

ORIGINAL

# UNITED STATES NUCLEAR REGULATORY COMMISSION

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In the matter of: )  
 )  
 LONG ISLAND LIGHTING COMPANY ) Docket Number 50-322-OL-5  
 )  
 (Shoreham Nuclear Power )  
 Station, Unit 1) )  
 )  
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UNITED STATES NUCLEAR REGULATORY COMMISSION  
ATOMIC SAFETY AND LICENSING APPEAL BOARD

In the Matter of: )  
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LONG ISLAND LIGHTING COMPANY ) Docket Number 50-322-OL-5  
)  
(Shoreham Nuclear Power )  
Station, Unit 1) )  
)

Wednesday,  
September 14, 1988

Public Hearing Room  
4350 East-West Highway  
Bethesda, Maryland

The above-entitled matter came on for hearing at  
9:33 a.m.

BEFORE: HONORABLE CHRISTINE N. KOHL, Chairman

FOR THE BOARD:

JUDGE ALAN S. ROSENTHAL  
JUDGE W. REED JOHNSON

APPEARANCES:

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## P R O C E E D I N G S

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JUDGE KOHL: Good morning.

We're hearing the appeal of Long Island Lighting Company from the February 1st, 1988, initial decision of the Licensing Board, in connection with an emergency exercise conducted in 1986 at the Shoreham Nuclear Facility.

I'd like counsel to identify themselves for the record right now, and we'll begin with counsel for LILCO.

MS. McCLESKEY: My name is Kathy McCleskey from Hunton and Williams. With me is Donald Irwin.

JUDGE KOHL: Thank you.

Ms. McCleskey, do you plan to reserve any time for rebuttal?

MS. McCLESKEY: Yes, ma'am. Seven minutes.

JUDGE KOHL: Counsel for the staff?

MS. YOUNG: Good morning.

My name is Mitzi Young. I represent the NRC staff. Seated at counsel table with me is Mr. Edwin Reis, and I am not reserving time for rebuttal.

JUDGE KOHL: None?

Counsel for the Government?

MR. MILLER: My name is Michael S. Miller. I'm with the firm of Kirkpatrick and Lockhart. With me is Susan M. Casey and P. Matthew Sutko at the end of the table. We represent Suffolk County, New York.



1 MR. ZAHNLEUTER: My name is Richard Zahnleuter,  
2 and I represent the Governor and the State of New York, and  
3 I will not be presenting, but Mr. Miller will be presenting  
4 argument on behalf of New York State.

5 JUDGE KOHL: Thank you.

6 Ms. McCleskey?

7 MS. McCLESKEY: Members of the Board, events are  
8 overtaking us. We have a record on an exercise that we're  
9 discussing today that's two and a half years old. We have  
10 two revisions since that exercise to the LILCO plan. We have  
11 a second exercise having been held on June 6th through 8th  
12 of this year.

13 FEMA last week issued an exercise report on the  
14 '88 exercise that found that there were no deficiencies, a  
15 RAC review of the Revision 10 of the plan and a letter  
16 finding reasonable assurance based upon these two reviews.

17 The staff has requested from the Licensing Board a  
18 schedule for the 1988 possible exercise litigation, and the  
19 Intervenors yesterday filed a paper challenging the 03  
20 Licensing Board's jurisdiction and suggesting possible  
21 relitigation of many of the issues that are pending on  
22 appeal before this Appeal Board now.

23 JUDGE KOHL: Well, then, Ms. McCleskey, why are we  
24 here? Is it still LILCO's position then that we should  
25 decide the issues raised in your brief?

1 MS. McCLESKEY: Yes, ma'am, it is.

2 LILCO believes that it is critical that this  
3 Appeal Board provide guidance on what fundamental flaw means  
4 and provide it promptly.

5 The parties, all the parties and the Licensing  
6 Board need this Board's guidance on how one applies the  
7 Commission's formulation in CLI 8611 and how that process  
8 can be accomplished within the rubric of an expedited  
9 proceeding.

10 JUDGE ROSENTHAL: Well, when you say that we  
11 should consider the question as to what a fundamental flaw  
12 means, do we have to at the same time go down the list of  
13 fundamental flaws found by the Licensing Board and determine  
14 whether in fact they are or are not fundamental flaws?

15 Is it enough for us, in your view, simply to  
16 provide the parties with a definition of fundamental flaws?

17 MS. McCLESKEY: I don't believe that our  
18 definition can be given without looking at the facts of the  
19 '86 exercise and the determinations that the Licensing Board  
20 made about whether those facts showed fundamental flaws.

21 Part of the reason that you have to get into the  
22 facts is not because LILCO is challenging the factual  
23 determinations, because we're not. There's only one disputed  
24 fact in the whole case and that is about whether Dr. Brill's  
25 statements regarding what protective actions should be taken

1 were corrected or not.

2           That is the only disputed fact. But the way the  
3 Licensing Board set up its decision, they didn't articulate  
4 a fundamental flaw standard test, and then they applied it  
5 irregularly to a variety of facts, and the result is that  
6 you have to look at what they found was a fundamental flaw.

7           I think that we've got to have a decision on  
8 fundamental flaw and on the scope of the exercise in order  
9 to reasonably go forward with the 1988 litigation, if there  
10 is any.

11           JUDGE ROSENTHAL: If we set forth standards with  
12 some degree of precision, I don't understand why it will be  
13 necessary to consider whether each individual fundamental  
14 flaw as found by the Licensing Board was in fact a  
15 fundamental flaw.

16           If we set forth the standard, it seems to me that  
17 that can be applied to any litigation involving the June  
18 1988 exercise. It doesn't seem to be you're going to be  
19 helped very much by our application of the standard to each  
20 of these alleged flaws in connection with the 1986 exercise.

21           Tell me why I'm wrong.

22           MS. McCLESKEY: I believe you're wrong because the  
23 problem with the fundamental flaw is one of degree of the  
24 activity, and you have got to look at the activity to  
25 determine whether you think it's a material licensing issue,

1 whether the exercise revealed a problem in the plan.

2 JUDGE KOHL: What if we were to amplify our  
3 definition by way of example?

4 MS. McCLESKEY: That would certainly be helpful  
5 and don't get me wrong. If the Appeal Board -- we need  
6 guidance and any guidance would be better than no guidance,  
7 and if the guidance is a legal standard, you know, so be it.

8 But the other problem that I would have, though,  
9 with not looking at all at what the Licensing Board did is  
10 that we took the 1986 exercise and we've been litigating it  
11 for basically two and a half years, and we think that the  
12 Licensing Board was wrong on some of their determinations,  
13 and we'd like the Appeal Board to review those  
14 determinations and tell us whether they were right or wrong.

15 JUDGE JOHNSON: You're asking us for a standard.  
16 Can you hear me?

17 MS. McCLESKEY: Yes, sir.

18 JUDGE JOHNSON: It seems to me the Intervenors  
19 have claimed that the Licensing Board did in fact invoke a  
20 standard and they, the Intervenors, think it was the correct  
21 standard, and that standard was that any deficiency which  
22 indicated that there was no reasonable assurance that  
23 protective measures could be taken equates to a fundamental  
24 flaw.

25 Are you -- I assume that it is your opinion that

1 this is not a correct standard, and if that is your opinion,  
2 can you explain to me why it is not?

3 MS. McCLESKEY: I wouldn't characterize the  
4 quotation as an incorrect standard. I mean, it's the same  
5 words that are in CLI 8611.

6 My problem with the repetition of those words is  
7 that it doesn't really help us advance the ball on whether  
8 the activities on the day of the exercise revealed problems  
9 in the plan.

10 I also don't think that the Licensing Board took  
11 even CLI 8611 language and properly applied it, and to  
12 understand what the CLI 8611 language means, you have to go  
13 back to Union of Concerned Scientists. You have to go back  
14 to pre-Union of Concerned Scientists, treatment by the NRC  
15 of exercises, and then consider what the Commission did  
16 after Union of Concerned Scientists, and the fact of the  
17 matter is that the exercise was considered the very final  
18 last limited restricted step, and CLI 8611 uses the word  
19 "restricted" in discussing how issues should be raised, on  
20 whether an emergency plan is flawed or not.

21 And in this case, we have a classic example of the  
22 kind of extensive review on emergency planning that's  
23 already gone forward.

24 The result with the Licensing Board was that they  
25 didn't limit the scope. They didn't focus the issues. They

1 admitted a 104 pages of contentions and then they went all  
2 over the map in trying to take every little piece of  
3 minutia. There were 1100 people at the exercise in 1986.  
4 There was a lot of activity going on, and they focused on  
5 almost every single action.

6           That is not appropriate, and I don't know whether  
7 it's because the Licensing Board merely misapplied the  
8 standard that was articulated or whether we need a more  
9 detailed articulation of the standard.

10           LILCO tried to articulate a more detailed test in  
11 its briefs, and we stand by that test, and we believe that  
12 you have to ask for any particular activity; whether the  
13 public health and safety would have been affected, whether  
14 the activity shows a pervasive systemic flaw in the plan  
15 itself as revealed by the exercise events, and whether or  
16 not you can easily correct the problem which sheds light  
17 really on the second part of the test.

18           JUDGE KOHL: Well, the Licensing Board agreed with  
19 two of the three prongs of your test, didn't it? So, we're  
20 really only talking about whether or not corrective action  
21 should be taken into account, is that correct?

22           MS. McCLESKEY: I don't think so.

23           The Licensing Board spent a few pages talking  
24 about the LILCO test, but you've got to look at what the  
25 Licensing Board did with whatever test it thought it was

1 articulating.

2           JUDGE KOHL: So, your point is that while the  
3 Licensing Board said at the outset of its opinion that it  
4 was accepting two of your three criteria, in fact, when it  
5 applied those criteria to the alleged flaws in the exercise  
6 or in the plan, the Board did not stick to what it initially  
7 had said it was going to do?

8           MS. McCLESKEY: I'm not sure.

9           The Licensing Board's discussion of its test for  
10 fundamental flaw is, in my view, less than illuminating, and  
11 I think when you look at how they went about applying the  
12 facts to what they articulated that they thought their test  
13 was, which basically was just to repeat the CLI 8611  
14 language, note that LILCO has put forward this three-pronged  
15 test of its own, that really in its -- in their view, the  
16 first part of it is just repeating what CLI 8611 says and  
17 the second part expands upon it a bit based on UCS.

18           But -- and then, of course, they rejected the  
19 easily-correctable piece of it, but I don't think that if  
20 you look at what the -- at the key activities that the  
21 Licensing Board focused on, what they really focused on was  
22 individual implementation of the plan on the day of the  
23 exercise, and they came out at the end with that's a  
24 fundamental flaw, and we think that's wrong. They got it  
25 wrong.



1 JUDGE KOHL: What do you think the purpose of an  
2 exercise is vis-a-vis licensing?

3 MS. McCLESKEY: Vis-a-vis licensing?

4 JUDGE KOHL: Yes.

5 MS. McCLESKEY: I think that the purpose of the  
6 exercise is to allow one final look at the emergency plan  
7 and to allow a reasonable assurance finding to be made that  
8 the plan is implementable, and I guess the best way that I  
9 can discuss that is to give you an example of what I think a  
10 fundamental flaw might be.

11 If you had the plan in place, it's already been  
12 reviewed by FEMA, and litigated or not before the NRC  
13 against all the planning standards and NUREG 5064, and all  
14 the pieces are there, the paper pieces are there, and you go  
15 to the exercise and consistently they cannot get EBS  
16 messages out in fifteen minutes, I would want the  
17 organization to go back to the plan and say, is there  
18 something about the way that we're doing this that keeps us  
19 from getting the EBS messages out in fifteen minutes.

20 And the fact that they can't meet my test because  
21 if you can't tell the public that there's an emergency,  
22 you've got a public health and safety impact. No question  
23 about it.

24 If they're doing it consistently, it's a pervasive  
25 systemic flaw, and it's revealed on the day of the exercise



1 because you can read the plan all you like about how they're  
2 going to do it in fifteen minutes, but until they actually  
3 try it and see that it doesn't work, you don't know if it  
4 works or not.

5 JUDGE ROSENTHAL: Supposing it's readily  
6 correctable to use the language I think that LILCO set forth  
7 as a third part of its test? Now, the readily correctable  
8 is not a fundamental flaw in LILCO's view?

9 MS. McCLESKEY: Yeah. The readily correctable  
10 piece, as far as I'm concerned, goes to shedding light on  
11 the pervasive systemic, and I think putting a new copying  
12 machine in is an example of readily correctable.

13 If you're not getting your EDS messages out in  
14 fifteen minutes, I would say it's unlikely that it's because  
15 of a copying machine.

16 JUDGE KOHL: Well, is any pervasive problem  
17 readily correctable then?

18 MS. McCLESKEY: Any pervasive problem readily  
19 correctable?

20 JUDGE KOHL: Yes. You said that the readily  
21 correctable criterion really is an outgrowth of the second  
22 plan, and if I understand you correctly, I think what you're  
23 saying is that if it truly is pervasive, then a forciari is  
24 not readily correctable.

