

ORIGINAL

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Agency: Nuclear Regulatory Commission
Atomic Safety & Licensing
Appeal Board Panel

Title: Public Service Company of New
Hampshire, et al., (Seabrook
Station, Units 1 and 2)

Docket No. 50-443-OL, 50-444-OL (Offsite
Emergency Planning Issues)

LOCATION: Bethesda, Maryland

DATE: Wednesday, April 18, 1990

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UNITED STATES NUCLEAR REGULATORY COMMISSION

Before the Atomic Safety & Licensing Appeal Board Panel

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In the Matter of:	:	Docket Nos.
PUBLIC SERVICE COMPANY OF NEW	:	50-443-OL
HAMPSHIRE, et al.,	:	50-444-OL
(Seabrook Station, Units 1 and 2)	:	(Offsite Emergency
- - - - -x		Planning Issues)

Nuclear Regulatory Commission
 4350 East-West Highway
 East-West Towers
 Bethesda, Maryland
 Wednesday, April 18, 1990

The above-entitled matter came on for hearing
 before the Atomic Safety & Licensing Appeal Board Panel, at
 9:30 a.m., pursuant to notice.

BEFORE:

G. PAUL BOLLWERK, III,
 Chairman of the Appeal Panel

ALAN S. ROSENTHAL,
 Member of the Appeal Panel

HOWARD A. WILBER,
 Member of the Appeal Panel

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P R O C E E D I N G S

1
2 JUDGE BOLLWERK: We are hearing oral argument
3 today on the appeals of Intervenors Attorney General of
4 Massachusetts, New England Coalition on Nuclear Pollution,
5 Seacoast Anti-Pollution League, the Town of Hampton, New
6 Hampshire, the City of Newburyport, Massachusetts, and the
7 Towns of Amesbury, Newbury, Salisbury, and West Newbury,
8 Massachusetts, from several Licensing Board decision on
9 emergency planning matters in this operating license
10 proceeding involving the Seabrook Station nuclear facility.

11 These include first LBP-89-32, in which the
12 Licensing Board found that the utility-authored Seabrook
13 Plan for Massachusetts communities meets applicable
14 regulatory requirements and that the June 1988 emergency
15 response exercise revealed no fundamental flaws in either
16 the utility plan for Massachusetts communities or the state-
17 sponsored New Hampshire Radiological Emergency Response Plan
18 for communities in the New Hampshire portion of the Seabrook
19 emergency planning zone; second, the Board's decision in
20 LBP-89-17, involving the adequacy of the Vehicular Alert
21 Notification System for Massachusetts communities; and
22 third, the Board's determination in LBP-90-1, concerning
23 Intervenors' motion to reopen the record in this proceeding
24 to permit further litigation concerning alleged deficiencies
25 in the emergency broadcast notification system for the

1 Massachusetts communities.

2 The argument this morning is governed by the terms
3 of our March 22 order. As indicated therein, each side has
4 been allotted two hours for the presentation of argument,
5 which the parties were to allocate among themselves. In
6 this regard, as we noted in an April 10 order, except for
7 the Coalition and the Town of Hampton, whose joint brief is
8 being argued by counsel for the Town of Hampton, all other
9 intervenors have been granted permission to have counsel for
10 the Massachusetts Attorney General present argument on their
11 behalf on the issues covered in the briefs submitted by
12 them, with the understanding that any of their issues not
13 touched upon in argument will be deemed submitted on the
14 brief.

15 I will now ask counsel to identify themselves
16 formally for the record and state how they are dividing
17 their time allocations.

18 Mr. Traficonte.

19 MR. TRAFICONTE: I am John Traficonte. I am an
20 assistant attorney general for the Commonwealth of
21 Massachusetts. The intervenors have divided their time in
22 the following way: I would like to reserve one hour for
23 direct presentation and Mr. McEachern is going to reserve 15
24 minutes for direct presentation of the issues that he is
25 going to argue.

1 JUDGE BOLLWERK: Which leaves you 45 minutes for
2 rebuttal?

3 MR. TRAFICONTE: Yes.

4 JUDGE BOLLWERK: Mr. Dignan.

5 MR. DIGNAN: Mr. Chairman and members of the
6 Board, my name is Thomas G. Dignan, Jr. I am a member of
7 the firm of Ropes & Gray, One International Plaza, Boston,
8 Massachusetts. To my right is Kathryn A. Selleck and to my
9 further right is George H. Lewald, my colleagues. We appear
10 together for the Applicants herein.

11 Staff and Applicants have agreed on a division of
12 time as follows: Assuming the full two hours were to be
13 used, Applicant would use one hour and 20 minutes and the
14 Staff 40 minutes.

15 MS. YOUNG: Good morning, members of the Board.
16 My name is Mitzi Young. I am here to represent the NRC
17 Staff. With me at counsel table is Edwin J. Reis from my
18 office and also Sherwin E. Turk. Also sitting at counsel
19 table is Joseph Flynn from the Federal Emergency Management
20 Agency.

21 JUDGE BOLLWERK: Thank you.

22 Before we proceed with the argument, we would like
23 to note for the record that in a motion filed with the Board
24 within the last week Intervenors have asked this Board to
25 stay or cease further consideration of their administrative

1 appeals in light of Intervenor's pending petition for review
2 in the United States Court of Appeals for the District of
3 Columbia Circuit challenging full power authorization for
4 the Seabrook Station. For reasons set forth in our orders
5 dated April 12 and 13, we denied that motion as well as a
6 subsequent motion for reconsideration. Also in this regard,
7 we would refer the parties to the discussion in ALAB-349, a
8 1976 decision regarding the Seabrook construction permit
9 proceeding, at 4 NRC 235, pages 242 to 245.

10 Yesterday morning, by rapifax, we received a
11 letter from the Massachusetts Attorney General advising us
12 that at the outset of today's hearing Intervenor would
13 request the following bench ruling:

14 "Standing ready to respond to questions posed by
15 this Board at oral argument is sufficient to prevent the
16 Intervenor from being deemed to have waived or withdrawn
17 (constructively or otherwise) their appeal. Intervenor
18 need not affirmatively present oral argument in order to
19 protect their rights to further intra-agency appellate
20 review."

21 The letter further declared that if this ruling
22 was made, Intervenor's counsel would make no affirmative
23 presentation but would be prepared to respond to Board
24 questions; however, in the absence of such a ruling,
25 Intervenor's counsel would present oral argument and file

1 with the Court of Appeals as soon as practicable a motion
2 seeking clarification of the present scope of the court's
3 jurisdiction under the second and third sentences of section
4 704 of Title 5 of the United States Code. Shortly after
5 receiving this letter, at the behest of the Board, counsel
6 to the Appeal Panel informed counsel for Intervenors,
7 Applicants, and the NRC Staff by telephone of the following
8 Board response to the Attorney General's request:

9 "The Appeal Board is not prepared to issue the
10 bench ruling requested in your letter to the Board received
11 by rapifax this morning. To the contrary, the Board will
12 expect you to present affirmatively your position on what
13 you deem to the Attorney General's major assignments of
14 error. You may or may not wish to present affirmative
15 argument on the issues raised by the other Appellants apart
16 from the Town of Hampton and the Coalition, the two parties
17 being represented by Mr. McEachern.

18 "The Appeal Board wishes to note further that,
19 while you are of course free to seek at any time such
20 judicial relief as you may deem warranted, that
21 consideration is of no relevance to the nature and scope of
22 tomorrow's oral argument."

23 Having fully apprised us of their views on the
24 matter of our continuing authority to consider their
25 administrative appeals, thereby protecting any right to

1 present their position to the commission or a court if they
2 believe it appropriate to do so, Intervenors need not and
3 should not repeat their views on that matter as part of
4 their presentations this morning.

5 I would like to also note that we have read the
6 briefs filed by the parties and are fully aware of their
7 contents, so all parties can dispense with any opening
8 factual recitation and proceed directly to their arguments.

9 Intervenors may now proceed with their
10 presentations.

11 ORAL ARGUMENT ON BEHALF OF THE INTERVENORS

12 MR. TRAFICONTE: Good morning, Your Honors. In
13 light of the introduction of the Chairman, I will pass over
14 some introductory comments that I had intended to make,
15 which were essentially preservative, in our view, of our
16 rights. I would only note that we do present oral argument
17 here, and to the extent that that represents an affirmative
18 pursuance of an interagency appeal after March 1, it is
19 solely for the reason that the Board, this Board, denied our
20 motion to stay the process and postpone the argument, and
21 further, has indicated that it would not issue a bench
22 ruling that would secure our further rights to interagency
23 appeal, if we did nothing further this morning than to
24 respond to questions.

25 Our understanding of the posture we're in is that

1 in order to protect our rights to interagency appeal in the
2 event our views on finality are found to be incorrect we
3 must go forward here and present some form of oral argument,
4 or at least run the risk that arguments presented in the
5 briefs are going to be deemed withdrawn or otherwise waived.

6 It's on that basis that I did proceed to address
7 certain issues we've raised in the briefs submitted here.
8 I'd like to begin with a matter that's a fairly complex
9 procedural one. It involves a set of issues that are not
10 found within the four corners of Intervenors' brief
11 submitted to this panel on January 24.

12 Nonetheless, in the view of the Mass AG and the
13 Intervenors, if the Agency has jurisdiction over this appeal
14 at this time, these issues are before this Board. I
15 specifically refer to the issues remanded by the Appeal
16 Board in ALAB-924 that arose out of a review by this Board
17 of LBP-88-32, the December 1988 decision by the Licensing
18 Board which found the plan for New Hampshire to be adequate
19 under Commission regulations.

20 I'm going to be very brief in the rehearsal of
21 these facts, because I'm sure that the Board is very
22 familiar with them.

23 JUDGE ROSENTHAL: We are fully familiar with what
24 we have on the 924. What I don't understand is precisely
25 what you're appealing from insofar as our 924 remand. We

1 only entertain issues that are brought to us by way of
2 appeal or by way of direct certification in a brief. Now
3 you're telling us you're trying to bring something to us
4 that you haven't briefed.

5 MR. TRAFICONTE: Well, I didn't say I didn't brief
6 it. I said it does not appear within the four corners of
7 any of the briefs submitted to this Board on January 24.

8 JUDGE ROSENTHAL: In what brief does it appear?

9 MR. TRAFICONTE: It appears in the motion
10 submitted on December 1 via the Mass AG and the Intervenors
11 to the Commission, a December 1 Mandamus Pleading, seeking
12 mandatory relief and revocation of the license on the
13 grounds that the remand issues -- that the lower Board's
14 disposition --

15 JUDGE ROSENTHAL: How do we have anything before
16 us that is reflected in a document that you filed with the
17 Commission? I'm having some difficulty in understanding
18 that.

19 MR. TRAFICONTE: Well, to begin with, this matter
20 is set forth in some detail in the Mass AG's February 6th
21 Emergency Motion 1 to clarify the status of the appeal of
22 LBP-89-33. That motion had a second part which sought to
23 reopen the record on the New Hampshire plan. That motion
24 still sits, as far as I know, before this Board and hasn't
25 been ruled on.

1 Of course we filed this before the Commission had
2 denied our Mandamus Motion, but our view was that, depending
3 on how that motion was handled by the Commission, issues
4 that we briefed in our December 1 pleading to the Commission
5 would revert essentially to this Appeal Board. I believe
6 that's precisely what has happened as a consequence of the
7 particular way in which the Commission dealt with our
8 mandamus claims.

9 I'd like to just briefly outline that, if I may.
10 We made the argument that ALAB-924 did two things. It
11 identified four issues and reversed the lower Board's
12 findings and rulings as to those issues.

13 With regard to the need for sheltering detail in
14 the New Hampshire plan, this Board expressly found that the
15 New Hampshire plan could not be approved in the absence of
16 that detail. At that point in ALAB-924 where the Board
17 found that the plan could not be approved, this Board
18 referred to an earlier Appeal Board decision in which the
19 distinction was made between the planning detail needed to
20 make a reasonable assurance finding and the detail does not
21 need to be in place in order to make that finding.

22 In the view of the Mass AG, the clear import of
23 the ruling made in ALAB-924 was, as to sheltering at least,
24 that no reasonable assurance could be made based on the New
25 Hampshire plan in the absence of sheltering detail. In the

1 first instance, as the Board is aware, that issue was put to
2 this Board itself and disposition over the merits was taken
3 by the Commission on November the 16th.

4 After LBP-89-33 issued, the Commission gave
5 Intervenors an opportunity to further develop their views on
6 these matters, which they did in some detail in our December
7 1 pleading that I mentioned earlier. In that pleading, we
8 made two distinct claims:

9 We made the claim, as I just outlined, that 924,
10 as a matter of law, held that in the absence of sheltering
11 detail there could not be a reasonable assurance finding
12 made. We also made the claim that these remand issues,
13 under Commission law, require hearing prior to resolution.

14 As to the need for hearing, we made the claim that
15 the Atomic Energy Act's hearing provision entitles us to a
16 hearing on those remand issues prior to the issuance of a
17 license. The Commission, in CLI 90-03 at page 10-15, which
18 is an adjudicatory portion of that decision, dealt with our
19 arguments as to the grounds for mandatory relief, but it did
20 so in a partial way.

21 That is to say, the only discussion set forth in
22 the Commission's disposition of our claims is our right to a
23 hearing on these matters prior to licensing. As to that
24 claim, the Commission, in our view, announced new law as to
25 the meaning of 5047(c)(1), such that it was permissible,

1 according to the Commission, if a matter was found to be not
2 significant for a plan in question, it was permissible for a
3 Licensing Board, even though an issue was in some fashion
4 open and unresolved -- it was permitted that that issue be
5 resolved after licensing.

6 The Commission, in CLI 90-03 in the relevant pages
7 at no point discusses or addresses the argument made in the
8 mandamus pleading that 924 also held as a matter of law that
9 the remand issues precluded the reasonable assurance
10 finding, specifically, sheltering, where the Board's
11 indication in that regard is quite clear.

12 In this circumstance, to the extent the Agency
13 continues to have jurisdiction, we believe that the issue
14 now becomes, under the newly announced law of 5047(c)(1),
15 which in sum permits a Licensing Board to postpone hearings
16 and issue a license if it can make a reasonable assurance
17 finding notwithstanding the open issues, the issue now
18 becomes, well, nonetheless, even with this new dispensation
19 as to (c)(1), did 924 as a matter of law preclude the
20 Licensing Board on November 9, as it explained on November
21 20, from finding on November 9 reasonable assurance in light
22 of the remand issues?

23 That remains an open appellate issue which we
24 raised in great detail. We raised it to the only entity the
25 only entity we could have raised it to and I believe the

1 only entity that had jurisdiction over our appellate claims
2 after November 16th, and that was the Commission.

3 The Commission in its March 1 ruling expressly
4 omits any reference or any discussion whatsoever to the
5 finding that this Board made in ALAB-924 as to reasonable
6 assurance.

7 JUDGE ROSENTHAL: How does all of this get before
8 us? All the papers you filed were filed with the Commission
9 and at no point, as far as I am aware, did you come to us
10 and ask us to pick up this ball. I'm hearing this morning
11 for the first time that somehow we should be addressing this
12 issue at this time, in circumstances where there isn't a
13 single piece of paper filed with us that asks us to do that.

14 MR. TRAFICONTE: Well, Your Honor, I don't know
15 what you mean by a single piece of paper. There's a
16 February 6th motion, entitled "Emergency Motion of the
17 Intervenors" to clarify the status of the appeal in which
18 the points I'm making are set forth in detail precisely.

19 JUDGE ROSENTHAL: Clarify the status of the
20 appeal. I don't see how that can be translated into a
21 specific request that we now entertain on the merits issues
22 which you presented to the Commission and are now claiming
23 the Commission didn't address.

24 JUDGE BOLLWERK: I think I would add that I
25 believe that motion was a result of a filing that was made

1 with the Applicants before the Licensing Board, asserting
2 that essentially there was nothing further to be done with
3 the remand; isn't that correct? Didn't that arise in some
4 respects from something the Applicants brought to the
5 Licensing Board?

6 MR. TRAFICONTE: The motion arose out of a
7 pleading filed by the Applicants to the Licensing Board,
8 which claimed that Intervenors had sought no appeal of LBP-
9 89-33. That's not just an inaccurate fact. We did appeal
10 LBP-89-33.

11 JUDGE BOLLWERK: That's correct, but you didn't
12 brief it. I see nothing in your brief that mentions one
13 word about 89-33.

14 MR. TRAFICONTE: Well, let's look at that. If you
15 turn to page 1 of our January 24 brief, it states the MASS
16 AG joins in the claims of error asserted by all other
17 intervenors, and further notes that he has not briefed here
18 the lower board's errors concerning the disposition of the
19 remanded issues identified in ALAB-924. The MASS AG
20 believes those errors entitle intervenors to mandatory
21 relief revoking the November license authorization. The
22 merits of Intervenors' motions for such mandatory relief
23 were presently pending before the Commission.

24 I'm really, quite frankly gentlemen, at a loss to
25 understand what the MASS AG could have done in those

1 circumstances. We made an appellate claim that the November
2 9 licensing decision directly contradicted this board in
3 ALAB-924. We presented that in the first instance in the
4 form of a Motion for Mandatory Relief and Revocation. We
5 presented it to this board on November 13, pursuant to this
6 Board's jurisdiction over LBP-88-32.

7 The Commission took jurisdiction over that claim
8 away from this board. Subsequently, the licensing board
9 issued LBP-89-33 on November 20. On November 22, the MASS
10 AG filed a notice of appeal of both LBP-89-32 and 33,
11 expressly referencing that we wanted to take review of 89-
12 33. However, at that point in time, all the claims that we
13 were making or would make about the errors in 89-33 were to
14 be put before the Commission. That is the clear intent of
15 the Commission's November 16 order taking jurisdiction away
16 from this Board over the appellate remedy of appellate
17 motions that we had filed.

18 JUDGE BOLLWERK: What you want from us essentially
19 is a ruling on whether the reasons given in LBP-89-33
20 conform with 54.7(c)(1).

21 MR. TRAFICONTE: Under the newly announced reading
22 of (c)(1) set forth in the pages 10 to 15 of CLI 90-03.
23 Again, let me repeat myself: If this agency has
24 jurisdiction -- obviously a point that we vigorously contest
25 -- there must be jurisdiction somewhere in this agency over

1 the remaining issue that left open, by the manner in which
2 the Commission disposed of our motion for mandatory relief.
3 We briefed it. Gentlemen, there can be no doubt that we
4 briefed it; indeed, we had made the claim that we had not
5 gotten an opportunity to be heard on (c)(1).

6 JUDGE BOLLWERK: I also think Mr. Dignan has made
7 a claim that we have sua sponte review over that decision in
8 any event.

9 MR. TRAFICONTE: I'm not interested in sua sponte
10 review. I'm interested in making it very clear in getting a
11 ruling from the Board, in the event that this Board has
12 jurisdiction down the road, that the Mass AG and the
13 Intervenors have taken every conceivable step that we could
14 have taken in the circumstances to preserve our appellate
15 rights over the disposition of the remand issues in LBP-89-
16 33, and to repeat, we briefed those issues to the Commission
17 on December 1.

18 The fact that makes it crystal clear that we did
19 brief it to the Commission is, as this Board may recall,
20 that on November 15 we also filed a motion regarding the
21 application of (c)(1) and we made the claim that we had not
22 had the opportunity to be heard on the issue of the
23 application of (c)(1).

24 JUDGE ROSENTHAL: What you are looking for from us
25 is simply a declaration that by going to the Commission and

1 filing a statement to the Commission you had exercised due
2 diligence? Is that what you are looking for?

3 MR. TRAFICONTE: Of course it is not Your Honor.
4 I'm looking for substantive review and appellate review to
5 the extent this Board intends to give us that, and indeed
6 feels duty-bound under the regulations to do that. I'm
7 looking for substantive review over LBP-89-33.

8 JUDGE ROSENTHAL: You told us, I thought, a few
9 minutes ago that the Commission took all of this out of our
10 hands.

11 MR. TRAFICONTE: It certainly did.

12 JUDGE ROSENTHAL: All right. When did the
13 Commission return it?

14 MR. TRAFICONTE: On March 1, when it ruled as to
15 our claims put forth on the December 1 pleading and omitted
16 any reference to certain appellate issues. Your Honor, it
17 could only be one of two things. Either the issues that I'm
18 raising here this morning that are set forth in our December
19 1 brief as to the reasonable assurance that the preclusive
20 effects of ALAB-924 as to reasonable assurance. Either
21 those issues, Your Honor, are before the Court of Appeals
22 along with everything else or those issues have reverted to
23 this Appeal Board. But the intervenors in the Mass AG did
24 not fail at any time to take any step to preserve their
25 right to substantive appellate review by whoever is properly

1 going to give us that review. The Mass AG did not omit any
2 rational step to preserve his rights to such review.

3 And again, I go back to the circumstances of the
4 January 24 brief. At that time when we filed that brief, we
5 expressly noted that this appeal board was not in a position
6 to entertain the arguments that I'm now making. It was not
7 in that position. The Commission had taken jurisdiction
8 away from it. We had briefed these very issues to the
9 Commission; there's no dispute about that. In fact, the
10 Commission so holds --

11 JUDGE ROSENTHAL: I think you're repeating
12 yourself Mr. Traficonte and I'm frank to state, you're
13 taking an hour this morning, and I'm much more interested in
14 hearing some of the matters that you have briefed to us. I
15 think we understand your point. You would like us to look
16 at the licensing board's disposition of our remand and the
17 context of what the Commission did. And of course we have
18 everything that you filed before the Commission and we can
19 look at that.

20 If we agree with you that from a procedural
21 standpoint, this matter is now before, something to which
22 I'm frank to state I'm still in some doubt.

23 MR. TRAFICONTE: Well Your Honor, I would like
24 then to take this opportunity to, at oral argument, put
25 these matters before you. And if you're going to instruct

1 me not to continue, that would be fine. But absent an
2 instruction not to continue and to present the substantive
3 aspects here, I would take the opportunity -- in fact, it's
4 an odd opportunity since we were seeking to avoid oral
5 argument -- but I would take the opportunity --

6 JUDGE ROSENTHAL: I would appreciate it if you
7 would not continually refer to the fact that you sought to
8 avoid it, that you've got this jurisdiction all concerned;
9 we're fully aware of that. You've preserved your
10 jurisdictional argument and let's just drop that for the
11 balance of the argument, if you don't mind.

12 MR. TRAFICONTE: Well, that's fine Your Honor. Go
13 back; if Your Honor's going to instruct me not to present
14 these matters, that's fine. But absent an instruction --

15 JUDGE ROSENTHAL: I'm not instructing you to do
16 anything. I'm just pointing out to you that you have come
17 before us with appeals from several licensing board
18 decisions raising a very substantial number of issues, and I
19 would think that you might want to devote a reasonable
20 portion of your time to what you consider to be your major
21 assignments of error. Now, you can take your time as you
22 see fit.

23 MR. TRAFICONTE: Thank you. One of the major
24 areas of error that we see in the decision under review
25 concerns the manner in which the licensing board, on

1 November 9 and then again in the November 20 decision, LBP-
2 89-33, dealt with the issue on remand from ALAB-924. That
3 is a major area of error. And, if there is a question
4 whether or not we have adequately briefed that or preserved
5 our rights to have that review substantively by this board,
6 because we did not put into our January 24 brief identical
7 portions of our December 1 brief that we put to the
8 Commission, I will take this opportunity now at oral
9 argument to put forth the arguments that we make in December
10 1 pleadings, to reinforce those arguments, so that the Board
11 will have, and there will be no dispute that, the MASS AG
12 presented these matters to this board.

13 Specifically, I would refer the Board to two of
14 the remand issues. I've already mentioned the sheltering
15 issue. I think it's unambiguous that ALAB-924 said that the
16 New Hampshire plant, in the absence of sheltering detail,
17 was not an approvable plant. Again, it's a footnote
18 citation to a case that talks about the reasonable assurance
19 finding.

20 In our view, there was a holding by this Board in
21 ALAB-924 that the sheltering issue was of enough safety
22 significance that it precluded the approval of the New
23 Hampshire plant. Therefore, no matter what the Commission
24 says about the proper interpretation of (c)(1) and the
25 impact of (c)(1) on hearing rights that intervenors may have

1 under the Atomic Energy Act, it's clear the MASS AG, at
2 least, that nothing the Commission says in CLI 90-03 touches
3 on the preclusive effect that ALAB-924 had.

4 JUDGE ROSENTHAL: They misread ALAB-924?

5 MR. TRAFICONTE: Excuse me?

6 JUDGE ROSENTHAL: The Commission misread 924?

7 Because you're telling us, I think that, as you read 924, it
8 precluded the Commission from authorizing at the time it did
9 a full power license. So, you must be telling us that the
10 Commission misread it, obviously.

11 MR. TRAFICONTE: No. I'm telling you that the
12 Commission addressed and ruled on only 1 of the 2 appellate
13 claims we made. It ruled only on the appellate claim we
14 made that our hearing rights were denied under the Atomic
15 Energy Act. It expressly said, no so (c)(1) permits post-
16 licensing resolution of not-safety significant issues. I'm
17 not said the Commission misread ALAB-924; it simply makes no
18 reference whatsoever to the point I'm making. We made an
19 additional argument, we pointed out that there's a holding
20 in ALAB-924 as to sheltering, that the plan cannot be
21 approved in its absence, and that the footnote there refers
22 to the reasonable assurance, the case law on reasonable
23 assurance findings. The Commission simply doesn't mention
24 that argument.

25 JUDGE ROSENTHAL: But the Commission's result is

1 inconsistent with your reading of ALAB-924.

2 MR. TRAFICONTE: It is not, Your Honor.

3 JUDGE ROSENTHAL: It is not?

4 MR. TRAFICONTE: It is not. And I would be
5 perfectly prepared to explain why it is not, depending on
6 what you mean by the result.

7 JUDGE ROSENTHAL: The result was that they
8 authorized the issuance of a full power license in advance
9 of a licensing for its disposition of these remanded issues.
10 I thought you were telling us, and maybe I don't understand
11 you, that ALAB-924, as you read it, precluded the issuance
12 of a full power license. Am I misreading, misinterpreting
13 what you're telling me?

14 MR. TRAFICONTE: You're not misinterpreting what
15 I'm telling you, and there appears --

16 JUDGE ROSENTHAL: Wasn't it the decision then that
17 the action taken inconsistent with your reading of ALAB-
18 924.

19 MR. TRAFICONTE: Well, there's a difference
20 between the action taken and the rulings made, because if
21 the Your Honor, would examine CLI 90-03, you'll see a very
22 interesting phenomenon taking place. There is an
23 adjudicatory portion of that decision -- pages 10 through
24 15. In adjudicatory portion, the mandamus is denied on the
25 grounds that there was no clear showing of error because the

1 claim of error was limited to the hearing claim and (c)(1)
2 disposes of that claim.

3 In other portions of CLI 90-03, the so-called
4 immediate effect in this non-adjudicatory portions, the
5 Commission does turn its attention to the actual character
6 of the four remanded issues and finds that the lower board's
7 November 9/November 20 finding, that the remand issues are
8 not safety significant. The Commission finds that
9 reasonable. But, that is not an adjudicatory decision, Your
10 Honor. So, yes. Do I think that the issuance of the
11 license, as supported by the non-adjudicatory portions of
12 CLI 90-03, contradicts ALAB-924? Absolutely. I clearly
13 believe it contradicts it. But it's of no legal consequence
14 whatsoever that it contradicted, because CLI 90-03 in the
15 non-adjudicatory portions is of no legal relevance to
16 anybody. Not to me, and it certainly should not be to this
17 board, and it certainly not be to the court of appeals.

