

ORIGINAL
UNITED STATES
NUCLEAR REGULATORY COMMISSION

IN THE MATTER OF:

DOCKET NO: 50-322-OL-3

LONG ISLAND LIGHTING COMPANY

(Shoreham Nuclear Power Station,
Unit 1)

LOCATION: HAUPPAUGE, NEW YORK

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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In the Matter of: :
:
LONG ISLAND LIGHTING COMPANY : Docket No. 50-322-OL-3
:
(Shoreham Nuclear Power Station, : (Emergency Planning)
Unit 1) :
:
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New York State Court of Claims
State Office Building, Room 3B44
Veterans Memorial Highway
Hauppauge, New York

Tuesday, July 8, 1986

The prehearing conference in the above-entitled
matter convened, pursuant to notice, at 9:30 a.m.

BEFORE:

MORTON B. MARGULIES, Chairman
Atomic Safety and Licensing Board Panel
U. S. Nuclear Regulatory Commission
Washington, D.C. 20555

JERRY R. KLINE
Atomic Safety and Licensing Board Panel
U. S. Nuclear Regulatory Commission
Washington, D.C. 20555

FREDERICK J. SHON
Atomic Safety and Licensing Board Panel
U. S. Nuclear Regulatory Commission
Washington, D.C. 20555

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APPEARANCES:

On Behalf of LILCO:

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On Behalf of the State of New York:

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Special Counsel to the Governor
Executive Chamber, Room 229
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Albany, New York, 12224

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On Behalf of FEMA:

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On Behalf of the NRC:

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Washington, D.C. 20555

* * * * *

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

2 JUDGE MARGULIES: Please come to order.

3 On June 6th, 1986 the Commissioner ordered an
4 expedited hearing on the results of the emergency plan
5 exercise conducted by the Federal Emergency Management
6 Agency for Shoreham.

7 We are the Licensing Board designated to conduct
8 that proceeding. On my left is Judge Shon, on my right is
9 Judge Kline and I am Judge Margulies.

10 On June 11th we scheduled a prehearing conference
11 for today to consider the matters at issue, the procedures
12 to be employed, the setting of schedules and other customary
13 topics to be reviewed before commencing the hearing.

14 We invited the parties to submit matters they
15 proposed for the agenda. Responses were received from
16 LILCO, Suffolk County, the State of New York, the Town of
17 Southampton and NRC Staff.

18 The Board has reviewed the proposals and both
19 applicant and intervenors in one way or another seek to
20 create new practices and procedures for use in this
21 proceeding.

22 The Commission in its order of June 6th, 1986
23 called upon the Board "to expedite the hearing to the
24 maximum extent consistent with fairness to the parties."

25 If anything is to be considered different about

1 this proceeding, aside from the requirement of pleading the
2 fundamental flaws, it is this requirement for expeditious
3 handling. There is nothing in using the present Rules of
4 Practice and Procedures that would impeded the Board from
5 accomplishing that goal.

6 The existing rules of Practice and Procedures were
7 designed to afford parties a full, fair and expeditious
8 hearing, and they should be employed to that end.

9 To bring about an expedited hearing requires the
10 setting of realistic schedules and adhering to them. It
11 means sticking to the issues and not being distracted by
12 irrelevancies. We already have the methods at hand in the
13 Rules of Practice and Accepted Procedures to provide the
14 type of hearing required.

15 The circumstances of this proceeding are not such
16 that the Board can start experimenting with new practices
17 and procedures that may well be in the long run more time
18 consuming and cause additional delay.

19 We thought you should be apprised of our views
20 before the start of the conference.

21 We will now take appearances.

22 Who appears for the applicant?

23 MR. IRWIN: Thank you, Judge Margulies. My name
24 is Donald Irwin from Hunton & Williams in Richmond,
25 Virginia. Immediately to my left is Kathy McCleskey also of

1 our firm, and immediately to my right is Lee Zeugin, also of
2 our firm. I would also like to introduce to the Board my
3 partner, Taylor Reveley, who is also one of the counsel to
4 Long Island Lighting Company and Anthony Earley, who is
5 General Counsel of Long Island Lighting Company.

6 JUDGE MARGULIES: Thank you.

7 Who appears for the intervenors?

8 MR. PALOMINO: Fabian Palomino. I appear for the
9 State of New York, and to my right is my assistant, Richard
10 Zahnluter, also appearing for the State of New York.

11 MR. BROWN: I am Herbert Brown for the County of
12 Suffolk. I am joined by co-counsel, which are Lawrence Coe
13 Lanpher and Karla J. Letsche. We are all of the law firm of
14 Kirkpatrick & Lockhart in Washington, D.C.

15 JUDGE MARGULIES: Who appears for NRC Staff?

16 MR. LATHAM: I think you missed one.

17 JUDGE MARGULIES: I am sorry. Excuse me.

18 MR. LATHAM: Steven Latham of the firm of Twomey,
19 Latham, Shea and Kelly on behalf of the Town of Southampton.

20 JUDGE MARGULIES: Thank you, Mr. Latham.

21 Who appears for NRC Staff?

22 MR. BORDENICK: Bernard M. Bordenick of the Office
23 of General Counsel, Washington, D.C. for the NRC Staff.

24 JUDGE MARGULIES: Is FEMA represented here today?

25 MR. GLASS: Yes. Stewart M. Glass, Regional

1 Counsel for the Federal Emergency Management Agency.

2 JUDGE MARGULIES: Are there any other appearances?

3 (No response.)

4 We will start off with the proposed schedule
5 submitted by LILCO. The Board has reviewed it.

6 We find the matters listed under Item 1, Proposed
7 Schedule, to be items placed on the agenda of course with
8 the caveat that you heard in my introductory remarks.

9 Item 2, Hearing Location, will also be placed on
10 the agenda.

11 Moving on to the submittal by Suffolk County,
12 State of New York and Town of Southampton, the first item we
13 come to is the Nassau Colosseum. Did the exercise involve
14 the Nassau Colosseum?

15 MR. BROWN: Yes.

16 JUDGE MARGULIES: Could you tell us what the
17 purpose of discussing the Nassau Colosseum issue would be,
18 Mr. Brown?

19 MR. BROWN: Well, the overriding purpose is to
20 bring to the Board's attention and have the involvement of
21 the parties on an issue of the most profound relevance to
22 the proceeding. The facts are dramatically different from
23 what they were at the time of the exercise and before that.

24 The Board might recall that LILCO has sought
25 repeatedly to identify a relocation center and it was

1 unsuccessful in doing that. At one point this came to a
2 climax and, Judge Margulies, your predecessor, Judge
3 Lawrensen ruled that on behalf of the Board the finding was
4 that there was a "void in the record," that is, the void in
5 LILCO's plan. There was no relocation center and no
6 compliance with the requirements of the Nuclear Regulatory
7 Commission and thus LILCO had failed to satisfy its burden.

8 LILCO made one more effort at that point to fill
9 the so-called void in the record, and it is did this with
10 the colosseum. It did it over the objection of the
11 governments, but nevertheless it had a purported solution.
12 That purported solution has now evaporated.

13 The identical void in the record which occurred
14 prior to LILCO's identification of the colosseum once again
15 exists and, thus, there is a void in the record. The
16 implications of such a void in the record I think would be
17 very appropriate for this Board and the parties to discuss
18 at some length because it may well be that those
19 implications have a sweeping and profound impact on the
20 further course of this hearing.

21 Incidentally, the events concerning the colosseum
22 occurred after the Commission's order. So this was not
23 something that the Commission was aware of or indeed could
24 have even taken cognizance of for the purpose of formulating
25 whatever language it put forth in its order.

1 I am sorry, Judge Margulies, counsel reminds me
2 that I perhaps should explain what the event was that would
3 have this sweeping effect, and that event was the
4 determination of the Board of Supervisors of Nassau County
5 that officially the colosseum could not -- it first
6 confirmed the fact that the purported agreement which LILCO
7 had sent in between the lessee of the colosseum, the Hyatt
8 Management Corporation, and LILCO was in fact a nullity.

9 This had been found by the attorney of Nassau
10 County to be a legally mandated conclusion and the Board
11 adopted that and further exercised its exclusive
12 jurisdiction in the area by asserting in a formal
13 resolution, a copy of which was sent to the Board, that the
14 colosseum shall not be a part of the LILCO plan. There is
15 no authority to make it such, and any use of the colosseum
16 or consideration of use would have to be only after the
17 prior concurrence of the Board were given.

18 JUDGE MARGULIES: Assuming its direct relevancy
19 and importance to the emergency plan exercise, shouldn't
20 this matter find its way into a contention?

21 MR. BROWN: I don't think so. I think it would
22 only find its way into a contention if we were to look upon
23 it as a cursory matter.

24 The fact is that when one takes a look at the
25 scenario and impact of the exercise of February of February

1 13th, its ultimate purpose was single-fold. It was really
2 to effect an evacuation to a particular relocation center at
3 which the argument could be made that the public was capable
4 of being protected.

5 There is no place in fact for the public to go,
6 and the extent to which people were directed to the
7 colosseum is an irrelevancy now of no consequence and the
8 impact on the exercise may be so sweeping as to render the
9 exercise itself in retrospect an entirely misguided event.

10 JUDGE MARGULIES: Do you wish to be heard,
11 counsel?

12 MR. IRWIN: Yes, I do, Judge Margulies.

13 Needless to say, LILCO has a considerably
14 different view of the significance of the colosseum issue.
15 The purpose goes to the purpose of the exercise and the
16 jurisdiction of this Board as well as to those issues which
17 this Board is looking at in this hearing.

18 This Board was constituted by the Commission to
19 review LILCO's proficiency in implementing its emergency
20 plan, but only one of the aspects of that implementation is
21 staffing a relocation center. It was, in fact, the staffing
22 and the agglomeration and implementation of equipment by
23 LILCO at that relocation center which was being examined.

24 Therefore, to the extent that the colosseum was a
25 part of that aspect of the plan, it was simply part of the

1 physical background. Any comparable facility or combination
2 of comparable facilities could fill the function that Mr.
3 Brown has mentioned to the Board.

4 What was being tested on February 13 was that
5 given the existence of those kinds of facilities did LILCO
6 people and other members of LERO adequately perform their
7 jobs.

8 Secondly, even though the Nassau County Board of
9 Supervisors has issued a resolution, it is not totally clear
10 to LILCO or to anybody else in this room that in the event
11 of a real emergency public officials who are responsible for
12 protection of the public health and safety would arbitrarily
13 deny the use of facilities, whether or not specified in a
14 given plan, to members of the public who needed them.

15 I should correct one or two things that Mr. Brown
16 indicated on the record. It is not fair to say that the
17 entire purpose of an emergency planning exercise or of an
18 emergency plan is to direct the entire population of the EPZ
19 to one facility.

20 The fact of the matter is that one is testing or
21 implementing a variety of functions, only one of which is
22 evacuation, and the portion of the public affected is only a
23 percentage, generally taken in this case to be on the order
24 of 10 to 20 percent, although that is now a matter before
25 the Appeal Board itself of evacuating population.

1 The long and short of it is that LILCO does not
2 believe that the colosseum itself as distinguished from
3 LILCO's ability to use a colosseum or other kind of
4 relocation facility is a proper matter before this Board at
5 this point.

6 LILCO also agrees with what I sense was your
7 suggestion, Judge Margulies, that if Suffolk County or New
8 York State or any other intervenor wished to raise the issue
9 of the colosseum itself, they should do so by virtue of a
10 motion to reopen the record in a formal contention and not
11 by a four-line suggestion in a piece of paper followed up by
12 extemporaneous oral argument.

13 JUDGE MARGULIES: I didn't say anything about
14 reopening the record. My intention was to raise the
15 possibility of making it a contention in this proceeding as
16 part of the emergency planning exercise flaw.

17 MR. IRWIN: My understanding, Judge Margulies, is
18 that that would lead you into exactly the trap you wish to
19 avoid, that of becoming diverted into a side issue, but that
20 is something obviously ---

21 JUDGE MARGULIES: I am not passing on the
22 contention at this point. I am just pointing out that that
23 may be an avenue of approach.

24 MR. BROWN: May I reply to Mr. Irwin, please,
25 Judge Margulies?

1 JUDGE MARGULIES: Just let's hear Mr. Bordenick
2 and Mr. Glass and then we will come back to you, Mr. Brown.

3 MR. BORDENICK: I do not believe that the Board
4 has jurisdiction to consider the recent events having to do
5 with the Nassau County Colosseum. I think the Commission
6 was explicit in its memorandum and order, CLI-86-11. It
7 said "continue to defer to the colosseum issue." Therefore,
8 I don't see where it would be very fruitful to have a
9 discussion of the kind that has already taken place this
10 morning continue.

11 I agree with the Board that if the County wants to
12 submit a contention, we will look at the contention. In the
13 abstract I can't say that a contention would be admissible
14 or not admissible. I would have to see the contention. But
15 that is certainly one avenue that is available to the County
16 and the other governments.

17 JUDGE MARGULIES: Mr. Glass.

18 MR. GLASS: FEMA has no comment at this time.

19 JUDGE MARGULIES: Mr. Brown.

20 MR. BROWN: I have several points. Simply in
21 reply to Mr. Bordenick's comment, I think that verges on the
22 most extraordinary proposition that we might have heard in
23 this proceeding, that this Board would not have jurisdiction
24 to deal with the reality that conditions are different from
25 what they were and the Board ought to ignore them. I don't

1 think that is a tenable proposition and I don't think it
2 merits serious consideration.

3 To go to the comments of Mr. Irwin, the law of
4 this case, and we have been through this development of this
5 law specifically with respect to relocation centers and
6 indeed particularly with respect to the identification of
7 the colosseum, the law of the case is that there was a void
8 in the record and it had a preclusionary effect. It meant
9 that the LILCO plan itself was devoid of content on its face
10 worthy of going forward. LILCO had failed its burden of
11 going forward and its burden of proof in that this void
12 existed. LILCO sought to fill that void and now LILCO has
13 seen that void evaporate.

14 The identical void which occurred when Judge
15 Lawrenson ruled and expressed the law of the case that in
16 the absence of a relocation center there is a void, and we
17 believe that void necessarily means that it has a
18 preclusionary effect on the further evaluation of LILCO's
19 plan due to the shortcoming, is one that should have a
20 preclusionary effect on further activities in this
21 litigation.

22 I would point out that in fact roughly a hundred
23 thousand people were told in the make-believe environment of
24 the exercise to go to the colosseum. It wasn't some side
25 issue. It was the central feature of the entire day of the

1 exercise, and without there there was literally no point to
2 that exercise. It was a void in fact and indeed it is a
3 void in law for the very reason that it was earlier in this
4 proceeding when we were in an identical situation.

5 So I think the issue before the Board is how to
6 proceed on the basis of that reality, and I think the
7 preclusionary avenue is the appropriate one.

8 MR. IRWIN: Judge Margulies, if I may, I think Mr.
9 Brown has just illustrated my point.

10 JUDGE MARGULIES: I think we have heard enough
11 argument on this.

12 (Board conferring.)

