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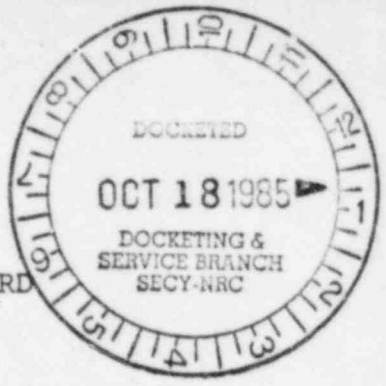

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING APPEAL BOARD

Administrative Judges:

Alan S. Rosenthal, Chairman
Gary J. Edles
Howard A. Wilber

October 18, 1985
(ALAB-818)

SERVED OCT 18 1985

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

James M. Christman, Richmond, Virginia (with whom W. Taylor Reveley, III, Donald P. Irwin, and Kathy E.B. McCleskey, Richmond, Virginia, were on the brief), for the applicant Long Island Lighting Company.

David A. Brownlee, Pittsburgh, Pennsylvania, and Karla J. Letsche, Washington, D.C. (with whom Michael J. Lynch and Kenneth M. Argentieri, Pittsburgh, Pennsylvania, were on the brief), and Eugene R. Kelley, Hauppauge, New York, for the intervenor Suffolk County, New York.

Fabian G. Palomino, Albany, New York, for the intervenor State of New York.

Stephen B. Latham, Riverhead, New York, for the intervenor Town of Southampton.

Sherwin E. Turk for the Nuclear Regulatory Commission staff.

DECISION

Before us is the appeal of the applicant Long Island Lighting Company (LILCO) from portions of the Licensing Board's April 17, 1985, partial initial decision in the emergency planning phase of this operating license

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proceeding involving the Shoreham nuclear facility.[1] The Licensing Board resolved many of the outstanding offsite emergency planning issues in LILCO's favor. Significantly, however, it concluded that LILCO lacks the legal authority to implement material features of its proposed emergency response plan. That being so, the Board determined that an emergency plan in conformity with Commission regulations cannot be carried out. As explained in detail below, we affirm the Board's result in this regard.[2]

I. Background

Under Commission regulations, no operating license for a nuclear power reactor can issue unless the NRC finds that there is reasonable assurance that adequate protective measures both on and off the facility site can and will be

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[1] LBP-85-12, 21 NRC 644.

[2] Appeals from other portions of the partial initial decision were taken by intervenors Suffolk County and the State of New York. In response to a motion from the intervenors seeking additional time in which to file briefs in support of their own appeal, and a separate request from LILCO that we refer the legal authority issues directly to the Commission or, in the alternative, sever its appeal for expedited review, we established two briefing and oral argument schedules. Order of May 15, 1985 (unpublished). We treat solely LILCO's appeal in this opinion. The County and State appeals are now being briefed. In addition, one contested emergency planning issue (dealing with the adequacy of a proposed relocation center) was recently resolved in a separate partial initial decision. LBP-85-31, 22 NRC ___ (August 26, 1985). Appeals from that decision have been filed and are also at the briefing stage.

taken in the event of a radiological emergency. As a general rule, offsite emergency plans must be developed for a 10-mile zone surrounding the plant (the plume exposure pathway emergency planning zone) and a second zone of approximately 50 miles (the ingestion pathway emergency planning zone).[3] In the usual case, state or local governments participate in the development and implementation of emergency plans. The Shoreham facility is situated in Suffolk County, New York, and the 10 mile emergency planning zone is either within the county or on the waters of Long Island Sound.[4] The controversy before us centers around the ramifications of the state and county governments' refusal to participate in the development and implementation of offsite emergency plans for Shoreham.

For a number of years both governments generally supported the construction of the Shoreham facility and assisted in the development of emergency response plans. Things changed in early 1982 when the County began to reappraise its view of the efficacy of an emergency response plan for Shoreham.[5] In due course, the county adopted

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[3] See 10 CFR 50.47 and Part 50, Appendix E.

[4] LBP-85-12, 21 NRC at 648.

[5] A partial history of the proceeding, on which we draw, is set out in an appendix to LBP-83-22, 17 NRC 608,

(Footnote Continued)

resolutions concluding that no local response plan could adequately protect the health, welfare and safety of Suffolk County residents, and directing that no emergency plan be adopted or implemented. The State has supported the County's position.

On the strength of the determination embodied in its resolutions, the County filed a motion with the Licensing Board to terminate this proceeding. The gist of the County's argument was that the Commission's regulations require the submission of an emergency response plan sponsored by the local government as a prerequisite to issuance of an operating license. The Board denied the motion.[6] It concluded that, under Commission regulations and applicable federal statutes, the existence of an emergency plan approved by the local government was not a precondition to issuance of an operating license. Rather, an applicant is to be accorded an opportunity to demonstrate that there is reasonable assurance that adequate protective measures can and will be taken in the event of an emergency despite the local government's refusal to prepare or

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(Footnote Continued)
647-54, aff'd on other grounds, CLI-83-13, 17 NRC 741 (1983).

[6] Id. at 615.

implement an emergency plan.[7] The Board found, in this connection, that it was not bound by the County's determination regarding the feasibility of developing adequate emergency planning for Shoreham.[8]

The Licensing Board referred its ruling to us for review,[9] and we, in turn, referred it to the Commission.[10] On review, the Commission approved the Board's analysis of the regulations and applicable statutes and determined that this agency was obligated to consider any plan the applicant might submit.[11] However, it expressly declined to examine at that juncture what it described as "serious issues of federal preemption involved in the current offsite emergency planning controversy."[12]

On May 26, 1983, LILCO filed its so-called "transition plan" in which offsite emergency response procedures would be implemented by LILCO personnel, federal agencies, or private contractors. The plan does not rely on County or

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[7] Id. at 612.

[8] Id. at 637.

[9] LBP-83-21, 17 NRC 593 (1983).

[10] Order of April 26, 1983 (unpublished).

[11] CLI-83-13, 17 NRC 741.

[12] Id. at 743.

State personnel.[13] Almost 100 contentions directed to the plan were thereupon tendered by the intervenors. Contentions 1-10, i.e., those addressed to the applicant's legal authority to implement certain elements of its plan, alleged that LILCO is prohibited by state or local law from performing key emergency functions (such as directing traffic, activating the emergency sirens, or broadcasting emergency messages) and that, as a consequence, the plan cannot and will not be implemented as required by Commission regulations.[14]

LILCO filed a motion for summary disposition of these contentions.[15] All parties agreed that it could be decided

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[13] See LBP-85-12, 21 NRC at 650, 895.

