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COURT OF APPEALS

STATE OF NEW YORK

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CONNOLLY,

Respondent,

-against-

No. 11

LONG ISLAND POWER AUTHORITY,

Appellant.

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BAUMANN,

Respondent,

-against-

No. 12

LONG ISLAND POWER AUTHORITY,

Appellant.

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HEERAN,

Respondent,

-against-

No. 13

LONG ISLAND POWER AUTHORITY,

Appellant.

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20 Eagle Street  
Albany, New York  
January 9, 2018



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Before:

CHIEF JUDGE JANET DIFIORE  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE LESLIE E. STEIN  
ASSOCIATE JUDGE EUGENE M. FAHEY  
ASSOCIATE JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE PAUL FEINMAN

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Official Court Transcriber



1 CHIEF JUDGE DIFIORE: The first matter on this  
2 afternoon's calendar are appeals 11, 12, and 13, Connolly,  
3 Baumann, and Heeran v. Long Island Power Authority.

4 Counsel.

5 MR. LAZER: Thank you, Your Honor. May it please  
6 the court, my name is David Lazer, and I appear on behalf  
7 of the appellants, Long Island Power Authority and National  
8 Grid Electric Services. May I reserve three minutes for  
9 rebuttal, please?

10 CHIEF JUDGE DIFIORE: You may, sir.

11 MR. LAZER: Thank you, Your Honor. This court  
12 has repeatedly said that the question of - - -

13 JUDGE RIVERA: Counsel, what constitutes the  
14 exercise of the police power in - - - in the decision-  
15 making process that you rely on or that your client relies  
16 on? Because that's what the cases say, it's the exercise  
17 of the police power.

18 MR. LAZER: Well, I was - - - I was about to say  
19 it's the specific act or omission that caused the injury  
20 and that goes to what - - -

21 JUDGE RIVERA: Yes, but it has to track back to  
22 the exercise of the police power.

23 MR. LAZER: And - - - and the power here is  
24 protecting the public and the public safety from a grave  
25 public emergency.



1 JUDGE STEIN: But doesn't - - - doesn't all  
2 government action in some way - - - isn't it meant to  
3 protect or benefit the public?

4 MR. LAZER: Well, protect and benefit are two  
5 different things, Judge Stein. Obviously, as counsel  
6 pointed out in his opposing brief, everything the  
7 Government does is supposed to benefit people. But here we  
8 have the so-called "storm of the century" and many  
9 thousands of people's lives are in peril. We had a  
10 declaration by the governor and the mayor - - -

11 JUDGE STEIN: Yeah, but let's talk about the  
12 specific act or omission - - -

13 MR. LAZER: Okay.

14 JUDGE STEIN: - - - which you refer to. Isn't -  
15 - - doesn't that simply have to do with whether they were  
16 going to use their electric transmission system in a - - -  
17 in a particular way?

18 MR. LAZER: I don't think so. If you - - - we  
19 look at the specific act or omission it's claimed here to  
20 be that we failed to preemptively de-energize - - -

21 JUDGE STEIN: Right.

22 MR. LAZER: - - - the Rockaway Peninsula, and  
23 that means to shut the power off deliberately a day or more  
24 in advance.

25 JUDGE RIVERA: But how is that any different from



1 a private utility, a Con Ed - - - this is what I'm saying.  
2 Where is the police power? The police power obviously is  
3 being exercised with the deployment or - - - or choice not  
4 to deploy and where to deploy police, firefighter, EMT. I  
5 understand all of that, but I'm having difficulty  
6 understanding your client's argument that the choice about  
7 turning off the energy - - - because that's what de-  
8 energizing means, right?

9 MR. LAZER: Right.

10 JUDGE RIVERA: It - - - it can be tracked back to  
11 the exercise of the police power which as I read the cases  
12 is the essential action.

13 MR. LAZER: I'm not sure that I agree with that -  
14 - -

15 JUDGE RIVERA: Okay.

16 MR. LAZER: - - - that it's only about the police  
17 power. I think Applewhite talks about the government  
18 acting for the protection and safety of the public. I  
19 don't know - - - there are plenty of police protection  
20 cases, Judge.

21 JUDGE RIVERA: Pursuant to its police - - - you  
22 know, you don't have to be a police officer, the  
23 government, to exercise police power, right?

24 MR. LAZER: Correct. But to - - - to address  
25 your issue with respect to Con Ed, and that, as the



1 Appellate Division said, all utilities faced the storm - -  
2 - the same storm. Well, that argument was raised in the  
3 World Trade Center case when Judge Ciparick said many of  
4 the large buildings owned by private landlords faced  
5 terrorist threats. And the difference is that the Port  
6 Authority owned the World Trade Center and that's a  
7 government. And if it was Rockefeller Center, we'd have a  
8 different situation. The Miller case involved a young  
9 woman who was assaulted at Stony Brook University, a state  
10 university. If that was at St. John's, we wouldn't have a  
11 Miller case. So there is a distinction to be made when the  
12 same act is performed by a government as opposed to a non-  
13 government and that's what Weiner says.

