

ORIGINAL

UNITED STATES
NUCLEAR REGULATORY COMMISSION

IN THE MATTER OF:

DOCKET NO: 50-322-OL-3

LONG ISLAND LIGHTING COMPANY

(Shoreham Nuclear Power Station,
Unit 1)

ORAL ARGUMENT

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

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In the Matter of: :
: Docket No. 50-322-OL-3
LONG ISLAND LIGHTING COMPANY :
:
(Shoreham Nuclear Power Station, :
Unit 1) :
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Nuclear Regulatory Commission
Fifth Floor Hearing Room
4350 East-West Highway
Bethesda, Maryland

Wednesday, February 12, 1986

The oral argument in the above-entitled matter convened
at 9:00 a.m.

BEFORE:

ALAN S. ROSENTHAL, Chairman
Atomic Safety and Licensing Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D. C.

HOWARD A. WILBER, Member
Atomic Safety and Licensing Appeal Board
U.S. Nuclear Regulatory Commission
Washington, D. C.

-- continued --

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P R O C E E D I N G S

1
2 JUDGE ROSENTHAL: Good morning, ladies and
3 gentlemen. This board is hearing oral argument this
4 morning on the various remaining appeals in the emergency
5 planning phase of this license proceeding involving the
6 Shoreham Nuclear Power Station. The argument is governed
7 by the terms of this board's January 21 order. I will
8 assume that all counsel taking part in the oral argument
9 are familiar with those terms, particularly in so far as
10 they relate to the order of presentation and to the time
11 allotments.

12 As the secretary to the board's January 29 note
13 advised counsel would be the case, Mr. Edles is not with us
14 this morning. This is because he is serving at present as
15 the acting director of the Commission's office of inspector
16 and auditor. It is currently unclear when this assignment
17 will terminate. Should it terminate within a reasonable
18 time, Mr. Edles will participate in the decision on the
19 basis of evidentiary records, the briefs of the parties and
20 the transcript of today's oral argument.

21 I will now ask counsel to identify themselves
22 formally for the record, and we'll start with Ms. Letsche.

23 MS. LETSCHE: Karla Letsche with Kirkpatrick &
24 Lockhart, representing Suffolk County.

25 JUDGE ROSENTHAL: I'm assuming that there's no

1 one present this morning for either the State of New York
2 or the Town of Southampton; is that correct?

3 MS. LETSCHE: Yes. My understanding is that the
4 weather yesterday created major problems in terms of
5 transportation for them. I will be presenting argument on
6 behalf of the County and the State and the Town of
7 Southampton.

8 JUDGE ROSENTHAL: I take it, the weather
9 conditions to one side, that was the arrangement between
10 yourself and the counsel for the other Intervenors; is that
11 correct?

12 MS. LETSCHE: That's correct, but I think they
13 might have hoped to attend at least.

14 JUDGE ROSENTHAL: One of the things, frankly,
15 that sort of surprised me was that after obtaining from
16 this board a postponement of the oral argument, because of
17 his unavailability on the date that the argument was
18 originally set, Mr. Palmino then elected not to participate
19 in the argument. I had assumed, quite frankly, that he
20 would be participating based upon his request that the
21 argument be postponed. I realize that's not your
22 responsibility, but I would note for the record my surprise
23 when I received your letter, Ms. Letsche, advising that
24 Mr. Palmino would not be participating in the argument.
25 For the Applicants?

1 MR. CHRISTMAN: I'm James N. Christman. I
2 represent the Applicant Long Island Lighting Company.

3 MR. BORDENICK: I'm Bernard M. Bordenick. I
4 represent the NRC Staff.

5 JUDGE ROSENTHAL: Mr. Bordenick. At two
6 occasions, the secretary to the board contacted counsel to
7 advise them that the board wished them to be prepared to
8 discuss both ALAB 694 issued in September of 1982, in the
9 Summer operating license proceeding; and Suffolk County's
10 Exhibit EP-1. And we will ask counsel at the outset of
11 their argument to address 694 and more particularly the
12 question which the board regards as posed by 694, whether
13 the Intervenors' appeal from the April and August decisions
14 will lie, given the fact that the Intervenors obtained the
15 result that they sought, even though a number of the
16 findings or conclusions reached by the board were not to
17 the Intervenors' liking. With that note, Ms. Letsche,
18 we'll start with you.

19 MS. LETSCHE: Good morning. I know that you
20 want to address those two issues that you had your
21 secretary call us about first and I will do so, but I would
22 state at the outset what else it is I intend to do during
23 the argument since the time is limited and obviously, as
24 the board noted, many issues were raised in the briefs and
25 I will not address them all.

1 I intend to cover two major subject areas.
2 First is the board's approval of several items in the face
3 of an acknowledged lack of planning on the record, which we
4 believe and our briefs demonstrate clearly violates the
5 post-TMI policy that an ad hoc response is unacceptable.
6 And I will discuss that licensing board error that was made
7 with respect to the schools issues, the evacuation of
8 hospitals and the ingestion pathway in the state of
9 Connecticut.

10 Secondly, I will address another major error by
11 the licensing board which was revealed in several
12 particular issues, but in general it was the decision to
13 bar Intervenors from submitting evidence at all on
14 particular issues. With respect to that, I will discuss
15 the ruling denying admission to Contention 22, the denial
16 of Intervenors' evidence on the role conflict issue, and if
17 I have time, some of the matters with respect to relocation
18 center testimony.

19 Going first to the board's question concerning
20 the applicability of ALAB 694 to Intervenors' appeals, the
21 licensing board's decision denying the operating license is
22 based, as I read the concluding partial initial decision,
23 on its findings on LILCO's lack of legal authority. The
24 other deficiencies are identifiable as correctable or would
25 be some kind of license conditions that apparently would be

1 imposed by the licensing board. The legal authority issues,
2 however, the board found made it impossible to make a
3 reasonable assurance finding with respect to the plan. We
4 believe that was the correct action and we believe the
5 Commission will also have to affirm it because it is
6 correct as a legal matter. However, it is on appeal now
7 and the Commission has indicated that it will take review,
8 and --

9 JUDGE ROSENTHAL: What does that have to do with
10 the question whether, given that the licensing board result
11 was in your favor, you are really not in a position here to
12 challenge the result? How can you appeal?

13 MS. LETSCHE: That's a very good question. The
14 fact is this licensing proceeding is continuing despite the
15 fact that the operating license has been denied. For
16 instance, there's an exercise going on tomorrow even though
17 the license has been denied. So if that ultimate result
18 were in fact determinative of whether or not we had won the
19 case and had no basis to come to anyone for additional
20 relief, then the cases would be over and we would not be
21 having an exercise tomorrow.

22 JUDGE ROSENTHAL: Again, how does one appeal
23 form a favorable result? I recognize the result you
24 obtained from the licensing board; we affirmed it. It has
25 not been reviewed as yet by the Commission, but we're now

1 looking at an appeal that you have taken to this board from
2 a favorable licensing board result.

3 Now, the teachings of the prior appeal board
4 decisions are to the effect that one cannot appeal from a
5 favorable licensing board result, and you have endeavored
6 to do that. What the parties can do is defend a favorable
7 result before the licensing board on alternative grounds.
8 In other words, you could have come before us and argued in
9 defense of the Applicant's appeal that the result reached
10 by the licensing board was correct not only for the legal
11 authority reason that the licensing board assigned, but
12 also because, contrary to what the licensing board
13 concluded, there were infirmities as a matter of fact in
14 this plan. That you could do. You could come up and argue
15 alternatively for affirmance of the result on the grounds
16 that the licensing board has not decided in your favor.

17 The question here is how does one appeal, as you
18 have endeavored to appeal, from a favorable result,
19 favorable judgment, if you will, of the licensing board;
20 and I have not heard your answer to that yet.

21 MS. LETSCHE: I have two answers. Number one,
22 if the only result is the denial of the operating
23 proceeding, then the fact is this proceeding should be all
24 over and we should not have had to have appealed at all.
25 But the fact of the matter is that the licensing proceeding

1 is continuing and it has not been terminated and the
2 Commission is continuing to not only --

3 JUDGE ROSENTHAL: It was terminated before the
4 licensing board. It is always true that there are further
5 appellate remedies and one never knows how those will come
6 out. But again, the jurisprudence is you cannot appeal to
7 an appellate tribunal from a favorable trial level decision,
8 and that's what you have endeavored to do.

9 MS. LETSCHE: What we're appealing, Judge
10 Rosenthal, is the rulings of the licensing board that were
11 not favorable to us.

12 JUDGE ROSENTHAL: You can't do that under the
13 jurisprudence. Appeals do not lie from findings or
14 conclusions. Appeals lie from judgments. That's the rule
15 in the courts and that's the rule which this board has
16 consistently applied, as the Summer decision reflects.

17 MS. LETSCHE: I don't know what else to tell you
18 other than that the proceeding, I agree with you, logically
19 doesn't follow because the entire thing should be over with
20 the denial of the license. However, Intervenors felt
21 strongly that because this whole proceeding had been
22 bifurcated and the legal issues were handled separately by
23 the whole appeal process, and since the denial of the
24 license was based solely upon that issue, which clearly was
25 going to be reviewed, that it was necessary to preserve our

1 rights by taking the appeal with respect to those decisions
2 which were unfavorable to us, which, if the legal authority
3 issue were reversed, would result in the granting of a
4 license.

5 JUDGE ROSENTHAL: But you could have raised
6 those very claims that you have made under the umbrella of
7 your appeal in defense of the Applicant's appeal from the
8 April decision, could you not have?

9 * MS. LETSCHE: You mean in response to their
10 appeal of the legal authority issues?

11 JUDGE ROSENTHAL: The rule is that the party is
12 always free to defend against an appeal on any ground that
13 the record will support, whether or not that is a ground
14 that was decided in favor of that party by the trial
15 tribunal. That's elementary appellate law, nothing that we
16 have invented. That's something which has been true in the
17 federal courts of appeals -- I dare say also in state
18 appellate courts -- since day one.

19 MS. LETSCHE: I guess I can't say that wouldn't
20 have been possible because of the way this entire
21 proceeding has been conducted. However, with a clear
22 bifurcation of the legal authority issues from the
23 remaining issues in the case, that didn't seem to make
24 sense at all at the time.

25 JUDGE ROSENTHAL: Okay, we've heard you on this.

1 I'm going to want both the Applicant and Staff counsel to
2 address this point because I'm rather surprised that
3 neither of them had raised it, that it had to be raised by
4 the board sua sponte.

5 Let's move on to your argument. Let me ask you
6 one sort of threshold question. Throughout your brief,
7 there are broad suggestions that the licensing board in
8 this instance, once it got beyond the legal authority issue,
9 which it decided in your favor, and we concluded correctly,
10 once it got past that where it was right on target, it did
11 absolutely nothing right. Absolutely every ruling that it
12 made was wrong. It had a double standard, we're told by
13 you, that it accepted the testimony of unqualified, or at
14 best semiqualfified Staff and Applicant witnesses, whereas
15 it consistently rejected the testimony of better qualified
16 witnesses that the Intervenors served up.

17 We're told that it rejected a late contention
18 that you people offered on timeliness grounds, whereas --
19 and I guess it was a Nassau Coliseum matter which the
20 Applicant put forth -- was even more untimely than your
21 endeavor was, and yet the licensing board found it timely;
22 and I find this very surprising that a board which, if we
23 read your brief, was either totally biased against your
24 client or incredibly stupid, could have seen the light in
25 your favor on this critical issue which led that board to

1 grant you the ultimate relief, i.e., a denial of the
2 operating license which it sought.

3 How do you explain this, that this board was so
4 right on this legal authority issue and then on absolutely
5 everything else was dead wrong?

6 MS. LETSCHE: Let me have a couple of answers.
7 There were a lot of questions in that statement of yours.
8 First, the board was not absolutely wrong in absolutely
9 everything. They made some findings which were correct.
10 They found lack of evidence and an inability to make
11 reasonable assurance findings with respect to certain
12 issues. They were right on that.

13 With respect to the acceptance of witnesses, I
14 think our brief is clear that in some areas the Staff --
15 not necessarily Staff, but in some areas, LILCO and
16 Intervenors had academic-type witnesses who were both well
17 qualified -- and I don't know that we suggest in our brief
18 -- with a possible exception in reference to one of the
19 Staff witnesses, that individuals were not necessarily
20 qualified to say what they said. However, with respect to
21 certain of our witnesses, in particular the Suffolk County
22 police officers whose job it is to deal day to day with
23 some of the very factual issues that were presented by the
24 board, we believe the board gave an improper distribution
25 of weight to evidence by accepting statements from people

1 who might academically have studied certain things but do
2 not deal with them day to day, or by accepting, for
3 instance, Dr. Mileti's testimony about what teachers are
4 going to do rather than listen to teachers themselves.

5 In terms of how I can explain the board being
6 right on one issue and wrong on some others, I can't
7 explain that. I can describe for you -- and I think we
8 have laid out fairly clearly in our briefs -- the specific
9 issues upon which the board was incorrect, the ways in
10 which it was incorrect and why it was incorrect.

11 Now, in terms of the law and in terms of the
12 facts and the evidence which we think demonstrated should
13 have led to the ultimate result, why they came out the
14 other way, I can't tell you.

15 We have not alleged in our brief that the basis
16 of our appeal certainly is not that the board was grossly
17 biased. We just believe they have come to a number of
18 incorrect conclusions for the reasons we've stated.

19 JUDGE ROSENTHAL: May I read from your brief,
20 page 2, "The decision is laden with errors. Some were
21 caused by the ASLB failure to interpret or apply
22 regulations correctly. Still others by the ASLB's
23 exclusion of relevant probative evidence." It wasn't
24 simply you were saying there were a few errors here and
25 there.

1 MS. LETSCHE: There were many, and what you read
2 was the introduction to our brief in which we try to
3 summarize for you in a way that capsulizes all of the
4 errors that we address in our brief, by lumping them into a
5 couple of areas which I think they fall into, and the fact
6 is, there were a lot of errors made. No doubt about that.
7 I'm not going to take back any of the arguments that we
8 made.

9 JUDGE ROSENTHAL: You are not claiming bias, are
10 you?

11 MS. LETSCHE: The basis of our appeal -- we do
12 not want you to find the board was biased. We want you to
13 find that the board made legal errors.

14 JUDGE ROSENTHAL: Through ingorance rather than
15 through bias? I want to be totally clear as to whether you
16 are claiming that this board applied a double standard.

