This is a PDF of a folder from our textual collections.

Collection: Roberts, John G.: Files
Folder Title: JGR/Shoreham Nuclear Power Plant (2 of 2)
Box: 49

ROUTING AND TRANSMITTAL SLIP

Date: 2/4/86

TO: (Name, office symbol, room number, building, Agency/Post)	Initials	Date
1. JOHN ROBERTS		
2.		
3.		
4.		
5.		

	Action		File		Note and Return
	Approval		For Clearance		Per Conversation
	As Requested		For Correction		Prepare Reply
	Circulate	X	For Your Information		See Me
	Comment		Investigate		Signature
	Coordination		Justify		

REMARKS

THESE PAPERS WERE FILED TODAY IN THE CAPTIONED CASE. ALSO, FOR YOUR INFORMATION, ENCLOSED PLEASE FIND LETTER TO AG FROM SUFFOLK COUNTY.

DO NOT use this form as a RECORD of approvals, concurrences, disposals, clearances, and similar actions

FROM: (Name, org. symbol, Agency/Post)	Room No.—Bldg.
JOANNE MARCHETTA	3726 - MAIN
	Phone No. 633-3716

5041-102

OPTIONAL FORM 41 (Rev. 7-76)
Prescribed by GSA
FPMR (41 CFR) 101-11.206

☆ GPO : 1980 O - 311-156 (17)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	Civil Action No.
	)	
v.	)	
	)	
THE COUNTY OF SUFFOLK, NEW YORK, and PETER F. COHALAN,	)	
	)	
	)	
Defendants.	)	
	)	

ORDER TO SHOW CAUSE

The Court having considered Plaintiff's Motion For A Preliminary Injunction, the declaration dated February 4, 1986, in support of the Motion, the Memorandum Of Points And Authorities In Support Of The Motion, and the complaint filed in the above-captioned action; and

It appearing to the Court that the issuance of an Order to Show Cause is necessary and proper in the matter; that immediate and irreparable injury will result to plaintiff before notice can be served and a hearing had on plaintiff's motion for a preliminary injunction, for the reason that if the defendants are not enjoined from the conduct alleged in the complaint, federal employees and other participants in a test scheduled by the federal government for February 13, 1986, will be subject to

criminal sanction for taking actions that are otherwise required by federal law, it is

ORDERED that the defendants show cause on the 10th day of February, 1986 at ____ o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, at the United States District Courthouse, for the Eastern District of New York, Uniondale Avenue at Hempstead Turnpike, Uniondale, New York, why plaintiff's motion for a preliminary injunction should not be granted; and it is

FURTHER ORDERED that copies of this Order and papers upon which it is granted shall be personally served upon the defendants on or before ____ o'clock on the 5th day of February, 1986; and it is

FURTHER ORDERED that all pleadings, affidavits, memoranda or other materials in response hereto be personally served upon plaintiff's attorney at the Department of Justice, Civil Division, 10th & Pennsylvania Avenue, N.W., Room 3716, Washington, D.C. on or before ____ o'clock on the ____ day of February 1986.

_____
UNITED STATES DISTRICT JUDGE

Dated: February, 1986

Issued at ____ o'clock, February, 1986.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	Civil Action No.
	)	
v.	)	
	)	
THE COUNTY OF SUFFOLK, NEW YORK, and PETER F. COHALAN,	)	
	)	
	)	
Defendants.	)	
	)	

DECLARATION OF RAPHAEL O. GOMEZ

I, Raphael O. Gomez, do hereby declare under penalty of perjury the following:

1. I am an attorney at the Department of Justice and represent the plaintiff, the United States of America (United States) in this case. I make this affidavit in support of the United State's motion for preliminary injunction which will enable the United States, through its various agencies, to conduct and evaluate a federally mandated emergency planning exercise scheduled by the Federal Emergency Management Agency (FEMA). The exercise is required by the Nuclear Regulatory Commission (NRC) as part of the federal licensing procedure at the Shoreham Nuclear Power Station in Suffolk County, New York (Shoreham). See Affidavit of Bernard H. Weiss for a description

of the exercise and Affidavit of Philip H. McIntire for scheduling of the exercise, Exhibits M and N, respectively.

2. As mandated by the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011, et seq., FEMA, by instruction from the NRC, scheduled a test of the effectiveness of an emergency preparedness plan at Shoreham for February 13, 1986. In response, Suffolk County passed Local Law 2-86 that makes it a criminal misdemeanor for any person to simulate the roles of state or county officials in a test such as the one scheduled at Shoreham.

On January 22, 1986, the NRC and FEMA jointly sent a letter to Peter Cohalan, Suffolk County Executive assuring the County that no police powers would actually be exercised but that federal employees would play the role of certain State and County officials in order to effectively evaluate Long Island Lighting Company's (LILCO) capability to respond to a radiological emergency.

On January 23, 1986, the Assistant Attorney General in charge of the Civil Division of the United States Department of Justice, Richard K. Willard, sent to Peter Cohalan, the Suffolk County Executive, a letter concerning the scheduled February 13 test at Shoreham. The letter informed Suffolk County officials that all activities associated with the February 13 exercise were considered to be federally protected. The letter sought assurances that Suffolk County would not be implementing the ordinance in a manner constituting an impermissible obstruction to the congressionally mandated radiological health and safety requirements of the Atomic Energy Act.

In response to the letter dated January 22, 1986, from Herzel H.E. Plaine, General Counsel of the NRC and George W. Watson, Acting General Counsel of FEMA, and the letter dated January 23, 1986 from Richard K. Willard, both to Peter Cohalan, the federal government received in the ordinary course of business a reply dated January 30, 1986 from Gregory Blass, Presiding Officer for the Suffolk County Legislature. The letter stated that the question whether the County intended to treat the February 13 exercise and role-playing it involves as a criminal misdemeanor required consideration by the Suffolk County Legislature. The letter further states that the County Legislature would be unable to act to consider its decision until February 7, 1986.

In response to the County's January 30, 1986 letter, the Department of Justice responded that the February 7 response date was too late and requested a response no later than February 3, 1986. As of this date, no response has been received.

An order to show cause is necessary and appropriate under these circumstances. The need for injunctive relief is urgent in order that federal employees not be subjected to criminal sanction by Suffolk County for carrying out a federal congressional mandate. The United States will suffer irreparable injury in the form of violation of the Supremacy Clause

of the federal Constitution and subjection of federal employees and other participants in the test to criminal sanction before a motion can be heard. For these reasons plaintiff is proceeding by order to show cause.

I swear under penalty of perjury that the above statements are true and correct to the best of my knowledge and belief.

_____
RAPHAEL O. GOMEZ

_____Date

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No.
	)	
THE COUNTY OF SUFFOLK, NEW YORK, and PETER F. COHALAN,	)	
	)	
Defendants.	)	
	)	

COMPLAINT

1. The United States of America, by its undersigned attorneys, brings this civil action for declaratory and injunctive relief. In this action the United States seeks a declaration that Suffolk County Local Law No. 2-86, as applied to the Federal Government's testing of the evacuation plan for the Shoreham Nuclear Power Plant ("Shoreham") located in Suffolk County, is unconstitutional. The United States also seeks an injunction to prevent defendants from enforcing or attempting to enforce Local Law No. 2-86 against a federally conducted test or exercise.

JURISDICTION AND VENUE

2. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1331 and § 1345.

3. Venue is proper in this district pursuant to 28 U.S.C. § 1391(b).

PARTIES

4. Plaintiff is the United States of America.

5. Defendant County of Suffolk, New York ("County") is a municipal corporation incorporated under New York state law.

6. Defendant Peter F. Cohalan is the Suffolk County Executive and is being sued in his official capacity.

CONSTITUTIONAL AND STATUTORY BACKGROUND

7. The United States Constitution, Article VI, Clause 2, provides in pertinent part:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . 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.

8. In 1954, Congress enacted the Atomic Energy Act, 42 U.S.C. § 2011 et seq., which provided for private involvement in the development of atomic energy. 42 U.S.C. §§ 2011-2284. Congress, however, granted exclusive authority to the Atomic Energy Commission to license the transfer, delivery, receipt, acquisition, possession, and use of nuclear materials. See 42 U.S.C. §§ 2014(e), (2), (aa), 2061-2064, 2071-2078, 2091-2099, 2111-2114.

9. Congress abolished the Atomic Energy Commission ("AEC") in 1974 and transferred to and vested in the Nuclear Regulatory Commission ("NRC") AEC's authority, inter alia, to license nuclear power plants and to regulate radiological health and safety. 42 U.S.C. § 5801 et seq.

10. To carry out its mandate concerning radiological health and safety, Congress granted the NRC broad regulatory authority

"governing the design, location and operation of [nuclear power plants] . . . in order to protect health and to minimize danger to life or property . . . . 42 U.S.C. § 2201(i)(3).

11. Applicants for a full power license to operate a nuclear power plant are required to submit an off-site emergency plan to NRC and to subject their off-site emergency plan to a federal test. 42 U.S.C. § 2201(c); 10 C.F.R. § 50.47 and Part 50, Appendix E.

12. Pursuant to its statutory and regulatory authority, the Federal Emergency Management Agency ("FEMA") conducts tests of evacuation plans for nuclear power plants at NRC's request. 42 U.S.C. §§ 5131 and 5201; 50 U.S.C. § 2253(g); 44 C.F.R. Part 350.

13. Prior to a determination by NRC as to whether to issue a full-power operating license, a concerned party, such as Suffolk County may participate in the NRC's licensing proceeding and, if aggrieved by final decision, appeal to a United States Circuit Court. See 42 U.S.C. § 2239.

COUNTY ORDINANCE PROVISIONS

14. Suffolk County Local Law No. 2-86 provides:

> (a) It shall be a crime for any person to conduct or participate in any test or exercise of any response to a natural or man-made emergency situation if that test or exercise includes as part thereof that the roles or functions of any Suffolk County official will be performed or simulated, and if the Suffolk County Legislature, pursuant to the procedure set forth in Sections 3 and 4 of this Local Law, has issued a notice of disapproval of such performance or simulation of County roles or functions.
>
> (b) It shall be a crime for any person to conduct or participate in any test or

> exercise of any response to a natural or man-made emergency situation if that test or exercise includes as part thereof that the roles or functions of any Suffolk County official will be performed or simulated, and if the person shall have failed to comply with the procedures set forth in Sections 3(a) and 3(b) of this Local Law.

15. If a person either conducts or participates in a prohibited exercise as described in paragraph 14 above, such action:

> 5(a) . . . shall be a Class A Misdemeanor and shall be punishable by a sentence of not more than one (1) year in prison or a fine of not more than one thousand dollars; or by both such fine and imprisonment.

THE PRESENT CONTROVERSY

16. The Long Island Lighting Company ("LILCO") is presently the holder of a federal low-power operating license at Shoreham and is seeking approval from the NRC for a full-power operating license.

17. Prior to determining whether a full-power operating license will be approved, upon request of an interested party the NRC must hold a public hearing to consider the application. 42 U.S.C. § 2239. Suffolk County has intervened in LILCO's application before the NRC and has been and is participating in the ongoing NRC administrative proceedings on LILCO's operating license application. See Long Island Lighting Co. (Shoreham Nuclear Power Station, Unit 1), LBP-83-22, 17 NRC 608 (1983).

18. Pursuant to LILCO's application, the NRC has requested FEMA to conduct a federal test of LILCO's emergency evacuation plan for Shoreham. FEMA has scheduled this test for February 13, 1986.

19. In this test, FEMA will evaluate LILCO's emergency preparedness to respond to emergencies identified by FEMA in an exercise "scenario." No State or County police powers will be asserted or exercised during the test. Federal employees or contractors will play the roles of absent state and local personnel. This exercise solely involves a simulation or "role-playing" in a hypothetical scenario and does not involve interaction with the public. In addition to FEMA and NRC personnel, federal participants from the following agencies will participate in the exercise: Department of Agriculture, Department of Commerce, Department of Energy, Environmental Protection Agency, Department of Health and Human Services and Department of Transportation.

20. Suffolk County Local Law No. 2-86 was enrolled by the New York Secretary of State on January 16, 1986.

21. In the preamble to Local Law No. 2-86, the County specifically cites the upcoming test of LILCO's emergency plan as the genesis for this ordinance. Through this ordinance, the County is threatening to apply criminal sanctions against participants in a federal test.

22. Without acknowledging that the ordinance could be lawfully applied to the February 13, 1986 test, LILCO submitted a description of the test to the County on January 16, 1986.

23. On or about January 22, 1986, the NRC and FEMA, also without acknowledging that it was subject to local authority, forwarded to the County a description of the test, emphasizing that it involved only a simulation, with no assertion or exercise of local police powers.

24. On or about January 23, 1986, the Department of Justice informed the County by letter that application of this ordinance to prohibit the February 13, 1986 exercise would constitute an obstruction to the achievement of a congressionally mandated purpose or objective under the Atomic Energy Act. The Department of Justice requested that the County inform the Federal Government by January 30, 1986 whether it intended to so implement the ordinance.

25. On or about January 30, 1986, Mr. Gregory Blass, Presiding Officer of the Suffolk County legislature, responded to the Federal Government letters. In that letter, the County informed the Federal Government that the "earliest date" that the County could advise the Federal Government that it was or was not applying this ordinance to disapprove the February 13th test was February 7, 1986.

26. On or about January 31, 1986, the Department of Justice informed the County, inter alia,: (1) that the test scheduled for February 13, 1986 is a federal test being conducted in furtherance of congressionally mandated objectives; (2) that the test was a simulation only and did not involve assertion or

exercise of local police powers; (3) that the County has the opportunity to challenge implementation of an emergency plan to which the County objects at a hearing before the NRC; (4) that the County has no role in approving the test or determining whether it should go forward; and, (5) that the February 7th date suggested by the County for responding to the Federal Government's inquiry as to whether the County was implementing the ordinance to prohibit the test was too late. This letter also requested that the County respond no later than February 3, 1986.

27. To date, the County has not responded to the Department of Justice's January 31, 1986 letter.

CAUSE OF ACTION

28. The United States repeats and realleges paragraphs 1-27.

29. The Atomic Energy Act authorizes the NRC to issue licenses to operate nuclear power plants and to conduct tests both on and off the premises of such plants to determine that there is reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency.

30. Through the Atomic Energy Act, Congress has preempted all aspects of radiological health and safety involved in the construction and operation of nuclear generated electricity.

31. By requiring County approval for a test conducted by Federal agencies pursuant to the Atomic Energy Act, Suffolk County is burdening and obstructing a federal function, thereby violating the Supremacy Clause of the United States Constitution.

32. By threatening to subject federal employees and their agents to criminal sanctions for conducting and/or participating in the February 13, 1986 test solely because federal employees will be simulating the roles of local governmental officials, Suffolk County is burdening and obstructing a federal function, thereby violating the Supremacy Clause of the United States Constitution.

33. The United States has no adequate remedy at law.

WHEREFORE, PLAINTIFF, THE UNITED STATES OF AMERICA, prays that this Court enter the following injunctive and declaratory relief:

1. Declare that Suffolk Local Law No. 2-86 is unconstitutional as applied to the federal agencies in connection with the test at the Shoreham Nuclear Power Plant planned for February 13;

2. Preliminarily and permanently enjoin and restrain defendants from enforcing or attempting to enforce Local Law No. 2-86 against federal tests conducted by NRC or FEMA or other federal agencies pursuant to the requirements of the Atomic Energy Act; and

3. Grant such further relief as the Court may deem that the plaintiff United States may be entitled to in law or in equity.

Respectfully submitted,

RICHARD K. WILLARD
Assistant Attorney General

RAYMOND J. DEARIE
United States Attorney

DAVID J. ANDERSON

SURELL BRADY

RAPHAEL O. GOMEZ

Attorneys, Department of Justice
Civil Division, Room 3716
10th & Pennsylvania Ave., N.W.
Washington, D.C. 20530
Telephone: (202) 633-1318

Attorneys for plaintiff.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff, v. THE COUNTY OF SUFFOLK, NEW YORK, and PETER F. COHALAN, Defendants.	)	Civil Action No.

MOTION TO CONSOLIDATE

Pursuant to Federal Rule of Civil Procedure 42, the United States hereby moves to consolidate the above-captioned action with Long Island Lighting Company v. The County of Suffolk, U.S.D.C. E.D.N.Y., a case presently pending in this Court that arises out of the same subject matter as the above-captioned case.

Respectfully submitted,

RICHARD K. WILLARD
Assistant Attorney General

RAYMOND J. DEARIE
United States Attorney

DAVID J. ANDERSON

SURELL BRADY

RAPHAEL O. GOMEZ

Attorneys, Department of Justice
Civil Division, Room 3525
10th & Constitution Ave., N.W.
Washington, D.C. 20530
Telephone: (202) 633-1318

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff, v. THE COUNTY OF SUFFOLK, NEW YORK, and PETER F. COHALAN, Defendants.	Civil Action No.

