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UNITED STATES
NUCLEAR REGULATORY COMMISSION

IN THE MATTER OF: **DOCKET NO:** 50-400 OL

CAROLINA POWER & LIGHT COMPANY
and
NORTH CAROLINA EASTERN MUNICIPAL
POWER AGENCY

(Shearon Harris Nuclear Power Plant)

PREHEARING CONFERENCE

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UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

BEFORE THE ATOMIC SAFETY AND LICENSING BOARD

In the Matter of:	:	
	:	Docket Number
CAROLINA POWER & LIGHT COMPANY and	:	50-400 OL
NORTH CAROLINA EASTERN MUNICIPAL POWER AGENCY	:	PREHEARING CONFERENCE
(Shearon Harris Nuclear Power Plant)	:	

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

Wednesday, February 5, 1986

The prehearing conference in the above-entitled matter convened at 1:00 p.m.

BEFORE:

JAMES L. KELLEY, ESQ., Chairman
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

JAMES H. CARPENTER, Member
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

GLENN O. BRIGHT, Member
Atomic Safety and Licensing Board
U.S. Nuclear Regulatory Commission
Washington, D. C. 20555

-- continued --

APPEARANCES:

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On behalf of the Nulcear Regulatory Commission Staff:

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P R O C E E D I N G S

JUDGE KELLEY: Good afternoon, ladies and gentlemen.

The Licensing Board associated with the application of Carolina Power & Light for the operating license for the Shearon Harris facility is in session here this afternoon in the Appeal Board's courtroom.

I personally want to thank you for cooperating with our request to move the starting time back by an hour. That helps us a lot.

We are not accustomed to the view from this lofty height. Perhaps it will improve the quality of our decisions.

But with that hope, if not expectation, we are going to address two things this afternoon, a motion by the Applicants' concerning the Board's planned reopening of the siren issue and, secondly, a discovery dispute between Mr. Eddleman and the Staff of FEMA.

We would prefer, unless there is an objection, to go with the Applicants' motion first and the discovery dispute second.

Is that agreeable?

(No response.)

JUDGE KELLEY: We perhaps ought to note who is here for the record. Most of you were here this morning.

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MS. MOORE: My name is Janice Moore, representing the Staff. With me is Mr. Barth and also Mr. Joseph Flynn from FEMA.

MR. BAXTER: For the Applicants, Thomas A. Baxter and Dale E. Hollar.

JUDGE KELLEY: And Mr. Eddleman.

MR. EDDLEMAN: Pro se.

JUDGE KELLEY: Pro se, right.

I turn first, then, to the motion by the Applicants for partial reconsideration of the Board order of January 16th, in which we reopened the record in the siren issue with respect to certain specific areas.

All parties are here this afternoon with the exception of the State of North Carolina. They have been contacted. We have been handed an Attorney General's response to Applicants' motion. The Board has read that motion, and I will speak in a moment further to how we are going to proceed. But I am going to say that we do have that.

The expectation then is that the other parties; namely, FEMA and Staff combined and Mr. Eddleman, would make their response to the Applicants' motion on the record. This is pursuant to prior discussions, and I think that procedure is agreeable to all.

Is that correct, Ms. Moore?

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MS. MOORE: Yes, sir.

JUDGE KELLEY: Mr. Eddleman?

MR. EDDLEMAN: Yes.

JUDGE KELLEY: Thank you.

We would expect to cover this motion in less than an hour. I won't get any more precise than that, but as an overall time frame we would like to do that.

You can assume, of course, that the Board and everyone else is fully familiar with the case, fully familiar with the Board's order, and familiar of course with the motion.

When your turn comes to address the motion, we would appreciate if you oppose the motion in some or all respects that you go right to the specifics, and I am sure everyone will be following you.

As a sequence in time, rough time, we thought we would first look to Mr. Eddleman, figuring about 10 minutes for his presentation, followed by whatever Board questions there may be, after that Staff/FEMA.

Mr. Flynn I believe is going to speak on this motion, is that correct?

MR. FLYNN: That is correct, your Honor.

JUDGE KELLEY: We thought also about 10 minutes for you plus any Board questions that might arise from your presentation.

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The North Carolina paper which I noted just a moment ago, the Board has read it. All the parties, I take it, have that.

If the parties, either Mr. Eddleman or FEMA, in their arguments want to refer to that, of course they are free to do so.

But we thought that after Mr. Flynn's presentation for the Staff and FEMA the Applicants would be given an opportunity to reply to both Mr. Eddleman and the Staff and North Carolina. Hopefully, they could do that in about 10 minutes, and there may be some Board questions following their reply.

Then following that we will have any further questions or discussion that seem appropriate, and we will send some time at the end for further discussion.

