

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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

AFFIDAVIT

The undersigned, David A. Brownlee, being duly sworn,  
deposes and says as follows:

1. I am a partner in the firm of Kirkpatrick & Lockhart, counsel to the Intervenor, County of Suffolk, in these proceedings. I make this Affidavit in support of the Answer of County of Suffolk and State of New York in Opposition to LILCO's Renewed Motion for Summary Disposition.

2. Since May, 1984, I have acted as principal trial counsel for the County of Suffolk in the action captioned County of Suffolk v. Long Island Lighting Company now pending in the Supreme Court of the State of New York, County of Suffolk, and consolidated in that Court at Consolidated Index No. 84-4615 with actions captioned Mario M. Cuomo v. Long Island Lighting Company and Town of Southampton v. Long Island Lighting Company which were originally filed in the Supreme Court of the State of New York in Albany County and Suffolk

County, respectively. The consolidated cases are referred to herein collectively as the "State Court Actions." I have personal knowledge of the pleadings and proceedings in the State Court Actions.

3. On August 6, 1984, LILCO filed its Motion for Summary Disposition of Contentions 1-10 (The "Legal Authority" Issues) pursuant to 10 C.F.R. §2.749 (1984). The Motion for Summary Disposition requested this Board "to resolve Contentions 1 through 10 in this proceeding in LILCO's favor." Motion for Summary Disposition, p. 1.

4. On February 27, 1985, LILCO filed its Renewed Motion for Summary Disposition of Legal Authority Issues on Federal-Law Grounds ("Renewed Motion"). The Renewed Motion urges this Board to decide LILCO's claim that any state-law-based restrictions on LILCO's performance of the offsite emergency planning functions set forth in LILCO's Transition Plan would be void because they are preempted under the Supremacy Clause of the U.S. Constitution.

5. The Renewed Motion represents that the "[F]ederal law questions were never placed for decision before the state court since the case was decided on cross motions to

dismiss and for summary judgment limited by the Court's October 2, 1984 Order to state law issues, and the case thus never developed to the point where LILCO would have filed an answer and pleaded its formal defenses." (Renewed Motion, p. 8, n. 11). That statement ignores LILCO's repeated representations to the New York State Supreme Court and to the United States District Court (E.D.N.Y.) that the federal preemption issue is part and parcel of the State Court Actions and should be decided in the State Court Actions. That representation has been made in the following instances:

(a) County of Suffolk filed a Complaint on March 8, 1984 in the Supreme Court of New York, Suffolk County, seeking a declaration that LILCO's implementation of the Transition Plan is unlawful and illegal under the Constitution and laws of New York State. LILCO moved to dismiss the County's action on April 6, 1984 and filed a supporting Affidavit of Herbert M. Leiman, Esq. dated April 6, 1984 stating that the issues presented were not within the subject matter jurisdiction of the New York Supreme Court and "fail to state a cause of action because they have been preempted by federal law, in particular, the Atomic Energy Act of 1954 (the "AEA") and the Nuclear Regulatory Commission regulations implementing the AEA." Affidavit dated April 6, 1984, ¶ 2.

(b) Mario M. Cuomo filed a Complaint for Declaratory Judgment on March 8, 1984 in the Supreme Court for the State of New York, Albany County, seeking a declaration (i) that LILCO's implementation of the Transition Plan would be in violation of New York State law and (ii) that LILCO lacked legal authority to implement the Transition Plan. LILCO moved to dismiss the State's action on April 6, 1984 and filed a supporting Affidavit of Herbert M. Leiman, Esq. dated April 6, 1984 stating that the issues presented were not within the subject matter jurisdiction of the New York Supreme Court and "fail to state a cause of action because they have been preempted by federal law, in particular, the Atomic Energy Act of 1954 (the "AEA") and the Nuclear Regulatory Commission regulations implementing the AEA." Affidavit dated April 6, 1984, ¶ 2.

(c) LILCO removed both the State and the County actions to the U.S. District Court for the Eastern District of New York on the ground that Plaintiffs' actions arose under the Constitution and laws of the United States. In support of its Petitions for Removal of both State and County actions, LILCO represented to the U.S. District Court (E.D.N.Y.) that the State Court Actions arose "under the Constitution and laws of the United States, and particularly the Supremacy Clause and



the Fourteenth Amendment of the United States Constitution and the Atomic Energy Act." Petitions for Removal dated April 5, 1984, ¶ 3.

