UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Board

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

LILCO'S RESPONSE TO INTERVENORS' AND NRC STAFF'S ANSWERS TO LILCO'S RENEWED MOTION FOR SUMMARY DISPOSITION

On March 19, 1985, the NRC Staff and the Intervenors each filed answers to LILCO's February 27, 1985 Renewed Motion for Summary Disposition of Legal Authority Issues on Federal Law Grounds. The NRC Staff asserts in its latest filing an analysis of preemption law which, in LILCO's view, is simply wrong, for the reasons explained in Part III below. The Intervenors in their latest filing release a great deal of smoke in an attempt to establish that the Board and parties must return to square one on the legal authority issues, if we turn to them at all. Through the haze, sensible heads must agree on the following immutable facts:

1. There are ten contentions on legal authority issues now pending before this Board, which were filed by the Intervenors. They have been briefed by the parties at length;1/ the

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1/ LILCO's Motion for Summary Disposition of Contentions 1-10 (the "Legal Authority" Issues), August 6, 1984 (78 pages); Op-

(footnote continued)

final briefs were filed four months ago; and the parties at one time agreed that no further hearings were required to resolve them.2/

2. Despite the Intervenors' best efforts to assure otherwise, these contentions must be decided in order to close the offsite emergency planning proceeding before this Board, which has been in active progress for almost two years.

(footnote continued)

position of Suffolk County and the State of New York to LILCO's Motion for Summary Disposition of Contentions 1-10 (the "Legal Authority" Issues), September 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), October 4, 1984 (29 pages); LILCO's Reply to the Responses to its Motion for Summary Disposition on Contentions 1-10, October 15, 1984 (67 pages); Suffolk County and State of New York Response to ASLB Memorandum and Order Dated October 22, 1984, November 19, 1984 (100 pages); LILCO's Reply Brief on Contentions 1-10, November 29, 1984 (25 pages); NRC Staff's Response Pursuant to the Licensing Board's Memorandum and Order of October 22, 1984, December 7, 1984 (34 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')," October 15, 1984 (11 pages); the Board struck that filing in its October 22 Order as an unauthorized pleading. In addition, recent filings addressing Contentions 1-10 are as follows: LILCO's Renewed Motion for Summary Disposition of Legal Authority Issues on Federal-Law Grounds, February 27, 1985 (11 pages); Answer of Suffolk County and State of New York in Opposition to LILCO's Renewed Motion for Summary Disposition, March 19, 1985 (24 pages); and NRC Staff Response to LILCO's Renewed Motion for Summary Disposition of Legal Authority Issues on Federal Law Grounds, March 19, 1985 (8 pages).

2/ See Tr. 13,823 (LILCO); Tr. 13,831 (Suffolk County), Tr. 13,832 (New York State), Tr. 13,834 (NRC Staff).

3. This Board has jurisdiction to decide the preemption issue; no one has contended or can contend otherwise.

Intervenors assert two basic propositions. The first is that LILCO has deliberately chosen to litigate on the merits, before the New York state court, the key federal preemption issue -- whether state law may be interposed to prohibit LILCO's utility emergency plan, which is authorized and required by Congressional legislation and NRC regulations. The Intervenors' proposition is false, and Intervenors know as much. The Intervenors' second proposition is that LILCO is engaging in unseemly manipulation of judicial processes and forum "footraces" in an attempt to get this Board to address the federal preemption issue before the state court has a chance to do so; Intervenors urge the Board to rebuke this unseemly conduct. Intervenors have much to learn about pots and kettles. The fact is that the preemption issue has been pending before this Board for many months, and the state court knew that before it decided to address state law issues, and not federal ones, initially. LILCO, on the other hand, submits that the following propositions cannot be disputed:

1. Contrary to the assertion in Mr Brownlee's affidavit filed with the Board, LILCO has never represented to any court "that the federal preemption issue . . . should be decided in the State Court Actions."

2. LILCO was hailed into state court as a defendant by the County, the State, and the Town of Southampton; LILCO did not choose that forum.

3. LILCO sought to remove those actions to a federal court on the ground that the complaints themselves raised threshhold issues of federal law requiring an analysis of the Atomic Energy Act and NRC regulations. The County, State and Town argued, to the contrary, that their complaints were based solely on state law and that federal preemption would become an issue, if at all, only after a decision on state law issues. The federal court reluctantly agreed with the County, State and Town and remanded the case to the state court. As a result, on August 14, 1984, LILCO withdrew its its original motion to dismiss based on federal preemption and instead moved to dismiss the complaints in the state court based solely on state law. At that time, LILCO forthrightly informed the state court that LILCO had moved this Board to decide the federal preemption issues.

4. On August 6, 1984, LILCO filed its motion for summary disposition of the legal authority issues before this Board. LILCO argued that, assuming State law would prohibit LILCO's actions under its utility plan (i.e., that the state court would rule as it did), federal law, by authorizing utility plans when state or local governments refuse to plan, preempts the state law.

5. The County, State and Town immediately changed their position and argued to the state court that the claims in their complaints could not be resolved without deciding the federal preemption issue. After briefing, the state court, on October 3, 1984, ruled that it would not address federal preemption at the outset and ordered the parties to brief and argue initially only the state law issues. Thus, the state court knew before it decided to limit its initial consideration to state law issues that the federal preemption issue was already pending before this Board.

6. After the state court's ruling on the state law issues, Mr. Brownlee informed LILCO's counsel that, if LILCO did not raise the federal preemption issue in the state court, the County and State would contend -- despite LILCO's pending motion on federal preemption before this Board -- that LILCO had waived the federal preemption argument for all time and would be precluded by res judicata from having any other forum -- including this Board -- address the federal preemption issue on the merits.

7. In response, LILCO has informed Mr. Brownlee and the state court that it emphatically does not waive the federal preemption issue, that it has already thoroughly briefed that issue before this Board, that it will plead the federal preemption issue before the state court in order to avoid any

inference of waiver, and that it will ask the state court to abstain or otherwise refrain from ruling on the federal issues on the merits so that this Board can do so.

8. It should come as no surprise to anyone that LILCO contends that a federal forum -- this Board -- should address the federal preemption issue, as the state court has issued a declaratory ruling on state law.

Therefore, for the reasons stated below and in previous briefs addressing the issues, LILCO asks that the Board address LILCO's motion for summary disposition on Contentions 1-10, and that the Board grant it.3/

I. Background

On February 23, 1983, following the Suffolk County Legislature's declaration that the County would not do emergency planning, Suffolk County moved to terminate offsite emergency planning proceedings before this Board on the grounds that LILCO could not as a matter of law meet its emergency planning burden under NRC regulations without local government participation in an emergency plan. The County argued that because it had passed resolutions stating it would not participate, and

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3/ As previously stated in a letter to the Board dated March 20, 1985, LILCO requests that the Board not delay its decision on the factual findings in order to include a decision on Contentions 1-10.

because participation was required for an adequate plan under federal regulations, the "utility-only" plan of the sort LILCO was contemplating presenting to the NRC would be deficient as a matter of law and need not be considered by this Licensing Board. LILCO argued that (1) the County's resolutions are pre-empted by the Atomic Energy Act, 10 C.F.R. § 50.47(c), and the Authorization Acts of 1980 and 1982-83, (2) federal law allows utility plans without state or county participation, and (3) federal law requires that the Licensing Board consider such a plan as part of its determination of whether emergency planning for Shoreham is adequate to obtain an operating license for the plant. See LILCO's Brief In Opposition To Suffolk County's Motion to Terminate This Proceeding and for Certification, March 18, 1983, Vol. I, at 63-96.