25 MS. McCLESKEY: No. You know, the readily

1 correctable piece, to me, is one way of trying to see  
2 whether it's a pervasive systemic flaw.

3           If you go on the day of the exercise and the  
4 copying machines don't work and you know that you can't fix  
5 them or get new copying machines, that's not a pervasive  
6 flaw in the emergency plan.

7           The emergency plan piece that's relevant is they  
8 provide copying machines. That's not going to change.

9           JUDGE KOHL: I thought the Licensing Board did  
10 say, though, that there was no single action or single  
11 problem, whatever you want to call it, that led it to its  
12 conclusion that there was a fundamental flaw.

13           Rather, it did look at the totality and in the  
14 Licensing Board's judgment, there were pervasive problems in  
15 the area of communications overall.

16           MS. McCLESKEY: Right.

17           Well, I think you have to -- in that regard, you  
18 have to look at the activities that they tied together.

19           In communications, for example, the fact that that  
20 poor evacuation route coordinator didn't pass the message  
21 out in a timely fashion is connected to the LERO  
22 spokesperson's performance during news releases. I mean,  
23 press briefings on three questions out of over the hundred  
24 that she was asked.

25           Now, in a gross sense, those are both

1 communications problems. The impediment fellow didn't  
2 communicate, and the LERO spokesperson misspoke a couple of  
3 times. But I do not think that you can take either of those  
4 activities singly or put them together and say, all right,  
5 that shows a pervasive communications problem in the plan  
6 itself.

7 JUDGE JOHNSON: What about --

8 MS. McCLESKEY: And on top of that -- I'm sorry?

9 JUDGE JOHNSON: What about the fact that the plan  
10 does not permit the lateral communication among the field  
11 workers?

12 MS. McCLESKEY: In that regard, there's no  
13 exercise activity that highlighted that as a problem. That  
14 is a clear example, in my view, of the Licensing Board going  
15 back and revisiting a planning issue and, lo and behold,  
16 we're told that they were never all that enthusiastic about  
17 the communications scheme that they approved three or four  
18 years ago now.

19 But there's nothing in the exercise that revealed  
20 anything about the plan regarding lateral communications,  
21 and the impediment problem and the EOC problems didn't  
22 involve lateral communications with field workers or anybody  
23 else.

24 JUDGE JOHNSON: I have a question with respect to  
25 your definition or, excuse me, your example of a fundamental

1 flaw.

2           Did the fact that the large majority of the  
3 traffic guides who were supposed to be on station in one  
4 hour were unable or at least in this exercise were not on  
5 station in one hour, it would seem to me that your example  
6 of a fundamental flaw would indicate that there was a  
7 fundamental flaw with respect to traffic guides and the time  
8 they got on their stations.

9           Why isn't that a fundamental flaw? You've argued  
10 that it isn't in your brief.

11           MS. McCLESKEY: Right.

12           JUDGE JOHNSON: But your example seems to tell me  
13 that it is.

14           MS. McCLESKEY: It's not a fundamental flaw  
15 because if you ask the first question of my test, would the  
16 public health and safety have been affected, the answer is  
17 no, and LILCO put forward arguments --

18           JUDGE JOHNSON: Aren't you changing the rules in  
19 the middle of your definition? The plan says they're going  
20 to be there in an hour. Presumably, there is a public health  
21 and safety implication to that provision in the plan.

22           Now, in the exercise, you demonstrate, at least in  
23 February of 1986, that they can't make it in one hour. Now,  
24 don't change the rules and say, yeah, well, that's not a  
25 public health and safety problems. I don't think that's

1 quite fair.

2           Why isn't the fact that they didn't make it in one  
3 hour a fundamental flaw?

4           MS. McCLESKEY: Let me first say that I don't  
5 believe I was changing the rules, and, second, it certainly  
6 would have been preferable if everybody had made it within  
7 one hour.

8           Now, Patchogue did. Port Jeff and River Head had  
9 problems.

10           My view is that you have to look at given the fact  
11 that they had problems and they didn't meet the one hour,  
12 that you have to look in terms of is this the material  
13 licensing issue. Is this something that troubles me enough  
14 that I would not give a reasonable assurance finding?

15           And to do that, the first question I ask is, well,  
16 what impact would it have had on public health and safety?  
17 And the answer is, the answer that LILCO's witnesses gave,  
18 was it may have extended the evacuation time of a controlled  
19 evacuation by nineteen minutes.

20           And in my view, that is not an impact on public  
21 health and safety.

22           Now, do you go back and try to do better? Of  
23 course you do. Do you practice it some more? Do you make  
24 sure that next time that they make it? Of course you try to  
25 do that.

1           But do you find that the plan is flawed because  
2 one facility followed it and made it and the other two  
3 didn't that day? No.

4           JUDGE JOHNSON: Don't you also want to look at why  
5 the other two didn't make it? In other words, if your plan  
6 says one hour and you go back and look at the two that  
7 didn't make it and you do look at the routes these people  
8 have to take, where you have to -- where they go to get  
9 their instructions, where they have to go and you do some  
10 calculations and you come out that it's unreasonable to  
11 expect these people to be in place by one hour, then doesn't  
12 that rise to a fundamental flaw?

13           MS. McCLESKEY: All right. Well, now you've given  
14 me an additional fact which is that you go back and you look  
15 at what they did and you decide it's unreasonable.

16           First, I wouldn't have determined that it was  
17 unreasonable because Patchogue made it. So, I would have  
18 continued to --

19           JUDGE JOHNSON: You're talking in a little bit  
20 navel oranges and some kind of other oranges.

21           Patchogue, the people there might physically be  
22 able to do it, whereas in River Head and the other one,  
23 maybe physically they can't do it in one hour.

24           I mean, so, conceivably, the fact that one  
25 organization makes it and the other two don't still allows

1 for a fundamental flaw with respect to the other two.

2 MS. McCLESKEY: Well, you only have a fundamental  
3 flaw if you have to go back and significantly change the  
4 plan because there's a pervasive systemic problem with how  
5 you're getting the people out, and I don't think that there  
6 is.

7 There's nothing to indicate that that was not  
8 something other than a problem the day of the exercise.

9 JUDGE JOHNSON: All right. Well, are you telling  
10 me now that you have gone back and looked at the two regions  
11 that didn't make it and you're saying that there's a day of  
12 the exercise problem and it is physically possible for those  
13 people to get there?

14 MS. McCLESKEY: They made it in the '88 exercise.

15 JUDGE JOHNSON: Okay. I guess I'm not sure  
16 whether that's a satisfactory answer because I'm really  
17 looking at examples of what would be -- what would  
18 constitute a fundamental flaw, and you gave an example of  
19 things that didn't work, and I'm saying that an apparent  
20 thing that didn't work in the '86 exercise was that people  
21 weren't -- as a group, were unable to meet the time  
22 requirements of the plan.

23 My question is, that certainly might be indicative  
24 of a fundamental flaw in the plan, would it not?

25 MS. McCLESKEY: It might be, and I guess, Dr.

1 Johnson, we're focusing on different questions, and my first  
2 question that I asked is, all right, we've got a problem.  
3 Two of the three facilities didn't make it. What was the  
4 public health and safety impact.

5 Because I'm at the end of this process, and I've  
6 looked at this emergency plan ad nauseam, and I want to know  
7 if there are any fundamental defects.

8 Is this a fundamental defect that would preclude  
9 the issuance of a license? And because it would have  
10 affected the controlled evacuation by only nineteen minutes,  
11 I come out no, it wouldn't have.

12 JUDGE ROSENTHAL: You would come out that it's a  
13 no, never mind, that you don't even have to worry about  
14 correcting it at the next exercise if it has no health and  
15 safety indications. Is that what you're telling us?

16 MS. McCLESKEY: If you're asking me do I think it  
17 was properly classified as a deficiency, I do not think it  
18 was properly classified as a deficiency.

19 JUDGE ROSENTHAL: And that's because you as a  
20 lawyer have reached a conclusion that it has no health and  
21 safety significance, and you keep talking about your own  
22 conclusions.

23 Apparently, if it was rated as a deficiency,  
24 somebody else thought it did have a health and safety  
25 implication or it wouldn't have been listed as a deficiency,



1 would it?

2 MS. McCLESKEY: Well, FFMA obviously rated it as a  
3 deficiency.

4 JUDGE ROSENTHAL: Okay. So, FEMA thinks it has  
5 health and safety implications, and you, the lawyer for  
6 LILCO, think it doesn't.

7 Now, where do we come out?

8 MS. McCLESKEY: I'm not sure that I'm advocating  
9 me the lawyer for LILCO thinking that it doesn't --

10 JUDGE ROSENTHAL: That's what I'm hearing. Now,  
11 you say nineteen minutes has no health and safety  
12 significance and, therefore, I think your response to Dr.  
13 Johnson was that this is not a fundamental flaw for that  
14 reason, and I'm asking you whether FEMA saw it differently  
15 and, if so, why should we not defer to the FEMA view as to  
16 whether it has possible health and safety significance.

17 MS. McCLESKEY: Well, FEMA's deficiency definition  
18 is very similar to the CLI 8611 definition, and I think your  
19 answer goes to the relationship between FEMA deficiency and  
20 the definition of fundamental flaw in CLI 8611.

21 And the fact of the matter is that the FEMA  
22 deficiency standard is a rebuttal presumption. We put on  
23 testimony that the Licensing Board -- that rebutted the FEMA  
24 deficiency.

25 We said, all right, two of the three facilities

1 didn't make it, but let's look at what the consequences of  
2 that would have been, and the consequences would have been  
3 the nineteen minutes.

4           Now, we also, at the Board's request, put in  
5 information that showed that the dose population -- the  
6 population to the dose, -- the dose to the population would  
7 have been the same, but the Board rejected that evidence,  
8 but the fact is that LILCO rebutted the FEMA deficiency  
9 presumption on the traffic control point issue.

10           JUDGE JOHNSON: Why don't you simply change the  
11 plan, which is, therefore, easily correctable, to say these  
12 folks should only have to be there in an hour and a half?

13           In other words, if the one hour time period has no  
14 health and safety implications, then why is it in the plan?  
15 Now, I must -- what you just told me blows my assumption out  
16 of the water, which is -- that's all right because I'm a  
17 Judge.

18           But if the facts were that the traffic guides  
19 could not get on station until an hour and a half or two  
20 hours, but there was no health and safety consequences as a  
21 result of that, then why have the one hour provision in the  
22 plan?

23           I mean, if it represents the potential for a  
24 deficiency every time you try it out, why does the plan  
25 have unmeetable constraints in it which have no -- which,

1 according to your testimony, have no health and safety  
2 consequences at all?

3 MS. McCLESKEY: Well, now you're at the crossroads  
4 between reasonable assurance and perfect planning, and  
5 you're right. Reasonable --

6 JUDGE JOHNSON: Is there an overturned truck at  
7 that crossroads?

8 MS. McCLESKEY: No, sir. There are no overturned  
9 trucks in any of my hypotheticals.

10 But the fact is that it may be that we could  
11 change the plan to an hour and a half for the times that the  
12 traffic guides had to be out there and that we could still  
13 show reasonable assurance, but why throw up your hands when  
14 one facility makes it and two don't, and change the time  
15 limitation when you can try to meet it.

16 I mean, the planning process, you know, there's  
17 this process of the NRC review and all of the litigation and  
18 all of that, and then there are the emergency planners who  
19 sat down and figured out how do we want to go about this  
20 response.

21 And what they came up with was this one hour time  
22 that they ideally would like to meet, and I think you keep  
23 trying to meet that ideal, but you don't deny a license  
24 issuance because you don't meet it if there's no public  
25 health and safety impact.

1           So, I would have a problem with saying, all right,  
2 let's just change the plan to an hour and a half.

3           JUDGE ROSENTHAL: I would like to hear you for at  
4 least briefly on the res judicata question because it seems  
5 to me offhand, you can correct me if I'm wrong, that when  
6 the plan is being litigated itself, it's being litigated  
7 essentially in the abstract.

8           We've got a piece of paper or several pieces of  
9 paper in which the plan is set forth, and you're passing  
10 judgment upon whether, looked at abstractly, the plan is  
11 satisfactory. When you get around to the exercise, the  
12 proof, as the old saying goes, is in the pudding, and I  
13 don't understand why, if an exercise reflected a significant  
14 flaw in the plan, a determination that might have been made  
15 earlier could serve to preclude a finding that that flaw  
16 existed and had to be dealt with.

17           Why am I wrong?

18           MS. McCLESKEY: In the abstract, I don't believe  
19 you are wrong. But in this case, that didn't happen.

20           There were two areas where arguably the res  
21 judicata issue comes up. One is in this lateral  
22 communications issue, and the other is in training.

23           Now, as to the lateral communications, it's clear  
24 from the record that nothing that happened the day of the  
25 exercise impacted or shed any light whatsoever on whether

1 the lateral communications was needed in the LILCO plant.

2 JUDGE ROSENTHAL: Well, then you're just saying  
3 that there wasn't a flaw. That doesn't go to the question as  
4 to whether there's a res judicata flaw or not, does it?

5 I mean, what you're saying is that this record of  
6 the exercise did not reflect that there was a flaw insofar  
7 as the lateral communications matter was concerned.

