

ORIGINAL

UNITED STATES NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:)	
LONG ISLAND LIGHTING COMPANY)	Docket No.
)	50-322-OL-5R
(SHOREHAM NUCLEAR POWER)	
STATION, UNIT 1))	ASLBP No.
)	88-579-06-OL-5R
)	

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Tuesday,
 December 6, 1988

East West Towers Hearing Room
 4325 East West Highway
 Bethesda, Maryland

The above-entitled matter came on for conference,
 pursuant to notice, at 10:00 a.m.

BEFORE: JUDGE JOHN H. FRYE, III, Chairman
 Atomic Safety & Licensing Board
 U.S. Nuclear Regulatory Commission
 Washington, D.C. 20555

ATOMIC SAFETY & LICENSING BOARD
PANEL MEMBERS:

JUDGE OSCAR H. PARIS
 U.S. Nuclear Regulatory Commission
 Washington, D.C. 20555

JUDGE FREDERICK J. SHON
 U.S. Nuclear Regulatory Commission
 Washington, D.C. 20555

APPEARANCES:

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On behalf of the Governor Mario Cuomo and the
State of New York:

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Executive Chamber, Room 229
The Capitol
Albany, New York 12065

P R O C E E D I N G S

1
2 JUDGE FRYE: This is a conference of counsel. Am
3 I not being heard?

4 Good morning. This is a conference of counsel
5 concerning the 1988 exercise of the emergency plan for the
6 Shoreham Nuclear Power Station.

7 We are the Atomic Safety and Licensing Board,
8 constituted in the so-called OL-5 proceeding which heard the
9 exercise litigation of the 1986 exercise and are sitting
10 pursuant to a remand of the Appeal Board in ALAB-901, if I'm
11 not mistaken.

12 On my left is Dr. Oscar Paris. He's a permanent
13 member of the Atomic Safety and Licensing Board Panel. He
14 is an environmental scientist.

15 And on my right is Judge Frederick Shon, a nuclear
16 engineer, also a permanent member of the Atomic Safety and
17 Licensing Board Panel.

18 I am John H. Frye, also a permanent member of the
19 Panel, a lawyer, and Chairman of the Board.

20 With those preliminaries, let me ask the parties
21 if they would please identify themselves, beginning with
22 Staff.

23 MS. CLARK: Representing the Staff, my name is
24 Lisa Clark. And with me today is Sherwin Turk.

25 MR. CUMMING: William R. Cumming, counsel for the

1 Federal Emergency Management Agency.

2 MR. IRWIN: My name is Donald P. Irwin, with the
3 firm of Hunton & Williams, counsel for Long Island Lighting
4 Company. With me to my left is James Christman, also of our
5 firm, also counsel for LILCO.

6 MR. MILLER: My name is Michael S. Miller with the
7 firm of Kirkpatrick & Lockhart. My firm represents Suffolk
8 County, New York. With me to my right is Christopher
9 McMurray and to his right, J. Lynn Taylor of the same firm.
10 Mr. Lampher, I may also mention, Judge Frye, is in the
11 audience, and is here if the Board would care to hear
12 discussion on Contention 1 regarding the scope of the
13 exercise.

14 JUDGE FRYE: Thank you.

15 MR. ZAHNLEUTER: My name is Richard J. Zahnleuter.
16 I represent Governor Cuomo and the State of New York.

17 JUDGE FRYE: Thank you. It had been the Board's
18 thought that we would proceed by beginning with a discussion
19 of CLI-88-9. Does that suit with the parties or do they
20 have some other agenda in mind?

21 MR. IRWIN: No other agenda that I'm aware of,
22 Judge Frye.

23 MR. MILLER: That's fine with us, Judge Frye. ^{JUDGE FRYE:} All
24 right. I take it that you have all received that document
25 and had an opportunity to study it. We thought it raised

1 some issues in terms of the practice that normally takes
2 place in these proceedings.

3 One such unique aspect is the fact that it places
4 the burden of going forward with evidence on the
5 intervenors, as opposed to LILCO, who would normally carry
6 such burden. Does that view comport with the parties'
7 views?

8 MR. MILLER: Absolutely, Judge Frye, from at least
9 Suffolk County's standpoint. We view the Commission's order
10 as being very different from the normal procedures utilized
11 in licensing proceedings and does indeed place the burden at
12 least initially upon the Governments to go forward, which we
13 take objection to, and the Governments intend and are
14 working on a motion for reconsideration to the Commission
15 with respect to CLI-88-9. We hope to have that motion for
16 reconsideration filed certainly this week and perhaps the
17 Commission will reverse its decision. But for the time
18 being, I think your summary is a fair summary of what the
19 Commission has done in terms of burden of proof, and we do
20 object to that.

21 JUDGE FRYE: Well, unless and until the Commission
22 reconsiders, we are bound by it, and we will have to proceed
23 under it. And I think we need to address the procedures
24 that we're going to use in following it.

25 One of the things that occurs to me in light of

1 the fact that the Intervenor do have the burden of going
2 forward with testimony is that we are likely after that
3 testimony is filed to be confronted with some motions to the
4 effect that the Intervenor have not met that burden because
5 the testimony does not describe a fundamental flaw under
6 ALAB-903. Is that a likely result or not?

7 MR. IRWIN: Judge Frye -- I don't think this mike
8 is operating. Maybe this one is.

9 I obviously cannot preclude or anticipate exactly
10 what the Intervenor's testimony will say. Certainly on the
11 basis of what is in their contentions and on the basis of
12 other materials known to LILCO, we do believe that that is a
13 possibility. I understand, though, from the Commission's
14 order, though, that it anticipates oral motions to strike
15 testimony which would certainly provide an opportunity for
16 making the kind of objections you anticipate and clearly the
17 parties could put the Board and the other parties on notice
18 of their expected intention by filing at least written
19 summary motions of areas they intend to strike and the basic
20 rationalia.

21 I'd like to address Mr. Miller's objection very
22 briefly, because this is not a standard proceeding. It
23 clearly comes at the end of a long proceeding. There is an
24 ample documentary basis for proceeding, including vast
25 amounts of discovery that LILCO has already made available

1 to intervenors as well as a comprehensive FEMA report. And
2 we believe that one can modify the presumptive standards or
3 the presumptive procedures of Part 2 without denying
4 anybody's due process right. And LILCO intends to help
5 assist in that process.

6 JUDGE FRYE: However that may be, that's not an
7 issue before us, I don't believe, is it?

8 MR. IRWIN: I'm sure there will be opportunities
9 to test both the parties' and the Board's ingenuity as we go
10 along. We intend to help on that while staying within the
11 framework which the Commission has prescribed.

12 JUDGE FRYE: My concern in bringing up this issue
13 about the possible motions was to provide some time frame
14 for filing such motions and having that kind of an issue
15 briefed and giving us a little better opportunity to
16 consider it than we would get if oral motions were filed.

17 Similarly, I would anticipate that the intervenors
18 may well want to move to strike LILCO and Staff testimony on
19 various grounds.

20 I don't believe that the Commission order really
21 provides for anything more than oral motions. If the
22 parties anticipate that these motions may be fairly
23 extensive, then I think we perhaps might want to exercise
24 our discretion, since we can extend schedules by up to 15
25 days without anybody's permission to do so to accommodate

1 such motions.

2 MR. IRWIN: Judge Frye, clearly, the Board can
3 extend the schedule up to 15 days. As I understand the
4 Commission's order, the 15 days is an aggregate extension
5 and the Board might wish to keep the entire basket of
6 requests that may have come before it today in mind before
7 it makes any specific suggestions for modifying the
8 schedule.

9 JUDGE FRYE: Fair enough.

10 MR. MILLER: Judge Frye, may I just quickly make a
11 couple of comments?

12 Number one, generally, as a proposition, the
13 Governments would prefer to file in writing motions to
14 strike, if such motions were to be filed against either
15 LILCO or the Staff/FEMA testimony. Like Mr. Irwin, I have
16 trouble anticipating at this time the nature of what that
17 testimony might be, so I am not sure there will be motions to
18 strike. But if history is any guide there will be motions
19 to strike, and I think written motions would make the most
20 sense.

21 My second comment is that I believe Judge Frye, if
22 you read C-88-9, that it is clear that the Board, this
23 Board, has the permission, has the authority, the ability to
24 extend the schedule beyond 15 days without seeking
25 permission of anyone, including the Commission. I think

1 this Board can extend the schedule. And all the Commission
2 says in 88-9 is that if that extension goes beyond 15 days
3 the Commission is to be notified.

4 My last point, Judge Frye, is that Mr. Irwin's
5 comment about the 15 days as an aggregate extension I think
6 totally misreads CLI-88-9. That order can only be read in
7 one way which is that this Licensing Board has the authority
8 to adjust the schedule in any way it sees fit up to 15 days
9 for any aspect of this schedule without notifying the
10 Commission and beyond 15 days for any aspect of the schedule
11 if the Commission is so notified.

12 There is no way to read that order as saying that
13 it is an aggregate 15-day extension.

14 In fact, Judge Frye, on Page 7 of the Commission's
15 order, it talks about extensions in the plural of more than
16 15 days.

17 MR. IRWIN: I think it profiteth little to go into
18 too much detail on this. But the order is pretty clearly an
19 expediting order, and multiplying Mr. Miller's 15 days
20 times the number of steps in the order leads one to an
21 extension of possibly up to four to five months without even
22 notifying the Commission.

23 JUDGE FRYE: Well, let's don't fight battles until
24 we get to them. I'm not sure we're at that battle yet,
25 although perhaps we will be.

1 Now, Mr. Irwin, you mentioned that we should hold
2 the consideration of whether the schedule needs to be
3 modified for motions until we've got the whole picture.
4 What else did you have in mind?

5 MR. IRWIN: I anticipate that the Intervenors will
6 wish probably to postpone the expected date of filing of
7 testimony for discovery, and that would clearly affect the
8 schedule right at the front end.

9 We received a letter from them yesterday afternoon
10 requesting our permission or our consent to a major schedule
11 modification. We did not agree to it. But I would be
12 surprised if they don't raise it this morning.

13 So that's an example of the kind of thing that I'm
14 sure will come up.

15 JUDGE FRYE: Well, are there other schedule
16 considerations we need to take up this morning?

17 MR. MILLER: Judge Frye, just to try to put in
18 context what Mr. Irwin is referencing, as the Board knows,
19 the Commission in its order indicated that there could be
20 adjustments to the schedule if all the parties agree and
21 this Board approves.

22 With that in mind, notwithstanding our objections
23 to the Commission's order, we initiated correspondence
24 yesterday with all the parties indicating a proposed
25 adjustment to the schedule. We understand it will take the

1 agreement of all the parties. LILCO, through Hunton &
2 Williams, has already indicated that they will not agree to
3 adjustments to the schedule, at least the adjustments that
4 we proposed, but the thrust of their letter seems to be they
5 will not agree to any adjustments to the schedule.

6 So at this point in time, the Governments are left
7 with no recourse other than to make various proposals to
8 this Board, that this Board use its authority to adjust the
9 schedule as it sees fit.

10 And we are prepared to discuss such adjustments.
11 We can do that now, --

12 JUDGE FRYE: Let's do it ^{now} ~~now~~.

13 MR. MILLER: -- in the abstract.

14 JUDGE FRYE: Well, is there something -- I cut you
15 off.

16 MR. MILLER: I suppose, Judge Frye, there's two
17 ways to proceed. One way is to proceed in the abstract.
18 One way is to proceed after the parties have some sense of
19 which contentions if not all the contentions are going to be
20 admitted by the Board.

21 There may be some impact on what we would be
22 proposing depending upon the number of contentions which are
23 admitted for litigation. But I could proceed in the
24 abstract at this point if that's what the Board wishes.

25 JUDGE FRYE: Can you give us a synopsis at least

1 at this point in the abstract so we have some idea of what
2 you envision may be necessary?

3 MR. MILLER: Judge Frye, I could set forth the
4 proposed schedule we have made to the other parties.

5 JUDGE FRYE: All right, fine.

6 MR. MILLER: Let me, before I do that, let me just
7 say, Mr. Irwin anticipates correctly, with respect to the
8 schedule and the steps for a schedule set forth by the
9 Commission. Obviously the first step, once this Board has
10 ruled on the contentions, is the Governments having to
11 prepare and file testimony with the Board and the other
12 parties.

13 The Commission has proposed a 30-day period of
14 time to do so. It would clearly be the Governments'
15 position that a 30-day period to prepare and file all
16 prefiled written testimony on these proffered contentions
17 within 30 days is simply not possible. Reasons, there are
18 many. The holiday season is one of the reasons. That's not
19 the most persuasive.

20 JUDGE FRYE: Let me interject myself at that point
21 and say I think it's safe to assume that you won't have a
22 ruling on contentions before the holiday season is over.

23 MR. MILLER: Okay. There's two other factors,
24 Judge Frye, that I think the Board must take into account.
25 One factor is that we've talked to the Board about this

1 before and I think the Board has an appreciation of it. We
2 are representatives of Governments. We have to go not only
3 find our witnesses to sponsor whatever contentions are
4 admitted, but we have to retain those witnesses through
5 governmental processes. That is not something we have the
6 power or the authority or the ability to do overnight.
7 There is a process which must be followed, must be adhered
8 to under the rules and conduct that govern the Governments.
9 So we must not only find our witnesses, we must go through
10 the process of retaining those witnesses so that they can
11 then sponsor testimony. That takes some time.

12 More importantly, I believe, is the fact that the
13 Commission has at this point said there will be no formal
14 discovery in this case.

15 At this time, Judge Frye, to proceed in the
16 preparation and filing of prefiled testimony without
17 discovery makes anyone's job difficult. We have essentially
18 the field report to go on and we have documents that have
19 been provided by LILCO.

20 Mr. Irwin has suggested that vast amounts of
21 documents have already been made available to the parties.
22 We have received thousands of pages of documents from LILCO.
23 I will represent to the Board that many of those pages
24 produced by LILCO are worthless pieces of paper. They are
25 redacted beyond meaning. We literally get hundreds and

1 hundreds of pages of documents from LILCO that have nothing
2 on them but stamps, redacted, all up and down the page.
3 They give you no information.

4 If the Board recalls back in the '86-'87
5 litigation, one of the issues before the Board involved the
6 slow mobilization and tardy dispatch of LILCO traffic
7 guides. We also had much evidence and testimony regarding
8 road crew mobilization and the time that they responded to
9 the simulated FEMA impediments.

10 I will represent to the Board again in putting
11 together our contentions on those two issues as examples, we
12 had access to documents provided by LILCO in discovery. We
13 formed in part our contentions based upon those LILCO
14 documents. Those documents indicated by positions, such as
15 road crew or traffic guide, the times those personnel got to
16 staging areas, the time they were briefed and dispatched
17 from the staging areas, the time they got to their positions
18 in the field. All that information was provided by LILCO.
19 We then used that same information in our prefiled
20 testimony. We submitted exhibits to the Board based upon
21 LILCO documentation showing in chart format the time those
22 personnel were dispatched to the field or arrived at their
23 posts, and our arguments then followed that this was target
24 dispatch, late mobilization, and led to serious problems in
25 LILCO's plan.

1 I will represent further to the Board that in this
2 instance following the 1988 exercise LILCO has given us the
3 same kind of information with the following exception. All
4 it says is Port Jefferson or Pachogue or Riverhead staging
5 area and then everything is literally redacted. No
6 position, no time of dispatch, no time of arrival in the
7 field. It's going to make our job very difficult to piece
8 together our case and prepare testimony when we're being
9 given no information by LILCO despite their claims that
10 we've had vast amounts of discovery thus far.

11 With respect to FEMA, FEMA at this point, we have
12 the FEMA report. That's essentially it. In the past, as
13 the Board will recall, we were given by FEMA the evaluation
14 critique forms from the exercise. They were valuable
15 documents. They shed substantial light upon the underlying
16 bases for the FEMA report.

17 In fact, this Board, when it ordered FEMA to
18 produce those documents, I believe in January of 1987,
19 recognized the essential nature of those underlying
20 evaluation critique forms in the comments made by the
21 evaluators.

22 At this point in time, FEMA has refused to produce
23 any of those documents. We don't have anything from FEMA
24 except its basis, the bases set forth in the FEMA report.

25 JUDGE FRYE: Yes, but we don't have authority to

1 order any discovery, as I read this order.

2 MR. MILLER: You have authority, Judge Frye, to
3 strongly encourage the parties to voluntarily produce
4 documentation in discovery. I will say that in that context
5 yesterday as well, Suffolk County on behalf of all the
6 Governments sent correspondence to FEMA and Hunton &
7 Williams on behalf of LILCO requesting that they produce
8 documents in the spirit of informal voluntary discovery
9 urged by the Commission.

10 I think you're correct, Judge Frye, as the
11 Commission has written this order, there is no formal
12 discovery. The most the Governments can do sitting here
13 today is to request that this Licensing Board urge LILCO and
14 FEMA to provide documents which have some meaning so that
15 they could be useful to the Governments in preparing its
16 case.

