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UNITED STATES
NUCLEAR REGULATORY COMMISSION

IN THE MATTER OF:

DOCKET NO: 50-322-OL-4

LONG ISLAND LIGHTING COMPANY

(Shoreham Nuclear Power Station,
Unit 1)

ORAL ARGUMENT

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1 understanding that you and Mr. Lanpher are going to
2 present the argument for the county; is that correct?

3 MS. LETSCHE: Yes, Judge Rosenthal. I will
4 present the majority of it. Depending on the questions
5 the Board may ask, I may call upon Mr. Lanpher if
6 necessary.

7 JUDGE ROSENTHAL: So there's no division between
8 the two of you on issues; is that correct?

9 MS. LETSCHE: That's correct. That's right.

10 JUDGE ROSENTHAL: Have you reached an
11 understanding with counsel for the state with respect to
12 how the hour on your side is being divided?

13 MS. LETSCHE: Yes, we have. I will speak for
14 approximately 30 minutes; my introductory remarks.
15 Mr. Palomino will then take about 15 minutes to make his
16 argument, and we will reserve approximately 15 minutes for
17 rebuttal.

18 JUDGE ROSENTHAL: Okay. Thank you.
19 For the State of New York?

20 MR. PALOMINO: Fabian Palomino. I'll be
21 representing the State of New York.

22 As Ms. Letsche said, we have an understanding, she will
23 speak first and I will do about 15 minutes.

24 JUDGE ROSENTHAL: Thank you, Mr. Palomino. And
25 for the Long Island Lighting Company?

1 MR. ROLFE: Judge Rosenthal, I am Robert Rolfe
2 of Hunton and Williams. Anthony F. Earley and I will
3 divide the argument. Also here is Donald P. Irwin on
4 behalf of LILCO. Mr. Earley and I will divide the
5 argument such that I will speak first and address the bulk
6 of the issues. Mr. Earley will address the security issue.

7 JUDGE ROSENTHAL: All right. You have a
8 division of your hour with the Staff, actually?

9 MR. ROLFE: Yes, we do. The Staff has agreed
10 that it will end up the argument and take the last 20
11 minutes and LILCO will have 40 minutes.

12 Is it the Board's practice to allow any rebuttal time
13 to LILCO if it wishes to reserve any?

14 JUDGE ROSENTHAL: You are the appellees; are you
15 not?

16 MR. ROLFE: Yes, we are.

17 JUDGE ROSENTHAL: In no court that I am aware of
18 are the appellees given rebuttal time, so the answer is
19 "no." You'll have one opportunity to speak your piece.

20 All right, Ms. Letsche. Are you going to lead off?

21 MS. LETSCHE: Did you want to take an appearance
22 from the NRC Staff?

23 JUDGE ROSENTHAL: Excuse me, Mr. Perlis. You
24 have my apologies. And to think of it, a former law clerk
25 to this panel --

1 JUDGE EDLES: Which shows the preference you get
2 around here.

3 JUDGE ROSENTHAL: That's right. I'm so used to
4 seeing you, Mr. Perlis, that you have just sort of faded
5 into the background.

6 MR. PERLIS: I'll remember this for later.
7 Robert Perlis with the NRC's Office for the Executive
8 Legal Director. I represent the NRC Staff today. To my
9 right is Ralph Caruso, the project manager for the NRC's
10 division of licensing.

11 JUDGE ROSENTHAL: All right. Thank you,
12 Mr. Perlis.

13 All right, Ms. Letsche. I appreciate your calling to
14 my attention the totally inadvertent overlooking of
15 Mr. Perlis.

16 MS. LETSCHE: May it please the Board. My name
17 is Karla Letsche, representing Suffolk County in this case.
18 I want to thank the Board, first of all, for having moved
19 up the timing of this argument as Intervenors requested
20 and, again, state that I intend to address, without
21 reiterating what is in our papers, the major points that
22 the county and state bring on appeal to this Board
23 concerning the Miller Board's October 9 decision.

24 I think it is very important to, at the outset,
25 remember the context of this proceeding. This is an

1 exemption proceeding, a special proceeding under Section
2 50.12 of the Commission's regulations. That section and
3 the Commission's May 16 order govern the conduct of this
4 proceeding that resulted in the order that we have
5 appealed.

6 JUDGE ROSENTHAL: I think you can assume we are
7 aware of that.

8 MS. LETSCHE: The main point of this county and
9 state's appeal, as I know you have understood from the
10 briefs, is that we were denied the right to a fair hearing
11 in this special exemption proceeding and that our due
12 process rights were violated and the gist of that argument
13 is, with respect to each of the dispositive issues which
14 governed the decision in this proceeding, the Miller Board
15 relied on its decision upon evidence submitted by LILCO,
16 or the NRC Staff, and denied evidence on the same issues --

17 JUDGE ROSENTHAL: Let me ask you something about
18 that, Ms. Letsche. My recollection is that the Miller
19 Board declined to allow the witness' on your side of the
20 case to get into the matter of the likelihood that this
21 plant would receive a full operating license, based upon
22 its interpretation of two Commission orders.

23 Now, I looked in your brief in vain for any discussion
24 of those orders.

25 Now, since it's customary for a party attacking the

1 decision of a trial tribunal to deal with the grounds
2 assigned by the trial tribunal I have assumed you didn't
3 address those two decisions because you didn't find them
4 distinguishable. If that's not the explanation for your
5 failure to address them I would like to know what is.

6 MS. LETSCHE: The fact is those decisions didn't
7 have any pertinence or relevant to the --

8 JUDGE ROSENTHAL: You didn't tell us that in the
9 brief. Are you saving that for oral argument?

10 MS. LETSCHE: I will address it now.

11 JUDGE ROSENTHAL: I want to know why it isn't
12 set forth in the brief? Isn't it fair to your opponents
13 to set forth in the brief your line of argument? Here
14 again the Licensing Board was relying heavily on two
15 Commission decisions which I regard on that point, rightly
16 or wrongly, as being dispositive.

17 MS. LETSCHE: What the Miller Board said in
18 ruling out our interest on the public interest, which I
19 believe is what you are referring to, is that that
20 evidence was not relevant. The position of the county and
21 state is that on the public interest issue which is raised
22 by Section 50.12, that evidence was eminently relevant,
23 and the prior decisions that you refer to from the
24 Commission, that talk about whether or not uncertainties
25 relate to full power are relevant to a low power license

1 proceeding simply are inapposite when we are in a
2 proceeding under Section 50.12, which says expressly there
3 must be an affirmative finding made that that exemption at
4 issue is in the public interest.

5 JUDGE ROSENTHAL: Where does it say that? It
6 says -- where does it say that specifically? And why are
7 not your opponents correct when they say that in this
8 instance the Commission has interpreted the public
9 interest factor in terms of their exigent circumstances
10 standing?

11 MS. LETSCHE: Section 50.12(a) reads, and I
12 quote, "the Commission may upon application issue any
13 interested person or upon its own initiative grant such
14 exemptions from the requirements of the relations in this
15 part as it determines are authorized by law, and will not
16 endanger life or property or the common defense and
17 security, and are otherwise in the public interest."

18 JUDGE ROSENTHAL: Okay. Now, last spring, was
19 it not, the Commission came down with an order in which
20 they instructed the Licensing Board with regard to what
21 the Licensing Board was to consider. And did they not
22 talk in terms of exigent circumstances? And did they not,
23 in that connection, laundry list, in a footnote, the kinds
24 of inquiries that should be made? And, if all of that is
25 true, why aren't your opponents correct when they say that

1 this is what the Commission has in mind when they talk
2 about public interest?

3 MS. LETSCHE: Let me make two points in response
4 to that statement, Judge Rosenthal. First of all, the
5 Commission's reference to a finding, required finding of
6 exigent circumstances followed its earlier statement that
7 the Applicant must address the determinations to be made
8 under 10 CFR Section 50.12(a). As we know, one of those
9 expressed determinations, as interpreted in Con Yankee, is
10 that the particular exemption being sought is in the
11 public interest.

12 Secondly, the discussion with the laundry list that I
13 believe you mentioned, in a footnote of the Commission's
14 opinion about the exigent circumstances requirement, is
15 certainly there and that was, following the Commission's
16 statement that it, and I quote, "regards the use of the
17 exemption authority under 10 CFR Section 50.12 as
18 extraordinary. The method of relief has been made
19 available by the Commission only in the presence of
20 exceptional circumstances, and then goes on to say that a
21 finding of exceptional circumstances is a decisionary
22 administrative finding which governs the availability of
23 an exemption and that a reasoned exercise of that
24 discretion should take into account the equities of each
25 situation and lists some equities which are included or

1 could be included in that reasoned exercise of discretion."

2 JUDGE ROSENTHAL: Are they superimposing, then --
3 as you read that order, the Commission is superimposing
4 upon the requirements specifically set forth in 50.12(a)
5 some additional requirements? And if that's the case,
6 what do you have to say about your opponent's argument
7 that they couldn't do this without some kind of a
8 rulemaking proceeding?

9 MS. LETSCHE: I'm not comfortable with your term
10 "superimposing."

11 JUDGE ROSENTHAL: Say "in addition." I don't
12 see anything, as I read 50.12(a), about exigent
13 circumstances or anything else. All I see is "are
14 otherwise in the public interest."

15 So I would assume -- you'll tell me why I'm wrong --
16 that this is what the Commission must have had in mind
17 when it promulgated public interest. "Otherwise in the
18 public interest." Unless it had in mind the conversation
19 we find in the Commission's order.

20 MS. LETSCHE: I can't read what was in the
21 Commission's mind at the time the regulation was
22 promulgated or when the decision we are discussing here
23 was issued. What I can say is that the fact is clear that
24 to issue an exemption there has to be a finding that that
25 exemption is in the public interest. And there has to be

1 a finding -- and maybe they are very closely related or
2 maybe they are even based on the same facts, I don't know
3 -- there also has to be a finding that there are
4 extraordinary circumstances or exceptional circumstances
5 that justify the extraordinary relief of an exemption.

6 The argument that LILCO and the Staff has made, which
7 tries to say there are not two separate issues here, is
8 really a red herring argument.

9 The fact is that in this case the evidence submitted by
10 the State and County which showed that the exemption was
11 not in the public interest -- the exemption, not full
12 power operation, but the grant of the exemption -- was not
13 in the public interest and which showed that there are no
14 exceptional circumstances in this case that favor the
15 grant of the exemption, and in fact, that there are
16 extraordinary circumstances in this case that favor the
17 denial of the exemption, all of that evidence was denied
18 admission by the Miller Board as irrelevant. And the
19 evidence that it did base its finding -- whether you want
20 to call it a public interest finding, an exigent
21 circumstances finding, whatever you want to call it -- the
22 only basis upon which the Miller Board made that ruling
23 was evidence by two LILCO employees that full power
24 operation would lead to benefits to the public and
25 evidence by LILCO employees that LILCO's efforts

1 constituted efforts to comply with the regulation --
2 constituted some kind of exceptional circumstances that
3 weighed in favor of granting an exemption. The Board had
4 other basis for granting its exigent circumstances finding.
5 All the money which LILCO had to spend in its licensing
6 proceedings, which still aren't over, to try to comply in
7 the regulations weighed in favor of that regulation, which
8 is truly an astonishing finding which seems to suggest the
9 more safety problems you have, which is what is dealt with
10 in licensing proceedings, the more entitled you are to an
11 exemption or ruling that you don't have to --

12 JUDGE EDLES: I'm not sure that's a necessary
13 corollary since the exemption, after all, could only be
14 granted if it won't endanger life and property or common
15 defense and security. So I'm not certain that it follows,
16 necessarily, that if you have lots of safety problems you
17 could then meet the other criterion quite apart from
18 public interest, so I'm not sure that that's correct.

19 MS. LETSCHE: Your statement is correct, Judge
20 Edles. My point is that the finding that the licensing
21 process itself -- the length of it and the demands that
22 were made upon LILCO by the NRC Staff -- caused financial
23 hardship to LILCO, was a basis for the Miller Board's
24 finding that there were exceptional circumstances that
25 justified a ruling. They didn't have to comply in this

1 case.

2 JUDGE EDLES: If I may, let me just give you my
3 sort of thumbnail sketch of the exemption requirements and
4 you tell me if I'm right or wrong. In your judgment,
5 exemptions are not the usual way of doing business.
6 Someone who wants an exemption has to come in and show
7 some special kind of factors that warrant the grant of the
8 exemption because the normal process of the application
9 somehow isn't playing out properly.

10 When you look at that you might look at exigent
11 circumstances, right? The other things particularized in
12 the Commission's order. I don't know it expands as much
13 as it particularizes the criteria set out in the
14 regulatory statements. The language set out means you
15 also look around at anything else around to make sure that
16 even if there are exigent circumstances and the like, that
17 you are not granting an exemption that might otherwise be
18 contrary to the public interest.

19 You certainly wouldn't want to do that.

20 Is that broadly your understanding of how the scheme
21 works?

22 MS. LETSCHE: Well, I -- broadly, I would say so.
23 But there does have to be a finding that a -- an
24 affirmative finding that the exemption is in the public
25 interest.

1 JUDGE EDLES: Why could that finding not be made?
2 Let's assume for the moment that the Applicant can
3 demonstrate genuine exigent circumstances and there is
4 nothing else, one way or the other, with respect to public
5 interest factors; that's all you've got in front of you.

6 Why isn't that enough to satisfy the requirement?
7 Let's assume for the moment also that we can show won't
8 endanger public health and safety. That we can make that
9 other finding and also that it's legal. Not illegal,
10 that's the third prong. Why wouldn't the exigent
11 circumstances be sufficient as long as there are no other
12 negative or overriding public interest factors which might
13 dictate denial of the exemption?

14 MS. LETSCHE: I think the "as long as"
15 qualifications that you just put on your statement is key.

16 The Board at the very least has to make a factual
17 finding, or the Commission, rather, under 501, that the
18 grant of the exemption would be in the public interest.
19 And maybe that's what you meant by the "as long as"
20 qualification you just put on your statement.

21 The fact that the utility might be able to come up with
22 all sorts of reasons for unfortuitous events or whatever,
23 that it believes justifies this extraordinary relief is
24 not sufficient, I don't believe, given the plain words of
25 Section 50.12 which say, in addition to the safety

1 findings -- and we'll assume all those away -- that the
2 Commission must determine this exemption is otherwise in
3 the public interest.

4 JUDGE EDLES: That's right. That means there
5 are no negative factors mitigating against a grant of an
6 exemption.

7 LILCO is a number of the public -- their interest is a
8 small portion of the public interest, perhaps; isn't that
9 right?

10 MS. LETSCHE: I think the important thing here,
11 Judge Edles, is that regardless of the interesting
12 intellectual discussion we can have on what these two
13 different statements in the order and the regulations mean,
14 the fact is that here -- regardless of what rubric you put
15 it under, the evidence that was submitted by the
16 representatives of the public which showed that granting
17 of this exemption would be detrimental to the public,
18 that's LILCO's customers, was denied admission and the
19 Miller Board relied solely upon the testimony of two LILCO
20 employees that, in finding that this was in the public
21 interest, that if LILCO eventually achieved full power
22 operation there would be benefits of \$8 million to the
23 public, the ratepayers.

24 JUDGE EDLES: Explain this to me. Let me work
25 with that for a moment. If we assume the exemption is

1 there in essence as a replacement vehicle for the normal
2 low power licensing procedures -- it's sort of an
3 extraordinary substitute, a substitute to be used, to be
4 sure, only in extraordinary circumstances but nonetheless
5 a substitute process for achieving low power operation.
6 If the Commission has already said that in considering a
7 license for low power operation you don't consider whether
8 or not the company will get the full power license, why
9 should I consider that as part of this alternate process
10 for considering low power operation?

11 MS. LETSCHE: Well, two things. First of all, I
12 don't think it's at all correct, or is there any basis to
13 say that Section 50.12 is any kind of a replacement for a
14 licensing process. It is an acknowledged extraordinary
15 situation when you are going to license a nuclear power
16 plant for operation when it doesn't comply with
17 established safety regulations.

18 But responding to your question, the reason why, in
19 this case, the Miller Board's rulings are just plainly
20 wrong is because -- for a couple of reasons.

21 The first most obvious one is that its finding that
22 there is a public benefit is based upon a presumption, and
23 assumption, that full power operation will occur. It
24 expressly says that you are going to save foreign oil and
25 you are going to get ratepayer benefits if you get full

1 power operation.

2 In basing its decision on that and refusing to consider
3 the other alternative, which in this case is at least as
4 likely by the Commission's only acknowledgements, not
5 getting a full power license eventually, the Miller Board
6 clearly excluded relevant evidence. It made an arbitrary
7 ruling.

