

ORIGINAL

UNITED STATES NUCLEAR REGULATORY COMMISSION

IN THE MATTER OF:

DOCKET NO: 50-322-OL-5

LONG ISLAND LIGHTING COMPANY

(Shoreham Nuclear Power
Station, Unit 1)

LOCATION: BETHESDA, MARYLAND

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UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD

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In the Matter of: :

LONG ISLAND LIGHTING COMPANY : Docket No. 50-322-OL-5

(Shoreham Nuclear Power : (EP Exercise)

Station, Unit 1) :

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Nuclear Regulatory Commission

5th Floor Conference Room

East-West Towers

4350 East-West Highway

Bethesda, Maryland 20814

Thursday, February 5, 1987

The oral argument in the above-entitled matter convened, pursuant to notice, at 9:30 o'clock a.m.

BEFORE:

ALAN S. ROSENTHAL, Chairman

Atomic Safety and Licensing Appeal Board

U. S. Nuclear Regulatory Commission

Bethesda, Maryland 20555

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GARY J. EDLES, Member
 Atomic Safety and Licensing Appeal Board
 U. S. Nuclear Regulatory Commission
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HOWARD A. WILBER, Member
 Atomic Safety and Licensing Appeal Board
 U. S. Nuclear Regulatory Commission
 Bethesda, Maryland 20555

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APPEARANCES:

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Special Counsel to the Governor

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P R O C E E D I N G S

2 JUDGE ROSENTHAL: This Board is hearing oral
3 argument today on the petition of the Federal Emergency
4 Management Agency seeking leave to appeal from portions of
5 the Licensing Board's December 11, 1986 order in the
6 emergency planning exercise phase of this operating license
7 proceeding involving the Shoreham Nuclear Power Station.

8 More particularly, FEMA challenges the admission
9 to the proceeding of Contentions EX-15 and EX-16 advanced
10 by the intervenors, Suffolk County, et al.

11 The oral argument is governed by the terms of our
12 January 21 order. As provided therein, each of the
13 participants has been allotted 30 minutes for the
14 presentation of its or their argument.

15 The order of presentation is FEMA, the applicant,
16 Long Island Lighting Company, the intervenor, Suffolk
17 County, et al., and the Nuclear Regulatory Commission
18 Staff. FEMA and the applicant may, if they so desire,
19 reserve a reasonable portion of their time for rebuttal.

20 The members of this Board are fully familiar with
21 the background of the controversy as well as with the
22 appellant positions of the respective parties as developed
23 in their briefs.

24 Counsel should therefore proceed immediately to
25 the heart of their arguments. In this connection the Board

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will expect counsel to focus upon the questions read to
2 them on the telephone yesterday. Those questions are
3 these:

4 1. Whether FEMA's status in this proceeding
5 entitles it to challenge the admission of the contentions
6 in issue.

7 2. Whether in any event there is sufficient
8 justification for interlocutory review of the admission of
9 those contentions.

10 In that connection, FEMA counsel will be expected
11 to particularize the irreparable programmatic harm that
12 FEMA assuredly will suffer unless the contentions are
13 excluded from the proceeding at this time.

14 3. Whether the admission of the contentions was
15 erroneous.

16 I will now ask counsel to identify themselves
17 formally for the record, and I will start with Mr. Cumming.

18 MR. CUMMING: My name is William R. Cumming. I M
19 the counsel for the Federal Emergency Management Agency.
20 With me this morning is George Watson, Associate General
21 Counsel for the Federal Emergency Management Agency.

22 JUDGE ROSENTHAL: Thank you, Mr. Cumming.

23 Mr. Irwin.

24 MR. IRWIN: My name is Donald Irwin. I am with
25 the law firm of Hunton and Williams, the Richmond office,

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and I am the counsel for Long Island Lighting Company.

2

JUDGE ROSENTHAL: Thank you, Mr. Irwin.

3

Mr. Lanpher.

4

MR. LANPHER: I am Lawrence Coe Lanpher appearing for Suffolk County. With me is Karla J. Letsche of our law firm of Kirkpatrick and Lockhart also.

7

I advised the Board yesterday by telephone call that due to some scheduling difficulties it was possible that Ms. Letsche will be presenting the argument instead of me, and in fact she will present the argument.

10

11

JUDGE ROSENTHAL: Very good, Mr. Lanpher. We will be happy to hear from Ms. Letsche.

12

13

Mr. Zahnleuter.

14

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

16

17

JUDGE ROSENTHAL: Are you intending to participate in the argument?

18

19

MR. ZAHNLEUTER: No, sir.

20

JUDGE ROSENTHAL: All right. Thank you.

21

Mr. Reis.

22

MR. REIS: My name is Edwin J. Reis. I represent the NRC Staff. With me at counsel table is Bernard M. Bordenick.

24

25

JUDGE ROSENTHAL: All right.

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2 Now do I assume that there has been no alteration
3 on the part of FEMA and the applicants of the 30-minute
4 allocation for each of those parties?

5 MR. CUMMING: The only alteration, Judge
6 Rosenthal, is the fact that we would like to reserve 10
7 minutes of the 30 minutes allocation to FEMA for rebuttal.

8 JUDGE ROSENTHAL: All right.

9 Now do you want to reserve part of your time, Mr.
10 Irwin?

11 MR. IRWIN: Yes, sir, I would.

12 JUDGE ROSENTHAL: How much?

13 MR. IRWIN: Approximately 10 minutes. Frankly, I
14 believe the issues have been well and thoroughly briefed
15 and I don't expect to use the 20 minutes that I would
16 otherwise use.

17 JUDGE ROSENTHAL: Well, that's heartening.

18 (Laughter.)

19 On the other hand, the Board may consume some of
20 your time with questions. So I wouldn't plan on an early
21 departure.

22 (Laughter.)

23 All right, Mr. Cumming, we will hear from you.
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ORAL ARGUMENT

2 ON BEHALF OF THE FEDERAL EMERGENCY MANAGEMENT AGENCY

3 MR. CUMMING: Once again for the record my name
4 is William R. Cumming and I am counsel for the Federal
5 Emergency Management Agency on this matter.

6 I would also like to state on the record that I
7 have never been employed or associated with any of the
8 parties in this matter. I do not have any financial
9 interest in either the nuclear power or elect generating
10 industry.

11 JUDGE ROSENTHAL: We were prepared to assume as
12 much.

13 (Laughter.)

14 MR. CUMMING: To direct the focus of my argument
15 to particularly the Board's questions as stated previously,
16 does FEMA's status allow it to challenge the admission of
17 contentions, FEMA footnoted in its brief in Footnote one
18 that its status before this proceeding was unclear.

19 Actually, FEMA's status has never been unclear in
20 its own mind. We believe that our status before the
21 Licensing Boards and the Appeal Boards are governed by the
22 Memorandum of Understanding between the Federal Emergency
23 Management Agency and NRC, the most current version of
24 which was signed and made effective April 18th, 1985.

25 JUDGE ROSENTHAL: Where do you find in that

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2 Memorandum of Understanding a basis for FEMA's entitlement
3 to challenge the admission of contentions? I couldn't find
4 anything in that Memorandum of Understanding that could
possibly serve as that basis.

5 MR. CUMMING: We believe that we have no basis to
6 challenge the admission of contentions because we are not a
7 party. We are a non-party. In fact, we have agreed with
8 the filing of the staff that was filed on December 2nd,
9 1986 concerning the Licensing Board order of November 19th
10 which dealt with our status.

11 The Board has treated us as a party for whatever
12 reasons appear because counsel for FEMA had vigorously
13 tried to represent his agency and witnesses before that
14 proceeding.

15 JUDGE EDLES: Mr. Cumming, if you are not a
16 party, and I recognize that the Memorandum of Understanding
17 says you are not a party to our proceedings, how are you
18 here?

19 MR. CUMMING: Because we believe that the Board
20 has discretion, the Appeal Board has discretion pursuant to
21 its own authority to determine an issue of considerable
22 interest, a generic interest, and the standards are
23 documented in a case that went back, the Marble Hill case.

24 JUDGE ROSENTHAL: But that was brought by a
25 party. Supposing that somebody walked in off the street

marysimons 1 and said that they had read this Licensing Board decision
2 and they thought that decision was dead wrong and in the
3 public interest the Appeal Board order reverses.

4 Now do you think that our discretion would extend
5 to entertaining that kind of complaint from somebody who is
6 a total non-party to the proceeding?

7 MR. CUMMING: Conceivably. Actually what has
8 happened in this case, and the FEMA status goes back, as
9 you know, before the Boards and the NRC back to 1980.
10 There is a need for consistent-policy treatment of FEMA
11 based on an Appeal Board clarification of our status.

12 With respect to your discretion, if in fact FEMA,
13 and FEMA is involved in this proceeding for a variety of
14 reasons. One is apparently the full Commission, which had
15 authority to conduct, evaluate, review, decide and make a
16 finding of reasonable assurance on its own, that that it
17 was necessary and appropriate for FEMA to conduct that
18 exercise.

19 Pursuant to an exchange of correspondence, FEMA
20 did in fact because of its understanding of its obligations
21 under the Memorandum of Understanding conduct jointly with
22 the NRC an evaluation of the exercise of February 1986.

23 JUDGE ROSENTHAL: I understand all that, but I
24 don't understand what relevance that has to your standing
25 as a non-party to complain of the admission of these

marysimons 1

2 contentions, and in that connection I would like to ask you
3 this. Did you request the staff, the NRC staff to file a
4 petition for directed certification because, as you know,
5 the staff's current position is that while they disagree
6 with you on the merits of the controversy, they do believe,
7 so they have told us in their brief, that this matter
8 warranted appellate resolution at this time.

9 Now isn't there something in the Memorandum of
10 Understanding or somewhere else to the effect that you
11 folks participate in these proceedings through the staff,
12 the NRC staff and, if so, I would have thought that your
13 remedy here would have been to have asked the staff to call
14 upon us to review this.

15 MR. CUMMING: We did ask the staff and it is so
16 stated in our filing with the Board.

17 JUDGE ROSENTHAL: All right, and the staff turned
18 you down.

19 MR. CUMMING: That's correct.

20 JUDGE EDLES: But, Mr. Cumming, to follow up on
21 Mr. Rosenthal's question, the Memorandum of Understanding
22 does say that if there are disagreements between the
23 lawyers representing FEMA and the NRC staff those
24 disagreements are resolved through the administrative
25 hierarchies by General Counsel on the NRC side and a FEMA
representative on the other.

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2 Why should we now get into the act? I understand
3 your argument that we have discretion to do certain things,
4 but in terms of the standing point, why don't we simply say
5 let the Memorandum of Understanding put to you sort of an
6 administrative resolution of these fratricidal battles, so
7 to speak, with the NRC staff and take it up with the
8 General Counsel or whoever?

9 MR. CUMMING: The differences cannot be resolved.

10 JUDGE ROSENTHAL: I think that we understand your
11 position on that issue.

12 Perhaps at this point it would be profitable for
13 you to go on and explain to us just what is the irreparable
14 programmatic harm that your agency will suffer unless the
15 contentions are excluded from the proceeding now, and I
16 stress at this time.

17 MR. CUMMING: To restate the question, is there
18 sufficient justification for interlocutory review by the
19 Board based on the irreparable harm that FEMA will suffer
20 unless the contentions are excluded at this time, was based
21 on a variety of reasons which I will try and articulate to
22 the Board.

23 First of all, FEMA as a policy matter believes
24 that given its limited resources it must give the fullest
25 attention to currently operating nuclear power plants,
currently licensed nuclear power plants.

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2 The reallocation of resources from operating to
3 non-operating plants dictated by our having to justify in
4 essence what we did not do rather than what we did do may
5 have an impact on our capability of dealing with currently
operating plants.

6 JUDGE EDLES: Does that mean you are going to
7 have to put other or different witnesses on the stand and
8 people are going to have to talk about things that would
9 not otherwise be committed to this hearing? Is that what
10 you mean?

11 MR. CUMMING: The witnesses that FEMA has
12 designated, and let me remind the Board that no staff
13 witnesses were ever designated for the proceeding. FEMA
14 designated witnesses on the basis that it understood its
15 role was to support, explain, justify, if you will, what it
16 had done on the day of the exercise.

17 There is in fact some indication that the Board
18 fundamentally misunderstood the concept of emergency
19 planning, and I say that for the following reason. FEMA
20 has never tested all observable elements in a plant in a
21 single test.

22 JUDGE EDLES: Mr. Cumming, I think I understand
23 that. Please see if you can come back and help me with
24 where exactly is the irreparable injury here? I mean you
25 said to me that FEMA is going to have to reallocate its

marysimons 1 limited resources. I am very sympathetic to that argument,
2 but you have to tell me how it is going to do that.

3 MR. CUMMING: The reason it will have to do that
4 is many of the witnesses and the people involved with
5 documenting what is already before the Board as an issue in
6 the admitted Contentions 15 and 16 we believe will require
7 FEMA to devote resources, the same resources that would be
8 involved with support of the witnesses in the hearing in
9 order to make a credible presentation and explain
10 accurately on the public record exactly why we did or did
11 not do something.

12 We also expect and anticipate that the whole
13 history of emergency planning will in fact be reviewed by
14 that Board and that the applicant will attempt to review
15 whether in fact this exercise compared favorably or
16 unfavorably with other exercises conducted by FEMA in the
17 past. That will necessitate an extensive and lengthy
18 document production as well as witness testimony giving a
19 rationale as to why in fact FEMA did or did not do
20 something in the past concerning other exercises.

21 JUDGE ROSENTHAL: So your irreparable injury is
22 at bottom the necessity to expend additional resources in
23 terms of witnesses and people who collect documents and the
24 like.

25 MR. CUMMING: That is one basis and we have

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others.

2

JUDGE ROSENTHAL: All right. What are your other

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bases besides this necessity to devote additional

4

resources?

