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June 9, 1985

DOCKETED
USNRC

The Hon. Nunzio J. Palladino '85 JUN 10 A11:09 BY HAND
Commissioner Thomas M. Roberts
Commissioner James K. Asselstine
Commissioner Frederick M. Bernthal
Commissioner Lando W. Zech, Jr.
United States Nuclear
Regulatory Commission
1717 H Street
Washington, D.C. 20555

OFFICE OF SECRETARY
DOCKETING & SERVICE
BRANCH

Re: Prospect, et. al, and Town of Southampton,
et. al. v. Cohalan. Index No. 85-10520
NRC Docket No. 50-322-OL-4 (Low Power)

Dear Commissioners:

On behalf of 11 Suffolk County Legislators and the Eastern Long Island Towns of Southampton, East Hampton, Southold and Riverhead, I am submitting two Petitions, an Order to Show Cause, and a Memorandum of Law in the above-referenced litigation. These petitions seek to annul Executive Order 1-1985, issued by Suffolk County Executive Peter Cohalan on May 30, 1985. The Petitions were submitted to State Supreme Court Justice Jack J. Cannavo on Friday, June 7. Judge Cannavo's signed an Order to Show Cause sets these matters down for a hearing in Riverhead Supreme Court on Monday, June 10, and we expect a determination on the merits shortly thereafter. These documents are submitted to be made a part of the record in the low power license proceeding [Docket No. 50-322-OL-4 (Low Power)].

Petitioners in these actions have been advised that the Commission has scheduled a meeting and possible vote for Tuesday afternoon, June 11th on LILCO's request for a low power license. This meeting follows one held on Tuesday afternoon, June 4, at which the Commission was squarely confronted with the fact that the position of the Suffolk County government concerning the operation of Shoreham had been suddenly and dramatically fractured by the issuance of Executive Order 1-1985.

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The Hon. Nunzio J. Palladino, et. al.
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Until a determination has been made by New York State Courts regarding the legality of Executive Order 1-1985, the issue of who speaks for Suffolk County will remain unresolved. Accordingly, any action by the Commission which results in the issuance of a low power license prior to a judicial resolution of this dispute would be a gross injustice to the legislature and residents of Suffolk County.

The Commission should be advised that, Mr. Ashare's representations to the contrary, the County was not represented by counsel at the June 4th hearings since the legal position advanced by Mr. Ashare does not constitute the County's position. The County Executive's unlawful usurpation of powers reserved to the Legislature and his attempt to override the County's position by executive fiat is a legal nullity and has denied the County Legislature and the citizens of Suffolk County due process.

I have reviewed the transcript of the proceedings held by the Commission on June 4, which clearly demonstrates the extent to which the County Executive is systematically dismantling the County's legal case. With regard to Mr. Ashare's attempt to withdraw the County's legal position on NEPA, his representation to the Commission on that issue is a nullity. Similarly, Mr. Ashare's representations concerning the County's participation in emergency planning are a nullity. To the extent Mr. Ashare and Mr. Cohalan may have attempted to settle, or have in fact settled, safety or security issues, any such settlements are a legal nullity. Those settlements were executed without consultation with the experts retained by the County, MHB Technical Associates or the County's special counsel, Kirkpatrick & Lockhart. In sum, Mr. Ashare's participation in the oral argument itself is a nullity, since he is bound by the County Charter and County Law to represent the County, not the County Executive.

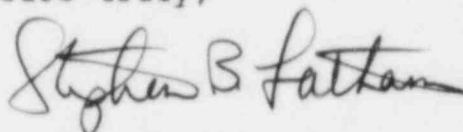
To proceed with the issuance of a low power license in the face of the County Executive's deliberate efforts to sabotage County policy and County government would be a monumental affront to due process and common sense. The issuance of any low power license will be challenged

The Hon. Nunzio J. Palladino, et. al.
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in the Courts on the merits, and any low power license issued in the face of this governmental conflict would be fatally tainted in that it would be based on a misrepresentation of the County's position.

For the foregoing reasons, the petitioners urge the Commission to suspend further consideration of the low power license until the matter of the legality of the County Executive's Executive Order has been determined by the Courts of New York State. In view of the urgency of these matters, we fully expect a determination on the merits of our litigation within a week or two. Moreover, since LILCO has stated that it will require several weeks to prepare for low power operation, no prejudice to any party will result pending the Court's resolution of the critical governmental conflict which we now face in Suffolk County.

Yours truly,



Stephen B. Latham

SBL:tf
Enclosures

cc: Docketing and Service (By Hand)
Low Power Service List (w/o encls)
Lawrence Lanpher, Esq. (Express mail)
Edwin J. Reis, Esq. (By Hand)
W. Taylor Reveley, III, Esq. (Express Mail)
Fabian Palomino, Esq. (By Hand)
Martin B. Ashare, Esq. (By Hand) (w/o encls)

At a Special Term, Part of the
Supreme Court of the State of New
York, held in and for the County of
Suffolk at *HAUPPAUGE*
New York, on the *7*-day of June, 1985.

P R E S E N T :

JACK I. CANNAVO

Justice

-----X
In the Matter of the Application of
WAYNE PROSPECT, GREGORY J. BLASS, JOHN
J. FOLEY, STEVEN ENGLEBRIGHT, JAMES MORGO,
JOSEPH RIZZO, PHILIP NOLAN, and SONDRACHETTY,

Petitioners,

for a Judgment under Article 78 of the
Civil Practice Law and Rules

PETER F. COHALAN, County Executive
of the County of Suffolk,

Respondent.
-----X

ORDER TO SHOW CAUSE

Index No.: *85-1020*

On reading and filing the Petition of WAYNE PROSPECT,
GREGORY J. BLASS, JOHN J. FOLEY, STEVEN ENGLEBRIGHT, JAMES MORGO,
JOSEPH RIZZO, PHILIP NOLAN and SONDRACHETTY, the Affidavit of
WAYNE PROSPECT, sworn to June 5, 1985, the Affirmation of IRVING
LIKE, ESQ., dated June 5, 1985, and the Exhibits annexed thereto;

I. LET the Respondent show Cause before Hon.

J.S.C. **A**, Justice of this Court, at a Special Term, Part **I** of
this Court, to be held at the Courthouse, Griffing Avenue, Riverhead,

New York, on June 10, 1985 at 9:30 o'clock in the forenoon of that day, or as soon thereafter as counsel may be heard, why an order should not be made and judgment entered pursuant to Civil Practice Law and Rules (CPLR) §7803 and CPLR §6301:

- A. Annulling Executive Order 1-1985 issued by Respondent on May 30, 1985;
- B. Enjoining the Respondent, his attorneys, agents, servants, employees and all persons acting in concert with them including but not limited to those of the Suffolk County Planning Department, Suffolk County Police Department and Suffolk County Attorney from taking any action whatsoever to enforce, implement or carry out the directions, policies or terms of Executive Order 1-1985 issued by Respondent on May 30, 1985 or any directive or instruction relating thereto;
- C. Enjoining the Respondent from assigning or expending any funds or resources in contravention of Resolutions 262-1982, 456-1982 and 111-1983, or directing any County personnel to review, test or implement the LILCO plan or any Radiological Emergency Response Plan (RERP), for the Shoreham nuclear plant without first presenting to the Suffolk County Legislature the need therefor and securing a resolution adopted

by the County Legislature and approved by the County Executive in accordance with the provisions of the Suffolk County Charter and applicable statutes, local laws and regulations;

- D. Enjoining the Respondent and the persons hereinabove described from modifying the policy and legal position of Suffolk County in any Shoreham related proceedings as established by the County and its Special Counsel, Kirkpatrick and Lockhart, Esqs., and the County policy as set forth in the resolutions 262-1982, 456-1982 and 111-1983, and from communicating to the Nuclear Regulatory Commission (NRC), the Public Service Commission (PSC), or to any federal or state judicial tribunal, administrative agency, department of government or official, either verbally or in writing directly or indirectly that such policy is other than is described in said resolutions or that such County policy has been changed from that of being opposed to the operation of Shoreham;
- E. Enjoining the Respondent from withdrawing the County's opposition to the issuance by the NRC to LILCO of a low power operating license for Shoreham.

II. The grounds for this application as more fully set forth in the petition and affidavits and supporting legal memorandum are that the Respondent has threatened to or is about to carry out acts which usurp and destroy the powers of the Suffolk County Legislature and violate:

- A. The provisions of the Suffolk County Charter concerning the distribution of the powers of the County Executive and the County Legislature;
- B. Resolutions, local laws and policy previously adopted by the County Legislature with Respondent's approval as County Executive relating to the Shoreham nuclear plant;
- C. The provisions of Article 2-B of the Executive Law governing the powers of chief executive officers of local political subdivisions; and
- D. On the further ground that the Petitioners have demanded a permanent injunction and said acts of Respondent, if committed during the pendency of this action, would produce injury to the Petitioners, the voters of Suffolk County, and the ratepayers of LILCO's service area.

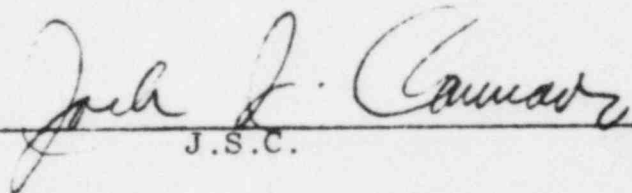
III. It appearing from the petition and the aforementioned affidavits that immediate and irreparable injury, loss or damage will

result to the Petitioners herein; it is

ORDERED, that service of this Order and the papers upon which it is granted upon the Respondent on or before the 6th day of June, 1985, shall be deemed sufficient notice; and it is further

ORDERED, that pursuant to Civil Practice Law and Rules (CPLR) §7804(e), a verified answer and supporting affidavits, if any, together with Respondent's entire official file and record with Respect to Executive Order 1-1985 and true copies of any and all documents which will be offered in evidence by Respondent in support of Executive Order 1-1985 shall be served upon Petitioners' attorneys ^{PRIOR TO ARGUMENTS ON} ~~no later than 12 Noon~~, June 10, 1985.

ENTER


J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

-----X
In the Matter of the Application of
WAYNE PROSPECT, GREGORY J. BLASS, JOHN
J. FOLEY, STEVEN ENGLEBRIGHT, JAMES MORGO,
JOSEPH RIZZO, PHILIP NOLAN, and SONDRACHACHETY,

VERIFIED
PETITION

Petitioners,

Index No.:

for a Judgment under Article 78 of the
Civil Practice Law and Rules

PETER F. COHALAN, County Executive
of the County of Suffolk,

Respondent.

-----X
TO THE SUPREME COURT OF THE STATE OF NEW YORK,
COUNTY OF SUFFOLK:

Petitioners, by REILLY, LIKE & SCHNEIDER, ESQS., and
LESTER B. LIPKIND, ESQ., their attorneys, complaining against the
Respondent, respectfully allege:

1. Petitioners are duly elected legislators of the
County Legislature of the County of Suffolk, taxpayers of the
County of Suffolk and ratepayers of the Long Island Lighting
Company, a New York electric and gas public service utility
corporation (LILCO).

2. Respondent is the duly elected County Executive
of the County of Suffolk.

3. The County of Suffolk is governed by the Suffolk County Charter ("Charter"), which establishes the County Executive and County Legislature as co-equal branches of government, and, entrusts to the County Legislature: (a) the determination of county policies; (b) the powers of local legislation and appropriation; and (c) the exercise of such other functions and powers as may be granted or assigned to it by such Charter or by State or local law (Charter §§201, 202, 213).

4. Local laws and resolutions of the Suffolk County Legislature may not be enacted except in accordance with the proceedings and requirements prescribed in said Charter, and shall require the affirmative vote of : a) not less than a majority of the total membership of the County Legislature; or b) two-thirds of the total membership of the County Legislature if prior to passage, the County Executive certifies as to the necessity of its immediate passage. (Charter §219-222).

5. No local law or resolution, other than a resolution relating to procedure shall take effect until it has been approved by the County Executive and after complying with the procedures and requirements of the Charter. (Charter, §§222-223).

6. The County Executive is charged with the responsibility of taking care that the laws and resolutions applicable to the County and the powers and duties assigned to him by the Charter as delegated to him by the County Legislature, are faithfully executed and performed consistent with law. (Charter §§303, 304).

7. Proceedings are presently pending before the Nuclear Regulatory Commission (NRC) on the application by LILCO for a license permitting it to operate an 820 mw nuclear power electric generated facility on property located at Shoreham in the Town of Brookhaven, County of Suffolk and State of New York.

8. In response to the accident which occurred at the Three Mile Island nuclear facility (TMI) at Harrisburg Pennsylvania in March, 1979, the Congress determined that no nuclear plant should be licensed to operate unless an adequate emergency plan could be drawn up and implemented for the area surrounding the nuclear facility. (NRC Authorization Act of 1980).

9. The NRC in implementing the policy necessitated by Congress, promulgated a number of regulations which included the mandatory submission of an adequate radiological emergency plan (RERP), by an applicant desirous of operating a nuclear power plant. An operating license is issued only if the NRC finds that there is a reasonable assurance that adequate protective measures can be taken to protect the area surrounding the nuclear facility in the event of a radiological emergency. (10 CFR §50.47(a)(1)(1984)).

10. On March 23, 1982, the Suffolk County Legislature passed Resolution 262-1982 which was introduced, strongly supported, and approved by the Respondent as County Executive on March 25, 1982,

authorizing the Suffolk County Planning Department to prepare a County RERP in connection with the Shoreham operating licensing proceedings, to serve the interests of safety, health and welfare of the residents of Suffolk County (Exhibit 1). Said resolution provided:

"RESOLVED, that said plan shall not be operable and shall not be deemed adequate and capable of being implemented until such time as it is approved by the Suffolk County Legislature; and

RESOLVED, that only after said plan is approved by the Suffolk County Legislature shall it be submitted to the Federal Emergency Management Agency and the Nuclear Regulatory Commission for purposes of any findings, determinations, rulings, reviews, or hearings by such Federal agencies."

11. On May 18, 1982 the Suffolk County Legislature passed Resolution 456-1982, introduced, strongly supported and approved by the Respondent as County Executive on May 19, 1982, establishing the RERP policy of the County of Suffolk (Exhibit 2). Said resolution provided:

"WHEREAS, Suffolk County's Emergency Planning Task Force, composed of nationally recognized experts drawn from a range of pertinent disciplines, is now conducting a detailed planning effort in order to attempt to develop a viable radiological emergency plan for Suffolk County; and

WHEREAS, The Long Island Lighting Company, in an unwarranted and arrogant act, has gone beyond its powers as a private corporation in an attempt to usurp the rightful powers of Suffolk County by submitting county planning resource material to the New York State Disaster Preparedness Commission for its approval as the official radiological emergency response plan for Suffolk County; and

WHEREAS, said planning resource material developed in part by county personnel, is preliminary data which in no way constitutes the Suffolk County approved RADIOLOGICAL EMERGENCY RESPONSE PLAN and will not in the future constitute such County plan; and

WHEREAS, Suffolk County will submit its RADIOLOGICAL EMERGENCY RESPONSE PLAN to the New York State Disaster Preparedness Commission only when that plan has been fully prepared and approved by Suffolk County and is thereby integrated with the planning efforts of both LILCO and New York State; therefore, be it

RESOLVED, that Suffolk County hereby established the following Radiological Emergency Response Planning Policy:

Suffolk County shall not assign funds or personnel to test or implement any radiological emergency response plan for the Shoreham Nuclear Plant unless that plan has been fully developed to the best of the County's ability.

Suffolk County shall not assign funds or personnel to test or implement any radiological emergency response plan for the Shoreham Nuclear Plant unless that plan has been the subject of at least two public hearings, one to be held in Riverhead and one to be held in Hauppauge.

Suffolk County shall not assign funds or personnel to test or implement any radiological emergency response plan for the Shoreham Nuclear Plant unless that plan has been approved, after public hearings, by the Suffolk County Legislature and the County Executive."

12. The Planning Department, in accordance with the legislative directive, submitted a RERP in December 1982. A number of public hearings were held by the Legislature to consider the RERP in January, 1983. The Suffolk County Legislature on February 17,

1983, adopted Resolution 111-1983, which was introduced, strongly supported and approved by the Respondent County Executive on February 22, 1983 (Exhibit 3), pursuant to which it was decided not to approve, adopt or implement any RERP for Shoreham.

The reason given for this action was that...

"(Since) no local radiological emergency response plan for a serious nuclear accident at Shoreham will protect the health, welfare, and safety of Suffolk County residents...the County's radiological emergency planning process is hereby terminated, and no local radiological emergency plan for response to an accident at the Shoreham plan shall be adopted or implemented...

"...(Since) no radiological emergency plan can protect the health, welfare and safety of Suffolk County residents and, since no radiological emergency plan shall be adopted or implemented by Suffolk County, the County Executive is hereby directed to assure that actions taken by any other governmental agency be it State or Federal, are consistent with the decision mandated by this Resolution".

13. The Governor of New York, after reviewing the results of a study by the Marburger Commission, an independent committee appointed by the Governor to study the Shoreham situation, announced that no RERP for Shoreham would be adopted or implemented by the state.

14. Following the County's refusal to adopt a RERP, LILCO, relying upon New York State Executive Law, Article 2-B (State and Local Natural and Man-Made Disaster Preparedness), submitted its own plan to the NRC, designated as "The LILCO Transition Plan" (PLAN).

15. The LILCO Plan describes in detail the actions which LILCO proposes to take in the event of a radiological emergency at the Shoreham facility.

16. Thereafter, the County of Suffolk, the State of New York and the Town of Southampton commenced separate declaratory judgment actions in the Supreme Court, Suffolk County against LILCO, seeking a declaration that LILCO does not have the legal authority to carry out its Plan.

17. The Supreme Court of Suffolk County, in a decision by Justice William R. Geiler, published in the New York Law Journal, April 19, 1985, (Exhibit 4), concluded that LILCO's plan constituted a usurpation by LILCO of governmental powers and directed that judgment be entered in favor of the Petitioners.

18. The Court declared that Executive Law, Article 2-B, did not authorize LILCO, expressly or impliedly, to exercise the State's police powers in emergency situations, but only conferred these powers upon state and local governments.

19. Upon information and belief, on May 30, 1985, the Respondent signed and issued Executive Order 1-1985 (Exhibit 5), whose intent and purported effect is to nullify Resolutions 262-1982, 456-1982 and 111-1983, and the provisions of the Charter distributing powers between the County Legislature and County Executive, directing County authorities to review and run a drill of LILCO's evacuation plan incident thereto, and Respondent stated:

"I've dropped my opposition to the Plan as long as the results of the drill are positive".

20. The Respondent's Executive Order 1-1985, is invalid and a violation of the Charter and the resolutions setting forth the policy and law of the County with regard to Shoreham and emergency planning, adopted by the County Legislature with the approval and concurrence of the Respondent as County Executive. Respondent's actions usurp the functions of the County Legislature and breach the principle of the separation of powers between the executive and legislative branches embodied in the New York State Constitution, the Municipal Home Rule Law and Charter. Respondent lacks any authority: a) to assign any funds or direct any County authorities or personnel to review, test or implement LILCO's plan, or any other RERP; or b) to modify or drop the County's policy of opposition to the licensing of the Shoreham plant for operation. Respondent has unilaterally arrogated to himself the power to determine the County's policy with regard to the operation of the Shoreham plant in violation of the express will of the County Legislature. The Respondent has vitiated the County's Shoreham policy and misrepresented it to third parties including the NRC, the PSC and Federal and State Courts in which Shoreham related proceedings are pending.

21. The Respondent's conduct and Executive Order #1-1985 constitute a violation of Article 2-B of the Executive Law in that:

- a. Respondent seeks to implement as a County RERP, the LILCO Plan previously rejected by the County

and declared by the Supreme Court of Suffolk County to be a usurpation of state and local governmental power;

- b. Respondent unilaterally undertakes to act in a manner denounced by the Presiding Officer of the Suffolk County Legislature as patently illegal, and without the concurrence and approval of the County Legislature; and
- c. Respondent acted without satisfying the requirements of the provisions of Article 2-B which are conditions precedent to the exercise of the authority of the Chief Executive of any political subdivision.

22. By reason of the foregoing, the acts of the Respondent have caused irreparable injury to the Petitioners, the people Petitioners represent as elected County Legislators, the taxpayers of Suffolk County, and the over 800,000 ratepayers of LILCO's service area, for which there is no adequate remedy at law.

23. The injunctive relief requested by petitioners is essential because of the Respondent's unilateral decision to change the policy of the Suffolk County Government from one of opposition to supporting operation of the Shoreham plant.

a. The County's policy of opposition to Shoreham on safety grounds and its legal position regarding the impossibility of any evacuation or RERP has been communicated to the NRC and the PSC and federal and state courts whenever Shoreham-related issues were under consideration. Executive Order 1-1985 is being misrepresented in Shoreham-related proceedings by Respondent and LILCO as a reversal of the County policy opposing operation of Shoreham.

b. As evidenced by the annexed letter dated May 31, 1985, to County Attorney Martin Bradley Ashare, Esq. from Herbert H. Brown, Esq., the County's special counsel in all the Shoreham proceedings (Ex. 6), the Respondent's reversal of position concerning emergency planning for and opposition to Shoreham has a significant adverse impact on the positions taken by Suffolk County in various Shoreham related proceedings.

c. In the Shoreham operating license proceedings pending before the NRC, LILCO has applied for a low power test license which, if granted, would permit LILCO to operate Shoreham at a power level causing it to become irrevocably radioactive.

d. Respondent has repeatedly stated publicly and in formal presentations to the County Legislature, Governor Cuomo's Shoreham Commission, the NRC, and federal and state courts, that Shoreham should not operate because it is impossible to safely evacuate or otherwise protect the public in the event of a serious nuclear accident at the plant. Respondent has further stated that

operation of Shoreham would imperil the well being of Suffolk County's residents. By virtue of the decision of this Court (Ex. 4) declaring the LILCO plan illegal, and the findings and conclusions of the NRC,

"The LILCO plan cannot and will not be implemented as required by regulations...

"From a practical standpoint the foregoing findings leave LILCO without an implementable comprehensive and effective Emergency Response Plan for Shoreham"

(Atomic Safety and Licensing Board Partial Initial Decision on Emergency Planning Dated April 17, 1985, Docket No. 50-322-OL-3, p. 426).

e. The unilateral decision of the Respondent to drop opposition to Shoreham misrepresents and vitiates the policy and legal position of the County of Suffolk in all such judicial and agency proceedings and, if allowed to be communicated as the new policy of the County of Suffolk, increases the possibility that the NRC will misperceive Suffolk County's policy as one of support of Shoreham and issue a low power test license and ultimately a full power operating license, thereby increasing the radiological risk to the health and safety of the people of Long Island.

f. Unless immediate injunctive relief is granted, the Respondent will effectively destroy the Suffolk County Charter form of government and will become the unauthorized accomplice of LILCO in putting the Shoreham plant into operation contrary to the duly established policy and resolutions of the Suffolk County government.

