and the stream of people who may be arriving at relocation centers for assistance. In my opinion as a police officer, such channeling of traffic constitutes the direction of traffic and LILCO is not authorized to perform such functions.

_____
Richard C. Roberts

Sworn to this ___ day of September, 1984.

_____
Notary Public

ATTACHMENT D

9/12/8

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

MARIO M. CUOMO, Plaintiff, -against- LONG ISLAND LIGHTING COMPANY, Defendant.	
COUNTY OF SUFFOLK, Plaintiff, -against- LONG ISLAND LIGHTING COMPANY, Defendant.	Consolidated Index No. 84-4615
TOWN OF SOUTHAMPTON, Plaintiff, -against- LONG ISLAND LIGHTING COMPANY, Defendant.	

AFFIDAVIT OF FABIAN G. PALOMINO IN OPPOSITION TO MOTION TO DISMISS AND IN SUPPORT OF PLAINTIFF'S CROSS MOTION FOR SUMMARY JUDGMENT

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

FABIAN G. PALOMINO, being duly sworn, deposes and says:-

1. I am Special Counsel to Governor Mario M. Cuomo, the plaintiff in the first-captioned action. As such I have exclusively represented him in this action until recently when the Attorney General, the Honorable Robert Abrams, became co-counsel. I am fully familiar with the facts and circumstances of this case, the prior proceedings had herein, and with the proceedings before the Nuclear Regulatory Commission and its Licensing and Appeals Boards in the efforts of LILCO to license its Shoreham nuclear facility. I make this affidavit in opposition to the defendant LILCO's motion to dismiss this action and in support of plaintiffs' cross-motion for summary judgment.

LILCO'S OFF-SITE EMERGENCY EVACUATION PLAN

2. In February, 1983, after considerable study, involving much expert testimony, visits to Three Mile Island, and extensive public hearings, the Suffolk County Legislature voted not to adopt the draft radiological emergency response plan or any other radiological emergency response plan for LILCO's Shoreham nuclear facility after it determined that local conditions on Long Island precluded the development of a radiological emergency response plan for Shoreham that would provide adequate protection for the health, welfare and safety of the inhabitants of Suffolk County.

3. Under the regulations of the NRC, in order to obtain a license to operate its Shoreham Nuclear Facility, LILCO had the burden of establishing that this plan was adequate, implementable, and that LILCO had the legal authority to implement it as proposed.

To satisfy this latter requirement, when it filed its plan, LILCO asserted that:

"Nothing in New York State Law prevents the utility from performing the necessary functions to protect the public." To the contrary, Article 2b of the New York State Executive Law, Section 20.1.3, makes it the policy of the State that State and local plans, organization arrangements, and response capability "be the most effective that current circumstances and existing resources allow"."

4. As a result of Suffolk County's refusal to participate in the offsite emergency evacuation plan prepared and submitted by LILCO, for Shoreham, Goverror Cuomo appointed a Commission, called the Marburger Commission, to report to him on the proposed LILCO plan. This Commission was comprised of a very diverse membership.The Commission held extensive hearings over many months in which Governor Cuomo actually participated.

5. On June 23, 1983, after reviewing the LILCO offsite emergency transition plan, FEMA issued a report to the NRC. In the covering memorandum for that report, FEMA found that the LILCO transition plan did not comply with NUREG-0654/FEMA-REP-1, Rev. 1 in 34 respects. The report then went on to state:

"There are two preconditions, identified below, that need to be met for a FEMA finding as to whether the plan is capable of being implemented and whether LILCO has the ability to implement the plan.

(1) A determination of whether LILCO has the appropriate legal authority to assume management and implementation of an offsite emergency response plan.

(2) A demonstration through a full-scale exercise that LILCO has the ability to implement an offsite plan that has been found to be adequate."

A copy of that report is annexed hereto as Exhibit A.

6. In an Order dated July 20, 1983, by the Atomic Safety and Licensing Board assigned to determine the adequacy and implementability of the LILCO transition plan, that Board expressly invited the State of New York to fully participate in that proceeding as an interested State. Up to that time, the State of New York had appeared in the LILCO licensing proceeding, but only for the limited purpose of tracking the various aspects of its progress, but had not participated in the proceedings.

7. By a letter dated August 29, 1983, from the Executive Director of FEMA to the Executive Director for Operations of the NRC, Jeffrey S. Bragg, noted:

"I also want to emphasize again that there is a real need to resolve the issue of LILCO's legal authority to act in accordance with the plan either in an exercise or during an actual emergency. This problem is one that can be resolved by the State of New York."