5

MR. CUMMING: The other bases consist of several

6

things. First of all, there is an implication in having to

7

litigate those contentions that FEMA must give an absolute

8

assurance as to what it did because it will be forced to

9

explain why it did not do something and that this contrast

10

is from reasonable assurance.

11

JUDGE ROSENTHAL: What is the irreparable injury

12

that stems from that?

13

MR. CUMMING: It's irreparable because it damages

14

the credibility of the Federal Emergency Management Agency

15

with respect to the public's understanding of its role in

16

emergency planning, and it significantly impacts on the

17

credibility of the reasonable assurance we give to the

18

Commission when we in fact sign off on the dotted line, so

19

to speak, with respect to either a plan or exercise.

20

JUDGE EDLES: And you believe that you will not

21

be able adequately to explain that to the Licensing Board

22

and ultimately to us and the Commission? Is that where the

23

confusion will lie?

24

MR. CUMMING: We have already completed, or

25

tomorrow discovery closes on the OL-5 proceeding. Our

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witnesses have been fully deposed on their testimony or
2 what their outlines in the testimony are on 15 and 16, and
3 based on what we have seen from the depositions, the answer
4 is yes. It has an impact on our credibility.

5

JUDGE EDLES: Now you have confused me more. You
6 tell me discovery is about to come to a close and they have
7 already deposed all the witnesses. So whatever harm to
8 FEMA in terms of document production in depositions, all of
9 that is going to be over tomorrow; is that correct?

10

MR. CUMMING: Discovery is a different issue than
11 presenting an argument at trial or hearing.

12

JUDGE EDLES: All right, but to the extent that
13 part of the irreparable injury is, as you mentioned earlier
14 I believe, you're going to have to produce lots of
15 documents and different people are going to have to be
16 served up and all of all, you are now telling me that, by
17 the way, all of that is going to be over tomorrow.

18

So even if we move with blazing speed here and
19 get an opinion out dismissing the contentions tomorrow or
20 the next day, I mean the damage is done, or part of the
21 damage is done.

22

MR. CUMMING: We would argue that in fact
23 irreparable harm may have already occurred in that in
24 testimony under oath there were questions raised concerning
25 FEMA's conduct of this exercise versus other exercises,

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whatever that may be. In fact, additional resources, and I must say that current operations are being disrupted by what we feel we will have to present in the hearing.

4 JUDGE EDLES: Give me an idea now of what additional resources are going to be expended for the trial of this. I mean you have presumably indicated the witnesses who are going to appear, and they have been deposed perhaps and documents produced. Are you going to serve up other witnesses that we don't yet know about?

10 MR. CUMMING: No. We are not going to change the designated witness, but we are talking about the length of time ---

13 JUDGE EDLES: So it's a matter of the length of time they are going to be on the stand, for three days instead of one day; is that what you're saying?

16 MR. CUMMING: No, that is not what FEMA anticipates. If the Board were able to represent that FEMA was on and off the stand in three days with respect to the other parties' interest in our witness, that might in fact be correct. But we believe that in fact because of Contentions 15 and 16 we will have a substantially more lengthy proceeding, our witnesses will be on the stand far longer than three days, and in fact perhaps even months.

24 JUDGE EDLES: How much longer is far longer?

25 MR. CUMMING: I just said, maybe months.

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2 JUDGE EDLES: And if we get these two contentions
3 out of there they will not be on for months; is that what
4 you're telling me?

5 MR. CUMMING: I would say it substantially
6 confines the scope of the proceeding to what we did on the
7 day of the exercise and not what we did not do and why we
8 did not do it.

9 JUDGE ROSENTHAL: The staff seems to think that
10 you have taken these contentions beyond the bounds that the
11 Licensing Board intended for them. Indeed, the staff now,
12 as you know, supports the admission of the contentions.

13 Do you think that the staff has misread them or
14 misread the Licensing Board's intent?

15 MR. CUMMING: I would state, and I am not arguing
16 to the technicalities, that FEMA just in drafting
17 testimony and preparing witnesses is uncertain as to how
18 the fundamental flow criterion, which this Board in
19 Footnote 71 in the Sharon Harris Plant proceeding, and I
20 think it's ALAB -- it's around 840 or 845, I'm sorry I
21 don't have the citation right at hand, discussed what a
22 fundamental flaw is, which is mentioned in each of these
23 contentions.

24 Let me read just briefly: "Although at the time
25 the decision below was rendered the Commission had not
spoken on the use of a fundamental flaw test, it has since

marysimons 1 expressly approved the standard. (See Long Island Lighting
2 citation.) The Commission therein made it clear that the
3 term 'fundamental flaw' means a deficiency which precludes
4 a finding of reasonable assurance that corrective measures
5 can and will be taken." It goes on.

6 In fact, in our post-exercise assessment at page
7 8 our definition of deficiency is remarkably similar. It
8 states: "Deficiencies are demonstrated and observed
9 inadequacies which cause a finding that offsite emergency
10 preparedness was not adequate to provide reasonable
11 assurance that appropriate protective measures can be taken
12 to protect the health and safety of the public living in
13 the vicinity of a nuclear power facility in the event of a
14 radiological emergency."

15 JUDGE EDLES: So what you're saying is that you
16 call a deficiency is what the Sharon Harris Board called a
17 fundamental flaw and they are roughly the same.

18 MR. CUMMING: That's right, and we found five
19 deficiencies in the LILCO exercise.

20 JUDGE EDLES: And you are presumably prepared to
21 discuss deficiencies in the plant I gather from your brief.

22 MR. CUMMING: That's correct.

23 JUDGE EDLES: So where is the problem here?

24 MR. CUMMING: The problem as we started on this
25 issue was how was FEMA irreparably harmed. The answer is

marysimons 1 once we took our slice we found there were deficiencies.
2 You in essence by admission of those contentions are asking
3 us in one way to prove a negative, and it basically
4 involves FEMA in the role of trying to explain and justify
5 what it did not do.

6 It's very comfortable with what it did. I know
7 of no precedent where one Federal agency has an
8 administrative body that examines what other agencies did
9 not do, but I can see that this might be ---

10 JUDGE ROSENTHAL: All right. You've got a
11 position on the merits. You say you are very comfortable
12 with what FEMA did. Why doesn't FEMA just present that
13 position to the Licensing Board. If the Licensing Board
14 construes the FEMA obligation in its initial decision
15 broader than you think it should be construed, there may
16 then be an appellate remedy available to you.

17 What we are dealing with here is why should we
18 step in at this interlocutory stage. There is a legion of
19 Appeal Board decisions to the effect that one of the things
20 that we will not look at at an interlocutory stage is the
21 admission of contentions. Now that is a large hurdle for
22 you to overcome here, and I still have some question as to
23 whether you've done it.

24 MR. CUMMING: Why should FEMA be involved in a
25 lengthy and complicated proceeding in which it has no

marysimons 1

2 control over the time frame in which its witnesses will
3 testify to explain on the record beyond the scope of its
4 post-exercise assessment?

5 The NRC staff signed off on the exercise pursuant
6 to the MOU. They approved it.

7 JUDGE EDLES: FEMA, excuse me, participated in
8 the earlier phases of this proceeding I assume?

9 MR. CUMMING: That is correct, on the plan.

10 JUDGE EDLES: On the plan, and how long were your
11 witnesses on the stand there?

12 MR. CUMMING: At least several weeks as I
13 understand it.

14 JUDGE EDLES: So in other words, we are looking
15 forward presumably to yet another several weeks no matter
16 what we do here. I mean is that a reasonable inference to
17 draw.

18 MR. CUMMING: You are characterizing this as
19 FEMA's time involvement. FEMA's time involvement is in
20 fact a factor, but I should state that FEMA must go on the
21 record for a lengthy time to explain if these contentions
22 are admitted and if evidence of other proceedings are shown
23 as to why we did or did not do something, the public will
24 be concerned as to why we gave reasonable assurance if in
25 here hypothetically we did something more arguendo than we
did in the past of why we didn't do that at other sites.

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2 Incidentally, I should state on the record that
3 this is not something that FEMA is trying to keep secret.
4 In a lengthy analysis of scenario development, exercise
5 design and problems with emergency planning, the General
6 Accounting Office on August 1st, 1984 issued a report
7 called "Further Actions Needed To Improve Emergency
8 Preparedness Around Nuclear Power Plants" where many of
9 these same issues were highlighted.

10 JUDGE EDLES: Mr. Cumming, again, I'm not
11 unsympathetic to your arguments that we ought not to be
12 mucking around in how FEMA does its business.

13 My problem is if we allow the contentions in, I
14 understand there will be a commitment of resources by your
15 agency over which you have to some degree no control, and
16 that is a troublesome element, I agree. I mean I would not
17 want some other agency telling us how to direct our
18 resources. I understand that.

19 But if it's only some additional minor increment
20 in time, then that's less bothersome than it might
21 otherwise be, and I can certainly understand your notion
22 that if at the end of the case we were to say how you ought
23 to run your business in a way different from the way you
24 think you ought to do it, then that may be, indeed, a
25 problem for the agency.

I guess what I don't see, other than the

marysimons 1 commitment of time and effort without minimizing that, is
2 how your sort of program operations would really be hurt
3 here.

4 MR. CUMMING: In addition to the disruption of
5 current operations, you've put our credibility at stake.
6 The public wants to know basically what goes on with
7 respect to emergency planning. They are entitled to an
8 explanation.

9 Someone must think that FEMA's credibility is
10 important or the NRC would have conducted this exercise on
11 its own.

12 JUDGE ROSENTHAL: Do you think the admission of
13 these two contentions by the Licensing Board puts FEMA's
14 credibility ---

15 MR. CUMMING: Absolutely.

16 JUDGE EDLES: Because you are going to be forced
17 to explain to the public as well as us why you did one
18 thing in one place and one thing is another?

19 MR. CUMMING: That is correct.

20 JUDGE ROSENTHAL: Why does it put your
21 credibility at risk? If you've got a good explanation I
22 would think that that would enforce your credibility and
23 not destroy it.

24 MR. CUMMING: Well, that goes back to my previous
25 point. As a policy matter FEMA believes it is more

marysimons 1 important to devote its limited resources to currently
2 operating plants, and we think that we in this post-
3 exercise assessment conducted an adequate evaluation. We
4 are willing to defend what was in the post-exercise
5 assessment.

6 You have to understand, and I think I should
7 state this before I go to your third question on the
8 contentions ---

9 JUDGE ROSENTHAL: You probably better get into
10 that third part. I will extend your time a little bit, but
11 you've already gone over the 20 minutes that you had
12 reserving 10 minutes for rebuttal.

13 MR. CUMMING: I'll be happy to retreat, but let
14 me just briefly state something with reference to the third
15 question.

16 JUDGE WILBER: Does FEMA make a distinction
17 between an exercise at an operating plant? You're talking
18 about devoting resources to operating plants. Do they make
19 a distinction between an exercise at an operating plant
20 from that which is conducted at a plant that is seeking
21 license? Is there any difference in their analysis or
22 review?

23 MR. CUMMING: It makes no difference on our
24 analysis, but we are committed by regulation to conducting
25 periodic exercises, which is an extensive and lengthy

marysimons 1 process, at each plant in the country on a cycle. So we
2 are committed to that right now.

3 JUDGE WILBER: But an exercise let's say in the
4 fifth year, and I think you called it a six-year cycle, but
5 an exercise in the fifth year may be no different than an
6 exercise that was conducted prior to the issuance of a
7 license; is that what I understand?

8 MR. CUMMING: That is correct.

9 JUDGE WILBER: You may no special effort prior to
10 the issuance of a license?

11 MR. CUMMING: That is correct. The reason, and
12 let me explain just briefly. We say six year in our brief
13 because NUREG 0654 has not been formally amended. However,
14 FEMA changed its regulation on the exercise cycle almost
15 two years ago, and in fact we do currently operate on a six
16 year rather than on a five-year cycle.

17 I believe the Commission also has a proposed rule
18 which deals with that issue.

19 JUDGE EDLES: The proposed rule deals with a pre-
20 license exercise as I recall.

21 MR. CUMMING: That's correct. But we in essence
22 make no distinction.

23 With respect to the third issue, and I will try
24 and deal briefly with it, the GAO report I mentioned
25 earlier was issued in August of '84.

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2 JUDGE EDLES: Excuse me, Mr. Cumming, with Judge
3 Rosenthal's indulgence maybe he can charge me with a minute
4 or two of your time, but I've got to ask this. The
5 Commission's regulations, Appendix E, distinguishes between
6 a full participation exercise before a license is issued
7 and various other kinds of exercises afterwards. I don't
8 know that they characterize them, although they say that in
9 these follow-up exercises the State at least partially
10 participates on an annual basis.

11 The Commission has drawn a distinction as far as
12 I can read our regulations between what you do at a full
13 participation exercise before the license issued and what
14 you have to do on a continuing basis.

15 What you are telling me is that FEMA does not
16 draw that distinction. As far as you are concerned all of
17 these things are roughly the same.

18 MR. CUMMING: That is correct.

19 I should briefly state that there is a
20 parallelism between the two regulatory schemes in that 44
21 CFR 350.5 reads precisely the same as 10 CFR 50.472 I
22 believe it is. We also at 44 CFR 350.2J define full
23 participation.

24 JUDGE EDLES: Where is that defined?

25 MR. CUMMING: 350.2J of 44 CFR.

Prior to the Union of Concerned Scientists cases

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2 exercises as I understand it were not litigable. That is
3 one of the reasons that FEMA has concerns about whether
4 this is a road map for what we may anticipate in the
5 future.

6 The regulatory schemes of the two agencies do
7 differ and in important respects. Now one of the reasons
8 that FEMA was unable to make a bottom-line finding is that
9 its regulatory scheme prohibits it. It has never been
10 amended to deal with utility only plans.

11 However, significantly we have constantly
12 believed that NRC does have the authority to review utility
13 only plans, and we have tried to support that to the extent
14 that we believed we could legally and as a policy matter.

