8/9

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

JUL15

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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

BRIEF OF SUFFOLK COUNTY AND THE STATE OF NEW YORK IN OPPOSITION TO LILCO'S APPEAL FROM THE ATOMIC SAFETY AND LICENSING BOARD'S PARTIAL INITIAL DECISION ON EMERGENCY PLANNING

KIRKPATRICK & LOCKHART

1900 M Street, N.W., Suite 800
Washington, DC 20036

and

1500 Oliver Building
Pittsburgh, PA 15222

Attorneys for Suffolk County

Fabian G. Palomino
Special Counsel to the Governor
of the State of New York
Executive Chamber, Room 229
Capitol Building
Albany, NY 12224

Attorney for Mario M. Cuomo,
Governor of the State of New York

July 11, 1985

D503

TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
BRIEF OF SUFFOLK COUNTY AND THE STATE OF NEW YORK IN OPPOSITION TO LILCO'S APPEAL FROM THE ATOMIC SAFETY AND LICENSING BOARD'S PARTIAL INITIAL DECISION ON EMERGENCY PLANNING	1
INTRODUCTION	1
FACTUAL BACKGROUND	3
I. THE ASLB'S DECISION ON THE LEGAL AUTHORITY CONTENTIONS SHOULD BE AFFIRMED	5
A. LILCO'S PREEMPTION ARGUMENT HAS NO LEGAL BASIS	5
1. LILCO Fails To Identify The State Statutes That It Seeks To Invalidate	5
2. LILCO's Preemption Argument Cannot Overcome Its Lack Of Affirmative Authority To Carry Out Governmental Functions	7
3. Recent U.S. Supreme Court Cases Demonstrate That LILCO's Preemption Claim Has No Merit	10
a. Pacific Gas and Silkwood Categorically Reject The Premises Of LILCO's Preemption Argument	11

b. LILCO Cannot Satisfy The Basic Preemption Tests Established By Pacific Gas And Silkwood 14

i. LILCO Cannot Satisfy The Zone Preemption Test 15

ii. LILCO Cannot Satisfy The Actual Conflict Preemption Test 19

4. LILCO Cannot Demonstrate That Congress Had A Clear And Manifest Purpose To Supersede The Historic Police Powers Of New York State 24

a. The Atomic Energy Act Does Not Provide Any Basis For Preemption Of The Challenged State Statutes 26

b. NRC Authorization Acts Do Not Support LILCO's Claim Of Preemption 28

i. The 1980 NRC Authorization Act Does Not Support LILCO's Preemption Argument 29

ii. The 1982-3 NRC Authorization Act Does Not Support LILCO's Preemption Argument 31

iii. The 1984-5 NRC Authorization Act Does Not Support LILCO's Preemption Argument 33

5. The ASLB Decision Is Consistent With The Commission's Decisions, Emergency Planning Rules and Public Positions 37

a. The Decision Is Consistent With the Brenner Board Decision 38

b. The Decision Is Consistent With Federal Law And Its Interpretation By The Commission 39

B. LILCO'S "REALISM" ARGUMENT HAS NO MERIT 45

C. LILCO'S "IMMATERIALITY" ARGUMENT WAS PROPERLY REJECTED 48

II. THE ASLB'S RULING ON CONTENTION 11 SHOULD BE AFFIRMED 52

A. THE BOARD'S DISCUSSION OF THE INDEPENDENCE OF LILCO EMPLOYEES IN COMMAND AND CONTROL WAS APPROPRIATE AND NECESSARY 53

B. THE BOARD'S FINDING THAT LILCO EMPLOYEES WOULD EXPERIENCE A CONFLICT OF INTEREST IS SUPPORTED BY THE EVIDENCE 57

C. THE BOARD'S CONTENTION 11 FINDINGS DO NOT "DISQUALIFY EVERYONE" OR "BAR A UTILITY PLAN" 58

D. THE CONFLICT OF INTEREST FOUND BY THE BOARD IS SUBSTANTIAL 60

E. THE BOARD EXPRESSLY CONSIDERED LILCO MEASURES TO INCLUDE NON-LILCO EMPLOYEES IN THE LILCO PLAN 61

III. THE BOARD'S RULING ON CONTENTION 92 SHOULD BE AFFIRMED 63

CONCLUSION 66

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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

BRIEF OF SUFFOLK COUNTY AND THE STATE OF NEW YORK IN OPPOSITION TO LILCO'S APPEAL FROM THE ATOMIC SAFETY AND LICENSING BOARD'S PARTIAL INITIAL DECISION ON EMERGENCY PLANNING

INTRODUCTION

By Partial Initial Decision ("Decision") dated April 17, 1985, the Atomic Safety and Licensing Board ("ASLB") denied LILCO's Renewed Motion for Summary Disposition of Contentions 1-10. Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-85-12, 21 NRC ____ (1985). The ASLB rejected LILCO's preemption, realism and immateriality arguments, stating that LILCO "cannot overcome the conclusion that the activities it seeks to perform as specified in Contentions 1-10 are unlawful." Given LILCO's concession that "unless the New York State Court Decision is overridden on federal-law grounds, LILCO will not be able, by itself, to implement its emergency plan regardless of its substantive merits," the ASLB held that LILCO had not submitted "an implementable, comprehensive, and effective emergency response plan for Shoreham." Decision, p. 426.

LILCO has noticed its appeal from the Decision's findings on Contentions 1-10 (the "legal authority contentions"). LILCO also challenges the ASLB's adverse findings on conflict of interest (Contention 11) and the lack of a state plan (Contention 92). Pursuant to this Board's Order dated May 15, 1985, Intervenors, County of Suffolk and the State of New York, submit this Brief in opposition to LILCO's appeal.

The legal authority contentions and the issue of preemption constitute the principal focus of LILCO's Brief Supporting its Position on Appeal (the "Brief"). LILCO's Brief and its underlying legal position suffer from multiple defects.

First, LILCO ignores the New York State Supreme Court's holding that LILCO had no legal authority to implement the Transition Plan. LILCO never once cites the specific statutes that it hopes to invalidate in this proceeding. LILCO's unwillingness to confront these statutes underscores the weakness of its preemption claim.

Second, LILCO cannot simply rely upon preemption to invalidate state laws. Instead, LILCO must establish some basis for its purported authority to carry out governmental functions. The preemption doctrine is not a source of such authority, and LILCO has not identified any other basis for its alleged authority.

Third, LILCO ignores the most pertinent U.S. Supreme Court holdings on preemption. Those holdings squarely reject LILCO's basic position in this proceeding.

Fourth, LILCO misconstrues the preemptive effect of the Atomic Energy Act ("AEA" or "Act"), and it misstates the legislative history of the most recent NRC Authorization Acts. The AEA and the Authorization Acts do not invalidate the New York statutes in question nor do they authorize private corporations to assume governmental powers.

Fifth, LILCO ignores the NRC's position on emergency planning, and it fails to deal with the substance of the ASLB Decision.

FACTUAL BACKGROUND

Intervenors' legal authority contentions (Contentions 1-10) assert that "LILCO personnel do not have the authority to order or to perform" identified functions that are integral elements of LILCO's Transition Plan. The Contentions assert that "LILCO's lack of legal authority to perform actions assigned to LILCO under the Transition Plan" constitutes noncompliance with the NRC emergency planning rules and NUREG-0654. Preamble to Contentions 1-10.

The ASLB recognized that the legal authority contentions presented state law questions. It requested the parties to resolve those issues in state court. Pursuant to

that direction, Intervenors filed declaratory judgment actions in the New York Supreme Court and sought a determination that LILCO had no authority to carry out the Transition Plan.

On August 6, 1984, LILCO filed a Motion for Summary Disposition of Contentions 1-10 that sought a ruling that "any state-law-based restrictions on LILCO's performance" of offsite emergency planning functions were preempted by federal law. See LILCO's Renewed Motion, p. 2. LILCO's Motion for Summary Disposition assumed arguendo that its defense of the state court actions would be unsuccessful. That assumption became fact when the State Supreme Court categorically rejected LILCO's legal authority position. See Cuomo v. LILCO, Consol. Index No. 84-4615 (N.Y. Sup. Ct., Feb. 20, 1985). The Supreme Court held that LILCO had no legal authority to carry out the functions in its Transition Plan.

On February 27, 1985, LILCO filed a Renewed Motion for Summary Disposition of Legal Authority Issues with the ASLB. LILCO's Renewed Motion accepted the holding of the New York State Supreme Court and requested the ASLB "to rule on the question of whether state law prohibitions against LILCO's implementing federally imposed emergency planning requirements ... are overridden as a matter of federal law." Renewed Motion, pp. 10-11. Thus, the Renewed Motion sought to strike down the New York State laws that were the basis of the Supreme Court's decision in Cuomo v. LILCO; it did not assert that LILCO had federal authority to exercise governmental functions.

I. THE ASLB'S DECISION ON THE LEGAL AUTHORITY CONTENTIONS SHOULD BE AFFIRMED

A. LILCO'S PREEMPTION ARGUMENT HAS NO LEGAL BASIS

1. LILCO Fails To Identify The State Statutes That It Seeks To Invalidate

LILCO's Renewed Motion and its present appeal accept the New York State Supreme Court's holding in Cuomo v. LILCO. That holding is clearly binding upon this Board under the doctrine of res judicata.

The Supreme Court's holding has several aspects:

(1) Functions integral to the Transition Plan are inherently governmental functions. Those functions are embraced by the police powers of New York State and reside in the State.

(2) Police power functions may be exercised only by governmental entities to whom the State specifically delegates such functions. New York law does not delegate governmental powers to private corporations.

(3) The New York Executive Law, Article 2-B, does not confer governmental powers upon LILCO or its agents. New York law does not authorize LILCO to carry out the Transition Plan.

(4) LILCO is a corporation established and existing under New York State law. Such a corporation has only those powers expressly or impliedly conferred upon it by the state corporation law. State law does not confer governmental powers upon private corporations.

Analysis of LILCO's preemption claim must begin with the Supreme Court's decision. That decision is based upon the New York State Constitution, Article 9, Section 2; the New York Municipal Home Rule Law; Executive Law, Article 2-B; the Traffic and Vehicle Law; the Business Corporation Law; the Transportation Corporation Law; and other New York statutes referenced in the Court's decision and Partial Declaratory Judgment. If this Board were to uphold LILCO's preemption claim, it would need to invalidate each of those statutes. It would have to overturn the basic governance statutes of New York State that allocate governmental functions. It would have to void New York's fundamental corporate law. This case does not involve an incidental overlap of federal and state statutes. It involves a claim of root-and-branch preemption.

LILCO's Brief utterly ignores the substance of the New York Court's holding. That Brief contains no reference whatever to the statutes upon which the Supreme Court's holding is based. Its Brief never refers to the specific New York statutes that it seeks to invalidate. LILCO never acknowledges that it challenges the organic law of New York State.

In sum, LILCO argues preemption of state law, but its filing with this Board contains no hint of the breadth of its claim or the sheer audacity of its legal position. That omission is understandable. The U.S. Supreme Court has held that a party asserting preemption must establish a clear and manifest intention of Congress to invalidate the challenged state statutes. Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 78 L.Ed. 2d 443, 457 (1984); see infra, at pp. 24-5. It is simply not credible that Congress, when it adopted the Atomic Energy Act, intended to invalidate the New York State laws that establish the essential structure of state government.1/ LILCO's avoidance of any reference to the allegedly preempted New York laws is a tacit admission of that fact.

