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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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

NRC STAFF'S BRIEF IN RESPONSE TO LONG ISLAND LIGHTING COMPANY'S APPEAL FROM THE PARTIAL INITIAL DECISION ON EMERGENCY PLANNING OF APRIL 17, 1985

Sherwin E. Turk
Deputy Assistant Chief
Hearing Counsel

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STATEMENT OF THE CASE

Introduction

This case arises as an appeal by Applicant Long Island Light Company ("Applicant" or "LILCO") from the Partial Initial Decision ("PID") on emergency planning issued by the Atomic Safety and Licensing Board in this proceeding on April 17, 1985. 1/ In its PID the Licensing Board resolved virtually all outstanding offsite emergency planning issues in LILCO's favor, except in three areas: (1) LILCO's lack of legal authority to implement various aspects of its offsite emergency plan (Contentions 1-10); (2) a conflict of interest involving LILCO employees who would occupy a "command and control" function in the event of an emergency (Contention 11); and (3) the lack of a New York State offsite

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1/ Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-85-12, 21 NRC 644 (1985).

emergency plan (Contention 92). [2/] One contested emergency planning issue (on the relocation center) remains to be resolved and will be addressed by the Licensing Board in a further partial initial decision, [3/] at which time the Licensing Board will render its "ultimate decision as to whether 'there is reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency' at Shoreham" (id., at 919-20). On May 2, 1985, LILCO filed its notice of appeal from the PID and on June 3, 1985, LILCO filed its brief [4/] in support of that appeal. [5/]

Pursuant to 10 C.F.R. § 2.762(c), the NRC Staff ("Staff") hereby files its brief in response to LILCO's appeal. For the reasons more fully set forth herein, the Staff submits that the Licensing Board correctly resolved the legal authority and state plan issues as to which LILCO appeals (Contentions 1-10 and 92) and, accordingly, the Staff opposes LILCO's appeal on those matters. At the same time, the Staff

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2/ The Licensing Board also found various minor deficiencies in LILCO's plan, which did not prevent the plan's approval, and left it to the Staff to confirm LILCO's rectification of these minor matters. LILCO has not appealed from these determinations.

3/ Reopened hearings on the relocation center issue were held on June 25-26, 1985. Proposed findings of fact and conclusions of law are due to be filed by all parties on or before July 22, 1985; and reply findings, if any, are to be filed by July 26, 1985.

4/ "LILCO's Brief Supporting Its Position On Appeal From The 'Partial Initial Decision on Emergency Planning' of April 17, 1985," dated June 3, 1985 ("App. Br.").

5/ Appeals from other aspects of the Licensing Board's PID have been filed by Suffolk County and the State of New York, and are to be briefed separately from the instant appeal by LILCO.

submits that the Licensing Board erred in deciding the conflict of interest issue (Contention 11) and its decision as to that issue should be reversed.

Background and Reference to Rulings

On February 17, 1983, the Suffolk County legislature resolved that it would not approve or implement an offsite emergency plan for the Shoreham facility, due to its determination that local conditions on Long Island would preclude any offsite plan from being implemented effectively (Suffolk County Leg. Reg. No. 111-1983). Suffolk County then moved to terminate this operating license proceeding, on the grounds that LILCO would be unable to demonstrate compliance with the Commission's emergency planning regulations without the County's participation in adopting and implementing an offsite plan. The Licensing Board denied Suffolk County's motion on April 20, 1983, and referred its ruling to the Commission; 6/ the Commission affirmed the Board's ruling in pertinent part, on May 12, 1983, 7/ holding that it was bound to consider an offsite emergency plan proffered by a utility in the absence of State or county plans. LILCO's Transition Plan, submitted on May 26, 1983,

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6/ Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-22, 17 NRC 608, aff'd on other grounds, CLI-83-13, 17 NRC 741 (1983). As noted by the Licensing Board, the County's motion "was limited to the legal issue of whether a county's refusal to prepare or implement a radiological emergency response plan operates as a veto, precluding as a matter of law the issuance of a full power operating license for a nuclear power plant." PID at 649 (emphasis added).

7/ Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-83-13, 17 NRC 741 (1983).

provided for the establishment of a Local Emergency Response Organization (LERO) to be comprised of LILCO employees and contractor personnel, which would be responsible for the performance of various offsite emergency response functions.

Intervenors' offsite emergency planning contentions (including Contentions 1-10, 11, and 92) were filed in revised form on July 26, 1983, [8/] and were admitted for litigation on August 19, 1983. [9/] Hearings on the contentions commenced in August 1983 and concluded in August 1984; no hearings were held on Contentions 1-10, and the parties agreed that no such hearings were necessary (Tr. 13,823 (LILCO); Tr. 13,831 (Suffolk County); Tr. 13,832 (State of New York); and Tr. 13,834 (NRC Staff). [10/] Following repeated suggestions by the

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8/ Intervenors' proposed emergency planning contentions (Phase II) were originally filed on July 7, 1983, as their "Consolidated Emergency Planning Contentions"; these contentions were then reorganized and submitted in revised form on July 26, 1983, as Intervenors' "Revised Emergency Planning Contentions". The contentions are set forth in full text in Appendix C to the PID. See 21 NRC, at 958 et seq.

9/ In admitting Contentions 1-10, the Licensing Board observed that "these contentions present questions of law which may be amenable to disposition without hearing." Special Prehearing Conference Order (Ruling on Contentions and Establishing Schedule for Discovery, Motions, Briefs, Conference of Counsel, and Hearing)," dated August 19, 1983, at 3-4.

10/ Contentions 1 and 2 concern LILCO's proposal to station traffic guides at key intersections to direct or guide traffic in the event of an emergency, although traffic will not be prohibited from moving in particular directions; flares, traffic cones, and stationary vehicles are to be placed on the roadways as a means of channeling traffic; various traffic lanes are to be blocked, and a two-mile section of roadway will be changed from two-way to one-way operation. Contention 3 concerns LILCO's proposal that, in advance of

(FOOTNOTE CONTINUED ON NEXT PAGE)

Licensing Board, 11/ in March 1984 actions seeking declaratory judgment were filed before the New York Supreme Court for Suffolk County, by the State of New York, Suffolk County, and the Town of Southampton, concerning the legal authority questions raised by Contentions 1-10.

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any emergency, it will post "trailblazer" signs along the major roads in the EPZ (this is the only pre-emergency function to be exercised by LILCO that is challenged in Contentions 1-10). Contention 4 concerns LILCO's plan, in the event of an emergency, for LERO personnel to utilize LILCO's tow trucks and line trucks to remove stalled cars and other obstructions from the roadways. Contention 5 concerns LILCO's plan, in the event of an emergency, to activate the prompt notification system (consisting largely of a system of fixed sirens, tone alert radios, and the emergency broadcast system). LILCO employees will determine the content of the EBS messages, will decide when the EBS broadcast should be made, and will initiate the broadcast; LILCO has made arrangements with local radio stations to carry the EBS messages. Contentions 6, 7 and 8 concern LILCO's proposal that it make decisions and recommendations to the public for protective responses during an emergency; such recommendations will be made for persons within both the 10-mile plume exposure pathway EPZ and the 50-mile ingestion pathway EPZ, as well as with respect to reentry and recovery. Contention 9 addresses LILCO's plan to dispense fuel from tank trucks, stationed near evacuation routes, to any motorists who may run out of fuel during an evacuation. Contention 10 addresses LILCO's proposal that its personnel identify persons entering the EOC (located on LILCO's property), maintain perimeter/access control to evacuated areas, and assist people at the relocation centers (all of which are located in adjacent Nassau County); LILCO personnel are not expected to use threats or force in maintaining access control, and will rely upon the Nassau County police to provide any necessary security at the relocation centers. References to these matters are set forth in the "NRC Staff's Response Pursuant to the Licensing Board's Memorandum and Order of October 22, 1984," dated December 7, 1984, at 16-17, and 25-31.

11/ The Licensing Board stated that it "believes that these legal contentions are properly matters to be disposed of by the New York State courts." (Tr. 3675). See also, Tr. 715, 2229, 2390, and 3661-62.

On August 6, 1984, LILCO moved for summary disposition on Contentions 1-10. [12/] LILCO's motion "assume[d], for the sake of argument, that the Intervenors . . . are correct that state law prohibits LILCO from taking the actions specified in Contentions 1-10," and then argued that those laws are preempted by federal law, and/or that the contentions should be resolved in LILCO's favor, as a factual matter, on grounds of "realism" and/or "immateriality" (see PID at 896). Responses in opposition to LILCO's motion were filed by Suffolk County, the State of New York, and the NRC Staff (see id.).

On October 22, 1984, the Licensing Board issued a Memorandum and Order in which it deferred ruling on LILCO's motion for summary disposition, as premature under Appeal Board and Federal court precedents, until the issuance of its initial decision on other emergency planning matters (see id., at 897). [13/] The Licensing Board also requested briefs from the parties indicating "who they believe should prevail on each contention and why the contention should be resolved in that manner," and invited the parties to include in their briefs a discussion of the following issues:

1. In connection with LILCO's "immateriality" argument, whether the LILCO activities enumerated in Contentions 1-10 are necessary pursuant to NRC regulations in order to obtain an operating license.

