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NUCLEAR REGULATORY COMMISSION

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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ORAL HEARING ON SHOREHAM

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PUBLIC MEETING

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Room 1130
1717 H Street, N.W.
Washington, D.C.

Friday, February 8, 1985

The Commission met, pursuant to notice, at 2:35 p.m.

COMMISSIONERS PRESENT:

- NUNZIO PALLADINO, Chairman of the Commission
- THOMAS ROBERTS, Commissioner
- JAMES ASSELSTINE, Commissioner
- FREDERICK BERNTHAL, Commissioner
- LANDO ZECH, Commissioner

STAFF AND PRESENTERS SEATED AT COMMISSION TABLE:

- S. CHILK
- H. PLAINE
- M. MALSCH
- L. LANPHER
- H. BROWN
- F. PALOMINO
- K. LETSCHE
- A. EARLEY
- R. ROLFE
- J. LEONARD
- D. IRWIN
- R. CARUSO
- E. REIS
- R. PERLIS

2 CHAIRMAN PALLADINO: Good afternoon, ladies and
3 gentlemen. I am advised that Commissioner Asselstine will
4 be delayed a few minutes but he will be shortly. He told
5 us to proceed without him for the time being.

6 The purpose of today's meeting is to receive oral
7 argument from the parties to the Shoreham licensing
8 proceeding on the initial decision of the Shoreham
9 licensing board, which was issued on October 29, 1984, and
10 is subject to Commission review. In that decision the
11 board authorized the issuance of the license to the Long
12 Island Lighting Company to conduct low-power testing up to
13 five percent of rated power at the Shoreham Nuclear Power
14 Station Unit 1.

15 The board's authorization was based on its
16 decision after the conduct of evidentiary proceeding
17 favoring the granting of an exemption to the applicant from
18 the requirements of General Design Criterion Number 17 of
19 the Commission's regulations. The exemption proceeding was
20 held in response to the applicant's March 20, 1984,
21 supplemental motion for low-power operating license.

22 In an order issued on May 16, 1984, the Commission
23 required the applicant to address, one, the exigent
24 circumstances that favor granting an exemption under 10 CFR
25 50.12.A, and, second, its basis for concluding that

patvasselo 1

operation at low power under the condition it proposed
would be as safe as operation at low power with a fully
qualified on-site AC power source.

The order of presentation today I understand to be
as follows: First, we will have presentation by New York
State and Suffolk County together; applicant; then
following the applicant, the NRC staff.

Each party will have 15 minutes in which to
present its views. That's 30 minutes for the combined New
York State and Suffolk County. Each party should indicate
whether or not it wishes to reserve time for rebuttal. I
am asking the secretary to time each of the presentations,
but if the presentations are interrupted by Commission's
questions, he will make allowance for that.

(Commissioner Asselstine enters meeting room.)

Do any other Commissioners have remarks to make at
this time?

COMMISSIONER ZECH: No.

COMMISSIONER ROBERTS: No.

COMMISSIONER BERNTHAL: No.

COMMISSIONER ASSELSTINE: No.

CHAIRMAN PALLADINO: If not, then let me turn the
meeting over to, I believe it is Mr. Palomino. Right?

ORAL ARGUMENT ON BEHALF OF NEW YORK STATE

MR. PALOMINO: Chairman Palladino, members of the

Commission, good afternoon. I would like to thank you for

the opportunity to present this oral argument.

2 I am Fabian Palomino, special counsel to Mario
3 Cuomo, Governor of the State of New York. I will speak
4 briefly about the public interest considerations which the
5 Commission must address in this proceeding. Mr. Herbert
6 Brown, on my left, will then further elaborate on the
7 reasons why no exemption can be granted and no low-power
8 license can be authorized. The state and county will speak
9 for a total of about 25 minutes and will reserve
10 approximately five minutes for rebuttal.

11 This is a unique and unprecedented proceeding.
12 For the first time in the history of nuclear energy this
13 Commission is being asked to grant an exception to its
14 prescribed safety standards so that Shoreham may operate
15 with no safety-grade emergency power.

16 It is also unique in that Shoreham is the only
17 nuclear plant in the country where proposed off-site
18 emergency evacuation plan is to be implemented by the
19 utility employees with no assistance or participation by
20 the state or local government.

21 It is most unique in that this extraordinary
22 relief is sought while there is a lawsuit pending in New
23 York State Supreme Court brought by the state and local
24 governments which presents a substantial question as to
25 whether the full-power operation of Shoreham will ever be

permitted.

2 By any reasonable standard and common sense, this
3 Commission's responsibility and the public interest dictate
4 that this Commission not permit low-power operation in
5 these extraordinary circumstances. This is underscored by
6 the fact that the record establishes beyond peradventure
7 that the power to be generated by this plant won't be
8 needed for more than 10 years. It is also underscored by
9 the fact that irradiation of the fuel and the
10 decontamination of the plant will present the State of New
11 York with the burden of allocating in excess of \$150
12 million of economic waste.

13 There are five operating nuclear plants in New
14 York State. They are operating under a relationship of
15 trust between the state and the NRC. This case is a litmus
16 test of that relationship. If the NRC permits low-power
17 operation now, it will destroy its credibility and the
18 relationship of trust it has established with the State of
19 New York and with other states as well.

20 The Governor of New York State and the County
21 Executive and Legislature of Suffolk County categorically
22 oppose the issuance of the low-power license. They are the
23 duly elected chief government officials accountable to the
24 people. If this nonelected Commission were to decline to
25 give due weight and due consideration to their views, it

patvasselo 1

would be showing another disregard for our governmental
structures and the people they represent.

3 In the past, this Commission has stated the
4 following, and I quote: "The Supreme Court has noted that
5 the debate over nuclear power is one in which the states
6 have a vital stake. The views of the chief elected
7 representatives of the people of the state should be
8 accorded great weight in fixing where the public interest
9 lies."

10 It is assumed that this Commission made these
11 statements with conviction and not for convenience.
12 Accordingly, it is respectfully requested that this
13 statement be followed in the subject proceedings and that
14 the exemption be denied and that no low-power license be
15 issued.

16 There are also many compelling legal reasons why
17 the exemption must be denied. My colleague, Mr. Brown,
18 representing Suffolk County, will now address those.

19 ORAL ARGUMENT ON BEHALF OF SUFFOLK COUNTY

20 MR. BROWN: My name is Herbert H. Brown, of the
21 law firm of Kirkpatrick and Lockhart, and I am joined by
22 two of my partners, Mr. Lawrence Lanpher, on my left, and
23 Ms. Carla J. Letsche, on the right.

24 There is no rational basis -- no rational basis --
25 for this Commission to grant an exemption that would allow

LILCO to operate the Shoreham plant at low power. The
diesels LILCO wants for full-power operation are still, as
you know, being litigated before the Brenner board, and
nobody can predict what will happen with the emergency
planning situation that is now a matter of uncertainty.
Indeed, before Shoreham could operate at full power, there
would have to be unprecedented NRC approval of LILCO's off-
site emergency plan, a ruling for LILCO by the New York
court in a case that's now pending decision, the successful
emergency planning exercise, and finally, a ruling
favorable to LILCO on a post-exercise hearing.

Thus, even if one were to assume the unlikely, for
argument's sake alone here today, that LILCO could carry
the day at all of these milestones, a low-power license
would still not be on the critical path, and by definition,
the denial of an exemption would not affect the scheduling
path for full-power operation. For even if LILCO carries
the day, there would be such a large cushion of time that
low-power testing, which LILCO itself has told the
licensing board would be but 25 or 30 days, would not be
appropriate now. And this assumes the propriety of using
the critical-path concept, which actually has no place
under the present uncertainties.

But even more significant, it is surely unlikely
that all of those milestones will be overcome by LILCO.

1 And thus, reality tells each of us that it's impossible --
2 or, if not impossible, improbable, certainly -- that
3 Shoreham will ever be eligible for full-power operation.

4 If, for example, the court determines in New York
5 that LILCO has no legal authority under the law of that
6 state to implement its emergency plan, that ruling alone
7 would put an end to Shoreham's future. Shoreham is not on
8 anybody's critical path except LILCO's, and it's important
9 for us to know that it's only there because LILCO finds
10 that it suits its own self-interest.

11 No legitimate public purpose -- public purpose, as
12 opposed to LILCO's own self-interest -- could be existing
13 to justify the issuance of a license to Shoreham now, whose
14 electricity equivalent will not be needed for at least 10
15 years. And yet, LILCO seeks to contaminate this plant at
16 \$150 million price tag, and while this \$150 million price
17 tag would be something that casually LILCO looks upon, it
18 would become indeed a mess for the State of New York to
19 straight it out. And it is the state PFC that had
20 concluded not too long ago, after a year-long
21 investigation, that Shoreham's construction was grossly
22 mismanaged -- grossly mismanaged -- to the tune of \$1.5
23 billion. Why add another needless \$150 million to that
24 debacle?

25 How will LILCO try to coax a low-power license out

patvasselo 1

of this Commission? Well, I think we all know already what
their pitch will be. All LILCO can do is plead to you for
a favor, although that favor will be masked by a plea which
amounts to nothing more than a bailout of the troubles that
it's gotten itself into.

LILCO will assert, without any basis, some sort of
an amorphous entitlement to a low-power license. But the
issue here is different from that. It is whether to grant
LILCO an exemption -- whether to grant LILCO an exemption
from the NRC regulations. That is, you have to decide
whether, under the circumstances of this case, it's lawful,
proper, and in the public interest to run Shoreham outside
the Commission's own mandatory standards.

LILCO will whine to you about how it has been
discriminated against, how the NRC staff has abused it, how
long litigation has taken. The fact is, as the PFC staff
in New York found, LILCO grossly mismanaged Shoreham. The
NRC put requirements on Shoreham to make the plant's design
safer, and the litigation addressed problems manifest at
the plant.

Remember, for the first time in NRC history, a 20-
foot-long, 2-foot-wide crankshaft fell apart. LILCO's
problems are LILCO's alone. It is entitled to no license
in a situation where it plainly doesn't comply with GDC-17
and doesn't qualify for an exemption.

1 Nor can the Commission claim that the Commission
2 is helpless and somehow must issue a license to LILCO. The
3 issue here is whether or not to grant an exemption under
4 section 50.12. That is a matter of unbridled discretion of
5 this Commission within the confines of the standards set
6 forth in section 50.12. That discretion is exclusively
7 yours. And here, as we will demonstrate this afternoon,
8 the grant of an exemption would be a radical abuse of
9 discretion.

10 LILCO and the staff will also argue that this
11 proceeding is just a rehash of what went before, and they
12 will say that the only question is whether LILCO gets a low-
13 power testing license now or later. Both statements are
14 gross mischaracterizations. First, this is an exemption
15 proceeding, unprecedented and within its own set of
16 mandatory and conclusive standards under which the
17 Commission is bound to make findings.

18 Second, the issue for low-power testing is not
19 whether now or later, it is whether if ever at all. Our
20 argument is not now, for reason of section 50.12 and GDC-
21 17, and not later, because the absence of off-site
22 emergency preparedness will permanently prevent the
23 operation of Shoreham.

24 Since last February LILCO has been pleading for a
25 favor from this Commission. It has asked Washington for a

patvasselo 1

so-called "signal to Wall Street," a sympathetic NRC
action, a low-power license, just a favor. Last May 7, in
argument before you, LILCO's counsel sat here and stated
that a license, any license, would be of immense assistance
to the confidence of LILCO's bankers.

A favor indeed. What LILCO has been asking for is
for the NRC to steamroll the state, steamroll the county,
and steamroll the interests of millions of people those
governments represent. Congress did not establish the NRC
to steamroll the state and local governments or to worry
about LILCO's bankers. Congress, in section 274 of the
Atomic Energy Act, told the Commission to cooperate with
the states. Congress did not establish the NRC to do
favours or to bail out a grossly mismanaged nuclear power
plant. Congress told the NRC to regulate. And
"regulating" means applying the law to LILCO. And that
means no exemption and no low-power license.

Let's take a look at what the law is, then at how
the Miller licensing board dealt with that law. To get an
exemption from GDC-17 and comply with section 50.12, LILCO
will have to prove the following: first, there are exigent
and extraordinary circumstances that require the
exemption. That is such an important requirement, that you
have gone to the length in cases to articulate the
significance of the need to show exigent and extraordinary

circumstances.

2 And the reason you have done it is because when a
3 plant gets an exemption, it means it's not going to run in
4 accordance with the regulations that over the years have
5 been developed to provide the defense in depth to which the
6 American people, and indeed here, the people of New York
7 and Suffolk County are entitled.

8 Second, the public interest requires an
9 exemption. You have to find it's in the public interest
10 and required thereby to give an exemption to put this plant
11 into the situation where it can seek a low-power license to
12 create trouble for the State of New York and the people of
13 that state.

14 Third, the exemption would not invade your life
15 and property.

16 Fourth, the exemption would not be inimical to the
17 common defense and security.

18 And fifth, operating Shoreham without being in
19 compliance with GDC-17 would be as safe as operating it in
20 compliance with GDC-17. And those are your words, the so-
21 called "as safe as" standard.

22 In addition, the Commission's May 16 order, in
23 unprecedented, unusual language, directed the Miller board,
24 the licensing board here, to follow the rules, follow the
25 rules in the exemption hearing. Let's look at each of

those points.

2 Despite the board's finding, the Commission cannot
3 find that LILCO has complied with section 50.12. First,
4 for the sake of argument only, let's assume that LILCO's
5 substitute emergency power system is in fact as safe as a
6 qualified on-site system and the on-site diesel. That is,
7 assume for argument's sake alone that there is no safety
8 issue here at all. Does that let the Commission grant a
9 50.12 exemption? No. Section 50.12 still permits that the
10 exemption can be granted only if there are exigent and
11 extraordinary circumstances and it is required by the
12 public interest.

13 There are no exigent or extraordinary
14 circumstances here that could justify LILCO getting an
15 exemption. Indeed, the only extraordinary circumstances
16 here work against LILCO and for the county and state.
17 LILCO grossly mismanaged Shoreham. It bought diesels that
18 were no good. Cracks developed. And even the crankshaft
19 broke in two.

20 LILCO then tried to fix it and couldn't do the job
21 to the satisfaction of the staff, the county, the state, or
22 even the licensing board. This is the case of an
23 extraordinary blunder. It hurts, not helps, LILCO's case
24 before you today.

25 Still, is there some other factor that could be

2 cooked up that might help LILCO offset their extraordinary
3 blunder? No, there isn't. In fact, the other existing
4 circumstances also weigh against LILCO and favor the state
5 and county. And here's why. At this very moment, a
6 lawsuit filed against LILCO in New York State Supreme Court
7 by the state and county is awaiting decision.
8 Significantly, this case was filed at the repeated urging
9 of your own licensing board, which wanted to see a
10 resolution of the state court issues in the only
11 appropriate forum, the courts of the State of New York.

12 The issue in that case, whether LILCO has legal
13 authority to implement its own emergency plan, will be
14 pivotal in deciding whether Shoreham ever operates. The
15 pendency of this case is an extraordinary reason not to
16 grant an exemption and not to contaminate Shoreham at a
17 \$150 million price tag.

18 Next, if Shoreham were licensed to operate at low
19 power and the state court decision keeps the plant from
20 operating, the Commission will have caused that useless
21 waste of \$150 million in ruined nuclear fuel and
22 decontamination expenses.

23 Therefore, while these uncertainties exist, it
24 makes no sense for the Commission blindly to rush ahead and
25 create a mess for the state in dealing with the
stockholders, ratepayers, and creditors of LILCO and for

the taxpayers of the state to sit by and suffer the
uncertainties that would come from your decision.

This favor also weighs against LILCO. It weighs
for the county and the state.

Finally, the evidence shows that electricity
output, as I mentioned earlier, from Shoreham will not be
needed for at least 10 years. This was the conclusion of
the state's blue-ribbon Shoreham commission. The NRC's
executive director himself was a member of that
commission. Will the NRC now repudiate the findings of the
state commission?

Surely the fact that there is absolutely no
urgency or requirement of the state or its consuming public
for putting Shoreham into operation requires the Commission
not to run headlong into contaminating the plant. If
Shoreham isn't required for 10 years, why not keep it
contamination-free for another few months and let it stand
unneded for only 9-1/2 years?

What all this boils down to is that there is
absolutely no public benefit or purpose to granting an
exemption from GDC-17. The only extraordinary circumstance
in this proceeding undercuts LILCO. These circumstances
show that LILCO is asking for a naked favor, and they can
compel the denial of an exemption.

Let's turn now to section 50.12's requirement that

patvasselo 1

an exemption be in the public interest. Hearing the
exemption is not in the public interest, and the reasoned
opposition of New York State and Suffolk County alone
should be compelling reason for this court to find that.
Surely the Commission cannot give LILCO's self-serving
words on the public interest any dignity whatsoever in
comparison with the official governmental positions of the
elected governments of New York and Suffolk County.

Therefore, as with the "extraordinary
circumstances" standard of 50.12, the public interest
standard also favors the county and the state.

Next, we've got the "as safe as" standard required
by the Commission's order on May 16. This standard
provides that for an exemption, LILCO's substitute
emergency power system must be as safe as the system in
compliance with GDC-17. LILCO's system is not as safe as
that. And here is why: The Miller board specifically
found that LILCO's substitute emergency power system
provides "a lesser margin of safety than a system which
complies with GDC-17." This of itself is conclusive. It
means that the standards set by the Commission's May 16
order is not satisfied. Despite this finding, however, the
Miller board made a blind leap in logic and concluded that
the "as safe as" standard is satisfied. That conclusion is
unsustainable, a fact which is evident from the far-fetched

comments of LILCO and the staff to divine some sort of
rationale to prop up the board's illogic.

3 By definition, the lesser margin of safety found
4 by the board is not congruous with the "as safe as"
5 standard, and no amount of semantic rationalization,
6 wherefores or howevers can change that fact. The
7 rationalizations put forth by the staff and LILCO are mere
8 apologies. They are dangerous invitations for this
9 Commission to commit another legal error.

10 Indeed, we remind the Commission of last April
11 when the staff and LILCO persuaded the Miller board to
12 accept their specious interpretation of GDC-17. You will
13 recall that they, in their own words, sought to "harmonize"
14 GDC-17. That is, they tried to read it out of existence.

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1 Well, LILCO and the staff are back again with more
2 of the same sophistry, and this time they're also trying
3 to harmonize the impossible. They want the Commission to
4 find that there is a lesser margin of safety and at the
5 same time that there is not a lesser margin of safety.

6 A second major mistake of the Miller board is
7 that it found LILCO's substitute system to be as safe as
8 that recognized by GDC-17 even though the system is not a
9 vital area and half of it is outside Shoreham's protected
10 area. By definition, an emergency power system that is not
11 treated as vital equipment and is outside a plant's
12 protected area cannot be safe as one that is treated the
13 opposite way. The nonvital system is simply vulnerable
14 to malevolent actions against which a vital system is not.

15 What underscores the illogic of the Miller board's
16 decision is that LILCO's original emergency power system,
17 which was intended to comply with GDC-17, treated a system
18 as vital and in a vital area. The substitute system does
19 not do so, yet the Miller board found the substitute system
20 to be as safe as the original system.