17 MS. LETSCHE: With respect to some issues a
18 double standard was applied.

19 JUDGE ROSENTHAL: If they did that, that must
20 have been because they had some preference for the
21 Applicants and/or the Staff, is it not?

22 MS. LETSCHE: I can't characterize what
23 preferences the board might have had. All I have before me
24 is their rulings and I can look at those and look at the
25 law and the evidence and reach the conclusion which we

1 stated here that it is wrong, and when they reach one
2 conclusion on one set of facts that goes one way and an
3 opposite conclusion with a set of facts which would appear
4 should have led to the same result, that there's as a
5 factual matter a double standard being applied. Why that
6 was applied in a particular area I'm not going to speculate
7 about and I don't think we make allegations about it in our
8 brief. What we talk about is the legal standards that
9 should have been applied, the facts and evidence before the
10 board and the conclusion that the board reached.

11 JUDGE ROSENTHAL: So the record is absolutely
12 clear on this, you are not claiming that the board was
13 prejudiced against your client. Am I correct about that?

14 MS. LETSCHE: We don't allege that in our brief,
15 no.

16 JUDGE ROSENTHAL: There's no claim of bias or
17 prejudice being made by the Intervenors on the part of the
18 board?

19 MS. LETSCHE: The errors we allege are set forth
20 and that is that wrong decisions were made with respect to
21 the facts and the legal standards. You indicated you also
22 wanted us to address the second item at the outset --

23 JUDGE ROSENTHAL: It can be -- if you are going
24 to talk about role conflict you can; in the course of
25 discussing it you can get to this exhibit. I might say at

1 this point that I can't make head or tails out of it. I
2 have read the explanation that was given by this witness.
3 Even with that explanation this document to me is worthless,
4 and I can readily understand why both Intervenors, and I
5 think it was the Staff, maybe it was the Applicant as well,
6 took this piece of paper and reached diametrically opposing
7 conclusions as to what it demonstrated. But I was
8 sufficiently puzzled by it that I thought I would call upon
9 the parties to help me in deciphering it and maybe come to
10 a conclusion as to whether it really stands for something.

11 MS. LETSCHE: It is the Intervenors' position
12 that it is not entitled to very much weight, because if you
13 have read the transcript you can see the way this
14 information was arrived at was not sort of your
15 conventional social science survey methods. A number of
16 interviews were conducted which consisted of one question,
17 "Where were you and what did you do when the emergency
18 happened?" Lots of transcripts were made of discussions
19 following that question, and at a later time somebody
20 decided to listen to the transcripts and created this chart
21 and put in numbers based on how they reviewed those
22 transcripts. That was not Dr. Dynes who testified and who
23 made those decisions, and for that reason the Intervenors
24 said in their proposed findings of the fact that it is not
25 entitled to much weight one way or the other.

1 Unfortunately, during the trial and in their
2 proposed findings, the Applicant relies heavily on this
3 because you always hear about the design research --
4 disaster research center's extensive study of 6000
5 interviews of emergency workers and how it shows that role
6 conflict is not an issue, that role conflict does not
7 happen. There are these very flat statements, it does not
8 exist, and they rely upon this one unpublished paper which
9 is a paper, Number 49, in which Suffolk County Exhibit
10 Number 1 appears for that statement that role conflict is
11 not a problem.

12 Well, when you look even at the only piece of
13 evidence they rely on for that proposition, it is clear
14 that it doesn't even support it, and the chart itself,
15 which I assume you have before you, is difficult to
16 understand, but I'll give you the one clue that makes it a
17 little clearer. The headings that are across the top of
18 the chart do not apply all the way down the chart. In
19 order to read the chart you have to -- in order to read a
20 particular row of numbers you have to relate them to the
21 column of words that immediately precedes them, rather than
22 going all the way to the top. That means, for instance, in
23 the second row which is listed "at home," where you have
24 the number 40 and it goes all the way across, the number 13
25 applies to a decision by the 40 workers or 13 workers here,

1 that they would do something, they would either stay on the
2 job or do something on the job.

3 I have never understood the distinction between
4 staying on the job and being on the job myself, but the
5 column that applies to that number 13 is the one
6 immediately on top which, when you keep going over to the
7 right, the number 13 which -- the "waited on notification"
8 applies to the 13, rather than the "temporarily left job."
9 The temporarily left job only applies to the 7, which is
10 immediately below that. 13 and 14 in the second row are
11 related to the immediately preceding headings.

12 When you look at the entire chart, the numbers
13 that relate to whether or not there was some kind of
14 nonreporting or delayed reporting activity, you look at the
15 columns that are headed under "active response to family
16 then work," which means they did something with their
17 family before going to work. You look at the column which
18 says "delayed reporting," because in that column the people
19 did not report when they were immediately called. You also
20 look at the column which says "abandoned occupational role"
21 or "temporarily left job" if there is not a heading that's
22 immediately in front of that.

23 The bottom line, and I have to agree that this
24 is very unclear, is that when you look at the categories of
25 people who are described as having done something other

1 than report to their job right away, you get in every
2 single box a situation of a substantial percentage of
3 people who did not immediately report to their job, and
4 that's the only point that the Intervenors made,
5 affirmative point, with respect to this exhibit, which is
6 you can't cite this to support the proposition that
7 emergency workers are not going to have some other conflict
8 that will keep them from reporting immediately to their
9 emergency work.

10 JUDGE ROSENTHAL: You endeavored to adduce
11 evidence respecting volunteer firemen; is that correct?

12 MS. LETSCHE: Yes, Judge. There were a couple
13 of pieces of evidence which Intervenors submitted which
14 were denied admission on the role conflict issue. One was
15 an extensive survey by Steven Cole, one of our witnesses
16 who did the other surveys which were admitted into evidence.
17 It was a standardized survey set up in the normal way that
18 sociologists do these things, and endeavored to find out
19 what these people would do in the event of a Shoreham
20 emergency.

21 That evidence from Dr. Cole which described in
22 detail the survey and the results, and also some testimony
23 by Drs. Erickson and Johnson which discussed the
24 applicability of those survey results to the individual
25 workers that LILCO was intending to rely on in its plan

1 were all denied admission by the licensing board without
2 any discussion other than the statement that it was
3 irrelevant.

4 JUDGE ROSENTHAL: Irrelevant because there were
5 no volunteer firemen involved in the --

6 MS. LETSCHE: I don't know. They did not say
7 why it was irrelevant. It had been alleged by LILCO and
8 the NRC Staff that that was the reason, because there were
9 not volunteer firemen involved in the plan, but I don't
10 know why the licensing board decided it was irrelevant.
11 The fact is, though, that LILCO relies very heavily, as
12 does the licensing board in its decision, on this theory
13 that a trained emergency worker is not going to have a
14 problem immediately reporting to his job if there's an
15 emergency, because he's been trained so well.

16 JUDGE ROSENTHAL: What about bus drivers? I
17 gather this plan involves bus drivers, does it not?

18 MS. LETSCHE: It involves school bus drivers,
19 yes, it does.

20 JUDGE ROSENTHAL: As you understand LILCO's
21 argument, these bus drivers will respond as well because
22 they are trained?

23 MS. LETSCHE: Well, they have not been trained.
24 LILCO believes that they are all going to respond because
25 LILCO's witnesses don't believe you would place any weight

1 on any polls, even though they were not polls, they were
2 surveys of the actual bus drivers expected to respond and
3 that showed that a locality would not respond immediately.
4 LILCO says you can't place any weight on those surveys.

5 JUDGE ROSENTHAL: What is your position with
6 respect to whether the record supports the proposition that
7 the bus drivers will respond?

8 MS. LETSCHE: The record does not support that
9 proposition. The survey evidence with respect to bus
10 drivers was admitted into evidence. That survey evidence
11 shows that a substantial number of them, I believe it is
12 60-some-odd percent, would not report immediately to work.
13 They would either go and personally escort their families
14 out of the area of danger, or they would do something else
15 to make sure that their families were safe before they
16 reported, and therefore they would not be immediately
17 available.

18 There was evidence in addition to that survey
19 evidence as well presented by the superintendents of
20 transportation for three school districts in the EPZ, and
21 those gentlemen who work every day with these bus drivers
22 and the bus companies gave their opinion as to what would
23 happen in the event of a Shoreham emergency; and they
24 testified that in their view there would be a substantial
25 problem, and this was based on their conversations with the

1 bus drivers and their having worked with them for a long
2 time, that there would be a substantial number not
3 immediately available.

4 In addition, another problem with respect to the
5 school bus drivers is that there are no agreements in
6 existence with any of the these bus companies -- much less
7 with the individual drivers, but not with the bus companies
8 -- according to which they have agreed to perform these
9 evacuation functions or even early dismissal functions
10 while a Shoreham emergency is going on. The NRC precedent
11 is clear that you need to have that kind of assurance if
12 you are going to rely on these people to get the school
13 children to safety in the event of an emergency, and there
14 are no agreements like that here and the licensing board
15 accepted that, which we believe was a major error.

16 JUDGE WILBER: Are you separating out the bus
17 drivers for the school children and the bus drivers for the
18 transportation dependents?

19 MS. LETSCHE: The bus drivers for the
20 transportation dependents are LILCO. There are LILCO
21 workers assigned to be bus drives who pick up the transit
22 dependent. The problem with the transit dependent which we
23 outline is there are not enough buses for them because the
24 buses are all already committed to all the schools. LILCO
25 doesn't have arrangements for those extra buses that they

1 need to be given up by the schools to them, and instead you
2 end up relying on some kind of ad hoc arrangement, at the
3 time, hopefully these buses would suddenly become available
4 and we can get everybody out, but the bus drivers, as to
5 whom there's no assurance that they will be available. Our
6 major concern is with respect to the school children, and
7 there not only are no agreements but the evidence admitted
8 indicated that they would not be available. That fact
9 makes it even more significant that the other evidence
10 submitted by Intervenors on the role conflict issue was not
11 admitted.

12 The teachers evidence which was submitted was
13 testimony by 12 teachers who worked in several different
14 districts in the EPZ, described, number one, what it was
15 that teachers were expected to do in the event of an early
16 dismissal or some kind of other action with respect to
17 children, to establish exactly what your personnel needs
18 would be in the event of an emergency, and they also
19 testified as to what real teachers in that real EPZ would
20 in fact do or would be likely to do in the event of an
21 emergency. That testimony was also ruled irrelevant by the
22 licensing board, which we believe was a clear error.

23 In the Zimmer case, for instance, before the
24 licensing board there was an issue about the availability
25 of all sorts of volunteer workers. In that case not only

1 was survey evidence about volunteer -- I think they were
2 called life squads men, rescue people, a survey of them,
3 and their availability was held to create substantial
4 problems, and the appeal board held this -- create
5 substantial questions as to the availability of bus drivers.
6 But in addition, before the licensing board in that case, a
7 license condition was imposed which required the Applicant
8 to conduct surveys of the volunteer workers upon which they
9 would rely, and that was people -- bus drivers and teachers
10 and all those people -- to determine their availability in
11 an emergency, what kind of family conflicts they had and
12 whether or not in fact they would report for duty during an
13 emergency.

14 The board held that that was a condition of
15 licensing. In addition, it accepted the testimony of
16 several other volunteer workers, absolutely equivalent to
17 the teachers which the Intervenors proposed in this case.
18 They let them testify as to what they would do in an
19 emergency. The licensing board decision in our case is
20 absolutely inconsistent with what happened at Zimmer and
21 clearly prevented Intervenors from making their case and
22 demonstrating that LILCO's assertions that these people
23 would in fact be available were incorrect.

24 JUDGE WILBER: Were teachers one of the groups
25 called in the Zimmer case?

1 MS. LETSCHE: I can't remember, frankly, Judge,
2 if it was teachers --

3 JUDGE WILBER: Whether they were support
4 personnel or not; is this correct?

5 MS. LETSCHE: Generally what the discussion and
6 the concern in the Zimmer case was, it was under the rubric
7 of volunteer workers and it was people who were not in a
8 functioning group, like the police officers or the
9 volunteer -- not volunteer, fire company, that was an
10 established group, but people who were nonetheless expected
11 to do things to implement the plan in the event of an
12 emergency, and it did include people like bus drivers. And
13 as I said, these volunteer rescue worker types -- and I
14 would have to reread the case to see if teachers were
15 expressly mentioned or not -- but the important thing is
16 that the evidence we attempted to submit as well as the
17 evidence which we did submit from the school administrators
18 made it very clear that in order to implement any
19 protective actions for school children, whether early
20 dismissal, sheltering or evacuation, you need to have
21 teachers and you need to have other school personnel as
22 well as the bus drivers.

23 So the availability of all those individuals is
24 crucial if you are going to implement any protective
25 actions for the schools; whether you call them support

1 personnel or support organization is not the point. The
2 question is whether or not you can implement those
3 protective actions. And the fact of the matter, based on
4 the evidence submitted as well as that which was not
5 allowed in, is that those people are essential if you want
6 to implement those actions.

7 JUDGE ROSENTHAL: I have a list of things I'm
8 interested in. I'm going to move to one of the issues
9 which arises out of the August 28 decision. That was, you
10 make what seemed to me to be a reasonably persuasive case
11 on the proposition that you are entitled to discovery on
12 the Coliseum issue, but what is unclear to me is how you
13 were prejudiced by the failure to obtain discovery. I
14 would appreciate it if you would elucidate on that subject
15 for me.

16 MS. LETSCHE: It is always difficult, and the
17 same is true with respect to the issue on not being able to
18 pursue our FEMA discovery. It is difficult to articulate
19 why you were prejudiced when you were never allowed to find
20 out the information that you were trying to get. Certainly
21 that is true with respect to the FEMA issue. We can't tell
22 you what crucial evidence we would have found out because
23 we were never allowed to find it out.

24 JUDGE ROSENTHAL: You did have cross-examination
25 of witnesses, did you not? What I'm getting at is didn't

1 the opportunities that you had available at trial really
2 render harmless the licensing board's assertedly erroneous
3 ruling on discovery?

4 MS. LETSCHE: I don't believe so. I think it is
5 fairly well established that requiring a party to conduct
6 its discovery during on the record -- during the trial is
7 not an adequate substitute for pretrial discovery where
8 information can be learned and can then be used in
9 preparation of one's own affirmative case. The fact that
10 -- and with respect in particular to the Nassau Coliseum,
11 the only witness provided by LILCO on that issue was
12 Mrs. Robinson, who was a local employee who had had various
13 and sundry conversations with some people at the Coliseum,
14 but she was not an employee of the Coliseum. She knew some
15 things but was not the person who had direct access to the
16 types of information that Intervenors would have sought
17 through discovery.