17 MR. IRWIN: Judge Frye, may I respond to what Mr.
18 Miller just said unless he's not through?

19 JUDGE FRYE: Does that complete your synopsis of
20 the schedule changes? Essentially what you've talked about
21 revolves around the period of time to prepare your
22 testimony.

23 MR. MILLER: Yes, sir. I guess I did not complete
24 because you had asked if maybe I should go ahead and put on
25 the table the schedule that we had proposed to the other

1 parties yesterday. I'll be glad to do that.

2 JUDGE FRYE: I would appreciate it.

3 MR. MILLER: There are some assumptions to this
4 schedule, Judge Frye, and I think the first is that we
5 assumed, the Governments assumed for no basis or reason but
6 just to make an assumption and get a starting point, that
7 the Licensing Board could rule as early as December 12 on
8 the contentions. So that's kind of your start date.

9 With that in mind we proposed the completion of
10 discovery beginning or about December 12 going until about
11 March 1, 1989.

12 We envisioned in this letter that there would be
13 discovery, that LILCO and the Staff and FEMA would agree to
14 the discovery that would involve depositions as well as
15 interrogatories and admissions and all the standard sorts of
16 discovery.

17 We then indicated that we believed 21 days to
18 prepare testimony by the Governments, LILCO and the Staff,
19 FEMA, would be filed on March 21 and otherwise we were
20 assuming in our letter that the parties would agree to
21 simultaneously file testimony on March 21 of next year.

22 We envisioned that as the Commission suggested
23 there would be a prehearing conference a week later on March
24 28, 1989, that the hearings would begin roughly a couple
25 weeks after that time on or about April 11, 1989, that the

1 hearings would end on or about May 19, 1989 which of course
2 is an extension beyond the time proposed by the Commission,
3 and I believe under our time table it would be a hearing of
4 roughly five to six weeks.

5 We indicated in our correspondence yesterday that
6 we would adhere or try to adhere to the proposed findings
7 schedule set forth by the Commission of roughly 20 days
8 following the end of hearing so that the findings would come
9 in about June 13, 1989, that reply findings would be due ten
10 days later, June 23, 1989 and then we built into our
11 proposed schedule another assumption, which is that it would
12 take the Board roughly a couple of months to issue a
13 decision so that a decision would come out around late
14 August or early September of 1989.

15 Those are the dates. Part of the premise for the
16 letter, Judge Frye, was to try to get cooperation among the
17 parties with respect to a proposed schedule and discovery.
18 The letter was also premised on the Government's assumption
19 that what the Commission is trying to accomplish in CLI-88-9
20 is to prevent the two-year closure of the window for an
21 exercise so that LILCO would not face time rolling by
22 without being able to use an exercise of the licensing
23 decision.

24 Under our proposed schedule, if accepted, even if
25 there are some rough adjustments made to that schedule, a

1 decision would come out sometime in the Fall of 1989 which
2 is roughly nine months before a decision would have to be
3 rendered. I'm sorry. Which is roughly nine months before
4 the two-year closure period. So that we thought this would
5 surely guaranteed or provide to LILCO the comfort it seeks
6 in making sure that two years doesn't roll by again and yet
7 be more fair to the parties in trying to present its case,
8 their case, in trying to put forth evidence before the
9 Licensing Board so that the Board can make a reasoned,
10 informed decision.

11 But as I've stated, Hunton & Williams has already
12 indicated that they will not accept adjustments to a
13 schedule.

14 Maybe the other thing I could do, Judge Frye, is
15 to give you a copy of the letter that went out to the
16 parties yesterday, if the Board cares to have the letter.

17 JUDGE FRYE: that might be helpful, yes. I assume
18 all the parties have it so we may as well have it. Mr.
19 Irwin?

20 MR. IRWIN: Judge Frye, let me address a number of
21 aspects.

22 JUDGE FRYE: Incidentally, while I'm saying that,
23 why don't we get your response as well? I assume all the
24 parties have that we well.

25 MR. IRWIN: Mr. Miller's schedule needs to be put

1 into a context of a situation where litigation went on in
2 such a protracted fashion that the Commission felt compelled
3 to intervene on its own.

4 I talked about a potentially endless cycle of
5 litigation which is brought about not through any fault of
6 any parties other than Intervenors nor through the fault of
7 this Board, but simply by a series of devices which I will
8 not go into at this point in any more detail than I need to.

9 The fact that the Commission's regulations
10 prescribe a two-year licensing window does not embody the
11 notion that two years is a desirable time in which to review
12 a one or two or three day exercise. Far from it.

13 As this Board remembers, the regulation used to
14 provide for a one-year exercise period and it had to be
15 modified just for this case. That's room enough for a
16 starting point.

17 The fact of the matter is that this is the second
18 time around the track. We have an exercise which was
19 flawless by FEMA standards. We have a reasonable assurance
20 of funding based on revision 10 of the emergency plan plus
21 the exercise report. There is no colorable basis to assume
22 that this exercise deserves microscopic dissection. That is
23 a starting point.

24 The second starting point is that the Commission
25 as I mentioned itself has intervened and said we don't want

1 what happened before to happen again.

2 A third starting point is that the Appeal Board
3 itself in ALAB-903 imposed higher threshold pleading
4 standards, which I will come back to in a minute, because
5 they are quasi-substantive in nature.

6 JUDGE FRYE: We want to get to those later on.

7 MR. IRWIN: Right. Mr. Miller hadn't addressed
8 them specifically, but I think they are part of the matrix
9 the Board has to consider.

10 Now, Mr. Miller's modest proposal for a schedule
11 distorts what the Commission ordered in four fundamental
12 ways. First, although the Commission did not order
13 compulsory discovery, it did encourage voluntary discovery.
14 And I want to put on the record right now that discovery
15 which LILCO has already made so the Board not be under any
16 mis-impressions.

17 The first is that on July 13, approximately one
18 month after the exercise and approximately five months ago,
19 LILCO made available to Intervenors every player generated
20 document collected after the exercise, over 31,000 pages of
21 documentation. That's every log, every message, every
22 miscellaneous scrap of paper. They've had it for almost
23 half a year.

24 Ten days later or 12 days later on July 25th,
25 LILCO made available to Intervenors all seven of the

1 oversized maps used at the EOC during the exercise.

2 On October 13, LILCO also made available various
3 categories of on-site player generated documents. On
4 October 13 they turned over the EOF documents and the ENC
5 documents. Over 3800 pages of those documents.

6 Again, all of the documents.

7 On November 2, they turned over the EOF and EOC
8 sign-in sheets. Some 57 sheets. Again, all of those
9 documents.

10 On October 13, LILCO turned over a calculation
11 performed at FEMA's request for total population dose. On
12 October 13, LILCO also turned in, turned over videotapes,
13 copies of videotapes made of every news conference held at
14 the ENC in the three days of the exercise.

15 The only category of documentation not provided
16 thus far by LILCO to Intervenor is LILCO controller logs.
17 Those are secondary documents which consist basically of the
18 observations made by LILCO personnel who are not players who
19 are basically shadowing or following or paralleling the FEMA
20 evaluators.

21 But every piece of primary documentation has been
22 long since turned over. LILCO is redacting right now the
23 names and other pertinent background information necessary
24 to protect confidentiality from its controller logs and will
25 have even them turned over to Intervenor by the end of this

1 week.

2 Now, that is basically the raw material from which
3 FEMA prepared its report. So intervenors have had for
4 months not only the FEMA report but also the background
5 information.

6 Now, that provides a substantial basis on which to
7 file testimony.

8 JUDGE SHON: Mr. Irwin?

9 MR. IRWIN: Yes, sir.

10 JUDGE SHON: What of Mr. M. Ver's assertion that
11 so many of the pages -- he gave us the impression the vast
12 majority of what you've given him -- are simply redacted
13 pages with nothing on them?

14 MR. IRWIN: Let me address that right now, Judge
15 Shon.

16 There was an exchange of correspondence, and I
17 believe the first letter of this nature we got,
18 notwithstanding the dates when these documents were turned
19 over, was approximately a week to ten days ago.

20 But about, somewhere in that period a week or ten
21 days ago, we received a letter from counsel for intervenors
22 containing a listing of various documents which were alleged
23 to have excessive redactions on them, or mistaken redactions.
24 I believe there were 23 such incidents.

25 We went back through each of those enumerated

1 pages which are Bates stamped and we found in fact four
2 mistakes. We corrected those four mistakes.

3 The others, we could find no mistakes in the
4 documentation. There are various documents, and I believe
5 the number is probably on the order of 50 to 100 pages of
6 paper which are for one reason or another blank or virtually
7 blank. They do not, however, relate to the kind of
8 information Mr Miller was talking about relating to
9 dispatch, mobilization, et cetera. Mr. Miller and I can get
10 into a swearing contest with one another and we will be
11 happy to work out details of these documents with
12 intervenors.

13 But I will represent to the Board that we are
14 talking about a de minimis problem. And I cannot be more
15 emphatic about that.

16 Now, let's talk about the alleged obstacles to
17 preparation of testimony. Intervenors filed their
18 contentions sometime ago. They had documentation on the
19 basis of which to have prepared them. They theoretically
20 knew what they were preparing their contentions about. They
21 should have thought, if they didn't, about who was going to
22 support that testimony. Certainly they have witnesses who
23 have been around this track before.

24 Therefore, this business about retaining witnesses
25 and building in delay, which only prejudices LILCO in the

1 schedule, is something which I submit the Board should not
2 pay much attention to.

3 Secondly, as to the inconvenience of a holiday
4 season, I will remind this Board, which was not then
5 convened but which you can look in the historical records,
6 that on Christmas Eve in 1985 the Intervenors undertook what
7 I can only describe as the equivalent of Pearl Harbor
8 against LILCO and the 1986 exercise

9 They passed a resolution through the Suffolk
10 County legislature, in one day making it a criminal offense
11 to participate in the 1986 exercise. They petitioned the
12 Commission to cancel the exercise. They petitioned FEMA to
13 withdraw its support of the exercise.

14 They chilled preparation of the exercise for the
15 following six weeks.

16 Now, when it suits their purposes, they can work
17 like dogs throughout the holidays. But when it suits
18 anybody else's, they have holidays to celebrate.

19 I don't think that's fair. We've been around that
20 track before, and it should not be listened to.

21 The long and short of it is, gentlemen, we have
22 provided everything with the exception of one small category
23 of secondary documentation which we're about to provide.
24 The raw material to provide testimony is there. And the
25 Commission was aware of it when it wrote this order, and it

1 should not be lightly disregarded by this Board.

2 That's the first category. In other words, the
3 need for discovery or further delay in the schedule to
4 accommodate discovery.

5 The second respect in which Intervenors' proposal
6 distorts the Commission's order is in abolishing the burden
7 of going forward which you noted aptly, Judge Frye, the
8 Commission had imposed. The business of filing testimony
9 simultaneously dissolves that burden.

10 I submit that that burden is fairly placed in this
11 proceeding for the reasons which I've gone through which
12 relate to discovery and ability to prepare. I won't go into
13 that further. But the Board should note that.

14 The third respect in which Mr. Miller's proposal
15 changes the Commission's concept is in the length of the
16 hearing, which the Commission said should be three weeks
17 long. The Intervenors' proposal is in fact six weeks long.

18 The fourth respect is in its assumptions about the
19 length of time it would take the Board to reach a decision,
20 where they I think propose actually two and a half months.
21 The rules of practice, of course, in Appendix A, presume
22 that in a contested case, the Board will have reached a
23 decision in 35 days, in an unexpedited proceeding.

24 What I am suggesting, gentlemen, is that this is
25 intended by the Commission with good cause to be an

1 expedited proceeding. What we are seeing is a standard
2 track. And our experience with standard track litigation is
3 that it lasts years. And that is not what the Commission
4 intended that is not what LILCO is interested in. We have a
5 plant that costs \$1 million a day in carrying costs. It is
6 ready to go and there's no reason to hold it up.

7 JUDGE FRYE: Mr. Turk?

8 MR. TURK: Your Honor, I'll address briefly CLI-
9 88-9. When me get around to addressing contentions I'm
10 going to turn to Ms. Clark.

11 JUDGE FRYE: Sure.

12 MR. TURK: First off, I'd note that the essence of
13 this proceeding, as was true for the exercise proceeding
14 until now, was to evaluate the adequacy of LILCO's plan.

15 The exercise is a means of testing that plan.
16 They've already had one round of litigation on the '86
17 exercise. But two years have passed, now there is a 1988
18 exercise.

19 The focus, however, is whether LILCO has provided
20 an adequate plan for emergency planning purposes.

21 I would note that I share Mr. Irwin's observation
22 that what you have here is an exercise that lasted one or
23 two or three days in all of its aspects and the Commission I
24 believe was aware that the focus is the plan and did not see
25 a need to protract litigation beyond the schedule which it

1 proposed and ordered in fact in its latest decision.

2 I do not agree that the purpose for that order was
3 to simply prevent the two-year window from closing. I think
4 the clear focus of the Commission was to avoid another round
5 of protracted litigation. And the Commission fairly ordered
6 this Board and the parties to proceed in an expeditious
7 fashion along the schedule it proposed unless there was good
8 cause for this Board to do otherwise.

9 I think it's entirely premature for Mr. Miller and
10 the intervenors at this time to propose to you a schedule
11 which would severely elongate that schedule without even
12 knowing how many contentions are going to be litigated.

13 Mr. Miller himself noted that it may be premature
14 to discuss this. And I think before we get down to the nuts
15 and bolts of how much additional time should be provided for
16 hearings or for filing of testimony that we really do have
17 to see what the issues are for litigation before we can
18 reach a concrete resolution of whether there's a need to
19 adjust the schedule.

20 In terms of the burden of going forward, I don't
21 see that the Commission has shifted this burden unfairly to
22 the Intervenor. All the Commission has done here is it has
23 said although in a normal case you may have simultaneous
24 filing or you may have Staff filing later than other
25 parties, here, because there has been discovery already, and

1 because the Commission wanted to avoid a second round of
2 testimony, a second round of rebuttal testimony, what the
3 Commission ordered is that in the first instance, that the
4 Intervenors file their case, let them file their testimony.

5 If there had been simultaneous filing, then there
6 would be no difference to the Intervenors. They would be
7 filing testimony without seeing LILCO's testimony in advance
8 and then it provides an opportunity for LILCO to consolidate
9 the presentation of its testimony. Instead of LILCO
10 providing a first round of testimony and then a rebuttal
11 testimony, LILCO now has the burden of doing all of its case
12 at one time, it's case in chief and any rebuttal it wishes
13 to present to the Intervenors. And that's simply a
14 procedural mechanism to avoid the delay of having additional
15 rounds of testimony filed.

16 In terms of the need for formal discovery, I
17 personally am not familiar with what LILCO has already
18 provided the Intervenors, but I have to note that if LILCO
19 has in fact provided the discovery which Mr. Irwin
20 represents it has done, then Mr. Miller's charges that there
21 is this gross over-redaction of documents which precludes
22 their case from going forward I think focuses on a de
23 minimis issue. It attempts to take a small flaw in document
24 production and elevate that to grounds for this Board
25 overruling and disregarding a Commission directive to

1 expedite the proceeding.

2 And if that's true, then the representation by Mr.
3 Miller, while it may be true that there has been over-
4 redaction, is totally out of place and should not be
5 permitted to be repeated in the future.

6 JUDGE FRYE: Mr. Cumming, does FEMA have any view
7 on this?

8 MR. CUMMING: FEMA does have a view on this.

9 I think it would be helpful for the Board to
10 understand that starting on June 5, 1988, an extensive
11 series of FOIA requests were sent to the Federal Emergency
12 Management Agency which have been responded to by the
13 Federal Emergency Management Agency.

14 This included production of the detailed
15 controller logs which were representative of the documents.
16 In fact, they were inclusive of all documents prepared in
17 the FEMA control cell at Brookhaven during the course of the
18 exercise.

19 This is the one area in which the Intervenors did
20 not have observers, so the Federal Emergency Management
21 Agency believed for other reasons that full disclosure of
22 all the documents prepared by FEMA in excess of 500 pages
23 were in fact disclosed prior even to the filing of
24 Intervenor-proposed contentions.

25 I should correct the record with respect to Mr.

1 Miller, and that is in the '86 exercise, the rulings, which
2 I'm sure this Board well remembers, with regard to discovery
3 against FEMA, were all subsequent to the admission of
4 contentions.

5 It is also fair to state that the documents left
6 that have not been produced, there are two major groups.
7 The first group deals with a form which the Board and the
8 parties would not be familiar with, which are verification,
9 the followup to the ARCAS.

10 FEMA is prepared to release those today, in fact,
11 during this proceeding, to all parties. The reason being is
12 that it supports Mr. Turk's argument that FEMA gives an
13 integrated plan review. In fact, one of the statements that
14 should be corrected by Mr. Miller, and that is that the
15 reasonable assurance finding of the Federal Emergency
16 Management Agency does not rest solely on the pillar of the
17 exercise. It also reflects the plan amendments and the
18 changes that have been made, modifications of the plan that
19 were made prior to our issuing that reasonable assurance
20 finding in a letter from Mr. Grant Peterson to the Associate
21 Director for State, the State and Local Programs Director to
22 Mr. Victor Stello on September 9.