The Board ruled that the County's resolutions were pre-empted insofar as they attempted to prohibit the Licensing Board from considering a plan submitted by a utility, and that the Atomic Energy Act, pertinent NRC regulations, and the NRC Authorization Acts allow a utility to submit a utility-only plan. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-22, 17 NRC 608, aff'd, CLI-83-13, 17 NRC 741 (1983). LILCO then submitted to the NRC its "Local Offsite Radiological Emergency Response Plan" for the Shoreham Nuclear Power Station.

Following the filing of its Plan by LILCO, the Intervenors responded on July 26, 1983 with approximately 200 pages of contentions. The first ten contentions allege that LILCO's taking various actions contemplated under the Plan -- acts such as making decisions and recommendations, notifying the public of an emergency, and facilitating traffic response, in short, the key elements required to meet NRC emergency planning regulations -- are illegal under specific state and local statutes. LILCO objected to these contentions, arguing that they were just another formulation of the County's previous argument, which it had lost, that a utility could not do emergency planning without state or local participation. See LILCO's Objections to Intervenors' "Revised Emergency Planning Contentions," August 2, 1983. The Licensing Board admitted Contentions 1-10 on August 19, 1983 over LILCO's objection.

While litigation of the other emergency planning issues proceeded, the parties agreed that hearings need not be held to address Contentions 1-10.4/ Briefing of the legal issues raised in Contentions 1-10 was deferred (Tr. 3675) at the suggestion of the parties. See Joint Report by LILCO and Suffolk County Concerning Briefing of Contentions 1-10, November 11, 1983; NRC Staff Status Report on Legal Authority Contentions,

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4/ See footnote 2, above.

November 14, 1983. The Licensing Board observed that Contentions 1-10 involved "issues of New York State law," Tr. 706 (Judge Laurenson), and suggested that the parties take the state law issues to state court. See, e.g., Tr. 715, 2229, 2390, and 3661-62.

In March 1984, Suffolk County, the Town of Southampton, and New York State filed suits in New York State court asking for a declaratory judgment that certain actions contemplated by the LILCO Plan were illegal under specific state statutes. LILCO removed these cases to the U.S. District Court for the Eastern District of New York, Cuomo v. LILCO, Civ. Act. No. 84-2328 (U.S.D.C., E.D.N.Y.) -- where a related (but not identical) preemption issue was already pending before Judge Altimari, Citizens for an Orderly Energy Policy, Inc., et al. v. County of Suffolk, et al., Civ. Act. No. 83-4966 (U.S.D.C., E.D.N.Y.)5/ -- on the grounds that the question of LILCO's legal authority to implement its utility plan can only be considered by looking at federal, and not just state, law. The federal court remanded the complaints based upon Franchise Tax

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5/ The issue before Judge Altimari was whether the federal regulatory scheme overrides Suffolk County's resolutions refusing to participate in emergency planning at Shoreham, i.e., whether it imposed a federal duty on Suffolk County to participate in emergency planning. This issue is distinguishable from that of LILCO's right to undertake emergency planning, in the absence of governmental participation, in order to meet federal licensing requirements.

Board of the State of California v. Construction Laborers Vacation Trust for Southern California, 463 U.S. 1 (1983). In oral argument on LILCO's removal petition, the Court noted that "[i]t makes more sense to me to have the cases stay here in this court. I will make that very clear to you. But I don't think that's the state of the law." LILCO's Reply to the Responses to its Motion for Summary Disposition on Contentions 1-10, Oct. 15, 1984, Att. 2 (May 25, 1984 Cuomo v. LILCO Hearing Tr.) p. 33. The state court cases were remanded to state court in June, 1984.

LILCO filed with this Board in August, 1984 a motion for summary disposition on Contentions 1-10, requesting that the Board assume that the activities challenged in Contentions 1-10 are prohibited by the state statutes cited and asking the Board to rule that the activities are allowed under federal law. The Board stated on October 22, 1984 that it would reserve ruling LILCO's motion for summary disposition on Contentions 1-10 pending action by the state court on the state law issues before it, and set a schedule for further briefings.

In state court, LILCO filed a motion to dismiss alleging that the state statutes cited in the complaints do not prohibit LILCO's emergency planning response.6/ Intervenors filed as

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6/ Because of the Federal District Court's ruling in remanding the lawsuits to state court, LILCO withdrew federal

(footnote continued)

their response a cross-motion for summary judgment, briefing the state law issues and then raising and briefing the issue of preemption, explaining that preemption had already been raised by LILCO before the ASLB. Plaintiffs' Joint Brief in Opposition to LILCO's Motion to Dismiss and In Support of Plaintiff's Cross-Motion for Summary Judgment, Sept. 11, 1984, p. 22-23.7/ At a conference of counsel, the Intervenors urged the state court to take up federal preemption as well as state law issues. Cuomo v. LILCO, Consol. Index No. 84-4615, Sept. 18, 1984, Tr. of Status Conference at 10-14. LILCO argued that the state law issues were properly raised by the complaint but that the federal issues were not yet before the court because LILCO had not filed an answer with affirmative defenses. Id. at 19-27. LILCO also noted that a motion for summary disposition of federal law issues was pending before this Board. Id. at 27. The state court ruled that the parties should file further briefs on the state law issues only. Cuomo v. LILCO, Memorandum and Order, October 2, 1984.

(footnote continued)

preemption as a basis for its motion to dismiss, since the federal court had ruled that this was an affirmative defense rather than an integral part of the cause of action, and moved to dismiss based on New York law.

7/ It is ironic that the State and County have tried to place the federal preemption issues before the state court by pointing to LILCO's filings on that issue before this Board, yet they have argued before this Board that LILCO has chosen to litigate the preemption issues in the state court.

On February 20, 1985, the state court judge issued his decision as to state law issues, ruling that LILCO's activities in pursuing its emergency plan were in violation of the state's police power. Cuomo v. LILCO, Memorandum and Order, February 20, 1985. On February 27, 1985, LILCO renewed its motion before this Board for summary disposition on Contentions 1-10 on the grounds of federal preemption. On March 6, 1985, LILCO filed before the state court judge a draft partial judgment accompanied by a cover letter. The cover letter forthrightly explained that in order to avoid any allegation that LILCO has waived the preemption argument and therefore is estopped from asserting it before the Licensing Board, LILCO would file an answer alleging its affirmative defenses, including federal preemption, accompanied by a motion asking the state court to abstain from any ruling on that issue because it is pending before this Licensing Board.

