ORIGINAL

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION '84 SEP 25 P12:36

In the Matter of:

LONG ISLAND LIGHTING COMPANY

Shoreham Nuclear Power Generating Plant, Unit 1

In Camera emp 2/28/85

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Date: Friday, September 14, 1984

UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

BEFORE ATOMIC SAFETY AND LICENSING BOARD

LONG ISLAND LIGHTING COMPANY (SHOREHAM NUCLEAR POWER GENERATING PLANT, UNIT 1)	Docket No. 50-322-OL-4 (Low Power)

Nuclear Regulatory Commission
Fifth Floor
4350 East West Highway
Bethesda, Maryland

September 14, 1984

Hearing in the above entitled matter convened at 9:30 a.m.

BEFORE:

JUDGE MILLER
JUDGE ELIZABETH B. JOHNSON

APPEARANCES:

On behalf of LILCO:

Anthony Earley
Donald Irwin

On behalf of the NRC Regulatory Staff:

Robert Perlis
Charles Gaskin
Don Kasum
Al Schwencer
Ralph Caruso

On behalf of Suffolk County:

Lawrence Lampher
Herbert Brown

PROCEEDINGS

JUDGE MILLER: Good morning. First of all, I would like the identification of everyone in the room. Indicate your status if you're not directly associated with the counsel parties, so we can be sure of the in-camera aspects of the tape.

MR. PERLIS: My name is Robert Perlis, counsel for the NRC staff.

MR. IRWIN: My name is Donald Irwin, from the firm of Hunton & Williams, representing Long Island Lighting Company.

MR. EARLEY: I am Anthony Earley, of Hunton & Williams, representing Long Island Lighting Company.

MR. BROWN: Herbert H. Brown, counsel for Suffolk County with the law firm of Kirkpatrick, Lockhardt, Christopher, & Phillips in Washington.

MR. LAMPHER: Lawrence Lampher, same law firm, representing Suffolk County.

JUDGE MILLER: I think we have had some communication from Mr. Pallomino, the counsel for the State of New York, indicating that he wouldn't be here.

He had business he had to attend to. But he associates himself with the procedure, I think, with the position taken by Suffolk County, indicating he had no objection to it.

Anyone else?

MS. FRUCCI: Eleanor Frucci, Long Island Lighting Company.

MR. GISANO: My name is Gary Gisano (phonetic), Long Island Lighting Company.

MR. CARUSO: Ralph Caruso, project manager for the NRC staff.

MR. KASUN: Don Kasum, Division of Safeguards, NRC.

MR. SCHWENCER: Albert Schwencer, Chief of Licensing Branch, NRC staff.

MR. GASKIN: Charles Gaskin, Division of Safeguards, NRC staff.

MS. DEWER: Donna Dewer (phonetic), Licensing Board.

JUDGE MILLER: Mr. Raymond Marshall, our security guard, is taking care of the privacy and security aspects of the hearing at the rear of the room.

Is there anyone we haven't identified? That takes care of all of us.

Let the record show, by the way, that we are proceeding this morning by a forum, Judge Johnson and myself.

Judge Bright is holding an evidentiary hearing in another case. He asked us to proceed, however, by forum, and has acquainted himself of the filings and

will review the transcript of any other matters that come up.

This is a conference of counsel and parties pursuant to a notice that was issued by the board on September 11, 1984.

It was preceded, I believe, the day before, by telephonic communication from our law court to counsel for all parties, advising them because of the short time involved.

We ask that all parties be prepared to discuss the effects and implications of a certain letter dated September 11, 1984 by Mr. Schwencer to Mr. Leonard.

I'll read that into the record in a moment. The letter itself, which was an attachment to the notice, was relative to docket number 50-322.

It's to Mr. J.D. Leonard, Vice President, Nuclear, Long Island Lighting Company, 175 Old County Road, Hicksville, New York, 11801.

"Dear Mr. Leonard:

Subject: Supplemental motion for low power operating license - physical security plan - Shoreham nuclear power station Unit 1.

The staff's previous approval of the Shoreham physical security plan was based in part on the protection of the TDI emergency diesel generators as

vital equipment. As a result of a reevaluation of your proposed alternative emergency power supply for operation at up to 5% power, the staff has determined that you should amend the security plan to describe the measures that will be used to protect alternative emergency power supply equipment located in the protected area as vital equipment.

Please submit your revised plan for our review and approval upon receipt of this letter. Our evaluation of the revised plan, which will update the evaluation presented in supplemental safety evaluation report (SSER) number five, will be published in a future SSER.

The reporting and/or recordkeeping requirements contained in this letter affects you or the ten respondents therefore OMB reports are not required under PL 96-511.

Sincerely..." And signed by Mr. A. Schwencer, Chief, Licensing Branch Number 2, Division of Licensing.

That is the matter that I ask the parties to be prepared to discuss.

I suppose first of all the staff should enlighten us as to what's happened.

MR. PERLIS: Your honor, after reevaluation, the staff, as this letter indicates, has determined that

the EMDs located in the protected area should be treated as vital equipment and protected as vital equipment since that relates to at least one of the contentions proffered by Suffolk County in this case.

We felt it our obligation to get that information to the board as soon as the staff position was reached.

JUDGE MILLER: Well, we appreciate bringing it to our attention. It was a rather stripped-down version which announced what appeared to us to be a substantial change in position, once again, by the staff in regard to the matter now pending for judication before this board and the Commission.

Isn't that true?

MR. PERLIS: It is a change in position, that is correct.

JUDGE MILLER: Then why did we just get a copy of a letter that dropped out of the blue on this one? We're trying to rule upon certain contentions.

We're trying to establish a schedule. We're in the midst of voluminous filings of proposed findings of fact, which we've asked the parties to file, and they have filed in the main case.

But what happened? What's this all about?

MR. PERLIS: Well, Mr. Chairman, at this point, a letter is all we have. We don't have an SSER ready f

publication.

We've brought people here who can identify when an SSER will be available for publication.

JUDGE MILLER: Before we get to that, why is an SSER now suddenly being dumped on us, a timing that is bound to have at least some potential effect upon our scheduled proceedings.

What is the staff up to? What is all this, now? Let's get right down to realities, and tell us what happened.

You followed a persistent, steady course in this case, and we've already commented on that in our ruling of the summary disposition motion now pending before the Commission.

It's not a frequent change of position, but the staff seemed to be following a steady, consistent course of flip-flops.

This is a poor way to run an adjudicatory proceeding, and we want a full explanation.

MR. PERLIS: First, I'd like to state that this position is not being taken because of the adjudicatory proceeding, but is being taken because of the licensing application. I'd like to make that point clear.

JUDGE MILLER: Well, does not the staff, both legal and technical, realize that that issue itself is

pending before this very board at this time?

MR. PERLIS: Certainly. I just wanted to make clear that the staff position is being taken not just because of this hearing, but because of the pending application.

JUDGE MILLER: The question isn't whether it's taken because of this hearing; the question is whether it is in effect a challenge to this hearing and an attempt at use of patience of the use of jurisdiction of this board in an adjudicatory matter.

That's the question.

MR. PERLIS: Okay. Mr. Chairman, we do not believe this is a challenge to the board at all.

JUDGE MILLER: Then tell us why not.

MR. PERLIS: Under 10 CFR 2.717 D, when a proceeding is taking place, the director of either the Office of NRR or NMSS has the authority to issue orders relevant to items involved in the proceeding and those orders, in a sense, could be countermanded by the licensing board that has jurisdiction over the hearing.

JUDGE MILLER: We're familiar with that. We're familiar with the fact that this position has been used by the appeal board, and I think by one or more licensing boards.

We know we have the power to modify that which is

an attempt at interference with what we're trying to adjudicate, but the question isn't whether we have the power; we know that.

The question is why in the first place you chose to throw this money wrench into an ongoing adjudicatory proceeding on an issue that itself was clearly one that the board was then about ready to rule on, frankly, and certainly it's pending before us, namely, the vital area question, also the security plan which the staff has repeatedly, in SSER 5, arguments here, you turned to your technical associate at one point and explained to us carefully why the security plan in place for almost two years doesn't cover nuts and bolts, but covers the other matters, and why we should proceed. Now, you told us that, didn't you?

MR. PERLIS: That's...

JUDGE MILLER: I've got the transcript, and I'm sure you remember it.

MR. PERLIS: That's correct. But that was also stated in reference to whether the security plan has to be changed to protect other vital areas.

What we're talking about here is the protection of the EMDs. The security plan, I believe, identifies those areas that are protected as vital equipment.

JUDGE MILLER: Wait a minute. Say that again. The

security plan, as we've now read it, no longer are you or we, as some of your earlier arguments said, you hadn't seen it.

We have seen the plan. We've got something of a handle on it. Let's be specific, precise, and concrete.

MR. PERLIS: The security plan today states that TDI diesels will be protected as vital equipment.

JUDGE MILLER: TDIs.

MR. PERLIS: Correct.

JUDGE MILLER: Well, they're not given any credit in this proceeding, are they?

MR. PERLIS: That's correct.

JUDGE MILLER: Then why are we bothering with that aspect of it?

MR. PERLIS: If I may continue.

JUDGE MILLER: Yes.

MR. PERLIS: The staff is of the position that the security plan should be amended to reflect that at low power the TDIs will not be used and because they will not be used, that the alternate source in the protected area be protected as vital equipment.

JUDGE MILLER: Just a moment.

MR. PERLIS: That is the only amendment to the security plan we're talking about.

JUDGE MILLER: Okay. Hold it. Let me discuss it with you as we go. That's the only motion, by the way, that the staff is talking about?

MR. PERLIS: We're talking about the protection of the EMDs. Period.

JUDGE MILLER: Well, the so-called amendment, technical staff and legal staff are talking only then about the amendment to cover the what?

MR. PERLIS: The EMD, to protect EMDs and whatever lines carry power from the EMDs.

JUDGE MILLER: Let me inquire of your position now on something that you just alluded to. You just said since the TDIs will not be used.

My understanding of the evidence presented is that they will be used and that the enhancements are only in the event that they don't come into play.

Isn't that correct?

MR. PERLIS: I misspoke. The TDIs may, in fact, be used, but for purposes of this hearing, they cannot be relied upon for licensing.

JUDGE MILLER: All right. They can't be relied upon as qualified on-site source of power, emergency power, is that right?

MR. PERLIS: Yes, but I think...

JUDGE MILLER: Well, if you mean something more,

spell it out, now. I don't want any quibbling here.

MR. PERLIS: No. What the staff means is the TDIs cannot be relied upon for licensing because they can't be relied on for licensing today.

We are in a sense assuming for licensing purposes that they don't exist. Now it may well be that in the event of emergency, the plant would use TDIs first.

JUDGE MILLER: That's the evidence.

MR. PERLIS: But for licensing purposes, we have to assume that they don't exist or that they will not work.

JUDGE MILLER: Well, we'll get back to that, but before we get into whether they exist for licensing purposes, isn't it a fact that the vital area is only required as to on-site emergency power, not off-site.

Isn't that correct under your regulations?

MR. PERLIS: I don't think the regulations refer to on-site or off-site in terms of protection.

JUDGE MILLER: Well, do they refer in any place to protection as vital areas of any kind of off-site power?

If so, point it out to me specifically and concretely.

MR. PERLIS: The regulation only defines equipment to be protected in 73.2. I believe it's number (i),

letter i.

JUDGE MILLER: What does it provide?

MR. PERLIS: Which defines vital equipment. It is that regulation, that definition that the staff thinks the EMDs meet.

JUDGE MILLER: All right. Then refer to that and show me just exactly why the staff believes that non-on-site emergency power disregarded by the staff for licensing purposes suddenly is going to have to have the requirement of vital protection as though for full power operation as though on-site.

Now that seems to me to have some inconsistencies, and I'd like for you to explain them.

MR. PERLIS: Okay. First of all, this equipment is not being disregarded for licensing purposes.

JUDGE MILLER: TDIs?

MR. PERLIS: No, we're talking about the EMDs now. I thought we were talking about the EMDs. The TDIs are located on-site.

It is the staff's...

JUDGE MILLER: They're on-site, but they're not being given any credit.

MR. PERLIS: Right. It is the staff's position that the EMDs, because the TDIs cannot be used for licensing purposes, meet the requirements of 73.2 (i).

JUDGE MILLER: You're going to tell me why, aren't

you?

MR. PERLIS: The EMDs.

JUDGE MILLER: You're going to tell me why, not just read to me from the section, but tell me why non-on-site power for low power operation suddenly has all the characteristics of on-site full power emergency power sources.

And I want to know really why now, not any...

MR. PERLIS: Because that power source is going to be used to supply a backup safety function at this plant.

JUDGE MILLER: All right, now you've already told s, Mr. Staff, that you don't need any such power for phases I and II.

MR. PERLIS: That's correct.

JUDGE MILLER: All right. And you also told us, I believe, and you correct me if I'm wrong, as to pages 3 and 4, you need it only if there's a LOCA.

MR. PERLIS: That's correct as well.

JUDGE MILLER: And that you don't regard a LOCA as being associated with or caused by any security breach or anything else.

You don't go into double or triple failures. You don't go into LOCA sabotage, to use the jargon of the trade.

Isn't that the staff's position?

MR. PERLIS: I believe that's also correct.

JUDGE MILLER: All right. So then if you need only in case of a LOCA and I think that the admitted fact that the staff's position would show, would they not, that in the event of the LOCA, the sole need for this backup power is that there's a certain amount of time which varies with the circumstances, but is not insubstantial, in which to get other sources of power besides these two or three you're talking about.

MR. PERLIS: At stages 1 and 2, that's correct.

JUDGE MILLER: No, 3 and 4 LOCA. One and 2 we've already gone past. We don't even need a LOCA for that.

MR. PERLIS. That's correct.

JUDGE MILLER: All right. Get to 3 and 4.

MR. PERLIS: At phases 3 and 4, it is the staff's position that you need the EMDs for the gas turbine and in fact, if you didn't, this whole proceeding would not have taken place.

JUDGE MILLER: Well, this whole proceeding is to get an exemption, isn't it? Doesn't this whole proceeding say, "We know and we concede arguments that of counsel last time, we concede that these enhanced power sources are not in...are meant to be in vital areas and we're asking for an exemption."

That's why we're here, not for the reason you stated. Isn't that the position LILCO took?

MR. PERLIS: That's correct. Mr. Chairman, the staff has looked at the exemption in terms of GDC-17. What we're talking about here now is not strictly GDC-17, but is rather security that should be provided to the site.

JUDGE MILLER: All right. That's what we're all talking about.

MR. PERLIS: I don't think there's any...it has been staff practice for the last two years, consistent staff practice, the backup power sources or at least one backup power source be protected as vital equipment.

JUDGE MILLER: That's on-site, isn't it? That's full power operation, isn't it?

MR. PERLIS: It is not just full power operation. No.

JUDGE MILLER: For low power?

MR. PERLIS: Yes.

JUDGE MILLER: All right. What have been the consistent requirements for decades now on low power? It seems to me about two decades.

MR. PERLIS: It's the requirement for the last two years has been to protect backup power as vital

equipment. Prior to two years...

JUDGE MILLER: Pardon me. Off-site?

MR. PERLIS: On-site. A power backup source. I want to make ...

JUDGE MILLER: Oh. I'm trying to get the differences between on-site and off-site, because those are differences that at least as far as the parties are concerned, have some significance here now.

MR. PERLIS: For our security review, obviously it's easier to protect something if it's in a protected area, but security here has not focused on whether these power systems are denominated on-site or off-site.

JUDGE MILLER: Well, if they were on-site, and compliant with all the requirements, you wouldn't have this proceeding as a waiver for an exemption, would you?

MR. PERLIS: You would not have an exemption proceeding, but you would the staff writing this same letter, saying protect them as vital equipment.

JUDGE MILLER: Well, if we didn't have an exemption, we wouldn't be here, and you could write all the letters you wanted.

We could care less. But we are here now. It is an exemption request, you're requesting an exemption for

what you're now telling them, you, meaning staff generically, to go ahead and do something about a plan that is now before the board.

And I'm trying to find out why you, very politely, tell us you're not challenging our jurisdiction.

MR. PERLIS: I don't think we're challenging your jurisdiction, but this is relevant to a contention.

JUDGE MILLER: Well, there isn't any admitted contention, is there?

MR. PERLIS: No, it is relevant to a proffered contention.

JUDGE MILLER: We were ready to rule upon the proposed contention, were we not?

MR. PERLIS: We were.

JUDGE MILLER: And while we were so doing, you drop this letter on us, did you not?

MR. PERLIS: That's correct.

JUDGE MILLER: Do you think there's no effect, causal relationship?

MR. PERLIS: Mr. Chairman, there may be an effect, but what we did want to do is make sure that the staff position on this outside of the hearing process was clear to the board.

The board doesn't have to follow this letter.

JUDGE MILLER: What happens, then, if we don't

follow the letter?

MR. PERLIS: That would depend on what the board does.

JUDGE MILLER: Go ahead and spell it out. Now you're telling us what the board can do, and you're not interfering with us.

Tell us, the board was then considering this and other contentions. Suppose if the board rules in a matter that holds that these are not required to be vital equipment or in vital areas.

If it's a matter of law and goes up on appeal. Suppose that's the ruling. Now what are you going to do?

MR. PERLIS: If the board were to find as a matter of law that on-site power sources, excuse me, that backup power sources...let's not talk about on-site...

JUDGE MILLER: Off-site. Let's say off-site, because they're regarded as off-site. Let's not quibble.

MR. PERLIS: Well, but our security program is focusing on backup power sources; not on-site or off-site, but backup.

JUDGE MILLER: Well, why can you ignore reality? Because you're asking for an exemption here of on-site, so rule out on-site and because it's...