18 The board kept saying in its order we told you
19 you could subpoena the general manager of the Coliseum to
20 appear at the hearing. Well, any litigant knows you are
21 not going to subpoena a witness you have never talked to
22 before -- you have not been allowed to talk to -- put him
23 on the stand and take a shot at what he says at trial.

24 JUDGE ROSENTHAL: What information would you
25 have sought to elicit on discovery?

1 MS. LETSCHE: We would have sought details about
2 the actual insides and the facilities within the Coliseum
3 to determine and to be able to question or challenge, if
4 appropriate, LILCO's assertions about all the room and how
5 they will be able to do these things and how they will
6 handle the numbers of people they were talking about being
7 able to handle.

8 We were very concerned, in addition, about the
9 availability of the Coliseum, and the testimony, some of
10 the testimony not admitted by the licensing board directly
11 challenged that; the ability of the people who signed the
12 letters that LILCO relies upon, their legal ability and
13 authority, in fact, to make that Coliseum available as well
14 as the practicalities of it when it is going to be used for
15 the boat show and rock concerts and those things, which we
16 were not permitted to find out.

17 In addition, the general uses and -- not general
18 uses, but the problems that arise when that Coliseum is
19 used, when you have lots of people in it, how the
20 facilities function under those conditions, how the traffic
21 conditions are during those conditions, what the parking
22 lots are like; those sorts of things are what we would have
23 pursued on discovery and presumably could have used or
24 might have been able to use -- I can't say for sure -- in
25 the preparation of our affirmative case.

1 The fact of the matter is that what happened
2 with respect to that issue was that we were totally barred
3 from presenting any evidence at all; and I mean that entire
4 proceeding was just a gross violation, we submit, of
5 Intervenor's due process rights. The denial of discovery
6 was one in a series of other erroneous rulings.

7 JUDGE ROSENTHAL: All that information you would
8 have elicited through discovery, I take it, you could and
9 did obtain during the course of the trial. Did some of it
10 come as a surprise?

11 MS. LETSCHE: We were not permitted to inquire
12 into certain of those areas.

13 JUDGE ROSENTHAL: That has nothing to do with
14 discovery. The question then is whether that was an
15 impermissible limitation on the inquiry, isn't it?

16 MS. LETSCHE: The question was did we in fact
17 inquire. Some of them, we did not. Others I can't
18 remember all the questions asked. I'm sure some of the
19 information was asked for at trial and some of it I'm sure
20 wasn't, because when you are not certain of the answer, you
21 might not ask it, as you all know.

22 I think that what happened during that entire
23 relocation standard proceeding is laid out in detail in our
24 briefs and I won't go back over it other than to suggest to
25 you that reading the entire history of what happened there

1 and the ultimate result, which was a finding that, for
2 instance, the care center proposal proposed by LILCO is
3 fine, and in the face of evidence that in fact the vast
4 majority of these facilities are not available and have not
5 agreed to be made available is an example of and probably
6 one of the most demonstrative examples of the licensing
7 board's refusal to just accept what the evidence showed or
8 what the evidence didn't show in that case.

9 It is similar, for instance, to what the
10 licensing board did with respect to the ingestion pathway
11 in the state of Connecticut. In that instance -- and
12 that's contention 24-R which we discussed in our brief --
13 there was no evidence before the licensing board as to what
14 the state of Connecticut would do with respect to the large
15 portion of the ingestion pathway which lies within that
16 state. There was an exchange of rather confusing letters
17 back and forth with the state of Connecticut and various
18 and sundry other people, including LILCO, and the bottom
19 line was the state of Connecticut would do something if
20 there was an emergency, but no one on the record, including
21 the licensing board, has any idea what they would do.

22 The licensing board said we think it is
23 preposterous to say they would not do something to protect
24 their citizens, but that's not the issue. They need to
25 make the finding that the people would be protected, and it

1 had no basis on the evidence before it on which to do that.
2 I think our brief lays that out in pretty good detail.

3 One case that has come out recently that became
4 available after we wrote our brief, which supports
5 Intervenors' position with respect to the board's rulings
6 on, for instance, the schools' contentions where this ad
7 hoc planning or ad hoc nonplanning, ad hoc response is not
8 accurate was accepted by the board; and with respect to the
9 hospitals where there is admittedly no evacuation plan,
10 LILCO intends only to recommend sheltering; and with
11 respect to the state of Connecticut the recent ALAB 819
12 decision in the Limerick case is very applicable and
13 provides additional support for Intervenors' position that
14 those rulings by the licensing board were incorrect.

15 In that case the appeal board found it
16 completely improper for the licensing board to rely upon,
17 number one, an argument that because there was a low
18 probability that you might have to evacuate an area you
19 don't need to plan for evacuation. The appeal board said
20 you can't assume that you have to have an evacuation plan,
21 just like the appeal board said in the Zimmer case.

22 In the ALAB 819, the board also said, it
23 interpreted the recent DC Circuit Court decision and said,
24 look, the court found that a listing isn't an arrangement.
25 You have to go beyond just saying we believe things will be

1 available and making an assumption that people will do
2 things in the event of an emergency, in order to meet the
3 regulatory requirements. You have to have evidence upon
4 which to make a reasonable assurance finding. You can't
5 just make assumptions.

6 That's exactly what the licensing board did in
7 this case. On the issues that we have identified in our
8 brief as those where there is in fact no planning and there
9 was before the licensing board no evidence of planning, it
10 nonetheless found that planning for hospitals, the planning
11 for schools, the planning for the state of Connecticut, the
12 planning with respect to congregate care centers was
13 adequate, and it had no basis upon which to do so.

14 Those decisions clearly violate the policies of
15 the Commission subsequent to TMI. There was no evidence
16 before the board that what would happen in the event of a
17 Shoreham emergency would be any different than what
18 happened at TMI, when you didn't have any planning at all
19 in advance, and I think that I'm not going to talk anymore
20 about that because I think we lay it out in our briefs.

21 JUDGE ROSENTHAL: I would like to ask about one
22 other issue arising again from the August decision, and
23 this relates to the rejection of your late contention
24 growing out of the strike that LILCO had, and you argue
25 that under decisions such as ALAB 130 in Grand Gulf and

1 Allens Creek ALAB 590, that it wasn't incumbent upon you to
2 address the merits of that contention at the threshold, and
3 therefore the licensing board had no basis for rejecting
4 the contention on the strength of the Applicant's affidavit.

5 Now, while I might accept that line of argument
6 in the context of a timely contention, aren't the rules
7 somewhat different in the context of late contentions? The
8 Staff, for example, referred in its brief to a decision, I
9 think, in this very proceeding ALAB 743, in which we were
10 dealing with the endeavor to intervene late on the part of
11 this Brookhaven scientist group. You were not in the case
12 at that time but --

13 MS. LETSCHE: We were.

14 JUDGE ROSENTHAL: I didn't see your name on the
15 opinion. You may have been in the case but you were not
16 involved here. We indicated there that when somebody comes
17 in with a late petition, that would also apply to a late
18 contention. It is expected that that party will do
19 something beyond what would be required of the submitter of
20 a timely contention, namely to identify its prospective
21 witnesses and summarize their proposed testimony. Now,
22 isn't really -- when you are dealing with a late contention,
23 the merits involved, why should we admit a late contention
24 in circumstances where, as appeared to be the case here,
25 your contention was based on a misapprehension of fact as

1 to the number of resignations?

2 MS. LETSCHE: Two things, Judge. When that
3 contention was submitted, it was Intervenor's position
4 there's no way it can be called untimely. It was submitted
5 12 days after the licensing board's decision --

6 JUDGE ROSENTHAL: It was a late contention. You
7 had to address the lateness factors. Whether it should
8 have been regarded as unreasonably late is another matter,
9 but it was late. So you address the five contentions. My
10 question again is, in that circumstance, why didn't you
11 have to get into the merits and show there was some at
12 least colorable merit to that claim.

13 MS. LETSCHE: At the time it was extremely
14 colorable. The licensing board said we understand there
15 have been massive resignations from LERA. That was the
16 licensing board's identification of the strike issues and
17 it was reported in the newspapers widely.

18 JUDGE ROSENTHAL: There's an affidavit that says
19 there's a very limited number.

20 MS. LETSCHE: An affidavit appeared sometime
21 after our contention was submitted and it also was at the
22 time the strike was going on, and it was not necessarily
23 clear that the way things were characterized in that
24 affidavit was necessarily true. It might have turned out
25 to have been true and the licensing board might have

1 appropriately granted summary disposition or done something
2 else like that with respect to those facts. The point of
3 the Intervenors, however, was it was not proper for the
4 licensing board to go directly to the merits of the
5 contention in making its admissibility ruling.

6 The Intervenors did identify witnesses that they
7 intended to present on that contention. They did describe
8 generally the types of evidence which we intended to submit.
9 In terms of responding, as you suggested the appeal board
10 had said we should, I believe we met those requirements.
11 The ultimate resolution is not something that we can debate
12 about. The fact was that the licensing board improperly
13 went to the merits at a point when it appropriately should
14 have been considering the admissibility of the contention
15 based on the standards that we had met for its admission.

16 JUDGE ROSENTHAL: You have almost run out of the
17 50 minutes that you were allotted, but given the fact that
18 I took up a fair amount of your time at the outset on this
19 new issue, more or less, I will give you another five
20 minutes at this point.

21 MS. LETSCHE: I think the only other matter I
22 would like to talk about in my few minutes remaining is the
23 licensing board's denial of our proposed Contention 22,
24 which has to do with whether or not local conditions were
25 considered in drawing up LILCO's emergency planning zone.

1 JUDGE ROSENTHAL: Isn't it true with respect to
2 Contention 22 that most of these specific local
3 characteristics that you -- or local conditions -- were
4 ventilated by the board or before the board in connection
5 with other contentions?

6 MS. LETSCHE: No. We were never permitted
7 because of the ruling on 22, never permitted to discuss the
8 impact of any local conditions upon the size of the EPZ
9 except the jurisdictional boundary issue, which was
10 discussed in 22-D and the board did look at that. We were
11 never permitted to discuss the impact, for instance, of the
12 fact that LILCO is not a government and does not have the
13 standard type of ad hoc expanding capabilities that a
14 government might have, the impact of that fact upon the
15 size of the EPZ; in other words, whether or not because
16 LILCO is LILCO and not a government, you might have to have
17 advanced planning out to 12 miles because of certain
18 conditions on the island, rather than 10. We were never
19 permitted to address that. That was raised in 22-B.

20 JUDGE ROSENTHAL: What were these local
21 conditions, such as transient population, inadequate roads,
22 adverse weather, considered in connection with?

23 MS. LETSCHE: Certainly when they were talking,
24 for instance, about LILCO's dose assessment methods there
25 was discussion of whether or not when they do their

1 projections in order to come with up with protective action
2 recommendations whether the computers deal with shifting
3 winds. Computers do and they have a way of dealing with it,
4 so shifting winds and that kind of meteorological condition
5 was discussed, but it had nothing to do with the EPZ
6 boundaries. Same is true with respect to the transient
7 population and the existence of that entire east end out
8 there isolated on the opposite side of the plant.

9 JUDGE WILBER: Beyond the EPZ 10-mile limit,
10 wasn't EPZ protective action guidelines the area where this
11 10-mile limit was established? I'm confused how roads are
12 going to change the concentration of radioactivity.

13 MS. LETSCHE: The most important implication
14 about the roads, Judge Wilber, is with respect to people
15 being on them and blocking them and preventing people from
16 being able to get away.

17 JUDGE WILBER: That was litigated, wasn't it?

18 MS. LETSCHE: Not with respect to where you put
19 the boundary. The number of roads within the EPZ was
20 certainly discussed at great length in the evacuation time
21 length estimate area, but the impact of the roads outside
22 the EPZ and the fact that you have a huge influx of people
23 in the summer, the transients coming into that east end and
24 the reaction, likely reaction of those people to an
25 emergency and what it does to the roads and whether that --

1 and this is the significant part -- whether that means that
2 you have to have planning further out was never discussed.

3 Whether or not, because you are going to have
4 all these people, for instance, you might want to set up
5 some kind of relocation center out on the east end. Maybe
6 they don't need it. Maybe the facts of this case, the
7 transients there and the roads out there, indicate a need
8 to have that. Maybe that's the kind of planning that
9 needed to go further out. Maybe you need to have a
10 different kind of public information program out there.
11 Maybe you need a different kind of perimeter control.
12 Maybe you need a perimeter control person 11 miles out.

13 There's a road 11-1/2 miles out on which you
14 will have 5000 people on Sunday afternoon in the summer.
15 We were never allowed to discuss that, on where you stop
16 your planning, and that clearly violates the San Onofre
17 case in which not only was a contention admitted which was
18 much more general, but which said, the EPZ boundary was not
19 drawn after consideration of local conditions. That was
20 admitted; there was testimony about it. The applicants
21 submitted a study concerning the health effects and the
22 likely figures product, as well as evidence which
23 demonstrated in that case that the Applicant had taken into
24 account local conditions, and the licensing board accepted
25 all that evidence and made a ruling off the EPZ and in that

1 case in one area had the EPZ going out 12 miles. What
2 happened in our case, the licensing board said we're not
3 even going to let you talk about it or try to persuade us
4 you need to go a quarter of a mile out. We're not going to
5 let you talk about it at all, and that's a clear violation
6 of 547(c)(2) which we were entitled to address in this
7 proceeding.

8 JUDGE ROSENTHAL: Thank you.

9 JUDGE WILBER: One more before you leave. You
10 talk about overwhelming evidence, this is on the
11 credibility, that schools would not believe LILCO and thus
12 would not take appropriate protective action. Are you
13 inferring here that they would do something more dangerous
14 than LILCO would recommend?

15 MS. LETSCHE: The point, I think, on credibility
16 and it is -- the issue you raise is a combination issue of
17 schools and credibility. There are two points. Number one,
18 the school districts in the EPZ have -- none of them have
19 accepted any, they have not done any planning, none have
20 accepted any proposals made by LILCO and none have said
21 they believe those proposals will work.