8 That may be right, --

9 MS. McCLESKEY: Right.

10 JUDGE ROSENTHAL: -- but that doesn't, seems to  
11 me, deal with the basic question as to whether you can't  
12 even look at it because of the application of res judicata  
13 to earlier Licensing Board determinations.

14 MS. McCLESKEY: Well, and I think that point goes  
15 to the whole nature of what we're supposed to be about  
16 looking at these exercises.

17 You do not go back and revisit every decision that  
18 has been made about the plan. You focus on what happened  
19 the day of the exercise. That's clearly what the NRC did  
20 before Union of Concerned Scientists. It's what it argued in  
21 Union of Concerned Scientists, and it's what CLI 8611  
22 articulated.

23 And in that regard, a musing about whether lateral  
24 communications in thinking it over for a couple of years may  
25 in fact be a better way to go in the plan is totally

1 inappropriate in the context of an exercise litigation.

2 Ms. Kohl, I see my time is up.

3 Thank you very much.

4 JUDGE KOHL: Thank you.

5 Ms. Young?

6 MS. YOUNG: Good morning again, Judge Kohl and  
7 members of the Board.

8 The issue the Board confronts today is that  
9 elusive standard, the fundamental flaw.

10 The staff supports LILCO's appeal and believes  
11 that the Board's erroneous findings of flaws resulted from a  
12 combination of factors. The most important was the Board's  
13 application of improper definition of a fundamental flaw.

14 The staff realizes that there is a change in its  
15 position as a result of the issuance of the realism rule,  
16 and the guidance provided in 8613 regarding the proper  
17 definition of a fundamental flaw.

18 As a result of the issuance of the realism rule,  
19 the staff believes this Appeal Board should apply 8613 to  
20 the Licensing Board's findings of flaw and find that the  
21 exercise did not reveal any flaws.

22 JUDGE KOHL: I don't quite understand, Ms. Young,  
23 why the issuance of the rule last November, which basically  
24 codified what was in the CLI 8613 decision, why does the  
25 issuance of the rule impact so strongly on the staff's

1 position?

2 I mean, there was nothing in the rule that we  
3 hadn't all heard before, very little in the rule that wasn't  
4 already stated in the Commission's decision, correct?

5 MS. YOUNG: To the extent that there are many  
6 words that appeared in the Commission's decision in 8613  
7 that later appeared in the rule, you are correct.

8 But it's the realism rule that tells us that the  
9 important measure of a passing grade for an emergency plan  
10 under 5047(a) is that the plan provide adequate protective  
11 measures, and it also indicates --

12 JUDGE KOHL: Wasn't that just another way of  
13 saying reasonable assurance, which is the bottom line  
14 standard?

15 MS. YOUNG: Well, as the staff would say, whether  
16 you say root question is adequacy of a plan, whether you say  
17 fundamental emergency planning standard, which the  
18 Commission did in 8613, or whether you say fundamental flaw,  
19 these things are actually the same thing.

20 JUDGE KOHL: Well, I would agree, and that's why I  
21 don't understand why the staff suddenly then shifts its  
22 position from what was the issuance of the rule last  
23 November. It's very confusing.

24 MS. YOUNG: The staff lacked insight as to the  
25 nexus between the finding of reasonable assurance in 5047(a)



1 and the Commission's discussion of adequate protective  
2 measures in 8613 and in the realism rule.

3           In other words, the main question for any  
4 emergency plan is whether it provides adequate protection  
5 measures. The Commission emphasizes this in the realism  
6 rule by stating that each plan shall be evaluated on a case  
7 by case basis for adequacy. It shall be evaluated on its own  
8 merits. The Commission's rules do not require any preset  
9 minimum dose savings, any preset minimum evacuation time,  
10 and it also tells us that a finding of adequacy for one plan  
11 is comparable to a finding of adequacy for another plan.

12           So, the staff, after reading the realism rule,  
13 believed it had the duty to inform this Board of current  
14 Commission guidance pertinent to the legal standards to be  
15 applied regarding fundamental flaws, and that it, you know,  
16 could not hide this relationship from the Board, even though  
17 it was late to receive it.

18           So, the important question in analyzing the  
19 fundamental flaw again rests with whether the plan can  
20 provide adequate protective measures. From the realism rule,  
21 the staff understands that in the statement of  
22 consideration, each plan is to be evaluated -- a utility  
23 plan is to be evaluated under the same standards that apply  
24 to a state or local plan.

25           The Commission indicates that there are sixteen



1 planning standards, but, again, allowances are to be made  
2 for the non-participation of surrounding governments and for  
3 the licensee's compensating measures.

4           So, in reading that realism rule, the staff  
5 focused on what did the Commission mean by adequate  
6 protective measures. That addresses the fundamental flaw  
7 standard.

8           JUDGE KOHL: Is there any indication in the  
9 Licensing Board's decision that it applied a double standard  
10 that would not be consistent with what the rule in CLI 8613  
11 provides?

12           MS. YOUNG: I'm not sure I understand what you  
13 mean by double standard.

14           JUDGE KOHL: Well, I guess I infer from what  
15 you're saying that, you know, the Commission has said that  
16 the emergency plan and exercise performance should be judged  
17 on the same basis for a utility's devised plan as it would  
18 be for a state and local government devised plan. Right?

19           So, I don't understand, I don't see in the  
20 Licensing Board's opinion that they violated that direction.

21           MS. YOUNG: No, it wouldn't be that they had  
22 violated that direction, but the problem was that they --  
23 even though they enunciated a fundamental flaw standard that  
24 closely tracked that in 8611, they did not go as far as  
25 addressing those factors regarding adequacy that the staff

1 believes can be found in 8613.

2           To that extent, the Commission was discussing the  
3 adequacy of a best efforts response. It applies the adequacy  
4 of a governmental response. When we look at the realism rule  
5 and we understand that the same questions of adequacy are  
6 pertinent to whether it's a utility implemented plan or a  
7 state and local plan, the staff believes that you can find  
8 in 8613 more guidance regarding what constitutes adequate  
9 protective measures.

10           JUDGE KOHL: Did the staff specifically argue to  
11 the Licensing Board that its definition of fundamental flaws  
12 should take into account the Commission's decision in CLI  
13 8613?

14           MS. YOUNG: No, the staff did not.

15           Again, the staff --

16           JUDGE KOHL: But that decision was available at  
17 that time?

18           MS. YOUNG: It was available, but the staff lacked  
19 insight into the full implications or the full relevancy of  
20 8613.

21           JUDGE KOHL: But you can't very well criticize the  
22 Licensing Board's decision for not specifically paying lip  
23 service to the CLI 8613 decision when none of the parties  
24 argued that to the Board, can you?

25           MS. YOUNG: Not specifically because of the

1 results of the parties' failure to argue it, but, again, the  
2 staff insight is gained after reading the realism rule which  
3 was promulgated in November, which preceded both the  
4 decision on the scope of the exercise and the decision under  
5 appeal in this argument.

6 JUDGE ROSENTHAL: How can you come up here and  
7 attack a Licensing Board decision on grounds that you didn't  
8 practice before the Licensing Board?

9 Isn't it a fundamental rule of appellate  
10 procedure, so to speak, that one who is attacking a decision  
11 of the tribunal below must do so on grounds that were  
12 presented in that tribunal?

13 MS. YOUNG: If you are referring to waiver, in a  
14 sense, as a result of the staff's failure to raise it below,  
15 --

16 JUDGE ROSENTHAL: Well, we normally do not hear  
17 from appellants arguments that were not presented to the  
18 lower tribunal and for good and sufficient reasons. It's  
19 rather unfair, isn't it, to come up and tell us that the  
20 Licensing Board was wrong for reasons that, whether it was  
21 due to a lack of insight or whatever else, were not  
22 presented to that Board?

23 Why should we consider anything that you are now  
24 telling us or told us in your brief that weren't put before  
25 the Licensing Board?

1 MS. YOUNG: Well, I believe both Judge Rosenthal  
2 and Judge Kohl has recognized in Douglas Point, ALAB-218,  
3 and in the Limerick decision, ALAB-819, that it's important  
4 that judicial decisions or administrative decisions, for  
5 that matter, be rendered under the law in effect at the  
6 time.

7 This was the reason that the staff felt it had the  
8 duty to inform the Board of Commission guidance that was  
9 pertinent --

10 JUDGE KOHL: But CLI 8613 was in effect at the  
11 time this case was being litigated.

12 MS. YOUNG: But the full implications of that  
13 decision regarding giving guidance pertinent to the adequacy  
14 of the protective measures under emergency plan was not  
15 clear or was not even confirmed until after the issuance of  
16 the realism rule and the discussion of the statement of  
17 considerations in the realism rule.

18 JUDGE ROSENTHAL: When was the realism rule --

19 MS. YOUNG: It was published in November of '87  
20 and became effective in December.

21 JUDGE ROSENTHAL: All right. That was November of  
22 '87.

23 When was the Licensing Board's decision that's now  
24 under appeal?

25 MS. YOUNG: It was rendered in early February.

1 JUDGE ROSENTHAL: All right. What happened in that  
2 interval?

3 MS. YOUNG: In that interval, the staff lacked the  
4 insight. That's basically all I can tell you.

5 JUDGE ROSENTHAL: Well, I understand this lacking  
6 insight. I mean, the staff, I assume, was familiar with the  
7 rule. The realism rule was not hidden under the proverbial  
8 bushel basket, and was it the staff just didn't until after  
9 February, did not focus on what it now is telling us was of  
10 significance?

11 MS. YOUNG: That is correct. It was shortly before  
12 we filed our brief that we realized the significance of 8613  
13 to a finding of fundamental flaws, but at that time, we did  
14 not have that realization or the position that I'm  
15 presenting to you today substantially prior to when we filed  
16 our brief.

17 JUDGE KOHL: Do you think the Commission's 1986  
18 decision in the Shearon-Harris proceeding, that part of the  
19 proceeding involving the exemption request, it talks about  
20 fundamental flaw, do you think that opinion sheds any light  
21 on what the Commission meant in the Shoreham opinion as to  
22 what fundamental flaw is?

23 MS. YOUNG: If you're referring to CLI 8624?

24 JUDGE KOHL: Yes.

25 MS. YOUNG: Possibly? I think that one does

1 explain to the parties in this proceeding that a finding of  
2 reasonable assurance should be based in part on the  
3 implementability of a plan, but other than that, there's no  
4 further guidance regarding what protective measures are  
5 adequate.

6 JUDGE KOHL: So, you still think that the 1987  
7 rule on realism adds more -- contributes more guidance in  
8 defining fundamental flaw than the Commission's  
9 pronouncements in both Shearon-Harris decision and the  
10 Shoreham opinion?

11 MS. YOUNG: Yes, and I think -- I believe that the  
12 statements of consideration, even though the words again,  
13 fundamental flaw, are not there, does say that the rule does  
14 amplify and clarify the Commission's guidance in 8613, and  
15 it states -- it reiterates the words from 8613, that the  
16 root question is adequacy of the protective measures  
17 provided under a plan.

18 JUDGE KOHL: It doesn't really go to the realism  
19 issues that are still being litigated before the Licensing  
20 Board as opposed to what happened in the --

21 MS. YOUNG: No. Judge Kohl, I have to disagree.

22 Adequacy of protective measures does not depend on  
23 whether they're taken by a state or local government or  
24 whether they're taken by a utility.

25 In each instance, to confront the fundamental flaw

1 criterion, you have to determine whether the protective  
2 measures are adequate and through that, you're able to  
3 determine whether you have reasonable assurance under a  
4 plan.

5 JUDGE ROSENTHAL: What is the Licensing Board  
6 considering the realism issue addressing at this point?  
7 Isn't that Board addressing whether, in point of fact, the  
8 response that is presumed that the state and local  
9 governments will make will be adequate, coupled with the  
10 activities of the applicant's own organization? Isn't that  
11 the question?

12 MS. YOUNG: Are you saying whether in the realism  
13 proceeding, the --

14 JUDGE ROSENTHAL: Yes. As I understand it, there's  
15 a Licensing Board that is now considering whether, in point  
16 of fact, the presumed response of the state and local  
17 governments, the presumption is that they'll make their best  
18 effort, whether that will be efficacious. Isn't that what  
19 the --

20 MS. YOUNG: Yes. There is a proceeding on that  
21 issue.

22 JUDGE ROSENTHAL: All right. Now, why isn't that  
23 tied to the exercise?

24 MS. YOUNG: I'm losing your question. Why isn't it  
25 --



1 JUDGE ROSENTHAL: The exercise reflects the  
2 response to the emergency of the LERO organization, does it  
3 not?

4 MS. YOUNG: Yes, it does, and --

5 JUDGE ROSENTHAL: All right. Now, on top of that  
6 response is going to be the response of the state and local  
7 governments, the bodies that have the police powers, is that  
8 not true?

9 MS. YOUNG: Because there's a presumption that the  
10 state and local governments will use the utility plan.

11 JUDGE ROSENTHAL: They will respond and they'll  
12 use the utility plan.

13 Now, why isn't there a close inter-relationship  
14 between the examination of this exercise and the questions  
15 that are being addressed by the Licensing Board that is  
16 looking at the efficacy of the presumed response from the  
17 state and local government with the police powers?