21 Finally, with respect to this standard, only four
22 days ago the state and county learned that LILCO and the
23 staff have been working privately to erase a new and
24 serious technical problem which LILCO's substitute emergency
25 power system has displayed. The staff's Board Notification

1 dated February 1, which went to the Commission, shows that
2 the staff is determined that the single-failure safety
3 criterion is violated by local substitute emergency power
4 system. The Miller board's decision had found precisely
5 the opposite. In short, the board's decision was wrong.
6 This is significant because both LILCO and the staff in
7 their filings with the Commission have expressly quoted
8 and relied upon the Miller board's erroneous finding that
9 LILCO complies with the single-failure criterion.

10 The staff and LILCO privately have agreed on a
11 so-called solution to this new problem without the state
12 or county having any role and without the licensing board's
13 involvement, even though the board's finding was to the
14 contrary. This is a matter on which the state and county
15 have a right to make their positions known and to make a
16 record if we disagree with the staff and LILCO's so-called
17 private solution.

18 Yesterday we jointly filed with the Commission
19 a reply to the staff's notification, which is a threshold
20 matter the Commission must deal with as a first step.

21 These substantive errors were not the only
22 mistakes, however, of the Miller board. It also egregiously
23 violated the state's and county's right to due process and
24 to a fair hearing. This should come as no surprise.
25 Recall last April and the hearing schedule set by the

1 Miller board in this proceeding. That hearing was so lacking
2 of due process that the state and county had to go to U.S.
3 District Court to enjoin it. We won an unprecedented TRO.

4 In the aftermath of that court decision the NRC
5 issued its May 16 order and issued the exceptional
6 instruction to the Miller board to follow the rules. Your
7 instruction was ignored, and here are some of the, shall we
8 say, more graphic examples:

9 The Miller board found that the exemption is in
10 the public interest. The only evidence on which is relied
11 was the testimony of two LILCO employees who presumed to
12 speak for the public interest. Curiosity, of course, would
13 lead one to ask, "Did the board also consider the testimony
14 of any witnesses put forth by the state or county" -- that
15 is, the governments whose job is to represent the public
16 interest. No, it did not. Why not? Because the Miller
17 board threw out the heart of the testimony of the chairman
18 of the State Consumer Protection Board, even though the
19 board is by law the representative of the state, of the
20 public interest.

21 This Commission surely must reject the board
22 decision which ignores the views of a state official charged
23 to represent the very public interest concerns that are
24 at central issue in the Commission's own licensing
25 proceeding.

1 The Miller board made this decision after
2 listening to LILCO berate the chairman of the State Consumer
3 Protection Board. LILCO now says he had spent his time as
4 a consumer advocate fighting the high price of Halloween
5 candy, Thanksgiving turkeys, and other non-nuclear items.
6 What LILCO is saying is akin to arguing that President Reagan
7 is not commander-in-chief because he used to act in
8 Hollywood.

9 A final illustration of the board's denials of
10 procedural regularities to the state and county is the
11 board's finding that the high cost of litigation incurred
12 by LILCO weighs in favor of granting the exemption. Now,
13 we all know that a plant which has safety defects will run
14 into problems before the NRC. We also know that litigation
15 focuses on safety problems. Therefore, the more safety
16 problems at a plant, the more litigation and the higher
17 the litigation costs.

18 What the board has thus said is that the greater
19 the number of safety problems at a plant, the more powerful
20 the reason to grant an exemption. In other words, the
21 worse the plant, the better the reason not to comply with
22 the regulations. Need any more be said?

23 To wrap this up, the Miller board betrayed the
24 mandates of both section 50.12 and the May 16 order, but
25 the staff wrote in its brief that the Miller board used

1 the common-sense approach, and LILCO wrote that the board
 2 "meticulously and scrupulously followed the May 16 order
 3 both in format and in substance." 1984 may have passed
 4 with the calendar, but the staff and LILCO are giving
 5 George Orwell's doublespeak just another run in 1985.

6 The elected governments of New York State and
 7 Suffolk County, the representatives of the public interest
 8 and the very people from whom this Commission takes its
 9 mandate ask for denial of the exemption and denial of the
 10 low-power license for Shoreham. The state and county
 11 believe that with the denial of the exemption and low-power
 12 license, good sense and good order would be brought to bear
 13 for the public interest.

14 Last April the Commission refused to listen to
 15 the state and the county, and decided to take its chance
 16 in court. The gamble backfired, and the NRC lost. That
 17 gamble also evidenced an untenable disposition of the NRC
 18 to fight in court against coordinate levels of government.
 19 We ask for no court fights, but we want the record clear.
 20 The state and county would take any adverse ruling here
 21 to court, and the court would be the same one in which
 22 this Commission, in arguing to sustain its Diablo Canyon
 23 ruling, relied on the "great weight" it gave to the views
 24 of the Governor of California. We expect the same great
 25 weight for the Governor of New York State and for the

1 county executive and the county legislature of Suffolk
2 County, the elected representatives of the public interest
3 in this exemption proceeding.

4 Thank you.

5 CHAIRMAN PALLADINO: Does that conclude your
6 presentation?

7 MR. BROWN: Yes, it does.

8 CHAIRMAN PALLADINO: All right. Let me see what
9 questions the Commission has. I have a couple. Maybe I
10 will start and I will go with one or two.

11 I wanted to understand this question on physical
12 protection with regard to vital versus nonvital items. When
13 the diesels were declared vital, it is my impression that
14 they were -- that that was a plan that was approved for
15 full power and, therefore, use at low power. But I also
16 thought that I read that for low power they had many days
17 approaching a month if they lost off-site power, and so there
18 is a basis for saying that the alternate system is not vital
19 because it's applied to the low power.

20 Could you comment on that, or do I have a
21 misimpression?

22 MR. BROWN: No, I understand your question. There
23 are several points to it. First, the regulations that
24 require that there be security at the power plant apply as
25 well to low power and to full power. They're categorical

1 regulations in Part 73, and they don't say that malevolent
2 attacks just aren't going to happen at low power and there
3 is no need to be concerned. That's a blanket regulation.

4 But secondly, getting to the question of vital
5 areas, if you take a look at the board's decision, you'll
6 find that the board made findings. You'll find that there
7 was nothing in the evidence of record to support those
8 findings. We had made a contention that essentially, to
9 characterize it simply, that just as the original designation
10 of the emergency power system for low power was a vital
11 area and to be protected against the design-basis threat,
12 the substitute should be. And we also have -- and we're
13 going to make factual presentations to that effect. The
14 Commission in its July 18 order specifically said it
15 wouldn't quibble over whether the security regulations
16 apply in their own right or not, because within the standard
17 of public health and safety came the need to protect
18 against a security threat.

19 And so the staff also at that time agreed with
20 us. The Miller board, however, threw out our contention.
21 It threw out our contention that this ought to be a vital
22 piece of equipment. Nevertheless, it found, without taking
23 any evidence on that point or on any other point, since
24 we had no contention that was admitted, that there is no
25 security problem at this plant, that indeed it could find

1 that the plant is not inimical to the public health and
2 safety, that there is no undue risk -- or not inimical to
3 the common defense and security, that there is indeed no
4 risk to the public health and safety because of the
5 failure of this plant's diesel system, its backup system,
6 emergency system, to be protected in accordance with
7 security regulations, without permitting us to litigate
8 that point.

9 . It made factual conclusions without any basis
10 whatsoever.

11 CHAIRMAN PALLADINO: In other words, you're
12 saying the information wasn't provided in the hearing?

13 MR. BROWN: Well, the point you raised, for
14 example, would be something that people would look into
15 as a factual matter. The board out of hand dismissed it.

16 Perhaps Mr. Lanpher has something to add.

17 MR. LANPHER: No.

18 CHAIRMAN PALLADINO: Okay. Let me ask another
19 question. You raised a question -- you raised a number of
20 questions having to do with situations beyond low power,
21 and I hesitate to get into them because some of them will
22 be coming before the Commission in another forum; for
23 example, emergency planning. But you did mention the need
24 for power, and I was wondering why the Commission should
25 consider the need for power in the exemption request when

1 the need for power is not a separate item for low power.

2 MR. BROWN: That's a question that is important
3 to get clear because LILCO and the NRC staff are running
4 around with a red herring here that's going to get you into
5 a lot of trouble. What they're trying to say -- and I am
6 going to give you their argument, the way we think that they
7 think it, I think, or I will let them make it themselves
8 but I will try my best to make it as they would.

9 They'd say the staff -- I mean the county and
10 the state are trying to relitigate an issue that should
11 have been dealt with and was dealt with many years ago.
12 Should our plant, would LILCO say, be licensed to operate
13 or not before we put \$4 billion into it? That's the time
14 we should have looked at that issue, and, by God, we did,
15 and there was a need for power, and that's closed and
16 nobody can look into it again.

17 Well, that's a nonsensical argument because it
18 fails to take a look at what I tried to stress here to you
19 before. This isn't a construction proceeding. You're darned
20 right it isn't a construction license proceeding. A plant
21 was built pursuant to it and grossly mismanaged -- to the
22 tune of a billion and a half dollars. This is not an
23 operating license hearing. This is a special-exemption
24 hearing, and the only rules and laws you have to look at
25 deciding the standards as to whether to grant that exception

1 in this narrow, narrow case are those in 50.12. 50.12 says
2 the public interest, and therefore, if one of the public
3 interest concerns is not to contaminate a reactor and cause
4 it to be wasted at \$150 million when there is no need to
5 do it now, you can't turn your eyes from that.

6 You can say straight in LILCO's eyes, you can
7 write it in your decision, "Need for power will never be
8 looked at in a low-power case. Need for power never will
9 be looked at in an operating license case. Need for power
10 will be looked at only in construction license cases and
11 where otherwise mandated." Where otherwise mandated is
12 section 50.12, this case. This is a peculiar case. I
13 mean everyone here knows it. You're not going to get another
14 one like this ever. That's a virtual guarantee -- where a
15 company puts together --

16 COMMISSIONER BERNTHAL: We're all hoping that
17 that's true.

18 (Laughter.)

19 MR. BROWN: Yes, I know. I think I almost can
20 guarantee it, too.

21 (Laughter.)

22 MR. BROWN: There aren't going to be more where
23 you get a situation where the diesels went through what
24 these diesels went through, and you're not going to get a
25 plant where you'd have to say, if you're a thinking person

1 -- and everyone at this table is -- that we don't know if
2 the plant is going to operate at full power.

3 Now, as far as the state and county are concerned,
4 it isn't going to operate at full power. We are serious
5 about that. The state and county have spent millions of
6 dollars to exercise their police power and protect their
7 citizenry.

8 Now, LILCO has decided to fight it. They could
9 have abandoned the plant and worked out a solution two
10 years ago. Those chose to fight. There were times they
11 almost, according to the newspapers, decided not to fight.
12 But they are bent on getting it licensed.

13 We have a fight. The public interest says this
14 Commission shouldn't get in the middle of it and cause
15 trouble for the people of New York State and bail out LILCO
16 out of its trouble.

17 Now I will say it very plainly. Shoreham is
18 going to be when it doesn't operate, if it doesn't operate,
19 an economic question to be dealt with in the State of New
20 York among the people who are the players there. The
21 Constitution in our country 200-plus years ago set up a
22 federal system, and those issues of economic ratemaking
23 for the state are with the state and the county. If the
24 state can't handle it, the state's in trouble, and it's
25 none of your business. You do your job according to the

1 health and safety regulations of 50.12. If the state and
2 the county bungle it, it's their fault and they ought
3 to get into trouble for it. They are big. They've got
4 taxpayers who fund them, and they ought to do their job
5 right just as this Commission ought to do its job right.

6 Why should you look at the question the plant
7 isn't needed for at least 10 years? Because what's the
8 need to get a low-power license now ←

9 CHAIRMAN PALLADINO: I think maybe you misunderstood
10 my question. My question was, you brought up the need for
11 power as an argument for not granting an exemption, and I
12 was just trying to understand what your argument was.

13 MR. BROWN: It's not the need for power in that
14 sense.

15 CHAIRMAN PALLADINO: Maybe I misunderstood.

16 MR. BROWN: And LILCO wants to put a label on it
17 so that it falls within something precluded by the
18 Commission's regulations.

19 What we're simply saying is, you can't put a label
20 on this and say that when we argue there should be no
21 exemption because that exemption wouldn't be in the public
22 interest, that we're really saying, bring into this case
23 the need for power issue that belongs in a construction
24 permit case.

25 The question of whether or not the power is needed

1 now bears on the public interest reason whether this
2 Commission ought to let the plant be contaminated if
3 there is no reason for it, it's not on the critical path
4 for anything to contaminate it now, and yet it's going
5 to cost the people of New York \$150 million mess. There's
6 no reason to do it.

7 COMMISSIONER BERNTHAL: I think the argument is
8 that this falls in the category of the exigent circumstances.

9 CHAIRMAN PALLADINO: Okay. Let me ask another
10 question.

11 MR. BROWN: Specifically, the public interest.
12 That's literally listed in 50.12. It says, "otherwise in
13 the public interest." And that's the quote to which we
14 respectfully refer you.

15 CHAIRMAN PALLADINO: I read your -- I guess I
16 won't say "yours" until I -- well, I guess it's from
17 counsel -- which gave some of the argument about
18 single-failure criterion. And you quoted what the hearing
19 board says, I believe, about the single-failure criterion.
20 And you said that this says that the single-failure is met.

21 Now, this doesn't seem to say that to me. I was
22 wondering if you could explain how you drew from the board
23 the conclusion that the single-failure criterion is met.

24 MR. BROWN: Well, Mr. Lanpher is our single-failure
25 expert, so we'll wait for him because you sure don't want

1 to listen to what I say about it.

2 (Laughter.)

3 CHAIRMAN PALLADINO: I see. I was looking
4 particularly at page 4 of your submittal, of this submittal,
5 and I guess I should identify it for you. It's the February
6 7th letter, Kirkpatrick and Lockhart.

7 MR. LANPHER: Mr. Chairman, the Miller board
8 decision, with all respect, is subject to a lot of
9 criticism because of its lack of precision. We tried to
10 highlight the fact that this was a discussion of the
11 single-failure criterion, and subsequently in the decision --
12 I will dig out the page number -- they expressly held that
13 it satisfied the single-failure criterion. And you will
14 find both in the staff's comments of November 29, the staff's
15 comments of January 14, and LILCO's comments of November 29,
16 quotations of the Miller board's statement that the
17 single-failure criterion was satisfied.

18 What is essential to understand here is that
19 in considering the "as safe as" standard, a significant
20 and critical issue that was debated among the parties was
21 whether a single failure, as defined in the introduction
22 to the General Design Criterion, could disable the alternate
23 AC power system.

24 The rationale for looking at that was that with
25 the fully qualified system, by definition it's designed to

1 survive such a single failure. Now, the staff in its SER,
2 which was relied upon by the Miller board, argued very
3 strongly that it had done an adequate review and had found
4 no single failure that could lead to the failure of the
5 entire system. By the way --

6 CHAIRMAN PALLADINO: But what you quote here
7 doesn't support that argument,

8 MR. LANPHER: Okay, let me refer you to page 91.
9 The gas turbine --

10 CHAIRMAN PALLADINO: Well, I was using your
11 letter -- that's where you gave me the argument -- that I
12 should look at particularly the portion that you quoted.
13 And when I read that, I didn't see that that said that the
14 single-failure criterion --

15 MR. LANPHER: Let me quote another place. Page 91,
16 Finding 79, and I quote -- and I will leave out the
17 citations -- "The gas turbine and the ENDS are considered
18 a system whose two parts are adequately independent of
19 one another for compliance with the single-failure
20 criterion, citing the staff's SER." That was the Miller
21 board conclusion, page 91.

22 CHAIRMAN PALLADINO: All right. I will look it
23 up later.

24 MR. LANPHER: So this is the critical question.

25 CHAIRMAN PALLADINO: Well, let me ask you one

1 other question, and then I will let my fellow Commissioners
2 ask questions.

3 The implication that whether this meets the
4 single-failure criterion or not gives me the impression
5 that in achieving whether this is as safe as the other
6 system, that they must meet all the criterion, all the
7 individual components of the criteria; if they do, then
8 you wouldn't need an exemption.

9 And my question is, how close do you think these
10 have to be to be as safe as? As I understand, the point
11 taken by the board is they meet the requirement such that
12 the circumstances in the core wouldn't lead to degradation
13 with this system as with the other system. And they did
14 not try to go item for item, because as I gather, their
15 thought was if they went item for item and you prove that
16 all the items were the same, then you wouldn't need the
17 exemption. So there's bound to be some difference between
18 these two if you're going to ask for an exemption, between
19 the basic diesel approach and the alternate system. I
20 don't know if I made myself clear or not.

21 MR. LANPHER: Well, you raised a number of points,
22 Mr. Chairman.

23 CHAIRMAN PALLADINO: I thought it was only one.
24 But maybe there are two.

25 MR. LANPHER: We're all lawyers at heart.

1 CHAIRMAN PALLADINO: I'm not; that's my problem.

2 (Laughter.)

3 MR. LANPHER: It's been stated, I believe, in
4 both the staff and the LILCO papers that all that Suffolk
5 County and the State of New York did was to compare item
6 for item, well, this widget and that widget. Well, that's
7 not at all true. We presented testimony that presented an
8 overall comparison of the two systems. That testimony
9 wasn't permitted in by the Miller board, and in our comments
10 we've highlighted some of that. And we couldn't go into
11 as much detail as we wanted because of space limitations.

12 But the point that we sought to emphasize is that
13 you set the standard here. This Commission heard argument
14 last May, considered the situation, cognizant of the problems
15 with 50.47(d) and other factors, you established the "as safe
16 as" standard. We didn't do a point-by-point comparison,
17 but the evidence clearly sustains the finding that the two
18 systems are not comparable; there is a lesser margin of
19 safety for the alternate AC power system than the other
20 system, the fully qualified system.

21 CHAIRMAN PALLADINO: Now, how do you reach that
22 conclusion?

23 MR. LANPHER: That was the finding of the Miller
24 board itself. And this further revelation, that we just
25 found out about this week having to do with the breaker 460

1 problem, is a further degradation -- or difference in the
2 safety between the fully qualified system and the system
3 which is proposed for operation at Shoreham.

4 CHAIRMAN PALLADINO: Yes. That's if you decide
5 that the single-failure criterion has to be met. And that
6 again goes along, the concept that you're going to check
7 them item by item, whereas they took the broad view that
8 temperature circumstances were such that you wouldn't need
9 to degrade core conditions in either case.

10 MR. LANPHER: Suffolk County never argued, and
11 neither did the State of New York, that the single-failure
12 criterion had to be met. But the fact that if it was met,
13 it was some evidence, as argued by the staff and LILCO,
14 particularly the staff, that this system would meet -- the
15 alternate system would meet -- the "as safe as" criterion.
16 If it would not meet the single-failure criterion, that
17 was some evidence that it was not as safe as,

18 The Miller board specifically relied upon that
19 staff testimony and found the single-failure criterion to
20 be met, in reliance thereon found that the "as safe as"
21 standard was met. We highlight this because we just found
22 out about it this week. It's a further reason to believe
23 that the Miller board's decision is just plain wrong.

