

ORIGINAL

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the matter of:

LONG ISLAND LIGHTING COMPANY

(Shoreham Nuclear Power Station
Unit 1)

Docket No. 50-322-OL-3

ORAL ARGUMENT

Location: Bethesda, Maryland
Date: Monday, August 12, 1985

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1 UNITED STATES OF AMERICA
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4 BEFORE THE ATOMIC SAFETY AND LICENSING APPEAL BOARD
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7 In the Matter of: :

8 LONG ISLAND LIGHTING COMPANY : Docket No. 50-322-OL-3

9 (Shoreham Nuclear Power Station : (Emergency Planning

10 Unit 1) : Procedure)

11 - - - - - x

12
13 Monday, August 12, 1985

14 Fifth Floor Hearing Room

15 4350 East West Highway

16 Bethesda, Maryland

17 The Oral Argument in the above-entitled matter was
18 convened, pursuant to notice, at 2:00 p.m.

19 BEFORE:

20 ALAN S. ROSENTHAL, Chairman of the Board

21 GARY J. EDLES, Member

22 HOWARD A. WILBER, Member
23
24
25

1 APPEARANCES:

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17 Office of the Executive Legal Director

18 U.S. Nuclear Regulatory Commission

19 Washington, D.C. 20555

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P R O C E E D I N G S

JUDGE ROSENTHAL: Good afternoon. This Board is hearing oral argument today on the appeal of the Long Island Lighting Company from portions of the Licensing Board's April 17, 1985 Partial Initial Decision in the emergency planning phase of this operating license proceeding involving the Shoreham nuclear facility.

Although appeals from other portions of the April 17 decision have been taken by Intervenor, Suffolk County and the State of New York, those appeals were placed on a separate briefing schedule and will be heard at a later date.

Subject to any alterations that may be made this afternoon, the oral argument is governed by the terms of this Board's July 26th order. That order provided that the Long Island Lighting Company will be heard first and will have 45 minutes for the presentation of its argument.

Under the terms of that order, the State of New York will be heard next for no more than 30 minutes, and it would be followed by Suffolk County which has been allotted 15 minutes, and the time of Southampton which has been given 5 minutes. The last party to be heard is the NRC Staff, which has been given 30 minutes.

It was further noted in our July 26th order that counsel may assume that each member of this Board is generally familiar with the relevant portions of the record and the

1 appellate positions of the respective parties. There thus
2 will be no necessity for any detailed, "brief" background
3 statements. Each counsel should proceed directly to the
4 issues presented by the LILCO appeal.

5 Now before I call for identification by counsel for
6 the purposes of the record, I do want to ascertain what is the
7 present state of the representation controversy. We learned
8 for the first time on Friday that the decision of Justice
9 Brown had been stayed in the first instance by Justice Brown,
10 and that that stay was continued by the Appellate Division.
11 We are also informed that there was some possibility that the
12 Appellate Division might rule in the merits of Justice Brown's
13 decision today.

14 Now, I would like to ask, if I might, the
15 representatives of the County Attorney's office first whether
16 to their knowledge the stay is still in effect.

17 MR. KELLEY: Yes, sir. For the record, my name is
18 Eugene R. Kelley, Chief Deputy County Attorney, attorney for
19 Martin, Bradley and Ashare, Suffolk County attorney.

20 Your Honor, the stay that you made reference to is
21 still in effect.

22 JUDGE ROSENTHAL: And there's been no ruling insofar
23 as you're aware on the merits of the controversy.

24 MR. KELLEY: That's correct.

25 JUDGE ROSENTHAL: All right. Let me ask you this,

1 Mr. Kelley. When did Justice Brown stay his order?

2 MR. KELLEY: I have a copy here, Your Honor.

3 JUDGE ROSENTHAL: Just let me have the date.

4 MR. KELLEY: July 31st, 1985.

5 JUDGE ROSENTHAL: And why were we not notified by
6 your office of the fact that that stay had been entered. Your
7 office had informed us previously of Justice Brown's order,
8 and it would have seemed to me offhand that it was your
9 responsibility, when that order was stayed, to so inform us,
10 particularly when it was clear from our July 26th order that
11 in fixing the time allocated to each party for the
12 presentation of argument, we were assuming that as a result of
13 Justice Brown's order, Kirkpatrick & Lockhart would not be
14 participating.

15 Now it seems to us that we should have been informed
16 of this a lot earlier than last Friday, and more specifically,
17 by your office.

18 MR. KELLEY: Sir, if I may, first of all, the County
19 Attorney's Office was not a party to this proceeding.

20 JUDGE ROSENTHAL: Not a party to what proceeding?

21 MR. KELLEY: The proceeding before Judge Brown.

22 JUDGE ROSENTHAL: But you are a party to the
23 proceeding before us, and I'm now talking about your advising
24 us of a development which I assume you were aware of.

25 MR. KELLEY: The impact of Judge Brown's decision we

1 don't feel impacts on this proceeding whatever.

2 JUDGE ROSENTHAL: Well, that may be, but don't you
3 think that that was for us to decide rather than for you to
4 make that unilateral determination? We had made it clear that
5 our argument was based upon -- our argument order, rather --
6 was based upon the assumption that Justice Brown's order would
7 be in effect, and that therefore, Kirkpatrick & Lockhart would
8 not be participants.

9 Now, when it became clear that that assumption might
10 prove to be unjustified, don't you think it was up to you to
11 tell us of this development so that we could make the decision
12 as to whether that development had an impact upon this
13 proceeding, to which you are a party?

14 MR. KELLEY: Sir, perhaps you're right, except I
15 want to say this. We take the position that this order does
16 not impact upon this proceeding, as to the representation by
17 the County. And that is for this reason: The only thing
18 that Judge Brown's decision did was it made a judicial
19 determination that the firing of the Kirkpatrick firm was
20 legal. The only thing that has been stayed is the entry of
21 that judgment of that judicial determination; it does not
22 change the firing. The firing which took place June 3rd is in
23 effect. And this is our position.

24 JUDGE ROSENTHAL: All right. Thank you, Mr. Kelley.
25 Now I take it from the letter that we received today

1 from Kirkpatrick & Lockhart, a letter signed by Herbert
2 H. Brown, that the law firm of Kirkpatrick & Lockhart wishes
3 to participate in this argument. Is that so? Who is here
4 from that law firm?

5 MR. BROWN: I am here. I am Herbert H. Brown.

6 JUDGE ROSENTHAL: All right. What is your response
7 to Mr. Kelley's position that the stay is irrelevant, for
8 present purposes?

9 MR. BROWN: Well, our response is that we feel that
10 we have an ethical obligation to represent the interests of
11 the County and insure that they are not prejudiced. There is
12 an internal conflict in Suffolk County and we have been asked
13 by 14 members of the Legislature and by a variety of other
14 actions since the date of that letter, June 3, which are in
15 parallel and in pursuit of that request to represent the
16 interests of the County.

17 We have independently researched the issue, we
18 asked for the opinions of outside counsel and predicated upon
19 those have reached the conclusion that we are required under
20 the Code of Professional Responsibility to seek to represent
21 the County.

22 JUDGE ROSENTHAL: And you are of that view,
23 Mr. Brown, notwithstanding the fact that a Justice of th
24 Supreme Court of the State of New York, who is presumably more
25 familiar with New York law than the District of Columbia law

1 firm whose opinion you solicited, has concluded that your firm
2 has no ethical obligation because the County Executive was
3 legally empowered to terminate your services? Your conclusion
4 is that the Justice is simply wrong, is that right?

5 MR. BROWN: Our conclusion is that the action of the
6 court in staying the order of Justice Brown established the
7 status quo ante, and it is under the status quo ante that our
8 responsibility we believe requires us to make the argument for
9 hearing which we are prepared to make today.

10 JUDGE ROSENTHAL: All right, thank you, Mr. Brown.

11 Well, the Board has considered the alternatives
12 available to it in advance of knowing precisely what the state
13 of affairs at 2:00 o'clock this afternoon would be, and it's
14 reached the following determination.

15 That is, the time allocated to the Long Island
16 Lighting Company is being enlarged from 45 minutes to one
17 hour. The time that was allocated to the State of New York
18 which had been 30 minutes, that time is being enlarged to 45
19 minutes, but that 45 minutes is to be shared by counsel for
20 the State of New York and the law firm of Kirkpatrick &
21 Lockhart. And we'll, before commencing with the argument we
22 will take a five-minute recess during which Mr. Palomino can
23 endeavor to reach some kind of an agreement with the
24 representatives of Kirkpatrick & Lockhart with respect to how
25 that 45 minutes will be divided. If they don't reach an

1 agreement, we'll divide the time ourselves.

2 The other time allocations will remain the same.
3 Suffolk County, as represented by its County Attorney, will
4 have 15 minutes; the time of Southampton, five minutes; and
5 the Nuclear Regulatory Commission Staff, 30 minutes. Long
6 Island Lighting Company may, as provided in our previous
7 order, reserve a reasonable portion of its one hour for
8 rebuttal.

9 I will now call upon counsel to formally identify
10 themselves for the record, and we'll start with Mr. Christman.

11 MR. CHRISTMAN: My name is James N. Christman of the
12 law firm of Hunton & Williams, P.O. Box 1535, Richmond,
13 Virginia 23212, and I will be representing the Applicant, Long
14 Island Lighting Company, this afternoon. To my left here at
15 the counsel table is Donald P. Irwin, also of that law firm.

16 JUDGE ROSENTHAL: Thank you, Mr. Christman.
17 Mr. Palomino?

18 MR. PALOMINO: My name is Fabian Palomino, I'm
19 representing the State of New York, and to my right is Mary
20 Gundrum from the Attorney General's Office of the State of New
21 York.

22 JUDGE ROSENTHAL: And from the law firm of
23 Kirkpatrick & Lockhart.

24 MR. BROWNLEE: My name is David A. Brownlee from the
25 Kirkpatrick law firm, and I will be speaking on behalf of

1 Suffolk County, together with Karla Letsche from the same
2 firm.

3 JUDGE ROSENTHAL: Well, we will permit that because
4 our rules do not specifically prohibit it, but I have to tell
5 you, Mr. Brownlee, that we find these divided arguments
6 singularly unhelpful, particularly where the time allotted is
7 relatively short. But if it's, for one reason or another, a
8 matter of necessity, we will allow it.

9 I might just say generally the next time the
10 Appellate rules are amended I am going to see to it that one
11 of the amendments is a preclusion of divided arguments.

12 MR. BROWNLEE: Our intention, sir, was that I would
13 speak entirely to Contentions 1 to 10, the legal authority
14 issues, and that Ms. Letsche would speak briefly to
15 Contentions 11 and 92, which involve matters of record which I
16 have not, in all candor, been involved in over the course of
17 this proceeding.

18 JUDGE ROSENTHAL: All right, Mr. Brownlee.

19 Mr. Kelley, you have already identified yourself.
20 You are the --

21 MR. KELLEY: May I say who is with me?

22 JUDGE ROSENTHAL: Yes.

23 MR. KELLEY: Lee Pilzer, Assistant County Attorney.

24 JUDGE ROSENTHAL: Thank you, Mr. Kelley.

25 Mr. Latham?

1 MR. LATHAM: Chairman Rosenthal, Steven B. Latham
2 from the firm of Twomey, Latham & Shea, P.O. Box 398,
3 Riverhead, New York, 11901, appearing on behalf of the Town of
4 Southampton.

5 JUDGE ROSENTHAL: Thank you, Mr. Latham. And
6 Mr. Turk?

7 MR. TURK: Good afternoon, Mr. Chairman and members
8 of the Board. My name is Sherwin Turk, I am Deputy Assistant
9 Chief Hearing Counsel of the Hearing Division, Office of
10 Executive Legal Director. I am appearing here today on behalf
11 of the NRC Staff, and I expect that perhaps later in the day I
12 may be joined at counsel table by another member of that
13 office who may be identified later.

14 JUDGE ROSENTHAL: All right, but I take that you
15 will present the entire Staff argument.

16 MR. TURK: That's correct.

17 JUDGE ROSENTHAL: Thank you, Mr. Turk.

18 All right, we will recess for five minutes to enable
19 consultation between Mr. Palomino and Mr. Brownlee and
20 Ms. Letsche.

21 [Short recess.]

22 Mr. Palomino, has there been an agreement reached
23 between the State and Kirkpatrick & Lockhart?

24 MR. PALOMINO: Yes, there has. The State would like
25 approximately 20 minutes, and the rest of the time will be for

1 Kirkpatrick & Lockhart.

2 JUDGE ROSENTHAL: Twenty for the State and 25 for
3 Kirkpatrick & Lockhart. Who will present argument first, the
4 State or Kirkpatrick & Lockhart? Oh, I know who we are going
5 to hear first.

6 [Laughter.]

7 MR. PALOMINO: I will go first, Your Honor.

8 JUDGE ROSENTHAL: All right. And then do I assume
9 that Mr. Brownlee will precede Ms. Letsche? Is that correct?

10 MR. BROWNLEE: Yes, sir.

11 MR. TURK: Mr. Chairman, for the record, let me note
12 that I have been joined at counsel table by Mr. Ed
13 Christenbury, who is Chief Hearing Counsel for OELD.

14 JUDGE ROSENTHAL: That will be duly noted in the
15 record. Pleased to have you, Mr. Christenbury.

16 Mr. Christman, you may proceed.

17 MR. CHRISTMAN: Thank you.

18 May it please the Board, my name is Jim Christman.
19 I will be speaking for the Long Island Lighting Company.

20 I would appreciate the chance to reserve 20 minutes
21 of my 60 for rebuttal.

22 The situation that faces us, or faces you, now, is
23 that there is a nuclear plant with a low power license on Long
24 Island that cannot operate above 5 percent at present, and the
25 reason is that the State says it may not. What is the reason

1 for that?

2 It is not that the plant is unsafe, at least not by
3 Federal standards. One by one, all of the objections that
4 have been raised to the safety of the plant have gone away as
5 the evidence was heard by this Commission. At the beginning,
6 there were a great many allegations about design and
7 construction of the plant, anticipated transients without
8 scram, quality assurance and so forth, and those were
9 litigated and it was found that the plant does meet NRC
10 regulation.

11 JUDGE ROSENTHAL I think you can assume that the
12 members of this Board are quite aware of the history of this
13 proceeding since we have been involved in many aspects of it.

14 MR. CHRISTMAN: I know you have, and I was merely
15 setting the stage, but let me say that as each of these
16 various issues came up, both the health and safety and the
17 onsite emergency planning, and now the offsite emergency
18 planning, it was alleged that the plant was unsafe for various
19 reasons, and as the evidence has been presented to your
20 agency, these allegations have been shown to be incorrect on
21 the facts.

22 So what we are left with essentially is a plant out
23 there that meets the design and construction and safety
24 requirements and that has a superb offsite emergency plan but
25 is not permitted to operate simply because the State says it

1 may not. That is a situation that we feel should be reversed
2 by this Appeal Board.

3 JUDGE ROSENTHAL: Now, you are not taking the
4 position, as I understand it, that this Commission can compel
5 the State or County to expend its resources in carrying out
6 the plan; that is not your argument, is it?

7 MR. CHRISTMAN: No, sir, that is not the issue here.

8 JUDGE ROSENTHAL: Okay. The issue is, I take it,
9 whether this Commission can, in effect, override a
10 determination of a New York State court that there cannot be
11 the exercise of police powers by LILCO employees.

12 MR. CHRISTMAN: Well, yes, sir, as a secondary
13 argument; but you need not reach that question, of course,
14 because of our realism argument.

15 JUDGE ROSENTHAL: Well, let's take the arguments one
16 at a time. The preemption argument. Are you saying that by
17 virtue of Federal preemption, the State cannot tell the Long
18 Island Lighting Company that it cannot exercise police
19 powers? I want to get really at what the core of your
20 argument is.

21 MR. CHRISTMAN: Let me see if we are saying the same
22 thing. What I am saying is that the enforcement of the state
23 laws on which that court decision is based are preempted, we
24 believe, by the Atomic Energy Act to the extent that -- yes,
25 sir?

1 JUDGE EDLES: What specifically is preempted, so we
2 know exactly what we are talking about?

3 MR. CHRISTMAN: That's fine. The State Court
4 decision recited several specific state statutes, and yet it
5 also resorted to the broader principle of usurpation of the
6 police power and the exclusiveness of the police power with
7 the state. We would say that the state law is what -- and
8 different laws are cited on different days, I must say. We
9 would say that the enforcement of any and all of those laws
10 are preempted to the extent that they forbid the
11 implementation of a valid offsite utility plan that is
12 approved by this Commission.

13 JUDGE EDLES: You are talking about the State
14 statutes now as opposed to the resolutions of the County
15 Legislature?

16 MR. CHRISTMAN: Yes, sir. The County Resolutions
17 were not really relied on in that statement.

18 JUDGE EDLES: By the State Court.

19 MR. CHRISTMAN: That's correct.

20 JUDGE EDLES: May I just follow up with one further
21 question. Are you then saying that to the extent that those
22 laws prohibit, for example, LILCO from sending its traffic
23 monitors out onto the streets, that those laws are preempted
24 by the Federal legislation?

25 MR. CHRISTMAN: Yes, sir, just to the extent that

1 they interfere with and prohibit the implementation of a
2 utility plan that is regulated and approved by this agency.
3 That is precisely right.

4 JUDGE EDLES: I know that there is much discussion
5 over who bears the burden of proving preemption and this and
6 that, but is there anything in the legislation itself or the
7 legislative history on which you rely, the Federal
8 legislation, which affirmatively preempts the State laws in
9 this issue?

10 MR. CHRISTMAN: If you mean express preemption, let
11 me say two things. We think that the field of the regulation
12 of the radiological health and safety is clearly preempted,
13 and there is a debate about whether that is expressed or
14 implied, but it is clearly preempted. Now, if you are
15 talking about specifically emergency planning, what we have --
16 and we take it that the authorization acts for this agency are
17 for the most part merely indicative of what the agency's
18 authority is under the Atomic Energy Act.

19 But we say that what we have in those authorization
20 acts and in their history are a couple of things. One, we
21 have the express language in the statutes that says that a
22 utility plan shall be considered by this agency -- well, what
23 it says is a LILCO or State or Utility plan should be
24 considered. What we have in the legislative history of those
25 acts are clear indications that Congress intended that the

1 utility plan be used to solve the problem that Congress
2 foresaw, which is the exact problem that has come up in this
3 case.