12/ "Motion for Summary Disposition of Contentions 1-10 (The 'Legal Authority' Issues)", dated August 6, 1984.

13/ "Memorandum and Order Deferring Ruling on LILCO Motion for Summary Disposition and Scheduling Submission of Briefs on the Merits," dated October 22, 1984.

2. In connection with LILCO's "realism" argument, what effect would an unplanned response by the State or County have and would such a response result in chaos, confusion and disorganization so as to compel a finding that there is no "reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency" at Shoreham? (see id.). 14/

Briefs in response to the Licensing Board's Memorandum and Order were filed by all parties on or before December 7, 1984.

On February 20, 1985, the New York Supreme Court, Suffolk County, issued its decision on the Intervenors' consolidated actions for a declaratory judgment on LILCO's legal authority to implement its offsite emergency plan. 15/ In its decision, the Supreme Court found that in the implementation of LILCO's plan by LILCO employees and contractors, LILCO would be performing activities which are inherently governmental in nature and which fall within the State's historic police powers, and that as a private corporation, LILCO does not have a right to exercise these governmental functions. 16/ An appeal from this decision has been noticed by LILCO before the Appellate Division of the New York Supreme

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14/ The Licensing Board also requested the parties' views as to what action the Board should take on Contentions 1-10 in the event that there is no decision from a New York State court at the time the Initial Decision on emergency planning proceeding is issued; this question was mooted by subsequent events.

15/ Cuomo v. Long Island Lighting Co., Consol. Index No. 84-4615 (N.Y. Sup. Ct., Feb. 20, 1985).

16/ While Contentions 1-10 asse[illegible] that specific New York State and local statutes prohibit the activities specified in those contentions, the State and Suffolk County primarily argued in the State court that those activities were unlawful as a usurpation of the State's police powers. Accordingly, the New York Supreme Court did not address the specific State and local statutes cited in Contentions 1-10.

Court, Second Judicial Department, although briefs have not yet been filed.

On February 27, 1985, LILCO renewed its motion for summary disposition of the legal authority issues (Contentions 1-10), on the grounds that New York law is preempted by Federal law to the extent that the State's laws preclude LILCO from implementing its offsite emergency plan. 17/ On April 17, 1985, following the filing of responses to LILCO's renewed motion for summary disposition (see PID at 899), the Licensing Board issued its Partial Initial Decision. The instant appeal by LILCO, as well as appeals by the State of New York and Suffolk County from other portions of the PID were then filed.

STATEMENT OF ISSUES

1. Whether the Licensing Board correctly held that Federal law does not preempt the laws of New York State, insofar as those laws prevent LILCO from undertaking the sweeping responsibilities allocated to it by its proposed offsite emergency plan.

2. Whether, in view of the presently undeveloped state of the record, the Licensing Board properly rejected LILCO's assertion of a "realism" defense, whereby LILCO claimed that Suffolk County and the State of New York would respond in real emergency, thus curing LILCO's lack of authority to implement its offsite emergency plan.

17/ "LILCO's Renewal Motion for Summary Disposition of Legal Authority Issues on Federal Law Grounds", filed February 27, 1985.

3. Whether the Licensing Board properly rejected LILCO's "immateriality" defense with respect to Contentions 1-4, 9 and 10, where the traffic control functions specified in those contentions had been incorporated in LILCO's offsite emergency plan as a means of demonstrating compliance with the Commission's emergency planning regulations and regulatory guidance.

4. Whether the Licensing Board correctly held that a conflict of interest was created by LILCO's offsite emergency plan, by the placement of LILCO employees in various "command and control" functions which are normally assigned to governmental officials, in that those individuals would not possess sufficient independence from LILCO in the event of an actual emergency (Contention 11).

5. Whether the Licensing Board correctly held that in the absence of a site-specific New York State plan, and given the uncertainties as to how the State might react in the event of an emergency, the lack of preplanned and assured State participation in implementing LILCO's "Transition Plan" constitutes a serious substantive deficiency in emergency preparedness at Shoreham (Contention 92).

ARGUMENT

I. THE LICENSING BOARD CORRECTLY HELD THAT FEDERAL LAW DOES NOT PREEMPT THE LAWS OF NEW YORK STATE, INSOFAR AS THOSE LAWS PREVENT LILCO FROM UNDERTAKING THE SWEEPING RESPONSIBILITIES ALLOCATED TO IT UNDER ITS OFFSITE EMERGENCY PLAN.

In its PID the Licensing Board deferred to the New York Supreme Court's ruling of February 20, 1985, in view of that Court's "juris-

diction and expertise" to decide the State law issues (PID at 899). 18/ Accordingly, the Board accepted the State Supreme Court's finding that the actions cited in Contentions 1-10 (see n.10, supra), are prohibited by New York law. (Id.). Further, the Board found that the question was ripe for decision, 19/ that no useful purpose would be served by awaiting

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18/ LILCO does not here contest the State Court's decision on State law issues (App. Br. at 5). The Licensing Board's determination to defer to the State court's ruling on State law issues is consistent with prior Appeal Board decisions. The Appeal Board has, at times, determined questions of State law. See, e.g., Public Service Co. of Indiana (Marble Hill Nuclear Generating Station, Units 1 and 2), ALAB-493, 8 NRC 253, 266 (1978) (determining the border between Kentucky and Indiana for purposes of deciding whether an effluent discharge certificate had been obtained from the proper State). However, the Appeal Board has generally remarked that questions of State law should be resolved by State courts or agencies, on grounds of comity or lack of agency expertise. See, e.g., Northern States Power Co. (Tyrone Energy Park, Unit 1), ALAB-464, 7 NRC 372, 375 (1978) ("The requirements of State law are beyond our ken; such matters are for the State regulatory commission"); Cleveland Electric Illuminating Co. (Perry Nuclear Power Plant, Units 1 and 2), ALAB-443, 6 NRC 741, 748 (1977) (Board's role was limited to deciding Federal issues and not questions of State law; plant construction would not be suspended pending a resolution of those questions by the State courts, where asserted potential outcome could not be known); Southern California Edison Co. (San Onofre Nuclear Generating Station, Units 2 and 3), ALAB-189, 7 AEC 410, 412 (1974) (construction would not be stayed pending outcome of marine environment study required by State Coastal Commission).

19/ The Licensing Board's "ripeness" determination is consistent with the Appeal Board's decisions in Consolidated Edison Co. of New York (Indian Point Station, Unit No. 2), ALAB-399, 5 NRC 1156, 1170 (1977), and Consolidated Edison Co. of New York (Indian Point Station, Unit No. 2), ALAB-453, 7 NRC 31, 35, 37 (1978). While the Appeal Board there required proper deference to the prior decision of the Appellate Division, the highest New York State court to have decided the State law question at that time, the Appeal Board did not require the Licensing Board to await the outcome of a pending motion for leave to appeal to the Court of Appeals, in view of the

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appellate review of the Supreme Court's ruling, and that the Board was empowered to decide the federal preemption question.

As noted by the Licensing Board (PID at 900-01), the preemption doctrine is founded in the Supremacy Clause of the United States Constitution, Article VI, Clause 2. That Clause provides as follows:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding. 20/

Congress' authority to legislate in the field of atomic energy has been broadly recognized, based upon its "constitutionally granted powers over the common defense and security, interstate and foreign commerce and promotion of the general welfare." Northern States Power Co. v. Minnesota, 447 F.2d 1143, 1147 (8th Cir. 1971), aff'd mem., 405 U.S. 1035 (1972), citing the Atomic Energy Act of 1954, as amended, §§ 1 and 2, 42 U.S.C. §§ 2011, 2012.

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delay that had already occurred and the fact that time was "of the essence." ALAB-399, supra, 5 NRC at 1168, 1170-71; ALAB-453, supra, 7 NRC at 36, 37 n.29.

20/ The Supremacy Clause has often been read in conjunction with the Tenth Amendment to the Constitution, with which it has been noted to be in tension; that Amendment provides as follows:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

In determining whether federal laws are preemptive, it must be ascertained whether Congress has acted "in such a manner as to exclude the States from asserting concurrent jurisdiction over the same subject matter." Id., 447 F.2d at 1146. This federal preemption may be established in either of two general ways. First, Congress' intent to occupy a given field to the exclusion of the States may be demonstrated either by its so stating in explicit terms, or by its establishment of a "'scheme of federal regulation so pervasive as to make reasonable the inference that Congress left no room to supplement it.'" Pacific Gas & Electric Co. v. State Energy Resources Conservation and Development Commission, 461 U.S. 190, 203-204 (1983), citing Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977); Fidelity Federal Savings & Loan Ass'n. v. de la Cuesta, 458 U.S. 141, 153 (1982); and Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947). Secondly, federal preemption may be established by the existence of an "actual conflict" between the State and federal laws:

> Even where Congress has not entirely displaced state regulation in a specific area, state law is preempted to the extent that it actually conflicts with federal law. Such a conflict arises when "compliance with both federal and state regulations is a physical impossibility," Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-43 (1963) or where state law "stands as an obstacle to the accomplish-ment and execution of the full purposes and objectives of Congress." Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

Pacific Gas & Electric Co., supra, 461 U.S. at 204. Accord, Silkwood v. Kerr-McGee Corp., 464 U.S. 238, ___, 78 L. Ed. 2d 443, 452 (1984).