23 So there is, the point of the exercise is, as Mr.
24 Turk stated, to test in fact the plant.

25 FEMA believes that the verification forms would

1 enhance the understanding of the followup of the Board and
2 the parties to what FEMA believed occurred subsequent to the
3 exercise.

4 The other major document which has been released
5 to the parties, and I understand this is not marked as an
6 exhibit, FEMA does intend to mark it, but for purposes of
7 informing the Board what I'm talking about I would like to
8 present a copy to the Board of something that's called the
9 Exercise Evaluator's Manual that was done for Shoreham. It
10 essentially superceded the August 23 McLaughlin memo to the
11 Regions on the exercise modules.

12 With the permission of the Board, may I give you a
13 copy?

14 JUDGE FRYE: Let me ask you a question In ALAB-
15 903 the Appeal Board referred to a FEMA document as
16 furnishing guidance as to what were major observable
17 portions --

18 MR. CUMMING: That's correct.

19 JUDGE FRYE: -- of the plant. Does this document
20 supercede that?

21 MR. CUMMING: That's correct.

22 JUDGE FRYE: Okay. Yes, I think it would be
23 helpful for us to have that. I assume all the parties have
24 it.

25 And while you're at it, Judge Paris and I do not

1 have copies of FEMA's report. Judge Shon does.

2 MR. CUMMING: Would you like a copy with holes in
3 it or with no holes?

4 JUDGE FRYE: Either way.

5 (Pause)

6 MR. CUMMING: The documentation concerning the
7 preparation of this document I just handed to the Board has
8 been furnished to the Intervenors. They understand its
9 utilization.

10 Basically the document I've given you is an
11 uncompleted, it's basically blank forms.

12 Now, obviously, in some instances, certain
13 objectives, there are multiple observers or evaluators, and
14 so they're filled out.

15 FEMA traditionally has been very reluctant and in
16 fact only in accordance with this Board's orders in the
17 prior exercised litigation disclosed the exercise evaluator
18 forms.

19 The reluctance of the agency to produce those is
20 based on the so-called deliberative process or the chilling
21 effect on evaluators. There is case law which supports that
22 objection.

23 It's also true that the individual evaluators do
24 not in fact determine the ultimate rating which will be
25 assigned a particular objective.

1 In other words, with respect to a plan review,
2 there is the term adequacy or inadequacy. That's with
3 respect to the NUREG 0654 elements.

4 With respect to an exercise evaluation, it deals
5 with whether the objectives have been met or not met.

6 FEMA does have concerns, and obviously just read
7 the Commission's ruling in CLI-8-9 recently. We have
8 brought it to the attention of our management. We have
9 indicated that there is in fact informal discovery. We
10 believe that the Board on the basis of the document I've
11 just given you should at least be willing to give a
12 suggestion and the parties speak to the issue as to whether
13 those documents should be produced.

14 FEMA is very concerned that there not be a due
15 process argument later raised based on FEMA actions. And so
16 we are in fact concerned that there be disclosure. It may
17 be necessary to disclose those documents.

18 It is also true that FEMA management at this time
19 has not determined to disclose the exercise evaluator forms.

20 So I'm soliciting a suggestion, I guess, from the
21 parties and the Board to speak to this issue. You have the
22 document before you. Basically the filled-out forms are
23 what would be produced.

24 There is in fact an issue raised by ALAB-905 as to
25 how the policy review function, as opposed to an individual

1 evaluator-reviewer, is brought to the attention of the
2 Board, discussed and defended.

3 It is true that these forms would be basically
4 composed of three parts. An observation part, which is
5 largely fact, what the observer observed, but also a
6 technical portion where the observer has to determine
7 whether or not the objective is met.

8 Therefore, to that extent, it is subjective. It
9 is an evaluator's opinion as to whether or not the objective
10 has been met.

11 I think with very few exceptions, the final
12 portion of the form, based on instructions that were given
13 out prior to the exercise by Mr. Husar, the regional RAC
14 Chairman, the portion of the forms that dealt with whether
15 it should be a sign of deficiency, are incomplete on these
16 forms.

17 So if any party believes that they are going to
18 somehow find a smoking gun or a deficiency that was labeled
19 and in fact there was no deficiency assigned, that is not
20 the case. I'm the only attorney who has reviewed these
21 forms and I personally believe that all parties might find
22 them of some assistance.

23 I don't think that they are in any way outcome
24 determinative with respect to the Intervenors' ability to
25 present their case.

1 JUDGE FRYE: The material you say that is not
2 there was not put there in the first instance, or was
3 redacted?

4 MR. CUMMING: It was not put there in the first
5 instance. And the reason is that individual evaluators do
6 not determine the ultimate rating of whether an objective
7 has been met.

8 JUDGE FRYE: I see.

9 MR. CUMMING: Because that is based on a
10 combination of the review process, of the observer-evaluator
11 forms, the RAC chairman in conjunction with the RAC, and
12 then with the recommendation, the RAC chairman and the
13 regional director, do not assign the ultimate finding.
14 There is a recommendation made to headquarters as to what
15 that assignment should be.

16 JUDGE FRYE: So essentially these forms consist of
17 factual observations if I understand you correctly?

18 MR. CUMMING: There is certainly a factual
19 portion. There are some observers who did list LILCO
20 player names. So we would believe that if the Board's
21 ultimate suggestion to us on the informal discovery is to
22 release the forms, that LILCO would be given an opportunity
23 to redact.

24 JUDGE FRYE: Redact those names.

25 MR. CUMMING: It's also true that with respect to

1 the FOIA release of the controller forms, we did give
2 Kirkpatrick & Lockhart an opportunity to oppose the
3 redaction by LILCO. They chose not to and the LILCO player
4 names that were mentioned on the controller forms were in
5 fact redacted.

6 Those controller logs represent the people who
7 were participating in the exercise as described in the
8 report. As the control cell, they played certain Federal
9 agencies and they played state and local governmental
10 officials, and basically on the other end of the line there
11 would be a LILCO player who would have been calling in. And
12 these people in the control cell, one of the reasons, the
13 other reason we did not object to their release, is that
14 they were not evaluators.

15 The LILCO player activity was evaluated on the
16 other end of the phone by an evaluator standing there
17 observing the calls to the FEMA control cell and making the
18 appropriate evaluation.

19 JUDGE FRYE: So the evaluator was observing the
20 LILCO player.

21 MR. CUMMING: That's correct.

22 JUDGE FRYE: And the forms you are talking about
23 were filled out by the FEMA control person who was receiving
24 the information over the telephone from a LILCO player?

25 MR. CUMMING: That's correct. Now, one other

1 fundamental misunderstanding, which I think we could
2 straighten out now.

3 With the exception of the impediment messages,
4 FEMA did not inject free play messages. There were a number
5 of occasions in which a LILCO controller asked someone at
6 the FEMA control cell to insert data based on the
7 confidential scenario, and that was done, I understand. But
8 there is no nondisclosure of FEMA free play messages or
9 there were no prompts that have not been disclosed.

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(Continued on the next page)

1 MR. CUMMING: The controlled exercise was devised
2 to fit revised NRC regulation 50.47(c)(1) and it was not
3 addressed to what some people had styled the normal controls
4 function, which is to make sure that if the exercise goes
5 completely askew, and there's certain elements that might
6 not be tested because the players get off on a track, that
7 they be brought back onto the exercise scenario.

8 That function in this exercise was performed by
9 LILCO. It was a LILCO exercise that FEMA evaluated.

10 JUDGE SHON: Mr. Cumming, a couple of quick
11 questions on these forms that we now have before us.
12 They're captioned Evaluation Form. That's the same as
13 Evaluator Form. Is that right?

14 MR. CUMMING: That's correct.

15 JUDGE SHON: Secondly, you say that in general
16 there were parts that were not filled in. Am I correct in
17 assuming, if you look at Form 1, which deals with Objective
18 1 emergency classification levels, there are a number of
19 things like time notified and notification of the unusual
20 event and that sort of thing.

21 Then there is a narrative summary and a note
22 Objective 1 was met, was not met, was partially met. Were
23 those things filled in?

24 MR. CUMMING: Yes.

25 JUDGE SHON: They were. But then the next sheet

1 which has Issue 1, Deficiencies.

2 MR. CUMMING: Yes, that's correct. There was not
3 a single form that had that completed.

4 JUDGE SHON: And these are indeed the forms that
5 Mr. Miller characterized a while ago as having been
6 extremely useful from the February 1986 exercise. Is that
7 right?

8 MR. CUMMING: That's correct, and the basis of
9 their not being completed, however, was not individual
10 decision. It was a FEMA policy decision that the correct
11 reflection. The evaluator, for example, cannot not mark a
12 deficiency or ARCA or ARFI can have that sustained by the
13 system.

14 They are free to argue their position, but it's
15 not outcome-determinative with respect to the final FEMA
16 judgment. The reason for that is -- there are many reasons
17 for it. One of it is that there are multiple observer-
18 evaluators, and you are reviewing ultimately to determine
19 whether the plan elements have been met and are
20 implementable, and we discussed this before in the context
21 of the 15 and 16 contentions in the earlier exercise.

22 The truth is that there is an aggregation of the
23 various forms, so that you might have multiple observer-
24 evaluators on a single element, and there could be in fact a
25 distortion if you relied on that individual observer-

1 evaluator, who only saw a certain slice of the exercise
2 activity, and would not be aware of other compensating
3 measures or other activity which occurred.

4 JUDGE SHON: Well, Mr. Cumming, inasmuch as this
5 portion of the form was not filled out at the evaluator
6 level, does not that to some extent vitiate your objection
7 to turning loose of it, since the objection was founded on
8 this decisionmaking process. The decisionmaking process
9 would not be compromised if that wasn't filled out, would
10 it?

11 MR. CUMMING: Well, you identified, Judge Shon,
12 the fact that there is a summary portion, and then there is
13 an evaluation by the evaluator as to whether the objective
14 was met. We believe that is subjective. That is opinion.

15 JUDGE SHON: So to that extent you see that there
16 is a chilling effect?

17 MR. CUMMING: That's correct.

18 JUDGE SHON: I see. Let me ask you another
19 question. Have you ever had a FOIA request for these
20 documents?

21 MR. CUMMING: Yes, we have.

22 JUDGE SHON: How did you treat that?

23 MR. CUMMING: It was denied on the basis of
24 deliberative process. I believe that that particular
25 category of form is still on appeal with the agency, and the

1 agency has not made any final determination.

2 JUDGE SHON: I see.

3 MR. CUMMING: I would be unfairly representing to
4 you that the agency did assert all of its rights under FOIA
5 through the course of discovery. However, there were a
6 series of requests and appeals and an extensive amount of
7 material has gone out. It's only the major categories that
8 I've identified the ARCA verification forms, which were
9 prepared and produced today, and those evaluator forms that
10 really remain.

11 The rest of the material, which was not disclosed,
12 was preliminary drafts, which we feel or believe fall
13 clearly within the normal deliberative process exception.

14 JUDGE SHON: I see, I see. Well, you've covered a
15 good deal of ground. Mr. Zahnleuter, I know you have --

16 MR. ZAHNLEUTER: Judge Frye, I know that we have
17 covered a good deal of ground, and I would appreciate the
18 small opportunity to respond to some of the points that have
19 been raised, and I will be brief, noting also that Mr.
20 Miller has preceded me.

21 JUDGE FRYE: Sure, sure.

22 MR. ZAHNLEUTER: Mr. Irwin has made four points
23 and Mr. Turk has made one additional one. Mr. Turk's
24 additional point is that it is premature to discuss now
25 modifications of the schedule, because we haven't had any

1 decision on the admission of contentions.

2 And while that may be true to some extent, and
3 while the admission of contentions may provide us with a
4 valuable reference point, I think it is prudent for the
5 governments to propose a modification to the schedule at
6 this time, because we're operating under severe time
7 constraints imposed upon us all by the Commission in CLI-
8 889.

9 I think it's fair for everyone that the
10 governments do the right thing here, and advise that the
11 time constraints are severe, and that we would appreciate
12 extra time, when the right time does come about, to prepare
13 testimony and to conduct some informal discovery, etcetera.

14 I think we've done the right thing by proposing
15 changes to the schedule at this time, although the admission
16 of contentions would help.

17 Mr. Irwin had four points. His first point was
18 that this is the second time around the track, so therefore
19 the governments should be expected to move on a faster track
20 also. I'd like to point out that that may have some bearing
21 on factors such as contention drafting, or contention
22 analysis by the Board or by the parties.

23 After all, we have ALAB-900 and ALAB 903. We have
24 LBP 87-32 and LBP 88-2, which are the Board's decisions, and
25 those factors have been incorporated into the drafting and

1 analysis of contentions.

2 But the point is that even though this is the
3 second time around the track, things are different. For
4 example, the County, even though it had prior contracts with
5 prior witnesses, cannot automatically reproduce those at
6 this time. The process needs to be started anew. The same
7 things is true with the State's witnesses. I have go out
8 and try to find different witnesses because of
9 reorganizations and other things that have happened.

10 Also, regarding discovery. The discovery that
11 happened in the prior proceeding on the first time around
12 the track isn't really applicable to what happened in the
13 1988 exercise. The documents are different, and the basis
14 for the contentions are different.

15 We need to have different documents to analyze, to
16 prepare testimony. We've had some discussion now with Mr.
17 Cumming about certain forms that FEMA has, the critique
18 forms and the evaluation forms. I'd like to ask the Board
19 at this time to ask Mr. Cumming if those documents, for
20 example, have been shared with LILCO already in the process
21 of putting together a draft FEMA report, which I presume is
22 the normal practice to share with FEMA.

23 If LILCO has those documents, it certainly is no
24 ground in fairness to deny the governments those documents.
25 I don't know what Mr. Cumming's answer is, and he has stated

1 some information to us already today, but look at when it
2 comes. It comes weeks after contentions and amended
3 contentions have been filed. I think that would be a
4 worthwhile inquiry for us to pursue.

5 JUDGE FRYE: Thank you. That is an interesting
6 question, Mr. Cumming. Have those documents been shared
7 outside the Government, with anyone outside the Government?

8 MR. CUMMING: To my knowledge, they have never
9 been furnished to LILCO. I believe Mr. Irwin should
10 represent a position on the record.

11 MR. IRWIN: That, Judge Frye, is correct insofar
12 as I know. LILCO has had access to documents only insofar
13 as we have filed reverse FOIA requests to try to track the
14 FEMA -- the intervenor's discovery.

15 JUDGE FRYE: I see. Mr. Miller, did you want to
16 respond -- I'm sorry. Mr. Zahnleuter, are you finished?

17 MR. ZAHNLEUTER: I had a few other remarks.

18 JUDGE FRYE: I'm sorry. I cut you off.

19 MR. ZAHNLEUTER: --that I wanted to make which are
20 brief. I would urge the Board to suggest that FEMA release
21 these documents that we've discussed, similar to the way
22 that the Board in early January of '87 compelled FEMA to
23 release the same documents back on the prior proceeding.

24 Another point that I want to quickly make is not
25 only relevant to document production, but depositions. We

1 have Mr. Cumming's word here in a conference of counsel and
2 that is certainly credible. I think the governments
3 deserve, as they have had an opportunity in the past, to
4 talk to the actual people, the actual witnesses who prepared
5 these documents and depositions would also help to go a long
6 way to help prepare testimony. I know that that is true,
7 especially from the point of view of helping to prepare my
8 State witnesses.

9 Mr. Irwin's second point related to the burden of
10 proof, and he objected to -- well, he endorsed the
11 Commission's ruling that there should be not simultaneous
12 filings. I think that the statement, as Mr. Miller has
13 reported, is correct, that we need to have simultaneous
14 filings or to have LILCO go first, because in this situation
15 the filing of testimony is not the first thing that's
16 happened in this proceeding.

17 The governments have already submitted contentions
18 and amended contentions. We have put our case forward. I
19 think it is proper that LILCO also have to respond to that,
20 at least in a simultaneous fashion.

21 Mr. Irwin's third point regarded the length of
22 hearing, and I'd like to point out that in CLI-889, the
23 Commission made an error, and they said that the hearing
24 that we all participated in in 1986 started on May 13th and
25 ended on June 18th.

1 JUDGE FRYE: Actually, they corrected that error,
2 I think, yesterday. It began on March 10th. They corrected
3 that.

4 MR. ZAHNLEUTER: That's fine. I was unaware of
5 the correction, but the point is still the same, that the
6 hearing did proceed much longer than the Commission had
7 apparently contemplated when they put together CLI-889. So
8 the modest two or three week extension that the governments
9 proposed in the letter which was just handed to you, is
10 reasonable under those circumstances.