8 JUDGE ROSENTHAL: Let me ask you, if I may, this
9 question. Supposing we agreed with you on that. Your
10 opposition, if I recall correctly, argues that these
11 witnesses weren't qualified to testify as to the matter
12 that they were being served up for.

13 Now, I'm asking you, one, did that conclusion form any
14 basis for the Licensing Board's decision at all? In other
15 words, did the Licensing Board's exclusion of this
16 testimony rest, to any extent, upon a determination that
17 in any event the witnesses weren't qualified?

18 MS. LETSCHE: Not with respect to the testimony
19 at issue here.

20 JUDGE ROSENTHAL: All right. That's what I'm
21 talking about.

22 MS. LETSCHE: That's correct.

23 JUDGE ROSENTHAL: Now, if we were to agree with
24 your basic point, would it be appropriate for us to remand
25 it and leave it to the Licensing Board to decide in the

1 first instance whether these witnesses were qualified to
2 testify? Or should we accept the Applicant's invitation
3 to determine ourselves that they -- their qualifications?

4 MS. LETSCHE: Well, in terms of the
5 qualifications of the Chairman of the New York State
6 Consumer Protection Board, whose duty it is, under the
7 enabling legislation of that agency, to represent the
8 public interest and who testified -- and it's in the
9 record that he has participated in ratemaking proceedings,
10 electric generation --

11 JUDGE ROSENTHAL: You are not answering my
12 question. My question isn't whether that gentlemen was
13 qualified. The question was whether that's something that
14 we should undertake to decide or whether we should leave
15 it to the Licensing Board and remand to pass upon any
16 claim of the Applicant and/or Staff that these witnesses
17 were unqualified?

18 MS. LETSCHE: I think in terms of this
19 proceeding, since that allegation was made by the
20 Applicant with respect to every witness offered by the
21 county and state, that allegation is so pervasive that a
22 board that is faced with those actual witnesses and can
23 judge their demeanor and can compare them to the --
24 compare it with the demeanor of the opposite side's
25 witnesses, would have to make that kind of judgment.

1 I think it's very significant, though, that you don't
2 have to get to that issue at all in this case.

3 The fact is that on many -- number 1, since the Miller
4 Board didn't rule on the basis of qualifications, it's not
5 an issue that's before you, but --

6 JUDGE ROSENTHAL: It is in a sense. Can't they
7 argue that if there was error on the part of the Miller
8 Board, the error was harmless because these individuals
9 weren't qualified to testify on the matters on which they
10 were being offered? They can certainly argue that as an
11 alternative basis for affirming the result, can't they?

12 MS. LETSCHE: I think in this instance, too, two
13 answers.

14 Number 1, the witnesses presented by the county which
15 talked about the public interest detriments that would
16 result from contaminating this plant had been found
17 qualified by the Miller Licensing Board to talk about all
18 those matters that were discussed in there, in their
19 testimony.

20 The chairman of the Consumer Protection Agency had also
21 been found qualified and I think that merely reading his
22 qualifications and the record leaves absolutely no doubt
23 that he is capable and competent to discuss the matters he
24 discussed.

25 More importantly there's precedent here in the Diablo

1 Canyon case before the Court of Appeals last year in which
2 the Commission asserted that when the question was "what
3 is the public's interest," that it assigns great weight to
4 the views of the public's own representatives. In that
5 case the public's representatives, the governor of the
6 state, supported the action of the NRC. In this case the
7 governmental parties, Suffolk County and the governor of
8 the State of New York, do not support that position. But
9 nonetheless, the Miller Board not only didn't give the
10 testimony submitted on their behalf great weight, it
11 refused to listen to it at all. And I think it's
12 important that much of that testimony was not just based
13 on this speculation or whatever you want to call it that
14 the plant might not an a full power license. Most of that
15 testimony had nothing to do with that kind of assumption
16 one way or the other.

17 The county and state's evidence showed that granting
18 this exemption, separate and apart from what would happen
19 later with respect to a full power license, would
20 immediately result in adverse consequences to LILCO's
21 customers.

22 They also submitted evidence which said that low power
23 testing, which is what would be authorized by this
24 exemption, standing alone, has absolutely no benefits to
25 anyone because the purpose of low power testing, as the

1 Staff stated in its brief, is solely to serve as a
2 preliminary step on the way to full power licensing.

3 The county and state evidence also showed -- stated
4 that there is a public interest in knowing that the
5 Commission's safety regulations are complied with,
6 particularly when you have a situation of a utility that
7 the state and the public's representatives, have found
8 have engaged in serious mismanagement in the past; and
9 that it is not in the public's interest --

10 JUDGE EDLES: Ms. Letsche, let me ask you a
11 question. If you are to assume that there's an interest
12 in having public regulations complied with -- and I agree
13 with you in the abstract -- that would mean no one would
14 ever warrant an exception because you could show that the
15 regulations had not been complied with. Isn't that the --

16 MS. LETSCHE: No. I think there could be
17 circumstances where there is an affirmative public
18 interest in saying we don't need to have that regulation
19 complied with here. The important point here, gentlemen,
20 is that there is no evidence in this record of any
21 affirmative plus, any benefit to the public or to anyone
22 other than LILCO, that arises from the grant of this
23 exemption, of the conduct of low power testing, which is
24 all we are looking at.

25 JUDGE ROSENTHAL: Unless you assume that this is

1 going to accelerate the date when the plant goes on line.

2 MS. LETSCHE: Even if you were to assume that,
3 if you get -- assume you get a full power license and you
4 then make the second assumption that doing low power
5 testing now is going to shorten the time when you get to
6 the full power operation, that does not show that there is
7 a public interest in granting the exemption because you
8 don't get that exemption -- excuse me -- you don't get
9 that benefit from the exemption. And if you never get to
10 full power operation, you never get the benefit at all.

11 JUDGE ROSENTHAL: But if you do get to full
12 power operation and you get to that full power operation
13 at an earlier date because of the exemption, then there is
14 a benefit; is there not?

15 MS. LETSCHE: If you make both of those
16 assumptions then arguably you would get the benefits of
17 full power operation earlier. That's true.

18 JUDGE ROSENTHAL: All right.

19 MS. LETSCHE: But the important point is that
20 you don't get any benefits from the activity which is
21 authorized by the exemption. And you never even looked at
22 the detriments that would occur from the granting of the
23 exemption.

24 JUDGE EDLES: But the gist of your argument, I
25 gather, is that the Licensing Board should also have

1 looked at the down side of granting an exemption? That's
2 really what it didn't do.

3 MS. LETSCHE: Absolutely.

4 JUDGE EDLES: At least from my perspective --
5 and again you are welcome to tell me you are wrong --
6 LILCO is a member of the public, there's an aspect of
7 their interest embraced by their corporate aspirations,
8 that's not to say that other parts of the public interest
9 shouldn't be considered and must be considered, but that
10 seems to me to be at least an element of the public
11 interest.

12 MS. LETSCHE: Certainly LILCO is entitled to put
13 its testimony concerning what it thought was in the public
14 interest on the record. Absolutely. We don't dispute
15 that, although parts of its evidence, the county and state,
16 belief were irrelevant because they went to the benefits
17 of full power rather than low power operation.

18 JUDGE ROSENTHAL: We have taken a good deal of
19 your time on this issue. I think we understand your
20 position on it.

21 I would like you to move, if you would, to your claims
22 with respect to the "as safe as" issue.

23 Now, I think we can agree, can we not, that this really
24 comes down to what the Commission meant by "as safe as"
25 when they employed it in one of its orders. Am I right?

1 It doesn't appear in the regulations of the Commission, as
2 far as I'm aware -- you can correct me if I'm wrong --
3 that the genesis of this phrase is a Commission order?

4 MS. LETSCHE: That's correct. You are right on
5 that.

6 JUDGE ROSENTHAL: So we are talking now about
7 what the Commission meant, whether the Commission, as the
8 Licensing Board concluded, meant to employ a basically
9 functional test? Or whether, as you insist, anything
10 that's a little bit better than the procedure called for
11 by the exemption, means that the procedure called for by
12 the exemption is not as safe.

13 I think I understand that to be your position.

14 MS. LETSCHE: That's one argument that we made.
15 I don't think it's necessary to, again, to figure out
16 exactly what was in the mind of the Commission when it
17 issued its order.

18 The words of the order are clear and there's a logical
19 basis for them in that you don't want to be eroding --

20 JUDGE ROSENTHAL: How are you eroding it? In
21 what respect does the equipment which the Applicants is
22 suggesting be substituted under this exemption -- in what
23 way does that equipment represent a possible threat to the
24 public health and safety that is not present by the full
25 compliance with GDC-17? What is the threat in the context

1 of phases 3 and 4? Not in the context of full operation.
2 What is the context that make this not as safe as the
3 equipment called for by GDC-17?

4 MS. LETSCHE: Thereto, number 1, with respect to
5 the functional comparison you referred to before, the
6 evidence submitted by the county, which went directly to
7 the relative safety of operation of this plant at low
8 power with the alternate configuration as compared to the
9 qualified configuration was denied admission.

10 JUDGE EDLES: Excuse me. Aren't we all agreed
11 that from a relative point of view -- even LILCO and the
12 Staff agree -- from a relative point of view the margin of
13 safety is reduced as a result of the exemption? Is that
14 an accurate description?

15 MS. LETSCHE: I don't know what LILCO and the
16 Staff would say. I know the Miller Board found there was
17 a lesser margin of safety and the evidence certainly
18 demonstrated that.

19 JUDGE ROSENTHAL: I want to know whether it's
20 significantly less.

21 JUDGE EDLES: I guess to me that to some degree
22 is the issue. I'm not sure what the Commission meant was
23 that any modest minor inconsequential reduction in the
24 margin of safety ought to serve to deny the exemption or
25 whether you have to look at what that reduction in the

1 margin of safety is and try to make some kind of an
2 assessment of whether that's a serious safety concern to
3 the public?

4 MS. LETSCHE: The point here, Judge Edles, is
5 that that reduced margin of safety was ruled irrelevant by
6 the Miller Board.

7 There was evidence, functional evidence before the
8 Miller Board which demonstrated there was a reduced margin
9 of safety --

10 JUDGE ROSENTHAL: By how much?

11 MS. LETSCHE: We were not permitted to produce
12 or quantify the evidence.

13 JUDGE ROSENTHAL: Did you make an offer of proof?

14 MS. LETSCHE: Yes.

15 JUDGE ROSENTHAL: What did the offer of proof
16 reflect as to the amount of reduction in the margin of
17 safety that attended upon this alternate configuration?

18 MS. LETSCHE: Attachment 4 to our brief, Judge
19 Rosenthal, was one piece of testimony, which was denied
20 admission. And in that testimony which discussed some
21 probabilistic assessment data which went to probabilities
22 of core vulnerability happening during low power operation,
23 showed that the likelihood of a loss of off-site power
24 event leading to core vulnerability under the alternate
25 configuration was 7-1/2 times higher than with a qualified

1 configuration.

2 JUDGE ROSENTHAL: That doesn't tell me anything
3 at all. 7-1/2. It has to be put, as you well know, into
4 context.

5 MS. LETSCHE: It was put into context with that
6 testimony, Judge Rosenthal. Would you like me to read the
7 entire piece of testimony?

8 JUDGE ROSENTHAL: No. I would hope you could
9 summarize in a few sentences what is the difference in the
10 margin of safety. 7-1/2 times -- for example, if you had
11 two pieces of equipment and one piece of equipment would
12 react in a second and the other piece of equipment in
13 7-1/2 seconds, that would not be significant if, for
14 safety purposes, all that you needed was reaction within
15 25 minutes. That's why I say that to tell me that it is a
16 factor of 7-1/2, in isolation, tells me nothing.

17 MS. LETSCHE: Okay. Let me address the type of
18 examples that are given. And let me just say for the
19 Board's information that if you review the county's
20 quantified PRA-related testimony that was not admitted you
21 will see that it is put into context in terms of the
22 accident sequences that were analyzed, but I don't want to
23 go into great detail on that because that's in the record.

24 The question of the reduction of the margin of safety,
25 though, in one respect was quantified and that was the

1 time necessary to get electric power in the event of a
2 loss of off-site power.

3 With a qualified system it can get there in 15 seconds.
4 With LILCO's alternate system it can take as long as 30
5 minutes. It could be faster but it could take that long.
6 You have 55 minutes before you get to core damage
7 situation under low power, according to the Staff's
8 assumptions.

9 That means that the margin of safety has been reduced
10 by 54 and -- 54 minutes and 45 seconds -- no. That's not
11 right. I didn't do the math right.

12 JUDGE EDLES: Can I cut through for just a
13 second? Is your argument that there may be no reduction
14 in the margin of safety? Or is your argument that the
15 reduction of safety contemplated by this exemption is just
16 too big, we shouldn't allow it?

17 MS. LETSCHE: Both.

18 The Commission's order said that there has to be a
19 finding that operation proposed by LILCO is "as safe."
20 Those words say what they say.

21 If this Board were to ratify the Miller Board's
22 findings that, in its own acknowledgment, that there was a
23 lesser margin of safety, nonetheless operation was as safe,
24 you would be ruling on this case on a standard different
25 from the one set up by the Commission. So that's the

1 answer to your first question.

2 On the second question -- I've now forgotten what it
3 was.

4 JUDGE EDLES: The second question is whether the
5 peculiar engine of safety, the reduction of the margin of
6 safety here is just too great from your perspective?

7 MS. LETSCHE: Two answers to that. First of all
8 it wasn't considered, it was considered irrelevant by the
9 Licensing Board so there aren't any findings for this
10 Board to review on the facts and the evidence to make that
11 determination, whether it was enough or not -- or too much
12 or not.

13 And it is certainly the position of the county and the
14 state, based on the evidence that it submitted, that the
15 reduction is far too low. Any reduction is unacceptable,
16 since this is such an extraordinary proceeding and there's
17 no need, there's no reason and no benefit to performing
18 this low power testing. You should take no risk and erode
19 that margin of safety. Not at all.

20 JUDGE EDLES: Give me an example of when an
21 exemption might be grantable, if that's the word, without
22 any erosion? Using the ground rules that you are setting
23 up, where there would be absolutely, exactly the same
24 safety level as you would have under the formal licensed
25 operation.

1 MS. LETSCHE: Presumably -- I'm not a technical
2 person, Judge Edles, I can't be very specific, but
3 presumably you could have different kinds of pipes or
4 different kinds of systems that are different
5 manufacturers or have slightly different width or length
6 or things like that, but the differences in which do not
7 have any safety significance.

8 In this case the differences do.

9 In one situation you have all safety grade equipment.
10 In another situation you have no safety grade equipment.
11 And by definition under the Commission's regulations that
12 is a reduction in reliability.

13 In one case you have three fully independent sources of
14 power. In another case, you have only two.

15 Now, that's a reduction and that's significant. Sure,
16 they both involve some diesel generators, but the
17 difference between the two has some safety impact.

18 In one case the system is automatic. It comes on, you
19 don't have to worry about an operator pulling the wrong
20 switch or forgetting to pull the switch. In the other
21 case an operator has to perform a lot, 20, 30 different
22 tasks, all over the plant. And if any of those are done
23 wrong or if it takes him longer or if he falls down the
24 stairs on the way, you are going to have a big problem.

25 That distinction that one system is automatic and the

1 other one requires manual actions has a safety
2 significance.

3 JUDGE ROSENTHAL: You think that the Commission,
4 when it authored 84-8, which is the opinion, as you know,
5 which had the "as safe as" language in it, assumed that
6 you -- the utility might come up with an alternative that
7 had these identical features with the system called for in
8 17? I think you are suggesting that the Commission gave
9 the Applicant a very rubber sandwich when it promulgated
10 this opinion because I don't think it would be possible
11 for the Applicant to meet your standard and I think the
12 Commission would have been fully aware of it at the time.
13 So you are saying that the Commission invited the
14 Applicant to engage in an idle exercise.

15 MS. LETSCHE: I can't speculate on what the
16 Commission thought. I understand that there's a rationale
17 behind Section 50.47(d) for example, which assumes a lower
18 risk at low power and I can see a legitimate rationale for
19 not wanting to change that risk at low power by eroding
20 safety margins and that would be a very rational
21 justification for the Commission having chosen the words
22 it did.

23 JUDGE ROSENTHAL: Let me ask you one question.
24 I, of course, did not attend the oral argument before the
25 Commission on Friday. Was the question of the meaning of

1 "as safe as" argued by the parties before the Commission
2 at that time?

3 MS. LETSCHE: I don't think in an abstract sense.
4 Certainly the points that we made in our filings with the
5 Commission concerning the errors committed by the Miller
6 Board were discussed and part of them was its improper
7 rulings related to the "as safe as" finding.