18 So the sum and substance of it is, there is no
19 question that the issuance of that license in our view
20 directly contradicted ALAB-924's clear holding, but that's a
21 no never mind because under the way the Commission has
22 structured itself, that contradiction is contained not in
23 the adjudicatory portion of 90-03, but in the non-
24 adjudicatory portion and therefore has no relevance to the
25 board at this time.

1 So in sum, you have somebody, somewhere, has
2 before it the issue of whether or not the remand issues
3 under the new dispensation that we were given in 90-03 as to
4 (c)(1), whether those remand issues, in fact, fit under the
5 new interpretation of (c)(1). And we believe they don't.

6 JUDGE BOLLWERK: Is there anything to preclude the
7 sheltering issue to be taken care of in relatively rapid
8 order, assuming the --

9 MR. TRAFICONTE: Well, other than the last 7 years
10 of efforts to come up with a sheltering plan, I guess it
11 could be pretty rapid if you've got maybe a decade-long
12 view. In fact, Your Honor, not to be flippant in response,
13 but the immediate response on the part of the State of New
14 Hampshire and the applicants and FEMA has been a truly
15 remarkable and Orwellian effort to rewrite the nature of the
16 hearings in New Hampshire, the nature of the New Hampshire
17 and to somehow, with smoke and mirrors, pretend that at no
18 time, apparently, was there going to be sheltering for the
19 general beach population. And the board is aware of these
20 quite remarkable, really truly remarkable developments,
21 because we brought them to your attention in the other half
22 of our February 6 emergency motion.

23 The long and the short of it is, I take it from
24 those acts of rewriting history that obviously the State of
25 New Hampshire is concerned that it may not be able to

1 develop the sheltering detail and the sheltering plan that
2 this board essentially found was necessary under the New
3 Hampshire plan as it was formulated. In that regard, I
4 would indicate that here it is April 18, the board's holding
5 came down on November 7, the licensing board ruled on
6 November 20 that it doesn't see any indication why
7 sheltering detail could not be put in place before
8 summertime comes, and here in April 1990 I can tell you
9 we're no closer, at least as far as the public is aware, and
10 certainly we're no closer as far as the parties are aware,
11 that there is any such sheltering detail. Most of the
12 activity, Your Honor, it's been spent trying to make believe
13 -- and make believe is truly what it is -- trying to make
14 believe that they never said that they intended to shelter
15 the general beach population.

16 So, if the question is --

17 JUDGE BOLLWERK: What efforts have you made to get
18 the Licensing Board to go forward on the issue?

19 MR. TRAFICONTE: What efforts have we made after
20 March 1 to have the Licensing Board go --

21 JUDGE BOLLWERK: I mean that, I know at one point
22 I know the Licensing Board issued an order asking the
23 parties for comments on the remand. One of your responses
24 was to say they shouldn't do anything because it was before
25 the Court of Appeals.

1 MR. TRAFICONTE: That's certainly correct Your
2 Honor. We are --

3 JUDGE BOLLWERK: Well, you're saying this hasn't
4 been taken care of, but you're also arguing that you all
5 want it taken care of because you want it pending with the
6 Court of Appeals.

7 MR. TRAFICONTE: I see no confusion, but usually
8 that's the case. I'm the only one who doesn't see
9 confusion. Maybe there's a lot of confusion and maybe we're
10 talking out of both sides of our mouth, but from our view,
11 it's very simple. The agency -- and I apologize, I'm going
12 to have to comment again on the finality point -- but, the
13 agency committed final agency action. It issued a license.
14 It did that on the basis of an adjudicatory record.

15 The record was, the plan says you need sheltering
16 for the general beach population. This board said you
17 needed that detailed before you could approve the plan, and
18 nonetheless, in the absence of the detail, the plan was
19 approved, the reasonable assurance finding apparently was
20 made, although there's an interesting question as to whether
21 that was ever made, and the license issued.

22 Now, we're trying to preserve our appellate
23 rights. We've been doing that a lot of that lately. And
24 we're trying to preserve that record so the Court of Appeals
25 can see quite clearly that that record does not support the

1 issuance of that license. So we oppose any further
2 development of a sheltering plan at this point; of course,
3 we do.

4 JUDGE ROSENTHAL: That's your right. But as Judge
5 Bollwerk suggests, you're not in a very good position to
6 come in and tell us that, here it is April and nothing has
7 happened. Nothing has happened because you don't want
8 anything to happen.

9 MR. TRAFICONTE: You can put to rest any notion
10 that the MASS AG and intervenor's views or desires as to
11 what will happen and will not happen, you can put to rest
12 any notion that we have any impact on this. We have had no
13 impact on whether or not the State of New Hampshire is in
14 the process of developing a sheltering plan. And if you're
15 looking for that culprit, I would look to the ones who came
16 up with the notion at some point after the cow was out of
17 the barn, that nobody ever said we meant sheltering for the
18 general beach population. I would find that individual, or
19 individuals, and I would assign to that group responsibility
20 for the fact that things have not budged November, December,
21 in the six months since such detail was required.

22 In any event, I have serious doubt as to whether,
23 particularly when the individuals responsible are making no
24 effort to do it, I have serious doubt whether a sheltering
25 plan that would pass muster is going to be available in the

1 short term. There's no indication of that. And quite
2 frankly, in light of my understanding and knowledge about
3 the situation on the ground, it's not an easy matter, which
4 is obviously why it was never done in the first place.

5 JUDGE BOLLWERK: Does the Stone and Webster survey
6 cover Massachusetts as well as New Hampshire?

7 MR. TRAFICONTE: Just give me one moment.
8 Yes it does, Your Honor.

9 JUDGE BOLLWERK: Thank you.

10 MR. TRAFICONTE: Now, one last point in the form
11 of presenting argument that may have been omitted in the
12 brief. One last point as to the impact of ALAB-924, even
13 under the Commission's (c)(1) ruling: this Board found that
14 the survey for the special needs population was not -- this
15 board found that the issue of the adequacy of that survey
16 had been improperly disposed of on summary disposition, and
17 it reversed, ostensibly we believed, for hearing on that
18 issue.

19 Now, connected to that ruling, the Board vacated
20 findings that the lower board in LBP-88-32, it vacated
21 findings and rulings it had made about the adequacy of the
22 drivers and vehicles for the special needs. It vacated that
23 finding pending the outcome of the hearings on the issue
24 improperly disposed of on summary disposition.

25 Now, again go back to what the Commission says

1 about (c)(1). If an issue is not safety-significant, it can
2 be resolved after licensing. Well, our position is that the
3 vacation of the finding as to the adequacy of the drivers
4 and the number of vehicles is safety significant. We think,
5 in fact, it's quite clear to us that if you don't know how
6 many special needs population individuals, you don't know
7 the size of that population, if you don't have an outside
8 bound, just as this Board found, if you don't have an
9 outside bound as to how large it might be, you don't have
10 any rational record basis for finding that there is an
11 adequate number of drivers and vehicles available.

12 JUDGE BOLLWERK: Well, that lack of an outside
13 bound may preclude us from finding a harmless error, but I'm
14 not sure that it makes it safety significant. I guess I see
15 a distinction. There clearly were a lot of drivers and
16 vehicles involved here. We just couldn't find a harmless
17 error as to the decision indicated, because there was no
18 outside bound. Isn't that different?

19 MR. TRAFICONTE: Well, if it is different, it's
20 unclear to me under the jurisprudence of appeal in this
21 agency because the failure to find a harmless error resulted
22 in a remand. It resulted in a reversal and remand of an
23 issue.

24 JUDGE BOLLWERK: Well, clearly there's authority
25 from this board in the Limerick case and others that

1 indicates that 50.47(c)(1), under that provision, we can
2 send back to be heard before, while the license process,
3 while the authorization goes on. I think the Limerick case
4 is pretty clear about that under 50.47(c)(1).

5 MR. TRAFICONTE: Well, I think that you have to
6 take it issue by issue. Our position is that the express
7 statements made about the survey and the impact on the
8 survey on the findings that there were an adequate number of
9 drivers and vehicles, that those express findings made in
10 ALAB-924 make the issue safety significant, because it means
11 there's no record support for the proposition that the New
12 Hampshire resources are adequate. That's a consequence.

13 So, I don't disagree that there might be case law
14 that you could remand something, and yet it's not safety
15 significant, but my focus is on the specific language used
16 in ALAB-924.

17 To sum it up, I think LBP-89-33, which is before
18 this Board for review, contradicted ALAB-924, as a matter of
19 law, and the issue was open, the Commission didn't reach and
20 this Board should reach it.

21 Now, I'd like to move on to sheltering issues.

22 JUDGE BOLLWERK: This is under the Massachusetts
23 Plan, I take it.

24 MR. TRAFICONTE: I'm now going to address the LBP-
25 89-32 and, just so everyone knows, provide a very brief road

1 map. I intended to discuss the remand issues. I want to
2 spend some time on the sheltering issues presented by the
3 utility plan. I'll briefly outline some of the contentions
4 that were not admitted that we think might need
5 highlighting, and then I want to address, if I have time,
6 the application of the new rule on the legal authority issue
7 which we briefed.

8 Now as to the sheltering issues, as we understand
9 this, and again there's procedural complexity here, but as
10 we understand it, both the applicants and the staff in their
11 briefs appear to rely on the findings made by the Board on
12 the Utility plan that there is no sheltering alternative for
13 the beach population. They seem to rely on this finding in
14 ALAB-922, which was then incorporated into ALAB-924, that
15 you don't need sheltering, you don't need a range of
16 protective measures because it's a second-tier, emergency
17 planning's a second-tier regulation.

18 Well, that's not going to hold any water anymore
19 because, of course, in CLI 90-02, the Commission reversed
20 ALAB-922 to the extent that that decision held that
21 emergency planning is second-tier. Instead, emergency
22 planning is now a first-tier regulation. Now, if it's a
23 first-tier regulation -- and I should add, by the way, that
24 it's quite clear from reading CLI 90-02 -- that you need
25 compliance with the 16 point standards in (b). That's

1 essentially, according to the Commission, that is a finding
2 that someone has complied with those 16 standards, is the
3 legal equivalent, if you will, of a reasonable assurance
4 finding. I believe that's not an unfair appraisal or
5 summary of what CLI 90-02 says.

6 Now, it's been a position of the AG and the
7 Intervenor for sometime, both as to the New Hampshire and
8 now again as to the utility plan, that one of the
9 requirements set forth at (b)(10) is that there be a range
10 of protective measures established for the public. And, as
11 we argued in New Hampshire, and again, as I am arguing to
12 you now, there is simply no range of protective measures for
13 the beach populations in Massachusetts. Therefore, in our
14 view it's a relatively simple matter. Under the
15 interpretation of CLI 90-02 that held that it was a first-
16 tier regulation, strict compliance with the terms of those
17 standards is necessary, particularly as to a very crucial
18 standard, (b)(10) that requires a range. The requirement of
19 a range is important --

20 JUDGE BOLLWERK: Isn't the range here exactly the
21 same as it was in New Hampshire though. If you look at the
22 plan at page 3.6-9 that says, "sheltering may be appropriate
23 protection action for a puff release," which is exactly what
24 we're talking about in New Hampshire.

25 MR. TRAFICONTE: There's absolutely no sheltering

1 plan, no sheltering proposal --

2 JUDGE BOLLWERK: I guess we're talking about the
3 difference between the protective action of sheltering and
4 where people will shelter. There does seem to be an
5 indication that sheltering would be used as a protective
6 action in that instance.

7 MR. TRAFICONTE: Okay. If you want to get at it
8 that way, then I would say that, first of all, it's not a
9 fact that the utility plan has a sheltering alternative for
10 the beach populations in Salisbury Beach. That is not a
11 fact.

12 But secondly, assuming that they're going to stand
13 up, my opponents are going to stand up and say that there's
14 loose language and perhaps it could be used, then I go back
15 to the holding of ALAB-924, which is there's no sheltering
16 detail of any kind. So, you know, either way, either it's
17 there but it's got a spectral existence, which is not good
18 enough, or it's not there at all.

19 JUDGE BOLLWERK: I take it your point, well, your
20 point seems to be that it hasn't been implemented. Are we
21 back to that?

22 MR. TRAFICONTE: Well, no. The first point is
23 that the utility plan is different from the New Hampshire
24 plan. In the utility plan, they actually had in the plan
25 some proposal that they would shelter the general beach

1 population in the event of an accident calling for shelter.
2 That is not in the utility plan. So, it's facially
3 inadequate on the clear terms of CLI 90-02 because it
4 doesn't have a range and because it's, emergency planning is
5 a first-tier requirement, requiring, in our view, strict
6 compliance. It does not have a range. But even if they
7 say, well, we can always use it, then there's no sheltering
8 detail, no effort at any sheltering detail. And I'm talking
9 again about the beach population.

10 Now, the need -- I'm sorry, Your Honor. Yes.

11 JUDGE WILBER: Would you go over that one more
12 time please.

13 MR. TRAFICONTE: Yes.

14 JUDGE WILBER: Are you saying that there's no
15 mention of sheltering in the Massachusetts plan?

16 MR. TRAFICONTE: For the beach population.

17 JUDGE WILBER: For the beach population.

18 JUDGE BOLLWERK: Let me stop here. Let me read to
19 you from 3.6-9. Now this is what we had; maybe there's been
20 revision since then, but it says, "Although precautionary
21 actions for an evacuation of the beach areas are the
22 preferred courses of action for the beach population.
23 Sheltering as a protective action option for this segment of
24 the population is not precluded. Sheltering may be
25 appropriate protection action for a puff release or

1 radioactive release of less than 2 hours duration." Isn't
2 that essentially what was in the Mass plan? I'm sorry, the
3 New Hampshire plan?

4 MR. TRAFICONTE: I take it you're reading from the
5 utility plan and, is it Amendment 6?

6 JUDGE BOLLWERK: Well, it says Revision 0 at the
7 bottom of the page, and the page number is 3.6-9.

8 MR. TRAFICONTE: Well, it may be. Does it give an
9 amendment number?

10 JUDGE WILBER: I guess it's zero. I assume it's
11 revision zero.

12 JUDGE BOLLWERK: I don't know.

13 MR. TRAFICONTE: Yes, amendment. The way they use
14 those words is that they put out the revisions and I believe
15 it's remained at revision zero, and then they put out
16 amendments. So you need Rev. 0, Amendment 6, or whatever
17 the most recent number is. Very very similar, by the way,
18 to the game that was played in New Hampshire, they had
19 sheltering in and then they had sheltering out and they had
20 sheltering in and then they had sheltering out. So you have
21 to sort of take a snapshot of what plan and what amendment
22 because it comes in, it comes out, it comes in, it comes
23 out, depending on what they need it for. But you may well
24 be reading one of the earlier versions where it was in and
25 then, at the hearings, it came out and then back and forth.

1 But I don't think there is going to be much dispute,
2 although I'm interested to see, and I'll reserve for
3 rebuttal a response. Maybe they're going to tell you it is
4 in there. I believe the record indicates it's not. FEMA's
5 statements --

6 JUDGE BOLLWERK: Mr. Dignan is shaking his head.
7 We will let him address that.

8 MR. TRAFICONTE: I don't know which way he is
9 shaking his head.

10 JUDGE BOLLWERK: Up and down.

11 [Laughter]

12 MR. TRAFICONTE: Up and down. It is in there.
13 Now, in April of '90, it's in there. And they are going to
14 distribute a new amendment in the back of the room after the
15 end of the argument.

16 In any event, either it's not there and it's
17 facially inadequate for the beach population because there
18 is no range, or it's there in a matter of words and there is
19 no implementation capability.

20 This is an important issue because as is now old
21 news, the evacuation times for the beach populations and the
22 areas close in are very long and it's quite clear to us that
23 you need an alternative in many circumstances for these long
24 evacuations. You need an alternative for these otherwise
25 unprotected populations. And the only alternative is

1 sheltering and they haven't even explored it. They haven't
2 even made an effort, in our view, to see whether or not in
3 the Salisbury Beach areas and the Plum Island beach areas
4 there is the possibility of sheltering. So, we think --

5 JUDGE WILBER: You are speaking of implementation,
6 though.

7 MR. TRAFICONTE: My point is not narrowed to
8 implementation. My point is I don't believe they are
9 seriously considering the use of sheltering as an
10 alternative to evacuation for the large beach populations in
11 Massachusetts. I don't believe that they are doing that.
12 They clearly -- and the record in the utility plan case
13 supports the distinction between the way in which sheltering
14 was looked at in New Hampshire and the way it was looked at
15 in the utility plan. And I'll tell you the reason: the
16 reason is because they believe it's significant that the New
17 Hampshire beaches are further away. And in our view, that's
18 just not going to matter.

19 JUDGE WILBER: The New Hampshire beaches are
20 farther away?

21 MR. TRAFICONTE: I'm sorry. Strike that. The
22 Massachusetts beaches are farther away.

23 JUDGE WILBER: But the statement in the plan we
24 have, whether it's the present plan or not, says the beach
25 population will be instructed to take shelter in the nearest

1 indoor public location for the use of a public address
2 message transmitted via the sirens and the broadcast radio
3 messages. That's not correct?

4 MR. TRAFICONTE: Your Honor, again, for my
5 benefit, just tell me what amendment number you are looking
6 at.

7 JUDGE WILBER: Zero.

8 JUDGE BOLLWERK: The same page.

9 MR. TRAFICONTE: No amendment number. Well,
10 again, my memory is that they had it in, they took it out,
11 they had it in, they took it out. I know that there's
12 nothing behind it. There is no investigation, no study, no
13 effort --

14 JUDGE WILBER: That's what I meant by
15 implementation.

16 MR. TRAFICONTE: Fine. Okay.

17 JUDGE BOLLWERK: I thought you just told us that
18 Stone & Webster's survey dealt with Massachusetts as well as
19 New Hampshire beaches and in theory there is an indication
20 that there is beach shelter just as there was in the survey
21 for New Hampshire.

22 MR. TRAFICONTE: I know of no indication that the
23 utility planners that devised the SP&C, as opposed to the
24 state officials, at any time reviewed, or considered, or
25 weighed the Stone & Webster report. Stone & Webster had no

1 role -- that report and that study played no role in the
2 utility plan case. I don't believe it's even admitted into
3 evidence. It was not part of the considerations as far as I
4 know. The Board certainly did not have it before them.

5 JUDGE BOLLWERK: Let me turn to one other
6 questioning on sheltering.

7 MR. TRAFICONTE: Sure.

8 JUDGE BOLLWERK: From reading the brief of the
9 Applicants and the Staff, they are simply going to say this
10 sheltering issue wasn't raised here as it was in New
11 Hampshire. What's your response to that?

12 MR. TRAFICONTE: Wasn't raised here?

13 JUDGE BOLLWERK: It wasn't raised in the same way
14 as it was in the New Hampshire proceeding.

15 MR. TRAFICONTE: Well, the contentions that raised
16 it were not admitted. I mean, there's that fact, which I
17 think we briefed. We briefed with the exclusion of those
18 contentions. I would refer the Board to MASS AG Contention
19 No. 41, filed on April 13, 1988. That was rejected in the
20 June 22nd memorandum, 1988. We also, in MASS AG Contention
21 No. 36, filed the same day in 1988, we raised the inadequacy
22 of the vehicular evacuation by itself.

23 So, to the extent that we didn't raise it, it was
24 because the issues on sheltering were precluded and they
25 were precluded because the Licensing Board said this is

1 really a rehash of the arguments you made on New Hampshire.
2 And there are clearly indications in the June '88 memorandum
3 that the Board found, look, you're trying one more time to
4 tell us that there had to be some minimum adequate level of
5 protection. We are just not going to buy that argument.

6 Well, in fact, now we find out -- and the
7 Commission's made it clear -- that, you know, compliance
8 with the regulations, at least, is what's needed. I think
9 no one is going to dispute that. We think, obviously, a
10 little bit more is needed but, all right. But compliance -
11 - and regulations require a range of protective measures.

12 Now, you are going to hear the Staff and the
13 Applicants argue that yes, yes, but not a range of
14 protective measures for every last soul sitting out in EPZ.
15 And I will support that position, not every last soul. But,
16 the word is a range of protective measures for the public.
17 And I believe that the tens of thousands of people who are
18 on the beach constitute a significant enough part of that
19 public to require a range of protective measures for them.
20 So, I don't think that's a problem. We don't have the case
21 of one or two people sitting on top of a hill. We've got
22 the public.

23 Just to cover myself and to save a little time on
24 rebuttal. They are also going to stand up and they are
25 going to quote from CLI 90-03 to the effect that the

1 Commission says look, the fact that you don't have
2 sheltering for that beach population -- you don't have an
3 alternative to evacuation for the Salisbury Beach population
4 is reasonable. That's what the Commission said. Again,
5 it's non-adjudicatory, it doesn't matter, it's irrelevant
6 and it, indeed, in my view, can't even be referred to and
7 certainly can't be relied on.

8 Now, according to my calculation, I have about
9 eight or nine minutes left.

10 JUDGE BOLLWERK: Ten minutes.

11 MR. TRAFICONTE: Ten minutes. Okay.

12 JUDGE BOLLWERK: Obviously, if you want to change
13 the allocation of 45 minutes, you can take some of that
14 time, the rebuttal time.

15 MR. TRAFICONTE: Well, let me do that. Let me
16 take another twenty minutes, thereby cutting down my
17 rebuttal by ten.

18 Now, I would like to address --

19 JUDGE WILBER: Still on this sheltering subject,
20 you mentioned that the Board improperly used the .9, I think
21 it's DRF --

22 MR. TRAFICONTE: DRF, yes.

23 JUDGE WILBER: I'll admit I didn't read your cite
24 to your proposed findings. Did you in there offer a
25 different DRF?

1 MR. TRAFICONTE: No. What we said in there was
2 that -- and this had to do with the non-beach areas.

3 JUDGE WILBER: Yes, that's correct.

4 MR. TRAFICONTE: The non-beach areas.

5 JUDGE WILBER: Yes.

6 MR. TRAFICONTE: Our claim was what was going on
7 here was they were using the lowest common denominator which
8 they were getting out of the beach areas. .9 is an
9 indication that the shelter is very poor. And they were
10 applying that for the whole EPZ. And our position was, and
11 we think you could take judicial notice, if need be, that
12 the houses in the non-beach areas in Massachusetts have
13 basements, many, many of them. I believe in the record is a
14 study -- at least I know I cross-examined Mr. Donovan on
15 this matter. There is some study that upwards of 90% of the
16 houses in New England have basements. Well, a house with a
17 basement does not have a .9 DRV. That's a fact. So, our
18 claim was that there had been absolutely no inquiry as to
19 whether or not, in light of the long ETEs, it might not be
20 much more rational to evacuate beach areas and shelter
21 outlying areas. So, our claim was that there is just no
22 basis whatsoever for a .9. And when challenged,
23 Mr. Donovan, who approved the .9, said that as far as he was
24 concerned the way to go at it was to take the population
25 with the worst sheltering protection. That makes no sense

1 whatsoever. Why you would take the dwelling that has the
2 worst and apply it to a general population that for the most
3 part may have very adequate shelter is beyond me. And I
4 think it is probably simply not rational. But that's what
5 they did and that's the nature of the decision criteria in
6 the utility plan.

7 I would like to push on to another contention that
8 was not admitted. I hope I can be brief but I suspect it
9 may take me five or ten minutes to get into this.

10 The Board is aware because we briefed it in some
11 detail that we made a challenge to the utility plant's
12 decontamination and monitoring centers and that's been
13 briefed at length. I am not going to spend any time
14 addressing myself to the arguments we make in that brief.

15 We claimed that and we think we proved that they
16 can't monitor 20 percent of the population but we also
17 challenged in contentions filed in April of '88 on the plan
18 and in contentions filed in September '88 on the exercise we
19 also challenged the 20 percent planning basis.

20 There is no dispute that we challenged the 20
21 percent planning basis. There was a dispute about that, a
22 rather lengthy one but the licensing board, I believe it is
23 in a January 13, 1989 hearing, agreed with us that the
24 contentions at issue, and here it was MAG Exercise 18, did
25 challenge the 20 percent planning basis. When I say

1 challenge the planning basis I mean we wanted to prove that
2 using 20 percent was not an appropriate planning basis
3 because of the demographic, meteorological, physical and
4 other characteristics of the Mass. EPZ.

5 JUDGE ROSENTHAL: Did you put forth some kind of a
6 statement of basis for your position that the demographics
7 or the meteorological conditions in Massachusetts made the
8 20 percent planning basis appropriate?

9 MR. TRAFICONTE: We asserted, this came out of an
10 exercise, Your Honor, a MAG Exercise 18. It was an
11 exercise contention and we asserted based on the exercise
12 scenario, based on the passage and movement of the plume,
13 based on the characteristics of the weather on that day, we
14 used the exercise scenario as played out over that day and
15 we said that if an accident like that model had happened
16 many more than 20 percent of the people would seek
17 monitoring because many more of the 20 percent would have
18 been either subject to radiation or at least may have
19 believed that they were subject to radiation, so we
20 specifically rooted our claim that 20 percent was not
21 adequate. We specifically rooted it in the exercise
22 scenario and the real world effect that that scenario would
23 have had.

24 JUDGE ROSENTHAL: The licensing board held that
25 your claim was barred by res judicata?

1 MR. TRAFICONTE: Yes. The ruling was res
2 judicata.

3 JUDGE ROSENTHAL: It should have been law of the
4 case, not res judicata, in any event, but let's assume that
5 it's either res judicata or law of the case, I take it your
6 position is that you made a showing that the situation in
7 Massachusetts was different from that in New Hampshire?

8 MR. TRAFICONTE: Well, I am going to come to that
9 but before I pass on beyond law of the case, res judicata,
10 it is our view that the issue is not law of the case and it
11 is not res judicata. It is not issue preclusion or claim
12 preclusion because the issue had not been presented -- in
13 fact ALAB-924 still holds.

14 The issue of the adequacy of the 20 percent
15 planning basis had not been presented in the New Hampshire
16 case.

17 JUDGE ROSENTHAL: It was -- no, this is one
18 proceeding. Now if there was a failure to raise this issue,
19 propriety of the 20 percent standard, in this proceeding,
20 the context of the New Hampshire plan, why isn't that
21 dispositive unless you came in with some kind of showing
22 that with respect to the Massachusetts portion of the EPZ
23 the situation factually is different and therefore you could
24 rely on what we held in the Shoreham proceeding that the
25 planning standard cannot be regarded as being generic when

1 it has to be site-specific.

2 That's why I'm getting at whether you did make an
3 endeavor to demonstrate that the situation in Massachusetts,
4 with respect to the Massachusetts portion of the EPZ, was
5 different from that or might have been different from that
6 of the New Hampshire portion.

7 MR. TRAFICONTE: Well, let me address --

8 JUDGE ROSENTHAL: -- otherwise the determination
9 you didn't raise it with respect to New Hampshire goes right
10 through the whole proceeding.

11 MR. TRAFICONTE: How can that be, Your Honor? How
12 can it be that without any notice to us that issues specific
13 to the New Hampshire proceeding were going to be claim
14 preclusive for the entire proceeding?

15 JUDGE ROSENTHAL: It would be -- again it isn't
16 dispositive with respect to the whole proceeding if there is
17 a difference in Massachusetts and that is what I am trying
18 to get at, is whether you asserted that whatever may have
19 been the situation with regard to the New Hampshire portion
20 of the EPZ with respect to the Massachusetts portion of the
21 EPZ there were meteorological or demographic considerations
22 that would bring into question the propriety of resorting to
23 the Krimm Memorandum 20 percent standard.