15 JUDGE EDLES: I don't think anyone is in
16 disagreement on that point. We all agree that utilities
17 can file plans and they can be reviewed by the NRC.

18 MR. CUMMING: If I may just have two minutes,
19 Judge Rosenthal, I will try and clean up.

20 The Union of Concerned Scientists which we read,
21 too. In fact, I found out about the case when I first saw
22 it in the Federal Second. FEMA was not party to that
23 case. FEMA's understanding of that case is that the court
24 left to the NRC's discretion as to what was material in a
25 licensing with respect to exercises.

In CLI-86-11 the Commission for the first time

marysimons 1

2 refined what it felt was material. What we think is in
3 fact material to the Commission is what they understand
4 FEMA finds material in an exercise. That is why we think
5 we were requested to participate in and conduct an
6 evaluation of the Shoreham exercise.

7 FEMA is important even though arguably in the
8 regulatory scheme, and we defer completely to you on this,
9 there is a provision 50.47C1 which indicates that the
10 failure to meet the planning standards, and that is what
11 the exercise is all about, it is in fact just a test of a
12 portion of the planning standards of the observable portion
13 of the planning standards, an argument can be made as to
14 why if 15 and 16 go to why we didn't test certain of the
15 observable portions ---

16 JUDGE EDLES: Excuse me for interrupting. 15 and
17 16, at least as I read them, and tell me where I'm wrong,
18 say simply the Commission's regulations require you to
19 conduct a full participation exercise before we issue a
20 license. This here wasn't a full participation exercise
21 and therefore doesn't comply with the regulation. I think
22 that's it in a nutshell.

23 Saying that, by the way, it's not a full
24 participation exercise, it doesn't do this, it doesn't do
25 this, it doesn't do this and it doesn't do this. Why isn't
that a litigable contention? I guess I don't understand

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2 that. I mean why isn't compliance with the Commission's
3 emergency planning rule something that the Licensing Board
4 ought to be able to look at?

5 MR. CUMMING: Basically all the other planning
6 elements and, first of all, I mentioned the two sections,
7 44 CFR 350.5 and 10 CFR 50.47-2 are parallel. There,
8 unfortunately, is not direct translation of compliance with
9 those planning standards although there is suggested
10 guidance in NUREG 0654 and synchronization with what is a
11 specific exercise deficiency.

12 So, in other words, the Board is forced to try
13 and rationalize two disparate schemes and it's a difficult
14 task.

15 Now FEMA can only operate based on what it knows
16 and feels that it is the responsibility of NRC to determine
17 how FEMA's operation integrates in its operations in both
18 the adjudicatory scheme as well as the regulatory scheme.
19 FEMA's open. We never published a regulation concerning
20 how FEMA would deal with the utility only plan.

21 Although our legal analysis is that we were
22 obligated to support NRC because NRC had the obligation
23 legally to in fact conduct and review that plan.

24 JUDGE WILBER: Does FEMA consider this Shoreham
25 exercise a full-participation exercise?

MR. CUMMING: But for the lack of participation

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2 by State and local government, FEMA considered this to be
3 both a full-scale, a term which has been used on occasion,
4 or a full-participation exercise.

5 JUDGE ROSENTHAL: Thank you, Mr. Cumming. I'll
6 provide you with the 10 minutes for rebuttal.

7 MR. CUMMING: Thank you very much, Your Honor.

8 JUDGE ROSENTHAL: Mr. Irwin.

9 ORAL ARGUMENT

10 ON BEHALF OF THE LONG ISLAND LIGHTING COMPANY

11 JUDGE ROSENTHAL: I'm going to say at the outset,
12 Mr. Irwin, that I was rather surprised to find very little,
13 if any, discussion in our brief about anything other than
14 the merits of the admission of these two contentions.

15 I didn't see your brief address either the
16 question as to whether FEMA has standing to complain about
17 the admission of contentions or even perhaps more important
18 the question as to whether interlocutory review is
19 appropriate here given the long line of Appeal Board
20 precedents to the effect that we just do not review on an
21 interlocutory basis the admission of contentions.

22 I mean your brief just didn't address those
23 issues, and I'm somewhat surprised to find that it didn't
24 given the fact that you were supporting the FEMA endeavor
25 to have us review this matter interlocutorily.

MR. IRWIN: Well, I guess the answer to that is

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2 fairly straightforward, Judge Rosenthal. We didn't take
3 the appeal. We think obviously that the admission of the
4 contentions was incorrect. LILCO did not take the appeal
5 and we thought we could best contribute on the merits of
6 the argument.

7 The intervenor's brief was filed the same day as
8 ours and had the Appeal Board invited response to briefs,
9 we certainly would have contributed to a discussion of that
10 subject.

11 JUDGE ROSENTHAL: Wasn't consideration given by
12 LILCO to seeking interlocutory appellate review on the
13 directed certification route which would have at least
14 obviated the problem of FEMA's standing?

15 MR. IRWIN: Yes, sir, we gave that consideration
16 and we rejected it simply on a judgment call basis.

17 We have, frankly, a set of concerns that
18 intertwine with those of FEMA, and I may as well put one of
19 them right on the table right.

20 Right months ago the Commission directed that an
21 expedited proceeding be conducted and we aren't even
22 finished with discovery yet.

23 All along we have had to make judgment calls.
24 We, for instance, wished to have summary disposition as a
25 phase of the proceeding below and the Licensing Board said
that's fine, it's a free country, but it will cost you at

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least two months before you get to hearing.

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The Commission's regulations require us to obtain an exemption if we don't have a decision out of a Licensing Board within a year after an exercise. It will be more than a year after the exercise before we even set foot in a hearing room with testimony in hand.

So we made judgment calls, and we frankly decided against appealing, not because we thought that the Licensing Board was right, but as you can tell from our brief we think they were dead wrong on a very important issue. But, frankly, we thought we would get through the end of this quicker by long process we took and then by taking an interlocutory appeal.

JUDGE EDLES: Mr. Irwin, give me your professional judgment as to how much additional time is going to be taken by the litigation of these contentions?

MR. IRWIN: Mr. Edles, that is hard to predict, but let me try. I can't recall exactly how long FEMA was on the stand the first time. The definition of "several" in the dictionary is I believe between three and seven, and FEMA was on the stand somewhere within that period I believe.

JUDGE EDLES: Is that days or weeks?

MR. IRWIN: Weeks, sir. I think it is probably closer to three than to seven, but it's still a substantial

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amount of time.

2 These two contentions change the nature of this
3 proceeding from being focused on what was done by
4 approximately 1,100 personnel from Long Island Lighting
5 Company and other organizations on February 13, '86 to what
6 was not done and why not, and what the standards for
7 comparison of the Shoreham exercise against over 100 other
8 exercises are. It radically changes. It's not just an
9 issue. It's not simply the indicia of an issue, but it's
10 an indicia of a whole new dimension to a proceeding.

11 So what I'm saying I guess is that I think it
12 could be a very substantial addition of time to FEMA's
13 case.

14 JUDGE EDLES: I understand that, but the
15 Commission's regulations say that there is supposed to be a
16 full-participation exercise before you get an operating
17 license. Why can't an intervenor come in and say you,
18 LILCO, have not conducted a full-participation exercise?
19 Maybe you can dispose of it on summary disposition and
20 maybe you can put in evidence and clearly demonstrate it is
21 a full-participation exercise. Mr. Cumming says it is. So
22 I assume he will be able to demonstrate that. I don't
23 understand why this is the kind of thing we ought to kick
24 out of the contentions.

25 MR. IRWIN: I think you have to go back to

marysimons 1 looking at what the Commission intended to be litigable
2 exercises, and to come back to address for a second why the
3 Appeal Board ought to consider this issue here.

4 This is the first intensely litigated piece of
5 exercise litigation that has ever occurred. It is in many
6 ways a threshold case. This is probably not the last
7 interlocutory appeal or attempt at one that the Appeal
8 Board will see. Therefore, it is important that issues of
9 this kind be considered.

10 This issue opens a whole new dimension in the
11 case. You have to go back to what the Commission said.
12 When the Commission was remanded in the UCS case it was
13 given leave by the court to exercise its historic latitude
14 in determining what was in and what was out of litigation,
15 and the Commission stated that the basic, and I'm reading
16 here from 50 Federal Reg. 19323, "The basic effect of the
17 court's decision and of the rule change is that the results
18 of pre-exercising emergency preparedness may be subject to
19 litigation."

20 It said exactly the same thing substantially in
21 CLI-86-11 where it said, and I quote again, "Under our
22 regulations and practice the staff review of exercise
23 results is consistent with the predicted nature of
24 emergency planning, and it is restricted to determining if
25 the exercise itself revealed any deficiencies which

marysimons 1 preclude a finding of reasonable assurance."

2 Now what we have gotten into here is not the
3 exercise itself, but the process by which an exercise is
4 developed.

5 Now any applicant has a peripheral role in the
6 process of exercise formation, but it is FEMA operating
7 pursuant to a Memorandum of Understanding, to NUREG 0654,
8 to its own Guidance Memorandum 17 that basically shapes
9 objectives for this exercise and as for other exercises.

10 There is no absolute cookie cutter, Mr. Edles.
11 There are 170 some aspects of an emergency plan that are
12 evaluated. FEMA considers only between 60 and 70 of them
13 to be observable, it has only 30 some objectives and it
14 doesn't have all those objectives in every exercise. It's
15 an inherently discretionary and expert process.

16 JUDGE EDLES: Well, I'm not suggesting that this
17 wasn't the full participation exercise and a FEMA witness
18 can get on the stand and say, look, all we need is to look
19 at 30 items and we can tell you whether everything will
20 work well, and maybe that's right. I'm not disagreeing
21 with that.

22 Why I don't understand is why you don't want us
23 to hear that?

24 MR. IRWIN: It's an extraordinary commitment of
25 resources and I submit an inappropriate one where there is

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2 no allegation that the process itself miscarried. You have
3 two expert agencies, each of them acting within the scope
4 of its expertise engaging in a normal process.

5 Suffolk County and the other intervenors have
6 expressly disclaimed any allegation that the process of the
7 exercise formation miscarried. They've said they basically
8 did it at Shoreham just as they did anywhere else.

9 JUDGE ROSENTHAL: What's wrong, Mr. Irwin, with
10 the analysis of the staff? Let me quote from the staff's
11 brief at page 17. They say "There is also no question, the
12 staff submits, but that the sampling must be broad enough
13 to give reasonable assurance that the emergency plans can
14 be implemented. As the Licensing Board has articulated its
15 interpretation of Contentions EX-15 and 16, this is
16 precisely the issue admitted for litigation, whether the
17 exercise was broad enough to be a proper test of the plan."

18 Now is the staff wrong in its understanding of
19 the Licensing Board's interpretation of those contentions
20 or does it simply make no difference that even if that is
21 the thrust of the contentions they're still out of the ball
22 park? Which is it?

23 MR. IRWIN: It's I think something close to the
24 latter, Mr. Rosenthal. The staff rightly understood the
25 Licensing Board and the Licensing Board and the Licensing
Board misapprehended the Commission.

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2 The Licensing Board in its December 3rd order, or
3 the December 11th order, I can't remember and I get the
4 dates mixed up, but the second order it issued acknowledged
5 that there is a facial difference between exercise results
6 and exercise formation, but in Licensing Board's view the
7 two concepts blur. I submit the Licensing Board is simply
8 wrong there.

9 JUDGE ROSENTHAL: May I interrupt there. The
10 Licensing Board is wrong in its belief that it is
11 appropriate to litigate whether the exercise was broad
12 enough to be a proper test of the plan? Is that a
13 litigable issue or is it not?

14 MR. IRWIN: It's not categorically non-litigable,
15 but there is not a properly framed contention here. The
16 Commission made it prima facie non-litigable by focusing on
17 exercise results, but what you have here ---

18 JUDGE EDLES: Let's take a different exercise
19 result scenario.

20 MR. IRWIN: Okay.

21 JUDGE EDLES: FEMA and LILCO call each other on
22 the phone and say we're going to conduct an exercise on
23 such and such day and how will it be conducted. It will be
24 conducted, but I will call you. I'm in charge of LERO. At
25 9 o'clock I will place a person-to-person phone call to
you, Mr. FEMA and we will for 15 minutes discuss whether we

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2 think this LILCO plan can work, and at the end of that you
3 will issue a report saying yes, you think it can or no, you
4 think it can't.

5 The Commission contemplated that if that were the
6 case that no one would be able to say, by the way, that
7 type of exercise doesn't qualify under the Commission's
8 rules.

9 MR. IRWIN: No, sir. You have jus' illustrated
10 exactly the type of contention which I would say is
11 admissible, but there is no such allegation here.

12 If those facts were known, and if there were also
13 an allegation, as I submit there should be, that this is
14 contrary to the practice which was developed over six years
15 in hundreds of exercises as well as to good common sense
16 and sufficiency of testing, that would be an admissible
17 contention because it would essentially say a process ---

18 JUDGE EDLES: But, Mr. Irwin, I think that the
19 intervenors, I don't think you are giving them ample
20 credit. They have not, as far as I can see, at least in
21 the contentions, said, look, this isn't the kind of
22 exercise that has been conducted a hundred times before.
23 What they have said is quite simply the Commission's rules
24 require a full-participation exercise and this isn't a full-
25 participation exercise. Ergo, the Commission's rules
aren't satisfied.

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2 Now I don't quite understand why that isn't
3 roughly speaking a correct characterization of their
4 contention.

5 MR. IRWIN: I think it is a correct
6 characterization of their contention, Mr. Edles. What I am
7 saying is that in the context of exercise development,
8 which is a complex process for which there is a pattern and
9 practice extending over six years.

