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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF RESPONSE TO
LILCO'S RENEWED MOTION FOR SUMMARY
DISPOSITION OF LEGAL AUTHORITY
ISSUES ON FEDERAL LAW GROUNDS

Introduction

On February 27, 1985, the Long Island Lighting Co. (LILCO) filed "LILCO's Renewed Motion for Summary Disposition of Legal Authority Issues on Federal Law Grounds". LILCO there asked the Board to rule on its August 6, 1984, motion [1/] which sought a determination of whether state-law prohibitions prevented LILCO from implementing its off-site emergency response plan. The plan provided that LILCO was to perform certain functions which would normally be performed by State or local government, such as the notification of the public of an emergency stemming from an emergency at the Shoreham Nuclear Power Station and traffic control in such an emergency. The Board ruled that the motion

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



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was premature. 2/ Questions concerning LILCO's authority to carry out its emergency plan under State law were pending in State courts, and this Board determined that it was appropriate for the Board to abstain from ruling on these legal authority questions until the State courts had determined the State law issues. 3/

On February 20, 1985, the New York State Supreme Court for Suffolk County, New York, issued a Memorandum 4/ in which it determined that LILCO did not have authority to carry out its off-site emergency response plan. Id. at 14-15, 17. LILCO now maintains, that since the State law questions have been determined in State court, it is appropriate for this Board to pass upon its original motion and determine whether LILCO may

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

3/ Id at 2-3.

4/ Cuomo v. Long Island Lighting Co., New York Supreme Court, Suffolk County, Ind. No. 84/4615, Memorandum, February 20, 1985.

implement its emergency response plan as a matter of Federal law notwithstanding whether it may do so under state law. 5/

LILCO also brings to the Board's attention the recent Supreme Court case of Garcia v. San Antonio Metropolitan Transit Authority, ___ U.S.___, No. 82-1913, decided February 19, 1985, for the proposition that the Tenth Amendment to the Constitution would not prevent the exercise of Federal power to permit LILCO to implement its off-site emergency plan.

As set out below, the NRC staff (Staff) believes the Federal law issues involving preemption are now ripe for adjudication by this Board. The Staff does not believe that the Constitutional question of the reach of the legislative power of Congress need here be addressed and that the issues of preemption may be addressed in terms of the relevant acts of

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5/ The question of whether authority rests in LILCO under Federal law to carry out its emergency plan is also pending in State court. LILCO, as an affirmative defense, claimed that Federal law, in providing for the licensing of nuclear facilities, preempted State law, and gave LILCO the authority to implement its off-site emergency response plan. The State court memorandum did not address that issue, and it is still pending in that court.

It is also noted that in the recent Federal case of Citizens for an Orderly Energy Policy v. Suffolk County, No. CV-83-4966, (E.D. N.Y. March 18, 1985), the court determined that Suffolk County resolutions prohibiting County cooperation in an off-site emergency response plan did not violate the supremacy clause of the U.S. Constitution, Article VI, by legislating in Federally preempted areas involving the regulation of nuclear safety. The court was not called upon and did not address the issue of whether Federal statute or regulation gave LILCO the right to implement an off-site emergency response plan where it might not have the power to do so under state law.

Congress and the Commission's intent in promulgating relevant regulations.

Discussion

I. The Preemption Issue Is Ripe For Decision By This Board.

In its pleadings of October 10, 1984 and December 7, 1984, [6/] the NRC Staff took the position that it was premature for this Board to rule upon LILCO's motion of August 6, 1984, which sought to have this Board determine whether Federal law preempted State law which could be construed as proscribing LILCO from performing certain off-site emergency response activities in the event of an accident at Shoreham, until such time as State courts had determined that State law prohibited LILCO from performing those acts. See Consolidated Edison Co. of New York (Indian Point Station, Unit No. 2), ALAB-399, 5 NRC 1156, 1166-1170 (1977). This Board agreed with that conclusion and deferred ruling upon whether Federal law preempted State law and allowed LILCO to implement its off-site emergency response plan regardless of State law. Memorandum and Order, October 22, 1984, at 2.

The State court has now interpreted the State laws and found that under State law LILCO may not carry out its off-site emergency response

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6/ NRC Staff's Answer in Opposition to "LILCO's Motion for Summary Disposition of Contentions 1-10 (the 'Legal Authority' Issues)", (NRC Staff's Answer), October 4, 1984, at 6-15; NRC Staff Response Pursuant to the Licensing Board's Memorandum and Order (NRC Staff Response), October 22, 1984, at 4-6.

plan. Cuomo v. Long Island Lighting Co., at 14-15, 17. [7/] Although the question of whether Federal law preempts State law in this area is still pending in the State court, [8/] it is no longer premature for this Board to determine whether Federal law gives LILCO the authority to carry out its off-site emergency response plan notwithstanding the proscriptions of State law. This question of preemption, being based upon the Supremacy clause of the U.S. Constitution (Article VI), is a question of Federal law. See Jones v. Rath Packing Co., 430 U.S. 519, 525-26 (1977). It is no longer necessary to await state court action.

Thus the Staff joins in LILCO's request that this Board now determine the preemption issue. This issue has formerly been briefed to this Board, and as LILCO, the Staff believes no further submissions are

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7/ The Staff has taken the position that State law did proscribe LILCO from taking certain of the disputed actions set out in its off-site emergency plan. NRC Staff's Response, October 22, 1984, at 28-31. The New York State court's Memorandum is broader and contrary to some of the reasoning in that brief. Compare Cuomo v. Long Island Lighting Co., at 10-15, with NRC Staff's Response, October 22, 1984, at 12-14.

