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LILCO, November 29, 1984

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)	)	Proceeding)
	)	

LILCO'S REPLY BRIEF ON CONTENTIONS 1-10

The parties have filed to date almost 500 pages of pleadings discussing the merits of Contentions 1-10 (the "legal authority" contentions),1/ exclusive of charts, affidavits, statements of material facts, and attachments. Out of this morass of paper and ideas, eight basic ideas emerge:

1. Under this country's system of government, behavior that is not prohibited is allowed; LILCO's actions under the Plan are legal unless a specific statute prohibits those actions.

1/ LILCO's Motion for Summary Disposition of Contentions 1-10 (the "Legal Authority" issues), Aug. 6, 1984 (78 pages); Opposition of Suffolk County and the State of New York to LILCO's Motion for Summary Disposition of Contentions 1-10 (the "Legal Authority" issues), Sept. 24, 1984 (119 pages); NRC Staff's Answer in Opposition to "LILCO's Motion for Summary Disposition of Contentions 1-10 (the "Legal Authority" issues), Oct. 4, 1984 (29 pages); LILCO's Reply to the Responses to its Motion for Summary Disposition on Contentions 1-10, Oct. 15, 1984 (69 pages); LILCO's Brief on Contentions 1-10, Nov. 19, 1984 (67 pages); and Suffolk County and State of New York Response to ASLB Memorandum and Order Dated October 22, 1984, Nov. 19, 1984 (100 pages). The Intervenors also filed 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 on Contentions 1-10 (The 'Legal Authority Issues')," Oct. 15, 1984 (11 pages). The Board struck that filing in its October 22 Order as an unauthorized pleading.

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2. The Intervenors have cited no statute which on its face or by construction prohibits any of the planning activities or actions to be taken in an emergency by LILCO or LERO, and the government's "police power" -- the authority to regulate and to enforce that regulation -- is not exercised by LILCO or LERO in planning for or responding to an emergency at Shoreham.

3. Even if affirmative authorization for non-government response to an emergency were deemed necessary by this Board, Article 2-B of New York Executive Law authorizes LILCO to plan for and respond to emergencies, even according to the State's own interpretation filed in a state court proceeding.

4. To the extent that this Board is persuaded that a State or local statute or "police power" or any other legal theory grounded in State or local law somehow prohibits an activity under the LILCO Plan, that State or local law is preempted by the Atomic Energy Act because (a) the state has invaded the preempted field of radiological health and safety, (b) LILCO cannot comply with both state and federal law, and (c) the state law stands as an obstacle to accomplishing the full purposes and objectives of Congress.

5. Without further hearings, testimony, affidavits, or other filings of any sort, the record and law support a decision that government would participate in a real emergency, and participate responsibly; that government participation would cure any "illegality"; and therefore that Contentions 1-10 are at best moot and at worst irrelevant to a finding of adequate emergency planning for Shoreham under 10 C.F.R. § 50.47.

6. Even if the traffic-related activities addressed in Contentions 1-4, 9, and 10 are deemed prohibited, the existing record establishes that the Plan is adequate without them.

7. The public notification and protective action recommendations challenged in Contentions 5-8 are authorized by Article 2-B (see point 4, above), FCC regulations, NRC regulations, and repeated Congressional approval of "utility plans."

8. This Board has the authority and the duty to decide Contentions 1-10; if the Board should find that it does not, those Contentions should be dismissed because the Intervenors have not met their burden of going forward.

Consequently, for the reasons stated below2/ and developed at length in LILCO's Motion for Summary Disposition, LILCO's Reply, and LILCO's Brief on Contentions 1-10, LILCO should prevail on Contentions 1-10.

I. LILCO Is Not Required to Establish Express Authorization For Its Emergency Planning Activities

A. LILCO Is Not Trying to Exercise "Police Power"

The Intervenors' fundamental proposition, the foundation of their case, is the notion that responding to an emergency is exclusively a "police" function.3/ This fundamental proposition is fundamentally wrong.4/ The "police

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2/ Point 1 is discussed in part I.B below; 2 in I.A and C; 3 in I.D; 4 is addressed at length in LILCO's previous filings; 5 in II.A, B, and C below; 6 in Part III; 7 in I.B; and 8 in Part IV.

3/ The Intervenors' reasoning goes like this: (1) LILCO's emergency plans are to protect the public; (2) any activity that protects the public comes within government "police powers" because the government is supposed to protect the public; (3) police powers may be exercised only by governments; (4) governments can not reassign police powers to private individuals; (5) LILCO is a corporation that has not been delegated police powers; and (6) therefore LILCO's actions under the LILCO Plan are illegal. As we discuss in this section, the Intervenors' whole chain of reasoning fails because the second link -- that emergency response is necessarily a "police power" -- is wrong.

4/ It rests on the misguided idea that whenever a private party does something that governments ordinarily do, it is engaging in rebellion against the government. Any child can see this is wrong. Private companies manufacture "coins" (the Franklin Mint comes to mind) and private companies issue warnings about public health and safety all the time (toy companies, for example, issue warnings about defects in their products). These activities resemble activities of governments, and yet none are a "usurping" of governmental power, any more than Boy Scouts are usurping governmental powers because they wear uniforms just as policemen do.

What distinguishes these cases, and the LILCO Plan, from governmental authority is the absence of regulation of private conduct and the absence of compulsion. Suppose the members of a private neighborhood organization

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power," in essence, encompasses the power to regulate and to compel those being regulated to comply. See, e.g., Nebbia v. New York, 291 U.S. 502, 525 (1934), citing License Cases, 5 How. 504, 583 (1847) (the police power of a state is "the power of sovereignty, the power to govern men and things within the limits of its dominion. It is by virtue of this power that it legislates . . . "); Lake Shore and Michigan Southern Railway Co. v. Smith, 173 U.S. 684, 688 (1899) ("the State was but exercising its proper authority under its general power to legislate regarding persons and things within its jurisdiction, sometimes described as the police power . . . . "); see generally 16A Am Jur 2d, Constitutional Law §§ 360 et seq. The ability to regulate, and the ability to compel persons to comply, does (as the Intervenors argue) reside in government, not private parties. All the cases cited by the Intervenors to support the proposition that the State cannot give away its "police power" (that is, its power to regulate and to compel compliance) support this proposition.

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decided to levy a "tax" on their neighbors to finance a new playground. Suppose they mailed letters to all their neighbors telling everyone to send a check for $5 to the secretary of the organization. Would this behavior be illegal? Of course not, so long as the neighborhood organization did not pose as governmental officials, try to defraud or mislead the public, or use force or the threat of force to collect the "tax." So long as people can be persuaded to pay the "tax" (because they want a neighborhood playground, for example), the money can be collected with no violation of the law.