The Licensing Board correctly applied these principles in rejecting LILCO's assertion that federal law preempts the laws of New York State, insofar as those laws preclude LILCO from implementing its offsite emergency plan. The Board observed, first, that Congress had not explicitly preempted state laws in the area of offsite emergency planning:

> The parties do not maintain, nor have we found, that Congress has expressly occupied the area of offsite emergency planning for nuclear power plants. The Atomic Energy Act of 1954, as amended, is silent with respect to offsite emergency planning. It does not address the responsibility and authority of State and federal governments to regulate in this area. Nor do the 1980, 1982-83, or 1984-85 NRC Authorization Acts provide an express statement of Congressional intent to preempt State law.

(PID at 901). 21/

Having so found, the Board proceeded to determine if there existed either a "pervasive" scheme of federal regulation or an "actual conflict" between State and federal laws, such as to warrant a finding of implied preemption. In so doing, the Licensing Board applied a fundamental principle of Constitutional law, that federal preemption in areas which are within the States' traditional police powers must be predicated upon a finding of "clear and manifest" preemptive intent by Congress:

> The State and local laws which Judge Geiler, of the New York State Supreme Court, ruled prohibit LILCO from performing the functions described in Contentions 1-10 were enacted pursuant to the State's police powers. A conclusion that a State's traditional police powers are preempted must be premised on a finding that it was the "clear and manifest purpose of Congress" to supersede State

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21/ On appeal, as before the Licensing Board, LILCO has not contended that Congress explicitly preempted State law in this area.

> law. Pacific Gas & Electric Co., supra, 461 U.S. 190, 75 L. Ed. 2d at 766; Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230, 91 L. Ed. 1447 (1947). Thus, a mere inference that Congress intended to preempt State law will not be sufficient to support a finding of preemption where State police powers are involved.

(PID at 901-02). Moreover, the Licensing Board noted that LILCO, as the party seeking to show preemption, "carries the burden of demonstrating that it was the 'clear and manifest purpose' of Congress to preempt State law." (Id., at 902; citations omitted). 22/

A. Congress Did Not Intend to Occupy the Field of Offsite Emergency Planning.

With respect to whether there is a "scheme of federal regulation so pervasive as to make reasonable the inference that Congress left no room to supplement it," the Licensing Board properly recognized that the Commission has been assigned responsibility for regulating the construction and operation of nuclear power plants, pursuant to

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22/ In holding that LILCO bears the burden of demonstrating Congress' intent to preempt State law, the Licensing Board rejected LILCO's argument that such intent should be presumed, on the theory that "[t]he federal government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the States." (See also App. Br. at 12-16). While the principle cited by LILCO has generally been held to be valid, it does not clearly apply in this instance. Offsite emergency planning presents certain unique circumstances, unrelated to most nuclear facility licensing issues, in that the States have traditionally been responsible for disaster preparedness under their police powers, and are more experienced and better qualified to direct public responses in instances of disaster. Moreover, many aspects of offsite emergency planning do not require the Commission's technical expertise in matters associated with nuclear power. See discussion infra, at 17-20.

§ 274(a)(1) of the Atomic Energy Act, 42 U.S.C. § 2011 et. seq. (PID at 902). The Board further noted, however, that a limitation on the NRC's authority is provided by § 274(k) of the Act, which provides that "nothing in this section shall 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(k). 23/

These statutory provisions were recently analyzed and interpreted by the Supreme Court in Pacific Gas and Electric Co., supra. There, the Supreme Court held that a California statute imposing a moratorium on the certification of new nuclear plants was not preempted by the Atomic Energy Act, where the California law was based upon the State's concern that nuclear power might become an uncertain and uneconomical source of energy in the absence of a prior resolution of waste disposal problems. The Court recognized that Congress had not exclusively occupied the field of nuclear power regulation in all of its respects, but that certain

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23/ In addition, Section 271 of the Act provides:

> Nothing in this chapter shall be construed to affect the authority or regulations of any Federal, State or local agency with respect to the generation, sale, or transmission of electric power produced through the use of nuclear facilities licensed by the Commission: Provided, that this section shall not be deemed to confer upon any Federal, State or local agency any authority to regulate, control, or restrict any activities of the Commission.

42 U.S.C. § 2018. As noted by the Licensing Board (PID, at 903), "[t]his section was enacted to allow States to exercise the same regulatory authority over nuclear power as they had over the production of electricity by other means." See Pacific Gas and Electric Co., supra, 461 U.S. at 205, 208-12.

areas of regulation were left to the States -- even if the States' exercise of their authority might affect the determination as to whether a nuclear power plant would be built:

> Even a brief perusal of the AEA reveals that despite its comprehensiveness it does not at any point expressly require the States to construct or authorize nuclear power plants or prohibit the States from deciding, as an absolute or conditional matter, not to permit the construction of any further reactors . . . as we view the issue, Congress, in passing the 1954 Act and in subsequently amending it, intended that the federal government should regulate the radiological safety aspects 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 & Electric Co., supra, 461 U.S. at 205.

In sum, while the regulation of radiological health and safety matters associated with the operation of nuclear power reactors has consistently been recognized to be the exclusive province of the federal government under the Atomic Energy Act, 24/ the Supreme Court's decision in Pacific Gas and Electric Co. teaches that where a State's laws are enacted pursuant to powers which it has traditionally exercised, for

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24/ See, e.g., Silkwood supra, 464 U.S. at ___, 78 L. Ed. 2d at 452-53; Pacific Gas & Electric Co., supra, 461 U.S. at 205, 207; Northern States Power Co., supra, 447 F.2d at 1149-54.

purposes unrelated to radiological health and safety, 25/ such preemption should not be presumed. 26/

Further, the Supreme Court's decision in Silkwood, supra, instructs that where a State acts in areas in which the Commission's expertise in radiological matters is not required, preemption should not be presumed. There, the Supreme Court held that a State-authorized award of punitive

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25/ LILCO's assertion that the PID "misapplies" the "state purpose" test, and that "the state's purpose in regulating makes no difference to the preemption analysis" is incorrect. The State's purpose in legislating is clearly relevant to the preemption analysis and, indeed, was the central factor in the Supreme Court's reasoning in Pacific Gas and Electric Co., supra, 461 U.S. at 212-16.

LILCO also asserts that although the State laws were enacted with a non-radiological purpose, the Board should have considered the State and County's purpose in applying those laws (App. Br. at 19-23). However, a litigant's motive in seeking to apply laws which had been enacted for proper purposes is irrelevant to a determination as to whether the laws, themselves, should be preempted. Further, the Licensing Board correctly disposed of LILCO's assertion in this regard, citing the Supreme Court's refusal to look beyond the avowed purpose of the legislation and to avoid "becom[ing] embroiled in attempting to ascertain [the] State's true motive." (PID at 904, citing Pacific Gas and Electric Co., supra, 461 U.S. at 216. The decision in United States v. City of New York, 463 F. Supp. 604 (S.D.N.Y. 1978), is inapposite. There, unlike the circumstances surrounding the development of the State laws at issue here, both the purpose of the legislation and the manner in which it was applied by the City, demonstrated to the court that the law's real purpose was to regulate radiological health and safety matters.

26/ The 1983 Suffolk County resolution (Leg. Reg. 111-1983) should be contrasted with the statute analyzed in Pacific Gas and Electric Co. Whereas the California statute was motivated by non-radiological concerns, Suffolk County's resolution clearly resolved that adequate emergency preparedness cannot be implemented through any radiological emergency plan; as such, its purpose was to attempt to regulate radiological health and safety matters, and it was held by the Licensing Board to be preempted by the Atomic Energy Act. See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-22, 17 NRC 608, 640, aff'd on other grounds, CLI-83-13, 17 NRC 741 (1983); cf. United States v. City of New York, supra.

damages, in a tort action arising from the escape of plutonium from a federally-licensed nuclear facility, was not preempted by Congress -- notwithstanding the fact that such damage awards are intended to penalize violations of nuclear safety standards and the fact that such standards and penalties are a subject of federal regulation. Central to the Court's reasoning was the fact that Congress had not demonstrated an intent to preclude the use of such damage awards. Moreover, as noted by the Licensing Board; preemption in the sphere of nuclear power regulation is premised on the Commission's technical expertise in nuclear matters:

> In analyzing the scope of preemption under the AEA, the Supreme Court noted "Congress' decision to prohibit the States from regulating the safety aspects of nuclear development was premised on its belief that the Commission was more qualified to determine what type of safety standards should be enacted in this complex area." Id. The Court found that Congress had decided that "technical safety considerations" relating to the handling of hazardous nuclear materials were of such "complexity" that regulation of such materials should be reserved to the NRC. Id.

(PID at 907, citing Silkwood, supra, 464 U.S. at ___, 78 L. Ed. 2d at 454.

