

UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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NUCLEAR REGULATORY COMMISSION

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PUBLIC MEETING

Nuclear Regulatory Commission  
1 White Flint North  
Rockville, Maryland

Tuesday, February 21, 1989

The Commission met in open session, pursuant to notice, at 2:00 p.m., Lando W. Zech, Jr., Chairman, presiding.

COMMISSIONERS PRESENT:

LANDO W. ZECH, JR.  
THOMAS M. ROBERTS  
KENNETH C. ROGERS  
KENNETH M. CARR

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## STAFF AND PRESENTERS SEATED AT THE COMMISSION TABLE:

SAMUEL J. CHILK, Secretary  
WILLIAM C. PARLER, General Counsel

For Suffolk County, Town of Southampton  
HERBERT H. BROWN  
LAWRENCE LANPHER

For the State of New York  
RICHARD J. ZAHNLEUTER

For Long Island Lighting Company  
DONALD P. IRWIN  
TAYLOR REVELEY  
IRA FREILICHER  
JOHN LEONARD

For NRC  
EDWIN J. REIS  
JOSEPH SCINTO  
MITZI YOUNG

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P-R-O-C-E-E-D-I-N-G-S

2:00 p.m.

CHAIRMAN ZECH: Good afternoon.

This afternoon the Commission will hear oral argument on the appeal issue identified in our November the 9th, 1988 order in this proceeding involving the Long Island Lighting Company's application to operate the Shoreham Nuclear Power Station Unit Number 1.

Commissioner Curtiss will not participate in this Commission's decision on this matter now pending before the Commission in the instant appeal, and accordingly is not present for today's oral arguments.

Parties opposed to the sanctions imposed by the Licensing Board will have 40 minutes to present their arguments. Parties in favor of the sanctions will likewise have 40 minutes to present their arguments. Parties for each side are responsible for deciding among themselves on the division of their 40 minutes. The parties opposing the sanctions may reserve some portion of their 40 minutes for rebuttal.

The Commission will hear first from the opponents of the sanctions.

I understand, Mr. Brown, you will go first.

MR. BROWN: That's right.

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1 CHAIRMAN ZECH: Would you state your name  
2 for the record and who you're representing, please?

3 MR. BROWN: Thank you, Mr. Chairman. My  
4 name is Herbert H. Brown of the Washington, D.C. law  
5 firm of Kirkpatrick and Lockhart and I am here  
6 representing Suffolk County. On my left, I'm  
7 accompanied by my law partner, Mr. Lawrence Coe  
8 Lanpher.

9 CHAIRMAN ZECH: All right. Thank you.

10 I'd like you to please indicate for the  
11 record how your 40 minutes has been divided and how  
12 much of your 40 minutes you wish to reserve for  
13 rebuttal.

14 MR. BROWN: Forty minutes has been divided  
15 by Suffolk County and New York State. On my right is  
16 Mr. Richard J. Zahnleuter, Deputy Special Counsel to  
17 Governor Cuomo who is representing the State of New  
18 York.

19 The time has been divided. The initial  
20 presentation will be 25 minutes by myself and I will  
21 be making a presentation that is covering all three  
22 governments, Suffolk County, the state of New York,  
23 the town of Southampton.

24 After that, for five minutes, Mr. Zahnleuter  
25 will make a separate statement particularly addressed

1 to the state of New York, and accordingly we will  
2 reserve ten minutes for rebuttal.

3 CHAIRMAN ZECH: All right. Fine.

4 The Commission wishes to advise you that the  
5 Secretary of the Commission will strictly enforce the  
6 time allotted. I'll remind you when you have one  
7 minute of your time remaining. You will also see the  
8 yellow light here and the red light will indicate that  
9 your time has expired. Presentations will terminate  
10 at the end of the allotted time.

11 If you're ready, Mr. Brown, you may proceed.

12 MR. BROWN: I'm ready and I thank you, Mr.  
13 Chairman and members of the Commission.

14 The issue here today is whether the Board's  
15 order which dismissed the governments from all the  
16 Shoreham proceedings or any other sanction is  
17 warranted. The governments will demonstrate, as I  
18 will do on their behalf, that no sanction is warranted  
19 and that the right course for the Commission at this  
20 point is to direct the Board to address the merits of  
21 this case with the participation of all the parties.

22 This, as everyone certainly knows, is a  
23 celebrated case. It's a case of first impression. It  
24 has unprecedented issues and it calls for a decision  
25 on the merits. It's also a contested case, a case in

1 which the intervenors are governments and these  
2 governments, as everyone knows, have strong views  
3 which are against the licensing of the Shoreham plant.  
4 These views also should be considered on the merits.

5 It doesn't do justice to the importance of  
6 this case for the issue to be whether the governments  
7 should be silenced rather than whether the governments  
8 are right.

9 Two of the three Licensing Board judges, in  
10 a sweeping decision, dismissed the governments from  
11 all the Shoreham proceedings, even from everything  
12 before other boards and from before the Commission  
13 itself. And as a result, in September, they  
14 authorized the licensing of Shoreham at 100 percent  
15 and in November at 25 percent. They didn't authorize  
16 these license by making any findings on the merits of  
17 the pending legal authority contentions or on any  
18 issue related to 25 percent. The majority just said,  
19 "Now that the governments are out of the case, no one  
20 opposes the license, and therefore, with no  
21 opposition, the staff in this now fictionally  
22 uncontested case, is free to make the findings  
23 necessary for a license."

24 The majority took the extreme step of  
25 dismissing the governments because it claimed that the

1 governments had, in the majority's words, "an overall  
2 plan to subvert the Commission's process for political  
3 ends." It said the governments behavior was designed  
4 to prevent the Commission from reaching an informed  
5 conclusion and it said the government sought to  
6 frustrate, to undermine, to thwart the NRC's  
7 responsibilities. In short, the Board majority  
8 imputed contemptible motives to the governments and it  
9 expelled the governments from the proceedings for  
10 having these motives.

11 It's important for everyone to keep in mind  
12 that the term "governments" as I'm using it isn't an  
13 abstraction here. It refers to the elected  
14 governments of New York State, Suffolk County and the  
15 town of Southampton, and it includes personally  
16 Governor Cuomo, the Suffolk County Executive, Patrick  
17 Halpen, and the 18 members of the Suffolk County  
18 legislature, all of whom are being condemned by the  
19 Board majority for their alleged motives to subvert  
20 you and subvert your subordinates.

21 The county and state's position, which these  
22 lawmakers have established, are the product of the  
23 Constitution of the state of New York and of laws that  
24 have been upheld in court and also of sworn affidavits  
25 of Governor Cuomo and Suffolk County Executive Halpen

1 that explain in detail why the State and the County's  
2 positions are required by the responsibilities of  
3 their offices.

4 The majority's so-called findings of overall  
5 plans and of subversion and of thwarting and  
6 undermining political ends, therefore, are accusations  
7 against these individuals. Without evidence to  
8 support the majority's findings, they are arbitrary in  
9 the most extreme sense, and there is no evidence to  
10 support the Board majority's words. The essence of  
11 the majority's decision is motives, false motives, and  
12 baseless allegations of ill motives are also the  
13 essence of what LILCO and the staff argue, and they  
14 indeed use language that far exceeds even the  
15 characterizations of the Board majority.

16 To dismiss any party, and particularly the  
17 governments, requires the findings of fact that the  
18 governments have acted in bad faith. Bad faith is  
19 what's required. This isn't a technicality. It's a  
20 legal standard and it's the standard the Board  
21 majority itself accepted and the standard that it  
22 purported to apply. What is telling is that the Board  
23 majority never cited any evidence of bad faith by the  
24 governments. Instead it looked beyond the facts,  
25 mischaracterized what it saw, assigned false motives

1 to its perceptions, labeled these bad faith and then  
2 punished the governments for these labels.

3 The NRC has a statement of policy which  
4 deals with sanctions. It says that even where a party  
5 acts with flagrancy, justifying dismissal, and that  
6 means with bad faith, a licensing board still has to  
7 consider the totality of the party's conduct before  
8 dismissing it.

9 Here, the Board majority didn't give even  
10 lip service to the governments' conduct in these  
11 proceedings over the past seven years. There were  
12 nine trials, numerous appeals, countless pleadings and  
13 conferences, meaningful victories before the boards  
14 and the Commission itself, and other actions that have  
15 protected public safety. More than once the  
16 governments achieved this over the vehement opposition  
17 of LILCO and the staff who argued for lesser safety  
18 standards. With indifference to these circumstances,  
19 the majority simply proclaimed there was nothing to  
20 mitigate dismissal.

21 What the majority relied on to dismiss the  
22 governments reveals the absence of both fact and  
23 reason. Indeed, there are only three bases the judges  
24 claim as grounds for the so-called pattern of  
25 obstructionism that they say merits dismissal and

1 requires dismissal of the governments.

2 First there are a small number of  
3 unconnected actions spread over the years, so-called  
4 procedural mechanisms which the judges allege were  
5 used by the governments to delay the Board in carrying  
6 out its responsibilities. Second was the County's  
7 alleged non-production of the County Emergency  
8 Operations Plan in 1982 and '83, and its so-called  
9 subsequent concealment by the county and the state.  
10 Third was what the Board called stonewalling and  
11 obstruction of discovery related to the legal  
12 authority contentions in 1988. The Board claimed this  
13 prevented it from reviewing LILCO's plan.

14 None of these claims has merit and,  
15 significantly, none involves bad faith. What you'll  
16 see as I address each of these three in turn is that  
17 the Board majority's opinion itself reveals there was  
18 no bad faith and that the only reason the governments  
19 were punished was for ill motives which the Board  
20 arbitrarily said they had.

21 Let's first examine the group of so-called  
22 procedural mechanisms. The Board claims that these  
23 were actually artifices designed to obstruct it. Here  
24 are a couple examples of that. One was the County's  
25 1982 objection to a discovery request on grounds of

1 executive privilege. But what's significant is that  
2 the Licencing Board sustained the objection in part.  
3 How could something of that order evidence bad faith  
4 of any kind?

5 Another was the County's 1983 motion to  
6 terminate. The Licensing Board accepted it with such  
7 seriousness that it referred it to the Appeal Board  
8 and then it went on to the Commission itself where it  
9 received two separate opinions from the Commission.  
10 There was nothing obstructionist or otherwise  
11 objectionable in these actions or in the other acts  
12 cited by the Board.

13 What's very significant is the Board  
14 majority itself admitted that these very acts were  
15 lawful, but it claimed that somehow in combination  
16 they were calculated to frustrate the NRC's process.  
17 That is the majority claim that somehow these lawful  
18 acts were metamorphosized into objectionable conduct  
19 by the governments' alleged ill motives. And the  
20 logic is stifling because just as everybody knows that  
21 two wrongs don't make a right, everyone also knows  
22 that seven rights don't make a wrong, let alone bad  
23 faith and let alone a basis to throw the governments  
24 out of all the proceedings before you.

25 Let's turn next to the controversy over

1 production of the Emergency Operations Plan. Again,  
2 this didn't involve any bad faith. The evidence  
3 before the Board was undisputed, that Suffolk County  
4 officials intended to give LILCO the plan in whatever  
5 form it existed in 1982 and '83. There was no intent  
6 by anyone to withhold the plan from LILCO.

7           What's even more important is that the Board  
8 itself did not find that the county had intentionally  
9 withheld the plan from LILCO and therefore, by  
10 definition alone, if there's no intent it means there  
11 could be no basis for a finding of bad faith. And as  
12 for the town and state, it's noteworthy that they were  
13 not even active intervenors when the discovery request  
14 was made and the issue therefore doesn't even relate  
15 to them. It's clear then that neither of the first  
16 two claims of the Board majority for dismissing the  
17 governments has merit and neither involves any bad  
18 faith.

19           The third and the final basis claimed by the  
20 majority for dismissing the governments related to the  
21 impasse over discovery in the spring of 1988. This  
22 culminated in the governments filing a notice on June  
23 10 that the Board had precluded continuation of the  
24 remand proceeding. The Board condemned this notice  
25 and the Board was wrong. The fundamental cause of the

1 impasse was the Board's interpretation of the NRC's  
2 new emergency planning rule. The rule provides that  
3 if governments don't have emergency plans of their  
4 own, it may be presumed that they will follow the  
5 utility's emergency plan, and here that would mean  
6 LILCO's plan.

7           What's important is that the rule says this  
8 presumption can be rebutted. It can be rebutted. The  
9 governments try to rebut the presumption by showing  
10 that for both legal reasons and government policy  
11 reasons they would not follow LILCO's plan, but the  
12 Board wouldn't let them do that. The Board ruled that  
13 the only way for the governments to rebut the  
14 presumption was by producing emergency plans of their  
15 own. Since the governments did not produce emergency  
16 plans of their own, the Board ruled that the  
17 governments would be deemed conclusively to follow  
18 LILCO's plan. This was impossible for the  
19 governments.

20           First, LILCO's plan says that the  
21 governments would authorize LILCO or give LILCO  
22 permission to perform various police power functions.  
23 This, however, is prohibited by New York law. So, the  
24 governments would not, and could not, do that. They  
25 were bound by New York law. But the ruling the Board

1 made was that the governments couldn't say what I just  
2 said, they couldn't say that they were prohibited by  
3 law from delegating those police power functions to  
4 LILCO.

5 Second, Governor Cuomo and three successive  
6 Suffolk County executives had explained in sworn  
7 affidavits that had been submitted to this Commission  
8 why they and their governments would not follow  
9 LILCO's plan and would not interface with LILCO.  
10 There were also county resolutions which had been  
11 upheld in federal and state courts both that  
12 prohibited county resources and personnel from being  
13 used to follow an emergency plan such as LILCO's. The  
14 Board ruled those statements of the Governor and the  
15 County Executive and the resolutions I just referred  
16 to as unacceptable.

17 In short, these laws and policies were  
18 binding on all state and county officials and  
19 therefore the officials could not explain in  
20 depositions how they would follow LILCO's plan or how  
21 they would interface with LILCO when, in fact, they  
22 would not and they could not do that.

