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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

SUFFOLK COUNTY AND STATE OF NEW YORK
REPLY BRIEF ON CONTENTIONS 1-10

KIRKPATRICK & LOCKHART

1900 M Street, N.W., Suite 800
Washington, DC 20036

and

1500 Oliver Building
Pittsburgh, PA 15222

Attorneys for Suffolk County

Fabian G. Palomino
Special Counsel to the Governor
of the State of New York
Executive Chamber, Room 229
Capitol Building
Albany, NY 12224

Attorney for Mario M. Cuomo,
Governor of the State of New York

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add: Gorn
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Pursuant to the Board's October 22, 1984 Memorandum and Order, Suffolk County and the State of New York submit this Brief in reply to certain arguments in LILCO's November 19, 1984 Brief on Contentions 1-10 (the "LILCO Brief").

Section I of this Brief addresses the single major issue in dispute: whether LILCO has any legal authority to implement its offsite radiological emergency response plan. Section II addresses subsidiary issues raised by LILCO's Brief, such as LILCO's reargument of its so-called "realism" defense and LILCO's response to the three questions raised by the Board at pages 3 and 4 of the October 22 Memorandum and Order.

In many instances, the State and County have already addressed in full or in substantial part the arguments raised

by LILCO, either in the September 24 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) (hereafter the "County/State September 24 Brief") or in the November 19 Suffolk County and State of New York Response to ASLB Memorandum and Order Dated October 22, 1984 (hereafter the "County/State November 19 Brief"). This Brief does not repeat those arguments but rather directs the Board's attention to the portions of the prior briefs that address those issues.1/

1/ LILCO's Brief also raises issues that are simply not relevant to any matter at issue in this proceeding. Perhaps the best example is LILCO's attempt to redefine the legal authority issue: "the question is not who has authority to help the public, but rather what authority permits state and local governments to refuse to." LILCO Brief at 2. First, this purported issue is part of the Citizens case litigation pending in the Federal District Court for the Eastern District of New York. It has no place in this ASLB proceeding. Moreover, the NRC has repeatedly stated that it does not have authority to compel any State or local government to adopt an NRC-compliant RERP. See Emergency Planning Around Nuclear Power Plants, Nuclear Regulatory Commission Oversight Hearing Before the Environment, Energy and Nuclear Resources Subcommittee of the House Committee on Government Operations, 96th Cong., 1st Sess. (May 14, 1979), at 264, 380, 399, 537, 542, 559 and 575-76. Second, the County and State have not refused to help the public but rather, through the exercise of their police powers, have determined that the best means to protect the public is to decline to adopt or implement an emergency plan that they deem to be unsatisfactory. See Suffolk County Legislative Resolution 111-1983, Attachment F to County/State September 24 Brief.

I. LILCO HAS NO LEGAL AUTHORITY UNDER NEW YORK STATE LAW TO IMPLEMENT THE TRANSITION PLAN.

A. INTRODUCTION

The issue posed by Contentions 1-10 is whether LILCO has authority under New York State law to perform the basic functions set forth in its Transition Plan. In the County/State November 19 Brief, Suffolk County and New York State established that LILCO's implementation of the Plan would constitute an unlawful usurpation of New York State's police power; would require LILCO to undertake activities beyond the scope of the corporate powers granted to it by New York State law; and would violate certain specific State and local statutes. Thus, the State and County have demonstrated that LILCO has no authority to implement the Transition Plan.

LILCO grounds its response to Contentions 1-10 and indeed, its claim of authority to implement the Transition Plan, primarily on three meritless assertions: first, that it has authority to implement the Transition Plan because it is not specifically prohibited by law from doing so; second, that the activities delineated in the Plan do not constitute an exercise of the State's police power because they would not involve coercion or regulation; and third, that, in the event

of a nuclear emergency, the State and County would invest LILCO with authority to implement the Transition Plan. Each assertion is made without supporting legal authority. Each assertion is wrong. Moreover, none of these assertions is sufficient to establish LILCO's legal authority to implement the Transition Plan.

B. LILCO HAS NO LEGAL AUTHORITY

LILCO's position concerning its legal authority rests upon a basic, and false, premise. LILCO states that "as a general proposition, activity that is not prohibited by law is allowed. This is a cardinal principle of our legal system." LILCO Brief, p. 29. LILCO offers this bald proposition without a shred of supporting legal authority.

LILCO's basic premise ignores two firmly established legal principles. First, governmental functions cannot be performed -- even by political subdivisions -- without an express grant of authority from the State Constitution or the State Legislature.2/ Second, corporations have and may exercise only those powers that have been specifically conferred upon them by the State of their incorporation.3/

2/ See County/State November 19 Brief at pp. 40-52 and cases there cited.

3/ See County/State November 19 Brief at pp. 52-55 and cases there cited.

Both principles require LILCO to establish some affirmative basis for its purported authority to implement the Transition Plan. The only legal bases that LILCO cites in support of its position are transparently inadequate.

1. LILCO Intends to Perform Governmental Functions Without Authority To Do So

LILCO appears to contend that some state statute must expressly prohibit it from performing each contested function. LILCO does not, however, directly challenge the established proposition that governmental functions may not be performed without express authority. Instead, LILCO asserts that its actions under the Transition Plan do not involve governmental functions and that its management of an evacuation of County residents would not involve an exercise of the State's police power.4/ It bases that assertion on two grounds: First, that LILCO "does not propose to, and will not, use force or the

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4/ In fact, LILCO's Brief admits that LILCO would perform governmental functions. Thus, it asserts that "Intervenors are offended by the idea that a private party would presume to do what they [the State and County] ordinarily would do." LILCO Brief, p. 2. This is a direct concession that LILCO would perform the functions normally vested in the State. LILCO also states that the "Transition Plan" is so named because LILCO would perform governmental functions until civil authorities become involved. LILCO Brief, pp. 2-3. This is a further concession of the governmental character of LILCO's intended actions.

threat of force to compel obedience to anything"; and, second, that the essence of the State's police power is "regulation" and the ability "to incarcerate persons who engage in prohibited activity" whereas LILCO, in carrying out the Transition Plan, is simply "planning for and responding to a radiological emergency" and not "regulating an emergency response." LILCO Brief, pp. 29, 33. Neither LILCO's "coercion" defense nor its "regulation" defense has any merit whatever.

a. LILCO's "Coercion" Defense Has No Merit

LILCO's principal argument is that its proposed actions do not involve the use of coercion or force and, therefore, do not constitute an exercise of the State's police power. Thus, LILCO asserts, as "undisputed fact", that "LILCO does not propose to, and will not, use force or the threat of force to compel obedience"; when they are directing traffic, LILCO employees "will not issue tickets to motorists ... and ... will not put the motorist in jail for disobeying their directions." LILCO Brief, pp. 29, 30. On that basis, LILCO asserts that none of its actions constitutes an exercise of the "police power." LILCO Brief, pp. 28-32. The short answer to that assertion is that LILCO has confused a fundamental constitutional concept with a uniformed public servant.

