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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

'85 MAR -4 P4:13

In the Matter of	)	
LONG ISLAND LIGHTING COMPANY	)	Docket No. 50-322-OL-4 (Low Power)
(Shoreham Nuclear Power Station, Unit 1)	)	

SUFFOLK COUNTY AND STATE OF NEW YORK RENEWAL OF REQUEST FOR NRC SUPPLEMENTATION OF THE SHOREHAM FEIS AS REQUIRED BY NEPA

The State of New York and Suffolk County hereby renew their request that the NRC issue a supplement to the 1977 Shoreham Final Environmental Impact Statement ("FEIS"), that analyzes and weighs the costs and benefits of operation of the Shoreham plant only at five percent of rated power or less, assuming the reasonably foreseeable possibility that Shoreham will never be authorized to operate at power levels greater than five percent.[1/]

We renew this request, despite the Commission's denial of the similar request made in June 1983 (see Long Island Lighting Co., CLI-84-9, 19 NRC 1323 (1984)), because the change in circumstances from those existing in 1977, which necessitated the supplementation in 1983, recently became even more definitive.

1/ This matter was raised initially in the Answer and Opposition of Suffolk County to LILCO's Motion for a Low Power Operating License, dated June 27, 1983.

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Accordingly, the need for supplementation is even more compelling now. Specifically, on February 20, 1985, the New York State Supreme Court issued a decision holding that LILCO lacks legal authority under the Constitution and laws of the State of New York to implement the offsite emergency response plan it has proposed as the basis for its full power license application. A copy of the Court's decision is attached hereto.[2/]

We do not repeat here the reasons the State and County believe that, under the terms of NEPA and case law interpreting it, a supplemental FEIS is required, in light of the unique circumstances of this case.[3/] In light of the New York Supreme Court ruling, and the State and County determination that they will not adopt or implement an offsite emergency plan for Shoreham, there is no basis to deem "speculative" the alternative that LILCO will not be issued a full power operating license.

[2/] In January 1984, the Laurenson (emergency planning) Licensing Board urged New York State and Suffolk County to obtain a New York State Supreme Court ruling whether LILCO has legal authority to implement its proposed offsite plan. The February 20, 1985 State Supreme Court decision was issued in the declaratory judgment actions which were filed in March 1984 by the State and County in response to the Laurenson Licensing Board's urgings.

[3/] Those arguments have been made previously, so we simply refer the Commission's attention to the Answer and Opposition of Suffolk County to LILCO's Motion for a Low Power License (June 27, 1983), Suffolk County Response to LILCO and NRC Staff Arguments that the Shoreham Final Environmental Impact Statement Does not Need to be Supplemented (July 29, 1983), Suffolk County Brief in Support of Appeal of Licensing Board Partial Initial Decision (December 23, 1983), at 124-30, and Petitioners' Memorandum in Support of Emergency Motion for Stay Pending Review of Nuclear Regulatory Commission Order (February 13, 1985) filed with the United States Court of Appeals for the District of Columbia Circuit, at 19-27, 49-60.

Accordingly, in light of this recent event which confirms the likelihood that low power operation of Shoreham, if permitted, will not be followed by full power operation, NEPA requires supplementation of the Shoreham FEIS to analyze that foreseeable alternative.

Respectfully submitted,

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Dated: March 4, 1985

Index No. 84/4615
Jan. 15, 1985

SUPREME COURT, SUFFOLK COUNTY

MARIO M. CUOMO,
Plaintiff,
-against-
LONG ISLAND LIGHTING COMPANY,
Defendant.

COUNTY OF SUFFOLK,
Plaintiff,
-against-
LONG ISLAND LIGHTING COMPANY,
Defendant.

TOWN OF SOUTHAMPTON,
Plaintiff,
-against-
LONG ISLAND LIGHTING COMPANY,
Defendant.

BY GEILER, J.S.C

DATED February 20, 1985

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INTRODUCTION

The State of New York (STATE), the County of Suffolk (COUNTY) and the Town of Southampton (TOWN), commenced separate declaratory judgment actions against the Long Island Lighting Company (LILCO), a public service corporation incorporated pursuant to the laws of the State of New York and primarily engaged in the production, distribution and sale of electricity on Long Island. These actions arise from LILCO's attempt to secure approval of its "utility" sponsored offsite emergency response plan for its nuclear plant located at Shoreham. The plaintiffs seek a declaration that LILCO does not have the legal authority to carry out its plan.

LILCO has moved to dismiss this action and the plaintiffs have cross-moved for summary judgment. The Court, in order to address the issues contained in these motions, must examine the events leading up to the commencement of these declaratory judgment actions.

THE ATOMIC ENERGY ACT OF 1954

The Congress of the United States, cognizant of the need for new methods of producing energy, passed the Atomic Energy Act of 1954. This legislation set forth the authority of the Federal government to negotiate the construction and licensing of nuclear production facilities in the United States (United States v. City of New York, 463 F.Supp. 604). The Atomic Energy Commission (AEC) was designated by the Act to oversee the construction and operation of nuclear power plants. This was to be accomplished by a two step licensing procedure. First, the operator of a nuclear plant was required to obtain a construction permit from the AEC in order to build a nuclear facility. Second, the operator after completion of the facility, was required to secure a license to operate the plant from the AEC. The AEC, in the latter licensing procedure, was interested mainly in the onsite preparation for an emergency.