23 To confront this directly, the governments  
24 filed objections to the Board's order interpreting the  
25 new rule and they attached an offer of proof. The

1 offer contained the full and the true statement of how  
2 they would respond to an accident at Shoreham. It  
3 included the testimony of the Chairman of the Disaster  
4 Preparedness Commission of the state of New York and  
5 the testimony of the Suffolk County Executive.

6 The Board then ordered depositions of these  
7 two officials and others as well. At the depositions,  
8 the county and state officials pointed out that there  
9 are no state and county emergency plans for Shoreham.  
10 As a result, they said that the governments' response  
11 to an accident at Shoreham would be ad hoc and would  
12 depend upon the exigencies of the moment. Therefore,  
13 they said, now they did not know what they would do  
14 and that they couldn't speculate about it. Also, they  
15 said that the New York Constitution prevents them from  
16 authorizing LILCO to perform certain functions in  
17 LILCO's emergency plan.

18 The answers of the state and county  
19 officials were not what LILCO wanted. To be sure,  
20 LILCO got answers, but they weren't the kind of  
21 answers that LILCO needed to prove its case. So LILCO  
22 went back to the Board and obtained an order requiring  
23 further depositions of the state and county officials.  
24 The Board again granted LILCO's request and held fast  
25 to its previous interpretation of the new emergency

1 planning rule. It was thereafter that the governments  
2 filed their June 10 notice.

3 The Board majority labeled the governments'  
4 action, "an unjustified refusal to comply with  
5 discovery orders," but the label doesn't stick. What  
6 the governments did was perfectly lawful. They chose  
7 to stand on their legal rights, they believed the  
8 Board's interpretation of the new rule was wrong in  
9 preventing them from rebutting LILCO's presumption in  
10 the way that they had attempted to do, and so they  
11 took a stand against the Board's discovery order  
12 requiring further depositions so as to permit an  
13 expeditious appeal of the Board's underlying order  
14 which had interpreted the new rule.

15 It's without question an accepted legal  
16 procedure for a party in litigation to seek appellate  
17 review of an underlying order by declining to comply  
18 with a discovery order. In the language of one of the  
19 federal Courts of Appeals, which cited the U.S.  
20 Supreme Court, "This is a serviceable method, well  
21 established in the case law of identifying the most  
22 burdensome discovery orders and obtaining appellate  
23 review." Surely there's no basis to find that by  
24 following a lawful procedure, the governments acted in  
25 bad faith.

1           The result is that the governments engaged  
2 in no bad faith conduct at all, let alone a pattern of  
3 it, and the Board majority therefore had no legitimate  
4 basis to expel the governments. But let's continue,  
5 for argument's sake, with the remainder of the Board's  
6 reasoning.

7           After proclaiming bad faith, the majority  
8 next stated that there was nothing to mitigate  
9 imposing the severest sanction of dismissing the  
10 governments. The reason they cited was that in 1982  
11 the governments' contentions had been dismissed as a  
12 sanction in so-called phase one of this case, and the  
13 sanction had not been an effective deterrent.  
14 Something therefore of greater significance was  
15 required at this time.

16           Now, the Board entirely mischaracterized the  
17 events of phase one. First, the town and the state  
18 weren't even active participants during phase one.  
19 Second, phase one didn't involve any bad faith. In  
20 phase one, the county opposed a new kind of hearing  
21 procedure ordered by the Board, so-called evidentiary  
22 depositions. The county took a stand against these as  
23 being unlawful. The county made clear that it was not  
24 willing to convert what were supposed to be public  
25 hearings into meetings behind closed doors and the

1 disagreement was a dignified disagreement and it was a  
2 matter of principle. It included a personal letter  
3 from the Suffolk County Executive to the five  
4 Commissioners of the NRC.

5 When the Board stuck by the evidentiary  
6 depositions, the county announced that it would not  
7 participate in the hearing on those particular  
8 contentions. Instead, it accepted dismissal of the  
9 contentions in order to appeal the underlying issue of  
10 evidentiary depositions. There wasn't any defiance,  
11 there wasn't any obstruction, there was no bad faith,  
12 there was nothing of the sort. The county did only  
13 what it had a right to do.

14 It's clear that what the governments  
15 actually did and what the Board said they did are  
16 entirely different matters. The governments lived up  
17 to their rights and duties as litigants in this  
18 proceeding. They have litigated for seven years, as I  
19 mentioned earlier, in nine different trials.

20 They've been in numerous appellate  
21 proceedings before the Appeal Board and indeed before  
22 this Commission as well, and they won major victories  
23 in the process and, in fact, played a very  
24 constructive role in protecting the integrity of the  
25 NRC and the integrity of the NRC's regulations, not

1 the least of which was proven to other licensing  
2 boards over the opposition of LILCO and the staff that  
3 the scope of LILCO's 1986 exercise was deficient and  
4 that LILCO's emergency plan was fundamentally flawed.  
5 And also in 1984, again over LILCO and staff  
6 opposition, the governments proved to the Commission  
7 itself that one of the NRC's critical safety criteria,  
8 so-called General Design Criterion 17, should not be  
9 circumvented by the interpretation that had been  
10 promoted by LILCO and by the staff. It defies reason  
11 for the Board majority to rule that bad faith imbued  
12 the governments' conduct, consistently, the Board  
13 said, during this multifaceted seven year proceeding.

14 Yet the Board not only said it, but it did  
15 so after claiming to have reviewed the entire record  
16 of the proceeding, the whole seven years. This is a  
17 claim which, I submit, no one can take seriously.

18 The majority's decision is simply not a  
19 credible decision. The false motives imputed to state  
20 and county policymakers, the accusations of an overall  
21 plan to subvert the NRC's process for political ends,  
22 which point incidently directly to Governor Cuomo and  
23 to County Executive Halpen, and the allegations of a  
24 design and a strategy of the governments to frustrate  
25 and undermine your exercise of authority and your

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1 review process deserve your prompt and your total  
2 rejection.

3 The necessary conclusion is the governments  
4 can't be dismissed from any of the Shoreham  
5 proceedings. There wasn't any bad faith or anything  
6 of the sort to warrant any sanction at all.

7 Therefore, the Commission should now  
8 reinstate the governments. It should direct the  
9 Licensing Board to make the essential decision on the  
10 merits, confronting the evidence of record and the  
11 full and the true testimony submitted by the  
12 governments. It should correct the Board's  
13 misinterpretation of the new rule and permit the  
14 governments to rebut the rule's presumption, as the  
15 governments have sought to do.

16 The Board's ruling that the only way to  
17 rebut the presumption was by producing state and  
18 county emergency plans is clearly erroneous and indeed  
19 the First Circuit Court of Appeals' decision upholding  
20 the new rule made that clear. It said that, in fact,  
21 there is more than one way to rebut the presumption.  
22 We submit that such rulings by the Commission would  
23 indeed restore legitimacy to this proceeding.

24 Thank you.

25 CHAIRMAN ZECH: Thank you very much. Let me

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1 just ask you, before we proceed to the next presenter,  
2 you've made a point, Mr. Brown, of talking about the  
3 legal constraints and the law which prevented you from  
4 proceeding. Did you bring forward those legal  
5 constraints and those laws to the Board? Could you--

6 MR. BROWN: If I understand your answer  
7 correctly --

8 CHAIRMAN ZECH: In other words, why were you  
9 legally constrained and did you bring that forward to  
10 show that you were legally constrained?

11 MR. BROWN: We did indeed, and we had done  
12 that substantially months and years before as well.

13 CHAIRMAN ZECH: Could you summarize very  
14 briefly for us why you were legally constrained? What  
15 specific laws were you referring to?

16 MR. BROWN: I'd be pleased to. There are  
17 two sets. There's the county's resolutions which are  
18 laws that have been upheld in court that I'll describe  
19 briefly, and there's also the law of the state of New  
20 York, in fact the Constitution. I'll get to that  
21 afterward.

22 As everyone knows, Suffolk County determined  
23 in February of 1983 not to adopt or implement an  
24 emergency plan. It was not an instinctive knee-jerk  
25 decision by any means. It was the product of one

1 year, roughly, of very serious consideration by a team  
2 of nationally known experts. The county had made an  
3 out of pocket expenditure of \$600,000.00 for people  
4 who -- well known planners, including the group that  
5 had done time estimates for FEMA, the former head of  
6 research of the Nuclear Regulatory Commission, a  
7 gentleman from Aerospace Corporation who is an expert  
8 on consequence analysis, and a list of luminaries,  
9 which I won't go through end to end.

10 The work product they transmitted to the  
11 county legislature and the county legislature held, I  
12 believe it was, eight days of hearings. After the  
13 process of bringing in experts, and LILCO itself  
14 testified twice, and police department and officials  
15 closest to the question of whether it's feasible to  
16 evacuate on the only three roads that go east and west  
17 away from the plant, concluded that it would not be  
18 possible to evacuate or otherwise protect the public  
19 in the event of an emergency at Shoreham.

20 So, what they did, to use almost their  
21 words, to paraphrase their words, is they decided it  
22 was their obligation to tell the truth and not mislead  
23 their public into believing they were being protected  
24 when, in fact, they were not. So, the county  
25 determined that it would not in resolutions adopt or

1 implement an emergency plan.

2 They also, in another companion resolution,  
3 provided as they did in this initial February '83  
4 resolution, that no county resources or personnel  
5 could be used to implement any emergency plan that  
6 hadn't been approved by the county legislature.  
7 LILCO's plan has not been approved, and accordingly  
8 the county could not follow or implement LILCO's plan.

9 So, incidentally, these resolutions were  
10 challenged by LILCO first in federal court and the  
11 United States District Court for the Eastern District  
12 of New York upheld the resolutions. They said they  
13 were lawfully and rationally based. The case was  
14 taken by LILCO to the Second Circuit Court of Appeals  
15 and the Second Circuit affirmed it. So we have those  
16 county laws which bind county officials.

17 The second set of laws deals with whether--  
18 LILCO's plan has a provision. The central premise of  
19 the plan that LILCO will get permission from county  
20 authorities, and also from state authorities, to  
21 conduct functions which are essentially police power  
22 functions, being involved in the direction of traffic,  
23 sounding alarms, the sirens, things which we associate  
24 exclusively with the functioning of government. They  
25 affect the public interest, they demand responses from

1 people on the grandest scale imaginable, perhaps  
2 hundreds of thousands of people to get onto roads and  
3 be in a situation where their safety would be in  
4 peril.

5 The county, under the Constitution of the  
6 state of New York, believes and determined that it did  
7 not have the power to delegate any of that to LILCO.  
8 Now, LILCO challenged that, of course, and they had  
9 their own arguments to the contrary. This went to  
10 court. It went to the lowest court. It's the trial  
11 court in New York which is called the Supreme Court.  
12 The justice in the Supreme Court ruled that the county  
13 could not delegate to LILCO these police power  
14 functions.

15 The case then went to the Appellate  
16 Division, which had four judges on it, and those four  
17 judges unanimously held that the county could not  
18 delegate those police power functions to LILCO.

19 Then the case went ultimately to the Court  
20 of Appeals. The Court of Appeals made a ruling on an  
21 issue of technical jurisprudence that what was being  
22 asked for was what's considered an advisory opinion.  
23 It is not technically what they would call a  
24 justiciable case in controversy, which means it's not  
25 a fight at this moment with people punching their

1 noses out. Therefore, it's a case that shouldn't have  
2 been brought to begin with. So, it technically erased  
3 from the books the cases that had been decided.

4 But what's significant is that there are  
5 five judges in the State of New York who looked at  
6 that issue. Those five judges all took an oath and  
7 swore to uphold the Constitution of the State of New  
8 York and unanimously they all agreed with the county  
9 that the county cannot delegate its functions.

10 CHAIRMAN ZECH: Thank you very much for  
11 that. But let me just ask you one other question. I  
12 hope you'll answer as briefly as you can.

13 You've made an argument that your conduct  
14 does not warrant dismissal.

15 MR. BROWN: Yes, sir.

16 CHAIRMAN ZECH: Would you characterize for  
17 the Commission what kind of conduct you would think  
18 that would warrant dismissal from proceedings?

19 MR. BROWN: I think clearly the standard is  
20 a bad faith standard. I think if a party comes before  
21 this Commission acting in bad faith, then it can be  
22 dismissed, and the reason -- I won't belabor it -- the  
23 reason is truly an obvious one. This Commission can  
24 only function if people before it assist it in making  
25 a record, making a judgment on the merits. The

1 governments have never challenged the legitimacy and  
2 right of the Commission to make its decision here. In  
3 fact, we stand as intervenors, not as decision makers.  
4 We stand pursuant to a particular statutory provision  
5 that invites us, Section 274 of the Atomic Energy Act.

6 If a party comes before you and is  
7 destructive of the proceedings so that you can't have  
8 a proceeding, and its purpose is to be destructive of  
9 the proceeding, I should think they shouldn't be in  
10 it. Absolutely.

11 CHAIRMAN ZECH: Well, do you think that  
12 there should be a different standard of conduct as  
13 applied to the governments as opposed to private  
14 parties?

15 MR. BROWN: I don't think so. I think the  
16 governments have a special invitation because there  
17 are federal/state issues involved and those federal/  
18 state issues ought to try to bring in state and local  
19 governments to the extent that it can help all of you  
20 in making your decisions. But I don't think there  
21 ought to be a separate standard. I think everyone  
22 ought to behave the right way in these proceedings.

23 CHAIRMAN ZECH: Thank you very much.

24 Any questions from my fellow Commissioners  
25 before we proceed with the next --

1 COMMISSIONER CARR: I have one.

2 CHAIRMAN ZECH: Commissioner Carr?

3 COMMISSIONER CARR: You said that local  
4 county laws prevent unapproved plans from being used?

5 MR. BROWN: I'm sorry, if I said that I'll  
6 clear it up. The local resolution, the county  
7 resolutions, which you'll see in the materials, it's  
8 111-1983, prevents the county from implementing any  
9 plan except a plan that has been approved by the  
10 county legislature.