[14] Contentions 1-10 set out the alleged prohibited actions as follows: (1) guiding traffic; (2) blocking roadways, erecting barriers in roadways, and channelling traffic; (3) posting traffic signs on roadways; (4) removing obstructions from public roadways, including towing private vehicles; (5) activating sirens and directing the broadcasting of emergency broadcast system messages; (6) making decisions and recommendations to the public concerning protective actions; (7) making decisions and recommendations to the public concerning protective actions for the ingestion exposure pathway; (8) making decisions and recommendations to the public concerning recovery and reentry; (9) dispensing fuel from tank trucks to automobiles along roadsides; and (10) performing access control at the Emergency Operations Center, the relocation centers, and the plume emergency planning zone perimeters. See id. at 895.

[15] Motion for Summary Disposition of Contentions 1-10 (The "Legal Authority" Issues) (August 6, 1984) (hereafter cited as LILCO Motion).

without evidentiary hearings.[16] The Board nonetheless deferred its consideration of the motion,[17] having earlier urged the parties to resolve the issue in court.[18] The County, the State, and the Town of Southampton sought a declaratory ruling from a state court that LILCO was prohibited under state law from undertaking the various emergency functions ordinarily performed by state or local officials. In due course, that court issued a decision in which it agreed that private companies such as LILCO cannot under New York law perform certain key emergency functions contemplated by its plan. Such functions may be performed only by governmental entities.[19]

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[16] See Tr. 13,383 (LILCO), 13,831 (the State and the County), and 13,834 (the staff).

[17] Memorandum and Order of October 22, 1984 (unpublished).

[18] See, e.g., Tr. 3675: "The Board believes that these legal contentions are properly matters to be disposed of by the New York State courts."

[19] Cuomo v. Long Island Lighting Co., Consol. Index No. 84-4615 (N.Y. Sup. Ct., February 20, 1985), appeal docketed (N.Y. App. Div. April 26, 1985). In addition, Citizens for an Orderly Energy Policy, a private organization supporting operation of the Shoreham Plant, brought suit in federal court to obtain a declaratory ruling that the County resolutions are preempted by federal law. The court concluded, however, that the resolutions were not in conflict with federal law and thus were not preempted. Citizens for an Orderly Energy Policy v. County of Suffolk, 604 F. Supp. 1084 (E.D.N.Y. 1985), appeal docketed, Nos. 85-7321, etc. (2d Cir. April 11, 1985). This organization

(Footnote Continued)

LILCO returned to the Licensing Board and renewed its motion for summary disposition of Contentions 1-10. For purposes of the motion, LILCO accepted the state court's decision as a binding interpretation of state law. It argued basically that the state laws prohibiting it from implementing its emergency plan are preempted by the Atomic Energy Act. In addition, it claimed that, in any event, state or local officials would respond in case of a genuine emergency. Finally, it asserted that most of the functions that it purportedly cannot perform by reason of New York law are not required by NRC regulations.

The Licensing Board rejected all of LILCO's arguments and denied the motion.[20] This appeal followed. LILCO renews its arguments before us. With some exceptions discussed below, intervenors Suffolk County and the State of New York, the Town of Southampton, and the NRC staff, support the Board's result.[21]

(Footnote Continued)
also sought to intervene in this proceeding but its request was denied as untimely. LBP-83-42, 18 NRC 112, aff'd, ALAB-743, 18 NRC 387 (1983).

[20] LBP-85-12, 21 NRC at 895-919.

[21] Throughout most of the litigation, the County was represented principally by the law firm of Kirkpatrick and Lockhart. The State and County filed a joint brief supporting the Licensing Board's decision. Recently,
(Footnote Continued)

II. Federal Preemption

A central issue on appeal is whether the Atomic Energy Act preempts the enforcement of the laws of the State of New York, insofar as they prohibit LILCO from performing crucial emergency functions. The general principles regarding federal preemption are relatively straightforward and were recently reasserted and applied in the context of nuclear regulation by the Supreme Court in Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984), and Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development

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however, the County Executive terminated the law firm's services and assigned the County Attorney to represent the County. On July 11, the County Attorney submitted a letter basically restating its support for the Board's determination of the preemption issue. However, the letter indicated that the County Executive now supports LILCO's claim that the County will respond in the event of a genuine emergency. The County Attorney takes no position on the Board's disposition of the so-called "immateriality" issue. See Section IV, infra. At the time of oral argument, the issue of the County Executive's authority to terminate the law firm's services was unresolved, so we permitted both the law firm and the Chief Deputy County Attorney to present argument. The state courts have now sustained the County Executive's authority. Prospect v. Cohalan, No. 5001A (N.Y. App. Div. August 13, 1985). The county resolutions remain in effect, however, and continue to reflect the official County position that no emergency plan can adequately protect county residents and Shoreham should not receive a license to operate at full power. App. Tr. 77-78, 86.

The Town of Southampton participated in the proceedings before the Licensing Board but before us filed only a letter outlining its position. With our permission, the Town was nonetheless accorded an opportunity to participate in oral argument.

Comm'n., 461 U.S. 190 (1983). In Silkwood, the Court observed:

> [S]tate law can be preempted in either of two general ways. If Congress evidences an intent to occupy a given field, any state law falling within that field is pre-empted. . . . If Congress has not entirely displaced state regulation over the matter in question, state law is still pre-empted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law . . . or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.[22]

Applying that standard, the Court determined that the Atomic Energy Act does not displace traditional enforcement of state tort law, including the state's right to authorize punitive damages for radiation injuries. In Pacific Gas & Electric, the Court decided that the Atomic Energy Act does not preclude a state from enacting a moratorium on nuclear power plant construction based on economic rather than radiological health and safety considerations.

LILCO does not challenge the state court's determination that it lacks authority under New York law to perform certain of the emergency functions required by its plan.[23] It maintains, instead, that both of the preemption

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[22] 464 U.S. at 248.

[23] LILCO's Brief Supporting Its Position on Appeal from the "Partial Initial Decision on Emergency Planning" of April 17, 1985 (June 3, 1985) (hereafter cited as LILCO Brief) at 5.

tests identified in Silkwood preclude the application of state law to block the implementation of its emergency plan. Specifically, LILCO contends, first, that the federal government has occupied the entire field of radiological health and safety, except for limited areas expressly reserved to the states,[24] and that regulation of emergency planning falls squarely within the preempted field.[25] In this regard, LILCO asserts that the history of atomic energy legislation demonstrates a congressional intent to maintain exclusive federal control over the operation of nuclear plants. In LILCO's view, Congress speaks clearly and unambiguously when it intends to allow the states to "infringe" on the field of radiological health and safety.[26]

Second, LILCO claims that a conflict exists between federal and state law because it is impossible to comply with both,[27] and the state law stands as an obstacle to the accomplishment and execution of congressional objectives.[28] According to LILCO, the state laws are preempted because

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[24] Id. at 14.

[25] Id. at 16.

[26] Id. at 12.

[27] Id. at 36.

