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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of

LONG ISLAND LIGHTING COMPANY

Docket No. 50-322 OL

(Shoreham Nuclear Power Station,
Unit 1)

(Emergency Planning)

ORAL ARGUMENTS

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A P P E A R A N C E S

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Administrative Judges:

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

Nuclear Regulatory Commission Representatives:

Edwin J. Reis
David A. Repka

Appellants:

Stewart M. Glass
FEMA

Intervenors:

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P R O C E E D I N G S

1
2 MR. ROSENTHAL: This Board is hearing oral argument
3 today on the motion of the Federal Emergency Management
4 Agency for a stay pending appeal of the effectiveness of
5 the Licensing Board's May 18, 1984, Memorandum and Order
6 and this operating license proceeding involving the Shore-
7 ham Nuclear Power Facility.

8 That order granted, in part, Suffolk County's
9 Motion to Compel FEMA's production of certain documents
10 sought to be discovered by the County. The Licensing Board
11 itself stayed that order until 5:00 p.m. this past Monday,
12 May 21st. In order to preserve our jurisdiction over the
13 matter, we granted an ex parte emergency stay shortly before
14 5:00 p.m. on May 21.

15 Scheduled for oral argument today, the question
16 as to whether the stay should be continued, pending full
17 consideration and disposition of FEMA's appeal. We also
18 invited the other parties to the proceeding, to file written
19 responses to the FEMA stay motion in advance of argument
20 and such responses have been received from Suffolk County
21 and the applicant.

22 I will now call upon counsel for the respective
23 parties to identify themselves formally for the record and
24 we'll start with FEMA.

25 MR. GLASS: Stewart M. Glass, Regional Counsel, Federal

1 Emergency Management Agency.

2 MR. ROSENTHAL: Mr. Glass, when you filed your motion
3 on Monday afternoon, you represented that the motion was
4 being served that afternoon on the other parties, and most
5 particularly, Suffolk County. I noted in Suffolk County's
6 paper this morning, the representation that they did not
7 receive your papers on Monday. They were not received until
8 Tuesday and I would like an explanation as to why that was
9 the case, in light of the representation that you made to
10 me.

11 MR. GLASS: I was in Mr. Repka's office at the NRC.
12 Mr. Repka handed it to one of his secretaries who informed
13 me she was bringing it downstairs to give it to a messenger
14 to have it delivered to the Kirkpatrick law firm. I think
15 Mr. Repka can explain what's happened there.

16 MR. ROSENTHAL: All right. But as you understand it,
17 it was your responsibility, not that of the NRC staff to see
18 to it that that paper was in fact served upon your adver-
19 sary that day.

20 MR. GLASS: I understand.

21 MR. ROSENTHAL: But I will ask Mr. Repka for an explan-
22 ation as to what transpired. All right, Suffolk County?

23 MR. McMURRAY: Chris McMurray, representing Suffolk
24 County.

25 MR. ROSENTHAL: May I have that name again?

1 MR. McMURRAY: Chris McMurray.

2 MR. ROSENTHAL: Okay. And for the applicant, Long
3 Island Lighting Company:

4 MS. LETSCHE: Excuse me, Judge Rosenthal. My name is
5 Karla Letsche.

6 MR. ROSENTHAL: Well, who is arguing?

7 MS. LETSCHE: I am.

8 MR. ROSENTHAL: Well, then why did I hear from your
9 co-counsel. When I was asking for the identification of
10 counsellor, it's the counsellor presenting argument.

11 MS. LETSCHE: Sorry, we misunderstood you, Judge
12 Rosenthal. My name is Karla Letsche, and I will be doing
13 the arguing on behalf of Suffolk County.

14 MR. EDLES: Mr. McMurray, could you spell your name
15 for me, please?

16 MR. McMURRAY: M c M u r r a y.

17 MR. EDLES: Thank you.

18 MR. ROSENTHAL: All right. For the Long Island
19 Lighting Company?

20 MR. IRWIN: Mr. Rosenthal, my name is Donald Irwin, I'm
21 the counsel for Long Island Lighting Company. I will make
22 the argument for Long Island Lighting Company. With me on
23 my right, is Kathy McCleskey, also of our firm.

24 MR. ROSENTHAL: Thank you, Mr. Irwin. And for the

25 MR. EDLES: Excuse me, could Miss McCleskey spell her

1 name for me?

2 MISS McCLESKEY: Certainly, it's M c C l e s k e y.

3 MR. EDLES: Thank you very much.

4 MR. ROSENTHAL: All right. And for the Nuclear Regu-
5 latory Commission staff?

6 MR. REPKA: David A. Repka for the NRC staff. And with
7 me is Edwin J. Reis.

8 MR. ROSENTHAL: All right. And would you like to
9 explain, Mr. Repka, what happened with regard to the service
10 which apparently the staff undertook to make of the FEMA
11 paper upon Suffolk County?

12 MR. REPKA: The factors related by Mr. Glass are correct.
13 In an attempt to accomodate Mr. Glass, we arranged for ser-
14 vice to all parties on Monday. We did arrange for a hand
15 carry to Kirkpatrick Law Firm. I had no idea until Tuesday
16 morning that that hand carry did not, in fact, arrive.
17 I have absolutely no explanation fo~ what happened to it,
18 but when Miss Letsche called me on Tuesday morning and told
19 me it did not arrive, I arranged for another copy to be
20 delivered at that point.

21 MR ROSENTHAL: Miss Letsche did you, had you been ad-
22 vised that service was going to be made upon you on Monday
23 afternoon?

24 MISS LETSCHE: Yes, I had, Judge Rosenthal.

25 MR. ROSENTHAL: And when you didn't receive it, you

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1 didn't bother checking until Tuesday morning.

2 MISS LETSCHE: Well, Judge Rosenthal, what happened was
3 I spoke with the Board's secretary and shortly after 4:00 p.
4 m., at which point she put me on hold for a minute, made
5 some inquiries, and came back and told me that she had been
6 informed that a messenger was on its way. I assumed at that
7 point that I would receive the documents subsequent to,
8 after 4:00. It did not arrive, I waited until 6:00, and
9 based on past experience, assumed at that point that I would
10 be unable to reach anyone at, reach Mr. Glass. At that
11 point, I did wait until the following morning, at which
12 point I attempted to reach Mr. Glass, who was unreachable.
13 Attempted to reach Mr. Perry from FEMA, who was unreachable,
14 and finally reached Mr. Repka at NRC who kindly telecopied
15 to me a copy of the document.

16 MR. ROSENTHAL: All right, well, I'm not certain that
17 any large harm was done, but at the same time it does seem
18 to me that it is the responsibility of parties to insure
19 that documents are served when they represent they are
20 being served. And, I would not want to encounter a repeti-
21 tion of this event in this case. With that, we'll hear
22 from the appellant. Before you start, Mr. Glass, I know
23 that the applicant is on your side. I don't know where the
24 staff is because it elected, and that was perfectly permiss-
25 ible, not to file a written response to your motion. Is

1 the staff on your side? And, if so, how is the time, your
2 45 minutes being divided?

3 MR. GLASS: I've spoken to the various parties. The
4 NRC staff has requested five minutes. The applicants have
5 requested approximately seven minutes, asking that five
6 minutes be a direct argument, two minutes for rebuttal. I
7 respectfully request to be able to reserve 10 minutes in
8 rebuttals since I will receive the papers as per the Board's
9 direction a little after 9:00 this morning.

10 MR. ROSENTHAL: All right. Well, you keep track of
11 your own time. This is very complicated, five and seven
12 and 10. So you, I'm not going to remind you when your
13 direct argument time as you would have it broken down has
14 expired.

15 Now, I might say for the benefit of all parties
16 that the Board has read everything that's been submitted to
17 it. It also read the Licensing Board's Memorandum and
18 Order of last Friday. There is no necessity for any party
19 to engage in detailed recitation of background. You can
20 assume that we're familiar with it and you can get right into
21 your basic arguments. All right, Mr. Glass?

22 MR. GLASS; May it please the Board, my name is
23 Stewart Glass, I'm the regional counsel of FEMA. With me
24 today is Mr. George Jett, general counsel for FEMA and
25 Mr. Spence Perry, the associate general counsel. I appear

1 before the Board today to seek the continuance of the stay
2 issued by this Board, pending full consideration, disposi-
3 tion, of FEMA's appeal from the Atomic Safety License
4 Board Memorandum and Order dated May 18th 1984.

5 In Virginia Petroleum and Jobbers Association
6 vs. Federal Power Commission 259 Fed 2nd 921

7 MR. ROSENTHAL: I think you can assume we're familiar
8 with the four standards which are now incorporated in the
9 Commission's Rules of Practice.

10 MR. GLASS: It is our contention that it is no require
11 ment that FEMA meet, though we feel FEMA does meet all four
12 standards that are necessary for a stay of the Order. It is
13 obvious, even from the Board's consideration, that FEMA
14 will suffer prejudice if these documents are released before
15 a full hearing on the matter.

16 MR. EDLES: Let me ask you this.

17 MR. GLASS: Certainly.

18 MR. EDLES: In view of overall public interest, why
19 isn't the truth finding or fact finding process facilitated
20 if we were to order release of these documents? Forget for
21 a moment about the deliberative process within FEMA, but
22 why would our fact finding process here be enhanced by
23 release of these documents?

24 MR. GLASS: It's a question of degree. It's making,
25 put aside, again, what goes on in the RAC review and the

1 public interest in that particular matter, which I feel may
2 override the other interest in this particular proceeding.
3 But, basically, what it is, is we're gonna be presenting
4 for FEMA witnesses. FEMA has identified a witness panel of
5 four individuals. There is gonna be an opportunity to
6 cross examine these four witnesses.

7 There has been no showing that there is any need
8 to have these particular documents that have been identified

9 MR. EDLES: What would be the harm, again, strictly
10 from a fact finding perspective now. Putting aside the
11 privilege element. What would be the harm in terms of our
12 discovering the ultimate truth in this matter from your
13 releasing those documents?

14 MR. GLASS: Number 1, you're making an assumption
15 that the ultimate truth cannot be ascertained without
16 having these documents and I think that is incorrect. I
17 think that even if there was a finding that some of these
18 documents may be necessary, it is very obvious that not all
19 the documents are gonna provide at all any additional
20 matter. Again, we're gonna be balancing that against the
21 problems that are creating in order for the RAC in order to
22 carry out its function.

23 MR. EDLES: No, I understand that, but I guess I'm
24 having difficulty seeing the harm to the, our adjudicatory
25 process from releasing these documents.

1 MR. GLASS: The harm to your adjudicatory process is
2 that its own Board has stated, is that this is a continuing
3 process. That the applicant in this proceeding is entitled to
4 make correction to the plan and submit those corrections and
5 to have a hearing on those corrections. And as Mr. McIntire's
6 affidavit has stated, that is going to cause major problems
7 to that process if this material is released.

8 MR. ROSENTHAL: Why?

9 MR. GLASS: Why? Because he's gonna have the diffi-
10 culty, as is the RAC Chairman as supported by his affidavit,
11 to be able to get the full opinions of the RAC members and
12 of his staff.