MEMORANDUM IN SUPPORT OF MOTION TO CONSOLIDATE

In support of its motion to consolidate Long Island Lighting Company v. The County of Suffolk, Civil Action No. CV-86-0174 (LDW), with the above-captioned action, the United States hereby states that the subject matter of both actions involves common questions of law and fact. In its complaint, filed January 27, 1986, the Long Island Lighting Company (LILCO) seeks to have the Court determine, inter alia, the constitutionality of Suffolk County Local Law 2-86 in the context of a federally mandated test of an emergency preparedness plan for the Shoreham Nuclear Power Station in Suffolk County, New York. See Complaint of Long Island Lighting Company at p. 1. Similarly, in the above-captioned case, the United States seeks to have this Court determine the constitutionality of the same local ordinance.

For these reasons, consolidation is appropriate under Federal Rule of Civil Procedure 42.

Respectfully submitted,

RICHARD K. WILLARD
Assistant Attorney General

RAYMOND J. DEARIE
United States Attorney

DAVID J. ANDERSON

SURELL BRADY

RAPHAEL O. GOMEZ

Attorneys, Department of Justice
Civil Division, Room 3525
10th & Constitution Ave., N.W.
Washington, D.C. 20530
Telephone: (202) 633-1318

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	Civil Action No.
	)	
v.	)	
	)	
THE COUNTY OF SUFFOLK, NEW YORK, and PETER F. COHALAN,	)	
	)	
	)	
Defendants.	)	
	)	

ORDER

The Court having considered Plaintiff's Motion To Consolidate pursuant to Federal Rule of Civil Procedure 42, and the arguments and authorities in support thereof and in opposition thereto, it is by the Court this _____ day of _____ 1986,

ORDERED that plaintiff's motion is granted, and it is further

ORDERED that the above-captioned action be consolidated with Long Island Lighting Company v. The County of Suffolk, Civil Action No. CV-86-0174 (LDW), U.S.D.C. E.D.N.Y., presently pending in this Court.

_____
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	Civil Action No.
	)	
v.	)	
	)	
THE COUNTY OF SUFFOLK, NEW YORK, and PETER F. COHALAN,	)	
	)	
	)	
Defendants.	)	
	)	

MOTION FOR A PRELIMINARY INJUNCTION

Pursuant to Federal Rule of Civil Procedure 65, the United States hereby moves the Court to grant a preliminary injunction against enforcement by Suffolk County, New York of Local Law 2-86 in connection with the test of the Radiological Emergency Preparedness Plan at Shoreham Nuclear Power Plant scheduled for February 13, 1986. The Court is respectfully referred to the affidavit attached hereto that shows immediate and irreparable injury, loss or damage to the plaintiff in the form of violation of the Supremacy Clause of the federal constitution and subjection of federal officials and other participants in the test to criminal sanction for taking actions that are otherwise required by federal law.

Respectfully submitted,

RICHARD K. WILLARD
Assistant Attorney General

RAYMOND J. DEARIE
United States Attorney

DAVID J. ANDERSON

SURELL BRADY

RAPHAEL O. GOMEZ

Attorneys, Department of Justice
Civil Division, Room 3525
10th & Constitution Ave., N.W.
Washington, D.C. 20530
Telephone: (202) 633-1318

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No.
	)	
THE COUNTY OF SUFFOLK, NEW YORK, and PETER F. COHALAN,	)	
	)	
Defendants.	)	
	)	

MEMORANDUM IN SUPPORT OF
MOTION FOR PRELIMINARY INJUNCTION

Respectfully submitted,

RICHARD K. WILLARD
Assistant Attorney General

RAYMOND J. DEARIE
United States Attorney

DAVID J. ANDERSON
SURELL BRADY
RAPHAEL O. GOMEZ

Attorneys, Department of Justice
Civil Division, Room 3716
10th & Pennsylvania Ave., N.W.
Washington, D.C. 20530
Telephone: (202) 633-1318

Attorneys for plaintiff.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No.
	)	
THE COUNTY OF SUFFOLK, NEW YORK, and PETER F. COHALAN,	)	
	)	
Defendants.	)	
	)	

MEMORANDUM IN SUPPORT OF
MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION

After years of supporting the construction of the Shoreham nuclear power generating plant by the Long Island Lighting Co. (LILCO), Suffolk County, New York did an about face in 1983 and has, from that time, opposed its plant licensing. The latest manifestation of that opposition is Suffolk County Local Law 2-86, which requires submission to the county of the details of any projected test of an emergency preparedness plan relating to any natural or man-made disaster. The conduct of such a test is a prerequisite for further consideration by the Nuclear Regulatory Commission (NRC) of LILCO's licensing application. The test, to be conducted by the Federal Emergency Management Agency (FEMA) at the NRC's request, is scheduled for February 13.

In adopting its ordinance, Suffolk County has set itself astride this important step in assuring the radiological health and safety of nuclear power plants, a subject Congress has preempted for federal regulation through the Atomic Energy

Act. By asserting the authority to approve or disapprove this federally required and conducted test, and by threatening the prosecution of federal employees and others who participate, the county has violated the Supremacy Clause of the Constitution. Even if this test were not part of a whole process preempted by Congress, the Suffolk Ordinance stands as an obstruction to and interference with a federal activity, a separate basis for its invalidity under the Supremacy Clause. If Suffolk County wishes to continue its opposition to the Shoreham facility, it is free to do so in the continuing licensing proceeding before the NRC, of which the test is only one small part, and by judicial review from any unfavorable ruling there. It is not free, however, to burden the performance of an emergency preparedness test conducted under the authority of federal law. This court should issue a preliminary injunction restraining that interference and removing the possibility of criminal prosecution that now hangs over the conduct of this test.

BACKGROUND

1. Statutory and Regulatory Framework

The Atomic Energy Act of 1954, 42 U.S.C. § 2011, et seq., gave the Atomic Energy Commission ("AEC") authority, inter alia, to regulate nuclear power. The Energy Reorganization Act of 1974, 42 U.S.C. §§ 5801, et seq., transferred the licensing and related regulatory functions of the AEC to the Nuclear Regulatory Commission ("NRC" or "Commission") in order "to more effectively address the complicated, demanding tasks of

licensing nuclear plants, materials, and activities." H.R. Rep. No. 93-707, 93rd Cong., 1st Sess., p. 4 (1973).

As mandated by the Atomic Energy Act, the NRC provides a thorough administrative process for consideration of the public health and safety aspects of nuclear power plant licensing. Utilities wishing to construct a nuclear power plant must make detailed health, safety, and environmental submissions. The NRC staff reviews these submissions and, subsequent to that review, participates as an independent party in the licensing process. In accordance with the Administrative Procedure Act, 5 U.S.C. §§ 551, et seq., and with Commission regulations, 10 C.F.R. Part 2, formal adjudicatory hearings are then held on all construction permit and contested operating license applications.

One of the many regulatory requirements which the NRC addresses in the course of its power plant licensing activities is emergency planning. As articulated by NRC regulation, "no operating license for a nuclear power reactor will be issued unless a finding is made by NRC that there is reasonable assurance that adequate protective measures can and will be taken in the event of a radiological emergency." 10 C.F.R. § 50.47(a)(1). To assist it in making this finding, the NRC requires that onsite and offsite emergency planning exercises be conducted prior to the licensing of a nuclear power plant. 10 C.F.R. § 50.47(b)(14) and Part 50, App. E, §IV, F, 1; Union of Concerned Scientists v. NRC, 735 F.2d 1437 (D.C. Cir. 1984), cert. denied, 105 S.Ct. 815 (1985). The offsite exercises, which the NRC requires, are conducted under the supervision of

the Federal Emergency Management Agency ("FEMA") which also evaluates the results. Exhibit A. Memorandum of Understanding Between Federal Emergency Management Agency and Nuclear Regulatory Commission, 50 Fed. Reg. 15,485 (April 18, 1985).

Parties to the NRC adjudication of a license application may litigate the results of the exercises before the NRC and its adjudicatory bodies. Union of Concerned Scientists, supra. Subsequently, based upon the exercise results, FEMA's findings, the parties' arguments, and its own expert judgment, the NRC makes the determination of whether the utility emergency plan provides reasonable assurance of adequate protective measures in the event of a radiological emergency. 10 C.F.R. § 50.47.

2. The Shoreham Adjudicatory Proceeding and Emergency Planning Issues

In 1968, LILCO applied to the AEC for a construction permit to build the Shoreham Nuclear Power Plant in Suffolk County, New York. That permit issued on April 12, 1973, and LILCO applied thereafter for a license to operate Shoreham. In March 1976, the NRC issued a notice inviting persons interested in LILCO's operating license application to participate in an NRC adjudicatory hearing. Numerous interested parties intervened in the Shoreham proceeding, including Suffolk County.

For more than a decade, Suffolk County supported the construction and licensing of Shoreham. In 1970, Former Suffolk County Executive, H. Lee Dennison, appeared in the federal administrative hearings on LILCO's construction permit to build Shoreham and urged that it be granted. Long Island Lighting Co.

(Shoreham Nuclear Power Station, Unit I) LBP-83-22, Appendix A, 17 N.R.C. 608, 647 (1983). Suffolk County continued its support of Shoreham throughout the 1970's. After the Three Mile Island accident occurred and the NRC redefined emergency planning requirements for nuclear power plants, Suffolk County and LILCO signed a Memorandum of Understanding which detailed their respective responsibilities concerning emergency planning. Id. In 1981, LILCO and Suffolk County signed a contract whereby Suffolk County agreed to enhance its emergency response plans, which Suffolk had developed for Shoreham, in order to meet the new NRC requirements. LILCO agreed to pay Suffolk $245,000 to defray the cost of developing a new plan.

Sometime in 1982, however, Suffolk County stopped cooperating with LILCO's emergency planning efforts and embarked on a different course of action which culminated in the passage of Suffolk County Resolution No. 111-1983 on February 17, 1983. Id. at 650-51. By this resolution, Suffolk County refused any further cooperation with LILCO's efforts to prepare an emergency plan that met NRC health and safety standards. LILCO and Suffolk County have litigated over this impasse and its significance to LILCO's efforts to obtain an operating license for Shoreham both before the NRC and in state and federal courts. That litigation has not, however, resolved the dispute between the utility and the County. LILCO continues to believe that it has developed an emergency plan that meets the NRC's standards; Suffolk continues to believe that its refusal to cooperate with LILCO has effectively precluded the utility from complying with

the NRC's emergency planning regulatory requirements. The matter is pending in the NRC adjudicatory process at this time and no final agency decision on the underlying LILCO-Suffolk County emergency planning dispute has been rendered by the NRC.

In order to assist in evaluating the competing LILCO-Suffolk County emergency planning claims and to fulfill its Atomic Energy Act public health and safety responsibilities, in June, 1985, the Commission, by a 3-2 vote, ordered its regulatory staff to request FEMA to schedule "as full an exercise of the LILCO plan as is feasible and lawful at the present time." Exhibit B (June 4, 1985 Memorandum for William J. Dircks); see also McIntire Affidavit at ¶ 3, Exhibit N. The NRC staff promptly requested FEMA to schedule such an exercise. Exhibit C (June 20, 1985 Memorandum for Richard W. Krimm from Edward L. Jordan) and Exhibit N at ¶ 3. In response to this request, FEMA offered the NRC two exercise options: either a limited exercise of only LILCO functions or a broader exercise with exercise controllers simulating the roles of those key State or Suffolk County officials unable or unwilling to participate. Exhibit D (October 29, 1985 letter from Samuel W. Speck to William J. Dircks). In early November 1985, the Commission, again by a 3-2 vote, requested FEMA to proceed with the broader exercise option to "include all functions and normal exercise objectives, recognizing that some offsite response roles may be simulated." Exhibits E and F (November 8, 1985 Memorandum for William J. Dircks and November 12, 1985 letter from William J. Dircks to Samuel W. Speck). In accordance with the NRC's

request, FEMA has scheduled such an exercise for February 13, 1986.

3. The Shoreham Exercise

Emergency planning exercises such as that planned for Shoreham are commonly used and regulatorily required devices that enable the NRC to assess the adequacy of a utility's emergency planning in the event of a hypothetical radiological accident at a power plant. See Exhibit G, I and Weiss Affidavit at ¶ 2, Exhibit M. These exercises are necessary for the Commission to determine if its statutory and regulatory health and safety requirements are met. In addition, with regard to the Shoreham exercise, the fact-gathering aspects of an emergency planning exercise are also critical if the NRC is fairly to resolve the LILCO-Suffolk County impasse over whether an emergency plan without State or County participation can ever pass NRC muster.

The Commission recently reiterated, on January 30, 1986, its need for public health and safety and information gathering when it denied a motion to cancel the Shoreham exercise, which was filed by Suffolk County and other intervenors in the Shoreham adjudicatory proceeding that is ongoing before the NRC. Exhibit G. The Commission majority found the exercise to be "both lawful and necessary to fulfill our responsibility under the Atomic Energy Act to protect the health and safety of the public." Exhibit G at 6. (Footnote omitted). 42 U.S.C. §§ 2132(d), 2201(c). Moreover, the Commission continued, the exercise will "allow us to evaluate whether the LILCO plan, as

described above, is as good as LILCO claims it is or, conversely, is as bad as the State, County, and Town assert." Exhibit G at 6.

The focus of the exercise will be on LILCO and its emergency planning abilities.

> FEMA intends to observe a number of [Local Emergency Response Organization] LERO primary response capabilities. This observation will entail an examination of facilities, plans, and communications, but will not entail interaction with the public that would be affected in the event of an actual emergency.

Exhibit G at 2. See also Exhibit I at 2-3; Exhibit M at ¶¶ 5-11.

The exercise will also examine whether LILCO's planned response to ad hoc State and County participation is adequate. Exhibit G at 4, Exhibit I at 3, Exhibit M at ¶ 6. This portion of the exercise also focuses on LILCO and its response capabilities. However, because no State or County personnel will participate in the exercise, it is necessary to "simulate" the ad hoc response which these governments will provide in an actual emergency. This "simulation" will in no way involve the actual performance of any function reserved by State or County law to State or County personnel. As the Commission recently explained:

> In order to test LILCO's planned response to ad hoc governmental participation in an actual emergency and to add more realism to the exercise, federal employees will play the role of such officials during the exercise. Through this role-playing, the NRC is attempting to evaluate LERO's capability (1) to accomodate the presence of state and local officials, (2) to support those officials using the resources available through LERO, and (3) to provide those officials with sufficient information to carry out their

> state and county responsibilities. These "actors," however, will be instructed not to play decisionmaking roles, not to assume any command and control authority, not to interact with members of the public so as to lead anyone to believe that they are actually county officials, and not to actually perform any state or local functions exclusively reserved to state or county officials by state or county laws.

Exhibit G at 5. See also Exhibit I at 3, Exhibit M at ¶ 6. In its concluding sentences denying Suffolk's recent request to postpone the exercise, the Commission characterized the situation that still faces the federal government as a result of the pendency of Local Law 2-86:

> For the past several years the State, County and Town have been claiming that no adequate plan can be developed for Shoreham, and that the LILCO plan is inadequate. They are entitled, as litigants before us, to advocate that position; they are not, however, entitled to obstruct our inquiry into the facts necessary to enable us to resolve that assertion.

Exhibit G at 7 (footnote omitted).

4. Suffolk County Local Law 2-86 And The Federal Response

On January 13, 1986, the Suffolk County Executive signed Suffolk County Local Law 2-86, entitled "A Local Law Concerning the Protection of Police Powers Held By the County of Suffolk." Exhibit H. From its terms and the brief legislative history surrounding its passage, the law is aimed at the upcoming February 13 Shoreham exercise. If applied to the Shoreham exercise, Local Law 2-86 would make it a criminal act

for anyone to participate in this federal function.[1]

In response to Local Law 2-86, on January 22, 1986, the NRC and FEMA wrote a joint letter to the Suffolk County Executive which provided a detailed description of the federal purpose which the Shoreham exercise will serve and also gives a detailed description of the exercise. Exhibit I. Suffolk County was assured that none of its police powers would be impinged in any way by the Shoreham exercise and that the focus of the exercise would be on LILCO, its ability to perform its own emergency planning functions, and its ability to accommodate ad hoc emergency responses by New York State and Suffolk County.

The following day, on January 23, 1986, the Assistant Attorney General in charge of the Civil Division of the Department of Justice wrote the Suffolk County Executive regarding Local Law 2-86. Exhibit J. The Assistant Attorney General requested to know by January 30, 1986 whether Suffolk County intended to treat the February 13 Shoreham exercise as a criminal misdemeanor. He further advised Suffolk County that such action on its part would "be implementing [Local Law 2-86] in a manner that constitutes an impermissible obstruction to the congressionally mandated radiological health and safety requirements of the Atomic Energy Act." Exhibit J at 2-3.

---

[1] Local Law 2-86 makes it a criminal act for any person to participate in any emergency planning exercise which involves any simulation of Suffolk County officials if that exercise has either been disapproved by the Suffolk County Legislature, Exhibit H, Section 2(a), or if certain filing procedures have not been followed. Exhibit H, Section 2(b), Section 3(a) and (b).

In response to the Federal Government's letters, on January 30, 1986, by letter of Gregory Blass, Presiding Officer for the Suffolk County Legislature, the County informed the Assistant Attorney General that the "earliest date that any notice of disapproval might be issued is February 7." Exhibit K at 2. In addition, Mr. Blass stated that the proposed test raised the question of whether LILCO has any legal basis to test the plan, since, in the County's view, LILCO does not have the authority to sponsor an emergency plan. Exhibit K at 1.