[28] Id. at 38.

they effectively accord the states a "veto" over operating licenses for nuclear power plants.[29]

The Licensing Board concluded, to the contrary, that the federal government does not exclusively occupy the field of nuclear safety insofar as it relates to offsite emergency planning,[30] and that no actual conflict exists between federal and state law despite the practical impediment that state law presents to LILCO's ability to implement its plan.[31] The Board believed that preemption of a state's traditional police powers "must be premised on a finding that it was the 'clear and manifest purpose of Congress' to supersede State law"[32] and that LILCO failed to demonstrate that Congress intended to preempt state and local laws that prohibit LILCO's proposed activities.[33] We agree with the Board's conclusions.[34]

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[29] Id. at 10-11.

[30] LBP-85-12, 21 NRC at 902-07.

[31] Id. at 908.

[32] Id. at 901, citing Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

[33] Id. at 902, 907.

[34] LILCO's preemption argument before us is directed only to state law. LILCO does not assert that the county resolutions are preempted by the Atomic Energy Act and we do not reach that issue. We note only that the Licensing Board suggested that the resolutions are preempted, LBP-83-22, 17

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A. Federal Exclusivity. We find that LILCO's thesis that the state laws are preempted because they affect an area exclusively reserved to the federal government cuts too wide a swath. As the Supreme Court observed in the Pacific Gas & Electric case, the Atomic Energy Act establishes a dual regulatory structure for nuclear-powered electric generation.[35] When the statute was originally enacted in 1954, the Atomic Energy Commission (and the NRC as its successor for regulatory functions) "was given exclusive

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NRC at 640-41, but the federal district court concluded to the contrary, Citizens for an Orderly Energy Policy, 604 F.Supp. 1084.

[35] 461 U.S. at 211-12. Section 274(c) of the Act provides that "the Commission shall retain authority and responsibility with respect to regulation of -- (1) the construction and operation of any production and utilization facility." 42 U.S.C. § 2021(c)(1) (1982). But section 274(k) provides that "[n]othing 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) (1982). Although section 274(k) applies in terms only to the preemptive effect of section 274, the courts have construed it as a reflection of congressional intent to distinguish generally between matters reserved to the federal government and those left to the states. See Brown v. Kerr-McGee Chemical Corp., 767 F.2d 1234, 1241 n.4 (7th Cir. 1985), citing Pacific Gas & Electric, 461 U.S. at 210. In addition, section 271 provides that "[n]othing 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 (1982).

jurisdiction to license the transfer, delivery, receipt, acquisition, possession and use of nuclear materials . . . . Upon these subjects, no role was left for the States."[36] Even when the statute was amended in 1959 to give the states some regulatory jurisdiction over radiological materials, the Commission retained its authority with respect to the regulation of the construction and operation of nuclear power plants.[37] The federal government retained plenary authority in those areas in which the Commission's expertise was considered important.[38] The states, in contrast, maintained their "traditional responsibility" for determining need, reliability, cost and other related state concerns because these are "areas that have been characteristically governed by the States."[39] The Court summarized this division of responsibility as follows:

> [T]he Federal Government maintains complete control of the safety and "nuclear" aspects of energy generation; the States exercise their traditional authority over the need for additional generating capacity, the type of generating facilities to be licensed, land use, ratemaking, and the like.[40]

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[36] Pacific Gas & Electric, 461 U.S. at 207.

[37] Id. at 208-10.

[38] See Silkwood, 464 U.S. at 250.

[39] Pacific Gas & Electric, 461 U.S. at 205.

[40] Id. at 212.

While there is no bright line dividing the areas of federal and state responsibility, and they may at times overlap, we find that the application of the state laws at issue in this case is within the areas traditionally reserved to the states.

We have no quarrel with the general assertion that the federal government has exclusive jurisdiction over radiological health and safety matters and that the Commission is involved in emergency planning pursuant to its health and safety jurisdiction. However, the management of vehicular traffic on public roads, governmental response to public emergencies (including the implementation of any necessary evacuation), and control over the actions of corporations operating within the state, have nothing to do with radiological health and safety and fall well within the category of activities routinely subject to state supervision. Although the Commission has recognized its own role in emergency planning oversight, it has nonetheless observed that "the State and local governments have the primary responsibility under their constitutional police powers to protect the public."[41]

LILCO acknowledges that the New York statutes at issue were passed long ago and for purposes wholly unrelated to

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[41] 44 Fed. Reg. 75,167, 75,169 (1979).

nuclear power or emergency planning for nuclear power plants.[42] These laws do not dictate the manner in which the Shoreham plant must be operated. Rather, they indicate the manner in which the utility may or may not conduct certain nonradiological activities within the state.[43]

To be sure, the conduct of such nonradiological activities heavily influences whether, or to what extent, viable emergency plans can be developed without governmental participation. But, as demonstrated by the Silkwood and Pacific Gas & Electric cases, such laws do not invade the federal domain simply because they have a significant effect on nuclear power issues or even foreclose the nuclear option entirely. As we read the Court's decision in Silkwood, and as the Licensing Board found, state laws of this stripe are entitled to respect, absent an affirmative showing that Congress intended to supplant them.[44] Apart from its reliance on the NRC Authorization Acts as a reflection of specific legislative intent (we discuss this matter in Section II(B) of the opinion), LILCO does not contend that

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[42] LILCO Brief at 19.

[43] The state laws at issue here are thus not, as LILCO suggests, analogous to a state law forbidding emergency core cooling systems. See id. at 22-23.

[44] Silkwood, 464 U.S. at 255.

Congress affirmatively announced an intention to supplant the type of state laws at issue here.[45]

Our view that application of these state laws does not bring them within the zone reserved exclusively to the federal government is unaffected by LILCO's claim that the state and county governments are simply using these laws to further their own radiological health and safety objectives.[46] When confronted with a similar assertion in the Pacific Gas & Electric case, the Court declined to undertake a probing inquiry into the state's "true motive" but, instead, accepted its "avowed economic purpose" when determining that the state action fell outside the occupied field of nuclear safety regulation.[47] We too need determine

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[45] We reject LILCO's suggestion that the rationale of the Pacific Gas & Electric and Silkwood opinions is somehow applicable only to cases involving need for power or tort law. App. Tr. 30-31. In our view, the Court reaffirmed the basic dichotomy between the regulation of radiation hazards, on the one hand, and "state regulation in traditional areas," on the other. Pacific Gas & Electric, 461 U.S. at 222 (emphasis added).

[46] LILCO argues that "[a]ny analysis that finds the State's 'purpose' in this case to be anything other than radiological health and safety is completely at odds with the facts." LILCO Brief at 19.

[47] 461 U.S. at 216. In the Silkwood case, the majority made no inquiry into the state's legislative purpose but seemed simply to accept the premise that tort law was a matter ordinarily left to the states. The four dissenting justices, in contrast, would have found the state's action preempted because the purpose behind punitive damage awards

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only whether there is "a nonsafety rationale"[48] for the enactment or enforcement of the state laws. Plainly there is. That being so, we may not look behind the state's avowed purpose in enforcing these laws merely because enforcement in this instance arguably results from an ulterior motive.[49]

B. Conflict Between Federal and State Law. Our conclusion that the federal enclave established by the Atomic Energy Act does not embrace the state laws at issue in this case does not end the inquiry. Enforcement of those laws may still be foreclosed if it actually conflicts with the Atomic Energy Act or stands as an obstacle to the achievement of congressional purposes or objectives. We turn, now, to a consideration of this issue.