11 COMMISSIONER CARR: So they have to prove  
12 these ad hoc responses before they can use them?

13 MR. BROWN: No, the whole nature of how the  
14 ad hoc response came up is because there is no county  
15 plan. By definition, an ad hoc response would mean in  
16 the absence of the plan. There just is no plan and  
17 will not be a plan for Shoreham because of the reasons  
18 I explained.

19 COMMISSIONER CARR: How about for an  
20 exploding tanker?

21 MR. BROWN: That in particular I don't know,  
22 but there are plans for a lot of things there,  
23 emergency plans. There isn't one for Shoreham though.

24 COMMISSIONER CARR: If you had an emergency  
25 that didn't fit an approved plan, you couldn't do

1 anything about it?

2 MR. BROWN: If we had an emergency that  
3 didn't fit an approved plan? I'll tell you, frankly,  
4 what they would do in any other kind of emergency, I  
5 don't know. I do know what they would do with respect  
6 to Shoreham, and that is they do not have an emergency  
7 plan for Shoreham.

8 COMMISSIONER CARR: Thanks.

9 CHAIRMAN ZECH: Any other questions? Mr.  
10 Rogers?

11 COMMISSIONER ROGERS: Yes. I wonder if you  
12 could just comment, to put things in perspective, on  
13 the matter that's in the record of January 16th, 1985  
14 memorandum from the then Health Commissioner of the  
15 state of New York, Doctor David Axelrod, which he says  
16 that the dedicated telephone lines connecting Shoreham  
17 with state officials were disconnected on advice of  
18 counsel and urges that the telephone lines be  
19 reconnected because the lack of dedicated lines  
20 creates a vulnerable situation in the event of an  
21 emergency at Shoreham.

22 Could you comment on that in terms of how  
23 you put that in perspective with respect to the whole  
24 issue of good faith/bad faith when the matter had not  
25 been totally settled yet in any way and yet this

1 action took place?

2 MR. BROWN: I'm going to have Mr.  
3 Zahnleuter, the counsel for New York, to do it. But I  
4 do want to make one careful distinction. We're  
5 talking good faith/bad faith. We're talking about bad  
6 faith in a proceeding. The issue of whether something  
7 outside the proceeding is part of some grand  
8 discussion point that people can quibble over as to  
9 good faith or bad faith isn't something, I think, for  
10 the Commission to get into.

11 We have had with LILCO, outside the context  
12 of this, arguments for years. LILCO, for example,  
13 packaged documents and misrepresented them years ago  
14 to be the county's documents which resulted in a  
15 special investigation which the county would say is  
16 bad faith, and many other things. There are enough  
17 "who struck Johns" in this, unfortunately, to fill  
18 volumes.

19 But insofar as that particular action is  
20 concerned, and any relevance it might have, Mr.  
21 Zahnleuter, the Governor's counsel, can respond.

22 CHAIRMAN ZECH: Please go ahead.

23 MR. ZAHNLEUTER: Well, Commissioner Rogers,  
24 the action that the state took with regard to  
25 disconnecting the RECS telephone lines, which are

1 dedicated telephone lines between Shoreham and state  
2 facilities, was part and parcel of the state's police  
3 power. The state was within its lawful rights to  
4 elect not to participate in emergency planning for  
5 Shoreham or to cooperate with LILCO in the  
6 implementation of the LILCO plan.

7 Mr. Brown referred to a series of cases,  
8 both federal and state, as well as NRC precedent,  
9 which clearly established that the states have the  
10 authority to determine that what they choose to do in  
11 the area of emergency planning and the NRC has no  
12 authority to require a state to develop a plan such as  
13 one might be developed in the case of Shoreham.

14 I recall the circumstances in 1985, and I  
15 think at that point the power plant was scheduled or  
16 it was close to being scheduled, to operate at five  
17 percent power. I think there was an inquiry regarding  
18 the status of the RECS telephones. As I recall also  
19 at that time, there were assurances from LILCO and  
20 perhaps some of you may recall LILCO obtained the five  
21 percent license against or over arguments by the  
22 governments that there was a possibility of an off-  
23 site disaster from operation at five percent power.  
24 We were assured by LILCO, and I believe the Commission  
25 also stated that no off-site emergency planning was

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1 necessary at five percent levels because the  
2 possibilities of an accident and the regulatory  
3 structure did not require any emergency plan for off-  
4 site matters.

5 The RECS telephones, of course, are part of  
6 a response for an off-site disaster. Therefore, there  
7 would have been no need for the telephones in  
8 existence to be in existence because of the  
9 determinations that were made against our objections  
10 regarding the telephones.

11 The federal and state case law that I'm  
12 referring to, Mr. Brown referred to, also the NRC  
13 precedents in the very Shoreham case, does not require  
14 the state to participate in the emergency plan and  
15 memorandum that you refer to was part of the  
16 deliberative process in government and Doctor  
17 Axelrod's recommendation was not accepted. The  
18 position that the state took was within its lawful  
19 rights.

20 COMMISSIONER CARR: The implication of that  
21 though is that if they're authorized to go above five  
22 percent, you'd put them back up.

23 MR. ZAHNLEUTER: I don't agree necessarily  
24 that that would be the implication, Commissioner Carr.

25 COMMISSIONER CARR: That's the reason you

1 took them down, as I understood your statement.

2 MR. ZAHNLEUTER: No, the reason why they  
3 were taken down was because there was no need for them  
4 because at five percent --

5 COMMISSIONER CARR: That's what I thought  
6 you said.

7 MR. ZAHNLEUTER: -- we were assured that  
8 there was no off-site response. But in addition, I  
9 think that the state's position was that the LILCO  
10 plan was not adequate, was not implementable, and we  
11 opposed it, and the state had the position that we  
12 would not cooperate in emergency planning, and that  
13 was within our lawful rights. To have RECS telephones  
14 in state buildings on state property connected to  
15 Shoreham made no sense and was inconsistent with that  
16 position. Again, it's within the state's lawful  
17 rights not to have the emergency plan being  
18 implemented by the state.

19 MR. BROWN: If I might, gentlemen, just add  
20 one thing. This whole idea of bad faith is something,  
21 when we look at the proceeding and the sanction  
22 against the governments, is something to be looked at,  
23 at the particular conduct and the record of evidence  
24 before the Commission, the behavior of the parties and  
25 what the Board said and did.

1           Outside the proceeding, if infact, if--  
2           it's not the case here, but to illustrate for the sake  
3           of conceptualizing this, if, Commissioner Rogers,  
4           there were in fact a group of people running in some  
5           state in this country against a particular nuclear  
6           power plant, and that was the only subject on which  
7           they ran for office was political opposition to it,  
8           had no safety merit whatsoever and everyone would  
9           stipulate there was no safety basis, they would have  
10          the right to be elected if their electorate obviously  
11          wanted it. And they would have the right to come  
12          before the Commission and make an argument as long as  
13          they lived up to your rules and they did it in order  
14          to assist you, whatever their motivation was. If it  
15          was to be against nuclear power or that plant or to  
16          raise Cain, they would have the right to do it. But  
17          they don't have the right to destroy your process, and  
18          that's the distinction between the two.

19                   CHAIRMAN ZECH: All right. Thank you very  
20                   much.

21                   If there are no other questions, Mr.  
22                   Zahnleuter, you may proceed.

23                   MR. ZAHNLEUTER: Good afternoon.

24                   CHAIRMAN ZECH: Identify yourself, please,  
25                   and tell us who you're representing for the record,

1 please.

2 MR. ZAHNLEUTER: Thank you, Mr. Chairman and  
3 members of the Commission. My name is Richard J.  
4 Zahnleuter and I am the Deputy Special Counsel to  
5 Governor Mario Cuomo.

6 On behalf of the Governor and the state of  
7 New York, I will stress briefly that there is no basis  
8 for the imposition of any sanction against the  
9 governments. The governments have acted responsibly  
10 during the seven years of Shoreham litigation. In the  
11 multiple proceedings that the governments have  
12 participated in, the governments have diligently  
13 worked to insure that NRC requirements are complied  
14 with. And, as Mr. Brown made clear, the governments  
15 have won significant victories for public health and  
16 safety in the process.

17 The Board majority simply ignored these  
18 contributions. There was no basis for any sanction  
19 and, in particular, no basis for the severe sanction  
20 of dismissal of the governments from all of the  
21 Shoreham proceedings.

22 In the concluding initial decision, the  
23 Board purported to make findings on matters that had  
24 no basis in the evidentiary record, such as the  
25 alleged motives or strategies of the governments. For

1 example, there is no evidentiary record that would  
2 support the allegation that the governments intended  
3 to subvert the NRC processes for political purposes.  
4 Yet, the concluding initial decision makes precisely  
5 this allegation. To impose sanctions on this basis,  
6 there must be evidence in the record and there is  
7 none.

8 Next I will briefly address the issue of the  
9 production of emergency plans pursuant to LILCO's  
10 discovery requests in 1982, 1983 and 1988. The  
11 Commission needs to be aware that the state of New  
12 York was not involved in the 1982, '83 document  
13 production. The state of New York did not actively  
14 enter the proceedings until 1984. The state, thus,  
15 had no obligation to respond to LILCO's 1983 and 1982  
16 discovery requests at any time, yet the concluding  
17 initial decision ignored these facts and accused the  
18 state of failing to meet discovery obligations at a  
19 time when the state was not even a party in the case.

20 Since the state had no obligation to respond  
21 to the 1982 and 1983 requests, such findings by the  
22 Board just make no sense with respect to the state of  
23 New York.

24 The Commission also needs to be aware that  
25 the Board, without support in the underlying record,

1 erroneously accused the state of demonstrating bad  
2 faith in taking certain actions and making certain  
3 decisions. One of the actions relied upon by the  
4 Board was a simple oversight by the state. The state  
5 sent a letter from the governor to the Commission  
6 without also sending it to the service list.

7           The Board never articulated how that  
8 oversight could constitute bad faith supporting  
9 dismissal from the entire proceeding. Moreover,  
10 neither the Board nor the parties ever had an  
11 opportunity to raise or address the issue in any  
12 detail prior to its sudden appearance in the  
13 concluding initial decision. Had the state had such  
14 an opportunity, the state would have shown that this  
15 was not an attempt to secretly communicate with the  
16 Commission.

17           On the same day that the state sent the  
18 letter to the Commission, the state released the  
19 letter to the media for all the world to know about.  
20 On the following day, Long Island's primary newspaper,  
21 which is *Newsday*, printed an article that quoted  
22 extensively from the letter. LILCO and the public  
23 were certainly aware of the letter. There was no bad  
24 faith.

25           Another action relied upon by the Board as a

1 demonstration of bad faith was the alleged political  
2 rationale for the state's decision to oppose the  
3 licensing of Shoreham. First, this purported issue is  
4 irrelevant. The issue is whether LILCO complies with  
5 NRC regulations, not why the state formulates and  
6 implements a certain policy with respect to the  
7 licensing of Shoreham.

8 Second, the Board's suggestion that the  
9 state opposed the licensing of Shoreham as part of an  
10 overall plan to thwart and subvert the NRC's processes  
11 for political ends is without basis in the evidentiary  
12 record and, more emphatically, preposterous. As the  
13 1986 letter to the Commission, that I just referenced,  
14 prominently states the state's decision to oppose the  
15 licensing of Shoreham was based on at least two  
16 things, the findings of a prestigious independent  
17 panel known as the Marberger Commission which included  
18 representatives of the NRC and FEMA and extensive  
19 studies which led the county to conclude that it would  
20 oppose the licensing of Shoreham.

21 CHAIRMAN ZECH: Excuse me, Mr. Zahnleuter.  
22 You have one minute. But Mr. Brown, I don't think,  
23 used all of his time.

24 SECRETARY CHILK: Did not use all of his  
25 time.

1 CHAIRMAN ZECH: So, he has, what, a couple  
2 of minutes more?

3 SECRETARY CHILK: He has four more minutes  
4 left.

5 CHAIRMAN ZECH: Four more minutes. So, you  
6 may --

7 MR. BROWN: I'll yield.

8 CHAIRMAN ZECH: -- add those two Mr.  
9 Zahnleuter, if you prefer to do that.  
10 So, Mr. Secretary, take note of that,  
11 please.

12 You may proceed.

13 MR. ZAHNLEUTER: Okay. Thank you,  
14 gentlemen.

15 As I was saying, the letter to the  
16 Commission that I just referred to prominently states  
17 that the state's decision was based on two things  
18 basically, the Commission that studied the matter,  
19 entitled the Marberger Commission, and also the  
20 county's experts that also studied the matter. This  
21 decision was grounded in an effort to protect the  
22 public health and safety. The Board's notion that the  
23 decision was designed to suit political purposes is  
24 unsubstantiated and it's wrong.

25 Other actions relied upon by the Board

1 included the state's decision that Commissioner Rogers  
2 referred to before about disconnecting and returning  
3 the LILCO the dedicated Shoreham telephones located in  
4 state buildings on state property. Also, the Board  
5 relied on actions relating to the state's decision to  
6 retain only the copies of the LILCO plan that the  
7 lawyers needed for litigation and the state's decision  
8 to not let LILCO use certain state facilities as  
9 relocation centers in the LILCO plan.

10 Again, the Board never articulated how these  
11 decisions and actions could support any sanction, much  
12 less warrant dismissal from the entire case. These  
13 actions are all within the lawful rights of the state,  
14 as I've stated before.

15 In conclusion, there is no basis for the  
16 imposition of any sanctions against the state, the  
17 county or the town. The Commission should direct the  
18 Board to reassess its determination on the merits of  
19 the legal authority contentions by taking into account  
20 the written testimony that was filed by the state  
21 Disaster Preparedness Commission chairman and the  
22 county executive.

23 Thank you. That concludes this portion of  
24 my presentation.

25 CHAIRMAN ZECH: Thank you very much.

1           Let me just ask you, and Mr. Brown may  
2 answer if you prefer, either one of you, but you  
3 obviously disagreed with the Licensing Board's orders.  
4 And I think, Mr. Brown, you referred to a process  
5 whereby it could be appealed later. If you believe  
6 that you were so fundamentally affected by the  
7 proceeding, why did you not seek interlocutory review  
8 of the order by referring the matter to the Commission  
9 or requesting an appeal?