4 JUDGE EDLES: Okay. Let me run a scenario by you
5 and tell me whether I am right or wrong. Congress had a
6 couple of options available to it. It either could have
7 affirmatively told the Federal Government to go in and do it
8 itself where the State and local government won't participate
9 or won't participate effectively.

10 Second, presume they could have told the State and
11 local governments that in the circumstances in which you won't
12 participate, we will allow the utility to go in affirmatively
13 and do this. It seems to me -- and I believe you cited in
14 your briefs the various Congressmen and Senators who
15 introduced particular proposals here -- what ultimately got
16 adopted, it seems to me, was some type of a compromise.

17 Now, explain to me why what you are now presenting
18 to us isn't one of the rejected options that had earlier been
19 considered and not adopted by the Congress.

20 MR. CHRISTMAN: They reject the option of having
21 the NRC impose a plan on the State of local government that
22 would require the marshalling of state and local resources
23 and so forth. What they allowed was a utility plan, which is
24 what we have got, which does not require the marshalling of
25 state or local resources, although it is our position that in

1 a real emergency, those resources, of course, would have
2 been marshalled because everybody would do what was necessary
3 to protect the public.

4 JUDGE EDLES: At one point you mentioned in your
5 brief an optional reading of the preemption is simply to let
6 the Utility fill in on the margins without any broad-based
7 authority to correct major deficiencies, and you suggest that
8 is not an appropriate reading of the legislation.

9 Why isn't that a sort of compromise reading of the
10 legislation which makes the most sense, really?

11 MR. CHRISTMAN: Well, because there is quite a bit
12 of language in the legislative history about how these are to
13 be used in the absence of State or local plans, and because if
14 all that were intended were gap fillers, it seems to me that
15 the local and State governments already have the authority to
16 use volunteer resources.

17 For instance, in the State of New York, the policy
18 is to coordinate with volunteer private agencies, according to
19 their general plan. That would not aid Congress to step in
20 for that.

21 JUDGE EDLES: Why couldn't one read the legislation
22 as saying simply that the NRC should consider a Utility plan
23 in circumstances where that plan will not offend the State?
24 It may be that there are some states other than New York -- I
25 don't know -- where a utility could exercise the kind of

1 police powers that are involved in your plan without running
2 afoul of State law. But isn't it rather difficult for us to
3 come to the conclusion that Congress intended to override the
4 New York State law with respect to the exercise of police
5 powers when Congress didn't say that explicitly?

6 I mean normally wouldn't you expect to find some
7 indication that the Congress intended to put aside a whole
8 group or a type of state law and to override it? And that
9 isn't present here.

10 MR. CHRISTMAN: To the contrary, I would expect
11 Congress, if they had intended to enact into law what you just
12 said, which was that only when it doesn't offend the state or
13 local law, that they would have said that because we find that
14 when Congress has allowed the states into this area, they have
15 explicitly and expressly done so as in the Clean Air Act.

16 Second, I think we will find it is not the case that
17 this sort of plan might, under Judge Geiler's decision, might
18 be lawful in any other state in the Union because the
19 reasoning in his decision, which stems largely from common law
20 type cases, about the exclusiveness of the police power would
21 apply in any state in the Union, I'm confident.

22 And finally, you must understand here that when you
23 talk about ousting or preempting the police power, it is the
24 hypothesis of the case that the police are not there. There
25 is absolutely nothing outrageous about the Federal Government

1 regulating closely this field, allowing a private utility plan
2 to protect the public in the hypothetical case when the state
3 and local police power are absent, and that was the hypothesis
4 of the case, that they would not respond. There is nothing
5 outrageous about that at all.

6 JUDGE EDLES: Could you turn your attention now to
7 the Commission's implementing regulations on emergency
8 planning?

9 MR. CHRISTMAN: 50.47?

10 JUDGE EDLES: Yes, 50.47. And explain to me why I
11 shouldn't read those regulations as essentially envisioning a
12 cooperative effort between the Federal and State and local
13 governments.

14 MR. CHRISTMAN: That is very simple. Two years ago
15 the County filed a motion to terminate this proceeding in
16 which they said the NRC regulations require the presence of a
17 State or local governmental plan, and that argument was
18 rejected by the Commission.

19 JUDGE EDLES: Go over that again for me.

20 MR. CHRISTMAN: Yes, sir. The argument was made two
21 years ago to the Commission and to the then Brenner Licensing
22 Board that this whole proceeding was illegal and should be
23 terminated, or at least it should be terminated because there
24 was no local governmental emergency plan. Subsequently the
25 argument was mad with respect to the State governmental plan

1 as well.

2 JUDGE EDLES: What the agency did was basically not
3 handle that hot potato at the moment but send it back to its
4 licensing board to see if it would percolate up in a fashion
5 that would make it a little bit more amenable to decision.

6 MR. CHRISTMAN: Yes, sir, on the preemption issue,
7 but on the construction of its own regulations, it clearly
8 held that the presence of a State and local governmental plan
9 is not necessary under those regulations.

10 JUDGE EDLES: But then is the issue whether or not
11 the Utility could, standing in the shoes of the State and
12 local government, assure this Commission that there is
13 reasonable assurance of adequate safety to the public? That
14 would be the basic issue, then.

15 MR. CHRISTMAN: The Utility has to carry the burden
16 of proving it can protect the public health and safety, but it
17 has done that on the facts.

18 JUDGE EDLES: Why, then, should we get embroiled in
19 whether Justice Geiler is right or he is wrong? You take it
20 up with Justice Geiler and the Appellate Division and the
21 Court of Appeals as to whether you can do it under State
22 law. If they tell me you can't, I accept that, as I gather
23 everyone has for present purposes, and all I say is, well,
24 that being the case, I feel for you, but I can't find that
25 there is reasonable assurance of safety as long as your folks

1 aren't out there or as long as the State and local governments
2 or the Utility isn't out there doing the things that are
3 contemplated -- and I realize there is an argument on whether
4 they are required by the rules -- but at least might be
5 contemplated by the rules.

6 Now, why isn't that a manner by which this Board
7 ought to approach the case?

8 MR. CHRISTMAN: You mean why shouldn't you leave us
9 solely to a State court remedy and try to get that reversed?

10 JUDGE EDLES: Well, I'm not saying I would leave you
11 solely to a State court remedy. All I am asking you to do is
12 not put us, perhaps, to a difficult decision in circumstances
13 -- we have to make a determination as to whether or not there
14 is reasonable assurance of adequate safety. Until you can
15 come forward and show us either that the State or local
16 government can do it or that you have authority to stand in
17 their shoes, it seems to me I am foreclosed from making a
18 reasonable assurance finding.

19 MR. CHRISTMAN: I don't think you are foreclosed
20 from that. In the first place, we have shown on the facts
21 that this plan so far, pending appeal, that this plan is able
22 to protect the public, and what we are asking for is a finding
23 that we have the authority because of Federal preemption. So
24 that is the issue I'm asking you to decide. And also, we have
25 to live with the state law as it is now, I'm afraid, and the

1 plant is ready to operate, or operating at low power, and so
2 the issue is ripe.

3 JUDGE ROSENTHAL: Let me get clear. Do you say that
4 the preemption stems from the Atomic Energy Act? Did I hear
5 you say that at the outset?

6 MR. CHRISTMAN: Yes, sir.

7 JUDGE ROSENTHAL: So it is not more recent
8 legislation dealing with utility plans.

9 MR. CHRISTMAN: I think most of the NRC
10 authorization law tends, in our view, merely to shed light on
11 Congress' intent because the basic emergency planning
12 regulations were enacted under the Atomic Energy Act of 1954.

13 JUDGE ROSENTHAL: Now, what specific provision of
14 the Atomic Energy Act are you relying upon, and what
15 legislative history, if any, underlying that provision do you
16 rely on?

17 MR. CHRISTMAN: So far as I know, the legislative
18 history of the Atomic Energy Act of 1954 doesn't mention
19 emergency planning, but it does cover the regulation of the
20 field of radiological health and safety, and the Commission's
21 emergency planning regulations were enacted under those
22 provisions of the Atomic Energy Act.

23 JUDGE ROSENTHAL: All right. So you are saying that
24 because the Atomic Energy Act preempts the field of
25 radiological health and safety, it necessarily overrides state

1 laws regarding who can exercise police powers?

2 MR. CHRISTMAN: Well, to the extent that state law
3 prohibits the implementing of a safety system, if you will,
4 composed of people rather than machines that the NRC has
5 decided is necessary.

6 JUDGE ROSENTHAL: Well, supposing that the state
7 were to decide simply that neither it nor its political
8 subdivisions, in this instance the County, had the resources
9 to participate in an emergency planning exercise, and
10 furthermore, that it regarded it as being contrary to the
11 public interest to have a lot of private policemen running
12 around. You are saying that, notwithstanding those
13 determinations, which had no radiological health and safety
14 foundation at all -- this isn't like the State of Minnesota
15 case, and the determinations in my hypothetical have no
16 radiological health and safety basis. It is a basis in
17 economics and a basis in the belief that private people
18 oughtn't to be exercising police powers, period.

19 Now, in that circumstance, would you say that there
20 was still preemption and that the NRC against that state
21 determination could authorize the utility to go forward with a
22 plan that involved the utility exercising police powers?

23 MR. CHRISTMAN: I think so because -- well, yes,
24 because you still have an actual conflict, I think: that is,
25 the state law or state determination that --

1 JUDGE ROSENTHAL: But it doesn't have anything in
2 the area of radiological health and safety. Now, we do know,
3 do we not, Mr. Christman, that the states have the authority
4 to kill off nuclear power plants so long as they don't do it
5 on radiological health and safety grounds? Indeed, the State
6 of New York has killed off, I think, both Jamesport and
7 Sterling.

8 MR. CHRISTMAN: That's right.

9 JUDGE ROSENTHAL: Now, if they can do it on the
10 economic or environmental grounds that were involved in the
11 Sterling and Jamesport matter, why can't they do it on the
12 grounds that I put forth in my hypothetical?

13 MR. CHRISTMAN: Yes. Well, they can certainly do it
14 on economic grounds, as Pacific Gas and Electric shows you.
15 At least they can do that for the threshold decision as to
16 whether or not you are going to have a certain kind of power
17 plant or not.

18 JUDGE ROSENTHAL: They can do it on environmental
19 grounds as long as there are not radiological health and
20 safety factors involved.

21 MR. CHRISTMAN: According to one of this Appeal
22 Board's decisions, they could do it on environmental grounds
23 in some circumstances; that's quite right. But when you get
24 into the area of regulating how a plant operates and the
25 effect of this law that you are talking about and the one we

1 have here is to limit a plant to 5 percent operation, then you
2 are both -- you have an actual conflict. And moreover --

3 JUDGE ROSENTHAL: Where is the conflict? What they
4 are saying, as I understand it, is we are not going to
5 participate in this emergency planning aspect of plant
6 operation, and you agreed, I think, at the outset that we
7 can't compel them to participate, and then they go on to say
8 that as a matter of state law -- not a state law enacted in
9 the nuclear plant context, but as a matter of general state
10 law -- Long Island Lighting Company can't exercise police
11 powers.

12 Now, where is that running afoul of the Atomic
13 Energy Act's preemption of matters relating to radiological
14 health and safety? I just don't see the connection.

15 MR. CHRISTMAN: Okay. State purpose, no matter how
16 pure, does not save a state law from preemption, for two
17 reasons. Under the zone test, Pacific Gas and Electric said
18 that a state law that regulates the operation of a nuclear
19 power plant and how it operates, and limiting one to 5 percent
20 is clearly that sort, will be preempted no matter whether
21 enacted out of a nonradiological state purpose or not.

22 Number two, you have an actual conflict because you
23 have a frustration of the full accomplishment of the
24 objectives and purposes of Congress because Congress had two
25 objectives. They wanted to have power plants operate if they

1 safely could, and they wanted to have good emergency
2 plans. Both of those.

3 Now, sometimes those two purposes of Congress come
4 into conflict, but they don't here. But they both come into
5 conflict with what the State would be doing, either in our
6 case or in the hypothetical you posed.

7 JUDGE EDLES: But Mr. Christman, aren't you making
8 to us the very same argument that the dissent made in the
9 Silkwood case?

10 MR. CHRISTMAN: In Silkwood? No. Go right ahead.

11 JUDGE EDLES: Sorry.

12 MR. CHRISTMAN: No, elaborate.

13 JUDGE EDLES: I just want to make sure we
14 understand, at least my understanding --

15 MR. CHRISTMAN: There were two dissents. Tell me
16 which one.

17 JUDGE EDLES: Well, I guess it was Justice Blackman,
18 and what I thought he was saying -- and I may have the
19 dissents confused, but you can correct me. I thought what
20 he was saying is, look, what the jury was doing in assigning
21 punitive damages was making the very type of safety decisions
22 that the Nuclear Regulatory Commission is supposed to be
23 making.

24 They are telling them this wasn't safe enough,
25 telling that you have got to shape up, get your act in order

1 here because we are going to assign punitive damages, all of
2 those things which, I believe Blackman says, that's the job of
3 the Nuclear Regulatory Commission.

4 Now, fortunately that argument was rejected by the
5 majority of the Court. So tell me why your argument isn't
6 pretty much the same as the dissent's argument in Silkwood.

7 MR. CHRISTMAN: Well, Justice Blackman was arguing
8 that the purpose is the determinant, and I'm saying it's more
9 complicated than that. Basically what you are looking for is
10 the intent of Congress in all of these sorts of cases. What we
11 have in this case is an intent of Congress shown clearly to be
12 that they foresaw a certain problem and that they enacted a
13 certain solution to that problem, which is utility plans, to
14 be used in precisely this sort of situation if there was a
15 failure of state or local government planning.

16 JUDGE EDLES: But that, again, swings over to what
17 the purpose of Congress was in enacting the authorization acts
18 as opposed to the Atomic Energy Act. Your principal argument,
19 as I understand it, is the Atomic Energy Act is what preempts
20 the field here, and that it does that because the Congress
21 intended that the states are not to be involved in making
22 radiological health and safety determinations.

23 MR. CHRISTMAN: If the State purpose is completely
24 nonradiological but it interferes with the types of
25 regulations the NRC has set up to regulate the operation of

1 the plant, then according to PG&E, the majority, not any of
2 the dissents or concurrences, that is still preempted.

3 JUDGE EDLES: But isn't that really what the
4 Silkwood case sort of implicitly overrode, then?

5 MR. CHRISTMAN: No, I don't think so.

6 JUDGE EDLES: If you accept the dissent's analysis
7 of what the majority does in Silkwood, they say, look, you are
8 affecting or impacting on the operations of the health and
9 safety of the plant, and that is something you are not allowed
10 to do -- under your argument. Under PG&E, you are not allowed
11 to do that, and the majority says essentially, no, no. The
12 state jury was cute enough to put it under the rubric of tort
13 law so they managed to slip it by, just as the State of New
14 York, if they are smart enough to lump it under where they
15 send their police and fire, they can also slip it by.

16 MR. CHRISTMAN: It's true that the four justices in
17 dissent or concurrence in Silkwood thought that the majority
18 was gutting PG&E, just decided the previous term. However,
19 what Silkwood really is is simply sort of a sui generis type
20 of case where they looked at congressional intent and they
21 found a specific intent there. It was clear to the majority
22 in this case it may not quite comport with all of the reasoned
23 analysis we do, but here Congress made its intent clear, and
24 it did not want to preempt tort law, which they took to
25 include punitive damages. They took it all as a piece.

1 I don't think Silkwood really makes any big changes
2 in the law that was set down by PG&E or, for that matter, is
3 all that --

4 JUDGE EDLES: So you think it really is unique to
5 the tort area, that there is something special about tort law
6 that makes Silkwood inapplicable to our facts.

7 MR. CHRISTMAN: I think not so much the nature of
8 tort law as that Congress had in the context of Atomic Energy
9 legislation shown an intent not to preempt tort law.

10 JUDGE ROSENTHAL: Your time is moving on. I would
11 like to turn, if I might, to your realism argument --

12 MR. CHRISTMAN: I would be delighted if you would.

13 [Laughter.]

14 JUDGE ROSENTHAL: -- and ask you this question, and
15 that is: even if we were to indulge in your assumption that
16 when the emergency occurred, the police and the fire personnel
17 and other people who have responsibilities in emergencies
18 would repond, isn't nonetheless the fatal flaw in your
19 realismi argument that those individuals are not part of the
20 planning process? Isn't it true that part of the emergency
21 planning process is you have drills, people are instructed as
22 to what they are supposed to do in particular emergencies,
23 Policeman A as part of the plan or somebody from that police
24 station would go to this crossing, somebody else would go
25 somewhere else, and that your realism argument just assumes

1 that all of these folks, when the emergency arises, are going
2 to know exactly what to do even though none of them have been
3 part of the planning program or exercise?

4 Now, why isn't that the total answer to your
5 realism?

6 MR. CHRISTMAN: It's not fatal flaw. It is
7 certainly the only reasonable counter-argument I can think of
8 that you might have raised, and let me tell you why it's not
9 fatal. In the first place, that issue, which let me call it
10 the coordination issue -- how do you marry a superb
11 organization, set of resources, a planning infrastructure,
12 with people in command and control and perhaps traffic guides
13 who have not previously been a part of that plan? And there
14 are a whole number of answers.

15 The first answer is that this is not raised in
16 Contentions 1 through 10 and really was not timely raised, but
17 leaving that aside, I don't think that need prevent us from
18 deciding the issue either, and there are several reasons why.

19 For one thing, we briefed this very issue, the
20 coordination issue, in some detail, at least the Applicant
21 did, and we showed that the key -- I think we showed, although
22 I'm not sure the Licensing Board considered this -- we showed
23 that when you have set up the planning basis -- that is, the
24 plan, the communications, in particular -- that you have the
25 basis for marrying relatively new people to an existing plan

1 and coming off with a splendid response in an emergency.

2 For instance, you have all of the consultants and
3 all of the advisers necessary to advise the decisionmakers, if
4 they should come from the government, but even more to the
5 point, what you have now in the county is a county executive
6 who is at least keeping an open mind and has committed to
7 gather information about all existing plans, including this
8 one. So the county executive -- and he has over 10,000
9 employees, and to the extent necessary to fulfill his legal
10 duties, he will collect information, so they will not be
11 totally ignorant about the plan should an emergency arise.