(d) Plaintiffs thereafter moved to remand both actions to the New York Supreme Court on the ground that Plaintiffs' causes of actions did not arise under the Constitution or laws of the United States and were not within the original or removal jurisdiction of the U.S. District Court. Plaintiffs' Motion for Remand filed April 24, 1984, p.1.

(e) In support of its Petitions for Removal, LILCO filed a Memorandum of Law in Opposition to Motion for Remand dated May 7, 1984. That Memorandum represented to the Court that "Suffolk County's Complaint and the context in which this action arises ... show conclusively that any claim that the LILCO Transition Plan is unlawful ineluctably rests on federal law and necessarily must begin with an analysis of federal law." Memorandum filed May 7, 1984, pp. 6-7. LILCO further represented to the Court that: "Suffolk County's asserted right to a declaration that LILCO's implementation of LILCO's Transition Plan is unlawful both finds its source in federal law and requires resolution of a substantial question of federal law in dispute between the parties." Memorandum filed May 7, 1984, p. 14 (emphasis supplied).

(f) At the argument on Plaintiffs' Motion for Remand, counsel for LILCO represented to the Court (Altimari, J.) that the central issue in the State Court Actions was a question of federal law: "Suffolk County and New York ... have claimed that LILCO does not have the authority to perform certain functions after a license is granted .... That conduct, I will submit, is federal in character, and the County's challenge is to that conduct. I just don't see any way that you could resolve the complaint, the claim that the County is making and that New York is making, without hitting a federal question, because it's their claim as to LILCO's conduct." Transcript of Argument before Hon. Frank X. Altimari, U.S.D.J., May 25, 1984, p. 11 (emphasis supplied).

(g) In response to Judge Altimari's direct question, counsel for LILCO asserted that a defense grounded in federal law was within the State Court's jurisdiction:

THE COURT: Can't a State Court Judge handle the preemption type defense.

MR. SISK: If it were a defense, yes. The State Court would have jurisdiction.

Transcript of Argument before Hon. Frank X. Altimari, U.S. D.J., May 25, 1984, p. 21.

(h) By Memorandum and Order dated June 15, 1984, the U.S. District Court (Altimari, J.) granted Plaintiffs' Motion to Remand, holding that Plaintiffs' actions arose under state law and were not within the jurisdiction of the U.S. District Courts. The Court expressly held that the issue of federal preemption presented by LILCO was a defense to Plaintiffs' state law Complaints; that the preemption defense did not constitute a basis for federal jurisdiction; and that the State Supreme Court was the proper forum for LILCO to raise that defense. Cuomo v. LILCO, Civ. Act. No. 84-2328 (U.S.D.C., E.D.N.Y.) Memorandum and Order dated June 15, 1984, pp. 12-26.

(i) On May 16, 1984, Plaintiff, Town of Southampton, had filed a Verified Complaint in the Supreme Court of the State of New York, County of Suffolk, which sought a declaration (i) that LILCO's implementation of its Transition Plan is, and would be, unlawful and illegal under the Constitution and laws of the State of New York and (ii) that LILCO lacked the legal authority to undertake such action. On June 14, 1984, LILCO filed a Petition for Removal of the Southampton action. In support of that Petition, LILCO represented to the Court that the Southampton action "arises under the Constitution and laws of the United States, and particularly the Supremacy Clause and the Fourteenth Amendment

of the United States Constitution and the Atomic Energy Act." Petition for Removal dated June 14, 1984, ¶ 3.

(j) Following the District Court's remand of the State and County actions, Defendant, LILCO, moved to dismiss Southampton's Complaint by Notice of Motion dated June 29, 1984. LILCO filed a supporting Affidavit of Herbert M. Leiman, Esq. dated June 29, 1984 stating that the issues were not within the subject matter jurisdiction of this Court and "fail to state a cause of action because they have been preempted by federal law in particular, the Atomic Energy Act of 1954 ("the AEA") and the Nuclear Regulatory Commission regulations implementing the AEA." Affidavit dated June 29, 1984, ¶ 2.

