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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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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 appeal of the Federal Emergency Management
4 Agency from the Licensing Board's May 18, 1984, Memorandum
5 and Order, directing the production of various documents
6 in connection with the on-going litigation of emergency
7 planning issues and this operating license proceeding in-
8 volving the Shoreham Nuclear facility.

9 By virtue of our May 24 Order, the effectiveness
10 of the Licensing Board's Order has been stayed pending the
11 disposition of the merits of the FEMA appeal. As further
12 provided in our May 24 Order, each side has been allotted one
13 hour for the presentation of oral argument.

14 Inasmuch as they support the appeal in full
15 measure, the applicant, Long Island Lighting Company, and
16 the Nuclear Regulatory Commission Staff are deemed for
17 this purpose to be on the same side as FEMA. Suffolk
18 County is the sole party on the other side. The members
19 of this Board are, of course, familiar with the background
20 of the controversy as well as with the content of both
21 the Licensing Board's Memorandum and Order and the various
22 briefs and memoranda filed in connection with the appeal.

23 Therefore, there will be no necessity for any coun-
24 sel to embark upon a detailed recitation of the underlying
25 facts. I will now call upon counsel intending to participate

1 in the argument to identify themselves formally for the
2 record and we'll start with FEMA.

3 MR. GLASS: Regional Counsel, Federal Emergency Manage-
4 ment Agency.

5 MR. ROSENTHAL: All right, thank you, Mr. Glass. The
6 applicant Long Island Lighting Company.

7 MR. IRWIN: My name is Donald Irwin, I'm with the
8 firm of Hunton and Williams, representing Long Island
9 Lighting Company.

10 MR. ROSENTHAL: All right. NRC staff?

11 MR. REIS: Edwin J. Reis, representing the NRC staff.

12 MR. ROSENTHAL: All right, and Suffolk County.

13 MS. LETSCHE: Karla J. Letsche with the law firm
14 Kirkpatrick, Lockhart, Hill, Christopher and Phillips,
15 representing Suffolk County.

16 MR. ROSENTHAL: All right, Mr. Glass, has there been
17 an agreement on the division of time on your side of the
18 case?

19 MR. GLASS: Yes, I will take 25 minutes on my direct.
20 Long Island Lighting Company and the NRC staff will each
21 take 10 minutes and I respectfully reserve 15 minutes for
22 rebuttal.

23 MR. ROSENTHAL: All right. I assume that the order
24 of presentation is going to be FEMA, Long Island Lighting
25 and NRC staff, in that order. Am I correct?

1 MR. GLASS: That is correct.

2 MR. ROSENTHAL: In that assumption? Very good, you may
3 proceed, Mr. Glass.

4 MR. GLASS: May it please the Board, my name is Stewart
5 Glass, I am the Regional Counsel for FEMA. With me today
6 is George Jet, FEMA's General Counsel and Spence Perry,
7 the Associate General Counsel.

8 The matter before this Board presents the limited
9 question with broad policy implications for FEMA, NRC and
10 the effective evaluation and regulation of offsite emergen-
11 cy planning and preparedness. The central issue under con-
12 sideration is whether the intervenors in this case,
13 Suffolk County, have demonstrated so compelling a need or
14 such exceptional circumstances that necessitate the pro-
15 duction of particular documents as to justify rejection of
16 an otherwise proper assertion of executive privilege by
17 the Director of the Federal Emergency Management Agency.

18 MR. ROSENTHAL: Well there is an issue, is there not,
19 as to whether the executive privilege attaches at all?
20 Suffolk County insists that it does not and in that respect
21 the Licensing Board was wrong.

22 MR. GLASS: I think it's rather late in the day for
23 Suffolk County to assert that the executive privilege does
24 not attach. Suffolk County, in its own filings, in its
25 own attempt in previous issues before this Board and the

1 other Boards that have been constituted to hear matters
2 before the, relating to the LILCO transition plant or
3 relating to the onsite preparedness of LILCO, have raised
4 similar issues and have addressed and raised the same,
5 and cited the same cases throughout.

6 I think the fact that, I don't think there's any
7 doubt that the Atomic Safety Licensing Board was correct in
8 its evaluation that the privilege does attach.

9 MR. EDLES: I think Suffolk County's point, as I under-
10 stand it, is two-fold. First of all, that this is not a
11 policy matter and therefore the privilege doesn't attach,
12 and second that there may be discreet facts that ought to
13 be released. In any event, not that this was not a deli-
14 beration, for example. I think, I don't see anything in
15 their brief that suggests that FEMA or RAC members don't
16 sit there and deliberate.

17 MR. GLASS: Okay, I think that the fact, number one
18 is that the executive privilege is broader than just
19 talking about policy. I think the executive privilege
20 extends to deliberative process. So I think in this parti-
21 cular matter it is obvious that the material that is provided
22 to the NRC is requested under the MOU to be a finding as
23 submitted by FEMA, and that in effect is a policy material.

24 MR. ROSENTHAL: Well, in the matter of injury, I re-
25 read the affidavits that FEMA submitted in support of its

1 motion for a stay, pending appeal and while there was alot
2 of conversation in those memoranda, respecting the harm
3 that might attach to the release of the RAC comments,
4 comments by the members of RAC, those affidavits seem to
5 me a little short on the demonsration or claim of injury
6 with regard to the reports of the consultants. And I have
7 in particular mind the gentleman, I don't offhand recall
8 his name, but I'm sure you will supply it to me, who is
9 employed by Argon out in Garden City, and who, one of his
10 evaluations, or his evaluation is one of the documents
11 involved and he's gonna be a witness. Now, where in the
12 affidavits that you submitted to us was there focus upon the
13 harm that would be released if, or would be excuse me,
14 incurred, if that gentleman's evaluation were to be publicly
15 released?

16 MR. GLASS: Okay, first of all to clarify the point.
17 There are two individuals who are consultants to FEMA.
18 One is Mr. Baldwin who works

19 MR. ROSENTHAL: I had Mr. Baldwin in mind.

20 MR. GLASS: And number 2 is Mr. Keller, who works for
21 Idaho National Laboratories. Both of these individuals
22 are consultants and I think that you are correct that
23 there is a difference between having that material released
24 versus having the material of the individual RAC members
25 released.

1 MR. ROSENTHAL: But yet your claim of executive priv-
2 ilege has been advanced with respect to the evaluations of
3 the two consultants as well as the comments of the RAC
4 members, is that not so?

5 MR. GLASS: That is correct. That does not negate the
6 fact that the executive privilege exists. We do recognize,
7 though that there are varying degrees as to the damage
8 that would be incurred

9 MR. ROSENTHAL: But where is there any claim of any
10 damage. What I'm getting at is, as I understand it, and
11 you correct me if I'm wrong. In order for the privilege
12 to attach in the first instance, there must be some showing
13 that the release of this, the material involved would be
14 injurious to the interests of the agency asserting the
15 privilege.

16 Now, I'm asking you where, in the affidavits, does
17 it appear that the release, for example Mr. Baldwin's
18 report or evaluation, would be injurious to your agency?

19 MR. GLASS: That was in Director Giuffrida's affidavit.

20 MR. ROSENTHAL: Would you point it to me, please, where
21 he focuses on that? I know that he says he's examined all
22 of these documents and come to they're being withheld
23 at his direction as they consist of interdepartmental
24 and intradepartmental memoranda and communications and that
25 the production of the documents will have a chilling effect

1 on the agency's ability. But there's no indication of
2 just why that's so and I'm frank to state that I don't see
3 the basis for the General's claim that the release of
4 Mr. Baldwin's report, for example, would have a chilling
5 effect.

6 I mean, isn't there some obligation on the part
7 of somebody along the line to spell out in some detail
8 what the harm is. And where does General Giuffrida do
9 that?

10 MR. GLASS: You are correct, he does not specifically
11 spell out the harm incurred.

12 MR. ROSENTHAL: Well, wouldn't one have expected that
13 in one of the other affidavits? I mean, my feeling was
14 and I might say that in my prior incarnation as a Depart-
15 ment of Justice Lawyer, I went through this exercise many
16 times and we were always very insistent that somebody in
17 the agency provide some kind of chapter and verse on just
18 what this injury was. Now, it wasn't usually the adman,
19 mean, he would come in with an affidavit because that's
20 required of him and it would be in the broadest possible
21 terms, but then it would be supplemented by the affidavits
22 of the people in the know, as it were.

23 Now, I'd like your view as to why I should accept
24 this very broad conclusory statement on the part of the
25 agency head as being sufficient to establish injury in the

1 case of these consultant reports.

2 MR. GLASS: The consultants play an important role
3 in the proceeding. They assist direction and formulation
4 of drafts and they work and review the other documents. Some
5 of their documents become compilations of the other documents
6 with additional notes indicating what the individuals have
7 participated in and their individual views. I do agree
8 with the Board that there is a difference in chilling
9 effect based on having the individual RAC members material
10 made available versus that of consultants who we have an
11 hiring or firing.

12 MR. EDLES: Mr. Glass, is Suffolk correct that when
13 the Argon folks reviewed the original LILCO plant, you
14 released their report routinely without invoking any type
15 of privilege?

16 MR. GLASS: Okay, number one, we released that material
17 through a request that I think came through the NRC. It's
18 not FEMA's intent to hide documentation, We're trying to
19 provide as much as possible.

20 MR. EDLES: I'm not suggesting that. I'm just
21 trying to figure out whether you made the claim now, more
22 recently you've reconsidered or how do the two differ?

23 MR. GLASS: There is a difference. What we released
24 in the Argon review was various drafts of a compilation.
25 Same type of material that we referred to in the Con Edison

1 situation. We did not release something that you could
2 identify that individual A wrote a particular document.

3 The only time that an individual's name appeared
4 on any of the documents that they talk about, is a letter,
5 transmittal letter where the individual says that Argon has
6 reviewed the material and we have reconsidered some of the
7 items contained there in.

8 MR. EDLES: In short, what you're saying I believe,
9 that is what FEMA is principally concerned about is that
10 individuals, whether they be on FEMA's staff or other
11 government agency officials or consultants, not have their
12 individual personality revealed in terms of who said I
13 think this stinks, I think this is great, as opposed to
14 the simple comments, or rather the substantive evaluation.
15 Am I right that you don't, basically object to the release
16 of preliminary substantive comments, as long as they are
17 somehow not associated with given individuals so that no
18 pressure is brought to bear on those people or anything
19 like that.

20 MR. GLASS: Understanding the needs of this Board and
21 the ASLD to proceed in the hearing, we are not waiving the
22 right of executive privilege, but we do understand that
23 there are circumstances where a team report, a consolidated
24 report in the interest of the proceedings should be
25 released.

1 MR. EDLES: Any of the 30 documents that were ordered
2 where you might have reconsidered and would now think that
3 you might be agreeable to releasing them?

4 MR. GLASS: Looking at those documents, there would
5 have to be certain, certain things that would have to be
6 redacted. For example, items 20 through 23 contain indi-
7 vidual notes of the RAC meeting which, as I say, I have
8 not reviewed except for one document I just reviewed to see
9 if there notes on it, so I could not comment what the
10 individual notes say.

11 But the underlying document which was a draft,
12 we would have no objection to providing. In addition, it
13 should be noted that FEMA has provided to the parties to
14 this proceeding, copies, of not only their final RAC
15 review as transmitted to the NRC, but that FEMA has sub-
16 mitted a draft version to FEMA headquarters and had gotten
17 some comments back and had made some changes before the
18 final transmittal to FEMA headquarters and to NRC. And had
19 provided copies of the before and after pages to the
20 parties to this proceeding. So it was not our intent to
21 try to discourage or prevent the parties from seeing if
22 there was an evolution somewhere.

23 We are very concerned about the process, it's
24 not limited just to this proceedings. It's limited to the
25 RAC's as they operate throughout the country.

1 MR. EDLES: This is the first time I've confronted
2 this problem. Has it come up in other licensing proceed-
3 ings before the NRC?

4 MR. GLASS: Well, we've had the situation in Indian
5 Point where the intervenors had made two requests. Origi-
6 nally they requested that they be allowed to observe an
7 exercise. There was a Board ruling that certain documents
8 be preserved, and that in the interest of safety, they not
9 be allowed to observe the exercise.

10 There were two concurring opinions, both of
11 Commissioner Roberts and Ahern, which strongly objected
12 to the idea that those documents should be preserved
13 because they felt that the individual notes would have
14 a chilling effect and that would also be misleading.

15 When that issue actually came before the ASLB
16 again, the question of should the individual notes be
17 released came in front of the Chairman and the two members
18 of the Board and their determination was that the team
19 executit, which was a compilation of the various teams that
20 worked, that those individual, those particular documents
21 be released, but that the individual executit forms that
22 identified which individual said what not be released.

23 There was even discussion, I think it was off
24 the record, I cannot swear to that, though, discussing the
25 fact of what would happen if you redacted just the

1 individual names. And it became very obvious that even
2 if you redacted just the individual names, the various
3 officials from the county and state knew who was at which
4 location, would be able to determine relatively easy who
5 had said what. So that issue has come up in those parti-
6 cular proceedings.

7 MR. ROSENTHAL: Let me, if I may, come back to
8 General Giuffrida's affidavit of May 18. He says and I
9 quote, and this was in the last page of the affidavit,
10 "the production of these documents will have a chilling
11 effect on this agency's ability to receive in written format
12 the comments, concerns and opinions of our staff."

13 Now, when the General referred to our staff, was
14 he including Mr. Baldwin and the Idaho Falls Consultants?

15 MR. GLASS: In that particular case, yes, they fulfill
16 the role of staff to the RAC

17 MR. ROSENTHAL : Well, that's rather imprecise, isn't
18 it? I mean, I would think that there might be some
19 question in the mind of Mr. Baldwin, if he's on the staff
20 of FEMA, and I would think that might be a justified
21 skepticism, wouldn't it?

22 MR. GLASS: I think, for the time that Mr. Baldwin
23 spends in our New York office.

24 MR. ROSENTHAL: All right, but so the suggestion was
25 that in the General's judgment, at least, consultants as

1 well as FEMA employees might be loathe to be totally candid
2 in their reports and evaluations if they knew they were gonna
3 become publi?

4 MR. GLASS: Yes, to give you a particular example,
5 you talked particularly about the Argon National Labora-
6 tories. When Argon submitted the material to us and did
7 an Argon review, it had to pass Argon's own internal pro-
8 ceedings. When Mr. Baldwin submits documents to us, Mr.
9 Baldwin's documents are submitted without that internal
10 review, he does not have to worry about his own contractor's
11 viewpoint of how is this gonna look to our other contracts
12 or our other contract vendees

13 MR. ROSENTHAL: You mean he doesn't send them to
14 Chicago for censorship?

15 MR. GLASS: No, he does not. That became a problem.
16 We had a document in anothe proceeding that had been pre-
17 pared by one of our consultants for Argon, that we were
18 hoping to be able to release, and we ran into problems
19 because the contractor refused to allow that to come out as
20 their document and have the imprint anywhere to be know
21 that it was their document, until their internal review
22 was completed. And, to tell you the truth, that resulted
23 in a delay in the submission of that particular document.

