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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)	)	

SUFFOLK COUNTY AND STATE OF NEW YORK RESPONSE
TO ASLB MEMORANDUM AND ORDER DATED OCTOBER 22, 1984

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November 19, 1984

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I. INTRODUCTION

By Memorandum and Order dated October 22, 1984,[1/] this Board invited the parties to submit additional briefs on Contentions 1-10 (the so-called legal authority contentions). The Board specifically invited the parties to address "who they believe should prevail on each [legal authority] contention and

1/ Memorandum and Order Deferring Ruling on LILCO Motion for Summary Disposition and Scheduling Submission of Briefs on the Merits, October 22, 1984.

why the contention should be resolved in that manner." October 22 Order at 3. In the context of the October 22 Order, it is clear that the Board seeks the parties' views on the state law questions raised by those contentions, since the federal preemption issues have already been briefed by the parties.2/ The County/State position on the state law issue is set forth in Sections II-V, infra.

The Board also invited the parties to address the following issues:

> 1. What action should this Board take on Contentions 1-10 in the event that there is no decision from a New York State court at the time the Initial Decision in the emergency planning proceeding is issued?
>
> 2. In connection with LILCO's "immateriality" argument, whether the LILCO activities enumerated in Contentions 1-10 are necessary pursuant to NRC regulations in order to obtain an operating license.
>
> 3. In connection with LILCO's "realism" argument, what effect would an unplanned response by the State or County have and would such a response result in chaos, confusion and disorganization so as to compel a finding that there is no "reasonable assurance that adequate protective measures

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2/ See LILCO's Motion for Summary Disposition of Contentions 1-10 (the "Legal Authority" Issues), August 6, 1984; 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), September 24, 1984; NRC Staff's Answer in Opposition to LILCO's Motion for Summary Disposition of Contentions 1-10 (the "Legal Authority" Issues), October 4, 1984; LILCO's Reply to the Responses to its Motion for Summary Disposition on Contentions 1-10, October 15, 1984.

can and will be taken in the event of a radiological emergency" at Shoreham?

October 22 Order at 3-4. Suffolk County and New York State address these additional issues in Sections VI-VIII, infra.

At the outset, Suffolk County and the State of New York disagree with the Board's statement that "[t]he parties have stipulated that no evidentiary hearing is required for the resolution of Contentions 1-10." October 22 Order at 3. The Board is only partially correct. With respect to the State law legal authority issue (addressed in Sections II-V of this Brief) and the federal preemption issue (addressed at pages 23-88 of the County/State September 24 Brief), the County and State agree that no evidentiary hearing is required and so stated on the record in late July. See Tr. 13,831-32. That "stipulation" did not, however, and, indeed, could not cover LILCO's "realism" and "immateriality" defenses because those defenses had not even been raised at that time. In the County/State September 24 Brief, we advised the Board that if it decided to consider the merits of the realism and immateriality defenses, disputed facts would exist and thus a further evidentiary hearing would be needed. E.g., County/State September 24 Brief, at 99-100, 106-07, and Attachment B, Statement of Material Facts as to Which a Genuine Dispute Exists.

Further, the County and State agree with the Staff statement that if LILCO is permitted to pursue its realism and immateriality defenses at this late date, "the other parties should be afforded the opportunity to determine whether they wish to make a focused evidentiary presentation with respect to these contentions before they are resolved." Staff October 4 Brief, at 27. As the Staff stated:

> Commission case law requires that "where a party prosecutes its case on one theory, a trial board cannot decide it on another without having given the opponents a fair opportunity to rebut the new theory with argument and evidence." Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-459, 7 NRC 179, 186 (1978), citing Niagara Mohawk Power Co. (Nine Mile Point Nuclear Station, Unit 2), ALAB-264, 1 NRC 347, 353-55 (1977). Accord, Pennsylvania Power and Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), LBP-82-30, 15 NRC 771, 781-82 (1982).

Id.3/

3/ LILCO has urged that there has been an evidentiary hearing on the realism and immateriality issues. See, e.g., LILCO October 15 Brief, at 66-67. It is true that some testimony during the hearing did address in some respects the time required for an allegedly uncontrolled evacuation, and LILCO did introduce one sentence of the Governor's December 1983 press release. But parties were never advised that LILCO intended to raise new "realism" and "immateriality" theories as alleged bases for resolving any of the legal authority contentions. Thus, it would be a denial of due process of law to resolve the merits of the realism or immateriality defenses without first providing the parties an opportunity for a fair evidentiary hearing.

Similarly, LILCO urged in its October 15 Brief that the

(Footnote cont'd.)

Therefore, with respect to the realism and immateriality defenses, a further evidentiary hearing is required if the Board decides to reach the merits of either defense. The County and State point out, however, that both defenses should be summarily rejected for reasons already articulated by the County and State. See County/State September 24 Brief, at 88-118. See also Sections VII and VIII of the instant Brief.4/ Thus, the County and State believe that a further evidentiary hearing may be avoided, but only if the Board correctly rejects these defenses for the reasons specified by the County and State.

(Footnote cont'd.)

County and State should not be permitted to submit data and affidavits in opposition to LILCO's summary disposition motion. See LILCO October 15 Brief, at 58, 60-61. The Board should not countenance such an attempt to deprive parties of their rights. 10 CFR § 2.749 clearly permits the filing of affidavits in response to summary disposition motions. Such affidavits were particularly appropriate in this instance because they were filed in response to LILCO's new theories. Thus, the County and State continue to rely on those materials and on the Statement of Material Facts in Dispute. The contents of those materials provide additional reasons why the Board cannot address the merits of the realism and immateriality defenses without a further evidentiary hearing.

4/ Regarding the realism defense in particular, the County and State believe that the alleged State or County "response" to an emergency which LILCO attempts to fabricate out of the December 1983 Governor Cuomo press release is not relevant to the legal authority issues. Even assuming arguendo that the County or State were to respond, this would not cure LILCO's lack of legal authority. Thus, the nature or existence of such an alleged response by governmental entities is not an issue which, in our view, needs to be resolved in ruling in the County and State's favor. If the Board disagrees and believes that the Cuomo statement is pertinent, then an evidentiary hearing would be required.

II. THE BACKGROUND TO THE LEGAL AUTHORITY CONTENTIONS

A. The State And County Challenge LILCO's Legal Authority To Implement The Transition Plan

LILCO must obtain an operating license from the NRC before it can operate Shoreham. 42 U.S.C. §2131. To obtain that operating license, LILCO must demonstrate that operation of the Shoreham facility "will provide adequate protection to the health and safety of the public." Id. §2232(a). LILCO has the burden of demonstrating to the NRC that "adequate protection" exists. 10 C.F.R. §2.732.

Following the nuclear accident at Three Mile Island in March, 1979, Congress determined that no nuclear plant could be licensed unless there was an adequate emergency preparedness plan. See Public Law 96-265, §109, 94 Stat. 783 (1980). While the construction of Shoreham was ongoing, the NRC imposed new requirements upon applicants for operating licenses.5/ The

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5/ Prior to the TMI accident, the NRC did not condition issuance of an operating license for a nuclear plant upon the existence of an approved offsite emergency response plan. The accident at TMI focused general attention on the fact that a nuclear accident can happen, on the importance of offsite emergency preparedness, and on the need to evacuate or otherwise protect substantial numbers of people in the areas surrounding nuclear facilities in the event of such accidents.

The NRC adopted its emergency planning regulations in response to these concerns. It adopted those regulations, notwithstanding criticism from the utility industry that offsite emergency planning requirements might, in some cases, jeopardize the ability of utilities to obtain operating licenses for

(Footnote cont'd.)

NRC's emergency planning regulations require each utility-applicant, such as LILCO, to submit a radiological emergency response plan ("RERP") as part of its license application. Each RERP must describe how nuclear emergencies will be handled both within a 10-mile radius plume exposure pathway Emergency Planning Zone ("EPZ") and a 50-mile radius food ingestion pathway EPZ. See 45 Fed. Reg. 55,402 (Aug. 19, 1980); 10 C.F.R. §50.33(g). The NRC cannot issue an operating license for a nuclear power reactor unless it finds, on the basis of the RERP that the utility-applicant submits, that there is a level of offsite emergency preparedness that provides "reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency." Id. §50.47(a)(1). Again, LILCO has the burden of demonstrating that such measures can and will be taken. Id. §2.732.

LILCO has attempted to meet its burden under the NRC's "reasonable assurance" standard for offsite emergency planning by devising its own RERP--the Transition Plan--and submitting the Transition Plan to the NRC as a part of its operating license application.6/ LILCO recognizes that the

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nuclear plants then under construction. 45 Fed. Reg. 55,402, 55,405 (Aug. 19, 1980).

6/ The Transition Plan describes the actions LILCO intends to take in the event of a radiological emergency. It consists of four volumes of materials: (a) a volume entitled Shoreham Nu-

(Footnote cont'd.)

Transition Plan is unique: it is the only RERP submitted to the NRC that does not rely upon participation by State and local governments.

LILCO's role under the Transition Plan is equally unique. It is the only instance in which the NRC has been asked to approve a utility's intention to assume the basic police power vested in State and local governments. In the event of a nuclear accident, LILCO itself would assess the severity of the accident and declare a public emergency; LILCO would decide who should be evacuated; LILCO would control traffic, block highways, alter traffic flow and the like; LILCO would direct other protective actions within a 50-mile radius of Shoreham; and LILCO would supervise the citizens at large in their return to the evacuated areas.

Finally, LILCO's Transition Plan confronts this Board with a unique dilemma: it is asked to approve LILCO's RERP and to conclude that adequate steps "can and will" be taken to protect the health and safety of the public where a private corporation would carry out all essential functions of the RERP. Moreover, this Board is now asked to find that "adequate

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clear Power Station -- Local Offsite Radiological Emergency Response Plan ("Plan"); (b) a two volume set of Offsite Preparedness Implementing Procedures ("OPIP"); and (c) a volume entitled Appendix A -- Evacuation Plan ("Appendix A").

protective measures can and will be taken" although LILCO has made no showing that a private corporation has the legal power or authority to perform the basic functions in question.

Rather than demonstrate that it has authority to implement the Plan, LILCO simply has told the NRC that:

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

LILCO Transition Plan, p. 1.4-1. Significantly, the Transition Plan does not state that the State or County has actually authorized LILCO to act. LILCO does not assert that it has the legal authority to carry out the Transition Plan. LILCO does not cite any affirmative state law basis for its purported authority. LILCO has chosen to argue simply that nothing prevents it from implementing its Transition Plan. That argument has no substance.

In carrying out the Transition Plan, LILCO would perform functions that are the traditional prerogative of State and local governments. Most fundamentally, LILCO would exercise the police power of the State. Thus, it is the position of the State and County that the entire effort of LILCO to implement the Transition Plan is illegal as an attempt to usurp

the police power of the State. More specifically, LILCO would exercise particular aspects of the State's police power: the declaration of a public emergency; the direction of evacuation traffic; decisions about health and safety protective actions; and supervision of citizens' return to evacuated areas.

Contentions 1-10 challenge LILCO's legal authority to exercise the police power and to perform the basic governmental functions assigned to it under the Transition Plan. LILCO's repesentation that "nothing in New York State law prevents the utility from performing the necessary functions to protect the public" is both irrelevant and wrong. LILCO's statement is irrelevant, because LILCO must show an affirmative basis for its authority to carry out the Transition Plan. It must demonstrate that it "can and will" perform the functions in question. LILCO cannot perform such functions unless it has actual authority to do so.

LILCO's position is wrong, because, in fact, LILCO has no legal authority to implement the Transition Plan. New York State law precludes LILCO from carrying out the essential functions of the Transition Plan. LILCO's position is wrong, because it ignores propositions of law so basic that the State and County would have supposed they did not need to be stated. Those propositions are as follows:

(1). The police power resides in the States under the Tenth Amendment to the United States Constitution. The functions LILCO intends to perform are examples of the police power, that is, the power to protect the health, welfare and safety of the citizens. The authority to carry out the overall response to a nuclear emergency involves an exercise of that power. The Contentions challenge examples of the exercise of that police power; the authority to control the overall emergency response to a major nuclear accident is part and parcel of the police power. Thus, in implementing the Transition Plan, LILCO seeks to exercise an inherent ingredient of the State's sovereign prerogative.

(2). The police power may be exercised only by the State or, upon appropriate delegation, by its political subdivisions. Even municipalities cannot exercise governmental powers unless the State Constitution or statutes confer such powers upon them; that principle is firmly established. Necessarily, a private corporation cannot exercise governmental powers without express delegation. Clearly, New York State has not delegated its police power to LILCO. Indeed, no such delegation of the police power to a private corporation could withstand legal scrutiny.

(3). Corporations have only those powers that the State grants to them. LILCO is a corporation created by and existing under New York State law. LILCO possesses only those powers conferred upon it. New York corporate law does not empower a private corporation to usurp or exercise the State's police power. New York law does not authorize a corporation to carry out the functions set forth in the Transition Plan. LILCO has no other source for its purported authority to do so.

Each of the foregoing propositions is a firmly established, hornbook statement of law. LILCO's position ignores these elemental principles.

LILCO's position also is wrong for a second set of reasons: the specific functions in question have been delegated to or conferred upon State or local governments. Each of the functions identified in the Contentions is an example of the State's police power. Accordingly, the exercise of those functions is governed by the basic legal principles stated above. In this case, numerous State and local statutes confer upon State or local governments the specific power to discharge functions that are elements of the Transition Plan. Most importantly, Executive Law, Article 2-B, specifically confers emergency police powers upon State and local governments. An express legislative grant of power to undertake specific

governmental activities precludes the exercise of that power by other entities, public or private. Accordingly, the Legislature's express delegation of the functions here in question to specific governmental units necessarily precludes LILCO's effort to exercise such functions.