13 MR. ROSENTHAL: Now, the witnesses that are testifying,
14 do they include members of RAC?

15 MR. GLASS: To clarify, there are four witnesses that
16 are being used. One is Roger Kowieski, who is the RAC
17 Chairman. Number two is Mr. Philip McIntire, who is the
18 Chief Division of Natural and Technological Hazards in
19 Region 2, he is not a member of the RAC. Number three would
20 be Mr. Joseph Keller, who is a consultant to FEMA and assists
21 the RAC as a staff assistant. And Number four is Mr. Tom
22 Baldwin, who is also a contractor with another contracting
23 firm who also is assisting the Board, RAC and works with
24 the RAC.

25 MR. ROSENTHAL: Okay, so you'll have the RAC Chairman

1 and two people that have been consultants to RAC

2 MR. GLASS: That's correct, and they're participating

3 MR. ROSENTHAL: Now, are those individuals going to
4 be permitted to be asked on the witness stand questions
5 with respect to the RAC deliberative process?

6 MR. GLASS: Okay, they will, but I think there's a
7 question as to where we're going on that. I think that
8 probably it is assistance to the Board to discuss the
9 process, how they proceeded, what they did, the steps they
10 took, and maybe even if necessary identify some of the
11 problems, or some of the disagreements that may underly the
12 material. But, it is inappropriate to have them have to
13 identify that Mr. X RAC member from XY Agency said so and
14 so on a particular date or submitting an opinion on a
15 particular date.

16 MR. ROSENTHAL: Now, do you take issue with the County's
17 statement that all it was, is involved in these documents
18 are basic fact findings?

19 MR. GLASS: I most certainly take umbrage with that
20 particular statement. This happens to have the professional
21 opinion of the individual RAC members and their approaches
22 not only to how it meets the RAC, the particular standards
23 of 0654, but also their suggestions on how the problem should
24 be approached and how it should be reviewed.

25 MR. ROSENTHAL: So their evaluations.

1 MR. GLASS: That is correct.

2 MR. ROSENTHAL: Now, if the RAC Chairman were asked
3 on the witness stand, to disclose the opinions that had been
4 expressed by each of his colleagues, I take it you object to
5 that?

6 MR. GLASS: Yes, I would, on relevancy grounds.

7 MR. ROSENTHAL: On relevancy grounds?

8 MR. GLASS: That would be one of the grounds that I
9 would object to on the stand.

10 MR. ROSENTHAL: Why is it irrelevant? Supposing that
11 the County wants to test the underpinnings of this report?
12 I take it that the RAC report is going to be put into evi-
13 dence, is it not?

14 MR. GLASS: It already, yes, it will be put into
15 evidence. It's been prefiled as testimony.

16 MR. ROSENTHAL: All right. It's been made available
17 but it will be formally introduced into evidence at the
18 hearing, is that correct?

19 MR. GLASS: That's correct.

20 MR. ROSENTHAL: Now, why isn't Suffolk County entit-
21 led to obtain the kind of information I suggested as part
22 of its endeavor to probe the underpinnings of this report,
23 which is being put into evidence?

24 MR. GLASS: Okay, let me make sure I understand you at
25 this point. Are you asking now at the deposition, you asking

1 at the hearing itself?

2 MR. ROSENTHAL: Here. I mean I gather that the claim
3 of executive privilege here and we get these affidavits that
4 say that there will be all kinds of harm if the deliberative
5 process, that the RAC members follow, was disclosed.

6 MR. EDLES: I would like to hear you also on the dep-
7 sitions area, where, at least my understanding, that's far
8 broader. You can go into matters that even are not relevant
9 on depositions.

10 MR. GLASS: As long as they would lead to discoverable
11 relevant material.

12 MR. EDLES: That's correct. I'd like to hear you
13 address that as well as the Chairman's question.

14 MR. GLASS: There have been other proceedings whereby
15 steps can be taken that information can be divulged and still
16 protect the system. There have been situations before the
17 Appeal Boards and before the Licensing Boards where indiv-
18 iduals who submitted certain information, whether they be
19 whistle blowers or others, their names have been kept so
20 that it was in such a manner that the individual who wrote
21 that material would not be identified.

22 MR. ROSENTHAL: We are not, in this instance, keeping
23 anybody's anonymity, are we?

24 MR. GLASS: Well, we're not trying to preserve the
25 anonymity, everyone knows who the RAC members are.

1 MR. ROSENTHAL: That's what I thought.

2 MR. GLASS: But there is a difference as to what a
3 particular RAC member said on a particular viewpoint. Some
4 of the RAC members take positions that are opposite, the
5 opinions and formal policy positions of their agency.

6 MR. EDLES: Would it be satisfactory simply to delete
7 all of the names and just submit the comments. No one
8 would then know who made a comment on what, so that presum-
9 ably their continued usefulness as consultants would be
10 preserved.

11 MR. GLASS: As it relates to the first 19 documents,
12 that would not work. The fact is that those 19 documents
13 are limited to specific reviews of subject areas that are
14 delegated to those individuals and it would be rather ob-
15 vious. But when we get to items 22 or 23, I think there are
16 four items that we have received, where there are individual
17 notes, personal notes that were taken on a combined document
18 now, that has the thought processes that has a combination of
19 all the material, but it's lumped together so that you
20 would not be able to identify the individual. The reason
21 we objected to the disclosure of those particular documents,
22 is those particular documents contain personal notes. Those
23 documents were originally subject to protection under the
24 Freedom of Information as personal notes by the individual,
25 the agencies.

1 MR. EDLES: But are they protected under FOIA, because
2 they're not agency records or because they're Fifth Amend-
3 ment material? Go ahead.

4 MR. GLASS: Those particular documents, the first rea-
5 son we were objecting, or at least the Agencies objected,
6 were that they were personal notes. They were written on
7 another document, there would be a way to mask those personal
8 notes, but the notes themselves were personal notes. That
9 is the reason that when General Giuffrida asserted executive
10 privilege, he was familiar with the underlying document,
11 was briefed as to the underlying document, but we would
12 have defeated the whole purpose if we had him review the
13 documents or the personal notes and then the Agencies from
14 which we had gathered them would not longer be able to
15 assert their protection.

16 MR. EDLES: I'm not certain of your answers. In other
17 words, these are not, you argue they are not Agency records,
18 they were personal notes?

19 MR. GLASS: Yes, we gathered, it should be realized
20 that we gathered, in order to fully comply with the rather
21 broad discovery request of Suffolk County, we gathered docu-
22 ments that were not only in our possession, and I know Miss
23 Letsche objected to the fact that I didn't have everything
24 on a particular day but as soon as we received them we
25 identified them. We went out to the PAC members and we

1 called upon them to present to us any documents that they
2 had relating to the particular discovery questions.

3 MR. EDLES: Now let me get again, if the executive
4 privilege or deliberative process privilege is designed es-
5 sentially to protect the free exchange of ideas, why
6 wouldn't that, apart from the first 19 documents where you
7 could clearly target which member was writing, why wouldn't,
8 as to these other documents, why would the reason behind the
9 privilege be completely satisfied simply by not telling who
10 said what?

11 MR. GLASS: Again, as to 21 through 23, if you remove
12 the personal notes, those documents then as an identical
13 document, you would not know who presented that.

14 MR. EDLES: And as to 1 through 19, I can understand
15 how you would be easy targets.

16 MR. GLASS: Right.

17 MR. EDLES: So now we're gonna work on, how many of
18 the others, just remind me again, how many were there not
19 released? 30 to 37 were ordered released.

20 MR. GLASS: Yes, before we get to that, I think one
21 thing should be noted. The ASLD talks about the 37 that we
22 asserted executive privilege for 37. I think that it should
23 be clearly noted that number one, there was an FOIA request
24 that proceeded this for over 1,000 pages were produced.
25 That we identified, and I personally reviewed those documents

1 or at least we identified another 40 that we did produce.
2 There were another eight that we produced after getting
3 clearances from other agencies, and in addition, as I received
4 them from other agencies, anything that we felt was
5 appropriate, we sent to them. So we are not dealing with
6 that we asserted the privilege over 37 out of 37. Okay.
7 If I could just get my list, I'll be right with you.

8 Of the ones in contention, 25 would not have an
9 individual involved, that would not involve an individual.
10 Twenty-six I would have to refresh my memory, they were
11 four random draft pages, I'm sorry, that's the consolidated
12 RAC review. I would have to review them to see if there
13 are any draft notes on it. But if there's no notes, then
14 that would not involve an individual.

15 MR. ROSENTHAL: Well, rather than go down that list at
16 this point, what is the problem about disclosure on the terms
17 that Mr. Edles suggested, documents not involving individuals,
18 or not involving disclosure of the identity of particular
19 individuals.

20 MR. GLASS: We felt that they were pretty decisional.
21 If, and we do feel that we had a right to assert the
22 executive privilege, and I don't think the Board challenged
23 that. If the Board in its weighing determine that those particular
24 documents were necessary, they I think that we
25 probably would not object to them.

1 MR. ROSENTHAL: What harm, I understand you have a
2 claim of executive privilege and of course the Board upheld
3 the assertion of the claim. What harm would the occasion
4 to FEMA and its processes, if those documents were disclosed?

5 MR. GLASS: You're not talking about 1 through 19,
6 you're talking about 39.

7 MR. ROSENTHAL: I'm talking about the documents that
8 could be disclosed without identification of positions of
9 particular individuals.

10 MR. GLASS: I would have to be honestly say that at
11 this point we probably would, if that was all that was going
12 to be ordered to be produced, we probably could agree with
13 that.

14 MR. ROSENTHAL: All right.

15 MR. GLASS: It's a similar result that resulted in the
16 India Point hearings in front of the ASLD, which involved
17 team leader execrits versus individual execrits, which I
18 think I described before.

19 MR. ROSENTHAL: Let me ask you this question. I'm
20 not clear how the RAC functions. I gather these individual
21 members provide their own comments and appraisals in writing
22 is that right?

23 MR. GLASS: That is correct.

24 MR. ROSENTHAL: Now, then do those comments circulate
25 among all other members of the RAC and then do they get

1 together to discuss them and out of this comes some kind
2 of a consensus report prepared by the Chairman or staff mem-
3 bers or what?

4 MR. GLASS: It's very close. What ends up happening
5 is they submit their individual reports, items number 1
6 through 19. They then assemble that material as is indicated
7 on item number 37, which what they basically did is they
8 cut out, and it's marked on that particular document, NRC
9 comment. We'll have the standard I A I or the element, we'll
10 mark down the individual who reported, just a past up job,
11 compilation, and then they take those materials and then
12 they put it down into a draft document, which is the one
13 that the individual RAC members had marked up, which is
14 identified as 20 through 23. And then they met on January
15 20th, 1984, and they reviewed those documents, made their
16 comments to the RAC Chairman and then the modifications and
17 the final version came out.

18 MR. ROSENTHAL: Were there dissents?

19 MR. GLASS: I spoke to the RAC Chairman about that.
20 There is always, in a collegial situation somebody who would
21 have liked his exact wording used, or his exact opinion
22 used.