Neither the State nor the County have ever argued that LILCO will rely upon force or the threat of jail sentences or traffic tickets. That point aside, LILCO's position suffers from multiple other defects.

First, LILCO's assertion that force or coercion is a necessary ingredient of governmental powers is put forth without any supporting legal authority whatever. Not one single case is cited in support of the proposition that is the keystone of LILCO's argument. In fact, courts seeking to determine whether the State has properly exercised its police power in a particular situation have adopted a functional approach. They have examined the activity in question and have sought to determine whether the activity is embraced by the concept of the State's police power and whether the State's actions represent a proper exercise of that power.5/ The courts have recognized that the activities LILCO proposes to perform fall within the State's traditional police powers.6/

5/ The legal authority question presented by this case arises in a different setting than the normal situation confronting the courts. Here, the issue is whether LILCO has the authority to exercise the State's police powers and not whether the State (or County) has acted within the proper scope of its police power authority. Nonetheless, the analysis concerning the scope and nature of the police power is the same.

6/ Instead of defining precisely the meaning of the State's police powers, courts generally make decisions regarding

(footnote continued)

See, e.g., Tornado Industries, Inc. v. Town Board of Oyster Bay, 187 N.Y.S. 2d 794 (1959) (control of traffic is a matter within the police power); 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) (matters concerning the public health, safety and welfare are within the State's police power); People v. Bielmeyer, 54 Misc. 2d 466, 468-69, 282 N.Y.S. 2d 797 (1967) ("It has long been recognized that the power to regulate and control the use of public roads and highways is primarily the exclusive prerogative of the States."); City of Utica v. Water Pollution Control Board, 6 App. Div. 2d 340, 177 N.Y.S. 2d 47 (1958), aff'd., 5 N.Y. 2d 164, 182 N.Y.S. 2d 584 (1959) (control of water pollution is within the public power); Royce v. Rosasco, 159 Misc. 236, 287 N.Y.S. 692 (1936) (control of milk and abatement of public emergencies are within State's police power). See, generally, N.Y. Const. Art. I, sec. 6, notes 681-909 (McKinney).

(footnote continued)

whether or not certain activities fall within the broad concept. See, e.g., Milchman v. Rivera, 39 Misc. 2d 347, 240 N.Y.S. 2d 859, 865 (1963), app. dismissed, 13 N.Y. 2d 1123, 247 N.Y.S. 2d 126 (1964) ("It is much easier to perceive and realize the existence and source of [the police] power than to mark its boundaries, or prescribe limits to its exercise."). See generally 20 N.Y. Jur. 2d, "Constitutional Law", §188 (1982).

Moreover, an exercise of governmental functions does not necessarily require the imposition of penalties:

> The term "police power" has often been defined as that power vested in the Legislature to make, ordain and establish all manner of wholesome and reasonable laws, statutes and ordinances, with penalties or without, not repugnant to the Constitution, as they shall judge to be for the good and welfare of the commonwealth, and of subjects of the same. Whatever affects the peace, good order, morals and health of the community comes within its scope.

Brandon Shores, Inc. v. Incorporated Village of Greenwood Lake, 68 Misc. 2d 343, 325 N.Y.S. 2d 957, 960 (1971) (emphasis supplied); see also Milchman v. Rivera, 39 Misc. 2d 347, 240 N.Y.S. 2d 859 (1963), app. dismissed 13 N.Y. 2d 1123, 247 N.Y.S. 2d 126 (1964).

Second, LILCO's position is nonsensical. The essence of LILCO's position is as follows: LILCO's conduct is immune from attack, because LILCO is exercising certain governmental functions (the protection of public health and safety, the declaration of a public emergency, the management of an evacuation, the direction of traffic) but is not exercising other governmental functions (the power to arrest, the power to incarcerate, the power to issue traffic tickets) that are prerogatives of the State. LILCO then argues that the functions it will perform cannot be deemed governmental,

because it will not exercise all other functions that are governmental. Under LILCO's theory, no private person could ever usurp the State's police power unless it sought to exercise all elements of the police power, including the right to arrest and incarcerate.

LILCO's coercion argument is invalid for a third reason: it misrepresents the position of the State and County. These parties' challenge to LILCO's authority does not assume that LILCO will in all cases exercise compulsion. The State and County do not contend that LILCO will issue traffic tickets or throw people in jail. Implementation of the Transition Plan will require LILCO to perform basic governmental functions, but the State and County will stipulate that the Transition Plan does not state that LILCO will arrest people or issue traffic tickets. LILCO's specter of traffic tickets and jail sentences is a strawman, pure and simple.

Fourth, LILCO's coercion defense is factually inaccurate. Jail sentences and traffic tickets aside, LILCO's Transition Plan obviously involves elements of compulsion. Thus, for example, LILCO's Plan states that LILCO will turn a two-way street into a one-way street. Plan, Appendix A, at IV-8. Given that fact, it is difficult to understand how LILCO can now assert that its traffic control powers will merely

"facilitate" traffic, leaving motorists free to drive as and where they wish.7/ Similarly, LILCO's Transition Plan clearly provides that LILCO vehicles will be parked in traffic lanes on the Long Island Expressway in critical locations, thereby limiting traffic to unrestricted lanes and "facilitating" the continued flow of traffic. Plan, Appendix A, at IV-7; see also Appendix A, fig. 8.2. That technique clearly restricts drivers' freedom and compels them to travel in accordance with the Transition Plan. Additional examples abound: LILCO's Transition Plan provides that traffic will be "channelized" by the use of traffic cones and flashing lights. Plan, Appendix A, at IV-7, 19. As a practical matter, each of those techniques restricts motorists and forces them to travel in accordance with the Transition Plan.8/ Finally, as noted in

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7/ LILCO asserts that if a "person is in a line of traffic that a traffic guide is directing to the left, and that person wishes to turn right, he is free to do so under the LILCO Transition Plan." LILCO Brief at 30-31. As a practical matter, however, such freedom will be limited by traffic cones, flashing lights, parked LILCO cars or the persuasive effect of oncoming traffic. The distinction at issue is not the difference between more and less active verbs as LILCO suggests; it is the difference between realism and fantasy.

