'025

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Appeal Board

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

SUFFOLK COUNTY AND STATE OF NEW YORK
RESPONSE TO LILCO MOTION FOR
REFERRAL TO THE COMMISSION OR, ALTERNATIVELY,
SEVERANCE AND EXPEDITED REVIEW OF
LEGAL AUTHORITY ISSUES

On May 13, 1985, LILCO filed a response to the County/State motion of May 8, 1985 which sought an adjustment to the briefing requirements for the County/State appeal of the Margulies Board's Partial Initial Decision on Emergency Planning ("PID"). As part of its Response, LILCO has asked the Appeal Board to:

-- Sever the issues LILCO is appealing (Contentions 1-10, 11, and 92) from those appealed by the County and State;

-- Refer those severed issues to the Commission for decision, thus bypassing normal Appeal Board review; and

DS03

-- Take steps to ensure that LILCO's issues are "resolved dispositively on the fastest possible track."

LILCO Response at 2.

Pursuant to a May 13 telephone notification from the Appeal Board, and as confirmed in an Appeal Board Order of May 13, Suffolk County and the State of New York respond as follows to LILCO's Motion:

1. There is no reason to sever the issues LILCO wishes to appeal from the remainder of the PID issues being appealed. For the past year, LILCO has been responsible for delay in resolution of the legal authority issues. If LILCO now is actually interested in obtaining a prompt resolution of the legal authority issues, it can do so by joining the State and County in urging the New York State Supreme Court to decide them. Further, the Appeal Board should advise LILCO that it will withhold any further NRC decision on the legal authority issues until the New York Supreme Court has issued its decision.

2. Neither severance nor referral of LILCO's appeal of the Board's decision on Contentions 1-10, 11, and 92 is appropriate. First, those contentions all involve disputed factual issues. Further, the legal issues involved in the Board's decision on Contentions 11 and 92: (a) differ significantly from those presented in Contentions 1-10 (which focus on the preemption issue); and, (b) are no different from the legal issues involved

in the Board's decision on other contentions being appealed by the State and County. Thus, there is no basis for severing, referring, or according special treatment to the LILCO appeal issues.

3. LILCO's appeal issues are not appropriate for referral to the Commission for an additional reason. Even assuming the NRC decides it is appropriate to address the legal authority issues despite their pendency in state court, then the quality of NRC review would be improved if the Appeal Board addressed those issues prior to any Commission review.

I. The Legal Authority Issues in Contentions 1-10 Are Pending In and Should be Decided by the New York Supreme Court

LILCO's May 13 motion is most remarkable for what it does not reveal. The entire premise of LILCO's motion is LILCO's purported interest in getting the legal authority issues "resolved dispositively on the fastest possible track." Given LICLO's past history of delay on the legal authority issues, however, this purported basis for the motion cannot be accepted.

Over the last year, LILCO has repeatedly taken actions to delay resolution of the legal authority contentions. The history of LILCO's efforts is set forth in Attachment 1 hereto, particularly pages 14 to 19 and the Affidavit of David Brownlee attached thereto.[1] Briefly, however the situation is as follows.

---

[1] Attachment 1 is the "Answer of Suffolk County and State of New York in Opposition to LILCO's Renewed Motion for Summary Disposition," filed with the Margulies Board on March 19, 1985. (footnote continued)

In January 1984, the Laurenson Board stated that the legal authority issues (Contentions 1-10) raised matters most appropriately resolved by a New York State Court. The Board made this ruling after LILCO had advised the Board that federal preemption would constitute a critical part of its opposition to Contentions 1-10. See LILCO Proposal for Resolving the "Legal Authority Issues" (Contentions 1-10), January 26, 1984.[2]

The State and County followed the Licensing Board's advice, and in March 1984 filed suit in New York Supreme Court to obtain a declaration that LILCO lacks legal authority to implement its plan. LILCO initially blocked progress on that suit by improperly attempting the remove the case to federal court, despite a controlling U.S. Supreme Court precedent barring such

---

(footnote continued from previous page)
Due to the brief time permitted to respond to LILCO's Motion (the Appeal Board requested a response by noon on May 15), we have attached our March 19 filing rather than repeating anew all the facts and circumstances set forth in that document.

