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UNITED STATES
NUCLEAR REGULATORY COMMISSION

IN THE MATTER OF:

SHOREHAM NUCLEAR POWER STATION

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UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:	
LONG ISLAND LIGHTING COMPANY	Docket No. 50-322-OL-5 (EP Exercise)
(Shoreham Nuclear Power Station; Unit 1)	(ASLBP No. 86-533-01-OL)

Court of Claims
State of New York
State Office Building
Room 3B46
Veterans Memorial Highway
Hauppauge, New York 11787

Wednesday, September 24, 1986

The hearing in the above-entitled matter resumed at 9:35 a.m., pursuant to recess,

BEFORE:

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

DR. JERRY KLINE, Member
Atomic Safety and Licensing Board
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DR. FREDERICK SHON, Member
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P R O C E E D I N G S

(9:35 a.m.)

JUDGE MARGULIES: Please come to order. Good morning, ladies and gentlemen.

At this pre-hearing conference, we have three areas to consider. The first thing, Intervenor's proposed contention, filed August 1st, 1986, along with Applicant's objections to the proposed contentions of August 15th, 1986; Staff's Answer to proposed contentions of August 15th, 1986, and Intervenor's Response to Applicant and Staff of August 25th, 1986.

The other areas that we are going to consider today are a proposed Discovery schedule and a hearing schedule.

At this time, it would be appropriate to take appearances. We will start with the Applicant.

MR. IRWIN: Judge Margulies, my name is Donald Irwin with the firm of Hunton & Williams, Richmond, Virginia, for the Long Island Lighting Company.

With me at counsel table, immediately to my left is Lee Zeugin, also of our firm. Immediately to my right is James Christman, and to his right is Kathy McCleskey, members of our firm.

Immediately behind me, I would like to introduce to the Board Scott Matchett who is also with our firm.

JUDGE MARGULIES: Who appears for Staff?

MR. BORDENICK: Bernard M. Bordenick. I am with

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the Office of General Counsel, United States Nuclear Regulatory Commission, Washington, D.C. 20555.

With me, on my left, is Oreste Pirfo of the same office.

JUDGE MARGULIES: Who appears for FEMA?

MR. GLASS: Stewart M. Glass, Regional Counsel for FEMA. And with me today is William R. Cumming. We have noticed his appearance, and he has been admitted to practice in the State of Virginia. And, he is from the Office of General Counsel.

JUDGE MARGULIES: Who appears for the State of New York?

MR. ZAHNLEUTER: I do, Richard J. Zahnleuter, representing the Governor and the State of New York.

JUDGE MARGULIES: Who appears for Suffolk County?

MS. LETSCHE: I am Karla J. Letsche with the law firm of Kirkpatrick & Lockhart, 1900 M Street, Washington, D.C.

With me are Michael S. Miller, Lawrence Coe Lanpher, Herbert H. Brown; sitting behind me, Susan Casey, also of that firm, representing Suffolk County.

JUDGE MARGULIES: Who appears for the Town of Southampton?

MR. LATHAM: Steven Latham, firm of Twomey, Latham, Shea and Kelley, 33 W. Second Street, Riverhead, New York.

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JUDGE MARGULIES: We had asked the parties in a telephone conference of September 5th, 1986 to be prepared to discuss on the matter of the admission of contentions, the defining and applying of the fundamental flaw criteria with emphasis on the permissibility of challenging the plan as well as the exercise and FEMA's evaluation.

It would appear reasonable to us that the parties can present their views, with each party taking 20 minutes to do so, in a direct presentation. This will be followed by any questions that the Board may have; and, then each party will have 10 minutes to present their response.

In that these are the proposed contentions of the Intervenors, we will start with the Intervenors and then permit the Intervenors to close at the time of the response. So, will you go ahead with your presentation?

MS. LETSCHE: Let me begin, Judge Margulies, by saying that I believe that our position is layed out clearly in the Response that we filed with the Board.

We discussed in that Response the UCS case, which is the controlling legal precedent with respect to this proceeding concerning the results of the February 13 exercise of LILCO's plan. And we also discussed in that Response why the proposed contentions, which the government submitted, satisfy all the admissibility standards for contentions in NRC proceedings.

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I will be brief in summarizing those comments that we made in our Response because I think, as I said, our arguments are pretty well layed out in there.

The most important point to remember in ruling on the contentions here is what the U.S. Court of Appeals for the District of Columbia Circuit said in the UCS decision. What they said was that, in NRC proceedings Intervenors have a right to a hearing on any material factor relied upon by the NRC in its licensing decision. That's in a nutshell what that decision held.

It goes on in great detail, and we quote several portions of it in our Response to explain exactly what that means, that Intervenors have a right to challenge and present evidence on any factor to be relied upon by the NRC in its licensing decision specifically with respect to emergency planning exercises. The Court points out by citing NRC statements, NRC regulations and other things, that assessments, particularly FEMA assessments, of exercise results are clearly a material factor relied upon by the NRC in licensing decisions.

Under the NRC's regs, the FEMA findings and conclusions and assessments of exercise results are a rebuttable presumption which must be relied upon -- those findings must be relied upon by the Commission -- in making a licensing decision.

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Clearly, therefore, under UCS and under the Commission's own regulations Intervenors are entitled to have a hearing, an evidentiary hearing, involving the right to challenge any portion of the FEMA assessment of the exercise results. The reason that that decision, and the holding of UCS, is so crucial here is because in their objections the NRC and the Staff basically told this Board that the governments aren't allowed to say much of anything, or challenge much of anything, that happened during the February 13 exercise.

In fact, however, what the governments have done in their contentions is do precisely what they are entitled to do under the UCS decision, the Atomic Energy Act, and the Commission's own regulations. We have filed contentions which challenge the FEMA conclusions contained in the post-exercise assessment, the FEMA conclusions about the exercise results, which is absolutely proper under UCS.

We are entitled to rebut, or attempt to rebut, whatever findings or conclusions FEMA might have arrived at concerning that exercise -- those exercise results, because under the regulations those results are a material factor which you presumably are going to rely upon in your licensing decision.

Therefore, our contentions which assert that the exercise results cannot support a reasonable assurance finding or cannot support a conclusion which FEMA purported to draw

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from those results in their assessment, or that FEMA's conclusions have no basis, or that FEMA's conclusions are incorrect, are all admissible contentions under UCS.

We are entitled to raise those issues because we have a right to rebut all of those FEMA conclusions. And, we have raised the issues -- all the matters -- which we believe need to be rebutted, because they are wrong. And, we have raised them in contentions which meet every admissibility standard.

In terms of admissibility standards, there are a couple out there, an NRC precendent which everyone knows and everyone wrote about in their filings with the Board. And, I'm referring to the basis and specificity requirements which everyone here is pretty familiar with.

I think it's pretty ludicrous for anyone to suggest that these contentions, which I dare say are probably the most detailed and most specific of any ever filed in any NRC proceeding, don't meet the basis and specificity requirements. I've read a lot of NRC cases, and I've seen lots and lots of contentions that have been submitted by experienced counsel and accepted for litigation, and many of them are a paragraph long. You don't have any paragraph-long ones in here.

They fully satisfy all the basis and specifity requirements, as those requirements have been interpreted in NRC case law. And I'm not even going to go into that discussion.

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There are a couple of other important points related to that, however, which I must raise. Number one, in their objections Staff and LILCO repeatedly, repeatedly break down the government's contentions and treat them as if each sub-part of a contention which forms one basis for the contention is a separate contention. And they allege that it shouldn't be admitted because it doesn't meet the requirements of a basis and specificity requirements of a contention.

Well, we addressed that fully in our Response and I'm not really going to go into detail on it here other than to say, the contentions are what they are. The allegations in the contention are set forth in the beginning of the contentions. The contentions themselves say that the sub-parts of the contention forms the basis for the contention.

And, it's well established in NRC precedent that Intervenors, in filing contentions, do not have to state all the factual underpinnings, or the bases, if you will, for the basis of their contentions.

So, the tactic used by LILCO and the NRC to try to get everything out of this proceeding, to try to get every contention striken, dividing them up and then saying individually each of these little pieces of the contentions don't meet the admissibility standard is really just a gross distortion of what the contentions are. And, you shouldn't fall into that trap when you are ruling on the admissibility of them.

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Getting back to the admissibility standards. In addition to the basis and specificity pleading requirement which, as I said, I think are fully satisfied here, there is one other one which is the pleading requirement set up by the Commission in CLI 86-11. And, that's what everyone refers to, the shorthand reference of the fundamental flaw pleading requirement.

You know, when you read through the objections of LILCO and the Staff, every other word is, "This contention doesn't plead a fundamental flaw." Well, when you read through, in essence, what they are saying when they describe why that's true, it's very clear that the argument that is being made is precisely the one that the Commission expressly rejected in CLI 86-11, which is an attempt to force you, the Licensing Board, to make a merit evidentiary determination on whether or not a contention is, in fact, true, whether or not the allegation in the contention is, in fact, true at the admissibility stage of this proceeding which is clearly improper. And the Commission expressly prohibited you from doing that in 86-11.

You shouldn't fall into that trap which has been set for you by LILCO and the Staff by their suggestion that because they don't believe an alleged deficiency or an alleged flaw isn't really fundamental, that in the contention we didn't demonstrate to you that it was fundamental; that,

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therefore, the contention is not admissible. You cannot properly make that ruling. The Commission expressly told you you can't.

All we have to do in these contentions is plead, is allege, with basis and specificity, that a particular exercise result precludes a reasonable assurance finding. That's what CLI 86-11 says. And, that's what every one of these contentions does.

LILCO and the Staff clearly disagree with that. They are obviously going to come in here when we get to trial and put on evidence to try to show you that particular deficiencies we have alleged aren't a big deal, or that they fixed them, or that you shouldn't worry about them because they were an ad hoc problem that occurred on the day of the exercise. Fine. That's perfectly fine for them to do at trial, because at trial we will put on our evidence which will demonstrate to you that, in fact, each one of those deficiencies we allege is fundamental and does preclude the reasonable assurance finding.

The point that you have to focus on now is whether or not we meet the pleading requirement. And, I submit to you, gentlemen, that there is no question that we do.

We have alleged deficiencies in -- we have alleged that the exercise results preclude a reasonable

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assurance finding. We have alleged specifically why that's true. And we have included in these contentions the basis for those allegations.

We meet all of the pleading requirements for the admissibility of contentions. And, under UCS those contentions that challenge FEMA's conclusions, as stated in their exercise assessment, are clearly also proper.

I think that basically summarizes our position as set forth in the Response. And, I think if there is anything else I need to say I will say it in response to statements made by LILCO and the Staff.

JUDGE MARGULIES: Do the governments have anything further?

MR. ZAHNLEUTER: Yes. I would like to add one brief thing as a supplement.

There is an example of the definition of how the fundamental flaw criterion is applied, and that is in the Shearon Harris case. One contention that was admitted dealt with effective communications among emergency personnel, and another one dealt with the effective functioning of an EBS system.

Both of those subjects are dealt with in the governments' contentions. For example, 45 and 40(C). And that case could provide a valid framework for the acceptability of the contentions that we have submitted.

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But, another point regarding that case, a more important point, is that there was a consideration that the Board said was largely decisive in its Shearon Harris ruling. There were actually two considerations.

But, there is a consideration that you should consider in this case, too, much in the same way the Shearon Harris Board decided that decision. That is that in this case there is no government participation in the exercise. It's an important consideration.

And, the old standard, run-of-the-mill exercise that FEMA conducts should not be appropriate in a case like this. This exercise should be more carefully scrutinized than in an exercise where governments are participating.

There are many reasons for that additional scrutiny. I think you heard quite a few of them yesterday at the limited appearance statements, and you will hear more in the next two days no doubt.

But, just as the Shearon Harris Board took into consideration factors which it thought was special and unique in that case, I suggest that you take into consideration the special factor in this case that the governments did not participate in the exercise, and the exercise was not based on a presumption that the governments would participate.

JUDGE MARGULIES: Are you ready to proceed, Mr. Irwin?

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MR. IRWIN: Thank you, Judge Margulies. I don't expect to take my full 20 minutes. These are the issues which the Board has brought us here to -- I guess today may require some clarification, but they have already been argued at length in the papers and this case is long enough and I don't want to unduly prolong it.

As Ms. Letsche indicated, I am not going to argue the merits of specific contentions. I will simply try to address the fundamental flaw criterion as applied particularly to the FEMA analysis.

I think one has to look at the fundamental flaw argument which is really the nub of what brings us here today in two lights. One of them is the traditional pleading and practice requirement of the NRC; and, the other is the specific context of an exercise and review of that exercise at the very end of a licensing proceeding.

The case law surrounding admissibility of contentions with respect to basis and specificity is reasonably well known. And, we don't disagree much on its Horne book descriptions.

Where I think I disagree with Ms. Letsche is in the suggestion that applications of the requirements of basis and specificity necessarily require the Board at this point to draw merits judgments. The Commission, in CLI 86-11 and in other decisions, has stated that the criterion of admissible

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contentions is whether the contention, if proven, was pleaded in such a fashion that it would demonstrate that which was required. And, in this case it would be the absence of an ability to reach a finding of reasonable assurance.

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That itself does not require the Board to reach merits evidentiary judgments. It requires the Board to look at the contention, and to parse it to see what is being alleged. Whether what is being alleged is supported by adequate allegations which if proven might enable the Board to reach a judgment that there was a lack of reasonable assurance.

