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UNITED STATES
NUCLEAR REGULATORY COMMISSION

IN THE MATTER OF: **DOCKET NO:** 50-322-1 (OL)

LONG ISLAND LIGHTING COMPANY

(Shoreham Nuclear Power Station)

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UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

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In the Matter of: : Docket No. 50-322-1

LONG ISLAND LIGHTING COMPANY : (OL)

(Shoreham Nuclear Power Station) :

- -x

Nuclear Regulatory Commission

Room 6507

Maryland National Bank Building

7735 Old Georgetown Road

Bethesda, Maryland

Tuesday, November 20, 1984

The hearing in the above-entitled matter was reconvened, pursuant to adjournment, at 8:40 a.m.

BEFORE:

JUDGE LAWRENCE BRENNER, Chairman
Atomic Safety and Licensing Board

JUDGE PETER A. MORRIS, Member
Atomic Safety and Lincensing Board

JUDGE GEORGE A. FERGUSON, Member
Atomic Safety and Lincensing Board

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APPEARANCES:

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PROCEEDINGS

JUDGE BRENNER: I guess we can begin.

This room is small enough so that we don't have microphones, but the Reporter is at one end. Those of you at the other end will have to make sure she can hear you.

Let's get the appearances of the parties, starting on our left with LILCO.

MR. ELLIS: Tim Ellis and Don Irwin and Tony Earley on behalf of the Long Island Lighting Company.

MR. REIS: Ed Reis, Bob Perlis, Bernard Bordenick, Russ Purpo, and project manager--

JUDGE BRENNER: Let's just keep it to the people who are going to talk. It is going to be complicated for the Reporter.

MR. REIS: -- on behalf of the Nuclear Regulatory Commission Staff.

MS. LETSCHE: Karla Letsche, Lawrence Lanpher and Allen Dynner.

JUDGE BRENNER: Mr. Lanpher, you can come closer if you want. We won't bite.

MR. LANPHER: If the need arises.

JUDGE BRENNER: We had at least two main subjects for today. One involved a carryover with respect to the diesel litigation involving the blocks, and the other involved the main purpose of the conference of Counsel this

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morning, which is the remand issues on which we have received written reports from the parties pursuant to our order.

Which subject do the parties wish to take up first?

MR. ELLIS: The diesels.

JUDGE BRENNER: All right, let's take up the diesels first.

When last we left this subject, one of the pending matters was the County's request that an examination be made of the coating in the cam gallery cracks below the weld cracks, and there was some discussion of who could make such an examination and what the procedural forms would be, but I won't get into it unless we have to.

MR. ELLIS: Judge, as I indicated to the Board on Friday, I undertook over the weekend and Monday to look into the matter more thoroughly, and to the extent that I was able to do so, I did learn more about it, consulted with our experts.

And late yesterday afternoon, I communicated to Mr. Dynner a settlement accommodation on that particular issue which I would not be surprised if he has not had an opportunity to review with his consultants because it happened late in the afternoon. But I have not had an opportunity to discuss that with Mr. Dynner this morning.

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LILCO would be interested in seeing whether that would bear fruit. If it doesn't, LILCO would like an opportunity, because it feels very strongly about a number of these issues, to be able to address the Board on the particular point. And I'm prepared to do some of that orally this morning if the Board is interested in doing it.

JUDGE BRENNER: All right.

Does somebody want to tell us what the communication was, or do you want to keep that among the parties for now?

MR. ELLIS: It is an offer to the County which is an offer of settlement which I'm not sure-- Mr. Dynner and I have not discussed it and I don't know that it would be appropriate for us to outline. But it does involve having tests conducted as a part of the accommodation.

MR. DYNNER: I don't mind responding right now and informing you before the Board and the rest of the world that the proposal is totally unacceptable, and the reasons why don't have anything to do with the technical side which you are quite right, I have been unable to discuss with Dr. Anderson because of the fact that we just got this last evening.

The reasons why it is unacceptable is that first of all it uses the test as a way of saying-- The bottom line, and I have no problem saying it, Tim, if you don't, to

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the Board is that the crux of the offer-- Stop me if you don't want me to say this.

MR. ELLIS: No, I have no problem at all. I don't mind.

MR. DYNNER: The crux of the proposal is, as I see it, in a sentence on page 2 that says:

"If the results...."

That's the results of this testing--

"....showed any concentration of high-temperature oxides, magnatites and/or wustites at levels of 10 percent or greater, then the County would withdraw its contention on the blocks provided further that LILCO complies with the Staff recommendations concerning wire gaging in the cam gallery and eddy current testing in the area between the stud holes on the block top."

That's the end of that quote.

In the first place, the suggestion that we made concerning the testing didn't have anything to do with withdrawing the entire contention. It had to do with a modification of the issue concerning the cam gallery cracks.

In the second place, LILCO's experts have provided testimony that it was only by virtue of the -- or that the thickness of the oxide layer could only have been formed from high-temperature oxides in order to reach that

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degree of thickness and indeed, if it had been formed under low-temperature conditions it would have taken 30 million years or something like that to reach this thickness, and now we're talking about, well, if 90 percent of that 30 million years had been reached, we are supposed to give us our contention.

So it is for those two reasons that the suggestion in your letter to me is -- suggestions are unacceptable. And I haven't been able to get into the issue of the x-ray crystallogy, or the labs or anything like that because I haven't talked to Dr. Anderson. But I think those two -- unfortunately those two approaches as set forth in the proposal make is unacceptable.

And therefore, I am in a position immediately to renew our motion to compel LILCO to turn over to us the section, the fractograph, the cracked sample of the cam gallery saddle Number 7 in order for us to proceed to have the x-ray test performed and present the results to the Board and the parties at an appropriate time.

I am very sorry that there are a lot of people in the room who don't have the slightest idea what we're talking about.

JUDGE BRENNER: I think it is to their benefit.

MR. DYNNER: I was going to suggest that it is to their benefit.

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MR. ELLIS: Judge Brenner, may I--

JUDGE BRENNER: Well, let me point out that the purpose of this discussion was not to summarize all of the testimony, and by selectively summarizing some of it, Mr. Dynner, you did not include all of it which may bear on the issue. And I'm sure you understand that yourself.

MR. DYNNER: I didn't intend to. I just wanted to highlight the reasons why we found that the LILCO proposal was unacceptable.

JUDGE BRENNER: You'll have to have the testimony that Dr. Anderson himself said that if there was 10 percent or more magnatite he would reach certain conclusions.

MR. DYNNER: I thought he said 25 percent.

JUDGE BRENNER: No, that was your question, and I said "Is that a magic number?" And he said No, 10 percent would be the number. And then we found out that you and he didn't have a chance to talk enough to pick the percentage in the question you would ask him on what must have been re-re-redirect by that point.

But as I said, even that is only a selective slice of the record, as I recognize.

MR. ELLIS: Judge Brenner, let me, if I may, just say a few things.

JUDGE BRENNER: The point I am at is to put the procedures in place to have the motion and answer placed

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before us in the near future, and in the meantime permit the parties to discuss possible settlement further in the next short time frame. But if you want to say anything else, you can.

MR. ELLIS: Let me just very briefly, but I think it would be appropriate at this time to put a few procedures.

As I indicated to the Board last time, and I am prepared to review those portions of the transcript, the state of the record at the current time is that Dr. Bush and Drs. Rau and Wachob had indicated that the test is not necessary; it is not just the thickness, it is also the color.

Dr. Anderson himself indicated in cross-examination that he advocated the use of the test but also, when I questioned him about whether the wire gaging of the cam gallery would satisfy his concerns, I believe his answer was -- and I can review that with the Board if it is appropriate now -- that that would be appropriate.

The major problem that LILCO has is we have the burden. We think we have carried the burden. There is this additional test with which we think there are very substantial technical problems. And we don't see where it advances the cause.

If one assumes that-- Let's assume for the

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moment that we show more than 10 percent high-temperature oxides. We don't see that that advances the cause very much at all because then the County simply says "Well, maybe some of it did form during the casting process, but some of the rest of it may not have," and all the rest.

If we show less than 10 percent we think there are very substantial technical difficulties with being able to tell that, but if that is the result, then we think there are also explanations of that which are not inconsistent with LILCO's theory, although if you showed 100 percent of nothing but hematites that would be inconsistent, as we admitted in our testimony.

So we don't see that that advances the cause very much, particularly since LILCO, as the Staff has recommended,-- They are recommending that LILCO strain gage or wire gage the cam gallery and therefore there will be that check.

If you put that together with the fact that the engines during that period are going to be operated only for an hour or so a month until the first refueling outage, we don't see on the whole that it advances the cause very much.

Our proposal-- I think I should point out that that was the bottom line, but we also recommended, because of the tremendous technical difficulties -- and we will be reporting this to the Board in our writing -- is that it be

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done by two independent laboratories, each utilizing two independent techniques, x-ray crystallography, which we think is very difficult, and Mossbauer spectroscopy.

The problem with the x-ray of course is essentially what you are doing is sending an x-ray in there to interrogate what is in there and the kind of surface you have, even though this is a thick oxide, in the sense of what this is is a .2 to .5 mils which is-- In this respect it is thin, and it presents some very serious or difficult problems of measurement, particularly when what you are after is a quantitative measurement.

The consulations that I have been able to have indicate that you would have to set up a standard. You would have to create samples with known quantities in there so that you could have a benchmark. This I am told is a difficult and time-consuming task.

There are technical difficulties, and LILCO is prepared to attempt to address these with the County, and we will do so while we, at the same time on a parallel course, comply with the Board's schedule for submitting the appropriate papers.

JUDGE BRENNER: Has any of the discussion involved the examination and also a photograph at 500 power of the crack in the vicinity of the weld as a comparison to the 500 power photograph which is in the record of the crack

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beneath the weld in the cam gallery?

MR. ELLIS: It hasn't, Judge, but we will go ahead and take that photograph and give it to them.

Our testimony was that you wouldn't be able to see any more than-- You wouldn't be able to see I think thin or no oxide there, and I think that a photograph will show that. And we will go ahead and take that.

JUDGE BRENNER: Would that also include the opportunity for Dr. Anderson to look at the sample through the microscope--

MR. ELLIS: Again?

JUDGE BRENNER: -- at 500 times if he wants to?

MR. ELLIS: Sure.

JUDGE BRENNER: All right. Why don't you supply the photograph as soon as you can, identifying what it is from since you have no objection, and also setting forth the opportunity for Dr. Anderson to view the sample if he wishes, or anybody else on behalf of the County, and Staff if they wish. It is the thought that when we reconvene the evidentiary hearing, we would make that part of the record.

I think we're finished with the block, other than setting forth some procedures, and also the findings, subject-- Why don't we turn to the findings subject and then we'll turn back to the coating.

MR. ELLIS: Judge, we have -- I don't think are

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of one mind on the findings. LILCO believes now that the evidentiary hearing is completed on this aspect of the blocks that we ought to go ahead and set a schedule for this aspect of it.

If we wait until th. end of the additional hearing, then we will have a very substant' . record to do in a shorter period of time, and we would prefer to do as we have done on the crankshaft, and get the matter out of the way now. We think it would be helpful to the Board. We think it would focus the Board's views, and when the hearing resumes, if it had those before it, we think it would expedite the Board's consideration of the issue and expedite a decision.

If we wait until the end and set a hearing schedule, it will be more difficult for the parties to-- It won't be as fresh in our minds. In addition, it won't be any help to the Board to prepare for the second hearings and to focus the second hearings.