Similarly, the LILCO Plan does not regulate the conduct of others or rely on the threat of force. The Plan itself consists of activities of LILCO personnel plus people (bus companies, the Red Cross) who have agreed to perform certain functions. As for the cooperation of the public, the Plan relies on economic incentives (the offer to purchase contaminated crops) and, more fundamentally, on people's interest in protecting their own health and safety. A recurring theme in this proceeding, voiced often by LILCO's witnesses, is that an emergency information system should be designed to give people the information they need to make good decisions in an emergency. This LILCO has done, and LILCO fully expects the public to act rationally on the basis of the information provided. But LILCO cannot force them to do so, and has no intention of trying.

But this is beside the point, because none of the activities to be taken under the LILCO Plan comes within the police power. The many cases cited by the Intervenors are all ones involving the power to regulate the conduct of private parties, with the threat of governmental enforcement standing behind the regulation. Thus, while in Fink v. Cole, 302 N.Y. 216, 97 N.E. 2d 873 (1951), the court ruled that the New York Legislature could not delegate to a private corporation (in this case, the Jockey Club) the power to grant or refuse licenses to horse owners, jockeys, and trainers, no one suggested that a private corporation cannot breed or race horses under the laws passed by the New York Legislature. It simply could not regulate horse owners, jockeys, and trainers by granting or refusing licenses to those people. Id. 302 N.Y. at 225, 97 N.E.2d at 876.

The Intervenors note that "New York Courts have repeatedly reached the same result in other cases, as have the courts of other jurisdictions," Suffolk County and State of New York Response to ASLB Memorandum and Order Dated October 22, 1984 (hereinafter Intervenors' Response) at 50-51 (footnotes omitted), and so they have, finding that the legislative function cannot be delegated by government to private individuals. But each of the cases cited by the Intervenors involved a legislative function. See, e.g., Builders' Council of Suburban New York, Inc. v. City of Yonkers, 106 Misc. 2d 700, 434 N.Y.S. 2d 566 (1979), aff'd, 79 A.D. 2d 696, 434 N.Y.S. 2d 450 (1980) (State law regulating tenant deposits of rents into court to remedy "conditions dangerous to life, health or safety" preempted local law creating a multiple dwelling commission empowered to collect rents from landlords for use against future emergencies that might arise; the invalid local law included a provision allowing commissioners to delegate to private individuals the duty to inspect property, to regulate the amount each owner must pay, and provided

for penalties if owners did not pay the amount set); Farias v. City of New York, 101 Misc. 2d 598, 421 N.Y.S. 2d 753 (1979) (improper delegation by legislature to New York Society for Prevention of Cruelty to Children allowing the Society to veto child performer permits); Podiatry Society of New York v. Regents of University of New York, 78 Misc. 2d 731, 358 N.Y.S. 2d 276 (1974) (private professional societies such as the Podiatry Society may act in advisory capacity and make recommendations to state boards and departments in matters affecting their professions, but have no independent power to establish mandatory standards for professional licenses); Fifty Central Park West Corp. v. Bastien, 60 Misc. 2d 195, 302 N.Y.S. 2d 267 (1969), aff'd, 64 Misc. 2d 911, 316 N.Y.S. 2d 503 (1970) (improper delegation for interested private association of landlords to be allowed to set rent stabilization guidelines); United Citizens Party of South Carolina v. South Carolina State Election Comm'n, 319 F. Supp. 784 (D.S.C. 1970) (statute having effect of allowing political party, by holding a primary, to control the date of submission of slate of candidates from other political parties that do not hold a primary, results in improper delegation of legislative power); Hetherington v. McHale, 458 Pa. 479, 329 A.2d 250 (1974) (statute granting to three interested private agricultural organizations the absolute authority to select eight of 17 members of a committee charged with deciding the disbursement of substantial public funds to agricultural programs is impermissible delegation); Olin Mathieson Chemical Corp. v. White Cross Stores, Inc., 414 Pa. 95, 199 A.2d 266 (1964) (fair trade statute impermissibly delegates regulation of prices to private individuals); Dade County v. State of Florida, 95 Fla. 465, 116 So. 72 (1928) (statute authorizing a non-elected commission to designate depositories of public funds, and to decide upon plans and estimates for public improvement where the county commissioners and city council disagree, is

improper delegation); Patrolmen's Benevolent Ass'n v. City of New York, 59 Misc. 2d 556, 299 N.Y.S. 2d 986 (1969) (switch from three-platoon to four-platoon work assignments does not impair the obligation of an existing police collective bargaining contract; government can take action for public welfare even if existing contracts are affected); Yanow v. Seven Oaks Park, 18 N.J. Super. 411, 87 A.2d 454 (1952), modified on other grounds, 11 N.J. 341, 94 A.2d 482 (1953) (statute prohibiting use of property for private school unless 80% of surrounding property owners consent is impermissible delegation); North Carolina Ass'n for Retarded Children v. State of North Carolina, 420 F. Supp. 451, 456 (M.D.N.C. 1976) (statute requiring director of institution where retarded person is confined or county director of social services to seek a court order allowing sterilization of mentally retarded person when the next of kin or legal guardian requests it is improper delegation).

These cases are indeed revealing, but not in the way the Intervenors think. The cases support the view that the activities under the LILCO Transition Plan are not illegal at all. Those activities are not legislative, they are not regulatory, and they are not compulsory. LILCO is not issuing licenses, passing laws, or compelling anyone to act in a certain way; it is simply developing, as a private organization, responses to an emergency in accordance with detailed regulations and guidelines and good emergency planning concepts so that an emergency response can proceed, if necessary. Where specific state regulation or even guidance is available on a particular issue, LILCO has followed it.5/

5/ Thus, for example, following New York State practice at other power plants, potassium iodide is not generally distributed to the public under the LILCO Plan; following the guidance of New York State Emergency Plans, selective sheltering and selective evacuation for radiosensitive portions of the population are included in the Plan; and the New York State information sheet is used for making protective action recommendations.

The Intervenors attempt to stretch "sovereign governmental functions" to include not only the legislative function and the availability of force to compel compliance with the legislature's intent, but also a response to an emergency. This extension directly contradicts the clear language of N.Y. Exec. Law Article 2-B, which recognizes and encourages local volunteer emergency organizations such as LERO.

In fact, no "police power" is to be exercised under the LILCO Plan. It is not illegal to direct traffic if one is not obstructing traffic; it is not illegal to broadcast EBS messages which give information about federal protective action guides and the level of radiation that may be in the area, if the radio stations have agreed to broadcast them. That, like the daily rush-hour broadcasts of traffic information (indicating accident locations and suggestions for avoiding them), is helpful information, not an exercise of the police power.

As the characterization of LILCO's activities as "police power" is wrong, so is the characterization of them as "usurping" something. In fact, there is no state action for LILCO to "usurp." LILCO is not contradicting any existing plans at the State and the County level; in fact, everything has been done to conform the LILCO Plan to existing State plans and to any State or County response that would be forthcoming, and at every turn the Plan states that State and County officials will be incorporated into the response should they choose to respond.