10 The mere allegation that something is not a full-
11 participation exercise gets one inherently into judgmental
12 and expert processes, and without some allegation that the
13 process miscarried somehow, I think what you are doing is
14 opening up a vast uncharted threshold or wilderness of
15 litigation which I frankly don't think the Commission
16 contemplated in its remand.

17 JUDGE ROSENTHAL: Now wait a minute. I would
18 like to get back to the way that the staff characterized
19 the issue. The staff suggests that the issue before the
20 Licensing Board presented by these contentions is whether
21 this exercise was sufficient so that the results of the
22 exercise could form a basis for a finding that there is
23 reasonable assurance that adequate protective measures can
24 and will be taken.

25 Now my question for you, Mr. Irwin, No. 1, is can
the Licensing Board consistent with Commission decisions

marysimons 1

2 inquire into that question, the question being whether the
3 exercise was sufficient so that the results of the exercise
4 could form a basis for a finding of reasonable assurance
5 that adequate protective measures can and will be taken?

6 Is that an issue open to the Licensing Board?

7 MR. IRWIN: Yes, sir, and I have no quarrel with
8 that as it's focused on the results of the exercise.

9 JUDGE ROSENTHAL: All right. Now supposing that
10 we were to come down with a decision in which we said we
11 interpret Contentions 15 and 16 as raising that question,
12 and that Licensing Board in litigating those contentions,
13 that is what you are to litigate them against, against that
14 question, whether the exercise was sufficient, et cetera,
15 just as the staff has set forth at page 17 of their brief.

16 Now if we were to tell a Licensing Board that is
17 what we interpret the contentions to mean and that is what
18 you are to proceed on the basis of, is there any problem?

19 MR. IRWIN: I guess I have to do something that
20 counsel isn't permitted to do. I have to ask the Board a
21 question.

22 JUDGE ROSENTHAL: You're perfectly free to do so.

23 MR. IRWIN: Is the Board to be confined to
24 evaluating the exercise within the four corners of what was
25 demonstrated, or may it look beyond what was demonstrated
or attempted to be demonstrated to decide whether that

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exercise so shaped is potentially sufficient?

2 JUDGE EDLES: Without attempting to avoid your
3 question, Mr. Irwin, my guess is that it is going to be
4 hard to distinguish those two things in the abstract in
5 advance. If you ask a question at the hearing and you can
6 see more or less where you are going with that line of
7 questioning, I think the Licensing Board at that point can
8 say, look, yes, that's within what the Appeal Board thought
9 or outside what the Appeal Board thought. But it is kind
10 of hard, because I agree with you that there is kind of an
11 overlapping here and to some degree you might have to take
12 a peak at what FEMA had in mind when it set up this
13 exercise in order to resolve the question.

14 But why shouldn't we leave that for the Licensing
15 Board and for you folks to thresh out at the hearing?

16 MR. IRWIN: Simply, Mr. Edles, because I don't
17 think that is what the Commission had in mind. The
18 Commission talked about exercise results. It didn't talk
19 about exercise formation. There was a process which was in
20 place and has been in place and is an expert process. That
21 process has not been challenged. But what is happening is
22 that by the back door that process is being challenged.

23 JUDGE EDLES: Who decides what elements are to be
24 tested? Does LILCO serve up its plan or does FEMA say we
25 want tested elements A, B, C, D and E?

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2 MR. IRWIN: Typically what happens, as I
3 understand it, is that the organization which is going to
4 be responsible for the conduct of an exercise, be it a
5 utility, a State, a State plus localities or whatever,
6 tenders to FEMA a proposed set of objectives and a
7 scenario. FEMA also has a proposed set of objectives. In
8 both cases they are derived from standard guidance
9 contained in Guidance Memo 17 or its successor draft, EX-3,
10 which in turn is derived from NUREG 0654.

11 There is a process of discussion and FEMA holds
12 the whip hand in that discussion quite obviously, and the
13 NRC participates in that discussion as do representatives
14 from other agencies. The objectives and the scenario
15 having been agreed upon are kept in absolute secrecy from
16 the players and they then go forward.

17 Now the problem I have with the contentions is
18 that LILCO could have done a hundred percent perfect job on
19 the exercise objectives and a hundred percent perfect job
20 in fulfilling the exercise scenario. But because of the
21 actual structure of the exercise, a process over which it
22 did not have ultimate control, the exercise could be deemed
23 deficient, notwithstanding that FEMA in its expert judgment
24 thought it was sufficient and the NRC signed off on it.

25 JUDGE ROSENTHAL: Mr. Irwin, deficient in what
respect? Deficient in the respect that the results of the

marysimons 1

exercise could not form a basis for a reasonable assurance finding?

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MR. IRWIN: Insufficient I suppose in that the exercise as agreed upon and help could not form a sufficient structure for a finding no matter how perfectly that structure was executed on the day of the exercise.

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JUDGE EDLES: The real nub of the problem then, as I understand it, is FEMA, the NRC staff and to some degree an applicant get together and decide on the scenario for the exercise acknowledging that the government here has the whip hand, as you described it, and the real problem I take it is now you've got this Licensing Board secondguessing this intramural decision that had been made earlier and that is really where the conflict comes in, isn't it?

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MR. IRWIN: That's right. At least where there is no allegation that that intramural decision-making process was either fraudulent, insufficient, inadequate or whatever. There is no allegation of that here.

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JUDGE EDLES: The only allegation here is that it doesn't meet the Commission's regulatory requirements.

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MR. IRWIN: But that is why you have expert agencies and discretion and presumptions of regularity. If you had a total willy-nilly free-form litigation on everything that is not spelled out to the last jot and

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2 tittle in the Commission's regulations, you would have
3 every licensing case like Shoreham. I mean in all
4 seriousness you've got to exercise some presumptions.

5 The problem with the Board's admission here is
6 that it simply didn't recognize what the Commission said in
7 focusing on results and it did not pay deference to the
8 interagency ---

9 JUDGE EDLES: Now one of the problems we have, if
10 we are now in agreement as to kind of what's happening, is
11 that you have the NRC staff here at least a player in round
12 one of the exercise construction saying well, we don't
13 really see anything terribly inconsistent in having the
14 Board look at certain things now along the lines that Mr.
15 Rosenthal has suggested.

16 What do I do with that line of argument?

17 MR. IRWIN: You recognize two things. One, they
18 have changed their mind and, two, they've been wrong
19 before.

20 (Laughter.)

21 Nothing is engraved in stone. I think there is a
22 legitimate process in here that ought to be given deference
23 and there is no allegation that the process miscarried.

24 You've got to pay attention to what FEMA says.
25 We have to, and let me add a couple of things to what Mr.
Cumming said.

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2 FEMA has, as I understand it, a proposed witness
3 panel of three witnesses. Only one of them is a FEMA
4 employee. The other two are contractors for Argonne
5 National Laboratory. Those fellows work on dozens of
6 plants. If they have prior commitments to operating plants
7 we may not be able to get them for as long as they will be
8 needed. We have already had to delay aspects of this
9 proceeding because FEMA has had other legitimate tasks to
10 perform. It's a significant hardship on FEMA.

11 There is also a cost to the Commission's own
12 processes because if this proceeding is opened up wide than
13 is fairly inferable from the Commission's intent, then
14 every other exercise proceeding, every renewal proceeding
15 is going to be subject to the same kind of process.

16 JUDGE EDLES: But we're talking about what, one
17 other case like this? I mean we're not talking about a
18 lot.

19 MR. IRWIN: No, sir. You have biennial exercises
20 at every operating plant and every operating ---

21 JUDGE EDLES: But how many are there in the
22 pipeline, one more maybe?

23 MR. IRWIN: There are two other plants, as I
24 understand it, that have not received their licenses yet,
25 but after licenses are issued, Mr. Edles, those plants have
to have periodic exercises.

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JUDGE EDLES: But the periodic exercises, I thought I agreed with Mr. Cumming that the periodic exercises are under a wholly different scheme, and that's not a full-participation exercise under the Commission's rules, relicensing and all that stuff.

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6 MR. IRWIN: No, that's not correct. Some of them do not need to be full-participation exercises, but some of them do.

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9 JUDGE EDLES: Under the Commission's rules?

10 MR. IRWIN: Yes, sir, as I understand it.

11 JUDGE WILBER: Appendix E, what is it, F-1, specifically gives you a different flavor of what the initial exercise should be, that you should test as much as possible, as much as reasonably possible.

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15 MR. IRWIN: I believe that is simply the definition of a full-participation exercise, Mr. Wilber.

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17 JUDGE WILBER: That definition is down in the footnote, but I'm talking about up in the text of Appendix E where it says you will test as much as possible before the issuance of a license.

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21 MR. IRWIN: My understanding is the same as Mr. Cumming about that, namely, that a full-participation exercise is a full-participation exercise. That is distinguished from a so-called partial participation exercise where one simply tests command and control

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functions.

2 In a full-participation exercise one deploys bus
3 drivers, ambulance drivers, traffic control personnel or
4 traffic guidance personnel, one calls hospitals and so
5 forth, and it doesn't matter whether a plant is in pre-
6 licensing or post-licensing.

7 In fact, in a deposition two days ago concerning
8 New York State operating plants there have been 12
9 exercises conducted in New York State alone since 1982, and
10 of them New York State and FEMA considered 10 to have been
11 full-participation exercises. So they come up, and if
12 there is an allegation of inadequacy all operating plants
13 are subject to the same kind of thing.

14 Now the route is slightly different, and I
15 presume one would have to go by a 2206 petition rather than
16 having a plant captive in a Part 50 process.

17 JUDGE ROSENTHAL: Does there have to be a finding
18 made by somebody that reasonable assurance exists that
19 adequate protective measures can and will be taken?

20 MR. IRWIN: I'm sorry, Judge Rosenthal, I lost
21 you.

22 JUDGE ROSENTHAL: Does somebody have to make an
23 affirmative finding that there is reasonable assurance that
24 adequate protective measures can and will be taken?

25 MR. IRWIN: Yes, sir.

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JUDGE ROSENTHAL: All right. Now does the
exercise play some role in the making of that finding?

MR. IRWIN: Absolutely.

JUDGE ROSENTHAL: Well, if that's the case, I
don't understand why it isn't entirely relevant whether the
exercise was in the staff's words sufficient so that the
results of the exercise could form a basis for that
finding.

If you have an exercise that is extraordinarily
limited in scope, and it might be nothing more than the
LERO official meeting in a tavern over a drink with
somebody from FEMA. Obviously the fact that the exercise
didn't turn up any flaws would scarcely warrant a finding
that reasonable assurance existed.

Why can't they go into the exercise, as the staff
suggests, for that limited purpose, was the exercise, not a
perfect exercise, but was it at least good enough so that
the results, which is what we are interested in, could form
a basis for the reasonable assurance finding?

MR. IRWIN: There is no theoretical reason why an
inquiry is absolutely prohibited. My problem is twofold.
One, that the situation you posited is not Shoreham's
situation.

JUDGE ROSENTHAL: I didn't say it was.

MR. IRWIN: But it's important because you make

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2 it easy. The Shoreham case is not that case. That case
3 would be easy to say, if the guys got together over a beer
4 and they said it would be a good exercise and they liked the
5 plan. Well, on the first day of discovery you would find
6 that out and then you could compare that against the
7 requirements of NUREG 0654 which says as many elements of a
8 plan should be observed as possible. Well, how do you
9 observe them? Well, we looked at the bubbles in the beer.

10 JUDGE ROSENTHAL: We're not that extreme. We are
11 at some point short of that, but what difference does it
12 make? Why isn't it always open to inquiry as to whether
13 the exercise was sufficient so that some degree of
14 reliability could attach to the results?

15 MR. IRWIN: Because while without suggesting that
16 such an inquiry is not permissible, there is no allegation
17 here, no basis for comparison and no standard. All they
18 are saying is you didn't test the sirens and therefore the
19 exercise is inadequate. The regulations don't say that.

20 Now I'll be frank to admit to you that if you got
21 to a hearing ---

22 JUDGE EDLES: Why wouldn't that -- excuse me for
23 interrupting, but why wouldn't that then be simply amenable
24 to a motion for summary disposition at the proper time?
25 You just come in and say, look, as a matter of law you
haven't made out a case here. That's a little bit

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different than allowing it in as a contention.

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MR. IRWIN: As a practical matter, Judge Edles,

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that was one of the things LILCO contemplated. As I

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indicated earlier, the Licensing Board felt that a summary

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disposition process would create a long delay and we

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didn't. Alternatively you could look at it in a hearing

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and arguably wrap it up.

8

But you'll notice that there are some 13

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allegations there each one of which either independent or

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commingled. There is no allegation that there is a bright

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line violation of a single regulation. Nowhere does it say

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that sirens are absolutely required to be sounded or that

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the Coast Guard is absolutely required to be ---

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JUDGE ROSENTHAL: Are you now saying there is no

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assigned basis for the contentions? I didn't understand

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that that was the thrust of either your position or FEMA's.

17

MR. IRWIN: I am not talking about a specific

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basis argument, Mr. Rosenthal. What I'm saying is that the

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determination of what has to be reviewed is an amalgam of

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an expert process. There is no argument here that it was

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the nature of that process that miscarried.

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So in the absence of that kind of allegation, I

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think what you have got to do is look at what the

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Commission said, and it talked about results. The sentence

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you keep reading to me from Ms. Wagner's brief is a very

marysimons 1 interesting sentence because it mixes the concept of
2 results and sufficiency and it doesn't define the term
3 "sufficiency."

4 JUDGE EDLES: Excuse me, let me come back to
5 that. The Commission said we are to look at the results.
6 Let's assume that FEMA and the NRC staff and LILCO got
7 together and decided they are going to put together a
8 partial participation exercise in compliance with the
9 rules.

10 Do you mean to tell me that all we could do under
11 the Commission's case is look at the results of that
12 partial participation although you and I and everybody in
13 the room knows that that doesn't comply with the
14 Commission's rules? That just doesn't seem to make sense
15 to me.