14 JUDGE WILSON: Why aren't there issues of fact  
15 where we're better off deciding the - - - the issue with a  
16 full record?

17 MR. LAZER: Well, I'm not sure that there are  
18 issues of fact that will be changed, Judge Wilson, with  
19 respect to the size of the storm, with respect to the fact  
20 that we did not de-energize in the Rockaways and that we  
21 did in Fire Island and not anywhere else.

22 JUDGE FEINMAN: Well, what about issues of fact  
23 of who was involved in the decision making and what  
24 discussions were had and what was said and what questions  
25 were asked in - - - in terms of making the decision?



1 MR. LAZER: Well, Judge Feinman, I - - - I don't  
2 know that the court's jurisprudence says we need to know  
3 who the decision maker was. And I think in some of the - -  
4 -

5 JUDGE STEIN: Well, if anybody would know it  
6 would be you, wouldn't it?

7 MR. LAZER: Well, certainly it's not on the  
8 record before the court now.

9 JUDGE STEIN: Right, but - - -

10 MR. LAZER: But a decision was clearly made by  
11 the - - -

12 JUDGE STEIN: But you don't need discovery to - -  
13 - to figure that out. You know.

14 MR. LAZER: We know - - -

15 JUDGE STEIN: Yeah.

16 MR. LAZER: - - - that there was a decision and  
17 it was posted on the website and on Twitter which said LIPA  
18 is going to de-energize - - - in conjunction with an  
19 evacuation by Suffolk County officials, going to de-  
20 energize Fire Island and has no plans to de-energize  
21 anywhere else. And that's their decision.

22 JUDGE RIVERA: Well, who's authorized to make  
23 such a decision within the LIPA structure?

24 MR. LAZER: The - - -

25 JUDGE RIVERA: Who's authorized to do that?



1 MR. LAZER: There are plenty of people, Michael  
2 Hervey, for one, who's the - - - the CEO and others who  
3 work in conjunction with him.

4 JUDGE RIVERA: That's not the governor, right?

5 MR. LAZER: And in close consultation with  
6 national - - -

7 JUDGE RIVERA: That's not the governor. Is it -  
8 - - is it an elected official?

9 MR. LAZER: He's not an elected official but - -  
10 -

11 JUDGE RIVERA: No, no, is it - - - so it's not an  
12 elected official who makes this choice, right?

13 MR. LAZER: Elected officials can say to LIPA, as  
14 they did in the Fire Island instance, we would like you to  
15 de-energize this area to protect people. And that we went  
16 along with and said yes, but the decision - - -

17 JUDGE RIVERA: Are you independently - - -

18 MR. LAZER: - - - in general is - - -

19 JUDGE RIVERA: Are you independently able to  
20 disagree? Is your client able to independently - - - able  
21 to disagree with a government official's directive?

22 MR. LAZER: I don't know that we would, but I  
23 think we do retain that power. Of course. It's ultimately  
24 our system, and we can shut it down or not. Obviously, it  
25 depends on who that public official is.





1 JUDGE FAHEY: You know - - -

2 MR. LAZER: If it's a county executive, the  
3 mayor, or the governor you don't take lightly what they  
4 say.

5 JUDGE FAHEY: You know, it seems that the  
6 distinction between what's a - - - a governmental and a  
7 proprietary action is more rooted in the historical  
8 analysis that's taken place around the individual action.  
9 So for instance, power companies, are they private or are  
10 they public? Well, we have I think forty-seven public  
11 power companies in New York State and we have a number of -  
12 - - though the vast majority of the population is served by  
13 private power companies. And it's - - - it's I think  
14 incumbent upon us to really not deal with this in a  
15 historical vacuum, and that's I think where I struggle with  
16 - - - because I can think of no instances, and point them  
17 to me if I'm wrong, where the - - - this decision wouldn't  
18 be considered a proprietary action.

19 MR. LAZER: Well, I disagree. I think when  
20 you're - - -

21 JUDGE FAHEY: Go ahead.

22 MR. LAZER: - - - when you're saying I'm going to  
23 deliberately black out thousands of people and by extension  
24 - - - and I want to - - -

25 JUDGE FAHEY: Well, go ahead. No, no. Point - -



1 -

2 MR. LAZER: I want to focus the court - - -

3 JUDGE FAHEY: Let me - let me stop you.

4 MR. LAZER: Sure.

5 JUDGE FAHEY: Point to the specific instances.

6 MR. LAZER: The specific instances - - - I'm  
7 sorry, Judge Fahey.

8 JUDGE FAHEY: To specific instances where this  
9 action would not be a proprietary action. It would not be  
10 an action that's traditionally been done by the private  
11 sector. It - - - and that decision wouldn't be made by a  
12 private sector if the decision maker was the private  
13 sector. So for instance, the Village of Arcade has a  
14 public power company. Well, all right, if Arcade decides  
15 to shut down the power then it's made by a governmental  
16 agency. But show me where in New York State this decision  
17 traditionally has not been made by the private sector.