12 In the second place, this sort of response, with
13 governmental entities moved in at the time of an emergency,
14 could very well be tested in a graded exercise, I believe, and
15 probably more usefully than could be argued about here, but
16 basically we believe that because the planning basis is there,
17 that people can be moved in at the right time, at least if
18 they have gathered information in advance, and that the
19 response can be just fine.

20 JUDGE WILBER: Are they allowed to participate in
21 your graded exercise?

22 MR. CHRISTMAN: That would be a question of state
23 law that I don't know I can answer, but they can gather
24 information, and I think if they could not participate in the
25 graded exercise, you would use a surrogate and see how it

1 works.

2 JUDGE WILBER: That is like watching Shakespeare and
3 suddenly becoming an actor, though, isn't it?

4 MR. CHRISTMAN: I don't think so. You know, the
5 people of the state do this sort of thing for several other
6 nuclear plants, so those people are already trained, and the
7 decision-making is sort of generic.

8 JUDGE WILBER: The same people?

9 MR. CHRISTMAN: I don't know if it would be the
10 same individuals, but they have a large number of people who
11 are familiar with radiological emergency planning, and the
12 logic and decisions is the same at every power plant in
13 the state. And as for the county people, I simply think that a
14 large, sophisticated county like this, with all the expertise
15 and experience that they have, that the gathering of
16 information in advance plus all the expertise that has been
17 gathered and trained and drilled -- for instance, the plan
18 specifically calls for the LILCO traffic or LERO traffic
19 guides to go out and direct traffic until the police show up.

20 Now, when the police show up, the traffic guides are
21 directed to stay there and assist them with their duties if
22 the policemen feel that they need that. So in essence, you
23 have got someone there to advise for every traffic policeman.

24 JUDGE EDLES: What is going to happen is the New
25 York State Trooper will stand there or the Suffolk County

1 Police and say, now, do I send them to the right or do I send
2 them to the left? And the LERO man will say, no, you send
3 them up this road there. Is that roughly how it's going to
4 play out? Or is the cop going to say, "Everybody goes down
5 this street." Presumably he is supposed to know.

6 MR. CHRISTMAN: Do you mean is the policeman going
7 to ignore the traffic guide, or do you mean is it going to
8 take a long time to fill him in?

9 JUDGE EDLES: No, is he going to ignore or -- how do
10 I really know what's going to happen when those two people get
11 out there, is my problem.

12 MR. CHRISTMAN: I will tell you how you know. We
13 litigated this at great length, and what happens in a real
14 emergency is that people come together and they do what is
15 necessary to help the people at risk. The Red Cross witness
16 said it better than anybody else. He said: Once you have an
17 emergency in this country, the American people rally and they
18 forget about their political differences. And I cannot
19 imagine a policeman out there with someone else who is trying
20 to help him, ignoring him or --

21 JUDGE EDLES: Mr. Christman, that was exactly the
22 problem that arose in Three Mile Island, which prompted all of
23 these emergency regulations: well-intentioned, decent human
24 beings out there not exactly knowing what to do.

25 MR. CHRISTMAN: Sure, but here you have got a plan,

1 and everybody knows it's a plan, and it has been approved by
2 this agency as a good plan, and you have a traffic guide there
3 standing ready to help with a package of information that he
4 is given, and he can brief the policeman very quickly on the
5 details of the plan.

6 In any event, we litigated an uncontrolled plan
7 without any traffic guides, and the evacuation time was only
8 an hour and 35 minutes less. It's hard to imagine that they
9 could do too much worse than that.

10 JUDGE ROSENTHAL: Mr. Christman, you wanted to
11 reserve 20 minutes for rebuttal, which means you have eight
12 minutes left, and you might want to touch upon your
13 immateriality argument and maybe say a few things about the
14 conflict of interest issue.

15 MR. CHRISTMAN: Sure, I will be glad to.

16 If you are interested in the immateriality argument,
17 it's not of such great importance because it does not
18 completely get us out of our problem. What it does, I think,
19 is remove some of the contentions, but I must tell you that
20 you can go down these contentions one by one and eliminate a
21 great many of them on different grounds.

22 For instance, number 9, the fuel pumping, I think
23 has already been eliminated on the materiality grounds, at
24 least as our reading of the Board's decision. Number 10,
25 which is law enforcement at the EOC, at the perimeter of the

1 EPZ, and at the relocation centers, I think is gone because
2 the relocation centers are in Nassau County where the Nassau
3 police will be doing the work. The EOC is a LILCO facility,
4 and there is no law enforcement by LERO people at the
5 perimeters. There are just traffic guides. This the same as
6 the traffic guide.

7 I must tell you also that number 3, about
8 trailblazer signs, has been affected by the latest revision of
9 the plan. The trailblazer signs were eliminated from that
10 plan just within the last week. That leaves the materiality
11 argument, then, can be directed at Contentions 1, directing
12 traffic, number 2, I think one stretch of road is made one way
13 and then you block off some lanes to facilitate the flow.

14 JUDGE WILBER: This Contention 3, to go back to
15 that, you said the trailblazers are --

16 MR. CHRISTMAN: They have been taken out.

17 JUDGE WILBER: Has that been reviewed by the
18 responsible people, FEMA --

19 MR. CHRISTMAN: No, it goes to FEMA now, and they
20 will review that.

21 JUDGE WILBER: So we don't know whether that is a
22 good idea or bad idea. You have just taken it out; is that
23 correct?

24 MR. CHRISTMAN: Well, that was because we knew that
25 in the event of a drill, the signs wouldn't be up because of

1 all of the legal wrangling and because we can't put them up at
2 present. But you must understand that those trailblazer signs
3 are merely one way of telling people what the routes out of
4 the EPZ are, the most efficient routes, and there are lots of
5 other ways. I mean the brochure goes out every year, the
6 company gives out some sort of a vest pocket brochure that
7 people are supposed to put in their glove box in their car.
8 There are maps in the telephone directories and maps in the
9 little community telephone directories, that sort of thing.
10 So it is unlikely --

11 JUDGE EDLES: Where is FEMA in all of this? What is
12 the actual status of their review of the plans, the various
13 plans?

14 MR. CHRISTMAN: They are going to review Rev. 5, I
15 believe. The Commission has asked, the NRC has asked FEMA to
16 schedule a drill insofar as that is legally possible, and, you
17 know, the company is ready to have a graded exercise on
18 perhaps a month's notice, and we are certainly hopeful that --

19 JUDGE EDLES: We are just basically waiting to hear
20 from FEMA as to whether it will conduct the exercise?

21 MR. CHRISTMAN: Well, so far as I know. I think
22 that, given the request, an exercise will be held sometime in
23 the future, and the company is ready. I think we could be
24 ready in a few days.

25 JUDGE EDLES: Have they yet made their

1 recommendations to the Commission or do they await the
2 exercise before that, or do they make interim recommendations
3 first?

4 MR. CHRISTMAN: Well, they will produce some sort of
5 written review --

6 JUDGE EDLES: But none has yet been produced; is
7 that right?

8 MR. CHRISTMAN: Well, Rev. 5 just came out last
9 Monday, but of course, Rev. 5, you must understand, is not
10 much of a change. Most of these changes were made to conform
11 to commitments made on the stand during the litigation here,
12 or minor changes made to -- you drill and exercise these
13 things all the time.

14 JUDGE EDLES: But what I'm getting at is we don't
15 yet have a FEMA-approved plan of any kind.

16 MR. CHRISTMAN: But the plan that was litigated is
17 pretty much entirely -- I think FEMA has testified on it, and
18 to the extent they can prior to an exercise, I think they have
19 approved every element of it.

20 JUDGE EDLES: Oh, okay. All right.

21 MR. CHRISTMAN: So what we are getting down to --
22 oh, also I might add that if you look at Contentions 7 and 8,
23 which have to do with the ingestion pathway and the recovery
24 and reentry, that is the sort of thing that is done in the
25 aftermath of an accident with some time. For instance,

1 recovery and reentry calls for setting up a committee in which
2 the state and county are invited to participate. It is
3 inconceivable under the realism argument that the state would
4 refuse to participate in those sorts of recommendations.

5 That leaves materiality. Well, we are still left
6 with the problem with 5 and 6, which basically say you can't
7 make decisions and recommendations and you can't broadcast
8 them to the public, and there I think you still need
9 preemption under the Atomic Energy Act, or even in the case of
10 broadcasting to the public under the FCC regulations, which do
11 regulate that sort of field. But we didn't argue that in the
12 brief. There simply wasn't space.

13 Finally, conflict of interest and state plan.
14 Conflict of interest. I have little to say, in any event,
15 about that. It seems to me that, taking the most cynical view
16 possible of this contention, if you don't believe that utility
17 folks can make these sorts of health and safety decisions in
18 an emergency with the limelight on them and everybody looking
19 over their shoulder, then why in the world do you let them
20 make those sorts of decisions when they operate the plant and
21 when they classify the accident in the first place and when
22 they broadcast a protective action recommendation to the
23 offsite authorities?

24 It seems to me that the flaw in the Board's decision
25 was that it overrode or discounted all of the things you do to

1 overcome this sort of conflict: your training, your
2 procedures, your consultants, your oversight by the NRC, 50
3 different kinds of checks and counterchecks, particularly
4 training and procedures, and they ignore that. The state
5 plan. In the record is the general state plan for
6 emergencies. It says that the state's policy in emergencies
7 is to take action, and its policy is to coordinate to the
8 maximum with all sorts of local government, Federal
9 government, as well as private/voluntary organizations.

10 I don't think this agency ought to be in the
11 position of presuming without evidence that a state won't
12 follow its own policy in an emergency when people's lives or
13 property are at risk.

14 JUDGE ROSENTHAL: Thank you, Mr. Christman.

15 Mr. Palomino.

16 MR. PALOMINO: First turning to legal authority, I
17 would like to respond to some of the questions raised on
18 preemption by this Board, or at least the responses given, and
19 I think the interpretation he has placed on the ability to
20 submit a utility plan is not logical. If that was the purpose
21 of that change, they wouldn't have raised the question as to
22 whether or not you need Federal intervention or whether you
23 should mandate a state plan. They have said it is right
24 there.

25 The fact is they did raise those questions. They

1 have raised this question in subsequent attempts at
2 legislation, and they have never passed it. The fact is that
3 nobody believes it, not even LILCO, that this is preempted.
4 If they would, they would have rushed to court.

5 This issue was raised by FEMA in June of 1983, and
6 we kept pressing them to take it to court. They didn't. We
7 had to take it to court and have it resolved against them.
8 And the Commission certainly doesn't believe it. The Chairman
9 has told Congress on many occasions. He has invited them to
10 change the legislation.

11 All they did when they enacted that legislation was
12 not penalize the utilities if the local governments didn't
13 submit a plan --

14 JUDGE EDLES: Let's talk a moment about that
15 language. Here you have a utility that has a plant ready to
16 go, and the only apparent stumbling block is the fact that the
17 state and local governments won't full participate. Why isn't
18 that penalizing the utility for the failure of the state and
19 local government to participate? Why doesn't it come right
20 within the legislative intent, the reason why the Congress
21 passed the authorization act?

22 MR. PALOMINO: Well, when they passed the
23 authorization act, they knew this question was extant and they
24 didn't expressly direct it. And the fact is they also knew
25 the possibility the plants might not be opened because of it.

1 JUDGE EDLES: But I am addressing your point. You
2 said that the Congress said, and this is correct, that they
3 didn't want utilities to be penalized. That was the language
4 in the legislative history, at least.

5 MR. PALOMINO: They didn't want them to be penalized
6 by not being able to have a plan, so they said: you can submit
7 a plan of your own, and if you can show you can meet the laws
8 and regulations in implementing it, then it will be a valid
9 plan and you can open your plant.

10 JUDGE EDLES: Did the Congress know about the
11 Shoreham problem at the time?

12 MR. PALOMINO: No, the Congress didn't know about
13 the Shoreham problem at the time, but the Congress recognized
14 that it might have some effects, and certainly the Commission,
15 on existing plants, and the Commission -- well, comment was
16 raised by the industry when the regulations were changed, and
17 they recognized the fact that the state or local governments
18 could have a veto over plants opening.

19 The Commission said, look, this is a sensitive area
20 between state and local governments and concerns the Tenth
21 Amendment, and we don't think that's the way to go.

22 JUDGE EDLES: Did the state court judge have before
23 him the County resolutions, or was his decision strictly on
24 state law grounds?

25 MR. PALOMINO: It was strictly on state law

1 grounds. The County resolutions, incidentally, were nullified
2 by the Court of Appeals of the State of New York. Oh, you
3 mean the other county. No, he had those County resolutions.
4 He had them before him. But the State also was opposing.

5 JUDGE EDLES: I'm aware of that. So in other words,
6 he ruled both on the county and the state, both on the state
7 law and the county resolutions?

8 MR. PALOMINO: No, he didn't rule on the county
9 resolutions. He ruled on the State Constitution and the State
10 laws.

11 JUDGE EDLES: Okay. What if we were to find that
12 only the County resolutions are preempted by Federal law?
13 What would happen then? Let's assume -- and assume our
14 decision is ultimately upheld in the Federal Courts. What
15 would happen then, if we struck down as preemptive the County
16 resolutions alone?

17 MR. PALOMINO: On what basis?

18 JUDGE EDLES: On the basis that they are -- one
19 basis might be that they are predicated on health and safety
20 determinations that the County under Federal law is not
21 permitted to make. Consequently, we strike those down -- and
22 again assuming the Federal Courts uphold that. Where would
23 that leave the circumstances out there in the real world?

24 MR. PALOMINO: It would mean the County resolutions
25 would not be valid, but the County still sets County policy,

1 and they could agree not to participate anyway.

2 JUDGE EDLES: But what would happen then? Would the
3 County Executive then be able to turn the police and firemen
4 loose?

5 MR. PALOMINO: No, he wouldn't because he doesn't
6 have that power.

7 JUDGE EDLES: He doesn't direct the police and the
8 fire department? Who is the supervisor for the fire and
9 police departments?

10 MR. PALOMINO: He does direct them, but the County
11 could adopt other resolutions.

12 JUDGE EDLES: Are they subject to veto by the County
13 Executive?

14 MR. PALOMINO: Well, they could override them with
15 the majority they have. So that wouldn't be a problem.
16 All right?

17 JUDGE ROSENTHAL: Well, in this instance,
18 Mr. Palomino, it is true, is it not, that the resolutions to
19 the effect that there would not be local participation in
20 emergency planning were grounded upon radiological health and
21 safety considerations? Is that not true? They weren't
22 grounded on economic considerations.

23 MR. PALOMINO: It's true they weren't grounded on
24 that.

25 JUDGE ROSENTHAL: They were grounded on radiological

1 health and safety considerations, namely, that it is just
2 impossible to evacuate people from Long Island? Wasn't that
3 the ground?

4 MR. PALOMINO: I think that was the ground, too.

5 JUDGE ROSENTHAL: Well now, if that's the case,
6 first they say we are not going to participate because of
7 radiological health and safety considerations, and then they
8 say, second of all, under New York law, LILCO can't perform
9 the functions which we are not going to perform. Doesn't that
10 really mean -- and in stripping this thing from all the
11 formalisms and getting down to the reality of it -- that the
12 State of New York or Suffolk County, one or the other or both,
13 have vetoed this plant on radiological health and safety
14 grounds?

15 MR. PALOMINO: It might mean the County has, but --

16 JUDGE ROSENTHAL: Well, County or State, whoever has
17 done it -- I don't care who has done it -- aren't they
18 prohibited from doing that by the Atomic Energy Act as
19 construed in the State of Minnesota?

20 MR. PALOMINO: I would say I don't think so. I
21 think radiological safety is related to those acts associated
22 with construction and operation, where the NRC has
23 expertise. As the Board below pointed out, this is concerned
24 in the nature of land use planning or control. These statutes
25 were on the books long before LILCO, and they don't care

1 whether you regulate LILCO, PEPSICO or whatever.

2 JUDGE ROSENTHAL: I understand that, but you get
3 back again to the original source, do you not, which is a
4 determination by Suffolk County that it will not participate
5 in emergency planning because it is not possible to protect
6 the citizens from the radiological effects of an accident.
7 That was a determination the County made, and everything has
8 flowed from that.

9 If the County hadn't made that determination, they
10 would have participated, presumably, and you wouldn't have had
11 this problem. But the county has come in and said we are not
12 going to participate because of the radiological safety and
13 health considerations, and not only are we not going to
14 participate, but as a matter of state law, neither LILCO or
15 you are going to participate because you can't exercise police
16 functions.

17 MR. PALOMINO: I don't know if it's radiological
18 health and safety considerations as it is the inadequacy of
19 the road, the climatology, the --

20 JUDGE ROSENTHAL: But it all turns to whether in the
21 event of an accident, the public would be protected from
22 radiological emissions, isn't it? Isn't that what it really
23 came down to, whether, if evacuation was necessary, you could
24 get them out of the danger area in sufficient time to ensure
25 that they were not exposed to radiation? Isn't that what this

1 was all about?

2 MR. PALOMINO: I may have. I would have to read the
3 resolutions.

4 JUDGE ROSENTHAL: Well, I'm sure you are familiar
5 with them. I thought that there was no doubt about that, that
6 the Legislature and Mr. Cohallen years ago were very up front
7 about that. They said, look, our roads and our geographic
8 configuration are such you just can't get people out of here,
9 and therefore, we are not going to perpetrate what they
10 claimed to be a fraud on the public by participating in a
11 plant that wouldn't work.

12 Now, wasn't that really what it was all about?
13 Isn't that what -- they were precluded from making that kind
14 of determination by the Atomic Energy Act.

15 MR. PALOMINO: Where? Which provision of the Atomic
16 Energy Act? As construed, as I understand, it's radiological
17 hazards relating to construction and operation.

18 JUDGE ROSENTHAL: But they were saying that this was
19 a radiological hazard they were forecasting connected with
20 operation, was it not? What they were talking about was that
21 there was an accident at the plant.

22 MR. PALOMINO: No, I think it meant the detailed
23 kind of operations of a plant, how you operate it, whether the
24 NRC has the expertise, and they intended to preempt that small
25 area, how you construct a plant and how it is operated.