18 MS. YOUNG: Why isn't there a close relationship  
19 between the two?

20 JUDGE ROSENTHAL: Yes. Why don't they inter-  
21 relate?

22 MS. YOUNG: Well, I guess they are related to the  
23 extent that the issue becomes the same, whether the  
24 protective measures provided by the LILCO plan are adequate.

25 With respect to the exercise that was conducted in



1 February of '86, the actions of state and local officials  
2 was simulated by FEMA controllers.

3           So, the exercise tests merely LILCO's ability to  
4 provide information to those controllers and then to make  
5 protective action decisions. These are the factors that are  
6 important from 8613.

7           The Commission, in 8613, had separated legal  
8 authority contentions and had there being litigated in the  
9 OL3 proceeding, but, again, 8613 does give us an indication  
10 of what protective measures are adequate, whether they are  
11 instituted by a utility or a state and local government.

12           So, the issue is always the same. Whether the plan  
13 can provide for adequate protective measures. Whether those  
14 measures are taken by utility or by state and local  
15 governments.

16           So, I believe there is a relationship between the  
17 two, but the extent that the history of this proceeding has  
18 somewhat separated the two issues to first examine LILCO's  
19 activities in one context and then look at the adequacy of  
20 best efforts responses in another proceeding, they have been  
21 separated.

22           JUDGE ROSENTHAL: I ask that question because  
23 you've indicated that the issuance of the realism rule last  
24 November has had a drastic effect upon the staff's approach.

25           The staff having now acquired this additional

1 insight --

2 MS. YOUNG: Certainly.

3 JUDGE ROSENTHAL: -- is why I was sort of

4 interested in --

5 MS. YOUNG: And the realism rule does, you know,  
6 specifically state that even though utility plans are to be  
7 evaluated along the same standards that are to be used to  
8 evaluate state and local plans, due allowances are to be  
9 made for non-participation of state and local governments,  
10 and for the compensatory measures under the plan.

11 Again, the ultimate question is whether the plan  
12 can provide for adequate protective measures, and when we  
13 look at the Commission's discussion of adequate protective  
14 measures, which was particularly focused on the efficacy of  
15 best efforts responses, the staff has gleaned basically  
16 three factors.

17 Whether the delays associated with the  
18 deficiencies in exercise would impact the timely alert of  
19 the public. Whether delays would impact the ability to make  
20 protective action decisions and recommendations, and whether  
21 the delays would preclude the viability of evacuation or  
22 other protective options.

23 If we look at these three things, we're talking  
24 about the significance of the failure to meet one or more of  
25 the planning standards in 5047(b).

1 JUDGE ROSENTHAL: In order to be a fundamental  
2 flaw as the staff sees it, it would have to produce a delay  
3 which would have one of those three effects?

4 MS. YOUNG: Certainly.

5 JUDGE ROSENTHAL: Is that right?

6 MS. YOUNG: In other words, you have to determine  
7 the significance of the deficiency on the ability to take a  
8 range of protective actions under the plan, and to that  
9 extent, you're addressing the issue of whether protective  
10 measures are adequate under the plan.

11 JUDGE KOHL: How do we decide if a certain period  
12 of time delay is fundamental or not?

13 Ms. McCleskey said that a nineteen minutes' delay  
14 was not significant.

15 Is an hour significant? Two hours? What do we do  
16 to go about making that kind of judgment? What do we look  
17 to?

18 MS. YOUNG: Well, I think you'd look at the -- you  
19 begin with the findings in the partial initial decision  
20 regarding -- we're talking about the staffing and traffic  
21 control guides in this instance.

22 The plan provides for a staffing, critical traffic  
23 control posts within one hour. The Licensing Board below  
24 also found that these guides could be mobilized within  
25 approximately three hours and that would be adequate.

1           So, the concern was to have critical traffic  
2 control post staff within the hour. That did not occur on  
3 the day of the exercise with respect to two of the staging  
4 areas. But when you look at 8613 and determine the adequacy  
5 of the protective measures and since this -- the traffic  
6 guides are used to control evacuations, you have to  
7 determine would that have precluded the viability of  
8 evacuation under those circumstances.

9           Nineteen minutes, as the testimony below indicates  
10 that would have further delayed evacuation, you make the  
11 judgment as to whether that would have precluded evacuation.  
12 It's clear that it did not.

13           JUDGE KOHL: But that's what I'm asking you, is  
14 how do we make that judgment. What do we look to to -- is it  
15 just strictly you bring in your experts and have them  
16 testify and if more of them testify that nineteen minutes  
17 isn't a problem, then nineteen minutes isn't a problem?

18           MS. YOUNG: Well, there was also testimony that  
19 even if the traffic control guides were not at their posts,  
20 that the evacuation would only be lengthened by an hour and  
21 a half.

22           I think -- I can't recall which decision the  
23 Licensing Board found that, but those things are acceptable.  
24 The Commission has specifically stated in the statements of  
25 considerations that no preset minimum evacuation time is

1 required. It has stated that each plan is to be evaluated  
2 for adequacy without reference to the specific dose  
3 reductions provided in that plan.

4           So, to the extent that the hour was not met, the  
5 plan could still be adequate.

6           JUDGE KOHL: That's true, but that takes us back  
7 to Dr. Johnson's question earlier, though.

8           Why have a time specified in a plan if it can't be  
9 met? I mean, presumably, that time, although it might not  
10 be required under the NRC's regulations, it's in the plan  
11 for some reason. That reason being that the individuals who  
12 have to make protective action recommendations can do so  
13 based on the planning basis set forth in the plan.

14           You know, why have that timing in there if it  
15 doesn't serve some significant purpose and why shouldn't it  
16 be strictly adhered to?

17           MS. YOUNG: I believe the timing in the plan is a  
18 goal for a certain level of emergency preparedness.

19           JUDGE KOHL: And presumably those goals are set on  
20 the liberal side at the outset, right?

21           MS. YOUNG: You mean on the optimistic end?

22           JUDGE KOHL: Yes.

23           MS. YOUNG: Yes, certainly, and that's a goal that  
24 should try to be achieved, but the determination in terms of  
25 fundamental flaw is not only whether the goals and the plans

1 are met, but what effect did the failure on the day of the  
2 exercise to meet those goals have on the ability to  
3 effectuate evacuation in that instance, and we've learned  
4 from the testimony in the proceeding that it would not have  
5 affected it very substantially.

6 JUDGE JOHNSON: Isn't the time dependence of  
7 population dose directly a function of the particular  
8 scenario that is being examined in the exercise and,  
9 therefore, nineteen minutes in an exercise that envisions  
10 one type of accident may not be harmful but nineteen minutes  
11 in an exercise that envisions another failure scenario might  
12 well be significant?

13 Would you not agree with me on that?

14 MS. YOUNG: I think I can agree with you, and to  
15 the extent that the Licensing Board below -- I can't recall  
16 whether it was in the partial initial decision or in this  
17 decision, recognized that even though it had approved  
18 mobilization of traffic guides within one to three hours, so  
19 to speak, that there may be some scenarios that were faster-  
20 breaking that even getting there in an hour would be too  
21 late.

22 But the Board still found that that's adequate  
23 because under emergency planning, you're taking a range of  
24 protective actions. It may be a situation where sheltering  
25 is more appropriate than evacuation, but, again, the goal in

1 the plan, you are correct, was to try to get there in an  
2 hour.

3           So, we have to look at the adequacy of the  
4 protective measures. It is a case by case evaluation, and  
5 the Commission has also made clear that its emergency  
6 planning regulations are flexible and utilities are not to  
7 be held to the exact same standard they would be if there  
8 was state and local participations.

9           The only finding that's important is to determine  
10 whether the protective measures under the plan are adequate  
11 and, therefore, provide reasonable assurance.

12           JUDGE KOHL: Ms. Young, your time has expired.

13           If you want to take another half a minute to sum  
14 up, you may.

15           MS. YOUNG: Basically, the staff would urge that  
16 this Board apply the guidance of 8613 regarding the adequacy  
17 of the protective measures as its elucidation of the  
18 fundamental flaw standard.

19           To that extent, the Board should apply to the  
20 Licensing Board's findings of flaws the question of whether  
21 the deficiencies during the exercise caused delays which  
22 would have affected the timely alert of the public, which  
23 would have affected the ability to make protective action  
24 decisions and recommendations, including recommendations  
25 regarding recovery and re-entry, and would have precluded



1 the viability of protective action options.

2 To that extent, the staff believes that if the  
3 Board applies this standard to the Board's findings of flaws  
4 below, that this Board will conclude that the exercise did  
5 not reveal any fundamental flaws.

6 Thank you.

7 JUDGE KOHL: Thank you.

8 We'll take about a seven-minute recess.

9 (Recess.)

10 JUDGE KOHL: Mr. Miller?

11 MR. MILLER: Thank you, members of the Board.

12 Briefly, to outline my remarks, I'm not going to  
13 repeat matters addressed in the briefs because I think the  
14 Board is amply familiar with the briefs. I may touch on some  
15 of those points in response to questions, but I will not --  
16 I will try not to repeat matters in the briefs.

17 It's my opinion that governments have fully and  
18 adequately responded to the arguments made by LILCO and by  
19 the staff since we were given the opportunity by this Board  
20 to address the staff's brief, and I will have some comments  
21 about LILCO's reply brief that we did not respond to, and I  
22 will make some remarks regarding the comments that have been  
23 made here earlier today by counsel for LILCO and for the  
24 staff.

25 I would like to perhaps begin by just reminding



1 the Board that some years ago, litigants in this proceeding  
2 stood before this Board or at least members of the Board  
3 that were then sitting and argued the merits of the appeal  
4 from the planning decision of the OL3 Board in the 1983 and  
5 '84 litigation, and at that time, in most respects, LILCO  
6 had prevailed on the facts and determinations made by the  
7 Planning Board, and LILCO stood before this Board and LILCO  
8 talked about due deference that must be given to the Board  
9 below

10 LILCO talked about the extensive record that had  
11 been developed below and how the Board had to take that  
12 record into account, and LILCO reminded the Board of its  
13 obligations as an appellate body.

14 Well, today, the tables are reversed. We have an  
15 extensive record below. The record which the Board is  
16 familiar with numbered nearly 12,000 pages of pre-filed  
17 testimony and a hearing transcript.

18 We had literally dozens of witnesses that  
19 testified for the parties. We had hundreds of exhibits  
20 offered to the Board.

21 JUDGE ROSENTHAL: None of that goes, Mr. Miller,  
22 does it, to the question as to whether the Board applied the  
23 right standard? You could have had a record of a 100,000  
24 pages and two million exhibits. If the Board applied the  
25 wrong standard to that wealth of evidence, the Board's

1 conclusions would not stand, would they?

2 MR. MILLER: I agree with you completely, Judge  
3 Rosenthal.

4 The Board here did not apply the wrong standard.  
5 It's the Government's position that the Board applied  
6 LILCO's very standard, LILCO's very definition. Their three-  
7 part definition of fundamental flaws.

8 We think the Board went further than it should  
9 have in doing so, but, nonetheless, the Board applied that  
10 standard, that restrictive test as we call it in our briefs,  
11 in LILCO's favor and, nonetheless, found fundamental flaws  
12 in numerous categories against LILCO.

13 I don't quite understand LILCO's complaint before  
14 this Board. They say they need guidance about what a  
15 fundamental flaw is.

16 JUDGE ROSENTHAL: Well, LILCO does not agree with  
17 you that the Licensing Board applied its standard.

18 MR. MILLER: Well, if we look at the test that  
19 LILCO asks the Board to apply, that a fault, a defect, to be  
20 fundamental, must impact public health and safety, that that  
21 defect must be pervasive, systemic throughout the plan, that  
22 the defect must not be one readily correctable.

23 The Board specifically adopted the first two parts  
24 of that standard, and we submit the Board also adopted a  
25 third part of that standard, the easily correctable part of

1 that standard.

2           If you look at the fundamental flaws found by the  
3 Board, in every case, the Board concluded that changes had  
4 to be made to LILCO's plan and changes have been made, and I  
5 think, Judge Johnson, one of your remarks to Ms. McCleskey  
6 was in the context of traffic guide mobilization. Why was  
7 that not a fundamental flaw and Ms. McCleskey said --  
8 pointed out to the Board that in the recent exercise, the  
9 traffic guides were able to get to their posts within one  
10 hour.

11           That's because LILCO has changed its plan since  
12 the litigation below. LILCO has changed its plan by  
13 requiring the traffic guides be pre-briefed, pre-equipped  
14 and dispatched earlier, so that if they performed in this  
15 recent exercise as Ms. McCleskey claims, that's a different  
16 question than what was before the Board below.

17           JUDGE JOHNSON: But I have a question on a  
18 statement you made a few paragraphs back. That is that the  
19 Board did, indeed, follow the LILCO proposed standard, but  
20 with respect to traffic guides, did not the Board explicitly  
21 state that they were not considering public health and  
22 safety when they were dealing with the issue of the  
23 timeliness of traffic guides?

