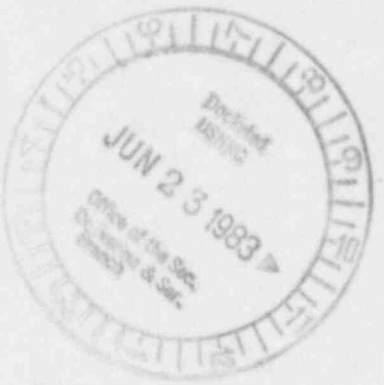

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Lawrence Brenner, Chairman
Dr. James H. Carpenter
Dr. Peter A. Morris

In the Matter of	Docket No. 50-322-OL
LONG ISLAND LIGHTING COMPANY	LBP-83-30
(Shoreham Nuclear Power Station, Unit 1)	June 22, 1983

MEMORANDUM AND ORDER RULING ON SUFFOLK COUNTY'S MOTION TO ADMIT NEW CONTENTION

On May 2, 1983, Suffolk County filed a motion to admit a new contention concerning the emergency diesel generators. The motion is opposed by the Applicant Long Island Lighting Company (LILCO) and the NRC Staff. For the reasons stated below, the motion is granted in part and denied in part.

LEGAL PRINCIPLES

The record in this operating license proceeding has been closed with the exception of two subjects unrelated to the County's proposed

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rew contention.[1/] Proposed findings have been filed on all issues for which the record has been closed and this Board is currently preparing a partial initial decision (P.I.D.) on all such issues. We have estimated that the P.I.D. will be issued the end of July 1983, subject to the possible effect on that estimate of a reopening of the record. The County's motion is properly cast as one to advance a new contention, because the matters which the County now seeks to litigate were not part of any previously admitted contention.[2/]

1/ "Phase II" emergency planning issues (a category of remaining offsite emergency planning issues) have yet to be litigated. At the request of this Board, a separate Licensing Board has been appointed to preside over the Phase II issues. The only other issue on which the record may not have been fully closed as of May 2, 1983 involved a sub-issue of the operational quality assurance ("OQA") program contention regarding the adequacy of the description in LILCO's written instructions, of how the program will be implemented. This OQA issue had been at least partially litigated. Pursuant to the approved settlement agreement, and actions thereafter, the County might have requested by June 20, 1983, that any remaining disagreements over the wording of a number of OQA procedures be litigated before the Board. If the County had so requested, the Board might have first decided whether the remaining disagreements were within the scope of the litigation and then whether they need be litigated prior to the possible authorization of a low-power testing license. In any event, on June 20, 1983, the parties reached full agreement on the wording of the OQA procedures and related documents. The record on all other issues was closed on April 8, 1983. Indeed, except for four hearing days in April 1983, occasioned by our grant of requests by the NRC Staff and the County to reopen the record on a contention unrelated to the present motion, the evidentiary hearing, on issues other than the two specified above, was completed on February 24, 1983.

2/ Suffolk County Contention 2, which was settled by the parties prior to litigation, involved the narrow issue of dirt accumulation in the diesel generator relays. This issue is unrelated to the diesel generator issues which the County now seeks to advance. To the extent any part of the new contention appears broad enough to invite revisiting QA/QC issues which have been extensively litigated, we reject such issues below.

A party seeking to add a new contention after the close of the record must satisfy both the standards for admitting a late-filed contention set forth in 10 C.F.R. § 2.714(a)(1) and the criteria, as established by case law, for reopening the record. Pacific Gas and Electric Co. (Diablo Canyon, Units 1 and 2), CLI-82-39, slip op. at 4, 16 NRC ___ (December 23, 1982), citing Pacific Gas and Electric Co. (Diablo Canyon, Units 1 and 2), CLI-81-5, 13 NRC 361, [364], (1981) (applied both to contentions raised by a private intervenor and to separate issues advanced by the Governor of California as an interested state participant). See also Detroit Edison Co. (Enrico Fermi, Unit 2), ALAB-707, particularly at slip op. 4 n.3, 6-7 and 9, 16 NRC ___, particularly at ___ (December 21, 1982) (applied to a County).

The Criteria for Reopening the Record Apply to the County's Contention

The County asserts, without explicating discussion, that because the record is still open on Phase II emergency planning matters (which the County labels a "health and safety" and "Part 50" issue), it does not have to satisfy the criteria for reopening the record. On the other hand, LILCO, inter alia, argues that the Board previously applied the reopening standard in denying LILCO's request to supplement a then-completed record on a particular health and safety contention (7B) while the record remained open on other health and safety issues. To LILCO, this precedent a fortiori mandates application of the reopening standard to the County's new contention now that the entire health and safety record has been closed.

NRC adjudicatory proceedings are often long and procedurally complex. They involve, as has this proceeding, litigation of many contentions, contention by contention. The multiple contentions can be grouped into separate segments of the evidentiary hearing by licensing boards for purposes of being able to issue separate partial initial decisions, each of which decide a major segment of the case. Many cases would be unmanageable for the multiple parties, as well as by the presiding board, without such segmentation. For example, where the hearing on all contentions in one major category (e.g., environmental, radiological health and safety, or emergency planning) can be completed, it serves no legitimate interest to allow the record to wither on the vine during periods of inattention because contentions in another major category remain to be litigated. Licensing boards can and do flexibly adjust the need to litigate a lengthy case in different segments to the circumstances of particular cases, depending on the number and interrelationship of the contentions, and at times, the different subject areas of contentions raised by different parties.

This process of issuing multiple partial initial decisions in one proceeding has been recognized in the context of appealability by the appeal board. The appeal board has held that partial initial decisions which decide a major segment of the case or terminate a party's right to participate are final, appealable licensing board decisions on the issues decided, even where the decisions do not authorize the issuance of a permit or license. See Boston Edison Co., (Pilgrim, Unit 2), ALAB-632, 13 NRC 91, 93 n.2 (1981); Duke Power Co. (Perkins, Units 1, 2

and 3), ALAB-597, 11 NRC 870, 871 & n.1 (1980); Houston Lighting and Power Co. (Allens Creek, Units 1 and 2), ALAB-301, 2 NRC 853, 854 (1975); Toledo Edison Co. (Davis-Besse), ALAB-300, 2 NRC 752, 758 (1975). In addition, as recognized in the regulations, partial initial decisions on certain contentions favorable to an applicant can authorize issuance of certain permits and licenses, such as a low-power testing license (or, in a construction permit proceeding, a limited work authorization), notwithstanding the pendency of other contentions. Such decisions clearly involve segmentable major portions of a case and are appealable.

Where a party seeks to provide or otherwise adduce new evidence for the purpose of supplementing the record on a contention on which the evidentiary hearing has been completed, such evidence must meet the standards for reopening the record. This is so even if other unrelated contentions remain to be litigated in the evidentiary hearing. The rationale that litigation must end sometime and that, therefore, timely presented significant new evidence which might change the outcome must be shown to exist in order to justify revisiting a contention already litigated applies no later than the completion of litigation of the pertinent issue. This was the circumstance in which this Board denied LILCO's request to admit further evidence on Contention 7B. Similarly, the County properly cast its recent (April 7, 1983) motion to add evidence on its Contention 11 (Passive Mechanical Valve Failure), as a motion to reopen the record. That motion, which will be ruled on in the P.I.D., was filed after completion of the hearing on the affected

contention and, in the same circumstance as presently exists, before the commencement of the evidentiary hearing segment on Phase II emergency planning issues.