MR. PERLIS: Mr. Chairman...

JUDGE MILLER: Wait a minute. Let me finish. Because it's part of the exemption request. You can't enter on that.

Now, what remains, then, is something that might be physically at or near the periphery, but that doesn't matter.

You and others have repeatedly told us it must be regarded, and we have so regarded it, as off-site.

Now, if we're going to look at off-site, then let's keep looking at off-site. Why do you suddenly go into a whole different spectrum?

MR. PERLIS: Because it is the staff's position that a backup power source needs to be vitalized. A backup power source.

JUDGE MILLER: Well, what about the backup power sources off-site of other sources on the grid, for instance, the so-called enhancements?

What about that? You can't make those be in vital areas, can you?

MR. PERLIS: I'd rather not get into how far our authority would extend.

JUDGE MILLER: I'd like to get into that. That's the whole question in our mind.

MR. PERLIS: I'm not at all...I wouldn't say today

that we couldn't require that an off-site power source be vitalized as a licensing condition.

JUDGE MILLER: It would be interesting to see you pose that and then run it through the Commission and a court, but nonetheless, I guess we agree that that's really not necessary at this stage, is it?

MR. PERLIS: In this case, it need not be necessary because it happens that there is a backup power source inside the protected area already, and it is that source that certainly for ease of protection...

JUDGE MILLER: Talking about TDI?

MR. PERLIS: No, the EMDs are located inside the protected area.

JUDGE MILLER: In the protected area. I see. I see. But not a vital area.

MR. PERLIS: That's correct. And they're still...

JUDGE MILLER: One is protected, not vital. The other is not protected, not vital. And whatever you want to label it. Right?

MR. PERLIS: The gas turbine is outside of a protected area, and it's the staff's position that a backup power source needs to be vitalized in this case because the EMDs are already located inside the protected area.

It is the staff's position that that backup power

source should be the one that's vitalized.

JUDGE MILLER: Well, why are you ignoring two things? First of all, the fact that the exemption is what's requested, not what the staff might say we'd like to have.

That's what the Commission is having us develop a regulatory exemption from; not an order to comply with.

And secondly, why are you ignoring now the staff's frequently stated position that you don't need backup power for Phases 1 and 2 and you don't need for 3 and 4 unless there's a LOCA, and if there's a LOCA, there's time to bring it in from multiple other sources.

Why are you ignoring that?

MR. PERLIS: Okay. This letter doesn't get into phases. It is the staff position that as to phases 1 and 2, because you don't need to rely on this equipment for any safety functions, as the board found and as the staff recommended in its response to summary disposition motions, this equipment would not be vital equipment at phases 1 and 2 and need not be protected as vital equipment at phases 1 and 2, since in fact it serves no vital equipment purpose.

At phases 3 and 4, we don't believe that's the case. The case indicates that you would need backup power in the event of a LOCA, and the loss of off-site

power, within an hour.

And in that situation, the staff believes this should be considered as vital equipment and vitalized.

The letter doesn't...

JUDGE MILLER: Well, what about the ...

MR. PERLIS: The letter doesn't get into phases.

JUDGE MILLER: I understand it, but what about the fact that an exemption from what you're describing is what is sought, and the staff apparently is saying, "Do so and so, X, Y, and Z," whatever it is, and for whatever reasons.

Why do you keep avoiding the fact that if we're following correctly the arguments advanced by LILCO previously, they're asking for an exemption from, they will concede whatever it is that you're saying, but they ask that there be an exemption.

MR. PERLIS: Mr. Chairman, as I understand LILCO's position, and I can't speak for LILCO, their exemption request is predicated upon having sources of power available that will meet the safety criteria set out in GDC-17.

But for various reasons, they can't meet some of the literal criteria in GDC-17 unrelated to the core cooling functions.

Therefore, they require an exemption from GDC-17.

JUDGE MILLER: And others.

MR. PERLIS: And others. But it is still their position, I believe, that using their alternate sources, those safety criteria, and those are the core cooling criteria listed in GDC-17, are met with the exemption, to not, I don't believe...

JUDGE MILLER: Are met...wait a minute. Are met with what? Spell it out for me.

MR. PERLIS: Are met by their alternate power sources. I don't believe they're requesting an exemption from those safety criteria.

But what they're saying is, "For various reasons, we can't meet some of the literal criteria. We don't have an on-site power source, for one.

Therefore, we need an exemption, a literal exemption. But in terms of the safety effect on the plant, we will still meet the safety criteria of GDC-17."

JUDGE MILLER: That last the staff, I think, has gone along with, has it not?

MR. PERLIS: The staff has gone along with that.

JUDGE MILLER: In terms of overall and as safe as, if I followed your arguments.

MR. PERLIS: That's correct, that core cooling can be accomlished with their alternate equipment. And I

believe the basis for the exemption is more of a literal problem in meeting the regulation as opposed to the safety criteria set out in the regulation.

JUDGE MILLER: I'm going to ask LILCO to comment. We'll give you an opportunity, but I'm recalling now the argument before when we were last here.

I think we can turn to it very readily, I'm sure, the discussion on August 30th, in which, if I understood them correctly, counsel stated that as far as this vital area situation was concerned, that there didn't need to be a hearing or the development of an evidentiary or fact of record because they conceded it was not a vital area, and that that's why they were asking for an exemption, which I thought carried the implication that the exemption request included that.

Now, maybe I'm wrong. In any rate, in order to refine our discussion, is this a convenient time to have them clarify what they're asking?

I don't want to cut you off. I want to hear from you fully.

MR. PERLIS: If you'd like to hear from LILCO now, I certainly don't mind stopping and letting them talk. I don't think that really is important to what I'm saying.

I don't think...

JUDGE MILLER: All right. Go ahead then with what you're saying that doesn't require that.

MR. PERLIS: Okay. I don't think they've requested an exemption from the security regulations.

JUDGE MILLER: Regulations, no, but go ahead.

MR. PERLIS: Well, the security requirements. If they have, we haven't addressed it, but I don't think they've requested it.

As I understand LILCO's position, it has been that the backup power sources here do not fall into the definition of vital equipment.

JUDGE MILLER: Nor do they have to, I think we said.

MR. PERLIS: Not because they're off-site instead of on-site, but because they don't meet...the function they're performing doesn't meet the requirements of 73.2 (i).

JUDGE MILLER: I think they've asserted both in some of their papers, but nonetheless, I recognize your point.

MR. PERLIS: It is the staff's position that in fact the backup power sources does fall into the definition of 73.2 (i), at least at Phases 3 and 4.

And therefore, it is required to be vitalized at those phases.

JUDGE MILLER: Well, if it falls within that, why doesn't it fall within the adequately certified on-site source of emergency power?

Why don't you just let them fall all the way into the same hole? Or why do you differentiate? You've got two different holes, it seems to me, with different purposes. You look at them differently.

MR. PERLIS: I don't think we're differentiating.

JUDGE MILLER: All right. Maybe I'm not understanding.

MR. PERLIS: We don't view the security protection as a literal problem, as opposed to whether this power source should be considered on-site or off-site.

The security regulations require that certain equipment that provide certain safety functions be protected.

This equipment in the staff's view falls into that definition. It doesn't matter whether it's on-site or off-site.

JUDGE MILLER: Let me ask you. Why didn't you take that same view when you, staff, generically, and all of your many heads brought out SSER number 5?

Don't you think that's inconsistent, what you're now telling me?

MR. PERLIS: I think it is inconsistent...

JUDGE MILLER: Let's at least explore that.

MR. PERLIS: The best I can tell you is LILCO came in with an application for an operating license. One has to go back in history here.

Their application for an operating license included protection of backup power sources. Okay? At full power, at low power, whenever, the backup power sources were going to be protected as vital equipment. Those are the TDIs.

JUDGE MILLER: You're now talking about that security plan in all its non-nitty-gritty that was approved about two years ago? Are we talking about the same thing?

MR. PERLIS: It's the same thing.

JUDGE MILLER: Well, there was no question then about non-on-site, fully-qualified power, was there?

MR. PERLIS: There was...no, no...

JUDGE MILLER: No question.

MR. PERLIS: Nor was there a question about whether backup power sources would be vitalized.

JUDGE MILLER: Correct. So when did the question first come up that you were not going to have the TDIs that were then assumed two years ago?

That question arose not just yesterday.

MR. PERLIS: No, that question, I believe, arose in

March or April.

JUDGE MILLER: When was the SSER-5 prepared?

MR. PERLIS: It would have been April 1980.

JUDGE MILLER: Now, there isn't before that, I suppose, the contemplation o. whoever in the staff looks at these things, because by now you've got a changed configuration, as you like to put it, and certainly somebody in making that magestic utterance in SSER-5 was looking at not the original, not the TDIs, but the proposed enhancement.

MR. PERLIS: That's correct.

JUDGE MILLER: Okay. When did the enhancements first come into view in terms now of the security plan?

MR. PERLIS: Okay. Well, first of all, the enhancements first came into view at all, I believe, March 20th.

JUDGE MILLER: All right.

MR. PERLIS: All right. And the question was then asked, and we all were operating under a short time frame then, what effect does this have on security?

And the answer was that it has no effect on security in the absence of a LOCA. That's the position taken in SSER-5.

JUDGE MILLER: Was that a study position? You don't get these SSERs flipped out in a matter of a

couple of days, do you?

MR. PERLIS: No.

JUDGE MILLER: The way the staff operates? How long was it under preparation and review, would you estimate?

MR. PERLIS: There are people here from the Division of Licensing that could answer that question.

JUDGE MILLER: Okay. We'll ask them, but ...

MR. PERLIS: I just don't know.

JUDGE MILLER: Do you have a guess at all? An informed guess?

MR. PERLIS: Well, it would certainly have been less than a month if the application came in March 20th.

JUDGE MILLER: All right. Okay. That's fair. That's fair. Go ahead.

MR. PERLIS: I would say that there has been a study process over the past few months.

JUDGE MILLER: Well, starting with March, now, and you had the SSER-5, and whatever review, then you yourself twice have sat there, once with a technical expert and you've gotten certain information and told me what this security plan was and what it did do and what it didn't do and why it was not necessary, why it was not necessary to have the vital areas and the other

security matters apply to the enhancement. You told me that yourself, didn't you?

MR. PERLIS: No, Mr. Chairman, I don't believe I ever said that.

JUDGE MILLER: What do you think you said?

MR. PERLIS: I believe I said that the security plan as it relates to the other, the now considered vital areas at the plants, those areas currently being protected. Okay? Or currently listed for protection. That that aspect of the plant does not need to be changed.

And it's the staff's position that ...

JUDGE MILLER: Let's talk now about what you told me. You can refer to your transcript there. Why don't you look at your transcript, because I know you want to be accurate.

MR. PERLIS: I don't have the transcript with me.

JUDGE MILLER: I'm sorry. I'll loan you mine. Go ahead. In all fairness, you should be able to refer to what you said.

MR. PERLIS: I'll look at the transcript. But my position has consistently been and I would hope that my words have been consistent with that position, Suffolk County has submitted two contentions as the staff defines it.

JUDGE MILLER: That's correct. That's just what you told me.

MR. PERLIS: One contention does not relate to protection of the EMDs, but rather relates to the protection of the other vital areas, they're all listed as vital.

It is now the staff's position, and I believe it was to that contention that I was speaking, when I stated that the security plan in the staff's view does not need to be amended for the protection of those vital areas now denominated as vital areas.

JUDGE MILLER: Do you remember...how about methodology and functions somewhere along the line? Do those words trigger your memory a little, methodology and function? Okay, go ahead.

MR. PERLIS: No, but the purpose was that as to the security plan, the protection now being afforded to the rest of the site, not to the EMDs now, but to the rest of the vital areas, that the presence of the EMD building does not change the protection afforded to the vital areas at the rest of the site.

That's a separate question from whether the presence not of the EMD building but of the backup power source that is now going to be relied upon for backup power because the TDIs aren't being considered

here, whether that needs to be vitalized. That's a separate question.

JUDGE MILLER: Let me point out, does the letter go into either or both of those two separate questions, and if so, describe that.

MR. PERLIS: The letter does not address at all the security plan as it relates to everything other than backup power sources.

JUDGE MILLER: What is it addressing?

MR. PERLIS: The letter addresses two things. First of all, and I'm not certain whether an amendment is even needed here, but ...

JUDGE MILLER: The letter says amendment.

MR. PERLIS: Well, well, this is to the first point only. The first point is right now the security plan says the TDI backup power sources will be vitalized.

JUDGE MILLER: You mean the original plan.

MR. PERLIS: Right.

JUDGE MILLER: And the original TDIs. Okay.

MR. PERLIS: Right. Right. Right. Right. There is some question as to whether that sentence needs to be amended because in fact the TDIs won't be used at low power.

JUDGE MILLER: That was known in SSER-5.

MR. PERLIS: I understand that, but ...

JUDGE MILLER: Oh, I see.

MR. PERLIS: But that's a minor point. It's just a question of whether that single sentence is misleading.

JUDGE MILLER: All right.

MR. PERLIS: The second point is not a minor point, and that is does something else need to be denominated as a vital area because the TDIs are listed as a vital area, in fact, won't be credited for supplying any backup power at low power.

It is that amendment that this letter gets to, and it is the staff's position that in fact, yes, because the TDIs cannot be credited for licensing purposes at low power some other piece of equipment needs to be listed there as vital, because the EMDs are in the protected area, it is the staff's position that it should be that backup power source.

JUDGE MILLER: Isn't that a legal conclusion, really, an interpretation point of view of regulation and requirements rather than a technical matter for technical staff people?

MR. PERLIS: Well, 73.2 (i) doesn't...if 73.2 (i) delineated specifically that equipment that must be protected and that equipment that need not be protected, then, yes, it would be strictly a legal matter.

But 73.2 (i) is not written that way.

JUDGE MILLER: Well, it's substantially a legal matter, isn't it? How are you going to interpet it? Wasn't it argued to the board that way by all the parties, practically?

MR. PERLIS: I don't think so. No. It is a technical question as to whether equipment falls into the controls of 73.2 (i).

That's a technical question, I believe, not a legal one.

JUDGE MILLER: Are your technical people then in position, and do they intend to overrule the board if the board, using legal considerations based upon a record, holds the contrary to this proceeding? What are you going to do about it?

MR. PERLIS: The best I can say is this. The staff has for the last two years consistently required that backup power sources be vitalized. But if it...

JUDGE MILLER: You're giving me history now. I'm giving you a very specific, "what are you going to do about it?"

MR. PERLIS: But if...well, this relates to the history. If the board is to determine that in fact backup power sources as a matter of law do not have to be vitalized.

JUDGE MILLER: We don't know. We were considering that very question and prepared to issue a decision when from the sky fell this letter, and we're trying now to get a little orientation from you, and we've now phrased it to you clearly and precisely, "What if the board does determine from the record, from its own view and issues in order holding it is not required? What are you going to do?"

MR. PERLIS: I'm not trying to avoid your question. It would depend a great deal on the language. But if...

JUDGE MILLER: Well, okay, what kind of language do you want?

MR. PERLIS: If the board were to determine that as a matter of law, backup power sources...

JUDGE MILLER: It's a matter of interpretation of regulations. I thought, although I don't want to quibble about it...

MR. PERLIS: Okay. The ones that were not clearly case-specific here, as a matter of law, the way we interpret 73.2 (i), backup power sources do not have to be vitalized.

JUDGE MILLER: In this case, limited to this record, now. You know, we only speak on the record. We don't give these majestorial proclamations for two

years or two decades.

MR. PERLIS: I understand that, but since...

JUDGE MILLER: Right here and now.

MR. PERLIS: But since this record indicates the backup power sources have some safety function, and we're talking about Phases 3 and 4 in the event of a LOCA, if the board determines that given that record, they do not have to be protected, as a matter of the board treating of 73.2 (i), that ...

JUDGE MILLER: And as applied to the record in this case.

MR. PERLIS: I understand. They do not fall into the definition of vital area equipment or vital equipment.

I'm not prepared to say today that the staff would or would not appeal, but clearly that would...

JUDGE MILLER: Oh, you're bound to appeal, but what are we going to do in the interim while it's being appealed and being tossed around up on a limb?

What are you going to do about the fact that the staff has come to one conclusion and hypothetically the board might have come to exactly the contrary conclusion?

Where does that leave us?

MR. PERLIS: I think part 2 answers that question,

and the board's order takes precedence over the staff's order.

If the board determines that it's a matter of law the staff cannot require that they be protected, right now the staff will not require that they be protected.

JUDGE MILLER: Or require an amendment...doesn't the letter talk about amending the security plan?

MR. PERLIS: It talks about an amendment, but the gist of this letter is that protective measures have to be taken.

I mean, we're not talking about changing a piece of paper.

JUDGE MILLER: We're talking about an amendment, aren't we, to a plan that is now in our own safe and has now been looked at and neither you nor I are any longer in ignorance about it?

MR. PERLIS: No, no, you're right.

JUDGE MILLER: Okay.

MR. PERLIS: But what I'm trying to say is it's more than just amending a piece of paper.

JUDGE MILLER: Well, I know, but ...

MR. PERLIS: Okay.

JUDGE MILLER: But that's where you start when it's a so-called security...that's why we're holding it in-camera because that little piece of paper has some

important significance to the Commission, the public, you and me.

MR. PERLIS: I understand. If the board says that is a matter of law, these need not be, the staff cannot require that they be protected.

Then clearly the staff right now cannot require that this amendment be put in.

JUDGE MILLER: I understand you can appeal it. No one would quarrel with your right to do so, but I'm talking about where we stand procedurally right here.

MR. PERLIS: There's no question that if the board's order is such that the staff doesn't have leeway to still require this, the staff won't require it.

JUDGE MILLER: That's why you're wondering what the wording of the order may be.