13 JUDGE MARGULIES: The matter of the Nassau
14 Colosseum as a reception center was previously before this
15 Board. Our decision was appealed and it went up to the
16 Appeal Board and that particular issue was remanded. The
17 remand is not presently in effect. It has been suspended.
18 It is an issue that is not per se before this phase of the
19 Licensing Board's hearing.

20 If intervenors feel that it plays a part in the
21 emergency planning exercise, they may raise it as part of
22 their proposed contentions, and if they do so, we will
23 consider it as part of that submittal.

24 The Board finds that it is a matter not to be
25 placed on the agenda today.

1 MR. BROWN: Well, pardon me, if I might ask. I
2 think you just made a ruling on it, but it is not on the
3 agenda and I am not certain that I understand.

4 JUDGE MARGULIES: Well, the ruling is that we are
5 not going to discuss it. If want me to terminate my ruling
6 at that point, I will do it there.

7 MR. BROWN: We are not going to discuss the merits
8 of the issue today?

9 JUDGE MARGULIES: That is correct.

10 MR. BROWN: If I may ask, with all deference to
11 the Commission, is this something that we can establish a
12 schedule to brief?

13 This is such an underpinning of what is going
14 forward and it has such a preclusionary effect as a matter
15 of logic in fact and surely as a matter of law, given the
16 prior experiences of the parties and the Board in this case,
17 that at a minimum we would ask leave of this Board that a
18 schedule be set for the briefing of this and the holding in
19 abeyance of other matters which we deem to be subsidiary to
20 it.

21 We think it would sell serve the interests of the
22 parties and the Board that we not rush head long into
23 something, a procedure which may well have no relevancy
24 whatsoever. This is a matter on which we believe the proof
25 rests with the governments and we would believe it is in the

1 interest of the Board to have the benefit of the parties'
2 views, and surely our views we would like to submit.

3 (Board conferring.)

4 JUDGE MARGULIES: The Board knows the extent of
5 its jurisdiction and we will not consider this matter
6 separate and apart from the emergency planning exercise
7 problem and not consider it as an independent matter.

8 As I stated before, if you propose to present it
9 as a contention, we will consider it under those
10 circumstances.

11 MR. BROWN: Just so I understand thought, and I am
12 sorry, but just for my own purpose of understanding, we are
13 not permitted to raise this as a matter of law, but we would
14 be permitted to raise this as a matter of fact through a
15 contention; is that correct?

16 JUDGE MARGULIES: I am not foreclosing your, Mr.
17 Brown. You are a very experienced practitioner before the
18 Commission and there may be other avenues before the
19 Commission to bring it before the Commission, but in terms
20 of the Board hearing emergency planning exercise matters
21 concerning its fatal flaws, it does not have a part in it
22 per se as an independent matter.

23 MR. IRWIN: Judge Margulies, excuse me. I have a
24 housekeeping request which I could not have made before
25 now. I would ask the Board's indulgence in asking that _____

1 microphones be removed from this table. They are very live
2 microphones, and I am afraid it may interfere with my
3 ability to consult with co-counsel. They were placed on the
4 table while I was actually speaking before, and I didn't
5 feel I could interrupt, but I was saying I just would feel
6 more comfortable if they were sitting a foot in front of
7 me. I don't mind them being in the room obviously, but I
8 would them not just be sitting right in my face.

9 JUDGE MARGULIES: I assume they belong to the
10 media.

11 MR. IRWIN: Yes, sir.

12 JUDGE MARGULIES: They they could move them back
13 that they are not right before counsel so that their
14 discussions will not be overheard.

15 (At this point the news media removed their
16 microphones from LILCO's counsel table.)

17 MR. BROWN: Judge Margulies, I beg the Board's
18 indulgence, just to make certain that I understand the
19 ruling and that we not go off in the wrong direction, if I
20 might state my understanding, and if it is not correct, I
21 would appreciate the Board's correcting it.

22 The ruling is that we have other avenues available
23 through the Rules of Practice. Am I to interpret that to
24 mean that the Board is referring to the fact that the
25 Commission's order binds it so as to prevent the Board from

1 entertaining our request, and thus if we were to seek to
2 have this Board consider it, it would require our pursuing
3 an avenue of taking it directly before the Commission? In
4 effect and in more simple words, simply that if we feel
5 strongly about this, we should go directly to the Commission
6 to lay the facts out there and seek to get the guidance of
7 the Commission for the benefit of any of the parties here
8 who share our interests?

9 JUDGE MARGULIES: Mr. Brown, I am not going to
10 advise you how to conduct your practice. As I said before,
11 you are a very experienced practitioner and you know the
12 Rules of Practice before the Commission and what the various
13 jurisdictions are of the various bodies before the
14 Commission. You may proceed in any way you may wish before
15 those other bodies. I am saying we will not entertain it.
16 That is my final ruling on it.

17 Moving over to paragraph 2, Basis of Litigation,
18 the Board is at a loss as to what you mean by it. Could you
19 give us some explanation, Mr. Brown, as to what your ---

20 MR. BROWN: Mr. Lanpher is the appropriate counsel
21 to do that.

22 JUDGE MARGULIES: Thank you.

23 MR. PALOMINO: Judge Margulies?

24 JUDGE MARGULIES: Yes.

25 MR. PALOMINO: I have a matter also I would like

1 to raise that I think is dispositive and I think ought to be
2 discussed at this point, and that is in connection with the
3 letter I sent to the members of the Commission and to which
4 LILCO replied. It involves a subsequent event that happened
5 last year, and that event was that the State of New York
6 made a solemn determination through legislation that it
7 wants to take over the Long Island Lighting Company through
8 a public power authority.

9 The State of New York has a long and successful
10 history with public power, and not only that and more
11 significant, this legislation specifically provides that
12 once they do acquire it, and they can acquire it either by a
13 takeover, tender offers or by condemnation, that Shoreham
14 shall not operate and that the Power Authority shall not be
15 able to operate any other nuclear plant, and that as a
16 result of that legislation, it is a determination that
17 Shoreham is not going to open.

18 I think that raises a question as to whether or
19 not we should proceed at all with these proceedings. The
20 fact is and the reality is that the Governor has announced
21 publicly that he intends to promptly and vigorously pursue
22 negotiations to acquire Long Island Lighting Company and it
23 is a reality that we should not ignore by putting heads in
24 the sand like ostriches and has a complete and dispositive
25 effect on all these hearings.

1 It seems to me it would be futile to go ahead in
2 light of this reality, and I was wondering whether the Board
3 felt that it was within its jurisdiction or is that
4 something else that we should possibly take up through other
5 procedures with the Commission?

6 JUDGE MARGULIES: It is a matter that would be
7 outside the jurisdiction of this Board, Mr. Palomino, and if
8 you wish to take it up elsewhere, you may do so.

9 We will now move on to Item No. 2, basis ---

10 MR. BROWN: Pardon me, Judge Margulies, I would
11 like to be heard on this before we go on to the next item.

12 JUDGE MARGULIES: It is so far beyond our
13 jurisdiction that there is no comment needed.

14 MR. BROWN: I think it is central to it, and I
15 would like to ---

16 JUDGE MARGULIES: I have already rules, Mr. Brown.
17 Mr. Lanpher, may we hear from you on Item No. 2.

18 MR. LANPHER: Judge Margulies, I have got to
19 clarify that ruling, that you are not going to allow Suffolk
20 County to make its views known on the question of the impact
21 of the public power legislation that was just enacted by New
22 York State?

23 JUDGE MARGULIES: Mr. Lanpher, we are having one
24 counsel from one side on one item. We are now on 2.

25 MR. LANPHER: On the question of the basis of

1 litigation, I think maybe, Judge Margulies, it makes sense
2 to combine that also with Item 3 if that was your intention
3 to go seriatim through these because they are related, Item
4 3 being Revision 7 and 8 and the LILCO plan.

5 We have had a long history of moving targets in
6 this litigation, and as we get ready to perhaps implement
7 the Commission's order of June 6th, I think it is essential
8 that the parties know what the evidentiary bases are for
9 this litigation.

10 My first question and the reason that this was
11 posed is is it the intention of this Board to admit into
12 evidence the FEMA post-exercise assessment report from April
13 1986, and it is that one of the documents or the only
14 document upon which subsequent litigation is going to be
15 focused?

16 In short, it is important to know with respect to
17 what parties are drafting contentions. We also have a
18 moving target with respect to revisions of the LILCO plan.
19 The exercise, as I understand it, was based on Revision 6 of
20 the plan. If we are supposed to be having a proceeding
21 about the results of the exercise, Revision 6 would appear
22 to be relevant, but there is no per se basis for bringing in
23 Revision 7 and 8, but recent correspondence indicates that
24 Revision 7 is a reality and Revision is coming some time in
25 the future.

1 So if the Board is going to be considering
2 schedules and that kind of information later in this
3 prehearing conference, as it indicated earlier, I think it
4 is absolutely essential that we have a clear understanding,
5 all of the parties, of what the focus of the litigation is
6 going to be on.

7 So I go back to my original question to the
8 Board. Is it the Board's intention that the FEMA post-
9 exercise assessment will be admitted into evidence in this
10 proceeding?

11 JUDGE MARGULIES: Do you wish to be heard?

12 MR. IRWIN: Yes, I do, Judge Margulies. Although
13 I don't hear a motion of any kind from Mr. Lanpher, I think
14 maybe we can help here.

15 The focus of the litigation as I have understood
16 it is to determine on an expedited basis whether the conduct
17 of those events which took place on February 13 involving
18 LERO and observers of the exercise demonstrates a
19 fundamental flaw in a plan which has otherwise been found to
20 be largely acceptable by the Commission. That is the
21 purpose.

22 Whatever documents exist and are relevant to that
23 purpose and are legitimately discoverable may be used, in my
24 view, by counsel to achieve whatever goals they wish to
25 achieve. If Suffolk County wishes to use the post-exercise

1 assessment, I am not here to say that that would be
2 unreasonable. In fact, I think we do intend to use it. But
3 I don't think that anything other than the normal Rules of
4 Discovery, although conducted on an expedited basis, should
5 determine the limits of relevance of documents to be used.

6 In that sense, I think Mr. Lanpher is
7 fundamentally wrong about the exercise being a moving
8 target. Let me explain a little bit about Revisions 7 and 8
9 and the suggestion that there is a moving target.

10 The post-exercise assessment had two degrees of
11 comments on the exercise other than approvals. One was an
12 area called deficiencies. With respect to those, the NRC
13 Staff asked for relatively expedited answers. Those answers
14 are contained in Revision 7.

15 The second area of comment in the post-exercise
16 assessment is what is referred to as ARCA's, or areas of
17 recommended corrective action or required corrective
18 action.

19 Those which are of a lesser degree of urgency are
20 what are contained in Revision 8. Those revisions I suppose
21 might be thought to, depending on what use people wish to
22 make of them, or could contain material relevant to issues
23 being placed in this litigation because if there is an
24 allegation that the exercise was deficient or showed a
25 deficiency in LILCO's plan then a question might arise as to

1 whether or not the content of those subsequent revisions to
2 the plan ought to be felt sufficient to correct whatever
3 deficiency there was.

4 It is within that narrow scope that I think
5 Revisions 7 and 8 might be relevant, but I don't think they
6 are moving targets. They simply are filling, as it were,
7 the pot holes in a pretty good road.

8 MR. BORDENICK: I have heard the moving target
9 argument since the first day I walked in this hearing
10 essentially, and I suppose I will hear it again.

11 The law of this case is that the Board will go
12 with whatever revision is in front of it. As one of the
13 parties pointed out, and I think it was Mr. Lanpher, the
14 exercise was based on Revision 6.

15 I think it is grossly premature for any party to
16 ask the Board to make a ruling or what is or what is not
17 admissible when no party has yet moved anything into
18 evidence.

19 MR. LANPHER: Judge Margulies, maybe the FEMA
20 counsel wants to be heard on this.

21 MR. GLASS: Not on this part.

22 MR. LANPHER: First off, we are being asked to
23 draft contentions concerning the exercise. Now there is a
24 wealth of information that slowly is being made available,
25 and we will get to that at a later time, the fact that much

1 information still is not available.

2 But I think we should stop using these platitudes
3 about, oh, you put in contentions on what you think is
4 relevant. That is just a trick, in my opinion, Judge
5 Margulies.

6 I think if the focus of this is to be the FEMA
7 Exercise Report we ought to just come out and say it. Now
8 if LILCO is talking about these revisions subsequent to the
9 exercise, those aren't results of the exercise. If LILCO
10 thinks those are relevant, I assume that LILCO is going to
11 be filing some contentions with respect to that.

12 The obligations of the parties should not be left
13 in a vacuum at this time. This is a serious proceeding and
14 there are a lot of citizens on Long Island that are very
15 concerned about it.

16 The question that was posed before is just a very
17 simple question. Are we supposed to expect that the FEMA
18 Exercise Report is going to be in evidence in this
19 proceeding. If it is, then that is a focus of the
20 litigation. If it isn't, tell us and maybe we can ignore
21 portions of it. But if that is all going to go into
22 evidence, then we have to focus on that.

23 In short, we have to know what to file contentions
24 on, Judge Margulies.

25 (Board conferring.)

1 JUDGE MARGULIES: The Board in considering Items 2
2 and 3 finds Mr. Bordenick's observation to be correct, that
3 these matters are premature and are not to be taken up at
4 this time.

5 MR. LANPHER: Judge Margulies, we didn't complete
6 Item 3. I hear your ruling, and I think it is incorrect,
7 but could I ask the Board's indulgence on portions of Item
8 3.

9 We ask that the Board inquire of the Staff and
10 FEMA and LILCO as to the schedules for, first, whether any
11 review of Revision 7 is going to be undertaken, what the
12 schedule is for that and LILCO's schedule for Revision 8,
13 which even Mr. Irwin says is probably relevant to this
14 proceeding.

15 (Board conferring.)

16 JUDGE MARGULIES: Mr. Lanpher, that would be a
17 proper matter for discussion in terms of when the applicant
18 proposes to come out with those documents. So we will take
19 up that portion of Item 3 that deals with the scheduling of
20 these documents.

21 MR. LANPHER: And not just the applicant's
22 schedule, but as I said, the NRC Staff and/or FEMA
23 schedules?

24 JUDGE MARGULIES: Exactly.

25 MR. IRWIN: Judge Margulies, should we take it up

1 right now or should ---

2 JUDGE MARGULIES: No. Let's take these items up
3 in order.

4 As to Item 4, Burden of Going Forward, the
5 submittal says the governments believe that in light of the
6 current posture of this licensing proceeding, LILCO has the
7 burden of going forward in any additional litigation.

8 As to Item 4, it was raised before the Commission
9 prior to the issuance of its June 6th, 1986 order. The
10 Commission in ordering the emergency planning exercise issue
11 for hearing rendered the argument in Item 4 moot.

12 What we have here is an ongoing application for an
13 operating license. In an application for an operating
14 license the scope of the Licensing Board hearing is
15 determined by the specific issues material to that
16 determination that are raised by the intervening parties.
17 The emergency planning exercise is but one of what have been
18 many issues raised in the proceeding.