In sum, LILCO does not have legal authority to implement its Transition Plan.

B. LILCO's Legal Authority To Implement The Transition Plan Will Be Decided By New York State Courts

This Board has been conducting hearings to determine whether LILCO's Transition Plan complies with NRC standards and is capable of being implemented. During these proceedings, FEMA has questioned LILCO's legal authority, and the State and County have advised this Board that LILCO lacks the legal authority to implement the Plan. In an effort to resolve this State law issue, the Board requested the parties to obtain a definitive answer from New York State courts. The issue is now before the New York State Supreme Court. Although LILCO has delayed a final resolution of that issue, final briefs on the legal authority question will be filed with the Supreme Court on December 1, 1984, and the Court will then be in a position to rule on the question.

In connection with these proceedings, FEMA has reviewed the Transition Plan. In a Memorandum dated June 23, 1983, FEMA reported to the NRC that a precondition for determining whether LILCO can implement the Transition Plan is "[a] determination of whether LILCO has the appropriate legal authority to assume management and implementation of an offsite emergency response plan."7/ FEMA's concerns were underscored in an August, 1983 letter from FEMA to the NRC:

> 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.8/

On March 15, 1984, FEMA delivered its review of Revision 3 of LILCO's Transition Plan to the NRC. FEMA's review highlights numerous aspects of the Transition Plan that raise legal authority issues under NUREG-0654 standards and evaluative criteria, including "the issue of LILCO's police power authority."9/ These same legal authority concerns were

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7/ See June 13, 1983 Letter of Richard W. Krimm, Assistant Associate Director of FEMA, to Edward L. Jordan, Director, Division of Emergency Preparedness and Engineering Response, NRC.

8/ August 29, 1983 Letter of Jeffrey S. Bragg, Executive Deputy Director of FEMA, to William J. Dircks, Executive Director for Operations, NRC.

9/ See Attachment 2, p.2 to March 15, 1984 Letter of Samuel W. Speck, Associate Director State and Local Program and Support, FEMA, to William J. Dircks, Executive Director for Operations, NRC.

reiterated by FEMA in its review of Revision 4 of LILCO's Transition Plan.10/

Similarly, the State and the County have challenged LILCO's legal authority to implement its Transition Plan and have advised this Board that no such authority exists under New York law. On July 7, 1983, the County and other intervenors filed 10 legal contentions challenging LILCO's legal authority.

This Board sought direction from the parties with regard to how to approach the legal contentions, and the County and LILCO initially jointly suggested that the ASLB defer consideration of the legal authority question until the end of the ASLB proceeding. On December 1, 1983, Judge Laurenson expressed the ASLB's reservations about this suggested procedure:

> Judge Laurenson: "[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. Having heard the parties on ways to resolve the legal authority issue, Judge Laurenson stated: "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. The issue was then tabled without resolution; the County and LILCO

10/ Attachment 2 to November 15, 1984 Letter of Samuel W. Speck to William J. Dircks. See discussion infra at pp. 21-25 regarding effect of FEMA'a legal authority concerns.

were directed to discuss the subject further; and Judge Laurenson concluded: "In the meantime, we would entertain suggestions by any other parties, of course including the staff, concerning this question of resolution of state law." Tr. 716 11/

In response to Judge Laurenson's invitation, LILCO filed a Proposal for Resolving the "Legal Authority" Issues on January 26, 1984, reciting LILCO's earlier view. LILCO's Proposal suggested that the ASLB should decide the legal contentions, stating as follows:

> Nor can the 'legal authority' contentions be resolved (except in LILCO's favor) by relegating them to a state court. The reason is that if there were any respect in which a state or local law made a utility plan less effective in protecting the public, such a law would be invalid under the Supremacy Clause.12/

11/ The NRC Staff had independently expressed its view that the question of LILCO's legal authority should be decided by state courts. See remarks of Mr. Reis: "[W]e feel that this is a matter that is more appropriate for a State instrumentality, rather than for this Board, and that this matter ought to be settled in New York State.

"No one has been willing to go forward, I don't know whether we -- on this matter -- but we feel that this is a matter of State law for State Courts .... And we think it would be inappropriate for this Board to be passing on these matters absent some definitive State Court ruling .... I do feel that these are matters that are for the State Courts, and not for the Federal, as a matter of comity should not be determined in a Federal proceeding." Tr. pp. 711-12 (emphasis supplied).

12/ LILCO January 26 Proposal, at 4-5, footnotes omitted. LILCO's position that a state court cannot decide the legal authority issues is simply wrong. See Cuomo v. LILCO; County of Suffolk v. LILCO, Nos. CV-84-2328, CV-84-1405 (E.D.N.Y. June 15, 1984), Memorandum and Order of Judge Altimari.

LILCO asserted that "this pre-emption issue would allow removal of litigation over [the legal contentions] from state court to federal court if a state lawsuit were brought." LILCO January 26 at Proposal, at 5.

After review of LILCO's Proposal, Judge Laurenson stated the ASLB's view that the County's legal contentions involved issues of State law that should be resolved by New York State courts. He urged the parties to resolve these legal issues so that the ASLB could act upon LILCO's Transition Plan.13/ In short, Judge Laurenson rejected LILCO's position that the courts of New York were an improper forum in which to resolve the legal contentions.

The State and the County filed declaratory judgment actions in State court in early March 1984. Those actions seek

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13/ Judge Laurenson recited the ASLB's basic view: "Turning then to the question of the legal contentions or contentions 1 through 10. The Board believes that these legal contentions are properly matters to be disposed of by the New York State courts. Until one or more of the parties to this matter obtain such a ruling this Board will follow the procedure originally recommended by Suffolk County and LILCO, to hold off a decision until the end of the case, when findings of fact are filed along with conclusions of law." Tr. 3675 (emphasis supplied).

In response to the County's position that LILCO had failed to establish its legal authority to implement its plan, Judge Laurenson 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. 3361-62.

a declaration that LILCO does not have authority to carry out its Transition Plan.

After initially moving to dismiss the Complaints on the grounds of pre-emption, LILCO removed the State and County actions to the U.S. District Court for the Eastern District of New York, claiming that Plaintiffs' challenge to LILCO's legal authority presented a question of federal law that was within the original jurisdiction of the federal courts. The State and County filed Motions for Remand of their actions to the State Court. By Order dated June 15, 1984, the Honorable Frank X. Altimari, U.S.D.J., granted the Motions, finding that LILCO's removal of the cases had been effected in the face of squarely controlling authority of the U.S. Supreme Court. Judge Altimari rejected LILCO's contention that the cases must (or indeed could) be decided in federal court. Judge Altimari held that the issue of preemption arose only by way of affirmative defense and that Plaintiffs' claims and any defenses thereto should be resolved by the Supreme Court of the State of New York. Cuomo v. LILCO; County of Suffolk v. LILCO, Nos. CV-84-2328, CV-84-1405 (E.D.N.Y. June 15, 1984), Memorandum and Order.14/

14/ After remand, on August 14, 1984 the State and County actions were consolidated with a similar action filed by the Town of Southampton on May 16, 1984. Upon a request by all the parties that those consolidated cases be handled by a single judge throughout all proceedings, the administrative judge of Suffolk County assigned those consolidated actions to Judge Geiler.

On August 14, 1984, LILCO launched a new strategem to avoid a consolidated resolution of the legal authority issue. LILCO renewed its Motion to Dismiss on the grounds that the State court does not have subject matter jurisdiction and that the Complaints fail to state a cause of action. But one week before renewing its Motion to Dismiss the State court actions, LILCO filed a pleading designated "Motion for Summary Disposition of Contentions 1-10 (The 'Legal Authority' Issues)" with the ASLB. That Motion put in issue the preemption question that (i) LILCO had cited as the basis of its initial Motion to Dismiss the State court cases and that (ii) Judge Altimiari had held was an affirmative defense to a State law claim that should be resolved in state court.

LILCO's Motion to Dismiss asserts that New York law does not prevent LILCO from implementing the Transition Plan. That Motion and the State and County's Cross Motion for Summary Judgment are before the Court and will have been fully briefed by December 1, 1984.

III. LILCO HAS THE BURDEN OF PROOF WITH RESPECT TO RESOLUTION OF THE LEGAL AUTHORITY ISSUE.

LILCO's statement that New York law does not prevent its intended actions cannot support a finding of "reasonable assurance" in this case. Moreover, LILCO's statement ignores that LILCO must meet a burden of proof on three fronts. It is not enough for LILCO to say it is not precluded from performing certain functions, although precluded it is. LILCO must affirmatively demonstrate that it has the requisite authority to act. LILCO has clearly failed to sustain its burden.

A. LILCO Must Demonstrate That Adequate Emergency Preparedness Measures Can And Will Be Taken.

First, LILCO's statement that New York law does not prevent it from performing the necessary functions set forth in the Transition Plan does not satisfy the burden of proof imposed upon it by 10 C.F.R. §2.732. LILCO must affirmatively demonstrate that it "can and will" implement the Transition Plan; it must demonstrate that it actually has the authority to do so. LILCO's Transition Plan states no basis for LILCO's purported authority. It contains no such affirmative demonstration.15/ LILCO has offered no basis upon which this Board

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15/ FEMA has stated that the Transition Plan is inadequate because LILCO has not complied with the basic "requirement to state, by reference to specific acts, statutes, or codes, the legal basis for the authority to carry out the responsibilities

(Footnote cont'd.)

might find, consistent with 42 U.S.C. §2232(a) and 10 C.F.R. §50.47(a)(1), that "adequate protection" for public safetv exists.

B. LILCO Must Overcome The Presumption Arising From FEMA's Finding That LILCO Has Not Established Its Legal Authority.

Second, LILCO's failure to demonstrate some positive basis for its purported authority is critical given FEMA's repeated assertions that LILCO's legal authority has not been demonstrated and FEMA's consequent determination that the Transition Plan cannot be found adequate.

The NRC is required to base its "reasonable assurance" finding on a review of FEMA's findings and determinations as to whether offsite emergency plans are "adequate" and "can be implemented." 10 C.F.R. §50.47(a)(2). FEMA's review of LILCO's Transition Plan has highlighted numerous aspects of the Plan that (in FEMA's view) raise legal authority issues, including "the issue of LERO's police power authority."16/

(Footnote cont'd.)

listed in A.2.a., i.e., all major response functions." November 15, 1984 letter of Samuel W. Speck Associate Director, State and Local Programs and Support, FEMA, to Mr. William J. Dircks, Executive Director for Operations, NRC. ("Speck Letter").

16/ See Speck Letter, Attachment 2, Concerns Pertaining to LERO's Legal Authority Identified During RAC Review of LILCO Transition Plan for Shoreham, Revisions 3 and 4 ("Concerns"),

(Footnote cont'd.)

FEMA's findings pursuant to its review of the current Transition Plan identify numerous inadequacies relating to LILCO's legal authority. FEMA's findings pertaining to legal authority are summarized as follows:

1. General Legal Authority.

FEMA has determined that "the legal authority cited in Attachment 1.4.1 to the plan (10 C.F.R. §50.47) does not specifically grant the necessary police powers to a licensee to implement those aspects of an offsite emergency response requiring the exercise of governmental authority."17/ Recognizing that an affirmative grant of authority was required, FEMA found the Transition Plan inadequate under NUREG 0654, §II.A.2.b. FEMA's recently issued review of LILCO's Plan highlights a broad range of legal authority questions that are unanswered, including LERO's general police power authority and the absence of any stated legal basis for its purported

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p. 3. As demonstrated in this Brief, the County and State believe that the illegality of the Transition Plan goes far beyond those specific concerns identified by FEMA. However, the fact that FEMA has identified police power/legal authority concerns is further reason to rule that LILCO has failed to satisfy its burden of proof.

17/ See Attachment to June 23, 1983 Letter of Richard W. Krimm, Assistant Associate Director of FEMA, to Edward L. Jordan, Director, Division of Emergency Preparedness and Engineering Response, NRC, entitled Element-by-Element Review of the LILCO Transition Module, at pp. 2-3.

authority. See Speck Letter, p. 2 and Concerns. Indeed, FEMA has specifically questioned LILCO's authority: (i) to assume the responsibilities required in an emergency response; (ii) to determine what actions should be taken to protect the health and safety of persons in the EPZ; (iii) to declare a public emergency without government involvement; and (iv) to assume traffic control duties during an emergency. Given these concerns, FEMA has advised the NRC that it cannot determine that LILCO has the ability to implement the Transition Plan until LILCO's legal authority to do so has been established.18/

2. Declaration of a Public Emergency and Basic Decisions Concerning Protective Actions.

FEMA has specifically questioned LILCO's legal authority: (i) to "seek a declaration of a state of emergency and to request State and Federal assistance;" (ii) to assume "command and control responsibilities;" and (iii) to undertake the "responsibility for alerting and notification of the public." See Concerns, p. 1.

Similarly, FEMA has questioned the broad authority given to the Director of Local Response under the Transition Plan, including specifically the responsibility that LILCO employee would have "for decision making and strategic controls,

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18/ See August 29, 1983 Letter of Jeffrey S. Bragg, Executive Deputy Director of FEMA, to William J. Dircks, Executive Director for Operations, NRC. See also generally Concerns.

and responsibility to decide upon the major responses to be made." Concerns, pp. 1-2. Finally, FEMA has questioned LILCO's authority: (i) to activate the EBS system; (ii) "to disseminate emergency information to the public without the involvement of State and/or local government officials;" and (iii) "to activate the alert and notification system without State and/or local government participation." Id. at 4.