23 MR. ROSENTHAL: Yes, we've experienced that up here.
24 But supposing there's disagreement on a matter of substance
25 rather than a matter of style, let me put it that way. Does

1 an individual member of the RAC have the right to file a
2 dissenting opinion expressing the view that the majority
3 is out to lunch on a particular aspect of it?

4 MR. GLASS: We've never come to that point. They will
5 sit there and work it out until they come to a collegial
6 judgment.

7 MR. ROSENTHAL? They do. Well, if we went about that
8 in all cases, I suspect that there would be decisions that
9 would never get issued.

10 MR. GLASS: We're very luck to have a very goo, very
11 strong RAC Chairman.

12 MR. WILBER: Do these members limit themselves to
13 special areas? You said they were given assignments as
14 to areas, for instance the EPA member, say they prepare the
15 protective action, this type thing?

16 MR. GLASS: They have their particular areas, but they
17 are not restricted. And there are many times that they go
18 beyond that and indicate other areas that they either have
19 an interest in, feel that they have an expertise, or feel
20 that they have a particular view that should be taken into
21 account.

22 MR. ROSENTHAL: Well now, if Suffolk County were to
23 obtain these materials, it might be able to ascertain whe-
24 ther this very strong Chairman to whom you refer bludgeoned
25 certain members into coming into line. Now, why isn't that

1 an appropriate exercise? I mean, this is why I was asking
2 you about the dissent process because if dissents were pos-
3 sible, perhaps even encouraged, then one could say, on the
4 face of the report, that it represented the views of whoever
5 subscribed to it. But if you've got a Chairman who apparen-
6 tly holds the thing up until he gets everybody in line, why
7 isn't this an appropriate kind of inquiry?

8 MR. GLASS: Number one, I safely can say, having
9 worked with Mr. Gillespie a number of years, that if you put
10 the question to him of whether he bludgeoned to anybody or
11 whether there was a dissenting view that he did not allow,
12 he would truthfully answer that question. And I think you
13 have three other, two other members of the panel who partici-
14 pated who certainly would not perjure themselves for this
15 particular proceedings. Nor for any other proceeding.

16 I think the comments, you have to realize, the
17 comments have a final viewpoint of yes something's adequate
18 and no, it's not adequate. But it also contains in there a
19 number of thoughts and a number of statements as to why it's
20 inadequate or adequate, what corrective action can be taken.
21 It's not a hard and fast rule of we're granting a yes or
22 we're granting a no. In the material, you may have some
23 things, if you want to talk about shading, you had a number
24 of items that were identified as conditionally adequate in
25 the final RAC documents.

1 MR. WILBER: Is there a single RAC document you mention-
2 ed, I believe revisions one, three and four have been men-
3 tioned as far as the plans. What does the RAC document
4 address?

5 MR. GLASS: There was originally submitted revision one
6 and work was done on revision one and some of the documents
7 indicated in here had gone as far as revision one. Revision
8 two came in and before we could even start work on revisio:
9 two, we were notified as to revision three. So they did not
10 actually start work until revision three came in. So they
11 had work on revision one, the first

12 MR. WILBER: Nine.

13 MR. GLASS: Nine deal with revision one. And the next
14 group deal with revision three. Revision four is not yet
15 here but there was a meeting at the request of the NRC, at
16 the request of the applicant, and we have been told by the
17 applicant that revision four will be here shortly.

18 MR. WILBER: And does one revision completely supersede
19 the prior revision?

20 MR. GLASS: No, the way it's been handled, though there
21 have been differences between each of the revisions, it's
22 basically that a revision, certain corrections have been
23 addressed. Certain changes have been made, hopefully they
24 correct them. Sometimes they create problems that didn't
25 exist before.

1 MR. EDLES: A question on unrelated matters. Is
2 General Guiffrida a presidential appointee?

3 AUDIENCE: He is a presidential appointee with advise
4 and consent to the Senate.

5 MR. EDLES: Thank you.

6 MR. ROSENTHAL: Do you have any further questions or
7 do you wish me to proceed?

8 MR. EDLES: Not at this point, you may proceed.

9 MR. ROSENTHAL: You'll want to watch your time, I
10 think, if you're reserving rebuttal.

11 MR. GLASS: Why don't I take my time now and then I'll
12 wait in rebuttal.

13 MR. ROSENTHAL: All right, now, we'll now hear from Mr.
14 Irwin.

15 MR. IRWIN: Thank you, Judge Rosenthal. May it please
16 the Board, my name is Donald Irwin, I am on a counsel for
17 Long Island Lighting Company. LILCO is here today on a dis-
18 covery in dispute which is not of its making but one in
19 which it has a strong derivative interest simply because the
20 efficient and effective functioning of the RAC is essential
21 to LILCO's obtaining an operating license for Shoreham.

22 MR. EDLES: Mr. Irwin, it's been represented in the
23 papers that you have at least not interposed any objection
24 to the very brief delay occasioned by this interim appeal on
25 this matter. Is that roughly accurate?

1 MR. IRWIN: For the reason that, yes, it is Judge Edles
2 for the reason that there are other witnesses who could tes-
3 tify next week in the event the FEMA witnesses do not
4 appear.

5 MR. EDLES: But since we have, I'm sorry.

6 MR. IRWIN: There two observations that ought to be
7 made on that. One is that we've, there are scheduling dis-
8 cussions that are currently in process with Suffolk County.
9 Local witnesses are prepared to appear on issues which are
10 scheduled for hearing. Secondly, I believe this is a matter
11 I hope the Licensing Board would work with the parties to
12 resolve, if need be, in short.

13 There are witnesses and issues, that is the reason
14 we didn't interpose an objection.

15 MR. EDLES: Okay, but let's, we have only before us a
16 stay. We haven't yet got to the merits or won't today.
17 Let's assume that takes another week or two or three to re-
18 solve the merits of this. How long, you know, roughly, can
19 you put these other witnesses on or move forward with the
20 hearing before we ultimately have to put these FEMA people
21 on the stand?

22 MR. IRWIN: My candid guess is that there are approxi-
23 mately three to five weeks of issues left to be tried at
24 Shoreham. The FEMA witnesses are now scheduled to appear
25 again in, I believe, the second week of July, is that right,

1 Stewart?

2 MR. GLASS: Yes.

3 MR. EDLES: The FEMA witnesses are scheduled to appear?

4 MR. IRWIN: They are scheduled to appear on two occa-
5 sions, Judge Edles. One next week and secondly during the
6 second week of July, if needed. So, I do not see any mater-
7 ial disruption of the hearings, assuming that LILCO is
8 unable to

9 MR. EDLES: Let me ask you, there's an argument made
10 by Suffolk County that they are not yet prepared on certain
11 of the other witnesses. Who else is scheduled, for example,
12 next week, other than the folks from FEMA?

13 MR. IRWIN: Next week had been set aside as FEMA week.

14 MR. EDLES: Okay.

15 MR. IRWIN: Because RAC is a busy group of people and
16 you have to schedule for a time certain.

17 MR. EDLES: I understand. Will you be holding hearings
18 the week following?

19 MR. IRWIN: Yes, sir, we'll be holding

20 MR. EDLES: And those are non-FEMA witnesses?

21 MR. IRWIN: That's correct.

22 MR. EDLES: Okay, presumeably, Suffolk County has
23 known that all along, that that week was scheduled for non-
24 FEMA week?

25 MR. IRWIN: Yes, sir, there is an agreed upon order of

1 trial of issues.

2 MR. EDLES: Okay, thank you.

3 MR. IRWIN: One introductory apology to the Board. My
4 paper reflects a brief telephone message. I did not realize
5 that today's argument was limited to the issues involved in
6 the stay. However, the merits, which I did address briefly,
7 are of course first of the issues of the stay in the
8 Virginia Petroleum Jobbers.

9 Let's make sure that we understand what the issue
10 is here. There is a group of documents which are admittedly
11 privileged. The only question seems to me before this
12 Board is whether or not Suffolk County has demonstrated com-
13 pelling need for these documents.

14 MR. ROSENTHAL: When you say admittedly privileged,
15 the Board found them privileged, but if I read Suffolk's
16 papers correctly, they don't concede that at all.

17 MR. IRWIN: That's correct, Judge Rosenthal. They
18 didn't file an independent appeal from that. In short,
19 I think

20 MR. ROSENTHAL: They didn't need to file an appeal.
21 If they're satisfied with the results, they can send that
22 result and any ground that they see fit. That's common
23 appellate practice.

24 MR. IRWIN: My understanding, Judge Rosenthal, is that
25 the Board held the documents to be privileged, but

1 outweighed, but held that the privilege had been outweighed.

2 MR. ROSENTHAL: I understand that, but Suffolk County
3 can defend its results on any grounds that it sees fit to
4 advance, whether that ground has Licensing Board support or
5 not.

6 MR. IRWIN: Admittedly, I agree with you also, that
7 Suffolk County can choose any ground it wishes in which to
8 defend it, nevertheless, the Board, which has examined the
9 documents, did find them to be privileged and I assume that
10 if this Board gets involved, it will also review the docu-
11 ments on that question. We, of course, have not, so we
12 can't make that judgment on it.

13 But assume that the documents are privileged, the
14 questions really are has Suffolk County shown a compelling
15 need for these documents, and does that need outweigh the
16 Agencies' asserted need for preservation of confidentiality.
17 One of the criteria that goes to the question of whether a
18 compelling need has been demonstrated, and that by the way
19 is Suffolk County's burden, of course, is whether these
20 documents convey unique information, whether there is other
21 information available that conveys essentially the substance
22 of the documents.

23 As Mr. Glass has pointed out, FEMA has already pro-
24 duced over 1,100 pages of documents on an FOIA request. Over
25 40 of those documents have been designated as relevant to the

1 RAC Process. In addition, two days of depositions have
2 been agreed upon of the four RAC witnesses. It seems to me
3 that the argument is, at best, premature, that there is a
4 compelling need for these documents given the other avenues
5 of access to the information which is arguably contained in
6 them.

7 Secondly, there is another component of compelling
8 need and that is whether the information in these documents
9 is essential. I don't know whether it's essential or not,
10 but it seems to me that there is enough information floating
11 around that you're going to make a strong argument that it's
12 not. In any event, the focus of FEMA's presentation is
13 not the RAC review or the RAC Process or the individual
14 views necessarily of RAC Members. It is the underlying
15 basis of the testimony and the RAC report. And I think we
16 need to make a distinction between prying into and essen-
17 tially mysterious process and understanding what the factual
18 and judgmental and technical bases is really distinguished.
19 I'm sorry, Judge Edles.

20 MR. EDLES: I was gonna ask what the relevance is or
21 bearing of the fact that the FEMA findings are given re-
22 buttably presumptive effect in our proceedings. Doesn't it
23 carry a little more weight and thus shouldn't we be a wee
24 bit more lenient in permitting people to probe behind those
25 findings?

1 MR. IRWIN: I'm not sure that that necessarily follows.
2 I think, even if it does though, I think you've got to dis-
3 tinguish between prying into the basis of findings and
4 prying into a process which is, as Mr. Glass has indicated,
5 one by why a committee attempts to reach a collegial judg-
6 ment. If you start getting too deeply into that process, as
7 I understand it, the basis of FEMA's argument and I'm always
8 leary of making other people's arguments for them. But, as
9 I understand it, you don't necessarily have a whole arith-
10 metically equalling the sum of its parts in that process.