MR. PERLIS: Well, for instance, if the board's order was that there's no ...

JUDGE MILLER: I see.

MR. PERLIS: If the board's order was that there was insufficient basis to support a contention...

JUDGE MILLER: I get it.

MR. PERLIS: Okay.

JUDGE MILLER: I was curious about that, but you've...

MR. PERLIS: No, there's no question, the board's order would take precedence over the staff's order.

JUDGE MILLER: Temporarily.

MR. PERLIS: Until such time as it was appealed and reversed, if reversed, yes.

JUDGE MILLER: Right. Right. Okay. Now, do you have anything further? I'm going to give you full opportunity and we're touching on some things here maybe a little out of order, because I'm going to hear from both staff and the county.

But if there is any more that you want to put on the record now, feel free to do it. We'll give you a chance to come back if that might be more helpful.

MR. PERLIS: Okay. I would like to make two things clear.

JUDGE MILLER: Go ahead.

MR. PERLIS: First of all, we have brought along four gentlemen in response to the board's order who will be available to answer questions, should the board have any.

JUDGE MILLER: It may be that you, making representations to us now, we certainly have confidence in your integrity as a lawyer.

If there are matters in addition...we wanted to know what was the basis of this letter, and that's why

we requested both the gentlemen who signed and others who might have knowledge of it. We'll give you a chance maybe to recess to confer and decide.

We don't want to just drag on things. I mean, if you've got the information, you can state it for the record, fine. That's okay.

If on the other hand these gentlemen have some insights or gentlemen who signed it might want to say why he signed it in that form, we'll give him the opportunity.

We're not trying to expand the record, but we want to have available the data, and we're making evidentiary record here.

Let there be no doubt about that. And we, like you, have looked at section 2.717 B, and six or so cases that relate to it.

So we're all going, I think, in terms of making a reasonable record for ultimate review.

MR. PERLIS: Okay. Now the gentlemen were brought to answer board questions. If the board...you indicated that you don't have any further questions for them and that ...

JUDGE MILLER: Not necessarily, because I'm not indicating any with you.

MR. PERLIS: Okay. Then...

JUDGE MILLER: I'm merely saying you've had your first shot at it and I'm trying to find out what might be needed, but I'm not waiving the right to ask questions of you and if the gentlemen can help you out, if you're able to commit the technical staff of whoever signed these things and the legal staff to make good, clear, consistent statements for the record, we'd probably accept that.

But, you know, you might yourself want to protect yourself, as sometimes happens at these matters, by having somebody tell us.

We'll be happy to hear them.

MR. PERLIS: I understand. They may well want to supplement things that I have said.

JUDGE MILLER: Very good. That's good.

MR. PERLIS: Okay. And the second point is that I want to stress that this letter was not sent solely because of this hearing or even partially because of this hearing to deregate the board's authority.

JUDGE MILLER: We probably will want to have a few questions of the technical staff on that. See, the context in which they wrote this letter, we can only look at a letter, which is a studied, reasoned thing, it's an action, and we certainly have some questions about its underlying intent, basis, but you may be able

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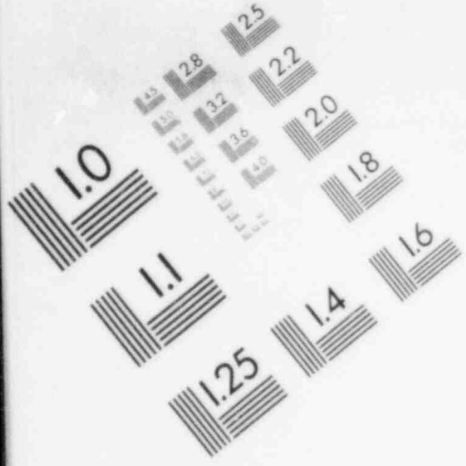

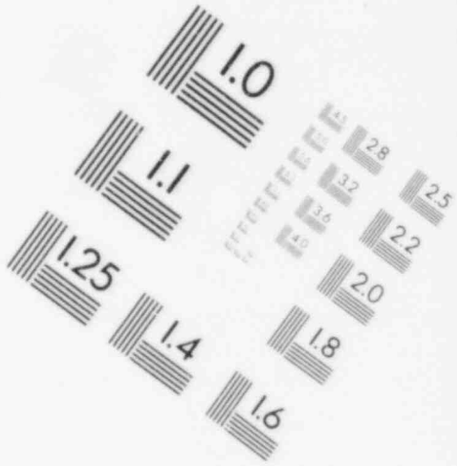

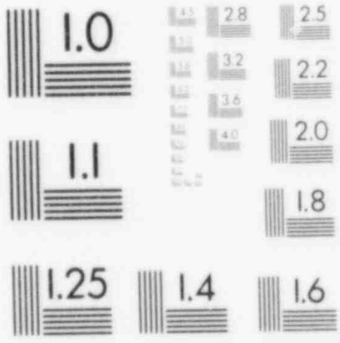

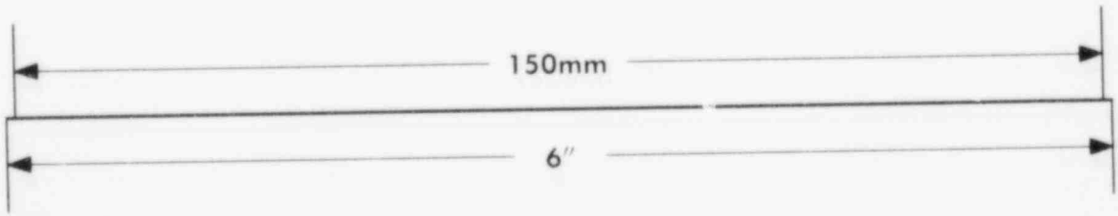

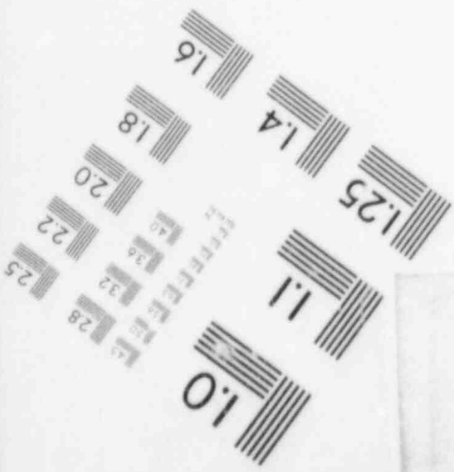

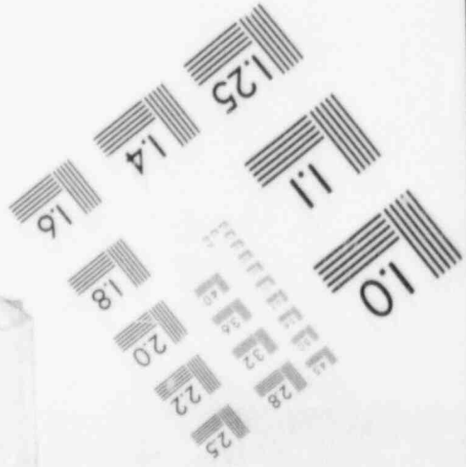

to focus perhaps on that.

MR. PERLIS: I understand, but the purpose of this letter was sent to notify the utility that in our licensing review, we think this has to be done.

Clearly, it's relevant to an issue before the board, and that's why this letter was sent to the board, and that's why we're all here today.

But the purpose of the letter was to tell the utility that as part of our licensing review, we want something done.

And I would like to make very clear that this is something that has been consistent with staff practice for the last couple of years.

JUDGE MILLER: You know, that "last couple of years" argument, when I read the two decade argument that the staff made in certain other matters, you know, two decades is a lot more than two years, so your history doesn't really impress me that much. But you're entitled to make your record on it.

MR. PERLIS: No, that...

JUDGE MILLER: Remember the two decades, too, that you've been doing certain things.

MR. PERLIS: Yes, that point is only made because LILCO, in their response which was passed to the parties yesterday, seems to imply that Shoreham is

being treated differently than, I believe, Catawba and Grand Gulf are the plants that are mentioned.

JUDGE MILLER: They think they're being treated differently what?

MR. PERLIS: Differently than Catawba and Grand Gulf in this respect.

JUDGE MILLER: They've put on evidence in other matters of different treatment. I'm not going into that, but at our evidentiary hearing, they put a lot of evidence on alleged discriminatory treatment, if you want to call it that.

MR. PERLIS: Although not in reference to any facilities and here they are specifically stating that the two plants have been treated differently as regards protection of backup power.

In fact, it's our position that those plants have not been treated differently at all, and that at both of those plants, backup power sources are being protected at low power as well.

JUDGE MILLER: They're vital areas and vital equipment? Either or both? Or what is the fact?

MR. PERLIS: There are backup power sources, and we have someone who could address this better than I.

JUDGE MILLER: What's your understanding? Am I behind your understanding already?

MR. PERLIS: There is a backup power source at Catawba, and there is a ...

JUDGE MILLER: On-site or off-site?

MR. PERLIS: On-site. On-site.

JUDGE MILLER: Protected or not protected area? Vital area or not vital area?

MR. PERLIS: It is considered vital equipment. That means it is in a vital area and I believe it's in a protected area as well.

JUDGE MILLER: All right. So vital equipment, then, by definition, constitutes a vital area? It's like extra territoriality, isn't it, for embassies?

MR. PERLIS: I'll have to let the security people...

JUDGE MILLER: Okay.

MR. PERLIS: ...talk about that one.

JUDGE MILLER: All right. All right. I won't ask it again.

MR. PERLIS: But at both Grand Gulf and Catawba, there is a source of backup power that is being protected as vital equipment.

I believe it's in a protected area in a vital area; I'm not sure, but it is being protected as vital equipment.

JUDGE MILLER: Okay. Anything further?

MR. PERLIS: That's all I have right now.

JUDGE JOHNSON: Mr. Perlis, did you indicate that LILCO had filed a reply to this letter yesterday?

MR. PERLIS: LILCO telefaxed to the parties, and I believe the board, a response dated September 13th, which we got late yesterday afternoon.

JUDGE JOHNSON: Thank you.

JUDGE MILLER: The board was not all present here when this came through. And Judge Johnson was, I guess, in Oak Ridge when it came through, and hasn't seen it, so that's why her question.

Do you have an extra copy? Does LILCO have an extra copy? Okay. Thank you.

Okay. Anything further at this time?

MR. PERLIS: No, sir.

JUDGE MILLER: I think we will want to hear from perhaps one or two of the gentlemen who have information that you're not quite certain about, but you can take that up, perhaps, at recess, so we can focus on what areas we might like to explore.

Okay. LILCO want to go next, yes, I guess LILCO should go next.

MR. EARLEY: Thank you, Judge Miller. At the outset, let me clarify and address a couple of things that came up in the staff's discussion.

First, the board was correct in interpreting the discussion at the last conference that LILCO is requesting an exemption from security regs to the extent that regulations require things for on-site equipment.

We've been through the discussion before in the context of GDC-1 through 4, and GDC-17 and others, that the regulations require an on-site power source.

That power source brings with it regulatory baggage, so to speak. You have to make it seismic, you have to have Appendix B quality assurance.

The staff is now saying that this equipment has to be a vital area. The extent we have said we don't have that on-site power source, and we're asking an exemption from having that on-site power source, we are either asking for an exemption...we ask for an exemption from GDC-17 and any of the other regulations that necessarily come along with not having an on-site power source.

JUDGE MILLER: Let's be precise here now. In terms of this letter and the talk we just had with counsel for the staff, tell us exactly what it is that you're asking, your company is asking or what the status of the record is.

MR. EARLEY: To the extent that the regulations

require that an on-site backup power source, however you want to term it, that power source has to be a vital area, and as I will discuss, we're not sure the regulations now require that.

To the extent that's what the staff says the regulations require, we are requesting an exemption from that.

And I think that...

JUDGE MILLER: The status also of the security plan that we all now have copies of, and the direction, if I understand it correctly, of the letter to amend it in some way.

What, with clarity, is the position of LILCO on that?

MR. EARLEY: LILCO's position on that is that its existing security plan that the board has is an adequate security plan for licensing this plant as proposed by LILCO.

The only potential modification is one that LILCO had already identified. The diagram that shows where the EMDs and the 20-megawatt gas turbine are located and that has been supplied to the board and the parties in one of LILCO's prior filings, that may be substituted for the similar diagram in the security plan, but we are not going to amend the security plan.

That is not our intention right now.

JUDGE MILLER: What about the submission, as you're apparently directed to do, of a revised plan for staff review and approval?

And let's talk about updating the evaluation of the SSER in a future SSER. Do you know anything about that?

I'll come back to the staff on that one, too, but we might as well let them have the first shot.

MR. EARLEY: Judge Miller, we think that making LILCO's EMD diesels a vital area is basically a legal question that this board can be resolved, and it was properly in front of this board and should be decided by the board.

And that's the legal question...

JUDGE MILLER: What legal question is that, now? Once again, frame it with particularities.

MR. EARLEY: The legal question is whether the EMD diesels must be made a vital area in light of a) the facts of low power, and b) the fact that LILCO has submitted an exemption request.

JUDGE MILLER: Which covers in part that very matter?

MR. EARLEY: Which covers in part the security matters which we're discussing here, the staff

requirement that these be a vital area.

JUDGE MILLER: Wait a minute. Mr. Perlis has recently now spoken of two things, vital areas and vital equipment, with some suggestion, maybe, that if it was vital equipment, it either is per se or should be designated a vital area.

What's your view on that?

MR. EARLEY: Judge, we believe that the regulations there are clear, that if a piece of equipment is vital equipment, it should be in a vital area.

JUDGE MILLER: What if it isn't? What if it's off-site or something? What is this off-site power that he reserved the right to say maybe is a condition you have to put in to get them? I think he used the term vitalized, I don't know what that means, of off-site power.

What's your position on that, especially the lega aspects of it?

MR. EARLEY: Well, I guess if it is decided that the equipment is vital equipment, then you would have to do something to make the area where the equipment falls a vital area.

JUDGE MILLER: So we're relying in part on a grid for off-site power, then you're going to have to go vitalize somebody else's grid?

MR. EARLEY: You have to put a fence along the 100 miles of transmission lines.

JUDGE MILLER: So be it. I guess a snail's order has his rights. Go ahead.

MR. EARLEY: Second point that I want to clarify before I get back to my main argument, there was some discussion about the TDIs.

TDIs, they will be used at low power. I think the record is clear on that. We haven't been discussing them in this particular proceeding, but they will be used at low power.

JUDGE MILLER: Didn't you put on evidence to that effect up in that hearing that we held up in Happauge?

MR. EARLEY: Yes, Judge, there was evidence to that effect. And finally, one point that Mr. Perlis seemed to be making, I think, is the crux of the matter, is that the staff seems to be worried about some long-term position.

They talk about what's happened in the last two years and what they're going to do elsewhere. I think we need to focus on the record that's been established in this case in light of all the evidence about low power, in light of LILCO's exemption request.

JUDGE MILLER: What is the record? What is the present, existing record in that regard?

MR. EARLEY: I think the present, existing record shows that there is no technical justification for ...

JUDGE MILLER: You're quoting the staff now, SSER-5.

MR. EARLEY: I'm using the staff's words in SSER-5 and it's LILCO's view that the record fully suppor. that conclusion in SSER-5.

JUDGE MILLER: Have you followed Mr. Perlis' discussion of the difference between this letter and whatever ramifications it may have and what is somewhat inconsistent in number 5?

MR. EARLEY: I have followed the discussion. Let me see if I can summarize what I think Mr. Perlis is saying.

First of all, Phases 1 and 2 are intact. He said the letter doesn't affect this because the EMD diesels indisputably are just not required for anything that would happen during Phases 1 and 2.

So we don't need to talk about that because the Schwencer letter doesn't have anything to do with Phases 1 and 2.

And that is basically point one of our written response.

The second thing I think Mr. Perlis says, that Mr. Schwencer's letter doesn't have any impact or doesn't

affect the existing plant security.

We're not ... it doesnt' have anything to do with whether existing plant security is degraded. All the statements that the staff had made that the existing plant is adequate to protect the plant, I think are intact.

So that brings us to what does the Schwencer letter affect. It only affects Phases 3 and 4 relating to what protection should be accorded to the EMD diesels.

Now with respect to that, I think Mr. Perlis agreed with you that none of the facts have changed. And the facts that are established in the record with respect to the EMD diesels are that they are not required for any event except the loss of coolant accident.

That loss of coolant accident would have to be accompanied simultaneously with a complete loss of all the off-site power source.

I don't need to go through the litany of the various sources of off-site power.

The staff still agrees that because the existing security plan is still intact and unaffected, that it's inappropriate to consider a sabotage-induced LOCA.

So you're left with considering the very unlikely, in fact, incredible event that you have a loss of off-site power, which has been, I think, it was established

on the record that that in itself is an unlikely event.

And remember, we're only talking about a three-month period. You can look at it as a so-called schedulary exemption, and the recent discussions about exemptions, there seems to be some distinction between schedular and permanent exemptions. It's only a temporary request.

You have to couple that with a loss of off-site power sources. Remember, under the facts of low power, not only do you have to have a loss, but you would have to have a complete inability to restore power from the AC power sources, and the record clearly establishes that East Hampton, South Hole, Port Jefferson, Holtsville (phonetic), they all can be restored in a matter of minutes, which is well within the acceptable time frames for low power operation.

And then beyond that, you would have to assume that at the same time you simultaneously had this design basis threat just happen to decide he was going to attack the plant, you had the LOCA shortly thereafter, and then would successfully disable not only the gas turbine, which is inside the owner controlled area and in a switchyard, but also then breach the controlled area, which is covered by the existing security plan that everyone has agreed is adequate and has been

accepted, you breach that owner controlled area and you disable all of the EMD diesels.