24 CHAIRMAN PALLADINO: Okay. Let me turn to some
25 of my colleagues --

1 MR. BROWN: Mr. Chairman, one further thing --

2 CHAIRMAN PALLADINO: Yes.

3 MR. BROWN: -- because you spoke of the board's
4 view. And it's important. Enough of a broad-brush view
5 can always eliminate crucial differences. From a far enough
6 distance, we can't tell the difference between a man and
7 a woman, they're both people; and yet there are crucial
8 differences between them when it comes to certain purposes.

9 (Laughter.)

10 MR. BROWN: The clear fact is this, that --

11 COMMISSIONER BERNTHAL: The board's arguments
12 are getting awfully complicated.

13 (Laughter.)

14 MR. BROWN: I had a hard time getting analogous
15 there.

16 (Laughter.)

17 MR. BROWN: The plain fact is this: The board
18 found that there was a lesser margin of safety, and the
19 board then said the plant is as safe as. You can't say
20 it's not as safe as and it's as safe as, at the same time.

21 Now, in the broadest brush you can, because you
22 can start then saying it's not material. But I want to come
23 back to the only issue here: it's an exemption proceeding.
24 An exemption into your regulations, and those of any other
25 federal agency or state agency, is the most extraordinary

1 regulatory opportunity or opportunity for exceptional
2 treatment, because what it does is it says this, in
3 essence, "We have many regulations which, through the
4 participatory process, have been commented upon and
5 promulgated. That's the way it's done in this country,
6 and once it's done that way, people are bound by it."

7 If we're going to have an exception in a particular
8 case, there has to be a reason for it. You've got to find
9 it's in the public interest. You've got to find there's
10 exceptional reason for it, extraordinary circumstances
11 for it.

12 Even if you were to say -- I tried to make that
13 point -- which you can't say, but even if you were to say
14 that there is no safety problem here, you can't say it's
15 in the public interest to depart from the established
16 regulations here. The state and the county speak for the
17 public interest. All the extraordinary circumstances
18 weighed against LILCO. There is no legal way to give an
19 exemption. It can be done with a broad, broad brush, but
20 that's the same brush that paints a man and a woman as
21 the same person.

22 CHAIRMAN PALLADINO: Well, I didn't embark to
23 debate the subject, and so maybe you've given me as much
24 of an answer as I need for the moment. I may come back
25 later. Let me see if other colleagues have any questions.

1 Tom, do you have any questions?

2 (No response.)

3 Jim, do you?

4 COMMISSIONER ASSELSTINE: I just have a few.

5 And I want to go back to pick up a little bit on
6 the question that you were talking about at the last, Joe,
7 and talk about the "as safe as" test a little bit.

8 Do you see -- do you read the "as safe as" test
9 as requiring absolute equivalence, or do you see any
10 flexibility; for an example, something that is substantially
11 comparable? Is there a rule of reason that you think has
12 to be applied in the way you read the "as safe as" test?

13 MR. BROWN: I would not adopt any phraseology
14 such as "rules of reason" or otherwise, for this simple
15 purpose. Such caveats, such footnotes, really become
16 excuses and opportunities to cause trouble in a situation
17 which is contested. There's no question in my mind that
18 in an uncontested case there's a great deal of flexibility,
19 there's no opposition, the Commission is in a position where
20 I think the latitude of how it approaches a situation is
21 more casual than in a contested case.

22 In a contested case where there are rules, there
23 are thus rights that the parties derive from those rules,
24 and there is a correlative duty on each and every one of
25 you personally to enforce those rules. You set a rule.

1 You said it will be "as safe as." And that made eminent
2 sense, because someone is trying to change a regulation
3 here in a case, and they're trying to change it in a way
4 that hurts us. It hurts the public interest, and we
5 don't want it changed.

6 Therefore, their test is a difficult test, and
7 they can't meet that test. So we say, simply, when you
8 said in your order "as safe as," you meant "as safe as"
9 the way you mean everything else that you write. For us
10 now to make up rules of reason or fudge words are all
11 post hoc generalizations that are result-oriented and
12 cause trouble.

13 CHAIRMAN PALLADINO: Jim, may I just pick up with
14 this?

15 COMMISSIONER ASSELSTINE: Sure.

16 CHAIRMAN PALLADINO: It's the same subject I was
17 trying to get at. I was trying to understand why you
18 don't think this is "as safe as."

19 MR. BROWN: The Miller board told us it isn't,
20 so I would stipulate that now.

21 CHAIRMAN PALLADINO: Well, no, I was trying to
22 understand what your arguments are --

23 MR. BROWN: Oh.

24 CHAIRMAN PALLADINO: -- aside from what the Miller
25 board says. Why do you feel this is not "as safe as"? Is

1 it because you do at these various components, or you
2 don't agree with or do agree with the criteria set up?
3 I am interested in the same question that Commissioner
4 Asselstine asked.

5 MR. BROWN: Perhaps Mr. Lanpher would like to
6 answer it properly.

7 MR. LANPHER: Herb has already identified
8 something, so I don't want to take more of your time.
9 There are a number of factors that lead to our view that
10 applying that standard, you have less safety. We heard
11 a lot of talk during the exemption proceeding that there's
12 55 minutes to get power to something, and this was all
13 applying the deterministic analyses that you assume, a
14 loop LOCA and then one other failure and you still get
15 power in a certain amount of time. With a 20-megawatt gas
16 turbine the estimate, I believe, was on the order of two
17 to five minutes power should be supplied. The EMB diesels
18 take longer because while they come on relatively soon,
19 they have to be synchronized and it may take 10, 15, maybe
20 30 minutes to get them off.

21 With the TDI diesels, or a fully qualified set of
22 diesels, you're expecting to have power available to the
23 safety loads in 10 to 15 seconds. That's your requirement.
24 And that's the way it's been interpreted by the staff.

25 The reason we think this is less safe is that when

1 you cut into that margin of safety, instead of having power
2 there immediately, you have power in a much reduced amount
3 of time. You may have power there when it's needed,
4 assuming no operator makes mistakes in this.

5 But I recall from the earlier argument that there
6 was a concern, not to apply is it a safe-enough standard.
7 That was what was giving the Commission an awful lot of
8 problem on May 7, when we had our oral argument here, and
9 that was the concern that the Miller board had articulated
10 a standard that really read GDC-17 out of existence and
11 left you with a safe-enough standard.

12 Well, the subsequent harmonization that we've got
13 now leaves you exactly back where we were in April. We're
14 back to a "safe enough" standard.

15 Now, the evidence that we've presented shows that
16 this was not as safe. You had Weatherwax in minor testimony,
17 which was barred from admission. It was barred because it
18 was supposedly probabilistic data. Well, there's no
19 regulation that says you can't use probabilistic data.

20 COMMISSIONER ASSELSTINE: In fact, it's being used
21 in a number of proceedings, isn't it?

22 CHAIRMAN PALLADINO: Yeah, I --

23 MS. LETSCHE: That's right.

24 MR. LANPHER: I mean that's all in our appeal board
25 brief, and I would urge you to take a look at some of that.

1 CHAIRMAN PALLADINO: Yes. One of the questions
2 I had in mind was to ask you what the results of your
3 probabilistic risk assessment would have been, but I think
4 I can pick that up.

5 But all I was trying to do was piggy-back on
6 Mr. Asselstine's question because I was interested in --

7 MR. LANPHER: The fact is our probabilistic data
8 shows that there was a lesser margin of safety. Mr. Brown
9 points out when you've got these --

10 CHAIRMAN PALLADINO: By a relatively small amount
11 compared to the --

12 MR. LANPHER: Ms. Letsche worked with those
13 experts. Let's let her answer.

14 MR. PALOMINO: May I address this, why do we feel
15 it's not "as safe as"? There were various instances where
16 we found it didn't meet the single failure. Their fuel
17 supply system had one common pipe before they had valves.
18 If that failed, no fuel went to it. They had one battery
19 system for all of the diesel engines. If that failed, all
20 of them failed. You had a control room where all controls
21 went through. If you have a fire, disruption or something,
22 all of them fail.

23 As you went down, even on the very engines, they
24 had two starters to turn them. If one starter failed,
25 they couldn't.

1 So it was a whole series of things that clearly
2 made it not "as safe as." And when you add to it, and
3 what the staff has found now, you're just compounding it,
4 Mr. Chairman Palladino. And as far as I am concerned,
5 I read your order to mean a point-by-point comparison,
6 because this is not a deemed on-site approved system.
7 and if you're going to have something less than an on-site
8 approved system, it should at least compare point for point.

9 CHAIRMAN PALLADINO: Well, then you don't need
10 an exemption if it compares point by point.

11 MR. PALOMINO: No, no, it would still be off-site.

12 CHAIRMAN PALLADINO: Oh, I see --

13 MR. PALOMINO: Oh, yes, and you had different
14 supply systems power to it to start it. So that it did
15 make a difference, because this was not deemed on-site.

16 CHAIRMAN PALLADINO: But that's one of the points --

17 MR. PALOMINO: And so it should have been compared
18 point to point for an on-site, and it still wouldn't be
19 fully qualified and approved as on-site. And that was what
20 the discussion was about the last time we met.

21 CHAIRMAN PALLADINO: Well, let me let Commissioner
22 Asselstine continue.

23 COMMISSIONER ASSELSTINE: Yes. I think that last
24 information was useful to me. And let me follow up with one
25 other question, if I can, on this, this functionability

1 test or rationalization, whatever you want to call it.
2 Whether the staff and licensee are trying to rationalize
3 what the board did or not, the one part that I had a concern
4 about was this timing element that you were talking about
5 just a couple of minutes ago. And I guess I am wondering,
6 if you have a system, assuming for the moment that it is
7 reliable, and I think that the points you just made raise
8 the reliability question, but assuming for the moment that
9 the system is reliable, why shouldn't it be permissible to
10 look at what kind of functions the system needs to perform
11 and when it needs to perform it, and if the system is
12 reliable but slower than the properly qualified system in
13 full compliance with GDC-17 but is nonetheless reliable
14 within the times that it's needed for the system to function
15 properly and avoid damage to the fuel, then why isn't that
16 good enough, setting aside for the moment the reliability
17 question?

18 MR. PALOMINO: May I address that, Commissioner?

19 COMMISSIONER ASSELSTINE: Yes.

20 MR. PALOMINO: They're all relying on the fact
21 that it's a 20 minutes -- 28 minutes if you have one form
22 of accident and 55 if you have another and that they can
23 always get power from the grid. The only evidence in the
24 record is the last time the grid failed, it was for an hour,
25 which is about five minutes over the 55 minutes maximum.

1 they allow. So it's not "as safe as" even from a functional
2 rather than a comparative point of view.

3 MR. LANPHER: Let me just add to that, and without
4 going into the reliability question, because that's in
5 dispute, but all of those assumptions are that nothing
6 else goes wrong, that no one makes any mistakes, that
7 everything -- it's really an offshoot of the reliability,
8 but you can't leave it completely out. This is using
9 your deterministic analyses: Okay, you're going to have
10 your single failure in this and nothing else is going to
11 happen, and so it's perfect.

12 But we know from other events that things can
13 happen. And that's why a margin of safety is essential.
14 That's why your decisions over the years have repeatedly
15 talked about the defense-in-depth. We want to have a margin
16 of safety. The people of Long Island, the citizens of
17 New York, are entitled to no less than the margin of
18 safety that's at other plants. And that we don't get here
19 under this decision.

20 COMMISSIONER ASSELSTINE: Is it your position that
21 basically what the board did was go back to a "no undue
22 risk" test, the same old test that had always been applied?

23 MR. LANPHER: Yes.

24 COMMISSIONER ASSELSTINE: Are you bothered at all
25 by the fact that the Commission has now said that the

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"as safe as" test only applies to one case? Is there an element of unfairness here to the licensee?

MR. BROWN: There would be an element of unfairness to us if the Commission sought, after holding a hearing on the "as safe as" standard and saying it applies in this case, not somehow to apply to the decision.

COMMISSIONER ASSELSTINE: Saying now it doesn't apply --

MR. BROWN: That's right.

MR. PALAMINO: All the discovery, all of the preparation of the evidence, all of the introduction of evidence, was met point by point on this comparative basis test, and after all the evidence was adduced.

end #1

1 Then they suddenly told us that isn't the rule, we
2 are not reading it -- it's just like Time Magazine, almost,
3 everybody else can understand it clearly but them. It's a
4 very interesting thing.

5 (Laughter)

6 MR. BROWN: There are legal precedents, in fact,
7 on this very point that the Commission or its Appeals Board --
8 I'm not sure which now but I'm sure that your staffs can find
9 it without any difficulty the citations which say that it's
10 unlawful for the case to be tried on one theory, but --

11 COMMISSIONER ASSELSTINE: And then decided on a - -

12 MR. BROWN: -- and then decided on a different theory,
13 that's correct.

14 COMMISSIONER ASSELSTINE: Let me ask just a couple of
15 questions about the exigent circumstances and public interest
16 portion of things.

17 You mentioned your view on LILCO's responsibility
18 in acquiring and purchasing, and installing the TDI diesels.
19 What about their efforts to comply with GDC-17 at least since
20 the diesel generator problems were identified?

21 To what extent if any would you give any credit for
22 their efforts to comply with GDC-17, or do you think it all
23 cuts the other way in terms of a failure on the licensee's
24 part in terms of looking at that element of exigent circumstances?

25 MR. BROWN: We cannot conceive any extraordinary

1 circumstance in this case that would favor LILCO.

2 COMMISSIONER ASSELSTINE: Go ahead.

3 MR. PALOMINO: May I inject that? I think if you
4 read all of that correspondence, all of their reviews, every
5 defect from the time the crank shaft broke, they found no
6 problem with it. It was we which had to bring up the problems.
7 The shop cleaning process was bad; the problem was, the
8 whole thing was over-powered and under-designed. They took
9 an engine of 250 hp per average cylinder and they increased
10 them to 600 without any basic redesign. And if you fix a crank
11 shaft, then of course pistons are going to go.

12 And if you fix the pistons and put heavy pistons in,
13 then the cylinder has to go. And they were completely ignoring
14 all of this. And they were not treating it with an honesty of --
15 as a matter of fact, they didn't even use precautions in buying
16 them because we put evidence in the Shipping Board found these
17 particular diesels unqualified for ships, and they bought them
18 and were using them in a nuclear plant.

19 So, both before and after they were closing their
20 eyes to it, they didn't want to believe it. They kept telling
21 everybody the diesels will be ready when they broke in
22 October, they'll be ready in January; they will be ready in
23 March, and the hearing before Judge Brenner proved that was
24 not so. And the extensive inquiry showed that their rosy view
25 of things was not so.

1 COMMISSIONER BERNTHAL: Well, they were not the
2 only ones to buy TDI diesels, though, and get in trouble. Are
3 you saying that everybody was equally negligent or were they
4 all unaware of the Shipping Board's decision?

5 MR. PALOMINO: I don't know. You see, there are
6 different configurations of these diesels. Some are in line,
7 some are high or above power, some are less. Some were made
8 to withstand different loads because you have different loads.
9 So that I don't think you can answer it simply across the
10 board that way, Commissioner Bernthal.

11 We can do it on the evidence that we have about LILCO.

12 MR. BROWN: We presented evidence, or we attempted,
13 excuse me. We attempted to present evidence that would, if
14 believed, if allowed into evidence, would have shown that
15 LILCO was on notice as early as 1975 of deficiencies in the
16 TDI diesels. They were on notice as early as 1975 of severe
17 quality assurance problems at TDI that should have lit a
18 little light and told them, "We've got a potential problem."

19 That evidence wasn't allowed in by the Miller Board.
20 So, you know, the record is one-sided again. The evidence that
21 LILCO wanted to put in about its alleged good faith in
22 attempting to meet GDC-17, that's in the record.

23 The evidence that would have refuted that, was barred
24 from the record. That's another of the due process violations
25 of the Miller Board.

1 MR. PALOMINO: It's clearly uncomfortable for every-
2 body to be sitting here, realizing that we have gone through
3 a period since last April or so, or even before that, with a
4 situation that's such a mess.

5 But there are only two options, to let it go forward
6 and stick the public with something which is unlawful and is
7 a betrayal of the mandate of this Commission, or to deal with
8 it straight-forwardly.

9 Now, it is uncomfortable, I'm sure, to sit and make
10 the decision. We are advocates here, we don't have to make
11 the decision. But we would have the same principle in mind
12 if we were on the other side of the table. Apply the law
13 and straighten things out. No, the Miller Board shouldn't
14 have stayed. Two Commissioners voted to get rid of the Miller
15 Board and three decided to keep him on a compromise that sang,
16 "Follow the rules." He didn't follow the rules and his
17 colleagues didn't follow the rules, and now we are stuck.

18 Well, let's do it right now.

19 COMMISSIONER ASSELSTINE: Just one last question.
20 The \$150 million cost for decontamination, where do I find that?

21 MR. BROWN: We tried to understate it. Our under-
22 standing -- excuse me one second. Our understanding from our
23 consultants is that the present value of the fuel at
24 Shoreham is \$120 million, and we simply -- we have been told
25 that the clean-up costs -- which has never been done after low

1 power -- would be far beyond \$30 million, but we didn't want
2 to make anything approaching an exaggeration and therefore
3 simply say \$150 million or more.

4 COMMISSIONER ASSELSTINE: That's all I have.

5 MR. PALOMINO: The fact is, that was evidence we
6 tried to put in the record and Judge Miller wouldn't let us --

7 COMMISSIONER ASSELSTINE: Okay.

8 MR. PALOMINO: -- the value of the fuel and the value
9 of the equipment contamination.

10 CHAIRMAN PALLADINO: Let me turn to Commissioner
11 Bernthal.

12 COMMISSIONER BERNTHAL: Yes. You made a considerable
13 point in your letter of February 7 which we received yesterday
14 about the apparent failure of our staff to notify the Board
15 as early as they might of difficulties with respect to one of
16 the breakers in the plant, the single-failure criterion.

17 Let me ask you a couple of questions about that,
18 and I guess we'll have a chance to talk to the staff as well.

19 First of all, leaving aside the procedural question,
20 I'm curious to get your reaction to some of the substantive
21 issues here, and I'd like to know whether you agree or not
22 that the fix that has been proposed now, racking down that
23 breaker -- I learned this morning, "racking down" is an
24 engineering term. It means physically moving it away to
25 another rack, for those of you who are wondering.

1 Would you agree that racking down this breaker,
2 which seems like a pretty straight-forward and simple avoidance
3 mechanism to avoid the single failure which is a solution
4 identified by the staff, resolves the problem or, if not, why
5 don't you agree with that?

6 MR. PALOMINO: I have no way of knowing, I didn't
7 discuss it with the consultants and I'm not an electrical
8 engineer. I would rely on the consultants on this.

9 COMMISSIONER BERNTHAL: Does your single-failure
10 expert know anything about that?

11 MR. BROWN: This is a lawyer expert who knows a lot
12 more than the three on his right.

13 MR. LANPHER: We have had to deal with this,
14 Commissioner Bernthal, by telephone for obvious reasons, with
15 our consultants. They indicate from review of FSAR materials
16 on that that from just their preliminary view of this, this
17 probably eliminates the single failure problem but reduces
18 the capability of the alternate AC power system to supply
19 power to all of the vital buses that might be called upon to
20 be used in the event of an emergency.

21 So, while this may address the single failure
22 problem to a degree and maybe completely -- I mean, we just
23 got this this week, and I must say, I don't think you can
24 set aside the procedural aspect. I think it's an outrage what
25 was done here because this was a matter of great importance

1 in the other hearing. But we think that this, while it may
2 address one problem, it creates or may create another problem.