24           MR. MILLER: No, sir.

25           The Board does have, in one sentence, "Defense

1 relied heavily by LILCO", where it states that it will not  
2 consider the evidence offered by LILCO regarding health and  
3 safety impact.

4           The Board said that because the Board found that  
5 the fundamental flaw demonstrated during the exercise, the  
6 fact that two of the three staging areas completely failed  
7 in getting its traffic guides to their post in time, and  
8 even the Patchogue staging area, notwithstanding Ms.  
9 McCleskey's comments to this Board, did not really pass, I  
10 think, giving benefit to LILCO regarding the time frames and  
11 what was demonstrated during the exercise. Something like  
12 sixty-four percent of the traffic guides from the Patchogue  
13 staging area reported to their posts within about one hour  
14 on the day of the exercise.

15           But put that to one side. The Board, I think,  
16 determined that given the array of evidence before it, given  
17 the dismal performance by LILCO during the exercise, given  
18 the fact that two of three staging areas clearly could not  
19 even begin to meet the one hour mobilization time frame set  
20 forth in the plan and approved by the Licensing Board, the  
21 CL3 Licensing Board in the planning litigation, the Board  
22 concluded it didn't need to see any further evidence about  
23 the health and safety impact.

24           JUDGE JOHNSON: Well, you clearly read the  
25 Licensing Board statement differently than I do because the

1 way I read the statement on page 85 is the Board is saying  
2 that health and safety is not a relevant issue in this  
3 particular finding.

4 But that needn't deter us or detract us any  
5 further.

6 Let me ask you another question. If this plan and  
7 the exercise of February 1987 revealed many fundamental  
8 flaws as the Licensing Board found, why did it take 12,000  
9 pages to describe them?

10 I would think the fundamental flaw in something  
11 like an emergency plan showing up in an exercise would be  
12 something that was so obvious that it would only take ten  
13 minutes to show it.

14 MR. MILLER: Well, your question, Judge Johnson,  
15 may go to the litigious natures of lawyers. Maybe it goes to  
16 the litigious nature --

17 JUDGE JOHNSON: Maybe it goes to the litigious  
18 nature of fundamental flaw, but, I mean, it would seem to me  
19 that a fundamental flaw is something that's going to jump  
20 out and hit you over the head, and you shouldn't have to  
21 take days and days and days of litigation to demonstrate  
22 that something is a fundamental flaw.

23 MR. MILLER: Judge Johnson, all I can point out to  
24 you is that likely it should not have taken as long as it  
25 took to demonstrate the fundamental flaws that the

1 Government demonstrated during the litigation.

2           The Board, you must remember, essentially followed  
3 FEMA's findings. FEMA calls it a deficiency. The Licensing  
4 Board calls it a fundamental flaw, but, essentially, the  
5 Board followed the FEMA findings as to what had been noted  
6 and observed as demonstrated deficiencies during the day of  
7 the exercise, and the Board essentially went down the line  
8 with FEMA on this.

9           The governments agreed with FEMA in FEMA's  
10 analysis of the exercise. You also have to remember in the  
11 context of your question, this was not a one-sided decision  
12 in favor of the governments. There were many, many  
13 contentions that were found against the governments. We did  
14 not appeal those issues. LILCO brought this appeal of the  
15 issues that they had lost.

16           But there were many matters that the Board  
17 concluded were not fundamental flaws that were litigated and  
18 did take time during the litigation.

19           JUDGE ROSENTHAL: Mr. Miller, you indicated awhile  
20 back that, as you saw it, the Board adopted all three parts  
21 of the LILCO proposed test. Did I understand you correctly  
22 to state that?

23           MR. MILLER: Yes, sir.

24           JUDGE ROSENTHAL: All right. The third portion of  
25 that test, and I'm quoting, was "the alleged problem must

1 not be readily correctable by means of additional training,  
2 the purchase of new equipment or some other reliable and  
3 verifiable method. Rather, it is a problem that is  
4 susceptible to correction only through substantial  
5 potentially far-reaching revision of the written emergency  
6 plan."

7           Now, you're telling me that each of these  
8 deficiencies would fail against that standard, is that  
9 right? Every one of the fundamental flaws that the  
10 Licensing Board found would come within the ambit of that  
11 third test?

12           MR. MILLER: Yes, sir. That's my position, and I  
13 would just point out, Judge Rosenthal, I think you're aware  
14 of this, but it was Revision 6 of the LILCO plan that was  
15 exercised, and we're now at Revision 10 with drafts of  
16 Revision 11 coming out.

17           So, there have been substantial changes by LILCO  
18 to its plan.

19           JUDGE ROSENTHAL: All right. But you're saying  
20 that each one of these problems that was identified by the  
21 Licensing Board and characterized as a fundamental flaw was  
22 a problem that was susceptible to correction only through  
23 substantial potentially far-reaching revision of the written  
24 emergency plan?

25           MR. MILLER: I certainly would say that the



1 problems identified as fundamental flaws are not easily  
2 correctable through additional training, new equipment or  
3 other such means.

4 JUDGE ROSENTHAL: Well, I read it. "Only through  
5 substantial potentially far-reaching revision of the written  
6 emergency plan." That was the LILCO proposed test which you  
7 say the Licensing Board adopted.

8 Now, if you're accepting that, then I would have a  
9 problem, of course, and that is if we find that one of these  
10 fundamental flaws was not a problem susceptible to  
11 correction "only through substantial potentially far-  
12 reaching revision of the written emergency plan", should we  
13 then reverse the Licensing Board's determination that that  
14 was a fundamental flaw?

15 MR. MILLER: No, and I want to make sure my  
16 position is clear.

17 What I am saying is that the Licensing Board  
18 followed LILCO's proposed for fundamental flaw. I'm also  
19 saying that the Licensing Board went further than it should  
20 have in doing so.

21 I am now saying, and I think we've said in our  
22 briefs rather clearly, that the definition of a fundamental  
23 flaw, in our opinion, is well set forth in CLI 8611 and in  
24 the Shearon-Harris Appeal Board and Commission decisions  
25 that followed CLI 8611.



1           It is, if a defect precludes a finding of  
2 reasonable assurance. That's what the governments submit the  
3 tests should have been.

4           What I am suggesting is that the Board went  
5 further and adopted LILCO's proposed test and LILCO has no  
6 basis for now complaining about what the Board found. LILCO  
7 failed.

8           JUDGE KOHL: Mr. Miller, wouldn't you agree that  
9 the concept of reasonable assurance is somewhat nebulous,  
10 and you have to flesh that out with some more specifics?

11           LILCO attempted to do that through its three-part  
12 test. Do the governments object to that three-part test?

13           MR. MILLER: The governments would submit that the  
14 tests should be the reasonable assurance findings set forth  
15 in the Shearon-Harris case and CLI 8611.

16           JUDGE KOHL: How would you decide what's  
17 reasonable assurance?

18           MR. MILLER: Reasonable assurance is demonstrating  
19 that public health and safety can be protected as required  
20 by 50.47(a)(1) in the regulations and reasonable assurance  
21 goes to whether or not an abstract plan, as approved in  
22 1983-84 by the Licensing Board, can, in fact, be  
23 implemented.

24           LILCO makes much about this plan implementability  
25 versus plan implementation on the day of the exercise. I

1 don't see the difference. I don't see the distinction, and I  
2 think it's a game of semantics that LILCO plays here.

3 JUDGE KOHL: Do you see the difference between  
4 implementability and how it may have been implemented on a  
5 given day with particular individuals who may or may not be  
6 there during the term of the license?

7 MR. MILLER: All you can do, Judge Kohl, as an  
8 exercise board, sitting and hearing the evidence, as the  
9 prior exercise board, is look at the performance on the day  
10 of the exercise and judge whether that performance was  
11 adequate and provided reasonable assurance.

12 JUDGE KOHL: No. Excuse me. But I thought that  
13 the Commission's instructions in CLI 8611, the Board was to  
14 determine if there are fundamental flaws in the plan, not  
15 fundamental flaws in the performance by particular  
16 individuals on a given day of the exercise.

17 Isn't that what the Commission's directions were?

18 MR. MILLER: If you go beyond CLI 8611, which did  
19 not specifically address the implementation question, and if  
20 you look at the Appeal Board and the Commission decision in  
21 Shearon-Harris, those bodies talk about implementation of  
22 the plan as well as flaws in the plan in defining a  
23 fundamental flaw.

24 What the Board did, Licensing Board in this case  
25 did, is it looked at implementation of the plan. It made a

1 decision, whether the plan, in abstract, as approved by the  
2 prior Licensing Board in 1983-84, could in fact work, and  
3 the Board concluded in significant respects the plan doesn't  
4 work as structured or at least as structured at that time.

5 JUDGE ROSENTHAL: Couldn't work or was it simply  
6 that on this particular occasion, in certain respects, it  
7 didn't work, perhaps because of shortcomings on the part of  
8 the people who were carrying it out?

9 I mean, it's a completely different principle,  
10 isn't it?

11 MR. MILLER: I think it's both, Judge Rosenthal.

12 It couldn't work and didn't work. Take  
13 communications. The Board specifically found in its opinion  
14 that LILCO's communications system had broken down on the  
15 day of the exercise in significant respects involving many  
16 different LERO personnel.

17 The Board went further and said that, in its  
18 opinion, that failure was an inherent failure of the LILCO  
19 plan.

20 So, I think the Board was saying it didn't work on  
21 the day of the exercise and as structured, the LILCO plan  
22 cannot work with respect to communications.

23 JUDGE KOHL: What did the Board say by way of  
24 explanation of why that showed the plan didn't work? Where  
25 did the Licensing Board elaborate on that conclusion?

1 MR. MILLER: It seems to me all throughout its  
2 communications decisions, which comes in with respect to  
3 Contentions 38 and 39 and E&C activities and the activities  
4 of the Rumor Control personnel and in connection with the  
5 tracking impairments in connection with Contention 41.

6 There's much language in the Licensing Board's  
7 decision about the LILCO plan, its communications structure,  
8 and how that structure does not permit a reasonable  
9 assurance finding.

10 You can go to the standpoint of what the Board  
11 said about lateral communications, the necessity for lateral  
12 communications, and let's not forget the Licensing Board did  
13 not just base its finding upon a lack of lateral  
14 communications among field personnel. The Board also,  
15 relying on FEMA, found that there had been a breakdown in  
16 communications at the EOC, and that that breakdown went to  
17 the lateral communications aspects within the EOC.

18 The Board also condemned LILCO's communications  
19 structure, which was is a vertical administrative structure.  
20 Completely vertical structure. The Board condemned that  
21 structure and said it's not workable, it does not allow  
22 response, an adequate response.

23 JUDGE KOHL: Why? I know it condemned it, but  
24 what I don't understand is why the Licensing Board condemned  
25 it.

1 MR. MILLER: Well, I think because of the  
2 performance demonstrated during the exercise, because they  
3 couldn't --

4 JUDGE JOHNSON: Why? We want specifics.

5 JUDGE KOHL: Why and how?

6 MR. MILLER: Let's focus on the traffic  
7 impediments. If you want to ask me about different  
8 examples, we'll talk different examples.

9 With the traffic impediments, in essence, it took  
10 three and a half hours for LILCO to simulate removing the  
11 gravel truck impediment and it went to four hours for the  
12 fuel truck impediment.

13 The Board found that in most respects, those  
14 breakdowns were attributable to the breakdown in the  
15 communications structure. That the fact that messages,  
16 communications and instructions had to go from the EOC down  
17 the chain to the staging areas, out into the field and then  
18 back through that same chain, is an inherent flaw in their  
19 structure.

20 JUDGE KOHL: I thought the problem was that the  
21 evacuation route coordinator did not communicate to his  
22 supervisor as promptly as the plan required certain facts  
23 relating to the traffic impediments and that, therefore, it  
24 was a problem in that individual's performance.

25 He did not do what the plan told him to do. Isn't

1 that what the Licensing Board's decision found?

2 MR. MILLER: No. I think that's a rather narrow  
3 reading of what the Licensing Board said.

4 That's one problem. It may have been the problem  
5 that started the problems that followed. The fact that the  
6 evacuation route coordinator did not communicate to his  
7 superior at the EOC and to his co-workers at the EOC.  
8 Clearly, that was a source of the traffic impediment  
9 problems. That's how it started.

10 JUDGE KOHL: But would you agree then that that's  
11 not a problem with the plan itself?

12 MR. MILLER: Well, if people can follow the plan  
13 --

14 JUDGE KOHL: If somebody told him to call his  
15 supervisor and he didn't do that.

16 MR. MILLER: If the evacuation route coordinator  
17 would have followed the plan, then certainly some of the  
18 problems demonstrated during that exercise may not have  
19 occurred.

20 But let's put all that to one side. Let's give  
21 LILCO every benefit of the doubt. Let's start with the time  
22 frame of 12:13 rather than 11:00. That's when FEMA prompted  
23 LILCO and said you've got problems in the field with these  
24 two traffic impediments. You better take care of them.

25 JUDGE KOHL: Weren't part of the problems because

1 FEMA wasn't in the place that it was supposed to be?

2 MR. MILLER: No.

3 JUDGE KOHL: And they didn't reveal themselves, so  
4 that there was no way that they could know there was a  
5 particular traffic accident?