MR. DYNNER: Yes. We would like to file one set of comprehensive findings on the blocks as you had suggested, within 15 days -- a shortened period after we deal with the blocks in the second hearing, and the reasons are this:

Number one, the principal reason I think we have already discussed before the Board, and that was that with

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with the schedule that we're on in this hearing, given the fact that we are going to have the same lawyers working on this for obvious reasons, we think that it would put an unnecessary strain on resources with getting into discovery, writing testimony, and doing the other things necessary to get ready for the second hearing.

We would of course begin working on the findings to the extent we can right away. It is really not a question of delaying the job of getting moving on the findings but, rather, having-- Realizing that there is going to be a good deal of interruptions and digressions from the findings during the preparation for litigation in the second phase, it really would put an unnecessary burden and strain on those involved. And I would like us to be able to think that we have done the very best job we could in putting the findings together.

Number two, it seems to us what is most useful would be comprehensive findings that could draw comparisons where appropriate. I don't believe that the Board, in terms of what is going to be put on in the second hearing concerning the blocks, is going to need to have anything focused for it by preliminary findings or partial findings in order to know what is happening in the second litigation. So I think that that is a rather subsidiary point.

Therefore, it seems to us that what we ought to

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give you is a comprehensive findings on the entire issue within a time frame that doesn't go the full 60 days after the end of the second hearings.

JUDGE BRENNER: The shortened time frame that we were talking about would be after completion of the blocks, not after completion of the entire remand of the hearings.

MR. DYNNER: Yes, sir, that's what I meant. And I am assuming we will take up the blocks with no objection from LILCO or the Staff as the initial issue in the hearing, the second-phase hearing I should call it.

So that we would be looking for-- Assuming that that is going to be at most a couple of days, and I don't know why I am optimistic about it, but we're talking some time I guess the end of February for the first findings to come in. And those are to be comprehensive findings.

JUDGE BRENNER: We told the County we would be sensitive to its schedule concerns in reopening the hearing and we will be, including this matter. The County knows best what its problems might be. It seems to me, and admittedly somewhat in ignorance of all of your allocation of resources decisions, that you are going to have similar problems in February that you would have now. You are going to have to allocate different Counsel to do certain tasks at that time.

MR. DYNNER: We will have-- I'm not sure--

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JUDGE BRENNER: You don't have to answer right now.

MR. DYNNER: I don't think we need the detail. I will just sy to you that we have people who are familiar with the issues that we have been litigating during the whole period from now through the time the hearing begins, working on a number of matters including the findings.

The problem we would have is if we were put on a regular 40-day schedule from now, let's say, is that I know that there are lots of other chores that people, the lawyers involved including myself, are going to have to be doing concerning Phase II, so we really wouldn't get the benefit of the normal 40 days that would be ordinarily allotted to us in terms of real work time.

So I would request, just as an accommodation and since the Board has earlier suggested that 15 days after the close of blocks would not be an offensive idea to them, but as an accommodation I would request that we do it on the basis that we have suggested.

MR. ELLIS: Are the conflicts only lawyers, or do they involve technical people at all?

MR. DYNNER: I have the feeling that the problems that I see are mainly lawyer problems, and not consultant problems.

JUDGE BRENNER: Does the Staff have a preference?

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MR. PERLIS: Not a strong one. I think the problem is an allocation of resources would be the same either way. But unless the Board feels a need to have the findings beforehand, I think one advantage of doing them later is, at least in our view, certain of our findings depend on information that will be discussed at the reopened hearing, and the findings we will be able to give, for instance in the cam gallery area, without seeing the results of the strain gage test, are somewhat tentative.

I'm not sure it makes sense to do findings on that area now and then do them again once we have final data. In terms of resources, it is not going to make that much difference.

JUDGE BRENNER: All right. We will permit that type of schedule. It is my personal opinion that it would have helped the Board a little bit to have the issues focused through proposed findings before going into the reopened hearing, but not so strongly that we would insist upon it.

We could give LILCO the option of filing findings before us 30 days from today, and then the right to supplement those findings by reference back to the portions you would add to and delete or otherwise modify in a filing 15 days after the close of the block record. And we could just leave it at that. They could have the option now,

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without any commitment on your part being necessary today.

For guidance, the total pages we might expect to set for the findings would be about the same as we set for the original crankshaft findings of about 90 total pages. I mention that-- We might adjust that number of course after the reopened hearing, but just for guidance now, since each of the parties, even though we are not requiring a filing now, are clearly going to have to use this time to begin drafting the findings.

And if LILCO does choose to file something, file the proposed findings 30 days from today, which would I guess be December 20th, you should keep in mind that the 90 pages will include your reply and perhaps the supplementation of that. By the time you're finished deleting or modifying, we would look at the total. But leave yourself some room if you are doing that.

For what it's worth, Mr. Ellis, you mentioned the crankshafts as an example of having findings in two stages. In my mind -- I'm speaking for myself -- that was not a rational way to proceed on the crankshafts. It came about because of the time and LILCO coming late to the realization that it would move to reopen the record on the matter as it has. And if we had known earlier on the crankshafts, I doubt if we would have set that type of approach.

On the other hand, and ironically on the blocks,

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I think that is a subject that would have better lent itself to having the findings in two stages because the areas of the blocks likely to be affected, although to be sure they may be affected greatly, are nevertheless severable areas in terms of crafting and organizing findings.

But because of the timing of things, we have resulted with the opposite arrangement than might have been perfect for each subject. But nonetheless we will proceed that way.

Now with the schedule we will set for the block findings after the further hearings on blocks it will be for LILCO to file its proposed findings so that we will receive it 15 days after the close of the record on blocks. And we want to be able to litigate the blocks first.

MR. ELLIS: Judge Brenner, would the findings then for the County and the Staff follow also on some other schedule other than the normal-- In other words, would they also be abbreviated to take account of the fact that there have been several months in the interim when people have been preparing?

Because one of the reasons we wanted to do the findings early, that is, do the -- cover the fairly voluminous record now and the smaller record later is that we hope to be able to minimize the imposition on the Board to have a reasonably -- what the Board would want to have,

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a reasonably prompt decision.

So do I understand that if LILCO has to file its findings 15 days after the close of the block record that there would be similar abbreviated times for the findings for the County and the Staff?

JUDGE BRENNER: No. It is difficult to cut that interval period, the ten-day interval period. The purpose of the interval is to be able to read, analyze and respond to the material contained in the proceeding proposed findings. It is just difficult to set less than a ten-day time frame for that purpose.

MR. ELLIS: Again, the only problem I can foresee is if Mr. Dynner's forecast of a couple of days I think he mentioned in his remarks earlier for the block, for one reason or another, balloons into a longer period, then we may have a situation where LILCO is required to produce findings on a bigger record in a shorter amount of time. And I guess that is a problem we can deal with if it arises.

JUDGE BRENNER: We would be willing to address that again if the situation does arise.

MR. ELLIS: All right, sir.

I take it the option that the Board gave LILCO is just for LILCO to do it. It is not for the County or the Staff to do it.

JUDGE BRENNER: They can if they want to.

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MR. ELLIS: We will if they will.

JUDGE BRENNER: The County won't, it sounds like. Any party can pursue that option.

MR. ELLIS: All right, sir.

JUDGE BRENNER: The only gain in the option -- by the option, it seems to me, would be to give the Board some material to help focus our thoughts. As I said, we think that it could be helpful but we don't feel so strongly about it that we're going to set that as a schedule. Also, its efficacy is vitiated somewhat when we only receive that from one party. So we will leave it solely as an option.

I want to take a short break before we come back to the subject of the blocks, including procedures.

One thing I am thinking of is that we should get a written motion from the County. It can be very brief, but I want to make sure I understand what the County is asking for so procedure doesn't overcome substance on this matter.

In a written motion you may decide that there are several alternative options, each of which could satisfy what the County is seeking, in other words, a motion to compel discovery or LILCO conducting the test itself, or both.

And there may be some benefit to the settlement letters and further discussion even if it doesn't lead to a resolution or a partial resolution in terms of giving the

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parties ideas of what could be accomplished, practically, even if it then has to be put in a motion because one party won't voluntarily do it.

Why don't you think about that for a few minutes? I want to take a break until 9:15.

MR. DYNNER: If I can respond, in terms of a written motion, given LILCO's letter and the technical issues that are raised in it, it would seem to me that before we file any kind of written motion, I will really have to go back and check with Dr. Anderson to make sure that what he has been talking about is the same things that are talked about in this letter.

Some of the terms in here are not familiar to me at all, so I don't think we would be in a position to respond right away, if that is what you had in mind.

JUDGE BRENNER: I didn't mean tomorrow. And one reason I was thinking of a written motion was to give you the opportunity to do what you just said. But I was thinking of next week, but you can suggest a time frame when we come back.

All right. We'll be back here at 9:15.

MR. DYNNER: On the blocks?

JUDGE BRENNER: Yes. And then we will let you go.

(Recess.)

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JUDGE BRENNER: On the record.

One reason we took the break was to see if we could give some preliminary guidance to ease the procedural burden on the parties and also to permit some greater efficiencies in the motion and answer process.

It is our view now that at a minimum the County should be entitled to have the tests performed on the coating in question. We would be willing to be disabused of that view in written pleadings but the parties are going to have to work very hard to accomplish disabusing us. I think we have considered the arguments but of course there are arguments that we might not have considered.

We realize that a practical effect of that would be that LILCO or the Staff might feel the need to have its own tests conducted. We are not on our own specifying the test, we don't know what tests have the greatest potential for some useful result. Some tests have been discussed on the record; Mr. Ellis mentioned another test here that was at least a new one to me but probably not to other people.

And what we would like to do is to get the parties to at least agree, if possible, that the County would be permitted to have the test conducted, perhaps the agreement would be broader, that other parties would go ahead and do the test along the lines perhaps suggested by LILCO. We don't know what those lines are, although they

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have been alluded to. However we will also set a schedule for motions and answers if no agreement can be reached.

And let's say if agreement isn't reached on the fact that at a minimum the tests will be conducted at the behest of the County -- I shouldn't say at a minimum, but some possible result, it may be a further agreement is reached that the County will not feel the need to have the test conducted and somebody else would have the tests conducted and that would suffice; and there are all kinds of possibilities that might arise beyond those two the parties might arrive at. But would it be reasonable to set next Wednesday for either a report, a joint report from the parties that sufficient agreement has been reached to avoid the need for motions or, in the alternative, a motion from the County seeking whatever relief it would seek with respect to the tests; a motion to compel discovery being one possible request and perhaps other requests in combination or in the alternative.

MR. ELLIS: I think that would be reasonable, Judge. I do hope the Board will retain an open mind on the issue itself because we do not believe that the Board -- that we have had an adequate opportunity to apprise the Board of what we consider to be the practical problems involved in the lack of utility or usefulness of such a test.

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Now on further investigation we may, too, be disabused of our current view but we do want an opportunity and we do hope the Board will keep an open mind on that because we don't think what the Board has heard to date is from people who, on the whole, in any event, the proponents of the test or from people who are experienced in conducting tests of this sort, particularly in a quantitative fashion. So we would earnestly request that the Board maintain an open mind on that matter and give us an opportunity to address that issue fully. I think next Wednesday would be an adequate opportunity to see if anything further can come from the offer of settlement that LILCO has made to the County.

I think one of the problems that LILCO has, of course, is that we don't see clearly how the issue is much advanced by the extreme likelihood of ambiguity in the results. But I think next Wednesday would be plenty of time within which we can apprise the Board of that and begin the clock on filing of papers on that.

We do want, though, an adequate opportunity to submit to the Board papers necessary to give our entire view of the matter, including what the record discloses to date on the issue.

JUDGE BRENNER: All right. The motion has to be filed on November 27th, because there is not agreement that

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at least somebody will perform the test then that is different than the necessity of an overall settlement agreement, you recognize?

MR. ELLIS: Yes, sir.