19 In Commission proceedings for operating licenses
20 the intervenors have the burden of going forward and
21 establishing the issues for litigation. That is
22 intervenor's responsibility here. The Commission's decision
23 of June 6th, 1986 is wholly consistent with that practice.
24 Inherently the Commission's decision calls upon intervenors
25 to proceed for it discusses pleadings and practice standards

1 intervenors are to meet in establishing the issues for
2 litigation.

3 The Board will not consider the matter for the
4 agenda because it has already been decided.

5 MS. LETSCHE: Judge Margulies, if I might just get
6 a clarification of your ruling. I heard you say that it is
7 the obligation of intervenors to raise issues which they
8 desire to have litigated in an ongoing licensing
9 proceeding.

10 The point which we intended to raise, and maybe it
11 wasn't clear in our proposed agenda, was the intervenors
12 have no need and no desire for any additional litigation in
13 this proceeding because the license has already been denied.

14 If there is any need or desire for any additional
15 litigation in connection with this license application, that
16 is something which presumably LILCO would want to request
17 this Board to pursue.

18 The point which we intended to make here was that
19 if there is to be additional litigation, the party which
20 desires to change the current status of the litigation,
21 which is that the full power operating license has been
22 denied, that party has the burden of setting forth what it
23 believes should be litigate and the basis under the
24 Commission's Rules of Practice for the entitlement to
25 conduct that additional litigation.

1 So I really don't understand why it is in the
2 context of this proceeding that the intervenors would have
3 any obligation to raise issues with respect to this
4 exercise.

5 Can you clarify your ruling for me?

6 JUDGE MARGULIES: Yes. Your basic premise is
7 incorrect. The application in this proceeding has not been
8 denied. The matter of the application is presently
9 pending. This Licensing Board came out with its decision
10 stating that the license should be denied, but that is not
11 the final action of the Commission.

12 The matter continues to pend before the Commission
13 and all the issues are presently open.

14 MS. LETSCHE: If I might respond, Judge
15 Margulies. Under the Commission's case law, and I can refer
16 you to South Carolina Electric and Gas Company, which is the
17 Sumner Case, 16 NRC 958. If a party has prevailed, even in
18 a Licensing Board decision, which is what happened in this
19 case, that party is not in a position, according to that
20 decision and cases cited within it, to request or seek
21 additional litigation because they have won.

22 Now I understand your point that your decision,
23 which was affirmed by the Appeal Board, is pending before
24 the NRC, but until that has been reversed, it is the ruling
25 and the law of this case that the license is denied.

1 Under the Commission's own case law, we as the
2 prevailing party here are not in a position to request
3 additional litigation, and it is only the party who seeks to
4 change the results which is at that point in existence that
5 has the obligation and is entitled to at least attempt to
6 meet the Commission's rules and justify additional
7 litigation, and in this case that is LILCO.

8 If they believe that that exercise provides a
9 basis to change the result which now exists in this case,
10 then they have the burden of setting forth their basis for
11 that and why they believe they are entitled to litigation,
12 and that is really the point which is supported by the
13 Commission's own case law.

14 (Board conferring.)

15 JUDGE SHON: Ms. Letsche, you sort of surprise
16 me. It seems to me that in this rather special proceeding
17 the Commission has given you an opportunity to have, so to
18 speak, two strings to your bow. Should the presently
19 existing decision on this part of this Licensing Board to
20 deny the license be reversed by the Commission or by an
21 Appeals Board or by anyone else, you would still have an
22 opportunity to show that for some reason or other involving
23 a fundamental flaw this exercise that was conducted in
24 February showed that it was impossible to achieve a proper
25 emergency plan one way or another.

1 Are you telling us now that you are not interested
2 in that opportunity and that you don't want to take this up,
3 because if you are, you know, you save us a lot of trouble
4 up here.

5 MS. LETSCHE: Judge Shon, the premise of your
6 question was if there is a reversal and so there is some
7 need to proceed. The present status of this case is that
8 this Board and the Appeal Board found a fundamental flaw in
9 LILCO's plan. It is the position of the governments that
10 that exercise is completely irrelevant with respect to that
11 fundamental flaw and did nothing to change it. And in light
12 of that ruling, there is no need to spend anybody's time or
13 effort litigating what happened on February 13th when in
14 fact none of that could ever happen in real life anyway.

15 Now if there were some ruling which said that
16 there was not already the most fundamental flaw in LILCO's
17 plan and that the Commission was nonetheless going to issue
18 a license, at that point clearly the governments would
19 continue to press their position which is that this plan
20 can't be implemented and the plan should not be licensed.

21 But until that condition happens, the burden to
22 seek any additional litigation or try to make any additional
23 record about the implementability of that plan under the
24 Commission's own case law is upon the applicant because they
25 are the party who have list and who wish to change the

1 result of the prior litigation.

2 The burden is not on intervenors to bid against
3 themselves essentially or to try to win two times. This
4 Board and the Appeals Board have already found that the
5 LILCO has a fundamental fatal flaw, and that is the end of
6 it unless something changes it.

7 JUDGE SHON: Are you telling me then that is how
8 you want to leave it, at that and you don't care to pursue
9 the matter further, that even given the opportunity, a very
10 unusual thing, that given the opportunity to litigate this
11 special phase, you would rather not do so because you feel
12 that confident?

13 MS. LETSCHE: If this Board rules that LILCO in
14 fact, in your opinion, does not have the burden to go
15 forward with this litigation, but that instead the
16 intervenors have the burden of going forward, while we
17 believe that would be a clearly erroneous ruling as a matter
18 of law, we would proceed in compliance with the Board's
19 ruling.

20 The point made here in raising this as an agenda
21 item was to focus for this Board the Commission's own case
22 law and the status of this case and to urge you to recognize
23 that given this unusual circumstance, as you put it, Judge
24 Shon, where a plan has already been found to be fatally
25 defective, that there is no obligation on the part of the _____

1 intervenors to try to prove that a second time, and that in
2 fact the applicant, if they want to change that result, has
3 the burden of coming forward and identifying the issues and
4 attempting to have that additional litigation.

5 JUDGE MARGULIES: The Board has ruled and stands
6 on its ruling.

7 VOICE FROM THE AUDIENCE: What ruling?

8 JUDGE MARGULIES: The ruling that it is not part
9 of the agenda that has already been previously decided.

10 No. 5, Data Requests, this is a matter that we
11 will place on the agenda.

12 No. 6, FEMA personnel and their availability, we
13 will place it on the agenda. Perhaps it would be more
14 effective to discuss it as part of scheduling rather than to
15 discuss it as a separate topic at the end.

16 No. 7, Limited Appearance Statements, we will put
17 that on the agenda.

18 Let's take a 15-minute recess.

19 (Recess taken.)

20 JUDGE MARGULIES: Please come to order.

21 MR. LANPHER: Judge Margulies, during the recess,
22 one of the persons who had hoped to address the Board later
23 in this session concerning the scheduling of limited
24 appearance statements informed me that one of the people has
25 to leave at 11 o'clock this morning, and if it is convenient

1 for the Board to take up that item of the agenda sometime
2 before 11, they would very much appreciate it.

3 JUDGE MARGULIES: Let's take up the limited
4 appearance statement right now.

5 MR. LANPHER: Thank you, Judge.

6 JUDGE MARGULIES: Is there anything that you wish
7 to add to that Item 7, Mr. Lanpher?

8 MR. LANPHER: All I would like to add is what is
9 stated there, that there is a need for limited appearance
10 statements. Suffolk County strongly supports the requests
11 that I know people would like to make directly to the Board
12 today that limited appearance statements be scheduled at a
13 convenient time at convenient locations, and I believe there
14 are three people who would like to briefly address the Board
15 on this matter.

16 JUDGE MARGULIES: Mr. Irwin.

17 MR. IRWIN: I take it these are limited appearance
18 statements about limited appearance statements. LILCO
19 doesn't object in principle, although I don't know why we
20 need three people, as indicated.

21 JUDGE MARGULIES: We haven't reached the point
22 where we are going to hear from these people, yet, Mr.
23 Lanpher.

24 MR. IRWIN: LILCO doesn't object to the
25 consideration of limited appearance statements, although I

1 frankly believe that scheduling of them can be conducted
2 through counsel today. Obviously Mr. Lanpher knows a good
3 deal about the plans of the people who would like to make
4 limited appearance statements. He obviously knows more than
5 I do.

6 JUDGE MARGULIES: Mr. Bordenick.

7 MR. BORDENICK: The staff certainly has no
8 objection to the public making limited appearance statements
9 at the appropriate time. Actually it would be my position
10 that that could have been discussed at a later prehearing
11 conference as to the actual dates and places and so forth.

12 I don't know what these people want to say this
13 morning, but it is highly unusual to hear limited appearance
14 statements at a prehearing conference.

15 MR. LANPHER: Judge Margulies, it is my
16 understanding that these people do not want to address the
17 Board for the purpose of making limited appearance
18 statements today. They want to impress upon the Board the
19 need to schedule those and the need to schedule them at more
20 than one location because of the great interest in this
21 proceeding.

22 Now I don't like to summarize what I think they
23 are going to say because they haven't told me. I would be
24 guessing. So I think it would be appropriate for the Board
25 to hear very briefly from these representatives of the

1 public.

2 (Board conferring.)

3 JUDGE MARGULIES: The Board feels that limited
4 appearance statements are in order, and we will have limited
5 appearances in this proceeding at the appropriate time. The
6 scheduling of limited appearances is not appropriate at this
7 time. It is not customary to do so. It is much too early.

8 VOICES FROM THE AUDIENCE: When?

9 JUDGE MARGULIES: If we are going to have comments
10 from the spectators group, we will have to have you removed,
11 sir.

12 MR. LANPHER: Judge Margulies, I can understand
13 that you may not want to pick a precise date today. I don't
14 think it is too early at all. These citizens wanted to make
15 their views known before FEMA right after the exercise and
16 they were barred from having that opportunity, but I think
17 they should be scheduled as expeditiously as possible.

18 I also know that they want to impress upon this
19 Board the need to for at least three locations for limited
20 appearance statements, in Nassau County, in Western Suffolk
21 County, the Western EPZ, and in Eastern Suffolk County, the
22 eastern portion of the EPZ. I know at least those three
23 locations they would like to address the Board about.

24 Is it your ruling that these citizens cannot
25 address the Board today?

1 JUDGE MARGULIES: That is correct. That is not
2 the usual practice and we are not deviating from our usual
3 practice today.

4 MR. BORDENICK: Judge Margulies?

5 JUDGE MARGULIES: Yes.

6 MR. BORDENICK: I would like to make a suggestion
7 to the members of the public. They are certainly free to
8 write in to the Board and making suggestions, and I am sure
9 the Board will consider their suggestions.

10 MR. LANPHER: Judge Margulies, when, without
11 setting a date today, when do you intend to reach a decision
12 on scheduling such statements?

13 JUDGE MARGULIES: The scheduling of such
14 statements will be in proximity to the holding of hearings,
15 and when that is to occur I certainly don't know today or at
16 this point anyway. But limited appearances are welcome and
17 they will be welcomed orally or in writing, and if the
18 parties have any suggestions, they can write into the Board
19 or apprise counsel for Staff as well as intervenors.

20 That disposes of Item 7.

21 JUDGE MARGULIES: We move to Item Roman numeral
22 I(a) with a proposal that contentions be filed no later than
23 July 15th.

24 MR. IRWIN: Judge Margulies?

25 JUDGE MARGULIES: Yes.

1 MR. IRWIN: Let me make two suggestions with
2 respect to this overall schedule. The remaining items from
3 the paper filed by Suffolk County, et al., take up issues
4 which I think have corollaries in this schedule and it might
5 be useful to consider them as we get down this schedule.

6 The second matter I wish to suggest is that
7 although this schedule is laid out with a framework which
8 includes summary disposition motions and dealing with them
9 prior to trial, I would like to exclude the possibility that
10 there may be some issues as to which we believe that summary
11 disposition would not probably be productive and there is as
12 to them no reason to wait until the completion of the entire
13 summary disposition phase to proceed toward hearing.

14 This may not be the time to suggest what the
15 nature of that framework would be, but I would like the
16 Board to know and the other parties to know that we would
17 like to think about two kinds of parallel practices,
18 depending upon the nature of the issue, and we would be
19 happy to expedite the focusing of which issues we believe
20 fall into which category as soon as the Board rules on
21 contentions, but we could consider the nature of parallel
22 schedules today.

23 JUDGE MARGULIES: Let's take up Items (a), (b),
24 (c) and (d) all at once. Mr. Lanpher, do you want to ---

25 MR. LANPHER: Before getting to that, I think one

1 thing that Mr. Irwin says is correct. The items that you
2 decided that you would consider from our schedule that you
3 held over, and I guess a portion of Item 3 plus Items 5 and
4 6, which are the data requests and the FEMA personnel items,
5 those are really critical threshold matters that ought to be
6 dealt with before we get down to any nitty-gritties of a
7 schedule.

8 So I think we should take those up first and then
9 come back to these other matters.

10 JUDGE MARGULIES: Is there any objection?

11 MR. IRWIN: Yes, because I think they all sort of
12 flow together, but it is not a serious objection.

13 MR. BORDENICK: No objection.

14 (Board conferring.)

15 JUDGE MARGULIES: Do you propose, Mr. Lanpher,
16 that we proceed with any individual item first?

17 MR. LANPHER: Well, I guess whatever you deem to
18 remain from Item 3, Judge Margulies, and then go on to Items
19 5 and 6 from our agenda. I believe what remains from Item 3
20 was that you were going to inquire of the Staff, FEMA and
21 LILCO about schedules for review of Revision 7 and the
22 submission of Revision 8.

23 JUDGE MARGULIES: Yes, let's proceed with that.

24 MR. IRWIN: With respect to Revision 7, as
25 everyone knows, LILCO has submitted that to the NRC Staff I

1 believe about two to three weeks ago, and I am not sure
2 whether the staff has transmitted it to FEMA for its review.

3 One thing that should be not forgotten is
4 something I mentioned a little while ago, and that is that
5 the only revision that deals with what FEMA categorized as
6 deficiencies is Revision 7, and therefore LILCO's views on
7 the correction of those items are already in the public
8 domain.

9 Revision 8, which deals with the minor areas
10 requiring corrective action specified in the report will be
11 ready we believe by mid-September.

12 Now one thing that is worth bearing in mind is
13 that there is a matrix which has already been submitted by
14 LILCO as a part I believe of its Revision 7 submission.
15 There is a matrix which outlines the areas for corrective
16 action and summarizes what LILCO intends to do.

17 So the parties are already on notice of not only
18 what FEMA things but what LILCO thinks is its response in
19 detail as to the deficiencies and in summary in the matrix
20 already submitted. Therefore, when we are talking about
21 schedule, let's bear those facts of knowledge and notice in
22 mind.

