UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

ANSWER OF SUFFOLK COUNTY AND STATE OF NEW YORK IN OPPOSITION TO LILCO'S RENEWED MOTION FOR SUMMARY DISPOSITION

On February 27, 1985, LILCO filed a Renewed Motion for Summary Disposition of Legal Authority Issues on Federal-Law Grounds (the "Renewed Motion"). LILCO's initial Motion for Summary Disposition, filed pursuant to 10 C.F.R. §2.749 on August 6, 1984, asked this Board to rule that "any state-law-based restrictions on LILCO's performance" of offsite emergency planning functions were preempted and void. Renewed Motion, p. 2. Similarly, the Renewed Motion asks this Board "to rule on the question of whether state-law prohibitions against LILCO's implementing federally imposed emergency planning requirements . . . are overridden as a matter of federal law." Id. at 10-11. Both Motions miss the point: LILCO must prove that it is authorized to perform the governmental functions set forth in its proposed Plan.

The Renewed Motion should be summarily denied for two fundamental reasons:

(1) LILCO has the burden of showing that it has legal authority to carry out its proposed Plan. LILCO's only stated basis for its purported authority to do so is New York State law, specifically Article 2-B of the New York Executive Law. The New York State Supreme Court has held that New York law does not authorize LILCO to implement the LILCO Plan; LILCO has advised this Board that "for the purposes of this proceeding, LILCO is prepared to accept the [New York State Supreme] Court's disposition of legal authority issues as a matter of New York State law."1/ Accordingly, there is no statement of LILCO's legal authority now before this Board that could be the basis for summary disposition.

(2) LILCO asks this Board to address and decide a question of federal preemption. In fact, LILCO has repeatedly stated that federal preemption is an integral aspect of the action now pending in New York State Supreme Court. Moreover, the U.S. District Court (E.D.N.Y.) has expressly held that

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1/ Letter from Donald P. Irwin, LILCO Counsel, to Judges Margulies, Kline, and Shon, February 22, 1985 (emphasis in original).

LILCO's preemption issue constitutes a defense to the State and County's pending state court actions. Accordingly, having chosen to litigate the preemption issue in the New York State Supreme Court proceedings, LILCO is estopped from litigating the same issue before this Board.

In light of these considerations, this Board should summarily deny LILCO's Renewed Motion. If, however, the Board wishes to address the Renewed Motion, it should: (i) require LILCO to amend its proposed Plan to set forth, with specificity, the legal basis for its purported authority; (ii) establish a briefing schedule under which the parties shall address the legal authority issue so presented; and (iii) provide for oral argument on this fundamental issue.

I. LILCO HAS NOT IDENTIFIED ANY LEGAL AUTHORITY THAT COULD BE THE BASIS FOR SUMMARY DISPOSITION IN ITS FAVOR ON THE LEGAL AUTHORITY ISSUE

NRC emergency planning regulations require offsite emergency response plans to assign primary responsibilities for emergency responses and specifically to establish the emergency responsibilities of various supporting organizations. 10 C.F.R. §50.47(b)(1). NUREG-0654 spells out the criteria against which the adequacy of emergency response plans, and

their assignment of emergency responsibilities, will be measured. NUREG-0654 requires each plan to "contain (by reference to specific acts, codes or statutes) the legal basis" for the authority to carry out specific emergency response functions. NUREG-0654, § II.A.2.b. LILCO has the burden of demonstrating its compliance with NRC regulations and NUREG-0654. 10 C.F.R. § 2.732.

LILCO and its support organization, LERO, propose to assume lead responsibility for offsite emergency response for the Shoreham plant. Plan, 1.4-1. LILCO's Plan asserts that "[u]nder federal law, there is no legal obstacle to a utility's performing whatever functions are necessary to protect the public health and safety in an emergency." Plan, 1.4-1. The LILCO Plan does not assert that federal law actually authorizes LILCO to perform any such function.2/

The only statement of authority that LILCO has offered in support of its Plan is the following:

2/ The Plan at 1.4-1 references 10 C.F.R. §50.47(c)(1). This regulation does not grant or even purport to grant license applicants any authority whatsoever. The Plan also references the 1980 and 1982-83 NRC Authorization Acts. Again, those Acts do not grant, or purport to grant, utilities the power to carry out governmental functions. Instead, those Acts only grant the NRC authority to consider the adequacy of a utility plan.