What is being "usurped" is not the state's right to do emergency planning, since LILCO would welcome that; it is not the state's right to respond in a real emergency, since the LILCO Plan is expressly designed to defer to the state in that event. It is only the state's right to prevent an operating license from being issued. And that is not "usurped" either; it is preempted.

The Intervenors have been arguing for over two years that New York State and Suffolk County must give permission to LILCO to operate its nuclear power plant or that plant cannot open. They are arguing once again that because the State and the County have not authorized LILCO to act and respond to an emergency, LILCO is acting illegally. This is the issue that the Brenner Board decided in denying Suffolk County's motion to terminate this licensing proceeding. The decision to plan for an emergency at Shoreham is not New York State's or Suffolk County's (or LILCO's) to make; it has been made by Congress, through the Nuclear Regulatory Commission, and the regulatory process of the NRC governs actions to be taken in planning and responding to an emergency at Shoreham.

B. Activity That Is Not Prohibited Is Allowed

The Intervenors argue that LILCO's burden is to show a positive grant of authority by the state. They cite no regulation or caselaw for this proposition. Instead, they set up a straw man by arguing that it is a "basic" precept of law that the Tenth Amendment allows government, not LILCO, to protect the health, safety, and welfare of the public. Intervenors' Response at 10-11.6/ And so it is, within certain constraints placed upon the states by

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6/ The Intervenors also argue that LILCO has not met its burden of proof under 10 C.F.R. §2.732 because FEMA has "found" that the LILCO Plan is deficient as to the legality of the Plan and LILCO has not rebutted the presumption of this FEMA "finding." Intervenors' Response at 21-25. The FEMA report identifies certain legal authority "concerns" that FEMA raised during the course of its review of the LILCO Plan. These "concerns" are not evidence entitled to a rebuttable presumption. FEMA has expressed no view that any activity in the LILCO Plan is "illegal." The issue of LILCO's legality in planning for or responding to an emergency at Shoreham is not one of the issues that has been given to FEMA for decision as part of its agency's expertise. The Intervenors themselves recognized that the issue of legal au-

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the federal system of government, constraints that preempt any state laws prohibiting or preventing emergency planning from being carried out at a nuclear power plant.

But there is another basic precept of law that explains why the LILCO Transition Plan is legal: activity that is not prohibited by law is permitted. See, e.g., Lanzetta v. New Jersey, 306 U.S. 451, 452 (1939) ("[a]ll are entitled to be informed as to what the State commands or forbids"). That is why LILCO need not cite laws allowing it to respond to an emergency at Shoreham. LILCO has made clear its intention to activate the emergency plan if an emergency occurs. It has put in place the means to make such a plan work. This satisfies its burden of proof.

If the Intervenors wish to challenge LILCO's legal authority to act, they must come forward with statutes or regulations that prohibit LILCO's behavior. Indeed, this was the initial approach the Intervenors took to the issue of legal authority, citing specific statutes that allegedly prohibit

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thority was a concern, not a finding, for FEMA when they stated in their proposed findings that "FEMA has recognized that this [LILCO's legal authority to implement its plan] is a significant issue which must be resolved before a license could be issued, even assuming arguendo that the Plan is otherwise satisfactory." Intervenors' Proposed Findings at 4 n. 2.

In addition, here the Intervenors argue that FEMA's legal authority concerns are entitled to a rebuttable presumption, but at the same time have rejected out of hand FEMA's actual findings on NUREG-0654 criteria, stating that "given the highly contested nature of this proceeding on virtually every contention, there is no presumptive effect to be accorded to the FEMA testimony," Intervenors' Proposed Findings at 11, and that "both FEMA and the Staff have basically performed only a paper review of the plan, which was not particularly helpful to the Board," Intervenors Proposed Findings at 11. See also the criticisms of the FEMA review on pages 12-13 of the Intervenors' Proposed Findings. The Intervenors do not explain why findings within the purview of FEMA's expertise are not entitled to the presumption, while concerns expressed outside of the agency's expertise are.

specific behavior in the LILCO Plan, because the Intervenors understand that what is not prohibited is allowed. They have now essentially abandoned that approach -- because it is clear that the statutes do not prohibit any of the activities to be taken under the LILCO Plan -- and are asserting a vague "police power" theory under which LILCO's activities "usurp" government.

But if affirmation is deemed to be necessary by the Board, LILCO has the authority under FCC regulations previously cited by LILCO to make protective action recommendations and announce them to the public over the radio (see LILCO's August 6 Motion for Summary Disposition at 64-68); it has the authority to assess the accident at the power plant and to discuss with the public the potential consequences of that accident under Article 2-B of N.Y. Executive Law (see below); under its charter, it has the express power to produce electricity and to take all action "necessary or convenient" to produce that electricity, including to plan a response within governmental regulations to an accident at a generating plant if such a response is required in order to operate that generating plant (see LILCO Brief on Contentions 1-10 at 35-38); and "utility plans" have been expressly authorized by Congress under the Atomic Energy Act and in three successive NRC authorization acts authorizing utility plans (see LILCO's August 6 Motion for Summary Disposition at 6-42, and LILCO's October 15 Reply at 19-46). Therefore, the activities to be taken under the LILCO Plan are authorized by law.

C. The Intervenors Have Not Established That LILCO's Activities are Prohibited by State Law

The Intervenors do attempt an argument that some of the statutes cited in Contentions 1-10 prevent a LERO emergency response. Since the statutes quite clearly do not by their terms prohibit anything LILCO proposes to do,

the Intervenors argue for a creative interpretation. But their theory simply will not withstand scrutiny.

As to the specific statutes cited in the contentions that are penal in nature (N.Y. Penal Law §§ 165.05, 190.25(3), 190.05, 195.05, 240.20(5)), if the statutes are ambiguous as to their coverage, the Board must strictly construe them because they carry criminal penalties. Unless the alleged conduct falls squarely within a proscription, there can be no finding that the conduct violates the statute. Dunn v. United States, 442 U.S. 100, 112 (1979).

A reading of the statutes cited in Contentions 1-10 reveals that, for example, "joy riding" and impersonating a police officer have nothing to do with the activities to be taken under the LILCO Plan. This in part may account for why, some 14 months after the contentions were proposed, the Intervenors are arguing a generalized "police power" theory prohibiting LILCO's activities, rather than relying upon the statutes that were used in attempting to create adequately specified contentions in the first instance.

D. Article 2-B Authorizes Private Organizations' Emergency Responses

As to the non-penal stautes and laws cited by the Intervenors (N.Y. Veh. & Traf. Law §§ 1102, 1114, 1602; N.Y. Transp. Corp. Law § 30; N.Y. Exec. Law § 20 et seq.; Suffolk County Sanitary Code, Art. 12; Code of the Town of Brookhaven, Chap. 30, Art. X), they likewise cannot be read to prohibit LILCO's emergency planning activities.