22 JUDGE WILBER: They said they will take all the
23 information they can get and use the best information they
24 have.

25 MS. LETSCHE: I think that's a little bit of a

1 mischaracterization. You can't selectively decide you are
2 going to selectively listen to some things the school
3 people say and not others. If you say we'll believe them
4 when they say they will do their best -- and I'm sure all
5 the people would have said at TMI we'll do our best too.
6 But you can't say we will not believe them when they say
7 the plans won't work.

8 The credibility issue, the major issue there
9 which applies to schools but applies generally to the
10 entire population is that you have a situation where up
11 front everyone acknowledges this utility, nobody believes
12 it. What the licensing board says, we know that but we
13 believe that emergency people will. Now, there wasn't any
14 basis for that. That's a nice assumption and that's a nice
15 hope, but you have got to have some evidence if you are a
16 licensing board and are making a reasonable assurance
17 finding, and there was none to support that conclusion in
18 this record.

19 JUDGE ROSENTHAL: Thank you. We'll take a
20 10-minute recess and hear from the Applicant.

21 (Recess.)

22 JUDGE ROSENTHAL: Mr. Christman, you have at
23 this point a total of, as I calculate it, 45 minutes.

24 MR. CHRISTMAN: That's correct. I take it you
25 would like me to go straight through on that?

1 JUDGE ROSENTHAL: That's correct. In this
2 portion you will address both Intervenors' appeals and your
3 own, and you'll address at the outset, I trust, the
4 question that I raised at the outset with Ms. Letsche.

5 MR. CHRISTMAN: Yes, sir, ALAB 694. I'm not
6 sure I can distinguish the Summer case, and I suppose it
7 can be said justifiably that I guess the argument or the
8 proposition before me is have the Intervenors waived their
9 right to appeal, because they didn't raise them in defense
10 of the board's decision when we appealed the legal
11 authority in a couple of factual issues. And I suppose one
12 could conclude that they had waived then and the board
13 should proceed with it sua sponte in the usual fashion, but
14 in doing your sua sponte review I presume you would be
15 guided to some extent by the complaints the Intervenors had
16 made, and therefore, as a practical matter, it makes a
17 difference.

18 JUDGE ROSENTHAL: What do we do about the appeal
19 as such? You are suggesting, probably correctly, that we
20 should address the claims the Intervenors are making, but
21 the question remains do we address them in the context of
22 an appeal or do we address them in the context of arguments
23 advanced as an alternative basis for upholding the
24 licensing board's result? Now, that may be in the real
25 world a distinction without significance, but nonetheless,

1 we have to do something with this appeal. Do we allow the
2 appeal to stand, and if so how do we justify doing that in
3 light of the fact that it is an appeal from a result that
4 was entirely in the Intervenors' favor?

5 MR. CHRISTMAN: I guess you would have a
6 difficult time justifying that. The answer would be to
7 consider the merits, which I think would be useful to the
8 Commission in the course of the ordinary sua sponte review
9 reaching your ultimate result.

10 JUDGE ROSENTHAL: All right, you can proceed
11 with your argument.

12 MR. CHRISTMAN: Fine. We talked about role
13 conflict first; Ms. Letsche did. I take it she has cleared
14 up the confusion about this exhibit which was --

15 JUDGE ROSENTHAL: I think she has cleared up the
16 confusion. I would tell you in all candor that I don't
17 find that this exhibit provides very much support for, if
18 any at all, for the proposition that these emergency
19 workers will respond. I can tell you that I am
20 particularly concerned about the bus drivers, I think more
21 so than your own employees or your client's employees.

22 I would like to know to what extent this exhibit
23 supports the proposition that these bus drivers will
24 respond in the event of an emergency; and if this exhibit
25 doesn't support that proposition, what in the record does?

1 MR. CHRISTMAN: This exhibit, which is, after
2 all, Suffolk County's exhibit, is only one page out of the
3 study.

4 JUDGE ROSENTHAL: This is the thing to which we
5 have been referred by both your brief and the Staff's brief.

6 MR. CHRISTMAN: Although I would not take this
7 one page out of a paper which is the basis of a witness'
8 opinion as the sole evidence on the matter.

9 JUDGE ROSENTHAL: What is the evidence?

10 MR. CHRISTMAN: Let me tell you. The evidence
11 you would say has two aspects, a theoretical and the purely
12 empirical. The empirical is over the course of the years,
13 the events that are represented by the witness' opinion and
14 part of which are represented by this EP-1, over what did
15 we say, 500 disasters in total, show that there has never
16 been a case where an emergency organization was unable to
17 function because of shortage of personnel. Rather, what
18 people observe when they go to those disasters is an
19 oversupply of personnel.

20 JUDGE ROSENTHAL: What are we talking about in
21 terms of personnel? I can understand that individuals who
22 have as part of their normal occupations an emergency
23 response responsibility will respond. I take it that that
24 description could not be reasonably ascribed to the bus
25 drivers. They are not policemen, firemen, whatever other

1 category of people you would have that are in the business
2 of responding to emergencies.

3 MR. CHRISTMAN: The key, as the theoretical side
4 of the evidence shows, is not what job they perform but
5 something called role certainty or role definition, which
6 is if people understand what they are to do in an emergency,
7 then history shows that they do it. Now, they can get that
8 role certainty in a number of ways, and there are two that
9 were discussed in the evidence at great length. One is if
10 they are part through training or through being a part of
11 an established emergency plan and understanding what the
12 people expect of them in an emergency. Another way to get
13 role certainty is to have a part in the emergency plan that
14 corresponds with their everyday jobs such as teachers, bus
15 drivers, because as FEMA would tell you and did say on the
16 record, teachers, for instance, are accustomed to be
17 filling the role of taking care of the children.

18 JUDGE ROSENTHAL: I don't have a problem with
19 the teacher. I assume the teacher will remain in the
20 classroom until those children are taken care of. My
21 problem is with contract bus drivers, and I'm not as ready
22 to make that assumption as you have. And I would like to
23 know again what evidence there is on the record that would
24 indicate that these bus drivers would leave their homes,
25 wherever they are, come into this area where there may be a

1 radioactive cloud or they may think there's a radioactive
2 cloud, pick up these kids and take them wherever they are
3 supposed to go. That is not the kind of role I would
4 suspect that most bus drivers think a part of their
5 everyday occupations.

6 MR. CHRISTMAN: Here is the evidence. The plan
7 builds on the emergency plans that are already in place.
8 That is the key. There is a requirement under New York law
9 that all these schools have emergency plans and those
10 include early dismissal and they also are supposed to have
11 "stay where you are" plans. Now, early dismissal plans are
12 emergency plans of a type and are exercised all the time.
13 They were exercised, I believe, while we had this hearing
14 because there was a snowstorm. The evidence shows that the
15 bus companies are obligated to send the buses when they
16 have an early dismissal and that they have fulfilled that
17 duty well in the past.

18 JUDGE ROSENTHAL: In what circumstances?

19 MR. CHRISTMAN: Snow emergencies.

20 JUDGE ROSENTHAL: I would suggest that it is
21 difficult to equate a snow emergency which these bus
22 drivers in the northern climes face on a regular basis --
23 our drivers here even in the not-so-northerly climes have
24 been facing that recently -- on the other hand, with a
25 radiological emergency, which is entirely foreign to the

1 experience of these drivers.

2 MR. CHRISTMAN: Are you propounding the theory
3 that radiological emergencies are fundamentally different
4 from other emergencies as far as role-playing is concerned?
5 If you look at those radiological emergencies, which I
6 would call TMI and Ginna, you find virtually no evidence of
7 role conflict. In Ginna, none whatsoever. The people at
8 the plant apparently showed up. There were some outside
9 emergency, as the record shows, some outside emergency
10 personnel called upon to mobilize and they did so. There
11 was no evidence of role conflict also.

12 JUDGE ROSENTHAL: School bus drivers were
13 involved also?

14 MR. CHRISTMAN: I don't think so, but you will
15 find no case in history where a school bus driver was
16 called to respond to a radiological emergency, but that
17 doesn't mean we did not carry our burden of proof. We did
18 so by showing that bus drivers show up in the kinds of
19 emergencies that have occurred.

20 JUDGE ROSENTHAL: How are these drivers trained?

21 MR. CHRISTMAN: They are trained to drive buses.
22 Similarly, teachers know how to teach kids.

23 JUDGE ROSENTHAL: They have no training in the
24 specifics of radiological emergency?

25 MR. CHRISTMAN: LILCO has offered to train them

1 and to reimburse them for the cost of training, to remove
2 any disincentive from taking it and to provide dosimeters.
3 I don't know what the current status of the training is but
4 it has been offered. I cannot guarantee that all bus
5 drivers will take LILCO up on that offer but I suspect if
6 the plant were to operate that that would happen.

7 JUDGE ROSENTHAL: All right, let me ask you a
8 few other questions. How do you justify the failure of the
9 licensing board to permit the discovery on the Nassau
10 Coliseum?

11 MR. CHRISTMAN: Very simply because as the board
12 noted the reopening was very, very narrow. It is a public
13 building. The issue was very narrow and no discovery was
14 warranted, and since it was very late in the proceeding an
15 expedited proceeding was justified.

16 JUDGE ROSENTHAL: It was late in the proceeding
17 because you surfaced it late. I don't understand how on
18 the one hand you can put a new element into the case at a
19 late stage and two, rely on its lateness as justification
20 for denying discovery. It was late; it was late because of
21 the Applicant; not because of the Intervenors.

22 MR. CHRISTMAN: It was late because of the
23 Applicant's motion. It was not the fault of the Applicant.

24 JUDGE ROSENTHAL: I'm not saying it was. You
25 are relying on the lateness of the hour as justification

1 for denying discovery, and I'm suggesting to you that the
2 lateness of the hour in this instance cannot be put at the
3 doorstep of the Intervenors.

4 MR. CHRISTMAN: If there was an issue that
5 warranted discovery, but I'm principally relying on the
6 narrowness of the reopening and also on the fact that some
7 informal discovery went forward. The Staff and FEMA
8 provided information, for instance. The Intervenors were
9 provided some information on the scheduling of events in
10 the Coliseum by the Coliseum management, and I have not
11 heard anybody tell me anything significant that they could
12 have uncovered through all this discovery they would have
13 had.

14 JUDGE ROSENTHAL: We heard from Ms. Letsche what
15 Intervenors would have sought to ascertain through
16 discovery. Now you are saying that that was not important.
17 She ended up by saying that as it turned out she couldn't
18 even get a lot of this information at the actual trial.

19 MR. CHRISTMAN: That's wrong. I was at that
20 actual trial. She talks about details about the Coliseum.
21 They could have asked Ms. Robinson. She has been through
22 the building with a fine-tooth comb. What they asked was
23 about their excluded evidence, which went to issues not
24 within the scope of the reopening. I was there. What they
25 asked about were not these sorts of details.

1 JUDGE ROSENTHAL: Getting to that excluded
2 evidence, your position is that none of that evidence had
3 any bearing upon the Coliseum issue?

4 MR. CHRISTMAN: Oh, not on the Coliseum issue.
5 Not on the reopened issue. There were a few snippets
6 relevant to the functional adequacy, and those were let in
7 -- whether the parking lot was big enough, that sort of
8 thing -- but so little of it was left that the Intervenors
9 elected to withdraw that.

10 JUDGE ROSENTHAL: Dr. Radford's proposed
11 testimony, as I understood it, went to the matter of the
12 distance of the Coliseum from the EPZ. Doesn't that go to
13 the functional adequacy of the Coliseum? I would think the
14 Coliseum would not be regarded as functionally adequate if
15 it was at such a distance from the EPZ that very few people
16 could get there to use it as a relocation center.

17 MR. CHRISTMAN: Number one, it goes to the
18 distance of the Coliseum from the EPZ, which in the first
19 place there was testimony on that in the August hearings
20 before this reopening occurred. In the second place, there
21 was a contention about distance which alleged that certain
22 facilities were too close to be used as relocation centers,
23 which shows that the issue was considered in the
24 contentions but not ever put in the contention about the
25 Coliseum being too far away, and in light of the fact that

1 there was a contention about something being too close --

2 JUDGE ROSENTHAL: How do you define functional
3 adequacy? I would think myself that functional adequacy
4 goes to the matter as to whether in the real world this
5 Coliseum is going to be able to serve as a relocation
6 center, and I would think if that's so, within the ambit of
7 that inquiry would be not only the matter of the distance
8 of the Coliseum from the EPZ but also the matter of traffic
9 conditions in connection with the various evacuation routes
10 to the Coliseum, which I understand was the subject of the
11 proposed testimony of Messrs. Roberts and Kilduff. Am I
12 wrong about that?

13 MR. CHRISTMAN: Yes, in the following sense.
14 The board was the one that reopened on this issue. The
15 issue was was there a letter of agreement in existence and
16 the answer is no. We produced a letter and that should
17 have put the matter to bed as an administrative matter.
18 The board expanded that issue to include not is there a
19 letter of agreement and is there a facility but is the
20 facility adequate, so it defined the scope of its reopening.
21 Since it reopened it wider than we had asked and
22 therefore --

23 JUDGE ROSENTHAL: You are suggesting that
24 adequacy just meant whether the facility was physically
25 adequate to accommodate the folks that might be there, not

1 whether in a real sense, given its location and the roads
2 leading to it, people could be expected to reach the
3 locations.

4 MR. CHRISTMAN: That is what the board clearly
5 had in mind, and the board defined the scope of the opening
6 in a more broad fashion than we asked for. I think the
7 Staff's explanation in its brief is probably the right one.
8 What the board had in mind was is the building big enough
9 to handle the number of people.

10 JUDGE ROSENTHAL: If you are serving up the
11 Nassau Coliseum as a relocation center, I can't understand
12 why it is not relevant in determining whether the Nassau
13 Coliseum can be expected to serve in that capacity, whether
14 people are going to be able to get there.

15 MR. CHRISTMAN: It is if there's a contention
16 that challenges that matter, but there was none in this
17 proceeding, and as you will recall from, I think, ALAB 819,
18 a litigant is bound by the real terms of his contentions
19 and there was no contention like that that says this
20 building is too far away and no one ever offered one, to
21 this day has never offered one.

22 JUDGE WILBER: There was an issue of functional
23 adequacy; isn't that right?

24 MR. CHRISTMAN: The issue is there is no letter
25 of agreement for a relocation center. That's all. That

1 was what we said and the board went beyond that and said,
2 no, where it said inherent in this issue is functional
3 adequacy and defined what it meant by that.