6 MR. MILLER: Clearly, the Board recognized that  
7 the way FEMA constructed the exercise and input the  
8 impediments, the artifacts of the exercise, as it's  
9 generally called, had something to do with LILCO's ability  
10 to verify the impediments, and perhaps was the source for  
11 some of the problems that followed.

12 But that's why I'm saying put all that to one side  
13 and let's start with the 12:00-12:13 time frame where FEMA  
14 issued the prompts to LILCO because at that point, the  
15 verification process was over.

16 Even if you start from the time of FEMA's prompts,  
17 it took hours to clear the impediments. There were delays in  
18 getting messages out in the field. There were delays in  
19 getting messages down to the staging areas to the dispatch  
20 personnel. There were delays with the preparation of the EBS  
21 messages regarding the impediments and, in fact, EBS  
22 messages were so delayed that by the time they went out  
23 talking about the impediments, the impediments under LILCO's  
24 performance and their supposed performance had been cleared,  
25 at least in one case of the --



1 JUDGE KOHL: So, that was behind then on that  
2 particular point. Where is the harm as shown in this record  
3 attributable to the delay or the incorrect information in  
4 the EBS message?

5 MR. MILLER: The harm would be that LILCO is  
6 telling people to avoid an evacuation route because it's  
7 blocked by impediments requiring people to do different  
8 things and take different actions when, in fact, under the  
9 supposed performance of LILCO during the day of the  
10 exercise, that impediment had been cleared.

11 That seems to be clear harm.

12 JUDGE ROSENTHAL: That has a health and safety  
13 implication?

14 MR. MILLER: I would think so. If people have --  
15 health and safety implications of the impediments are many,  
16 but with respect to the EBS messages, if that's what we're  
17 focusing on, if people are told don't go the evacuation  
18 route that we've been telling you you should be going, don't  
19 follow what we've been telling you to do, go some different  
20 route, take some different measures, I think there's a  
21 health and safety impact of that.

22 It may take longer for people to get out of the  
23 EPZ.

24 JUDGE ROSENTHAL: You're satisfied that the  
25 Licensing Board with respect to each of these found



1 fundamental flaws, dealt specifically with the question of  
2 implementability as opposed to actual performance?

3 In other words, I think that you agree that the  
4 question is whether or not the plan is implementable as  
5 opposed to whether in this particular day, in the course of  
6 this particular exercise, somebody didn't do the job that he  
7 or she was supposed to do in the fulfillment of the plan.

8 Do you agree with that or not?

9 MR. MILLER: Judge Rosenthal, frankly, I think  
10 that's a distinction without basis.

11 If you take plan implementability in the abstract  
12 as far as LILCO would have you take it, it seems to me that  
13 becomes a matter for the planning litigation because in the  
14 abstract, can a plan be implemented goes to the --

15 JUDGE ROSENTHAL: On any particular day, any  
16 individual can fail to fulfill some responsibility. None of  
17 us, as the old saying goes, is infallible.

18 Moreover, as I think Ms. Kohl pointed out, the  
19 people that are conducting the exercise on any particular  
20 day may not be the people who, down the road, will be  
21 involved in the response to a maximum emergency.

22 Now, if it turns out that the problem is one of an  
23 individual having a certain responsibility and not carrying  
24 out that responsibility, my question to you is, is that --  
25 does that reflect a fundamental flaw in the plan because the

1 test is not fundamental flaw in the conduct of the exercise;  
2 the test is fundamental flaw in the plan?

3 MR. MILLER: Judge Rosenthal, my response has to  
4 be it can be, but it may not be.

5 We argue, and we continue to assert, that even if  
6 LILCO is correct and it's just all the evacuation route  
7 coordinator's fault, one mid-level LERO person can cause  
8 complete breakdown, a complete failure in responding to  
9 impediments.

10 That, in and of itself, is a fundamental flaw. It  
11 shows there's no checks, there's no balances of any kind  
12 within the plan. But I think that the other answer to your  
13 question is that all you can do is look at the performance  
14 of LILCO during the day of the exercise as observed and  
15 judged and evaluated by FEMA.

16 Ms. McCleskey talked about the fact there were  
17 1100 people out there that day. FEMA didn't observe 1100  
18 people. FEMA observed a handful of the participants of that  
19 exercise. Of the handful FEMA observed, there were many,  
20 many problems.

21 That's what we have to focus on. We have to focus  
22 on the problems and the performance of the individuals, and  
23 --

24 JUDGE ROSENTHAL: And these reflect flaws in the  
25 plan rather than simply in the conduct of that exercise, is

1 that right?

2 MR. MILLER: I think there are flaws in both.

3 If the Board can point me or LILCO and the staff  
4 can point me to any deficiency, any fundamental flaw found  
5 by the Licensing Board that goes just to one individual,  
6 I'll rethink my position. There are none.

7 Those fundamental flaws went to the performance of  
8 an array of individuals, including with the impediments in  
9 the evacuation route coordinator, because it's nonsense to  
10 argue that it was all the evacuation route coordinator's  
11 fault.

12 JUDGE ROSENTHAL: Well, one of the communications  
13 problems, if I recall correctly, was placed at the doorstep  
14 of the evacuation route coordinator, is that not true?

15 MR. MILLER: That's true.

16 JUDGE ROSENTHAL: All right. That was his  
17 performance.

18 MR. MILLER: But that wasn't the only performance  
19 that made a fundamental flaw deficiency for communications.  
20 There were many other inadequate performances.

21 JUDGE ROSENTHAL: All right. But let's look at  
22 that. That was found to be a fundamental flaw, was it not?

23 MR. MILLER: His performance was found to be a  
24 fundamental flaw as part and parcel of the fundamental flaw  
25 in communications.

1 JUDGE ROSENTHAL: All right. Now, you would  
2 concede that viewed alone, that that did not constitute a  
3 fundamental flaw? His shortcomings, the things he should  
4 have done but didn't do.

5 Now, if you look at it by itself, --

6 MR. MILLER: If it was just the evacuation route  
7 coordinator by himself, everyone else performed well, I  
8 would agree. You don't need to reach a fundamental flaw  
9 finding. That's not what happened during the exercise.

10 JUDGE ROSENTHAL: So that his shortcomings, then,  
11 you concede, standing by themselves, could not constitute a  
12 fundamental flaw?

13 MR. MILLER: I would say that any organization,  
14 regardless of how well it's trained, they're going to all  
15 see one person who just can't handle the job and that may be  
16 revealed during an exercise.

17 JUDGE ROSENTHAL: Supposing that there are six or  
18 eight people that do not perform their jobs properly? How  
19 many people are involved in the conduct of this exercise?  
20 How many?

21 MR. MILLER: LILCO says they put out 1100 people  
22 on the day of the exercise.

23 JUDGE ROSENTHAL: All right. There are 1100 people  
24 out conducting this exercise. Now, supposing that out of the  
25 1100, there's a showing that twenty, twenty-five of the

1 people did not do the job as anticipated in the plan?

2 MR. MILLER: It would depend on how many of those  
3 1100 people FEMA observed and evaluated. They didn't look at  
4 them all, and it would depend on the nature of the person  
5 that didn't perform as he was supposed to perform.

6 It may be one thing for a traffic guide not to  
7 know his duties. I mean, there was examples, numerous  
8 examples of FEMA where it talked with traffic guides in the  
9 field, interviewed them. They didn't know that the National  
10 Coliseum was the reception center for the public.

11 FEMA thought that was a problem. FEMA did not take  
12 that to the level of deficiency, and the Board did not find  
13 that to be a fundamental flaw.

14 JUDGE KOHL: But we have to make some judgment  
15 then of materiality, of a given individual's function,  
16 performance, etc.?

17 MR. MILLER: Materiality of his performance, his  
18 job, his duties, how that impacts the rest of the LERO  
19 organization and its performance as an organization to the  
20 scenario during the exercise.

21 You do have to make that judgment, although you  
22 should not make that judgment because that's what the  
23 Licensing Board did.

24 JUDGE KOHL: If I understand LILCO correctly,  
25 they're saying that, all right, that materiality judgment is

1 part 1 of their three-part test. The public health and  
2 safety aspects.

3 We're getting back to try to give some meaning and  
4 specifics to the concept of reasonable assurance, and how do  
5 we decide that?

6 MR. MILLER: I don't want to be repeating myself,  
7 but it seems to me that the concept of reasonable assurance  
8 in the context of a fundamental flaw as demonstrated during  
9 the FEMA-graded exercise has been well established in the  
10 case law in Shearon-Harris, in the Commission's CLI 8611,  
11 it's talked about in the regulations in the context of what  
12 is reasonable assurance in 50.47(a)(1), and it seems to me  
13 there is ample guidance out there.

14 LILCO's only complaint is that it couldn't meet  
15 that guidance because it failed the exercise. So, now it  
16 wants the criterion changed in some way. I'm suggesting  
17 that the Licensing Board applied LILCO's test and they still  
18 couldn't pass.

19 JUDGE JOHNSON: Well, I'm a little confused.

20 If radiological consequences are not the prime  
21 consideration in reasonable assurance, what is?

22 MR. MILLER: I'm not sure why radiological  
23 consequences are not a consideration.

24 JUDGE JOHNSON: Well, why are they not the primary  
25 consideration?

1 MR. MILLER: It seems to me one thing --

2 JUDGE JOHNSON: You're talking about reasonable  
3 assurance of protecting the public. What you're protecting  
4 them from is radiation dose in the event of a reactor  
5 accident, and if a problem in the plan is revealed and it is  
6 also revealed that although this problem is there, there's  
7 no change in the radiological consequences, then the same  
8 level of reasonable assurance is achieved whether the  
9 problem is there or not and, therefore, I cannot see why  
10 there's a fundamental flaw.

11 MR. MILLER: Judge Johnson, first of all, the  
12 Licensing Board clearly recognized that you have to look at  
13 health and safety aspects of a defect if you're going to  
14 determine that's going to be a fundamental flaw.

15 They look to that in every case, in every  
16 instance.

17 JUDGE JOHNSON: Well, I'm just citing to you one  
18 in which they specifically eschewed that and that's the  
19 delay in the road guides.

20 MR. MILLER: The delay in the traffic guides.

21 JUDGE JOHNSON: Right.

22 MR. MILLER: You and I apparently have a  
23 disagreement about that point because I say the Board had  
24 before it the plan requirement that the traffic guides be in  
25 the field by a certain time.



1 The Board had before it --

2 JUDGE JOHNSON: That's the only thing considered,  
3 though. One hour.

4 Now, --

5 MR. MILLER: No, sir.

6 JUDGE JOHNSON: -- where does one hour -- is one  
7 hour the guarantee of reasonable assurance? That's what I  
8 want to know. Why isn't the radiation dose the guarantee of  
9 reasonable assurance?

10 MR. MILLER: Let me just -- there's a lot of  
11 responses I can give you to that question.

12 First of all, the Licensing Board did not just  
13 apply the one hour standard. They also applied the standard  
14 of three hours for mobilizing the traffic guides from the  
15 time of the site area emergency that had been recognized and  
16 approved by the Licensing Board in the planning litigation.

17 With respect to your dose question, in my opinion,  
18 the Licensing Board looked at the dose question, the health  
19 and safety aspects. The Board decided not to accept LILCO's  
20 proffered testimony regarding total population dose because  
21 the Board decided that based on the evidence, the  
22 overwhelming evidence before it, the health and safety  
23 determinations, the impact on the public health and safety,  
24 had been presented and made clearly by the governments in  
25 presenting the governments' case.



1 JUDGE JOHNSON: How? What impact are we talking  
2 about if we're not talking about dose?

3 MR. MILLER: Well, we're talking about dose, Judge  
4 Johnson. I'm not saying that we're not talking about dose.

5 What I'm saying is that even -- first, let's go  
6 back to the nineteen minute time that LILCO wants to talk  
7 about.

8 My opinion is that even if there was only a  
9 nineteen minute delay in terms of total evacuation time as  
10 LILCO asserts, that, under particular scenarios, could  
11 impact public health and safety.

12 I also suggest to you that that nineteen minutes  
13 delay testimony was discredited at trial by the Licensing  
14 Board itself.

15 With respect to LILCO's proffer of total  
16 population dose, the Board decided it did not need to hear  
17 it. The Board decided it had enough before it to make its  
18 determination.

19 The governments made clear that they wanted and  
20 were willing and ready to contest that evidence. The Board  
21 said no, we don't want to hear it.

22 LILCO did not object to the Board's failure to  
23 admit that evidence. They haven't preserved an objection for  
24 appeal in the first place.

25 I guess the only other point I would make is that

1 with respect to dose reduction, I guess this Appeal Board  
2 must be cognizant of the new rule and the amendment to  
3 50.47(c)(1) which expressly states that the adequacy of a  
4 plan is not to be judged solely by the dose levels and the  
5 dose reductions that may be envisioned in one plan versus  
6 another plan.