8 JUDGE ROSENTHAL: I wondered whether we might
9 get some help from the Commission on that.

10 Well, you have taken a little more than that 30 minutes.

11 MS. LETSCHE: I believe I have and I think I
12 will leave the rest of the time for Mr. Palomino.

13 JUDGE ROSENTHAL: Okay. Very good.

14 Mr. Palomino?

15 MR. PALOMINO: Yes. Thank you.

16 I would like to address some of the questions that have
17 been raised here because they seem to be troubling the
18 Board.

19 The first is with respect to the public interest. This
20 question as to whether or not it's the safe as exigent
21 circumstances.

22 It seems to me clearly they are different. Exigent
23 circumstances are needed to be by the Applicant for the
24 exemption because he's asking for extraordinary relief and
25 he has to show exigent circumstances, why he should get it

1 now rather than later.

2 JUDGE ROSENTHAL: Why didn't the Commission add
3 that to 50.12? I look at the regulation and I don't see
4 anything about exigent circumstances?

5 MR. PALOMINO: Well, I think the Commission is
6 aware of what the regulation said. 50.12(a) and also
7 aware of Ccn Yankee which held that the public interest
8 determination "constitutes a distinct and separate aspect
9 of the exemption decision."

10 So that it is separate and they are two different
11 aspects and then logically they follow.

12 Not only must they show there's a reason to speed it up.
13 They must also show that it's otherwise in the public's
14 interest.

15 JUDGE ROSENTHAL: Even though 50.12(a) does not
16 import, specifically at least, the concept of exigent
17 circumstances, you are saying, if I understand you
18 correctly, that the Commission has, in effect, added that
19 as an additional requirement?

20 MR. PALOMINO: Added that to show what they
21 meant in this context in order to meet that they had to be
22 exigent circumstances for this extraordinary remedy. And
23 they added to it and nobody challenged it.

24 JUDGE ROSENTHAL: In short, as you see it the
25 Commission had in mind that you'd have to meet the

1 50.12(a) requirements, in addition you'd have to establish
2 exigent circumstances warranting what the Commission
3 characterized as extraordinary relief.

4 MR. PALOMINO: This extraordinary relief. Yes,
5 why now and not later? And that's why they used the word
6 "exigent circumstances." So I don't think they could or
7 should be interpreted in light of Con Yankee. I think
8 it's clearly consistent, so that that is not a reason for
9 it.

10 JUDGE EDLES: If that's the case isn't the
11 "otherwise than in public interest" language -- that could
12 be interpreted, it seems to me two ways. I know these
13 regulations get drafted ages and ages ago and we somehow
14 ought to get the draftsman and figure out what he meant;
15 but doesn't "otherwise in the public interest" mean either
16 there's additional affirmative reasons for granting it or
17 at least there are no reasons for not granting it? No
18 public interest reasons for not granting it? Why isn't
19 that what "otherwise in the public interest" means? That
20 there aren't any -- there's no down side to it?

21 MR. PALOMINO: Logically, no.

22 If you had a neutral situation as far as the public
23 interests are concerned, then it would mean that having
24 this power and having this plant and having this testing
25 was in the public's interest. But where there is

1 opposition to it, and a down side to it, then they've got
2 to show otherwise it's in the public's interest and not
3 contrary to it.

4 JUDGE EDLES: Okay.

5 MR. PALOMINO: All right. That's the first
6 point I would like to pick up.

7 The next thing is, as far as -- there was an assumption
8 made that it would accelerate the date of this plant
9 getting on line.

10 Well, maybe you could assume that generally because
11 generally you are on a critical path when you reach this
12 stage of construction, and you are seeking a license. But
13 in this case it's pure conjecture because, as I pointed
14 out in the case -- and I wanted to point out further but
15 he refused to receive other exhibits -- that there is a
16 pending lawsuit in this case which won't be determined for
17 months and possibly years with appeals, which raise
18 serious doubt about this plant ever being licensed. And
19 it really is a question of whether or not LILCO has the
20 authority to implement its off-site emergency evacuation
21 plan.

22 JUDGE ROSENTHAL: Would you have expected the
23 Licensing Board to have speculated on how long it would
24 take that litigation to reach its culmination?

25 MR. PALOMINO: What I wanted to show by the

1 evidence which they rejected, and I show it on the record,
2 was that LILCO was trying to avoid a determination on this
3 because it wasn't in its favor, that, in fact, it was
4 LILCO's burden to show that it had the power and it would
5 not go to court to show that it had the power and finally
6 the Licensing Board kept urging anybody to go and we went.
7 And then when we brought the suit in the state court, and
8 was properly there, they improperly removed it to the
9 federal court to eat up time and we had to get it remanded.

10 JUDGE ROSENTHAL: Is the suit back in the state
11 court now?

12 MR. PALOMINO: It's back in the state court now;
13 yes, your Honor. So that -- and I want to show that they
14 weren't really pushing this and that all that talk about
15 the delay in this whole licensing proceeding is irrelevant
16 because, until this issue is determined, they are never
17 going to get a full power license if they ever get one.

18 JUDGE ROSENTHAL: The issue might be determined
19 next month, might it not?

20 MR. PALOMINO: No, it might not. The only
21 question you might have at the next month is they made a
22 motion to dismiss our complaint. It might be determined
23 preliminarily there, and it doesn't look too favorable --

24 JUDGE ROSENTHAL: Aren't these legal issues that
25 are basically --

1 MR. PALOMINO: Whether or not they are usurping
2 state power.

3 JUDGE ROSENTHAL: That's a legal issue, is it
4 not?

5 MR. PALOMINO: Yes. A legal issue.

6 JUDGE ROSENTHAL: I would have thought, perhaps
7 I'm wrong, that that issue, if not decided on a motion to
8 dismiss, would be decided or might be decided on motions
9 for summary judgment and that would not involve a trial;
10 would it?

11 MR. PALOMINO: No. It wouldn't involve a trial.
12 As a matter of fact we made that motion because we want to
13 speed it up. And LILCO countermoved by moving to dismiss.

14 The fact is, they don't want to reach a culmination of
15 this issue; because it's going to end the ballgame one way
16 or another for them and not only that -- when you say that,
17 they'll tell you they are going to appeal, either side is
18 going to appeal. It's too critical an issue. So that if
19 they lose they are not going to -- for years they could
20 not get a license, a permanent license. So that it's not --
21 in this instance it's not a question of, you can fairly
22 assume either way or that you can follow some normal
23 assumption that they are going to -- that this is on a
24 critical path. This is not on a critical path at all and
25 it makes all this other talk about the course of the

1 proceeding irrelevant.

2 JUDGE ROSENTHAL: We don't know, really, whether
3 it's on a critical path or not. It depends, among other
4 things on what happens in that lawsuit and whether it
5 happens?

6 MR. PALOMINO: Certainly that prevents it from
7 being on a critical path where in the normal course of
8 events it would just be a matter of time for construction,
9 testing and operation, and off site emergency evacuation.

10 JUDGE EDLES: Are all the papers in before the
11 State Supreme Court Justice?

12 MR. PALOMINO: Yes.

13 JUDGE EDLES: All the papers are in; the next
14 step is for him or her to decide your motion for dismissal?

15 MR. PALOMINO: Their motion to dismiss the
16 complaint.

17 JUDGE EDLES: Your motion for summary judgment?

18 MR. PALOMINO: And then our motion for summary
19 judgment would follow. He said he'd take it in stages
20 when they crossmoved to dismiss the complaint. So that
21 would have to be briefed and argued then.

22 JUDGE EDLES: Maybe Mr. Rolfe will later offer
23 his estimate of the timeframe.

24 MR. PALOMINO: Going to this lesser margin of
25 safety, as far as I'm concerned, it's not really -- it's a

1 question also of safety, but the real problem with this
2 was it was a denial of due process.

3 You had a clear regulation, a very clear order by the
4 Board after argument and weeks of decision. We went ahead.
5 Nobody objected to the order. And then we did our
6 discovery, framed our testimony, educed our testimony in
7 the event we were permitted in this hearing and we tried
8 it all on this theory and then after all the evidence was
9 in, suddenly the judges of the Board decided, oh, well,
10 we've got a different standard you should have met.

11 Well, you can't run litigation that way. It's not fair.
12 It's mouse trapping.

13 JUDGE ROSENTHAL: What was the different
14 standard that the Licensing Board --

15 MR. PALOMINO: It wasn't a comparative standard,
16 with an on-site, fully qualified and approved on-site AC
17 source. That's not that standard. And every turn we --
18 that LILCO tried to meet what we were opposing and they
19 did it with their testimony. We all tried it on one
20 theory. And he's coming and changing the rules.

21 So, the real question is a denial of due process and
22 it's a serious one.

23 You know, I have tried cases for 30 years and I have
24 never seen anything like this. I have been in proceedings
25 like this, I'm not surprised at some things. But, you

1 know, to shift the rules after you have tried the whole
2 case is quite different.

3 Also, talking about Kessel, you raised the question
4 about whether or not you could judge Kessel's
5 qualifications at this level.

6 It wouldn't make any difference because I'll tell you,
7 in the record it's clear, not only does he have this legal
8 responsibility and duty according to state law, but
9 insofar as the time -- the amount -- whether power would
10 be available as needed, he participates in developing the
11 state long range power plan.

12 JUDGE ROSENTHAL: Let me ask you this. When he
13 considers when the power will be needed, does he do it
14 simply from the standpoint of whether Long Island would
15 need additional generating capacity, or does he also
16 consider the substitution for oil-fired plants?

17 MR. PALOMINO: Well, what happens is, as
18 consumer protection agent, they have to consider the whole
19 state.

20 He sits in with the -- these various people who set up
21 the state electrical power needs and you have all the
22 people who determine all the alternatives, including oil;
23 dependency on foreign oil, including dependency on foreign
24 oil coming from Canada and everything else, so he was well
25 qualified. He also wanted to testify -- and they struck

1 his testimony -- to show that LILCO did not act diligently
2 and properly in selecting the diesels, testing them, or
3 otherwise.

4 Now, he has qualified with that and testified before
5 the State Public Service Commission on the prudence
6 hearing. And, as a result of his testimony in the
7 prudence hearing, the State Public Service Commission
8 found that LILCO shouldn't get any money because of these
9 diesels.

10 JUDGE ROSENTHAL: With respect to need for power,
11 the Commission, as you know, has a generic rule which
12 takes need for power out as an issue in operating license
13 proceedings.

14 Do you suggest that that rule is not applicable here
15 because this is an exemption proceeding?

16 MR. PALOMINO: That's right. This is an
17 exemption proceeding and they have to show it's a public
18 interest.

19 This plant -- if the power is not needed for 10 years
20 and there's chances they won't get an operating license at
21 all, or if they will it's only remote in time, what's the
22 exigent circumstance? Where's the public interest in
23 granting it at this time?

24 JUDGE ROSENTHAL: So I take it your position,
25 like that of the county, is, in good measure, that there

1 was a fundamental unfairness about the way this proceeding
2 was conducted in the same that the utility was given the
3 opportunity to come in and establish why, in its judgment,
4 the public interest supported the grant of the exemption
5 while the county and the state were denied the opportunity
6 to establish why, in their judgment, the public interest
7 would be disserved by the grant of the exemption; is that
8 really -- I realize it's a simplistic way of stating it
9 but is that really what it comes down to in the final
10 analysis?

11 MR. PALOMINO: That's right. It comes down to
12 that. It goes beyond that, Judge Rosenthal, in that there
13 was this persistent pattern that every time our witnesses
14 came up they had to summarize their testimony before the
15 Board and if it looked like it was going to be
16 countervailing of the LILCO's testimony, then it was
17 stricken -- as it was not only done in this area, it was
18 done virtually throughout the whole thing so that it
19 really was a total denial of due process; not only the
20 entrapment and the ruling but the total weight of the
21 rulings. And they say: Well, they are based on the
22 evidence, but -- well -- they could have been justified
23 possibly because these people weren't qualified. But
24 there was no such ruling. He just struck the testimony:
25 Said it was irrelevant in some cases or that he didn't --

1 he felt it didn't bear materially on the issue, in some
2 cases. But he was just, willy-nilly, striking everything
3 that seemed to be able to countervail the evidence that
4 LILCO would put in.

5 And then that goes to security. I mean security was an
6 outrageous example. He, at first, was urging security,
7 there we raised it, was an important issue and he berated
8 LILCO about what they were doing for the protection of the
9 people in Long Island. And he forced them to come up with:
10 Well, show me what you -- then, finally he, ipse dixit,
11 reversed himself and said there's no need for it, to
12 everybody's astonishment. Even the Staff support on the
13 relevance, admissibility of some of the issues. And then
14 after that --

15 JUDGE WILBER: Did they support you on all the
16 issues or just some of them?

17 MR. PALOMINO: Just some of them. That doesn't
18 mean they were right.

19 JUDGE WILBER: Was there a general area where
20 they supported you?

21 MR. PALOMINO: Basically what they said was our
22 issues were redundant. Everything we raised were covered
23 basically in two of them and if we went with two of them
24 we could introduce all the evidence we wanted to introduce
25 on security. So it wasn't a case --

1 JUDGE WILBER: They supported you in those two?
2 You said they -- I believe it was mentioned in one of your
3 briefs, there were seven.

4 MR. PALOMINO: They said it could be reduced to
5 two because they were really saying the same things in
6 different ways.

7 JUDGE WILBER: And they supported you in both of
8 those?

9 MR. PALOMINO: In both of those. All right?
10 And they said that way we could have gotten all the
11 evidence in on security. But that isn't the point. The
12 point is he never admitted any evidence on security but he
13 made findings on security. Which is also an egregious
14 error. How you can make findings without any evidence on
15 the record, without anything contested? He also did that
16 on another issue with respect to information he got from
17 the Staff and LILCO, which was extralegal. It's referred
18 to in the briefs. We had no opportunity to test that by
19 cross-examination or any other judicial test of its
20 probity and weight or worth. So that it was just replete
21 with errors, all going to material issues. And, as I say,
22 I practiced law 30 years but I have never seen a record
23 this bad.

24 MR. LANPHER: Members of the Board, thank you.
25 If you'll indulge me, just two comments because I think

1 there are two areas that really have to be clarified to
2 give LILCO and the Staff an opportunity to respond as well.

3 First is this question of a critical path that was
4 raised a number of times in the initial argument. First
5 of all, we do not accept that the critical path has any
6 applicability in this proceeding, especially where, by all
7 standards it is equally likely that this plant will never
8 be operated or get a full power --

9 JUDGE ROSENTHAL: Supposing at this point the
10 facts were these, and I appreciate the -- that you do not
11 believe the facts --

12 MR. LANPHER: I'm willing to assume it gets a
13 full power license now.

14 JUDGE ROSENTHAL: Let's assume two things. One
15 that this plant is assuredly going to get a full power
16 license and, two, that it would be in the public interest
17 to have it get that full power license as quickly as
18 possible.

19 Now, if you made those assumptions, if you made those
20 assumptions, then could one take into account whether the
21 third and fourth phase of testing would accelerate the
22 process of obtaining that full power license?

23 MR. LANPHER: I'm perfectly willing to make the
24 first assumption. The second assumption I think I'm
25 willing to make, but it's really backwards.

1 The issue is: Is it in the public interest to insure
2 that -- assuming full power is going to take place -- is
3 it in the public interest to have reasonable assurance
4 that the low power testing doesn't get in the way so that
5 when you get to that full power authorization you are
6 ready to use it? Maybe that's the same way --

7 JUDGE ROSENTHAL: I think it's that way. The
8 way I understand it, before one can go to full power
9 operation one must go through certain testing procedures.
10 And I would imagine that the quicker you get to those
11 testing procedures the quicker the opportunity to go to
12 full power. If you assume, again, that there is a public
13 interest in getting this plant on line as quickly as
14 possible -- just making that assumption -- then is the
15 public interest served by putting these folks in the
16 position of being able to do, at the earliest possible
17 time, the third and fourth phase low power testing?

18 MR. LANPHER: The public interest would be
19 served only in getting the low power testing done at any
20 timeframe so that it does not block the full power testing
21 -- the full power operation, or the power as essential --
22 anything above 5 percent power.

23 But the critical fact here is that there is no way that
24 this Board, just looking at the undisputed facts, could
25 possibly think that this is in the critical path now.

1 Let's make the assumption, which we don't like, but
2 let's make the assumption that eventually the NRC does
3 approve a full power license. What are some of the
4 milestones everyone has to agree has to take place?

5 The Emergency Planning Board has to come out with a
6 decision favorable to LILCO on all material issues. On
7 Friday the NRC Staff said that a decision might come out
8 in April. That was in the oral argument.