8/ LILCO has sought to convince this Board that its evacuation plan will enable 160,000 Suffolk County residents to leave the 10-mile EPZ surrounding the Shoreham plant in 4 hours, 35 minutes (assuming "normal" weather conditions). Plan, Appendix A, at V-3 (Evacuation

(footnote continued)

the County/State November 19 Brief, LILCO will declare an emergency and broadcast that emergency declaration on EBS channels, advising residents to leave their homes for a p[illegible]od of days, taking pills and pillows with them. OPIP 3.8 19-20. Of cou[illegible]se, LILCO will not enforce that evacuation directive by threat of jail sentences.9/ Nonetheless, such a broadcast under the circumstances then prevailing would exert an element of compulsion upon the residents of Suffolk County.

The foregoing examples demonstrate that the Transition Plan has, at its base, elements of compulsion. That compulsion does not derive from jail threats or physical force; it results instead from the nature of the functions LILCO would perform and the circumstances under which it would act. These elements of compulsion notwithstanding, the fundamental issue is a functional one: Do LILCO's activities involve an exercise

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scenario #12). Such an evacuation, LILCO contends, will keep residents' exposure to life-threatening radiation to acceptable levels. Only if LILCO's "traffic guides" succeed in "facilitating" traffic by persuading motorists to follow their "hand and arm signals" does LILCO have any hope whatever of reaching its stated evacuation targets.

9/ Curiously, LILCO itself asserts that "even governments do not ordinarily force people to evacuate at gunpoint" (LILCO Brief, p. 32, n. 20), thereby contradicting LILCO's expressed position that force is a necessary element of governmental action.

of the State's police power as that power has been defined? Are LILCO's intended functions inherently governmental in nature? The State and County have demonstrated that LILCO's actions, by their very nature, involve functions that are within the embrace of the State's police powers. LILCO has offered no credible argument to the contrary. Indeed, in designating its RERP the "Transition Plan," LILCO has conceded the essence of the State and County's position.

b. LILCO's "Regulation" Defense Has No Merit

LILCO's second argument is that the police power of the State necessarily entails regulation and enforcement; because LILCO is acting, i.e., "planning for and responding to an emergency," and not "regulating an emergency response," LILCO asserts that its actions do not involve an exercise of the police power.

Again, LILCO offers a broad, sweeping generalization that is crucial to its legal position, but it cites absolutely no supporting legal authority. LILCO does not cite any case that justifies the obscure distinction it attempts to state. Instead, LILCO asserts that the State and County have recited "platitudes" regarding the police power that do not express why the LILCO Plan is illegal. LILCO Brief, p. 33. In fact, the

State and County's "platitudes" are drawn from numerous decided cases that (i) clearly define the nature and function of the police power, (ii) hold that the police power is vested in the State, (iii) demonstrate that actions such as LILCO contemplates are within the police power, (iv) hold that such powers may be exercised by governmental units only with an express grant of authority and may not in any case be delegated to private bodies and (v) demonstrate that specific statutes confer such powers upon political subdivisions to the exclusion of private corporations such as LILCO.10/ Whether one calls these propositions "platitudes" or recognizes them as fundamental axioms of our constitutional system, one fact is clear: those propositions have been stated and restated in decided judicial opinions; they control this case; and they preclude LILCO's exercise of the functions in question.

LILCO then contends that its own actions do not "regulate emergency response" but rather consist simply of "planning for and responding to a radiological emergency." LILCO Brief, p. 33. In fact, LILCO's contention supports the position of the State and County. In "planning for ... a radiological emergency", LILCO would exercise functions that

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10/ County/State November 19 Brief, pp. 40-76.

are governmental in nature; in "responding to a radiological emergency", LILCO would undertake activities that are reserved to the State and its political subdivisions. LILCO cannot lawfully do so. That is what this case is about.

2. Corporations Can Only Exercise Those Powers Conferred Upon Them By The States Of Their Incorporation

LILCO recognizes that its powers are limited to those conferred upon it by the State.11/ LILCO seeks to find authority for its actions in the implied powers of corporations, now codified in Section 202(a)(16) of the New York Business Corporation Law which grants corporations "all powers necessary or convenient to effect its corporate purposes." Specifically, LILCO argues that it has the authority to build or operate power plants; that to operate Shoreham, LILCO must establish that an adequate offsite emergency plan exists for the plant; and that, therefore, LILCO has the implied power to implement its Transition Plan and carry out all functions stated therein so as to obtain a license for Shoreham.

11/ This concession contradicts LILCO's assertion that any activity not expressly prohibited is in fact allowed. LILCO Brief, p. 29.

LILCO's view of the scope of implied corporate powers is without limit; moreover, it is without support. LILCO bases its theory of implied powers on early and pre-1900 cases concerning the nature of corporations and their powers. Those cases provide no support to LILCO's intention to implement the Transition Plan. Thus, for example, cases holding (i) that a corporation has implied power to make charitable contributions for the benefit of the corporation and its employees or (ii) that a corporation operating a home for persons 60 years or older has the implied power to admit a 59 year-old do not support LILCO's claim that it has implied authority to assume responsibility for the protection and evacuation of over 100,000 Suffolk County residents. 12/

Drawing upon a turn-of-the-century case, LILCO recites the proposition that "it is difficult to say in any given case that a business act is not within the powers of a corporation." LILCO Brief, p. 35. Clearly, a judge writing in 1901 would not have considered the direction of traffic or the declaration of a public emergency "a business act" as that term

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12/ See Steinway v. Steinway & Sons, 17 Misc. 43, 40 N.Y.S. 718 (1896) and In Re Heim's Estate, 166 Misc. 931, 3 N.Y.S. 2d 134, aff'd., 255 App. Div. 1007, 8 N.Y.S. 2d 574 (1938), which LILCO cites to support its implied power theory.