16 MR. IRWIN: The exercise would be known as a
17 partial participation exercise.

18 JUDGE EDLES: They call it that, but you're
19 telling me that I can only look at the results and I can't
20 look to see if the partial participation exercise meets the
21 requirements of a full participation exercise in the
22 Commission's rules. That's what you're saying.

23 MR. IRWIN: No one would, or at least I would
24 never urge that a partial participation exercise be used
25 for the purposes that required a full participation

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exercise.

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JUDGE EDLES: But what you are arguing is that I can't look to see if what you actually exercise is what the Commission expected you to exercise.

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MR. IRWIN: No, I don't think that's the case, Mr. Edles. I think I know what the Commission expected, and that was for the expert process of its staff and that of the FEMA staff to create something which was presumptively valid as a structure. Then you go out and test it and we see how the people who actually ran through their paces did.

What I think we are wrestling with is the fact that you're not sure and I'm not sure and nobody is a hundred percent sure of what the Commission said when they said look at the results of an exercise. It may well be that this is a classic issue of the kind that ought to be bucked up to the Commission after this Board has its good crack at it because I submit to you -- well, I think I know what the Commission intended, but I'm not omniscient.

JUDGE ROSENTHAL: I think if you want to reserve some time for rebuttal ---

MR. IRWIN: I would like to reserve it.

JUDGE ROSENTHAL: All right.

We will take a 10-minute recess and then hear from counsel for the intervenors.

(Recess taken.)

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JUDGE ROSENTHAL: You may proceed, Ms. Letsche.

2

ORAL ARGUMENT

3

ON BEHALF OF SUFFOLK COUNTY

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MS. LETSCHE: Thank you. Good morning,

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gentlemen.

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Basically, I think that our position is pretty

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well laid out in our brief, and I will briefly address the

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questions which you have expressly posed to us and then

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respond to any questions that you might ask as a result of

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the other argument today or our brief.

11

First of all, on the question of whether FEMA can

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properly bring this appeal because of its status in the

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case, it has been our understanding, based on the way FEMA

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has acted, that they have been acting like a party and,

15

therefore, in the process of bringing an appeal and other

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things that they have done before the licensing board seem

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to have been taking on that status with themselves.

18

Therefore, we did not expressly challenge that in response

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to their appeal.

20

However, if you all find that FEMA is not a party

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for whatever basis, then as you indicated in some of your

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questioning, you should dismiss the appeal.

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JUDGE ROSENTHAL: Well, what is a party? As you

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know, interested states and municipalities that invoke the

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provisions of 10 CFR 2.715.C participate as nonparties. I

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2 think, indeed 2.715.C specifically states that they are not
3 parties, and yet we have held that they have appellate
4 rights.

4

5 Now, if FEMA to be equated with an interested
6 state nonparty, and if so, does it have appellate rights;
7 or it is yet a different breed of cat, so to speak?

7

8 MS. LETSCHE: Frankly, Judge Rosenthal, I can't
9 answer that question because I don't know what breed of cat
10 they are. I think that is the problem here. No one is
11 really sure, given the MOU and given the way things have
12 happened in this proceeding and elsewhere.

12

13 JUDGE EDLES: You would agree, though, that we
14 are bound by the Memorandum of Understanding that the
15 Commission has drafted with FEMA?

15

16 MS. LETSCHE: I don't know what it means to say
17 that you are bound. As I understand that memorandum, it is
18 as you describe it, Judge Edles, that an agreement between
19 two agencies concerning how they will perform certain
20 administrative functions, I don't know, frankly, that that -
21 -in fact, I would assert that that memorandum does not rise
22 to the level of a regulation and, therefore, can't change
23 what your regulations would require you to do as a
24 procedural matter.

24

25

26 That is why this is a difficult situation,
27 because you have a purported agreement between two

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2 administrative agencies which says something, and then you
3 have your regulations and your precedent which tell you
4 something else, and then you have the parties acting
5 perhaps not always consistently with the terms of either
6 one of them.

7 I think the point that I want to make is that if
8 you find that FEMA is not a party as that term is used and
9 defined in your regulations, then you would have to dismiss
10 their appeal. If you find that they have been acting as a
11 party, then you know, that point kind of goes away and you
12 can go ahead.

13 JUDGE ROSENTHAL: Acting like a party, is that
14 the significance, the criterion, whether somebody acts like
15 a party, wears a sign saying, "I'm a party"? Just what is
16 it? I don't understand that, "acting like a party"
17 criteria.

18 MS. LETSCHE: Well, I wouldn't want to suggest
19 that that is a legal criteria that rises to the level of
20 something that is in the regulations or even necessarily in
21 your case law. I guess the point I was making was that the
22 reason we did not challenge that aspect of the FEMA appeal
23 was because of the licensing board's holding below, finding
24 that in this instance FEMA did appear to be acting as a
25 party and therefore that was not a point which we wanted to
pursue in the appeal.

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JUDGE ROSENTHAL: All right. That's cleared up.

2

Let's move on to the second question.

3

MS. LETSCHE: Okay. I think the bottom line on

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the whole question of whether or not you should entertain

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this interlocutory appeal is very clear and is set forth in

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the cases that, as somebody mentioned before, are legion.

7

There has been no demonstration here at all of any kind of

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irreparable harm or indication that the admission of these

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two contentions would have a pervasive negative impact on

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the structure of this proceeding.

11

In light of that and in light of the fact that

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even in oral argument FEMA was not able to set forth any

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irreparable harm that could not be remedied upon a regular

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appeal after the trial of the case --

15

JUDGE ROSENTHAL: Well, let me ask you this. One

16

of the aspects of harm that was referred to by Mr. Cumming

17

was the expenditure of resources. Now, as you know,

18

Ms. Letsche, when private parties have advanced that kind

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of claim of harm, it has fallen on essentially deaf ears.

20

Do you think the claim has a sound or ring to it

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when it is advanced on behalf of a government agency that

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is subject to the strictures of budgetary limitations and

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the other things that you think a government agency from

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that standpoint is in the same position as a private

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litigant who talks about resource expenditures?

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2 MS. LETSCHE: With respect to this case, Judge
3 Rosenthal, which is the context in which I an answer that
4 question, I think the answer is clearly that that
5 particular claim that it will take up too much resources
6 should be rejected and does not begin to rise to the level
7 of irreparable harm.

8 That is true for several reasons. Number one,
9 the only resource allocation difficulty that I heard
10 expressed here was reference to discovery, which as
11 somebody noted is over, and the possibility that the FEMA
12 witnesses may have to testify for more than a short period
13 of time, which is of course undefined.

14 The fact is that FEMA has identified three
15 witnesses in this case. Only one of them is a FEMA
16 employee. The others two are contractors. That FEMA
17 employee is not even in the radiological emergency
18 preparedness program anymore; he has been transferred
19 somewhere else. So his involvement in this proceeding --
20 and he is on detail, has been detailed to work as a witness
21 in this proceeding -- has no impact whatsoever on what FEMA
22 is doing with respect to other radiological emergency
23 planning exercises.

24 And whether or not the FEMA witnesses may have to
25 testify for two or three days or two or three weeks -- no
one can say that at this point -- is no different from what

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2 could happen in any proceeding. What did happen in the
3 earlier proceeding here -- I think they were on the stand
4 for roughly three weeks at a couple of different time
5 periods. I mean, that is not irreparable harm, the fact
6 that they would have to expend resources.

7 Moreover, the purpose of this proceeding is to
8 analyze and evaluate the results of that exercise to
9 determine if the public health and safety of the people up
10 on Long Island can be protected. Now, FEMA did that
11 exercise, and FEMA has said, "We are going to stand behind
12 our report. We will support it, as we have to do that in
13 the proceeding," and they are doing that pursuant to their
14 agreement with the NRC in the MOU.

15 JUDGE ROSENTHAL: What about their credibility
16 argument? I think Mr. Cumming suggested that if these
17 contentions remained in the case, that that would somehow
18 impact the credibility of FEMA. Do you agree with that?

19 MS. LETSCHE: Well, I have a couple of responses
20 to that. I have to confess I don't quite understand the
21 argument. But if what he is saying is that it would impact
22 -- I think he said something like it would impact FEMA's
23 credibility in giving a reasonable-assurance finding -- the
24 fact is that here they didn't give one. They refused to
25 make a finding, so that argument doesn't seem even to be

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applicable here.

2 If he is suggesting it would hurt their
3 credibility because they would have to explain to the
4 public what they did, well, frankly, I think it's about
5 time they did that. They refused to hold a public meeting
6 in this case, although they have done that in every other
7 case to explain to the public what they did. If they have
8 to explain it in the course of this proceeding, I think
9 that's fine.

10 I think you were right, Judge Rosenthal, in
11 pointing out that if anything, that should enhance their
12 credibility as opposed to hurting it.

13 The other related point, though, which Mr.
14 Cumming brought up, I believe, in this context was some
15 suggestion that it would be awful if the FEMA witnesses had
16 to talk about something they didn't want to talk about,
17 such as other exercises or what they did in other places,
18 or justify why they did something differently here.

19 Well, there are a couple of important relevant
20 answers to that. Number one, other exercises are nowhere
21 in Contentions 15 and 16. They are not mentioned in
22 there. There is no need in writing testimony on
23 contentions to talk at all about other exercises. FEMA is
24 going to write prefiled testimony and submit it.

25 According to the depositions of their witnesses

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2 and according to statements that have been made publicly by
3 FEMA and their counsel, FEMA's testimony is going to
4 consist basically of their post-exercise report and some
5 presumably kind of small explanation of that. They don't
6 need to address anything they don't want to address in
7 their prefiled testimony.

8 JUDGE EDLES: Ms. Letsche, is whether or not the
9 exercise is a full-participation exercise within the
10 requirements of the Commission's regulations, is that a
11 matter of law that will be decided basically in briefs and
12 oral argument, or is that something to which you would need
13 testimony and evidence?

14 MS. LETSCHE: I think it's a combination of the
15 two. I think the factual part is, as stated in the
16 contentions, there may need to be some explanation of why
17 the failure to evaluate or the failure to demonstrate
18 certain capabilities in fact prohibits you from making a
19 reasonable-assurance finding. That is related to the
20 express requirement in Appendix E that the point of a full-
21 participation exercise is to include testing resources and
22 personnel in sufficient numbers to verify the capability to
23 respond to this scenario.

24 Now, you may need to have factual evidence which
25 says, "If you don't know what 33 schools are capable of
doing, you can't assure the protection of the children."

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2 One of the subparts of these contentions at issue us you
3 only looked at one school and there are 33 of them out
4 there, and based on what the one school did -- and by the
5 way, you didn't even really observe that one -- you can't
6 conclude that the kids can be protected.

7 So there is a factual element in that sense.
8 Obviously, ultimately there is a legal element to it
9 because there needs to be a determination that the
10 regulatory requirement has or has not been met.

11 JUDGE EDLES: You mentioned that your contentions
12 do not in terms address other exercises at all.

13 MS. LETSCHE: That's right.

14 JUDGE EDLES: But implicitly what you are saying,
15 it seems to me, is that what they did here is something
16 different from what they did in the past.

17 Now, can I reasonably assume that you are not
18 going to ask them at trial what did they do when they
19 reviewed other plants? Is that what you're telling me?

20 MS. LETSCHE: That's not the point of our
21 contention.

22 JUDGE EDLES: Without revealing your litigation
23 tactics here, I am trying to get at exactly what you are
24 going to be probing there at the trial.

25 MS. LETSCHE: Well, we will be alleging and
demonstrating in our testimony, Judge Edles, that the

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2 failure to demonstrate and to evaluate various capabilities
3 and elements of emergency planning that are set out in
4 those contentions resulted in an inability to find that
5 objectives had been met or that particular regulatory
6 requirements had been satisfied or that a reasonable-
7 assurance finding could be made.

8

9 Now, we don't intend to be saying -- I am not
10 familiar with what happened in other exercises, and the
11 basis of our contentions --

12

13 JUDGE EDLES: Excuse me. Would you agree that no
14 two exercises need be identical? I assume that's right.

15

16 MS. LETSCHE: That is certainly -- yes, I mean,
17 that is certainly true, and we are not alleging that, as
18 Mr. Irwin mentioned in his argument, the only way he
19 believes our contentions would be admissible is if we made
20 some kind of a challenge to the process or alleged some
21 kind of fraud, it sounded like he was saying, in the
22 construction or the creation of this exercise. We don't
23 allege that.

24

25 The process was what it was. In terms of
26 negotiating objectives and deciding on a scenario. It may
27 very well have been -- the process may very well have been
28 just like every other exercise. I don't know and I don't
29 care. It was what it was.

30

31 Our point is that what that process resulted in

MarySimons 1

2 on February 13, 1986, was an exercise the results of which
3 are not sufficient to enable you to make a reasonable-
4 assurance finding.

5

6 JUDGE ROSENTHAL: In that connection, do you
7 accept the staff's interpretation that Contentions 15 and
8 16 as set forth at page 17 of its brief -- this is, as you
9 will recall, what I referred to in my dialogue with Mr.
10 Irwin?

11

12 Just to repeat it, "As the licensing board has
13 articulated its interpretation of Contentions EX-15 and 16,
14 this is precisely the issue admitted for litigation:
15 whether the exercise was broad enough to be a proper test
16 of the plan.

17

18 To the extent that the licensing board will be
19 looking at the scope of the exercise, it is not to
20 determine whether better exercises could be developed, but
21 solely to test whether this exercise was sufficient so that
22 the results of the exercise could form the basis for a
23 finding that there is reasonable assurance that adequate
24 protective measures can and will be taken."

25

26 Now, do you accept that articulation, as it were,
27 of the thrust of Contentions EX-15 and 16?

28

29 MS. LETSCHE: With the addition of a reference to
30 the fact that the contention, as described roughly by the
31 staff in its second sentence, also includes the question of

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whether or not the exercise met the regulatory requirements
2 for a full-participation exercise.