Obviously these statutes do not prohibit anything LILCO proposes to do. They are cited rather because the Intervenors think they imply a prohibition. The Intervenors' entire case, to the extent it is based on these statutes, is one of implication. But no such implication can properly be drawn. The Intervenors argue that the statutes, by naming certain entities

that are allowed to do certain things, prohibit everyone else from acting, under the principle of "expressio unius est exclusio alterius" (the specific mention of one thing implies the exclusion of others). The Intervenors use this principle in an attempt to support their novel theory that LILCO must show an affirmative delegation of power before it can claim to perform the functions it does perform under the LILCO Plan, Intervenors' Response at 48, and to argue that under Article 2-B of New York Executive Law, emergency planning and disaster response activities have been delegated only to state and local governments, prohibiting LILCO or LERO from participating in emergency planning and response, Intervenors' Response at 56-73.

Unfortunately for the Intervenors' argument, New York State has already gone on record against it with respect to Article 2-B. Suffolk County made the same argument in December 1982 in seeking to enjoin the New York State Disaster Preparedness Commission (DPC) from considering a radiological emergency response plan for Suffolk County other than a plan submitted by the County. In a suit brought in the New York Supreme Court, the County argued that under Article 2-B, the local governmental entity has the exclusive authority to prepare and submit a disaster preparedness plan to the DPC for its consideration and approval, and that therefore the DPC could not consider the plan of a public utility, just as the Intervenors are now arguing that Article 2-B precludes disaster response activities by anyone other than a state or a local government. However, New York State disagreed with Suffolk County. In its brief in support of LILCO's motion to dismiss the County's suit, New York State asserted the following:

15. Executive Law [Article 2-B] Section 23 provides in pertinent part:

> (1) Each County, except those contained within the City of New York, and each city is authorized to prepare disaster preparedness plans. The disaster preparedness commission shall provide assistance and advice for the development of such plans.

16. Manifestly, this section provides the counties with the "authority" to submit plans to the Commission but does not give the counties exclusive authority. The legislature never indicated that the counties are the sole entities to submit disaster preparedness plans. To the contrary, Article II.B of the Executive Law authorizes the public and private sector to prepare for and meet disasters of all kinds.

Affirmation in Support of Respondent's Motion to Dismiss and in Opposition to Petitioner's Motion for a Preliminary Injunction (Attachment 1 to this brief) at 5 (emphasis added). No plainer statement of the meaning of state law on emergency planning could be imagined. This explanation is in direct contradiction to the position New York State and Suffolk County are now taking before this Board.

Moreover, there is no reason to apply expressio unius here, where the language of the statutes is clear. "Where the language of a statute is clear and unambiguous, the courts may not seek other interpretations in order to restrict or extend its meaning." Mykolin v. Consolidated Edison Co. of New York, 89 Misc. 2d 193, 389 N.Y.S. 2d 996 (1976), citing Meltzer v. Koenigsberg, 302 N.Y. 523, 99 N.E.2d 679 (1951).

Finally, expressio unius works more in LILCO's favor than the Intervenors'. If, as the Intervenors assert, expressio unius "is a universal principle in the interpretation of statutes" (Intervenors' Response at 47-48) then it ought to be applied to the criminal statutes cited by the Intervenors as well as the civil ones. Since those criminal statutes expressly prohibit

certain behavior ("joy riding," for example), they must by implication authorize other, unmentioned activities. New York State has expressly chosen to prohibit joy riding, impersonating an officer, interfering with a public official, etc.. But it has not prohibited "directing traffic," for example, because the harm that the State wanted to prevent was not "directing traffic" (as bystanders or motorists may have to do, for example, after an auto accident), but rather such things as obstructing traffic, misleading people, and so forth.

Latin rules of thumb like expressio unius can be manipulated to prove all sorts of absurd things; here expressio unius is used by the Intervenors to show that citizens may not do anything that they are not expressly authorized to do by statute. Thus, if a motorist, driving down the road on a rainy night, discovers a bridge has been washed away, the Intervenors would say he is forbidden by law to block the highway leading to the bridge and warn other motorists to turn back. With the same reasoning, the Intervenors support the absurd notion that a person may not remove a stalled car from traffic without a government permit. This reasoning has nothing whatsoever to recommend it.

II. The Governments' Responses In An Emergency Moot Contentions 1-10

A. No Further Hearings Are Necessary

In response to LILCO's "realism" argument, that in a real emergency governments would participate and therefore the allegations of illegal action in Contentions 1-10 are moot, the Intervenors have two responses: (1) they have not been given an adequate opportunity to present evidence on this issue,7/ and (2) a governmental response "would not cure LILCO's lack of

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7/ Apparently the Staff agrees with this argument. See Staff October 4 Brief, at 27 ("[t]he other parties should be afforded the opportunity to de-

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legal authority," Intervenors' Response at 5 n. 4. The Intervenors are wrong on both counts.

First, the Intervenors have never articulated what additional evidence they might produce. Even the affidavits filed with the Intervenors' September 24 brief fail to articulate what governmental response would be forthcoming in a real emergency by qualifying everything with "arguendo" and "assuming," and take the opportunity only to characterize the existing record in a particular manner. The Intervenors in two lengthy filings (over 200 pages) on the legal authority contentions have never articulated what necessary additional evidence they might show in further hearings.

Second, as previously outlined in some detail in LILCO's filings, all parties had ample notice that the realism argument would be made by LILCO beginning with filings over a year ago. See LILCO's November 19 Brief on Contentions 1-10 at 39-40, 42-46.

Third, the parties not only had notice that these arguments would be made, but they had ample opportunity to present evidence regarding the response that might be forthcoming from the government during an emergency. LILCO presented that sort of evidence in a wide variety of issues ranging from shadow phenomenon (which was litigated almost a year ago), to role conflict, to traffic control, to the issue of a Shoreham-specific New York State Plan, to ingestion pathway issues. See LILCO's November 19 Brief on Contentions 1-10 at 9-12, 48-52. The Intervenors moved to exclude this evidence. Id. at 48-52.

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termine whether they wish to make a focused evidentiary presentation with respect to these Contentions before they are resolved").

The fact is that the Intervenors have had notice and opportunity to present evidence on the issue of governmental response. They chose not to present a single witness who could discuss what that response might be, and they have consistently refused in testimony and in pleadings to articulate what that response might be. They have not even described the additional evidence that they would want to offer. They are simply evading the question.

B. The Governments' Response Would Cure Any "Illegality"

Because the Intervenors have refused to present evidence on this issue, LILCO is entitled to two presumptions: (1) that were evidence to be presented, it would be contrary to the Intervenors' position, Public Service Co. of New Hampshire (Seabrook Station, Units 1 &2), ALAB-471, 7 NRC 477, 478, rev'd as to other matters, CLI-78-14, 7 NRC 952 (1978), and (2) that the government response would be responsible, not irrational, Duke Power Co. (Catawba Nuclear Station, Units 1 & 2), LBP-84-37, 20 NRC ___, slip op. at 54 (Sept. 18, 1984). And there is no question but that under New York State law, that response would cure any alleged "illegality" in LILCO's implementation of the offsite emergency plan it has prepared.