These decisions require that the Licensing Board's PID on Contentions 1-10 in the instant case be affirmed. Here, as noted by the Licensing Board, the State laws at issue "were enacted pursuant to the State's police powers, for purposes totally unrelated to nuclear safety concerns." (PID at 904). These laws deal with such matters as the regulation of traffic, the broadcasting of instructions for emergency actions, and the supervision and control of the public's emergency response. Such functions are traditionally performed by State and local

governments under their police powers, without regard to whether a particular emergency has a nuclear or non-nuclear origin. The fundamental allocation of powers discussed in the New York Supreme Court's decision was extant long before LILCO submitted an application to construct the Shoreham facility, and existed "for purposes totally unrelated to nuclear power or emergency planning." (Id.). Under the Supreme Court's decision in Pacific Gas and Electric Co., the Licensing Board correctly determined that these laws may not be preempted absent a "clear and manifest" Congressional intent. 27/ Moreover, as noted by the Board (PID at 907), rather than raising highly technical radiological issues for which the Commission's expertise is required, offsite emergency planning "raises a host of questions more akin to land use, in that local conditions and the capabilities of local agencies will determine how plans for evacuation, transportation, and relocation will be implemented." Accordingly, because offsite emergency planning clearly requires the expertise of State and local governments in managing public

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27/ In pleadings filed before the Licensing Board, the Staff had rejected the Intervenors' "police powers" theory, and argued that LILCO's actions were only unlawful if they contravened specific statutory enactments. The Staff then found that the specific statutes cited in Contentions 1-10 precluded LILCO from performing the functions described in Contentions 1-4, 9 and 10 (all of which dealt with traffic control or EOC/EPZ access measures), but that New York law did not prohibit LILCO from performing the recommendation functions specified in Contentions 5-8. See "NRC Staff's Response Pursuant to the Licensing Board's Memorandum and Order of October 22, 1984," dated December 7, 1984, at 12-31. Notwithstanding our previously stated views, however, we recognize the State Supreme Court's greater expertise in matters of State law, and we accept that Court's views pending appellate review.

disaster responses, [28] the Court's decision in Silkwood instructs that State laws affecting offsite emergency planning should not be viewed to be preempted absent "clear and manifest" Congressional intent.

The Licensing Board carefully analyzed the legislative history of the Atomic Energy Act and other applicable enactments by Congress, and correctly found that Congress had not exhibited a "clear and manifest" purpose of reserving to the Commission exclusive authority to regulate in the sphere of offsite emergency planning. (PID at 9C4-06).

Neither the Atomic Energy Act nor the Energy Reorganization Act of 1974, 42 U.S.C. § 5801 et seq., addresses the issue of emergency planning or the respective responsibilities and authorities of State and Federal governments to regulate in this area; [29] nor is there anything in the legislative history of those Acts which demonstrates a preemptive intent in this regard. While LILCO asserts that such preemptive intent is

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28/ While the Commission's technical expertise and guidance may well be important to the safe resolution of nuclear plant emergencies and to the protection of the public health and safety, lead responsibility for evaluating offsite emergency preparedness has been assigned to the Federal Emergency Management Agency, in recognition of that agency's expertise in offsite disaster preparedness matters. See, e.g., 10 C.F.R. § 50.47(a)(2); and "Memorandum of Understanding Between Federal Emergency Management Agency and Nuclear Regulatory Commission," 50 Fed. Reg. 15,485 (April 18, 1985). This assignment of responsibilities reflects the fact that in offsite emergency planning matters, the Commission's unique expertise in nuclear matters is only one of several factors to be considered.

29/ Although neither the Atomic Energy Act nor the Energy Reorganization Act explicitly addresses emergency planning, the Commission views its authority to regulate in this area as being founded upon the broad regulatory authority conferred by those Acts. See Statement of Consideration, "Emergency Planning," 45 Fed. Reg. 55,402, 55,403-404 (1980).

demonstrated by recent NRC Authorization Acts (see, App. Br. at 24-32), 30/ the Licensing Board correctly rejected that argument. As noted by the Board, these statutes permit the NRC to accept "utility plans" for review in the absence of State or local plans; however, they do not exclude State and local governments from submitting such plans in the first instance, or from performing an offsite emergency preparedness function. (See PID at 904). While it is true that Congress exhibited an intent "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" (App. Br. at 26), Congress did not address the subject of a plan's implementation, and did not indicate that a nuclear plant should be permitted to operate where its emergency plan could not be implemented under State law. 31/ Moreover, Congress was clearly willing to accept the continued performance by State and local governments of a role in the sphere of offsite emergency planning and preparedness, and recognized that State and local governments are normally responsible for developing offsite emergency plans for review by FEMA.

Rather than support LILCO's preemption argument, the Authorization Acts' legislative history demonstrates that Congress did not intend to

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30/ 1984-85 NRC Authorization Act, § 108, Pub. L. No. 98-553, 98 Stat. 2825 (1984); 1982/83 NRC Authorization Act, § 5, Pub. L. No. 97-415, 96 Stat. 2067 (1983); 1980 NRC Authorization Act, § 109, Pub. L. No. 96-295, 94 Stat. 780 (1980).

31/ See H.R. Rep. No. 98-103, Part 1, 98th Cong., 1st Sess. (May 11, 1983), cited in App. Br. at 35.

preempt State and local governments in the area of offsite emergency planning. As noted by the Board (PID at 905-06), Congress recognized that the States might fail or refuse to submit a workable emergency plan, but rejected proposals that would have required the States to plan, or that would have permitted the NRC to establish an interim plan for nuclear plants located in states without an acceptable plan. Also, the Board observed (PID at 905), that members of the Senate had acknowledged that the States were not required to engage in emergency planning, citing the following statement contained in a Senate committee report:

> State and local compliance with requirements for emergency planning is now voluntary. A utility seeking to operate a nuclear plant must present its own emergency plan for the plant and must establish arrangements with appropriate State and local authorities for assistance, but the State and local officials responsible for emergency response planning are under no compulsion to develop an acceptable plan. 32/

On this basis, the Licensing Board properly concluded that Congress, in enacting the Authorization Acts, had "acknowledg[ed] the potential veto power of a State" but had declined to override that veto power by allowing the NRC to establish interim emergency plans in the absence of a State plan (PID at 906). 33/

32/ Senate Comm. on Environment and Public Works, S. Rep. No. 176 on S.562, Pub. L. 96-295, at 45 (May 15, 1979), 96th Cong., 2d Sess. (1980), reprinted in U.S. Code Cong. & Ad. News 2257-58.

33/ The remarks of Senator Simpson, Congressman Pashayan, and various other Congressmen cited by LILCO (App. Br. at 27, 29-31), were offered as their individual views and should not be viewed as representing the views of either their Committees or the full

(FOOTNOTE CONTINUED ON NEXT PAGE)

This view of the preemption doctrine's applicability to offsite emergency planning is fully consistent with the published views of the Commission. The Commission recognized that State and local governments perform an important role in the area of offsite emergency planning and, in adopting its emergency planning regulations, the Commission declined to assert that its rules possessed preemptive authority. The Commission noted that various comments on the draft rules (1) had encouraged the Commission to seek additional legislation to compel the States and local governments to develop plans; (2) had suggested that, "in the absence of additional statutory authority, the proposed rule frustrates Congressional intent to preempt State and local government veto power over nuclear power plant operation"; and (3) had asserted that the proposed rule was unfair to utilities in that the "NRC is seen as in effect giving State and local governments veto over the operation of nuclear plants." Statement of Consideration, "Emergency Planning", supra, 45 Fed. Reg. at 55,404-405.

These comments withstanding, however, the Commission stated as follows:

> 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

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(FOOTNOTE CONTINUED FROM PREVIOUS PAGE)

Congress. As noted by the Supreme Court, "[w]hat motivates one legislator to vote for a statute is not necessarily what motivates scores of others to enact it." Pacific Gas and Electric Co., supra, 461 U.S. at 216.

> 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 . . . and Federal environmental laws. The Commission notes, however, that such considerations generally relate to a one-time decision on siting, whereas this rule requires a periodic renewal of State and local commitments to emergency preparedness. . . . The Commission believes, based on the record created by the public workshop, that State and local officials as partners in this undertaking will endeavor to provide fully for public protection.

Id., 45 Fed. Reg. at 55,404. 34/ In light of this pronouncement by the Commission -- after passage of the 1980 Authorization Act -- the Licensing Board properly found that the Commission, itself, "believed Federal law did not preempt State and local regulation, but that [offsite] emergency planning fell within the regulatory field left to the States." (PID at 906).

34/ The testimony of then NRC Chairman Joseph M. Hendrie before the Subcommittee on Environment, Energy, and Natural Resources, House Committee on Government Operations, is also instructive. As noted by the Licensing Board (PID at 905), Chairman Hendrie stated:

> The question is whether the NRC ought to have authority under the law to require a State or locality to [participate in emergency planning] . . . I am not quite sure. I would prefer to have the Congress recognize the nature of the problem and then let you decide whether it is appropriate for the Federal Government to come down and preempt an area which previously has been regarded as a State and local prerogative.

Id., citing Emergency Planning Around Nuclear Power Plants: Nuclear Regulatory Commission Oversight Hearings Before a Subcomm. of the Comm. on Government Operations, 96th Cong., 1st Sess. 534 (1979).