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was used in the City Trust case cited by LILCO.13/ Morecver, none of the cases LILCO cites would confer upon a private corporation the power to manage a mass evacuation or carry out the other functions here in question.

LILCO would have this Board conclude that its power to undertake actions necessary or convenient to the effectuation of its corporate purposes has no bounds. In fact, a corporation does not have the power, implied or otherwise, to engage in activities against public policy. See County/State November 19 Brief, pp. 54-55. See also State of New York v. Abortion Information Agency, Inc., 37 App. Div. 2d 142, 330 N.Y. 2d 927 (1971), aff'd., 30 N.Y. 2d 779, 339 N.Y.S. 2d 174 (1972); State of New York v. Saksnit, 69 Misc. 2d 554, 332 N.Y.S. 2d 343 (1972). New York State constitutional, statutory and common law firmly establish that only the State and, upon proper delegation, its municipalities, may exercise the State's police powers. The exercise of such powers by LILCO pursuant to the Transition Plan would constitute a clear violation of this public policy.

13/ City Trust, Safe-Deposit & Surety Co. of Philadelphia v. Wilson Manufacturing Co., 58 App. Div. 271, 68 N.Y.S. 1004 (1901). See LILCO Brief, p. 35.

3. LILCO Has Identified No Legal Authority For Its Intended Actions

LILCO's Brief attempts to suggest that various State or federal statutes authorize it to perform some or all of the functions in question. None of the statutes provides any such authority. In addition, LILCO offers a Contention-by-Contention Analysis that misreads state statutes and utterly ignores the legal context in which such statutes exist.14/

First, LILCO refers to Article 2-B of the Executive Law, asserting that the "activity proposed by LILCO under its Plan is directly supported by New York State Executive Law, Article 2-B." LILCO Brief, p. 34. In that connection, LILCO asserts that LERO is an "emergency service organization" which Article 2-B defines as an organization functioning "for the purpose of providing fire, medical, ambulance, rescue, housing, food or other services directed toward relieving human suffering, injury or loss of life or damage to property." §20(2)(e). LILCO asserts that Article 2-B encourages the

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14/ In the main, LILCO's Contention-by-Contention Analysis attempts to demonstrate the absence of explicit prohibitions rather than the existence of legal authority. The State and County have demonstrated that that approach operates on a faulty premise. Moreover, even if valid, such an exercise would not support LILCO's affirmative authority to carry out the functions in question.

creation of such organizations and stops there. LILCO Brief, pp. 34-5. LILCO does not even argue that Article 2-B authorizes emergency service organizations to perform the functions LILCO would undertake.= Article 2-B does indeed acknowledge emergency service organizations, and it recognizes that such organizations may perform limited functions.15/ Article 2-B does not confer general emergency powers upon emergency service organizations, nor does it authorize such organizations to declare a public emergency, to manage an evacuation, to direct traffic or to undertake the basic governmental functions that the substantive provisions of Article 2-B vest exclusively in the State and local governments. None of these powers is among the purposes of emergency service organizations that are referenced in the definition section LILCO relies upon.16/ LILCO's assertion

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15/ For example, Section 28(2) indicates that, if directed to do so by the governor, an emergency service organization may notify the public that an emergency exists and may take appropriate protective actions pursuant to a state approved radiological emergency preparedness plan. Section 28(2) provides emergency service organizations with no authority to undertake actions independent of such direction by the governor. LERO, however, proposes to declare an emergency and communicate that declaration to the public without the direction or consent of the governor.

16/ See, generally, County/State November 19 Brief, pp. 57-63, 67 and 71-77 concerning the terms and effect of Article 2-B.

that its proposed activities are "directly supported" by Article 2-B is utterly baseless.

Simply stated, Executive Law, Article 2-B, does not authorize LILCO to implement its Transition Plan. Instead, by conferring particular powers upon State and local governments which those governments may exercise according to their discretion, Article 2-B impliedly excludes private corporations such as LILCO from performing those same functions.17/

Second, LILCO states that "LILCO has specific authority under federal law administered by the Federal Communications Commission to make those radio announcements [declaring a general radiological emergency and advising of the need for evaluation], as does any other private individual or organization." LILCO Brief, p. 31 (emphasis in original).18/ In fact, FCC regulations demonstrate that LILCO does not have the authority to perform the acts in question. See 47 C.F.R. §73.902:

17/ See County/State November 19 Brief at pp. 47-48, 56-77.

18/ See also LILCO Brief, p. 19, where LILCO claims that, pursuant to 47 C.F.R. §§73.913(b) and 73.935, FCC regulations permit the "activation" of an EBS system without any governmental officials' prior approval or notification.

> The objective of this subpart [relating to the Emergency Broadcast System] is to provide a means for the development and implementation of Emergency Broadcast System planning and operation at the National, State, and local levels. Provision is made for operation of participating broadcast stations and other non-government industry entities on a voluntary, organized basis during emergency situations for the purpose of providing the President and the Federal government, as well as heads of State and local government, or their designated representatives, with a means of communicating with the general public. Participation in the EBS at the State and Operational (Local) Area levels is at the discretion of broadcast station management. (Emphasis supplied.)

FCC regulations permit station operators or individuals to "activate" EBS networks; they do not authorize station operators or private citizens to declare a state of emergency and to broadcast their determination to the general public. FCC regulations do provide that the EBS, once "activated", can be used by "the President and the Federal government, as well as the heads of State and local governments or their designated representatives" to communicate with the public. Thus, FCC regulations clearly contemplate that governmental authorities, and only governmental authorities, will carry out the functions which, in this case, LILCO itself claims authority to perform. Far from vindicating LILCO's purported authority, FCC regulations clearly contemplate that the responsibility for communicating with the general public rests with the relevant governments.

In sum, LILCO offers no legal authority for its position. Each statute that LILCO references undermines, rather than supports, its claim of legal authority.