18 MR. LAZER: Well, this decision to shut off the  
19 power to thousands of people by implication all across Long  
20 Island - - - we have 120 miles of - - -

21 JUDGE FAHEY: We understand that.

22 MR. LAZER: Okay. So that decision - - -

23 JUDGE FAHEY: Tell me - - - give me some  
24 examples.

25 MR. LAZER: It's not really a decision that's



1 kind of sui generis if you will. It's not really come  
2 before this court.

3 JUDGE FAHEY: So you're saying it's - - - it's  
4 the nature of the emergency that makes it a governmental  
5 action?

6 MR. LAZER: Absolutely. You had a declaration of  
7 disaster by the mayor and - - -

8 JUDGE RIVERA: Well, the - - - let - - - let me  
9 ask you this. You all replaced a private entity, correct?

10 MR. LAZER: Yes, we did.

11 JUDGE RIVERA: Okay. So if you had not and LILCO  
12 was still in place, wouldn't LILCO have been making the  
13 same decision? So again, I'm - - - I'm - - -

14 MR. LAZER: Well - - -

15 JUDGE RIVERA: I'm not certain I understand the  
16 argument how this is other than proprietary.

17 MR. LAZER: Well, let me - - - let me address  
18 because I know Justice Fahey talked about the historical -  
19 - -

20 JUDGE RIVERA: Yes.

21 MR. LAZER: - - - perspective and - - - and let's  
22 talk about history now. The MTA gets immunity and has  
23 gotten it from this court and from the Appellate Divisions.  
24 Now the MTA controls the railroads. The railroads were  
25 privately owned for more than a century, Jay Gould and J.P.



1 Morgan and all those guys, the MTA was in fact created to  
2 take over the Long Island railroad. And the things that we  
3 now call the Metro-North portion of the MTA were in fact  
4 owned by the New York Central and the Penn Central  
5 privately owned railroads. So if we're going to talk  
6 history, we're going to talk about whether or not the MTA  
7 ever should get immunity.

8 JUDGE FAHEY: Well, I - - - I was more getting to  
9 the point that you made which was that it was the nature of  
10 the emergency that was the key factor in - - - in  
11 determining whether it was public or private. Is that the  
12 point that you're - - -

13 MR. LAZER: It's to protect the public, okay.

14 JUDGE FAHEY: Okay. All right.

15 MR. LAZER: We are protecting the public when we  
16 make that decision because we're talking about thousands -  
17 - - tens of thousands of people all across Long Island.

18 JUDGE FAHEY: Here's - - - so - - - so that would  
19 mean that every - - - every private entity that made a - -  
20 - a decision that was to protect the public would be  
21 entitled to some form of governmental immunity?

22 MR. LAZER: Every private - - -

23 JUDGE FAHEY: Every private entity.

24 MR. LAZER: No, of course not.

25 JUDGE FAHEY: Okay. All right. So - - - so - -



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MR. LAZER: Of course not. A private entity by definition is out of the box right - - - right away.

JUDGE FAHEY: All right. So - - - so Con Ed, they don't count? The Con Ed decision clearly is not a - - - is a proprietary decision, right?

MR. LAZER: Con Ed decision, well - - - well, proprietary governmental deals with a decision made by a government to get governmental function immunity so Con Ed does not - - - can't even invoke the defense so it's irrelevant whether it's proprietary or governmental.

JUDGE RIVERA: Yes, but for purpose of the doctrine, I mean, Sebastian, Applewhite, the cases make clear that it is the exercise of the police power.

MR. LAZER: Well, I think Applewhite says it's a general rule - - -

JUDGE RIVERA: No, no, no.

MR. LAZER: - - - that they're - - -

JUDGE RIVERA: "In contrast, a municipality will be deemed to have been engaged in a governmental function when its acts are undertaken for the protection and safety of the public pursuant to the general police powers.

MR. LAZER: Okay. But we are a government and the Public Authorities Law says that we exercise essential governmental functions. And when we exercise prudent



1 utility practices which is defined in Public Authorities  
2 Law Section 1020(b)(13), "In evaluating those prudent  
3 utility practices, the legislature declared that in  
4 evaluating whether any manner - - - matter conforms to  
5 prudent utility practice the parties shall take into  
6 account the fact that the authority," Long Island Power  
7 Authority, "is a corporate municipality of the state with  
8 the statutory duties and responsibilities thereof." And I  
9 think that ties into Applewhite's declaration that  
10 governments act to protect the people. Those powers I  
11 think were given by the legislature. This is a unique  
12 situation - - -

13 JUDGE STEIN: Can I take you back to the  
14 statement you made - - -

15 MR. LAZER: This is a unique situation.

16 JUDGE STEIN: - - - a few minutes ago and in  
17 response to Judge Fahey's question? And I - - - I think  
18 you said that a private entity wouldn't get immunity no  
19 matter what they were doing by definition, right?