10           MR. BROWN: Well, Mr. Chairman, you're  
11 pointing out what in fact people confront in that  
12 situation as several options. There was the option of  
13 interlocutory relief, seeking it, not getting it, I'm  
14 afraid to say, but seeking it.

15           CHAIRMAN ZECH: You could have sought --

16           MR. BROWN: No, it's frowned upon so  
17 strongly at the Commission that it's essentially  
18 impossible to get. But you are correct, we could have  
19 sought interlocutory --

20           CHAIRMAN ZECH: Regulations provide for  
21 that, I think.

22           MR. BROWN: Absolutely.

23           CHAIRMAN ZECH: Yes. Go ahead.

24           MR. BROWN: There are extreme situations --

25           CHAIRMAN ZECH: Right.

1 MR. BROWN: -- that permit it and certainly  
2 counsel who understand the regulations know that  
3 interlocutory appeal is an option. You're absolutely  
4 correct. It's frowned upon. We, in fact, tried to  
5 get interlocutory relief of the 25 percent power  
6 license and it was summarily rejected several months  
7 ago. It's something that is very --

8 MR. LANPHER: In January.

9 MR. BROWN: In January. Very seldom is that  
10 an achievable end to get it, though it is an option.  
11 The second option is to wait until the end and get a  
12 final order. The third option, which is lawful, is  
13 the option that we chose. It was a matter of judgment  
14 and the reason for our judgment is straightforward.

15 We had filed our objections and we filed our  
16 offer of proof on the 13th of April. It was eight  
17 full weeks. We couldn't get an answer, a ruling from  
18 the Board for eight weeks. During that eight weeks,  
19 an untenable impasse had come about. We were having  
20 telephone conference calls with the Board and  
21 essentially being condemned for not being forthright  
22 in giving answers at depositions. The answers were  
23 given. It's just that LILCO wasn't satisfied with the  
24 answers. Our people were saying, "Our response is not  
25 pursuant to a plan, so I can't say what we'll do, but

1 I can say that it'll be ad hoc in the best possible  
2 under the circumstances, whatever they be. I don't  
3 know what we do and I can't speculate." LILCO would  
4 run to the Board for rulings. The rulings were  
5 severe, sending us back, compelling further answers.

6 It got to the point that we saw that this  
7 confrontation would turn into something of such an  
8 extreme nature that it was absolutely unproductive.  
9 We needed an answer and the way to get the answer was  
10 this technique, which is accepted by the courts and is  
11 not something that has to be done often. It's, as the  
12 courts say, well established in the law as an option.  
13 We chose it as -- the first time we ever chose it in  
14 any NRC proceeding, except actually with the  
15 sanctions. It was twice we followed that in phase  
16 one.

17 CHAIRMAN ZECH: Do I understand it was an  
18 option that you chose?

19 MR. BROWN: Right.

20 CHAIRMAN ZECH: -- a strategy, if you will,  
21 that in order to show that you disagreed with the  
22 Board and --

23 MR. BROWN: The Board's interpretation of  
24 the new rule.

25 CHAIRMAN ZECH: As a result though you

1 indicated to the Board rather plainly that you did not  
2 intend to continue with the proceeding.

3 MR. BROWN: In order to get a final ruling  
4 on the discovery order so that we could appeal the  
5 Board's interpretation of the new rule.

6 CHAIRMAN ZECH: I see. But it was a  
7 strategy that you --

8 MR. BROWN: Well, the word "strategy" is  
9 inappropriate for me to use in light of the fact the  
10 word condemned us for strategies.

11 CHAIRMAN ZECH: You can use the word. I  
12 don't --

13 MR. BROWN: I'm sorry, I mean strategy in  
14 the wholesome sense of it. It was --

15 CHAIRMAN ZECH: Well, so do I. There's  
16 nothing wrong with strategy, I don't think.

17 MR. BROWN: We had the three options. There  
18 might have been four or five options actually. The  
19 only one that we saw that could get us an answer and  
20 out of an intractable fight with the Board. We had no  
21 ruling for eight weeks. We wanted to get this behind  
22 us. We felt profoundly the Board made a mistake and,  
23 as I have said, months later the First Circuit Court  
24 of Appeals, I believe we're reading correctly that  
25 opinion, substantiated our position. We wanted to get

1 it to the Appeal Board or to you and we succeeded in  
2 doing that.

3 CHAIRMAN ZECH: Thank you very much.

4 Other questions? Commissioner Carr?

5 COMMISSIONER CARR: You chose a crude but  
6 serviceable method.

7 MR. BROWN: Pardon me?

8 COMMISSIONER CARR: I said it quotes here in  
9 your -- it's a crude but serviceable method you chose.

10 MR. BROWN: I don't think it said crude, did  
11 it? If it did, it must mean in the wholesome sense  
12 too.

13 COMMISSIONER CARR: I'm quoting your quote.

14 CHAIRMAN ZECH: Are there any other  
15 questions?

16 COMMISSIONER CARR: Page 13.

17 CHAIRMAN ZECH: Mr. Roberts?

18 MR. ZAHNLEUTER: Excuse me, Chairman Zech.

19 CHAIRMAN ZECH: Yes?

20 MR. ZAHNLEUTER: May I add that in June of  
21 '88, the governments did attempt to take an appeal to  
22 the Appeal Board, but we were unsuccessful.

23 CHAIRMAN ZECH: All right. Thank you very  
24 much.

25 Mr. Rogers?

1 All right. If there are no further  
2 questions, then I believe they have a minute or two to  
3 add on to the rebuttal time. Is that right?

4 SECRETARY CHILK: About two minutes.

5 CHAIRMAN ZECH: About two minutes? So, you  
6 have 12 minutes rebuttal time rather than ten. We  
7 thank you very much. Appreciate your being here with  
8 us today.

9 MR. BROWN: Thank you.

10 CHAIRMAN ZECH: We'll hear from you in a few  
11 minutes.

12 MR. BROWN: Thank you very much.

13 CHAIRMAN ZECH: And then we'll call on the  
14 parties in favor of the sanction.

15 I understand, Mr. Irwin, you will go first  
16 and if you would please state your name for the record  
17 and who you represent and how you've divided your 40  
18 minutes.

19 MR. IRWIN: I'd be glad to, Mr. Chairman.  
20 I've got my name tag out. As you can see, I'm Donald  
21 Irwin with the law firm of Huntley and Williams,  
22 representing Long Island Lighting Company.

23 To my immediate right is my partner, W.  
24 Taylor Reveley, III, who has been familiar on close to  
25 a day to day basis with the Shoreham plant and its

1 licensing since 1971 and is the senior outside lawyer  
2 associated with the case.

3 To my immediate left is Ira L. Freilicher,  
4 Vice President of Law of Long Island Lighting Company.  
5 Mr. Freilicher, as a member of the company's senior  
6 management, may be able to respond more  
7 authoritatively to some issues than anybody not with  
8 the company.

9 To Mr. Freilicher's left is John D. Leonard,  
10 Vice President of Long Island Lighting Company's  
11 Office of Nuclear Operations. Mr. Leonard is in  
12 charge of the Shoreham plant. Prior to that he was an  
13 employee of the New York State Power Authority and was  
14 in charge of the Fitzpatrick plant. Prior to that he  
15 was in the nuclear Navy for a long and distinguished  
16 career.

17 CHAIRMAN ZECH: Tell us, before you proceed,  
18 how you desire to divide up your 40 minutes, please.

19 MR. IRWIN: I propose to take 30 minutes.  
20 Mr. Reis from the NRC staff will take ten minutes. I  
21 was informed by the Secretary's Office that rebuttal  
22 is not customary for respondents here. I accept that,  
23 although I notice that ten minutes is a rather long  
24 period for rebuttal. If there is any reason --

25 CHAIRMAN ZECH: They have 12 instead of ten.

1 MR. IRWIN: Well, all the more so. If I  
2 need to make an extraordinary request given that  
3 length of time, I will do so. I can't anticipate  
4 that.

5 CHAIRMAN ZECH: We'll consider it if you  
6 make it. You may proceed.

7 MR. IRWIN: Thank you.

8 Gentlemen, some 13 years ago in 1976, Long  
9 Island Lighting Company filed its operating license  
10 application for the Shoreham Nuclear Power Station.  
11 Hearings began in contested issues some seven years  
12 ago, in the spring of 1982. By the spring of 1985,  
13 the plant was physically complete. By the summer of  
14 1985, all safety reviews had been completed and the  
15 plant had been licensed to operate at low power.

16 Since 1985, all issues relating to the  
17 feasibility of emergency planning, can it be done if  
18 organizations are willing to do it, have been resolved  
19 in LILCO's favor.

20 Three and a half years later, the plant is  
21 still not operating. Why? Because of the issues that  
22 we are here today to discuss, because of an issue  
23 which was at one time called legal authority. It's  
24 now been transformed to the concept of realism, which  
25 is a synthetic issue, a creation of the governments of

1 Suffolk County, New York State and their silent  
2 partner, the town of Southampton, an issue which has  
3 had no basis in fact since 1985 and is entirely within  
4 the power of these organizations to remedy.

5 It is important to recognize the difference  
6 between this issue and ordinary issues that confront a  
7 licensee or an applicant. Those issues are factual.  
8 You wrestle with them, you bring the facts to light,  
9 you try to deal with them. These issues are man  
10 created. They deal with intent, they deal with  
11 purpose.

12 People in charge of these organizations had  
13 a purpose. They took positions, they've changed their  
14 positions, they've modified them, adjusted them, tuned  
15 them over time for one purpose and that is to keep in  
16 place their ultimate ability to interpose their  
17 authority under state and local law against the  
18 overall federal supremacy of the NRC in a matter of  
19 nuclear safety.

20 The issue is different in a second respect.  
21 Because it is human created, it can be modified by  
22 humans and it can only be created by a particular  
23 quality of human or characteristic of human. That is  
24 public officer holders, people who wield a public  
25 trust, to protect their citizens.

1           These issues, which have been refined and  
2 honed and caused this Commission's licensing boards  
3 almost no end of trouble, have paralyzed the plant for  
4 three and a half years.

5           In the meantime, during the course of the  
6 seven years that emergency planning issues were at  
7 large, not only the issues today, but earlier issues  
8 have been before the Commission, a number of matters,  
9 a number of actions have taken place. Initiated by  
10 Suffolk County, it made its decision in early 1982 to  
11 oppose the plant and more recently by New York State.

12           It's worth going through them because these  
13 issues, some of them have taken place within the four  
14 corners of the licensing proceeding, others have taken  
15 place outside those four corners. But it is  
16 emphatically not the case, as Mr. Brown asserted, that  
17 a bright line must be drawn between those issues  
18 because those issues which took place outside have  
19 been imported into the case. Those issues outside  
20 have been taken sometimes on the advice of counsel who  
21 are involved in the case. You cannot separate them.

22           Let me go through a few of the high points  
23 of these issues. First of all, in the spring of 1982,  
24 as Mr. Brown indicated, Suffolk County fired its own  
25 internal emergency planners and revoked a contract

1 with LILCO to do emergency planning for the plant. It  
2 hired a group of outside experts, spent a lot of  
3 money, had them do an analysis that involved two  
4 predicates. One, a 20 mile EPZ, not a ten mile EPZ.  
5 Two, non-exceedance of EPA's standards in even the  
6 most fast breaking, most severe accident. Well, the  
7 results of such a study are a foregone conclusion for  
8 any plant in a densely settled part of the country and  
9 this study reached that conclusion.

10 The results of that study were litigated for  
11 the next three years, and at the outcome of it, LILCO  
12 prevailed. But in the meantime, the government of  
13 Suffolk County, since joined by New York State,  
14 wrapped itself in a cocoon of ignorance about the  
15 results of the litigative process and about the  
16 updating of the knowledge basis and adhered to public  
17 policy decisions embodied in resolutions of the county  
18 which had been taken in 1982 and 1983, before that  
19 basis had been refined and exposed to the public  
20 through the NRC process.

21 Within the NRC process, Mr. Brown, in fact  
22 has alluded to this, the county provoked the sanction  
23 of dismissal of issues by the licensing board rather  
24 than proceed with what were called evidentiary  
25 depositions. I need only say a couple of things.

1 First of all, the decision by the Licensing Board was  
2 taken not precipitously but after long and careful  
3 process which included written submissions by the  
4 parties beforehand on the permissibility of the  
5 concept of evidentiary depositions.

6 It also would not, as Mr. Brown asserted,  
7 have taken a public process behind closed doors.  
8 Depositions would have later been subject to public  
9 questioning. There's just no question about that.  
10 The county deliberately defied the Board, said they  
11 wouldn't go ahead, and the Board invoked sanctions.  
12 Sounds familiar.

13 Third, Suffolk County's government withheld  
14 facilities, resources, legal authority, personnel from  
15 LILCO, from its own people which are there, paid for  
16 by the taxpayers, for the protection of people in  
17 emergencies. Withheld schools, day care centers,  
18 hospitals, nursing homes, everything, communications.  
19 Not only did that, but imported the fact that the  
20 facilities were unavailable into the licensing case.  
21 So, once again, I don't know whether that's outside  
22 the case or inside the case, but you can't separate  
23 them in my book.

24 In addition, the county, through means  
25 direct and indirect, convinced owners of hospitals,

1 day care centers, radio stations, contractors, not to  
2 participate with LILCO in its emergency plan. There  
3 was one contractor, Bauman Bus Company, which was  
4 brave enough to contract with LILCO and stick by its  
5 contract. What did the county do? It canceled its  
6 contract and threatened, in fact, to cancel a broader  
7 set of franchises that Bauman Bus Company held until  
8 they apparently received advise that that was not a  
9 good idea.

10 The county went further yet, it enacted an  
11 unconstitutional, criminal ordinance at the end of  
12 1985 in order to try to derail the 1986 emergency  
13 planning exercise. That ordinance would have turned  
14 LILCO employees and federal employees into common  
15 criminals. For what? For trying to participate in an  
16 exercise, the absolute right of which has been upheld  
17 by federal court in Long Island.