4 JUDGE ROSENTHAL: What you are saying is the
5 Intervenor should have understood that the board did not
6 have in mind whether people could reach this relocation
7 center. They should have governed themselves accordingly
8 and put in a contention that the relocation center would
9 not be in a broad sense functionally adequate because
10 people couldn't get there?

11 MR. CHRISTMAN: In light of the fact that there
12 was testimony in August on whether facilities 40 miles away
13 are too far away in light of the fact there was a
14 contention in the record on certain facilities being too
15 close that, yes, it would be reasonable to expect the
16 Intervenor to submit a contention saying this is too far
17 away if they wanted to litigate that.

18 JUDGE ROSENTHAL: You are also of the view that
19 the proposed testimony of Ms. Myland respecting possible
20 groundwater pollution was beyond the scope of the licensing
21 board's functionally adequate inquiry; is that right?

22 MR. CHRISTMAN: Yes, I do think that. That
23 raised a question of radiological health and safety and
24 decontamination, which you can see from other contentions
25 put in about washing fruit and that sort of thing could

1 have been submitted at any time and were not. There's no
2 difference in that contention really between the Coliseum
3 and the other facilities that were proposed earlier, or for
4 that matter any hypothetical facility that could be
5 proposed. All she says is when you decontaminate people
6 the wash water has to go somewhere and that was not within
7 the scope of any of the contentions.

8 JUDGE ROSENTHAL: What's your answer to any of
9 the Intervenors' claims respecting the exclusion of 22?

10 MR. CHRISTMAN: We did not discuss at all the,
11 what I think is 22-A, which has to do with probability risk
12 assessments, but I'll talk about 22-B which has to do with
13 so-called local conditions.

14 The condition mentioned this morning was that
15 LILCO was not a government and is not able to conduct an ad
16 hoc expansion of efforts as necessary -- as might be
17 necessary when you get beyond the planning basis, but the
18 judgment that a 10-mile planning zone is sufficient to
19 permit ad hoc expansion was precisely one of the judgments
20 underlying the generic 10-mile distance. That was the
21 judgment the Commission made when it passed that rule and
22 that is simply a challenge to the regulation.

23 By the way, as to the proposition you have to be
24 a government to expand, that's not right. Presumably, if
25 you have planned to respond to a full 10-mile EPZ in one of

1 those very rare cases where the plume goes beyond 10 miles
2 and you need protective actions beyond that range, it is
3 almost a certainty that that plume will be a fairly tight,
4 narrow plume, otherwise it wouldn't get out that far in
5 that concentration, therefore you can remobilize some of
6 the people from the parts of the EPZ where they are not
7 needed to go outside. It doesn't have to be a government
8 at all. But in any event, that's a clear challenge to the
9 regulation because that's one of the underlying judgments
10 behind the generic 10-mile zone.

11 You remember from the regulations the most
12 important -- in the emergency planning regulation -- the
13 most important judgment made was there should be a generic
14 10-mile zone. That was the key to all that deliberation
15 that the Commission went through. We talked about the east
16 enders. Well, all that was litigated. The shadow
17 phenomenon. We litigated the east-enders. The shadow that
18 the County wanted to propose extended as much as 50 miles
19 out on the east end, and they managed to show under their
20 mode of analysis some of those east-enders come in and go
21 down on Sunrise Highway outside the EPZ --

22 JUDGE ROSENTHAL: If I understood Ms. Letsche
23 correctly, the claim of the Intervenors is they were not
24 permitted to litigate the local contentions in the context
25 of whether the EPZ was of the appropriate size and

1 configuration. She says that local conditions were
2 considered, it was in an entirely different context. Now
3 is she right about that? If so, does it make a difference?

4 MR. CHRISTMAN: That seems a mere philosophical
5 difference. I don't understand the basic meaning of that.
6 The effects on people outside the EPZ were considered at
7 great length and where the people would go. The evacuation
8 time estimates the County submitted were mostly different
9 from LILCO's, only because of a large number of people who
10 never came into the 10-mile EPZ but skirted around it.

11 JUDGE ROSENTHAL: To what purpose were they
12 considered? Ms. Letsche said it was not the bottom line of
13 whether the EPZ should be enlarged. If it wasn't that it
14 must have been in some other context for some other purpose.

15 MR. CHRISTMAN: It was in the context of
16 determining evacuation time estimates for the 10-mile EPZ;
17 it was not in the context of expanding the EPZ.

18 MS. LETSCHE: Could she have put in proposed
19 findings to the effect that these local conditions
20 ventilated in this other context required an expansion of
21 the EPZ?

22 MR. CHRISTMAN: We would have objected on the
23 ground that it is still a challenge to the regulation
24 because the generic 10-mile distance is a requirement.

25 JUDGE ROSENTHAL: I thought the regulation

1 allowed some adjustment in the size and configuration of
2 EPZs because of local conditions. If the claim is that the
3 local conditions here required some alteration in the EPZ,
4 why is that a challenge to the regulations?

5 MR. CHRISTMAN: Because it is a challenge to the
6 underlying logic that set the 10-mile EPZ, I guess. The
7 local conditions just means there are people outside the
8 EPZ. If you scratch the argument, it means there are
9 people outside the EPZ, therefore they should be included
10 in the EPZ. I don't think the argument makes sense.

11 JUDGE ROSENTHAL: What does the regulation have
12 in mind when it talks about local conditions requiring an
13 alteration in the size of the EPZ?

14 MR. CHRISTMAN: We think that means, and the
15 emergency planning witnesses who do this sort of thing
16 testified that that means a sort of a fine-tuning of the
17 10-mile boundary. For instance, you certainly wouldn't
18 follow a strict compass-drawn circle if there were a
19 prominent road that people would recognize as a good
20 boundary. You tend to use those sorts of landmarks; and
21 also case law suggests that licensing boards are ready to
22 expand it out to bulge around a small discrete population,
23 or in this case to draw in a school that wasn't otherwise
24 in it, but basically it is to make the circle that you draw
25 of 10 miles observable by people on the ground so they know

1 where the boundary is, and that's really the basis of it.

2 JUDGE WILBER: Did your evacuation time estimate
3 model consider these people outside and would impact the
4 release points of the EPZ?

5 MR. CHRISTMAN: Yes. The KLD did all kinds of
6 sensitivity analyses. They assumed a 20-mile EPZ and
7 assumed 25 percent shadow, 50 percent shadow and a full
8 evacuation of the 10-mile EPZ, and you can see from the
9 board's decision that that had some effect on the
10 evacuation times from the 10-mile EPZ, but not huge effects
11 on it. The only way you get huge effects is by considering
12 those people that don't go in the EPZ at all and are from
13 outside the EPZ and skirt around.

14 JUDGE WILBER: That's the question I'm asking.
15 Those people outside that remain outside but are clogging
16 the roads outside, doesn't that have an impact on the
17 people inside the EPZ in getting out?

18 MR. CHRISTMAN: Yes, that's what KLD's numbers
19 were. How long does it take the people in the EPZ to get
20 out and what effect do you have on those numbers from the
21 so-called shadows outside? Those numbers reflect the
22 people inside getting out under the impact of the so-called
23 shadow.

24 JUDGE ROSENTHAL: You would not have objected to
25 that hypothetical proposed finding on the ground there was

1 not a contention in the case to support it? I asked you if
2 they tried to put in a finding that the EPZ should be
3 altered because of local conditions; you said, well, you
4 would object to that on the ground it was an
5 impermissible attack on the regulations. I'm asking
6 whether you would have also objected to it on the ground
7 that there was not a contention such as 22 endeavoring to
8 tie the local conditions to the size of the EPZ.

9 MR. CHRISTMAN: That's a good question. The
10 objection would be, of course, that the contention was
11 already -- the objection was there was a contention
12 submitted and it was excluded by the board. You are saying
13 that the basis of excluding the contention was they could
14 litigate the same thing under other contentions, and my
15 answer to that would be, it simply makes no difference
16 because they were allowed to litigate the effected people
17 outside on local conditions, the road network and the
18 impact on planning --

19 JUDGE ROSENTHAL: You agreed not in the context
20 of the expansion of the EPZ, and I asked you if they tried
21 to use that testimony for that purpose, whether you would
22 have objected on, among other grounds, the ground that they
23 were trying to resurrect Contention 22 which had been
24 excluded.

25 MR. CHRISTMAN: Yes, we would have objected on

1 that ground.

2 JUDGE ROSENTHAL: Sounds to me like it's heads
3 you win and tails the Intervenor's lose.

4 MR. CHRISTMAN: If they were allowed to litigate
5 the impact of planning on all these items, and no matter
6 how you put it -- or that you should draw a larger circle --
7 the argument is still that there are people outside the EPZ
8 therefore you should make the EPZ bigger to enclose them,
9 and I don't think the logic is there.

10 JUDGE ROSENTHAL: I think Mr. Wilber has a few
11 questions on hospitals and things.

12 JUDGE WILBER: Let's start with the customer
13 service office, CSO.

14 MR. CHRISTMAN: Customer service operator. I
15 think it is both.

16 JUDGE WILBER: Intervenor's call them merely a
17 vehicle, and I assume they mean by that that that is not an
18 adequate 15-minute notification. Is this correct, that
19 they are just a vehicle?

20 MR. CHRISTMAN: No. It is precisely analogous
21 to the usual situation where the notification goes to, say,
22 a sheriff's's office and there's somebody there 24 hours a
23 day and he calls the people, but that's all that's required
24 and I think everybody except the Intervenor's would agree to
25 that.

1 JUDGE WILBER: Do they have any special training?

2 MR. CHRISTMAN: They are trained as necessary,
3 yes, because they have to be because you see, if in 15
4 minutes they can't get the director of local response they
5 have to sound the sirens themselves.

6 JUDGE WILBER: I think it was the Staff that
7 said that they will activate the public warning system -- I
8 assume that's a siren -- within 15 minutes whether or not
9 they get the director. That tells me the siren is going to
10 go in 15 minutes no matter what happens; is that correct?

11 MR. CHRISTMAN: That's correct, if they can't
12 get the person who makes the decision, because it is deemed
13 important to move quickly. The sirens mean listen to your
14 radios.

15 JUDGE WILBER: Who puts what message on the
16 radio? Who has the training and intelligence to say put on
17 tape 23?

18 MR. CHRISTMAN: As I recall, there are of course
19 precomposed messages, and I believe there are precomposed
20 messages for that situation. I believe they would come --
21 the information would come from the on-site plan, and it
22 has been so long since we litigated that I don't know the
23 exact details but --

24 JUDGE WILBER: This has to be an off-site
25 situation, I would think.

1 MR. CHRISTMAN: But the initial information
2 comes from the plant. It may say there's an emergency at
3 the Shoreham plant, please stay tuned for further
4 information. That tells people to be alert until more
5 information comes.

6 JUDGE WILBER: Does the CSO do that if they --

7 MR. CHRISTMAN: Those messages -- and I'm hazy
8 on those details, the information has to come from the
9 on-site Staff, and it has to go to the radio station.
10 Either that or they have -- the original message would
11 simply say stay tuned and if they couldn't get the director
12 -- there's always a director on call. It is hard to
13 imagine not being able to get him within 15 minutes, but in
14 order to meet the 15 minutes there's a provision that if
15 you can't you must sound the sirens.

16 JUDGE WILBER: If I were to read that I would
17 say those sirens will go within 15 minutes no matter what
18 the event is. This sounds a little bit --

19 MR. CHRISTMAN: We would have to check. It
20 wouldn't be in the case of an unusual event, I don't
21 believe.

22 JUDGE WILBER: The decision says the director
23 can initiate the sirens at the alert stage. Does this mean
24 the CSO can also?

25 MR. CHRISTMAN: I can't tell you that. I would

1 have to look at the procedures. I just don't know.

2 JUDGE WILBER: Question on hospitals.

3 Ms. Letsche brought up ALAB 819.

4 MR. CHRISTMAN: So did I, I think.

5 JUDGE WILBER: Appeared that the board was
6 relying on the probability of an event as a basis for not
7 preplanning.

8 MR. CHRISTMAN: Thanks for asking. I had a note.
9 Her statement is you can't justify nonplanning by low
10 probabilities. In the first place, we are not justifying
11 nonplanning, not even for evacuation. It is true the
12 principal protective action for these hospitals is
13 sheltering rather than evacuation. That is not, I would
14 say -- well, in the first place, there's a plan for
15 evacuation in the extremely unlikely event it should be
16 called for.

17 When the ambulances and ambulets contracted for
18 have moved nonambulatory patients out, they can be
19 remobilized to evacuate the hospitals. They would be
20 evacuated later but it is anticipated that would never be
21 necessary. The reason for preferring sheltering is not so
22 much probability as A, those hospitals are all right on the
23 edge of the EPZ. Two are outside 10 miles and one is right
24 on the line but are on the EPZ but are out or on the
25 10-mile line. Two, they are massive institutional

1 buildings with thick walls, good for sheltering; and three,
2 it is generally unwise to move 4079 patients because
3 evacuating them is something you don't want to do unless
4 you really have to because of their other conditions.
5 Those are the other reasons, not really just probability at
6 all, just sound planning.

7 JUDGE WILBER: The board was wrong when they
8 talked about that probability then?

9 MR. CHRISTMAN: No, but it follows from the fact
10 that they are on the very edge. That's another way of
11 putting the proposition that they are on the very edge of
12 EPZ and unlikely to have heavy radiation doses.

13 JUDGE WILBER: The plan is supposed to plan for
14 this situation if it is within the EPZ; isn't that correct?

15 MR. CHRISTMAN: Yes, that goes to my first point.
16 You temper what you plan to do and how much focus and how
17 much planning you do by the likelihood. There is a plan
18 for evacuation. You use the same ambulances and ambulets,
19 remobilize them and it shouldn't be hard because they are
20 right on the edge. It is like walking across the street.

21 JUDGE WILBER: The other issue is as I
22 understand it there's no firm knowledge of where these
23 hospital patients are going if they are to be evacuated
24 other than to some hospital somewhere.

25 MR. CHRISTMAN: That's right.

1 JUDGE WILBER: This is planning? The ambulance
2 and ambulet drivers know where that 'some hospital' is
3 without any prior thought? Looks very ad hoc to me.

4 MR. CHRISTMAN: As you know, the basis of the
5 board's decision was, one, that history shows the hospitals
6 are more than cooperative in accommodating patients. Two,
7 that oral agreements have been reached with all of them
8 that they would do the best they could, but it was
9 impossible for those hospitals to specify in advance how
10 many beds they would have in advance.