The licensing and regulating functions of the AEC was transferred to the National Regulatory Commission (NRC) by the Reorganization Act of 1974 (U.S.C. §5841 (f)).

SHOREHAM

In 1968 LILCO applied to the AEC for a permit to construct an 820 megawatt nuclear powered electric generating facility on property located at Shoreham in the Town of Brookhaven, County of Suffolk, State of New York. The application was opposed by a private organization known as the Lloyd Harbor Study Group. The latter was permitted to intervene and cross-examine LILCO's witnesses at hearings before the AEC.

None of the plaintiffs herein were parties to the permit application proceedings. However, the late H. Lee Dennison, Suffolk County Executive at the time, made a limited appearance before the licensing board in 1970 and spoke in favor of the issuance of a construction permit

Construction Permit Hearings, Transcript 209, 211, 216, 1970). The permit to construct a nuclear facility at Shoreham was issued by the AEC in 1973).

The approval of the Shoreham construction permit was the catalyst for the issuance of an order by the Suffolk County Executive to the appropriate COUNTY department to develop a "Response Plan for Major Radiation Incidents". In 1975, representatives from LILCO and the COUNTY held a series of meetings in order to define the emergency planning role for each of them in the event of a major radiological accident at Shoreham. These conferences culminated in the development of a plan known as "Suffolk County's General Radiation Emergency Plan". The latter was approved by the Suffolk County Executive on August 30, 1978.

THREE MILE ISLAND

The accident at the Three Mile Island Nuclear facility (TMI) at Harrisburg, Pennsylvania in March 1979, demonstrated the need for improving the planning for radiological emergencies. The NRC, prior to the TMI accident did not condition issuance of an operating license for a nuclear plant upon the existence of an adequate offsite emergency plan. The TMI accident focused attention on the fact that nuclear accidents may endanger surrounding communities and require the mass evacuation of people in those communities.

Congress, in response to the events which occurred at TMI, determined that no nuclear plant should be licensed to operate unless an adequate emergency plan could be drawn up and implemented for the area surrounding the nuclear facility and passed the NRC Authorization Act of 1980.

The NRC, in implementing the policy expressed by Congress, promulgated a number of regulations which included the mandatory submission of an adequate radiological emergency response plan (RERP) by an applicant desirous of operating a nuclear power plant. The RERP must describe in detail how nuclear emergencies will be handled within a ten mile radius plume exposure pathway emergency planning zone (EPZ and also within a fifty mile radius food ingestion pathway (45 Fed, Reg. 55, 402 August 19, 1980 and 10 C.F.R. §50.33(g) 1984). An operating license is issued only if the NRC finds that there is a reasonable assurance that adequate protective measures can be taken to protect the area surrounding the nuclear facility in the event of a radiological emergency (10 C.F.R. §50.47(a)(1)1984).

FROM PROTAGONIST TO ANTAGONIST

A careful study of the NRC regulations indicates that the emergency plans such as RERP, which were to be submitted by licensing applicants, would probably have some imput by those governmental units having jurisdiction over the area to be evacuated in the event of a nuclear emergency. The "Memorandum of Understanding" signed by County Executive John V. N. Klein and LILCO on December 28, 1979 and the approval

of the terms of said agreement by the County Executive Elect, Peter F. Cohalan, gives credence to this analysis of the NRC regulations (see letter from John V. N. Klein to Ira Freilicher, Vice President of LILCO, dated December 31, 1979).

A number of discussions took place between LILCO and COUNTY representatives between 1980 and 1981 for the purpose of determining the best means of developing an acceptable RERP. These discussions led to the signing of a contract between LILCO and the COUNTY on March 15, 1981. The COUNTY agreed to develop an emergency plan and LILCO in turn consented to paying the projected $245,000.00 cost of preparing the plan. The County Legislature, in September 1981, approved the terms of the agreement and LILCO advanced $150,00000 as the first installment on the payment of $245,000.00. The latter was to be paid in full on March 18, 1982, the scheduled completion date of the PLAN.

On February 19, 1982, the COUNTY advised LILCO that the $150,000.0(advancement would be returned because of the "apparent conflict of interest" in the acceptance of any funds from LILCO for the purpose of preparing an emergency plan (see letter dated February 19, 1982 from Lee E. Koppelman, Director of Planning for Suffolk County to LILCO). On March 23, 1982 the Suffolk County Legislature passed a resolution authorizing the Suffolk County Planning Department to prepare a new emergency plan which was to be submitted to the Legislature for its consideration (Resolution 262-1982).

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The Planning Department, in accordance with the Legislative directive, submitted a RERP in December 1982. A number of public hearings were held by the Legislature to consider the PLAN in January, 1983. The Legislature, with the concurrence of the County Executive, Peter F. Cohalan, decided not to approve, adopt or implement any RERP for Shoreham. The reason given for this action was that ...

> "[Since] no local radiological emergency response plan for a serious nuclear accident at Shoreham will protect the health, welfare, and safety of Suffolk County residents, . . . the County's radiological emergency planning process is hereby terminated, and no local radiological emergency plan for response to an accident at the Shoreham plant shall be adopted or implemented . . .
>
> . . . [S]ince no radiological emergency plan can protect the health, welfare, and safety of Suffolk County residents and, since no radiological emergency plan shall be adopted or implemented by Suffolk County, the County Executive is hereby directed to assure that actions taken

by any other governmental agency be it State or Federal, are consistent with the decision mandated by this Resolution."

(Resolution 111-1983).