24 MR. ROSENTHAL: I don't understand the relevance of
25 that. I assume that at some point the folks back home in

1 Chicago get to see what Mr. Baldwin had told you, or am
2 I wrong about that?

3 MR. GLASS: No, they do not.

4 MR. ROSENTHAL: Never? I mean, it's privileged even
5 from disclosure to his superiors in the laboratory?

6 MR. GLASS: I would not say never, I cannot answer
7 that truthfully as the way you put it. But I know that he
8 submits it to the RAC Chairman without any prior approval
9 of Argon National Laboratories.

10 MR. ROSENTHAL: I understand that, but if there's some
11 concern on his part that what he has had to say might not
12 meet with the approval of his superiors, that concern is
13 not abated by giving that report to Suffolk, unless he has
14 an assurance that it's not going to somehow get into the
15 hands of those superiors.

16 MR. GLASS: Well, let's bring it into focus. I think
17 you really are bringing it to focus at this point with that
18 question. The point is, Mr. Baldwin's superiors are not
19 concerned about their having to review it prior to his
20 submittal when he is submitting it to FEMA. Their concern
21 is going to be different when the document identified as
22 Mr. Baldwin's end product, as an employee of Argon is
23 made public and if there are concerns about A, the quality
24 of the job that's done, the statements that are said, or
25 if there are any policy implications, for ARgon National

1 Laboratories, they will be concerned about having that
2 made public. That's the important distinction here.

3 MR. EDLES: So in other words, even after the fact, if
4 this were to be publicly released, you say that Argon may
5 say to him, Jesus, you're shooting from the hip here. Why
6 don't you sit down and think about this a little more
7 carefully before you do it because it's giving us a bad
8 name out there. We don't look like we're thoughtful,
9 rather we're something else.

10 So, and that really, that's roughly the same type
11 of analysis you would make, I suppose, even if it was a
12 staff subordinate.

13 MR. GLASS: It's not so much that they're gonna be con-
14 cerned about the quality. I mean, I have dealt with Mr.
15 Baldwin and I have a great respect for his ability. What
16 they're concerned about is the ramifications. They are
17 a contractor, they are an individual looking for work.
18 They get employment, not only from FEMA, but from the
19 Department of Energy. And if they all of a sudden see
20 that Mr. Baldwin has made a statement that may be discour-
21 aging to the encouragement of nuclear power, maybe DOE is
22 gonna reconsider whether they're gonna issue them any
23 contracts.

24 MR. EDLES: I appreciate that point. But he's gonna
25 testify on the stand.

1 MR. GLASS: That is correct.

2 MR. EDLES: To what degree is he likely to say things
3 different from what he's told you in confidence?

4 MR. GLASS: He's gonna tell the truth.

5 MR. ROSENTHAL: I would think so. I would think, isn't
6 that the total answer to the concern which you have just
7 expressed on his behalf? I mean, if in fact he's got pro-
8 blems with that plan, he's gonna testify and he's gonna
9 indicate what his problems are and if that's construed by
10 some as being an undesirable anti-nuclear stance, he's just
11 gonna be stuck with it. I don't see, I could understand
12 this if he were not gonna be a witness. But I don't under-
13 and your line of argument in light of the fact that he's
14 goin to be a witness. And as you can see, he's gonna tell
15 the truth as he sees it. Why isn't that gonna let the
16 cat out of the bag?

17 MR. GLASS: You may be very well correct, but I think
18 there's a difference, now he's participated in the proceedings
19 he's seen other viewpoints. What he has testified to is
20 that the testimony and the RAC support is submitted is
21 his testimony. And I assume that the questions that could
22 be asked by Suffolk County would be did you ever disagree
23 and if so, where did you disagree. And I think that, you
24 know, that probably is a correct avenue of exploration.

25 MR. EDLES: Are there any express pledges of

1 confidentiality given to people who participate in the
2 RAC process? If I sign up as I'm now an Agriculture
3 Department employee. And they say, Edles, you've been
4 assigned to this RAC committee for a few weeks. Am I
5 told, by the way, all of your information is kept in
6 confidence?

7 MR. GLASS: There is nothing carved in stone, but
8 they realize that we have fought for their confidentiality
9 in other matters, they understand that we are fighting for
10 their confidentiality in this particular matter. And the key
11 issue is that if this material is released, it is going to
12 impact dramatically on how the RAC operates. Because the
13 individual RAC members who submit their materials to us
14 with little or very little review by their superiors, are
15 now gonna have to worry about, or at least the agencies
16 are probably gonna worry, is what our individual's saying
17 now a matter of policy, not a matter of professional
18 judgment.

19 MR. EDLES: Do the agencies get to take a look at
20 their own employees' comments to RAC? If I were some
21 GS-15 in the Agriculture Department or something, would I
22 get to look at what my GS-12 or 13 subordinate told you
23 folks?

24 MR. GLASS: The two RAC individuals that are RAC
25 representatives but not actual RAC members, there RAC

1 members have reviewed their work. But based on my own
2 involvement or questions to various attorneys at these
3 agencies, after we got the various FOIA requests, indicate
4 that there really had not been any degree of review of these
5 RAC comments prior to this inquiry.

6 MR. EDLES: What about after?

7 MR. GLASS: I don't know what they're doing.

8 MR. EDLES: Are these guys likely to get assigned again
9 to a RAC committee if they don't catch their comments the
10 way their agencies like them?

11 MR. GLASS: I don't, you know, I cannot judge what is
12 going to happen, but I would suspect that if an individual
13 has made statements that may be found to be counter to the
14 policy of their agency, that they may be replaced, the
15 agency has the right to do that. We cannot tell them who
16 to designate to RAC

17 MR. EDLES: I can also see that that might well be
18 different than if you release them publicly. I mean, it's
19 one thing for a subordinate to know their supervisor's
20 gonna read something, it's also quite another, it seems to
21 me, to know that the world at large is gonna read it.

22 So I'm not suggesting, necessarily, that those
23 have to be the same.

24 MR. ROSENTHAL: Excuse me, one quick question. You
25 did not, on brief, address the question of our authority

1 to release, or to order the release of these documents.
2 Do you have any views substantially different from that
3 contained in the brief submitted by the parties?

4 MR. GLASS: No, we feel the Atomic Energy Act gives
5 you authority. We're not questioning, certainly, your
6 authority in this matter. You have a function to perform
7 and we have a function to perform.

8 MR. ROSENTHAL: I've got another question for you. Your
9 25 minutes are almost up. I realize you've been taking
10 alot of questions, but that's what oral argument is all
11 about.

12 MR. GLASS: I understand.

13 MR. ROSENTHAL: And so, responding to our concern,
14 why didn't you insist upon subpoena's being issued? You're
15 a nonparty in this proceeding. Staff, I think it was,
16 suggested in a footnote in its latest document, that the
17 subpoena procedure would have been appropriate in dealing
18 with discovery against a nonparty and that's something that
19 occurred to me independently and

20 MR. GLASS: We understand our rights under the
21 Calloway decision, we understand our rights under the NRC
22 regulation. It is not our intent to try to frustrate the
23 proceedings of the ASLB. We feel that it saves alot of
24 time to voluntarily come in and provide answers to inter-
25 rogatories. We've done that, we're not waiving our right,

1 but we have provided answers to interrogatories when it
2 assists the ASLB. We have produced documents when it has
3 assisted the ASLB. We have no problem with that. But
4 when it reaches a point that it is going to jeopardize the
5 operation of our agency's ability to get the comments that
6 are necessary in order to carry out our mandated functions,
7 then we must object.

8 MR. ROSENTHAL: YOU dedided to do it in this way
9 rather than require the issuance of subpoenas?

10 MR. GLASS: It would have only added a few additional
11 steps. We are not trying to delay the proceeding, or delay
12 the ASLB's work.

13 MR. ROSENTHAL: I have one final question. I looked
14 at the list of RAC members that you supplied and I didn't
15 see the commerce representatives. Isn't there supposed
16 to be one from the Department of Commerce?

17 MR. GLASS: There is not in that particular region.

18 MR. WILBER: There is not, you say?

19 MR. GLASS: There is not.

20 MR. WILBER: And why is that? I thought they were

21 MR. PERRY: The participation on RAC, Your Honor,
22 Spence Perry, Associate General Counsel, National Security
23 Preparedness and FEMA. Participation on the RAC is some-
24 thing that each agency has some discretion about. In some
25 regions, they just don't have an individual they can assign.

1 In some regions they don't have adequate money to partici-
2 pate. That's normally why there is an occasional absence.

3 MR. WILBER: Well then who addresses the areas in the
4 case of commerce, I believe it was meteorology and hydrology.
5 Who addresses these areas, then?

6 MR. GLASS: Normally would probably be the EPA represen-
7 tative.

8 MR. WILBER: Then suppose all of them decided after
9 their documents, they may be vulnerable to have them released,
10 suppose all of the agencies decide they don't want to do
11 it, then who's going to

12 MR. GLASS: I think you've identified our problem.

13 MR. WILBER: You're telling me that the thing is somewhat
14 voluntary, is this correct?

15 MR. GLASS: Yes. Our regulations give us no right to
16 compel those individuals to participate.

17 MR. ROSENTHAL: I have another question respecting
18 this list of individuals. Where it came to the matter of,
19 for example, Ms. Feldman, who's listed as an official
20 reviewer from EPA, and the official RAC member is Juan
21 Giardina, to whom she reports apparently. Now, who is
22 actually doing the voting?

23 MR. GLASS: The reviewer is Miss Feldman. If I remem-
24 ber correctly, in one of the two situations where we have
25 a reviewer, the official RAC member review, removed himself

1 from the proceeding due to the fact that his personal
2 counsel happens to be one of the counsel's to the proceed-
3 ings and therefore he felt it was inappropriate to partici-
4 pate.

5 MR. ROSENTHAL: So he, so, in these two instances, I
6 mean, there were two instances.

7 MR. GLASS: In one of the instances I know that's
8 the reason, I cannot give you the reason behind

9 MR. ROSENTHAL: In that instance, the reviewer is
10 the one that's casting the vote and all of that?

11 MR. GLASS: That is correct.

12 MR. ROSENTHAL: Really a substitute RAC member.

13 MR. GLASS: That's correct. It's the titles that
14 their own agency is using.

15 MR. ROSENTHAL: And now is that true in the case of
16 the other one? There were two. There was Miss Feldman
17 and the Department of Agriculture, you have listed a
18 Ms. Malina as the official reviewer.

19 MR. GLASS: I think in the other case, I can't, I'm
20 not positive which was which, but in the other case it was
21 just a policy decision that they were gonna call one indi-
22 vidual the RAC member and the other one the reviewer. We
23 have no control over how they want to write up their own
24 performance programs and performance plans. But that is,
25 but the two individuals that are participating for our

1 purposes, are the individual that is casting the vote and
2 it's their material that we are reviewing.

3 MR. ROSENTHAL: Okay, thank you, Mr. Glass.

4 MR. WILBER: There are three, evidently three FEMA
5 employees, Serno, Jackson and Wallace, are none of these is
6 a member of the

7 MR. GLASS: They're not official members of the RAC.
8 They are the staff to the RAC chairmen and they assist
9 the RAC chairmen and they do a great deal of work on it.

10 MR. ROSENTHAL: All right. Do you want to preserve
11 your 15 minutes?

12 MR. GLASS: I would like to just touch on one area
13 that was raised by Suffolk County in their filing and I
14 think if you review page 20 of Suffolk County's filing,
15 you'll notice that they indicate that they have certain
16 questions that they feel it is necessary to ask the RAC, cer-
17 tain why questions, why the RAC took or did not take cer-
18 tain action. And they seem to be putting this forward as
19 the proposition of why there is a compelling need to have
20 the underlying document. I think, this is very similar to
21 everything that's been stated throughout their material.

22 They can get this information by other means. They
23 don't need to know what the individual RAC members said.

24 MR. EDLES: When they asked the RAC Chairmen and the
25 other RAC members these questions, you're not gonna object

1 on executive privilege grounds?

2 MR. GLASS: Our, if you look at our protective order
3 that we filed and at the request of the, of Suffolk County,
4 we withdrew, voluntarily withdrew, we indicated in there
5 what we're looking to protect is who said what. We're not
6 concerned, if they ask the RAC chairmen what their disagree-
7 ments, were there other opinions, we're not gonna have a
8 problem in saying yes and stating what those other grounds
9 are.

10 But if they're gonna ask on the stand or ask in
11 the deposition can you please tell us what Mr. Boris said
12 or what particular action. We certainly are gonna have
13 the same objections.

14 MR. ROSENTHAL: All right, Mr. Irwin.

15 MR. IRWIN: May it please the Board, my name is
16 Donald Irwin, representing Long Island Lighting Company.
17 I will be very brief this morning because I believe the
18 issues in this case are relatively well laid out in the
19 papers and because the only additional information which can
20 be brought to bear is that which is privy to those who have
21 had access to the documents in question.

22 I think the important question or the important
23 thrust of this appeal is that it involves legal questions,
24 not simply a factual set of determinations of what's in a
25 series of documents. That's important because it is not

1 merely a question of whether document by document claims of
2 need have been substantially made out by FEMA or overcome
3 by Suffolk County.

4 What we have here is a basic policy question
5 relating to whether an agency, upon an assertion of privi-
6 lege, which a Licensing Board appears to have accepted,
7 has been held to, have asserted the privilege properly and
8 whether the proper tests have been applied in judging the
9 assertion of that privilege. Principally, we're dealing
10 with the means by which the Licensing Board reached this
11 decision. We believe, quite simply, that the Licensing
12 Board did not distinguish between the actual factual contents
13 of the documents in question, and their relationship to the
14 RAC process, which is what Mr. Glass devoted the principal
15 amount of his argument to.

16 The papers lay that question out very clearly. I
17 won't elaborate on it. With one exception. And that is,
18 the role of consultants which you, Judge Edles, got into
19 in some detail. From my own experience, consultants inter-
20 act with staff members. To the extent, as Mr. Glass indi-
21 cated, they are subject to their own review by their own
22 organizations. That's a fact which I know exists in other
23 organizations. I don't know whether it exists in Argon
24 or not. But to the extent that they may have served as
25 catalysts for discussion or reflection or interplay or

1 catalyzation of the views of other members of the RAC, I
2 think you've got to understand that they are part of the
3 web of a deliberative process.

4 MR. ROSENTHAL: Should this have been spelled out in
5 the affidavit that were supplied by FEMA in support of
6 their claim of executive privilege or are we, is this lawyer
7 talk that we're getting from you and Mr. Glass and really
8 the responsibility of agency officials advancing the claim
9 to spell it out.