Finally, LILCO offers a "Contention-by-Contention Analysis" that attempts to bolster its legal authority position by asserting (i) that the State and County have abandoned their position that state law precludes LILCO's exercise of the challenged functions and (ii) that the specific statutes referenced in the Contentions are of no significance.19/ LILCO

19/ LILCO claims that the County and the State "have for all practical purposes abandoned the position stated in Contentions 1-10." LILCO Brief, p. 3. LILCO is incorrect. The County/State November 19 Brief specifically analyzes the effect of the laws cited in the legal contentions upon LILCO's legal authority. See pp. 56-73. The County and State have presented substantially similar arguments to the New York State Supreme Court in their Joint Brief Concerning LILCO's Legal Authority dated November 15, 1984 at pp. 50-65.

LILCO's misconception apparently stems from a brief filed in the State Court action by the State and County on September 11, 1984 in which the State and County set forth the fatal flaws behind LILCO's claim of legal authority: namely, that LILCO has not been and cannot be delegated the State's sovereign police power and that LILCO has only those powers expressly conferred upon it. These propositions are so clear under New York State law and they so clearly preclude LILCO's exercise of the functions in question that the County and State did not see the necessity of briefing the specific statutes referenced in each of the legal contentions and cited in the State's Complaint. Those specific statutes are, moreover, only the reverse side of the same legal coin. In light of LILCO's position, however, the County and State have now presented the analysis of those statutes to both this Board and the State Court.

Brief at pp. 3, 28-29. LILCO gravely misconstrues the position of the State and County. New York law requires an express grant of authority before any entity other than the State can exercise the State's sovereign police powers. See County/State November 19 Brief, at pp. 40-52. The State and County have shown that each function LILCO proposes to undertake in its Transition Plan has been delegated under New York law to various other governmental entities, such as the Governor, Executive agencies or local governments. In particular, the County and State have shown that many of the statutes cited in the legal contentions specifically confer authority upon governmental entities to carry out the functions LILCO proposes to usurp. Ibid. These express grants of authority necessarily demonstrate LILCO's lack of legal authority.

In its "Contention-by-Contention Analysis," LILCO does not rebut the State and County's position but rather summarily dismisses the statutes cited in the legal contentions in the hope that they will vanish. For instance, the legal contentions cite statutes which empower various governmental entities to regulate traffic generally, N.Y. Veh. & Traf. Law §1102; to close streets and divert and direct traffic in an emergency, N.Y. Veh. & Traf. Law §1602; and to declare and notify the public of an emergency, N.Y. Executive Law, Article

2-B, §28. These are precisely the activities LILCO proposes to undertake in an emergency, yet it makes the bold, unsubstantiated statement that "§1102 is inapposite," that "§1602 does not by its terms apply to anything LILCO proposes to do under the Transition Plan," and that " ... there plainly is nothing in Article 2-B that would prohibit LERO from making an initial notification to the public ..." LILCO Brief, pp. 5, 18. Each assertion is wrong. The statutes are pertinent; they confer powers upon governments not private corporations; and they preclude LILCO's implementation of the Transition Plan functions.

That point aside, LILCO plainly has misread statutes cited in the legal contentions. For example, LILCO's effort to evade the clear meaning of New York law is evident with respect to N.Y. Veh. & Traf. Law, §1114 (McKinney). Section 1114, which is cited in contentions 2 and 3, provides:

> No person shall place, maintain or display upon or in view of any highway any unauthorized sign, signal, 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 railroad sign or signal, or which attempts to direct or regulate the movement of traffic, or which hides from view or interferes with the effectiveness of any official traffic-control device or any railroad sign or signal.

Without any support, LILCO asserts that the "intent

of the statute is clearly to prevent 'public nuisances', for example, unauthorized signs that hide stoplights from view." LILCO Brief, p. 8. LILCO's interpretation is unsubstantiated. The statute contains no such limitation, and it does not even permit the reading that LILCO suggests. By its terms, §1114 clearly prohibits LILCO from using traffic cones, flashing lights, trail blazer signs and other devices that would attempt "to direct or regulate" traffic during an evacuation or that resemble or are likely to be construed as official traffic control devices. As hard as it may try, LILCO cannot change the statute's plain language.

As an additional argument, LILCO claims its trail blazer signs would not violate §1114, because they "do not control, direct or regulate traffic; they merely mark evacuation routes, and any member of the public is free to ignore them." LILCO Brief, p. 14. This is ridiculous. According to LILCO's view, nothing could violate this provision because no sign or device "controls," "directs," or "regulates" traffic unless the public is not free to ignore them. Again, LILCO's unsubstantiated interpretation of this New York law would render it meaningless. In addition, LILCO ignores the prohibition against any sign and device "... which purports to be or is an imitation of or resembles or is likely to be

construed as an official traffic-control device ..." LILCO's trail blazer signs fall squarely within this description; they are therefore prohibited in spite of LILCO's baseless assertion to the contrary.

In short, LILCO's "Contention-by-Contention Analysis" does not cure LILCO's lack of legal authority. Rather, that Analysis highlights the fact that LILCO has no legal authority to carry out its Transition Plan.

II. THE STATE AND COUNTY RESPONSES TO OTHER ISSUES

A. THE BOARD SHOULD SUMMARILY DISMISS LILCO'S REARGUMENT OF THE SO-CALLED "REALISM" ISSUE

In its "Contention-by-Contention Analysis" (LILCO Brief, p. 4-28), LILCO reargues the merits of its so-called "realism" defense, urging that the County and State "would in fact respond in a real emergency" and that the hoped for State or County response would cure LILCO's lack of legal authority. See LILCO Brief, pp. 9-12, 15, 18, 19, 22, 24, 26, 27. The "realism" defense must be rejected. The reasons which compel rejection have been previously set forth,20/ and thus we provide only a summary in the instant filing.

20/ County/State September 24 Brief at 94-101; County/State November 19 Brief at 88-99.

1. Even if the County or State were to "respond", this would not cure LILCO's lack of legal authority. LILCO cites no authority for the proposition that some sort of County or State "response" would or could provide LILCO with the authority to do that which State law declares to be illegal. The reason LILCO cites no legal authority is clear: there is none. See County/State September 24 Brief at 94-101; County/State November 19 Brief at 49-52, 88-99.