The Governor of New York, after reviewing the results of a study by the Marburger Commission, an independent committee appointed by the Governor to study the Shoreham situation, announced that no RERP for Shoreham would be adopted or implemented by the STATE.

THE LILCO TRANSITION PLAN

LILCO, interpreting the COUNTY's refusal to adopt a plan as a derogation of its responisbility under Article 2B of the New York Executive Law, submitted its own plan to the NRC. The PLAN has been designated "The Lilco Transition Plan". (PLAN)

The PLAN describes in detail the actions which LILCO proposes to take in the event of a radiological emergency at the Shoreham facility. The PLAN is contained in four volumes. One volume is entitled "Shoreham Nuclear Power Station - Local Offsite Radiological Emergency Response Plan". Two volumes are entitled "Offsite Radiological Emergency Response Plan". The fourth volume is designated as "Appendix A - Evacuation Plan".

Highlights of the PLAN which would be utilized in the event of a radiological accident may be outlined as follows:

1. The organization which is primarily responsible for implementing the PLAN is known as the Local Emergency Response Organization (LERO). This group is composed of over 1,300 LILCO employees and consultants.

2. The Director of LERO, a LILCO employee, would have the primary responsibility for the coordination and implementation of the PLAN. He would make certain that the following mentioned functions would be carried out in the event of a nuclear accident at Shoreham.

3. Assessment of the severity of the nuclear accident.

4. Determination of the action to be taken in order to protect the public.

5. The declaration of an emergency.

6. Notification of the public by the following methods:

   a) The activation of 89 fixed sirens.
   b) The transmittal of messages on an Emergency Broadcast System (EBS).
   c) The transmittal of signals on tone alert radios.

7. The instruction of the public by means of EBS messages as to protective measures to be taken, including selective and general evacuation of the EPZ.

8. Implementation of traffic control measures in order to evacuate the public along specified routes. These measures include the following:

a) The conversion of a two mile stetch of a two-way road into a one-way road.
b) The placement of roadblocks to cordon off the immediate plant area.
c) The placement of 193 traffic guides at 147 traffic control points throughout the EPZ. These traffic guides, by the utilization of cones and hand signals, will channel traffic along the designated evacuation routes and discourage traffic from proceeding along different routes.
d) The placement of LILCO vehicles, cones and flares in the traffic lanes before certain entrance ramps on four evacuation routes to cause traffic to move into adjoining lanes in order to permit the continuous flow of traffic onto the routes from such ramps.
s) The authorization of the use of road shoulders and the creation of lanes for turnpockets.

9. The erection of permanent trailblazer signs along all evacuation routes.

10. The removal of stalled cars and other obstacles from the roadway by tow trucks.

11. The formulation of protective action recommendations which are to be broadcast to the public present in the ingestion exposure pathway. These recommendations may include the following:

a) The placement of dairy animals on stored feed.
b) The removal of dairy animals from contaminated fields to shelters.
c) The withholding of foodstuffs and milk from the market.
d) The change from the production of fluid milk to the production of dry whole milk.
e) The washing or scrubbing of fruits and vegetables prior to consumption.
f) The suspension of fishing operations.

12. The making of decisions and recommendations with reference to recovery and re-entry to the EPZ after a nuclear accident.

THE CATALYST FOR THE INSTANT PROCEEDING

The Atomic Safety and Licensing Board (ASLB), an administrative panel of the NRC, has been and still is in the process of conducting hearings to determine if the plan complies with NRC standards and is capable of being implemented.

LILCO has represented to the NRC that it may lawfully implement its PLAN and that neither State nor Federal law prevent LILCO from performing the functions described therein. The STATE, COUNTY and TOWN have advised the NRC that LILCO lacks the legal authority to carry out its plan. These governmental bodies have filed ten "legal contentions" with the ASLB setting forth their positions on the lack of legal authority by LILCO to implement its PLAN.

The Federal Emergency Management Agency (FEMA), the Federal body charged with the initial reviews of RERPS, has advised the ASLB that it cannot determine whether the LILCO PLAN can be implemented until the legal authority issue has been resolved (see Letter of Richard W. Kreiner, Assistant Associate Director, Division of Emergency Preparedness and Engineering Response, NRC).

The Chairman of the ASLB, after listening to all sides and considering FEMA's views, determined that the ten legal contentions filed by the plaintiffs herein present issues of New York State Law and he urged the parties to get a resolution in the State Courts (Transcript ASLB January 27, 1984 p. 3675).

On March 7, 1984, separate actions seeking a declaration that LILCO did not have legal authority to execute its PLAN was commenced by the STATE and COUNTY in the New York State Supreme Courts. The COUNTY's complaint alleges that LILCO's implementation of its PLAN would be unlawful, illegal and a usurpation of the police powers of the STATE. The COUNTY specifically mentioned that the execution of the PLAN would violate the New York State Constitution, the Municipal Home Rule Law and the Executive Law. The STATE similarly alleged that LILCO is precluded from exercising the functions mentioned in the PLAN. In addition, the STATE cited that the implementation of the PLAN would be violative of the Transportation Corporations Law, the Business Corporations Law, the Vehicle and Traffic Law, the Public Health Law, the Agricultural and Markets Law and the Penal Code.

LILCO did not serve an answer but immediately moved to dismiss the actions on the grounds that the Court did not have subject matter jurisdiction and the complaints fail to state a cause of action.