Where, rather than add evidence on a previously litigated contention, a party seeks to place a truly new subject in contention after the completion of the litigation of only some of the contentions, there may be close questions of whether the standards for reopening the record must be met in addition to the applicable test for admission of a nontimely contention. It follows from the description of NRC hearings given above, that the analysis would depend on whether a major segment of the evidentiary hearing has been completed, and if so, whether the subject of the new contention would fit under the completed segment or a segment which is still pending.

The County's new diesel generator contention does not present a close question of whether the standards for reopening the record apply. In the posture of this case, they clearly do. All issues have been litigated with the exception of Phase II emergency planning issues.[3/] The pending emergency planning litigation is totally unrelated to the new contention. Moreover, the Phase II emergency planning issues

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3/ The circumstance that an approved settlement agreement on an unrelated OQA procedures issue permitted the County to seek further litigation of that issue, if such disagreements had remained, does not affect the question of whether the County's new diesel generator contention must meet the reopening standards.

comprise a separate major segment of the case which has been long recognized as such by the Board and the parties in the scheduling of the litigation. A separate, appealable partial initial decision will be issued on the completed evidentiary hearing issues, and a later one will be issued on the Phase II emergency planning issues. This procedure was in place before it was known that a separate Licensing Board would be convened to hear the Phase II emergency planning segment of the case. It would remain a separate segment of the case even if there was not a separate Licensing Board, but the fact that a separate Board could be appointed with no practical difficulties of overlapping subject matter still existing between two Boards demonstrates the lack of connection of the Phase II issues to any non-emergency planning issues. Moreover, although not an essential element, under the normal application of the regulations, the pending Phase II emergency planning segment of the case need not be completed prior to possible issuance of a low-power operating license. 4/ This reenforces the conclusion that the pendency of the emergency planning segment of the case does not absolve the County from having to meet the standards for reopening the completed

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4/ The Board has recommended that the regulations not be automatically applied to the special circumstances of this case in a certification to the Commission. LBP-83-21, 17 NRC ___ (April 20, 1983). However, the Commission may disagree. Moreover, our recommendation, even if accepted, does not necessarily mandate completion of the Phase II emergency planning segment of the case prior to possible issuance of a low-power license. In any event, the proposed new contention clearly falls within the completed segment of all non-emergency planning contentions on which a separate partial initial decision will be issued in advance of any initial decision on Phase II emergency planning contentions.

hearing on all other radiological health and safety issues in order to raise a new non-emergency planning contention.[5/]

The Criteria for Late-Filed Contentions Also Apply to the County's Contention

The County also argues that interested governmental agencies participating pursuant to 10 C.F.R. § 2.715(c) need not satisfy the standards for admitting a nontimely contention set forth in Section 2.714(a)(1). Suffolk County was admitted as a full intervenor party in this proceeding pursuant to Section 2.714, and, in fact, has taken a position and advanced many contentions. This does not affect the analysis, which is the same when considering a governmental entity irrespective of whether it is participating pursuant to Section 2.714 or 2.715(c). As we have ruled in this case, "the County does not lose its right to participate as an interested governmental agency pursuant to Section 2.715(c) because it has elected to participate as a full intervenor on specified contentions." LBP-82-19, 15 NRC 601, 617 (March 15, 1982), citing Project Management Corporation (Clinch River Breeder Reactor Plant), ALAB-354, 4 NRC 383, 392-93 (1976). We added, however, that in the then existing posture of the case less than two months before the start of the hearing, the County, even under Section

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5/ As will be seen below, the extent to which we find that portions of this contention are not significant for low-power, relatively short term operation prior to issuance of a full-power license does influence the application to this contention of the standards for reopening and for admitting a nontimely contention.

2.715(c), could not raise new issues in the case not already embraced within the scope of admitted contentions without satisfying the test for late-filed contentions. 6/ LBP-82-19, supra, 15 NRC at 617, citing Gulf States Utilities Co. (River Bend, Units 1 and 2), ALAB-444, 6 NRC 760, 768-70 (1977). Perforce, at this point over a year later, and after the pertinent segment of the hearing has been completed, the County must satisfy the criteria for late-filed contentions.

This does not mean that we agree with the inference which may be drawn from the NRC Staff's filing that an interested governmental participant must raise any issues not already in the case on which it seeks to participate at the same time as the filing of contentions by Section 2.714 intervenors. River Bend, supra, 6 NRC at 768-70, does not stand for such a proposition, since the time was well past for contentions by private parties when the River Bend Licensing Board directed the State of Louisiana to specify, in advance of the hearing, any issues which it might seek to raise in addition to those already admitted in the case. Furthermore, the last sentence of Section 2.715(c), enacted after and in apparent agreement with the River Bend decision, implies the contrary, since it states permissively that "The

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6/ We excluded, inter alia, emergency planning issues from having to meet the nontimely contention test since contentions for that segment of the hearing were not ripe for filing. This is another of many acknowledgments in the case that emergency planning issues, and certainly Phase II ones, constituted a separate, later segment of the case. LBP-82-19, supra, 15 NRC at 617 n.24.

presiding officer may require [an interested governmental entity] to indicate with reasonable specificity, in advance of the hearing, the subject matters on which [it] desires to participate." (emphasis added)[7/] However, once the time for identification of new issues by even a governmental participant has passed, either by schedule set by the Board or by circumstances (see e.g., the discussion in this case in LBP-82-19, supra, 15 NRC at 617), any new contention thereafter advanced by the governmental participant must meet the test for nontimely contentions.

Manifestly, even under a liberal interpretation of the last sentence of Section 2.715(c), the circumstance of the hearing being completed requires that any governmental participant seeking to advance a new contention or issue, whether or not it be a participant already in the case or one seeking to enter, must satisfy the criteria for late-filed contentions (as well as the criteria for reopening the record). The cases so hold. Diablo Canyon, CLI-82-39, supra, slip op. at 3-4, 16 NRC at ___ (applies to Governor Brown's motion to reopen to the extent it raises a new issue for litigation); Pacific Gas and Electric Co. (Diablo Canyon, Units 1 and 2), ALAB-728, slip op. at 36-38, 43, 17 NRC at ____ (May 18, 1983); Enrico Fermi, ALAB-707, supra,

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7/ There is no hint in this language or in the statement of considerations (43 Fed. Reg. 17,798 (1978)), or by analysis of the River Bend case or other cases, that this sentence is limited to issues already advanced by other parties in the case.

slip op. at 3-4, 16 NRC at ___; Mississippi Power & Light Co. (Grand Gulf, Units 1 and 2), ALAB-704, 16 NRC ___ (December 8, 1982).

The current situation may be readily distinguished from our recent ruling permitting the Town of Southampton to enter belatedly the Phase II emergency planning case as an interested governmental entity. LBP-83-13, 17 NRC ___ (March 10, 1983). Southampton was not belatedly advancing contentions, but was seeking to enter the case in order to be able to participate in issues and perhaps advance its own contentions on the same time schedule as all other parties. As discussed above, Phase II emergency planning issues are a separate segment of the case. Contentions on these issues were not filed or even scheduled to be filed by any party at the time Southampton was admitted. Consistent with our view just expressed above, we noted in LBP-83-13, issued in the context of the pertinent segment of the hearing not having commenced, that there is no explicit time requirement for a request to participate pursuant to Section 2.715(c).