11 I am worried, as counsel for an applicant, about
12 that process being torn asunder. There are sincere expres-
13 sions of concern on the part of the Agency about that
14 process. The majority of members of that committee are not
15 FEMA employees, that means they're not subject to internal
16 agency discipline and, indeed, as I understand the affidavits
17 they may be unwilling to participate voluntarily in the RAC
18 if their views and lives and so forth are inconvenienced
19 beyond acceptable bounds. We are concerned about that.

20 MR. EDLES: One further question on timing.

21 MR. IRWIN: Yes, sir.

22 MR. EDLES: This upcoming week is for FEMA witnesses.
23 The following week will begin non-FEMA witnesses. Do you
24 then run through up through and including the second week
25 of July?

1 MR. IRWIN: At this point, Judge Edles, we would be
2 running for three weeks, recessing for two weeks and resu-
3 ming for three further weeks. There's a list of about 20
4 additions. We're in the process of discussion with Suffolk
5 County and the other parties of possible restructuring of
6 the hearing schedule. But, in any event, there is no dearth
7 of either issues or witnesses or agreement on a schedule.

8 MR. EDLES: At least between now and first week of
9 July.

10 MR. IRWIN: Yes, sir, that's correct, at least during
11 that.

12 MR. ROSENTHAL: Your time has about expired. I'll give
13 you about a minute if you.

14 MR. IRWIN: Okay. Very briefly, on the other three
15 tests other than merits, FEMA can make its own case on
16 irreparable harm, or harm to other parties from not produ-
17 cing. I think it's minimal given Judge Edles and my
18 discussion about hearing schedules. The public interest is
19 an important factor. And obviously involves full and frank
20 discussion of those facts necessary to a decision. It also
21 involves protection of the Agency process. And you have a
22 unique situation here because FEMA is an independent Federal
23 agency due to the same deference as other Federal agencies.
24 That's a thicket that I don't care, want anybody to suggest
25 it. It's worthy of the Board's consideration. Thank you.

1 MR. ROSENTHAL: Okay, Mr. Repka?

2 MR. REPKA: Thank you, Judge Rosenthal. My name is
3 David A. Repka and I represent the NRC staff. Like LILCO,
4 the staff views itself as a third party to this discovery
5 dispute between Suffolk County and FEMA. However, the staff
6 supports fully FEMA's request for a stay pending considera-
7 tion of the important issues here on merits.

8 MR. EDLES: But Mr. Repka, what we decide in this case
9 may well have a bearing on the type of discovery and dis-
10 closure that we might order in other cases where the staff
11 is involved, isn't that true?

12 MR. REPKA: That's true, and that's precisely why we
13 believe that this issue requires consideration on the merits
14 and we would support the stay request pending that considera-
15 tion. Under the standards of 10 CFR 2.78 A, I think it's
16 very clear that FEMA can make a showing on, can and has made
17 a showing on all four factors. The case law also has, is
18 clear that no one factor is dispositive, but nevertheless,
19 in this case, FEMA has made an adequate showing on all
20 four factors.

21 First, have they shown a likelihood of prevailing
22 on the merits? In this case, it is very real concern to the
23 staff that the Licensing Board may have underestimated the
24 need for the privilege that FEMA here asserts. FEMA has pro-
25 vided the affidavit of the head of the Agency, General

1 Giuffrida, and the affidavit of two important RAC officials
2 asserting harm to the RAC process. Naturally, since the
3 staff has to work with FEMA through continuing reviews of
4 license applications, the staff would like to give some defer-
5 ence to the claim of privilege asserted by FEMA.

6 Second, as to

7 MR. EDLES: Mr. Repka, what was your position in
8 connection with the release of documents by the State of
9 New York?

10 MR. REPKA: We did not take a position in that case.
11 It has been generally our practice in the Shoreham pro-
12 ceedings to stay out of discovery disputes between other
13 parties. However, we have inserted ourselves on a very low
14 level basis in this dispute only because of the viewed im-
15 portance of the relationship between the NFC and FEMA that is
16 raised here.

17 MR. ROSENTHAL: What's a low level basis? That's just
18 appearing orally and not filing a brief, is, does that con-
19 stitute low level?

20 MR. REPKA: I think that's correct. We did file papers
21 below at a Licensing Board supporting FEMA, but it has to
22 be understood that like LILCO, we have not seen the docu-
23 ments that are in dispute here. We are getting a great deal
24 of reliance to the affidavit of General Giuffrida.

25 Second, on the merits, as LILCO has pointed out,

1 there's a very difficult question presented here as to the
2 County's real need for these documents. There's been vast
3 amount of discovery in this case. The burden in on the
4 County to show a compelling need and it is very unclear that
5 they have met that showing. FEMA is making available four
6 witnesses for depositions. Those depositions will undoubtedly
7 ly be open and frank discussions of the basis for the RAC
8 findings, the basis for the FEMA direct testimony. And
9 there's no reason beyond the speculation of the County, for
10 the County's assertion that it needs these documents.

11 Third, an Appeal Board's decision in North Anna
12 the Appeal Board addressed the claim of privilege for ACRS
13 documents. The Appeal Board affirmed Licensing Board's
14 release of those documents, but one of the factors they con-
15 sidered very important to overriding the claim of privilege
16 was the important safety significance involved in those
17 ACRS documents. No similar showing has been made in this
18 case.

19 Moving quickly to the second factor, FEMA has
20 clearly shown an irreparable

21 MR. EDLES: Excuse me, is that the only distinction
22 between our case and North Anna?

23 MR. REPKA: As I see it, that is the key distinction
24 here.

25 MR. EDLES: If we should decide that there is a critical

1 safety factor involved here. If that's the case, then we
2 would be obligated under North Anna to order the documents
3 released.

4 MR. REPKA: I don't think obligated is the right word.

5 MR. EDLES: Then I withdraw obligated. Then we would
6 probably have to allow the exercise of the Licensing Board's
7 discretion to release the documents.

8 MR. REPKA: That's precisely what the Appeal Board held
9 in North Anna and I think you have to recognize that it is
10 a balancing task. Many factors are considered and the key
11 factor in North Anna was the significant safety concern.
12 That's what created the compelling need to override the
13 privilege.

14 MR. EDLES: What about the fact that one of the critical
15 issues in that case was the fact that everybody seems to be
16 withholding documents. And there was so snooping around
17 and sniffing around to try to get at the stuff.

18 MR. REPKA: Well, I think that's also an important
19 consideration and I don't think that similar facts are pre-
20 sented here. You have vast amounts of documents

21 MR. EDLES: So that would be the second distinction
22 from North Anna.

23 MR. REPKA: That's correct. FEMA has also shown irre-
24 parable harm if the stay request is not granted. The docu-
25 ments would be released and the ball game would be over as

1 far as FEMA's claim of privilege.

2 MR. EDLES: In light of the release of the documents in
3 North Anna many many years ago, has there been any genuine
4 chilling effect on the work of the Advisory Committee on
5 Reactor Safety, that you can perceive from your position on
6 staff?

7 MR. REPKA: I cannot speak for the ACRS, there's none
8 that I can perceive but I simply cannot

9 MR. EDLES: Well, this chilling effect business may be
10 a little overstated or over estimated.

11 MR. REPKA: I would not say that. I think we have a
12 claim of privilege asserted by a sister agency, by the
13 head of the agency, I think that we have no reason to assume
14 that that claim can be taken lightly. FEMA has asserted it
15 very vigorously and we have every reason to assume that it
16 is in fact a very important matter to them.

17 Third, as stated by applicant, there is no harm
18 to the applicant in this case and there is no harm to the
19 other parties as far as the staff can perceive.

20 Fourth, the fourth factor is where the public
21 interest lies and as far as the staff can determine, the
22 most important public interest here is to give FEMA an
23 opportunity to address the merits of this claim of executive
24 privilege. It's a very important matter to FEMA and one
25 which should be given full consideration by the Appeal

1 Board. Therefore, the stay should be continued.

2 MR. EDLES: Give me a little hint, though, as to what
3 your view is on the merits.

4 MR. REPKA: The staff has supported below, before the
5 Licensing Board, the claim of privilege. We believe the
6 privilege exists, we cannot speak for the detail of the
7 documents since we haven't seen them, but we have supported
8 FEMA to date and have no reason to suspect that we will not
9 support them.

10 MR. ROSENTHAL: Your time has expired.

11 MR. REPKA: Thank you.

12 MR. ROSENTHAL: Miss Letsche? At the outset of your
13 agruments, Miss Letsche, your papers really puzzled me. You
14 state categorically that these documents contain merely fac-
15 tual findings. You haven't seen them, I don't think. The
16 Licensing Board which has seen them said you're wrong. Now,
17 I don't understand how you can come before us and tell us
18 that these documents contain matter other than what the
19 Licensing Board, which has read the documents, say they con-
20 tain.

21 MISS LETSCHE: Well, Judge Rosenthal, let me reply this
22 way. My understanding of the contents of these documents,
23 and I have to set aside the couple of Memoranda that are
24 involved, because I really have no idea what's in those.
25 But the documents I'm talking about are the RAC member

1 comment, they're described that and the notes of the RAC
2 members. My understanding of the contents of those docu-
3 ments is based first of all on the review, which we have,
4 which is the final version of those comments, and also on
5 the description of those documents that's been provided by
6 Mr. Glass. And on all of our knowledge of how this RAC
7 process works and what it produces.

8 And what happens, as I understand it, is that
9 these individual people go through the LILCO plant, looking
10 at the LILCO plant and NUREG 0654, and they decide whether
11 or not this element in 0654 is in the LILCO plant. And
12 they have reason, presumably for deciding yes this is there
13 or no it 's not there. And my understanding of those com-
14 ments, based on Mr. Glass' description in his papers filed
15 with the Licensing Board is that this is a technical review
16 that's performed by these individuals. They're going through
17 and finding facts.

18 MR. ROSENTHAL: Well, what do you mean by finding facts?

19 MISS LETSCHE: Whether or not particular elements are
20 contained or are not contained in the LILCO plant.

21 MR. ROSENTHAL: Well, that's not a matter necessarily
22 confined to basic facts. Isn't it a matter of judgement,
23 appraisal and technical reviews usually contain those ele-
24 ments and my problem again is that the Licensing Board has
25 read these documents and the Licensing Board has said there

1 are elements of appraisal, of judgment.

2 MISS LETSCHE: I see ~~wha~~ your point is.

3 MR. ROSENTHAL: And I don't understand why we should
4 not accept that description of the documents over your
5 counter-description, which is not based upon an actual exam-
6 ination of the documents in question.

7 MISS LETSCHE: Let me explain, let me explain the dis-
8 tinction I intended in our papers between what I call factual
9 and what based on our view of the law, is covered by execu-
10 tive privilege. And that is policy making and decision
11 making, that is the distinction I was drawing.

