April 12, 1985

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

NRC STAFF REPLY TO LILCO'S RESPONSE TO THE
NRC STAFF'S ANSWERS TO LILCO'S
RENEWED MOTION FOR SUMMARY DISPOSITION

I. Introduction

The NRC Staff submits this reply to "LILCO's Response to the Intervenors' and NRC Staff's Answers to LILCO's Renewed Motion for Summary Disposition," dated March 26, 1985. "LILCO's Renewed Motion for Summary Disposition of Legal Authority Issues on Federal Law Grounds" had been filed on February 27, 1985, and the Intervenors and the NRC Staff had separately filed answers to that Renewed Motion on March 19, 1985. In the subject response to those answers LILCO deals with the Intervenors' arguments that the legal authority issues are not before this Licensing Board and that those issues should be decided in other forums. LILCO's response also addresses matters pertaining to preemption and the intent of Congress in regard to the authority to implement utility-drafted emergency response plans. The NRC Staff treats only the latter matters in this pleading, as it believes the issue of preemption is ripe for determination by this Board. See "NRC Staff Response to

LILCO's Renewed Motion for Summary Disposition of the Legal Authority Issues on Federal Law Ground," at 4-6, filed March 19, 1985. [1/]

II. Discussion

LILCO's motion for summary disposition of the "Legal Authority" contentions turns on one central issue, which is whether LILCO has the legal authority to implement its off-site emergency plan. In view of the state court decision in Cuomo v. LILCO, Ind. No. 84/4615 (N.Y. Sup. Ct., Suffolk County, Feb. 20, 1985), determining that LILCO does not have authority to implement its emergency plan under state law, the issue is one of whether such state statutes are pre-empted by Federal law, to wit:

> Does the Atomic Energy Act, [2/] which encourages the peaceful use of nuclear power and provides for federal regulation of radiation hazards, or the NRC Authorization Acts [3/], which provide that the NRC can approve a utility's emergency response plan in the absence of a state or local

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1/ The background relevant to the legal authority issues has been set out in former pleadings of the parties. See e.g., "NRC Staff's Answer in Opposition to LILCO's Motion for Summary Disposition of Contention 1-10 (The 'Legal Authority' Issues)," October 4, 1984; "NRC Staff's Response Pursuant to Licensing Board's Memorandum and Order of October 22, 1984," December 7, 1984.

2/ Act of August 1, 1946, ch. 724, as amended by Act of August 30, 1954, ch. 1073 (68 Stat. 921), and subsequent amendments, 42 U.S.C. §§ 2011 et seq.

3/ Pub. L. No. 96-295, § 109, 94 Stat. 780 (1980); Pub. L. No. 97-415, § 5, 96 Stat. 2067 (1983); Pub. L. No. 98-553, § 8, 98 Stat. 2847 (1984).

plan, preempt state law so as to permit a NRC licensed utility to perform activities necessary to implement an emergency response plan which the utility would not otherwise be permitted to perform under state law?

As we have indicated in prior pleadings, the answer to this question turns on an interpretation of federal law and whether it was the expresss or implied intent of Congress to provide this authority to utilities over the contrary mandates of state law. See Pacific Gas & Electric Co. v. State Energy Resources and Development Commission, 461 U.S. 190, 204 (1983); Silkwood v. Kerr-McGee Corp., ___ U.S. ___, 78 L.Ed 2d 443, 452 (1984). 4/ These cases establish that while Congress set out definite policies to encourage the development of peaceful uses of nuclear energy and to provide for federal regulation of nuclear radiation hazards, not all applications of state law which might affect these areas were proscribed. See Pacific Gas & Electric Co., 461 U.S. at 212, 222; Silkwood, 78 L.Ed 2d at 458.