9. On or about December 16, 1983, the Marburger Commission issued its report. As a result of his participation in the hearings and the findings in the

Marburger report, Governor Cuomo decided to oppos the licensing of the Shoreham nuclear facility. On December 20, 1983, Governor Cuomo issued a press release stating his reasons for opposing the licensing of that facility. A copy of that press release in its entirety is annexed hereto as Exhibit B. In that statement, the Governor made it clear that the State would oppose any granting of a license to operate Shoreham predicated solely and entirely on the LILCO developed and LILCO implemented plan for evacuation. He noted that the County of Suffolk had said evacuation is impossible and had submitted no plan. He observed that the State did not have the resources by itself to supply the wherewithall that would be required. He further noted that the State opposed the notion that the LILCO plan is approveable because its employees lack the capability and the legal power to implement it. He further observed that even in conjunction with the County's active participation that the State might not even be able to give assurance of evacuation. The entire thrust of that 4-page single spaced press release was that the plant should not be opened. He pointed out that it was increasingly clear that LILCO lacked the experience and skill required to build the plant. He briefly stated in passing that if the plant were to be operated and a misadventure were to occur, both the State and the County would help to the extent possible. He immediately followed that with the sentence: "However, governments

obligation to respond to a misadventure should not be used as an excuse for inviting peril." In context, this passing statement was intended to mean that the State would not be in a position to implement LILCO's transition plan if an emergency would occur. It was a clear recognition that since the State and County were not participating in the implementation of that plan, any assistance offered would not be structured, or adequate to assist in the evacuation. On the contrary, it would be limited to whatever state personnel and equipment were locally available and could respond in the event of such a misadventure. Indeed, there would not even be ready communication with LILCO in the event of such a misadventure because the telephones which were connected to the Shoreham facility have been removed and placed in storage.

9. In response to the invitation to the State to fully participate in the proceedings for the approval of LILCO's offsite emergency evacuation plan extended by that licensing board, your deponent appeared at its resumed hearing which commenced on January 17, 1984. At the outset of his appearance, your deponent read into the record a statement on behalf of the State of New York stating that LILCO lacked the legal authority to implement that plan and if that Licensing Board sought to resolve such question of law, it would violate the rights reserved to the State of New York under the 10th Amendment to the Federal Constitution.

The presiding Judge at that hearing, Judge Laurensen, said he would defer further consideration of that question until that phase of the hearing was to recess.

10. That phase of the hearing terminated on January 27, 1984. Prior to recessing, the presiding justice, Judge Laurensen, then turned to the question of LILCO's lack of power to implement its plan. On behalf of the State of New York, your deponent requested the licensing board to dismiss the proceeding on the grounds that LILCO had the burden of proving it had the legal authority to implement its plan, and had failed to do so. Your deponent contended that since the sovereign State of New York had declared LILCO did not have the power under New York Law to implement its transition plan, and since the Licensing Board was without power to rule otherwise, the Application should be dismissed. The County joined in that position and suggested that if the Board was not willing to so rule that the question should be certified to the Commission to let the commission decide it. Judge Laurenson expressed the view that it was an area where a State Court would be able to dispose of the legal contentions and suggested that one or more of the parties to the matter go to State Court to obtain a ruling.

11. On or about the 8th day of March, 1984, New York State and Suffolk County commenced the within action.

12. By a letter dated May 7, 1984, Donald Hodel, the Federal Secretary of Energy, requested that Governor Cuomo have the State of New York assist the Department of Energy

and FEMA in a "full-field exercise of the utility's (LILCO's) plan". In a letter dated May 9, 1984, Governor Cuomo rejected that request. A copy of that letter is annexed hereto as Exhibit C. It should be noted that in that letter, Louis O'Guiffrida, Director of FEMA wrote on December 28, 1983:

"The federal government is not in a position in terms of policy, authority, or resources to assume the responsibilities of State and local governments for protecting the health and safety of citizens in the event of an accident at a commercial nuclear power facility." (emphasis added)

FABIAN G. PALOMINO

Sworn to before me
this 19th day of September, 1984

Notary Public

HELEN A. KLOMPUS
Notary Public, State of New York
No. 01 [illegible]
Qualified in New York County
Commission Expires March 30, 1985

STATE OF NEW YORK
EXECUTIVE CHAMBER
MARIO M. CUOMO, GOVERNOR

Press Office
212-587-2126
518-474-8418

FOR RELEASE:
IMMEDIATE, TUESDAY
DECEMBER 20, 1983

STATEMENT BY GOVERNOR MARIO M. CUOMO

Tomorrow, the State will submit the attached brief to the Atomic Safety and Licensing Appeal Board to contest the conclusion that permission to load low power fuel may be granted, even without an adequate and implementable evacuation plan and despite the view of the Licensing Board, that there is no "reasonable assurance" that an emergency off-site preparedness plan will ever be approved.

In the near future the State will also participate in the Atomic Safety and Licensing Board hearing on off-site emergency planning issues. The State will oppose any grant of a license 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.

A brief review of some of the underlying circumstances makes the significance of these positions clear.