3

JUDGE ROSENTHAL: All right.

4

MS. LETSCHE: Then, with that addition, generally
5 I would agree with that characterization.

6

JUDGE ROSENTHAL: All right. So you agree that
7 the issue is not whether this exercise was a perfect one or
8 whether this exercise could have been better; the issue is
9 whether this exercise met regulatory requirements and was
10 at least broad enough to give confidence that the results
11 will support a reasonable-assurance finding?

12

MS. LETSCHE: I think that is generally correct,

13

yes.

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JUDGE ROSENTHAL: All right.

15

JUDGE EDLES: Let me come back a moment to
16 Mr. Irwin's point at the very end about what the Commission
17 intended here. Do you agree that one of the things that we
18 have to consider is what did the Commission mean when it
19 said we are to look at the results of the exercise?

20

MS. LETSCHE: Yes. I always have trouble with
21 that because I am not sure that anyone can really get into
22 the Commission's mind and --

23

JUDGE EDLES: No, I am not asking the substance
24 of what the word "results" means, but what I am asking is
25 do you agree that somehow we have to discern what the

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2 Commission meant? I am not asking for the moment as to the
3 substance of what was in the minds of the Commission. What
4 I am asking is whether or not the word "results," when the
5 Commission said, "You look at the results," whether that is
6 something that we have to try to figure out what "results"
7 means.

8 MS. LETSCHE: In this case, I don't think you
9 need to worry about that at all. You have the UCS decision
10 out there, which says very clearly that intervenors in a
11 licensing proceeding are entitled to challenge any material
12 factors of a licensing decision. Under 5047.A.2, the
13 results of an exercise, FEMA's findings about an exercise
14 are to be considered by the NRC in making its licensing
15 decision in its reasonable-assurance determination up or
16 down.

17 In this case -- and UCS also very clearly stated
18 that it is the evaluation of an exercise, the results of
19 the exercise -- those terms were both used in UCS -- that
20 intervenors have an absolute right to challenge.

21 In this case, when in addition you have the
22 regulatory requirement which says you need to have a
23 full-participation exercise, and our contentions allege
24 that the results of this exercise, what this exercise
25 produced, was insufficient data to enable you to make a
reasonable-assurance finding.

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JUDGE EDLES: Excuse me for interrupting, but let me pick up my train of thought rather than yours.

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Let's assume that what you are saying is correct, that the court requires us to look at material elements. Why couldn't the Commission, in construing the court's mandate, say, "Look, we require a full-participation exercise, and what we mean by that is that a full-participation exercise is what our staff and FEMA together decide is a full-participation exercise," and basically, you know, we sort of defer to that technical judgment.

Now, why wouldn't that be more or less consistent with what the court -- now, I don't think that the court really thought all of this stuff down all the way -- why wouldn't that be a reasonable interpretation, which would essentially mean that a licensing board ultimately cannot second-guess the administrative determination by FEMA, concurred in by the NRC staff, that this constitutes a full-participation exercise?

MS. LETSCHE: Okay. I will tell you the one very easy answer to that is that that would be a direct contradiction to the regulations. 5047.A.2 says that FEMA's findings concerning the results of an exercise are a rebuttable presumption. You can't rebut it if there is an iron-clad assumption out there that you're not allowed to even talk about it or challenge it. I think that would be

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the result of the analysis you just made, Judge Edles.

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I think Mr. Irwin is playing sort of word games here in trying to make some magic out of the word "results" and suggests that when you're talking about the results being a failure to have the data -- which is really what you're talking about in these Contentions 15 and 16 -- that for some reason that isn't a result.

In trying to characterize our contentions as attempting to challenge the process and being unsuccessful in doing that, he is mischaracterizing it. We are not challenging the process; we are challenging what happened during that exercise and saying that it does not provide a basis to make the necessary finding.

JUDGE EDLES: You are saying that the word "results," what the Commission must have meant when it said, "Look at the results of the exercises," does the exercise give us enough confidence to be able to make a reasonable-assurance finding? That is really what the Commission must have meant by the word "results."

MS. LETSCHE: Well, that is certainly part of what is a result of an exercise, and particularly when the Commission, even in the famous statement which people keep quoting about fundamental flaws, what they talk about is a deficiency in the exercise that precludes a finding of reasonable-assurance. Well, if the deficiency is that you

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2 didn't look at these things or you didn't demonstrate these
3 things, that precludes the finding, and that is precisely
4 what these contentions at issue allege.

5 I think it is clearly within the requirements of
6 UCS and what the Commission had to say, that these
7 contentions should be admitted for litigation, as the
8 licensing board found.

9 JUDGE ROSENTHAL: Let me ask you a question going
10 back to the second question that we had posed. The staff
11 believes that there is a public interest to be served in
12 this issue receiving appellate resolution now, despite the
13 fact that the staff does not accept FEMA's claims with
14 respect to the impact of the admission of these contentions
15 on FEMA's program.

16 Now, I take it you don't agree with the staff as
17 to that?

18 MS. LETSCHE: That's right. I don't think that
19 the fact that somebody is concerned about something is
20 sufficient to overcome the well-established case law out
21 there governing interlocutory appeals. I think that that
22 is what the staff's argument boils down to in this case.

23 JUDGE EDLES: But the concern is coming through
24 us from a sister federal agency. I mean, parties can
25 depart from the NRC staff, parties can come in and out of
these cases and devote as much money or time or effort as

MarySimons 1 kind of they want to, more or less.

2 FEMA has agreed to participate. It is an agency
3 established under its own statute and regulations. It has
4 a presidentially appointed director.

5 Isn't it a little bit troublesome to have
6 licensing boards presumably all around the government
7 telling them, "We need you to commit to eight weeks' worth
8 of work here as opposed to three weeks' work"? I mean, if
9 we did that and every agency in the government began doing
10 that with every other agency, I mean, the place would be a
11 zoo or more of a zoo even than it is today. That's a real
12 problem for a federal agency that, frankly, doesn't exist
13 to quite the same degree for private parties who want
14 something, you know, want us to do something, and can
15 commit or not commit.

16 MS. LETSCHE: Well, there are two points that are
17 relevant to that, Judge Edles. Number one, in this case,
18 the licensing board tried very hard to allay FEMA's
19 concerns, and I think the point that the staff made in its
20 brief was that they did. I mean, the licensing board told
21 FEMA that -- and I am quoting from the December 11th
22 decision -- "While FEMA may be questioned on its evaluation
23 of the exercise, it may not be questioned concerning
24 whether the exercise meets NRC requirements."

25 He also says, "Contrary to FEMA's fears, we have

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2 not opened the hearing to issues concerning its conduct and
3 design of the exercise, nor have we determined if the
4 exercise must be the best possible."

5 As we said, the contentions don't allege that
6 there is something wrong with your process, and the
7 licensing board reiterated that with FEMA.

8 So I think that is number one, that although
9 there are concerns expressed here, your agency has done as
10 much as seems reasonable to allay those concerns.

11 Number two, I am not sure that this instance,
12 given what FEMA has agreed to do with the NRC under the
13 Memorandum of Understanding and what in fact it did do in
14 this particular proceeding -- that is, conduct a big
15 exercise with the understanding ahead of time that they
16 were going to defend that in the litigation, and everyone
17 knew then that the litigation was going to be a hard-fought
18 one --in that circumstance, I don't think it's quite right
19 to come in and now start saying, "Gee, we don't have the
20 resources," particularly when the question of how much
21 resources are going to be involved here is purely
22 speculative.

23 No one standing up here can tell you how long the
24 FEMA witnesses are going to be on the stand until their
25 testimony is filed, and based on what I understand their
testimony is going to be, it is not going to be hugely

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2 expensive. As I explained, none of the resources from FEMA
3 involved in preparing that testimony are even involved in
4 the radiological program. They do have two contractors who
5 are working on it, but their only FEMA employee is not.

6 So I think that, given those circumstances of
7 this case, that you don't have the kind of irreparable harm
8 present that would justify your taking this interlocutory
9 appeal.

10 There is only one other thing that I guess I
11 would like to add. That is, in response to an argument
12 made by Mr. Cumming suggesting that it was his
13 understanding of how this proceeding should go that only
14 what FEMA found material during the exercise could be
15 challenged. I have two responses I would like to make to
16 that.

17 Number one, again that makes the FEMA findings
18 irrebuttable, which would be directly contrary to 5047.A.2,
19 and also the UCS decision.

20 Even more significant, though, is that in this
21 case several of the items that are mentioned in these
22 contentions at issue -- that is, the failure to sound the
23 sirens, the failure to test the EBS stations, the failure
24 to look at very many schools, the failure to look at public
25 education materials -- were expressly cited by FEMA in
their post-exercise assessment as problems.

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2 In fact, most of those problems have been stated
3 by FEMA to require a remedial exercise.

4 Now, for FEMA to come up here and say that the
5 intervenors are not allowed to challenge the validity of
6 the initial exercise results because things were not
7 included, when FEMA itself, despite the fact that they
8 called this a full-participation exercise, has said that it
9 is a problem that these things were tested and you better
10 test them in a remedial exercise, is just not right. I
11 wanted to make that point because it is significant.

12 I think the bottom line here is that the
13 requirements to justify an interlocutory appeal have not
14 been met. In addition, if you were to overcome that
15 hurdle, on the merits the licensing board here was right
16 and it should be affirmed.

17 JUDGE ROSENTHAL: Thank you, Ms. Letsche.

18 ORAL ARGUMENT ON BEHALF OF

19 THE NUCLEAR REGULATORY COMMISSION

20 MR. REIS: If it please the Board. As Ms.
21 Letsche did, I would like to go directly to the questions
22 the Board has asked and then say that our brief, we
23 believe, is full and complete, and unless the Board has
24 questions we will submit the argument on the brief.

25 First, the first question was whether FEMA's
status in this proceeding entitled it to challenge the

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2 contentions or issues. The first question is, we do not
3 believe FEMA is a party to this proceeding and it is only
4 parties which may appeal; therefore, it does not have an
5 entitlement.

6 JUDGE ROSENTHAL: It's not only parties that may
7 appeal, because interested states are not parties and they
8 may appeal.

9 MR. REIS: That's right. Nor is it an interested
10 state. It is quite clear when we look at the statutory
11 base of 715 and what the Atomic Energy Act says as to that
12 gave rise to 715 allowing states and municipalities and
13 others to come in and advise the Commission, but the other
14 federal agencies were not thought of as to be states or
15 municipalities.

16 JUDGE EDLES: But other federal agencies aren't
17 cosigners of Memorandum of Understanding with us for the
18 purposes of participation in adjudicatory proceedings.
19 Isn't that right?

20 MR. REIS: That is quite right, and that is one
21 of the reasons why we think that you should take
22 discretionary review under 2.718.I.

23 JUDGE EDLES: Your point is what, that it doesn't
24 matter really whether they're a party or not?

25 JUDGE ROSENTHAL: What I don't understand,
Mr. Reis, is this: FEMA went to the staff, apparently, and

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2 asked the staff to file a petition for directed
3 certification. The staff declined to do so.

4 Now, if the staff believes that this is an issue
5 that warranted interlocutory or appellate review and if the
6 staff further recognizes that FEMA is not a party in this,
7 therefore there may be some problems about FEMA's standing
8 to seek directed certification, it is difficult for me to
9 understand why the staff didn't say, "Yes, FEMA, we don't
10 agree with you on the ultimate result, but we certainly
11 agree with you that this should be reviewed in the public
12 interest. We have standing, clearly, to seek directed
13 certification, and we will do it for you."

14 Now, I don't understand the staff's actions when
15 it was asked by FEMA to carry the ball when the staff is
16 now telling us that interlocutory review is in the public
17 interest and in our discretion we should conduct it.

18 MR. REIS: When FEMA came to us and asked us to
19 certify this action, this was tied up, in our minds and I
20 think at the time in everyone's mind, with taking a
21 position on the merits of the admission of the
22 contentions. At that time we didn't do it. We still take
23 the position here, because FEMA is a sister federal agency,
24 because it is especially called out in 5047 as necessary
25 and its opinions necessary for a determination, that it
should have directed certification.

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2 However, our feelings on the merits were such
3 that we were not going to go forward and do that.

4 JUDGE ROSENTHAL: You can't file a petition for
5 directed certification simply to obtain an appellate
6 resolution of an issue even if you think that the licensing
7 board's disposition was correct?

8 MR. REIS: Judge Rosenthal, I can't say that
9 statement is wrong. I think you could. I don't think we
10 did it in this situation. I think our thinking at the time
11 was that, no, we didn't feel the decision below should be
12 upset, particularly given the limitation that the board
13 below put, an explanation the board below gave for its
14 admission to the contention upon reconsideration, and we
15 didn't feel it should be taken up.

16 FEMA felt so strongly that they did bring it
17 here. Now we think that this board, under its power to
18 certify matters to us, can properly consider this.

19 JUDGE ROSENTHAL: Why? You are familiar,
20 Mr. Reis, with the wrong line of appeal board decisions
21 applying the Marble Hill standard to endeavors to obtain
22 interlocutory appellate review of admission of
23 contentions. Now, in light of that long line of appeal
24 board decisions, why should we take this?

25 MR. REIS: Only because FEMA is called out
especially in 5047, special status, because it is called

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2 out in 5047 and the fact that it comes to us and says it is
3 another federal agency which we have a Memorandum of
4 Understanding with that we should give deference to, says
5 you should consider this. Yes, I agree that that long line
6 of Marble Hill cases, ordinarily you say -- and it is
7 correct -- that interlocutory review should not be given to
8 the admission of contentions. But we view this because of
9 FEMA's --

10 JUDGE ROSENTHAL: Just because this is FEMA?

11 MR. REIS: -- place, because it is a federal --

12 JUDGE ROSENTHAL: Just because this is FEMA? I
13 mean, are you telling us that if it's a a federal agency
14 that is seeking this interlocutory appellate review, that
15 we just put the Marble Hill test's completely to one side
16 and say, "Okay, simply because it's a federal agency,
17 interlocutory review is appropriate"?