That is a very unlikely and incredible sequence of events. I think as we pointed out last time, there are no facts left in dispute.

LILCO concedes that the EMD diesels and the 20-megawatt gas turbine are not classified as vital equipment and contained in vital areas, as the staff defines them, for security purposes.

It is a basic legal or policy decision. Does the NRC require you to look at something that's highly speculative and incredible as the sequence of events that have been clearly developed on this particular record?

It's LILCO's view that the NRC process would be incredibly bogged down if you were required to litigate hypothetical problems along these lines.

We think it is significant that the staff in SSER-5 looked at the facts and concluded that there was no technical justification for requiring these things to be vital areas.

So we go to why is the staff changing their position. What is changed? LILCO believes that the staff is trying to protect some larger regulatory interest that really is appropriate for this board to

consider.

They keep talking about the fact that this has been their policy for two years. Clearly, the staff wants to require backup on-site power sources to be in vital areas.

They are not required to be by regulation right now. There is a proposed regulation that is out there, that is being considered, and that would make them vital areas.

They were talking about on-site power sources for full power operation. If you look at SSER-5...

JUDGE MILLER: Wait a minute. For full power, is that proposed regulation, which I think someone has suggested is up for comment in December of 1984, does that apply to low power as well as full power?

MR. EARLEY: It just addresses full power.

JUDGE MILLER: Just full power?

MR. EARLEY: Well, within that, it would necessarily include low power, but it doesn't make any attempt to distinguish that there might be lesser requirements for low power operation.

But I would note that SSER number 5 on page 13-3, there's a footnote, and it notes that the NRC in NUREG 0992 recommends that emergency power sources be protected as vital equipment, even though no site-

specific need has been identified.

This is not a formal requirement at this time. And since the regulation has not been adopted yet, and no implementation schedule has been set for that regulation, the staff is trying to violate a fundamental principle of administrative law that you can't enforce a rule until the Commission decides they want that rule and sets an implementation schedule for it.

So, I think the staff is looking to a larger regulatory interest. They're trying to establish this consistent policy, which will help them certainly in their rulemaking to go to the Commission and say, "This is what we've been doing. It's not that big a deal to enforce this as a regulation."

What the staff has failed to consider here is the implications of low power on this record. And second, they've failed to consider that we're talking about an exemption proceeding as we discussed, and it's not necessary to protect their institutional position here.

Rather, this case ought to be consider on the facts of the case, and on the facts that are in front of the board, we think that it is appropriate for the board to decide that as a matter of law or as a matter of regulatory interpretation, given the low power facts

and given LILCO's exemption request, that LILCO is not required to make these vital area. And that's the decision, and we're sure that the county will take that to the Commission on appeal.

The staff may or may not take that to the Commission on appeal, and we will get that basic policy decision and legal decision, again decide it, and we think this board has got all the facts to decide that now.

JUDGE MILLER: We intend to let all counsel be heard from the county. If you or your associate want to be heard, we're willing to hear from all the lawyers here. We're not trying to ...

MR. EARLEY: If I may have one minute, Judge, we may be finished with our argument.

JUDGE MILLER: Go ahead. This is lawyers' field day.

(Laughter.)

MR. EARLEY: The last point that I would like to make, Judge, there has been some suggestion, I believe, on the part of the county and it may be the staff's suggestion that somehow you don't consider the fact of low power operation for security matters, somehow security is different, that you've always got to have the full tonality of security requirements in place for

low power as well as full power.

I don't think that that position is a valid position. I think we cited to the board last time that Diablo Canyon case ALAB-653 at 16 NRC 55, and there the appeal board recognized that it may well be appropriate to have differing requirements for low power taking into account the facts of the situation.

JUDGE MILLER: What page is that?

MR. EARLEY: That's page 88 of that decision, there is a discussion of ... 88 is the conclusion. The discussion starts on 86 and over to 88, and the applicant has not complied with the regulations with respect to certain training requirements.

And the appeal board took into account the much lower risk from fuel loading and low power testing, the lower fission product inventory, the greater amount of time that's available, in concluding that what had been done, it was appropriate to permit low power testing before meeting the regulations with respect to security and they specifically noted that the applicant had in effect committed to have full security in place by the time a full power license was issued.

And that was made a condition that that regulation be met by the time full power license was issued.

JUDGE MILLER: What did the appeal board say about

the issue of low power licensing?

MR. EARLEY: For a low power license, they said that a low power license could be issued without meeting all of the security regulations and all of the requirements, I believe it was of Appendix B to 73.55 at that time.

And that wasn't an exemption proceeding, I might remind. That was a normal licensing proceeding.

The facts are somewhat different here in that we're not talking about the training requirements. The concept is the same that there is no hard and fast rule that you've got to have all the security requirements in place at full power.

You've got to look at the circumstances.

JUDGE MILLER: All right.

MR. EARLEY: You don't have to have all the requirements in place in fuel load. You've got to look at the facts and circumstances as we've discussed here.

Thanks, Judge.

JUDGE MILLER: Anything further?

MR. BROWN: We'll be very brief. Speaking for the State, too, Mr. Pallomino has discussed this. We're displeased that the proceeding gets more and more truncated and we can't just get on with a resolution of

it. But our view is, first, that what happened with the staff's letter, the board's order said, "What are the effects and implications?"

For this proceeding, the effects and implications are none. The staff is a party to the proceeding, the delegated authority of the Commission is in the board, the board can do whatever it wants with contentions.

The staff has informed LILCO to do something, it's up to LILCO to agree with the staff, or if they don't want to, they can decide they won't, and this court can find that they don't have to.

If they want to do it, they can, and they can come in here and make a filing with this board.

We don't think it's necessary for any of us to waste any more time in any more of these conferences, frankly.

We like to get on with the litigation if there's litigation. And if there's not, this board says no contentions ought to come in, fine. Let's just appeal it.

We're at this point tired, frankly, of waiting. The discussion that went before I began to talk is principally on the merits, as far as we're considered, concerned, that is not something that's pertinent or appropriate here.

It's to wait if contentions are admitted. The statement by LILCO was surprising and unsustainable to the extent to which Mr. Earley says that they're applying for an exemption from some part of the security regulations.

But they're never telling anybody what part. The board obviously couldn't grant that relief that has to say an exemption is granted from A, B, C, D, or something.

We certainly as a party have a right to know what it is from which they seek an exemption so we can decide whether we can contest it or not.

So if in fact there's an exemption request here, it ought to be set forth in accordance with the regulations which requires that it be done in writing and there be under 50.12 A, that there be matters addressed, and they ought to be addressed systematically and appropriately.

As far as we're concerned, the regulations state categorically and clearly that part 73 applies from the moment of fuel loading, that there is no way out from that.

If LILCO wants to change that, it requires an exemption.

Finally, as we said before, we're prepared to

litigate, we want to file testimony three weeks from the date on which contentions, if admitted, are so admitted.

We don't want any discovery, we think in this proceeding it would be a big waste of time. We'd like one site visit.

And we'd like, following the submittal of testimony, to have the hearing two weeks thereafter. The dates that we're talking about...

JUDGE MILLER: Yes, you might specify for the record now, it would be helpful, and ask other parties to do likewise.

MR. BROWN: I would make the assumption, if the board would indulge me for the moment, of assuming that there would be...day one, for example, let's say, is next Monday, just for purposes of simplicity.

JUDGE MILLER: All right.

MR. BROWN: The ruling of this board is issued. If the board should rule no contentions are admissible, that's the end, and parties go to the Commission, and in accordance with how they feel they should best protect their rights.

If this board admits contentions, then we would like...that would be on Monday, the 17th. Then we would say testimony should be filed on October 9.

JUDGE MILLER: 17th to the 9th, okay.

MR. BROWN: The 9th is a Tuesday. It would be the 8th, but the 8th is Columbus Day, so we made it the 9th.

And we would say during that period all that's required is a single site visit. We can coordinate that so that if the board made visit, we would do it at the same time to take the burden off of LILCO.

And we would ask for the hearing to start two weeks after the 9th, which is the 23rd, a Tuesday, and we would ask for Tuesday, because our consultant's in California, and we'd appreciate if they didn't have to travel on Sunday.

JUDGE MILLER: Okay. What was the date of commencement under that proposal?

MR. BROWN: Commencement of hearing would be the 23rd of October.

JUDGE MILLER: By the way, where?

MR. BROWN: Well, being ...

JUDGE MILLER: Since we're in-camera, is there any necessity of all of us going to the expense of going up to beautiful downtown Happauge, if there is such a place?

MR. BROWN: My own feeling, I'd want to check it, but subject to my not getting back to the board

promptly, I would say the hearing could be here without any difficulty.

JUDGE MILLER: Because it's in-camera, so therefore there isn't going to be any public attendance, and I wonder, therefore, if anyone would have any objection if the hearing were conducted right here with in-camera proceedings.

MR. BROWN: No, in fact, it is facilitated by the fact that this is a secured area and so on.

JUDGE MILLER: All right. We'll ask...

MR. BROWN: Judge, Mr. Lampher had one point to add.

JUDGE MILLER: Yes, be glad to hear from him.

MR. LAMPHER: Just because we haven't been able to coordinate. I would like to address one final matter that Mr. Brown touched on a bit.

LILCO repeatedly says, "We'll rely on the evidentiary record of August, the hearing, and make security findings."

First of all, we don't think that that evidentiary record in any way supports the grant of any exemption from part 73.

That kind of a record was not developed.

JUDGE MILLER: I'm dubious about that, if they're seriously asserting it. I'm dubious about going into a

record made for other purposes on a discrete issue, so we'll hear from you on that.

MR. LAMPHER: Judge, you ought to be dubious, because frankly, I think you'd be subject immediately to reversal if you did.

Because on July 18 in the order that you promptly issued after the Commission had accepted referrals, and said, "Wait a second, we do want parties to have a chance to look at security," you basically said, "Wait, it's too late, we're getting ready to go into another hearing. We're putting security aside. We're not addressing it here."

JUDGE MILLER: That's correct.

MR. LAMPHER: So we didn't address it.

JUDGE MILLER: You're correct.

MR. LAMPHER: And we couldn't address it because you said not to.

JUDGE MILLER: I don't think you need to spend much time on it, because I think we agree with you. You know, when everybody's in agreement...

MR. LAMPHER: So...

JUDGE MILLER: I think you're correct.

MR. LAMPHER: So the idea that you can all of a sudden extract alleged security findings out of a record where we were told, "Don't address it,"...

JUDGE MILLER: Well, you might look at the fact, here's a plan, there's a physical description, but that isn't controverted.

MR. LAMPHER: Exactly, Judge.

JUDGE MILLER: On any controverted matter is a matter where you or others have not had an opportunity to be heard, we would not contend...

MR. LAMPHER: Okay. And our contentions here certainly put matters in a controversy. We've argued that all before.

I'm distressed, just as my colleague Mr. Brown is, that has ired an awful lot of argument today, that we heard a couple of weeks ago, and it's time to get on with it.

We think, admit the contentions or deny the contentions, one way or the other. The staff is a party.

In essence, what this letter says is, "When we file testimony, Judge Miller, we're going to support at least in part the county's contentions."

JUDGE MILLER: Will that interfere, then, with the normal order of proof?

MR. LAMPHER: You can make anyone file testimony whenever you want, Judge.

JUDGE MILLER: I know it. We've normally been

letting the staff go after LILCO because they were essentially supporting LILCO's position, and in fairness to you, so you wouldn't have to come twice.

Now in this view, since we may be talking about in-camera evidentiary hearing, what would be your position, then, on the order of proof?

MR. LAMPHER: Whatever you want. I just don't think it matters. I would like to mention one final thing, Judge, and it's a little bit collateral.

You've entered protective orders and this kind of thing. I think that we need a little more direction from you about what is safeguarded information.

Mr. Schwencer's letter goes into the question of whether something's going to be a vital area or not.

JUDGE MILLER: You know, that puzzled us, too. Because you, when you filed, you took the precaution to say it may involve protective matters, when the county filed.

But now we're getting filings which may well involve some of the same things, and they just come in through regular mail without even a plain brown cover.

MR. LAMPHER: It's my experience in a number of security proceedings is, when you talk about what's vital equipment or even what's to be protected in any way, that constitutes a part of the security, or it

may, in this instance, it may ...

JUDGE MILLER: It might affect, and that's enough. We agree with you on that. You know, we're in agreement with you an awful lot here today, but we think you're correct on...

MR. LAMPHER: We'll withhold judgment on that, Judge.

JUDGE MILLER: I was going to say, wait for the bottom line.

(Laughter.)

MR. LAMPHER: But the staff's final...

JUDGE MILLER: Let me interrupt just a moment. I do think that counsel's correct on that, and I'm taking the opportunity now to point out to all of you, including the technical staff as well as the legal staff, that when you start fooling around here with matters when we're hearing them in-camera and we can't disassociate, you may be opening up something in that area which to respond could conceivably get into confidential matters.

We think this letter should have been, and we think anything in the future should be in terms of the protective order.

We had assumed that counsel would take that into consideration in advising his client, whoever his

client is, in this case the staff.

We take the opportunity because Mr. Lampher's quite correct, these matters are held in-camera for a particular purpose.

We don't want to have to go through and sort out. We had planned, whatever our order is, we haven't written it completely as yet, it would be with the protections of the security that we've set out.

In other words, we think this whole thing is...we understand it should be in security, so in the future now, please have that in mind when these things come whipping though, request or direct your client, Mr. Perlis, to consult you as to the procedure when something like this is done.

We trust we don't need to say anything more, but everybody will get more sensitive now to the handling of these so-called safeguard matters.

In a security plan, it says that all kinds of safeguarding is as amended. It seems to us a little inconsistent, but we won't dwell on it unless you want to say something for the record.

MR. PERLIS: For fear of putting my foot in my mouth, I would like to say one thing here, and that is that SSER-5, of course, was public information.

To the extent that that SSER needs to be amended

and this letter gets to that as well...

JUDGE MILLER: If you're going to amend anything involving security, you better have it in a plain brown wrapper, at least until the Commission or somebody of higher authority says that you can talk about it in public.

I'm not going to be the one. I'm sorry to interrupt you, but you had a point that I did want to make of general application.

MR. LAMPHER: The staff sort of started it all, I guess, with their letter that we got by telecopy, LILCO's response. Obviously our telecopier is not protected.

That goes to our mailroom and these people...I mean, I think they're all trustworthy and all this kind of stuff, but ...

JUDGE MILLER: It still should be protected.

MR. LAMPHER: That concludes my comment.

JUDGE MILLER: Let me inquire now. The last paragraph of LILCO's response, have you looked at that?

MR. LAMPHER: Excuse me. Mr. Brown wants...

JUDGE MILLER: Yes.

MR. BROWN: Yes, I'm sorry, Judge Miller, one more thing I thought of. The only other procedural matter that affects us would be this SSER that the staff talks

about.

It would be useful to know when it's coming out, because if it came out subsequent to the filing of testimony, the board might want to provide a very brief opportunity for others to supplement their testimony, to respond.

JUDGE MILLER: We might not accept it in evidence, too. There are all kinds of options, I'm informed by counsel.

However, whatever the disposition may be, certainly we have these matters much in mind. You may want to address them.

I'm going to ask other counsel about the paragraph number four on page 4 of LILCO's preliminary response, in which it states, among other things, that the resolution of the staff's request in this letter is a matter that can and will be resolved by LILCO and the staff in the normal licensing review process.

This letter does not automatically give rise to mitigable issues before this board, which I think counsel for the county have indicated and I partly agree with that as a mitigable issue.

But is this just a nice way of saying, "Don't bother the board. We'll work something out and go home"?

What do you mean by that?

MR. EARLEY: Judge Miller, what paragraph four of the response means is what we said before in the argument, that the board has the information in front of it to decide the issue.

I guess we're saying it in a different way. What the county said, the letter doesn't affect what the board has to decide, the board already has decided, and I think the staff in essence conceded that, too.

There are always ongoing discussions about security. Our position with the staff will be certainly consistent with what we've said here, that these areas are not vital areas.

We don't intend to make them vital areas unless we're ordered by the board to make them vital areas.

JUDGE MILLER: Well, we've already got some orders from the staff. In any event, you've heard now a proposed schedule by the county, which is addressing itself in a forthright way to whatever the board decides in an evidentiary hearing. The proposed to reasonably expedite the schedule, leaving out a lot more time on discovery, which has something to commend it.

These things are not new. The plan is two years old, almost, and the configuration and whatever the

enhancements are is hardly novel anymore, either.

So we'd like the comments of all counsel. Since you have the floor at the moment, why don't you tell us what LILCO's position is on the suggested scheduling of conditions as counsel described.

MR. EARLEY: As we indicated at the last conference, we generally agree with the county's proposed schedule with one modification.

It is true that lots of information has been exchanged about security. We have no knowledge of the county's consultants and potential witnesses' views on security with what we proposed the last time, that everyone involved...

JUDGE MILLER: Couldn't you conjecture about what they're going to say?

MR. EARLEY: I think that's generally true.

JUDGE MILLER: Don't you now have some discovery by virtue of counsel telling us what his witnesses have told him and we may sharpen that a little after a short recess?

Aren't you getting some discovery there? I mean, these things are copyrighted by anybody. It doesn't matter, the state of New York, the county, the staff, whoever says them, there it is and there's what you're confronted with.

MR. EARLEY: I think we've gotten the bottom line conclusion. We haven't gotten a lot of the detailed rationale that's akin to the details that are included in the security plan and procedures. Our proposal the last time...

JUDGE MILLER: I thought the security plan didn't get into nitty-gritty and didn't get into nuts and bolts.