LILCO, before any action could be taken with reference to its motion, removed the declaratory judgment actions to the Federal District Court in April 1983. It claimed that the challenge to its legal authority presented a question of federal law that was within the original jurisdiction of the federal courts. The STATE and COUNTY filed motions for a remand of their actions back to the New York State Supreme Court. The Federal District Court ruled that LILCO's federal law claims and its invoca-

tion of the federal preemption argument constituted affirmative defenses that could be raised in a state court proceeding (Cuomo v. Lilco; County of Suffolk v. Lilco; Nos. CV-84 1218, CV-84-1405, ED N.Y., June 15, 1984). On August 14, 1984, the STATE and COUNTY actions were consolidated in this Court with a similar action for declaratory judgment commenced by the TOWN in May 1984.

LILCO renewed its motion to dismiss the complaints on the grounds that this Court does not have subject matter jurisdiction because no justiciable controversy is present and the complaints fail to state a cause of action.

JUSTICIABLE CONTROVERSY?

LILCO maintains that no real dispute exists concerning its legal authority to act in the event of an emergency because the plaintiffs' complaints are based upon a "hypothetical scenario" that will never occur. That "hypothetical scenario", according to LILCO is that the utility alone will respond to a radiological emergency at Shoreham. LILCO boldly proclaims that "in fact New York and Suffolk County would respond in the event of an actual emergency at Shoreham" and thus the "hypothetical scenario" in the complaint that "Lilco alone would perform the contested activities" is moot.

LILCO's characterization of the complaints as being based on a hypothetical scenario is without any basis in fact and can only be attributed to "wishful thinking". One does not have to be a genius to ascertain that the issue presented by these actions is the legal authority of LILCO to execute the PLAN and not whether the STATE or COUNTY will or will not respond to a radiological emergency at Shoreham.

What constitutes a justiciable controversy? The necessary elements of a justiciable controvery are a legally protected interest and a present dispute (Davis Construction Corp. v. County of Suffolk, 112 Misc.2d 652, 447 N.Y.S.2d 355, aff'd. 95 A.D.2d 819, 464 N.Y.S.2d 519; Board of Co-Operative Educational Services, Nassau County v. Goldin, 38 A.D.2d 267, 328 N.Y.S.2d 958. These elements are present in the instant matter. The plaintiffs have an interest in insuring that their governmental powers are not usurped by a private corporation. LILCO claims that it has a right to exercise the functions mentioned in the PLAN. How can anyone say that a bona fide controversy does not exist?

The Court is of the opinion that the declaratory judgment action is the best vehicle to solve the controversy herein as attested to by the following language of the Court of Appeals in the case of New York Public Interest Research Group, Inc. v. Carey, 42 N.Y.2d 527, 399 N.Y.S.2d 621 at page 623:

> "...The need for judicial intervention is obvious when, because of the actions of one of the parties, a dispute arises as to whether there has been a breach of duty or violation of the law. Then the courts can declare the rights and obligations of the parties, and if a breach is found, compel compliance, award damages or otherwise order appropriate action to be taken.

That is the traditional, but not the only way in which a genuine legal dispute may arise or be resolved by the courts. For instance, when a party contemplates taking certain action a genuine dispute may arise before any breach or violation has occurred and before there is any need or right to resort to coercive measures. In such a case all that may be required to insure compliance with the law is for the courts to declare the rights and obligations of the parties so that they may act accordingly. That is the theory of the declaratory judgment actions authorized by CPLR 3001 (James v. Alderton Dock Yards, 256 N.Y. 298, 176 N.E. 401; Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR 3001, pp. 355 357; 3 Weinstein Korn Miller, N.Y. Civ.Prac., par. 3001.02; Borchard Declaratory Judgments, 9 Brooklyn L Rev., pp.1 3).

The controversy concerning LILCO's legal authority to implement its PLAN is real and present. Resolution of the dispute will determine what the police powers of the STATE entail and if those powers have been usurped by LILCO's PLAN. The determination of LILCO's authority to implement the PLAN will have a significant bearing on its application for an operating license at Shoreham. The interests of the parties are clearly at stake in this proceeding. The Court can not envision a better example of a justiciable controversy which is ripe for a judicial determination in a declaratory judgment action.

THE ISSUE

LILCO, as previously mentioned, moved to dismiss the complaints pursuant to Section 3211(a)(7) of the CPLR on the ground that the complaints fail to state a cause of action. LILCO contends that (1) "New York law does not prohibit it from performing the activities mentioned in the complaints; and (2) if state laws "were construed as plaintiffs allege, they would be preempted under the Supremacy Clause of the United States Constitution and by federal statues and regulations."

The Court, at the behest of the parties, issued an order dated October 4, 1984 which limited the issue to be decided to that of LILCO's legal authority to implement its PLAN under the laws of the State of New York. The parties have submitted the pleadings, transcripts of their oral arguments before the Court, affidavits, the PLAN, voluminous briefs and documents and there is no need to hold a hearing as none of the material facts are in dispute.

A synopsis of the posture of the case to be decided by the Court and the issue involved is described as follows:

LILCO, in order to obtain a license to operate its Shoreham facility, must submit a plan for responding to a radiological accident which the NRC finds is adequate and capable of being implemented. LILCO has submitted a PLAN to deal with a radiological emergency at Shoreham. The plaintiffs have challenged LILCO's legal capabilities to perform the

functions contained in the PLAN and maintain that the PLAN amounts to a usurpation of the STATE's police powers. The proposed functions are undisputed and set forth at great length in LILCO's four volume PLAN. The legality of LILCO's performance of these functions under the laws of the State of New York is before this Court for a resolution.