Under Article 2-B, the Governor of the State of New York has the authority (and LILCO would argue the obligation) to take control of any emergency response for the State, including the response of local volunteer organizations such as LERO, N.Y. Exec. Law Art. 2-B §§ 24.7, 28, 29, 29-a, 29-b; the chief executive of a locality has similar authority for his territory, id. at § 24, 25. Thus, LILCO's response to the emergency, including determining the extent of the emergency, making protective action recommendations, alerting citizens to the emergency, and broadcasting recommendations

over the radio, would be coordinated by the Governor and taken with his approval. The LILCO Plan provides for coordination with government officials should they choose to participate in an emergency response at Shoreham. See LILCO's November 19 Brief on Contentions 1-10 at 52-66.

As for the traffic response, including the actions of traffic guides under the LERO Plan, they would be coordinating their actions with policemen sent to each post. LERO traffic guides are trained to turn over posts to policemen when policemen arrive to respond to an emergency and to stay to assist the policemen should they require or request assistance. LILCO Transition Plan, OPIP 3.6.3, p. 11 of 46; Babb et al., ff. Tr. 11,140, at Vol. 5, Att. 20, Module 12.8/ Under New York State law, a citizen acting at the direction of a policeman is exempt from any liability resulting from the citizen's assistance under the policeman's direction. N.Y. Civ. Rights Law § 79.f. Clearly the intent of this statute is to encourage citizen cooperation with police of the precise sort that is contemplated in the LILCO Plan.

C. The Intervenors Have Not Established That "Chaos" Would Result

In its October 22 Order, one of the questions the Board asked the parties to answer is this:

> 3. In connection with LILCO's realism argument, what affect 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

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8/ Under the LILCO Plan, traffic guides are posted at all major intersections within the 10-mile EPZ. The Intervenors argue that there is no assurance that police would respond by going to the major intersections. But in a good faith attempt to respond in an evacuation, where else would officials send them?

> in the event of a radiological emergency" at Shoreham?

October 22 Order at 3-4. The Intervenors do not answer the Board's question in their response. Instead, they invite the Board to "withdraw" the question, arguing that any response would be "speculation," Intervenors' Response at 88-89, and ask the rhetorical question "and how can one predict whether a response will result in chaos, etc. when there is no evidence of what that alleged response is going to entail?" Intervenors' Response at 90.

In fact, there is evidence as to what that will entail, from LILCO witnesses and the Governor's own words in a press release; there is also the presumption that arises from the silence of County and State witnesses on this issue. Only the Intervenors have not presented evidence on what their response would be. And at the same time that they refuse to make any statements about the extent of that response, they insist that an evidentiary hearing is necessary on the issue.

The Intervenors argue in their response that "the County and State dispute that the State and County could or would do [various acts in an emergency response]." Intervenors' Response at 90 n. 61. They cite for that proposition their statement of material facts in dispute. But while the County and State raise the issue of whether they would respond as a "material fact as which there is a genuine dispute," see ¶¶ 1-3, 6, and 7, they do not offer any disputed facts on the issue, and they did not offer any evidence.9/

9/ In fact, none of the "material facts in dispute" listed in Attachment B to the Intervenors' September 24 brief is a "fact" at all. They are simply summary statements of the Intervenors' arguments on issues that have already been litigated in this proceeding and upon which an ample record has

(footnote continued)

III. The Activities in Contentions 1-4, 9, and 10 Are Not Essential To A Finding of Adequacy

As to LILCO's argument that the functions challenged as illegal in Contentions 1-4, 9, and 10 (resulting, in essence, in an "uncontrolled" evacuation plan) are not necessary for a finding of adequate planning (the "immateriality" argument), the Intervenors argue that (1) they need to present further evidence on this issue and (2) these activities are required. Intervenors' Response at 82-88.

The activities challenged in Contentions 1-4, 9, and 10 all revolve around LILCO's traffic plan. While the Intervenors suggest that they were not on notice that the "uncontrolled" evacuation argument would be made, and therefore that they must be allowed the opportunity to present additional evidence, Intervenors' Response at 3-5, the record shows that they were on notice since the beginning of this litigation that LILCO might argue that an uncontrolled evacuation was adequate10/, see LILCO's November 19 Brief on

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(footnote continued)

been developed for the Board to make a decision. For example, "material fact" 4, "whether an essential part of emergency preparedness for a Shoreham emergency is the existence of the capability to implement actions such as those set forth in Contentions 1-4, 9 and 10, when, and as the need arises" is a question of law that has been briefed by the parties; "material fact" 8, whether LERO traffic guides "are adequately trained to assist police should they participate in an emergency" was litigated in the training issues; "material fact" 9, whether "the LERO organization [would] coordinate its activities with State and County officials" was litigated as part of Contention 92; "material facts" 10-16, 18-23, were litigated as part of the traffic contentions; "material fact" 24, whether Connecticut has agreed to implement the LILCO Plan, was the subject of several pieces of testimony filed and litigated as part of Contention 24.R; and so forth.

10/ The County's own contention (Contention 1) alleges that LILCO cannot legally assure that motorists will use the prescribed routes and that therefore the evacuation time estimates are inaccurate; how then can the Intervenors

(footnote continued)

Contentions 1-10 at 39-40.

Moreover, they have never articulated what evidence it is that must be in the record. Thousands of pages of evidence are in the record regarding the traffic plan; New York State, Suffolk County, the NRC Staff, and LILCO all presented witnesses on traffic time estimates both for controlled and uncontrolled evacuation. While t e County lists in its "material facts as to which there are disputes" many items related to traffic, the items listed have all been litigated. In short, there has been no showing of facts in dispute; the Intervenors have never articulated what additional evidence would be required to address the issues they claim are in dispute; they had clear notice and have litigated the uncontrolled evacuation scenario; and they are now simply trying to have a second run at the traffic issues. They should not be allowed the opportunity.

Finally, the Intervenors have not cited any regulation, caselaw, or NUREG guideline that would require an offsite plan to include the activities listed in Contentions 1-4, 9, and 10. See, e.g., Intervenors' Response at 82-88. There is simply no support for their argument that these activities are required.

(footnote continued)

seriously claim surprise at LILCO's showing that even without traffic control the time estimates would be acceptable?

Even before the contentions were drafted, LILCO advised (on May 26, 1983) that an uncontrolled traffic plan was feasible. See LILCO's Brief on Contentions 1-10, Nov. 19, 1984, at 40. More important, LILCO presented evidence on the issue -- an analysis designated KLD TM-77 (see Intervenors' Finding ¶539) that addressed the evacuation time estimates under an "uncontrolled" scenario. If the Intervenors did not think that the uncontrolled scenario was an issue, why did they think LILCO was presenting evidence on it?