MR. EARLEY: Well it gets in...certainly there are procedures and what the security plan has, lots of information, as the board knows, in what we've sent the board, and we don't have anything like that.

JUDGE MILLER: Well, do you foresee any modifications in the sense of changing or amending the non-existent nuts and bolts?

MR. EARLEY: No, but what we're talking about is, we don't have facts on what rationale their consultants are going to use in the hearing.

I guess what we suggest...

JUDGE MILLER: Instead of taking a deposition, why don't we all just have an evidentiary hearing with in-camera, and just sit down and just ask them and then cross-examine, and everybody testify under oath and then you have your record?

I mean, we don't have to dance around this thing,

do we?

MR. EARLEY: Judge Miller, here's what we suggested the last time. Everyone file a testimony on the date proposed by the county.

JUDGE MILLER: They proposed a schedule. Do you find yourself in agreement with it, in agreement in part?

Precisely what ...

MR. EARLEY: We agree with the schedule and propose one additional possibility that in the two weeks between the filing of testimony and the hearings, that if LILCO believes that it is necessary to get clarification or additional information concerning the staff's or the county's witnesses' testimony so that we can be adequately prepared to conduct a hearing and we get a day or two of depositions.

JUDGE MILLER: Well, couldn't you do that informally?

MR. EARLEY: Excuse me?

JUDGE MILLER: Couldn't you do that informally? Call up counsel and say, "What do you mean by this? What are your witnesses going to say?"

We all want to try this case and get it over with. Why couldn't you do it that way satisfactorily?

While you're thinking about that, let me inquire

this. LILCO has asked for a reasonably expedited hearing consistent with the interests of themselves, their opponents, the public, and so forth.

Now every time you come in with a suggestion, it takes more time and then more countertime. You are extending the time. I realize this.

Secondly, let me suggest to you also your urging as a matter of law now, a position here, last time we heard this with your filings and today, you are urging that as a matter of law, the board should make a decision on these particular safeguarded areas.

Now, if the board should make such a decision, and I don't say we have because we haven't, but if the board should decide as a matter of law, are you prepared for whatever additional time might be incurred as a result of successful appeal?

Have you thought about that? Now, while you're thinking about those two things, we'll hear from the staff in the way of a short recess.

But I think you should put those things into your computer because I don't want to hear later of this, that, or the other thing occurred.

Everybody is putting it on the table today, which I think is a sensible way to do it. We want you to bear the responsibility now of your stated reactions.

You can state it now, or you can think about it.

MR. IRWIN: I think it was my proposal a couple of weeks ago that we discussed. My recollection is that what LILCO proposed was to modify the county's proposal in two respects.

JUDGE MILLER: That was rejected by the county. Do you have any more optimism today that you'll meet a better fate?

MR. IRWIN: No, but ...

JUDGE MILLER: Let's not spin our wheels. Are you willing to make the modification you requested?

MR. IRWIN: No.

JUDGE MILLER: That was the position before, and it was pretty firm, I believe in reality.

MR. IRWIN: It is the board's decision, not the county's, I believe.

JUDGE MILLER: That may be, and you may be trying the case at Christmas, too, of 1986.

MR. IRWIN: I hope not.

JUDGE MILLER: I hope not, too.

MR. IRWIN: I think, Judge Miller, that ...

JUDGE MILLER: If we do "what ifs" then let's "what if" everything. Let's get right down to brass tacks.

That's what I'm asking you. I mean, I'm giving you time to think about it. Don't react off the top of

your head. You're going to live with whatever decision is made as a result of all of the input in the board's decision-making.

MR. IRWIN: That's correct. We're prepared to live with whatever scheduling decision the board comes up with.

We're also prepared to live with the consequences of an appeal if the board orders and decides not to have a hearing at this point, and by virtue of having rejected contentions.

And our proposal, such as it is, remains what it was two weeks ago.

JUDGE MILLER: And I assume now for the record that the county's position remains the same also, namely the refusal.

MR. BROWN: Yes.

JUDGE MILLER: If you want to change it, fine. I'm not urging you to remain adamant.

MR. BROWN: We don't want to change at all. I would just like to elaborate that the reason going into depositions would be in this particular instance totally useless is that the exact same witnesses that we had before are the people whom LILCO not only opposed, but had meetings day after day with.

They may not have deposed them formally. I don't

recall that. But had meetings with them, they know their credentials.

To go through a couple of wasteful days of listening to where people went to school when they're highly qualified already, if we've got two weeks between the filing of testimony and the trial, and the parties addressed the issues forthrightly, as they will, because we know the consultants are, there's no need to go through this rigamarole of testimony and adding more depositions and more time.

Secondly, we're the ones at the disadvantage. We don't have the slightest idea who LILCO's witnesses are.

And we're prepared to live with that, so surely they know who ours are, they're subject to board rulings, and we don't see any reason why we ought to squander time and money, frankly. And that's it.

JUDGE MILLER: Now, staff, we haven't heard from you for some time, so you're entitled to a full, fair shot at it.

Cover anything you want.

MR. PERLIS: Well, first of all, in terms of scheduling, the staff also suggested a modification of the schedule last time, and I'm going to suggest the same one this time.

Our concern is not necessarily depositions, although we certainly wouldn't mind depositions. But we would like the ability to address the positions of the other parties in direct testimony.

Now if there's no discovery, that won't be possible in the October 9 testimony, because we won't know what the other parties are saying on October 9 until we see their testimony.

What we suggested last time, and I don't think this would require any increase in the length of the schedule, would be a filing October 16th where the parties could file rebuttal testimony or supplemental testimony addressing the filings by the other parties.

In that respect, the board could get a full picture, both of the parties case and of their response, which normally one could get in direct testimony because of discovery what the other parties' positions are.

I don't think that would require any extension of the schedule.

JUDGE MILLER: In trial practice, doesn't the staff think there are advantages to all the lawyers a) in cross-examination right at the time when everything is being put on the table by the witness and question whatever way is appropriate, as well as rebuttal

testimony that isn't canned, prefiled, a written scenario?

Wouldn't you rather have the opportunity to put on live rebuttal in response to something significant that we've all just heard?

And the board would weed out the non-significant. Wouldn't that appeal to you as a trial lawyer?

MR. PERLIS: It's not that it wouldn't appeal to me, Mr. Chairman. It's traditionally in NRC practice, one does not do supplemental direct testimony at the hearing.

If the board wants supplemental...

JUDGE MILLER: But there is not supplemental direct testimony. I don't know that in practice I've ever heard of such a thing as supplemental direct testimony.

You put on your direct testimony and you're entitled to put on rebuttal, which may be written or preferably, in my way of thinking, would be oral from the stand.

They're not supplemental at all. What are you supplementing? You're writing a speech or something?

MR. PERLIS: No.

JUDGE MILLER: These are witnesses. Let them testify and let them stand by their testimony. Don't write a script in advance.

MR. PERLIS: That's fine. The purpose of having prefiled testimony is so everyone knows positions before one goes to hearing.

JUDGE MILLER: You don't know them now? I don't know the substantial positions all of these parties are going to take.

MR. PERLIS: Mr. Chairman, I know that the county believes that the security plan is inadequate for certain reasons.

I don't know what those reasons are.

JUDGE MILLER: Well, you know your own reasons. You just now have a letter. Now, you're getting a new element in practice.

I thought cross-examination and direct testimony was good. Now we've got litigation by letter.

MR. PERLIS: I'm not suggesting litigation...

JUDGE MILLER: I've seen everything. All right. Let's get right down now to what it is. A) on the schedule, do you agree on the proposed schedule?

Do you disagree? You have about 30 seconds to say why, because you have already gone over it. Let's get on with the scheduling and then you have all the time you want to go into the other matters.

MR. PERLIS: The modification I would make to the proposed schedule is to have a filing October 16 for

rebuttal testimony, which has been done in NRC proceedings in the past.

JUDGE MILLER: Does this somehow give a charm to you to say two years ago or two decades we've been doing this?

MR. PERLIS: No.

JUDGE MILLER: Does that give it some kind of an authenticity?

MR. PERLIS: No.

JUDGE MILLER: Why do you need supplemental written testimony?

MR. PERLIS: Because I would like the chance to present our response to their direct testimony before the board at some point.

JUDGE MILLER: Well, what about rebuttal? That's what direct oral rebuttal is. The man gets up and he says, "Yeah, I know what they said. I heard it." Or it being in-camera, "I read it. Now ask me the question and I'll give you the answer."

MR. PERLIS: At the last hearing I asked one of our witnesses to respond to certain issues raised by LILCO's direct testimony, Suffolk County objected on the grounds that we had already filed our direct testimony, the board upheld the objection.

JUDGE MILLER: Well, it depends on the nature of

the testimony. Now look. Rebuttal testimony or supplemental testimony are any testimony is not going to take the place of things that you should have put into your original direct.

Now, that's a rule in every trial, and I don't care if it's written or oral.

MR. PERLIS: I understand.

JUDGE MILLER: That we'll uphold.

MR. PERLIS: I understand that.

JUDGE MILLER: That was the basis of our ruling, as I recall.

MR. PERLIS: Well, as I understand it, the basis of the objection was that all direct testimony should have been filed and now this whole purpose of counsel is cross-examination.

JUDGE MILLER: Well, I think what they were contending was that you had improperly failed to include in your direct testimony that which should have been in there and thereby restricted the scope of their cross.

And that's a perfectly valid objection. That gets to you on your filing of direct as a lawyer.

MR. PERLIS: If that was the basis for the board's ruling, I stand corrected. But the sole...

JUDGE MILLER: I won't press it, because I don't

remember it.

MR. PERLIS: But the question asked to the witness dealt solely with evidence that had been presented at that trial, which had not been available earlier, and the objection was sustained.

And the objection was based on the fact that we had already presented our direct case.

JUDGE MILLER: Yeah, but that's getting into a different evidentiary ruling.

MR. PERLIS: No, because this was not a part of our...this could not have been a part of our direct case.

JUDGE MILLER: It was not a part of your direct case?

MR. PERLIS: It came up on cross-examination of another party by another party.

JUDGE MILLER: I know where it came up, but what I'm saying is should that not have been covered by your direct case?

That's what the question is. You're not understanding me.

MR. PERLIS: No, I believe I do.

JUDGE MILLER: If you understand me, put it in your direct written testimony and you won't have to worry about whether or not it comes up later.

MR. PERLIS: Mr. Chairman, without discovery, we can't anticipate Suffolk County's position in our direct case.

JUDGE MILLER: I can't anticipate yours, letter by letter. I mean, this could go on forever. You change all the time.

You've got a policy of a steady flip-flop, and I'm semi-serious about that. You keep changing your position.

MR. PERLIS: I'm very serious here, too. Normally what...

JUDGE MILLER: Then all right. Take a position and then live or die with it.

MR. PERLIS: The position is the parties should be accorded some time during the hearing or before.

JUDGE MILLER: That will be denied. You'll be given time during trial to give appropriate rebuttal testimony, which is properly in a lawyer-like way, rebuttal, not something you forgot to do in direct. But you'll be given that opportunity.

MR. PERLIS: That's fine.

JUDGE MILLER: You'll be given that opportunity right there on the witness stand and maybe this very witness stand, because we're talking about holding the hearing.

MR. PERLIS: That's fine, provided it's understood that there has been no discovery. And there is a lot that one can't anticipate.

JUDGE MILLER: Well, you're not going to let us forget it, are you?

MR. PERLIS: I'll certainly try not to.

JUDGE MILLER: All right. Nobody's had discovery, but you certainly gleaned a lot of information.

MR. PERLIS: Hm?

JUDGE MILLER: Through the two years that it was enforced, since March on the five, today. We've all got a lot of information.

Now let's get on with whatever we want to do. The board is going to rule one way or the other.

MR. PERLIS: That's fine.

JUDGE MILLER: I'm not telling you, because we haven't prejudged or decided which way, but we're going to rule pretty fast one way or the other.

One way is going to lead to an evidentiary trial, and the other way is going to lead to an appeal. So...

MR. PERLIS: That's fine. I do want to make clear the staff's position, and that is that we do not know much at all of Suffolk County's position at this point.

MR. LAMPHER: Judge, I've got to respond. We've got these contentions here that lays out exactly what

are concerns are.

I think it's the most preposterous thing that I've ever heard.

JUDGE MILLER: Well, don't foreclose the ingenuity of man.

(Laughter.)

JUDGE MILLER: Okay. Now do you have something on the substantive side? Would you like a short recess? Because I did want you to talk to your witnesses.

I want to be sure that we've got the record, and we may have it fully covered, but there were some areas that you were not completely certain.

So why don't you take ten minutes. I'm not shutting you off now. Talk to your people there and see what we should have in order to complete the record without redundancy and then we'll come back. Okay?

MR. PERLIS: Okay.

(Wherepon, a recess was taken from 11:07 a.m. to 11:21 a.m.)

JUDGE MILLER: All secure? The board has decided we would like to hear from Mr. Schwencer and the other gentleman. Okay, fine.

They know now what is in the board's mind, so we would like to have them have an opportunity to respond. So put them on.

Not put them on formally but give them the chance in whatever order you wish.

MR. PERLIS: First of all, I believe they indicated they had nothing additional to add, although, of course, they're willing to answer any questions you might have.

Mr. Kasun would like to speak just a little bit on the subject of what materials need to be safeguarded and what doesn't.

I would like to emphasize, as he will as well, that the letter that was sent out as SSER material was examined for safeguard content.

JUDGE MILLER: Well, who wrote the letter? I withdraw that.

(Laughter.)

JUDGE MILLER: I understand. Mr. Schwencer, first of all, give us an understand of how this came about and why some of the background we've been discussing.

MR. PERLIS: Just for the record, this is Al Schwencer from the Division of Licensing.

JUDGE MILLER: Yes, give us your full name and address, sir, and your title.

MR. SCHWENCER: My name is Al Schwencer, and I'm chief of the licensing branch of the ...

JUDGE MILLER: We can't hear you. Try the other

mike, maybe it's live.

MR. SCHWENCER: My name is Al Schwencer, and I'm chief of the licensing branch number two.

JUDGE MILLER: Have you got a live mike there?

MR. SCHWENCER: My name is Al Schwencer, I am chief of licensing branch number two, Division of Licensing.

The background behind this letter is essentially when it was presented to me, I made sure that I had the review and the concurrences and the technical staff people and it appeared to be an appropriate letter to release.

The concerns that we had, I did want to make sure that once a decision was made, that this matter was available to the board.

I did discuss with Mr. Perlis the concern that as soon as we were at a point where we did have a staff position on it, that we could do that, and basically once that was done, I signed the letter and made sure that it was dispatched.

JUDGE MILLER: I'd glad you could tell us something of the background. You're familiar with the fact that the SSER-5 had a significantly different conclusion and so forth.

So what we're confused about is what brought about,

since March, we'll say, of this year, what brought about the fairly sharp change in position by the staff from the position set forth in SSER number 5?

If this is beyond your area of knowledge, just tell me. I'm just trying to get the facts.

MR. SCHWENCER: Yes, I would like to defer that to Mr. Kasun.

JUDGE MILLER: Defer to who?

MR. SCHWENCER: Mr. Kasun.

JUDGE MILLER: Fine. Have you completed everything that you want to say?

MR. SCHWENCER: Yes, sir.

JUDGE MILLER: Did you review the facts upon which this was based, yourself, or was that pretty much the product of others who brought it to you for official action?

MR. SCHWENCER: I think largely I was aware of the facts as they were discussed, but there are several levels of management involved, both within the Division of Reactor Regulation and NMSS.

JUDGE MILLER: Let me inquire, was any consideration given by you or by others to your knowledge of the impact this might have upon this very issue in a pending adjudicatory proceeding?

MR. SCHWENCER: Certainly when it came to my

attention that it appeared that we were going to lean in this direction, I was anxious to make sure that it was made available to the board.

JUDGE MILLER: I understand your letting the board know what you had done, but my question is, when this letter came, pretty much sharply changing the position taken by the staff, in an official document, SSER number 5, did you or anybody stop to think what effect it would have on this proceeding or on this very issue of a vital area in an ongoing adjudicatory proceeding?

MR. SCHWENCER: I would have to say I did review SSER number 5 when it was issued, and I did note that a footnote that we had some reservations at that time about whether or not the emergency power, a source of emergency power should have protection.

And this has been an ongoing discussion within the staff.

JUDGE MILLER: Well, now, that footnote in SSER number five pointing out that there had been some request for comment and so forth, request I think due in December, that party was indicating, was it, that the staff had serious reservations about its conclusion?

MR. SCHWENCER: I don't believe so, no, sir.

JUDGE MILLER: Well, when you or others realize

that the position of the staff now in effect from your letter that says you should amend the security plan, that was a significant departure from all prior staff position in this case, wasn't it, in the Shoreham case?

MR. SCHWENCER: I guess my perception is that it does represent an additional requirement that we had not looked at before.

JUDGE MILLER: Well, let's be clear about it. It represented 180 degree turn in the position taken by the staff about the technical requirements of this particular area vital area-vital equipment, didn't it?

Didn't that come through? Weren't you told that?

MR. SCHWENCER: I think at the present I don't feel qualified...

JUDGE MILLER: All right.

MR. SCHWENCER: ...to answer.

JUDGE MILLER: Fine. All right.

MR. SCHWENCER: Whether the basis...

JUDGE MILLER: If you didn't go into it, fine. I don't want you to go into matters that you didn't consider or you don't believe that you're either competent or responsible for.

So I take it we've reached that point. Is there anything else now that would help establish completely for the record for the board in this matter?

I want to be sure you have full, fair opportunity.

MR. SCHWENCER: Not from my vantage point, no, sir.

JUDGE MILLER: Okay. Go ahead.

MR. PERLIS: Mr. Chairman, I think Mr. Kasun can answer a number of those questions.