23 JUDGE MARGULIES: Mr. Bordenick.

24 MR. BORDENICK: Mr. Irwin is correct. The
25 Revision 7 was forwarded to the staff by LILCO several weeks

1 ago. I talked to the people whose responsibility it is to
2 ask FEMA to make the review yesterday, and I was informed
3 that the formal request of FEMA to review Revision 7 was in
4 the process of going out or it may have already gone out,
5 and that FEMA would be asked to make the review in a timely
6 manner.

7 I think we would have to hear from Mr. Glass as to
8 when they would make that review.

9 MR. GLASS: We have not of course gotten a copy of
10 that request yet. I don't know what action, whether FEMA
11 will agree at this particular juncture to undertake that
12 review considering other workloads, but they would need
13 approximately 75 days to complete a RAC review of that
14 revision.

15 JUDGE MARGULIES: Well, while we have you here,
16 Mr. Glass, could you tell us what the situation is with FEMA
17 personnel?

18 MR. GLASS: FEMA has just undergone a RIF, which
19 is a reduction in force that has involved voluntary early
20 retirements and a number of involuntary separations. The
21 regional staff has gone from approximately 70 people down to
22 about 40 people. The individual that most impacts upon this
23 hearing is that Mr. Kowieski has been reassigned from his
24 present job to another function unrelated to radiological
25 emergency planning, and therefore we do not expect that he

1 would be available for this hearing.

2 We feel that the other three gentlemen probably
3 that have appeared in front of this body will probably be
4 available. The only concern we will have to watch is the
5 scheduling since Mr. Baldwin is intimately involved also in
6 the Seabrook proceeding. So if we can take light of that
7 fact, hopefully we will be able to proceed.

8 The impact of losing Mr. Kowieski should be
9 minimal on the activities that took place at the actual
10 exercise and the results of the exercise as there are other
11 people involved.

12 As to the material involving the preparations for
13 the exercise, Mr. Kowieski was intimately involved, and I do
14 think that there is anybody else who can take his place in
15 that particular area, nor do I think there is anybody else
16 who has information in that particular area.

17 We are also aware of the fact that we are closing
18 down as part of our budgetary problems all the regional
19 counsel offices. Right now there are only two regional
20 counsel offices left. Our two offices, mine included, are
21 scheduled to be closed October 1st.

22 I have made a request to find out who will be
23 taking over for this hearing, and I have not been informed
24 yet, but I hope we will be able to handle an orderly
25 transition. That may also indicate some of the problems

1 that we are having with getting out some of the materials.
2 I know it is on another section here.

3 We have provided some materials. We have already
4 sent out in May the controller and simulator plan for the
5 Shoreham exercise. We provided copies to Ms. Letsche and to
6 the others. Last night I sent out 11 documents, one of
7 which was over 240 pages, to the parties.

8 The results are that in order to do this, I
9 Xeroxed it, I re-Dacted it, I collated it, I typed the cover
10 letter and I personally put it in the mail, and that is the
11 reason we have problems about getting things out.

12 I am also winding up the open litigation in our
13 region, and that is keeping me out of the office two days a
14 week because we are trying to close out as many cases as
15 possible and we have had expedited requests in front of
16 hearings and in front of various Federal Judges to
17 accomplish that goal. So that is the situation that we are
18 involved in right now.

19 What would be helpful is if it could be agreed at
20 least for the copies that I am making that if I could be
21 limited to making one set for the intervenors and asking
22 them to share, it would be appreciated. We did do that on
23 one set of materials, and Ms. Letsche was very cooperative
24 on that, and LILCO was helpful in providing duplication on
25 those particular materials.

1 The other materials, it is just the fact that I
2 had to do it last night myself that causes a problem, and if
3 they would consent to that, that would save us some time.

4 JUDGE MARGULIES: Are you saying, Mr. Glass, that
5 you will not be part of this proceeding as of October 1st?

6 MR. GLASS: I don't intend to work for free.

7 (Laughter.)

8 Actually, I wouldn't even have authority to appear
9 because my job ---

10 JUDGE MARGULIES: Well, I didn't know if you were
11 being transferred to headquarters.

12 MR. GLASS: I am being eliminated. I have not
13 gotten formal documentation of it, but the budget reports
14 indicate that and I have been told unofficially that we are
15 closing all regional operations. We have already let go of
16 two others in March and, as I say, myself and the gentleman
17 in Atlanta are the last two.

18 JUDGE MARGULIES: Is there anything further in
19 these two areas that the parties wish to discuss?

20 MR. LANPHER: Judge Margulies?

21 JUDGE MARGULIES: Yes.

22 MR. LANPHER: It is my understanding, and maybe
23 Mr. Glass can answer this, it is my understanding that Mr.
24 Kowieski was the author of the FEMA Assessment Report. Is
25 that correct.

1 MR. GLASS: He is one of the people involved, but
2 we had a number of people involved. He did not do the
3 writing. He reviews it afterwards. We use other people to
4 help us write it.

5 MR. LANPHER: But he was the lead FEMA person in
6 charge of ---

7 MR. GLASS: He was the lead coordinator with Mr.
8 McIntyre. We will have people who will be able to address
9 the issues as to the results and the findings of that
10 report. The areas that we will not be able to address
11 without Mr. Kowieski deal with the material leading up to
12 the preparation of that exercise, for preparations for the
13 actual exercise itself, but the results, the review of the
14 exercise and the materials as reviewed thereafter, we will
15 be able to provide a panel that will be knowledgeable and
16 will be able to answer those questions.

17 MR. LANPHER: Mr. Glass indicated I believe that
18 seven documents were mailed out last night ---

19 MR. GLASS: Eleven.

20 MR. LANPHER: Eleven, excuse me. Obviously, we
21 haven't seen those. So could he please describe what those
22 documents are?

23 MR. GLASS: If you want, at the break I can give
24 you a copy of the letter. If you want it on the record, I
25 will give it to you on the record just to save time.

1 JUDGE MARGULIES: How extensive? If it isn't very
2 extensive ---

3 MR. GLASS: It is 11 items. Basically the
4 itinerary for the Shoreham exercise, the control
5 organization management plan, the Shoreham exercise
6 evaluator organization, the evaluator assignment location
7 and structures instructions, the exercise evaluation
8 critique form, the maps and address directory, the
9 memorandum from Kowieski to the observers and controller
10 simulators, the emergency classification time line, the
11 messages that were planned to be used, the simulator siren
12 failure, the impediment to evacuation, traffic control
13 points, bus routes of evacuation if mobility impaired and
14 the forms that were going to be used with those messages.
15 Those are the blank forms. We do have other material, and
16 we are in the process, as I say, or I am in the process of
17 duplicating.

18 Do I have the parties' consent that I can send
19 just one copy to Suffolk County?

20 MR. LANPHER: We have agreed to that from the
21 beginning.

22 MR. GLASS: Thank you.

23 MR. LANPHER: But just so I understand, none of
24 the logs were sent out yet?

25 MR. GLASS: I am still going through them, and it

1 will probably be next week until I can get to those because
2 I am scheduled for I believe two meetings out of the office
3 this week.

4 MR. IRWIN: Those are the FEMA logs you are
5 referring to, because I believe the LILCO logs have already
6 been transmitted some time ago?

7 MR. GLASS: Yes, it is the FEMA logs. We have
8 already produced two or three boxes of the LILCO logs.

9 JUDGE MARGULIES: Is there anything further on
10 Items 3 and 6?

11 MR. BORDENICK: Judge Margulies, I just wanted to
12 add that I think Mr. Glass has explained the FEMA regional
13 situation, and I just wanted to add the fact that the NRC
14 Staff has been in contact with the FEMA headquarters and of
15 course we will try to do everything possible to expedite and
16 facilitate the dealings between FEMA and the NRC absent the
17 past dealings with the region.

18 JUDGE MARGULIES: Let's on to data requests.

19 MS. LETSCHE: Judge Margulies, this is something
20 that we mentioned during the conference call and in some of
21 our prior filings and referred to by Mr. Glass, and I will
22 be very brief.

23 We have received from Mr. Glass copies of
24 documents which FEMA received from LILCO, and we received
25 from LILCO documents which they produced for FEMA. So we

1 have got basically a duplicate set with some slight
2 differences of documents generated by LILCO, or at least a
3 part of the documents generated by LILCO.

4 There are two major sets of information, however,
5 that are outstanding, and the items which Mr. Glass
6 indicated he sent out last night do not deal with those two
7 areas.

8 They are, No. 1, FEMA generated documents, that is
9 documents generated during the exercise by FEMA, and we
10 refer to those as logs. I don't know exactly what was
11 generated, but I do know that there were at least simulator
12 logs, and presumably there were other logs kept by the FEMA
13 or other non-LILCO personnel, the observers and the
14 controllers of the exercise. We have received no
15 documentation concerning what was happening on that end of
16 the exercise.

17 All we have is the recipient end, that is LILCO's
18 end of what they were generating during the exercise. So
19 that is one big category of information which is missing,
20 and it makes it very difficult to understand and to evaluate
21 what happened during the exercise when you only know when
22 half of the communicating duo knew of something.

23 We need to know what it was that was being
24 generated by the FEMA or other non-LILCO parties, and that
25 is information that we have been promised since before the

1 exercise and have been trying to get since a week after the
2 exercise, that is beginning on February 20th.

3 There also is the matter of information from FEMA
4 concerning the preparation of the scenario and the pre-
5 exercise preparation materials, which I gather we have now
6 heard are forever unavailable since Mr. Kowieski seems to be
7 the only person with knowledge of those and he has
8 apparently disappeared.

9 So that is a problem that I don't know how is
10 going to be dealt with and perhaps Mr. Glass has a
11 suggestion as to how we are ever going to obtain that
12 information which again was promised since before the
13 exercise and clearly is important in understanding the
14 scenario and figuring out what happened during the
15 exercise. Those are the FEMA related documents that fall
16 under our category of data requests.

17 There is another area, the second area, which is
18 documents from LILCO. We did receive, as I said, a number
19 or a large number of documents which were generated by
20 LILCO, various messages and things that were written by the
21 people who were "playing" during the exercise.

22 There is one big category, though, that LILCO has
23 refused to provide us, and those are the documents generated
24 at the EOF. LILCO has taken the position that we are not
25 entitled to those documents because they call the EOF an

1 onsite area.

2 The fact is that during the exercise FEMA had
3 observers at the EOF. There are objectives related to the
4 FEMA review of the offsite plan, related to what happened at
5 the EOF, including relationships between LILCO and the
6 simulators who were at the EOF, people who were purportedly
7 playing the rules of state and local governmental officials.

8 We have been denied those documents which are
9 clearly relevant to FEMA's observation of the exercise and
10 relevant in our evaluation of what happened offsite because
11 the offsite LERO personnel who were doing all the dose
12 assessment work are, according to the LILCO offsite plan,
13 required to rely upon and deal with information generated by
14 the EOF. That is a very important link in the carrying out
15 or implementing of this offsite plan and we have just been
16 just flat out denied any access to any of that data by
17 LILCO.

18 So those are the two categories of documents, one
19 batch from FEMA and one from LILCO that we have not
20 received, and we can't evaluate in any meaningful way what
21 went on during the exercise without either of those sets of
22 documents.

23 JUDGE MARGULIES: Could you help us, Mr. Glass,
24 about making those documents available?

25 MR. GLASS: As far as the logs, I will try to do _____

1 it. As I say, I was there until 8:30 last night doing it
2 myself when the machine is free. I mean there is only so
3 much I can do, and I am trying my best with limited
4 facilities, including the fact that we ran out of Xerox
5 paper. We have problems.

6 I mean, it has just gotten to be a problem that
7 maybe you don't deal with in the private sector, but in the
8 government we do have these particular problems.

9 MR. LATHAM: Mr. Glass, maybe you can make your
10 set available to us and we will copy them and save you the
11 aggravation of standing over a Xerox machine.

12 MR. GLASS: Well, there are certain things that I
13 certainly as an attorney and you as an attorney know that I
14 have to review and determine what we are doing, and
15 therefore, it is something that only I can do in regard to
16 that.

17 MR. LATHAM: Yes, but it is a matter that has been
18 going on for five months, and at least when you complete
19 that aspect of the work, then you need not be saddled with
20 the aggravation of doing the Xeroxing.

21 MR. GLASS: Maybe we can work out a similar
22 arrangement that we worked out the last time. The only
23 problem is the last time when it was sent out to be Xeroxed,
24 that is when we had some problems about copies being messed
25 up when they came back and having to be resorted. So it

1 does cause us some problems. But I am willing to work with
2 you informally on any method that will expedite this.

3 We only got the particular logs back in about May,
4 or I got them in my hands, because up to that point they
5 were being used to prepare the post-exercise assessments.

6 JUDGE MARGULIES: Mr. Latham has made an offer,
7 and it is something that you should seriously explore.

8 MR. GLASS: I certainly will, Your Honor.

9 MR. IRWIN: Judge Margulies, I don't understand
10 Mr. Glass to be suggesting that he is to be doing anything
11 more than review these documents before they are copied. We
12 obviously would be willing to help expedite their projection
13 also in any way we can.

14 As to two other categories of documents which were
15 mentioned by Ms. Letsche, the FEMA logs, I am not sure
16 exactly what she is referring to, although I understand them
17 to include logs kept by participants known as simulators,
18 participants who were simulating the roles of state and
19 county personnel during the exercise.

20 There were, as I understand it, only a relatively
21 small number of those logs, and maybe on the order of a
22 dozen or fewer such people, and the other end of
23 communications, i.e., the receiving end of communications
24 from them to exercise players are recorded in the player's
25 log. So we are not totally bereft of knowing of what that _____

1 small number of people were doing.

2 The long and short of it is that I hear Ms.
3 Letsche's suggestion that those are an insuperable obstacle
4 to proceeding with the framing of contentions, and I don't
5 think they would be.

6 With respect to the documents that relate to the
7 EOF, the EOF is an onsite facility. It communicates with
8 offsite facilities, particularly the EOC. Documents from
9 the EOC end of those communications are available.
10 Secondly, a major source of common information, namely, data
11 generated by a computer which is resident in I believe the
12 EOF also printout identically in the EOC. So the data base
13 from which the missing end of those conversations would take
14 place, or a significant portion of that data base is already
15 available.

16 The long and short of it is that if there are
17 problems with respect to production of EOC documents, my
18 suggestion is that we await the filing of contentions and
19 see what kinds of data production with respect to them need
20 to be made.

21 Other than that, Ms. Letsche, LILCO has produced
22 all the documents, all the player and open documents from
23 the exercise.

24 MS. LETSCHE: If I could just respond, Judge
25 Margulies. I heard Mr. Glass talk about the logs that he is

1 going to try to review. I didn't hear any comment on the
2 other materials which apparently Mr. Kowieski is the sole
3 responsible person who knows anything about them, and I
4 don't know what the status of those is.

5 MR. GLASS: The other documents, Mr. Kowieski has
6 given me a set of those, and I am reviewing them and I hope
7 to get them out for duplicating.