1 JUDGE ROSENTHAL: But the NRC -- part and parcel of
2 that is not a determination as to whether in a particular area
3 you can have an emergency plant that would protect the
4 citizenry in the event of a radiological accident? That's not
5 preempted, in your view?

6 MR. PALOMINO: I don't think so.

7 JUDGE EDLES: Well, let me ask you this. Does that
8 mean that when the NRC establishes its emergency planning
9 regulations, it is acting outside the authority conferred on
10 it by Congress?

11 MR. PALOMINO: No, no, no. That is not its
12 exclusive authority, but it expects state and local
13 cooperation and seeks it and wants it. But you are not
14 preempted if you don't, and I think that is clear. You don't
15 have to plan. So that to the extent that it's preempted, it's
16 limited and it doesn't cover this area, so they can do that,
17 and they can do it because it involves things other than what
18 the restricted area or zone of preemption is. And regardless
19 of their motive.

20 JUDGE ROSENTHAL: So it is possible for a state at
21 any time to, in effect, veto a nuclear power plant on the
22 grounds that -- or on the basis that we will not participate
23 in emergency planning so long as the state has laws which
24 preclude the utility from engaging in the exercise of police
25 powers. Is that what you are telling me?

1 MR. PALOMINO: Yes.

2 JUDGE ROSENTHAL: So that this preemption in the
3 State of Minnesota, that is just a will-o'-the-wisp, that a
4 state can very readily get around it by simply saying we won't
5 participate in emergency --

6 MR. PALOMINO: I think they can not only
7 participate, they can withdraw participation, and also --

8 JUDGE ROSENTHAL: With the necessary consequence
9 that the plant can't operate if that state has laws such as
10 New York apparently does which preclude the utility from
11 exercising police powers?

12 MR. PALOMINO: That's right.

13 JUDGE EDLES: Why did the Supreme Court, then, in
14 Pacific Gas and Electric spend, it seems to me, a lot of time
15 explaining why the State of California had not done this on
16 radiological health and safety grounds? They said, you know,
17 it's clear from the legislation that this is done on economic
18 grounds, not radiological health and safety if, as you say,
19 the motive of the legislature is unimportant in all of this.

20 MR. PALOMINO: As long as the statute -- it is the
21 enactment and the motive that is important. Now, those
22 enactments -- as I say, here also these statutes were not
23 enacted to affect LILCO, and that is what they were dealing
24 with, the statute that was specific, and where it is specific,
25 then you have to find that it is not to frustrate the

1 purpose. But here where there are general statutes not
2 specifically directed or applied for that purpose --

3 JUDGE EDLES: So they are not specifically directed,
4 they are not applied for that purpose, but they have the
5 effect of denying LILCO the license. I mean that's what we
6 are saying.

7 MR. PALOMINO: Yes, that's fair. Yes. That is why
8 you don't have to participate, and if the Federal Government
9 wants it corrected, they can either put in a Federal --
10 expressly put in Federal exemption and interpose the Federal
11 presence, or they could mandate state cooperation. They have
12 done neither, and this option is one that they recognize
13 between state and Federal relations.

14 JUDGE ROSENTHAL: You think they could mandate the
15 expenditure of state resources?

16 MR. PALOMINO: It would be a serious constitutional
17 question.

18 JUDGE ROSENTHAL: I think the state would resist
19 that.

20 JUDGE EDLES: Presumably they could call up the
21 National Guard or something like that, is what you are saying.

22 MR. PALOMINO: Yes, they could bring in FRET teams
23 and manage these themselves and coordinate.

24 JUDGE EDLES: Your point is that was an option
25 available to Congress that it declined to pursue.

1 MR. PALOMINO: Yes.

2 Now turning to the realism argument raised by LILCO,
3 that doesn't withstand the test of logic either because at the
4 time of Three Mile Island, states and local governments had
5 the power to respond, and it was the way they responded that
6 created all the chaos and confusion and misinformation that
7 led to that situation, and that is why, when the Commission
8 said we have to change this, they said that what we want is a
9 preplanned evacuation plan which is a comprehensive one, a
10 cooperative one, and one which can achieve the objective.

11 Now, the ad hoc responses that they are talking
12 about that might be made by the state are the same thing in
13 Three Mile Island. They wouldn't solve the situation. They
14 are not comprehensive and cooperative plans that eliminate the
15 problem; they are sort of formulas for chaos that occurred at
16 Three Mile Island.

17 And he talks about communications. We don't even
18 have a RECS phone connected with them at our Disaster Planning
19 Commission. They say we do in their plan, but we don't, and
20 we put in evidence that we don't. And it's all based on
21 conjecture, what will happen in the future.

22 If you are going to base it on conjecture -- because
23 there is no evidence in the record to show what would happen
24 or to evaluate it, to show that it would be an adequate
25 response or that we would be implementing their plan.

1 They talk about Cohallen's order was nullified, and
2 this letter adds nothing to it, really. He says that he will
3 gather information. You know, we have 30,000 pages of
4 information, of sworn testimony of all the County's witnesses,
5 and they say this plan is not workable. So now he is going to
6 gather information to find he is going to be able to cooperate
7 with them.

8 The fact is if you are going to conjecture, maybe
9 the Governor will remove Cohallen as County Executive next
10 month for misfeasance in office. You talk about conjecture.
11 Our DOT people took a survey which we wanted to introduce in
12 evidence and couldn't saying they wouldn't respond in an
13 emergency if the state is not cooperating. They are not paid
14 to go into a zone where there is a nuclear accident.

15 It's all conjecture. And they talk about making it
16 available for cooperation. It's one sided. It's like a
17 conspiracy of one. Nobody is cooperating. So that the notion
18 that they can do this or that they are obviating the problem
19 of having to show the legal ability to implement this plan as
20 a coordinated, comprehensive and effective plan is outlandish.

21 As a matter of fact, Judge Geiler -- they raised
22 this argument before him, and he ruled that LILCO doesn't have
23 the power to exercise any laws, and the State and the County
24 couldn't delegate them to them as a private -- these sovereign
25 powers as a private corporation.

1 JUDGE EDLES: Let me just pursue that. Enlighten me
2 on state law. The State, for example, cannot hire private
3 police officers to do certain of their functions if they go
4 out to -- I don't know, whatever, Shea Stadium or Yankee
5 Stadium to direct traffic around the stadium? The state is
6 not empowered by law to have private police officers, for
7 example, do things like that?

8 MR. PALOMINO: Not exercising sovereign powers. If
9 they wanted them, they would have to appoint them because
10 that's a sovereign power. Under the Public Officers Law, they
11 would have to be appointed to exercise a sovereign power.
12 They could hire them to do other things, but not exercise
13 sovereign powers. And also, they are a private corporation.
14 They are limited by their charter. Their charter doesn't
15 give them the right to exercise any of these powers. So that
16 --

17 JUDGE EDLES: Was that a part of Judge Geiler's
18 ruling, that their corporate charter precludes them from doing
19 this?

20 MR. PALOMINO: No. It also ruled the State and
21 County and local governments would be violating their law if
22 they attempted to delegate them as a private --

23 JUDGE EDLES: Yes, but I don't recall that Justice
24 Geiler discussed LILCO's own corporate authority to do this in
25 the interest of getting the plant run.

1 MR. PALOMINO: Well, he pointed to them as a
2 corporation, yes. I think he talked about they are limited by
3 their powers, and he talked about the delegation of power only
4 by the state to local governments and not to private
5 corporations.

6 Also, if you want to conjecture, the Long Island
7 Expressway is the main evacuation route. That is now
8 patrolled by the County Police. We could change that to State
9 Police without any legislation, so that when they talk about
10 realism, they ought to get in the real world and see what it's
11 like because -- but there is none of this in the record, no
12 way to assess it, no way to establish its inadequate plan.

13 JUDGE EDLES: But by the same token, as a matter of
14 realism, we can proceed, I assume, from the proposition that
15 in the event of a real emergency, that it may be
16 uncoordinated, it may be misguided, but the State of New York
17 and the County are not simply going to stand by and let the
18 people fend for themselves.

19 MR. PALOMINO: You could, and you would probably be
20 right, but that wouldn't be a basis for granting a license
21 because they have to show as a condition precedent that they
22 have this adequate coordinated plan and the legal authority to
23 operate it.

24 JUDGE WILBER: Could I ask a question on Contention
25 92? I believe it is the State. There were, I think, four

1 areas where they said the State participated. Was there any
2 expansion of that in the course of the arguments? I don't
3 recall the four. They are related to the ingestion zone.

4 MR. PALOMINO: Oh, yes, yes, there is. They are set
5 forth in Judge Geiler's opinion where the state has power.

6 JUDGE WILBER: No, I'm saying that they pointed out
7 that there are four areas: specifically, the interdiction of
8 foodstuffs, the sampling, protective action recommendations,
9 and one more. These were the four they said the State did.

10 MR. PALOMINO: No, you said Contention 92 -- oh,
11 yes, deals with whether or not there is a state plan, and site
12 specific to Shoreham, relating to these, and there is none.

13 JUDGE WILBER: But didn't they go on and say that
14 what LILCO was doing was acceptable --

15 MR. PALOMINO: No.

16 JUDGE WILBER: -- on those four areas? I thought
17 they ruled that they had found LILCO's performance in these
18 four areas was acceptable.

19 MR. PALOMINO: I don't see how, if they are the
20 areas I'm thinking of. They talked about condemning
21 contaminated food supply.

22 JUDGE WILBER: No, they didn't. They talked about
23 buying it.

24 MR. PALOMINO: Yes, but buying it isn't the same as
25 condemning it, no, but --

1 JUDGE WILBER: That's what I'm getting at.

2 MR. PALOMINO: In the event of emergency if you have
3 contaminated food, are they going to run around the whole
4 county negotiating with people for price? That's why --

5 JUDGE WILBER: I'm asking you were there more than
6 those four areas? As I recall, the Board said that LILCO was
7 performing satisfactorily in those four areas, and I don't
8 recall you saying that this is not true. I don't recall you
9 saying that there are more areas. So I'm very curious about
10 where I should look on 92.

11 MR. PALOMINO: I just dealt with 92 generally
12 because they don't raise it here, really.

13 JUDGE WILBER: That is one of their appeals, I
14 believe.

15 MR. PALOMINO: They are not contending it now, I
16 don't think.

17 JUDGE WILBER: Pardon?

18 MR. PALOMINO: It was whether or not there was a
19 state plan, and they said they are dealing with -- they are
20 saying there is no evidence to support, that it was a
21 non-evidentiary ruling, but they had the burden of showing
22 there was a state plan to accomplish these.

23 JUDGE WILBER: But there are no more than those four
24 areas; is this correct?

25 MR. PALOMINO: I really don't know. I will let

1 Ms. Letsche -- because she handled that at the trial.

2 JUDGE WILBER: All right, fine.

3 The other point was I believe one of the County
4 letters said that the State took over beyond the ten-mile
5 limit; is this correct? That their activities were limited to
6 outside the ten miles?

7 MR. PALOMINO: There are certain functions, like
8 protecting the water supply and so forth, yes. The County is
9 limited to ten miles. They don't have any power beyond their
10 territorial --

11 JUDGE WILBER: No, they were saying that the State
12 did not go within the ten miles. I'm a little curious if this
13 is right, if I understood what they said in their letter
14 correctly.

15 MR. PALOMINO: I don't know what the County said in
16 that letter. I do know the State can operate within the
17 EPZ. I gave an example, the Long Island Expressway. We can
18 displace the County Police with State Police at whim.

19 JUDGE ROSENTHAL: Thank you, Mr. Palomino.

20 All right, Mr. Brownlee.

21 Now, how are you dividing the 25 minutes between
22 yourself and Ms. Letsche?

23 MR. BROWNLEE: Ungallantly, I am taking almost all
24 of it.

25 JUDGE ROSENTHAL: All right. I will leave it to you

1 to keep track of your time so that you leave something for
2 Ms. Letsche and you are not, therefore, too ungallant.

3 MR. BROWNLEE: All right.

4 For the record, my name is David A. Brownlee. I
5 appreciate the Board's indulgence in what has been a difficult
6 period for those of us who have represented the County, and I
7 appreciate your willingness to hear me this afternoon.

8 JUDGE EDLES: Mr. Brownlee, I would like to take up
9 with you the matter that I raised earlier, and which I think
10 Judge Rosenthal discussed a little bit, the preemption of the
11 County resolutions themselves.

12 Do you agree that those were not embraced within
13 Justice Geiler's decision?

14 MR. BROWNLEE: I do, and in fact, that is the first
15 point that I wanted to speak to, Mr. Edles. They were not
16 embraced by Judge Geiler's decision but they were embraced by
17 Judge Altimari's decision. The County and Mr. Cohallen were
18 sued --

19 JUDGE EDLES: I'm familiar. That is the Citizens
20 for Orderly Energy. I am familiar with the case.

21 MR. BROWNLEE: Yes, sir. And the issue there is
22 precisely whether the County resolutions were preempted by the
23 Atomic Energy Act.

24 JUDGE EDLES: Am I correct that Judge Altimari's
25 decision preceded from the premise that these were not

1 predicated on health and safety-related matters?

2 MR. BROWNLEE: No, sir. I don't think that's
3 correct at all. He had the matter before him on motion to
4 dismiss, and precisely that argument was laid out at great
5 length in a speaking complaint. The issue with respect to the
6 resolutions and the preemption thereof is virtually a
7 conundrum because normally what you have in terms of
8 preemption is some issue of the State or local government
9 intruding into an area which they are not permitted to enter,
10 and here what you have are essentially resolutions founded on
11 the County's constitutional safety, health and welfare powers,
12 which says we are not going to get into this area, we are not
13 going to adopt a plan.

14 The question that was before Altimari was is that
15 preempted, and his answer was categorically, no, it is not
16 preempted, and that decision is conclusive of the issue with
17 respect to the resolutions and is, I submit, binding under res
18 judicata on this Board.

19 The issue of the resolutions, although it obviously
20 bears upon the total package that is in front of this Board,
21 was never litigated to or never presented to the ASLB, and it
22 seems to me necessary to bring into focus what really is at
23 issue -- and I submit the resolutions are not at issue in this
24 matter -- those things which are not at issue and those things
25 which are at issue.

1 JUDGE EDLES: Could I ask you, then, to turn your
2 attention for a moment to the Silkwood case? Do you agree
3 with counsel for the Applicants that it is really kind of a
4 support case not really related to the general problem that we
5 are dealing with here?

6 MR. BROWNLEE: No, not in the least.

7 JUDGE EDLES: Okay, tell me why.

8 MR. BROWNLEE: I think that there is some unclear
9 language in Pacific Gas, and I think that Silkwood cleans up
10 the situation. It says quite clearly that in that case, even
11 in the context of conduct which, as you said in a question to
12 Mr. Christman, has as its sole intent to influence the conduct
13 of an operator of a nuclear facility, that conduct, if it
14 arises in a traditional area of State Police powers, is not
15 preempted unless there is a clear showing of congressional
16 intent to preempt.

17 There was no such showing in that case, really for
18 two reasons. One was that in a general sense, Congress was
19 aware that tort remedies were out there, and the Court said
20 that there was no evidence that Congress has considered
21 getting rid of punitive damages.

22 This case is, if you will, much stronger, from our
23 point of view, and much more difficult from LILCO's point of
24 view because it's an area in which Congress looked at the
25 precise problem with a greater level of definition and clarity

1 than did Congress with respect to tort remedies. It looked at
2 an area which was classically a traditional area within the
3 State Police powers, and it decided that it would not intrude
4 upon the State sovereignty in that area.

5 JUDGE EDLES: So what was the purpose for calling
6 for utility plans at all? It must have known that it could
7 not have solved the problem for LILCO in New York State. In
8 other words, it enacted the law knowing it was a useless act
9 certainly insofar as New York State was concerned?

10 MR. BROWNLEE: Well, I don't know that it knew that
11 --

12 JUDGE EDLES: Or it agreed with you folks.

13 MR. BROWNLEE: Indeed, LILCO's view, of course, is
14 that they have such authority under State law, and they
15 continue to assert that position. But I think that either you
16 or Mr. Rosenthal made reference to a congressional compromise,
17 and I think that is exactly what it was. You had the Senate
18 -- you had a clear consensus after TMI that this is
19 unsatisfactory, there must be a plan and a plan that is
20 subject to litigation, to review, to evaluation and to
21 approval or disapproval.

22 That was a given, and that view was put very
23 strongly in the Senate, and the Senate's response was we will
24 have a State obligation to submit a plan, and there was a
25 proposal for a Federal fallback planning role, which was

1 defeated, and it was defeated precisely because Congress was
2 not willing to intrude upon what they recognized was an area
3 of traditional state sovereignty in the offsite area.

4 Everyone knew going in that this was an area in
5 which state and local governments had traditionally acted, and
6 they were not willing to inject the Federal Government. When
7 it got to the House, the House wasn't even willing to go so
8 far as to say there must be a plan. They said the NRC must
9 develop standards, it must analyze the plans that are out
10 there and report back to Congress in terms of whether further
11 legislation is needed.

12 When it got to the conference, the Senate was
13 unwilling to recede from its position that there must be a
14 plan. There was concern that such a provision would make it
15 impossible if a state either acted noncompliantly or did not
16 act at all, that the utility would be estopped right there;
17 and to give the utility some room to maneuver, not a guarantee
18 that they could meet the licensing required, but some room to
19 maneuver, Congress said we will allow the NRC to consider a
20 plan that a utility presents and determine whether that plan
21 is adequate.

22 Now, obviously one standard about adequacy is that
23 it can be --

24 JUDGE ROSENTHAL: Is it ever possible to have an
25 adequate plan without somebody being called upon to exercise

1 what would be generally regarded as police powers?

2 MR. BROWNLEE: I think it is a question of state
3 law, and I'm not in a position --

4 JUDGE ROSENTHAL: No, I'm not getting to the
5 question of state law; I'm just saying could you have a plan
6 that would pass NRC muster without somebody, whether it is a
7 state official, local official, utility or whatever,
8 exercising police powers? Can you have a plan where nobody is
9 performing what would be generally regarded as the exercise of
10 a police power?