JUDGE MILLER: Okay.

MR. KASUN: I'm from the Division of Safeguards.

JUDGE MILLER: I guess for the record, I know you, but identify yourself. Give us your name, address, rank, serial number.

MR. KASUN: I'm Donald J. Kasun. I'm chief of the Safeguards Licensing Section in Division of Safeguards. We wrote the SSER-5, and also we were instrumental in the development of any change of position.

In explaining why we changed positions, I have to establish two things to begin with. Number one, the regulations in part 73 do not explicitly define what safety-related equipment is vital and not vital.

In fact, the only vital piece of equipment in part 73 is the central power station. So the staff, for a number of years, have been trying to define in more detail what pieces of equipment of a site should be declared to be vital.

Several years ago, the staff started a staff position and the staff practice of requiring all AC DC

power sources to be protected as vital equipment, regardless of any site-specific technical analysis that we did.

It was just a general requirement, not a regulatory requirement, but a staff requirement.

When we reviewed the first time on SSER-5, we went through a technical analysis and came to the conclusion that maybe technically there was no requirement but we noted in the SSER that nevertheless it was a general practice to still go ahead and require protection of these AC and DC power sources.

At that time, we thought we had some leeway because it was not an explicit requirement, and we said, "Okay, there's no technical requirement.

The staff has some discretionary authority in this area. We won't require any further protection."

At that time, that's all we did, because the hearing then was stopped.

When we re-reviewed this position, in conjunction with this latest activity, we came to the conclusion that the technical findings were still valid, but we also came to the finding that we were being inconsistent in this case.

In all other cases, we were requiring an AC power source to be protected, and in this case we were not.

JUDGE MILLER: In low power exemption proceedings? I want you to be precise now. This is a low power exemption proceeding.

I'm not sure that you're giving a clear-cut analysis.

MR. KASUN: That's right.

JUDGE MILLER: Okay.

MR. KASUN: We did not examine this in conjunction with a low power hearing. But on the other hand...

JUDGE MILLER: What did you examine it in conjunction with? I'm trying now to get so our record will be clear.

You see, I've asked you and other staff witnesses to address the question of why...I'll read to you in a minute in five...why it was reassessed or why it is now reviewed by the staff, I assume administratively, when it obviously could have some impact on an ongoing low power exemption request.

MR. KASUN: First, the security regulations don't make any provisions for operation of anything other than 100% power.

You know, there is no authority for us to not impose all the requirements at the time the license is issued.

JUDGE MILLER: Don't you have discretion at low

power not to impose all the requirements of a full power?

MR. KASUN: No. That would have to be done only in the form of specific exemption under 50.12.

JUDGE MILLER: Now wait a minute. You say a specific exemption. Didn't I understand that the staff has raised this very question that for two decades, which to me is 20 years, that they have been giving sometimes in the form of an exemption, sometimes implicitly, that very thing?

MR. KASUN: We could.

JUDGE MILLER: You have, haven't you? Not could; have. Twenty years, two decades. It was your language, not mine.

MR. KASUN: In security, we have only issued, to my knowledge, at least in the last several years, two exemptions.

One was for Diablo Canyon, after they had received their operating license, they had not yet loaded any fuel in the core, we exempted them from certain of their security requirements while they were upgrading some of the safety equipment.

And clearly the finding there was there was no sabotage potential.

We've also issued an exemption to H.B. Robinson

plant, who was in a shutdown condition because they were going to do major maintenance.

There again, we made a finding since the material was removed from the core, there was very little sabotage potential outside the spent fuel.

We issued an exemption to let them back off or suspend temporarily some of their security requirements.

JUDGE MILLER: That was exercising discretion that the staff, such as yourself, felt that you had.

MR. KASUN: But there was a legal determination and a legal order...

JUDGE MILLER: Who made the legal determination? That's what I'm interested in. In those cases, who made the legal determination?

MR. KASUN: It was issued by the Division of Licensing.

JUDGE MILLER: Who? Some person?

MR. KASUN: I'm sorry. I don't know who signed it. Probably Eisenhut, the director of the Division of Licensing.

JUDGE MILLER: Is he a lawyer?

MR. KASUN: No, he's the director. He has the authority.

JUDGE MILLER: He makes legal decision.

MR. KASUN: He has the delegated authority from the Commission to issue exemptions to requirements.

JUDGE MILLER: Let me direct your attention now to this SS-5. You say you or your division had something to do with that, sir?

MR. KASUN: Yes.

JUDGE MILLER: Okay. Let's just read it. It's on page 13-3, Shoreham SSER-5. On that page, it's (3). "There is no technical reason to protect the temporary diesels in the gas turbine generator as vital equipment because they are not required for safe shutdown in the absence of a LOCA."

Was that the reason that you based it on as stated?

MR. KASUN: Correct.

JUDGE MILLER: Doesn't that same reason apply today? There's no change in that, is there?

MR. KASUN: No change in that finding whatsoever.

JUDGE MILLER: Then why, and I'm getting back now, why did you state officially, in the absence of a LOCA, they're not required for safe shutdown, which was, I guess, accepted by the parties, so far as I know. I'm not trying to bind anybody.

It may be open. I'm not trying to get it in by the county or staff. The staff stated this as the staff's position.

Now, that's looking at a case that's involving exemption request, low power, and it isn't just a technical matter, sir, as I think you've been using the term, because it gives as its reason they're not required for safe shutdown in the absence of a LOCA. And the LOCA is discussed elsewhere.

Now I'm asking, isn't that same situation precisely present today, after your letter?

MR. KASUN: Yes, it is. But that same technical finding can be made in other sites where we also required the protection of the AC and DC power sources, and therein lies the problem.

JUDGE MILLER: Why do other sites have a bearing on an adjudicatory proceeding where we're taking evidence in one particular case, and you or your associates are throwing a letter in here which seems to spin around almost completely the reasoned finding and a stated reason for it.

That's what I'm trying to get.

MR. KASUN: We have an obligation under the law to apply our criteria uniformly in all licensing...

JUDGE MILLER: Are you a lawyer, sir?

MR. KASUN: No, I'm not.

JUDGE MILLER: Okay. All these requirements of law and legal decisions, where is the lawyer in this?

Where's the beef?

MR. KASUN: We have an obligation to apply criteria uniformly to all licensed facilities.

JUDGE MILLER: Have you done that in the Shoreham case?

MR. KASUN: That's what we're trying to do now.

JUDGE MILLER: Well, now you know there are certain matters that are now before the Commission where it is alleged that the requirements have been different.

I refer now to the as-safe-as requirement they talk about the Shoreham case, six or eight different interpretations of that.

MR. KASUN: I am only speaking to security requirements.

JUDGE MILLER: I see. Okay.

(Laughter.)

JUDGE MILLER: Okay.

MR. KASUN: So pure and simply, what we found and came to the conclusion that we were treating Shoreham facility for low power differently than we had treated and we are presently treating other facilities, and we had no justification for this.

JUDGE MILLER: So in a spirit of fairness, then, you said, "LILCO should be discriminated in far," and so you said, "My gosh, in other cases here, we didn't

say that if they don't have to have a safe shutdown in the absence of a LOCA we'll look at it differently. So my goodness, we've got to apply this so that Shoreham will be like everybody else."

Now, is that what the reasoning is?

MR. KASUN: It's not a matter of fairness; it's a matter of a regulatory process of treating everybody equally.

JUDGE MILLER: Well, where's the regulatory process that says you, sir, can be responsible in part for a letter which does seem to be interfering with the judgment now pending before this board?

I'd like to have you now to give me the basis of that one.

MR. KASUN: We have also a regulatory problem in regard to the security plan. See, we've approved this security plan in about April of '83, I guess, or whenever it was.

JUDGE MILLER: Yes, almost two years ago.

MR. KASUN: And that, at the time the license is issued, that becomes a part of the license, an official part of the license.

It says a licensee shall fully implement all measures contained in the security plan.

JUDGE MILLER: I know. We got that.

MR. KASUN: The security plan...

JUDGE MILLER: Hold it. We've got that plan now because it's in litigation. This is an adjudicatory proceeding.

Now I would like to know by what authority you deem it within your purview, you and your associates now, to interfere in that respect or to issue requirements to amend a security plan, the integrity of which, in this particular matter, is pending before an adjudicatory body.

Did you think about that at all?

MR. KASUN: Yes, sir, we did.

JUDGE MILLER: Who did you consult about it? Who did you consult when you were thinking?

MR. KASUN: We consulted...this letter was a joint effort of the legal staff and the technical staff.

JUDGE MILLER: Well, give their names, please. I want to know who's responsible for it. You're in-camera.

We're not going to publish it in the paper, but I'd like to know who brought this letter out recommending...recommending, maybe even requiring a change in a security plan when the very issue was pending before the board.

Now, you don't need to take it. I want it from the

witness, first of all, and then you can say whatever you want, but you're not a witness.

MR. KASUN: We felt...

JUDGE MILLER: Who is "we"?

MR. KASUN: Me. Well, direct...

JUDGE MILLER: I want the names of those you consulted in view of the fact that this letter was to be issued in whatever posture you deemed the adjudicatory to be. Names.

MR. KASUN: The recommendation to send the letter came from the Division of Safeguards.

JUDGE MILLER: Who?

MR. KASUN: Signed by the branch chief.

JUDGE MILLER: Who is it?

MR. KASUN: George McCorkle.

JUDGE MILLER: Did he actually discuss this with you?

MR. KASUN: I discussed it with him, yes.

JUDGE MILLER: However you did it, whatever your protocal is, did any...who said, "Well, look, the adjudicatory body is considering this."

Who was it that raised that first in your conversation with him?

MR. KASUN: May I also say it was also approved by our director...

JUDGE MILLER: I didn't ask you that. I asked you, first of all, whether you discussed with him, since you did talk about the pendancy of this very matter before this board.

Did you or did you not?

MR. KASUN: I can't say that we discussed that matter. It was general knowledge that...

JUDGE MILLER: Never mind the general knowledge. I want to know who discussed what. I'm asking you precisely now for names and titles. You can understand that.

I'm not asking you for general knowledge. I'm asking you a very precise question. Who, besides yourself, sir?

MR. KASUN: That issue was, again, you have to let me finish what I'm trying to say.

JUDGE MILLER: Why don't you answer my question first?

MR. KASUN: I can't say that I ...

JUDGE MILLER: You don't know that anyone that you discussed it with?

MR. KASUN: I can't say that I addressed the importance of the adjudicatory process in conjunction with this memorandum.

It was done for another reason.

JUDGE MILLER: Did you discuss the pendancy of that question, vital areas, as a pending matter here as well as whatever letters you were writing, with anyone?

Now, you can say that, yes or no, and if you say yes, I'm going to say, "Who?"

Now that's pretty clear, isn't it?

MR. KASUN: Yes. I talked about it with Mr. Perlis, sir. I talked about it with Mr. Perlis.

JUDGE MILLER: All right. Were you talking to him as a technical matter or as a lawyer?

MR. KASUN: As a technical representative.

JUDGE MILLER: Who else either you discussed with or it was discussed to your knowledge, persons?

MR. KASUN: Well, again, in the Division of Safeguards, the branch chief and the director.

JUDGE MILLER: You are just telling me general information. What I want to know is who considered and discussed in a reasoned matter and had his attention addressed to the fact that this kind of amendment to the security plan set forth in the letter was also the subject of a pending, ongoing issue before this board?

I want to know who. You've given me two. Anybody else? We'll let you testify in a minute, Mr. Perlis, but if the witness doesn't know any more, he can just

say that's all he knows.

MR. KASUN: Well, all I know is that this letter received very high level of attention throughout the entire...

JUDGE MILLER: How do you know? It might have been low level by non-lawyers who didn't even consider the implications.

What do you know, of your own knowledge?

MR. KASUN: No, I was in some of the meetings, and I know it was...

JUDGE MILLER: Okay. Then who discussed the legal implications of it?

MR. KASUN: Legal implications, I'm not sure. I don't know who did the legal implications.

JUDGE MILLER: I don't want you to guess, but I want to know ... just a minute. I want to know whether the staff, I take it you're talking about the technical security staff, did or did not give any thought to the fact that the content and subject of that letter was the subject of ongoing litigation here.

Did you or did you not?

MR. KASUN: I certainly did. That's all I can say.

JUDGE MILLER: Okay. Hold it. Did anybody else?

MR. KASUN: I'm not sure anybody else did. I did.

JUDGE MILLER: All right. Now we'll get your

attention. What attention did you give to it, and what considerations did you review in that regard?

MR. KASUN: Well, I considered that we had an overriding obligation here because we had a defect in the plan that had to be corrected.

It was brought to our attention that their security plan had portions in it which we had approved which were not possible to be implemented at the site.

We felt that it was an obligation on our technical staff to tell the licensee that that plan is defective now, you've got to do something about it.

JUDGE MILLER: When did that...pardon me. When did that plan become defective? When did it become defective, as you just described it?

MR. KASUN: Well, it would become defective...

JUDGE MILLER: When did it become defective as you described it?

MR. KASUN: Well, legally, it will become defective the minute the license is issued. We can't wait...

JUDGE MILLER: You haven't issued a license, have you?

MR. KASUN: It will be, and we have an obligation to tell somebody they're going to be in violation. We have to do that.

JUDGE MILLER: Okay. Forget your general division

now. When did this plan become defective as you just told me? When did it? Not future, not all the rest of it. When did it?

MR. KASUN: I can't answer that. I don't know the answer to that.

JUDGE MILLER: All right. When did the facts change from what was stated by the same staff in SSER-5 that I just read to you?

MR. KASUN: The facts did not change.

JUDGE MILLER: And so something changed, then, when you decided to redo an accepted, approved, and I think, pretty much agreed to in all respects at the time, about the requirement of vital equipment on these enhanced matters, not the original ones, but the enhancements, because they are not required for safe shutdown in the absence of a LOCA.

When did that change?

MR. KASUN: That didn't change. Those technical findings are still valid today.

JUDGE MILLER: Not just technical.

MR. KASUN: What did change was our finding that we were not treating Shoreham the same as we were treating everybody else. That's all.

JUDGE MILLER: Oh, you're back to that. I see.

MR. KASUN: That's the whole basis for this. We

don't have any other reason for it.

JUDGE MILLER: All right. I'm glad we got the whole basis. Give it to me once clearly. What was the whole basis for this letter changing the SSER-5?

Give me the whole basis.

MR. KASUN: The basis was that we recognized on our re-review that since the staff practice had been for a period of time prior to this to require protection of the off-site AC DC diesel, whatever they are...

JUDGE MILLER: On-site?

MR. KASUN: Not necessarily on-site. Just A emergency power.

JUDGE MILLER: You said on-site. Was that inadvertent?

MR. KASUN: It turns out that they always were on-site. Since this was a staff practice, it was not codified yet, the fact that it's probably difficult to find it stated in writing anywhere, but it was a staff practice because we implemented this for almost two years.

JUDGE MILLER: Now, wait a minute. Wait a minute. I think you told me, but correct me if I'm wrong, that so-called implementation pertained to on-site full power situations, didn't it? Did it or didn't it?

MR. KASUN: It did, but ...

JUDGE MILLER: All right. Now, you're getting into an area you hadn't been in before. I think you should, for the record, indicate that you're now giving your judgment, but that the facts are that what the staff had done two years before was significantly different from the facts set forth by the staff in SSER number 5. Now, isn't that...

MR. KASUN: I'm not sure that's true.

JUDGE MILLER: Well, then, why isn't it true?

MR. KASUN: All the licenses that are issued generally stop at 5% power. At that time, we still say when the license is issued, the full security plan has to be in effect.

JUDGE MILLER: All right. Pardon me, sir, I'll just wrap this up. Were you the one that made the final judgments that go into this letter, or had a significant role in it?

MR. KASUN: I had a significant role in developing it. I did not participate in the final work, but yes.

JUDGE MILLER: Let me...the basic formulation and reasoning for it was what you've just given me, what you've just described as your own judgment? Is that correct?

MR. KASUN: That's correct. And that would also be the basis for any SSER that we developed for this

matter also. That would be the basis for it.

JUDGE MILLER: Will be?

MR. KASUN: Yes, sir.

JUDGE MILLER: Okay. I think I've heard...unless there's something more you want to add, I think you've covered your role.

MR. KASUN: Let me finish.

JUDGE MILLER: Oh, go ahead and finish.

MR. KASUN: I was saying that the reason we sent this letter out because we perceived here a real defect, and we had to bring to the applicants attention that he had a plan which could not be implemented, could not be properly implemented and we couldn't let this violation occur.

This is true of any time the staff knows of anything to be in violation. So we had to bring it to his attention.

The only way we could do this formally is through this letter.

JUDGE MILLER: Why can't you bring it to the board's attention through your lawyer? Why couldn't you?

MR. KASUN: At the time, the previous prehearing conference we had here, at that time, when we said that we do not object to admitting this contention...

JUDGE MILLER: You said do not object. You don't say, "My goodness, it's so important and for all these reasons we've got to do it," and the staff says, "Do it, do it, do it," and here's the letter. You didn't say that, did you?

MR. KASUN: Wait a minute. At that time, though, there was not a coordinated staff position on this matter. There was not. We couldn't make that statement.

JUDGE MILLER: Then you helped develop it, didn't you, and it's effectuated in this letter, isn't it?

MR. KASUN: Yes. Correct.

JUDGE MILLER: Okay. That's enough.

MR. KASUN: But that coordinated staff position was developed after that prehearing conference.

JUDGE MILLER: Okay.

MR. KASUN: That's why it wasn't brought up.

JUDGE MILLER: I'm glad we were of help to you. Would that you had thought of us when you started formulating.

Go ahead. You've got any more?

MR. PERLIS: I do have something I would like to say.