The Staff recognizes, of course, that the Commission's regulations requiring offsite emergency planning and preparedness are an "integral part" of the NRC's regulations, and were adopted for the purpose of protecting the public health and safety from potential radiological hazards associated with nuclear power plant operation (see App. Br. at 16-18). However, while in other areas of Commission regulation this purpose would trigger application of the preemption doctrine, a different result obtains for offsite emergency planning, where the Commission and FEMA rely significantly upon State and local emergency planning and preparedness to provide the requisite "reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency." Thus, 10 C.F.R. § 50.47(a) normally requires consideration as to whether State and local emergency plans "are adequate and whether there is reasonable assurance that they can be implemented." 35/ In addition, State and local officials are normally expected to perform

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35/ See also, Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), CLI-83-13, 17 NRC 741 (1983). The Staff disagrees with LILCO's assertion that the PID is inconsistent with the Commission's decision in CLI-83-13, which had permitted the Board to consider LILCO's plan (see App. Br. at 7-9). In CLI-83-13, the Commission determined only that it was authorized and obligated "to at least consider any proffered utility . . . plan," and it specifically declined to reach the federal preemption issue. CLI-83-13, supra, 17 NRC at 743. The Commission clearly stated that LILCO would "bear the burden of showing that its plan can meet all applicable regulatory standards," and it "express[ed] no opinion at this juncture whether it will be possible for the utility to meet this burden." (Id.). Moreover, the Commission did not express any view as to whether a utility's offsite plan could be found to be adequate in the absence of State and local implementation. See generally CLI-83-13, supra; and see id., 17 NRC at 744 (Commissioner Gilinsky's Separate Views).

certain functions under 10 C.F.R. § 50.47(b) and 10 C.F.R. Part 50, Appendix E. 36/

In light of these principles, LILCO's assertion that Congress left no room for the States to regulate in the field of offsite emergency planning and preparedness flies in the face of the clear recognition, by both Congress and the Commission, that the States perform an important role in this area. 37/

B. There Is No "Actual Conflict" Between the Federal and State Laws.

As to the existence of an "actual conflict" between State and Federal laws, the Licensing Board concluded that there was no "physical impossibility" of complying with both laws, and that State law did not stand as "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." (PID at 908-09, citing

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36/ See Statement of Consideration, supra, 45 Fed. Reg. at 55,404.

37/ The Staff disagrees with LILCO's assertion that the PID renders it impossible for any utility plan to be accepted and that the PID "reads 'utility plans' out of the law" in derogation of the recent NRC Authorization Acts. (App. Br. at 4, 9). The NRC Authorization Acts only go so far as to permit the NRC to consider a utility's offsite plan. There is no indication of Congressional intent that the utility's implementation of such a plan was to be approved in all cases, in the absence of State or county participation in such implementation. Moreover, the Licensing Board's PID does not preclude utility plans from being accepted in other cases, where (1) the State and local governments commit to implementing the utility's plan, (2) State law does not prohibit a utility from implementing an offsite plan, or (3) only certain functions are designated to be implemented by the utility, and an adequate plan could be implemented without the implementation of those particular functions.

Pacific Gas and Electric Co., supra, 461 U.S. at 204). 38/ First, the Licensing Board found that federal law did not require LILCO to perform the functions identified in Contentions 1-10, observing that one of those functions (activation of the public notification system) was actually reserved to governmental authorities under 10 C.F.R. Part 50, Appendix E, § IV.D.3 (PID at 908). Further, the Board found that "LILCO can point to no language by which the federal government compels LILCO to do any act or compels States and local governments to participate in the development of emergency plans" (Id.). The Board continued as follows (Id.):

> While it is true that LILCO cannot obtain a license without an adequate emergency plan, and that LILCO is forbidden by State and local law from performing certain acts required to make the plan adequate, nowhere does the federal government mandate that LILCO perform these functions. We are aware of the dilemma this poses for LILCO, but the issues surrounding the State's refusal to act pursuant to its police powers are not before this Board. We have no authority to fashion a remedy for LILCO's difficulties and find only that there is no "actual conflict" as that term has been used by the Supreme Court.

This determination is manifestly correct. While LILCO contends that its license may be denied absent a finding of "actual conflict" and

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38/ A determination as to whether State and Federal laws actually conflict requires an interpretation of both the State and federal statutes:

> Deciding whether a state statute is in conflict with a federal statute and hence invalid under the Supremacy Clause is essentially a two-step process of first ascertaining the construction of the two statutes and then determining the constitutional question whether they are in conflict. . . .

Perez v. Campbell, 402 U.S. 637, 644 (1971).

application of the preemption doctrine, it does not follow that the federal government should intrude into areas historically reserved to the States merely because, absent such intrusion, LILCO's license application might be denied. Indeed, LILCO's argument would require that regardless of how extreme the provisions in its emergency plan may be, and regardless of which state laws might be violated thereby, those laws must be preempted in order to assure that LILCO receive its license. 39/ No such open-ended preemption could reasonably have been intended by Congress. 40/

LILCO's assertion that New York's laws stand as "an obstacle to the accomplishment of the full purposes and objectives of Congress" was also properly rejected by the Licensing Board. Accepting LILCO's assertion that Congress had the objectives of (1) encouraging nuclear power, and (2) assuring the existence of effective emergency plans and uniform standards for emergency planning, the Licensing Board found that other objectives must be considered in deciding the preemption issue. The Board cited the Supreme Court's statement in Silkwood, supra, as follows:

39/ LILCO's plan does not appear to contain such ominous provisions as the use of guns by traffic guards or access control personnel, or forcible detainer and arrest of looters or persons who fail to comply with LILCO's traffic directions. Nonetheless, if LILCO had included such provisions in its Transition Plan, LILCO's preemption argument would require that state laws affecting such activities be preempted, in order to enable LILCO to obtain its license.

40/ LILCO asserts that it cannot comply with both federal and State law without abandoning its license application, and that this dilemma constitutes "physical impossibility." (App. Br. at 36-37). LILCO's argument is misplaced, however, in that Federal law does not require or compel a utility to build or operate a nuclear plant. See Pacific Gas and Electric Co., supra, 461 U.S. at 218-19.

> "[t]here is little doubt that a primary purpose of the Atomic Energy Act was, and continues to be, the promotion of nuclear power," [75 L.Ed. 2d at 775.] However, we also observed that "the promotion of nuclear power is not to be accomplished 'at all costs'." [Id. at 776-77.]

The Licensing Board noted the importance of maintaining proper Federal-State relations, and concluded as follows:

> We must bear in mind that the cost to our federal system of transferring a State's historic police powers to a private entity. 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. Indeed, Congress would not even enact a provision requiring the States to perform emergency planning or placing responsibility for emergency planning with the federal government. The Supremacy Clause is not a basis for accomplishing that which the Congress itself chose not to accomplish. There is no precedent for using the Supremacy Clause to transfer authority from government to a private entity. We find LILCO's argument that the laws cited in Contentions 1-10 are preempted to be without merit.

(PID at 909; footnote omitted).

This determination, in our view, is correct. The Licensing Board was properly sensitive to the importance of preserving a balance in Federal-State relations, and gave proper deference to the principle that the States are not to be preempted from acting in areas within their historic police powers absent a "clear and manifest" Congressional intent

that such preemption occur. 41/ LILCO has failed to demonstrate the existence of such a "clear and manifest" intent and, accordingly, the Licensing Board's rejection of LILCO's preemption argument should be affirmed. 42/

41/ LILCO now argues that it does not propose a "fundamental shift in the structure of federal-state relations," because its offsite emergency plan would only be used in the event of an accident which "everyone must admit is extremely rare" (App. Br. at 39-40). This argument misses the point. The "shift in federal-state relations" discussed by the Board would be occasioned by the federal preemption of State laws, which the State Supreme Court found prohibit the implementation of LILCO's offsite plan. Although LILCO may well never experience an accident that requires its offsite plan to be implemented, if such an event were to occur, under the New York Supreme Court's analysis LILCO's implementation of its offsite plan would indeed constitute a fundamental shift in federal-state relations.

42/ In their brief in opposition to LILCO's appeal, Suffolk County and the State of New York refer to County Executive Order 1985-1 (May 30, 1985), which had directed County employees "to review, test and evaluate LILCO's Transition Plan" (Id. at 47). While the lawful scope of any such exercise is not an issue pending before the Appeal Board, it should be noted that the Staff recently requested that FEMA schedule an exercise for Shoreham, acting at the Commission's suggestion that there be "as full an exercise of the LILCO plan as is feasible and lawful at the present time." See Memorandum from Samuel J. Chilk to William J. Dircks, dated June 4, 1985, attached to Memorandum from William J. Dircks to Samuel J. Chilk, re "Scheduling of Emergency Plan Exercise for Shoreham," dated June 20, 1985. The Staff's position in the text above, concerning the correctness of the Board's decision, is not inconsistent with the scheduling of such an exercise as may be "feasible and lawful at the present time."

II. IN VIEW OF THE PRESENTLY UNDEVELOPED RECORD, THE LICENSING BOARD PROPERLY REJECTED LILCO'S ASSERTION THAT SUFFOLK COUNTY AND THE STATE OF NEW YORK WOULD RESPOND IN THE EVENT OF AN ACTUAL EMERGENCY, THUS CURING LILCO'S LACK OF LEGAL AUTHORITY ("REALISM").