WHEREFORE, the Petitioners demand judgment against the Respondent as follows:

- A. Annulling Executive Order 1-1985 issued by Respondent on May 30, 1985:
- B. Enjoining the Respondent, his attorneys, agents, servants, employees and all persons acting in concert with them, including but not limited to those of the Suffolk County Planning Department, Suffolk County Police Department and Suffolk County Attorney from taking any action whatsoever to enforce, implement or carry out the directions, policies or terms of Executive Order 1-1985 issued by Respondent on May 30, 1985 or any directive or instruction relating thereto;
- C. Enjoining the Respondent from assigning or expending any funds or resources in contravention of Resolutions 262-1982, 456-1982 and 111-1983, or directing any County personnel to review, test or implement the LILCO plan or any Radiological Emergency Response Plan (RERP), for the Shoreham nuclear plant without first presenting to the Suffolk County Legislatur the need therefor and securing a resolution adopted by the County Legislature and approved by the

County Executive in accordance with the provisions of the Suffolk County Charter and applicable statutes, local laws and regulations;

- D. Enjoining the Respondent and the persons hereinabove described from modifying the policy and legal position of Suffolk County in any Shoreham related proceedings as established by the County and its Special Counsel, Kirkpatrick and Lockhart, Esqs., and the County policy as set forth in the resolutions 262-1982, 456-1982 and 111-1983, and from communicating to the Nuclear Regulatory Commission (NRC), the Public Service Commission (PSC), or to any federal or state judicial tribunal, administrative agency, department of government or official, either verbally or in writing directly or indirectly that such policy is other than is described in said resolutions or that such County policy has been changed from that of being opposed to the operation of Shoreham;
- E. Enjoining the Respondent from withdrawing the County's opposition to the issuance by the NRC to LILCO of a low power operating license for Shoreham.

F. For such other and further relief as the Court deems proper, together with reasonable attorneys fees and costs and disbursements of this action.

REILLY, LIKE & SCHNEIDER
200 W. Main St., Box 218
Babylon, New York 11702
(516) 669-3000

LESTER B. LIPKIND, ESQ.
12 Grove Place
Babylon, New York 11702
(516) 669-3421

Dated:
June 5, 1985
Babylon, New York

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

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In the Matter of the Application of
WAYNE PROSPECT, GREGORY J. BLASS, JOHN
J. FOLEY, STEVEN ENGLEBRIGHT, JAMES MORGO,
JOSEPH RIZZO, PHILIP NOLAN, and SONDR
BACHETY,

Petitioners,

AFFIDAVIT

for a Judgment under Article 78 of the
Civil Practice Law and Rules

Index No.:

PETER F. COHALAN, County Executive
of the County of Suffolk,

Respondent.

-----X

STATE OF NEW YORK)
) SS.:
COUNTY OF SUFFOLK)

WAYNE PROSPECT, being duly sworn, deposes and
says:

1. I am a Suffolk County Legislator and one of
the petitioners named in the caption.

2. I submit this affidavit in support of the relief
requested in the within petition brought on by Order to Show Cause
pursuant to CPLR §§7803 and 6301.

3. I am intimately familiar with the facts and
proceedings described in the Petition.

4. I and my colleagues on the Suffolk County Legislature have joined in this proceeding in order to prevent Respondent from destroying our Suffolk County Charter form of government guaranteed to us by New York State Constitution, Article 9 §1. and Municipal Home Rule Law §10.

5. As detailed in the Petition, Respondent's Executive Order 1-1985 violates County Resolutions 262-1982, 456-1982 and 111-1983, duly enacted with his approval and enthusiastic support, and violates the Suffolk County Charter's provisions governing the distribution of powers between the County Legislature and County Executive, the establishment of County policy and expenditure of funds.

6. These resolutions codified the County policy and practice on the subject of radiological emergency response planning concerning the Shoreham nuclear plant, and determined that, as a result of Suffolk County's unique island geography and limited road capacity, it would be impossible to design an evacuation plan that could be successfully implemented if there were a nuclear accident at Shoreham.

7. Accordingly, it is Suffolk County's official position, established through the lawful processes, required by our Suffolk County Charter, that the Shoreham Nuclear Power Station should not operate because the risk to the public health and safety would be too great.

8. Consequently, pursuant to the enumerated County Resolutions, all county departments and agencies have been precluded from planning, developing and participating in any radiological emergency response plan for Shoreham, and the County Executive, pursuant to such legislation, has been directed to take all actions necessary to assure that actions taken by any other governmental agency, be it state or federal, are consistent with the positions of Suffolk County.

9. In addition, our adopted legislation explicitly states that there can be no radiological emergency response plan for Shoreham unless such a plan is approved by the County Legislature.

10. This Court has declared LILCO's plan to be illegal as a private corporation's usurpation of state and local governmental power (Exhibit 4 to Petition).

11. In view of the official position taken by the Suffolk County government and New York State opposing operation of Shoreham, the NRC's Atomic Safety and Licensing Board has concluded that LILCO's plan cannot and will not be implemented as required by regulation, and that LILCO lacks an implementable, comprehensive and effective emergency response plan for Shoreham (Petition, Pg. 11, para. d).

12. The Respondent's Executive Order 1-1985 of May 30, 1985 now seeks to unilaterally and arbitrarily rescind all County legislation on the subject of radiological emergency response planning by directing Suffolk County's participation in the LILCO emergency response plan for Shoreham and to change Suffolk County's policy and position on Shoreham from opposition to support.

13. Respondent's action has provoked such widespread public outrage at his cynical disregard of orderly democratic governmental processes that Mr. Lou Howard, the Presiding Officer of the Suffolk County Legislature and a supporter of Shoreham, has denounced Respondent's Executive Order as patently illegal and an inappropriate vehicle for accomplishing any change in the County policy on Shoreham.

14. Respondent's contempt for the requirements of the Suffolk County Charter is evidenced by the fact that a Resolution had previously been introduced by Presiding Officer Howard and laid on the table 2/13/85 (Intro Res. No. 1177-85) (Exhibit 7), which proposed repeal of Resolution Nos. 456-1982 and 111-1983, and a change in the County's policy on Radiological Emergency Response Planning so as to authorize a test of a County RERP to be prepared in a specific manner. This resolution failed to gain sufficient support to be voted on by the County Legislature.

15. If Respondent wished to change the County's policy on Shoreham he had available to him the means of doing so through supporting Mr. Howard's resolution or any variation thereof.

16. Instead, Respondent has attempted in an unprecedented manner to circumvent the governmental processes prescribed by the Charter and the express will of the County Legislature by issuing Executive Order 1-1985 and then unilaterally taking immediate steps to reverse the County's policy on Shoreham in pending Shoreham related proceedings.

17. Respondent's conduct irreparably injures the County in the most profound ways imaginable. First, by destroying the fabric of Suffolk County's government through nullification of the legislative will expressed after the deliberate processes prescribed by the Charter. Second, by carrying out his executive usurpation of legislative functions in the Shoreham case, whose outcome, one way or another will vitally affect the immediate and long term health, safety and well-being of the people of Suffolk County, and indeed, Long Island.

18. One need not be for or against Shoreham to experience revulsion at Respondent's executive lawlessness.

19. The County Executive himself has testified that "Shoreham should not operate, because it is impossible to safely

evacuate or otherwise protect the public in the event of a serious nuclear accident at the plant. That fact alone means that the operation of Shoreham would imperil the well-being of Suffolk County's residents." (Statement of Suffolk County Executive Peter F. Cohalan before Governor Cuomo's Shoreham Commission, September 30, 1983, pg. 1).

20. The County Executive described the magnitude of the peril earlier on February 16, 1983, in his statement to the County Legislature concerning radiological preparedness. "Radiological emergency preparedness for Shoreham is the most significant issue of public safety that this County government has faced. It affects the health, safety and welfare of Suffolk's 1.3 million citizens and the hundreds of thousands of visitors who annually use our recreational facilities and shoreline. There is no competing value, be it political, economic or otherwise, that could justify our giving the public's safety any priority other than the very highest" (Statement, p. 2).

21. On the following day, February 17, 1983, the County Legislature adopted Resolution 111-1983, and it was approved and ratified by Respondent on February 22, 1983 (Ex. 3).

22. On May 1, 1985, Herbert H. Brown, Esq., the County's Special Counsel in the Shoreham related matters, sent a status report on pending matters in which he pointed out that Suffolk County, together with the State of New York, stood close

to complete victory (Ex. 8). He pointed out that the Shoreham case was at a critical stage and described what County legal resources were necessary to protect its interest in the various pending judicial and administrative proceedings.

23. As late as May 7, 1985, Respondent stated: "We have not publicly changed our position on Shoreham. We still have two concerns, emergency planning and safety..." (Newsday, May 31, 1985, p. 5).

24. On May 30, 1985, the Respondent suddenly, and in complete contradiction to his publicly stated representations announced he was dropping opposition to Shoreham and had issued Executive Order 1-1985 to implement his reversal of position.

25. In doing so, he completely vitiated the gains which the County achieved in such proceedings, and misrepresented the County's established policy on Shoreham. LILCO lost no time in capitalizing on Respondent's unilateral reversal of position. On May 31, 1985 its counsel, Hunton & Williams, sent a letter circulating the Executive Order and related media articles to various officials (Ex. 9).

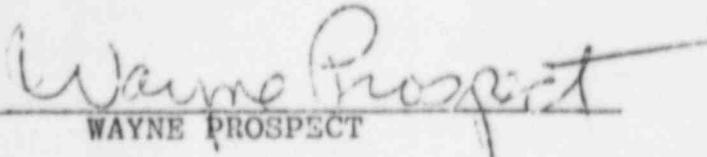
26. Whatever justification, if any, Respondent may claim for his Executive Order and about face on Shoreham, and whether one supports or opposes the operation of Shoreham, there

is no justification, legal or moral, for the County Executive to arrogate to himself without the approval of the County Legislature, his co-equal partner under the Suffolk County Charter, unilateral policy-making with regard to Shoreham.

27. The County's official policy and position on Shoreham was arrived at over a long period of time with painstaking and scrupulous adherence to the respective roles of the executive and legislative institutions established by the Charter and in compliance with its democratic processes for adopting local laws and resolutions. The County Executive himself either introduced, or actively and vigorously supported and lobbied for enactment of the very resolutions he now seeks to obliterate by midnight executive fiat on the eve of critically important hearings in the Shoreham case which could result in the plant becoming imminently and irrevocably radioactive.

28. To allow him now to dictate policy on the Shoreham case by a naked usurpation of power is to create a tragic precedent paving the way for future executive abuse of power in other matters vitally affecting the interests of the people of Suffolk County.

29. In short, unless the relief requested is granted by this Court, the Respondent has destroyed the meaning and integrity of the Suffolk County Charter and has trampled upon the rights of the citizens of Suffolk County.


WAYNE PROSPECT

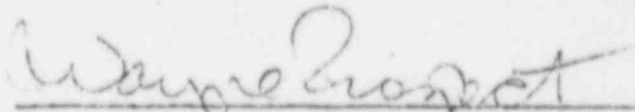
Sworn to before me this
5th day of June, 1985.


IRVING LIKE
NOTARY PUBLIC, State of New York
No. 60,000,000 Suffolk County

VERIFICATION

STATE OF NEW YORK)
)SS.:
COUNTY OF SUFFOLK)

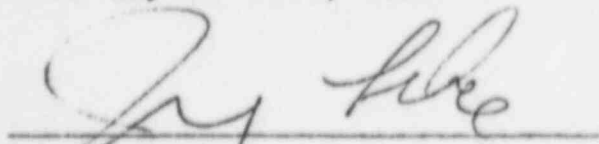
WAYNE PROSPECT, being duly sworn, deposes and says that deponent is one of the Petitioners in the within action; that deponent has read the foregoing Petition and Affidavit and knows the contents thereof; that the same is true to deponent's own knowledge except as to the matters therein stated to be alleged on information and belief, and that as to those matters deponent believes it to be true.



WAYNE PROSPECT

Sworn to before me this

5 th day of June, 1985.



IRVING LIKE
NOTARY PUBLIC, State of New York
No. 52-2363450, Suffolk County
Term Expires March 30, 1987

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

-----X
In the Matter of the Application of
WAYNE PROSPECT, GREGORY J. BLASS, JOHN
J. FOLEY, STEVEN ENGLEBRIGHT, JAMES MORGO,
JOSEPH RIZZO, PHILIP NOLAN and SONDR
BACHETY,

Petitioners,

for a Judgment under Article 78 of
the Civil Practice Law and Rules

PETER F. COHALAN, County Executive
of the County of Suffolk,

Respondent.
-----X

STATE OF NEW YORK, COUNTY OF SUFFOLK:

IRVING LIKE, an attorney duly admitted to practice in
the courts of the State of New York, affirms under penalties of
perjury:

1. I make this affirmation to stress the irreparable
injury petitioners and the people of Suffolk County will suffer if
this matter is not brought on for expedited judicial review with
immediate injunctive relief as requested in petitioners' Order to
Show Cause, submitted herein.

2. This proceeding draws its urgency not simply from
the County Executive's abuse of power and nullification of the
Suffolk County Charter, but from the unique circumstances that
it happens to involve a critical stage of the Shoreham nuclear

AFFIRMATION

Index No.:

plant operating license hearings, and, therefore, if such abuse is not immediately checked irreparable injury may result.

3. Whether one believes County policy should support or oppose the opening of the Shoreham plant, no one disagrees the County's policy should be properly fashioned so that the health, safety and economic well-being of its citizens will be protected to the maximum extent possible.

4. The irreparable injury consequences that will follow if immediate, permanent injunctive relief are not granted are detailed in the Affidavit of Stephen B. Latham, Esq., dated June 5, 1985 submitted in the proceeding captioned, "In the Matter of the Application of the TOWN OF SOUTHAMPTON, TOWN OF EAST HAMPTON, TOWN OF SOUTHBOLD, and TOWN OF RIVERHEAD, Petitioners, for a Judgment under Article 78 of the Civil Practice Law and Rules, PETER F. COHALAN, County Executive of the County of Suffolk, Respondent". It is respectfully requested that the matters stated in Mr. Latham's affidavit, petition and papers submitted in such proceeding be deemed incorporated herein.

5. The Nuclear Regulatory Commission is deliberating at this very moment whether to issue a low power operating license to LILCO.

6. Since the issuance of Executive Order 1-1985, the Respondent has been moving precipitously to dismantle the County's policy and legal position in the NRC operating license proceeding and all Shoreham related proceedings. His acts have included:

A. The firing of Kirkpatrick & Lockhart, Esqs., the law firm that has represented the County in the Shoreham related proceedings, a move whose validity is questionable in view of the illegality of Executive Order 1-1985;

B. Respondent, on Friday, May 31, 1985, one day after the issuance of Executive Order 1-1985, secretly

"signed a settlement with LILCO on the security issues for back up diesel generators, the largest obstacle to LILCO getting a license to test the plant at up to 5 percent power" (Newsday, 6/4/85, p. 3)

Prior to Executive Order 1-1985 the County's position had been to prevent low power operation of Shoreham with LILCO's so-called alternate AC power system (the EMD diesels and gas turbine), because (i) this system is not safe, and (ii) it would be unlawful (and a potential waste of more than \$120 million) to permit low power operation when it is foreseeable that Shoreham will never qualify for a license to operate at full power (See Ex. 8 to the Petition, p. 2, para. 5).

C. In addition, the County has vigorously opposed low power operation on various additional grounds included under the emergency planning circumstances existing at Shoreham (See Ex. 8, pp. 6-8).

D. At the hearing before the NRC on June 4, 1985, Martin Bradley Ashare, Esq., the County Attorney made statements to the NRC which undermined each of the County's policy and legal positions articulated in Exhibit 8. A transcript of such hearing will be presented to this Court on the return date of the Petition.

7. The County Executive's Executive Order 1-1985 and the actions he and the County Attorney have taken subsequently threaten to destroy the County's position in the low power operating license proceedings and in all the other Shoreham related proceedings and matters described in Ex. 8, and is also contrary to the resolution adopted by the County Legislature on November 27, 1984 in which it expressed its opposition to low power licensing (Ex. 11).

8. If a low power license is issued to LILCO, the Shoreham plant will become permanently radioactive, thereby presenting a threat to the health and safety of the people of Suffolk County. Low power operation, even if not followed by commercial full power operation, will make infinitely more

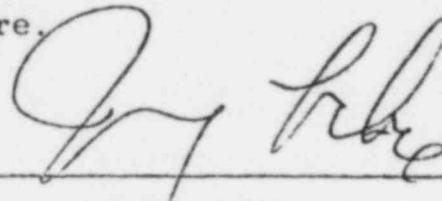
difficult and costly the decommissioning of the Shoreham plant if operation is discontinued. For a description of the decommissioning process and its financial implications, see Ex. 10, John S. Ferguson, "Decommissioning A Nuclear Plant: The Financial Implications", Management Accounting, 9/79.

9. The NRC hearings on the low power license issue are now scheduled for June 11, 1985. If the NRC issues a low power license to LILCO in the mistaken belief that Executive Order 1-1985 is valid, or that the County Executive speaks for the County government, or that the County's policy of opposition to Shoreham's operation has been changed, the County will suffer the irreparable injury described herein and in Mr. Latham's affidavit.

10. It is hard to conceive of a more classic case justifying immediate injunctive relief.

11. I gave notice pursuant to Sec. 670.3(iii) Rules of the Appellate Division, Second Department, to the County Attorney, Martin Bradley Ashare, Esq., at approximately 2:30 p.m. on June 5, 1985 by telephone, that this application for Article 78 relief and temporary stay would be made in the Supreme Court, Hauppauge, before Justice Jack J. Cannavo, at 9:30 a.m., June 6, 1985.

12. I informed Mr. Ashare that the application would be joined in by the East End Townships, represented by Stephen B. Latham, Esq., and that copies of the Petitions and supporting papers in both proceedings would be available to be delivered to him at 7:30 a.m. on June 6, 1985. We agreed to meet at the Sea Coral Diner in Hauppauge at 7:30 a.m., at which time such papers will be served upon Mr. Ashare.

A handwritten signature in cursive script, appearing to read 'Irving Like', written over a horizontal line.

IRVING LIKE

Dated: June 5, 1985

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

-----X

In the Matter of the Application of
WAYNE PROSPECT, GREGORY J. BLASS, JOHN
J. FOLEY, STEVEN ENGLEBRIGHT, JAMES MORGO,
JOSEPH RIZZO, PHILIP NOLAN and SONDR
BACHETY,

Index No.:

Petitioners,

for a Judgment under Article 78 of
the Civil Practice Law and Rules

PETER F. COHALAN, County Executive
of the County of Suffolk,

Respondent.

-----X

PETITIONERS' MEMORANDUM OF LAW IN SUPPORT
OF MOTION FOR PRELIMINARY INJUNCTION

June 5, 1985

REILLY, LIKE & SCHNEIDER
200 W. Main St., Box 218
Babylon, New York 11702
(516) 669-3000

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12 Grove Place
Babylon, New York 11702
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Attorneys for Petitioners

I. INTRODUCTION

1. "Alea jacta est...the die is cast. Those were Caesar's words as he crossed the Rubicon". Thus spoke Respondent County Executive Peter F. Cohalan in an interview with Newsday following his signing of the Executive Order directing Suffolk Police Commissioner De Witt Treder and Planning Commissioner Lee Koppelman, to prepare for and assume command and control of an evacuation drill based on a LILCO plan of evacuation previously denounced by this Court as a private usurpation by LILCO of governmental functions (Newsday, May 31, 1985, p. 5).

2. One would be hard put to select a better metaphor than the autocratic Roman Emperor Caesar to illuminate Respondent's illegal abuse of his powers as County Executive and flagrant disregard of binding legislative resolutions enacted by the Suffolk County Legislature with the initiative, strong support, concurrence and approval of Respondent as County Executive.

3. Less than two months ago, this Court eloquently instructed the Respondent and LILCO of the philosophy of our founding fathers in creating our government - a) this is a government of law and not of men or private corporations; b) the powers of government are limited; c) government only enjoys a fiduciary power entrusted to it by the community, and is, therefore, accountable to the community (Cuomo v. Long Island Lighting Company, New York Law Journal, April 19, 1985, Ex. 4, annexed to the complaint). Respondent's conduct mocks the

Court's admonition that this is a government of laws and not men and breaches the fundamental constitutional principle of the separation of powers.

II. LIMITATIONS ON THE EXECUTIVE POWER

A. Historical Curbs on Abuse Of The Executive Prerogative

4. This is not the first case in which a Court is called upon to review the attempt by a governmental Executive acting as if he were a latter day absolutist Stuart royal monarch to use the Executive Order as a means of exercising power not granted to him as a means of contravening or evading the legislative will.

5. As one of the nation's leading legal scholars demonstrates in his review of the executive power, the courts will not contenance executive lawlessness.

"Much of English constitutional history has revolved around the effort to subject the prerogative of the Crown to the law of the land... In Stuart theory, the royal prerogative meant nothing less than the inherent power of the king to do whatever he thought necessary for the good of the realm... The extravagant pretensions of the Stuarts were, of course, obliterated by two revolutions..."

"The Framers of the American constitution were familiar both with the repudiation of the Stuart claims to absolute prerogative and the more limited prerogative which was conceded in the Crown after the Act of settlement... Certainly, it was the furthest things from their intentions to fashion

the executive which they were creating in accordance with the claim for which Charles I lost his life and James II his throne."

Bernard Schwartz, A Commentary on the Constitution of the United States, The Powers of Government, Volume Two, The Powers of the President, the MacMillan Company, 1963, pp. 56, 57.

B. Steel Seizure Case

6. The problem of executive prerogative or inherent power, which has been invoked by the defendant in justification of his executive order, was given a detailed consideration by the United States Supreme Court in Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952). President Truman issued an executive order directing the Secretary of Commerce to seize and operate the plants and facilities of the nation's steel industry. The President had acted in order to head off a steel strike that was to have begun the next day. The seizure, he declared, was necessary in order to ensure the continued availability of steel and national defense and the economy which a steel stoppage would entail. President Truman's action posed directly the question of executive prerogative under Article II of the U.S. Constitution for he had acted without any specific authorization, statutory or otherwise. The Court, with a 6 man majority, held the steel seizure executive order invalid. The Court rejected the notion of inherent power in the President. The opinion of the Court delivered by Justice Black was based upon the proposition that the President cannot

act without Congressional authority in an area where Congress can clothe him with authority to act. In this case, since the Congress could have permitted the seizure of private property for public use, the President lacked the power to seize the steel mills without statutory authorization. The President possesses no inherent authority either as Chief Executive or Commander in Chief to take possession of private property in order to keep labor disputes from stopping production:

"This is a job for the Nation's lawmakers".
343 U.S. at 587.