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

Plan, 1.4-1. Thus, New York Executive Law, Article 2-B, §20.1.e, is the only basis that LILCO has identified for its purported authority to implement its proposed Plan. LILCO's claim of authority under Article 2-B has been rejected by the New York State Supreme Court. That Court has determined that Executive Law, Article 2-B, does not authorize LILCO to implement the LILCO Plan. Its holding is categorical:

> Article 2-B of the Executive Law involves the distribution of powers held by the Executive Branch of State Government. It clearly expresses the intention of the Legislature to confer the STATE's power to plan for and to respond to disast - situations solely upon State and local governmen . . . The Court, no matter how many times it has read and re-read Article 2B, could not find any authorization for LILCO, express or implied, to exercise the STATE's police powers in emergency situations.

See Cuomo v. LILCO, Consol. Index No. 84-4615, Supreme Court of the State of New York, County of Suffolk, Memorandum Opinion dated February 20, 1985, p. 15.

Intervenors have filed 10 legal authority contentions. Those contentions assert that "LILCO personnel do not

have the authority to order or to perform" specific emergency response functions that are set forth in detail in Contentions 1-10. Intervenors further contend that "LILCO's lack of legal authority to perform actions assigned to LILCO under the Transition Plan" constitutes noncompliance with the NRC emergency planning rules and NUREG-0654. Preamble to Contentions 1-10. In short, Intervenors' legal authority contentions challenge LILCO's purported authority to carry out the LILCO Plan.

The Renewed Motion asks this Board to decide whether state-law based restrictions on LILCO's authority to exercise offsite emergency planning functions are preempted and therefore invalid. Nonetheless, the real thrust of the Renewed Motion is substantially more ambitious. The Renewed Motion is, in essence, a request that this Board: (i) deny the legal authority contentions; (ii) grant summary disposition in LILCO's favor with respect to LILCO's authority to implement the Plan; and (iii) conclude that LILCO's claim of legal authority under Executive Law, Article 2-B, as set forth in the LILCO Plan, is legally adequate and in compliance with NRC regulations and NUREG-0654.

A. LILCO HAS NO ADEQUATE STATEMENT OF ITS LEGAL AUTHORITY

Based upon its review of the LILCO Plan, FEMA has concluded that LILCO has not identified any adequate basis for its purported authority to carry out the Plan. Accordingly, FEMA has determined that the Plan does not comply with NUREG-0654, §II.A.2.b. FEMA has specifically stated:

> LILCO has indicated in their summary of responses to the consolidated RAC review for Revision 3 of the plan (see page 2 of 13), that this is a legal authority issue to be addressed elsewhere and there is no modification to Revision 4 of the plan. Therefore, the legal authorities/bases of the LERO plan are not yet defined and for this reason, the element has been rated inadequate.

Regional Assistance Committee review of LILCO Transition Plan (Rev. 4) dated October 12, 1984, p. 8. Thus, quite apart from the legal authority decision rendered in the New York State court action, FEMA has determined that LILCO's Plan does not comply with NUREG-0654, § II.A.2.b.

Where then is LILCO's legal authority? What specific acts, codes or statutes contain the legal basis for LILCO's purported authority?

Simply stated, the LILCO Plan fails to identify any adequate basis for LILCO's purported legal authority. This

failure does not result solely from the New York State Supreme Court decision; LILCO's failure rests also in its noncompliance with NUREG-0654. Accordingly, the LILCO Plan cannot support the Renewed Motion or its request for summary disposition. The Renewed Motion must, therefore, be denied.