12 MR. EDLES: Go ahead, I'm sorry.

13 MISS LETSCHE: In terms of evaluation and having an
14 opinion or containing a judgment, you're correct, Judge
15 Rosenthal. Finding that something is contained in a plant
16 does involve a judgment and does involve an evaluation.
17 However, that particular process of making a finding of
18 compliance with a regulation is not a policy matter. It's
19 not a decision as to what FEMA policy is with respect to
20 anything. It's a fact, I don't want to use the word fact
21 because you don't like that one, but it's

22 MR. ROSENTHAL: It's not that I don't like it, the
23 Licensing Board Judge didn't like it. I haven't read
24 the documents myself.

25 MISS LETSCHE: No, that was the distinction which we

1 were intending to draw. This is a technical review, this
2 is something that these individuals do regularly for every
3 plant. They have expertise, presumably, in these areas and
4 that's why they're doing this review. And they go through
5 and look at the document and say this is good, this is not
6 good. This makes it, this doesn't make it.

7 MR. EDLES: But Miss Letsche, as I understand the
8 Court and Agency decisions in the area of deliberative pro-
9 cess, policy and, is very broadly construed. In other words
10 if I'm a subordinate and I sit there summarizing facts and
11 I decide certain facts are relevant, certain facts are not,
12 and I keep certain facts out of my summary to my superior,
13 for example, that's the deliberative process. That's not
14 facts, I mean, that's my judgment as to what's important
15 and what isn't. Then why isn't what they're doing there
16 roughly the same as that?

17 MISS LETSCHE: Well

18 MR. EDLES: First of all, I guess I ought to back off
19 and say are we in agreement that that type of summarization
20 putting some facts in, certain facts out, is part of the
21 deliberative process?

22 MISS LETSCHE: Well, I'm not sure I'm prepared to agree
23 to that kind of a blanket statement, Judge Edles, because
24 I think you have to look at the context of what's going
25 on. And in this particular context, separate and apart from

1 what might happen over in the State Department or somewhere
2 else, what's happening here is that this body of people is
3 doing a review pursuant to various and sundry regulations
4 and it's going to be submitted, and has been submitted to the
5 Licensing Board as a basis for licensing a nuclear power
6 plant. And its findings of compliance or non-compliance
7 with NUREG 0654.

8 MR. EDLES: Okay, let me come back for a moment. I'm
9 now a technical consultant.

10 MISS LETSCHE: Right.

11 MR. EDLES: And I look at the plans and I look at
12 0654 and I say yes, .1 complies with 0654.

13 MISS LETSCHE: Right.

14 MR. EDLES: Why isn't that judgmental as opposed to
15 factual, I mean, in the sense that facts are the, there are
16 3.5 inches between your ear and that kind of stuff.

17 MISS LETSCHE: The reason why in the County's view the
18 executive privilege does not apply to that process in this
19 case is very simple. And that is because in this case, we
20 have that opinion that there is compliance being submitted
21 by an expert witness in a proceeding. It's in prefile
22 testimony, he says I believe this complies, I believe that
23 this does not comply.

24 MR. EDLES: Right, and you're welcome to answer my
25 basis.

1 MISS LETSCHE: You're entitled to ask him why.

2 MR. EDLES: On what basis, right.

3 MISS LETSCHE: And his basis is, as stated in the
4 FEMA witnesses testimony, the conclusions of the RAC. Now,
5 according to Mr. Glass, that's as far as I'm allowed to go
6 because I am not permitted to ask, well, how did the RAC
7 arrive at that conclusion? I can see it, it's written there
8 it says non-compliance. But I want to know how they arrived
9 at it, whose expertise they relied on, what they looked at,
10 who disagreed. I'm entitled to inquire into that. And in
11 the context of this proceeding, when that opinion has been
12 directly been put into controversy by FEMA, a party to the
13 proceeding, by having its expert witnesses rely on those
14 conclusions, I think it is

15 MR. EDLES: Let me ask you this. Let's assume that I'm
16 now a private attorney with a client.

17 MISS LETSCHE: Right.

18 MR. EDLES: That client is a technical individual of
19 some type. He submits to me, for my review, before he
20 testifies, a copy of his testimony.

21 MISS LETSCHE: Right.

22 MR. EDLES: I look over it and I say to him, well, I
23 don't understand this sentence, I mean, what does this
24 mean? Well, what that really means is such and such and
25 he changes it. I also say to him, by the way, this paragraph

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1 here I think is irrelevant to what we're discussing at this
2 hearing and I would strike it out. He says all right, take
3 it out.

4 MISS LETSCHE: Um-hum.

5 MR. EDLES: Could a lawyer on the stand say what did
6 Edles, your attorney, say to you when you submitted a draft
7 testimony to him? Or would that be covered by the attorney
8 client privilege?

9 MISS LETSCHE: That might be covered, not by the
10 attorney client privilege, possibly by the attorney work
11 product privilege, and you would have another balancing
12 test, because that's not an absolute privilege, anymore than

13 MR. EDLES: All right, but why is that any different
14 from these consultants submitting their materials to the
15 RAC, whoever the RAC is, and then a RAC witness getting on
16 the stand and presenting that view. Why isn't the back-
17 ground of that the same as if I was sitting there as a
18 lawyer discussing and preparing my client for cross exami-
19 nation?

20 MISS LETSCHE: Well, mostly because the RAC isn't a
21 lawyer, I mean, that's number one distinction.

22 MR. EDLES: Well, but it is entitled to an executive
23 privilege and which I am assuming for current purposes is
24 more or less co-extensive with the work product privilege.

25 MISS LETSCHE: Well, well

1 MR. EDLES: And I don't understand what the differences
2 are here betwen that kind of interaction between the testi-
3 fying witness on the one hand and his or her advisors on the
4 other, and my client and his advisors or her advisors.

5 MISS LETSCHE: Well, Judge Edles, the distinction that
6 the County sees is the following. We all had put up expert
7 witnesses in this proceeding, every party with the exception
8 of FEMA so far. And those witnesses have done various and
9 sundry things to arrive at their conclusions which are stated
10 in their testimony. Everyone of those witnesses has been
11 deposed before hand and documents have been obtained, basi-
12 cally the same kind of document requests we made to FEMA,
13 the documents that form the basis for the expert opinions.
14 They've all been provided here.

15 MR. EDLES: In some sort of a fairness, what's sauce
16 for the goose is sauce for the gander.

17 MISS LETSCHE: I don't think it's just a matter of
18 fairness, I think it is required under the rules. I think
19 that the, under the Rules of Procedure, number one, parties
20 are entitled to cross examine the expert testimony that's
21 submitted the Licensing Board, under the discovery rules,
22 which is all we're dealing with here.

23 MR. EDLES: All right, but before the discovery and
24 testimony rules are subject to genuine invocation of
25 privilege.

1 MISS LETSCHE: That's correct.

2 MISS EDLES: But isn't the real question here not
3 whether the rule is covered, I agree, the rule's ordinarily
4 covered subject to privilege. But isn't the real question
5 here is whether we ought to permit FEMA to invoke the
6 privilege?

7 MISS LETSCHE: Well, that's certainly one question.
8 The Licensing Board decided that it was proper to permit
9 that invocation, we disagree.

10 MR. EDLFS: All right.

11 MISS LETSCHE: I think the important thing is that even
12 if we continue to disagree and you continue to agree with
13 the Licensing Board in this case there is, has been a
14 compelling showing by the County of the need to probe into
15 this matter.

16 MR. ROSENTHAL: Let me ask

17 MISS LETSCHE: Which is arguably privileged.

18 MR. ROSENTHAL: Let me ask you this. We've all, we're
19 considering this morning, is the question as to whether to
20 continue the emergency stay we entered on Monday.

21 MISS LETSCHE: Um-hum.

22 MR. ROSENTHAL: Now, if we decide not to continue that
23 stay, the up-shot is that FEMA, unless it wishes to disre-
24 gard the Licensing Board's Order, has to turn the documents
25 over to you and move the appeal. Now, the Supreme Court

1 Justices, at least, when confronted with requests for stays
2 attached considerable significance to the fact that in the
3 absence of a stay, the controversy will be mooted and they
4 hook that onto the irreparable injury factor. Now, I've
5 listened to this dialog between you and my colleague Mr.
6 Edles, on whether or not the privilege obtained, there's a
7 big dispute here over whether all of the documents that
8 you've been furnished to date are really enough. And that's
9 a point, as you know, that LILCO makes and why should we
10 undertake to an effect decide all of these questions at
11 this point by denying the stay application? It seems to
12 me, within the circumstances, that there are a number of
13 interesting perhaps difficult questions involved here and
14 we ought to follow the course, I would think, that my
15 experience at least, as an advocate, appellate advocate,
16 most Courts have followed when they get something like
17 this dumped on their platter. And they say we'll preserve
18 our jurisdiction, we'll grant a stay and we'll consider
19 these very difficult questions in perhaps under an expedited
20 schedule, but nonetheless, we'll consider them in the time
21 period that they really require.

22 Now, that's the problem, frankly, that I have.
23 And you've gotta persuade me that the immediate injury to
24 you is going to be so great that if we continue this stay
25 that we have to deny the stay even though that moots this

1 appeal and leaves FEMA without an appellate consideration of
2 some very difficult questions.

3 That's, as far as I'm concerned, is your burden.

4 MISS LETSCHE: Judge Rosenthal, let me respond to that.
5 As we state in our papers, and I don't want to repeat all of
6 that, it's the position of the County that the standards
7 set forth in 2.788 have not been met here. You're absolutely
8 right with respect to irreparable injury which would occur
9 if their claim were mooted. I can't dispute that and we
10 don't, you're right.

11 If you find that the other, that the factors in
12 2.788 have been satisfied here, then you're right to grant
13 the stay and you should go on and consider the merits.
14 But, for the reasons we set forth in our papers and which
15 the Licensing Board found in its temporary stay order,
16 FEMA has not met the other three requirements.

17 MR. ROSENTHAL: But you remember one argument on the
18 merits goes directly against the Licensing Board's decision.
19 I mean, the first argument that you presented to us as to
20 why FEMA cannot succeed on the merits is that executive
21 privilege doesn't come into play and this is because the
22 Licensing Board was wrong in concluding that there were
23 deliberations or appraisals involved that would bring that
24 privilege into play.

25 MISS LETSCHE: That's right. We have made that argument

1 Judge Rosenthal, but you don't need to reach that argument
2 in order to deny the stay here. You can merely look at
3 the Licensing Board's ruling which was there is a privilege
4 but regardless of that, we having examined the documents,
5 find that the balancing of interest here results in us
6 ordering the documents be turned over.

7 MR. ROSENTHAL: Your opposition says that the Licensing
8 Board didn't take into account and I didn't find any refer-
9 ence in the Licensing Board's Order which would suggest the
10 contrary, that there has been a ton of material which has
11 already been supplied to your client.

12 MISS LETSCHE: I have to address that, Judge Rosenthal,
13 because it's been said so many times here.

14 MR. ROSENTHAL: Maybe it's wrong and I'm happy to
15 hear you on that.

16 MISS LETSCHE: It is incorrect. Certainly there's been
17 there've been alot of pieces of paper turned over to the
18 County in response to an FOIA request. And alot of them
19 are the same ones that were turned over, that were part of
20 the response to the document request. However, all of the
21 same documents that were withheld in response to the docu-
22 ment request, were withheld in response to the FOIA request.