11 MR. BROWNLEE: My instinct on that would be no.

12 JUDGE ROSENTHAL: That would be my instinct, too, so
13 --

14 MR. BROWNLEE: And I would say further that the
15 legal authority issue is not different in the case of a
16 utility plan from in the case of a local plan. That is, if a
17 local government submitted a plan in cooperation with a
18 utility purporting to exercise certain functions which had
19 been reserved by state law to the states, shall we say, you
20 would have a legal authority question in that case. You have
21 the same circumstance here.

22 JUDGE ROSENTHAL: Ah, but the point I am getting at
23 is this. If the plan in order to be viable as a matter of
24 fact requires the exercise by somebody of police powers, and
25 if, as in New York and most states, perhaps all states, police

1 powers cannot be willy-nilly assumed by private corporations,
2 then it would follow, I would think, that this was an entire
3 rubber sandwich that was being handed out by the Congress when
4 it said consider utility plans, because the utility plan by
5 definition would fail.

6 Now, I would have thought myself that in calling
7 upon the Commission to consider or at least leaving the road
8 open for the consideration of the utility plan, the Congress
9 wouldn't have done it if they thought that this was simply
10 setting up an idle exercise.

11 MR. BROWNLEE: Well, frankly, it is not clear to me
12 exactly how much focus Congress gave on the implementation
13 problem. What is clear to me is that Congress gave a great
14 deal of focus on their unwillingness to intrude upon state
15 prerogatives, and it is clearly a much more severe intrusion
16 upon state prerogatives to confer upon a private corporation
17 public governmental powers than it is to simply say the state
18 must act and must come forward with a plan, a matter which, as
19 the colloquy a little bit earlier suggests, entails some
20 serious policy questions and, I suspect, Garcia
21 notwithstanding, some serious Tenth Amendment questions.

22 So that you have a situation where Congress clearly
23 does not go Step A, and I submit what LILCO is asking you to
24 do is say that Congress, in the context of an NRC
25 authorization act, not in the context of the Atomic Energy

1 Act, has not gone to Step A but has gone to about Step G.

2 JUDGE ROSENTHAL: Is it true that in the real world,
3 if we accept your position, the Long Island Lighting Company
4 will not be able to operate the Shoreham plant because of
5 judgments made by the County and/or State with respect to the
6 radiological health and safety hazards associated with this
7 plant's operation?

8 MR. BROWNLEE: No, I think that is not the case.

9 JUDGE ROSENTHAL: Will you explain to me why it is
10 not?

11 MR. BROWNLEE: Surely.

12 JUDGE ROSENTHAL: It seems to me that the initial
13 decision not to participate was based solely upon the County's
14 premise that the radiological health and safety of the public
15 could not be adequately protected in the event of an
16 accident. Am I wrong that that was what motivated that
17 decision? If I'm right about it, it would seem to me -- I
18 mean you can go through a lot of formalisms and legalisms, but
19 it seems to me the real world is that you follow that chain
20 down and these people are not being able to operate that
21 plant, under your thesis, because of that County decision as
22 to radiological health and safety hazards.

23 MR. BROWNLEE: I think the real world is that there
24 are two quite different questions. One is: Did the County
25 have a duty to engage in planning? And neither the Commission

1 nor Congress has ever indicated that it does, and there is no
2 basis for the assertion that it does. And concomitantly with
3 that: Are the County resolutions reflecting a determination
4 not to act preempted? And that issue has been resolved for
5 the purposes of this proceeding by Judge Altimari.

6 JUDGE ROSENTHAL: Did the Judge's decision discuss
7 the State of Minnesota decision on the radiological health and
8 safety --

9 MR. BROWNLEE: Yes, sir.

10 JUDGE ROSENTHAL: It did. And what was his
11 conclusion?

12 MR. BROWNLEE: His conclusion was that the most
13 relevant authority was Pacific Gas and Silkwood, and applying
14 Pacific Gas and Silkwood, the resolutions were not preempted.

15 JUDGE ROSENTHAL: Why? Because the County's
16 decision wasn't based upon health and safety considerations?

17 MR. BROWNLEE: Because the County's decisions did
18 not involve regulation of radiological health and safety in
19 the operation of a plant. It involved nonaction. But the
20 real question is: What are the statutes which are the basis of
21 the preemption claim here? And those are state statutes which
22 have absolutely nothing to do with radiological health and
23 safety.

24 JUDGE EDLES: Right. And I'm really not quarreling
25 at the moment with the notion that those state statutes which

1 Justice Geiler dealt with are really perhaps outside of our
2 purview at the moment, his construction of state law. But I
3 am intrigued by this notion that you are suggesting that Judge
4 Altimari's decision now is stare decisis and thus binding on
5 us, presumably -- res judicata, not stare decisis -- and then
6 binding on us. I'm not sure why that should be.

7 Has there been an agreement among the parties to
8 accept his ruling on the preemption the way there sort of is
9 for Justice Geiler's decision or his construction of state
10 law?

11 MR. BROWNLEE: No, but my understanding, Your Honor,
12 is that a decision of a court of competent jurisdiction
13 litigated between the parties as this was between LILCO and
14 ourselves is res judicata with respect to that issue until
15 reversed, and it is res judicata notwithstanding the pendency
16 of any appeal.

17 JUDGE EDLES: Has Judge Altimari's decision been
18 appealed?

19 MR. BROWNLEE: It was appealed when the County
20 Executive issued Executive Order One. The plaintiffs, which
21 were citizens, moved to discontinue the appeal without
22 prejudice to reinstitution of the appeal, and they moved to
23 reinstitute it, I believe, a week or two ago.

24 JUDGE EDLES: So in due course, the Second Circuit
25 will decide it?

1 MR. BROWNLEE: In due course the Second Circuit will
2 decide, yes, sir.

3 But for the moment, the resolutions have been upheld
4 in Court. I take it from the colloquy, unless it was by way
5 of devil's advocacy in your comment, that I need not spend
6 much time on the specific state statutes. I think what really
7 prohibits this plan are things like the State Constitution,
8 the Municipal Home Rule Law, those statutes which allocate
9 governmental powers.

10 And with respect to a question that you had earlier,
11 Mr. Edles, it is the case that the corporate charter issue was
12 before Judge Geiler. The argument was made that under the
13 business corporation law and the transportation corporation
14 law, LILCO had the power to do this. Judge Geiler found that
15 a corporation has only those powers that it has been given,
16 and those powers did not include governmental powers of --

17 JUDGE EDLES: I was only inquiring to get some
18 information, but I am not here to second guess Justice Geiler
19 on issues of state law.

20 MR. BROWNLEE: I understand, and I am not speaking
21 in that connection, but that is an issue was litigated and
22 decided and is embraced by that opinion.

23 JUDGE EDLES: Okay, thank you.

24 MR. BROWNLEE: I think quite simply that the Board
25 probably has our preemption argument in terms of Pacific Gas

1 and Silkwood. You have one case which validates a total
2 moratorium on nuclear power plants which is accepted (a)
3 because the Court finds it does not, notwithstanding the
4 prohibition, regulate construction or operation, and (b)
5 because it has a nonsafety purpose. That is precisely the
6 situation in our case except that the statutes have a more
7 indirect impact on the proceeding than did the moratorium.

8 Silkwood we have discussed in terms of validating
9 state awards because of the lack of a congressional intent.

10 Let me speak just quickly to congressional
11 intent. Obviously, the Act itself is silent on emergency
12 planning. It is even more obviously silent on the allocation
13 of governmental powers and on corporate powers, and I simply
14 can't imagine how this Board or any other body can find a
15 clear congressional purpose to preempt embodied in a statute
16 which does not deal with the subject closest at hand or the
17 subjects that the statutes really address.

18 With respect to the Authorization Act, we have
19 talked about the concept of penalty and what I regard as a
20 clear policy choice which Congress made, an intrusion upon
21 state sovereignty that they were unwilling to make, and I
22 would only in that connection call your attention specifically
23 to Chairman Palladino's comments in the context of the 1984-85
24 Authorization Act, which are quoted, I believe, in our brief
25 at page 33 and 34, in which he went before Congress and said,

1 look, we have a problem here, and that problem is how does a
2 utility derive the authority to implement a plan? We think
3 this is something you should address.

4 Now, his solution to it -- first of all, his
5 suggestion presupposed that there was no such authority of the
6 sort that is now claimed, but his solution to it was Federal
7 implementation, not utility implementation, and
8 notwithstanding the fact that he squarely put that issue in
9 the context of the Shoreham proceeding, obviously, before
10 Congress, Congress chose not to act on it, and it seems to me
11 they have left in place the situation that existed at the time
12 of 1980 precisely because they have been unwilling as a matter
13 of policy to intrude upon state sovereignty, and that --

14 JUDGE ROSENTHAL: You have got five minutes left on
15 your side, so Ms. Letsche, you are now in that last five
16 minutes. How much of it do you wish to give to her?

17 MR. BROWNLEE: I would only say, then, with respect
18 to realism, that I think LILCO's realism position is simply
19 out of touch with reality. What comes out of TMI is that
20 there must be a plan which can be evaluated. They are asking
21 you to sign on to a plan which can't be tested on the
22 hypothetical ground that something may happen out there.

23 Mr. Cohallen has said, in Executive Order 2, which I
24 think has been put before you, that he will consider the plan
25 and he will report to the Legislature. As Mr. Palomino

1 recognized, the people that he is going to seek counsel with
2 have already appeared before the ASLB in sworn testimony and
3 stated that the plan is not adequate.

4 So I don't see how one can realistically say that
5 gives one entitlement to say that a coordinated preplan is
6 before this Board which can be the basis of a licensing
7 decision.

8 JUDGE ROSENTHAL: Thank you, Mr. Brownlee.

9 Ms. Letsche.

10 MS. LETSCHE: I think I really only have two or
11 three minutes of things to say, and in particular, unless the
12 Board has questions on Contention 11, which I think is covered
13 in our brief, and Mr. Christman didn't spend too much time on
14 it in his presentation, and I will be happy to answer any
15 questions on that contention, obviously, but if not, I will go
16 directly to the State plan, Contention 92, which Mr. Palomino
17 referenced and suggested I might be able to clear up your
18 question, Judge Wilber.

19 It is true that in the Board's decision they mention
20 the fact that four specific functions -- I am quoting from the
21 PID -- normally performed by the State at other plants during
22 a radiological emergency are within LILCO's physical
23 capability in a radiological emergency at Shoreham. That's at
24 page 369 of the PID.

25 In the County's appeal, that finding of the

1 Licensing Board is going to be challenged; but separate and
2 apart from that, the point that the Board made in its finding
3 on Contention 92 is very different. Contention 92 makes two
4 allegations. Number one, there is no State plan, no
5 preparedness on the part of the State with respect to the
6 Shoreham plant covering those four functions or covering
7 anything else.

8 Number two, the Contention says that because of
9 that, LILCO cannot comply with the NRC requirement and that in
10 NUREG 0654 for an integrated, coordinated approach to
11 emergency response. And then the Board goes on to say that
12 despite the fact that it believes LILCO has the physical
13 capability to do those four functions, there can be no finding
14 that there would be any State response, there can be no
15 finding that there could be any kind of coordinated,
16 integrated response because there is no fact in the record
17 that could support that finding.

18 JUDGE WILBER: But Mr. Palomino said it was a
19 conspiracy of one, so who do you coordinate with?

20 MS. LETSCHE: That is exactly the point the Board
21 made.

22 JUDGE WILBER: If there are no participants, why
23 can't LILCO do it and do it very well without any
24 coordination?

25 MS. LETSCHE: Well, I think what the Board said,

1 reading NUREG 0654, is that there is an affirmative
2 requirement that there be coordination between the
3 governmental authority, in this case the State --

4 JUDGE WILBER: Between the participants.

5 MS. LETSCHE: Well -- excuse me -- between the
6 State, who has far more authority, commitment, resources to
7 perform those functions than LILCO has. There has to be
8 coordination between them and any other participants. In this
9 case, the only one is LILCO. Because LILCO has said we're
10 willing to cooperate doesn't mean that there can be any
11 cooperation. It takes two to have the cooperation.

12 JUDGE WILBER: I understand, but the way I read the
13 Board's decision, there wasn't any need for cooperation; that
14 LILCO could accomplish this, and I didn't see that challenged
15 on authority grounds. I don't believe you said that they
16 don't have the authority to do what the Board found that they
17 could do.

18 MS. LETSCHE: Well, I think if you look at the first
19 ten contentions -- I don't have them here in front of me --

20 JUDGE WILBER: Contention 7 is the one.

21 MS. LETSCHE: Okay, that talks about the State
22 functions, and I think, in fairness to the Licensing Board, in
23 doing the individual contentions separate from -- Contentions
24 1 to 10 in its PID, it didn't deal with the legal authority
25 issues when it was talking about the fact questions of, in

1 this case, ingestion pathway activities. So the Board, when it
2 said, here, we found they have the physical capability, wasn't
3 talking about whether they had the authority.

4 They do say in their discussion on Contention 92,
5 however, that LILCO lacks the commitment, resources and
6 decision-making -- I'm reading from page 371 of the PID --
7 decision-making capability and authority of the State, and
8 that is the reason why it found, and I'm quoting, that "the
9 absence of the State participation constitutes a serious
10 deficiency in the plan."

11 And the reason the Board made that --

12 JUDGE WILBER: But wasn't that predicated on their
13 doubt? It says we have a great deal of trouble accepting that
14 that is all that a state might do in a genuine emergency, and
15 then they started going into the greater resources and greater
16 authority. And see, that's why I was asking Mr. Palomino, are
17 these the only four things that the State does? And evidently
18 --

19 MS. LETSCHE: Well, and I think Mr. Palomino was
20 correct that that isn't true, that it is those four things.

21 JUDGE WILBER: Then these are the only things that
22 are in the plan, though; is that correct?

23 MS. LETSCHE: I think, and I really can't read what
24 was in the Board's mind when it talked about four things. I
25 mean it is true that here in the PID in this section they

1 mention these four functions. I'm not sure what the Board
2 based that particular assertion on.

3 JUDGE WILBER: I think it was the testimony of a
4 LILCO witness.

5 MS. LETSCHE: It might have been; but I think what
6 the Board recognizes and what I think everyone recognizes is
7 that when you have a state involved in an emergency response,
8 the state is going to be involved in lots of levels. They
9 might be primarily involved in ingestion pathway things more
10 so than other areas, but the point made in NUREG 0654 is that
11 you need to have a coordinated, integrated response involving
12 all the governmental authorities and the utility, and that is
13 what was raised specifically in Contention 92 and why the
14 Board made the finding that it did on that contention, because
15 that precise issue was before it as a factual matter in this
16 case.

17 JUDGE ROSENTHAL: Your time has expired.

18 MS. LETSCHE: Okay, thank you.

19 JUDGE ROSENTHAL: We will take a ten-minute recess,
20 and then we will hear from the County attorney.

21 I would like all of the participating counsel to be
22 back in ten minutes.

23 [Recess.]

24 JUDGE ROSENTHAL: All right, Mr. Kelley, you may
25 proceed.

1 MR. KELLEY: Mr. Chairman and members of the Board,
2 at the beginning of today's session, you indicated that there
3 might be a void in the record in connection with Judge Brown's
4 decision.

5 I have here four copies of Judge Brown's Order and
6 his decision. If you would, please, I would like to hand it
7 up to the Bench, if I might.

8 I take it that all Counsel have copies of it.

9 [Counsel Kelley distributes the document to the
10 Board members.]

11 MR. KELLEY: If it please the Board, before
12 proceeding to address the issues, I would like to reaffirm two
13 basic principles that the county continues to press, not only
14 to this Board, but to the NRC as well, and they are:

15 One, it is the continued policy of Suffolk County,
16 as set out by Resolutions Nos. 456-1982 and 111-1983 that no
17 radiological response plan for a serious nuclear accident at
18 Shoreham could protect the health, welfare, and safety of
19 county residents, and therefore no radiological emergency plan
20 will be adopted by the county.

21 And number two, the county's position continues to
22 be that in view of the fact that no local plan will be
23 adopted, the plant itself should not receive a license to
24 operate at full power. This is the stated policy of the
25 county, and the County Attorney's office will continue to

1 assert that position before all appropriate administrative
2 boards and courts.

3 Now with reference to the issues before the Board
4 today, it is the county's position that the April 17th PID,
5 which rejected LILCO's various arguments, stating that
6 LILCO cannot overcome the conclusion that activities it seeks
7 to perform, as specified in Contentions 1 through 10, are
8 unlawful. It is a valid decision and amply supported by the
9 record below.

10 It seems to me, the position of the Intervenor here
11 today is fairly simple. The lower Board has made a decision.
12 All we have to do is defend it. The burden is on LILCO to
13 show it was incorrect.

14 I would like to state for the record that, with
15 regard to this issue of preemption, the County Attorney's
16 office is in step with the other two Intervenor's positions
17 heretofore put on the record, the position of the state and
18 the position of the Kirkpatrick representatives.

19 LILCO argues basically --

20 JUDGE EDLES: Let me ask you this, Mr. Kelley, if I
21 might.

22 Could you address just for a moment Mr. Brownlee's
23 suggestion that we are without authority to second-guess Judge
24 Altimari's decision?

25 MR. KELLEY: I believe that is so, Your Honor. When

1 I first heard it mentioned, I reached down and got out my PID
2 and made the reference back to the footnote that the lower
3 Board made reference to and tried to recall the specifics. It
4 is my recollection that Judge Altimari did find that these
5 resolutions were not preempted by Federal law, and that he
6 related the issue of the -- he related it to the radiological
7 health and safety references, but to the construction of the
8 plant, and they drew a distinction between the evacuation
9 plan. That's my recollection of the Judge's decision.

10 I also think it s res judicata.

11 JUDGE EDLES: Okay.

12 MR. KELLEY: I have two pages here, if it please the
13 Board, of the basic arguments as to what should be looked at
14 in order to determine whether or not preemption exists. I
15 know the Board is very familiar with it. I don't think I'm
16 going to take up the time of this Board to go through each and
17 every item that we have gleaned from the various --

18 JUDGE EDLES: Well, maybe from my perspective -- my
19 colleagues can tilt you in another direction, if they care to
20 -- why don't you again, then, reiterate where you disagree
21 with any of the positions that might previously have been
22 advanced by Suffolk County, which are now advanced by the
23 state?