On March 18, 1985, Judge Altimari ruled in Citizens suit that Suffolk County's acts in passing its resolutions were not in and of themselves preempted acts under federal law. Citizens for an Orderly Energy Policy, Inc. v. Suffolk County, Civ. Act. No. 83-4966, Memorandum and Order (E.D.N.Y. March 18, 1985). The ruling was limited, holding only that the County is not itself required by federal law to adopt its own emergency plan. The Court did not hold that the County could frustrate

LILCO's utility plan by interposing state law. Indeed, the court's reasoning strongly suggests the contrary:

> Certainly the County may not require LILCO to comply with the County's requirements for a satisfactory RERP; whether LILCO's RERP is sufficient is a question for the NRC, and the County may not override the NRC's judgment. Here, however, the County has not passed a moratorium on nuclear plant construction and operation based on the County's opinion that no satisfactory RERP can be devised. Rather the County has adopted the position that a satisfactory RERP is not obtainable. The County has not and cannot supersede the judgement of the NRC on whether or not a license should issue for Shoreham. Once the NRC makes the decision the County's opinion on LILCO's RERP will become academic.
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> An examination of the relevant legislative history in this case leads to a similar conclusion. Congress was well aware of the possibility that local governments might refuse to cooperate in furnishing a RERP. The possibility that a state might frustrate completion of a RERP was expressly addressed from the floor of the Senate. Senator Johnston stated that it was "reasonable to expect" that states might "simply not . . . submit an evacuation plan." 125 Cong. Rec. S. 9473 (daily ed.) July 16, 1979. Senator Simpson commented that "[t]he possibility that . . . a plant under construction could have its permit terminated because the state where it is sited has failed to form a plan . . . is not a matter to which we should give only cursory attention." Id.
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> The Senate debate on this point indicates that the Senate was aware that a local government could refuse to participate in emergency planning. The Senate did not,

> however, adopt an amendment to require local government participation.
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> Rather than require participation, Congress provided that the utility could provide a plan.

Id. at 26-31 (emphasis added). The NRC Staff and the Intervenors each replied to LILCO's renewed motion for summary disposition on March 19, 1985.

II. The County's Opposition To LILCO's Renewed Motion

The Intervenors urge the Board to summarily deny LILCO's renewed motion for summary disposition on the conflicting grounds that (1) there is no statement of the legal authority issues now before the Board that could be the basis for summary disposition and (2) the legal authority issues remaining before the Board have been asserted in state court and should be decided there. These arguments are addressed in turn below.

A. Contentions 1-10 Are Pending Before This Board And Should Be Decided By This Board

The Intervenors now argue that there is not an adequate statement of "LILCO's legal authority" to carry out its Plan and therefore LILCO's Renewed Motion for Summary Disposition must be denied. This argument makes no sense in light of the record already developed before this Board on Contentions 1-10.

1. The State Court Decision Does Not Resolve Contentions 1-10

While the Intervenors often recite that it is LILCO that has the burden of proof in this proceeding, see, e.g., Intervenors' Answer at 4, it is the Intervenors' burden in the first instance to sustain their contentions. The Intervenors assert in the first portion of their contentions that certain acts contemplated under the LILCO Plan are illegal under state law. The second portion of each of Contentions 1-10 asserts that the state law illegality results in LILCO's inability to meet NRC requirements, and therefore a license for Shoreham cannot issue. The Intervenors now claim that LILCO, by advising the Licensing Board of the state court decision that the contested acts are illegal under state law, has "admitted" Contentions 1-10, rendering LILCO's Motion for Summary Disposition "nonsensical." Intervenors' Answer at 12. But the state court decision goes only to the first part of each of Contentions 1-10 -- the assertion that certain acts contemplated under the Plan are illegal under state law -- and merely sets up the second part of each of those contentions, namely what effect such a determination has as to LILCO's compliance with NRC law. It is that issue which was addressed in LILCO's initial motion for summary disposition and which LILCO has now renewed. For purposes of briefing Contentions 1-10 before this Licensing Board, LILCO

has always assumed that the state law assertions in Contentions 1-10 were true. See, e.g., LILCO's Motion for Summary Disposition of Contentions 1-10 (the "Legal Authority" Issues), August 6, 1984, at 2. The state court decision does not change the posture of Contentions 1-10 before this Board, except to eliminate any question about their ripeness.8/

In arguing that the state court decision disposes of Contentions 1-10, Suffolk County characterizes the state court decision as having been based on the two separate notions that (1) LILCO has no authority to perform the functions set forth in the LILCO Plan because it would violate New York law and (2) LILCO has no corporate authority under New York law to perform the functions set forth in the LILCO Plan. The Intervenors contend that these are "two independent bases" identified in the Supreme Court's decision, and that either, standing alone, is "fully dispositive of the legal authority question." Intervenors' Answer at 10. First, it is LILCO's view that basis number 2 is subsumed in basis number 1. New York law is New York law. Whether one determines to apply traffic laws, corporate laws, or a general case law theory of "police power" and

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8/ LILCO has consistently taken the view before this Licensing Board and in other forums that state law does not prohibit the activities contemplated under the LILCO Plan. LILCO disagrees with the state court's decision and will appeal it at the appropriate time.

"governmental functions," the fundamental finding that New York law prohibits LILCO's actions is the same for purposes of examining whether federal law allows those actions notwithstanding state law.

Second, contrary to the Intervenors' assertion in their Answer at 12, LILCO is claiming precisely that the Atomic Energy Act, the NRC regulations, and the NRC Authorization Acts empower LILCO to perform those acts required by NRC regulations to implement an emergency plan, should it be necessary to do so in response to an emergency at Shoreham.9/

NRC regulations require as a safety matter that LILCO have in place an emergency plan in order to obtain a license for its plant. As LILCO has discussed at length in its pleadings on federal preemption, Congress considered whether requiring as a safety matter an emergency plan would inhibit utilities where a state or locality refused to help prepare and implement that plan. Congress foreclosed the opportunity of states and localities to regulate nuclear power by withholding their services in furtherance of an emergency plan by allowing utilities to submit their own plans where the states and localities are

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9/ As part of its argument that LILCO has asserted no authority before implementing its utility plan, the Intervenors cite several cases for the proposition that the Supremacy Clause does not grant that authority. See Intervenors' Answer at 13. LILCO has not asserted that the Supremacy Clause in and of itself allows LILCO to implement its Plan.

not participating or submit inadequate plans.10/

The interpretation of the Authorization Acts that is urged upon the Board by the Intervenors, that the Acts "merely" authorize the NRC to review such plans (but apparently not to approve them regardless of their merits), Intervenors' Answer at 4, n.2, if accepted, would make that review meaningless. The Brenner Board concluded as much in the Board's opinion denying Suffolk County's Motion to Terminate.11/

2. LILCO's Legal Authority Arguments Have Been Well-Defined

The Intervenors suggest that the appropriate way to proceed is for LILCO somehow to rewrite its emergency plan to assert that LILCO is authorized to conduct emergency planning,

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10/ Judge Altimari concluded this as well in his decision in Citizens. See Part I above, quoting from that decision.

11/ In the cover letter on behalf of the Intervenors to the Board transmitting the Intervenors' Answer, counsel for Suffolk County asserts that Judge Altimari's decision in the Citizens suit "rejects the grounds upon which the Brenner Board found that preemption might have occurred." In fact Judge Altimari's decision supports the Brenner Board's decision on the County's Motion to Terminate. The Brenner Board found that the Suffolk County resolutions, to the extent they were being used to prohibit LILCO from submitting its own plan for review by the Licensing Board, were preempted by federal law. Judge Altimari determined that the resolutions were valid because they did not attempt to regulate or prevent LILCO's utility plan. The court ruled that the Nuclear Regulatory Commission, not Suffolk County or New York State, would determine whether the utility plan is adequate.

and then for the parties to begin again briefing the legal authority issues from square one. The record developed thus far on Contentions 1-10 is so complete and so lengthy that the only reasonable explanation for the Intervenors' suggestion is that they wish to continue to delay the conclusion of this proceeding in any manner possible. While accusing LILCO of an "unseemly" footrace because it has renewed a motion that has been pending before this Board for months, the State and County seek to stall this Board while trying to thrust the same federal preemption issue before the state court, where it has not yet been briefed or addressed in any way on the merits. LILCO has stated repeatedly in its briefings before this Board that the Atomic Energy Act, 10 C.F.R. § 50.47(b) and (c), and the 1980, 1982-83, and 1984 NRC Authorization Acts allow a utility to plan for and implement an emergency response for accidents at a nuclear power plant notwithstanding state and local refusal to respond, and the Intervenors have responded to that argument. No clearer statement of LILCO's position can be found. Indeed, the Intervenors and the NRC Staff have been on notice since March of 1983, when LILCO filed its first brief on preemption in response to the Intervenors' motion to terminate the licensing proceeding, that it is LILCO's view that federal law allows LILCO to proceed as it has done with offsite emergency planning given New York State and Suffolk County's refusal to do so.