In sum, neither a schedule requirement of the Board nor circumstances in the case supported a determination that the request of Southampton to participate as an interested government had come late enough to trigger the application of the criteria for late intervention to it. However, Southampton was admitted with restrictions involving discovery and coordination with other intervenors and governmental participants to avoid any disruption to the proceeding and prejudice to other parties. Restrictions to assure that Southampton "take the

proceeding as it finds it" were easily devised given the pre-contention posture of the Phase II emergency planning segment of the case.

Application of the Criteria

For convenience, we set forth the factors which must be balanced in determining whether to admit a late-filed contention pursuant to Section 2.714(a)(1):

(i) Good cause, if any, for failure to file on time.

(ii) The availability of other means whereby the petitioner's interest will be protected.

(iii) The extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record.

(iv) The extent to which the petitioner's interest will be represented by existing parties.

(v) The extent to which the petitioner's participation will broaden the issues or delay the proceeding.

Although the test for reopening the record in an NRC proceeding has been variously stated, it requires that 1) the motion be timely, 2) new evidence of a significant safety (or environmental) question exists, and 3) the new evidence might materially affect the outcome. See e.g., Diablo Canyon, CLI-81-5, supra, 13 NRC at 364-65; Detroit Edison Co. (Enrico Fermi, Unit 2), ALAB-730, slip op. at 10 n.7, 17 NRC ___ June 2, 1983); Diablo Canyon, ALAB-728, supra, slip op. at 34 n.66, 17 NRC ___.

Through a series of pleadings in addition to the legal pleadings, we have before us the affidavits of technical personnel filed on behalf of Suffolk County, LILCO and the NRC Staff. In addition, to aid us in our determination of whether to reopen the record to admit the County's new contention for litigation, we held an all day on the record conference of parties. (June 10, 1983, Tr. 21,179-438.) At the conference, we heard directly from the parties' technical personnel, including those who had filed affidavits, and from the NRC Staff inspectors who prepared the pertinent inspection reports. This was not an evidentiary hearing since the witnesses were not subject to cross-examination by the parties. The Board, however, questioned the technical personnel at length, in order to obtain supplementary information in addition to the affidavits to assist in our application of the reopening and late-filed contention factors to the proposed contention. We found this procedure to be very helpful to this decision.

We note that the County believes the reopening factor of whether the new evidence might materially affect the outcome cannot be applied in advance of a partial initial decision. This is not fully correct. However, the ease with which this factor can be applied will vary, in part, depending on whether a decision has issued and also depending on the extent to which the subject of the motion to reopen is related to an issue which has been litigated. Where the motion to reopen is related to a litigated issue, the effect of the new evidence on the outcome of that issue can be examined before or after a decision. Of course, the

degree of certainty of the effect on the outcome, all other things being equal, will increase after proposed findings have been filed, and again after a decision has been issued. To the extent a motion to reopen is not related to a litigated issue, then the outcome to be judged is not that of a particular issue, but that of the action which may be permitted by the outcome of the licensing proceedings. Vermont Yankee Nuclear Power Corp. (Vermont Yankee), ALAB-138, 6 AEC 520, 523 (1973).

As the Appeal Board well explained this factor, if the first two reopening factors of timeliness and significance of the issue are resolved in favor of the movant,

> the Board must then proceed to consider whether one or more of the issues requires the receipt of further evidence for its resolution. If not, there is obviously no need to reopen the record for an additional evidentiary hearing. As is always the case, such a hearing need not be held unless there is a triable issue of fact.
>
> In other words, to justify the granting of a motion to reopen the moving papers must be strong enough, in the light of any opposing filings, to avoid summary disposition. Thus, even though a matter is timely raised and involves significant safety considerations, no reopening of the evidentiary hearing will be required if the affidavits submitted in response to the motion demonstrate that there is no genuine unresolved issue of fact, i.e., if the undisputed facts establish that the apparently significant safety issue does not exist, has been resolved, or for some other reason will have no effect upon the outcome of the licensing proceeding. (Footnote omitted.)

Id. See also and compare Cerro Wire and Cable Co., 677 F.2d 124, 128-29 (D.C. Cir. 1982); Independent Bankers Association of Georgia v. Board of Governors of the Federal Reserve System, 516 F.2d 1206, 1220 and cases discussed at n.57 thereof (D.C. Cir. 1975), explained by Costle v. Pacific Legal Foundation, 445 U.S. 198, 341-342, 343 n.12 (1980).

The Appeal Board went on to note that the utilization of principles akin to those involved in summary judgment includes the right of the movant seeking to reopen not only to rely on showing that there is a triable issue in the face of opposing facts, but also or in the alternative to demonstrate with particularity that it cannot now present facts essential to show a triable issue but that discovery would enable it to do so. Id., at 524, relying on 10 C.F.R. § 2.749(c) and F.R. Civ. P. 56(f). If the Board agrees, it could defer ruling on the motion to reopen until after discovery (or it could grant the motion to reopen the record without precluding a later standard motion for summary disposition of the contention or other resolution short of a full evidentiary hearing).

The Appeal Board added that,

> while it is useful from an analytical standpoint to keep separate the factors to be considered on a motion to reopen, it will not always be possible, in passing upon the motion, to give them separate consideration. The questions of whether the matter sought to be raised is significant and whether it presents a triable issue may often be intertwined, and can be so treated,....

Vermont Yankee, ALAB-138, supra at 524.

Contrary to the implication of LILCO's pleadings, as recognized by LILCO at the conference (Tr. 21,204, Ellis), the factors to be applied in reopening the record are not necessarily additive. It is true that even if timely, the motion may be denied if it does not raise an issue of major significance (in this case, to plant safety). However, "a matter may be of such gravity that the motion to reopen should be

granted notwithstanding that it might have been presented earlier." Id. at 523, citing Vermont Yankee Nuclear Power Corp. (Vermont Yankee), ALAB-124, 6 AEC 358, 365 and n.10. See also Metropolitan Edison Co. (Three Mile Island, Unit 2), ALAB-474, 7 NRC 746 (1978).

We add that, in our view, the additional test of the criteria for reopening the record adds little, if anything, of practical import to the application of the factors for a late-filed contention in the circumstance of a truly new contention. This is because the reopening factors of significance of the issue and whether the issue presents genuine triable facts are inherently part of the calculus of factors for ruling on the admissibility of a late-filed contention. For example, the extent to which the petitioner's participation may reasonably be expected to assist in developing a sound record is only meaningful when the proposed participation is on a significant, triable issue. In addition, even where a contention is measured solely under Section 2.714(a)(i), the extent to which the petitioner's participation will broaden the issues or delay a proceeding is properly balanced against the significance of the issue. If significance and triability of the issue were not inherently part of the overall balancing test for late-filed contentions, the illogical result would be that the significance of an issue could not weigh the balance in favor of admitting a late-filed contention before the record closes, but could weigh in favor of admitting the same contention filed even later, after the close of the record. In our view, our reasoning and result below in denying some parts and admitting other parts of the contention would

apply equally under either the reopening or the late-filed contention test, or under both of them.

THE COUNTY'S DIESEL GENERATOR CONTENTION

A copy of the County's entire contention, as it was filed as Exhibit 1 to the County's motion of May 2, 1983, is attached to this order. As we stated at the conference (Tr. 21,220), we find that the first two unnumbered paragraphs comprise a broad, nonspecific preamble alleging generally that LILCO violates broad General Design Criteria applicable to diesel generators and broad Quality Assurance criteria. The preamble understandably was not meant by the County to stand alone. However, if allowed to remain at all it appears that the boundaries of the contention are not ascertainable and, therefore, do not put the Board or the parties on sufficient notice of what the County would seek to litigate. This is particularly impermissible at this stage. Indeed, it is impossible to analyze the application to the contention of the criteria for reopening the record and late-filed contentions if the first two paragraphs are part of it. Accordingly, these first two paragraphs of the contention are rejected. The contention must rise or fall on the third unnumbered paragraph which alleges that LILCO has failed to assure required rapid starting and reliable operation of the emergency diesel generators, and on the five numbered subparagraphs alleging the reasons in support of the allegation.