24 MR. KELLEY: Okay. I think that on the preemption
25 issue, we are in step, as I said.

1 JUDGE ROSENTHAL: What about on realism?

2 MR. KELLEY: On the immateriality argument, we are
3 in step.

4 JUDGE ROSENTHAL: Realism?

5 MR. KELLEY: And on the realism, if I can jump right
6 to that, I think we have a set of developments that may
7 impact.

8 JUDGE ROSENTHAL: Well, now, are these developments
9 reflected in the existing record?

10 MR. KELLEY: Yes, they are, Your Honor. May I just
11 make reference to them?

12 Since the PID of April 14, 1985, certain other
13 events have occurred that may or may not impact on the realism
14 argument.

15 JUDGE ROSENTHAL: Oh, then these are not
16 developments in the record?

17 MR. KELLEY: Oh, yes. Oh, I'm sorry. You mean in
18 the PID record?

19 JUDGE ROSENTHAL: No. I'm talking about the record
20 that is up before us. We have this proceeding on the record
21 that undergirded the PIDs on appeal. Now if these are
22 subsequent developments, I mean, they might be very
23 interesting, but I don't know that we could give much weight
24 to them in terms of our review of the PID.

25 MR. KELLEY: All right. When I said they were part

1 of the record, what I meant was, these documents have been
2 sent in. I did not refer to the fact that they were part of
3 the PID record.

4 But they are developments, nonetheless, and if I may
5 just state them for the record:

6 Number one, on June 22, 1985, the Suffolk County
7 Executive, responding to a letter from W. Taylor Reveley, III,
8 one of Counsel for LILCO, with respect to the issue of whether
9 the County Executive would respond in the event of a
10 radiological emergency at Shoreham, the County Executive
11 replied that he would so respond, quote, "to the best of my
12 ability and in accordance with the duties and obligations
13 placed upon me by Article II.B of the executive law."

14 Number two, on July 9, 1985, the New York Court of
15 Appeals, by a 4-to-3 vote, upheld the trial court's
16 invalidation of Executive Order No. 1-1985, but the Court of
17 Appeals majority opinion also included the following passage
18 in their decision, quote: "If the challenged Executive Order
19 is merely a vehicle for the gathering of information to enable
20 the County Executive to perform his statutorily mandated
21 function of taking, quote, 'an active and personal role in the
22 development and implementation of disaster plan preparedness
23 programs,' close quote, with a cite of the executive law of the
24 State of New York, and giving, quote, 'advice and assistance,'
25 close quote, to the local legislative body or other duly

1 appointed planning authority" -- and once again, another
2 executive law cite -- "it is clearly authorized by the
3 statute," close quotes.

4 JUDGE EDLES: But in terms, Mr. Kelley, of the
5 operative activity -- namely, this County Executive's
6 participation in some type of coordinated effort in advance --
7 I gather that the Court of Appeals decision still precludes
8 that type of activity.

9 MR. KELLEY: It depends on what you mean, sir.
10 My next point, I think, might address it.

11 JUDGE EDLES: Okay.

12 MR. KELLEY: Point 3, pursuant to the aforementioned
13 language, the County Executive has issued Executive Order
14 No. 2 of 1985. Basically, the Order tracks the language of
15 the Court of Appeals, and it indicates that from time to time,
16 the County Executive will direct county officials and the
17 Executive Branch of county government, and hence those under
18 the direct supervision of the County Executive to, quote,
19 "investigate, gather information, review, and evaluate such
20 radiological response plans for the Shoreham facility as may
21 be feasible to protect the health, wealth, and safety of the
22 residents of Suffolk County."

23 Now pursuant to that provision, the County Executive
24 has reappointed our Director of Planning and the Police
25 Commissioner to continue to review the various plans that are

1 around relating to the Shoreham facility.

2 He has also indicated that if, from time to time,
3 any other official must be appointed to that Commission, he is
4 prepared to make the necessary appointment.

5 JUDGE ROSENTHAL: Granting all of that, on what
6 basis could we now determine that in the event of a
7 radiological emergency, county and/or state policemen,
8 firemen, and other emergency workers not only would respond,
9 but would respond effectively? I mean, what in this record
10 would justify our making that determination -- both parts of
11 it -- one, that they would respond, and two, that that
12 response would be effective?

13 MR. KELLEY: Well, the answer to the first question
14 is that the County Executive is mandated by law to respond.
15 That's number one.

16 JUDGE ROSENTHAL: All right.

17 MR. KELLEY: Now as to the second question, that
18 becomes a little more difficult, and I'll tell you why, sir.

19 The county has plans in place for various types of
20 disasters. There are 39 agencies or departments of county
21 government, 38 of which are commanded by the County
22 Executive. These are the police, the fire, the health,
23 emergency medical services, et cetera. The only department of
24 county government that he does not have executive control over
25 is the county legislature.

1 JUDGE ROSENTHAL: Yes, we got that impression.

2 [Laughter.]

3 MR. KELLEY: There are roughly ten to eleven
4 thousand county employees.

5 I said earlier that there are various plans in
6 existence right now to deal with other types of disasters --
7 you know, earthquakes, floods, hurricanes, airplane crashes.
8 The county has a network of apparatus that can deal with these
9 disasters that I make reference to.

10 JUDGE ROSENTHAL: Do you equate a nuclear emergency
11 with those disasters?

12 MR. KELLEY: No, sir, I don't. This is why I'm
13 saying that it's very difficult for me to answer this Question
14 No. 2.

15 We find ourselves, in the county, in a legal anomaly
16 or a paradox. On the one hand, we have the State Court of
17 Appeals telling the County Executive that it is his duty to
18 plan for disasters. On the other hand, we have them upholding
19 the resolutions of the County Legislature, which say, "You
20 can't plan for this particular Shoreham -- if there's a
21 radiological incident at Shoreham."

22 So it's a very difficult line for me, as a
23 representative for the county, to walk in and try to explain
24 to this Board. All I can say is that I don't care who the
25 County Executive is down the line, I believe that he will

1 respond. The law, as a matter of fact, says that he is
2 allowed to use any assets or resources that he has at his
3 command.

4 There was a reference made earlier about, can the
5 police power be given to private people? The answer is no.

6 However, the Suffolk County Charter has a provision
7 that allows the Suffolk County Police Commissioner to appoint
8 special patrolmen in the event of problems. The Suffolk
9 County Sheriff has the authority under state law to appoint
10 Special Deputy Sheriffs to handle emergencies. So that there
11 is this type of power that can be utilized to enhance or
12 increase any type of disaster response force.

13 JUDGE ROSENTHAL: Can it be done on an expeditious,
14 ad hoc basis, the appointment of these Special' Deputies?

15 MR. KELLEY: As this Board may or may not know, I
16 was Police Commissioner in the Suffolk County Police
17 Department for four years, and I say, yes, it can be done
18 expeditiously.

19 I see my time is about running. May I just --

20 JUDGE ROSENTHAL: You've got about two more minutes.

21 MR. KELLEY: Thank you, sir.

22 We believe that the aforementioned developments
23 indicate that the County Executive would respond in the event
24 of an actual radiological emergency at Shoreham, that the New
25 York Court of Appeals has specifically recognized the

1 existence of statutorily mandated duties on his part in this
2 respect, that the court has refused to prescribe his taking
3 steps to gather information concerning any emergency response
4 plan, which may be in effect in such an event.

5 In conclusion, we state again for the record, that
6 the policy of the county continues to be that no radiological
7 emergency plan for response to an accident at the Shoreham
8 facility is feasible, and because of that position, the county
9 continues to oppose the issuance of the full-power license.

10 We further submit that the Licensing Board's
11 decision as to Contentions 1 through 10, the legal authority
12 issue, and Contention 92, the State Plan, which I did not get
13 around to comment on, and Contention 11, the conflict of
14 interest, should be affirmed.

15 JUDGE ROSENTHAL: Thank you, Mr. Kelley.

16 Mr. Latham, you have five minutes.

17 MR. LATHAM: Thank you, Chairman Rosenthal. I'm
18 glad I didn't decide to divide my argument as some of the
19 others did.

20 I'll try to be brief, and let me try to contribute
21 to the issues before the Board by drawing on some of the State
22 Court proceedings which are relied on in LILCO's reply brief.

23 Let me first address the difficult line or the
24 paradox which Mr. Kelley just referred to, because I don't see
25 that it's a paradox at all.

1 The Court of Appeals in its decision, to which he
2 referred, did nothing other than recognize the obvious, which
3 is to state that with regard to preplanning activities, if the
4 County Executive chooses to educate himself, he may do so, but
5 that he is charged with then taking that information to the
6 County Legislature, and the planning activity is something
7 which he may not engage in. That is a legislative function.

8 JUDGE EDLES: Okay. Define for me the difference
9 between planning and preplanning.

10 MR. LATHAM: I think that if one is gathering facts
11 which become a part of a coordinated, comprehensive planning
12 exercise, something which has been clearly recognized as a
13 function requiring the deliberation of a legislative body,
14 something which may require hearings, all of which the County
15 of Suffolk did, that is a planning exercise, as opposed to,
16 for example, the County Executive beginning to gather some
17 information on what he might do, so that he could present that
18 to the legislative body for deliberation. That's the kind of
19 distinction that I want to draw.

20 Now there's another observation that I want to make
21 with regard to the Doyle -- I'm sorry, not the Doyle -- the
22 Geiler decision, and that has to do with the legal authority
23 issues.

24 With regard to each and every function that is
25 involved in Contentions 1 through 10, Judge Geiler found that

1 LILCO did not have the legal authority to carry out those
2 functions. So as far as all of those Contentions are
3 concerned, we have a state law precedent that controls.

4 There is a lot of argument that has been presented
5 to you, particularly in the reply brief filed by LILCO, which
6 relies on either the Doyle Order or the Court of Appeals
7 decision.

8 First, may I ask whether or not the Board has a copy
9 of the Doyle Order? Has that been submitted?

10 If not, or to play it on the safe side, I would like
11 to hand up a copy of that Order. I think everyone has it.

12 [Counsel Latham distributes the document to the
13 Board.]

14 MR. LATHAM: This is a copy of the Order that was
15 entered by Judge Doyle. That is the law of the State of New
16 York. That Order, which obviously you can read on your own,
17 was affirmed without any modification by the Appellate
18 Division in the Court of Appeals, regardless of the dictum and
19 the other language which LILCO is reciting.

20 Now there is another issue which LILCO refers to,
21 and that is this notion of refusing to plan or preventing
22 planning, and I would draw your attention to the Court of
23 Appeals decision again in this case, where at the second page
24 -- and if I may briefly read with regard to the Executive law:

25 "Moreover, the use of the term 'is authorized' in

1 Section 23, Sub 1, unequivocally signals a legislative intent
2 that the preparation of a County Plan is optional, not
3 mandatory. The provisions authorizing the Chief Executive of
4 a county to act upon the declaration of a radiological
5 accident do not necessarily presuppose the existence of a
6 plan."

7 That is the law of the State of New York And the
8 notion that these resolutions in some fashion have been struck
9 down by the Court of Appeals decision, which is an idea that
10 LILCO is advocating, is absurd. The Order was upheld without
11 any modification.

12 Now with regard to the realism argument, very
13 briefly, first of all, I think that the position of the
14 Intervenors is that that argument is irrelevant. But since
15 LILCO insists on making it, let's focus on where it gets
16 LILCO, even if you assume that those notions are true.

17 Whether you take Executive Order No. 2, which was
18 just referred to, whether you take the June 26th letter or any
19 of the other documents that Mr. Kelley or LILCO has cited to
20 you, that gets the Long Island Lighting Company nowhere,
21 because there no factual record in front of you upon which you
22 can decide that the LILCO plan can be implemented or that you
23 can make a reasonable assurance with regard to the safety
24 questions. It is sheer speculation. So it is either
25 irrelevant, or even if you give them credit that those

1 arguments are true, it does not get them anywhere at all.

2 I think on that basis I'll conclude my argument.

3 JUDGE ROSENTHAL: Thank you, Mr. Latham.

4 All right, Mr. Turk?

5 MR. TURK: The Licensing Board's partial initial
6 decision presents a very highly unusual circumstance for your
7 review. It presents a circumstance where the Commission Staff
8 and the Licensing Board have found that LILCO's offsite plan
9 cannot be implemented under New York law, and further, that
10 Federal law does not preempt the state laws at issue here.

11 Notwithstanding the potential significance of these
12 conclusions, the Staff is recommending that you affirm the PID
13 with respect to its findings on Contentions 1 to 10 and 92.

14 JUDGE EDLES: Mr. Turk, could I ask a question?

15 Mr. Brownlee said earlier that the Federal
16 preemption issue has been decided by the Federal District
17 Court.

18 MR. TURK: I disagree.

19 JUDGE EDLES: Okay. Because I was wondering why we
20 were debating all of the Federal preemption questions here, if
21 Judge Altimari has already decided it.

22 MR. TURK: Well, there are two things to be kept in
23 mind.

24 First, Judge Geiler's decision was not premised upon
25 the county resolutions.

1 JUDGE EDLES: No. I'm talking about Federal Judge
2 Altimari's decision.

3 MR. TURK: I recognize that. The point I was going
4 to make is that Judge Geiler's decision still applies New York
5 law. There has been no determination yet whether those laws
6 are preempted by Federal law. And that is the issue before
7 you today.

8 What Judge Altimari's decision dealt with were the
9 county resolutions, which are not before you. And on those, I
10 would say that Judge Altimari took an unfortunate shortcut in
11 his reasoning, in that even though he may ultimately be found
12 to be correct, that the county cannot be compelled to engage
13 in emergency planning or to implement a plan, that doesn't
14 affect the prior question of whether or not the county
15 resolutions themselves are lawful under Federal law or
16 preempted under Federal law.

17 In our opinion, the resolutions themselves do
18 intrude into the regulation of radiological health and safety
19 issues, and if you are applying a very careful analysis of the
20 preemption laws, you would have to find that there is Federal
21 preemption of those resolutions.

22 Nonetheless, as I mentioned, that does not mean that
23 the county or state can be compelled to implement a plan or
24 that you override lack of implementation and find that LILCO
25 can implement the plan.

1 JUDGE EDLES: But as I was discussing earlier, if we
2 were to conclude that the county resolutions had been
3 preempted, that basically then throws the ball back to
4 whatever political in-fighting is going on. I mean, the
5 County Executive can try to proceed and do whatever he thinks
6 is consistent with his responsibilities. The County
7 Legislature can do what it thinks is necessary to try to pass
8 another resolution. But basically it's back, then, to the
9 elected official in Suffolk County, presumably, to thrash all
10 of this out.

11 MR. TURK: Well, certainly it will be back to them
12 to decide what to do. But in terms of whether the LILCO plan
13 is implementable and would provide reasonable assurance, that
14 issue is still before you, based upon the Licensing Board's
15 PID.

16 JUDGE ROSENTHAL: If the county resolutions were
17 grounded upon public health and safety, radiological health
18 and safety considerations, and therefore were subject to
19 preemption, why doesn't it follow that by then precluding
20 LILCO from providing the requisite services itself, the state
21 ran afoul of Federal preemption?

22 MR. TURK: The answer to that is that a distinction
23 has to be drawn between the laws of New York State and a
24 party's attempt to apply those laws to block the
25 implementation of LILCO's plan.

1 JUDGE ROSENTHAL: Now I would grant that the laws of
2 New York -- at least the laws which have been interpreted as
3 precluding private entities from exercising police powers --
4 are of general application, are they not?

5 MR. TURK: Yes, they are.

6 JUDGE ROSENTHAL: But is that the total answer?
7 Even if they are of general application, can they still be
8 brushed aside, if, in a particular application, they have the
9 effect of intruding upon the Federal province?

10 MR. TURK: I don't think so. I think that is
11 something which was at issue in PG&E, where even though the
12 state's purpose was not to regulate health and safety matters,
13 but instead was for economic reasons, even though that statute
14 could have precluded the development of a nuclear plant, the
15 Supreme Court still found that there is no preemption. And I
16 think the same would have to apply here.

17 JUDGE ROSENTHAL: Well, even though in this
18 instance, I think unlike PG&E, the particular state law comes
19 into play only because of some action which the county took,
20 grounded upon its determinations in the area of radiological
21 health and safety.

22 Does that make a difference?

23 MR. TURK: Not to my mind.

24 JUDGE ROSENTHAL: Why not?

25 MR. TURK: Well, first, I stated in PG&E, where you

1 have a proper purpose in the state's law, you don't really
2 have to look any further. You don't have to look to see how
3 the litigant may be applying it in a particular case because
4 --

5 JUDGE ROSENTHAL: Well, in the PG&E instance, was
6 there any decision that was made by the State of California
7 that has a radiological health and safety foundation? I mean,
8 everything they did, they did in the name of economics, didn't
9 they?

10 MR. TURK: Yes, they did.

11 JUDGE ROSENTHAL: Here we have got again the
12 underpinning of a determination that is grounded upon health
13 and safety considerations. In other words, we have a
14 double-barreled matter, don't we?

15 First, the county says, "We're not going to
16 participate in emergency planning. We are not going to
17 exercise our police powers." And that decision is based upon
18 health and safety considerations, radiological health and
19 safety considerations.

20 And then they say, "Okay, we're not going to do it,
21 and neither are you going to do it, because state law
22 precludes it." So they are using, are they not, radiological
23 health and safety determinations as a springboard for
24 precluding the operation of this plant? To be sure, they are
25 tunneling it through a state law of general application.

1 MR. TURK: That's true.

2 JUDGE ROSENTHAL: But can they do that? I mean, is
3 that state law of general application, can it be employed in
4 this instance, given the springboard?

5 MR. TURK: I would have to say yes.

6 JUDGE ROSENTHAL: Okay. You might like to elaborate
7 on that for me?

8 MR. TURK: Yes. I would answer in two parts.

9 First, the state laws in question are the ones which
10 say that the police powers are inherently governmental in
11 nature. Those laws themselves were enacted for proper
12 purpose. They did not invade radiological health and safety
13 determinations and are not preempted.

14 The second question of whether the county's
15 application of the law should be preempted really leaves you
16 -- even assuming that the application was preemptable -- for
17 instance, if the county had drafted a resolution which said,
18 "We will now bar the operation of this plant by applying prior
19 state laws" -- even if you could say that the resolution
20 itself had improper radiological purposes and was preempted,
21 you still are not in a position where you can say that
22 preemption would allow you to force implementation of LILCO's
23 plan.