9 In addition, the Brenner Board has to make a decision
10 favorable to LILCO on all the TDI issues.

11 Next, there has to be a decision that LILCO has legal
12 authority and that has to be favorable to LILCO.

13 Next, there has to be a scheduling of an exercise. No
14 exercise has even been scheduled yet. We heard the other
15 day -- I think it was Friday, again -- that normally FEMA
16 takes 120 days to schedule an exercise. This is the first
17 exercise only of a utility-only plant. The county and
18 state don't want that exercise to take place, but we don't
19 see any basis to think that it would be less than the 120
20 days for such an unprecedented exercise. It has to take
21 place. Then, after that, FEMA has to make findings.
22 Again those findings have to be favorable to LILCO.

23 We heard on Friday that normally FEMA makes findings in
24 two months. Sometimes it expedites it. But how can it do
25 it on the first utility plant ever? On the UCS decision

1 there has to be a hearing, after the hearing there has to
2 be a decision favorable to LILCO again. Then, after all
3 of that has taken place, there's a 30-day immediate
4 effectiveness review. You can't add that up and get to a
5 decision on full power until early next year under any
6 circumstances, so there is no benefit whatsoever to low
7 power now.

8 The second point I want to respond to -- and it's just
9 your question, Judge Wilber -- what was the gist of the
10 security issue that the Staff supported Suffolk County on?
11 That was the question of whether the alternate AC power
12 supplies in part or in whole needed to be made into a
13 vital area and protected as vital equipment; that was the
14 gist of several contentions stated different way. The NRC
15 Staff supported those contentions. The Miller Board
16 denied admission of those contentions. And we believe
17 that's error for reasons we laid out in our brief.

18 JUDGE WILBER: Mr. Palomino said there were two
19 general contentions. Are you saying they only supported
20 one of those two?

21 MR. LANPHER: No. They supported the
22 admissibility of two contentions, both of which dealt with
23 the vital areas in question.

24 JUDGE WILBER: All right.

25 JUDGE ROSENTHAL: All right. The Board will

1 take a 10-minute recess and then we'll hear from the
2 Applicant.

3 (Recess.)

4 JUDGE ROSENTHAL: Mr. Rolfe? We are going to
5 see to it that you leave some time for your colleague,
6 Mr. Earley, because among other things I think Mr. Earley
7 will find there will be a few questions on the security
8 issue.

9 I would like you, if you would, Mr. Rolfe, to start off
10 by giving us a status report as to where, as you
11 understand it, the Colt generators now stand, and, in
12 addition, where, as you understand it, the proceeding
13 before the Brenner Board on the TDI generator stands.
14 Because it's my impression -- I could be wrong -- that you
15 are not likely to see a decision from that Brenner Board
16 for several months. And I'm just wondering where the
17 Colts now fit into the picture in terms of where this
18 proceeding really stands in terms of its practical
19 significance.

20 MR. ROLFE: Judge Rosenthal, might I ask
21 Mr. Earley to address that? He's involved on the TDI
22 diesel proceeding and --

23 JUDGE ROSENTHAL: I'll wait until Mr. Earley
24 comes and you can proceed with your argument.

25 MR. ROLFE: I think you are correct. It will be

1 several months before a decision on the diesels is
2 expected.

3 As far as the Colts, they have been installed up to a
4 point. I think there's still some work left to be done --
5 Mr. Earley can correct me -- which I think is being left
6 to the first refueling outage in the expectation that the
7 TDIs will be qualified.

8 JUDGE ROSENTHAL: Okay. I also say, Mr. Rolfe,
9 for my benefit I hope you would focus your attention on
10 the issue of the public interest, because I have to tell
11 you quite frankly that I am very much disturbed. You may
12 be able to remove my concerns, but it seems to me offhand
13 that there's a great deal to be said for your opponent's
14 claim that the Licensing Board entertained your evidence
15 on why the public interest would be served by granting
16 this exemption and, at the same time, precluded them from
17 educating evidence pointing in the opposite direction. And
18 it seems to me on the face of it that there's a high
19 element of fundamental unfairness, at minimum, about this.
20 Perhaps you can persuade me that I'm wrong in that belief.

21 MR. ROLFE: I will start out with that, then,
22 and skip some of the safety-related arguments that I was
23 going to make.

24 I have to disagree, as you would expect, with your
25 initial inclination in that area.

1 JUDGE ROSENTHAL: I would have been surprised if
2 you agreed with it. Your client would have been even more
3 surprised.

4 MR. ROLFE: I think there are a couple of
5 fundamental things you have to keep in mind when
6 considering what the Board did with respect to the public
7 interest area.

8 First of all, what we have here is an exemption from
9 GDC-17, an exemption from meeting the requirements that we
10 have qualified diesels.

11 The Commission's decision in CLI-83-17 said that the
12 Licensing Board can issue a low power license, regardless
13 of the resolution of emergency planning issues which may
14 be pertinent to full power operation but not to low power
15 operation.

16 JUDGE ROSENTHAL: But that, you'll agree, was
17 not in the context of an exemption.

18 MR. ROLFE: That's right. It was not in the
19 context of an exemption, but we start from the premise
20 that if LILCO had qualified diesels under GDC-17, it would
21 have been entitled to a low power license regardless of
22 the pendency of full power emergency planning questions
23 which were unresolved. So, the question before the
24 Licensing Board, and the key element of the exemption, was
25 not whether low power testing should be engaged but when.

1 It was a timing question.

2 JUDGE ROSENTHAL: I thought the question before
3 the Licensing Board was whether or not an exemption would
4 be consistent with the public interest.

5 Now, if that was not the question that was before the
6 Brenner Board at the time that the Brenner Board served up
7 the question which the Commission answered in, what was it
8 83-17?

9 Now, if the question is one of whether this exemption
10 would be consistent with the public interest, I fail to
11 understand why the Intervenors were not entitled to come
12 forward with their evidence, indicating that, for one
13 reason or another, perhaps that the plant would never
14 operate at full power, it would not be consistent with the
15 public interest to grant the exemption?

16 MR. ROLFE: Because, Judge Rosenthal, the only
17 thing that was changed by asking for the exemption was not
18 the fundamental premise underlying CLI-83-17, but what was
19 changed was just the fact that, rather than conducting low
20 power testing with qualified diesels, now we were going to
21 do it with a different configuration --

22 JUDGE ROSENTHAL: I thought what was changed was
23 that for the first time a public interest factor was
24 introduced. There was no public interest factor involved
25 in the low power decision at the outset. Forget about the

1 diesel generator problem. Assuming there had been no
2 problem with the diesel generators, Licensing Board would
3 determine whether the regulatory requirements for a low
4 power license were met and if they were met, you got one.
5 And the Commission said, you don't look at whether the
6 emergency plan is likely to be approved or not.
7 Understand that.

8 Now we are dealing with an exemption. The exemption --
9 the rules governing the grant or denial of an exemption,
10 as I understand it, are quite different. And they
11 involved, among other things, the determination as to
12 whether this exemption would be consistent with the public
13 interest.

14 Now, again, you have to explain to me why this, being
15 under different rules, the Commission having to make a
16 public interest determination and you people recognizing
17 that because you came in with your own evidence saying
18 that this would be in the public interest for the
19 following reasons: Why, in that context -- different
20 context than the Brenner question answered in 83-17, the
21 intervenors were not entitled to put in their public
22 interest evidence.

23 That's my question and let's get it.

24 MR. ROLFE: I think there are several answers to
25 that and the first is: It is a different procedural

1 context. There is no doubt about it. They were in an
2 exemption context but you don't throw the baby out with
3 the bath water. That doesn't mean all the decisions the
4 Commission made about what is and what is not pertinent to
5 low power testing are not still pertinent to the exemption
6 context.

7 JUDGE ROSENTHAL: Why, there's different issues
8 in the exemption proceeding? I don't know it's a matter
9 of throwing out the baby with the bath water. I think
10 it's a matter of saying: Okay, what are the issues in an
11 exemption proceeding? One of them is in the public
12 interest, therefore the parties can and, indeed your
13 client was allowed to, address the public interest.

14 MR. ROLFE: Judge Rosenthal, I think, though,
15 you have to ask: The public interest in what? What we
16 are dealing with here is not the question whether low
17 power testing should go forward at all, what we are
18 dealing with here is the question whether low power
19 testing should go forward earlier under this exemption as
20 opposed to the question whether these TDI's should be
21 qualified --

22 JUDGE ROSENTHAL: I'll accept that for the
23 moment. You introduced evidence to the effect the public
24 interest would be served by granting that exemption. What
25 did that evidence purport to establish?

1 MR. ROLFE: That evidence established a number
2 of things. First of all it established there were
3 training benefits involved with allowing earlier low power
4 testing with more time -- some of the evidence involved
5 the potential benefits which might arise from advancing
6 date of full power operation.

7 JUDGE ROSENTHAL: Let's stop right there. If
8 you put that forward as an affirmative benefit, why isn't
9 it perfectly permissible for the opponent to come in and
10 say: Wait a minute, that plant either isn't going to go
11 on line at all, or there's a high probability it won't go
12 on line at all; or, as Mr. Lanpher suggested in his few
13 words, if it goes on line it's way down the road? There's
14 a number of obstacles in the path.

15 It seems to me that old tired metaphor, what's sauce
16 for the goose is sauce for the gander.

17 If you are free to come and push that as a plus, get
18 the plant on line a little bit earlier and these other
19 benefits, they are entitled to come in and say there's a
20 down side; and to put in what their down side is.

21 MR. ROLFE: But, Judge Rosenthal, the down side
22 ought to be in the context of what the Commission has
23 already said the issue surrounding low power testing is.
24 And the Commission has said that, at the low power testing
25 stage we are not concerned with the ultimate resolution of

1 emergency planning.

2 JUDGE ROSENTHAL: It wasn't in the context of an
3 exemption.

4 MR. ROLFE: That's true, it wasn't in the
5 procedural context, but there's no inconsistency.

6 JUDGE ROSENTHAL: Why did you put in any
7 evidence on public interest at all? And what do you think,
8 if you were free to put in public interest and if there
9 were some relevance to this -- I mean if you -- you
10 apparently thought there was relevance to coming forward
11 with why this exemption was in the public interest -- why,
12 then, is it not open to the Intervenor's to come back and
13 say: As far as we are concerned and here's our witnesses
14 to testify to it, it is contrary to the public interest?

15 It seems to me you're advocating a double standard;
16 it's permissible for you to come in with evidence on one
17 side, but it's not possible for the Intervenor's to come in
18 with evidence on the other side.

19 MR. ROLFE: You have to answer in two ways. I
20 don't think it's inconsistent. I think what we were
21 saying is that our public interest evidence was consistent
22 with what the Commission had said in its precedent. It
23 had said in 83-17 you don't worry about emergency planning
24 issues. It said in 84 --

25 JUDGE WILBER: Excuse me a moment. Why did they

1 say that, though? Didn't they say you didn't because you
2 didn't need the emergency plan for the lower power license?
3 Wasn't that the basis of that?

4 MR. ROLFE: Yes, Judge, that's exactly what the
5 basis was.

6 JUDGE WILBER: So the emergency plan wasn't a
7 factor whether you go to full power or low power --

8 MR. ROLFE: It wasn't a factor when you go to
9 low power.

10 JUDGE WILBER: Whether you go to low power or
11 not.

12 MR. ROLFE: Right. And then when the Commission
13 came back and said we needed an exemption here, they were
14 concerned with that and that's how we got to the "as safe
15 as" method of LOCA proving its case because you didn't
16 need the emergency plan at low power and they knew when we
17 were coming in and asking for the exemption that we
18 wouldn't have an emergency plan. But I don't think that
19 any of that takes us into a position which the Commission
20 embraced in 83-17 --

21 JUDGE ROSENTHAL: I would have been a lot more
22 comfortable if the Commission had said in 83-17 that, for
23 no purpose, including exceptions, is the Licensing Board
24 to consider the likelihood, or the timing of full power
25 operation. Because, again, it -- the question was posed

1 by the Brenner Board in an entirely unrelated context and
2 it seems to me you're reading out of this exemption
3 proceeding the public interest requirements.

4 As long as the Commission has to make a determination
5 as to public interest, it seems to me that these
6 intervenors were entitled to put forth whatever they had
7 that suggested that the public interest would not be
8 served. And then the Licensing Board, having your side of
9 the story and their side of the story, would make a
10 judgment as to where the public interest in this respect
11 could be found.

12 MR. ROLFE: Judge Rosenthal, let me suggest
13 three things to you.

14 First of all, I don't think that kind of evidence would
15 have related to the exemption in particular that we were
16 seeking. That same type of evidence would have applied --
17 that same type of reason would apply if you were trying to
18 go to low power testing with the TDI diesels. What they
19 wanted to litigate was whether low power testing ought to
20 be allowed in the face of uncertainties concerning
21 emergency planning.

22 Second, I think that the -- even if the Appeal Board
23 were to find that that kind of evidence should have been
24 permitted, and LILCO vehemently disagrees with that, but
25 even if you had the evidence of what those witnesses would

1 have said, is in the record before you and you can look at
2 at this stage without any kind of remand -- and again I
3 don't think it's necessary to look at it, but if you want
4 to weight that in the public interest equation --

5 JUDGE ROSENTHAL: Why should we look at it? We
6 are not the trial tribunal here. This evidence was
7 excluded. You are now, as I gather it, making a claim
8 that, among other things, a lot of this evidence was
9 incompetent in the sense that the witnesses were not
10 qualified to testify as to some of these matters. Why
11 isn't the appropriate course, if we should disagree with
12 your fundamental premise, to remand this to the Licensing
13 Board and let them educe the evidence, let them pass on
14 the qualification of witnesses, and let them reach a new
15 determination based upon the outcome of this additional
16 evidence? We are an appellate body. We are not a trial
17 court.

18 MR. ROLFE: That's correct, but there are
19 certain things in the record which you as an appellate
20 body can look at. There is no need, if the witnesses are
21 not qualified, this Appeal Board can look at the record
22 and judge whether they had qualification to express the
23 opinions that they purported to express.

24 JUDGE ROSENTHAL: Were these witnesses on voir
25 dire?

1 MR. ROLFE: Yes, they were.

2 JUDGE ROSENTHAL: Full voir dire?

3 MR. ROLFE: Yes, your Honor. Messrs. Madan and
4 Dirmeier were, and Mr. Kessel was. Those were the only
5 two who had any evidence excluded on public interest.
6 There is no judging of demeanor which is required for the
7 determination of the qualifications of an expert witness.
8 The judging of the credibility and demeanor of witnesses
9 comes in afterwards in judging whether to attach any
10 weight to their testimony.

11 I might also point out to the Board that the whole
12 question of public interest and the application of CLI-83-17
13 was addressed during the Commission's oral argument last
14 Friday. I would encourage the Appeal Board to take a look
15 at that because I think one of the comments of
16 Commissioner Burnthal in particular was: How can you
17 argue about whether low power testing ought to take place
18 pursuant to this exemption consistently with that decision?

19 I'm paraphrasing --

20 JUDGE ROSENTHAL: I can just tell you as to that.
21 I speak just for myself, that the whole immediate
22 effectiveness process gives me a great deal of concern and
23 I'm frank to state that this case illustrates it.

24 As you well know, the Commission's immediate
25 effectiveness rule provides that -- nothing it says in

1 connection with an immediate effectiveness review is to be
2 taken into account by an Appeal Board, unless the
3 Commission specifically so provides.

4 I don't know what was said before the Commission. No
5 member of this panel or of its staff attended that soiree
6 Friday afternoon, and deliberately did so and if the
7 Commission is going to act I don't know what we are going
8 to do. But what Commissioner Burnthal said may be very
9 interesting but I don't know we are even going to pay very
10 much attention to what the Commission says.

11 JUDGE EDLES: I kind of share Mr. Rosenthal's
12 .concerning over the admission of some evidence and the
13 nonadmission of other. But let me just make sure I
14 understand your position exactly. It is that the public
15 interest that we are looking at is not simply some
16 abstract public interest? It is the public interest
17 attendant upon allowing low power testing to go forward
18 now as opposed to next week or two weeks or three weeks
19 from now; that's the sort of narrow public interest window
20 that we are supposed to be looking at. If that's the case
21 then it doesn't matter whether or not the plant will ever
22 get licensed; isn't that your position?

23 MR. ROLFE: Yes, Judge Edles, that is it. The
24 only thing this exemption proceeding changes from the --

25 JUDGE EDLES: Whether we use this vehicle as

1 opposed to the conventional low power licensing vehicle as
2 a means of getting the low power license issued.