24 MR. TRAFICONTE: Well, let me address this
25 question first, although I do want to come back to the point

1 about whether claim preclusion could even get -- if there's
2 any purchase on this matter for claim preclusion at all, but
3 the short answer to this is that as I indicated we used the
4 specifics of the exercise scenario when we made our claim
5 that if the scenario had actually occurred in the real world
6 that the impact would have been that more than 20 percent
7 would have retired to a monitoring center.

8 There is a deeper point here. We argued in the
9 contention -- the contention ran to both the New Hampshire
10 plan and the utility plan -- we asserted that one thing that
11 the exercise revealed was an inadequate planning basis for
12 monitoring centers and we believe that was well -- in fact,
13 if there is any purpose whatsoever, something I might doubt,
14 in holding an exercise pre-licensing like the one that was
15 held, it's to throw up and highlight fundamental flaws.

16 We alleged that that exercise revealed that a 20
17 percent planning basis both for the New Hampshire plan and
18 for the utility plan is simply inadequate in light of the
19 circumstances at this site.

20 That was the contention.

21 JUDGE BOLLWERK: I guess the problem I am having
22 is you're saying you raised this in an exercise contention.

23 Does that mean you sort of string things out here
24 and finally when the exercise comes along and you're back to
25 an assertion you should have made when you were challenging

1 the plan?

2 MR. TRAFICONTE: Of course, Your Honors, we
3 disagree on whether we challenged the 20 percent planning
4 basis in the New Hampshire proceeding so let's start with
5 that.

6 We -- I am here arguing within the constraints of
7 what the Board found in ALAB-924.

8 We are trying to get review of ALAB-924 in that
9 regard so that is not -- we have to take that as a given,
10 but what the Board found was we hadn't -- or at least SAPL
11 had not raised the issue of the adequacy of the 20 percent
12 planning basis in the New Hampshire proceeding. Fine.
13 That's a given.

14 Now the question is -- we clearly raised it both
15 as to New Hampshire and as to the utility plan as it arose
16 out of an exercise. That's why you held an exercise, to see
17 if it would throw up a fundamental flaw. We alleged it.

18 Now it is res judicata.

19 Therefore, imagine and try to understand how this
20 could work. You have an opportunity to litigate the plan.
21 You did not litigate something you could have litigated, the
22 New Hampshire plan.

23 Then you hold an exercise to see whether there is
24 a fundamental flaw.

25 JUDGE BOLLWERK: But what you also had an

1 opportunity to litigate was the Massachusetts plan and I
2 guess from what you are telling me here you didn't raise it
3 with respect to the Massachusetts plan but you raised it
4 with respect to the exercise.

5 MR. TRAFICONTE: No. That is not what I am
6 telling you. The brief makes clear that in Mass. AG
7 Contention 65, submitted in April of '88, we also raised as
8 a plan issue challenging the utility plan alone, we said
9 there was not adequate monitoring centers because of the
10 large number of people on the beaches who were actually not
11 get out in time and therefore would need decontamination and
12 monitoring.

13 JUDGE BOLLWERK: And that was your only basis?
14 You didn't have the basis where you tried to propose, as you
15 did with the exercise, some kind of a scenario where so many
16 people were being exposed to radiation given the situation?

17 MR. TRAFICONTE: Well, you said the only basis.
18 The basis was that the site-specific characteristics -- I
19 mean I don't have that Contention 65 in my mind at the
20 moment -- but let me put it this way. You read the
21 contention in the basis and you look at what ALAB-905 says
22 about the site-specific characteristics that might impact on
23 a planning basis and we -- obviously some seven months
24 before ALAB-905 issued we put in that as our basis, that
25 there were site-specific characteristics that required an

1 examination of the planning basis.

2 We did that as to the utility plan.

3 Now to go back to my other point, we then did it
4 as to both New Hampshire and Massachusetts regarding the
5 exercise but I just for the life of me cannot understand why
6 we were not free as part of exercise litigation to challenge
7 something that for whatever reason, whether it was lawyer
8 malfeasance or nonfeasance, that for whatever reason was not
9 adequately presented in the plan case.

10 We can do that as long as the exercise throws it
11 up as a fundamental flaw. That is exactly what it did and
12 that is what we alleged and it did -- the licensing board
13 agreed that that was what we alleged.

14 JUDGE ROSENTHAL: The exercise itself, your
15 allegation was, reflected demographic and/or meteorological
16 conditions that were not previously known that had an impact
17 upon what percentage of the population would go to a
18 monitoring center?

19 MR. TRAFICONTE: The exercise had a particular
20 accident; it had a particular accident speed, an unfolding
21 speed; it had meteorological assumptions built in it; it has
22 weather assumptions regarding beach populations. It was a
23 specific example of an accident that we alleged, as modeled,
24 would have led more than 20 percent of the population
25 present at the time to seek monitoring. This was a

1 challenge we made to the planning basis because we believed
2 that the exercise demonstrated the inadequacy of the
3 planning basis.

4 JUDGE ROSENTHAL: Because of assumptions that the
5 exercise makes with respect to meteorological and
6 demographic conditions?

7 MR. TRAFICONTE: Well, in part, meteorological and
8 in part, accident characteristics; in part, demographics,
9 i.e., wintertime would have very different demographics than
10 summertime.

11 JUDGE ROSENTHAL: I don't follow this at all. I
12 would have thought that the demographics of your EPZ would
13 have been known well before any exercise. They're there;
14 where the people are located. That isn't something that
15 grows out of an exercise. I wouldn't have thought that the
16 meteorological conditions have grown out of an exercise
17 either.

18 I would have thought that the weather bureau or
19 whatever it is, would have been in a position to advise
20 anybody as to what the meteorological conditions in a
21 particular geographic area in the United States are.

22 MR. TRAFICONTE: Well, meteorological conditions
23 change, Your Honor, and the point is --

24 JUDGE ROSENTHAL: But how does the exercise --

25 MR. TRAFICONTE: Because it blows the plume in one

1 direction or another; it blows the plume at a certain speed
2 in one direction or another, thereby catching people who
3 would otherwise not be caught.

4 JUDGE BOLLWERK: Why can't those same sorts of
5 assumptions be part of your basis for your challenge to the
6 plan which you could have done in the first instance. Why
7 wait for the exercise to have to do that?

8 MR. TRAFICONTE: Well, I already indicated that if
9 you read Mag 65, we think we did challenge, in general, the
10 site-specific characteristics of Seabrook. We challenged
11 the adequacy of the 20 percent basis.

12 I want to make an additional point which I think
13 is behind the Board's questions to me on this issue. There
14 is no obligation, unless I'm misreading something. We had
15 no obligation, nor did SAPL have any obligation to
16 specifically challenge the FEMA 20 percent claim basis,
17 based on the Krimm memorandum.

18 There was no obligation on our part to do that.
19 We may have had an obligation to challenge whether or not
20 the New Hampshire plan meets the 20 percent planning basis.
21 I agree that had we failed to challenge whether or not the
22 plan meets the 20 percent planning basis, that might have
23 preclusive effect.

24 But that's a very different logical order than
25 arguing that we were obligated to make the claim that the

1 FEMA planning basis was not legitimate. We were under no
2 obligation to challenge that. The reason why we were under
3 no obligation to challenge that in New Hampshire, was
4 because that wasn't part of the New Hampshire plan.

5 That was a FEMA proposition. This Court has ruled
6 that SAPL did not challenge it. Okay. SAPL, as a matter of
7 law, is now held now to have changed it, but we were under
8 no obligation to challenge the FEMA 20 percent planning
9 basis. Therefore, since we had no obligation to challenge
10 it, --

11 JUDGE BOLLWERK: The 20 percent planning basis was
12 incorporated into the plan. That's what the planners used.
13 I mean, when they incorporated it, then it strikes me that
14 you had an obligation to come forward and say it was wrong.
15 You can't say it was outside of the plan, simply because it
16 belonged to FEMA.

17 They took it and used it as part of their planning
18 basis.

19 MR. TRAFICONTE: We were under no obligation to
20 challenge FEMA's support for it, which is precisely what the
21 ALAB-905 dealt with. In any event, we don't see how we were
22 obligated or any party in the New Hampshire proceeding was
23 obligated to challenge the 20 percent planning basis, based
24 on the FEMA policy. Therefore, we don't think that the fact
25 that it's been held that we didn't challenge it, somehow has

1 claimed preclusive effect, first of all, on the utility plan
2 case, and secondly, on the exercise case, where we think the
3 facts that came out of the exercise threw up that issue a
4 second time.

5 JUDGE WILBER: On the monitoring, you claim that
6 the Board erred when it didn't accept your 40 percent of the
7 total beach population being from Massachusetts?

8 MR. TRAFICONTE: Yes.

9 JUDGE WILBER: Do you know how that number
10 compares with the number you used on the New Hampshire plan?

11 MR. TRAFICONTE: Could you repeat that question?

12 JUDGE WILBER: Yes. You claim that 40 percent of
13 the beach population comes from Massachusetts. That's what
14 I gather from your brief on page 85.

15 MR. TRAFICONTE: That 40 percent of the total
16 beach population should be allocated to Massachusetts, yes.

17 JUDGE WILBER: Okay, now, my question is; is that
18 consistent with what you argued?

19 MR. TRAFICONTE: Yes. I understand the question.

20 JUDGE WILBER: Do you understand the question?

21 MR. TRAFICONTE: I do.

22 JUDGE WILBER: I think you said there were some
23 38,000 vehicles -- I'm talking about your New Hampshire case
24 now.

25 MR. TRAFICONTE: Yes.

1 JUDGE WILBER: Of that, you said X vehicles were
2 from the New Hampshire beaches and Y were from
3 Massachusetts. Now, is this percentage the same as that?

4 MR. TRAFICONTE: Yes, but I don't think we argued
5 a percentage. We didn't argue over a figure in New
6 Hampshire allocating these people.

7 JUDGE WILBER: But you gave the numbers.

8 MR. TRAFICONTE: Yes, it was in our New Hampshire
9 brief that we filed with the Board, and the two numbers are
10 consistent.

11 JUDGE WILBER: How close should they be to be
12 consistent?

13 MR. TRAFICONTE: How close should they be? You
14 mean, that's a legal question, a practical question?

15 JUDGE WILBER: I mean, is 39 percent in New
16 Hampshire; is that good?

17 MR. TRAFICONTE: Yes.

18 JUDGE WILBER: Thirty percent and 40 percent; is
19 that a good number?

20 MR. TRAFICONTE: I think that within a percent --

21 JUDGE WILBER: If I've done the calculations
22 correctly, they are not the same numbers. I'm just curious
23 to know if this is an error, or if it's a change in your
24 numbers of what the source of it is.

25 MR. TRAFICONTE: May I just confer for one moment,

1 Your Honor?

2 JUDGE WILBER: Yes.

3 [Counsel for Intervenor conferring off the
4 record.]

5 MR. TRAFICONTE: Your Honor, I believe that we
6 argued somewhere in the range of 39 percent was
7 Massachusetts' population and we briefed this issue earlier,
8 so we don't see any inconsistency.

9 JUDGE WILBER: You said that in the New Hampshire
10 argument, you came up with the number of 39 percent?

11 MR. TRAFICONTE: That's our view. That will be
12 subject to a check of the numbers, but that's what we
13 believe we did, yes.

14 Now, I'd like to very briefly touch on an argument
15 concerning contentions again that -- this time, they were
16 admitted and the testimony was filed and the cross
17 examination took place. In my view, a fundamental flaw was
18 disclosed in the on-site plan, and then the Licensing Board
19 simply struck the contentions after the fact, after the
20 cross examination and after the testimony, based on its
21 narrow reading of the actual language of the contention.

2 I am specifically referring to MAG Exercise
23 Contention No. 19 which incorporated MAG Exercise Contention
24 No. 11. We think that a fair reading of those two
25 contentions makes crystal clear, as it was clear to the

1 parties, that the gravamen of exercise Contention 19 was a
2 challenge to the decision criteria in the on-site plan.

3 That's why people filed testimony and that was the
4 thrust of my cross examination of staff witnesses, and we
5 believe, in fact, that a fundamental flaw in the on-site
6 plan's criteria for beach closings was revealed during the
7 hearings. Then, the Board simply, on motion, excluded the
8 issue on the basis that it had not been properly presented.
9 We just think that is completely and totally irrational.

10 Now, I have not a lot of time left.

11 JUDGE BOLLWERK: You have zero time left. You
12 have 35 minutes left for rebuttal. Do you want to take
13 another five minutes from that?

14 MR. TRAFICONTE: I keep chipping away at my
15 rebuttal, but I'll take five minutes to address the
16 application of the new rule.

17 Now, for the most part, we stand on the brief that
18 we submitted on this matter. After careful review of the
19 briefs submitted by the Applicants and the Staff, I found
20 very little that I would be able to say would argue the
21 claims and the arguments made in the brief, but I would like
22 to spend a few moments talking about FEMA.

23 In our view -- and I want to basically reiterate
24 what we said in the brief on this point -- but in our view,
25 there is not regulatory basis for assigning a rebuttable

1 presumption to a FEMA review of a utility plan. The
2 regulation simply does not say that.

3 I know of no earlier occasion when this issue had
4 been presented and I don't believe this issue was ever
5 presented in the Shoreham proceeding; therefore, I don't
6 think there's a holding on point.

7 JUDGE BOLLWERK: Wasn't FEMA's position at one
8 point that they couldn't review a utility plan? I take it
9 that position has changed now. Wasn't that part of the
10 problem?

11 MR. TRAFICONTE: Well, their position was that if
12 they reviewed a utility plan, it would be just -- any
13 finding they would make about reasonable assurance would be
14 speculative. Now, I'd rather leave it to the record to
15 answer the question of whether the finding they have made in
16 this case is speculative.

17 I believe they were right. I believe they were
18 right in 1987. In April of that year, they filed comments
19 on the then proposed utility rule and they said, look, we
20 wouldn't know how to do this because we're the expert
21 agency and we're here to tell you that in the absence of a
22 governmental plan, we don't know how we could make a finding
23 and conduct an evaluation.

24 In my view, it was exactly that reason why the
25 Commission consciously and intentionally omitted FEMA from

1 C-1 and provided no role for FEMA -- at least no regulatory
2 role. We made this argument repeatedly below. We've argued
3 again and again that the FEMA presumptions should not have
4 attached, and we can't understand on what basis the
5 Licensing Board made the ruling that the FEMA finding does
6 deserve a rebuttable presumption under the regulation.

7 Beyond that, I would just comment that it is
8 simply beyond me, how the Licensing Board could grant a
9 rebuttable presumption to FEMA when it's transparent on the
10 record that in New Hampshire, FEMA thought and FEMA's
11 judgment was that planning was not adequate, and in light of
12 the Licensing Board's own determination, the FEMA position
13 changed.

14 Well, that may or may not be appropriate, but what
15 seems to be completely inappropriate is that now that FEMA
16 has come around and adopted the Licensing Board's view of
17 what adequate planning is, seems completely inappropriate
18 when FEMA then, a year later, stands up on the utility plan
19 and says, yes, we're here to tell you that this matches your
20 regulations as you've chosen to interpret them.

21 It seems completely inappropriate for the
22 Licensing Board to assign to that Agency which is simply
23 conforming its own expertise to the Licensing Board's
24 rulings -- it seems completely inappropriate for the
25 Licensing Board to assign that a rebuttable presumption.

1 That's like assigning a rebuttable presumption to yourself.

2 Again, I'm at a loss to see how one can get out of
3 that circularity, particularly in a situation where the
4 regulation indicates --has no indication that FEMA's
5 findings are to be given presumptive weight.

6 JUDGE BOLLWERK: Assuming the regulation is
7 deficient, is there anything wrong in assuming that FEMA is
8 making the usual review of the plan? Is there anything
9 wrong with the Licensing Board assigning that presumption in
10 its adjudicatory authority, rather than having to do it
11 through a rulemaking?

12 MR. TRAFICONTE: Yes, it's a rulemaking. Yes, it
13 is a rulemaking and, indeed, had you given the opportunity
14 and had the evidence we tried to submit as to the bases for
15 FEMA's opposition in April of '87 to the utility rule; had
16 we been given the opportunity to put that into the record,
17 the serious concerns that FEMA expressed at high levels of
18 its Agency in 1987 to the Commission, would be in the
19 evidentiary record, and I'd be able to answer your question
20 by saying, yes, I'll tell you why FEMA should not have been
21 given, as a practical matter, a rebuttable presumption;
22 because the Agency at very high levels said in '87 to the
23 Commission that it couldn't make anything but a speculative
24 judgment about a utility plan.

25 So, yes, absolutely, it was an error. It was not

1 rooted in the regulations and it's not in the regulations
2 for a very real and meaningful historical reason and for the
3 Licensing Board simply to assign the rebuttable presumption
4 and then to exclude our -- they just excluded any effort we
5 made to put in evidence as to why FEMA believed it was not
6 appropriate for it to judge utility plans. Those citations
7 are set forth in the brief.

8 JUDGE BOLLWERK: Are you saying that it's proper
9 to create a rebuttable presumption, other than a rulemaking?

10 MR. TRAFICONTE: No, I am not.

11 JUDGE BOLLWERK: Are you simply saying it is
12 improper in this instance?

13 MR. TRAFICONTE: It is improper; it is a
14 rulemaking. We had a rulemaking. The Commission, in that
15 rulemaking, by express omission, did not give a rebuttable
16 presumption to FEMA's finding. It did not do that for the
17 obvious reason that FEMA was on record in April of '87 for
18 saying it was not a good idea for it to review utility plans
19 and that such a review would be speculation. That's a fact.
20 Those are historical facts.

21 For a licensing board to nonetheless, in the
22 absence of a regulation and in light of that history, say,
23 yes, we're going to assign a rebuttable presumption to FEMA
24 and then exclude the Mass AG's efforts to challenge by
25 evidence, FEMA's earlier position, is completely irrational.

1 Thank you.

2 JUDGE BOLLWERK: Good morning, Mr. McEachern.

3 ORAL ARGUMENT BY MR. MCEACHERN, ON BEHALF OF

4 INTERVENOR TOWN OF HAMPTON

5 MR. MCEACHERN: Good morning, Mr. Chairman. Mr.
6 Chairman, members of the Board, my name for the record is
7 Paul McEachern. I represent the inhabitants of the Town of
8 Hampton, New Hampshire.

9 I'd like to say at the outset it's been an honor
10 for me to appear before this Board. This is, I'm sure, my
11 last time, and it's been an honor to have been associated
12 with such learned counsel on both sides. At my age, it's
13 hard to be impressed, but I have been impressed.

14 It's always a pleasure to come before this Board,
15 which is sort of an oasis in this agency, what, in my view,
16 based on my experience with the agency, is an advocate
17 agency, that this Board has represented some allegiance to
18 the rule of law, and I appreciate that.

19 I'm here to argue an exercise contention to the
20 June, 1988 exercise. At the outset, I might say that if the
21 operation of this plant reflects the complexity of these
22 proceedings, we're all safe because it's never really going
23 to get working.

24 The scope of the proceedings in the June, 1988
25 exercise we say were insufficient as a matter of law. The

1 regulation which measures the full participation exercise is
2 really a three-pronged test. That's basically to test,
3 mobilize, and verify. To test the major observable portions
4 of the plant; to mobilize sufficient numbers of personnel so
5 that you can verify the capability of those personnel to
6 respond to the accident.

7 Specifically, I'm going to argue in my brief
8 moments that it was inadequate in the area of schools,
9 inadequate in the area of transportation, and inadequate in
10 the area of traffic.

11 I might add that in ALAB-900 at page 296, you
12 placed the burden of proof upon the applicant in this case,
13 not upon the Town of Hampton, who is challenging the scope,
14 but upon the applicant to show that they have met the
15 standard expressed in the regulations.

16 JUDGE ROSENTHAL: In the area of school
17 participation, you would take the position that there was
18 inadequate participation on the part of school officials,
19 teachers, etcetera, in this exercise. What, in your
20 judgment, would have constituted an adequate participation?

21 MR. McEACHERN: I would say that you have to use
22 some common sense test. You just can't call a school and
23 say, "There's a test going on. What's going on at the
24 school?" You've got to have a fair enough sampling. In
25 this case, out of 113 schools in the district, 35 public, 78

1 private, two of those schools were even called. The 17
2 towns in the EPZ each have their own emergency response
3 plan, and just to call two out of 113 is clearly inadequate.

4 Now, if they had called 50, and showed what
5 deficiencies existed -- and we've always been told that this
6 is a dynamic process --

7 JUDGE WILBER: Where would these deficiencies have
8 been -- where would you have expected the deficiencies? In
9 the calling or in the reception of the calls?

10 MR. MCEACHERN: Well, in what was said and what
11 they decided to do. The applicant chose to conduct a test
12 when school was out, and I think it places a higher burden
13 on them to show that you've got an adequate response system
14 in place for school population in those circumstances than
15 if they chose a date when schools were in session, because
16 clearly, you can find out more if a school is in session
17 than you can by calling up the secretary who happens to be
18 manning the phone when they're not in session.

19 JUDGE ROSENTHAL: Would you have required the
20 teachers being actually involved in the exercise?

21 MR. MCEACHERN: Well, we know that teachers chose
22 not to participate in the New Hampshire plan, and there
23 should be some default mechanism for that in the plan to
24 show that it's adequate in that exercise. I'm not going to
25 suggest to them how to do it, but they've got to show that

1 they have a plan that's going to work, or that might work.
2 But what they've shown is absolutely nothing, and they've
3 showed that they're almost afraid to exercise this plan
4 because they didn't. This was not an exercise. It wasn't
5 just deficient; it just wasn't an exercise.

6 Now, how did the Licensing Board handle this?
7 They handled it in two ways. First, they eviscerated the
8 standard, and the standard comes from ALAB-900, and the
9 Licensing Board said this of the standard expressed in that
10 case, at Section 1262, quoting, "They . . ." referring to
11 the Intervenors ". . . again rest their argument on the
12 rulings in ALAB-900 which interpreted the requirements of 10
13 CFR Part 50, Appendix E, IV, F1 in light of the 1986
14 Shoreham exercise. We do not find ALAB-900 to be the
15 guiding light in the case before us. The glaring
16 deficiencies in the Shoreham exercise that ALAB-900
17 addressed are simply not present in the Seabrook exercise."
18 Well, they found a factual distinction in Shoreham. It was
19 one out of 48 schools that were called, and that was ruled
20 by you to be deficient. In Seabrook, it was two out 113.

21 So, they threw out the standard, first of all.
22 What did they substitute for the standard? Well, I submit,
23 Your Honors, that they substituted what I'd like to call,
24 instead of a guiding light, a black hole; that they
25 substituted what I'd like to call the Prince William Sound

1 Standard, which we've seen a lot about recently.

2 At Section 12.89, they enunciate that standard,
3 and they say, "Bus drivers, as with teachers and ambulance
4 drivers, do not have to be tested in what they do
5 professionally. It is reasonable to assume that they will
6 do their job." That's the Prince William Sound Standard.
7 They're saying, "Why have a test at all because they're
8 going to do their job," so that all of this is meaningless.

9 Once you enunciate that standard that the
10 Licensing Board enunciated, everything else is meaningless
11 because you don't need a test, because you're not testing
12 the general public. They're not required to participate.
13 You're testing the professionals, the school teachers, the
14 bus drivers, the traffic control points.

15 Interestingly enough, on the bus drivers, we took,
16 during this proceeding, the deposition of a man, Mr.
17 Guidagna of the National School Bus Transportation Company
18 in North Chelmsford, Mass., who was one of the providers of
19 buses, and he told us that his bus drivers didn't even know
20 that there were going to be emergency bus drivers for
21 Seabrook. In many cases, in most cases, they were part-
22 time, housewives, mothers, who drove school buses in the
23 afternoon. Didn't know where, to his knowledge, Seabrook
24 even was, and yet they were expected to participate.

25 So, what did the exercise test on bus drivers?

1 Well, they contracted, I guess, three companies out of 18
2 ahead of time to supply some buses so they could have a show
3 and tell. But they didn't actually try to incorporate the
4 professionals, the bus driving companies into a meaningful
5 exercise.

6 JUDGE BOLLWERK: The Licensing Board decision does
7 say that a representation of vehicles for schools was
8 actually deployed from transportation staging areas and the
9 vehicles traversed the bus routes. What else would you have
10 them do?

11 MR. McEACHERN: Well, they were contracted ahead
12 of time to be there. Ten out of the 18 bus companies
13 refused even to participate. Two out of the 18, they
14 couldn't even reach. So that it's just not an exercise to
15 hire some bus drivers ahead of time to come in and do
16 certain tasks.

17 I think a meaningful exercise has to be, sure,
18 notify them ahead of time that there's going to be a test,
19 but say, "Okay. Now, on the day of the test, we're calling
20 you, and how many bus drivers can you mobilize?" None of
21 that information was even elicited. We don't know from this
22 examine, and, of course, we don't need to know because they
23 are assumed to do their job under the standard provided you
24 by the Licensing Board.

25 Lastly, on traffic control points, there were two

1 traffic control points manned, none of them at Hampton
2 Beach. No one was sent to Hampton Beach during this
3 exercise. All this time we've been down here we've shown
4 you videos of the traffic jams at Hampton Beach and it's
5 assumed, assumed that it's going to work without a test.
6 Well, I don't think so. We can only hope that there will
7 never been an accident.

8 If there's never an accident at Seabrook, what we
9 do here is virtually meaningless because history's going to
10 ignore it. That's my hope. But if there ever is an
11 accident, everything that's been done in this proceeding is
12 going to be scrutinized with a magnifying glass and it's
13 going to be found lacking on this basis. We feel, and we've
14 submitted and argued in our brief, that this scope is just
15 fundamentally flawed, and it's not our burden to show that
16 it's fundamentally flawed.

17 JUDGE ROSENTHAL: Let me ask you a question in
18 that regard. I was looking at the Town of Hampton Coalition
19 statements that were set forth in the footnote on page 8 of
20 your brief, where you were talking about the deficiencies in
21 the exercise, and you end up with the statement that these
22 deficiencies represent a fundamental flaw in the plan. Did
23 you mean a fundamental flaw in the plan, or did you mean a
24 fundamental flaw in the exercise, and I ask that question
25 because I'm interested in your position as to whether a

1 fundamental flaw formulation applies to the plan as written,
2 as opposed to simply the plan as implemented to the
3 exercise.

4 MR. MCEACHERN: Well, I probably meant both, but
5 it should have been to the exercise.

6 JUDGE ROSENTHAL: But, now do you agree that the
7 fundamental flaw test is the one that applies to the plan
8 itself. In other words, that in order to find that the
9 plan, as written, is deficient, we must find that there's a
10 fundamental flaw in it.

11 MR. MCEACHERN: No, I don't. It's a
12 reasonableness test for the plan. A reasonable assurance,
13 and I don't, you know, I wouldn't give us a higher burden
14 than that and, in fact, the fundamental flaw burden of proof
15 to get beyond that is on the applicant, not on us. Their
16 briefs have all said, well, we haven't proven that there's a
17 fundamental flaw. That's a reversal, as much in this Agency
18 -- you know, seems, up is down, long and short -- and that's
19 a reversal by the Licensing Board and by the parties on the
20 other side. Our contention is that the exercise that was
21 carried out demonstrated almost a pervasive fear on the part
22 of the applicants. If they got anybody involved in the
23 exercise at all, it was going to show to the whole world
24 that it didn't work. So they chose not to get anybody
25 involved.