4/ The Staff's principal discussion of "preeemption" is contained in "NRC Staff's Answer in Opposition to LILCO's Motion for Summary Disposition of Contentions 1-10 (The 'Legal Authority' Issues)", October 10, 1984, at 15-26. The "NRC Response to LILCO's Renewed Motion for Summary Disposition of Legal Authority Issues on Federal Law Grounds", March 19, 1985, at 6, supplemented that discussion. See also "NRC Staff's Response Pursuant to the Licensing Board's Memorandum and Order of October 22, 1984," December 7, 1984. The NRC Staff and LILCO set out essentially the same tests for judging preemption based upon Pacific Gas & Electric Co., 461 U.S. at 203-204, and cases there cited. Cf. NRC Staff's Answer, October 10, 1984, at 15-26, and LILCO's subject Motion, at 30-32.

In Pacific Gas & Electric Co., 461 U.S. at 194, the Court points out that "The interrelationship of federal and state authority in the nuclear energy field has not been simple; the federal regulatory structure has been frequently amended to optimize the partnership." There is no express language in the Atomic Energy Act requiring states to authorize nuclear power plants or prohibiting the states from not per itting them. Id. at 205. However, it is clear that the Congress in the Atomic Energy Act set up a scheme whereby the federal government was to regulate the radiological safety aspects involved in the construction and operation of nuclear plants, and the states were to retain certain traditional responsibilities. Id. at 205, 212, 222; Silkwood, 78 L.Ed 2d at 458.

"The preemption doctrine, which has its roots in the Supremacy Clause, U.S. Const., Art. VI, cl. 2, requires us to examine Congressional intent." Fidelity Savings & Loan Assn. v. De la Cuesta, 458 U.S. 141, 152 (1982). 5/ In both Pacific Gas & Electric Co. and Silkwood, the Court focused on the legislative history of the relevant provisions of the Atomic Energy Act and allied legislation in order to determine whether state laws were preempted by Congress in setting up a Federal scheme for the regulation of nuclear safety. See Pacific Gas & Electric Co., 461 U.S. at 205-12; Silkwood, 78 L.Ed 2d at 453-58. In areas of regulation which have been traditionally occupied

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5/ LILCO appears to concur in this approach, stating: "Indeed all legal analysis of preemption boils down to a search for Congress's intent." (Motion at 33).

by the States "...we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947), quoted in Pacific Gas and Electric Co., 461 U.S. at 206. 6/

Thus, we begin with an examination of relevant statutes. The Atomic Energy Act does not explicity provide for emergency response plans. The relevant provisions of law dealing with emergency response plans are contained in three NRC Authorization Acts for fiscal years 1980-1985. Pub. L. No. 96-295, § 109, 94 Stat. 780 (1980); Pub. L. No. 97-415, § 5, 96 Stat. 2067 (1983); Pub. L. No. 98-553, § 108, 98 Stat. 2827 (1984). After the accident at Three Mile Island, the Congress enacted Section 109 of the NRC Authorization Act for Fiscal Year 1980, Pub. L. No. 96-295, which provided that an applicant shall submit state or local emergency preparedness plans for responding to accidents at nuclear plants as a condition of licensing; however, the Act further provided that in the absence of such a state or local plan an operating license might also be

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6/ LILCO has cited Garcia v. San Antonio Metropolitan Transit Authority, 105 L.Ed 2d 1005 (1985), for the proposition that this presumption against preemption of traditional state police powers set out in Rice and Pacific Gas & Electric Co. is no longer viable. (Motion at 38). However, Garcia dealt with an explicit declaration by Congress in the Fair Labor Standards Act that it was legislating in an area traditionally controlled by states -- a situation not presented by any of the pertinent statutory language or legislative history here. For this reason, Garcia is not germane to the issue of whether a federal act should be interpreted to have implicitly superseded traditional state controls.

issued if there was a utility plan "which provides reasonable assurance that public health and safety is not endangered by operation of the facility concerned." The Commission also adopted regulations to this end. See 10 CFR §§ 50.33(g), 50.47, 50.54(r) and (s), 45 Fed. Reg. 55402 (1980). The succeeding Authorization Acts, Pub. L. No. 97-415, § 5 and Pub. L. No. 98-553, § 108, provide, in similar language, that:

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

These provisions of law, although providing that a plant may be licensed on the basis of "a utility plan which provides reasonable assurance that the public health and safety is not endangered," do not address the questions of whether a state law is preempted or whether utilities may perform acts called for in an emergency response plan which are necessary for a finding of "reasonable assurance", if such acts are in violation of state law.