IV. This Board Should Decide or Dismiss Contentions 1-10

In response to the Board's first question in its October 22 order

> What action should this Board 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?

the Intervenors continue to urge this Board not to decide Contentions 1-10, arguing that the Board should wait for a state court decision. This does not answer the Board's question, which asks the parties to assume there is no decision from a New York State court at the time the Board's decision is issued.

As LILCO stated in its October 15 Reply to the responses to its motion for summary disposition on Contentions 1-10 at 3-16, and reiterated in its November 19 Brief on Contentions 1-10 at 39-40, LILCO urges the Board to either decide Contentions 1-10 or dismiss them because the Intervenors have not met the burden of going forward on these Contentions. The Intervenors have not articulated to this Board why their Contentions continue to be viable when both LILCO and the NRC Staff agree that the statutes cited in the Contentions do not appear to prohibit any of the activity to be taken under the LILCO Plan; what the Board is to do about the fact that some of the issues raised in the Contentions will not be decided by the state court proceeding; or how a Board decision to hold open indefinitely Contentions 1-10 squares with the Board's duty to resolve promptly contentions before it, see generally Statement of Policy on Conduct of Licensing Proceedings, CLI-81-8, 46 Fed. Reg. 28,533 (May 27, 1981), especially in light of the advanced state of these proceedings.

As part of their argument, the Intervenors assert that "NRC Boards have no expertise in deciding state law issues." To the contrary, with the Intervenors now arguing that the actions to be taken under the LILCO Plan are "usurping police powers" instead of alleging that particular statutes prohibit activities taken under the LILCO Plan, this Board is in a unique position to decide the "legal authority" issues. It alone has heard the testimony of what actions LILCO intends to carry out under the LILCO Plan. How one understands and expresses the nature of those actions is at the very heart of the County's argument regarding "usurpation" of police powers.11/

Finally, while it is true that briefs will be before the state court on these issues by December 1, see Intervenors' Response at 13, 19, those briefs are on LILCO's motion to dismiss. If LILCO prevails, the proceeding will end; but if LILCO's motion is denied, it will not. Further adjudication may or may not require additional briefings, discovery, and the taking of evidence.

V. Conclusion

The Intervenors have cited dozens of cases that they assert support their arguments on Contentions 1-10. In fact, the cases are either irrelevant to this case or support propositions that no one denies. More revealing are the propositions for which the Intervenors cite no authority at all:

11/ The Intervenors also argue, without any citation in support, that the limit on federal question jurisidiction of federal district courts where the federal question is raised as a defense, see Franchise Tax Board v. Construction Laborers Vacation Trust, 463 U.S. 1 (1983), limits the Licensing Board's jurisdiction on Contentions 1-10. Intervenors' Response at 81. This Board has the authority under 10 C.F.R. § 2.104(c)(1)-(7) to "consider any matters in controversy among the parties." This includes Contentions 1-10. If the Board finds, as the Intervenors argue, that Contentions 1-10 are beyond the scope of the NRC operating license regulations, then the Contentions should be dismissed as irrelevant to this proceeding.

- Planning for an emergency is a "police power" (Intervenors' Response at 28-29, 39)

- LILCO has the burden of proving that New York law authorizes the activities to be taken under the Plan (Intervenors' Response at 25-27)

- Government participation would not "cure" LILCO's alleged lack of legal authority (Intervenors' Response at 97-99)

- Traffic control is required by NRC regulations (Intervenors' Response at 82-88)

- The Board lacks jurisdiction to decide the issues (Intervenors' Response at 81)

They also cite no evidence they would present if they were given the additional hearings they say they need. In short, on all the crucial points of their argument, the Intervenors have presented no authority whatsoever.

As to all of Contentions 1-10, LILCO has given the Board four grounds upon which to find that its proposed activities are not unlawful:

(1) Because the State or the County or both will participate in emergency response, thereby curing legal deficiencies (the mootness or "realism" argument);

(2) Because the specific statutes cited by the Intervenors in Contentions 1-10 do not prohibit the actions to be taken under the LILCO Plan;

(3) Because the actions to be taken under the LILCO Plan do not involve an exercise of any "police power"; and

(4) Because federal law preempts state law in the field of radiological health and safety.12/

12/ There are really three preemption arguments: preemption by conflicting laws, preemption of the field, and preemption by impossibility of complying with State and Federal law. All three apply here. See LILCO's Motion for Summary Disposition of Contentions 1-10 (The "Legal Authority" Contentions).

In addition, the activities alleged in Contentions 1-4, 9, and 10 to be prohibited are not necessary for the Board to find that the LILCO Plan is adequate under NRC regulations (the "immateriality" argument), and there is express authority under FCC regulations, Article 2-B of the New York State Executive Law, NRC regulations, and three NRC Authorization Acts providing for utility plans, authorizing LILCO to respond to an emergency at Shoreham. Consequently, LILCO is entitled to judgment in its favor on Contentions 1-10.

Respectfully submitted,

LONG ISLAND LIGHTING COMPANY

Kathy E. B. McCleskey

James N. Christman
Kathy E. B. McCleskey

Hunton & Williams
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Post Office Box 1535
Richmond, Virginia 23219

DATE: November 29, 1984

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ALBANY

In the Matter of the Application of PETER F. COHALAN, as County Executive, on behalf of the COUNTY OF SUFFOLK, and JOHN C. WEHRENBERG, as Presiding Officer of the SUFFOLK COUNTY LEGISLATURE, and the COUNTY OF SUFFOLK,

Petitioners,

For an Order pursuant to Article 78 of the Civil Practice Law and Rules,

-against-

The NEW YORK STATE DISASTER PREPAREDNESS COMMISSION, and WILLIAM HENNESSY, as Chairman of the NEW YORK STATE DISASTER PREPAREDNESS COMMISSION, or his Successor in Office,

Respondents.

MOTION TO DISMISS ON GROUNDS OF OBJECTIONS IN POINT OF LAW

PLEASE TAKE NOTICE that upon the petition of Peter F. Cohalan, et. al., verified on December 6, 1982, and the affirmation of Vida M. Alvy, Assistant Attorney General, affirmed on December 9, 1982, Robert Abrams, Attorney General of the State of New York, attorney for respondents, will move this Court pursuant to CPLR 7804(f), at a Special Term thereof to be held in and for the Third Judicial District, at the Albany County Court House, Albany, New York, on December 10, 1982 at 9:30 a.m. or as soon thereafter as counsel may be heard for an order denying the relief sought and dismissing the petition on the ground of objections in point of law in that:

> Petitioners have failed to state a claim upon which relief can be granted.

WHEREFORE, respondents respectfully request this Court to deny petitioners' request for a preliminary injunction, to grant this motion to dismiss the petition upon the above-stated ground and alternatively in the event that motion is denied for leave to serve an answer, and for such other and further relief as this Court may deem proper.