THE POSITIONS

LILCO's basic premise for its view that it has a right to implement the PLAN under the laws of the State of New York is found in the following statement contained in the PLAN at P 1.4-1.8:

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

This argument has been succintly advanced by counsel for LILCO in his statements before this Court on January 15, 1985 and transcribed at pages 26 and 27 of the minutes in the following concise mannor:

> "Under the LILCO view, as a private citizen or as a corporate citizen, any action that I want to take of any type that is not prohibited by law, or that does not threaten the health of one of my fellow citizens, unless that action is expressly prohibited by State law, that I've got a right to do it. That's part of my rights as a citizen of this country, and if I were a citizen of New York, it's part of my rights under the New York constitution."

LILCO, in addition to this argument, also maintains that its activities under the PLAN do not amount to an exercise of police power. It bases its contention on two grounds. First, the PLAN "does not propose to, and will not, use force or the threat of force to compel obedience to anyone or anything." Second, the essence of the STATE's police power is "regulation" and the ability "to incarcerate persons who engage in prohibited activity" and LILCO is simply "planning for and responding to a radiological emergency" and "not regulating an emergency response."

The plaintiffs' argument is rather simple. They maintain that the activities which are to be performed by LILCO employees as delineated in the PLAN are governmental functions and amount to a usurpation of the STATE's police power and thus is prohibited under New York State Law.

THE STATE'S POLICE POWER

A resolution of the controversy herein necessarily involves a discussion of the source, nature and exercise of the police power of the STATE.

(a) THE SOURCE

In our system of government, the police power is an inherent attribute and perogative of state sovereignty (Teeval Co. v. Stern, 301 N.Y. 346, Cert. den. 340 U.S. 876). The Tenth Amendement to the Constitution of the United States specifically provides that the exercise of the police power for the general welfare of the public is a right reserved to the States (Brown v. Brannon, 399 F. Supp, 133, aff'd, 535 F 2d 1249). This principle has been affirmed by our Courts even before the turn of the 1900's (See Nunn v. People of Illinois, 94 U.S. 113).

(b) THE NATURE

One cannot deny that the police power is the STATE's most essential power (People v. Bibbia, 262 N.Y. 259, aff'd, 291 U.S. 502). Nor can one dispute that the protection and safety of persons and property is unquestionably at the core of the STATE's police power (Kelly v. Johnson, 425 U.S. 238). Our courts have continually and consistently ruled that the protection of the public health and safety is one of the acknowledged purposes of the police power of the STATE (Adler v. Deegan, 251 N.Y. 467; Yonkers Community Development Agency v. Morris, 37 N.Y.2d 478, 373 N.Y.S.2d 112).

(c) THE EXERCISE

Who may exercise these police powers? Does a governmental subdivision such as a county or town have an inherent right to exercise these powers? Does a corporate entity such as LILCO have an inherent right to exercise these police powers?

The acceptance of the cardinal rule, that the police power is an inherent perogative of the STATE, can only lead to the conclusion that this power can only be exercised by the STATE or by governmental subdivisions upon whom the State Constitution or State laws confer such power. In fact, municipal corporations, who are creatures of state law and whose sole purpose is to perform governmental functions, have no inherent authority to exercise police powers. These municipal corporations may only exercise the police power which the State Constitution or the State Legislature confers upon them (Rochester v. Public Service Commission, 192 Misc. 33, 83 N.Y.S.2d 436, aff'd. 17 A.D. 172, 89 N.Y.S.2d 545, aff'd.301 N.Y. 801; People ex rel Elkind v. Rosenblum, 184 Misc. 916, 54 N.Y.S.2d aff'd. 269 A.D. 859, 56 N.Y.S.2d 526).

POLICE POWER - POLICE POWER

A brief study of the PLAN, as outlined by this Court, indicates the basic activities LILCO intends to perform in the event of a radiolocical accident at Shoreham.

It intends to declare an emergency and advise citizens of the steps they should take to protect themselves. LILCO intends to manage a major, full-scale evacuation of a 160 square mile area. It intends to close public highways, re-route traffic and direct the flow of traffic. The utility intends to decide upon and oversee steps to secure public health within a fifty mile radius of the nuclear facility. LILCO intends to oversee evacuation centers for more than 100,000 people. It intends to decide when and in what fashion citizens may return to their homes in previously contaminated areas.

LILCO maintains that these actions do not involve governmental functions and that its proposed "management" of the evacuation of the residents of Suffolk County would not involve an exercise of the STATE's police power. What is the basis of LILCO's assertion?

Two reasons are advanced by LILCO for its stance. First, LILCO does not propose to use force or the threat of force to compel obedience to its recommendations. Second, the essence of the STATE's police power is regulation and the ability to incarcerate persons who engage in prohibited activity. LILCO is merely planning for and responding to a radiological emergency in carrying out the functions in the PLAN and not regulating an emergency response.

The position taken by LILCO is untenable. The fact that LILCO will not issue traffic tickets or arrest someone is of little significance. The exercise of governmental functions does not necessarily require the imposition of penalties as indicated by the following language in the case of Brandon Shores, Inc. v. Incorporated Village of Greenwood Lake, 68 Misc.2d 343, 325 N.Y.S.2d 957 at page 960:

> "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."