2. LILCO's Preemption Argument Cannot Overcome Its Lack Of Affirmative Authority To Carry Out Governmental Functions

LILCO's Motion for Summary Disposition and its Renewed Motion invoke the preemption doctrine and seek to strike down any state statute that does not authorize LILCO to act as though it were a government. Both Motions miss the essential point. LILCO must show that it has an emergency plan

---

1/ See Decision, p. 109: "We find no evidence to suggest that Congress ever intended to allow a private utility to exercise powers that have traditionally belonged to the states. We cannot believe that so fundamental a shift in the structure of federal-state relations could be accomplished by the NRC Authorization Act provision which merely allows the NRC to consider the adequacy of a utility sponsored emergency plan."

that it can and will implement. 10 C.F.R. §§ 2.732 and 50.47. Accordingly, LILCO must prove that it has authority to perform the governmental functions embraced by the Transition Plan.

Throughout these proceedings, LILCO has consistently refused to face up to its basic problem: it must prove that federal law preempts all state laws that limit its powers, and it must prove that it has affirmative authority for its alleged governmental powers. LILCO must establish that Congress intended to set aside the basic governance statutes of the State of New York and its fundamental corporate law. LILCO must also establish that the preemption doctrine or some other federal law grants it the power to carry out basic governmental functions.

Clearly, the Supremacy Clause itself and the preemption doctrine are not independent sources of LILCO's purported authority to perform governmental functions. The Supremacy Clause states a fundamental structural principle of federalism; it is a neutral traffic cop as between conflicting federal and state statutes. The Supremacy Clause has no independent content. It is not a source of federal rights. See Chapman v. Houston Welfare Rights Organization, 441 U.S. 600, 613 (1979); Mobil Oil Corp. v. Tully, 639 F.2d 912, 915 (2d Cir.), cert. denied, 452 U.S. 967 (1981); Andrews v. Maher, 525 F.2d 113, 119 (2d Cir. 1975); Mashpee Tribe v. Watt, 542 F. Supp. 797, 806 (D. Mass. 1982), aff'd., 707 F.2d 23 (1st Cir.),

cert. denied, 104 S. Ct. 555 (1983). The Supremacy Clause does not authorize state corporations to perform governmental functions.

On this appeal, LILCO accepts the fact that it must identify some affirmative authority for its purported governmental powers. Brief, pp. 42-3. LILCO now argues that its source of authority to carry out governmental functions is the license it hopes to receive from the NRC.2/ Thus, LILCO argues that if it "can meet NRC requirements it is entitled to a license under the Atomic Energy Act, and that [license] gives it the authority to implement its emergency plan." Brief, p. 43.

LILCO's position is a textbook example of circular reasoning. The issue before this Board is whether LILCO can meet NRC requirements. To satisfy NRC requirements, LILCO must prove that it has the authority to implement the emergency plan it has submitted to the NRC. Until LILCO proves that it has that authority, it cannot receive a license. An operating license is not a source of authority to carry out NRC requirements. Proof of that authority is a precondition to the grant of a license. If granted, a license is only an evidence

---

2/ LILCO also suggests in passing that the AEA is a source of its purported authority. That assertion is frivolous. The Act does not even address offsite emergency planning. It manifestly does not grant state police powers to state-chartered corporations. Throughout this entire proceeding, LILCO has never previously made such a claim.

(Footnote cont'd.)

that authority has been independently established.3/

In sum, LILCO seeks to strike down the basic governance statutes of New York and its corporate law as well. For the first time, however, LILCO also acknowledges that it must establish an independent legal basis for its alleged legal authority. Preemption is not the source of that authority. LILCO's only stated basis for its authority -- the operating license -- is transparently frivolous. Thus, LILCO's invocation of preemption as support for its Renewed Motion is both ambitious and unavailing. Even if this Board accepted LILCO's preemption argument, LILCO would not have established its authority to implement the Transition Plan.

3. Recent U.S. Supreme Court Cases Demonstrate That LILCO's Preemption Claim Has No Merit

On two recent occasions, the U.S. Supreme Court has addressed the scope of preemption in the context of the Atomic Energy Act: Pacific Gas & Electric Co. v. State Energy Resources and Development Commission, 461 U.S. 190 (1983), and Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 78 L.Ed. 2d 443

3/ LILCO's citation of Sperry v. Florida, 373 U.S. 379 (1963), is as inapposite as its affirmative authority argument is circular. In Sperry, state officials challenged the right of an individual registered with the Patent Office to act as a patent agent. Unlike LILCO in this case, the patent agent had satisfied all federal requirements and received a license. The Court merely held that Florida could not interfere with the exercise of federal rights previously granted.

(1984). Pacific Gas and Silkwood restate the basic tests for preemption. Both cases uphold state laws against claims of federal preemption and, in doing so, provide the analytical framework against which LILCO's preemption claim must be measured. Both cases reject the essence of LILCO's preemption position.

LILCO acknowledges that "preemption is governed primarily" by Pacific Gas and Silkwood. Brief, p. 11. Nonetheless, LILCO's Brief contains no substantive discussion of either case. Instead, LILCO's Brief virtually ignores Silkwood; it relies upon out of context quotes from Pacific Gas and references to less germane, and less recent, preemption cases. The reason for LILCO's cavalier treatment of the most relevant cases is obvious: LILCO's position is fundamentally inconsistent with the holding of those cases.

a. Pacific Gas and Silkwood Categorically Reject The Premises Of LILCO's Preemption Argument

Any realistic reading of Pacific Gas and Silkwood establishes that those holdings are in fundamental conflict with LILCO's basic preemption position. In Pacific Gas, the Supreme Court considered a California statute that imposed a blanket moratorium on the construction of nuclear power plants. The moratorium statute provided that no nuclear plant could be constructed until Congress adopted a procedure for disposing of

hazardous radioactive wastes. The Supreme Court determined that California's moratorium statute had a non-safety rationale: legislative concerns over the economics of nuclear generating facilities and the financial stability of utilities. The Supreme Court upheld California's moratorium statute, finding that Congress "intended that the Federal Government should regulate the radiological safety aspects involved in the construction and operation of a nuclear plant, but that the States retain their traditional responsibility in the field of regulating electrical utilities for determining questions of need, reliability, cost, and other related state concerns." Pacific Gas, 461 U.S. at 205.

The Court held that the Atomic Energy Act does not preempt state laws in traditional areas of state responsibility, provided that those laws were not adopted for the purpose of regulating "the radiological safety aspects involved in the construction and operation of a nuclear plant." The Court concluded that states can completely block the construction of nuclear facilities by actions outside "the occupied field of nuclear safety regulation." Pacific Gas, 461 U.S. at 216.

In Silkwood, the Supreme Court was asked to declare that the Atomic Energy Act preempted and rendered invalid punitive damage awards under state tort law. After trial, punitive damages were awarded to the estate of a decedent who

had suffered plutonium contamination injuries and against Kerr-McGee, the decedent's employer and the operator of a nuclear facility. Kerr-McGee argued that state-authorized punitive damage awards are intended to compel adherence to a particular standard of safety and are "regulatory" in nature rather than compensatory. Silkwood, 78 L.Ed. 2d at 453. Nonetheless, the Supreme Court found that state tort law remedies were traditionally within the states' domain. It determined that Congress had never seriously considered precluding the use of state tort remedies by injured employees of a nuclear facility; to the contrary, Congress had assumed that such remedies would be available. Because Kerr-McGee offered no proof that Congress had clearly and specifically intended to foreclose traditional state tort remedies, the Court held that the AEA did not preempt punitive damage awards against the operator of nuclear facilities.

To state the holdings of Pacific Gas and Silkwood is to refute LILCO's preemption claim. If the Act does not preempt a moratorium on nuclear plant construction that is based upon economic rather than safety concerns, it surely does not preempt state statutes that allocate governmental powers among political subdivisions and that have no relationship to radiological safety. If the AEA does not preempt traditional state tort remedies that are intended to influence the conduct of a nuclear facility operator, it does not invalidate the organic statutes of New York state government simply because

those statutes limit a private corporation's authority to exercise governmental powers in the area surrounding a nuclear power plant.

LILCO's preemption argument in this proceeding is far more difficult to sustain than were the arguments presented to -- and rejected by -- the U.S. Supreme Court in Pacific Gas and Silkwood. In light of the Supreme Court's holdings in Pacific Gas and Silkwood, LILCO's claim of preemption is frivolous.

b. LILCO Cannot Satisfy The Basic Preemption Tests Established By Pacific Gas And Silkwood

Congress may preempt state authority in a given area by so stating in express terms.4/ Absent express preemptive language, implied preemption may exist when either of two basic standards is met. First, Congress may evidence its intent to occupy a given field by adopting a pervasive scheme of federal regulation. In that case, any state law falling with the occupied field is preempted (the field or zone preemption test). Second, even if Congress does not entirely displace state regulation in a particular zone of activity, state laws may be preempted if they actually conflict with federal law and either render compliance with both state and federal law impossible or stand as an obstacle to the accomplishment of

---

4/ LILCO does not argue that the Atomic Energy Act expressly preempts the statutes involved in this case.

congressional objectives (the actual conflict preemption test). See Pacific Gas, 461 U.S. at 204, and Silkwood 78 L.Ed. 2d at 452. LILCO cannot meet either of these basic preemption tests.

i. LILCO Cannot Satisfy The Zone Preemption Test

Zone preemption involves (i) a pervasive scheme of federal regulation that (ii) completely displaces any state action within the preempted zone. Neither element is present here. Congress has not adopted a pervasive scheme of federal regulation governing the allocation and exercise of state police powers, and it has not displaced all state statutes governing the distribution of such powers. Similarly, Congress has not adopted pervasive federal legislation governing the creation and authorization of state-chartered business corporations, and it has not displaced state laws that define the powers of state-chartered corporations. Nonetheless, LILCO hopes to invalidate state statutes that involve the allocation and exercise of such powers.

Taking the analysis one step further, it is equally clear that offsite emergency planning is not an area preempted by Congress and reserved to federal action. It is an area in which Congress and the NRC have sought to encourage state and local governmental action.5/ Decision, pp. 398-405. Thus, the

---

5/ The NRC itself has determined that offsite emergency planning is analogous to other areas in which state action is

(Footnote cont'd.)

NRC has adopted emergency planning rules that contemplate -- indeed encourage -- the role of state and local governments in offsite emergency planning. 10 C.F.R. §§50.33(g) and 50.47(a)(2) and (b).

In sum, there is no basis for any contention that state governance statutes, state corporate laws or even offsite emergency planning fall within a preempted zone that the federal government has occupied.

Second, neither the AEA nor the decided cases support an argument that the zone preemption standard has been met in this case. Pacific Gas recognizes that the AEA preserves the NRC's exclusive regulatory authority over "the construction and operation" of nuclear facilities. The AEA does not affect state authority in areas other than "the construction and operation" of nuclear facilities, and Pacific Gas acknowledges "the continued preservation of state regulation in traditional areas." Pacific Gas, 461 U.S. at 222. The AEA expressly permits states to regulate activities for purposes other than protection against radiation hazards. 42 U.S.C. §2018 and 2021(c) and (k).

(Footnote cont'd.)

permissible; thus, the NRC has rejected any concept that offsite emergency planning falls within a preempted zone. See infra at 41-2.