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is to regulate the safety procedures of nuclear licensees. See Silkwood, 464 U.S. at 260-62 (Justice Blackmun, with whom Justice Marshall joined, dissenting), and id. at 274-78 (Justice Powell, with whom Chief Justice Burger and Justice Blackmun joined, dissenting).

[48] Pacific Gas & Electric, 461 U.S. at 213.

[49] Our rejection of LILCO's assertion that the state laws fall within the zone reserved exclusively to the federal government disposes as well of its claim that the states are foreclosed from taking any action affecting emergency planning in the absence of an express and precise delegation of authority from Congress. See LILCO Brief at 12-16. As LILCO recognizes, the requirement of an express and precise delegation from Congress arises only in those circumstances where exclusive authority over the subject matter would otherwise rest with the federal government. See id. at 23.

LILCO asserts that New York's laws are preempted because it is impossible to comply with both state law and NRC regulations, and because state law frustrates the establishment of uniform national emergency planning standards and the improvement of emergency planning.[50] The Licensing Board, reviewing this argument, reached the opposite conclusion. It determined that there is neither a conflict between the federal and state law nor an obstacle to the accomplishment of federal objectives simply because state law stands as a practical impediment to LILCO obtaining a federal license.[51]

We agree with the Board's conclusion. As we see it, the operative question is not whether state law stands in the way of LILCO getting its license (plainly it does), but whether Congress was prepared to tolerate a situation in which state action could coincidentally block operation of a nuclear plant. If the answer to that latter question is yes, there is no impermissible conflict with federal law or any frustration of congressional objectives.

As the Silkwood and Pacific Gas & Electric cases show, the reservation of exclusive jurisdiction by the federal government over radiological health and safety matters does

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[50] Id. at 36-42.

[51] LBP-85-12, 21 NRC at 908-09.

not necessarily prevent a state from asserting its authority over matters within its own jurisdiction merely because its action coincidentally affects the area subject to federal control.[52] The state laws do not conflict with the Atomic Energy Act or frustrate congressional objectives simply because they make it difficult, or even impossible, for LILCO to satisfy the conditions for a license. In Pacific Gas & Electric, the Supreme Court concluded that there was no conflict with the Atomic Energy Act and no frustration of congressional purpose where state law prohibited the construction of nuclear power plants entirely. The Court observed that "[t]he elaborate licensing and safety provisions and the continued preservation of state regulation in traditional areas belie" the notion that nuclear power is to be accomplished at all costs.[53] In the Court's view, the Atomic Energy Act "does not at any point expressly require the States to construct or authorize

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[52] See generally Huron Portland Cement Co. v. City of Detroit, 362 U.S. 440, 447 (1960) (local air pollution regulation that could require structural changes of ship boilers previously inspected and approved by the federal government is not in conflict with federal law despite extensive and comprehensive set of federal controls over ships and shipping; "[t]he mere possession of a federal license . . . does not immunize a ship from the operation of the normal incidents of local police power, not constituting a direct regulation of commerce").

[53] 461 U.S. at 222.

nuclear power plants or prohibit the States from deciding, as an absolute or conditional matter, not to permit the construction of any further reactors."[54] The Court rejected the argument that a ban on construction is preempted because it "regulates construction of nuclear plants;"[55] no persuasive reason is offered why the Court's rationale should not permit the states to enforce their laws in areas traditionally under their control even if such action bars the operation of a completed reactor as well. That being so, we cannot find in the terms of the Atomic Energy Act or its history as interpreted by the Supreme Court any preemption of state laws solely because they coincidentally prevent reactor operation.[56]

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[54] Id. at 205.

[55] Id. at 204.

[56] LILCO points to the Supreme Court's decisions in Douglas v. Seacoast Products, Inc., 431 U.S. 265 (1977), and Sperry v. Florida, 373 U.S. 379 (1963), as illustrations of a conflict between state and federal law where the practical alternative to compliance with state law is to forgo a right to engage in federally licensed activities. LILCO Brief at 37, 42-43. But state law is not preempted in all circumstances where it interferes with the potential exercise of federally licensed activities. See, for example, Radio Station WOW, Inc. v. Johnson, 326 U.S. 120, 129-33 (1945) (state not precluded by principles of preemption from ordering the rescission of a contract transferring radio station property on grounds of fraud even though the transfer had been approved by the Federal Communication Commission and the rescission could result in cancellation of a license awarded by the Commission). Whether state law is preempted by an alleged conflict

(Footnote Continued)

LILCO contends, however, that the congressional intent in the Atomic Energy Act to prevent the states from precluding nuclear power plant operations on emergency planning grounds is revealed by Congress' express treatment of emergency planning matters in the 1980 NRC Authorization Act[57] and subsequent authorization acts. By those enactments Congress permitted utilities to submit their own emergency plans when state or local governments refused to do so. LILCO claims that Congress has thereby evinced a specific intent not to allow states to use emergency planning as a means of preventing nuclear plant operation.[58] LILCO asserts that the Licensing Board's decision essentially reads the "utility plan" option out of the law.[59] It also contends that the Board's decision is in conflict with earlier Commission decisions authorizing LILCO

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with federal law must be resolved by reference to the particular statutes at issue in each case. Thus, Silkwood and Pacific Gas & Electric, expressly construing the Atomic Energy Act and analyzing the respective roles of the federal government and the states in the realm of nuclear power regulation, are more pertinent to our inquiry.

[57] Pub. L. No. 96-295, § 109, 94 Stat. 780 (1980).

[58] LILCO Brief at 23.

[59] Id. at 4-7.

to submit its plan for consideration.[60] We disagree with LILCO's arguments.

Section 109(a) of the 1980 Authorization Act, which deals with emergency plans, requires that "there exists a State or local emergency preparedness plan which . . . provides for responding to accidents at the facility concerned" but nevertheless permits issuance of an operating license in the absence of an approved state or local plan if "there exists a State, local, or utility plan which provides reasonable assurance that public health and safety is not endangered by operation of the facility concerned."[61]

Two things are clear from these provisions. First, the lack of an emergency plan officially sponsored by a state or local government does not stand as an absolute barrier to grant of a license. The Commission may consider a utility plan in the absence of a state or local government-sponsored plan. Second, the mere existence of a utility plan is not a sufficient basis for issuance of a license. The Commission must be able to conclude that the utility plan provides

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[60] Id. at 6-9.