20 MR. LAZER: Apples to apples to LIPA, yes.

21 JUDGE STEIN: Okay. But - - - but yet, you're  
22 arguing that National Grid should get immunity here under  
23 some agency principle. And could you explain why that's  
24 not completely foreclosed by the fact that this is  
25 essentially a - - - that the immunity is personal to



1 governmental entities?

2 MR. LAZER: Well, it's personal to governmental  
3 entities, but in the Altro case and in the Filarsky case,  
4 which we cite in our brief, and the governmental entity is  
5 working hand in hand with that private entity and the  
6 private entity is in fact - - - as the Altro case held,  
7 carrying out the wishes of the government.

8 JUDGE STEIN: Well, isn't that - - - isn't it the  
9 reverse here? Assuming the facts in the complaint as true,  
10 isn't it - - isn't it the reverse here that in fact, LILCO  
11 is carrying out that - - - that National Grid is  
12 essentially running the show here? That they're - - -  
13 they're - - -

14 MR. LAZER: National Grid operates our system,  
15 the transmission and distribution system which we own.  
16 Long Island Power Authority owns the actual power system.

17 JUDGE STEIN: Well, I understand who owns it.

18 MR. LAZER: Right.

19 JUDGE STEIN: But who's actually making the  
20 decisions about, you know, the - - - the operations of this  
21 system?

22 MR. LAZER: And - - - and those decisions are  
23 made - - - the - - - this type of a decision whether we  
24 should cut - - -

25 JUDGE STEIN: General - - - generally, it's



1 National Grid that - - -

2 MR. LAZER: On a - - - on a blue sky day, yes.

3 JUDGE STEIN: Well, okay.

4 MR. LAZER: On - - - on the storm of the century  
5 there's plenty of people from both sides of the aisle if  
6 you will, National Grid and LIPA, making those kinds of  
7 decisions. That's why they're tied in this kind of  
8 circumstance.

9 CHIEF JUDGE DIFIORE: Thank you, counsel.

10 MR. LAZER: Thank you.

11 CHIEF JUDGE DIFIORE: Counsel.

12 MR. SHOOT: Good afternoon, Your Honors. With  
13 respect to the questions posed by Judges Wilson and  
14 Feinman, there's no proof in this record that any conscious  
15 decision was made to not de-energize Breezy Point or any  
16 thought was given to - - -

17 JUDGE FEINMAN: Well, but isn't the point that  
18 because this isn't a 3211 posture we don't know anything,  
19 really, and what we're really just looking at is - - - is  
20 whether your complaint within this four corners makes out a  
21 theory that gets you viability?

22 MR. SHOOT: True. But my point is you have heard  
23 this about - - - in their brief and today about this cost-  
24 benefit analysis, there's no proof it occurred. More than  
25 that, Your Honors, you've heard - - - you - - - I've heard





1 talk today and you've read in the brief it's all about  
2 emergency preparedness. There's no proof in this record  
3 that there was actually a conscious determination made  
4 prior to all of these events - - -

5 JUDGE FEINMAN: Well, we won't have any proof  
6 until they have to put in an answer, and so my question is  
7 let's say the Appellate Division was correct that if we  
8 accept everything you've alleged as true you - - - you  
9 could maybe have a claim. But did they go too far,  
10 perhaps, in basically kicking out any defense that they may  
11 have either at trial or at least after discovery to - - -  
12 to argue on summary judgment?

13 MR. SHOOT: Judge, let me go further than that.  
14 Let's accept everything that you've just heard factually as  
15 true. That would still not get you - - - everything that  
16 was factually just said, let's assume it's true. There was  
17 a conscious decision made before any of these events  
18 occurred to not have a plan for storm protocols. And by  
19 the way - - -

20 JUDGE STEIN: Well, you're not saying that  
21 they're precluded for - - - from offering a defense to - -  
22 - to a claim of negligence, are you?

23 MR. SHOOT: Of course, Your Honor, they're - - -  
24 they're not precluded from that. But my - - - my point is  
25 if you say, as they say, that there was a conscious



1 decision made to not have a plan for storm protocols and if  
2 you check pages 665 to 666 - - - 666 of the record, that's  
3 what the Moreland Commission focused on, not the events of  
4 these few days, but that a utility that services an island  
5 has no plans for storm because I guess they don't expect  
6 one.

7 JUDGE RIVERA: And again, I think the - - - the  
8 point Judge Stein was trying to get you address is that  
9 sounds like a question on the merits.

10 MR. SHOOT: Exactly.

11 JUDGE RIVERA: I'm just trying to get to the  
12 question of this doctrine and whether or not they're immune  
13 under the doctrine. So they say that their - - - their  
14 action given the scope of this emergency is what makes it a  
15 governmental function as opposed to proprietary. Why are  
16 they not correct about that?