11 And Mr. Irwin's fourth point related to the length
12 of time that it would take the Board to prepare a decision
13 in this case and I don't think it's within the realm of
14 proper discussion for any of the parties to discuss that.
15 That's within the Board's prerogative.

16 JUDGE FRYE: Thank you. Mr. Miller?

17 MR. MILLER: Judge Frye, I'll keep this brief.

18 JUDGE FRYE: Yes, we've got a lot of ground to
19 cover still, so --

20 MR. MILLER: I understand, so I will slip over
21 some points to the one that I would like to make.

22 JUDGE FRYE: I guess I would like to know
23 specifically whether the documents that Mr. Cumming was
24 talking about will satisfy -- if you had them, whether that
25 would satisfy some of your problem?

1 MR. MILLER: Judge Frye, certainly the governments
2 would welcome the production of any additional documentation
3 regarding the exercise. I hope everyone understands, Judge
4 Shon, I'll talk mainly to you right now, because you were
5 asking questions of Mr. Cumming.

6 It's my impression or understanding from Mr.
7 Cumming that what he is telling us is that there is a
8 significant difference between the evaluation critique forms
9 of 1986 and those forms of 1988, in that in 1986, the
10 evaluators themselves did indicate whether they believed
11 inadequate performance constituted deficiencies or ARCAs or
12 ARFIs, and that information was reflected on the documents
13 that were eventually produced to the governments when this
14 Board ordered FEMA to do so.

15 I gather Mr. Cumming is saying that now, the
16 documentation even if produced, would not reflect such
17 information because the process has been changed. I'm not
18 sure why the process was changed. I don't know if it was a
19 result of the previous exercise at Shoreham. But the
20 process has been changed, and so the answer, Judge Frye, is
21 that certainly the governments would find any additional
22 information helpful and we would welcome that.

23 Perhaps the information won't be as informative as
24 it was in 1986, according to Mr. Cumming, but I gather it
25 will be at least somewhat informative.

1 Now I'll try to quickly respond to some of the
2 points and I'm mainly, obviously going to address Mr.
3 Irwin's comments. I will try to go through these in quick
4 summary. First of all, Judge Frye, the comment that, the
5 gratuitous comment offered that two years went by last time
6 around because of the behavior of the intervenors, I think
7 is unwarranted and I'll just simply note the governments'
8 objection to Mr. Irwin's characterization, which I don't
9 think the record supports in any way.

10 The comment by Mr. Irwin that this is the second
11 time around the track, it is the second time around the
12 track. If LILCO would not have failed so miserably the
13 first time around the track, we wouldn't be here today
14 perhaps. But they did fail, and as far as the governments
15 are concerned, LILCO should be held to a higher standard
16 than they were in 1986.

17 There were deficiencies and fundamental flaws
18 found by this Board. They have to show they have rectified
19 those. The fact that FEMA has found LILCO's performance to
20 not be deficiency-free does not bar inquiry by the
21 governments under Union of Concerned Scientists, as this
22 Board is well aware.

23 With respect to the documents, which seems to
24 become a big issue here today, I want to make sure the Board
25 understands what I was saying, and I believe again Judge

1 Shon, you asked some questions in this regard. I am not
2 suggesting that of the roughly 35,000 pages of documents, I
3 guess, if I total Mr. Irwin's figures correctly, of the
4 roughly 35,000 pages of documents which LILCO says it has
5 produced to the governments, 32,500 have been redacted
6 improperly. That is not my suggestion at all.

7 What I am suggesting is that in certain instances,
8 in certain areas, if you will, where after the 1986 exercise
9 the governments proved their case based upon, in large part,
10 LILCO documentation. It seems that this time information
11 either was not kept or if it was kept, it was totally
12 redacted before being provided to the governments.

13 Let me give you the contrast. For example, EBS
14 and rumor control, public information documents of that
15 sort. We were given a lot of documentation in 1986
16 following the exercise by LILCO. We have been given a lot
17 of documentation by LILCO following the 1988 exercise.

18 To my knowledge, based upon my understanding of
19 the documents produced, there has not been improper
20 redaction for the most part, on those type of documents. I
21 think that is reflected in our contentions themselves, which
22 are very detailed when it comes to rumor control and ENC and
23 EBS messages and things of that sort. That detail is drawn,
24 certainly not from the FEMA report, but from for the most
25 part, from LILCO's documents.

1 Exceptions to that. I already suggested the
2 examples of the traffic guides, the mobilization of traffic
3 guides, the mobilization and dispatch of road crews, another
4 example. The Board will well recall the traffic impediments
5 of 1986. Those impediments generated a fair amount of
6 discussion before this Board. The Board found a fundamental
7 flaw as a result of the performance by LILCO during the '86
8 exercise with respect to LILCO's response to the simulated
9 FEMA impediments.

10 We based, the governments based their case in 1985
11 to a large degree not just on the FEMP report, but on
12 documents produced by LILCO following the exercise. We have
13 hundreds of documents that led to the impediment issue. We
14 have a file containing our analysis review of LILCO's
15 documents regarding the four impediments from the 1988
16 exercise, which contains a total of six pages of documents
17 regarding the four impediments.

18 Before, we had two impediments in 1986 and we had
19 hundreds of documents. Either LILCO didn't keep documents
20 this time, and they did that for a reason, a very specific
21 reason, or the documents they've given us are so redacted
22 they don't tell us anything except that documents were
23 redacted. So it depends on the area that you're talking
24 about.

25 What I've suggested to the Board and I'll stand by

1 my representation, is that in areas LILCO has redacted the
2 documents in a way which the way I read the documents, goes
3 beyond any possible claim of privilege. We, the
4 governments, have never had any problem with LILCO redacting
5 the names of individuals. We still don't have a problem in
6 that regard. Mr. Cumming referenced the fact in our FOIA
7 request to FEMA. We agreed to FEMA redacting the names of
8 LILCO players.

9 We don't have any problem with redacting names.
10 We have a problem when you redact times people were
11 dispatched, times people got to the field, times they were
12 mobilized. Those kinds of things are informational. That
13 sort of information is relevant, and there's no basis for
14 the redaction and that's what I have suggested to the Board.

15 I can -- I don't know if the Board wants to take
16 the time, but I have files with me today, where I can show
17 you the difference between the 1986 information produced by
18 LILCO, and the same sort of information in 1988. You'll see
19 forms from 1986 giving you the whole array of information
20 from the time they got to the staging area until they
21 reported to the position in the field. We gleaned that
22 entirely from LILCO documents.

23 You'll see the same form in 1988 which v't
24 tell you anything except the name of a staging
25 Everything else is redacted. If the Board wants to see it,

1 I'll be glad to show it to the Board.

2 I stand by my representation. Mr. Irwin did not
3 want to get into a swearing contest. I do not want to get
4 into a swearing contest. I make my representation. I
5 gather from Mr. Turk's comments, if he cares to believe Mr.
6 Irwin more than he cares to believe me, that's fine. But my
7 representation is on the table.

8 MR. IRWIN: Well, I think Mr. Miller is --

9 MR. MILLER: I would like to finish, Mr. Irwin,
10 and then you can say anything you care to say, as long as Judge
11 Frye permits you. Now, Judge Frye, the other point made by
12 Mr. Irwin is that -- the other point I wanted to make, not
13 just the redaction, but there are other segments of
14 documents that are simply blank pages or they're illegible.

15 JUDGE FRYE: Number one, they're illegible?

16 MR. MILLER: Illegible. Now, if we were going to
17 be given blank pages, I could have just been given reams of
18 xerox paper. It would have been more useful than the
19 information that they actually gave us in some cases. With
20 respect to the illegible documents, we have sent LILCO a
21 list of the documents we claim are illegible.

22 LILCO has indicated that they will try to find if
23 they have better copies than those that were produced.
24 Perhaps Mr. Irwin is confused between our list of illegible
25 documents and the list of redacted documents. I'm not sure,

1 regarding his representation.

2 But in any event, when we sent to LILCO our
3 complaint about their overzealousness in redacting
4 documents, we listed instances and examples for LILCO to
5 look at, so that LILCO would re-review its documents and
6 send us documents that had not been overly-redacted. I do
7 not want it to be LILCO's impression that those were our
8 only instances or examples of this kind of redaction
9 problem, and Mr. Irwin's reference to 23 instances. Those
10 are examples. That was not the sum total of the problem we
11 face.

12 I would also point out to the Board that LILCO has
13 yet to produce any training-related documents from the
14 exercise or following the exercise, and as the Board will
15 well recall, we fought this battle in 1986. LILCO opposed
16 production of training documents. LILCO eventually produced
17 training documents from the exercise and post-exercise, and
18 those documents went a long way toward revealing fundamental
19 flaws in LILCO's training program.

20 To date, no training documents have been produced
21 by LILCO, to my knowledge.

22 I'll wrap this up. Mr. Irwin's point about the
23 holiday season. He misses the point, Judge Frye. We're not
24 complaining that the lawyers don't want to work hard. We've
25 been working hard on this case for six and a half years now.

1 It's got to be recognized by everybody that it's not just a
2 lawyer problem; there's a witness problem. Witnesses tend
3 to make plans around holiday seasons, and that's something
4 that has to be dealt with.

5 With respect to everything that's been provided to
6 the governments, I think Mr. Irwin's words were that all the
7 raw material is there to provide testimony, with the
8 exception of the controller logs and they're now going to
9 produce those logs. We have a disagreement, and I can't do
10 anything more than make it clear to the Board that our
11 disagreement is clear and fundamental.

12 JUDGE FRYE: That does seem to be clear.

13 MR. MILLER: Lastly, with respect to Mr. Irwin's
14 point, Judge Frye, he has indicated that he disagrees with
15 our proposed adjustments to the schedule for litigation in
16 this case, because the Commission has made clear, this
17 should not be a standard track litigation. It should be an
18 expedited litigation process.

19 Well, if there's anything clear, Judge Frye, it is
20 that we recognize that the Commission wants to expedite this
21 litigation. We have attempted to accommodate the
22 Commission's concerns in that regard and the schedule we
23 proposed was a very expedited schedule in the governments'
24 view. It was not a standard-track litigation schedule.

25 My only response to Mr. Turk's comments, Judge

1 Frye, is his concern seems to be that the filing of
2 simultaneous testimony by the parties would really serve no
3 purpose because then you have to face rounds of rebuttal
4 testimony and perhaps surrebuttal testimony.

5 And frankly, my recollection of the exercise
6 litigation last time is that we had very little need for
7 rebuttal testimony for that litigation, that the parties
8 filed their testimony simultaneously and that that procedure
9 seemed to work just fine. The parties then came in with
10 motions to strike, and we then went to trial and cross-
11 examined the witnesses. But there wasn't rounds and rounds
12 of rebuttal testimony, because --

13 JUDGE FRYE: No, but you also had a lot of
14 discovery too, so I suspect that you knew pretty well in
15 advance what the testimony opposing you would say.

16 MR. MILLER: Certainly better than we will know
17 this time without discovery. I guess, Judge Frye, I'll wrap
18 it up with respect to my comments. Mr. Cumming, I think
19 made one point I wanted to respond to. Oh, I -- just for
20 clarification sake, the form request Mr. Cumming referred
21 to, to my knowledge, had probably already been made by
22 Suffolk County, and just so there's no misimpression, there
23 are a number of documents beyond the critique forms and the
24 ARCA verification forms yet to be produced by FEMA in
25 response to the County's FOIA request.

1 The County has noticed an appeal and we're still
2 fighting that battle with the agency, but there are a number
3 of other documents.

4 JUDGE FRYE: But you agree with him, that that
5 issue still pends within the agency?

6 MR. MILLER: It still pends within the agency, and
7 I would agree with Mr. Downing that of the documents that
8 have not been reduced, the most significant ones, based
9 upon the list that you give you, which is sometimes
10 hard to read on to tell what FEMA is really meaning.

11 But the most important documents are the critique
12 forms, completed critique forms, and the ARCA verification
13 forms.

14 JUDGE FRYE: Mr. Irwin, do you want to respond
15 quickly and then I think we want to move on?

16 MR. IRWIN: Yes, I do Judge Frye. I guess the
17 first thing, the most general point I want to make is that
18 Mr. Miller's complaints about discovery today are to some
19 extent a surprise to LILCO and I think they're an
20 unjustified series of charges.

21 I indicated earlier that LILCO is willing to work
22 out details of discovery, misunderstandings or confusion
23 with the intervenors. We've already undertaken it. The
24 first question we got from them, however, was not more than
25 about ten days ago. So it's not as though these documents

1 which we have turned over in the beginning, about five
2 months ago, have been mined exhaustively from the day they
3 came in.

4 As for -- just to take an example, though, the
5 business about impediments, the suggestion that there are
6 only six pages of material relating to four impediments this
7 year, overlooks two things. First of all, this year the
8 impediments were handled very well by all accounts. The
9 second is there are literally dozens, if not hundreds of
10 pages of log and message form entries, and Mr. Miller is
11 either not talking about them or he hasn't read them. But
12 they're there.

13 All I'm saying is, I don't want to get into more
14 of this than we can --

15 JUDGE FRYE: Yes. You and Mr. Miller are
16 obviously going to disagree on a lot of points, and I'm not
17 sure that we're going to gain any ground by discussing the
18 issue here.

19 MR. IRWIN: My point is that I think there is
20 ground to be gained by suggesting that Mr. Miller, if he has
21 problems, give them to us in writing promptly and we'll deal
22 with them legitimately.

23 JUDGE FRYE: I would encourage you to do that,
24 particularly where forms have been turned over with dates
25 and times redacted --

1 MR. IRWIN: What Mr. Miller thinks are dates and
2 times redacted, which may not -- LILCO submits might not be
3 the case.

4 JUDGE FRYE: Which may not be, right. I have no
5 way of knowing. But I would encourage you in any event to
6 try to meet those sorts of objections.

7 MR. IRWIN: We are 100 percent in sympathy with
8 that, because we want this proceeding to get underway in a
9 timely fashion, and to be completed in a satisfactory way.

10 The one other point I want to address very briefly
11 is Mr. Miller's suggestion that intervenors may be surprised
12 by the content of LILCO's testimony, in a way that they
13 would not be normally.

14 One of the things that LILCO has tried to do by
15 presenting document discovery early, is give intervenors
16 knowledge of its database. The second thing we've tried to
17 do in our responses to the interrogatories is in a great
18 deal of detail, for instance, on the scope contentions,
19 produce material which puts the facts out on the line and
20 with respect to the other contentions, puts facts in.

21 They may claim we're pleading facts, but I think
22 under ALAB-903 in particular, it's proper pleading. They
23 are in factual notice of LILCO's case in a way that is not
24 normally there.

25 JUDGE FRYE: Yes. That's an issue that I want to

1 get to later as well. Does that complete?

2 MR. IRWIN: That's all.

3 JUDGE FRYE: You have a motion pending to dismiss
4 Contentions 4 through 20, is it?

5 MR. IRWIN: That's correct. That's right.

6 MR. IRWIN: And I think we can essentially rule on
7 that one now, but we do have a question with regard to it.
8 We believe that the intervenors have not waived or abandoned
9 their right to modify their contentions based upon ALAB-903,
10 nor are we concerned about any possible ex-parte
11 communications based on Mr. Miller's phone call. We think
12 his phone call was proper.

13 MR. IRWIN: LILCO never suggested his phone call
14 was not proper, Judge Frye. All LILCO ever suggested was
15 that parlaying the ambiguity left by the absence of a Board
16 response into the equivalent of a holding, may have not been
17 justified, particularly where they didn't inform us. That's
18 all.

19 I want to make that straight. Now the Board may
20 disagree with us on that, but we never impugned Mr. Miller's
21 calling the Board per se, and I want that to be clear on the
22 record. You have to call the Board to set up a conference.

23 JUDGE FRYE: Sure, sure. So -- but the question
24 remains, and let me say we want to get to a discussion of
25 the merits of the amendments that have been made to the

1 contentions later on in this conference.

2 The question remains nonetheless whether your
3 motion contains arguments that should be considered with
4 regard to the admission of these contentions as a general
5 proposition.

6 MR. IRWIN: I think it does. We did not respond
7 to the revised contentions because as the Board may recall
8 in our cover letter --

9 JUDGE FRYE: You didn't argue the point.

10 MR. IRWIN: We didn't have them and we also
11 indicated in our cover letter that if the Board wanted to
12 hear from us further, we requested they let us know. We
13 thought the Board had plenty of paper before it. But yes, I
14 think that motion does contain material which should be
15 considered.

16 JUDGE FRYE: Okay, and we have, Mr. Miller, we
17 have your response to that motion and I think we just got
18 Staff's response this morning.

19 MS. CLARK: Yes, Judge Frye, and I'd like to point
20 out that in that response, we do respond to the contentions
21 as amended.

22 JUDGE FRYE: I see. Okay, so you have a written
23 response to the contentions as amended at this point in
24 time?

25 MS. CLARK: Yes, we do.

1 JUDGE FRYE: Now it goes without saying, in light
2 of our comments on that issue, that we think that the motion
3 to amend the contentions, filed by the intervenors, was
4 appropriate and we grant that and we're particularly
5 impressed by the fact that the changes did not go to the
6 bases that had been provided for the contentions originally,
7 but the contentions themselves, which are more in the nature
8 of argument.

