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LILCO, July 24, 1985

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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Before the Atomic Safety and Licensing Appeal Board

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

LILCO'S MOTION FOR  
LEAVE TO FILE REPLY BRIEF

On July 11, 1985, Intervenor New York State and Suffolk County filed their "Brief of Suffolk County and the State of New York in Opposition to LILCO's Appeal from the Atomic Safety and Licensing Board's Partial Initial Decision on Emergency Planning" (referred to hereinafter as "Intervenors' Brief"). The NRC Staff filed its "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" ("Staff's Brief") on July 19, 1985. On July 11, 1985, the Chief Deputy County Attorney of Suffolk County submitted the County Executive's views on certain of the questions at issue here. LILCO has drafted a reply to these briefs, which is entitled "LILCO's Reply Brief on the Legal Authority, Conflict of Interest, and State Plan Issues" and is attached to this motion.

In accordance with the Appeal Board's Order of May 15, 1985, LILCO hereby asks leave to file the attached brief. We believe there is good cause for the Appeal Board to accept the brief, as follows:

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1. Several pertinent developments occurred after LILCO filed its previous brief, especially with respect to the "realism" argument.
2. The NRC Staff has briefed the issues fully for the first time in its answering brief.
3. The reply brief will help to focus the issues.

I. The Need to Address Recent Developments

Since LILCO filed its brief on June 3, 1985, a number of developments have occurred that shed light on the issues in this proceeding, particularly with respect to LILCO's "realism" argument (the argument that there would be no purely legal barriers in a real emergency because all governmental units would do their best to respond). In particular:

1. The County Executive has expressed his commitment to respond to a real emergency and to consider the LILCO Plan for informational purposes.
2. The Commission, in CLI-85-12, expressed its view 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 judgement and will provide the participation needed to make the plan successful."
3. Counsel for the State of New York, in oral argument before the Commission on June 4, made clear yet another time that the State's purpose is to regulate radiological health and safety.

The NRC Staff discussed CLI-85-12 at Staff's Brief 34-35. The Intervenor's discussed recent developments in Suffolk County at Intervenor's Brief 47-48. LILCO has not addressed these developments before this Appeal Board, except for a paragraph in a letter of June 13, 1985, advising the Board of one of the recent state court decisions.

## II. The Need to Respond to the NRC Staff's New Arguments

Moreover, the NRC Staff has now weighed in with its first full-fledged brief opposing LILCO's arguments. Previous Staff briefs left open the "possibility" that there might be preemption, NRC Staff's Answer in Opposition to "LILCO's Motion for Summary Disposition of Contentions 1-10 ('Legal Authority' Issues)," at 25 n.23 (Oct. 4, 1984), or addressed preemption in a footnote, NRC Staff Response to LILCO's Renewed Motion for Summary Disposition of Legal Authority Issues on Federal Law Grounds, at 6 n.9 (Mar. 19, 1985). New Staff arguments that have not surfaced in previous briefs include the following:

The Staff's explanation of why emergency planning, though an integral part of NRC's regulations, is an exception to the preemptive effect of those regulations (Staff's Brief at 25); and

The Staff's reversal of its position on Contention 92 (Staff's Brief at 44 n.58).<sup>1/</sup>

## III. The Need to Focus the Issues

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<sup>1/</sup> In its proposed findings the Staff supported LILCO on this contention, stating that:

The Transition Plan provides that in making any protective action recommendations the Director of Local Response is to take into account advice that may be received from local and State government officials. . . . Consequently, if New York State officials should decide to participate, their involvement could easily be incorporated into the emergency response. . . . If they do not respond, the Transition Plan as discussed above provides for LERO to perform the functions that the State performs at other nuclear facilities in New York State.

NRC Staff's Proposed Findings of Fact and Conclusions of Law in the Form of a Supplemental Partial Initial Decision on Emergency Planning, at 303 (Nov. 5, 1984) (citations omitted; emphasis in original).

Finally LILCO is hopeful that one more brief may sharpen the issues. The issues on appeal here, though only three in number, suffer from a multiplicity of arguments and subissues, and the key points seem to get buried in the mass. Also, despite several rounds of briefing, both in state and federal court and before the ASLB, LILCO's and the Intervenor's arguments continue to pass like ships in the night. Both sides agree that Pacific Gas & Electric Co. v. State Energy Resources and Development Comm'n., 461 U.S. 190 (1983), and Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984), are the controlling cases. Yet the arguments of the two sides still do not meet head-on, the Intervenor's arguing that Congress intended to leave "traditional state functions" alone and LILCO arguing that Congress intended to preserve federal regulation of the operation of nuclear power plants. LILCO has therefore tried in this reply brief to focus on seven significant points and to ignore the rest.

In short, LILCO requests the opportunity to address some of the new developments and new arguments and to attempt to focus the debate on the essential issues. The attached brief is submitted to that end.

Respectfully submitted,

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