10 MR. IRWIN: Ideally it should have been spelled out.
11 I think we all have a certain degree of experience with the
12 policy formulation process and with its implementation and
13 administrative proceedings, if the Board wishes further spec-
14 ification of this, I think it might be something to which,
15 if the Board considers it pertinent to its decision,
16 General Giuffrida might be asked to indicate with further
17 specificity whether this is a consideration that he meant
18 to indicate.

19 MR. ROSENTHAL: Do you regard the affidavit before us
20 as being legally sufficient to establish the privilege?

21 MR. IRWIN: I regard them as being legally sufficient,
22 certainly to establish the privilege as to RAC members.

23 MR. ROSENTHAL: Forget about the RAC members, I'm talking
24 about the consultants.

25 MR. IRWIN: By necessary implication, giving the

1 representations about the integral nature of the RAC process
2 and good faith representations of counsel, I think that
3 in the absence of contradiction, they're entitled to a
4 prima facie showing of credibility, yes, sir.

5 MR. EDLES: Mr. Irwin, everybody seems to agree that
6 the standards for overriding the privilege is compelling
7 need even Suffolk County agrees to that in its brief.
8 Where do those magic words come from? Is there a case that
9 you can cite me to that uses those magic words? We didn't,
10 the Commission didn't use it in its one opinion on the
11 subject.

12 MR. IRWIN: I believe the Licensing Board at Shoreham
13 used it in its opinion in September of 1982, citing a
14 number of Federal court cases.

15 MR. EDLES: But no one at the moment can tell me what
16 case uses those magic words, compelling need?

17 MR. IRWIN: Well, I can tell you Judge Brenner used
18 it September of '82. And I can go back and I will be happy
19 to supply you with further citations. I don't have them on
20 the tip of my tongue, but I'm confident that it's good law.
21 If you're not confident, I will be happy to go back to my
22 table and dig out some citations.

23 MR. EDLES: Well, perhaps you can slip it to Mr. Glass
24 on rebuttal, which will save a little bit of time.

25 MR. IRWIN: Okay. The fact of the matter is, though,

1 in terms of demonstration of compelling need, it is the
2 burden of a party claiming discovery to assert that need,
3 not the burden of the government to show the logical im-
4 possibility of the compelling need's existing.

5 And, frankly, Suffolk County's claim in this
6 regard is, at best, premature. There are a lot of documents
7 which have been released. Suffolk County devoted exactly
8 one sentence in its 30 pages of brief for discussion of
9 those documents. I can't recall what page it's on, but
10 it simply says the documents don't do the trick for us.

11 Well, that's fine, but that's not really much of
12 a demonstration of why they don't. Secondly, they've got
13 two days of depositions coming up. Mr. Glass has indicated
14 that in terms of disclosure of information and the basis
15 for conclusions, he is not going to interpose objections to
16 that. It is only the protection of the fabric of the pro-
17 cess that he's going to object to.

18 We believe, LILCO believes, since we have to get
19 a RAC review and that's essential to our getting a license,
20 that anything that destroys that process is going to be
21 damaging to us. So we care about that process.

22 MR. EDLES: And as I understood Mr. Glass, there
23 might even be another document or two in a sort of
24 expurgated version yet forth coming.

25 MR. IRWIN: That, as I understand it, could be the

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1 case. Now, once again, that depends on one's ability to
2 actually separate facts from context. I can't make that
3 judgment because I haven't seen the documents.

4 We certainly would have no objection to release
5 the factual information. We're going to ask those guys
6 questions too. What we're interested in is seeing to it
7 that the process is protected.

8 The ways in which we would believe the Licensing
9 Board erred are laid out in our brief. Let me address,
10 in passing, one point which is made in a Licensing Board's
11 decision and picked up in Suffolk County's brief. Namely
12 that documents as to which executive privilege have been
13 claimed and possessed by Suffolk County and the State of
14 New York have been released to LILCO on discovery motions.

15 MR. EDLES: Am I correct, Mr. Irwin, my recollection
16 is that the Licensing Board in each case released some docu-
17 ments and ordered other documents withheld or declined to
18 release other documents. So they sort of made a document
19 by document, case by case, fact by fact analysis of the
20 particular documents.

21 MR. IRWIN: That's exactly my point, Judge Edles. The
22 fact that some documents were released does not have any
23 bearing, in my view, on what the Board ought to do in this
24 case. I'll save the rest of my time for rebuttal, thank
25 you.

1 MR. ROSENTHAL: Mr. Reis?

2 MR. REIS: Yes, sir. If it please the Board, responding
3 to the question of Judge Edles of where the words compelling
4 necessity come from, compelling need, the words compelling
5 need, I don't recall seeing in my review of the cases,
6 however the word necessity. For instance, in United States
7 versus Reynolds, which really involved military secrets,
8 but there is some language there that certainly goes to
9 this, and they talk about how strong the privilege is and
10 they indicate there is qualified privilege and their words
11 are by their failure to pursue other alternatives. And the
12 other alternatives, that other alternative, meaning there
13 was another way to get some of this information in any
14 event.

15 Respondents oppose the privilege question for dis-
16 cussion with a formal claim of privilege set against a
17 dubious showing of necessity. Again

18 MR. EDLES: Is necessity a lesser standard than
19 compelling need?

20 MR. REIS: I think if anything, well, necessity, I
21 think is a higher standard, but I think, to show some-
22 thing is absolutely necessary I think is a necessity. Now,
23 in that case, of course, they were dealing with military
24 secrets and you might have had a different standard.

25 But in Hickman versus Taylor, too, the word was

1 used and that's at page, I just had that a moment ago,
2 excuse me, I believe it's at page 510. The court talked
3 about, and of course that's attorney-client privilege
4 there and you drew the analogy at the last argument and
5 asked the parties about that. And they talked about without
6 purported necessity or justification, breaching the privi-
7 lege or the work product privilege in that particular case.

8 MR. EDLES: Well, I was just a little amused by the
9 fact that everybody seems to agree that's the standard, but
10 I couldn't quite find where that standard came from.

11 MR. REIS: Well, I think compelling need and necessity
12 are pretty close, as I say, I pointed to two Supreme Court
13 sources where the word necessity was used. Let me talk here
14 about compelling need and compelling necessity, or necessity
15 here. And let me say here, the County's position on this
16 point, we think, is particularly weak. The only evidence
17 available on this subject matter, and the only way to get
18 evidence, is not from FEMA. There have been six months of
19 hearings going to really what the contention is.

20 The contention is does the LILCO plant meet Nureg
21 0654 and 5047B. And this is what FEMA is going at. Now,
22 these facts that they can ask FEMA about on the stand and
23 look at and test the FEMA report, don't come from FEMA and
24 are not from FEMA. Now, FEMA's evaluation of these facts
25 certainly is, and that's matters they can ask FEMA. But

1 getting the basic facts themselves does not come from FEMA.
2 They've had, the trial's been going on for six months getting
3 these facts out.

4 Further, there's been discovery. Further, there
5 can be discovery of FEMA.

6 MR. ROSENTHAL: Is there a lot of dispute as to basic
7 fact in this case?

8 MR. REIS: Well, there's dispute as to what agreements
9 were made with what bus company and what the effects of
10 that agreement are and whether the agreements really

11 MR. ROSENTHAL: Dispute or is it just that the record
12 didn't reflect that and it has to be brought out and put
13 on the record. I mean, is there really a disagreement
14 between the parties as to whether there is some arrangement
15 with bus company A?

16 MR. REIS: To some extent, but that isn't the principle.
17 Your characterization is in more cases true than not.

18 MR. ROSENTHAL: That was my impression in most of
19 these emergency planning cases.

20 MR. REIS: That's right.

21 MR. ROSENTHAL: That the basic facts were pretty
22 well established and there was a question as to whether
23 given the particular ingredients of the plan the plan was
24 adequate enough.

25 MR. REIS: That is precisely so. And that's the

1 particular reason why here it is not necessary to see the
2 input to the FEMA report. The history you don't need. You
3 have the facts, you can ask the witnesses. Well, the
4 agreement wasn't signed with bus company X to supply school
5 buses or to transport handicapped people. How can you come,
6 what basis did you come to this decision.

7 MR. EDLES: Well, Mr. Reis, but I can understand an
8 argument that there isn't a compelling need here, but how
9 can you argue that it's kind of irrelevant. I mean, we
10 routinely allow people, even for impeachment purposes,
11 to show that at some prior stage, there was a different
12 view of the world. And that goes to the weight perhaps
13 that we ought to attach now to the more recent pronouncement.
14 I guess I don't quite follow your argument.

15 MR. REIS: I don't question that it is relevant. There
16 is no question that this is relevant, but I don't think
17 the test that it is relevant or that it might help is not
18 the test that has been applied. I think the

19 MR. EDLES: I understand that. But what I'm getting
20 at is that, you know, it's clear that this is important
21 information and maybe it's not basic facts, but it's im-
22 portant because it goes to the weight to be attached to the
23 ultimate FEMA findings. Would you agree with that? I mean,
24 in routine discovery, we allow you to get earlier documents,
25 you can use them for impeachments, and on the strength of

1 that, presumably you can show that the more recent pronoun-
2 cement isn't quite as substantial as you originally thought.

3 MR. REIS: I don't think, I don't follow what you say
4 completely. I think you can here show what is the question
5 here, is, are the FEMA determinations that is presumably
6 valid, is it supported by the facts? And I think you have
7 the facts to test that determination and can go to that.
8 I don't think that the, somebody in the course of the deli-
9 berative process, might have given some preliminary views
10 and written in to something that was discussed among all
11 the Board members and worked over among them, whether it
12 be a consultant or a member of the RAC itself.

13 I don't think that goes to

14 MR. EDLES: But you don't have any doubt that if
15 these documents were served up, that there might be some
16 insight as to the facts that might be gleamed by Suffolk
17 County which they don't get from the face of the testimony.

18 MR. REIS: Yes, there may, there well might be.

19 MR. EDLES: So the real question then, is whether
20 there's a sort of overriding need or some additional need
21 beyond what they have done.

22 MR. REIS: That's right. The test on privileged
23 documents is not the test on ordinary discovery. On ordinary
24 discovery these documents would be made available.

25 MR. ROSENTHAL: Let me ask you this. You heard Mr.

1 Glass' explanation as to why there would be a problem, a
2 possible problem with the public disclosure of Mr. Baldwin's
3 report or evaluation. Now, is it not true that throughout
4 the history of this agency and this licensing process, we've
5 relied on national laboratories to do environmental reviews,
6 to do safety reviews and the individual reviewers presum-
7 ably give the staff reports, which in the environmental
8 sphere end up in environmental impact statements, that
9 right?

10 MR. REIS: That's true.

11 MR. ROSENTHAL: Now, have you, has the staff taken the
12 position that all of these reports are, that are given by
13 Oak Ridge or whoever, are to be shielded from public view
14 because of the considerations that Mr. Glass has set forth?
15 I mean, it comes as a surprise to me, if that's the case.

16 MR. REIS: No, the staff has not taken that position.

17 MR. ROSENTHAL: Well, why not, if there's this room
18 for the kind of harm that Mr. Glass said that General
19 Giuffrida had in mind.

20 MR. REIS: Well, we give great deference to General
21 Giuffrida in another executive department. And if he comes
22 forward and he sets forth an affidavit that there is harm
23 and there will be harm to his deliberative processes in the
24 RAC review, we give great deference to it.

25 MR. ROSENTHAL: Even though he doesn't set forth any

1 reasons. He just says this is so. I mean, is he divinely
2 inspired or what is it?

3 MR. REIS: No, we do not

4 MR. ROSENTHAL: Don't you normally expect that
5 officials, even those on the level of General Giuffrida,
6 should set forth the bases for that kind of conclusion?
7 Now, Mr. Glass supplied a basis, but this is a basis that
8 apparently the NRC has never recognized in connection with
9 its own consultants.

10 MR. REIS: The NRC, what drives the NRC make decisions
11 as to its own consultants in areas like environmental matters
12 or even the national laboratories and some of the input
13 into the SCR's are different and certainly it's shown to
14 be different.

15 MR. ROSENTHAL: Aren't you interested in the candor
16 of your consultants? Don't you want to avoid any chilling
17 effect to make certain that when they give you a report that
18 they're not holding something back because they're afraid
19 of embarrassment if it became public?

20 MR. REIS: Yes.

21 MR. ROSENTHAL: Why is the considerations any different
22 to which FEMA alludes?

23 MR. REIS: I don't, I don't believe that we should
24 dictate to another agency in this area, if they have a
25 valid privilege.

1 MR. ROSENTHAL: Who's talking about dictating? I mean,
2 what I'm gettin at is not whether we should dictate to an
3 agency. FEMA has presented to this agency an executive
4 privilege claim. FEMA recognizes that this agency has
5 the authority, under the Atomic Energy Act, to compel
6 disclosure. They've asked us, however, to acknowledge
7 their executive privilege claim. What I'm now getting at
8 is whether that claim has been adequately asserted. It's
9 not a matter of directing or forcing our will upon another
10 agency.

11 MR. REIS: Yes, we consider it as properly asserted in
12 the affidavit, as was determined by the Board below. We
13 feel that there is enough, where General Giuffrida talks
14 about the chilling effect on his agency and how his agency
15 works and the need to cooperate with many federal agencies,
16 not just one and to just going to one laboratory and pos-
17 sibly having one consultant. But getting together represen-
18 tatives from six or seven different executive departments
19 and getting them together and getting them to work together.

20 MR. ROSENTHAL: That's the RAC, I'm not talking about
21 the RAC. The other affidavits, apart from General Giuffrida
22 covered the situation of the RAC members. I'm talking
23 now about the consultants which were not addressed in any
24 affidavit, except General Giuffrida's, and in General
25 Giuffrida's, in the broadest conclusionary terms.

1 And I'm asking you whether the affidavit is adequate.

2 MR. REIS: I believe it is and that I think the sense
3 of the affidavit is that he includes those consultants
4 when he talks about the working of the RAC, they meet with
5 them, they get together with them, as I understand, and
6 this is a give and take among them. These are people who
7 are part of that give and take. Now,

8 MR. ROSENTHAL: Your consultants part of the NRC's
9 consultants on environmental matters part of the give and
10 take as well? I mean, or do they just turn in a report
11 and that's the end of it?

12 MR. REIS: No, there is a give and take. We go back and
13 we question them and we ask for further elucidation.

14 MR. ROSENTHAL: All right. Why don't the same consi-
15 derations apply in terms of chilling effect to the NRC?
16 And it's consultants?

17 MR. REIS: The NRC has made a determination as to its
18 consultants that there are overriding needs that FEMA has
19 not made here.

20 MR. EDLES: That's the real difference. In fact, the
21 factors are all the same, it's just that we assess chilling
22 effect around here slightly differently from the way FEMA
23 does it and I gather what you're saying they're a coordinate
24 branch of government, we ought to

25 MR. REIS: Give deference.

1 MR. EDLES: Give deference to them, they're not, even
2 though they do it differently from the way we do, they're
3 not crazy and we ought to give them a little deference.