3 MR. ROLFE: Exactly. And, Judge Rosenthal, let
4 me just say I would not have brought up the Commission's
5 argument last week but for your question earlier whether
6 the Commission had considered "as safely as" --

7 JUDGE ROSENTHAL: I wasn't curious as to what
8 any of the Commission said. I was just curious, and it
9 was only curiosity whether the Commission actually
10 addressed --

11 MR. ROLFE: Let me point out to the Appeal Board
12 that when we are talking about evidence which was excluded
13 and one side's evidence being let in and the other's not,
14 you have to look at the full evidence that was presented
15 here.

16 The only evidence of the county on public interest
17 which was excluded was evidence -- well, two pieces of
18 evidence. One was the evidence of Mr. Madan and
19 Mr. Dirmeier, who testified in three sections, basically.

20 One dealt with an attempted refutation of LILCO's
21 financial analysis for the benefits of early low power
22 testing; all of that evidence was admitted. It was
23 cross-examined fully, it was considered by the Licensing
24 Board.

25 The only bits of their evidence which were struck were

1 evidence concerning LILCO's financial qualifications and
2 the evidence on the decommissioning costs.

3 JUDGE EDLES: What about evidence of need for
4 power?

5 MR. ROLFE: I'm glad you asked that, Judge Edles.
6 This whole issue of a need for power was never raised
7 before the Licensing Board. Suffolk County, in its
8 prefiled testimony, did not have any testimony concerning
9 the need for power.

10 The only evidence upon which they now rely is an
11 exhibit, which was the Narburger report, which was
12 introduced into evidence during the cross-examination of
13 Brian Macaffrey who testified about the length of the
14 licensing proceedings and that evidence -- that Narburger
15 report which was introduced as Suffolk County Exhibit 20 --
16 was introduced during an attempt to impeach Mr. Macaffrey
17 on it, totally unreliable. LILCO had no evidence on the
18 need for power.

19 The only other evidence on the need for power was that
20 of Mr. Kessel who purported to state in a conclusionary
21 subparagraph of his testimony that there was no need for
22 power.

23 Mr. Kessel was not the representative of New York State.
24 He was responsible for forecasting need for power. He was
25 head of the Consumer Protection Board. He admitted that

1 the State Energy Office does the state energy master plan.
2 He further admitted that the state energy master plan then
3 in effect as of the time of the hearings in effect
4 contradicted him. It called for Shoreham to come on line
5 and said that there was a great need in New York State to
6 reduce the state's dependence on foreign oil.

7 But the Licensing Board was never even given the
8 opportunity to rule on the relevance of the need for power
9 except that little bit of Mr. Kessel's testimony. Their
10 decision was correct, given the Commission's regulations
11 on need for power, and I might add that the precedent upon
12 which the Intervenors rely in their brief concerning need
13 for power were all construction permit exemption cases
14 under Section 50.12(b) of the Commission's regulations.

15 JUDGE EDLES: But even assuming, again, this
16 sort of narrow public interest window that you and I
17 talked about a little bit before, that the question is now
18 as opposed to then -- I recognize need for power is not
19 ordinarily an issue in a licensing case -- but why doesn't
20 the question of need for power bear on now versus six months
21 from now if in fact there is no need for power for another
22 several years? Why isn't that a relevant factor even
23 given your view of what the public interest ought to be?

24 MR. ROLFE: I think for two reasons. One is
25 procedural, the other substantive, or practical.

1 The procedural issue is that the Commission has said in
2 license proceedings that is not a relevant issue. I come
3 back to the point what we were seeking here --

4 JUDGE EDLES: It's not relevant perhaps to the
5 determination of whether this plant ought to ultimately
6 get a full power license, but I don't understand why it
7 isn't relevant to get an exemption to do low power testing
8 now as opposed to three months from now.

9 MR. ROLFE: Because LILCO did not contend that
10 the plant was needed for power and that was the reason
11 that it needed the exemption. It might have been able to
12 contend that. The facts would support that. But it was
13 not in the record.

14 JUDGE EDLES: The reason not to consider is
15 there really isn't evidence one way or the other on it?

16 MR. ROLFE: That's one reason. I think the
17 other reason is --

18 JUDGE EDLES: If it were in would it be relevant?

19 MR. ROLFE: I don't think it would, Judge Edles.

20 JUDGE EDLES: Explain why.

21 MR. ROLFE: I don't think it would. I have to
22 go back to a comment which you made earlier that I have to
23 agree with. "Otherwise in the public interest" is really
24 looking for negative reasons why you shouldn't allow the
25 requested exemption assuming you made the safety findings.

1 JUDGE EDLES: Those are my questions in the
2 context of the Suffolk County advocate. I may have a
3 different perspective. You shouldn't assume that I have
4 come up with a conclusion based upon my earlier question.

5 MR. ROLFE: I didn't assume that was your
6 conclusion.

7 JUDGE EDLES: I'm just probing at this point.

8 MR. ROLFE: But it was a comment with which
9 LILCO would agree. That is precisely what the regulation
10 was geared to get at, and that the primary consideration
11 here, when you are looking at an exemption from a safety
12 requirement, is whether you can do it safely and then,
13 once you determine whether you can do it safely, then you
14 look at whether it fits within the general context of the
15 Commission's regulations.

16 JUDGE EDLES: Even given that, why shouldn't
17 Suffolk County be able to come in and show: Look, here's
18 sort of a negative. No need for the power. There won't
19 be for the next five years.

20 Why isn't that something they ought to be allowed to
21 show? You may be able to discount that on the merits.
22 You might say look, I know there's no need, but look,
23 shifting over from coal is important; make some kind of
24 substantive determination, but why should they be excluded
25 from trying to show that?

1 MR. ROLFE: The Commission has made a generic
2 determination that once you got past the construction
3 stage and you are talking about plants which have already
4 been built and plants which are then ready to operate, you
5 don't worry about the need for power.

6 JUDGE ROSENTHAL: But that's in a different
7 power. That's saying: Look, you have got a built plant,
8 umpteen millions if not billions of dollars invested in it.
9 It's silly in the context of this completed plant to be
10 talking about whether its power is needed.

11 Isn't that an entirely different question from the one
12 as to whether it is in the public interest to grant this
13 Applicant exception and relief, give it an exemption from
14 the provisions of the Commission's regulations? Why isn't
15 it in that context proper to say: All right, what is that
16 exemption going to enable the utility to do? Basically it
17 will enable the utility, possibly, to move its date up for
18 on-line service.

19 Then the next question. Okay, is there some public
20 interest to be served in granting the exemption for that
21 purpose? If the answer is the plant is not going to be
22 needed for several years, I would think the answer to that
23 would be "no."

24 In other words, when you come back to the rules that
25 govern your ordinary garden-variety operating license

1 proceeding and try to carry them over, put them into an
2 exemption proceeding, I get lost.

3 MR. ROLFE: Judge Rosenthal, I don't think that
4 the Commission had in mind in its exemption rules, that it
5 would simply disregard all of the other generic judgments
6 it had made in its regulations.

7 I think that "otherwise in the public interest" means
8 that you -- once you make your safety determination, and
9 the other determinations required by 50.12(a), you then
10 look at whether there are any countervailing considerations
11 to granting it.

12 Now, if there was a need for the plant's power, that
13 might be something to consider in the public interest. If
14 there isn't a need for the plant's power -- and again I'd
15 emphasize that if this issue had been litigated LILCO
16 would have had a totally different view of it than what
17 the Intervenors have presented here -- but if there is no
18 contention that the plant is needed for power right away,
19 and there was none by LILCO below, then it just becomes a
20 nonconsideration, if you will.

21 JUDGE ROSENTHAL: I think pretty soon you better
22 wind up your argument and let Mr. Earley take on security.

23 MR. ROLFE: I will do that right now.

24 JUDGE WILBER: Mr. Rolfe, you didn't want to
25 address safety issues and I didn't want you to feel

1 slighted. I do have a few questions.

2 Somewhere in the decision -- and I can get a cite for
3 you if you wish -- the Licensing Board said that you had
4 to have either RCIC or HPCI and then the power supplied by
5 the diesels; is that correct? In other words, it appears
6 to me that they had to rely on HPCI and RCIC for even --
7 whatever condition it was. I'll give you a cite for that
8 if you wish.

9 MR. ROLFE: I think that's correct. LILCO did
10 rely --

11 JUDGE WILBER: 56 -- whatever the proper volume
12 is --

13 MR. ROLFE: I think that is correct.

14 JUDGE WILBER: Let me go further. I also read
15 in the decision that the HPCI isn't ready yet. Is that
16 correct? It wasn't seismicly qualified?

17 MR. ROLFE: There were some changes mated on it --

18 JUDGE WILBER: We are receiving conflicting
19 things. One says the plant is ready, it has been ready; I
20 think one paragraph later I find the HPCI isn't seismicly
21 qualified and then in another paragraph I find you have to
22 have either HPCI or RCIC, so I have a little disconnect in
23 the line of thought of the Board.

24 MR. ROLFE: The evidence was that the HPCI was
25 undergoing some modifications as a result of some

1 information about the HPCI pumps which had arisen at other
2 plants. It was originally seismicly qualified, I believe,
3 and then had to be modified. The evidence was those
4 modifications were underway and would be completed by the
5 time the decision would come down and LILCO would be
6 prepared to go to phases 3 and 4.

7 JUDGE WILBER: One other item. I think the
8 batteries can last for 24 hours, as I recall, the worst
9 power the HPCI or RCIC valves -- and then someone said
10 there was a portable generator on-site. Is that a
11 dedicated generator or is the day they go look for it it's
12 off in some other plant? What is the situation there?

13 MR. ROLFE: Judge Wilber, I do not believe that
14 was a dedicated generator, but keep in mind that as long
15 as the HPCI or RCIC functioned once within that first 24
16 hours, you didn't --

17 JUDGE WILBER: Four days, I think it was.

18 MR. ROLFE: You'd have four days to find that
19 thing and recharge the batteries.

20 JUDGE WILBER: I did have some question about
21 that, too. I think there's a time when you can make that
22 thing function and you would have wasted your effort if
23 you did it too soon. I think probably you should wait
24 until the level goes down until you start it and I saw
25 nothing in the decision that said there were procedures

1 controlling that. Perhaps there are.

2 MR. ROLFE: Judge, I'll be candid with you. I
3 don't believe that was an issue that was discussed before
4 the Licensing Board.

5 I would now let Mr. Earley address the Board's security
6 concerns.

7 JUDGE EDLES: I would remind Mr. Earley, I would
8 like, as Judge Rosenthal would, some sort of status report
as to where we are, just for my own personal perspective.
10 I would like to know where this proceeding fits in that
11 whole status report, whether we are to some degree going
12 through an academic exercise here or not.

13 MR. EARLEY: Yes, Judge, I will do that. If I
14 could just address Judge Wilber's last question before we
15 go on to security, the generator discussed for charging
16 the batteries was on-site. Procedures have been written
17 to cover various uses and there also are procedures to
18 control level in the reactor in the event of accidents.

19 With respect to the status of the procedure, the status
20 of the plant, the Colt diesel's construction is currently
21 in process. The first machine should operate within the
22 next week or so. There are three Colts on-site.

23 The testing of those machines will be completed in
24 approximately May. That doesn't mean they will be
25 available in service for May, because in order to hook

1 them into the plant you would have to disconnect the TDI
2 diesel generators which we are confident will be used, so
3 the current plans call for hooking the Colts in at the
4 first refueling outage so that Shoreham will have six
5 diesels.

6 JUDGE ROSENTHAL: When are you predicting now?
7 I realize predictions of when a particular adjudicatory
8 decision might come down are fraught with some peril, but
9 I assume that your client has got a schedule based upon
10 assumptions being made as to various adjudicatory
11 milestones.

12 When in the present planning is it assumed that Judge
13 Brenner's Board's decision on the diesels will be handed
14 down?

15 MR. EARLEY: We expect the Brenner Board
16 decision on diesels will come down sometime in April, late
17 April or May of this year.

18 JUDGE ROSENTHAL: April or May? When are you in
19 hearing? Aren't you in hearing before them?

20 MR. EARLEY: Tomorrow, hearings start in front
21 of the Brenner Board on the remaining issues in the diesel
22 proceeding. We hope that those proceedings will take no
23 more than one to two weeks.

24 JUDGE ROSENTHAL: Didn't Judge Brenner hold open
25 the possibility they would go into March?

1 MR. EARLEY: There is that possibility, but I
2 think the parties in discussing the cross-examination
3 plans now probably think that it can be done in, certainly
4 no more than two weeks.

5 JUDGE ROSENTHAL: What are you allowing for --
6 let's pursue that schedule. What are you allowing for
7 proposed findings of fact and conclusions of law? And
8 then what period of time are you allowing for Judge
9 Brenner and his colleagues to decide it? It just seemed
10 to me offhand -- you may prove to be right, that your
11 estimate was extremely optimistic.

12 MR. EARLEY: Proposed findings of fact have
13 already been submitted on the crankshaft issue.

14 JUDGE ROSENTHAL: All right.

15 MR. EARLEY: The issue of the diesel generator
16 blocks, a substantial amount of testimony has already gone
17 on in that. The parties are in the process of preparing
18 findings, and I believe the schedule calls for submission
19 of those findings within a week of the close of the record
20 of this reopened portion of the proceeding.

21 And also, Judge Brenner has informed the parties that
22 any supplemental findings on the small piece of hearings
23 that's supposed to be starting tomorrow will be on a
24 fairly tight timeframe.

25 JUDGE EDLES: So as I understand it both the

1 Colts and Judge Brenner's decision on the TDIs ought to be
2 ready sometime in about April or May?

3 MR. EARLEY: The Colts will be physically ready.
4 They will not be hooked into the plant, because in order
5 to hook them into the plant you would have to disconnect
6 the TDI generators.

7 JUDGE WILBER: Is there more to that than just
8 opening a breaker? You mean you don't have enough spare
9 breakers on your emergency buses? You can't put them both
10 in --

11 MR. EARLEY: There is engineering under way now
12 to how you would run the plants on a six-diesel hookup to
13 increase the availability of on-site power. But it is
14 more than just adding another breaker, because of various
15 single-failure criteria that have to be taken into account.

16 JUDGE ROSENTHAL: If there were, for one reason
17 or another, a delay in the decision of the Brenner Board
18 or supposing you were told you couldn't expect that
19 decision before June or July, would that make a difference
20 in the scheduling, in terms of your use of the Colts, for
21 example?

22 MR. EARLEY: My understanding of the ability to
23 use the Colts, it is a longer lead-time item than just a
24 several-month delay. I'm sorry, I can't give you the
25 timeframe. I think if there were going to be a very

1 substantial delay in the Brenner Board decision on the
2 order of months, then the company would have to look at
3 other options.

4 JUDGE EDLES: I see. But if the Brenner Board
5 should issue its decision in May and if the coatings were
6 ready to be tested and hooked up by May you would hook the
7 TDIs up first?

8 MR. EARLEY: The TDIs are already hooked. They
9 are ready to go. They have been tested and ready. In
10 fact --

11 JUDGE EDLES: The company's preference would be
12 to hold off on the Colts until after the first refueling?

13 MR. EARLEY: Yes, sir. And the reason we are
14 confident that the Colts will be ready, the schedule on
15 the construction of the Colts is very close to what the
16 projected schedule is, but we still have the preoperational
17 test program to go.

18 JUDGE EDLES: Just one other question on it.
19 What if the low power testing phase 3 and 4 of the
20 Commission -- if those go forward? What happens if they
21 run beyond the time of the TDIs? Would you continue to
22 use the equipment before us in this case as the power, or
23 would you shift over to the TDIs, assuming the Brenner
24 Board's decision is favorable and the Commission permits
25 immediate effectiveness?

1 MR. EARLEY: As the low-powered record reflects,
2 there's no need to shift over; the TDIs are hooked up and
3 ready for use.

4 JUDGE EDLES: This equipment would then serve as
5 a backup.

6 MR. EARLEY: It would be a backup, and the
7 company intends to keep the equipment available for at
8 least the short term.

9 JUDGE ROSENTHAL: I thank you for the status
10 report. We can get on to security.

11 MR. EARLEY: Yes. LILCO's position that the
12 licensing board properly denied admission of the security
13 contentions proposed by Suffolk County and New York State.

14 There are several key facts we think should be kept in
15 mind in looking at the Licensing Board's decision.

16 First, at power levels up to 5 percent, none of the
17 accident and transient event normally analyzed in a safety
18 analysis, with the exception of a LOCA, require any AC
19 power for at least 30 days, and there is evidence in the
20 record suggesting that power may not be needed
21 indefinitely.

22 Therefore, with respect to security measures there's
23 just no need, by and large, to protect these alternate
24 power supplies for anything except the LOCA, and we think
25 that's an important consideration.

1 Second, the security deliberations by the Miller Board
2 were not undertaken on a clean slate. There was a
3 substantial security record and information developed in
4 the operating license proceeding. There was a
5 comprehensive settlement agreement, and that settlement
6 agreement did not preclude litigation per se of security
7 issues, but the Board could not ignore that there was an
8 approved complex security plan and procedures that all of
9 the parties had had access to and had agreed upon.