11 JUDGE WILBER: Couldn't they give you an average
12 empty bed rate? Seems to be a pretty big subject here.
13 They seem to have good numbers on that.

14 MR. CHRISTMAN: That would be like the average
15 two feet deep stream, over your head in one spot and dry in
16 another. In the hospital's judgment they were not able to
17 commit in advance. There's a list of these hospitals and I
18 think it is the health services coordinators would call the
19 hospitals and locate which ones had beds and arrange to
20 have the ambulets dispatched to those places. That's
21 provided for in the plan. It is just not likely that's
22 ever going to have to happen or that it would be wise,
23 given that these are hospitalized patients who should not
24 be moved.

25 JUDGE WILBER: For some reason the board made a

1 distinction between nursing homes and hospitals. Nursing
2 homes you have to know where they are going, where their
3 relocation centers are, and I have a little bit of
4 difficulty, other than in maybe a limited number of
5 hospital cases, why there is a difference here.

6 MR. CHRISTMAN: Nursing homes sometimes are not
7 the good sheltering structures, and they are houses a lot
8 of times. People in nursing homes tend not to be as
9 gravely ill as people in hospitals.

10 JUDGE WILBER: But some are bedridden --

11 MR. CHRISTMAN: For instance the Suffolk
12 infirmary is technically a nursing home but is treated like
13 a hospital under the plan because it is an institutional
14 sort of building and the people there, as I understand it,
15 are of the more gravely ill types of elderly people.

16 JUDGE ROSENTHAL: These distinctions are all
17 found in the record here?

18 MR. CHRISTMAN: I believe so, yes. I'm sure
19 they are because they are in our findings.

20 JUDGE ROSENTHAL: You have about 10 minutes left.
21 You might want to address your own appeal.

22 MR. CHRISTMAN: Wouldn't be a bad idea, would it?
23 Our appeal goes to the planning basis involved in
24 determining how many people must we be prepared to monitor
25 and decontaminate at the Nassau Coliseum.

1 JUDGE ROSENTHAL: Why doesn't one fairly assume,
2 have to assume for present purposes, that absolutely
3 everybody in the EPZ might have to be evacuated and might
4 have to or might turn up for at least monitoring at the
5 relocation center? In other words, while there might be
6 only 32,000 people who needed public sheltering, that there
7 could be 160,000 or whatever that number is in the EPZ
8 requiring radiological monitoring. As I understand it, the
9 Nassau Coliseum is the only place that would be provided.

10 MR. CHRISTMAN: What you said is not irrational,
11 but my answer is there's no regulation or guideline that
12 even suggests, if you were going to impose such a
13 requirement -- after all, there are very detailed
14 requirements and guidelines -- and if you thought that that
15 was a guideline then you should have written something that
16 said you must be prepared to monitor everybody in the EPZ.
17 That's easy to say.

18 JUDGE ROSENTHAL: Why is that not a possibility?

19 MR. CHRISTMAN: It would be almost criminal
20 negligence to have that in your mind when you wrote those
21 guidelines and not say it outright. I know there are lots
22 of plans in this country, lots of emergency plans that
23 simply don't provide for the entire EPZ, and I have never
24 seen any suggestion that there is that requirement. It has
25 to be something less than that. Moreover, this may not

1 impress you at your level, but at the board's level they
2 refused to accept a contention which seemed to suggest that
3 everybody should be told -- two contentions. There was a
4 brochure contention that everybody should be told to go for
5 monitoring and --

6 JUDGE ROSENTHAL: Am I right that that 32,000
7 figure is the estimate of those people that are going to
8 require public sheltering?

9 MR. CHRISTMAN: Yes, a conservative estimate of
10 that.

11 JUDGE ROSENTHAL: If that's the case, isn't it
12 reasonable to assume that there will be at least some
13 people, maybe not everybody in the EPZ, at least some
14 people who will need monitoring but will stay with Uncle
15 George rather than require housing in one of the whatever
16 they call them, care centers or whatever the name is? It
17 seems to me that that would be required, to make that
18 assumption, that there are going to be people who will need
19 monitoring but will not need sheltering.

20 MR. CHRISTMAN: Well, the only requirement right
21 now is the board's decision which is a common law
22 requirement, but it is -- first, I think it would be
23 unlikely -- well, of course you have to assume first the
24 unlikelihood that it would be such a fast-break accident
25 that the evacuation wouldn't work. The chances of that

1 happening so that people actually get contaminated,
2 notwithstanding all the proposals, plans for sheltering and
3 evacuation, I suppose the probability is low, but yes, it
4 is possible that someone might go --

5 JUDGE ROSENTHAL: Then how can you attack, as
6 apparently you do, the board's finding that the number of
7 persons expected to seek shelter in the event of a disaster
8 is not necessarily the same as the number who might seek
9 monitoring in the event of a radiological accident? That
10 is the finding which underlies what you are complaining
11 about. It seems to me offhand that's a perfectly
12 reasonable finding.

13 MR. CHRISTMAN: The 32,000 is a conservative
14 number --

15 JUDGE ROSENTHAL: But that's the number that
16 we're taking as the sheltering number, and if you agree
17 there may be people who will go to Uncle George instead of
18 requiring sheltering in a public facility, then it perforce
19 follows that that board's finding is rational.

20 MR. CHRISTMAN: It is rational. It is based on
21 our testimony that if that were to happen, that sort of
22 thing, it might be necessary to put out EBS messages
23 advising certain people to report to the Coliseum for
24 monitoring, but that could be done. The 32,000 assumes an
25 evacuating of the entire EPZ, which means that it is

1 conservative on that ground. We believe the 20 percent is
2 also conservative, all of which is reflected by the
3 evidence, and moreover there is an outline of a procedure
4 in the plan for dealing with greater than 32,000 people,
5 but we didn't think it was raised by the issues before us,
6 so it wasn't presented to the board.

7 JUDGE WILBER: Then there are the -- you said it
8 was based on the evacuation of the entire EPZ; is that
9 correct?

10 MR. CHRISTMAN: Everybody moves out and 20
11 percent of those need housing.

12 JUDGE WILBER: 80 percent are just going to go
13 on their way and ignore -- you are not going to tell them
14 to go to the relocation center to be monitored?

15 MR. CHRISTMAN: No, no.

16 JUDGE WILBER: Is that going to be a secret,
17 that only people that need housing go to the relocation
18 center? J-12 says all people who arrive at the relocation
19 center, you have to have provisions for monitoring them.

20 MR. CHRISTMAN: Yes.

21 JUDGE WILBER: But you are saying only 32,000
22 are going to arrive there.

23 MR. CHRISTMAN: Because people are told in the
24 brochure and whatnot that if they need housing, or shelter
25 or care, come to the Coliseum. It is true --

1 JUDGE WILBER: The people leaving the zone, you
2 don't care about that; is that correct?

3 MR. CHRISTMAN: It is assumed in the normal case
4 those people would go -- not be contaminated and would stay
5 with other people. In the event that the monitoring shows
6 that there has been a particulate release and that certain
7 people may have passed through that particulate release and
8 would be contaminated, the message would say, you should
9 report to the Coliseum.

10 JUDGE ROSENTHAL: I must say if I were the
11 relative of one of these people who lived in the EPZ that
12 was going to provide shelter, I would want this person to
13 go through a radiological monitoring before they turned up
14 on my doorstep. Is that unreasonable?

15 MR. CHRISTMAN: That's what the purpose of the
16 EBS message, if it were not that there were a risk that
17 people had been contaminated, people would be told to do
18 that, but as a planning matter, we believe that the 32,000
19 would be adequate to handle those situations. We believe
20 that the planning basis should be based and is based
21 generally everywhere, as far as I know, on people who need
22 housing.

23 JUDGE ROSENTHAL: How is your client really
24 injured by the licensing board's declaration which is the
25 basis for your appeal? In the real world how does it hurt

1 your client?

2 MR. CHRISTMAN: In two ways, I guess. They want
3 us to predict on some basis how many people might have to
4 be monitored in a particulate accident, which would be once
5 in a lifetime event. I still haven't thought of any way to
6 predict that on a reasoned basis. Now, polls ask if there
7 is a radiological emergency would you like to be monitored,
8 and people say yes. People decide if there's a release,
9 which way it went, if they had evacuated and the release
10 started 10 hours later on, most people wouldn't feel the
11 need to go. If they were not told to get monitored they
12 probably wouldn't. You can't figure out that sort of thing
13 for a one-time only accident by opinion polls.

14 JUDGE WILBER: Doesn't your plant have to
15 consider the full zone evacuation?

16 MR. CHRISTMAN: It does.

17 JUDGE WILBER: All 160,000 are leaving and only
18 32,000 are going to the -- something is wrong there.

19 MR. CHRISTMAN: The planning basis is 32,000.
20 It is a conservative basis. The rational basis for that
21 was based on housing decision, the need for housing, not
22 monitoring. What I'm telling you is that in virtually
23 every case that number would cover the people who might
24 have been contaminated and might be advised to be monitored,
25 and in addition there is a -- the effort can be expanded to

1 accommodate additional people. We didn't present evidence
2 on that because we didn't feel it was fairly within the
3 contentions. There is a procedure for that in the plan not
4 in the record.

5 JUDGE WILBER: Was the upper limit of the
6 capacity of the Coliseum ever litigated?

7 MR. CHRISTMAN: No, sir. As you know, we
8 presented evidence back in that August, I guess, or summer
9 of '84 on the capacity, we presented our evidence in
10 presenting the basis for it and no one took issue with that
11 basis or really raised the issue of using a different basis
12 at that time. When the record was reopened in January, it
13 was expressly reopened to exclude the consideration of the
14 number of people who might be expected to go to the
15 Coliseum. Everyone was precluded from litigating at that
16 point. We felt it had been litigated earlier.

17 JUDGE ROSENTHAL: Your time has expired.
18 Mr. Bordenick? You have 20 minutes on the division of time,
19 Mr. Bordenick. Now, what's your response to the question
20 as to whether Intervenors' appeal will lie, and if not,
21 what should we do about it?

22 MR. BORDENICK: I think in this instance the
23 three parties are somewhat in agreement. In the Staff's
24 view, I must admit when the County's appeal came in I was
25 aware of Summer and I had the same thoughts. What's the

1 basis for their appealing given the fact that the licensing
2 board has denied the license, but I think the situation or
3 the two things that make Shoreham distinguishable from
4 Summer, first of all, the licensing board did deny the
5 license but not totally for the reasons that the county
6 advanced.

7 JUDGE ROSENTHAL: What difference does that make?

8 MR. BORDENICK: Makes a difference with the
9 second point I will make, which is that the Commission in
10 deciding to exercise its discretion to review ALAB 818 has
11 indicated it is going to hold on that review until the
12 appeal board decides the rest of the case. Taking that
13 into account and taking into account the fact that the
14 Commission has authorized the exercise to go forward, it
15 seems to me clear that the Commission is interested in
16 gathering all the facts on Shoreham because ultimately they
17 will be the final decisionmaker on whether or not a license
18 can issue.

19 JUDGE ROSENTHAL: That may mean, if we're as
20 sensitive as we should be to the Commission's wishes, that
21 we should go ahead and consider all of these interesting
22 claims that the Intervenors put up, but that doesn't answer
23 the question as to whether they should be considered in the
24 context of the Intervenors' appeal. The Commission did not,
25 as far as I am aware, focus upon, let alone repeal, the

1 settled jurisprudence in this appeal board decision, Summer
2 is one example, to the effect that a party can only appeal
3 from an adverse judgment, which is, as I suggested to
4 Ms. Letsche, nothing novel at all, but that's the rule, as
5 any appellate advocate knows, in the courts. You can
6 defend a judgment in your favor on any ground that the
7 record or judicial or official notice will permit, but you
8 can only appeal from adverse judgments. Now, my question
9 to you is, why should we leave this appeal standing, if we
10 should?

11 MR. BORDENICK: It is true the Commission did
12 not address the Summer case or the question that the appeal
13 board has raised. However, given the other circumstances
14 that I have elaborated, I think the Commission would find
15 it extremely helpful to have a ruling on whether or not --

16 JUDGE ROSENTHAL: Can we dismiss the Intervenors'
17 appeal and still pass on all of these issues that they have
18 raised?

19 MR. BORDENICK: Yes, because I'm in substantial
20 agreement with what Ms. Letsche said. You asked her why
21 she didn't raise these points in support of the licensing
22 board's decision which was adverse to LILCO. I don't want
23 to use the phrase you would be putting form over substance,
24 but I don't think the Commission is really interested in
25 how the determination as to what was litigated vis-a-vis

1 the plan was in a proper form, and I think the
2 circumstances in this case are distinguishable from Summer.

3 JUDGE ROSENTHAL: You've heard some of the
4 matters raised with Mr. Christman. You don't need to
5 repeat any of his responses that you agree with, but if you
6 approach some of those questions a little differently, we
7 would be very glad to have your views on them.

8 MR. BORDENICK: I would like to turn in that
9 context to the discussion that took place before the appeal
10 board this morning on Contention 22. I did not hear much
11 discussion on why it was the county did not exercise a
12 remedy it had available, a remedy the licensing board
13 discussed in its order denying the contention, which this
14 particular Intervenor certainly did not need to be told
15 that by the licensing board. That remedy was to file a
16 petition for an exception to the regulation of the question,
17 50.47(c)(2) under 10 CFR --

18 JUDGE ROSENTHAL: I suspect they didn't do that
19 because they didn't believe this was in effect an attack on
20 the regulation. That's their view, rightly or wrongly, was
21 that there was a regulation that permits the fine-tuning or
22 the adjustment of EPZs based upon local conditions and they
23 were invoking that regulation, so why should they have
24 sought a compensation from the operation of a regulation?

25 MR. BORDENICK: That was their option. They

1 certainly didn't accept the licensing board's decision.
2 They continue to challenge the validity here today, but the
3 point I'm making this morning is I'm curious as to why they
4 didn't go that route.

5 JUDGE ROSENTHAL: They didn't think they were
6 called upon to do so. The only circumstance in which they
7 would have seen the necessity to go along that path would
8 have been if they agreed with you, which they don't, that
9 they were attacking a regulation.