24 JUDGE EDLES: That may be right. But that wouldn't
25 get back to the question of whether or not we could, under

1 preemption, strike as inconsistent with Federal law the
2 particular county resolutions. Then, as I suggested, it sort
3 of throws it back into the political arena, and what happens
4 then, I'm not really sure.

5 Is that right? In other words, I am not attempting
6 to undergird -- I'm not attempting, rather, to challenge Judge
7 Geiler's decision on state law grounds. I mean, I assume that
8 under his decision LILCO cannot now use its own troops to do
9 what are governmental functions.

10 I also recognize that, under preemption, I can't
11 order in LILCO to do what the state should be doing or could
12 be doing under its own governmental powers.

13 But why would that foreclose this Board, the
14 Commission, and ultimately perhaps the Court of Appeals from
15 concluding that, to the extent that for radiological reasons,
16 the county has decided to pass these resolutions ordering its
17 County Attorney not to do something, that those are precluded
18 under Federal preemption doctrine? And that's as far as we
19 go.

20 Now the players out there pick up the ball at that
21 point.

22 MR. TURK: I would agree with all that. And you
23 could go so far as to say that the county resolutions are
24 preempted, notwithstanding the District Court's decision.

25 JUDGE EDLES: And that doesn't solve LILCO's problem

1 in this case.

2 MR. TURK: That's correct.

3 JUDGE EDLES: That's right.

4 MR. TURK: That's correct. And that's the position
5 that we are taking.

6 JUDGE EDLES: Okay.

7 MR. TURK: Our position is basically that,
8 notwithstanding the potential significance of the Licensing
9 Board's decision, Federal law, as it is currently structured,
10 requires that absent a clear and manifest Congressional intent
11 to preempt state laws in this area, in the area of offsite
12 emergency planning, there is no such preemption. And you
13 can't arrive at an implementable plan.

14 JUDGE ROSENTHAL: Now I take it that your position
15 is that if, for example, Suffolk County decided that they
16 didn't want this plan within their borders for radiological
17 health and safety reasons, but they knew, because they have
18 read State of Minnesota, that they couldn't come out and say,
19 "No plant, because of radiological health and safety
20 considerations," but they came in and said, "Well, we're not
21 -- we're simply not going to commit our resources to an
22 emergency plan, and incidentally, LILCO, bad news for you.
23 Under state law, you can't run a plant either, because you
24 can't exercise police powers," that's all perfectly fine.

25 So really, the State of Minnesota doctrine is

1 meaningless. So that with a minimum amount of sophistication,
2 with an emphasis on the "minimum," a state or local government
3 can, in effect, bar a plan on radiological health and safety
4 grounds, just as long as when they get around to the bar, they
5 say economics, or they give no reason at all.

6 MR. TURK: Assuming that particular jurisdiction
7 would be correct, that state or local law precludes a
8 utility's implementation of a plan on its own, that's the
9 unfortunate result that now occurs --

10 JUDGE ROSENTHAL: Well, don't you think that's
11 probably true in most states, that without an express, at
12 least, state authorization, that a private entity can't
13 exercise police powers? Wouldn't that make sense?

14 MR. TURK: LILCO makes that assertion in its brief.
15 I don't know the laws of the different jurisdictions to
16 contest that.

17 JUDGE ROSENTHAL: Well, I appreciate that.

18 MR. TURK: But for the sake of argument, I'm willing
19 to assume it.

20 JUDGE ROSENTHAL: But it wouldn't strain your powers
21 of acceptance to believe that that might well be the case?

22 MR. TURK: For the sake of argument, I am willing to
23 accept that that's the case.

24 JUDGE ROSENTHAL: All right. So if that is the
25 case, then what we're saying is, in the nuclear regulation

1 field, there isn't any such animal as preemption, because
2 nothing is preempted, because a state or local government,
3 without again any kind of real imagination, can circumvent
4 it. And that is the message, I take it, you say one garners
5 from PG&E; is that right? I mean, just as long as you make
6 the right noise at the appropriate time, preemption is out the
7 window.

8 MR. TURK: I think the principle that I would argue
9 is a little more narrow than that, to the extent that it has
10 to be an area within the traditional police powers of the
11 state to regulate, such as offsite disaster and emergency
12 preparedness.

13 JUDGE ROSENTHAL: Well, but that's --

14 MR. TURK: Within that context.

15 JUDGE ROSENTHAL: Every plant has to have an
16 emergency plan. You're not narrowing it at all, are you,
17 Mr. Turk. There is, through emergency planning, there is this
18 license.

19 So NRC regulation, in a sense, is subject to state
20 or local veto?

21 MR. TURK: Until Congress is willing to go on the
22 record, either through explicit enactments or in clear
23 legislative history, indicating its intent, that is the result
24 which Congress has left open at this time.

25 JUDGE ROSENTHAL: You don't see in these

1 Appropriations Acts any intrusion upon that result insofar as
2 emergency planning is concerned?

3 MR. TURK: I don't see anything support LILCO in the
4 Authorization Acts. In fact, --

5 JUDGE ROSENTHAL: Then what is the meaning of this
6 utility plan business, if the state has this total control
7 over it? Is Congress just giving them the rubber sandwich or
8 what?

9 MR. TURK: I think there are potential situations
10 where Congressional enactment of the utility plan provision
11 could prove to have some effect. For instance, when I make
12 these statements, I'm not in any way attempting to express
13 prior condonement by the Staff for a particular utility's
14 emergency plan provisions.

15 But there might be situations where a plant is
16 located in a highly remote area, such that you don't need the
17 use of police authorities to clear out an area and maintain
18 safe from looting after the evacuation has occurred. Or there
19 might be instances in which several jurisdictions have
20 contiguous jurisdiction within the EPZ, as recognized in
21 NUREG-0654, and perhaps only one small area of the EPZ is
22 affected by the lack of a plan.

23 Perhaps in that situation, you could have a
24 reasonable assurance.

25 JUDGE EDLES: But how does that differ from what

1 took in 1980? Or maybe that's a bad timeframe, since the
2 emergency planning rules got into effect, I guess, in 1979 and
3 1980.

4 But why did Congress need to act at all? I mean,
5 wasn't that always an option available to a utility to try and
6 sort of fill in -- at Indian Point, my recollection is that
7 the utility there agreed to train those bus drivers. In the
8 event that the local bus drivers weren't going to do the job,
9 they would send the utility people in.

10 My recollection from the Three Mile Island case is,
11 the utility agreed to pay for dosimeters, because the state
12 government didn't want to fund the dosimeters, and there was a
13 suggestion that dosimeters are necessary in order to have
14 adequate protection of emergency workers, so they said, "Look,
15 we'll pay for them."

16 But all of that was available before Congress acted
17 one way or the other. Why did Congress jump in and attempt to
18 do something different?

19 MR. TURK: I cannot say what motivated Congress, but
20 I can think of other instances more than simply filling in the
21 interests as may be possible.

22 JUDGE EDLES: Well, give me some examples, because
23 I'm having trouble thinking of any.

24 MR. TURK: There may be instances in which a local
25 government does not have the resources to adopt its own plan

1 and where the utility instead develops a plan and submits it
2 for NRC approval.

3 JUDGE EDLES: How would that work? In other words,
4 the utility submits the plan that says the local police would
5 do this, that, and the other thing?

6 MR. TURK: Well, yes. But then in terms of
7 implementability, you would still have to have an indication
8 that the local officials are familiar with the plan or are
9 able to implement it effectively, the reasonable assurance
10 finding.

11 JUDGE EDLES: Just as a practical matter, Mr. Turk,
12 enlighten me, do utilities now assist the local governments in
13 putting together their emergency plans? I mean, isn't that a
14 fact of life?

15 MR. TURK: My experience is that they are
16 instrumental in assisting in the development of the plans and
17 implementation of the plans.

18 JUDGE EDLES: So I'm still having a little trouble
19 trying to find out what it is that Congress had in mind here
20 that was kind of special that couldn't already be done under
21 existing law.

22 MR. TURK: Congressional intent is not clear. I
23 cannot speculate as to how far Congress may have intended to
24 go. They certainly did not give the answer to that question
25 in their legislative history or in the enactment.

1 JUDGE EDLES: But your basic position is that what
2 is clear is that they didn't preempt anything here. That's
3 painfully clear.

4 MR. TURK: That's correct. They went so far as to
5 allow a utility plan to be submitted. What happens next, they
6 explicitly left to the Commission to determine whether the
7 plan was implementable and whether reasonable assurance was
8 provided. Indeed, if anything, the legislative history goes
9 against LILCO.

10 LILCO makes reference in their brief to a 1984
11 committee report. I believe it's House Report No. 98-103.
12 There the concept of implementability was expressly discussed,
13 and floor debate indicates -- and this is a committee report
14 and floor debate, not simply the view of some one member of
15 Congress -- but the legislative history indicates that there
16 is no intention to require that a plan be approved where state
17 and local governments refuse to participate.

18 Now we have footnoted in our brief, for the reason
19 that I didn't consider that the legislative history was so
20 instructive so as to require your decision; nonetheless, LILCO
21 picked it up from one of our prior papers and attempts to
22 rebut it. It's not rebuttable.

23 JUDGE ROSENTHAL: All right. Well, what about
24 realism?

25 MR. TURK: Well, someone today said that LILCO's

1 realism argument was unrealistic. I wouldn't go that far. I
2 would recognize the County Executive's intention to fulfill
3 his statutory responsibilities to respond to an emergency
4 situation. But the Licensing Board raised the question that
5 goes further, which LILCO and the County Attorney have not
6 been able to get around, and that is, how effective would the
7 response be?

8 At this time, there is no record before you that
9 permits you to find that there is reasonable assurance that an
10 adequate protective response would be implemented.

11 JUDGE ROSENTHAL: Do you think, Mr. Turk, that as a
12 matter of law, the organizations that would be counted upon in
13 the event of an emergency have to be involved in the planning
14 and the exercise as a norm of that?

15 MR. TURK: As a matter of law?

16 JUDGE ROSENTHAL: Yes. In other words, for a plan
17 to pass muster at the outset, do those organizations that will
18 be involved in the emergency response, do they have to be in
19 the planning and the exercise and all of that? Not
20 necessarily the same individuals. I mean, obviously Policeman
21 X may not be there when the emergency occurs. But does the
22 organization as such, the police department, the rescue group,
23 the fire department or something, do they have to be involved
24 in it?

25 MR. TURK: Strictly as a matter of law, I would say

1 no. But as a matter of fact, the other answer would apply,
2 and let me explain that.

3 As far as I'm aware, Commission regulations do not
4 insist that a state be involved. If the state, for instance,
5 had legislation which enabled it to delegate to a utility to
6 take over those functions, then I would imagine that NRC
7 regulations and Federal law would not require otherwise.

8 JUDGE ROSENTHAL: No. But would then the people to
9 whom it was delegated have to be participants?

10 MR. TURK: Yes. As a matter of law, the people who
11 would be providing the offsite response, whether they are
12 state officials or delegates, would have to be involved, would
13 have to be familiar with the plans --

14 JUDGE ROSENTHAL: All right. Well, then doesn't
15 that defeat the realism argument, if that's right? The
16 realism argument is that when push comes to shove, your
17 policemen and your firemen and whatever are going to be there
18 and are going to respond.

19 MR. TURK: That's correct.

20 JUDGE ROSENTHAL: Now these are people who, as
21 matters now stand, are not going to be participating in any
22 kind of an exercise or planning; isn't that right?

23 MR. TURK: To my knowledge, yes, it is.

24 JUDGE ROSENTHAL: Well that's, I gather, the thrust
25 of New York State Court decisions, as they now stand, is it

1 not?

2 MR. TURK: The County Attorney might argue with
3 that.

4 JUDGE ROSENTHAL: All right. Well, assume that's
5 the case. Then is that, as a matter of law -- is the
6 non-participation in the planning stage of these people an
7 obstacle to the acceptance of the realism argument?

8 MR. TURK: Excuse me. I am uncomfortable with the
9 phrase "as a matter of law."

10 JUDGE ROSENTHAL: Well, I thought you said "as a
11 matter of law" that the people were going to participate,
12 either the state people or local people or the delegate -- or
13 the people to whom it was delegated had to participate.

14 JUDGE EDLES: Well, also -- let me see if I can pick
15 up on that. Forget for a moment about the legalisms here.

16 In terms of the way the Staff normally reviews an
17 implementation plan, would you require some kind of prior
18 participation by all of the players in an exercise or in
19 putting together a coordinated response, or would the Staff
20 permit something less than that?

21 Forgetting about the law, I mean, how do you folks
22 approach this kind of problem?

23 MR. TURK: I never intended to suggest that we
24 should. Regulation requires that there be an exercise
25 annually of the emergency plans. To have an effective

1 exercise, to have a meaningful one, whose success or lack of
2 success can be evaluated, requires that the participants are
3 there.

4 JUDGE EDLES: So in other words, you would assume
5 that the Staff, at least, would not come in and tell us that
6 the exercise went well, if the police didn't show up at their
7 street corners, if the fire department didn't know where
8 they're supposed to get their dosimetry, if they didn't know
9 that the ambulances were called, and somebody pressed the
10 right communications button or lifted the right telephone or
11 got on the wireless or something like that.

12 MR. TURK: I think that's correct. You might have
13 some subordinate findings that certain aspects of the plan had
14 been successfully tested, where you had sufficient knowledge
15 of the participants' responses through whatever means. But I
16 think ultimately you would find that the entirety of the
17 exercise could not be meaningful --

18 JUDGE EDLES: But if no one, for example, got to the
19 offsite emergency facility, because none of the county
20 officials were going to respond there, I mean, you'd probably
21 have a finding that nobody responded.

22 MR. TURK: I imagine you would.

23 JUDGE ROSENTHAL: Mr. Turk, you have a little better
24 than five minutes left, and I am interested in your views on
25 the one aspect of the LILCO appeal that you support outright,

1 and I gather you support their view that the Licensing Board
2 erred, for example, in its conflict of interest determination?

3 MR. TURK: Yes. And our reasons are that the Board
4 erred as a matter of law and as a matter of fact.

5 As a matter of law -- and here, I'm using the phrase
6 with a little more confidence -- as a matter of law, the
7 Licensing Board found that Commission regulations require
8 structural independence for offsite authorities. We don't
9 find that intent in the regulations.

10 What we find, indeed, is that there be offsite
11 governmental participation, not necessarily for independence
12 reasons, but perhaps because traditionally it is the
13 governments which are able to respond to emergencies. They
14 have a built-in infrastructure. They have personnel; they
15 have resources with which to respond. They have experience in
16 directing public evacuations.

17 JUDGE EDLES: Is it possible also that we have the
18 government do that because the public doesn't have terribly
19 much confidence in a utility that is in the midst of an
20 accident?

21 MR. TURK: That argument has been made on numerous
22 occasions.

23 JUDGE EDLES: Is it right or is it wrong?

24 MR. TURK: I don't know the answer to that. I think
25 it would depend upon the particular fact situation involved.

1 JUDGE EDLES: I'm talking now about what motivated
2 the Commission in its regulations. I appreciate the fact
3 that, yes, the state and local governments have the firemen
4 and policemen and ambulances.

5 MR. TURK: I am not aware of Commission intent which
6 would indicate that utility officials cannot be trusted by the
7 public.

8 JUDGE EDLES: And presumably, as Mr. Christman
9 pointed out, it is the utility's responsibility, in any event,
10 to make the basic determination of what category of accident
11 we are involved in.

12 MR. TURK: That's right. In our brief, we argue
13 that that's a fundamental in the Licensing Board's logic. It
14 failed to recognize that it's the initial utility personnel's
15 decision as to what the emergency action level is, as to what
16 protective action to recommend, which gets transmitted to
17 offsite officials. And as a practical matter, it's usually
18 the utility's recommendation that would get the greatest
19 weight in consideration by offsite officials.

20 So the utilities are, in fact, entrusted to perform
21 a significant function without any taint of conflict of
22 interest in the event of an emergency.

23 The Appeal Board asked various questions. I don't
24 know how much time I have left to respond. But let me see if
25 I can respond to a few of the questions.

1 JUDGE ROSENTHAL: You have three minutes, four
2 minutes.

3 MR. TURK: An assertion has been made by LILCO that
4 an uncontrolled evacuation would only involve a difference of
5 an hour and a half in time over what a normal, controlled
6 evacuation would entail.

7 I don't think that's a usable figure. I don't
8 think it reflects the fact that the uncontrolled evacuation
9 that LILCO refers to would have had the benefit of emergency
10 brochures directing the public in advance as to how to
11 structure their response.

12 It also ignores the fact that you don't have
13 authority to use the emergency broadcast system. You don't
14 have the authority to recommend protective actions here. All
15 of those things are ignored by this one and a half hour
16 estimate which LILCO presents. And incidentally, it's one and
17 a half hours in good weather or three hours in inclement
18 weather.

19 There has been discussion of the current status of
20 Revision 5 to the LILCO plan. Until today, I was unaware that
21 the Trailblazer sign provision had been retracted. In any
22 event, Revision 5 to the LERO plan is still within this
23 agency. It is to be submitted shortly for FEMA approval, but
24 has not yet gone over to FEMA, and we have no schedule as of
25 now to know what FEMA's review plans may be.

1 There is a question as to the applicability of the
2 Silkwood decision. I think Silkwood presents unusual
3 circumstances, which, although not clearly applicable here,
4 still provide significant authority for how the Board should
5 reach its decision.

6 In Silkwood, the Supreme Court found that there was
7 explicit consideration by Congress of the fact that state law
8 remedies were not preempted by either the Atomic Energy Act or
9 the Price-Anderson Act or other applicable statutes.

10 Here we are dealing with a situation in which
11 Congressional intent is silent. Nonetheless, Silkwood is
12 significant, in that it describes one further reason why the
13 Commission has traditionally held to have exclusive authority
14 to regulate radiological health and safety, and that is the
15 Commission's unique expertise to determine questions of
16 radiological health and safety.

17 In the Staff's view, the issue of offsite emergency
18 planning does not strictly involve radiological health and
19 safety determinations, which only the Commission has the
20 expertise to render. Instead, you have other considerations
21 in addition, such as how can traffic best be directed, how can
22 the public best be assured that the recommended action is, in
23 fact, something which they should follow. Those are issues
24 which the states traditionally have been involved in and the
25 Commission has not, and that is one further reason not to find

1 preemption here.