10 JUDGE WILBER: Is that security agreement a
11 living thing? Or was it a snapshot of what was in place
12 in 1982?

13 MR. EARLEY: That's a good point, Judge Wilber.
14 It is a living agreement in that although it agreed to
15 certain security provisions for the plant it also imposed
16 in it close cooperation between the Suffolk County Police
17 and the LILCO security personnel.

18 JUDGE WILBER: Did it have any modifications to
19 it?

20 MR. EARLEY: All modifications to the security
21 plan are forwarded to Suffolk County for their comment and
22 review, and there are various provisions in the settlement
23 agreement as to exactly what rights Suffolk County has in
24 enabling -- in their ability to comment.

25 If the company tries to change something that is

1 specifically addressed, their rights are stronger than if
2 it is something that's not specifically addressed in the
3 agreement. They do have the right to comment and to
4 participate, and the security agreement anticipates close
5 cooperation between Suffolk County and Long Island
6 Lighting Company on security measures.

7 And I think that is an important point that ought to be
8 brought out. Despite the availability of the opportunity
9 for the county police to indicate whether they have any
10 security concerns and make comments to the company about
11 security, no specific concerns have been raised through
12 that settlement mechanism. So I think that gives the
13 Board some assurance that there really are no safety
14 concerns that need to be addressed with respect to
15 security.

16 The third point that I think needs to be kept in mind
17 in looking at security is that the Commission in its July
18 18th order which addressed security didn't give the
19 Licensing Board unlimited discretion to litigate security,
20 and, in fact, it gave the Board guidance on what issues --
21 what to look at when deciding whether issues were
22 admissible.

23 It told the Board to look at whether they, the issues,
24 were responsive to the -- and relevant to the exemption
25 request; whether they were reasonably specific; whether

1 they were capable of on-the-record litigation; whether
2 they were applicable to low power. And that's an
3 important point:

4 The Commission specifically told the Board to look at
5 the applicability to low power.

6 So the Commission itself specifically anticipated that
7 the Board would police contentions that were submitted to
8 ensure that only valid issues were litigated; and in fact
9 if the Appeal Board reviews the Licensing Board's
10 September 19 security decision, that demonstrates that the
11 Board carefully applied those criteria set out by the
12 Commission in determining whether the contentions should
13 or should not be admissible.

14 The security contentions really can be boiled down to
15 two issues. First the County and New York State contended
16 that, since the TDI diesel generators were considered
17 vital areas and that equipment was being replaced, if you
18 will, by the EMDs and the 20-megawatt gas turbine, that
19 the security requirements for the TDIs automatically were
20 transferred to the alternate power supplies and they had
21 to be treated as vital areas.

22 Second, the other contentions alleged that since
23 modifications were made to the plant, in that these EMDs
24 were installed on the site and a 20-megawatt gas turbine
25 was installed on the site, that that per se made the

1 existing security arrangements which had been discussed
2 and agreed to, that that per se made the security --
3 existing security plan inadequate. And they did that
4 without showing specifically how the new -- the
5 modifications affected the existing security plan.

6 With respect to the Board's determination that the
7 supplemental power sources, or the EMDs and the 20-megawatt
8 gas turbine did not need to be vital areas, first the
9 Board correctly decided that the NRC's regulations don't
10 even require that on-site diesel generators be considered
11 as vital areas.

12 JUDGE WILBER: Could I ask you a question on
13 that? Does the regulation call for any -- does it specify
14 any equipment? You are saying the emergency on-site power
15 is not specified in part 73, I guess is what you are
16 saying; is that correct?

17 MR. EARLEY: Yes, sir. Part 73 has a definition
18 of vital areas.

19 JUDGE WILBER: Does it specify any equipment in
20 there?

21 MR. EARLEY: It doesn't specify any particular
22 equipment?

23 JUDGE WILBER: Shall I take your logic and say
24 the containment area isn't a vital area?

25 MR. EARLEY: No. There is a reason why the

1 on-site diesels were not required to be vital areas and
2 that's because right now pending before the Commission is
3 a proposed rule that would specifically require diesel
4 generators, on-site diesel generator or on-site power
5 supplies to be considered --

6 JUDGE WILBER: What else does it require?
7 Containment?

8 MR. EARLEY: There are a number of other
9 specific --

10 JUDGE WILBER: My point is I didn't see anything
11 in part 73 that excluded diesel generators or containment
12 or anything else. And yet you are saying, because it's
13 not mentioned the emergency power is automatically
14 excluded.

15 MR. EARLEY: As the Staff indicated in various
16 arguments on the security issues, the Staff conceded that
17 it is only really required as its practice to make backup
18 power supplies vital areas, that that practice has only
19 been required in the last two years or so; and I think
20 that that suggests that prior to that time the regulation
21 had not been interested to require making these on-site
22 power sources vital areas, and that's one of the reasons
23 why this particular provision is put in the rule.

24 JUDGE WILBER: You are saying that there were no
25 vital areas prior to two years ago?

1 MR. EARLEY: No. That on-site diesel generators
2 were not necessarily considered vital. Many plants do
3 have them as vital areas, but there are plants --

4 JUDGE WILBER: In fact you just mentioned your
5 TDIs were in a vital area.

6 MR. EARLEY: And there are plants that don't
7 have them as vital areas.

8 JUDGE WILBER: Is that correct?

9 MR. EARLEY: That was our understanding from the
10 NRC Staff, and I think that was indicated in some of the
11 arguments by the Staff in front of the Licensing Board;
12 and they did indicate that this practice is a practice
13 that has come about in the last two years of trying to
14 make people make them vital areas.

15 JUDGE WILBER: If they had been doing this for
16 two years then I don't understand your footnote, I think
17 it's number 30, where you said their September 11 letter
18 was attempting to set a precedent? If it had been doing
19 it for two years, hasn't the precedent already been set?

20 MR. EARLEY: A better way to state it is they
21 are trying to avoid an adverse precedent. My
22 understanding is that the Staff's view was that since this
23 proposed rule was pending and since the Staff had been
24 developing this practice, they didn't want to deviate from
25 what they had been trying to establish by allowing

1 somebody to have a backup power supply not be considered a
2 vital area. But the Staff conceded in various arguments
3 that they hadn't taken into account -- in trying to
4 determine whether that would be or would not be an adverse
5 precedent, they had not taken into account the fact that
6 this one was a low-power proceeding, and, two, that it was
7 an exemption proceeding. And the reason the second is
8 significant is that one of the intervenor's arguments is
9 you must take all of the requirements applicable to
10 on-site power systems, whether it be quality assurance
11 requirements, single failure requirements, or security
12 requirements, and automatically transfer those
13 requirements with blinders on without looking to whether
14 it really makes sense to have all those requirements on
15 the alternate power supplies that are being used.

16 The point is that if that concept is adopted, there's
17 no need for Section 50.12(a), because if you have to
18 transfer all of the requirements then you don't need an
19 exemption from the regulations.

20 JUDGE WILBER: This requirement is under part 73,
21 which has its own exemption; 73.5, I think, is the
22 exemption clause for part 73. And I think 50.12(a) says
23 that those exemptions apply only to that part.

24 Are we jumping from part to part here?

25 MR. EARLEY: No, we are not. The exemption that

1 LILCO has requested is the exemption of having qualified
2 diesel generators. Along with having qualified diesel
3 generators that brings along with it regulatory baggage.
4 It must meet the quality assurance requirements of GDC-1,
5 seismicly qualified; LILCO had made it a vital area for
6 security purposes, the Staff would say that that ought to
7 be required. But, anyway there are certain requirements
8 that are imposed on it.

9 What we are saying is when you apply for an exemption
10 from having that on-site source of power, that doesn't
11 automatically transfer all those requirements to what you
12 are using in place. You have to look at function. And
13 one of the things the Board did was look at functions of
14 the power sources during low power operation and, in fact,
15 found that, absent a loss-of-coolant accident like a LOCA,
16 you didn't need power at all, so there wasn't a reason to
17 protect these alternate power supplies.

18 JUDGE WILBER: How do you get along with that?

19 MR. EARLEY: The Board weren't going to look at
20 a loss-of-coolant accident. The Board found that a
21 loss-of-coolant accident was a very unlikely event.
22 That's particularly important because we are only looking
23 at a short period of time that this exemption applies to.
24 We are not asking for an exemption for the life of the
25 plant. It is until the TDI diesels can be licensed or the

1 Colt diesel. So we are looking for a small period of time.

2 Second, the Board then looked and said that you would
3 have to assume that at the same time that this unlikely
4 event was occurring that you had some kind of security
5 attack going on at the plant.

6 JUDGE ROSENTHAL: Isn't this the merits of that
7 contention? It would seem to me this is the kind of
8 argument you could have advanced once the contention was
9 in litigation. I don't understand how you can offer this
10 as a justification for its exclusion.

11 MR. EARLEY: Judge Rosenthal, all of these facts
12 were already on the record. As the Commission said, there
13 must be a need for on-the-record litigation. There was no
14 dispute. LILCO said that its alternate power supplies are
15 not vital areas, and we conceded that.

16 JUDGE WILBER: There was evidently a difference
17 of opinion about that; wasn't there?

18 MR. EARLEY: There was no difference of opinion
19 whether they were or were not vital areas. The County
20 said they should be. We said they shouldn't be. These
21 arguments we are making are based upon facts that had
22 already been established in the lower power record.
23 There's no reason to go back and relitigate those facts
24 all over again.

25 The Board had all the information it needed in front of

1 it to make the decision, and that's what the Board did.
2 And it went through and looked at what the low-power
3 record had established, that you would have to disable all
4 of the off-site power sources, and in fact it had
5 previously found that LILCO exceeded GDC-17.

6 JUDGE ROSENTHAL: You are saying what the Board
7 in effect gave you was summary judgment or summary
8 disposition, not exclusion of the contention. If these
9 are factual matters, if they were established beyond
10 peradventure in the existing records, then perhaps this
11 was a summary disposition matter, but the Board apparently
12 didn't look at it that way. The Board, I thought,
13 excluded this contention as a matter of law. Am I wrong
14 in that?

15 MR. EARLEY: It did exclude it. First --

16 JUDGE ROSENTHAL: How are we talking about facts
17 if this was excluded as a matter of law?

18 MR. EARLEY: The first point was that it's just
19 not required as a matter of law. I think the Licensing
20 Board found that based upon its analysis of the Federal
21 Register notice promulgating the rule, coupled with the
22 fact that it had not been long-standing practice to make
23 these things vital areas.

24 JUDGE WILBER: You are saying that the normal
25 on-site emergency power, if I use "normal" and "emergency"

1 in the same breath, is not a vital piece of equipment?
2 Vital material?

3 MR. EARLEY: It is for the Shoreham plant. But
4 that doesn't mean it's required --

5 JUDGE WILBER: I'm talking about 73-55, whatever
6 -- I'm sorry, the definition of "vital equipment." Why
7 doesn't any purchase power fall into that category or any
8 power that you rely on to get yourself out of an accident
9 decision?

10 MR. EARLEY: If you look at the definition of
11 "vital area," it calls for areas that could -- calls for
12 release of radioactive equipment or equipment that
13 prevents the release of radioactive effluents.

14 That can be your ECCS systems.

15 JUDGE WILBER: It could be. What powers the
16 ECCS system?

17 MR. EARLEY: What powers the ECCS system? How
18 far back in the chain does that security rule apply? I
19 think what we are saying is the Staff now believes that it
20 should include on-site emergency power sources, and they
21 want to make sure it does and they have promulgated that
22 rule. But that hasn't been an across-the-board rule up
23 until this time. And the fact that the rule is still
24 pending and comments aren't due till March 17 indicates
25 that it would be premature to impose that as a requirement

1 on Shoreham right now for their supplemental power sources,
2 particularly considering the fact that this is a low-power
3 proceeding and the Commission directed the Board to take
4 into account low power in determining the admissibility of
5 contentions.

6 JUDGE WILBER: I thought that rule itself said
7 it was a clarification. I don't see where it was imposing
8 or implying it was imposing new items. It said certain
9 items will be deemed vital in all cases, and in there --

10 MR. EARLEY: Which I think suggests, sir, in
11 some cases it has not been deemed vital in the past.

12 JUDGE WILBER: No, there are times when what
13 happens in the course of the life of a plant it might not
14 have to be kept under tight control. I thought that was
15 one of the purposes of this proposed rule.

16 They also included, as I mentioned, the containment and
17 control rooms as lifting up specific items which were not
18 lifted up in the present 73. Are you telling me the
19 containment was never considered a vital area?

20 MR. EARLEY: Judge, I just haven't looked at how
21 the containment has been treated in the past. That was
22 not litigated. I think it would be fair to say the
23 containments were treated as a vital area.

24 Let me make one other point because of my time --

25 JUDGE ROSENTHAL: You have well exceeded it. I

1 have been fairly tolerant because most of your time has
2 been taken responding to Board questions, but I would like
3 you to bring your argument to an end.

4 MR. EARLEY: If I may make one point, Judge,
5 with respect to the Staff position on vital areas, one
6 thing must be kept in mind. The Staff had concluded in
7 Safety Evaluation Report No. 5, which is on the record,
8 that there is no technical reason to make these alternate
9 power supplies vital areas, and in fact -- I think that
10 indicates there was no safety concern. The Staff
11 indicates -- indicated that their change of position, that
12 these alternate power supplies should be made vital, did
13 not reflect any change in their technical conclusions
14 about safety or not safety. They were concerned with the
15 administrative problems that might be created, of having --
16 trying to go forward with this rule, trying to have plants
17 make their on-site sources vital, and then allowing some
18 plant to have an alternate source not be vital.

19 JUDGE ROSENTHAL: Thank you.

20 Mr. Perlis? I may have forgotten about you at the
21 calendar call, but I recall you at present.

22 Mr. Perlis, you may proceed.

23 MR. PERLIS: Good afternoon. I think it's clear
24 from listening to the other parties that the real question
25 in this case is not over the facts surrounding this

1 exemption request but rather over the interpretation of
2 the standard to be applied to the request. That standard
3 was set out in CLI-84-8, and I would like to talk a little
4 about the "as safe as" standard first. "The Applicant
5 must demonstrate at power levels for which it seeks
6 authorization" -- and in this case we are talking about 5
7 percent power or less -- "operation would be as safe under
8 the conditions proposed by it as operation would have been
9 with a fully qualified on-site AC power source."

10 I think it's no secret that the parties have approached
11 that standard very differently. The Intervenors have
12 continually argued that a comparison between the
13 originally-proposed TDIs and LILCO's proposed alternate
14 power configuration is what was mandated by the Commission.

15 JUDGE ROSENTHAL: Well, they have got literal
16 language employed by the Commission to support them, do
17 they not? Something is not "as safe" if the margin of
18 safety is less; is it?

19 MR. PERLIS: I don't believe so. What the
20 Commission said was you have to show that operation would
21 be as safe as operation would have been with a fully
22 qualified on-site source, not the TDI source originally
23 proposed by LILCO. I think that difference is an
24 important one, because if you look at how the Staff
25 determined that the "as safe as" standard was satisfied,

1 what the Staff did is it applied the GDC-17 core cooling
2 criteria to the alternate system and determined that, in
3 fact, the alternate system adequately satisfied the core
4 cooling criteria of GDC-17. That's a very important
5 distinction, because Suffolk County and the State of New
6 York did not address whether the alternate system
7 adequately satisfied core cooling criteria of GDC-17. If
8 you have reached the Commission standard that's the
9 critical issue.

10 JUDGE ROSENTHAL: You are saying that what you
11 look at is what is the criterion that the particular
12 requirement is designed to satisfy?

13 MR. PERLIS: In essence --

14 JUDGE ROSENTHAL: If the alternate equipment
15 will satisfy that criterion, then the alternate equipment
16 is as safe as --

17 MR. PERLIS: A fully qualified source, because
18 it will be performing the same function as that fully
19 qualified source. I think one has to look at what GDC-17
20 requires from a power system. It requires two essential
21 safety criteria.

22 First, it requires that specified acceptable fuel
23 design limits and design conditions of the reactor coolant
24 pressure boundary are not excised as a result of
25 anticipated operational occurrences. Second, GDC-17

1 requires that the core remain cooled and containment
2 integrity and other vital functions maintained in the
3 event of postulated accidents.