Dated: Albany, New York
December 9, 1982

ROBERT ABRAMS
Attorney General of the
State of New York
Attorney for Respondents
The Capitol
Albany, New York 12224
(VIDA M. ALVY, of Counsel)
Telephone: (518) 473-5095

TO: MR. DAVID I. GILMARTIN
Suffolk County Attorney
Veterans Memorial Highway
Hauppauge, New York 11787

STATE OF NEW YORK
SUPREME COURT : COUNTY OF ALBANY

In the Matter of the Application of PETER F. COHALAN, as County Executive, on behalf of the COUNTY OF SUFFOLK, and JOHN C. WEHRENBERG, as Presiding Officer of the SUFFOLK COUNTY LEGISLATURE, and the COUNTY OF SUFFOLK,

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-against-

The NEW YORK STATE DISASTER PREPAREDNESS COMMISSION, and WILLIAM HENNESSY, as Chairman of the NEW YORK STATE DISASTER PREPAREDNESS COMMISSION, or his Successor in Office,

Respondents.

AFFIRMATION IN SUPPORT OF RESPONDENTS' MOTION TO DISMISS AND IN OPPOSITION TO PETITIONERS' MOTION FOR A PRELIMINARY INJUNCTION

VIDA M. ALVY, an attorney duly admitted to practice before the courts of the State of New York, affirms under penalties of perjury pursuant to CPLR 2106, that the following statements are true, except those statements made upon information and belief, which statements she believes to be true.

1. I am an Assistant Attorney General in the office of Robert Abrams, Attorney General of the State of New York, attorney for respondents herein and I make this affirmation in support of respondents' motion to dismiss this petition and in opposition to petitioners' request for a preliminary injunction.

THIS COURT MUST DISMISS THE INSTANT PETITION.

2. Petitioners, the County Executive of the County of Suffolk, the Presiding Officer of the Suffolk County Legislature and the County of Suffolk, commence this Article 78 proceeding in the nature of prohibition, to enjoin, pendente lite and permanently, respondents from considering and/or approving a Radiological Emergency Response Plan (hereinafter RERP) for the geographic area of Suffolk County, other than a plan submitted by the County of Suffolk.

3. In support of their position, petitioners refer this Court to Executive Law Article 2-B, which they claim provides authority for their contention that only the local governmental entity may prepare and submit a disaster preparedness plan to respondent Disaster Preparedness Commission for its consideration and approval and that therefore, respondents must be enjoined from considering the plan of a public utility company.

4. An examination of Article 2-B of the Executive Law, as well as the appropriate legal standards for the issuance of a writ of prohibition, reveals that petitioners' arguments must be dismissed as meritless.

5. "Prohibition is an extraordinary remedy to be invoked only where a clear right to relief is established and the action taken is clearly without jurisdiction or in excess of jurisdiction". Matter of Rainka v Whalen, 73 AD2d 731, 732 (3d Dept, 1979), affd 51 NY2d 973 (1980). Petitioners have not established the right to such relief.

6. Moreover, "[e]ven when the petition presents a 'substantial claim' of an absence of jurisdiction or an act in excess of jurisdiction, prohibition still may be deemed inappropriate after consideration of such factors as the 'gravity of the harm which would be caused by an excess of power' or 'whether the excess of power can be adequately corrected on appeal or by other ordinary proceedings at law or in equity' ". Matter of Nicholson, et. al., v State Commission on Judicial Conduct, et.al, 50 NY2d 597, 605-606 (1980).

7. Indeed, a writ of prohibition is not a proper remedy where, as here, any action, order or decision by the Disaster Preparedness Commission that may be made in this matter is reviewable in a certiorari proceeding. Village of Camillus v Diamond, 76 Misc 2d 319, 320 (Co. Ct. Monroe Co. 1973), affd, 45 AD2d 982 (4th Dept, 1974) cert denied 421 US 931 (1975).

8. An examination of Article 2-B of the Executive Law reveals that petitioners cannot establish a clear right to the relief sought.

9. In amending the Executive Law in Chapter 640 of the Laws of New York of 1978, in relation to disaster preparedness, the New York State Legislature found "that a joint effort, public and private, (emphasis added) is needed to mobilize the resources of individuals, business, labor, agriculture, and government at every level - federal, state and local - for effective organization to prepare for and meet natural and man-made disasters of all kinds (Laws of New York, 1978 Chapter 640).

10. Thus, the Legislature established respondent Disaster Preparedness Commission and authorized the Commission to:

> ...meet at least twice each year at such other times as may be necessary. The agenda and meeting place of all regular meetings shall be made available to the public in advance of such meetings and all such meetings shall be open to the public... Executive Law §21.2.

11. The Legislature vested in the Commission the power to:

> ...a. study all aspects of man-made or natural disaster prevention, response and recovery;
>
> b. request and obtain from any state or local officer or agency any information necessary to the commission for the exercise of its responsibilities;
>
> c. prepare state disaster preparedness plans, to be approved by the governor, and review such plans and report thereon by March thirty-first of each year to the governor and the legislature. In preparing such plans, the commission shall consult with federal and local officials, emergency service organizations, and the public as it deems appropriate; ... Executive Law ¶21.3 a,b,c.

12. Such a grant of authority by the Legislature clearly empowers respondents to meet publicly and consider disaster preparedness plans submitted by public and private entities.

13. Yet, petitioners seek a judgment enjoining respondents from performing their statutorily authorized responsibilities of meeting and considering Radiological Emergency Response Plans submitted to them. Surely, such [illegible] would be contrary to the intent of the Legislature and contrary to case law.

14. In support of their position, petitioners argue that Executive Law §23 vests exclusive authority with local governments to present disaster preparedness plans such as RERP to respondent Commission.

15. Executive Law §23 provides in pertinent part:

> 1. Each county, except those contained within the city of New York, and each city is authorized to prepare disaster preparedness plans. The disaster preparedness commission shall provide assistance and advice for the development of such plans.

16. Manifestly, this section provides the counties with the "authority" to submit plan to the Commission but does not give the counties exclusive authority. The Legislature never indicated that the counties are the sole entities to submit disaster pareparedness plans. To the contrary, Article 2-B of the Executive Law authorizes the public and private sector to prepare for and meet disasters of all kinds.

17. Thus, as petitioners have not established a clear right to the relief requested, this petition must be dismissed.

18. Moreover, petitioners have failed to state a claim for relief pursuant to CPLR §3001.

19. An action for a declaratory judgment is appropriate to challenge a statute or a quasi-legislative administrative action. Matter of Lakeland v Onondaga County Water Authority, 24 NY2d 400 (1969).

20. In the case at bar,petitioners seek to challenge the actions of an administrative agency before the agency has an opportunity to act.

21. Clearly, such an action is premature and not ripe for controversy. Thus, an action for declaratory judgment does not lie.

PETITIONERS' APPLICATION FOR A PRELIMINARY INJUNCTION MUST BE DENIED.