The Federal government has exclusive jurisdiction over the question whether Shoreham is safe to operate and can therefore be licensed to open. The applicable regulations require an evacuation plan that is implementable and that will assure the quick and effective movement of the population out of the zone of danger in the event of an accident that threatens to increase substantially the radiation normally emitted by a nuclear power plant.

The adoption of the Federal evacuation regulations was based on the reality that even under ideal circumstances, the operation of a nuclear power plant poses a clear and always present danger of a radiological accident. Nowhere do they suggest that the efficacy of evacuation preparations should be a relative requirement, affected by economic or fiscal factors. The law -- as it should -- puts safety first and does not allow financial considerations to compromise what is irreplaceable -- life and health.

No evacuation plan has yet been certified as adequate and implementable.

The County of Suffolk has said evacuation is impossible and therefore it has submitted no plan. The State does not have the resources, by itself, to supply the wherewithall that would be required. LILCO has offered a plan, which would be implemented by its employees, by which it would attend to evacuation by itself. The State opposes the notion that this LILCO plan is approvable. Its employees lack the capability and the legal power to implement it. Indeed, even in conjunction with the County's active participation, the State might not be able to give reasonable assurance of evacuation.

Of course, if the plant were to be operated and a misadventure were to occur, both the State and the County would help to the extent possible; no one suggests otherwise. However, government's obligation to respond to a catastrophe should not be used as an excuse for inviting the peril.

Despite all of this, the Nuclear Regulatory Commission has ruled that its ASLB can approve a request for low power loading without any certified evacuation plan being in existence. The brief to be submitted by New York tomorrow is part of the appeal from that decision.

If the State is successful in its opposition, the Shoreham plant will not be allowed to open because it has not met the basic safety requirements set out in the Federal law and regulations. Because the health and safety of our people must come first, we will persist in these objections until we have succeeded or exhausted our legal opportunities.

It should be noted that my strong feeling as to the inadequacy of the evacuation plans and forces now available prompted me to ask Congress for legislation that would supply us with the resources to make evacuation at all the State's nuclear facilities more reasonably achievable. For reasons I do not fully understand, that legislation has not been vigorously supported by the editorial boards and business interests that advocate LILCO's desire to open Shoreham despite all its obvious dangers.

Whatever occurs with the two pending proceedings involving the evacuation plans, it is clear that Shoreham is a long way from opening. Moreover, it is increasingly clear that LILCO lacked the experience and skill required to build a plant like this one. LILCO's construction problems may never be solved. It is also possible -- some say likely -- that even if Shoreham is licensed, its operations will be interrupted frequently with increasing costs to rate payers. That would mean that the people would have to pay the price for LILCO's deficiencies repeatedly and extensively for years to come.

Notwithstanding the complexity surrounding this situation and the "inhomogeneous" quality of its report, some things were not substantially disputed by the Marburger panel. Among them were the following:

1. The Shoreham project is a mistake which was made years ago and for which we are now being asked to pay. It is probable that Shoreham would not be acceptable as a licensable site under current federal siting practices. Free to choose, no one would build it again.

2. Lilco's lack of training, preparation, and credibility with respect to the construction and management of the plant is amply established. Lilco must be held responsible for all costs associated with these inadequacies.

3. The decisions already made by the Governor are reasonable ones. These actions are specifically: my decision not to impose a State plan upon Suffolk County; my decision to oppose the Lilco plan; my decision to oppose low power loading and my commitment to deal with the economic impact that results from this 10 year old debacle, whether it goes on line or not.

No one can reasonably dispute the primacy of the issue of safety here. The only substantial reason being offered for opening the plant in disregard of strict application of the evacuation requirements is the desire to avoid the potential increase in rates that might result from the plant's not going on line.

I believe that although the plant was not the idea or the error of this administration, we have the obligation now to do everything we can to minimize any negative economic consequences that result from the Shoreham mistake. Accordingly, several months ago I assembled a special cabinet level working group headed by my Secretary, Michael

DelGiudice, with instructions to develop a series of short term, intermediate and long term actions to mitigate the impact on rate payers and the Long Island community whether the plant opens or not. They have already consulted with some of the best minds available on ideas to deal with the financial, economic, energy supply and other implications deriving from this project. They have talked with investment bankers; special legal counsel; financial market analysts; SEO and NYSERDA; the Power Authority, Hydro Quebec, and others, and are now in the process of formulating a series of options for my consideration. At an appropriate point, I will discuss my conclusions with the legislative leaders as well.

My preliminary view of the work being done satisfies me that we will be able to mitigate substantially the financial impacts created by what has been termed by one newspaper as an "epic miscalculation."

Some who are eager to see the plant open have expressed their dissatisfaction with my refusal to put aside my reservations and work aggressively to open the plant. My decisions have been deliberate ones.

I will not permit the uncertainty about relative economic impact to override what appears to me to be the certain responsibility I have to protect the safety and health of the people. That must be our first concern and that has been the predicate of all my decisions to date.