The numbered paragraphs must be parsed separately to analyze whether they each meet the tests discussed above for admission as an issue in controversy at this stage of the proceeding.

Paragraph 1 (Preoperational Diesel Test Procedures)

Paragraph 1 of the proposed contention alleges that LILCO cannot assure reliable operation of the diesels because it has failed to conduct tests and review and approve test procedures and results adequately. The contention cites, as basis, IE Reports 82-35, 83-02, 83-07 and 83-08, and IE Enforcement Action ("EA") 83-20.

A brief and simple overview of the diesels may be useful at this point. There are three diesels of the same model at Shoreham, manufactured by the Transamerica Delaval Company. Each diesel is very large, rated at 3,500 KW (for the "100%" rating at 450 RPM), and has eight cylinders. Tnis basic model has been manufactured for about thirty years by the vendor. It has been used for applications other than nuclear power plants, e.g., for marine engines. The diesels are required, in the event of a loss of offsite electrical power, to provide the essential A.C. electrical power for the plant, including for emergency equipment necessary to safely shut down the plant in the event of a design basis accident. Even in the event of a design basis accident at 100% power and maximum core fission product inventory, only two out of the three diesels are required for safe shutdown. However, it is required by the NRC's "single-failure criterion" that there be

three operable diesels in the event of a failure of one of them upon demand. Among other tests, the diesels are pre-operationally tested for a two hour run at their overload rating (nominal 3,900 KW, minimum 3,881 KW for Shoreham), which could be required for a short time period upon the occurrence of a maximum design basis accident, for a 22 hour run at the 100% rating, and a 72 hour run at the load required for relatively longer term maintenance of a safe shutdown condition after a design basis accident. In addition to load, the diesels must operate within other specified parameters (e.g., coolant temperature) during these preoperational tests.

When filed on May 2, 1983, paragraph 1 was based on a number of violations identified by Staff inspectors in the 22 hour load and two hour overload test for one diesel. County Motion, at 6-7, County Response (May 31, 1983), at 19; Goldsmith Affidavit (attached to County Response and thereafter formally executed June 2, 1983), at 7-10. The crux of the violation is the failure, in the Staff's view, of LILCO to run the test either at the minimum of the full overload rating for the two hours, or to justify a range falling below that rating, and the failure of several layers of LILCO review (although short of still-pending final LILCO revie to note the deficiencies. There were also secondary matters noted involving means and intervals of data recording of the load, and also questions regarding the range of other monitored parameters of the diesels.

The request to reopen the record to admit this contention is very late, particularly in the circumstances of this case. After February 1, 1983, the only remaining items in the non-emergency planning segment of the evidentiary hearing were one portion of QA/QC held open and heard on February 22-24, 1983, to permit inquiry into particular QA violations set forth in the Staff's so-called RAT (Readiness Assessment Team) inspection, and the reopened hearing on Contention 7B held on April 5-8, 1983. Indeed, proposed findings on most issues were filed in January and the first half of February 1983, and were filed on all remaining issues except the reopened April hearing from late March through April 1983. This then was a time period in which the hearing was complete on many issues and essentially complete on remaining issues. In such circumstances, as the parties well knew, a time delay of even a few weeks more than necessary in filing a new contention, which delay would have little effect in a prehearing or perhaps even a hearing phase, has a great effect after the hearing. This is particularly true where there were many weeks in March and even April 1983, during which timely raised significant issues could have been litigated with much less impact, if any, on the estimated date for issuance of our P.I.D.

A reopening of the record now (anytime after the May 2, 1983 date of the County's motion) to litigate a new contention would cause an extensive, significant delay in the completion of the non-emergency planning segment of the proceeding. Therefore, the County's showing on all of the other factors, particularly timeliness, significance of the issue (and whether there are genuine facts in dispute requiring

litigation), and expected contribution of the County to developing a sound record, must be very substantial in order to find the balance in favor of reopening. It is the delay of the proceeding, not possible operation of the facility, which is pertinent. 10 C.F.R. § 2.714(a)(1)(v); Enrico Fermi, ALAB-707, supra, slip op. 9, 16 NRC at ___. However, as described above, if the Commission disagrees with our recommendation that a low-power license not issue in the present circumstances of offsite emergency preparedness, reopening the record now to litigate a new contention would also substantially delay (by at least several months) the possible issuance of a low-power license in August 1983, (in the event the upcoming P.I.D. finds that there is no other bar to issuance of a low-power license).

Against this background, paragraph 1 is very late. The diesel test violations were discovered by Staff inspectors in December 1982, and were noted without details in the January 20, 1983 cover letter to the RAT inspection (IE Report 83-02). Significantly, however, the diesel test was discussed at a January 25, 1983 management meeting between Region I of the NRC Staff and LILCO, which was attended by the County. On the record of January 27, 1983, the County's counsel discussed the NRC Staff finding of the diesel test violations in sufficient detail to disclose that the County then knew about the essential elements of the failures to run the two hour test at full overload and that several stages of the LILCO review process had not discovered this.

Tr. 19,422-23 (Miller). We believe it fair and accurate to hold that the County had knowledge as of January 25, 1983, sufficient to raise the same paragraph 1 of the contention.

Even if we give the County every benefit, IE Report 82-35, dated February 24, 1983, was received by the County on or about March 8, 1983. This is the report which contains the formal NRC Staff inspection findings on the subject diesel test. A delay of almost two months in filing a contention based on this report is too long. The County's argument that it could not be expected to file the contention until the Staff issued its enforcement action on April 12, 1983 (EA Letter 83-20), which proposes to assess a fine of $40,000 against LILCO, is fallacious. This enforcement action adds no facts; the County has suggested none. The only knowledge added by EA 83-20 is the seriousness with which the Staff viewed the failure of LILCO's test engineer and reviewers to pay attention to required detail of the diesel test. 8/

LILCO has rerun the 22 hour and two hour load tests (among other preoperational tests) for all three diesels. There is no remaining question requiring litigation on whether the diesels meet these tests.

8/ IE Report 83-07 (March 24, 1983) cited by the County in paragraph 1 is not pertinent to that contention on adequacy and review of testing. That report is the focus of paragraph 2. IE Report 83-08 (April 15, 1983), at pp. 17-18, continues to note the Staff's concern with "negative tolerances" in the range for the load tests, albeit in this instance as LILCO proposes in written procedures to rerun the tests.

Tr. 21,233 (Higgins); Tr. 21,229-31, 21,244-46 (Goldsmith). Although the Staff had not completed its review of the tests as of the June 10, 1983 conference of parties, all parties agree on the now specified criteria. Whether the diesels satisfied the criteria is a readily ascertainable fact which the Staff can and will verify. The Staff's preliminary review was favorable to LILCO. IE Report 83-10, at 13 (May 27, 1983); IE Report 83-11, at 8-9 (May 27, 1983).