To that extent, to the extent that there is a conclusion by the Board that the contention would include a finding of reasonable assurance, yes, there is an element of merits judgments. But that is a kind of screening or decisional process that the Board has to engage in, and it can be engaged in here independent of the specifics of the record.

It is illustrated in the Shearon Harris case, which Mr. Zahnleuter referred to, and which, incidentally, was affirmed by the Appeal Board within the past couple of weeks.

There, the licensing board had before it, if I recall, ten contentions, and it did admit two of them, but it threw out eight others, and it did so on a threshold basis, finding that the necessary tests of specificity and basis had not been met, and the Appeal Board said that was an entirely appropriate analysis for the licensing board there to undertake.

One problem with these contentions is that, as Ms. Letsche indicated, they are detailed, but I think it is important to distinguish between detail which may go to specificity and detail which doesn't necessarily go to adequacy or basis.

That, I think, is a job for the Board, and mere numbers of words don't automatically preclude that, and that threshold reviewing portion of the Board is not the same as reaching a merits judgment as to whether or not matters had been proven.

Now, let's bring that basic test into the context of litigation, or the opportunity for it, after an exercise which looks at an emergency plan which itself has been thoroughly litigated at the end of an operating license proceeding.

The controlling case, which I agree with Ms. Letsche, is the Union of Concerned Scientists, revolves entirely around the concept that the NRC was either allowing or not allowing sufficient opportunity for parties at interest to look at what were called fundamental flaws, fundamental defects. The concept occurs repeatedly in the case, and no judge in that case and no party in that case suggested that anything other than fundamental -- things which really went to the heart of the emergency plan should be looked at in this case. Not at this point. This is not the beginning

of the contruction permit case, it is not the beginning of an operating license case. It is not even the beginning of an emergency plan.

This is a review of the actual execution of the plan, and is, in essence a fail safe kind of review, and I don't think the D. C. Circuit disagreed with that. The problem that they had was that they felt the NRC's only avenues of review, namely staff review, checked by Section 2206, Petition to Reopen, after the fact, was an insufficient avenue.

They said that the exercise as a whole was a material element in the Commission's judgment. Not every jot and till of every portion of the exercise. The exercise as a whole.

That is the framework in which they looked at it, and I think you can see that from the Court's treatment of scheduling and its treatment of Judge McKennon's dissent. And anybody who reads this opinion knows it is written, majority dissent, by three judges who are pretty well versed in NRC proceedings, and how long they can take.

One of Judge McKennon's arguments in his dissent was that if one allows these kind of proceedings to be heard on a regular basis, they could conceivably delay commercial operation of other licensing the plants by up to two years by the time you got the proceeding held, and

up to the Court of Appeals and back, and the majority said no, that just isn't the case, and there are two reasons. Well, there are three.

One is what we are looking at, and the kinds of procedures you can follow. You can follow expedited procedures, and besides licensee is automatically stayed upon review.

Here we are over seven months into this case, and we are defining issues. I think that this without any elaboration, illustrates the problem the D. C. Circuit saw if there was simply an open flood gate of every aspect of every exercise.

Now, turning to the use of the FEMA Report in this litigation. The FEMA Report is a resource document, and is one which under NRC regulations is entitled to a presumption of validity, but it is rebuttable presumption. There is other material available. Indeed, LILCO has already turned over to the Interveners every docukment in its possession concerning the offsite players participation in the exercise.

By informal count, I believe it is on the order of fifteen or sixteen thousand pages of material. It has been available to them for at least two months, and up to four months or five months.

There is a lot of material there. The FEMA Report

is just one aspect of it.

What FEMA said is right, what FEMA said is wrong, we certainly agree is challengable, like any other resource document.

Where I think we part company with the Interveners is in their invitation that this Board second guess FEMA's definition of an exercise. FEMA is an independent Federal agency which has under its memorandum of understanding with the NRC, the primary responsibility for setting up and conducting and framing exercises. There is no allegation here that this exercise was set up and framed in any professional sense, putting to the side the artifact of governmental participation, which I think truly is an artifact, but in any professional sense that this exercise was set up any differently than any other. The contentions of interveners which go to the scope of the exercise, to the size of samples and other areas where we have objected to the contentions concerning FEMA's evaluation, basically our invitation, as we see it for this Board, this Commission, to second guess a presumptively valid methodology which is used everywhere, and we don't think that is appropriate.

That is the primary difference I think between our views of how the FEMA results should be used, but it is a very important one.

In terms of the divisibility of contentions which

Ms. Letsche referred to, I think that factors in this proceeding, which is now almost five years old, suggests that Boards and parties have treated contentions as being examinable in their component parts. In the safety hearings. In the diesel hearings. In the first portion -- in the plan portion of the emergency planning proceeding, contentions were in fact looked at and evaluated and ruled on in their parts, and I don't recall anybody ever having complained about that before. I don't think these contentions are any different.

It is a convenient argument, but I don't think it bears scrutiny either from experience of those cases or from logic.

In short, what we are about here is an important fail safe review coming at the end of years of careful scrutiny of a plan which has probably been looked at more closely than any other, and the difficulty with these contentions, which are basically as long as those originally filed, is that they are potentially an invitation to reopen everything that has been litigated to date.

I don't think that is what the Commission had in mind in 8611. I am quite sure that is not what the Court of Appeals had in mind in the UCS case. And I will be happy to answer any questions the Board has.

JUDGE MARGULIES: The Staff?

MR. BORDENICK: Judge Margulies, first I would like

to refer to an extraneous -- what I consider an extraneous matter, and that has to do with what the Staff feels were the unwarranted comments that the Interveners made in their reply which was filed on August 25th, at pages 2 to 3, regarding the Staff's review of these contentions, and we feel the comments were unwarranted --

JUDGE MARGULIES: Mr. Bordenick, I don't think it is necessary to go into that. We haven't taken it up, and didn't schedule it for a matter to be discussed. Let's not open --

MR. BORDENICK: I understand that. I just briefly wanted to say that we did not want our silence to be construed as acquiescence to the comments, and in light of your comments, I will --

JUDGE MARGULIES: Well, we don't construe silence as the equivalent to acquiescence.

MR. BORDENICK: I think the parties -- one thing that the parties are in agreement on this morning is the fact that the papers that have been filed, and I think there are approximately five hundred and fifty pages of the matter before the Board, and those papers pretty well set out the parties respective position.

So, like the other two parties before me, my comments should be fairly brief and I would like to make several observations.

First, it might be helpful for the record since everyone has referred to the UCS case to give the citation for the record, not the case, the Union of Concerned Scientists versus the United States Nuclear Regulatory Commission, and it is found at 735 Fed 2nd, 1437, and the case was decided in 1984.

Essentially, I agree with the comments that Mr. Irwin has made regarding that case. I agree with Ms. Letsche that it is a key case before the Board. Like Mr. Irwin, I think it is important to look at the context of that case.

The case went to the D. C. Circuit because prior to 1984, prior to this case, the Commission's regulations provide that licensing boards need not consider the results of the merits of planning exercises in licensing hearings before authorizing full power licenses for nuclear power plants.

The focus of the UCS case focuses on whether or not that rule was valid. It was found in that case that it was not, and that is why we are here this morning arguing admission of contentions. It was in that case, however, that the concept of the fundamental flaw first appeared.

Unfortunately, the case doesn't shed a lot of light on what a fundamental flaw is. However, I think that the case that is really instructive for the Board for purposes

of determining which of these contentions are admissible is a case, again, that both parties have referred to, and that is the so-called Shearon Harris case.

Mr. Irwin did mention that recently, it was on August 15th, which coincidentally was the same date the Staff filed its response, affirmed the licensing board, and I think that Footnote 71 on page 26 and 27 on that case is very instructive; if the Board has not as yet read it, I would recommend that you read it.

The Appeal Board more or less in passing, because they really didn't get into a discussion of the licensing board's action in Shearon Harris which the Staff submits are essentially the same as the position we are urging this Board to adopt, although admittedly the Shearon Harris Board did not have the lenth and breadth of contentions before it that you have in the Shoreham proceeding.

Footnote 71, I think, is instructive in that it first talks about the fact that the Intervener in that case had asserted that because the Commission had not adopted the fundamental flaw standard, the licensing board lacked the authority to apply it. Of course, the Appeal Board was able to dispose of that argument by citation to the Commission's Decision in CLI 86-11 in this proceeding.

And the Appeal Board went on to state, and I quote: The Commission therein made it clear that the term, 'fundamental

flaw,' means a, 'deficiency which precludes a finding of reasonable assurance that protective measures can and will be taken.'

That same decision also made it clear that this standard is nothing more than the long standing requirements of the rules of practice that contentions must be pleased with adequate basis and specificity.

They cite 10 CFR 2.714B of the Commissionss regulations, which go to admissibility of contentions.

They finally ended up, and I think this is the key portion of the footnote for purposes of the Board's consideration this morning, they said as to Mr. Eddleman's second argument that the licensing board reached the merits of the contentions, we do not agree. The Board did not delve into the merits of the four contentions.

These were the four contentions that were excluded at the threshold.

It merely applied the standard for admissibility of contentions endorsed by the Commission in Shoreham, that is, it found that the contentions in question did not allege that the exercise demonstrated fundamental flaws in the emergency plan, or did not plead bases that if shown to be true would demonstrate a fundamental flaw in the plan.

This is essentially similar to what the Staff and also the Applicant argued in their papers in response

to the contentions.

So, I don't think, in essence, my heavy reliance this morning on the Shearon Harris decision is for purposes of saying to the Board in effect you are not writing on a clean slate, vis-a-vis admission of contentions.

You have got some precedent by another licensing board which has been fully affirmed by the Appeal Board, and the standards applied in Shearon Harris is essentially the same standards that we are suggesting you apply in the Shoreham proceeding.

Now, Ms. Letsche talked about the fact that there is a right to a hearing vis-a-vis the exercise. That is, of course, beyond question based on the UCS case, but as we all know in order to have a hearing you have to have one or more admissible contentions.

Now, both the Applicant and the Staff have conceded there are some admissible contentions. I think the Staff suggested a few more than the Applicant did, but obviously not as many as the Interveners have suggested. I think it is also important to put the proposed contentions in the context of some past history regarding the exercise proceeding.

I don't remember the time sequence, and I don't think it is particularly important for purposes of the discussion this morning, but LILCO requested that the Staff

asked FEMA to hold an exercise on this plan. That was done. The Interveners vigorously opposed the holding of that exercise. As a matter of fact, they went to the Commission and asked the Commission to cancel the exercise. The Commission in what is now CLI-86-14, which is somewhat out of sequence numbering wise, rejected the argument that the exercise not be held.

In large part, the contentions that the Interveners have proposed for admission in this proceeding really try to rehash why the exercise should have been held in the first place, and that sort of thing.

As we pointed out in our response paper, it is clearly beyond the scope of the type of hearing that we believe the Commission envisioned.

Now, as to FEMA. It has been pointed out that FEMA -- what FEMA says is a rebuttable assumption, and that is true. FEMA has issued its exercise assessment, and in large part the proposed contentions draw on the deficiencies found in the exercise report.

In my own mind, the question of FEMA's rebuttal presumptions really arises at the time you submit testimony. However, for purposes of determining the admissibility of contentions, although the County argues that in deciding whether or not deficiencies that FEMA found are correctable were things that just happened on that

particular day, but don't constitute fundamental flaws in the plan, and this is somehow requiring the Board to make an evidentiary determination in order to admit the contentions.

Again, this is the same sort of argument that was made in Shearon Harris, and it has been rejected. It is up to the person advancing the contention to allege with basis and specificity how and why something is going to be a fundamental flaw in the plan.

It is not enough to say that it is going to be a fundamental flaw. We have the same sort of situation in this proceeding before, albeit before another Board, on the quality assurance contention, and the Appeal Board there found it is not enough to come in and cite deficiencies in a QA program. You have to allege and you have to prove that these deficiencies constitute in the QA area a breakdown in the program, and in the emergency planning area, you have to allege, which was not done here, merely by more than just stating the phrase, 'it is a fundamental flaw,' you have to allege and you ultimately have got to prove that it is a fundamental flaw.

With few exceptions that has not been done. Now, in the case of Contentions 38 and 38, for example, both of those the Staff has no objection to admission of the contention. LILCO, I think, does not object to one but the other, I don't remember offhand which one it is, but those

the Board might ask if you are not objecting to admission of those, why are you objecting to some others?

That is a little different story. What we are saying there is that each of the deficiencies alone might not constitute fundamental flaws, but on those contentions we believe they have been pleaded with adequate basis and specificity that if they establish at a hearing that all those deficiencies, in fact, took place and can't be corrected, that they are so pervasive that they could constitute a fundamental flaw. I am not suggesting at this time they do or they don't.

End 2.

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But certainly we feel on those contentions they are admissible for that reason.

As to breaking the contentions up into subparts, again I don't want reiterate or rehearse what Mr. Irwin said, but it sounded somewhat strange to me for the intervenors to be complaining that the applicant and the staff broke down their responses into subparts.

First of all, it was the intervenor that set up the contentions in subparts and, secondly, as Mr. Irwin pointed out in this proceeding, and I will give you one really classic example for this proceeding was the so-called Contention 22 which had to do generally with the EPZ.

Originally that contention was proposed I believe with Judge Brenner and he admitted parts of it. That was appealed by the country.

The Appeal Board reversed Judge Brenner, and the Commission last Friday indicated that they would take review of that part. That is a classic example in this proceeding, at least as far as I am concerned of how the County in the past has proposed contentions in subparts and the applicant and the staff and the Board have admitted parts, but not the full contention.