1 JUDGE ROSENTHAL: Your position, basically, is
2 that the exercise is fundamentally flawed.

3 MR. MCEACHERN: It is fundamentally flawed.

4 JUDGE ROSENTHAL: Rather than the plan itself, in
5 this respect.

6 JUDGE WILBER: One question: you mentioned that
7 there were no state police at Hampton, I believe you said.

8 MR. MCEACHERN: That's right.

9 JUDGE WILBER: Is this true of all the other
10 beaches? Or is it only Hampton Beach?

11 MR. MCEACHERN: The traffic, the one traffic
12 control point was in Hampton, away from the beach. Nobody
13 at any of the beaches.

14 JUDGE WILBER: All right. Thank you.

15 MR. MCEACHERN: Thank you very much. It's been a
16 pleasure.

17 JUDGE BOLLWERK: We'll take a 5 minute recess
18 before we start with Mr. Dignan's argument.

19 MR. DIGNAN: Mr. Chairman, I was going to
20 respectfully request that there be a somewhat longer recess.
21 I do think it will facilitate the argument. I have here a
22 book in which i have covered essentially all the points that
23 I'd like to be raised. If I could have a longer recess I
24 can pull out what actually raised that would facilitate the
25 oral argument.

1 JUDGE BOLLWERK: How long do you think you'll be?

2 MR. DIGNAN: I'd like 15 minutes if I might. And
3 I secondly wish to advise the Board respectfully that that
4 first argument you heard, in my judgment, simply was not
5 before you today in the Board's order, and I did not come
6 down here to argue that first point, and therefore I will
7 operate on the principal that I will not respond to that
8 argument. I, of course, will respond to any question the
9 Board might have to it, but I do not believe it's properly
10 argued before you in terms of your order. And therefore, I
11 wish the Board could be advised of that so that I surprising
12 anybody.

13 JUDGE BOLLWERK: The one thing I would say, I may
14 well have some questions on the context of the motion that
15 was filed to clarify the status of the appeal and some of
16 the response you made to that. That would be one thing I
17 may have some questions on.

18 MR. DIGNAN: And I must confess, I will do the
19 best I can with it. I did not come down here prepared to
20 argue that motion either. I deemed that that had been
21 submitted on the papers and it was my understanding that it
22 wasn't up for oral argument.

23 JUDGE BOLLWERK: All right. We'll take a 15
24 minute recess.

25 [Recess.]

1 JUDGE BOLLWERK: We are ready, if you are, Mr.
2 Dignan.

3 ORAL ARGUMENT BY MR. DIGNAN, ON BEHALF OF
4 APPLICANTS

5 MR. DIGNAN: Mr. Chairman, and Members of the
6 Board, it is my privilege at this time to present the
7 argument on behalf of the Applicants in this matter.

8 I should like to begin by addressing the matters
9 specifically addressed by my learned friend from the
10 Commonwealth in his oral argument, arising out of the
11 decisions before you today.

12 The first is the shelter argument. And the first
13 argument, as I understand it, was that both the Applicants
14 and the Staff had taken the position that the shelter
15 argument turned on whether or not the emergency planning
16 rule was second-tier. And I beg to differ with my learned
17 friend. In my brief, at least, one will find that what I
18 argued was that the regulation itself simply cannot be read
19 as requiring that either every individual or every
20 discernible group of individuals has to have a range of
21 protective measures. And indeed, I think the Commission, it
22 is true, simply said it was reasonable, but I think the
23 Commission has adopted that point of view in CLI 90-03 quite
24 clearly, at Page 50.

25 I did want to clear up two things that went on in

1 the colloquy between the Board and counsel during that
2 argument. What the Chairman read from the plan is correct,
3 and it is in the plan. I did want Judge Wilber to
4 understand that that portion that he read to Mr. Traficonte,
5 I am advised is no longer in the plan.

6 JUDGE WILBER: It is in the same paragraph.

7 MR. DIGNAN: It is probably in the same paragraph
8 in the version that you have, but in the present version,
9 all that is left is what the Chairman read. And I just
10 didn't want there to be any misunderstanding about that.

11 JUDGE WILBER: Can you tell me what the revision
12 or amendment, whatever you are accounting --

13 MR. DIGNAN: Well, the amendment that is current
14 is Amendment 6, and the revision could be that Revision
15 Zero. I don't know if anybody can pull it straight, but I
16 would be glad to advise the Board of that subsequently.

17 JUDGE WILBER: Has this been served on the Board?
18 I'm asking because it is rather a large volume.

19 MR. DIGNAN: It should have been served on the
20 Board. And what I will do is come back, if you don't mind,
21 in writing, precisely with the amendment and the change.
22 I'm unable to do it on the facilities I have in this room.
23 I just didn't want to leave an improper impression as to the
24 contents of the plan.

25 The sheltering plan, in other words, while it is

1 not termed shelter-in-place in Massachusetts, I think that
2 the different terminologies may, but it is the same concept
3 throughout the Massachusetts region. And what the Chairman
4 read is in the plan, and the sheltering, and we are the
5 first to agree that it is a very unlikely alternative, but
6 the alternative is there, and it is a shelter, essentially a
7 shelter-in-place concept as that term is used in New
8 Hampshire.

9 JUDGE ROSENTHAL: What does shelter-in-place mean
10 in the context of individuals on a beach? They dig a big
11 hole in the sand and dive in?

12 MR. DIGNAN: It means if they don't have access to
13 a shelter they get in a car and leave. That's what it
14 means.

15 JUDGE ROSENTHAL: That's not shelter at all.

16 MR. DIGNAN: It is sheltering to the point of
17 getting in the car, and it is not sheltering at all if you
18 view it that way. But that is the sheltering concept. This
19 comes off, I'm sure as the Board is aware, I obviously
20 respectfully, as was evident from my petition to the
21 Commission, disagree with the finding you made on the New
22 Hampshire side of the case with respect to sheltering,
23 because I do think, respectfully, the Board did misconceive
24 it. The sheltering that was put in, the standard which you
25 wished adopted, or the implementing detail for everybody,

1 was not part of sheltering. It was part of evacuation.
2 Because when you ordered evacuation, there were certain
3 individuals who would have to wait for the bus, a provision
4 was made to shelter them while they waited for the bus. But
5 that was not a sheltering plan. That was a part of an
6 evacuation plan. Now, I understand that has been decided
7 and not open for litigation. But it is the same concept on
8 the Massachusetts side.

9 JUDGE BOLLWERK: It sounds like what you are
10 saying is the instructions to the beach population to go to
11 a shelter have been taken out --

12 MR. DIGNAN: That is correct.

13 JUDGE BOLLWERK: -- to take shelter in the nearest
14 indoor public location.

15 MR. DIGNAN: That is correct. That is my
16 understanding, Your Honor.

17 JUDGE BOLLWERK: I guess what you are telling us
18 is that is also not the plan in New Hampshire. Is that
19 correct? These are now the same?

20 MR. DIGNAN: My understanding is they are close to
21 the same. Whether the wording is the same, I just, I can't
22 --

23 JUDGE BOLLWERK: Well, I guess the question is,
24 what are the beach population told to do? Are they told to
25 go into a shelter or are they told to go to their car?

1 MR. DIGNAN: They are told that sheltering in all
2 of New Hampshire, everywhere in New Hampshire, and
3 everywhere in Massachusetts, is shelter in place. And that
4 means that the instruction will be, if you have access to a
5 shelter, go to it, and if you don't have access to a
6 shelter, get in a car.

7 JUDGE BOLLWERK: Well, that is sort of an
8 ambiguous instruction. I mean, in theory, there are
9 buildings away from the beach. Are they being told to go to
10 these buildings; or are they being told to go to their car?

11 MR. DIGNAN: Well, now you are getting into -- The
12 EBS message I am sure will be worded correctly to make clear
13 what they are to do. This is a lawyer's version.

14 JUDGE BOLLWERK: Right.

15 MR. DIGNAN: But the message should be clear and
16 should instruct people so that they know what they are to
17 do. If somebody, for example, as I understand it, if
18 somebody happens to be eating in McDonald's, next to the
19 beach, they will stay in McDonald's.

20 JUDGE BOLLWERK: Right.

21 MR. DIGNAN: And so forth and so on. I presume if
22 you get the message, and you are walking by McDonald's, and
23 McDonald's is open, you would walk into McDonald's. But I
24 also assume --

25 JUDGE BOLLWERK: If I am standing on the beach,

1 what do I do?

2 MR. DIGNAN: As I say, I think the message
3 hopefully will clarify it for you, and if I am standing, if
4 you and I are standing on the beach together and you have a
5 cottage nearby, I assume that is where we will repair to.
6 If I, Tom Dignan, with a home in Sudbury, happen to be at
7 the beach that day and don't know anyone else on the beach,
8 I guess I will get in my car.

9 JUDGE ROSENTHAL: Or go to the McDonald's.

10 MR. DIGNAN: Or go to the McDonald's.

11 JUDGE BOLLWERK: I guess that would go back to the
12 same question. Are you told to go to your car or go to
13 McDonald's.

14 MR. DIGNAN: Well, the EBS message, obviously you
15 can't have an EBS message, it seems to me, and I really
16 don't want to -- EBS is one of the things that is not
17 appealed here -- but my point is this, Your Honor, because I
18 think it illustrates it. Obviously, you can't put over that
19 siren, all you guys go to McDonald's. I mean, McDonald's is
20 going to fill up. The message has to cut it somewhere in
21 between and try to be as clear as possible, and rely, which
22 is one of the problems in this case, that I respectfully
23 suggest is the constant theme with the Intervenors. No one
24 wants to rely on the concept that the public has some common
25 sense, and when the public is told in a message that this is

1 a situation where you should either, if you have access to a
2 shelter, take it; if you don't, get in your car, I think
3 most people will apply common sense, and if they see a
4 McDonald's, they will walk in. If they are way down on the
5 beach and they don't see anyplace near them except maybe one
6 private home and it looks locked up, they will go to their
7 car.

8 You know, there comes a point at which you have to
9 rely on the fact that people use their common sense. Now,
10 the message-writing problem is a different problem, and not
11 on appeal here. But the message will be clear and will
12 reflect that basic philosophy.

13 JUDGE BOLLWERK: Well, we could guess that the
14 message-writing problem goes directly to the issue of
15 implementation. If people are told to go to their car, that
16 takes no implementation. Anybody can go to their car, open
17 the door and get in, without any implementation. If people
18 are directed to go into a shelter, then that takes some
19 implementation.

20 MR. DIGNAN: Not, if they are told, go to a
21 shelter if you have access to it. Because that means to me,
22 my common sense is, go to my home, if I have a cottage on
23 the beach. If I see a wide-open drugstore, walk in there.
24 It does not mean that I walk up and try to bang down a
25 locked door somewhere.

1 JUDGE WILBER: It sounds like you are telling them
2 to make a sheltering survey in the middle of an event.

3 MR. DIGNAN: No, I don't think we are asking them
4 to make a sheltering survey.

5 JUDGE WILBER: You are telling them to look around
6 for a shelter and go to it if they find it.

7 MR. DIGNAN: What else can we tell them?

8 JUDGE WILBER: Isn't that making a sheltering
9 survey?

10 MR. DIGNAN: Yes, but what else can we tell them?
11 How can you formulate something that tells everybody who is
12 randomly scattered on a beach precisely what shelter to go
13 to? I don't see how that can be done. The EBS message will
14 probably say, I would think it would say, go to a shelter,
15 and maybe they will add to it, this is the best kind of
16 shelter, if you see it available, and this is the next best.
17 I don't know what the planners do at that point. But I
18 don't know how you have an implementing detail of a precise
19 message that is going to instruct everybody on the beach, or
20 be meaningful to everybody on the beach, on precisely what
21 building to go to. What is being relied on, on both sides,
22 is the therapeutic community and the fact that people will
23 open their homes to people in this situation. And I think
24 that the evidence is pretty solid that that is precisely
25 what will happen, that in a disaster, the society comes

1 together and protects itself.

2 But I think, as I say, and I am very nervous that
3 what I am doing is arguing something which I fully
4 understand, and I respectfully disagree with the ruling, but
5 that you have ruled upon, and my forum is now the
6 Commission, it is not this Board.

7 JUDGE BOLLWERK: I would indicate in part on the
8 basis of representation you made to us at oral argument last
9 time.

10 MR. DIGNAN: Well, if that is true, all I can do
11 is deeply apologize, because I can assure you I certainly
12 didn't mean to mislead you in anything I said in an oral
13 argument, Your Honor. And if you would advise me as to how
14 I misrepresented something --

15 JUDGE BOLLWERK: We won't go into that. There are
16 a lot of things pending here. But go ahead and make your
17 argument.

18 MR. DIGNAN: Turning next to the 20 percent, I
19 think the colloquy between the Commonwealth and Judge
20 Rosenthal was most edifying. I pulled the hard copies of
21 Massachusetts EX 18B and Massachusetts Contention 65, which
22 is who they're relying on. Now, I simply can't find any
23 attempt on the basis of either of those contentions to try
24 to distinguish Massachusetts from New Hampshire in some way,
25 and with respect to the exercise contention, it is clear to

1 me that what it was was a challenge to the monitoring, not a
2 challenge to the 20 percent basis. So, therefore, insofar
3 as they're relying on these two contentions to say they even
4 raised the issue, it doesn't get it done.

5 JUDGE ROSENTHAL: Is there anything in the
6 exercise that conceivably have provided information as to
7 demographic or meteorological conditions in Massachusetts
8 that wouldn't have been previously known?

9 MR. DIGNAN: I can't see how it could. The
10 demographics of Massachusetts are the demographics of
11 Massachusetts, whether there's an exercise going on or
12 whether there isn't. The same with meteorology. More
13 importantly, the only thing I can see coming out of an
14 exercise, in an exercise challenge where the 20 percent rule
15 is correct would be to see what happened if you were
16 exercising the entire public, and you're not allowed to do
17 that anyway under the regulations. So, to say that a
18 challenge to the 20 percent basis, planning basis, can come
19 out of something that occurred at the exercise, I must
20 confess I simply cannot see it.

21 JUDGE ROSENTHAL: Now, are you telling me that
22 with respect to the Massachusetts court on the EPZ, they
23 didn't endeavor to challenge at all the 20 percent standard?
24 Clearly, we found that Sepal had not adequately raised the
25 issue with respect to New Hampshire. Now, the Licensing

1 Board has applied its determination with respect to New
2 Hampshire to the Massachusetts portion of the EPZ on res
3 judicata grounds, and as I suggested to Mr. Traficonte, not
4 that it necessarily makes any difference. It seems the law
5 of the case not res judicata, because this is one
6 proceeding. But, be that as it may, the argument in
7 Massachusetts is, look at folks, whether it was properly
8 raised with respect to the New Hampshire EPZ or not, it was
9 raised with respect to the Massachusetts, and so there can't
10 be really law of the case because there wasn't any
11 consideration on the merits of the issue of the 20 percent
12 standard in New Hampshire. It was thrown out for not having
13 been properly raised. Now, they say it was raised with
14 respect to the Massachusetts portion of the EPZ; now why is
15 that wrong?

16 MR. DIGNAN: They certainly, I don't believe, and
17 the contentions have to be read as they read them. As I
18 read 65 and 18B, they didn't raised, if that's what they're
19 relying on.

20 There is no doubt that in the course of oral
21 argument, or somehow with respect to that, the licensing
22 board deemed it to have been raised, because otherwise it
23 would not have been ruled upon, and I'm content to rely on
24 the licensing board ruling because another thing I don't
25 agree with as a premise of their argument is that they say

1 it wasn't raised in New Hampshire. It was raised in New
2 Hampshire and they lost it in New Hampshire. They keep
3 saying that it was never raised in New Hampshire. It was
4 raised, and it was lost, and it was lost because the --

5 JUDGE ROSENTHAL: They didn't attack the Krimm
6 memorandum. Isn't that why they lost it?

7 MR. DIGNAN: Well, what they didn't do is put any
8 evidence in as to why the Krimm memorandum was bad. They
9 said they didn't like the 20 percent basis, they asked some
10 cursory questions of a FEMA witness, and this Board
11 sustained the finding that that had not overcome the
12 presumption that attached to it.

13 JUDGE BOLLWERK: Now supposing that we were to
14 find that, with respect to Massachusetts, that they had put
15 forth some meteorological or demographic conditions that
16 might distinguish Massachusetts from New Hampshire. I
17 realize your position is they didn't do that. But let's
18 assume, hypothetically, that they did do that. Is that
19 enough to avoid a law of the case rule?

20 MR. DIGNAN: I am tempted in candor, Mr. Chairman,
21 to conceive that it would. I would like to make the
22 concession, however, with one caveat. A lot will depend, I
23 think, upon precisely what difference you find, or what they
24 pleaded. I can see it, if you find a very clear pleading
25 that things were different in Massachusetts, and for this

1 reason the 20 percent, it isn't fairly viewed as law of the
2 case or, a doctrine of repose should not apply, yes, that
3 would save it for them. And then I would be back to the
4 argument which I have made, and I'm sure you don't want to
5 hear again that whether the question of whether or not the
6 ALAB should hold up or not on reconsideration and that, I've
7 argued to the Board before, and I'm sure they don't want to
8 hear it again.

9 So I don't think it's a winner for them, if it is,
10 but I would agree with you that if you get satisfied that
11 they had actually pled a contention that -- and certainly
12 these two don't do it -- that set it up differently enough
13 on the facts to avoid the law of the case, then the law of
14 the case ruling's wrong. I'd have to concede that --
15 except insofar, and this is why I'm not happily conceding
16 and walking away from it, exactly what you find is
17 different.

18 The precise holding that is law of the case, as I
19 see it, is that the 20 percent planning basis is reasonable.
20 I mean, that's the precise factual holding one is dealing
21 with, a reasonable basis on which to plan for a nuclear
22 power plant. And that's why I say, you know, some little,
23 small gimmick doesn't get you there. You've got a get a
24 reasonable finding, what I deem as a reasonable finding and
25 therefore some showing, for example, that there was a MET

1 tower that they had pled, which they didn't. A MET power
2 located in Massachusetts showed a little bit of deviation
3 from the beach a hundred yards up, I don't think, would get
4 it done for them. They'd have to have something
5 substantial.

6 JUDGE BOLLWERK: But you say it has to be a
7 significant difference in either demography or
8 meteorological conditions or something else that --

9 MR. DIGNAN: That would affect only the territory
10 and the Commonwealth of Massachusetts, and not New
11 Hampshire, and therefore would affect the --

12 JUDGE BOLLWERK: Well, that would make
13 Massachusetts significantly different from New Hampshire.

14 MR. DIGNAN: Right, and result in a reasonable
15 view that that would vitiate the planning basis of how many
16 people would show up, and I think that's an awfully long
17 reach that I don't think they could make.

18 The third point that was gone into was this
19 business of MAG EX 19 and MAG EX 11 in the evidence. The
20 short answer to this, and I don't know that I can improve on
21 my brief, when you parse your way all the way through those
22 two contentions together, you come up with, they pled one
23 specific basis, and that was that METPAC was giving bad
24 information. And that's all they did. The testimony that
25 got excluded finally, and there was a lot of objection to

1 it, the testimony that finally got excluded was not relevant
2 to that issue, and what was left was the METPAC question,
3 and on that I think the record is clear -- even their own
4 witnesses testified -- that that model is one of the best
5 around, and therefore I just don't see that there's any
6 error been committed with respect to 19 and 11.

7 In addition, insofar as what the claim is, is that
8 the PARs generated were bad in the exercise. A separate
9 finding has been made that the PARs were adequate, so that
10 if there was error in that act of excluding the contention
11 and excluding the testimony, I submit that it was harmless
12 error insofar as an exclusion to the contention, because the
13 question of whether the PARs were good or not were fully
14 litigated.

15 With respect to the FEMA argument, I think that
16 the two prior decisions of this Board and the Commission
17 cite in our brief made it clear that FEMA can review a
18 utility plant, and at CLI 90-03, there's a footnote in which
19 the Commission says FEMA's conclusions are presumed to be
20 correct unless rebutted. So, again, whatever any demerits
21 of trying to get the Commission to change its mind on that,
22 I think the Commission has made a ruling that the utility
23 plant is reviewable by FEMA and it is to be accorded a
24 presumption.

25 JUDGE BOLLWERK: Do you consider this to be under

1 the regulation or as a matter of adjudicatory policy, or
2 however you want to term it?

3 MR. DIGNAN: I always assumed the Commission was
4 saying the regulations should be read as including it, but
5 I'm indifferent as to how they reach the result, as long as
6 they reach it. And it makes eminent good sense no matter
7 how you reach the result.

8 FEMA is the agency the President of the United
9 States designated as the lead agency here, and the whole
10 idea of the rebuttable presumption was to serve a purpose;
11 it was to pay the deference, a unique deference I might add,
12 in agency regulations to another agency. And whether you do
13 that by decision, and certainly a presumption can come into
14 the law by decision of an adjudicatory tribunal, as opposed
15 to rulemaking, it happens all the time. The common law
16 presumptions were all judge-made. Before we had rules of
17 evidence, we had common law judges' rulings as to what the
18 presumptions would be. So, whether it comes from a decision
19 of this Board or from the Commission, or comes from the
20 rulemaking, it's the law in this agency.

21 With respect to the scope argument of Mr.
22 McEachern I will be brief, but with respect to the schools,
23 in New Hampshire it must be remembered, the unit is called a
24 School Administrative Unit in the public schools. And I
25 believe the record will reflect, every single one of them

1 were contacted. The two schools he's talking about, I
2 believe the record will show, were two schools in Brentwood,
3 and the only reason they were contacted directly as opposed
4 to the usual way, through the School Administrative Unit,
5 was because Brentwood has a local provision in their local
6 plan where the Civil Defense Director on a different track
7 also makes a call.

8 JUDGE ROSENTHAL: This exercise took place when
9 the schools were out of session, is that true?

10 MR. DIGNAN: The schools were out that day, yeah.
11 And the complaint is --

12 JUDGE ROSENTHAL: How do you, how do you have a
13 realistic exercise of participation of school personnel in
14 circumstances where the exercises took place when the
15 school's out of session?

16 MR. DIGNAN: Well, first of all, the question is,
17 let's assume they were in session; I'm not so sure we would
18 have gone any farther than doing what we did, which was to
19 call the School Administrative Units, demonstrating the
20 ability to contact them.

21 But secondly, where do you cross the line at the
22 schools, I've always wondered, between the plan being
23 exercised and involving the members of the public. Clearly,
24 you start throwing the kids on busses, you involve the
25 members of the public, which is not allowed.

1 The only other point I wanted to make, Judge
2 Rosenthal, the suggestion that, you know, there was a
3 selection here to avoid the schools, that's nice. But if we
4 had exercised this plan when the schools were in session,
5 let's say on a nice windy day in November, we would have
6 been told we had picked a day when there was no one on the
7 beach. Whatever day we selected, somebody was going to
8 complain about the facts that were out there but the fact of
9 the matter is you are not going to have the beach period
10 when you've got all the schools in session. The schools
11 aren't in session in July and August.

12 JUDGE WILBER: School administrative units, is
13 that what they're --

14 MR. DIGNAN: That's what I understand is the name
15 of them, yes.

16 JUDGE WILBER: Do they apply only to the public
17 schools?

18 MR. DIGNAN: They apply to the public schools and
19 they were all called and I don't know that anything was done
20 with other schools. I would have to inquire on that.

21 JUDGE WILBER: Does the plan reflect that there is
22 going to be a difference here?

23 MR. DIGNAN: I believe that the plan does reflect
24 a difference in contacting such entities as Exeter Academy
25 or a day-care center or something like that.

1 I'm sorry, Your Honor --

2 JUDGE ROSENTHAL: That's all right. I would like
3 to broaden the inquiry as to school participation. I
4 realize that Mr. McEachern was focusing on the exercise. I
5 would like to focus on my favorite subject of role conflict.

6 As I understand it, insofar as the Commonwealth of
7 Massachusetts is concerned, with that portion of the EPZ
8 that is in the Commonwealth, there's no question that it is
9 expected that the school faculty and day-care and nursery
10 schools' staff will go to the school host facility with the
11 evacuated students and will continue to supervise them until
12 the children are released to the custody of parents or
13 guardians or transferred to a congregate care center
14 operated by the American Red Cross.

15 Now I draw that from Applicant's rebuttal
16 testimony No. 6 -- so that insofar as Massachusetts is
17 concerned, the evidence is that these teachers are needed to
18 perform these particular functions.

19 I have grave doubt in my own mind as to the
20 evidentiary basis for assuming that teachers are going to be
21 willing -- I don't care about therapeutic communities and
22 the rest of this -- I mean specific evidence that teachers
23 are going to be willing to undertake that very major role.

24 Unlike the Shoreham case where the teachers were
25 only required to see that the children got on the buses in

1 their school environments and we were prepared to assume
2 there that the teachers being professionals would be
3 prepared to do at least that, in this case they are not only
4 expected to accompany these students for considerable
5 distances but also to remain with them and continue to
6 supervise them until there is either a release to the
7 custody of their parents or transfer to a Red Cross
8 facility.

9 Now I don't understand how one can assume,
10 granting as I do that teachers as a class are responsible
11 professionals, that we can assume that they would go to that
12 extent, particularly if they have their own children at home
13 who they might possibly have some interest in ensuring their
14 own safety.

15 MR. DIGNAN: The evidence was, and I don't know of
16 any evidence that came in against it from Dr. Milette in the
17 first phase of this case was that teachers historically in
18 the United States of America have been among the best in
19 terms of taking responsibility for their charges.

20 JUDGE ROSENTHAL: On the school premises.

21 MR. DIGNAN: Well, no. I think beyond that. I
22 mean there's been evacuations of schools before and I know
23 of no case, of no case that's been demonstrated where
24 teachers did not do what had to be done.

25 Now keep in mind if you have a school full of

1 children and you are sending them on a bus there is going to
2 be more than one teacher around. Not every teacher has to
3 go to begin with.

4 Secondly, if a teacher has a child at home, as you
5 indicated, presumably that child is in the care of a
6 responsible adult, either the spouse and/or somebody who
7 does day-care.

8 JUDGE ROSENTHAL: Or an 18 year old babysitter who
9 might not --

10 MR. DIGNAN: I have a 5 year old and a 9 year old
11 daughter and I have sat them with 18 year old babysitters.
12 I was satisfied they were responsible and knew what to do
13 with them in case of an emergency.

14 JUDGE ROSENTHAL: Well, some people might be less
15 inclined to trust the 18 year old babysitter in a
16 radiological emergency situation.

17 MR. DIGNAN: It could well be, but on the other
18 hand that same person you are asking not to trust them is
19 somebody who knows they are entrusted with the welfare of 20
20 small children and have a duty to take care of those
21 children and like it or not has probably selected that 18
22 year old with in mind the fact that they have other duties
23 that they must perform.

24 JUDGE ROSENTHAL: But you talk about evidence
25 here. We have the theoretician Dr. Milette against what I

1 understand is the teachers themselves who say they are not
2 going to do it.

3 MR. DIGNAN: You have the teachers who in New
4 Hampshire -- I have a feeling we are rearguing the appeal in
5 New Hampshire now -- that's fine. You have the teachers who
6 stood under cross examination. If you could have been in
7 that room you'd see the basis for the finding of the
8 licensing board itself and they sat there and they sort of
9 looked me in the eye, not really, and said yes, we'll
10 abandon those kids. That's right. I don't believe them and
11 the Board didn't believe them and if you had seen them you
12 wouldn't have believed them.

13 JUDGE ROSENTHAL: I don't know. The reason I am
14 getting at this is that the Commission if I recall correctly
15 found at least a partial way around this problem by pointing
16 to testimony in New Hampshire that the teachers weren't
17 needed.