3 That's why in our letter we tried to not make
4 categorical statements in terms of a final result. We believe
5 this has to be addressed with the proper procedures and give
6 everyone an adequate opportunity to address it.

7 COMMISSIONER BERNTHAL: But you are saying, I gather
8 your point then -- and I won't press you further on it unless
9 you want to offer further information -- is that while it may
10 address the single failure problem, it might cause problems,
11 other problems in reliability of the AC system and it might
12 be that our staff then should comment on that later.

13 MR. LANPHER: That was the point of the final foot-
14 note of the letter, Commissioner Bernthal. And again, this
15 letter was written by me and read to consultants, and you
16 are trying to do things over the telephone and it's difficult.

17 Further investigation needs to be made. Quite
18 frankly, this highlights -- I mean the fact that this problem
19 came up, the staff's review of this whole system was done at
20 extraordinary speed.

21 COMMISSIONER BERNTHAL: Well, I have to say that
22 the problem of the single failure perhaps short of a flood,
23 which I don't necessary want to rule out, I guess, tidal waves,
24 floods, what not, are a possibility on Long Island.

25 The fix to the problem seems reasonably straight-

1 forward unless there is another issue of AC reliability that
2 gets introduced. I mean, actually what we are talking about
3 here is simply moving one rack or one box, presumably, to
4 another rack and that isn't an issue of extraordinary
5 technical complexity.

6 MR. LANPHER: The major question appears to be,
7 what is the impact on the configuration. This is something
8 different than what everyone litigated.

9 COMMISSIONER BERNTHAL: Well, maybe we can hear from
10 the staff on that.

11 Let me ask a second question, then, about the single
12 failure point. If we were to find, then, if the Commission
13 were to find that meeting that single failure criterion was not
14 critical to disposition of the exemption request before us,
15 would you agree then that the Board notification issue that
16 you have outlined in your letter should not be material to the
17 low power decision one way or the other?

18 MR. LANPHER: No because I believe you have to deal
19 with the Miller Board's decision, that's what's before you
20 and it was a critical factor there. I don't see -- I mean,
21 this undermines the critical basis in the Miller Board's
22 decision. I don't see how this Commission can get around it.

23 You have testimony that must have been in good faith
24 that was submitted and relied upon by the Miller Board that
25 was wrong. This information shows that it was wrong. I don't

1 think you can get around that now.

2 COMMISSIONER BERNTHAL: Well, you are really talking
3 the procedural issue. What I'm asking you is -- and I
4 realize procedure is important and the rights of the parties
5 are important. But I'm trying to get at the issue of substance
6 here which is the safety of the plant. And what I'm asking
7 is whether if the Commission, sitting as it is today, can make
8 a determination on what on its face at least appears to be
9 a rather straight-forward technical issue and hear the staff
10 and can make a finding that that single failure criterion is
11 not the critical issue, then what would be your answer to the
12 question?

13 I'm really in a sense asking you, if we are able to
14 make that technical determination, then what would you
15 respond regarding the Board notification question which is a
16 procedural question?

17 MR. LANPHER: Maybe I just don't understand the
18 point you are making, Commissioner Bernthal. I don't see
19 how the Commission in reviewing the Miller Board decision could
20 come to a technical judgment that something was essentially
21 irrelevant, all evidence on single failure criterion being
22 met or not was irrelevant, when a finding of the Miller Board
23 is that there is a lesser margin of safety.

24 This goes directly to that question of widening
25 that margin of safety. Whether you believe that the single

1 failure criterion in and of itself is -- in isolation is
2 important, the problem is, you have to apply the "as safe as"
3 standard and no one argued that the single failure criterion
4 was a per se rule in this case. We were all addressing it in
5 the context of "as safe as," you still have to deal with that.

6 I don't see how making a judgment about single
7 failure criterion or not can get you around the fact that
8 the "as safe as" standard is not met.

9 COMMISSIONER BERNTHAL: Well, that may be. But
10 then I think you have answered my question, so the Board
11 notification issue then that your letter relies on so heavily
12 yesterday, you are saying, is not the major issue that we
13 should be considering here.

14 We are, after all, also an adjudicatory body and
15 can make a decision on --

16 MR. LANPHER: Well, it's inexplicably tied up
17 together. I frankly don't see how you could make that
18 technical judgment and say because in the process I think you
19 would be repudiating the "as safe as" standard which we said
20 before, you can't change the rules in the middle of the game.

21 COMMISSIONER BERNTHAL: Let me ask one further
22 question here, if I may, and then I'll give somebody else a
23 chance.

24 MR. BROWN: Excuse me, Mr. Lanpher did not agree,
25 just so that the record is clear. He did not agree with what

1 you said, Commissioner Bernthal.

2 COMMISSIONER BERNTHAL: Okay, I wasn't sure.

3 MR. LANPHER: Well, that's correct.

4 COMMISSIONER BERNTHAL: One last question here. Can
5 you hypothesize or construct for me, then, a scenario -- and
6 I want to ask this question because I believe that the
7 fundamental issue of safety here, of course, is public health
8 and safety, the question of whether the public health and
9 safety is at risk. That means off-site and on-site health
10 and safety.

11 Given that that is the issue that we all really-mean
12 by safety, we are not talking about machines so much with
13 safety as we are about the public, can you construct for me
14 a scenario that you believe would lead to off-site radiological
15 consequences, health and safety consequences, at five percent
16 power, assuming that we do eliminate this question of the
17 single failure, we rerack this particular breaker and what
18 not.

19 What I'm asking you is, can you come up with a
20 scenario, or are you arguing that if this plant were to operate
21 at five percent power, given this removal of the single failure
22 criterion issue where public health and safety would, in your
23 judgment, be at hazard?

24 MR. LANPHER: Are you asking -- let me understand.

25 Are you asking is it possible to have an accident with off-site

1 consequences at low power?

2 COMMISSIONER BERNTHAL: At five percent power, given
3 the plant as it sits, assuming this reracking of breaker issue
4 is removed, that's what I'm asking, yes.

5 MR. LANPHER: I have been informed by experts that
6 if you had the proper kind of accident, yes, you can have
7 off-site consequences at five percent power.

8 But I'm not an expert, I can't sit here and testify,
9 Commissioner Bernthal, what the sequence would be. But I
10 certainly cannot preclude that there could be off-site
11 consequences at low power.

12 COMMISSIONER BERNTHAL: Are you suggesting or is
13 your impression that the off-site consequences there would be --
14 and I realize this isn't the fundamental issue as a procedural
15 matter, but I'm curious what your opinion would be in comparing
16 the potential off-site consequences with this system with the
17 off-site consequences that the Commission routinely accepts
18 with a plant at full power operation.

19 MR. LANPHER: I would just have to be speculating
20 to answer that question, Commissioner. I mean, you are asking
21 very technical questions on that. I can't give you an
22 answer.

23 COMMISSIONER BERNTHAL: Maybe our staff can comment
24 on that.

25 MR. LANPHER: But I would like to comment. I don't

1 think that's the issue in this proceeding.

2 COMMISSIONER BERNTHAL: No, I realize that's not
3 the specific issue. But finally, the issue the public is
4 concerned, I think, about is public health and safety of this
5 plant operating at five percent power. And that is certainly
6 one of the issues that is going to weigh in my consideration.

7 MR. BROWN: I think you will find that the more
8 appropriate perspective, perhaps, on reflection is the
9 precise issues in the case before us, and those are confined
10 to Section 50.12.

11 COMMISSIONER ASSELSTINE: That's right.

12 MR. BROWN: And a more grandiose approach, a broad-
13 brush approach, really isn't what's required. It's just not
14 permitted.

15 COMMISSIONER BERNTHAL: Well, I want to make clear,
16 though, that one could gather the impression from the dis-
17 cussion here today that we are talking about a public health
18 and safety hazard under these conditions at five percent power,
19 and that was the reason I was asking the question.

20 If you are making that argument or alleging that,
21 then I certainly would like to know that and perhaps the
22 staff should speak to that issue because that is important
23 to the public, I think.

24 MR. BROWN: All that anybody does in a case like
25 this is follow the orders of the Commission and make an

1 evidentiary record, and then make decisions on the basis of
2 that record.

3 Now, we can represent what's in the record, that
4 is what you required us to try and tell you what you have to
5 decide based on what you required us to do.

6 But we can't, as lawyers, give you technical
7 judgments on things outside that record. We could have a
8 hearing and bring in technical experts to put their evidence
9 before the Commission and then draw a judgment. But we truly
10 are confined to deal with the record before us and the issues
11 here. That's just how the system --

12 COMMISSIONER BERNTHAL: No, I understand that you
13 are not the technical experts and we may --

14 MR. BROWN: It's not that we want to be unresponsive,
15 it's just that --

16 COMMISSIONER BERNTHAL: No, I understand.

17 MR. BROWN: -- this Commission created a system
18 under law which binds us to follow the rules, and that's
19 what the record --

20 CHAIRMAN PALLADINO: Mr. Brown, you used the
21 statement several times -- and I'm not sure where you got it.
22 But I hope you didn't think you got it from me. You said
23 the "broad brush approach." I almost started to answer when
24 you talked about the men and the women, I never used a broad-
25 brush approach.

1 MR. BROWN: I coined that phrase based on someone
2 that used the word "broad approach."

3 CHAIRMAN PALLADINO: No, I said the criterion that
4 I understood the Board took was that we wanted to avoid
5 conditions that would cause degradation of the core, and if
6 it avoided degradation of the core, then they said then that's
7 "as safe as."

8 I was asking you whether you had a problem with
9 that philosophy as compared to the point by point, and I
10 explained to you what I had as a problem with point by point
11 because it got down to saying if every point matches, then
12 you don't need an exemption.

13 I just wanted to clarify, if you got any impression
14 that I was going along with your "broad brush," I was looking
15 specifically at the criterion that was established to define
16 "as safe as."

17 MR. BROWN: Yes, I want to take full credit for this,
18 the phrase "broad brush."

19 CHAIRMAN PALLADINO: All right.

20 MR. BROWN: And to say --

21 CHAIRMAN PALLADINO: Let me give --

22 MR. BROWN: -- it was the Licensing Board which
23 took a "broad brush" approach. That's what I was saying.
24 They made the details disappear, and the details are the issues
25 that matter here.

1 CHAIRMAN PALLADINO: And I was trying to address
2 those details.

3 MR. BROWN: I didn't mean to say, I hope I didn't
4 suggest -- I didn't want to put words in your mouth.

5 CHAIRMAN PALLADINO: Commissioner Zech, do you have
6 any questions?

7 COMMISSIONER ZECH: No.

8 MR. PALOMINO: Commissioner Bernthal, may I?

9 COMMISSIONER BERNTHAL: Yes.

10 MR. PALOMINO: I think the problem with your question
11 is, it assumes a guarantee that when you have an mechanical
12 electronic system which is operated by human beings, you can
13 guarantee that you can keep it at five percent.

14 I think the history of nuclear accidents were all
15 low power accidents -- the Fermi reactor; the book that we
16 almost lost Detroit, they were all when they were supposed to
17 be low power and they were human, mechanical, electrical
18 failures.

19 So that, you know, the assumption that they can keep
20 this absolutely at all times at five percent, I don't think
21 is a valid one.

22 CHAIRMAN PALLADINO: I think we ought to check some
23 of your statements about what was at low power and what was
24 not because you said all had been at low power.

25 MR. PALOMINO: No, no, I said absent Three Mile

1 Island you have a lot of accidents at low power, at testing.
2 I take the Fermi reactor, we have a problem with low power.
3 You have the one up near Detroit, the first one that was
4 built, that was a low power accident. You have another one
5 they talked about in the book which they examined, and that
6 was another low power, when it was at low power and they almost
7 got away from them.

8 COMMISSIONER BERNTHAL: That's a legitimate point
9 and maybe our staff should address that point. And I realize
10 that I'm not a lawyer and I always have some difficulty
11 separating out the practical and technical issues that, frankly,
12 I think the public is most concerned about. And that finally
13 is whether the plant is safe.

14 CHAIRMAN PALLADINO: Yes.

15 COMMISSIONER BERNTHAL: And that really was the basis
16 for my question, and I understand that that was not specifically
17 the issue that you are being asked to address in the hearing
18 before the Board.

19 MS. LETSCHE: Excuse me, if I could just respond
20 on one matter which I think addresses your question, Commissioner.
21 You had asked Mr. Lanpher about whether there was any risk
22 to the public of an accident at low power that differed from
23 the risk at full power, and I think he responded that that
24 wasn't the issue here because we are in an exemption proceeding.

25 And Mr. Brown explained that we are lawyers and we

1 don't know the technical stuff anyway.

2 But just so that you are aware, Suffolk County
3 submitted evidence to the Miller Board, technical evidence,
4 which compared the risk of core vulnerable condition at low
5 power operation of the Shoreham plant, assuming low power
6 operation occurred with the ultimate configuration and
7 compared that with an assumption that low power operation
8 occurred with qualified system of TDIs.

9 That evidence -- and people can quibble about
10 whether you want to believe it, what weight you want to give
11 it to -- what weight you want to give to it, or what else
12 you want to do with it. But that evidence was denied
13 admission. The Miller Board said, "That's not relevant, I'm
14 not even going to look at it."

15 That technical evidence was submitted and was
16 ignored, and that's another basis why we have taken the
17 position that the Miller Board proceeding has denied our due
18 process right to address the very issues which the Commission
19 said needed to be addressed.

20 CHAIRMAN PALLADINO: Well, I am going to suggest,
21 unless there is some real burning question, that we go on
22 to the applicant.

23 But we thank you very much, all of you.

24 MR. BROWN: Thank you for your time.

25 CHAIRMAN PALLADINO: Let me ask if the applicant

1 representatives would come forward.

2 May I ask who is going to be the lead-off spokesman?

3 MR. ROLFE: I am, Mr. Chairman.

4 CHAIRMAN PALLADINO: All right, would you proceed?

5 MR. ROLFE: Members of the Commission, my name is
6 Bob Rolfe. With me at the table today on my right is Mr.
7 John Leonard, LILCO's Vice President of Nuclear who has been
8 at Shoreham since May 1984 and has been overseeing the plant
9 since that time. He is here and available to answer any
10 questions you might have about the status of the plant.

11 Also to his right is Donald P. Irwin, and to my
12 left is Anthony F. Earley, Jr.

13 Members of the Commission, I'm not going to sit here
14 and try to throw a lot of fancy catch-words at you and a lot
15 of fancy phrases. I think what you have to look at today is
16 the law and your regulations, and your precedent, and what
17 the Licensing Board did -- not issues which are totally beyond
18 the record below; not issues which had nothing to do with
19 this proceeding such as emergency planning; such as the
20 status of the diesels; such as politics.

21 This Commission does have precedent and the
22 Licensing Board followed that precedent scrupulously. I
23 don't have time in 15 minutes to address all of the many mis-
24 leading statements that I think were made in the more than
25 one hour of argument which just took place, or in the 60 pages

1 of comments which have been filed. LILCO has responded in its
2 written comments to all of the intervenors' arguments.

3 I would, however, like to talk about three broad
4 areas in which I think there have been misconceptions, and I
5 encourage you, if you have questions that I'm not addressing,
6 to please interrupt and ask them.

7 The first is safety. And LILCO wants to address
8 safety first because LILCO thinks safety is the most important
9 issue here. We don't put it back in the back of our briefs
10 or at the end of our arguments as the intervenors do, and I
11 suspect there is good reasons why the intervenors do that. It's
12 because there was no evidence in the record below that this
13 plant was unsafe.

14 The record below overwhelmingly showed lthat LILCO's
15 proposed low power operation is safe, would not endanger
16 life and property, and indeed would be as safe as operation
17 at a plant at low power with qualified diesels.

18 The intervenors instead would have you cling to a
19 very narrow and, indeed, almost nonsensical interpretation of
20 "as safe as," which has no support in the record or in the
21 law.

22 I would remind the Commission that "as safe as" is
23 not a legal standard. The standard in your regulations, in
24 Section 50.12(a) which is the same standard that applies to
25 all other plants, is that the exemption not endanger life or

1 property. "As safe as" was language used by LILCO when you
2 asked how LILCO intended to prove its case, and LILCO sat
3 before you last May and answered that question by saying that
4 we intended to show that operation would be as safe as it
5 would be at another plant with qualified diesels at low power.

6 So, to attach any extraordinary legal significance
7 to the words "as safe as" just makes no sense and I think that's
8 important.

9 I would also remind the Commission that your order
10 did not set "as safe as" as a legal standard. You said "LILCO,
11 you told us you were going to ask for an exemption. If you
12 ask for an exemption you should address two things. One,
13 the exigent circumstances and two, your basis for saying that
14 you will be as safe as."

15 Well, we addressed that and the Licensing Board
16 made findings that operation would be as safe as, but I don't
17 think that those words have any legal significance in themselves.

18 COMMISSIONER BERNTHAL: It sounds like you are not
19 so enthusiastic about "as safe as" any more.

20 MR. ROLFE: No, Commissioner, that's not the case.
21 We believe that the record shows very clearly that operation
22 will be as safe as, but we don't think those words ought to be
23 used to construct a legal standard different from the
24 regulations which in essence defies common sense, and I'll
25 tell you why I think it does that.

1 What LILCO did and what the staff also in their
2 testimony was present virtually uncontradicted testimony of
3 the time in which low power -- excuse me, in which AC power
4 would have to be restored to the plant, and LILCO's multiple
5 sources for achieving the restoration of low power, of AC
6 power, in the event of a loss of off-site power.

7 There was no contradiction about any of that in
8 the record, and what we showed was that in Phases 1 and 2,
9 for example, you wouldn't need any AC power under any
10 circumstances under the traditional Chapter 15 accident and
11 transient analysis.

12 We showed that in Phases 3 and 4 you wouldn't need
13 AC power to be restored in the event you lost it for any
14 transient or accident other than a loss of coolant accident
15 for a minimum of 30 days. So, in effect you don't have to
16 worry about AC power at all for anything other than a loss
17 of coolant accident, and during Phase 4 -- which was the
18 five percent operation -- you wouldn't need AC power for a
19 minimum of 55 minutes to three hours, depending on which
20 analysis. Fifty-five minutes was an unrealistically
21 conservative analysis which relied on core configuration
22 different from Shoreham's and a thousand days at five percent
23 power which would be far longer than the proposed low power
24 testing here. Three hours was a more realistic analysis to
25 which everyone agreed.

1 And again I emphasize that the intervenors did not
2 dispute those figures, they didn't have a single witness to
3 testify about any of that.

4 And given those time frames, LILCO then showed
5 through its evidence that it had multiple sources, not just
6 the two that have been emphasized, the four EMD diesel
7 generators at the site and the 20 megawatt gas turbine at
8 the site. LILCO has an off-site system which has the ability
9 to restore power to Shoreham well within -- even using that
10 55-minute figure which is unrealistically conservative --
11 LILCO showed that it had ten gas turbines at Holtsville
12 any one of which could supply enough AC power to the site
13 in the event of loss of AC power to power the necessary
14 emergency system.

15 In tests -- and five of those by the way are
16 deadline black start, which means they come on automatically
17 upon the loss of power to the grid -- and actual test has
18 shown that LILCO can get power to the Shoreham site within six
19 minutes from Holtsville.