In addition to arguing that State and local laws are preempted insofar as they impede implementation of its offsite plan, LILCO has asserted that Contentions 1-2 and 4-10 [43/] should be resolved on grounds of "realism" -- i.e., LILCO asserts that the State and County would respond in the event of a real emergency, thus curing LILCO's lack of legal authority. In support of this assertion, before the Licensing Board LILCO cited an extra-record pronouncement made by Governor Cuomo of New York, in a press release, that "if the plant were to be operated and a misadventure were to occur, both the State and County would help to the extent possible." (See PID at 910). Presumably, the Governor would remove any legal impediment to LILCO's actions under its offsite plan either by implementing the plan using State resources, or by authorizing or "deputizing" LILCO to perform those functions. (See PID at 910, 911).

The Licensing Board properly rejected LILCO's "realism" argument. The Board cited the New York State Supreme Court's decision in Cuomo v. LILCO, supra, which held that LILCO could not be deputized by the State and County in the event of an emergency, to act in the manner contemplated by LILCO:

> "The Court, no matter how many times it has read and re-read Article 2B [The Executive Law] could not find any authorization for LILCO, expressed or

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43/ LILCO recognizes that this argument does not apply to Contention 3, concerning the posting of "trailblazer" signs in advance of an actual emergency (see PID at 909-10).

> implied, to exercise the State's police powers in emergency situations." The Court ultimately concluded, "[t]he State and County would be breaking their 'fiduciary duty' to protect the welfare of its citizens if they permitted a private corporation to usurp the police powers which were entrusted solely to them by the community."

(PID at 911, citing Cuomo v. LILCO, supra, slip op. at 18). The Board concluded that this determination by the State Supreme Court "disposes" of the realism argument (Id.):

> The Supreme Court interpretation of the New York State law, which we have accepted, disposes of the realism argument. The realism argument, predicated upon LILCO being authorized to participate in its proposed emergency response plan, fails because Applicant cannot be delegated the authority to perform the functions enumerated in Contentions 1-10.

Further, the Licensing Board correctly rejected the "realism" argument on the grounds that the Commission's emergency planning regulations -- developed as a result of the uncoordinated response to the TMI accident -- require "comprehensive, cooperative, and detailed preplanning and ability by the concerned entities . . . including the various governmental groups . . . to mount a very highly coordinated effort." (PID at 911). In contrast to the coordinated and preplanned effort contemplated by regulation, however, the Board found "[t]here is nothing on which to base a finding that there will be a cooperative, coordinated effort between the government and the utility to prepare for and implement the existing emergency response plan." (Id. at 912).

The Licensing Board has resolved this issue correctly. First, the Board properly deferred to the New York Supreme Court's ruling, in light of that Court's greater expertise in matters of New York law, that LILCO

could not be deputized to implement its offsite plan. Further, the Board correctly determined that the nature of the State and County's response, and the effect that response would have on the overall offsite emergency response, simply could not be known on the basis of the present record. As the Staff indicated in its filings before the Licensing Board [44/] -- and as LILCO has conceded [45/] -- the present evidentiary record does not indicate how the State and County would respond in an emergency, or what effect that response might have upon the overall implementation of LILCO's offsite plan. [46/] As the Licensing Board observed, "[a]lthough [the State and County] may well respond in a planned manner insofar as they do respond, there is no reasonable assurance of record that the response will be in cooperation and coordination with Applicant, which is what is

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44/ See "NRC Staff's Answer in Opposition to 'LILCO's Motion for Summary Disposition of Contentions 1-10 (The 'Legal Authority' Issues)", dated October 4, 1984, at 27-28; and "NRC Staff's Response Pursuant to the Licensing Board's Memorandum and Order of October 22, 1984," dated December 7, 1984, at 33.

45/ LILCO conceded before the Licensing Board that the "issue of how the State and County would respond, now raised by the Board sua sponte [in its Order of October 22, 1984], is an entirely new issue that has not been addressed in testimony." See LILCO's Brief on Contentions 1-10," dated November 19, 1984, at 42.

46/ LILCO argues that the issue of "coordination" is "a new factual issue," first raised by the Board in its PID, and that this issue is not encompassed within Contentions 1-10 (App. Br. at 47). However, LILCO itself first raised a factual issue in this regard, by seeking summary disposition of Contentions 1-10 on grounds of "realism". LILCO should not now be heard to complain that the Licensing Board resolved LILCO's untimely factual issue based upon its own analysis the facts which it deemed to be relevant to LILCO's "realism" argument.

contemplated for an adequate plan." (PID at 912, emphasis added). 47/

Nor is this conclusion altered by the Commission's Order of June 20, 1985, declining to require the supplementation of Shoreham's environmental impact statement, to consider the costs and benefits of low power operation prior to authorizing such operation. Long Island Lighting Co. (Shoreham Nuclear Power Station), CLI-85-12, 21 NRC ___ (June 20, 1985), stay denied per curiam sub nom. Cuomo v. NRC, No. 85-1042 (D.C. Cir., July 3, 1985). There, the Commission observed as follows (Id., slip op. at 4):

> We note that our Licensing Board in its decision of April 17, 1985 has found that an adequate emergency plan is in fact achievable if the State and county participate in emergency planning, as all other local and state jurisdictions have done when so called upon. . . . Congress has entrusted the protection of public health and safety in matters concerning nuclear power to the Commission, not to Suffolk County or New York State [citing Pacific Gas and Electric Co., supra, 461 U.S. at 205]. Accordingly, we believe that the County and the State must recognize that when a health and safety issue has been fully litigated before the Commission, the Commission's final judgment, subject to judicial review, must be the controlling determination, even if some continue to disagree with it.
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> Thus, while we express no opinion concerning the Board's decision while it remains under

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47/ LILCO has not cited the Governor's press release in its brief on appeal; instead, LILCO now claims it is the "undeniable truth" that the State and County would respond in an emergency, and that a "presumption" should be made that the State and County will respond in accordance with their legal duties (App. Br. at 45-46). This argument misses the point. As the Licensing Board observed, even if the State and County were to respond in a real emergency, "there is no reasonable assurance of record that the response will be in cooperation and coordination with Applicant" (PID at 912). See discussion infra, at 44-46.

> administrative review, we are confident that if the Commission upholds the Licensing Board's finding that an adequate emergency plan is feasible with state and local participation, the State and County will accede to that judgment and will provide the participation needed to make the plan successful. In short, we shall not take as an element of uncertainty in the eventual full-power operation of Shoreham the possibility that either the State or the County will refuse to cooperate with LILCO on the basis of their own conception of what radiological public health and safety requires, rather than on the findings of the Commission.

In our view, this statement is consistent with the Commission's earlier declaration, in its Statement of Consideration accompanying the emergency planning regulations, that "[t]he Commission believes, based on the record created by the public workshop, that State and local officials as partners in this undertaking will endeavor to provide fully for public protection." See discussion supra, at 23-24. The Commission's views in CLI-85-12 are not based upon facts of record in this proceeding, and do not alter the Licensing Board's pivotal findings that: (1) the State and County are barred under New York law from deputizing LILCO to implement its offsite plan, and (2) there is no evidence of record as to how the State and County might respond in an emergency or what effect their response might have upon an overall protective response. Accordingly, the Commission's views in CLI-85-12 do not require that the Licensing Board's conclusion on LILCO's "realism" argument be reversed.

For the reasons set forth above, the Board properly rejected LILCO's "realism" argument, 48/ and decided Contentions 1-2 and 4-10 in favor of Intervenors. This determination should be affirmed.

III. THE LICENSING BOARD PROPERLY REJECTED LILCO'S "IMMATERIALITY" ARGUMENT AS TO FUNCTIONS IDENTIFIED IN CONTENTIONS 1-4 AND 9-10, WHERE THOSE FUNCTIONS WERE INCORPORATED IN LILCO'S PLAN AS A MEANS OF COMPLYING WITH THE COMMISSION'S EMERGENCY PLANNING REGULATIONS AND REGULATORY GUIDANCE.

In moving for summary disposition before the Licensing Board, LILCO asserted, for the first time, what it referred to as an "immateriality" argument. Under this theory, LILCO contended that the actions specified in Contentions 1-4 and 9-10 (relating to traffic control and EPZ/EOC access control) are not required to provide "reasonable assurance that adequate protective measures can and will be taken in the event of an emergency." According to LILCO, an "uncontrolled evacuation" would result in only slightly greater evacuation times than a controlled

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48/ The Board also could have rejected LILCO's "realism" argument on procedural grounds. The Board and parties had previously construed the contentions as raising questions of law rather than questions of fact; LILCO's untimely attempt to raise a factual basis for resolving the contentions to be considered, would have required that the other parties be afforded an opportunity to rebut LILCO's position with their own evidentiary presentations. 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 2), ALAB-264, 1 NRC 347, 353-55 (1977) ("where a party prosecutes its case on one theory, a trial board cannot decide it on another without having given the opponents a fair opportunity to rebut the new theory with argument and evidence."). Accord, Pennsylvania Power and Light Co. (Susquehanna Steam Electric Station, Units 1 and 2), LBP-82-30, 15 NRC 771, 781-82 (1982).

evacuation, 49/ and would take place in an amount of time comparable to evacuation times for other nuclear plants (see PID at 913). In other words, LILCO contended that while these actions would improve evacuation times, their absence would not preclude evacuation from being considered as an adequate protective response (Id.).