8 MS. LETSCHE: In response to Mr. Irwin's comments
9 about the EOF documents, we have received documents from the
10 EOC and, frankly, we have tried to make some sense out of
11 them and what was going on. We have been in informal
12 communication with counsel for LILCO to try to comprehend
13 these things, and we literally can't because there is an
14 entire body of data out there, and apparently there were
15 telephone calls and communications between the EOC and the
16 EOF in which that data was discussed.

17 It is silly to talk about drafting contentions and
18 then after we draft contentions figure out what other facts
19 we should have known.

20 The fact is that one of the things that was
21 evaluated in terms of offsite implementation by FEMA during
22 this exercise was the following objective, and I will quote
23 from the post-exercise assessment, ". . . whether or not at
24 the EOF they could demonstrate the ability to coordinate the
25 dose projections based on plant data and field measurements

1 with county and/or state officials (role or state and/or
2 county officials will be simulated by FEMA designated
3 personnel)."

4 That was something that FEMA evaluated, and to
5 suggest that we are supposed to be litigating these exercise
6 results without any of the data that came from that facility
7 which FEMA presumably had access to in order to make its
8 evaluation on whether or not this objective was met doesn't
9 make any sense. That is the basis for our position that we
10 should receive that information if we are expected to file
11 contentions on it.

12 MR. IRWIN: I don't think it is fair that there is
13 a void or a vacuum of information on what happened at the
14 EOF or anywhere else to the extent that what happened is
15 even relevant to the offsite exercise because the EOF itself
16 is an onsite facility.

17 What is directly relevant is what happened
18 beginning at the EOC and other facilities with information
19 generated or messages which were transmitted from the EOF.

20 We have received some communication recently from
21 counsel for Suffolk County regarding a rather small sample
22 of documents, about this large. We responded to that in
23 writing yesterday, and we are working with them on narrowing
24 areas where there are legitimate disputes.

25 My feeling is we may have document disputes later,

1 but there is neither sufficient absence of information about
2 this facility or, more importantly, how the offsite players
3 reacted to information from it to give rise to an argument
4 that contentions can't be filed, nor is there an absence of
5 information sufficient to proceed generally on it.

6 JUDGE MARGULIES: Yes, Mr. Latham.

7 MR. LATHAM: Judge Margulies, I just wanted to
8 follow up with Mr. Glass on this question of Mr. Kowieski.
9 It seemed to be suggested that Mr. Kowieski will be, or some
10 formal determination has been made that he is entirely
11 unavailable for all aspects of the litigation in this
12 proceeding.

13 MR. GLASS: What I said is Mr. Kowieski has been --
14 he has been replaced. The way a government RIF works is
15 that certain peoples' jobs are scheduled to be eliminated.
16 These people based on seniority have then a right to bump
17 other people out of their jobs. It has nothing to do with
18 the quality of work or performance.

19 What ended up happening is a gentleman with senior
20 seniority to Mr. Kowieski bounced Mr. Kowieski out of his
21 job, and Mr. Kowieski had to retreat into another position,
22 and that other position is completely unrelated to the
23 radiological emergency preparedness program. He still is
24 employed by FEMA, but he has other duties at this particular
25 point.

1 MR. LATHAM: My question is other than perhaps
2 some scheduling constraints in terms of the normal discovery
3 process and his appearance at hearings, depositions and
4 other elements of this proceeding, is there any reason why
5 he will not be made available?

6 MR. GLASS: Right now he is not too happy, and I
7 don't know if I can convince him to show ---

8 MR. LATHAM: Well, his happiness is not terribly
9 relevant to the conduct of this proceeding, and I think that
10 people are more interested in finding out whether there is
11 some validity to this exercise.

12 MR. GLASS: There may be ---

13 MR. LATHAM: Let me just finish, Mr. Glass. If he
14 is deemed to be relevant to this proceeding, can we assume
15 that he will be made available and produce?

16 MR. GLASS: At this point it is premature. By the
17 time you get to it there will be a different attorney
18 handling it and I would rather leave it. I am not trying to
19 put you off. There may be procedures whereby Mr. Kowieski
20 could be ordered to appear. But you have to realize this is
21 a gentleman who has put a lot of work and a lot of
22 additional hours into the job and has done a very good job
23 at it, and was rewarded by being removed from the system.

24 MR. LATHAM: But that has nothing to do with the
25 fact that FEMA had a responsibility and he had a

1 responsibility with regard to this exercise, and maybe we
2 ought to scrap that portion of FEMA's review and start
3 again.

4 Judge Margulies, I wonder if we could get some
5 assistance perhaps in the form of a ruling from you.

6 MR. GLASS: I think it is premature on the
7 question of producing Mr. Kowieski.

8 Judge Margulies, it is premature to ask for a
9 ruling at this time. The agency is trying to see what can
10 be done. Mr. Kowieski has an appeal pending for the fact
11 that he has been removed from his job, and there are a lot
12 of other factors that are ongoing well before we are ever
13 going to get to hearing where we may be in a position that
14 Mr. Kowieski will be back or we may have a situation where
15 Mr. Kowieski as a private citizen is not longer working for
16 the government. I suspect one of those two will occur
17 before we are at hearing.

18 Therefore, it is premature at this time for any
19 sort of ruling in that regard to tell a federal agency who
20 they have to produce as their witness. I think we have
21 already had, if you want, you know, argument on the merits,
22 I think we have already had the issue come up of whether
23 FEMA has the right to choose who its own witnesses are and I
24 think it has been upheld that FEMA does have the right to
25 choose its own witnesses.

1 MS. LETSCHE: Judge Margulies, if I might just
2 provide a little factual background because most of what Mr.
3 Glass is now referring to is history that we were all
4 involved in, but I am not sure you were.

5 Mr. Kowieski has been the Chairman of the RAC, the
6 Regional Assistance Committee, which has been evaluating the
7 LILCO plan from the beginning back when it was Rev. 1 and
8 they are now up to Rev. 7. Mr. Kowieski has chaired that
9 committee and, according to his prior testimony, he was
10 responsible for collating and organizing all the comments on
11 all the prior RAC reviews of the LILCO plan and was, as Mr.
12 Glass said, completely responsible for creating and
13 organizing this entire February 13th exercise and at least
14 in coordinating he obviously had some assistance from the
15 post-exercise assessment which is obviously is going to be
16 an important piece of this litigation.

17 I support Mr. Latham's request that we get some
18 kind of a ruling from this Board that Mr. Kowieski who is
19 the central figure in this whole FEMA event of February 13
20 be made available and that we not be asked to proceed along
21 this path of filing contentions and taking lots of time and
22 filing lots of motions if it turns out that this central
23 character is never going to be available to deal with this
24 issue.

25 MR. GLASS: No. 1, Judge Margulies, I again repeat

1 that this issue is premature. If we are asked to deal with
2 the merits, there have been rulings in the past that FEMA
3 does have the authority to choose who its own witnesses are.

4 No. 2, FEMA has not determined yet what will be
5 done in regard to Mr. Kowieski, if there are other avenues
6 open or whether we will even have jurisdiction over Mr.
7 Kowieski, if Mr. Kowieski is still employed and if he is
8 still dissatisfied over what has occurred in this situation.

9 We have indicated that Mr. Kowieski has been
10 certainly actively involved in this events leading up to the
11 exercise, but he was not the only individual, and we
12 certainly will be able to be prepared to go forward on what
13 took place at the exercise and the impact. Whether it is
14 Mr. Kowieski or somebody else, it would only have an impact
15 on the weight to be given to the FEMA testimony.

16 (Board conferring.)

17 JUDGE MARGULIES: The Board rules that it is
18 premature at this time. When appropriate we will take into
19 account the equities of the parties.

20 MR. BROWN: Judge Margulies?

21 JUDGE MARGULIES: Yes, sir.

22 MR. BROWN: I was approached five or so minutes
23 ago by an individual who introduced me to counsel for the
24 Nassau County Board of Supervisors who asked for leave of
25 the Board to make a brief statement on behalf of the Board

1 of Supervisors, if this Board would entertain that.

2 MR. IRWIN: Judge Margulies, I object to that
3 request. Nassau County is not a party to this proceeding.
4 The Board has already ruled on participation by entities not
5 parties, and it seems ---

6 VOICE FROM THE AUDIENCE: Can you speak a little
7 louder. We can't hear you.

8 MR. IRWIN: I am addressing the Board ---

9 VOICE FROM THE AUDIENCE: Well, you are addressing
10 the public, too. I think we have a right to hear you.

11 MR. IRWIN: My belief is that Nassau County, if it
12 wishes to participate may do so by the customary means of
13 filing papers in the customary fashion and that we should
14 proceed with the agenda established by the Board.

15 I have foregone from a lot of things that we might
16 otherwise have said this morning, but I think we have gotten
17 to the point.

18 MR. BROWN: I think in our society, Judge
19 Margulies, oral communication is accepted just as much as
20 written communication when it is appropriate, and I see no
21 reason why Mr. Irwin would suggest something in writing and
22 seek to prevent something stated orally.

23 JUDGE MARGULIES: Mr. Bordenick.

24 MR. BORDENICK: I think in light of the Board's
25 earlier ruling the request would be out of order.

1 MR. ZAHNLUTER: Judge Margulies, I might add that
2 the State supports that request, and I would also ask you to
3 make deference to the fact that this person is a
4 representative of the Nassau County Government.

5 JUDGE MARGULIES: The Board has already ruled in
6 this matter and we are not making any special exceptions.

7 MR. CARROLL: Excuse me, Your Honor. My name is
8 Thomas Carroll, and I am Counsel for the Nassau County Board
9 of Supervisors. I just would like to ---

10 JUDGE MARGULIES: You are out of order here.

11 VOICE FROM THE AUDIENCE: Let him speak. He is
12 supported by the public. The public wants to hear him.

13 VOICE FROM THE AUDIENCE: We want to hear him,
14 Judge.

15 VOICE FROM THE AUDIENCE: Why the arbitrary and
16 capricious judgments?

17 (Disturbance from the audience not allowing the
18 proceedings to continue.)

19 JUDGE MARGULIES: Let's take a 10-minute recess.

20 (Recess taken.)

21 JUDGE MARGULIES: Back on the record.

22 JUDGE SHON: Mr. Carroll, I have a brief question
23 I personally want to ask. I don't want to hear your
24 statement right now, but I want to know what the nature is
25 of the matter that you feel you wish to address at the

1 present moment. What is its nature?

2 MR. CARROLL: Your Honor, I just wanted to let the
3 Judges know what the position of the Board of Supervisors
4 was with respect to the use of the County facilities.

5 JUDGE SHON: Okay. There is provision in our
6 agency's regulations for an interested county or any agency
7 there of through its representative or attorney to make
8 known to the Board its position on any matter that pends
9 before the Board. It is not even clear to me that the use
10 of the Nassau Colosseum pends before this Board because we
11 just ruled that it might or might not enter depending on the
12 contentions.

13 It seems to me appropriate that if you wish to do
14 that, you should file an appearance before this Board and
15 appear at the hearing when the hearing is scheduled and not
16 at this prehearing conference the nature of which is simply
17 a talk to arrange when the hearings will be schedule. In
18 other words, there will be a time for that later and we
19 would be delighted to hear you then.

20 Is that clear?

21 MR. CARROLL: Yes, Your Honor. Thank you very
22 much.

23 JUDGE MARGULIES: Are we ready to proceed with
24 Items (a), (b), (c) and (d)?

25 MR. BROWN: Judge Margulies, if the Board will

1 indulge, I have a preliminary matter which relates to items
2 (a), (b), (c) and (d).

3 I would like to see if a schedule could be set up
4 to deal with what I believe is the overriding issue that is
5 before the Board and the parties, and I perhaps would hope
6 that the parties could stipulate to such a schedule so that
7 it could be done in an orderly fashion with concurrence of
8 the Board, too, and we could await an appropriate resolution
9 of the matters that I think ought to be addressed.

10 My understanding is that it is indeed going to be
11 treated as a fact issue, the status of the colosseum as a
12 fact issue and a topic for contentions and the Board did not
13 want here to get into the legal aspect of the conclusionary
14 effect of the action of the Nassau County Board of
15 Supervisors' action on the availability of the Colosseum
16 and, more importantly, the legal consequences of what the
17 Board has done, but that it would be dealt with by means of
18 contentions when that avenue was established.

19 Secondly, it is my understanding that the Long
20 Island Power Authority issue was one that the Board
21 determined was irrelevant on grounds because the board does
22 not have jurisdiction to consider the Long Island Power
23 Authority and its implications to this proceeding at this
24 time or indeed in the future, that this is a matter left to
25 the professional skills of counsel to determine how best to

1 go forward.

2 We have given some thought to what we would like
3 to do, and I would submit that it is the most reasonable
4 avenue for all the parties at this point.

5 The decision of the State of New York to create a
6 Long Island Power Authority is, in other words, to say that
7 the Long Island Lighting Company will not exist any more.
8 Another provision of that law is that the Shoreham plant
9 will not be operated by the new company.

10 The effect of that is to eliminate from existence
11 a bona fide applicant to pursue an operating license shore
12 Shoreham. LILCO itself won't exist to operate Shoreham and
13 LIPA, or the Long Island Power Authority is precluded by law
14 from operating that entity.

15 So we are pushed into a situation which no one in
16 fact considered, neither the Commission, neither this Board
17 and, indeed, not the parties as we move forward in
18 developing an agenda for this meeting and indeed the
19 comments that would be made pursuant to the agendas which we
20 submitted to the Board a week ago.

21 The Long Island Power Authority was created just
22 last Thursday I believe, Wednesday or Thursday of last week,
23 just before the holiday commenced.

24 What I would propose is the following, that the
25 Board, even though it is not going to consider it a matter

1 of its jurisdiction and take up the legal issue, recognize
2 that the creation of the Long Island Power Authority is
3 literally the most significant issue affecting electric
4 power on Long Island since the invention of the electric
5 light bulb and that it is not something that we can consider
6 a matter of irrelevance for purposes of the parties'
7 interest in this proceeding, and it is certainly nothing
8 that can be ignored when the public has depended upon this
9 solution and this event as something that relates in one way
10 or another to the efficacy of Shoreham's operation or
11 inefficacy of that and, indeed, to the direction in which
12 this proceeding is being headed.

13 I would thus propose that a procedure be
14 established and a schedule be set so that the moving
15 parties, and we would be movants here, and perhaps LILCO or
16 the Staff would want to be a movant also, but we clearly
17 would be movants and would want to take these matters to the
18 authority before which it belongs. And if that indeed is
19 the Commission, we would want to put that before the
20 Commission and give them the justification for suspending
21 this proceeding in light of the developments which have such
22 a potentially catastrophic effect upon decisions which were
23 made by the Commission prior to the occurrence of the
24 legislation creating LIPA.

25 We accordingly would like to propose a schedule in

1 which any parties wishing to file briefs on the impact of
2 this most significant event and in fact set forth precisely
3 what it did and what its implications and then have a second
4 step which would be the filing of reply briefs
5 simultaneously and put those before the Commission for a
6 ruling.