At the June 10, 1983 conference, the County stated it wants to litigate broadly the conduct by LILCO of all aspects of all diesel preoperational tests. The County had no specifics beyond the test violations noted in IE 82-35 other than: 1) A Staff noted test violation for LILCO's failure to have a recent written change notice to the diesel test procedure at the location where the tests were rerun (on April 27, 1983). IE Report 83-10, at Appendix A and 13 (May 27, 1983) (received after the County's written filings); and 2) a Staff follow-up item in IE Report 82-35 at 6-7, never previously cited in the County's motion or reply, involving a generic Staff circular regarding surveillance and maintenance of the corrosion inhibitor in the diesel lube oil coolant. Tr. 21,225-28 (Goldsmith). The inspection logically notes that the NRC Staff will require a corrosion inspection if LILCO's present failure to document past maintenance of the corrosion inhibitor cannot be resolved. Tr. 21,266 (Higgins).

It does not denigrate the importance of adherence to procedures to hold, as we do, that paragraph 1, even when supplemented with the two

additional instances, do not give rise to a common pattern of failure to test the diesels properly (even if one can label the corrosion circular item as a test procedure). This is particularly true at this stage where the matter must be significant. Further, there is no concern for the reliability of the diesels based on the testing items. (To the extent the County believes the corrosion inhibitor item may have affected the cracked heads if, in fact, it was not maintained (Tr. 21,259, (Goldsmith)), it is subsumed by our treatment of the cracked heads issue under paragraph 3 of the contention.)

The County has not indicated what it would contribute to the record under paragraph 1, other than its desire to commence discovery and then possibly litigation of any diesel tests it has a question about. (Tr. 21,248-49 (Dynner)). This proposition patently is not an identified, specific significant safety concern for which a late contention should be admitted or the record be reopened.

To the extent any part of paragraph 1 may be construed not as a new contention concerned with the reliability of the diesels, but rather as a request to reopen and continue the QA/QC litigation, it is rejected. In addition to being out of time [9/], the diesel test violations would

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9/ It is late for reconsideration as well as if construed as raised initially on May 2, 1983. On January 27, 1983, we rejected the County's desire to expand the litigation of RAT inspection violations to include the diesel test as another example of why LILCO's final inspections could not be relied upon to uncover construction defects. Tr. 19,533 (Brenner).

not materially affect the result of the QA/QC contention on construction defects. The diesel preoperational test procedures are collateral to the construction QA contentions (albeit not totally irrelevant) and, therefore, not worth the extensive inquiry which would take place (even if there were no delay to completion of the proceeding, which there would be on a reopening at this time). We have had a truly extensive litigation of QA/QC audit and inspection items, allowing the County to use its best examples. One or two more items at this late date, particularly collateral ones, would not change the result either way.

Paragraph 2 (Vibration)

This paragraph alleges that the diesels vibrate excessively, thereby preventing them from reliably performing, and that such vibration may reflect design and/or fabrication/erection deficiencies. The contention cites IE Report 83-07 for basis.

The cited IE Report is dated March 24, 1983 and was received by the County on or about April 4, 1983.[10/] The report (at 5-7), records the inspector's concern that the number and type of diesel incidents during

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10/ Such a time-lag has been typical for receipt by the Board and parties of Staff IE Reports (and of LILCO technical "SNRC" letters to the Staff, including deficiency reports). For example, the Board received IE Report 83-07 on or about April 1, 1983 (a Friday).

preoperational testing listed in IE 83-07, which were reported in LILCO deficiency reports over the past year, indicates "an apparent overall excessive vibration problem" with all three diesels, and that "the reliability for continuous operation and for standby electric power is questionable at this point," and that further trend analysis of the incidents is required to resolve the concern.

LILCO and, to a lesser extent the NRC Staff, argue that the County is untimely, because it should have known of the same past occurrences compiled by the inspector. If we were left with this, the question of good cause for the County's failure to file on time would be a close question. LILCO has not identified which of its deficiency reports to the Staff (which it claims the County had access to on discovery as early as the spring of 1982) should have alerted the County to file its vibration contention. All correspondence after the spring of 1982 between LILCO and the Staff, including deficiency reports, have been served on the parties (including the County). LILCO has not specified which of these should have alerted the County to file its vibration contention. The NRC Staff attached some deficiency reports to its pleading, but did not indicate which ones should have disclosed a vibration problem. As we read them, none of them discuss vibration. The one which arguably comes closest, involving a fatigue crack on a water pump impeller shaft caused by cyclic movement on an improperly tightened nut, does not imply, or even on reflection now, appear to be related to a diesel vibration problem. (Indeed, this item was closed out by the Staff itself in IE Report 83-11 (May 27, 1983),

notwithstanding the fact that the Staff is still reviewing the items it considers possibly pertinent to vibration). In sum, the parties claiming sufficient prior knowledge by the County have not carried their burden. On the other hand, it does appear generally that the County had access on discovery (and, since the spring of 1982, by receipt) to the reported diesel occurrences. The County arguably should have been able to do what the NRC Staff inspector commendably did, that is, look at the number and type of occurrences and become concerned over the possibility of an overall common-cause vibration problem.

However, the balance on timeliness for a vibration contention shifts more clearly in the County's favor as a result of recent events. IE Report 83-10 (May 27, 1983), received by the Board on June 8, 1983, and discussed at the conference on June 10, 1983, reports (at 14) new "unresolved items" observed during testing on April 27, 1983 of all three diesels. A large amount of small diameter tubing (lube oil, fuel oil, water and air) was either loose, vibrating and/or not clamped properly. In addition, various lube oil and fuel oil leaks were observed while the diesels were running. Also, the exhaust lines had missing, torn and crushed insulation and flashing where the lines enter a concrete section outside the diesel rooms.

On May 20, 1983, LILCO reported (the oral report was made to the Staff on or about April 20, 1983), the failure of two high pressure fuel oil injector lines (on one cylinder each for two of the diesels)

attributed to "fatigue induced by cyclic loading" from the pulsations of the fuel injector pump.

In addition, one of the incidents of cracking of components which are the subject of paragraph 3 of the contention (and are discussed under that subheading below) could be vibration related. This incident involves partial cracking of a rocker arm assembly bolt, also attributed to fatigue induced cyclic loading in LILCO's written report to the Staff, dated May 4, 1983 (reported orally to the Staff on March 30, 1983 and known to the County before the written report as stated in the contention). We do not, at this stage, completely dismiss the possibility that the occurrences of cracking of the cylinder heads, discussed under paragraph 3, may be related to vibration. However, as there is presently no apparent reason to connect it, we assume it is unrelated for the sole purpose of ruling on the admissibility of paragraph 2.

Dated from receipt of IE Report 83-07, the County was not unreasonably untimely (about 1 month), although the contention could have been filed by mid-April. Furthermore, IE Report 83-10 adds items of apparent concern regarding vibration, as arguably, does the rocker arm bolt written deficiency report of May 4, 1983, and the fuel line cracking failure written report of May 20, 1983. After initial events were solved, in the late 1981-fall of 1982 period, there was a relatively long time-lag before the newer events were disclosed, raising the concern which depends on the cumulative nature of all the events

with an apparent nexus to vibration. We believe that a reasonable basis to allege a possible common-cause vibration problem for many events, disparate in time and precise nature, only became reasonably apparent in the April 1983 time frame.