#

STATE OF NEW YORK
EXECUTIVE CHAMBER
ALBANY 12224

MARIO M. CUOMO
GOVERNOR

May 9, 1984

Dear Mr. Secretary:

I have received your letter of May 7th and I am frankly disappointed with your response.

As you recall, I wrote you on May 16, 1983, and again on June 16, 1983, expressing my strong conviction that a national policy was needed to clarify the respective responsibilities of Federal, State and local government for the development, implementation and financing of off-site emergency preparedness plans at our nation's nuclear power plants. You will also recall last year in a Department of Energy memo, you wrote:

> "The breakdown of Federal, state, local and private utility cooperation in developing and implementing a workable emergency evacuation plan in the event of a serious accident at a nuclear power plant has become an issue of national significance."

To date the administration has said nothing or done nothing to develop such a national policy.

Why?

In point of fact, today's NEW YORK TIMES reports you told the Nuclear Power Assembly yesterday that the Reagan Administration was flatly opposed to loan guarantees or other financial assistance to utilities facing bankruptcies because of problem nuclear plants, but urged further expansion of the nuclear industry. It appears the Administration has embarked upon a policy of forcing the construction of new nuclear power plants through the regulatory process, instead of dealing intelligently and comprehensively with the enormous financial and safety problems they present.

Your letter requests the state participate in a so-called "dress test" of the LILCO off-site evacuation plan, a federal requirement you referred to last week as a mere technicality.

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 to the Federal Constitution. Moreover, the State of New York and the County of Suffolk are also legally challenging LILCO's right to a low power license for Shoreham in the absence of an approved off-site evacuation plan.

To accede to your request, when the Federal government is in the same legal position as LILCO, would jeopardize the State's legal standing in these actions.

Also I must disagree with your assertion that "LILCO has developed a plan that has been reviewed under proper legal requirements and is considered accurate with some corrections." FEMA's review of that emergency evacuation plan has disclosed some 30 deficiencies. More importantly, that plan is presently being challenged by the State of New York and the County of Suffolk in an ongoing licensing proceeding which is far from concluded. In that proceeding, the State and County have raised many contentions in addition to the deficiencies found by FEMA.

Your letter goes on to suggest that FEMA is prepared to orchestrate the development of an off-site evacuation plan. This seems to conflict with the position of Louis O. Giuffrida, Director of FEMA who wrote on December 28, 1983:

> "FEMA does not support the idea that the federal government should be empowered as the "last resort" to develop a plan even if all other responsible entities fail to do so. The role of the federal government is to enhance, not supplant, State and local government capabilities to prepare for and respond to radiological and other types of emergencies.
>
> The federal government is not in a position in terms of policy, authority, or resources to assume the responsibilities of State and local governments for protecting the health and safety of citizens in the event of an accident at a commercial nuclear power facility."

Additionally, Representative Edward J. Markey (D) Mass., Chairman of the House Interior Subcommittee on Oversight and Investigation has said he believes contact and discussions between Department of Energy, FEMA, and the NRC raises questions as to the independance of these agencies.

Mr. Secretary, I ask you to embark immediately on the development of a national policy which provides both a clear definition of responsibility and decisive action to support and implement effective off-site emergency planning and recognize the financial problems facing utility companies throughout this nation, instead of indulging in last minute, ad hoc, rhetorical efforts that fail to meet the conceded problems.

Sincerely,

/s/ Mario M. Cuomo

Mr. Donald Paul Hodel
Secretary of Energy
Washington, D. C. 20585

THE SECRETARY OF ENERGY
WASHINGTON, D.C. 20585

May 7, 1984

Honorable Mario Cuomo
Governor of New York
New York, New York 10047

Dear Governor Cuomo:

Thank you for your letter of April 25, 1984. I appreciate and understand your concerns about an off-site emergency preparedness plan for the Shoreham nuclear power plant. I agree that, as you said, "an adequate and implementable off-site preparedness plan is an integral element of Federal safety requirements for nuclear power plants."

The Reagan Administration has always had faith in the ability of American citizens and local elected officials to handle the problems which confront them directly. The issue here, though, is how to deal with a situation where a locality refuses even to try to discharge its responsibility. There is also a much larger issue at stake.

From a national perspective, we continue to believe that a balanced and mixed resource base is critical to achieving energy non-dependence. And, as a clean, safe and reliable domestic energy resource, nuclear is a critical component of that balanced energy system.

The Shoreham plant will replace 7-9 million barrels of oil now used annually to produce electricity. Those are significant numbers, particularly considering that, in 1983, New York used 24 percent of the oil burned in the U.S. to produce electricity. Moreover, the amount of oil used in this country outside the Northeast region to generate electricity is down a marked 58 percent over the past four years, but your region has achieved only a 22 percent reduction. In fact, Northeast utilities account for 65 percent of all the oil used for this country's electrical generation. All of this points to the need for nuclear as part of our safe and reliable energy supply.