4 MR. REIS: Essentially, thank you, Judge Edles.
5 Essentially yes.

6 MR. ROSENTHAL: Your time has about expired. You have
7 something you want to wind up in one minute, I'll give it
8 to you.

9 MR. REIS: No, the only matters I wanted to say is
10 point to the South Texas case and Palisades cases. Pointed
11 to in our brief, but speculation or the feel that you
12 might get some help from getting a document or deposing a
13 particular person or learning the name of a particular
14 person is not enough. You have to show more than that to
15 show compelling need.

16 MR. ROSENTHAL: Thank you, Mr. Reis. We'll take a
17 10 minute recess and resume at five minutes after 11.

18 (Brief Recess.)
19
20
21
22
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25

1 MR. ROSENTHAL: Mrs. Letsche, we'll hear from you
2 now.

3 MRS. LETSCHE: Good morning, gentlemen. I would
4 like to address just briefly a couple of the points that were
5 discussed in your discussions with the other Counsel in the
6 case and then I have a couple of particular points I'd like
7 to make with respect to the briefs that were filed by the
8 other parties, since these were simultaneous filings and we
9 didn't have an opportunity to respond in writing.

10 There are four points that I want to make just very
11 briefly first because I think it's important to keep those
12 in mind during this entire argument and your consideration
13 of the appeal, in general. First, this is not an FOIA case.
14 Here the issue before the Board is whether or not there is
15 the existence of a privilege, but even if you determine not
16 to satisfy the Board's finding on that matter, the issue is
17 a balancing of interests that went on.

18 So all the FOIA cases that are cited in many of
19 the parties briefs in which there is no issue as to the
20 relevance of the documents and there is no issue as to bal-
21 ancing a litigant's needs versus the confidential needs of
22 an Agency are not really relevant here because we're in a
23 different fact situation. Another important point is that
24 the Licensing Board below --

25 MR. EDELS: Ms. Letsche, just a quick question. Are

1 those FOIA cases nonetheless pertinent to other points, such
2 as what matters are embraced with --

3 MS. LETSCHE: With respect to the existence of the
4 privilege and whether or not it's been properly invoked, yes.
5 They are also significant, and there are a couple of cases in
6 particular I want to address that were cited by the parties,
7 in which started out as FOIA cases, but nonetheless did
8 address situations where there was a litigant need involved
9 in which the balancing was done. But my point was that if
10 you are faced with a straight FOIA case, the decision that
11 a court is making is not influenced at all by a balancing
12 situation, that was really the point I wanted to make.

13 The second important point is that the Licensing
14 Board below, in making its ruling, did so based, number one,
15 on its almost year long involvement in this case and its
16 knowledge of the facts involved in the case and the positions
17 taken by the parties in the case. And also based on a pre-
18 view of the documents. We state in our papers, and I'm not
19 going to repeat it here at any length, but it's the view of
20 the county that that kind of decision and that exercise in
21 discretion by the Licensing Board, in light of its knowledge
22 and expertise of the particular facts involved here and its
23 review of the documents, should be overturned only with re-
24 luctance on the part of this Board.

25 MR. ROSENTHAL: I'm not so certain I follow that.

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1 What is the particular relevance of the Licensing Board's
2 having lived with this case for a protracted period? Does
3 that make it better equipped to arrive at an informed judg-
4 ment as to whether you need the documents?

5 MS. LETSCHE: Yes, I believe it does, Judge Rosen-
6 thal, and the reason is this, they know, that Licensing Board
7 knows, the evidence that has already gone into this case on
8 a lot of the contentions that are now being addressed by the
9 -- witnesses, that are in their testimony and which is the
10 reason why this whole issue has come up. They know the evi-
11 dence that has been presented. They know the positions taken
12 by the parties. They know the discovery disputes and the
13 discovery that has occurred in the past between the two
14 parties and they, therefore, know and have a basis for their
15 finding that these documents were centrally - are centrally
16 important to the county's case and --

17 MR. ROSENTHAL: Did they spell all of this out, I
18 mean, the - if, in fact, the Licensing Board arrived at this
19 conclusion because of this abundance of knowledge, which it
20 possessed as a result of having lived with the case, did it
21 spell this out in its --

22 MS. LETSCHE: Well, you have the order, Judge Rosen-
23 thal, and, I mean, the level of detail is something we could
24 discuss, but I think the important thing is their finding
25 which was that these documents were centrally important to

1 the county's presentation of its case, that cross examination
2 alone and the Board has been presiding over 6 months of
3 cross examination now, the cross examination alone would
4 not be sufficient for the county to get the information they
5 needed.

6 MR. ROSENTHAL: What about did Licensing Board take
7 into account, insofar as its order is concerned, the wealth
8 of materials that was made available to you, because you
9 your adversaries insist that the Licensing Board really
10 didn't attach the significance that it should have to --

11 MS. LETSCHE: Well, I believe my opponenets are in-
12 correct. The documents that started this whole process going,
13 filed by Mr. Glass, his response to the initial document re-
14 quest by the county, listed 40 or 50 documents that had been
15 turned over by FIMA. And then, after that, he listed the
16 37 that he was withholding. Those 50 documents - I don't
17 know their number - 40 or 50, whatever it was, were turned
18 over pursuant to an FOIA request and also because they were
19 responsive to the discovery request and those, in fact, were
20 identified and were known to the Licensing Board. And so I
21 don't think it's fair to say they didn't take that into
22 account. What's significant is that the Licensing Board
23 looked at these actual documents, they know what's in them,
24 I don't, they know what's in them. And, based on their
25 knowledge of what's in them --

1 MR. ROSENTHAL: I may know what's in them also.

2 MS. LETSCHE: At some point, if you're going to
3 rule on this, I certainly hope you do know.

4 MR. ROSENTHAL: Well, supposing I've looked at them
5 myself and that's sort of a wash item, isn't it, that the
6 Licensing Board is familiar with the documents I have read
7 them too?

8 MS. LETSCHE: If you read the documents, that part
9 of it is a wash.

10 MR. ROSENTHAL: Alright, well let me ask you though
11 this question and with all due deference to the Licensing
12 Board and its having lived with the case for all of this
13 period of time, I don't think that's entirely irrelevant
14 factor, I have some difficulty in understanding, to begin
15 with, your need or I would say even entitlement to the pre-
16 liminary views that may have been expressed by individual
17 members of the --- The rack has come up with a report, the
18 report speaks for itself, you're certainly entitled to -
19 through the witnesses that will sponsor that report - to
20 endeavor to attack its underpinnings, but I'm a lot less
21 clear that you have a right or a need, either one, a compel-
22 ling need, for the individual comments of rack members. I'm
23 sure you'd like to have them. I mean, if I were sitting with
24 a report which I wanted to attack, I'd love to know what
25 people had to say, but that's a far cry from saying I would

1 be entitled to it or that I have a compelling need for it.

2 MS. LETSCHE: Judge Rosenthal, let me respond in
3 this way, the issue that this Board is faced with were the
4 discovery requests and the discovery requests asked for the
5 documents that related or formed the basis of the conclusions
6 in the rack report. And the reason for that discovery re-
7 quest was the fact that certain expert witnesses appearing
8 in this hearing on behalf of FEMA have stated in their pre-
9 filed testimony that they have certain opinions that cer-
10 tain contentions are true or false or that certain aspects
11 of the plan are adequate or inadequate based upon the con-
12 clusions contained in the rack report. Now, the discovery
13 request was to get underlying documents that led to those
14 conclusions and that presumably formed the basis --

15 MR. ROSENTHAL: Well, why are you entitled to it?

16 MS. LETSCHE: Could I just finish my answer, please?

17 MR. ROSENTHAL: Yes.

18 MS. LETSCHE: The standard applied by the Licensing
19 Board, which is correct, in determining a discovery request
20 with respect to the relevance now of the documents and whether
21 the request is proper with respect to relevance, is whether
22 or not those documents are reasonably calculated to lead to
23 discovery of admissible evidence during the hearings and the
24 Licensing Board, in applying that standard, having - being
25 familiar with the issues and having reviewed the documents,

1 found that that standard was met and that, in fact, these
2 were centrally important to the county's case and that the
3 county was entitled and had no other source - cross examina-
4 tion would not be sufficient - we're talking about a dis-
5 covery standard of relevance here. Now, with respect to the
6 individual views of rack members, I want to emphasize that we
7 - our discovery request was not please tell us who said
8 what - our discovery request was give us the documents that
9 form the basis of the rack conclusions. It is our under-
10 standing that this rack report is a compilation of individual
11 reviews, it's a compilation of conclusions or opinions of
12 individual rack members. It just so happens that the under-
13 lying documents happen to have been prepared by individuals.
14 That's not something that the county said, we have an entitle-
15 ment to know who said what. What we do have an entitlement
16 to under the discovery standard is the documents that are
17 relevant to that report because those are our - I've heard
18 some statements by the Board that at least there is some
19 agreement with this - those are reasonably calculated to
20 lead to the discovery of admissable evidence. So that's
21 where the, if you want to call it, entitlement, and I believe
22 it is entitlement under this Commission's discovery rules,
23 of the county to these documents comes from.

24 MR. ROSNETHAL: What is the relevance of the fact
25 that rack member, X, may have said preliminarily - this is

1 part of the deliberative process, gee, I think such and such.

2 MS. LETSCHE: It's just as relevant, Judge Rosenthal,
3 as the process that any other expert witness in a proceeding
4 goes through in reaching his conclusion. When he says I ul-
5 timately conclude that this communication system isn't going
6 to work, and you say how did you arrive at that, well, first
7 I went out and I looked at the equipment, then I went and I
8 talked to Joe Blow and he told me there was this problem with
9 the equipment. Then I plugged the equipment in and tried it.
10 Then I did this test. Then I did this calculation and I
11 concluded X.

12 MR. EDELS: Ms. Letsche, let me just interrupt a
13 second, is the same test applicable to determine relevance
14 as to determine compelling need?

15 MS. LETSCHE: No, no, those are separate. Those are
16 separate.

17 MR. EDELS: So let me assume that I agree with you
18 that the general discovery standard, if this is likely to
19 lead to admissible evidence, is the test for relevance. I
20 really don't disagree with that. The Licensing Board, I
21 think, also used that test, perhaps implicitly, although I
22 think explicitly, to determine whether you had a compelling
23 need for the documents. -- that was a factor, but how does
24 that equate to compelling need? Again, I agree with you that
25 that's certainly a test for relevance.

1 MS. LETSCHE: I'm not sure whether the Licensing
2 Board actually articulated a particular standard that it used
3 in deciding the level of the need --

4 MR. EDELS: But they had to have done that implicit-
5 ly in order to use that as a factor in determining whether
6 you had overridden the privilege. I mean, --

7 MS. LETSCHE: If, in fact, that was a factor in
8 making the determination of overcoming the privilege, then
9 you're right, I'm not sure, analytically, of the entire pro-
10 cess the Board went through, -- of those things are certain-
11 ly contained in their opinion.

12 MR. EDELS: If it were not used as a factor to deter-
13 mine whether it overrides, then it's not really relevant to
14 our deliberations here this morning because that's what
15 we're talking about is whether you've made out enough of a
16 case to override the privilege.

17 MS. LETSCHE: Well, the question that I was respond-
18 ing to when I started talking about that standard, Judge Edels,
19 was Judge Rosenthal's question about whether or not we were
20 entitled to get these documents and I took that to be with
21 respect to the original request for them, not with respect
22 to the balancing test and if that was what he intended, then
23 I misunderstood his question.

24 MR. EDELS: But I'm prepared to conclude, as I think
25 we all are, that this is relevant material which should

1 ordinarily be entitled to, absent the privilege. But the way
2 I read the Licensing Board's decision is that they assume
3 that the mere fact of relevance somehow was an element to
4 be considered in determining compelling need. And I think
5 that if that is true, then the standard for privilege docu-
6 ments and the standard for unprivileged documents would be
7 the same, namely, are they likely to lead to admissible in-
8 formation?

9 MS. LETSCHE: Well, I guess, with all due respect,
10 I disagree a little bit with your reading of the Licensing
11 Board's opinion. I think what they found with respect to
12 relevance, beyond their finding that we met the discovery
13 standard of reasonably calculated to lead to admissible
14 evidence, was that these documents were centrally important
15 to the county's case. Now that's a much stronger, a much
16 bigger finding, if you will, than a finding that they're
17 reasonably calculated to lead to admissible evidence. They
18 said these are centrally important and I think --

19 MR. ROSENTHAL: Why? Defend that. I don't under-
20 stand why they're centrally important. Can you explain that
21 to me?

22 MS. LETSCHE: Well, Judge Rosenthal, I can't ex-
23 plain in a lot of detail because I don't know what's in them,
24 but I assume that the Licensing Board had reason to believe
25 that access to those documents was necessary in order to

1 enable the county to effectively and completely conduct its
2 cross examination of the FEMA witnesses and to effectively
3 be able to rebut the FEMA findings. --

4 MR. ROSENTHAL: Now if I, having examined th. docu-
5 ments, see it otherwise I conclude that they're not centrally
6 important, then that's the end of it assuming that we agree
7 that there is an Executive privileg~~e~~ to begin with.

8 MS. LETSCHE: Well, if you're asking me, obviously
9 your opinion is going to be your opinion and unless it's
10 appealed, that will be the end of it. But I'm not quite
11 sure what your question is. If you decide that, you decide
12 that.

13 MR. ROSENTHAL: Well, I mean, is this really what's
14 involved here is just looking at the documents and reaching
15 some kind of a conclusion as to whether these documents are
16 centrally important? That's what it really comes down to?
17 That's all that -- what else is there? Because if that's
18 all that's involved, that's pretty easy because then I will
19 just review the documents again, reach my conclusion and
20 cast my vote , affirmance or reversal, accordingly.

21 MS. LETSCHE: That's certainly one very, very im-
22 portant element, Judge Rosenthal. You also will have to
23 find, if you find that there is a privilege, assuming that
24 there is a properly asserted privilege, which is your number
25 one, your first finding in the order of chronology here, then

1 you need to find, after reviewing the documents, that they
2 are centrally important and you have to weight the right to
3 confidentiality asserted by FEMA against the need, based on
4 this central importance, to the county of those documents.

5 --

6 MR. ROSENTHAL: Well, if I find that they're not
7 centrally important, that's the end of it, right? And if
8 there is an Executive privilege and my conclusion is that
9 these documents are not centrally important to your case,
10 the privilege would carry the day, wouldn't it?

11 MS. LETSCHE: Well, it might. There are other as-
12 pects involved. You would have to make your centrally im-
13 portant finding in the context of the broad scope of the
14 discovery rules, which is something that is taken into ac-
15 count when you're ruling in a discovery request --

16 MR. EDELS: A Why is that important once - assum-
17 in; a privilege has been validly involved here, again, we're
18 operating - I think in a context other than conventional dis-
19 covery here.