9 That brings me to the Staff's position that the
10 contentions, some of the contentions, are tardy under 2.714
11 and should be rejected. And on that point, I wonder whether
12 LILCO has any comment it wants to make?

13 MR. IRWIN: That was, Judge Frye, I think I have
14 not yet read the Staff's paper filed this morning, but I
15 believe we made a parallel argument in the -- in our motion
16 to dismiss the contentions on the basis that they were
17 inherently late filed contentions.

18 Now since I haven't read the Staff's paper, I
19 can't relate it directly. But I believe --

20 JUDGE FRYE: Well, they made this argument, and
21 forgive me if I missed that point in your motion. They made
22 this argument in their response to the contentions as
23 originally filed.

24 MR. IRWIN: Well, without having read it in
25 detail, I think it is a valid argument as a general

1 proposition. We made an analogous argument in the motion we
2 filed to dismiss Contentions 4 through 20, prior to the
3 revision, and I think the same argument would probably tend
4 to apply.

5 I'm sorry that I haven't read the paper they
6 handed out at the beginning of this hearing.

7 JUDGE FRYE: Well, you brought to my attention
8 that there's some papers apparently I haven't focused on
9 properly either, so we will do that. I think we've got your
10 case on that point.

11 MR. IRWIN: Yes sir.

12 JUDGE FRYE: Now before we get into the question
13 of the specific contentions, as modified, one of the things
14 that's troubled me somewhat, Mr. Irwin, about LILCO's
15 responses and you've just alluded to it a moment ago, is the
16 fact that it seems to me in many instances it does raise
17 factual matters which I was brought up to believe just are
18 not an appropriate consideration at this stage of the
19 proceeding.

20 You have alluded to that and I'd like to elicit
21 some more information or positions in regard to that. For
22 instance, the contention, one of the contentions, as I
23 recall, states that LILCO's or LERO's, I suppose, response
24 to the fact that so many sirens failed, as improper in that
25 it did not send out road alert drivers and did not inform

1 the governments of the failures.

2 And the response is that FEMA overrode that fact
3 by telling LERO to assume that three sirens failed. Now
4 that seems to me to get into a question of facts, and I'm
5 not sure we should be considering that at this stage.

6 MR. IRWIN: Well, that may be an interesting
7 illustration, Judge Frye. I think it goes to -- to take it
8 to an extreme, the argument that you've just put to me,
9 which I understand to be reflected in cases like that at
10 Allen's Creek, is to the effect that you can plea that the
11 moon is made of balsawood, and get the contention in and it
12 has to be disproved later.

13 JUDGE FRYE: Well, I don't want to take it to that
14 extreme, and the reason I picked that example is because I
15 don't think it takes it to that extreme.

16 MR. IRWIN: Well, let me --

17 JUDGE FRYE: And it seems to me it's uncontested,
18 is it not, that roughly two-thirds of the sirens did fail.

19 MR. IRWIN: That's correct. It's also uncontested
20 that this was not a FEMA --

21 JUDGE FRYE: That FEMA overrode --

22 MR. IRWIN: No sir, it is not. The fact is this
23 was not a FEMA Rep 10 test where the early notification
24 system itself, as a mechanical system, was being tested.
25 The organizational capability to sound those sirens was

1 tested.

2 Now the fact of the matter is that organizational
3 capability was demonstrated. The fact of the matter is also
4 that it's not that FEMA overrode anything. It was part of
5 the scenario, that X number of sirens were to have failed.

6 As another factual matter, which is not in our
7 pleadings, the reason the sirens failed was that LILCO had
8 not tested the sirens systematically prior to the exercise,
9 largely because of the disapproval of Suffolk County. Since
10 the exercise, we've analyzed what happened. It was a
11 readily detectable timing problem. We've modified the
12 procedure. We have tested the sirens approximately five
13 times since the exercise, with a success rate in excess of
14 95 percent per sounding.

15 But that is not part of the exercise. I tell you
16 that as factual background, but the exercise is you're
17 supposed to demonstrate that you can sound the sirens. We
18 demonstrated that organizationally.

19 JUDGE FRYE: Yes, okay. Excepting that. But you
20 raise another problem that concerns me here, and that is
21 under ALAB-903 we need to consider not only whether the
22 contentions raise one of the elements listed in 50.47(b).
23 We also need to consider whether they would require, if
24 true, significant plan changes.

25 Now what you just said would lead me to believe

1 that it probably doesn't involved significant plan changes,
2 but there again we're talking about facts, aren't we?

3 MR. IRWIN: Well, if the contention raised the
4 suggestion that there had been a failure within the scope of
5 the exercise, yes, it could have arguably been a significant
6 failure without a need for a substantive or substantial
7 modification of the plan.

8 We don't believe that the mechanical failure of
9 the sirens was within the scope of the matters being tested
10 in the exercise. That's a matter the Board will have to
11 decide at the threshold. But if --

12 JUDGE FRYE: Just assume, for the sake of
13 argument, that it is.

14 MR. IRWIN: Okay. Then I think you have parsed
15 that particular matter right. In other words, there was a
16 potentially major failure but there was no substantial
17 modification required, and in fact the correction has
18 already been effected.

19 So that would not, if you accept -- your question
20 then is how are we supposed to deal with that at the
21 threshold? Do we rule it out on the basis of common sense
22 and undisputed fact, if the facts are undisputed, or do we
23 let it in and let the testimony decide the matter?

24 I believe that ALAB-903 stands for two
25 propositions in that regard. The first is that there is

1 some notion of substantive scrutiny intended by the Appeal
2 Board at the threshold admission stage, and I would refer
3 the Board in that regard to the latter half of page 12 of
4 ALAB-903, where the Appeal Board is discussing the
5 difficulties faced by an applicant on the one hand, if a
6 deficiency is assigned, in rebutting the presumption that
7 there's a fundamental flaw, and by an intervenor, on the
8 other hand, if a deficiency has not been assigned.

9 And the sentence that I look at in particular is
10 one that Mr. McMurray has quoted part of, but I think it's
11 instructive to look at the entire sentence. The sentence
12 reads, and I quote: " So, too, if FEMA has found problems
13 revealed by the exercise, and intervenor seeking the
14 admission of contentions that allege a fundamental flaw, has
15 a more difficult task, but it cannot be precluded from even
16 offering such contentions. Otherwise, the Commission would
17 be abdicating its ultimate responsibility," etcetera.

18 Now what they're saying, I think, is that the
19 question of substantiality has got to come in to some extent
20 at the threshold. Now, how does that come in? I think it
21 comes in primarily in the way allegations that are contained
22 in the contentions, are knitted together to suggest a
23 fundamental flaw.

24 Is there a really serious problem, in the case of
25 the sirens? Were the sirens within the scope of the

1 exercise, that would be a serious problem. But in other
2 cases, if there is not such a serious problem, the Appeal
3 Board has said there's got to be a pattern of relationships,
4 pervasiveness, repetition, and that has got to be
5 established within the contention.

6 Now we have a point of disagreement with the
7 intervenors, because we believe that you've got to look at
8 contentions analytically and that the various parts of them,
9 what they call their bases themselves, have to make some
10 sense and have to be integrated. They say no, you put the
11 whole thing together and does it add up to what looks like a
12 fundamental flaw if you accept everything.

13 We think there's got to be more structure added at
14 this stage, and we believe that in most cases, the
15 intervenors have simply strung together miscellanea. There
16 are, for instance, allegations of inaccurate communications
17 with state and local governments, and they list nine or ten
18 instances.

19 Well, there were recorded over 655 such
20 communications in the exercise. Our answer says there were
21 over 655 such communications, and they found nine or ten
22 where there was a problem. And FEMA said they didn't see
23 any evidence of a pervasive problem. Now we're pleading
24 facts there, but the fact of the matter is unless the
25 intervenors can suggest in their reply, and they had an

1 opportunity for a reply, that we were way wrong in our
2 assessment.

3 Ten out of 655 and no demonstrable adverse effect
4 on the conduct of the exercise, that ain't bad, and I think
5 the Board is well within its discretion to decide that that
6 contention should not be admitted. In other words, I don't
7 think you can plead the moon is made out of balsawood.
8 You've got to have some verifiable evidence for it.

9 JUDGE FRYE: You've got to have some reasonable
10 basis for it.

11 MR. IRWIN: That's right.

12 JUDGE FRYE: And I think I would go along with
13 that concept, that your basis can't be, as you say, the moon
14 is made out of balsawood. But let me give you another
15 example, and maybe this states it even more clearly. I
16 think contention one raises the problem about school
17 participation, and LILCO's response is we asked them to
18 participate and they said they wouldn't.

19 Now, I realize that there are more nuances to it
20 than just that, but just taking it based -- just taking
21 those facts, should we accept your factual representation
22 that the schools were asked and didn't participate at this
23 stage?

24 MR. IRWIN: I have to ask you one more question
25 before I can answer it. Are we to assume that the Board has

1 before it any documentary evidence that the schools declined
2 to participate?

3 JUDGE FRYE: Only such that you -- only that that
4 you furnished to us.

5 MR. IRWIN: But those are presumptively official
6 -- are we to assume that those are presumptively official
7 documents, like under the letterhead of school districts or
8 such?

9 JUDGE FRYE: Well, let me go back to intervenors
10 and see whether they can answer that.

11 MR. MCMURRAY: What Mr. Irwin is asking is are you
12 prepared to make a merits decision, accept the document as
13 official, and then make a merits decision, and it's our
14 position that you cannot make a merits decision at this
15 stage, whether it's considered an official document or not.
16 Whether it's official is really irrelevant at this point.

17 MR. IRWIN: Well, let me put LILCO's position on
18 the record. If there's a presumptively official document,
19 and unless the intervenors can allege successfully that the
20 document is either fraudulent or mistaken, you are allowed
21 to take administrative notice of what it says.

22 It's under the business records exception to the
23 hearsay rule. It's under the official records, the Federal
24 Rules --

25 JUDGE FRYE: Sure, but I've got to give them an

1 opportunity to contradict it too.

2 MR. IRWIN: Well, they've had -- they had an
3 opportunity to respond to our objections. My contention is
4 that if you have an official document, and a legal
5 presumption that a school is a governmental entity, and
6 ALAB-900, which says if you get turned down by a
7 governmental entity, that's it as a matter of law. Then I
8 think you can throw that contention out. That's LILCO's
9 position.

10 MR. MCMURRAY: We're in no position to state right
11 now that the letters that were given to the governments
12 constituted all of the schools that would have participated,
13 and other schools might not have -- that should have
14 participated that didn't, and were not contacted, because we
15 are not prepared at this time to address merits. Right now,
16 we're at the pleading stage.

17 JUDGE FRYE: So you at this point don't feel that
18 you can admit or deny the genuineness of the documents that
19 LILCO furnished in the attachment to its response?

20 MR. MCMURRAY: No, I don't think we are.

21 MR. IRWIN: I think Mr. McMurray was making
22 another point too, Judge Frye, and that is that the
23 intervenors haven't canvassed the available school
24 districts. And as to that, LILCO's view is that the
25 obligation fell on them at least at the time they received

1 LILCO's response, to undertake that inquiry, if it hadn't
2 fallen on them quite earlier.

3 We've had six months since that exercise. We've
4 had three months since the FEMA report. We've had over a
5 month since LILCO's objections and Mr. McMurray is now
6 saying well, we're just going to get around to it when the
7 Board rules on the contentions.

8 This is an expedited matter. That is a notion of
9 expedition, did not begin with CLI-889. It began with the
10 UCS case itself. It was reaffirmed in CLI-8611. It's been
11 reaffirmed in every Commission and Appeal Board decision
12 regarding exercise litigation since then.

13 An intervenor cannot responsibly sit on its
14 haunches, which I think is what Mr. McMurray is suggesting.
15 I don't want to overstate it, but I think they have an
16 obligation of due diligence, which I don't think they've
17 undertaken yet.

18 MR. MCMURRAY: No sir, that --

19 MR. LANPHER: Judge Frye. The only reason --

20 JUDGE FRYE: Yes, Mr. Lanpher.

21 MR. LANPHER: For the Reporter, Larry Lanpher. As
22 was stated at the outset, I'm only here to address
23 Contention 1, because we've had such a nice rapport with Mr.
24 Irwin on Contentions 15 and 16 from before.

25 You perhaps chose a simple example, in going to

1 question to Contention 1 and the schools issues
2 specifically. I concur with what Mr. McMurray said about
3 you're not allowed to go the merits, but two additional
4 things.

5 Even on the merits, as we addressed at page 48 of
6 our November 15 response, there are 22 school districts that
7 on LILCO's piece of paper indicated they were willing to
8 participate. We've alleged that only one participated. So
9 there are factual issues there.

10 Further, under ALAB-900, the proper showing is
11 whether under 50.47(c) (1) the failure to have to meet the
12 regulatory requirements of adequate participation is
13 excusable. That takes proof under ALAB-900. It's not
14 something that is to be resolved at the pleading stage, and
15 if LILCO believes it can show its proof when its testimony
16 comes in, so be it and we will attempt in our testimony to
17 show that its proof is not adequate.

18 MR. MCMURRAY: Let me just address one other
19 point, Judge Frye, and that is that we haven't been sitting
20 on our haunches. If LILCO's defense to a contention is that
21 the schools wouldn't participate, that's something to be
22 addressed at a later stage, not at this time.

23 It's not our duty to make LILCO's case. It's our
24 duty to proceed in good faith and in good faith we know that
25 22 school districts who should have participated, schools

1 who should have participated, only one did participate. We
2 have met our obligation in good faith. If LILCO wants to
3 make its affirmative case, it does that at a later time.

4 JUDGE FRYE: Mr. Zahnleuter?

5 MR. ZAHNLEUTER: I think it would be helpful to
6 refer the Board to ALAB-900, page 36 of the slip opinion,
7 which is what Mr. Lanpher was referring to, and it clearly
8 establishes that the burden is on LILCO pursuant to 10
9 C.F.R. 50.47(c)(1), to show that the school districts
10 precluded full participation.

11 JUDGE FRYE: Let me get Staff's position, and then
12 I'll come back.

13 MS. CLARK: Well, the Staff believes that in
14 certain instances, it can clearly be recognized by the Board
15 that participation, which intervenors allege should have
16 occurred, couldn't have because of refusal. And for an
17 example, we would say the Red Cross, the American Red Cross.

18 It's clear that they refused to participate in the
19 exercise and therefore it would not be deficient in scope.
20 Now whether --

21 JUDGE FRYE: I want to come back to that point,
22 because I think that raises another issue as well.

23 MS. CLARK: Now whether in this situation that
24 you're bringing up, these school districts, this may go, I
25 think, further towards a merit determination, because it is

1 incumbent, I believe, on LILCO to establish that they had --
2 their participation had been requested and they've refused.

3 JUDGE FRIT: I notice that in your response to the
4 contentions, very often you did not object where LILCO had
5 raised objections, which in my mind anyway, did go to the
6 merits or seemed to. So you take a somewhat different view,
7 I gather, than LILCO here.

8 MS. CLARK: Well, we believe that it depends on
9 the particular instance you're talking about, at least with
10 regard to scope, that clearly there are situations where we
11 really don't need to go into any further detail as to
12 whether certain entities are going to participate in the
13 exercise because it's clear, from the history of this case,
14 that there's no way LILCO is going to get their
15 participation. On the other hand, with something like the
16 school districts, it's a slightly different situation.

17 JUDGE FRYE: Mr. Irwin? Excuse me, Mr. Cumming,
18 before I get to Mr. Irwin, did you have any points you want
19 to make?

20 MR. CUMMING: Two brief comments, Judge Frye.
21 With respect to the failure of the sirens the day of the
22 exercise, FEMA counsel would respectfully disagree with Mr.
23 Irwin. We don't believe that that mechanical failure could
24 ever show a fundamental flaw in the plan. It's because of
25 the fact that typically the history of the whole alert

1 notification system has been on-site issue.

2 There is case law involving the Sharon Harris
3 proceeding, FEMA even with respect to its formal 350
4 findings, often has conditioned that granted that finding,
5 subject to confirmation by the Rep 10 testing, that has been
6 adopted by the full Commission repeatedly as an appropriate
7 procedure. The Sharon Harris ruling was that that was in
8 fact that mechanical testing, statistical analysis was
9 appropriately separated.

10 This would effectively reopen a contention, it
11 seems to me, or add a new contention, that is unrelated to
12 the plan. From that standpoint, FEMA took the position
13 inconsistent with its long-standing practice, that you had
14 to be consistent with what the scenario required. We were
15 not in a position observe. We separately observe, under the
16 Rep 10 process, the mechanical testing of sirens, and that's
17 our position on that issue.