LILCO challenges statutes (i) that do not regulate the "construction or operation" of the Shoreham facility; (ii) that involve traditional areas of state responsibility; and (iii) that were enacted for "purposes other than protection against radiation hazards." First, statutes such as the Municipal Home Rule Law do not regulate the construction or operation of Shoreham. They do not say how LILCO can construct or operate the Shoreham plant. They simply define what political subdivisions can exercise state police powers in the area beyond the plant site. Second, nothing is more central to state government than the control and allocation of the state's police powers. Third, the challenged statutes were adopted for reasons unrelated to radiological safety or the operation of nuclear generating facilities. New York State was not motivated by radiological safety concerns when it adopted the State Constitution or the statutes LILCO challenges.6/

The ASLB recognized that "the state laws at issue here were enacted pursuant to the state's police powers, for purposes totally unrelated to nuclear safety concerns." Decision, p. 400. LILCO acknowledges that the statutes it challenges were adopted "for purposes totally unrelated to nuclear power or emergency planning." Brief, p. 19. The AEA

6/ Even the New York Executive Law, which allocates emergency response powers among particular governments, is concerned with the assignment of governmental functions rather than with radiation hazards per se.

permits states to regulate activities for purposes other than protection against radiation hazards. 42 U.S.C. §2021(k). Given those facts, LILCO's preemption claim has no legal basis whatever.

LILCO offers two arguments in its effort to avoid that conclusion. First, LILCO argues that the ASLB should have based its preemption analysis on the intent of the State and County in invoking state laws rather than to the purpose of the state laws themselves. There are three answers to that contention. First, LILCO does not seek to invalidate the Intervenors' opposition to Shoreham; it seeks to invalidate specific state statutes. Second, the U.S. District Court has already rejected LILCO's claim that the County's resistance to Shoreham is preempted and illegal. See Citizens et al. v. County of Suffolk, 604 F. Supp. 1084 (E.D.N.Y. 1985). Third, if the motive of a state government that invoked otherwise valid state laws was the relevant factor in any preemption analysis, any state statute (including the California moratorium statute) would be invalid if it was cited by a government opposed a nuclear plant. That result is inconsistent with common sense, not to mention Pacific Gas.

Second, LILCO argues that the state statutes are preempted even if one looks only at the historic purpose behind them, because, in LILCO's view, the purpose of those state laws is nothing other than radiological health and safety. Brief,

p. 22. LILCO's argument is inconsistent with LILCO's earlier concession that the statutes were adopted for reasons unrelated to nuclear power. Brief, p. 19. It is also inconsistent with facts. The purpose of the Municipal Home Rule Law, for example, is not protection against radiation; it is the need to provide a orderly system of government and to allocate governmental powers among responsible political subdivisions.

In sum, statutes here in question do not intrude upon a preempted zone wholly occupied by pervasive federal legislation. These statutes involve traditional areas of state responsibility. They are based upon traditional -- and wholly permissible -- state purposes. Thus, LILCO cannot satisfy the zone preemption standard.

ii. LILCO Cannot Satisfy The Actual Conflict Preemption Test

State law will be preempted if it actually conflicts with federal law. Actual conflict exists where compliance with both state and federal law is a physical impossibility or where state law frustrates Congressional objectives.

LILCO's physical impossibility argument is as follows: NRC regulations require LILCO to have an offsite emergency plan. New York law forbids such plans. LILCO cannot comply with both laws unless it does not operate Shoreham. New York Law is, therefore, preempted. LILCO's physical impossibility argument is absurd.

Federal law conditions the licensing of a nuclear plant on the existence of an adequate offsite emergency plan. Federal law does not impose an affirmative obligation on LILCO to have such a plan or to perform functions forbidden by state law. LILCO's protestations notwithstanding, a prerequisite to obtain a federal benefit, i.e., an operating license, does not constitute a federal duty upon LILCO.7/ Moreover, state law does not forbid emergency planning; it provides that governmental powers can be exercised only by authorized governments.

LILCO's essential position is that New York law should be deemed preempted because it impairs LILCO's ability to obtain an operating license. However, the Act does not guarantee that every applicant will be able to satisfy all the criteria for a license nor does it provide federal authority to clear any hurdle such criteria impose. LILCO's desires notwithstanding, a regulatory prerequisite for licensing does not constitute a grant of carte blance federal authority to take whatever action a utility deems necessary to satisfy such prerequisite.

7/ Indeed, as the ASLB recognized, federal regulations preclude a utility from performing certain of the functions necessary for an adequate plan. See 10 C.F.R. Part 50, Appendix E (responsibility for public notification systems remains with governmental authorities); Decision, p. 408.

Finally, LILCO argues that physical impossibility conflict is present because it cannot comply with federal and state law and operate Shoreham. The short answer to this argument is Pacific Gas. The California moratorium statute absolutely precluded the construction of all nuclear plants, thereby preventing all utilities from operating new plants. If that statute does not conflict with federal law, state statutes that withhold sovereign state powers from private corporations clearly do not.8/

LILCO argues that any state law that hinders its efforts to obtain an operating license for Shoreham obstructs federal purposes and is, therefore, preempted. The Supreme Court squarely rejected this argument in Pacific Gas. Appellants in Pacific Gas attacked the California moratorium statute on the ground that it would preclude any nuclear plant from being constructed, would frustrate Congress' intent to promote nuclear power and was, therefore, preempted.9/ The U.S. Supreme Court rejected these arguments.

8/ The cases LILCO cites are inapposite. In each case, a party was subject to conflicting federal and state duties. LILCO has cited no case where a state law was deemed preempted, because it impaired a party's ability to satisfy the prerequisites for a federal license.

9/ Citing Perez v. Campbell, 402 U.S. 637 (1971), appellants contended that a statute that frustrated the operation of federal law was invalid even if the state law in question had been enacted for some purpose other than frustration of federal purposes. See Petitioners' Brief before the U.S. Supreme Court in Pacific Gas (No. 81-1945) esp. pp. 33 and 48-9. LILCO's argument relies in part on Perez although the Supreme Court rejected the same argument in Pacific Gas.

First, Pacific Gas holds that a construction moratorium statute does not frustrate Congressional purposes or represent an obstacle to Congressional objectives merely because it would prohibit the construction and operation of new nuclear power plants. If a blanket moratorium statute does not frustrate Congressional purposes, a home rule statute does not frustrate Congressional purposes merely because it withholds governmental powers from a private corporation and indirectly impairs that corporation's ability to satisfy NRC licensing requirements.

Second, Congress has sought to promote nuclear power, but the Supreme Court has expressly recognized that "the promotion of nuclear power is not to be accomplished 'at all costs.' The elaborate licensing and safety provisions and the continued preservation of state regulation in traditional areas belie that." Pacific Gas, 461 U.S. at 222. See Silkwood, 78 L.Ed. 2d at 458; Decision at 401-2, 409-10. If a state prohibition on the construction of nuclear plants based on state economic concerns is permissible, the statutes in question which involve "state regulation in traditional areas" unrelated to nuclear power are clearly permissible.

In short, LILCO cannot show that these statutes frustrate Congressional purposes. Given the holding of Pacific Gas, it is difficult to see how any litigant can seriously argue that federal law preempts these statutes allocating basic

governmental powers, establishing state-chartered corporations and granting them limited powers.

Finally, it should be noted that LILCO advocates a view of preemption that is both novel and unsupportable. LILCO claims that the New York statutes in question are preempted because they block LILCO from implementing an offsite emergency plan in the manner it has chosen. In LILCO's view, state law is preempted "to the extent the NRC determines that the utility's plan for meeting [the offsite emergency plan] regulations is acceptable." Brief, p. 41. Hence, under LILCO's theory, the preemptive scope and reach of the AEA varies with the particular means a utility chooses to respond to a plant emergency; moreover, preemption applies only in the event the NRC approves the plan the utility has submitted.

LILCO's theory of preemption has no foundation in law. The scope and reach of the AEA is exclusively a matter of Congressional intent. It does not expand or contract according to the lights of particular utilities. It cannot be stretched and reshaped from site to site to permit each utility to undertake any action it deems necessary to obtain an operating license. Moreover, preemption is not a function of NRC decisions on plan adequacy.10/

10/ LILCO attempts to make its unbounded and utility-controlled preemption concept more palatable by claiming that state laws need be displaced only to the extent

(Footnote cont'd.)

In sum, LILCO cannot establish that the statutes in question intrude upon a federally-preempted zone of activity governed by a pervasive scheme of federal regulation. LILCO cannot establish that these statutes actually conflict with federal law or obstruct Congressional purposes. LILCO cannot satisfy either of the preemption standards set forth in the decided cases. Accordingly, the Decision should be affirmed.

4. LILCO Cannot Demonstrate That Congress Had A Clear And Manifest Purpose to Supersede the Historic Police Powers of New York State

Both Pacific Gas and Silkwood hold that a litigant who seeks to establish preemption in an area within the state's historic police powers must show that Congress clearly and manifestly intended to preempt such state laws. Pacific Gas, 461 U.S. at 206; Silkwood, 78 L.Ed. 2d at 457. See also Rice v. Sante Fe Elevator Corp., 331 U.S. 218, 230 (1947); U.S. v. Bass, 404 U.S. 336, 349 (1971); N.Y. Dept. of Social Services v. Dublino, 413 U.S. 405, 413 (1973); and ASLB Decision at 397.

(Footnote cont'd.)

they block AEA objectives. LILCO offers no authoritative support for this concept; it cites only the reversed lower court opinion in Silkwood and an out-of-context quote from a concurring and dissenting opinion. Moreover, LILCO's argument misses the point. The issue before this Board is whether Congress intended to preempt state statutes that withhold governmental powers from utilities when it adopted the AEA. Clearly, it did not.

A party claiming preemption bears the burden of establishing Congress' intent to preempt state law. Silkwood, 78 L.Ed. 2d at 457.

The statutes LILCO challenges involve the historic police powers of the state. That fact is established by the Cuomo v. LILCO decision and the Partial Declaratory Judgment entered thereon. Those statutes LILCO challenges involve the organic statutes of New York State government, its traffic laws and its basic corporate laws. LILCO must demonstrate Congress' clear and manifest intention to preempt those statutes. No such showing has been, or could be, made in this case. Absolutely no evidence exists that Congress has ever intended to void basic state laws allocating governmental powers among its political subdivisions. No evidence exists that Congress intended to void state corporate laws.11/

In attempting to meet its burden of proof, LILCO relies upon the Atomic Energy Act and, to a lesser degree, the three most recent NRC Authorization Acts. In fact, the absence of any congressional intent to preempt the New York statutes here at issue is particularly striking in the context of (i)

11/ The Supreme Court has recognized that corporations are the creatures of state law. Federal law will not be held to interfere with state corporation laws without "a clear indication of Congressional intent," and state law will govern the internal affairs of corporations "except where federal law expressly requires" a contrary result. See Santa Fe Industries, Inc. v. Green, 430 U.S. 462, 479 (1977) and Cort v. Ash, 422 U.S. 66, 84 (1975).

the Atomic Energy Act's express preservation of traditional state responsibilities, even where state authority directly impacts the operation of a nuclear plant and (ii) Congress' repeated recognition during the debates over the NRC Authorization Acts that offsite emergency planning is a traditional state function that has not been displaced by federal law.

a. The Atomic Energy Act Does Not Provide Any Basis For Preemption of The Challenged State Statutes

The Atomic Energy Act is silent on the subject of offsite emergency planning. LILCO asserts that "for over 30 years the regulation of radiological health and safety has been the province of the federal government. Brief, p. 10. For over 200 years, however, states and their authorized political subdivisions have been responsible for basic police power functions, including emergency planning. See Decision, p. 403. The Atomic Energy Act does not negate state responsibilities in the offsite area.

