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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)	)	

RESPONSE OF SUFFOLK COUNTY AND THE STATE OF NEW YORK TO THE NRC STAFF'S ANSWER IN OPPOSITION TO "LILCO'S MOTION FOR SUMMARY DISPOSITION OF CONTENTIONS 1-10 (THE 'LEGAL AUTHORITY ISSUES')"

On October 4, 1984, the NRC Staff filed its Answer in Opposition to the Long Island Lighting Company's ("LILCO") Motion for Summary Disposition. Pursuant to 10 C.F.R. §2.749(a), Suffolk County and the State of New York respond to certain new arguments asserted by the NRC Staff.

The NRC Staff asserts that LILCO has failed to establish that federal law preempts the body of state and local law that precludes LILCO from performing the various ingredients of its Transition Plan that are identified in Contentions 1-10. In addressing the preemption issue, however, the NRC Staff makes certain new arguments that warrant a response.

The Staff asserts that federal preemption may be established in either of two general ways: Congress may occupy

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a given field to the exclusion of the States by so stating in explicit terms or by establishing a scheme of federal regulation so pervasive as to make reasonable the inference that Congress left the States no room to supplement it[1]; or, alternatively, even where Congress has not entirely displaced state regulation in an area, state law may be preempted if it actually conflicts with federal law, either because compliance with federal and state laws is a physical impossibility or because state law stands as an obstacle to the accomplishment of the purposes and objectives of Congress. Staff Answer at 16-17. Accordingly, the preemption issue is whether Congress, in adopting the Atomic Energy Act, has impliedly preempted the entire body of state law here at issue under either of the applicable standards.

The NRC Staff rightly recognizes that LILCO has failed to establish preemption under the first standard. Turning to the second standard for measuring preemption -- that of actual conflict between federal and state law -- the Staff asserts that the preemption question is "a difficult one" on

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1/ The Staff's statement of the first standard confuses the concepts of express and implied preemption. No express preemption has been or can be argued in this case. Indeed, the Staff recognizes that the Atomic Energy Act does not expressly address either the issue of emergency planning and preparedness or the respective responsibilities and authorities of state and federal governments to regulate in this area. Staff Answer at 19, n. 20.

which it reserves judgment. Nonetheless, the Staff outlines an argument, based upon Perez v. Campbell, 402 U.S. 637 (1971), which it asserts "LILCO might be able successfully to argue." Staff Answer at 25, n. 23. It is utterly clear, however, that in light of the Supreme Court's decision in Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Commission, ____ U.S. ____, 75 L.Ed. 2d 752 (1983), the Perez decision cannot support a finding of preemption in this case.

In Perez, the Supreme Court sought to determine whether a provision of the Arizona Motor Vehicle Safety Responsibility Act was invalid as in conflict with the federal Bankruptcy Act. The Arizona statute protected judgment creditors from "financially irresponsible persons" by continuing state penalties intended to force a debtor to satisfy preexisting judgments notwithstanding a discharge in bankruptcy; conversely, the Bankruptcy Act was intended to give discharged debtors a fresh start unhampered by the effects of pre-existing debt. The Court determined that the purpose of the Arizona statute conflicted with the Bankruptcy Act and held that it was, therefore, preempted. The Court also noted that two prior decisions had upheld similar state vehicular responsibility statutes on the ground that the purpose of those statutes was not to circumvent the Bankruptcy Act but to promote highway safety. The Court rejected those decisions on

the ground that they "looked to the purpose of the state legislation" but "did not look at the effect of the legislation." Perez, 402 U.S. at 650. The Staff surmises that this aspect of Perez might support a claim of preemption in this case; the Staff apparently suggests that New York State law may be preempted if its effect would be to frustrate federal law even though its purpose is unrelated to, and not in conflict with, federal objectives.

This argument provides no support to LILCO. First, it is clear that the entire discussion of statutory effect in Perez is pure dictum given the Court's holding that the purpose of the Arizona statute was to frustrate federal law. Perez, 402 U.S. at 644-8 and 652-4. That holding alone was dispositive of the question before the Court. The effect of the Arizona statute was, therefore, irrelevant.2/

Moreover, the line of argument the NRC Staff now proffers to LILCO is exactly the position that petitioners in

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2/ The Perez dictum, establishing an effects test, represents the farthest reach of the Supremacy Clause and the preemption doctrine into state and local regulation and has been narrowed substantially by subsequent cases. At the very least, in areas of traditional state sovereignty, New York State Department of Social Services v. Dublino, 413 U.S. 405 (1973), "clearly revives the flexible supremacy principle of Huron and Kesler that the Court expressly repudiated only two years previously in Perez." Note, The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court, 75 Colum. L. Rev. 623, 647 (1975).

Pacific Gas advanced without success.3/ The moratorium statute in Pacific Gas had the effect of blocking any construction of nuclear generating facilities; petitioners argued that this effect was in conflict with federal purposes and required the Court to determine that the moratorium statute was preempted. Nonetheless, the Supreme Court upheld that statute on the ground that it had "a non-safety rationale"; that is, notwithstanding the effect of the statute on future construction of nuclear generating facilities, the statute had an economic purpose and was, therefore, permissible. Thus, in the face of a preemption claim grounded on Perez, the Supreme Court in Pacific Gas upheld a state statute that had the effect of imposing a moratorium on the construction of any nuclear generating facility in the State of California, because the purpose of that statute -- insuring the economic viability of any nuclear plant -- was unrelated to nuclear health and safety concerns that are the heart of the Atomic Energy Act. It follows necessarily that Perez offers no support for LILCO's position in this case.4/

3/ See Pacific Gas, 75 L.Ed. 2d at 773-7, esp. n. 28; see also Petitioners' Brief before the U.S. Supreme Court in the Pacific Gas case (No. 81-1945) at pp. 33 and 48-9.