[61] Language similar to that contained in the 1980 Act was included in the 1982-83 NRC Authorization Act, Pub. L. No 97-415, § 5, 96 Stat. 2067, 2069 (1983), and the 1984-85 NRC Authorization Act, Pub. L. 98-553, § 108, 98 Stat. 2825, 2827 (1984). Section 109 of the 1980 Authorization Act is set out in full as an appendix to this opinion.

reasonable assurance that the public health and safety will be protected.

But that is about all that is clear from the language of the Act. Despite Congressional awareness that some state or local governments might be unwilling or unable to participate effectively in emergency planning, Congress chose not to speak explicitly to the question of whether state actions that are an impediment to implementation of a utility plan should be deemed preempted by federal law.

LILCO urges us to conclude that Congress must have intended to override state laws in such circumstances, lest a utility's ability to mount its own plan be foreclosed at the threshold, rendering the utility plan option a nullity.[62] While we do not find LILCO's construction of the statute implausible, an alternative reading is more reasonable -- namely, that Congress intended only to make clear that a plan sponsored by a state or local government was not to be a condition for grant of a license if the utility could otherwise demonstrate that it had the wherewithal (including any necessary authority under the law of its home state) to develop a plan that would adequately protect the public health and safety. When choosing between alternative constructions of a statute, we must not work a

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[62] LILCO Brief at 4-7.

displacement of state laws exercising historic police powers "unless that was the clear and manifest purpose of Congress."[63] No such clear and manifest purpose is demonstrated by the text of the 1980 Authorization Act.

Nor does anything in the legislative history of the 1980 Act call this construction of the statute into question. Heightened interest in emergency planning arose in the wake of the accident at the Three Mile Island nuclear plant in 1979. Because federal law did not at that time require review of any state or local emergency plans for responding to an accident at a nuclear power plant, the President's Commission on the Accident at Three Mile Island and the General Accounting Office (GAO) independently recommended that an approved state or local emergency plan be a condition of licensing.[64]

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[63] Rice v. Santa Fe Elevator Corp., 331 U.S. at 230, cited with approval in Florida Lime and Avocado Growers, Inc. v. Paul, 373 U.S. 132, 146 (1963).

[64] See Report of The President's Commission on the Accident at Three Mile Island (October 1979) at 76 and "Areas Around Nuclear Facilities Should be Better Prepared for Radiological Emergencies," Report to the Congress by the Comptroller General of the United States (March 30, 1979) at 35-36. Commission regulations in effect prior to the Three Mile Island accident nonetheless required the development of some plans by the applicant for coping with emergencies, including establishment of an exclusion area and a so-called low population zone (roughly one to two miles) immediately surrounding a nuclear plant. The exclusion area had to be totally under the applicant's control. There had to be a

(Footnote Continued)

Bills passed by both the House and the Senate directed the Commission to establish standards for state plans and to review the adequacy of each state's plan. But these bills differed as to the effect to be given to the state plans. The Senate bill required Commission approval of state and local plans as a condition for licensing. In adopting this approach, the Senate expressly rejected an alternate proposal which would have affirmatively preempted state law by giving the Commission authority to prepare an interim emergency plan where a state plan was deficient. The House bill, in contrast, did not direct the Commission to take any action with respect to new or existing licenses if a state plan failed to comply with Commission regulations or was otherwise inadequate. Rather, the Commission was instructed to identify those states without adequate plans and to recommend to Congress any additional statutory authority

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(Footnote Continued)
sufficiently small number of people in the low population zone to assure that steps for their protection (such as evacuation) could easily be taken in the event of an emergency. Also, the plant had to be designed so that radiation dosages at the respective zone perimeters in the event of an accident would not exceed certain levels. See generally, Metropolitan Edison Co. (Three Mile Island Nuclear Station, Unit No. 2), ALAB-486, 8 NRC 9, 14, review denied, CLI-78-19, 8 NRC 295 (1978); and Public Service Co. of New Hampshire (Seabrook Station, Units 1 and 2), ALAB-422, 6 NRC 33, 42-44 (1977), aff'd CLI-78-1, 7 NRC 1 (1978), aff'd sub nom. New England Coalition on Nuclear Pollution v. NRC, 582 F.2d 87 (1st Cir. 1978).

which the Commission deemed necessary to ensure that each state had an adequate plan.

A conference committee declined to adopt either the House or Senate formula. Although it was not prepared to adopt the House view and allow the operation of nuclear plants in the absence of some emergency plan that ensured adequate protection of the public, it did not require Commission approval of state and local plans as a condition of licensing as the Senate proposed. The conference committee (and, eventually, the Congress) adopted the compromise section 109. The conference committee explained its approach as follows:

> The compromise provides that the NRC is to issue an operating license for a new utilization facility only if the State or local plan, as it applies to such facility, complies with the NRC's current guidelines for such plans or the new rules when promulgated, except that if a state or local plan does not exist that complies with the guidelines or rules, the compromise provides that NRC still may issue an operating license if it determines that a State, local or utility plan provides reasonable assurance that public health and safety is not endangered by operation of the facility. The Commission's regulations now require the determination prior to the issuance of an operating license that there is reasonable assurance that public health and safety is not endangered by operation of the facility.
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> The conferees sought to avoid penalizing an applicant for an operating license if a State or locality does not submit an emergency response plan to the NRC for review or if the submitted plan does not satisfy all the guidelines or rules. In the absence of a State or local plan that complies with the guidelines or rules, the compromise permits NRC to issue an operating license if it determines that a State, local or

> utility plan, such as the emergency preparedness plan submitted by the applicant, provides reasonable assurance that the public health and safety is not endangered by operation of the facility.[65]

LILCO argues that "the only rational conclusion is that Congress intended federal law to preempt."[66] In our judgment, the more reasonable conclusion is that Congress declined to embroil itself in the preemption thicket at all. Only the Senate had attempted to resolve the preemption question explicitly and, as noted above, it affirmatively rejected the option of federal intercession where the states are unwilling or unable to plan. Indeed, by requiring the approval of state and local emergency plans as a condition for licensing, it had accorded the states an absolute veto over licensing. We refuse to conclude that the compromise should now be read as representing a 180 degree reversal of the Senate's earlier position.

The House had not opted for either solution proposed in the Senate. Rather, it had instructed the Commission simply to report back on the need for further legislation in the event an impasse emerged. This House provision was included in the compromise ultimately adopted. That being so, we

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[65] H.R. Rep. No. 1070, 96th Cong., 2d Sess. 27, reprinted in 1980 U.S. Code Cong. & Ad. News 2260, 2270-71.