Courts assessing the scope of AEA preemption have focused upon Sections 271 and 274 of the Act, 42 U.S.C. §§2018 and 2021. See Pacific Gas, 461 U.S. at 205-212. Section 271 provides that the Act does not affect the authority or regulations of any state or local agencies with respect to "the generation, sale or transmission of electric power produced

through the use of nuclear facilities licensed by the Commission ...." Obviously, LILCO challenges New York statutes in this proceeding that are several steps removed from any regulation of electric power produced by nuclear facilities.

The AEA was amended in 1959 to "heighten the state's role" in the regulation of nuclear facilities. Pacific Gas, 461 U.S. at 209. Section 274(c) provides that "the Commission shall retain authority and responsibility with respect to regulation of -- (i) the construction and operation of any production or utilization facility." Section 274(k) stipulates, however, that the NRC's retention of authority shall not be construed "to affect the authority of any state or local agency to regulate activities for purposes other than protection against radiation hazards." 42 U.S.C. §§2021(c) and (k) (1984) (emphasis added).

LILCO recognizes, as it must, that the Act creates a system of dual regulation. LILCO also acknowledges that the 1959 amendments to the AEA reaffirm the states' traditional authority to regulate nonradiological aspects of power plants. Brief, pp. 13-14. That concession, standing alone, should foreclose any serious preemption argument that LILCO might have in this case. If a state can regulate the nonradiological aspects of power plants (a traditional area of state concern), it may clearly regulate in other traditional areas of state concern that are even further removed from either radiological

safety or the construction or operation of nuclear power plants. Neither the Act nor the Commission's exclusive jurisdiction over regulation of the construction and operation of nuclear facilities impact state powers in the offsite area.

The basic state provisions here in issue are the New York State Constitution and its Municipal Home Rule Law, both of which simply define the circumstances under which the states' inherent police powers may be exercised by subordinate governmental units. It defies all logic to concede, as LILCO does, that a state mav prohibit the construction of nuclear power plants on economic grounds while arguing, conversely, that a state may not determine what entities can perform inherently governmental functions merely because a private corporation believes that it must exercise governmental functions in order to obtain an operating license for a nuclear facility.

b. NRC Authorization Acts Do Not Support LILCO's Claim of Preemption

LILCO references the three most recent NRC Authorization Acts as potential support for its preemption claim and its purported authority. An act that authorizes an instrumentality of the federal government to expend funds for prescribed purposes is a strange place to look for corporate authority. That point aside, neither the language nor the legislative history of the Authorization Acts supports LILCO's

position. Congress has not authorized LILCO or any other private corporation to perform functions that "are inherently governmental in nature and fall clearly within the ambit of the STATE's police power." Cuomo v. LILCO, p. 12.

i. The 1980 NRC Authorization Act Does Not Support LILCO's Preemption Argument

Section 109 of the 1980 NRC Authorization Act permits the NRC to grant an operating license if it determines that there is an emergency preparedness plan that meets certain standards. Pub. L. 96-295, Section 109 (1980). Section 109 permits the Commission to make a "reasonable assurance" finding with respect to a utility plan. Section 109 is absolutely silent concerning a utility's legal authority to implement any particular plan. Section 109 does not guarantee that any utility plan will satisfy applicable regulatory standards nor does it authorize a utility to perform inherently governmental functions.

The legislative history of Section 109 provides no support for LILCO's preemption claim. Section 109 is a legislative compromise crafted in conference. The Senate's version of the 1980 Authorization Act required each state to submit to the NRC an emergency response plan, and it required the NRC to find that adequate state or local offsite emergency plans existed as a condition of licensure. In reaching that

position, the Senate rejected a proposed federal emergency planning role. 125 Cong. Rec. S. 9463-84 (July 16, 1979). The House, on the other hand, did not impose a mandatory planning duty upon states nor did it require the NRC to make an adequacy finding. 125 Cong. Rec. H. 11507 (Dec. 14, 1979). As a compromise, the conferees and ultimately Congress decided (i) to require every utility to submit an adequate offsite emergency plan as a condition of plant licensing; (ii) to require the NRC to establish emergency planning standards for all emergency plans; and (iii) in those cases where state or local government emergency plans did not exist or did not comply with NRC standards, to permit the NRC to examine an emergency plan developed by a utility and to determine whether that plan met NRC standards.12/

The Conference Committee report provides as follows:

> The conferees sought to avoid penalizing an applicant for an operating license if a State or locality does not submit an emergency response plan to the NRC for review or if the submitted plan does not satisfy all the guidelines or rules. In the absence of a State or local plan that complies with the guidelines of rules, the compromise permits NRC to issue an operating license if it determines that a State, local, or utility plan, such as the emergency preparedness plan submitted by the applicant, provides reasonable assurance that the public health and safety is not endangered by operation of the

---

12/ P.L. 96-295, §109 (1980) and Stenographic Transcript of Hearings Before the Senate Subcommittee on Environment and Public Works and the House Committee on Interior and Insular Affairs Joint Conference on the Nuclear Regulatory Commission (February 21 and April 22, 1980).

> facility. Joint Explanatory Statement of the Committee on Conferences, H. Conf. Rep. 96-1070, 96th Cong., 1st Sess. (June 4, 1980) at 27-28, reprinted in 1980 U.S. Code Cong. & Ad. News at 2270-2271.

Thus, the Conference report confirms that the NRC is permitted to decide the issue now before it, that is, whether a utility plan provides "reasonable assurance." If a utility does not have the legal authority to carry out its plan, there can be no reasonable assurance finding. That is LILCO's dilemma in this case.

ii. The 1982-3 NRC Authorization Act Does Not Support LILCO's Preemption Argument

Section 5 of the 1982-3 NRC Authorization Act re-enacts Section 109 in somewhat different language:

> The Nuclear Regulatory Commission may use such [appropriated] sums as may be necessary, in the absence of a State or local emergency preparedness plan which has been approved by the Federal Emergency Management Agency, to issue an operating license ... for a nuclear power reactor, if it determines that there exists a State, local, or utility plan which provides reasonable assurance that public health and safety is not endangered by operation of the facility concerned. P.L. 97-415, sec. 5 (1983).

Section 5 speaks to the NRC's authority to grant a license. It does not authorize a utility to perform basic governmental functions.

The legislative history of Section 5 provides absolutely no support for LILCO's contention that Congress intended to permit private corporations to perform governmental functions. It provides no evidence that Congress intended to confer extra-charter powers upon private corporations existing under state law.

LILCO seeks to find authority to implement its Transition Plan in the comments of a single legislator, Congressman Lujan, rather than in the text of the Authorization Act. Brief, p. 27. Rep. Lujan's conclusion is as follows:

> The clear language of the statute and our intent throughout the legislative process was to insure that a plant could operate if there existed some plan -- State, local or utility sponsored -- providing reasonable assurance of the public health and safety. Brief, p. 27; 128 Cong. Rec. H 5061 (Dec. 10, 1982).

This Board must find that LILCO has authority to perform governmental functions before it can determine that the Transition Plan provides "reasonable assurance." The 1982-3 Authorization does not grant LILCO such authority. Moreover, even Rep. Lujan did not assert that Congress intended to grant governmental powers to public utilities.

iii. The 1984-5 NRC Authorization Act Does Not Support LILCO's Preemption Argument

Section 108 of the 1984-5 NRC Authorization Act re-enacts Section 5 of the 1982-3 Authorization Act in identical language. P.L. 98-553, sec. 108 (1984). On its face, Section 108 speaks to the NRC's authority to grant a license. It does not, expressly or impliedly, grant state police powers to private corporations or enlarge any public utility's corporate powers.13/ The legislative history of Section 108 establishes beyond any question that Congress did not believe that private corporations had authority to carry out governmental powers. At a 1984 NRC budget hearing, the NRC advised the Subcommittee on Nuclear Regulation of the Senate Committee on Environment and Public Works that certain states and localities had refused to participate in offsite emergency preparedness.14/ Chairman Palladino raised two issues in his opening remarks:

13/ The Senate report on Section 108 stating the views of the Committee on Environment and Public Works states that the provision is "identical" to Section 5 of the 1982-3 Authorization Act and "is intended to reconfirm the authority of the NRC and FEMA to evaluate an emergency preparedness plan submitted by an applicant or licensee pursuant to this section". Authorizing Appropriations to the Nuclear Regulatory Commission, S.Rep. 98-456, 98th Cong., 2d Sess. (June 14, 1984) at 13-15. The Report does not remotely suggest that Section 108 grants utilities federal authority to undertake activities beyond their legal powers under state law.

14/ Fiscal Year 1985 Budget Review Hearings Before the Committee on Environment and Public Works, S. Rep. 98-758, 98th Cong., 2d Sess. (Feb. 23, 1984) at 13-19, 97.

> Two important new questions are whether State or local governments may have an obligation to participate in emergency planning and, in the absence of State or local government participation, whether a licensee has the legal authority to carry out proposed actions that normally would be handled by State or local governments in an actual emergency ...
>
> I think the situation as it now exists, as pointed out in my testimony, raises two questions, one the extent to which State and local governments have an obligation to participate in emergency preparedness and the other is the question of legal authority of utilities to develop a plan and want to implement it and exercise it and I think addressing those issues, particularly the second one, would be something that I think the subcommittee might want to consider.15/

Chairman Palladino's statement contradicts LILCO's assertion that existing federal law authorizes LILCO to carry out its Transition Plan. Chairman Palladino would not have presented this issue to Congress as a "new question" if he had believed that the AEA or any other existing body of law conferred upon a license applicant "the legal authority to

---

15/ Id. at 4-5, 13-14. Chairman Palladino's remarks assume that utilities could not perform governmental functions. Moreover, he did not suggest that the Subcommittee grant governmental powers to public utilities to cure their lack of legal authority:

> It is also important for the subcommittee to work with FEMA and NRC to come up with a solution to the problem of legal authority in the absence of State or local government participation. A possible approach would be to make available Federal resources if a Governor required them. Id. at 5.

Thus, Chairman Palladino's recommendation was that Congress authorize federal participation to cure a utility's conceded lack of legal authority to implement an offsite plan.

carry out proposed actions that normally would be handled by State or local governments in an actual emergency."

Moreover, Chairman Palladino's testimony notwithstanding, the Subcommittee's version of the 1984-5 Authorization bill did not address the "new question" of a utility's legal authority to develop, implement or exercise an offsite emergency plan. In particular, the Committee did not confer governmental powers upon public utilities. Instead, Congress simply continued the NRC's authority to decide whether a utility plan met applicable regulatory standards. Thus, the Senate considered the issue LILCO now confronts, but it took no action to confer the authority that LILCO fervently seeks.

More dramatically, the relevant House Committee made it clear that the NRC is not authorized to license a plant where a utility cannot lawfully implement an offsite emergency plan because of a lack of local government participation:

> [S]ection 6 allows the Commission to look at a utility plan (as it pertains to offsite emergency preparedness) in making its determination about the adequacy of offsite emergency planning. The provision, however, in no way implies that it is the intent of the Committee that the NRC cite the existence of a utility plan as the basis for licensing a plant when State, county, or local governments believe that emergency planning issues are unresolved. Moreover, section 6 does not authorize the Commission to license a plant when lack of participation in emergency planning by State, county, or local governments means it is unlikely that a utility plan could be successfully carried out. (Emphasis supplied).16/

16/ Authorizing Appropriations to the Nuclear Regulatory Commission in Accordance with Section 261 of the Atomic Energy

(Footnote cont'd.)