23 MR. EDLES: Have you asked the Federal District Court
24 to overturn that decision?

25 MISS LETSCHE: We are appealing the FOIA

1 MR. EDLES: In Federal Court, and you'll have a prompt
2 response presumably to that.

3 MISS LETSCHE: No, we are, well, first

4 MR. EDLES: You're bidding within the Agency?

5 MISS LETSCHE: You have to appeal the Agency, you have
6 to do that and we are in the process of doing exactly that
7 right now. But the point is that there's been lots of
8 paper turned over here, but there has not been any paper
9 going to the bases for the RAC review finding.

10 MR. EDLES: Let me ask you this. Given the nature of
11 General Giuffrida's presidential appointment and the fact
12 that this is a sister agency, we're not their supervisors
13 after all. Why should, why are I better off allowing a
14 Federal District Judge ultimately under the FOIA to decide
15 whether or not these matters ought to be released, than a
16 member of a staff appeal board doing that? Recognizing that
17 the standards under discovery are roughly analogous to those
18 under exemption five under the Freedom of Information Act.

19 MISS LETSCHE: Well, I think the answer, Judge Edles,
20 is that we are in the middle of litigation here and it is
21 the obligation of the Licensing Board and this Board, as I
22 understand it, to enforce the rules of procedure of the NRC
23 under this that litigation is being conducted. And what's
24 happening here, because of the denial to the County of
25 access to these documents, and discovery to which, in the

1 Licensing Board's view it is entitled, that is pursuing
2 depositions to follow up on this document discovery and
3 ultimately to be able to cross examine effectively in the
4 hearing. The County is being denied those rights and if
5 this proceeding were to continue without the County being
6 given access to those documents and being allowed to pursue
7 legitimate discovery and therefore being able to present
8 full facts on the record of the proceeding, clearly our
9 rights are being violated and we can't participate properly
10 in that proceeding.

11 MR. ROSENTHAL: I find that rather circular. Mr. Edles
12 suggested that you could enforce this right in a District
13 Court.

14 MISS LETSCHE: Well

15 MR. ROSENTHAL: Now, if the District Court decides in
16 your favor, then you're back to here with all of the benefits
17 that flow from that District Court's ruling.

18 MISS LETSCHE: Well, if the NRC proceeding were stayed
19 while we did that, that would be fine. I guess I was as-
20 suring that that wouldn't happen.

21 MR. EDLES: All right. Let me ask you about what
22 happens between now and let us say July 2nd. You mention
23 in your papers that there would be all kinds of delay and
24 this and that. But presumably there'd be no problem with
25 going forward with the non-FEMA witnesses already scheduled

1 to appear, what if we were to decide the merits of this
2 thing before the 2nd of July and give you some opportunity,
3 if you win, to get the documents, to depose and then get
4 the FEMA witnesses on the stand the week of whatever, the
5 2nd of July. Why isn't that an acceptable way of proceeding?

6 MISS LETSCHE: I think in terms of the delay that
7 what we mentioned in our papers was basically with respect
8 to this coming week. We have a problem if all of a sudden
9 on Monday, we are told that on Tuesday we're supposed to be
10 cross examining a witness panel which we expected to come up
11 the following week. I think you're right that if you decide
12 to continue the stay and we readjust the schedule, not for
13 next week, because I don't think we can do next week, but
14 for the following week, we can certainly proceed with the
15 other witnesses and continue on with the proceedings.

16 And as long as the FEMA witnesses haven't come
17 up, we are not gonna have a problem.

18 MR. EDLES: In other words, that's not a bad adminis-
19 trative fix here, so to speak. And if we were to get our
20 decision out one way or the other in advance of let us
21 say the week of July 2nd.

22 MISS LETSCHE: Well, assuming that there would be
23 time, if we had time to get the documents, to do the
24 depositions, and all that, that's correct

25 MR. EDLES: Even to get the documents, read them,

1 depose them.

2 MISS LETSCHE: And assuming that the scheduling diffi-
3 culties naturally were taken into account. The one thing
4 I want to make clear in response to something Mr. Irwin
5 said is that this idea that there are lots of issues and
6 lots of witnesses out there is true, but you do have planning
7 that's been done in terms of the use of your resources, the
8 availability of lawyers and preparation for things. And we
9 have all been rolling along under the assumption that FEMA
10 was next week.

11 MR. EDLES: Right, but presumably if the FEMA witnesses
12 let us say, were not to appear next week.

13 MISS LETSCHE: Right.

14 MR. EDLES: Off essentially.

15 MISS LETSCHE: Right.

16 MR. EDLES: Then they ought to certainly be able to
17 go with the rest of the week

18 MISS LETSCHE: That's right, that's correct. I think
19 next week is really the problem and if we got over that
20 that we could continue, you're right. There are a couple
21 of other matters that were raised by Mr. Glass and Mr.
22 Irwin that I would like to address very briefly.

23 One was a point that I believe you suggested your-
24 self, Judge Edles, and that was the fact that this RAC
25 review does have a rebuttable presumption status to it under

1 the NRC regulations. That fact was a major portion, or a
2 major element at least, in the Licensing Board's decision
3 concerning the weighing of interest in this case. Even
4 assuming there is an executive privilege here, in light of
5 the fact that that RAC report is going to be the basis
6 under the Rules, is required to be one of the basis for the
7 Licensing Board's decision in this case. Not only the
8 County, but the Licensing Board needs to be able to probe
9 into the bases for those RAC findings. And, in fact, those
10 RAC findings are the bases for the FEMA witnesses testimony.

11 MR. ROSENTHAL: Does this probing extend legitimately
12 to finding out what every person that was involved in
13 deliberative process said? I would have thought, myself,
14 that when a collegial report comes into evidence, somebody
15 obviously has to be up there to support the report to
16 answer any questions that might go to its validity. But
17 I didn't think that there was an entitlement when you have
18 in evidence a collegial report in which a number of people
19 were involved in its preparation, finding out what everybody
20 said along the line.

21 MISS LETSCHE: Judge Rosenthal

22 MR. ROSENTHAL: I may be wrong about that but that's
23 my impression.

24 MISS LETSCHE: I really can't answer your questions
25 specifically for this case because I don't know the answer

1 yet. What we're talking about right here, first of all, is
2 a discovery matter and if we're talking about the standards
3 of permissible discovery which is whether or not a particular
4 inquiry is likely to lead to the discovery of admissible
5 evidence. Let me respond to one other thing that's related
6 to what you said.

7 And that's this idea of whether or not there is an
8 entitlement to find out who said what. I'm not sure if
9 there's that kind of entitlement, but there is certainly a
10 threshold entitlement to find out how it is that a particu-
11 lar conclusion was arrived at. Now, these RAC members have
12 individual kinds of expertise and presumably they were as-
13 signed based on what Mr. Glass said, although they were
14 allowed to do anything they wanted, they were were assigned
15 areas that were in their expertise. If someone who is an
16 expert on protective action recommendation concluded that
17 something in a LILCO plant was wrong and someone else who's
18 an expert on transportation disagreed, and the transporta-
19 tion guy won, I think it might be significant to find out
20 that the person with protective action expertise disagreed
21 with him.

22 I don't know. I'm speaking in a vacuum because
23 I don't know any of the facts here. In a discovery context,
24 I think that kind of probing is appropriate.

25 MR. ROSENTHAL: Well, why can't you get the Chairman

1 on deposition and say to the Chairman is, was this particu-
2 lar conclusion or whatever reached in the report a unani-
3 mous one. And if not, who disagreed, was it disagreed, was
4 there disagreement on the part of a member of RAC who had
5 special expertise in this area. I mean, that, I suspect
6 you could probably inquire into.

7 MISS LETSCHE: Well I, based on the statements Mr.
8 Glass has made and the statements he made in his testimony

9 MR. ROSENTHAL: Well, I'm not saying Mr. Glass isn't
10 necessarily divinely inspired.

11 MISS LETSCHE: No, no, but I'm talking about in terms
12 of what he is going to object to and what he is going to
13 permit.

14 MR. ROSENTHAL: Well, I don't know what he is going to
15 object to and that may be for the Licensing Board to deal
16 with if he does object. But what I'm getting at is I'm
17 not at all certain in my own mind, and this is the first
18 time I've encountered this question, and I'm not divinely
19 inspired either.

20 MISS LETSCHE: Um-hum.

21 MR. ROSENTHAL: But I'm not certain in my own mind
22 that when you have a collegial report, you're entitled to
23 get the written notes expressing the deliberative opinions
24 of everybody that was involved. And I'm suggesting that
25 there may be something short of that to which you're entitled

1 as part of your probing of the underpinnings of the report.
2 Because you were expressing, a minute or two ago, concern
3 that some critical conclusion may have not received the
4 support of the particular expert in that area. And I was
5 suggesting to you that you may be able to get at that with-
6 out receiving the notes of all of the members of the
7 committee.

8 MISS LETSCHE: Well, Judge Rosenthal, you might be
9 right. I don't know that. But what we're talking about
10 here is the question of discovery. And you apply the dis-
11 covery rules and what we're talking about here is whether or
12 not these background documents which led up to this final
13 collegial report and which presumably also formed the basis
14 for the opinions of the witnesses who are testifying in
15 this proceeding. That's what we're talking about, after
16 all, not that RAC report in a vacuum. But those underlying
17 documents are the typical discoverable documents that are
18 turned over in this kind of a case, because they're likely
19 to lead to discovery of admissible evidence.

20 MR. ROSENTHAL: You're ignoring again the fact that
21 the Licensing Board found that FEMA's executive privilege
22 claim was warranted.

23 MISS LETSCHE: That's true.

24 MR. ROSENTHAL: Now, that takes it out of normal
25 discovery rules and now you're in the area of whether there

1 is a compelling necessity.

2 MISS LETSCHE: Well, Judge Rosenthal

3 MR. ROSENTHAL: And that's , normally you don't have
4 to deal with that in a discovery context.

5 MISS LETSCHE: The Licensing Board also found expressly
6 and we quoted in my papers and I don't want to go through
7 and try to find it, but expressly found that these documents
8 are clearly relevant to this proceeding, that they are
9 relevant to the contentions in this proceeding and that they
10 are central central was the word that the Licensing Board
11 used, to the County's case. And although you're right that
12 we have, based on the Licensing Board's findings, that there
13 was a privilege found and that they then had to balance,
14 they nonetheless found that these were relevant documents to
15 which, because of the balancing test, the County was en-
16 titled. I think we're losing sight of the context that
17 we're talking about here. We're talking about discovery of
18 documents that are the basis for these witnesses' opinions.

19 MR. EDLES: On the contrary, I think we have the
20 context. I think there's no doubt here that your case
21 would be aided if you were to know precisely all of the
22 underpinnings of this. Just as when we issue an opinion
23 you would know a little bit more if you discovered that
24 Edles was the draftsman of the opinion, he circulated it to
25 Rosenthal and Wilber, each one struck one paragraph because

1 it was stupid. Edles can read, yeah, in retrospect, this
2 guy is kind of stupid, and we put the opinion out without
3 those two paragraphs. You know alot more about what went
4 into the ultimate decision.