18 New York State joined Suffolk County in  
19 1983, as Mr. Zahnleuter said, at the end of '83. His  
20 characterization today, however, is inconsistent with  
21 the characterization of the nature of the decision  
22 which was given by Mr. Axelrod before the Gleason  
23 Board this summer, which in fact was the first  
24 explanation anybody had ever gotten. Mr. Zahnleuter  
25 says that it was based on the Marberger Commission

1 Report and the 1982 studies of the county. Doctor  
2 Axelrod said that it was based on a reading of policy  
3 statements by Governor Cuomo and then County Executive  
4 Halpen. But in any event, it did take place behind  
5 closed doors. Nobody ever heard that except the  
6 members of the state government who were  
7 participating. Certainly nobody from LILCO was ever  
8 invited.

9 Subsequently, New York State has frustrated  
10 any attempt by LILCO to develop ingestion pathway  
11 planning for the Shoreham plant. We have had to go  
12 back and forth between state plans, county plans,  
13 refusals to authenticate documents, refusals to  
14 produce documents that have utterly confounded the  
15 company's efforts to supplant the state in this area.

16 Finally, and perhaps most importantly, as  
17 various of you noted, the state deliberately disabled  
18 its own dedicated emergency capacity to communicate  
19 with the plant through the Radiological Emergency  
20 Communication System line, ripped it right out. That  
21 action was apparently taken on the advice of counsel.  
22 Once again, that action may have been outside the  
23 litigation, but counsel advised it, technical experts  
24 opposed it, and the effect of it was imported into the  
25 proceeding. The state used the fact of that to

1 suggest that LILCO could not communicate adequately  
2 with the state.

3 The town of Southampton, the town has been  
4 along for the ride. The town has filed pleadings,  
5 allowed its name to be signed. It has never  
6 disassociated itself from the state or from the  
7 county, has been a joint enterpriser with them since  
8 1983.

9 Throughout this process, the intervenors  
10 have been told time and again that they may advocate  
11 their views, but they may not disrupt NRC processes.  
12 This has come from the Commission in a series of  
13 decisions that have been becoming more and more  
14 strident ever since 1985. CLI 86-14, right before the  
15 exercise, was probably the first of them. It's also  
16 been stated by at least two federal courts, the court  
17 that has decided the so-called Cope Case, and the  
18 <sup>t</sup>course that decided the case on the exercise. But the  
19 county and state have had a difficult time apparently  
20 discerning the line between advocacy of a position and  
21 ultimately trying to control a process.

22 This is a longstanding pattern and this is  
23 the pattern which confronted the Gleason Board when it  
24 took over in the spring of this year, trying to  
25 administer the application of the realism rule to the

1 Shoreham case.

2 CHAIRMAN ZECH: The spring of this last year  
3 I think you mean, don't you?

4 MR. IRWIN: Yes, sir, the spring of 1988.

5 CHAIRMAN ZECH: '88?

6 MR. IRWIN: Right, sir.

7 CHAIRMAN ZECH: Thank you. It's 1989 now,  
8 I think.

9 MR. IRWIN: I sure hope so.

10 CHAIRMAN ZECH: You may proceed.

11 MR. IRWIN: The handwriting had been on the  
12 wall about what realism entails for quite some time  
13 before the Gleason Board took over. There's no  
14 question about what is involved with realism.

15 First, an assumption that responsible  
16 governments will exercise their best efforts in an  
17 emergency.

18 Second, a presumption, increasingly clearly  
19 stated as time went along, that utility plans would be  
20 followed if they were acceptable unless rebutted.

21 Third, an assumption which appeared in  
22 licensing board decisions beginning with the Margolis  
23 Board's decisions in 1987 and was continued by Judge  
24 Gleason, that he expected intervenors to be  
25 forthcoming in the production of information at their

1 disposal concerning the questions of implementability  
2 of a plan, how in fact interface could be conducted or  
3 it's practical, because I know that Suffolk County and  
4 New York State do not like the word "interface," but  
5 the fact of the matter is it is a process and not a  
6 ceremony.

7           The Gleason Board, when it took over in the  
8 spring of 1988, did not, as intervenors have been  
9 saying, demand that the county produce an emergency  
10 plan. What the Gleason Board demanded was that if  
11 they wished to rebut the presumption that the county  
12 and state would follow LILCO's plan, the county and  
13 state must either produce a plan or other information  
14 sufficient to show how their resources would be used.  
15 The Gleason Board made explicit, as the Commission had  
16 in the realism rule, and as the Margolis Board had  
17 earlier, that for the county and state simply to sit  
18 mute would be unacceptable.

19           That was the background against which  
20 discovery commenced in March of '88. What began was  
21 an almost immediate and multifarious stone wall.  
22 Depositions were not answered, requests for extensions  
23 were filed the day before the interrogatory answers  
24 were due and then when the answers were filed they  
25 were general objections.

1           When deponents were asked to appear for  
2 deposition, only Mr. Halpen of the county and Doctor  
3 Axelrod of the state were proffered. Mr. Halpen  
4 proved to be less than fully informed about the  
5 details of Suffolk County's emergency planning.  
6 Doctor Axelrod, while admirably informed, was  
7 instructed repeatedly by counsel not to answer  
8 questions beyond counsel's concept of relevance. Both  
9 depositions were systematically obstructed in a  
10 fashion that compelled Judge Gleason in a May 10  
11 prehearing conference to warn counsel for the county  
12 and state not to continue their obstructionist  
13 tactics.

14           The same thing was true with documents.  
15 LILCO's requests for discovery included requests for  
16 production of emergency plans back to 1982, '83.  
17 These requests were objected to largely on grounds of  
18 relevance. This, however, has been a continuing  
19 pattern for all boards to say that emergency plans are  
20 relevant.

21           The long and short of it was there was an  
22 increasing build-up of requests by LILCO, denials by  
23 the county and state.

24           The county and state filed two pieces of  
25 paper, one their April 13 objection, and second their

1 June 9 notice, which brought the issue to a head. Mr.  
2 Brown is correct that they brought it to a head. But  
3 the grounds on which they brought it to a head are  
4 not, LILCO believes, as he would have them.

5 First, as I have indicated earlier, the  
6 Board was not compelling the county or state to  
7 produce a plan. It was not compelling them to produce  
8 anything they could not produce. What it was  
9 compelling them to do was to produce facts at their  
10 disposal, nothing in the Board's orders which  
11 compelled witnesses to testify beyond their knowledge.  
12 That was all LILCO was asking them to do. But the  
13 objection and notice of the county and the transcript  
14 of the June 10th prehearing conference made clear that  
15 the county was not going to go beyond its position,  
16 that there would be no interface, no delegation, no  
17 cooperation, no plan, and nothing beyond that.

18 The upshot was that the county and state  
19 simply were defying the Board's power to produce  
20 information necessary to shed light on the problem  
21 intended to be solved or at least explored by the  
22 realism rule.

23 The county and state chose to simply defy  
24 the Board rather than to take other routes which have  
25 been explored in questions and answers with Mr. Brown.

1 The county could, in fact, have sought an  
2 interlocutory appeal and, in fact, over the course of  
3 the last seven years, I don't know how many times  
4 interlocutory appeals have been sought in this case,  
5 but I'm sure they number in the dozens and the county  
6 has taken its share of them. The county has not  
7 hesitated, when it thought its interests were  
8 threatened, to go outside the Commission and go into  
9 federal district court to try to enjoin proceedings.  
10 In fact, one phase of the low power case was enjoined  
11 in 1985, I believe, by the county. So, the county  
12 knows how to take other remedies.

13 Secondly, the remedy referred to by Mr.  
14 Brown, namely defiance of what a board has ordered on  
15 discovery, is an argument with a couple of problems.  
16 The first is that the issue which is to be brought to  
17 a head is not the general issue of the validity of the  
18 fundamental argument which the Board is implementing.  
19 In other words, what the county and state apparently  
20 wanted to do was bring to a head the whole validity of  
21 the realism argument as applied to them. The case law  
22 doesn't support that. The case law will support only  
23 the validity of a sanction.

24 Secondly, the case on which the county  
25 relies is -- and it's useful to read. It says, "If a

1 party if willing to pay the price of being published  
2 for contempt or suffering an equivalent sanction such  
3 as dismissal of the complaint for the validity of the  
4 order he's disobeyed is ultimately upheld, he can get  
5 immediate review of that order." Well, dismissal of  
6 one's complaint in a civil case is very close to being  
7 dismissed as a party from an NRC proceeding.

8 The long and short of it is the county and  
9 state gave no justification for their actions defying  
10 the Board and there is none. That is one prong of  
11 behavior which led up to the Board's decision to hold  
12 extraordinary hearings in July.

13 The second prong was the appearance late in  
14 May of a document called the Suffolk County Emergency  
15 Operations Plan. The Commission has no doubt read a  
16 lot about it. This is it. It's about 750 pages long.  
17 I'll be the first to tell you it's not a Shoreham  
18 specific plan, but it gives name, rank, serial number,  
19 telephone numbers, organization charts of county  
20 organizations. It also is accompanied by a document  
21 called the County Resource Manual which fills in the  
22 interstices of this document. This document is used  
23 by the county. So is the resource manual. The County  
24 Resource Manual includes, among other things, an EBS  
25 appendix, EBS being an issue which the county has

1 hotly contested over the years.

2 The county claims that they thought they  
3 turned it over in 1982, '83. They didn't. LILCO has,  
4 according to its records, 161 pages of the some 760  
5 pages in this document. They're in close to a dozen  
6 fragments. Those fragments have widely dispersed  
7 Bates stamp numbers. Bates stamp numbers are things  
8 that lawyers stamp on documents as they send them out.  
9 If that document had been one coherent document, the  
10 Bates stamp numbers should have been continuous. They  
11 weren't. It was almost as though the document were  
12 sundered.

13 The document was not produced since that  
14 time. LILCO's records indicate that it wasn't  
15 produced. The county has no records to indicate that  
16 it was. The county says it returned its records from  
17 Washington to Suffolk County in 1985, but they, to  
18 this date, have not gone back to try to recreate them.  
19 I believe the evidence is strong that it was not  
20 produced.

21 Was LILCO damaged by that non-production?  
22 You bet. The realism rule depends on the production  
23 of information exactly like this. LILCO was  
24 profoundly damaged by this. It took LILCO some years  
25 to get enough information to refine that argument, to

1 persuade ultimately the Commission to adopt it. We  
2 could have done it sooner otherwise, I believe. Even  
3 that is secondary. The fact of the matter is that  
4 there was disregard for the Commission's rules in the  
5 failure to produce this document.

6 This was not the only document which wasn't  
7 produced until the literally last minute. There was,  
8 in addition to this, the Suffolk County Resource  
9 Manual. There were numerous miscellaneous county  
10 emergency plans. The state produced a guidance  
11 document by the State Emergency Management Office at  
12 the very last minute. There were state/local  
13 governmental plans for guidance for the ingestion  
14 pathway that were produced. None of these things came  
15 out of normal discovery. None of them came out until  
16 the Gleason Board had said, "We've decided these  
17 issues. There's going to be a sanction of either  
18 dismissal of the contentions, the realism contentions  
19 for LILCO, or a default judgment entered in your  
20 favor." It wasn't until after the sanction of  
21 dismissal for the entire proceeding had been discussed  
22 that these documents started coming out.

23 Now, at the hearings, information about the  
24 emergency operations plan came out. Information about  
25 the knowledge of state officials about radiological

1 ingestion pathway protection came out. Information  
2 about the way the state had made its decision to cut  
3 the RECS line came out.

4 The hearings were not limited, as the county  
5 has suggested, to the very narrow issues of one  
6 production of this plan to the discovery impasse to  
7 the spring. Those were central issues, but Judge  
8 Gleason made clear in orders prior to the hearing that  
9 they would cover the entire issue of production or  
10 non-production of emergency plans and related  
11 documents since 1982. There was not, as intervenors  
12 have claimed from time to time, lack of notice to  
13 that, nor was there any lack of notice as to the  
14 possibility of a dismissal sanction as a result of the  
15 hearing. LILCO broached that subject on June 23 in a  
16 motion. It was raised again in a June 24th  
17 teleconference with the Board after the discovery  
18 impasse had really reached fairly severe proportions.

19 The Board at that time said it would  
20 consider it. It was not prepared to rule on it at  
21 that point.

22 CHAIRMAN ZECH: Excuse me. Who participated  
23 in the teleconference?

24 MR. IRWIN: I believe the transcript will  
25 indicate -- certainly I participated, a couple of

1 other members of my firm, representatives of Suffolk  
2 County, including I know Mr. Brown and Ms. Letsche, I  
3 believe Mr. Lanpher also, although the transcript is  
4 authoritative on that. Mr. Zahnleuter for the state  
5 of New York, Mr. Reis for the staff, Mr. Cumming for  
6 FEMA. There may have been a couple of others, plus  
7 all the members of the Gleason Board.

8 CHAIRMAN ZECH: Thank you, you may proceed.

9 MR. IRWIN: The Board's decision resulting  
10 from the July hearings is one which I'm certain  
11 everyone has read and I won't go over it in detail.  
12 It is detailed. It is well reasoned. It establishes  
13 that the county and the state had, on selected issues,  
14 pursued a course, in the long run, which was  
15 inconsistent with their obligations as litigants  
16 before the NRC. It documented the nondisclosure of the  
17 emergency operations plan and the harm from that. It  
18 documented the disclosure only in an untimely fashion  
19 of other documents. Documented the refusal by the  
20 county and state to be forthcoming with information.  
21 We correctly found that the discovery impasse before  
22 it was a threat to the integrity of its operations and  
23 those of the Commission and showed a disrespect for  
24 the operations of the Commission, per se.

25 It also was correct and proper in tracing

1 through six years of history to show that there was a  
2 pattern, a certain degree of consistency in the  
3 county's and state's conduct.

4 Now, let me discuss briefly a point which  
5 Mr. Brown has made. He's tried to suggest two things.  
6 First, that you have to separate those things within a  
7 proceeding from those things without. As I've  
8 indicated that can be done, particularly if those  
9 things which took place outside the four corners of  
10 the proceeding are imported into it.