20 LILCO has a gas turbine at Port Jefferson, again
21 sufficient to supply the plant, which can supply power to the
22 plant within 25 minutes.

23 LILCO has another gas turbine at Southold, and
24 another one at East Hampton, each of which could supply power
25 to the plant in 15 minutes.

1 Now, the intervenors would have you say, "Well, you
2 can't consider the off-site power system." But the off-site
3 power system is real and, unlike full power where you only
4 have seconds -- and that's why the TDIs are designed to come
5 up within 15 seconds -- where you really can't consider the
6 off-site power system because there is no realistic prospect
7 of getting power back to the site from off-site, here you've
8 got -- again using that very conservative analysis -- at
9 least 55 minutes in the event of a LOCA.

10 So, you have a very real prospect of getting power
11 back to the site from any one of these numerous sources -- I
12 might add, over seven different transmission circuits which
13 feed the site.

14 So, LILCO -- and again, all of that is uncontradicted.
15 In addition, it was uncontradicted that there is a 20 megawatt
16 gas turbine at the site which can supply power, emergency
17 power, by a procedure within ten minutes, which has been
18 tested to show that it can supply power within four minutes
19 to the emergency system.

20 Then you have four EMD diesel generators which
21 LILCO has put at the site, any one of which would be sufficient
22 to power the necessary emergency systems which, again, by
23 procedure would supply power within 30 minutes, by test
24 can supply power within nine minutes.

25 There is no dispute and any one of these sources

1 alone would be sufficient to provide the necessary AC power.
2 There is no contradiction in this record.

3 There is no dispute that power could be restored
4 from any of these sources well within the 55 minutes available.
5 No Suffolk County witness in the record below said that the
6 proposed operation was unsafe.

7 No New York State witness even addressed safety,
8 they didn't put on a single witness about safety. LILCO has
9 shown, therefore, that it has multiple sources of power that
10 can restore AC power within the times necessary to meet the
11 regulatory limits set by this Commission for every plant.
12 And therefore, the operation is "as safe as."

13 Now, what Suffolk County wants to say is, they
14 want to argue that each individual piece of equipment, and
15 first of all they want arbitrarily to just forget all those
16 off-site sources of power, they want to focus solely on
17 the EMD diesels at the site and the 20 megawatt gas turbine
18 at the site, and they want to argue that each one of those
19 ought to measure up to the TDI diesels.

20 They want to say, for example, that the TDI diesels
21 supply power within 15 seconds and since the EMD diesels
22 take nine minutes by test, they are not as safe. Well, that
23 approach makes no sense when you don't need the power for
24 55 minutes. The uncontradicted evidence, again, below is
25 even if the EMDs which were the slowest means of restoring

1 power took the full 30 minutes allotted by procedure, and
2 again by test they only took nine minutes. But even if they
3 took the full 30 minutes, that the core would only reach a
4 peak cladding temperature of 1086 degrees. And when you
5 compare that with the 2200 degrees allowed in 10 CFR Section
6 50.46, you see that LILCO is still at less than half of the
7 peak cladding temperature allowed by regulation. And no one
8 in this room would challenge that the Commission's regulations
9 which are set for every plant have a built-in margin of
10 safety.

11 The Commission is not letting every plant, if
12 they can operate it with possible peak cladding temperatures
13 of 2200 degrees, that clearly is not right on the brink. Your
14 regulations must have a built-in margin of safety.

15 COMMISSIONER BERNTHAL: Excuse me, are you
16 arguing or did you argue, then that, citing all of these
17 external sources of power, that in fact your capability for
18 emergency power is as safe as -- or let me use a different
19 term, is as great as or greater than with the fully qualified
20 on-site emergency system?

21 MR. ROLFE: At low power, in a sense, we didn't
22 make that argument per se, but it is, Commissioner Bernthal
23 because most other plants would not have access to the numerous
24 off-site sources of deadline blackstart AC power that Shoreham
25 has, that have been shown to be able to provide AC power in

1 sufficient time to cool the core and meet the functions
2 prescribing GDC-17.

3 COMMISSIONER BERNTHAL: And so you didn't attempt,
4 though, to make the argument that this array of external
5 sources of power and those internal to defense were in fact
6 taken by themselves "as safe as" the fully qualified on-site
7 emergency power system; is that what you are saying?

8 MR. ROLFE: Well, we did argue that our off-site
9 system exceeded GDC-17 requirements for an off-site system
10 in a number of respects. We did not try to isolate --

11 COMMISSIONER BERNTHAL: Certainly, I understand
12 that, yes.

13 MR. ROLFE: We did not try to isolate the off-site
14 sources of power in contrast to the EMDs and the 20 megawatt
15 and say that those alone were sufficient to make the plant
16 "as safe as."

17 What we said was, that all of those sources taken
18 together, and you had to consider all of the sources, gave us
19 the same level of safety as a plant at low power that had
20 qualified diesels.

21 The Licensing Board also found, and we agree, that
22 even ignoring the off-site system, just the 20 megawatt gas
23 turbine and the four EMD diesels alone gave us the same level
24 of safety.

25 COMMISSIONER BERNTHAL: Okay, sorry.

1 MR. ROLFE: Now, I think you ought to focus for
2 a minute, the intervenors have made a great deal about how
3 the Licensing Board didn't listen to their evidence and the
4 proceedings were unfair.

5 But I think that the Board ought to -- the
6 Commission ought to focus on exactly what evidence the inter-
7 venors put before the Licensing Board.

8 There are only three pieces of evidence on safety.
9 Again, they were all from Suffolk County, New York State
10 didn't proffer a single witness on safety.

11 The first one was a panel consisting of Mr. Eley,
12 Mr. Smith, Mr. Minor and Mr. Bridenbough who purported to
13 come in and talk about the EMB diesels and the 20 megawatt
14 gas turbine.

15 The Commission ought to realize that Mr. Eley and
16 Mr. Smith had some marine diesel experience, they had no
17 experience with gas turbines and they knew nothing about EMD
18 diesels, and that is all in the record.

19 Mr. Meyer and Mr. Bridenbough had no experience
20 at all with operating diesels or designing diesels and again
21 didn't know anything about the operating reliability of EMD
22 diesels.

23 Now, what these witnesses tried to do was to come
24 in and talk about the single failure criteria, but on cross-
25 examination they admitted that what they were doing was saying

1 that the EMD diesels by themselves were subject to single
2 failure. And the 20 megawatt turbine by itself was subject
3 to single failures. But they were asked several times on
4 cross-examination -- Mr. Eley, Mr. Smith -- is there any
5 failure of the 20 megawatt gas turbine which would cause
6 a corresponding failure in the EMD diesels and vice versa,
7 and they said, no, they couldn't point to any.

8 So, there is redundancy there. There is no
9 common failure in one power source on site the EMDs, that
10 would incapacitate the 20 megawatt and vice versa.

11 Mr. Palomino's comments in response to
12 Commissioner Asselstine's question about having common fuel
13 lines and common batteries, and common starters and what not,
14 is a little misleading in the context that I think he meant it.

15 What that evidence said was, that the four EMD
16 diesels had a common fuel line. But the four EMD diesels
17 are not supplied from the same fuel line as the 20 megawatt
18 gas turbine. The four EMD diesels had a common battery.

19 And again, remember, any one of those diesels
20 would have been sufficient, all four of them don't need to
21 come up. The four EMD diesels each have their own individual
22 starting sets and they do have two motors. But again, there
23 was no evidence that a failure in one of the starting motors
24 on even one of the EMD diesels would affect any of the others,
25 and the Suffolk County witnesses were asked on cross-examination

1 whether a failure in the starters in the EMDs would affect
2 the 20 megawatt gas turbine, and they said, no.

3 With respect to the control room, which I said
4 Mr. Palomino was referring to the switch gear room, the
5 lines from the EMD diesels and the 20 megawatts did go
6 through a single wall, but unless there were an earthquake,
7 there was no event that would affect that wall, and in an
8 earthquake -- assuming you didn't have a LOCA at the same
9 time, and the staff testified, again without any contradiction
10 and the Board found that it didn't have to postulate on a
11 LOCA and an earthquake at the same time because they were
12 independent events and they were both so remote that it just
13 wasn't a credible event to postulate them both simultaneously.

14 So, absent an earthquake there is no danger to
15 the two supply cables that come from the 20 megawatt and the
16 EMD diesels through the same wall, and LILCO has in place
17 a procedure and some preliminary physical modifications to
18 allow an alternate routing of power from the EMDs around
19 that wall directly to the emergency buses. So, in the event
20 of an earthquake, assuming you didn't have a LOCA, you would
21 have 30 days to get power back and LILCO has a procedure for
22 going around that wall and getting the power.

23 So, that panel of Eley, Smith, Bridenbaugh and
24 Miner didn't point to any lesser element of safety. All they
25 did, again, was try to compare each power source individually

1 with the TDI.

2 LILCO doesn't claim that its EMD diesels can
3 perform up to what the TDIs can do necessary for full power.
4 That's not the issue here. If you have 55 minutes to restore
5 AC power, you don't need to restore in 15 seconds.

6 The second panel Suffolk County -- and I might add,
7 by the way, that all of the evidence of that Eley, Smith,
8 Bridenbaugh, Miler was admitted subject to cross-examination
9 and considered by the Board.

10 The second panel that Suffolk County presented
11 on safety issues was a seismic panel. And there is really
12 no dispute in this record on the seismic capabilities of
13 these machines. While they have not been seismically
14 qualified, the Suffolk County seismic panel said that the
15 20 megawatt gas turbine has been given assurances by its
16 manufacturer that it can likely withstand the SSE at
17 Shoreham. The EMD diesels had undergone a substantial
18 study by some LILCO witnesses and there was really no dis-
19 agreement by the Suffolk County witnesses that showed that
20 they would withstand for the most part the SSE. There might
21 be a soil liquifaction problem at 1.2 gs, but the testimony
22 was, again uncontradicted, by today's method of calculating
23 what the SSE would be, Shoreham's SSE would be 1.3 gs.

24 CHAIRMAN PALLADINO: Mr. Rolfe, the Secretary
25 indicates to me that even with allowance for the inter-

1 ructions that we have made, your time is up.

2 Do you have another sentence or two you want to say?

3 MR. ROLFE: Yes, Commissioner, I would. I would
4 just like to point out that I've not been able to address
5 the public interest aspects. I would point out simply that
6 the bulk of Suffolk County's case on public interest in
7 the region, a great deal of their testimony was excluded on
8 public interest was because it flew flat in the face of the
9 Commission's decision in 83.17 which said that you don't
10 consider the uncertainties attendant to a full power license
11 at low power.

12 So, that's why the Licensing Board didn't let in
13 evidence of decommissioning, costs and things like that.
14 This Commission has already broached that subject, has
15 already decided it. It was not up to the Licensing Board
16 to relitigate that issue. The Licensing Board refused to do
17 so.

18 The other elements of public interest are addressed
19 in our brief.

20 The last thing I would like to say is that the
21 whole due process argument that has been made is nothing but
22 a red herring. What they are saying is that their evidence
23 in certain instances was excluded. Well, if evidence is
24 inadmissible, if it's immaterial or if it's incompetent for
25 other reasons -- and every bit of the evidence that was excluded

1 here was, there is no due process violation in excluding it.
2 Indeed, LILCO would be subject to a denial of its due process
3 rights if improper evidence had been included. It wasn't.
4 The proceedings below were proper, and for that reason this
5 license ought to be granted forthwith.

6 CHAIRMAN PALLADINO: All right, thank you, Mr. Rolfe.

7 I wanted to ask you a couple of questions --

8 COMMISSIONER BERNTHAL: I'm sorry, I'd like to have
9 him repeat one sentence. I didn't understand the comment
10 about if under current methods of calculating safe shutdown
11 earthquake -- I don't know what you were saying -- would be
12 qualified at 1.3g. What's that? I mean, that's extra-
13 ordinary. Would you tell me what 1.3 --

14 MR. ROLFE: That's .13 gs.

15 COMMISSIONER BERNTHAL: Point-one-three. Oh, I'm
16 sorry. I misunderstood.

17 MR. ROLFE: I may have misstated it, I apologize.

18 CHAIRMAN PALLADINO: Okay.

19 COMMISSIONER ASSELSTINE: That's still higher than
20 the SSE, isn't it?

21 MR. ROLFE: The SSE for Shoreham now is set at
22 .2.

23 COMMISSIONER ASSELSTINE: Point-two, okay.

24 CHAIRMAN PALLADINO: Mr. Rolfe, in your earlier
25 remarks you said that there was nothing that required you to

1 address the question "as safe as," and I'm reading from the
2 order of May 16, 1984 by the Commission. And the second point
3 is, the one that you have addressed is the basis for
4 concluding that power levels for which -- it seeks authorization
5 to operate, operation would be as safe as under the conditions
6 proposed by it as operation would have been with fully
7 qualified on-site AC power source.

8 So, the Commission did ask you to address the
9 question "as safe as."

10 MR. ROLFE: Yes, Mr. Chairman. I didn't mean to
11 imply the Commission didn't ask us to address it. What I
12 meant to say was that that is not the legal standard. The
13 legal standard is what your regulations say. "As safe as"
14 was what LILCO said it would prove, and so therefore I don't
15 think you can place any particular significance on the words
16 themselves.

17 In other words, the concept is there and we proved
18 that the operation would be as safe as.

19 CHAIRMAN PALLADINO: I wasn't admitting as to what
20 you proved or didn't prove.

21 COMMISSIONER BERNTHAL: I think that was the same
22 question I asked earlier, Joe. He is just saying that the
23 Commission's words in an order are not law.

24 CHAIRMAN PALLADINO: Well --

25 COMMISSIONER ASSELSTINE: It's a little different

1 than that.

2 MR. ROLFE: I don't mean to say that at all. But
3 if you read your order, you said we should address our basis.

4 COMMISSIONER BERNTHAL: I know. Yes, I know.

5 CHAIRMAN PALLADINO: Let me ask a couple other
6 questions, and I'll try not to be too long.

7 Given that issuance of a low power license is not
8 involved in a commitment to grant a full power license, why
9 is it proper for the Commission to consider the claim that
10 the exemption will result in commercial operation three months
11 earlier?

12 I think that was in some of your briefs.

13 MR. ROLFE: Mr. Chairman, the reason is because
14 this Commission's decision in CLI 83-17, there you said that
15 in terms of looking at a low power license the Commission or
16 the Licensing Boards would not consider the ultimate full power
17 issues which had not been decided.

18 So, what you said was that low power licenses could
19 be issued without resolving the contested full power issue
20 such as emergency planning.

21 Now, given that, it was not proper for the -- again,
22 keep in mind that had LILCO had TDI diesels or qualified
23 diesels, it would be entitled to a low power license. The
24 question here is not whether low power license ought to be
25 allowed now, which is what Suffolk County and New York State

1 wanted to litigate and what the whole import of their evidence
2 about decommissioning costs and what not, it's whether it ought
3 to be allowed earlier than qualification of the TDI diesels.

4 Low power testing in itself, as the Commission held
5 in CLI 84-9, dealing with the NEPA issue, is not an alternative
6 to full power testing. It's only a step along the way, so that
7 any benefits from low power testing have to necessarily
8 relate to full power operation.

9 CHAIRMAN PALLADINO: Well, I have a problem with
10 the logic in the argument because you use as one of your points
11 that the commercial operation could come three months earlier.

12 Now, if you had used as your argument that you
13 deserve a prompt answer, maybe that would have been a different
14 argument.

15 Well, let me ask you, what is the most important
16 equity that favors grant of the exemption?

17 MR. ROLFE: I think of several, rather than to
18 try to pull the most important one. The plant is complete.
19 It is ready to operate. It can operate safely, and that was
20 one of the public or the exigent circumstances criterion that
21 you asked, is there public interest in the safety issue.

22 Well, there isn't because we have proved it can
23 operate safely. LILCO has undergone very long, lengthy,
24 expensive licensing proceedings. Again, there is no intimation
25 here that these proceedings have been improper. But this plant

1 has been subjected to extensive scrutiny, probably more
2 scrutiny than any other nuclear plant in the history of this
3 country. It has been proved safe to operate through all that
4 scrutiny. LILCO has personnel at its plant who are employed
5 there, who are ready to operate the plant.

6 For all of those reasons, LILCO is entitled to
7 a license under the regulations. I think, to answer your
8 question, the most important thing from a public-interest
9 standpoint here is safety. And once you determine that the
10 plant can operate safely here and that the plant is complete
11 and it's ready to go, and that training benefits can be
12 achieved by an extra period for low power, that possibly
13 full power operation might be advanced by concluding low
14 power testing now. All of those things weigh towards granting
15 of this exemption.

16 CHAIRMAN PALLADINO: Well, those are reasons why
17 you would want one, and I'm not quite sure that they are all
18 that well organized -- maybe it's in my mind to support an
19 equity position.

20 Well, let me ask you another one. Why should the
21 Commission not adopt the State and Suffolk County view that
22 we should defer to the elected officials on issues of public
23 interest?

24 MR. ROLFE: Mr. Chairman, public officials have a
25 place in these proceedings. But public officials are not

1 above the law. They are given standing to participate in
2 these proceedings. They have had the opportunity to participate
3 in this particular proceeding almost ad nauseam, probably much
4 more opportunity than has been given public officials or
5 any party in most other licensing proceedings.

6 But nowhere are they afforded by law, or by
7 regulation, or by precedent, the opportunity to be above the
8 record. They have the obligation to present evidence on the
9 record to be considered by the legal standards just like any
10 other party, and if they don't do that and if they don't
11 comply with the legal standard, and if they don't submit
12 admissible evidence or indeed any evidence on a lot of things,
13 they don't have the right to come in here and ask you to
14 consider things which are outside of the record as they have
15 done, to consider reasons which are beyond this Commission's
16 decision and directly contrary to this Commission's precedent.

17 Nowhere are they above the law. So, I don't say
18 that they aren't entitled to be heard and to be listened to
19 carefully, but they still have to do that within the confines
20 of the procedures and the law established by the Commission.

21 CHAIRMAN PALLADINO: You are implying they were
22 above the law. I was thinking their assertions that, "Look,
23 we have expressed the public interest on behalf of the public
24 and you, the Commission, said you were going to give that great
25 weight." And I'm saying, "Well, why shouldn't we?"

1 MR. ROLFE: Because, Mr. Chairman, they have the
2 obligation to produce evidence on facts. It is then the
3 function of the Licensing Board, ultimately this Commission,
4 to review that evidence and determine whether it is in the
5 public interest.

6 If the public interest is going to be whatever
7 New York State and Suffolk County say it is, then we can all
8 go home. There is no need for a Commission.

9 CHAIRMAN PALLADINO: Okay, fine. Let me see if
10 my colleagues have questions. Tom?

11 COMMISSIONER ASSELSTINE: I had just a couple, and
12 let me start with the last one that the Chairman raised.

13 Why isn't Diablo Canyon a precedent in this case?
14 I mean, my recollection is -- and I don't look back at it --
15 that the State of California didn't introduce a great deal of
16 evidence on the public-interest kind of determination and yet,
17 the Commission said in that case, "When it comes to that kind
18 of a public interest finding it may not be dispositive, but
19 we are going to give great weight to the views of the State and
20 the views of a Governor of a State."