The following day, Assistant Attorney General Willard responded to Mr. Blass by letter, a copy of which was hand-delivered to his office. Letter dated January 31, 1986 from Richard K. Willard, Exhibit L. Mr. Willard reiterated that the February 13, 1986 test is to be conducted by federal agencies in furtherance of a congressionally mandated objective. Exhibit L at 1. Furthermore, he informed Mr. Blass that the issue of whether LILCO could sponsor an emergency plan was not at issue in this test. Exhibit L at 2. As stated by the NRC in its January 30, 1986 denial of the County's motion to compel the test, the NRC is conducting this test to assist it in determining whether "any defects . . . exist as a result of 'the limitations of LILCO's plan when executed under the state and county restrictions'" and whether there exists a basis to approve LILCO's application where LILCO's "plan provides for planned LILCO action in the event of an ad hoc State and County response to an actual emergency." Exhibits L at 2 and G at 4.

The County will have the opportunity to challenge the result of the test, as well as the premises upon which LILCO would seek approval of its operating license with such an emergency plan.[2] Exhibit L at 2.

Finally, Mr. Willard advised the County that with the test less than two weeks away, February 7th was not a timely date for the County's response. Exhibit L. Furthermore, he informed the County that the County did not have a role in determining whether the test should go forward, and unless this matter could be resolved by February 3, 1986, "it may be necessary to authorize seeking immediate judicial relief to ensure that this federal test is not impermissibly obstructed." Exhibit L at 3. As of February 3, 1986, the County has not responded.

This state of events leaves open the possibility of criminal action against federal employees and others who are participating in a perfectly lawful federal function. This threat is disrupting the planning and preparation for the upcoming exercise and, if carried out on or before February 13, 1986, will disrupt the actual conduct of that test.[3] Weiss Affidavit, Exhibit M, and McIntire Affidavit, Exhibit N.

---

[2] The County can forward its challenge before the NRC and, if it is dissatisfied with the result, before the United States Circuit Courts. Id.

[3] As stated in the affidavit of Philip H. McIntire, FEMA normally needs at least 75 days to prepare for an exercise. Exhibit N at ¶ 5. FEMA estimates that, at minimum, it would require six weeks to administratively prepare for a new exercise and that, in any event, because of prior exercise commitments, it would not be able to reschedule this February 13th test until May 1986. Exhibit N. at ¶ 10.

ARGUMENT

I. SUFFOLK COUNTY'S ATTEMPT TO REGULATE A FEDERALLY REQUIRED EMERGENCY PLANNING EXERCISE AT SHOREHAM VIOLATES THE SUPREMACY CLAUSE

The Supremacy Clause, Article VI, clause 2, of the United States Constitution provides that:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; * * * 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.

The purpose of this Clause is "to remove all obstacles to * * * [the Federal government's] action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence." McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316, 427 (1819). The doctrine of federal preemption provides that where Congress authorizes Federal regulation of an area, Congress may assert such authority so as to exclude concurrent state regulation. See Pacific Gas & Electric Co. v. State Energy Resources Conservation & Development Commission, 461 U.S. 190, 203-204 (1983). Thus, a state ordinance would be invalid where Congress has occupied an area to the extent that it has superseded state law altogether,[4] or where state law directly conflicts with

---

[4] Jones v. Rath Packing Co., 430 U.S. 519, 525 (1977); Fidelity Federal Savings & Loan Assn' v. De La Cuesta, 458 U.S. 141, 153 (1982).

federal law. Florida Lime & Avocado Growers, Inc. v. Paul, 373 U.S. 132, 142-143 (1963); Hines v. Davidowitz, 312 U.S. 52, 67 (1941). These principles apply to federal regulations as well as statutes. E.g., Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 696 (1984); De La Cuesta, 458 U.S. at 153.

1. The Federal Government Occupies The Field Of Radiological Health And Safety Aspects Involved In The Construction And Operation Of Nuclear Power Plants

The Supreme Court sets out in Pacific Gas & Electric Co., the test to be applied when the Federal Government has so occupied a field: that is, whether "the matter on which the State asserts the right to act is in any way regulated by the Federal Act." Pacific Gas & Electric Co., 461 U.S. at 213 (quoting Rice v. Santa Fe Elevation Corp., 331 U.S. 218, 236 (1947).

In the area of nuclear-powered electricity generation, the Supreme Court has held that:

> Congress intended that the Federal Government should regulate the radiological safety aspects involved in the construction and operation of a nuclear plant . . . [and the Supreme Court concluded that] the Federal Government has occupied the entire field of nuclear safety concerns, except the limited powers expressly ceded to the States.

Silkwood v. Kerr-McGee Corp., 464 U.S. 238, 249 (1984) (quoting Pacific Gas & Electric, 461 U.S. at 205 and 212).

Pursuant to the statutory scheme which Congress established under the Atomic Energy Act of 1954, 42 U.S.C. § 2011, et seq., Congress has maintained a dual regulatory structure: (1) the

NRC issues licenses for nuclear power plants and has sole authority to regulate the radiological safety aspects involved in the construction and operation of nuclear power plants; and (2) the states exercise their traditional authority over economic questions such as the "need for additional generating capacity, the type of generating facilities to be licensed, land use, ratemaking, and the like." Pacific Gas & Electric v. Energy Resources Comm'n, 461 U.S. 190, 211-12 (1983). Accordingly, the NRC was authorized to make rules "governing the design, location and operation of [power plants] * * * in order to protect health and to minimize danger to life or property * * *." 42 U.S.C. § 2201(i)(3).

The County's ordinance impermissibly infringes on the NRC's exclusive regulatory authority concerning the radiological health and safety aspects of the construction and operation of nuclear power plants. Nuclear power plants cannot be built or operated without an NRC license. 42 U.S.C. §§ 2131 et seq. The NRC requires, inter alia, that, before a full-power operating license for a nuclear power plant is granted: (1) an emergency evacuation plan must be submitted; (2) a federal test of that plan must be conducted; and (3) the plan must be finally approved. See 10 C.F.R. § 50.47 and Part 50, Appendix E; see also Exhibits G and M at ¶ 2.

Pursuant to those federal requirements, LILCO has submitted an emergency plan to the NRC, albeit without State or local sponsorship. See Long Island Lighting Co., 17 NRC 741 (1983). Pursuant to its statutory authority, the NRC, through

FEMA, will conduct a federal test of the emergency plan on February 13, 1986. The NRC is conducting this test in order to determine whether there is a reasonable assurance that adequate protective measures both on and off the plant site can and will be taken in the event of radiological emergency. Exhibit G.

In seeking to regulate the federal test at Shoreham, the County posits safety concerns as a justification, and contends that the test will infringe on its exercise of police powers. Nothing in upcoming exercise will in any way impinge on Suffolk County's police powers. No one will play decision-making roles; no one will assume any command and control authority; no one will interact with members of public so as to lead anyone to believe that they are with officials; no one wil actually perform any county function reserved by law to county officials. If Suffolk County applies LL 2-86 to this exercise, it will not be to protect its police powers. To the contrary, Suffolk County applications could only be to prevent that exercise because the County's opposition to the licensing Shoreham is based on its radiological health and safety concerns.

In this regard, the Second Circuit Court of Appeals in County of Suffolk v. Long Island Lighting Co., 728 F.2d 52 (2d Cir. 1984), rejected the County's assertion that it could intrude into the safety aspects of the construction or operation of a nuclear power plant: "[T]o the extent that . . . safety concerns pervade the complaint, [the county's] claims are preempted," 728 F.2d at 59. In the instant case, the County has

continued its efforts to block the licensing of Shoreham. However, under the regulatory scheme which Congress has authorized, there is no role for the County to approve or disapprove federal tests of emergency planning.

As demonstrated above, and as the Second Circuit noted in County of Suffolk, a concerned party may participate in the NRC's licensing proceedings. See 10 C.F.R. § 2.714; 42 U.S.C. § 2239(a). In fact, the County is currently an intervenor in the LILCO's application for a full-power license for Shoreham and has pursued numerous administrative challenges regarding the construction of Shoreham. The County is free to continue to pursue its safety concerns in that administrative forum, and, if unsuccessful, appeal to the United States Circuit Courts. 42 U.S.C. § 2239(b); see County of Suffolk, 728 F.2d at 59; Union of Concerned Scientists v. NRC, 735 F.2d 1437 (D.C. Cir. 1984); cert. denied, 105 S.Ct. 815 (1985). However, the County cannot subject tests conducted pursuant to the NRC's statutory approval to its prior approval or otherwise obstruct their implementation.

2. Suffolk Local Law No. 2-86 Conflicts With Federal Law.

"Even when Congress has not completely displaced state regulation in a specific area, state law is nullified to the extent it actually conflicts with federal law." Fidelity Federal Savings & Loan Association v. DeLaCuesta, 458 U.S. 141, 153 (1982). Such a conflict arises when compliance with both federal and state law is "physically impossible or where state

law stands as an obstacle to the full accomplishment of the Congressional purpose." Pacific Gas & Electric, supra, 461 U.S. at 203-04, citing cases. In the instant case, Suffolk's ordinance conflicts with federal law in at least two ways. First, the County impermissibly seeks to establish an obstacle to this federal test by setting itself up as the final arbiter as to whether the Federal Government can conduct a test of LILCO's emergency preparedness at Shoreham. Such veto power is an obstacle not only to the federal licensing of nuclear power plants but also to the continued operation of licensed nuclear power plants since such licensed plants periodically must be re-tested. Second, Suffolk would be directly obstructing a federal test being conducted to further congressionally mandated objectives by threatening criminal prosecution of federal employees and other participants in that test. The Supremacy Clause precludes Suffolk from taking either action.

A. The requirement of Suffolk Local Law No. 2-86 That A Federal Test Be Submitted For County Approval Conflicts With Federal Law.

It has long been established that "[t]he United States may perform its functions without conforming to the police regulations of a state." Arizona v. California, 283 U.S. 423, 451 (1931), citing Johnson v. Maryland, 254 U.S. 51 (1920) and Hunt v. United States, 278 U.S. 96 (1928). In Arizona, the Supreme Court explicitly held that, if Congress has the power to authorize the construction of the dam and reservoir at issue, the federal government is under no obligation to submit the plans and specifications to the state for approval. That

principle governs this case and establishes that the Suffolk County approval requirement set forth in Local Law 2-86 is unlawful when applied to the Shoreham exercise.

Since McCulloch v. Maryland, 17 U.S. (4 Wheat 316), federal instrumentalities and programs have been presumed to be immune from state control. The immunity is to be inferred, subject to Congressional revision, from the plan of the Constitution. Id., Penn Dairies v. Milk Control Commission, 318 U.S. 261, 269 (1943) ("implied constitutional immunity of the national government . . . from state regulation of the performance, by federal officer and agencies, of government functions", citing Ohio v. Thomas, 173 U.S. 276 (1899), Johnson v. Maryland, supra, Hunt v. U.S., supra, Arizona v. California, supra).

Thus, if Congress does not authorize state regulation or taxation of federal instrumentalites, the possibility of interference with substantial federal policy creates a presumption of immunity from state and local approval authority. See Tribe, American Constitutional Law 392 (1978).

Accordingly, Congress must make clear its intent to subject federal programs to state control. Absent such intent, federal authorities are not required to secure state permits or approvals. See, e.g., EPA v. State Water Resources Control Board, 426 U.S. 200, 211-228 (976) (federal installations discharging water pollutants are not required to obtain state permits); Hancock v. Train, 426 U.S. 167 (federally owned or operated installations operating air pollution sources not required to secure state permits). Public Utilities Commission

of the State of California v. United States, 355 U.S. 534 (1958) (the United States cannot be subjected to the discretionary authority of a state agency for the terms on which it can make arrangements for services to be rendered it); Mayo v. United States, 319 U.S. 441 (1943) (the federal Agricultural Adjustment Administration did not have to comply with Florida regulatory requirements and secure state inspection for certificates to distribute fertilizer for use on Florida soil). Don't Tear it Down v. Pennsylvania Avenue Development Corp., 642 F.2d 527, 534-36 (D.C. Cir. 1980) (local approval could not be required "[a]t least where local control over federal activity would obstruct achievement of an explicit objective . . ."[5]

Equally impermissible is state and local government control of a federal program by requiring state or local approval of activities of individual federal officials or of private parties integral to implementing the federal program. Sperry v. Florida, 373 U.S. 379 (1963); Miller, Inc. v. rkansas, 352 U.S. 187 (1956).

Moreover, even a cursory examination of this ordinance raises a serious question as to how a test in which no police powers are being exercised is infringing upon the County's

---

5 While state regulations that have some effect on the federal program but do not impinge on the federal purpose have been permitted to stand, see e.g., Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 132 (1978), Local Law 2-86 does not present such a case. If applied to the Shoreham exercise, it would not only impinge in that federal function, it would halt it at the County's caprice.

lawful police power functions. In any event, this ordinance directly conflicts with federal law by impermissibly seeking to regulate a federal test being conducted pursuant to statutory authority. 42 U.S.C. § 2201(c).

B. Subjecting Federal Employees and Other Participants In A Federal Test To Criminal Prosecution For Such Participation Conflicts With Federal Law.

In the preamble to the instant ordinance, the County specifically cites the NRC's February 13th exercise as the basis for its enactment. Exhibit H at 1. The County cites as its concern that the roles and governmental functions of Suffolk County officials would be performed and simulated. Id. Hence, the genesis of this ordinance is the pending federal test and, while the County has not formally disapproved the test, the threat of the County to apply criminal misdemeanor sanctions is real.[6]

Accordingly, a second conflict arises with federal law because of the County's likely subjection of federal employees and others to criminal prosecution. As demonstrated above, the NRC and FEMA are conducting this test as part of the regulatory scheme in which the NRC has the responsibility of determining whether the plan is effective and a full-power operating license can be granted. See 10 C.F.R. § 50.47 and Part 50, Appendix E.

By subjecting federal employees and other participants to criminal prosecution, the County is precluding the NRC and FEMA

---

[6] 42 U.S.C. § 2201a(c).

from carrying out their statutory responsibilities. Such an intrusion in federal regulatory authority conflicts with federal law and is invalid. County of Suffolk, 728 F.2d at 59. Because Suffolk Local Law No. 2-86 impermissibly intrudes in the NRC's exclusive regulatory authority, it must be enjoined.

II. THE UNITED STATES IS ENTITLED TO INJUNCTIVE RELIEF TO PREVENT SUFFOLK COUNTY FROM OBSTRUCTING THE PURPOSES OF THE ATOMIC ENERGY ACT

A. This Court Has Authority To Grant The United States Preliminary Injunctive Relief Against The Enforcement Of Suffolk Law No. 2-86

The United States may seek judicial relief "to enjoin state action where its federal power preempts the field." NLRB v. Nash-Finch Co., 404 U.S. 138, 144 (1971). Here, the superior federal interest in enforcing the Supremacy Clause by "eliminating the threat of conflicting and inconsistent local regulation" is itself sufficient to permit this Court to adjudicate the question of the application of Suffolk's ordinance to a federal test. Marshall v. Chase Manhattan Bank, 558 F.2d 680, 683 (2d Cir. 1977) (footnote omitted).

B. The Requirements For A Preliminary Injunction Have Been Met.

Suffolk Local Law No. 2-86 violates NRC regulations, the Atomic Energy Act, and the Supremacy Clause. A preliminary injunction is necessary to prohibit the County from impermissibly obstructing a congressionally mandated objective under the Atomic Energy Act. The Second Circuit has formulated a dual test to be applied by district courts generally in determining whether to grant a preliminary injunction. The

movant must demonstrate:

> (a) irreparable harm and (b) either (1) probable success on the merits, or (2) sufficiently serious questions going to the merits to make them a fair ground for litigation and a balance of hardships tipping decidedly toward the party requesting the preliminary injunctive relief.

Kaplan v. Board of Education, 759 F.2d 256, 259 (2d Cir. 1985), (citing Sperry International Trade Inc. v. Government of Israel, 670 F.2d 8, 11 (2d Cir. 1982); Jackson Dairy, Inc. v. H.P. Hood & Sons, Inc., 596 F.2d 70, 72 (2d Cir. 1979); see Vision, Inc. v. Parks, 610 F. Supp. 927, 929 (S.D. N.Y. 1985).

The United States can meet either of these tests. However, when the movant is the federal government seeking to protect distinctly federal interests, the Supreme Court and this Circuit have held that not all of the traditional factors, such as irreparable harm and balancing of the equities, apply in a suit such as this one brought to vindicate the interests of the United States in enforcing federal statutes and policies. For instance, in the United States v. City and County of San Francisco, 310 U.S. 16 (1940), the United States sued to enforce a condition imposed on a grant of certain rights to use federal park land. In rejecting the contention that the balance of equities weighed against the United States, the Court explained:

> The equitable doctrines relied on do not militate against the capacity of a court of equity as a proper forum in which to make a declared policy of Congress effective. Injunction to prohibit continued use -- in violation of that policy -- of property

> granted by the United States, and to enforce the grantee's covenants, is both appropriate and necessary.

310 U.S. at 31 (footnote omitted). See also Chris-Craft Industries, Inc. v. Piper Aircraft Corp., 480 F.2d 341, 386 (2d Cir. 1973); United States v. Diapulse Corporation of America, 457 F.2d 25, 28 (2d Cir. 1972).