7. Justice Black's rejection of inherent authority in the President to seize the steel industry was based on the doctrine of the separation of powers. In the view of four other majority justices, the Presidential seizure was incompatible with the expressed will of the Congress. The conflict between the President's action and the Congressional will arose out of the provision by the Congress in the Taft-Hartley Act of 1947 of a fact-finding injunction procedure alternative to seizure, which the President could have followed to deal with the threat of a steel strike. Furthermore, at the time when the Taft-Hartley Act was passed, the Congress specifically rejected a proposal to empower the President to seize any plant, mine or facility in which a threatened work stoppage would, in his judgment, imperil the public health or security. Thus, the Congress, by these Taft-Hartley Act provisions, had exercised its power in opposition to the exercise of any executive seizure authority.

In short, Congress "has expressed its will to withhold this power from the President as though it said so in so many words." 343 U.S. at 602. Thus, where Congress has laid down specific procedures to deal with the emergency confronting the President, he must follow these procedures. 343 U.S. at 662.

C. Principles Applicable To Exercise
Of Executive Power

8. The Steel Seizure case stands for the propositions
that:

- a. There is no inherent executive prerogative which is independent of a constitutional or statutory source.
- b. Executive prerogative is subordinate to statutory or constitutional law and may not be exercised in a manner incompatible with the constitution or the legislative will.
- c. Executive prerogative does not include law making power.
- d. Executive prerogative is subject to judicial review.

9. Since the constitution is based on the principle of separation of powers, it is beyond dispute that the executive power may not be exercised so as to usurp or encroach upon the functions of the legislative branch.

A. The principles of separation of powers and that the Executive may not through an executive order invade the legislative sphere, are well-established as the pattern of government in New York State. In Matter of Gottlieb v. Duryea, 38 A.D.2d 634, 635, 326 N.Y.S.2d 889, the Court stated:

"The fundamental constitutional principle of the separation of powers among the three departments of government is included by implication in the pattern of government adopted by the State of New York..., it being a basic part of the organic law that each department should be free from interference in the discharge of its own functions and peculiar duties, by either of the others..."

B. In County of Oneida v. Berle, 49 N.Y.2d 515, 523, 427 NYS2d 407, 412, the Court of Appeals reaffirmed that the laws and policies of the State are established by the lawmaking powers, not by officers acting solely on their own ideas of sound public policy, however excellent such ideas may be, and that however laudable its goals, the executive branch may not override enactments which have emerged from the lawmaking process. On the contrary, the executive branch is required to implement policy declarations of the Legislature until vetoed or judicially invalidated.

C. In Rapp v. Carey, 44 N.Y.2d 157, 404 N.Y.S.2d, 565, 375 N.E.2d 745, the Court of Appeals was faced with a situation of a Governor invading the legislative domain through the device of an executive order. In that case, former Governor Carey issued

an executive order which required the annual filing of financial disclosure statements by certain State employees, prohibited service in political party office, and regulated outside activity and employment. The purpose of the order, ie., promoting ethics in government was, laudable. The scheme itself was reasonable, and if enacted by the Legislature could have been upheld. The problem was that the Legislature had not so acted and through the executive order the Governor was invading the legislative sphere. In the majority opinion, former Chief Judge Breitel instructed:

"There are...limits to the breadth of executive power. The State Constitution provides for a distribution of powers among the three branches of government... This distribution avoids excessive concentration of power in any one branch or in any one person. Where power is delegated to one person, the power is always guided and limited by standards. In fact, even the Legislature is powerless to delegate the legislative function unless it provides adequate standards... Without such standards there is no government of law, but only government by men left to set their own standards, with resultant authoritarian possibilities" (Rapp v. Carey, 44 N.Y2d 157, supra, 162, 404 N.YS2d 565, 375 N.E.2d 745.)

"The crux of the case is the principle that the Governor has only those powers delegated to him by the Constitution and the statutes", (supra, 166, 404 N.YS2d 565 375 N.E.2d 745).

"Under our system of distribution of powers with checks and balances, the purposes of the executive order however desirable, may be achieved only through proper means. No single branch of government may assume a power, especially if assumption of that power might erode the genius of that system. The erosion need not be great. 'Rather should we be alive to the imperceptible but gradual increase in the assumption of power properly belonging to another department' (supra 167, 404 N.YS2d 365, 375 N.E.2d 745).

In its recent opinion in Subcontractors Trade Ass'n v. Koch, 62 N.Y.S.2d 422, 477 N.Y.S.2d, 120, 123, 124 (1984), the Court of Appeals held that an executive order and its implementing rules and regulations which mandated a share of construction contracts awarded by the City be given to locally based enterprises was beyond the Mayor's functions and general charter-conferred powers and constituted an unlawful usurpation of the legislative function.

The Court said:

"We note, however, that the general power to enter into contracts which is bestowed upon the executive branch of government ordinarily cannot serve as a basis for creating a remedial plan for which the executive never received a grant of legislative power..."

"Plaintiffs do not challenge these general powers but, rather, assert that what the Mayor did by way of Executive Order No. 53 goes well beyond his executive powers and actually creates, without having been granted authority to do so, a program at odds with existing legislative policy. We agree. In two similar cases, Matter of Fullilove v. Beame, 48 N.Y.2d 376, 423 N.Y.S.2d 144, 398 N.E.2d 765, *supra* and Matter of Broidrick v. Lindsay, 39 N.Y.2d 641, 385 N.Y.S.2d 265, 350 N.E.2d 595, *supra*, we struck down executive action which went beyond enforcement of legislative enactments by prescribing remedial devices not embraced by stated legislative policy. In those cases, the Executive Orders promulgated purported to enforce legislative enactments prohibiting discrimination in employment. However, because the executives lacked a grant of legislative authority to adopt affirmative action plans, the orders requiring affirmative action were declared invalid. The same result must follow in this case..."

"However desirable the ostensible purpose may be, there is simply no legislative authority permitting the Mayor to unilaterally initiate this type of program or the means for effectuating it. In the absence of such specific authority, the executive action must be deemed an unlawful usurpation of the legislative function."

10. If the enumerated limitations on executive prerogative have cut down the royal Stuartist doctrines and bind the great and powerful Presidents and Governors of the United States, they should apply without question to the powers of a lesser chief executive officer, such as the Respondent.

D. The Invalidity of the
Respondent's Executive Order

11. Judged by these principles, the court must invalidate and annul Respondent's Executive Order.

12. First, there is no inherent power in the Respondent to issue an Executive Order nullifying the Charter simply because he is the chief executive officer of the County. The Charter clearly sets forth the boundaries separating the powers of the County Executive and County Legislature. Respondent transgressed these lines and breached the principle of separation of powers which is imbedded therein.

13. Second, Respondent's Executive Order conflicts with and violates the binding legislative resolutions specifically prohibiting him from doing what he attempts to do in his Executive Order. The analogy to the Steel Seizure case is clear. In that case, Congress forbade the President from seizing the steel mills and provided an alternative procedure for dealing with the subject. Thus, the Court ruled the President's executive order seizure to be incompatible with the Congressional will. Here, the County

Legislature specifically prohibited the County Executive from participating in any RERP and, specifically rejected LILCO's plan. Thus, Respondent's Executive Order is clearly incompatible with and designed to thwart the legislative will.

E. The Inapplicability of Article 2-B
of the Executive Law

14. Third, the Respondent's invocation of Article 2-B of the Executive Law, as the fount of his unilateral authority is sham, and a cynical disregard of the decision of this Court in which it held that the power to carry out RERP activities are governmental and have been solely conferred upon the State and its political subdivisions. By the terms "governmental", and "political subdivisions", the Court clearly meant not the County Executive alone, but the government of Suffolk County, to wit, the county executive and the county legislature, acting together in accordance with the requirements of the Suffolk County Charter.

15. A reading of the provisions of Article 2-B, Executive Law bears out this interpretation and refutes the Respondent's claim that they empower him to disregard the County Legislature's resolutions on the subject of Shoreham.

16. Contrary to Respondent's assertion in his Executive Order, Article 2-B does not authorize the actions the Respondent directed to be taken in his Executive Order. Article

2-B, §20 provides in relevant part:

"§20. Natural and man-made disasters; policy; definitions

1. It shall be the policy of the state that:

a. local government and emergency service organizations continue their essential role as the first line of defense in times of disaster, and that the state provide appropriate supportive services to the extent necessary;

b. local chief executives take an active and personal role in the development and implementation of disaster preparedness programs and be vested with authority and responsibility in order to insure the success of such programs;

c. state and local natural disaster and emergency response functions be coordinated in order to bring the fullest protection and benefit to the people;

d. state resources be organized and prepared for immediate effective response to disasters which are beyond the capability of local governments and emergency service organizations; and

e. state and local plans, organizational arrangements, and response capability required to execute the provisions of this article shall at all times be the most effective that current circumstances and existing resources allow.

2. As used in this article, the following terms shall have the following meanings:

a. "disaster" means occurrence or imminent threat of wide spread or severe damage, injury, or loss of life or property resulting from any natural or man-made causes, including, but not limited to, fire, flood, earthquake, hurricane, tornado, high water, landslide, mudslide, wind, storm, wave action, volcanic activity, epidemic, air contamination, blight, drought, infestation, explosion, radiological accident or water contamination....

c. "municipality" means a public corporation as defined in subdivision one of section sixty-six of the general construction law and a special district as defined in subdivision sixteen of section one hundred two of the real property tax law."

17. Respondent relies on §20.1b as empowering him to disregard the prior duly enacted resolutions of the County Legislature. However, no such authority is granted him. §20.1b simply states the policy that local chief executives should take an active role in the development of disaster preparedness programs to "be vested with authority and responsibility in order to insure the success of such programs".* This section does not repeal or do away with the provisions of the Suffolk County Charter which define the respective authority and responsibility of the county executive and county legislature. Respondent, as County Executive, is vested only with such authority and responsibility with regard to disaster preparedness associated with Shoreham as have been given him by the County Legislature in the enumerated resolutions (Ex.'s 1, 2 and 3).

18. These resolutions accomplished precisely what Article 2-B requires be done by local government. They established the policy of the County of Suffolk after careful deliberation in which the Respondent County Executive actively participated, to wit, that evacuation was impossible, and that no RERP was possible, and that none should be developed. The State of New York concurred with the County's conclusions and policy. In short, no Shoreham disaster preparedness program should be undertaken because none could be developed.

* The policy statement contained in §20.1b must be read together with the specific provisions of §§23 and 24 with regard to development and implementation of disaster preparedness programs. Furthermore, a local chief executive officer lacks any authority to declare an emergency in a radiological situation, but must request the governor to do so. (§24.1) The governor alone has the authority to make such declaration. (§28)

19. The provisions of Article 2-B confirm that it is not the Respondent alone, but county government (i.e., the County Executive acting with approval of the County Legislature in the manner prescribed by the Suffolk County Charter), which is granted the power to develop and implement disaster preparedness programs.

20. §20.1a sets forth as state policy that local government performs the "essential role as the first line of defense in times of disaster". §20.1d provides for state resources to be marshalled for immediate effective response to disasters which are beyond the capability of local governments.

21. Throughout Article 2-B, its provisions demonstrate the clear intent that it is the municipality or local governmental institution and not the County Executive acting unilaterally that is charged with disaster preparedness, authority and responsibility.

§20.2.c - definition of "municipality"

§21.3.f - actions to be taken by state disaster preparedness commission if municipality unable to manage local disaster operations

§22.2.a(4) - state agency technical assistance to municipalities

§22.3.a(9) & §23.7b(9) - provisions for training state and local governmental personnel in disaster response operations

§23.1 - each County (such as Suffolk County) authorized to prepare disaster preparedness plans

§23.6 - all plans for disaster preparedness developed by local governments shall be submitted to the Commission

§23.b(15) - procedures under which the County or other political subdivision will be used in the event of a disaster

§23.b(17) - continued operation of governments of political subdivisions

F. The Respondent's Executive Order Cannot be Justified as a Local Emergency Order

22. §24 empowers the Chief Executive of a county to promulgate local emergency orders notwithstanding any inconsistent provision of law under certain defined circumstances. These are:

First, there must be an event of disaster, rioting, catastrophe or similar emergency with the territorial limits of the County; or

Second, the Chief Executive must have a reasonable apprehension of immediate danger thereof; and

Third, the Chief Executive must make a finding that the public safety is imperiled thereby.

If these conditions are satisfied, he may proclaim a local state of emergency within such county and following such proclamation and during the continuance of such local state of emergency, he may promulgate local emergency orders to protect life and property or to bring the emergency situation under control.

23. There is clearly no basis for treating Respondent's Executive Order as a local emergency order because the requirements of §24 for doing so are not present here and, in any event, he has no such unilateral power if the emergency is not radiological. §24.1.

G. Defendant Has no Authority on the Basis
of Article 2-B to use Local Governmental
Resources as Directed in his Executive Order

24. Upon the threat or occurrence of a disaster, §25 authorizes the chief executive to use the personnel and other resources of his political subdivision in such manner as may be necessary or appropriate to cope with the disaster or any emergency resulting therefrom.

25. Again, in the instant case, there being no threat or occurrence of a disaster present, the Respondent derives no authority from Article 2-B to issue his Executive Order directing County personnel to take action prohibited by the enumerated resolutions, and, in any event, he has no such unilateral power if the disaster is radiological.

III. STANDARDS FOR GRANTING PRELIMINARY
INJUNCTION SATISFIED

26. In order to be entitled to a preliminary injunction, the moving party must demonstrate (1) a likelihood of success on the merits, (2) irreparable injury to him if the relief is not granted, and (3) a balancing of the equities in his favor (see Nassau Roofing & Sheet Metal Co. v. Facilities Dev. Corp., 70 A.D.2d 1021, 1022, 418 N.Y. S2d 216, app. dsmd. 48 N.Y.2d 654, 396 N.E.2d 490; Picotte Realty v. Gallery of Homes, 66 A.D.2d 978, 412 N.Y.S.2d 47).

27. Petitioners satisfy these standards. Respondent's ultra vires Executive Order and his breach and attempted nullification of the Charter and duly enacted resolutions of the County Legislature make it likely that petitioners will succeed on the merits.

28. Respondent has compromised the County's governmental institutions by his attempt to nullify the County Legislature's powers and thereby caused injury to the democratic process.

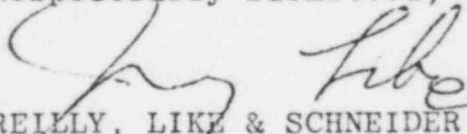
29. Respondent has also unilaterally misrepresented, changed and vitiated the established policy of the County opposing the operation of the Shoreham plant in violation of the established law and policy of Suffolk County, thereby increasing the risk to the health and safety of the people of Long Island.

30. The balance of equities favor petitioners here. There is no redeeming consideration which justifies Respondent's naked usurpation of power. Nor is there any possible equity which justifies Respondent in misrepresenting, vitiating and arrogating to himself the determination of the County's policy with regard to Shoreham.

CONCLUSION

Once again, this Court is asked to review and provide a remedy for an abuse of power. When LILCO attempted as a private corporation to usurp governmental power this Court had no hesitation in striking down the act of hubris. Now we have a County Executive seeking to circumvent the will of the County Legislature and to arrogate to himself in the fashion of autocratic rulers the determination of the County policy with regard to the operation of the Shoreham plant - a matter of profound concern to the people of Long Island and which will irrevocably affect their future well being. The Court should now strike down Respondent's act of executive lawlessness which threatens the integrity of Suffolk County's governmental institutions and grant the relief requested by Petitioners.

Respectfully submitted,


REILLY, LIKE & SCHNEIDER
200 W. Main St., Box 218
Babylon, New York 11702
(516) 669-3000

LESTER B. LIPKIND
12 Grove Place
Babylon, New York 11702
(516) 669-3421

Dated: June 5, 1985
Babylon, New York

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

-----X
In the Matter of the Application of
THE TOWN OF SOUTHAMPTON, THE TOWN
OF EAST HAMPTON, THE TOWN OF
SOUTHOLD, and THE TOWN OF RIVERHEAD,

Petitioners,

VERIFIED
PETITION

for a Judgment under Article 78 of
the Civil Practice Law and Rules

Index No. 85-10520

PETER F. COHALAN, County Execu-
tive of the County of Suffolk,

Respondent.

-----X
TO THE SUPREME COURT OF THE STATE OF NEW YORK,
COUNTY OF SUFFOLK

The Petition of the Town of Southampton, et. al,
respectfully shows:

1. Petitioners ask this Court to annul Executive Order 1-1985, issued by respondent on May 30, 1985 and attached hereto as Exhibit 1, as a) in violation of Suffolk County Resolutions 262-1982, 456-1982 and 111-1983 (attached hereto as Exhibits 2, 3 and 4 respectively); b) Articles II and III (Sections 202, 213, 219, 223 and 303 of the Suffolk County Charter (hereinafter "Charter")), c) §153 of the County Law; d) §23 of the Executive Law (Article 2-B); and e) as in excess of respondent's jurisdiction under Article IX §2 of the Constitution of the State of New York.

Petitioners further ask this Court to enjoin respondent and his agents from taking any action or expending any County resources in contravention of the aforesaid Resolutions, as set forth in the Order to Show Cause.

2. Petitioner TOWN OF SOUTHAMPTON is a municipal corporation duly established under the Laws of the State of New York. It was formed for the purpose of exercising such powers of local government in the administration of public affairs as have been or may be conferred upon it by the Constitution and Laws of the State of New York, including the exercise of the police power to protect the lives, health and safety of its citizens. The Town of Southampton consists of approximately 123 square miles on what is known as the "South Fork" of Long Island, which is, at its narrowest point, about 3/4 of a mile in width. The Town has a year-round population of approximately 45,000 people. During a period between May and September each year, the population of Southampton approaches 100,000 people and many more visit the Town on a daily basis as "transients".

3. Petitioner TOWN OF EAST HAMPTON is a municipal corporation duly established under the Laws of the State of New York. It was formed for the purpose of

exercising such powers of local government in the administration of public affairs as have been or may be conferred upon it by the Constitution and Laws of the State of New York, including the exercise of the police power to protect the lives, health and safety of its citizens. The Town of East Hampton consists of approximately 64 square miles and has a year-round population of approximately 15,000 people. During a period between May and September each year, the population of East Hampton approaches 60,000 people and many more visit the Town on a daily basis as "transients".

4. Petitioner TOWN OF SOUTHDOLD is a municipal corporation duly established under the Laws of the State of New York. It was formed for the purpose of exercising such powers of local government in the administration of public affairs as have been or may be conferred upon it by the Constitution and Laws of the State of New York, including the exercise of the police power to protect the lives, health and safety of its citizens. The Town of Southold consists of approximately 69 square miles and has a year-round population of approximately 19,500 people. During a

period between May and September each year, the population of Southold approaches 40,000 people and many more visit the Town on a daily basis as "transients".

5. Petitioner TOWN OF RIVERHEAD is a municipal corporation duly established under the Laws of the State of New York. It was formed for the purpose of exercising such powers of local government in the administration of public affairs as have been or may be conferred upon it by the Constitution and Laws of the State of New York, including the exercise of the police power to protect the lives, health and safety of its citizens. The Town of Riverhead consists of approximately 78 square miles and has a year-round population of approximately 23,000 people. It is the western most Town on the north fork of Long Island and the LILCO property upon which the Shoreham plant is located is adjacent to the western boundary of the Town of Riverhead. During a period between May and September each year, the population of Riverhead approaches 45,000 people and many more visit the Town on a daily basis as "transients".

6. Petitioners are four of the ten Towns located within the County of Suffolk. Proceedings are presently

pending before the Nuclear Regulatory Commission (NRC) on the application by the Long Island Lighting Company (LILCO), a New York electric and gas public service corporation utility, for a license permitting it to operate an 820 mw nuclear power electric generating facility on property located at Shoreham in the Town of Brookhaven, County of Suffolk and State of New York. LILCO has applied for a low power license which, if granted, would permit LILCO to operate Shoreham causing it to become irrevocably radioactive and contaminated. Portions of Southampton and Riverhead are located within 10 miles of the Shoreham nuclear power plant ("Shoreham").

5. A significant portion of Petitioners' land area and of their population is located within the emergency planning area considered and evaluated by Suffolk County as set forth in Exhibit 4. By the lawful adoption of Exhibit 4, the County of Suffolk has determined that the health, safety and welfare of Southampton residents could not be protected in the event of a serious accident at Shoreham and that petitioners' residents could not be safely evacuated in the event of such an

accident (see Exhibit 4).

6. Respondent Peter F. Cohalan is the duly elected County Executive of the County of Suffolk.

7. On March 23, 1982, the Suffolk County Legislature passed a resolution which was approved by the respondent as County Executive on March 25, 1982, authorizing the Suffolk County Planning Department to prepare a County Radiological Emergency Response Plan ("RERP") in connection with the Shoreham operating licensing proceedings, to serve the interests of safety, health and welfare of the residents of Suffolk County (Resolution 262-82, a copy of which is annexed hereto and made part hereof as Exhibit 2). Said resolution provided:

"RESOLVED, that said plan shall not be operable and shall not be deemed adequate and capable of being implemented until such time as it is approved by the Suffolk County Legislature; and

RESOLVED, that only after said plan is approved by the Suffolk County Legislature shall it be submitted to the Federal Emergency Management Agency and the Nuclear Regulatory Commission for purposes of any findings, determinations, rulings, reviews or hearings by such Federal agencies."

8. On May 18, 1982 the Suffolk County Legislature

passed a resolution approved by the respondent as County Executive on May 19, 1982 establishing the RERP policy of the County of Suffolk. (Resolution 456-82, a copy of which is annexed hereto and made part hereof as Exhibit

3.) Said resolution approved:

"WHEREAS, Suffolk County's Emergency Planning Task Force, composed of nationally recognized experts drawn from a range of pertinent disciplines is now conducting a detailed planning effort in order to attempt to develop a viable radiological emergency plan for Suffolk County; and

WHEREAS, The Long Island Lighting Company, in an unwarranted and arrogant act, has gone beyond its powers as a private corporation in an attempt to usurp the rightful powers of Suffolk County by submitting county planning resource material to the New York State Disaster Preparedness Commission for its approval as the official radiological emergency response plan for Suffolk County; and

WHEREAS, said planning resource material developed in part by county personnel, is preliminary data which in no way constitutes the Suffolk County approved RADIOLOGICAL EMERGENCY RESPONSE PLAN and will not in the future constitute such County plan; and

WHEREAS, Suffolk County will submit its RADIOLOGICAL EMERGENCY RESPONSE PLAN to the New York State Disaster Preparedness Commission only when that plan has been fully prepared and approved by Suffolk County and is thereby integrated with the planning efforts of both LILCO and New York State; therefore, be it

RESOLVED, that Suffolk County hereby established the following Radiological Emergency Response Planning Policy:

Suffolk County shall not assign funds or personnel to test or implement any radiological emergency response plan for the Shoreham Nuclear Power Plant unless that plan has been fully developed to the best of the County's ability.