11 Secondly, whether to be a pattern which is  
12 not acceptable conduct doesn't require unlawful  
13 conduct, per se. It merely requires conduct which is  
14 inconsistent with the ultimate purposes and goals and  
15 procedures set forth by an agency or other body which  
16 is connected.

17 Secondly, it doesn't have to dominate every  
18 action. The county and state played good hard ball,  
19 hard-nosed litigation, on a lot of issues. Some they  
20 prevailed on, frankly though they didn't win on any  
21 substantive issues. They won on some procedural  
22 issues to delay the plant. But you don't have to  
23 violate rules on every issue to violate -- such a way  
24 on those issues you care about that enables you to  
25 subvert a proceeding. That's what they did.

1           In the case of deciding who is actually  
2 going to implement an emergency plan, how it would be  
3 done and keeping information from coming to light  
4 which shows beyond a shadow of a doubt that it can be  
5 done and that these organizations are well endowed to  
6 do it. The county, which has had Brookhaven Lab in it  
7 for 20 years and almost all of whose territory lies  
8 within the ingestion pathway zones of three different  
9 nuclear plants. New York state which operates six  
10 nuclear plants and is perfectly capable of doing  
11 emergency planning and which, in fact, took over for  
12 Rockland County in 1982 and '83 when that county  
13 defaulted temporarily. Information which clearly  
14 indicates those entities can do the job, that's what  
15 they withheld. It was selective, well done, and it  
16 was wrong.

17           Second, Mr. Brown suggests that no sanctions  
18 are warranted. Even Judge Shon who dissented from  
19 parts of the majority opinion agreed that the sanction  
20 of disbarment of the contentions in awarding a summary  
21 disposition of the realism issues should have been  
22 awarded. The question is how much more. I, frankly,  
23 believe that the record fully supports the well-  
24 reasoned views of the Gleason majority.

25           The Board -- Judge Shon raised the question

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1 of whether government participants should be subjected  
2 to different standards than those of other  
3 participants. I agree with Mr. Brown that they should  
4 not. They should be held to the same standards. And  
5 other participants take the proceedings as they find  
6 them, governmental participants should, too. Like  
7 other participants, they should obey the rules.

8 What has happened here, though, is there's  
9 one caveat one has to put on governmental  
10 participation, and that is when governments cease to  
11 act as participants in a NRC proceeding and begin to  
12 act as though they themselves are running the other  
13 agency's show, then they have a special obligation.  
14 That is what has happened here. The governments  
15 stepped outside the rule of litigants and they simply  
16 asserted their sovereign prerogative to have their  
17 final choice.

18 They may not cooperate. It is within their  
19 rights not to plan in advance for emergency planning.  
20 That may not be good policy, it may not be sensible  
21 for the people of the state of New York or of Suffolk  
22 County, but it's their legal prerogative. What they  
23 can't do is prevent LILCO from compensating for their  
24 default or prevent the NRC from finding the facts  
25 necessary to reach a decision. It's at that point

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1 when the government stepped outside their role as  
2 participants in an NRC proceeding that they crossed  
3 the line.

4 So, in short, the participation of the  
5 governments of New York state, Suffolk County and  
6 Southampton has, I think, crossed the line on this  
7 selective group of issues consistently and repeatedly  
8 for six years. And for that reason, the Gleason  
9 Board's decision should be upheld.

10 The town of Southampton wants a quick note.  
11 The town of Southampton has not been an active  
12 participant, but it has been a co-venturer and it has  
13 been on board ever since 1983. For the town not to be  
14 thrown out would not only be pernicious and would be  
15 inconsistent with basic notions of joint ventures and  
16 taking the burdens of a bargain as well as the  
17 benefits, it would have a particularly pernicious  
18 consequence. If the town were still in the proceeding  
19 and the county and state out, you would have the same  
20 issues having to be litigated by surrogates with the  
21 information which LILCO and the Commission having to  
22 obtain being one step removed from the basic source.  
23 In other words, it would have to go through the town,  
24 through the county and the state. And if it's been  
25 hard to get the information from the county and state

1 thus far, add another leg to the dog leg and you can  
2 imagine it.

3 One quick note on the realism issues which  
4 are, I believe, technically before the Commission,  
5 although it's hard to say. All the Board members  
6 agree the local had carried its burden on those  
7 issues.

8 I believe my watch says I have 15 seconds  
9 left.

10 COMMISSIONER ZECH: Yes, you have just one  
11 minute left to go if you want to summarize quickly  
12 or--

13 MR. IRWIN: To summarize, gentlemen, the  
14 issue before this Commission ultimately is who is in  
15 charge here. Is the Commission going to be able to  
16 enforce its policies when the rubber hits the road of  
17 a very hard fought proceeding against powerful  
18 adversaries that don't play by the same rules as the  
19 Commission wrote for other litigants, but rather  
20 resort to their sovereign prerogatives. If the  
21 answer is yes, the Commission has gone, I think, most  
22 of the way toward resolving its probably most  
23 difficult policy problem it's faced in the '80s, that  
24 of emergency planning.

25 If the answer is no, I think the Commission

1 has lost control of its own process and the future not  
2 only at Shoreham, but at every other plant that may  
3 face similar circumstances is very much in doubt. The  
4 Board did the right thing, you should affirm.

5 COMMISSIONER ZECH: And I thank you very  
6 much.

7 How would you characterize, Mr. Irwin, what  
8 kind of conduct would warrant dismissal from a  
9 proceeding?

10 MR. IRWIN: First of all, it's inherently a  
11 matter of inference, Chairman Zech. You're never  
12 going to find a piece of paper that has "bad faith"  
13 written across the top of it. You've got to look at  
14 how conduct squares with the norms and requirements of  
15 an agency.

16 Now, a good working definition is that just  
17 as the litigation process is designed to expose  
18 information, refine it and bring it to judgment;  
19 conduct which frustrates that, particularly when  
20 there's evidence of consistency and openness about it,  
21 tends to indicate behavior that is inconsistent with  
22 the responsibilities of a litigant. For governments,  
23 for any other participant, to say we simply will not  
24 comply with these rules, I don't care whether they're  
25 overt about it or covert about it; when they defy your

1 rules, they're playing by something you can't live  
2 with as an administrator of an agency.

3 When that's done consistently and in the  
4 face of sanctions that are repeated, as was the case  
5 here, I think you have sufficient bad faith conduct to  
6 discipline parties by its dismissal.

7 COMMISSIONER ZECH: I thank you.

8 Questions from my colleagues? Mr. Roberts?

9 Mr. Carr?

10 Mr. Rogers?

11 COMMISSIONER ROGERS: Well, just if you  
12 could say a word. Part of your complaint is that by  
13 refusing to participant in emergency planning, the  
14 governments have created roadblocks in the way of a  
15 license. But for the NRC to license a plant, it must  
16 find emergency planning to be adequate whether there  
17 is a contested proceeding or not. And if, as you  
18 claim, the intervenors continue to obstruct emergency  
19 planning, how would their being dismissed in  
20 terminating the proceeding cure that problem?

21 MR. IRWIN: The problem has been cured on  
22 the record already, Commissioner. By 1985 the  
23 licencing board had found that LILCO had put together  
24 a plan using its own resources and those otherwise  
25 available to it that would really supplant those of

1 the state and county.

2 Different plants, the actual mix of  
3 resources actually controlled by the utility and its  
4 contractors or hypothetically attributed to  
5 governments which have when emergencies occur an  
6 obligation to respond to particular citizens will  
7 vary. But in LILCO's case, the answer is pretty  
8 simple. We have everything in place. All we need is  
9 the authority or the response of governments in the  
10 actual event of an emergency to implement that plan  
11 within the limits imposed by an absence of delivered  
12 pre-coordination between them and us. That, in  
13 itself, has been in LILCO's case reviewed in probably  
14 the most exhaustive exercise every held, a three day  
15 exercise this June.

16 So in short, the Commission has to look at  
17 the resources provided by the utility and its  
18 contractors, it has to see in an exercise whether they  
19 work. And, as you may be aware, FEMA reviewed the  
20 exercise and found that there were no deficiencies in  
21 it. And if that is the case, depending on whether our  
22 proceeding is contested or uncontested, you can reach  
23 your conclusions. But the mere fact of opposition  
24 doesn't prevent you from reaching your conclusions.  
25 You know the resources can be found and you know that

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1 governments have an obligation to respond in an  
2 emergency. And the test is whether the plan is agile  
3 enough to cope with the pre-emergency obstreperousness  
4 of the governments.

5 COMMISSIONER ZECH: Anything else, Mr.  
6 Rogers? Then I thank you very much and appreciate  
7 your presentation.

8 We'll call on Mr. Reis. I believe he has  
9 ten minutes of the time. Mr. Reis, you may state your  
10 name and who you represent for the record, please.

11 MR. REIS: Mr. Chairman, members of the  
12 Commission, my name is Edwin J. Reis. I represent the  
13 NRC staff here today. Sitting next to me is Mitzi  
14 Young, who is also an attorney with the staff.

15 COMMISSIONER ZECH: I thank you very much.  
16 You may proceed.

17 MR. REIS: Mr. Chairman, members of the  
18 Commission, much was made in Suffolk County's argument  
19 about what is the meaning of bad faith and there was  
20 an admission that if there was bad faith in this  
21 proceeding, the Commission would be within its rights  
22 to dismiss the county and the other intervenors to  
23 this proceeding. I would like to say that bad faith  
24 is not evil motivation under the cases and the laws of  
25 the United States. It is just a refusal to obey

1 lawful orders of a court or, in this case, of the  
2 Commission through a board.

3           The cases we cite in our brief, including  
4 particularly Jones vs. Niagara Frontier Transit  
5 Company, makes that very, very clear. A refusal to  
6 obey lawful orders is, of itself, bad faith. The June  
7 notice and the telephone conversation of June 9th  
8 wherein the county and the state indicated that they  
9 would not submit to discovery, they would not produce  
10 any witnesses for deposition but the two they chose--  
11 and I want to ask what kind of legal proceeding can  
12 you have when one side chooses only the people they  
13 will produce -- shows that there was this refusal to  
14 obey an order of the Licensing Board.

15           They talk about being legally constrained  
16 and that, therefore, they could not obey the order of  
17 the board. Let me say that the question of legal  
18 constraint and what it means, and where there is  
19 legally constrained is fully set out in the Supreme  
20 Court case of Society International, etcetera cited at  
21 page 45 of our brief. That case plainly shows that  
22 there is was not legal constraint here. There was no  
23 law here of a competent authority that could prohibit  
24 them from giving the information they withheld.

25           There was the resolution of the county,

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1 there was the orders of the government, but as this  
2 Commission well knows, jurisdiction to find out  
3 whether the public health and safety is protected in  
4 connection with the licensing of nuclear plants rests  
5 with this Commission and not with those authorities.  
6 And therefore, considering that this Commission has  
7 this authority and is the supreme law of the land as  
8 being law of the United States under the Constitution  
9 there was no legal constraint on them from giving the  
10 information they refused to give.

11 Further, even the laws they cite didn't say  
12 don't give the information. They only said don't  
13 cooperate in emergency planning. They didn't say you  
14 should not give the information you're required to  
15 give in administrative proceedings.

16 The county and the state here used the  
17 rubric and repeat again and again, "Oh, you can't  
18 force us to plan for an emergency." But as Mr. Irwin  
19 said, and as I think the record plainly shows, what is  
20 required here is not planning. It's that they be  
21 forthcoming, as Judge Margulies said in his original  
22 orders, and be forthcoming in a way the Commission  
23 indicated in its orders starting the Shoreham  
24 proceeding from the beginning and say what their  
25 resources are, what their general emergency plans

1 would be, which they didn't reveal until May of last  
2 year, what their methods of operation would be, what  
3 their capacity to take emergency actions are, which  
4 they refused to say, and what they could -- and I  
5 emphasize could -- do in an emergency as well as what  
6 they would do. They instead say, "Oh, this is all  
7 hypothetical. This is all speculation. This is all  
8 not relevant. We don't know what's going to actually  
9 happen until there is an emergency." Well, this is an  
10 attempt to prevent the Commission from learning the  
11 facts it should learn.

12 And the county was instructed in the case of  
13 LILCO vs. Suffolk County as well in the second circuit  
14 case involving this proceeding, by the courts that  
15 they can't pass laws to prevent the Commission from  
16 gathering facts necessary to see if the public health  
17 and safety is protected.

18 COMMISSIONER ZECH: Did you say "can't?"

19 MR. REIS: Cannot.

20 COMMISSIONER ZECH: All right.

21 MR. REIS: They cannot pass such laws.

22 COMMISSIONER ZECH: All right. Thank you.

23 MR. REIS: Here they can't prevent employees  
24 from testifying and they can't go around failing to  
25 reveal plans and other documents in their possession.

1                   Certainly the basic integrity of the  
2 adjudicatory process would be attacked by allowing  
3 them to do that.

4                   It's not upon individual parties to decide  
5 which orders to comply with, what discovery to meet  
6 and what parts of the proceeding to take part in.  
7 Instead, they have to cooperate. The intervenors here  
8 took it upon themselves to try and get a veto over the  
9 licensing of Shoreham; not on the merits of the safety  
10 of Shoreham, but by abusing the process through  
11 defaults and delay. They have done so in the past,  
12 and I listened carefully this afternoon and didn't  
13 hear that they would cut this conduct out in the  
14 future.

15                   As in the courts, litigants must obey  
16 orders. It is not on them to choose when to obey or  
17 not to obey. How unfair it would be to allow one to  
18 participate in part of a proceeding and refuse to  
19 perform their obligations in another part. Judge  
20 Gleason correctly stated that where one unjustly  
21 refuses to take part and obey orders in one part of  
22 the proceeding and thus hamper the Commission from  
23 elucidating the facts it needs to make a decision, may  
24 not take part in another.