JUDGE BRENNER: We'll set a time for answering the written motion of December 4th for LILCO and the Staff.

MR. DYNNER: Judge, did you mean -- Wednesday would be November 28th, wouldn't it, rather than -- I think you said the 27th.

JUDGE BRENNER: Did I say the 27th? I'm sorry, I meant the 28th.

MR. ELLIS: So would that be the 5th then?

JUDGE BRENNER: If you want it.

MR. ELLIS: Thank you.

JUDGE BRENNER: I was looking ahead to 1985 apparently.

Mr. Ellis, it was a preliminary judgment on our part but not so preliminary that we consider it a gross prejudgment. We think we appreciate the gist of the arguments, although certainly not all of the details. And let me point out that much of what you have said in argument that the test should not be performed could be said in other contexts, such as the need to perform compression tests of the cam gallery -- not compression tests, strain gage tests to see whether or not the cam gallery is in

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compression while operating. And it may turn out that the substantive results of the tests are arguable but that, too, may shed some further light from the Board's point of view in reaching a decision on the merits on the overall contention before us, and bear in mind that initially at least it is this Board that has to be satisfied and not necessarily Dr. Anderson's criteria.

It is my personal opinion that when you talk about quantification of the test you are exaggerating the need for quantification, for the specificity of quantification. And if you are implying 16.5 percent of Oxide X and 23.2 percent of Oxide Y --

MR. ELLIS: No, sir.

JUDGE BRENNER: -- I don't think anybody says that's required.

MR. ELLIS: No, sir, I was not implying that. I do think that in these papers we will be able to elaborate and elucidate on the subject so that when the Board does make up its mind ultimately I hope we will all be better informed about the kinds of tests that are available and the results that they promise or don't promise.

JUDGE BRENNER: All right.

The other point I wanted to make is if, indeed, any test is conducted, we think that it could best aid the parties and the proceeding if the test is cast as part of

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some narrowing of the issue. If it is not a settlement of the entire contention, perhaps a settlement of the cam gallery aspect of the contention. If not a settlement of the cam gallery aspect of the contention, at least some stipulations of facts or other forms of narrowing as to certain information with respect to the cam gallery cracks, such as time of origin and propagation or lack thereof after propagation.

And I point that out because we believe that the results could be cast that way. And if it turns out in the papers before us that a party thinks that it is not possible to establish criteria for the results of the test which might then lend the test to such use, that might affect our judgment as to whether the test is useful at all.

We understand that when the results of the test come out, if a test is done, it might not fit the criteria but that is not the same as believing that if certain results do obtain, certain criteria can be established.

MR. ELLIS: Judge, I think that does address one of the major points that LILCO is concerned about, that is, the thinking about how exactly does doing the test advance the cause? And if it does lead to elimination of the cam gallery portion of the block contention or some aspect of it, I think that is certainly something we think should be addressed rather than lead merely to more disagreement and

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more dispute and more testimony.

JUDGE BRENNER: That's the kind of thing Mr. Dynner has to talk to his experts about and we expect that dialogue to take place and then discussions among all of the parties including the Staff between now and next Wednesday.

MR. DYNNER: Judge, if I can just make one comment on this:

Our position -- or at least we stated a position on the record at the hearing with respect to the test and why we wanted to do it. I don't view this motion -- and please correct me if I'm wrong, but I don't view this motion as a debate between the County and LILCO as to, a, whether this test is necessary or, b, as to all of the technical difficulties or lack of difficulties. It seems to me that those issues ought to be addressed after the test is completed in determining what the significance is and how much value one would attribute to the results, depending on what the results might be. And so when Mr. Ellis mentioned about what he expects to file as an answer, assuming the parties can't reach an agreement, I would say that our motion is likely to be quite simple and quite straightforward and very similar to what I said to the Board on the record and that is based upon what the County -- the conclusions the County would come to with respect to its

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position on the issue of the cam galleries depending upon the outcome. And we would -- in accordance with your comments -- state in our motion how we think that certain results might affect our position with respect to the cam gallery issue.

If I'm wrong and if, in fact, what needs to be addressed up front is going to be a technical debate as to all of the difficulties of doing this test and the pluses and the minuses and the advantages and disadvantages of one type of procedure over another type of technical procedure within the context of the test and how much weight it should be given, then I think that we would want to have the right to reply to any answer that LILCO might frame in those terms.

But I would emphasize that it seems to the County at any rate that that kind of debate need not take place at this stage when we are just deciding whether the County should be given the material so that it can carry out a test that the County feels is important to the County's position on these cracks.

JUDGE BRENNER: One thing missing from your reasoning just now, Mr. Dynner, is my last comment before yours should indicate that one of the things that could change the Board's preliminary view that the County at least should be permitted to have the test conducted is if we

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become convinced, contrary to our present preliminary view, that the test is unlikely to be useful. And that is why I addressed the point that we are going to have to see -- or should see certain criteria that might be expected to be applied with the results of the test: now we should be able to see that before the test is conducted. And if that's close to what you said you would have in your motion, Mr. Dynner, that would be acceptable.

One reason I want you to put it in writing is some of what you said orally did not comport fully with my memory of what Dr. Anderson said on the stand. Although you remembered what he said in answer to your question, but didn't remember what he said in answer to somebody else's question after your question.

MR. DYNNER: Well I want to go back also and check on all of the oral statements that I made on the issue with the ability of hindsight and not speaking in the heat of combat, so to speak.

JUDGE BRENNER: Well for all I know there is information even more pertinent and more useful beyond what is on the record each of you can obtain from your experts.

I did want to ask the Staff, for the sake of the record this morning, whether it had a position on the test?

MR. PERLIS: Yes, sir, we do have a preliminary

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position. In our view, first of all, the test is not necessary primarily because we think the evidence indicates the nature of the origin of the cracks and also that the cracks, at least in our view, are not expected to propagate but if in fact they should propagate during operation wire gauging would take care of that.

Having said that much, the preliminary view of our consultants is that the tests might well be helpful but that there are two problems with it: one is acceptance criteria and the other is test procedures.

If the parties could agree on the acceptance criteria to be used and the test procedures to be used, our consultants aren't clear as to whether the tests would be conclusive but they would agree that they may well be helpful. On the other hand, if the parties are unable to agree on acceptance criteria and the procedures, it may muddy the waters without accomplishing much.

JUDGE BRENNER: What about the County's right to have the tests conducted on its behalf?

MR. PERLIS: As I see it -- You're talking about a discovery right there?

JUDGE BRENNER: Yes.

MR. PERLIS: Subject to timeliness, we wouldn't object to the County being given the sample to do the test. One then may well have to deal with re-opening the record

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to get any results of the tests in. And that's where the problems with acceptance criteria and procedures might well come in.

JUDGE BRENNER: I presume in LILCO's lexicon it would be just a supplementation of the record since the motion was made the day before the record actually closed, even though so late such that it was guaranteed that a Board decision could not be reached before the close of the record -- or close to the same time as the closing the record.

MR. ELLIS: Yes, Judge Brenner, but we never made much of that distinction. We tried to meet both standards. What we tried to do was to be accurate: I wouldn't call it re-opening if in fact the block record hadn't closed.

JUDGE BRENNER: That's true, you did attempt to meet the other standards, but I enjoyed the caption of the pleading and the emphasis throughout on that caption.

I think that completes the block matter for now and all of you block people can go.

(Pause.)

MR. REIS: Judge Brenner, before we proceed on this issue, I want to call the Board's attention to a misquote on page four of the Staff's response. In the typing the last sentence -- a sentence in the text was picked up in the quote on page four of the Staff's submission of its report pursuant to the Licensing Board's

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order of November 5th. And the sentence that says:

"No basis has been shown that resolution of USI A-47 is necessary for approval of operation at low power," it should be in the text and not in quotes. I'm sorry that that typographical error appears.

JUDGE BRENNER: All right. Thank you.

All right. As we all know in its October 31st, 1984 decision Number ALAB 788, the Appeal Board remanded three issues. Those issues involve aspects of the quality assurance housekeeping issue which was litigated before us, an aspect of the environmental qualification issue which arose under the applicable regulation 10 CF Section 50.49 and also an issue involving what has been known as unresolved safety issue A-47, control system interactions, which was litigated under the overall large issue 7-B.

After we received and read while up at the hearing the Appeal Board decision, we requested certain reports from the parties on the transcript and then summarized our request in a written order dated November 5th.

Pursuant to our order we received reports, separate reports from LILCO, the Staff and the County on November 14th and then, in response to those reports, on the record of November 15th we pointed out why we thought the

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County's answer was too general to suffice for certain purposes, particularly as a basis upon which to stay issuance of a low power license pending any possible further resolution of the remanded issues.

As a starting point, as we read the reports of the parties, no party disagrees that nothing further need be done with respect to the QA housekeeping remanded issue. Is that correct? I guess I should ask the County, if I read its filing correctly on that point.

MS. LETSCHE: That's correct.

JUDGE BRENNER: We agree with that view and at this point we'll note for the record that we have read and accepted the Staff's certification in the form of its affidavits that LILCO at this point has met its commitments and is maintaining an appropriate level of cleanliness.

With respect to the environmental qualification of electrical equipment issue, the Appeal Board, primarily at page 105 of the slip opinion but some of the discussion begins a page or so earlier, in its remand pointed out that it was aware from a copy of a Staff memorandum which was provided to the Appeal Board that although the Staff had approved LILCO's submission with respect to meeting the requirement of the regulation in 50.49(b)(2), that the Staff's filing did not state whether LILCO had identified any equipment that fell within that category -- and the

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Staff agreed with the identification and the treatment of the equipment -- or whether, on the other hand, LILCO's information supported the conclusion agreed to by the Staff that no such equipment fell within that category.

The point was important to the Appeal Board in part -- I infer from the Appeal Board's discussion -- because the Licensing Board's decision had accepted the testimony of LILCO and the Staff that there was not likely to be any such equipment. I don't have to recount for the parties here that that in turn is related to some of our findings on the overall 7-B issue, even though more precisely this came up under another contention.

And in response to the remand, the Staff has now provided affidavits which in turn reference the Staff's Safety Evaluation Report supplement that the basis of the Staff's approval is that there is no such equipment within that category 50.49(b)(2).

It seems to us, I guess in agreement with LILCO and the Staff's filing, that completes the matter insofar as it might be directly before us. The Appeal Board asked this Board to review the Staff submission and take such further action as it deems necessary; as we read the Appeal Board's decision, no further action is necessary if there is no such equipment in that category. We already had an extensive record on why there might not be any such equipment in the

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category: our decision, however -- because the review was not complete -- indicated a possibility that some such equipment might fall within it.

Since there is none, we believe that closes our review of the matter directly. We understand the County's derivative argument and I will address that in the next subject. But it seems to us that the County's argument can be addressed directly under USI A-47.

Let me see if I can summarize the County's point: The County's point is that some of -- in part, the studies that were not yet completed at the time of our decision under A-47 are used as a basis in the Staff's analysis to conclude that there is no 50.49(b)(2) equipment, and that is correct, as is set forth in the Staff's SER and amplified in the affidavits before us.

However, there is no sense keeping the 50.49(b)(2) issue open, whatever our resolution is of USI A-47, and similar to the resolution of at least one other contested issue before us. If we find that there is certain necessary equipment being required to function in a situation where such equipment needs to be environmentally qualified, then it derivatively follows that whatever environmental qualification requirements would apply have to be applied

And you may recall the analysis of, I think it

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was Reg. Guide 1.97, if I remember the item correctly, was analyzed on a similar basis.

I would like therefore to turn directly to USI A-47.