18 That is not a way around Massachusetts because the
19 teacher are needed.

20 MR. DIGNAN: Sure it is, because they are no more
21 needed in Massachusetts than they are in New Hampshire.

22 A plan has been drawn that we are going to do it,
23 but if it is necessary to put them on buses without
24 teachers, Massachusetts children can ride just as easily as
25 New Hampshire children without teachers.

1 JUDGE WILBER: You mentioned that there had been
2 examples of teachers accompanying their students --

3 MR. DIGNAN: No, I did not -- I said all I know
4 is that the evidence that was testified to is that there is
5 no acknowledged case that I am aware of or it was testified
6 to and lord knows everybody had his own expert on this of
7 teachers abandoning children in an emergency situation.

8 I have got to assume that some of those involved
9 evacuation. Now maybe I am wrong in that assumption but I
10 have got to assume there must have been -- I mean schools
11 have been evacuated for floods in this country or whatever.

12 JUDGE ROSENTHAL: What is the distance from the
13 schools in Massachusetts on an EPZ to these school host
14 facilities?

15 MR. DIGNAN: Holy Cross College?

16 JUDGE ROSENTHAL: In Worcester?

17 MR. DIGNAN: Yes, that's in Worcester,
18 Massachusetts. It's -- that's what I am trying to focus on,
19 Mr. Chairman. It's a good distance. It's 60 miles.

20 JUDGE ROSENTHAL: 60 miles --

21 MR. DIGNAN: One hour driving time at 60 miles an
22 hour, two hours, 30 minutes.

23 JUDGE ROSENTHAL: But Dr. Milette didn't have any
24 kind of concrete illustrative examples of teachers who in
25 emergency situations where again there might be some concern

1 for their own youngsters were prepared to go 60 miles with
2 their students and to remain with the students until --

3 MR. DIGNAN: His testimony, I must concede his
4 testimony was all -- that he had researched the records and
5 found no cases of teachers abandoning children and, believe
6 me, the Intervenors if they had somebody who had them
7 abandoning would have had -- they had their experts up
8 there.

9 Nobody -- it's like panic, Judge Rosenthal.
10 Everybody assumed there's going to be panic in one of these
11 cases and nobody can point to a case where there was an
12 emergency and there was panic during an evacuation.

13 This is true no matter whose witness you cross
14 examine on it. It was a free gift cross on their witnesses
15 because when you put it to them, every time they say no they
16 couldn't point to any case where there have been evacuation
17 and everybody had gone haywire and panicked and I am darned
18 if I know of a case or if I heard and certainly this record
19 is bereft of any case where teachers just walked out and
20 abandoned children.

21 Now you are right --

22 JUDGE ROSENTHAL: You use the word "abandoned."

23 MR. DIGNAN: That's the word. I use it
24 deliberately.

25 JUDGE ROSENTHAL: I would agree with that use if

1 we were talking about a teacher walking out of a school
2 building leaving the children there unattended but I think
3 abandonment may not be a precise word as applied to the
4 matter of whether the teacher is expected to get on the bus
5 and go 60 miles with those children and remain with those
6 children at that 60 mile distance for an indefinite period
7 of time without again knowing what the situation is with
8 their own kids.

9 That is not abandonment. You are calling upon
10 these teachers to do something affirmatively.

11 MR. DIGNAN: No, no, look -- a teacher, this may
12 sound hard but I mean it -- a teacher is entrusted with
13 small children, to protect them until they go home. It's
14 that simple.

15 JUDGE ROSENTHAL: In the school building.

16 MR. DIGNAN: No, no, no! They are in charge of
17 them -- if they go out and break their leg, it's recess,
18 they are in charge of them and if the child strays off the
19 reservation, they are in charge. They are responsible for
20 those people.

21 I don't see that responsibility any different than
22 I see that of a police officer or a fire fighter.

23 A fire fighter in a conflagration of a city may
24 well be worrying about his family which is in that city but
25 that fire fighter is expected to and they do stick at their

1 post.

2 I expect teachers to do the same thing.

3 If the protection -- if what they are instructed
4 is that the protection of these children depends upon their
5 getting on the bus and taking them to Holy Cross College I
6 expect enough of them will do it.

7 We have conceded will there be a role abandonment
8 of teachers -- sure. I concede that but enough of them will
9 do their duty that we don't have to worry about this
10 problem.

11 Again, I will fall back to the Commission
12 position. I don't know of any reason you can't put the
13 children on a bus with a route guide and a bus driver and
14 take them there and it'll make a little more work for the
15 Red Cross at the other end but move them out -- if you don't
16 believe the teacher will stay.

17 JUDGE ROSENTHAL: Well, all that I can say, and I
18 am testifying I suppose just as you are that when I think
19 back to the days that my children were Kindergartners and
20 First Graders, it's one thing riding a bus between a school
21 and their home with a familiar bus driver and something else
22 again for those young children to have been taken off 60
23 miles in a bus with an unfamiliar bus driver with no
24 familiar face at all.

25 I just don't think that those are the same thing.

1 The Commission may feel that --

2 MR. DIGNAN: No, no, I concede that to you, Mr.
3 Chairman.

4 JUDGE ROSENTHAL: I am not the Chairman. Mr.
5 Bollwerk is the Chairman.

6 MR. DIGNAN: Mr. Bollwerk, I made that apology
7 once before. It's too many years and I apologize.

8 JUDGE BOLLWERK: Absolutely.

9 MR. DIGNAN: I apologize.

10 Judge Rosenthal, I'll concede that to you. My
11 little girl would be scared to death but I am sure of two
12 things.

13 One, the bus driver isn't going to open the bus at
14 60 miles an hour and let her jump out. She is going to get
15 there. She's going to be very unhappy. She's going to be
16 very scared -- and we are talking emergency here -- you
17 know, an evacuation, forget the nuclear power plant. If
18 there is a god awful tidal wave up in the New Hampshire
19 coast and they have to move those kids out of there, little
20 kids will be unhappy if they are put on buses with no
21 teacher, but would you rather have them unhappy on the bus
22 or wait for the tidal wave?

23 JUDGE ROSENTHAL: All right, well, if that's the
24 fall-back position, why then shouldn't we eliminate from
25 these plans any reference to the teachers accompanying these

1 kids, because if I were a parent I would think I would want
2 to know whether I can count on my child being accompanied by
3 a familiar face that distance of 60 miles or whether my kid
4 may as you have just suggested have to just lump it.

5 MR. DIGNAN: Mr. Chairman, what you are supposed
6 to come up with is the best plan possible. We believe the
7 teachers will go. We believe on the basis of sound evidence
8 the teachers will go. I would rather have them go. Now, if
9 you want to pull it out and say that teachers won't go, I
10 suppose that's an easy fix to the plan. But I don't think
11 it's a good one.

12 JUDGE ROSENTHAL: Your sound evidence, I take it,
13 begins and ends with Dr. Milette.

14 MR. DIGNAN: Yes, and I think it's pretty sound.

15 JUDGE ROSENTHAL: So we have to find that his
16 evidence is more reliable than the testimony of the
17 teachers?

18 MR. DIGNAN: There's no question about that. If
19 you elect to overturn the credibility finding of the Board
20 and the teachers, and then decide that they're more
21 believable than Milette, all you've established at that
22 point is that 13 teachers in New Hampshire won't go.

23 JUDGE ROSENTHAL: But you're telling me that these
24 teachers are -- on the one hand, you're telling me these
25 teachers are these wonderful, reliable, responsible

1 professionals and on the other hand, you're telling me that
2 they are liars, in effect.

3 MR. DIGNAN: Well, I tried not to use that word.

4 JUDGE ROSENTHAL: All right, let's --

5 MR. DIGNAN: No, let's take it on. Yes, I don't
6 think they've told the truth, because I looked them straight
7 in the eye. I don't think one of them will abandon a kid,
8 not one of them. I think that's why they shook on that
9 stand when they gave those answers, and if you had been in
10 that hearing room, you'd have seen it. These were very
11 distressed people.

12 This was a terribly unpleasant experience for
13 everybody, including this cross examiner to put those
14 teachers through. I think the Board's finding was exactly
15 right. I don't think those teachers will abandon by any
16 means.

17 JUDGE ROSENTHAL: What was their incentive? I
18 mean, you're telling me --

19 MR. DIGNAN: Because they want to stop the
20 Seabrook Power Plant.

21 JUDGE ROSENTHAL: Their interest in stopping the
22 Seabrook Power Plant is so great that they were prepared, as
23 you see it, to get up and not only lie, but also to
24 denigrate their own professional responsibility?

25 MR. DIGNAN: Yes, that's correct. That's

1 precisely what I'm saying. I would like to take the word
2 "lie" out of it, because I never use that normally in a
3 courtroom, but that they were people who sincerely felt that
4 they had to do something to contribute to an effort, I have
5 no doubts that they would abandon children -- not on your
6 life. I don't think so.

7 I think this Board should think a long time before
8 overturning that kind of a finding when you didn't observe
9 the witnesses. At this point --

10 JUDGE WILBER: Could we stick with the students
11 just for briefly?

12 MR. DIGNAN: Certainly.

13 JUDGE WILBER: On page 105 of your brief, in the
14 last sentence in Section G, that, to me, needs some
15 punctuation or something, but I am reading that and I'll
16 throw out some of it. The short answer is that the
17 provision of a school host facility at all, goes beyond
18 applicable criteria with respect to schools. Are you
19 telling me that you don't have to shelter school children?

20 MR. DIGNAN: No, I'm saying that -- the point I'm
21 making there is that having a separate facility beyond the
22 EPZ for sheltering school children is not something that, as
23 I understand it, is required in the regulations or the
24 guidance.

25 JUDGE WILBER: But you have to shelter them

1 somewhere.

2 MR. DIGNAN: No, you've got to get them out of the
3 EPZ.

4 JUDGE WILBER: Then turn them loose?

5 MR. DIGNAN: Well, no. I wouldn't turn them
6 loose, but if there's nothing in the regulations that
7 requires us to set up this separate shelter facility for
8 children --

9 JUDGE WILBER: I'm not talking about separate.
10 Don't you have to set up safe sheltering for the children?

11 MR. DIGNAN: Well, what are we talking about here?
12 We're not talking about sheltering radioactive; we're
13 talking about congregate care. Yes, but my point is that we
14 could have used just the other congregate care centers. We
15 didn't have to have a separate one set up to handle only the
16 children.

17 JUDGE WILBER: All right, you're saying it doesn't
18 have to be special, but it still has to be provided.

19 MR. DIGNAN: Well, the congregate care centers
20 have to be provided and the children would be -- anybody
21 who is evacuating out is going to be subject to that. This,
22 I believe, addresses the points that were addressed in oral
23 argument.

24 After the oral argument of the opposition, I do
25 have one point I want to make generally on that brief.

1 Several times in my brief, I pointed out that certain
2 arguments were made to you and they looked to me like a bill
3 of exceptions and not a brief. I don't think this case was
4 fairly set forth in the brief, and I think large parts of it
5 ought to be stricken.

6 That concludes my response to the arguments. If
7 the Board has questions on other matters, of course, I will
8 answer them.

9 JUDGE WILBER: I have a couple of questions. This
10 goes to a statement made in the town of West Newbury's brief
11 at page 23. We're talking about the flooding of streets. I
12 also read paragraph 423 in the decision by the Licensing
13 Board. I'm getting a little confused here on what's going
14 on.

15 I read paragraph 423 as inferring that these roads
16 that are under discussion are only going to flood maybe once
17 every 100 or 500 years. Yet, I read some of the other
18 briefs and the flooding is much more frequent than that.
19 What is the 100 year, 500 year maps that they're discussing?

20 MR. DIGNAN: What happened was that certain of the
21 routes -- and I'm not sure whether we're dealing with the
22 same routes. Certain of the routes were claimed to be
23 flooded all the time. Among other things that came into
24 evidence were the flood plain maps, and the flood plain maps
25 are drawn that the flooding will be once every -- I'll do it

1 the easy way, because they always reverse it.

2 It's once every hundred years and then it will be
3 the 500 year flood plain and so forth. What was pointed
4 out, and my guess is, in the area-wide flooding, what the
5 Board was pointing out was that there was very low
6 probability of area-wide flooding in this area, which is
7 true.

8 Now, there was some testimony by certain people
9 that certain roads flooded -- Plum Island, in particular, I
10 remember that somebody testified that in the Wintertime, the
11 Plum Island Turnpike was under water a lot. I think it's
12 fair to say on that evidence -- and I think the record shows
13 -- is while that may or may not be true, the flooding was
14 not significant enough to stop a bus from getting on it.
15 Indeed, that same witness said, well, what we do is get the
16 people off them with National Guard buses.

17 The flooding issue is, to me, a very simple one.
18 There is not doubt one can conjure up a big flood coincident
19 with a nuclear accident. What is going to have to happen is
20 adjust. What nobody has pointed out is that there's some
21 better route that we should have selected that is either
22 immune from flooding, or assuming there was going to be
23 flooding, was going to be the better choice.

24 I've seen no evidence of that. We've picked, I
25 think, very good routes. I'm prepared to concede that on

1 the day the accident happens, a piece of one of those routes
2 may be flooded and it's going to have to be accounted for;
3 it's going to have to be accounted for in an EBS message or
4 some other way so that people don't stand out on the road.

5 This idea that they're all going to stand on a
6 flooded street waiting for a bus to come by, I find a little
7 ridiculous, because I think that if it's really a flood that
8 will stop a bus, I don't think anybody is going to be
9 standing there. They're going to have done something else,
10 probably regardless of the nuclear accident, to get out of
11 the area.

12 JUDGE WILBER: The Board appeared to be basing
13 their conclusion on the fact that it would be very
14 infrequent.

15 MR. DIGNAN: I think that they were in terms of
16 area-wide floods. I think that the Board -- at least my
17 view of the case -- is that the Board has conceded in the
18 decision also, that there could be a road taken out at a
19 given time that was coincident with the nuclear event.

20 JUDGE BOLLWERK: I have a couple questions. One
21 relates to NUREG 0654 and the question about the need to
22 look at special facilities, facility-by-facility in terms of
23 evacuation times and other planning. I take your position
24 is that there is no need to do that in any way, shape, or
25 form?

1 MR. DIGNAN: No, no, the point I'm making is that
2 you should look at them, and we have looked at them. But
3 there is no need to have ETEs for each facility in the case
4 of Seabrook, is my position. There's no question that you
5 look at them, but what our studies have shown is that the
6 evacuation, in the way it's going to be run, which is by
7 area, the time is always going to envelope these times so
8 you don't need any special ETE in there for those; that's
9 our position.

10 JUDGE BOLLWERK: What you're saying is that you
11 have looked, for instance, at each facility, and you've
12 figured out what the longest ETE would be for a given
13 facility and that's enveloped into the time for the general
14 public?

15 MR. DIGNAN: I don't want to represent that we've
16 looked at each facility and come up with a time. What I do
17 know is that they've looked at the facilities sufficiently
18 to have reached the conclusion on the envelope and also to
19 reach the conclusion adopted by the Commission and by the
20 Licensing Board that, you know, the ETE in this setting, at
21 least, -- the ETE for special facilities, the alternative is
22 shelter and that's what they're going to be doing whenever
23 they're picked up anyway.

24 So, if you've got a situation where for some
25 reason there's a long ETE, --

1 JUDGE WILBER: But you said you didn't want to do
2 sheltering either.

3 MR. DIGNAN: We don't.

4 JUDGE WILBER: You don't want to do an evaluation
5 of the sheltering potential of these nursing homes and
6 hospitals and whatever?

7 MR. DIGNAN: My point is this: with the special
8 facility and with people who are disabled in some respect
9 that they have to be in a special facility, the only
10 sheltering they can have is what that offers them. You
11 can't move them to another shelter, and this is one reason
12 why you would want to evacuate them as soon as possible, but
13 if it turned out for some reason that you could not in the
14 given situation, they would be having the benefit of the
15 only other alternative available to them, which is
16 sheltering in the premises, sheltering in place.

17 There's no need to look at the individual DRFs of
18 these places, because that's where they're going to be.

19 JUDGE WILBER: I don't understand that at all. If
20 you have a DRF of .2 -- let's make it that they're in a cave
21 somewhere.

22 MR. DIGNAN: Right.

23 JUDGE WILBER: Wouldn't you say, well, it might be
24 better to leave that group of people there rather than to
25 put them out into an evacuation?

1 MR. DIGNAN: Well, I think that the evidence was
2 pretty clear that the individual administrator has a right
3 to make that decision, if the evacuation is ordered.

4 JUDGE WILBER: How is he going to do it if he
5 doesn't know what the DRF is?

6 MR. DIGNAN: We will do a DRF analysis for anybody
7 who is willing to let us do one. The testimony was clear on
8 that one, too.

9 JUDGE WILBER: You haven't done any, and my
10 understanding from your brief is that you would not want to
11 do any.

12 MR. DIGNAN: Well, my guess is that we're not
13 anxious to get people in the business of deciding to
14 shelter, but if somebody wants it done, we would do it for
15 them, I assume.

16 JUDGE BOLLWERK: A quick question about the motion
17 to clarify the status of appeal of 89-33. In your response
18 to that motion, you indicated that you thought that they had
19 not briefed it sufficiently to preserve their appeal, but
20 that we still had sua sponte review authority over that
21 decision. Has anything that's happened subsequently -- you
22 filed this back in February -- has anything that's happened
23 subsequently that changed your mind on that regard?

24 MR. DIGNAN: You know, what I never know is
25 whether that sua sponte authority always expires in 45 days,

1 but you will make the ruling on that.

2 This motion which has got everybody uptight is
3 real. I went through it. I don't think they have preserved
4 it. Whether your decision to -- if you should make such a
5 decision, to review it sua sponte will reserve their
6 appellate right in the Court of Appeals, that's the problem
7 they're going to have to deal with later. But I didn't file
8 that motion for the fun of it. I think they waive their
9 appeal.

10 JUDGE ROSENTHAL: I doubt if you file many motions
11 for the fun of it.

12 MR. DIGNAN: Thank you, Mr. Rosenthal.

13 Judge Bollwerk -- excuse me.

14 JUDGE BOLLWERK: Just let me ask one other
15 question about it. I have to come back to the question of
16 sheltering. This question of sheltering in place, it's in
17 both plans, I guess, but I take it you're not really saying
18 that someone in an automobile is really sheltering in place,
19 given an automobile has no protection against cloud shine.
20 I mean, that's the evidence in the --

21 MR. DIGNAN: Well, I'm saying that -- let me back
22 up. Shelter in place, which is best defined in the New
23 Hampshire plan is clear. It is that when asked to shelter
24 in place, those having access to shelter will go in; those
25 who don't get in a car. That's the definition. Contrary to

1 some things you may have read and heard, that's been in the
2 plan since I've been in emergency planning. That's always
3 been the definition of shelter in place in the New Hampshire
4 plan.

5 Now, I don't want to get into a semantic argument
6 with the Board as to whether being in a car constitutes
7 sheltering. I assume, having a car around you with the
8 windows closed, constitutes some protection. On the other
9 hand, obviously what we're saying, basically, if there's no
10 place to shelter, get in the car and get out if you can.

11 It also might mean, in a situation, walk out. I
12 mean, you know, if somebody is in a car and the car won't
13 go, then they're going to have to walk out. What basically
14 shelter in place is, is if you don't have access to shelter,
15 you've got to do something else by removing yourself from
16 the scene.

17 JUDGE BOLLWERK: Evacuate.

18 MR. DIGNAN: Yes.

19 JUDGE ROSENTHAL: I take it, on the theory of the
20 -- what is it? -- the therapeutic community, there will be
21 just hundreds of people who will be willing to give you a
22 ride if you don't have your own car?

23 MR. DIGNAN: My view of the therapeutic community
24 is nobody will be without shelter in all likelihood except
25 those in the stretches of the beach where there just is

1 none. In terms of if you run out of gas, or you're there,
2 yes, I have no doubts people would pick you up. I'd do it.
3 I think you'd do it. I mean, people pick you up when you're
4 just out of gas on a highway where there is no emergency.

5 JUDGE WILBER: In the Coalition Hampton brief,
6 they identified that the state troopers had commented that
7 the maps were not adequate in the exercise. Has that been
8 corrected? It's page 20 of the Coalition Hampton brief.

9 MR. DIGNAN: I'm sorry, may I have that page
10 reference again?

11 JUDGE WILBER: Page 20, I believe it is. Yes,
12 it's the indented part. "State police troopers indicated
13 that better maps were needed, especially for trooper who are
14 not familiar with the area."

15 MR. DIGNAN: Okay. That's from the exercise
16 report that FEMA sent to state police. I don't know whether
17 FEMA asked that those be corrected or not. I do know --

18 JUDGE WILBER: And have they?

19 MR. DIGNAN: I'm informed by the technical people
20 they have been. FEMA did make a request for correction, and
21 they have been corrected.

22 JUDGE BOLLWERK: In that regard, I guess the
23 Licensing Board decision had a variety of changes that were
24 supposed to be made to the plan. Are we going to receive or
25 are they going to receive some kind of status report at some

1 point? I guess we're now in full-power -- well, we're going
2 up the essential ladder, and I haven't really heard anything
3 about what the status of all these is.

4 MR. DIGNAN: I think we're -- I'm informed the
5 Licensing Board changes have all been done and FEMA has
6 signed off. I don't believe we have filed anything with the
7 Boards announcing the finishing of the changes, no. If this
8 Appeal Board would like certification of that nature, that
9 would be easily given and we'd be glad to do it.

10 JUDGE BOLLWERK: I think you need to comply with
11 the Licensing Board's requirement in whatever timely manner
12 you need to do that. You ought to let us know.

13 MR. DIGNAN: They've all been signed off on by --
14 gone over and signed off on by FEMA.

15 JUDGE BOLLWERK: I take it the staff is aware of
16 that?

17 MR. DIGNAN: My understanding is yes.

18 JUDGE BOLLWERK: One last question, at least from
19 me. When is the next emergency exercise scheduled for
20 Seabrook?

21 MR. DIGNAN: December '90.

22 JUDGE BOLLWERK: Of '90?

23 MR. DIGNAN: Yes. Judge Bollwerk, before I sit
24 down, I approach this with some temerity. You had indicated
25 that you thought I had said something in a prior argument

1 that misled this Board into a finding. I don't know if
2 you'd wish to enlighten me on that, but in any event, if I
3 did, I deeply apologize and I can assure you that was not
4 intentional.

5 JUDGE BOLLWERK: All right.

6 JUDGE WILBER: Did the Board request a new EPE
7 study within 60 days from, I guess, the date of the
8 decision?

9 MR. DIGNAN: Not a new ETE study. What the Board
10 said is we were to put together what some people refer to as
11 a user friendly document that would lay out the ETEs so that
12 people could use them more readily.

13 JUDGE WILBER: I see.

14 MR. DIGNAN: And this has been done and completed
15 and signed off by the staff and FEMA, as I understand.

16 JUDGE BOLLWERK: I'm sorry, one last question. I
17 keep doing this. In terms of the 20 percent commitment to
18 give decontamination for 20 percent of the people, how much
19 over -- what kind of gap do you now have between the
20 monitoring stations, and how many they can handle, and how
21 many people you actually, on the basis of your estimates,
22 expect to see?

23 MR. DIGNAN: Yes. It's 20 percent monitoring.

24 JUDGE BOLLWERK: Right. Sorry.

25 MR. DIGNAN: My understanding -- and I'm going to

1 give you the answer and then turn back to be sure I haven't
2 said the wrong thing -- my understanding is we've got 30
3 percent of the Summer peak and 50 percent of the Winter in
4 Massachusetts.

5 JUDGE WILBER: What were those numbers again?

6 MR. DIGNAN: Thirty percent of the Summer peak
7 population and 50 percent of the Winter.

8 JUDGE BOLLWERK: Okay. Thank you very much. I
9 think we'll adjourn at this point for lunch and come back
10 about ten minutes to two.

11 [Whereupon, at 12:15 p.m., the hearing recessed
12 for lunch, to reconvene this same day at 1:50 p.m.]

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AFTERNOON SESSION

[1:50 p.m.]

JUDGE BOLLWERK: Go ahead.

ORAL ARGUMENT BY MS. YOUNG ON BEHALF OF THE NRC

STAFF

MS. YOUNG: Good afternoon. I am going to confine my arguments to the issues raised by Intervenors in their presentation this morning. And I will try to refrain from repeating arguments made by Mr. Dignan, to the extent I can.

The Staff believes that the LBP-89-33 decision and the remand issues are not properly raised before this Board. They weren't addressed in Intervenor's brief, and the Staff did not come here today prepared to make extensive argument on this points.

JUDGE ROSENTHAL: What about the motion for clarification? You don't regard that as having properly dealt with these issues?

MS. YOUNG: No. If the February 6th motion raised those issues or Intervenors somehow sought to amend their brief, they could have sought leave to do that before this Board. So I would not construe that that motion automatically put those in issue before this Board.

JUDGE ROSENTHAL: Do we have the authority to consider those matters "sua sponte"?

MS. YOUNG: You have ample "sua sponte" authority.

1 The Staff's position is that they were not briefed, and it
2 is difficult to respond to those without being on notice if
3 they were being raised here.

4 JUDGE ROSENTHAL: I think that Mr. Dignan
5 suggested that the passage of 45 days might have stripped us
6 of that authority.

7 MS. YOUNG: I'm not quite sure where the time
8 period lies for that. Also, I can't even recall the date of
9 89-33 at the moment.

10 JUDGE ROSENTHAL: It was more than 45 days ago.

11 MS. YOUNG: That's correct. And again, they did
12 not notice an appeal on that decision.

13 JUDGE BOLLWERK: I think they did notice an
14 appeal. I think that is pretty clear. The question is
15 whether they briefed it. If you look back at their notices
16 of appeal, they very clearly filed notice of appeal from
17 that decision.

18 MS. YOUNG: You are correct. My recollection is
19 faulty. No, they did not brief the issues and they did have
20 the opportunity to raise that in their brief here and they
21 did not. Nor did they seek leave to amend their brief once
22 the March 1st decision came out of the Commission.

23 The Staff joins in statements by Mr. Dignan
24 concerning sheltering for Massachusetts beaches and whether
25 the bad Contentions 65, 18B, 19 and 11 raise the issues that

1 Intervenor have alleged. The Staff also agrees that there
2 is ample Commission precedent for applying a rebuttal
3 presumption to FEMA's findings concerning emergency
4 planning.

5 JUDGE BOLLWERK: Do you know what, at the time
6 that this matter was litigated before the Licensing Board in
7 terms of the Massachusetts Plan, what version of the
8 Massachusetts plan on sheltering, that the provision we've
9 read was pending with, was that the operative plan at that
10 point, or what exactly? Mr. Dignan has now indicated that a
11 sentence is missing. Do you have an idea why that sentence
12 was removed? Was it removed when the Licensing Board was
13 considering it, or was it afterwards?

14 MS. YOUNG: I would have to confer for a moment to
15 verify that.

16 I regret no one here is able to verify for sure if
17 the situation is different than Mr. Dignan represented. If
18 you would like the Staff to get you that information after
19 this argument, we can provide it.

20 JUDGE BOLLWERK: I think we would appreciate
21 knowing what, in terms of Page 3.6-9, which we referred to
22 this morning, at the time the matter was pending with the
23 Licensing Board, exactly what the plan said in terms of the
24 provisions on sheltering that are mentioned in that page.

25 MR. DIGNAN: Judge Bollwerk, I can answer that

1 question now. It was Amendment 6, and Rev. Zero of
2 Amendment 6. I'm sorry. Amendment 6 of Rev. Zero.