Even if the County could have acted with greater alacrity before the issuance of IE Report 83-07, the later reported events would have affected either preparation for any litigation (LILCO's review of the vibration question, including these events, is expected to be complete the end of June 1983; the Staff's review is estimated to be complete by the end of July 1983), or the completion of any litigation on vibration. In addition, as discussed below, we find that at this juncture there is a genuine, triable issue of possible safety significance related to vibration of the diesels for the long term, but not for the short term, and therefore: a) any arguable untimeliness by the County is ameliorated since litigation of the vibration contention would not affect the possibility of low-power testing; and b) for the long term, the other factors, including significance of the issue and contribution of the County, weigh sufficiently in the County's favor.

The conference of parties was of great assistance in understanding the facts and positions of the parties on the vibration issue. It is not necessary to set forth at length all of the facts; it would approach a "mini-decision" on the merits to do so. We have taken all of the affidavits, written arguments, and statements at the conference into

account. We summarize the most important aspects in sufficient detail to disclose our rationale.

Diesels, such as the ones at Shoreham, vibrate normally. It would not be unexpected that problems of vibration of at least appurtenances attached to the diesels appeared during preoperational testing. Tr. 21,329-30 (Nicholas). However, the number and timing of the occurrences at Shoreham was of concern to the Staff. The County believes that the nature of some of the occurrences, involving components of the diesel itself, rather than appurtenances, also support a basis for concern. LILCO, for its part, believes that only the earlier problems in the late 1981-fall of 1982 period (i.e., vibration of turbocharger, exhaust bolting, and the coolant system funnel) were related to vibration. LILCO asserts they were isolated, typical instances requiring localized support or modification of the item, and not caused by excessive vibration of the diesels themselves. The Staff agrees that there are many subsequent running hours on the diesels showing that those earlier problems are solved, and that there are no later occurring uncorrected items vibrating at this time (tubes noted in IE Report 83-10 have been attached securely). There have been substantial testing hours with the new rocker arm bolts, at least, and no further internal high pressure fuel line problems have occurred since the two early March 1983 cracking failures. See e.g., Tr. 21,272-77, 21,323-30 (Nicholas, Higgins); Tr. 21,282-84, 21,288-91 (Youngling); Tr. 21,345-48 (Goldsmith); Youngling Affidavit (May 16, 1983, attached to LILCO's Opposition of May 16, 1983), at 10-14.

Importantly, LILCO has provided measurements showing that the baseline diesel vibration is well within the desired normal level. Tr. 21,278-79 (Youngling). This is a readily ascertainable level, which the Staff will verify by examining LILCO's data (to be presented the end of this month). Tr. 21,322 (Higgins). The Staff inspector never observed the diesels appearing to vibrate excessively. Rather, he based his concern on all the summarized occurrences. Tr. 21,323 (Nicholas). The Staff inspector also agrees with LILCO that his observations regarding vibration of the small diameter lines in IE Report 83-10 is not related to a diesel vibration problem, but to inadequate clamping of the lines, since corrected by LILCO. Tr. 21,318-21 (Higgins, Nicholas). The Staff also states that the fuel leaks and crushed insulation items in that report are unrelated to vibration (although the Board neglected to ask the bases for this view by the inspectors). Id.

In sum, any main baseline excessive diesel vibration does not appear to exist. The Staff will verify this, pursuant to the stated measurement criteria prior to any operation of the reactor. The Staff will not permit low-power testing, if the measurements do not satisfy the criteria. As with the load tests, the readily ascertainable nature of the item allows it to be left for Staff verification outside of the litigation. See e.g., Southern California Edison Co. (San Onofre, Units 2 and 3), LBP-82-46, 15 NRC 1531, 1535-36 (1982) (straightforward and objective decibel measurements of sirens). Cf. Public Service Co. of Indiana (Marble Hill, Units 1 and 2), ALAB-530, 9 NRC 261 (1979), citing Consolidated Edison Co. of New York (Indian Point, Unit 2), CLI-74-23, 7

AEC 947, 951-52 (1974) ("minor procedural deficiencies" may be left for post-hearing resolution by the Staff, but not controversial questions in controversy in the proceeding).

The required demonstration that the baseline vibration meets the criteria, combined with the fact that all identified vibration-related items have been remedied, and that they have not recurred with substantial, additional testing hours, give reasonable assurance that any induced vibration problems (occurring even though the baseline diesel vibration is normal) would be a problem developing only from long term operation failure mechanisms. Tr. 21,348-49 (Goldsmith). The diesels, given their emergency standby function, will operate for only relatively short periods (including monthly surveillance tests), even if needed for emergency service, during any low-power testing.

However, we cannot go further and conclude there is nothing of significance to litigate in the long term either. It is not a readily ascertainable matter to say that there will be no vibration problems which could cause, in the long term, significant failures. Failures such as fuel injector lines, rocker arm bolts, and fuel, air and water tubing, could fail at least individual cylinders in the diesel. Failure of even one cylinder could prevent the diesel from starting or running at all, or could degrade needed power output. Tr. 21,296 (Youngling). If needed, at least two of the three diesels are required to start up very rapidly, and at least one must operate briefly in an overloaded condition, at least when the reactor is operating at substantial power. There could be, therefore, safety significance in the long term.

We cannot now find that there are no genuine, material issues to litigate unless we accept all of LILCO's position. Among other things, we are unable to accept LILCO's distinction between excessive diesel vibration and cyclic loading-induced fatigue as causes of the bolt and the high pressure fuel line failures, at least in advance of discovery by the County. Tr. 21,291-92 (Youngling). The Staff does not make the same easy distinction as LILCO. Tr. 21,336-39 (Higgins). We do not, of course, preclude a successful motion for summary disposition after discovery, or a settlement approved by us, in advance of an evidentiary hearing.

Similarly, it does no disservice to the Staff's efforts in pursuing the diesel concerns, which preliminarily appear to us to have been commendably excellent to date, to hold that such efforts do not replace the forum of an adjudicatory hearing, if merited by other applicable factors, when there remain genuine, significant issues in controversy which do not preliminarily appear resolvable for the long-term by readily ascertainable criteria.

In addition, the extent to which the County's participation may reasonably be expected to contribute to a sound record weighs heavily in its favor. Its consultant, Mr. Goldsmith, has nuclear experience and education, along with marine engineer diesel engine experience (including a U.S. Cost Guard license for diesel engines awarded after an examination). Significantly, the County also proposes to retain, to the extent appropriate to the issues, two identified individuals with

substantial credentials regarding diesel engines. See qualifications of Messrs. Meulengracht and Christensen, furnished by counsel's letter to the Board of June 15, 1983. Concomitant with the level of such independent, professional expertise, we expect that if further investigation discloses no remaining vibration problem, the record will benefit from that view by the County's experts.

Paragraph 3 (Cracking of Components)

As discussed under paragraph 2, this paragraph includes the rocker arm bolt crack deficiency report. All the rocker arm bolts have been changed for ones that are much sturdier (now being used for the vendor's new, 40% more powerful, "R-5" diesel). Youngling Affidavit, at 15-16; Tr. 21,295 (Youngling). The new bolts, unlike the old ones, were tested ("mag particle") for structural irregularities at the factory. Substantial testing hours have been accrued on the Shoreham diesels since the new bolts were installed with no problem. Tr. 21,384-85 (Youngling (agreeing with Ellis); Tr. 21,387 (Youngling); Youngling, Affidavit, at 16. We conclude that the only remaining triable significance of the bolt issue is its possible connection with the vibration contention, and it may be considered under any paragraph 2 litigation. Goldsmith Affidavit, at 12. The one remaining long term question regarding the bolts directly should be easily resolved without resort to litigation. That question is the scope of LILCO's plans (undecided at the time of the conference of parties. Tr. 21,385-89 (Youngling)), if any, to prudently inspect a sample of the new bolts at

reasonable intervals of operation of the diesels (not too soon or too long), perhaps including before any fuel-loading given the substantial testing hours accrued with the new bolts. Tr. 21,368-69 (Goldsmith). We direct LILCO to discuss such a testing proposal with the Staff and the County, reporting any agreement or disagreements. Subject to our approval of such surveillance, or approval of any position by LILCO as to why such sampling should not be done, we find there is nothing left to litigate regarding the reliability of the rocker arm bolts.