2 With that, I would like to summarize and say that
3 this Board is required to apply existing principles of law.
4 Only Congress can change the outcome, if the Board finds, as
5 the Staff believes, that there is no preemption of the state
6 laws here.

7 Thank you.

8 JUDGE ROSENTHAL: Thank you, Mr. Turk.

9 All right, Mr. Christman, you have twenty minutes of
10 rebuttal. As I think you understand, the rebuttal has to be
11 confined to either matters that were addressed by the Counsel
12 who tendered arguments after yours or matters that the Board
13 raised. In other words, no brand new points.

14 MR. CHRISTMAN: Understood.

15 Let me point out, if I didn't make it clear before,
16 that Rev. 4, the last Rev. of the plan, was reviewed by FEMA
17 and was found, I think, acceptable in all respects, except
18 snow removal, and that was dealt with by the initial decision,
19 if I didn't make that clear before. Rev. 5 is simply a next
20 refinement of Rev. 4.

21 Now we heard some discussion from Mr. Palomino about
22 whether the county resolutions were based on radiological
23 health and safety. Well, I sat there through several days of
24 the hearings on that subject, and I can tell you, without fear
25 of being wrong -- not without fear of contradiction, but

1 without fear of being wrong -- that those resolutions are
2 based on radiological health and safety.

3 The document they were considering started with the
4 probablistic risk analysis and dose response curves, and
5 everything those folks were thinking about was radiological
6 health and safety. And if you don't believe --

7 JUDGE ROSENTHAL: I believe it was in the context of
8 how much traffic the highways could support, or how long it
9 would take to move people along a particular road. While the
10 concerns might have been radiological health and safety,
11 nonetheless, the determination would have been based, would it
12 not, as Mr. Turk suggested, upon factors or considerations
13 which are peculiarly local in character.

14 MR. CHRISTMAN: Every consideration about how to use
15 the roads was aimed at how to evacuate from a radioactive
16 plume, and that was all that was at issue. And you can say
17 that roads -- certainly roads are involved. So are telephone
18 lines and radio stations. But it was all based on
19 radiological health and safety and their assessment of the
20 risks of that plant. And if you don't believe me, read the
21 resolutions. We have attached them to our brief.

22 JUDGE EDLES: Is Mr. Brownlee correct, though, that
23 the Federal District Court in New York has decided the
24 preemption question?

25 MR. CHRISTMAN: Not precisely. He's pretty much --

1 JUDGE EDLES: Tell me what we have before us that we
2 can look at.

3 MR. CHRISTMAN: Well, let me tell you about Judge
4 Altimari's decision very briefly. He decided what he did,
5 based on the reasoning that the county resolutions were not
6 regulating nuclear power. Ever since, because the Intervenors
7 went into that court and said, "All we're doing is refusing to
8 participate in emergency planning; we're not regulating LILCO
9 or anybody else," well, since then, all we've heard is how
10 those county resolutions and the results of them prevent LILCO
11 from --

12 JUDGE EDLES: Let me ask you this: Let's assume
13 that I disagree with the Judge's analysis of that. Do I have
14 authority under principles of res judicata, collateral
15 estoppel, at-issue preclusion, whatever you want to call it,
16 to go in and make an independent determination?

17 MR. CHRISTMAN: I don't think you can overrule that
18 Judge, but I think there is plenty of room in his decision for
19 additional decision-making.

20 For one thing, it was based on the proposition that
21 you could still do a utility plan, that there was still an
22 option, and that's now shown not to be true.

23 For another thing, you've now got a part of the
24 county government that's been told that he has the authority,
25 and indeed the duty, to respond in a real emergency and is

1 willing to fulfill that duty, and that makes a difference.

2 JUDGE EDLES: In your judgment, would we run afoul
3 of the Federal Court's decision if we were to hold that those
4 three county resolutions are preempted by Federal law?

5 MR. CHRISTMAN: No, sir, not based on what we've
6 learned since that decision came down, about what the real
7 effect of those county resolutions --

8 JUDGE EDLES: But the real effect would mean that
9 we're second-guessing Judge Altimari's factual determination,
10 isn't it, and we're -- I'm not saying that we might not be
11 right, and he might not be wrong -- but aren't we precluded
12 from making that determination?

13 MR. CHRISTMAN: Well, you can't second-guess him on
14 the facts. But what the people have done is, they have gone
15 into two forums, and in one forum, they said, "Don't preempt
16 the county resolutions, because they don't regulate LILCO's
17 right to do a utility plan," and they can now come into this
18 forum and in other courts and say, "Well, you can't have a
19 utility plan either, because of state law," and they just
20 can't have it both ways.

21 JUDGE ROSENTHAL: I take it that you are of the view
22 -- and perhaps it's one position that is shared by the other
23 parties -- that we can take official notice of all of these
24 developments that have occurred since that Licensing Board
25 PID, because if we can't take official notice of them, then I

1 would guess, under settled appellate practice principles, we
2 can't take them into account.

3 We could remand it to the Licensing Board.

4 MR. CHRISTMAN: That's true. I don't think there
5 would be a whole lot of point in going through another
6 hearing.

7 JUDGE ROSENTHAL: Because everybody seems to be
8 referring to these subsequent developments, not merely
9 yourself, but your opponents.

10 MR. CHRISTMAN: That's right.

11 JUDGE ROSENTHAL: So I'm assuming there is general
12 agreement that they are officially noticeable.

13 MR. CHRISTMAN: Well, you don't want to blind
14 yourself to the truth, and the fact is, they are -- everybody
15 is on notice of them, they have been submitted, and I don't
16 think anybody has objected to that.

17 You can also take official notice, I suppose, of
18 official resolutions, like the Executive Resolution, which is
19 sort of a matter of law. But more than that, all those things
20 do is confirm what we think was already in the record, and
21 there's been a good deal of quarreling with the evidence that
22 the state and county officials would cooperate or would
23 function, would act in a real emergency, but I don't think
24 that's really open to serious doubt.

25 There is evidence on that in the record. You can

1 quarrel with it, but, you see, we're the only one that put in
2 any evidence on Contention 92. And if the state or county
3 wanted to rebut that, well, they have the means to do it, the
4 proposition that there would be a response in a real
5 emergency, and nobody rebutted it. They are the ones that
6 had the means to do that, and they didn't do it.

7 Moreover, you've got the state policy, which is in
8 the record again, that the state will -- it's the state's
9 policy to take action and to coordinate with all sorts of
10 groups. And that's all in the record. Nobody rebutted that.

11 So these subsequent things are simply consistent
12 with the pattern of evidence in the record, as far as I can
13 see. You can either use them or not use them. They really
14 confirm what we all know to be true, which is what we know
15 about how people act in a real emergency.

16 Now we are hearing that there is going to be a
17 TMI-style response with a bunch of good natured folks who have
18 the best of intentions, bumbling around because they won't
19 coordinate, won't cooperate. I just don't think that makes
20 any sense.

21 In the first place, as I tried to make clear with
22 the example about the traffic guides, all the key LERO
23 workers, especially at the command and control level, are told
24 in their training that they might have to step aside for a
25 governmental official, and they are told to be prepared to

1 help that person function in a real emergency. The traffic
2 guide is a good example, but also the command and control
3 functions. That's part of their training, and it's part of
4 the plan. It's throughout the plan. It's explicit in the
5 plan.

6 This is a modular plan. It was designed for
7 flexibility because of this political situation that the
8 company had to face. And that's one reason that it's probably
9 the best emergency plan you've ever had at this agency,
10 because it was flexible, and it's been through the fire of
11 this proceeding, and of drills, where that sort of thing can
12 be tested out.

13 Now we heard some talk about how the state can't
14 delegate it's police power. Well, that's right. That's what
15 Judge Geiler said. But I don't think anybody is talking about
16 state or county officials simply handing the job over to a
17 private party. That's not the point. The point is, it's a
18 cooperative effort in a real emergency, and there is plenty in
19 the record about cooperation and why people in an emergency
20 concentrate only on the goal of protecting the people at
21 threat, the people at risk.

22 Somebody asked, somebody talked about whether there
23 are really only four roles that the state plays in an
24 emergency. Well, that was in LILCO's evidence on Contention
25 92. Nobody else put in any evidence on Contention 92. Nobody

1 cross-examined LILCO's evidence on Contention 92, except for a
2 handful of inconsequential questions, and then they sat down.

3 I heard a lot of quarreling with the evidence here,
4 but it is the evidence.

5 Moreover, you should know that in states like New
6 York, with large, sophisticated local governments, the state
7 function tends to be supplementary, and again, that's in the
8 state plan that is in the record. The first line of defense
9 is usually local governments or county governments in this
10 case.

11 So the state's role tends to be more in the
12 ingestion pathway, the state people being closes to the scene.

13 Now you were told a few minutes ago that a decision
14 in LILCO's favor in this case would interfere with the state's
15 prerogatives more than, say, in Pacific Gas & Electric and in
16 Silkwood even. Well, that's just not -- I don't think that's
17 so.

18 For one thing, the state here always has a choice.
19 I mean, it can either exercise its police power and do an
20 emergency plan and response in an emergency, or it can opt
21 out, in which case it's not at all, as I said, shocking to
22 have a private company fill in the gap, if regulated by a
23 Federal agency.

24 Now what the Intervenors are saying, I think, is,
25 the prerogative they are talking about is the prerogative to

1 decide whether there is going to be an emergency plan or not.
2 Or another way to put is, whether they have the prerogative to
3 ban emergency planning for a nuclear power plant altogether.
4 And the only purpose in ever doing that, since emergency
5 planning is always better than no emergency planning, is to
6 prevent the operation of a nuclear power plant. That is the
7 prerogative they are talking about. It's the only one that
8 makes any sense, if you reason out to the end of the logic.

9 Now we heard about the corporate charter problem.
10 Well, you know, a corporation never has the authority under
11 its corporate charter to violate state law, and yet there are
12 lots of preemption cases where the state says that a
13 corporation can't do anything, can't do a particular something
14 -- *Allessi vs. Raybestos Manhattan*, which we cited in our
15 brief is one -- and yet the Federal law preempts that state
16 law. So that's just another way of saying the same thing, and
17 it's not really, I don't think, an additional point.

18 We are told that Congress chose not to act, in
19 response to the testimony of one NRC Commissioner. Well, it's
20 always perilous to conclude anything from Congress' failure to
21 act, but I think what you've got to remember is that if we're
22 going to play that game and assume that Congress was watching
23 real close what's going on in this proceeding, what they would
24 have seen is a decision from the Brenner Board saying that
25 there is preemption in this case. And as you say, not reached

1 by the Commission, but not discounted or negated either. And
2 then they would have seen the Commission ordering this
3 proceeding to go forward for a hearing on the LILCO emergency
4 plan.

5 So I don't think that you can assume that Congress,
6 looking at what has gone on here, thought that it was leaving
7 the state prerogatives in place by not acting. I think, if
8 anything, it probably thought that everything was going fine,
9 the preemption was being upheld, and that that's the way the
10 agency was going.

11 But you don't want to draw too many conclusions from
12 Congress' failure to act, in any event.

13 Now Ms. Letsche said something about, they think
14 that under the NRC regs, there's an affirmative requirement
15 that the utility plan coordinate with the state. I don't know
16 whether she's saying that this is just another legal authority
17 issue, in which case it ought to be dismissed as redundant, or
18 whether she is saying that NRC regulations require there to be
19 a state plan as a matter of law, and that is the issue we
20 decided in the motion to terminate, and it was decided
21 contrary to her position. So I don't understand what the
22 argument is, I guess.

23 Mr. Turk discussed the meaning of preemption under
24 the Atomic Energy Act, and I think pretty well verified what
25 we believe to be the case, which is that an affirmance in this

1 case means the end of Federal superintendence of this field.
2 I, for the life of me, don't see how there is any difference
3 between -- or what would prevent a state from saying, "We're
4 going to ban emergency core cooling systems because they're
5 expensive, and we don't want the ratepayers to have to bear
6 that burden."

7 As long as they cite economics, I don't see why they
8 can't do that.

9 JUDGE EDLES: I think that is probably right, isn't
10 it, to cite economics under PG&E, unless a court is prepared
11 to go behind that and say, "We hear what you're saying, and we
12 don't believe you"?

13 MR. CHRISTMAN: Okay. But you've got to remember,
14 the purpose -- I believe purpose is not the sole test of
15 preemption, because Perez tells you, it isn't in the cases of
16 actual conflict at all, and Florida Avocado and Lime Growers
17 says the same thing. The state purpose is not -- that's part
18 of the reason it's so complicated. It's just not that
19 clearcut.

20 JUDGE ROSENTHAL: Well, your own client lost its
21 Jamesport facility because the State of New York decided that
22 that plant was not going to fly. And I gather it was either
23 economic or environmental reasons.

24 MR. CHRISTMAN: One or the other.

25 JUDGE ROSENTHAL: I gather those Siting Boards look

1 at both the economic and the environmental side, don't they?

2 MR. CHRISTMAN: Yes.

3 JUDGE ROSENTHAL: And so there it is. And
4 obviously, I gather -- and correct me, if I'm wrong -- but
5 LILCO didn't take the Siting Board to court, did it, on the
6 ground that that decision ran afoul of preemption?

7 MR. CHRISTMAN: Well, I think that's right. But
8 that's like PG&E. There's a difference between a threshold
9 decision not to allow a plant to go forward at all, based on
10 the state's traditional right to figure out the mix of
11 generating facilities and a decision that restricts an
12 existing plant to five percent of operation.

13 The second thing is, there is not an actual conflict
14 there because you don't have presumably, according to the
15 analysis, interference with the motives and objectives, with
16 the accomplishment of the objectives of Congress. And that's
17 what you do have here.

18 JUDGE ROSENTHAL: Well, why didn't you have that
19 with Jamesport?

20 MR. CHRISTMAN: Well, because in PG&E they said that
21 the purpose of promoting nuclear energy was not to be
22 accomplished at all costs. But we have more purposes than
23 promoting nuclear energy. As a matter of fact, we emphasize
24 the purpose of promoting emergency planning, which is being
25 thwarted here.

1 JUDGE ROSENTHAL: It still remains, I take it, that
2 a Governor, at least in the State of New York, who is opposed
3 to nuclear power period, has within his or her authority to
4 preclude nuclear power plants by sagacious appointments to
5 that Siting Board; is that not true?

6 MR. CHRISTMAN: Yes.

7 JUDGE ROSENTHAL: And there isn't a thing that a New
8 York State utility could do about it, at least not in the
9 context of Federal preemption. You might do something about
10 it politically within the realm of New York.

11 Now if all that's the case, I don't -- I'm having
12 some difficulty in following your line of argument.

13 MR. CHRISTMAN: Siting decisions are somewhat
14 different from decisions that directly impinge on an operating
15 plant and make the Operating License worthless.

16 JUDGE ROSENTHAL: The only difference is, in the one
17 case, Jamesport wasn't built, and in the other case, Shoreham
18 is built.

19 MR. CHRISTMAN: And I think the difference comes out
20 of PG&E where they're talking about an initial decision, but a
21 decision that impinges on the operation of a power plant and
22 thwarts several purposes of Congress at the same time is at
23 actual conflict with the objectives of Congress.

24 We heard, last of all, that the NRC lacks the
25 necessary expertise, I guess, to regulate offsite emergency

1 planning. If that is the case, I don't know why we spend all
2 of our time presenting our case, first to FEMA and then to
3 this --

4 JUDGE ROSENTHAL: Well, I don't think Mr. Turk
5 suggested a lack of expertise. I think he was suggesting that
6 this isn't exclusively within the NRC's expertise, that
7 certain aspects of emergency planning, like traffic control
8 and all of that, have been traditionally within the scope of
9 local expertise, and that would seem to me to be a reasonable
10 point.

11 MR. CHRISTMAN: Okay. But I can tell you that the
12 state plan, which is in the record -- that is, the generic
13 state plan -- there being no site-specific state plan -- says
14 that the Federal Emergency Management Agency has the lead
15 responsibility for all offsite nuclear emergency planning and
16 response.

17 And I can tell you from sitting through months of
18 evidence in this case, that the conclusions of the witnesses
19 that were presented against us were based mostly, by and
20 large, on those witnesses' views of what happens in a
21 radiological emergency, mostly on the unique nature of
22 radiation as a disaster agent and on the speed with which
23 those folks thought that emergencies at nuclear reactors
24 always react. And those notions were wrong in many respects,
25 but that was the basis of a lot of the evidence that was

1 presented against us, and that is why you need the Federal
2 Government in this area, because it is part and parcel of
3 radiological health and safety.

4 Do you have any questions. I've got about one
5 second left, I guess.

6 [No response.]

7 MR. CHRISTMAN: Thank you very much.

8 JUDGE ROSENTHAL: Okay. Thank you, Mr. Christman.

9 On behalf of the entire Board, I would like to thank
10 all of the participants in this afternoon's argument for their
11 helpful presentations.

12 I think I can say, in addition, that the Board would
13 appreciate being kept advised of developments in the
14 representation controversy, not from the standpoint of whether
15 or not we are going to consider the arguments made by
16 Mr. Brownlee and Ms. Letsche. They will be considered
17 irrespective of what the outcome of that controversy may be.
18 But maybe simply a matter of intellectual, or perhaps
19 non-intellectual, curiosity, but we have sort of following the
20 developments in this rather bizarre proceeding, and I think we
21 would like to be kept informed.

22 On that note, the Appeal of the Long Island Lighting
23 Company from the Licensing Board's partial initial decision on
24 emergency planning stands submitted.

25 [Whereupon, at 5:05 o'clock, p.m., the hearing was

1 concluded.]

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1 CERTIFICATE OF OFFICIAL REPORTER

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5 This is to certify that the attached proceedings
6 before the United States Nuclear Regulatory Commission in the
7 matter of LONG ISLAND LIGHTING COMPANY (Shoreham Nuclear Power
8 Station Unit 1)

9 Name of Proceeding: Oral Argument

10
11 Docket No.: 50-322-OL-3

12 Place: Washington, D. C.

13 Date: Monday, August 12, 1985

14
15 were held as herein appears and that this is the original
16 transcript thereof for the file of the United States Nuclear
17 Regulatory Commission.

18
19 (Signature)

(Typed Name of Reporter) Suzanne B. Young

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23 Ann Riley & Associates, Ltd.
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