21 Why isn't the Commission bound by that view? Why
22 isn't Mr. Brown right on that?

23 MR. ROLFE: Commissioner Asselstine, I think the
24 answer to that is -- there are a couple of answers. First of
25 all, in Diablo Canyon you had a situation where you had a

1 record being looked at on appeal. At one point, the State
 2 had opposed that plant, I believe. It then changed its view.
 3 The Commission merely came in and said, "You ought to listen
 4 to the State in weighing the equities."

5 But there, I assume, was evidence to support what
 6 the State wanted to do. Indeed, if the State wanted that
 7 plant open, the applicant had compiled a full record there.
 8 It was not a case where the State was coming in with something
 9 directly contrary to the applicant and directly contrary to
 10 what the facts in the record showed.

11 In other words, there was no reason for the State
 12 itself to present additional evidence to what the applicant
 13 already had in the record there. So, that's a totally different
 14 situation to which you had here where you have LILCO presenting
 15 evidence which was largely uncontradicted, and then you had
 16 the intervenors coming in and really not making a record to
 17 support their public interest considerations within the law
 18 as defined by the regulations and precedent.

19 COMMISSIONER ASSELSTINE: Let me go back to the
 20 standard for a minute. You say the right standard really is
 21 in essence a no undue risk standard. That's what's in the
 22 regulations, that's the way it's been interpreted in other
 23 cases, that's the right safety test. Am I right on that?

24 MR. ROLFE: That's in the regulation, we are
 25 being no danger to life and property; yes, sir.

1 COMMISSIONER ASSELSTINE: Is that the test that
2 the Board applied?

3 MR. ROLFE: No, that's not the test that the
4 Board applied.

5 COMMISSIONER ASSELSTINE: What did the Board apply?

6 MR. ROLFE: The Board applied the "as safe as"
7 test. I merely say ---

8 (Laughter)

9 MR. ROLFE: -- it applied it and it applied it
10 properly. But I merely point out that I don't think that
11 "as safe as" is a legal standard. The Board found that there
12 would be no danger to life and property because operation
13 here would be as safe as low power operation at a plant with
14 qualified diesels.

15 COMMISSIONER ASSELSTINE: Let me ask you one of
16 the questions, too, in terms of the need for an exemption.
17 You didn't need an exemption for fuel loading because diesel
18 generators weren't needed, an emergency on-site power supply.

19 If you interpret the kind of function -- if you
20 provide the functional interpretation that the Board had
21 applied in this case, that is at low power levels you need
22 emergency power supplies within a certain period of time to
23 avoid fuel damage, in what specific respects do you fail to
24 meet GDC-17 under that kind of an interpretation, and why do
25 you need an exemption?

1 MR. ROLFE: I have to refer back to the
2 Commission's order of May 16. You recall --

3 COMMISSIONER ASSELSTINE: Where we said you
4 needed an exemption.

5 MR. ROLFE: Yes. You recall, it was LILCO's
6 initial position that it did not need an exemption. If you
7 are asking me what this system doesn't have that a system
8 designed to comply with GDC-17 at full power does have, I
9 could list off some things, but I don't think they are
10 pertinent to the low power inquiry.

11 COMMISSIONER ASSELSTINE: I guess what I'm getting
12 at is the functionality kind of a test, in essence back to
13 the point where you are saying, "Well, applying that test is
14 the functional equivalent of your original position."

15 MR. ROLFE: I think the answer is that our
16 initial position was applying that functional test, we did not
17 need an exemption. You said in your order that we needed
18 an exemption. We meet all the functional requirements in
19 GDC-17. That's how we showed that the plant would be as safe
20 as.

21 COMMISSIONER ASSELSTINE: I want to get to the
22 benefits side of this and the exigent circumstances. What can
23 you do at five percent power level that you can't do at
24 cold criticality, and is Mr. Brown accurately reflecting the
25 record when he said that what you are talking about is 25 to

1 39 days at testing, basically, at the outside.

2 MR. LEONARD: Commissioner Asselstine, may I
3 address this one?

4 COMMISSIONER ASSELSTINE: Sure.

5 MR. LEONARD: Cold criticality testing basically
6 tests the core physics.

7 COMMISSIONER ROBERTS: I'm sorry, sir. Basically?

8 MR. LEONARD: Cold criticality testing basically
9 tests the core physics, that the core, you know, is performing
10 as specified.

11 When you bring steam down the pipes at five
12 percent, you can test every component of that plant except
13 the main turbine. We will be checking out the off-gas system;
14 high pressure coolant injection; reactor core injection
15 cooling; all the rad waste systems, everything.

16 It's conceivable we are going to look very, very
17 carefully to see if we could possibly spin the turbine. I
18 don't think we can with that small amount of steam. I don't
19 think we can overcome its inertia.

20 That's one of the things. It's very critical for
21 us because it allows us, again, to get a leg on further
22 power testing, we'll find out if anything needs to be adjusted,
23 any major repairs have to occur. It's initiating a test
24 program that is very vital to finding out how the plant is
25 going to perform.

1 Second, and this is intangible, but based on my
 2 Navy career I can state this categorically, the effect it will
 3 have on the operators, the people there, will be overwhelmingly
 4 beneficial. You do not want to lose from the Long Island
 5 Lighting Company the people that have built and tested that
 6 plant.

7 I have only been with LILCO for nine months, but
 8 I found out you've got a young group of intelligent, aggressive
 9 people there. The operators are trained well. They have
 10 participated in the start-up testing of that plant. They
 11 know the systems.

12 You want to keep them. To keep them, you've got
 13 to show some semblance of face that this thing is moving, and I
 14 think that's very important in the long run for all really
 15 interested in reactor safety.

16 COMMISSIONER ASSELSTINE: Except what you say about
 17 the testing of systems, the reason I asked the question, I
 18 have asked this question periodically as part of immediate
 19 effectiveness reviews for boiling water reactors over the past
 20 couple of years. And the answer I have always gotten from
 21 the staff is that while you can test systems it's very limited
 22 at low power levels for boiling water reactors simply because
 23 there are a number of systems in terms of components and
 24 equipment that don't trigger in at five percent, and it
 25 isn't until you get up to 20 percent or above that you can really

1 do extensive testing.

2 And also typically the testing program at low
3 power operation for boiling water reactors once fuel is
4 loaded, it tends to be of very limited duration. Typically
5 those plants are back to us for full power licenses in a very
6 short period of time, within a month.

7 MR. LEONARD: That could be true, it could be a
8 short duration. But I do think it's very important.

9 COMMISSIONER ASSELSTINE: The reason I asked that
10 question is, it's obvious that emergency planning is an open
11 issue in this proceeding and one that is not likely to be
12 resolved at least within the next month, two or three.

13 Given the fact that the Commission cannot issue a
14 full power operating license until that decision is resolved
15 and given the limited duration in which low power testing
16 can be done, what is the real benefit of doing that testing
17 now if there is any, as opposed to a few months from now,
18 assuming that the Commission -- there is no way that the
19 Commission is going to be issuing a full power license until
20 the emergency planning issue is resolved, which is likely to
21 take several more months.

22 MR. LEONARD: Well, I don't take quite as gloomy
23 a view of emergency planning as you do, Commissioner Asselstine.
24 Maybe I'm the incurable optimist. But I do think we are
25 moving on fronts to demonstrate that emergency planning is

1 possible.

2 COMMISSIONER ASSELSTINE: But I thought you all had
3 asked that hearings be re-opened, haven't you?

4 MR. IRWIN: I can address that.

5 There is a formal requirement laid down by the
6 Licensing Board that we submit information respecting the
7 designation of a reception center, namely the Nassau
8 Colloseum, into the emergency plan. It's not a full-scale
9 re-opening of issues relating to relocation centers at all.

10 It's basically like one last piece of a jigsaw
11 puzzle which we couldn't put in because every time we thought
12 we had an emergency relocation center, we found that Suffolk
13 County or New York State would pull it out from underneath us.

14 We finally got a government that would cooperate
15 with us. We have an imminently satisfactory facility. But the
16 Licensing Board said we had to use the formal procedure of
17 re-opening the record to put it in.

18 We have filed affidavits which put that information
19 in the record. Responses on the merits are due from the
20 other parties on February 18. We have every expectation that
21 that issue will be closed forthwith unless there is something
22 which I frankly don't expect that substantially contradicts
23 the prima facie case we have put in.

24 In short, I think that record is closed for all
25 practical purposes. I do not understand that the replacement

1 of Chairman Lawrenson by a new chairman earlier this week
2 is to have any effect on the projected March issuance of an
3 emergency planning decision.

4 As you know, we have requested an exercise be
5 held. We are doing everything in our power to get that planning
6 process underway. We have every reason to believe that will
7 be a successful exercise, whatever organizations participate
8 in it with us.

9 So, I share some of Mr. Leonard's enthusiasm and
10 optimism, having lived with this issue for a year.

11 Let me also add just by way of clarification on
12 the New York State litigations which Mr. Brown and Mr.
13 Palomino referred to.

14 There was a suggestion that if the decision is
15 adverse to LILCO, that is disposed. That is untrue for
16 two reasons. First of all, it is a base-line trial court
17 decision and, as you all know, there are two other levels of
18 courts in New York State, followed by a U.S. Supreme Court
19 review.

20 Second, the only issue before the New York State
21 court right now on the merits is an issue of New York State
22 law, whether that which LILCO is trying to do right now is
23 permitted by New York State law. The more fundamental
24 constitutional issue of Federal preemption is not reached at
25 this moment and will not be reached unless the State Court

1 rules adversely to us on the issue of State law.

2 So in short, if we win, it's over. But if we lose,
3 there is still a much more important federal question.

4 COMMISSIONER ASSELSTINE: But given all of that,
5 given the exercise, the potential for hearings on the
6 results of the exercise, isn't it at least fair to say that
7 there is substantial uncertainty about when that issue is
8 going to be resolved, and even if it's within the next few
9 months, aren't the real benefits from the immediate low power
10 operation somewhat questionable?

11 MR. IRWIN: I think the immediate benefits are
12 exactly what the immediate benefits are, as Mr. Leonard has
13 indicated. I think the question really is whether the
14 Commission should deny LILCO the opportunity to realize
15 those benefits if we satisfy the requirements for them.

16 We are doing everything in our power to deal with
17 the very difficult issues surrounding emergency planning, and
18 those are not before this Commission today in any substantive
19 sense. But I think -- I really think it's important to turn
20 that question around because if the Commission believes that
21 we have satisfied the requirements, then I think we --

22 COMMISSIONER ASSELSTINE: Well, except that one
23 of those requirements is demonstrating exigent circumstances
24 which, it seems to me, requires some affirmative showing that
25 there is a valid reason for granting an exemption in this case.

1 And it's more than simply satisfying the applicable safety
2 tests.

3 MR. ROLFE: Commissioner, in your order you laid
4 out a number of considerations which were applicable to
5 exigent circumstances. I think if you go through those and
6 go through the Licensing Board decision, you will see that
7 Judge Miller and the Licensing Board addressed each one of
8 those and made findings that each one of those weighed in
9 favor of the granting of this exemption.

10 COMMISSIONER ASSELSTINE: Well, I wanted to talk
11 to you about a couple more of those, and one of them is the
12 significance of the safety question involved. And the way I
13 read the Board's decision it seems to be that, well, since
14 we have determined that they meet the safety test -- whether
15 it's no undue risk or whatever -- that that is dispositive
16 of the question of how significant are the safety questions
17 involved.

18 (Commissioner Bernthal leaves meeting.)

19 COMMISSIONER ASSELSTINE: And I wonder whether
20 that's the way you read the significance of the safety questions
21 test, or is it how significant is this question of emergency
22 power supplies and GDC-17 requirements.

23 MR. ROLFE: I think you have to read the hybrid
24 of those two. In other words, GDC-17 is obviously important
25 to have the backup power supply. But I also think that you

1 can't answer that question without looking at the fact and
2 the evidence here that at low power you have a substantially
3 increased time to supply AC power, and then the Licensing
4 Board went a step further and said, it's obvious from the
5 evidence that that AC power can be provided.

6 So that from a public safety standpoint it's not
7 a critical issue.

8 COMMISSIONER ASSELSTINE: I wanted to ask you
9 about the stage of life of the facility as well, that test.
10 And I wonder if you found anything in the Commission's
11 precedence that would indicate that what people had in mind
12 there was this notion that, "Well, the facility is basically
13 complete," as opposed to the notion that, "You might want
14 to consider granting an exemption to a particular plant if
15 it's in the latter stages of the life of that plant and there
16 is a very limited remaining useful life of the facility," and
17 that that would be a factor in terms of granting exemptions.

18 What is the basis, and are there any Commission
19 precedents that point in the direction of, you would grant
20 an exemption because the facility is otherwise essentially
21 complete?

22 MR. ROLFE: Commissioner, I don't think that there
23 are any Commission precedents which have arisen in quite
24 this context. But I have to think that since the Commission
25 set out NCLI-84-8, that as an equity to be weighed, that it

1 had to have this case in mind when it drafted the order, and
2 obviously it couldn't have been thinking about --

3 COMMISSIONER ASSELSTINE: You are thinking too much.

4 CHAIRMAN PALLADINO: Do you have more?

5 COMMISSIONER ASSELSTINE: One last one.

6 CHAIRMAN PALLADINO: Okay.

7 (Commissioner Bernthal rejoins meeting.)

8 COMMISSIONER ASSELSTINE: I wish you could try and
9 explain to me a little more why the length and complexity
10 of the proceeding is the basis for granting an exemption to
11 relax the safety requirement. I have a little trouble with
12 that one.

13 MR. ROLFE: It's a basis for two reasons, and keep
14 in mind that it's not the only basis. If that were the
15 only thing that the Licensing Board had to go on, then maybe
16 we would have to look at it more carefully.

17 But given the fact that these licensing procedures
18 have been lengthy, the plant has been scrutinized very, very
19 carefully and at great length, so we have great assurance of
20 safety. It has been costly, and the Commission ordered that
21 the Licensing Board look at the financial and economic hard-
22 ships test.

23 It's a fairnes equity. The plant has gone through
24 all of this, and it has come through all of this with a clean
25 bill of health, a clean safety record. It's entitled, along

1 with all the other equities, to a license.

2 CHAIRMAN PALLADINO: Okay.

3 COMMISSIONER BERNTHAL: I have one problem with
4 the statement you just made of relaxing the safety -- and I
5 thought the Board considered that issue. I thought that's
6 what we are talking about here. Am I right or wrong?

7 COMMISSIONER ASSELSTINE: Well, you are granting
8 an exemption and the Board said that the margin of safety is
9 lower.

10 MR. ROLFE: May I respond to that one moment?
11 This whole business about the margin --

12 COMMISSIONER BERNTHAL: I'm talking about the
13 "as safe as."

14 MR. ROLFE: This whole business about the margin
15 of safety being lower is, I think, taken out of context. What
16 the Board said is that if you got power back within 15 seconds
17 as the TDIs were designed to do for full power, your peak
18 cladding temperature would have been 550 degrees.

19 If you took the longest amount of time which any
20 of the alternate power sources at Shoreham would take in the
21 low power configuration, and that's 30 minutes for the EMD
22 diesel, your peak cladding temperature would be 1086 degrees.
23 It said in either case you are well below the 2200 degree
24 limit set by the Commission. And if you look at the Licensing
25 Board's decision, if you look on page 78, or down one of the

1 findings there, the Licensing Board said that there is this
2 difference in peak cladding temperature, but it's irrelevant
3 given all the other safety assurances.

4 COMMISSIONER BERNTHAL: Yes, I just wanted to
5 clear the record there because, again, I think that what the
6 public is most interested of all in this process here is whether
7 the plant is safe to operate under five percent power. And it
8 seems to me that that issue has been considered fairly
9 carefully by the Board and is reasonably well settled.

10 Whether all of the equities are met and whether
11 some of the other threshold criteria are met to grant an
12 exemption to proceed in lieu of some of the other unfinished
13 business and issues is a separate question.

14 But I don't think that we are talking about public
15 health and safety being at risk in the plant in its current
16 configuration.

17 CHAIRMAN PALLADINO: Okay, thank you. Lando?

18 COMMISSIONER ZECH: No.

19 CHAIRMAN PALLADINO: Well, thank you, gentlemen.

20 We will now ask that, I guess, Ed Reis representing the staff
21 come forward.

22 I hate to suggest a recess because we'd like to get
23 finished, but I certainly need one. I'm going to declare at
24 least five minutes while those gentlemen get ready.

25 (Whereupon, at 4:45 p.m. a short recess was taken.)

1 CHAIRMAN PALLADINO: Will you again take your
2 seats? We'll now turn to the presentation by the staff.

3 MR. REIS: Commissioners, I'm Edwin Reis, an
4 attorney with the staff of the Nuclear Regulatory Commission.
5 On my left is Ralph Caruso, the project manager for this
6 plant. On my right is another attorney with the staff, Robert
7 Perlis.

8 I want to start by getting back to the Commission's
9 test set out in 84-8 itself, the grant of an exemption here.
10 There has been a lot of talk and I think we have to go back
11 to the words itself used by the Commission -- whether at
12 the power levels for which it seeks authorization to operate,
13 operation would be as safe as under the conditions proposed
14 by it as operation would have been with a fully qualified
15 AC power source.

16 When we look at those words, we see some things
17 that we don't have "as safe as" without any reference. The
18 phrase "as safe as" without a reference, without talking
19 about as safe as what doesn't make any sense.

20 What we do see are three conditions: at the power
21 level sought; under the conditions proposed by the applicant,
22 and as operations would have been with a fully-qualified AC
23 power source -- not with TDI diesels, not with what LILCO
24 may have proposed originally, but with a fully-qualified
25 AC power source that meets the criterion of GDC-17.

1 Now, let's look at for a minute what is in GDC-17.
2 And I'm sure the Commission is aware of this, but I just want
3 to reemphasize it.

4 The first part of GDC-17 talks about operation. It
5 says you have to have sufficient capacity and capability to
6 meet fuel design limits, conditions, and to meet the conditions
7 of the reactor coolant pressure boundary, make sure they are
8 not exceeded.

9 Secondly it says, sufficient capacity and capability
10 for postulated accidents -- and that's "postulated accidents" --
11 make sure the core is cool; containment integrity is maintained,
12 and other vital functions maintained.

13 Now, when we look at the evidence and the staff's
14 analysis, that's exactly what we did. We looked at those
15 things. We didn't look at a hypothetical and just juggle
16 numbers to find out in a PRA. We said, "What were the
17 conditions that would be meant?"

18 We went through the accident sequence and we
19 said at the power levels for which authorization is sought, the
20 five-percent power level. And under the conditions proposed
21 by the applicant, when would this be used? How it would be
22 used, what limitations he put on his operation, and what would
23 a normally qualified AC power source as required by GDC-17
24 give. And we compared those two.

25 And it was on that basis that the staff concluded that

1 it was "as safe as."

2 COMMISSIONER BERNTHAL: Let me ask a question. Are
3 you suggesting, then, that there is a fully qualified on-site
4 power system -- just to get very specific for a moment, since
5 the essential difference we have been hearing is the difference
6 between 1000 degrees and 500 degrees for which the temperature
7 would in fact rise to 1000 degrees in an accident scenario?