25                   The appeal order said that a litigant may

1 not step in and out of a proceeding at will. How  
2 unfair it would be if one was to choose where it would  
3 reveal facts and where it wouldn't. When Suffolk  
4 County and the state of New York and the town of  
5 Southampton gave notice that they would not  
6 participate in the realism proceeding and not to  
7 submit to discovery because they didn't like the  
8 orders of the Board, they took themselves out of the  
9 entire Shoreham case. They can't choose to remain  
10 only where it is to their advantage. The integrity of  
11 the adjudicatory process depends, as I have said, on  
12 litigants not deciding which orders they will obey and  
13 where they wish to participant. Fairness not only  
14 permitted, but requires dismissal of the entire  
15 Shoreham proceeding.

16 Thank you.

17 COMMISSIONER ZECH: All right. Thank you  
18 very much.

19 Could you characterize for me what kind of  
20 conduct that you think would warrant dismissal from a  
21 proceeding?

22 MR. REIS: I can't characterize the minimum,  
23 but I can't very plainly say that it is conduct that  
24 we have present here, including the June 9th order  
25 where they said they would not make anybody available

1 to appear at depositions but two people. Certainly  
2 that is a refusal to obey plain Board orders that were  
3 given. And they were Board orders and that was given.  
4 Even before then, in the course of discovery before  
5 they revealed the Suffolk County emergency plan and  
6 they said they would not have discovery after they  
7 revealed that plan, they didn't fully answer the  
8 interrogatories as the Board found. They didn't  
9 produce documents for discovery, the May 25th order.  
10 They didn't produce many of the witnesses asked for in  
11 depositions and when they did, they interrupted the  
12 questions, they gave evasive answers and they walked  
13 out of the depositions before they were over.

14 Certainly these things fall within the scope  
15 of where there can be dismissal. And as I said, the  
16 cases very plainly indicate that the refusal to obey  
17 is bad faith and bad faith necessitates dismissal.

18 COMMISSIONER ZECH: Let me ask you also do  
19 you believe a different standard of conduct should  
20 apply to governments as opposed to private parties?

21 MR. REIS: Under the Atomic Energy Act, of  
22 course, governments have special status in NRC  
23 proceedings. They need not take part, take a  
24 particular side, they can advise the Commission. But  
25 once they choose to litigate and take part as a party,

1 I think they are held to the same standards as other  
2 parties. And just in the same way to preserve the  
3 jurisdiction of this Commission and of the United  
4 States, they have to obey the orders and lawfully take  
5 part in those proceedings.

6 COMMISSIONER ZECH: I want to thank you.

7 Questions from my fellow Commissioners.  
8 Commissioner Roberts?

9 COMMISSIONER ROBERTS: No.

10 COMMISSIONER ZECH: Commissioner Carr?

11 COMMISSIONER CARR: Yes. Apparently the  
12 staff changed their position on sanctions. Why did  
13 you do that?

14 MR. REIS: Why did we do that? We did that  
15 in looking at the scope of it. We originally just  
16 looked at, well, had they produced parts of the  
17 emergency plan early on. Later, after we read Judge  
18 Gleason's opinion and were educated, and later after  
19 we saw the pleadings of the county and the state that  
20 they weren't changing their position and would not go  
21 cooperate, we felt that our position originally had  
22 been wrong and that they should be dismissed from the  
23 proceeding because there was no way in which the  
24 integrity of the adjudicatory process could be  
25 preserved and the Commission could preserve its

1 jurisdiction and go forward and determine facts  
2 without them being dismissed.

3 COMMISSIONER ZECH: Commissioner Rogers?

4 COMMISSIONER ROGERS: Yes. Just on a  
5 follow-on since you did take that position ultimately,  
6 what weight would you assign to the public's interest  
7 in having issues related to public safety decided in a  
8 public forum?

9 MR. REIS: I assign great weight to that and  
10 were it to be done, I think that should be done. I  
11 think here was an opportunity for the state and the  
12 county to come forward and show how they would improve  
13 emergency planning after it was decided that it could  
14 be done, after it was decided that the plant could be  
15 done.

16 Here we cannot reach that. We can try, but  
17 we could not reach that end. We did have the  
18 cooperation of the state and county, not in litigating  
19 whether the plant was safe, not in litigating whether  
20 emergency planning was possible, but just in delays  
21 and defaults. So we could not go ahead and obtain a  
22 very sought for result as to have them take part in  
23 public proceedings and have public proceedings decide  
24 this.

25 Let me say this, if the Commission should

1 dismiss this proceeding, a heavy weight would be put  
2 on the Director of Nuclear Reactor Regulation to  
3 decide the issues left over in this proceeding. It  
4 would be on him to decide, though, at this point.

5 COMMISSIONER ZECH: Any other questions?  
6 If not, then I thank you very much, Mr. Reis.

7 MR. REIS: Thank you.

8 COMMISSIONER ZECH: I'll ask the  
9 representatives of New York, Suffolk County and the  
10 town of Southampton to come forward for rebuttal.

11 It's my understanding, Mr. Secretary,  
12 there's 12 minutes.

13 SECRETARY CHILK: Twelve minutes.

14 COMMISSIONER ZECH: So you may proceed  
15 whenever you're ready. Mr. Brown or Mr. Zahnleuter,  
16 whoever wishes to go ahead and proceed when you're  
17 ready, please.

18 MR. BROWN: Could we confer just for one --

19 COMMISSIONER ZECH: Certainly.

20 MR. BROWN: Mr. Chairman.

21 COMMISSIONER ZECH: Proceed when you're  
22 ready.

23 MR. BROWN: Yes. I'd like to, if we could  
24 divide this, that I would take, say, 9 minutes.

25 COMMISSIONER ZECH: All right.

1 MR. BROWN: And then Mr. Zahnleuter would  
2 proceed.

3 COMMISSIONER ZECH: Nine minutes, Mr.  
4 Secretary, and three minutes. Fine. Let's proceed.

5 MR. BROWN: Thank you, Mr. Chairman.

6 What we have witnessed is a continuation of  
7 exaggerated accusations and claims, but I want to  
8 point out a couple of things. Mr. Irwin, when he made  
9 his presentation, said the central issue here is  
10 whether the governments are seeking to overtake  
11 control of this Commission. Actually, he used sort of  
12 a flowery phrase in his brief and it talked about the  
13 "true motive of the governments is to arrest control  
14 of this proceeding from the Commission and take it  
15 into the government's own hands." And that motif of  
16 exaggeration pervades everything.

17 The most significant thing to keep your eye  
18 on is the notice that you put out. This Commission  
19 put out a notice saying today that the question is  
20 whether the sanction issue is warranted. It could  
21 only be warranted if there is bad faith, and bad faith  
22 I will get to in a moment, isn't a casual finding  
23 plucked as a flower, as Mr. Reis would do it.

24 The issue is whether this Commission is  
25 going to throw out the governments which have

1 participated for seven years in this proceeding and  
2 have conducted themselves in what is an exemplary way  
3 in every form of the word. And on top of that, the  
4 governments have in no way done anything which anybody  
5 could characterize as bad faith.

6 Mr. Irwin spoke for 30 minutes and never  
7 used "bad faith." He was asked a question, finally,  
8 after 30 minutes of never mentioning anything about  
9 bad faith, never gave any facts. He referred to a  
10 question, I believe, from Commissioner Rogers and said  
11 that the standard is bad faith.

12 Mr. Reis said that what is necessary to do  
13 is to glean, "to infer" was his word, bad faith from  
14 disobeying an order. But if you disobey an order for  
15 the purpose of taking an appeal, as the 7th Circuit  
16 case I quoted from and that case cites the United  
17 States Supreme Court and is well established in the  
18 law and nobody gets thrown out for doing it, how do  
19 three governments that have participated for seven  
20 years most constructively that have done things even  
21 over opposition of the staff of LILCO and succeeded  
22 and tragically, even Mr. Irwin referred to a sad note  
23 in the Commission's history in this case. In 1984 the  
24 Commission exuded such hostility against the  
25 governments that we had to go to court and get an

1 injunction, a temporary restraining order, against the  
2 Commission to stop it from denying us constitutional  
3 rights.

4 Well, this is not a case of some  
5 obstreperous government trying to take over. We don't  
6 ask to be given special treatment. You can hold us to  
7 the highest standard you want. The conduct of the  
8 government are the only three pillars on which the  
9 Board rested its determination that it could throw us  
10 <sup>out</sup> that, in which it made its link of logic to get the  
11 bad faith, was one, those unconnected lawful actions  
12 which can't conceivably be deemed to have been done in  
13 bad faith. The second is the county emergency  
14 operations plan in which the Board itself did not find  
15 an intent to withhold it. And if you don't intend to  
16 do something, you can't, obviously, try to do it in  
17 bad faith. And the third is the question of the  
18 impasse over discovery, which was in good faith in  
19 which the governments disclosed everything  
20 forthrightly and took an appeal. They didn't hide  
21 anything.

22 And what led up to that impasse, the notion  
23 that the governments were concealing and not  
24 responding is one gross mischaracterization. People  
25 were asked questions in depositions, just like on the

1 witness stand, what they would do in an emergency.  
2 And they said, "I don't know." The reason they didn't  
3 know, they don't have a plan for Shoreham. "What  
4 would you do?" "I can't speculate about what I would  
5 do."

6 Now the reason it's proper to say they don't  
7 speculate is this Commission has to make findings that  
8 are based on reasonable assurance. Could you  
9 conceivably make findings that have the substance of  
10 reasonable assurance if they're predicated upon  
11 speculation? No. And that's why one of the time  
12 honored objections that's made in legal proceedings is  
13 "I can't speculate." The witness can't speculate.  
14 Everybody knows that. To be held accountable and  
15 thrown out of every proceeding because witnesses told  
16 the truth, namely "I can't speculate." No one's  
17 hiding that. They said I can't speculate, because  
18 they couldn't.

19 Now, the answer comes back from Mr. Irwin  
20 and Mr. Reis, they refused -- they refused to give  
21 answers. Well, they refused to give answers no more  
22 than an unfortunately blind person refuses to read.  
23 They only would have refused if they, in fact, had the  
24 information of what they would do and they withheld  
25 it. That would be refusal. If you can find that

1 people lied, then you are in a different category of  
2 situation and you have the right to be pretty  
3 irritated that someone had lied. Now, no one had lied  
4 on this record. No one alleged anybody lied. Nobody  
5 refused to do anything. Everybody told the truth.  
6 And it's not appropriate for this case to turn at this  
7 moment on the issue whether the governments should be  
8 thrown out to give a license. Everybody knows LILCO's  
9 frustrated and everybody knows from the public record  
10 that there are government officials who want Shoreham  
11 licensed. All one has to do is read any newspaper and  
12 there are people out there who think that if Shoreham  
13 doesn't get a license, it's the end of nuclear power.  
14 Well, that's nonsense. There are five operating in  
15 New York state right now. There's no anti-nuclear  
16 juggernaut at worst.

17 Suffolk County has got three roads that go  
18 east and west. And you can't evacuate. Shoreham  
19 happened to have been built before the NRC passed  
20 emergency planning regulations. And no one looked at  
21 whether you could evacuate. After the NRC passed the  
22 regulations they looked and found out they couldn't, so  
23 Suffolk County told the truth. They said we have two  
24 choices. We'll put an emergency plan into being and  
25 lie to our public, tell them they can be protected

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1 when, in fact, they can't or we'll tell the truth and  
2 not mislead them so they don't get stuck in a gridlock  
3 exposed to the radiation they were sought to flea.  
4 And they told the NRC they did this.

5 We have never -- it is a parity of a joke  
6 almost to think that we have been here telling you not  
7 to do your job. We have fought to have the NRC apply  
8 the regulations. We fought to win the cases before  
9 the appeal board and the licencing board and before  
10 you. We went to court to protect you and your  
11 integrity. That's what the record is. The notion  
12 that somehow we're in here to subvert things for  
13 political ends is intrinsically preposterous and it's  
14 unseemly. And the notion that people can sit here  
15 with a straight face and suggest to you that you have  
16 to throw us out, you have to kill the messenger in  
17 order to get rid of the message that we're giving so  
18 that you can license Shoreham to save nuclear power  
19 for prosperity is plain and simple nonsense.

20 Nuclear power doesn't turn on Shoreham. It  
21 was a mistake. It happened to have been built at a  
22 place where no one checked whether you could evacuate.  
23 And if six years ago LILCO would have agreed with the  
24 county when the county offered LILCO to abandon the  
25 plant and work with LILCO to solve the economic

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1 problems, this never would have happened. You have a  
2 company that took a risk and its judgment was very,  
3 very bad because it created problems left and right.  
4 And now it wants you to bail it out of the problems it  
5 created. It wants to say if you don't do this, it'll  
6 effect some agenda that you have or an agenda that the  
7 federal government has.

8           The fact is, the issue is was there bad  
9 faith here? Can you throw out the governments? No  
10 bad faith. You can't throw out the governments. We  
11 followed lawful procedure. I'm sorry.

12           COMMISSIONER ZECH: Please, go ahead.

13           MR. BROWN: We followed lawful procedure on  
14 the impasse. We did absolutely nothing that could  
15 speak of contemptible behavior on anything else. And  
16 the only issue -- the only issue relates to the legal  
17 authority contentions. And in some circumstances, you  
18 could make the case that the contentions ought to be  
19 dismissed. And that's the sanction because we  
20 disobeyed an order. But we didn't disobey an order.  
21 I explained to you we followed lawful procedure and  
22 the appropriate thing here isn't even to dismiss the  
23 contentions. That would be a miscarriage of justice  
24 when you have governments working with you, seeking to  
25 bring about a resolution of this case in the public

1 interest. It's not appropriate to kill the messenger  
2 in order to get rid of the message.

3 COMMISSIONER ZECH: I thank you very much.

4 Mr. Zahnleuter, you may proceed.

5 MR. ZAHNLEUTER: Thank you.

6 It's necessary for me to address three  
7 points very quickly that were made by counsel for  
8 LILCO and the NRC staff. The first point is that  
9 counsel for LILCO used the word frustrate in the sense  
10 that the state has frustrated LILCO in LILCO's  
11 attempts in 1983 and 1984 to compose a radiological  
12 emergency plan by not volunteering equipment to be  
13 relied on by LILCO.