For reasons such as these, the National Governors' Association in 1983 resolved that "The responsibility for developing off-site emergency plans properly ought to be shared by Federal, state and local governments and the involved utilities" and that "the states should take responsibility for preparing a plan" and that "...the Federal government should be empowered to develop the plan as a last resort in the event that all other entities fail to develop an acceptable plan."

Shoreham will not operate until the NRC determines its operation to be safe. The major remaining issue to be resolved, and it is clearly an essential one, is that of an adequate emergency plan. LILCO has developed a plan that has been reviewed under proper legal requirements and is considered adequate with some corrections. The Federal Emergency Management Agency is prepared to assist in the development of an off-site evacuation plan. Their approach envisions a full-field exercise of the utility's plan, assuming necessary corrections are completed. In addition, we pledge to commit Department of Energy resources to assist FEMA and the State of New York in these efforts.

Your letter expresses skepticism on the outcome of a proper test of any plan. You state "...even in conjunction with the County's active participation, the State probably could not give reasonable assurance of evacuation," and "...even with federal resources, I believe it is unlikely that an adequate and implementable evacuation plan can be developed for Shoreham," and "...I do not believe it probable that an adequate and implementable off-site preparedness plan can be developed at Shoreham..."

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

I believe we must at least <u>try</u> to satisfy our concerns and ensure operation of a valuable asset for the nation, consistent with the safety of the people of Long Island. Working together we can achieve our objective of a safe nuclear plant which can provide essential electrical generation to the people of New York for decades to come. Let's give safety a try.

I appreciate your openmindedness on this issue which is so important to your constituents. I am also reassured by your willingness to work with us to find a solution. Thank you for your invitation to talk. I welcome the opportunity to do so.

Most sincerely,

Don Hodel

DONALD PAUL HODEL

STATE OF NEW YORK
EXECUTIVE CHAMBER

MARIO M. CUOMO
GOVERNOR

TWO WORLD TRADE CENTER
17TH FLOOR
NEW YORK N.Y. 10047

April 25, 1984

Dear Mr. Secretary:

In view of remarks attributed to you in the April 24th edition of Newsday, I am writing to assure that you are not operating under any misunderstanding or misconceptions regarding New York State's position with respect to the adequacy and implementability of an off-site emergency preparedness plan for the proposed Shoreham nuclear power plant.

I do not consider the lack of an approved off-site emergency preparedness plan for Shoreham to be a mere technicality. An adequate and implementable off-site preparedness plan is an integral element of Federal safety requirements for nuclear power plants. The adoption of Federal evacuation regulations is based on the reality that even under ideal circumstances, the operation of a nuclear power plant poses a clear and always present danger of a radiological accident.

With respect to Shoreham specifically, the County of Suffolk has concluded that evacuation is impossible and therefore it has submitted no plan. Without the County's participation, the State does not have the resources, by itself, to supply the wherewithall that would be required. Indeed, even in conjunction with the County's active participation, the State probably could not give reasonable assurance of evacuation.

The Long Island Lighting Company (LILCO) has offered its own plan, which would be implemented by its employees, by which it would attend to evacuation itself. The State opposes the notion that this LILCO plan is approvable. Its employees lack the capability and the legal power to implement it.

Now it is being publicly suggested that perhaps a federally supervised evacuation plan for Shoreham might be the solution to LILCO's inability to secure approval of its off-site preparedness plan. I respectfully submit to you, Mr. Secretary, as I have informed LILCO Chairman Dr. William Catacosinos, that even with federal resources, I believe it is unlikely that an adequate and implementable evacuation plan can be developed for Shoreham.

I am pleased that the Federal government has begun to focus upon its responsibility for the development and implementation of off-site emergency preparedness plans at commercial nuclear power plants. As James Holton of FEMA has stated "We feel we are being dragged into something here..." However, its approach at Shoreham is belated and too ad hoc.

What is needed is a comprehensive Federal Policy and program, not a series of bandaids. On June 16, 1983, I wrote Congressional leaders and suggested a series of initiatives to clarify the respective responsibilities of federal, state, and local governments for the development, implementation, and financing of off-site emergency preparedness plans.

I proposed congressional establishment of a dedicated cadre of trained federal personnel, a Federal Radiological Emergency Team, to supplement state and local personnel in responding to any incidents at these nuclear plants. I also recommended that federal funds be provided to state and local governments to finance planning, personnel training, communications systems and equipment, and any associated costs. Equally important, I proposed that the states be given the ultimate authority for determining whether a specific off-site preparedness plan assured that public health and safety is adequately protected. Surely, the Reagan Administration is sympathatic to this state's rights issue.

While I do not believe it probable that an adequate and implementable off-site preparedness plan can be developed at Shoreham, I am prepared to work with you and Congressional leaders to develop a comprehensive national policy that assures that at those sites where an adequate and implementable off-site plan is feasible, the highest standards of safety are exercised by government and by utilities to protect the public welfare.