In any event, as demonstrated above, the Suffolk ordinance impermissibly intrudes into an area preempted by federal regulation. The NRC is conducting a federal test in furtherance of its congressional mandate that there is reasonable assurance that the radiological health and safety of the public will be met if it grants a license for operation of a full-power nuclear plant. The Supreme Court's prior holdings in Silkwood and Pacific Gas and Electric and the Second Circuit's holding in County of Suffolk unequivocally demonstrate that Congress has preempted the safety aspects of constructing and operating a nuclear power plant. The irreparable harm which would accrue from this ordinance is obstruction of federal agencies from carrying out their congressional mandate and subjection of federal employees and other participants to criminal prosecution, however unwarranted. In view of Suffolk's attempt to frustrate a federally mandated test and the federal preemption of this area, injunctive relief is necessary to vindicate the important federal responsibility for nuclear safety.

CONCLUSION

For the foregoing reasons, the United States' motion for preliminary injunction should be granted.

Respectfully submitted,

RICHARD K. WILLARD
Assistant Attorney General

RAYMOND J. DEARIE
United States Attorney

DAVID J. ANDERSON

SURELL BRADY

RAPHAEL O. GOMEZ

Attorneys, Department of Justice
Civil Division, Room 3716
10th & Pennsylvania Ave., N.W.
Washington, D.C. 20530
Telephone: (202) 633-1318

Attorneys for plaintiff.

LIST OF EXHIBITS

A. Memorandum of Understanding between FEMA and NRC, 50 Fed. Reg., 15,485 (April 18, 1985)

B. Memorandum for William J. Dircks dated June 4, 1985

C. Memorandum for Richard W. Krimm from Edward L. Johnson dated June 20, 1985.

D. Letter from Samuel W. Speck to William J. Dircks dated October 29, 1985.

E. Memorandum for William J. Dircks dated November 8, 1985.

F. Letter from William J. Dircks to Samuel W. Speck dated November 12, 1985.

G. NRC denial of Suffolk County's Motion to Cancel February 13, 1986 test dated January 30, 1986.

H. Suffolk county Local Law No. 2-86.

I. Letter from NRC and FEMA to Peter F. Cohalen, Suffolk County Executive, dated January 22, 1986.

J. Letter from Richard K. Willard, Assistant Attorney General, Civil Division to Peter F. Cohalen, dated January 23, 1986.

K. Letter from Gregory Blass, Presiding Officer for the Suffolk County Legislature, to Richard K. Willard dated January 30, 1986.

L. Letter from Richard K. Willard to Gregory Blass dated January 31, 1986.

M. Affidavit of Bernard K. Weiss dated February 3, 1986.

N. Affidavit of Philip H. McIntire dated February 3, 1986.

its maximum lawful selling prices with respect to its sales of propane to Dow Chemical Company and Enterprise Products Company. According to the PRO, one of three restitutionary methodologies should be adopted.

[FR Doc. 85-9414 Filed 4-17-85; 8:45 am]
BILLING CODE 6450-01-M

Southwestern Power Administration

Proposed New Rate Schedule P-4B and Opportunity for Public Review and Comment

AGENCY: Southwestern Power Administration, DOE.

ACTION: Notice of proposed new Rate Schedule P-4B for power and energy sold to certain SWPA customers which desire to change their service arrangements and opportunity for public review and comment.

SUMMARY: The Administrator, Southwestern Power Administration (SWPA), has determined that a new Rate Schedule P-4B is required for certain SWPA customers which desire a change from their present firm service arrangements with load center delivery from SWPA under Rate Schedule F-4B and pursuant to contractual arrangements between SWPA and the Public Service Company of Oklahoma (PSO) and Oklahoma Gas and Electric Company (OG&E). These SWPA customers now desire peaking service arrangements with load center delivery from SWPA pursuant to other contractual arrangements between SWPA, PSO, OG&E, and/or the Oklahoma Municipal Power Authority (OMPA). The proposed Rate Schedule P-4B will have the same rates and terms for load center deliveries as the existing Rate Schedule F-4B, but will recognize the peaking service arrangements between SWPA and the affected SWPA customers, which provide for direct purchase by the affected SWPA customers of non-federally generated energy from PSO, OG&E, and/or OMPA. Since the same rates that apply under Rate Schedule F-4B (except for revenues and expenses associated with non-federally generated energy) will also apply under the proposed rate schedule, the net repayment results of the 1983 Power Repayment Study (the basis for present rate levels) will not be altered. However, the amount that SWPA must budget and receive Congressional appropriations for purchased power each year will be reduced, thereby reducing the overall annual Federal Budget. An opportunity is presented for interested parties to submit written comments on the proposed rate schedule. Following review of written comments, the Administrator will submit the proposed rate schedule to the Deputy Secretary of Energy for confirmation, approval, and placement in effect on an interim basis and also submit it to the Federal Energy Regulatory Commission (FERC) for confirmation and approval on a final basis.

DATES: Written Comments on the proposed Rate Schedule P-4B are due on or before May 3, 1985.

FOR FURTHER INFORMATION CONTACT: Francis R. Gajan, director, Power Marketing, Southwestern Power Administration, Department of Energy, P.O. Box 1619, Tulsa, Oklahoma 74101, (918)581-7529.

SUPPLEMENTARY INFORMATION: SWPA's proposed new Rate Schedule P-4B is merely a modified version of the existing Rate Schedule F-4B to recognize the change in service arrangements desired by a certain group of SWPA customers now served through PSO and OG&E under Rate Schedule F-4B. The implementation of the proposed Rate Schedule P-4B will not affect the rate levels under other SWPA rate schedules and will produce a rate level which will be identical to that for service under either Rate Schedule F-4B with elimination of the purchase cost pass-through element, or Rate Schedule P-4 with load center delivery. Furthermore, participation in the new service arrangements and, hence, the proposed Rate Schedule P-4B, is purely voluntary. The Administrator has, therefore, determined that written comments will provide adequate opportunity for public participation in the development of the proposed rate schedule and that a shortened comment period is reasonable. Consequently, written comments are due on or before fifteen (15) days following publication of the notice in the Federal Register.

Ten copies of written comments should be submitted to the Administrator, Southwestern Power Administration, U.S. Department of Energy, P.O. Box 1619, Tulsa, Oklahoma 74101. Following review of the written comments, the Administrator will develop the proposed rate schedule which will be submitted to the Deputy Secretary of Energy for approval on an interim basis and to FERC for approval on a final basis.

Issued in Tulsa, Oklahoma, April 9, 1985.

Ronald H. Wilkerson
Administrator, Southwestern Power Administration.

[FR Doc. 85-9419 Filed 4-17-85; 8:45 am]
BILLING CODE 6450-01-M

FEDERAL EMERGENCY MANAGEMENT AGENCY

NUCLEAR REGULATORY COMMISSION

Memorandum of Understanding Between Federal Emergency Management Agency and Nuclear Regulatory Commission

The Federal Emergency Management Agency (FEMA) and the Nuclear Regulatory Commission (NRC) have entered into a new Memorandum of Understanding (MOU) Relating To Radiological Emergency Planning and Preparedness. This supersedes a memorandum entered into November 4, 1980 (Published December 16, 1980, 45 FR 82713). The substantive changes in the new MOU deal principally with the FEMA handling of NRC requests for findings and determinations concerning offsite planning and preparedness. The basis and conditions for interim findings in support of licensing are defined, as well as provisions for status reports when plans are not complete. The text of the MOU is set out below except that an attachment is not included. This attachment concerns membership on a steering committee.

Memorandum of Understanding Between NRC and FEMA Relating to Radiological Emergency Planning and Preparedness

I. Background and Purpose

This memorandum of Understanding (MOU) establishes a framework of cooperation between the Federal Emergency Management Agency (FEMA) and the U.S. Nuclear Regulatory Commission (NRC) in radiological emergency response planning matters, so that their mutual efforts will be directed toward more effective plans and related preparedness measures at and in the vicinity of nuclear reactors and fuel cycle facilities which are subject to 10 CFR Part 50, Appendix E, and certain other fuel cycle and materials licensees which have potential for significant accidental offsite radiological releases. The memorandum is responsive to the President's decision of December 7, 1979, that FEMA will take the lead in offsite planning and response, his request that NRC assist FEMA in carrying out this role, and the NRC's continuing statutory responsibility for the radiological health and safety of the public.

On January 14, 1980, the two agencies entered into a "Memorandum of Understanding Between NRC and FEMA to Accomplish a Prompt Improvement in

EXHIBIT A

Radiological Emergency Preparedness" that was responsive to the President's December 7, 1979, statement. A revised and updated memorandum of understanding became effective November 1, 1980. This MOU is a further revision to reflect the evolving relationship between NRC and FEMA and the experience gained in carrying out the provisions of the January and November 1980 MOU's. This MOU supersedes these two earlier versions of the MOU.

The general principles, agreed to in the previous MOU's and reaffirmed in this MOU, are as follows: FEMA coordinates all Federal planning for the offsite impact of radiological emergencies and takes the lead for assessing offsite radiological emergency response plans [1] and preparedness, makes findings and determinations as to the adequacy and capability of implementing offsite plans, and communicates those findings and determinations to the NRC. The NRC reviews those FEMA findings and determinations in conjunction with the NRC onsite findings for the purpose of making determinations on the overall state of emergency preparedness. These overall findings and determinations are used by NRC to make radiological health and safety decisions in the issuance of licenses and the continued operation of licensed plants to include taking enforcement actions as notices of violations, civil penalties, orders, or shutdown of operating reactors. This delineation of responsibilities avoids duplicative efforts by the NRC staff in offsite preparedness matters.

A separate MOU dated October 22, 1980, deals with NRC/FEMA cooperation and responsibilities in response to an actual or potential radiological emergency. Operations Response Procedures have been developed that implement the provisions of the Incident Response MOU. These documents are intended to be consistent with the Federal Radiological Emergency Response Plan which describes the relationships, role, and responsibilities of Federal agencies for responding to accidents involving peacetime nucelar emergencies.

II. Authorities and Responsibilities

FEMA—Executive Order 12148 charges the Director, FEMA, with the responsibility to ". . . establish Federal policies for, and coordinate, all civil defense and civil emergency planning, management, mitigation, and assistance functions of Executive agencies" (Section 2–101) and ". . . represent the President in working with State and local governments and the private sector to stimulate vigorous participation in civil emergency preparedness, mitigation, response, and recovery programs." (Section 2–104.)

On December 7, 1979, the President, in response to the recommendations of the Kemeny Commission on the Accident at Three Mile Island, directed that FEMA assume lead responsibility for all offsite nuclear emergency planning and response.

Specifically, the FEMA responsibilities with respect to radiological emergency preparedness as they relate to NRC are:

1. To take the lead in offsite emergency planning and to review and assess offsite emergency plans and preparedness for adequacy.

2. To make findings and determinations as to whether offsite emergency plans are adequate and can be implemented (e.g., adequacy and maintenance of procedures, training, resources, staffing levels and qualifications, and eq uipment adequacy). Notwithstanding the procedures which are set forth in 44 CFR 350 for requesting and reaching a FEMA administrative approval of State and local plans, findings, and determinations on the current status of emergency planning and preparedness around particular sites, referred to as interim findings, will be provided by FEMA for use as needed in the NRC licensing process. Such findings will be provided by FEMA on mutually agreed to schedules or on specific NRC request. The request and findings will normally be by written communications between the co-chairs of the NRC/FEMA Steering Committee. An interim finding provided under this arrangement will be an extension of FEMA's procedures for review and approval of offsite radiological emergency plans and preparedness set forth in 44 CFR 350. It will be based on the review of currently available plans and, if appropriate, joint exercise results related to a specific nuclear power plant site.

An interim finding based only on the review of currently available offsite plans will include an assessment as to whether these plans are adequate when measured against the standards and criteria of NUREG–0654/FEMA–REP–1, and, pending a demonstration through an exercise, whether there is reasonable assurance that the plans can be implemented. The finding will indicate one of the following conditions: (1) Plans are adequate and there is reasonable assurance that they can be implemented with only limited or no corrections needed; (2) plans are adequate, but before a determination can be made as to whether they can be implemented, corrections must be made to the plans or supporting measures must be demonstrated (e.g., adequacy and maintenance of procedures, training, resources, staffing levels and qualifications, and equipment adequacy); or (3) plans are adequate and cannot be implemented until they are revised to correct deficiencies noted in the Federal review.

If in FEMA's view the plans that are available are not completed or are not ready for review, FEMA will provide NRC with a status report delineating milestones for preparation of the plan by the offsite authorities as well as FEMA's actions to assist in timely development and review of the plans.

An interim finding on preparedness will be based on review of currently available plans and joint exercise results and will include an assessment as to (1) whether offsite emergency plans are adequate as measured against the standards and criteria of NUREG–0654/FEMA–REP–1, and (2) whether the exercise(s) demonstrated that there is reasonable assurance that the plans can be implemented.

An interim finding on preparedness will indicate one of the following conditions: (1) There is reasonable assurance that the plans are adequate and can be implemented as demonstrated in an exercise; (2) there are deficiencies that may adversely affect public health and safety that must be corrected in order to provide reasonable assurance that the plans can be implemented; or (3) FEMA is undecided and will provide a schedule of actions leading to a decision.

3. To assume responsibility, as a supplement to State, local, and utility efforts, for radiological emergency preparedness training of State and local officials.

4. To develop and issue an updated series of interagency assignments which delineate respective agency capabilities and responsibilities and define procedures for coordination and direction for emergency planning and response. [Current assignments are in 44 CFR 351, March 11, 1982. (47 FR 10758)].

NRC—The Atomic Energy Act of 1954, as amended, requires that the NRC grant licenses only if the health and safety of the public is adequately protected. While the Atomic Energy Act does not

[1] Assessments of offsite plans may be based on State and local government plans submitted to FEMA under its rule (44 CFR Part 350), and as noted in 44 CFR 350.3(f), may also be based on plans currently available to FEMA or furnished to FEMA through the NRC/FEMA Steering Committee.

specifically require emergency plans and related preparedness measures, the NRC requires consideration of overall emergency preparedness as a part of the licensing process. The NRC rules (10 CFR 50.33, 50.34, 50.47, 50.54, and Appendix E to 10 CFR Part 50) include requirements for the licensee's emergency plans.

Specifically, the NRC responsibilities for radiological emergency preparedness are:

1. To assess licensee emergency plans for adequacy. This review will include organizations with whom licensees have written agreements to provide onsite support services under emergency conditions.

To verify that licensee emergency plans are adequately implemented (e.g., adequacy and maintenance of procedures, training, resources, staffing levels and qualifications, and equipment).

3. To review the FEMA findings and determinations as to whether offsite plans are adequate and can be implemented.

4. To make radiological health and safety decisions with regard to the overall state of emergency preparedness (i.e., integration of emergency preparedness onsite as determined by the NRC and offsite as determined by FEMA and reviewed by NRC) such as assurance for continued operation, for issuance of operating licenses, or for taking enforcement actions, such as notices of violations, civil penalties, orders, or shutdown of operating reactors.

III. Areas of Cooperation

A. *NRC Licensing Reviews.* FEMA will provide support to the NRC for licensing reviews related to reactors, fuel facilities, and materials licensees with regard to the assessment of the adequacy of offsite radiological emergency response plans and preparedness. This will include timely submittal of an evaluation suitable for inclusion in NRC safety evaluation reports.

Substantially prior to the time that a FEMA evaluation is required with regard to fuel facility or materials license review, NRC will identify those fuel and materials licensees with potential for significant accidental offsite radiological releases and transmit a request for review to FEMA as the emergency plans are completed.

FEMA routine support will include providing assessments, findings and determinations (interim and final) on offsite plans and preparedness related to reactor license reviews. To support its findings and determinations, FEMA will make expert witnesses available before the Commission, the NRC Advisory Committee on Reactor Safeguards, NRC hearing boards and administrative law judges, for any court actions, and during any related discovery proceedings.

FEMA will appear in NRC licensing proceedings as part of the presentation of the NRC staff. FEMA counsel will normally present FEMA witnesses and be permitted, at the discretion of the NRC licensing board, to cross-examine the witnesses of parties, other than the NRC witnesses, on matters involving FEMA findings and determinations, policies, or operations; however, FEMA will not be asked to testify on status reports. FEMA is not a party to NRC proceedings and, therefore, is not subject to formal discovery requirements placed upon parties to NRC proceedings. Consistent with available resources, however, FEMA will respond informally to discovery requests by parties. Specific assignment of professional responsibilities between NRC and FEMA counsel will be primarily the responsibility of the attorneys assigned to a particular case. In situations where questions of professional responsibility cannot be resolved by the attorneys assigned, resolution of any differences will be made by the General Counsel of FEMA and the Executive Legal Director of the NRC or their designees. NRC will request the presiding Board to place FEMA on the service list for all litigation in which it is expected to participate.

Nothing in this document shall be construed in any way to diminish NRC's responsibility for protecting the radiological health and safety of the public.

B. *FEMA Review of Offsite Plans and Preparedness.* NRC will assist in the development and review of offsite plans and preparedness through its membership on the Regional Assistance Committees (RAC). FEMA will chair the Regional Assistance Committees. Consistent with NRC's statutory responsibility, NRC will recognize FEMA as the interface with State and local governments for interpreting offsite radiological emergency planning and preparedness criteria as they affect those governments and for reporting to those governments the results of any evaluation of their radiological emergency plans and preparedness.