The Intervenors' latest suggestion that LILCO must somehow go back and rewrite the Plan to make clear that which has been briefed for over two years before this Board makes no sense whatsoever.

3. No Further Briefing on Contentions 1-10 Is Necessary

As to the suggestion that following some rearticulation of LILCO's position, briefing should begin anew on the legal authority issues, it is well to point out that over 500 pages of legal briefs have already been filed on the issue of whether LILCO can proceed with its emergency plan, over 200 pages of which were filed by Suffolk County and New York State alone.12/ These filings stand in stark contrast to the Intervenors' assertion in its March 19 Answer that the legal authority issues have not yet been adequately addressed.13/

12/ See footnote 1, above.

13/ In its Renewed Motion for Summary Disposition of Legal Authority Issues on Federal-Law Grounds, Feb. 27, 1985, at 10-11, LILCO asserts that in its view further briefing is not required, but requests, should the Board decide otherwise, that the Board define specifically any narrow issues on which it wishes to receive further briefs from the parties, and set limits of time and length on those briefings. We continue to urge that the Board do so, particularly in light of the Intervenors' position that briefing has not yet seriously begun.

B. The Preemption Issue Is Pending Before this Board, And Should Be Decided By This Board

The Intervenors next argue that it is the state court and not this Licensing Board that should decide the preemption issue pending before this Board. Their argument is based on three incorrect assertions: (1) that this Board sent the issues of federal preemption to the state court; (2) that the Federal District Court in denying LILCO's removal position mandated that the federal preemption issue must be raised in state court; and (3) that LILCO has "repeatedly and consistently raised the federal preemption issue in the State Court Actions," Intervenors' Answer at 15.

1. The Board and the Federal District Court Have Not Ordered that Federal Preemption Issues Must Be Decided By the State Court

As to the notion that this federal Licensing Board and the Federal District Court have given a mandate to the state court to determine the federal preemption issue, the Intervenors previously raised that notion in their briefings urging the Licensing Board not to reach the preemption question last fall, 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, at 13-17, and LILCO responded at that time. LILCO's Reply to the Responses to Its

Motion for Summary Disposition on Contentions 1-10, Oct. 15, 1984, at 3 n.2. That response need only be summarized as follows.

a. The Licensing Board

As to the assertion that the Licensing Board has insisted that the state court decide Contentions 1-10, only the Licensing Board can define with finality what it intended in suggesting that the parties take the state law issues to state court. It appears to LILCO that what was intended was that issues of state law -- that is the first part of each of Contentions 1-10 -- be determined by a state court. The clear language of the Board's statements suggesting that the parties might take the state law issues to state court (see e.g., Tr. 706); the Board's decision subsequent to receiving briefings from the parties on preemption that it would refrain from further decision pending a decision by the state court because it did not need to reach preemption unless and until the state court struck LILCO's activities as illegal under state law; and the lengthy further briefings on the legal authority issues as a result of the Board's October 22 Order do not indicate any intent by this Board to abdicate jurisdiction over the federal-law component of Contentions 1-10 to a non-federal forum.14/

14/ Indeed, if the Licensing Board thought that Contentions 1-10 were not properly addressed by it, it could have dismissed the contentions.

The complaints filed in New York State Court by Suffolk County, New York State, and the Town of Southampton, which delineate actions challenged as a matter of state law but make no mention of any federal preemption issues, and the NRC Staff's Response to LILCO's Motion for Summary Disposition, pointing out that the state law issues pending before the state court may very well be decided in LILCO's favor because on the face of the statute cited by the Intervenors it did not appear that LILCO's actions contravened those statutes, support LILCO's understanding of the Board's statements.

b. The Federal District Court

As LILCO previously discussed in its October 15 Reply, Judge Altimari did not mandate that the preemption issues raised in Contentions 1-10 must be determined in state court. Judge Altimari merely found that as a jurisdictional matter, the issue of federal preemption (which did not appear on the face of the Intervenors' state court complaints) could be raised as an affirmative defense. In Judge Altimari's view under Franchise Tax, supra, federal question jurisdiction for removal from state to federal court cannot be based upon federal questions that arise as defenses rather than on the face of complaints. In so ruling, the judge noted that in his view it would have made more sense to retain jurisdiction of the case

and that the federal question of preemption "could" be raised before the state court. He did not rule that it must be raised before the state court, or, as the Intervenors imply, that the state court has exclusive jurisdiction over this federal issue. Nor did he suggest in any fashion whether it should or could be raised before the Licensing Board.

The Intervenors' continued insistence in characterizing both the Licensing Board's and Judge Altimari's decisions as requiring preemption to be heard before the state court is merely an attempt to bolster the Intervenors' forum shopping. It must be remembered that it was the Intervenors, not LILCO, who first raised the legal authority issues and they raised them before this Board, not in state court.

2. The Preemption Issue Has Not Yet Been Reached In State Court

The Intervenors assert that LILCO is asking this Board "to race to decide the very issue that LILCO has already placed at issue in another forum [state court]." This suggestion of duplicity on LILCO's part is absurd. First, LILCO has never asked the state court to address the federal preemption issue on the merits, and the Intervenors know it. Second, LILCO's request that this Board decide issues that were raised in July of 1983, briefed in over 500 pages of legal pleadings between August and November 1984, and pending since the close of

briefing for over four months now, is hardly an invitation to a race. Third, it is the Intervenors, not LILCO, who have attempted at every turn to do all possible to see to it that preemption issues are determined by the state court judge and not this Licensing Board. The state court has thus far rejected Suffolk County's continued invitations to determine the preemption issue.

The issue of LILCO's legal authority was raised first before this Licensing Board by Suffolk County in June of 1983. Those contentions were objected to by LILCO on the grounds that they had already been decided when the Brenner Board rejected Suffolk County's motion to terminate the licensing proceeding and accepted LILCO's argument of preemption. Thus LILCO has asserted the issue of preemption in response to the legal authority contentions before this Board for almost two years. The Intervenors waited nine months to assert their state law claims before state court; during this time Contentions 1-10 were pending before this Board. In filings before the state court subsequent to remand, LILCO has asserted repeatedly that the state court judge should decide matters of state law. LILCO has noted that it is not waiving any preemption defense it may have before state court, and has continued to do so as a matter of good pleading to avoid an argument by the Intervenors before this Board that LILCO has waived the preemption

argument. Interestingly, the Intervenors are now attempting to argue that, because LILCO has noted it does not wish to waive its preemption argument, LILCO cannot now obtain a decision before this Board that clearly must be reached in order to resolve contentions that were raised by Intervenors almost two years ago.