So that it is actually standard procedure in this proceeding and in every other proceeding that I am personally familiar with, and I am familiar with quite a few of them,

Sim 3-2

where you have that sort of subpart-by-subpart aspects of the contention. Again, that is the way the County submitted it. I didn't submit it that way, and I responded in the way they submitted it.

In fact, on some contentions we said we had no objection to some subparts of the contention, but we objected to others.

So I don't quite understand the significance of her argument in that respect.

Also, Ms. Letsche dealt at some length with the fact that in her opinion the contentions that the intervenors proposed in this proceeding, based on their length, they are a model of what a contention should look like from the standpoint of the basis and specificity.

So I think you can reject that sort of argument out of hand because, yes, I have seen contentions that are one paragraph long admitted and they were admitted because they had basis and specificity, and I can conceive that you could have one contention a hundred pages long and it could be rejected because it lacks basis and specificity.

I don't think that the test for the admission of contentions is the length of the contention.

Also, I would like to make one last general comment vis-a-vis the contentions which generally involve

Si m 3-3

what I call the scope of the exercise by FEMA.

We did not cite these cases in our responses, but I think that the Board might want to take a look at several Appeal Board decisions. I will tell you the names of the cases and then I will tell you why you should take a look at them.

The first one is -- well they both came out around the same time, and I was going to try to give them to you in chronological order.

The first one is the Diablo Canyon case. Like the Shoreham proceeding, there are a lot of ALABs and Commission decisions in Diablo Canyon, but this one happens to be ALAB 728, and it came out on May 18th, 1983.

Then there is the Three Mile Island case which came out a few days subsequent to that, on May 26th, 1983, and it is ALAB 729.

Now these particular cases are not in the emergency planning context, but I think the principles enunciated therein are certainly analogous to the emergency planning situation and again it should be applied by the Board in the context of looking at the FEMA conduct of the exercise.

Both of these decisions involve the so-called unresolved safety issue area or what is referred by the acronym of USI, and I would just like to read briefly

Sim 3-4

from, first of all, Diablo Canyon, and this appears, and I don't know if I gave you the citation, but the Diablo Canyon ALAB is found at 17 NRC 777.

The language in question says that "An intervenor in an operating license proceeding is free to challenge directly an unresolved generic safety issue by filing a proper contention, but it may not proceed on the basis of allegations that the staff has somehow failed in its performance."

The Three Mile Island case, which is found at 17 NRC 814 -- and by the way, the specific page on the Diablo Canyon decision which was I was reading from is page 807.

The Three Mile Island case is found at 17 NRC 814 and at page 889 in part, and I am not reading the total paragraph, by the way. They cited the River Bend case for the proposition that "Parties interested in litigating unresolved safety issues -- and this goes to the question actually of the basis and specificity rather than the FEMA review, but the two are, as we know, somewhat intertwined.

"Parties interested in litigating unresolved safety issues must do something more than simply offer a check list of unresolved issues. They must show that the issues have some specific safety significance for the

Sim 3-5

reactor in question and that the application fails to resolve the matter satisfactorily."

Now you could argume, and I am sure the intervenors in Three Mile Island argued that to do what was suggested be done required some sort of an evidentiary determination by the Board at the threshold stage that we are at in admitting contentions, or in these two cases in decising what USIs, if any, would be litited.

I think the cases though are instructive in that the focus is not on what FEMA did in its exercise. There is no allegation in any of the contentions that FEMA did or didn't do anything at the Shoreham exercise that they didn't do at any other exercise.

Admittedly, as I think Mr. Zahnleuter pointed out, the County and State Governments were not present -- I am sorry, they were present as spectators. They did not participate in the proceeding. However, that does not vitiate in and of itself the exercise because the Commission told FEMA in CLI 86-14 to go ahead with the exercise because they felt that whatever came out of the exercise would be useful to them in reviewing all the matters that were before them.

I think that by admitting, I guess it is Parts 3, 4 and 5, or certainly 3 and 4 of the contentions, you would be opening the door to litigating what it is that

FEMA did or didn't do at the exercise, and I believe that that would be far beyond the scope of the type of proceeding that the Commission envisioned for this proceeding.

One other point briefly. I am sure everyone is aware of the Commission's order of September 19th, but I don't think it has a CLI number on it.

Some of the contentions, and if the Board is interested in going through contention by contention, which I understand they are not interested in doing, it seems to me that some of the contentions that the county proposed, and we have heretofore objected to, might fall within the scope of some of the issues that are before the full Commission.

I have not personally gone through the list of contentions in that context, but I am simply alerting the Board that that possibility may exist, and if you want to hear further on that, I am sure the parties will address it.

I think that concludes my remarks. I will be certainly delighted to respond to any questions that the Board may have.

JUDGE MARGULIES: Does FEMA have anything?

MR. GLASS: Just a very short comment. FEMA doesn't have a formal role in the litigation of which

Sim 3-7

contentions shall be admitted. We certainly are not looking to create such a role for ourselves.

Today the issue as to the scope of review of FEMA's obligations under the MOU, under this proceeding and in its involvement in conducting and preparing for an exercise have been raised.

I would like to reserve an opportunity when we get to the discovery schedule to address those issues becuase I think it would be more appropriate at that time.

JUDGE MARGULIES: We will take a 10-minute recess.

XXXXXXXXXXX

(Recess taken from 10:25 a.m. to 10:35 a.m.)

JUDGE MARGULIES: Back on the record.

JUDGE SHON: The Board has a question that seems pretty fundamental to the whole thing.

10 CFR Part 50, Appendix E4(f) requires that a specific exercise be held within I think a year before the granting of an operating license.

We would like to know for starters is this exercise the exercise? Will there be another? Is this a special thing that was undertaken only because the Commission ordered it and not because it is a requirement of the regulations? What is the nature of this beast?

Would anybody like to start answering?

MR. IRWIN: It is my belief, Judge Shon, and I

believe I speak for LILCO in this, that this exercise was intented by the Commission, if satisfactorily conducted, to afford a sufficient basis for licensing. In other words, it is eligible to be that exercise referred to in Appendix E and not simply a kind of model exercise which would then be followed by a real exercise.

It is conceivable that if there were deficiencies in the exercise which must be addressed by either a remedial exercise or a table-top or some other event, those would follow as they have in various other plant cases.

My understanding from everything the Commission has said, including its precursor orders for the exercise, was that if the exercise were shown adequate for an emergency that it could be sufficient for licensing.

Now the section you have read raises an interesting question because there is a time frame built into that regulation and we are in, shall we say, some danger of being turned into a penumbrum by the force of passage of time.

Suffice it to say that LILCO will either seek -- well, we will do both. We will seek to have this proceeding go as fast as possible and, if necessary, we will seek a waiver from that requirement, but I don't think that requirement definitionally would operate to preclude this exercise from being sufficient.

Sim 3-9

JUDGE MARGULIES: Is it intended that this be the exercise under that portion of the regulation? You used the term that it is "eligible," but it is intended to fulfill the requirements of that portion of the regulations?

MR. IRWIN: I believe, Judge Margulies, that that was the Commission's intent. It may be CLI 86-14 or it may be an earlier order where the Commission instructed FEMA to hold an exercise that was as full in scope as possible given the circumstances. That tracks another provision of Appendix E which requires that exercises for licenses purposes be as full as practicable under the circumstances.

It does not require that every element of the 50.47(b) be in fact exercised, and that is an important point.

So I think the Commission was tracking the intent of the regulations in its order.

JUDGE SHON: How, Mr. Irwin, could it have been in the Commission's mind that this could even be THE exercise, that specified exercise, when the specified exercise is supposed to be evaluated by FEMA and FEMA had already served notice that it would not be able to make a finding of reasonable assurance?

I believe that was the chronology, was it not?

Sim 3-10

MR. IRWIN: That is the chronology.

As I say, I am glad you asked that question.

(Laughter.)

It goes to a pretty fundamental concept in the structure of this exercise and in the structure of this unique aspect of this case. This whole proceeding is operating under the Memorandum of Understanding and not Part 350 of FEMA's regulations.

Part 350 of FEMA's regulations in 44 CFR presume as a starting point, and I hope Mr. Glass will correct me if I am wrong, that State and local government are participating.

The fact that State and local governments are not participating, it seems clear to me from all of the correspondence from FEMA between Mr. Spec and Mr. Dircks ruled out, as you indicated Judge Shon, FEMA's ability to reach the finding of reasonable assurance.

That does not, however, mean that the NRC itself cannot reach the finding. It is, after all, the NRC that issues the license based on its conclusion of reasonable assurance.

What it means is in effect that this Board and the Commission play a larger role than is the case is some other exercises where FEMA does in fact routinely reach reasonable assurance findings.

Sim 3-11

That is an ultimate legal judgment that is inherently this Commission's legal duty, and the fact that FEMA can't reach it for its own purposes under its own regulations doesn't prevent you from being able to reach it. That is an important question because this exercise and this proceeding are coming under a slightly different rubrick than the normal one, but it is very important that we not be stymied by the artifact of the absence of State and local participation.

To turn the argument around a little bit, if the Commission had not thought that it would be possible for this Board and for it to reach that ultimate conclusion of reasonable assurance, it seems to me that the Commission would have have been issuing the orders that it has been from the start of this exercise and the start of this proceeding in order to assist this Board in shaping its determinations.

JUDGE MARGULIES: Do intervenors wish to comment?

MS. LETSCHE: Yes, just a couple of brief comments.

First of all, I am not sure that any of us are in a position here to know what the NRC truly intended. As I recall, it said the January 30th order. It did not say in that order that the exercise would lead to or should lead to a reasonable assurance finding.

Sim 3-17

I seem to recall the Commission saying that they believed the exercise would be "useful" to the NRC, and I am not sure that that the same as the way Mr. Irwin interpreted it, that the NRC believed it was an opportunity to lead to a reasonable assurance finding.

Since no one reasIly knows what the Commission meant, maybe this Board should certify the question to the Commission and find out what in fact the Commission did mean.

It is the position of the governments that there is no question, however, that there needs to be another exercise in this case. I mean it is clear that not only did FEMA say up front that we can't make a finding, but FEMA said at the end we can't make a finding. That is Contention 19.

There can't be any finding not just because even FEMA acknowledged it, but for all the other reasons that we have stated in our contentions. There is no way that this exercise could result in that finding. There has got to be a second one.

I just don't think that is even subject to question here.

JUDGE MARGULIES: Ms. Letsche, that response goes really to the merits. The question is what is the intervenor's position as to what they think is the intention

Sim 3-13

of the Commission.

MS. LETSCHE: Well, frankly, Judge Margulies, I can't get inside those people's brains to tell you what they thought. I told my recollection of that order, and I don't have it in front of me, was that they said it would be useful. I don't remember any statement on the part of the Commission saying that they believed that exercise could lead to a reasonable assurance finding, and I think Judge Shon is absolutely right, the Commission knew up front that they weren't going to get a FEMA finding out of it.

The Commission's regulations indicate that to make the reasonable assurance finding you need to rely on FEMA's findings and determinations, and there isn't a FEMA finding of reasonable assurance out of this exercise.

And I might note also that FEMA's obligation to making a finding is a mandatory one. Notwithstanding references to the MOU, FEMA is to make a finding after an exercise, and that is something that they said they weren't going to be able to do with respect to this exercise.

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And, since the Commission knew that when it said, "Go ahead and hold that exercise," which FEMA had already told them could not lead to a finding I would assume that the Commission never thought this was The exercise.

MR. BORDENICK: If you are looking for a definitive answer from the Staff, I'm afraid you are not going to get one.

I think, very briefly, it's conceivable that this could be the exercise. But, it may or may not be. I don't know.

MR. IRWIN: Judge Margulies, may I respond to one point that Ms. Letsche made?

JUDGE MARGULIES: Yes. It may help.

MR. IRWIN: Ms. Letsche suggested that -- or, did not suggest, she stated that this could not be the exercise for the -- the exercise for licensing purposes for the reason that FEMA cannot draw a finding of reasonable assurance. The reason that FEMA cannot is that State and local governments did not, in fact, participate.

If one takes the State and local governments at their words, they will never participate in an exercise. Therefore, no license can issue.

If the NRC itself accepted this line of reasoning, it would follow that this whole proceeding would be an exercise in futility. If this proceeding were an exercise in futility, the Commission presumably would not have scheduled it.

#4-2-SueW

The NRC itself has ultimate licensing responsibility and ultimate responsibility for making the reasonable assurance finding. FEMA's reasonable assurance finding is a routine that it follows pursuant to its own regulations. And, I think the Board must, while recognizing that the two frameworks exist, recognize that the NRC's framework is the dispositive one for this hearing purposes.

JUDGE SHON: Mr. Irwin, one more final point that I would certainly like to have everybody address, in fact.

The particular sentence in the regulations to which I referred, the one that mentions this time limit, I would like to read the sentence in its entirety, because more is said than just the time limit. The second half of the sentence has something in it that may bear on this question also.

It says, "This exercise shall be conducted within one year before the issuance of the first operating license for full power and prior to operation above five percent of rated power of the first reactor, and shall include participation by each state and local government within the plume exposure pathway EPZ and each state within the ingestion exposure pathway EPZ."

How could this then be that exercise?

