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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges  
James A. Laurenson, Chairman  
Dr. Jerry R. Kline  
Mr. Frederick J. Shon

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In the Matter of  
LONG ISLAND LIGHTING COMPANY  
(Shoreham Nuclear Power Station,  
Unit 1)

Docket No. 50-322-OL-3  
(Emergency Planning Proceeding)  
October 22, 1984

MEMORANDUM AND ORDER  
DEFERRING RULING ON LILCO MOTION FOR SUMMARY DISPOSITION  
AND SCHEDULING SUBMISSION OF BRIEFS ON THE MERITS

On August 6, 1984, we received LILCO's Motion for Summary Disposition of Contentions 1-10. The contentions concern LILCO's legal authority to carry out certain activities described in the Transition Plan it proposed in its effort to meet NRC requirements for emergency planning in the absence of a state or local plan. Briefs in opposition to LILCO's motion were submitted by Suffolk County and New York State jointly and by the NRC Staff. LILCO filed a reply brief. The Board notes that it has also received a reply brief by Suffolk County and New York State purportedly in response to the answer submitted by the Staff. Suffolk County and the State of New York claim that they are entitled to respond under 10 C.F.R. § 2.749(a). The Board, however, disagrees because new arguments may be answered only if they are contained "in any

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statement filed in support of the motion." The Staff's brief was not filed in support of LILCO's motion for summary disposition.

Accordingly, the Board strikes Suffolk County's October 15 response as it does not comply with NRC regulations at 10 C.F.R. § 2.749(a).

LILCO asserts that "even if state law prohibits these activities, summary disposition is nevertheless called for, for reasons that are either purely matters of federal law or already established on the record." LILCO Motion at 1. Suffolk County and New York State argue that the "legal authority" issues are already pending in a New York State court and LILCO's Motion should be dismissed. Opposition of Suffolk County, et al., at 2-3. NRC Staff urges "that LILCO's Motion should be dismissed as premature, or, in the alternative, the Motion should be denied." NRC Staff's Answer at 1.

As a preliminary matter, we are of the view that the preemption issue is indeed premature at this time. We are particularly impressed with the reasoning of the Appeal Board in Consolidated Edison Co. (Indian Point Station, Unit No. 2), ALAB-399, 5 NRC 1156, 1170 (1977) as follows:

Where preemption is concerned, there is an even greater reason for restraint--the Federal government has no right to interfere with state law which is otherwise within Constitutional bounds unless it conflicts with Federal law. Thus, in cases where a state statute could be interpreted in such way as to be either consistent or in conflict with Federal law or where an actual conflict between state law in a valid area of state concern and Federal law was possible but had not yet arisen, the Supreme Court has held that the Federal judiciary should stay its hand until such time as the state courts

interpret the statute or an actual conflict arises.

Therefore, we will defer our determination of this question, as well as the merits of the first ten contentions, until the issuance of the Initial Decision. In other words, we will hold the LILCO Motion for Summary Disposition in abeyance until the issuance of the Initial Decision at which time we shall rule upon the motion and all other issues in this proceeding. The parties have stipulated that no evidentiary hearing is required for the resolution of Contentions 1-10. (Tr. 13,823, 13,831-32, and 13,834).

In order to complete the record on the merits of the first ten contentions, all parties are invited to submit briefs as to who they believe should prevail on each contention and why the contention should be resolved in that manner. The Board also invites all parties to include in such briefs discussion of following:

1. What action should this Board should take on Contentions 1-10 in the event that there is no decision from a New York State court at the time the Initial Decision in the emergency planning proceeding is issued?

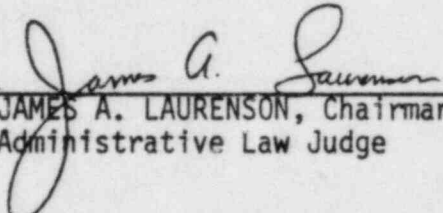
2. In connection with LILCO's "immateriality" argument, whether the LILCO activities enumerated in Contentions 1-10 are necessary pursuant to NRC regulations in order to obtain an operating license.

3. In connection with LILCO's "realism" argument, what effect would an unplanned response by the State or 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?

The briefing schedule shall be as follows: LILCO and Intervenors Suffolk County and New York State are to submit their briefs by November 9, 1984. Responses are due November 16. NRC Staff shall submit its brief by November 21. As in other scheduling orders, we will allow the parties to establish a different briefing schedule provided that all parties are in agreement and we are promptly notified of any such change.

ATOMIC SAFETY AND  
LICENSING BOARD

  
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JAMES A. LAURENSEN, Chairman  
Administrative Law Judge

Bethesda, Maryland