Suffolk County, in contrast, has repeatedly urged the state court to reach federal preemption, and the state court thus far has declined to do so. The decision issued by the state court reaches only state law issues. LILCO has filed a draft partial judgment before the state court, as provided under New York Procedure, with a cover letter explaining that further proceedings before the state court judge would include a motion by LILCO that the state court abstain from any further decision regarding preemption issues because that issue has been placed squarely before this Licensing Board and this Board is the appropriate forum in which to determine the meaning of the NRC's enabling act and regulations.

In short, Suffolk County raised contentions before this Licensing Board almost two years ago questioning LILCO's legal authority under state law to implement its Plan and therefore its ability under federal law to meet NRC requirements; took the state law portions of those contentions on a somewhat different legal theory to a state court nine months later;

asserted, on LILCO's attempt to remove the state law issues to Federal Court, that the federal law issues were not part and parcel of the state law issues and did not require removal; urged, totally inconsistently, upon remand to the State Court, that the State Court must consider the federal issues and the state law issues together, and now urges this Board not to decide federal issues that the state court has not yet reached. Having maneuvered unsuccessfully thus far in every way possible to ensure that the federal preemption issue is decided in state court rather than a federal forum, the Intervenors are now accusing LILCO of forum shopping. At the same time, the Intervenors have given this Board not one sensible reason why this Board cannot decide issues surrounding the NRC's enabling statute and regulations which were raised before it by the Intervenors. Their arguments should be rejected.15/

15/ The Intervenors set out certain alleged "facts" regarding the assertion of the preemption defense before the state court both in their pleadings and in an affidavit attached to their Answer submitted by David A. Brownlee, an attorney with the law firm representing Suffolk County before this Board and in State Court. All the references to these "facts" can be found in pleadings filed before the state court, the Federal Court, and this Board, in decisions issued from these forums, and in transcripts of public hearings before these forums. Mr. Brownlee's affidavit does not provide any true "facts" in response to a motion for summary judgment, but rather takes the opportunity merely to characterize pleadings, transcripts of argument, and opinions that are already in the public record. Not only are some of those characterizations inaccurate, but they are inappropriate for an affidavit purporting to be a factual asser-

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III. Response to NRC Staff: State Law Is Preempted

The NRC Staff agrees with LILCO that the Board should decide Contentions 1-10 as a matter of federal law. In the course of agreeing, however, the Staff has made a number of observations about the merits of the federal preemption issue, suggesting, in fact, that state law is not preempted in this case. These observations are found in footnote 9 of the NRC Staff Response, which reads as follows:

> See NRC Staff Answer, October 4, 1984, at 15-26. In footnote 23 of that Answer, it is stated that the subject state laws may be found to actually conflict with Federal law and be preempted, although drafted for a valid purpose, if (1) they were applied with the purpose of regulating radiological health and safety, or (2) their application frustrates the purpose and objectives of Congress. See Perez v. Campbell, 402 U.S. 637 (1971). In Pacific Gas & Electric Co. v. Energy Resources Commission, 461 U.S. 190, 205-213, 222-23, 75 L.Ed.2d 752, 766-771, 776-77 (1983), the Court concluded that although the purpose of the Atomic Energy Act (AEA), as amended, 42 U.S.C.

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tion. "[T]he signature of a person signing in a representative capacity [a document filed with this Board] is a representation that the document has been subscribed in the capacity specified with full authority, that he has read it and knows the contents, that to the best of his knowledge, information, and belief the statements made in it are true, and that it is not interposed for delay," 10 C.F.R. § 2.708(c). Consequently, it is at best unnecessary and at worst improper for attorneys representing parties before this Board to file separate affidavits that propound legal arguments.

§§ 2011 et seq., was to encourage the development of nuclear power plants, this was not to be accomplished "at all costs" and override the traditional areas of state economic regulation. In Silkwood v. Kerr-McGee Corp., ___ U.S. ___, 78 L.Ed.2d 443, 458 (1984), the Court emphasized that although Congress intended to encourage the development of the peaceful uses of nuclear energy it did not intend to override traditional state powers and preempt the award of punitive damages under State law to those injured by radiation. In its Statement of Consideration, "Emergency Planning," 45 Fed. Reg. 55,402, 55,404 (1980), the Commission recognized that state and local governments might frustrate Congress' encouragement of the development of nuclear energy by not cooperating in the development of emergency response plans. See NRC Staff Answer, October 10, 1984. In Cuomo v. LILCO, supra, the New York court determined that the general statutory scheme of New York governing the exercise of powers ordinarily exercised by the police prevented LILCO from carrying out its emergency plan without State or local government cooperation. It does not appear from the foregoing that the determination that LILCO may not exercise the State's police powers was made particularly for the purpose of regulating radiological health and safety or that laws have been applied so as to frustrate the objectives of Congress in promoting the development of nuclear energy consistent with the states' exercise of their traditional powers over non-nuclear activities.

This is not to indicate whether Congress has the power to legislate that private entities created under state law have the authority to carry out emergency response plans regardless of State law. Cf. Federal Energy Regulatory Commission v. Mississippi, 45 U.S. 742, 758, 764 (1982); Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n, 443 U.S. 658, 695 (1979).

NRC Staff Response to LILCO's Renewed Motion for Summary Disposition of Legal Authority Issues on Federal Law Grounds, Mar. 19, 1985, at 6 n.9.

The NRC Staff's views on the interpretation of statutes and judicial decisions are entitled to no more weight than those of any other party. Public Service Co. of New Hampshire (Seabrook Station, Units 1 & 2), CLI-76-17, 4 NRC 451, 462 (1976); Consolidated Edison Co. of New York (Indian Point, Units 1, 2 & 3), ALAB-304, 3 NRC 1, 6 (1976); Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 & 3), ALAB-268, 1 NRC 383, 399 (1975). Nevertheless, the Staff's opinion needs to be answered, if only because it is the only jarring note in what LILCO believes to be a virtually open-and-shut case for preemption. We must conclude that the Staff has simply misread the case law.

The Staff begins by proposing two tests for finding an "actual conflict" between state and federal regulations:

> (1) the state laws are applied with the purpose of regulating radiological health and safety, or
>
> (2) the application of the state laws frustrates the purposes and objectives of Congress.

This statement of the tests is apparently drawn from the Staff's reading of Perez v. Campbell, 402 U.S. 637 (1971).

However, the conventional statement of the tests for preemption, drawn from Silkwood v. Kerr-McGee Corp., 104 S.Ct. 615, 621 (1984) (hereinafter Silkwood) and Pacific Gas & Elec. v. State Energy Resources Conservation & Development Comm., 461 U.S. 190, 103 S.Ct. 1713, 1722 (1983) (hereinafter PG&E), is as was stated in LILCO's Motion for Summary Disposition of Contentions 1-10 (the "Legal Authority" Issues), Aug. 6, 1984, at 8:

> A. If Congress evidences an intent to occupy a given field, any state law falling within that field is preempted.
>
> B. If Congress has not entirely displaced state regulation over the matter in question, state law is still preempted to the extent it "actually conflicts" with federal law, that is:
>
> 1. When it is impossible to comply with both state and federal law, or
>
> 2. When the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress."

Silkwood, 104 S.Ct. at 621 (1984); PG&E, 103 S.Ct. at 1722.

The NRC Staff's second test ("frustrating the purposes and objectives of Congress") is the Hines test, the same as LILCO's B.2 above. However, the Staff's first test (the "state purpose" test) has to do with "occupied field" preemption (A above), not "actual conflict" preemption. The first "actual conflict" test (physical impossibility of complying with both state and federal law) the Staff does not address at all in its footnote 9.