3. Evacuation and Traffic Control.

FEMA has determined that LILCO's intended "assignment of traffic control responsibilities to persons who are not police officers is inappropriate given the necessity of blocking public thoroughfares, ordering drivers to follow specified routes, and other extraordinary changes in legal driving patterns."19/ On that basis, FEMA found that the Transition Plan was inadequate under NUREG-0654, §II.A.2.a. FEMA has determined that the Plan's reliance upon LILCO employees for traffic control is inadequate because "traffic control guides will not be able to put signals on "flashing" operation as could be done by police".20/ On that basis, FEMA determined that the Transition Plan did not meet NUREG-0654, §II.J.10.j.

19/ Element-by-Element Review of the LILCO Transition Module, attached to June 23, 1983 Letter of Richard W. Krimm, Assistant Associate Director of FEMA, to Edward L. Jordan, Director, Division of Emergency Preparedness and Engineering Response, NRC, p. 2.

20/ Id. at 10. See also id. at 11 re NUREG-0654, §II.J.10.k.

In addition, FEMA found that it could not determine that the Transition Plan "is capable of being implemented" and that LILCO "has the ability to implement the plan" until there was a determination that "LILCO has the appropriate legal authority to assume management and implementation of an offsite emergency response plan."21/

Finally, FEMA has questioned LILCO's authority to implement traffic control measures in an evacuation, stating that "[a]ssigning access control duties to LILCO employees including: setting-up and controlling roadblocks [and] dealing with evacuation, etc., remain a concern." Concerns at p. 6. FEMA has also stated that "LERO's authority to remove impediments to evacuation remains a concern." Ibid.

C. LILCO Has The Burden Of Establishing Its Legal Authority In View Of Contentions 1-10.

The State and the County have also challenged LILCO's legal authority to implement its Transition Plan and have advised the ASLB that no such authority exists under New York law. The legal authority contentions assert that "LILCO cannot, as a matter of law, exercise the responsibilities identified in Contentions 1-10." Preamble to Contentions 1-10. The individual contentions identify the specific functions that

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21/ Krimm Letter of 6/23/84, p. 2.

LILCO's Transition Plan states will be performed by LILCO employees in the event of a nuclear emergency at Shoreham.

LILCO argues that the State and the County bear the initial burden of establishing a prima facie case supporting the Contentions, that the State and the County have not carried this burden; and that, therefore, LILCO has no obligation to disprove the Contentions. LILCO October 15 Brief, at 10-11. LILCO relies primarily on a passage from Louisiana Power and Light Company (Waterford Steam Elec. Station, Unit 3), ALAB-732, 17 NRC 1076, 1093 (1983), which states that an intervenor has the burden of introducing evidence to support a contention that raises issues of fact. That proposition is inapposite when the contention in question involves an interpretation of law. Thus, LILCO's argument is simply nonsensical in the context of Contentions 1-10 which, all parties recognize, raise substantial questions of New York State law concerning LILCO's legal authority to implement its Transition Plan.

LILCO also attempts to support its position by referencing the concept of "threshold showing" discussed in Vermont Yankee Nuclear Power Corp. v. NRDC, 435 US 519, 549-55 (1978). In Vermont Yankee, the Court agreed with the NRC's conclusion that intervenors had failed to establish that contentions met a threshold materiality standard. However, the materiality of Contentions 1-10 is indisputable. LILCO cannot

obtain an operating license for Shoreham unless it establishes, inter alia, that it has the legal authority to implement the Transition Plan in the event of a nuclear accident. The Contentions directly question LILCO's legal authority to implement the Plan. LILCO's suggestion that the Contentions fail to pass any threshold test for materiality is ridiculous.

Moreover, LILCO's argument that the State and the County must meet an initial burden in pressing the Contentions completely turns the legal authority issue upside down. LILCO must affirmatively establish that an adequate offsite emergency response plan exists for Shoreham. Independent of any need to respond to Contentions raised by other parties, LILCO has an obligation to prove that New York law permits the activities set forth in the Plan. LILCO has made no effort to do so.

LILCO has not asserted that it has a positive basis of authority to carry out the Transition Plan. It has, therefore, failed to carry its burden under each standard applicable to this matter. Moreover, it is clear that LILCO has no such authority. The New York State Constitution, numerous New York statutes, and basic jurisprudential concepts preclude LILCO from exercising the State's police power or from performing the specific functions here at issue.

IV. THE FUNCTIONS LILCO WOULD EXERCISE UNDER ITS TRANSITION PLAN ARE ESTABLISHED IN THE RECORD

A. The Dispositive Facts Are Not Disputed

The Contentions challenge LILCO's authority to carry out the Transition Plan and to exercise governmental functions. The functions in question are set forth in detail and in LILCO's own words in the Transition Plan itself. In sum, the basic functions LILCO would perform under the Transition Plan are not in dispute. Only the legal character of those functions and LILCO's legal authority to perform those functions are pertinent to the legal authority contentions.

B. LILCO'S Actions Under The Transition Plan

LILCO's activities under the Transition Plan which the State and County challenge constitute an exercise of the State's police power of startling breadth and scope. The control and direction of a response to a community-wide emergency, which reaches into every aspect of daily life and can lead to the mass relocation of hundreds of thousands of people, is a quintessential governmental function. LILCO has, by its Transition Plan, arrogated to itself and its force of LILCO employees, the exercise of the police power that direction of a community-wide response to a nuclear emergency by definition entails. Quite apart from any specific functions that LILCO

would perform, LILCO's basic undertaking constitutes an unlawful usurpation of the police power vested solely in the State of New York and its political subdivisions. Its undertaking to direct the entire emergency response in accordance with the Transition Plan is unauthorized and impermissible.

In addition, LILCO's intended exercise of the police power involves specific governmental functions. Each of those functions is a particular exercise of the police power; each of those functions is within the exclusive prerogative of state and local governments. Just as LILCO lacks the general authority to exercise the State's basic police power, so LILCO lacks the specific power to perform the particular governmental functions at issue. These basic governmental functions may be roughly categorized as follows:

1. Declaration Of A Public Emergency and Basic Decisions Concerning Protective Actions

First, the State and County challenge LILCO's legal authority to assume responsibility for declaring a public emergency in the event of a nuclear accident at Shoreham and for advising the population of Suffolk County. The State and County also challenge LILCO's legal authority to decide what actions should be taken to protect the health and safety of the public in the EPZs. Contentions 5 and 6.

In such a situation, LILCO will alert the public to an emergency through an emergency siren system and advise the population as to what protective actions to take -- including evacuation of their homes and businesses. Each of these functions is clearly set forth in the Transition Plan itself.22/

LILCO acknowledges in its Plan that a LILCO employee, the "Director of Local Response[,] assumes the responsibility for protecting the health and safety of residents and transients within the Emergency Planning Zones," and that "[t]he decision to notify and implement protective actions for the general public is solely [his] responsibility...." Plan 2.1-1.2; see OPIP 2.1.1 at 5. LILCO employees and consultants will make decisions regarding whether protective actions for the 50-mile ingestion exposure pathway EPZ should be recommended. OPIP 3.6.6 at 1n.

LILCO's Plan asserts that if LILCO determines an emergency to exist, it will activate an extensive communication system, including 89 fixed sirens, to alert the public, and will "provide alerting and clear instructions ... to the general public". Plan 3.3-4, 3.4-6. LILCO will also use the Emergency Broadcast System to advise residents to leave their homes and neighborhoods. OPIP 3.8.1, 3.8.2. 23/ Each of these steps

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22/ See Contentions 5 and 6; Plan 3.1, 3.3, 3.5; OPIP 2.1.1, 3.1.1, 3.6.1, 3.8.2.

23/ The following is the partial text of LILCO's general emergency broadcast message:

(Footnote cont'd.)

must be taken if LILCO's Transition Plan is allegedly to have any substance.

Although LILCO proposes to assume responsibility for making decisions to protect the public, the Transition Plan allows the individual who will make these determinations a wide range of discretion. LILCO's Plan does not dictate what actions should be taken in a given situation; instead it sets

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(Footnote cont'd.)

> A General Emergency was declared at (time) today at the Shoreham Nuclear Power Station. The General Emergency condition . . . indicates that there has been a failure in plant safety systems.
>
> A release of rediation occurred at (time) . . .
>
> The Director of Local Response [a LILCO employee] . . . has recommended the following publice actions:
>
> 1. All schools within the 10-mile emergency planning zone are advised to evacuate students to predesignated relocation centers. Parents should not drive to school to meet their children . . .
>
> 4. People within emergency planning zones . . . should evacuate as soon as possible away from Shoreham. . . .
>
> People are advised to close all windows, turn off all appliances, extinquish any fires, close fireplace dampers, and lock all doors before leaving their home or business. In addition, they should take blankets, pillows, and medication with them. People asked to evacuate could expect to be away from their homes for several days.

OPIP 3.8.1 at 19-20. The full text of this and other emergency messages is found at OPIP 3.8.1 at pages 5-23 and OPIP 3.82 at pages 11-32.

forth a precedure by which the Director of Local Response will obtain advice from various sources before making these decisions. OPIP 3.6.1; Plan 3.6 and Table 3.6.1. The Plan also provides that any final determination regarding protective actions should take into account both factual matters such as the amount of radiological release, time of day and weather conditions and public policy factors such as the best course of action for schools, hospitals, nursing and adult homes and the general public. OPIP 3.6.1; Appendix A, Part II. Thus, a LILCO employee with only an obligation to this private corporation is charged with balancing numerous considerations for determining that a radiological accident is significant enough that the public should be notified. That LILCO employee retains broad and total discretion to make protective action recommendations. Plan 3.6-4.

In sum, LILCO's Transition Plan leaves no doubt as to what LILCO plans to do. Contentions 5 and 6 challenge LILCO's legal authority to make basic public decisions and to declare an emergency.

2. Evacuation and Traffic Control

Second, the State and County challenge LILCO's legal authority to control the evacuation of the public from the 10-mile EPZ in the event of a serious radiological accident and

to direct the resulting traffic. Contentions 1, 2, 3, 4, 6 and 9. LILCO's Transition Plan clearly provides for such an evacuation under certain circumstances. The State and County assert that LILCO will manage and direct traffic if an evacuation is required. In particular, the State and County challenge LILCO's legal authority to direct traffic, Contention 1; to block roadways, set up barriers in public highways and "channel" traffic, Contention 2; to post permanent traffic signs on public roadways, Contention 3; to remove obstructions from roadways, Contention 4; to perform all command and control functions and to manage and coordinate the evacuation and the total emergency response, Contention 6; and to dispense fuel from tank trucks to vehicles which run out of gas, Contention 9. Finally, the State and County challenge LILCO's authority to assume responsibility for security, access control and related functions at relocation centers during an emergency, Contention 10. At base, the State and County question the authority of LILCO to assume responsibility for relocating more than 100,000 persons from the 10-mile EPZ. See Plan 3.6-6; Appendix A at III-2.

LILCO's Plan recognizes that circumstances could develop whereby members of the public may be advised to evacuate their homes for an indefinite period of time. Plan 3.6-6. LILCO's Transition Plan demonstrates that an evacuation of the 10-mile plume exposure pathway EPZ will entail a massive

undertaking requiring the exercise of the very activities that the State and County challenge. The Shoreham 10-mile EPZ constitutes an area of approximately 160 square miles with a 1980 winter population of over 113,000 persons. Appendix A at III-2. Evacuation of that area would entail relocating children from 38 public and parochial schools and 13 nursery schools. Appendix A, Part II. Evacuation would necessitate the relocation of persons in 10 adult nursing homes and 14 facilities for the handicapped, requiring a total of 26 buses, 113 ambulances and 209 vans. Appendix A at 12-12, 18, 28; at IV-166 to 168, 172, 175.24/ LILCO will use 333 buses to evacuate the general public without cars. Appendix A, at IV-74b. LILCO estimates that the entire LERO operation will require 1363 LILCO employees and other personnel to carry out Plan functions. Plan, Figure 2.1.1.

The LERO evacuation coordinator, a LILCO employee, would direct and coordinate the evacuation and would be responsible for actions related to traffic control. Plan 2.1-4. An evacuation would require approximately 147 traffic control posts, manned by 193 traffic guides and utilizing around 600

24/ The numbers of busses and other figures used in this portion of this Brief are from the LILCO Plan. As is clear from the County/State Proposal Findings of October 26, we challenge the number of buses LILCO believes will be required. For purposes of the State law legal authority issue, however, the precise number of buses which will be required does not need to be resolved.

traffic cones and 173 flashing lights. Appendix A, at IV-52 through 65. This private group will effect an extraordinary change in the legal driving patterns in the 10-mile EPZ by using road blocks to cordon the immediate plant area, Appendix A at IV-5; by using LILCO cars to block certain through lanes and thereby control traffic travelling on Sunrise Highway, Nichols Road and the Long Island Expressway, Appendix A, at IV-7; by authorizing the use of road shoulders and creating lanes for "turn pockets", Appendix A at IV-10 through 13; by converting a two-mile stretch of a two-way road to a one-way road, Appendix A, at IV-8; by authorizing traffic movement against the traffic lights to maintain a continuous flow, Appendix A, at III-11 and IV-9; by restricting persons located outside the EPZ from entering the EPZ during an evacuation, Appendix A, at IV-8; by dispensing fuel to evacuating vehicles which run out of gas, Appendix A, at IV 176; and by pushing disabled vehicles from traffic lanes. OPIP 2.1.1 at 35; OPIP 36.3 at 2; Plan 4.4-3. LILCO will also install trailblazer signs along evacuation routes marking out evacuation directions; those signs are to be posted by LILCO employees on public highways in advance of any emergency. Appendix A, at IV-70. Finally, the Transition Plan contemplates that during an emergency, relocation centers will be established "to provide monitoring, decontamination, temporary housing, feeding, and first aid for evacuees." Plan 3.6-7. LILCO employees are

assigned responsibility for directing traffic to these centers and performing other functions. OPIP 2.1.1 at 60-61.

Thus, LILCO's Transition Plan confirms that LILCO intends to carry out the very functions that the State and County challenge.