Correspondence between Reps. Udall, Broyhill and Lujan establishes that section 6 was intended to mean (i) that the mere existence of a utility plan is not a sufficient basis for issuing a license and (ii) that the NRC must determine whether a utility plan provides reasonable assurance of public safety under applicable standards.17/ This exchange of letters makes no reference to an intention to grant utilities the authority to exercise governmental police powers.

Given this background, it is literally impossible to understand how LILCO can seriously suggest that Congress has either preempted the challenged statutes or authorized a public utility to assume and exercise basic state powers. In the face of this record in the Senate, the House of Representatives and their relevant committees, LILCO offers only the isolated comments of individual congressmen, including personal statements of Senator Simpson that no other Senator joined in. See S Rep. 98-546, 98th Cong., 2d Sess. 22-26 (June 29, 1984).18/ Clearly, the statements of individual Congressmen do

---

(Footnote cont'd.)

Act of 1954 and Section 305 of the Energy Reorganization Act of 1974 and for other Purposes, H. Rep. 98-103, Part 1, 98th Cong., 1st Sess. (May 11, 1983) at 8-9.

17/ These letters, set forth in full, are reprinted at 130 Cong. Rec. H. 12195-6 (Oct. 11, 1984).

18/ LILCO quotes Rep. Pashayan, but Rep. Pashayan never stated that the 1984-5 Act grants LILCO governmental powers. Brief,

(Footnote cont'd.)

not constitute legislative intent nor do they confer authority that the relevant statutes withhold.

5. The ASLB Decision Is Consistent With The Commission's Decisions, Emergency Planning Rules And Public Positions

LILCO argues that the Decision is inconsistent with prior Commission decisions and the NRC's emergency planning rules. Moreover, LILCO argues that the ASLB has determined that a utility plan could never satisfy NRC emergency planning regulations unless the state or local government consents. Brief, pp. 1, 4-7. In fact, LILCO seeks to overturn a decision the ASLB never made. The Decision is fully consistent with federal law and NRC's rules and prior decisions.

(Footnote cont'd.)

pp. 30-1. Response, pp. 36-7. His answer to a local government's refusal to implement a plan was not corporate authority but rather federal implementation:

> I also view existing law as providing authority for the Federal Government to implement any utility plan submitted under this provision. I think that both concepts -- that of utility submission, and that of Federal implementation, of emergency plans -- are important .... 130 Cong. Rec. H. 12,196 (Oct. 11, 1984).

Rep. Pashayan's concept of federal authority is not shared by Congress as a whole. Moreover, the Senate itself clearly rejected a federal emergency planning role when it adopted the 1980 Authorization Act. Brief, p. 25. In any event, the spokesman LILCO identifies in connection with the 1984-5 Authorization Act does not support LILCO's position that the 1984-5 Act grants governmental powers to private utilities.

a. The Decision Is Consistent With the Brenner Board Decision

The Decision is consistent with the Brenner Board's decision on the Intervenors' Motion to Terminate.19/ In those proceedings, the County sought to terminate LILCO's application for an operating license on the ground that NRC regulations require a state or local government emergency plan. The Brenner Board held that the NRC can evaluate a utility plan to determine if it meets NRC regulations, and the NRC affirmed, holding that LILCO should have an opportunity to show that its Plan satisfies NRC regulations. Neither the Brenner Board nor the Commission guaranteed that LILCO could satisfy all NRC emergency planning requirements. Nonetheless, LILCO now argues that the Decision deprives LILCO of a meaningful opportunity to show that its Plan meets the pertinent standards because, in effect, the Decision outlaws all utility plans.

The ASLB has given LILCO an opportunity to show that it has the legal authority to implement the Transition Plan. LILCO's claim of legal authority was rejected by the State Supreme Court, but LILCO has appealed that adverse decision. The ASLB was bound by that state law ruling. The fact that LILCO has not met the NRC requirements in this case does not

---

19/ Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-83-13, 17 NRC 741 (1983), aff'g., Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-22, 17 NRC 608 (1983).

mean that it had no opportunity to meet NRC requirements nor does it mean that every other utility plan would fail to meet those requirements.20/

b. The Decision Is Consistent With Federal Law And Its Interpretation By The Commission

The main thrust of LILCO's argument against the Decision is that, as a practical matter, LILCO will not be able to meet the NRC emergency planning regulations without government participation. Brief, p. 9. Because Congress has authorized the NRC to consider utility plans, LILCO concludes that Congress and the NRC must intend that utilities have authority to take all steps necessary to implement an NRC-compliant emergency plan. The ASLB rejected LILCO's argument for a simple reason. It has no merit.

LILCO's argument presupposes that an administrative agency that establishes licensing requirements, by that same act, grants all persons the authority to do all things necessary to meet those requirements and obtain a license. That is an absurd argument. The promulgation of regulatory

---

20/ The Decision states that the ASLB would consider another revised plan submitted by LILCO. Decision, p. 426. Such an offer would be meaningless if the ASLB had categorically rejected utility plans. Because LILCO lacks the legal authority to take the activities included in the Transition Plan, it does not follow that every other conceivable utility plan is illegal.

standards is not the same as conferring legal authority to meet those standards. When the NRC imposes a requirement upon license applicants, it does not guarantee that each applicant will have the legal capacity to satisfy that requirement. Under LILCO's argument, a state that requires citizens to be 16 years old to obtain a driving license thereby guarantees that all license applicants are 16 years old regardless of their date of birth.

That point aside, it is clear that the Decision is consistent with federal law and the NRC's emergency planning rules. The Commision has clearly anticipated that a lack of governmental cooperation in emergency planning may, in some cases, make it impossible for a utility to submit an adequate plan. First, the legislative history of the NRC Authorization Acts show that Congress specifically considered the possibility that license applicants may not obtain a license where state and local government refuse to participate in offsite emergency planning. Congress considered alternative ways to address that problem. It considered, and rejected, a fall-back federal planning role. Brief, p. 25; 124 Cong. Rec. S. 9463-84 (July 16, 1979). It considered, and rejected, a mandated state planning role. Brief, pp. 25-6; see supra, p. 30, ftnt. 12. It rejected both of those approaches because it was unwilling to intrude upon an area of historic state sovereignty. As a compromise, Congress permitted the NRC to consider utility plans, but it required the NRC to find that those plans meet

essential planning standards and provide reasonable assurance. No evidence exists that in adopting that compromise, Congress authorized the more intrusive step of authorizing utilities -- private corporations -- to take over governmental functions. Clearly, Congress chose a different route. It provided utilities with some leeway; they could submit their own plans for NRC review. But it required that those plans meet basic standards, thereby recognizing that in some cases a utility plan might be an unsatisfactory basis upon which to grant an operating license. See, supra, pp. 30-2; Decision, pp. 402-4.

Moreover, the Commission recognized the tension created by Congress and accepted its potential impact upon license applicants in adopting its emergency planning rules. The Commission's "Summary of Comments and Major Issues" acknowledged that its draft regulations had been criticized as "unfair to utilities."

> NRC is seen as in effect giving State and local governments veto over the operation of nuclear plants. It was questioned whether this was an intent of the rule. In addition, it was felt that utilities, their customers, and their shareholders should not be penalized by a shutdown (with a resulting financial burden) because of alleged deficiencies or lack of cooperation by State and local officials. 45 Fed. Reg. 55,405 (Aug. 19, 1980).

Industry criticisms of the emergency planning rules notwithstanding, the NRC adopted the Final Rules and stated its rationale as follows:

> [A]dequate emergency preparedness is an essential aspect in the protection of the public health and safety. The Commission recognizes there is a possibility that the operation of some reactors may be affected by this rule through inaction of State and local governments or an inability to comply with these rules. The Commission believes that the potential restriction of plant operation by State and local officials is not significantly different in kind or effect from the means already available under existing law to prohibit reactor operation, such as zoning, and land-use laws, certification of public convenience and necessity, State financial and rate considerations (10 CFR 50.33(f)), and Federal environmental laws. 45 Fed. Reg. 55,404 (Aug. 19, 1980).

The Commission's acknowledgement of the "potential restriction of plant operation by State and local officials" would be meaningless if the Final Rules had authorized utilities to carry out governmental functions whenever state and local officials do not adopt an NRC-compliant offsite plan.

Moreover, the NRC regulations actually forbid utilities from performing one of the required emergency planning acts. 10 C.F.R. Part 50, Appendix E states: "The responsibility for activating such a public notification system shall remain with the appropriate governmental authorities." (emphasis added); see Decision, p. 408. Thus, the NRC regulations and their adminstrative history lend no support to LILCO's attack upon the Decision.

Finally, the Commissioners themselves have recognized the potential for disruption of the operations of nuclear

plants where state and local government participation is lacking. For example, during hearings on the 1984-85 NRC Authorization Act, NRC Commissioners expressed doubt that a utility plan developed without governmental participation could be found adequate.21/ The Commissioners acknowledged that such a result could affect currently operating plants as well as new license applicants. In this connection, Senator Simpson asked:

> If the NRC were to find that the only way to insure effective implementation of an emergency plan is by the cooperation of either the State or local governments or, certainly, preferably both, would the NRC be prepared to suspend a utility's operating license if, at some point during the lifetime of the facility, a county changes its mind and decides that it would not implement the emergency plan and that the county position is then supported by the State?

Id. at 13. To this question, Commission Ahearne responded:

> You asked a question basically: If we conclude that a particular provision is

---

21/ See, e.g., the remarks of Commissioner Ahearne:

> I don't really at the moment see how at least for myself ... I could agree that a utility plan generated by the utility in which neither the State nor local government agreed, and if both the State and local government said we aren't participating in this planning process, I don't see how we could then say that is an acceptable offsite plan since the heart of the offsite plan has to be the involvement of the offsite authorities.

Nuclear Regulatory Commission's Budget Request for Fiscal Years 1984 and 1985, S. Rep. 98-53, 98th Cong., 1st Sess., p. 10 (March 10, 1983). See also Nuclear Emergency Planning Hearing Before the Subcommittee on Nuclear Regulation of the Committee on Environment and Public Works, S. Rep. 98-222, 98th Cong., 1st Sess., pp. 5, 7-9, 12 (April 15, 1983).

> necessary to meet our regulation and that provision can't be met, then would we insist on, our regulation being met? That is really what your question is ...
>
> Usually in our regulations, whenever we require a provision, we have also a way of waiving, an examption category. But if we were to conclude that there is no way that you can meet that provision and there is no waiver that can be granted to meet that provision, then we would have the situations where one of our regulations which we require the plant to meet cannot be met, and, then, I think, the Commission would cite it. Since you cannot meet that regulation, which is required, then you can no longer operate.
>
> But that is true no matter what the provision is. In emergency planning, in emergency core cooling, in operators, it is an issue that it is something that if we conclude the regulation cannot be met and it cannot be met, we pull the plug.

Ibid. None of the Commissioners suggested that Congress had authorized utilities to perform functions not granted them by state law or that Congress had preempted and rendered unenforceable any state law that hindered a utility's planning activities.

In short, the ASLB examined the AEA, the NRC Authorization Acts, the NRC emergency planning rules and the views of the Commissioners in rendering its decision. The ASLB acknowledged the dilemma facing LILCO, created by the tension created by Congress. Decision, p. 499. The ASLB concluded that it could not "fashion a remedy for LILCO's difficulties." Id. The ASLB acted responsibly and correctly. Its Decision must be affirmed.