B. THE NEW YORK STATE SUPREME COURT'S RULING ON LEGAL AUTHORITY REQUIRES SUMMARY DENIAL OF THE RENEWED MOTION

FEMA's review of the LILCO Plan states that LILCO has represented that the "legal authority issue [is] to be addressed elsewhere." See FEMA review, supra. LILCO's statement is a reference to the fact that, pursuant to this Board's suggestion, the State and County filed declaratory judgment actions in the New York State Supreme Court (herein collectively the "State Court Actions") to obtain a judicial resolution of the legal authority question.3/ In opposing the claims

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3/ After the County and State filed their legal authority contentions, this Board sought comments from the parties regarding how to handle the contentions. In response, LILCO proposed that the Board should decide the legal contentions because of the preemption issue. LILCO's Proposal for Resolving the "Legal Authority" Issues, January 26, 1984. Nonetheless, Judge Laurenson restated the Board's view that the legal contentions should be resolved by the New York State Supreme Court and rejected LILCO's position that the state court was an improper forum for resolving the legal contentions.

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asserted in the State Court Actions, LILCO has contended that: "(1) New York law does not prohibit it from performing the activities mentioned in the complaints; and (2) if state laws 'were construed as plaintiffs allege, they would be preempted under the Supremacy Clause of the United States Constitution and by federal statutes and regulations.'" Cuomo v. LILCO, Memorandum Order dated February 20, 1985, p. 8.

The decision on LILCO's first contention in the State Court Actions was rendered on February 20, 1985. The Supreme Court (Geiler, J.) declared that the functions set forth in the LILCO Plan are inherently governmental functions, that those functions are reserved to the State and its duly authorized political subdivisions by the New York State Constitution and laws, that LILCO has no authority to perform those functions, and that LILCO's exercise of such functions would be in

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> 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 . . . hold off a decision until the end of the case when findings of fact are filed along with conclusions of law.

Transcript, January 27, 1984, p. 3675 (emphasis supplied). The County and State declaratory judgment actions were filed shortly thereafter.

violation of New York State law. The Court further declared that no other New York law, including specifically LILCO's stated source of authority, Executive Law, Article 2-B, authorizes LILCO to carry out the functions set forth in its Plan. Finally, the Court declared that LILCO, as a corporation chartered under the law of New York, has only those powers conferred upon it by New York State law, and that New York State law does not, either expressly or impliedly, authorize LILCO to carry out the functions set forth in the LILCO Plan.

Thus, the Supreme Court's decision has two independent bases: (1) LILCO has no authority to perform the functions set forth in the LILCO Plan and would violate New York law if it sought to do so; and (2) LILCO has no corporate authority or power to carry out the Plan. Either basis, standing alone, is fully dispositive of the legal authority question.

By letter dated February 22, 1985, LILCO advised this Board that "for the purposes of this proceeding, LILCO is prepared to accept the [New York State Supreme] Court's disposition of legal authority issues as a matter of New York State law." Letter of Donald P. Irwin, Esq., supra note 1. Similarly, the Renewed Motion accepts, as it must, the Supreme Court's disposition of the legal authority issue. Accordingly,

LILCO has conceded that it has no authority under New York law, including Executive Law, Article 2-B, to implement its proposed Plan. LILCO has conceded that it is a creature of state law, that its powers are limited to those conferred upon it by New York State law, and that such powers do not include the authority to implement the LILCO Plan.

In sum, LILCO has conceded that the only statement of legal authority contained in its Plan has no basis. LILCO has never identified any other basis for its purported authority. LILCO has also conceded that it has no source of corporate power other than state law. LILCO cannot then claim any other source of authority.

What then is the basis for LILCO's Renewed Motion? What conceivable basis does LILCO have for its claim of authority?

The Renewed Motion asks this Board to grant summary disposition in LILCO's favor on the legal authority contentions. The legal authority contentions assert that LILCO does not have authority to carry out the Plan. The New York State Supreme Court has squarely held that LILCO has no such authority under the New York Executive Law. The New York State Supreme Court has squarely held that LILCO has no corporate power

to implement the Plan. LILCO has accepted those holdings. Accordingly, LILCO has admitted the Intervenors' legal authority contentions. In fact, LILCO has rendered its own Renewed Motion nonsensical.

In sum, there is literally no basis for this Board to grant LILCO's Renewed Motion. LILCO cannot claim state law authority. LILCO cannot claim corporate power to carry out the LILCO Plan. LILCO has not claimed that the Atomic Energy Act empowers state corporations to perform functions that their state charters do not authorize.4/ LILCO has not claimed any other federal authority.