The legislative history of Section 108 of Pub. L. No. 98-553 (1984) contains the most recent expressions of Congress dealing with emergency preparedness planning and the question of Federal preemption in this area. Significantly, neither the underlying Reports of the Senate Committee on Environment and Public Works (S. Rep. 98-118, 98th Cong.,

1st Sess.; S. Rep. 98-546, 98th Cong., 2d Sess. [7]) nor the Reports of the House Committee on Interior and Insular Affairs (H.R. Rep. 98-103, Pt. I, 98 Cong., 1st Sess.) or the House Committee on Energy and Commerce (H.R. Rep. 98-103, Pt. II, 98th Cong. 1st Sess.) [8] --the Committees which bore responsibility for development and passage of the Acts in question -- contain any language indicating that these Committees intended that NRC licensees could carry out utility emergency response plans in violation of state laws barring such implementation. S. Rep. 98-546 (at 14-15) recognized that state or local government inaction might keep FEMA and the NRC from evaluating an applicant's emergency plan and, as a result, prevent the NRC from issuing an operating license to such applicant or licensee, even though such a plan provided reasonable assurance that the public health and safety was not endangered by operation of the plant. The Senate Report further provided that in order to avoid penalizing an applicant for state inaction, a utility's plan can be evaluated and "that the NRC still may issue an operating license if it determines that a [the utility] plan . . . provides reasonable assurance that public health and safety is not endangered by operation of the facility." Id. at 15. However, the issue of whether a utility can

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7/ S. Rep. 98-546 is on S. 2846 S. Rep. 98-118 is on S. 1291, which was passed. Debate indicates that the relevant section of material the bills were the same. See 130 Cong. Rec. S 14174 (daily ed. October 10, 1984).

8/ These House reports are on H.R. 2510. The House concurred in S. 1291, which as here relevant was identical to H.R. 2510. See 130 Cong. Rec. H 12194 (daily ed., October 11, 1984).

implement an off-site emergency plan which is in violation of state law is not expressly addressed.

In the "Supplemental Views of Senator Simpson" (Chairman of the Senate Committee on Environment and Public Works) incorporated into S. Rept. 98-546, at 22-27, he states:

> With the adoption of section 108, this Committee has now made it clear in three successive NRC authorization bills that it is not our intention to allow a state or locality to prevent a completed facility from operating by refusing to prepare an emergency preparedness plan. It necessarily follows that the Committee did not intend to allow such governmental entities to accomplish the same result by refusing to participate in the exercise or implementation of an otherwise acceptable emergency plan. To accept such a situation would be to completely frustrate this thrice-stated authority and to ignore various other existing federal emergency response responsibilities and authorities that will, if exercised, enable the NRC and FEMA to avoid such an unfortunate and unintended result. [Id., at 22] 9/

In addition, in the Senate debate on the 1984-1985 NRC Authorization Act, Senator Simpson discussed the possibility that a state, by failing to act, could keep the NRC from evaluating an emergency preparedness plan and thus prevent the issuance of an operating license. 130 Cong. Rec. S 14175 (daily ed., Oct. 10, 1984). He stated that "it is not [the

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9/ Senator Simpson then goes on to detail his belief that the federal government has authority to implement an emergency response plan in such situations under the NRC Authorization Act for 1980, Pub. L. No. 96-295 (1980), the Civil Defense Act of 1950, 50 U.S.C. App. §§ 2251 et seq., and the Disaster Relief Act, 42 U.S.C. §§ 5121 et seq., among other authorities. (at 22-23). Thus he continues, "... sufficient authority exists for the Federal Government to exercise a plan prepared and submitted by a utility, and to implement such a plan in the event of an actual emergency." (at 23-24 [footnote omitted], see also 25-27).