Suffolk County shall not assign funds or personnel to test or implement any radiological emergency response plan for the Shoreham Nuclear Plant unless that plan has been the subject of at least two public hearings, one to be held in Riverhead and one to be held in Hauppauge.

Suffolk County shall not assign funds or personnel to test or implement any radiological emergency response plan for the Shoreham Nuclear Plant unless that plan has been approved, after public hearings, by the Suffolk County Legislature and the County Executive." (emphasis added)

9. The County Planning Department, in accordance with the legislative directive, submitted a RERP in December 1982. A number of public hearings were held by the County Legislature to consider the RERP in January, 1983. The Suffolk County Legislature on February 17, 1983, adopted a resolution, which was approved by the respondent County Executive on February 22, 1983, a copy of which is annexed hereto and made part hereof as Exhibit 4, pursuant to which it was decided not to approve, adopt or implement any RERP for Shoreham. The reason given for this action was that:

"[Since] no local radiological emergency response plan for a serious nuclear accident at Shoreham will protect the health, welfare, and safety of Suffolk County residents . . . the County's radiological emergency planning process is hereby terminated, and no local radiological emergency plan for response to an accident at the Shoreham plan shall be adopted or implemented . . .

. . . [Since] no radiological emergency plan can protect the health, welfare and safety of Suffolk County residents and, since no radiological emergency plan shall be adopted or implemented by Suffolk County, the County Executive is hereby directed to assure that actions taken by any other governmental agency be it State or Federal, are consistent with the decision mandated by this resolution" (Resolution 111-1983)." (emphasis added)

10. The Governor of New York, after reviewing the results of a study by the Marburger Commission, an independent committee appointed by the Governor to study the Shoreham situation, announced that no RERP for Shoreham would be adopted or implemented by the State.

11. Following the County's refusal to adopt a RERP, LILCO, purportedly relying upon New York State Executive Law, Article 2-B (State and Local Natural and Man-Made Disaster Preparedness), submitted its own plan to the NRC, designated as "The LILCO Transition Plan". The LILCO Plan describes in detail the actions which LILCO proposes to take in the event of a radiological emergency at the Shoreham facility.

12. Thereafter, the County of Suffolk, the State of New York, and the Town of Southampton commenced separate declaratory judgment actions in the Supreme Court, Suffolk County against LILCO, seeking a declaration that LILCO does not have the legal authority to carry out its Plan.

13. On February 20, 1985, the Supreme Court of Suffolk County, in a decision by Justice William R. Geiler, a copy of which is annexed hereto as Exhibit 5, concluded that LILCO's plan constituted a usurpation by LILCO of governmental powers and directed that judgment be entered in favor of the plaintiffs in that action.

14. On April 17, 1985, the Atomic Safety and Licensing Board ("Licensing Board") of the Nuclear Regulatory Commission ("NRC") which had held extensive hearings on LILCO's Transition Plan determined that LILCO did not have the legal authority to implement its Plan and that, accordingly, LILCO did not have an implementable, comprehensive and effective emergency response plan for Shoreham.

15. The legal and practical effect of Judge Geiler's decision and the Board's Partial Initial Decision was to unequivocally unhold and endorse the

police power responsibilities and determinations of Suffolk County as set forth in Exhibits 2, 3 and 4.

16. On May 30, 1985, defendant signed and issued Executive Order 1-1985 (Exhibit 1) which, inter alia, purported to commit "whatever resources of the government of the County of Suffolk are necessary" to review and evaluate the LILCO Transition Plan; to conduct a "test and exercise" of that Plan; and to direct County officials to "assume the function of command and control with implementation of the police powers of the County of Suffolk over the conduct of said test and exercise".

17. As exemplified by Exhibit 6 attached hereto, upon information and belief, Executive Order 1-1985 has been distributed to virtually all federal officials and agencies presently involved in proceedings concerning the issuance of a low power license for Shoreham and a subsequent full power license.

18. Upon information and belief, Executive Order 1-1985 is being represented to these officials and agencies, as a new County policy on emergency planning. Upon information and belief, these representations have been and are being made by respondent and his agents as

well as by LILCO.

AS AND FOR A FIRST CLAIM FOR RELIEF

19. The issuance of Executive Order 1-1985, and the resulting actions and expenditures by County officials, which it has caused and will immediately cause to take place, are in clear violation of the County Resolutions attached as Exhibits 2, 3 and 4. On the basis of the foregoing, Executive Order 1-1985 must be rescinded, annulled and set aside.

AS AND FOR A SECOND CLAIM FOR RELIEF

20. The Suffolk County Charter clearly delineates the line of authority between the County Legislature and the County Executive. The Suffolk County Charter entrusts to the County Legislature: (a) the determination of County policies; (b) the powers of local legislation and appropriation and (c) the exercise of such other functions and powers as may be granted or assigned to it by such Charter or by State or local law (Charter §§201, 202, 213).

21. Local laws and resolutions of the Suffolk County Legislature may not be enacted except in accordance with the procedures and requirements prescribed in said Charter, and require the affirmative

vote of: (a) not less than a majority of the total membership of the County Legislature; or (b) two-thirds of the total membership of the County Legislature if, prior to passage, the County Executive certifies as to the necessity of its immediate passage. (Charter §§219-222).

22. No local law or resolution, other than a resolution relating to procedure, may take effect until it has been approved by the County Executive and there has been compliance with the procedures and requirements of the Charter. (Charter §§222-223).

23. Respondent Cohalan is charged with the responsibility of taking care that the laws applicable to the County and the powers and duties assigned to him by the Charter or delegated to him by the County Legislature, are faithfully executed and performed consistent with law. (Charter §§303, 304).

24. Exhibits 2, 3 and 4 clearly set forth the law of Suffolk County with regard to emergency planning for Shoreham. Respondent's obligation under the County Charter [§303(d)] is to:

take care that the laws applicable to the county and that local laws and resolutions of the county are faithfully executed. (emphasis added)

25. On the basis of the foregoing, Executive Order 1-1985 must be rescinded, annulled and set aside.

AS AND FOR A THIRD CLAIM FOR RELIEF

26. As provided by County Law §153, local laws and resolutions are legislative enactments. Resolutions are effective when adopted, and only the County Legislature has the power to amend, repeal or supersede a resolution after its adoption.

27. Executive Order 1-1985 purports to supersede and annul the County policy and legislation as set forth forth in Exhibits 2, 3 and 4. Upon information and belief, Executive Order 1-1985 was promulgated and issued by respondent by executive fiat, without legislation duly enacted by the County Legislature, in violation of County Law §153.

28. On the basis of the foregoing, Executive Order 1-1985 must be rescinded, annulled and set aside.

AS AND FOR A FOURTH CLAIM FOR RELIEF

29. Respondent Cohalan bases his jurisdiction for issuing Executive Order 1-1985 on the "power vested in me under Article 2-B of the New York State Executive Law . . . " (See Exhibit 1).

30. Although Respondent Cohalan does not reference

any provision of Article 2-B in his Executive Order, he apparently relies on the general statement of policy set forth in §20(1)b. However, that section provides only that:

local chief executives take an active and personal role in the development and implementation of disaster preparedness programs and be vested with authority and responsibility in order to insure the success of such program.

31. This general policy, however, is specifically enacted through the provisions of §23. Section 23(1) provides:

**Each County . . . is authorized to prepare disaster preparedness plans.
(Emphasis added.)**

The remaining provisions of §23 delineate the content and objectives of these plans, which encompass the emergency planning exercises, tests and implementation purportedly authorized by Executive Order 1-1985.

32. The distribution of authority set forth in Article 2-B does not grant to the respondent the powers invoked by him. Article 2-B specifically authorizes each County to plan for disasters and delegates authority to local officials, such as respondent, to effectuate these functions, if and when plans are adopted by County government.

33. In his decision, Judge Geiler issued several

rulings of law with regard to the exercise of the State's police power and the development and implementation of radiological emergency plans under Article 2-B of the Executive Law. Among Judge Geiler's legal conclusions were the following:

a) ". . . municipal corporations may only exercise the police power which the State Constitution or the State Legislature confers upon them . . . " (citations omitted, emphasis supplied);

b) "Article 2B of the Executive Law involves the distribution of powers held by the Executive Branch of State Government Thus, this Statute creates a state agency, the Disaster Preparedness Commission (DPC) to coordinate State and local emergency responses. This legislation authorizes each county and city to plan for disasters and delegates authority to State and local officials to effectuate these functions." (emphasis supplied; at pp. 10 and 15)

34. Executive Law Article 2-B provides no authority to the County Executive to take unilaterally the actions taken and directed an Executive Order 1-1985. It particularly provides no authority for him to review, test and implement an emergency plan developed entirely by a utility.

35. No emergency plan for Shoreham has been developed or adopted by Suffolk County. The County legislature and Respondent have specifically adopted

legislation providing that no such plan is capable of being developed (see Exhibit 4). Accordingly, Respondent's attempt to test and implement the Transition Plan prepared by LILCO is in excess of his jurisdiction and in violation of Article 2-B of the Executive Law. On the basis of the foregoing, Executive Order 1-1985 must be rescinded, annulled and set aside.

AS AND FOR A FIFTH CLAIM FOR RELIEF

36. The development and implementation of an emergency plan is an exercise of the State's police power. The police power can only be exercised by State and local governments.

37. Local governments are authorized to exercise the police power pursuant to Article IX §2 of the Constitution of the State of New York. This constitutional power is allocated within the branches of County government by the Suffolk County Law, and Article 2-B of the Executive Law. The preparation and adoption of emergency plans are police power functions that have not been delegated to the County Executive for his unilateral action. They have been reserved to County government as a whole.

38. Executive Order 1-1985 is in excess of the

respondent's jurisdiction established by the doctrine of separation of powers. On the basis of the foregoing, Executive Order 1-1985 must be rescinded, annulled and set aside.

AS AND FOR A SIXTH CLAIM FOR RELIEF

39. The petitioners have never surrendered to the County of Suffolk the police power functions delegated to the Towns by the State Constitution. None of the petitioners has ever held the necessary referendum required by County Charter §1207 to establish County police districts within their borders. Thus, each of the petitioners has retained their own Town police department in an exercise of the State police power delegated to the Towns.

40. The petitioners have determined that successful evacuation of the "East End" of Long Island in a nuclear emergency at Shoreham is impossible and that no emergency plan is feasible to protect the health and safety of their East End residents. Therefore, the petitioners have refused to participate in the preparation and/or implementation of a Shoreham emergency plan for their Towns since such a plan would be a sham.

41. The County Executive has purported to direct the County Commissioner of Police and other County officials to test the Shoreham emergency plan developed by LILCO. Most important respondent has directed:

that agents of Suffolk County assume the function of command and control with implementation of the police powers of the County of Suffolk over the conduct of said test and exercise [of the LILCO emergency plan]. (Exhibit 1)
[emphasis added]

42. As noted above, Judge Geiler's decision has already determined that LILCO's emergency plan is an unlawful usurpation of local police powers. The County Executive has purported to assert command and control over the police power functions for the purpose of exercising the LILCO Transition Plan, infringing upon the police powers reserved by petitioners, over which he has no authority.

43. The respondent's Executive Order is an unconstitutional usurpation of the police powers retained by the East End Towns which have never established County police districts within their borders and which have never surrendered their emergency planning functions to the County of Suffolk.

44. On the basis of the foregoing, Executive Order 1-1985 must be rescinded, annulled and set aside.

WHEREFORE, Executive Order 1-1985 should be

rescinded, annulled and set aside and the Court should enjoin the respondent and his contractors, agents, servants, officers and employees and all persons in active concert and participation with them which, directly or indirectly, allow, induce, or support the implementation of the policies and actions set forth in Executive Order 1-1985, and further enjoining the respondent, his contractors, agents, etc. from testing or implementing the LILCO plan or any RERP for the Shoreham Nuclear Plant without presenting to the Suffolk County Legislature such a plan and the need therefor and securing the approval and concurrence of the County Legislature in accordance with the above-cited statutes, Charter provisions and Resolutions.

Dated: June 5, 1985
Riverhead, NY

Yours, etc.,

TWOMEY, LATHAM & SHEA
Attorneys for Petitioners
33 W. Second Street
P.O. Box 398
Riverhead, NY 11901
516-727-2180

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

-----X
In the Matter of the Application of
THE TOWN OF SOUTHAMPTON, THE TOWN
OF EAST HAMPTON, THE TOWN OF
SOUTHOLD, and THE TOWN OF RIVERHEAD,

VERIFICATION

Petitioners,

Index No. 85-10520

for a Judgment under Article 78 of
the Civil Practice Law and Rules

PETER F. COHALAN, County Execu-
tive of the County of Suffolk,

Respondent.

-----X

STATE OF NEW YORK)

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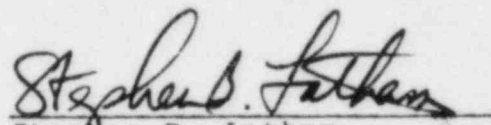
COUNTY OF SUFFOLK)

STEPHEN B. LATHAM, being duly sworn, deposes and
says:

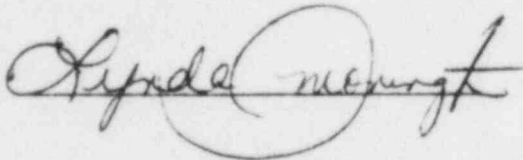
1. He is an attorney duly licensed to practice law
in the State of New York and is special counsel to the
Town of Southampton, East Hampton, Southold and
Riverhead, municipal corporations, which are the
petitioners in this proceeding.

2. He has read the foregoing Petition and knows
the contents thereof and that same is true to his own
knowledge except those matters therein stated to be
alleged upon information and belief and as to those
matters, he believes them to be true.

3. This verification is made by the deponent because the petitioners are municipal corporations and the deponent is special counsel to the petitioners and the deponent is acquainted with the facts alleged herein.


Stephen B. Latham

Sworn to before me this
5th day of June, 1985.



LYNDA A. MONINGTON
NOTARY PUBLIC, State of New York
No. 4736164, Suffolk County
Term Expires March 30, 1987



PETER F. COHALAN
SUFFOLK COUNTY EXECUTIVE

OFFICE OF THE COUNTY EXECUTIVE

JOHN C. GALLAGHER
CHIEF DEPUTY COUNTY EXECUTIVE

EXECUTIVE ORDER NUMBER 1 - 1503

By the power vested in me under Article II-B of the New York State Executive Law and §302 of the SUFFOLK COUNTY CHARTER, I hereby determine that it is necessary for me to cause to be reviewed and evaluated the Local Emergency Response Plan for Suffolk County presently before the United States Nuclear Regulatory Commission and the Federal Emergency Management Agency.

I therefore direct the Commissioner of Police and Commissioner of the Suffolk County Planning Department to use whatever resources of the government of the County of Suffolk are necessary in order to complete a review and evaluation of the above Local Emergency Response Plan and carry out and cause to be conducted a test and exercise of the above said Plan in conjunction with the Local Emergency Response Organization (LERO). I further direct that agents of the County of Suffolk assume the function of command and control with implementation of the police powers of the County of Suffolk over the conduct of said test and exercise.

IN WITNESS WHEREOF, I hereby set my hand this 30th day of May, 1985.


PETER F. COHALAN
SUFFOLK COUNTY EXECUTIVE

Introduced by the Presiding at the request of the County Executive

RESOLUTION NO. 262-1992, DIRECTING THE
COMPTROLLER AND COUNTY TREASURER TO REFUND
\$150,000 RECEIVED FROM LILCO AND TRANSFERRING
FUNDS IN CONNECTION WITH RADIOLOGICAL RESPONSE PLAN.

WHEREAS, Resolution No. 694-1991 authorized an agreement between LILCO and the Suffolk County Department of Planning for the preparation of a County radiological emergency response plan; and

WHEREAS, under the terms of the agreement, LILCO has paid the County of Suffolk \$150,000 with an additional \$95,000 due upon completion of the contract; and

WHEREAS, special counsel for the County in the Shoreham operating licensing proceedings has advised the County that it is in the best interest of the County to avoid any appearance of a conflict of interest by returning the \$150,000 received from LILCO for the radiological response plan; and

WHEREAS, it is the intention of the County to complete the radiological response plan at its own expense; now, therefore, be it

RESOLVED, that the County Comptroller and County Treasurer are directed to return \$150,000 to LILCO; and be it further:

RESOLVED, that the County Comptroller and County Treasurer are directed to cancel the unexpended balance in the following encumbrances;

01-8026-992

01-8026-993

01-8026-994

and be it further

RESOLVED, that the County Comptroller and County Treasurer be, and they hereby are authorized to transfer the following funds and authorization:

FROM

Employee Benefits Health Insurance
01-9060-836

\$375,000

TO

Planning
Radiological Response Plan (Office Supplies)
01-8026-301

10,000

Planning
Radiological Response Plan (Printing)
01-8026-304

19,000

Planning
Radiological Response Plan (Misc.)
01-8026-350

40,000

Planning Radiological Response Plan (Adv.) 01-8026-377	1,000
Planning Radiological Response Plan (Mileage) 01-8026-433	5,000
Planning Radiological Response Plan (Fees for services for non-Employees 01-8026-456	300,000

and be it further

RESOLVED, that the County Planning Department shall prepare a County Radiological Emergency Response Plan to serve the interest of safety, health and welfare of the residents of Suffolk County; and be it further

RESOLVED, that said plan shall not be operable and shall not be deemed adequate and capable of being implemented until such time as it is approved by the Suffolk County Legislature; and

RESOLVED, that only after said plan is approved by the Suffolk County Legislature, shall it be submitted to the Federal Emergency Management Agency and the Nuclear Regulatory Commission for purposes of any findings, determinations, rulings, reviews, or hearings by such Federal agencies.

DATED: March 23, 1982

APPROVED BY:

[Signature]
County Executive of Suffolk County

Date of Approval: 3/25/82

SUFFOLK COUNTY
County Legislature
RIVERHEAD, N. Y.

This is to Certify that J. William H. Rogers, Clerk of the County Legislature of the County of Suffolk, have compared the foregoing copy of resolution with the original resolution now on file in this office, and which was duly adopted by the County Legislature of said County on *March 23, 1982* and that the same is a true and correct transcript of said resolution and of the whole thereof.

In Witness Whereof, I have hereunto set my hand and the official seal of the County Legislature of the County of Suffolk

[Signature]
Clerk of the County Legislature

RESOLUTION NO. 456 -1982, ESTABLISHING THE
RADIOLOGICAL EMERGENCY RESPONSE PLANNING
POLICY OF THE COUNTY OF SUFFOLK

WHEREAS, County of Suffolk has the primary responsibility for the protection of its residents in the event of a radiological emergency at the Long Island Lighting Company's Shoreham Nuclear Power Station; and

WHEREAS, Suffolk County takes this responsibility seriously and intends through good faith and sound planning efforts, to assure that the best possible emergency plan and preparedness are developed to protect the citizens of Suffolk County; and

WHEREAS, Suffolk County's Emergency Planning Task Force, composed of nationally recognized experts drawn from a range of pertinent disciplines, is now conducting a detailed planning effort in order to attempt to develop a viable radiological emergency plan for Suffolk County; and

WHEREAS, The Long Island Lighting Company, in an unwarranted and arrogant act, has gone beyond its powers as a private corporation in an attempt to usurp the rightful powers of Suffolk County by submitting county planning resource material to the New York State Disaster Preparedness Commission for its approval as the official radiological emergency response plan for Suffolk County; and

WHEREAS, said planning resource material developed in part by county personnel, is preliminary data which in no way constitutes the Suffolk County-approved RADIOLOGICAL EMERGENCY RESPONSE PLAN and will not in the future constitute such County plan; and

WHEREAS, Suffolk County will submit its RADIOLOGICAL EMERGENCY RESPONSE PLAN to the New York State Disaster Preparedness Commission only when that plan has been fully prepared and approved by Suffolk County and is thereby integrated with the planning efforts of both LILCO and New York State; therefore, be it

RESOLVED, that Suffolk County hereby established the following Radiological Emergency Response Planning Policy:

Suffolk County shall not assign funds or personnel to test or implement any radiological emergency response plan for the Shoreham Nuclear Plant unless that plan has been fully developed to the best of the County's ability.

Suffolk County shall not assign funds of personnel to test or implement any radiological emergency response plan for the Shoreham Nuclear Plant unless that plan has been the subject of at least two public hearings, one to be held in Riverhead, and one to be held in Hauppauge.

the Shoreham Nuclear Plant unless that plan has been approved, after public hearings, by the Suffolk County Legislature and the County Executive

and, be it further

RESOLVED, that copies of this resolution be sent to the Governor, the Speaker of the Assembly, the Majority Leader of the Senate and the Legislature of the State of New York.

DATED: May 18, 1982

APPROVED BY:

John H. ...
County Executive of Suffolk County

Date of Approval: 5/19/82

SUFFOLK COUNTY
County Legislature
RIVERHEAD, N. Y.

This is to Certify that I, William H. Rogers, Clerk of the County Legislature of the County of Suffolk, have compared the foregoing copy of resolution with the original resolution now on file in this office, and which was duly adopted by the County Legislature of said County on May 18, 1982 and that the same is a true and correct transcript of said resolution and of the whole thereof.