MR. IRWIN: Judge Shon, I think the answer to your question is the same as what I was stating a minute ago. If,

#4-3-SueW

in fact -- well, I think the answer to it is that the Commission has recognized in the realism decision, CLI 86-13, that if state and local governments will not commit in advance and will not follow the accustomed procedures, then the logic of this entire proceeding must be followed. Mainly, that one sees what, in fact, is demonstrated in an exercise; one sees what a plan produces; and, then one makes, in the final analysis, the assumption that state and local governments will do their duty, fulfill their moral obligation.

This regulation was written prior to the withdrawal of New York State and Suffolk County from emergency planning at Shoreham and I think must be read in light of succeeding events and the Commission's decisions in CLI 86-13 and elsewhere.

I agree with you that the words say what they say, but there have been a number of -- if you read 5047(b), you will find that it is ripe with references to state and local governments, and it hasn't been a single instance of state and local government participation here for three years.

I think one just has to look at this case in what, until a couple of weeks ago, was a unique context. And, now they have a similar context in New England.

But, the fact of the matter is I think this is an exception to the rule which the Commission has recognized.

MS. LETSCHE: I guess my response to you, Judge Shon,

#4-4-SueW

is that you are absolutely right. And, in fact, that's something else that we said in our contentions. That's Contention 18.

The fact is that what the Commission -- the Commission did not have any of this we-are-not-going-to-believe what the County and State say routine until 86-13. If we are talking about what the Commission intended when it said, "Let's have this exercise," which was back in November or January, they hadn't come up with that rationale yet. And they knew at that time when they were asking that that exercise take place, and they told Congress that they thought it would be useful to them and would provide useful data to them, they knew that there was not going to be any State or local governmental participation in that exercise.

And, in light of that knowledge on their part which was long before they decided they weren't going to take at face value what the Governor and County Executives in this State said, they well knew that the exercise was not going to meet Appendix E requirements and, therefore, couldn't be the exercise that you referred to.

And, therefore, it's the position of the governments that this clearly is not an exercise that can lead to a licensing of this plant, and that if LILCO wants to continue to pursue the application there would have to be another exercise that, in fact, meets the regulatory requirement.

#4-5-SueW

MR. ZAHNLEUTER: Judge Margulies, I have a copy of that decision and I would like to read a sentence from it. It's the January 30th decision, and it might give you some idea of what the Commission meant.

It says, "The exercise does not flaunt that decision..." -- speaking of the Cuomo v. LILCO decision -- "To the contrary, it presumes the validity of the limits on LILCO's authority to implement its plan as set forth in that case. The only elements of LILCO's emergency plan which will be tested are those that LILCO may lawfully do on its own."

I think, therefore, that the exercise is limited. And the answer to your question is that that part of the regulation is not applicable to this exercise.

MR. IRWIN: If I may, I think what Mr. Zahnleuter said is not inconsistent with anything LILCO has been stating to date.

The regulations simply require that in the licensing exercise it must be tested as is reasonably practicable under the circumstances. That's entirely consistent with what the Commission said in the January 30th Order.

There is nothing in that Order or in anything else which suggests that this exercise was not, if its contents and results prove sufficient, intended to be eligible to be the licensing exercise. And, certainly if the Union of Concerned

#4-6-SueW

Scientists case, which everybody agrees is the controlling case for licensing purposes for exercise, is in fact the controlling case, then it suggests that we are adjudicating the results of an exercise which was intended for licensing purposes.

I just think you have got to go back to first premises here.

JUDGE MARGULIES: Let's move along. There appears to be a departure between Staff and the Applicant on the matter of whether scope contentions are admissible.

I take it from Staff's presentation, it's their position they are not. Is that correct?

MR. BORDENICK: That's correct.

JUDGE MARGULIES: Whereas, the Applicant has taken the position that scope contentions are admissible but they are to be -- the alleged inadequacies are to be measured against other FEMA evaluations.

Is that correct, Mr. Irwin?

MR. IRWIN: I think I agree with your characterization, Judge Margulies. I would have to put that into the context of a burden on Intervenors to allege that the scope here was A different from B and properly so.

JUDGE MARGULIES: Okay. My question to you is, why don't you measure it against the regulatory requirements rather than as against other FEMA evaluations ?

#4-7-SueW

MR. IRWIN: Well, I think that FEMA practice is, to some extent, an illustration or implementation of NRC regulatory requirements over the past several years. I believe that obviously -- I would, of course, concede that regulatory requirements which I presume are primarily set out in 5047(b) set the outer bounds of what needs to be demonstrated.

I think what the -- as I understand the Intervenors' contentions on this subject is that either the exclusion of certain categories of demonstration or the sizes of samples taken in others are definitionally insufficient.

I think in deciding whether those allegations raise questions that are worthy of litigation, one has to look both to practice and to what is practicable under the circumstances such as, for instance, limitations on legal ability to notify the public in the course of an exercise.

So, I'm not sure I answered your question but I --

JUDGE MARGULIES: Let me ask it this way. What is the logic to look at other FEMA evaluations at other plant locations?

MR. IRWIN: Well, to give a very concrete example, recovery and reentry and ingestion pathway aspects of an exercise or potential exercise are not always evaluated by FEMA. And their mere omission here is not, I would submit, de facto or de jure a deficiency.

Nevertheless, those two elements are elements of --

#4-8-SueWalsh

in 5047(b). Plenty of other plants have been licensed without ingestion pathway or recovery/reentry aspects of the exercise being, in fact, fully implemented in an exercise.

So, that's the kind of reason one needs to look at in implementation of regulations as well as the actual words.

MS. LETSCHE: If I might just respond briefly, Judge Margulies, I think your point -- your question, what is the logic of looking at other FEMA practice here, is exactly the right one.

To suggest that in deciding whether a contention which talks solely about what happened on February 13 with respect to this plant, that in deciding whether that's admissible you are supposed to go and figure out what FEMA did at other plants and other exercises, is just ridiculous. That's just ridiculous.

What we put into issue here is the only thing that is relevant in this case. And that is whether what happened on February 13 could result in a finding by you that there is reasonable assurance of certain capabilities and abilities on the part of LILCO.

And FEMA told you its position on that. And LILCO presumably is going to try to tell you -- we just heard it -- that what happened on February 13th can lead you to find reasonable assurance. Well, we have told you lots of reasons why it can't, because there are big, gaping holes in what the

events of February 13th told you. It didn't tell you anything about a whole lot of very essential emergency planning capabilities.

Because of that, in this case, you can't make the reasonable assurance finding. And we are entitled to make all of those arguments under UCS.

What FEMA did with respect to other plants is not relevant. I don't know if anyone looked at what FEMA did in the other plants or attempted to challenge it.

The fact is that in this case, the governments have looked. And, the governments are challenging it. And, we have the right to challenge it.

And, you have to apply the regular NRC admissibility standards to determine whether or not those challenges are admissible. And, in this case they are.

JUDGE MARGULIES: Is there anything further on that question?

JUDGE SHON: Mr. Irwin, you have mentioned the adequacy of the test as being measured by its adequacy compared to other tests that have also led to licensing. Judge Margulies suggested that the adequacy could be clearly measured against the regulations.

Perhaps because of my background I see another measure of adequacy of a test or an experiment, and that is the adequacy of a sample. In all kinds of scientific endeavors

#4-10-SueWal1

we talk about the adequacy of the sample. If there is a hundred million out there and you test two, that's not enough.

Should we not also be looking at things in that way? In other words, if you need a hundred bus drivers and you test two, is that enough or is it not enough? Is it not something that we could hear scientific evidence and opinion on and try to decide whether two is really a test or whether you needed 20?

And that would be completely independent of other licensing cases which might be licensed if two, because they only needed three to begin with. Do you see what I mean?

There is a science aspect of this, too.

MR. IRWIN: I agree with that, although as I understand the way FEMA structures tests, Mr. Shon, there is less I think abstract science than pattern of usage, experience and so forth that has led FEMA to decide what may be a large enough sample.

Suffice it to say, on the size of samples LILCO is prepared to put out every piece of equipment and every driver/traffic guide that it had to be observed. There are, in fact, limits on the sources that may limit the sizes of the samples.

But, I think -- let me try to link your observation with Judge Margulies', because you both are getting to the same point. You don't want to look at every test that has ever been conducted to decide whether this one was a reasonable

#4-11-SueWalsh one. And I'm afraid I may have inadvertently invited you to do that. What I think we are suggesting -- and maybe this comes back to your observation, Judge Margulies, that we look at the regulations -- is that FEMA has its own problems and its own expertise in the methodology and the substance of setting up tests.

It presumably followed that here as to substance with the one artifact exception that the identity of some of the individuals who were filling various roles was different in its affiliation, i.e. it was the utility rather than state or local government than is the case in other tests.

But, in all other respects, so far as anybody knows, this test was set up basically the same as any other. Against that background, all I'm suggesting is that there is a burden on the party which would suggest an inadequacy in the test to demonstrate or to allege that the test is different in material respects from those conducted elsewhere.

I'm not inviting the Board to tell the parties to do a comparative sample of every exercise. I don't think that would be a profitable exercise.

But, I do think that the recognized function and expertise of FEMA and its role under the Memorandum of Understanding, which it fulfilled in this test as with every other test is a kind of bedrock fact that this Board can rely on just as other agencies rely on this Agency's expertise within its

#4-12-SueWall

own province.

JUDGE MARGULIES: Are you proceeding on some sort of an assumption of regularity on the part of the federal agency?

MR. IRWIN: Essentially, Judge Margulies, yes, sir.

MR. GLASS: Judge, if I could be heard since you are addressing the manner in which FEMA conducted an exercise.

We normally would not get involved at this point, because it is not a role to get involved with the standard admissibility for contentions but I feel that we are getting into areas that go well beyond it.

The Federal Emergency Management Agency has been conducting exercises for a number of years. They used, as much as possible, the standard procedures in setting up this exercise, except for the particular differences that have already been discussed.

The Intervenors have already said in their particular response, Joint Intervenors, that they do not intend to challenge the background of the exercise. What they seem to be challenging is the results.

And the governments themselves also indicate that they nowhere allege -- in footnote 22 -- that to be valid an exercise must have a 100 percent of the plan. There are limitations to resources. There are so many people that the federal government can put out. There are so many people that

#4-13-SueWal1

can be tested.

I think we are getting into a very dangerous area if we are going to be opening up this proceeding to questions of whether we should have tested one bus driver or 10 bus drivers or 20 bus drivers. And, I think that the standard that was alleged in Pacific Gas and Electric very clearly sets out that what you are doing is not reviewing whether the Staff somehow failed in its performance or whether the standards that the Staff used were correct.

But, what you are evaluating here is not how FEMA evaluated the exercise but what were the results of that particular exercise. That's the only remarks that I have at this particular point.

Do you have any questions?

JUDGE MARGULIES: Could you tell us, Mr. Glass, how many FEMA exercise evaluations have been tested?

MR. GLASS: In Region II, which I'm familiar with, I think we have had three Indian Point and two remedials -- three remedials for Indian Point. We also have Nine Mile Point, Salem, Oyster Creek, and Fitzpatrick. Fitzpatrick is co-located up in Upstate New York.

I think we have had a total of three exercise per location. So, we are talking about, you know, 10 or 12 at least in this particular region alone.

JUDGE MARGULIES: I'm asking how many have been

#4-14-SueW

tested in an open hearing of this type?

MR. GLASS: When you say tested, what we discussed here --

JUDGE MARGULIES: There was a hearing on the exercise and people opposed the results and there was a determination made on that evaluation of FEMA?

MR. GLASS: The only other hearing that we've had in Region II dealing with the exercise was a special proceeding, which Judge Shon participated in, in Indian Point. And there were some questions raised about how many bus drivers we tested.

There was also a verification report that was done in regard to that. But there was not really a direct challenge to the number of people that we tested.

JUDGE KLINE: My question is for the Staff. My understanding is that your position is that contentions which challenge the sufficiency of performance of the Staff and by analogy FEMA are not admissible; is that right?

MR. BORDENICK: That's right. That's essentially correct. They are beyond the scope of CLI 86-11.

JUDGE KLINE: And, your citation of that Diablo Canyon raised some memories in that that I want to ask you about, particularly the fact that the prohibition against challenging the Staff was in the context of challenging an unresolved safety issue; isn't that correct?

#4-15-SueW

MR. BORDENICK: That's correct.

JUDGE KLINE: And, I'm wondering if I see a broader applicability than just applicability to the unresolved safety issue, for it seemed at the time that Intervenors could win an easy victory if they alleged that the Staff had failed to resolve an unresolved safety issue, an issue that was by definition unresolved.

And, why is it more broadly applicable than that?

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MR. BORDENICK: Well, I think the principle is the same. If you are talking about Staff review of the USI or FEMA's designing the scope of the exercise, I think the principle is the same.

Obviously, Diablo, as I stated in my remarks earlier, was not in the emergency planning context, but I think the principle involved is applicable to this context.

JUDGE KLINE: Has that principle ever been applied to any other case other an unresolved safety issues?

MR. BORDENICK: Well, the reason I am hesitating is I am trying to think. I really can't say for sure.

JUDGE KLINE: Isn't it shown that the Staff goes into a usual proceeding in fact admitting that an unresolved safety issue is unresolved?

MR. BORDENICK: That is true, but there is usually some sort of an interim --

JUDGE KLINE: The contention then comes in and said what everybody already knows, that it is unresolved, that it is not an admissible contention. Was that the rationale behind Diablo Canyon?

MR. BORDENICK: Yes, it is.

MR. GLASS: Judge Klein?

JUDGE KLINE: Yes.