Where questions arise concerning the interpretation of the criteria, such questions will continue to be referred to FEMA Headquarters, and when appropriate, to the NRC/FEMA Steering Committee to assure uniform interpretation.

C. *Preparation for and Evaluation of Joint Exercises.* FEMA and NRC will cooperate in determining exercise requirements for licensees, State and local governments. They will also jointly observe and evaluate exercises. NRC and FEMA will institute procedures to enhance the review of the objectives and scenarios for joint exercises. This review is to assure that both the onsite considerations of NRC and the offsite considerations of FEMA are adequately addressed and integrated in a manner that will provide for a technically sound exercise upon which an assessment of preparedness capabilities can be based. The NRC/FEMA procedures will provide for the availability of exercise objectives and scenarios sufficiently in advance of sheduled exercises to allow enough time for adequate review by NRC and FEMA and correction of any deficiencies by the licensee. The failure of a licensee to develop a scenario that adequately addresses both onsite and offsite considerations may result in NRC taking enforcement actions.

The FEMA reports will be a part of an interim finding on emergency preparedness; or will be the result of an exercise conducted pursuant to FEMA's review and approval procedures under 44 CFR Part 350. Exercise evaluations will identify one of the following conditions: (1) There is reasonable assurance that the plans are adequate and can be implemented as demonstrated in the exercise; (2) there are deficiencies that may adversely impact public health and safety that must be corrected by the affected State and local governments in order to provide reasonable assurance that the plan can be implemented; or (3) FEMA is undecided and will provide a schedule of actions leading to a decision. Within 30 days of the exercise, a draft exercise report will be sent to the State, with a copy to the Regional Assistance Committee, requesting comments and a schedule of corrective actions, as appropriate, from the State in 30 days. Where there are deficiencies of the types noted in 2 above, and when there is a potential for a remedial exercise, FEMA Headquarters will promptly discuss these with NRC Headquarters. Within 90 days of the exercise, the FEMA report will be forwarded to the NRC Headquarters. Within 15 days of receipt of the FEMA report, NRC will notify FEMA in writing of action taken with the licensee relative to FEMA initiatives with State and local governments to correct deficiencies identified in the exercise.

D. *Emergency Planning and Preparedness Guidance.* NRC has lead

responsibility for the development of emergency planning and preparedness guidance for licensees. FEMA has lead responsibility for the development of radiological emergency planning and preparedness guidance for State and local agencies. NRC and FEMA recognize the need for an integrated, coordinated approach to radiological emergency planning and preparedness by NRC licensees and State and local governments. NRC and FEMA will each, therefore, provide opportunity for the other agency to review and comment on such guidance (including interpretations of agreed joint guidance) prior to adoption as formal agency guidance.

E. *Support for Document Management System.* FEMA and NRC will each provide the other with continued access to those automatic data processing support systems which contain relevant emergency preparedness data.

At NRC, this includes Document Management System support to the extent that it does not affect duplication or records retention. At FEMA, this includes technical support to the Radiological Emergency Preparedness Management Information System. This agreement is not intended to include the automated information retrieval support for the national level emergency response facilities.

F. *Ongoing NRC Research and Development Programs.* Ongoing NRC and FEMA research and development programs that are related to State and local radiological emergency planning and preparedness will be coordinated. NRC and FEMA will each provide opportunity for the other agency to review and comment on relevant research and development programs prior to implementing them.

G. *Public Information and Education Programs.* DEMA will take the lead in developing public information and education programs. NRC will assist FEMA by reviewing for accuracy educational materials concerning radiation and its hazards and information regarding appropriate actions to be taken by the general public in the event of an accident involving radioactive materials.

IV. NRC/FEMA Steering Committee

The NRC/FEMA Steering Committee on Emergency Preparedness will continue to be the focal point for coordination of emergency planning, preparedness, and response activities between the two agencies. The Steering Committee will consist of an equal number of members to represent each agency with one vote per agency. When the Steering Committee cannot agree on the resolution of an issue, the issue will be referred to NRC and FEMA management. The NRC members will have lead responsibility for licensee planning and preparedness and the FEMA members will have lead responsibility for offsite planning and preparedness. The Steering Committee will assure coordination of plans and preparedness evaluation activities and revise, as necessary, acceptance criteria for licensee, State, and local radiological emergency planning and preparedness. NRC and FEMA will then consider and adopt criteria, as appropriate, in their respective jurisdictions. (See Attachment 1.)

V. Working Arrangements

A. The normal point of contact for implementation of the points in this MOU will be the NRC/FEMA Steering Committee.

B. The Steering Committee will establish the day-to-day procedures for assuring that the arrangements of this MOU are carried out.

VI. Memorandum of Understanding

A. This MOU shall be effective as of date of signature and shall continue in effect unless terminated by either party upon 30 days notice in writing.

B. Amendments or modifications to this MOU may be made upon written agreement by both parties.

Approved for the U.S. Nuclear Regulatory Commission.

Dated: April 3, 1985.

William J. Dircks,

Executive Director for Operations.

Approved for the Federal Emergency Management Agency.

Dated: April 9, 1985.

Samuel W. Speck,

Associate Director, State and Local Programs and Support.

[FR Doc. 85-9308 Filed 4-17-85; 8:45 am]

BILLING CODE 6718-01-M

FEDERAL HOME LOAN BANK BOARD

State Savings and Loan Association; Salt Lake City, UT; Appointment of Receiver

Notice is hereby given that pursuant to the authority contained in section 406(c)(1)(B)(i)(I) of the National Housing Act, 12 U.S.C. 1729(c)(1)(B)(i)(I) (1982), the Federal Home Loan Bank Board duly appointed the Federal Savings and Loan Insurance Corporation as sole receiver for State Savings and Loan Association, Salt Lake City, Utah, on April 12, 1985.

Dated: April 15, 1985.

Jeff Sconyers,

Secretary.

[FR Doc. 85-9362 Filed 4-17-85; 8:45 am]

BILLING CODE 6720-01-M

FEDERAL RESERVE SYSTEM

Citicorp, et al.; Applications To Engage de Novo in Permissible Nonbanking Activities; Correction

This notice corrects a previous Federal Register document (FR Doc. No. 85-8785), published at page 11561 of the issue for Firday, March 22, 1985, specifying a period for public comment concerning an application by Citicorp, New York, New York, to engage in data processing and data transmission activities. Citicorp proposes to engage in these activities world-wide. Comments on this application must be received at the Federal Reserve Bank of New York, not later than May 2, 1985.

Board of Governors of the Federal Reserve System, April 15, 1985.

James McAfee,

Associate Secretary of the Board.

[FR Doc. 85-9317 Filed 4-17-85; 8:45 am]

BILLING CODE 6210-01-M

Applications To Engage de Novo in Permissible Nonbanking Activities; the Marine Corp., et al.

The companies listed in this notice have filed an application under § 225.23(a)(1) of the Board's Regulation Y (12 CFR 225.23(a)(1)) for the Board's approval under section 4(c)(8) of the Bank Holding Company Act (12 U.S.C. 1843(c)(8)) and § 225.21(a) of Regulation Y (12 CFR 225.21(a)) to commence or to engage *de novo*, either directly or through a subsidiary, in a nonbanking activity that is listed in § 225.25 of Regulation Y as closely related to banking and permissible for bank holding companies. Unless otherwise noted, such activities will be conducted throughout the United States.

Each application is available for immediate inspection at the Federal Reserve Bank indicated. Once the application has been accepted for processing, it will also be available for inspection at the offices of the Board of Governors. Interested persons may express their views in writing on the question whether consummation of the proposal can "reasonably be expected to produce benefits to the public, such as greater convenience, increased competition, or gains in efficiency, that outweigh possible adverse effects, such

Action: Taylor, IE
Cys: Dircks
Roe
Rehm
Stello
GCunningham
Denton
Murley
Jordan

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555

OFFICE OF THE SECRETARY

June 4, 1985

ACTION

COMTR-85-5A

MEMORANDUM FOR: William J. Dircks, Executive Director for Operations

FROM: Samuel J. Chilk, Secretary

SUBJECT: SCHEDULING OF EMERGENCY PLAN EXERCISE FOR SHOREHAM

In view of LILCO's standing request to schedule an exercise of its emergency plan, the Commission, with Chairman Palladino and Commissioner Asselstine disagreeing, sees no reason why the licensee should not be allowed to exercise those parts of the plan which it may legally exercise.

The Commission does not disagree with the view that an exercise of the LILCO plan could yield meaningful results, even though such an exercise may not satisfy all of the requirements of NRC's regulations. It could, as a minimum, identify the impact of the limitations of LILCO's plan when executed under the state and county restrictions. Although the Commission is aware that because of the recent court decision a full exercise of the LILCO emergency plan may not be possible, the staff should request that FEMA schedule as full an exercise of the LILCO plan as is feasible and lawful at the present time. If FEMA indicates an exercise is not currently possible, the staff should ask FEMA to provide a detailed report of its reasons for declining, addressing the following:

1. Status of the outstanding technical and operational deficiencies with the LILCO plan.

2. Estimates of when each remaining deficiency will be corrected.

NOTE: Since this SRM was approved, the County Executive of Suffolk County has issued an Executive Order indicating that the County will cooperate in emergency planning activities for Shoreham. The Staff, in requesting that FEMA schedule an emergency plan exercise, should also suggest that FEMA give appropriate consideration to the County's apparent change of position regarding participation in emergency planning activities.

3. Specific plan implementation activities LILCO could not exercise given the state court's decision.

4. Benefits and disadvantages to holding an exercise, given the response to Item 3, until legal concerns have been fully resolved or adequate compensating measures taken.

5. Views on whether (and if so how) the deficiencies can be adequately remedied without the involvement and cooperation of state and local entities.

Commissioner Asselstine's views for inclusion in any letter to FEMA will be provided to you within several days.

cc: Chairman Palladino
Commissioner Roberts
Commissioner Asselstine
Commissioner Bernthal
Commissioner Zech
OGC
OPE
ASLBP
ASLAP
OI
OIA
OPA
OCA
Shoreham Service List

Commissioner Asselstine does not believe that the Commission should request that FEMA schedule an emergency planning exercise of the LILCO plan at this time. Absent state or local government participation, there are serious questions about LILCO's authority to implement significant portions of its emergency plan for Shoreham. Further, there is an ongoing dispute within Suffolk County concerning the county's position on emergency planning at Shoreham and its willingness to participate in testing and implementing an emergency plan. Under these circumstances, Commissioner Asselstine believes that scheduling an exercise of the LILCO plan at this time would only confuse matters further. He therefore recommends that FEMA wait to plan and schedule an exercise for Shoreham at least until there is some resolution of Suffolk County's position on this issue.

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

JUN 20 1985

MEMORANDUM FOR: Richard W. Krimm
Assistant Associate Director
Office of Natural and Technological
Hazards Programs
Federal Emergency Management Agency

FROM: Edward L. Jordan, Director
Division of Emergency Preparedness
and Engineering Response
Office of Inspection and Enforcement

SUBJECT: SCHEDULING OF EMERGENCY PLAN EXERCISE
FOR SHOREHAM

In response to LILCO's standing request to schedule an exercise of its emergency plan for Shoreham, the Commission, in a memorandum to the Executive Director for Operations dated June 4, 1985 (Enclosure 1), stated that it sees no reason why the licensee (i.e., LILCO) should not be allowed to exercise those parts of the plan which may be legally exercised. Further, the Commission indicated that it does not disagree with the view that an exercise of the LILCO plan could yield meaningful results, even though such an exercise may not satisfy all of the requirements of NRC's regulations. The exercise could, as a minimum, identify the impact of the limitations of LILCO's plan when executed under the state and county restrictions.

Accordingly, we request that FEMA schedule as full an exercise of the LILCO Local Emergency Response Organization (LERO) plan as is feasible at the present time giving appropriate consideration to the Suffolk County Executive's May 30, 1985 Executive Order and subsequent developments relating to emergency planning activities by the County. In determining those portions of the LERO plan that might be appropriate for inclusion in an exercise at this time, we suggest that FEMA emphasize evaluation of the functional areas of emergency preparedness related to the demonstration of response capabilities within the plume exposure (10 mile) Emergency Planning Zone.

Contact: F. Kantor, IE
492-9749

ENCLOSURE 2

EXHIBIT C

In the event FEMA determines that an exercise is not currently possible, we request that FEMA provide a response which addresses the five issues identified in the memorandum from the Secretary of the Commission. Commissioner Asselstine's views on this matter are provided as Enclosure 2.

/s/ Sheldon Schwartz

for Edward L. Jordan, Director
Division of Emergency Preparedness
and Engineering Response
Office of Inspection and Enforcement

Enclosure:
1. Memorandum from the Secretary of the Commission dtd. 06/04/85
2. Commissioner Asselstine's Views

DISTRIBUTION

J. M. Taylor, IE
R. H. Vollmer, IE
J. G. Partlow, IE
B. K. Grimes, IE
E. L. Jordan, IE
S. A. Schwartz, IE
K. E. Perkins, IE
D. B. Matthews, IE
C. R. Van Niel, IE
F. Kantor, IE
W. J. Dircks, EDO
H. R. Denton, NRR
T. E. Murley, Region I
E. S. Christenbury, ELD
E. J. Reis, ELD
J. R. Sears, IE
W. R. Butler, NRR
R. R. Bellamy, Region I
DCS
DEPER RF
EPB RF
JRoe
TRehm
VStello
GCunningham
EDO r/f

ELD
ESChristenbury
6/14/85

EDO
WJDircks
6/14/85

EPB:IE	Tech.Ed	EPB:IE	DD:DEPER:IE	D:DEPER:IE	DD:IE	D:IE
FKantor	DGable	DBMatthews	SASchwartz	ELJordan	RHVollmer	JMTaylor
6/14/85	6/ /85	6/14/85	6/14/85	6/14/85	6/14/85	6/14/85

Federal Emergency Management Agency

Washington, D.C. 20472

October 29, 1985

Mr. William J. Dircks
Executive Director for Operations
U.S. Nuclear Regulatory Commission
Washington, D.C. 20555

Dear Mr. Dircks:

This is in response to a memorandum dated June 20, 1985, from Edward L. Jordan to Richard W. Krimm in which FEMA was requested to proceed with the conduct of "as full an exercise.....as is feasible to test offsite preparedness capabilities at the Shoreham Nuclear Power Plant." In my October 8, 1985 letter, which transmitted the review of revision 5 of the LILCO Local Emergency Response Organization (LERO) plan, I indicated we were analyzing the results of the plan review in the context of the September 17, 1985 letter from Chairman Palladino to Congressman Markey, and the various legal proceedings related to Shoreham in order to respond to the June 20 memorandum within several weeks. Our analysis includes consideration of the Atomic Safety and Licensing Appeal Board decision of October 18, 1985.

The deficiencies identified in my letter of October 8 do not preclude the conduct of an exercise of the LERO plan. However, the reluctance of county and State officials to participate in such an exercise and the related legal authority issues would place special parameters on the conduct of a LERO exercise.

We have no indication at this time that offsite jurisdictions are willing to directly participate in an exercise in the short term. Thus, any exercise will be dramatically different than is typical at other sites in the State of New York. Any exercise without participation by State and local governments would not allow us sufficient demonstration to reach a finding of reasonable assurance. This conclusion is based on the current legal decision with respect to utility authority to perform civil emergency functions. However, that does not preclude the conduct of an exercise that would provide an indication to the Nuclear Regulatory Commission (NRC) as to utility onsite and offsite emergency capabilities. We believe such a report would have value in decisions to continue the licensing process or possibly provide a basis on which the NRC could make predictive findings. Obviously, the value of such an exercise in the licensing process is a determination which can only be made by the NRC.

Given the nature of your June 20 request and consideration of a practical structure for an exercise, we feel that, while there are a number of variations possible, the basic options for exercising in the near term are limited to two:

Option 1 - This option would require that we set aside all functions and exercise objectives related to issues of authority and State and local participation. Thus, only the functions outlined for LILCO would be exercised. Such

ENCLOSURE 3

EXHIBIT D

an exercise is possible but its usefulness would seem very limited. An exercise of this type would not address questions such as those raised on pages 35 through 39 of the October 18 decision of the Atomic Safety and Licensing Appeal Board and would be redundant to actions already taken by NRC.

- Option 2 - This option would include all functions and normal exercise objectives. This option would exercise Revision 5 of the LERO Plan. Exercise controllers would simulate the roles of key State or local officials unable or unwilling to participate. It would be desirable that State and local government personnel actually play. However, such a simulation mechanism would at least test the utility's ability to respond to ad hoc participation on the part of State and local governments.

The ultimate purpose of an exercise is to support a finding by FEMA for use by the NRC in their licensing process. As we mentioned above, neither of these options would allow a finding by FEMA on offsite preparedness. However, we recognize that Shoreham is in no way typical and that in the past in exercising its adjudicatory powers the Commission and the various Atomic Safety and Licensing Boards have reached predictive findings.