3 JUDGE BOLLWERK: Right. And that was put in place
4 when? That's the question.

5 MR. TURK: Your Honor, my recollection is that is
6 the version of the plan which drew contentions from the
7 Intervenors. That was before the Licensing Board.

8 It seems to be in dispute here. Maybe we ought to
9 have it clarified.

10 MR. DIGNAN: That was what was put in evidence,
11 Amendment 6 of Rev. Zero.

12 JUDGE BOLLWERK: I guess that is the question.
13 Could someone send us a page, the page that was put into
14 evidence. That is what we would like to see. Whatever was
15 before the Licensing Board as evidence.

16 MS. YOUNG: Are you making that request of
17 Applicants?

18 JUDGE BOLLWERK: Could you do that? I would
19 appreciate it.

20 MS. YOUNG: All right. And to continue. The
21 Staff, like Applicants have previously stated, have never
22 argued before the Commission that the emergency planning
23 regulations were second-tier or that a range of protective
24 actions could not be provided under the Massachusetts plan.
25 There is a range of protective actions for the Massachusetts

1 beach population. These include precautionary beach closing
2 at the site area emergency, evacuation at the general
3 emergency level, the shelter-in-place concept, which I would
4 point the Board to the Licensing Board's description of that
5 concept and its decision on the New Hampshire plan, LBP-88-
6 32, Paragraph 8.35.

7 JUDGE BOLLWERK: Since you brought it up, let me
8 ask you a question. There was an extensive discussion in
9 LBP-88-32 concerning sheltering-in-place and also concerning
10 implementation. Was there really any reason to talk about
11 implementation if the actual thing was to stay where you are
12 or go to your car? Why would you have to implement
13 anything?

14 MS. YOUNG: I think the discussion the Board made
15 was in response to the concerns that Intervenors had.

16 JUDGE ROSENTHAL: That may be. But the question
17 still remains, what is there to implement if the
18 instructions are to stay in place or go to your car? It
19 doesn't seem to me, and I think the thrust of Judge
20 Bollwerk's question was it doesn't seem to him either, that
21 there is anything to implement.

22 MS. YOUNG: In terms of the need for
23 implementation detail on that issue?

24 JUDGE ROSENTHAL: What kind of implementation is
25 involved if the instruction is stay in place or go to your

1 car? There doesn't seem to me to be very much room for
2 implementation.

3 MS. YOUNG: In terms of implementing the
4 protective action or in terms of the need to explain to the
5 public more details than those instructions? I guess I'm
6 misunderstanding the question.

7 JUDGE BOLLWERK: I guess going back to the
8 Licensing Board's discussion, there was an extensive,
9 probably two-or-three-page discussion of implementation of
10 the sheltering option. And it seems, as Judge Rosenthal has
11 suggested, if the sheltering option is shelter-in-place,
12 meaning stay where you are or go to your car, that there is
13 no reason to talk about implementation at all. I mean, in
14 theory one can go to their car without any implementation.
15 I mean, everyone can find their own car, in theory, or they
16 can stay where they are. I guess that is what I'm --

17 MS. YOUNG: And I think you are correct in
18 assuming that. For the shelter-in-place concept, those who
19 do not have shelter would go to their cars, and then receive
20 instructions on how to evacuate.

21 JUDGE ROSENTHAL: So the implementation is what?
22 What would the implementation involve?

23 MS. YOUNG: Well, the shelter-in-place concept, I
24 guess to refresh again, is that those at home shelter at
25 home and those who have access to indoor location, without

1 access to some indoor location, are advised to get to their
2 vehicles as quickly as possible.

3 JUDGE ROSENTHAL: And what is involved in
4 implementing this? It doesn't seem to me that there is
5 anything to be implemented.

6 MS. YOUNG: Well, there wouldn't be anything more
7 than an EBS instruction to the public explaining that this
8 is what they are supposed to do.

9 JUDGE ROSENTHAL: So the implementation is simply
10 the EBS saying stay in place or go to your car; that is what
11 is involved by way of implementation?

12 MS. YOUNG: Basically, that is correct.

13 JUDGE ROSENTHAL: That is what took a couple of
14 pages in the Licensing Board to discuss?

15 MS. YOUNG: The Licensing Board was very careful
16 and tried to justify its findings in this proceeding. I
17 think the record reflects that the Board repeatedly
18 considered issues raised by Intervenors, exhaustively.

19 Okay. So in addition to precautionary beach
20 closings, evacuation as a general emergency, the shelter-
21 in-place concept, there is also a decontamination provided
22 for the Massachusetts beach population. So there is a range
23 of protective actions that can be taken for the
24 Massachusetts beaches. And there is also evidence on the
25 record below that the shelter-in-place concept does provide

1 some dose savings. If individuals are instructed to remain
2 in the shelter that they have available, there are less
3 individuals who would be on the roads, so therefore you have
4 less potential for extended ETEs. So there is some overall
5 dose savings that can be accomplished by the shelter-in-
6 place concept.

7 JUDGE BOLLWERK: Well, there's no dose savings to
8 the people in the cars. I mean, the dose savings, it is my
9 understanding, if you look at, I think it is the Applicant's
10 Exhibit 34, in the New Hampshire, indicates that in terms of
11 cloud shine, that being in a car or being outside are
12 exactly the same.

13 MS. YOUNG: That is correct. But to the
14 population as a whole, there is some dose saving to the
15 extent that evacuation could be completed a little more
16 quickly without tying up roads, everybody trying to begin
17 the evacuation at once.

18 JUDGE ROSENTHAL: But for the beach population,
19 the sheltering options are very limited, aren't they?

20 MS. YOUNG: I think you are correct. The record
21 does show there is not that much shelter on the beach --

22 JUDGE ROSENTHAL: So the savings would be limited.

23 MS. YOUNG: -- to those who have residence.

24 JUDGE ROSENTHAL: So the savings in terms of
25 people taking shelter or remaining in shelters rather than

1 going to their cars and crowding the roads, would be very
2 slight, wouldn't they?

3 MS. YOUNG: I don't know how slight they would be,
4 but there would be some saving, some reduction in time.

5 JUDGE ROSENTHAL: Well, it hinges upon how much
6 shelter is available, doesn't it, how much savings would be
7 involved?

8 MS. YOUNG: You're right. That is part of the
9 consideration.

10 On that same point --

11 JUDGE WILBER: This argument of a puff release,
12 has that also been stricken from the plan? That's kind of
13 out the window, now, I guess. They were, earlier on Page
14 3.4-5, they were speaking of sheltering may be an
15 appropriate action for a puff release. But you are telling
16 me that that is not to be considered now because we aren't
17 sheltering everybody.

18 MS. YOUNG: I'm going to have to confer on that
19 one. I don't have that page of the plan before me.

20 JUDGE WILBER: Once again, I don't know what
21 edition it is, but it is Revision Zero.

22 MS. YOUNG: I am informed by FEMA counsel, it's
23 his recollection that the shelter in place concept has
24 remained constant throughout the provisions of the
25 Massachusetts plan, so that has not changed.

1 JUDGE WILBER: I am talking about then discussing
2 the concept of sheltering in the event of a puff release,
3 which they say is a viable option.

4 MS. YOUNG: Still, the shelter in place concept is
5 still used in that circumstance also.

6 JUDGE WILBER: And then they go on to say
7 potential public exist in Salisbury Beach and Plum Island.
8 That evidently is not the case, is that correct? See, I
9 would read that that would be public shelter, or there's
10 enough shelters for the public. Now, maybe that's not what
11 I should read.

12 MS. YOUNG: Again, I don't have that part of the
13 plan before me.

14 JUDGE BOLLWERK: Judge Wilber's referring to page
15 3.4-5; in this instance it's a different page.

16 MS. YOUNG: If it's important, the staff can
17 provide more information on that after --

18 JUDGE WILBER: To the people without shelter, yes.

19 MS. YOUNG: But, you know, I would also like to
20 reiterate that there is some savings provided by shelter in
21 place for individuals who are only evacuating in cars, since
22 people in cars are not going to remain static in their
23 location; they are going to move away from the plume pathway
24 and they would be instructed to do so. So it's not as if
25 just sitting, they're being asked to sit in their cars and

1 remain there.

2 JUDGE BOLLWERK: One of the arguments the staff is
3 making here is that emergency plans should be looked at in
4 terms of whether they create a fundamental flaw, if there is
5 a fundamental flaw. Now that's always been the standard for
6 emergency exercises, and I think you're trying to extend
7 that now to the plan itself.

8 MS. YOUNG: That's correct, you're right. The
9 practice of the Commission has been generally to restrict
10 that to an evaluation of exercise results.

11 JUDGE ROSENTHAL: Well, what basis do you have for
12 expanding it to plans?

13 MS. YOUNG: Well, I think if you look at 10 C.F.R.
14 50.47(c)(1), the regulation states that any failure to meet
15 one of planning standards in 10 C.F.R. 50.47(b) is to be
16 analyzed in terms of its significance and whether it would
17 conclude a finding of reasonable assurance that that
18 provision is a restatement of the fundamental flaw standard.
19 To that extent there is a basis for the application of that
20 standard to a plan in general, although in the record in
21 this proceeding the Board found dose deficiencies in the
22 plan.

23 JUDGE ROSENTHAL: Do you find it at all surprising
24 that in all of these decisions, Appeal Board and Commission
25 decisions dealing with emergency plans, that neither the

1 Commission nor this Board has ever adopted this theory that
2 fundamental flaw is also the test for plans?

3 MS. YOUNG: Well, I don't think it's surprising.
4 I think it's more that each adjudicator set bounds on what
5 issues were actually in controversy before them. In other
6 words, what issues were right for decision. In this
7 proceeding, we don't have any deficiencies identified on the
8 records, but the Commission has indicated, I think in CLI
9 90-03 or 02, right now which one escapes me, that there are
10 certain standards, planning standards that may be more
11 important than others. So, if there's a failure of a plan
12 to meet one of the planning standards, you have to look at
13 significance. To that extent, it's similar to the
14 fundamental flaw concept.

15 JUDGE BOLLWERK: I take it the fundamental flaw
16 concept is one that has a higher standard in the order to
17 define the deficiency, is that correct, or would you have to
18 show a fundamental flaw, as been defined the Appeal Board in
19 ALAB-900 is essentially something that is very, well it just
20 says fundamental to the exercise indicates there's something
21 fundamentally wrong. I don't have any, I don't know that
22 we've ever applied that kind of a standard in terms of
23 dealing with the plan itself. I mean, the licensing board
24 here found all kinds of problems with the plan that they
25 corrected. I guess my question is, do you say they can't do

1 that unless those deficiencies constitute a fundamental flaw
2 or that they can't even look into any parts of the plan
3 unless it constitutes a fundamental flaw?

4 MS. YOUNG: No, I'll say at the contention
5 pleading stage, with respect to planning contention, the
6 board almost has to assume that if there's enough
7 specificity and basis for the contention raised then
8 arguably the case had been made that this planning --

9 JUDGE ROSENTHAL: But that specificity, at least
10 in terms of exercise contentions, is governed to some degree
11 by having to show a fundamental flaw. Am I correct on that
12 or what?

13 MS. YOUNG: Definitely. ALAB-903 tells you that
14 you have to show this fundamental flaw.

15 JUDGE ROSENTHAL: And the fundamental flaw is
16 something that's not readily correctable, isn't that right?

17 MS. YOUNG: Without a significant revision of the
18 plan or re-conception of the plan.

19 JUDGE ROSENTHAL: Now, is that the test with the
20 plan that the only attack upon a plan that can be made 'y
21 the intervenor is one on a portion of the plan that's not
22 merely defective but not correctable? I would think that
23 they'd be able to raise any question with respect to a
24 purported deficiency in the plan, whether or not that
25 deficiency was correctable. If they're right, you'd have to

1 have it corrected, obviously.

2 MS. YOUNG: But each time the Commission in
3 elucidating the fundamental flaw standard has said that it's
4 reasonable to restrict a litigation of emergency plan
5 results to those issues that are material to licensing,
6 i.e., those which would preclude a finding of reasonable
7 assurance, and that's where you get the fundamental flaw
8 standard.

9 JUDGE BOLLWERK: In part, doesn't that reflect
10 where the exercise comes in the process though, it's at the
11 end of the process after, in theory, you've litigated the
12 plan and found all the deficiencies in it; perhaps not. But
13 it comes at the end where you're looking at the exercise on
14 the basis of the plan, not the plan itself, then you're --

15 MS. YOUNG: I think you're correct in stating
16 that.

17 JUDGE ROSENTHAL: I'd like to move onto another
18 area. You were indicating before your agreement with Mr.
19 Dignan on a number of the arguments he advanced this
20 morning. I would like to know whether that agreement
21 extends to his insistence that these teacher witnesses were
22 fabricating. Is that the staff's position as well?

23 MS. YOUNG: Well, no it's not clear whether they
24 lied or not, but I think they are.

25 JUDGE ROSENTHAL: Well, if it's not clear whether

1 they lied or not, why shouldn't their testimony be accepted.
2 I mean, Mr. Milette, or Dr. Milette, whichever he is, if I
3 recall correctly, was not able to point to specific
4 instances where teachers had acted in a manner analogous to
5 what this plan is calling upon the teachers to do here.
6 This was a theoretician speaking. Now, we had these
7 teachers who are the people in the best position to know
8 whether they will or will not respond and Mr. Dignan says we
9 shouldn't believe them, but their credibility was destroyed
10 during their testimony. Now you're telling me that you're
11 not prepared to go that far. If that's the case, why
12 shouldn't we accept the teacher's testimony?

13 MS. YOUNG: I think that first of all, I'd have to
14 disagree with the scope of the credibility that can be given
15 to Dr. Milette's testimony. I don't believe the intervenors
16 below challenged on cross-examination of Dr. Milette whether
17 these teachers are being asked to do anything the teachers
18 have not done with emergencies. In other words, Dr. Milette
19 was not asked whether there had been any instances where
20 teachers have accompanied on school busses.

21 JUDGE ROSENTHAL: What was Dr. Milette's basis for
22 concluding that it was reasonable to suppose that these
23 teachers would get on these busses with these children and
24 go a distance of sixty miles and remain with these children
25 until such time as either their children picked them up or

1 they were transferred to a Red Cross facility, you know,
2 what was the basis? I mean, was this just his notion of
3 what professionals will do, or did he have some concrete
4 list of examples to support it, this thesis he had?

5 MS. YOUNG: Well, I can't restate to the Board
6 exactly what concrete examples he used, because I'm not
7 familiar with his testimony to that extent.

8 JUDGE ROSENTHAL: But you're telling me that we
9 ought to rely on his testimony. Now, on what basis?

10 MS. YOUNG: I think he indicated in testimony on
11 this proceeding as it had been indicated in testimony on
12 other proceedings that often times statements given by
13 teachers and other individuals who might be expected to
14 perform a role in an emergency is not reliable when asked
15 before an event what they might do. In other words, they're
16 predictive.

17 JUDGE ROSENTHAL: In his view, why are these
18 teachers to be expected to give unreliable testimony?

19 MS. YOUNG: To the extent that in an actual
20 emergency, when you know your role is defined, it's very
21 unlikely that you would abandon it, but when asked prior to
22 such an event, when that event is just hypothetical, you
23 indicate, your indication is not predictive of how you act
24 in an actual emergency, and that's partially dependent, I
25 think, on the concept of the therapeutic emergency, excuse

1 me, therapeutic community, and also the history of the
2 experience of emergency workers throughout emergency
3 response in the United States.

4 JUDGE ROSENTHAL: Do you have specific examples of
5 teachers or people who could be analogized to teachers who
6 said one thing when asked in advance what they would do, and
7 then when the emergency arose, did something else? Do you
8 have actual examples of that or is that some more theory?

9 MS. YOUNG: I'd have to confer with my colleagues
10 for a moment on that precise point.

11 MS. YOUNG: My co-counsel tells me I misspoke. It
12 was not Dr. Milette who said that their statements prior to
13 an emergency of what people would do in an actual emergency
14 were not reliable. It was the Board's reasoning after
15 listening to his testimony, and also --

16 JUDGE ROSENTHAL: Oh, this was the Board that
17 reasoned this?

18 MS. YOUNG: Yes.

19 JUDGE ROSENTHAL: Was the Board under oath, and
20 apparently there were witnesses.

21 MS. YOUNG: No, they weren't under oath, but
22 they're not the only Licensing Board to have similarly
23 concluded that. I think also in the Limerick and Shoreham
24 proceedings --

25 JUDGE ROSENTHAL: What was the evidence on which

1 the Board reached this conclusion?

2 MS. YOUNG: It was based on the testimony of
3 experts in general that in emergencies, people would perform
4 their roles if that role is specified for them.

5 JUDGE ROSENTHAL: Experts in general? I mean,
6 were these people that testified?

7 MS. YOUNG: Dr. Milette is one.

8 JUDGE ROSENTHAL: Just one. Were there other
9 experts that -- what I want to know was whether there was
10 any concrete examples put forth by a witness of either, one,
11 teachers or their equivalent saying one thing and then
12 subsequently doing something else, or, two, people
13 responding to an emergency in a manner that is roughly
14 equivalent to what these teachers are being expected to do
15 in the event of an emergency at Seabrook? Now, were there
16 concrete examples presented on either of those fronts by a
17 witness?

18 MS. YOUNG: Excuse me for a moment.

19 [Pause.]

20 MS. YOUNG: Again, it's my understanding that Dr.
21 Milette gave general testimony about the roles or the
22 actions of workers in emergencies. It was not specific to
23 teachers, but neither did Intervenors specifically challenge
24 him on extending that testimony to what teachers would do in
25 an emergency at Seabrook.

1 JUDGE ROSENTHAL: All right. Another aspect of
2 this thing: As you understand this record, is it necessary
3 for the teachers to accompany these children to the school
4 host facilities?

5 I'm getting at -- the Commission had a fallback
6 position in their immediate effectiveness decision that
7 pointed to some evidence to the effect that, at least in New
8 Hampshire I think it was, that it wasn't really necessary
9 for the teachers to accompany these children. Is it your
10 understanding that that would apply also to the
11 Massachusetts portion of the EPZ, the Massachusetts schools?

12 MS. YOUNG: I think that's correct to the extent
13 that there are individuals who could accompany them.

14 JUDGE ROSENTHAL: All right. If that's the case,
15 why shouldn't we simply require this to be deleted from the
16 plan so that the parents of these children are under no
17 illusions that their children in all circumstances will be
18 accompanied by teachers, and then they recognize that it's
19 very possible that the children will go on these buses
20 without a teacher escort?

21 MS. YOUNG: Well, I'm not sure I can agree that if
22 that provision is in the plan, that somehow it's faulty
23 because it's there. Maybe the teachers do not accompany
24 students. The Board found that teachers will accompany
25 teachers in sufficient numbers.

1 JUDGE ROSENTHAL: I understand that. What I'm
2 getting at is suppose that we do not agree with that, that
3 we conclude that there isn't sufficient evidence to support
4 that, then would you say that, as the Commission seems to
5 think in its immediate effectiveness decision, that there is
6 a fallback, which is that the teachers are needed, and if
7 one goes to that fallback, isn't then the appropriate course
8 to remove the provision from the plan, the provision calling
9 for the teachers to accompany these youngsters to the school
10 host facilities?

11 MS. YOUNG: I'm not -- since the staff isn't the
12 author of the licensee's plan, I'm not sure I'd want to say
13 whether the provision should be deleted. I think there are
14 other things that could be done, minor revisions to the
15 plan to correct any failure of teachers to actually
16 accompany students in an emergency. That would be a simple
17 revision. Again, it wouldn't be something that would
18 constitute a fundamental flaw. I mean, that whole provision
19 would not have to be totally re-conceived in order that
20 those children be supervised in an evacuation.

21 JUDGE ROSENTHAL: All right. If I could move on
22 to another --

23 JUDGE WILBER: One other thing. I believe you
24 said a few minutes ago that the teachers would respond in
25 the manner, as Dr. Milette said, if their role is well

1 defined.

2 MS. YOUNG: Right. That's been the testimony in
3 numerous proceedings.

4 JUDGE WILBER: Okay. Now, my question to you is,
5 have these teachers' roles been defined to them, what
6 they're supposed to do? Do they have instructions, do they
7 have procedures, or are they going to wing it, or what is
8 going on?

9 MS. YOUNG: It's my understanding that the
10 individual school districts do have procedures. I don't
11 know whether there's been training offered to teachers under
12 what they're expected to under the plan.

13 JUDGE WILBER: The teachers will accompany the
14 teachers to the reception centers or care centers or
15 whatever it may be?

16 MS. YOUNG: The school districts do have various
17 emergency plans of their own.

18 JUDGE WILBER: No, I'm talking about the specific
19 issue of whether they are going to accompany them to the
20 school centers, whatever you wish to call them.

21 MS. YOUNG: Whether those procedures specify that?

22 JUDGE WILBER: Pardon?

23 MS. YOUNG: Whether the procedures for emergencies
24 at the schools include that the teachers would accompany?

25 JUDGE WILBER: Yes.

1 MS. YOUNG: I'm not familiar with that.

2 JUDGE WILBER: Have the teachers been approached
3 at all?

4 MS. YOUNG: Excuse me again, but I think I'd have
5 to confer to them --

6 JUDGE WILBER: Well, Mr. Milette said if the role
7 is well defined. I assume it has to be defined to the
8 participants, not to somebody off in space somewhere.

9 MS. YOUNG: I think, in terms of the New Hampshire
10 plant, the school administrators are aware of the provisions
11 in the plan, and to the extent that teachers are under those
12 administrators, they would presumably be instructed by them
13 what roles they're supposed to take in an emergency. I
14 think that is consistent with, in general, the best efforts
15 presumption, that municipalities and employees of
16 municipalities would take such actions as necessary to
17 protect their citizenry in event of an emergency.

18 JUDGE ROSENTHAL: If we're off that subject, I'd
19 like to turn, if I might, to the matter of the 20 percent
20 planning standard. Do you agree -- I take it you do agree
21 with the Licensing Board's decision that the matter was res
22 judicata when it came up in the context of the Massachusetts
23 portion of the EPZ?

24 MS. YOUNG: Yes, we raised res judicata law in the
25 case. Yes, that issue.

1 JUDGE ROSENTHAL: Which is it?

2 MS. YOUNG: Well, to the extent in the same
3 proceeding law in the case might be more appropriate, but
4 the intervenors did raise a challenge to the adequacy of the
5 monitoring basis in New Hampshire, although it was poorly
6 raised. They failed to allege --

7 JUDGE ROSENTHAL: All right. But the claim of
8 your adversary is that whatever may have been the case in
9 New Hampshire -- and, of course, we held that it was not
10 properly raised -- that they did raise it properly in the
11 context of Massachusetts. Now, why -- is that right, and,
12 if so, why is the Licensing Board correct in applying what
13 we'll call law of the case?

14 MS. YOUNG: First of all, I don't think it's
15 correct that they raised it properly with respect to
16 Massachusetts. They did have a contention challenging the
17 adequacy of facilities, but that contention did not go
18 directly to challenging the adequacy of the monitoring
19 basis.

20 JUDGE ROSENTHAL: So they didn't say anything at
21 all about the monitoring basis?

22 MS. YOUNG: It's my recollection that they did
23 not. I can --

24 JUDGE ROSENTHAL: None of their contentions dealt
25 with -- spoke to the monitoring basis?

1 MS. YOUNG: No. I believe the language of the
2 contingency did not raise the monitoring basis as an issue
3 at all.

4 I think Mr. Traficonte raised in his arguments
5 this morning the issue of whether FEMA properly applied a
6 dose reduction factor of .9 to the general population. I
7 think there is testimony on the record below which will
8 support the conclusion that it's a better approach to apply
9 that test across the board to the population to the extent
10 that it would reduce any potential confusion for protective
11 actions that could be made with respect to individuals in
12 the population.

13 JUDGE WILBER: Might not it lead to increased
14 exposure? It might be much better if they stayed in a
15 better shelter than the .9. It leads you to believe that
16 all things are .9 there. Suppose you have one that's .5.
17 Isn't it better if they stay there than to go out into the
18 radiation and be exposed?

19 MS. YOUNG: Well, to the extent that a shelter in
20 place concept would be --

21 JUDGE WILBER: If this is a valid argument, why
22 don't you say that DRF is 1 and evaluate it from there, or
23 .5? Why .9 when you have different dose reduction factors?

24 MS. YOUNG: I think it's a reasonable approach,
25 and FEMA concluded this in this proceeding, that it's

1 reasonable to use the least restrictive dose reduction
2 factor -- in other words, for the whole population to use
3 the factor that provided the least --

4 JUDGE WILBER: But that's 1 for the beach people.

5 MS. YOUNG: Right.

6 JUDGE WILBER: So why not use 1?

7 MS. YOUNG: I'm sorry, I --

8 JUDGE WILBER: The beach people are out there, and
9 they have no sheltering, so your dose reduction factor is 1.

10 MS. YOUNG: No. Again, it was concluded that for
11 a certain segment of the population, this was the least
12 restrictive factor that could be used reasonably to plan for
13 the general population. That's been FEMA's practice.

14 I believe, Judge Wilber, you also asked a question
15 about whether there's a requirement in NUREG 0654 that dose
16 reductions be considered for individual facilities.

17 JUDGE WILBER: Pardon?

18 MS. YOUNG: I believe you asked a question about
19 whether NUREG 0654 requires that dose reductions be
20 considered for individual facilities, special facilities?

21 JUDGE BOLLWERK: And ETE.

22 JUDGE WILBER: And ETES as well.

23 MS. YOUNG: Okay. I think that provision
24 generally requires that the ETES for special facilities be
25 considered.

1 JUDGE WILBER: And have they been?

2 MS. YOUNG: They have, but not on facility by
3 facility basis. There was a determination made that the
4 evacuation time calculated would include those for the
5 facilities, in general.

6 JUDGE WILBER: And how did the Commission treat
7 that in the Shoreham decision? Didn't they express in there
8 that the ETE must be calculated on an individual basis?
9 It's CLI 87-12.

10 MS. YOUNG: I don't have that decision before me.

11 JUDGE WILBER: I can read part of it for you, if
12 you wish. Appendix E to 10 CFR Part 50 requires evacuation
13 time estimates for the EPC without exceptions for special
14 facilities such as hospitals. Now, that, as I say, is what
15 I thought they were doing, was treating them on an
16 individual basis.

17 MS. YOUNG: Well, I think the evacuation time
18 estimate for those facilities was looked at, and it was
19 determined that they were within the evacuation time
20 estimates for the general population.

21 I think Mr. Traficonte also raised an issue as to
22 whether he should have been allowed to succeed in getting
23 admitted into evidence what FEMA's previous position was
24 regarding evaluating utility plants.

25 The staff would submit that that complaint does

1 not really directly rebut the FEMA presumption, but rather
2 it goes to whether FEMA's testimony can be given
3 credibility. Under the Commission's regulations, it's not
4 the credibility of FEMA's findings that's at issue. The
5 presumption applies if FEMA makes a determination that the
6 emergency plans meet or do not meet the Commission's
7 regulations.

8 JUDGE BOLLWERK: Do you think that the presumption
9 that's been accorded to FEMA findings here, does that come
10 from the regulation, or does this come from, as Mr. Dignan
11 suggested -- he didn't really care what the difference was
12 -- it comes from the Commission's adjudicatory decisions
13 rather than the rule itself?

14 MS. YOUNG: I think it comes from both. You have
15 the wording in the regulation that FEMA's findings in any
16 proceeding constitute a rebuttable presumption. You also
17 have a few of the authorization acts containing language
18 that it wants FEMA to take whatever efforts it can to
19 facilitate evaluation of emergency plan in those
20 circumstances where state and local governments do not
21 participate in planning.