17 MR. SHOOT: The standards that this court set  
18 forth in Turturro; in World Trade Center, a close four-to-  
19 three decision; in Applewhite, a close four-three decision,  
20 very clear what a government activity is, what a  
21 proprietary activity is. A governmental activity is  
22 precisely what you read, Your Honor. It's undertaken for  
23 the protection of the public pursuant to the police powers.  
24 Why is that important, pursuant to the police powers?  
25 Because this court rejected a century ago the notion that



1 when the argument was made in Oeters, O-E-T-E-R-S, in our  
 2 brief, and before that in Missano, that cleaning the street  
 3 benefits the public. Of course it benefits the public.  
 4 It's not, however, done pursuant to the police powers. So  
 5 this court there said, "Although a municipality cleaning  
 6 its streets acts in the interest of public health,  
 7 nevertheless, it discharges a special power which is  
 8 regarded as" - - -

9 JUDGE FAHEY: I have a question, Mr. Shoot, that  
 10 I've always wondered. If - - - because these cases, they  
 11 can be difficult, I think. Is an action that is taken and  
 12 it's not taken pursuant to police powers, is it always then  
 13 a proprietary action?

14 MR. SHOOT: You know, I'm sure that we can come  
 15 up with examples of purely municipal actions, for example,  
 16 a medical examiner correcting - - - or for example, a  
 17 licensing bureau that grants a license or grants a  
 18 certificate of occupancy, distinctly municipal. That's not  
 19 this case.

20 JUDGE FAHEY: Right.

21 MR. SHOOT: You have a trifecta - - -

22 JUDGE FAHEY: So that's - - - so really - - - so  
 23 then that's - - - so then we're back to what we talked  
 24 about before. Does the nature of the event then aid us in  
 25 determining whether it falls on the side of the



1 governmental or proprietary divide?

2 MR. SHOOT: It's two things, Your Honor. First,  
3 quoting directly from this court's decision, it's the  
4 nature of the act of omission claim to give rise to  
5 liability and the capacity in which that act or failure to  
6 act occurred. So for example, in Turturro, it mattered not  
7 just what the act was but who the actor was, i.e., it  
8 wasn't police. It was highway. In Wittorf, for example,  
9 it mattered not just what the act or omission was but who  
10 the actor was.

11 JUDGE FEINMAN: Well, don't look at me. I got  
12 Wittorf wrong. I thought it was - - -

13 MR. SHOOT: It's both of those things. Now here,  
14 Your Honor, you have a trifecta which this takes it out of  
15 the ZIP code of governmental immunity. Number one - - -

16 JUDGE RIVERA: But isn't capacity just another  
17 way of saying police powers? Because that's all that that  
18 means.

19 MR. SHOOT: Yes.

20 JUDGE RIVERA: What hat are you wearing?

21 MR. SHOOT: Yes, exactly.

22 JUDGE RIVERA: Where do you draw your authority  
23 from?

24 MR. SHOOT: In this case, Your Honor, you have  
25 three things. Number one, you have an entity that



1 substitutes for LILCO. The test from this court's  
2 decisions in Turturro, we quoted again and again back from  
3 Sebastian, "Proprietary is when a governmental entity  
4 performs a purely proprietary role when its activities  
5 essentially substitute for or supplement traditionally  
6 private enterprises." And remember, back in Applewhite it  
7 was important to the court that in that case, it was  
8 private ambulances, the majority opinion by Judge Graffeo  
9 said supplementing this critical medical function rather  
10 than the opposite. This is the opposite. That's number  
11 one. That's enough to make this proprietary.

12 Number two, we think the persons behind the  
13 curtain actually aren't governmental entities at all. The  
14 people making the decision is actually - - - the person  
15 behind the - - - the curtain is the 2,000 employees of  
16 National Grid, not the 100 employees of the - - - of LIPA.  
17 Now add three, why are they - - - don't they have a plan  
18 for - - - it would seem a good idea. But what - - - what's  
19 the reason for not having a plan? Is there a public policy  
20 reason why you don't have a plan for storms?

21 According to the Moreland Commission, this is at  
22 page 683 of the record, "Emergency preparedness is often  
23 not seen as contributing to short-term profitability."  
24 These people get paid a quarter-billion-dollars a year plus  
25 an additional sum for every kilowatt that they - - - that



1 they provide, that they sell. They lose money by shutting  
2 off the power, and they make no money. And for the  
3 purposes - - - I'm not talking negligence, Your Honor. I'm  
4 talking about the character of the act. How can you  
5 possibly say it's governmental when it's substituting for a  
6 proprietary entity, a function that elsewhere throughout  
7 the state, Con Ed, Rochester, and Orange, Central Hudson  
8 Gas & Electric, Niagara Mohawk, it's all provided by - - -  
9 all provided by private entities, done by private persons,  
10 and according to the Moreland Commission, for the reasons  
11 of profit.

12 JUDGE RIVERA: So let me ask you - - - so let me  
13 ask you this. So if the governor had called LIPA and said  
14 this - - - now that we've seen how this is shaping up I  
15 want you to close it all down, de-energize that peninsula  
16 and they did, is that now proprietary or governmental  
17 function?