The Licensing Board recognized that the functions specified in Contentions 1-4, 9 and 10, are not specifically listed as requirements in either 10 C.F.R. § 50.47 or 10 C.F.R. Part 50, Appendix E; at the same time, the Board found that these measures provide a means of satisfying applicable Commission regulations (PID at 917). Thus, 10 C.F.R. § 50.47(a)(1) requires that there be "reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency." Also, 10 C.F.R. § 50.47(b)(10) requires, in part, that "a range of protective actions be developed for the plume exposure pathway EPZ," and that "guidelines for the choice of protective actions, consistent

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49/ LILCO's evidence, admitted for purposes of litigating other contentions, indicated that an uncontrolled evacuation (without traffic guides but with route compliance) would increase evacuation times by 1 hour, 35 minutes under normal conditions and by 3 hours in inclement weather (see PID at 792). Although the Staff and FEMA found LILCO's traffic and time estimate model to be conceptually valid and in compliance with regulatory guidance found in NUREG-0654, Appendix 4 (see PID at 783), we did not have occasion to consider, and expressed no view, as to whether an uncontrolled evacuation would satisfy Commission regulations and regulatory guidance.

with Federal guidance, are developed and in place." 50/ Similarly, as noted by the Licensing Board (PID at 916-17), federal guidance provides that:

> the purpose of emergency planning is to achieve dose savings to the general public; . . . the emergency response plans should be framed to cope with a spectrum of accident possibilities including the worst accidents; and that there is no standard time required to be met for evacuation in a radiological emergency.

The Licensing Board evaluated these regulatory pronouncements and found that an uncontrolled evacuation of the Shoreham EPZ would reduce the range of protective actions available to the public, would limit the dose savings which might otherwise be achieved, and would result in the framing of emergency response plans that are capable of coping with a smaller spectrum of accident possibilities (PID at 917).

In Staff's view, LILCO's "immateriality" argument was properly rejected. LILCO had identified these functions as material elements of its Transition Plan, and they were considered by FEMA and the Staff in reviewing the overall adequacy of LILCO's offsite emergency plan. In light of the State Supreme Court's determination that these functions are

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50/ Regulatory guidance with respect to 10 C.F.R. § 50.47 is contained, inter alia, in NUREG-0654, FEMA-REP-1, Rev. 1, "Criteria for Preparation and Evaluation of Radiological Emergency Response Plans and Preparedness in Support of Nuclear Power Plants" (November 1980). Only one of the functions listed in Contentions 1-4, 9 and 10 (EPZ perimeter access control) appears to be mentioned specifically in NUREG-0654 (see id., § II.J.10). However, that document is intended to be used as a general guide by reviewers in determining the adequacy of offsite emergency plans; it does not purport to delineate the full range of emergency actions that must be included in an emergency plan.

prohibited to LILCO under State and local law, LILCO's Transition Plan, as submitted, could not lawfully be implemented.

The parties have had neither the occassion nor an opportunity to present evidence as to whether an "uncontrolled evacuation" would provide an adequate protective response in the event of an emergency in compliance with Commission regulations. 51/ Accordingly, the Licensing Board's rejection of LILCO's last-minute attempt to obtain a ruling, on inherently factual grounds, that an uncontrolled evacuation would provide an adequate and effective protective response, should be affirmed. 52/

51/ As noted above, Contentions 1-10 had previously been construed by the Board and parties as raising solely questions of law and all parties, including LILCO, had agreed that evidentiary hearings on these contentions were not required. See discussion supra, at 4-5 and 36. The Staff and FEMA have evaluated only the specific plan submitted by LILCO for review (which included the functions now asserted by LILCO to be "immaterial"), and have not heretofore reached conclusions as to whether an uncontrolled evacuation for Shoreham would be acceptable. Nonetheless, we cannot lightly dismiss the Licensing Board's further conclusion that an uncontrolled evacuation at Shoreham would be unacceptable, given the population density and geographical characteristics of Shoreham's 10-mile EPZ.

52/ LILCO asserts that its Transition Plan should have been approved by the Board under 10 C.F.R. § 50.47(c)(1), as an "interim compensating action," and it urges that the lack of governmental participation is not a "significant" deficiency (App. Br. at 50-52). LILCO further asserts that "[a]t issue here is not a request for a waiver of the rules, but for an application of them." (Id. at 51). These assertions are without merit. LILCO has failed to demonstrate that its Transition Plan can be implemented under State law, and thus there is no reason to believe that it could operate as a "compensating action"; nor, for that matter, has LILCO demonstrated that its Transition Plan is "interim" in nature, or that the County and State's refusal to implement its plan is "insignificant". Finally, LILCO's request for an application of 10 C.F.R. § 50.47(c) does indeed appear to be a request for a waiver or exemption from the Commission's other emergency planning regulations. Cf. Philadelphia Electric Co. (Limerick Generating, Station, Units 1 and 2), ALAB-809, 21 NRC ___ (June 17, 1985).

IV. THE LICENSING BOARD ERRED IN FINDING THAT LILCO EMPLOYEES WHO WOULD PERFORM A COMMAND AND CONTROL FUNCTION LACK SUFFICIENT INDEPENDENCE FROM LILCO TO MAINTAIN THEIR INDEPENDENCE AND OBJECTIVITY IN AN EMERGENCY (CONTENTION 11).

Contention 11 asserts that LILCO employees who would occupy command and control positions in the event of an emergency are not sufficiently independent of LILCO, and that they may experience a conflict between LILCO's financial and institutional interests and the public interest. According to Intervenors, this lack of independence could hamper the individuals' ability to act in the public interest, could lead them to minimize the public's perception of the danger, and could cause them to fail to recommend appropriate protective action promptly.

The Licensing Board found that the Intervenors' evidence on this issue outweighed the evidence adduced by LILCO and the Staff (PID at 605). In this regard, the Board stated, "[i]n view of the very important ties of livelihood and company loyalty which normally exist . . . between upper-level management and a corporation, we cannot find that the LERO decisionmakers are truly independent of LILCO" (Id. at 682). Rather, the Board found that "[p]ersons holding important positions in a nuclear utility's day-to-day organization will experience strong forces urging them to interpret any ambiguous situation in the company's favor" (Id. at 605). Further, the Board observed that "[w]ith the important matters of livelihood and career deeply bound to the company, utility executives will, we fear, be much more subject to conflict of interest than would local officials, whose interests clearly parallel those of the populace, and whose accountability is clearly to the public" (Id. at 686). On this basis, the Board found in favor of Intervenors on Contention 11 (Id.):

> We conclude that the Intervenors have, indeed, carried the day on Contention 11. Applicant has not met the burden of demonstrating that the employees in command and control positions in LERO are sufficiently independent from LILCO to maintain independence and objectivity. In ambiguous accident situations, their loyalties, personal interests, and career inclinations would dispose them to minimize their estimate of the possible hazard and might cause delay in or omission of proper public notification and protective actions. Applicant has not, for these reasons, provided adequate assurance that these persons would make correct and appropriate command and control decisions.

The Staff submits that the Licensing Board's findings in this regard were erroneous for two fundamental reasons. 53/ First, the Licensing Board altogether ignored the fact that a utility's executives are normally required to perform other vitally important roles in notifying the public of the existence of an emergency. The quintessential determination as to whether and when to alert public officials of an emergency situation -- a necessary first step which must take place before the governmental officials can even consider alerting the public -- rests in the utility's hands. 54/ See 10 C.F.R. § 50.47(b)(5). Moreover, utility personnel are entirely responsible for determining what information is presented to the governmental officials. The importance

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53/ In addition, the Staff has reviewed LILCO's brief on appeal of this issue (App. Br. at 53-65), and we generally concur with the views expressed therein. We believe that LILCO has amply demonstrated that the Licensing Board's decision on Contention 11 is inconsistent with the weight of the evidence.

54/ While radiation readings and other indicia of an emergency situation are not "ambiguous" (Tr. 15,209, 15,228 (Sears)), the utility employee remains responsible for communicating that information in a prompt and appropriate manner to offsite governmental authorities.

of these functions, performed by utility personnel at Shoreham and at every other commercial nuclear plant, was emphasized by Staff witness Schwartz, as follows:

> [I]f a potential problem situation were to occur at a nuclear power plant, the appropriate protective actions would be recommended and implemented whether or not the command and control positions were filled by trained utility or offsite personnel . . . . No matter who makes the offsite command and control decisions, these decisions will depend to a large extent on information about the status of the power plant and potential radioactive releases. This will be supplied by onsite utility employees according to the emergency plan and procedures. It is the information and recommendations provided by the onsite personnel that will affect offsite decisionmaking most significantly.