5 MR. ROSENTHAL: And it might help you if you went to
6 the Commission with that

7 MR. EDLES: But by the same token, we by and large do
8 not allow that kind of probing of the deliberative process,
9 decision making or the preparation and presentation.

10 MISS LETSCHE: That's correct.

11 MR. EDLES: So what we have to weigh is how important
12 your needs are vis a vis protecting the decisional process
13 of a sister Federal agency.

14 MISS LETSCHE: And in response to your example, Judge
15 Edles, I submit that if you were testifying in any kind of
16 a proceeding concerning an opinion that you wrote, that
17 while those deliberations and those drafts might be privi-
18 leged at one point, that once that was the issue that was
19 put in the controversy by you and your testimony, the need
20 of the other litigants to review those other documents so
21 that they could cross examine you effectively would over-
22 ride, or at least could override, someone could decide that
23 the initial need for protection of those documents.

24 MR. EDLES: Okay, I'm not certain that you're correct
25 on that. I think certainly in an adjudicatory or judicial

1 context, I really doubt whether they'd get the Judge on
2 the stand, first of all, to do that. I think his opinion
3 speaks for itself by and large. But I don't think we have
4 to debate that this day.

5 MISS LETSCHE: That's right. But your point brings me
6 to another important consideration, another factor under
7 7.88 and that is the public interest here. We've heard alot
8 talk from the staff counsel and from LILCO and from Mr.
9 Glass about concerns that they have about the process here.

10 And about concerns that members of this RAC committee
11 wouldn't give their comments if they knew they were gonna
12 see the light of day. Well, frankly, we've said this in our
13 papers, I just find that sort of mind boggling. If in fact,
14 someone is going to not give their true opinion, or not
15 state the facts accurately because they are concerned that
16 the public is going to see it, when that person is in a pub-
17 lic body and is performing a function that is designed to
18 protect the public interest, to me is just inexplicable.

19 MR. ROSENTHAL: Just one moment, I'm trying to put
20 myself into that picture. I think that I might not be
21 quite as candid in commenting upon Judge Edles' hypotheti-
22 cal opinion in writing if I knew that what I put in writing
23 which might just off the top of my head, might be a tentative
24 view, was going to be put up in neon lights. I'm very sym-
25 pathetic, frankly, to the view that people who are a part of

1 a deliberative body and where you have the exchange of ideas
2 have to have a certain amount of protection against those
3 ideas which again may be tentative, being publicly disclosed.
4 Because I do think it has a chilling effect, and I know it
5 would have a chilling effect on me, and my understanding is
6 that the exemption, what is it, 10 in the Sunshine Act or
7 something like that, I think it's 10, has as its foundation
8 precisely that policy. Now, I haven't looked at these
9 documents and maybe before we're finished, we're gonna have
10 to get them from the Licensing Board and examine them.

11 But I can just tell you if there's real delibera-
12 tion going on and these people are expressing, you know,
13 tentative opinions, subject then to alteration when the
14 group gets together, I can really understand why they might
15 wish to keep them confidential and why there might be a
16 chilling effect if they're disclosed.

17 MISS LETSCHE: Well, I think the distinction that must
18 be kept in mind is apparently the one that influenced the
19 Licensing Board below in ruling that although there was a
20 privilege, that these documents should be turned over.

21 MR. EDLES: I understand that. The idea that, you
22 know, you want to get at the truth still.

23 MISS LETSCHE: Well, in that goes to the first ques-
24 tion that you asked, why isn't fact finding facilitated
25 by turning these over and I think it clearly is. But the

1 distinction I was trying to get to, Judge Edles, was that
2 whether or not there is any basis for assigning a preferred,
3 untouchable shielded status to one set of witnesses in a
4 proceeding when that status has not been provided to any of
5 the other witnesses in the proceeding. And, particularly
6 when the so-called basis for that is public interest.

7 When you're talking about licensing a nuclear
8 power plant and the safety or the adequacy of an emergency
9 plan to suggest, that giving that kind of status which shields
10 from the public the knowledge of how certain conclusions
11 were arrived at, the suggestion that that is more in the
12 public interest than letting the public know and letting
13 the representative of that public in the proceeding itself
14 bring that to the attention of the Board.

15 MR. ROSENTHAL: Any of the other witnesses part of
16 deliberative bodies?

17 MISS LETSCHE: Well, certainly witnesses always get,
18 we have large panels of witnesses and they get together and
19 form collegial opinions, we have numerous pieces of testi-
20 mony that are sponsored by 10 or 12 individuals.

21 MR. ROSENTHAL: Well, I'm sure that's right, but are
22 these deliberative bodies with some official status? I
23 take it that these RAC committees are under the auspices of
24 a Federal agency and I assume that they are just more than
25 just a group of engineers or whatever getting together to

1 work up testimony or to work up a document on some subject.

2 MISS LETSCHE: Well, but the issue, Judge Rosenthal,
3 is not, we're not looking to depose the individual RAC
4 members. We are talking about

5 MR. ROSENTHAL: Why aren't you?

6 MISS LETSCHE: Well, because we are hopeful we could
7 get the information we needed from the FEMA witnesses and
8 not have to go to the individual RAC members.

9 MR. EDLES: Would those other RAC members be available
10 under subpoena or would they be entitled to invoke some
11 privileges?

12 MISS LETSCHE: Well, according to Mr. Glass, if we ask
13 for them, he would like to invoke a privilege. We have,
14 in fact, we've submitted applications for subpoenas but
15 haven't gone after them, hoping we can get the information
16 we need from the RAC members. But, my point was, we're not
17 talking about going after the individual members. We are
18 talking about discovery of witnesses, not a collegial body.
19 We're talking about FEMA witnesses. And those witnesses say,
20 in my opinion, this contention is wrong. The reason it is
21 wrong is because of the findings of the RAC. And according
22 to the position that FEMA has taken in this proceeding which
23 the Licensing Board ruled against, we are not permitted to
24 inquire into the basis for that witness' opinion, if his
25 answer would be something that would go to the deliberative

1 process of the RAC committee.

2 MR. ROSENTHAL: I don't understand this at all. FEMA
3 puts into evidence a report and the report contains certain
4 conclusions with respect to the adequacy or inadequacy of
5 LILCO's plant, I gather that's what we're talking about.

6 MISS LETSCHE: Right, yes.

7 MR. ROSENTHAL: I would have thought that the witness
8 sponsoring that plan, and every bit of evidence that comes in
9 has to have a sponsoring witness, could be asked any kind of
10 question that occurred to you that might probe the correct-
11 ness of the conclusions that are presented. I mean, we
12 see this all the time, for example, in the context of a
13 staff environmental impact study. Or a staff safety evalua-
14 tion report. Somebody's gotta sponsor those documents and
15 that person has got to be ready to defend it. Now, you can
16 ask him well now how did you, you say in this paragraph of
17 your FES that the grit from the cooling tower will not be
18 a significant factor. Well, now, just what did you base
19 that on, what experiments were conducted, etc. You can go
20 into all of that.

21 Now, that's the kind of probing I thought was
22 customary and permissible. I didn't know that you could go
23 in and say well now, who were the 25 people that prepared
24 that section, did they meet together and did they have notes
25 and, if they had notes, let me see them.

1 MISS LETSCHE: I agree with you, Judge Rosenthal. What
2 you were, the first part of your statement is exactly what
3 we want to be able to do. In order, well, let me make two
4 comments. Number one, it is my understanding, based on Mr.
5 Glass' papers filed before the Licensing Board, in which he
6 states his basis for withholding these various documents,
7 that if they question in his view, goes after anything that
8 he categorizes as pre-decisional, that is anything before
9 the final report was issued, thought processes, whatever
10 that means, or opinion of the RAC members, it is privileged.
11 That is the position of FEMA and it's this, if the Board's
12 order below is reversed saying that these documents des-
13 cribed that way are entitled to a privilege, then I suspect
14 that to be consistent, I would if I were Mr. Glass, I would
15 not be permitted to ask those questions if the answer was,
16 in Mr. Glass' view, going to go to anything that went to the
17 deliberation of the RAC committee.

18 But that's number one and we're talking about
19 during the hearing. But the other problem is that in order
20 to be able to intelligently ask those precise questions
21 that we agree are proper, Judge Rosenthal, you need to have
22 some prior discovery to find out what the facts are.

23 MR. ROSENTHAL: Not where I come from on the matter of
24 whether X -- says his written comments in which said why
25 -- Here is the, here are the conclusions that were reached

1 by RAC, they speak for themselves and then you say okay,
2 what are the underpinnings. I mean, that's what I would do
3 I would want to explore not who said what back in the early
4 stages of deliberative process, but just what, when they've
5 reached this collegial agreement, what is it that this,
6 with them did they consider this, did they consider that.
7 Now, Mr. Glass tells you that you can't even ask that, you
8 can't even ask questions as to whether a conclusion has
9 been reached, has factored in a particular consideration. I
10 might disagree with Mr. Glass on that and Licensing Board
11 might as well.

12 MISS LETSCHE: Well, the documents that have been
13 withheld, who asked what has never been asked here. I
14 mean that's something that has sort of been created by the
15 documents that were responsive to the document request. But
16 among the documents that were withheld are some of the
17 drafts and the comments that turned into the final report.
18 Now, if I'm asking what is the basis of your conclusion of
19 inadequacy, the basis is gonna be well, my opinion that
20 XYZ, which I wrote which turned into this conclusion. It's
21 that basis, my opinion, my comment, that is contained in
22 documents 1 through 23 and is in the draft that contains
23 those documents and the notes, that contain those comments,
24 and the notes concerning his comments, that are being
25 withheld. We're talking about the standard of whether or

1 not these documents are likely to lead to discoverable
2 material.

3 MR. EDLES: See, I guess, I don't agree, I think there's
4 no doubt that these documents are likely to lead to more evi-
5 dence that will help you out at all. I just guess I don't
6 really see that that's much in dispute at this point. I
7 think what is in dispute is to what degree that will com-
8 promise the effective operations of a governmental body
9 here. It seems to me that's what the Licensing Board is
10 weighing and balancing. Then you may disagree or agree
11 with the result it reached, but it seems to me those are
12 considerations.

13 Let me ask you a question on a separate matter.
14 On my reckoning, the Licensing Board denied access to docu-
15 ments 24, 27, 28, 29, 30, 32, 33. I'm not interested in
16 the particular numbers. But you haven't formally filed
17 an appeal for those denials. Can we assume that you've
18 essentially waived your request insofar as those documents
19 are concerned with, basically we're dealing today only with
20 those that the Board has already released?

21 MISS LETSCHE: I think all, as I understood it, all you
22 were dealing with today was whether or not to continue the
23 stay of the Court Order.

24 MR. EDLES: That's correct, but I'm interested

25 MISS LETSCHE: Which only dealt with the

1 MR. EDLES: Right, but you, I guess what I'm asking,
2 is do you plan to appeal from their denial of the various
3 documents that you asked for and that they didn't give you?

4 MISS LETSCHE: I find that we haven't thought about it.
5 I don't think it's before you today, if that's your ques-
6 tion.