18 MR. SHOOT: I - - - I'd say it differently, Your  
19 Honor. You know, if - - - if they said it to Con Ed and  
20 Con Ed did it, I think now you're getting to the area of no  
21 negligence because if you're following what a governmental  
22 authority says it doesn't make it more governmental if  
23 you're Con Ed but it does make it you're not negligent.

24 JUDGE RIVERA: No, no. But I'm talking about  
25 LIPA not Con Ed. That's a private act. I'm talking about



1 LIPA.

2 MR. SHOOT: I don't think it changes the  
3 character or the act. So I think it's - - - it's a  
4 defense, and they said we can't sue them but for  
5 negligence. And if they're ordered to do something and  
6 they do it, I would say that they're not negligent. Not  
7 that it changes the character of the act to governmental  
8 and makes them immune. My time is up, Your Honor.

9 CHIEF JUDGE DIFIORE: Thank you.

10 Mr. Isaac, does responding to a disaster of this  
11 proportion change the equation for us?

12 MR. ISAAC: Judge DiFiore, I'm going to take a  
13 little bit of a different view on that, and - - - because  
14 that's actually something I was going to raise. And if  
15 it's okay with the court, I'm not going to repeat what Mr.  
16 Shoot said. He's a terrific lawyer who's far better than I  
17 am. But I think that helps us. And I'm going to go back  
18 to something that's nobody's spoken about at all, Palsgraf,  
19 right. The risk reasonably to be perceived defines the  
20 duty to be obeyed, risk imports relation. The greater the  
21 threat the more the need for ameliorative measures. I  
22 don't see the - - - the immenseness of the storm as being a  
23 factor that should - - - down to the benefit of the  
24 municipality or a - - - a municipal entity that's running a  
25 power grid because that's what they do. Look - - -



1 JUDGE STEIN: So are you saying that it goes to  
2 their negligence, not to the nature of their act?

3 MR. ISAAC: A hundred percent, and - - - and I  
4 think three judges here have actually cited the test right  
5 out of Sebastian. I mean it couldn't be clearer,  
6 "Proprietary activities occur where the activities  
7 substitute for or supplement for traditionally private  
8 enterprises." Let's look at what LIPA did in this case.  
9 Some of the judges on this - - -

10 CHIEF JUDGE DIFIORE: But when a private  
11 enterprise would make that decision, aren't the  
12 considerations that go into that decision for a private  
13 entity very different than the same decisions that would go  
14 into, for example, the State making this decision?

15 MR. ISAAC: I would say - - - I would say  
16 absolutely - - -

17 CHIEF JUDGE DIFIORE: Lots of things?

18 MR. ISAAC: I - - - I would say the only  
19 difference is that one has a different corporate charter.  
20 I would say the answer to that is no, and let me tell you  
21 why. The threat to the public - - - keeps talking about  
22 the public. Now all public official - - - it doesn't  
23 matter if you're a Court of Appeals judge, you're a - - -  
24 you're a worker for the sanitation department, or you're  
25 one of a clerk, everybody does the same thing. You're all





1 public servants. You exist to - - - to protect the public.  
2 So obviously, that can't be the test. This type of  
3 enterprise - - - for a hundred years, even Judge Miller in  
4 his dissenting opinion said this is proprietary-like  
5 activities. The risk to the public, if we're going to look  
6 at the public, is exactly the same. It doesn't matter if  
7 Con Ed is doing it, it doesn't matter if LIPA's doing it,  
8 it doesn't matter if Niagara Mohawk or Power is doing it,  
9 it's exactly the same.

10 And the MSA itself speaks about prudent utility  
11 practice. That's what we should be talking about. There's  
12 no reason to increase immunities because as your decisions  
13 have shown, specifically the Turturro decision going back  
14 to the Haddock decision, we don't want to extend immunities  
15 to a situation where there is no discretion being  
16 exercised. That's why, despite Weiss v. Fote, in Turturro  
17 you said unless there's an exact match with respect to the  
18 study and the theory of plaintiff's liability, there is no  
19 governmental discretionary immunity. I would point out to  
20 the court, as I think Judge Stein pointed out and Judge  
21 Rivera pointed out, LIPA succeeded LILCO and then what did  
22 they do? They delegated, according to the Moreland  
23 Commission and according to the allegations in our  
24 complaint, almost complete authority to another private  
25 entity.



1           So if they're - - - if they're taking over for a  
2 public entity because - - - or a private entity, I'm sorry,  
3 because there was mass dissatisfaction with LILCO and  
4 that's in the report - - - and look, I'm a Long Island  
5 resident, and I understand that. But then they're  
6 delegating that very function to another private entity,  
7 how can you under Sebastian, under Turturro, under  
8 Applewhite, doesn't matter which of the cases you cite, how  
9 can you say that that is something other than a proprietary  
10 duty? It just doesn't make sense, not based on what Brian  
11 Isaac said, not based on what Brian Shoot said, based on  
12 the actions of LIPA itself which is the best indication of  
13 what's transpiring. I would also point out to you that the  
14 Moreland Commission report isn't a report commissioned by  
15 plaintiff's lawyers. It's a State-commissioned report  
16 that's admissible. If you look at footnote 4 of our brief  
17 - - -

18           JUDGE RIVERA: But isn't there a difference  
19 between delegating the implementation of the choice and  
20 what they're arguing about is the choice itself?