[2] Judge Laurenson said: "Turning then to the question of the legal contentions on contention 1 through 10. The Board believes that these legal contentions are properly matters to be disposed of by the New York State Courts." Tr. 3675 (Jan. 27, 1984). And similarly, in response to the County's position that LILCO had failed to establish its legal authority to implement its plan, Judge Laurenson stated: "I'm curious why the County has not pursued a declaratory judgment, if that is their position concerning state law. We have indicated before that this is one area where a state court would presumably be able to dispose of these legal issues." Id. at 3661-62.

removal. Following briefing and argument necessitated by LILCO's removal, on June 15, 1984, the federal court remanded the case to state court for lack of subject matter jurisdiction.[3]

After remand, the State and County finally were able to obtain a New York Supreme Court ruling that LILCO cannot implement its plan because under New York law, a corporation such as LILCO lacks the legal authority to do so. That ruling was rendered February 20, 1985.[4] Thereafter, LILCO answered the State and County complaints and raised a single affirmative defense -- federal preemption. However, instead of immediately briefing that issue in the state court to obtain a dispositive resolution of all the legal authority issues, LILCO moved to defer any state court ruling on preemption until the NRC's licensing board ruled on the preemption issue.[5]

LILCO's deferral motion in the New York Supreme Court has now been rendered moot: the Margulies Board rejected LILCO's preemption defense, which means that the sole basis for LILCO's request that the state court defer action on the preemption issue

---

[3] Cuomo v. LILCO; County of Suffolk v. LILCO, Nos. CV-84-1218, 84-1405, slip op. (E.D.N.Y. June 15, 1984).

[4] Cuomo v. LILCO, No. 84-4615, slip op. (N.Y. Sup. Ct. Feb. 20, 1985).

[5] See LILCO Notice of Motion to Stay, April 22, 1985, (Cuomo v. LILCO, Consolidated Index No. 84-4615, in which LILCO stated that the "defense of federal preemption is pending in a federal forum before the Atomic Safety and Licensing Board of the Nuclear Regulatory Commission, and ... this Court should defer resolution of the federal preemption question to that Licensing Board."

in the pending case has disappeared. On May 2, 1985, the State, County, and Town of Southampton filed in the state court action a Joint Motion for Summary Judgment of the preemption issue. We are informed, however, that, undaunted, LILCO will attempt to persuade the New York Supreme Court that it should hold off on any decision on the preemption issue pending before it until the Commission -- and perhaps also the U.S. Court of Appeals and the Supreme Court on appeal from a final NRC decision -- has ruled on the issue.

This "history" reveals LILCO's unseemly effort to put off any state court decision on the preemption issue, despite its having raised preemption as a defense when the cases were first filed in March 1984, and the Laurenson Board's admonition that the legal authority/preemption issue was appropriately a matter to be decided by the state court. See Attachment 1. It is as if LILCO is afraid to allow the state court to rule on the question. But, as Judge Altimari (E.D.N.Y.) held in remanding the case to state court last June, a New York court is perfectly competent to decide all legal authority issues, including those of federal preemption:

> Our decision today far from ends the present lawsuits or controversy. It is likely that this matter will move speedily to resolution in State Court where LILCO may, of course, raise its defense of Federal pre-emption. While State court judges are not asked to apply Federal law every day, it is a task I well know to be within their capabilities. Indeed, I am confident they will do so with the same open mind and sense of responsibility with which this court

> addresses so-called diversity cases which ask us to apply the law of the states. Further, if the State Court rejects a defense of Federal pre-emption, that decision may ultimately be reviewed on appeal by the United States Supreme Court. See Franchise Tax Bd., supra, ____ U.S. at ____, 103 S. Ct at 2848 n.12.

Cuomo v. LILCO; County of Suffolk v. LILCO, Nos. CV-84-1218, CV-84-1405, slip op. at 26 (E.D.N.Y. June 15, 1984).