JUDGE MILLER: Go ahead.

MR. PERLIS: That is just to clear up what effect

this letter has and whether it is or is not a challenge to the board, because frankly, we believe it is not within one width a challenge to the board.

I'd like to make that point very clear. The purpose of this letter is to express the staff position and to get it to the licensee.

Obviously because there is an ongoing hearing, one, we believe that our obligation to get it to the licensee as soon as the position is formulated, and secondly, because there is an ongoing proceeding, we believe it our obligation to get it to the board as soon as the position is formulated.

Had we arrived at this position three weeks earlier in responding to the county's contentions, we would have expressed the position.

And I don't think the board or anyone else would have complained, possibly about the nature of the staff's position, but no one would have complained about the timing of it.

That position...

JUDGE MILLER: We asked you, as a matter of fact. We asked you very carefully twice, the staff's position.

We went into it. I asked you some questions. Don't rewrite history.

MR. PERLIS: No, that's correct, and the staff position at that time...

JUDGE MILLER: You and I discussed it.

MR. PERLIS: But the staff position at that time was not that they had to be vitalized.

JUDGE MILLER: No, it was 180 degrees different. That's what we're talking about.

MR. PERLIS: No, the staff did not, at a prehearing conference, I did not say they did not have to be vitalized.

JUDGE MILLER: You didn't pull back the assertion of SSER-5 at any time, to my knowledge.

MR. PERLIS: I didn't pull back the assertion of SSER-5.

JUDGE MILLER: It stood there in the record, didn't it, up until this letter, in the record?

MR. PERLIS: Except that the staff had also taken the position that we did not object to the admissibility of the contention.

JUDGE MILLER: Well, that's a different question. Not objecting is one thing. You know, that's how we get ten different interpretations.

Now we're moving from not objecting to something to this letter, which says amend the plan.

Well, all right. I understand the position on

that.

MR. PERLIS: But I do want to make it clear that, in fact, I believe paragraph four of LILCO's letter that we agree with that as well.

This letter is not telling the board to do anything in terms of the hearing process. What this letter is telling the board as to ...

JUDGE MILLER: Is what?

MR. PERLIS: What the staff position is on an issue that is in front of the board.

JUDGE MILLER: The staff, by letter that we just had the genesis of...and exodus, too, maybe...has told this LILCO to amend a security plan.

Now, that's pretty plain. It's the English language. This board had and has before it an issue, a proposed contention controverted by others and one time by the staff, in part, which goes into the question of the necessity in this proceeding, low power exemption request, of having a vital area that encompasses the enhancement.

Now the staff...all right, the record is there. We can all draw inferences of whether the staff has changed positions, and if so, whether it's 180 or 170 degrees.

But at any rate, it's before us. Now, what I would

like to find out, the staff....I don't know, who is the staff?

Are you the legal staff? All I want to find out, when you use staff, I get some big umbrella. I want to know who's responsible here.

MR. PERLIS: For this letter?

JUDGE MILLER: You're the legal staff, aren't you?

MR. PERLIS: I...

JUDGE MILLER: You're a lawyer, you got a client.

MR. PERLIS: My direct supervisor would be the executive legal director. Our client includes both NRR and NMSS, which ...

JUDGE MILLER: For the record, spell out this NRR, so we'll know who they are.

MR. PERLIS: NRR, the Office of Nuclear Reactor Regulation and NMSS, Nuclear Material...

(Laughter.)

JUDGE MILLER: Confer with your experts.

MR. PERLIS: Let's just call it NMSS.

JUDGE MILLER: Okay. I can't remember it either. Okay. Now, the question that I was trying to get to was this.

Who are the rest of the staff that come to these conclusions, some legal, by non-lawyers, and some non-legal, by technical people?

Who are they, anyway? Are they these two agencies, these two segments you've described? Anybody else?

MR. PERLIS: Let me do it this way. This letter, the questions that you were asking Mr. Kasun as to who considered the fact that this letter was involved in an ongoing hearing process.

JUDGE MILLER: He told us that.

MR. PERLIS: Well...

JUDGE MILLER: He told us that, unless you're going to disavow your own witness.

MR. PERLIS: I'm not going to disavow it. I think I can develop it more fully than Mr. Kasun. There were a number of meetings that took place, some of which he was present at, some of which he was not present at.

JUDGE MILLER: The board was nowhere advised of that. This has been an ongoing issue before the board, whether or not...

MR. PERLIS: That's correct. We believed that it was our obligation to notify the board as soon as a position was reached.

JUDGE MILLER: That's nice, since we're right in the midst of a hearing, almost, it's nice to hear from you.

All right, what did you have in mind, you or whoever wrote the letter? About some kind of a future,

another, perhaps different SSER?

What's that supposed to mean?

MR. PERLIS: Well, there were going to be two things in a future SSER.

JUDGE MILLER: Everything you tell me means two things. Give me both of them. Go ahead. Go ahead.

MR. PERLIS: I'm sorry. Do you want one of them?

JUDGE MILLER: I asked you what will be published in a future SSER.

MR. PERLIS: There are two specific pieces of information that would have to be in that SSER. One is the staff position as to what...

JUDGE MILLER: Don't we know it now?

MR. PERLIS: Yes.

JUDGE MILLER: It says amend the plan. Is that going to remain the staff position or is that one of these mallable things?

MR. PERLIS: No, that is the staff position.

JUDGE MILLER: Is it going to change in a future SSER?

MR. PERLIS: No, but that position would be put in a SSER since it is not ...

JUDGE MILLER: It's put well enough now. I think we're all familiar with it.

MR. PERLIS: The staff was planning on putting that

position in an SSER.

JUDGE MILLER: What did you have in mind? What passed through the stream of various people that this future SSER was going to come out?

MR. PERLIS: I would imagine now the position is taken that would be in the next SSER, which I believe is scheduled for October, but I'm not certain about that.

JUDGE MILLER: You mean you've already got one scheduled in addition to six?

MR. PERLIS: I believe seven has already come out.

JUDGE MILLER: I'm not going to ask you what is in seven or anything else. I'm up to my ears now in changing SSERs.

MR. PERLIS: There have been a number of SSERs. I believe SSER-7 has been issued. It was not relevant to...

JUDGE MILLER: Does it go into any of these security matters? Does it go into any of the matters on the merits of the evidentiary hearing we just had?

MR. PERLIS: No.

JUDGE MILLER: Now, back to this future SSER, which you indicated or somebody indicated this letter will be published in future SSER, and on this particular subject.

MR. PERLIS: I'd like to get to the second item, because I think that's ...

JUDGE MILLER: You don't like the first one so well?

MR. PERLIS: No, no, the staff...

JUDGE MILLER: Okay. Then go ahead.

MR. PERLIS: In the SSER process, normally identifies two things. One is open items and secondly is resolution of open items.

JUDGE MILLER: And third, adjudicatory matters pending before a board. Was that in your contemplation, too?

MR. PERLIS: Of SSERs? No.

JUDGE MILLER: Yeah. Well, don't you think maybe you ought to inject it there somewhere along the line when you've got a pending matter before a board about to make a decision on a matter that is in an adjudicatory setting?

Don't you think that somebody in all this chain of thing should say, "What impact might it have on evidentiary hearing," or a hearing that's under way?

Didn't that ever occur to anybody?

MR. PERLIS: I'm not quite sure what you're suggesting. If you're suggesting that the staff not take a position because of evidentiary hearing, I'd

have to reject that.

JUDGE MILLER: No, no, I'm just saying the staff should take a position and stick to it. I've had changing staff positions in this and other matters.

What I'm saying that now in the midst of a hearing, you're coming up with still another significant change in the staff position in a matter...it may not be to you, you're laughing...

MR. PERLIS: I'm not ...

JUDGE MILLER: But to me it's a significant issue. It's not unimportant, and the fact we're in-camera doesn't mean that it's not a significant issue to the public.

MR. PERLIS: It is a significant issue. I don't mean to laugh, but in terms of changing position, the fact remains that the staff's feeling was the position should be changed.

Now we could do one of two things. We could say, "Well, we've put out a position, we'll stick to it, even though we believe it's wrong."

Or we could go to the board and say, "No, we have a new position, here it is."

Frankly, I think the public is better served when we take the second road, which is the road we took in this proceeding.

JUDGE MILLER: Of a letter.

MR. PERLIS: Of...

JUDGE MILLER: In public.

MR. PERLIS: The letter went public because the SSER wasn't ready to go public at that time and we believed because it was before the board, we should get it to the board...

JUDGE MILLER: The issue was in-camera, wasn't it, just as this whole proceeding is?

MR. PERLIS: This proceeding is in-camera. The issue about security is not totally in-camera.

JUDGE MILLER: Whoa, now. Security is going to be public now. When did the staff come to that conclusion?

MR. PERLIS: In SSER-5, for instance, was public and it deals with security.

JUDGE MILLER: Well, did it? What did it say that had to do with security, other than the fact that you didn't need the power except in a LOCA? What else that had any effect on security or safeguard?

MR. PERLIS: Pages 13-1 through 13-4 all deal with security. None of it in our view contains safeguards materials, but those are two distinct things.

JUDGE MILLER: I'm looking at the same page. You made the statement this goes into security matters, as

though that justifies the public nature of this letter saying change the security plan.

It's in our safe. I don't know why it's in our safe, if you feel free to go ahead and talking about changing amendments and then the next thing I suppose, why.

I think you were wrong on that. I think you, as a lawyer, I think the technical people, whoever participated, were wrong in not having that as a safeguarded matter.

I think you were wrong in not considering and making a considered judgment in writing both the impact upon a pending matter that the board was in the process of deciding.

I'm telling you that very flatly. You can disagree, but this record is going to show that you have got some responsibility as a lawyer, and your clients have a lot of responsibility as a regulating agency to handle these things properly.

MR. PERLIS: I would like the record also to reflect that the staff did consider whether this material needed to be kept from the public, and determined that it did not, that it does not cover safeguards material of the type that would pose a danger to the public health and safety that need to be

protected.

JUDGE MILLER: Now where's the record on that? This is the first I've heard of it, and we're about at the close of our hearing.

Where is your documentation on that one? I'd like to see that right now.

MR. PERLIS: Mr. Chairman, there has been no documentation as to whether or not material needs to be safeguarded.

When Suffolk County filed its contentions, it stated that out of prudence and we don't mean to challenge this, its filing was going to be considered safeguards materials.

The fact that Suffolk County made that determination and that the board has since determined that everything in writing in this case should be considered safeguarded material does not mean that in the staff's technical view that material needed to be kept from the public.

JUDGE MILLER: I see. So this is another now where the technical staff...I note you make it technical, not legal staff...feels perfectly free to go out and write more of these things to the public based on their determination that it doesn't matter if they amend a security plan in respect to vital equipment.

Doesn't that tell people that as of now, the plan does not cover this kind of vital equipment? This couldn't be of help to a potential saboteur?

Boy, you're making judgments here without either considering, and I've given you full opportunity to tell me what you consider, and I'd like to see if there is anything in writing.

MR. PERLIS: We did give this consideration.

JUDGE MILLER: Just a moment. Just a moment here. Just a moment. I didn't follow you yet. You had full opportunity.

I think that the staff is remiss. Now, if you want to quarrel about it and appeal, go ahead. Be my guest. But I'm not going to be a chairman of a board which proceeding of safeguard material and security, I think that the county did exactly the proper thing rather than going into the question of sorting out when they've got a complicated matter, they treated the whole thing.

We have all done so, except it now turns out the staff, which apparently still feels free to go ahead with these utterances about a security plan, which we finally got to see, you and I, in this case for the first time.

You hadn't seen it before, you told me. All right.

We asked this production. Ours is in the safe. Where's yours?

MR. PERLIS: Mine is in a safe at OALD.

JUDGE MILLER: Good. Any proposed amendments floating around? Are they in a safe, too?

MR. PERLIS: All kept in a safe.

JUDGE MILLER: Good. I trust everybody is following the same safeguard.

MR. PERLIS: Mr. Chairman, I do need to point out we have a public document in SSER, which in our view needs to be amended.

And we believe we would be remiss if not pointing out in public that that document needs to be amended. We are not proposing to put in public any details as to the protection to be afforded.

JUDGE MILLER: What are you going to put in public?

MR. PERLIS: Either the...

JUDGE MILLER: What are you going to put in public?

MR. PERLIS: What we would propose to put in public and this certainly isn't finalized.

JUDGE MILLER: Don't start apologizing for it in advance. What are you going to put in public? This will be your last statement.

MR. PERLIS: I believe what we would put in public is first of all expanding a little bit on this letter,

that the security plan needs to be amended because it is now relying on an item for the security plan references the protection of an item that is not going to be relied upon at low power.

JUDGE MILLER: And wasn't when SSER was written.

MR. PERLIS: And...

JUDGE MILLER: You've got to look at that, too.

MR. PERLIS: Yes, and as I've already explained, we have changed our position from SSER-5. Now it might be a lot easier if we hadn't, but we have.

JUDGE MILLER: Well, I'm just trying to find out why, when, and how, whether or not, how far you're going to go public on it.

MR. PERLIS: Secondly...

JUDGE MILLER: You may take the public angle, I'm asking you for an extra on that. I want to know what you propose to make public now in another SSER.

MR. PERLIS: The second thing that would be made public is when, assuming that this position is accepted, and that the utility changes its plan...

JUDGE MILLER: The security plan?

MR. PERLIS: Changes its security plan, that in a future SSER, this item would be closed. I would not propose that there be specific information as to why it is being closed, but since it's an open item, would

have been identified in an SSER, there would be a notation saying that that item has been adequately resolved.

JUDGE MILLER: Are you going to go public on the date of this proposed future SSER? And if so, what?

MR. PERLIS: As to when it's going to be?

JUDGE MILLER: Yes, when.

MR. PERLIS: Well, certainly we couldn't go public on any date as to when we could resolve this item because the utility hasn't submitted anything.

JUDGE MILLER: You're right. And you haven't even started to prepare your future SSER, have you, you and the rest of your staff?

MR. PERLIS: We certainly haven't prepared a close out SSER on an open item where a utility hasn't addressed that open item, nor could we.

JUDGE MILLER: Then you don't even have the remotest notion of this future SSER which impacts upon an existing issue in litigation.

Is that where we stand not?

MR. PERLIS: If the impact on litigation is that the utility hasn't addressed an issue that is involved in litigation that also the staff hasn't independently resolved...

JUDGE MILLER: They told you what their position is

a couple of weeks ago, and they told you now. You know what their position is.

MR. PERLIS: They have not written a response to this letter saying that "Dear Mr. Schwencer, we are not going to vitalize any equipment."

When we get that letter, when and if we get that letter, we would have to determine what steps to take, but that step hasn't been reached yet.

JUDGE MILLER: Well, let's see. This letter now was first uttered on September 11th. That would be this week.

You still can't give us any projected date of the issuance of a future SSER now? Have you thought about it?

MR. PERLIS: I could give you the date of a future SSER where the staff position that these items should be vitalized could be published.

JUDGE MILLER: When?

MR. PERLIS: I'm told that that information could be published in an SSER in two weeks, but that doesn't resolve the question by any means, because the real key, we believe, is the close out items, and I cannot tell you...

JUDGE MILLER: Maybe you better tell us more about that procedure, then, because we'd like to know what

you see as a terminal point of the fairly administrative determination of an adjudicatory issue. So at least enlighten us to that extent.

MR. PERLIS: Well, this is the termination of an administrative item outside of the hearing process. Now the hearing process may impact it, but outside the hearing process...

JUDGE MILLER: Wouldn't you like to put that the other way around? The hearing process may impact.

MR. PERLIS: The hearing process...

JUDGE MILLER: What we're inquiring about is the impact and consideration given to something on the adjudicatory process.

MR. PERLIS: Mr. Chairman, when we identify an open item, that is resolved when the adequate technical information is presented to resolve it.

I can't tell you when that information is going to come in. I can tell you how long it would take our staff to review it when it comes in.

JUDGE MILLER: How long is that?

MR. PERLIS: In general it would take a couple of weeks and that could probably be expedited because of the hearing process.

But as to when that information is going to come to the staff, I can't answer that question. I can say

that it can't be resolved absent or ruling from this board until we get that information from the utility.

JUDGE MILLER: Anything further?

MR. PERLIS: The only thing further is that it might have been a lot easier if the staff hadn't changed its position here.

We have and we feel it would be imprudent not to have notified the board and the parties as soon as possible.

And to the extent that there's argument over whether we should have notified the board, we feel that that was our responsibility once the position was reached.

And that position was not reached until early this week.

JUDGE MILLER: In the manner that's been described fully hitherto?

MR. PERLIS: What? I'm not trying to...

JUDGE MILLER: I'm trying to give you a chance to make a full record now.

MR. PERLIS: I'm not sure it's been described fully.

JUDGE MILLER: Then if you've got some interstitial information, just don't feel bashful. Put it on the table.

MR. PERLIS: The only other piece of information I would like to place before the board is that both the nature of the position and its effect on this hearing, the fact that there was an ongoing legal issue, was well known by a number of people in both NRR and in NMSS.

JUDGE MILLER: Hold it just a minute. I didn't get very many names from this gentleman. Maybe you can give me the names of more who knew about it and considered it, not including the ones he's given.

MR. PERLIS: I believe he gave you Mr. McCorkle.

JUDGE MILLER: I think he did.

MR. PERLIS: He'll have to help me with the titles of these gentlemen, but there was, I believe, Mr. McCorkle's supervisor, Mr. Burnett.

JUDGE MILLER: Just a minute. Mr. McCorkle's supervisor. Do you know his name?

MR. PERLIS: Burnett is the name. I don't know his exact position.

JUDGE MILLER: That's all right. Confer.

MR. PERLIS: He's the director of the Division of Safeguards.