18 With respect to the schools, FEMA has
19 traditionally treated the schools as part of the general
20 public, with special consideration not as response
21 organizations. That's why we don't review down to the level
22 of the individual school preparedness plans, as far as
23 verification.

24 It seems to me that the Staff did take a slightly
25 different position to us in its correspondence, saying that

1 they should be treated as Governmental units. We don't
2 disagree with that. NRC is certainly the arbiter of its own
3 rules. It's also true, though, that FEMA does not believe
4 that school participation is an issue that is dictated by
5 their treatment as a formal response organization as we do
6 other formal response organizations.

7 JUDGE FRYE: Mr. Irwin.

8 MR. IRWIN: Just two points of clarification. Mr.
9 McMurray referred to school districts. Mr. Lanpher, more
10 correctly, referred to schools and that's important because
11 the schools we're talking about are private and day care
12 centers and kindergartens, and in fact, there were a number
13 of them which did participate but were not recorded by FEMA.

14 FEMA observed one, as is I gather, its practice.
15 But there were a number of others which did participate and
16 in the sense of receiving phone calls, and that in fact is
17 part of the documented history of this exercise. Now
18 whether the intervenors have noticed that or not, I don't
19 know.

20 JUDGE FRYE: We're in facts again, aren't we?

21 MR. IRWIN: We are in facts again, but we're also
22 into allegations that aren't well founded, and I feel when
23 the intervenors raised them, we've got to rebut because the
24 Board will remember what it's heard. I know.

25 MR. MCMURRAY: Judge Frye. Excuse me. I didn't

1 realize earlier that we had finished our debate on whether
2 or not merits should be considered at this point.

3 JUDGE FRYE: Well, I don't think we have.

4 MR. MCMURRAY: Okay, well I'd also like to respond
5 and make certain points that I was not able to raise
6 earlier, if Mr. Irwin is finished.

7 JUDGE FRYE: Are you finished Mr. Irwin?

8 MR. IRWIN: I wanted to say that I agree with Mr.
9 Cumming's characterization of a siren problem. We were
10 assuming hypothetically, as you asked me to, that sirens
11 were a major element.

12 JUDGE FRYE: Yes, yes.

13 MR. MCMURRAY: I want to go back to Mr. Irwin's
14 first set of comments. First, with respect to the sirens
15 failing, number one I certainly disagree to any suggestion
16 that Mr. Irwin may have made that the sounding of the sirens
17 was not part of the exercise and was not something to be
18 evaluated at that time.

19 As a matter of fact, in a letter from Mr. Crocker
20 to FEMA, I have here it states under Objective 12, the
21 sirens will be sounded once following the general emergency
22 declaration, etcetera, etcetera. So certainly the sirens
23 were a part of the emergency.

24 JUDGE FRYE: But again I think what you're really
25 saying is that we've got a factual controversy.

1 MR. MCMURRAY: Absolutely. Every single response
2 that we've heard from Mr. Irwin is getting into facts. He's
3 told the Board that well, the sirens weren't really a
4 problem because they weren't tested systematically for some
5 reason and it was a timing problem. Well, that's a merits
6 consideration. That's something that the Board has to evaluate
7 at a later stage.

8 The same thing with the communications between
9 various FEMA controllers who were simulating Government
10 officials and the LERO representatives. Mr. Irwin states
11 that there were 655 communications and we dispute that with
12 respect to how substantive, how many substantive
13 communications there were.

14 But certainly again that's a merits consideration.
15 He states that we only had nine or ten examples. No, we had
16 many more and they were pervasive. They didn't just go to
17 one communication. They were statements about the sum total
18 of certain communications by a certain LERO representative.

19 These are all things that must be addressed at a
20 later stage. I agree with you. I was always taught that at
21 this stage, you don't get into the merits. That's what CLI-
22 8611 says. That's what other NRC case law says, and ALAB-
23 903 did not change that.

24 All ALAB-903 says is that you must address the
25 test that's set out and we do that. In our many

1 contentions, we address that test, and we do it in detail,
2 which is also required. But once we have addressed it, once
3 we have made the allegations, it is improper to go behind
4 those allegations and attempt to address the merits.

5 Every argument we've heard from Mr. Irwin has been
6 a merits argument, and this is not the time to hear such
7 merits arguments.

8 MR. IRWIN: Let me try and focus on something,
9 Judge Frye. There are some -- in Contentions 4 through 19
10 in particular, which I'll call garden variety contentions,
11 there are areas which arguably deal with merits. I think
12 that merits are properly part of your threshold decision, as
13 I said, and I'm not going to revisit that.

14 Contentions 1, 2 and 3 are different. Contention
15 20 is a bit different. I'm interested, as everybody else
16 is, in moving and proceeding to the extent possible, and I
17 had a thought that I'd like to float, and that is that if 1,
18 2 and 3 are in a different category from 4 through 19, and
19 perhaps they are in different category to some extent, from
20 20, 1 being the scope contention and 2 being a contention
21 about : surface and cooperation with governmental agencies,
22 3 being an allegation about the fairness or adequacy of
23 FEMA's evaluation, 4 through 19 being properly dedicated to
24 the performance of the exercise, and 20 being training.

25 If we try to think about whether or not we can

1 categorize these things and get some Board rulings on them
2 as quickly as possible, because if it frankly is the Board's
3 sense, and I don't think it's correct, but if it is the
4 Board's sense that 4 through 19 all involve factual
5 determinations, let's get to the merits. Let's get the
6 testimony filed, and let's get on to hearing as the
7 Commission suggested in CLI-88-9.

8 Let's get decisions by the Board in summary form
9 with a memorandum opinion later, to sustain the Board's
10 reasoning. The Board has plenty of paper before it, and I
11 think that would be helpful to us. As I say, the reason I
12 break it up is that rather than go through 20 contentions,
13 we may want to focus of them and try to parse them today.

14 I was told very frankly by the Board that we
15 weren't going to get a decision until around the end of the
16 year.

17 JUDGE FRYE: I frankly don't see how we can get a
18 decision out any faster than that, although I'm anxious to
19 do so, get a decision out as quickly as we can, and since
20 you bring up this point, let me tell you that prior to CLI-
21 88-9, it had been my thought, taking a cue from the Federal
22 Rules of Civil Procedure, and taking a look at your
23 opposition to the contention, to more or less treat it as a
24 motion for summary disposition.

25 I would have you supplement it with affidavits and

1 a statement of facts not in dispute and let the intervenors
2 respond and hopefully address the facts at that point, and
3 identifying which ones were not in dispute and which ones
4 were, and then move from that point. But I don't think that
5 option's open to us anymore.

6 MR. IRWIN: That may be. What I'm suggesting is
7 that if the Board does not consider that option open,
8 then --

9 JUDGE FRYE: Well, let me rephrase it. It would
10 be open if everyone agreed that it should be open. But I
11 don't know whether everyone would or not.

12 MR. IRWIN: Well, I believe that there is
13 sufficient material already in the record, particularly as I
14 know is likely to be supplemented in the very immediate
15 future, to proceed along the lines set out in CLI-88-9, and
16 what I am suggesting is that we might want to think along
17 those lines, particularly if as I say it is the Board's
18 inclination to let in the majority of the factual
19 contentions, so we can get this testimony going, let us see
20 what the intervenors have to say and let us respond to it
21 and get to the merits on it.

22 JUDGE FRYE: Mr. McMurray?

23 MR. MCMURRAY: I'm not really sure I understand
24 Mr. Irwin's suggestion. To the extent that he feels that or
25 he is suggesting that Contentions 1 through 3 and 20 are

1 distinct in that they don't raise factual matters, that's
2 just not true.

3 JUDGE FRYE: I didn't understand him to say that,
4 I don't think.

5 MR. MCMURRAY: Well, I think --

6 JUDGE FRYE: I think he was saying they're
7 different, somewhat different than the others.

8 MR. IRWIN: Well, I do think Contention 2 is a
9 purely legal question, which goes --

10 JUDGE FRYE: Well, 2 and 3, all right.

11 MR. IRWIN: And 3 is a purely legal question.

12 JUDGE FRYE: 2 and 3 probably are.

13 MR. IRWIN: And 20 is -- raises, if the Board
14 decides to admit it, factual issues, but it's one of these
15 omne un gatherum contentions which I'm not sure is
16 adequately supported. Well, it's a different kind of --

17 JUDGE FRYE: We need to talk about specific
18 contentions and this afternoon I want to do that.

19 MR. IRWIN: Yes.

20 MS. CLARK: Judge Frye, if I may I'd like to
21 respond a little bit to some of these comments about the
22 merits determinations, and that is because in our filing
23 that we gave to you today, we actually have made some
24 additional objections to some of the contentions. And we've
25 made those additional objections because of the issuance of

1 ALAB-903.

2 In essence, in neither this filing nor our
3 previous filing, I believe we have not addressed any of the
4 merits considerations that the intervenors are talking
5 about, and I believe that in many instances LILCO has not
6 either. And the fact is that ALAB-903 states that for a
7 contention to be admissible, it must allege problems which
8 if substantiated, reflect a fundamental flaw in a particular
9 element of the plan.

10 And I think many of these contentions, if you look
11 at the bases that have been alleged, even if they're taken
12 as true, they are not adequate under that standard. And
13 this is not --

14 JUDGE FRYE: You look at the bases.

15 MS. CLARK: Right. The specific instances, the
16 specific problems that they've cited, and this is not, in
17 fact, a merits determination.

18 JUDGE FRYE: No. That is not. I agree with you.
19 If you can say excepting the contentions or the bases for
20 the contention as true, it isn't a fundamental flaw because
21 it doesn't allege a fundamental flaw in a particular
22 element. I would agree.

23 MS. CLARK: And I think in many instances, the
24 intervenors have confused that argument with a merits
25 argument, and have --

1 JUDGE FRYE: Well, perhaps and perhaps not. There
2 are also other aspects of it where I think there seems to be
3 a controversy as to whether the bases is true or not.

4 MS. CLARK: That's true, that's true.

5 JUDGE FRYE: And if true, it could perhaps allege
6 a fundamental flaw.

7 MS. CLARK: And in particular in ALAB-903, I think
8 it goes a little further, in that it says that those
9 elements have to be identified with a failure of a
10 particular element to the plan, and I think oftentimes what
11 these contentions do is string together a lot of unrelated
12 problems, following a very over-general statement that an
13 essential element of the plan is defective, and I think that
14 that also is not adequate. There has to be some nexus shown
15 in the contention.

16 JUDGE FRYE: But here again, when we're
17 considering whether a string of problems are related or
18 unrelated, I get a little troubled if we're really dealing
19 perhaps with facts again.

20 MS. CLARK: But again -- exactly.

21 JUDGE FRYE: Where the factual context maybe isn't
22 totally apparent from the pleadings?

23 MS. CLARK: Again though, I think that -- I think
24 it's upon the intervenors to come up with some kind of
25 legitimate way in which those problems can be related to any

1 particular plan element, that if on their face you accept
2 all those problems as true, and you cannot come up with any
3 legitimate way that they could all come up, and they have
4 not -- and the intervenors have not given you any basis for
5 deciding how they could reflect a failure in the plan, then
6 the contention should not be allowed in.

7 JUDGE FRYE: Okay.

8 MR. MCMURRAY: Judge Frye, we're speaking in
9 generalities. As far as individual contentions go, we stand
10 on our responses to the various objections and maybe there
11 will be further argument today.

12 JUDGE FRYE: Yes.

13 MR. MCMURRAY: Obviously, we don't agree with the
14 characterization that we've just strung together unrelated
15 bases. We feel that they all deal, in each contention, with
16 one essential element. We're arguing in the abstract now,
17 and until we get to a specific contention, I don't think
18 it's worthwhile to argue anymore.

19 JUDGE FRYE: I think it would be helpful to get to
20 specific situations. I certainly agree with that. So why
21 don't we take our lunch break now. Before we do, let me ask
22 have you had an opportunity to read the Staff's response?

23 MR. IRWIN: No sir.

24 JUDGE FRYE: Okay. Have you?

25 MR. CUMMING: No sir.

1 JUDGE FRYE: All right. Why don't we take an hour
2 and a half, come back at five minutes -- or excuse me, 25
3 minutes past one. That will give you a chance to look at
4 the Staff's paper that they have filed this morning, and get
5 some lunch.

6 MR. IRWIN: Judge Frye. Okay, from my guidance if
7 nobody else's, can you give us an idea of whether the Board
8 wishes to parse the written responses or contentions,
9 responses and replies and answer my contention this
10 afternoon?

11 JUDGE FRYE: First, I think that we may have
12 specific questions for you with regard to specific
13 responses, but I think what we're basically interested in
14 hearing from you is your response to the amendments that the
15 intervenors have filed. Those amendments, it seems to me,
16 focus the issue pretty clearly under ALAB-903.

17 To the extent that you feel that you've already
18 addressed the ALAB-903 elements in your responses, fine. We
19 don't need to go over that again. But your responses, if
20 I'm not mistaken, were largely filed before ALAB-903 was
21 issued.

22 MR. IRWIN: 100 percent.

23 JUDGE FRYE: Yes, and it would be helpful to know
24 how ALAB-903 might change your position. In that sense, I
25 think that the intervenors' amendments, which they filed,

1 are very helpful and I hope they will enable us to speed up
2 the process somewhat.

3 MR. MILLER: Judge Frye, just before we break for
4 lunch, I'm assuming that we're leaving discovery and
5 scheduling matters behind now.

6 JUDGE FRYE: That's right. It was my intent just
7 to hold those for now. I would like to confer with the
8 Board to a certain extent, but more than that I think we may
9 -- well, I want to confer with the Board before I come back
10 to that issue.

11 MR. MILLER: If I could, just so the record is
12 clear, the letter that I gave to the Board, which the other
13 parties had already seen, is a letter dated December 5,
14 1988, from Lawrence Lanpher of my firm to Mr. Irwin, Mr.
15 Reis of the NRC Staff, and Mr. Cumming. That identifies the
16 letter that was given to the Board.

17 The other thing, Judge Frye, is I'm sure the Board
18 will vividly recall in the 1986 exercise, LILCO made a lot
19 of the same arguments we've heard today about we voluntarily
20 have given to the governments thousands and thousands of
21 pages of documents and this should shorten everything and
22 make all kinds of discovery unnecessary.

23 In fact that turned out not to be the case at all,
24 notwithstanding all the documentation which they did give us
25 voluntarily prior to the formal commencement of discovery in

1 1986. The last point --

2 JUDGE FRYE: You'll also probably get an argument
3 as to whether that discovery was necessary, but that
4 aside --

5 MR. MILLER: I'm sure Mr. Irwin and I could argue
6 all day. Judge Frye, the last thing is just to accommodate
7 a schedule, is it at all possible that if the Board has
8 particular questions on Contention 1 that we do that before
9 we break for lunch? We didn't amend Contention 1, Judge
10 Frye, so that --

11 JUDGE FRYE: No, that's true. You didn't amend
12 it, and so I'm not sure that we really have any specific
13 questions on it. I think it is probably unique in the sense
14 that it was filed and the responses came in after ALAB-900.
15 I get all these 900 series mixed up. I think that's the
16 right one. So I would assume you were pretty well briefed
17 on that. Do you want to be heard on Contention 1 any
18 further?

19 MR. IRWIN: Not unless the Board has any
20 questions. I think that's ready to be submitted?

21 JUDGE FRYE: Ms. Clark?

22 MS. CLARK: No, Your Honor.

23 JUDGE FRYE: I don't believe we have any questions
24 on that.

25 MR. MILLER: Thank you, Judge Frye.

1 MS. CLARK: I have one other point, Judge Frye. I
2 just wanted to note for your reference that in our response,
3 the second half of this response essentially sets forth our
4 additional objections under ALAB-903, and for each
5 contention that we have a section which responds to the
6 contention as amended by intervenors. So when you review
7 the document, and how it's structured.

8 JUDGE FRYE: You have given us your position in
9 writing, obviously so. You won't have too much to say this
10 afternoon.

11 MR. CUMMING: Judge Frye, before we go off the
12 record, I'd just like to note that I am going to serve on
13 all the parties at the break the ARCA verification forms, so
14 Mr. Miller doesn't complain. I've given him the best copy
15 we have, retaining one copy of that for our own file copy.
16 If we do, and we are still diligently searching to find the
17 originals, come up with an original, and a better copy, we
18 will furnish it to Mr. Miller.

19 JUDGE FRYE: Fine. Why don't we then --

20 MR. IRWIN: Judge Frye?

21 JUDGE FRYE: Excuse me?

22 MR. IRWIN: I was just going to make a point of
23 information. Our views on the effect of ALAB-903 will not
24 be lengthy. I'll save them for after lunch, but they will
25 not be lengthy. I very much hope we can reach closure on a

1 schedule this afternoon, and that the Board can give us at
2 least some inkling as to what it believes are likely to be
3 admitted and not admitted.

4 Let me give one example. Contention 1, which
5 makes allegations about FEMA's process, is a matter which
6 LILCO alleges is not fairly within the scope of exercise
7 litigation. A large number of the arguments we've been
8 hearing from intervenors about the need for further
9 discovery, seem to be predicated largely on the supposition
10 that FEMA's process itself is within the scope of this
11 proceeding.