In Witness Whereof, I have hereunto set my hand and the official seal of the County Legislature of the County of Suffolk

William H. Rogers
Clerk of the County Legislature

Resolution No. 111 -1983,
Constituting the Findings and
Determinations of Suffolk County
on Whether A Level of Emergency
Preparedness To Respond to a
Radiological Accident At the
Shoreham Nuclear Power Station
Can Protect the Health, Welfare
and Safety of the Residents of
Suffolk County

WHEREAS, Suffolk County has a duty under the Constitution of the State of New York, the New York State Municipal Home Rule Law, and the Suffolk County Charter to protect the health, safety, and welfare of the residents of Suffolk County; and

WHEREAS, the Long Island Lighting Company ("LILCO") is constructing and desires to operate the Shoreham Nuclear Power Station ("Shoreham"), located on the north shore of Long Island near the town of Wading River, a location which is within the boundaries of Suffolk County; and

WHEREAS, a serious nuclear accident at Shoreham could result in the release of significant quantities of radioactive fission products; and

WHEREAS, the release of such radiation would pose a severe hazard to the health, safety, and welfare of Suffolk County residents; and

WHEREAS, in recognition of the effects of such potential hazard posed by Shoreham on the duty of Suffolk County to protect the health, safety, and welfare of its citizens, this Legislature on March 23, 1982, adopted Resolution No. 262-1982, which directed that Suffolk County prepare a "County Radiological Emergency Response Plan to serve the interest of the safety, health, and welfare of the citizens of Suffolk County ..";
and

WHEREAS in Resolution 262-1982, the Legislature determined that the plan developed by the County "shall not be operable and shall not be deemed adequate and capable of being implemented until such time as it is approved by the Suffolk County Legislature"; and

WHEREAS, in adopting Resolution 262-1982, the Board found that earlier planning efforts by LILCO and County planners (the "original planning data") were inadequate because they failed to address the particular problems posed by conditions on Long Island and further failed to account for human behavior during a radiological emergency and the lessons of the accident at Three Mile Island; and

WHEREAS, on March 29, 1982, Peter F. Cohalan, Suffolk County Executive, acting to implement Resolution 262-1982, by Executive Order established the Suffolk County Radiological Emergency Response Plan Steering Committee ("Steering Committee") and directed it to prepare a County plan for submittal to the County Executive and County Legislature; and

WHEREAS, the Steering Committee assembled a group of highly qualified and nationally recognized experts from diverse disciplines to prepare such County plan; and

WHEREAS, such highly qualified experts worked in a diligent and conscientious effort at a cost in excess of \$500,000 to prepare the best possible plan for Suffolk County, and particularly to ensure that such plan took into account all particular physical and behavioral conditions on Long Island that affect the adequacy of the emergency response plan; and

WHEREAS, the analyses, studies, and surveys of such experts included:

- (a) Detailed analyses of the possible releases of radiation from Shoreham;
- (b) Detailed analyses of the radiological health consequences of such radiation release on the population of Suffolk County, given the meteorological, demographic, topographical, and other specific local conditions on Long Island;
- (c) A detailed social survey of Long Island residents to determine and assess their intended behavior in the event of a serious accident at Shoreham;
- (d) A detailed survey of school bus drivers, volunteer firemen, and certain other emergency response personnel to determine whether emergency personnel intend to report promptly for emergency duties, or instead to unite with their own families, in the event of a serious accident at Shoreham;

serious accident at Shoreham, as well as the number of persons who intend to evacuate voluntarily even if not ordered to do so;

- (f) Detailed analyses of the road network in Long Island and the time required to evacuate persons from areas affected by radiation releases;
- (g) Detailed analyses of the protective actions available to Suffolk County residents to evacuate or take shelter from such radiation releases; and
- (h) Analysis of the lessons learned from the accident at Three Mile Island on local government responsibilities to prepare for a radiological emergency; and

WHEREAS, on May 10, 1982, LILCO, without the approval or authorization of the Suffolk County Government, submitted to the New York State Disaster Preparedness Commission ("DPC") two volumes entitled "Suffolk County Radiological Emergency Response Plan" and containing the original planning data, as further revised and supplemented by LILCO, and requested the DPC to review and approve such LILCO submittal as the local radiological emergency response plan for Suffolk County; and

WHEREAS, in Resolutions 456-1982 and 457-1982, the County further addressed the matter of preparing for a radiological emergency at Shoreham and emphasized that:

- (a) The LILCO-submitted document was not and will not be the County's Radiological Emergency Response Plan; and
- (b) The County's Radiological Emergency Response Planning Policy, as enunciated in Resolution 456-1982, is as follows:

Suffolk County shall not assign funds or personnel to test or implement any radiological emergency response plan for the Shoreham Nuclear Plant unless that plan has been fully developed to the best of the County's ability.

Suffolk County shall not assign funds or personnel to test or implement any radiological emergency response plan for the Shoreham Nuclear Plant unless that plan has been subject of at least two public hearings, one to be held in Riverhead, and one to be held in Hauppauge.

emergency response plan for the Shoreham Nuclear Plant unless that plan has been approved, after public hearings, by the Suffolk County Legislature and the County Executive; and

WHEREAS, on June 9, 1982, the DPC rejected the LILCO-submitted document for the reason that it was deficient; and

WHEREAS, on October 6, 1982, LILCO, again without the approval or authorization of the Suffolk County Government, submitted to the DPC an amended version of the previously submitted LILCO document which had been rejected by the DPC; and

WHEREAS, on December 2, 1982, the Draft County Radiological Emergency Response Plan authorized by Resolution 262-1982 was submitted to the County Legislature for review and public hearings as specified in Resolutions 262-1982, 456-1982, and 457-1982; and

WHEREAS, in January 1983, the Legislature held hearings on the Draft County plan, which hearings included:

- (a) More than 1,590 pages of transcripts;
- (b) Detailed written statements and oral testimony of County expert consultants who prepared the Draft County plan;
- (c) Detailed written statements and oral testimony of LILCO officials and expert consultants retained by LILCO;
- (d) Detailed written statements and oral testimony of the Suffolk County Police Department, the County Health Department, the County Social Services Department, and the County Public Works Department, all of which would have indispensable roles in responding to a radiological emergency at Shoreham;
- (e) Detailed written statements and oral testimony of organizations in Suffolk County concerned with radiological emergency preparedness; and
- (f) Extensive presentations by hundreds of members of the general public; and

WHEREAS, members of the Legislature also travelled to and held public hearings in the vicinity of the Three Mile Island Nuclear Power Plant to gain information on the lessons to be learned by local governments from the accident at Three Mile Island; and

WHEREAS, the Draft County plan identifies evacuation and protective sheltering as the two primary protective actions which would need to be implemented in the event of a serious accident at Shoreham; and

WHEREAS, evacuation of Suffolk County residents in the event of a radiological emergency could take as much time as 14-30 hours because of various factors, including: the limited number of appropriate evacuation routes in Suffolk County; difficulties in mobilizing police and other emergency personnel; difficulties ensuing from spontaneous evacuation of large numbers of County residents, thus creating severe traffic congestion; and unavailability of alternate evacuation routes for persons residing east of Shoreham and thus the necessity for such persons during an evacuation to pass by the plant and possibly through the radioactive plume; and

WHEREAS, evacuation times in excess of 10 hours -- and certainly evacuation times in the range of 14-30 hours -- will result in virtual immobilization of evacuation and high exposure of evacuees to radiation such that evacuees' health, safety, and welfare would not be protected; and

WHEREAS, protective sheltering is designed to protect persons from excessive radiation exposure by such persons staying indoors until radiation with the greatest danger to health has passed; and

WHEREAS, if protective sheltering were ordered for Suffolk County residents, unacceptable radiation exposure would still be experienced by substantial portions of the Suffolk County population, thus making it impossible to provide for the health, welfare, and safety of these residents;

WHEREAS, the document submitted by LILCO to the DPC without County approval or authorization is deficient because it does not deal with the actual local conditions, physical and behavioral, on Long Island that would be encountered during a serious nuclear accident at Shoreham; and

WHEREAS, the document submitted by LILCO to the DPC without County approval or authorization does not ensure that effective protective action by persons subject to radiation exposure, in the form of evacuation or sheltering, would be taken in event of a serious nuclear accident at Shoreham, and thus such document, even if implemented, would not protect the health, safety, and welfare of Suffolk County residents; and

WHEREAS, the extensive data which the Legislature has considered make clear that the site-specific circumstances and actual local conditions existing on Long Island, particularly its elongated east/west configuration which requires all evacuation routes from locations east of the plant to pass within a zone of predicted high radiation, the ineffectiveness of protective sheltering, the severe traffic congestion likely to be experienced if a partial or complete evacuation were ordered, and the difficulties in ensuring that emergency personnel will promptly report for emergency duties, preclude any emergency response plan, if implemented, from providing adequate preparedness to protect the health, welfare, and safety of Suffolk County residents; therefore be it

RESOLVED, that the Draft County plan submitted to the County Legislature on December 2, 1962, if implemented, would not protect the health, welfare, and safety of Suffolk County residents and thus is not approved and will not be implemented; and

RESOLVED, that the document submitted by LILCO to the DPC without the County approval or authorization, if implemented, would not protect the health, welfare, and safety of Suffolk County residents and thus will not be approved and will not be implemented; and

RESOLVED, that since no local radiological emergency response plan for a serious nuclear accident at Shoreham will protect the health, welfare, and safety of Suffolk County residents, and since the preparation and implementation of any such plan would be misleading to the public by indicating to County residents that their health, welfare, and safety are being protected when, in fact, such is not the case, the County's radiological emergency planning process is hereby terminated, and no local radiological emergency plan for response to an accident at the Shoreham plant shall be adopted or implemented; and

RESOLVED, that since no radiological emergency plan can protect the health, welfare, safety of Suffolk County residents and, since no radiological emergency plan shall be adopted or implemented by Suffolk County, the County Executive is hereby directed to take all actions necessary to assure that actions taken by any other governmental agency, be it State or Federal, are consistent with the decisions mandated by this Resolution.

SUPREME COURT, SUFFOLK COUNTY

Jan. 15, 1985

MARTO M. CUOMO,
Plaintiff,
-against-
LONG ISLAND LIGHTING COMPANY,
Defendant.

By GEILER, J.S.C.

cc
Latham

DATED February 20, 1985

COUNTY OF SUFFOLK,
Plaintiff,
-against-
LONG ISLAND LIGHTING COMPANY,
Defendant.

TOWN OF SOUTHAMPTON,
Plaintiff,
-against-
LONG ISLAND LIGHTING COMPANY,
Defendant.

FABIAN G. PALOMINO, ESQ.
Spec. Counsel to the Governor
of New York State
Executive Chambers
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and
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Of Counsel

INTRODUCTION

The State of New York (STATE), the County of Suffolk (COUNTY) and the Town of Southampton (TOWN), commenced separate declaratory judgment actions against the Long Island Lighting Company (LILCO), a public service corporation incorporated pursuant to the laws of the State of New York and primarily engaged in the production, distribution and sale of electricity on Long Island. These actions arise from LILCO's attempt to secure approval of its "utility" sponsored offsite emergency response plan for its nuclear plant located at Shoreham. The plaintiffs seek a declaration that LILCO does not have the legal authority to carry out its plan.

LILCO has moved to dismiss this action and the plaintiffs have cross-moved for summary judgment. The Court, in order to address the issues contained in these motions, must examine the events leading up to the commencement of these declaratory judgment actions.

THE ATOMIC ENERGY ACT OF 1954

The Congress of the United States, cognizant of the need for new methods of producing energy, passed the Atomic Energy Act of 1954. This legislation set forth the authority of the Federal government to negotiate the construction and licensing of nuclear production facilities in the United States (United States v. City of New York, 463 F.Supp. 604). The Atomic Energy Commission (AEC) was designated by the Act to oversee the construction and operation of nuclear power plants. This was to be accomplished by a two step licensing procedure. First, the operator of a nuclear plant was required to obtain a construction permit from the AEC in order to build a nuclear facility. Second, the operator after completion of the facility, was required to secure a license to operate the plant from the AEC. The AEC, in the latter licensing procedure, was interested mainly in the onsite preparation for an emergency.

The licensing and regulating functions of the AEC was transferred to the National Regulatory Commission (NRC) by the Reorganization Act of 1974 (U.S.C. §5841 (f)).

SHOREHAM

In 1968 LILCO applied to the AEC for a permit to construct an 820 megawatt nuclear powered electric generating facility on property located at Shoreham in the Town of Brookhaven, County of Suffolk, State of New York. The application was opposed by a private organization known as the Lloyd Harbor Study Group. The latter was permitted to intervene and cross-examine LILCO's witnesses at hearings before the AEC.

None of the plaintiffs herein were parties to the permit application proceedings. However, the late H. Lee Dennison, Suffolk County Executive at the time, made a limited appearance before the licensing board in 1970 and spoke in favor of the issuance of a construction permit

Construction Permit Hearings, Transcript 209, 211, 216, 1970). The permit to construct a nuclear facility at Shoreham was issued by the AEC in 1973).

The approval of the Shoreham construction permit was the catalyst for the issuance of an order by the Suffolk County Executive to the appropriate COUNTY department to develop a "Response Plan for Major Radiation Incidents". In 1975, representatives from LILCO and the COUNTY held a series of meetings in order to define the emergency planning role for each of them in the event of a major radiological accident at Shoreham. These conferences culminated in the development of a plan known as "Suffolk County's General Radiation Emergency Plan". The latter was approved by the Suffolk County Executive on August 30, 1978.

THREE MILE ISLAND

The accident at the Three Mile Island Nuclear facility (TMI) at Harrisburg, Pennsylvania in March 1979, demonstrated the need for improving the planning for radiological emergencies. The NRC, prior to the TMI accident did not condition issuance of an operating license for a nuclear plant upon the existence of an adequate offsite emergency plan. The TMI accident focused attention on the fact that nuclear accidents may endanger surrounding communities and require the mass evacuation of people in those communities.

Congress, in response to the events which occurred at TMI, determined that no nuclear plant should be licensed to operate unless an adequate emergency plan could be drawn up and implemented for the area surrounding the nuclear facility and passed the NRC Authorization Act of 1980.

The NRC, in implementing the policy expressed by Congress, promulgated a number of regulations which included the mandatory submission of an adequate radiological emergency response plan (RERP) by an applicant desirous of operating a nuclear power plant. The RERP must describe in detail how nuclear emergencies will be handled within a ten mile radius plume exposure pathway emergency planning zone (EPZ) and also within a fifty mile radius food ingestion pathway (45 Fed. Reg. 55, 402 August 19, 1980 and 10 C.F.R. §50.33(g) 1984). An operating license is issued only if the NRC finds that there is a reasonable assurance that adequate protective measures can be taken to protect the area surrounding the nuclear facility in the event of a radiological emergency (10 C.F.R. §50.47(a)(1) 1984).

FROM PROTAGONIST TO ANTAGONIST

A careful study of the NRC regulations indicates that the emergency plans such as RERP, which were to be submitted by licensing applicants, would probably have some input by those governmental units having jurisdiction over the area to be evacuated in the event of a nuclear emergency. The "Memorandum of Understanding" signed by County Executive John V. N. Klein and LILCO on December 28, 1979 and the approval

of the terms of said agreement by the County Executive Elect, Peter F. Cohalan, gives credence to this analysis of the NRC regulations (see letter from John V. N. Klein to Ira Freilicher, Vice President of LILCO, dated December 31, 1979).

A number of discussions took place between LILCO and COUNTY representatives between 1980 and 1981 for the purpose of determining the best means of developing an acceptable RERP. These discussions led to the signing of a contract between LILCO and the COUNTY on March 15, 1981. The COUNTY agreed to develop an emergency plan and LILCO in turn consented to paying the projected \$245,000.00 cost of preparing the plan. The County Legislature, in September 1981, approved the terms of the agreement and LILCO advanced \$150,000.00 as the first installment on the payment of \$245,000.00. The latter was to be paid in full on March 18, 1982, the scheduled completion date of the PLAN.

On February 19, 1982, the COUNTY advised LILCO that the \$150,000.00 advancement would be returned because of the "apparent conflict of interest" in the acceptance of any funds from LILCO for the purpose of preparing an emergency plan (see letter dated February 19, 1982 from Lee E. Koppelman, Director of Planning for Suffolk County to LILCO). On March 23, 1982 the Suffolk County Legislature passed a resolution authorizing the Suffolk County Planning Department to prepare a new emergency plan which was to be submitted to the Legislature for its consideration (Resolution 262-1982).

On February 19, 1982, the COUNTY advised LILCO that the \$150,000.00 advancement would be returned because of the "apparent conflict of interest" in the acceptance of any funds from LILCO for the purpose of preparing an emergency plan (see letter dated February 19, 1982 from Lee E. Koppelman, Director of Planning for Suffolk County to LILCO). On March 23, 1982 the Suffolk County Legislature passed a resolution authorizing the Suffolk County Planning Department to prepare a new emergency plan which was to be submitted to the Legislature for its consideration (Resolution 262-1982).

The Planning Department, in accordance with the Legislative directive, submitted a RERP in December 1982. A number of public hearings were held by the Legislature to consider the PLAN in January, 1983. The Legislature, with the concurrence of the County Executive, Peter F. Cohalan, decided not to approve, adopt or implement any RERP for Shoreham. The reason given for this action was that ...

"[Since] no local radiological emergency response plan for a serious nuclear accident at Shoreham will protect the health, welfare, and safety of Suffolk County residents, . . . the County's radiological emergency planning process is hereby terminated, and no local radiological emergency plan for response to an accident at the Shoreham plant shall be adopted or implemented . . .

. . . [S]ince no radiological emergency plan can protect the health, welfare, and safety of Suffolk County residents and, since no radiological emergency plan shall be adopted or implemented by Suffolk County, the County Executive is hereby directed to assure that actions taken

by any other governmental agency, be it State or Federal, are consistent with the decision mandated by this Resolution."

(Resolution 111-1983).

The Governor of New York, after reviewing the results of a study by the Marburger Commission, an independent committee appointed by the Governor to study the Shoreham situation, announced that no RERP for Shoreham would be adopted or implemented by the STATE.

THE LILCO TRANSITION PLAN

LILCO, interpreting the COUNTY's refusal to adopt a plan as a derogation of its responsibility under Article 2B of the New York Executive Law, submitted its own plan to the NRC. The PLAN has been designated "The Lilco Transition Plan". (PLAN)

The PLAN describes in detail the actions which LILCO proposes to take in the event of a radiological emergency at the Shoreham facility. The PLAN is contained in four volumes. One volume is entitled "Shoreham Nuclear Power Station - Local Offsite Radiological Emergency Response Plan". Two volumes are entitled "Offsite Radiological Emergency Response Plan". The fourth volume is designated as "Appendix A - Evacuation Plan".

Highlights of the PLAN which would be utilized in the event of a radiological accident may be outlined as follows:

1. The organization which is primarily responsible for implementing the PLAN is known as the Local Emergency Response Organization (LERO). This group is composed of over 1,300 LILCO employees and consultants.
2. The Director of LERO, a LILCO employee, would have the primary responsibility for the coordination and implementation of the PLAN. He would make certain that the following mentioned functions would be carried out in the event of a nuclear accident at Shoreham.
3. Assessment of the severity of the nuclear accident.
4. Determination of the action to be taken in order to protect the public.
5. The declaration of an emergency.
6. Notification of the public by the following methods:
 - a) The activation of 89 fixed sirens.
 - b) The transmittal of messages on an Emergency Broadcast System (EBS).
 - c) The transmittal of signals on tone alert radios.

7. The instruction of the public by means of EBS messages as to protective measures to be taken, including selective and general evacuation of the EPZ.

8. Implementation of traffic control measures in order to evacuate the public along specified routes. These measures include the following:

- a) The conversion of a two mile stretch of a two-way road into a one-way road.
- b) The placement of roadblocks to cordon off the immediate plant area.
- c) The placement of 193 traffic guides at 147 traffic control points throughout the EPZ. These traffic guides, by the utilization of cones and hand signals, will channel traffic along the designated evacuation routes and discourage traffic from proceeding along different routes.
- d) The placement of LILCO vehicles, cones and flares in the traffic lanes before certain entrance ramps on four evacuation routes to cause traffic to move into adjoining lanes in order to permit the continuous flow of traffic onto the routes from such ramps.
- s) The authorization of the use of road shoulders and the creation of lanes for turnpockets.

9. The erection of permanent trailblazer signs along all evacuation routes.

10. The removal of stalled cars and other obstacles from the roadway by tow trucks.

11. The formulation of protective action recommendations which are to be broadcast to the public present in the ingestion exposure pathway. These recommendations may include the following:

- a) The placement of dairy animals on stored feed.
- b) The removal of dairy animals from contaminated fields to shelters.
- c) The withholding of foodstuffs and milk from the market.
- d) The change from the production of fluid milk to the production of dry whole milk.
- e) The washing or scrubbing of fruits and vegetables prior to consumption.
- f) The suspension of fishing operations.

12. The making of decisions and recommendations with reference to recovery and re-entry to the EPZ after a nuclear accident.

THE CATALYST FOR THE INSTANT PROCEEDING

The Atomic Safety and Licensing Board (ASLB), an administrative panel of the NRC, has been and still is in the process of conducting hearings to determine if the plan complies with NRC standards and is capable of being implemented.

LILCO has represented to the NRC that it may lawfully implement its PLAN and that neither State nor Federal law prevent LILCO from performing the functions described therein. The STATE, COUNTY and TOWN have advised the NRC that LILCO lacks the legal authority to carry out its plan. These governmental bodies have filed ten "legal contentions" with the ASLB setting forth their positions on the lack of legal authority by LILCO to implement its PLAN.

The Federal Emergency Management Agency (FEMA), the Federal body charged with the initial reviews of RERPS, has advised the ASLB that it cannot determine whether the LILCO PLAN can be implemented until the legal authority issue has been resolved (see Letter of Richard W. Kreiner, Assistant Associate Director, Division of Emergency Preparedness and Engineering Response, NRC).

The Chairman of the ASLB, after listening to all sides and considering FEMA's views, determined that the ten legal contentions filed by the plaintiffs herein present issues of New York State Law and he urged the parties to get a resolution in the State Courts (Transcript ASLB January 27, 1984 p. 3675).

On March 7, 1984, separate actions seeking a declaration that LILCO did not have legal authority to execute its PLAN was commenced by the STATE and COUNTY in the New York State Supreme Courts. The COUNTY's complaint alleges that LILCO's implementation of its PLAN would be unlawful, illegal and a usurpation of the police powers of the STATE. The COUNTY specifically mentioned that the execution of the PLAN would violate the New York State Constitution, the Municipal Home Rule Law and the Executive Law. The STATE similarly alleged that LILCO is precluded from exercising the functions mentioned in the PLAN. In addition, the STATE cited that the implementation of the PLAN would be violative of the Transportation Corporations Law, the Business Corporations Law, the Vehicle and Traffic Law, the Public Health Law, the Agricultural and Markets Law and the Penal Code.

LILCO did not serve an answer but immediately moved to dismiss the actions on the grounds that the Court did not have subject matter jurisdiction and the complaints fail to state a cause of action.

LILCO, before any action could be taken with reference to its motion, removed the declaratory judgment actions to the Federal District Court in April 1983. It claimed that the challenge to its 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 a remand of their actions back to the New York State Supreme Court. The Federal District Court ruled that LILCO's federal law claims and its invoca-

tion of the federal preemption argument constituted affirmative defenses that could be raised in a state court proceeding (Cuomo v. Lilco; County of Suffolk v. Lilco; Nos. CV-84 1218, CV-84-1405, ED N.Y., June 15, 1984). On August 14, 1984, the STATE and COUNTY actions were consolidated in this Court with a similar action for declaratory judgment commenced by the TOWN in May 1984.

LILCO renewed its motion to dismiss the complaints on the grounds that this Court does not have subject matter jurisdiction because no justiciable controversy is present and the complaints fail to state a cause of action.

JUSTICIABLE CONTROVERSY?