8/ See Cuomo v. Long Island Lighting Co., at 8.

required unless the Board believes that any issue was not adequately addressed by the parties. 9/

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9/ See NRC Staff Answer, October 4, 1984, at 15-26. In footnote 23 of that Answer, it is stated that the subject state laws may be found to actually conflict with Federal law and be preempted, although drafted for a valid purpose, if (1) they were applied with the purpose of regulating radiological health and safety, or (2) their application frustrates the purpose and objectives of Congress. See Perez v. Campbell, 402 U.S. 637 (1971). In Pacific Gas & Electric Co. v. Energy Resources Commission, 461 U.S. 190, 205-213, 222-23, 75 L.Ed.2d 752, 766-771, 776-77 (1983), the Court concluded that although the purpose of the Atomic Energy Act (AEA), as amended, 42 U.S.C. §§ 2011 et seq., was to encourage the development of nuclear power plants, this was not to be accomplished "at all costs" and override the traditional areas of state economic regulation. In Silkwood v. Kerr-McGee Corp., ___ U.S. ___, 78 L.Ed.2d 443, 458 (1984), the Court emphasized that although Congress intended to encourage the development of the peaceful uses of nuclear energy it did not intend to override traditional state powers and preempt the award of punitive damages under State law to those injured by radiation. In its Statement of Consideration, "Emergency Planning", 45 Fed.Reg. 55,402, 55,404 (1980), the Commission recognized that state and local governments might frustrate Congress' encouragement of the development of nuclear energy by not cooperating in the development of emergency response plans. See NRC Staff Answer, October 10, 1984. In Cuomo v. Long Island Lighting Co., supra, the New York court determined that the general statutory scheme of New York governing the exercise of powers ordinarily exercised by the police prevented LILCO from carrying out its emergency plan without State or local government cooperation. It does not appear from the foregoing that the determination that LILCO may not exercise the State's police powers was made particularly for the purpose of regulating radiological health and safety or that laws have been applied so as to frustrate the objectives of Congress in promoting the development of nuclear energy consistent with the states' exercise of their traditional powers over non-nuclear activities.

This is not to indicate whether Congress has the power to legislate that private entities created under state law have the authority to carry out emergency response plans regardless of State law. Cf. Federal Energy Regulatory Commission v. Mississippi, 45 U.S. 742, 758, 764 (1982); Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 695 (1979).

2. Garcia v. San Antonio Metropolitan Transit Authority Does Not Cause Local Laws To Be Preempted.

Constitutional questions should not be addressed unless necessary to decide a case, and determinations should be made on the basis of statute or regulation, if possible. See New York Transit Authority v. Beazer, 440 U.S. 568, 582 (1979). Garcia v. San Antonio Metropolitan Transit Authority deals with whether Congress had the power under the Constituion to provide that employees of a public transit authority are covered by provisions of the Fair Labor Standards Amendments of 1966, § 102(a) and (b), 80 Stat. 831, the Fair Labor Standards Amendments of 1974, §§ 6(a)(1) and (6), 21(b), 88 Stat. 58, 60, 68. See 29 U.S.C. §§ 203(d) and (x). The broad Constitutional question addressed in that case involving the reach of legislative powers of Congress are only necessary for resolution if it is first determined that the Atomic Energy Act and subsequent legislation and regulations evidence a Congressional intent to wholly preempt the State's exercise of power in the emergency planning area. See LILCO's Renewed Motion at 7.

The Staff has formerly briefed the issue of whether Congress or the Commission intended to preempt the state's exercise of power in the emergency planning area. See NRC Staff Answer, October 10, 1984, at 15-26. The Staff submits the question of whether Congress preempted the exercise of state power in emergency planning area is there addressed, and the consideration of the broader Constitutional issues of the reach of the legislative power of Congress, dealt with in Garcia v. San Antonio

Metropolitan Transit Authority, need not be addressed in this proceeding. 10/

## Conclusion

For the reasons set out above, the Staff believes the preemption issues is ripe for consideration by this Board. The Staff does not believe the Constitutional issues presented by Garcia v. San Antonio Metropolitan Transit Authority need be considered.

Respectfully submitted,

Edwin J. Reis

Edwin J. Reis
Assistant Chief Hearing Counsel

Dated at Bethesda, Maryland
this 19th day of March, 1985

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10/ The Supreme Court there recognized that some limits on the Congressional exercise of delegated power over certain State functions might exist, when it stated (slip op. at 27):

> Of course, we continue to recognize that the States occupy a special and specific position in our constitutional system and that the scope of Congress' authority under the Commerce Clause must reflect that position. But the principal and basic limit on the federal commerce power is that inherent in all congressional action--the built-in restraints that our system provides through state participation in federal governmental action. ...
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> These cases do not require us to identify or define what affirmative limits the constitutional structure might impose on federal action affecting the States under the Commerce Clause. See Coyle v. Oklahoma, 221 U.S. 559 (1911). ...

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CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF RESPONSE TO LILCO'S RENEWED MOTION FOR SUMMARY DISPOSITION OF LEGAL AUTHORITY ISSUES ON FEDERAL LAW GROUNDS" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class or, as indicated by an asterisk, through deposit in the Nuclear Regulatory Commission's internal mail system, this 19th day of March, 1985.

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