7 We would want this proceeding held in abeyance,
8 suspended until we get an answer to that, and we would want
9 that done for the most practical reasons. We believe that
10 the consequence of the legislation creating LIPA is to make
11 it, if not necessary as a matter of law, which it may well
12 be, sure necessary as a matter of discretion in this
13 Commission's action pursuant to the public interest that
14 there be no continuation of these proceedings headlong
15 toward the issue of a license under circumstances in which a
16 license surely could not issue, namely, the absence of a
17 bona fide application and the absence of any entity to be
18 qualified to operate the Shoreham plant.

19 Whatever the answer would be ultimately is
20 something which would have a fundamental impact, not only on
21 the structure of this proceeding, but on the very next step,
22 because if the ruling were what we have in our own judgment
23 determined to be appropriate, namely, the need for a
24 suspension of this proceeding, it would save a great deal of
25 resources to a great number of parties.

1 There has been an effort by the county and the
2 state and the town earlier in this proceeding to bring the
3 proceeding to an end. That matter was taken to the
4 Commission and the Commission decided not to terminate the
5 proceedings at that time because of the determination that
6 there were fact questions as opposed to legal questions
7 involved.

8 We think this time there is a straightforward
9 legal question and we ask that this Board work with us in
10 order to get this matter before the Commission so that we
11 are not all headed down the road toward an issue which can
12 lead to no resolution of benefit to anyone.

13 The issue that will benefit the parties is to
14 determine whether this proceeding should be suspended in
15 full, and we believe that is what LIPA will demonstrate, and
16 that is precisely what we would like to have the opportunity
17 to move to achieve.

18 JUDGE MARGULIES: Mr. Irwin.

19 MR. IRWIN: I believe the Board has already ruled
20 on what Mr. Brown has just resuggested a couple of hours
21 ago, and that he is trying without requesting for the Board
22 to reconsider its ruling doing exactly that. So I request
23 the Board to deny his motion.

24 I have just two observations. One is that if Mr.
25 Brown is correct about the inexorability of a timetable,

1 then putting this proceeding in abeyance will in effect be a
2 taking right now of Shoreham. I don't think he is proposing
3 to put \$4.5 billion on his clients' shoulders this morning.

4 Secondly, just bear in mind that the effective
5 provisions of LIPA don't even come into being until January
6 15, 1987, and there is a lot of time between now and then.
7 Secondly, after LIPA comes into being it is going to have to
8 decide whether or not he can buy LILCO's assets or its
9 stock, and it can't do it unless it decides that he can
10 operate the company economically as defined in the statute.
11 There are a lot of things that have to happen between now
12 and then.

13 Finally, the Commission in CLI-86-11 told this
14 Board to proceed and it recognized even as it did so that
15 there might be contrary rulings on other matters and it
16 nevertheless reached the decision it did. So I request the
17 Board to stick to its prior decision.

18 JUDGE MARGULIES: Mr. Bordenick.

19 MR. BORDENICK: I will be very brief. The Board
20 has already ruled, and the state, the county and the town
21 are free to file whatever they want to file with the
22 Commission, but unless and until the Commission instructs
23 this Board not to proceed with this hearing, the Board is
24 under an obligation to proceed.

25 MR. BROWN: I would like to reply there absolutely

1 is no such thing. I don't know how people can take a simple
2 statement and twist it to such a distorted end. So I am
3 going to repeat it.

4 I brought this up in the context of a schedule.
5 We are not asking the Board to make a ruling on the merits
6 at all. The Commission never knew about this event, and
7 certainly the impressions of a person who sits at 1717 H
8 Street in Washington doesn't include the crystal ball talent
9 to know whether a piece of legislation in the future will
10 pass or not.

11 The Commission had not the foggiest notion of what
12 would happen, nor did any of us here. Now if something
13 happened which literally is the most significant event to
14 electric power generation, transmission and distribution in
15 the history of Long Island, I can't conceive of someone
16 sitting quietly, as Mr. Irwin did and Mr. Bordenick, and
17 suggest that it be passed off because of some prior ruling.

18 This Board ruled, as it did before, that the
19 content and the merits of the colosseum would not be looked
20 into now because that was a matter to be dealt through the
21 factual issues of contentions.

22 I am here as a scheduling matter saying that the
23 merits of this issue, which Mr. Irwin argued in this reply,
24 that everything he said goes to the merits. Well, we are
25 just not that capable of laying out all the merits off the

1 tops of our heads. This legislation is still warm and we
2 haven't fully considered it.

3 We believe that when you get the most important
4 piece of legislation which affects the structure of this
5 proceeding and its effect is potentially catastrophic,
6 namely, it would end or suspend these proceedings, one can't
7 dig a hole for oneself and pretend that that is not what the
8 real world provides.

9 What we are saying is that we wish the Board would
10 provide an opportunity for argument on the merits. The
11 Board has said that it will not entertain that for a lack of
12 jurisdiction. We are saying as a scheduling matter that
13 that should be the highest priority and first order of
14 business, and we hereby more for the opportunity to address
15 the merits before the very body which this Board has said is
16 the appropriate body.

17 We see no point in not suspending this proceeding
18 and rushing headlong into a direction which has not
19 pertinence whatsoever when a more compelling priority is
20 before us and which requires our attention.

21 JUDGE MARGULIES: There is no prohibition which
22 would limit the intervenors from proceeding on a dual
23 track. They can participate in this proceeding and, if they
24 wish, bring the matter to the attention of the Commission.

25 We will proceed with this proceeding as directed

1 by the Commission.

2 MR. BROWN: I am sorry, but I just have to get an
3 understanding so that if we go to the Commission we know
4 what the basis of it is. The basis of this ruling is that
5 we are going to proceed on a dual track?

6 JUDGE MARGULIES: I said you have the option to
7 proceed if you so wish on that issue before the Commission.
8 We are proceeding with this proceeding. If you want to
9 institute or make additional filings before the Commission,
10 that is up to you. But we are proceeding with this
11 proceeding and going ahead with the scheduling conference
12 today. It doesn't limit you in any manner from taking any
13 other legal action before any other body or before the
14 Commission.

15 MR. BROWN: But my motion is that this proceeding
16 be suspended so that our resources can be devoted to getting
17 a decision on what ought to preclude any continuation of the
18 proceeding.

19 JUDGE MARGULIES: The Board denies the motion.
20 Do the intervenors wish to be heard on the dates
21 set forth in (a), (b), (c) and (d)?

22 MR. LANPHER: We certainly do, Judge. Obviously
23 the comments we make now are without any waiver of our view
24 that even consideration of this schedule is not proper, but
25 given your ruling, we will go ahead and give our comments.

1 First, with respect to the filing date of
2 contentions, as my colleague, Ms. Letsche pointed out, we
3 are still lacking critical data. I talked with Mr. Glass
4 during the recess and if a trial that he has scheduled for
5 next week is settled he believes that the data in FEMA's
6 possession can be provided by the end of next week through
7 the use of the Hunton & Williams office in New York City to
8 Xerox, et cetera. If his schedule does not improve next
9 week, then we should have those FEMA documents no later than
10 the following week, which looking at my calendar means that
11 hopefully we have the documents no later than next Friday
12 the 18th, but there is an outside chance that they would not
13 be provided until the 25th, which is the following Friday,
14 the 25th of July.

15 Now from the earlier discussion that we had, Judge
16 Margulies, I believe there was no resolution of the matter
17 brought up by my colleague, Ms. Letsche, that LILCO has
18 refused to provide the critical EOF documents that we need
19 to review.

20 In recess Mr. Irwin confirmed that he is not going
21 to provide those documents. So I think before we get any
22 further into this scheduling and in order to provide the
23 comments that you have requested, I hereby move that you
24 direct Mr. Irwin or LILCO to provide the EOF documents that
25 they have withheld. I don't think you need further argument

1 on it as we went over that before, but these are critical
2 data for us to have in order to prepare contentions. So we
3 ask that you direct them to provide that.

4 MR. IRWIN: Judge Margulies, I am not sure whether
5 additional argument will help, but I am willing to try.

6 JUDGE MARGULIES: Mr. Lanpher, will you please
7 continue, or does that conclude your comment on (a), (b),
8 (c) and (d)?

9 MR. LANPHER: Knowing whether LILCO is going to
10 provide those documents and, if so, whether they are going
11 to be directed to provide them and, if so, by what date is
12 critical to my comments on Item (a) and the things that
13 follow from Item (a).

14 No, I have not completed my comments, but I
15 thought it would be more orderly if we took one item at a
16 time or subitem. This is really a preliminary matter to
17 that of when are we going to get the data?

18 (Board conferring.)

19 JUDGE MARGULIES: May we hear your response, Mr.
20 Irwin.

21 MR. IRWIN: Yes, sir. It is LILCO's view that
22 access to the very small corner of documentary information
23 about which Mr. Lanpher is complaining is not necessary for
24 the filing of contentions.

25 Suffolk County has had since February 13 access to

1 the facilities at which the exercise was conducted. They
2 had telephone linkups to their people out in the field.
3 They had copies of message forms simultaneously as they were
4 handed out. They had significantly more observers in LILCO
5 facilities than have been granted at any other exercise ever
6 held. They had, in addition, unnumbered numbers of Suffolk
7 County police in cars and helicopters during the conduct of
8 the exercise. They have a large independent data base.

9 Second, since the exercise, the FEMA report, which
10 is the distillation of all the FEMA work and a fairly
11 detailed report as the Board and the parties know has been
12 produced.

13 LILCO has also produced every offsite player
14 document. They produced their player logs, literally dozens
15 of player's logs. They have produced every LERO message.
16 They have produced every EBS message. They have produced
17 every filled out check list. They have produced every
18 filled out call-out list and log-in times. They have
19 produced very dispatch form. There is a monumental amount
20 of information there.

21 Suffolk County and other parties had observers
22 present at the EOF which is an onsite facility. It is
23 relevant only because of an interface with the offsite
24 facilities. They also had parties present at the offsite
25 facilities. Everything that was received from the EOF has

1 already been turned over.

2 Suffolk County back before this Board ever had
3 jurisdiction over emergency planning matters sought to raise
4 onsite emergency planning matters, and they deliberately
5 defaulted and the Board threw those issues out and barred
6 them from adopting further discovery or other litigation on
7 onsite emergency planning matters.

8 I don't know whether this is an effort to evade
9 the thrust of that ruling or whether it is simply a
10 legitimate exercise to obtain information with respect to
11 the interface between one particular onsite facility and the
12 offsite facilities.

13 LILCO will respond according to the rules with
14 legitimate discovery requests after contentions are filed.
15 The rules don't give Suffolk County or any other intervenor
16 any discovery rights prior to the normal filing of
17 contentions, and they have received incredibly liberal
18 discovery already. I just don't think it is necessary
19 before the filing of contentions, and I think that applies
20 equally to the remaining FEMA documents.

21 Once again, those are simply another layer of
22 primary information all going to the same point.
23 Contentions can be filed now and the parties have been on
24 notice to that fact since at least the June 18th phone
25 conference call among the parties and the Board, and I just

1 don't think there is any basis for holding the process up.

2 MR. LANPHER: Judge Margulies, may I be heard just
3 briefly.

4 JUDGE MARGULIES: Wait, we have Mr. Bordenick.

5 MR. BORDENICK: The motion is simply a request for
6 discovery prior to the framing of issues and, as Mr. Irwin
7 has aptly pointed out, it is not provided for in Part 2 and
8 it is inconsistent with CLI-86-11.

9 Based on the representations that have been made
10 to the Board by Messrs. Irwin and Glass, I think that LILCO
11 and FEMA have gone out of their way in an attempt to be
12 cooperative with the county in supplying documents prior to
13 the fact, and I don't think the Board can or should order
14 anything further at this point.

15 JUDGE MARGULIES: Do you wish to be heard, Mr.
16 Glass?

17 MR. GLASS: No, thank you, Your Honor.

18 MR. LANPHER: Judge Margulies, may I be heard just
19 briefly?

20 JUDGE MARGULIES: Yes, Mr. Lanpher.

21 MR. LANPHER: I resent very strongly Mr. Irwin's
22 casting innuendoes here in saying that he doesn't know if
23 this is a legitimate effort to get information or to evade
24 some prior rulings. Well, if he doesn't know, he shouldn't
25 cast innuendo like that. That is just out of place.

1 Second, Mr. Bordenick's comments, well, this is
2 discovery and you don't get discovery until after
3 contentions. To my knowledge, this is the first full post-
4 exercise litigation since the UCS case, and maybe there are
5 some others, but I am just not familiar with the details of
6 them, if so. This is a situation that really is unique in
7 NRC practice.

8 We have been attempting to get the data so that we
9 understand what happened. To file contentions when you
10 don't understand what happened, that is not going to lead to
11 an expedited proceeding and that is not going to lead to
12 anything focused. It is going to lead to a waste of time in
13 quibbling and argument.

14 I was at the EOF on the date of the exercise.
15 This suggestion that we had wonderful access and wonderful
16 information is just hogwash. I was barred from going in and
17 seeing what was going on close up. I don't know what
18 happened there.

19 More important, though, our expert witness, or one
20 of our expert witnesses has gone over the data that we have
21 received from LILCO, and LILCO has provided a good bit of
22 information, and we thank them for that, but our expert has
23 told us I need the information from the EOF in order to
24 assess this information.

25 Now if you want to call him a liar, fine, but no

1 one has a basis for that. So we are making a representation
2 that we need this information. LILCO doesn't know what we
3 need or what we don't need in order to frame contentions and
4 neither does Bernie Bordenick.

5 Finally, this continued talk about this being an
6 onsite facility, this was part of the exercise and something
7 that FEMA reviewed. There are objectives relating to the
8 offsite emergency plan which were reviewed by FEMA relating
9 to the EOF, and to suggest that somehow that facility is
10 outside the the scope of this litigation I just think has no
11 basis.

12 JUDGE MARGULIES: The Board will reserve decision
13 until after the luncheon recess.

14 We will recess for lunch until 1:15.

15 MR. LANPHER: Judge Margulies?

16 JUDGE MARGULIES: Yes, Mr. Lanpher.

17 MR. LANPHER: There are people with some other
18 schedules. Is it possible that maybe we could just take a
19 10-minute recess now and press through lunch? I don't know
20 if other people would prefer that. I know for Suffolk
21 County and the Town of Southampton we would much prefer to
22 continue and take a lunch at the end of the conference if
23 that is possible.

24 JUDGE MARGULIES: We have been here since 9:30.
25 We have worked hard, and it is only appropriate to take

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lunch now.

MR. LANPHER: Until what time?

JUDGE MARGULIES: 1:15.

(Whereupon, at 12:15 p.m., the hearing recessed,
to reconvene at 1:15 p.m., the same day.)

AFTERNOON SESSION

(1:15 p.m.)

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3 JUDGE MARGULIES: Back on the record.

4 The Board finds that the key pacing document for
5 the filing of contentions is based on the FEMA evaluation
6 report, which has been out for quite a number of months now.