Committee on Environment and Public Works'] intention to allow a State or locality to prevent a completed facility from operating by refusing to prepare an emergency preparedness plan", and emphasized that the NRC could issue a license on the basis of its evaluation of a utility-drafted plan if that plan provided reasonable assurance that the public health and safety is not endangered by the operation of the plant. Id. However, no indication is given in either the accompanying reports or debate that the Senate intended to preempt state laws which might stand as a bar to the implementation of a utility plan. Id.

Similarly, the legislative history for Pub. L. No. 98-553, in the House of Representatives, does not show an intent to permit an NRC licensed utility to implement an off-site emergency plan where to do so would violate state law. The House Committee on Interior and Insular Affairs, in discussing provisions providing for utility-drafted emergency response plans, stressed only that an operating license was to be issued if there was an emergency plan which provided reasonable assurance that the public health and safety would not be endangered by the plant. 10/ (H.R. Rep. 98-103, Part I, at 8). The Report continued:

> Furthermore, [this section] allows the Commission to look at a utility plan (as it pertains to offsite emergency preparedness) in making its determination about the adequacy of offsite emergency planning. The provision, however, in no way implies that it is the intent of the committee that the NRC cite the existence of a utility plan as the basis for licensing a plant when State, county, or local governments believe that emergency planning

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10/ This discussion involved § 6 of H.R. 2510, which was identical to language enacted in Pub. L. No. 98-553. See 130 Cong. Rec. H 12194 (daily ed., October 11, 1984).

> issues are unresolved. Moreover, [this section] does not authorize the Commission to license a plant when lack of participation in emergency planning by State, county, or local governments means it is unlikely that a utility plan could be successfully carried out. [at 9] 11/

The House Committee on Energy and Commerce also emphasized that an emergency plan which provided reasonable assurance that the public health and safety would not be endangered was a predicate to the issuance of an operating license. [H.R. Rep. 98-103, Part II, at 15].

In House debate on the NRC 1984-1985 authorization bill (S. 1291, 89th Cong.) Representative Dingell, Chairman of the House Committee on Energy and Commerce, particularly addressed Section 108 of S. 1291, 98th Cong. dealing with emergency response planning. This Section of the bill, which became law, was identical to section 6 of the House's authorization bill (H.R. 2510, 98th Cong.). Mr. Dingell inserted into the record that part of H.R. Rep. 98-103, Part II, on Section 6 of H.R. 2510 as the House's legislative history to Section 108 of S. 1291. 130 Cong. Rec. H 12194 (daily ed. Oct. 11, 1984). The Ranking Minority Member of that Committee, Mr. Broyhill, then inserted into the record correspondence with the Chairman of the House Committee on Interior and Insular Affairs, Mr. Udall, and the Ranking Minority Member of that Committee, Mr. Lujan, dealing with the licensing of Shoreham and the relevant section of the authorization bills pertaining to the evaluation of an applicant's offsite emergency response plan. Mr. Udall, in

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11/ The meaning of this language was further discussed at 130 Cong. Rec. H 12194-97 (daily ed., October 11, 1984). See infra.

responding to the inquiries from Mr. Broyhill on the above quoted portion of the Interior and Insular Affairs Committee Report, wrote:

> First, you are correct in your interpretation of the Interior Committee's intent that the mere existence of a utility plan is not a sufficient basis for issuing an operating license, but if the NRC can make the statutory determination set out in Section 6, a state, county, or local government's belief that planning issues are unresolved would not in itself stand as a bar to such a determination. Second, the word "unlikely" in the last sentence of the first paragraph on page 9 of the Interior Committee's report on H.R. 2510 is not intended to create a new threshold for the NRC's determination under Section 6 . . . [130 Cong. Rec. H 12195 (daily ed., Oct. 11, 1984)]

Mr. Lujan responded:

> Specifically, your interpretation in your letter of the accompanying report language is exactly correct; the mere existence of a utility plan is not a sufficient basis for issuing an operating license, but if the NRC can make the statutory determination set out in Section 6, a state, county, or local government's belief that planning issues are unresolved would not in itself stand as a bar to such determination. Additionally, as you have stated, the NRC is required to make a determination pursuant to Section 6 as to whether an emergency plan is adequate to protect the public health and safety, and nothing in Section 6 or its accompanying report is intended to provide any different threshold for that determination. ... [Id. at H 12196] 12/

12/ Representative Pashayan, of California, addressed the House on the ability of federal authorities to implement a utility-drafted emergency response plan so as not to prevent the licensing of a nuclear plant where state and local authorities refused to act. Id. He gave no indication that it was Congress's intent that utilities have federal authority to implement an emergency response plan which they could not implement under State law. Id.

The Chairman of the House Committee on Interior and Insular Affairs, Mr. Udall, concluded the House record on Pub. L. No. 98-553 by extending his remarks to reiterate the statements quoted above from H.R. Rep. 98-103, at 8, regarding the review plans submitted by a utility. He stated:

> It is the intent of the House amendments that emergency planning adequate to protect the public health and safety be a mandatory condition that must be satisfied in order to obtain a reactor operating license. In assessing the adequacy of emergency preparedness, the Commission may consider utility emergency plans. The Interior Committee amendment to H.R. 2510 in no way implies that it was the committee's intent that the NRC cite the existence of a utility emergency plan as the basis for licensing a plant when State, county, and local governments believe that emergency planning issues are unresolved. Moreover, the Interior Committee amendment did not authorize the Commission to license a plant when lack of participation in emergency planning by States, county, or local governments means it is unlikely that a utility plan could be successfully carried out.
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> I am reiterating the statement in the Interior Committee report which accompanies H.R. 2510 in order to make clear that my support for the Senate bill in no way reflects a change in my agreement with the interpretation of the emergency planning provisions stated by the Interior Committee in its report. [130 Cong. Rec. H 12196-97 (daily ed. Oct. 11, 1984)].

In sum, the legislative history of provisions of the law dealing with the approval of utility-drafted offsite emergency response plans shows that, while Congress recognized the need for permitting utilities to submit their own offsite emergency plans where adequate state or local plans were not provided, neither the Senate nor the House explicitly or implicitly indicated that utilities might implement these utility-drafted plans in violation of state law. Under the preemption analysis set out

in Pacific Gas & Electric Co., 461 U.S. at 203-24, the absence of any express or implied intent of Congress to allow utilities to perform activities necessary to implement emergency response plans in violation of state law, in areas of historic state powers, precludes a finding that New York State law is preempted here. Moreover the statutes and legislative history do not suggest that the Congress considered the federal interest in encouraging the peaceful use of nuclear energy to be "so dominant" as to preclude the operation of otherwise valid state law enacted without intent to regulate health and safety matters, merely because those laws affect a utility's ability to implement an emergency response plan.

III. Conclusion

In view of the legislative history set out above and the reasons set forth in the Staff's prior filings addressing the preemption issue, the Staff believes that federal law does not preempt the operation of the New York State laws here at issue, and recommends that LILCO's motion for summary disposition of the legal authority contentions should be denied.

Respectfully submitted,

Edwin J. Reis

Edwin J. Reis
Assistant Chief Hearing Counsel

Dated at Bethesda, Maryland
this day of April, 1985

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S REPLY TO LILCO'S MOTION FOR LEAVE TO RESPOND TO ANSWERS TO LILCO'S RENEWED MOTION FOR SUMMARY DISPOSITION AND REQUEST FOR PERMISSION TO REPLY TO LILCO'S RESPONSE" and "NRC STAFF REPLY TO LILCO'S RESPONSE TO THE NRC STAFF'S ANSWERS TO LILCO'S RENEWED MOTION FOR SUMMARY DISPOSITION" 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, or as indicated by a double asterisk, by hand delivery, this 12th day of April, 1985.

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