MS. LETSCHE: Excuse me, Judge Brenner, if I could make one comment on what you just said with respect to the environmental qualification issue:

Setting aside the point that you just made that if the A-47, the resolution of the A-47 studies indicate a need to environmentally qualify equipment that that could be handled under the A-47 issue, I don't think the County would agree that simply because of that fact the environmental qualification issue could be closed because I think the issue that has not been addressed in any of the submittals by the Staff to date is the linkage between those two studies that we are talking about in the A-47 context and the contents of a list of non-safety-related equipment that would fall in the 50.49(b)(2) category.

You are right and everyone agrees that the Staff relies on those two studies with respect to both issues: A-47 and 50.49(b)(2). I think it is also manifest on the face of the Staff's filing that although they say they rely on that there is not any statement in this record upon which the Board could rely which provides a basis for those studies adequately addressing the issue in 50.49 which is

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the content of that list. So the County believes that there is a separate issue in the environmental qualification subject, and that is, the link between those studies and the Staff's findings on environmental qualification. And I think --

(Pause.)

Mr. Lanpher just pointed out another point here and that is that the reason that issue remains in the environmental qualification subject matter, separate from the A-47 matter, is a direct result of the Appeal Board's ruling on the environmental qualification issue. The Appeal Board remanded to this Board the Staff's findings concerning what is in the Section 50.49(b)(2) category and the basis for the Staff's findings on what is in that category.

And if the Staff's basis is in fact those two studies, not only do those two studies and their contents need to be looked at to see if they provide the basis but whether or not those studies are an appropriate basis for that finding needs to be looked into also and that is the linkage point that I am addressing.

JUDGE BRENNER: I think we see the linkage point. I think your paraphrase of the Appeal Board ruling was broader than it was, but I don't think even that disagreement that I might have with your paraphrase of matters in the context of the discussion here, if it is

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correct -- which is the if at this point until we discuss A-47 -- that there are no unacceptable interactions disclosed by the two A-47 studies, then that result is consistent with the Staff's findings that based on other analyses and studies beyond those two studies that there is no equipment that falls within the 50.49(b)(2) category.

As a footnote, my disagreement with your paraphrase in part is the fact that the Appeal Board only opened inquiry into the basis for the Staff's approval if there was any such equipment identified. As I said, that disagreement doesn't matter for this discussion.

MS. LETSCHE: I think we do disagree with that interpretation, which was LILCO's interpretation in their filing of the Appeal Board's decision, because it simply makes no sense to say that there must be in the record a basis for a finding that there is equipment in that category but there is no requirement that there be any basis in the record if the finding is that there is no equipment. That simply doesn't make any sense, that whether or not you have to have a basis depends on what the answer to the question is.

And so we do disagree with LILCO's and, I gather, at least at this point, your reading of the Appeal Board's ruling on page 105.

JUDGE BRENNER: I will just note that the one

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reason for my reading, other than the exact language on page 105 is exactly that reading is, if you read the discussion on 103 and leading into 104 of the Appeal Board's decision, they have found that the delegation we had granted the Staff was permissible with respect to 50.49 and the context of the discussion on 103 and 104 and then went on to say however with respect to this aspect that they wanted further information. But for purposes of this conference I am not attempting to summarize everything in the Appeal Board's decision on 50.49.

With respect to unresolved safety issue A-47, which we have termed control system interactions, the Appeal Board I believe primarily at page 54 of this -- there is discussion before and after that also -- agreed with the County that the two evaluations which at the time this matter was litigated were to be performed by LILCO and reviewed by the Staff, the Appeal Board found that these two evaluations must be completed by LILCO prior to the authorization of a license for Shoreham.

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Let me say that was the County's claim. What the Appeal Board said at 57 is that LILCO must complete the two evaluations requested by the Staff, and the results of these studies must be made part of the adjudicatory record. I was paraphrasing from my notes. The exact quote might be a little different.

The studies are the effect of high energy line breaks on control systems and also the effect of power supply sensor and sensor impulse line failures on several control systems.

As it turns out, and unknown to the Appeal Board through no fault of the Appeal Board but, rather, through the fault of all the parties, in my view at least, the two studies have been long performed and reviewed by the Staff.

The Staff's review was contained in the Safety Evaluation Report which show up generally dated September 1983, according to my records which I kept at the time I received it. The report's cover letter bore a date of September 30th and it was not actually received by the Board until October 6th. And I mention that since our decision was issued on September 21st, 1983.

The underlying reports from LILCO are at least dated -- and I did not go back and check my record to see when I might have actually received them, but were dated November 8th, 1982, with respect to high energy line breaks

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and with respect to the effect of the power supply sensor and sensor impulse line failures, the reports from LILCO containing substantive information are dated August 27th, 1982, and June 20th, 1983.

Given this state of affairs, and the reason for our comments on the November 15th transcript, are that we would expect more from the County than its answer saying it wanted more time to examine the underlying reports of LILCO and the Staff's analyses. And this is particularly so since as we read the Staff's affidavits, the affiants are not relying on anything beyond that which they relied on at the time they prepared their Safety Evaluation Report dated September '83.

I did mention in passing, and let me make emphatic the fact that it is certainly surprising that none of the parties kept the Appeal Board informed of the status of this item. It is even somewhat surprising that as I recall, the parties well knew our general expected time frame for issuance of a partial initial decision because we received certain other pieces of information from the Staff in that time frame of approximately July through early September which started out saying "Since we believe the Board is in the process of preparing its decision, here is some more information," that we did not receive information of the Staff's review of these items.

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It is true that the SER is dated as I indicated it, but surely the results must have been available prior to that time since the dates I gave you were the time for the printed and bound SER.

So even we should have been informed. Whether it would have changed our result I don't know. And at a minimum, the party that was arguing that these reports should be available, that is, the County, certainly should have informed the Appeal Board.

That being said, I don't want to belabor it. We are at the present point we're at, but we did expect to hear more from the County than we have heard. And as I said, if the County's position is that it wants more time to review the matters, that would not support in our mind a reason to stay issuance of the license, either by application of the State criteria or by application of the end results on the safety issue criterion.

I guess I will back up with an additional oral footnote on the fact of the parties not keeping us or the Appeal Board informed.

It seems particularly ironic to me at least, since in this proceeding the Board paid I think what was extraordinary attention to the status of the unresolved safety issue and requested report after report from the Staff before we decided we would not pursue certain of

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those matters, including proposed findings on unresolved safety issues as a separate matter although to be sure by that point in time, we were focusing on those that were not otherwise in controversy, so that did not include the A-47 matter.

Nevertheless, against that background, the silence was certainly surprising.

MR. IRWIN: It was clearly regrettable in hindsight.

JUDGE BRENNER: I think we all know that.

MR. EARLEY: Judge Brenner, if I may say one thing, I apologize that the Board didn't receive the studies that LILCO had submitted. Our--

JUDGE BRENNER: I did not mean to say we did not receive them. My comments assumed that we received them. I'm glad you asked so that I could at least make that much clear.

I have from time to time, however, distinguished between the receipt of informational copies of things and matters directly affecting an issue that should be the subject of notification. For what it's worth, I don't recall any testimony from the witnesses as to those reports being done, and I think some of the at least 7-B testimony was in a time frame beyond at least the earlier one of those three reports, and perhaps the first two.

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I certainly don't pretend -- don't want to rely on my recollection today of everything in that record on 7-8.

MR. REIS: The Staff also apologizes. It was through oversight that we did not report the Supplement 4 to the Board, and our resolution of the open matters.

JUDGE BRENNER: My main point in mentioning it was not to stimulate any apologies to us, because it was rather my view that the Appeal Board was put in a position of not knowing certain things that it might have taken into account in its decision.

Ms. Letsche, given all that, what is it the County seeks to have this Board do?

MS. LETSCHE: What the Appeal Board has said in its decision was that the Appeal Board did not have sufficient information to conclude that the ultimate resolution of A-47 would have no significance for Shoreham and that without additional analysis it could not say so, and in addition, that the County was entitled to test the basis of any conclusion regarding this matter in the same manner as any other litigable issue. And that is on pages 58 and 59 of the Appeal Board's slip opinion.

It is now apparently the case that those two studies form the basis of the Staff's conclusion on A-47 and according to the Appeal Board, the County is entitled to

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test the basis of those conclusions. The timing of when the Staff reached that conclusion, given everything else that has been happening in this case in the interim, in the view of the County is not relevant, given the Appeal Board's ruling.

Given everything that was happening, I don't think it should have been expected that the County was going to be following every single thing that came out of the Staff or came into the Staff from LILCO, particularly with respect to an issue that this Board had already ruled it didn't need to look at. It said you didn't need to look at those studies, and that issue was on appeal to the Appeal Board.

And I think that suggesting that the County had some obligation at that point to try to change this Licensing Board's decision when it had already ruled against us and we had appealed it just doesn't make any sense. So the--

JUDGE BRENNER: Let me interject at that point. Maybe I wasn't very clear, and I'm sorry if I wasn't. I was talking about your obligation to inform the Appeal Board.

MS. LETSCHE: Well, my comments aren't any different with respect to the Appeal Board or the Licensing Board. We had appealed the Licensing Board's decision. That appeal was pending before the Appeal Board. And our

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appeal point was only partially that the studies hadn't been done. The main point was that because they hadn't been done and because they had not been entered into the evidentiary record, and because, as a result of that, the County was not entitled to test the basis of the conclusions of the Staff on A-47, that the Licensing Board's decision was wrong.

So the mere fact that the studies had then been done didn't constitute a significant change in facts because the ultimate fact which led to the appeal was that none of that stuff was in the evidentiary record and the County had never been entitled to test the basis of any conclusions on A-47.

I think the important point here is the Appeal Board's ruling that the County is entitled to test those conclusions and the County is entitled to that right. And the suggestion by the Staff and by LILCO in their reports to the Board on the remand issues that the Board should simply accept these conclusions of the Staff and accept this big pile of papers that LILCO has submitted to the Board into evidence and then dismiss the issues simply ignores what the Appeal Board says.

And that is clearly improper and just makes a mockery of the right that the Appeal Board recognized that the County possessed.

So what the County believes should happen is that

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we should be given the right to test the bases of those conclusions and because this is a complicated, technical issue, the studies are complicated matters and thick and fairly voluminous and technical, we need to have the input of our consultants and we need to review them and then give the Board our views, as we stated on our filing.

JUDGE BRENNER: What about the argument that they have been available since long ago, the dates of the LILCO reports that I mentioned, culminating in the Staff's summary, if you will, of its analyses and conclusions in the SER?

MS. LETSCHE: Well, as I believe I stated, and I didn't expand on it very much, Judge Brenner, a minute ago, when those items came out apparently -- well, the dates that are floating around some time in late '83, this whole question was in the appeal process. And I'll be very frank with you:

Given everything else that has been going on in this proceeding, emergency planning, low power, diesel litigation, and that pending appeal, the County would have been, in my view and the view of the other lawyers working on this case, it would have been a waste of our client's resources to be evaluating every single technical piece of information that came out of the Staff or LILCO on something that had already been decided against us.

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It would have been a waste of time to have experts reviewing that when this Board had already ruled that it didn't matter. And so we did not review it then and only became aware of the pertinence of reviewing it after the Appeal Board decision came out, when they agreed with us that yes, we were entitled to look into that matter and to litigate it as we would any other situation.

So it is only since the Appeal Board decision came out that there was any reason or justification for a client to spend its resources to review those matters.

JUDGE BRENNER: One reason I don't fully understand that, and I want to point it out so that you can respond, is that while you may have felt it was useless to inform this Board of it, -- I will assume that arguendo, although that is not the test for supplying apparently material information to a Board, particularly information which might tend to cut against a party's position.

But putting that aside, I don't understand why you say there would have been no point in reviewing the information in the context of the appeal, because the very appeal -- and I went back and read that portion of the County's brief since the Appeal Board did reference it -- the thrust of the A-47 appeal is exactly what the Appeal Board said it was, the County's argument that those studies have to be performed and reviewed prior to the close of the

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record, as part of the record.