LILCO repeatedly invokes the preemption doctrine, but preemption is not an independent source of corporate authority. Not even LILCO has seriously advanced such a claim. Whatever one may think of LILCO's contention that the Atomic Energy Act preempts the New York State Constitution, the New York

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4/ LILCO discusses at some length the U.S. Supreme Court's recent decision in Garcia v. San Antonio Metropolitan Transit Authority, 53 U.S.L.W. 4135 (Feb. 19, 1985). That opinion gives the federal government greater flexibility to act in areas previously thought to be reserved to the states under the Tenth Amendment. That opinion is irrelevant to the basic issue in this case, i.e., whether LILCO, a state-chartered corporation, has any authority to carry out the proposed LILCO Plan.

Municipal Home Rule Law, the New York Executive Law, the New York Business Corporation Law and the New York Transportation Corporations Law, it is clear that the preemption doctrine does not itself create or confer authority upon state-chartered business corporations. The Supremacy Clause has no independent content. It is not a source of federal rights. The Supremacy Clause states a fundamental structural principle of federalism; it is a neutral traffic cop as between conflicting federal and state statutes. See Chapman v. Houston Welfare Rights Organization, 441 U.S. 600, 613 (1979); Mobil Oil Corp. v. Tully, 639 F.2d 912, 915 (2d Cir.), cert. denied, 452 U.S. 967 (1981); Andrews v. Maher, 525 F.2d 113, 119 (2d Cir. 1975); Mashpee Tribe v. Watt, 542 F. Supp. 797, 806 (D. Mass. 1982), aff'd., 707 F.2d 23 (1st Cir.), cert. denied, 104 S. Ct. 555 (1983). Clearly, the Supremacy Clause itself confers no authority upon state corporations.

If LILCO seriously believes that it has legal authority to carry out the LILCO Plan -- either under federal or state law, either in the abstract or in light of the New York Court's decision -- it should now be required to state the basis for that authority. As required by NUREG-0654, LILCO must now identify the "specific acts, codes or statutes" that contain the legal basis for its purported authority to implement its proposed Plan.

In sum, the FEMA RAC review states that LILCO has failed to set forth its legal authority in accordance with NUREG-0654. LILCO's failure to do so is even more glaring in the cold light of the February 20 decision in Cuomo v. LILCO. LILCO must act to remedy that failure, or it must concede the merits of Intervenors' legal authority contentions. Until LILCO remedies this deficiency in its Plan, Intervenors cannot sensibly respond to any renewed claim of legal authority. Until it does so, even LILCO cannot imagine that it has met its burden of proof in this proceeding. And, until it does so, this Board cannot possibly address the legal authority issue, let alone grant LILCO summary disposition on the legal authority contentions.

II. LILCO CANNOT LITIGATE BEFORE THIS BOARD AN ISSUE IT HAS ALREADY PLACED IN CONTROVERSY IN STATE COURT

LILCO's Renewed Motion is subject to a second, equally fundamental, defect: it asks this Board to consider and decide an issue that LILCO has not once, but repeatedly, asserted in other forums. LILCO requests this Board to decide whether federal law preempts any state-law based restrictions on LILCO's performance of the functions set forth in the LILCO Plan. LILCO's Renewed Motion suggests that the preemption

issue was never placed before the State Court. The facts are quite different.

The truth of the matter is that LILCO has repeatedly and consistently raised the federal preemption issue in the State Court Actions. In doing so, it has substantially delayed the State Court's resolution of the legal authority issue. LILCO attempted to remove the preemption issue to federal court (despite a clear U.S. Supreme Court decision barring such removal) but the District Court held that preemption is a defense to the State Court Actions which should properly be decided in State Court.5/ Now, however, having repeatedly raised the preemption issue in State Court, LILCO seeks to extract that single issue from the State Court's jurisdiction and present that issue to this Board for decision; then, lest its disrespect for orderly judicial proceedings go unnoticed, LILCO underscores its audacity by urging this Board to engage in a footrace with the State Court and to dispose of the issue on an accelerated basis and without briefing. Having delayed the resolution of the State Court Actions by a frivolous removal petition, LILCO now has the sheer chutzpah to suggest that it is being

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5/ See Affidavit of David A. Brownlee, Esq., Exhibit A hereto, ¶ 5(h).

prejudiced by a delay in deciding an issue it has, by turns, pressed upon and held back from the State Court.