7 I guess that does come into play in that context.

8 JUDGE JOHNSON: I still would like to understand.

9 You are saying that reasonable assurance of  
10 protecting the public in the event of an accident is the  
11 standard one should apply when looking for a fundamental  
12 flaw, and I -- whereas, the rule you just cited says you  
13 don't look at dose when you're testing one plan against  
14 another.

15 Nevertheless, I cannot see under the standard that  
16 you are talking about how anything but the resultant  
17 radiological consequence, i.e. dose, is not the only measure  
18 of the efficaciousness of the implementation of a particular  
19 plan on a particular day.

20 MR. MILLER: I don't know if we really have a  
21 disagreement, Judge Johnson.

22 It seems to me that what the exercise board was  
23 charged with is looking at whether the plan on paper could  
24 work, and it decided in significant respects where it found  
25 fundamental flaws that the plan could not work.

1           With respect to the traffic guide mobilization,  
2 the Board had before it not only LILCO's dismal performance  
3 in getting the people out into the field, but ample  
4 testimony by witnesses for Suffolk County, primarily police  
5 witnesses, people as the Licensing Board characterized as  
6 knowledgeable in the streets, as to the consequences of  
7 those traffic guides reaching their posts late.

8           The consequences, the way the streets would be  
9 lost was the phrase that was used at the --

10           JUDGE JOHNSON: The police were experts in  
11 radiological dose assessment?

12           MR. MILLER: The police were experts in the  
13 consequences that would follow from traffic impediments  
14 remaining without being addressed or taken care of or  
15 removed.

16           The police were experts in the consequences of  
17 traffic guides under LILCO's plan not getting to their posts  
18 in time to fulfill their duties under that plan.

19           The police were not experts with respect to  
20 radiological dose. They offered testimony as practical  
21 people that understand the streets and the way people behave  
22 to impediments, to emergencies, to stress, and all these  
23 other factors.

24           JUDGE ROSENTHAL: Now, if I can get back to  
25 something I was exploring with you a short while ago, you're

1 satisfied that this Licensing Board has explained adequately  
2 why each of these fundamental flaws reflected something in  
3 the plan that couldn't work as opposed to something that  
4 didn't happen to work on the day of the exercise?

5 MR. MILLER: I think my answer before, Judge  
6 Rosenthal, was that, at least in some cases, it was both.

7 It did not work the day of the exercise and it  
8 could not work.

9 JUDGE ROSENTHAL: Then explain why the did not  
10 translates itself into could not.

11 MR. MILLER: Well, in the case of --

12 JUDGE ROSENTHAL: Because as I understand the test  
13 here, it's fundamental flaw in the plan.

14 So, I would think that I would be obligated to  
15 look to see what explanation the Licensing Board put forth  
16 with regard to each of these fundamental flaws as to why a  
17 particular deficiency, call it what you will, reflected not  
18 merely something that didn't work but also something that  
19 couldn't work.

20 MR. MILLER: Judge Rosenthal, the Board  
21 articulated the standard of fundamental flaw in the plan,  
22 lack of reasonable assurance, and, as I've said before,  
23 followed LILCO's test.

24 But in terms of whether something did not work or  
25 could not work, if you look at each of the fundamental flaws

1 found by the Board, in my opinion, it's scattered throughout  
2 their opinion. The Board said it's going to take changes to  
3 the plan with respect to training and the training  
4 fundamental flaw.

5 The Board said the training program as structured  
6 obviously has not trained. You're going to do something  
7 different. LILCO, you must remember, prepared for this  
8 exercise for three years, had numerous dress rehearsals  
9 before the exercise.

10 This was the biggest thing that ever happened to  
11 that company, and they still failed miserably.

12 JUDGE ROSENTHAL: Then what you're telling me is  
13 that you're satisfied that the Licensing Board adequately  
14 explained in each instance why the plan could not as opposed  
15 to did not work?

16 MR. MILLER: And I'm also saying the fundamental  
17 flaw in the plan as interpreted by the Commission and the  
18 Appeal Board subsequent to CLI 8611, fundamental flaw in the  
19 plan also -- a fundamental flaw can be an implementation  
20 deficiency, can be a --

21 JUDGE ROSENTHAL: Solely a limitation?

22 MR. MILLER: Can be solely -- if the plan on paper  
23 is the best thing in the world, it can't have a better plan,  
24 but you get out there and test it and you can't implement

1 JUDGE ROSENTHAL: No, no. That's  
2 implementability.

3 I am talking again about -- I mean, for example,  
4 if you have a plan, the plan is fine on paper, it happens on  
5 the day of the exercise that a key individual had a fight  
6 with his wife the night before and/or had a fight with her  
7 husband, either way, either way, and comes to work, his mind  
8 on something entirely different, and because the individual  
9 has a key role in the implementation of the plan,  
10 significant portions of the plan are not properly carried  
11 out with possible health and safety implications.

12 Now, my understanding is, and if I'm wrong, please  
13 correct me, that that failure on the part of the key  
14 official could not be deemed to be a fundamental flaw in the  
15 plan unless one were to say, well, the plan was deficient in  
16 giving the responsibilities to somebody who might have a  
17 fight with his or her spouse the night before the exercise.

18 Now, I don't care what might have been the health  
19 and safety implications that might have resulted from this  
20 individual's failure. It seems to me that his or her failure  
21 does not constitute a fundamental flaw.

22 You have to show that there was something in the  
23 plan that was not subject to being implemented, not that  
24 there was some aspect of the plan which, on this particular  
25 day, wasn't.

1 MR. MILLER: Judge Rosenthal, all you can do is  
2 look at the evidence on the day of the exercise and  
3 determine whether the plan was in fact implemented in the  
4 way which is supposed to be implemented.

5 Under your example, I would say still that if a  
6 key individual doesn't perform for whatever reason, fight  
7 with spouse or for whatever reason, if that individual  
8 doesn't perform and the organization as a whole breaks down  
9 and can't handle basic problems introduced by FEMA, there's  
10 a fundamental flaw in the plan.

11 The plan doesn't provide checks and balances. No  
12 one is looking over the shoulder of that individual to see  
13 if he does perform. No one is checking his performance.  
14 That's a fundamental flaw of a plan.

15 Other emergency organizations, I can assure you,  
16 at least if you take the police as an example, they've got  
17 checks and balances. They don't let one individual make the  
18 whole organization fall apart. So, it can be a fundamental  
19 flaw if it's just one individual for whatever reason.

20 JUDGE ROSENTHAL: But you would need then a  
21 determination that the fundamental flaw in the plan was, as  
22 you have it, the absence of checks and balances, not simply  
23 the fact that this individual didn't do his or her job  
24 properly?

25 MR. MILLER: I think that would be a critical



1 ingredient to looking at whether or not it's a fundamental  
2 law.

3 JUDGE ROSENTHAL: The Licensing Board has analyzed  
4 it, you're telling me, from that standpoint.

5 MR. MILLER: No, no, no. What I'm saying is that  
6 this exercise did not concern fundamental flaws that would  
7 result of any single individual.

8 Sure. The Licensing Board, like FEMA, looked at  
9 the performance of individuals. That's all you can look at,  
10 is the performance of individuals. But it wasn't any single  
11 individual.

12 JUDGE ROSENTHAL: But you're asking us to uphold  
13 the Licensing Board's determination that there were certain  
14 fundamental flaws. If we're to uphold the Licensing Board  
15 determination, we have to first conclude, do we not, that  
16 the Licensing Board analysis leading it to the conclusions  
17 that it reached was a sound analysis.

18 If it's not a sound analysis, I don't understand  
19 how the conclusion can be upheld.

20 MR. MILLER: My understanding of the test this  
21 Board has to apply is that with respect to the  
22 determinations made below, based upon review of the entire  
23 record, you can change the result reached below only if that  
24 entire record compels a different result. That's the  
25 standard, as I understand it.

1           If this Board looks at the entire record, looks at  
2 the decision below, decides that the Licensing Board erred  
3 in fundamental ways and that a different result is  
4 compelled, you have the authority to change that result.

5           JUDGE ROSENTHAL: Also, if we find that the  
6 Licensing Board has not properly articulated the basis for  
7 its determinations, we, under long-settled principles, we  
8 have the ability, if not the duty, to remand it.

9           MR. MILLER: I wouldn't disagree with that, but I  
10 certainly would suggest to the Board that the Licensing  
11 Board did articulate its reasoning, its bases, for its  
12 conclusions in a very sound fashion.

13           JUDGE ROSENTHAL: We'll have to look at the  
14 determinations and the articulation of the basis for those  
15 determinations for ourselves.

16           MR. MILLER: I guess I'll proceed.

17           Maybe what I should do in the little time left to  
18 me is to try to respond to some of the points that were made  
19 by opposing counsel, and I think we've addressed a lot of  
20 those points.

21           JUDGE JOHNSON: While you're having a little  
22 trouble with what you want to say next, I'll stimulate  
23 something.

24           MR. MILLER: Stimulate me.

25           JUDGE JOHNSON: With respect to communication, is

1 it your reading of the Licensing Board's opinion that the  
2 communications system in an emergency plan should be  
3 entirely lateral?

4 MR. MILLER: Oh, no, sir. I don't think anyone has  
5 ever suggested that.

6 I think the most that's ever been suggested by the  
7 governments through its witnesses and its case is that a  
8 solely vertical communications scheme, as LILCO has and  
9 LILCO's always had in place in its emergency plan, is not  
10 workable because it does not allow personnel to respond to  
11 the unexpected, to the ad hoc problems that are surely going  
12 to arise during any emergency.

13 JUDGE JOHNSON: And you --

14 MR. MILLER: And we wouldn't it to be purely  
15 lateral communications system. That wouldn't work either.

16 I think it's got to be a mix of the two.

17 JUDGE JOHNSON: And you and the Licensing Board --  
18 I mean, agree -- do not see a difficulty associated with  
19 people in the field making decisions and taking actions that  
20 the Headquarters is not aware of?

21 MR. MILLER: I don't think we've ever suggested  
22 that, Judge Johnson.

23 JUDGE JOHNSON: Doesn't lateral communication,  
24 what you've just suggested, responding to unexpected events  
25 in the field laterally, doesn't that almost imply that the

1 people at the top don't know what's going on at the bottom?

2 MR. MILLER: No, sir.

3 You always keep people informed at the top. I  
4 mean, working with the police witnesses for six and a half  
5 years, one thing I've learned is how you keep people  
6 informed at the top.

7 But that doesn't mean people in the field can't  
8 communicate, can't talk, can't between themselves try to  
9 resolve problems that are occurring in the field.

10 It doesn't mean that the traffic guides under  
11 LILCO's scheme couldn't talk to one another about the best  
12 way to get that traffic around that impediment, but that  
13 doesn't mean you don't get on your radio and tell the people  
14 at the top what you're doing.

15 JUDGE JOHNSON: Is there evidence in this record  
16 that traffic guides on the scene might have been able to  
17 have cleared the impediments more rapidly as a result of  
18 lateral communications?

19 MR. MILLER: Well, there's a problem in that  
20 context, Judge Johnson, because the traffic guides that  
21 would have been closest to at least one impediment, the  
22 gravel truck impediment, in fact, right down the road from  
23 the scene of that impediment, was so late in getting to  
24 their post that they weren't involved in the supposed  
25 response to the --

1 JUDGE JOHNSON: Where did the idea of lateral -- I  
2 mean, where is there any demonstration that lateral  
3 communications would have helped?

4 MR. MILLER: There is ample testimony in the  
5 record submitted by the governments through primarily again  
6 police witnesses as to how you need to have that ability.

7 JUDGE JOHNSON: Were the police witnesses  
8 observing this exercise?

9 MR. MILLER: We had some police witnesses that  
10 observed portions of the exercise, yes.

11 JUDGE JOHNSON: Well, was this testimony you're  
12 talking about testimony as a result of their experience or  
13 was it a result of observations of what went on at the  
14 exercise?

15 MR. MILLER: It could have been a combination -- I  
16 assume a combination of both. Certainly, their experience is  
17 a far-reaching factor in the testimony they offered.  
18 Certainly, the fact that they observed portions of the  
19 exercise maybe came into play, and certainly, they were well  
20 familiar with the exercise scenario, LILCO's performance,  
21 the FEMA report of that performance.

22 JUDGE JOHNSON: Specifically, is there any  
23 indication that some lateral communication, a specific  
24 lateral communication with respect to a specific impediment,  
25 would have helped clear it up?

1 MR. MILLER: The best evidence offered in response  
2 to your question is the expert testimony that was proffered  
3 by the Suffolk County Police witnesses.

4 You've got to keep in mind, Judge Johnson, that  
5 what we were faced with here --

6 JUDGE JOHNSON: You're really not answering my  
7 question.

8 MR. MILLER: I'm trying to.

9 What we were faced with here is a completely  
10 vertical communications scheme. Therefore, it's hard for me  
11 to point to you in the record as to where lateral  
12 communications would have made a difference because lateral  
13 communications weren't permitted under LILCO's scheme.

14 But there is evidence in the record from the  
15 police witnesses as to, in their expert opinion, how lateral  
16 communications would have made a difference.