MR. GLASS: There is, you know, a situation where you can question the results of how an evaluation was

conducted, but it should be noted that FEMA has conducted numerous exercises, and they form the basis for our own regulatory findings that were transmitted under 350s to the NRC.

They had been accepted by the NRC all along, and you are now getting into what I find a very dangerous area, because what you are questioning is not the particular results of FEMA's work, but what you are questoning is the operation of an independent agency and how it goes about conducting its business.

Not only in this proceeding, but in its every day work under its own regulations.

If there was an assertion that there was a difference between how we conduct -- let's use the number of the percentage of bus drivers -- since that is one of the issues which was used as an example. If you show that there was a difference between this proceeding and what has been done by FEMA and accepted by the NRC in all of its other 350 proceedings, and then you show that the fact that there was a difference, that that difference had an impact on the ability to evaluate the results, then I would probably say that that would be a legitimate means to evaluate and look behind the exercise and the process used by FEMA.

But to be judging an independent agency's process which has been accepted by your agency in its normal 350's

at this particular point, I think creates a dangerous precedent of one agency really overseeing another agency.

JUDGE KLINE: I wanted to just follow up on that. How do you equate that view with the NRC regulations would permit FEMA's findings to be a rebuttable presumption?

MR. GLASS: There is a distinction, I think, between the actual finding and the design.

You are talking about what FEMA found in an exercise versus how FEMA designed the exercise -- actually didn't design it, but how FEMA determined what the objectives would be, and how they would proceed to evaluate it.

Otherwise, just as you say, there is an unresolved -- if you are talking about the unresolved safety issues, people go in there and admit that there is an unresolved safety issue it would be an easy target. FEMA will admit at this point that we do not do what would be considered a statistical sampling when we determine how many bus drivers we are going to evaluate at the exercises.

We cannot do it, due to limitation of resources, both on our part and the part of the participants, whether they be governments or private entities.

So, it would be the same easy sitting target or duck that you were talking about in the earlier example.

JUDGE KLINE: In the UCS decision, the court found, among the usual reasons for hearing, that it could

test questions of sufficiency. Now, why can Interveners not test questions of sufficiency in these hearings; that is to say sufficiency of the exercise, sufficiency of the scenario?

MR. GLASS: If you are challenging specifics, and that gets back I guess to the test that I put forward, that there was a difference, but what you are really talking about here is testing a generic situation. The percentages is rather similar from exercise to exercise. What you are really doing is challening the generic standards that FEMA uses, where the test that I gave you earlier talks about if you show there is a difference, and you show that difference has a result that impacts on the evaluation of the results of the exercise, that I could probably agree with.

But you are really talking about a generic challenge to how FEMA does its business.

JUDGE KLINE: Well, I am not sure I understand that. I don't see why at an admissibility stage we can't view sufficiency as ranging potentially from zero to a hundred percent, and that the test is where we fall on that continually.

MR. GLASS: As I said when I prefaced my remarks, as to admissibility FEMA does not intend to be taking a position, but we are concerned as to the implications during discovery, and as to FEMA's involvement during the hearing

and the challenges to FEMA as to its generic way of doing business.

It may be the same thing; it may get to the admissibility standard, but it is not our normal attempt to intercede at this point, but you are really getting to the heart of how FEMA does business.

JUDGE KLINE: I understand that. Let me turn to the Staff then and ask them the same question. Aren't questions of sufficiency admissible, and isn't it at admissibility stage reasonable to suppose that sufficiency may range from zero to a hundred percent, and that is where it really falls?

MR. BORDENICK: I think under some circumstances it could be. As I argued earlier, I don't read these contentions as asserting that FEMA did or didn't do anything different here. I think it is conceivable that you could frame a contention going to the sufficiency of FEMA's review. I don't think it has been done in this case.

MR. GLASS: One other point. The normal time to challenge FEMA's method of doing business on a generic challenge would be when FEMA adopted its regulations. Its 350 Regulations. It is really stretching to be utilizing a proceeding in front of another Federal agency to be challenging the sufficiency of regulations that have been adopted by another agency.

JUDGE KLINE: Do you know the scenario that it

uses in these tests are fixed by regulation?

MR. GLASS: The scenario is not fixed, but the type of standards have been addressed when the original rulemaking came out.

Now, as to the particular material that has been put forth by the Interveners today, they themselves make no claim to be drawing challenges between what we have done here and what we have done in other cases. They are only footnotes. Throughout their response they indicate they are not making such a challenge, so all I can say is that we really are challenging then the generic method in which FEMA does business.

JUDGE SHON: Mr. Glass, I must confess I am not familiar with regulations, but is there set forth in the regulations or the equivalent regulatory guides, a precise description of just which functions must be tested in an exercise, and exactly what fraction of a given number of things must be tested?

MR. GLASS: In the guidance memoranda, there is a description of when certain items must be tested. Which items must be tested at almost every exercise, which items is discretionary, and which items only have to be tested once every six years.

There are procedures such as a night time exercise only has to be done once every six years. A surprise once

every six years. The ingestion pathway only has to be done once every six years.

So, those type of standards are set out. As to the specific percentage, no, that is not set out in the guidance memorandums.

JUDGE SHON: And within a given thing. For example, whether or not you had to test response of the Coast Guard if there is water in the area, or something like that.

MR. GLASS: I am straining my memory on whether the Coast Guard's involvement has to be tested, whether the Federal component has to be tested in every exercise, I cannot recall that, but I do remember the ingestion is once every six years, and there are other standards.

JUDGE SHON: Things as to the number of individual units, say ambulets, or busses, or schools, or something that --

MR. GLASS: There is not a particular number, but again, if you are trying to reach -- as you remember from the Indian Point hearing when we did the verification report, which was---Board notification was not part of the formal proceeding, the numbers that you must test in order to have what is considered a statistically significant amount, we even went around and did a verification effort, as to remember, to determine how many people had been notified and said they would participate.

You were talking about numbers that were approaching eighty to ninety percent of participants in each segment in a number of those components. There are different numbers being utilized here.

So, if you had to actually test those people, sixty or seventy percent, you would have serious problems as far as cost involved. We have had complaints from various governments that the cost is overwhelming.

JUDGE MARGULIES: We don't want this area to get away from us, so if you have any comment Mr. Irwin, go ahead and follow up.

MR. IRWIN: I just want to indicate that I agreed with Mr. Glass a few minutes ago. The distinction between a demonstration of how an articulation of the standard during the course of an exercise differs from -- I quarrel with the standard itself.

And I just simply add that the framework in which one analyzes and parcels that difference I think comes in under the basis for the contention. Our problem is we just don't think that as Mr. Glass laid out the distinction, and I tried to frame it, and he did it better, the contentions have been pled with sufficient basis to demonstrate why what was done was wrong.

MS. LETSCHE: I guess I have to say up front that I don't understand the purpose of this entire discussion.

Because there is nowhere in the contentions that we can find the government attack the generic way that FEMA does business, or that we challenge the FEMA processes, which is what everyone seems to be talking about here.

It is a red herring. What these contentions talk about is the results of the February 13th exercise. What happened on February 13th, and we are also challenging what FEMA said happened, or what FEMA concluded from what happened.

We are absolutely entitled to do that. In your reference, Judge Kline, to the statement about us being entitled to challenge credibility and sufficiency of exercise assessments is absolutely on target.

That is the standard here, and that is what we have done, and our contentions are perfectly admissible under that standard. The suggestion that any contentions which challenge the performance of FEMA are not admissible, which was your opening question to Mr. Bordenick and he said that is right, that is the position of the Staff, it throws due process principles and UCS out the window.

You, the NRC, are going to rely according to its regulations on FEMA's findings. We are entitled to challenge them. FEMA is not the Pope. They are not infallible. We are entitled to challenge them, and we have done it properly in those contentions.

The suggestion that they don't have a basis is just belied when you read them. We never say in any one of those contentions FEMA was wrong, period, at the end.

We explain they are wrong because this is an important function, here is the plan citations saying they are important, and they only looked at this and they should have looked at this, there are a lot of reasons in those contentions that form the basis for every one of them.

They meet the admissibility standards and they are admissible. It is clearly proper under UCS.

MR. ZAHNLEUTER: In addition, it seems that FEMA's position is that evaluations in the Shoreham exercise case could be unreliable because they don't have a statistical basis.

FEMA's findings are presumed to be valid unless rebutted, and what better way to rebut an evaluation than to say it is not based on a statistical or solid reason?

Also, FEMA has suggested to us today that if we wish to challenge the scenario, what we should do is challenge the regulations. We also heard that this exercise and scenario wasn't done pursuant to the regulations, so it doesn't make any sense to proceed that way.

JUDGE KLINE: Let's go back to fundamental flaw for a moment. The kinds of licensing decisions that the NRC makes that may fall into a couple of categories; one I

would characterize as ultimate or the final decision.

The other are conditional licensing decisions that say: Yeah, if you fix this we would have reasonable assurance, or in some sense conditioning a reasonable assurance finding on a fix-up.

And that fix-up is the area that I want to go into. Is there any way for us to consider correctibility at the contention pleadings stage, or is that always a merits question?

MS. LETSCHE: Who is that addressed to?

JUDGE KLINE: It is addressed to whoever wants to answer it.

MS. LETSCHE: I think when you are ruling on the admissibility of contentions, what you are looking at is what has been pled by the sponsor of the contention.

And that is what has to meet the admissibility standard. It has to have a basis, it has to be specific, and in this case it has to allege that there has been a flaw.

If you are talking about whether or not something could be done to make the allegation incorrect, to change it so that it is no longer true, that is something which goes to the merits of that allegation. You have to look at the allegation now as it appears in front of you, though.

That is what you have to rule on, and if someone

wants to come in and say: Oh, but wait a minute -- you know, since that allegation was made the facts have changed, and therefore now I want to prove to you that that allegation isn't true, you are talking about evidence, and you are talking about the merits.

You have to look at the allegation standing there by itself. And the case law is pretty clear on that. You are not supposed to be making a decision in the absence of anybody having the opportunity to present evidence to you that that contention is wrong, or is false, because even though someone might be able to tell you that they think they can fix it, the contension's sponsor might have very good reasons to persuade you that, in fact, this is irrelevant, or isn't going to happen, or didn't happen.

So, my answer would be in the context of admitting contentions, the question of fixability does involve the merits or an evidentiary decision.

JUDGE KLINE: But didn't UCS decision mention correctability in the context that appeared to make a threshold issue?

MS. LETSCHE: I believe that the discussion you are talking about in UCS, Judge Shon, was in a context of summary judgment motions, which involves the submission of factual information, and in essence evidentiary-type rulings. Which may be proper at a summary disposition phase. They are

not proper at the admissibility phase as the Commission itself acknowledged, and I believe this Board in essence acknowledged when it rejected LILCO's suggestion of this type of threshold summary disposition ruling.

When you get to the point where parties are submitting evidence and you have a joint opportunity for that to happen, so that both of us can try to persuade you fine, then you can make the evidentiary ruling, but not at the point where all you have in front of you is an allegation that has been pleaded.

And you are talking pleading requirements here, and you can only look at the pleadings.

Now, you can't go beyond them and try to make a ruling on the substance.

JUDGE KLINE: Mr. Irwin?

End 5.

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JUDGE MARGULIES: Mr. Irwin.

MR. IRWIN: I believe, Judge Kline, that the Licensing Board in the Shearon Harris case applied the concept of correctability, not only at the summary disposition stage, which I would agree with Mr. Letsche is an appropriate stage at which to evaluate correctability, but also at the threshold stage.

I would suggest, frankly, that its applicabilty at the threshold stage is an aspect where a board must be careful because there is the possibility of reaching merits judgments of a kind that I was not suggesting this morning.

It seems to me, for instance, that if somebody that a pile of dust in the middle of the floor constituted a fundamental flaw, well one might be a bug on cleanliness and conclude that that would be a fundamental flaw if it remained there, but everybody know that it is not hard to clean up a pile of dust.

That I think is the kind of contention that one could dispose of at the threshold stage because just common sense and a few years of living will tell you the answer to that. But there are a lot of others though where frankly I think it is a good deal more difficult and the Board ought to be careful on that issue at the threshold.

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JUDGE KLINE: If a contention that pleads a fundamental flaw is admitted and then later proved, does that commit the Board at the outset to conclude that a fundamental flaw has been demonstrated then?

MR. IRWIN: I'm sorry. Try that again on me.

JUDGE KLINE: If a contention is pleaded with a number of factual bases and also alleges a fundamental flaw, and the Baord decides to admit it, then if it is later proved, does the question of fundamental flaw deserve any further discussion, or is the Board committed to making a finding of fundamental flaw?

MR. IRWIN: The Baord may be committed if ---

JUDGE KLINE: Do we commit ourselves in advance, in other words?

MR. IRWIN: No, you are not committed -- well, there are two questions that I think are implicit. Is the flaw, if uncorrected, fundamental and can it be or has it been corrected on the basis of material submitted later in the record.

I think it is clearly possible that there can be findings that conditions alleged or events alleged reveal fundamental flaws which if uncorrected would prevent the issuance of a license, but the record may also show that they either can be or nave been corrected, and I would frankly expect that in the coures of litigation there would

Sim 6-3

be attempts to demonstrate such correction.

Clearly, and I agree with Ms. Letsche on this, if the concept of correctability is clearly a proper notion that goes along with litigation of whether something admitted constituted a fundamental flaw, and obviously if you have a problem you are going to want to fix it and the Board ought to hear the evidence on that.