4/ In Pacific Gas, the Court found that Perez would be apposite only if the state statute frustrated the accomplishment of federal objectives or rendered adherence to state and federal law impossible. Pacific Gas, 75 L.Ed. 2d at

(Footnote cont'd.)

The Staff's argument based on Perez is unsound for a further reason. The second preemption standard requires a court to determine the purpose and objectives of Congress in order to determine whether state law would frustrate such purposes. Pacific Gas squarely addresses that issue. It holds that a primary purpose of the Atomic Energy Act is the promotion of nuclear power to the maximum extent consistent with public health and safety; it further holds that the promotion of nuclear power is not to be accomplished at all costs and that Congress' continued preservation of state regulation in traditional areas is evidence of that fact. Pacific Gas, 75 L.Ed. 2d at 775-7. Noting that Congress has permitted the States to determine as a matter of economics whether a nuclear plant should be built, the Court stated its ultimate conclusion: "[T]he legal reality remains that Congress has left sufficient authority in the states to allow the development of nuclear power to be slowed or even stopped for economic reasons." Pacific Gas, 75 L.Ed. 2d at 777.5/ This conclusion is, of course, consistent with the

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(Footnote cont'd.)
775, n. 28. If a moratorium statute passes muster under that standard, state laws reserving the exercise of police powers to the state and its authorized municipalities cannot possibly be said to frustrate federal objectives.

5/ The conclusion is apparently the "see also" reference that the Staff offers in n. 23 of its Answer. In fact, the Court's conclusion is dispositive of this case and not merely a point of potential reference.

Congressional dictate that state and local agencies may "regulate activities for purposes other than protection against radiation hazards." 42 U.S.C. §2021(k).

Thus, the Supreme Court has determined that a nuclear construction moratorium does not conflict with the objectives of the Atomic Energy Act or obstruct federal purposes where that moratorium has a purpose unrelated to the regulation of nuclear safety. The laws here in question -- the New York State Constitution, the Municipal Home Rule Law, the New York Executive Law, the basic corporate law of the State of New York, the N.Y. Vehicular and Traffic Law, the N.Y. Penal Law and local statutes -- do not address nuclear health and safety or the construction or operation of nuclear generating facilities. Moreover, they regulate in traditional areas of state concern. Where state and federal laws are clearly distinct and separate, incidental effects of the state law on the federal regulatory scheme are tolerated under the Supremacy Clause and general principles of federalism. In Merrill, Lynch, Pierce, Fenner & Smith v. Ware, 414 U.S. 117 (1973), state employment laws were upheld, even though they clearly conflicted with regulations issued by the New York Stock Exchange pursuant to the Securities and Exchange Act. The Court stressed that where the state interest is strong compared to the federal interest, the "proper approach is to reconcile"

the two statutory schemes rather than to override state regulation. No state interest is more fundamental than the distribution and exercise of the basic police power of the State.

The NRC Staff also appears to suggest that the standard of Congressional intent, either express or implied, applicable to the first basis for preemption -- exclusive field preemption -- does not apply to the second standard for preemption -- specific conflict with federal law. Staff Answer at 22-3. In fact, determining the purposes and objectives of Congress is fundamentally a question of defining Congressional intent. See, e.g., Schwartz v. Texas, 344 U.S. 199, 203 (1952) ("It should never be held that Congress intends to supersede the exercise of the police powers of the states, even when it may do so, unless its purpose to effect that result is clearly manifested'." (quoting Reid v. Colorado, 187 U.S. 137, 148 (1902)). As the Staff acknowledges, no evidence of preemptive interest exists in this case.

Finally, the NRC Staff Answer ignores a fundamental defect in LILCO's whole preemption position. LILCO must establish that it can and will take adequate protective measures and that its Transition Plan "can be implemented." 10 C.F.R. §50.47(a)(1) and (2) and Staff Answer at 19-20. In

short, LILCO must establish that it has the authority to carry out its Transition Plan. State law precludes LILCO from performing essential functions under that Plan; it reserves to the state and its municipal subdivisions the exercise of such functions, and it does not (and could not) authorize LILCO to conduct such activities. Assuming arguendo, however, that all relevant portions of State law were struck down as preempted under the Perez line of argument the Staff outlines, LILCO would still have no authority to assume the police power of the State. In order to meet its burden of proving that it can implement the Transition Plan, LILCO must identify some positive authority that permits it to do so. State law provides no such authority. The Atomic Energy Act is not a source of authority. The NRC Authorization Acts do not authorize a utility to exercise powers not granted under state law. And, the preemption doctrine itself is not a source of authority. Consequently, even if all relevant state laws were struck down, LILCO would be no better off. It would still be unable to meet its burden of proving that the Transition Plan "can be implemented." In the most fundamental sense, therefore, LILCO's preemption argument, even if supplemented as the Staff suggests and accepted as valid, is immaterial to this proceeding.

CONCLUSION

For the foregoing reasons and those previously addressed in the Opposition of Suffolk County and the State of New York, LILCO's Motion for Summary Disposition must be denied.

Respectfully submitted,

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October 15, 1984

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CERTIFICATE OF SERVICE

I hereby certify that copies of RESPONSE OF SUFFOLK COUNTY AND THE STATE OF NEW YORK TO THE NRC STAFF'S ANSWER IN OPPOSITION TO "LILCO'S MOTION FOR SUMMARY DISPOSITION OF CONTENTIONS 1-10 (THE 'LEGAL AUTHORITY ISSUES')", dated October 15, 1984, have been served on the following this 15th day of October, 1984 by U.S. mail, first class.

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