Furthermore, the bold statement that the PLAN is devoid of any coercion is incorrect. Does turning a two-way street into a one way street leave motorists free to drive as and where they wish? Likewise, does parking LILCO vehicles in traffic lanes on the Long Island Expressway in critical locations afford motorists a freedom of choice? Is a motorist thus compelled to travel in accordance with the route set out in the PLAN? Does LILCO REALLY believe that its declaration of an emergency and evacuation on the emergency broadcast channel is any less compulsive because the directive will not be enforced by a threat of incarceration?

LILCO's regulation theory is likewise without merit. It claims that its own actions do not "regulate emergency responses" but rather consist of "planning" for and "responding" to a radiological emergency.

LILCO, in "planning" for a radiological emergency would in effect be performing functions that are governmental in nature. In "responding" to a radiological emergency, the utility would undertake to perform activities that are reserved to the STATE and its political subdivisions.

In fact, the Courts of the State have recognized that the functions LILCO intends to perform fall within the STATE's historic police power. See, eg. 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); Royce v. Rosasco, 159 Misc. 236, 287 N.Y.S. 692 (1936) (abatement of public emergencies is within 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."); 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); 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); See, generally, N.Y. Const. Art. I, sec. 6, notes 681-909 (McKinney)).

No amount of semantics can change the true meaning of the activities which LILCO proposes to perform in the event of a radiological accident at Shoreham. No amount of ink can cover up or blot out the fact that LILCO's "intended functions" are inherently governmental in nature and fall clearly within the ambit of the STATE's police power.

THE DELEGATION OF POLICE POWERS

Does LILCO have any statutory authority to exercise the functions contained in the PLAN? How are the STATE's police powers delegated? Have any of these powers been delegated to LILCO?

(a) TO LOCAL GOVERNMENTS

The COUNTY, TOWN and other local governmental subdivisions have been delegated "nearly the full measure of the STATE's police power by the State Constitution and various State statutes" (Hoetzer v. County of Erie, 497 Supp. 1207). Article 9, Section 2 of the New York State Constitution is the primary source for the authority of local governments to exercise the police power. Section 10.1a(12) of the Municipal Home Rule Law expressly delegates police power to governmental units by conferring authority upon them to "provide for the well-being of persons or property therein." Thus, these constitutional and statutory provisions in of themselves, authorize the COUNTY and TOWN to exercise the STATE's police power.

(b) TO PRIVATE CORPORATIONS

The Court has been unable to find any provisions in the State Constitution or State statutes which authorize LILCO or any other private corporation to exercise any portion of the STATE's police power. In fact, any attempted delegation of police power to LILCO would amount

to an unlawful delegation of governmental powers (See 20 N.Y. Jur. 2d, "Constitutional Law" §183). A governmental unit can not bargain away its police power to a private party or organization (Beacon Syracuse Associates v. City of Syracuse, 560 F. Supp. 188). Governmental functions and responsibilities cannot be surrendered by contract where police power, public safety and welfare are involved (Patrolmen's Benevolent Ass'n. v. City of New York, 59 Misc.2d 556, 299 N.Y.S.2d 986).

CORPORATE POWERS

LILCO is nothing more than a creature of the STATE. Corporations, unlike natural persons, possess only those powers that have been conferred upon them by the state of their incorporation (14 N.Y. Jur. 2d "Business Relationships, §340). Corporate powers do not exist merely because they are not expressly prohibited. A valid basis must be demonstrated for the existence of a claimed contested power under the laws of the state under which the corporation has been created. (See 6 Fletcher, Cyclopedia of Corporations §2476 - 2486, Rev. Perm. ed. 1979).

The express powers which LILCO possesses are set forth in Section 11 of the New York State Transportation Corporations Law and Section 202 of the New York State Business Corporation Law. What express powers does LILCO have as a direct result of these statutes?

Section 11 of the Transportation Corporation Law grants electric corporations and gas and electric corporations the power to generate, acquire and supply electricity for heat or power to light public streets, places and buildings. In addition, such corporations are empowered to acquire and dispose of necessary machines and to transmit and distribute electricity through suitable wires and other conductors. Such corporations can use streets, public parks and public places to place their poles, pipes and fixtures, but only with the consent of the municipal authorities. These corporations also have power to acquire real estate, for corporate purposes, but only in the manner prescribed by the eminent domain procedure law. Thus, even in areas necessary to the conduct of their businesses, utilities can act only under express legislative grants of power and with the consent of municipalities.

Section 202 of the Business Corporation Law sets forth sixteen general powers which are common to all corporations incorporated pursuant to the laws of the State of New York. For example, the power to sue and be sued, to hold property and to make contracts.

Thus none of these express powers bestow upon LILCO the authority to implement its PLAN. Nevertheless, LILCO is undaunted by its inability to point to a specific grant of power in either the Transportation Corporations Law or the Business Corporation Law which would lend credence to its claimed authority to implement the PLAN. Instead, LILCO seeks to rely on "implied powers" which existed at common law and is now codified in Section 202 (a)(16) of the Business Corporation Law. The latter provides that a corporation has "all powers necessary or convenient to effect its corporate purposes." LILCO states that one of its corporate purposes is to create and sell electricity and thus it has the power to build or operate a power plant such as Shoreham. The operation of Shoreham, according to

LILCO, is conditioned upon the existence of an adequate offsite emergency plan. Thus LILCO reasons that it has the implied power to implement the PLAN in furtherance of its corporate powers.