Sincerely,

Mario M. Cuomo
Governor

Honorable Donald P. Hodel
Secretary
U.S. Department of Energy
Room 7A257
1000 Independence Avenue, S.W.
Washington, D.C. 20585

Intro. Res. 1516-82

ATTACHMENT E

Introduced by Legislators Blass, Rosso, Foley, Caracappa, Giese, Altigrove, Richards, Wortenberg, Rizzo, Nolan, Hariton, Nolan, Howard, Prospect, Lubin, Levine, Mrazek

RESOLUTION NO. 456 -1982, ESTABLISHING THE RADIOLOGICAL EMERGENCY RESPONSE PLANNING POLICY OF THE COUNTY OF SUFFOLK

WHEREAS, County of Suffolk has the primary responsibility for the protection of its residents in the event of a radiological emergency at the Long Island Lighting Company's Shoreham Nuclear Power Station; and

WHEREAS, Suffolk County takes this responsibility seriously and intends, through good faith and sound planning efforts, to assure that the best possible emergency plan and preparedness are developed to protect the citizens of Suffolk County; and

WHEREAS, Suffolk County's Emergency Planning Task Force, composed of nationally recognized experts drawn from a range of pertinent disciplines, is now conducting a detailed planning effort in order to attempt to develop a viable radiological emergency plan for Suffolk County; and

WHEREAS, The Long Island Lighting Company, in an unwarranted and arrogant act, has gone beyond its powers as a private corporation in an attempt to usurp the rightful powers of Suffolk County by submitting county planning resource material to the New York State Disaster Preparedness Commission for its approval as the official radiological emergency response plan for Suffolk County; and

WHEREAS, said planning resource material developed in part by county personnel, is preliminary data which in no way constitutes the Suffolk County-approved RADIOLOGICAL EMERGENCY RESPONSE PLAN and will not in the future constitute such County plan; and

WHEREAS, Suffolk County will submit its RADIOLOGICAL EMERGENCY RESPONSE PLAN to the New York State Disaster Preparedness Commission only when that plan has been fully prepared and approved by Suffolk County and is thereby integrated with the planning efforts of both LILCO and New York State; therefore, be it

RESOLVED, that Suffolk County hereby established the following Radiological Emergency Response Planning Policy:

Suffolk County shall not assign funds or personnel to test or implement any radiological emergency response plan for the Shoreham Nuclear Plant unless that plan has been fully developed to the best of the County's ability.

Suffolk County shall not assign funds of personnel to test or implement any radiological emergency response plan for the Shoreham Nuclear Plant unless that plan has been the subject of at least two public hearings, one to be held in Riverhead, and one to be held in Hauppauge.

folk County shall not assign ... or personnel to test or implement any radiological emergency response plan for the Shoreham Nuclear Plant unless that plan has been approved, after public hearings, by the Suffolk County Legislature and the County Executive

and, be it further

RESOLVED, that copies of this resolution be sent to the Governor, the Speaker of the Assembly, the Majority Leader of the Senate and the Legislature of the State of New York.

DATED: May 18, 1982

APPROVED BY:

County Executive of Suffolk County

Date of Approval: 5/19/82

SUFFOLK COUNTY
County Legislature
RIVERHEAD, N. Y.

I, the undersigned, Clerk of the County Legislature, do hereby certify that I have compared the foregoing copy of resolution with the original resolution now on file in this office, and which was duly adopted by the County Legislature of said County on May 18, 1982 and that the same is a true and correct transcript of said resolution and of the whole thereof.

I do hereunto set my hand and the official seal of the County Legislature of the County of Suffolk.

William H. Rogers

Clerk of the County Legislature

The North Carolina Cash Management Trust
Fidelity Mercury Fund
Fidelity Freedom Fund
Fidelity Qualified Dividend Fund
Fidelity High Yield Municipals
Fixed-Income Portfolio
Tax-Exempt Portfolio
Fidelity Daily Income Trust
Fidelity Limited Term Municipals
Fidelity Thrift Trust

* means more than 1 portfolio.