If LILCO really is interested in obtaining a rapid ruling on legal authority issues, the avenue for doing so is clear. As noted, the State and County have moved the state court for a ruling on the preemption issue. An argument on that motion is tentatively scheduled for the week of June 10, 1985. If LILCO would simply stop attempting to get New York Supreme Court Judge Geiler to defer issuance of a ruling on the pending motion, then it seems clear that a "dispositive" ruling would be issued by the state court in the near future. This course of action would be fully consistent with Judge Laurenson's ruling of almost 16 months ago that a state court is the right forum to resolve these matters.

Instead, LILCO is engaged in an all out multi-pronged effort to avoid obtaining a state court ruling: it has moved Judge Geiler in state court to hold off on a preemption ruling (despite the fact that LILCO raised preemption as an affirmative defense in the pending action); and it has asked the Appeal Board to bifurcate the PID appeals and to send the preemption issues to the Commission for rapid decision. LILCO cites no basis or

justification for this Appeal Board to agree to such an extraordinary proposal. Moreover, LILCO's asserted "need" for a quick resolution could be satisfied by LILCO's simply proceeding on the merits of the preemption issue in state court. That would result in the dispositive ruling LILCO purportedly wants, but without resort to the extraordinary and unnecessary Appeal Board actions it suggests in its Response.

In view of all the foregoing circumstances, the County and State submit that LILCO's motion should be rejected. Indeed, the Appeal Board should refuse to participate in LILCO's machinations, and should stay its consideration of Contentions 1-10 until the New York Supreme Court has issued a decision. Such action would be consistent with proper notions of federal/state comity and would provide a true test of whether LILCO is really interested in obtaining the fastest possible decision on preemption issues or whether, instead, LILCO is trying to maneuver the NRC into the unseemly posture of racing to issue a decision before the state court does.[6]

II. The Appeal Board Should Retain Jurisdiction of All PID Appeal Issues

---

[6] At an absolute minimum, the Appeal Board should hold off any decision on LILCO's motion until Judge Geiler has ruled on LILCO's motion to defer state court consideration of the preemption issues, which, we hope, will be during the week of June 10. Clearly, however, the State and County need a ruling on their request for an adjustment in the briefing requirements for the County/State appeal before that time.

Assuming, arguendo, that the NRC (the Appeal Board or Commission) decides to address the legal authority issues rather than according deference to the New York Supreme Court which is about to rule on them, several matters need to be addressed.

First, LILCO urges that all the issues it has raised on appeal -- Contentions 1-10, 11, and 92 -- should be separated and decided by the Commission as a single group of "inextricably related contentions." LILCO Response at 1. Regardless of how the referral issue is decided, LILCO's severance proposal makes no sense because Contentions 1-10, 11 and 92 involve (a) disputed factual issues as well as "legal" issues, making them no different from all the other issues on appeal, and (b) legal issues that are markedly different, rather than "inextricably related." Hence, no separation of those issues from the others on appeal, no special schedule, and no referral of them to the Commission, are appropriate.

Contentions 1-10 raise three basic issues: preemption (PID at 394-410); LILCO's so-called "realism" defense (PID at 410-15); and LILCO's so-called "immateriality" defense (PID at 415-26). The last two LILCO defenses -- "realism" and "immateriality" -- involve factual issues which are no different from the other matters on appeal characterized by LILCO as "record-based factual issues." It would be entirely inappropriate to sever those issues from others, to afford them special expedited consideration, or to refer them to the Commission.

Contention 11 pertains to the potential conflict of interest which will affect the performance of LILCO personnel relied upon to implement the LILCO Plan. Although some legal issues are involved, the PID turns on the Margulies Board's critical determination, as a factual matter, that LILCO has not done enough to ensure the independence of LILCO's personnel. See e.g., PID at 63. The facts relevant to this contention are not related to those involved in Contentions 1-10 or 92, and contrary to LILCO's suggestion, they are not different in kind from the record-based facts involved in the other PID issues on appeal.