[66] LILCO Brief at 32.

cannot assume that the House intended that the compromise serve as a definitive resolution of the preemption issue. In the circumstances, we believe that Congress intended to leave unaffected the law of preemption as it existed under the Atomic Energy Act.[67]

This view of congressional intent is fully consistent with the Commission's contemporaneous pronouncements on the subject. In July 1979, taking note of the GAO recommendation, the Commission invited public comment regarding a proposed new regulatory requirement that NRC approval of state and local emergency plans be a condition for issuance of an operating license or continued operation of a nuclear facility.[68] In light of the comments received, the Commission issued a Notice of Proposed Rulemaking to require NRC concurrence in state and local response plans as a condition for licensing unless an applicant could demonstrate that deficiencies in the plans were not

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[67] LILCO directs our attention to the remarks of individual legislators (Representatives Lujan, Pashayan, Coughlin and Corcoran, and Senator Simpson) reflecting their view that preemption was intended. See id. at 27, 29-31. The remarks of individual legislators are often an unreliable gauge of overall legislative intent, In re Surface Mining Regulation Litigation, 627 F.2d 1346, 1362 (D.C. Cir. 1980), and, given the compromise nature of the bill as it eventually emerged, we are unprepared to conclude from the remarks of individual legislators that preemption was intended.

[68] 44 Fed. Reg. 41,483 (1979).

significant, that alternative compensating actions have been or will be taken promptly, or that there are other compelling reasons for issuing the license.[69]

In August 1980, the Commission issued new emergency planning regulations which it characterized as consistent with the recently passed 1980 Authorization Act.[70] The regulations rejected any requirement that emergency plans sponsored by the state or local government be a condition of licensing. The Commission did not assert, however, that its regulations were intended to have preemptive effect. On the contrary, it recognized that state and local governments were expected to be important participants in emergency planning and acknowledged that a problem would arise if states declined to participate in emergency planning. It observed:

> The Commission recognizes there is a possibility that the operation of some reactors may be affected by this rule through inaction of State and local governments or an inability to comply with these rules. The Commission believes that the potential restriction of plant operation by State and local officials is not significantly different in kind or effect from the means already available under existing law to prohibit reactor operation, such as zoning and land-use laws, certification of public convenience and necessity, State financial and rate considerations . . . and Federal environmental laws. The Commission notes, however, that such considerations generally relate

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[69] 44 Fed. Reg. 75,167 (1979).

[70] See 45 Fed. Reg. 55,402 (1980).

> 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 workshops, that State and local officials as partners in this undertaking will endeavor to provide fully for public protection.[71]

More recently, interpreting its new regulations, the Commission reaffirmed that inaction by a state or local government "could effect a potential restriction on plant operations."[72] In our judgment, the only sensible conclusion to be drawn from the Commission's pronouncements is that it expected the state and local governments to cooperate in emergency planning but recognized that they could use their new emergency planning responsibilities in a manner akin to their traditional power to prohibit reactor operation on nonradiological health and safety grounds.

We disagree with LILCO's assertion that such construction of the statute renders utility plans a nullity,[73] although it may well diminish their usefulness as a means of complying with the emergency planning requirements. The legislative compromise, after all, makes clear that utilities are not foreclosed at the threshold

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[71] Id. at 55,404.

[72] Consolidation Edison Co. of New York (Indian Point, Unit No. 2), CLI-83-16, 17 NRC 1006, 1010 (1983).

[73] See LILCO Brief at 4-7.

from obtaining a license merely because the state or local government declines to participate in emergency planning. In other words, the legislation accords a utility at least the opportunity to supplement an otherwise deficient governmental plan. It also appears to foreclose the Commission from mandating a state or local government-sponsored plan as a regulatory requirement for licensing. Although LILCO in this instance may have come up against an insurmountable obstacle despite the legislation (the bill, however, was not intended as a guarantee that all utilities would receive licenses), the statute may well have kept open avenues that might otherwise have been closed.[74]

LILCO also claims that the Board's decision rejecting its plan conflicts with Commission decisions encouraging the filing and consideration of the plan. In LILCO's view, the Commission would not have authorized it to present a plan to the Board for consideration if it was clear at the outset that an operable plan could not be implemented.

We find no conflict with the Commission's decisions. The decisions principally relied on by LILCO were rendered in 1983 and 1984 -- before the state court's decision and at

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[74] For example, in the Indian Point case, CLI-83-16, 17 NRC 1006, the utility's ability to act in concert with the state government prevented the shutdown of a plant despite a local county's lack of participation in the emergency plan.

a time when LILCO's authority under state law to perform its emergency functions was genuinely in doubt.[75] At that time the Commission quite properly concluded that the planning issues were not "categorically unresolvable."[76] The Commission's June 1985 decision denying a request for an environmental evaluation of low power operation, although rendered after the state court had ruled on the state law issues, simply assumed that state and county cooperation would be forthcoming if the Commission ultimately determined that an adequate emergency plan is achievable with state and county participation.[77] As we discuss in Part III of this opinion, such assumption was not the predicate for the plan under review by the Licensing Board, and the Commission expressly declined to address any of the issues before us in this case.[78]

In sum, we conclude that the most reasonable construction of the Atomic Energy Act, the NRC Authorization Acts, and the Commission's prior determinations is that

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[75] See CLI-84-9, 19 NRC 1323 (1984) and CLI-83-17, 17 NRC 1032 (1983), cited in LILCO's Brief at 7-9.

[76] CLI-83-17, 17 NRC at 1034.

[77] See CLI-85-12, 21 NRC 1587, cited in LILCO's Reply Brief on the Legal Authority, Conflict of Interest, and State Plan Issues (July 24, 1985) (hereafter cited as LILCO Reply Brief) at 2, 4.

[78] See CLI-85-12, 21 NRC at 1589.

LILCO is entitled to submit an emergency plan in the absence of a state or local plan in an effort to demonstrate that the public can be adequately protected. But federal law does not override enforcement of the statutes of the State of New York that impede or foreclose LILCO from presenting a viable emergency plan to the Commission for review. If the current state of the law frustrates LILCO by giving the state an eleventh hour veto over operation of the Shoreham reactor, the remedy lies in the legislative arena.

III. Realism

As noted earlier, LILCO did not rest its case below solely on its preemption argument. It contended as well that it is entitled to a decision in its favor on Contentions 1-10, even if state law bars it from carrying out the actions specified in those contentions.[79] This is so, according to LILCO, because the state and local governments would respond and take the necessary protective measures in the event of a real emergency that threatened the health and safety of the populace surrounding the plant.[80]

The Licensing Board rejected the claim, finding it flawed in two critical respects. First, according to the

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[79] LILCO Motion at 43.

[80] Ibid.

Board, LILCO "cannot be delegated the authority to perform the functions enumerated in Contentions 1-10" and therefore could not fully implement the plan by itself.[81] Second, and more to the point, any response by the state and county in a real emergency would be on "an uncooperative, uncoordinated, ad hoc basis."[82]

LILCO continues to press its "realism" argument before us. According to LILCO, the Licensing Board erred in basing its decision on the premise that in the event of a radiological emergency "the state would simply deputize LILCO employees to carry out an emergency plan but do nothing itself."[83] LILCO claims that its argument is "simply that the State and County would in fact respond if a real emergency were to occur."[84]

It is not altogether clear that the Board predicated its decision on the premise suggested by LILCO. Although some portions of the Board's decision support LILCO's position,[85] there is also language suggesting that the Board

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[81] LBP-85-12, 21 NRC at 911.