18 I ask that question because, again, in your brief
19 you explicitly state that you don't agree with FEMA as to
20 the impact on FEMA's program. So that being so, it seems
21 to me what you're saying is it's enough that it's FEMA,
22 that any time that FEMA or some other federal agency wants
23 interlocutory appellate review they should get it,
24 notwithstanding the Commission's general proscription
25 against interlocutory appellate review, and the appeal
board's stringent standards in Marble Hill.

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2 MR. REIS: First, again I would not generalize to
3 all federal agencies. I would talk particularly about FEMA
4 here because of the place it has in 5047 and because of the
5 Memorandum of Understanding.

6 Now, looking at because of FEMA's concerns here
7 and because its fears were not allayed by the opinion on
8 reconsideration of the board below, I think that those are
9 special circumstances that rise above what we usually talk
10 about, and here the board should take and look at those as
11 a matter of discretion.

12 JUDGE ROSENTHAL: So any time that FEMA has an
13 articulated concern, even if they're not able to
14 demonstrate any basis for that concern, we should lay to
15 one side the proscription against interlocutory appellate
16 review and step in and review the matter? Is that what you
17 are telling me?

18 MR. REIS: I am not saying, Your Honor, at any
19 time. What I am saying is that in this case, when FEMA
20 sincerely puts forth a position and seems quite sincere and
21 has pressed this again and again, that, yes, we think it is
22 appropriate for you to do so.

23 JUDGE ROSENTHAL: So the test is sincerity? Just
24 as long as they are sincere, that we ought to review it,
25 even if there is no discernible basis for their claim that
they are going to be irreparably injured. Is that what I

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am being told?

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MR. REIS: I don't think the sole test is sincerity. I think sincerity is an important part of it.

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JUDGE ROSENTHAL: Well, what is the rest of the test?

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MR. REIS: I think the very statements that they say and that were partly tested here by the appeal board on the effect on their resources. Now, we say that their resources would not be affected in the way they say they would but --

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JUDGE ROSENTHAL: But we don't accept that the claim of impact on resources when it's advanced by anybody else. Why should we accept it when it's advanced by FEMA? Time and time again people have come to us seeking stays or some other form of relief, arguing that the erroneous action of the licensing board is going to have a serious effect upon their resources. I think a universal answer to that claim has been, "Too bad. That doesn't constitute irreparable injury." Now, why does it make any difference in this case?

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MR. REIS: Because it's another federal agency that is specially called out in the regulations that we have to cooperate with and that we look to in the processes of this organization, that the Commission looks to to help it in making its determinations. That's the difference.

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JUDGE ROSENTHAL: So special solicitude goes to FEMA because they are a partner of ours in the matter of looking at emergency response plans? Is that really what it comes down to ultimately?

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MR. REIS: Special solicitude goes to FEMA because they are a necessary witness or participant in our proceedings on emergency planning, and therefore there is special solicitude for FEMA, yes, sir.

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JUDGE EDLES: Mr. Reis, could you address for me again the issue of the Commission's regulations which require a full-participation exercise and what I believe to be the suggestion of Mr. Irwin that somehow the determination made by FEMA with the concurrence of the staff is not open to review by a licensing board in an adjudication?

In other words, they call it a full-participation exercise; therefore, what the Commission meant, the Commission knew the process -- and I may be extrapolating a little from Mr. Irwin's argument -- but the Commission knew the process and, therefore, what the Commission did was essentially to waive its right to second-guess FEMA on what constitutes a full-participation exercise.

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MR. REIS: I don't think that's what the Commission did, Your Honor.

JUDGE EDLES: Okay, tell me what they did.

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2 MR. REIS: I think if we go back first to the
3 amendment to the regulations after the UCS case was
4 decided, the Commission said -- and Mr. Irwin quoted the
5 provision to the effect that the basic effect of the
6 court's decision on the rule change, which follows, is that
7 the results of prelicensing emergency preparedness
8 exercises may be subject to litigation. I think there it
9 is not limited to just what people say come out. What we
10 have to see whether those results are valid results because
11 it is only on those results that you go forward under
12 5047.A.2 and reach your reasonable-assurance findings --
13 those results and other matters.

14 I do not think, in the CLI 8611, where they talk
15 of fundamental flaw in the plan, they were limiting that.
16 Frankly, the language --

17 JUDGE EDLES: Well, they talked about fundamental
18 flaws in the plan. I suppose, had they said what would
19 have happened if they had said "fundamental flaws in the
20 exercise"?

21 MR. REIS: Well, then there would be some
22 question, yes.

23 JUDGE EDLES: That might have been different?

24 MR. REIS: Yes. But I think the question arises
25 here before the appeal board because they did say
"fundamental flaw in the plan." I tried to go back and

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2 trace in the brief, I think with some success, showing that
3 the exercise is always under the heading of "plan," so that
4 when we look at the plan and we look at what was probably
5 in the minds in order to -- and what the Commission said in
6 meeting the UCS case -- they were subsuming under the word
7 "plan" the exercise itself because the exercise is required
8 as part of the plan.

9 I think that as well addresses the merits of the
10 appeal, and if the board has no further questions --

11 JUDGE ROSENTHAL: Do you accept Ms. Letsche's
12 amendment to the statement of the thrust of the
13 contentions, which is found on page 17 of the staff's
14 brief? She suggested that the inquiry also goes to whether
15 the exercise complied with the Commission's regulations.

16 MR. REIS: To the extent that it would not in the
17 same sense as any other minor or noncompliance might not
18 necessarily show you cannot make reasonable-assurance
19 findings. It would have to be a substantial noncompliance,
20 not some minor thing of a "t" forgotten to be crossed or
21 something along that line. I think that is particularly
22 important in view of the Commission's words and concern
23 about there be a fundamental flaw and that we not litigate
24 minor or trivial matters.

25 JUDGE EDLES: But accepting that understanding,
if the Commission's regulations require a full-

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2 participation exercise, it would be at least in the
3 contention stage valid for an intervenor to say, "No, it
4 doesn't comply with the regulations because this isn't a
5 full-participation exercise."

6 MR. REIS: Yes.

7 JUDGE EDLES: Down the road you could say, "Well,
8 that may be right technically, but it's not substantial.
9 It doesn't preclude a finding of reasonable assurance, all
10 of that kind of stuff."

11 MR. REIS: That's right.

12 JUDGE ROSENTHAL: Okay. You have said it very
13 well.

14 JUDGE WILBER: Does the staff consider this a
15 full-participation exercise?

16 MR. REIS: Yes, sir. As we say in our brief, we
17 do, and we think the evidence will show that.

18 JUDGE WILBER: Did the staff have input into the
19 development of the exercise?

20 MR. REIS: Yes, we did. As was explained, LILCO
21 essentially drafts the exercise, drafts the objectives; it
22 goes to FEMA; and the RAC committee on which NRC is a
23 member, and I think even more with the RAC committee et
24 al., the staff takes part in approving that exercise and
25 having that exercise amended if it is not satisfied that it
will be an exercise that meets the tests of the

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regulations, which is partly a full-participation exercise.

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Looking at here also the Commission's statements

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in previous decisions such as CLI 8313, which said, "Yes,

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you shall exercise this plan and you shall know that the

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state has not really taken part in it," I think that those

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allowances for the Commission's interpretations of its

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regulations and it said this proceeding should go forward

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is taken into account in judging what is a full-

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participation exercise.

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But the fact is that it has to, with all the

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other decisions of this board and the Commission, meet the

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standards of full-participation exercises.

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JUDGE ROSENTHAL: Thank you, Mr. Reis.

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MR. REIS: Thank you.

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JUDGE ROSENTHAL: Mr. Cumming, you may have ten

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minutes for rebuttal.

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REBUTTAL ARGUMENT ON BEHALF OF

18

THE FEDERAL EMERGENCY MANAGEMENT AGENCY

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MR. CUMMING: With respect to the staff's

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argument, FEMA does believe that the board correctly

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decided that FEMA witnesses could not testify as to what

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this exercise was under NRC regulations. Staff has not

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designated the witnesses, so I am not certain how that

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testimony would get into the record at the trial.

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JUDGE EDLES: I gather even FEMA now agrees that

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2 whether this is a full-participation exercise within the
3 meaning of the Commission's regulations is a matter for the
4 Commission to decide in the adjudication?

5 MR. CUMMING: Absolutely.

6 JUDGE EDLES: Okay. All right.

7 MR. CUMMING: Also, with respect to intervenor's
8 argument as to their being precluded from rebutting FEMA's
9 conclusions, although FEMA did not make any ultimate
10 finding, it certainly did make findings and determinations
11 in its post-exercise assessment, and we believe that those
12 intervenors and applicants can take shots at those, present
13 testimony and rebut them or support them or do whatever
14 they can.

15 JUDGE ROSENTHAL: Mr. Cumming, why is it not open
16 to a licensing board to inquire into, again to quote the
17 staff's language, whether this exercise was sufficient so
18 that the results of the exercise could form a basis for a
19 finding that there is reasonable assurance that adequate
20 protective measures can and will be taken?

21 MR. CUMMING: The language is sufficient that it
22 actually does track directly from the Union of Concerned
23 Scientists case, and I believe that the question -- I am
24 not sure which one of the judges asked it earlier -- as to
25 the Commission's use of the term "plan" reflected the fact
that the plan is paramount in FEMA's concern.

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2 In fact, as I believe it was stated by Mr. Irwin,
3 not all observable elements may have been tested, but in
4 fact not all elements of the plan -- and the public record
5 should be made clear -- can be tested in an exercise.

6 FEMA is vitally concerned that verification of
7 elements not testable by exercise, also of which may be of
8 significance, be dealt with in its review process. In
9 fact, intervenors discussed the status of the principal
10 FEMA witness designated; in fact, he is under consideration
11 to help buttress technically uniformly beyond that issue.
12 We do in fact have fewer than one FEMA staff person per
13 operating plant.

14 JUDGE ROSENTHAL: I am not so sure that goes to
15 the question that I posed to you. I still don't understand
16 your answer as to whether the licensing board can
17 appropriately inquire into whether the exercise was
18 sufficient so that the results of the exercise could form a
19 basis for the reasonable-assurance finding. Can they
20 inquire into it or can they not, yes or no?

21 MR. CUMMING: FEMA believes that they cannot.

22 JUDGE EDLES: But that is not something that FEMA
23 inquires into, is it? I mean, you told me earlier, I
24 believe, that you were specifically not going to make a
25 finding here as to whether there is or is not reasonable
assurance of adequate safety for the public. Isn't that

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right?

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MR. CUMMING: That's correct.

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JUDGE EDLES: Excuse me for just a moment. You are saying you are not going to make that finding, and yet you say that we the NRC can't make that determination either? I don't understand that.

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MR. CUMMING: No. Absolutely not. But I would argue that it is an unusual procedure in which if in fact reasonable assurance does have to be found, not being fully conversant with everything that the staff and the Commission does, who in fact will make the reasonable-assurance finding? My understanding is that the Commission would make the reasonable-assurance finding.

JUDGE EDLES: The licensing board makes it in the first instance, at least as to those matters before it, and that will come up ultimately to us and eventually to the Commission. It comes ultimately to us.

MR. CUMMING: I would think, if I was sitting as a licensing board judge and this is one of the elements that concerns me is that I might very well wish to consider sufficiency, FEMA's position is, however, that they have not been authorized to consider sufficiency.

JUDGE ROSENTHAL: Well, what does a licensing board consider? How can the licensing board pass judgment on the results of an exercise -- and that is what it is

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2 called upon to pass judgment on -- unless it also looks at
3 whether the exercise was sufficient so that those results
4 could form a basis for the reasonable-assurance finding? I
5 mean, is the licensing board just engaged in a charade?

6 MR. CUMMING: That is the conundrum of this
7 process.

8 JUDGE ROSENTHAL: well, I am sorry, but you know,
9 you see this case as --

10 MR. CUMMING: I don't see it as a charade. I
11 don't see it as a charade.

12 JUDGE ROSENTHAL: You say this case indicates
13 these people are entitled to a hearing. Now, if they have
14 a hearing, it must be on some concrete issue. Now, if
15 you're telling me that the licensing board cannot go into
16 whether the exercise was sufficient to enable the results
17 of the exercise to form a basis for a reasonable-assurance
18 finding, I don't understand what the licensing board is
19 doing at all.

20 MR. CUMMING: We have been asked a similar
21 question. Actually what the --

22 JUDGE EDLES: I know what they're doing. They're
23 sitting there as a surrogate for the Commission, which in
24 my judgment at least and you haven't convinced me to the
25 contrary, has the ultimate responsibility here for making
the reasonable-assurance finding. It has not, as far as I

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am aware, yet delegated that responsibility to FEMA. Now,
2 am I correct in that?

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MR. CUMMING: That's correct. That's absolutely
4 correct.

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JUDGE EDLES: All right. Now, if that's true,
6 why can't the licensing board, serving as the Commission's
7 delegate -- this is the threshold stage here -- decide
8 whether the exercise helps to demonstrate that there is
9 reasonable-assurance of adequate safety? Yes, it does; or
10 no, it doesn't.

11

MR. CUMMING: The UCS case said that what the
12 Commission finds material may in fact be litigated. If the
13 sufficiency of the exercise is what the Commission directed
14 this board to do, then I would say that that is an issue.
15 How that is established --

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JUDGE EDLES: So you think the Commission has
17 delegated to FEMA the right to determine the sufficiency of
18 the exercise? I can't comprehend that.

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MR. CUMMING: I think we are the expert agency.