Let us now go through each of the three tests and show why the Staff is mistaken.

A. Physical Impossibility

The physical impossibility test is the one the Staff fails to address. The essence of the matter is this: NRC regulations require LILCO to have an offsite emergency plan; New York law, according to Judge Geiler's decision, says that LILCO is forbidden to have an offsite emergency plan. LILCO cannot comply with both.

The only possible argument in response is that LILCO can comply with both if it abandons the Shoreham plant. This argument fails, as LILCO has pointed out,16/ because it would also make a nonconflict out of the very example given by the Supreme Court in the seminal case that is always cited for the "physical impossibility" type of preemption, Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 143 (1963). One can almost always avoid a conflict by ceasing the regulated activity.17/

16/ LILCO's Motion for Summary Disposition of Contentions 1-10 (the "Legal Authority" Issues), Aug. 6, 1984, at 37-38; LILCO's Reply to the Responses to its Motion for Summary Disposition on Contentions 1-10, Oct. 15, 1984, at 32-33.

17/ For example, in Ray v. Atlantic Richfield Co., 435 U.S. 151 (1978), a state law requiring oil tankers enrolled in the

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B. Frustration of Purpose

Another test of an "actual conflict" is met if the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." The NRC Staff addresses only one of the federal purposes that LILCO contends state law is frustrating, namely the purpose of promoting atomic energy. More important purposes, from the standpoint of the case, are the purpose of having uniform federal standards of radiological emergency planning18/ and, even more specifically, the purpose of providing emergency plans, by whomever implemented, so as to ensure safe operation of nuclear plants.

Indeed, all the legal analyses of preemption boil down to a search for Congress's intent. And it is undeniable that Congress intends to allow utility plans so as to prevent precisely

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coastwise trade to have a local pilot on board was found to be in "direct conflict" with federal regulations requiring vessels to have a pilot licensed by the Coast Guard and prohibiting states from requiring pilots to obtain a state license in addition to a federal one. 435 U.S. at 158-59. Obviously this conflict could have been avoided by having two pilots on board or by quitting the coastwise trade. Nevertheless, the state law was held preempted.

18/ See LILCO's Motion for Summary Disposition of Contentions 1-10 (the "Legal Authority" Issues), Aug. 6, 1984, at 15-16, 40-41.

what Suffolk County and New York State are attempting in this case -- the shutting down of safe nuclear plants because state or local governments do not have adequate emergency plans. The evidence is in the legislative history of the three successive Authorization Acts that authorized "utility plans." For example, the following is from the House Conference Report on the 1980 Act:

> The conferees sought to avoid penalizing an applicant for an operating license if a State or locality does not submit an emergency response plan to the NRC for review or if the submitted plan does not satisfy all the guidelines or rules.

H.R. Rep. No. 96-1070, 96th Cong., 2d Sess. 27 (1980), reprinted in 1980 U.S. Code Cong. & Ad. News 2270.

Congressman Lujan said this about the 1982-83 Act:

> Frankly, these provisions -- allowing a utility to file an onsite plan for a temporary operating license, and allowing the NRC to determine that an adequate offsite plan of a utility exists in the absence of an FEMA-approved State or local plan for a final, full power license -- were included to insure that Federal preemption in the area of nuclear power would not be frustrated in the emergency planning area by foot dragging on the part of a reluctant State or locality. The wisdom of including such federal provisions is underscored by the situation which we understand exists in one district where a county has sued to try to enjoin its State from approving an emergency plan. The clear language of the statute and our intent throughout the legislative process was to insure that a plant could operate if there existed some plan -- State, local or utility sponsored -- providing reasonable assurance of the public health and safety.

128 Cong. Rec. E5060-61 (daily ed. Dec. 10, 1982) (emphasis added).

The following is from the Senate report on the 1984-85 Act:

> In the course of the Subcommittee's hearings, however, two potentially significant problems have been raised. First, witnesses expressed concern that under the existing process, state or local governments, by acting or failing to act, could keep FEMA and the NRC from evaluating an emergency preparedness plan for a nuclear powerplant that was prepared or submitted, or both, by the applicant or licensee, and, as a result, prevent the NRC from issuing an operating license to such applicant or licensee if the NRC determines that the plan submitted by the applicant or licensee provides reasonable assurance that public health and safety is not endangered by operation of the plant.
>
> The Committee reiterates that the adoption of this provision is intended to reconfirm the authority of the NRC and FEMA to evaluate an emergency preparedness plan submitted by an applicant or licensee pursuant to this section.
>
> In 1980, the Conference Report on the fiscal year 1980 NRC Authorization Act (Public Law 96-295) stated that:
>
> > [T]he conferees sought to avoid penalizing an applicant for an operating license if a State or locality does not submit an emergency response plan to the NRC for review or if the submitted plan does not satisfy all the guidelines or rules, the compromise permits NRC to issue an operating license if it determines that a State, local, or utility plan, such as the emergency preparedness plan submitted by the

> applicant, provides reasonable assurance that the public health and safety is not endangered by operation of the facility. (H. Rpt. 96-1070, p. 27)
>
> Under section 108 of this bill, the Committee expects the NRC and FEMA to undertake a review of all emergency preparedness plans submitted for evaluation, regardless of whether the plans have been prepared or submitted, or both, by a governmental entity or by the applicant or licensee for such facility. If a state or locality does not submit an emergency response plan for review, or in the absence of a state or local emergency preparedness plan which has been approved by FEMA, this provision provides that the NRC still may issue an operating license if it determines that a plan prepared or submitted, or both, by an applicant or licensee provides reasonable assurance that public health and safety is not endangered by operation of the facility.

S. Rep. 98-546, 98th Cong., 2d Sess. 14-15 (June 29, 1984).

Congressman Pashayan said this about the 1984-85 Authorization Act:

> I applaud this provision which I view as clearly confirming what is already in the law: That a plan submitted by a utility will satisfy the Atomic Energy Act's requirements. I also view existing law as providing authority for the Federal Government to implement any utility plan submitted under this provision. I think that both concepts -- that of utility submission, and that of Federal implementation, of emergency plans -- are important, and I am happy to see them further reinforced by this bill.
>
> Both are important because <u>they add up to one central principle: The Congress does not intend to allow States or localities, by refusing to participate in the emergency planning process, to prevent a completed</u>

> facility from operating. A refusal to participate could take the form either of a refusal to submit or a refusal to implement a plan. With regard to a refusal to submit a plan, the bill provides explicitly for a remedy: a utility plan will suffice. With regard to a refusal to implement, the bill is not explicit, but the intent of Congress is clear: We cannot allow a refusal to implement to be used to prevent the operation of a facility, for to do so would make a mockery of the provision. It would allow states and localities to achieve through a refusal to implement a plan what we have expressly forbidden them to do by refusing to submit one.

130 Cong. Rec. H.12,196 (daily ed. Oct. 11, 1984) (emphasis added). See also LILCO's Motion for Summary Disposition of Contentions 1-10 (The "Legal Authority" Issues), Aug. 6, 1984, at 13-28.

Given these, and the other, unequivocal statements of Congress's purpose, there can be no doubt that New York law is preempted in this case. If New York State enacted a statute that said "'utility plans' are prohibited in this state," it would certainly be preempted by the Atomic Energy Act and the NRC Authorization Act as frustrating the goals and objectives of Congress. And that is precisely the law of New York, as now interpreted by Judge Geiler.19/

19/ It is not entirely clear whether Judge Geiler's decision is based on the precise statutes cited in the state court complaint (some of which are also cited in Contentions 1-10), on a broad theory of the exclusivity of governmental police power, or on both. LILCO has asked the judge for clarification.