2. The law of Suffolk County -- particularly Resolutions 456-1982 and 111-1983 -- makes it clear that the County cannot effect a response to a Shoreham emergency. Only the County Legislature can change that law, and it has not done so. See County/State September 24 Brief at 93 and Attachments E and F; County/State November 19 Brief at 94-95. Thus, the true "realism" is for this Board to acknowledge that County law bars a response and to reject LILCO's efforts to speculate about any County response.

LILCO belatedly appears to acknowledge that the County is barred from responding to a Shoreham emergency but argues "that the Resolution does not bind the Governor, who has authority under New York Executive Law, Article 2-B, to suspend any statute, local law, ordinance, etc., in an emergency." LILCO Brief at 11. We have already demonstrated that the

Governor's power to suspend laws could never be used to grant LILCO authority to exercise the police power. See County/State September 24 Brief at 97-98; County/State November 19 Brief at 49-52. Further, there is not one speck of evidence that the Governor would ever exercise his purported Article 2-B powers in the way LILCO speculates. Thus, LILCO has provided no basis at all for a finding in its favor on the "realism" issue.

3. There is no "evidence" that the County or State would "respond" at all to a Shoreham emergency, much less in a fashion which would be at all meaningful in terms of making the necessary "reasonable assurance" findings. See 10 C.F.R. § 50.47(a)(1). Rather, at most the "evidence" regarding a County or State "response" consists of an out-of-context sentence from the Governor's 11-month old press release. This Board could not possibly rest any findings on such a "record." See County/State September 24 Brief at 94-101; County/State November 19 Brief at 91-94. Moreover, the Governor emphasized that the State lacked resources to effect any meaningful response to a Shoreham emergency, thus further underscoring the paucity of "evidence" regarding the value of any such alleged response. See County/State September 24 Brief, Attachment D.

4. If the Board considers the merits of the "realism" defense, the County and State are entitled to an

evidentiary hearing, both because there are facts in dispute and because LILCO's defense was only raised after the hearing on other issues was essentially completed. See County/State September 24 Brief at 90 and Attachments B and C; County/State November 19 Brief at 3-5, 90-91.

LILCO has admitted that the issue of "how the State and County would respond ... is an entirely new issue that has not been addressed in testimony." LILCO Brief at 42 (emphasis in original). LILCO asserts, however, that the "remedy" is not to hold further hearings and that the Intervenors could have raised the issue previously if they had wanted to. This LILCO argument is absurd on at least two counts. First, as noted already, there was no reason for the County or State to address the "realism" defense previously because LILCO never apprised the Board or the Intervenors that this was to be part of the case. In this regard, it bears repeating that, in June, 1983, this Board established that the focus of this proceeding was the adequacy of an emergency plan implemented solely by LILCO.21/ Thus, LILCO now has absolutely no basis to suggest

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21/ 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

(footnote continued)

that the County or State should have addressed this issue earlier.

Second, assuming arguendo that the Board reaches the merits of the realism defense, the Board of course must consider the nature of that response in order to determine whether the putative "response" could be meaningful and could support a reasonable assurance finding. At present, the record is devoid of anything meaningful in this regard. For instance, regarding traffic control, LILCO states that the hoped for "response is bound to include either (1) providing policemen to facilitate the movement of traffic during an evacuation, or (2) conferring authority on LERO to do so." LILCO Brief at 12 (emphasis supplied). This Board, of course, cannot make findings on the basis of such "bound to include" speculation. Rather, this Board must rely on evidence; there is none.

Therefore, for all the foregoing reasons, this Board should reject LILCO's reargument of its so-called "realism" defense.

(footnote continued)

> 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."

B. BOARD QUESTION 1: THE BOARD SHOULD NOT ADDRESS THE MERITS OF CONTENTIONS 1-10 IF THE COURT HAS NOT RULED

The County and State have already presented their primary views on this issue and have urged this Board to refrain from addressing Contentions 1-10 on grounds of federal/State comity, NRC precedents, lack of jurisdiction, and the fact that it is LILCO's own fault that a State Court decision has been delayed. See County/State September 24 Brief at 13-22; County/State November 19 Brief at 13-19, 77-82. We shall not repeat those arguments.

In its latest Brief, LILCO suggests that this Board might dismiss the Contentions because the County and State allegedly have failed to supply a basis for the Contentions and have failed to satisfy their burden of going forward. LILCO Brief at 39. This is absurd. The County/State November 19 Brief (pp. 13-27) sets forth in great detail the facts which show that the County and State have more than satisfied any burden on them and that, in fact, LILCO has never sustained its burden of demonstrating that it has legal authority to implement its Plan.22/ Indeed, all LILCO has ever done is

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22/ LILCO suggests that all that has been done to support Contentions 1-10 is to "merely [cite] a statute" that an Intervenor claims makes an operating license illegal.

(footnote continued)

argue that nothing in State law prohibits it from implementing the Plan. Until LILCO demonstrates that it has the necessary legal authority -- and the only way to do so is to obtain a judgment to that effect from a competent State Court -- this Board is compelled to rule that LILCO has failed to sustain its burden of proof.

C. BOARD QUESTION 2: THE SO-CALLED "IMMATERIALITY" DEFENSE

LILCO persists in arguing that the implementing entity for a radiological emergency response plan does not need to have the capability to perform traffic control functions. Thus, LILCO asserts that the traffic management functions addressed in Contentions 1-4, 9 and 10 are not required by the NRC's regulations. LILCO Brief at 41.23/ For reasons already

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(footnote continued)

LILCO Brief at 39. It is disingenous for LILCO to suggest that somehow the County and State are at fault for not having done more to resolve this issue. When the Board suggested that the parties go to State Court, the State and County did just that. But for LILCO's delay tactics, a State Court decision would already have been obtained. Further, LILCO belittles the significance of these Contentions by suggesting that they be dismissed. See LILCO Brief at 39. Even FEMA has found the LILCO Plan inadequate in the legal authority area. See County/State November 19 Brief at 21-25. Thus, the County and State have clearly met any burden of going forward, and LILCO has failed sustain its burden of demonstrating legal authority to implement the Plan.