JUDGE KLINE: Anybody else?

MR. BORDENICK: I would just simply go back to my earlier comments about the Shearon Harris case, the UCS decision and the Shearon Harris case's concept of correctability.

Admittedly, there might be some contentions, as Mr. Irwin just pointed out, where it is a little harder to -- the question is a little closer on whether or not you are actually making an evidentiary determination, but again going back to CLI 86-11, which after all in addition to the Commission's regulations and precedents on the admission of contentions generally is really the standard that this Board is bound by or the guidance that this Board is bound by, and also the Appeal Board's decision in Shearon Harris.

You are not by making a determination on correctability, you may or may not be making an evidentiary determination. I think this is something the Board has

Sim 6-4

to watch very closely.

The question of the evidentiary determination, as the Commission pointed out, is one that could be remedied by applying the bases and specificity standards. And as we have pointed out in our response, we don't feel that it is enough to simply allege a fundamental flaw. You have to show more in your allegations. That is not the same as saying that you have got to prove your case in order to get your contention admitted, which is apparently what the intervenors seems to be arguing, that in arguing to the Board that you should reject the majority of these contentions that we are suggesting that you make evidentiary determinations. We are doing no such thing.

MS. LETSCHE: If I could respond, Judge Kline.

I think it is clear that in making an admissibility ruling the Board is not making a ruling on the evidence or on the facts or on the merits by definition. You are going to do that after you hear the evidence that both sides have an opportunity to subit to you.

So the whole question of correctability, you know, you are talking about what has been pled in these contentions, and what has been pled here has been pled, that there are deficiencies, that they constitute a fundamental flaws, that they preclude a finding and all the other things that these things say.

Sim 6-5

In terms of making your admissibility ruling you don't go to the merits and you don't decide whether that is true or not or whether it fact it could be corrected.

Now I might note that the only way that that could have happened would have been if LILCO decided to submit contentions saying that some deficiency that FEMA identified is correctable and here is our contention and we want to prove it.

Well, they decided they didn't want to do that. So in terms of admissibility here you don't have any issues before you on correctability. What you have are the contentions that we submitted.

In admitting those you don't lock yourselves into a finding because you can't make a finding until you have heard the evidence.

JUDGE KLINE: How does your pleading standard for fundamental flaw differ from a merely proforma pleading and simply entering words after each contention?

MS. LETSCHE: Well, I think that when you read it, when you read our contentions and we provide you with our reasons or our bases, and they are pretty specific for why we make that allegation, that the particular item discussed in the contention precludes a reasonable assurance finding.

I think the Shearon Harris Appeal Board, and we

have heard a lot about that this morning, recognized the fact that in truth the fundamental flaw standard is not, in their opinion, any different in terms of being a pleading requirement from the bases and specificity requirements. I mean they say that and Mr. Bordenick read it to you before.

They said referring directly to CLI 86-11 this standard is nothing more than the long-standing requirement of the Rules of Practice that contentions must be pleaded with adequate bases and specificity, and I am quoting from the Shearon Harris Appeal Board decision, 843.

As long as we allege it, and we have a bases and specificity, we have met that standard and CLI 86-11 makes that clear. If you allege that something precludes the finding of reasonable assurance, you meet that pleading requirement.

JUDGE KLINE: But it appears to me that there is kind of a two-stage element to that. One is that your contentions plead that certain factual things happened or took place, and then at a second stage allege that given they occurred, they are a fundamental flaw.

Does one need bases and specificity for both kinds of allegations? One, you do appear to submit bases and specificity by the fact that a certain kind of event occurred or did not occur.

Sim 6-7

But does the contention then have to go forward and show bases and specificity for believing that it is a fundamental flaw, in addition ot the fact that it occurred?

I mean why could one not say yes, it in fact occurred; but it wouldn't affect licensing?

MS. LETSCHE: Well, presumably in everyone's proposed findings they will be explaining to you why they believe that is or is not true.

JUDGE KLINE: But we are using it at the threshold here now, and the question is how we use it at the threshold. I don't understand how a pleading requirement that merely tacks the words on to the end of a contention really gets us anywhere unless those words themselves have to have bases.

MS. LETSCHE: I certainly am not suggesting that our contentions are admissible because they have the words "fundamental flaw" in them, and I think that is a little mischaracterization of those contentions. They don't just say there is a fundamental flaw. They say this provision -- and it is hard to do this in general but I will -- this provision of the LILCO plan says that this has to be done. This was not done during the exercise. The plan says it has to be done and the regulations require that it has to be done because it wasn't demonstrated, you can't make

Sim 6-8

a finding, because the regulations require it, it is a fundamental preparedness standard.

Those contentions do not just bodily state "X" fact constitutes a fundamental flaw. I think as long as there is a reason stated for that assertion, and I submit to you that in each one of those contentions there is, that we meet the admissibility standards.

It is important to emphasize here though that we are talking about the contentions and we are not talking about little pieces of the contentions, and this whole question which was discussed in the earlier remarks, which I haven't had a chance to respond to yet, about breaking the contentions up into subparts is very important here because we did not write those contentions so that each subpart was a separate contention.

Now maybe LILCO and the staff would like to read them that way and maybe they misunderstood the way they were written, but that isn't the way they were written.

The fact is the contentions say what they say, and they say the following five things, if it is five, demcstrate a fundamental flaw.

Now of the individual five things might also individually be fundamental, but some of them aren't, and to suggest that we have to in every single little subpiece of every contention allege that every single little thing

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constitutes a fundamental flaw is just not right.

Our contentions are the way they are and they have to be dealt with that way, and you can't just go down the line and end up requiring that every single sentence meet every single basis and specificity requirement you never end.

JUDGE MARGULIES: Well I think the staff takes the position that that does not constitute a fundamental flaw as a shibboleth being attached to the end of your primary allegation and you don't do anything more and something more is required.

MS. LETSCHE: But I guess my point is that that is not true. When you read the contentions that is not true.

JUDGE MARGULIES: It is a matter for us to decide.

MR. IRWIN: Judge Margulies, may I respond.

I think that Judge Kline asked exactly the right question a minute ago. I don't think that one needs to go -- if I can characterize it slightly differently. I don't think the Board needs to make two investigations, one has to whether or not certain things occured and whether there is a basis for it and, secondly, as to whether there is a basis for alleging that it is a fundamental flaw.

I think really the basis is the sort of linking

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between what occurred and a threshold conclusion that a fundamental flow has been alleged. The difficulty that we have is that that linking by and large has not occurred and it is sometimes obscured in a welter of specificity.

Specificity, we don't have a problem with in a lot of these contentions. It is the rationale, the linking.

Let me just address one other quick thing that Ms. Letsche said.

I think I heard her suggest that because LILCO had not put in contentions of its own dealing with the correctability of various conditions that may have been found in the exercise and alleged in FEMA's report that we are precluded from arguing that these conditions are either not fundamental flaws or that they can be corrected.

I think that is just plainly incorrect argument. The Board when through the question of whose burden it was to submit contentions a while ago and decided that it was intervenor's burden and, secondly, if the intervenors allege that a problem was a fundamental flaw, particularly in light of this background, that we can't be stopped from putting in material suggesting the correctability to the Commission.

Sim 6-11

Again, I just don't want silence on that to be taken as acquiescence on what strikes me as plainly an incorrect argument.

(Board conferring.)

JUDGE MARGULIES: We have now reached the portion of hearing responses from the parties.

Are they ready to proceed, or do they want to do that after lunch?

Do you want to go first, staff?

MR. BORDENICK: I was going to say I did want to proceed, but I am not quite sure that I have anything to add. So I guess I'll pass.

JUDGE MARGULIES: All right.

MR. IRWIN: Judge Margulies, I believe I have said about everything as well as I can say it this morning. If Ms. Letsche says something that I just can't resist in trying to clarify, but I don't want to prolong this.

MS. LETSCHE: I really don't have very much because we did cover a lot of it in response to your questions.

I do have just a couple of things that I would like to mention though.

There has been a lot of talk about Shearon Harris as if it is the only thing out there that provides some indication to the Board on how to interpret fundamental

Sim 6-12

flaw requirements and how to deal with the exercise litigation.

I would just like to bring to the Board's attention a recent Appeal Board decision in the Limerick case. This is ALAB 845, dated August 28, 1986, and I have a slip opinion here.

That involved the submission of a couple of contentions arising out of the emergency planning exercise which were not admitted for litigation. They were denied admission, however, because they didn't have a sufficient bases or specificity.

What is significant in that opinion though is the Appeal Board's discussion of why those contentions did not meet the bases and specificity requirements and therefore were excluded, and I will read to you from page 23 of ALAB 845.

These contentions were submitted by inmates of a prison. They say that "The inmates did not either identify any deficiencies in the scenarios -- those were the exercise scenarios -- or justify inclusion of those others -- and they are talking about other elements of emergency planning mentioned in the regulations and they refer to NUREG 0654 -- nor in the Board's view did they give any reason for disputing FEMA's finding that this was a successful remedial exercise."

Sim 6-13

Now I submit to you that in the contentions that the government submitted, the proposed contentions, that we do both of those things, which in this decision the Appeal Board clearly indicates would be admissible contentions in light of UCS and in light of CLI 86-11, both of which were out there.

We do specifically identify, and we don't call them deficiencies in the scenario, but we tell you things that didn't happen during the exercise. And we indicate and justify to you why certain elements of emergency planning that were not included in the exercise should have been because we tell you why they are crucial with respect to LILCO's plan and the safety of Long Islanders.

We also tell you in our contentions specific reasons why we dispute FEMA's findings with respect to specific things, and I do refer you all to ALAB 845 for a little more enlightment on how you deal with this issue.

JUDGE MARGULIES: May I have the date on that?

MS. LETSCHE: Yes. It is August 28, 1986.

I think in terms of fundamental flaw questions, there clearly is some confusion on what it all means that has been evident today.

What I would like to say is something that we say in our submission. If the Board believes that there is a problem in terms of the wording of these contentions,

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or that there is something that doesn't constitute what you consider sufficient bases, we will be more than happy to attempt to rectify that. That has been done in almost every other proceeding where we have submitted contentions here. If there has been a question or if someone thinks that we haven't adequately explained what we mean, we fixed it for you.

Give us a chance to do that if you have that kind of a problem. This is too important a proceeding to let semantics or words decide that issues are not going to be looked at and you really shouldn't do that. If you have a problem with how we have worded a contention, please let us know and we will try to reword it for you.

The only other thing I have to mention just because it has been brought up a couple of times, and I think it is a little nit, but I want to mention it.

We keep hearing words that talk about the QA proceeding and how because of what happened in the QA proceeding that you can't admit any of our contentions.

I just want to make one point. The QA contention was admitted for litigation. The Licensing Board found after the trial that we didn't prove it, but it was admitted into litigation.

So all the references and everybody's responses in here today to the QA contention and the QA litigation

Sim 6-15

doesn't matter and isn't relevant to what we are talking about here in terms of admitting these contentions.

I think that is all I have to say.

MR. IRWIN: Just a few quick observations.

I don't have the Limerick decision in front of me, but from I heard Ms. Letsche quote from it, I don't have any disagreement with the tests she used because it includes as one of the bases of the Appeal Board's rejection of the Greaterford Prison inmates' contentions that they didn't give any reason for their belief that what they alleged constituted a fundamental flaw or whatever they alleged it to constitute.

The problem we have with the majority of these contentions dealing with the fundamental flaws is what I think the Appeal Board there called giving reasons, and what I think you referred to a minute ago, Dr. Kline, as exploring the basis for what I would call linking up the allegations to the conclusions. That is item one.

Item two, with respect to rewriting contentions, we have tried that before, but I can tell you -- well, two of you member what it does. It takes time. We have taken a lot of time. We would rather have up or down decisions on these contentions, and if a contention has been denied and the intervenors feel it has been wrongly excluded, they can file a new contention for good cause

showing that they really were misunderstood the first time and that in fact there is a basis for refiling the contention. We would just as soon get on with this expedited proceeding.

(Board conferring.)

MS. LETSCHE: Judge Margulies, a quick comment on the Limerick decision since I am the only one that has it here in front of me.

The point I was making from the quotation in reference to the Board's ruling in that case was that what the Board said is that it is proper to challenge the scenario of the exercise, challenge what was included in the exercise or excluded, and that it was proper to challenge FEMA's conclusions. That was the point that I am citing that case for.

(Board conferring.)

MR. BORDENICK: Judge Margulies, may I make a few brief replies to what Mr. Letsche had to say?

JUDGE MARGULIES: Go ahead.

MR. BORDENICK: I indicated earlier that I had not reply, but that was before she had spoken.

I will be very brief. First of all, I don't think there is any confusion as to what the fundamental flaw concept means. I think, if anything, that there is disagreement on how to apply it. For reasons that we previously set forth in writing we believe it should be

Sim 6-17

applied the way we argued. They obviously feel that it should be applied the way they argued it. So it is up to the Board to decide that now.

As far as Ms. Letsche's offer to rewrite the contentions or have the Board help them, this is in effect tantamount to asking the Board to help them write their contentions and I am unaware of any requirement that the Board to that.

I think she has pointed out several times this morning that the contentions say what they say, and if she wants to move to amend them, let her file a motion.

Finally, on the Limerick decision. I, unfortunately do not have a copy in front of me. I did read the decision when it came out, and my recollection of the decision is that it did not involve an emergency planning exercise. It involved a discussion that she alluded to and involved a contention on notification of prison guards.