Schwartz, ff Tr. 15,143, at 4. The Licensing Board altogether ignored these facts, 55/ and failed to see the illogic of its decision: if a "conflict of interest" does not preclude utility executives from being relied upon to provide public officials with timely and accurate information -- thereby triggering the chain of events by which the public may be alerted of an emergency -- there is likewise no reason to fear that a

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55/ The Board also failed to recognize that the utility's personnel are required to be present at the EOC during an emergency, and are largely relied upon by governmental officials for their recommendations as to when, and which, protective responses should be undertaken.

conflict of interest would preclude those executives from alerting the public directly, if and when it becomes necessary to do so. 56/

Secondly, because, as the Staff believes (see, e.g., Tr. 15,223), structural independence from a utility is not strictly required by regulation, a "conflict of interest" would present a problem only if the individuals in question, on a personal basis, are insufficiently trained or fail to possess sufficient independence of thought and objectivity to act appropriately in an emergency. In this regard, the Licensing Board gave insufficient consideration to the Staff's testimony that the most important criteria are whether an individual in an emergency situation places "overriding emphasis . . . on safety interests" (Schwartz, ff. Tr. 15,143, at 2), and whether the individual possesses an appropriate sense of "responsibility" with respect to his role in responding to an emergency (Tr. 15,211-212, 15,215, 15,250 (Sears)). Moreover, the Board gave insufficient consideration to the fact that Staff witness Sears interviewed the particular individuals who had been designated to perform the command and control functions for LERO, and was satisfied that they possess sufficient understanding of their responsibilities to assure that their actions would be unaffected by any "conflict of interest." E.g.,

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56/ The Licensing Board's determination, as a matter of law, that the Commission's regulations are "structured" so as "to assure independence in emergency decisions" is unsupported. Other valid reasons why the Commission's regulations allocate offsite responsibilities to State and local governmental authorities were not considered by the Board. For instance, State and local governments normally possess greater experience and expertise in managing public disasters; similarly, those entities normally already possess the necessary manpower and infrastructure to coordinate a large-scale public response.

Sears, ff. Tr. 15,143, at 2, 5-7. 57/ The Licensing Board's decision that a conflict of interest would preclude these individuals from maintaining their independence and objectivity such that they would make correct and appropriate decisions in an emergency, is inconsistent with the weight of the evidence, and should be reversed.

V. THE LICENSING BOARD'S DETERMINATION THAT THERE IS NO NEW YORK STATE PLAN APPLICABLE TO THE SHOREHAM FACILITY, AND THAT NO PROVISIONS EXIST FOR A COORDINATED RESPONSE BY THE STATE IN THE EVENT OF AN EMERGENCY (CONTENTION 92), SHOULD BE AFFIRMED.

Contention 92 asserts that there is no New York State emergency plan that is site-specific for Shoreham, and that LILCO's offsite plan fails to provide for coordination of LILCO's and the State's emergency responses, assuming a State response would occur. 58/

57/ The Licensing Board appears to have misapprehended much of the essence of the Staff's testimony with respect to Contention 11. For instance, the Staff did not urge that monitoring by the NRC is sufficient to ensure that individuals will respond appropriately in an emergency (see PID at 685). Rather, such Staff oversight was indicated to be but one additional factor to be considered, once it has been determined that appropriate preplanning had taken place in accordance with Commission regulations, and that adequately trained, and responsible individuals would occupy command and control positions. See, e.g., Schwartz, ff. Tr. 15,143, at 2, 4; Tr. 15,211-212 (Sears); Tr. 15,222-223, 15,230-231, 15,241-248 (Schwartz).

58/ Before the Licensing Board, the Staff had recommended that the Board find only that LILCO's plan provides an opportunity for State participation, based on a narrow reading of the Contention. (Contention 92 asserts, in part, "the LILCO Plan fails to provide for coordination of LILCO's emergency response with that of the State of New York. . . .") The Licensing Board eschewed making the limited findings recommended by the Staff and decided the Contention in Intervenors' favor, based on a broader reading of the contention. However, the Board's decision is supported by the administrative record and, in our view, is not erroneous.

It is undeniable, as the Licensing Board found, that no site-specific emergency plans for Shoreham exist in the New York State plan (see PID at 882). True, LILCO's offsite plan permits participation by New York State and local officials, and an infrastructure has been established by LILCO to facilitate such participation (e.g., communication lines, working space for governmental officials, and procedures for conferring with such officials have been established). However, as the Board found (Id. at 883) there is no evidence in the record to permit a finding that New York State would participate in an actual emergency in an effective and coordinated manner, as contemplated by the Commission's regulations and guidance. (Id. at 883, 885). 59/ In this regard, the Board cited the guidance of NUREG-0654, that:

> [A]n integrated approach to the development of response plans to radiological hazards is most likely to provide the best protection of health and safety of the public. NRC and FEMA recognize that plans of licensees, state and local governments should not be developed in a vacuum or in isolation from one another. Should an accident occur, the public can best be protected when the response by all parties is fully integrated.

(PID at 884, citing NUREG-0654, at 23-24).

59/ See discussion supra, at 31-34, with respect to the lack of assurance provided by Governor Cuomo's press release, cited by LILCO in support of its claim that the State and County would respond in a real emergency.

In light of the lack of evidence that the State would respond to an emergency in a manner coordinated with LILCO's emergency response, 60/ the Board properly concluded that LILCO had failed to demonstrate "reasonable assurance" that an integrated or coordinated emergency response that included the State would occur. (Id. at 883, 884). Accordingly, the Board's resolution of this contention in favor of Intervenors should be affirmed.

CONCLUSION

For the reasons set forth above, the Staff submits that the Licensing Board's decision as to Contentions 1-10 (the legal authority issues) and Contention 92 (the State plan) should be affirmed, but that the Board's decision on Contention 11 (conflict of interest) is in error and should be reversed.

Respectfully submitted,

Sherwin E. Turk
Deputy Assistant Chief
Hearing Counsel

Dated at Bethesda, Maryland
this 19th day of July, 1985

60/ LILCO cites the testimony of several of its employees and witnesses, who testified that they believed the State and County would cooperate with LILCO (App. Br. at 68-69). In our view, the Licensing Board properly struck various speculative portions of that testimony, and accorded an appropriate amount of weight to the remainder of that testimony. The record does not indicate that LILCO's witnesses based their opinions on any statements which had been made to them by government officials (while hearsay, such testimony would have been admissible in an administrative hearing); nor did LILCO's witnesses appear to be particularly qualified to render such testimony. LILCO's arguments in this regard should be rejected.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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

CERTIFICATE OF SERVICE

I hereby certify that copies of "NRC STAFF'S BRIEF IN RESPONSE TO LONG ISLAND LIGHTING COMPANY'S APPEAL FROM THE PARTIAL INITIAL DECISION ON EMERGENCY PLANNING OF APRIL 17, 1985" in the above-captioned proceeding have been served on the following by deposit in the United States mail, first class or, as indicated by an asterisk, through deposit in the Nuclear Regulatory Commission's internal mail system, or as indicated by a double asterisk, by Federal Express, this 19th day of July, 1985.

Alan S. Rosenthal, Esq., Chairman*
Atomic Safety and Licensing Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Howard A. Wilber*
Atomic Safety and Licensing Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Morton B. Margulies, Chairman*
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dr. Jerry R. Kline*
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Gary J. Edles, Esq.*
Atomic Safety and Licensing Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Gerald C. Crotty, Esq.
Ben Wiles, Esq.
Counsel to the Governor
Executive Chamber
State Capitol
Albany, NY 12224

Fabian G. Palomino, Esq.
Special Counsel to the Governor
Executive Chamber
State Capitol
Albany, NY 12224

Jonathan D. Feinberg, Esq.
New York State Department of Public Service
Three Empire State Plaza
Albany, NY 12223

Mr. Frederick J. Shon*
Administrative Judge
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Stephen B. Latham, Esq.
John F. Shea, III, Esq.
Twomey, Latham & Shea
Attorneys at Law
P.O. Box 398
33 West Second Street
Riverhead, NY 11901

Atomic Safety and Licensing
Board Panel*
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Atomic Safety and Licensing
Appeal Board Panel*
U.S. Nuclear Regulatory Commission
Washington, DC 20555

Docketing and Service Section*
Office of the Secretary
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

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

Edward M. Barrett, Esq.
General Counsel
Long Island Lighting Company
250 Old County Road
Mineola, NY 11501

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

Donald P. Irwin, Esq.**
Hunton & Williams
707 East Main Street
Richmond, VA 23212

Herbert H. Brown, Esq.
Lawrence Coe Lanpher, Esq
Karla J. Letsche, Esq.
Kirkpatrick & Lockhart
1900 M Street, N.W.
8th Floor
Washington, D. C. 20036

Donna Duer, Esq.*
Attorney
Atomic Safety and Licensing Board
Panel
U.S. Nuclear Regulatory Commission
Washington, DC 20555

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

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

Robert Abrams, Esq.
Attorney General of the State
of New York
Attn: Peter Bienstock, Esq.
Department of Law
State of New York
Two World Trade Center
Room 46-14
New York, NY 10047

Ms. Nora Bredes
Shoreham Opponents Coalition
195 East Main Street
Smithtown, NY 11787

Leon Friedman, Esq.
Costigan, Hyman & Hyman
120 Mineola Boulevard
Mineola, NY 11501

Martin Bradley Ashare, Esq.
Suffolk County Attorney
H. Lee Dennison Building
Veteran's Memorial Highway
Hauppauge, NY 11788

Chris Nolin
New York State Assembly
Energy Committee
626 Legislative Office Building
Albany, NY 12248

Hon. Peter Cohalan
Suffolk County Executive
County Executive/Legislative Bldg.
Veteran's Memorial Highway
Hauppauge, NY 11788

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

Mr. Robert Hoffman
Ms. Susan Rosenfeld
Ms. Sharlene Sherwin
P.O. Box 1355
Massapequa, NY 11758

Sherwin E Turk

Sherwin E. Turk