10 MR. BORDENICK: That's true; they don't agree
11 with me, but in any event, as has been pointed up by
12 Mr. Christman and I won't elaborate on it, and as we
13 discussed in our brief at some length, the fact is the
14 10-mile EPZ, the so-called local conditions were litigated,
15 specifically 22-D was litigated, albeit the licensing board
16 only adjusted the EPZ to allow the inclusion of I think it
17 was three schools, but nevertheless, that was admitted.

18 JUDGE ROSENTHAL: Mr. Christman, I thought,
19 conceded that it was litigated in a different context, and
20 if indeed the Intervenors had tried in their proposed
21 findings to use those local conditions to argue that there
22 should be alterations in the size of the EPZ, the Applicant
23 at least would have responded that proposed finding tries
24 to resurrect Contention 22, which was excluded. Would you
25 have run the same argument?

1 MR. BORDENICK: Absolutely.

2 JUDGE ROSENTHAL: Then you follow your --

3 MR. BORDENICK: They couldn't have had a
4 contention and the basis for that position would be they
5 couldn't have a contention because it was clearly a
6 challenge to the regulation.

7 With regard to -- I'm sorry, do you have a
8 question?

9 JUDGE WILBER: I would like to talk about
10 credibility.

11 MR. BORDENICK: I was going to move on to
12 schools but --

13 JUDGE ROSENTHAL: I want to hear about school
14 bus drivers specifically.

15 JUDGE WILBER: On the credibility the licensing
16 board evidently relied on the fact that while no one trusts
17 LILCO, they could go to seek information from many sources.
18 Now, I'm a little curious who these many sources are that
19 they are going to seek information from.

20 MR. BORDENICK: I think what that alludes to is
21 the fact the record shows that there will be inputs coming
22 from, for example, Department of Energy, U.S. Department of
23 Energy, NRC, FEMA, that sort of thing.

24 JUDGE WILBER: The Applicant, or in the
25 testimony, as I recall, the Applicant's witness says this

1 is the local police department and the county officers, as
2 I recall, and my question there is, doesn't that go right
3 back to the realism argument that we had before, that they
4 are not actors in this play?

5 MR. BORDENICK: I agree.

6 JUDGE WILBER: That testimony is not acceptable
7 then; is that correct?

8 MR. BORDENICK: Perhaps I misunderstood --

9 JUDGE WILBER: The many people were the local
10 officials, the Applicant.

11 MR. BORDENICK: You are referring to the
12 Applicant. Well, to the extent that they are relying on
13 the realism argument, of course this appeal board supported
14 by Staff has rejected that position, and to that extent we
15 would not agree with the Applicant, that's correct, but I
16 was in the context of getting inputs from federal agencies.

17 JUDGE WILBER: I recall the Applicant's
18 testimony was I don't remember those numbers being given
19 out to be called. It was they said they would give the
20 phone numbers of local people who could respond to these
21 questions.

22 MR. BORDENICK: To the extent they rely on that
23 testimony, I would disagree with them because we have
24 suggested that the realism argument -- we were not relying
25 on the realism argument. The Applicant was. This appeal

1 board has rejected that.

2 JUDGE WILBER: The DOE people are prepared to
3 receive these calls?

4 MR. BORDENICK: The record is extensive on the
5 role that DOE people -- they call them the rap team or
6 something like that. The board may know the Brookhaven
7 National Laboratory, which is a --

8 JUDGE WILBER: That team is interfacing with the
9 public?

10 MR. BORDENICK: They could.

11 JUDGE WILBER: Yes, it is physically possible,
12 but are they in the plan?

13 MR. BORDENICK: I don't remember all the details,
14 but I think the plan provides that these people will be
15 available to LILCO to give inputs and I suspect they would
16 be available to interface with the public.

17 JUDGE ROSENTHAL: Mr. Bordenick, if I may turn
18 to Suffolk County Exhibit EP-1 which you relied upon, if I
19 recall correctly, in your brief, do you truly believe that
20 this exhibit supports the proposition that school bus
21 drivers will respond in an emergency? And if it doesn't,
22 then what is there in the record that would support that
23 proposition?

24 MR. BORDENICK: I think I have to address two
25 questions. First of all, I don't recall that the Staff

1 relied on this exhibit. This was a County exhibit.

2 JUDGE ROSENTHAL: I thought I saw it rely on it
3 in its brief. If I'm wrong, I apologize for that error,
4 but then I'm asking you now, irrespective of what you may
5 or may not have said in your brief, do you believe that
6 this exhibit provides support?

7 MR. BORDENICK: I'm not -- assuming it doesn't
8 provide support, I think what does provide support is
9 what's in our brief, at I believe page 30, which
10 Mr. Christman alluded to. That's the testimony of FEMA.
11 There are steps that have been taken by LILCO to see to it
12 that the bus drivers will do what it is they are supposed
13 to do.

14 JUDGE ROSENTHAL: What are the steps and what
15 kind of assurance do they provide that the bus drivers will
16 do what you say they are supposed to do?

17 MR. BORDENICK: As Mr. Christman indicated, he
18 does not know the status of the training of these people.
19 Training and providing dosimeters, extra pay, that sort of
20 thing. As he didn't, I don't know the status of where
21 LILCO is with that program. That's what we relied on.
22 That's what FEMA relied on.

23 JUDGE WILBER: Do we know the scope of the
24 training, the subject matters?

25 MR. BORDENICK: I suspect with all the

1 litigation we had on training it is somewhere in the record.

2 JUDGE WILBER: Talking about the bus drivers.

3 MR. BORDENICK: I can't recall specifically
4 whether there's anything in the record or not that relates
5 to the training of bus drivers. Given the extensive
6 litigation we had on training, though, as I said, I'm
7 fairly confident it is in the record. It is certainly in
8 the LILCO plan.

9 JUDGE ROSENTHAL: I find in your brief that you
10 did rely on the research of the disaster research center.
11 I don't know whether you referred to this exhibit but you
12 said the DRC did not come across one instance of emergency
13 role abandonment.

14 MR. BORDENICK: Permanent abandonment. I think
15 there's a difference between permanent and temporary and my
16 reaction --

17 JUDGE ROSENTHAL: Says "emergency role
18 abandonment" is what you said.

19 MR. BORDENICK: Role abandonment. When we
20 received a call from the people over at Secretary we went
21 and looked up the exhibit. Of course, it is a County
22 exhibit, not a local exhibit, not a Staff exhibit. My
23 impression based on reading the transcript and
24 cross-examination by Ms. Letsche of Dr. Dynes was that she
25 was trying to establish through that vehicle that he was

1 incorrect when he said there had never been a case of
2 emergency response people who had well-defined roles, et
3 cetera, abandoning that role. That cross-examination went
4 on at length, and it is somewhat confusing as to the table.
5 I would agree with the chairman, the table itself is
6 confusing, but I would again point out it is not my exhibit.

7 JUDGE ROSENTHAL: All right, fair enough. Fair
8 enough. Let me ask you this: How would you justify the
9 licensing board's refusal to permit discovery on the late
10 emerging Nassau Coliseum?

11 MR. BORDENICK: I'm in total agreement with what
12 Mr. Christman said. I have never --

13 JUDGE ROSENTHAL: Agreement with his statement
14 that this was very narrow or agreement with the statement
15 that because of the lateness of the hour --

16 MR. BORDENICK: I don't agree with the lateness
17 of the hour. The lateness of the hour is just not relevant
18 to that question, I would agree with that, but I think the
19 key is the fact that the record was reopened on LILCO's
20 motion. As LILCO has pointed out, actually the licensing
21 board went a little beyond what LILCO asked in its
22 reopening, but given that LILCO -- I can't speak for LILCO
23 or know what was in their mind, but I'm sure they accepted
24 that slightly broadened reopening than that which they
25 sought, and at the time that they filed their motion they

1 attached the documents that LILCO was relying on, and as
2 Mr. Christman pointed out, the Nassau County Coliseum is a
3 public building. They could have gone there and looked
4 around.

5 JUDGE ROSENTHAL: Isn't there an absolute right
6 to discovery if some new issue comes in? Is it for you to
7 say or the Applicant to say or the licensing board to say
8 we think this is so narrow that it is enough that the
9 Intervenors can cross-examine at trial?

10 MR. BORDENICK: There certainly is a right to
11 discovery; however, in this case I think the County, at the
12 time they were seeking discovery, was focusing on discovery
13 of the issues which they were seeking to have the board
14 expand, which in my opinion the board rightfully rejected.

15 JUDGE ROSENTHAL: I don't follow that. The
16 Nassau Coliseum rears its ugly head for the first time with
17 Applicant's rejection of it. Up to that time there had not
18 been anything about the Nassau Coliseum. Why were not
19 these Intervenors -- here comes the Applicant, relying upon
20 the Nassau Coliseum as a relocation center, why can't they
21 get discovery to help them ascertain whether this is a
22 viable proposition?

23 MR. BORDENICK: They have never shown that they
24 were prejudiced by this lack of --

25 JUDGE ROSENTHAL: That's a separate question.

1 I'm asking you now whether it was an error for the
2 licensing board to deny them discovery. If it was an error,
3 then there's a question as to whether that error was
4 harmless, but those are two separate issues.

5 MR. BORDENICK: Not under the limited reopening
6 allowed by the licensing board. I don't know what they
7 would have sought to discover.

8 JUDGE ROSENTHAL: You heard this morning what
9 Ms. Letsche would have sought to discover. Why wasn't she
10 entitled to do so?

11 MR. BORDENICK: Because discovery would not have
12 served a useful purpose.

13 JUDGE ROSENTHAL: She has a different view of
14 that. How do we know whether discovery would have served a
15 useful purpose?

16 MR. BORDENICK: She hasn't explained how she was
17 prejudiced.

18 JUDGE ROSENTHAL: I understand your argument she
19 wasn't prejudiced. I'm asking you whether, prejudice or
20 not, this was licensing board error. That's a separate
21 question.

22 MR. BORDENICK: As we've stated in our brief it
23 was not because of the limited scope of the reopening.
24 There really was nothing to discover.

25 JUDGE ROSENTHAL: You agree, I take it, with the

1 response Mr. Christman gave on the matter of the exclusion
2 of their testimony of their witnesses?

3 MR. BORDENICK: The school teachers, for example?

4 JUDGE ROSENTHAL: There was a whole list of
5 witnesses excluded and Mr. Christman, as I recall,
6 justified the exclusion on the ground that that testimony
7 didn't go to the functional adequacy of the Nassau Coliseum,
8 as the licensing board used that term.

9 MR. BORDENICK: Okay. You're still on the
10 Nassau Coliseum?

11 JUDGE ROSENTHAL: Yes, love the Nassau Coliseum,
12 particularly when the hockey game is going on.

13 MR. BORDENICK: I'm in total agreement with what
14 he said on that.

15 JUDGE ROSENTHAL: You read functional adequacy
16 in the same way Mr. Christman assigns to that?

17 MR. BORDENICK: Absolutely.

18 JUDGE WILBER: Did I read where this was going
19 to serve a dual function, that some activities will
20 continue on whether they are hockey games or whatever; is
21 that correct?

22 MR. BORDENICK: You must be alluding to the
23 recent LILCO amendment to the plan?

24 JUDGE WILBER: Perhaps. Is that correct?

25 MR. BORDENICK: My understanding is, as the

1 board is probably aware, there's an exercise taking place
2 tomorrow. LILCO's original proposal for the Nassau
3 Coliseum was that -- well, I take it the board has never
4 been to the Coliseum. You go to the Coliseum, if you go to
5 the floor where, for example, the hockey games are played,
6 it is a relatively small floor area, big enough to
7 accommodate a basketball or hockey game or circus. The
8 bulk of the space available at the Nassau Coliseum is in
9 the so-called exhibit area, underground in the concourse
10 and the parking lots, and turns out that tomorrow I think
11 there's a boat show. So rather than ask FEMA, because it
12 takes -- there's a long lead time to gear up the holding
13 exercise on FEMA's part, LILCO, rather than say, cancel our
14 exercise because there's a boat show, moved the --

15 JUDGE WILBER: This applies only to this
16 specific case; is that correct?

17 MR. BORDENICK: They have amended their plan.
18 What they propose to do next month I couldn't answer that.
19 I suspect they will leave it as is but I don't know.

20 JUDGE WILBER: This is, I believe, quite
21 different from what the plan that was litigated or the
22 space allowed --

23 MR. BORDENICK: It is less space but space is
24 space. They feel it is still adequate.

25 JUDGE WILBER: You can't get 10 pounds in a

1 five-pound box, you know --

2 MR. BORDENICK: They feel it is adequate space.
3 FEMA will tell us whether or not their opinion is correct
4 or not after tomorrow. I can't address whether it is
5 adequate space or not. I don't know.

6 JUDGE ROSENTHAL: While your time is expired, I
7 have one question for you on the Applicant's appeal. That
8 is, do you agree that whether there are people that would
9 call for monitoring that at the same time would not need
10 sheltering, is a "no, never mind" here, that the Applicant
11 doesn't need to estimate the number of people, if any, that
12 fall in the category of monitoring but not sheltering?

13 MR. BORDENICK: I'm not sure it is a "no, never
14 mind." I don't go so far as to say it is clearly precluded --
15 I support his appeal because I have a problem with the fact
16 that what the licensing board did here was beyond the scope
17 of any admitted contention. Nor did they ever put LILCO on
18 notice that they were going to do what they did. I stated
19 simply I think it was unfair. I'm somewhat surprised at
20 the licensing board because I think the licensing board did
21 an excellent and thorough job on every issue, and on this
22 issue not to have put LILCO on notice seems to be
23 elementarily unfair.

24 JUDGE ROSENTHAL: Did LILCO ask for
25 reconsideration on the issue? Normally when one is

1 surprised by some action on the part of the tribunal that
2 that party had no reason to anticipate the course of action
3 is motion for reconsideration. Was that done here?

4 MR. BORDENICK: It was not done and as to why
5 they didn't do it --

6 JUDGE ROSENTHAL: Doesn't that sort of strip
7 your unfairness claim of its vitality? If they didn't
8 invoke the remedy that would be available to them to
9 overcome the action without proper notice I don't know why
10 we should step in on that basis.

11 MR. BORDENICK: I think motions for
12 reconsideration in those circumstances are generally
13 advisable. I don't remember the citation -- I remember one
14 case from many years ago, the Fitzpatrick case. It seems
15 to me motions for reconsideration are appropriate when the
16 licensing board has done something based on some
17 misunderstanding --

18 JUDGE ROSENTHAL: Also it is appropriate when
19 the licensing board, which is in fact the case here, acted
20 without giving appropriate notice to one of the parties
21 that was considering taking that action.