Paragraph 3 also includes a LILCO deficiency report of cracking in one cylinder head in each of the three engines and concomitant water jacket leaks into the affected cylinders. LILCO's written report to the Staff is dated April 15, 1983, and the oral report was made on March 8, 1983. Although the County knew of the occurrences as early as its counsel's March 23, 1983 letter to LILCO's counsel, there is no reason to assume, based on the brief reference in that letter, that sufficient details were known to form a properly based contention. Although this issue could delay issuance of a low-power license, it will only do so if LILCO cannot establish its lack of significance for low-power in summary procedures. If LILCO cannot readily establish its lack of significance for low-power, the issue is significant enough to counter-balance the delay in the proceeding, including any delay engendered by the County arguably filing the contention about five weeks later than it could have. Moreover, based on the same experts discussed above, the County may be expected to assist in developing a sound record if the issue cannot be disposed of summarily.

The safety question is significant because water in the cylinders could prevent start-up, or at least necessary rapid start-up, of the diesel, or could reduce power if a leak occurs while the diesel is operating. The deficiency report does not give a reason for the cracked heads. Three out of 24 cylinder heads, 12.5%, exhibited cracking. Goldsmith Affidavit, at 15-16. At the conference, LILCO identified the cause as flaws in the vendor's manufacturing casting process which could cause hot tears resulting from inclusions and thinning of walls resulting from floating of the core pattern of the heads. LILCO plans to replace all the heads with new heads with some minor design changes. However, LILCO stresses that the big advantage of the new heads is the improved casting technique and other changes in manufacturing, testing, and quality control of the process by the vendor. Tr. 21,297-305 (Youngling, Kammayer); Youngling Affidavit, at 16-19. However, LILCO may not be able to change all the old heads before start-up since the new heads may not be available when LILCO might otherwise be permitted to begin low-power testing. The three cracked heads and some additional heads have been replaced. Tr. 21,310-11 (Youngling).

In the interim, LILCO has proposed a surveillance procedure after every test run of the diesels to assure there is no water in the cylinders. LILCO believes this to be acceptable because it asserts the crack in the cylinder head is non-propagating and will only open when hot (e.g., during a test run). Therefore, LILCO reasons, if there is no water leakage after a test run, there will be no water leakage during the period of cold standby of the diesels. LILCO also believes the

crack won't affect operability if it occurs while the diesels are being depended upon in a non-test situation because the amount of water leakage is too small (the larger of the three leaks was 9.25 gallons per hour). Tr. 21,307-10 (Youngling).

The NRC Staff is still reviewing this matter and is not in a position yet to agree or disagree with LILCO's premises regarding the cause of the problems or the lack of effect on necessary diesel functions. Therefore, the Staff does not yet agree that the new heads need not be put in before low-power testing. Tr. 21,331-35 (Higgins). At the conference, the Board raised the question of whether the diesels had to operate at full power, and how many diesels would be required, in the event of a loss of offsite power during a low-power (up to 5%) test program. This analysis had not been performed.

We cannot say that there is no material issue of fact, or that this issue is not significant, even for a low-power testing program. LILCO's views on the nature and characteristics of the cylinder head cracks, and that the interim testing program will prevent any problem may be correct. However, they are not based on readily ascertainable facts such that there is nothing in genuine controversy. Accordingly, we admit a contention that the diesels may not start or operate as required unless and until the cylinder head cracking problem is resolved for the Shoreham diesels.

The parties are, of course, free to agree, subject to our approval, that facts set forth in the agreement resolve the contention totally, or at least for any period of low-power testing. In addition, LILCO and/or the NRC Staff is free to move for summary disposition of the contention. To achieve a finding by us that this contention has no effect at least on possible low-power testing, the movants are advised to establish that there is no genuine issue of material fact that:

1) a surveillance procedure or alternative will be employed which will detect any water leakage in quantities of concern for needed diesel start-up and operation from the old heads (and from the new heads unless and until it is established that the new heads will not crack given the established causes of the cracks in the old heads) after the diesels have been run; and

2) that there will be no water leakage of concern for the needed function of the diesels during shutdown periods after the last operation and surveillance for water leakage of the diesels; and

3) that there will no water leakage of concern for the needed function of the diesels during operation when needed in a non-test situation if proposition 1) and 2) are established.

See Tr. 21,362, 21,365-66 (Youngling); Tr. 21,331-35 (Higgins). We do not preclude the possibility of a showing under these propositions, if LILCO believes it must rely on it, that the needed function of the diesels during low-power testing of the reactor is different than during normal full-power operation.

The Board is concerned, concededly based on the incomplete, preliminary information from LILCO, that the diesel vendor may not have informed LILCO of problems in cylinder heads which occurred in other diesels of the same model because of faulty vendor manufacturing and quality testing processes. Presumably as a result of problems elsewhere, the vendor had changed its process years ago, albeit apparently after the Shoreham diesels were manufactured. Tr. 21,302-306 (Youngling). The NRC Staff commendably is looking into this reporting aspect. Tr. 21,306-07 (Higgins). Our concern is limited to the required reliability of the Shoreham diesels; the Staff may rightly be concerned also with diesels at other nuclear plants. Some elements of any vendor reporting concerns may become pertinent to the portions of the County's contention which we are admitting although, if so, the focus will be on identifying the causes of any past failures within the scope of the contention, as admitted, so as to assure that changes, in fact, eliminate the problems of the past.

The Board wishes to know whether further problems of significance may be known to the vendor and have not been corrected for the Shoreham diesels. Such concern will be heightened or lessened by whether, in

fact, past cylinder head cracking events (and past rocker arm bolt cracking and high pressure fuel injector line cracking) were known by the vendor and unreported to LILCO. Tr. 21,293-95 (Youngling, Kammayer); Tr. 21,314-15 (Youngling). As noted, the basic model diesel used at Shoreham has been in use for about thirty years in various applications.) Accordingly, in order to determine our further course, if any, for Shoreham diesel issues beyond the vibration and the cylinder head cracking concerns, we direct the NRC Staff to perform an inquiry into the process and criteria in place and employed by the vendor for reporting deficiencies to nuclear power plant owners using its diesels, and whether the Staff identifies other past defects of significance for the design and use of the Shoreham diesels which the vendor has not reported to LILCO and/or the Staff. LILCO may also furnish such a report to us if it wishes to do so, based on its asserted inquiries to the vendor subsequent to and in light of the apparent examples of non-reporting. Tr. 21,304-05 (Youngling).

We view this as a report which need not be furnished to us prior to any possible low-power testing. If a specific problem presently unknown to us is discovered in the course of the Staff's inquiry, the Staff is free to take any direct action deemed necessary by it, along with reporting the matter to the Board and the parties. We request the Staff (and LILCO if it wishes to file a report) to furnish, as soon as practicable, an approximate schedule for its report of this vendor inquiry to us. We emphasize that our interest at this juncture is in a report of the facts which may bear on the needed reliability of the

Shoreham diesels, and not with any enforcement action which the Staff may or may not wish to consider outside of this hearing.