[82] Id. at 912.

[83] LILCO Brief at 46.

[84] Id. at 45.

[85] The Board at one point stated that "LILCO assumed that if the State and County were to participate in an

(Footnote Continued)

had in mind a response involving the direct participation by state and county officials in the implementation of the plan. The Board observed:

> Applicant anticipates the State and County will provide for a planned response, but only after Shoreham begins to operate. LILCO Brief on Contentions 1-10, at 44. We must base our determination on what the proposed plan actually provides and whether it currently complies with the regulatory requirements so that a determination can be made whether there is reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency. The State and County affirmatively oppose participating in LILCO's Plan. We cannot base a judgment on the adequacy of the Plan on conjecture, as LILCO would have us do. Although Intervenors 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 contemplated for an adequate plan. (See Board Findings on Contention 92 in § XIII.C.).[86]

We need not decide whether the Licensing Board misconstrued LILCO's argument, as claimed. Even if it did, the Board's decision must be upheld. In the first place, assuming, as LILCO would have us do, that the state and county will in good faith respond in the event of a genuine

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(Footnote Continued)
emergency response at Shoreham, they would authorize the utility to perform the functions it proposes to carry out in an emergency as enumerated in the subject contentions. The realism argument is wholly predicated on the State and County authorizing LILCO to act as planned. Without such authorization the realism argument vanishes." LBP-85-12, 21 NRC at 911.

[86] Id. at 912 (emphasis supplied).

emergency, no state or county response plan has been submitted for review on this record. The best that is currently available is the assurance of the County Executive that the county will fulfill its responsibility to protect the public in the event of an emergency and the assumption that the state would do the same.

In this regard, we have not overlooked the County Executive's recent announcement that the county is prepared to take any necessary action to protect the public in the event of a genuine emergency and that a test of the LILCO emergency plan, presumably with the oversight of the County Executive, can be conducted.[87] It may well be that a new effort by LILCO and the county will in due course result in an adequately coordinated emergency plan. If and when some arrangement between LILCO and the county comes to fruition, it may be submitted for consideration.

Moreover, the Board found that any response by the state and county in the absence of prior planning and rehearsal would be necessarily ad hoc. It is this type of ad hoc response that was found unsatisfactory during the accident at Three Mile Island and that led to the adoption

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[87] See Letter to Appeal Board from Chief Deputy County Attorney Eugene R. Kelly (July 11, 1985).

of the Commission's current emergency planning regulations.[88]

On this score, LILCO claims that the "issue of 'coordination' is a factual issue not properly raised by the motion for summary disposition of Contentions 1-10."[89] We disagree. In the usual licensing proceeding, the question of whether, and to what extent, an emergency plan can and will be successfully implemented does present factual issues for litigation. In the instant case, however, the state and county have thus far refused to participate at all in any preparation or testing of emergency procedures. Even if we assume that the state and county will respond to a genuine emergency, we cannot assume that such response will be coordinated in advance and rehearsed.

In this regard, LILCO has failed to make any demonstration that its plan is amenable to ad hoc adoption by the appropriate governmental units at the time of an emergency. The inch-thick volume of the transition plan itself, plus two volumes of implementing procedures, each at least two inches thick, and another, three and one-half inch volume, labeled "Appendix A - Evacuation Plan", do not lend

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[88] See generally, Duke Power Co. v. NRC, 770 F.2d 386, 388 (4th Cir. 1985).

[89] LILCO Brief at 47.

themselves to quick review and implementation if the state or county are called upon to act.[90] The plan establishes more than 50 different position titles and as many separate functions.[91] It is designed to evacuate up to 160,000 residents from a 160-square mile area that is encompassed within an approximately 10-mile radius from the plant.[92] Among the facilities to be evacuated are three hospitals, eight major nursing and adult homes, and two correctional facilities.[93] At other plants, extensive coordination and rehearsal have been required for such a substantial undertaking. In short, there is simply no reasonable basis for assuming that the state or county could realistically step in at the last moment and execute the LILCO plan.[94]

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[90] Tr. 832-35, 1204.

[91] See Applicant Ex. EP-1, Emergency Response Plan Implementing Procedures, at 2.1.1.

[92] See id., Local Offsite Radiological Emergency Response Plan, Appendix A - Evacuation Plan, at I-4.

[93] Id. at II-28 to II-30.

[94] We reject LILCO's alternate arguments that its transition plan should be considered an "interim compensating action" under 10 CFR 50.47(c), or that other factors warrant issuance of an operating license despite the lack of governmental participation in emergency planning. LILCO Brief at 50-52. Section 50.47(c) permits an applicant to show that deficiencies in emergency plans "are not significant for the plant in question, that adequate interim compensating actions have been or will be taken promptly, or that there are other compelling reasons to permit plant

(Footnote Continued)

IV. Immateriality

LILCO contends, finally, that certain of the actions specified in Contentions 1-10 -- namely those associated with traffic management[95] -- are not required by Commission regulations and thus are "immaterial" to a determination that adequate protection can and will be provided in the event of an accident. In LILCO's view, an evacuation can be conducted even without traffic control; such evacuation would take only about an hour and a half more than under controlled conditions and no longer than at other plants; and adequate protection in case of an emergency can be assured as long as accurate time estimates for an evacuation can be developed and found reliable.[96] In LILCO's view, the refusal of the state or county to allow traffic control simply increases the time estimate for an evacuation which must be taken into account when protective actions are considered (just as a major snowstorm might affect protective action recommendations).[97]

(Footnote Continued)
operation." In the instant case, material features of the LILCO transition plan cannot be carried out and the public's safety cannot be adequately assured. LILCO has also failed to demonstrate that compensating actions can or will be taken or that compelling reasons exist to permit plant operation.

[95] Contentions 1-4, 9, and 10. See note 14, supra.

[96] LILCO Brief at 48-50.

[97] Id. at 50.

The Licensing Board acknowledged that no standard time is established in the regulations for an evacuation[98] and that, in any event, the utility is not obligated to ensure the best possible evacuation.[99] Nonetheless, the Board noted that 10 CFR 50.47(a)(1) requires that there is "reasonable assurance that protective measures can and will be taken in the event of a radiological emergency." It also indicated that section 50.47(b)(10) requires that a "range of protective actions be developed for the plume exposure pathway EPZ for emergency workers and the public" and that "[g]uidelines for the choice of protective actions during an emergency, consistent with Federal guidance, are developed and in place."[100] It concluded that an unplanned evacuation restricts the range of available options and cannot meet these regulatory requirements.[101]

We believe that the Board properly rejected LILCO's "immateriality" argument. We recognize that the Commission's regulations do not spell out the precise manner in which an evacuation is to be conducted if necessary. Nonetheless, the Commission has construed its emergency

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[98] LBP-85-12, 21 NRC at 917.

[99] Id. at 918.

[100] Id. at 916.