3. Other Protective Actions In The 50-Mile Area

Third, the State and County challenge LILCO's authority to decide what actions should be taken to protect the health and safety of persons within the 50-mile ingestion exposure pathway and communicating these decisions to the public. Contentions 6, 7 and 10.

LILCO's Plan clearly sets forth the actions it intends to perform. Thus, it provides that, in the event of a radiological release, LILCO will assume responsibility for making protective action recommendations for the entire 50-mile ingestion exposure pathway EPZ. Plan 3.6-8; OPIP 3.6.6 at 1, 1n. Under the Transition Plan, a LILCO employee, the Director of Local Response, will decide what "protective actions" to recommend for the 50-mile ingestion pathway zone. OPIP 3.6.6 at 1n. LILCO may recommend implementation of any of the following actions:

(a) Removal of lactating dairy animals from contaminated pastures;

(b) Withholding contaminated milk from the market and diverting the production of fluid milk for the production of dry whole milk;

(c) Limiting the ingestion of potable water until the source has been checked and approved for consumption;

(d) Suspending fishing operations until resumption is recommended;

(e) Preventing introduction of milk supplies into commerce; and

(f) Withholding or diverting produce from markets.

See LILCO Plan, OPIP 3.6.6 at 18-21.

Thus, it is LILCO and LILCO alone that will decide whether food, water, milk, etc. should or should not be consumed by people both throughout the 50 mile ingestion exposure pathway EPZ and beyond. Moreover, LERO's Coordinator of Public Information will be responsible for communicating LILCO's decisions to the public (Plan 3.6-8; see also OPIP 3.6.6), and LILCO will implement the decisions it makes. In

addition, LILCO's Plan calls for LILCO to provide security at the relocation center located beyond the 10 mile EPZ. OPIP 2.1.1 at 62,61.

4. Re-Entry and Recovery

Finally, the State and County challenge LILCO's legal authority to make determinations regarding recovery and re-entry to the EPZ's after a nuclear accident. Contention 8.

The Transition Plan provides that the LERO committee will "plan and implement actions for the restoration of the affected areas to their pre-emergency conditions." Plan at 3.10-1; see OPIP 3.10.1. In implementing the recovery and re-entry responsibilities that it assumes, LILCO would perform virtually the same activities it must perform to implement an evacuation, including communicating with the public, controlling traffic, providing transportation to the general public, providing security against entry into still contaminated areas and providing foodstuffs and drinking water to areas in need. OPIP 3.10.1 at 2-4. The Transition Plan also places long-term recovery decisions and operations in the hands of LERO's Health Services Coordinator. Under the Plan, this LILCO employee "has responsibility for recommending protective actions; for overseeing the total related radiological program; and for modifying, relaxing and discontinuing protective actions." Plan 3.11-1.

* * * *

In sum, the State and County challenge and LILCO must concede that LILCO intends to perform basic functions -- declaration of emergency, direction of an evacuation, implementation of protective actions and management of re-entry. These functions are provided for in LILCO's Transition Plan.

Each of these functions is an example of a more basic governmental function: the exercise of the traditional governmental authority to protect the health, safety and welfare of the public. Protection of the public is the essence of governmental power. Exercise of the State's basic power to govern has not been, and cannot lawfully be, delegated to a private corporation such as LILCO. Moreover, LILCO as a creature of state law possesses only those powers that have been expressly granted to it. Those powers do not include the police power of the State. These basic legal principles -- the reservation of the police power to the State and the limited powers of a corporate entity -- preclude LILCO's exercise of the powers in question.

Each specific Transition Plan function that the Contentions challenge is a specific instance of the police power. Moreover, each of those functions has been conferred upon governmental subdivisions of the State. The Legislature has delegated each such function to particular governmental entities.

An express grant of authority to one party precludes the exercise of that authority by all other parties not so named. That fact alone precludes LILCO's exercise of the challenged powers.

These basic principles and the New York Legislature's specific delegation of particular powers are reviewed below.

V. LILCO LACKS THE LEGAL AUTHORITY TO IMPLEMENT THE TRANSITION PLAN

A. Basic Legal Principles Demonstrate That LILCO May Not Implement The Transition Plan.

LILCO's position fails to account for two basic legal principles. First, the police power resides in the States under the Tenth Amendment to the United States Constitution. Accordingly, LILCO cannot exercise the State's police power or functions derived therefrom absent an express delegation of such power. Second, corporations have only those powers expressly conferred upon them by the State. Accordingly, LILCO cannot carry out the Transition Plan, exercise the State's police power, or carry out governmental functions unless it proves that the authority to do so has been conferred upon it.

1. LILCO Seeks to Perform Functions That are Exclusively Reserved to the State and its Duly Authorized Local Governments

LILCO seeks to avoid the inescapable conclusion that its proposed activities under the Transition Plan, taken individually or as a whole, constitute an exercise of the police power that belongs solely and exclusively to the State and, upon proper delegation, to local governments such as Suffolk County. The fact remains, however, that LILCO wishes to act as the civil authority in the event of a nuclear emergency resulting from its operation of Shoreham. LILCO wishes to act as though it were a government. It may not lawfully do so.

a. LILCO's Implementation of the Transition Plan Involves an Exercise of the State's Police Power and the Performance of Governmental Functions

The police power is the State's most essential power. 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."25/ See also Yonkers Community Development Agency v. Morris, 37 N.Y.2d 478, 373 N.Y.S.2d 112 (1975), app. dismissed, 423 U.S. 1010 (1975); Silvan v. Shang, 70 A.D.2d 704, 416 N.Y.S.2d 671 (1979).

LILCO's Transition Plan clearly involves an exercise of the State's police power. The Plan itself states that LILCO is prepared to act to protect the safety and health of the public. Plan, 1.4-1. The basic functions at issue relate to the protection of public health and safety and are clearly within the embrace of the State's police power.26/ LILCO's entire

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25/ In the present context, Congress and the NRC have recognized that offsite emergency planning is an area involving the police power of the States. See, e.g., the remarks of former NRC Chairman Joseph M. Hendrie testifying before Congress:

> 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.

Statement of Joseph M. Hendrie, 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 380, 398-99. See also comments of Senator Hart during the debates of the 1980 NRC Authorization Act, Public Law 96-295 (1980): "[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).

26/ Emergency planning and disaster prevention is at the core of the State's police power. See N.Y. Executive Law, §20 et seq. (McKinney).

Transition Plan is premised upon its assumed right to protect the health and safety of Suffolk citizens within a 50-mile radius of the Shoreham facility and to do so in the way it deems most satisfactory.

Moreover, it is clear that LILCO intends to perform specific functions that, by any stretch of the imagination, are governmental in nature. It intends to declare an emergency and to advise citizens concerning steps they should take to protect themselves. Contentions 5 and 6. It intends to manage a major, full-scale evacuation of a 160 square mile area. Contention 6. It intends to close public highways, to re-route traffic, and to direct and manage the flow of traffic. Contentions 1, 2, 3, 4, 9 and 10. It intends to decide upon and oversee steps to secure public health within a 50-mile radius of Shoreham. Contentions 6 and 7. It intends to oversee evacuation centers for thousands of people. Contention 10. It intends to decide when and in what fashion citizens may return to their homes in previously contaminated areas. Contention 8.

These are governmental functions. Setting aside legal niceties, the Transition Plan, viewed with realism and common sense, establishes that LILCO intends to carry out functions that intrude upon and usurp governmental prerogatives.

b. The Police Power Is Vested In The State Of New York And May Be Exercised Only By Those To Whom Such Power Has Been Lawfully Delegated

In the American constitutional system, the police power is an inherent attribute and prerogative of state sovereignty. Teeval Co. v. Stern, 301 N.Y. 346 (1950), cert. denied, 340 U.S. 876 (1950); American Consumer Industries, Inc. v. City of New York, 28 A.D. 2d 38, 281 N.Y.S. 2d 467 (1967); People v. Ford Motor Co., 271 A.D. 141, 63 N.Y.S. 2d 697 (1946). The Tenth Amendment to the U.S. Constitution reserves the police power to the States.27/ See Munn v. People of Illinois, 94 U.S. 113 (1877); Brown 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.")

The police power, as an inherent prerogative of the State, may be exercised only by the State or by governmental subdivisions upon whom the State Constitution or State statutes confer such power. Because local governments are creations of

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27/ The Tenth Amendment provides:

> 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.

State law, governmental subdivisions have no inherent right to exercise public powers, and a Constitutional or statutory basis for the exercise of such powers must be established. Courts have repeatedly held that even municipal corporations, whose sole purpose is to perform governmental functions, have no inherent authority to exercise state police powers. They may do so only if the State Constitution or the State Legislature, by statute or charter, confers that power upon them. See In the Matter of Bon-Air Estates, Inc. v. Building Inspector of the Town of Ramapo, 31 A.D. 2d 502, 298 N.Y.S. 2d 763, 767 (1969) ("The residual police power reposes in the State, not in any of its political subdivisions; and a municipality can only exercise police power when it has specifically or impliedly received a delegation of such power from the State."); Incorporated Village of Brookville v. Paulgene Realty Corp., 24 Misc. 2d 790, 200 N.Y.S. 2d 126 (1960), aff'd, 14 A.D. 2d 575, 218 N.Y.S. 2d 264 (1961), aff'd, 11 N.Y. 2d 672, 225 N.Y.S. 2d 750 (1962) ("[T]he residual "police power" reposes in the State, not in its political subdivision, and ... in presuming to exercise it, a municipality first must show a delegation of such power from the State.").28/ A fortiori, private

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28/ See also 8200 Realty Corp. v. Lindsay, 34 A.D. 2d 79, 309 N.Y.S. 2d 443, 446 (1970), rev'd on other grounds, 27 N.Y. 2d 124, 313 N.Y.S. 2d 733 (1970), app. dismd., 400 U.S. 962 (1970) ("A municipality may only exercise legislative powers, including an exercise of the police power, to the extent that it has expressly or impliedly received a delegation of authority from the State."); Rochester v. Public Service Commission,

(Footnote cont'd.)

corporations such as LILCO have no inherent authority to exercise New York State's sovereign police power. LILCO must therefore show an affirmative delegation of such power before it can "presume" to exercise it.

c. The Police Power Of New York Has Been Delegated Only To Local Governments And May Not Be Conferred Upon Private Corporations

i. New York Law Delegates The State's Police Power To Local Governments

Local governments in New York, such as Suffolk County, have been delegated "nearly the full measure of New York's police power" by the Constitution and various State statutes.29/ Article 9, §2 of the State Constitution delegates the police power to local governments as follows:

(Footnote cont'd.)

192 Misc. 33, 83 N.Y.S. 2d 436 (1948), aff'd, 275 A.D. 172, 89 N.Y.S. 2d 545 (1949), aff'd, 301 N.Y. 801 (1950); People ex rel. Elkind v. Rosenblum, 184 Misc. 916, 54 N.Y.S. 2d 295 (1945), aff'd, 269 A.D. 859, 56 N.Y.S. 2d 526 (1945), aff'd, 295 N.Y. 929 (1946) ("The city, which is a municipal corporation, is a creature of law. The law defines its powers and duties. It has no more right to act in excess of the powers granted to it than has a private corporation.").

29/ Hoetzer v. County of Erie, 497 F.Supp. 1207, 1215 (W.D.N.Y. 1980); Lane v. City of Mount Vernon, 38 N.Y. 2d 344, 379 N.Y.S. 2d 798 (1976); Mobil Oil Corp. v. Town of Huntingdon, 72 Misc. 2d 530, 339 N.Y.S. 2d 139, 142 (1972); Grimm v. City of New York, 56 Misc. 2d 525, 289 N.Y.S. 2d 358, 362 (1968).

> "[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,
>
> * * * * *
>
> "(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). The counterpart statutory reflection of the Constitutional delegation of authority is Section 10 of the Municipal Home Rule Law which confers upon counties, cities, towns and villages the authority to provide for "the government, protection, order, conduct, safety, health and well-being of persons or property, therein." N.Y. Mun. Home Rule Law, §10.1.a(12) (McKinney).

These constitutional and statutory provisions, standing alone, authorize Suffolk County to exercise the State's police power. Neither the Constitution nor the Municipal Home Rule Law contains any provision that could even remotely be interpreted as delegating the State's police power to private corporations like LILCO. LILCO does not suggest otherwise.

ii. An Express Grant of Government Powers to Specific Entities Precludes the Exercise of Such Powers by all Other Bodies

It is a universal principle in the interpretation of statutes that the specific mention of one person implies the

exclusion of all others. Expressio unius est exclusio alterius. Thus, where a law expressly confers a particular power upon one person, an irrefutable inference must be drawn that the Legislature intended to omit and exclude all other persons from the exercise of that power. See McKinney's Cons. Laws of N.Y., Statutes, §240; Combs v. Lipson, 44 Misc. 2d 467, 254 N.Y.S. 2d 143, 146 (1964). See also Eaton v. New York City Conciliation and Appeals Board, 56 N.Y. 2d 340, 452 N.Y.S. 2d 358 (1982); Patrolmen's Benevolent Association v. City of New York, 41 N.Y. 2d 205, 391 N.Y.S. 2d 544 (1976).

LILCO's basic premise in this proceeding, as reflected in its legal authority statement in the Transition Plan, is that New York law does not prevent it from performing governmental functions. LILCO's argument is simply wrong-headed. LILCO must show an affirmative delegation of such power before it can claim to perform the challenged functions. No such delegation exists. Moreover, such powers have been conferred upon the State and its political subdivisions both generally and specifically. The Legislature's action in granting such powers to particular governmental entities evidences its intention to exclude all other entities, such as private corporations, from the exercise of such powers.

iii. New York State May Not Lawfully Delegate The Exercise Of Its Police Power To Private Corporations Such As LILCO

The State has conferred the powers in question upon State and local governmental authorities and not upon private corporations such as LILCO. Moreover, if the Legislature attempted to delegate the State's police power to a private corporation such as LILCO, that action would constitute an unlawful delegation of governmental powers.