4 In determining whether the alternate configuration was
5 as safe as a qualified system, the staff focused
6 exclusively on whether that alternate configuration could
7 adequately assure that those criteria would remain met.
8 It did this through a two-tiered process. First the Staff
9 applied an analysis using the FSAR September 15 event to
10 determine whether emergency AC low power would be needed.
11 I want to stress the evidence uncovered here has been
12 uncontroverted by the County or State. The results of the
13 analysis show that only four of the chapter 15 events are
14 affected at all by the loss of power. For three,
15 core-cooling AC power would not be needed for 15 days, and
16 assuming that HPCI or RCIC worked once within the first
17 four hours, no AC power would be needed for at least 30
18 more days. You don't need an additional injection from
19 HPCI or RCIC.

20 For the fourth event and that's the combined loss of
21 off-site power and loss-of-coolant accident, using
22 extremely conservative assumptions core cooling would not
23 be needed for at least 55 minutes. That's the first part
24 of the Staff's analysis, and as I say it was
25 uncontroverted below. The second part of the analysis

1 entails determining whether, given what the first part of
2 the analysis has shown you, there's adequate assurance
3 that AC power would be restored from the alternate
4 configuration within the time needed; and again that time
5 is 55 minutes, and it's only needed in the event of a
6 concurrent loss-of-coolant accident. The Staff found that
7 there was such adequate assurance that core cooling could
8 be maintained, and the Intervenors have not seriously
9 controverted that finding either.

10 I think if you look at what the Intervenors have
11 focused on, and the PRA testimony is the perfect example
12 of it, what they are alleging there is that the alternate
13 configuration is not as safe as the TDIs. They are not
14 saying the alternate configuration does not adequately
15 fulfill the safety requirements of GDK-17. That being the
16 case, the PRA testimony was really irrelevant to the
17 ultimate considering for the Board to make, which was
18 whether that alternate configuration provides the level of
19 safety that would be provided by a system in compliance
20 with GDC-17. The Staff's analysis does show that in fact
21 it has meet those safety requirements.

22 I can't stress enough the fact to this Board that none
23 of the essential safety issues were ever controverted below.

24 JUDGE ROSENTHAL: Talk about the public interest,
25 if you would.

1 MR. PERLIS: Yes. Turning next to the exigent
2 circumstances, the Commission determined that a resolution
3 on that standard turned on a balancing of a number of
4 identified equities.

5 JUDGE ROSENTHAL: It did? You are equating the
6 public interest with those items laundry-listed in that
7 footnote?

8 MR. PERLIS: Yes, sir.

9 JUDGE ROSENTHAL: I would like you in that
10 circumstance to tell me what any internal inconsistencies
11 in the regulation, which is one of the standards there,
12 has to do with the public interest? If there's a
13 relationship between the two it totally escapes me.

14 MR. PERLIS: I would think the public interest
15 there is that if there are internal inconsistencies in the
16 regulation -- and the Staff found that there were none
17 here -- but if for argument's sake there were internal
18 inconsistencies in the regulation, then one could argue
19 that, through a sense of fairness, the --

20 JUDGE ROSENTHAL: We're not talking about
21 fairness. We are talking about public interest. We are
22 not talking about equities in favor of the utility. I
23 don't doubt that, if there are inconsistencies in the
24 regulation, I don't doubt that if the Applicant has made a
25 good faith effort to comply with the regulations that

1 those are equitable considerations that might, if we are --
2 if this is turning exclusively on a matter of balancing
3 equities, could tip a balance in favor of the utility. We
4 are talking about public interest, and I don't see how --
5 still, how those have any bearing, either one of them, on
6 the public interest.

7 MR. PERLIS: I think in that circumstance the
8 public interest is exactly that of being fair to a license
9 Applicant in a case where the NRC regulations wouldn't
10 provide the Applicant with adequate guidance as to what to
11 do. I think there is a public interest in regulations
12 being applied fairly, but as I say the Staff did not find
13 that there were any internal inconsistencies in this case.

14 JUDGE ROSENTHAL: I understand that, but I have
15 some problem with your suggestion that this represents
16 what the Commission had in mind by "public interest"; and
17 in determining where the public interest lies, I would
18 gather you would have it that we simply look at these
19 factors.

20 If the Commission really had thought that this was what
21 public interest was all about, I would have thought they
22 would have said so.

23 MR. PERLIS: Well, I think first of all, the
24 Commission did say so.

25 JUDGE ROSENTHAL: Where?

1 MR. PERLIS: In its footnote number 3 on CLI-84-8.

2 JUDGE ROSENTHAL: I have it before me.

3 MR. PERLIS: Where it deals with the equities to
4 be balanced.

5 JUDGE ROSENTHAL: The only interest is the
6 Commission's interest in public regulation.

7 MR. PERLIS: They could only have come from the
8 public interest requirement 50.12. They clearly do not
9 deal with the public health and safety nor do they deal
10 with common defense and security.

11 JUDGE ROSENTHAL: So you are telling me that all
12 of what the Applicant put in here itself, that was all
13 irrelevant. The Applicant misread this regulation,
14 because if you are right, these factors that the Applicant
15 served up about the advantages of training or the
16 advantages attendant upon hastening the day when the plant
17 would be ready for full power operation, they were really
18 beside the point? Is that right?

19 MR. PERLIS: Well, I wouldn't argue that they
20 are beside the point. I think there is a second step.
21 The first step is after looking at these equities, is
22 there something additional in terms of public interest
23 which need be considered?

24 I won't argue that the Commission in establishing these
25 equities said these are the only equities that can be

1 considered. I think what they said is in determining
2 whether the public interest is met, first consider these
3 equities; secondly, is there anything else to be
4 considered? And I think then one has to look at what the
5 additional items offered for consideration are.

6 JUDGE ROSENTHAL: Well, let me ask you this,
7 Mr. Perlis, since you are concerned and I think
8 legitimately so, about fairness and equity where the
9 Applicant is concerned, do you think it is fair for the
10 Licensing Board on the one hand to accept this evidence
11 from the Applicants as to what the Applicants regarded as
12 being the public interest that would be served by granting
13 this exemption and then shutting the door entirely upon
14 the Intervenors when they wished to come up with, or
15 endeavored to come up with evidence pointing in the
16 opposite direction? Is that your concept of fairness?

17 MR. PERLIS: That would not be my concept of
18 fairness, but I don't think that's an accurate reflection
19 of what the Board did. It didn't turn away everything the
20 Intervenors tried to bring forward on fairness. What it
21 did turn away was all the detriments alleged by
22 Intervenors that when examined closely have nothing to do
23 with the grant of an exemption but had everything to do
24 with whether a low power license should issue in the
25 absence of resolution of security concerns dealing with

1 full power.

2 All of the detriments talked about by the Intervenor
3 have nothing to do with whether a low power license goes
4 forward now or in three months or six months.

5 JUDGE ROSENTHAL: It may have something to do
6 with whether there is a sufficient public interest
7 justification for granting an exemption. Why grant an
8 exemption at this point, if, for example, this plant's
9 chances of ever going on line are dismal or, alternatively,
10 the probability of this plant coming on line in the next
11 six months, year, year and a half are dismal? I mean,
12 what public interest is going to be served by granting
13 this exemption?

14 MR. PERLIS: Let me give you the Staff's
15 approach on that issue. First of all, given that there
16 are no safety issues involved here, and we think the
17 record reflects that there are not, is there some reason
18 to treat LILCO's exemption request differently than one
19 would treat a qualified system for purposes of licensing?

20 Now, the Commission has set up the equities that have
21 to be examined. If one finds that those equities favor
22 issuance of a license -- and we feel that the Board
23 correctly found that the balancing of those equities do
24 favor issuance of a license -- one then has to look at
25 whether there are any countervailing public interest

1 considerations which might militate --

2 JUDGE ROSENTHAL: Intervenors tried to serve up
3 a number of them and the Board cut them off, I thought.
4 If that's not the correct scenario you can enlighten me.

5 MR. PERLIS: But what I'm saying, the items
6 served up by the Intervenors had nothing to do with
7 whether an exemption should issue. Every single one of
8 those detriments is affected totally by whether a low
9 power license should ever issue before uncertainties
10 surrounding full power license are resolved, every single
11 detriment that the Intervenors are talking about here. It
12 has nothing to do with whether a low power license issues
13 now, in three months or six months. It has to do with
14 whether you issue a low power license in the absence of
15 resolving full power uncertainties, given that the
16 Commission has said that LILCO is entitled to a low power
17 license once it can reach GDC-17. And given that there
18 are no safety issues to warrant differentiating between
19 this system and a system in compliance with GDC-17, I just
20 don't believe that the Intervenors have shown any public
21 interest whatsoever in postponing the issuance of a low
22 power license for three to six months.

23 What they have tried to show is a public interest in
24 not allowing a low power license to go forward at all, and
25 that issue has been resolved by the Commission.

1 I think if you look carefully at the detriments offered
2 up by the Intervenors they all relate solely to that issue,
3 and that issue, I don't believe should have been taken
4 into consideration by the Miller Board.

5 JUDGE ROSENTHAL: What did you have to say about
6 the fact that the Licensing Board, in rejecting the
7 testimony of Mr. Kessel, relied on the Commission's answer
8 to the Brenner Board as well as a subsequent decision? Do
9 you think that their answer to the Brenner Board also
10 applies in the context of an exemption proceeding?

11 MR. PERLIS: Yes, sir. I think it applies
12 because once the Commission has talked about what equities
13 to consider, if we are to go beyond those equities it's
14 incumbent upon the State and County to show some public
15 interest detriment in granting an exemption. Mr. Kessel's
16 testimony is it is a detriment only if a low power license
17 issues.

18 JUDGE ROSENTHAL: Full power?

19 MR. PERLIS: No. If a low power license will
20 issue at all, then Mr. Kessel's detriments have no bearing
21 on this case; and the Commission has already said that
22 when a system is found to meet GDC-17 a low power license
23 will issue, that LILCO is entitled to such license.
24 That's the Commission's words.

25 JUDGE ROSENTHAL: I think we understand your

1 position on that. Would you turn to the security issue
2 there? Has the Staff changed positions or am I imagining
3 it?

4 MR. PERLIS: First of all I would like to clear
5 up what our position was below. We reduced the security
6 contentions to two somewhat related but somewhat different
7 contentions.

8 The first is whether the alternate power equipment had
9 to be treated as equipment and the second was whether the
10 securities equipment as a whole for the rest of the plant
11 had to be revised to reflect the addition of essentially
12 new buildings on-site. We strongly oppose the admission
13 of any portion, and we oppose it on the grounds that,
14 having had access to the security plan for more than two
15 years the Intervenors never suggested any reason why the
16 presence of new buildings on-site would affect the
17 security plan for the plant as a whole.

18 As to the first contention which deals with the
19 vitalization of the alternate configuration, the Staff
20 took the position below that under 73.2, which defines
21 vital equipment, that a better reading of that regulation
22 is that alternate power sources should be treated as vital
23 equipment.

24 What the Board found was based on two very important
25 factual predicates: one that it's a lower power exemption

1 proceeding, and second that in the context of this
2 proceeding backup AC power is only needed in the event of
3 a LOCA. The Board concluded based on those two predicates
4 as a matter of law that the alternate configuration need
5 not be considered as vital equipment.

6 JUDGE ROSENTHAL: It could really decide that as
7 a matter of law, or at best could it have been decided as
8 a matter of fact?

9 MR. PERLIS: No, I think -- I -- I won't quibble.
10 The factual issues were not controverted by anyone. It's
11 clear in what situation we are dealing. It's an exemption
12 proceeding. You don't need AC power except in the event
13 of a LOCA. This whole question then becomes, based on
14 those facts -- and those facts aren't in controversy as a
15 matter of law -- need the equipment be treated as vital?

16 JUDGE EDLES: The 55-minute number also is not
17 in controversy?

18 MR. PERLIS: The only controversy there is
19 between the Staff and LILCO. LILCO feels the Staff is
20 excessively conservative. It was not controverted, at
21 least on the low side.

22 JUDGE ROSENTHAL: In order to justify that
23 holding we have to conclude that it is legally significant
24 that the probability of occurrence of a LOCA is low; is
25 that right? That was a necessary ingredient of this

1 determination, so we have to decide then, as a matter of
2 law, that's a critical factor.

3 MR. PERLIS: Again I don't think that factor was
4 in controversy either.

5 JUDGE ROSENTHAL: I'm not saying whether it was
6 in controversy. I'm asking you, we have to say that makes
7 a difference here?

8 MR. PERLIS: I would agree.

9 JUDGE ROSENTHAL: That how probable or
10 improbable a LOCA is?

11 MR. PERLIS: Part and parcel of backup AC power
12 only being needed in the event of a LOCA is that that
13 event will only be needed rarely and the backup LOCA will
14 only be needed rarely.

15 JUDGE ROSENTHAL: So the fact that I take it, if
16 there is a LOCA, combined with the loss of all AC power,
17 you can have core damage if the power is not restored in
18 55 minutes, is regarded as a "no, never mind"?

19 MR. PERLIS: The testimony indicated that in 55
20 minutes you would begin to exceed the core temperature
21 limits set up, I believe, in 50.46.

22 JUDGE ROSENTHAL: All right.

23 MR. PERLIS: That was the cutoff used for a 55
24 minutes. It's not core damage would immediately result.

25 JUDGE ROSENTHAL: Whatever happens after 55

1 minutes, that's not regarded as significant, because the
2 LOCA is an improbable occurrence; is that right?

3 MR. PERLIS: That was the Board's legal
4 conclusion.

5 JUDGE ROSENTHAL: You support that?

6 MR. PERLIS: We have not supported that.

7 JUDGE ROSENTHAL: Okay.

8 MR. PERLIS: I want to make one point very clear
9 though, and that is that Intervenors in their brief have
10 provided no reason to question that determination
11 whatsoever. The only argument they make against the Board's
12 ruling is the fact that the Board ruled in the way it did
13 because the Staff supported the Intervenors and frankly I
14 think one has to give Judge Miller more credit than that.

15 JUDGE ROSENTHAL: Perhaps. But let's get to
16 what your position is. The hour is late.

17 MR. PERLIS: To be frank, the Staff has never
18 reached a position on this for one very simple reason.
19 After the Miller decision came out the Staff negotiated
20 with the utility and got the utility's agreement to treat
21 as vital the EMD diesels.

22 JUDGE ROSENTHAL: I thought the action started
23 before the decision came out.

24 MR. PERLIS: The Staff's decision was taken
25 before the decision came out. It was after the decision

1 the utility indicated it would go along with our request
2 voluntarily, in view of Miller's decision, that they would
3 voluntarily agree to provide protection for the EMDs.
4 Once that happened the Staff's interest in this matter,
5 given the limited nature of Judge Miller's decision,
6 because he does restrict it to an exemption proceeding, in
7 these very rare circumstances that we don't foresee
8 recurring again, the Staff never did decide whether Miller
9 was correct or not. We certainly took the position below
10 that this equipment should be vitalized. It is now being
11 vitalized in --

12 JUDGE ROSENTHAL: Well, now are you interested
13 in how good, bad or indifferent the security protection
14 that is being provided might be?

15 MR. PERLIS: As part of the agreement we reached
16 with the utility the Staff was very interested in what
17 that protection would be and the Staff found that that
18 protection was equivalent -- was the same as the
19 protection that would be accorded to a piece of vital
20 equipment.

21 JUDGE ROSENTHAL: All right. The Staff
22 determined that.

23 MR. PERLIS: I'm talking about resolving the
24 Staff's concerns. The Staff made very clear --

25 JUDGE ROSENTHAL: Fine. That's very good and

1 that led the Staff to state in its final footnote in its
2 brief, page 39, that it now considers any disagreement it
3 may have had with the Licensing Board to be moot. That's
4 wonderful. Is it enough that the Staff agrees or were the
5 Intervenors entitled to a shot at whether this security
6 arrangement which was satisfactory to the Staff and to the
7 Applicant is also satisfactory to them? Are they given
8 that opportunity?

9 MR. PERLIS: My first response is, again, that
10 the Intervenors have never come in with any reason to
11 challenge Miller's original decision. I think in that
12 sense the security issue really ends right there. There
13 is no basis in their appeal to question the Miller Board
14 ruling. It's just not in their brief. And these
15 Intervenors are certainly --

16 JUDGE ROSENTHAL: They didn't? I thought they
17 had a section in their brief that dealt with security, and
18 if they weren't attacking the Miller Board's resolution of
19 it I don't know what they were attacking.

20 MR. PERLIS: The only grounds was that since the
21 Staff agreed with LILCO, the Miller Board -- I'm sorry --
22 since the Staff agreed with the Intervenors the Miller
23 Board determined that it had to rule against them and I
24 suggest to you that that's not really an adequate grounds
25 to challenge a Licensing Board decision.

1 JUDGE ROSENTHAL: We'll read that again and see
2 whether that's right.

3 MR. PERLIS: The last thing I would like to
4 address is that the Intervenors argued that a number of
5 procedural rulings by the Board deprived them of a fair
6 hearing. This was a long and fairly bitter proceeding and
7 I think it's common that under such circumstances some
8 Board rulings may later have been found to be incorrect.
9 I would urge you to focus on two particular things in this
10 area.