22 JUDGE BOLLWERK: I take it at one point, FEMA's
23 position was they couldn't review utility plants, and that's
24 not their position anymore?

25 MS. YOUNG: Well, I think part of the reason for

1 that position was that they didn't feel that they had
2 adequate criteria to review utility plans; in other words,
3 that the emergency planning regulations as drafted envision
4 considerable state and local participation in planning.

5 JUDGE BOLLWERK: But it's now their position that
6 they do, in fact, have sufficient criteria?

7 MS. YOUNG: We have the criteria. We have NUREG
8 0654, rev. 1, sup. 1, I believe it is, which incorporates
9 the best efforts presumptions under the 5047(c)(1).

10 JUDGE BOLLWERK: With respect to 5047(c)(1), Mr.
11 Traficonte makes an argument which he hasn't really repeated
12 here that the regulation seems to anticipate that there is
13 going to be some kind of a finding of a deficiency or
14 infeasibility in terms of compliance with the agency's
15 regulatory standards for the utility plan before the
16 presumptions apply, and when you look at the regulation, it
17 certainly seems to read that way. Tell us a little about
18 where that takes us.

19 I mean, clearly it talks about due allowance for
20 infeasible, where compliance is infeasible or where there
21 are any deficiencies resulting from state and/or local
22 participation, but there were not any kind of deficiency
23 findings here that I'm aware of.

24 MS. YOUNG: No, you're correct, the Board found no
25 deficiencies, but, again, those 16 planning standards, many

1 of them do envision considerable state and local
2 participation. So, to the extent that that was not present,
3 an applicant would not be required to specify where his plan
4 fails to meet those standards in order to have it evaluated
5 by NRC and FEMA.

6 JUDGE BOLLWERK: Doesn't the Board have to make a
7 finding there's a deficiency before it can comply? I mean,
8 why is the language of deficiency in this regulation if it
9 doesn't seem to have any -- if you're just going to apply
10 the presumption whenever you have a utility plan?

11 MS. YOUNG: Well, I guess we have to be clear on
12 what presumption we're talking about. I think the
13 regulation specifically provides, if there is a utility
14 plan, there's a best efforts presumption which is
15 irrebuttable, that state and local governments will act to
16 protect their citizenry in an emergency.

17 The rebuttal presumption is that they would use
18 the utility plan, and that presumption passes muster in
19 situations where there's a failure of state and local
20 governments to participate, and a failure to indicate what
21 actions they would take in an emergency.

22 JUDGE BOLLWERK: Would the regulation be better
23 drafted there if it didn't refer to deficiencies at all? Is
24 there really any need to show deficiencies?

25 MS. YOUNG: The deficiency in terms of the concept

1 of regulation is that state and local governments aren't
2 participating in emergency planning, and that's the
3 situation for Seabrook, where neither FEMA nor the Board
4 found any deficiencies in the plant.

5 JUDGE BOLLWERK: Again, the regulation was drafted
6 in part, in the Shoreham case, which was an instance where
7 essentially the argument was that the people directly
8 traffic couldn't even stand on the corner without violating
9 state law, that was clearly a deficiency, in this case there
10 wasn't any deficiency like that, but my understanding is
11 there's no argument that traffic people can't stand on the
12 corner, there's not the same situation at Shoreham, there's
13 no need to find a deficiency to have this regulation go into
14 effect.

15 MS. YOUNG: I think the Massachusetts Attorney
16 General did at one time allege that the New Hampshire Yankee
17 RO would not have legal authority to take certain actions.
18 So, it's not true then in this proceeding, issue in
19 controversy as to whether certain actions other than that
20 could be taken by the utility. So, as to the issues raised
21 by Intervenors, would put into question whether the plan met
22 the Commission's emergency planning standards. You know,
23 arguably, the contentions raised that, and because they
24 raised that the Board had to consider whether the advocate
25 would prevail or had met the criteria for consideration of

1 this utility plant.

2 JUDGE WILBER: I have some questions about the
3 Town of Hampton Coalition, page 22 through 26. I thought we
4 heard this morning from Mr. McEachern that there were no
5 troopers at all around the beach.

6 MS. YOUNG: I recall him stating that this
7 morning.

8 JUDGE WILBER: Yes, all right, now if you look at
9 footnote 26 in there, he claims in TR 23 through 38 that
10 FEMA found that the troopers handled beach closing. Now,
11 how did they do that?

12 MS. YOUNG: Well, I think again the Board assumed
13 that those activities were part of individual's normal
14 duties, would be taken in the event of emergency.

15 JUDGE WILBER: How can they make a positive
16 statement that they handled it if they weren't there?

17 MS. YOUNG: You're questioning the adequacy of the
18 demonstration of that objective during the exercise?

19 JUDGE WILBER: I don't have the transcripts in
20 front of me, but if this was properly quoted it says FEMA
21 found that they had handled the beach closing, and yet it
22 goes on to say that there weren't any troopers there.

23 MS. YOUNG: I think in terms of devising these,
24 FEMA and New Hampshire agreed on how many individuals would
25 be involved in staffing various locations. There were

1 only --

2 JUDGE WILBER: I think you missed my question.

3 MS. YOUNG: I'm sorry.

4 JUDGE WILBER: How can they make this statement if
5 there were no troopers there? I can understand them saying,
6 well, we didn't exercise that part of it, but according to
7 this they're saying they were making a positive statement
8 that they handled the beach closing.

9 MS. YOUNG: But I think part -- the basis for that
10 was that the procedures were followed to implement staffing
11 at those locations even though individuals did not appear
12 and the exercise demonstrated that those procedures weren't
13 followed.

14 JUDGE WILBER: And in the same light, we go back
15 to page 17 of this, it says they're claiming, a Mr. Donovan
16 testified, or stated in an exhibit that these schools were
17 promptly notified of changes in the situation at home from
18 the Department of Education, and then you go onto the next
19 page where there's a discovery, statement in the discovery
20 document that FEMA did not observe or evaluate the
21 performance of school administrators. How do you reconcile
22 these two?

23 MS. YOUNG: Could you read the first statement, I
24 see the second one.

25 JUDGE WILBER: It's in the second paragraph, the

1 bottom, page 17, in that report Mr. Donovan states that EPZ
2 schools were promptly notified of changes in the situation
3 by phone in the Department of Education.

4 MS. YOUNG: I think that the contact was made to
5 those administrative units in New Hampshire and that
6 Mr. Donovan's testimony did rely on advocates, laws during
7 the exercise and what activities were done.

8 JUDGE WILBER: Then the discovery statement is not
9 correct, is that -- they didn't observe or evaluate the
10 performance of school administrators?

11 MS. YOUNG: Well, it may be that they did not
12 directly observe it, but it was part of their evaluation of
13 whether certain activities were done?

14 JUDGE WILBER: How do you do that?

15 MS. YOUNG: They had the applicant's records of
16 activities that were done in the exercise, and again, you
17 know, the demonstration, whether the various objectives were
18 met in the FEMA exercise was limited by various constraints.

19 JUDGE WILBER: FEMA does an evaluation by
20 reviewing the records?

21 MS. YOUNG: That's one of the ways that it does
22 its evaluation. It also interviews individuals who perform
23 certain duties during the exercise, sometimes directly
24 observes individuals as they're executing their duties
25 during exercise. There are constraints on a number of FEMA

1 evaluators that can be present at any exercise and so they
2 look at a number of indicators to determine whether various
3 objectives are met.

4 JUDGE BOLLWERK: Let me ask a broader question in
5 the same context. One of the things licensing board said
6 was that there's no need to have a lot of police officers,
7 for instance, around and direct traffic because the police
8 officers already know how to direct traffic and they don't
9 have to be there to practice that, I guess that's a valid
10 statement as far as it goes, but it's my understanding, and
11 correct me if I'm wrong, one of the aspects of emergency
12 planning exercise is not only to have people perform their
13 duties, but also to see that people to some degree are going
14 to show up and be where they're supposed to be. There's an
15 aspect to it, things that can be implemented in terms of
16 both their availability and their willingness to show up, am
17 I correct in that assumption?

18 MS. YOUNG: I think you are correct with respect
19 to police personnel. I believe there are about sixteen
20 officers in total that were mobilized during the exercise,
21 so it's not true that there was demonstration by virtue of
22 one or two individuals, and there was confirmation by FEMA
23 in its exercise report that the procedures for mobilizing
24 other officers were followed, and they could reasonably
25 conclude that they would perform in event of emergency.

1 JUDGE BOLLWERK: Would the same be true with
2 respect to the schools where I'm told apparently there were
3 some bus routes that may have been run and a couple of calls
4 were made although Mr. Dignan's indicated none of the
5 private schools were called.

6 MS. YOUNG: Well, I think there was at least one,
7 there was a public school and one private school, a nursery
8 school, that was called during the exercise, but the bus
9 routes for many of the schools, some were run in sequence,
10 some were run out of time just to determine whether they
11 could be followed, and also those numbered, I think, over a
12 hundred, and there were bus routes that were actually run.

13 JUDGE BOLLWERK: Buses with drivers in them going
14 around the route.

15 MS. YOUNG: I'm not -- I think some of them were
16 buses, some were other vehicles, but anyway the routes were
17 run to see if they could be followed and the times involved.

18 JUDGE WILBER: Can I go off into a different area?

19 MS. YOUNG: Certainly, I've finished my comments
20 on your arguments raised this morning.

21 JUDGE WILBER: Pardon?

22 MS. YOUNG: I finished my prepared remarks in
23 arguments raised this morning.

24 JUDGE WILBER: In the licensing board decision
25 90-1, which deals with the -- bear with me a moment -- the

1 withdrawal of WCTY, I believe radio, one of the applicant's
2 response to the attorney general's motion to re-open, I
3 think they said something that is critical in determining,
4 public information material is critical to determining what
5 public will listen, that public will listen to the correct
6 station, okay, this was the statement made by the applicant,
7 and I looked at exhibit 40, which I'm sure has been updated
8 at least to the year, which is a 1989 calendar they put on
9 it, and in there is listed WCTY as the station to listen to.
10 Now, if they're not participating, isn't that misleading.
11 Is the calendar, other than the year, been updated? Have
12 they moved that station from the public?

13 MS. YOUNG: I think that kind of question is
14 better addressed to applicants, I'm not familiar with the
15 status in that calendar.

16 MR. DIGNAN: The answer is yes.

17 JUDGE BOLLWERK: In terms of the appeal from 89-
18 17, Vans System, vehicular alert notification system, one of
19 the questions in there is the point what does about fifteen
20 minutes mean, some of the times there are considerably,
21 well, considerably at least three or four minutes in excess
22 of fifteen minutes, and I wonder if the staff has any
23 thoughts about what the word "about" means?

24 MS. YOUNG: Well, not in the terms of a specific
25 time period, although twenty minutes is not unreasonable.

1 JUDGE BOLLWERK: You say twenty minutes is not
2 unreasonable?

3 MS. YOUNG: No, it's not unreasonable.

4 JUDGE WILBER: Within five --

5 MS. YOUNG: Well, just let me state, in terms of
6 the requirement of Appendix E, I think, it talks about
7 having a design objective to alert and complete official
8 notification within about fifteen minutes, so that criteria
9 doesn't say exactly fifteen minutes, and the staff has taken
10 a position consistent with FEMA that that time period does
11 not require the completion of the EBS message within that
12 time, within the fifteen minute cutoff to the extent that it
13 might be unreasonable sometimes to limit EBS messages
14 artificially to a certain time period. So, to the extent
15 that a message broadcasted would extend for a few more
16 minutes, that would not be unreasonable or inconsistent with
17 the design objective.

18 JUDGE BOLLWERK: I think earlier we raised a
19 question about a status report on all the things that the
20 licensing board asked the applicant to do. Do you have any
21 idea when that's going to be coming out?

22 MS. YOUNG: From the staff?

23 JUDGE BOLLWERK: I don't know if the staff's going
24 to issue it, or if FEMA's going to issue, or who is going to
25 issue it in terms of --

1 MS. YOUNG: Hold off for a moment and I'll ask.

2 MR. REIS: As I understand the question, the SER
3 was issued prior to the approval of NRR's issuance of the
4 license. That was a predicate for the license issuance.

5 JUDGE WILBER: The 20 or 30 or whatever conditions
6 that are in the decision?

7 MR. REIS: That's right. They were written off by
8 FEMA. They sent us a letter. We reviewed them in an SER
9 and that was part of the SER issued immediately prior to
10 license issuance as I understand it. We will advise you if
11 my understanding is wrong, but that is as I pretty firmly
12 understand it.

13 MS. YOUNG: I think that safety violation was
14 served on the Licensing Board. I'm not sure it was served
15 on the Appeal Board. We can confirm that and provide it.

16 MR. REIS: It was Supplement 9 to the SER.

17 JUDGE ROSENTHAL: Was that furnished to us?

18 MS. YOUNG: We would have to verify it for sure.

19 MR. REIS: I believe you are on the service list.
20 So I think it was furnished.

21 JUDGE BOLLWERK: Any other questions?

22 JUDGE WILBER: I have one more. Paragraph 835 of
23 the Licensing Board's decision says subject to modification
24 of the SP&C to ensure that all facilities for special
25 populations can be contacted within 90 minutes. My question

1 relates to the 90 minutes. If we look at NUREG 0654, I
2 believe they say 45 minutes. How are these two numbers
3 reconciled. If you look at page 3.3 of NUREG 0654, they
4 assure 100 percent coverage within 45 minutes. Now it
5 appears that the Board is saying 90 minutes is all right.
6 Is this a new criteria to be followed?

7 MS. YOUNG: I think that finding was based in part
8 on the Applicant's testimony that it would take somewhere
9 between 60 and 90.

10 JUDGE WILBER: Yes, but my question is, how does
11 it meet NUREG 0654? Are you going to tell me that 90
12 minutes is close to 15 minutes?

13 MS. YOUNG: Let me confer with my colleague.
14 Could you point me to the provision that you are
15 referring to about the 45-minute notification?

16 JUDGE WILBER: NUREG 0654, page 3.3, (b)(2)(c). I
17 believe I am citing that correctly. Which is the criteria
18 for acceptance.

19 MR. DIGNAN: The answer is very simple. The
20 criteria for the acceptance we are talking about is the
21 criteria for acceptance of the prompt alert notification
22 system, i.e., the siren and EBS system. This isn't part of
23 that. These are the calls that are made to see what the
24 transportation needs are. One of the reasons it is no big
25 problem is because if the call can't get through, we send

1 the default transportation.

2 JUDGE WILBER: I was misreading it as a
3 notification.

4 MR. DIGNAN: Judge Wilber, I can see from the
5 choice of language of the Licensing Board why there is
6 confusion. As I say, the notification we are talking about
7 in here, I think is clear in context, the call is for
8 transportation. These are the calls that are being made.
9 We are not relying on this to notify people that there is a
10 problem. That is done through the public alert notification
11 system, a combination of the sirens and EBS system. That is
12 the criteria that is addressed in Appendix 3 of NUREG 0654.

13 JUDGE WILBER: If were to just read this sentence
14 standing alone, it sounds like it's a PAR.

15 MR. DIGNAN: I concur in why you would, because
16 they made it as though it sounded like initial contact.
17 What they are talking about in there is our phone
18 notification of transportation.

19 MR. TURK: Your Honor, I am Sherwin Turk. I am
20 not seeking to make any sort of an extended presentation to
21 you. I did want to indicate that there was a part of the
22 questioning today that dealt with New Hampshire evidentiary
23 questions in which Ms. Young was not a participant and in
24 which I was. At some point when Ms. Young turned to me to
25 ask me for a statement of what happened in New Hampshire I

1 believe we became a little garbled in our transmission to
2 you. This had to do with teachers. The point the Staff was
3 making on teachers is that Dr. Milette's testimony was
4 generic in nature. He was not confronted with cross-
5 examination by the Intervenors as to whether teachers in any
6 other situation have boarded buses. He was not asked
7 whether his conclusions would apply to teachers who are
8 asked to board buses. That was a failure in cross-
9 examination by the Intervenors. If they sought to argue, as
10 perhaps they would like you to hold today, that teachers may
11 not be expected to board buses, they failed to establish
12 that either through cross-examination or through any
13 rebuttal testimony of their own.

14 JUDGE ROSENTHAL: They established it through
15 their witnesses, the teachers. It seems to me, Mr. Turk,
16 that if the Applicants and Staff were taking the position
17 that these teachers were not correctly representing what
18 they would do given the emergency that there was some
19 obligation upon again the Applicants and Staff to come forth
20 with some fairly concrete testimony that in circumstances
21 such as this teachers will respond and it might be that
22 there was some affirmative obligation than to do more than
23 putting on a theoretician whether or not the Intervenors
24 asked the question which you are now saying that they should
25 have asked on cross examination.

1 MR. TURK: Your Honor, what the Board had in front
2 of it was testimony from the Applicant's panel that
3 statements such as those of the teachers in which they state
4 in advance how they will respond in an emergency are not
5 reliable predictors.

6 JUDGE ROSENTHAL: Why? Why are they not?

7 MR. TURK: Because the facts and circumstances
8 which will confront a person at the time of an emergency
9 cannot be palpated, cannot be sensibly understood by the
10 person stating his opinion in advance.

11 Further, may I indicate also the Board's decision
12 relies on the Milette testimony to that effect and also goes
13 off into an analysis of the credibility of the teachers.

14 The Board never said that the teachers are lying
15 but they did find that the testimony was not entirely
16 credible and the teachers may have other, have had other
17 motives for their testimony.

18 JUDGE ROSENTHAL: Wait a minute. Let's explore
19 that if I might a minute.

20 To begin with, again did Dr. Milette have any
21 specific examples of instances where people said in advance
22 that they would or would not do something and later on they
23 did what they said they wouldn't do or vice versa?

24 MR. TURK: Your Honor, I have to note that that
25 testimony was given two years again as part of the New

1 Hampshire proceeding. I don't have recall of the instances.

2 JUDGE ROSENTHAL: Okay, all right. Well, we can
3 review that testimony.

4 The second question I have is you say as did Mr.
5 Dignan that the licensing board found these teachers not
6 credible. Now is that because they had sweaty palms or
7 shifty eyes or just what was it about them that led the
8 board to that conclusion?

9 I mean there has to be something more than mere
10 speculation or even more than attributing to them as Mr.
11 Dignan attributes to them this ulterior motive of opposing
12 the plant at all costs even the cost of perjuring
13 themselves.

14 MR. TURK: No one has suggested perjury, Your
15 Honor, but in the Board's New Hampshire decision, at
16 paragraph 7.7 through 7.22, this is 28 NRC 729 to 732, the
17 Board discussed its perception of the credibility of the
18 teachers.

19 For instance, in paragraph 7.11 the Board
20 indicated that "appearing before the Board with such
21 testimony was not a pleasant experience for the teachers.
22 They were very uncomfortable in stating that they would
23 leave their charges in danger."

24 JUDGE ROSENTHAL: That affects their credibility?
25 I am sure I would have been very uncomfortable in that

1 circumstance too.

2 I don't understand how that affects their
3 credibility or makes it apparent that they are not
4 testifying accurately.

5 MR. TURK: Well, that's only one example of the
6 Board's treatment of credibility.

7 Another example is in paragraph 7.15 where the
8 Board addresses the testimony of one of the lead
9 spokespersons for the teachers, a Ms. Dunphy. The Board
10 relates the fact that she is a teacher and she is a strident
11 anti-Seabrook demonstrator.

12 The Board also went into a discussion of the
13 actual petitions that were signed by all of the different
14 teachers who were not appearing before it and indicated that
15 those petitions by themselves did not inform teachers of the
16 types of circumstances that might apply as to whether the
17 teachers' families would be in danger, et cetera.

18 So the Board had a multitude of reasons why it
19 elected to attribute less weight to that testimony than to
20 the generic expert testimony of Dr. Milette.

21 JUDGE ROSENTHAL: Did the Staff make any effort -
22 - I assume that the Staff put on an affirmative case.

23 Did it make any effort to produce teachers who
24 testified to the effect that they are responsible
25 professionals who would not abandon their charges?

1 I didn't see a single teacher that came up and
2 testified to that effect.

3 MR. TURK: The Staff did not try to make that type
4 of an affirmative case, Your Honor.

5 JUDGE ROSENTHAL: And neither did the Applicants,
6 did they?

7 MR. TURK: In terms of producing teachers --

8 JUDGE ROSENTHAL: Did any teachers who would give
9 credence to what Mr. Dignan has told us today that teachers
10 are responsible professionals who would not abandon their
11 children?

12 I don't recall a teacher testifying. All I recall
13 is Dr. Milette.

14 MR. TURK: Your Honor, I don't recall any teachers
15 coming forward and saying yes, they will stay at the
16 schools, they will stay with the children on the buses.

17 The testimony of Dr. Milette however does address
18 school teachers, although not school teachers boarding
19 buses, and that is discussed at paragraph 7.59 in the
20 Board's decision.

21 This issue of course was addressed by Your Honor
22 in the New Hampshire decision. It's not an issue which is
23 before you today.

24 JUDGE ROSENTHAL: Oh, it's not before us today?
25 That issue hasn't been raised at all by any of these

1 Intervenors?

2 MR. DIGNAN: If I may, there is no contention
3 before the Board on Massachusetts teachers and as we pointed
4 out in the brief there's probably a good reason for it
5 because Massachusetts has a legal opinion that says you've
6 got an emergency, the governments will tell the teachers
7 what to do and they will do it.

8 That is point one.

9 Point two, if I may, I would suggest the Board on
10 the question of New Hampshire and what evidence is in, take
11 a look at Zeigler, their witnesses' testimony, post TR 7849
12 at page 49, which I believe you'll find their own witnesses
13 confirmed Dr. Milette's view of teachers.

14 As to the fact that there was no evidence of a
15 teacher abandoning children in any history of the United
16 States, TR 3967, TR 3969, TR 6625-26.

17 Then on the question of any evidence at Three Mile
18 Island of there being any abandonment by teachers, take a
19 look at Applicant's direct post TR 5622 at page 130.

20 There is plenty in this record that says teachers
21 don't walk out.

22 JUDGE ROSENTHAL: These were examples, Mr. Dignan,
23 of teachers being at Three Mile Island, being called to
24 escort their children a distance of 60 miles?

25 MR. DIGNAN: I would have, had I been up here,

1 conceded to you I know of no case where teachers, that
2 somebody has testified that teachers went 60 miles in a bus
3 with children.

4 I know that what was testified to by not a
5 theoretician and his name is "doctor" -- but one of the
6 outstanding people in the world in this field that there is
7 no known case of teachers abandoning the charge put to them
8 by their care of children and that I suggest to you on
9 coming from an expert witness is more than enough to base
10 the finding on unless rebutted, and as I say the views of
11 Dr. Milette on teachers not abandoning children was
12 confirmed by the opposition witnesses.

13 Thank you for the indulgence.

14 JUDGE BOLLWERK: Does the Staff have anything
15 else?

16 MR. TURK: One last point on teachers, Your Honor,
17 and that is we cited in our brief to you on the New
18 Hampshire case back in June of '89 other cases in this
19 Agency where teacher role abandonment has been found not to
20 be a problem and that included the Wolf Creek licensing
21 board decision in which teachers were expected to drive
22 children to reception centers in the teachers' cars.

23 The issue presented was are letters of agreement
24 needed for teachers to perform that role.

25 The licensing board found no such need and the

1 appeal board never reversed that.

2 One last point with regard to Dr. Milette's
3 testimony on role abandonment.

4 My colleague indicated that where emergency
5 workers have a known role and they know it well, that that's
6 a basis for finding they won't abandon, that testimony was
7 not provided in this proceeding as to teachers. That has to
8 do with emergency workers. The teachers were not perceived
9 of as emergency personnel in this proceeding so that
10 testimony may not be applicable to the teachers.

11 I think that is all I have to say, Your Honor.

12 JUDGE WILBER: I have a bookkeeping question, for
13 Ms. Young, I believe.

14 It's on the Massachusetts plan.

15 Are you --

16 MR. TURK: No, I noted that while Mr. Dignan was
17 speaking about transcript cites that the reporter
18 figuratively threw up his hands in the air. I don't think
19 he was catching the transcript cites.

20 I don't know if that is a problem we need to --
21 maybe we can supplement that, ask Mr. Dignan to supplement
22 that after the argument.

23 JUDGE WILBER: Mr. Dignan, could you talk with the
24 Reporter afterwards and see that he gets the transcript
25 cites that you gave?

1 We'd appreciate it. Thank you.

2 MR. DIGNAN: In addition, for the convenience of
3 the Appeal Board those cites will all show up in Section 7
4 of our proposed findings filed in connection with the New
5 Hampshire decided case.

6 JUDGE WILBER: I have a question at page 108 of
7 your brief.

8 You mention that the Westboro facility is a backup
9 and I believe this is for -- not a primary center for excess
10 special populations.

11 You correctly cite the licensing board's paragraph
12 915 for that but I also read a discussion of that at
13 paragraph 8.118 of the licensing board's decision and once
14 again he calls it a backup and I am a little confused.

15 He says it is a backup to accommodate the
16 approximately 1400 special needs persons who cannot fit in
17 the Shriners Auditorium.

18 Now how can this be considered a backup if you
19 have 1400 people that you have no place to put them?

20 Am I missing something here? It says that there
21 are 1400 people that you have no space for and the Westboro
22 facility can be used for that.

23 See, what's bothering me is the expression
24 "backup."

25 MS. YOUNG: I think I understand your question.

1 [Recess.]

2 MS. YOUNG: Judge Wilber, in response to your last
3 question, it is my understanding that the words "backup for
4 that facility" are used in the context of if the primary
5 facility at Wilmington fills, then the Westboro facility is
6 activated. So it is the second facility to be used in case
7 there is overflow.

8 JUDGE WILBER: Am I right that FEMA has not looked
9 at it, or used it as a special facility? I believe that was
10 also in the --

11 MS. YOUNG: Yes. That is in a footnote to that
12 finding at 118.

13 JUDGE WILBER: It seems as though I read that
14 somewhere.

15 MS. YOUNG: Yes. It is the Footnote 52.

16 JUDGE WILBER: Where, I don't know.

17 MS. YOUNG: It is Footnote 52 to Finding 8.118.

18 JUDGE BOLLWERK: All right. I guess we have
19 time for rebuttal. I think Mr. Traficonte reserved 30
20 minutes.

21 MR. McEACHERN: I hope to use only two or three of
22 that.

23 REBUTTAL ARGUMENT BY MR. McEACHERN, ON BEHALF OF
24 INTERVENOR TOWN OF HAMPTON

25 MR. McEACHERN: Your Honors, I occupy a little bit

1 of a unique position here, because my wife and I are the
2 parents of a six-year-old and a three-year-old that go to
3 school in this zone that we have talked about. And the
4 aspersions cast upon the schoolteachers by the Staff of the
5 NRC and by the Applicant are aspersions on the teachers of
6 my children. And they have, regrettably, argued before you
7 that you should not believe them. And in fact, they have
8 argued before you that the Licensing Board did not believe
9 them.

10 Now, I am going to read you what the Licensing
11 Board did say about their credibility, which wasn't read to
12 you by Staff. And at Paragraph 7.16, they say: "The other
13 12 teachers...", speaking of all of the teachers on the
14 panel with the exception of the one teacher that was
15 referred to in Staff's argument: "The other 12 teachers
16 seem to be serious, fair-minded, and, we believe, sincere.
17 We have no reason to believe that the teachers appearing
18 before us have any less commitment to their pupils than do
19 other teachers."