8 MR. REIS: No, I am not saying that. If the TDI
9 diesels worked, if we could rely on the TDI diesels, in the
10 time frames involved -- and I think Mr. Caruso could speak more
11 to it -- it would rise as much. But it would be substantially
12 below the safety criteria in the regulations.

13 COMMISSIONER BERNTHAL: No, I don't disagree with
14 that. I realize we are not talking about an actual issue of
15 safety here. But when you are around this place long enough,
16 you start looking at words very carefully because we are
17 surrounded by lawyers.

18 It sounded like you were saying that since they
19 were not talking necessarily about their own fully qualified
20 on-site power system, that you were trying to judge it against
21 the standard of any fully qualified on-site AC power system.
22 Am I missing --

23 MR. REIS: Well, what I am saying is, the words
24 used by the Commission were that you judge it against a fully
25 qualified AC power system. That's true. But not necessarily

1 the TDI.

2 COMMISSIONER BERNTHAL: Exactly.

3 MR. REIS: Otherwise you would be penalizing, as
4 we point out in our filing to the Commission, we would be
5 penalizing an applicant for coming in above the regulation.

6 COMMISSIONER BERNTHAL: Well, let me leave
7 temperatures out, maybe that's the wrong issue to pick on.
8 Are you saying, then, that the system as it sits there is
9 indeed as safe as, as good as other fully qualified on-site
10 AC power systems?

11 MR. REIS: First of all, we have not analyzed
12 this as an on-site system. We said this was an alternate
13 system. We said it was a substitute for an on-site system,
14 I want to make that clear.

15 COMMISSIONER BERNTHAL: I understand, but "as
16 safe as" is the question.

17 MR. REIS: We have said it is as safe as, and the
18 method we used was looking at the analysis in the Standard
19 Review Plan in Chapter 15, and the accident sequences there,
20 we saw what could happen and where the power could be gotten
21 back within times available at five percent.

22 On that basis, we decided it was "as safe as."
23 One of our witnesses, Wayne Hodges, at the hearing used the
24 example of driving on the inside lane or outside lane of a
25 bridge. You might theoretically think that one is less safe

1 than the other but really, one is "as safe" as the other.

2 When we split hairs fine enough, we might get to
3 some point where there can be some distinction made.

4 COMMISSIONER BERNTHAL: I think the answer to
5 my question is, yes?

6 MR. REIS: Yes, that it is "as safe as."

7 COMMISSIONER BERNTHAL: As other qualified AC
8 power systems might be.

9 MR. REIS: Yes, yes.

10 COMMISSIONER BERNTHAL: Or as a plant with A
11 fully qualified AC power system.

12 CHAIRMAN PALLADINO: I'd prefer to use those
13 words.

14 COMMISSIONER BERNTHAL: That's right, that's right.

15 CHAIRMAN PALLADINO: The meaning of the other on.
16 Why don't you go ahead then, is that okay?

17 COMMISSIONER BERNTHAL: Yes, I'm sorry.

18 MR. REIS: Yes. The staff's SER itself reflects
19 our conclusions on the safety of the system and the system
20 as a whole, and I think it gets to your question, Commissioner
21 Bernthal, particularly as to our safety concerns with the
22 system. And it answers those questions.

23 I would like to leave "as safe as" because I
24 think that sums it up. I don't think there is much more to it,
25 to the question, and go to exigent circumstances. And what we

1 have there is again words of the Board. And we take exigent
2 circumstances and I presume it must only come from the words,
3 "public interest" in 50.12(a) because the words "exigent
4 circumstances" themselves are not used in the regulations in
5 50.12(a), but the words "public interest."

6 And what I take it to be -- and I may be misreading
7 the Board -- I mean the Commission. But as I understand the
8 Commission, exigent circumstances meant public interest.
9 The Commission itself said it is a matter of weighing
10 equities, and it pointed to certain specific equities that
11 should be weighed.

12 (Commissioner Asselstine joins meeting.)

13 MR. REIS: It talked about the stage of the facility
14 like the financial or economic hardships, internal inconsistency
15 and regulations, applicant's good-faith efforts to meet the
16 regulations, public interest in adhering to regulation, and
17 safety significant of the issues involved.

18 And it was in those terms, plus a couple of others,
19 and we didn't agree completely with the Board. We thought
20 they misconsidered some. We said, on balance the equities
21 favor the issuance of the license. We said that some things
22 they considered, they considered wrongly. We did not go
23 completely with the Board or with the applicant.

24 We said on balance they had reached the right
25 decision. And we looked at each of these things and we considered

1 each of these things as the Board did below. It focused on
2 what the Commission said it should focus on in the opinion that
3 started the proceeding, in 84-8.

4 As to the stage of the facility life. We again
5 believe how near licensing that is. I know that the prior
6 questions propounded by the Board were whether it only had
7 a few years left. We think in the context of this proceeding
8 it was, how much does it need. Is this something needed to
9 get start-up, start, the tests start up here.

10 And again, as the Board found, we agreed with that.

11 On financial and economic hardships. We looked
12 at that in the terms of what the Commission had said before
13 twice, twice before, in 83-17 and 84-9, that a low power
14 license does not depend upon the likelihood of a full power
15 license. That it should be looked at separately. And we
16 said in those cases that we should look at it without
17 considering whether or not there will eventually be start-up.
18 And we tried to apply, staff tried to apply the guidance
19 given by the Commission.

20 On internal inconsistent regulations, we had
21 previously said we had to synthesize our regulations before
22 you and read them together, and you had rejected that when we
23 were here before you about a year ago on that.

24 So, we said the Commission has told us there were
25 no inconsistent regulations.

1 On the applicant's good-faith efforts to comply,
2 we supported the applicant. We said they had made every effort
3 to comply and to qualify proper on-site for AC power sources,
4 that they have taken actions to qualify the TDI diesels after
5 they learned of the problems, and they have taken actions
6 to bring the -- there as another on-site power source.

7 We differ -- although there may have been some
8 negligence -- and what we think the county is talking about
9 is negligence rather than a good-faith effort to comply -- we
10 figure we would say there was a good-faith effort to comply
11 by LILCO.

12 As far as the public interest in adhering to
13 regulations here -- I'm sorry. I'll let Mr. Perlis address
14 that point.

15 MR. PERLIS: Well, in terms of adherence to the
16 public interest, the public interest in adhering to
17 Commission regulations, the staff does see a general public
18 interest in meeting Commission regulations and they are
19 following those regulations.

20 I think one has to look at the proposal here,
21 though. You are talking about a very limited time exemption.
22 The utility is not asking for an exemption at full power and,
23 indeed, there is every indication that they will either meet
24 GDC-17 at full power or the staff would not support a full
25 power license.

1 So, under those circumstances when you are talking
2 about a limited duration exemption without safety significance,
3 as we believe is shown here, we don't think there is an over-
4 riding public interest in adherence to the regulations in
5 this case.

6 MR. REIS: Now, going to the safety significance
7 of the issues here, there is no question that every one of
8 our general design criteria are of safety significance. We
9 have to also look at the power levels here and the fact that
10 the staff has concluded that with operations with the alternate
11 power system is as safe as operation otherwise would be.

12 In weighing all these exigent circumstances, these
13 equities, these public interest matters the Commission
14 outlined should be looked at. We found that they met the test
15 of exigent circumstances, and in that sense we support the
16 order.

17 CHAIRMAN PALLADINO: Does that conclude your
18 presentation?

19 MR. REIS: That concludes the staff's presentation.

20 CHAIRMAN PALLADINO: All right. I am going to ask
21 you two questions -- I have decided in view of the late hour
22 and maybe we'll even get enough answers on some of the
23 others.

24 Has Shoreham been treated differently from Grand
25 Gulf and Catawba on low power operation without fully qualified

1 diesels, and if so, how should this factor weigh in the
2 exigent circumstance question?

3 MR. REIS: I think the question of how that weighs
4 in the exigent circumstances before the Commission, I think
5 that's a policy question. Certainly, the Commission in
6 SECY Paper 84-290, issued on July 27, 1984, said that no matter
7 what was done in other plants in looking at exigent circumstances,
8 an exemption was there. We should continue to apply the test
9 that the Commission had set out in 84-8 on that plant, and
10 the staff followed that direction.

11 CHAIRMAN PALLADINO: Well, let's see, what did we
12 do different in the other two plants than we did here?

13 COMMISSIONER ASSELSTINE: The others were not
14 issued exemptions, as I recall.

15 MR. REIS: I am going to let the project manager
16 answer that.

17 MR. CARUSO: I'm not intimately familiar with the
18 details of the Catawba and the Grand Gulf cases, but in the
19 case of Grand Gulf they already did have a five-percent license
20 when they issue of the TDI diesel generators arose, and the
21 staff concluded that on an interim basis it was acceptable to
22 continue operation with those TDI diesel generators because
23 there were in the case of Grand Gulf additional -- there was an
24 additional EMD diesel generator at Grand Gulf powering a
25 separate train emergency core cooling equipment. And considering

1 that and considering the fact that the Grand Gulf diesels were
2 different diesels than the Shoreham diesels, the staff
3 concluded that Grand Gulf did not need an exemption from the
4 general design criteria.

5 In the case of Catawba, I'm not sure but I think
6 that we did grant an exemption for Catawba.

7 MR. PERLIS: If I could add to that. My recollection
8 is that an exemption was granted for Catawba. There is
9 a supplemental SER in which the staff addressed the exigent
10 circumstances that were set out in 84-8 to the Catawba facility
11 in granting that exemption.

12 COMMISSIONER ASSELSTINE: Okay.

13 CHAIRMAN PALLADINO: Let me ask one other question
14 and then turn it over to my colleagues.

15 What's the staff position on whether the alternate
16 system is vital equipment in accordance with Part 75.21?

17 MR. REIS: We initially said before the Licensing
18 Board that that -- the question that there was a proper
19 contention raised on whether it was vital equipment within
20 the context of 10 CFR Section 73.2, and the definitions
21 therein.

22 The Board found that it wasn't vital equipment on
23 the basis that it was unlikely that you would have a safeguards
24 incident at the same time as you would need the diesel within
25 any reasonable period of time, in other words, a LOCA happening.

1 The staff position now is that the Board's decision,
2 although the staff thought it might be a proper subject to
3 litigate, the staff now feels that the Board was not wrong,
4 that it certainly was within its discretion to reject it
5 on the ground that it was quite unlikely to be happening. In
6 other words, you need a safeguards incident at the same
7 time as a loss of coolant accident.

8 MR. PERLIS: If I can add to that. We don't
9 disagree with the factual premise the Board made in
10 rejecting the contention.

11 It's also well to point out that the licensee has
12 subsequently agreed to vitalize the EMDs, which was the staff's
13 original position, and that resolved our concerns here
14 respective to the Board's action.

15 CHAIRMAN PALLADINO: Is that all that it would
16 take to make a final -- did you say to vitalize it?

17 MR. PERLIS: The staff believes that security
18 measures the applicant took put the EMDs with the equivalent
19 of vitalization, yes.

20 MR. REIS: To say they are vitalized meant to
21 apply safeguard assurance to this equipment, and they did.
22 They followed the recommendation of the Safeguards Office
23 of the staff.

24 CHAIRMAN PALLADINO: Are you saying that they
25 finally put the alternate system in the same category as

1 vital equipment?

2 MR. CARUSO: They did not specifically list the
3 EMD diesels in the security plan as vital equipment, but they
4 took the steps necessary to protect those EMD diesels that
5 they would if that equipment were formally designated as
6 vital equipment.

7 CHAIRMAN PALLADINO: Okay, let me think about that
8 a little.

9 (Laughter)

10 CHAIRMAN PALLADINO: Tom, do you have any questions?
11 Jim?

12 COMMISSIONER ASSELSTINE: I had just a couple.

13 Let me go back to my questions to the licensee
14 about what they can do at five percent power levels. The
15 licensee described some testing. How much of that testing
16 can be done without having to go above zero percent power
17 using pump heat, boilers, whatever else is available?

18 How much of that can be done without having to
19 use -- for the plant to go above zero --

20 MR. CARUSO: Mr. Wayne Hodges of the staff who is
21 here did some calculations recently to determine what capability
22 existed to run equipment on pump heat.

23 Looking at his calculations, they would be able
24 to bring the reactor to normal operating temperature and normal
25 operating pressure. However, to run steam-driven equipment

1 such as the high-pressure coolant injection system and the
2 reactor core isolation cooling system would require heat
3 capacities beyond the ability of the pumps, the reactor
4 recirculation pumps to provide.

5 COMMISSIONER ASSELSTINE: Are there other options
6 for providing that heat capacity, other than --

7 MR. CARUSO: Indeed, I understand that that
8 equipment has already been tested, using non-nuclear steam.
9 When it's originally installed, the utility will bring in a
10 boiler using oil-fired means, and they will run that equipment
11 in place using non-nuclear steam.

12 However, the testing of that equipment as it is
13 installed in the plant cannot be done without nuclear steam.

14 COMMISSIONER ASSELSTINE: How much work is left
15 in terms of duration, time, if you did everything that you
16 can do at zero percent criticality as well with the authority
17 they have now?

18 Usefully, how much would be left up to five percent
19 power level?

20 MR. CARUSO: I understand that only a few days of
21 testing after initial criticality is capable of being done.

22 COMMISSIONER ASSELSTINE: Well, that's what we are
23 really talking about. Everything else could be accomplished
24 with the exception of a few days --

25 MR. CARUSO: No, no. What I am saying is, once

1 initial criticality is accomplished with the limitation on
2 power that has been applied to the license, the plant can only
3 be tested for a few more days. The testing that could be
4 accomplished would only take a few more days.

5 COMMISSIONER ASSELSTINE: My question is, beyond
6 that point --

7 MR. CARUSO: Beyond that point?

8 COMMISSIONER ASSELSTINE: -- how much is involved
9 from there up to the five-percent power limitation?

10 MR. CARUSO: Well, that's something that seems to
11 vary from utility to utility and from plant to plant. We
12 have some statistics on how long it is has taken utilities to
13 go from initial criticality to being ready to exceed five-
14 percent power, and times there vary from 18 days in the case
15 of a second plant at an experienced utility to 91 days in
16 the case of a less experienced utility starting up a first
17 plant. It runs the gamut of time. It depends on the
18 utility, it depends on the test program --

19 CHAIRMAN PALLADINO: It depends on what you find
20 there.

21 MR. CARUSO: It depends on what you find. If
22 you find a problem while you are doing this testing, which is
23 the reason for the testing, then it could drag out. But some
24 of this testing -- you cannot identify some of these problems
25 unless you have the nuclear heat available. For example, some

1 of the testing involves nuclear instrumentation in determining
2 proper overlap, a calibration of nuclear instrumentation. That
3 can't be done unless the reactor is indeed critical and
4 operating at power levels which power that instrumentation.

5 COMMISSIONER ASSELSTINE: One example you are
6 talking about are boilers; right?

7 MR. CARUSO: Yes. Those are the numbers I have for
8 La Salle, Sasquehanna, WNT-2, Susquehanna 2 -- I didn't
9 include Grand Gulf because that's a separate case.

10 COMMISSIONER ASSELSTINE: Right. And there the
11 testing program actually, when it was done, went fairly
12 quickly with all the other stuff that --

13 MR. CARUSO: I don't have any numbers specifically
14 for Grand Gulf.

15 COMMISSIONER BERNTHAL: Jim, let me just ask, why
16 would one struggle so much to seek an alternative system to
17 carry out the checks that can so easily be carried out at
18 five percent power?

19 I realize we don't want to be accused here of
20 harboring the hobgoblin of small minds, but it apparently is
21 true that the Commission has once said that a full power
22 license shouldn't depend on the granting of a low power license.

23 And as you and I have discussed, it seems to me
24 at least one of the major arguments that the intervenors
25 present is the question of contamination. But now being

1 reminded of the Commission's statements about the granting of
2 a full power license not depending on the granting of a low
3 power license, I'm wondering where the consistency would be
4 in that.

5 COMMISSIONER ASSELSTINE: I guess what I'm trying
6 to get at is what has been done thus far, and how much
7 realistically is going to be done with a five-percent license,
8 and how much that's going to gain because if you are looking
9 for a tangible benefit as an exigent circumstance for granting
10 an exemption, it's interesting -- it is necessary to understand
11 what that benefit is.

12 If realistically you are getting 25 to 30 days worth
13 of testing and it's going to be six months before this plant
14 gets a full power license, then what does it matter whether
15 they do that testing within the next month as opposed to five
16 months from now?

17 MR. CARUSO: Well, considering the uncertainties
18 when you do start up a lot of this equipment, if you have a
19 piece of equipment fail that is a long lead-time item, you may
20 need all of that time to repair it or to solve the problem
21 that you identified.

22 The utility has said that it expects to roll the
23 turbine.

24 COMMISSIONER ASSELSTINE: It said it was going to
25 try to roll the turbine.

1 MR. CARUSO: That they are going to try and roll
2 the turbine. Turbines are long lead-time items. If they find
3 a problem there. The high pressure cooling injection system,
4 the RCIC systems. If they would have a problem with those
5 systems, that would take a significant amount of time to
6 correct. They might need that time.

7 COMMISSIONER BERNTHAL: I suppose the argument is
8 there that the reason you do low power testing is to find out
9 whether you have a problem, and if you don't, then of course
10 it goes very quickly, and it's a month.

11 MR. CARUSO: That's correct.

12 COMMISSIONER BERNTHAL: If you do, it involves
13 significant delay.

14 MR. CARUSO: That's correct, that's an uncertainty.

15 COMMISSIONER ASSELSTINE: Yes. But the key
16 factor is the extent to which you can test things at low
17 power levels. And my impression was that is significantly
18 lower for boilers than it is for PWRs at five-percent power
19 levels.

20 MR. CARUSO: You mean --

21 COMMISSIONER ASSELSTINE: The extent to which you
22 can test equipment, the range of equipment and systems that
23 you have available to test, and the potential for identifying
24 problems that are the long lead-time items.

25 MR. CARUSO: I wouldn't want to speculate any more

1 on that.

2 CHAIRMAN PALLADINO: More, Jim?

3 COMMISSIONER ASSELSTINE: A couple on the exigent
4 circumstances.

5 What information and precedents, or whatever, is
6 available to support your reading of the stage of facilities
7 like Provision 2 to mean in essence that the facility is
8 essentially completed, as opposed to the kind of case where
9 you are talking about granting an exemption from the
10 regulations for a plant that is late in its life and where
11 there is limited operation available beyond that point -- which
12 I think has been the more typical -- have been the case
13 in which that criterion has been applied in the past?

14 Are there any precedents that support this
15 interpretation?

16 MR. REIS: I cannot cite particular precedents
17 to support that interpretation, but that's certainly is the
18 language in the context of this proceeding.

19 COMMISSIONER ASSELSTINE: Okay. And I guess the
20 last question I had had to do with the safety significance
21 of the issues involved criterion. What you seem to be
22 saying in your brief is that the test is on the merits of
23 the safety question. That is, if you meet the safety test,
24 that also resolves this issue. What basis is there for
25 interpreting that criterion in that manner, as opposed to looking

1 at the significance of the safety issue involved, rather
2 than the outcome on the merits?

3 MR. REIS: I think what you have talked about is the
4 major factor. But I also thing you have to look at the system
5 and how much you need the system here.

6 What we are talking about is a five-percent operation,
7 operation at five percent where you have at least an hour
8 to restore AC power -- whether it be on site or off site.
9 And within that context you have to interpret what significance
10 means.