Again, I don't have it in front of me and I have not reviewed it since it came out, but I do not think the discussion she made this morning relative to that decision has any significance for the questions before the Board this morning.

Thank you.

MR. GLASS: I would just like it noted for the record that FEMA does use its own terms such as deficiencies,

and areas that require corrective actions and areas recommended for improvement when it completes its review of an exercise, but we have never used a fundamental flaw as our term and it is certainly not a term of art used by FEMA.

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JUDGE MARGULIES: Mr. Bordenick had raised the possibility of the effect that ALAB 847 which was issued on September 19th, 1986 may have on the proposed contentions.

He offered to discuss that briefly. Would the other parties be ready to discuss it briefly? Or, would they have any objections to comments on that?

MR. BORDENICK: If it pleases the Board, I would like to modify my remarks in that regard. I think the -- we are talking about three issues, two of which relate to the emergency planning contention.

I don't think that necessarily anything -- the three issues I am alluding to are the three issues that the Commission is taking review of.

JUDGE MARGULIES: You are talking about the Commission --

MR. BORDENICK: I am talking about the Commission's Order of September 19th which responded to the --

MR. IRWIN: The three issues?

MR. BORDENICK: Three issues, that's correct. This was in response to the petitions for review of -- I guess there were cross-petitions for review. And I guess the LILCo petition went to the Appeal's Board treatment of two EPZ sub-part contentions. And the other issue went to the Appeal Board's reversal of this Board on planning -- specific planning or evacuation of hospitals.

#7-2-SueWal

On reflection, and in the Commission's Order, they did indicate that they would take review of those issues. There were other issues which they indicated that they would not review, and I won't get into a discussion of those obviously. On reflection, I don't think that either of the two EPZ issues, which were two out of three of the issues that they took review of, bear on any of these contentions.

The only one that may -- and over the lunch break I will be delighted to go back over the contentions and give you further specificity -- some may involve the hospital issue.

JUDGE MARGULIES: If it's your intention to point out which of the contentions involve the hospital issue, we could do that. And, that wouldn't be helpful.

MR. IRWIN: Judge Margulies, I think Mr. Bordenick is correct in his assessment. And if I have any further thoughts, I will point them out. I think it's just the hospitals that are implicated.

JUDGE MARGULIES: We have completed the discussion on Area I. We will recess for lunch until 1:15 and start up on the proposed schedule.

(Whereupon, the hearing is recessed at 11:58 a.m., to reconvene at 1:20 p.m., this same day.)

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AFTERNOON SESSION

(1:20 p.m.)

JUDGE MARGULIES: Back on the record. The next area for discussion is the matter of a discovery schedule.

We are not in the position to tell you at this time as to how we are going to rule on the 50 or so proposed contentions. So, to that extent you have an unknown in deciding how much time you need for discovery.

But, we are also dealing with a finite factual situation. We are dealing with the exercise. So, that's a limiting factor. And, you should be able to come up with some estimate of the time that you will need.

Would it be helpful if we would allow the parties to discuss this among themselves and see what they can come up with before we take it up on the record?

(No response.)

JUDGE MARGULIES: It hasn't worked in the past.

(Laughter.)

MR. IRWIN: I think we should go ahead and maybe it will suggest areas that we might explore further.

I can give you LILCO's general perspective on discovery, recognizing that the scope of the proceeding can't be definitively bounded until we know what contentions are in.

It seems to me that discovery can begin promptly as soon as -- it ought to begin immediately as soon as the Board

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issues its Order with respect to contentions. From out standpoint, we believe that the great majority of document discovery, at least that which can be legitimately made toward LILCO, has already been voluntarily produced.

I think that there are other kinds of discovery devices obviously, interrogatories, requests for admission and depositions. But, this is a relatively bounded case, and I would think that relatively narrow sets of interrogatories and a limited number of sets, perhaps one set and a follow-up set, as far as I can tell, ought to be sufficient.

Now, Suffolk County and New York State may disagree, but intuitively I would think that what we are trying to do is recreate the events of the day and what happened. And those largely are spoken for in the documents.

I see no reason not to be able to try to set some tentative time frames on those kinds of discovery. And, we would be willing to cooperate in expediting those areas because, as I say, regardless of the number of contentions it's boundable.

I have no idea what Suffolk County will want to do in terms of deposing people who took part in the exercise. But, I think that there is one concept that you might want to try to bear in mind and that is, first of all, many, many depositions have been taken in this case in the emergency planning area. I think there were close to 100 depositions taken in the

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first part of it. Precious few of them were made direct use of in the hearing or in the findings of fact. I think depositions are a useful device, but I don't think they are in most cases a unique device for uncovering information.

And I think frankly given the document discovery that limitations on the amount of depositions are worth contemplating. Exactly where they will be, I'm not sure I can say in the abstract.

But, one concept we might want to contemplate is not simply limits on the number of depositions but limits on the amount of time involved. Say, 10 witness days or 20 witness days or 20 taking lawyer days of depositions, something like that, to ration the parties' efforts, help them focus.

And if there is reason to expand, come back to the Board. But, we have -- in previous phases of this case -- had very, very long discovery phases. And I don't think we need it here.

If I had to entrust my thoughts, I think we could set a finite period, probably on the order of 60 days or so for the overall completion of discovery, have two rounds of interrogatories in that period, have all the depositions that need to be taken taken during that period, and allow the parties to do basically whatever they want within that finite period and then cut it off. Sixty days may be too long; it may be too short. I can't tell quite yet. But, I think that's the

#7-6-SueWal

way I would like to approach it.

JUDGE MARGULIES: Mr. Bordenick.

MR. BORDENICK: Judge Margulies, I think it might be helpful if you heard from the Intervenors first, although I would say that generally speaking the Staff has no quarrel with what Mr. Irwin has proposed.

As to the specifics, Mr. Glass, since it effects what contentions we have, as he pointed out, was the NRC's problem, but it's a question of the availability of witnesses for depositions and ultimately the hearing. Since it will involve FEMA people, I will let Mr. Glass address the specifics.

But, I think it would be helpful if you hear from the County first.

JUDGE MARGULIES: Any objection?

MR. LANPHER: No objection, Judge. But, we are going to throw it right back at the Staff frankly, because we think, as you said, it's dealing in the abstract and it's difficult to hear our thoughts on the abstract, but a thresh-hold preliminary matter when we talk about a discovery schedule, based on past experience, is what is the present schedule for FEMA's RAC review of LILCO's corrections, what are their witness availabilities? And, also Rev 7.

Those witnesses, not only their availability in terms of coming up with conclusions about the proposed changes in LILCO's plan to purportedly address deficiencies, but just as

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important is their availability to talk about what went on in the exercise back on February 13th.

So, until we have an idea of what the FEMA availability is -- I'm assuming, by the way, that there are no peer staff witnesses that are being proposed -- maybe that's different. There were Staff people at the exercise.

But, I would like to hear from Mr. Glass just as a preliminary matter and then I will be happy to address scheduling in the abstract.

MR. BORDENICK: That's agreeable with us. In response to one point that Mr. Lanpher just raised, at this point we don't contemplate that there would be any Staff witnesses but I don't want to foreclose that at this point.

I will turn it over to Mr. Glass.

MR. GLASS: Okay. There have been discussions between the Nuclear Regulatory Commission and the Federal Emergency Management Agency as to the review of Revision 7 and 8. So, I don't think all of the formal documents have gone back and forth.

But by request yesterday, I got the final determination from them orally on the phone. They will prepare and complete -- FEMA will -- by December 15th and transmit by that date to the NRC the review of Revision 7 and Revision 8. So, I think that answers one of your questions.

As far as availability for FEMA witnesses, there

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are some problems in the upcoming months due to the fact that in October, the week of the 20th, there is an Indian Point remedial exercise. And, in November, the week of the 10th, there is a Salem full-scale exercise. And, we do have other commitments to the NRC relating to those particular activities.

Unfortunately, it appears that due to other commitments that for most of November the FEMA witnesses are not available. There is some opportunity, scattered opportunities, in October for their availability, such as the week of the 13th, and the FEMA witnesses will all be available as we presently recognize them as a panel.

The composition of the panel may change depending upon the scope of the contentions. But, right now we see Mr. McIntyre, Mr. Keller and Mr. Baldwin as constituting the panel.

And, I think that is preliminary information from us.

As to our ability to file contentions, the agreement with the NRC was -- not contentions, I'm sorry -- filing testimony, the agreement would be that the testimony would not be filed until after the review of Revision 7 and 8. And, therefore, since the FEMA witnesses are not available the last two weeks of December, we would probably need anywhere -- depending upon the scope of the contentions admitted -- between 30 to 45 days.

#7-9-SueWall

So, we are talking either at the beginning of February or the middle of February as it is presently envisioned for the filing of testimony by FEMA.

MR. LANPHER: There is one thing that I'm not sure I understood. You said that you anticipate the RAC review by December 15 but then the next two weeks none of the FEMA personnel are available; is that correct?

MR. GLASS: Their present schedule --

MR. LANPHER: The second half of December, in other words.

MR. GLASS: Yes. That's what I'm checking. The present schedule -- I have checked with all the witnesses, checked their schedules all the way through the end of January, and none of them are available the last two weeks of December.

ENDD

MR. LANPHER: I don't mean to be asking questions here, but may I ask -- it was raised back on July 8th, a critical person from our perspective, and Mr. Latham's perspective, and he had somewhere he had to go, and that is why he is not here now, Mr. Coleski, have you inquired into his schedule?

MR. GLASS: I have inquired as to his schedule, but there has been no formal determination yet whether Mr. Coleski will have a role in this proceeding.

MR. LANPHER: Well, quite aside from whether he intends to be a FEMA witness, I can assure the Board and Mr. Glass that we intend to want to pursue discovery with Mr. Coleski, since he was the leading FEMA person on the exercise. You can decide who you want to have as a witness, obviously, but we are going to want to pursue discovery with him.

MR. GLASS: I think that there was a ruling the last time we went through this that it was a little premature to talk about the production, either voluntarily or by compulsion, of Mr. Coleski at this time.

JUDGE MARGULIES: Well, it wasn't at that time, but now we are starting to speak about schedules, and I think FEMA should be more forthcoming.

MR. GLASS: I think it is going to depend partly on the scope of the contentions as to whether -- I think there

has to be some sort of standard that you are going to be using if the Board is going to feel there is going to be a need to compel Mr. Coleski, and if the other members of the panel are able to respond and produce answers to the questions that come up during discovery, and I think that really what will have to happen is they will have to depose the other individuals first, and establish that there is some need for Mr. Coleski that cannot be made by the rest of the panel.

That is why I still think you are rather premature on that.

JUDGE MARGULIES: Is Mr. Coleski still employed by FEMA?

MR. GLASS: He is still employed by FEMA, but he is working in a different section.

MR. LANPHER: Judge, with that sort of preliminary, let me respond to just a couple of comments that Mr. Irwin said. I think it is entirely premature even to discuss the idea of limiting the number of depositions or deposition days or whatever, until we see what contentions are in, and how things are framed.

I would note that there have been quite a number of depositions in the past. I haven't attempted to add up who has taken the most depositions, but I wouldn't be at all surprised if LILCO has taken more depositions than Suffolk County.

But that is all passed. We are dealing with the exercise now, and we have two sets of things that have to be pursued.

We have to find out what happened in the exercise and pursue that discovery, and necessarily we are going to have to pursue discovery after the RAC Review is completed, 7-A, insofar as that contains to the proposed fixes to deficiencies, LILCO has made clear of its intention in the discussion this morning of putting those in its testimony, and we in fact have addressed some of those in some of the contentions. We have filed -- we had 7 at that time, we didn't have Rev. 8, obviously, when the contentions were filed.

We intend to pursue discovery through a limited number of interrogatories. Certainly for the purpose of identifying witnesses, in those areas.

I think what Mr. Irwin said about probably two sets of interrogatories, that is probably a reasonable number to be contemplating; again, in the abstract.

We are going to want to take depositions with respect to LILCO, not only their witnesses, but to the extent that their witnesses are different from some of the key players that we will identify, we are going to want -- exercise players I am talking about -- we are going to want to depose those exercise players as well.

Now, with respect to FEMA, we are going to want to pursue discovery with their witnesses, but we will want also to have access to the people who actually did the evaluation in the exercise. Not every single evaluater in all likelihood, but there are some key areas, especially where we believe there were significant deficiencies. That we will want to talk with the precise FEMA personnel who were involved.

From past experience, I think it is unlikely that FEMA will be in a position to talk about the Rev. 7 and 8 fixes until the FEMA personnel have gone through their process to come up with a position on it.

That is -- if my memory serves me, that was the case in the past.

Given that situation and the FEMA schedule, I think we are looking at a time period for discovery that can start as soon as the Board issues an order relating to contentions, and we should probably plan on attempting to pursue discovery on the events of February 13th in the early part of the discovery period.

It sounds to me from what Mr. Glass said the only FEMA availability really is that week of the 13th of October.

After that, literally until January FEMA personnel, except for maybe some smattering of dates, they are not

available, is that correct?

MR. GLASS: There is some time for the first three weeks of December. I don't know which of those dates may be taken up with their involvement in putting the finishing touches on the review of Revision 7-A, but from December 1st through December 19th, except for that particular involvement they are all available.

MR. LANPHER: I think in dealing with the abstract, and given people's availability, we are talking about a discovery period that has to include an opportunity to talk with FEMA personnel after the RAC Review has been completed. That can be late December, so that is the first several weeks of January, an opportunity to talk with them at that time, and so I think we should be talking in the abstract of a discovery period that ends in late January.