17 JUDGE JOHNSON: Okay. Thank you.

18 Go ahead with what you were talking about.

19 MR. MILLER: I guess one point made by Ms.  
20 McCleskey, I'm going to go through these quickly, is that  
21 the purpose of an exercise is to allow one final look at the  
22 plan, to determine whether the plan is implementable, to  
23 determine whether reasonable assurance findings can be made.

24 I listened to that remark and I said to myself,  
25 the governments do not disagree with that. That is the

1 purpose of an exercise. We have no dispute with the way she  
2 characterized what this Board and what the Licensing Board  
3 below should have been concerned with.

4 JUDGE KOHL: Does that mean you have no dispute  
5 with the three-part test that LILCO proposes for a  
6 fundamental flaw?

7 MR. MILLER: We have a dispute with that test. We  
8 think the Board went too far.

9 JUDGE KOHL: What specifically do you find  
10 objectionable about that?

11 MR. MILLER: It seems to the governments that the  
12 test should simply be the reasonable assurance test, that if  
13 the defect precludes reasonable assurance, then that's a  
14 fundamental flaw in the exercise.

15 JUDGE ROSENTHAL: Even if it's not incorrectable?  
16 Excuse me. Even if this defect could be corrected without  
17 substantial revisions of the plan, the mere fact that the  
18 defect has a reasonable assurance, relationship is enough,  
19 is that correct?

20 MR. MILLER: We don't think that the Licensing  
21 Board had to go to that part of the LILCO test about easily  
22 correctable.

23 In our opinion, if a defect was so fundamental  
24 that it would preclude reasonable assurance, whether or not  
25 it can be easily corrected, is just a matter of opinion and



1 the Board did not have to go that far.

2 I mean, after all, what are we talking about here?  
3 We're talking about LILCO's opinion that it's easily  
4 correctable. At a minimum, it seems to us, you'd have to  
5 wait until the next exercise to get FEMA's evaluation as to  
6 whether that deficiency, that fundamental flaw had, in fact,  
7 been corrected.

8 So, we don't think the Board needed to go to that  
9 easily correctable standard, but, in our opinion, the Board  
10 did and still found the fundamental flaws that it found.

11 JUDGE JOHNSON: You are -- excuse me, Alan. Go  
12 ahead.

13 JUDGE ROSENTHAL: Go ahead.

14 JUDGE JOHNSON: No.

15 JUDGE ROSENTHAL: Just so I understand you  
16 correctly, in your view, it's irrelevant whether the defect  
17 is one that is subject to ready correction, that as long as  
18 that defect had an implication in terms of the reasonable  
19 assurance finding, that's it.

20 MR. MILLER: Looked at in the abstract, I don't  
21 think the Licensing Board needs to look at easily  
22 correctable.

23 I think looked at in the context of this case, the  
24 Board did look at that standard, and the Board concluded  
25 that none of these problems that they concluded were

1 fundamental flaws were easily correctable problems, and as I  
2 pointed out earlier, we're four revisions down the road from  
3 the plan that was exercised.

4           So, obviously, LILCO has also thought that these  
5 matters weren't easily correctable, and if you go to the  
6 list of fundamental flaws, in the cases, for example,  
7 mobilization of traffic guides, LILCO has made fundamental  
8 changes to its plan in an attempt to resolve the problems it  
9 faced during the '86 exercise.

10           JUDGE ROSENTHAL: Aren't these emergency plans  
11 like our Constitution, living documents, and where they -- I  
12 would assume, without knowing, that they're under constant  
13 revision whether or not there is a feeling abroad that  
14 there's some serious defect.

15           MR. MILLER: I've certainly heard that before,  
16 Judge Rosenthal. They are living, breathing documents.  
17 They always change, and we have to change along with them.

18           But in this case --

19           JUDGE ROSENTHAL: Isn't that right?

20           MR. MILLER: It is right. They do change, but  
21 what I'm suggesting to you is that the fundamental flaws  
22 demonstrated by the exercise that the Licensing Board found,  
23 LILCO has changed its plan in ways to take those problems  
24 into account, to try to rectify those problems.

25           In some respects, I should point out. In

1 communications, from my knowledge of the present revisions  
2 to LILCO's plan, I assume LILCO still has a vertical  
3 communications scheme, and I assume that the Licensing Board  
4 was correct in its analysis that such a scheme is inherently  
5 unworkable. There's going to continue to be problems with  
6 the LERO performance and LILCO's response to handling  
7 emergencies at Shoreham.

8 I guess that's a time for future litigation to  
9 tell.

10 JUDGE KOHL: I'm sure it will be.

11 JUDGE JOHNSON: I hate to revisit this, but you  
12 keep using the word, which I find an exercise in jargonese,  
13 but it's used by everyone, reasonable assurance.

14 For my benefit, would you tell me precisely what  
15 you mean when you say reasonable assurance and what you  
16 think the Commission meant when they used the word  
17 reasonable assurance?

18 MR. MILLER: I think the Commission meant what it  
19 said in the Shearon-Harris decision, and what it said in CLI  
20 8611, from my standpoint, reasonable assurance, with respect  
21 to an exercise and the finding of a fundamental flaw, goes  
22 to whether or not a plan in fact can be implemented or  
23 whether there are fundamental flaws in the plan.

24 I think there's two ways of saying the same thing.

25 JUDGE JOHNSON: Reasonable assurance of what?

1 MR. MILLER: Reasonable assurance of protecting  
2 the public health and safety.

3 JUDGE JOHNSON: Okay. From what? You've got to  
4 protect them from something, right?

5 MR. MILLER: I assume, Judge Johnson, that we're  
6 talking about protecting them from the consequences of an  
7 emergency at a nuclear plant, and those consequences, of  
8 course, can draw dose, and whether those people are going to  
9 be contaminated and getting those people out of the area as  
10 fast as you can get them out of the area, and that's what  
11 the Licensing Board looked at.

12 JUDGE JOHNSON: Okay.

13 MR. MILLER: I think my time is just about up.

14 JUDGE KOHL: You've got about seven minutes.

15 MR. MILLER: Okay. Let me just -- with respect to  
16 the staff's position, I'll be more than happy to entertain  
17 questions from the Board.

18 I think that we do a pretty good job in our reply  
19 brief of pointing out, number one, that the staff position  
20 was never brought up before the Licensing Board and clearly  
21 could have been on numerous occasions.

22 JUDGE ROSENTHAL: No. They didn't have the  
23 insight. You heard --

24 MR. MILLER: Judge Rosenthal, I suggest that  
25 that's a little contrived excuse that we've heard here this

1 morning.

2           The new rule, which was first proposed in October  
3 of 1987, published in November 1987, made final December  
4 3rd, I think, 1987, clearly that new rule, if you look at  
5 the new rule and you look at CLI 8613, the new rule did  
6 nothing that was not set forth, reasons articulated by the  
7 Commission in CLI 8613.

8           JUDGE ROSENTHAL: So, you look at it as simply a  
9 codification of prior adjudicatory determination?

10           MR. MILLER: Exactly, and CLI 8613 came out in  
11 July 1986, and the staff had so many opportunities to bring  
12 this to the Licensing Board that it just doesn't deserve  
13 much further comment, except for the fact that Ms. Young  
14 this morning seems to even have admitted that before the  
15 staff filed its proposing findings to the Licensing Board,  
16 it realized, it got insight and realized that the new rule  
17 changed everything, and they still didn't bring it to the  
18 Licensing Board.

19           And I suggest that under these circumstances, this  
20 Board cannot take into account or consideration matters that  
21 were not argued before the Licensing Board, and that's a  
22 clear rule that governs this Board's jurisdiction.

23           JUDGE KOHL: Mr. Miller, what do you think of the  
24 staff's analogy in its brief of this fundamental flaw  
25 problem to problems in quality assurance?

1           They suggest that the standards that we set down  
2 in Calloway and has been followed many times since, that you  
3 should take into account whether there are pervasive  
4 failures and a QA problem and whether or not they have been  
5 or could be corrected. Sounds a lot like LILCO's --

6           MR. MILLER: Sounds like LILCO's test.

7           JUDGE KOHL: Right. And do you think that's an  
8 appropriate analogy given that the point in litigation is  
9 which exercise issues are raised and just the whole nature  
10 of it?

11           MR. MILLER: My response, Judge Kohl, is that it  
12 does sound like LILCO's test, and I have made as good as I  
13 can make it that the governments believe that the Licensing  
14 Board went too far in the sense of adopting LILCO's test.

15           So, the Licensing Board would have gone too far in  
16 essentially adopting that test now proposed by the staff. I  
17 don't think the Board needed to go as far as it went, but  
18 even though it did, it found the fundamental flaws, and  
19 they're supported by the evidence.

20           JUDGE JOHNSON: Would you distinguish between this  
21 Licensing Board's going too far in adopting the LILCO test  
22 and the performance of the Shearon-Harris Board which was  
23 countenanced by the Commission in 8624 with respect to day  
24 of the exercise performance glitches?

25           MR. MILLER: You're talking about the Shearon-

1 Harris Licensing Board?

2 JUDGE JOHNSON: That's correct.

3 MR. MILLER: Well, it seems to me that the  
4 fundamental difference between the two is that the Licensing  
5 Board in Shearon-Harris was faced with a positive FEMA  
6 finding.

7 JUDGE JOHNSON: Were they not also faced with  
8 deficiencies, findings of deficiencies?

9 MR. MILLER: My memory may be hazy, but if I'm not  
10 mistaken, before the Licensing Board in Shearon-Harris,  
11 deficiency was defined in a different way than it is now  
12 defined by FEMA, than was defined at the time of the  
13 Shoreham exercise.

14 Deficiency by FEMA is now defined to essentially  
15 be an observed inadequacy which precludes reasonable  
16 assurance for the protection of the public health and  
17 safety.

18 I think the deficiency standard definition used by  
19 FEMA at the time of the Shearon-Harris Licensing Board  
20 litigation was a lesser standard. So, I don't think you can  
21 draw that analogy.

22 JUDGE JOHNSON: There was, in fact, no negative  
23 finding by the FEMA in this case?

24 MR. MILLER: There was no negative finding by  
25 FEMA.



1 JUDGE JOHNSON: I'm aware of what the testimony  
2 was, but there is no negative FEMA finding in this  
3 particular case?

4 MR. MILLER: There was none because by agreement  
5 between FEMA and RC, there would be none one way or the  
6 other at the time FEMA conducted the exercise. But as you  
7 said, you're aware of the FEMA testimony.

8 Let me try to end this up by just saying that, or  
9 suggesting to the Board that if a plan cannot be implemented  
10 by people who train for three years as was the case at  
11 Shoreham, how could one conclude and on what basis that the  
12 plan is implementable?

13 I mean, that's the question I keep asking myself.  
14 That's why I think this is a distinction without basis  
15 between LILCO's plan implementability and the implementation  
16 of the day of the exercise.

17 And LILCO's references, constant references to the  
18 Licensing Board's failure to examine all of the records and  
19 all of the evidence, I mean that's belied just by the size  
20 of the decision. Any reading of that decision shows you that  
21 the Licensing Board was careful in sifting through the  
22 evidence.

23 It referred to the testimony presented by both  
24 parties in the reasoned analyses that, of course, attributed  
25 credibility where it had to attribute credibility to the

1 witnesses, and I point out only because it's no where been  
2 said that LILCO in its entire two briefs before this Board  
3 cites to, if my count last night is correct, forty-six pages  
4 of hearing transcript in total in all of their briefs.

5           The Licensing Board in its decision cites to  
6 hundreds of pages.

7           JUDGE ROSENTHAL: The Licensing Board, if it  
8 wishes to insulate itself from appellate reversal, should  
9 just write 6 or 800 page opinions?

10           MR. MILLER: No.

11           JUDGE ROSENTHAL: I am struck with it, with an  
12 element of terror in the suggestion that we ought to put  
13 some reliance on the length of that decision.

14           MR. MILLER: No. But, Judge Rosenthal, what I'm  
15 suggesting is that if the Licensing Board conducted a full  
16 and fair review of all the evidence put before it and  
17 presents a reasoned analysis of the evidence put before it  
18 as the Licensing Board did in this case, this Board has to  
19 show due deference to the Licensing Board's decision.

20           JUDGE KOHL: Thank you, Mr. Miller.

21           MR. MILLER: Thank you.

22           JUDGE KOHL: Ms. McCleskey, you have about seven  
23 minutes.

24           MS. McCLESKEY: I have nothing further, Your  
25 Honor.

1 JUDGE KOHL: Thank you.

2 I thank all the participants for your arguments  
3 this morning.

4 The case is submitted.

5 (Whereupon, at 11:38 a.m., the hearing was  
6 concluded.)

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This is to certify that the attached proceedings before the United States Nuclear Regulatory Commission in the matter of:

Name: LONG ISLAND LIGHTING COMPANY

Docket Number: 50-322-OL-5

Place: Bethesda, Maryland

Date: September 14, 1988

were held as herein appears, and that this is the original transcript thereof for the file of the United States Nuclear Regulatory Commission taken stenographically by me and, thereafter reduced to typewriting by me or under the direction of the court reporting company, and that the transcript is a true and accurate record of the foregoing proceedings.

1s/ Margaret Daly

(Signature typed):

MARGARET DALY

Official Reporter

Heritage Reporting Corporation