12 If that is not the case, then it seems to me a lot
13 of -- a decision on that contention has significant bearing
14 on the large number of scheduling arguments. That is an
15 example, but I think it's a salient one.

16 JUDGE FRYE: How do the parties feel about our
17 ruling promptly on that contention and reserving the others?

18 MR. MILLER: On Contention 3 in particular, Judge
19 Frye?

20 JUDGE FRYE: That's -- yes, that's my
21 understanding. Contention 3.

22 MR. MILLER: Obviously the governments believe
23 that the contention is well-pleaded and if the Board --

24 JUDGE FRYE: I'm not trying to -- don't argue it.

25 MR. MILLER: If the Board is prepared to rule on

1 that contention, then we'll prepare to hear the Board's
2 ruling.

3 JUDGE FRYE: Would you have any objection if we
4 separated it out?

5 MR. MILLER: When you say separate out, you mean
6 just simply rule on that?

7 JUDGE FRYE: Rule on that one alone, and not on
8 any others, defer the others. You heard Mr. Irwin. He says
9 he thinks it might have some impact upon discovery.

10 MR. MILLER: Let us think about it, Judge Frye.
11 My inclination is that we have no objection, but let me --
12 we'll get back to you right after lunch.

13 JUDGE FRYE: After lunch, fine. Staff?

14 MS. CLARK: We have no objection.

15 JUDGE FRYE: FEMA?

16 MR. CUMMING: We have no objection either.

17 JUDGE FRYE: Okay. Anything else? Well, let's
18 break until 1:30.

19 (Whereupon, at 12:00 p.m., the hearing was
20 recessed, to reconvene at 1:30 p.m. that same day.)

21

22 (Continued on the next page.)

23

A F T E R N O O N S E S S I O N

(1:30 p.m.)

JUDGE FRYE: Back on the record, please.

Mr. Miller, do you object to our ruling on contention 3, now, separately from the others?

MR. MILLER: Judge Frye, upon further reflection, the government would object. But let me explain why we would think that ruling on contention 3 separately from the other contentions may not be the best procedure.

First of all, if you look at contention 3 in essence, that contention alleges that the FEMA reasonable assurance finding is flawed and is not entitled to any special difference by this Board.

That same thesis, if you will, flows throughout contentions 4 through 20. We did amend contentions 4 through 20 to try to allege specifically allege that because of what the FEMA report said or did not say, those particular contentions have merit and should not be rejected by the Board, simply because FEMA in its report disagreed.

contention 3 goes a step further and says FEMA's overall reasonable assurance finding is wrong, and should be given no special weight by the Board because of the allegations made in the contention.

I think one of the reasons we would suggest to the Board that it not rule separately in contention 3 is that

1 this thing ties together throughout all the contentions, and
2 it's our position that, in the abstract, piecemealing the
3 Board's ruling with respect to the contentions would not be
4 the way to go. And that the better procedure would be for
5 the Board to make a reasoned and informed decision on the
6 contentions as a whole, because they were submitted as a
7 whole.

8 JUDGE FRYE: Okay.

9 MR. MILLER: I just have two other quick points,
10 Judge Frye.

11 The one thought would be really what is to be
12 gained by ruling on contention 3 separately. If the theory
13 would be to start the clock running against the government
14 with respect to that contention, whereas we would be
15 awaiting Board rulings in other contentions, it would seem
16 to me that by the time that the clock has started to run and
17 has perhaps run against the government's, at that point in
18 time, the board will be coming out with its other rulings
19 and we'd be facing the situation we faced two years ago,
20 which is that neither the Board nor the parties can do two
21 things at once. And therefore preparing testimony in our
22 case, affirmative case on the other contentions we wouldn't
23 be going anywhere with contention 3 anyway assuming
24 contention 3 is going to be admitted for litigation.

25 And the second thought I have it that I would hope

1 that the Board would recognize that contention 3 in some
2 particular ways is a contention that will require some
3 discovery on the governments' behalf against FEMA
4 specifically.

5 Mr. Cumming has indicated that perhaps there will
6 be some discovery forthcoming with respect to documents, but
7 we need some discovery with respect to proving our case in
8 contention 3. And it would seem to us that for that reason,
9 a Board ruling today on contention 3 should not start the
10 clock running, even if the Board was to take that procedure,
11 because we would need FEMA to provide us additional
12 information in the spirit of cooperation encouraged by the
13 Commission before the clock should ever start to roll.

14 JUDGE FRYE: I see.

15 Well, I think in light, we'll withhold our ruling
16 and rule on all of the contentions together at one time.

17 Off the record.

18 (Discussion held off the record.)

19 JUDGE FRYE: Back on the record.

20 Before we address those specific contentions, let
21 me say a couple of things. With regard to your request for
22 our thoughts, Mr. Cumming, and I treat it as that, and
23 without taking any kind of a formal position with regard to
24 deliberative process privilege, we think it would be nice if
25 you made the document available.

1 MR. CUMMING: Thank you, Judge Frye. I'll convey
2 that to management.

3 JUDGE FRYE: Convey that.

4 With regard to the discovery requests and schedule
5 adjustments, I think we're going to withhold any
6 pronouncements with regard to those until we issue our order
7 on the contentions. But it would be our thought that the
8 Commission schedule would apply initially. We would not
9 modify it at this time.

10 But we would hold open the possibility that it
11 might need to be modified in the future.

12 So with that, shall we pick up then with
13 contention, I would say contention 4. One, 2 and 3 really
14 have not changed in light of ALAB-903. And it would seem to
15 me that contention 4 would be an appropriate place to pick
16 up unless the parties have a different thought.

17 Mr. Irwin, do you want to start off responding to
18 their modifications?

19 Now, what's best, to proceed contention by
20 contention, or do you want to give them all at once and then
21 --

22 MR. IRWIN: Let me give them all at once, Judge
23 Frye. And I'll be brief.

24 Our objections to the contentions were filed
25 before the issuance of ALAB-903. In our Motion to Dismiss

1 contentions 4 through 20 following the issuance of ALAB-903,
2 we outlined why we believe that ALAB-903 applied all the
3 further to make those contentions inadmissible.

4 What the intervenors have done in the
5 modifications to their contentions is to address in a purely
6 formalistic way the criteria of ALAB-903. In other words,
7 they have alleged in each case that there is a failure of a
8 significant portion of the local plan. They've cited to a
9 section of 5047 (b) and often to a section of FEMA Guidance
10 Memorandum EX-3, although that itself is not a basis under
11 ALAB-903. It's got to be the 5047 or Part 50, Appendix A.

12 But nevertheless -- Appendix E -- I'm sorry. But
13 nevertheless, they have formalistically recited that the
14 material they had already alleged satisfies the
15 substantiality test and they have formalistically alleged
16 that in each case, substantial reworking of the plan and
17 rethinking of the plan would be necessary.

18 Now, if all that's necessary at a pleadings stage
19 is to allege that the moon is made of balsa wood, they have
20 complied. If you were looking for a kind of piercing
21 analysis that suggests that in each case, the elements that
22 are being alleged need to be put together into a coherent
23 framework.

24 As Ms. Clark said it just before lunch I think
25 very convincingly, I don't think they've done it and

1 ALAB-903 simply raises what was already the threshold.

2 The Appeal Board said when it wrote ALAB-903, we
3 are not changing the law that the Commission set out in its
4 CLI-8611. We have no power to do that. We are, however,
5 clarifying it.

6 And I think they did it in a number of ways, and
7 most of those ways are pointed out in our pre-903 comments
8 because we anticipated, I think, 903, because that's what we
9 believed the law had always been.

10 So the long and short of it, Judge Frye, is we
11 don't think that the intervenor's revised contentions cure
12 in any analytical way the defects that were there before.
13 And I'm not going to belabor the point.

14 We'll be happy to deal with individual
15 contentions.

16 JUDGE FRYE: Ms. Clark, do you have anything to
17 add over and above what you've already given us in your
18 paper?

19 MS. CLARK: Not in general. Do you want me to
20 address contention 4 in particular?

21 JUDGE FRYE: Well, I think that Mr. Irwin -- do
22 you want to proceed contention by contention?

23 MR. IRWIN: Judge Frye, you indicated that you
24 might have questions on contention 4.

25 JUDGE FRYE: Well, I think we may have some

1 questions, but we will come back to that.

2 MR. IRWIN: Well, I think we've laid out our
3 contention by contention arguments at length on paper, and
4 if the Board has questions, we'll be happy to respond to
5 them.

6 JUDGE FRYE: All right.

7 MS. CLARK: Basically, I believe I set out our
8 position before and as far as what Mr. Irwin said, we agree
9 with LILCO, that largely the amendment in this case consists
10 of the addition of a lot of boilerplate language which
11 reiterates the standard set forth in ALAB-903, but doesn't
12 aid in the analysis of the contentions.

13 For that reason, we believe that our previous
14 objections still hold and even the additional objections
15 that we made on the basis of ALAB-903 are not cured by the
16 amended contentions.

17 JUDGE FRYE: Mr. McMurray?

18 MR. MCMURRAY: Yes, Judge Frye, I really do take
19 exception to the characterization of our amendments as just
20 being formalistic. What they do is exactly what ALAB-903
21 says needs to be done. That is, to address the two-prong
22 test that the Appeal Board set out there.

23 That is, to state that an essential element has
24 failed and then to allege that there needs to be some sort
25 of substantial effort to correct that. And that it must be

1 pled in detail, and that is what we've done.

2 Now, we were prepared at the November 22nd
3 conference of counsel to argue that our contentions without
4 being amended met ALAB-903 because really they did in every
5 case address an essential element. We set out the
6 regulations that it followed, we set out the FEMA objective
7 that weren't met, we set up a NUREG 0654 sections that
8 hadn't been met and the local plan sections themselves that
9 hadn't been met.

10 Now, if that doesn't set out violation of an
11 essential element, then I don't know what does.

12 What we've done now is to make sure that with
13 respect to that particular prong, there is absolutely no
14 doubt that we are alleging failure of an essential element.

15 Also, now, where delays have been alleged, we have
16 made clear that it's our contention that those delays would
17 result in delays with the public receiving protective action
18 recommendations and taking action on those recommendations.

19 So there again, we have met the requirements of
20 ALAB-903. And it's clear from the bases that those
21 statements, if true, would show a fundamental flaw. It's
22 also true that our original contentions, as set out, were
23 tremendously detailed, which is what 903 requires.

24 I don't think there are contentions I've ever seen
25 before that are as detailed. We haven't really added any

1 detail because no more detail needs to be added to meet
2 ALAB-903's requirements.

3 Mostly, the amendments are meant to do what
4 ALAB-903 said needs to be done, which is to identify how the
5 two-prong test has been met. That's what we've done.
6 That's all that ALAB-903 requires.

7 JUDGE FRYE: Mr. Zahnleuter?

8 MR. ZAHNLEUTER: LILCO invites the Board to adopt
9 a test of "piercing analysis." And Mr. McMurray has just
10 explained why the governments advocate a position of a test
11 of whether or not the contention addresses the two-prong
12 test that ALAB-903 sets forth.

13 And it is ALAB-903 that controls. And ALAB-903 on
14 page 8 of the Slip Opinion uses the word, address, and does
15 not use the piercing analysis language that LILCO quotes.

16 So therefore, Mr. McMurray is correct and the
17 contentions as we have set them out do meet the test of 903.

18 Thank you.

19 JUDGE FRYE: Well, that was short and sweet.
20 I do have one question that I would like to throw out for
21 you all, particularly with regard to the Red Cross. I
22 forget which specific contention raises the fact that the
23 Red Cross did not participate. But I believe both LILCO and
24 staff have indicated that that should be excused under
25 5487(c).

1 And while that argument may go to the merits, I
2 would be interested in having your reaction to the question
3 of whether the Red Cross is a government within the concept
4 of that regulation?

5 MR. IRWIN: Judge Frye, the American Red Cross is
6 as I believe this Board will recall from the first round of
7 this proceeding, an organization which functions under a
8 Congressional Charter which provides it certain privileges
9 and puts upon it broadly stated obligations. It has a, as a
10 result at least governmental sanction and to some extent and
11 in a quasi-official position in the hierarchy of response to
12 catastrophes of all kinds throughout the United States.

13 It is privately funded in large measure. In fact,
14 it may be an entirely privately funded organization, but it
15 clearly has more than voluntary status. And its
16 Congressional charter does impose duties on it that I
17 believe would warrant the Board's treating it as a
18 Governmental entity which one could count on to respond in
19 the event of an emergency.

20 JUDGE FRYE: When you say, obligations, are you
21 taking the position that the Red Cross is required to
22 respond by its charter?

23 MR. IRWIN: Yes, sir.

24 JUDGE FRYE: I see.

25 MR. IRWIN: In fact, let me read from a May 11th

1 letter from Mr. Reis to Mr. Cumming referring to the Red
2 Cross and the necessity of letters of agreement. This
3 letter is the first attachment to LILCO's responses to
4 intervenor's contentions and the second paragraph of the
5 letter bears on it, and it reads as follows:

6 "The Commission in Long Island Lighting Company,
7 CLI87-5, 25 NRC 884 at page 888, recognized that the
8 American Red Cross Charter from Congress and its national
9 policy require that the American Red Cross provide aid in
10 'any radiological or natural disaster,' whether or not there
11 are letters of agreement with the American Red Cross in
12 connection with a particular emergency plan."

13 So that is the basis on which we believe that this
14 Board would be warranted in treating the Red Cross as a
15 quasi-governmental organization which could be counted on to
16 respond.

17 MR. CUMMING: Judge Frye, I'd just like to make
18 one comment on the record. All funds administered by the
19 American Red Cross are not derived solely from private
20 contributions. An example would be their Federal Emergency
21 Management Agency has an emergency food and shelter program
22 under the Stuart B. McKinney Act, and they're on the board,
23 national board which helps to distribute that money. That's
24 my belief. And that comes from government obligated monies,
25 appropriated funds.

1 JUDGE FRYE: I see. Now would that food? Food, I
2 believe you said?

3 MR. CUMMING: Food and shelter.

4 JUDGE FRYE: Food and shelter provided with those
5 monies would be required to be available in a radiological
6 emergency, is that your point?

7 MR. CUMMING: I'm not making that direct analogy
8 but based on the qualifications, that is certainly a
9 function of that Board to insure that whatever American
10 citizens need that emergency food and shelter would in fact
11 gain that appropriate assistance.

12 JUDGE FRYE: I see.

13 MR. CUMMING: I believe the other Board Members
14 are, for example, National Catholic Charities, I believe
15 United Jewish Appeal has been on there from time to time,
16 most of the Salvation Army and other eleemosynary
17 organizations or the equivalent.

18 JUDGE FRYE: And the Board is not the Red Cross
19 Board but a different Board?

20 MR. CUMMING: It's a Board chartered pursuant to
21 the Stuart B. McKinney Act.

22 JUDGE FRYE: I see.

23 MR. CUMMING: And I don't purport to be an expert
24 on the Red Cross' arrangements. For example, they have a
25 Staff member permanently assigned to each FEMA region. And

1 there is assistance to the Red Cross to maintain those staff
2 positions, an example, integration of the Red Cross with
3 normal on-going emergency management activities. That's all
4 a matter of public record.

5 JUDGE FRYE: Ms. Clark?

6 MS. CLARK: Well, as that letter from Mr. Reis
7 indicates, the staff is also of the view that the American
8 Red Cross should be treated as a governmental entity.

9 JUDGE FRYE: For the same reason, I guess?

10 MS. CLARK: Yes.

11 MR. MILLER: If I may, just briefly.

12 The Board question is should the Red Cross be
13 treated as a governmental entity. Mr. Irwin has recast the
14 question is should the Red Cross be treated as private
15 governmental entity.

16 In response to the Board's question, the Red Cross
17 should not be treated as a Governmental entity, and it is
18 not a governmental entity. There are many organizations and
19 entities that are quasi-governmental in nature. Amtrak is
20 quasi-governmental. Amtrak has a governmental charter. So
21 what? It wouldn't be bound to follow LILCO's plan, and it
22 would not be treated as a governmental entity in a
23 proceeding before this Board.

24 Mr. Reis' letter that's been referred to does not
25 constitute legal authority of any kind. It's Mr. Reis'

1 opinion. It's worth Mr. Reis' opinion.

2 I would suggest that perhaps the Board may want to
3 look at I believe it's ALAB-905 which was recently issued
4 and that was the decision where the Appeal Board reversed
5 the Licensing Board decision approving LILCO's reception
6 center scheme. My recollection is that in ALAB-905, the
7 Appeal Board does address the Commission's realism rule and
8 talks specifically in terms of that rule not being a
9 panacea, I believe the Appeal Board said, that LILCO would
10 want it to be. And that may be worth reading.