Similarly, Contention 92 also presents both factual and legal issues entirely different from those involved in Contentions 1-10 and 11. On Contention 92, the Board found, again essentially as a factual matter, that LILCO's plan is inadequate because acting alone LILCO is not capable of carrying out the multiple actions which may be required if an emergency arises. See PID at 370-71. Thus, Contention 92 presents a record-based factual issue which does not merit separation from all the other similar issues, referral to the Commission, or any special treatment.

In sum, LILCO's so-called "legal authority" issues do not present a neat block of easily or properly severable issues on appeal. Rather, the issues in Contentions 1-10, 11, and 92 are highly dissimilar and, with the sole exception of the preemption

portion of the Contention 1-10 issue, they all involve disputed facts as well.[7] In such circumstances neither severance nor referral to the Commission is appropriate.

Second, even considering just the preemption issue -- which is the only one of LILCO's three defenses to Contentions 1-10 that is a purely legal question -- severance and referral to the Commission still are not appropriate. LILCO has attempted through broad generalities and conclusory assertions which lack even a semblance of legal citation, to characterize the Shoreham case as the "litmus test" for the future of nuclear power. In page after page of argument, LILCO seeks to build the preemption issue into one of extreme significance.[8]

---

[7] LILCO is constrained to acknowledge the factual record-based nature of the Contention 11 and 92 issues, but attempts to gloss over it in a footnote. See LILCO Response at 4, n.2.

[8] See, e.g., LILCO Response at 4 (legal issues "of obvious significance" to "NRC licensees generally"); id. at 5 ("availability of utility plan ... to enable an applicant to meet NRC requirements ... despite government refusal to participate ... affects all nuclear plants now operating or under construction"); id. at 6 (PID "has far-reaching implications for all nuclear power plants," and LILCO's appeal issue is important "to the nuclear industry"); id. at 7-8 (arguing [without citation] that PID dooms all plants where state and local governments refuse to cooperate because "common law of all states" will deny authority to implement utility plans).

Clearly, the Margulies Board's resolution of the preemption issue is of extreme significance to LILCO, since it means that LILCO cannot obtain a license to operate Shoreham. Neither the PID nor this case, however, can, by LILCO's fiat, be turned into the policy issue that will decide the future of the entire nuclear industry. The Shoreham case is unique. The decision to build the plant was a mistake since the electricity is not needed; the decision to locate it on Long Island is acknowledged to have been an error of huge proportion; and its construction and LILCO's

(footnote continued)

Furthermore, even if the Board were to assume, arguendo, that LILCO's appeal issues have far-reaching significance, the relief LILCO seeks makes no sense. After attempting to characterize its preemption issue as the "issue to end all issues," LILCO then proposes to bypass completely the established appeal procedures that would serve to focus that legal issue and ensure that the issue, as ultimately presented to the Commission, is as clearly delineated and thoroughly analyzed as possible. The Shoreham Appeal Board, having two attorney members, certainly seems well equipped to assist the Commission on this legal issue, especially since the Commission has only one lawyer among its five members. Further, the Appeal Board, unlike the Commission, is charged routinely with handling PID appeals and issues of legal interpretation; and, presumably, the Appeal Board is in a position to devote considerable attention to the matter, whereas the Commission has before it many more matters which require attention.

(footnote continued from previous page)
consistently unsuccessful efforts to satisfy NRC safety regulations have been an economic debacle from the very beginning. No other nuclear plant that has not been abandoned is similarly situated, or faced with the number or magnitude of problems which LILCO has created by its actions with respect to Shoreham. Shoreham was a mistake. LILCO's apparent refusal to acknowledge that under the NRC's regulations the plant cannot be licensed, however, cannot be used to bootstrap this unique case or LILCO's PID appeal issues into being the "litmus test" upon which the fate of the entire industry depends.

In short, therefore, in a case LILCO portrays as being of overriding importance, LILCO urges a short-cut procedure that could only result in a less deliberate and less carefully considered decision than that contemplated by the NRC's regulations and usual practice, and that which these substantial issues of law deserve. That makes no sense. The Appeal Board should retain jurisdiction of the matter and accord LILCO's "legal" appeal issues the treatment accorded to all the PID appeal issues.