And in fact on page 58 of the Appeal Board's slip opinion, you read from one portion of that, or paraphrased the Appeal Board saying that it, like the Staff, did not have sufficient information to conclude that the ultimate resolution of USI A-47 will have no significance for Shoreham.

That follows the Appeal Board's recitation that one notable difference between its view on USI A-17 and A-47 is that in-depth studies have not been performed to verify the Staff's expectations in connection with A-47. Now as it turns out, although through no fault of its own the Appeal Board did not know that, that is not the case.

So I come back to saying I just don't understand why it wasn't pertinent, in conjunction with the very appeal made by the County, for the Appeal Board to have been informed of these studies.

Now I'm not saying the County is the only party with the obligation. I think that I have pointed out that all the parties failed in that obligation. But you are the only party saying that you shouldn't have told them.

MS. LETSCHE: I have told you, Judge Brenner, the reason that we did not. It is a question of the expenditure of resources and the other things that were going on at that time. And given the fact that this matter

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had been appealed and was on appeal before the Appeal Board, and given everything else that our client's resources were devoted to, that was the decision that was made. And that's all I can tell you.

As far as the County was concerned, it was certainly a reasonable and justifiable decision, and that's all I can tell you.

MR. LANPHER: If I can just add, Judge Brenner, lots of things are possible with hindsight. And I don't know how many SNRC letters you have got in your files. I know our files, with attachments, are rather voluminous by this time. With hindsight, maybe everyone should have gone back and looked at it. We didn't.

As Ms. Letsche points out, what we have to do now is deal with the Appeal Board's opinion which says we have the right to contest that. We put in our status report that we want that right, and as expeditiously as possible we are ready to confront that, and to inform the parties and the Board whether there are concerns that need to be addressed or not.

With all respect, I think going back into doing a "Who struck John" over 1982 and '83 and when things came out just isn't very material to the Appeal Board's decision and this Board's jurisdiction under that decision.

JUDGE BRENNER: Well, I think it is material to

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stay considerations, which is why we are discussing it, and not just to say who struck John.

MR. LANPHER: Could I address that just briefly?

This is maybe the second time you have mentioned stay considerations. I don't understand what this has to do at all with stay considerations. Quite frankly, the fact is according to the Appeal Board's decision,-- They didn't use the word "void" in their record. There is something missing there in the Appeal Board's opinion.

There is nothing-- There is not a matter of a stay at all involved here. We have to decide how we deal with the lack of the necessary information that the Appeal Board felt was needed for the record and the procedural rights of the parties. So that's all we have to say about stay.

Maybe the Board would like to explain in a little more detail what you have in mind because quite frankly, I don't see how that is applicable at all.

JUDGE BRENNER: Okay. The matter was remanded to us for further consideration in light of any additional information developed by LILCO or the Staff. As we see it, there is plenty of additional information, as we have just discussed.

If we had on our own reached the decision the Appeal Board reached, that is, that the results of those

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reports were necessary and the County had a right to contest them on the adjudicatory record or to test the bases for them, as the Appeal Board put it, on the adjudicatory record, we would have also stated whether or not and why or why not we thought that that matter need be done prior to any possible issuance of a low power license.

And as you may recall, where we did have matters upon which we felt that at that time LILCO had not met its burden of proof, we identified those matters and addressed those considerations and came out one way on the diesels, for example, and other ways with reasons presented on other issues.

MR. LANPHER: With all respect, Judge Brenner, I understand that point. I don't understand how that means anything about a stay or not. That seems to be a severable issue than the traditional stay criteria that are applied by the NRC.

My recollection of the PID of September 1983 was you made your determinations whether things were pertinent to low power or not without ever making any reference to stay critera.

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JUDGE BRENNER: That may be the case. I will assume that it's the case. I will assume that's the case because I don't remember any reference to stay criteria, either. But the considerations are similar in the sense that whether or not there is a basis with respect to the potential merits of this issue upon which a low power license should not be permitted if one is otherwise permitted, and the circumstance we have before us is that another board has said that in its view there is no reason not to issue a low power license or, to state it another way, found reasons to permit it. The Commission now has that before it.

MR. LANPHER: It was just under the exemption. What they looked at was a far more narrow --

JUDGE BRENNER: I'm getting to it. They didn't address that issue at all.

MR. LANPHER: That's right.

JUDGE BRENNER: Now, this issue has arisen before us, and we believe we have an obligation as part of whatever further procedures we might set in place here to indicate our view so far as jurisdiction over these remanded matters, as to whether or not the pendency -- if there is any pendency: we haven't gotten to that point, either -- whether the pendency of this USI A-47 issue should, so long as it's pending, prevent or permit issuance of a low power license.

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What I have in mind, we addressed that aspect in the PID, as I said, although we miht not have put it in terms of stay criteria. Arguably, the stay criteria might present a somewhat greater burden, but we think they're appropriate to apply here because of the situation we're in.

We have the remand to us for further consideration, and that is part of our further consideration.

MR. LANPHER: Judge Brenner, I am not disputing the propriety of you -- of the Board making an inquiry into whether the remanded issues are pertinent for low power. My only disagreement is -- again, it continues to be a disagreement -- pertains to whether, in making that inquiry, the stay criteria have any pertinence whatsoever. I'm not going to repeat myself. I don't believe they do, but--

JUDGE BRENNER: What consideration should we apply, in your opinion?

MR. LANPHER: I think that the considerations of -- what is it? 5057(c) -- whether an issue is pertinent to low power, and the kinds of things I recollect are the introductory portions of the September PID that the Board went through when there were a couple of issues that you said you couldn't make a final decision on. I think one was-- I can't remember back that far.

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JUDGE BRENNER: It has been a long time.

MR. LANPHER: It has been a long time.

But stay criteria just don't have any application. The criteria is whether any of these issues could be pertinent to the safe operation of Shoreham at low power. And that is a pertinent inquiry by this Board.

But I don't see how stay criteria come into play in that consideration.

JUDGE BRENNER: What about the unresolved safety issue criteria which arise originally under the River Bend case and North Anne? And there have been some further decisions explaining and applying those criteria also.

MR. LANPHER: I don't understand your question. You say "What about them?"

JUDGE BRENNER: Well, what about them? Tell me about them. How should we apply those to determine whether or not (a) there is anything further to be done before us at all on the merits, and, (b) if the answer to the first question is Yes, whether or not the pendency should preclude issuance of a license in the interim.

MR. LANPHER: As to your Question A, I believe the appeal board, with all respect, has already answered that. They said Yes, there is further stuff that has to be done on this issue. We don't have confidence in the adequacy of that record on A-47.

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I forget, quite frankly, whether the appeal board specifically referenced River Bend or North Anna or any other decision. I don't believe they did in that portion of their opinion. But their opinion is pretty clear that they expect this Board to do something else to fix what I would characterize as a void in the record. Again, they didn't use that word.

So as to your first question, something has to be done. The appeal board directed. I think that's why we're here today, to decide how we go about it.

JUDGE BRENNER: Go to (b), and then we'll come back to (a): whether or not we should use the River Bend or North Anna--

MR. LANPHER: I think your second question was how should we go about deciding whether this is pertinent to low power.

JUDGE BRENNER: Yes: should we use those same criteria?

MR. LANPHER: Maybe I have to go back and review River Bend and North Anna again. I don't recall how those cases pertained to low power versus full power.

I'm sorry: I just can't answer your question on that.

JUDGE BRENNER: What if we find that there is in fact a staff analysis that shows that, as applied to the

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facility in question, the results show that there is reasonable assurance that public health and safety will be protected, although there is some further generic work being performed. And then we turn to the County and say: Now that we have those results, County, you have some obligation to particularly frame an issue as to why we shouldn't accept those results.

MR. LANPHER: I think you are basically asking a procedural question, and I think that's a fair approach for the Board to take. Our position, however -- and we have set it forth in our filing of November 14th -- is that we will, as diligently as possible, proceed to inform the Board and the parties of whether there is an issue in light of the Staff analyses, but it is an issue that we want to contest in accordance with the appeal board's remand, and, if there isn't, we will inform the Board, if there is, we will set forth with particularity exactly what we think is inadequate about the studies that have been performed and the bases articulated by the staff for its A-47 resolution.

I think we're talking about setting forth procedures for how we go about doing that. I think that's the right inquiry.

JUDGE BRENNER: Let me hear from the other parties on this. LILCO. Mr. Irwin.

MR. IRWIN: It's Mr. Earley's show at this point.

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MR. EARLEY: Judge Brenner, let me make a couple of comments in response to the County's points.

First, with respect to schedules, there are a number of days, but I think one thing needs to be clear: the only document that came after this Board's partial initial decision was the Staff's SER closing out all of the items.

LILCO's report were sent to the Board and all the parties starting in 1982, in the second quarter of 1982, and continued into 1983. If you look at the titles of the letters that were sent with the results of those studies, they're clearly delineated either as control system interaction study or the high energy line break study. So it should have been absolutely clear to the county as those things came in. The only thing they didn't have was a little flag on it that told the County that they ought to review this.

In hindsight, at the end of the process, when the Staff came out with their final evaluation signing off, maybe the parties should have noted to the Board that this is all resolved now, and then highlighted that to the appeal board.

But clearly the information was available to the county, and has been available to the county for well over a year. LILCO made sure that that information was sent out to the Board and to the parties, because it was an issue in

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controversy.

So the argument that we shouldn't have done anything because the issue was on appeal is just not a valid argument. The issue was not on appeal when all of the results of the studies were provided to the county.

We think that the fact that that information has been available to the county for a long time is a very significant consideration in deciding what this Board ought to do. It's LILCO's position that by remanding to the licensing board, the appeal board told the licensing board that you ought to look at and consider any new information that developes, and permit the county the option, or the possibility of testing those issues.

But the licensing board still ought to apply the same standards you would apply if these things had been raised in the first instance when the materials came out. So that if the county had raised a question about the high energy line break study, say, in 1982 or '83, this board would not necessarily have automatically litigated the high energy line break study, you would have looked at the significance of the issues raised, the timeliness of raising those issues, and decided whether litigation was appropriate at that particular time.

I think that the appeal board would expect this board to do the same thing now.

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I don't think the appeal board wanted this board to blindly go forward with litigation of these studies. I think the board ought to take a look at the facts and circumstances. The studies have been available for a long time; the NRC staff has reviewed and approved these studies, and found that there are not control systems interactions, and couple that with the findings of fact that the Board has already made that this, in essence, is a confirmatory type of unresolved safety issue where the purpose is to confirm that the existing regulations are adequate, not that any particular systems interactions have been identified, and couple it also with the fact that these studies are only pieces of the puzzle, there was other evidence on the record about other studies that have been performed on systems interactions. Also there was evidence on the record about these very studies.

I recall Mr. Dau being cross-examined on the methodology to be used in these particular studies and what types of things they would look at.

JUDGE BRENNER: Do you mean anything besides the portion of the record cited in your pleading?

MR. EARLEY: Those were the portions of the record. I believe there was some prefiled testimony that described the systems interaction study, and then recited some of the portions where Mr. Dau was cross-examined by

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the county on those particular studies.

I'm not sure we got every single page. We tried to give some representative cites.

So there really is a sufficient basis for this board to conclude right now that there is no issue to be litigated. The county has not raised, or pointed to any reasons to reopen the record on the control systems interaction issue.

What we've also argued in our pleadings is, if the board decides that the appeal board remand requires the board to allow the county to go into litigation and have some hearings on these particular studies, that under the analysis for remand issues, whether it affects a license, under that analysis clearly it should not hold up -- the pendency of these issues should not hold up any license for Shoreham.