Funds reorganizing under "new" Declaration of Trust before end of October:
Fidelity Municipal Bond Fund
Fidelity Destiny Fund
Fidelity Magellan Fund
Fidelity Corporate Bond Fund

Sarah Libbey

Resolution No. /// -1982,
Constituting the findings and
Determinations of Suffolk County
on whether A Level of Emergency
Preparedness To Respond to a
Radiological Accident At the
Shoreham Nuclear Power Station
Can Protect the Health, Welfare
and Safety of the Residents of
Suffolk County

WHEREAS, Suffolk County has a duty under the Constitution of the State of New York, the New York State Municipal Home Rule Law, and the Suffolk County Charter to protect the health, safety, and welfare of the residents of Suffolk County; and

WHEREAS, the Long Island Lighting Company ("LILCO") is constructing and desires to operate the Shoreham Nuclear Power Station ("Shoreham"), located on the north shore of Long Island near the town of Wading River, a location which is within the boundaries of Suffolk County; and

WHEREAS, a serious nuclear accident at Shoreham could result in the release of significant quantities of radioactive fission products; and

WHEREAS, the release of such radiation would pose a severe hazard to the health, safety, and welfare of Suffolk County residents; and

WHEREAS, in recognition of the effects of such potential hazard posed by Shoreham on the duty of Suffolk County to protect the health, safety, and welfare of its citizens, this Legislature on March 23, 1982, adopted Resolution No. 262-1982, which directed that Suffolk County prepare a "County Radiological Emergency Response Plan to serve the interest of the safety, health, and welfare of the citizens of Suffolk County ..."; and

WHEREAS in Resolution 262-1982, the Legislature determined that the plan developed by the County "shall not be operable and shall not be deemed adequate and capable of being implemented until such time as it is approved by the Suffolk County Legislature"; and

WHEREAS, in adopting Resolution 262-1982, the Legislature found that earlier planning efforts by LILCO and County planners (the "original planning data") were inadequate because they failed to address the particular problems posed by conditions on Long Island and further failed to account for human behavior during a radiological emergency and the lessons of the accident at Three Mile Island; and

WHEREAS, on March 29, 1982, Peter F. Cohalan, Suffolk County Executive, acting to implement Resolution 262-1982, by Executive Order established the Suffolk County Radiological Emergency Response Plan Steering Committee ("Steering Committee") and directed it to prepare a County plan for submittal to the County Executive and County Legislature; and

WHEREAS, the Steering Committee assembled a group of highly qualified and nationally recognized experts from diverse disciplines to prepare such County plan; and

WHEREAS, such highly qualified experts worked in a diligent and conscientious effort at a cost in excess of $500,000 to prepare the best possible plan for Suffolk County, and particularly to ensure that such plan took into account all particular physical and behavioral conditions on Long Island that affect the adequacy of the emergency response plan; and

WHEREAS, the analyses, studies, and surveys of such experts included:

(a) Detailed analyses of the possible releases of radiation from Shoreham;

(b) Detailed analyses of the radiological health consequences of such radiation release on the population of Suffolk County, given the meterological, demographic, topographical, and other specific local conditions on Long Island;

(c) A detailed social survey of Long Island residents to determine and assess their intended behavior in the event of a serious accident at Shoreham;

(d) A detailed survey of school bus drivers, volunteer firemen, and certain other emergency response personnel to determine whether emergency personnel intend to report promptly for emergency duties, or instead to unite with their own families, in the event of a serious accident at Shoreham;

(e) Detailed estimates of the number of persons who would be ordered to evacuate in the event of a serious accident at Shoreham, as well as the number of persons who intend to evacuate voluntarily even if not ordered to do so;

(f) Detailed analyses of the road network in Long Island and the time required to evacuate persons from areas affected by radiation releases;

(g) Detailed analyses of the protective actions available to Suffolk County residents to evacuate or take shelter from such radiation releases; and

(h) Analysis of the lessons learned from the accident at Three Mile Island on local government responsibilities to prepare for a radiological emergency; and

WHEREAS, on May 10, 1982, LILCO, without the approval or authorization of the Suffolk County Government, submitted to the New York State Disaster Preparedness Commission ("DPC") two volumes entitled "Suffolk County Radiological Emergency Response Plan" and containing the original planning data, as further revised and supplemented by LILCO, and requested the DPC to review and approve such LILCO submittal as the local radiological emergency response plan for Suffolk County; and

WHEREAS, in Resolutions 456-1982 and 457-1982, the County further addressed the matter of preparing for a radiological emergency at Shoreham and emphasized that:

(a) The LILCO-submitted document was not and will not be the County's Radiological Emergency Response Plan; and

(b) The County's Radiological Emergency Response Planning Policy, as enunciated in Resolution 456-1982, is as follows:

Suffolk County shall not assign funds or personnel to test or implement any radiological emergency response plan for the Shoreham Nuclear Plant unless that plan has been fully developed to the best of the County's ability.

Suffolk County shall not assign funds or personnel to test or implement any radiological emergency response plan for the Shoreham Nuclear Plant unless that plan has been subject of at least two public hearings, one to be held in Riverhead, and one to be held in Hauppauge.