Paragraph 4 ("Lock-out" On Hot Restart)

This paragraph may be summarily rejected. All parties agree that it was based on a misunderstanding by the County of an oral conversation with the NRC Staff. In fact, the diesel did not "lock-out" or fail to start as required during the hot restart test because of a diesel problem. Rather, although apparently not realized by the test personnel, the electrical power for the diesel start signal was not in service. The diesels have successfully been tested for hot start-up. Youngling Affidavit, at 19-21; Goldsmith Affidavit, at 16-17.

However, the County wants to include this item as another example to litigate within paragraph 1 of the contention on diesel test procedures. Tr. 21,399 (Goldsmith); Goldsmith Affidavit, at 16-17. The County's belated attempt to convert this non-problem into an example of significance for the conduct of the test program as it would bear on the assurance of reliability of the diesels borders on the frivolous. It is not consistent with the County's desire that we view its participation as being motivated by serious professional concern over significant safety issues related to the diesels. Where warranted, we have given the County's proposed diesel contention serious consideration, as discussed at length in this order. Paragraph 4, on the other hand, warrants no such consideration. It is rejected.

Paragraph 5 (Trend Analysis)

The County here embraces the NRC Staff inspector's recommendation, in IE Report 83-07, that all past diesel problems be analyzed for trends to assure identification of any underlying problems. LILCO is performing a trend analysis and will present it at a public meeting with the NRC Staff now scheduled for the end of June 1983. Youngling Affidavit, at 21-24; Tr. 21,392-94 (Nicholas).

To the extent pertinent to the vibration contention (paragraph 2), the trend analysis may provide material evidence, but it will be litigated under the vibration subject. The County has not provided any specific contention in paragraph 5. We do not permit a possible broad inquiry into each and every diesel problem (because the problems are charted in a trend analysis) in the absence of any showing of significance and a contention with known boundaries and bases. See Tr. 21,404-08 (Goldsmith, Dynner). The scope of admissible issues, even in a normal time frame and perforce at this stage requiring reopening, does not automatically expand to the entire spectrum of NRC Staff IE inspections and reviews which the Staff may properly think prudent to conduct in the performance of its wide-ranging responsibilities. This paragraph is rejected.

LILCO's presentation to the NRC Staff is scheduled for June 30, 1983, at a meeting open to the public. We expect the County to attend. In addition, we direct the parties to confer on a schedule for discovery (to be expedited by informal access to information and documents, and depositions if desired), the filing of any settlement agreements or motions for summary disposition, and any necessary testimony and hearing sessions. The parties shall file a schedule report, noting agreements or disagreements, so that it is received by the Board by July 6, 1983. The Board would not hold a hearing on the vibration contention, paragraph 2, earlier than mid-September 1983. Due to its possible impact on issuance of a low-power license, the Board will consider holding a hearing on any low-power aspects of the cylinder head cracking issue as soon as practicable, if such a hearing is necessary due to failure to settle or obtain summary disposition of at least the low-power aspects of this issue.

For the reasons stated above, the County's motion to reopen the record and admit a new contention regarding the diesel generators is granted in part and denied in part.

FOR THE ATOMIC SAFETY
AND LICENSING BOARD

Lawrence Brenner

Lawrence Brenner, Chairman
ADMINISTRATIVE JUDGE

Bethesda, Maryland
June 22, 1983

Attachment: (County Contention)

Diesel Generator Contention

Suffolk County contends that LILCO has failed to comply with NRC regulatory requirements designed to assure the rapid starting and reliable operation of the Shoreham emergency diesel generators. The specific regulations violated by LILCO are 10 CFR Part 50, Appendix A, GDC 1, 17, 18, 33-35 and 38 and 10 CFR Part 50, Appendix B, Criteria III, V, X, XI and XIV.

GDC 17 requires LILCO to establish an onsite electric power system that permits the functioning of structures, systems and components important to safety. As further specified in GDC 33-35 and 38, the system required by GDC 17 must be sufficient to provide capacity and capability to assure that (1) acceptable fuel design limits and design conditions of the reactor coolant pressure boundary are not exceeded as a result of anticipated operational occurrences and (2) the core is cooled and containment integrity and other vital functions are maintained in the event of postulated accidents. Further, under GDC 18, the system must also be designed with a capability to test periodically the operability of the system under conditions as close to design as practical. Under GDC 1, the emergency diesel generators must be designed, fabricated, erected and tested to quality standards commensurate with the safety functions to be performed. Further, the Shoreham emergency diesel generators are subject to the specific Appendix B requirements set forth in Criteria III, V, X, XI and XIV, all of which are intended to ensure reliable operation of the diesels.

In violation of regulatory requirements, LILCO has failed to ensure rapid starting and reliable operation of the Shoreham emergency diesel generators. The data supporting this contention are:

(1) LILCO has failed to test adequately the emergency diesel generators, and has failed to ensure adequate review and approval of test procedures and test results, as documented in I&E Reports 82-35, 83-02, 83-07 and 83-08 and I&E Enforcement Action 83-20. Without adequate testing, reliable operation cannot be assured.

(2) The diesels have been subject to excessive vibration, as documented in I&E Report 83-07. Such vibration may reflect a design defect or a fabrication/erection deficiency or a combination thereof. In any event, such vibration prevents the diesels from reliably performing their intended functions.

(3) The diesels have suffered from cracking of components, as documented by LILCO's verbal reports to NRC Region I on March 8 and 30, 1983, and LILCO's written report, SNRC-873, dated April 15, 1983.[1/] These deficiencies have included water jacket leaks which have the potential to decrease power output and interfere with rapid startup of the diesels.

1/ LILCO's written report concerning the deficiencies verbally reported to Region I on March 30, 1983 has not yet been filed.

(4) One of the diesels "locked-out" (i.e., would not restart) when hot restart was attempted during testing.[2/]

(5) LILCO has failed to prepare an adequate trend analysis of the diesel problems and occurrences, as documented by I&E Report 83-07. Such failure means that there can be no assurance that these diesels have been adequately analyzed to ensure reliable performance of required functions.

The County contends that the foregoing deficiencies document that LILCO has failed to comply with the aforementioned regulatory requirements as they pertain to the Shoreham emergency diesel generators.

2/ I&E Bulletin Nos. 83-03 and 83-17, issued in March, indicate that there might be a generic problem with the ability of the emergency diesel generators to perform a hot restart.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges:

Lawrence Brenner, Chairman
Dr. James H. Carpenter
Dr. Peter A. Morris

In the Matter of	Docket No. 50-322-OL
LONG ISLAND LIGHTING COMPANY	
(Shoreham Nuclear Power Station, Unit 1)	June 22, 1983

COURTESY NOTIFICATION

As circumstances warrant from time to time, the Board will mail a copy of its orders and memoranda directly to each party, petitioner or other interested participant. This is intended solely as a courtesy and convenience to those served to provide extra time. Official service will be separate from the courtesy notification and will continue to be made by the Office of the Secretary of the Commission. Unless otherwise stated, time periods will be computed from the official service.

I hereby certify that I have today mailed the following: "Memorandum and Order Ruling on Suffolk County's Motion to Admit New Contention" to the persons designated on the attached Courtesy Notification List.

Valerie M. Lane
Valarie M. Lane
Secretary to Judge Lawrence Brenner
Atomic Safety and Licensing Board

Bethesda, Maryland
June 22, 1983

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