The board has mentioned stay criteria. In light of the time involved, and the length of time the County has had the material, it might well be appropriate to apply the stay criteria. LILCO did not discuss the stay criteria. I think we went to the more flexible criteria permitted in remand issues; if you look at the remand cases, they do distinguish between the remand criteria and the stay criteria, and giving more flexibility when you're applying the remand criteria.

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But even with those remand criteria, I think those criteria weigh heavily in favor of permitting license while any further proceedings on these particular studies go on. There's just no reason to delay licensing.

Also the board ought to focus on the fact that this is a low power license, it is not a full power license that would be authorized. To get a full power license, as the board knows, we still have the diesel generator and emergency planning issues to resolve.

LILCO has divided the lower power testing program into four phases. Two of the phases, Phases 1 and 2, the low power licensing board has found that there's just no risk associated with conducting those activities, and granted LILCO summary disposition motions on that basis.

I think that's analogous to the Diablo Canyon case that we cited, where the Board permitted similar activities to go on while issues were still pending, QA issues, which could have affected the whole plant.

Beyond that, we think there is also assurance that Phase 3 and 4 activities can be conducted. Low power clearly presents less risk to the public, and, second, no control system interaction problem has been identified. LILCO has completed the study, the Staff has reviewed the study, the county has had the studies for several years and has not raised any secific control system interactions.

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So, again, that dictates going forward with licensing in the interim if the board decides to hold any hearings. But we think it is within the board's authority to look at the facts and determine no hearings -- no further proceedings are justified on these issues.

JUDGE BRENNER: What about the fact that the county says, if it is a procedural matter, that they would agree that they would frame a specific issue, at least, as to what they would seek to litigate as to the two reports, but that they need more time to do it?

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MR. EARLEY: I think our response to that is that the County has had these studies for a long time and that there was no reason, when this study arrived in the County's offices, some of them as long as almost 18 months ago, they were issues that the County had raised -- they were the ones that were concerned with A-47 and brought it up in their testimony, it was not part of the contention and it has been LILCO's argument all along that the contention focused on methodology and not resolution of specific issues.

If the County had a real concern about A-47, the first thing that they should have done when studies that were clearly A-47 studies came in was to look at them and see what they said. And this Board knows that where matters have come to the County's attention that they have not hesitated to raise what they thought were significant issues and the other parties disagreed with their conclusions but those things have been raised in the past using I&E notices and I&E reports that come in. There are many of those that come in and the County has found areas that they wanted to raise.

So I don't think that this Board ought to be swayed by the argument that Gee, we just didn't have enough time, we're poor little old County. Everyone knows that both parties have put in a lot of time and effort in this

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proceeding, they have sophisticated counsel and have sophisticated consultants and I don't think that the Board ought to be swayed by that particular argument.

One other point I want to note is since the Appeal Board decision came down on October 31st and then when this Board issued their order on November 2nd, the County has been on specific notice that the system -- control system interaction study was something that they were going to have to engage and certainly they could have gotten at least a preliminary review between the beginning of this month and today and yet nothing has been done to date.

One final point that I did mention in my earlier argument: another reason why this Board ought to permit licensing of this plant while any hearings on this issue go on would be that it would be consistent with the NRC's policy on the A-47 issue. As we noted in our pleading, a number of other plants have been licensed with the unresolved safety issue A-47 outstanding and those plants have been given -- some of them had to have it completed prior to receiving 5 percent power, others were given through the first refueling outage. So they were, I would assume, at full power operation or permitted full power operation during the pendancy of those issues.

Right now LILCO -- if there are any hearings,

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LILCO would only be asking for low power licensing in the interim and in fact the studies have been completed and reviewed by the Staff so there is even greater assurance than at some of those other plants.

JUDGE BRENNER: In any of those -- Taking your last point first: in any of those other cases were they adjudicatory decisions?

MR. EARLEY: Let me take a look and see if I can recall offhand.

JUDGE BRENNER: I'll come back to you on it a little later in the day, if you want to.

MR. EARLEY: Let me check that later. I'm not sure whether those were contested cases, and I don't think I'm going to be able to say whether the A-47 issue was litigated --

JUDGE BRENNER: That's really my question.

MR. EARLEY: I just don't know.

JUDGE BRENNER: Let's take a 15 minute break and then I will ask the Staff for its position.

(Recess.)

JUDGE BRENNER: Back on the record.

All right. Let's get the Staff's position.

MR. BORDENICK: Judge Brenner, I would like to point out on the question of the County's notice of the resolution of the matters that the Appeal Board raised in

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ALAB 788, I will certainly concede that there has been a lot going on in this case and I will certainly concede that particularly the lawyers have had a lot to do in this case. However, I do want to point out to the Board that many, many moons ago the County requested that I specifically serve -- or that the Staff specifically serve copies of everything that we were serving on the Board and the parties directly on NHP.

And while I will also concede that in supplement for perhaps the discussion of the Staff's review of the two LILCO studies, which might be tied up under the flag of A-47, I would submit that I personally would have expected that the County's consultants would have looked at supplement four, which is not a very thick document, and which has a table of contents. So I would just point that out as a comment on the question of notice to the County.

Certainly in addition to that that the County has had a fair amount of notice prior to today as to the issues that would be presented by virtue of ALAB 788 and specifically ALAB 788 came out on October 31, the Board addressed this matter at the diesel hearing November 2nd.

In compliance with the Board's directive -- I know I personally took the initiative to get the parties together on a conference call and on Friday the 9th I specifically gave the section numbers in question to the

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County, even though my affidavits were not served on them until -- well the affidavits in question at least were not served until the 13th. So they have been on notice for quite some time and I am frankly somewhat surprised that they come in today without even an outline of what their position is, what their concerns are.

And in summary, I have heard nothing in their arguments this morning that would lead me to suggest to the Board that the Board -- well let me state it this way:

If they want further time to examine the Staff filings, that's fine. There are other matters pending before this Board and of course the overall question of emergency planning is still pending before the Lawrence board. So there is time if they want time to review these documents. However I have heard nothing here that would support any kind of a stay on the issuance of a low power license which, in another context, has been approved by the Miller low power board and which, as I understand it, is pending before the Commissioner.

Finally, I would like to address myself to the Applicant's filing whether they talk about the issuance of other licenses. First of all, I believe -- and this is really off the top of my head -- I think the only case or the only proceeding that they cite which was contested was Susquehanna, and I am pretty sure that the issue that this

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Board is addressing today did not come up in that proceeding. I could be wrong, but that is my understanding of the situation.

Also I don't take issue with what the County is saying, per se -- not the County, LILCO is saying per se with respect to those cases. I don't think I would dignify what the Staff has done in those cases as Commission policy; on the other hand, the facts speak for themselves and those licenses were issued on the basis that LILCO claims they were issued on.

JUDGE BRENNER: One thing that confused me, Mr. Bordenick, in your written pleading -- and maybe your oral remarks supercede the written pleading, but I saw an inconsistency between footnote one on page three which, if I may paraphrase, took the position that a determination is premature as to whether, if a hearing need be held, it should be before or after low power license and compare that with the first sentence of the first full paragraph on page four which says that:

> "The Staff further believes none of the three issues could affect the issuance of a low power license or a full power license."

I saw an apparent inconsistency there.

MR. BORDENICK: I want apologize if that is an apparent inconsistency. What we were suggesting in the

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footnote is that we were hedging our bets until we heard from the County and as I said earlier I was fully expecting to hear something from the County on this point. Having heard nothing from them, you're right, my verbal remarks do supercede that foonote.

JUDGE BRENNER: I did want to get LILCO and the Staff's views and take away your free right, I guess, Mr. Irwin, as to environmental qualifications and just let you voice disagreements with some of what I said on there.

MR. IRWIN: We believe basically what we said in our paper, namely that the Appeal Board was concerned, in the event that there was equipment which LILCO believed needed to be qualified, with whether the qualification process was properly completed and so forth, that if the Staff concluded that there was no such qualification necessary -- excuse me, that there was no equipment falling within the 50.49(b)(2) category and therefore there was no equipment that needed to be qualified that such a determination by the Staff on the basis of the information supplied by LILCO would be within the proper scope of decisional responsibility left to the Staff and the matter could be closed on that basis.

(Discussion off the record.)

JUDGE BRENNER: I'm sorry, go ahead.

MR. IRWIN: Let me --

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JUDGE BRENNER: I'll be more particular: What about the County's point that the bases for the Staff's agreement with LILCO that there is no 50.49(b)(2) equipment depends at least in part on the acceptance of the two USI A-47 studies?

MR. IRWIN: Well there was one point that remained to be addressed, Judge Brenner --

JUDGE BRENNER: -- which we should point out are not all of the studies or analyses upon which the resolution of A-47 for Shoreham depends, but they are the two that were the subject of the remand.

MR. IRWIN: That is correct.

Had I not contented myself with a free ride I would have said that Suffolk County disagreed with Ms. Letsche's characterization in the County's pleading that Counsel for LILCO and the Staff agreed with Suffolk County that there were major interties between the A-47 and the EQ issues. I don't recall ever having made such a representation: if I did, I would repent myself rather heartily.

We do not agree with it. There are a number of independent bases, starting with the entire design basis of the plant which takes us back over a decade to a philosophy of either designing equipment so that it is safety-related or isolated from safety-related power sources or functions.

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and following through a whole series of studies of varying degrees of comprehensiveness, a number of which were referred to either in the EQ litigation itself or in the 7-B litigation conducted over a period of years, some of which we referred to in our pleading. Even since that time there have been other studies in addition to the two A-47 studies, which are confirmatory in nature.

The long and short of it is if you are trying to prove a negative, which essentially the 50.49(b)(2) exclusionary category is, it is very difficult to construct the perfect definitive dispositive study. What you have is a combination of design philosophy reinforced by construction patterns, quality assurance and a whole series of confirmatory studies which build up a very high degree of confidence in your outcome. This was the basis on which Mr. Kasak was able to testify in January of '83 that he believed there were few, if any, and he thought probably no pieces of equipment in that category, and that conclusion has simply been reinforced by the confirmatory studies on A-47 as well as a couple of others which we haven't even bothered to put into the record. So the long and short of it, we disagree with the County on that.

JUDGE BRENNER: Staff, did you want to add anything on that?

MR. BORDENICK: Yes, Judge Brenner. I also

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disagree with the County for the reasons that Mr. Irwin has indicated with specific reference to Ms. Letsche's statement in her report about the parties agreeing that USI A-47 -- to use the shorthand -- EQ issues are closely related to one another. Perhaps she got that idea from a statement I made -- and the only reason I made it, quite frankly, was at the time that conversation was going on I was also in the process of trying to get the affidavits together and it was a question of who had prepared what sections. And if you'll notice --

JUDGE BRENNER: Let me interject: I have read the SER's and the SER section -- I don't remember the section exactly, 3.11-something, depends apparently expressly as I read it on the two A-47 studies for the 50.49(b)(2) analysis, I believe -- I don't have it in front of me now.

MR. BORDENICK: You are correct in part.

JUDGE BRENNER: I mean I have it, I just didn't...

MR. LANPHER: Page 3-8.

MR. BORDENICK: That is certainly not an unreasonable reading of that particular section --

MR. LANPHER: -- the second full paragraph.

MR. BORDENICK: -- it doesn't depend completely on those studies.

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But the point I am making with respect to the statement in Ms. Letsche's filing is that with respect to different Staff witnesses involved in preparation of subparts of Section 3.11, the part you have just referred to was prepared by a Mr. LeGreen and I had to get that into his affidavit for purposes of his swearing to the accuracy of that subpart. But the thrust of that particular section was prepared by Mr. Mauck.