Suffolk County shall not assign funds or personnel to test or implement any radiological emergency response plan for the Shoreham Nuclear Plant unless that plan has been approved, after public hearings, by the Suffolk County Legislature and the County Executive; and

WHEREAS, on June 9, 1982, the DPC rejected the LILCO-submitted document for the reason that it was deficient; and

WHEREAS, on October 6, 1982, LILCO, again without the approval or authorization of the Suffolk County Government, submitted to the DPC an amended version of the previously submitted LILCO document which had been rejected by the DPC; and

WHEREAS, on December 2, 1982, the Draft County Radiological Emergency Response Plan authorized by Resolution 262-1982 was submitted to the County Legislature for review and public hearings as specified in Resolutions 262-1982, 456-1982, and 457-1982; and

WHEREAS, in January 1983, the Legislature held hearings on the Draft County plan, which hearings included:

(a) More than 1,590 pages of transcripts;

(b) Detailed written statements and oral testimony of County expert consultants who prepared the Draft County plan;

(c) Detailed written statements and oral testimony of LILCO officials and expert consultants retained by LILCO;

(d) Detailed written statements and oral testimony of the Suffolk County Police Department, the County Health Department, the County Social Services Department, and the County Public Works Department, all of which would have indispensable roles in responding to a radiological emergency at Shoreham;

(e) Detailed written statements and oral testimony of organizations in Suffolk County concerned with radiological emergency preparedness; and

(f) Extensive presentations by hundreds of members of the general public; and

WHEREAS, members of the Legislature also travelled to and held public hearings in the vicinity of the Three Mile Island Nuclear Power Plant to gain information on the lessons to be learned by local governments from the accident at Three Mile Island; and

WHEREAS, the Draft County plan identifies evacuation and protective sheltering as the two primary protective actions which would need to be implemented in the event of a serious accident at Shoreham; and

WHEREAS, evacuation of Suffolk County residents in the event of a radiological emergency could take as much time as 14-30 hours because of various factors, including: the limited number of appropriate evacuation routes in Suffolk County; difficulties in mobilizing police and other emergency personnel; difficulties ensuing from spontaneous evacuation of large numbers of County residents, thus creating severe traffic congestion; and unavailability of alternate evacuation routes for persons residing east of Shoreham and thus the necessity for such persons during an evacuation to pass by the plant and possibly through the radioactive plume; and

WHEREAS, evacuation times in excess of 10 hours -- and certainly evacuation times in the range of 14-30 hours -- will result in virtual immobilization of evacuation and high exposure of evacuees to radiation such that evacuees' health, safety, and welfare would not be protected; and

WHEREAS, protective sheltering is designed to protect persons from excessive radiation exposure by such persons staying indoors until radiation with the greatest danger to health has passed; and

WHEREAS, if protective sheltering were ordered for Suffolk County residents, unacceptable radiation exposure would still be experienced by substantial portions of the Suffolk County population, thus making it impossible to provide for the health, welfare, and safety of these residents;

WHEREAS, the document submitted by LILCO to the DPC without County approval or authorization is deficient because it does not deal with the actual local conditions, physical and behavioral, on Long Island that would be encountered during a serious nuclear accident at Shoreham; and

WHEREAS, the document submitted by LILCO to the DPC without County approval or authorization does not ensure that effective protective action by persons subject to radiation exposure, in the form of evacuation or sheltering, would be taken in event of a serious nuclear accident at Shoreham, and thus such document, even if implemented, would not protect the health, safety, and welfare of Suffolk County residents; and

WHEREAS, the extensive data which the Legislature has considered make clear that the site-specific circumstances and actual local conditions existing on Long Island, particularly its elongated east/west configuration which requires all evacuation routes from locations east of the plant to pass within a zone of predicted high radiation, the ineffectiveness of protective sheltering, the severe traffic congestion likely to be experienced if a partial or complete evacuation were ordered, and the difficulties in ensuring that emergency personnel will promptly report for emergency duties, preclude any emergency response plan, if implemented, from providing adequate preparedness to protect the health, welfare, and safety of Suffolk County residents; therefore be it

RESOLVED, that the Draft County plan submitted to the County Legislature on December 2, 1982, if implemented, would not protect the health, welfare, and safety of Suffolk County residents and thus is not approved and will not be implemented; and

RESOLVED, that the document submitted by LILCO to the DPC without the County approval or authorization, if implemented, would not protect the health, welfare, and safety of Suffolk County residents and thus will not be approved and will not be implemented; and

RESOLVED, that since no local radiological emergency response plan for a serious nuclear accident at Shoreham will protect the health, welfare, and safety of Suffolk County residents, and since the preparation and implementation of any such plan would be misleading to the public by indicating to County residents that their health, welfare, and safety are being protected when, in fact, such is not the case, the County's radiological emergency planning process is hereby terminated, and no local radiological emergency plan for response to an accident at the Shoreham plant shall be adopted or implemented; and

RESOLVED, that since no radiological emergency plan can protect the health, welfare, safety of Suffolk County residents and, since no radiological emergency plan shall be adopted or implemented by Suffolk County, the County Executive is hereby directed to take all actions necessary to assure that actions taken by any other governmental agency, be it State or Federal, are consistent with the decisons mandated by this Resolution.