> A state has no power to bargain away its police power where related to fundamental matters of public health, safety or morals.

Beacon Syracuse Associates v. City of Syracuse, 560 F. Supp. 180, 199 (N.D.N.Y. 1983).

This principle is firmly established under our constitutional system.30/ In the leading case of Fink v. Cole,

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30/ See generally the frequently cited case of Rouse v. Thompson, 228 Ill. 522, 536, 81 N.E. 1109 (1907), in which the Illinois Supreme Court stated:

> "We have .... examined the reported cases with care and have been unable to find any case .... where the delegation of power to an individual or a number of individuals has been sustained by the courts. The general rule is that such power cannot be conferred upon a private person; but must be delegated, if at all, to some public agency, such as a municipal corporation, commission, local board or public officer.

The principle of Rouse has been followed repeatedly in the New York cases. See 20 N.Y. Jur. 2d, "Constitutional Law" §183 (1982).

302 N.Y. 216 (1951), the New York Legislature delegated to stewards of The Jockey Club, a private corporation, power to grant or refuse licenses to horse owners, jockeys and trainers. Although acknowledging that this grant of power to a private corporation may have served a useful purpose (maintaining proper control over race meetings), the New York Court of Appeals nevertheless held the delegation unlawful. The Court observed that by issuing licenses, The Jockey Club was exercising "essentially a sovereign power." 302 N.Y. at 224. Yet, its stewards "are officers of The Jockey Club who are neither chosen by, nor responsible to the State government." Ibid. The Court concluded that this delegation of sovereign powers to a private corporation was unconstitutional:

> In our view the delegation by the Legislature of its licensing power to The Jockey Club, a private corporation, is such an abdication as to be patently an unconstitutional relinquishment of legislative power in violation of section 1 of article III of the Constitution of this State which provides: 'The legislative power of this State shall be vested in the Senate and Assembly.'

Id. at 225. New York Courts have repeatedly reached the same result in other cases,31/ as have the courts of other

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31/ 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. 2d 450 (1980) ("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 exercise or review of its power."); Podiatry Society of New York v.

(Footnote cont'd.)

jurisdictions.32/ The principle that sovereign governmental functions cannot lawfully be delegated to private individuals or corporations embraces not only the legislative function but all sovereign powers of the State, including, specifically, the police power.33/

(Footnote cont'd.)

Regents of University of New York, 78 Misc. 2d 731, 358 N.Y.S. 2d 276, 279 (1974) ("[T]he interpretation urged by petition would result in an unconstitutional delegation of governmental powers to a private corporation ...."); Fifty Central Park West Corp. v. Bastien, 60 Misc. 2d 195, 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 private association to possess what in effect would be legislative power is an unlawful delegation of such legislative power.").

32/ See, e.g., United Citizens Party of South Carolina v. South Carolina State Election Comm'n., 319 F. Supp. 784, 787 (D.S.C. 1970) ("It is a black letter rule now so firmly fixed that it is found in legal encyclopedias that a legislature may not delegate legislative functions to private persons or associations."); Hetherington v. McHale, 458 Pa. 479, 486, 329 A.2d 250, 254 (1974) ("[P]ersons who make governmental decisions [must] be either elected by the people or appointed by the representatives chosen by the people."); Olin Mathieson Chemical Corp. v. White Cross Stores, Inc., 414 Pa. 95, 99, 199 A.2d 266, 268 (1964) ("The vesting of a discretionary regulatory power over prices, rates or wages, in private persons violates the essential concept of a democratic society and is constitutionally invalid."); Dade County v. State of Florida, 95 Fla. 465, 476, 116 So. 72 (1928) ("[T]he exercise of sovereign governmental powers .... may legally be exerted only by officials duly commissioned for that purpose. The Constitution does not contemplate that essential governmental power or authority may be exercised by a corporate agency whose members are not duly commissioned officers.").

33/ See Patrolmen's Benevolent Ass'n v. City of New York, 59 Misc. 2d 556, 299 N.Y.S. 2d 986, 990 (1969) ("[G]overnmental functions and responsibilities cannot be surrendered by contract .... where police power and public safety and welfare are involved."); Yanow v. Seven Oaks Park, 18 N.J. Super. 411, 87 A.2d 454 (1952), modified on other grounds, 11 N.J. 341, 94 A.

(Footnote cont'd.)

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In sum, the police power LILCO seeks to exercise resides with the State of New York. It has not been and could not be delegated to a private corporation such as LILCO.

2. Corporations May Exercise Only Those Powers Expressly Conferred Upon Them By the State

Corporations are state-created entities. Unlike natural persons, corporations possess only those powers that have been conferred on them by the state of their incorporation.34/ When an issue arises as to the existence of a particular corporate power, some basis for that power must be found in the laws under which the corporation operates. Corporate powers do not exist simply because they are not expressly prohibited.35/

(Footnote cont'd.)

2d 482; North Carolina Ass'n for Retarded Children v. State of North Carolina, 420 F. Supp. 451, 456 (M.D.N.C. 1976).

34/ See, e.g., Schwab v. E.G. Potter Co., 194 N.Y. 409, (1909); Robia Holding Corp. v. Walker, 257 N.Y. 431, 438, (1931) ("No corporation, public or private, may 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.").

Moreover, it is clear that federal law cannot confer upon LILCO powers that it does not have under the law of its incorporation. See 6 Fletcher, Cyclopedia of the Law of Private Corporations, §2477 (Rev. perm. ed. 1979): "The powers conferred on a corporation by its charter and the laws of the state creating it cannot be enlarged by federal statutes."

35/ For a thorough discussion of these principles, see 6 Fletcher, Cyclopedia of Corporations §§ 2476-2486 (Rev. perm. ed. 1979).

LILCO attempts to stand reality on its head and contend that it may do anything under the sun if there is no specifically applicable, state prohibition. Thus, LILCO suggests that it may implement the Transition Plan unless expressly prohibited by State law from doing so. In fact, LILCO has no power to adopt and implement that Plan unless it can identify an express or implied basis for the exercise of that power in the New York laws under which it exists.

LILCO's express 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 (McKinney). None of these express powers authorizes LILCO's Transition Plan or would even remotely permit LILCO's assumption of the powers it purports to possess.36/

36/ Section 11 of the Transportation Corporation Law grants electric corporations and 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 businesses, 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 sixteen "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).

Accordingly, if LILCO has any power to implement the Plan, that power must be implied. Here, again, no basis for LILCO's assumption of the State's police power exists. Although corporations have implied authority to exercise powers that are "necessary or convenient" to carry out their express powers, a corporation has no implied authority to perform any act that furthers its corporate interests.37/ The law is well established that:

> [a corporation] cannot, any more than can an individual, do acts prohibited by law or which are against public policy. No charter power can be conferred upon a corporation to do such acts, and no implication of such power can arise.38/

This principle has been frequently applied39/ and is

37/ The doctrine of "implied powers" arose at common law. Section 202(16) of the Business Corporation Law codifies the common law by providing that all corporations operating thereunder may "exercise all powers necessary or convenient to effect any or all of the purposes for which the corporation is formed."

38/ 6 Fletcher, Cyclopedia of Corporations §2491 (Rev. perm. ed. 1979).

39/ See, e.g., Hadlock v. Callister, 85 Utah 510, 39 P.2d 1082 (1935) ("[T]here can be no implied powers to do any act which is contrary to the statutes or the public policy forming the basic powers of the statutes."); United States v. Northern Securities Co., 120 F. 721, 727 (1903), affd, 193 U.S. 197 (1904), ("[W]hatever powers the incorporators saw fit to assume, they must hold and exercise for the accomplishment of lawful objects."). See also Security Trust & Savings Bank v. Marion County Banking Co., 287 Ala. 507, 253 So. 2d 17 (1971) (No express or implied corporate power exists to engage in branch banking in contravention of state policy against branch banking.); State v. Jefferson Lake Sulphur Co., 36 N.J. 577, 178 A.2d 329 (1962), cert. den. and app. dismd., 370 U.S. 158 (1962) (No express or implied corporate power exists to circumvent state escheat policy.).

dispositive of any claim by LILCO that it has an implied power power to carry out the Transition Plan or perform governmental functions. As previously discussed, the Tenth Amendment reserves general police powers to the State. Under New York law, the police power can be exercised only by the State or, upon proper delegation, by its political subdivisions. The police power has not been, and could not be, delegated to LILCO. Accordingly, the law and public policy of New York preclude private corporations from assuming the police power or from performing governmental functions. The Transition Plan involves the assumption of inherently governmental powers. Its implementation cannot, therefore, be sustained as an exercise of LILCO's implied corporate powers.

In sum, New York corporate law does not grant LILCO the authority to exercise the State's police power or to perform the governmental functions set forth in the Transition Plan. Accordingly, LILCO cannot lawfully implement the Transition Plan.

B. The Legislature Has Specifically Delegated Particular Functions Embraced By The Transition Plan To State And Local Governments

As previously discussed, the New York Constitution and the Municipal Home Rule Law confer the State's general police power upon local governments. In addition, the Legislature has specifically authorized the State and/or local governments to engage in emergency planning and disaster response activities and to exercise particular functions that are essential elements of the Transition Plan. That express delegation forecloses LILCO's effort to discharge the same functions. The State's delegation of the powers in question may be seen from two perspectives: (i) the delegation of general emergency planning and response powers; and (ii) the delegation of specific powers employed in emergency situations.40/

40/ LILCO's Transition Plan appears to assume that New York State statutes must expressly preclude it from exercising governmental functions. See also LILCO October 15 Brief, at 11. Nothing could be further from the case. The State Legislature has acted to identify those governmental bodies that have particular powers, and State courts have consistently held that such positive authorization, even of governmental bodies, is a precondition to the lawful exercise of governmental functions. Moreover, the Legislature need not expressly identify every category of persons who may not exercise certain functions; its express grant of authority to particular persons who may do so is sufficient evidence of its intention. As previously discussed, where the Legislature expressly grants such powers to governmental entities, its action necessarily entails that other entities, such as private corporations, have no such authority. McKinney's Cons. Laws of N.Y., Statutes, 240; Combs v. Lipson, 44 Misc. 2d 467, 254 N.Y.S. 2d 143, 146 (1964).

1. Executive Law, Article 2-B, Confers Broad Emergency Planning Powers Upon State And Local Governments

The Transition Plan involves emergency planning and emergency response. The New York Executive Law addresses the distribution of powers held by the Executive Branch of the State Government. Article 2-B of the Executive Law specifically authorizes State and local government emergency planning activities and confers all such powers upon such governmental entities.41/ Article 2-B establishes a framework for State and local cooperation in planning and preparing for emergency responses to all kinds of disasters, including, specifically, nuclear accidents at electric generating facilities.42/ Thus, Article 2-B creates the Disaster Preparedness Commission ("DPC") and authorizes the DPC to coordinate the overall State response to any disaster and to prepare a state disaster preparedness plan (Sections 21 and 22). Article 2-B authorizes each county and city to prepare disaster preparedness plans and

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41/ The Contentions challenge functions related to emergency planning. The Executive Law is specifically cited as a bar to LILCO's conduct of such functions in Contentions 5, 6, 7, 8 and 10.

42/ Section 20 of the Executive Law defines "disaster" to mean an "occurrence or imminent threat of widespread or severe damages, injury or loss of life or property resulting from any natural or man-made causes, including .... radiological accident ...." N.Y. Exec. Law §20.2.a (McKinney). Section 29-c defines "radiological accident" to include an accident "occurring at a nuclear electric generating facility." Id. §29-c.1(c).

identifies areas of disaster prevention and response that such plans should address (Section 23). The remaining sections of Article 2-B address the delegation of authority to react to, rather than to plan for, a disaster. Again, these sections contemplate that disaster operations will be under the complete control of local governments with State assistance when necessary.

No provision of Article 2-B expressly authorizes any private corporation to engage in emergency response activities.43/ No section of Article 2-B authorizes any private corporation to prepare or carry out emergency plans or to engage in the wide-ranging emergency planning and disaster reaction activities LILCO contemplates. If the State Legislature had intended to delegate the State's police power and broad-scale emergency planning and disaster response authority to utilities such as LILCO, it would have done so in clear, explicit language.

43/ See also discussion infra at pp. 74-76.

2. The Legislature Has Delegated The Essential Functions Of The Transition Plan To State Or Local Governments

The Legislature has also delegated to the State and local governments the authority to carry out the basic functions contained in the Transition Plan. Each of the basic functions in question is addressed by State statutes that apportion such powers between State and local governments and control the exercise of such responsibilities.

a. Declaration Of A Public Emergency And Basic Decisions Concerning Protective Actions

Contentions 5 and 6 challenge LILCO's authority to declare a public emergency, to activate sirens and direct emergency broadcasts and to make basic decisons concerning protecitve actions. Contentions 5 and 6 reference the New York Executive Law and the Penal Law. Article 2-B of the Executive Law confers upon State and local governments the specific powers that LILCO purports to exercise. Thus, §28(1) empowers the Governor, under certain circumstances, to declare a disaster emergency by executive order, and §24 empowers chief executives of local governments to proclaim a local state of emergency or, in the case of radiological accidents at nuclear generating facilities, to request the Governor to declare such an emergency. There is absolutely no suggestion in Article 2-B that a private

corporation may take the extraordinary step of declaring a public emergency and broadcasting its declaration to the general public.

Second, Article 2-B specifically authorizes the Governor "or his designee" to direct local chief executives or emergency services organizations to notify the public that an emergency exists and to take appropriate protective actions in the event of a radiological accident (§28(2)). Although LILCO claims that LERO is an "emergency service organization", Article 2-B clearly specifies that even an emergency service organization is empowered to communicate with the public about emergency conditions only at the Governor's direction.