B. LILCO'S "REALISM" ARGUMENT HAS NO MERIT

LILCO's fall-back position on legal authority is its so-called "realism" argument. LILCO contends that, in the event of a Shoreham emergency, the State and County would implement the Transition Plan and that such action would remove any legal authority issue. The ASLB concluded that this argument lacked factual and legal foundation for several reasons:

(1) NRC emergency planning regulations require a cooperative, coordinated, preplanned effort between the utility and the government to implement an offsite emergency response plan. Decision, p.413.

(2) In reviewing whether a particular plan provides reasonable assurance that a coordinated effort will be made and that adequate protective measures will be taken, the Board "must base [its] determination on what the proposed plan actually provides and whether it currently complies with the regulatory requirements ...." The Board may not engage in "conjecture" as to what actions participants may take in an emergency response. Id. at 414.

(3) The State and County have opposed LILCO's Transition Plan, and they have no plans of their own for an emergency response at Shoreham. Accordingly, "any government response that can be anticipated will be on an uncooperative, uncoordinated ad hoc basis ...." Ibid.

(4) As a result, "there is no reasonable assurance of record that the response will be in cooperation and coordination with Applicant, which is what is contemplated for an adequate plan." Id. at 414-15.

(5) Furthermore, the Cuomo decision holds that the actions contemplated by the Plan are within the exclusive domain of the State and its duly authorized subdivisions. Consequently, "[t]he realism argument predicated upon LILCO being authorized to participate in its proposed emergency plan, fails because applicant cannot be delegated the authority to perform the functions enumerated in Contentions 1-10." Id. at 413.

The ASLB's reasoning is undeniable. The NRC's offsite emergency regulations were promulgated in the wake of TMI to insure that any future nuclear plant emergency would be met by a preplanned and coordinated response. The purpose of the Commission's review of a RERP is to assess whether actions that will be taken in response to an emergency will adequately protect the public. As stated by the ASLB, "Any proposal which introduces the highly undesirable element of uncertainty as to how various entities will react, is inadequate." Id. at 415.

LILCO contends that the State and County would act to implement the Transition Plan in the event of an emergency at Shoreham. Neither the record in this proceeding nor LILCO's Brief provides any factual support for this prediction. LILCO

grounds this claim solely on the notion that "a planned response better protects the public than an unplanned one, and since the State and County know it, it is inconceivable that they would deliberately choose an unplanned response." Brief, pp. 47-48. LILCO's assumption is not supported by the record, and the ASLB correctly concluded that LILCO had offered no factual support for its claim that the State and County will implement a plan that they have consistently opposed as inadequate.

Since filing its Brief, LILCO has attempted to bolster its realism argument through reference to Suffolk County Executive Order 1985-1 issued May 30, 1985 and directing County employees to review, test and evaluate LILCO's Transition Plan. The Executive Order was challenged by members of the Suffolk County Legislature and four towns in the County who filed suit in New York Supreme Court seeking to enjoin implementation of the Executive Order. On June 10, 1985, the Supreme Court declared the Executive Order null and void and issued an injunction that prohibits the County Executive from implementing the Executive Order. That decision has been affirmed by the New York State Court Appellate Division and the New York Court of Appeals, and the Supreme Court's injunction remains in effect. Accordingly, the Executive Order has no bearing on these proceedings.

LILCO's newest attempt to bulwark its realism argument suffers from the fundamental defect that infected its argument in the first instance. Recent events do not provide adequate assurance that any government will participate in a preplanned, coordinated effort to implement LILCO's RERP. The Suffolk County Legislature, through County Resolution 111-1983, has decided against developing an emergency response plan for Shoreham. The State has made the same decision. Consequently, there is no State or County plan to implement LILCO's RERP or to coordinate with it. Any response by either government would be unplanned and ad hoc in nature. Under those circumstances, there can be no finding of reasonable assurance as required by NRC regulations. Accordingly, LILCO's realism argument must be rejected.

C. LILCO'S "IMMATERIALITY" ARGUMENT WAS PROPERLY REJECTED

Contentions 1-4, 9 and 10 concern LILCO's plan to control traffic and otherwise to assist motorists who may be attempting to evacuate, to remove roadway obstacles, to dispense fuel and to provide access control at the EPZ perimeter and other locations.22/ LILCO urges that even if its preemption and "realism" arguments are rejected, it should still prevail on these six contentions because NRC regulations

---

22/ Contrary to LILCO's assertion (Brief, p. 48), the Board found that the activities covered by Contention 9 are illegal under State law. See Decision, p. 421.

do not require these activities to be part of an emergency plan. Brief, p. 48. The Licensing Board rejected LILCO's so-called "immateriality" argument. Decision, pp. 415-25.23/ The Appeal Board should affirm.

By its immateriality defense, LILCO is asking the NRC to license Shoreham with no plan or capability to perform any of the foregoing traffic and access control related functions. Thus, according to LILCO, and contrary to the statements in its

---

23/ The Licensing Board rejected LILCO's realism and immateriality defenses on legal grounds. There were other compelling grounds as well why the Board could not have accepted either argument in the context of a summary disposition motion. Rather, a further hearing on both issues would have been required if these arguments had not been rejected on legal grounds. First, as noted by the Staff in its October 4, 1984 Answer to LILCO's Summary Disposition Motion (at page 27), as well as by the State and County in their September 24, 1984 Opposition (at pages 106-07), the immateriality and realism arguments represent attempts by LILCO to have issues disposed of on a different theory than that on which they were prosecuted. The entire trial from December 1983-July 1984 was premised on LILCO alone implementing its plan, including all of the activities specified in Contentions 1-4, 9 and 10. On August 6, 1984, LILCO, for the first time, asserted that all of the activities covered by these contentions were unnecessary. A trial on the immateriality and realism issues therefore would have been required if the Board had not dismissed the defenses as a matter of law. See Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-459, 7 NRC 179, 186 (1978), citing Niagara Mohawk Power Co. (Nine Mile Point Nuclear Station, Unit 1), ALAB-264, 1 NRC 347, 353-55 (1977). Accord, Pennsylvania Power and Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), LBP-82-30, 15 NRC 771, 781-82 (1982). Second, on both the realism and immateriality defenses, material facts were clearly in dispute which precluded summary disposition. See, e.g., Opposition of Suffolk County and the State of New York to LILCO's Motion for Summary Disposition of Contentions 1-10, September 24, 1984, at 90-93, 106-119, and Attachments B-D thereto.

own Plan, all that needs to be done if there is a serious accident at Shoreham is to notify the public of the emergency and let citizens take care of themselves. The Licensing Board properly rejected this argument. Decision at 422-25.

LILCO's argument is that the NRC can find adequate preparedness under 10 C.F.R. §50.47 even though there is no capability to assist evacuees during an emergency.24/ The NRC's regulations are not prescriptive about particular traffic control strategies and other actions that may need to be implemented to provide reasonable assurance, because it is impossible to predict precisely how a serious accident might progress and what protective actions may be necessary when the emergency occurs.25/ Accordingly, the regulations call for a capability to implement a "range of protective actions." 10

24/ For example, LILCO argues that its Plan should be found adequate without any traffic control measures, even if serious traffic problems developed during a Shoreham emergency and even if implementation of a range of traffic control measures could reduce evacuees' exposure to health-threatening radiation.

25/ Contrary to LILCO's assertion (Brief, p. 49), there is authority for the proposition that traffic control capability and related activities are required by the NRC's regulations. NUREG-0654, §II.J.10.k requires the capability to deal with potential roadway impediments. Thus, the activities covered by Contentions 4 and 9 are clearly covered by the NRC's guidance documents. Similarly, NUREG-0654, §II.J.10.j requires a capability to control access to evacuated areas, a matter which is the subject of Contention 10. And, NRC case law establishes that traffic control functions are clearly expected to be included in a plan submitted pursuant to 10 C.F.R. §50.47. See Pennsylvania Power & Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), LBP-82-30, 15 NRC 771, 796 (1982) (traffic control planning described as having a "unique level of importance" in emergency planning).

C.F.R. §50.47(b)(10). The State and County submit that such actions must include some capability to assist evacuees in the event of an emergency.26/

LILCO's argument does not represent the appropriate legal standard. Rather, Section 50.47(a)(1) requires reasonable assurance that adequate protective measures "can and will be taken" in the event of a radiological emergency. An emergency may present a multitude of possible accident scenarios. It is essential for adequate preparedness, however, that there be a flexible capability to respond to events which reasonably may be expected to occur, including adverse traffic conditions. See, e.g., NUREG-0654, Appendix 4, at 4-5, 4-6. This is particularly true since an EPZ evacuation at Shoreham may involve movement of upwards of 150,000 persons (and even more when shadow evacuees are included). Thus, the Licensing Board clearly acted correctly when it rejected LILCO's immateriality defense to these contentions.27/

26/ To our knowledge, there is no nuclear plant in the United States which has an offsite emergency response organization that lacks any capability assist in evacuating the public if there is an emergency. Yet, that is what LILCO is asking the Board to approve.

27/ LILCO attempts to twist the Licensing Board's decision on the immateriality defense by asserting that the Board rejected the defense because the increase of evacuation times in an uncontrolled evacuation were unacceptable. See Brief, pp. 49-50. However, the Board specifically disclaimed any belief in standard evacuation times (Decision at 423-24) and rested its ruling on its finding that elimination of the activities covered by Contentions 1-4, 9 and 10 would seriously reduce the

(Footnote cont'd.)

II. THE ASLB'S RULING ON CONTENTION 11 SHOULD BE AFFIRMED

LILCO's attack upon the ASLB's Contention 11 ruling rests on two false premises. The first is that the Board's finding is "not really an evidentiary decision," but "rather a legal judgment." Brief, p. 53. LILCO is incorrect. Contention 11 raises a factual question: whether the LILCO Plan and its proposed command and control strategies could and would be effectively implemented in the event of a Shoreham emergency given the inherent conflict in LILCO's role. The ASLB concluded that LILCO had failed to sustain its burden of demonstrating reasonable assurance that under the LILCO Plan correct and appropriate command and control decisions would be made. That conclusion flows directly from the ASLB's findings of fact concerning whether the LILCO employees in command and control positions would be likely to experience a conflict of interest and the effect such conflicts would have upon LILCO's ability to implement adequate protective actions.

LILCO's second false premise is that the ASLB's factual findings on Contention 11 have such far-reaching implications that they render any emergency plan proposed for

---

(Footnote cont'd.)

range of protective actions that could be implemented to achieve dose savings. Decision at 423-24. Thus, the Board found that elimination of these activities would result in noncompliance with 10 C.F.R. §50.47(a)(1) and (b)(10).

any other nuclear power plant inadequate. See, e.g., Brief, pp. 53, 55, 57, 60-61, 65. In fact, the ASLB's findings and conclusions are expressly limited to the particular LILCO Plan that was litigated, the particular issues raised in Contention 11 and addressed by the parties in testimony and the NRC regulations referenced in the Contention. Because the ASLB found for Intervenors on the important factual issue of LILCO's inability to implement the command and control portion of its plan without conflict, it does not follow that the ASLB has held "that private utilities should not be allowed to operate nuclear plants at all." Brief, p. 57.

LILCO alleges that five alleged "errors" are embodied in the ASLB's decision on Contention 11. LILCO seriously mischaracterizes the Decision and the evidentiary record. None of the so-called "errors" exists, and, accordingly, the Decision on Contention 11 should be affirmed.