Pursuant to your June 20 request, we are initiating the process necessary to conduct an exercise of either option. We are prepared to conduct such an exercise in approximately 75 days. However, FEMA requires further clarification from NRC as to the scope of the exercise to be conducted. FEMA will proceed with the initiating steps until November 15, at which time we will need a definitive exercise scope from NRC in order to avoid prohibitive costs. If at that time we have received no direction from the Nuclear Regulatory Commission we will suspend activities until a decision is made. Given other demands, we do feel that any delay beyond the current window would require an exercise postponement of at least 90 days beyond the mid-January time frame.

Sincerely,

Samuel W. Speck

Samuel W. Speck
Associate Director
State and Local Programs and Support

UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555

OFFICE OF THE
SECRETARY

Action: Taylor, IE
Cys: Dircks
Roe
Rehm
Stello
Denton
GCunningham
Murley
Jordan
Matthews

November 8, 1985

MEMORANDUM FOR: William J. Dircks
Executive Director for Operations

FROM: Samuel J. Chilk, Secretary

SUBJECT: SECY-85-346 - EMERGENCY PREPAREDNESS EXERCISE FOR SHOREHAM

This is to advise you that the Commission (with Commissioners Bernthal, Roberts and Zech agreeing) have approved your recommendation to proceed with the Emergency Preparedness Exercise following option 2. Chairman Palladino and Commissioner Asselstine disapproved and continue to question the usefulness of an exercise at this time.

Ltr to FEMA 11/12/85

cc: Chairman Palladino
Commissioner Roberts
Commissioner Asselstine
Commissioner Bernthal
Commissioner Zech
OGC
OPE

Rec'd Off. EDO
Date 11-12-85
Time 8A

ENCLOSURE 4

EXHIBIT E

NOV 12 1985

Mr. Samuel W. Speck
Associate Director
State and Local Programs and Support
Federal Emergency Management Agency
Washington, D.C. 20472

Dear Mr. Speck:

This responds to your letter of October 29, 1985, proposing two options for an exercise to test onsite and offsite emergency preparedness capabilities at Shoreham. We conclude that an exercise should be conducted consistent with the approach outlined in your Option 2.

You asked in the letter for further clarification from the NRC as to the scope of the exercise to be conducted. As stated in our memorandum to you of June 20, 1985, we requested that you schedule as full an exercise of the LILCO Local Emergency Response Organization plan as is feasible. Option 2 would include all functions and normal exercise objectives, recognizing that some offsite response roles may be simulated. We believe that such an exercise would be useful in the licensing process for Shoreham. Please let me know if we can be of further assistance.

Sincerely,

[Signed] Jack W. Roe

William J. Dircks
Executive Director for Operations

DISTRIBUTION

JMTaylor, IE	JRSears, IE
RHVollmer, IE	WRButler, NRR
JGPartlow, IE	RRBellamy, RI
BKGrimes, IE	JROE, EDO
ELJordan, IE	TRehm, EDO
SASchwartz, IE	GHCunningham, ELD
KEPerkins, IE	EDO R/F 1139
DBMatthews, IE	DCS
CRVan Niel, IE	DEPER R/F
FKantor, IE	EPB R/F
WJDircks, EDO	SECY
HRDenton, NRR	
TEMurley, RI	
ESChristenbury, ELD	
EJReis, ELD	

ELD ESC
ESChristenbury
11/14/85

EDO
WJDircks
11/12/85

*SEE PREVIOUS CONCURRENCE

*EPB/IE	TECH ED	*EPB/IE	DD/DEPER/IE	D/DEPER/IE	DB/IE	D/IE
FKantor:sc	DGable	DBMatthews	SASchwartz	ELJordan	RHVollmer	JMTaylor
11/12/85	11/ /85	11/12/85	11/ /85	11/12/85	11/ /85	11/12/85

ENCLOSURE 5

EXHIBIT F

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSIONERS:

Nunzio J. Palladino, Chairman
Thomas M. Roberts
James K. Asselstine
Frederick M. Bernthal
Lando W. Zech, Jr.

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

MEMORANDUM AND ORDER

Background

Long Island Lighting Company's (LILCO) application for a full power operating license for its Shoreham Nuclear Power Plant, located in Suffolk County, New York, is pending before the NRC. In order for there to be an adequate record for safety review of LILCO's full power application, NRC regulations generally require, among other things, that an offsite emergency plan be developed, and that there be an exercise of the plan. See 10 CFR § 50.47 and Part 50, App. E. The exercises are generally supervised and conducted by the Federal Emergency Management Agency (FEMA), with participation by relevant state and local governments. In this case, however, the emergency plan before us for review was developed and proposed by LILCO because the State and County refused to develop one. The LILCO Plan for Shoreham provides for the lead role for offsite emergency response to be administered by the Local Emergency Response Organization (LERO), an

EXHIBIT G

organization comprised of primarily utility employees. In a December 26, 1985 motion, New York State, Suffolk County, and the Town of Southampton jointly moved the Commission to cancel a February 13, 1986 exercise of LILCO's emergency preparedness plan for Shoreham. LILCO and the NRC staff oppose the motion, and we deny it for the reasons explained below.

The movants have not identified any basis in NRC regulations for the filing of such a motion, which in effect attempts to interfere directly with the Commission's process for obtaining information necessary for its licensing decisions. Under NRC practice it is not clear that this type of motion is authorized or that we are obligated to respond in any formal way. On this basis alone the motion may be denied. Nevertheless, because we consider the upcoming exercise to be important in carrying out our safety responsibilities, we are responding to the motion in this Memorandum and Order.

The Nature of the Exercise

In the upcoming Shoreham exercise planned for February 13, 1986, FEMA intends to observe a number of LERO primary response capabilities. This observation will entail an examination of facilities, plans, and communications, but will not entail interaction with the public that would be affected in the event of an actual emergency. Specifically, FEMA plans to observe the following facilities and/or activities:

- LERO Emergency Operations Center
- Emergency Operations Facility
- Emergency News Center
- Reception Center
- Congregate Care Centers

- Emergency Worker Decontamination
- General Population Bus Routes
- School Evacuation
- Special Facilities Evacuation
- Mobility Impaired at Home
- Route Alerting
- Traffic Control Points
- Impediments to Evacuation
- Radiological Monitoring
- Accident Assessment

The Motion

The State, County and Town oppose the holding of this exercise of the LILCO plan for essentially two reasons: (1) they contend that various court decisions make clear that LILCO cannot implement its plan, so an exercise of the plan would be useless; and (2) they contend that, if the exercise is designed to test the implementability of the LILCO plan using a simulated State and County response which was never litigated before any NRC Board, it would be irrelevant to the licensing process for Shoreham, and thus the results of the exercise would be worthless for that reason as well. We reject both reasons.

As to the first argument, it is true that a New York State Court has held that, in the event of an actual emergency, certain elements of LILCO's emergency plan can only be implemented by New York State or Suffolk County authorities. Cuomo v. LILCO, No. 84-4605 (N.Y. Sup. Ct., Feb. 20, 1985). The exercise does not flaunt that decision; to the contrary, it presumes the validity of the limits on LILCO's authority to implement its plan as set forth

in that case; the only elements of LILCO's emergency plan which will be tested are those that LILCO may lawfully do on its own. The exercise of these elements of the LILCO plan will not, however, be useless. To the contrary, the exercise is expected to provide important and material information to the Commission. For example, as we noted when we directed the NRC staff to request FEMA to schedule an exercise, the exercise will assist us in determining whether any defects that exist as a result of "the limitations of LILCO's plan when executed under the state and county restrictions" (memorandum from S. Chilk to W. Dircks, dated June 4, 1985 at 1), are significant under our regulations. See 10 CFR 50.47(c)(1). Therefore, it is simply incorrect for the movants to argue that the exercise is useless because not all of the plan's elements will be tested.

As to the second argument, the LILCO Plan in part states that:

> The role of Suffolk County, should it decide to become involved in the response to a radiological emergency, either because the Governor orders it to do so or because the County Executive so chooses, will be for the various members to participate to the extent to which they are qualified by reason of prior training or experience.

Thus a fundamental factual premise for movants' second argument, i.e., that the plan litigated in the Shoreham licensing proceeding provides solely for a LILCO-only response, is incorrect. The plan provides for planned LILCO action in the event of an ad hoc State and County response to an actual emergency. Not only does the LILCO plan anticipate the possibility of such a response, such a response has been, in effect, promised by the State and County. The County Executive has stated that in the event of an actual radiological accident at Shoreham he would "respond to the best of [his] ability and in accordance with the duties and obligations placed upon [him] by Article 2-b of the Executive Law" (letter from P. Cohalan to T. Reveley dated June 26, 1985),

and Governor Cuomo has stated that in a radiological emergency, "both the State and the County would help to the extent possible; no one suggests otherwise." Governor's Press Release dated December 20, 1983.

In order to test LILCO's planned response to ad hoc governmental participation in an actual emergency and to add more realism to the exercise, federal employees will play the role of such officials during the exercise. Through this role-playing, the NRC is attempting to evaluate LERO's capability (1) to accommodate the presence of state and local officials, (2) to support those officials using the resources available through LERO, and (3) to provide those officials with sufficient information to carry out their state and county responsibilities. These "actors," however, will be instructed not to play decisionmaking roles, not to assume any command and control authority, not to interact with members of the public so as to lead anyone to believe that they are actually county officials, and not to actually perform any state or local functions exclusively reserved to state or county officials by state or county laws. The basis for the number of actors to be used in this aspect of the exercise and the detailed instructions they will be provided are based, primarily, on New York State plans for other nuclear power plants and the manner in which New York State personnel and other counties have participated in other New York facility exercises.

Thus, contrary to movants' assertion, the simulation to be performed during the exercise will test an actual and important aspect of LILCO's plan. Indeed, the exercise currently scheduled, including the role playing, corresponds exactly with the current status of emergency planning for Shoreham.

Conclusion

In sum, we find that the motion presents no reason why the exercise should be cancelled.[1] We further find that the conduct of this exercise, which is permitted by our regulations, is under current circumstances both lawful and necessary to fulfill our responsibility under the Atomic Energy Act to protect the health and safety of the public.[2] The exercise will allow us to evaluate whether the LILCO plan, as described above, is as good as LILCO claims it is or, conversely, is as bad as the State, County, and Town assert.

---

[1]The County appears to assert (Motion, p. 21) that, in the event of a radiological accident at Shoreham, County personnel could not lawfully make use of the LILCO plan, even if this was under the circumstances the best way to protect the safety of the citizens of Suffolk County. We find this assertion to be too preposterous an abrogation of the County's obligations to its citizens to be taken seriously.

The motion also states that NRC may not request an exercise at a plant "which has been denied an operating license." (See, e.g. Motion at 3). However, the Commission itself has not reviewed the evidentiary record on the adequacy of LILCO's plan, and consequently there is no final agency action denying LILCO an operating license.

Movants also seem to argue that the Commission erred by failing to conduct a formal Commission meeting when it decided to request the exercise. See Motion at 2. No law requires such a meeting.

[2]Section 103d., 42 U.S.C. § 2132d., provides that:

> ... no license may be issued to any person within the United States if, in the opinion of the Commission, the issuance of a license to such person would be inimical to the common defense and security or to the health and safety of the public.

Section 161c., 42 U.S.C. § 2201c., authorizes the Commission to:

> ... make such studies and investigations, obtain such information, and hold such meetings or hearings as the Commission may deem necessary or proper to assist it in exercising any authority provided in this Act, or in the administration or enforcement of this Act, or any regulations or orders issued thereunder.

Accordingly, we decline movants' invitation to cancel the exercise based on movants' assertion that the exercise is useless because it cannot prove that LILCO's emergency plan is sufficient to meet NRC requirements. While, for the reasons set forth herein, we believe that the exercise is very useful, we obviously take no position on whether the exercise will satisfy our emergency planning requirements. For the past several years the State, County, and Town have been claiming that no adequate plan can be developed for Shoreham, and that the LILCO plan is inadequate. They are entitled, as litigants before us, to advocate that position; they are not, however, entitled to obstruct our inquiry into the facts necessary to enable us to resolve that assertion.[3]

---

[3]The motion did not inform us of a pending development directly related to the motion: a County law, now in effect and under County consideration when its motion was filed, that is apparently intended to make NRC participation in the exercise a crime should the County legislature disapprove of it. Because it has not been raised by the movants as a basis for their motion, we do not deal with the new local law in this Order.

Chairman Palladino and Commissioner Asselstine disapprove this order. Chairman Palladino provided dissenting views with which Commissioner Asselstine agreed. The additional views of the Commission majority are also attached.

It is so ORDERED.

For the Commission

SAMUEL J. CHILK
Secretary of the Commission

Dated at Washington, D.C.
this 30th day of January, 1986.

DISSENTING VIEWS OF CHAIRMAN PALLADINO

I BELIEVE MY POSITION ON THE SCHEDULING OF AN EXERCISE AT THIS TIME IS WELL KNOWN. THAT POSITION IS AS FOLLOWS:

AFTER THINKING ABOUT THIS ISSUE A GREAT DEAL, I CONCLUDED THAT ONLY A POTENTIALLY WORKABLE PLAN SHOULD BE EXERCISED. GIVEN THE LICENSING AND APPEAL BOARD DECISIONS THAT LILCO DID NOT HAVE THE LEGAL AUTHORITY TO PERFORM MANY OF THE REQUIRED EMERGENCY RESPONSE FUNCTIONS SET OUT IN THE PROPOSED PLAN, I QUESTIONED THE USEFULNESS OF THE DRILL BEING PROPOSED. FURTHER, THE RESULTS OF A DRILL OF AN INADEQUATE PLAN MIGHT CREATE NEW HEARING ISSUES WHICH WOULD NEED TO BE ADDRESSED AND THAT MIGHT NOT ARISE IF ONE WERE TO EXERCISE ONLY AN ADEQUATE PLAN.

I BELIEVE THAT AN EXERCISE AT SHOREHAM WHICH INVOLVES PARTICIPATION OF THE STATE, SUFFOLK COUNTY, AND THE UTILITY COULD PROVIDE, ON THE OTHER HAND, USEFUL INFORMATION ON THE ADEQUACIES OF EMERGENCY PREPAREDNESS AT SHOREHAM THAT WOULD BE OF USE AND INTEREST TO ALL PARTICIPANTS.

UNTIL THE COMMISSION COMPLETES ITS REVIEW OF THE EMERGENCY PLANNING LEGAL AUTHORITY ISSUES AND DEPENDING UPON THE OUTCOME OF THAT REVIEW, I WILL CONTINUE TO HOLD THE ABOVE-STATED VIEW. I WOULD ADD THAT I HAVE NOT PREJUDGED, AND DO NOT INTEND TO

PREJUDGE, ANY OPEN ISSUE IN THE SHOREHAM OPERATING LICENSE PROCEEDING.

Additional Views of Majority

While we share our colleagues' views that the February 13, 1986, exercise would be more useful to us in discharging our regulatory responsibilities were Suffolk County and New York State to participate (and indeed we would be inclined to postpone the exercise were state and local participation certain in the near future), we are aware of nothing which suggests that there is any realistic chance of that occurring. Given the intransigence of these governmental bodies we believe our responsibilities require that we proceed with an exercise without them.

For the reasons stated herein, we simply disagree with the view that this exercise will not provide useful information. Whether the LILCO plan adequately accounts for a promised, but ad hoc, governmental response (the "realism" argument) is a matter on which we express no opinion at this time. As noted in our opinion, however, we expect the upcoming exercise to provide us with important factual information to help us resolve this issue.

Intro. Res. No. 2127-85
Introduced by Legislators Blass, Prospect, Caracappa, Englebright, Morgo, Nolan, Bachety, Devine, Foley, Allgrove, D'Andre, Rizzo, Mahoney, Glass, Heaney, LaBua, Rosso

RESOLUTION NO. 1255-1985, ADOPTING LOCAL LAW NO. YEAR 198 , A LOCAL LAW CONCERNING THE PROTECTION OF POLICE POWERS HELD BY THE COUNTY OF SUFFOLK .

WHEREAS, the County of Suffolk, pursuant to the Constitution and laws of the State of New York, has been delegated police powers by the State; and

WHEREAS, the County has a duty to ensure that such police powers are not usurped by other entities; and

WHEREAS, County preparations for and responses to natural and man-made emergency situations involve the County's exercise of its police power functions; and

WHEREAS, the Long Island Lighting Company has prepared an off-site emergency plan for the Shoreham Nuclear Power Station in which private persons, including Long Island Lighting Company employees, would carry out governmental functions and otherwise usurp the police powers of Suffolk County; and

WHEREAS, at the initiative of the Long Island Lighting Company there is proposed to be a test of that Company's off-site emergency plan, during which test the roles and governmental functions of Suffolk County officials would be performed and "simulated" by persons who are not officials of Suffolk County and who are not legally authorized to perform or simulate Suffolk County roles or governmental functions; and

WHEREAS, the County of Suffolk has not been informed of what roles and governmental functions of the County would be so performed or "simulated," what actions would be taken by persons carrying out the test, and what public roadways, lands, and other property would be affected during such test; and

WHEREAS, the County of Suffolk finds that it would be inconsistent with its police powers and its duty to prevent such powers from being usurped if it were to remain indifferent to usurpation of its police powers or allow unauthorized persons to perform or simulate the County's roles or governmental functions; and

WHEREAS, the County of Suffolk finds that it is required to establish a mechanism of general applicability to gain information needed to assess whether persons are proposing to take actions or perform roles or governmental functions, or otherwise usurp the County's police powers in a test or actual emergency situation; and

WHEREAS, there was duly presented and introduced to this County Legislature at a meeting held on , 1985, a proposed local law entitled, "A LOCAL LAW CONCERNING THE PROTECTION OF POLICE POWERS HELD BY THE COUNTY OF SUFFOLK," and said local law in final form is the same as when presented and introduced; now, therefore, be it

RESOLVED, that said local law be enacted in form as follows:

LOCAL LAW NO. , SUFFOLK COUNTY, NEW YORK

LOCAL LAW CONCERNING THE PROTECTION OF POLICE POWERS HELD BY THE COUNTY OF SUFFOLK

BE IT ENACTED BY THE COUNTY LEGISLATURE OF THE COUNTY OF SUFFOLK AS FOLLOWS:

Section 1. Definition.