20 MS. LETSCHE: Well, I think invoking privileges is
21 part of the context of conventional discovery, Judge Edels,
22 and in my statement that you need to - that a court needs to
23 make that determination in the context of the discovery rules
24 is based upon the case -- and the finding for the Licensing
25 Board and I'd refer the Board to - let's see if I can find it

1 here - a case that was cited --I have to find it here - I be-
2 lieve it was by Lilko, which is the Connoy case, Connoy
3 versus I forget who and I don't have the first page of the
4 case - page 12 of that decision where it said, "Against the
5 considerations favoring non-disclosure of a privileged docu-
6 ment, the courts weigh the needs of the litigants seeking
7 disclosure, keeping in mind the philosophy of broad discov-
8 ery which the federal rules of civil procedure embrace."

9 That's exactly what the Licensing Board said with
10 respect to the NRC rules, discovery is most likely when the
11 material is centrally important and the litigant has no other
12 means of obtaining equivalent proof of his allegations or --
13 that's another factor and later in that case, on page 14,
14 that court stated, "Evidentiary privileges are to be con-
15 strued narrowly to permit the broadest possible discovery
16 consistent with the purposes of the privilege."

17 And that's a widely held, well-established --

18 MR. ROSENTHAL: I have - what's before us now is
19 the claim of a federal Agency buttressed by the affidavits
20 of, among others, the head of that Agency who is a Presiden-
21 tial appointee, to the effect that the release of these docu-
22 ments will have a chilling effect upon the conduct by that
23 Agency of its important responsibilities. Now, it seems to
24 me that we have to take that averrment seriously, even though,
25 as I suggested to Mr. Glass I think that the General might

1 have been a little more specific and a little less conclusory.
2 Now, I would think and, correct me if I'm wrong, that in
3 order to tell General Giafreda that he has to accept this
4 chilling effect, he has to accept the damage to his process,
5 that we would have to be totally convinced that you just can't
6 present your case fairly and effectively without these docu-
7 ments. And I'm just suggesting to you on behalf of myself,
8 Ms. Letsche, that I'm not persuaded at this juncture that you
9 have demonstrated that. Now it might well be that down the
10 road you get these folks up there and you cross examine them
11 and it may turn out that there is a need for these documents
12 and, at that point, the matter could be reconsidered.

13 But if there is any element of speculation at this
14 juncture, it seems to me that that speculation may have to
15 be resolved or laid to one side, I suppose more accurately,
16 in favor of this claim of a Presidential appointee. Now,
17 why am I wrong about that?

18 MS. LETSCHE: Well, I think, I'm not sure I'm aware
19 exactly what the question went to in your remarks, but
20 your absolute certainty, I'm not sure what that means. There
21 are a couple of points to keep in mind. Number one, this is
22 not an absolute privilege that's being claimed here, it's a
23 qualified privilege. So although there is a chilling effect
24 being asserted, it has to be weighed. I think you have to
25 look at the particulars of the chilling effect that's being

1 asserted here and that's something I want to address because
2 the Board indicated some interest in it with respect to
3 contractors - I'll come back to that in a minute, but I
4 think you have to look at exactly what this so-called chilling
5 effect is supposed to be. And that that's what you have to
6 weigh against the showing that the county has made.

7 But it's also important to remember that this case
8 is taking place in a discovery context and the fact that
9 there might be a possibility that during the hearing a ques-
10 tion might be asked that Mr. Glass might not object to that
11 might produce some pertinent information, is not - that
12 possibility is not a sufficient basis, in the county's view,
13 for this Board to reverse the Licensing Board's findings on
14 a discovery dispute.

15 MR. EDELS: But if we were to conclude that
16 there is a possibility or a strong possibility that you could
17 get the information during the course of depositions or
18 hearings, isn't that, likewise, a basis for us concluding at
19 least at this juncture, as Mr. Irwin suggests, that this
20 isn't the time for us to tell Director Giafreda that he's
21 got to turn over his internal documents?

22 MS. LETSCHE: That's something you would have to
23 take into account in your balancing, Judge Edels, but I think
24 in doing that particular analysis the Board should also keep
25 in mind the motion for protective order that was filed by

1 FEMA and the extent to which this privilege claim has been
2 asserted, the breadth of it. It isn't just that they don't
3 want to be able to say that Mr. Smith said X and Mr. Jones
4 said Y. What they are seeking to protect here, according
5 to that motion for a protective order, which I believe we
6 provided the Board a copy with, is the pre-decisional thought
7 processes and input, the discussions of and documents sub-
8 mitted by the RAC members. Now, it's a question of judgment
9 as to what that covers, ok? Whether or not a particular
10 question, when I ask a witness up on the stand what did you
11 base that on or I ask him, was there any dissent and he
12 might say, yes. Well, which question is it that I'm going
13 to be stopped? Which question is it that Mr. Glass is going
14 to interpret as being covered by this Board's ruling if you
15 were to reverse the Licensing Board, as inquiring into a
16 pre-decisional process? I don't know and that's the danger
17 that's involved in relying upon the possibility.

18 MR. ROSENTHAL: Yes, but you don't know nor do I
19 know but what you're saying to me is given all of these un-
20 certainties out there, this Board ought to order Director
21 Giafreda to turn over his internal documents. What I'm
22 suggesting is, given all those uncertainties out there, why
23 don't I wait and see what comes up and, at that point, we'll
24 decide whether we ought to tell another government Agency
25 to turn over its documents?

1 MS. LETSCHE: Well because in making that decision
2 you are denying the discovery rights of Suffolk County and
3 you would be forcing the county to go forward with its at-
4 tempts to compile and to present a true and accurate factual
5 record in a hearing without being given the opportunity to
6 have conducted discovery beforehand.

7 MR. EDELS: But I can always correct that mistake
8 by allowing you further opportunity down the road. I can't
9 correct the mistake if I order the documents released now
10 and it turns out that you're going to get everything at the
11 hearing. So those are the two problems that I've got as I
12 sit here today.

13 MS. LETSCHE: Well, in terms of how you could cor-
14 rect that mistake, Judge Edels, I think it's questionable of
15 whether correcting it after an appeal has been taken from a
16 final Licensing decision is an adequate remedy when, at that
17 point you have an entire hearing record and a Licensing de-
18 cision made with one substantial party having been denied
19 his rights under the regulations to conduct discovery and,
20 thereby, to conduct its cross examination and, in addition,
21 to effectively rebut what is, under the Commission's own
22 rules, a rebuttable presumption upon which the decision must
23 be based. I think it's important to keep that in mind.

24 There are, as I said, a few additional points that
25 I would like to address that were raised in the pleadings

1 filed by the parties to this case and before I get to that I
2 want to comment on just one or two things that were discussed
3 with other counsel during their arguments.

4 First of all, the question of the privilege as it
5 applies or assertedly applies to the contractors, to FEMA.
6 I think it's significant that Mr. Glass was - not only has
7 Mr. Giafreda not stated in his affidavit, but Mr. Glass
8 failed to articulate it at any time, at least that I've
9 heard, any difference between the reasons for the attaching
10 of a privilege to those contractors as opposed to the other
11 "official members" or participators in the RAC Committee.
12 And here I'm talking about the existence of a privilege and
13 I don't want to waste a lot of time on that because you
14 don't really have to decide that issue in order to rule on
15 this appeal. But I think it's significant that there wasn't
16 any articulation of difference.

17 And with respect to the injury that Mr. Glass did
18 articulate in response to the Board's questions up here,
19 the fact that an individual might be embarrassed if his
20 Agency found out what he said or that a particular statement
21 might affect what the Agency thought of him - that kind of
22 allegation of injury, which is apparently the same injury
23 that's being asserted with respect to these RAC members, can
24 be applied to any witness. If you're talking about embarrass-
25 ing that person because they're saying something inconsistent

1 with something else or inconsistent with a superior or in-
2 consistent with a position or a theory, that's exactly,
3 exactly what cross examination is all about. To identify
4 those things and to suggest that that injury, that chilling
5 effect, justifies keeping secret this process, upon which
6 this Agency is going to rely to decide the license of nuclear
7 power plants, I think, without any basis.

8 MR. EDELS: Let me suggest an alternative hypo-
9 thesis. It's not that we are worried about the embarrass-
10 ment that individuals would feel, but recognizing the human
11 nature that none of us like to be embarrassed publicly, and
12 I have to accept that as a given for the moment, isn't it
13 true that if I know I am likely to be publicly embarrassed,
14 I may not say things precisely the way I would otherwise
15 and what we're trying to do is foster a scheme in which I
16 say things as honestly and candidly and openly and forth-
17 rightly as possible because I know I don't have to worry
18 that somebody is going to see that Edels is really not as
19 smart as he likes to think he is, see?

20 MS. LETSCHE: Judge Edels, I think you're right,
21 if what you're talking about is the more traditional situa-
22 tion that Executive privilege tends to come up in, where you
23 have somebody deciding a policy or deciding whether or not
24 they're going to enact a regulation and you have everyone
25 giving and taking and talking about the pros and cons. What's

1 happening here though is you have witnesses up on the stand,
2 they have subjected their opinion, they've introduced them
3 as evidence, they want somebody to rely on them and they are
4 subject to cross examination and my point was that this
5 argument of injury is - it's even more than a slippery slope.
6 It's like a drop off the edge. It would apply to every
7 single witness in every single hearing.

8 MR. ROSENTHAL: Well, now wait a minute. Let's
9 look at the RAC members, to begin with. I would suppose that
10 any member of the RAC should expect to be called upon to
11 justify his or her ultimate opinion as reflected in the RAC
12 report. But the deliberative process of the RAC as well as
13 the deliberative process of a lot of other bodies is an
14 evolutionary one. Now, I can assure you that I have sat in
15 our conference room from time to time on a preliminary ex-
16 ploration of a matter before us and expressed opinions which
17 subsequently I had reason to question and I may have even
18 put them in writing. Now I think you have to draw a dis-
19 tinction between the --

20 MS. LETSCHE: Yes, Judge Rosenthal, you're right.
21 You are a Judge and the standard for inquiring into how you
22 arrived at an opinion might be very different. That's not
23 the situation here. Here you have expert witnesses who are
24 submitting their expert opinions and conclusions as evidence,
25 as a rebuttable presumption in this proceeding.

1 MR. ROSENTHAL: Are we talking about the RAC members
2 or are we talking about the consultants?

3 MS. LETSCHE: We're talking about both of them.

4 MR. ROSENTHAL: Well no, I want to separate them
5 because, I mean, I don't know whether you separate them or
6 not.

7 MS. LETSCHE: I don't think there is any distinction.
8 In terms of the injury that is being alleged here and --

9 MR. ROSENTHAL: -- the RAC members who are going to
10 be ultimately responsible for I suppose voting on the report.
11 Now, if they express opinions early in the game, why isn't
12 that essentially the same as my expressing an opinion early
13 in the game. To be sure they are not adjudicators, I am,
14 but, nonetheless --

15 MS. LETSCHE: That's a -- distinction.

16 MR. ROSENTHAL: Well I can tell you, if I were a
17 RAC member I would be very, very circumspect about expressing
18 an early opinion if I knew that that early opinion was going
19 to get into the hands of litigants in the case. I would say
20 I'm not going to say anything in writing. The only way I
21 will communicate is orally and without a transcript.

22 MS. LETSCHE: If that's the case then maybe that's
23 what these RAC members should have done because they know or
24 they should have known that that RAC report is a rebuttable
25 presumption in an NRC proceeding and they know or should have

1 known that several of their members were going to be witness-
2 es subject to cross examination.

3 MR. ROSENTHAL: But they didn't necessarily know
4 from that - I wouldn't have assumed, as a RAC member, that
5 what I stated at the outset in some comments that were part
6 of the deliberative process were going to become public.
7 What I would assume is that the ultimate report and any
8 dissent that might have been filed would become public and
9 then I might be called upon to defend that report. That's
10 all I would assume.

11 MS. LETSCHE: Well, perhaps, Judge Rosenthal, there
12 was a lack of communication or an improper education of the
13 RAC members as to what this process was all about, I can't
14 deal with that and I don't think that's pertinent. What's
15 pertinent here is a situation where you have in litigation
16 one litigant being given a final conclusion and being told
17 that they are not going to be permitted to go underneath
18 that final conclusion to probe it.

19 MR. ROSENTHAL: Certainly you can go underneath
20 that. Who is saying you can't go underneath that final con-
21 clusion? I mean you can say here is the conclusion. You can
22 say to these witnesses, alright, now here is the conclusion
23 that you reached. What is that conclusion based on?

24 MS. LETSCHE: And then let's say he says that's
25 based on the findings of the RAC Commission and then I say,

1 ok, which findings were those? And you say, well, those
2 were the findings about communications. And what was done to
3 determine those findings? Oh, I can't tell you that pre-
4 decisional. That's a thought process. Do you want me to'
5 tell you what the individual RAC members did to arrive at it.

6 MR. ROSENTHAL: No, but you can ask what the basis
7 of that conclusion was.

8 MS. LETSCHE: And then he will - let's say he says,
9 - let's say I ask that question and he says this was the
10 collegial view of the members of the RAC.

11 MR. ROSENTHAL: What is the basis of that view?
12 You can ask him that.

13 MS. LETSCHE: I can ask him that and he'll say it
14 was based on our collegial review of these documents.

15 MR. ROSENTHAL: If you think that they can get away
16 with an answer like that --

17 MS. LETSCHE: Judge Rosenthal, that's what we've
18 been hearing and that's what we've been seeing in all these
19 papers.

20 MR. ROSENTHAL: Well, you may be, but I haven't
21 passed on judgment on that and I'm just telling you that if
22 that, in fact, is all you're getting from them, that well we
23 don't need to explain --

24 MS. LETSCHE: Let me suggest, Judge Rosenthal, that
25 you look at the RAC report and the FEMA testimony of which we

1 we provided a copy because it was cited in our brief, and in
2 looking at that you will see that there are generalized,
3 broad, unexplained conclusory statements - that's all they
4 consist of.

5 MR. ROSENTHAL: Well, I am telling --

6 MR. EDELS: -- not sufficient, maybe you've effect-
7 ively rebutted the presumption at that stage at which point,
8 I assume, that LILCO ultimately bears the burden of showing
9 that the plan is good and --

10 MS. LETSCHE: Well, Judge Edels, I mean there is a
11 point here - I think we're getting a little bit off the
12 track.

13 MR. EDELS: Well, I don't think we're getting off
14 the track at all because it seems to me that you're basing
15 your case of need on an assumption that all that needs to be
16 done in defense of this report, by FEMA, if it's attacked
17 is to say, well, we just reached that conclusion and we're
18 not going to tell you what the underpinnings were. We're
19 just going to say that our group reached that conclusion.
20 Now, that has never, in my judgment, I've been at the bar a
21 considerable period of time, been sufficient defense of a
22 report.