A. THE BOARD'S DISCUSSION OF THE INDEPENDENCE OF LILCO EMPLOYEES IN COMMAND AND CONTROL WAS APPROPRIATE AND NECESSARY

LILCO argues that it was error for the ASLB to use "independence" as a criterion in judging whether LILCO's command and control scheme could be implemented to protect the public adequately. LILCO ignores the wording of Contention 11, the evidence submitted by all parties, including LILCO, as well as logic and common sense. First, what LILCO appears to mean

by the "independence" criterion is simply the corollary of the conflict of interest issue. If a person in command and control were independent of LILCO, its management and its corporate profit-making goals, then the potential conflict of interest identified in the contention would not exist. Thus, while LILCO appears to imply that the ASLB's discussion of "independence" is somehow inappropriate, in fact that concept is the very heart of the Contention 11 issue.28/ The ASLB was obligated to confront the question of the independence from LILCO's management of LILCO employees in command and control positions.

Second, the evidence on Contention 11, including that submitted by LILCO, directly addressed the so-called "independence" issue. See e.g., citations in Decision, pp. 52-55.29/ The ASLB quite properly based its Decision on the evidentiary record compiled by the parties.

28/ Indeed, Contention 11 pointedly alleges that "LILCO has failed to institute appropriate measures to insure the independence of LERO personnel," and therefore there is no assurance that LILCO employees could effectively exercise command and control as necessary to provide adequate protection for the public. Thus, the entire point of Contention 11 is the conflict of interest created by the competing loyalties (to LILCO's corporate interests and to the public) faced by LILCO officials in command and control positions, and its impact upon the implementability of the LILCO Plan.

29/ Indeed, as the ASLB noted, "LILCO appears to concede the desirability of independence, but believes LERO workers are sufficiently independent of LILCO." LILCO witnesses testified at length about means by which LILCO attempted to enhance such "independence." Decision, pp. 52-54.

Third, the Decision explains why, as a factual matter, "independence" is important, with specific citations to evidence of record. Clearly, the ASLB did not err in relying upon the lack of independence of LILCO's employees in command and control roles to support its decision on Contention 11.

LILCO's assertion that the Board's finding on "independence" conflicts with the evidence is also without basis. Brief, p. 57. LILCO claims that four recommendations of its witness, Dr. Mileti, were incorporated into the LILCO Plan and eliminated any conflict of interest arising from a lack of independence. Id. at 55-57. The ASLB expressly acknowledges the Mileti recommendations as well as LILCO's assertion that their incorporation in the Plan eliminates conflict of interest problems. See Decision, pp. 59-60. Nonetheless, the ASLB concludes, based upon all the evidence, that "Intervenors' witnesses present the weightier case." Id. at 61.30/

30/ The Board found that "it is to LILCO's credit that the utility has made a considerable effort to remove the LERO decision-makers from LILCO influence, but we do not find that the effort gives a result comparable to that contemplated by the regulations. Id. at 63. Furthermore, the Board clearly had an evidentiary basis for finding that Dr. Mileti's recommendations either could not be fully implemented or, if implemented, could not be fully effective. See Decision, pp. 61-62. As the Board found, "key decisions cannot be completely formalized," since regardless of the existence of Emergency Action Levels, substantial amounts of discretion still exist for LERO officials in command and control to make protective action recommendations. Cordaro et al., ff. Tr. 10,196, at 12-13; Tr. 10,379 (Cordaro); 10,292-93, 10-263-64 (Weismantle).

(Footnote cont'd.)

LILCO also argues that the ASLB's Contention 11 ruling "is a denial of the value of emergency planning," because "emergency planning is done ... precisely to counteract the types of effect postulated by Contention 11." Brief, p. 56. That argument is meaningless and circular. The sole issue presented by Contention 11 is whether the effects postulated therein have been counteracted by LILCO's Plan; LILCO's argument assumes the conclusion and ignores the basic factual issue.31/

Finally, LILCO's wild assertion that the Contention 11 ruling "implies that private utilities should not be allowed

---

(Footnote cont'd.)

And, as the Board noted with respect to the post-event audit relied upon by Mileti, "it will always be unclear during an incident whether that audit would sanction a strong or weak response." Decision, p. 62. See, e.g., Tr. 10,926-28 (Lipsky) (post-accident audit would not eliminate conflict which may impact response during an accident); Tr. 10,928 (Cole) (post-accident accountability will not be an effective check because LERO personnel will think they are performing properly; post-accident accountability helps only when persons are consciously doing the wrong thing).

31/ LILCO's assertion that the Board's decision conflicts with "the basic philosphy of NRC regulation, which relies on licensees to take proper actions (Brief, p. 57) suffers from the same defect. What LILCO refers to as the NRC's reliance on professionalism (Brief, p. 57) cannot be used as a bootstrap means of reaching a reasonable assurance finding on a question of fact presented by the LILCO Plan. The issue presented by Contention 11 and decided by the Board is whether LILCO demonstrated reasonable assurance that with LILCO employees in positions of command and control, the LILCO Plan could be implemented to protect the public as required by 10 C.F.R. §50.47. An abstract notion of "professionalism" has nothing to do with the narrow issue of fact presented to the Board.

to operate nuclear plants at all" is ridiculous. Brief, p. 57. The fact that the NRC may rely upon licensees to act appropriately in operating a plant is simply irrelevant to the findings required of a licensing board when reviewing an offsite emergency plan for compliance with 10 C.F.R. §50.47.

B. THE BOARD'S FINDING THAT LILCO EMPLOYEES WOULD EXPERIENCE A CONFLICT OF INTEREST IS SUPPORTED BY THE EVIDENCE

The "second major error" alleged by LILCO is the ASLB finding that in an accident LILCO employees would have interests that conflicted with those of the public. Brief, p. 58. LILCO basically disagrees with the ASLB's factual conclusion. LILCO's bald assertion that the evidence does not support the ASLB finding is baseless. Even LILCO is able to cite no evidence to support the opposite finding; it refers only to testimony to the effect that the consequences of the utility's making a wrong decision that harmed the public would be devastating.32/ The Decision demonstrates that there was substantial evidence establishing that LILCO employees would be likely to experience a conflict between their obligation, as high-level LILCO management employees, to enhance LILCO's

---

32/ Furthermore, the ASLB acknowledges the statement of LILCO's witnesses that "they believe that it is 'obviously in LILCO's best interest' to recommend appropriate protective actions and to be open and frank about the emergency." The ASLB noted, however, that the LILCO witnesses "do not indicate why this is 'obvious.'" Decision, p. 60.

profit and reputation, and their obligation, under the LILCO Plan, to ignore LILCO's corporate and public relations interests and put the public's health and safety first. See, e.g., Decision, pp. 52-53, 56-58.33/

C. THE BOARD'S CONTENTION 11 FINDINGS DO NOT "DISQUALIFY EVERYONE" OR "BAR A UTILITY PLAN"

LILCO asserts that the ASLB erred because its Decision assumes no one can perform command and control functions because everyone is subject to subtle bias. Brief, p. 60. LILCO's straw man must be rejected. Contention 11 does not present general questions of whether indigestion, lack of sleep, age, sex, or marital status would affect one's ability to exercise command and control functions. While those characteristics may be "universal," they have nothing to do with the issue presented by Contention 11. The ASLB decided

---

33/ LILCO's assertion that the ASLB findings on Contention 11 "ignored" its findings on Contention 25 (Role Conflict) should also be rejected. Brief, pp. 58-59. For reasons which will be set forth in their brief on appeal, the County and State believe that the Board's Contention 25 findings are incorrect; however, their accuracy is irrelevant for present purposes. The role conflict findings were based upon the facts and evidence presented on that issue, that is, whether individuals relied upon in the LILCO Plan would show up to perform their emergency jobs in an actual nuclear accident rather than attending first to the safety of their families. The question of how or whether they could effectively exercise judments, make decisions or exercise command and control assuming they did show up was never addressed in the context of the role conflict issue. On the other hand, the decision on Contention 11 was based on evidence concerning a separate issue -- whether ties to LILCO would prevent LILCO command and control employees from making proper protective action recommendations.

that placing high-level LILCO management employees in command and control positions would affect those employees' ability to make protective action recommendations and related decisions that would adequately protect the public. The ASLB considered expert opinion and factual evidence on that issue. Its findings cannot be read to mean or imply that persons other than those proposed in the LILCO Plan to occupy command and control positions would be unable to perform as required. Indeed, the Board expressly recognized that a different proposal might meet regulatory requirements despite the fact that the one before it did not:

> It may well be that this flaw [the fact that LERO decision-makers are influenced by LILCO] is curable, and there is, of course, no bar to LILCO's proposing a plan that would meet the requirements. The present LILCO Plan is not such a plan.

Decision, p. 63. LILCO's assertion that the ASLB erred on this issue is without merit.34/

34/ LILCO's argument that "the record shows that government officials, being human, are subject to the same sorts of influences as anyone else" begs the question. Brief, p. 61. There is no evidence in the record, nor does LILCO cite any in its brief, that public officials are subject to the kind of conflict between private corporate profit-making goals and public health and safety that renders the LILCO proposal inadequate. Further, the Board expressly acknowledges and rejects LILCO's argument. See Decision, pp. 61-2.

D. THE CONFLICT OF INTEREST FOUND BY THE BOARD IS SUBSTANTIAL

The fourth "error" alleged by LILCO is that the conflict of interest found by the Board "is a mere phantom." Brief, p. 62. Again, LILCO's argument consists of nothing but bald assertions of LILCO's disagreement with the ASLB's weighing of the evidence and findings of fact.35/ Significantly, LILCO's assertions contain no citations to the evidentiary record; they do not support reversal of the Board's findings based on ample and specifically cited evidence.36/

In addition, LILCO asserts that "if the Board wished to take into account a settled psychological factor such as the 'utility bias,' it should have balanced it against the advantages of a utility plan that a governmental plan does not have." Decision, p. 64. LILCO ignores the fact that the Board did exactly that.37/ After considering the evidence, the ASLB

35/ See, e.g., Brief, p. 62 ("to raise such a consideration to the basis of an NRC licensing decision is unheard of"); p. 63 ("it is incorrect to conclude that [a utility bias] would overcome all the other influences on decisionmaking"), ("it is clear that the effect of the alleged bias must be small"), ("to raise just one factor to dispositive status is wrong").

36/ Furthermore, this alleged "error" is again premised on a straw man. The ASLB did not find against LILCO on Contention 11 based upon a finding of a "utility bias." See Decision, p. 53. Rather, the ASLB's ruling is based on its finding that the pressures, loyalties and demands placed upon LILCO employees in command and control positions would result in a conflict of interest presented by the need to make decisions during a Shoreham accident.

37/ See Decision, p. 55 (setting forth three bases for Staff position that independence is not necessary) and pp. 60-61 (NRC

(Footnote cont'd.)

found, on all the evidence presented, that "Intervenors' witnesses present the weightier case." Decision, p. 61.

E. THE BOARD EXPRESSLY CONSIDERED LILCO MEASURES TO INCLUDE NON-LILCO EMPLOYEES IN THE LILCO PLAN

The fifth "error" alleged by LILCO is that the ASLB ignored the independence of non-LILCO personnel involved in the LILCO Plan. This, again, is merely an expression of LILCO's disagreement with how the ASLB weighed all the evidence presented. Contrary to LILCO's assertion, the ASLB expressly considered not only the measures taken in an attempt to insulate LILCO command and control personnel from other LILCO employees, but also evidence concerning the role of LILCO consultants and the effect of NRC oversight. See, e.g., Decision, pp. 54, 61-2. The Board weighed all the evidence presented in reaching its conclusion that the LILCO Plan does not provide adequate assurance as required by the regulations.38/

(Footnote cont'd.)

monitoring eliminates conflict and absence of public officials may enhance emergency response).