(k) Following remand of the State and County actions to this Court and upon stipulation of all parties, the actions filed by Plaintiffs Cuomo, County of Suffolk and Town of Southampton were consolidated in the Supreme Court of the State of New York, Suffolk County, as Consolidated Index No. 84-4615. LILCO renewed its Motion to Dismiss Plaintiffs' actions on August 13, 1984 pursuant to Section 3211(a)(2) and (7) of the CPLR on the ground that (i) the Court lacked subject matter jurisdiction because the actions did not present a justiciable controversy and (ii) the Complaints failed to state



a cause of action because New York law did not prohibit LILCO from performing the functions set forth in the Transition Plan. In connection therewith, LILCO filed a supporting Affidavit of Rosalind M. Gordon, Esq. dated August 13, 1984 said to "supersede" the three previously-filed Affidavits of Herbert M. Leiman, Esq. that had asserted preemption as a ground for LILCO's Motions to Dismiss the several Complaints. Nonetheless, LILCO's Memorandum of Law in Support of Motion to Dismiss represented that the State Court Actions "obviously implicate controlling issues of federal law [i.e., preemption]." Notwithstanding the pendency of LILCO's Motion for Summary Disposition filed with this Board seven days earlier, LILCO also represented to the Court that "This Memorandum of Law does not address or waive the issue of federal preemption." LILCO Memorandum of Law, pp. 6-7. (emphasis supplied).

(1) On September 11, 1984, Plaintiffs filed a Cross Motion pursuant to Sections 2215 and 3211(c) of the CPLR requesting that the Court (i) treat LILCO's pending Motion to Dismiss as a Motion for Summary Judgment and (ii) grant summary judgment in favor of Plaintiffs. At a subsequent status conference before the Court, counsel for LILCO reiterated LILCO's previously-stated position that preemption was an issue

in the State Court Actions in the following terms: "Because one of the defenses that would be raised to that suit involved the question of preemption, if we ever got that far, we attempted to remove it to Judge Altimari's court." Transcript of Status Conference before Hon. William R. Geiler, J.S.C., September 18, 1984, p. 15 (emphasis supplied). At that same time, counsel for LILCO also acknowledged that LILCO had already asserted the preemption defense in the State Court Actions: "The motion which we originally filed before we removed the case so that we have a responsive pleading of record did move to dismiss, and it did raise the preemption argument." Id., p. 19 (emphasis supplied).

6. The Renewed Motion represents that the State and County "have consistently taken the position that their Complaints in New York State Court raised only state law issues" (Renewed Motion, p. 2, n. 2). In fact, Intervenorors have consistently stated (i) that the causes of action alleged in the State Court Actions arise under state law and (ii) that the issue of federal preemption that LILCO has repeatedly raised in the State Court Actions constitutes a defense to the Intervenorors' state law claims. Intervenorors have consistently stated that, if the state court finds that LILCO has no authority under state law to implement the Transition Plan,

then LILCO's preemption defense must be addressed as part of the decision on the merits. Intervenor's have stated that position in the following instances:

(a) The County's Memorandum in Support of Plaintiff's Motion for Remand states the distinction between the basis of the County's Complaint and the nature of LILCO's defenses:

The sum and substance of Suffolk County's claim, as alleged in the Complaint, is LILCO's "usurpation of the police power of Suffolk County and the State of New York" in contravention of the Constitution and laws of the State of New York....LILCO's Petition for Removal is grounded on the proposition that, because LILCO asserts it has defenses (including federal preemption) which are based on federal law, the County's claim is one that "arises under" the Constitution and laws of the United States. As we demonstrate below, such a basis for removal was specifically and expressly rejected by the United States Supreme Court.... Memorandum in Support of Plaintiff's Motion for Remand dated April 23, 1984, pp. 1-2.

(b) The County's Reply Brief with respect to the removal/remand issue stated that the County's claim arose under the state law and that LILCO's preemption claims constituted a defense to that claim. See, e.g., the following:

In this case....the federal preemption question is not a necessary element, or indeed any part of the County's claim. The controversy in this case is whether LILCO can, under state law, exercise state police power functions ... LILCO ... contends that it can exercise police powers either because federal law permits it or because federal law requires it or because federal law prohibits the County from seeking to prohibit LILCO from exercising such powers. Those propositions constitute statements of LILCO's defense; indeed, if a court were to determine that New York law permits LILCO to exercise state police powers, the question of federal preemption would never be reached. In sum, LILCO's federal preemption defense is not an element of the County's cause of action, and it does not justify removal of this action. Plaintiff's Reply Brief dated May 21, 1984, pp. 13-14.

(c) The County's position was reiterated to the New York Supreme Court in connection with LILCO's Motion to Dismiss and the Plaintiffs' Cross Motion for Summary Judgment. See, e.g., the following:

The State and County filed these declaratory judgment actions in state court....By these actions, Plaintiffs seek a declaration that LILCO does not have authority to carry out its Transition Plan....LILCO removed the State and County actions to the U.S. District Court for the Eastern District of New York, claiming that Plaintiffs' challenge to LILCO's legal authority presented a question of federal law that was within the



original jurisdiction of the federal courts. The State and County filed Motions for Remand of their actions to this Court, asserting that their causes of action arose under state law and that LILCO's preemption contention constituted an affirmative defense to the causes of action but was not an essential element of the claims alleged....Judge Altimari held that the issue of preemption arose only by way of affirmative defense and that Plaintiffs' claims and any defenses thereto should be resolved by the Supreme Court of the State of New York. Plaintiffs' Joint Brief in Opposition to LILCO's Motion to Dismiss and in Support of Plaintiffs' Cross Motion for Summary Judgment dated September 11, 1984, pp. 19-21.