The Intervenors, and perhaps the NRC Staff, are of the view that the NRC's authority to review utility plans is an illusory one, revocable at the will of the states. They argue that Congress gave the NRC the right to consider utility plans, but only if the state either approves or is indifferent; if the state objects, then the NRC's consideration of a utility plan is a futile exercise. This view of Congress's intent is simply not credible; suffice it to say that LILCO has discovered no evidence to support such an empty construction of every Authorization Act passed since the post-TMI emergency planning structure came into effect in 1979-80.

Even taking into account only the purpose of promoting atomic energy, the NRC Staff's analysis fails. The Staff has two bases for believing the frustration of this purpose does not result in preemption. First, the Staff notes, from PG&E and Silkwood, that the promotion of nuclear energy is not to be had "at all costs" or override "traditional" state powers. But the idea that "traditional state areas" (PG&E, 461 U.S. at 222) are entitled to a presumption against preemption has lost any force it may have had in light of Garcia v. San Antonio Metropolitan Transit Authority, 105 S.Ct. 1005 (1985). Moreover, in PG&E the traditional state area was economic regulation of electric utilities and in Silkwood tort law; for both these areas the Court found clear evidence of a Congressional

intent to preserve state authority. In the present case the opposite situation exists: there is no traditional state hegemony over nuclear safety, but rather exclusive federal authority; and Congress has expressly authorized, and the NRC required, what the state now forbids.

The Staff's second basis is a passage from the Federal Register notice of the Commission's emergency planning regulation. The Staff says that the NRC, when it enacted the emergency planning regulation, recognized that state and local governments might frustrate Congress' encouragement of nuclear energy by not cooperating in emergency resonse plans:

> The Commission recognizes there is a possibility that the operation of some reactors may be affected by this rule through inaction of State and local governments or an inability to comply with these rules. The Commission believes that the potential restriction of plant operation by State and local officials is not significantly different in kind or effect from the means already available under existing law to prohibit reactor operation, such as zoning and land-use laws, certification of public convenience and necessity, State financial and rate considerations (10 C.F.R. 50.33(f)), and Federal environmental laws. The Commission notes, however, that such considerations generally relate to a one-time decision on siting, whereas this rule requires a periodic renewal of State and local commitments to emergency preparedness. Relative to applying this rule in actual practice, however, the Commission need not shut down a facility until all factors have been thoroughly examined. The Commission believes, based on the record created by the public workshops, that State and local officials as partners in this undertaking will endeavor to provide fully for public protection.

45 Fed. Reg. 55,402, 55,404, col. 1 (Aug. 19, 1980). But, as LILCO pointed out in its Brief on Suffolk County's Motion to Terminate this proceeding and LILCO's Reply to the Response to its Motion for Summary Disposition on Contentions 1-10 (Oct. 15, 1984), at 28-29, the history of the regulation shows that de facto noncompliance with NRC safety standards was being referred to, not de jure state prohibitions on meeting those standards.20/ The Brenner Board agreed with this analysis. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-22, 17 NRC 608, 623-25, aff'd, CLI-83-13, 17 NRC 741 (1983). Moreover, the Commission's reference to "inaction" and "inability" of state and local governments (as opposed to hostility and active opposition), plus the Commission's belief that states and localities would cooperate, show that the present situation simply was not being addressed in the passage cited above.

C. State's Purpose

The Staff's third test, whether the purpose of the state

20/ "The staff recognizes this potential for a third party defacto [sic] veto power. The Commission is also aware of this." SECY-80-275, June 3, 1980, Enclosure L, Analysis of ACRS Comments, at 8. An industry witness, Mr. Owen, also referred to a "de facto veto." Statement of Warren H. Owen, June 25, 1980, at 8, bound into transcript of NRC June 25, 1980, ff. Tr. 131.

law is to regulate radiological health and safety, is also a misreading of the case law.

The Staff suggests that because the New York legislature and the New York court in Cuomo v. LILCO did not act "particularly for the purpose of regulating radiological health and safety," the exercise of the state laws is not an invasion of a preempted field.

The fact is that the Staff has misread Pacific Gas & Electric, or perhaps Perez,21/ to say that a nonradiological

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21/ In fact, Perez is notable for rejecting the rule of two earlier cases that a state law is not preempted so long as its purpose is not to frustrate federal law:

> We can no longer adhere to the aberrational doctrine of Kesler and Reitz that state law may frustrate the operation of federal law as long as the state legislature in passing its law had some purpose in mind other than one of frustration. Apart from the fact that it is at odds with the approach taken in nearly all our Supremacy Clause cases, such a doctrine would enable state legislatures to nullify nearly all unwanted federal legislation by simply publishing a legislative committee report articulating some state interest or policy -- other than frustration of the federal objective -- that would be tangentially furthered by the proposed state law.

Perez, 402 U.S. at 651-52. Instead, the Court approved the Hines test (from Hines v. Davidowitz, 312 U.S. 52, 67 (1941)) of determining whether a challenged state statute "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." Perez, 402 U.S. at 649.

purpose will save a state law from preemption. Nothing could be further from the truth.

A state's purpose in enacting its law is immaterial, if the effect of the state law is to regulate the construction or operation of a nuclear power plant:

> At the outset, we emphasize that the statute does not seek to regulate the construction or operation of a nuclear powerplant. It would clearly be impermissible for California to attempt to do so, for such regulation, even if enacted out of nonsafety concerns, would nevertheless directly conflict with the NRC's exclusive authority over plant construction and operation.

PG&E, 103 S.Ct. at 1726 (emphasis added).22/ That is, if the boundaries of the preempted field are clear and the state is

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22/ Accord, State Dept. of Env. Pro. v. Jersey Cent. Pow. & Light, 351 A.2d 337, 343 (1976):

> A state may not interfere, directly or indirectly, with a preempted matter, even though the state's proscription may not have been directed at the particular activity involved. The Court in Florida Avocado Growers v. Paul, 373 U.S. 132, 83 S.Ct. 1210, 10 L.Ed.2d 248, reh. den. 374 U.S. 858, 83 S.Ct. 1861, 10 L.Ed.2d 1082 (1963) commented:
>
> * * * The test of whether both federal and state regulations may operate, or the state regulation must give way, is whether both regulations can be enforced without impairing the federal superintendence of the field, not whether they are aimed at similar or different objectives. [373 U.S. at 142, 83 S.Ct. at 1217].

trying to regulate within them, the state law is preempted no matter what its purpose.23/

The state's nonradiological purpose entered the analysis in PG&E only because it was necessary to determine the boundaries of the preempted field. The purpose ("rationale") was the only way to tell whether the state was regulating need for power and economic concerns (outside the preempted field) or radiological health and safety (inside it).

In just about any other case one can imagine,24/ particularly where the state law regulates not whether to build a plant but rather how to build one or how or whether to operate it once built, a state regulation affecting the operation of a nuclear plant is preempted.25/ For example, if a state tried

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23/ Likewise, it makes no difference what the state's purpose was if its law "actually conflicts" with federal law. See PG&E, 103 S.Ct. at 1728 n.28 (distinguishing Perez as involving an "actual conflict").