23 MR. LETSCHE: I agree with you, Judge Rosenthal.

24 MR. ROSENTHAL: And you can't defend the environ-
25 mental impact statements on that basis. You can't defend

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1 First of all, there are arguments in the FEMA
2 brief that the - or there is a statement in the FEMA brief
3 that the RAC members are junior in rank, that they don't
4 set Agency policy, that they are not subject to pressures
5 from FEMA. This point, I think, is significant on the ques-
6 tion of whether or not the privilege applies here. I think
7 the argument that was made in the county's papers that this
8 FEMA report that is at issue here was never even given to
9 anybody at FEMA headquarters or - and there was no consulta-
10 tion with FEMA policy makers until after it came out.

11 And the fact that all of these people are admittedly
12 not policy makers themselves, are junior and are not even
13 subject to pressure from FEMA. It poses a significant ques-
14 tion as to whether or not an Executive privilege is properly
15 claimed here by FEMA and I'll also note that with respect to
16 the contractors, which there has already been some question
17 raised as to the adequacy of the claim there, I think there
18 might be a waiver problem with respect to having all those
19 contractors involved in these so-called secret executive
20 policy making discussions. That was something I heard about
21 for the first time today, that maybe there was some distinc-
22 tion here, but I think that's something that should be taken
23 into account and considered.

24 MR. EDELS: I don't understand taht argument. The
25 government uses contractors all the time and, are you

1 objection raised and those questions were answered.

2 MR. EDELS: Mr. Glass mentioned earlier this morn-
3 ing that the documents, though, did not reveal individual
4 comments by discreet persons, but rather simply judgments
5 which could not be traced to discreet individuals. Is that
6 true as you understand it as well?

7 MS. LETSCHE: I frankly can't recall all of the in-
8 dividual documents. Several of the documents were individu-
9 ally authored and did have individual opinions.

10 MR. EDELS: Could you tell from the face of the
11 document, once the document was revealed, who the author was?

12 MS. LETSCHE: Oh, yes and in addition, as I said
13 during deposition, I personally deposed one of these Oregon
14 people and I asked him, did you write this section? No,
15 Joe Blow did. Well, who wrote this section? Joe Blow did.
16 Whose opinion was this? This was Joe Blow's. All those
17 questions were asked during that deposition.

18 There is a case that's cited by LILCO which I think
19 is particularly pertinent to the question of whether or not
20 the privilege exists here and that is the case of Massin
21 versus Zutcher which involved an investigative report by
22 Air Force mechanics of an airplane crash. In that case the
23 Agency and the Air Force there was not a party to that case.
24 This was a law suit by an individual who was injured against
25 the aircraft company. In that case the Air Force was ordered

1 suggesting that when you do that somehow the government is
2 no longer entitled to claim that its contractors can keep
3 its advice secret?

4 MS. LETSCHE: Well, I think there certainly might
5 be a question as to it, Judge Edels. I don't know the facts
6 because that's something, as I said, that had never come up
7 before. But there certainly are waiver provisions, waiver
8 covers an Executive privilege just as it covers any other
9 privilege and my suggestion is that depending upon the in-
10 volvement of the contractor, if, in fact, we were to assume
11 that these discussions or whatever it was that was going on
12 were privileged, there might be a question as to waiver. I
13 don't know the answer to it.

14 MR. EDELS: Well, FEMA, as I recall from last week's
15 arguments, said that they, at least at the outset, used con-
16 sultants because they didn't have the adequate staff re-
17 sources under the time constraints. So they were, in essence,
18 using these consultants in the same role that they would
19 normally use their staff and they used it for good, it seems
20 to me, for good and sufficient governmental reasons.

21 MS. LETSCHE: And you were correct in noting, Judge
22 Edels, that with respect to that review all of the documents
23 were turned over and, in fact, during cross examination
24 there were questions asked as to which of the reviewers did
25 this or which of the reviewers did that and there was no

1 SER's on that basis and I would put it to you, you can't
2 defend a FEMA report evaluating a plan on that basis.

3 MS. LETSCHE: I agree, Judge Rosenthal.

4 MR. ROSENTHAL: If they're doing it on that basis
5 then you can come up and tell us about it on an appeal from
6 a decision that accepts the report.

7 MS. LETSCHE: In response to your assertion, Judge
8 Rosenthal, my statement and the position of the county here
9 is not based just on assumption by us. It's based on the
10 fact that FEMA has withheld all the underlying documents.
11 They've withheld those. They filed a motion for a protective
12 order to prevent, before the deposition happened, inquiries
13 into the thought processes in the documents submitted by the
14 RAC Commission. And, I might also note, that if we're talk-
15 ing about environmental impact statements or we're talking
16 about SER's, in those instances litigants are entitled and
17 do receive the bases that went into those reports. They get
18 documentation. They are not told, you go into the hearing
19 and ask your questions, litigant, you're not allowed to con-
20 duct any discovery. That's a big distinction that's being
21 made in this case and I would like, unless there are addi-
22 tional questions on this, to move into some of the areas
23 that were addressed by the parties in their briefs that we
24 didn't have an opportunity to address because of simultan-
25 eous filings.

1 to turn over the facts and conclusions, the findings that
2 were contained in that investigative report. And I think
3 that's very significant and very analagous to this case here
4 where you have a situation involving the facts.

5 MR. EDELS: Am I correct though that in that par-
6 ticular case the court declined to order most of the materials
7 to be turned over?

8 MS. LETSCHE: No, they did order --

9 MR. EDELS: They ordered certain underlying mater-
10 ials, but not, as I recall it, the basic investigatory -
11 the basic witness statements which had been collected be-
12 cause they had been done under a pledge of confidentiality.

13 MS. LETSCHE: That was a separate case involving -
14 that was - I have that case written down too. That was a
15 separate case involving witness statements which I'll get to
16 in a second.

17 MR. EDELS: But it was just --

18 MS. LETSCHE: It was the Mitchell versus Bass case
19 that I think you're referring to, Judge Edels, and I'll get
20 to that in a minute. In the Massin case that I'm talking
21 about, there was an investigative report involved by these
22 mechanics and the court stated - I'm quoting from page 340
23 of that case - "These factual findings of Air Force mechan-
24 ics who examined the wreckage, their investigations and re-
25 ports would not be inhibited by knowledge that their

1 conclusions might be available for use in future litigation.
2 And their findings may well be of utmost relevance to the
3 litigation now pending between appellant and United Aircraft."
4 And what happened in that case, they ordered these things -
5 they made an order which was interpreted in a sort of a
6 strange way the court felt by the parties and the court
7 then remanded to the District Court and ordered them to
8 review the documents and determine what constituted the
9 findings and conclusions in ordering those things to be
10 turned over.

11 The Mitchell case which you referenced, Judge Edels,
12 I believe, and that's probably a result of my poor pronouncia-
13 tion of that other case.

14 MR. EDELS: No, no I think I may well be confused,
15 but I thought I was talking about -- against Zutcher, but go
16 ahead.

17 MS. LETSCHE: Well maybe. The Mitchell case in-
18 volved a situation where there were - that was a labor case
19 and there were witnesses who had spoken to the defendant
20 and there were some witnesses who refused to speak to the
21 defendant. Those individuals were going to be witnesses in
22 the case, however, and the parties were unable to get the
23 underlying statements that had been given out. In that case
24 depositions were ordered as being proper because it was the
25 only way that the defendant could get the information that

1 was needed. I think the point that I wanted to make with
2 respect to Massin was just the fact that you can't have a
3 conclusory assertion that something in a document is privi-
4 leged, particularly when it's of this type, I believe --

5 MR. ROSENTHAL: It's a long time since I last read
6 Massin which was in my section in the Department of Justice,
7 but my recollection was and I don't think anything you've
8 said contradicts it, that what was ordered released there
9 was simply basic factual findings that the wing was sheared
10 off, if that was the case, at a certain point. I don't
11 think that the court there ordered the disclosure of any
12 conclusions as to the cause of the accident that may have
13 resulted from those - am I wrong about that?

14 MS. LETSCHE: I'm not sure you're correct, I mean
15 the court does say that if the mechanics expressed any opin-
16 ions or conclusions as to possible defects in the propellers
17 or propeller governors it might have been due to the negli-
18 gence of United Aircraft. We do not consider such express-
19 ions would come within the privileges. I'm not sure I'm
20 disagreeing with your recollection, Judge Rosenthal, my
21 point was that in this case which involved investigative
22 report, the findings and conclusions contained in those re-
23 ports were ordered to be turned over or at least examined by
24 the court. That was the only point I wanted to make. I
25 also wanted to make a point with respect to the Playboy case

1 which was cited by FEMA and that was the case that involved
2 the death of a Civil Rights worker and that was an FOIA
3 case.

4 What's significant about that case though was that
5 the report, and this was an investigation or a report, of
6 the incident involving the death of this worker was ordered
7 to be turned over or at least almost all of it was ordered
8 to be turned over and there wasn't even any balancing in-
9 volved in that case. But one of the statements by the court
10 at page 935 as instructed -- what the court stated was that
11 anyone making a report must, of necessity, select the facts
12 to be mentioned in it. But a report does not become a part
13 of the deliberative process merely because it contains only
14 those facts which the person making the report thinks mater-
15 ial. If these were not so every factual report would be
16 protected as part of the deliberative process.

17 MR. EDELS: In which case? Could you give me the
18 case and which court decided that?

19 MR. LETSCHE: Yes. This is Playboy Enterprises
20 versus the Department of Justice which was a D. C. Circuit
21 Court of Appeals case in 1982. It's cited by FEMA - I don't
22 have the page citation to where FEMA cited it, although I
23 can find that for you pretty fast. It's cited at page 18 of
24 the FEMA brief. And the court goes on to explain that and
25 that's a point that the county has made in the past, that

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1 although there might be some evaluation involved or some
2 choosing involved in determining what it is that you put in-
3 to your report, if what you're talking about is a factual
4 report, which we understand this RAC report to have been,
5 that doesn't necessarily make it part of the deliberative
6 process.

7 In addition, the AT&T case which is cited by FEMA,
8 and I'm trying to find the page citation for that --

9 MR. EDELS: Ms. Letsche, are you suggesting that
10 to the extent that someone culls out what that person thinks
11 is relevant as opposed to irrelevant and serves it up to
12 his or her superiors, that that process is purely factual
13 as opposed to deliberative?

14 MS. LETSCHE: No, what I'm suggesting is what the
15 court suggested, which is that even though there clearly is
16 some deliberation or choosing involved - evaluation involved
17 - in determining what goes into that report that that, in
18 and of itself, doesn't render that report part of the delib-
19 erative process. That's what the court stated in the Playboy
20 case. And that's the point I am making.

21 I can't go much further than that with respect to
22 these documents because I haven't seen them.

23 MR. EDELS: Ok, I understand that, but I guess I
24 don't understand how that tracks with what I had understood
25 to be the generally prevailing view that, for example, if I

1 asked a law clerk to prepare for me a memorandum on a case,
2 and he or she summarizes the facts necessarily leaving out
3 things that he or she doesn't think is important to the case,
4 and saying, Gary, these are the relevant considerations,
5 that's part of the deliberative process, as I understand it.

6 MS. IETSCHER: That might be in that context.

7 In that context you're correct, but that's not the context
8 that's going on here. What's happening here is there is an
9 evaluation of a plan against new reg. 0654 standards. It's
10 not a submission of a memorandum which chooses what it is
11 you might want to consider in making a policy decision.

12 MR. EDELS: How is that different from my law clerk
13 telling me that XYZ decision complies with the Agency's
14 regulation?

15 MS. LETSCHE: Well, aside from the --

16 MR. EDELS: The statute?

17 MS. LETSCHE: Aside from the distinction which we
18 said a bunch of times of just the context of this case where
19 you have a witness filing expert testimony versus your law
20 clerk giving you something that's going to go to a judicial
21 decision, which is a very major distinction in my view, I
22 think the other distinction is that what went on here in
23 this RAC process is some kind of a check listing. It was
24 not any interpretation of - an interpretation of how law
25 should be applied or interpreted, it was going down a check

1 list and I think that, based on what I have seen of the final
2 RAC report, that there is a distinction in kind and that
3 there is not the same sort of analysis or submission going on
4 in the two. But a review of the documents would be essen-
5 tail to tell me that.

6 MR. EDELS: What if a RAC reviewer was simply to say
7 this aspect complies with the new reg. 0654, this aspect
8 doesn't? Is that judgmental or is that purely factual?

9 MS. LETSCHE: Well, I mean in my view that is a
10 factual finding.

11 MR. EDELS: In other words, I don't need an expert
12 for that. I could get some clerk to make that determination
13 because that's just deciding whether there is some --

14 MS. LETSCHE: Well, no, there is clearly a judgment
15 involved in his evaluation of the facts. I've never - I
16 don't think I've ever disputed that, but that's no different
17 from any other judgment that any expert witness makes and
18 it certainly doesn't have anything to do with FEMA policy
19 when the people involved in making that judgment or making
20 that statement in these documents that are being withheld
21 never said it to anybody in a policy position at FEMA, aren't
22 even affiliated with FEMA, are under no pressure from FEMA
23 and the final document is not anything that's FEMA policy.
24 It's a finding of fact or of compliance. Another case I
25 want to just refer the Board's attention to which was cited

1 by FEMA was the AT&T case which was an FOIA case and this
2 is District of Columbia, District Court, 1981.

3 As I stated before, all those FOIA cases and attor-
4 ney-client privilege cases cited by FEMA are, in our view,
5 not relevant to this case other than with respect to the
6 existence of the privilege. But the AT&T is interesting
7 because, although most of that case did involve a straight
8 FOIA request, there was one aspect of the case in which the
9 court ordered documents to be turned over even though they
10 were subject to the B5 privilege and those documents in-
11 volved an issue dealing with an allegation by the other
12 side which the court held that the defendant's were clearly
13 entitled to refute. And those particular witnesses were the
14 witnesses for the government who was making the allegation,
15 were the only source that the defendants who had to refute
16 that contention had of the evidence that they needed to be
17 able to refute the contention.

18 It's instructed because although it's an FOIA case,
19 when it came to a balancing test the needs of the litigant
20 in terms of making a defense were taken into account and
21 in that case, disclosure was ordered even though there was
22 a B% exemption claimed with respect to the rest of the docu-
23 ments. I want to address just one or two of the points made
24 by LILCO in its argument and in its brief.