38/ The Board's decision to put little weight on the involvement of contractors and the possible involvement of NRC personnel in command and control decisions is fully supported by the evidentiary record. Thus, there was testimony that while the DOE-RAP team and the consultant Radiation Health Coordinator theoretically are involved in the decision-making process, in fact they are not part of the top level LERO

(Footnote cont'd.)

Finally, LILCO attacks the Commission by suggesting that it should "clarify its own responsibilities rather than reject utility plans." Brief, p. 65. This attack is simply another version of LILCO's argument that a factual finding that a portion of its plan is inadequate constitutes either a challenge to the regulations or a ruling that all utility plans are inadequate. While LILCO is entitled to an opportunity to show that there can be adequate preparedness under its plan, no utility, including LILCO, is guaranteed that the NRC will find, as a factual matter, in its favor. The ASLB ruling in favor of Intervenors on Contention 11 was based on the evidence before it. LILCO states no basis for reversing that Decision.

(Footnote cont'd.)

command and control structure and actions can be taken without their input and contrary to their recommendations. Tr. 10,295-96, 10,307-09 (Weismantle); 10,788 (Olson). See OPIP 3.6.1 (LERO director has sole authority for making protective action recommendations). Furthermore, even though the NRC could be aware that an accident had occurred at Shoreham and could monitor its progress and LILCO's response, in the early minutes and hours of an accident, LILCO employees in command and control would be the only ones with the responsibility and information necessary to make all required command decisions, including protective recommendations to the public. See Tr. 15,235 (Schwartz).

III. THE BOARD'S RULING ON CONTENTION 92 SHOULD BE AFFIRMED

LILCO makes three basic arguments in asserting that the Board's ruling on Contention 92 should be reversed. Each of the arguments is meritless.

First, LILCO asserts that "the Board's decision on Contention 92 is essentially nonevidentiary." Brief, p. 66. This is incorrect; the Decision flows directly from the evidence, or lack thereof, concerning the factual issue raised in Contention 92. The contention alleges that there is no New York State emergency plan to deal with an emergency at Shoreham. LILCO concedes this point. Cordaro and Weismantle, ff. Tr. 13,899, p. 4. The contention alleges further that there can be no finding of compliance with 10 C.F.R. §§50.47(a)(2), 50.47(b), or NUREG-0654 Section I.E, I.F, I.H or II without a state plan for Shoreham. LILCO cannot cite any evidence of record that New York State would participate in an actual emergency at Shoreham or that any ad hoc state response would comply with NRC's regulations, be meaningful, coordinated or integrated with LILCO's proposed response or otherwise protect the public health and safety. See Decision, pp. 367-71. The ASLB's conclusion that there is no "reasonable assurance that an integrated or coordinated emergency response that included the State would occur" in the event of a Shoreham emergency is fully supported by the record. Any contrary conclusion would be purely speculative and erroneous.39/

39/ LILCO's suggestion that its plan "has provided for the participation of state officials," is meaningless in light of

(Footnote cont'd.)

Second, LILCO asserts that there is no support for the ASLB's finding that the State has greater capability than does LILCO.40/ Brief, p. 66. This ignores the obvious. LILCO itself concedes that "a state has greater resources than a utility," Brief, p. 67. There is no question that the State has legal authority which LILCO lacks. There is no need for "evidence" of these uncontroverted facts. LILCO's assertion that the State's substantial legal authority, resources and capabilities are "irrelevant" is simply incorrect. NRC regulations and guidance are premised upon the need for an integrated emergency response by state and local government officials and the utility; accordingly, the fact that the greater resources, authority and commitment of the State are lacking in this case is not only relevant but dispositive of Contention 92. See Decision, pp. 369-71.

(Footnote cont'd.)

the State's unwillingness to assist LILCO in its planning efforts. As the ASLB stated, "LILCO's willingness to cooperate and coordinate and its preparations for that contingency do not provide reasonable assurance that cooperation with New York State would actually occur ...." Decision, pp. 368-69. There is no evidence of record upon which the ASLB could base a finding as to what a "coordinated" response would consist of in this case.

40/ The ASLB finding was: "Clearly the State has broader powers and resources than those called for in performing the four specific elements of state emergency function .... The Board need not specify a long list of contingent possibilities as to how future accidents might play out to find that absence of commitment, resources, and decisionmaking capability and authority of the State together with similar absences on the part of the County constitutes a serious deficiency in the plan." Decision, pp. 370-71.

Third, LILCO urges that the Board's Contention 92 ruling "reads 'utility plans' out of the law and nullifies the Commission's decision of two years ago." Brief, p. 67. Once again, this argument ignores the fact that the ASLB's decision is limited to the facts of the Shoreham case and the evidence before it relating to the LILCO Plan. There is no basis for LILCO's assertion that the ASLB's decision is applicable to any other case or set of facts. Moreover, LILCO's argument completely mischaracterizes the Commission's 1983 decision.41/ The 1983 NRC decision held that LILCO should be given an opportunity to demonstrate that its utility-implemented plan could be an adequate substitute for a local government-approved emergency response plan.42/ In rendering that decision, the Commission chose not to anticipate events:

> [the utility's plan will] be examined by the Federal Emergency Management Agency, the NRC Staff, and ultimately the Licensing Board in the pending Shoreham adjudication in which the licensee will bear the burden of showing that its plan can meet all applicable regulatory standards. We express no opinion at this juncture whether it will be possible for the utility to meet its burden ....

17 NRC at 743. The Board's finding that LILCO has not met its burden in this case is based on the evidence. It is clearly correct. And, it is not in conflict with the Commission's 1983 decision. It should be upheld by this Board.

41/ Long Island Lighting Co. (Shoreham Nuclear Power Plant) CLI-83-13, 17 NRC 741 (1983).

42/ That decision was rendered before the Governor's Shoreham fact-finding panel had issued its report and before the Governor had determined to oppose the licensing of Shoreham.

CONCLUSION

For each of the reasons set forth above, Intervenors submit that the ASLB Decision on Contentions 1-10, 11 and 92 should be affirmed.

Respectfully submitted,

Herbert H. Brown
Lawrence Coe Lanpher
Kirkpatrick & Lockhart
1900 M Street, N.W.
Suite 800
Washington, DC 20036

David A. Brownlee
Michael J. Lynch
Kenneth M. Argentieri
Kirkpatrick & Lockhart
1500 Oliver Building
Pittsburgh, PA 15222

Attorneys for Suffolk County

Fabian G. Palomino, Esq.
Special Counsel to the Governor
of the State of New York
Executive Chamber
Two World Trade Center
57th Floor
New York 10047

Attorney for the Governor of
the State of New York

July 11, 1985

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that copies of BRIEF OF SUFFOLK COUNTY AND THE STATE OF NEW YORK IN OPPOSITION TO LILCO'S APPEAL FROM THE ATOMIC SAFETY AND LICENSING BOARD'S PARTIAL INITIAL DECISION ON EMERGENCY PLANNING dated July 11, 1985, have been served on the following this 11th day of July, 1985 by U.S. mail, first class, except as otherwise noted.

Alan S. Rosenthal, Chairman*
Atomic Safety and Licensing Appeal Board, U.S. Nuclear Reg. Com.
4350 East-West Highway
Bethesda, MD 20814

Howard A. Wilber*
Atomic Safety and Licensing Appeal Board, U.S. Nuclear Reg. Com.
4350 East-West Highway
Bethesda, MD 20814

Gary J. Edles*
Atomic Safety and Licensing Appeal Board, U.S. Nuclear Reg. Com.
4350 East-West Highway
Bethesda, MD 20814

Morton M. Margulies, Chairman
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Com.
4350 East-West Highway
Bethesda, MD 20814

Edwin J. Reis, Esq.*
Bernard M. Bordenick, Esq.
U.S. Nuclear Regulatory Com.
7735 Old Georgetown Road
Bethesda, MD 20814

Dr. Jerry R. Kline
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Com.
Washington, DC 20555

W. Taylor Reveley, III, Esq.*
Hunton & Williams
P.O. Box 1535
707 East Main Street
Richmond, VA 23212

Mr. William Rogers
Clerk, Suffolk County Legislature
Suffolk County Legislature Office Building
Veterans Memorial Highway
Hauppauge, NY 11788

Mr. Frederick J. Shon
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Com.
Washington, DC 20555

Anthony F. Earley, Esq.
General Counsel
Long Island Lighting Company
175 E. Old Country Road
Hicksville, New York 11801

Spence W. Perry, Esq.
Associate General Counsel
Federal Emergency Management Agency
500 C Street, S.W., Room 840
Washington, DC 20472

Mr. Lawrence F. Britt
Long Island Lighting Company
Shoreham Nuclear Power Station
P.O. Box 618
North Country Road
Wading River, New York 11792

Joel Blau, Esq.
New York Public Service Com.
The Gov. Nelson A. Rockefeller Building
Empire State Plaza
Albany, New York 12223

Martin Bradley Ashare, Esq.*
Suffolk County Attorney
H. Lee Dennison Building
Veterans Memorial Highway
Hauppauge, New York 11788

Atomic Safety and Licensing Board Panel
U.S. Nuclear Regulatory Com.
Washington, DC 20555

Donna D. Duer, Esq.
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Com.
Washington, DC 20555

Jay Dunkleberger, Esq.
New York State Energy Office
Agency Building 2
Empire State Plaza
Albany, New York 12223

Stephen B. Latham, Esq.
Twomey, Latham & Shea
P. O. Box 398
33 West Second Street
Riverhead, New York 11901

Ms. Nora Bredes
Executive Director
Shoreham Opponents Coalition
195 East Main Street
Smithtown, New York 11787

MHB Technical Associates
1723 Hamilton Avenue
Suite K
San Jose, California 95125

Hon. Peter F. Cohalan
Suffolk County Executive
H. Lee Dennison Building
Veterans Memorial Highway
Hauppauge, New York 11788

Fabian G. Palomino, Esq.*
Special Counsel to the Governor
Executive Chamber
Two World Trade Center
57th Floor
New York, New York 10047

Docketing and Service Section
Office of the Secretary
U.S. Nuclear Regulatory Com.
1717 H Street N.W.
Washington, DC 20555

James B. Dougherty, Esq.
3045 Porter Street, N.W.
Washington, DC 20008

Mr. Stuart Diamond
Business/Financial
NEW YORK TIMES
229 W. 43rd Street
New York, New York 10036

Mary M. Gundrum, Esq.
New York State Department
of Law
2 World Trade Center,
Room 4614
New York, New York 10047

Atomic Safety and Licensing
Appeal Board
U.S. Nuclear Regulatory Com.
Washington, DC 20555

Jonathan D. Feinberg, Esq.
Staff Counsel
New York State Public
Service Commission
3 Rockefeller Plaza
Albany, New York 12223

Stewart M. Glass, Esq.
Regional Counsel
Federal Emergency Management
Agency
26 Federal Plaza, Room 1349
New York, New York 10278

David A. Brownlee

David A. Brownlee
KIRKPATRICK & LOCKHART
1500 Oliver Building
Pittsburgh, PA 15222

DATE: July 11, 1985

* By Sky Courier