11 I guess also, Judge Frye, my reaction to why the
12 Red Cross is not a government, a government to me is a body
13 by which there are elections by the general population or
14 which the entity has authority over the general population
15 or over which the entity has either passed laws or regulate
16 conduct. That is not the Red Cross. And I think for the
17 reasons set forth in our response to LILCO and the Staff
18 objections to our contentions at pages 65 and 66, this Board
19 should not conclude that the Red Cross is a governmental
20 entity.

21 JUDGE FRYE: Let me ask you a question, Mr.
22 Zahnleuter. And I take it you're in agreement, generally?

23 MR. ZAHNLEUTER: Yes. Thank you. But I have
24 nothing to add.

25 JUDGE FRYE: Let me ask you a question, and I

1 think I know the answer to this already, but I'd like some
2 elaboration. Do you think there is any relief that should
3 be afforded LILCO because an organization, which is not a
4 governmental organization, refused to participate in the
5 exercise?

6 MR. MILLER: That's a tough question, Judge Frye,
7 to answer in the abstract. I guess I would want to know the
8 circumstances as to why the entity did not participate, what
9 LILCO did in its efforts to try to get the organization to
10 participate, why the organization refused to participate.

11 JUDGE FRYE: Well, let's just assume that LILCO
12 said, please, we need you to participate, and they said, no,
13 we won't.

14 MR. MILLER: Then it seems to me that among other
15 things, the Board has to inquire into the necessity of that
16 entity's participation under LILCO's plan and what the lack
17 of that participation means in assessing the
18 implementability of LILCO's plan.

19 JUDGE PARIS: Did the Red Cross give you a reason
20 for its refusal to participate, or any intimation as regards
21 to why it did not participate.

22 MR. MILLER: Judge Frye, I would defer to LILCO on
23 that.

24 MR. IRWIN: Yes, sir, they did. And let me quote
5 to you from their response which is in Attachment 5 to our

1 objections to the Intervenor's Interrogatories.

2 It's a recitation in the letter from Douglas
3 Crocker, who's a local employee to Mr. Peter VonBerg, who is
4 the Executive Director of the American Red Cross, Nassau
5 County Chapter, dated April 27, 1988.

6 The reason recited by the Red Cross and
7 memorialized by Mr. Crocker is that the Red Cross responds
8 in emergencies but only to State requests for participation
9 in exercises. In other words, when a State requests
10 participation, the Red Cross complies.

11 And of course, under the Realism Rule, one is
12 entitled to presume that a State government would respond in
13 an emergency, and one is therefore entitled to presume that
14 the Red Cross would comply.

15 Let me just add one other comment on Mr. Miller's
16 comparison of the Red Cross to Amtrak. Amtrak isn't
17 obligated under its charter to respond in radiological
18 emergencies; the Red Cross is.

19 MR. MILLER: I've no response, Judge Frye, other
20 than again to reiterate that the Realism Rule, the
21 Commission's new rule, only applies to governmental entities
22 and the Red Cross is not such an entity.

23 JUDGE FRYE: In short, I think you're saying to me
24 that if a non-governmental entity refuses to participate,
25 there should be no relief for LILCO if that participation

1 were important to an assessment of the plan in the exercise?

2 MR. MILLER: That would be the Government's
3 position. And the Realism Rule does not afford such relief.

4 JUDGE FRYE: I see.

5 Mr. Irwin, do you?

6 MR. IRWIN: Judge Frye, I think I've already
7 anticipated that in the letter of Mr. Crocker sent to the
8 Red Cross.

9 JUDGE FRYE: No, I'm not talking about the Red
10 Cross now. I'm talking about my hypothetical organization,
11 whatever it may be, volunteer fire squad, etcetera, doesn't
12 participate.

13 MR. IRWIN: Well we have to again, I have to think
14 about this, but one has to break down response organizations
15 from everything else. There are lots of entities out there
16 in the world whom one likes to have play in an exercise
17 because they may have one kind of passive role or another
18 role. If it is a response organization, clearly one needs
19 to have them respond. If they're not a response
20 organization, there is a presumption that one does not
21 mandate public participation and non-response private
22 organizations are presumptively out there in the general
23 public and their participation is not required.

24 JUDGE FRYE: Ms. Clark?

25 MS. CLARK: Thank you.

1 I would just like to point out that in terms of
2 scope, LILCO is only required to test those portions of the
3 plan which are reasonably achievable. If a non-governmental
4 entity refuses to participate, clearly, that's not going to
5 be a deficiency in the exercise, since it cannot be
6 reasonably achievable.

7 JUDGE FRYE: But can, are we permitted to do that,
8 following ALAB-900? ALAB-900, we had originally said the
9 lack of school participation in the '86 exercise, or their
10 refusal to participate meant that their participation wasn't
11 reasonably achievable.

12 And I read 900 as saying our rationale was wrong.
13 That if it's excused, it's excused under 5047(c).

14 MS. CLARK: That's true, but --

15 JUDGE FRYE: Now, if that's correct, then I'm not
16 sure that we would be able to apply that reasonably
17 achievable argument to a non-governmental entity.

18 MS. CLARK: Well, I believe that the
19 Appeal Board was saying that we were putting too much
20 emphasis on that section of the Regulation talking about
21 mandatory participation. But I still believe that under
22 that decision if LILCO goes out and attempts to get
23 cooperation and cannot get it because, and in this case with
24 the American Red Cross, as a direct result of the State's
25 refusal to participate in the exercise, that this would not

1 be a flaw in the exercise. First, because it's not only a
2 portion which cannot be reasonably achievable, but secondly
3 because even if the American Red Cross itself is not a state
4 governmental entity, it's refusal to participate is a direct
5 result of the state's refusal, and therefore it should be
6 considered in that vein.

7 JUDGE FRYE: Okay.

8 MR. CUMMING: May I make a brief comment?

9 JUDGE FRYE: Surely.

10 MR. CUMMING: The scope of 5047(c)(1) aside, as
11 currently amended, the history of CLI 8705 is that FEMA had
12 ruled that there was a plan inadequacy in that there were no
13 letters of agreement with the local Red Cross. And the full
14 Commission determined that the plan was in fact adequate
15 based on its analysis of the charter.

16 The charter argument it seems to me is crucial.
17 We agree with that position of the Commission, now, and it
18 seems to me that it's not the licensing board which would be
19 in the position to decide that the Charter dictated other
20 than that there would be an appropriate response.

21 I mean, you're obviously obligated to integrate
22 that with the regulatory scheme, but that's a separate
23 argument from the technicalities of the current language of
24 the regulation, based on the Commission's analysis of the
25 Charter.

1 I don't know how you would rebut that
2 determination other than have a Federal Court construe the
3 Charter of the American Red Cross or to have the Board of
4 Directors approve a resolution of the American Red Cross
5 saying that they read their Charter so as not to dictate a
6 response.

7 MR. MILLER: Judge Frye, my only comment is that
8 my recollection is that the very arguments made by Ms. Clark
9 were presented to the Appeal Board and in ALAB-900, the
10 Appeal Board disagreed with the position now being taken by
11 the Staff and the Appeal Board clearly said that the not
12 reasonably achievable language cannot be applied to afford
13 relief to LILCO with respect to non-governmental entities.

14 That's the way I think you have got to read
15 ALAB-900.

16 JUDGE SHON: I'd like to have everyone I think
17 address a sort of second order look at this thing. The
18 matter alleges, the contentions allege that a particular
19 aspect of the plan wasn't tested. Now, that can only be of
20 significance to us here if that omission could hide a
21 fundamental flaw.

22 And a fundamental flaw again has to be something
23 that's not easily corrected. I think it might be arguable
24 that since the Red Cross is expected only to do things they
25 regularly do in an emergency, there is no way that a

1 fundamental flaw could be hidden in not testing the Red
2 Cross.

3 I'd like to hear you address that, and perhaps you
4 first, Mr. Miller?

5 MR. MILLER: Well, my response would be that I
6 believe it would be a disservice for this Board or any other
7 tribunal to make that sort of assumption. When it comes to
8 the sort of matters that are involved in the exercise of an
9 offsite utility plan as we have in this case.

10 It may be true that the Red Cross as a matter of
11 routine goes out and provides services to the public in
12 disasters and emergencies, and knows how to hand out food
13 and provide clothing and things of that sort.

14 But here we have a specific LILCO plan and as FEMA
15 is fond of saying, the purpose of an exercise is to test the
16 workability of a plan to see that if in the real world, that
17 plan is workable and can implemented.

18 There's no real world experience to lead to a
19 conclusion that the Red Cross would know how to perform
20 under LILCO's plan interface with LILCO personnel and
21 perform in a way which would adequately protect the public
22 health and safety.

23 Those are matters which I think require
24 demonstration and a test of the workability of LILCO's plan
25 with respect to the Red Cross. And if the Red Cross did

1 not participate in the implementation or the test of that
2 plan, as they did not in this exercise, then I think there's
3 deficiency of the scope of the exercise, which does lead to
4 a fundamental flaw conclusion.

5 MR. CUMMING: Judge, may I make a quick comment
6 before Mr. Irwin?

7 I think your remark is perceptive, because the
8 NUREG basically indicates that reception centers would be
9 established. The LILCO plan, as you are well aware, splits
10 the reception center function into two: a congregate care
11 function as well as a monitoring decontamination function.

12 The monitoring and decontamination function is not
13 at issue. It basically is the congregate care, the normal
14 food, shelter function the Red Cross performs. So in fact,
15 Mr. Miller's argument is not apropos at all. They're
16 exactly doing what they do traditionally, providing social
17 services in a mass care situation with the unique
18 requirements that are dictated by a radiological emergency.

19 MR. IRWIN: I have nothing to add except that the
20 ratio of Mr. Miller's argument is to suggest that the
21 state or county can induce a fundamental flaw any time they
22 want by knowing that a private organization or quasi-
23 governmental organization or any kind of organization will
24 respond only when they call it, and they refuse to call it.

25 I don't think that's the way that the Realism Rule

1 was set up to operate. But Mr. Cumming's accurately
2 described the Red Cross' functions here, and they're simply
3 its ordinary functions.

4 JUDGE SHON: Mr. Zahnleuter?

5 MR. ZAHNLEUTER: I think we should remember that
6 the Red Cross itself, especially in Long Island, does not
7 have congregate care centers itself. In other words, it is
8 not in the business of owning and maintaining congregate
9 care centers.

10 Those congregate care centers exist by way of
11 agreements with other entities. And it might very well be
12 that a fundamental flaw is hidden in the Red Cross element
13 in the plan if there are no congregate care center owners,
14 no voluntary businesses or no facilities that allow the Red
15 Cross to use the buildings or whatever they have in the
16 event of a Shoreham emergency.

17 I think what the ramification of that is is that
18 we're getting closer and closer to an evidentiary question.
19 For example, had the Red Cross participated, would have
20 congregate care centers been made available by enough
21 facilities in a Shoreham emergency. And we're at a second
22 level then of extension.

23 And that might more properly be decided in an
24 evidentiary context rather than at a contention
25 admissibility stage.

1 MR. IRWIN: Let me just add that the issue of
2 congregate care centers has been litigated as an evidentiary
3 matter and decided at least once by this Board.

4 JUDGE SHON: Ms. Clark, did you have anything that
5 you wanted to say?

6 MS. CLARK: I have nothing further to add.

7 JUDGE FRYE: Let me ask you generally whether --
8 and this doesn't go to specific contentions, but to
9 contentions in general, I suppose -- well, I take that back.
10 Conceivably it does go to a specific contention which I will
11 let you identify.

12 Do you think any of the record which was compiled
13 on the '86 exercise would be relevant to this exercise, and
14 I'm thinking specifically in terms of experts talking in
15 more general terms, or giving their conclusions in more
16 general terms.

17 MR. MILLER: I'll bite the bullet first, Judge
18 Frye.

19 It's a good question. I would think that there is
20 a possibility that your question would have some merit and
21 that there are in a general sense perhaps expert testimony
22 offered in 1986-87, could be relevant to the upcoming
23 proceeding.

24 I certainly think that the prior litigation is
25 relative to this proceeding from the standpoint of, for

1 example, there were fundamental flaws identified last time
2 and to the Government's way of thinking, that raises the
3 standard of what LILCO should have to demonstrate in this
4 proceeding. And it may make it more difficult for LILCO to
5 demonstrate that it has overcome the fundamental flaws
6 previously identified in its plan. And with respect to
7 whether a matter is easily correctable or not, if the
8 governments can allege, as they have, that problems existed
9 in 1988 that also existed in 1986, and in fact were
10 identified as fundamental flaws previously by this Board,
11 that in and of itself demonstrates matters are not easily
12 correctable, at least by LILCO.

13 So there's clearly a relevance, to me, to the
14 prior litigation. I gather your question really goes more
15 in terms of the evidentiary record from --

16 JUDGE FRYE: I was thinking more on those terms,
17 yes.

18 MR. MILLER: The evidentiary record from the last
19 proceeding and can that record somehow be used in the up-
20 coming proceeding?

21 JUDGE FRYE: Portions of it.

22 MR. MILLER: I would think that there's a
23 possibility that in a general sense, maybe background
24 matters, things of that sort. I mean, that's on the record.
25 It would depend on whether the plan has changed. There have

1 been revisions to the plan since 1986-1987. I guess there's
2 a possibility. I can't really think off the top of my head
3 of an example where I would say for certain that it would be
4 doable.

5 MR. IRWIN: I can't answer your question
6 categorically, Judge Frye. My instinct is that certainly
7 exercise specific facts are different in 1988 than those in
8 1986.

9 JUDGE FRYE: Obviously.

10 MR. IRWIN: Therefore, the possible set of
11 testimony or opinion would be a fairly small one.

12 JUDGE FRYE: The contentions, though, in many
13 instances are similar to the contentions that were raised in
14 '86, in the '86 exercise. And that's what led me to wonder
15 whether there was some expert testimony that might apply in
16 the '88 situation, given the fact that the facts are
17 obviously different.

18 MR. IRWIN: I'm hesitant simply because experts
19 generally testify on the basis of assumed or known facts.

20 JUDGE FRYE: Specific facts, yes.

21 MR. IRWIN: I think I'd prefer to reserve that
22 until a specific instance came up.

23 JUDGE FRYE: Sure, sure. Fair enough.

24 Well, I don't believe we have anything further for
25 you at this point. So unless you have something further,

1 any of you --

2 MR. MILLER: Not from the county.

3 JUDGE FRYE: -- to be raised?

4 MR. IRWIN: Judge Frye, I have something further.

5 JUDGE FRYE: Surely.

6 MR. IRWIN: And that is this: we are obviously in
7 the position of litigants who are anxious for a licensing a
8 decision to be reached as soon as practicable consistent
9 with due process.

10 The circumstances surrounding this hearing are
11 known to everybody; they're not garden variety
12 circumstances. And we urge expedition on the Board wherever
13 possible.

14 I do believe that one circumstance where the board
15 may be able to help the parties themselves go to work, as it
16 were, on the case, and help advance the ball is if the Board
17 would consider rendering summary rulings with respect to
18 admission of the contentions quite soon, following up with a
19 Memorandum Decision, later. But letting the parties then
20 get to work on preparing their testimony and following that
21 schedule set out by the Commission.

22 The Commission set a whole series of intervals
23 that's approximately 120 days long and the only undefined
24 interval there is the interval between this Board's
25 prehearing today and your decision on the contentions. The

1 only guidance we have there is that it must be expeditious.

2 I am requesting that the Board consider issuing
3 summary rulings so the parties can start on their testimony.

4 JUDGE FRYE: Well, we're going to rule, as I
5 indicated earlier, we're going to rule as expeditiously as
6 we can.

7 For your guidance, I think given the posture of
8 this and given the detail of the contentions, I think that
9 the earliest that could occur would be shortly after the
10 first of the year. And that will be our target.

11 Now, let me say in that regard, that I would urge
12 the governments -- of course, how they conduct their
13 business is their business and not mine -- but I would urge
14 you to be thinking in terms of the witnesses you want to
15 retain now, and not waiting until the ruling of the
16 contentions comes out.

17 Because you can always, I would think, perhaps
18 more easily say, well, as it turns out, we don't need you,
19 than it would perhaps be to scramble around and find someone
20 that you needed at the last minute.

21 MR. IRWIN: I don't want to revisit anything more
22 than I'm invited to, but these contentions have been before
23 us all for over, in the case of the contentions, a month a...
24 a half; our responses over a month, and if it is possible to
25 get decisions out before the holidays, we would appreciate

1 it. We're otherwise just going to be sitting, spinning our
2 wheels for another month. They're going to be contracting
3 for experts but we're going to be spinning our wheels.

4 JUDGE FRYE: I understand. I understand the
5 situation.

6 Well, if there's nothing further, we are
7 adjourned.

8 (Whereupon, at 2:10 p.m., the hearing in this
9 matter was concluded.)

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CERTIFICATE

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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-5R
Place: Bethesda, Maryland
Date: December 6, 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.

ISI Khalid C. Sekander

(Signature typed):

Khalid C. Sekander
Official Reporter

Heritage Reporting Corporation