As used herein, "person" shall mean any individual, partnership, corporation, association, or public or private organization of any character, provided, however, that "person" shall not include any governmental entity authorized by law to perform the governmental function of Suffolk County or authorized by law to exercise police powers within the State of New York.

Section 2. Prohibition.

EXHIBIT H

(a) It shall be a crime for any person to conduct or participate in any test or exercise of any response to a natural or man-made emergency situation if that test or exercise includes as part thereof that the roles or governmental functions of any Suffolk County official will be performed or simulated, and if the Suffolk County Legislature, pursuant to the procedures set forth in Sections 3 and 4 of this law, has issued via resolution a notice of disapproval of such performance or simulation of County roles or governmental function.

(b) It shall be a crime for any person to conduct or participate in any test or exercise of any response to a natural or man-made emergency situation if that test or exercise includes as part thereof that the roles or governmental functions of any Suffolk County official will be performed or simulated, and if the person shall have failed to comply with the procedures set forth in Sections 3(a) and 3(b) of this Local Law.

Section 3. Procedures and Public Hearings.

(a) At least 25 days prior to conducting or participating in a test or exercise covered by this law, a person who intends to conduct or participate in such test or exercise shall submit to the Clerk of the Suffolk County Legislature a description of the proposed activity, specifying how, when, where, by whom, and for what purpose the roles or governmental functions of Suffolk county officials may be performed or simulated.

(b) Upon receipt of the submittal required by Section 3(a) of this Local Law, the Clerk of the Suffolk County Legislature shall within 7 days inform the person of any additional information required for the Legislature's review of such submittal, and such person shall supply the additional information within 7 days.

(c) The Legislature shall review the submittal to assure that the times, places, manner, and purposes of the proposed performance or simulation of County of Suffolk roles or governmental functions do not interfere with the public's use of or access to public property, do not involve the unauthorized performance of governmental functions, and do not usurp or otherwise impair the police powers held by the County.

(d) The Legislature shall hold a public hearing concerning any submittal hereunder wherein the Legislature determines via resolution that the proposed performance or simulation of County roles or governmental functions may involve an interference with the public's use of or access to public property, or unauthorized performance of governmental functions, or a usurpation or other impairment of the police powers held by the County.

(e) After such public hearing, the Legislature shall determine via resolution whether the proposed performance or simulation of County roles or governmental functions constitutes an interference with the public's use of or access to public property, or unauthorized performance of governmental functions, or a usurpation or other impairment of the County's police powers, and in the event of a determination to disapprove the proposed performance or simulation, the Clerk shall issue and transmit to such person a notice of disapproval of such proposed performance or simulation.

Section 4. Special Procedures.

(a) If any person making a submission pursuant to Section 3 of this law believes that some or all of the data in the submittal merit confidential treatment, the person shall so inform the Clerk at the time of the submission. If the Legislature then determines that confidential treatment is required, the procedures of Section 3 shall be modified as necessary and appropriate. If the Legislature determines that confidential treatment is not required, the person shall be so advised and shall have the option of withdrawing the submittal or proceeding under the procedures of Section 3.

(b) The Presiding Officer is hereby authorized to convene such special meetings of the Legislature as may be required in order to conduct the reviews and other procedures required by this law in a timely manner.

Section 5. Penalties and Remedies.

(a) A violation of Section 2 of this law shall be a Class A Misdemeanor and shall be punishable by a sentence of not more than one (1) year

in prison or a fine of not more than one thousand dollars, or by both such fine and imprisonment.

(b) A violation or threatened violation of any section of this law, including a failure to submit information as set forth in Sections 3(a) and 3(b), shall give the County the option, among other civil remedies, of seeking injunctive relief against the person who is in violation or threatened violation thereof.

Section 6. Separability.

If any part of this Law shall be declared invalid or unconstitutional by any Court, such declaration shall not affect the validity of any other part.

Section 7. Effective date.

This Law shall take effect immediately, and shall apply to any activity conducted after such effective date.

DATED: December 23, 1985

APPROVED BY:

Peter F. Cohalan

County Executive of Suffolk County

Date of Approval: 1/13/86

January 22, 1986

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

Dear Mr. Cohalan:

On January 16, 1986, Suffolk County Local Law 2-86 became effective. That law, entitled "A Local Law Concerning the Protection of Police Powers Held by the County of Suffolk" purports to require Suffolk County Legislature approval of certain tests or exercises for responding to emergency situations. The law obviously is designed to apply to the upcoming February 13, 1986 scheduled emergency planning exercise for the Shoreham Nuclear Power Plant. This exercise will include not only federal government participants from the Nuclear Regulatory Commission ("NRC" or "Commission"), the Federal Emergency Management Agency ("FEMA"), the Department of Energy, the Department of Commerce, the Environmental Protection Agency, the Department of Health and Human Services, the Department of Transportation, and the Department of Agriculture, but also employees of the Long Island Lighting Co. ("LILCO"), the holder of a Commission low-power operating license.

We have no desire for a confrontation with Suffolk County over Local Law 2-86. To the contrary, we would welcome a reversal of Suffolk County's opposition to the upcoming exercise and its participation in that important information gathering function. The NRC has requested FEMA to conduct that exercise to enable the Commission to gain facts that will assist it in evaluating aspects of LILCO's emergency plan and in determining whether that plan provides reasonable assurance that adequate protective measures can and will be taken in the event a radiological emergency were ever to occur at Shoreham. This important task could be done more efficiently and effectively were Suffolk County to participate in the exercise, as have other local communities surrounding the more than 100 nuclear power plants in operation or close to operation in this country. Moreover, were Suffolk County to participate in the upcoming exercise, any legitimate concerns over either infringement of its police powers during the exercise or lack of information about the exercise would obviously be satisfied.

Regardless of the County's decision concerning participation in the February 13 exercise, however, its concerns over that

EXHIBIT I

exercise are not justified: the County's police powers will not be impinged in any way and we have no desire to unreasonably withhold information concerning the upcoming exercise from the County. We are hopeful that, once the County understands the context of the test in the federal licensing scheme and the nature of the federal participation, a confrontation can be avoided. Toward that end we want to advise you about the upcoming exercise. We understand that LILCO has also submitted a description of the February 13, 1986 exercise for your information.

The exercise is to be supervised and conducted by FEMA at the request of the NRC. No State or County functions will be performed by any federal personnel during the upcoming exercise. No LILCO employee will be, or appear to be, performing any State or County functions. Indeed, as the NRC made clear in requesting FEMA to schedule and conduct the exercise, the upcoming test will comply with all State and County laws which limit the exercise of certain functions to State or County personnel. Although, as explained below, federal personnel will, to a limited degree, play the roles of certain State and County officials, this limited role-playing will not, and is not intended to, infringe on any legitimate police powers of Suffolk County.

The LILCO Transition Plan for Shoreham provides for the lead role for offsite emergency response to be administered by the Local Emergency Response Organization ("LERO"), an organization comprised of primarily utility employees. In the upcoming Shoreham exercise, FEMA intends to observe, by examination of facilities, plans, and communications, but not by interacting with the affected public, a number of LERO primary response capabilities. Specifically, FEMA plans to observe the following facilities and/or activities:

* LERO Emergency Operations Center
* Emergency Operations Facility
* Emergency News Center
* Reception Center
* Congregate Care Centers
* Emergency Worker Decontamination
* General Population Bus Routes
* School Evacuation
* Special Facilities Evacuation
* Mobility Impaired at Home
* Route Alerting
* Traffic Control Points
* Impediments to Evacuation
* Radiological Monitoring
* Accident Assessment

In addition to the above areas, FEMA will evaluate the part of the plan which provides for possible New York State and/or Suffolk County involvement in response to a radiological emergency. The LILCO Plan in part states that:

> The role of Suffolk County, should it decide to become involved in the response to a radiological emergency, either because the Governor orders it to do so or because the County Executive so chooses, will be for the various members to participate to the extent to which they are qualified by reason of prior training or experience.

In order to test this aspect of the plan and to add more realism to the exercise, should neither Suffolk County or New York officials choose to participate, federal employees will play the role of such officials during the exercise. Through this role-playing, the NRC is attempting to more effectively evaluate LERO's capability (1) to accommodate the presence of State and local officials, (2) to support those officials using the resources available through LERO, and (3) to provide those officials with sufficient information to carry out their State and County responsibilities. These "actors," however, will be instructed not to play decisionmaking roles, not to assume any command and control authority, not to interact with members of the public so as to lead anyone to believe that they are actually County officials, and not to actually perform any State or local functions, which are exclusively reserved to State or County officials by State or County laws. The basis for the number of actors to be used in this aspect of the exercise and the detailed instructions they will be provided are based, primarily, on New York State plans for other nuclear power plants and the manner in which New York State personnel and other counties have participated in other New York facility exercises.

As is clear from the above description, the February 13 Shoreham exercise is not intended to, nor will it, infringe on any lawful County interest. As stated above, the NRC is requiring this exercise to fulfill the congressionally mandated objective under the Atomic Energy Act of ensuring that the public health and safety is protected by any decision that the NRC makes on LILCO's application. In order to carry out this important federal function, the NRC is granted specific statutory authority to obtain information through such studies and investigations which it deems necessary and proper. See, e.g., 42 U.S.C. § 2201c. Similarly, FEMA has a congressional mandate to conduct such an exercise at the request of the NRC. 42 U.S.C. §§ 5131 & 5201; 50 U.S.C. § 2253(g); 44 C.F.R. Part 350.

We would welcome a Suffolk County decision to participate in the Shoreham exercise. In our view the public only loses by your refusal to help the NRC and FEMA perform their federally mandated functions. Regardless of your decision, however, it is NRC's intention that FEMA continue to plan for and conduct the upcoming February 13 exercise in order to fulfill our federal responsibilities.

Sincerely,

Herzel H. E. Plaine
General Counsel
United States Nuclear
Regulatory Commission

George W. Watson
Acting General Counsel
Federal Emergency
Management Agency

U.S. Department of Justice
Civil Division

Office of the Assistant Attorney General

Washington, D.C. 20530

JAN 23 1986

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

Dear Mr. Cohalan:

As you are aware, the Nuclear Regulatory Commission ("NRC"), in conjunction with the Federal Emergency Management Agency ("FEMA") and the Department of Energy, have scheduled for February 13, 1986 an emergency planning exercise for the Shoreham Nuclear Power Plant ("Shoreham") located in Suffolk County, New York. The Long Island Lighting Company ("LILCO") is presently the holder of a federal low-power operating license at Shoreham and is seeking approval for a full-power operating license. In order for LILCO to obtain approval for such a license, the NRC requires, inter alia, that an emergency plan be developed and that NRC and FEMA conduct an exercise to demonstrate the effectiveness of the plan. See 10 C.F.R. § 50.47 and Part 50, Appendix E. These important federal requirements are mandated by the Atomic Energy Act because Congress has found that, with respect to the utilization of atomic energy, it is in the "national interest . . . to protect the health and safety of the public." 42 U.S.C. § 2012(e).

I understand that Suffolk County has adopted an ordinance, Suffolk Local Law No. 2-86, which could be interpreted to prohibit federal officials from simulating the role of county officials in any such test, or participating in a test in which someone else was engaging in such role-playing. Such an interpretation would constitute an obstruction to the achievement of a congressionally mandated purpose or objective under the Atomic Energy Act. Because of their concern over any possible frustration of these important federal interests, particularly, the congressional mandate to protect the public health and safety from radiological hazards, we have been discussing with the agencies the possibility of legal action. I feel confident that, once the county understands the context of the test in the federal licensing scheme and the nature of the federal participation, litigation can be avoided. Toward that end, and in the interest of federal, state and local comity, the federal

EXHIBIT J

agencies involved in the test are forwarding to you a description of the upcoming exercise. In addition, we have been advised that LILCO has already submitted to you their description of the February 13, 1986 exercise.

The test is to be supervised and conducted by FEMA. No state or county functions will be exercised by any federal personnel during the upcoming test. No LILCO employee will be performing any state or county functions. Indeed, as the NRC made clear in requesting FEMA to schedule and conduct the exercise, the upcoming test will comply with all state and county laws which limit the exercise of certain functions to state or county personnel. It will not, and is not intended to, infringe any legitimate police powers of Suffolk County. In sum, the test involves federal employees playing the part of local and/or state personnel, and LILCO employees and other individuals acting out their roles under a simulated exercise. Of course, if the county and/or state decides to participate in the exercise, participation which has long been sought and is welcome now, there would be no need for role-playing of local and/or state personnel. In any event, no action will be taken which would require the actual exercise of local police powers.

As stated above, the NRC is requiring this exercise to fulfill the congressionally mandated objective under the Atomic Energy Act of ensuring that the public health and safety is protected by any decision that the NRC makes on LILCO's application. In order to carry out this important federal function, the NRC is granted specific statutory authority to obtain information through such studies and investigations which it deems necessary and proper. See, e.g., 42 U.S.C. § 2201c. Similarly, FEMA has a congressional mandate to conduct such an exercise at the request of the NRC at 42 U.S.C. §§ 5131 & 5201; 50 U.S.C. 2253(g); 44 C.F.R. Part 350.

For the reasons outlined above and because of the imminence of the February 13th date, the agencies are continuing their preparations for the exercise. However, we do not intend t subject federal employees or others involved in this exercise to confirm the safety of a nuclear power plant to criminal prosecution, however unwarranted. We therefore request that you respond by January 30, 1986, indicating whether you intend to treat this exercise and the role-playing it involves as a criminal misdemeanor. In light of the advance preparation needed to perform this exercise, we need such a prompt response to be assured that you will not be implementing this ordinance

in a manner that constitutes an impermissible obstruction to the congressionally mandated radiological health and safety requirements of the Atomic Energy Act.

Thank you for your cooperation in this matter.

Sincerely yours,

Richard K Willard (by R.L.)

RICHARD K. WILLARD
Assistant Attorney General

COUNTY OF SUFFOLK

COUNTY LEGISLATURE

JAN 30 1986

GREGORY J. BLASS
PRESIDING OFFICER

January 30, 1986

Richard K. Willard, Esq.
Assistant Attorney General
Civil Division
U.S. Department of Justice
Washington, D.C.

Dear Mr. Willard:

As Presiding Officer of the Suffolk County Legislature, I acknowledge receipt of your letter to County Executive Peter F. Cohalan, dated January 23, which Mr. Cohalan referred to the County Legislature for consideration. All members of the Legislature have received copies of your letter.

I appreciate your views regarding the proposed Shoreham exercise and Local Law 2-1986, as well as those in the joint NRC/FEMA letter of January 22, to which you refer. Let me assure you that both letters will receive careful consideration by me and by other members of the Legislature. While I cannot speak for the Legislature as a body prior to its official determinations, I am able to state my view that there is no intention to apply Local Law 2-1986 to Federal employees acting within the scope of their authority. Your views will aid the Legislature in considering this matter.

Nevertheless, your letter causes me to believe that there may be some confusion regarding several matters. First, the posture of the proposed exercise presents an unprecedented situation. LILCO lacks authority to sponsor its emergency plan, because major portions of the plan have been declared to be illegal. This was the ruling of the New York State Supreme Court (February 20, 1985) and the NRC's Licensing and Appeal Boards (April 17, August 26, and October 18, 1985). None of these decisions has been reversed or stayed. This raises for the Legislature the question whether LILCO has any legal basis to test its ability to perform illegal acts. In a letter of December 26, 1985, our counsel asked FEMA whether it planned to assist LILCO in demonstrating its capacity to act illegally. FEMA has declined to answer our inquiry. Your letter assists in

EXHIBIT K

our consideration of this matter; we certainly would welcome any additional views you may have on this issue. This issue is particularly important because the NRC has acknowledged that "because of the recent Court decision a full exercise of the LILCO emergency plan may not be possible" and has requested that FEMA schedule only such exercise of LILCO's plan as is "feasible and lawful at the present time." (Emphasis in the original.) Memorandum dated June 4, 1985, from Samuel J. Chilk, Secretary, NRC, to William J. Dircks, Executive Director for Operations, NRC.

Second, it appears from your letter that you believe that Local Law 2-1986 prohibits the February 13 exercise unless the Legislature first issues an approval. That is not the case. LILCO on January 16 made a filing with the Legislature pursuant to Section 3(a) of the Local Law and on January 28 provided additional data. In view of such compliance by LILCO with the Local Law, there is as of this time no application of other provisions of the Local Law that would prevent the February 13 exercise. LILCO's exercise would be affected only if the Legislature, after a public hearing, decided via resolution to issue a notice of disapproval with respect to some portion or all of the exercise. It is, of course, not possible for me, as only one member of the Legislature, to predict what action, if any, the Legislature might ultimately take on the merits. However, I can inform you of the Legislature's schedule for consideration of this matter:

Feb. 5 — Public Hearing of Legislature at 10 a.m. at the Legislature's auditorium in Hauppauge, New York.