11 Also, I think what is important, although you
12 talk alone about safety significance of the issue, also, you
13 have to think of whether it's settled and whether there really
14 is a safety issue involved, not just whether there is a
15 safety issue but whether public health and safety is going to be
16 affected by this at all and the extent to which it is going to
17 be affected.

18 So, I don't think we can just focus on the issues
19 there. Obviously, as I have said before, every TDC is an
20 important safety matter.

21 COMMISSIONER ASSELSTINE: Okay.

22 CHAIRMAN PALLADINO: Fred?

23 COMMISSIONER BERNTHAL: How many more people are
24 we going to hear from here anyway?

25 CHAIRMAN PALLADINO: Well, we have the request from

1 New York State and Suffolk County -- not yet, I'm just
2 answering his question.

3 (Laughter)

4 CHAIRMAN PALLADINO: We have the request, I think,
5 for five minutes. So, after we are through here, unless you
6 wish to do anything more.

7 COMMISSIONER BERNTHAL: Oh, I don't think I do.

8 (Laughter)

9 COMMISSIONER BERNTHAL: Let me just keep the
10 questions short here and ask one simple one, and this is
11 primarily a technical issue.

12 I'm curious to know -- and I asked earlier --
13 exactly what would have to take place as a physical matter, a
14 physical phenomenon, so that this breaker that we are talking
15 about, reracking, would fail in such a way as to disable both
16 of the AC power sources.

17 Are we talking about a flood as a practical matter?

18 What are we talking about?

19 MR. CARUSO: No. In considering single failures
20 we just assume the mechanistic -- that there was mechanistically,
21 deterministically that there was a failure. Electrical
22 equipment is generally reliable and doesn't fail in that way.
23 But people who have been associated with electrical equipment
24 know that sometimes it does fail spectacularly and that rare
25 event is what we were considering.

1 COMMISSIONER BERNTHAL: Okay, let me ask then the
2 legal question which I asked before. In your judgment should
3 we view this Board's favorable decision, the Board's favorable
4 decision as in any sense depending on being very closely
5 lined to that single failure criterion issue?

6 MR. REIS: Certainly, the Board did depend and
7 the staff's case depended upon single failure. However, we
8 now face the question of whether the record should be re-
9 opened.

10 COMMISSIONER BERNTHAL: That's precisely the point,
11 yes.

12 MR. REIS: Right. And the question is, it is
13 a significant matter. We found something that was wrong. We
14 very promptly, by the way -- in spite of any inference to the
15 contrary, brought this to the Commission.

16 COMMISSIONER BERNTHAL: To the Board or to the
17 Commission?

18 MR. REIS: To the Board and the Commission. We
19 issued that notice very, very promptly.

20 COMMISSIONER BERNTHAL: When did you first know
21 about that?

22 MR. REIS: Late on Friday, January 25, and we
23 issued this thing very rapidly thereafter.

24 COMMISSIONER BERNTHAL: Okay.

25 MR. REIS: The question is, part of the test for re-

1 opening a record is, besides safety significance, is whether
2 to change the outcome of the proceeding. We have nothing here
3 to indicate it could change the outcome of the proceedings.
4 We found this additional possible common fault and it was
5 corrected.

6 Nobody has suggested that there is another one.

7 COMMISSIONER BERNTHAL: How did you miss that one?
8 Are you confident you got them all now?

9 MR. REIS: We are confident we have them all, and
10 I'll let --

11 COMMISSIONER ASSELSTINE: What is the basis for
12 that judgment?

13 MR. REIS: I'll let Mr. Caruso -- it's a technical
14 question and I'll let Mr. Caruso respond.

15 MR. CARUSO: Well, the staff reviews that are done
16 are audit reviews and generally the staff doesn't look at
17 every nut and bolt and wire in the plant. And in this case
18 the possibility of a failure in this breaker was not identified
19 at the time the original review was done.

20 COMMISSIONER ASSELSTINE: What percentage did you
21 look at as part of this review?

22 MR. CARUSO: Well, I happened to find this one
23 and I happened to look at every breaker that I could find
24 and considered whether it would be a problem. I discussed
25 that with the Power Systems Branch, our technical reviewers, and

1 they agreed that that was the only one.

2 CHAIRMAN PALLADINO: Okay. Lando?

3 COMMISSIONER ZECH: Thank you.

4 COMMISSIONER ASSELSTINE: I had one other question,
5 Joe, if I could.

6 What is the staff's present estimate for when the
7 emergency planning hearing might be concluded and when an
8 exercise might be conducted when any subsequent hearings
9 might be concluded on the emergency planning issue?

10 MR. REIS: The schedule right now for the Board
11 to issue its emergency planning decision is April. All that
12 matters on that will depend -- are strictly speculation at
13 this time.

14 COMMISSIONER ASSELSTINE: Has any exercise
15 been scheduled yet?

16 MR. REIS: LILCO has asked for an exercise. It
17 has not been scheduled. There are some of the legal problems
18 involved in scheduling the exercise. Really, that's up to
19 FEMA, for FEMA to schedule the exercise.

20 COMMISSIONER ASSELSTINE: Once the decision is
21 made to schedule an exercise, typically, what's the lead time
22 involved?

23 MR. REIS: I'm sorry, I can't answer that question.
24 I don't know the answer.

25 MR. CARUSO: I really don't know either.

1 MR. REIS: I know it has been more than a couple
2 of months.

3 COMMISSIONER ASSELSTINE: Okay. And typically,
4 how long is required for FEMA to provide its results for the
5 exercises that are conducted?

6 MR. CARUSO: In my experience, it's been several
7 months.

8 COMMISSIONER ROBERTS: They conducted an exit interview
9 that was open to the public that gave in general terms their
10 findings.

11 MR. REIS: That's right.

12 COMMISSIONER ASSELSTINE: I'm asking when they
13 provide their written findings to the Commission.

14 MR. CARUSO: I think that's generally several
15 months.

16 COMMISSIONER ASSELSTINE: Okay.

17 MR. REIS: They have given preliminary findings
18 many times, though, in a shorter time period.

19 CHAIRMAN PALLADINO: Any more?

20 COMMISSIONER ASSELSTINE: No.

21 CHAIRMAN PALLADINO: Well, thank you very much,
22 gentlemen.

23 Now we will give New York State and Suffolk County
24 five minutes rebuttal.

25 MR. BROWN: I will go first, then Mr. Palladino.

1 We have a total of five minutes -- Mr. Palomino. I feel out
2 of it with the name Brown here.

3 (Laughter)

4 MR. BROWN: I guess the time begins now?

5 CHAIRMAN PALLADINO: Yes.

6 MR. BROWN: Thank you.

7 Some facts for you. Suffolk County Exhibit LP-2
8 is LILCO's testing schedule on this record, and it provides
9 that Phases 3 and 4, take 23.6 days to complete.

10 Next. We've got to straighten out something here.
11 I told you at the beginning of our argument that LILCO would
12 do two things, it would say it's just a rehash of other
13 issues, and it would further say it's entitled to a license
14 hearing.

15 This has nothing to do with this case, with
16 the decision of the Commission which said that the failure
17 of the Brenner Board to be able to find reasonable assurance
18 of emergency preparedness was no bar to a low power license.
19 That was in the context of a certified question he made with-
20 out it being in the context of the legal requirements of the
21 exemption case. The exemption case says the public interest
22 in order to give an exemption.

23 Why is that important? What Mr. Reis forgot to
24 read to you when he told you the various standards was, he
25 read from Footnote 3 on page 1156, the volume that has the

1 May 16 order. He left out the first sentence which says
2 specifically the Commission only would give an exemption in
3 an extraordinary case. It is going to depart only in an extra-
4 ordinary case. You have to find the public interest here is
5 satisfied.

6 Now, the other thing is, quickly, this notion of
7 an exercise, FEMA claims it takes 120 days lead time when
8 there is a state and county plan, and these are materials
9 that FEMA has written.

10 This is not a state/county plan. The Governor
11 and the County Executive have put themselves on record,
12 President Reagan wrote a letter saying that he would not,
13 his administration would not favor the position of federal
14 authority over the objections of state and local governments.
15 We have submitted that record to you, and it was done and
16 taken seriously.

17 The next point is that what LILCO is asking, to
18 boil everything down here, LILCO is simply saying, "Do a
19 favor." They want this Commission to go to court and to fight
20 for them. They tell you there is no problem, there are
21 public interest reasons, there is everything. You just go
22 fight for us. You make up some reason that you are not going
23 to listen to the Governor of this State as the counsel for
24 LILCO stated because in this case it's different.

25 In Diablo Canyon the Governor agreed with the

1 applicant. Here he doesn't. Therefore, don't give weight
2 to the Governor.

3 Try that one on the court. Also, try on the court
4 the other one that counsel for LILCO suggested, that the
5 Governor is acting above the law. Who, here, is going to put
6 his name under such words?

7 They are desperate to serve their own ends. This
8 is no extraordinary public purpose. As I mentioned earlier,
9 none of us wish this came about. We moved to terminate this
10 proceeding on the 24th day of February, 1982. We have
11 been the ones that -- '83, I'm sorry. We have sought to
12 end the litigation from the beginning.

13 LILCO seeks to perpetuate it and get itself into
14 a deeper and deeper hole, and it's asking this Commission
15 to dig it out of that hole; to ruin a relationship with the
16 State; to pretend the public interest is served; to say there
17 are exigent circumstances, and to give a license when it
18 can't be done.

19 Now, it is not our intention to have a relationship,
20 as a government, with this Commission that is predicated upon
21 fighting in court. There is no machismo involved and that's
22 not our intention. We don't think that's the way to go. We
23 did it before and that's what they are asking you to do. They
24 should fight for their own rights. If they want to start
25 suing, let them sue. They have sued the County in one

1 instance in Federal court. That will be adjudicated and
2 they have that right. But they don't have the right to ask
3 you to go out and be a cow catcher in front of a railroad
4 that is going to steamroll over us.

5 Let me see if there is anything else here, and
6 then, Fabian, it's yours since I can't read my writing.
7 I don't know if there is anything here or not.

8 (Laughter)

9 MR. BROWN: Fabian?

10 MR. PALOMINO: As far as they -- they talked
11 about the gas turbines they have at Holtsville, Fort
12 Jefferson, and so forth and they have seven transmission
13 lines. They all come into LILCO's plants either through
14 the 38 kv line or the other two kv lines and they don't have
15 the kind of redundancy they are trying to commit to you.

16 Secondly, in judging single failures, you judge
17 it by each system separately, redundancy is a separate
18 question.

19 Thirdly, when they talked about in response to
20 the question of the Chairman and the question he raised, I
21 talked about the lowering of safety. I mentioned generally
22 speaking various single failures. One I mentioned was the
23 switch gear room, but I said of course by a fire they all go
24 through there. I didn't say if the wall fell down, that's
25 another problem they've got to deal with, for whatever reason.

1 Also, as far as LILCO's complaints about the
2 order now, if they had complaints about the order they should
3 have raised those objections when it was issued, and they
4 haven't. They have gone through this whole proceeding and now
5 they lost they are trying to say, "Well, they should rely
6 on the regulations and not the order." Well, that isn't
7 the way the game was played and they have waived their right
8 to complain about it at this stage.

9 CHAIRMAN PALLADINO: The Secretary points out
10 five minutes are up.

11 MR. PALOMINO: Okay, fine. May I have one more
12 thing to say?

13 CHAIRMAN PALLADINO: Okay, two seconds.

14 MR. PALOMINO: As far as testing, this emergency
15 off-site question is not going to be turned into a legal
16 question and determined, and that's not going to be done
17 for years. If you are going to have any testing, it should
18 be as close as reasonably possible if they are ever going to get
19 that full power license.

20 To test it now, irradiate the place and then
21 have them mothball it, or whatever, would be a waste of time
22 to test because it would have to go from the beginning after
23 a couple of years.

24 CHAIRMAN PALLADINO: Okay. Well, thank you very
25 much.

1 MR. PALOMINO: Thank you.

2 CHAIRMAN PALLADINO: Are there any questions?

3 COMMISSIONER BERNTHAL: Well, I had intended to
4 ask this question before. I realize you would all love to
5 spend more of your time here this Friday evening, but
6 just a short answer, please.

7 Of all of the issues that you have raised here
8 today, could you pinpoint the one that you feel is the most
9 persuasive, the strongest argument that the intervenors
10 have as to why this exemption and five percent power permit
11 should not be granted?

12 MR. BROWN: The most persuasive argument we have
13 is the Commission's regulation. And the reason we are
14 sitting here is Section 50.12, the exemption provision.

15 LILCO is not entitled to a provision and this
16 Commission cannot find the public interest to satisfy it,
17 that there are exigent circumstances, that this is extra-
18 ordinary, and therefore it ought to be done to incur all the
19 penalties and the damage to the people of the State of New
20 York. That is the most compelling, simple way of putting it.

21 COMMISSIONER BERNTHAL: Well, you have quoted
22 regulations or at least "implied" regulations. Can you
23 give me a substantive issue?

24 MR. BROWN: You know, we are really going to have
25 some trouble here because I can't think of anything more

1 substantive in a legal proceeding than the law.

2 COMMISSIONER BERNTHAL: Well, but my point is that
3 we have heard "on the one hand - on the other hand." I'd
4 like to know what you think -- from the different groups
5 here -- I'd like to know what you think is the single most
6 important substantive issue where the public interest, if
7 you please, weighs in your favor. What is it?

8 MR. BROWN: I want to respond directly. The single-
9 most and not a collection, the single most public interest
10 factor that weighs against LILCO getting this extraordinary
11 remedy is, there is absolutely no public benefit to be
12 derived by giving LILCO the license.

13 You have to find and subscribe to with your own
14 name that if you were to give a license -- and I don't suggest
15 that, I'm just raising the hypothetical -- you would have
16 to write down that it serves the public interest. That means
17 required by the public interest; it means that there is a
18 public benefit. You would have to say that and it can't be
19 said.

20 Now, the problem is -- and I don't think anyone
21 wishes this proceeding got to where it is the way it did --
22 but with all respect to the Commission, the Commission did it.
23 It created this. We objected to how it was done. It was
24 done and it's a mess, and it ought to be dealt with forthrightly.

25 COMMISSIONER BERNTHAL: Well, let me just interrupt

1 for a moment, if my colleagues will indulge me for 30 seconds
2 yet.

3 Suppose that they ran at five percent power,
4 suppose that we granted the five percent power permission, and
5 suppose that they found the problem. And let's suppose
6 further -- and these are purely hypothetical suppositions,
7 I'm not prejudging anything.

8 But let's suppose further that ultimately this
9 plant does go to full power in some reasonably timely fashion.
10 Is it not true that the public interest then would favor
11 their finding that problem earlier rather than later?

12 MR. BROWN: Here is what you've got to do. There
13 is some point at which we don't compound speculation and
14 deal with something too remote.

15 But let's just look then at what the Commission
16 traditionally looks at. When the critical path is in fact
17 at issue, if you take the critical path here, there is no
18 way you can conceive low power testing being on the critical
19 path.

20 Now, if you want to start cooking up things and
21 say, "Well, in this case it's a lousy plant, they are going
22 to find problems at low power." We don't normally do that.

23 COMMISSIONER BERNTHAL: But it's hardly cooking up,
24 that's why we run low power testing.

25 MR. BROWN: When you look at the critical path, you

1 set down the number of days and weeks and months until full
2 power operation, and then you see how long low power operation
3 is going to be. And if low power will conflict with that.
4 If you run out these 23 days, that's as much as you want to.
5 Cook up a couple reasonable problems based on experience, not
6 some wild things but something, you know, that a technically
7 expert person such as yourself could define.

8 Then run right next to that how many months it
9 is going to take assuming everything goes for LILCO. Assume
10 that the State courts are all going to say, "LILCO is fine."
11 Assume that the County is going to roll over on the exercise,
12 despite President Reagan's letter. Assume Governor Cuomo
13 is going to decide to ignore everything, despite the letter he
14 wrote to General Giuffrida at FEMA, saying that we oppose an
15 exercise because it would be the pursuit of an awful objective.

16 Pretend all those things aren't here. You've got
17 in a regular case where there is a State and County plan 120
18 lead time for an exercise. It's certainly got to be 120 days
19 plus one because it's the first time in history that FEMA is
20 going to have one of these utility plants. So, you've got 121
21 days if not 500 days.

22 You've got on top of that the time to wait for
23 FEMA to assess that. You've got to have an exercise hearing
24 under the law, post-exercise hearing. You haven't had one of
25 those. I can't tell you if it's going to take five hours or

1 five years. But to get to it is so remote, so unlikely that
2 we are ever going to do that. But even if we say we will, what
3 we've got is a date for full power operation that under
4 the Commission's traditional way of doing things can't
5 conceivably be on the critical path --

6 COMMISSIONER BERNTHAL: So, your argument is that
7 the odds of their finding any significant problem are so low
8 that we are quite safe in waiting with low power operation
9 until much later.

10 MR. BROWN: I am saying that the date for full
11 power is so far off. If they find the problem at low power
12 that bad, that it's going to keep them beyond that, you've
13 got a Diablo problem. And you are also confronted with the
14 remarkable words here of counsel for LILCO that said that
15 this plant was the most thoroughly studied plant in the
16 history of America.

17 Now, that has a special meaning to me because
18 I met Chairman Palladino just before he issued the license,
19 suspended the license. I was representing California and
20 had the opportunity to be there when the Commission suspended
21 that Diablo license. And the senior vice president of Diablo
22 Canyon's PG&E said that this plant is the "most thoroughly
23 analyzed plant in the history of the world."

24 Now, I should stop at that point. But I want to say
25 that I don't understand why the staff has taken the positions

1 it has taken here.

2 COMMISSIONER BERNTHAL: I think I have heard
3 enough to answer my question.

4 (Laughter)

5 CHAIRMAN PALLADINO: Are there any other burning
6 questions?

7 COMMISSIONER ROBERTS: That same quote has been
8 directed to us before.

9 CHAIRMAN PALLADINO: Well, thank you very much,
10 gentlemen.

11 MR. BROWN: We truly appreciate this time.

12 CHAIRMAN PALLADINO: The Commission has been
13 deliberating the information on the information it had before
14 this oral argument. I am going to ask them to continue their
15 deliberations, taking into account information that we have
16 had presented to us today.

17 We have tentatively scheduled a possible discussion
18 and vote on this next Tuesday, but we will have to see how
19 the Commissioners feel after they have looked at this
20 information.

21 MR. BROWN: If I might ask on behalf of the County,
22 though, we would very much appreciate if the Commission would
23 hold its discussion open. I know normally in adjudications
24 the Commission tends not to, but it made an exception in
25 TMI and this has a great deal of significance, and we would

1 appreciate that if you might consider that.

2 CHAIRMAN PALLADINO: Well, we will see how we are
3 going to go. I was just informing you, we now have to pick
4 up our deliberations taking into account the information we
5 got today, and we'll see how soon the Commissioners are
6 prepared to take action.

7 MR. BROWN: Thank you.

8 CHAIRMAN PALLADINO: Anything more to come before
9 us?

10 MR. PALOMINO: Thank you.

11 CHAIRMAN PALLADINO: We will stand adjourned.

12 (Whereupon, at 5:35 p.m., the meeting of the
13 Commission was adjourned.)

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