7. The Renewed Motion's representation that the State and County "have consistently taken the position that their complaints in New York State Court raised only state law issues" (Renewed Motion, p. 2, n. 2) is inconsistent with statements of LILCO's counsel made in open court, acknowledging the position of the State and County that LILCO's preemption issue constitutes a defense to the State Court Actions:

MR. FARNHAM (counsel for LILCO): Last spring, at the time we went before Judge Altimari, he did decide that because of the Franchise Tax Board case, the careful pleading of the county and the state had limited their cause of action to state law grounds and, therefore, it should be remanded.

Now, the thrust of that argument was by Mr. Brownlee, and to quote directly from his argument to the court, this is to Judge Altimari: "If the Court is to determine that LILCO does not have that power,"

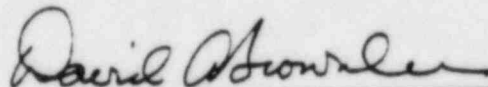
that is, the power under state law to do these things, "then and only then does the federal preemption issue become relevant."

And on that argument and on other arguments Mr. Brownlee beat me and succeeded in having Judge Altimari remove the entire case back to the state court, and they were consolidated here. Transcript of Status Conference before Hon. William R. Geiler, J.S.C., on September 18, 1984, pp. 16-17 (emphasis supplied).

8. By Order dated October 2, 1984, the New York Supreme Court determined that it would dispose of each of the issues presented by the pleadings and motion papers in the State Court Actions separately and that it would first address LILCO's "authority to undertake and implement an evacuation plan in the event of a nuclear accident..." Cuomo v. Long Island Lighting Company, Memorandum Order dated October 2, 1984. By Memorandum Opinion dated February 20, 1985, the N.Y. Supreme Court has resolved that legal authority issue. The Court has determined that the functions that LILCO intends to perform fall within the State's historic police power; that New York law (including specifically Executive Law, Article 2-B) does not authorize LILCO to exercise the functions contained in the Transition Plan; that LILCO is a corporation and has only those powers conferred upon it by state law; and that LILCO's corporate powers do not include the authority to implement the Transition Plan. The Memorandum Opinion directed the

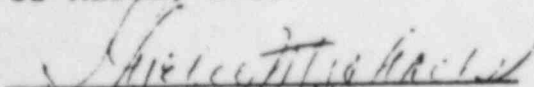
submission of a proposed Judgment reflecting the Court's decision.

9. Plaintiffs' Proposed Declaratory Judgment, now before the Court for execution, directs LILCO to present within fifteen (15) days any further defenses that LILCO may have, including its previously asserted preemption defense. In response, LILCO advised the Court that it intends to assert, and does not waive, the preemption defense, and LILCO has submitted a proposed Partial Summary Judgment to the Court which provides that LILCO shall, within twenty (20) days, raise or renew any defenses that it may have, including the issue of federal preemption. LILCO has also advised the Court that it will move the Court to abstain from or defer consideration of its renewed federal preemption defense. Letter of James E. Farnham, Esq. dated March 8, 1985, p. 3. Nonetheless, the proposed forms of Judgment submitted by the State and County and by LILCO itself both recognize that LILCO must renew its preemption defense as part of the State Court Actions.



David A. Brownlee

Sworn to and subscribed  
before me this 10th day  
of March, 1985.

  
Notary Public

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety and Licensing Appeal Board

DOCKETED  
USNRC

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

Docket No. 50-322-OL-3

(Emergency Planning )  
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Certificate of Service

I hereby certify that copies of 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 have been served on the following this 15th day of May, 1985, by U.S. mail, first class, except as otherwise noted.

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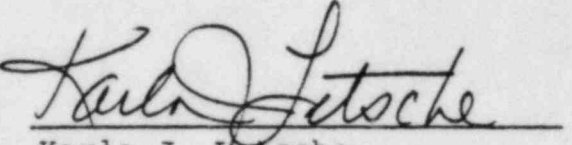
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Date: May 15, 1985

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\* By Hand

\*\* By Federal Express