Third, Article 2-B specifies that State and local disaster preparedness plans may include systems for warning, and plans for communicating with, endangered populations (§§22(3)(b)(3) and (5) and 23(7)(b)(3) and (5)). Similarly, Article 2-B authorizes chief executives of local governments to decide upon appropriate protective actions and to promulgate local emergency orders to protect life or property (§24(1)). The entire thrust of Article 2-B is to provide ample authority to local governments to engage in disaster prevention and to respond to actual disasters, calling upon the state for such assistance as they may require.

Article 2-B does not authorize private corporations to notify the public concerning emergencies, to establish emergency warning systems, to decide upon appropriate protective actions or, most fundamentally, to declare public emergencies on their own say-so.

Finally, the Contentions also reference Penal Law, §195.05 which states in material part: "A person is guilty of obstructing governmental administration when he intentionally ... perverts the administration of law or other governmental function ... by means of any independently unlawful act." LILCO's unauthorized and unlawful usurpation of powers expressly vested in the State and local governments falls squarely within the embrace of this statute.

Similarly, Penal Law §190.25 prohibits any individual from acting as though he is a "public servant or is acting with approval or authority of a public agency or department." This is exactly what LILCO would do in declaring and broadcasting a public emergency, in exercising "command and control" functions and in making the sole "decision to notify and implement protective actions for the general public." Plan, 2,1-1.2; OPIP 2.1.1 at 5. It is hard to imagine anything that is more precisely akin to acting as a public servant than recommending on an emergency broadcast system a general evacuation of a 160 square mile territory populated by more than 100,000 residents.

b. Evacuation And Traffic Control

Contentions 1, 2, 3, 4, 6, 9 and 10 challenge LILCO's authority to carry out an evacuation, to direct evacuation traffic and, in connection therewith, to manage evacuation centers. These Contentions reference the New York Executive Law, the Vehicle and Traffic Law, the Transportation Corporation Law and the Penal Law as well as Suffolk County and Brookhaven codes.44/

Article 2-B also empowers state and local governments, but not private corporations, to perform the evacuation and traffic control functions set forth in the Transition Plan. Article 2-B provides that emergency preparedness plans prepared by State or local governments may include provisions for coordinated evacuation procedures and controls upon ingress and egress to and from disaster areas (§§22(3)(b)(6) and (13) and 27(7)(b)(6) and (13)). Local chief executives are given extraordinary powers concerning the prohibition and control of pedestrian and vehicular traffic, and similar authority is embraced by the executive order powers conferred upon the Governor (§§24(1)(a) and (b) and 29-a(1)). Article 2-B does not authorize private corporations to control traffic, to set aside

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44/ LILCO's lack of power to carry out these functions under the Transportation Corporation Law and New York corporate law is discussed supra, at pp. 52-55.

existing governmental traffic controls, to establish or implement evacuation procedures or to assume or share any powers specifically conferred upon State and local governments. By vesting such powers in State and local governments, Article 2-B clearly precludes other entities from exercising such powers.

Similarly, the New York Vehicle and Traffic Law vests in the State "the exclusive power to control the use of motor vehicles on public highways." People v. Evans, 205 Misc. 886, 131 N.Y.S. 2d 412, 414 (1954). Local governments may regulate and control the streets and the flow of traffic only where expressly authorized to do so by the State legislature. See, e.g., People v. Grant, 306 N.Y. 258, 260 (1954): "[S]treets are subject exclusively to regulation and control by the State as sovereign, except to the extent that the legislature delegates power over them to political subdivisions and municipal corporations." See also Article 35, Vehicle and Traffic Law; People v. Scanlan, 27 Misc. 2d 442, 211 N.Y.S. 2d 635 (1961). If express statutory authorization is required before local government officials may direct or control traffic, such express authorization is clearly required before any private entity, such as LILCO, can exercise such control. No such delegation to private corporations exists.

The same point is demonstrated by Title VIII of the Vehicle & Traffic Law which defines the respective powers of

the State and local authorities to regulate traffic. Title VIII delegates the power to regulate traffic to specific governmental authorities: the State Department of Transportation and other state authorities (Art. 36, 37); public authorities and commissions (Art. 38); cities and villages (Art. 39); County Superintendents of Highways (Art. 40); towns (Art. 41); local authorities and school districts (Art. 42); and County traffic safety boards (Art. 43). In each case, specific legislative authority supports each government's traffic control powers. No corresponding Article gives any such authority to private corporations. Again, it is clear that the Legislature did not intend that private corporations should have or exercise such powers.

Several other sections of the Vehicle and Traffic Law either confer specific traffic control functions upon civil authorities but not private corporations or, alternatively, prohibit unauthorized persons from performing such functions. Thus, Section 1110 requires obedience to "official traffic-control devices ... unless otherwise directed by a traffic or police officer." LILCO's Transition Plan presupposes that LILCO employees will direct traffic and "facilitate" the flow of traffic without regard to existing traffic light patterns. See Appendix A, III-11. Such actions are contrary to §1110 and are unauthorized.45/

45/ See e.g., FEMA comments: "[T]raffic control guides will not be able to put signals on "flashing" operation .... This is

(Footnote cont'd.)

Section 1602 of the Vehicle and Traffic Law authorizes "police officer(s) or other person(s) empowered to regulate traffic at the scene" to regulate traffic in an emergency. That Section does not empower private individuals or corporations to perform such functions unless they are "empowered to regulate traffic"; moreover, §1602 clearly indicates that due authorization is required before a person can lawfully perform emergency traffic control functions. LILCO intends to perform emergency traffic control functions, but it offers no legal basis for its authority to do so.

Finally, it is clear that State law prohibits LILCO's intended use of trail blazer signs, cones and barriers to "channel," "facilitate" or "direct" traffic. LILCO asserts that trail blazer signs are to be located along every major road to mark escape routes for evacuees fleeing the EPZ. See Appendix A, IV 10. Section 1114 of the Vehicle and Traffic Law specifies that "No person shall place, maintain, or display upon or in view of any highway any unauthorized sign, signal,

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(Footnote cont'd.)

a disadvantage since existing signals may be counter to the control strategy the guide is trying to implement. The confusion which may be generated by traffic signals differing from traffic control guide strategies could reduce intersection capacity and increase evaluation time." Element by Element Review of the LILCO Transition Module attached to June 23, 1983 Letter of Richard Krimm, Assistant Associate Director of FEMA, to Edward L. Jordan, Director, Division of Emergency Preparedness and Engineering Response, NRC, p. 2.

marking or device which purports to be or is an imitation of or resembles or is likely to be construed as an official traffic control device ..., or which attempts to direct or regulate the movement of traffic." Each of LILCO's traffic direction and control devices -- trail blazer signs, cones, barriers and parked cars on public highways -- falls with several clauses of this prohibition. Each is therefore impermissible.

Finally, as previously noted, §§190.25 and 195.05 of the Penal law prohibit (i) acts which purport to be those of a public servant and (ii) the perversion of governmental functions through unlawful acts. Pursuant to the Transition Plan, LILCO employees would act as though they were policemen and government officials, directing a general evacuation and controlling traffic. The actions here challenged clearly fall within the scope of these prohibitions.

c. Other Protective Actions

Contentions 6, 7 and 10 challenge LILCO's authority to make decisions and official recommendations for protective actions in the 50-mile EPZ and to exercise law enforcement functions at relocation centers. Those Contentions reference the Executive Law, the Vehicle and Traffic Law, the Transportation Corporation Law and the Penal Law.

As indicated above, LILCO proposes to assume responsibility for making protective action recommendations regarding the production, consumption, use, storage and disposal of food, milk and water in the 50-mile ingestion pathway EPZ. In doing so, LILCO intends to exercise authority which has been delegated by the Legislature to specific State and local officials and administrative agencies.

The principle aspects of this function are precisely addressed by Article 2-B. Thus, Article 2-B gives both State and local governments broad powers to respond to disaster situations (§§22.3.b and 23.3.b). Moreover, in the event of a duly-declared emergency, any local government chief executive is empowered to promulgate local emergency orders to protect life and property. Section 24.1. Thus, local chief executives are expressly granted the very powers that LILCO has purported to exercise; LILCO's usurpation of such powers is an attempt to negate the statutory allocation of authority deliberately chosen by the State Legislature. Moreover, Article 2-B imposes substantive and procedural safeguards upon any local emergency order issued by local chief executives. See §§ 24.1.f and 24.2 and 3. These limitations underscore the Legislature's concern about the exercise of emergency powers; LILCO, however, assumes the power to act in this area, subject to no limitations other than those it itself accepts.

LILCO's actions also would violate other State statutes not specifically referenced in the Contentions but clearly pertinent to the legal authority issue.46/ The purpose of LILCO's protective action recommendations would be to protect the public health from the effects of radiation exposure to food-producing livestock, crops and water supplies. However, the Legislature has specifically empowered the State Department of Health to "supervise and regulate the public health aspects of ionizing radiation and nonionizing electromagnetic radiation...." N.Y. Public Health Law, §201(1)(r) (McKinney). In this connection, the Department's Public Health Council, as part of its authority to develop and amend the State's Sanitary Code, has been empowered to "establish regulations in respect to ionizing radiation and nonionizing electromagnetic radiation..."; id. §225(5)(p); to "authorize appropriate officers and agencies to ... render such inspection and other radiation protection services as may be necessary in the interest of public health, safety and welfare..."; id. §225(5)(q); and to "prescribe the qualifications of ... radiation safety officers..."; id. §225(5)(b).

In addition to these general powers in connection with radiation protection, the Department has been delegated

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46/ These statutes are at issue in the litigation now pending before the Supreme Court of the State of New York, Suffolk County. See Cuomo v. LILCO, Consolidated Index No. 84-4615.

particular authority over the public health aspects of food exposed to radiation. Section 206(1)(k) of the Public Health Law authorizes the Commissioner of Health, with the advice and assistance of the Commissioner of Agriculture and Markets, to "establish rules and regulations to require such treatment of food or food products ... as may be necessary for protection of the public health against the hazards of ionizing radiation." Id. §206(1)(k). Thus, LILCO's plan to assume responsibility for making its own protective action recommendations regarding food in the ingestion pathway zone would usurp the Department of Health's authority over this subject.

LILCO's intention to make protective action recommendations concerning water constitutes a similar usurpation. The Legislature has empowered the Department to "supervise and regulate the sanitary aspects of water supplies ... of the state." Id. §201(1)(1). In this regard, the Department "may make rules and regulations for the protection from contamination of any or all public supplies of potable water and water supplies of the state. .". Id. §1100 (1).

LILCO's Transition Plan would also require LILCO to intrude upon authority delegated to the Commissioner of Agriculture and Markets over the sanitary aspects of food and milk. The Legislature has empowered the Commissioner to "[c]o-operate with local health departments and other local agencies in

preventing the production, manufacture, sale or offering for sale of ... deleterious or unwholesome food...". N.Y. Agriculture and Markets Law, §16(24). In addition, the Commissioner has specific authority to protect and promote "the health and welfare of the people of [the] state by inspecting, regulating and supervising the sanitary quality of milk and cream distributed, consumed or sold within [the] state...". Id. §71-1(1).47/

Thus, LILCO's plan to assume responsibility for protecting the public from unsafe or unwholesome food, milk and water resulting from a nuclear accident at Shoreham would constitute an exercise of powers given to the Departments of Health and Agriculture and Markets concerning such subjects. LILCO's plan also involves an invasion of authority delegated to local governments. Specifically, local boards of health in cities, towns and villages have been authorized to enact regulations "necessary and proper for the preservation of life and

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47/ See also Agriculture and Markets Law, §16(35) (authorizing the Commissioner to "[i]nvestigate, inspect and supervise all sanitary aspects relative to the production, processing, sale and distribution of milk and milk products"); id. §254(9) (vesting the Department of Agriculture and Markets with power "to supervise and regulate the entire milk industry of New York State, including the production, transportation, manufacture, storage, distribution, delivery and sale of milk and milk products in the state of New York,"); and id. §46-9 (charging Commissioner with the duty, inter alia, of promulgating rules and regulations relating to the manufacture, processing, distribution and sale of milk and milk products and the sanitary aspects thereof).

health" which are not inconsistent with the Sanitary Code. N.Y. Public Health Law, §308(d) (McKinney). See also id. §228(2), §347(1), §352(2). Local health officers are also empowered to maintain sanitary supervision over and to enforce the Public Health Law and Sanitary Code within their jurisdictions. Id. §324. See also id. §352(2), §366(1), §395.

In sum, LILCO intends to usurp authority which the Legislature has chosen to delegate to particular State and local agencies. Neither Article 2-B nor the Public Health Law nor the Agriculture and Markets Law provides for a wholesale transfer of the power to protect the public from unsafe food, milk or water to any private corporation. Such a transfer of authority cannot be implied.

d. Re-entry And Recovery

Contention 8 challenges LILCO's authority to make decisions and issue official recommendations concerning re-entry and recovery. Contention 8 references the Executive and Penal Laws.

Article 2-B confers specific powers upon State and local governments concerning the re-entry and recovery process. Article 2-B specifically provides that disaster preparedness plans which State and local governments may adopt shall address "recovery and redevelopment after disaster emergencies"

(§§22(3)(c) and 23(7)(c)). Thus, Article 2-B recognizes that the recovery aspect of disaster response is within the purview of local governmental powers.

Article 2-B also authorizes local governments to prepare local recovery and redevelopment plans after a state disaster emergency has been declared. Article 2-B specifically provides that any plan so adopted "shall be the official policy for recovery and redevelopment within the municipality" (§28-a(7)). Notwithstanding such authorization, the legislative bodies of such municipalities are expressly authorized to determine that such plans are unnecessary or impractical (§28-a(i)).