20 There is nowhere in this decision where the Board
21 hints the fact that they were otherwise than sincere. Yes,
22 for any parent who has to decide between caring for their
23 own children or fulfilling a group role, that is going to be
24 a very uncomfortable, anguishing experience. And it was no
25 different from these teachers.

1 The Board merely concluded after that that these
2 13 were not representative of all of the teacher population.
3 Even though another 600 signed a petition to the same
4 effect, the Board said basically they didn't know what they
5 were doing.

6 JUDGE ROSENTHAL: Didn't the Licensing Board
7 conclude that the teachers, while sincere, were simply wrong
8 in predicting what they would do? I thought the Licensing
9 Board's basic conclusion was that all right, these teachers
10 are very sincere in telling you now that they will not
11 respond in the event of the emergency, but in point of fact,
12 we, the Board, conclude that they are wrong about that.
13 Isn't that what the Board --

14 MR. McEACHERN: No, they said they were not
15 representative, Your Honor. At Paragraph 7.20, they said:
16 we do not find that the testifying teachers are
17 representative of the teachers at large. In fact, at
18 Paragraph 7.18 they say: however, we accept the central
19 theme of the teachers' testimony.

20 In other words, anyone who saw them, with the
21 exception of the other people in this room, including the
22 Licensing Board, would believe them, because it was an
23 emotional experience for them. And I just, I frankly am
24 hard-put to understand how Staff counsel can come before you
25 and skirt Paragraph 7.16, which I have just read to you, and

1 how Applicants' counsel can come before you and say that the
2 Board found that they were incredible. I think that those
3 statements are misleading, and they are in issue in this
4 proceeding, because our Exercise Contention 1 went to the
5 scope and there were no teachers that participated in this
6 exercise.

7 JUDGE ROSENTHAL: That doesn't go to the question
8 as to whether teachers will respond or not. That
9 contention, to which you refer, only deals with the question
10 as to whether the exercise was inadequate.

11 MR. McEACHERN: I agree with you.

12 JUDGE ROSENTHAL: Now, I am going to have to ask
13 of Mr. Traficonte, I suppose it is better to ask of Mr.
14 Traficonte than you, Mr. McEachern, whether the Applicants
15 are correct in insisting that there really is no, in the
16 Massachusetts proceeding, or in the Massachusetts part of
17 this proceeding, contention concerned with role conflict as
18 applied to teachers, because your Exercise Contention is a
19 different breed of cat.

20 MR. McEACHERN: I understand that. But at least
21 this gives you, and you first raised it, Your Honor, some of
22 the background behind all of that. This was no exercise at
23 all. And one last point, on the maps issue, yes, they
24 updated the maps, but they didn't exercise the updated maps,
25 because the only four troopers that participated were from

1 Troop A, who knew the roads already.

2 REBUTTAL ARGUMENT BY MR. TRAFICONTE, ON BEHALF OF
3 INTERVENOR COMMONWEALTH OF MASSACHUSETTS

4 MR. TRAFICONTE: Let me take my points slightly
5 out of order, dealing with the schoolteacher issue first.

6 JUDGE ROSENTHAL: I would like you to address
7 first the question as to whether this is properly before us.

8 MR. TRAFICONTE: Yes.

9 JUDGE ROSENTHAL: The question of whether the
10 teachers in the Massachusetts schools will or will not do
11 what the plan calls upon them to do.

12 MR. TRAFICONTE: Yes. I heard a lot of discussion
13 by Your Honor and the Staff and Applicants as to Dr.
14 Miletti's testimony. As I was sitting there, I wasn't sure
15 whether this was testimony that he had given and that I had
16 cross-examined personally in the New Hampshire proceeding,
17 or whether this was some special testimony that in fact is
18 not in the record in the Massachusetts proceeding.

19 The reason why it is not in the record, if the
20 Board has available the brief that we filed on January 24,
21 if you turn to Page 34, you will find that we seek appeal on
22 the disposition of four separate bases of our April 1988 MAG
23 47. And you will note there, and I won't read it in detail,
24 that these bases were rejected by the Board as being
25 previously-litigated human behavior issues.

1 Now, Mr. Dignan stood up here, and I believe, with
2 his usual mild-mannered style, he stood up here and stated
3 as a matter of fact that there had been no contention raised
4 challenging role abandonment in Massachusetts. And he
5 apparently knows why. He's got some secret theory that it
6 runs against the Governor's policy.

7 I will read to you MAG 47Q, and I will read to you
8 MAG 47R, filed in April 1988, both excluded, on the grounds
9 that the issue had already been litigated, presented in New
10 Hampshire.

11 JUDGE ROSENTHAL: But these contentions pertain to
12 the Massachusetts schools and Massachusetts schoolteachers.

13 MR. TRAFICONTE: These are challenges made to the
14 utility plan, based on the utility's plan, what is the word,
15 dragooning of schoolteachers in Massachusetts, with whom, by
16 the way, they have made no contact. So Ms. Young was wrong
17 on one of the many occasions where she simply misstated the
18 facts, no doubt because of her unfamiliarity. But there has
19 been no contact with the Massachusetts teachers by the
20 planners, and certainly nothing in the record to indicate
21 that.

22 But in any event, what we said in Basis Q is the
23 following: There is no reasonable assurance that in the
24 absence of school-specific radiological response plans,
25 sufficient school staff will stay at schools with children

1 waiting for an unknown period of time for New Hampshire
2 Yankee ORO buses. Schoolteachers will not be willing to
3 trust ORO's assurances that the buses will arrive in a
4 timely fashion. They will also be concerned about the well
5 being of their own families. Therefore, teachers and staff
6 will not stay with students for more than a very short
7 period of time waiting for ORO's buses. Since, for many
8 schools, the buses cannot arrive for hours, many teachers
9 and staff were likely to press school officials to pursue
10 other ad hoc strategies, and most will seek to leave by
11 other means.

12 That is Q.

13 The next basis states, and this is Basis R, again
14 excluded. And it reads: There is no reasonable assurance
15 that sufficient teachers or other school staff will
16 volunteer, on an ad hoc basis, to accompany and supervise
17 the students on the evacuation buses at the reception center
18 and at the host special facility. ORO bus drivers, route
19 guides, and other ORO staffers are inadequate substitutes.
20 Many of the students themselves will simply not get on a
21 strange bus, driven by a stranger, unless a familiar and
22 trusted person rides along with them.

23 These two contentions were excluded on the grounds
24 that they raised role abandonment issues, that those issues
25 had already been adjudicated in New Hampshire, and

1 therefore, there was no testimony, nor was the issue open,
2 for the Mass. AG to litigate during the utility plan case.
3 And that is on appeal.

4 JUDGE ROSENTHAL: And you raised on appeal the
5 rejection of those contentions?

6 MR. TRAFICONTE: We raised it in the form, the
7 only form we have, which is that we are seeking --

8 MR. DIGNAN: You are correct.

9 MR. TRAFICONTE: I'm sorry?

10 MR. DIGNAN: You are correct.

11 MR. TRAFICONTE: That is a historical moment.

12 Now, I would like to touch quickly on only one
13 argument that Ms. Young made. And that had to do with the
14 status of these remand issues, which I argued here, and
15 which we believe we briefed to the Commission.

16 She stated that at no time had we moved to amend
17 our brief after March 1. That is to say, after the
18 Commission disposed of our mandamus motion, we have never
19 moved this Board officially for permission to amend our
20 brief. That is a fact.

21 The two points I want to make is, we certainly
22 moved on an emergency basis, prior to March 1, we moved this
23 Board on February 6 on an emergency basis for a
24 clarification of the status of the appeal.

25 JUDGE ROSENTHAL: Why is that a substitute for

1 your having briefed the issues presented by the notice of
2 appeal? You did file a notice of appeal with us.

3 MR. TRAFICONTE: Specifically referencing that
4 decision.

5 JUDGE ROSENTHAL: Addressed to those Licensing
6 Board orders. Correct.

7 MR. TRAFICONTE: Yes.

8 JUDGE ROSENTHAL: All right. Now, I don't
9 understand why it did not become your responsibility, if you
10 wished us to consider your attacks upon those two Licensing
11 Board orders, to brief them. I mean, I don't understand how
12 a motion for clarification, no matter what may be in that
13 motion, can be treated as a substitute for a brief.

14 MR. TRAFICONTE: No. It is not the substitute for
15 the brief.

16 JUDGE ROSENTHAL: What is it?

17 MR. TRAFICONTE: First of all, we did not brief,
18 we did not repeat, in our January 24 brief, what we put in
19 our December 1 brief to the Commission. That is a fact. We
20 did not repeat it.

21 In our January 24 brief, however, we state clearly
22 that we did not repeat those arguments, because it was our
23 view, at that time, that they were before the Commission,
24 and that this Board, at that time, had no jurisdiction.

25 JUDGE ROSENTHAL: All right. Fine.

1 MR. TRAFICONTE: As soon as Mr. Dignan intimated
2 below to the Licensing Board that that may have effected a
3 waiver of our right to get review, we filed an emergency
4 motion for clarification with this Board seeking
5 clarification to the effect that we in fact did not waive
6 our right to have those issues addressed if and when the
7 Commission rules in the mandamus posture, freeing those
8 issues up, as it were, and putting them back, either to the
9 Court or to this --

10 JUDGE ROSENTHAL: Whether it waives it or not, the
11 fact is, you are asking us today to consider issues which
12 you haven't briefed. You do not have a brief on file with
13 us addressed to these two Licensing Board orders, memoranda,
14 whatever they were. Isn't that correct?

15 MR. TRAFICONTE: That is correct.

16 JUDGE ROSENTHAL: All that you asked us to do was
17 to discuss whether, or to address the question as to whether
18 somehow there had been a waiver. But that is a completely
19 different question than the one of whether you have today on
20 file a brief supporting arguments that you wish us to
21 consider at this point.

22 MR. TRAFICONTE: I understand that. And the
23 point, the express language that we used in our February 6
24 motion was that those matters had been briefed prior to
25 January 24, that the brief was sitting before the

1 Commission, and that, indeed, there is even language in this
2 emergency motion that says, upon disposition by the
3 Commission, depending on which way it is disposed of, there
4 is language where I had indicated that the brief would come
5 back to this Board. That was our understanding, at that
6 time, of the jurisdiction --

7 JUDGE ROSENTHAL: How does a brief that you file
8 with the Commission suddenly become a brief that is filed
9 with an Appeal Board?

10 MR. TRAFICONTE: Well, first of all, the
11 jurisdiction over the claims we were making was originally
12 with this Appeal Board.

13 JUDGE ROSENTHAL: Oh, I understand that.

14 MR. TRAFICONTE: So that was taken away.

15 JUDGE ROSENTHAL: I understand that. But from my
16 perspective, a brief before the Appeal Board has written up
17 on top of it "Before the Atomic Safety and Licensing Appeal
18 Board," not "Before the Nuclear Regulatory Commission."

19 MR. TRAFICONTE: Well, Your Honor, I am going to
20 rest on -- I really am at a loss to understand, in light of
21 the situation that was obtaining between November 16 and
22 January 24 -- I have no idea what else we could have done.

23 JUDGE ROSENTHAL: All right.

24 MR. TRAFICONTE: As soon as the issue of waiver
25 came up, we sought emergency --

1 JUDGE ROSENTHAL: Speaking for myself, I
2 understand your argument. I have to think about it more.

3 I think you have made your point on that, and I
4 think --

5 MR. TRAFICONTE: Well, the only other point I
6 wanted to add, in direct response to Ms. Young's argument,
7 is that I would now, if there is a failure to move this
8 Board for permission to amend the brief, and certainly there
9 has been, although I would count that emergency motion as
10 something very close to it, I would now move orally to
11 permit the Intervenor and the Mass. AG to amend the January
12 24 brief to include those issues that have already been
13 addressed that were fully briefed on December 1 to the
14 Commission.

15 JUDGE BOLLWERK: I think a motion like that needs
16 to be put in writing and the opposing parties have an
17 opportunity to respond.

18 MR. TRAFICONTE: Yes. I will do that, Your Honor.
19 Now I am going to take this in no particular
20 order.

21 I want to make a correction. This actually did
22 not come up in argument but I do want to make a correction,
23 a very minor correction to our brief.

24 On page 82 of our brief on the fourth line from
25 the bottom of that page, the last entry there on that line

1 is 164 and that number should be 64.

2 Page 82 of our January 24 brief.

3 JUDGE ROSENTHAL: Would you point specifically for
4 my benefit to where you feel you raised in the context of
5 the Massachusetts portion of the EPZ the matter of the
6 acceptability or non-acceptability of the 20 percent
7 planning standard?

8 MR. TRAFICONTE: Yes, sir --

9 JUDGE ROSENTHAL: I would like you to give me
10 chapter and verse as to where that --

11 MR. TRAFICONTE: Chapter and verse?

12 JUDGE ROSENTHAL: -- that was raised.

13 MR. TRAFICONTE: I will give you chapter and --

14 JUDGE ROSENTHAL: Because I think your opponents
15 said that you never attacked the 20 percent planning
16 standard as such.

17 MR. TRAFICONTE: Right. I want to make two points
18 in that regard.

19 First of all, the licensing board found and it is
20 clear from the transcript I think of the January 13th oral
21 argument that we had in Boston, the licensing board found
22 that our exercise contention 18 which I am going to read a
23 portion of in a minute presented a challenge to the 20
24 percent planning basis. It so found, it held that the
25 language as we had an opportunity to explain the language at

1 oral argument, the licensing board found, yes, that does
2 constitute a challenge to the 20 percent planning basis.

3 JUDGE ROSENTHAL: Which they then found was barred
4 by res judicata.

5 MR. TRAFICONTE: Then they proceeded to come out
6 after a short break and rule that it was barred by res
7 judicata.

8 I want to turn to that in a minute but I just want
9 that first point to be that the licensing board already
10 addressed the issue because both Applicants and Staff argued
11 vigorously that it did not raise the 20 percent issue and
12 the licensing board found that it did.

13 Now where it does is in our MAG Exercise
14 Contention No. 18, which is a lengthy --

15 JUDGE ROSENTHAL: Look, you don't need to read it
16 to us. We have it.

17 MR. TRAFICONTE: It is MAG Exercise 18, basis B.

18 JUDGE ROSENTHAL: All right.

19 B as in Boy or D as in --

20 MR. TRAFICONTE: Yes, B as in Boy, I'm sorry, B as
21 in Boy.

22 JUDGE ROSENTHAL: Well, we can read it.

23 I was just asking you to identify --

24 MR. TRAFICONTE: Well, I can read one sentence of
25 it right now: "Moreover the Exercise demonstrated a

1 fundamental flaw in the utility plan, the SP&C and the New
2 Hampshire plan in that in the event of the kind of
3 radioactive release that occurred during the exercise,
4 resulting in a clockwise sweeping plume that hit virtually
5 every town in the EPZ. Many more persons would have been
6 reporting to the reception centers for monitoring than ORO
7 and the State of New Hampshire had the staff and equipment
8 to monitor within a 12-hour period, even assuming each team
9 could monitor at a continuous rate of 55 evacuees per hour."

10 MR. DIGNAN: Is this an amended one?

11 MR. TRAFICONTE: It is not.

12 I am reading directly from our MAG Exercise
13 Contention 18, Basis B. So we did --

14 MR. DIGNAN: You have a different version than I
15 have. That's for sure.

16 MR. TRAFICONTE: Well, this must be Rev. Zero,
17 Amendment 7.

18 MR. DIGNAN: Well, that's okay --

19 MR. TRAFICONTE: No, this was as filed in
20 September of 1988. You can rest assured of that.

21 MR. DIGNAN: But you amended that.

22 JUDGE BOLLWERK: Wait. One at a time here.

23 MR. TRAFICONTE: It's my turn, so I think I should
24 probably go.

25 Now I want to make one more point about the res

1 judicata law of the case and I apologize to the Board
2 because I think I was under a misapprehension.

3 I argued earlier in my direct argument that this
4 cannot be a matter of claim preclusion because that claim
5 was not adjudicated and it cannot be a matter of issue
6 preclusion for the same reason.

7 Your Honor corrected me and said, well, res
8 judicata may not be the right term, law of the case.

9 I think we may have had a disconnect because when
10 you said law of the case I was assuming that the issue
11 preclusion was the point and not claim preclusion.

12 I understand now as it has been argued by my
13 opponents that this is a straightforward matter of law of
14 the case apparently. The issue was already decided in this
15 proceeding and therefore it governs any time anybody might
16 attempt to relitigate.

17 If that is the notion behind the res judicata
18 finding in January of '89, that is just manifestly wrong.

19 The reason why it is manifestly wrong is that for
20 law of the case to obtain in those circumstances the issue
21 would have had to have been decided.

22 JUDGE ROSENTHAL: Wait a minute, wait a minute,
23 wait a minute, wait a minute.

24 Let's go back to the beginning. This is one
25 proceeding. To be sure, there was a portion of it that

1 dealt with New Hampshire and there was a portion of it that
2 dealt with Massachusetts but it is one proceeding.

3 Now at an early stage of this proceeding there was
4 a contention put into the hopper to the effect that the 20
5 percent planning standard was unacceptable --

6 MR. TRAFICONTE: No, there was not.

7 JUDGE ROSENTHAL: I thought there was.

8 MR. TRAFICONTE: There wasn't.

9 JUDGE ROSENTHAL: And I thought we held, correct
10 me if I am wrong, let me finish --

11 MR. TRAFICONTE: Yes, sir.

12 JUDGE ROSENTHAL: -- correct me. I thought what
13 we held in whatever the ALAB was that dealt with this that
14 there hadn't been a sufficient case made on that issue
15 because unlike the Shoreham case there was no attack upon
16 the Krimm Memorandum, what was the basis of the conclusion
17 of the Applicants that they had to plan simply for 20
18 percent.

19 I thought that the 20 percent standard was put
20 into issue.

21 MR. TRAFICONTE: It was not.

22 JUDGE ROSENTHAL: Not at all? Nobody mentioned
23 the 20 percent standard? It was never -- no Intervenor ever
24 raised any question about the adequacy of the planning on
25 the number of people that were to be monitored? You are

1 telling me that?

2 MR. TRAFICONTE: I am going to tell you the
3 following and very precisely.

4 I think that the confusion here if there is
5 confusion is that there is a difference between the claim
6 that was adjudicated.

7 The claim and the contention that was adjudicated
8 and ruled on was the challenge to the adequacy of the
9 monitoring capacity in the New Hampshire Reception Centers.

10 JUDGE ROSENTHAL: Right.

11 MR. TRAFICONTE: And the thrust of the testimony
12 as this Board found in ALAB-924, the thrust of the
13 testimony and the thrust of the evidence and the focus of
14 Intervenors on that issue was that the 20 percent planning
15 basis, that they did not have the capacity to monitor 20
16 percent of the evacuating population.

17 That is to say that is how the issue was presented
18 for decision -- did they or did they not have the capacity
19 to monitor 20 percent of the population?

20 On appeal to this Board because of the intervening
21 event of ALAB-905 Intervenors including SAPL stood up and
22 said, well, included in that challenge that we made to the
23 capacity of the monitoring centers, included in that
24 challenge -- oh, by the way, we were also challenging
25 whether the 20 percent planning basis was adequate.

1 JUDGE ROSENTHAL: So that they said yes, that was
2 part of our challenge before the licensing board.

3 MR. TRAFICONTE: That is what we argued on appeal
4 to this Board and therefore we argued that ALAB-905 would
5 have an impact on the disposition of the case.

6 This Board in ALAB-924 found that there had been
7 no challenge to the 20 percent planning basis, that had just
8 simply not been preserved or argued or otherwise that SAPL
9 had for a variety of reasons failed to challenge the 20
10 percent planning basis.

11 I can read --

12 JUDGE ROSENTHAL: I think there is an operative
13 word, "sufficiently," that goes in there.

14 Well, in any event we'll have to go back and look
15 at precisely what was before us and what we decided and
16 reach our own conclusion as to whether this was or was not
17 previously raised.

18 MR. TRAFICONTE: On that score, Your Honor, I
19 don't have ALAB-924, which was your decision on this point.
20 I don't have it in the NRC Report version but at the slip
21 opinion, which is what I am looking at, exactly what I just
22 said to you is set forth I believe at pages 33 through 38
23 onto the top of 39.

24 Right there is where you say what is and is not
25 presented.

1 Anyway, to sum that point up about the 20 percent
2 basis, if it is law of the case and it is one giant
3 proceeding, then we don't -- the issue wasn't decided. The
4 issue is not decided. It can't have preclusive effect.

5 One quick point on the -- well, I think I have
6 addressed the school teachers issue sufficiently at this
7 point.

8 JUDGE BOLLWERK: Mr. Dignan in his brief at one
9 point makes in a footnote a reference to the Governor's
10 policy and the policy of the Commonwealth the teachers will
11 do what is necessary.

12 MR. TRAFICONTE: Yes. I believe that was what
13 Judge Rosenthal read. At least I assumed that was what he
14 had read, yes.

15 Well, the Governor can have any policy he wants to
16 and as a constitutional officer the Attorney General can
17 challenge in a proceeding whether the net result of the
18 policy's one way or the other would be people showing up to
19 do their job, so again a matter of role abandonment, we have
20 always -- there has never been a hesitation on our part to
21 challenge the adequacy of the utility plan including whether
22 or not Massachusetts school teachers, public or private,
23 would respond to an emergency.

24 That is something that is open, as far as we are
25 concerned, open to challenge in the proceeding regardless of

1 whatever the Governor's policy might be.

2 That may run, however, to whether or not a letter
3 of agreement is necessary. There is clearly a potential
4 impact on whether or not a letter or agreement would be
5 necessary with such a teacher.

6 JUDGE ROSENTHAL: Are you telling us that the
7 teachers can in essence thumb their noses at the Governor's
8 policy?

9 MR. TRAFICONTE: I am not saying that the teachers
10 can -- I am not in a position one way or the other to say
11 what the teachers can do.

12 I am here to tell you that we would be free and
13 would have challenged on role abandonment and behavioral
14 grounds whether Mass. teachers who are dragooned into the
15 utility plan by fiat would have in fact responded the way
16 the plan assumes.

17 That would have been -- in fact, we filed a
18 contention that attempted to litigate that and we would have
19 litigated that.

20 JUDGE BOLLWERK: Even if it's a fiat of the
21 Governor? The Governor says show up.

22 MR. TRAFICONTE: Well, I'm not sure of the fact
23 that the Governor has a policy, how does that solve real
24 world human behavioral concerns?

25 I mean it may for all I know be a policy of the

1 Governor of New Hampshire -- I can't see how that policy is
2 going to solve any real world behavior, factual dispute as
3 to whether these teachers are going to do what they are
4 expected to do.

5 On that point, by the way, Worcester is not 60
6 miles from the EPZ. That is just not right. Worcester has
7 to be at least 85 miles from Salisbury, Massachusetts, and I
8 have never driven from Salisbury from Worcester but it
9 can't, I don't believe it can be done in sixty minutes.

10 JUDGE ROSENTHAL: We have road atlases around
11 here.

12 We can look at that ourselves.

13 You have about five minutes.

14 MR. TRAFICONTE: That is about all I am going to
15 need.

16 I want to briefly address the in-again, out-again
17 sheltering problem which is very elusive. I want to leave
18 that for last. I do believe that the special facility ETES,
19 just as a lab 924 said, has to be done on an individualized
20 basis, I believe that's the law, I believe it's expressly
21 stated in the regulation, we challenged it on the New
22 Hampshire side, this court confirmed our position, the
23 licensing board two days later went right ahead and ruled in
24 the same way on the Mass side that there has to be no
25 individualized treatment of the special facilities, we

1 believe the law is to the contrary, and we brief that here
2 before you, that's also put forth in our brief.

3 Now, leaving perhaps -- if not the best at least
4 the bizarre for last -- I was sitting there and I apologize
5 if in a couple occasions I was laughing because as I sit
6 here now I can't tell you whether sheltering is in this plan
7 or not in the plan. We, as you know, filed the second half
8 of our February 6th motion, set out in some detail how
9 history was attempting to be rewritten or applicants were
10 attempting to rewrite history. We followed it up with a
11 February 27 motion in which we thought it had become even a
12 more twisted and sad story and in both of those portions of
13 those motions had been referred by this board down to the
14 licensing board. The bottom line is, this is not a matter
15 of an EBS message bringing clarity to an otherwise unclear
16 situation because I'd like to meet the person that's going
17 to draft the EBS message since the issue is, is there
18 sheltering in the New Hampshire plan, which is no longer
19 before you, or is there sheltering in the utility plan for
20 the general beach population. Is it in the plan, and as I
21 indicated on direct argument it was in and out and in and
22 out and it goes in and out and will continue to go in and
23 out to meet whatever is needed on that particular day before
24 whatever tribunal it is being argued because it's simply
25 literally a shell game and I really do believe that if

1 Orwell could not do it justice then maybe Kafka could
2 because it's either -- sheltering is either in the plan and
3 therefore sheltering detail is needed or it is not in the
4 plan for the general beach population and therefore there's
5 no range of protective measures.

6 My simple mind sees it as that simple, but for the
7 life of me it seems to be going in and out and we think that
8 beyond just making it extremely puzzling how you're supposed
9 to come to a decision on this matter, we think it just is
10 not suitable for this kind of litigation over a very serious
11 issue to basically play with the plan for the sake of
12 whatever litigated advantages is being sought.

13 So, on that point I think as it now stands, and
14 again I'm sure I could be corrected on this, as there now
15 stands there is no sheltering provision in the utility plan
16 whereby the people on the beaches in Massachusetts would be
17 told to shelter in the event of -- the people on the beaches
18 who don't have access -- who are out on the beaches, they're
19 transients, there's thousands of them, there is no present
20 procedure for putting those people into shelters, therefore
21 there's no range.

22 Now, if the other side takes the position that
23 there is such a provision and that's what we would recommend
24 as some of the language of the plan seems to indicate, then
25 there's no sheltering detail, we are at a loss to understand

1 how it can be either way. I'm not going to get into --
2 because I just don't think it's worthy of argument, I'm not
3 going to get into the shelter in place notion that everybody
4 except the Mass AG always knew that general sheltering for
5 the beach population was not intended, that's not what the
6 testimony says, that's not what the licensing board says,
7 that's not what this board said, that's not what applicant's
8 counsel at oral argument said, that's not what the plan
9 said. That's not enough. It's not enough that all those
10 things indicate one basic fact, that's not enough, it's
11 apparently possible to just wipe that away and make believe
12 that there is no such thing as sheltering for the general
13 beach population.

14 Thank you.

15 JUDGE BOLLWERK: I thank counsel for their
16 arguments. The case is submitted and we stand adjourned.

17 [Whereupon, at 3:40 p.m., the hearing adjourned.]

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REPORTER'S CERTIFICATE

This is to certify that the attached proceedings before the United States Nuclear Regulatory Commission

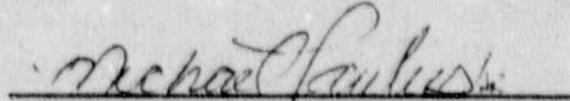
in the matter of:

NAME OF PROCEEDING: Seabrook Units 1 and 2

DOCKET NUMBER: 50-443-OL, 50-444-OL

PLACE OF PROCEEDING: Bethesda, Maryland

were held as herein appears, and that this is the original transcript thereof for the file of the United States Nuclear Regulatory Commission taken by me and thereafter reduced to typewriting by me or under the direction of the court reporting company, and that the transcript is a true and accurate record of the foregoing proceedings.



Michael Paulus
Official Reporter
Ann Riley & Associates, Ltd.