LILCO maintains that no real dispute exists concerning its legal authority to act in the event of an emergency because the plaintiffs' complaints are based upon a "hypothetical scenario" that will never occur. That "hypothetical scenario", according to LILCO is that the utility alone will respond to a radiological emergency at Shoreham. LILCO boldly proclaims that "in fact New York and Suffolk County would respond in the event of an actual emergency at Shoreham" and thus the "hypothetical scenario" in the complaint that "Lilco alone would perform the contested activities" is moot.

LILCO's characterization of the complaints as being based on a hypothetical scenario is without any basis in fact and can only be attributed to "wishful thinking". One does not have to be a genius to ascertain that the issue presented by these actions is the legal authority of LILCO to execute the PLAN and not whether the STATE or COUNTY will or will not respond to a radiological emergency at Shoreham.

What constitutes a justiciable controversy? The necessary elements of a justiciable controversy are a legally protected interest and a present dispute (Davis Construction Corp. v. County of Suffolk, 112 Misc.2d 652, 447 N.Y.S.2d 355, aff'd. 95 A.D.2d 819, 464 N.Y.S.2d 519; Board of Co-Operative Educational Services, Nassau County v. Goldin, 38 A.D.2d 267, 328 N.Y.S.2d 958. These elements are present in the instant matter. The plaintiffs have an interest in insuring that their governmental powers are not usurped by a private corporation. LILCO claims that it has a right to exercise the functions mentioned in the PLAN. How can anyone say that a bona fide controversy does not exist?

The Court is of the opinion that the declaratory judgment action is the best vehicle to solve the controversy herein as attested to by the following language of the Court of Appeals in the case of New York Public Interest Research Group, Inc. v. Carey, 42 N.Y.2d 527, 399 N.Y.S.2d 621 at page 623:

"...The need for judicial intervention is obvious when, because of the actions of one of the parties, a dispute arises as to whether there has been a breach of duty or violation of the law. Then the courts can declare the rights and obligations of the parties, and if a breach is found, compel compliance, award damages or otherwise order appropriate action to be taken.

That is the traditional, but not the only way in which a genuine legal dispute may arise or be resolved by the courts. For instance, when a party contemplates taking certain action a genuine dispute may arise before any breach or violation has occurred and before there is any need or right to resort to coercive measures. In such a case all that may be required to insure compliance with the law is for the courts to declare the rights and obligations of the parties so that they may act accordingly. That is the theory of the declaratory judgment actions authorized by CPLR 3001 (James v. Alderton Dock Yards, 256 N.Y. 298, 176 N.E. 401; Siegel, Practice Commentaries, McKinney's Cons. Laws of N.Y., Book 7B, CPLR 3001, pp. 355 357; 3 Weinstein Korn Miller, N.Y. Civ.Prac., par. 3001.02; Borchard Declaratory Judgments, 9 Brooklyn L Rev., pp.1 3).

The controversy concerning LILCO's legal authority to implement its PLAN is real and present. Resolution of the dispute will determine what the police powers of the STATE entail and if those powers have been usurped by LILCO's PLAN. The determination of LILCO's authority to implement the PLAN will have a significant bearing on its application for an operating license at Shoreham. The interests of the parties are clearly at stake in this proceeding. The Court can not envision a better example of a justiciable controversy which is ripe for a judicial determination in a declaratory judgment action.

THE ISSUE

LILCO, as previously mentioned, moved to dismiss the complaints pursuant to Section 3211(a)(7) of the CPLR on the ground that the complaints fail to state a cause of action. LILCO contends that (1) "New York law does not prohibit it from performing the activities mentioned in the complaints; and (2) if state laws "were construed as plaintiffs allege, they would be preempted under the Supremacy Clause of the United States Constitution and by federal statutes and regulations."

The Court, at the behest of the parties, issued an order dated October 4, 1984 which limited the issue to be decided to that of LILCO's legal authority to implement its PLAN under the laws of the State of New York. The parties have submitted the pleadings, transcripts of their oral arguments before the Court, affidavits, the PLAN, voluminous briefs and documents and there is no need to hold a hearing as none of the material facts are in dispute.

A synopsis of the posture of the case to be decided by the Court and the issue involved is described as follows:

LILCO, in order to obtain a license to operate its Shoreham facility, must submit a plan for responding to a radiological accident which the NRC finds is adequate and capable of being implemented. LILCO has submitted a PLAN to deal with a radiological emergency at Shoreham. The plaintiffs have challenged LILCO's legal capabilities to perform the

functions contained in the PLAN and maintain that the PLAN amounts to a usurpation of the STATE's police powers. The proposed functions are undisputed and set forth at great length in LILCO's four volume PLAN. The legality of LILCO's performance of these functions under the laws of the State of New York is before this Court for a resolution.

THE POSITIONS

LILCO's basic premise for its view that it has a right to implement the PLAN under the laws of the State of New York is found in the following statement contained in the PLAN at P 1.4-1.8:

"(N)othing in New York State law prevents the utility from performing the necessary functions to protect the public. To the contrary, Article 2-B of New York State Executive Law, Sec. 20.1.e, makes it the policy of the State that State and local plans, organization arrangements, and response capability "be the most effective that current circumstances and existing resources allow." "

This argument has been succinctly advanced by counsel for LILCO in his statements before this Court on January 15, 1985 and transcribed at pages 26 and 27 of the minutes in the following concise manner:

"Under the LILCO view, as a private citizen or as a corporate citizen, any action that I want to take of any type that is not prohibited by law, or that does not threaten the health of one of my fellow citizens, unless that action is expressly prohibited by State law, that I've got a right to do it. That's part of my rights as a citizen of this country, and if I were a citizen of New York, it's part of my rights under the New York constitution."

LILCO, in addition to this argument, also maintains that its activities under the PLAN do not amount to an exercise of police power. It bases its contention on two grounds. First, the PLAN "does not propose to, and will not, use force or the threat of force to compel obedience to anyone or anything." Second, the essence of the STATE's police power is "regulation" and the ability "to incarcerate persons who engage in prohibited activity" and LILCO is simply "planning for and responding to a radiological emergency" and "not regulating an emergency response."

The plaintiffs' argument is rather simple. They maintain that the activities which are to be performed by LILCO employees as delineated in the PLAN are governmental functions and amount to a usurpation of the STATE's police power and thus is prohibited under New York State Law.

THE STATE'S POLICE POWER

A resolution of the controversy herein necessarily involves a discussion of the source, nature and exercise of the police power of the STATE.

(a) THE SOURCE

In our system of government, the police power is an inherent attribute and prerogative of state sovereignty (Teeval Co. v. Stern, 301 N.Y. 346, Cert. den. 340 U.S. 876). The Tenth Amendment to the Constitution of the United States specifically provides that the exercise of the police power for the general welfare of the public is a right reserved to the States (Brown v. Brannon, 399 F. Supp. 133, aff'd, 535 F.2d 1249). This principle has been affirmed by our Courts even before the turn of the 1900's (See Nunn v. People of Illinois, 94 U.S. 113).

(b) THE NATURE

One cannot deny that the police power is the STATE's most essential power (People v. Bibbia, 262 N.Y. 259, aff'd, 291 U.S. 502). Nor can one dispute that the protection and safety of persons and property is unquestionably at the core of the STATE's police power (Kelly v. Johnson, 425 U.S. 238). Our courts have continually and consistently ruled that the protection of the public health and safety is one of the acknowledged purposes of the police power of the STATE (Adler v. Deegan, 251 N.Y. 467; Yonkers Community Development Agency v. Morris, 37 N.Y.2d 478, 373 N.Y.S.2d 112).

(c) THE EXERCISE

Who may exercise these police powers? Does a governmental subdivision such as a county or town have an inherent right to exercise these powers? Does a corporate entity such as LILCO have an inherent right to exercise these police powers?

The acceptance of the cardinal rule, that the police power is an inherent prerogative of the STATE, can only lead to the conclusion that this power can only be exercised by the STATE or by governmental subdivisions upon whom the State Constitution or State laws confer such power. In fact, municipal corporations, who are creatures of state law and whose sole purpose is to perform governmental functions, have no inherent authority to exercise police powers. These municipal corporations may only exercise the police power which the State Constitution or the State Legislature confers upon them (Rochester v. Public Service Commission, 192 Misc. 33, 83 N.Y.S.2d 436, aff'd, 17 A.D. 172, 89 N.Y.S.2d 545, aff'd, 301 N.Y. 801; People ex rel Elkind v. Rosenblum, 184 Misc. 916, 54 N.Y.S.2d aff'd, 269 A.D. 859, 56 N.Y.S.2d 526).

POLICE POWER = POLICE POWER

A brief study of the PLAN, as outlined by this Court, indicates the basic activities LILCO intends to perform in the event of a radiological accident at Shoreham.

It intends to declare an emergency and advise citizens of the steps they should take to protect themselves. LILCO intends to manage a major, full-scale evacuation of a 160 square mile area. It intends to close public highways, re-route traffic and direct the flow of traffic. The utility intends to decide upon and oversee steps to secure public health within a fifty mile radius of the nuclear facility. LILCO intends to oversee evacuation centers for more than 100,000 people. It intends to decide when and in what fashion citizens may return to their homes in previously contaminated areas.

LILCO maintains that these actions do not involve governmental functions and that its proposed "management" of the evacuation of the residents of Suffolk County would not involve an exercise of the STATE's police power. What is the basis of LILCO's assertion?

Two reasons are advanced by LILCO for its stance. First, LILCO does not propose to use force or the threat of force to compel obedience to its recommendations. Second, the essence of the STATE's police power is regulation and the ability to incarcerate persons who engage in prohibited activity. LILCO is merely planning for and responding to a radiological emergency in carrying out the functions in the PLAN and not regulating an emergency response.

The position taken by LILCO is untenable. The fact that LILCO will not issue traffic tickets or arrest someone is of little significance. The exercise of governmental functions does not necessarily require the imposition of penalties as indicated by the following language in the case of Branden Shores, Inc. v. Incorporated Village of Greenwood Lake, 68 Misc.2d 343, 325 N.Y.S.2d 957 at page 960:

"The term "police power" has often been defined as that power vested in the Legislature to make, ordain and establish all manner of wholesome and reasonable laws, statutes and ordinances, with penalties or without, not repugnant to the Constitution, as they shall judge to be for the good and welfare of the commonwealth, and of subjects of the same. Whatever affects the peace, good order, morals and health of the community comes within its scope."

Furthermore, the bold statement that the PLAN is devoid of any coercion is incorrect. Does turning a two-way street into a one way street leave motorists free to drive as and where they wish? Likewise, does parking LILCO vehicles in traffic lanes on the Long Island Expressway in critical locations afford motorists a freedom of choice? Is a motorist thus compelled to travel in accordance with the route set out in the PLAN? Does LILCO REALLY believe that its declaration of an emergency and evacuation on the emergency broadcast channel is any less compulsive because the directive will not be enforced by a threat of incarceration?

LILCO's regulation theory is likewise without merit. It claims that its own actions do not "regulate emergency responses" but rather consist of "planning" for and "responding" to a radiological emergency.

LILCO, in "planning" for a radiological emergency would in effect be performing functions that are governmental in nature. In "responding" to a radiological emergency, the utility would undertake to perform activities that are reserved to the STATE and its political subdivisions.

In fact, the Courts of the State have recognized that the functions LILCO intends to perform fall within the STATE's historic police power. See, eg. Yonkers Community Development Agency v. Morris, 37 N.Y.2d 478, 373 N.Y.S.2d 112 (1975), app. dismissed, 423 U.S. 1010 (1975) (matters concerning the public health, safety and welfare are within the State's police power); Royce v. Rosasco, 159 Misc. 236, 287 N.Y.S. 692 (1936) (abatement of public emergencies is within State's police power). People v. Bielmeyer, 54 Misc.2d 466, 468-69, 282 N.Y.S.2d 797 (1967) ("It has long been recognized that the power to regulate and control the use of public roads and highways is primarily the exclusive prerogative of the States."); Tornado Industries, Inc. v. Town Board of Oyster Bay, 187 N.Y.S.2d 794 (1959) (control of traffic is a matter within the police power); City of Utica v. Water Pollution Control Board, 6 App.Div.2d 340, 177 N.Y.S.2d 47 (1958), aff'd., 5 N.Y. 2d 164, 182 N.Y.S.2d 584 (1959) (control of water pollution is within the public power); See, generally, N.Y. Const. Art. I, sec. 6, notes 681-909 (McKinney)).

No amount of semantics can change the true meaning of the activities which LILCO proposes to perform in the event of a radiological accident at Shoreham. No amount of ink can cover up or blot out the fact that LILCO's "intended functions" are inherently governmental in nature and fall clearly within the ambit of the STATE's police power.

THE DELEGATION OF POLICE POWERS

Does LILCO have any statutory authority to exercise the functions contained in the PLAN? How are the STATE's police powers delegated? Have any of these powers been delegated to LILCO?

(a) TO LOCAL GOVERNMENTS

The COUNTY, TOWN and other local governmental subdivisions have been delegated "nearly the full measure of the STATE's police power by the State Constitution and various State statutes" (Hoetzer v. County of Erie, 497 Supp. 1207). Article 9, Section 2 of the New York State Constitution is the primary source for the authority of local governments to exercise the police power. Section 10.1a(12) of the Municipal Home Rule Law expressly delegates police power to governmental units by conferring authority upon them to "provide for the well-being of persons or property therein." Thus, these constitutional and statutory provisions, in of themselves, authorize the COUNTY and TOWN to exercise the STATE's police power.

(b) TO PRIVATE CORPORATIONS

The Court has been unable to find any provisions in the State Constitution or State statutes which authorize LILCO or any other private corporation to exercise any portion of the STATE's police power. In fact, any attempted delegation of police power to LILCO would amount

to an unlawful delegation of governmental powers (See 20 N.Y. Jur. 2d, "Constitutional Law" §183). A governmental unit can not bargain away its police power to a private party or organization (Beacon Syracuse Associates v. City of Syracuse, 560 F. Supp. 188). Governmental functions and responsibilities cannot be surrendered by contract where police power, public safety and welfare are involved (Patrolmen's Benevolent Ass'n. v. City of New York, 59 Misc.2d 556, 299 N.Y.S.2d 986).

CORPORATE POWERS

LILCO is nothing more than a creature of the STATE. Corporations, unlike natural persons, possess only those powers that have been conferred upon them by the state of their incorporation (14 N.Y. Jur. 2d "Business Relationships, §340). Corporate powers do not exist merely because they are not expressly prohibited. A valid basis must be demonstrated for the existence of a claimed contested power under the laws of the state under which the corporation has been created. (See 6 Fletcher, Cyclopedia of Corporations §2476 - 2486, Rev. Perm. ed. 1979).

The express powers which LILCO possesses are set forth in Section 11 of the New York State Transportation Corporations Law and Section 202 of the New York State Business Corporation Law. What express powers does LILCO have as a direct result of these statutes?

Section 11 of the Transportation Corporation Law grants electric corporations and gas and electric corporations the power to generate, acquire and supply electricity for heat or power to light public streets, places and buildings. In addition, such corporations are empowered to acquire and dispose of necessary machines and to transmit and distribute electricity through suitable wires and other conductors. Such corporations can use streets, public parks and public places to place their poles, pipes and fixtures, but only with the consent of the municipal authorities. These corporations also have power to acquire real estate, for corporate purposes, but only in the manner prescribed by the eminent domain procedure law. Thus, even in areas necessary to the conduct of their businesses, utilities can act only under express legislative grants of power and with the consent of municipalities.

Section 202 of the Business Corporation Law sets forth sixteen general powers which are common to all corporations incorporated pursuant to the laws of the State of New York. For example, the power to sue and be sued, to hold property and to make contracts.

Thus none of these express powers bestow upon LILCO the authority to implement its PLAN. Nevertheless, LILCO is undaunted by its inability to point to a specific grant of power in either the Transportation Corporations Law or the Business Corporation Law which would lend credence to its claimed authority to implement the PLAN. Instead, LILCO seeks to rely on "implied powers" which existed at common law and is now codified in Section 202 (a)(16) of the Business Corporation Law. The latter provides that a corporation has "all powers necessary or convenient to effect its corporate purposes." LILCO states that one of its corporate purposes is to create and sell electricity and thus it has the power to build or operate a power plant such as Shoreham. The operation of Shoreham, according to

LILCO, is conditioned upon the existence of an adequate offsite emergency plan. Thus LILCO reasons that it has the implied power to implement the PLAN in furtherance of its corporate powers.

LILCO's view of the scope of implied corporate power has no limit. Furthermore, it has no support in the cases which LILCO has put forth as supporting its theories. For example, it cites the following four cases which held:

1. That a corporation has implied power to make charitable contributions for the benefit of the corporation and its employees (Steinway v. Steinway & Sons, 17 Misc. 43, 40 N.Y.S. 718).

2. That a corporation operating a home for persons 60 years or older has the implied power to admit a 59 year old (In Re Heims Estate, 166 Misc. 931, 3 N.Y.S.2d 134, aff'd. 255 A.D. 1007, 8 N.Y.S.2d 574).

3. That a construction company may also perform related professional engineering services (John B. Waldbilling, Inc. v. Gottfried, 22 A.D.2d 997, 254 N.Y.S.2d 924, aff'd. 16 N.Y.2d 773, 262 N.Y.S.2d 498).

4. That a corporation may make payments under a "non-compete agreement, provided such payments do not constitute a prohibited restraint of trade (Leslie v. Lorillard, 110 N.Y. 519).

This Court can not fathom how LILCO expects to support its claim of authority to declare an emergency and assume responsibility for the evacuation of over 10,000 people on the basis of these cited cases.

Likewise, the Court is at a loss for LILCO's reliance upon a 1901 case, City Trust Safe Deposit and Surety Co. of Philadelphia v. Wilson Manufacturing Co., 58 A.D. 271, 68 N.Y.S. 1004 for the proposition that "it is difficult to say in any given case that a business act is not within the powers of a corporation." Ironically, the City Trust case did not even involve New York State Corporate Law. Defendant, a West Virginia corporation, sought to avoid an indemnity agreement previously given. It argued that its act was "ultra vires" under the laws of West Virginia, but it failed to offer any evidence as to the West Virginia Laws. The court held that, absent such evidence, defendant could not avoid its contractual obligation.

Does LILCO sincerely believe that a judge writing a decision in 1901 would have considered that the direction of traffic or the declaration of a public emergency constituted a "business act" as the term was employed in the City Trust case?

LILCO is mistaken in its view that the power to undertake actions necessary or convenient to effect its corporate purposes has no bounds. A corporation lacks power, express or implied, to engage in activities which are contrary to public policy (State of New York v. Abortion Information Agency, Inc., 37 A.D.2d 142, 330 N.Y.2d 927, aff'd. 30 N.Y.2d 779, 339 N.Y.S.2d 174). The implementation of the PLAN amounts to an

exercise of the police power. The latter can only be exercised by the STATE and upon proper delegation, the municipalities. The exercise of such power by LILCO would accordingly violate the public policy of this state.

THE EXECUTIVE LAW
ARTICLE 2B

LILCO claims that the activity which it proposes to take under its PLAN is directly supported by New York State Executive Law, Article 2B. This law is entitled "State and Local Natural and Man-Made Disaster Preparedness" and is found in Sections 20 - 29 of the Executive Law.

What was the intention of the Legislature in enacting this law? What does the law provide.

Article 2B of the Executive Law involves the distribution of powers held by the Executive Branch of State Government. It clearly expresses the intention of the Legislature to confer the STATE's power to plan for and to respond to disaster situations solely upon State and local government. It establishes a framework for state and local co-operation in planning and preparing for emergency responses to all kinds of disasters, including nuclear accidents. Thus, this Statute creates a state agency, the Disaster Preparedness Commission (DPC) to coordinate state and local emergency responses. This legislation authorizes each county and city to plan for disasters and delegates authority to STATE and local officials to effectuate these functions.

The Court, no matter how many times it has read and re-read Article 2B, could not find any authorization for LILCO, express or implied, to exercise the STATE's police powers in emergency situations. What is the basis of LILCO's claim that Article 2B of the Executive Law authorizes it to implement its PLAN?

LILCO rests its claim of authority upon two sub-paragraphs, Section 20-1(a) and Section 20-1(e) contained in the statement of policy that constitutes the preface to Article 2B. Section 20 of Article 2B of the Executive Law provides as follows:

"§20. Natural and man-made disasters; policy, definitions

1. It shall be the policy of the state that:

a. local government and emergency service organizations continue their essential role as the first line of defense in times of disaster, and that the state provide appropriate supportive services to the extent necessary;

b. local chief executives take an active and personal role in the development and implementation of disaster preparedness programs and be vested with authority and responsibility in order to insure the success of such programs;

c. state and local natural disaster and emergency response functions be coordinated in order to bring the fullest protection and benefit to the people;

d. state resources be organized and prepared for immediate effective response to disasters which are beyond the capability of local governments and emergency service organizations; and

e. state and local plans, organizational arrangements, and response capability required to execute the provisions of this article shall be the most effective that current circumstances and existing resources allow.

2. As used in this article the following terms shall have the following meanings:

a. "disaster" means occurrence or imminent threat of wide spread or severe damage, injury, or loss of life or property resulting from any natural or man-made causes, including, but not limited to fire, flood, earthquake, hurricane, tornado, high water landslide, mudslide, wind, storm, wave action, volcanic activity epidemic, air contamination, blight, drought, infestation, explosion, radiological accident or water contamination.

b. "state disaster emergency" means a period beginning with a declaration by the governor that a disaster exists and ending upon the termination thereof.

c. "municipality" means a public corporation as defined in subdivision one of section sixty-six of the general construction law and a special district as defined in subdivision sixteen of section one hundred two of the real property tax law.

d. "commission" means the disaster preparedness commission created pursuant to section twenty-one of this article.

e. "emergency services organization" means a public or private agency, organization or group organized and functioning for the purpose of providing fire, medical, ambulance, rescue housing, food or other services directed toward relieving human suffering, injury or loss of life or damage to property as a result of an emergency, including non-profit and governmentally-supported organizations, but excluding governmental agencies.

f. "chief executive" means:

(1) a county executive or manager of a county;

(2) in a county not having a county executive or manager, the chairman or other presiding officer of the county legislative body;

(3) a mayor of a city or village, except where a city or village has a manager, it shall mean such manager; and

(4) a supervisor of a town, except where a town has a manager, it shall mean such manager.

This Section states general STATE policies including the proposition that "local government and emergency service organizations continue their essential role as the first line of defense in times of disaster" and that the STATE shall provide appropriate supportive services to the extent necessary. This policy statement, contrary to LILCO's assertions, does not explicitly or implicitly authorize private corporations to exercise police powers in the event of a nuclear accident.