JUDGE MARGULIES: Go ahead, Mr. Irwin.

MR. IRWIN: Just a couple of observations. I think Mr. Lanpher in many respects accurately inferred what may follow if nothing happens between now and FEMA's scheduled completion of its review of Revs. 7 and 8.

I must say that I just learned about FEMA's proposal to take ninety days to review Rev. 7 and 8, and my hope is to come to understand the basis for that estimate, and perhaps get it modified, because this is supposed to be an expedited proceeding, and FEMA is a participant in that

process.

If it is not possible to expedite it, then it is not possible, but I hope we can.

And more particularly, I think we can get discovery underway, particularly if LILCO personnel and Suffolk County and New York State personnel -- we are not unavailable. We are not going to be unavailable, and I think that can proceed.

The only area, and indeed some of the FEMA people's observations, particularly those people who may have been evaluators on the 13th of February, I don't see any reason why they could not be made available now.

The only analytical purpose it seems to me of Revs. 7 and 8 is to understand the nature and validity of the proposed fixes to deficiencies that have been proposed by LILCO. In terms of understanding what happened on February 13th, I don't see any impediment, even given everything you have heard to going ahead, getting that done, and closing that phase of the discovery off relatively rapidly.

The documents are there. The people are known, the people are listed in FEMA's Report. They are listed in our documents, and we can go ahead and do that.

It may be a need for a reopener as to some FEMA people later after the completion of Revs. 7 and 8, but I think that ought to be sort of a tag-on rather than sort of

basic framework of discovery, where there is a five month discovery period. I just don't think that is necessary.

MR. GLASS: I would like an opportunity to comment. It appears that we already see a discovery dispute coming up that we went through in the first round of these proceedings. And that deals with the use of executive privilege, and the individual insights of our individual observers.

There was an attempt prior to get the individual observations of the RAC members, and the issue went up to the Appeal Board. The parties are certainly well familiar with that result. They did not have to produce that information.

FEMA has produced the end product. We produced a lot of the material involved, including the group of FEMA logs that were requested. The only material that I see that we have not produced that will still be forthcoming, and it just has to do with time constraints with my departing from the office, has to do with the statement that was delivered by Mr. Coleski after the exercise. Provide a copy of that.

And it has to do with some of the prepatory documents relating to leading up to the exercise, and we will be revealing that -- Mr. Cumming will be revealing that and taking care of the distribution of appropriate copies.

The documents that we intend to keep out deal with the individual observations of our observers.

This issue has come up in the Indian Point proceeding. it came up when it dealt with the individual observations, and it came up in the first phase of this proceeding dealing with the RAC members individual comments, and I think FEMA is going to take the same position. We are concerned about the chilling effect, and I am sure that the Interveners are going to take their same position.

We are going to be going back over the same ground, and I think we see a dispute coming. If there is any way to facilitate or to avoid that dispute at this time by the Board, it would be appreciated. We are going to be rehashing the same arguments. We have already done that, and FEMA's right to protect the privacy of its individual observers, to be able to keep its process intact -- we are not only concerned about this proceeding; we are concerned about being able to go on and work in other proceedings.

Our people who do observations interact with members of the public agencies, private agencies, and many other areas, and it is a great strain when their personal observations are made public, and I think that was recognized by the Appeal Board.

MR. LANPHER: Judge Margulies, we may very well have a dispute with FEMA sometime down the line. We are

purely abstract now. If we do, we will bring it to the Board's attention with a motion promptly.

JUDGE MARGULIES: Is there any way to bifurcate the discovery period, and set aside the discovery on Revisions 7 and 8?

And then go ahead with discovery in the other areas?

MR. LANPHER: I think bifurcation is really the wrong word at this time, because I think necessarily there is going to be some overlap.

As I said before, we are prepared to go forward with the discovery as soon as this period is opened by the Board, and we will attempt to get as much of that done as promptly as possible.

But I don't particularly dealing in the abstract that it is possible to say that a certain amount of discovery has to be completed by one day, and everything having to do with Revision 7 and 8 can wait, or once you get to Revisions 7 and 8 at a later time, you can't go back to anything that was dealt with earlier. That harkens back to Phase 1 and Phase 2 of emergency planning that we still are battling about. Those kind of lines are impossible to draw.

I think, again dealing in the abstract, as we must here today, the thing to do is to agree that we start discovery promptly, and necessarily we will focus on the

events -- at least insofar as FEMA is concerned -- the events of the exercise. Insofar as LILCO is concerned, we will pursue discovery not only pertaining to the exercise, but since LILCO personnel have come up with their views of fixes with things that went on during the exercise, we will attempt to pursue that discovery at the same time as well with LILCO.

It is just -- that same discovery can't proceed with the Staff and FEMA at that time, so I think bifurcation is wrong. I think we will go forward with everything that we can at the outset, just realizing that there is some portion that is going to have to be left until January.

MR. IRWIN: I am not sure Mr. Lanpher and I disagreed at all, but I do think it is important that we have an expectation that there will be everything covered presumptively except for fixes -- and I agree there will be some swap back and forth between the -- fixes of problems are pretty distinguishable from the problems themselves, and we recognized there will be some points of contact.

I think in terms of Mr. Glass' -- you have to protect FEMA witnesses or non-witnesses individually, he is right, that matter has come up in this proceeding, and of course, it has come up in others, and it strikes me that that is a matter that can be resolved as it comes up. It

need not impact the scheduling of the first part of discovery.

MR. BORDENICK: Judge Margulies, I would simply add I agree with Mr. Irwin, I don't think there is a dispute between the Applicant and the Interveners at the present time.

I think the Board can certainly go ahead and order at the time that it comes out with the order on what contentions are admitted, that discovery will start.

I guess the problem is -- so there is no problem on the front end. I guess the problem is on the back end, and I think the Board might just want to defer that to another day.

MR. LANPHER: Judge Margulies, does the Board have any target date for a ruling?

JUDGE MARGULIES: We expect to rule fairly soon. I can't tell you anything more than that, but in a matter of weeks.

We are going to deal with it promptly. I can't tell you anything further than that.

MR. IRWIN: I have one suggestion, Judge Margulies, and one question. The suggestion is in the form of a question to Stu Glass, and that is did they ask their people to hold the week of the 13th of October, since that seems to be the only open window we know we have got for a while, because I

presume we will start discovery by then.

Secondly, I would like to get an idea from Mr. Lanpher, if he has any, as to how -- assuming the majority of Suffolk County and New York State's contentions were to be admitted, does he have any idea at this point of the number of LILCO personnel that Interveners would like to depose, just so we can get a ball park estimate.

MR. LANPHER: We haven't come up with a number. We can try to do that, and talk to you later.

MR. IRWIN: You have no sense of whether it is under a dozen or over a hundred?

MS. LETSCHE: It will not be over a hundred.

MR. IRWIN: Between a dozen and a hundred.

MR. GLASS: I will have the FEMA witnesses reserve the 14th through the 17th. The 13th is a religious observation, but I don't think it affects any of the witnesses, but it may affect some of the attorneys, so I will reserve the 14th through the 17th.

End 8.

Sim 9-1

MR. IRWIN: Just one other observation. Having heard the estimate of somewhere between a dozen and a hundred, a dozen I don't think will cause us problems, but a hundred quite clearly would unless there is a really efficient combination of depositions or really good cause for that many depositions.

MR. LANPHER: Judge Margulies, unless there be any misapprehension and assuming that we will proceed on the assumption that it would be profitable to take depositions of FEMA personnel on the week of the 13th, and that's premised in all likelihood on getting some additional documents from FEMA by then assuming that there is time, but those depositions would then need to be adjourned. That wouldn't be the last time that we would talk with those FEMA personnel. So we would have to come back to them at least in early January after the RAC evaluation. Just so everyone understands that.

MR. GLASS: We understand.

MR. LANPHER: Fine.

JUDGE MARGULIES: Do you have any problem with the 60-day term in addition to whatever time you have to take in terms of reviewing the RAC evaluation?

MR. LANPHER: I didn't even respond in terms of the 60-day term. My response was in terms of the realities as best we can address them here today of a

9-2

discovery period which runs which runs until sometime in late Janaury, assuming that the FEMA personnel keep their early January schulede open and available to personnel.

A 60-day term dealing in the abstract and getting FEMA's schedules I think is too short. You have got 30 days for document production responses and you have 14 days for interrogatory responses, and it takes some time in between to prepare these things, and depositions come on reasonable notice.

I think even if the FEMA witnesses had not conflicts in their schedule, you would be talking about a schedule of 90 to 120 days. But I don't think we have to be talking about whether Mr. Irwin is right in the abstract of 60 days or I am right in the abstract in 120 days.

We have got some realities to deal with here whchi take us to late January and there is just no way around that.

MR. IRWIN: Judge Margulies, I think there are some additional realities, one of which is that every document that LILCO has that isn't privileged has been in Suffolk County's and New York State's possession for at least two or three months.

Another reality is that this is supposed to be an expedited proceeding, and there has been a raft of documents that have simply damned the flow of what would

otherwise be this proceeding for months.

Another one is that while the rules specify nominal reply periods, those reply periods can be modified by the Board as consistent with due process justice and the needs of the proceeding, and there are some felt exigencies here. I mean we are not simply here to have a proceeding for ever and every. The regulations presume that certainly the proceedings could have been completed in a year and we are just not even going to get to a hearing by then if Mr. Lanpher's concept of discovery doesn't go unabated.

It seems to me not unreasonable, for instance, to suggest that a first round of interrogatories could be required within 20 days of the start of discovery and responses thereto within 20 days, and a second round of discovery to get interrogatories out, a shorter one, within 10 days thereafter and responses due to that within 10 days.

I see nothing unreasonable about that. There are not many documents those fellows are going to get out of us at least without an order from this Board, and I don't think there are many to be had even with an order of the Baord. Our people are here, and I just don't see what more there is to it.

FEMA may present a special problem, but that is a special and I submit an exceptional aspect of discovery.

Sim 9-4

JUDGE MARGULIES: Well, how would you work that in?

MR. IRWIN: I think that if the intervenors can articulate whom they wish to depose from FEMA and its contractors far enough in advance of October 13th, and any disputes as to accessibility can be resolved by the 13th, and I see no reason why they couldn't because the exercise report lists all the FEMA evaluators, participants and so forth, and we could bring those motions on if there are any to be had.

We could take those depositions during the 13th and get presumptively all of the FEMA discovery except that dealing with Revs 7 and 8 done at that point.

Mr. Glass also indicated that there may be some time during the first half of December if necessary. I think we are going to have to play that one a little specially, but certainly as among LILCO and the intervenors discovery can start now and I don't see any impediments to getting on with it and getting it done.

MR. LANPHER: Judge, I think we are frankly going in circles at this point until you all issue your rulings and we all have a chance to look at that.

I mean I disagree with some of what Mr. Irwin said. We will go as fast as is reasonable, but no one can point to any reasons why discovery limits should be

imposed or cut off in this case. This case is complicated and, yes, it deals with an expercise. It is the first exericse that the utility planned. We are all feeling our way a little bit. There has been some recrimination back and forth of why we haven't been to trial yet. That is water over the dam. I think we should go forward from here.

FEMA is a reality in this and we heard what they had to say.

(Board conferring.)

JUDGE MARGULIES: It seems the parties have gone as far as they can go in discussing the matter with one another. What the Board would like the parties to do is to submit to the Board within the next five days a proposed order which they believe the Board should order on the matter of discovery.

If you need a few more days than the five days ---

MR. LANPHER: Some of us are going to be tied up the rest of this week and it may be hard to really confer in detail before early next week. How about next Wednesday?

MR. IRWIN: I am incredulous. There are five counsel sitting at that table all of whom have been here all day and all of whom are experienced in this case.

I thjink next Monday is plainly fine, but I am not going to throw a tantrum over two days.

JUDGE MARGULIES: How about staff?

MR. BORDENICK: The way I would like to leave it, Judge Margulies, is given the situation with FEMA, I don't know what kind of a schedule I can propose. I would like to see the other parties' proposals first and then just be in a position to comment on them, if I could.

JUDGE MARGULIES: Well, I would like simultaneous filings.

MR. LANPHER: You are asking for one filing?

JUDGE MARGULIES: Yes, and when I say simultaneous, I mean all parties and not ---

MR. IRWIN: Are you talking about a joint filing, Judge Margulies or individual ---

JUDGE MARGULIES: I assume there will not be a joint filing.

(Laughter.)

We will make it due a week from today. It would appear premature to discuss a hearing schedule at this point in that parties are so far apart on a discovery schedule. We will take that up at another time.

Is there anything further that the parties wish to discuss at this time?

MR. IRWIN: No, sir, not from LLICO's point of view.

JUDGE MARGULIES: The conference is concluded. Thank you.

(Wherupon, at 2:00 o'clock p.m., the conference concluded.)

* * * *

CERTIFICATE OF OFFICIAL REPORTER

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

NAME OF PROCEEDING: SHOREHAM NUCLEAR POWER STATION

DOCKET NO.: 50-322-OL-5

PLACE: HAUPPAUGE, NEW YORK

DATE: Thursday, September 24. 1986

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

(sigt) Garrett J. Walsh
(TYPED) Garrett J. Walsh

(sigt) Sue Walsh
(TYPED) Sue Walsh

(sigt) Mary C Simons
(TYPED) Mary Simons

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