This Board should not reward LILCO for its machinations. It should reject LILCO's urging that it move quickly to decide the preemption issue and effectively nullify the decision of the U.S. District Court. Courts frequently have invoked the doctrine of judicial estoppel to prevent a party from "'playing fast and loose' with the courts, and to protect the essential integrity of the judicial process." Allen v. Zurich Insurance Co., 667 F.2d 1162, 1166 (4th Cir. 1982). "The essential function of judicial estoppel is to prevent intentional inconsistency; the object of the rule is to protect the judiciary, as an institution, from the perversion of judicial machinery." Edwards v. Aetna Life Insurance Co., 690 F.2d 595, 599 (6th Cir. 1982). This Board should decline to decide the preemption issue because of estoppel principles.6/

6/ The policies underlying judicial estoppel are relevant to, and should be applied to preclude, the tactical maneuvering displayed by LILCO in this proceeding and in the State Court Actions. See Allen v. Zurich Insurance Co., 667 F.2d at 1162: "Its essential function and justification is to prevent the use of intentional self-contradiction . . . as a means of obtaining advantage in a forum provided for suitors seeking justice."

The facts relating to LILCO's assertion of the preemption defense in the pending State Court Actions are set forth in the Affidavit of David A. Brownlee, Esq., Exhibit A hereto. Those facts may be briefly summarized. On a dozen different occasions, in pleadings, in affidavits and by representations of counsel in open court, LILCO has asserted that the preemption issue is part and parcel of the State Court Actions. Preemption was the basis of LILCO's effort to remove the State Court Actions to the U.S. District Court. LILCO's removal petition succeeded only in delaying the State Court Actions. In remanding the State Court Actions, the District Court held that preemption was a defense to the State Court Actions, that that defense was within the jurisdiction and competence of the State Court to decide, and that it should be raised in State Court upon remand. That determination by the U.S. District Court is binding upon LILCO. See generally Chandler v. O'Bryan, 445 F.2d 1045 (10th Cir. 1971), cert. denied, 405 U.S. 964 (1972). It is entitled to res judicata effect by this Board. Id. Moreover, having elected to remove the State Court Actions to Federal Court, and in connection therewith, having raised and presented the preemption issue to the District Court, LILCO should not now be permitted to avoid the District Court's decision through a footrace run in a collateral setting.

Since it filed its August 6, 1984 Motion for Summary Disposition with this Board, LILCO has continued to assert that preemption is the "controlling issue" in the State Court Actions. LILCO has expressly stated that it does not waive preemption as a defense to the State Court Actions. See Brownlee Affidavit, ¶ 5(k). Counsel for LILCO advised the Supreme Court that preemption was "one of the defenses that would be raised" in the State Court Actions. See Brownlee Affidavit, ¶ 5(l). Since it filed its Renewed Motion and as recently as March 8, 1985, LILCO has asserted that it intends to assert the preemption defense in State Court, that it does not waive that issue, and that it will submit that issue to the New York State Supreme Court for resolution unless the Court agrees to refrain from deciding the issue. Moreover, LILCO has submitted a form of Partial Summary Judgment to the Supreme Court that directs LILCO to renew and brief its preemption argument within twenty (20) days. See Brownlee Affidavit, ¶ 9. Moreover, under New York law, LILCO is required to assert or to waive all affirmative defenses that it may have. See generally, Glass v. Wiener, 104 App. Div. 2d 467, 480 N.Y.S.2d 760 (2d Dept. 1984) (duty is incumbent upon one opposing motion for summary judgment to lay bare his proof to the court).

Thus, LILCO continues to assert that the preemption issue is at the heart of the State Court proceedings, it continues to urge that issue as a defense to the State Court Actions, and it has a legal duty to press that defense (and any other) in the State Court Actions. Undaunted, however, LILCO now urges this Board to race to decide the very issue that LILCO has already placed at issue in another forum.7/

In short, LILCO asks this Board to excuse LILCO's own prior tactical decisions, to ignore the holding of the District Court, to decide quickly an issue already in litigation in State Court, and to render a duplicative and redundant decision. That request is procedurally extraordinary. It is substantively invalid. It is an affront to the U.S. District Court. It is an affront to the New York State Supreme Court. It is an abuse of judicial and administrative proceedings. It should be rejected out of hand.