Section 20-1(a) acknowledges the role of private groups called "emergency service organizations" in providing "services directed toward relieving human suffering, injury or loss of life or damage to property" such as fire, medical, ambulance, food, housing and similar rescue services.

These private emergency service organizations have not been delegated in any way, shape, manner or form to the governmental functions which the PLAN contemplates. The Legislature, if it intended to delegate the broad-scale powers LILCO claims, would have done so in clear explicit language in the substantive portions of Article 2B which presently only confer these powers upon state and local governments.

CONCLUSION

These declaratory actions which arise out of LILCO's attempt to secure approval of its utility sponsored PLAN clearly present a justifiable controversy and the complaints do state a cause of action. The limited issue of LILCO's authority to implement its PLAN under the laws of the State of New York does not involve any disputed questions of fact.

LILCO, as previously mentioned, intends to execute the PLAN solely with its own employees and intends to carry out activities which are inherently governmental in nature. These powers have been solely conferred upon the STATE and its political subdivisions. LILCO, a private corporation, is a creature of state law and only has those powers which the STATE has conferred upon it. These powers, express or implied, do not include the right to exercise governmental functions.

There is a paradox which is present in this controversy and involves the philosophy of the creation of our government. In order to recognize this paradox, one must examine the philosophy of our founding fathers in creating our government.

The political ideas behind the Declaration of Independence and the Constitution were not the sole inventions of the founding fathers. Franklin, Jefferson, Madison and other colonial leaders were learned and widely read men, steeped in the ideas of the English political philosophers. The most influential of these philosophers upon the founding fathers was John Locke (See Clinton Rossiter, "1787: The Grand Convention", [MacMillan, 1966]).

Locke, an avid opponent of the divine right theory of government, put forth his ideas about the creation, purpose and powers of government in his "Treatise of Civil Government" written in 1689. His ideas, for the purpose of this discussion, may be summarized as follows:

1. Individuals originally existed in a state of nature. Each individual had the right to do whatsoever was necessary for his preservation and the right to punish those who committed crimes against the laws of nature. Locke called these rights the "supreme power".

2. The weak were at the mercy of the strong in the state of nature. Each individual, because of the situation, entered into a "social contract" with every other individual and this social contract resulted in the creation of a civil society or community. The "supreme power" is surrendered by each individual to the community.

3. The community is created for the purpose of establishing a government, which is accomplished by means of a trust. This means that government only enjoys a "fiduciary power". Thus the community does not surrender the "supreme power" but merely entrusts it to government.

4. The powers of government are limited. Government is accountable to the community. The community, if government breaches its trust, had a right to "appeal to the heavens". This latter phrase meant the right of revolution (our founding fathers substituted the right to change governments by means of a free election for Locke's right of revolution).

What is the paradox?

The STATE and COUNTY would be breaching their "fiduciary" duty to protect the welfare of its citizens if they permitted a private corporation to usurp the police powers which were entrusted solely to them by the community. LILCO has to realize that this is a government of law and not of men or private corporations (See John Adams "Draft Massachusetts Constitution, Declaration of Rights, ART XXX, 1779").

On the other hand, the STATE and COUNTY maintain that they exercised their police powers in order to protect the community in their determination not to adopt or implement any emergency plan for Shoreham because of the "impossibility" to have a "safe evacuation" in case of a nuclear accident. LILCO asserts that this position is nothing more than a "sham" and amounts to a breach of the STATE's and COUNTY's duty to protect the citizens in case of a nuclear accident at Shoreham as envisioned by Article 2B of the Executive Law. LILCO is in effect reminding the STATE and COUNTY governments that "Non est Princeps Super Leges, Sed Leges Supra Principem" (The Prince is not above the Laws, but the Laws above the Prince, Pliny the Younger, "Panegyric of Trajan" Sec. 65 100 A.D.).

There is no need to resort to a revolution or the usurpation of governmental powers by LILCO if there has in fact been a breach of a trust by the STATE and COUNTY. LILCO can test this matter in another tribunal by commencing an action in the nature of a writ of mandamus or in the arena of public opinion which manifests itself by the results of an election.

Settle judgment on notice.

William R. Ginter

J.S.C.

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FILE NO

DIRECT DIAL NO 804 788

To: Chairman Palladino, Commissioners Roberts, Asselstine
Bernthal and Zech

Samuel J. Chilk, Secretary of the Commission

Judges Rosenthal, Edles and Wilbur

Judges Brenner, Morris and Ferguson

Judges Margulies, Kline and Shon

Judges Kelley, Bright and Johnson

Docket No. 50-322-OL

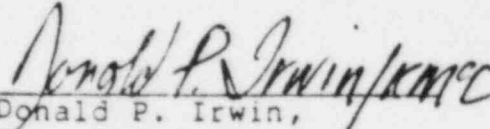
(Shoreham Nuclear Power Station, Unit 1)

Notice of Issuance of Suffolk County Executive Order 1985-1

The Suffolk County Executive yesterday issued the attached Executive Order 1-1985, directing the Suffolk County government to review the Shoreham Emergency Response Plan now before the NRC and FEMA and to conduct an exercise of that plan in conjunction with LERO, with the County assuming command-and-control functions. Related articles appearing in this morning's Newsday are also attached.

The issuance of Executive Order 1-1985 is clearly an event of significance for this proceeding. It is too early to tell the exact contours of its effects. LILCO will endeavor to keep all parties notified and will request any appropriate schedule or other modifications.

Respectfully submitted,


Donald P. Irwin,
One of Counsel for
Long Island Lighting Co.

LILCO, May 31, 1985

CERTIFICATE OF SERVICE

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

I hereby certify that "Notice of Issuance of Suffolk County Executive Order 1985-1" with attachments was served on the following persons this May 31, 1985 by hand, as indicated by an asterisk, or by telecopier, as indicated by two asterisks, or by Express Mail, as indicated by three asterisks, or by first-class mail, postage prepaid.

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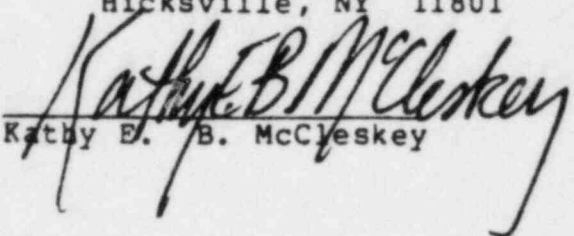
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DATED: May 31, 1985



PETER F. COHALAN
SUFFOLK COUNTY EXECUTIVE

OFFICE OF THE COUNTY EXECUTIVE

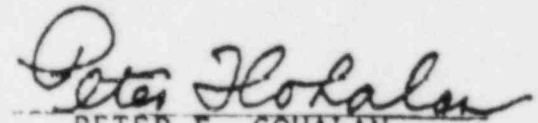
JOHN C. GALLAGHER
CHIEF DEPUTY COUNTY EXECUTIVE

EXECUTIVE ORDER NUMBER 1 - 1985

By the power vested in me under Article II-B of the New York State Executive Law and §302 of the SUFFOLK COUNTY CHARTER, I hereby determine that it is necessary for me to cause to be reviewed and evaluated the Local Emergency Response Plan for Suffolk County presently before the United States Nuclear Regulatory Commission and the Federal Emergency Management Agency.

I therefore direct the Commissioner of Police and Commissioner of the Suffolk County Planning Department to use whatever resources of the government of the County of Suffolk are necessary in order to complete a review and evaluation of the above Local Emergency Response Plan and carry out and cause to be conducted a test and exercise of the above said Plan in conjunction with the Local Emergency Response Organization (LERO). I further direct that agents of the County of Suffolk assume the function of command and control with implementation of the police powers of the County of Suffolk over the conduct of said test and exercise.

IN WITNESS WHEREOF, I hereby set my hand this 30th day of May, 1985.


PETER F. COHALAN
SUFFOLK COUNTY EXECUTIVE

Cohalan Drops Shoreham Fight

'The unique local conditions of Long Island make it impossible to protect the public safety if there were a serious accident at the Shoreham plant ... In short, there can never be emergency preparedness to protect our citizens.'



Cohalan during interview yesterday

'I am directing the county to participate in emergency planning ... If a review of the emergency plan is found to be favorable then I'm not opposed to the operation of the plant.'

Orders County Evacuation Drill; LILCO to Pay \$130M in Back Tax

Coverage Begins, Pages 4-5

'There is no competing value, be it political, economic or otherwise, that could justify our giving the public's safety any priority other than the very highest.'

— Feb. 16, 1983, Cohalan announcing his position on emergency preparedness for Shoreham

'The county government will not become LILCO's pawn, and we will not be pushed by LILCO into compromising the truth ... Suffolk County will not walk away from the fact that Shoreham cannot operate.'

— March 8, 1983, in a Newsday op-ed essay

'The most damning thing I can say about Pat, and it's the truth, is his lack of consistency and political integrity.'

— Nov. 1, 1983, attacking Assemb. Patrick Halpin's shift to support of Shoreham

'... New faces and new ideas present us with new opportunities to reach a solution on the economics of Shoreham.'

— Jan. 31, 1984, Cohalan on the naming of William Catacosinos as LILCO's chairman

'We have not publicly changed our position on Shoreham. We still have two concerns, emergency planning and safety ... these people in the opposition ... think the only problem is Shoreham. There are other problems out there including fiscal stability of the county.'

— May 7, 1985, reacting to criticism he had softened his position.

'... I'm going to cooperate in the review and evaluation of the plan on the table and carry out a drill, and to that extent you could extrapolate I've dropped my opposition to the plan as long as the results of the drill are positive.'

— May 30, 1985, after signing the executive order directing county authorities to review LILCO's evacuation plan.

Major Hurdles Before Startup

By John McDonald

Suffolk County's participation in testing an evacuation plan for the Shoreham nuclear power plant is a key step toward opening the plant, but Long Island Lighting Co. still must clear several hurdles before the \$4.2-billion plant goes on line.

Although the dramatic shift in position by Suffolk County Executive Peter F. Cohalan is a major victory for LILCO, the utility still faces major political and regulatory hurdles that block the plant's opening.

Foremost among the problems is how to turn around Gov. Mario Cuomo's opposition. The Suffolk County Legislature is strongly committed to keeping the plant from opening. Other problems include the plant's problem-plagued backup diesel generators. Also, the emergency evacuation plan and low-power tests of the plant's equipment still must be found to meet Nuclear Regulatory Commission standards. LILCO's license to conduct low-power tests was revoked by the NRC in February so that the NRC could reconsider equipment security issues.

Whether Cuomo's position on the Shoreham issue will change because of Cohalan's swing is yet to be determined. In 1983, Cuomo said only that he would not impose an emergency plan on Suffolk after the county decided not to adopt one. But Cuomo's position since has hardened.

In a May 21 letter to President Ronald Reagan, Cuomo said, "The independent decisions of Suffolk County and New York State against adopting or implementing an emergency plan for Shoreham were made to protect the safety and welfare of the public and followed extensive analysis and deliberations."

In the same letter, he warned the Reagan administration not to attempt to "promote operation of the plant over objections of the State of New York and the County of Suffolk. New York State would consider any such action an affront to its sovereignty."

While Cohalan's party holds a majority in the county legislature, Cohalan's shift does not guarantee that Republicans in the legislature will follow suit. Cohalan maintains that the legislature has no role in deciding whether the county will participate in emergency planning, but that opinion is certain to be challenged.

Up to now, only Presiding Officer Lou Howard (R-Armyville) has been a consistent Shoreham backer, with two others abstaining on occasional anti-Shoreham votes. If a vote were taken today, even LILCO supporters doubt that more than four of the legislature's 18 members would back opening the plant.

On the other hand, Cohalan has a history of eventually getting his way with the legislature. He enlisted Democrats to help him oust a troublesome presiding officer and changed the minds of seemingly strong-willed legislators to put together a finan-



Newsday/ David L. Poitras

LILCO Chairman William J. Catacosinos during interview

cial aid package for the Southwest Sewer District and to wrest from the legislature authority over amendments to the county operating budget.

As for LILCO, it still must clear a number of regulatory hurdles, some of which still may take a significant amount of time to implement. Among them are the following:

- **Low-power Tests.** The NRC is considering LILCO's request that the company be allowed to test the plant at up to 5 percent power with a gas turbine and mobile diesel generators as temporary backup generators. An appeals board revoked an earlier low-power license in February because not enough consideration was given to security issues.

- **Diesels.** An NRC licensing board is weighing whether LILCO can use its Transamerica Delaval Industries diesel generators, which suffered cracks in 1983, during at least the first 18 months of the plant's operation. A decision is expected in June or July.

- **Emergency planning.** Even with the main issue of county participation apparently resolved, details of the plan must be recast to include county emergency workers. A drill must be conducted and graded by the Federal Emergency Management Agency.

Shoreham at a Glance

CONSTRUCTION: Begun in 1973. Nuclear fuel loading was completed in January, 1985.

POWER: 800 megawatts to be generated by a General Electric boiling water reactor.

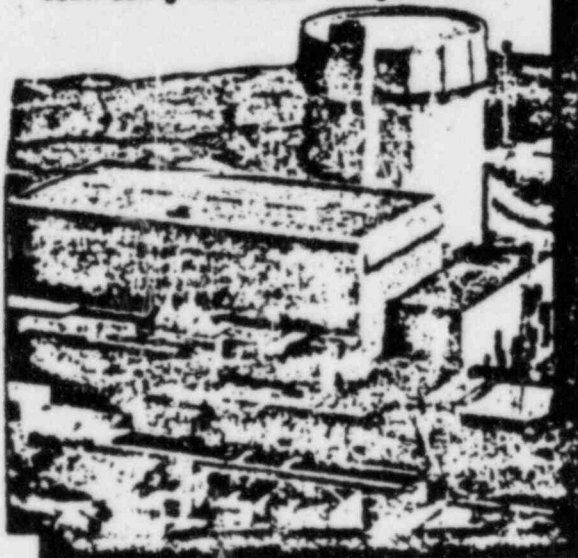
STATUS: Awaiting permission for low-power tests ranging from 1 to 5 percent of capacity. Nuclear Regulatory Commission revoked low power license in February for further consideration of security issues. Plant has completed tests at extremely low power.

SCHEDULE: Plant predicted to go into commercial operation by October, at the earliest.

COST: Estimates range from \$4.2 billion, if the plant opens for commercial operation in October, to \$4.7 billion, if the plant opens in June, 1986.

WHO WILL PAY: Officials are working on plans to lessen Shoreham's impact on LILCO rates, but many would need approval from the state legislature and governor. If all the proposals were adopted, rates would increase 2.2 percent a year for 5 years and LILCO would defer for 10 years recouping \$3.5 billion in Shoreham revenues. The state Public Service Commission is reviewing a recommendation that LILCO be forced to bear between \$1.2 and \$1.9 billion of the plant's cost because of poor management.

PATH TO OPERATION: A drill must be held to test a plan to evacuate more than 130,000 persons living within a 10-mile radius of the plant in the event of a nuclear accident. The NRC must approve that plan. An NRC board is to decide within two months whether to permit LILCO to operate Shoreham with emergency backup diesel generators that have undergone extensive repairs since breaking down during initial tests in August, 1983.



Cohalan Ends Fight Against Shoreham

By Rick Brand

Suffolk County Executive Peter F. Cohalan yesterday dropped his battle against the Shoreham nuclear plant and directed police and planning officials to run a drill of an emergency-evacuation plan.

Reversing two years of staunch opposition to the opening of the nearly completed plant, Cohalan said in an interview with *Newsday* that he was prepared to support Shoreham's opening if the drill proved successful.

Almost immediately, the plant's owner, Long Island Lighting Co., said it would now pay \$130 million in back taxes it has withheld in response to the county's battle against Shoreham. The two developments, which came after weeks of private meetings between Cohalan and LILCO Chairman William Catacosinos, drew quick and sharp criticism from Shoreham opponents.

Cohalan said, "You could extrapolate I've dropped my opposition to the plant as long as the results of the drill are positive." Then he added, "*Alea jacta est* . . . the die is cast. Those were Caesar's words as he crossed the Rubicon." Cohalan was interviewed after he signed an executive order directing Suffolk Police Commissioner DeWitt Treder and Planning Commissioner Lee Koppelman to prepare for a drill and assume "command and control" over the exercise.

Asked about the executive order at the utility's Hicksville office, Catacosinos said, "This is fantastic, it's great." The two men said that Cohalan had informed the LILCO chairman of his intention to change his position by telephone Wednesday, and Catacosinos agreed to turn over the withheld taxes today on the \$4.2-billion Shoreham plant. "The reason for withholding the taxes no longer exists," he said.

Cohalan's decision shifts the focus of the battle to the county legislature and Gov. Mario Cuomo, who has been allied with Suffolk in fighting the plant. Cuomo has said he would continue the battle even if Suffolk dropped its opposition. Last night, informed of Cohalan's action, Cuomo refused to comment.

"We have not seen any written explanation or justification of the county's change of position," said Michael Del Giudice, secretary to the governor. Cuomo administration officials expressed surprise at the change and said the issue of Shoreham's safety, which Cuomo has called fundamental, has not been addressed at all. They also said they had been working in the past two weeks on a bill that would have helped Suffolk County financially by forcing LILCO to pay its back taxes immediately.

Cohalan has spent two years and more than \$12 million in county funds battling the plant, and used the issue as the centerpiece of re-election campaign. He said, "My position has not changed so much as the facts have changed. I have no problem changing

my position if the facts change."

But public officials who have joined Cohalan in the fight against Shoreham condemned his shift when they were informed about it late last night. Legis. Gregory Blass (R-Jamesport) said, "I think it's the most tragic decision of his administration."

Cohalan said state executive law gave him the power to act unilaterally in ordering county agencies to take part in emergency planning for the plant. But several legislators questioned the legality of Cohalan's move last night.

To operate Shoreham, LILCO must get federal approval for its evacuation plan, conduct a successful drill, obtain a waiver of Nuclear Regulatory Commission regulations to use non-qualified diesel generators for shutting down the plant in the event of an emergency, get its troubled Transamerica Delaval Industries diesel generators certified and receive a full-power license.

But Cohalan's action could remove what has generally been considered the prime obstacle to Shoreham's opening — the lack of county participation in the emergency plan.

"We basically had a lose-lose situation," said Cohalan. "We both had our hands on each other's throats and we were choking each other to death . . . There could be no winners and there would be three losers — LILCO and the county were two and the other loser was the ratepayer."

Cohalan's shift comes amid a growing chorus of

nuclear opponents who maintain that the county executive has deserted their ranks and is preparing to "sell out the public safety" of county residents. Since last September, the administration has removed fiery field general Frank Jones from overseeing the Shoreham battle, curtailed its lawyers' role and begun consulting on a frequent basis with top LILCO officials.

His switch comes at a time when many Shoreham opponents are saying the county has virtually won its battle against the plant in the courts and with the NRC. Judges and NRC hearing officers have endorsed the county's arguments that LILCO did not have legal authority to implement its emergency plan, which used utility workers in key roles.

Cohalan said yesterday that new information from national studies has emerged about radiation releases which makes the county's position in favor of a 20-mile evacuation zone no longer necessary. "Ten miles is really the outer limit of what is necessary," he said.

Although the fight has been costly, Cohalan maintained that the expense was worthwhile because of gains he said the county made in getting a safer plant.

The county's opposition, Cohalan maintained, has gotten the NRC to increase its scrutiny of Shoreham to the point where "it's the most inspected plant in the nation;" forced LILCO to make wholesale changes to its own evacuation plan, improving its safety; caused an overhaul in LILCO management, including replacement of the company chairman and the hiring of a nuclear vice president with extensive experience in the industry; and resulted in LILCO agreeing to treat its alternate diesel generators as "vital equipment" for security purposes. Such moves, said Cohalan, "are a victory for public safety."

Pointing to LILCO's one-time proposal for a 56.5 percent rate increase for Shoreham, Cohalan also said the county's opposition has forced the utility to stretch out payment for the \$4.2 billion plant. Cohalan, LILCO and Nassau County Executive Francis Purcell have proposed a rate-mitigation plan which, if enacted, would increase rates only 2.2 percent annually for five years. In addition, Cohalan said, since taking his original position, the demand for electricity has grown dramatically and the power from Shoreham is needed to keep the region prosperous.

Cohalan also said LILCO's payment of property taxes will stabilize the county's financial situation and improve its bond rating, now one grade above the speculative category. Until now, he said, the county faced the specter of at least a 25 percent tax increase and layoffs of up to 3,000 employees. With the \$67 million in cash the county expects tomorrow from back tax payments, along with another \$13 million from the payments LILCO will give to Brookhaven town, Cohalan said the county may be able to reduce taxes in 1986, although he could not say how much.

The county executive's stance is a 180-degree turn from his position in 1983, when Cohalan took the lead in the anti-Shoreham movement and said safe evacuation of the area was impossible. "We must not put into place a 'paper plan' — a sugar coated package of platitudes which serve LILCO's self interest," he said then. "That would only lull the public into believing they are protected, when in fact they are not." The county concluded that evacuation was not feasible after spending \$600,000 on experts who maintained that it would take 30 hours to evacuate the 20-mile zone around the plant because roads would be jammed with traffic.

In his re-election campaign in 1983, Cohalan used the issue to batter his opponent for county executive, Assemb. Patrick Halpin (D-Lindenhurst), who favored the plant's opening. At the time, Cohalan attacked him for lacking "political integrity" and having "the backbone of a chocolate éclair."

The county executive expressed the hope that both the county legislature and Cuomo would follow his lead and back his executive order for a drill. But he conceded that if it were put to a vote of the local lawmakers, he probably would not get their approval.

Cohalan said, "I may be entering the the most exciting part of my public career." At worst, he said, reaction might be "I'm hanged." Last night, after informing seven Suffolk town supervisors, Cohalan claimed that all of them backed his move. Of the officials he called, only Blass and State Sen. Kenneth LaValle (R-Port Jefferson) were critical of the switch.

Cohalan said state executive law gives him the authority to order participation in emergency planning without approval from the county legislature. Under that law, it is state policy that "the local chief executive take an active and personal role in development and implementation of disaster preparedness programs and be vested with the authority . . . to ensure the success of such programs."

Although a 1983 county legislature resolution directs Cohalan not to participate in emergency planning or allow state or federal government to intervene, Cohalan said legally he "is not fettered by that resolution and the executive has the ability to operate independently of that resolution."

Cohalan said his change came after "spending quite a bit of time agonizing over this." He said the idea of modifying his position began to germinate in January and became a more central concern when LILCO succeeded in getting a low-power license for operating the plant. Once the plant would be allowed to operate at low power, he said, "I would be in a quandary; I would be responsible for providing for the public safety."

He said his decision was made about 10 days ago, and in that time he has met once and spoken twice with Catacosinos. Ever since Catacosinos replaced former LILCO chairman Charles Pierce in a boardroom coup in 1984, Cohalan and Catacosinos have met regularly.