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JUDGE EDLES: Okay. I don't -- there may be --

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MR. CUMMING: There may be fundamental
22 disagreement --

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JUDGE EDLES: I do not believe that the
24 Commission has delegated that authority or has divested
25 itself of that authority and given it over to FEMA. As far

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as I read the regulations, the Commission still has in its
2 power the authority to make reasonable-assurance findings.

3 MR. CUMMING: That's right, and it is also able
4 to rebut. FEMA is rebuttable. Its findings are
5 rebuttable.

6 JUDGE EDLES: Okay. Let me work this through
7 just a little bit more now. You determine that this is a
8 full-participation exercise. The Commission has
9 regulations which define full-participation exercise. And
10 you are telling me that we can't look at the ambit, the
11 scope, if you will, the design of the exercise, to
12 determine whether -- the Commission cannot determine
13 whether that exercise, as devised, meets the full-
14 participation requirements of its own regulations? That is
15 what you are telling me, I think.

16 MR. CUMMING: That is not quite what I am telling
17 you.

18 JUDGE EDLES: Okay. Tell me what you are saying.

19 MR. CUMMING: I am telling you that basically the
20 Commission finds material what FEMA finds material, and it
21 has a review process. In fact, both the GAO report
22 referenced earlier and the current Memorandum of
23 Understanding indicate how both preparation and evaluation
24 is conducted, and it is joint. So there is review at every
25 step of the way. Okay.

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2 FEMA uses the exercise as an evaluation
3 technique, but we are equally concerned that, based on the
4 admissions of 15 and 16, all the other things we don't
5 test, in addition to the observable elements, are equally
6 worthy of concern.

7 In fact, FEMA has over time been under
8 significant pressure to prioritize or indicate which of the
9 planning elements or which of the NUREG elements are most
10 significant. We think they are all significant, and we
11 think significant -- this goes to the irreparable harm --
12 basically we have concerns with operating plants, just as
13 the Nuclear Regulatory Commission, and we are concerned
14 that some of the nonobservable elements may be equally
15 significant.

16 So we do have an impact. However -- however --
17 we think that there is implication in admission of 15 and
18 16 that somehow there was a sweetheart deal with LILCO. We
19 don't think LILCO got any better deal --

20 JUDGE EDLES: I don't read that at all that way.

21 MR. CUMMING: -- or any worse.

22 Well, you may not. I am just telling you how
23 FEMA reads it. FEMA gave LILCO no better deal or no worse
24 deal other than state and local participation, and we feel
25 compelled as an agency to establish that at the hearing if
these contentions are admitted.

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2 Incidentally, with respect to that, an earlier
3 question came up, and I believe it was misstated. FEMA in
4 its regulations does not distinguish between exercises
5 between operating plants, the full-participation exercise
6 and NTOL plants. FEMA reserves the right -- and the
7 utility industry should be on notice that in fact because
8 of our concerns about the quality of earlier exercises --
9 that we can in fact order as full-scale an exercise as we
10 wish.

11 JUDGE EDLES: I was not suggesting to the
12 contrary. What I was suggesting is that the Commission's
13 regulations appear to contemplate something perhaps
14 different for prelicense under its concerns than periodic
15 post-license exercise. I wasn't certainly telling FEMA how
16 it ought to construe its own rules or how it ought to
17 operate.

18 I was simply saying that there is a reference in
19 the Commission's rules to a full-participation exercise
20 being necessary before the plant can be licensed and the
21 you can have periodic exercises, however that is defined,
22 after the plant gets its license.

23 MR. CUMMING: An important clarification.

24 JUDGE ROSENTHAL: All right. You have about two
25 minutes.

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2 MR. CUMMING: All right. The only other thing I
3 would like to touch on is that the issue of sampling got
4 brought into the staff brief. FEMA has never represented
5 that it gives statistical, some sort of statistical
6 assurance. It is giving reasonable assurance.

7 This goes back to the staffing issue. One of the
8 reasons that Argonne is involved is because we need
9 additional evaluators due to the heavy exercise schedule.
10 It is also the reason that Idaho is involved, is because,
11 as documented in the GAO report, there was concern as to
12 whether the scenarios which are in fact one of the key
13 factors in determining whether in fact a full response will
14 be required, there were people more expert in looking at
15 the onsite emergency and determining what the event was
16 that triggered the response. That is the explanation.

17 Now, in fact, the person who is on this board as
18 a designated witness is one of the key people at Idaho and
19 one of the key people at Argonne, and they have more than
20 one region to evaluate. FEMA will openly admit that we
21 don't have all the expertise. I can make personal judgment
22 as to whether that should be on board or not. But that's
23 the point, it isn't.

24 So with that, I think FEMA has no further
25 argument.

JUDGE WILBER: I have one question. You said all

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2 elements are critical or equal or major, so the distinction
3 that I think the NRC regulations talks about major
4 observable elements. They are all major in your mind; is
5 that correct?

6 MR. CUMMING: You added a word which we think
7 would be a significant addition, and we think we have
8 always read implicitly in our regulations, because ours
9 talks about major observable elements -- it talks about
10 major elements; it does not use the word "observable."
11 That is a very important distinction. Both regulations of
12 both agencies are silent and do not include the word
13 "observable." And we give significant weight and are
14 significantly concerned as an agency with verification of
15 nonobservable elements.

16 JUDGE WILBER: But they are all major. So
17 whether that word is there or not, you would treat them all
18 equally?

19 MR. CUMMING: We would give equal weight to all
20 elements. As to which ones we choose to test in any
21 particular exercise, we believe it's our discretion, expert
22 discretion.

23 JUDGE ROSENTHAL: Thank you, Mr. Cumming.

24 Five minutes, Mr. Irwin.

25 REBUTTAL ARGUMENT

ON BEHALF OF LILCO

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2 MR. IRWIN: Thank you, gentlemen. I won't take
3 the full time. Let me state a couple of points quickly.

4 First of all, with respect to the basis for
5 FEMA's appeal, which is something we tripped over very
6 lightly before, there have been a number of arguments made
7 about the nature and basis of FEMA's participation.

8 It should not be forgotten also that FEMA got
9 into this whole area by virtue of two presidential orders,
10 one a presidential directive of December 7, 1979, and
11 Executive Order 1248, promulgated in 1980. So it is not
12 simply interagency understandings. There is a good deal of
13 authority which says that FEMA cannot extricate itself when
14 its interests are threatened or concerned. Obviously, it
15 has rights which this board will have an opportunity to
16 deal with. But we shouldn't forget that basis.

17 Secondly, with respect to issues of harm which
18 are flowing from the admission or exclusion of these
19 contentions. FEMA has indicated that its resources are
20 being used more than they would be otherwise. We feel the
21 board should not omit reference to Mr. Wilkerson's
22 affidavit.

23 Mr. Wilkerson is the point man on this project, and his
24 affidavit speaks specifically to programmatic problems.

25 With respect to the timing of a decision here,
the point has been made that considerable discovery has

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2 taken place, and we suggest that maybe most of the harm has
3 occurred. Now, one can advance that argument to the point
4 that virtually any potentially injunctive situation
5 resolves itself by moot. So obviously, there are policies
6 against that.

7 JUDGE EDLES: But those policies, Mr. Irwin, are
8 implicated at the stay stage, and we had the papers before
9 us, we denied the stay, and so be it. Isn't that right?

10 MR. IRWIN: I concur -- I did not ask for a stay
11 myself on behalf of LILCO, simply because -- and this is
12 what I was going to get to -- another value to be
13 considered is the integrity of the Commission's own
14 processes. The Commission ordered this to be an expedited
15 proceeding. It is not looking much like an expedited
16 proceeding. There is a time value to Long Island Lighting
17 Company of \$50 million. Now, if money doesn't count here
18 in these proceedings, then we --

19 JUDGE EDLES: But we would not rule on the
20 admissibility of contentions, saying, "By the way, the
21 Commission decided this would be expedited, so you're only
22 entitled to three contentions. Sorry, you know, we just
23 don't have time. Pick your three best." I mean, that is
24 not the way we do business here.

25 MR. IRWIN: And we are not suggesting that. What
we are suggesting --

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2 JUDGE EDLES: So that really isn't a relevant --
3 I mean, I understand the Commission's said it's to be
4 expedited. The answer is you take in admissible
5 contentions and then you get the licensing board to get
6 this case on the road. Isn't that the way you'd handle it?

7 MR. IRWIN: That's right. And the reason these
8 contentions are important and the reason they justify
9 threshold review is that they open up not just the question
10 of what happened at the exercise but, as Mr. Cumming said,
11 what didn't happened or, as I would have put it, not what
12 anybody did but the design of the exercise is. That is a
13 unique dimension.

14 One of the difficulties with these contentions,
15 although Ms. Letsche said that the contentions do not
16 mention other exercises, the only way to establish their
17 validity or not is by reference to other exercises. There
18 is no concrete guideline that requires 17 certain
19 elements. As I indicated, there are 160 or 170-some
20 elements in --

21 JUDGE ROSENTHAL: Well, you're going to have to
22 look at other exercises. Now, if you were going to
23 determine whether this was the best of all possible
24 exercises, then I could see you might look at other
25 exercises to determine whether they had elements which
should have been introduced into this exercise which would

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have made this exercise better.

2

But if the test is, as the staff suggests, whether this exercise was sufficient to enable a reasonable-assurance finding based upon the results of the exercise, I don't understand why you would have to get into other exercises.

7

MR. IRWIN: Because, Mr. Rosenthal, there is no other basis, there is no defined checklist which says the following elements must all be included. There are 160-some from which some 60 are winnowed down to 35, of which some subset are tested, and it's a different subset in every exercise.

13

For someone to say that the exclusion of this element is definitionally sufficient to render it insufficient, well, heavens, we are going to have to look at other exercises to see whether that element was universally included and then to see whether ten years of history or seven years of history suggests that practice suggests the result that the regulations and the NUREGs and the guidance that's been rendered don't command.

21

That is a hellacious job, and we should not underestimate it.

23

Now, let's get to, just very briefly once again, what admission of these contentions entails. It is entirely possible that LILCO could have conducted an

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2 exercise in which FEMA said, "LILCO fulfilled every
3 objective we set out. They did everything the scenario
4 required, and they did it absolutely splendidly. But the
5 exercise is insufficient. Go back and try it again."

6 I submit to you that that is an absolute
7 miscarriage of an expert process. The limit on it,
8 Mr. Edles, is not what you suggested, which is that total
9 deference should be given to the staff and FEMA. There is
10 opportunity for inquiring into how that process went, and
11 that opportunity has been afforded in discovery. There has
12 never been an allegation that this exercise as it came out
13 of that formation process was materially different from
14 anything else, materially defective. That, it seems to me,
15 is pretty telling.

16 JUDGE EDLES: Well, again, Mr. Irwin, I guess I
17 understand the argument that you are making, but let me
18 again put it in a different context. The Commission's
19 rules require a full-participation exercise. I assume for
20 the moment that the Commission is the ultimate arbiter of
21 what its rules mean.

22 Now, I gather what you are saying to me is the
23 Commission has delegated to FEMA and the staff working
24 jointly the authority to determine that the exercise that
25 you and the FEMA and the staff have devised is a full-
participation exercise and that is not something that we

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are going to take a look at at the end of the case. Isn't
2 that what you're telling me?

3

MR. IRWIN: Not a hundred percent. What I have
4 been saying is there is a threshold allegation that should
5 be required.

6

JUDGE EDLES: All right. If it's fraud, if there
7 is a bribe, if a FEMA official took a bribe when he created
8 the design, we can look at that. What else?

9

MR. IRWIN: An allegation that in every other
10 exercise that has ever been conducted; for an allegation
11 that there is an absolute requirement for a specific
12 element to be tested and a demonstration that that is the
13 case; or an allegation that there had been a hundred
14 exercises and in every other one this was tested, here it
15 was not. That kind of thing. But there is no such
16 allegation here.

17

JUDGE EDLES: But what you are still saying is
18 that we accord substantial deference to FEMA in how we
19 construe our own regulations. That's what you're telling
20 us.

21

MR. IRWIN: FEMA in participation with your own
22 staff which concurred in it.

23

JUDGE EDLES: Okay.

24

MR. IRWIN: One last note. We all talk about the
25 word "sufficiency," which has become talismatic. It

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2 doesn't hurt to look back at the actual sentence in which
3 that word resides in the UCS case. That sentence is worth
4 reading.

5 It says in the discussion of why you have it
6 here, it says, "Whereas the preparedness exercises the
7 decision involves a central decision maker's consideration
8 and weighing of many other persons' observations and
9 firsthand experiences, questions of credibility, conflicts,
10 insufficiencies surface and the ordinary reasons for
11 requiring a hearing come into the picture."

12 In short, what the court of appeals was concerned
13 with there was the kind of process that should be invoked,
14 not the corpus of the litigation. I urge that we not get
15 off on that term unnecessarily.

16 JUDGE ROSENTHAL: Thank you.

17 MR. IRWIN: Thank you, sir.

18 JUDGE ROSENTHAL: On behalf of the entire board I
19 would like to thank counsel for the respective parties for
20 their spirited arguments this morning.

21 On that note, the petition of FEMA will stand
22 submitted.

23 (Whereupon, at 11:55 a.m., the oral argument in
24 the above-entitled matter concluded.)

25

* * * * *

CERTIFICATE OF OFFICIAL REPORTER

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

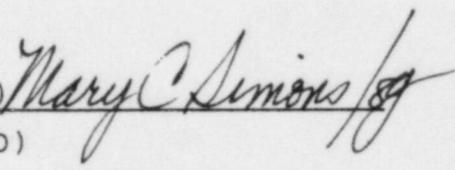
NAME OF PROCEEDING: LONG ISLAND LIGHTING COMPANY
(Shoreham Nuclear Power Station,
Unit 1)

DOCKET NO.: 50-322-OL-5

PLACE: BETHESDA, MARYLAND

DATE: THURSDAY, FEBRUARY 5, 1987

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

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(TYPED)

MARY C. SIMONS

Official Reporter

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