So this is by way of explanation to --

JUDGE BRENNER: Well is there a relationship or not?

MR. BORDENICK: In part but not totally.

JUDGE BRENNER: I don't think anybody argued the total relationship.

MR. BORDENICK: But I don't think they are interrelated for purposes of the Board disposing of EQ and A-47. And again, this ties in with the fact that I would have expected the County to give us some further indication if in fact they believe that's the case. I would like to know a little further the basis for that belief and I have not heard anything this morning.

MR. IRWIN: If I could just have one more time at this thing:

Whether the A-47 studies may in fact relate to the EQ studies is not necessarily the only question. The

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only question is whether there is additional information as well. And in LILCO's mind there was additional sufficient information as well to have led it to the conclusion that there was no equipment in the 50.49(b)(2) category.

Secondly, the Appeal Board's decision as we read it is simply the binary decision of the threshold and only if one gets into the question -- only if one gets into the conclusion that there is 50.49(b)(2) equipment does one begin to parce the basis -- does one have to parce the basis for the Staff's conclusion.

JUDGE BRENNER: All right. Let me ask this then -- I suppose we can take responses in turn from the County and LILCO and the Staff:

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If we were to give the County time to tell us specifically what, if anything, it were to seek to challenge with respect to the USI A-47 studies, what would the County have to show us in order for us to conclude that yes, it has met whatever requirements should be applicable? That's the question in order to be entitled to frame an issue for litigation.

MR. LANPHER: I would be happy to go first.

I think at page 59 of the Appeal Board's decision that it basically answers that question for you, Judge. I do have some other comments I would like to come back to afterwards. But it says it's:

> "....entitled to test the basis of any conclusion regarding this matter in the same manner as any other litigable issue."

I think that means that we would have to come forward and show -- I'm not sure you have to do a formal contention but you have to lay out precisely, so people are on notice, exactly what is of concern, and so forth, so that the litigation can go forward on a reasoned basis.

The thing that would be challenged is the conclusion of the Staff regarding this matter. I've paraphrased but that's at the top of page 59 also. And I am not sure again that the Appeal Board had in mind contentions or whatever in this regard, because it said it's entitled

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to test the basis of any conclusion, as any other issues. I read that as saying in the formal adjudicatory pattern that Licensing Boards usually conduct.

We are willing to stipulate now that when we finish our review we will advise the Board and parties exactly what it is, if anything, that we want to contest. I think I said that earlier so I don't want to repeat myself.

JUDGE BRENNER: All right. That would be specificity, I guess.

MR. LANPHER: Yes.

JUDGE BRENNER: What about the bases for believing that there is a litigable issue?

MR. LANPHER: Yes.

JUDGE BRENNER: Would we have to find-- I hate to use this word: it was overused in the hearing the first time. But would we have to find some nexus to the umbrella 7-B issue?

MR. LANPHER: No. I believe that the Board has already -- the Appeal Board has already deemed this to be a litigable issue, again page 59 of its decision. It clearly was concerned. I can't read their minds, but the Board members were concerned that something was missing here. And this Board has to find a way to fill in that void.

JUDGE BRENNER: Well, I didn't ask the question precisely enough.

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In fact the Licensing Board, as I recall, had overruled some of LILCO's objections where LILCO had objected that the inquiry on USI A-47 was not material to 7-B. What I meant was-- So in general we are past the point as to whether some aspects at least of A-47 could be material to 7-B.

The question is whether whatever specific -- whatever issue the County framed with specificity and bases would also have to show a nexus between that issue and the overall 7-B contention, or is it impossible to have an issue related to A-47 which is unrelated to 7-B?

MR. LANPHER: The bottom of page 58 of the Appeal Board's decision, your Honor, I think may provide some guidance on that, Judge Brenner. The Board said:

> "We do not have sufficient information to conclude that the ultimate resolution of A-47 will have no significance for Shoreham."

I think they were-- This is subject to reviewing other portions of their opinion. I think they were basically focusing on A-47 and not specifically in the 7-B context, so I do not believe that we would be required to tie that to the overall -- what you call the umbrella contention of 7-B.

JUDGE BRENNER: I don't know what to call it at this point, but it is almost history.

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MR. LANPHER: I don't have a teeshirt for this year.

JUDGE BRENNER: Maybe your teeshirt was premature, if I recall the wording on it.

MR. LANPHER: I've got two of them already.

But that's the best I can do in terms of answering the 7-B question.

JUDGE BRENNER: Mr. Earley?

MR. EARLEY: In response to the question what does SC have to show, I think there are a number of things.

First, let me say that whether or not the Board decides to allow the County a chance to litigate, we still think that there is a basis, and a sound basis for allowing any licensing of the plant to go forward.

And to clarify one thing the Staff mentioned, that some of the other plants that had been licensed with the USI A-47 issue outstanding and they were not contested, and the Board asked the question, LILCO cited those things for not the proposition that no hearing should be granted but, really, the equitable issues associated with licensing the plant, regardless of whether any hearings go on or not.

JUDGE BRENNER: I know. But the reason I asked you the question I did was to carry your reasoning further to a context that you certainly are probably not interested in.

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We would accept that argument to say that our decision on the effect of the pendency of the diesel issue in Shoreham was incorrect because the Staff went ahead and licensed Grand Gulf. And there may be an arguable distinction between what Staff may do and what may be considered correct in an adjudicatory setting. That is why I asked you your other question.

But I understood I think the purpose of LILCO in citing the cases.

MR. EARLEY: I think it was cited for a limited purpose and not for the proposition-- We didn't cite it as Commission precedent that has to be followed, but just a consideration in looking at the evidence.

But to get to the factors that ought to be considered, first is the timeliness. If the County submits any issue, the Board ought to engage the reasonableness or unreasonableness of any delay. In fact, if the Board decides at the outset that it really would be justified now in eliminating any further litigation because the County has been untimely and has not engaged these studies earlier, then the standard for permitting litigation ought to be fairly high.

The second thing that the Board ought to look at is the significance of the issues raised. They ought to be particularized issues relating to the study, not generalized

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concerns. They ought to be very particular problems that the County can show at the outset that there is some threshold showing that it is a signficant safety issue that the Board ought to go back and reopen the record and hear.

And third, I think any litigation ought to be limited to the results of the study, and by that I mean that we shouldn't get into whether there are other studies or other things that ought to be done to resolve A-47.

When the record was closed on the systems-interaction issue, everybody knew what was being done to resolve A-47. There were two studies that the Staff had asked LILCO to do to confirm the resolution of the USI A-47. The County now shouldn't come back and say Oh, well, there are two or three other studies that you also ought to do in addition to those. So we ought to focus on those two studies and whether the results of those studies show that there are some safety problems at Shoreham.

And finally I do think that there ought to be some relationship to the overall 7-B contention. A-47 was not a signficant part of the systems-interaction litigation. I believe it was limited to several pages in the County's initial testimony.

In briefly reviewing the record, I don't think we spent more than 20 pages on A-47 out of a massive proceeding on systems interaction. So that it ought to be look at in

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the context of the overall systems-interaction issue since that was the litigated issue, and whether or not the County can show that because of some defect in the studies or something in the study show that there is something wrong with the overall conclusions that systems interactions are not a problem at Shoreham.

I think those are the things that the Board ought to look at if the Board decides that some hearing should be permitted, or the County should be given an additional opportunity to pursue a hearing.

JUDGE BRENNER: Staff.

MR. BORDENICK: In connection with the 7-B litigation, I agree that there must be some connection shown on one hand between that. On the other hand, I would hope that the County doesn't take ALAB 788 as an invitation to try to reopen 7-B. If they do I think they need to meet a fairly stiff burden in the context of a traditional motion to reopen.

I personally don't believe that the Appeal Board was speaking in that sort of a context. Obviously, as Mr. Earley pointed out, they are going to have to address the timeliness aspect, and I think all the parties have spent some amount of time on that particular point this morning. And I won't reiterate the arguments that have been made except to say in summary, or in conclusion, I don't

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think they have been timely.

Also of course the Board is aware of the Appeal Board decision in the Catawba, which I think is going to be applicable in this particular instance. As far as I'm concerned, in looking at ALAB 788, I key on the word on page 58 where the Appeal Board was talking about the fact that the Staff had required additional information, and the Appeal Board indicated:

> "We, like the Staff, do not have sufficient information to conclude that the ultimate resolution of USI A-47 will have no significance for Shoreham."

The key word I would focus on there is the word "significance." In other words, the County has got to come in with something significant. To, in effect, nitpick what LILCO did or didn't do in their studies or what the Staff did or didn't do in their review of those studies is not going to carry the day, in my opinion. They are going to have to show some significance, some safety significance for Shoreham.

Until I see what they come in with I don't think I can address that point any further.

JUDGE BRENNER: LILCO mentioned the point and then you, Mr. Bordenick, emphasized it a little more strongly by using the word "obviously." You said obviously

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timeliness would be a factor and then you said Catawba would be applicable.

Why is that obvious? Don't we have a situation here where the Appeal Board on page 59 said:

> "The County is entitled to test the basis of any conclusion regarding this matter in the same manner as any other litigable issue."

Why is timeliness obviously a factor then since now we are in a posture of supplementing the record in response to the remand?

MR. BORDENICK: I say that because as you pointed out earlier, through no fault of its own, the Appeal Board was unaware of the subsequent developments. And I for one believe that if they had been aware, perhaps you would have some different language in this ALAB. Unfortunately they weren't aware of it, and so of course they did not address-- I don't think they have addressed the question of timeliness at all. They had no reason to.

JUDGE BRENNER: Are you finished?

MR. BORDENICK: Yes.

JUDGE BRENNER: I didn't see any petition for reconsideration filed with the Appeal Board. Did I miss any?

MR. BORDENICK: No, you didn't. And that thought ran through my mind because I remember a case going back

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many years where something similar happened-- I don't want to go into all the details of it. It was the Fitzpatrick case. It probably goes back to 1973, maybe 1974, where the Appeal Board did indicate that perhaps the appropriate procedure to use in circumstances similar to what we find ourselves faced with in Shoreham would have been a motion for reconsideration to the Appeal Board.

You are right, none of the parties have thought in that particular context.

JUDGE BRENNER: Well, actually I wasn't solely asking to emphasize the point. Due to the fact that we've been at this diesel hearing, it was possible that we might have missed some papers.

Is it correct that LILCO has not filed?

MR. IRWIN: It is correct, Judge Brenner. And part of the reason LILCO has not filed any paper with the Appeal Board was almost immediately after the Appeal Board's decision was handed down, your bench order indicated that this Board would take the issue up promptly, and we frankly expected that substantive issues, if there were any, would have been crystalized today because of the Board's two clear injunctions to the County to show any substantive difficulties they might have.

I thought things were moving along quite briskly with this Board.

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JUDGE BRENNER: That may or may not be the case, but it seems to me if a party wants to argue that timeliness should clearly be a factor as opposed to arguably being a factor, that reconsideration before the Appeal Board would have been the best route to test the vitality of that claim.

MR. BORDENICK: Again, Judge Brenner, for the Staff's part at least, I was laboring apparently under the erroneous impression that I would hear something today. So again in my case, sitting here this morning and thinking about the reconsideration aspect, it was really a matter that really crossed my mind for the first time this morning.

MR. IRWIN: I think there is also an additional point, Judge Brenner, and that is the facts and circumstances that apply to any kind of remand are things which I don't think the Appeal Board, any more than any other adjudicatory or appeal tribunal, would suggest be ignored. When one talks about susceptibility to litigation, the same as any other litigable matter, one doesn't ignore the surrounding circumstances such as the fact that LILCO had completed its analysis and the fact that the Staff did sign off on it.