25 First of all the allegation that the Licensing

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1 Board somehow looked at the documents at issue here in
2 isolation, I think I stated before that's not correct be-
3 cause they were aware of the other documents, they had been
4 identified by FEMA to them. They had been turned over. The
5 more important point though and we make this in our brief,
6 is that the fact is that none of the relevant documents ,
7 those that underlie the RAC review, have been turned over
8 and I think that that's significant. In addition, the LILCO
9 argued in their brief that it is clear beyond argument, and
10 this is at page 8 of the LILCO brief, that the last RAC
11 report is not simply a collation or compilation of indivi-
12 dual views. Well, in the county's view that fact is not
13 clear at all, much less beyond argument and it appears to
14 be exactly the contrary, based upon the description of the
15 process and the description of the documents at issue here,
16 it appears that this RAC report is, in fact, a collation
17 and a compilation of individual views. What happened during
18 the January 20th meeting was that these views were "consoli-
19 dated" and after that consolidation they were sent off, so
20 I don't think that's an accurate statement that it's clear
21 beyond argument that the RAC report is not simply a compila-
22 tion of individual --

23 MR. EDELS: Ms. Letsche, if, on deposition or per-
24 haps on cross examination, one of the sponsoring witnesses
25 were to say, that's our finding because one of our members

1 drafted that, but not me - not the witness - drafted that
2 part of the document and you say to him, well, what was the
3 basis? Well, I'm not prepared to discuss it. All it is is
4 that was his or her findings. Why wouldn't that be the right
5 time to get that other person on the stand and then say -
6 because I think if someone were to say to me on the stand,
7 I rest on what that document says. It speaks for itself.
8 It was prepared by someone else, not wanting to reveal at
9 the moment who that someone else was, I'd be very unsettled
10 by that as a justification, but why isn't that the time to
11 say, look, Mr. FEMA, you better get out here and get some-
12 body who can talk about this aspect --

13 MS. LETSCHE: I agree, I agree although that ques-
14 tioning should go on during the deposition of the FEMA wit-
15 nesses and it's why we submitted applications for subpoenas
16 for the rest of the RAC members. We have now pursued those
17 because we are hopeful that the witnesses identified by
18 FEMA will be able to answer those questions. But I can
19 assure you, Judge Edels, that if, during the deposition, the
20 FEMA witness says I can't tell you what the basis of that was,
21 that subpoena application will come back.

22 MR. EDELS: Well, alright, but that's the point
23 that I was trying to make a little bit earlier. I think
24 you're premature. We don't know what is going to transpire
25 at the taking of the depositions. It may be that you'll

1 be able to get all that you need or at least will get leads
2 that will --

3 MS. LETSCHE: Judge Rosenthal, you're absolutely
4 right. There might be additional problems that come up
5 during the depositions, but what we're faced here with is
6 a document request. We haven't gotten to the depositions
7 yet and the documents being withheld.

8 MR. EDELS: We're faced here with a document re-
9 quest, but on the other hand, we're faced here with the
10 invocation of a privilege by a sister Agency. We've got to
11 look at both of those in reaching a determination.

12 MS. LETSCHE: You're right and, obviously, if the--

13 MR. EDELS: No, I love my two children equally,
14 but I've got them both here before me.

15 MS. LETSCHE: Well, the fact that there might be
16 a subsequent dispute down the road in the county's view
17 doesn't - shouldn't alter the decision on the facts before
18 you now. I have just one or two more --

19 MR. ROSENTHAL: You have about 5 minutes.

20 MS. LETSCHE: Ok, I want to comment on a couple of
21 the cases that were cited by the NRC staff in their brief.
22 First of all, at page 4 of their brief, they cite the Con-
23 sumer Powers case and talk about that as standing for the
24 proposition that the Executive privilege has been recognized
25 in NRC cases. It's significant that in that case, which, in

1 fact, was a ruling of one Administrative Law Judge, the -
2 that Judge explicitly did not reach the question of whether
3 or not the documents at issue there were necessary for the
4 defense of, I believe it was the applicant who was asking
5 for documents there with respect to a notice of violation,
6 because the case had not proceeded to that point. This was
7 in a much earlier stage. So that case, although there was
8 an assertion of Executive privilege, did not involve the
9 balancing situation that we have here and the case, in the
10 county's view, is not pertinent.

11 The Houston Lighting and Power case, which the NRC
12 staff cited at page 8 of their brief and which LILCO also
13 cited in their supplemental brief, is, I think, very signi-
14 ficant with respect to your inquiry at the last hearing,
15 Judge Edels, about the attorney-client privilege and also
16 with respect to the balancing that has to go on when you're
17 in a litigation situation. In that case, which apparently
18 involved the attorney work product privilege, the Board
19 held that the subject of discovery concerning expert wit-
20 nesses and the evolution as well as the basis for their opin-
21 ion testimony was the proper subject of discovery. A signi-
22 ficant - he expressly said the evolution as well as the
23 bases and if you talk about the evolution here, you're talk-
24 ing about the precise information that FEMA is seeking to
25 withhold. And I request that the Board take a look at that

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1 case and the analysis that went on there overruling the
2 attorney-client privilege in that apparently or the attorney-
3 work product privilege, I assume, which is the qualified one
4 in that case with respect to the evolution and the basis of
5 expert witnesses opinions.

6 The staff also cites at page 9 of their brief an-
7 other Houston Light and Power Company, South Texas Project
8 case. That case involved the so-called informer's privilege
9 which is not relevant to this case and I would suggest that
10 that case is just not -- at all.

11 Finally, the North Anna case which is cited by the
12 staff because of its reference to the ACRS I think is also
13 very instructive here because, as I'm sure the Board knows,
14 in that case the documents were ordered to be turned over.
15 They were ordered turned over because the information in-
16 volved a safety issue which is certainly the case here. We
17 are talking about the adequacy of an emergency plan to pro-
18 tect public health and safety and, in that case, the Commis-
19 sion also found that the information was necessary for a
20 proper decision. In this case, the document we're talking
21 about inquiring into is, in fact, a rebuttable presumption
22 under the Commission's own regulations.

23 MR. EDELS: I guess I misunderstand. How can you,
24 who have not yet looked at the documents, tell me that those
25 documents are necessary to a proper decision?

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1 MS. LETSCHE: I didn't mean to say if I said that
2 the documents --

3 MR. EDELS: Well, you didn't say that, but what
4 you said is that the FEMA finding is necessary to a proper
5 decision and I don't disagree with that. But what the
6 earlier case held I thought, in part, was that the documents
7 to be turned over were necessary to a proper decision and
8 I'm wondering how you know that. -- can think that or sus-
9 pect that.

10 MS. LETSCHE: I would have to --

11 MR. EDELS: Isn't that the documents that we're
12 talking about?

13 MS. LETSCHE: No, what we're really talking about
14 here is whether or not the issue that this discovery and
15 the cross examination that would be dependent upon that
16 discovery is going to - whether or not that involves an
17 important safety issue. The Diablo Canyon case which is
18 cited and there again it was the ACRS witnesses who had
19 disagreed, interestingly enough, with the collegial view of
20 the ACRS there and they were ordered that they could be
21 desposed despite the assertion of Executive privilege.
22 There - it's the issue that you're talking about. It's not
23 necessarily the fact that what a particular man says or the
24 fact that a particular document is important, but you're
25 talking about discovery as to an important safety issue.

1 MR. ROSENTHAL: I'm just sort of curious, do you
2 think that you would have the right to do the following: to
3 subpoena each member of the RAC and say to that member, first,
4 do you agree with this report? Secondly, if you disagree
5 with the report, in what respect do you disagree with it
6 and why? Third, as to the aspects of the report with which
7 you agree, what is the basis for your agreement with X con-
8 clusion? Why do you think that conclusion is right? Do
9 you think you can ask those questions?

10 MS. LETSCHE: Well, are you talking about of the
11 witnesses? --

12 MR. ROSENTHAL: I am asking whether you could de-
13 position, call if you saw fit, each member of the RAC and
14 pose those questions to them? The ones I've just identified.

15 MS. LETSCHE: I would say we probably could. That's
16 not before this Board. We haven't asked them to do that.

17 MR. ROSENTHAL: Well, I appreciate that, but, again,
18 as we've --

19 MS. LETSCHE: I would say because this RAC report
20 is, in fact, a rebuttable presumption, upon which the Commi-
21 sion's findings under 5047 must be based that we would be
22 entitled to inquire into the basis of the RAC report. If
23 that ended up requiring, because other people - I'm not
24 saying you automatically have the right to despose everyone
25 in sight, there are limits as to how many people someone

1 should have to produce - if we were unable to get the informa-
2 tion from other sources such as the witnesses designated by
3 FEMA, then, yes, I think that type of information would
4 probably be not only proper, but necessary.

5 MR. ROSENTHAL: Well, if you could do that , how
6 are we in a position to say now that the information in
7 these documents is of such central importance to your case
8 that there is a compelling need on your part that the in-
9 formation be made available?

10 MS. LETSCHE: Oh, perhaps I misunderstood your
11 prior question, Judge Rosenthal, I thought you were asking me
12 whether, under my interpretation of the discovery rules I
13 would be entitled to do that. My interpretation is yes and
14 that's no different from my belief that I'm entitled to get
15 these documents.

16 MR. ROSENTHAL: Well, I'm asking you whether -
17 your view because I am going to ask Mr. Glass the very same
18 question and - because I was really very surprised that, at
19 your earlier response what you understand the FEMA position
20 would be with respect to what you're allowed in deposition
21 because that seems to me to be a rather strange position.
22 And the fact that they're taking it, that Mr. Glass will
23 tell me that because, again, it seemed to me that you're
24 entitled to explore the underpinnings of the final report
25 that came out just as you would be with respect to a final

1 environmental statement or an SER or any other document.
2 And that, to me, doesn't necessarily mean you're entitled to
3 get the information that you're now seeking, but you're
4 entitled to explore it and my question really is whether, at
5 this point, we can say that you will be unable to explore it
6 unless you get this material. That's my concern.

7 MS. LETSCHE: It's my understanding, based upon the
8 basis of FEMA's objection to the turning over of these docu-
9 ments, and it's motion for protective order, which was with-
10 drawn because it was premature, since we hadn't done any
11 depositions yet and there were no questions pending, based
12 on those two items, that the type of questioning of indivi-
13 dual RAC members as to what they agreed and why they agreed
14 to it and what they did to reach that agreement would not be
15 permitted by FEMA because it would be an objection that that
16 goes to the thought processes and the pre-decisional process.
17 I mean that's my understanding --

18 MR. ROSENTHAL: Alright, alright. Well, Mr. Glass
19 will elucidate. I think your time has expired. Thank you,
20 Ms. Letsche. Alright, Mr. Glass.

21 MR. GLASS: If we could just have a 5 minute recess
22 before we resume?

23 MR. ROSENTHAL: Alright, I will --

24 MR. EDELS: Mr. Chairman, if I may, just as an ob-
25 servation, before we take the recess, just as a matter of,

1 a personal matter on my part. I realize we asked last
2 Thursday for Counsel to submit briefs on the questions of
3 the permissability and advisability of our ordering these
4 documents. I just wanted to compliment Counsel. That was
5 a very short turn around time. I may be giving you some
6 pre-decisional thoughts on my part, but I had grave concerns
7 over whether we could do this. I am now hear from all Coun-
8 sel, including Mr. Glass this morning, that there is no
9 impediment to our release of the documents as a matter of
10 authority and I just wanted to compliment Counsel for turn-
11 ing around that information in a very, very short amount of
12 time and it was extremely helpful to me.

13 MR. ROSENTHAL: I most certainly, as I'm sure Mr.
14 Wilbur will, concur in Mr. Edels' statement and will, at the
15 request of FEMA, take a 5 minute recess and resume at quarter
16 after twelve.

17 (BRIEF RECESS.)

18 MR. GLASS: Why don't we address just the question
19 that you've raised.

20 MR. ROSENTHAL: Yes.

21 MR. GLASS: We would oppose the depositions because
22 we feel the witnesses will be responsive, our witnesses and
23 while we can't say what we will object to at the deposition,
24 I really believe that the witnesses will be responsive.

25 MR. ROSENTHAL: -- responsive. Now, if the witness

1 at the deposition can, I take it, be asked one, is this the
2 unanimous opinion of your group?

3 MR. GLASS: No problem.

4 MR. ROSENTHAL: Alright. Now, if he says, no, can
5 he be then asked to identify those people who disagreed with
6 it?

7 MR. GLASS: I would probably object to that. --

8 MR. ROSENTHAL: Well, I think you'd probably be
9 wrong, but I'm not going to pre-judge that. Why do you
10 think - why aren't they entitled to know who has objected
11 and then to find out the basis for the objection?

12 MR. GLASS: I think the basis for the objection
13 they have a right to know, but, again, we come into the
14 problem of identifying the particular individual.

15 MR. ROSENTHAL: Well, but if you follow the scent,
16 my friend, you identify yourself. And I don't understand
17 on what basis an individual who disagrees with the particular
18 conclusions of the body has a right to expect that his or
19 her name is going to be withheld. As a matter of fact, I
20 don't understand how one can responsibly disagree with the
21 conclusions of the body without noting that dissent.

22 MR. GLASS: Then let me seek some clarification,
23 maybe I misunderstood. Are you requesting that the question
24 is there is somebody who disagreed with the final end product
25 of the RAC or are you talking about somebody who may have

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1 submitted somewhere along the line --

2 MR. ROSENTHAL: No, I'm not talking about the steps
3 of the deliberative process. I mean what you have at the
4 end of this process is a RAC report, I gather, and that is
5 the report which, it seems to me, or the conclusions in that
6 report are what it seems to me are open to exploration and
7 probing on the part of the litigants to this proceeding.

8 MR. GLASS: Then we would have no problem.

9 MR. ROSENTHAL: Oh, you have no problem about the
10 question being asked whether there is a dissent and if so,
11 the dissenter being identified?

12 MR. GLASS: Right.

13 MR. ROSENTHAL: Alright. Now --

14 MR. EDELS: What about the problem though where
15 particular Agency individuals have reviewed discreet por-
16 tions of the plan and have thus brought to bear their exper-
17 tise? I mean, isn't it important that the critical dissent-
18 er, for example, was the one with the most expertise on a
19 given matter?

20 MR. GLASS: You're talking now in our own Agency's
21 employees?

22 MR. EDELS: Right. Well, your Agency and also your
23 consultants and those people from other Agencies who parti-
24 cipate with RAC.

25 MR. GLASS: Well, I think we have to break it down

1 in various components. We've had the question raised in
2 this proceeding before whether FEMA has the right to identi-
3 fy its own witnesses or whether other parties can identify
4 those witnesses that should be participating at the hearing
5 and should be deposed. And the Board ruled that, for that
6 limited purpose, the FEMA witnesses were serving as a pur-
7 pose of a consultant and, at the same standards that we're
8 applying to NRC would apply and, therefore, we'd be allowed
9 to choose our own witnesses. I think there was a difference
10 in that.

11 MR. EDELS: Alright, now you choose your witness,
12 but if your witness comes up there that witness can be asked
13 I take it, to explain the basis for any conclusion in that
14 report, can they not?

15 MR. GLASS: Yes.

16 MR. EDELS: Now, if that witness is asked to explain
17 the basis for, let us say, a meteorological conclusion and
18 that witness doesn't happen to be a particular authority on
19 meteorology and the cross examination says, well, now, did
20 you consider such and such and such and such and he us un-
21 able to state that because in point of fact he had essen-
22 tially relied on the judgments of the expert meteorologists.
23 Can they then say, produce the meteorologist whose input was
24 crucial to that determination and, if not, why not?