[101] Id. at 917.

planning regulations to require "provisions for evacuating the public in times of radiological emergencies."[102] We have likewise observed that the Commission's emergency planning scheme contemplates that emergency evacuation procedures be developed for the 10-mile area surrounding a nuclear plant.[103] As we stated in our Zimmer opinion,

> Commission regulations plainly require the formulation of satisfactory evacuation plans as a part of the overall emergency preparedness effort. Moreover, at least if adequately developed, those plans should aid materially the making of an informed judgment respecting which available protective measures are most suitable in the totality of the circumstances attending the specific emergency at hand.[104]

LILCO included traffic control as part of its proposed evacuation procedures in light of such requirements. We believe that such inclusion was proper. In the context of this case, at least, something more is needed than an

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[102] 46 Fed. Reg. 11,288, 11,289 (1981) (emphasis added).

[103] See The Detroit Edison Co. (Enrico Fermi Atomic Power Plant, Unit 2), ALAB-730, 17 NRC 1057, 1069 n. 12 (1983). Discrete aspects of an evacuation plan may be subjected to adversarial evaluation to determine the efficiency with which an evacuation can be accomplished. See, e.g., Cincinnati Gas & Electric Co. (Wm. H. Zimmer Nuclear Power Station, Unit 1), ALAB-727, 17 NRC 760, 770-71 (1983).

[104] Id. at 774 n.19.

aspiration that the public will be able to fend for itself in the event an evacuation is required.[105]

V. Other Issues

LILCO's appeal challenges certain other of the Licensing Board's subsidiary determinations.[106] Such challenges principally attack the Board's application of the Commission's regulations to the special facts of this case, but involve as well some disagreement over the conclusions the Board drew from the evidence of record. Although LILCO was obliged to raise these matters as part of its appeal from the Board's decision, they appear to bear on the viability of the plan itself, rather than LILCO's authority to implement it, and are more amenable to disposition in connection with the matters likely to be raised by the state

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[105] We offer no views as to whether every item subject to Contentions 1-4, 9, and 10 must be considered material to a proper emergency plan. We note, for example, that LILCO indicated at oral argument that a newly revised emergency plan eliminates trailblazer signs which were the subject of Contention 3. See App. Tr. 37.

[106] LILCO claims, for example, that, in response to Contention 11, the Board erroneously concluded that LILCO employees would be insufficiently independent of management to permit them to recommend appropriate protective action. LILCO Brief at 53-65. LILCO also maintains that, in connection with Contention 92, the Board improperly found that the lack of participation by the state constitutes an irremediable deficiency. Id. at 66-70.

and county.[107] Moreover, given our conclusions with respect to LILCO's principal arguments, resolution of LILCO's remaining claims does not affect our ultimate disposition of the emergency planning phase of the case. Thus, in view of the outcome here and our desire to expedite resolution of this phase of the case, we will defer our consideration of LILCO's remaining arguments until disposition of the appeals filed by the county and the state.

The Licensing Board's conclusions in LBP-85-12 concerning LILCO's legal authority to implement material features of its emergency plan are affirmed.

It is so ORDERED.

FOR THE APPEAL BOARD

C. Jean Shoemaker
Secretary to the
Appeal Board

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[107] For example, counsel for the county noted that it planned to challenge the Board's conclusion that four functions normally performed by the state are within LILCO's capability to perform. App. Tr. 72-73. Staff counsel indicated that the Board's ruling regarding the alleged conflict of interest was wrong both as a matter of construction of the Commission's regulations and as a matter of fact. App. Tr. 108-09. LILCO asserted that the question of coordination with the state raised by Contention 92 is dealt with as well under Contentions 81, 85 and 88. LILCO Reply Brief at 5 n.4.

APPENDIX

1980 NRC Authorization Act

SEC. 109. (a) Funds authorized to be appropriated pursuant to this Act may be used by the Nuclear Regulatory Commission to conduct proceedings, and take other actions, with respect to the issuance of an operating license for a utilization facility only if the Commission determines that--

(1) there exists a State or local emergency preparedness plan which--

(A) provides for responding to accidents at the facility concerned, and

(B) as it applies to the facility concerned only, complies with the Commission's guidelines for such plans, or

(2) in the absence of a plan which satisfies the requirements of paragraph (1), there exists a State, local, or utility plan which provides reasonable assurance that public health and safety is not endangered by operation of the facility concerned. . . .

(b) Of the amounts authorized to be appropriated under section 101(a), such sums as may be necessary shall be used by the Nuclear Regulatory Commission to--

(1) establish by rule--

(A) standards for State radiological emergency response plans, developed in consultation with the Director of the Federal Emergency Management Agency, and other appropriate agencies, which provide for the response to a radiological emergency involving any utilization facility,

(B) a requirement that--

(i) the Commission will issue operating licenses for utilization

facilities only if the Commission determines that--

(I) there exists a State or local radiological emergency response plan which provides for responding to any radiological emergency at the facility concerned and which complies with the Commission's standards for such plans under subparagraph (A), or

(II) in the absence of a plan which satisfies the requirements of subclause (I), there exists a State, local, or utility plan which provides reasonable assurance that public health and safety is not endangered by operation of the facility concerned, and

(ii) any determination by the Commission under subclause (I) may be made only in consultation with the Director of the Federal Emergency Management Agency and other appropriate agencies, and

(C) a mechanism to encourage and assist States to comply as expeditiously as practicable with the standards promulgated under subparagraph (A) of this paragraph.

(2) review all plans and other preparations respecting such an emergency which have been made by each State in which there is located a utilization facility or in which construction of such a facility has been commenced and by each State which may be affected (as determined by the Commission) by any such emergency,

(3) assess the adequacy of the plans and other preparations reviewed under paragraph (2) and the ability of the States involved to carry out emergency evacuations during an emergency referred to in paragraph (1) and submit a report of such assessment to the

appropriate committees of the Congress within 6 months of the date of the enactment of this Act,

(4) identify which, if any, of the States described in paragraph (2) do not have adequate plans and preparations for such an emergency and notify the Governor and other appropriate authorities in each such State of the respects in which such plans and preparations, if any, do not conform to the guidelines promulgated under paragraph (1), and

(5) submit a report to Congress containing (A) the results of its actions under the preceding paragraphs and (B) its recommendations respecting any additional Federal statutory authority which the Commission deems necessary to provide that adequate plans and preparations for such radiological emergencies are in effect for each State described in paragraph (2).

(c) In carrying out its review and assessment under subsection (b)(2) and (3) and in submitting its report under subsection (b)(5), the Commission shall include a review and assessment, with respect to each utilization facility and each site for which a construction permit has been issued for such a facility, of the emergency response capability of State and local authorities and of the owner or operator (or proposed owner or operator) of such facility. Such review and assessment shall include a determination by the Commission of the maximum zone in the vicinity of each such facility for which evacuation of individuals is feasible at various different times corresponding to the representative warning times for various different types of accidents.