LILCO's view of the scope of implied corporate power has no limit. Furthermore, it has no support in the cases which LILCO has put forth as supporting its theories. For example, it cites the following four cases which held:

1. That a corporation has implied power to make charitable contributions for the benefit of the corporation and its employees (Steinway v. Steinway & Sons, 17 Misc. 43, 40 N.Y.S. 718).

2. That a corporation operating a home for persons 60 years or older has the implied power to admit a 59 year old (In Re Heims Estate, 166 Misc. 931, 3 N.Y.S.2d 134, aff'd. 255 A.D. 1007, 8 N.Y.S.2d 574).

3. That a construction company may also perform related professional engineering services (John B. Waldbilling, Inc. v. Gottfried, 22 A.D.2d 997, 254 N.Y.S.2d 924, aff'd. 16 N.Y.2d 773, 262 N.Y.S.2d 498).

4. That a corporation may make payments under a "non-compete agreement, provided such payments do not constitute a prohibited restraint of trade (Leslie v. Lorillard, 110 N.Y. 519).

This Court can not fathom how LILCO expects to support its claim of authority to declare an emergency and assume responsibility for the evacuation of over 10,000 people on the basis of these cited cases.

Likewise, the Court is at a loss for LILCO's reliance upon a 1901 case, City Trust Safe Deposit and Surety Co. of Philadelphia v. Wilson Manufacturing Co., 58 A.D. 271, 68 N.Y.S. 1004 for the proposition that "it is difficult to say in any given case that a business act is not within the powers of a corporation." Ironically, the City Trust case did not even involve New York State Corporate Law. Defendant, a West Virginia corporation, sought to avoid an indemnity agreement previously given. It argued that its act was "ulta vires" under the laws of West Virginia, but it failed to offer any evidence as to the West Virginia Laws. The court held that, absent such evidence, defendant could not avoid its contractual obligation.

Does LILCO sincerely believe that a judge writing a decision in 1901 would have considered that the direction of traffic or the declaration of a public emergency constituted a "business act" as the term was employed in the City Trust case?

LILCO is mistaken in its view that the power to undertake actions necessary or convenient to effect its corporate purposes has no bounds. A corporation lacks power, express or implied, to engage in activities which are contrary to public policy (State of New York v. Abortion Information Agency, Inc., 37 A.D.2d 142, 330 N.Y.2d 927, aff'd. 30 N.Y.2d 779, 339 N.Y.S.2d 174). The implementation of the PLAN amounts to an

exercise of the police power. The latter can only be exercised by the STATE and upon proper delegation, the municipalities. The exercise of such power by LILCO would accordingly violate the public policy of this state.

THE EXECUTIVE LAW
ARTICLE 2B

LILCO claims that the activity which it proposes to take under its PLAN is directly supported by New York State Executive Law, Article 2B. This law is entitled "State and Local Natural and Man-Made Disaster Preparedness" and is found in Sections 20 - 29 of the Executive Law.

What was the intention of the Legislature in enacting this law? What does the law provide.

Article 2B of the Executive Law involves the distribution of powers held by the Executive Branch of State Government. It clearly expresses the intention of the Legislature to confer the STATE's power to plan for and to respond to disaster situations solely upon State and local government. It establishes a framework for state and local co-operation in planning and preparing for emergency responses to all kinds of disasters, including nuclear accidents. Thus, this Statute creates a state agency, the Disaster Preparedness Commission (DPC) to coordinate state and local emergency responses. This legislation authorizes each county and city to plan for disasters and delegates authority to STATE and local officials to effectuate these functions.

The Court, no matter how many times it has read and re-read Article 2B, could not find any authorization for LILCO, express or implied, to exercise the STATE's police powers in emergency situations. What is the basis of LILCO's claim that Article 2B of the Executive Law authorizes it to implement its PLAN?

LILCO rests its claim of authority upon two sub-paragraphs, Section 20-1(a) and Section 20-1(e) contained in the statement of policy that constitutes the preface to Article 2B. Section 20 of Article 2B of the Executive Law provides as follows:

> "§20. Natural and man-made disasters; policy, definitions
>
> 1. It shall be the policy of the state that:
> a. local government and emergency service organizations continue their essential role as the first line of defense in times of disaster, and that the state provide appropriate supportive services to the extent necessary;
>
> b. local chief executives take an active and personal role in the development and implementation of disaster preparedness programs and be vested with authority and responsibility in order to insure the success of such programs;
>
> c. state and local natural disaster and emergency response functions be coordinated in order to bring the fullest protection and benefit to the people;

d. state resources be organized and prepared for immediate effective response to disasters which are beyond the capability of local governments and emergency service organizations, and

e. state and local plans, organizational arrangements, and response capability required to execute the provisions of this article shall be the most effective that current circumstances and existing resources allow.

2. As used in this article the following terms shall have the following meanings:

a. "disaster" means occurrence or imminent threat of wide spread or severe damage, injury, or loss of life or property resulting from any natural or man-made causes, including, but not limited to fire, flood, earthquake, hurricane, tornado, high water landslide, mudslide, wind, storm, wave action, volcanic activity epidemic, air contamination, blight, drought, infestation, explosion, radiological accident or water contamination.

b. "state disaster emergency" means a period beginning with a declaration by the governor that a disaster exists and ending upon the termination thereof.

c. "municipality" means a public corporation as defined in subdivision one of section sixty-six of the general construction law and a special district as defined in subdivision sixteen of section one hundred two of the real property tax law.

d. "commission" means the disaster preparedness commission created pursuant to section twenty-one of this article.

e. "emergency services organization" means a public or private agency, organization or group organized and 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 as a result of an emergency, including non-profit and governmentally-supported organizations, but excluding governmental agencies.

f. "chief executive" means:
(1) a county executive or manager of a county;
(2) in a county not having a county executive or manager, the chairman or other presiding officer of the county legislative body;
(3) a mayor of a city or village, except where a city or village has a manager, it shall mean such manager; and
(4) a supervisor of a town, except where a town has a manager, it shall mean such manager.