24/ Indeed, it appears that the state law in was upheld in PG&E only because what was involved was the "threshhold" decision of whether to have a nuclear plant at all. Even the concurring justices in PG&E, who would have permitted the states to make the "threshold determination" whether to permit the construction of new nuclear plants on safety grounds, would not have allowed the states to make the subsequent determinations of how to construct and operate the plants. PG&E, 103 S.Ct. at 1733. State law that regulates how emergency planning may and may not be done, indeed to the point of forbidding emergency planning altogether, is clearly regulation of how to operate a nuclear plant.

25/ Silkwood was simply a case in which Congress had, in the Court's view, made clear its intention not to preempt. By con-

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to regulate the size of plant staff (with a purpose of keeping operating costs down) or forbade the installation of a certain type of safety valve26/ (with the purpose of punishing South Africa, where the valves were manufactured), the state law would be preempted.

Such is the case with Shoreham, where the state's law, as interpreted by Judge Geiler, is that LILCO may not have an emergency plan. This is a direct regulation of how the plant is operated -- indeed, so extreme a regulation that it prevents operation at all. What the state is attempting to regulate here is unquestionably the "radiological safety aspects involved in the construction and operation of a nuclear plant," PG&E, 103 S.Ct. at 1723. This is obvious for three reasons. First, the state is attempting to regulate radiological health and safety (as distinguished from economics or aesthetics or

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trast, in the case of emergency planning Congress has made clear its intention (1) to have uniform federal standards and (2) to allow nuclear plants to operate if there is an emergency plan that provides reasonable assurance that the public health and safety is not endangered.

26/ As LILCO has pointed out before, what New York is attempting to do is simply to ban what the NRC has required as an essential safety system for a nuclear plant, thus requiring by state law that the plant be kept too unsafe to meet federal regulations. No more blatant interference with federal authority can be imagined: as PG&E put it, the objective of the Atomic Energy Act is to ensure that nuclear technology be safe enough for widespread development and use. 103 S.Ct. at 1726.

the like) by definition; the activity being regulated is an emergency plan for radiological accidents.

Second, the Appeal Board has said that emergency planning is an "integral part" of the NRC's regulation of nuclear plants:

> Although section 274 of the Atomic Energy Act provides a framework for cooperation with, and transfers of authority to, the states for the regulation of certain byproduct, source, and special nuclear materials, that section also requires the Commission to retain all authority and responsibility for the regulation of nuclear power plants and prohibits any delegation of that authority. It should hardly need be stated that the Commission's emergency response requirements are an integral part of the agency's regulation of nuclear power plants, and compliance with those rules determines whether an applicant receives an operating license, not obedience to additional requirements that may have been adopted by state or local authorities. Even though offsite emergency planning depends upon state and local resources, the applicant cannot be denied an operating license, if, as in this case, planning within the NRC-prescribed EPZs complies with the Commission's emergency response requirements.

Pacific Gas & Elec. Co., (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-781, 20 NRC 819, 831-32 (1984) (emphasis added) (footnote omitted).27/

27/ Diablo Canyon was not a case of "actual conflict" preemption. The applicant could have complied with both state and federal law by simply adopting the state's emergency planning zone, and it does not appear that the Appeal Board found a purpose of Congress that was being frustrated (although it could be concluded that the purpose of uniform regulation was).

Third, Congress has clearly and expressly placed emergency planning within the preempted field (both by requiring uniform federal standards for emergency planning and by authorizing utility plans to solve the problem of state and local lack of planning). As Judge Altimari recognized in his decision, Congress enacted the "utility plan" provisions of the Authorization Acts precisely to solve the problem of the state or local government that could not or would not plan adequately. Congress rejected the solution of having the NRC write a plan for the state and adopted instead the provision for utility plans. See Citizens for an Orderly Energy Policy, Inc. v. County of Suffolk, No. CV-83-4966 (E.D.N.Y. Mar. 18, 1985).

To repeat what we have said before: the motive or purpose of the state legislature was relevant in PG&E only to determine whether the state was in the preempted field.28/ If the state is clearly regulating in a preempted field (or "actually conflicting" with federal law), state purpose is irrelevant. Here, as the Appeal Board's words above make clear, the regulation of emergency planning is clearly within the preempted field of nuclear safety regulation. It might be said that Silkwood and PG&E are polar opposites of the Shoreham case. In both these cases Congress had clearly indicated its intent to leave state regulation outside the preempted field.

28/ That the "state purpose" test has been rejected is demonstrated by the fact that it is relied on in the dissent in Silkwood. Silkwood, 104 S.Ct. at 628, 631.

The effect claimed by the Intervenors (and apparently the NRC Staff) for state law is not just to prevent LILCO from operating a nuclear plant -- it is to supersede the NRC's authority to decide if a plant may operate. In a slightly different guise, the Intervenors have simply renewed Suffolk County's February 23, 1983 Motion to Terminate the proceeding. In response to that motion, the NRC held that LILCO was entitled to show that its emergency plan could meet NRC regulations and noted that the Commission, not the State or County, would be the ultimate authority:

> Further, while there may well be serious issues of federal preemption involved in the current offsite emergency planning controversy, we find it unnecessary to reach such issues at this time because, as we read the applicable regulatory provisions, the agency is obligated to consider a utility plan submitted in the absence of State and local government-approved plans and has the ultimate authority to determine whether such a submission is sufficient to meet the prerequisites for the issuance of an operating license. . . .
>
> . . . We intend for [the LILCO Transition Plan] to be examined by the Federal Emergency Management Agency, the NRC Staff, and ultimately the Licensing Board in the pending Shoreham adjudication in which the licensee will bear the burden of showing that its plan can meet all applicable regulatory standards. We express no opinion at this juncture whether it will be possible for the utility to meet this burden; there is no evidentiary record before us upon which to provide any such opinion. That record should be compiled in the first instance, by the Licensing Board, subject to later appellate review by the Atomic Safety

and Licensing Appeal Panel and the Commission.

Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-83-13, 17 NRC 741, 743 (1983). Now the Intervenors (and perhaps the NRC Staff) take the position that it is the State, and not the NRC at all, that must decide whether a utility plan is adequate. That position simply cannot be squared with the Commission decision, in this very case, quoted above.

And, although it must already be obvious, it should be noted that upholding the Intervenors' position in this case would be the end of federal control of nuclear energy. Any state could thereafter prohibit operation of any nuclear plant at any stage of its life. The suitability of emergency plans would be subject to veto by the state. Moreover, it would not be just emergency planning, but all safety systems, that would end up being regulated by the state; if a state wanted a more elaborate emergency core cooling system than NRC regulations required at a particular plant, or a larger EPZ, it would only have to advise the utility that it would not participate in emergency planning until the utility complied with the state's design preferences. The state would not even have to pass a special statute forbidding utility emergency plans; it could merely turn to its "joyriding" statute or the like. Clearly this result would be contrary to the will of Congress.

IV. Conclusion

For the reasons stated above, the Board should decide Contentions 1-10 now, and decide them in LILCO's favor.

Respectfully submitted,

LONG ISLAND LIGHTING COMPANY

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DATED: March 26, 1985

CERTIFICATE OF SERVICE

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

I hereby certify that copies of LILCO'S MOTION FOR LEAVE TO FILE RESPONSE TO INTERVENORS' AND NRC STAFF'S ANSWERS TO LILCO'S RENEWED MOTION FOR SUMMARY DISPOSITION and LILCO'S RESPONSE TO INTERVENORS' AND NRC STAFF'S ANSWERS TO LILCO'S RENEWED MOTION FOR SUMMARY DISPOSITION 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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