22. It is well established that there are three prerequisites which must be shown before this Court can find that petitioners are entitled to a preliminary injunction:

a) A strong likelihood of success on the mertis (i.e., a clear right to the relief sought);
b) that they will be irreparably injured if the preliminary injunction is not granted; and
c) that the equities balance in their favor.

23. In the case at bar, petitioners have failed to demonstrate a clear legal right to the relief sought as can be seen by paragraphs 5-17 of this affirmation.

24. Moreover, petitioners clearly will not be irreparably injured if the preliminary injunction is not granted (see affidavit of Donald B. Davidoff, attached hereto as Exhibit I and incorporated herein).

25. Finally, the equities balance in favor of respondents.

26. Petitioners will have an opportunity to submit their "RERP" to respondents when it is available.

27. In the interim, the submission of the plan by the Long Island Lighting Company will give the respondents an opportunity to consider this plan and have it available in the event that petitioners fail to timely present a plan to respondents which has been approved by their county legislature.

28. In addition, in allowing respondents to exercise their statutory right in holding a meeting of their Commission, it will give respondents an opportunity to entertain a public

dialogue on the merits of the utility sponsored preparedness plan.

29. Thus, for the reasons given above, the relief sought should be denied and the petition dismissed.

Dated: Albany, New York
December 9, 1982

Vida M Alvy

VIDA M. ALVY

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

- -X

In the Matter of the Application of PETER F. COHALAN, as County Executive, on behalf of the COUNTY OF SUFFOLK and JOHN C WEHRENBERG, as Presiding Officer of the SUFFOLK COUNTY LEGISLATURE, and the COUNTY OF SUFFOLK,

Petitioners,

- against -

THE NEW YORK STATE DISASTER PREPAREDNESS COMMISSION and WILLIAM HENNESSY, as Chairman of the NEW YORK STATE DISASTER PREPAREDNESS COMMISSION, or his Successor in Office,

Respondents,

and

LONG ISLAND LIGHTING COMPANY,

Intervenor-Respondent.

- -X

AFFIDAVIT

Index No.

STATE OF NEW YORK)
ss.:
COUNTY OF ALBANY)

DONALD B. DAVIDOFF, being duly sworn, deposes and says:

1. I am the Director of the Radiological Emergency Preparedness Group of the New York State Disaster Preparedness Commission ("Commission"). In my capacity, I am responsible for the administration of the State's radiological emergency preparedness program.

2. I make this affidavit in support of respondents' motion to dismiss and in opposition to petitioners' motion for a preliminary injunction.

3. The controversy at hand has a history that dates back to the mid-1970s. In 1978, Suffolk County endorsed an emergency preparedness plan that complied with the regulations in existence at that time. In 1979, due to the seriousness of the Three Mile Island incident, new federal regulations concerning off-site emergency preparedness plans were promulgated. See NUREG-0654: FEMA-REP-1. During 1980, Suffolk County and Long Island Lighting Company ("LILCO") attempted to revise the 1978 emergency preparedness plan in order to bring it into compliance with the new federal regulations. Following these negotiations, LILCO and Suffolk County entered into a contract in September, 1981. This contract required LILCO to provide Suffolk County with $245,000 to prepare, within six months, an off-site emergency preparedness plan. In April, 1982, approximately six months later, Suffolk County tendered LILCO's initial monetary advance, which was refused, and categorized its work product completed thus far as "working papers." These "working papers" were obtained by LILCO on April 29, 1982. Thereafter, LILCO formulated an off-site emergency preparedness plan and submitted it to the Commission. Twenty to forty percent of the plan submitted by LILCO consisted of Suffolk County's "working papers."

4. At the meeting that had been scheduled for December 8, 1982, the Commission had intended to receive, from its own staff, a technical evaluation of the plan submitted by LILCO and an analysis of that plan with respect to compliance with appropriate federal regulations. In

recognition of the need to foster cooperation and of the need to provide for essential objectivity and fairness in the exercise of its governmental responsibility, the Chairman of Commission had formally invited petitioner Cohalan to attend the meeting and to comment on and evaluate the technical substance of the plan submitted by LILCO. He had also been offered the opportunity to present or discuss appropriate elements of the plan yet-to-be submitted by Suffolk County. The Chairman of the Commission had promised, in addition, that if Suffolk County were to submit its plan within eight weeks from the Commission's December 8, 1982 meeting, it would have been subjected to the same rigorous review as that of any other plan. Where appropriate, it would have been used to replace, supplement or supercede any plan that might have been found to be acceptable by the Commission. In the spirit of cooperation, the Chairman of the Commission had also offered to extend Suffolk County's time in which to submit a plan to twelve weeks.

5. Had the Commission had the opportunity to receive the viewpoints of all concerned, the Chairman would have proposed a resolution to the Commission. This resolution would have authorized the Chairman to submit the LILCO-developed plan to the Federal Emergency Management Agency ("FEMA") for review and eventual acceptance. Actual

transmission, however, would not have been authorized until the eight week, or twelve week, as the case might have been, waiting period had elapsed. After this period, if FEMA had accepted the plan according to the established procedure, it would have transmitted it, in turn, to the Nuclear Regulatory Commission for consideration in its comprehensive licensing process.

6. Accordingly, if the Commission is permitted to consider the LILCO-submitted plan prior to the submission by Suffolk County of its plan, Suffolk County will not be irreparably harmed because:

(a) Suffolk County will have an ample opportunity to express its viewpoints concerning the LILCO-submitted plan before the Commission votes on whether or not to accept the LILCO-submitted plan;

(b) Suffolk County will have an ample opportunity to present and discuss appropriate elements of the plan yet-to-be submitted by Suffolk County before the Commission votes on whether or not to accept the LILCO-submitted plan;

(c) Suffolk County will have an ample opportunity to finalize its plan, hold public hearings and obtain the approval of the county legislature before the LILCO-submitted plan will

be transmitted to FEMA;

(d) Suffolk County will have an ample opportunity to show the Commission why its plan should replace, supplement or supercede the LILCO-submitted plan, before the LILCO-submitted plan will be transmitted to FEMA; and

(e) Suffolk County will have an ample opportunity to have its plan considered for formal, final approval since the only administrative agency that is authorized to grant such formal, final approval is FEMA, not the Commission.

7. The Commission should be permitted to consider the LILCO-submitted plan in order to exercise its statutory authority to submit an acceptable plan to FEMA.

WHEREFORE, respondents' motion to dismiss should be granted and petitioners' motion for a preliminary injunction should be denied.

DONALD B. DAVIDOFF

Sworn to before me this
[illegible] day of December, 1982.

Notary Public

[illegible]

LILCO, November 29, 1984

CERTIFICATE OF SERVICE

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

I certify that copies of LILCO'S REPLY BRIEF ON CONTENTIONS 1-10 were served this date upon the following by first-class mail, postage prepaid, or (as indicated by an asterisk) by Federal Express.

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DATED: November 29, 1984