7 Suffolk County, the State of New York and the Town
8 of Southampton recognized this fact in a pleading filed in
9 March. The pleading is titled "Motion of Suffolk County,
10 the State of New York and the Town of Southampton for Ruling
11 Concerning Proceedings Related to the Shoreham Exercise."
12 On page 5 they say "The FEMA report constitutes the key
13 pacing item in the evaluation of the exercise."

14 We have recognized this previously when we held
15 our telephone conference on June 18th. In our order
16 following the prehearing conference we said the time for the
17 preparation of contentions started to run from June 18th.

18 So our ruling is that the time for contentions has
19 already begun to run. It started running June 18th, and it
20 would be proper to set a date today for the filing of the
21 contentions.

22 MR. LANPHER: Judge Margulies, I understand your
23 ruling, and it was our understanding that in getting into
24 Items (a) through (d) that we were going to into filing of
25 contentions. The Suffolk County prior pleading has to be

1 read in light of the fact that during the time that that
2 very pleading was pending, and I guess that was before the
3 Commission originally, and maybe it was the Appeal Board
4 first, we also were seeking these other documents at all
5 times.

6 So I don't want that statement read out of context
7 and to be taken to indicate that we ever believed that that
8 was the only document that was key to understanding the
9 exercise.

10 Leaving that aside, we still have the motion that
11 was argued before lunch to direct LILCO to provide us these
12 key documents regarding the EOF, and I didn't hear any
13 ruling on that from the Board in your previous statement.

14 JUDGE MARGULIES: I will rule on it at this
15 point. It would be premature to issue such a ruling at this
16 time. Following the submission of contentions, it is then
17 when we take up the matter of discovery, and the matter that
18 you are directing your motion to is really directed to a
19 matter of discovery and a premature response.

20 MR. LANPHER: Is it the Board's ruling then that
21 the Board has determined that we don't need those documents?

22 JUDGE MARGULIES: No. You make your own case. We
23 don't make the case for you.

24 MR. LANPHER: You have our representation that we
25 need those documents in order to prepare detailed

1 contentions, but it is your ruling that we don't need those?

2 JUDGE MARGULIES: No, that is not my ruling. My
3 ruling is is the time to submit contentions started to run
4 from June 18th, and we will set the date for filing
5 contentions on that basis.

6 In terms of the other documents you seek, you have
7 to rely upon your own means of practice to obtain them.

8 MR. LANPHER: Well, I made an oral motion earlier
9 this morning to obtain those documents, and that is the best
10 means I know how to do it, Judge Margulies, and you are
11 denying the motion?

12 JUDGE MARGULIES: The motion is denied at this
13 time as being premature. It is a matter that you may want
14 to get into at the time for discovery. It is premature to
15 hold discovery prior to the time of filing contentions.

16 MR. LANPHER: Well, I would just like to make a
17 representation for the record then that the contentions that
18 will be filed on behalf of Suffolk County will be less
19 detailed than otherwise would have been possible given this
20 ruling, and I think that is unfortunate. But since we don't
21 have those data, you can't expect us to include references
22 to those data in our bases, et cetera.

23 I don't think it furthers the proceeding, but if
24 that is your ruling, so be it.

25 JUDGE MARGULIES: That is the ruling of the Board.

1 MR. LANPHER: Judge, is it appropriate to give our
2 comments then on the -- I guess you were asking (a) through
3 (d) initially, on page 2 of LILCO's pleading?

4 JUDGE MARGULIES: That is correct.

5 MR. LANPHER: Is this the appropriate time to do
6 that?

7 JUDGE MARGULIES: Yes.

8 MR. LANPHER: LILCO suggested that we should have
9 a week from today to file contentions. We think that that
10 is far too short, Judge. We are still expecting those FEMA
11 documents and hopefully next week. We would suggest a date
12 no less than two weeks after receipt of those FEMA documents
13 which they have promised.

14 We have been working diligently since your order
15 and actually before that we have been attempting to put
16 things together, and I am referring to your June 20th order
17 after the conference call, but it takes a great deal of time
18 to review the materials and to put it together. It includes
19 the review of experts and getting their materials, and you
20 have to recognize also that it involves coordination with
21 two other parties as well, the State of New York and the
22 Town of South Hampton.

23 It is our intention to put in a single set of
24 contentions rather than three sets of contentions, and
25 accordingly we would ask for contentions to be filed two

1 weeks after we receive the FEMA documents, which hopefully
2 would be two weeks from next Friday.

3 Do you want me to continue with (b), (c) and (d)
4 or do you want to stay on (a) for now?

5 JUDGE MARGULIES: No. Let's put a date on that.

6 MR. LANPHER: Well, assuming that we get the
7 documents next Friday, Judge Margulies, that is the 18th of
8 July. Two weeks from then is August 1st.

9 JUDGE MARGULIES: Okay. Would you please continue
10 with the other subsections.

11 MR. LANPHER: Yes. Subsection (b), for the
12 benefit of the people in the audience, states "Parties
13 designed to respond to contentions must do so by no later
14 than July 25."

15 I think if the intervenors are the only parties
16 submitting contentions that -- well, let me go back a
17 second. That means one week after the submission of
18 contentions LILCO is suggesting responses to contentions.

19 If Suffolk County is the only party filing
20 contentions, that provision is not a problem, and that would
21 be August 8th for responses.

22 I would like to make an inquiry though whether
23 LILCO intends to be submitting contentions or whether the
24 NRC Staff intends to be because that would affect our views
25 on whether that is a reasonable amount of time.

1 JUDGE MARGULIES: Would you please respond.

2 MR. IRWIN: My understanding of the structure of
3 this proceeding, Judge Margulies, is that the burden is on
4 the intervenors to go forward with contentions showing flaws
5 in our plan as revealed by the exercise. So LILCO at this
6 point does not intend to file any contentions.

7 MR. BORDENICK: That will also hold true for the
8 staff.

9 JUDGE MARGULIES: Thank you.

10 MR. LANPHER: Then Suffolk County has no objection
11 to a one-week period for the response -- or, no, that was 10
12 days. Excuse me. That was a 10-day period and I misspoke
13 before. So instead of the 8th of August, that really would
14 come to -- it ought to be the 12th of August to avoid Monday
15 deliveries. That is just I think throughout this proceeding
16 it would be good to not have receive dates on Monday because
17 it makes it very hard for overnight mail service, et cetera.

18 MR. IRWIN: We can live with Monday deliveries,
19 Judge Margulies. We automatically build in a day when we
20 don't try and expedite things on a daily basis. We both
21 have offices in Washington and computers and we both have
22 telecopiers that go at 20 seconds a page. We can get things
23 to them and they can get things to us.

24 JUDGE MARGULIES: Please proceed.

25 MR. LANPHER: If I may finish what I am saying.

1 Suffolk County would much prefer not to have Monday delivery
2 dates. There are great difficulties with telecopying. For
3 some reason our office and Mr. Irwin's office have had a
4 hard time communicating. I think our secretaries have
5 finally learned how to coordinate some of that, but it is
6 difficult and it is much nicer to be able to do it by
7 Federal Express overnight.

8 Third, LILCO states that it proposes that any
9 replies to contentions be filed one week after the
10 responses. We don't have an objection to that one-week
11 period.

12 We do have a comment on part (d). We believe that
13 this proceeding would benefit from building into the
14 schedule oral argument on the contentions, and we would
15 suggest that approximately five days after receipt of the
16 final pleadings, the replies to objections, that the Board
17 schedule oral argument on Long Island and issue an
18 appropriate ruling thereafter.

19 So we would change Part (d) from "if the Board
20 desires to have oral argument" to building right into the
21 schedule at the outset that there will be oral argument.

22 JUDGE MARGULIES: Does that conclude your
23 presentation on Items (a) through (d)?

24 MR. LANPHER: Yes, sir.

25 JUDGE MARGULIES: Thank you.

1 Mr. Irwin.

2 MR. ZAHNLUTER: Excuse me, Judge Margulies.

3 JUDGE MARGULIES: Oh, I'm sorry.

4 MR. ZAHNLUTER: The State of New York joins in
5 that position.

6 JUDGE MARGULIES: Thank you, Mr. Zahnluter.

7 MR. IRWIN: Judge Margulies, I just have three
8 quick things.

9 One is that I still haven't heard anything from
10 Mr. Lanpher that suggests any reason why data which have
11 been available in large measure for several weeks and formal
12 notice of which has been around for three weeks can't lead
13 to the filing of contentions within about a week from
14 today.

15 If there are matters, which as Mr. Lanpher
16 suggests that need to be subsequently revised or added to,
17 the rules provide for amending contentions or submission of
18 new contentions for good cause shown.

19 This is an expedited proceeding and it has
20 regrettably taken us almost a month to get together for our
21 initial confabulation since the Commission's order, and I
22 don't see any point in building in two weeks artificially at
23 the very start of the process.

24 Secondly, Mr. Lanpher is right in that Federal
25 Express is a better means, all else being equal, than

1 anything else. However, I think it would be very useful for
2 us to stick to the notion of getting papers filed by hand
3 with each other on the date they are due and confirming
4 overnight by Federal Express.

5 It is very rare that a telecopier transmission is
6 so inadequate that it arrives on the evening of the date it
7 is due and is confirmed the next morning by Federal Express
8 that any substantial time or effort has been lost, and I
9 would suggest that as a compromise for both of us, but still
10 keeping the due dates on Monday and having the things
11 trigger off of that. That is a more general observation
12 than just for these pleadings.

13 JUDGE MARGULIES: We did have a problem with your
14 July 1st telefax statement on the agenda.

15 MR. IRWIN: I don't know where that got lost,
16 Judge Margulies. Our operator verified it with the operator
17 out in Bethesda, but we can verify it with the Board's
18 secretary from now on and will do so.

19 I think what we need to do is make sure that
20 secretaries or the principles in fact talk directly to each
21 other as well as the operators talking to each other on
22 that.

23 My third observation is just simply that oral
24 argument and the location of it, if held, are both for the
25 Board's convenience and that should remain a matter of the

1 Board's decision.

2 JUDGE MARGULIES: Mr. Bordenick.

3 MR. BORDENICK: Judge Margulies, as I indicated in
4 my letter to the Board of July 1, 1986, the staff had no
5 objection to the schedule that LILCO had proposed on that
6 same date. I am at a loss to understand why Mr. Lanpher
7 suggests a filing date keyed to two weeks after FEMA
8 provides its documents in light of the Board's ruling on
9 these document requests.

10 Finally, I have no problem with any Monday filing
11 dates. I can meet those.

12 MR. LANPHER: Judge, if I can just briefly respond
13 only to what Mr. Bordenick stated.

14 Your opening remarks, Judge, in the afternoon
15 session were keyed to the FEMA assessment report. The date
16 that we are expecting from FEMA is data which is directly
17 related to that FEMA assessment report.

18 Mr. Glass had been kind enough to promise that he
19 will get those documents to us just as soon as possible. If
20 they get here sooner than next Friday, fine. We are willing
21 to work hard. It takes time to review the materials. We
22 are still in the process of reviewing the materials we have
23 gotten from LILCO. It is a very time consuming process to
24 do it.

25 I don't know if Mr. Bordenick has been through the

1 documents that LILCO has provided to us. If he has, I think
2 he will find what a time consuming difficult process that
3 is.

4 So we need some additional time to get these
5 contentions in shape, and that is why we came up with the
6 two weeks after receipt of those FEMA documents.

7 JUDGE MARGULIES: Could you give us an idea for
8 the number of documents you are speaking about in toto in
9 terms of what you are working with presently?

10 MR. LANPHER: Could I ask Ms. Letsche to do that.

11 MS. LETSCHE: The documents that we are received
12 which, as I explained before, are basically one half of the
13 action that went on during the exercise, are I guess roughly
14 two boxes, two Xerox size boxes full of documents give or
15 take some, and those are the things generated by the LILCO
16 players.

17 I don't know the volume of documents that FEMA
18 generated, but what they are are the messages that led to
19 the LILCO players generating all their things. Presumably
20 it is going to be less because there were more LILCO people
21 involved than there were controllers and observers and
22 simulators.

23 But the information that we are still in a
24 complete vacuum about is what the simulator knows he said as
25 opposed to what the LILCO person might have heard him say

1 when the simulator said it, according to the simulator, as
2 opposed to the LILCO player so that we can figure out how
3 quickly those messages were transmitted and reacted to and
4 all of that stuff. One whole end of it we don't have, and I
5 don't know the volume of that.

6 MR. GLASS: I think there are a couple of things
7 that we discussed before that should be verified. The logs
8 were kept in certain locations, but there were not
9 necessarily full sets of logs kept with every discussion
10 that took place in the EOC, and I think we had spoken about
11 the differences between what took place say in the EOC with
12 the simulators versus what took place from the Command Cell,
13 and that is where the logs were kept. So they are not a
14 voluminous nature, and they are certainly not going to show
15 every portion of the other side, and I hope Ms. Letsche is
16 not expect that because we did discuss that before. It does
17 not cover every discussion.

18 MS. LETSCHE: They are what they are. I haven't
19 seen any of them. The fact is that we don't have any, and I
20 can't create them if they don't exist. But our position is
21 that we at least need to know what there is out there so we
22 can try to make some sense out of the other half of the
23 interactions that we do have information about.

24 MR. IRWIN: Let me ask a point of information,
25 Judge Margulies, if I may. I keep hearing that Suffolk

1 County believes they don't know what happened in enough
2 detail to file contentions.

3 As I understand it, they already have the messages
4 from FEMA both ordinary messages, triggering responses and
5 messages from simulators. The only thing they are lacking
6 is the independent corroboration at the sending end that the
7 messages were in fact sent. They already have the LILCO
8 logs at the receiving end verifying when the messages were
9 received.

10 The scenario for the exercise contains a time line
11 which includes an entry with a time at which a message is
12 supposed to have been sent. So they know when the message
13 is supposed to have been sent, they know the message and
14 they know when LILCO says they received it.

15 The only thing missing, if indeed it matters at
16 all, is when the FEMA notetakers say they sent it. It just
17 strikes me as an issue at best for discovery, and I am
18 willing to concede that that is what it is in principle, but
19 I think it is a red herring at this point.

20 MS. LETSCHE: If I could just respond to one
21 thing. The scenario does not include any information about
22 what the simulators were doing because it is my
23 understanding that that was one thing that LILCO didn't
24 write in the scenario. They wrote the rest of it, but they
25 didn't even know what the simulators were going to do.

1 So with respect to that we are completely in the
2 dark. There is information on LILCO message forms that
3 supposedly the LILCO player received from the simulator, but
4 whether or not that message might have written two hours
5 after the simulator told some other LILCO person the
6 message, which would be a very significant fact in terms of
7 whether that procedure was being implemented appropriately i
8 something that we don't know without getting the information
9 from the horse's mouth, and that is from the people who
10 produced those simulator messages.

11 The other matter of correction I think to what Mr.
12 Irwin said is although we did receive many messages that
13 were in the scenario or free-play messages from FEMA, we
14 don't know from FEMA when in fact those things were
15 delivered, and the scenario, as Mr. Irwin said, lays out
16 when things were supposed to have been sent.