Unhappily, the Appeal Board didn't know about them. I think that the sentence on the bottom of page 58 which people keep reading has one telling phrase in it.

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That is the phrase "like the Staff." Mr. Lanpher read it a couple of minutes ago. He admitted that phrase.

"We....do not have sufficient information to conclude...."

et cetera.

"We, like the Staff,...."

The Staff has now got that information and has had it over a year, and has put everybody on notice of its conclusions for over a year. We think that is a significant circumstance.

Also, the actual posture of this case at this moment is a signficant circumstance, as is the absence of any demonstrated likelihood of any significant effect from this issue even if it were not resolved totally, as LILCO and the Staff believe it has been resolved.

In short, those are all circumstances that ought to be taken into account, whether to permit litigation at all and even more, the question of whether to permit litigation in advance of deciding whether or not to forestall the low power licensing decision.

JUDGE BRENNER: We are going to take a break now unless--

Did the County want to respond?

MR. LANPHER: I have some brief comments on that. And before we went to this question that you've raised,

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Judge Brenner, we had gone around the table and I had a couple of comments in response if I may.

As I told you at the last break, I've got an interest in getting out of here so I will be very brief.

I agree with the implication in the Board's statement that timeliness is nowhere in this. They said "You are entitled to test these." And we ought to go back to the Appeal Board if anyone is going to make a serious argument on that.

I agree that issues have to be significant or else no one ought to spend the time litigating it, but a threshold already has been shown at the bottom of page 58, that the Appeal Board felt that the record and they believed that the Staff felt the record also was inadequate on A-47. So there is a need to fill that record. And we certainly aren't going to ask to have formal adjudication on something that we don't think is significant. It would be a waste of everyone's time.

Mr. Bordenick I believe said-- Maybe it was Mr. Earley. I guess it was Mr. Earley who said that the focus of any litigation would have to be on the two studies. The focus of the litigation I believe is defined by the Appeal Board. The focus is to test the basis for any Staff conclusion regarding this matter.

Now if the Staff conclusion is only those two

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studies, that is certainly a major basis for it and that should be the focus. But the Appeal Board defines that and we can't -- defines the focus, and we cannot set up some artificial limitations.

Now let me go back to a couple of things that have also been said.

I think Mr. Bordenick, on at least three occasions, has said Gee. I was surprised this morning that the County didn't come in with something substantive, or something to that effect. We are not going to come in and make a bunch of wild allegations.

We set forth in our pleading of the 14th that our experts have been tied up in hearings and obligations in other proceedings, and have not completed even a detailed preliminary review such that they are willing to put down in an affidavit form that this or that is of significance or not of significance.

We are not going to speculate on this record, and I think that is to the benefit of all parties that we don't do that.

I am sorry, Mr. Bordenick, that we are not in a position to go forward with lots of details.

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But that's just the state of the circumstances and notwithstanding some people's speculation that Gee, we would have thought things could have happened -- Mr. Bridenbaugh and Mr. Hubbard were tied up a good bit of this month in Long Island, along with the Board. Mr. Minor has been tied up very significantly on the Seabrook and Clinton proceeding and that's just a fact of life.

I would like to comment on --

JUDGE BRENNER: They weren't tied up that much on the diesel hearing but --

MR. LANPHER: They were required to be there. Whether they were asked a lot of questions or not, they were up in that proceeding is what I am told by Mr. Dynner.

LILCO has suggested a number of times that perhaps we are not to be afforded an opportunity to decide whether something is to be litigated here or not.

The Appeal Board -- maybe I am misconstruing what LILCO says -- the Appeal Board said we are entitled to test the basis for any conclusion, we are entitled to make a determination on that, as long as we meet significant standards we are entitled to do that.

There was reference to the fact that A-47 is allegedly a confirmatory USI, perhaps that has something to do with whether we are entitled to test the bases for the Staff conclusion. This is nowhere in the Appeal Board's

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decision and again that's the guidance that has to be followed.

A number of times there has been talk about a re-opening of the record or a re-opening standard. The idea of meeting some sort of re-opening standard is just nowhere -- here again, the Appeal Board directed this Board to take in additional information, it has demanded in effect that we re-open -- or that you re-open the reactor record at least for some purpose. So I don't see how that can be pertinent.

Over and over we have heard the argument that we are untimely because we should have come forth, perhaps particularly with the Appeal Board, to have informed it of the status of the Staff's SER -- I believe, as the Board said, it was early October when we probably received the Staff's SER on this.

I think it is important to keep the posture of the case be clear at that point. This Board would have lost its jurisdiction somewhere in that time frame had we filed our notice of appeal and that sort of thing. This Board had held in its PID that the data which we are discussing now in A-47 were not required for the record. For us to have attempted to get that in the record we essentially would have had to file a motion to re-open with the Appeal Board, I believe, as a procedural matter. And to do that, to file that motion to re-open, we would have had to have argued

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in the substance of our appeal that you, Judge Brenner, and the other judges were wrong and that's exactly what we are briefing. Now maybe we should have brought that to their attention in our substantive brief that was filed December 23, and we didn't. But certainly made it clear that we thought that these data had to be part of the record. To my recollection, no one else in their briefs that were filed in early March brought that to the Appeal Board's attention either.

JUDGE BRENNER: Well you anticipated me, because I was going to say certainly at the time you filed the brief, particularly when such brief argued that the studies have to be performed, it certainly would have been pertinent in conjunction with that claim to say they have been. But you didn't and we are at the point we are today.

MR. LANPHER: That's right.

Mr. Earley referenced the Miller board's exemption decision pertaining to phases one and two as a basis for this Board, at a minimum, I guess, to say that these issues are not pertinent for phases one and two, and we have already put in some pleadings with the Commission relating to phases one and two. I don't want to repeat any of that stuff.

I think it is important for this Board to realize that the Miller board's phase one and two decision was

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-- addressed whether there was a need for diesel generators in phases one and two and did not address the issues -- could not have addressed the issues pertinent to ALAB 788 or systems interaction.

And finally, there has been discussion about whether these remand issues have to be resolved prior to a low power decision. We believe that the Appeal Board's decision makes it clear that we have a right to test the basis for the Staff conclusion. That includes the Staff conclusion at page five of the affidavit of Mr. -- I can't pronounce his name --

MR. BORDENICK: Szukiewicz.

MR. LANPHER: Szukiewicz -- page five of his affidavit. We believe we have a right to test the bases, the factual bases that have been put out. We think it may also be significant to point out that Mr. Szukiewicz's affidavit is general in its conclusion, paragraph eight, and it is based upon the supplementary SER, I guess October or September of 1983, which was prior to the time the new diesel configuration for low power for the exemption was put into place and there is no evidence that the Staff's conclusion has considered the applicability of these studies that LILCO has performed in light of that new configuration.

We think there is a void in the record here that precludes any decision at this time regarding the pertinence

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of these outstanding remanded issues to low power and we would urge that the proper decision is to allow us to perform our studies in this regard. I believe we suggested that we would report to the Board on December 11th, which I think is still a do-able date at least for what we have proposed.

JUDGE BRENNER: All right. Why don't we take a 10 minute break? We may come back and simply adjourn the proceeding or we may come back and tell you certain things.

(Recess.)

JUDGE BRENNER: Back on the record.

All right. We can give you a ruling at this time which obviously will be supported by a written order setting forth our reasoning.

We are going to give the County some additional time to set forth issues with respect to A-47. However we also find at this time that the possible pendancy of any issues under the A-47 remand does not affect the possible issuance of a low power license.

In terms of considering whether or not we would have a litigation on the merits, even though it would not affect issuance of a low power license, we would require that the County set forth whatever issues it seeks to litigate within the scope of the A-47 remand with bases and specificity; in addition, the County would have to set

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forth the significance of the issue. As to those criteria, I don't think any party disagrees. In any event, we find that those criteria should be applicable.

We would also require the County to set forth -- without now deciding whether or not we would consider them in judging the litigability of issues -- to set forth the nexus and significance of the issue to the 7-B issue and/or argue that such factors are not appropriate or necessary.

I should point out that even if we determine that the factors as I have just stated are not necessary -- that is, the nexus and significance of the issue to 7-B -- we would, of course, only litigate issues we find to be within the scope of the remand. And we have had some discussion of what that means. LILCO talks about the remand being in terms of results of the study. The County read back the language of the Appeal Board but did not fully indicate whether it thought LILCO's view of what that language meant was correct or not.

There is no sense discussing it further in the abstract. However if and when specific issues are set forth obviously we are going to have to determine whether or not they are within the scope of the remand. It would therefore behoove the County as part of its filing to say something about why it believes it is within the scope of the remand, particularly if it is an issue where it is not immediately

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apparent why it flows from the conclusions of those two studies.

The County had asked for December 11th -- and I hard you say that was still do-able, Mr. Lanpher, although your tone of voice was not very emphatic: in any event, is that the date you would still request?

MR. LANPHER: Yes.

JUDGE BRENNER: All right.

We would set that as a received date, as has been our practice in the past for the Board and the immediately participating parties. I think it is a Tuesday, if that's what you're worried about.

MR. LANPHER: As long as it's not a Monday.

JUDGE BRENNER: If I have the right year it's a Tuesday.

(Laughter.)

JUDGE BRENNER: This proceeding begins to be measured in several years.

We would like to set a fairly tight frame for an answer and that would be on the subject of whether or not the issues are admissible and we set one week for LILCO, which would be December 18th. We can give the Staff a few more days beyond that, but not a full week, like until the 21st.

MR. BORDENICK: The 18th is a Tuesday --

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JUDGE BRENNER: Yes, the 21st is a Friday.

MR. BORDENICK: The 21st is a Friday.

That would be a received date also?

JUDGE BRENNER: Yes.

MR. BORDENICK: -- LILCO's filing on the 18th?

JUDGE BRENNER: Yes.

Particularly received by the Staff, given the time frames we've set.

Our practice in the past has been for parties to make good faith efforts to discuss issues before the first filing by whichever party is going to set forth issues, which usually has been the County, and we would put that same requirement in place here. It is a good faith effort and the abilities to fully come to grips with what is being filed will vary depending on their readiness and we understand that. These efforts sometimes have the benefit of at least resulting in issues being framed so that the parties understand the issues even though -- and sometimes even an agreement on the admissibility, but not always. And this is helpful even where there may continue to be violent disagreements on the merits of the issues.

If there are issues set forth and some potential settlement or narrowing discussions going on even while the issues are being set forth on the filing schedule we had provided, we, of course, would like to be apprised of that

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as part of the appropriate filings from the parties.

In thinking about it for the first time I suppose it would be helpful but not necessarily required unless it would support some of the other criteria we have already set forth to get some insight if there is an issue being set forth into what the parties would attempt -- an outline of what the parties might attempt to put forward in evidentiary litigation on a subject and what other procedural steps, if any, would be necessary leading up to consideration of the issue on the merits, including any party's views on possible summary disposition and whether there is any need for any sort of discovery at this point.

That's all we have. If there are any questions of a clarifying nature but not of a reconsideration nature, we will entertain them.

MR. IRWIN: We don't have any questions, Judge.

JUDGE BRENNER: All right.

Hearing none, we are adjourned. Have a happy Thanksgiving and holiday season beyond that.

(Whereupon, at 11:47 a.m., the conference in the above-entitled matter was adjourned.)

CERTIFICATE OF OFFICIAL REPORTER

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

NAME OF PROCEEDING: LONG ISLAND LIGHTING COMPANY

(Shoreham Nuclear Power Station)

DOCKET NO.: 50-322-1 (OL)

PLACE: BETHESDA, MARYLAND

DATE: TUESDAY, NOVEMBER 20, 1984

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

(sigt) Anne G. Bloom

(TYPED)
Anne G. Bloom

Official Reporter
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