11 First of all, when it seemed that the Licensing Board
12 determined the 84-8 standards correctly, most of the
13 challenged rulings will be seen to be vindicated. And in
14 those instances, as we find out in our brief where we
15 believe the Board did in fact commit error, a close
16 examination shows the error was harmless in nature and did
17 not deprive them of a fair hearing. Going back to
18 security we find the Board made erroneous findings of fact
19 on security because of having denied contentions that the
20 Board didn't need to treat the issue any further. Since
21 the Board didn't need to treat the issue any further it's
22 difficult to see how Intervenors could possibly be harmed
23 by any findings that might have come out by the Board.

24 I think if you look at the allegations of error that
25 stand up, you'll find that in all cases the error was

1 harmless.

2 JUDGE ROSENTHAL: Thank you, Mr. Perils.

3 All right. One lawyer for rebuttal, not two. And,
4 Mr. Lanpher, I gather you are going to present it and also
5 there's no new matter, you can only respond.

6 MR. LANPHER: Can I confer for a second with
7 Mr. Palomino?

8 JUDGE ROSENTHAL: When I meant one lawyer, I
9 meant the county. If Palomino wants a few minutes of the
10 15 minutes your side has -- and certainly I might say,
11 Mr. Lanpher, there's no necessity to repeat everything
12 that you previously said. We have a transcript as well as
13 a moderately good memory, so just address any points that
14 your opponents made or any observation that the Board
15 might have made that were not really covered in your prior
16 presentation.

17 MR. LANPHER: Well, judge, I will try to refrain
18 from addressing some of the comments the Board made
19 because I'll be quite honest, I think a number of the
20 observations that you made of issues that were giving you
21 difficulty are issues that we press very urgently on
22 appeal. I will try to stay away from those. I think you
23 understand the issues. If you come to grips with those I
24 think the Board has to be reversed.

25 Let me start with security, then I'll go to some other

1 things. We spent some time on that.

2 Mr. Perlis just said you have got to give some credit
3 to Judge Miller. We disagree with a lot of things Judge
4 Miller said, but on security you don't give any credit to
5 Judge Miller, with all respect.

6 Go and read the September 14th transcript; for one.
7 This proceeding -- I don't say this lightly -- was out of
8 control on security. We identified deficiencies; we said
9 let us put on our evidence, we will show you that this new
10 configuration creates vulnerabilities, it's dangerous; we
11 argued it's vital equipment.

12 Mr. Erlich testified, well, you can't get -- what were
13 his words -- he said that, to get these as vital equipment
14 goes far back in the chain.

15 Well, accept a definition of vital equipment, it talks
16 about "any piece of equipment that the failure or
17 destruction or release of which could directly or
18 indirectly lead to the release of radiation."

19 You have to look down the chain. The regulations call
20 for that. We wanted an opportunity to put on evidence.
21 We didn't have an opportunity on security. Nonetheless,
22 Mr. Perlis -- I don't understand how he can call it
23 harmless -- on page 76 and 77 of the Board's decision he
24 makes findings with no citations to evidence. That's not
25 the way these proceedings are supposed to be done. He

1 makes findings about the NRC's subsequent agreement. You
2 can't do that. We were excluded.

3 Let me see if there's anything else on security. I
4 could spend the whole 15 minutes on that, but I think it
5 merits you taking a look at what was done. The
6 contentions were specific. Everyone knew what the
7 concerns -- it really centered primarily on vital
8 equipment.

9 By the way, Mr. Perlis said the equipment has now been
10 made vital. My understanding is that is not the case. It
11 certainly wasn't done the way we wanted it to be done
12 because we said it all had to be vital. My understanding
13 is the fixes are only as to parts of the equipment. It's
14 my understanding it's also not in the security plan as
15 vital equipment, but rather has got in some of the
16 accoutrements of being vital. We are not satisfied with
17 the agreement that came out between the Staff and LILCO,
18 but that's outside the record. That was subsequent and
19 the Board wasn't allowed to rely on it.

20 JUDGE ROSENTHAL: If you have moved off of that
21 subject I would like to ask you a question. Mr. Perlis
22 suggests that the Board's ruling on public interest was
23 correct because all of the down sides that you came up
24 with had nothing to do with the exemption per se, but,
25 rather, dealt with whether it was in the public interest

1 to grant a low power license. And, if I understood
2 Mr. Perlis correctly, he was saying that's really not an
3 issue at this point because the Commission has already
4 determined that once they -- the Applicant has a
5 GDC-17-qualified equipment they have get the low power
6 license. So he said that you are really -- you were
7 really moving down the wrong path because your public
8 interest showing was on something that was impermissible.

9 What is your response to that?

10 MR. LANPHER: My response is I'm going to give
11 you a citation to testimony which has been provide in the
12 appendix. You can read it as well as we can, which --
13 Mr. Perlis is wrong, as a factual matter.

14 Look at Madan and Dirmeier's testimony, pages 41 to 43;
15 look at Mr. Kessel's testimony, pages 6 and 7; look at
16 Mr. Hubbard and Breidenbaugh's testimony --

17 JUDGE ROSENTHAL: Were they talking about a down
18 side on exemption or a down side on giving LILCO a low
19 power license, phase 3 and 4 low power license in
20 circumstances where, among other things the plant might
21 not operate?

22 MR. LANPHER: The testimony I'm citing here had
23 nothing to do with whether LILCO would get a full power
24 operating license.

25 JUDGE ROSENTHAL: I understand that, but again,

1 the position of Mr. Perlis, and again this may also have
2 been what Mr. Rolfe was talking about, was this: That
3 what your public interest, or anti-public interest -- call
4 it what you have will -- demonstration went to was, really,
5 whether or not it was in the public interest to give these
6 folks a low power license. And the argument went, that's
7 not what this is all about here.

8 The question is whether there is a public interest to
9 be served in not giving them an exemption. Because, in
10 terms of the low power license, once they get their
11 off-site power source qualified, be it the TDIs, or be it
12 the Colts, they are entitled to a low power license no
13 matter whether they ever get a full power license or not.

14 So, there, the argument goes, as I understand it, that
15 everything that you have said or your witnesses would have
16 said was, as Judge Miller and his colleagues would have
17 had it, totally irrelevant.

18 What you had to come in and say is that somehow there
19 is a public interest down side to the exemption itself.
20 Not to the low power operations which the Commission has
21 said they get sooner or later. The question is simply
22 whether they get it now by virtue of an exemption or
23 whether they get it later by virtue of either Colts or
24 "blessed" -- if I may put it that way -- TDIs.

25 That's the argument that's being advanced and I'm not

1 so certain that I understand your response to it. I
2 wasn't certain I understood their argument, frankly -- I'm
3 not saying I necessarily agree with it -- but I don't
4 think I understood it until Mr. Perlis advanced it.

5 MR. LANPHER: I'm not sure I do yet, but let me
6 tell what you our evidence did go to. Our evidence did
7 not go to whether, if everything had been perfect you were
8 entitled to a low power operating license. We have
9 litigated that. We have had some disagreements with the
10 Commission obviously. Our evidence went strictly to the
11 question whether, this in an exemption proceeding, in this
12 exemption proceeding, it was in the public interest to
13 grant a special case to say, despite not complying with
14 safety regulations, it's in the public interest to allow
15 this plant at this time to operate nonetheless.

16 For instance, Mr. Madan and Dirmeier had excluded
17 testimony about the adverse impact on the customer service
18 from the grant of this exemption.

19 Mr. Kessel -- I'll be brief --

20 JUDGE ROSENTHAL: From the grant of this
21 exemption or is it from low power testing? Which is it
22 that produces this down side? Because if it's low power
23 testing, then their argument is that beyond the pale.

24 MR. LANPHER: It was from a grant of an
25 exemption to permit low power testing. You can't separate

1 the exemption and low power testing. You can't separate
2 them completely -- let's be frank on it -- because the
3 exemption was to permit low power testing. As you said
4 before, the fact that they had to come in and ask for an
5 exemption as opposed to complying with the regulations,
6 bring in other factors, factors that normally under your
7 precedents would not be looked at but they are mandatory
8 to look at now.

9 Adverse impacts on the customer service which we allege
10 would take place, we weren't allowed to attempt to prove
11 that. Similarly, we weren't allowed to prove that there
12 was not requirement for this power for a long time.

13 Further, Mr. Hubbard and Mr. Breidenbaugh wanted to put
14 in testimony that showed that it wasn't included -- that
15 LILCO had not been diligent in attempting to comply with
16 GDC-17, that they had been on notice for years and years
17 about problems with the TDI diesels, and their own
18 slowness in coming to grips with that was the only reason
19 for needing an exemption. We said it was not in the
20 public interest to exempt someone from compliance with the
21 regulatory requirements when -- if our evidence is
22 believed -- it was their own fault.

23 That's the kind of evidence that was excluded.

24 JUDGE ROSENTHAL: If I may jump to another thing,
25 these are questions that I have.

1 MR. LANPHER: Sure.

2 JUDGE ROSENTHAL: What is your answer to the
3 Staff's argument with respect to the "as safe as" where
4 the Staff says that the critical consideration is whether
5 the substitute configuration, whatever you wish to call it,
6 will meet the criteria that are established for the --

7 MR. LANPHER: Fuel cladding temperatures, I
8 think?

9 JUDGE ROSENTHAL: Right. Staff says that since
10 here it meets it, it should be regarded as "as safe as."

11 Do you dispute the factual premise that the substitute
12 equipment does meet the -- these criteria?

13 MR. LANPHER: I don't dispute that if the power
14 comes on within 55 minutes the fuel cladding temperatures
15 will not be exceeded. That's right.

16 But, in answer to your first question, Judge Rosenthal --

17 JUDGE EDLES: Would you also, I may interject,
18 dispute the fact that it is likely that they'll be able to
19 get the power on in 55 minutes? I think Mr. Perlis says
20 that was essentially an uncontested matter during the
21 litigation.

22 MR. LANPHER: I don't think it was uncontested.
23 I -- we said that there was a substantially less -- there
24 was less certainty that they would be able to with the
25 alternate AC power system than with a fully qualified

1 power system. This went to the margin of the safety.

2 We did not, however, assert that we thought it was
3 affirmatively unlikely under all circumstances that they
4 would be able to.

5 JUDGE EDLES: Okay.

6 MR. LANPHER: But let me get back to your direct
7 question because I think it goes right to the May 16
8 offered and were you said about reading the plain words:
9 If the standard had been what Mr. Perlis suggests I think
10 it was, the Commission would say the Applicant should show
11 whether under its alternate AC power supply it could meet
12 the 1050(a) requirements. That's not what they said.

13 Under Mr. Perlis' argument if all they had was some AC
14 power supplies that got the power supply on, it's
15 predicted in 54 minutes; well, we've got 55 minutes to do
16 it, it's just fine.

17 But the Commission set a deliberate standard here, the
18 "as safe as" standard. There's no ambiguity there.
19 That's what they haven't met.

20 How much time have I got?

21 JUDGE ROSENTHAL: You have five minutes if you
22 want to leave two or three minutes for Mr. Palomino.

23 MR. LANPHER: I will have to let me just
24 emphasize a couple of points then. Mr. Perlis talks about
25 we ought to balance the equities and -- he never expressed

1 what the equities were, he said we ought to grant the
2 exemption. That's not what the standard is. He brought
3 to your attention footnote 3 of the May 16 order. The
4 first sentence of that note is crucial, "the Commission
5 regards the use of the exemption authority under 501 as
6 extraordinary."

7 What is it that is extraordinary in this case that
8 would make you say that LILCO should be able to operate
9 the plant without any safety grade power supply? What is
10 it that is so extraordinary apart from the safety standard?
11 What is it so extraordinary given the fact the prediction
12 is May or June there's going to be a TDI diesel decision?
13 If they lose that decision you can't say there ought to be
14 an exception to allow it because then they really won't
15 have any diesel since they put off the Colt. If they win
16 that decision -- we hope they don't, but we'll have to see
17 what the Brenner Board does -- then they have qualified
18 diesels at that time.

19 Now, there's nothing extraordinary here. The only
20 thing extraordinary is their diesels don't work. You
21 don't need to test them now. And I omitted to mention
22 before, LILCO's evidence, it was a Suffolk County low
23 power Exhibit 2, but it was a document prepared by LILCO,
24 said that their low power testing program, 3 and 4, takes
25 23.6 days to perform. There is no need to do this now.

1 To me that's just conclusive in terms of the public
2 interest. Why would you contaminate a plant at this time
3 when there's no affirmative benefit and there clearly is a
4 real likelihood that the plant some day, there will be a
5 decision that says no full power license? There's plenty
6 of time to contaminate the plant later when we have gotten
7 closer to these decisions.

8 Another factor that's terribly important here that was
9 mentioned earlier. The appeal brief in the Diablo Canyon
10 case in the Court of Appeals, the Commission itself argued
11 that in making decisions on licenses and the public
12 interest factor, there's great deference shown to the
13 states.

14 JUDGE EDLES: Counsel, that's not really, in our
15 context, a Commission pronouncement. I understand the way
16 the general counsel represents the Commission in the
17 courts but it isn't quite like five commissioners signing
18 off on a decision or an order.

19 I understand that the general counsel speaks -- when he
20 speaks he speaks for the Commission in court proceedings,
21 but from my understanding -- I don't know this particular
22 case, but from my basic understanding of litigation
23 procedures, the general counsel probably doesn't send this
24 brief around to each of the commissioners to make sure
25 that they sign off on this and that.

1 JUDGE ROSENTHAL: Not only that, but the general
2 counsel frequently, under our system here where cases get
3 into court off of Licensing Board decisions before they
4 have been reviewed, even by an Appeal Board the general
5 counsel is frequently in court telling the Court that the
6 Licensing Board decision was dead right and it hasn't even
7 been reviewed by Appeal Board, again, let alone the
8 Commission.

9 So I think Mr. Edles' point is that we don't, and can't,
10 really, attach very much significance to what the general
11 counsel's office may tell the --

12 MR. LANPHER: The general counsel as I
13 understand it is charged by law with representing --

14 JUDGE EDLES: It's not quite like E.F. Hutton.
15 When the general counsel speaks, not everybody listens.

16 MR. LANPHER: The Court of Appeals listened and
17 I think other people ought to listen.

18 JUDGE ROSENTHAL: Let's make it rapid.

19 MR. LANPHER: Mr. Rolfe said even if there was
20 no probability of getting a full power license here, the
21 question is let us have our low power license. That's
22 just not the standard here. You don't do low power
23 testing unless there's a purpose for it. The only purpose
24 -- and it's in the Staff's brief -- is as a step toward
25 full power licensing. I think you have to reject this

1 idea of any kind of entitlement, specially in an exemption
2 proceeding.

3 And one other point on the security matter; Mr. Earley
4 said you have to look back at the security settlement
5 agreement between the county -- look at the August 20
6 order of the Commission. It specifically said -- we read
7 it all. It doesn't preclude these new security issues.
8 That was on a motion for reconsideration by Long Island
9 Lighting Company.

10 JUDGE ROSENTHAL: Thank you. Mr. Palomino?

11 MR. PALOMINO: I'll be very brief. I would like
12 to point out some factual misstatements that were made.
13 First of all, the state was never part of the settlement
14 agreement. It had nothing to do with it. Secondly, state
15 never had access to this security plan, I'm the only one
16 in the state, until I signed up in this proceeding.

17 Thirdly and lastly, it wasn't even a summary judgment,
18 Judge Rosenthal, that they granted. What they were doing
19 was making arguments. We expected to have issues framed
20 and then counter them on a framed basis. And then he
21 ruled as a matter of law, as you pointed out. But it
22 wasn't even summary judgment. We didn't even put anything
23 in in opposition to it.

24 JUDGE ROSENTHAL: Thank you, Mr. Palomino.

25 On behalf of the entire membership of this Board, I

1 would like to thank counsel for their interesting, and I
2 think helpful, presentations this afternoon and, on that
3 note, the appeals of Suffolk County and the State of New
4 York will stand submitted.

5 (Whereupon, at 5:00 p.m., the hearing was
6 adjourned.)

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CERTIFICATE OF OFFICIAL REPORTER

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

NAME OF PROCEEDING: LONG ISLAND LIGHTING COMPANY
(Shoreham Nuclear Power Station,
Unit 1)

DOCKET NO.: 50-322-OL-2

PLACE: WASHINGTON, D. C.

DATE: MONDAY, FEBRUARY 11, 1985

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

(sig) *Joel Breitner*

(TYPED)

JOEL BREITNER

Official Reporter

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