22 MR. BORDENICK: I don't think the fact and the
23 circumstances of what was done here, that the Applicant
24 didn't seek reconsideration, precludes them from pursuing
25 what the licensing board did on appeal.

1 JUDGE ROSENTHAL: Thank you, Mr. Bordenick.

2 MR. BORDENICK: I suspect I have exceeded my
3 time. I would have liked to address one further point if I
4 might. That was on the Connecticut plan.

5 JUDGE ROSENTHAL: All right.

6 MR. BORDENICK: I'll be very brief about it.

7 The admitted contention that was litigated was
8 whether or not there was an agreement from the -- or letter
9 from the state of Connecticut. The question of the
10 adequacy of the Connecticut plan was never raised, and in
11 fact in the reply brief they point out that it was raised
12 in Contention 79, but if you go back and look at the
13 genesis of the contentions raised in this case you'll see
14 that back on January 12, 1984, there was a memorandum
15 accompanying proposed modified emergency planning
16 contentions that accompanied a rather thick document which
17 in effect was the book of contentions, so to speak. And in
18 that memorandum that was submitted on behalf of Suffolk
19 County, they specifically state on page 3, the heading is
20 "Item 2, withdrawn contentions. The following contentions
21 or subparts have been withdrawn by Intervenors because the
22 revisions to LILCO plan made subsequent to filing of
23 contentions in July of '83 made the contention no longer
24 applicable to the plan being submitted by LILCO." There is
25 a series of contentions and one of them is 79, so that

1 contention was -- for a while it was proposed but it was
2 specifically withdrawn by the County. That's what the
3 Staff meant when we said they never raised the issue below.
4 They pointed out in a reply brief and raised it in their
5 findings but I suggest that hardly raises it to the level
6 of litigation.

7 JUDGE ROSENTHAL: Ms. Letsche, you have a total
8 of 25 minutes which must be devoted to one, your response
9 to the Applicant's appeal and two, a rebuttal on your own
10 appeal, and in terms of your own appeal there be can no new
11 matter raised.

12 MS. LETSCHE: Judge, I don't have anything
13 specific to say in response to LILCO's appeal. I think
14 everything we have to say is laid out in our briefs
15 including responses to matters the board raised, so I won't
16 be using those 15 minutes. I do have a few things to say
17 in rebuttal with respect to our appeal. First of all, with
18 respect to the applicability of the Summer case, if I could
19 just make two responses. First of all, at the time that
20 the legal authority issues were briefed, there was not any
21 final result yet.

22 The concluding partial initial decision came out,
23 I believe August 26. The legal authority issues were
24 briefed and in fact argued August 12 before this board. I
25 think that that is one reason why certainly, when we wrote

1 our legal authority issue briefs, we were not in a position
2 to know that it would have -- might have been appropriate
3 to have included all these other appeal issues in that
4 brief rather than waiting until the subsequent brief came
5 out.

6 In addition, if the board believes that the
7 Summer case does apply here, then our position would be
8 that you should treat our appeal of the issues as an
9 additional reason to reject LILCO's legal authority appeal,
10 and as an additional reason why the result, that is, that
11 no license should issue, is correct.

12 Let me respond to a few of just a couple of
13 matters discussed by Mr. Christman and Mr. Bordenick.
14 First of all, on the role conflict question, first of all,
15 with respect to bus drivers, Mr. Christman has stated and
16 it is in the decision and in the evidence that LILCO has
17 offered to provide training to bus drivers, but that is all.
18 There's no evidence that any training has been given.
19 There is no evidence that any training will be accepted or
20 that any has ever taken place, and it is clear under the
21 NRC precedent, and we've cited this in our briefs,
22 particularly the Zimmer case and the Consumers Power at Big
23 Rock Point case that training or ongoing efforts to
24 accomplish things are not sufficient. There is no evidence
25 upon which a finding of training is going to take care of

1 the role conflict problem that is in the evidence --

2 JUDGE ROSENTHAL: Do you agree if the bus
3 drivers were afforded some training that they could then be
4 counted upon to respond in the event of an emergency? In
5 other words, that that would take care of the role conflict
6 problem that you suggest?

7 MS. LETSCHE: No. First of all -- and the
8 volunteer firemen survey not admitted into evidence is a
9 substantial part of this -- that survey showed that trained
10 emergency workers trained to be firemen are going to
11 experience role conflicts and would not show up during a
12 Shoreham emergency. The board didn't want to listen to
13 that, they didn't let it in but it showed that these
14 so-called emergency workers that LILCO is relying on,
15 talking about their own workers, as well as if you wanted
16 to, incorrectly, assume that some training of the bus
17 drivers would occur, that that does not take care of the
18 role conflict problem.

19 In addition, the evidence which LILCO and the
20 Staff supposedly believe shows the history that in fact you
21 don't have a role conflict problem if you have trained
22 emergency workers, that history is the disaster research
23 center study; as the board said, and as I believe we have
24 demonstrated, it doesn't support that, so I don't think the
25 record shows that the training would make the difference.

1 JUDGE ROSENTHAL: How does one affirmatively
2 show that bus drivers will respond in the event of a
3 radiological emergency when there's been no empirical
4 experience one way or the other?

5 MS. LETSCHE: One thing you can do, which is
6 what the Zimmer board ordered and what Intervenors
7 attempted to do here but were not permitted to, is you
8 listen and believe what the people tell you. You ask them
9 are you going to show up and if they say no, you don't turn
10 around and say we don't believe you.

11 JUDGE ROSENTHAL: Who do you ask, the bus
12 drivers, and ask them if there were a radiological
13 emergency would you or would you not respond?

14 MS. LETSCHE: That's right. If you have a
15 sufficient number of people who say yes, I will, so you can
16 make a reasonable assurance finding, if there's evidence to
17 that, then you might have a different situation, but you
18 don't have that evidence here.

19 JUDGE ROSENTHAL: Have we ever required that in
20 any other case?

21 MS. LETSCHE: In Zimmer, a license condition was
22 that the surveys be performed of the volunteer workers
23 being relied upon, and that there be a determination as to
24 whether they were available, what their family commitments
25 were and whether they would perform the duties they were

1 going to be assigned during the radiological emergency, and
2 based on that the Applicant had to demonstrate that there
3 would be sufficient volunteers available to accomplish what
4 they said they were going to accomplish.

5 JUDGE ROSENTHAL: Was this all done before a
6 license issued -- the surveys took place?

7 MS. LETSCHE: Zimmer, as you know, ended.

8 JUDGE ROSENTHAL: What was the licensing board
9 decision, though? I don't ask for a citation. What was
10 the bottom line?

11 MS. LETSCHE: It was the one that your decision --
12 the appeal board's decision in 17 NRC affirmed.

13 JUDGE ROSENTHAL: It authorized some form of
14 license?

15 MS. LETSCHE: No, it did not, but it issued --
16 this was a partial initial decision. It had a number of
17 conditions in it. It did not grant the license because of
18 the schools. The appeal board affirmed there was no
19 planning for the schools --

20 JUDGE ROSENTHAL: As far as the licensing board
21 was concerned, before this plant could obtain its blessing,
22 the board's blessing on an emergency plan, it had to
23 conduct these surveys?

24 MS. LETSCHE: That is correct. Here it is.
25 June 21, 1982 is the licensing board decision. 15 NRC 1549.

1 One other matter related to the role conflict
2 issue, I believe you, Judge Rosenthal, said something with
3 respect to teachers, that you don't really have a problem
4 with the teachers because you assume they will stay. Well,
5 with all due respect, the evidence that has to determine
6 that judgment -- the evidence in this case --

7 JUDGE ROSENTHAL: I can't take official notice
8 of that fact?

9 MS. LETSCHE: No, with due respect, you can't. ▲
10 The evidence we attempted to submit was from the teachers
11 and would have given the licensing board some facts upon
12 which to make some kind of judgment one way or the other.
13 They had none other than Dr. Miletì saying he believes
14 teachers will stay. It was clearly improper not to permit
15 that evidence in and in addition to make an affirmative
16 finding in the total absence of any evidence and based
17 solely on an assumption.

18 With respect to the hospitals you had a few
19 questions, Judge Wilber, for Mr. Christman about that. I
20 just have a couple of comments. It is very clear in the
21 record of this proceeding that there is not any plan for
22 evacuation of those hospitals.

23 Number one, what LILCO has said they will do,
24 and they have been up front about it, they will discuss it
25 when there's an accident. They don't have ambulances and

1 vans ready to go. If they have some left over when they
2 come back from the nursing homes they will do it. There
3 are no time estimates done for these hospitals. According
4 to Guard and Wolf Creek and others we have cited, a list of
5 hospitals that might be available is not sufficient.

6 With respect to the nursing home/hospital
7 distinction, the licensing board in its decision never gave
8 any reason for its differential treatment with respect to
9 reception centers for those two types of facilities.

10 JUDGE ROSENTHAL: Isn't the reason it was
11 assigned by Mr. Christman rational? If there's record
12 support for it? Different types of buildings and,
13 presumably, in large measure different type of patients.

14 MS. LETSCHE: I beg to differ. I'm not aware of
15 that in the record anywhere, but most importantly the
16 licensing board didn't make a finding like that. What it
17 said, and it is in the decision on page 840, is it is okay,
18 we don't think you have to do anything else with respect to
19 reception centers for hospitals, but it is different for
20 nursing homes and therefore you have to have them. No
21 rationale for it, just you have to have it. It is just not
22 true to say there's any kind of planning for evacuation for
23 hospitals because there is none in the LILCO plan.

24 One quick point on the credibility question you
25 raised. There is nothing in the LILCO plan that says the

1 DOE people are available to take calls from the public if
2 there's a credibility problem there. And with respect to
3 the Connecticut --

4 JUDGE WILBER: Would you say that again?

5 MS. LETSCHE: Mr. Bordenick said something about
6 the DOE. There's nothing in the plan that says DOE rap
7 teams will be available to take calls from the public. The
8 LILCO people who are given titles of director of LERA and
9 who do the EBS messages, write the messages and give them
10 out, and there is a reference to the messages that says
11 something about scientists have been consulted, but the
12 messages are all coming from LERA and the rumor control
13 point that the public is told to call is LILCO.

14 Finally, with respect to the Connecticut plan, I
15 just want to make one quick comment in response to
16 Mr. Bordenick's statement about the fact that the adequacy
17 issue was not raised. When you look at, for instance, the
18 new regulation 0654 requirements that talk about agreements,
19 they don't say you have to have a piece of paper. They say
20 you have to have evidence that there's sufficient staff,
21 sufficient resources, there's a way to mutually acceptable
22 criteria for implementing what these people are going to do.
23 You have arrangements for exchanging information and
24 there's a statement of the emergency responsibilities that
25 the particular organization with whom you have an agreement

1 has agreed to.

2 Whether you call that adequacy or not I don't
3 know. That's just a word. The fact is this licensing
4 board had no idea of what the state of Connecticut was
5 going to do.

6 With respect to Contention 79 which
7 Mr. Bordenick alleges we said was withdrawn, the fact is
8 that the licensing board had admitted that contention and
9 said it was consolidated into 24-R, so when we are did our
10 contentions we didn't bother writing it again.

11 JUDGE ROSENTHAL: I think your time has expired.

12 MS. LETSCHE: It might be helpful, Judge, to
13 have a copy of the Exhibit EP-1 put into the transcript. I
14 have an extra copy if the board would like to do that.

15 JUDGE ROSENTHAL: Any objection?

16 MR. CHRISTMAN: Not from us.

17 MR. BORDENICK: It is already bound into a
18 licensing board contract.

19 JUDGE ROSENTHAL: Yes, the suggestion was, for
20 those unfortunate enough to have to read the transcript, we
21 might include that. Since Ms. Letsche chose not to address
22 the Applicant's appeal, there obviously is no room for
23 rebuttal to anything she said. Therefore, the appeal will
24 stand -- or excuse me, appeals will stand submitted, with
25 the thanks of the board to all counsel for their helpful

1 participation.

2 Without committing my colleagues to any
3 particular course, my guess is that even if we were to
4 dismiss the Intervenors' appeal on the strength of the
5 Summer decision and the decisions that were referred to
6 therein, we would very likely go ahead and consider the
7 issues that are presented by those appeals if, for no other
8 reason than as was alluded to, the Commission indicated a
9 desire to have our views; but in any case, what decision we
10 will make on that will be in the fullness of time
11 communicated to the parties. With that I would note once
12 again that the appeal stands submitted.

13 (Whereupon, at 11:40 a.m., the oral argument was
14 concluded.)

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CERTIFICATE OF OFFICIAL REPORTER

This is to certify that the attached proceedings before the UNITED STATES NUCLEAR REGULATORY COMMISSION in the matter of:

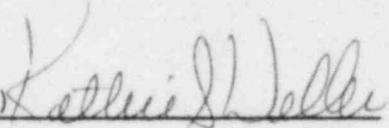
NAME OF PROCEEDING: LONG ISLAND LIGHTING COMPANY
(Shoreham Nuclear Power Station,
Unit 1)

DOCKET NO.: 50-322-OL-3

PLACE: BETHESDA, MARYLAND

DATE: WEDNESDAY, FEBRUARY 12, 1986

were held as herein appears, and that this is the original transcript thereof for the file of the United States Nuclear Regulatory Commission.

(sig) 

(TYPED)

KATHIE S. WELLER

Official Reporter
ACE-FEDERAL REPORTERS, INC.
Reporter's Affiliation

FLOOD-HURRICANE

Location at Time of Event

Stayed On Job

Search Behavior

Temporarily Left Job

Abandoned Occupational Role

At Work

N

104

83

On Job

14

7

0

At Home

40

Active Response To Work or Reaction To Definite Need
13

Passive Response
Waited On Notification
13

Delayed Reporting
14

Neither

19

Active Response To Work 9
To Family Then Work 5

Passive Response
Home and Waited
2

Delayed Reporting
3

TORNADO

At Work

58

56

2

0

0

At Home

72

Active Response
62

2

Passive Response

8

Neither

29

Active Response
19

4

3

Passive Response

3

EARTHQUAKE

At Work

21

16

5

0

At Home

53

Active Response
37

16

Passive Response

0

Neither

17

Active Response
12

4

1

Passive Response

0

5. What did we find? The table below summarizes our general findings.

SC
Exhibit
EP-1

RE L