This Section states general STATE policies including the proposition that "local government and emergency service organizations continue their essential role as the first line of defense in times of disaster" and that the STATE shall provide appropriate supportive services to the extent necessary. This policy statement, contrary to LILCO's assertions, does not explicitly or implicitly authorize private corporations to exercise police powers in the event of a nuclear accident.

Section 20-1(a) acknowledges the role of private groups called "emergency service organizations" in providing :services directed toward relieving human suffering, injury or less of life or damage to property" such as fire, medical, ambulance, food, housing and similar rescure services.

These private emergency service organizations have not been delegated in any way, shape, manner or form to the governmental functions which the PLAN contemplates. The Legislature, if it intended to delegate the broad-scale powers LILCO claims, would have done so in clear explicit language in the substantive portions of Article 2B which presently only confer these powers upon state and local governments.

CONCLUSION

Those declaratory actions which arise out of LILCO's attempt to secure approval of its utility sponsored PLAN clearly present a justiciable controversy and the complaints do state a cause of action. The limited issue of LILCO's authority to implement its PLAN under the laws of the State of New York does not involve nay disputed questions of fact.

LILCO, as previously mentioned, intends to execute the PLAN solely with its own employees and intends to carry out activities which are inherently governmental in nature. These powers have been solely conferred upon the STATE and its political subdivisions. LILCO, a private corporation, is a creature of state law and only has those powers which the STATE has conferred upon it. These powers, express or implied, do not include the right to exercise governmental functions.

There is a paradox which is present in this controversy and involves the philosophy of the creation of our government. In order to recognize this paradox, one must examine the philsophy of our founding fathers in creating our government.

The political ideas behind the Declaration of Independence and the Constitution were not the sole inventions of the founding fathers. Franklin, Jefferson, Madison and other colonial leaders were learned and widely read men, steeped in the ideas of the English political philosophers. The most influential of these philosophers upon the founding fathers was John Locke (See Clinton Rossiter, "1787: The Grand Convention", (MacMillan, 1966]).

Locke, an avid opponent of the divine right theory of government, put forth his ideas about the creation, purpose and powers of government in his "Treatise of Civil Government" written in 1689. His ideas, for the purpose of this discussion, may be summarized as follows:

1. Individuals originally existed in a state of nature. Each individual had the right to do whatsoever was necessary for his preservation and the right to punish those who committed crimes against the laws of nature. Locke called these rights the "supreme power".

2. The weak were at the mercy of the strong in the state of nature. Each individual, because of the situation, entered into a "social contract" with every other individual and this social contract resulted in the creation of a civil society or community. The "supreme power" is surrendered by each individual to the community.

3. The community is created for the purpose of establishing a government, which is accomplished by means of a trust. This means that government only enjoys a "fiduciary power". Thus the community does not surrender the "supreme power but merely entrusts it to government.

4. The powers of government are limited. Government is account able to the community. The community, if government breaches its trust, had a right to "appeal to the heavens". This latter phrase meant the right of revolution (our founding fathers substituted the right to change governments by means of a free election for Locke's right of revolution).

What is the paradox?

The STATE and COUNTY would be breaching their "fiduciary" duty to protect the welfare of its citizens if they permitted a private corporation to usurp the police powers which were entrusted solely to them by the community. LILCO has to realize that this is a government of law and not of men or private corporations (See John Adams "Draft Massachusetts Constitution, Declaration of Rights, ART XXX, 1779).

On the other hand, the STATE and COUNTY maintain that they exercised their police powers in order to protect the community in their determination not to adopt or implement any emergency plan for Shoreham because of the "impossibility" to have a "safe evacuation" in case of a nuclear accident. LILCO asserts that this position is nothing more than a "sham" and amounts to a breach of the STATE's and COUNTY's duty to protect the citizens in case of a nuclear accident at Shoreham as envisioned by Article 2B of the Executive Law. LILCO is in effect reminding the STATE and COUNTY governments that "Non est Princeps Super Leges, Sed Leges Supra Principem" (The Prince is not above the Laws, but the Laws above the Prince, Pliny the Younger, "Panegyric of Trajan" Sec. 65 100 A.D.).

There is no need to resort to a revolution or the usurpation of governmental powers by LILCO if there has in fact been a breach of a trust by the STATE and COUNTY. LILCO can test this matter in another tribunal by commencing an action in the nature of a writ of mandamus or in the aren of public opinion which manifests itself by the results of an election.

Settle judgment on notice.

William R. Geiler

J.S.C.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Commission

In the Matter of	)	
LONG ISLAND LIGHTING COMPANY	)	Docket No. 50-322-OL-4 Low Power
(Shoreham Nuclear Power Station, Unit 1)	)	

CERTIFICATE OF SERVICE

I hereby certify that copies of Suffolk County and State of New York Renewal of Request for NRC Supplementation of the Shoreham FEIS as Required by NEPA have been served on the following this 4th day of March 1985, by U.S. mail, first class, except as otherwise noted.

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