III. The Margulies Board's Decision is Not Inconsistent with Prior NRC Decisions

LILCO argues at length that the Margulies Board's PID is inconsistent with the Brenner Board and NRC decisions in April/May 1983 on the County's Motion to Terminate. See LILCO Response at 9-15. Time does not permit an extensive discussion of this argument; the following brief comments should suffice.

First, contrary to LILCO's assertion, the Brenner Board's discussion of preemption in LBP-83-22 (17 NRC 608, 635-43) was expressly not dealt with by the NRC (see 17 NRC at 743). Moreover, the Brenner Board's analysis of preemption was rejected by the U.S. District Court in its decision of March 18, 1985,[9] and the Margulies Board expressly referenced the Citizens

---

[9] Citizens for an Orderly Energy Policy, Inc. v. County of Suffolk, No. CV-83-4966, slip op. (E.D.N.Y. March 18, 1985).

decision in its PID. See PID at 406. Thus, LILCO's attempt to use the Brenner Board's opinion to support its request for referral is without basis.

Second, in CLI-83-13, the Commission stated only that it was willing to have the Licensing Board consider a LILCO-sponsored utility plan, if one were submitted. Clearly, the NRC was speaking totally in hypothetical terms, however, since LILCO had not submitted any "utility" plan. The State law/preemption/legal authority issue was never addressed by the NRC, nor could it have been; no plan was even before the NRC, so how could the legality of implementing a non-existent plan have been decided? See 17 NRC at 742-44. Thus, LILCO has absolutely no basis to suggest that the Commission in May 1983 found that LILCO had authority to implement the plan it later submitted.

IV. Schedule for Appeal Board Briefs

LILCO's Response includes no arguments on why the briefing adjustments proposed by the County and State in their May 8 Motion are not proper. Therefore, since the Staff also makes no substantive arguments (it merely asserts that so-called "experienced" counsel are supposed to be able to get all work done and in very few pages regardless of time constraints), the County/State Motion should be granted.

With a minor adjustment, the County and State do not object to following the time limits in the regulations for briefing LILCO's appeal issues (i.e. LILCO's brief due June 3;

County/State brief in response due July 5).[10] However, on May 13 we learned of a development that requires a small adjustment in the time for filing the County/State brief. The U.S. Court of Appeals for the Second Circuit set a briefing schedule which calls for the County to file on July 1, 1985 its brief on LILCO's and the other plaintiffs' appeal of the Citizens case. Since the same Kirkpatrick & Lockhart attorney (Mr. Brownlee) has prime responsibility for the legal authority issues involved in all the cases now pending in various forums (state court, federal court and the NRC), it will be very difficult to file the County's Second Circuit brief on July 1 and have the preemption brief to the Appeal Board ready by July 5. We thus request that the time for the County/State brief in response to LILCO's brief on appeal be extended from July 5 to July 11 to accommodate this conflict.

Respectfully submitted,

Martin B. Ashare
Suffolk County Attorney
Suffolk County Department of Law
H. Lee Dennison Building
Veterans Memorial Highway
Hauppauge, New York 11788
(516) 350-4039

---

[10] We strongly oppose, however, LILCO's suggestion that just because the Staff disagrees with LILCO's position on Contentions 1-10, LILCO should be permitted to file a reply brief. See LILCO Response at 16 and 6. The clear implication of LILCO's argument is that the Staff is supposed to support the utility in all instances, and new rules must apply when the utility has lost. There is no basis in the regulations (10 CFR § 2.762) for such an extraordinary procedure and LILCO's Response falls far short of demonstrating any "good cause" that might at this time justify leave to file a reply.

Herbert H. Brown
Lawrence Coe Lanpher
Karla J. Letsche
KIRKPATRICK & LOCKHART
1900 M Street, N.W., Suite 800
Washinton, D.C. 20036
(202) 452-7000

Attorneys for Petitioner
Suffolk County

Fabian G. Palomino
Special Counsel to the Governor
Executive Chamber
Two World Trade Center
57th Floor
New York, New York 10047
(212) 587-2118

Attorney for Mario M. Cuomo and
the State of New York

May 15, 1985