21           MR. ISAAC: Well, let me - - -

22           JUDGE RIVERA: That - - - that discretionary  
23 decision that that's theirs and they made that choice and  
24 that that is a governmental choice that is protected by the  
25 governmental protection doctrine.



1 MR. ISAAC: Right, my response - - -

2 JUDGE RIVERA: Not the implementation of it, not  
3 that it's a private contractor is the one that ensures  
4 something is or is not de-energized.

5 MR. ISAAC: Right, my - - - my response is no,  
6 and I'll make it very, very easy. If you look, we've cited  
7 to - - - and I - - - I just want you to note this for your  
8 disposition - - - if you look at the PGI 2:195 sets for the  
9 general rule for public authorities - - - excuse me, for  
10 power authorities and it says, quote, "In view of the  
11 dangerous and subtle character of electricity and the ease  
12 of its escape from transmission lines an electric power  
13 company" - - - that's what LIPA is, it's a - - - it's a  
14 governmental entity but it's a electric power company - - -  
15 "has the duty to use that degree of care which is  
16 reasonably necessary to prevent persons from coming into  
17 contact with the transmission line and to prevent a  
18 dangerous escape of electricity." PGI 2: - - - PGI 2:205  
19 says, quote, "An electric power company must use reasonable  
20 care to keep its transmission lines from falling and  
21 sagging."

22 You know that in our - - - in the Heeran case we  
23 actually got some FOIL requests. We showed that there was  
24 sagging and arcing lines, and we showed that there was LIPA  
25 notification some ten to twelve hours before.



1 JUDGE WILSON: Does LIPA have a tariff on file  
2 with the Public Utilities Commission that essentially  
3 exempts it from any negligence other than gross negligence?

4 MR. ISAAC: It depends on what you're talking  
5 about. There's a difference between interruption of  
6 service and there's a difference between the provision of  
7 electricity. With respect to interrupting service, which  
8 is what Mr. Shoot and I were talking about in our brief,  
9 they are exempt except for gross negligence.

10 With respect to supplying electricity, ordinary  
11 negligence applies, and as we pointed out in the Lee  
12 against Con Ed case, the - - - the utilities have used a  
13 tariff in accordance with the Public Service Law as well to  
14 have the force an effective law. They've used that  
15 successfully to immunize themselves from liability. So I  
16 would also argue that in - - - it - - - I know it's an old  
17 case and my adversary points out it's old but I still think  
18 it's good law, in the Van Leet case you said and I quote,  
19 "Unusual precautions must be taken against extraordinary  
20 dangers when discussing electricity."

21 I see I have just probably forty seconds. I  
22 cannot for the life of me fathom how a for-profit company  
23 that's making a quarter of a billion dollars to a captive  
24 audience - - - we don't have the ability to go get another  
25 power company - - - can claim that they get transferred or



1 derivative immunity. If you look at the Appellate Division  
2 decision cites, they're right on point. It isn't fair. It  
3 isn't just. And this court should absolutely say that.  
4 Thank you.

5 CHIEF JUDGE DIFIORE: Thank you, counsel.  
6 Counsel.

7 MR. LAZER: Thank you, Your Honor. To talk about  
8 many things, but let's start with the man behind the  
9 curtain argument that we heard from Mr. Shoot. If it was  
10 their obligation to prove that LIPA made a decision not to  
11 de-energize the Rockaways, they'd be pointing to our  
12 website and to our Twitter feed which says LIPA is not de-  
13 energizing any part of its service area other than Fire  
14 Island. And they'd say that as a matter of law, that's an  
15 admission that binds us. Now we did have a plan and the  
16 Moreland Commission found that to be that we evacuate and  
17 de-energize in coordination with those evacuation  
18 decisions.

19 And if I may, at page 444 of the Heeran record  
20 there's a status report from the governor's office about  
21 twenty hours before the storm hit and said, referring to  
22 Con Ed's preemptive de-energization of some portion of its  
23 service area that all shutdowns of electric service, quote,  
24 "Will be coordinated with customers and the City and State  
25 Office of Emergency Management, the New York City Police



1 Department, the New York City Housing Authority, the MTA,  
2 elected officials, and local municipalities." That's  
3 what's required when you evacuate and de-energize and that  
4 sounds pretty governmental to me.

5 JUDGE RIVERA: So - - - so what factors did your  
6 client take into consideration that a private utility would  
7 not have to take into consideration to make this decision?

8 MR. LAZER: Well, private utility is going to be  
9 answerable in damages. My client can make a decision, as  
10 this court has said on several occasions, free from that  
11 second-guessing. Okay. So we can - - - may have made the  
12 same decisions but there has to be - - - when you're  
13 talking about thousands of people if not all of the South  
14 Shore of Long Island if the duty runs to de-energize the  
15 Rockaways why doesn't it run all the way to Montauk Point?  
16 We're going to shut down all of Long Island and that's  
17 proprietary?