Article 2-B does not assign any responsibility to private corporations for recovery or re-entry operations nor does it authorize such private bodies to perform any such activities. Notwithstanding the provisions of Article 2-B, LILCO seeks to have its Transition Plan recognized as the official recovery policy for Suffolk County; pursuant to that Plan, LILCO would assume the power to act in place of State and local governments and to usurp governmental prerogatives.

Moreover, LILCO's actions in an official capacity are themselves unlawful and would, independently, violate §§ 190.25 and 195.05 of the Penal Law.

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In sum, State and local governments have general emergency planning authority pursuant to their Constitutional police power. The exercise of that authority is addressed by Executive Law, Article 2-B. Article 2-B confers no general emergency planning authority upon private corporations. Moreover in vesting such powers in state and local governments, Article 2-B necessarily precludes any independent exercise or assumption of such powers by a corporation, such as LILCO.

More specifically, Article 2-B and other State statutes expressly confer upon State and local governments the power to carry out the functional components of the Transition Plan that the State and County challenge. These legislative enactments clearly preclude LILCO's intended usurpation and exercise of these governmental functions.

C. LILCO Offers No Credible Authority To To Support Its Attempted Implementation Of The Transition Plan

In the face of established authority that limits the exercise of the State's police power to the State and its authorized municipalities, in the face of the established doctrine that the State cannot delegate its inherent powers to a private entity, in the face of the hornbook rule that corporations have only those powers conferred upon them by the Legislature, in the face of comprehensive State enactments governing the exercise of emergency planning and response powers, and in the face of numerous other specific legislative enactments conferring particular aspects of the police power upon the State and local governments, LILCO's Transition Plan offers the slenderest reed imaginable to support its legal authority to carry out the Transition Plan: a single phrase from a sub-paragraph contained in the statement of policy that constitutes the preface to Article 2-B of the Executive Law, N.Y. Exec. Law §20 (McKinney). The phrase in question is as follows:

> It shall be the policy of the state that:
>
> e. state and local plans, organization arrangements, and response capability required to execute the provisions of this article shall at all times be the most effective that current circumstances and existing resources allow.

N.Y. Exec. Law, §20(1)(e) (McKinney). LILCO apparently asserts that LILCO may usurp the State's police power because, in

LILCO's view, such usurpation is necessary to insure that "state and local plans" shall be the "most effective that circumstances and existing resources allow."48/

LILCO's position has two basic problems. First, the language in question appears in the statutory statement of policy that precedes Article 2-B. It is well established that statutory preambles and policy sections do not constitute operative sections of a statute and do not confer powers not otherwise granted by specific provisions. See Association of American Railroads v. Costle, 562 F.2d 1310 (D.C. Cir. 1977); U.S. v. One Solid Gold Object, 208 F. Supp. 99 (D. Nev. 1962); Jacobson v. Massachusetts, 197 U.S. 11 (1905); Bissette v. Colonial Mortgage Corp., 477 F.2d 1245 (D.C. Cir. 1973); 1A SANDS, Statutes and Statutory Construction, §§20.03, 20.12 (4th ed. 1972 and 1984 Supp.). That point aside, it is simply beyond belief that the New York Legislature would have effected a major change in the allocation of governmental powers through a phrase in a statement of policy that has no counterpart in the substantive provisions of Article 2-B.49/

48/ Plan 1.4-1.

49/ Section 20(i)(e) specifically refers to execution of "the provisions of this article." Thus, by its terms, it requires reference to the substantive provisions of Article 2-B to have any meaning; those provisions do not authorize LILCO's intended actions.

Second, LILCO misreads the statutory provision in question. As previously discussed, Article 2-B confers no authority upon private corporations and, indeed, demonstrates that only State and local governments can exercise the police power. Section 20 of Article 2-B States certain general state policies including the proposition that "state and local plans, organizational arrangements, and response capability" shall be as effective as "current circumstances and resources permit." Section 20(1)(e) contains no reference to private corporations. It certainly does not authorize LILCO to do anything.50/ Moreover, LILCO simply misreads the section: the words "plans", "organizational arrangements" and "response capability" are all modified by "state and local," terms which are used throughout Article 2-B to refer to governmental entities. Thus, in each case, "plans," "organizational arrangements" and "response capability" refer to governmental responses; they do not constitute some short-hand authorization of private corporations to exercise public functions or to usurp government powers.

50/ Section 20.1.e, on its face, is not substantive and does not confer particular powers upon local governments or private corporations. Moreover, far from conferring powers upon any corporation, it is clear that the statement of policy was intended to underscore the primary authority of local governments to deal with local emergency planning efforts. This fact is established by the Memorandum of the State of New York Executive Chamber filed with Senate Bill No. 7265-B, the Senate version of Article 2-B. This Memorandum, contained within the bill wrapper for Article 2-B, emphasizes the leading role assigned to local governments in emergency planning.

In sum, Executive Law, Article 2-B, does not authorize LILCO's implementation of its Transition Plan. Article 2-B allocates emergency planning and disaster response powers among state and local governmental entities. It confers no such power upon LILCO. LILCO's attempt to find such authority in Article 2-B is simply frivolous.

VI. THE BOARD SHOULD DECLINE TO RULE ON THE "LEGAL AUTHORITY" ISSUES

This Board has invited the parties to address the issue of what the Board should do if there is no decision from a New York State court at the time the Board's Initial Decision on other emergency planning contentions is issued. The State and County submit that the proper course is clear: the Board must await the State court's ruling on these issues.51/

First, sound principles of comity compel this Board to wait until a State court decision on legal authority issues is rendered. NRC decisions express a strong preference for NRC boards to avoid attempting to decide State law issues, particularly where (as in this instance) there is a competent State tribunal which is addressing the same or closely related issues. See Northern States Power Co. (Tyrone Energy Park, Unit

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51/ The County and State will only briefly address this issue in the instant discussion since in large part the Board is already familiar with our views. See, e.g., County/State September 24 Brief, at 13-23.

1), ALAB-464, 7 NRC 372, 374 (1978); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-433, 6 NRC 741, 748 (1977); Consolidated Edison Co. (Indian Point, Unit 2), ALAB-399, 5 NRC 1156, 1166, 1169-70 (1977); id., ALAB-453, 7 NRC 31, 37 (1978).

Further, deferral of a decision by this Board is especially appropriate in this case. The legal authority issues go to the very core of the governmental authority of the State of New York, that is, the State's "power" to protect the health and safety of persons within the State's territorial domain. The continued vitality of concurrent state judicial and federal administrative systems requires this Board's deference to ongoing State court proceedings, particularly where those state court proceeding was initiated at the Board's behest. Interference with the orderly and comprehensive disposition of the state court litigation should be avoided.

Second, and related to the foregoing, NRC boards have no expertise in deciding State law issues.52/ Presumably this

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52/ Courts accord weight to the interpretation placed upon a statute by an agency charged with its administration. See generally NLRB v. Bell Aerospace Co., 416 U.S. 267, 274-75 (1974). Resolution of the State law legal authority issues do not, however, involve this Board's interpretation of its governing statute nor does the resolution of those issues call upon this Broad's administrative expertise. The legal authority issues involve the construction and application of New York State laws; New York State courts have the expertise, competence and jurisdiction to interpret those laws.

factor was one matter which prompted this Board in January 1984 to express the view that the "legal contentions are properly matters to be disposed of by the New York State courts." Tr. 3675

Third, as discussed supra, the New York State Supreme Court on December 1 will have before it all briefs which are necessary to rule on the State law issues.53/ We, of course, cannot predict when a decision will be issued, but the County and State are urging the court to issue a decision as soon as possible. In this regard, we reiterate our view (see County/State September 24 Brief, at 13-22) that there likely would already have been a State court decision if LILCO had been willing to move expeditiously (in accordance with the views expressed by this Board in late January).54/ Instead, by

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53/ The State court has deferred consideration of the preemption issue until after it has decided the State law issues.

54/ In its October 15 Brief, LILCO argues that it has not delayed the State court case and that its removal effort (which delayed the State court proceeding by at least 2-1/2 months) was perfectly proper. LILCO attempts to justify that removal by suggesting that it was merely attempting to be efficient by getting the preemption issue related to the State court action before Judge Altimari who was allegedly presiding over "the preemption issue." LILCO October 15 Brief, at 4. This twists the facts. Yes, in the Citizens lawsuit, a preemption issue is pending. However, that was an entirely different issue, pertaining to the County's Legislative Resolutions. The Citizens case did not include any preemption issue pertaining to LILCO's legal authority to implement its Plan. Further, while Judge Altimari did not call LILCO's attempted removal frivolous, the fact remains that there was controlling Supreme Court precedent less than one year old (Franchise Tax Board v. Construction Laborers Vacation Trust, ___ U.S. ___, 103 S.Ct. 2841 (1983))

(Footnote cont'd.)

improperly removing the State court case, LILCO delayed progress by at least several months.

Given its own role in causing delay of the State court proceeding, LILCO should not now be heard to complain about potential delay in resolution of the legal authority contentions. Rather, now that the State court has finally got the issues before it in a posture suitable for decision, this Board should follow NRC guidance and await that Court's decision.55/ Indeed, this Board can do much to expedite the State court proceeding by stating clearly that this Board will not address the legal authority issues but rather will wait for a State court ruling on those matters.

(Footnote cont'd.)

which made it abundantly clear that LILCO's attempted removal was improper. The County specifically informed LILCO's counsel of this precedent shortly after filing the State court suit in an effort to head off any attempted removal and the inevitable ensuing delay. LILCO ignored our efforts.

55/ LILCO has urged that if this Board does await a State court decision, it should rule that a decision on Contentions 1-10 is not material to an overall emergency planning decision, suggesting also that Intervenors have not carried their burden of going forward. See LILCO October 15 Brief, at 7-12. This argument is absurd. As we have demonstrated supra, the burden clearly is on LILCO to go forward to demonstrate its affirmative legal authority to implement the Plan. It has known of this burden since at least mid-1983 but has chosen, for its own reasons, not to seek vindication of its alleged authority in the appropriate forum -- the New York State courts. Any adverse consequences that flow from LILCO's inability to establish its legal authority result from its own decision not to act.

Moreover, in the present case, this Board has no authority or jurisdiction to decide these issues of state law. LILCO sought to remove the State declaratory judgment cases to federal court. Its basis for removal was its assertion that the State law issues were federal questions that were within the jurisdiction of the federal courts. The U.S. District Court refuted this argument; that Court held that the legal authority questions presented issues of state law that could not be decided byt he federal court. The state law questions were beyond the jurisdiction and powers of that court to decide. This Board's juridiction to resolve state law questions does not exceed the jurisdiction of the U.S. District Court.

Finally, LILCO has suggested that the State court decision may not actually resolve the contentions and that for this reason the Board should proceed to a decision. LILCO October 15 Brief, at 15-16. This is totally wrong and merely underscores LILCO's lack of understanding of the thrust of Contentions 1-10. These contentions concern the police power and the County/State view that settled principles of law prohibit LILCO from exercising the police power. The same basic issue is pending in State court. Thus, a State court decision certainly will address the same fundamental arguments which underlie Contentions 1-10. Thus, a State court decision will provide an authoritative decision on New York legal principles which this Board should welcome.

In sum, since at least January 1984, this Board has urged parties to seek a State court resolution of the legal authority issues. We appear now to be nearing such a decision, albeit after much unfortunate delay. This Board must now adhere to its prior view and wait for that decision.

VII. THE CAPABILITY TO CARRY OUT THE ACTIVITIES ENUMERATED IN CONTENTIONS 1-10 IS NECESSARY PURSUANT TO NRC REGULATIONS IN ORDER TO OBTAIN AN OPERATING LICENSE

The Board has requested the parties' views on whether LILCO must be capable of performing the activities which are contested in Contentions 1-10 in order to obtain an operating license. For reasons described below, the County and State submit that a capability to perform all these actions is clearly required under the NRC's regulations. Thus, LILCO's "immateriality" defense must be rejected.

The specific actions which are contested in Contentions 1-10 may be summarized as follows:

Contention	Action(s)
1	Guiding traffic.
2	Blocking roadways, erecting barriers in roadways, and channeling traffic.
3	Posting traffic signs on roadways.
4	Removing obstructions from public roadways, including towing private vehicles.
5	Activating sirens and directing the broadcasting of emergency broadcast

system messages.

6 Making decisions and recommendations to the public concerning protective actions.

7 Making decisions and recommendations to the public concerning protective actions for the ingestion exposure pathway.

8 Making decisions and recommendations to the public concerning recovery and reentry.

9 Dispensing fuel from tank trucks to automobiles along roadsides.

10 Performing access control at the EOC, the relocation centers, and the EPZ perimeter.

First, regarding Contentions 5-8, LILCO has not asserted that its immateriality defense even applies. Indeed, in its August 6 Summary Disposition Motion, LILCO limited its immateriality defense to Contentions 1-4, 9 and 10. See LILCO August 6 Motion, at 3, 51-53. See also LILCO October 15 Brief, at 2. The apparent reason for LILCO's having so limited its immateriality defense is that it is absolutely clear that federal regulations require a capability to perform the functions discussed in Contentions 5-8:

-- Concerning siren activation (Contention 5), LILCO has agreed that this is required by 10 CFR Part 50, App. E, IV.D.3, by NUREG-0654, p. 3.3, and by FEMA-43, Standard Guide for the Evaluation and Notification Systems for Nuclear Power Plants, Ex. E.6.2. See LILCO August 6 Motion at 63.

-- Concerning broadcasting emergency messages (Contention 5), 10 CFR § 50.47(b)(5) specifically requires a

capability "to provide early rotification and clear instruction to the populace" within the plume EPZ. See also NUREG-0654, § II.E, esp. subparts 5 and 6, and Appendix 3.