25 MR. GLASS: A, we're getting into a matter of

1 degrees, I guess that's what we're dealing with here.

2 MR. EDELS: Well, I'm certain of that, but I mean,
3 what - one of the things that you're telling us is that
4 Suffolk County really doesn't need this. There isn't the
5 compelling need and offhand that struck a responsive chord
6 in me. Then I listened to Ms. Letsche who is telling me
7 that there is going to be a very limited, from your stand-
8 point, amount of inquiry that's going to be allowed into this
9 plan. Now the one thing I am totally persuaded of is that
10 whether they get these documents or not, they're entitled
11 to explore the underpinnings of that plan. That plan - oh,
12 excuse me, the report - that report is being put into evi-
13 dence for the truth of the matter asserted and is relevant
14 to some issue, as it clearly is, in this case, they're en-
15 titled to test the correctness of the conclusions in that
16 plan. Are they not? Or do you disagree with that?

17 MR. GLASS: Yes, they have a right to do that.

18 MR. ROSENTHAL: Alright, so they're entitled to,
19 I would think, to having people up there who are knowledge-
20 able on the particular aspects of that plan who they can
21 cross examine on the validity of that particular conclusion,
22 are they not?

23 MR. GLASS: That's the reason we composed a panel
24 of four individuals that we feel can meet those needs.

25 MR. ROSENTHAL: Alright, but you would agree if

1 the four - I don't know, they may be able to meet them - if
2 you say they will be able to, they will be able to testify
3 on an informative basis on all of these various parts of it.
4 If they're not, then you would agree that Suffolk would be
5 entitled to require you to serve up somebody who could?

6 MR. GLASS: Ok, now we get to a point that they
7 then, the individuals that they're going to be requesting
8 are individuals who are employees of other Agencies. And,
9 of course, would be subject to the objections that those
10 other Agencies may have.

11 MR. ROSENTHAL: Well, I don't know what objections
12 offhand they would have. Alright.

13 MR. EDELS: But, in principal, if the four FEMA
14 witnesses together say, well, as to that one aspect, Ms.
15 Letsche, that you're cross examining -- we really rely on
16 the meteorological judgment of a member of the Committee,
17 but not the four of us. Am I correct in at that point -
18 now maybe another Agency might object, but it seems fair
19 that FEMA would want to say, look, I'd like to discuss that
20 with the meteorological expert.

21 MR. GLASS: Well, I think there are two ways that
22 could be arrived at. Number one, --

23 MR. EDELS: Or you can just reject a FEMA finding
24 on meteorology.

25 MR. GLASS: Number one is the possibility that the

1 FEMA witness may want to request an adjournment of the de-
2 position and refresh his memory because it may be just that
3 he does not remember a particular fact and we do not intend
4 that all four of our witnesses will be able to answer all
5 questions, we hope between the four they will. And then, if
6 it is necessary to depose a particular RAC member, that the
7 inquiry be limited to that particular area and that it be
8 limited to the opinions presently held, that it not be a
9 back door way into get into the deliberative process --

10 MR. ROSENTHAL: No, I'm trying to separate -- my
11 questions the evolution with the ultimate conclusions that
12 have been reached.

13 MR. GLASS: If we're dealing with the ultimate
14 conclusions, yes.

15 MR. EDELS: In conventional discovery through, you
16 can always impeach on the basis of a prior inconsistent
17 statement or opinion. You're saying, though, in this cir-
18 cumstance that you should not be allowed to do that because
19 it would infringe on the deliberative process.

20 MR. GLASS: At some point we have give some weight
21 to the privilege, the assertion of the privilege and to the
22 concerns of the process. We're going to be seeing revision
23 #4 shortly. We have a number of other plants where the RAC
24 members are participating. It's not just Region 2. There
25 are 10 regions where this is involved. And we have a

1 problem. You have the corollary that discovery is a continu-
2 ing request and, therefore, what would prohibit us - prohibit
3 the county from coming in and asking for documents as they
4 arrive in our office.

5 MR. ROSENTHAL: What's going to happen when re-
6 vision 4 comes in? As a matter of fact, I think this is not
7 germane to the issue before us, but my recollection is that
8 Suffolk County has a motion to put the proceeding in limbo,
9 which is based on the soon to be surfaced revision 4. Now,
10 does the RAC go back into action again and consider the
11 differences between revision 3 and revision 4?

12 MR. GLASS: We get a request from the NRC to review
13 revision 4 and provide our interim finding, that is what we
14 will provide. And so the - which brings us to the point
15 that the question has been raised before this - it's not part
16 of the deliberative process. It's not part of the policy
17 process. I think that that has to be corrected. What is
18 very clear is that when FEMA is presenting the testimony of
19 its witnesses, it is clearly stated in there that it is
20 their testimony, that they are authorized to state the policy
21 of the Agency on that particular point and, in addition,
22 those are the interim findings of the Agency.

23 MR. ROSENTHAL: And do the RAC members, in fact,
24 vote on all parts of the report or is - there has been a
25 suggestion made that this really isn't a collegial report

1 that it's a collection of individual reports which somebody
2 has glued together.

3 MR. GLASS: As a starting point, you take all the
4 individual RAC comments. In one case they used - and they
5 use different methods - but it ends up with the same result,
6 a big chart and they cut up each of the individual pieces
7 and next to item A1A they say, NRC and they have their
8 comments and EPA and they have their comments and they put
9 additional comments after reviewing. They then come togeth-
10 er with a draft document. The RAC Chairman and his staff
11 come together with a RAC draft, consolidated draft, and then
12 they bring it into the meeting and they discuss every one of
13 the issues. And it is a collegial judgment. There is no
14 vote that somebody forces something, you know, 4 to 3 de-
15 cision. It is a collegial judgment. There may be points
16 where somebody would have preferred different wording, but
17 the end product is in agreement and I think that when they
18 depose our individuals they're going to find there are no
19 outstanding disagreements by any of the parties.

20 MR. WILBER: If one of the members had a strong
21 difference of opinion on something, how would it ever be
22 reflected?

23 MR. GLASS: To be quite honest there is the pre-
24 rogative of the RAC Chairman, he is responsible for this and
25 if he - if it was his prerogative to be exercised that he

1 felt that one opinion was the correct opinion and that was
2 to go forward, I think that there may be a situation where
3 he would exercise that. It has not been exercised. I
4 specifically asked that the RAC Chairman that and it has not
5 been exercised.

6 MR. WILBER: But he has the right to suppress dis-
7 sent?

8 MR. GLASS: Not suppress dissent.

9 MR. ROSENTHAL: Well, what do you call it then, if
10 the individual disagrees with him?

11 MR. GLASS: Well, you have a situation where an
12 item is either adequate or inadequate. You may - there have
13 been situations where you may have a conditional adequate.
14 There are a number of procedures whereby the dissent can be
15 dealt with. We do not have a situation in this case where
16 there has been a prerogative exercised by the RAC Chairman.
17 I would have to assume that there is the right on the RAC
18 Chairman. This has not happened --

19 MR. ROSENTHAL: Why - that's strange to me. I
20 mean, it would seem to me that if one of the members of the
21 overall Committee disagreed with the judgment of his or her
22 colleagues on the adequacy on a particular portion of the
23 plan that that individual would have both the right and the
24 duty to set that forth. Now you're telling me that the
25 Chairman of the RAC can say no, I think that the majority

1 is right and that you, the dissenter, are wrong and so your
2 dissent is not going to see the light of day.

3 MR. GLASS: Let me state two things. Number one,
4 it is requests, remember, from the NRC to FEMA for a FEMA
5 finding on each of the elements and a finding is just that.
6 It deals with the adequacy and inadequacy of a particular
7 point. I would believe that in most cases they can either
8 resolve it or by the use of the verbage, there may be a
9 disagreement on the ultimate use of the word adequate or
10 inadequate, but the other concerns may be addressed in the
11 comment section. But it is still the requirements that it
12 be a FEMA interim finding. Again, what's very important,
13 I am not aware of any situation where the RAC Chairman has
14 exercised that discretion and he certainly has not done
15 that in this particular case.

16 MR. ROSENTHAL: You're not aware of any case in
17 which a dissent was filed either, are you?

18 MR. GLASS: That's true.

19 MR. EDELS: I understand the point that you're
20 making, which is that it's essentially an institutional
21 document and someone has to take over the responsibility.
22 I mean I too have served as Bureau Director and when they
23 ask for the Bureau Director's opinion, the fact that my
24 subordinates might have a different view doesn't mean they
25 get the right to exercise it all the time. I understand

1 that, but I wonder whether that takes away from the colleg-
2 iality. When I sit down, for example, in a meeting with my
3 two junior lawyers, we're really not in a collegial environ-
4 ment. They know who is in charge, although I respect their
5 views and if I think they're right they're clearly incorpor-
6 ated into my testimony, my letter, my opinion, whatever, but
7 I'm wondering now whether the RAC process is less collegial
8 than you're suggesting and more in the nature of the RAC
9 Chairman, on behalf of FEMA, setting forth his views with
10 the right to adopt or not adopt those of all of these other
11 players.

12 MR. GLASS: My personal experience has been that
13 it has always been a collegial judgment, but you are asking
14 me a question of a possibility and I would be misleading
15 you if I said --

16 MR. EDELS: Well, I know, Gary Edels has always
17 been a decent fellow and allowed his subordinates views to
18 be -- testimony too, but --

19 MR. ROSENTHAL: It's been a lot simpler for me,
20 over the years, if, as a Chairman of an Appeal Board, I had
21 this apparent power. I think we've pursued that. We'll
22 give you some additional time for something else.

23 MR. GLASS: There is no additional time needed.

24 MR. ROSENTHAL: Alright, Mr. Irwin.

25 MR. IRWIN: Let me come and go in three minutes.

1 Judge Edels, you asked about the question of whether the
2 term compelling need was some kind of talismanic test that
3 appears enshrined in case law. That phrase is not, what is
4 there and is clearly, throughout all the cases, is whether
5 there has been a sufficient showing of need on the part of
6 the applicant for discovery to overcome the claim of privi-
7 lege which has been asserted.

8 All lawyers take editorial licensing characterizing
9 the nature of a test and I plead guilty to that. What is
10 important though is that the nature of the need of the Agency
11 that has been asserted must be weighed and the nature of the
12 need of the applicant to overcome that privilege also has
13 to be weighed against it and there has to be, I think, I
14 have seen cases that say that there is a substantial showing,
15 some that say an adequate showing, some that say a clear
16 showing, but, in any event, there has got to be a preponder-
17 ance in favor of the applicant for overcoming the privilege.
18 Ethical --, it seems to me, stands in favor of a properly
19 invoked privilege.

20 That's the first point which I wanted to clarify.
21 With respect to that, obviously the principal ways -- which
22 one goes to determine whether or not a proper showing of
23 need has been made is to look at the centrality of the infor-
24 mation and as you both probably pointed out, that's a differ-
25 ent test than looking to see whether information arguably

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1 leading to relevant information -- in a hearing will come
2 out. Centrality of information is one aspect, the second
3 is other availability of other means to obtain that informa-
4 tion.

5 Suffolk County has dealt at length with the central-
6 ity. They have not dealt at all, it seems to me, with the
7 availability of other means. There is an over --

8 MR. ROSENTHAL: Oh, except that they don't know
9 what's in these documents. Now how would they be able to
10 say one way or t'other on the matter of whether they can get
11 this information through other means when they don't know
12 what the information is?

13 MR. IRWIN: It may be, Judge Rosenthal, that what's
14 in those documents is not per se relevant or capable of
15 leading of what is relevant in the hearing. What we're
16 looking at is, first of all, the adequacy of an emergency
17 plan. Secondly, a FEMA finding which is, itself, a rebuttable
18 presumption. As I understand that that, basically, is not
19 more than a prima facie case that any kind of participants
20 in a hearing makes. It's not a judgment engraved in stone
21 which has to be attacked by any kinds of special tests.

22 What is important is whether those - the contents
23 of that RAC report are adequately supported. Those contents
24 can go out exactly as you suggest in deposition and the
25 county has taken somewhere on the order of 50 depositions in

1 this case. They know how to do it. If they don't get what
2 they want, you can be sure they're going to be back here.
3 -- those depositions, they're good at it.

4 Let me just touch on a couple of quick cases which
5 Ms. Letsche referred to. The -- case, K-I-N-O-Y - there are
6 some very important distinctions between that case and this
7 one. First of all, the applicant to overcome the privilege,
8 was basing his claim on what the court referred to as the
9 strongest possible showing of need, namely, an illegal wire-
10 tap which violated his 4th Amendment rights. Secondly, the
11 court found that there was not other less sensitive source
12 of that information or its equivalent available. Third, the
13 government did not claim at that point that the material con-
14 sisted of confidential deliberations. Even then, the court
15 did not require the disclosure of those documents. It gave
16 the government one more crack at filing a sufficient affi-
17 davit. Those are all four very significant distinctions
18 from the current case.

19 As to the Macon versus Rucker case, your recollec-
20 tions are right, Judges, the court did not require disclos-
21 ure of anything except truly factual information with some
22 --, non-expert judgments on the edge of it and, even then,
23 they gave the Secretary of the Air Force an opportunity,
24 again, to come back and justify a disclosure of that case.

25 The Houston Lighting and Power case obvious - I

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1 won't say obviously, but if one reads between the lines of
2 that opinion, there were special facts in that case, which
3 I refer to in footnote in our supplemental brief. Secondly,
4 and finally, the North Anna case not only dealt with a sub-
5 stantial safety issue - a very substantial safety issue -
6 disclosed late in the hearing after evidence had been taken,
7 but also very serious allegations about VEPCO's conduct,
8 allegations of willful withholding of information on a
9 serious safety issue. There are no such allegations here.
10 That's clearly a distinguishable case. Thank the Board very
11 much.

12 MR. ROSENTHAL: Thank you, Mr. Irwin. Well, on
13 behalf of the entire Board I wish to thank all Counsel for
14 their interesting and helpful presentations. I might say, at
15 least from my perspective, this is a lot more interesting
16 than dealing with important safety-related water hammer
17 although my colleague, Mr. Wilber, might think otherwise on
18 at least the water hammer. On that note the FEMA appeal
19 will stand submitted. I think that the parties can reason-
20 ably anticipate a fairly rapid disposition of the appeal.

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CERTIFICATE OF PROCEEDINGS

1
2
3 This is to certify that the attached proceedings before
4 the NRC COMMISSION

5 In the matter of: Long Island Lighting Company
6 Docket No. 50-322

7 Date of Proceeding: June 7, 1984

8 Place of Proceeding: Washington, D. C.

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

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12
13
14 Tom Berry
15 Official Reporter - Typed

16
17 Tom Berry / 913
18 Official Reporter - Signature

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