23/ LILCO admits that the functions covered by Contentions 5-8 are required by the NRC's regulations. LILCO Brief at 41.

set forth at length,24/ the County and State disagree. In addition, the Board in the Susquehanna proceeding clearly indicated that careful traffic control preparations -- and hence traffic control capability as well -- were a "critical item in emergency planning." See Pennsylvania Power & Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), LBP-82-30, 15 NRC 771, 796 (1982). This squarely supports our view that the immateriality defense should be dismissed as a matter of law.

LILCO has also argued that even if the traffic-related functions covered by Contentions 1-4, 9 and 10 are required by the regulations, the Board should find for LILCO under 10 C.F.R. § 50.47(c)(1) because the obstacle allegedly is beyond LILCO's control and within the control of the County and State to eliminate. LILCO Brief at 41. The Board should reject this argument. Under Section 50.47(c)(1), the Board may find that noncompliance with the regulations does

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24/ County/State September 24 Brief at 101-18; County/State November 19 Brief at 82-88. LILCO has reargued its immateriality defense to various degrees in the context of its "Contention-by-Contention Analysis." See LILCO Brief at 12-14, 15, 16, 25, 26, and 28. The County has disputed the factual bases for the so-called immateriality defense and is entitled to an evidentiary hearing if the Board addresses the merits of the defense. See County/State September 24 Brief at 101-18 and Attachments B and C; County/State November 19 Brief at 3-5, 82-88.

not bar an operating license if the deficiencies are not significant for the plant in question, if adequate interim compensating measures have been or will be taken, or if there are other compelling reasons to permit plant operation.

LILCO does not identify which of the Section 50.47(c)(1) standards it believes it meets. Presumably it is the first, since there are no proposed compens ting traffic control measures if LILCO cannot implement the Plan and there are no "compelling reasons to permit the plant to operate."25/ With respect to the significance of the deficiences, there clearly are facts in dispute which preclude summary disposition, and the County and State are entitled to an evidentiary hearing if the Board is inclined to consider the merits of the immateriality defense. See County/State September 24 Brief at 101-18 and Attachments B and C; County/State November 19 Brief at 82-88. Such a right to an evidentiary hearing is particularly great in the instant case wherein LILCO waited until August 1984 -- after all traffic related issues had been tried -- to apprise the Board and parties of its intended reliance on the so-called immateriality defense.

25/ The power proposed to be generated by Shoreham is not needed for at least 10 years, thus underscoring that there clearly are no "compelling" reasons which favor operation if the regulations are not satisfied.

D. BOARD QUESTION 3: THE EFFECT OF AN UNPLANNED COUNTY OR STATE RESPONSE

In our November 19 Brief (pp. 88-89), we cautioned the Board that its third question[26] invited speculation that could not result in any reliable findings of fact. After reviewing LILCO's response to this Board question (LILCO Brief at 42-66), we submit that our concern was accurate: LILCO has engaged in unprecedented speculation that does nothing to move Contentions 1-10 any closer to resolution. Indeed, all LILCO has done is speculate what it hopes may happen if the NRC were to grant an operating license for Shoreham. But LILCO fails completely to address whether LILCO first qualifies for an operating license. Since LILCO lacks legal authority to implement its Plan, it clearly does not qualify and thus LILCO's speculation about what might happen if a license were issued is completely irrelevant.

The LILCO so-called "realism" defense must be summarily rejected or, if not rejected, a fair evidentiary

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26/ "In connection with LILCO's 'realism' argument, what effect would an unplanned response by the State and 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 can and will be taken in the event of a radiological emergency' at Shoreham?" October 22 Memorandum and Order at 3-4.

proceeding must be held for the reasons we have already set forth. See Section II.A, supra. See also County/State September 24 Brief at 88-101; County/State November 19 Brief at 88-99. Suffolk County and the State of New York also add the following additional responses to certain of LILCO's latest speculation:

1. LILCO has characterized Board question three as whether the State or County would inadvertently or otherwise "sabotage" an emergency response. See LILCO Brief at 42, 44, 46. This is a serious preceeding in which such characterizations have no place. The issue presented by Contentions 1-10 is whether LILCO has legal authority to implement its Plan. The idea of sabotage is a figment of LILCO's imagination and has nothing to do with whether LILCO complies with the regulations. The County and State do believe that there will likely be chaos and confusion if there were a Shoreham emergency but not because of any purported sabotage but rather because successful preparedness for a Shoreham emergency is impossible no matter what plan one attempts to implement.

2. LILCO asks this Board to assume that if an operating license is granted and Shoreham begins to operate, then the County and State will join in LILCO's planning effort

or in some other planning effort of their own. LILCO Brief at 44-45. On this basis, LILCO urges the Board to find that any response will be planned. Aside from being gross speculation, LILCO's argument is irrelevant. The issue is not what might happen after a license is issued but rather whether LILCO qualifies for a license in the first place. LILCO cannot be issued a license unless it so qualifies. LILCO does not qualify for a license if it lacks authority to implement its Plan, and no amount of speculation can alter that fact.27/

3. LILCO also argues that since the State and County failed to present evidence on what their alleged "response" would entail, it should be presumed that the County and State will act responsibly in an emergency. LILCO Brief at 48-49. The reason, of course, that no evidence was submitted was that such an alleged response was not an issue in this proceeding until August 1984 when LILCO first raised its "realism" defense. It thus is disingenuous for LILCO to try to create a presumption out of its own failure to act in a timely

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27/ LILCO also speculates that if the County and State are really concerned about public safety, they will plan and respond once a license to operate is granted. See LILCO Brief at 10. Again, however, LILCO has put the cart before the horse: the issue is not what might happen if an operating license is issued but, rather, whether LILCO has satisfied regulatory requirements for an operating license in the first place.

(footnote continued)

manner.28/ At any rate, LILCO's alleged presumption is merely another example of LILCO speculating about what the County and State might do if a license were granted.29/ It has nothing to do with whether a license can lawfully be granted.