Feb. 7 — If needed, special meeting of Legislature at the Legislature's auditorium in Riverhead, New York.

Therefore, the earliest date that any notice of disapproval might be issued is February 7. In the meantime, the Local Law does not stand in the way of any preparations for the exercise. Indeed, I am informed that on Monday of this week, the Suffolk County Attorney informed U.S. District Judge Wexler (E.D.N.Y.) that Suffolk County would not seek to apply the Local Law to preparatory activities (such as those which occurred last week and similar activities scheduled for this week) that occur within 25 days of the Law's effective date.

Finally, you requested that the County "respond by January 30, 1986, indicating whether you intend to treat this exercise and the role-playing it involves as a criminal

misdemeanor." This question necessarily involves consideration by the Legislature of LILCO's January 16 and 28 filings, the FEMA/NRC letter of January 22, and your letter of January 23. In view of the schedule described above, the Legislature will not be in a position to act upon LILCO's submission until February 7. I will inform you promptly when a decision is reached.

Again, the Legislature appreciates the time you have taken to convey your views, and we will carefully consider your views and those of FEMA/NRC. If you, or other Federal personnel, would like to address the Legislature on February 5 at the public hearing, please let me know by February 3. Similarly, any further written submissions will also be considered.

Sincerely yours,

Gregory J. Blass

Gregory Blass
Presiding Officer

cc: Members of the County Legislature
The Honorable Peter F. Cohalan
Herzel H.E. Plaine, Esq.
George W. Watson, Esq.

U.S. Department of Justice

Civil Division

Office of the Assistant Attorney General

Washington, D.C. 20530

JAN 31 1986

Honorable Gregory Blass
Presiding Officer
Suffolk County Legislature
H. Lee Dennison Building
Veterans Memorial Highway
Hauppauge, New York 11788

Dear Mr. Blass:

I appreciate your prompt response on behalf of the Suffolk County Legislature to my January 23rd letter to Mr. Peter F. Cohalan, Suffolk County Executive. With the test of the Long Island Lighting Company's ("LILCO") evacuation plan only two weeks away, resolution of the apparent conflict between the county and the federal agencies conducting the test is urgently needed.

Your letter reflects fundamental misperceptions concerning the test and the ultimate determination by the Nuclear Regulatory Commission ("NRC") concerning LILCO's application for a full-power operating license. Pursuant to the statutory scheme which Congress established under the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011 et seq., the NRC has the regulatory responsibility to ensure the radiological health and safety aspects involved in the construction and operation of nuclear power plants. See Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984). To assist the NRC in making its determination that adequate protective measures both on and off the plant site can and will be taken in the event of a radiological emergency, the NRC conducts emergency planning exercises, such as the February 13th test. See 10 C.F.R. 50.47 and Part 50, Appendix E. Thus, the test scheduled for February 13, 1986 is a federal test.

Attached is a determination by the NRC dated January 30, 1986, in which the Commission by a 3-2 vote denied Suffolk County's request to cancel the February 13, 1986 test. (Attached). The Commission reiterates the nature of the upcoming test. It does not involve exercise of police powers and does not "entail interaction with the public that would be affected in the event of an actual emergency." Decision at 2. Rather, it merely involves an examination of facilities, plans and communications and simulation of emergency "scenarios" in order to evaluate LILCO's emergency preparedness. While federal

EXHIBIT L

personnel will "role-play" for absent local and state officials, they will not exercise police functions at this exercise. The NRC is conducting this test to assist it in its determination as to whether "any defects . . . exist as a result of 'the limitations of LILCO's plan when executed under the state and county restrictions'" and whether there exists a basis to approve LILCO's application where LILCO's "plan provides for planned LILCO action in the event of an ad hoc State and County response to an actual emergency." Decision at 4. Thus, LILCO's sponsorship of an emergency plan is not at issue. While the New York State Supreme Court decision in Cuomo v. LILCO, No. 84-4605 (N.Y. S.Ct., Feb. 20, 1985), to which you refer, holds that in event of an actual emergency, certain elements of LILCO's plan which require police power cannot be exercised on LILCO's authority alone, it does not preclude sponsorship of an emergency plan or this test. As discussed below, the County will have the opportunity to address that issue, as well as approval of LILCO's plan with only ad hoc participation by the County, at a hearing before the NRC. Furthermore, because the NRC is conducting this test in futherance of its congressionally mandated responsibilities, it is not required to submit this test for approval to the Suffolk County Legislature. See Pacific Gas & Electric Co. v. State Energy REsources Conservation & Development Commission, 461 U.S. 190, at 205, 212.

Your letter also appears to misperceive the status of this federal test under NRC's regulatory scheme for approving full-power operating licenses. When an interested party objects to the issuance of such a license and requests a hearing, as the County has done with respect to LILCO's application, in accordance with NRC practices a hearing will be held. If Suffolk County requests a hearing with regard to the results of the upcoming exercise, it will be entitled to receive a hearing before issuance of such a license. At that hearing the County will have the opportunity to express its concerns regarding whether an evacuation plan can be approved where the County opposes its implementation. If the County is dissatisfied with the final determination by the NRC, it can, of course, exercise its right to appeal to a United States Circuit Court. 42 U.S.C. § 2239 (b); see County of Suffolk v. Long Island Lighting Co., 728 F.2d 52 (2d Cir. 1984); Union of Concerned Scientists v. NRC, 735 F.2d 1437 (D.C. Cir. 1984); cert. denied, 105 S.Ct. 815 (1985).

I understand the County's desire to deliberate on this matter in depth. However, significant federal resources have been allocated in preparation for this test and we perceive no role for the County in deciding whether it should go forward. In these circumstances, we see no point in our waiting until the legislature makes that decision on February 7. There are numerous preparations which must be made well before the exercise and can no longer be delayed. If this matter cannot be resolved by Monday, February 3, 1986, it may be necessary to authorize seeking immediate judicial relief to ensure that this federal test is not impermissibly obstructed.

Sincerely yours,

Richard K. Willard (by RJC)

RICHARD K. WILLARD
Assistant Attorney General

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA, Plaintiff, v. THE COUNTY OF SUFFOLK, NEW YORK, and PETER F. COHALAN, Defendants.	Civil Action No.

AFFIDAVIT OF BERNARD H. WEISS

1. My name is Bernard H. Weiss. I am the Federal Response Coordinator in the Incident Response Branch, Division of Emergency Preparedness and Engineering Response, Office of Inspection and Enforcement, U.S. Nuclear Regulatory Commission, Washington, D.C. I have been employed in this position since March 1982. I received a Bachelor's degree in Chemical Engineering in 1958 from City College of New York, and in 1962 a Master's degree Public Health, with a concentration in Environmental Health from the University of Michigan. I have more than 25 years of experience working on public health issues involving radiation safety, with nearly 20 years of that experience at the NRC and its predecessor, the AEC.

As the NRC Federal Response Coordinator, I am the primary coordinator of all federal response to emergencies involving NRC licensed facilities. I develop and maintain detailed emergency operating procedures for coordination between NRC headquarters and

EXHIBIT M

regional offices and other federal agencies involved in a radiological emergency; plan and develop the National Emergency Preparedness Program; and perform various emergency response duties at the NRC Operations Center such as assuring that federal agencies, the news media, and the Congress understand the course of any accident, and insuring that appropriate federal agencies are notified of significant accidents and have sufficient information to perform their duties in responding to such accidents. In that position, I have been responsible for doing some of the scenario planning and control for many tests of the NRC Incident Program. Additionally, in this position I have been chairman of the Scenario Development, Control and Evaluation Work Group which includes representatives from the primary offsite authorities, most participating federal agencies, NRC utility company licensees, and contractors. This group planned and implemented the largest nuclear facility exercise ever conducted.

From 1979 to 1982, I was the Chief of the NRC Incident Response Branch. In this position, among other things, I developed guidance for NRC regional offices on procedures to be used in emergencies; I planned, monitored and evaluated exercises of emergency response plans for NRC licensed facilities; I developed agreements with organizations supporting NRC emergency responses; and I assured the operational readiness of the NRC Operations Center.

From 1977 to 1979, I was an NRC Senior Technical Operations Specialist, responsible for developing, exercising and coordinating the NRC Incident Response Program. I also participated in the development and implementation of emergency response agreements between NRC and other federal as well as State agencies.

Prior to 1977, I held various positions with responsibilities for radiation safety at the NRC and the AEC, and with the State of Kansas, and the city of Philadelphia, Pennsylvania.

2. Prior to the issuance of a full power operating license for a nuclear power plant, NRC regulations generally require, among other things, that an offsite emergency plan be developed and tested or exercised. See 10 CFR § 50.47 and Part 50, App. E. The exercises are evaluated by the Federal Emergency Management Agency (FEMA), pursuant to a Memorandum of Understanding between FEMA and NRC (50 Fed. Reg. 15485, 4/18/85). FEMA cooperates with NRC and licensees to develop exercise objectives, including, among other things, demonstration of decisionmaking, notifications, actions to protect the public, and accident assessment. From these exercise objectives, exercise scenarios are developed. The scenarios specify the onsite accident and offsite radiation doses necessary to create the conditions which adequately test the exercise objectives. The onsite scenario, based on both the objectives and the characteristics of the nuclear reactor for which the test is conducted, consists of a hypothetical reactor accident which is

comprised of many events occurring at specified times. In addition to radiation doses, the offsite scenario includes specifics on the times and places at which hypothetical events will occur, including, for example, weather and traffic conditions. Prior to the exercise, the overall scenario is not divulged to the "responders" who will be evaluated by the exercise observers.

3. In addition to planners who develop the scenarios, responders, and observers who evaluate the responders' performance, there is another critical class of participants involved in the offsite portion of any exercise -- "controllers." Controllers "inject messages" to the responders. The messages provide information to the responders upon which they should act. Controllers thus create hypothetical circumstances which require responders to assess and react according to emergency plan procedures.

4. With both parts of the scenario, onsite and offsite, there is an integrated scenario which is then used in the exercise to provide an opportunity for the responders to demonstrate their response capability in relation to the events listed in great detail in the scenario. For example, the scenario might call for a fire onsite one hour into the exercise, necessitating the response of the licensee's firefighting group, or a change of weather conditions which should cause a reassessment of protective action recommendations, e.g., sheltering or evacuation of the public. In each case, controllers inject messages about these

events to the responders, and observers assess the response to the events.

5. Long Island Lighting Company's (LILCO) application for a full power operating license for its Shoreham Nuclear Power Plant, located in Suffolk County, New York, is pending before the NRC. The LILCO Plan for Shoreham provides that the lead role for offsite emergency response is administered by the Local Emergency Response Organization (LERO), an organization composed primarily of utility employees. In the upcoming February 13, 1986, Shoreham exercise, FEMA intends to evaluate a number of LERO primary response capabilities. This evaluation will entail an examination of facilities, plans, and communications, but will not entail interaction with the public that would be affected in the event of an actual emergency. Specifically, FEMA plans to evaluate the following facilities and/or activities:

- LERO Emergency Operations Center
- Emergency Operations Facility
- Emergency News Center
- Reception Center
- Congregate Care Centers
- Emergency Worker Decontamination
- General Population Bus Routes
- School Evacuation
- Special Facilities Evacuation
- Mobility Impaired at Home

- Route Alerting
- Traffic Control Points
- Impediments to Evacuation
- Radiological Monitoring
- Accident Assessment

In the normal exercise, relevant State and local governments personnel act as offsite controllers. In this case, however, the emergency plan before the Commission for review was developed and proposed by LILCO because the State and County refused to develop one. The controllers in this exercise will not be State or local employees because Suffolk County and New York State have not agreed to participate; instead, federal employees from the NRC and FEMA will be the controllers for this exercise.

6. In addition to the participants in the usual exercise, for the Shoreham exercise there will be another category of participants -- simulators. In order to test LILCO's planned response to ad hoc governmental participation in an actual emergency, federal simulators will provide an opportunity for LILCO employees to demonstrate during the exercise how they would respond to the presence of and questions from various County and State officials. For example, a federal official simulating a State or County health officer might ask the LERO technical staff for the information it used to estimate potential offsite doses to the public. Another simulator might also request an explanation of the basis for protective action recommendations being considered

by LERO. In each instance, federal observers will assess the LILCO responses. Through the use of simulators, FEMA will evaluate LERO's capability (1) to accommodate the presence of State and local officials, (2) to support those officials using the resources available through LERO, and (3) to provide those governmental officials with sufficient information to carry out their State and County responsibilities.

7. The number of simulators to be used in this aspect of the exercise and the detailed instructions they will be provided are based, primarily, on New York State's plans for other nuclear power plants and the manner in which New York personnel and other counties have participated in other New York facility exercises. In developing the plan for these simulations, individuals who have participated in the planning for and evaluation of previous New York nuclear facility exercises were consulted.

8. These simulators will not perform any actions reserved to State and local governments. The simulators have been instructed not to play decisionmaking roles, not to assume any command and control authority, not to interact with members of the public so as to lead anyone to believe that they are actually State or County officials, and not to actually perform any State or local functions exclusively reserved to State and County officials by State or County laws. Moreover, federal employees have been instructed not to direct LILCO employees to perform any such functions themselves. For example, exercise simulators have been

instructed not to direct LILCO employees to turn on sirens or to broadcast messages to the public over the emergency broadcast system during the exercise.

9. Federal participants have been instructed to take no actions which are likely to mislead members of the public into believing that exercise participants are State and County decisionmakers exercising State or County legal authority that must be obeyed. Indeed, the exercise activities will not intrude or threaten to intrude on pedestrian or motor traffic, or any other public activity.

10. As noted above, there also will be "observers" at the exercise. They are contractors and personnel from many federal agencies including FEMA, NRC, the Environmental Protection Agency, and the Departments of Agriculture, Transportation, Energy, and Health and Human Services. The observers, of which there will be over forty for the Shoreham exercise, will accompany various responders, grading the actions and decisions of the responders to the events of the scenario.

11. In order to preserve the credibility of the exercise, and "emergency" integrity, it is essential that the responders not obtain the scenario or any information which might reveal the scenario. The latter type of information includes, but is not limited to, the titles and numbers of the State and County officials whose roles will be "simulated." If the responders know

which officials will be simulated during the exercise, it is possible that the responders will focus their preparation on the potential questions of these anticipated officials, to the exclusion of other relevant officials, thus detracting from the effectiveness of the exercise.

12. Suffolk County Local Law 2-86 would be significantly disruptive to NRC activities if the exercise were delayed pending a final determination as to whether the law will be enforced. NRC controllers, simulators and observers (about 25) have spent considerable time and effort planning for or preparing to participate in the exercise to be conducted on February 13. Any delay will require rescheduling of personnel work schedules for the week of February 10. If the delay is not announced until shortly before the exercise, those employees will not be able to effectively reschedule their time; indeed, some will have already travelled to Suffolk County by February 11 and 12. If the exercise is rescheduled, the preparation process will have to begin again. By having to reschedule the exercise the NRC will be

required to expend additional time and expense that would otherwise be avoided were the exercise to be conducted on February 13.

The above statements are true and correct to the best of my knowledge.

Bernard H. Weiss

Subscribed and sworn to me on
this 3d day of February, 1986

Notary Public
My commission expires: 7-1-86

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	Civil Action No.
	)	
v.	)	
	)	
THE COUNTY OF SUFFOLK, NEW YORK, and PETER F. COHALAN,	)	
	)	
	)	
Defendants.	)	
	)	

ORDER GRANTING PRELIMINARY INJUNCTION

The Court having considered Plaintiff's Motion For A Preliminary Injunction, the affidavit sworn to February 3, 1986, in support of the Motion the Memorandum Of Points And Authorities In Support Of The Motion, the complaint filed in the above-captioned action, and the arguments of the parties, the Court hereby grants this ORDER enjoining Suffolk County, New York from enforcing Local Law 2-86 in connection with the test of the Radiological Emergency Preparedness Plan at Shoreham Nuclear Power Plant scheduled for February 13, 1986 for the reasons that (1) Local Law 2-86, if enforced, directly conflicts with enforcement of a federal statute in violation of the Supremacy Clause of the federal Constitution, and (2) Local Law 2-86 threatens all federal employees who engage in the scheduled test to criminal sanction.

UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that copies of Plaintiff's Order To Show Cause, Affidavit of Raphael O. Gomez, Motion To Consolidate and Memorandum in Support Thereof, Motion For Preliminary Injunction and Memorandum in Support Thereof were hand-delivered this 4th day of February, 1986 on the following:

Martin B. Ashare, Esq.
Suffolk County Attorney
Suffolk County Department
of Law
158 North County Complex
Hauppauge, New York 11788

Attorney for Suffolk County and
Peter F. Cohalan

David R. Davies
K. Dennis Sisk
Hunton & Williams
100 Park Avenue - 10th Floor
New York, New York 10017

Attorneys for LILCO

RAPHAEL O. GOMEZ
Attorney for Plaintiff