18 JUDGE STEIN: But again, doesn't that go back to  
19 whether there was negligence, not whether it's proprietary  
20 or governmental?

21 MR. LAZER: Well, they - - -

22 JUDGE STEIN: I mean I just - - - I don't  
23 understand how the - - - how the nature of the act - - -  
24 the act changes depending upon whether there's no storm, a  
25 little storm, a big storm - - -



1 MR. LAZER: It - - -

2 JUDGE STEIN: - - - an even bigger storm.

3 MR. LAZER: Judge Stein, it goes to the  
4 allocation of resources, and I'm reminded of what Judge  
5 Kaye said in her concurrence in the Miller case, one  
6 dormitory no locks is very different than twenty-seven  
7 dormitories and thousands of students and the - - -

8 JUDGE STEIN: Allocation of police resources.

9 MR. LAZER: Allocation of government resources to  
10 protect the public. And I - - -

11 JUDGE RIVERA: Yes, but that's the - - - that's  
12 the point. In those cases, the allocation of where do you  
13 deploy police, where do you deploy firefighters, EMT, how  
14 do you use them, what's the time allotted, that - - -  
15 that's the deployment of resources.

16 MR. LAZER: Well, the deployment - - -

17 JUDGE RIVERA: In your case, it's a decision to  
18 de-energize or not de-energize.

19 MR. LAZER: There are a tremendous, as I just  
20 indicated from the Heeran record, a tremendous amount of  
21 resources involved in evacuation and in cooperation with  
22 all of the government entities involved - - -

23 JUDGE FEINMAN: <Indecipherable>

24 JUDGE RIVERA: Yes, but I - - - I appreciate that  
25 argument that - - - that government is busy with ensuring



1 that people are out of the area that they've ordered an  
2 evacuation on. They're using their police force. They're  
3 using their firefighters and these other responders to  
4 address that. But again, I don't - - - I'm - - - I'm  
5 really asking what's the point of LIPA's choice here that  
6 connects to that kind of deployment of resources?

7 JUDGE FEINMAN: So is - - - doesn't their own  
8 complaint say that they had to use police, for example, on  
9 Fire Island to go make sure everybody's off life support  
10 and all of that?

11 MR. LAZER: That's in the record.

12 JUDGE FEINMAN: So - - - so it's not just in the  
13 record. It's in their allegations and that's what we're  
14 evaluating.

15 MR. LAZER: Absolutely.

16 JUDGE FEINMAN: And doesn't that - - - that sort  
17 of cut against their claim?

18 MR. LAZER: Their - - -

19 JUDGE FEINMAN: And answer Judge Rivera's  
20 question.

21 MR. LAZER: Their - - -

22 JUDGE RIVERA: Are those LIPA personnel?

23 MR. LAZER: LIPA personnel? I don't think LIPA  
24 personnel but in coordination with the county.

25 JUDGE RIVERA: No, because my question is about





1 your client.

2 MR. LAZER: They were cooperating with the county

3 - - -

4 JUDGE RIVERA: But they would do that even if it  
5 was Con Ed.

6 MR. LAZER: I - - - I think that - - -

7 JUDGE RIVERA: If it was Con Ed making that  
8 choice you'd have the same emergency - - -

9 MR. LAZER: But it doesn't implicate - - -

10 JUDGE RIVERA: - - - personnel doing that.

11 MR. LAZER: It doesn't implicate the government  
12 when Con Ed does it. When LIPA does it, you're saying,  
13 well, let's do it here but not there. So sue us if we de-  
14 energize here but not there. And if I may just say one  
15 other thing, it's a two-way street, immunity. If - - - if  
16 - in regard to one of the questions that was posed if the  
17 governor said shut - - - shut it down, if - - - the  
18 governor obviously here had powers because of the emergency  
19 declaration. But put that aside for a minute. Let's say  
20 the head of the MTA said we've got this superstorm coming,  
21 shut down the transit system. I would argue that's an  
22 absolutely governmental function immune decision. And if  
23 he said keep the trains running. We're going to keep the  
24 transit system alive. That, too, would be immune.

25 JUDGE WILSON: And does Con Ed get the same



1 immunity if the governor tells Con Ed shut down the grid?

2 MR. LAZER: I would think they - - - if the  
3 government told them to do it absolutely.

4 CHIEF JUDGE DIFIORE: Thank you, counsel.

5 MR. LAZER: I see my time is up. Thank you, Your  
6 Honor.

7 (Court is adjourned)

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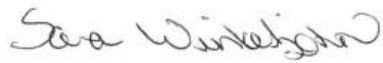
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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of Connolly v. Long Island Power Authority, No. 11, Baumann v. Long Island Power Authority, No. 12, and Heeran v. Long Island Power Authority, No. 13 were prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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