-- Concerning making decisions and recommendations to the public regarding protective actions in the plume exposure and ingestion exposure EPZs (Contentions 6 and 7), 10 CFR § 50.47(b)(10) and NUREG-0654, § II.J, specifically require that there be a range of protective actions which can be suggested to the public.

-- Concerning recovery and reentry (Contention 8), 10 CFR § 50.47(b)(13) and NUREG-0654, § II.M, specifically require a capability to implement recovery and reentry operations.

Second, LILCO has asserted its "immateriality" defense with respect to Contentions 1-4, 9 and 10, urging that even if the actions specified in these contentions cannot be carried out, the Board should still find the Plan to be adequate. Suffolk County and the State of New York have already largely addressed this alleged defense. See September 24 County/State Brief at 101-18 and the affidavits referenced therein. This prior discussion, in our view, documents that federal regulations do require that LILCO have the capability of performing these functions. However, for the sake of completeness, the County and State reiterate and expand upon certain of these matters below.56/

56/ The County and State will not reiterate the full scope of these prior arguments in this Brief. Rather, to avoid complete duplication, we refer the Board to pages 101-18 of our September 24 Brief.

Contentions 1-4, 9 and 10 concern LILCO's plan during a Shoreham emergency to control traffic and otherwise to assist motorists who may be attempting to evacuate, to remove roadway obstacles, to dispense fuel, and to provide access control at the EPZ perimeter and other locations. By its immateriality defense, LILCO is essentially asking this Board to license Shoreham with no plan or even capability to perform any of the foregoing traffic- and access control-related functions, 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. Thus, according to LILCO's new argument, contrary to the statements in its own Plan, all that really needs to be done if there is a serious accident at Shoreham is to notify the public of the emergency and then let the people take care of themselves.

LILCO's argument also necessarily encompasses the further contention that this Board can find adequate preparedness which conforms to 10 CFR § 50.47 even though there is no capability at all to provide assistance to evacuees during an emergency. Thus, for example, even if serious traffic problems developed during a Shoreham emergency and even if implementation of traffic control measures could reduce evacuees' exposure to health-threatening radiation, LILCO now argues that its Plan is adequate without even the capability of implementing any traffic-related actions that may be necessary 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.57/ This is because it is impossible to predict precisely how a serious accident might progess 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.58/

57/ We note, however, that NUREG-0654, § II.J.10.k requires the capability to deal with potential roadway impediments. Thus, the activities covered by Contentions 4 and 9 are expressly covered by the NRC's guidance documents. See further discussion at pages 115-16 of the County/State September 24 Brief. Similarly, NUREG-0654, § II.J.10.j, requires a capability to control access to evacuated areas, a matter which is the subject of Contention 10. Since NRC Boards generally follow the guidance of NUREG-0654, Consolidated Edison Co. (Indian Point, Unit 2), LBP-83-68, 18 NRC 811, 944 n.71 (1983), these specific NUREG 0654 guidelines are additional reasons why the Board should find that a capability to perform the activities addressed by Contentions 4, 9, and 10 is required by the NRC's regulations.

58/ See Statement of Material Facts in Dispute, Attachment B to County/State September 24 Brief, ¶ 4; Roberts Affidavit, Attachment C to County/State September 24 Brief, ¶¶ 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 or access into the the EPZ at the EPZ boundary; and no capability at all to provide access control at other locations.59/ To our knowledge, there is no nuclear plant 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 the legal standard for adequate preparedness under the NRC's regulations is, as LILCO suggests, merely a capability of notifying the public, and then letting the public take care of itself, then why require an emergency plan at all?

LILCO's argument does not represent the appropriate legal standard. Rather, Section 50.47(a)(1) requires reasonable

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59/ 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 to County/State September 24 Brief, ¶ 4. If the Board is going to consider the merits of LILCO's argument, these factual disputes require that an evidentiary hearing be held. See discussion in Section I, supra.

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 protective action proposals unsatisfactory. It is essential for adequate preparedness that there be a flexible capability to respond to whatever events reasonably may be expected to occur, including adverse traffic conditions, which certainly are a reasonably foreseeable occurrence if evacuation is recommended. See, e.g., NUREG 0654 Appendix 4, at 4-5, 4-6. 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). 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.

VIII. THE LILCO "REALISM" DEFENSE SHOULD BE SUMMARILY REJECTED

Suffolk County and the State of New York submit that the Board's invitation for further briefing pertaining to the "realism" issue should be withdrawn. The Board has asked the parties to speculate whether an unplanned response to a Shoreham emergency by the County or State "would result in chaos, confusion and disorganization so as to compel a finding that there

is no 'reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency' at Shoreham." October 22 Order at 3-4. In our view, no possible benefit could result from such speculation and, certainly, based on such speculation, there could be no reliable finding of fact at all, much less one that there is reasonable assurance that adequate protective measures will be taken.

Beyond what the County and State already have stated regarding the "realism" defense (County/State September 24 Brief, at 88-101), there is little more to add. Indeed, in our previous filing, we highlighted the impossibility of predicting how such an alleged "response" would affect the overall response to an emergency. Thus, we stated:

> [T]his 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? 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. Accordingly, there is no possible basis for this Board

to find that such unspecified "responses" could conceivably work.60/

And how can one predict whether a "response" will result in chaos, etc., when there is no evidence of what that alleged response is going to entail?

The County and State believe this "realism" issue clearly has no merit at all. The word "realism" is itself a misnomer here, for the true realism is that existing County law does not permit any response and the State of New York is not about to permit LILCO to usurp the police powers. However, in the event the Board believes this issue to be worthy of decision on the merits (i.e., speculation as to the nature of the "response," the potential for chaos, etc.), an evidentiary hearing is necessary since the speculation called for by the Board's question is clearly factual in nature.61/

60/ County/State September 24 Brief, at 99.

61/ The Roberts Affidavit, the Palomino Affidavit, and the Statement of Material Facts in Dispute make clear that the adequacy of such an alleged ad hoc response is a matter in dispute which precludes summary disposition or any resolution of the "realism" defense raised by LILCO (other than outright rejection) without an evidentiary hearing. LILCO's assertion that the State or County could perform various acts if they so chose further highlights the factual speculation embodied in the LILCO argument. See, e.g., LILCO Statement of Material Facts as to Which There is No Dispute, ¶¶ 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 to County/State September 24 Brief, ¶¶ 3, 5-7, 9. Thus, aside from all other defects, LILCO, as the moving party has plainly failed to show how this alleged "response" would eliminate all genuine issues of material fact so as to permit a Board finding without an evidentiary hearing. See, e.g., Cleveland Electric

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The County and State do not urge that the Board convene a further evidentiary hearing. Rather, there are compelling reasons why the Board should not engage in the speculation urged by LILCO and should, instead, immediately reject LILCO's "realism" theory. These reasons are set out in detail in our September 24 Brief (see pages 88-101), some points of which are summarized below.

First, there is no reliable factual basis for LILCO's claim that the State and County will participate in the implementation of LILCO's Transition Plan.62/ 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

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(Footnote cont'd.)

Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741, 752-54 (1977).

62/ In its August 6 Motion, LILCO asserts as an "undisputed fact" (LILCO August 6 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.). The County and State specifically disputed LILCO's assertion. See Statement of Material Facts in Dispute, Attachment B to County/State September 24 Brief, ¶¶ 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, 13 NRC 335, 337-38 (1981). Again, if this realism defense is not rejected outright, a further evidentiary hearing is required.

Board well knows, the State and County have developed no emergency plans for implementation in the event of a Shoreham emergency. Merely having some undefinable number of unidentified persons "showing up" somewhere during an emergency is 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. Under the NRC's regulations, such an ad hoc response could never be considered adequate.

Moreover, the only "evidence" that LILCO has been able to adduce of any "assurance" that government resources would 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 of adequate preparedness and provide no reasonable assurance that adequate protective measures would be taken.63/

63/ LILCO has the burden of proof in this proceeding. Thus, it is absolutely meaningless for LILCO to assert: "No one stated, for example, that the Governor would refuse to make use of radio stations to advise the public simply because it was LILCO that had made the arrangements." LILCO October 15 Brief, at 63. There is no proof at all that the Governor in fact

(Footnote cont'd.)

Indeed, 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.

Further, 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. On the contrary, Governor Cuomo has made 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.64/ The Governor's opposition to LILCO's usurpation of

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(Footnote cont'd.)

would use radio stations or take any other action to implement LILCO's plan. Assuming arguendo that this defense even merits discussion, the burden was on LILCO to show affirmatively that the Governor would take specific actions. LILCO has plainly failed to sustain its burden of proof. Its extravagent reliance on the press release only serves to highlight LILCO's failure to sustain this burden.

64/ 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 to the County/State September 24 Brief. LILCO has objected to the County/State submission of the entire press release, suggesting that since the County objected to putting the release into the record earlier, it may not do so now. See LILCO October 15 Brief, at 60--61. This is absurd. The County objected to the release during the evidentiary hearing because it was not relevant to the issues being litigated. Significantly, LILCO at that time had

(Footnote cont'd.)

State laws is also convincingly demonstrated by the fact that the Governor has sued LILCO in State court for a ruling that all of LILCO's actions by which it attempts to implement the Plan are, and will remain, unlawful. The Governor obviously does not derive the same meaning from his press statement that LILCO seeks to foist on this Board.

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 or speculation; 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."65/ Indeed, County Executive Cohalan has stated: "The County could not implement a response to a Shoreham accident

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not raised its "realism" defense. The County could not have anticipated LILCO's novel defense. LILCO has moved for summary disposition and under Section 2.749 the County and State clearly are permitted to rebut LILCO's out of context quotation. Thus, it is entirely proper for the County and State to have submitted the press release and the other data in support of our September 24 Brief.

65/ See Attachment E to County/State September 24 Brief, page 6. See also County Resolution 456-1982, Attachment F to County/State September 24 Brief (No County funds may be used to test or implement any plan unless it has been approved by the County legislature).

because County law -- particularly Resolution Nos. 262-1982, 456-1982, and 111-1983 -- prohibits that.66/ Thus, the facts are clear: Suffolk County law clearly bars any County response. LILCO may not like that law, and indeed, has sued the County in an attempt to have Resolution 111-1983 (and Resolutions 262-1982 and 456-1982 as well) declared unconstitutional.67/ But LILCO has no basis whatsoever (such as it has asserted in its October 15 Brief at page 59, n.33) to dispute those resolutions for their clear assertion that the County will not -- intend cannot -- respond to a Shoreham accident.68/

In sum, therefore, there is no basis identify, define, or characterize any kind of State or County response to a Shoreham emergency. Thus, LILCO's "realism" defense should be rejected.

66/ See Roberts Affidavit, Attachment C to County/State September 24 Brief, ¶3, and the statement of County Executive Cohalan attached to that Affidavit.

67/ See Complaint of Intervenor Plaintiff LILCO in Citizens for an Orderly Energy Policy, Inc. v. Suffolk County and Peter F. Cohalan, E.D.N.Y., Docket No. 83-4966.

68/ In its October 15 Brief, LILCO also asserts that "everyone with authority would show up" in a Shoreham emergency. (Page 55, emphasis in original). Similarly, LILCO states that Intervenors cannot deny that they will respond. Id. at 59. The Board cannot accept such wishful thinking by LILCO. The law of Suffolk County makes clear that no Suffolk County resources or personnel may be used to respond to a Shoreham accident. That Suffolk County law has not been altered and, indeed, could only be altered by a new legislative resolution. This Board is in no position to second guess the law of Suffolk County.

contentions and the import of LILCO's own admission. 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). See discussion supra. Rather, the State and County contend -- and LILCO necessarily must admit this for purposes of this defense -- 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. Therefore, it is irrelevant whether during an emergency LILCO were to exercise those powers alone or at the same time as 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, LILCO 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" LILCO's admitted lack of authority.70/ Indeed, it is a total non sequitur for LILCO to

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70/ Again, LILCO has the burden of establishing its realism defense. Its failure to cite authority for its assertion that an unspecified government "response" will cure its legal authority problems is additional reason for the Board to reject this defense.

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 has argued 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 allegedly 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 August 6 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 LILCO with any such temporary authority.71/ 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

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71/ Governor Cuomo's press release and his suit against LILCO in State court make unmistakably clear that the Governor has no intention of permitting LILCO to usurp police powers.

2-B of the Executive Law, or any other New York law, supports a contrary result.

In conclusion, this Board should summarily reject LILCO's "realism" defense. LILCO's license application consists of the LILCO Transition Plan -- a plan to be implemented solely by LILCO. LILCO's effort to litigate the adequacy of other alleged plans -- plans for State, County and federal government participation with LERO -- was expressly rejected by this Board.72/ LILCO's effort to inject a so-called "realism" argument into this litigation at this eleventh hour is nothing more than a back door effort to relitigate the law of the case. This Board should reject LILCO's argument and reaffirm that this proceeding will only determine whether the emergency plan submitted by LILCO -- that is, the one devised and implemented only by LILCO -- can satisfy the NRC's regulations and can lawfully be implemented.

72/ See ASLB Order Limiting Scope of Submissions, June 10, 1983, in which 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."

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November 19, 1984

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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

CERTIFICATE OF SERVICE

I hereby certify that copies of SUFFOLK COUNTY AND STATE OF NEW YORK RESPONSE TO ASLB MEMORANDUM AND ORDER DATED OCTOBER 22, 1984, dated November 19, 1984, have been served on the following on the ~~this~~ 20th day of November 1984 by U.S. mail, first class, except as otherwise noted.

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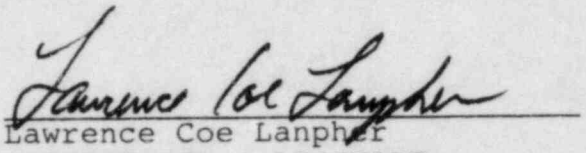

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* By Hand on 11/20/84
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