17 What we need to know is when in fact they were
18 sent during that exercise so we can evaluate LILCO's
19 response to it.

20 MR. GLASS: One thing that I think should be
21 corrected is on May 6th, 1986 you were sent a copy of the
22 controller simulator plan for the Shoreham exercises.

23 MS. LETSCHE: That's true, but that was again just
24 sort of general instructions that this is what you are
25 supposed to do. It was none of the specifics as to what

1 happened.

2 MR. GLASS: It did not show when the documents
3 were transmitted.

4 MS. LETSCHE: That is right.

5 MR. GLASS: But you were provided that. You
6 referred before with the other plan that you did not have
7 the information about the simulator role. You were provided
8 that plan.

9 MS. LETSCHE: The general instructions, that is
10 true.

11 JUDGE MARGULIES: The Board will take several
12 minutes to confer and come up with a decision.

13 (Brief recess.)

14 JUDGE MARGULIES: On the record.

15 The Board will set the date for the filing of
16 contentions now based on any contingency. The pacing
17 document was the FEMA report. If documents come to light,
18 they may very well raise the possibility of additional
19 contentions being filed at a later date.

20 We will set and we do set August 1st as the date
21 for filing of contentions.

22 We set August 11th as the date for filing the
23 reply, and August 18th as the date for the filing of a
24 response.

25 We set August 26th as the date for hearing oral

1 argument on the contentions. Most likely the place of
2 hearing will be in this area.

3 That covers items (a) through (d).

4 The dates given for the filings are the dates for
5 the documents to be received in the hands of the Board and
6 of the parties.

7 Let me make one comment in reference to filings in
8 this proceeding. It would be helpful if we designate future
9 filings in this proceedings as EP Exercise so we can keep a
10 separate file on the documents rather than using the
11 emergency planning designation we had used previously.

12 MR. LANPHER: The same docket number?

13 JUDGE MARGULIES: And the docket number, and have
14 in parentheses instead of emergency planning underneath the
15 docket number, EP Exercise.

16 It also would be quite helpful if the parties
17 would place the date of the document on the front page of
18 the document if it runs more than a single page.

19 VOICE FROM THE AUDIENCE: Judge Margulies, are the
20 people from Nassau County going to be allowed a limited
21 appearance hearing in Nassau County on the 26th?

22 JUDGE MARGULIES: Madam, we ruled on that
23 previously earlier this morning. It was one of the first
24 things that we ruled on. We will permit limited
25 appearances. We have not set the time and place, and we are

1 aware of the request to hold a limited appearance session in
2 Nassau County.

3 VOICE FROM THE AUDIENCE: Thank you.

4 JUDGE MARGULIES: We next come to the matter of
5 motions for summary disposition and discovery.

6 You have heard the comments of the Board at the
7 beginning of the proceeding that we are not in favor of any
8 novel approaches. We think the current rules are good
9 enough to proceed by and very adequate to proceed by.

10 With that, I throw the discussion open.

11 MR. IRWIN: Judge Margulies, I did not intend in
12 these suggestions to depart in any way that conflicts with
13 the rules. We have tried to observe the structure of the
14 rules and bear in mind simply the need and the goal of
15 expedition of the proceeding.

16 The difficulty with a normal pace toward hearing
17 as set up by the rules is that it is very difficult,
18 frankly, to get to a hearing from the time of a prehearing
19 conference such as less in less than about six or seven
20 months, and that is just simply longer than we believe the
21 Commission has in mind.

22 I don't want to do violence to the fabric of it,
23 but I believe that, first of all, the events at issue here,
24 namely, the conduct and exercise on one day are considerably
25 narrower than those of an application at large.

1 Secondly, there has been a great deal of voluntary
2 anticipatory discovery.

3 Third, the parties are all quite expert.

4 Fourth, the fact here are basically historic and
5 readily ascertainable.

6 I believe from past experience in this case as
7 well that the parties are capable of moving pretty fast.

8 What I was trying to do here was, keeping these
9 background factors in mind, think of what would be realistic
10 and reasonable time frames in which to try to do something
11 and, in addition, try to build in a way of dealing with the
12 problem that often a Board or parties are confronted with on
13 summary disposition motions, namely, that of dealing with
14 where the respondent does not have sufficient information to
15 answer the summary disposition motion.

16 I think the Commission's order, CLI-86-11,
17 contains at page 6 a pretty helpful test for determining
18 what is information that is required but not available. It
19 is a pretty narrow needle's eye for a respondent to get
20 through. The sponsor of that kind of argument must convince
21 the Board that discovery is necessary and likely to produce
22 evidence supporting the existence of a genuine issue of
23 material fact.

24 My sense is that given the background of this
25 narrow proceeding there are not going all that many such

1 issues. I concede that this structure is not required by
2 the regulations, but I don't think it is inconsistent with
3 them and certainly LILCO is not going to go howling into the
4 wilderness if the Board does not adopt it literally. I do
5 believe, however, it would work and would expedite things.

6 JUDGE MARGULIES: Do you wish to be heard, Mr.
7 Bordenick?

8 MR. BORDENICK: I would just simply say I did not
9 view anything that the applicant has suggested by way of the
10 schedule proposal to be a departure from what was provided
11 for either in the rules or in the Commission's decision in
12 this case.

13 JUDGE MARGULIES: Intervenors?

14 MR. LANPHER: Judge, I prepared some views on this
15 given your comments that you are not favorably disposed, but
16 I don't want to take a lot of extra time. I don't think
17 that LILCO's proposal will in fact lead to a savings of
18 time. If LILCO wants to go that way and the Board thinks
19 that makes sense, so be it. I think it is going to lead to
20 arguments, do you have things or don't you have things.

21 The documents are not all self-explanatory. We
22 have innumerable questions that are arising out of documents
23 we have seen already. So I think it is leading to the
24 potential for the kinds of affidavits that LILCO is talking
25 about saying we cannot respond to this summary disposition

1 motion because we have not had an opportunity for discovery.

2 I must say that LILCO's what I would call note in
3 their pleading, they make it sound benign enough, but if you
4 go and look at the case law, there are no NRC cases on this
5 that I know of. This is a pretty novel approach. NRC
6 decisions indicate that where there is no NRC president that
7 you go to the Federal Rules of Civil Procedure, and I don't
8 think this stands up under the Federal Rules of Civil
9 Procedure.

10 I am happy to give case cites if you wish it. I
11 think we should follow the rules. If you want to get into
12 specifics, LILCO talks about shortening the time for
13 responses. Before contentions have even been filed and
14 before motions are filed, how anyone can say that it would
15 be in the interest of fairness, and that was a word that the
16 Commission used at page 6 of their June 6th order, it would
17 be in the interest of fairness to shorten these times,
18 before anything is done, none of us have that kind of
19 wisdom. We don't know that.

20 So really probably the thing that makes the most
21 sense, Judge, is that this time just to say we are going to
22 follow the rules. It is questionable whether we should even
23 be going beyond the schedule which you announced 10 minutes
24 ago. After the Board rules presumably subsequent to August
25 26th, at that point we can set a schedule based upon the

1 discovery that is needed and build in summary disposition
2 after discovery, which is the normal practice in NRC
3 proceedings, and get on with things and we will know what we
4 are dealing with at that point.

5 JUDGE MARGULIES: Mr. Irwin, any response?

6 MR. IRWIN: Yes, sir, two points.

7 We agree with the Board's suggestion earlier this
8 morning that it is important to try to set schedules as far
9 ahead and in advance as possible, make sure they are
10 reasonable and stick to them.

11 There is obviously a lot of discretion invested in
12 a Board and LILCO is willing to abide by the Board's
13 discretion in this matter in the interest of setting a
14 framework that we live with and stick to later.

15 I do think though that if we take a schedule which
16 is geared to the typical dates that are set forth in the
17 regulations for summary disposition, I think it that will
18 lead to a longer progress toward hearing on those issues
19 that were covered by summary disposition than the one that I
20 have set out in our paper.

21 We should also bear in mind that we may want to
22 establish a parallel track for some issues as to which we
23 should go straight to hearing because we recognize that they
24 cannot be summarily disposed of.

25 So bearing that caveat in mind, we are willing to

1 abide by the Board's judgment as it sees the lay of the land
2 on this issue.

3 We are interested in getting to a hearing in a
4 sound fashion as quickly as possible. There is an obvious
5 incentive for LILCO to finish this proceeding and I won't
6 belabor it, but it is there.

7 MR. LANPHER: Judge Margulies, if I may be
8 permitted to say something. If you are going to go with
9 LILCO's proposed schedule here, and let me just give the
10 specific comments, we have no problem with two weeks after
11 rulings for the filing of summary disposition motions. We
12 have a very big problem with this idea of Part (f) that
13 there are only two weeks to respond to summary disposition
14 motions. Again, you don't know in advance how many motions
15 or what the subjects and all that.

16 We should just follow the rules. 2.749 allows 20
17 days. If LILCO wants to build in an automatic opportunity
18 for a reply, that is not provided for in the rules. What
19 ought to be provided for is someone wants to file a reply,
20 they file a motion for leave to reply, and if you want to
21 set a time limit within which that has to be done, that is
22 fine, but let's once again follow the rules.

23 We would propose, similar to our earlier proposal
24 on the contentions, that you set a time subsequent to
25 replies, if any are filed, for oral argument.]

1 (Board conferring.)

2 JUDGE MARGULIES: On the matter of summary
3 disposition, the Board rules that the procedures provided
4 for in the Rules of Practice will be followed in this
5 proceeding.

6 On the matter of setting a discovery schedule, it
7 would be premature at this time. We don't know how many
8 contentions we will have to deal with or what is involved.

9 We will probably set the discovery schedule at the
10 time of holding the oral argument on the contentions.

11 It is also premature to rule on the filing of
12 direct testimony and as to when the evidentiary hearing is
13 to begin.

14 We next come to the matter of the hearing
15 location.

16 Is there anything you wish to add to that, Mr.
17 Irwin?

18 MR. IRWIN: Judge Margulies, LILCO has simply the
19 concern that hearings be held in a secure location and that
20 they not be disrupted.

21 We have found that there are places on this Island
22 that although they are owned by governments that does not
23 necessarily guarantee that the proceedings will be orderly.
24 Our witnesses, our documents and our case in the process as
25 a whole will be aided if they are orderly.

1 Our experience in this building until this
2 morning, quite frankly, was that security was adequate
3 here. The Board has broad powers of its own to enforce
4 discipline.

5 There are three federal facilities that we are
6 aware of on the Island which we believe would be adequate.
7 We frankly desire to have our issues in an impartial forum,
8 and that includes not only the Board but to some extent the
9 atmosphere, and the buildings in which we have sat are those
10 owned and run by governments that are implacably hostile to
11 us.

12 We would be happier in a federal forum. All we
13 ask is that the Board wherever we hold the hearings try to
14 enforce order, and that is all we are asking.

15 JUDGE MARGULIES: Mr. Bordenick.

16 MR. BORDENICK: Members of the Board, normally the
17 Staff does not take a position as to where a hearing should
18 be held. We appear when and where the Board orders the
19 hearing to be held.

20 However, in this proceeding we support the
21 applicant's request that hearings be held in a federal
22 facility, and as I understand it, there are three of them on
23 Long Island, and we believe, as does the applicant, that
24 holding the hearing, which after all is before a Federal
25 Board, in a federal facility will be more conducive to an

1 orderly hearing.

2 JUDGE MARGULIES: Intervenors.

3 MR. BROWN: Yes. I am perplexed by what is the
4 patent silliness of what I heard through innuendo alone in
5 Mr. Irwin's comments, and I think that what would be most
6 important is for him to give us the particulars as to what
7 he is afraid of.

8 I know that we have had many, many hearings in
9 county facilities where county policy officers have been
10 made available I think at no charge. They have done, I
11 would suspect this Board would agree, just an exceptional
12 job.

13 The state facilities have been made available and
14 people have bent over in ways far beyond that which would
15 expected by any government to make accommodations available.

16 I think the appropriate words from Mr. Irwin might
17 be thank you at this point rather than silly innuendo.

18 I mean I don't know what threat he is talking
19 about. Is he saying that there is a threat of terrorist
20 attack here? Is he saying somehow he is afraid or his life
21 is threatened or mine is? I would like to know if he knows
22 something that we ought to know.

23 If his concern though is simply that people spoke
24 out of order here and thus speaking out of order is
25 justification to call upon the use of a federal facility

1 which is neutral in all kinds of fundamentally silly words
2 that add no content whatsoever, I think he ought to spell it
3 out.

4 As far as I am concerned and speaking for the
5 Country and I think I express the views of Mr. Latham, and
6 the State will speak for itself, we under no circumstances
7 would consent to doing anything at Brookhaven National
8 Laboratory. Why that would be a joke extordinaire. People
9 at that laboratory repeated sued Suffolk County, and if the
10 thesis of Mr. Irwin is somehow there is an abstract
11 neutrality that one can sense from the air, that is one
12 abstraction we can do without.

13 Now could we settle for a facility in Nassau
14 County, because it is the custom and practice of the NRC
15 since 1954 that hearings are in the "vicinity of the
16 plant."

17 So if there were some facility other than a county
18 or a state facility in Suffolk County, and not Brookhaven
19 National Laboratory, which were convenient to the parties
20 and to the Board, we wouldn't object. But we certainly
21 aren't prepared to sit by and listen to silly talk be made
22 about some kind of sub rosa or subsilential threat that he
23 perceives of people coming over the wall after us.

24 And as for the concurrence of Mr. Bordenick, I
25 don't know if he has the foggiest notion of why he even

1 agreed, and I would love to know what his rationale is.

2 JUDGE MARGULIES: Well my observation, Mr. Brown,
3 was that of a bunch of disorderly spectators here today
4 waving signs, speaking out of turn, shouting out and placing
5 signs up here on the bench.

6 Based on the prior history of this facility the
7 Board did not arrange for security because the past history
8 has been one of proper decorum in this hearing room, but
9 certainly what went on today wasn't representative of what
10 could or should be expected in any hearing room in which any
11 proceeding is conducted.

12 It may be possible to obtain adequate security to
13 prevent that from happening again here. But wherever we do
14 hold our hearings, we will assure that the facility is
15 secure and not disrupted.

16 Our preference is to hold proceedings in a federal
17 courthouse where that is possible. The next step down has
18 been to hold hearings in a state courthouse because of the
19 security that can be provided.

20 Our intent is to see that security is provided for
21 everyone, the parties, the Members of the Board as well as
22 the spectators and we will do what is necessary to obtain
23 such a facility.

24 Is there anything further?

25 (No response.)

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There being nothing further, the conference is closed.

(Whereupon, at 2:10 p.m., the prehearing conference in the above-entitled matter concluded.)

* * * * *

CERTIFICATE OF OFFICIAL REPORTER

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

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

DOCKET NO.: 50-322-OL-3

PLACE: HAUPPAUGE, NEW YORK

DATE: TUESDAY, JULY 8, 1986

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

(sig) *Mary C. Finney*
(TYPED)

Official Reporter

Reporter's Affiliation