7 MR. ROSENTHAL: In that connection, your last argument
8 in your papers filed this morning suggested that we not
9 take this interlocutory appeal. I take it you're not aware
10 of the fact that under long standing Appeal Board precedent,
11 going back to ARAC 122 6 AC 322, 1973, that we've held that
12 discovery orders against non-parties are appealable as a
13 matter of right.

14 MISS LETSCHE: Well

15 MR. ROSENTHAL: FEMA, I assume is not a party to this
16 proceeding.

17 MISS LETSCHE: Well, I'm not sure that's true, we've
18 had

19 MR. ROSENTHAL: Well, they are or they're not, I mean,
20 it's like pregnancy, I would think. I mean, are they a
21 party or are they just

22 MISS LETSCHE: In my, in the County's opinion they are
23 a party. I think we've had alot of discussion among all
24 the parties as to exactly what the status of FEMA is, but
25 they are submitting witnesses here and are sponsoring the

1 RAC report and, which upon which the Licensing Board is
2 going to rely in its decision. And, for all practical pur-
3 poses in this proceeding, FEMA is participating as a party.

4 MR. ROSENTHAL: They have no stake in this proceeding,
5 do they? What would be their standing to participate as
6 a party?

7 MISS LETSCHE: I assume the same standing as the NRC
8 staff.

9 MR. ROSENTHAL: Well, the NRC staff has been tradi-
10 tionally a party without necessity of standing, but I don't
11 know that we've ever considered anyone, Federal agency or
12 otherwise, apart from the NRC staff, as being a party,
13 unless that entity had some form of standing.

14 MISS LETSCHE: Well, Judge, I can't answer you other
15 than how I have, which is if for purposes of this proceeding
16 they have been considered as

17 MR. ROSENTHAL: There are, at least you say there for
18 all practical purposes they are a party.

19 MISS LETSCHE; Right.

20 MR. ROSENTHAL: There are obviously some practical
21 purposes for which they are not a party. They don't file
22 briefs to us, they won't file a proposed findings of fact,
23 I assume, they won't appeal no matter what the Licensing
24 Board does, so in those practical senses, they're not a
25 party.

1 MISS LETSCHE: I don't know the answers to those
2 things because I don't know what they're gonna do.

3 MR. ROSENTHAL: Well, under, as I say, under our
4 precedent, unless they were regarded as a party, their
5 appeal would lie as a matter of right.

6 MISS LETSCHE: Well, I think the main point upon which
7 the County relies in terms of the stay, is the continuation
8 of the stay, is that the requirements, other than the irre-
9 parable harm and the mooted problem of 78A have not been
10 met here and that in light of that, and the findings of
11 the Licensing Board, which has full knowledge of the case
12 and all the ramifications of the case and has reviewed those
13 documents, that the compelling need of the County outweighs
14 any interest in confidentiality by FEMA and the public
15 interest matters, which are discussed in our papers. Then
16 in light of that, the stay should not be continued.

17 If, however, as we said before, if you, if the
18 Board rejects that and finds that despite FEMA's failure
19 to meet those 78A standards, that there is, would be irre-
20 parable harm because of the mooted problems, then the stay
21 probably would be appropriate and I assume that if that
22 were granted, that the parties would then have the oppor-
23 tunity to address the merits of the appeal. Separately
24 from the papers we have already filed.

25 MR. ROSENTHAL: Thank you, Miss Letsche. All right,

1 Mr. Glass, I might say, Mr. Glass, that under our practice
2 rebuttal must be confined to points that were made by your
3 adversaries.

4 MR. GLASS: I understand that. I will be very very
5 brief. I just think that a lot of issues have been raised
6 today, a lot of them of extreme concern and may be a first
7 impression, and that the issue is crucial to the function-
8 ing of FEMA's work as presently structured and we urge
9 that a stay hold until, pending full briefing and dis-
10 cussion on the merits.

11 MR. ROSENTHAL: Thank you. Do you have anything, Mr.
12 Irwin, to add?

13 MR. IRWIN: Very briefly, Judge Rosenthal. Whatever
14 this Board's determination, LILCO urges that it issue at
15 least a bottom line order as quickly as possible so that the
16 parties may schedule their endeavors for next week.
17 Secondly, just as a matter of record, FEMA has not been
18 categorized as a party to this proceeding, but rather as
19 a consultant to the NRC staff, the Licensing Board, in a
20 discovery order entered last fall, treated it as such and
21 I'm not aware of any departure from that. That's all I
22 have.

23 MR. ROSENTHAL: Thank you, Mr. Irwin. Mr. Repka, do
24 you have anything to add to it?

25 MR. REPKA: No, Judge Rosenthal.

1 MR. ROSENTHAL: All right. I will request counsel to
2 remain. I think that the Board may have a ruling shortly.
3 Let's leave it this way, that counsel should be back in the
4 room at quarter of 1, in other words, in 12 minutes. At
5 that point, we'll recess.

6 (Brief Recess.)

7 MR. ROSENTHAL: Be seated, please. The Board has
8 decided to continue the temporary stay which it entered on
9 Monday. The basis for that determination is essentially
10 this. The Board is persuaded that there are serious issues
11 on the merits of the Licensing Board's decision of last
12 Friday. The Board is further persuaded that it would not
13 be justified in mooting the appeal raising these issues in
14 the absence of a compelling necessity for doing so. And
15 the Board does not see that compelling necessity at this
16 time.

17 What the Board has in mind is setting the merits
18 of the appeal down for briefing and oral argument on an
19 extremely expedited schedule. Now, we appreciate the fact
20 that over the next several weeks the parties will be in
21 hearings. We also however recognize the fact that both
22 Suffolk County and Long Island Lighting Company are repre-
23 sented by law firms containing a substantial number of
24 lawyers of high legal talent and we are assuming, I take it
25 correctly, that the necessary resources can be allocated to

1 both this appeal and the proceedings before the Licensing
2 Board. I might add that the same assumption is made with
3 respect to the NRC staff.

4 What we specifically have in mind is contempor-
5 aneous briefs to be in the hands of the Board and the coun-
6 sel for other parties by the conclusion of business on
7 Friday, the 1st of June. Now, we appreciate, of course,
8 that there is an intervening holiday, but we're taking into
9 account the fact that this is not, none of the issues that
10 are presented come as a surprises to any counsel. You've
11 been dealing with them for sometime and we think that in
12 the circumstances, that date is not an unreasonable one.

13 I must say in that connection that it is not nor-
14 mally the practice of appeal boards, although it is the
15 practice of the Commission, to call for contemporaneous
16 briefing and in this instance, where most of the parties
17 have already filed briefs with us, there's been this
18 oral argument, we think that, again, that nothing is gonna
19 come as a particular surprise to any of the parties and that
20 therefore, in this instance, contemporaneous briefing is
21 desirable, given, again, the interest in getting this
22 matter decided as quickly as possible.

23 Our further contemplation is hearing oral argu-
24 ments during the following week, that is the week of June
25 4th. What we have in mind, at least tentatively, is that

1 this will be open to discussion would be Wednesday,
2 the 6th of June. I might say in this connection that Mr.
3 Edles will be unavailable after June 13, that is a factor
4 that we've taken into account along with the obvious desir-
5 ability of deciding this matter as quickly as possible
6 and I think on the schedule that we're proposing, that the
7 parties could expect to hear from us by the 13th of June,
8 or if not that, shortly thereafter. And that would allow
9 at least two weeks to accommodate whatever decision we
10 might reach before the FEMA witnesses might be surfacing.

11 All right. That's what we have in mind.

12 MR. EDLES: Excuse me. It would be our contemplation
13 that the FEMA witnesses would not appear the week of the
14 28th, at least until we have resolved this matter. Now
15 that's not a matter within our control necessarily. But I
16 think that we would probably make a suggestion or recom-
17 mendation to the Licensing Board along those lines.

18 MR. ROSENTHAL: All right. Well, I think at this
19 point I'll go around the circle of counsels to obtain
20 reactions. We'll start with Mr. Glass.

21 MR. GLASS: Yes, I'm sorry.

22 MR. ROSENTHAL: What is your reaction, if any, to the
23 proposed schedule for consideration of the merits of the
24 appeal.

25 MR. GLASS: We will comply.

1 MR. ROSENTHAL: All right. Miss Letsche?

2 MISS LETSCHE: Off the top of my head, I don't have a
3 problem, although I gather you were looking for a reaction
4 to June 6th and I frankly can't give you one without
5 checking with the office. But other than that, yes, it
6 sounds fine.

7 MR. ROSENTHAL: Mr. Irwin?

8 MR. IRWIN: We have no difficulties with your proposal,
9 Judge Rosenthal. I assume that as to the conduct of hearings
10 next week, the Appeal Board is not making any determination
11 as to whether the hearing should or should not go forward
12 with other witnesses, other than the FEMA witnesses, that
13 being a matter of, within the Agency.

14 MR. EDLES: Again, that's within the purview of the
15 Licensing Board. I think all we can do is suggest that
16 they not hear the FEMA witnesses until we decide the matter
17 in order, whichever way we decide it, to permit appropriate
18 depositions to be taken in advance of those witnesses
19 appearing.

20 MR. IRWIN: I see.

21 MR. ROSENTHAL: Mr. Repka?

22 MR. REPKA: The schedule as proposed by the Board is
23 acceptable to the staff.

24 MR. ROSENTHAL: All right, well, why don't then, subject
25 then to Ms. Letsche telling us this afternoon that there is

1 a problem with the June 6th date, assume that that is the
2 schedule. I take, in any event, there's no problem with
3 our June 1 filing date on briefs. Now, I might say in that
4 connection, that there's no necessity to repeat what you
5 may have already told us. The brief at least that of the
6 County, was or Memorandum, was fairly complete. This is
7 really by way of supplementation rather than repetition.
8 I think all of the parties can assume that we will not for-
9 get what we have already been supplied with and read.

10 MR. EDLES: Mr. Chairman, I would appreciate from the
11 parties that they address at least two issues that came up
12 in my discussion this morning.

13 One, is roughly the analogy with the lawyer-client
14 privilege for witnesses placing testimony in evidence and
15 then testifying as to the ultimate piece of testimony
16 prepared. And second, the discussion that I had with Mr.
17 Glass, with respect to the chilling effect, yes or not,
18 where the names are deleted so that no one knows whose
19 opinions or views are being offered and how the Courts,
20 and also other Federal agencies have dealt with that pro-
21 blem.

22 MR. ROSENTHAL: Mr. Wilber, do you have any specific
23 questions you wish addressed? All right. If there is
24 nothing further, we will stand in recess.

25 (Subsequent to the close of the oral arguments, the

1 proposed date for the oral arguments on the merits was
2 changed to June 7, 1984, from June 6, 1984.)

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CERTIFICATE OF PROCEEDINGS

This is to certify that the attached proceedings before the
NRC COMMISSION

In the matter of: Long Island Lighting Company
Shoreham Nuclear Power Station,
Unit 1
Docket No. 50-322 OL

Date of Proceeding: Wednesday, May 23, 1984

Place of Proceeding: Bethesda, Maryland

were held as herein appears, and that this is the
original transcript for the file of the Commission.

David L. Becker
-Official Reporter - Typed

David L. Becker
Official Reporter-Signature

Esbeck
6/24/84