4. LILCO argues at length that its Plan is designed to incorporate elements of the State and County who may wish to respond. LILCO Brief at 52-66. This argument is irrelevant. First, LILCO again is speculating about what would happen if plant operation started, instead of focusing on whether an operating license can lawfully be granted. Second, there is no "evidence" that either the County or State will respond pursuant to LILCO's Plan. Rather, it is clear that the County

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28/ LILCO spends several pages citing instances where the County and State successfully had LILCO speculation about alleged County/State "response" striken from the record. See LILCO Brief at 49-52. These data were deemed irrelevant to the ASLB proceeding concerning LILCO's Plan. This simply underscores the point that neither the other parties -- nor the Board -- were on notice about LILCO's alleged "realism" defense.

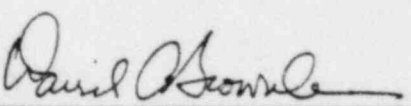
29/ LILCO criticizes the State and County for failing to state what they would do in the event of a Shoreham emergency. See LILCO Brief at 44-45. Aside from the fact that the realism defense was not timely raised, LILCO failed to state that the County and State acted with the utmost responsibility in not addressing this issue: the case was tried on the sole basis of what LILCO would do in a Shoreham emergency; why should the County or State engage in speculation when the ASLB had already ruled that such speculation was outside the scope of the proceeding?

(footnote continued)

is barred by law from responding,30/ and the State lacks the necessary resources to respond.31/ Finally, without preplanning, there is no basis to find that any County or State response could or would be meaningful. "A radiological emergency is not a normal condition and no assumption can be made as to how an organization will respond without preparatory planning." FEMA RAC Review of Transition Plan, Revision 4, October 12, 1984, Attachment 2, at 2. Thus, LILCO again is engaged in speculation about what it hopes might occur. Such speculation, however, does nothing to satisfy 10 C.F.R. § 50.47 requirements.

Respectfully submitted,

Martin Bradley Ashare
Suffolk County Department of Law
Veterans Memorial Highway
Hauppage, New York 11788



David A. Brownlee, Esq.
Michael J. Lynch, Esq.
Kenneth M. Argentieri, Esq.
KIRKPATRICK & LOCKHART
1500 Oliver Building
Pittsburgh, PA 15222

30/ County/State November 19 Brief at 94-95.

31/ County/State September 24 Brief, Attachment D (Palomino Affidavit and Cuomo Press Release).

Herbert H. Brown
Lawrence Coe Lanpher
Karla J. Letsche
KIRKPATRICK & LOCKHART
1900 M Street, N.W., Suite 800
Washington, D.C. 20036

Attorneys for Suffolk County

Fabian G. Palomino
Special Counsel to the Governor
Executive Chamber, Room 229
Capitol Building
Albany, New York 12224

Robert Abrams, Esq.
Mary M. Gundrum, Esq.
Attorney General of the State
of New York
Two World Trade Center
Room 46-14
New York, New York 10047

Attorneys for MARIO M. [redacted]OMO,
Governor of the State of New York

November 29, 1984

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that copies of SUFFOLK COUNTY AND STATE OF NEW YORK REPLY BRIEF ON CONTENTIONS 1-10, dated November 29, 1984, have been served on the following this 29th day of November, 1984 by U.S. mail, first class, except as otherwise noted.

James A. Laurenson, Chairman
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Com.
Washington, DC 20555

Dr. Jerry R. Kline
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Com.
Washington, DC 20555

Mr. Frederick J. Shon
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Com.
Washington, DC 20555

Edward M. Barrett, Esq.
General Counsel
Long Island Lighting Company
250 Old Country Road
Mineola, New York 11501

Edwin J. Reis, Esq.*
Bernard M. Bordenick, Esq.
U.S. Nuclear Regulatory Com.
Washington, DC 20555

W. Taylor Reveley, III, Esq.*
Hunton & Williams
P.O. Box 1535
707 East Main Street
Richmond, VA 23212

Ms. Donna D. Duer
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Com.
Washington, DC 20555

Mr. Jay Dunkleberger
New York State Energy Office
Agency Building 2
Empire State Plaza
Albany, New York 12223

Spence Perry, Esq.
Associate General Counsel
Federal Emergency Management
Agency
Washington, DC 20472

Mr. Brian R. McCaffrey
Long Island Lighting Company
Shoreham Nuclear Power Station
P.O. Box 618
North Country Road
Wading River, New York 11792

Joel Blau, Esq.
New York Public Service Com.
The Gov. Nelson A. Rockefeller
Building
Empire State Plaza
Albany, New York 12223

Martin Bradley Ashare, Esq.
Suffolk County Attorney
H. Lee Dennison Building
Veterans Memorial Highway
Hauppauge, New York 11788

Atomic Safety and Licensing
Board Panel
U.S. Nuclear Regulatory Com.
Washington, DC 20555

Docketing and Service Section
Office of the Secretary
U.S. Nuclear Regulatory Com.
1717 H Street N.W.
Washington, DC 20555

James B. Dougherty, Esq.
3045 Porter Street, N.W.
Washington, DC 20008

Mr. Stuart Diamond
Business/Financial
NEW YORK TIMES
229 W. 43rd Street
New York, New York 10036

Stephen B. Latham, Esq.
Twomey, Latham & Shea
P. O. Box 398
33 West Second Street
Riverhead, New York 11901

Ms. Nora Bredes
Executive Director
Shoreham Opponents Coalition
195 East Main Street
Smithtown, New York 11787

MHB Technical Associates
1723 Hamilton Avenue
Suite K
San Jose, California 95125

Hon. Peter F. Cohalan
Suffolk County Executive
H. Lee Dennison Building
Veterans Memorial Highway
Hauppauge, New York 11788

Fabian G. Palomino, Esq.
Special Counsel to the Governor
Executive Chamber
Two World Trade Center
57th Floor
New York, New York 10047

Atomic Safety and Licensing
Appeal Board
U.S. Nuclear Regulatory Com.
Washington, DC 20555

Jonathan D. Feinberg, Esq.
Staff Counsel
New York State Public
Service Commission
3 Rockefeller Plaza
Albany, New York 12223

Stewart M. Glass, Esq.
Regional Counsel
Federal Emergency Management
Agency
26 Federal Plaza, Room 1349
New York, New York 10278

David A. Brownlee
KIRKPATRICK & LOCKHART
1500 Oliver Building
Pittsburgh, PA 15222

DATE: November 29, 1984

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* Indicates via Federal Express