JUDGE MILLER: Who else?

MR. PERLIS: There is a Mr. Mosshart, who is the deputy director of NMSS.

JUDGE MILLER: You say a Mr. Is he employed by NRC? Does he have a title?

MR. PERLIS: He's the deputy director of the Office of NMSS. I don't know his first name.

JUDGE MILLER: Okay.

MR. PERLIS: Mr. Davis, the director of NMSS, John Davis. Over at NRR, Ed Case, who is, I believe, the title of deputy director of NRR.

There are a number of gentlemen below Mr. Case.

JUDGE MILLER: He would speak for them, then, I take it, in a legal sense?

MR. PERLIS: He certainly concurred in this position and was aware of its involvement in the licensing proceeding.

JUDGE MILLER: Now, when this discussion or these discussions took place, did anybody say that maybe we better approach this a little differently than letter writing, inasmuch as it is an issue in a pending matter that is an immediately pending decision?

If so, who said what? Tell us what consideration was given.

MR. PERLIS: Okay. It was never intended that a letter be the...

JUDGE MILLER: You're telling me not. Tell me what was said in these meetings about the fact that there's

a board in an adjudicatory setting considering the very thing you're talking about as a security plan. Who said what?

MR. PERLIS: Okay. I don't think...I don't know that anything was said at that time as to how to get this information before the board.

What was said was let's get a position so we can get it to the board as soon as possible.

JUDGE MILLER: Even though that position might interfere with the board's adjudication of the very issue?

What was said about that?

MR. PERLIS: I would think it was precisely because it has a relationship to ...

JUDGE MILLER: What was said about it, and by whom, is what I am asking. You know how lawyers relate the substance of conversations.

Who said what in substance? Just go ahead and give me the conversation with that aspect in mind.

MR. PERLIS: Mr. Chairman, there were a number of meetings. I can't...

JUDGE MILLER: Yeah, yeah, yeah. What was said affirmatively about the fact that what you're kicking around here, whether it was going to be a letter or not, was a matter that the board was then considering?

Who said what, if anything?

MR. PERLIS: I can't remember what individuals said. I do remember a consensus opinion which was that because it is an issue in front of the board, the decision should get to the board as soon as possible, that we should not wait to publicize this decision until after the board has ruled.

JUDGE MILLER: Well, that's nice. That's clear. You're the lawyer, these are your clients, apparently, sitting down there talking.

You know you're going to participate in this hearing, in-camera. What was said about the fact that you could advise the board and the parties in-camera that the staff was about to change its position 180 degrees?

Why couldn't you do that in the adjudicatory setting as a lawyer?

MR. PERLIS: Because the staff position...

JUDGE MILLER: Where was the motion here on the 12th? Do you know how to make a motion?

MR. PERLIS: I know how to make a motion. I don't believe a motion was necessary here.

JUDGE MILLER: Oh, I see. You just go right ahead and we can like it or lump it, is that it?

MR. PERLIS: No, 2.717...

JUDGE MILLER: I keep trying to find out what discussion and consideration was given to the fact that you were perhaps usurping the jurisdiction of this board in an adjudicatory setting on that very issue.

Now if there was no consideration given, just tell me that. And if there was, then tell me what was said. Now that's pretty clear and to a lawyer, its meaning is plain.

MR. PERLIS: If your question is, was a decision made as to whether we were usurping the board's authority...

JUDGE MILLER: No. Was any consideration given to the effect of that insipient decision upon a known, to you, at least, ongoing issue before a board, then ripe for decision?

MR. PERLIS: Yes.

JUDGE MILLER: What was the consideration?

MR. PERLIS: The consideration was is this information that is relevant to the board decision? Is this information that the board would feel ... I guess...

JUDGE MILLER: You can be gentle now.

MR. PERLIS: No, it's...

(Laughter.)

JUDGE MILLER: I won't embarrass you further. I

infer from what you've said there was no real consideration given.

MR. PERLIS: That's not the case.

JUDGE MILLER: You can't describe it, you can't give me the names, and you can't tell who said what about should we be doing this when the matter's up before the board.

Nobody discussed it.

MR. PERLIS: No, that was considered.

JUDGE MILLER: All right. Now then back up and tell me how it was considered. Who said what? Since you didn't do it in writing, you see, I have to do it by your oral communications with each other.

Who said what in that regard?

MR. PERLIS: I understand, Mr. Chairman, I cannot give you what each individual said.

JUDGE MILLER: Well,give me what six of 'em said, including yourself, in substance.

MR. PERLIS: What was said in substance was, first of all, is this the position we want to take. The answer eventually was yes, it is the position we want to take.

Secondly, what does that do to the hearing? Well...

JUDGE MILLER: Who said that? Can you remember who

first said, "What does that do to the hearing?" This is of interest.

MR. PERLIS: I can't remember.

JUDGE MILLER: Was it you? Was it you?

MR. PERLIS: No, I was generally answering that question.

(Laughter.)

MR. PERLIS: It was said by a number of people.

JUDGE MILLER: What was your answer, then, when you were answering that question? That seems to be a very pertinent question. What did you say, Mr. Perlis, unless you want to claim privilege?

MR. PERLIS: No.

JUDGE MILLER: All right, you don't want to claim privilege, then tell me what you said when they said, "What does this do to the hearing?"

I'm interested in your reply to that one.

MR. PERLIS: It may well have an effect on the board's ruling on contentions.

JUDGE MILLER: That's what you said?

MR. PERLIS: It very likely would have an effect on the board's ruling on contentions.

JUDGE MILLER: You went further. And then what did these people that you can't remember the names, what did they say about that?

MR. PERLIS: Secondly, well, I'd like to say one other thing, because secondly, if the position is reached after the board has ruled on contentions, the position may or may not be controlled by the board's decision, so that if the position is going to be taken, there is a risk if the position is not taken soon that events will overtake us.

JUDGE MILLER: I see. So you advised them not to let events overtake them but to resort to litigation by letter.

Is that the nub of it?

MR. PERLIS: No, I would...

JUDGE MILLER: Did you advise them not to?

MR. PERLIS: I recommended that they not let events overtake them. I would disagree with the characterization of litigation by letter.

JUDGE MILLER: All right. What kind of litigation did you have in mind when that letter was being drafted and talked about consensus and all the rest of it?

MR. PERLIS: That...

JUDGE MILLER: What were you as a lawyer doing when that letter was being drafted and that decision taken by letter?

MR. PERLIS: Preparing to file a number of other pleading issues in the claim.

(Laughter.)

JUDGE MILLER: Including any motions? Appeals? Or what did you have in mind? All right, I withdraw that. I don't want to embarrass you about it.

MR. PERLIS: I'm not embarrassed. I would like to make this point clear. We don't believe that this letter is an infringement upon the board's authority in the slightest.

The authority is in the hands of the board. If you make a ruling negating the effect of this letter, the letter is negated.

And that's...

JUDGE MILLER: Is it negated?

MR. PERLIS: Under 2717, yes.

JUDGE MILLER: Well, but aren't there appeals?

MR. PERLIS: I'm not...

JUDGE MILLER: Wouldn't the staff take an appeal? Are you prepared to say the staff would not take an appeal?

MR. PERLIS: I certainly would not be prepared to say that we would not take an appeal.

JUDGE MILLER: I'll bet you wouldn't take that position.

MR. PERLIS: I don't know what our position would be.

JUDGE MILLER: Well, that's true, too, but nevertheless, when you were considering the matter, you were giving them advice, you're the lawyer, you said, "Don't let events overtake you."

MR. PERLIS: Right.

JUDGE MILLER: "Do it so it's going to have some impact on the board. The board has certain powers under this section but they can be reviewed on appeal," which is perfectly true.

MR. PERLIS: They can be reviewed on appeal.

JUDGE MILLER: Is that what you told your client?

MR. PERLIS: I don't know if I told them this or other lawyers did, but I believe that point was made note of.

JUDGE MILLER: That's interesting. I don't have the names of any the other lawyers besides you. Who are your brethren in this?

You've been giving me nothing but technical people. Give me the lawyers.

MR. PERLIS: My supervisor, Mr. Reese, who's appeared here before, the director of the hearing division, Mr. Chris Curry (phonetic). Those are primarily the two lawyers who are most involved here.

JUDGE MILLER: And what was their advice?

MR. PERLIS: Their advice was no different than

mine.

JUDGE MILLER: And what was it? Don't tell me what it was different from; just tell me what it was.

MR. PERLIS: The basic advice was to get a position in front of the board as soon as possible.

JUDGE MILLER: To get an administrative position already taken with the direction to amend a security plan and to get that action before the adjudicatory board as soon as possible.

Am I fairly paraphrasing?

MR. PERLIS: To notify, to make sure that the board is aware of the staff's position as soon as a position is formulated.

JUDGE MILLER: Well, you had a pretty good idea we'd hear about it, didn't you, whether it was by letter or some other means?

MR. PERLIS: Yes, we wanted to make sure you heard about it as soon as possible so the letter was delivered to the board as soon as it was issued.

JUDGE MILLER: In fact, I think somebody from your office may have made an inquiry Friday whether we had already issued an order with regard to contentions, didn't you?

MR. PERLIS: I didn't make ...

JUDGE MILLER: Friday about 5:00 o'clock of last

week.

MR. PERLIS: Mr. Reese, I believe.

JUDGE MILLER: Yes. Now was that not in contemplation of this little letter?

MR. PERLIS: Yes, it was in contemplation of ...

JUDGE MILLER: We wondered at the time we got the letter. We were able to put two and two together.

MR. PERLIS: Well, I shouldn't say that this letter was in contemplation of the position.

JUDGE MILLER: Well, the action that this letter takes, saying amended.

MR. PERLIS: That position had not yet been finalized Friday at 5:00 o'clock, and the question was...

JUDGE MILLER: Were we in time, or will be overtaken by events? Is that what you were taking about then?

MR. PERLIS: That's probably what was in mind, yes.

JUDGE MILLER: Okay.

(Laughter.)

JUDGE MILLER: Now do you have anything further substantive? I want you to have full chance to make your record.

MR. PERLIS: Yes. I would just strongly, strongly disagree with the characterization that this letter is

being sent as a challenge to the board or in any way is a deregation of any of your authority.

It's not. It is meant to express a staff position, which, if this board weren't here, we would enforce on our own.

JUDGE MILLER: You have that power administratively, doesn't the staff?

MR. PERLIS: Yes, and we have this power.

JUDGE MILLER: In the absence of adjudication.

MR. PERLIS: And in an adjudication, we have that authority until the board takes it away from us. Now the board does have the authority to take it away from us.

JUDGE MILLER: After it knows about it, after it knows what plans you're hatching there. "Don't get overtaken by events, guys, you get it to 'em fast."

MR. PERLIS: Well, we did get it to you as soon as the position was made.

JUDGE MILLER: You were lucky. We almost issued one on Friday, as a matter of fact. The modern technical facilities enabled you to get it in in time for whatever purpose you were getting it in in time so you not be overtaken by events.

It worked out all right.

MR. PERLIS: But I do want to make clear that we

don't view this letter as LILCO and the county both stated and we agree with them, we don't do this as a litigation item in terms of the existence of this letter.

JUDGE MILLER: How were events going to be overtaken, then, if you didn't quick get it into the board?

MR. PERLIS: Events would be overtaken because the board could have issued...it might not have, I don't know what was in your order...

JUDGE MILLER: It could have issued an order to what effect?

MR. PERLIS: It could have issued an order which by its terms would have made this letter a direct challenge to the board.

JUDGE MILLER: I see. I have the explanation now.

MR. PERLIS: Well, I'm not...

JUDGE MILLER: You were apprehensive that the board might make a ruling contrary to what the staff had decided, so you wanted to get it in before the board had a chance to make an adjudicatory ruling. That's what you just said.

Well, if you've got anything further, go ahead and say it. I think we understand the situation.

MR. PERLIS: I have nothing further.

JUDGE MILLER: Anybody else? Anybody has anything further? Okay. We adjourn the hearing and the board will endeavor, and hopefully next week if we don't get interrupted, we'll get out a written order.

(Whereupon, the hearing adjourned at 12:27 p.m.)

CERTIFICATE OF PROCEEDINGS

This is to certify that the attached proceedings before the NRC COMMISSION

In the matter of:

LONG ISLAND LIGHTING COMPANY

Shoreham Nuclear Power Generating Plant, Unit 1

Date of Proceeding: SEPTEMBER 14, 1984

Place of Proceeding: BETHESDA, MARYLAND

were held as herein appears, and that this is the original transcript for the file of the Commission.

TIM SMITH

Official Reporter

Tim Smith/ddr

Official Reporter - Signature

DEBORAH REID, TECHNI-TYPE

Official Transcriber

Deborah Reid - Techni-Type

Official Transcriber - Signature

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ATOMIC SAFETY AND LICENSING BOARD

Before Administrative Judges
Marshall E. Miller, Chairman
Glenn O. Bright
Elizabeth B. Johnson

In the Matter of LONG ISLAND LIGHTING COMPANY (Shoreham Nuclear Generating Plant, Unit 1)	Docket No. 50-322-OL-4 (Low Power) (ASLBP No. 77-347-OIC-OL) September 19, 1984

ORDER DENYING REVISED SECURITY CONTENTIONS

On August 13, 1984, Intervenors Suffolk County and the State of New York filed seven proposed security contentions for litigation in this low-power proceeding. LILCO replied on August 24, and the County and the State responded to the LILCO reply on August 28, submitting a superseding set of seven "Revised" security contentions. On August 30, at a conference of counsel held in Bethesda, Maryland, the Board heard the response of LILCO, additional arguments of the Intervenors, and the position of the NRC Staff regarding the "Revised" contentions.

Subsequent to that conference, but before this Board had ruled on the contentions, the NRC Staff (Division of Licensing, Office of Nuclear Reactor Regulation) issued a letter to LILCO dated September 11, 1984. This letter apparently constituted an abrupt change in the previous

position of the Staff on the issues of vital areas or equipment, which are matters significantly related to the subject matter of this segment of the proceeding. We therefore found it necessary to hold another conference with counsel on September 14, 1984 to discuss the "effect and implications" of the Staff's letter "upon substantive issues and scheduling" in the proceeding.

The Commission in its Memorandum and Order of July 18, 1984, set forth guidance on the admissibility of contentions in the special circumstances of this proceeding.[1] The Commission said that admissible contentions must be: (1) "responsive to new issues raised by LILCO's exemption request;" (2) " relevant to the exemption application and the decision criteria as set forth in the Commission's Order of May 16, 1984;" (3) " reasonably specific;" and (4) " otherwise capable of on-the-record litigation." The Commission further explained that security issues, if any, may be litigated:

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1 LILCO has requested an exemption pursuant to 10 C.F.R. § 50.12(a), to requirements of general design criteria (GDC), specifically GDC 17, to allow issuance of a low-power operating license for Shoreham prior to completion of litigation regarding certain emergency power systems. LILCO has added certain "enhancements" to the plant's offsite emergency power systems: four EMD diesels and one gas turbine. The security of the "enhancements" is also part of their exemption request. Tr. S-108, 232-3.

"(1) to the extent they arise from changes in configuration of the emergency electrical power system, and

(2) to the extent they are applicable to low power operation."

In its Memorandum and Order dated August 20, 1984, the Commission stated that it did not believe that the security agreement, "by its terms, precluded the raising of any new security issues raised by LILCO's exemption request" (at page 2). We have followed this direction and permitted the Intervenors to file (and revise) their proposed contentions, which must be within the Commission's guidelines.

Each of the proffered contentions must be measured against the six criteria, supra, explicitly set forth by the Commission as governing the admissibility of physical security issues. Such contentions must also be viewed in the context of an approved security plan resulting from the parties' November 24, 1982 security settlement agreement, approved by an ASLB order entered December 3, 1982. That plan is a complex, sophisticated security plan which covers all aspects of the Shoreham facility. New contentions involving security issues must therefore plead with reasonable specificity their necessary causal connection with the "changes in configuration" of the enhancements to emergency power, and the "extent they are applicable to low-power operation" covered by the exemption application. The Intervenors have had access to this detailed security plan for almost two years, and their contentions must reflect this high level of prior information in specifying concerns

solely attributable to such "changes in configuration." The Intervenors have failed to meet the standards required by the Commission.

The Intervenors' proposed contentions wholly fail to plead new security issues arising "from changes in configuration of the emergency electrical power system," as required by the Commission Order of July 18, 1984 (at page 3). These proffered contentions also are not "relevant to the exemption application," and they are not "applicable to low-power operation" (Id.).

The reasons for denial of the Intervenors' contentions are set forth and discussed in a Restricted Order Denying Revised Security Contentions (Restricted, Security/Safeguards Information) which has been issued this date and forwarded directly to the Commission for appropriate action. Such Restricted Order is incorporated herein by reference. The proceedings involved in the Restricted Order were held in camera, and were reported in restricted transcripts numbered S-1 to S-333, inclusive. The Commission, of course, has the power to release all or such portions of the Restricted Order as it deems appropriate.

For the foregoing reasons, it is ordered that the "Revised Security Contentions of Suffolk County and the State of New York" are denied in their entirety.

Although this Order denying security contentions may not be technically within the Commission's reserved jurisdiction in CLI-84-8, we believe that it is within its spirit. Accordingly, this Order

Denying Revised Security Contentions is hereby transmitted directly to the Commission for appropriate action.

It is so ORDERED.

THE ATOMIC SAFETY AND LICENSING BOARD

Glenn O. Bright, Member
ADMINISTRATIVE JUDGE

Elizabeth B. Johnson, Member
ADMINISTRATIVE JUDGE

Marshall E. Miller, Chairman
ADMINISTRATIVE JUDGE

Dated at Bethesda, Maryland
this 19th day of September, 1984.