7/ At the very least, the Board should defer action until LILCO has renewed its preemption defense in State Court and obtained a ruling on its promised motion to defer state court consideration of that defense.

III. LILCO'S REQUEST FOR ACCELERATED DECISION IS UNWARRANTED, AND ITS PROPOSED PROCEDURE WOULD DEPRIVE THIS BOARD OF AN ADEQUATE BASIS FOR DECISION

LILCO asks the Board to grant summary disposition on an accelerated basis (claiming prejudice from delay) and without further briefing (claiming that all issues have been fully addressed). Quite apart from its substantive inadequacy and its procedural irregularity, the Renewed Motion is internally inconsistent and seeks a decision without adequate briefing.

First, there is no compelling reason for this Board to decide the legal authority issue on an accelerated basis. The State Court Actions are proceeding expeditiously. The only material delay in those actions was the result of LILCO's frivolous removal petition. Moreover, LILCO has failed to show that it would be prejudiced by awaiting the New York Supreme Court's decision on the merits.

Second, LILCO urges this Board to decide the legal authority issue without further briefing. LILCO's suggestion is absurd. As previously noted, LILCO has not yet stated any purported basis of its legal authority in the light of the February 20, 1985 decision in Cuomo v. LILCO. Moreover, all prior briefs that addressed the preemption issue were written

without the benefit of that decision and its delineation of New York State law. LILCO proceeds on the basis that preemption can be analyzed in a vacuum. On the contrary, rational analysis of a preemption claim must begin with the particular state law in question. Perez v. Campbell, 402 U.S. 637, 644 (1971); see Chicago & Northwestern Trans. Co. v. Kalo Brick & Tile Co., 450 U.S. 311 (1981); Commonwealth Edison Co. v. Montana, 453 U.S. 609 (1981). Prior to the February 20, 1985 decision of the State Supreme Court, the parties differed in their interpretations of the effect of New York law upon LILCO's proposed implementation of the LILCO Plan; indeed, they even disagreed concerning which statutes were material to that issue. The Court's decision eliminates those differences and permits a careful, focused analysis of the preemption question.8/ Thus, at a minimum, this Board should not rule on the Renewed Motion on the present papers.

If the Board does not summarily deny the Renewed Motion, it should: (i) require LILCO to state clearly the legal

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8/ LILCO also cites the recent U.S. Supreme Court decision in Garcia v. San Antonio Metropolitan Transit Authority, supra. Although Intervenors believe the Garcia decision is irrelevant to the preemption issue in this case, given LILCO's position, this Board should have a full statement of the preemption position of LILCO, the Intervenors and the Staff written in light of that opinion.

basis for its purported authority; (ii) direct the parties to address the legal authority and preemption issues in the light of that statement, the decision in Cuomo v. LILCO and the Garcia opinion; and (iii) set oral argument on the preemption issue.

IV. CONCLUSION

LILCO's Renewed Motion for Summary Disposition is substantively without merit; it asks this Board to address the legal authority issue, while conceding that its stated basis of legal authority has no support.

LILCO's Renewed Motion is procedurally defective; it asks this Board to decide an issue that LILCO has repeatedly raised before the U.S. District Court and the New York State Supreme Court.

LILCO's suggestion that the Renewed Motion must be decided quickly and without further briefs is frivolous. The only prejudice LILCO may have suffered results from its own tactical ploys; moreover, the preemption issue, framed in the light of the New York Supreme Court's decision in Cuomo v. LILCO, has never been briefed.

If this Board does not summarily deny the Renewed Motion, it should: (i) direct LILCO to comply with NUREG-0654, Section II.A.2.b and amend the LILCO Plan to set forth "by reference to specific acts, codes or statutes" the legal basis for LILCO's purported authority; (ii) establish a briefing schedule under which the parties can address the preemption issue in the light of LILCO's statement of authority, the New York State Supreme Court's February 20, 1985 decision and the U.S. Supreme Court's decision in Garcia v. San Antonio Metropolitan Transit Authority, supra; and (iii) hear oral argument on the issues thus framed.

Respectfully submitted,

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