14 As I said before, the state has acted in its  
15 lawful capacity. These actions were lawful. But also  
16 LILCO's burden in these years of litigation has been  
17 to show that its utility plan is adequate. This  
18 burden was established by a decision rendered in 1983,  
19 it was June 10, 1983, by the licencing board. The  
20 citation is 21 NRC 644. But that Licensing Board  
21 established a burden on LILCO and from the beginning  
22 the premise was that the utility plan relying solely  
23 on the utility's resources would have to be shown to  
24 be adequate. LILCO may not now be allowed to reverse  
25 that precedent and claim that it was entitled, in

1 effect, to seize state or even county resources and  
2 incorporate them into the plan. Such an attempt would  
3 violate the long standing law that this case has  
4 proceeded under.

5 My second point relates to statements that  
6 were made regarding responses to interrogatories,  
7 which are devices used in discovery. The bottom line  
8 is that the state and the county and the town as well  
9 responded to all interrogatories. There were none  
10 that were not responded to. In addition, the state,  
11 the county and the town also complied with all Board  
12 orders and produced documents in accordance with the  
13 time schedules established by the Board orders.

14 There was a reference to some documents that  
15 LILCO requested such as authentication of certain  
16 documents. But the state's position is that those  
17 documents were requested in an untimely manner. It's  
18 a very technical argument and I would refer the  
19 Commission to the Attachment 16 in the governments'  
20 October 27, 1988 brief, specifically Attachment 2 to  
21 Attachment 16 discusses these technical matters.

22 The third point that I'd like to conclude  
23 with is that counsel made a statement about how during  
24 the depositions of state and county officials there  
25 were objections made that obstructed the depositions

1 and that counsel instructed these witnesses not to  
2 answer questions. I know from the state's prospective  
3 that there was only one question directed to state  
4 witnesses which was not answered by the witness upon  
5 instruction from counsel. That dealt with the matter  
6 involving communications with an attorney.

7 COMMISSIONER ZECH: One minute. I've messed  
8 up my time, so you go ahead.

9 MR. ZAHNLEUTER: That objection involved  
10 discussions with an attorney, and that is protected  
11 information. Further, the objections were not made on  
12 the basis of relevance, as counsel asserted. The  
13 objections were made on the basis of clarifications  
14 and vagueness. Those are the kinds of objections that  
15 the Commission's rules require counsel to make during  
16 objections so that opposing counsel can refrain the  
17 question. And that particular regulation is 2.740A  
18 paragraph D.

19 So since my time is up, I will conclude.

20 COMMISSIONER ZECH: All right. Thank you  
21 very much.

22 Questions of my fellow Commissioners? Mr.  
23 Roberts?

24 COMMISSIONER ROGERS: No.

25 COMMISSIONER ZECH: Mr. Carr?

1           COMMISSIONER CARR: Yes. For the purposes of  
2 probing the position of the governments, isn't it  
3 reasonable to inquire into the resources that the  
4 county and the state have or probe the voracity of  
5 official denials that any response would occur?

6           MR. BROWN: If you're saying did the state  
7 and the county withhold from local information on  
8 resources, the state and the county gave LILCO  
9 enormous amounts of information on resources. LILCO  
10 knows how many police departments there are, how many  
11 this and that kind of trucks and how many personnel  
12 and so on. And they've never had a problem with that.  
13 The problem becomes one of interface with LILCO. How  
14 are we going to interface with LILCO? And there isn't  
15 going to be an interface with LILCO, and that's what  
16 led to the impasse.

17           COMMISSIONER CARR: You think that would  
18 require the government to disobey their own laws --

19           COMMISSIONER CARR: -- if they interfaced  
20 with LILCO?

21           MR. BROWN: Categorically.

22           COMMISSIONER CARR: On the interrogatories,  
23 I believe Mr. Irwin said that you usually asked for an  
24 extension the day before the due date and then on the  
25 extended date you objected. Is that reasonably

1 accurate?

2 MR. BROWN: Well, I'm going to have Mr.  
3 Lanpher tell you. I can guarantee you that there was  
4 no connivance involved in it, Commissioner, but --

5 COMMISSIONER CARR: Just coincidence?

6 MR. BROWN: I don't even know what the facts  
7 are. Mr. Lanpher does.

8 MR. LANPHER: If there was an extension of  
9 time, my recollection is that approximately one week  
10 after the extension, I believe it was on April 20, we  
11 filed objections to certain of the interrogatories  
12 which was the schedule established by the Board for  
13 objections. And on April 22nd, I believe the date  
14 was, we filed answers to other interrogatories. There  
15 subsequently was a motion to compel, Commissioner  
16 Carr, that was granted by the Board and then on June  
17 3, 1988 further answers pursuant to the Board's order  
18 were filed by both the state and the county. And  
19 there was never any objection to those answers on the  
20 record, no motions to compel. I hear now people  
21 complaining that those subsequent answers weren't  
22 satisfactory. Well, it's certainly untimely to raise  
23 such objections at this time, Commissioner Carr. If  
24 they had an objection, they should have moved to  
25 compel.

1 COMMISSIONER ZECH: Mr. Rogers?

2 COMMISSIONER ROGERS: Yes. There seems to  
3 be a great deal that hangs on the meaning of this word  
4 "interface." I wonder if you could just help me out a  
5 little bit to understand what the limits are of what  
6 you're talking about when you talk about interfacing  
7 which would be prohibited under government laws.  
8 What are we taking about?

9 MR. BROWN: What it actually means is --

10 COMMISSIONER ROGERS: What it would not be?

11 MR. BROWN: It actually means working with  
12 LILCO during an emergency on its plan. The affidavit  
13 of Governor Cuomo and the affidavit of County  
14 Executive Halpen go into, in great detail, the reason  
15 why Suffolk County and the state of New York would not  
16 interface or work with LILCO or follow LILCO's plan.  
17 They don't have confidence in LILCO. There is page  
18 upon page of reasons why. And the bottom line of all  
19 this is a simple conclusion. After years of telling  
20 the public and working to demonstrate that the  
21 shortcomings of LILCO's plan would show that the plan  
22 was not in the public interest, the county and the  
23 state, the Governor, the other officials after  
24 believing from the bottoms of their heart that the  
25 LILCO plan is no good and emergency workers are

1 incompetent, couldn't in an emergency turn around and  
2 tell the public now we're going to work with LILCO on  
3 this plan. They would lose their credibility  
4 themselves.

5 And the interface goes to the simple  
6 question of working with LILCO, doing things with  
7 LILCO, following LILCO's plan. And very significantly  
8 it goes to the issue of authorizing LILCO to do  
9 certain functions or giving LILCO the power to do  
10 certain functions which is in LILCO's plan. The  
11 state and the county profoundly believe that as a  
12 matter of law they cannot delegate to LILCO any police  
13 power functions. That is in the Constitution of New  
14 York, which was not written, incidently, to stop the  
15 Shoreham plant. It was around a long time before.  
16 And it was stated by five judges in the court, the  
17 Supreme Court and the Appellate division of Supreme  
18 Court of New York and the county and state are on  
19 unassailable grounds in making the statement they will  
20 not delegate to LILCO these powers and will not work  
21 with LILCO.

22 COMMISSIONER ROGERS: Well, I can understand  
23 that very well, but I don't understand the extent of  
24 what you choose to use the word "interfacing" to cover  
25 because --

1 MR. BROWN: Well, that's the NRC's word.  
2 That's not our word. That's the word --

3 COMMISSIONER ROGERS: -- it seems to me you  
4 can cover everything.

5 MR. BROWN: Judge Gleason used that word  
6 on --

7 COMMISSIOER ROGERS: Well, but you are  
8 adopting it, aren't you?

9 MR. BROWN: -- telephone conference calls  
10 and Mr. Lanpher has something more.

11 MR. LANPHER: If I could just add,  
12 Commissioner Rogers, under the LILCO plan for that  
13 plan to be implemented as conceived by LILCO, there  
14 was a requirement that LILCO personnel call people  
15 like the Suffolk County Executive, speak with the  
16 Suffolk County Executive and get the Suffolk County  
17 Executive to authorize LILCO personnel to take certain  
18 actions such as direct traffic, such as sound sirens.  
19 That goes under the euphemism of interfacing; that  
20 communication. But interface also includes gaining  
21 the legal authority. LILCO's plan purports to have  
22 LILCO gaining legal authority. We raised from the  
23 very beginning before the Licensing Board that LILCO's  
24 plan makes an unlawful assumption because Suffolk  
25 County and New York state personnel may not delegate

1 to LILCO these authorities. And Judge Margulies in  
2 the fall of 1987 in reported decisions, I don't have  
3 the citation right in front of me, said that under the  
4 Cuomo v. LILCO decisions, that's the New York state  
5 Supreme Court decision referred to by Mr. Brown, that  
6 you cannot delegate those authorities. However, in  
7 April of 1988 the impasse was created because Judge  
8 Gleason and the Licensing Board majority said that no  
9 longer can legal authority be raised. You can't  
10 nullify the decision for the New York state Supreme  
11 Court Justices. And that was what created the impasse  
12 here on legal authority issues.

13 COMMISSIONER ROGERS: Thank you.

14 COMMISSIONER ZECH: One question on the  
15 subject of the realism doctrine. The Commission has  
16 stated, as you know, that we believe that in times of  
17 an emergency of any kind, the state and local  
18 governments would, indeed, carry out their sworn  
19 duties to protect their citizens. Do you have any  
20 comment to make on that doctrine? Do you agree that  
21 they would, indeed, carry out their duties to protect  
22 their citizens?

23 MR. BROWN: No government would ever turn  
24 its back on its citizens. The issue is whether the  
25 governments would work with LILCO and follow the LILCO

1 plan.

2 COMMISSIONER ZECH: I understand. But  
3 you're not refuting the fact that the governments  
4 would, indeed, carry out their duties to protect their  
5 citizens?

6 MR. BROWN: These governments stand on their  
7 responsibility. The reason they are protecting their  
8 citizens is such a plain and important consideration  
9 to them, is the reason we're here today.

10 COMMISSIONER ZECH: Yes.

11 MR. BROWN: This is how they're protecting  
12 their public.

13 COMMISSIONER CARR: But the government is not  
14 really ready to testify as to what they would do.

15 MR. BROWN: The government is prepared to  
16 testify what they would do.

17 COMMISSIONER CARR: Well, I understood they  
18 said they would ad hoc it at the time and that's all  
19 they would do.

20 MR. BROWN: They said they would do the best  
21 thing under the circumstances because they wouldn't  
22 adopt a plan to mislead the public. Now, they didn't  
23 do both simultaneously. To the say the least, it  
24 would be peculiar conversation if the government stood  
25 up and said we're not going to have any kind of plan.

1 But if the plant's in operation, then we'll do an ad  
2 hoc response but we don't know what it is and won't  
3 speculate.

4 This latter conversation about not  
5 speculating came in years after as LILCO struggled  
6 year-by-year to get around the regulations and  
7 preclusions that kept them from getting a license.  
8 And ultimately the bottom line is when pushed to  
9 responding to the question on, in effect, the witness  
10 stand they said we don't know what we'd do. We don't  
11 have a plan.

12 COMMISSIONER ZECH: All right. Thank you  
13 very much.

14 Any other questions? All right. Then, I'd  
15 like to thank you all very much. Does the LILCO  
16 person insist on a rebuttal? If you do, we'll take it  
17 under advisement. If not, we'll stand adjourned.

18 MR. IRWIN: Chairman, could I have about one  
19 minute on rebuttal?

20 COMMISSIONER ZECH: Well, we would like to  
21 then take it under advisement. What we'll do is take  
22 a very short recess and talk with the Commissioners  
23 and we'll be back very shortly.

24 MR. BROWN: Chairman, if I might -- I'm  
25 sorry, Commissioner, Mr. Chairman. But given the fact

1 that the procedure is that the first party has a  
2 chance to rebut, I'm reluctant to say but I have to,  
3 that if LILCO says something, we should be given the  
4 right again to reply.

5 COMMISSIONER ZECH: We'll consider that  
6 also.

7 MR. BROWN: There could be somewhat of a  
8 spiral. I'm sorry.

9 COMMISSIONER ZECH: We'll consider that,  
10 too.

11 We stand in recess for just a few minutes.

12 (Whereupon, a recess.)

13 COMMISSIONER ZECH: The Commission has  
14 decided not to have any further rebuttal argument.

15 (Whereupon, at 4:22 p.m., the Commission was  
16 adjourned.)

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CERTIFICATE OF TRANSCRIBER

This is to certify that the attached events of a meeting  
of the United States Nuclear Regulatory Commission entitled:

TITLE OF MEETING: ORAL ARGUMENT ON SANCTION ISSUE IN  
SHOREHAM PROCEEDING

PLACE OF MEETING: ROCKVILLE, MARYLAND

DATE OF MEETING: FEBRUARY 21, 1989

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TITLE: ORAL ARGUMENT ON SANCTION ISSUE IN SHOREHAM PROCEEDINGS

SCHEDULED: 2:00 P.M., TUESDAY, FEBRUARY 21, 1989 (OPEN)

DURATION: APPROX 2 HRS

PARTICIPANTS: INTERVENORS 40 MINS

SUFFOLK COUNTY/TOWN OF SOUTHAMPTON

- HERBERT H. BROWN - SPEAKER (25 MINS)  
LAWRENCE LANPHER

STATE OF NEW YORK

- RICHARD J. ZAHNLEUTER - SPEAKER (5 MINS)  
DEPUTY SPECIAL COUNSEL TO THE GOVERNOR

APPLICANT/NRC 40 MINS

LONG ISLAND LIGHTING COMPANY

- DONALD P. IRWIN - SPEAKER (30 MINS)  
TAYLOR REVELEY  
IRA FREILICHER  
JOHN LEONARD

NRC

- EDWIN J. REIS - SPEAKER (10 MINS)  
JOSEPH SCINTO  
MITZI YOUNG

REBUTTAL BY INTERVENORS (10 MINS)