Cohalan said he plans to alert all the county legislators and other officials starting at 6 a.m. today. He then will meet with Treder and Koppelman's top aide Arthur Kunz to begin preparations for the drill. Cohalan said he also plans to contact Samuel Speck, associate director of the federal agency that supervises nuclear evacuation planning, to seek his assistance in preparing for the drill. He said he hopes a meeting with Speck could be arranged for next week.

Cohalan also said he plans to meet with Washington lawyer Herbert Brown, who has led the county's legal fight against Shoreham, to review current litigation in the case. Chief Deputy County Executive John Gallagher said decisions will be made whether to continue various parts of the Shoreham litigation on a "case by case basis." Cohalan said it will be up to Brown and his firm whether they still want to represent the county in the case, given Cohalan's shift.

2083

Cohalan's Shift: Signs Were There

By Jonathan Landman

The anti-Shoreham people saw it coming.

Just three weeks ago, Leon Campo, one of Suffolk's leading anti-nuclear activists, wrote of "the man who had been his key ally for two years."

"I am one of those who believe that Peter Cohalan is now negotiating to sell out the public safety of the people of Suffolk County," Campo said at the time.

Cohalan's political and intellectual journey away from his Shoreham opposition progressed slowly and subtly, but the signs were there.

As Suffolk County executive, Cohalan was once the symbol of uncompromising hostility to Long Island Lighting Co. and a hero to the local anti-Shoreham people. The reversal comes from a man who left no room for a change of heart. For it was Cohalan who declared war against LILCO in 1982, who made free use of the words "never" and "impossible" and vowed that nothing could change his judgment that nuclear power could not be made safe for Long Island.

At a Feb. 16, 1983, press conference Cohalan said: "Radiological emergency preparedness for Shoreham is the most significant issue of public safety that this county government has faced. There is no competing value, be it political, economic or otherwise, that could justify our giving the public's safety any priority other than the very highest."

By his own account, however, Cohalan's attitude toward nuclear power on Long Island has changed at least three times. As Islip Town supervisor in 1978, he took the anti-Shoreham side in a debate with then-County Executive John V.N. Klein. Later, under pressure from construction unions for whom Shoreham meant jobs, Cohalan retreated and fired Irving Like, a lawyer representing the county in battles with LILCO. By 1982, however, following electoral victories by several Shoreham foes, Cohalan was a determined enemy of nuclear power again.

The first public sign of his latest retreat came in September.

Without warning, Cohalan abruptly replaced Deputy County Executive Frank Jones as field general of the county's efforts to block Shoreham's operation. Jones, a big, bearded man with a voice like a cannon and an appetite for combat to match, made way

for Chief Deputy County Executive John Gallagher, a former college administrator with a soft voice and mild demeanor.

Cohalan insisted that the move had no significance, that Jones' doctor had simply ordered his patient to rest. But that explanation cut no ice with partisans on either side of the Shoreham issue. "It's a good sign," Legis. Lou Howard (R-Amityville), the presiding officer and sole Shoreham supporter in the Suffolk County legislature, said at the time.

But the move jolted Shoreham opponents, who had been given ample reasons for confidence in their alliance with the county executive. While signs of Cohalan's ebbing enthusiasm for the Shoreham crusade stayed submerged until the autumn of 1984, some insiders suggest that the process began with a political shock nearly a year earlier.

Running for re-election on an anti-Shoreham platform in 1983, Cohalan, an incumbent Republican in an overwhelmingly Republican county, eked out a 22,000-vote victory over Assemb. Patrick Halpin (D-Lindenhurst), a 30-year-old Democrat little known in the county outside his Babylon assembly district.

Some Republican strategists drew the moral that despite various public opinion polls showing overwhelming opposition to the Shoreham plant, the issue cut both ways in the political arena and may have helped Halpin.

Two months after the election, Cohalan's once unyielding opposition to LILCO began showing hairline cracks.

In January, 1984, he welcomed LILCO's new chairman, William Catacosinos, by saying, "New faces and new ideas present us with new opportunities to reach a solution on the economics of Shoreham." Although he continued to call for LILCO to abandon Shoreham, it was his first conciliatory gesture toward the company he called an "outlaw utility" 19 days before.

The following summer, funds for the legal fight against Shoreham became a bargaining chip in another political battle, over the Southwest Sewer District, with Cohalan saying he wouldn't approve additional Shoreham legal funding unless legislators backed a sales tax increase to bail out the sewers.

Then came Jones' removal, followed by Gallagher's revelation, in a meet-

ing with Wall Street investment brokers, that the county might re-examine its once uncompromising position that the area around the plant could not be evacuated in case of a nuclear accident. Gallagher cited new scientific studies that suggested radiation released in a nuclear accident would affect a smaller area than was previously believed.

This year, Cohalan's public comments became more and more equivocal, and the county executive allowed himself to be seen with Catacosinos, whom he later joined in a summit meeting to discuss rates to pay for Shoreham. And, citing increasing costs, he sent a letter to Suffolk's Washington law firm telling it to curtail its activities.

That was too much for Cohalan's former allies.

Campo announced earlier this month that Shoreham opponents would hold an escalating series of demonstrations seeking a renewed commitment from Cohalan to the anti-Shoreham cause. "I just hope he hasn't gone too far that he can't get back on the right course," Campo said.

At the time, Cohalan insisted his position had not switched, but refused to deny that change was in the wind.

But yesterday he said he'd been mulling his change of heart since January.

"It took me quite a while to think about this," he said. "I spent a great deal of time agonizing over this. The decision I made today has germinated for quite some time."

'We Turned the Issue Around'

Here are excerpts from the Newsday interview yesterday with Suffolk County Executive Peter F. Cohalan in which Cohalan said he is dropping his opposition to operation of the Shoreham nuclear power plant:

I, as the county executive, have the responsibility and the duty to protect the public's health, safety and welfare . . . We feel the courts, both federal and state, have definitely established that the county . . . is the only legitimate authority to authorize and implement an evacuation or an emergency plan. And I am hopeful that the legislature . . . will see the ethics of what I'm attempting. Time will tell."

Suffolk County and New York State have played a major role in getting the federal government to move from a mere checklist approach to emergency planning to what we think now is a full and realistic assessment . . . Our intervention in the licensing procedure forced a level of quality inspection unprecedented in the nation . . . Suffolk County forced the redesign and the total rebuilding of the . . . Transamerica Delaval diesels and (the addition of) . . . several additional diesels as backup equipment.

Last week . . . [LILCO] agreed that the same security standards that are applied to vital equipment at the plant be applied to backup [diesel] equipment. This concession is a big victory for us, and it puts to rest the concern that we've had for many months . . .

Where the management of LILCO's concerned, LILCO has a new chairman, Shoreham has a new vice president of nuclear operations; the New York State Power Authority has extensive experience in running a nuclear plant similar to Shoreham. So in three years we feel we've turned the Shoreham issue around. It took a lot of money and a great deal of sacrifice on the part of our residents but the county is now in a position to take control of Shoreham's future. And . . . I feel the time has now come to look at Shoreham in a new light.

Long Island must have a reasonable source of electricity at reasonable rates if we're hopeful of sustaining a healthy economic growth . . . A safe Shoreham plant, operated under a realistic, well tested emergency plan, can play a major role . . . as a resource of such power. God forbid we have brownouts — spoiled food, downtime in industrial plants, the possibility that emergency services would be curtailed.

There have been many changes since 1982 . . . Number one, energy forecasts have changed. There has been a tremendous increase . . . in the use of energy. Number two . . . it's becoming clear that a 10-mile evacuation zone provides a

margin of safety that we insisted on in 1982 and 1983.

I feel the plant is safer now than in 1982. For one, emergency planning is better . . . The federal government now has up to 12 agencies involved insuring public safety. Number two, the level of inspection at the plant is unprecedented . . . The Atomic Safety and Licensing Board and the NRC have called the plant safe. Number three, the diesel and backup systems are better . . . Number four, the new and more competent management is also another major change for us . . .

If anything caught my attention more than anything else it was probably the February 13, 1985, decision of the NRC which . . . said they would license the plant at five percent [power] . . . Under the responsibilities and duties I have, I would have been in a quandary and would have . . . to cooperate with the authorities on an emergency plan to protect the health, safety and welfare of the people.

Where the financial situation is concerned LILCO and the county had each other locked in a death grip. We both realized we were in a death struggle and I saw that Shoreham was part of a bigger picture, really, which involved the whole survival of Long Island, involving rates, possible demise of LILCO as a corporate entity — which I've never been for — demise of county government due to lack of LILCO taxes, the future energy needs of Long Island and where does the lack of LILCO's taxes come in . . . We both had our hands on each other's throats and were choking each other to death . . . There could be no winners and there would be three losers: LILCO . . . the county . . . and the consumer . . .

The time has come . . . to give the emergency response plan an honest test, one controlled, conducted and commanded by Suffolk County officials and that's the reason why I issued this executive order today directing Lee Koppelman and Dick Treder to lead a county task force . . . And I'm calling on the federal government . . . to [be] a full participant . . . We're also asking the federal government to continue exploring all scientific data surrounding the issue of nuclear plant safety as it impacts on public safety.

Governor Cuomo has supported us right down the line because he respected the autonomy of local government to govern its own affairs. Governor Cuomo could have overruled the county on this matter of an emergency plan on Shoreham, but he didn't. He didn't because he respected local autonomy . . . Now I ask his help to get us beyond Shoreham as we enter the struggle for rate and energy stability and I'm also requesting all of our county legislators to join with me on this issue and to ask for their support . . .

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

-----X
In the Matter of the Application of
THE TOWN OF SOUTHAMPTON, THE TOWN
OF EAST HAMPTON, THE TOWN OF
SOUTHOLD, and THE TOWN OF RIVERHEAD,

AFFIDAVIT

Petitioners,

for a Judgment under Article 78 of
the Civil Practice Law and Rules

Index No.

85-10520

PETER F. COHALAN, County Executive of the County of Suffolk,

Respondent.

STATE OF NEW YORK)

: 33

COUNTY OF SUFFOLK)

STEPHEN B. LATHAM, being duly sworn, deposes and says:

1. I am a member of the firm of Twomey, Latham & Shea, special counsel to petitioners in this proceeding. I make this affidavit in support of the Order to Show Cause and in support of the temporary restraining order sought by petitioners.

2. There is an urgent need for an expedited ruling on the merits of this Article 78 proceeding as well as the issuance of the temporary restraining order. Unless such relief is granted, which will preserve the status quo in numerous pending state and federal proceedings,

respondent will continue to cause irrevocable damage to the position of the County and the interests of petitioners herein.

3. This special proceeding seeks to annul Executive Order 1-1985 (Exhibit 1 to the Petition) issued by respondent Peter Cohalan on May 30, 1985. By that Executive Order, and actions implementing it, respondent is actively and systematically dismantling the County's emergency planning policy and legislation as set forth in Exhibits 2, 3 and 4. By Executive Order 1-1985, respondent has directed the Commissioner of Police and the Commissioner of the Suffolk County Planning Department, among others, to use whatever resources of Suffolk County are necessary to test and exercise an emergency plan prepared by the Long Island Lighting Company ("LILCO") and to assume the functions of command and control concerning the implementation of the police powers of the County of Suffolk with regard to that plan. (See Exhibit 1).

4. Exhibit 4 to the Petition clearly establishes that the actions which respondent has and is undertaking pursuant to Executive Order 1-1985 are in violation of the lawfully adopted legislation of Suffolk County.

5. As is evident from Exhibit 6 to the Petition, this alleged "change in position" of the government of Suffolk County has been disseminated throughout federal agencies in an effort to seek the licensing and operation of the Shoreham Nuclear Plant (see Exhibit 6). Respondent's directive, issued by executive fiat, is in direct contravention of the County's lawfully enacted legislation set forth in Exhibits 2, 3 and 4 and in violation of the Suffolk County Charter, Article 2-B of the Executive Law, §153 of the County Law, and Article IX, §2 of the Constitution of the State of New York.

6. Petitioners herein are seeking a temporary restraining order enjoining the respondent, his contractors, agents, etc. from taking any action which directly or indirectly supports or executes the policies and actions set forth in Executive Order 1-1985. Without such immediate relief, respondent Cohalan and his agents, etc. will continue to cause irreparable damage to the position of the County of Suffolk on emergency planning, causing irreparable injury to petitioners and their residents. (See attached Affidavit of Martin Lang).

7. Agents of respondent Cohalan appeared before the Nuclear Regulatory Commission on Tuesday afternoon,

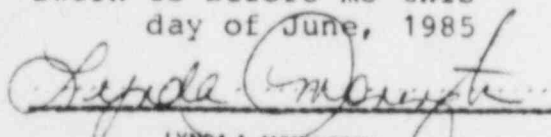
June 4, 1985, advocating Commission action in further-
ance of the actions and policies set forth in Executive
Order 1-1985. The Nuclear Regulatory Commission has
scheduled a decision on the issuance of a low power
license for Tuesday, June 11, which, if issued, will
permit LILCO to increase the power levels at Shoreham to
5% within hours or days thereafter.

8. Should this occur, the contamination of the
Shoreham plant will require in excess of \$100 million of
decommissioning costs which will have to be borne, in
part, by petitioners and the residents of their Towns.
Unless the legislative policy and findings set forth in
Exhibits 2, 3 and 4 are reversed, as respondent seeks to
do by the issuance and implementation of his Executive
Order, petitioners believe that no low power or full
power license for Shoreham can be issued.

9. For the foregoing reasons, the petitioners
respectfully urge the Court to issue the Order to Show
Cause as supported by the Petition submitted herein.


STEPHEN B. LATHAM

Sworn to before me this
day of June, 1985



LYNDA A. MONINGTON
NOTARY PUBLIC, State of New York
No. 4736164, Suffolk County
Term Expires March 30, 1987

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF SUFFOLK

-----X
In the Matter of the Application of
THE TOWN OF SOUTHAMPTON, THE
TOWN OF EAST HAMPTON, THE TOWN OF
SOUTHOLD, and THE TOWN OF RIVERHEAD,

Petitioners,

AFFIDAVIT

for a Judgment under Article 78 of
the Civil Practice Law and Rules

Index No. 85-10520

PETER F. COHALAN, County Execu-
tive of the County of Suffolk,

Respondent.

-----X
STATE OF NEW YORK)
 : ss
COUNTY OF SUFFOLK)

MARTIN LANG, being duly sworn, deposes and says:

1. I am the duly elected Supervisor of the Town of Southamptn. I make this affidavit in support of the petition which seeks to annul Executive Order 1-1985 issued by respondent Peter F. Cohalan on May 30, 1985. This affidavit is also made in support of the Order to Show Cause which petitioners herein seek.

2. The Town of Southampton is a municipal corporation organized under the laws of the State of New York. The Town of Southampton has been an active participant in proceedings before the Nuclear Regulatory Commission and in litigation in Supreme Court, Suffolk

County, challenging the feasibility of developing an adequate emergency plan for the residents of Suffolk County. The Town has focused particularly on the feasibility of evacuating residents from the Town of Southampton and the rest of eastern Long Island.

3. Petitioner Town of Southampton consists of approximately 123 square miles on what is known as the "South Fork" of Long Island which, at its narrowest point, is about 3/4 of a mile in width. The Town contains a very limited road network and transportation problems during even limited emergencies or during the influx or exodus of our substantial summer population, are severe. With approximately 45,000 people, Southampton has the largest year-round population among petitioners. During the summer months, however, the population of Southampton approaches or exceeds 100,000 people. An additional number of "transients" who visit the Town increase our daily population by many thousands more. These conditions and problems exist to varying degrees within the Town of each petitioner herein.

4. Petitioner Southampton is first and fundamentally concerned with the safety and well-being of its

residents. In the event a general emergency were to occur at Shoreham and an evacuation were to be ordered, we believe that an uncontrolled evacuation of a major portion of Southampton's residents would occur and that our police, fire and other officials and emergency services would be unable to control such an emergency. On this basis, alone, we have determined that the operation of the Shoreham Nuclear Power Plant poses a serious threat to the health and safety of our residents and that it should not operate.

5. The Town of Southampton has adopted and strongly supported the emergency planning policy for Suffolk County as set forth in Resolutions 262-1982, 456-1982 and 111-1983 (attached to the Petition as Exhibits 2, 3 and 4 respectively). As the responsible government primarily involved with developing emergency plans for Suffolk County residents, we support the County Legislature's determination set forth in the above resolution as signed by County Executive Peter Cohalan, which have concluded that no safe evacuation or emergency plan for Suffolk County can be developed or implemented.

6. In the proper exercise of its legislative

judgment, Suffolk County determined that emergency planning would have to take place throughout a major portion of the Town of Southampton and in many other areas of the Towns represented by petitioners. The impossibility of implementing such a plan was among the reasons leading to the determination that no emergency plan for Shoreham would be adopted.

7. That position accordingly represents the lawful exercise of the police power and police power determinations made by the Suffolk County government for the benefit of the Town of Southampton and all Suffolk County residents. Accordingly, it is of paramount importance that the emergency planning policy and determinations contained in Exhibits 2, 3 and 4 be upheld.

8. Executive Order 1-1985 issued by respondent Cohalan seeks to annul by executive fiat the legislative determinations and emergency planning policy of the County government. In particular, Executive Order 1-1985 sets in motion a series of actions and procedures by various departments and officials of the Suffolk County government which seeks to validate an emergency plan developed by the Long Island Lighting Company

("LILCO"). Not only is respondent Cohalan seeking to use County resources to support a utility plan to annul police power determinations properly made by the County government as a whole, which have been adopted by Southampton and other petitioners, but the emergency plan which respondent Cohalan is seeking to implement excludes virtually all of the area within petitioners' Towns from the planning process, to the severe detriment of petitioners' residents.

9. In the event Executive Order 1-1985 is not declared null and void by this Court as an unlawful act and in excess of the authority granted to respondent under the County Charter and laws of the State of New York, the health and safety of Southampton and other East End residents as protected by Exhibits 2, 3 and 4 will be effectively abandoned.

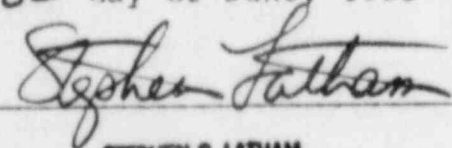
10. Upon information and belief, respondent Cohalan and the Long Island Lighting Company are actively seeking on a day-by-day basis to portray Executive Order 1-1985 as the new County policy on emergency planning. Those misrepresentations are being used to secure the expedited issuance of a low power license for Shoreham, which will permit the plant to

increase its power generation to five percent. Upon information and belief, such operation of the plant will incur tens of millions of dollars in decommissioning costs in the event a full power license is not issued. Unless Executive Order 1-1985 is immediately declared null and void, it will be used to undermine the position of petitioner Town of Southampton in pending Supreme Court litigation before the Hon. William Geiler and in other administrative and judicial forums before which the Shoreham case is presently pending.

11. For the foregoing reasons, I respectfully urge this Court to sign the Order to Show Cause in support of the petition. I further urge that this Court annul Executive Order 1-1985 as in violation of the County Resolutions set forth as Petition Exhibits 2, 3 and 4; the County Charter, the County Law, Article 2-B of the Executive Law and the State Constitution.


MARTIN LANG

Sworn to before me this
5th day of June, 1985



STEPHEN B. LATHAM
NOTARY PUBLIC, State of New York
No. 4677200, Suffolk County
Term Expires March 30, 1986

In the Matter of the Application of

THE TOWN OF SOUTHAMPTON, THE TOWN OF EAST HAMPTON, THE
TOWN OF SOUTHOLD, and THE TOWN OF RIVERHEAD,

Petitioners,

for a Judgment under Article 78 of the
Civil Practice Law and Rules

PETER P. COHALAN, County Executive of the County of Suffolk,

Respondent.

ORDER TO SHOW CAUSE, PETITION AND
AFFIDAVITS OF LANG AND LATHAM

TWOMEY, LATHAM & SHEA
Petitioners

Attorneys for

Office and Post Office Address, Telephone

P. O. Box 388

33 WEST SECOND STREET

RIVERHEAD, N. Y. 11901

516 227-2100

To

Attorney(s) for

Service of a copy of the within

is hereby admitted.

Dated,

Attorney(s) for

Sir:—Please take notice

☐ NOTICE OF ENTRY

that the within is a (certified) true copy of a
duly entered in the office of the clerk of the within named court on

19

☐ NOTICE OF SETTLEMENT

that an order
settlement to the HON.
of the within named court, at
on

of which the within is a true copy will be presented for
one of the judges

19

at

M.

Dated,

Yours, etc.

TWOMEY, LATHAM & SHEA

Attorneys for

To

Office and Post Office Address

P. O. Box 388

33 WEST SECOND STREET

RIVERHEAD, N. Y. 11901

Attorney(s) for

STATE OF NEW YORK, COUNTY OF

I, the undersigned, an attorney admitted to practice in the courts of New York State,

- ☐ Certified
By Attorney
- ☐ Attorney's
Affidavit

certify that the within
has been compared by me with the original and found to be a true and complete copy.
state that I am

the attorney(s) of record for
in the within action; I have read the foregoing
and know the contents thereof; the same is
true to my own knowledge, except as to the matters therein stated to be alleged on information and belief, and as
to those matters I believe it to be true. The reason this verification is made by me and not by

The grounds of my belief as to all matters not stated upon my own knowledge are as follows:

I affirm that the foregoing statements are true, under the penalties of perjury.

Dated:

STATE OF NEW YORK, COUNTY OF

The name signed must be printed beneath

I, being sworn, say: I am

- ☐ Individual
Verification
- ☐ Corporate
Verification

in the within action; I have read the foregoing
and know the contents thereof; the same is true to my own knowledge, except as to
the matters therein stated to be alleged on information and belief, and as to those matters I believe it to be true.

a corporation and a party in the within action; I have read the foregoing
and know the contents thereof; and the same is true to my own knowledge,
except as to the matters therein stated to be alleged upon information and belief, and as to those matters I believe
it to be true. This verification is made by me because the above party is a corporation and I am an officer thereof.

The grounds of my belief as to all matters not stated upon my own knowledge are as follows:

Sworn to before me on

19

The name signed must be printed beneath

STATE OF NEW YORK, COUNTY OF

(If both boxes are checked -- indicates after names, type of service used.)

I, being sworn, say: I am not a party to the action, am over 18 years

On 19 I served the within

- ☐ Service
By Mail
- ☐ Personal
Service on
Individual

by depositing a true copy thereof enclosed in a post-paid wrapper, in an official depository under the exclusive care
and custody of the U.S. Postal Service within New York State, addressed to each of the following persons at the last
known address set forth after each name:

by delivering a true copy thereof personally to each person named below at the address indicated. I knew each person
served to be the person mentioned and described in said papers as a party therein.

Sworn to before me on

19

The name signed must be printed beneath