We will simply have to see where we come out on the arguments as to whether we are going to be able to rule this afternoon or whether we rule in the next day or two. It depends really on what is presented and how the Board views the arguments.

With that, Mr. Eddleman, do you want to go ahead?

MR. EDDLEMAN: Thank you, Judge.

Let me say that Mr. Runkle and I have to be out of here by a little after 2:00 o'clock, so I will try to be extremely brief.

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I don't think there is a lot to say about this motion. It appears to be in the nature of a motion for summary disposition without accompanying affidavits and also in the nature of additional proposed findings of fact and, in effect, a motion for summary judgment in favor of Applicants on those issues.

I don't think it is appropriate at all. I think that any changes the Applicants have proposed and the effects of those changes, and so on, are properly the subject of cross-examination. I think the Board ordered additional hearings, and I as an Intervenor and the State of North Carolina as an Intervenor and all parties have the right to cross-examine on these issues and it is not proper to close that off.

I guess I would summarize by saying that I view this thing as totally improper and of no merit, and I guess I would adopt the Attorney General's arguments on behalf of the State of North Carolina.

Considering what North Carolina did last night in the basketball game, I will rely on their strength, too.

But I just don't see any reason to go forward with this. It is like summary disposition without an affidavit. It is like proposed findings that say rule in our favor instantaneously. It doesn't make any sense.

JUDGE KELLEY: Breaking it down a bit,

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Mr. Eddleman, would you distinguish in the Applicants' motion between their proposal for the hearing on the self-alert from the other issues?

As I understand it, they are not asking for a judgment on this paper. They're asking us to read this.

MR. EDDLEMAN: Pardon, sir?

JUDGE KELLEY: Let me put it a different way. I read the motion to say we would like to cut back on this reopened hearing and look only at the tone alert radios.

So my question to you is: you do acknowledge, don't you, that the tone alert radios are subject to evidentiary hearings, cross-examination, and the like?

MR. EDDLEMAN: Yes. But I don't think that precludes the other issues.

JUDGE KELLEY: I am just separating that one out for the moment.

MR. EDDLEMAN: Yes, sir.

JUDGE KELLEY: Okay, Mr. Eddleman -- I am sorry. Do you have another point?

MR. EDDLEMAN: On page 4, the Applicants mention in that regard -- this speaks to the question that you were asking, Judge -- the other items of additional evidence called for by the memorandum and order are now only relevant in light of Applicants' decision to an assessment of the relative capability in the five to 10-mile area of the EPZ.

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This is the thing, I think -- this is an additional thing that I think is not proper, that they can rule out the interest of those questions.

I think it is also true that the rest of the motion -- they are talking about answering the question in the negative, ending up on page 6 -- is the thing I was referring to in the nature of additional proposed findings.

JUDGE KELLEY: Okay.

The Board, Mr. Eddleman, came up with a series of tentative views -- you will recall that discussion in the middle of the order -- in terms of computation, and the like, leading to certain bottom lines, depending on whether you used the Krallmann data or the Horonjeff data.

Do you agree or disagree, or are you not in a position to say at this time with regard to those kind of views?

MR. EDDLEMAN: Judge, I would say part of them I think I agree with and part of them I think may not be sufficiently conservative.

Do you want me to try to get into the technical merits of it?

JUDGE KELLEY: No, a short answer. All I am really after is if all the parties walked in and said those tentative views are absolutely correct, we agree, that would certainly have a narrowing effect on this case. You are not

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expected this afternoon to have a definite answer on my question except to be able to say I would hope -- or would you stipulate to those?

MR. EDDLEMAN: No, sir, I won't stipulate to them. I can't.

JUDGE KELLEY: Thank you.

Mr. Flynn?

MR. FLYNN: Thank you, your Honor.

FEMA and the NRC Staff support the Applicants' motion to limit the scope of the reopened hearing.

I agree with the interpretation announced by the Board a moment ago of that motion, and that is the motion asks that there be a hearing on the effectiveness of the tone alert system but that there not be any further hearing on the effectiveness of the siren system within the initial five-mile zone.

So it is not accurate for Mr. Eddleman to say that the motion is equivalent to a motion for summary disposition on the issue of the tone alert radios, not at all. The Applicant, at least in my interpretation of the motion, is asking for a hearing, and we feel that is appropriate.

As far as the assertion that Mr. Eddleman has made that the tone alert radios have no effect on the second five-mile zone, that is correct. But that is not the

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issue.

The Board has already made a determination that the reopened hearing will not address the second five miles but will focus on the first five miles.

JUDGE KELLEY: I don't think that is correct.

MR. FLYNN: Then I stand corrected.

JUDGE KELLEY: We went on to say, as I recall, that we wanted Mr. Kiest to do the findings for the second five miles. That is in paragraph 1, page 8.

MR. FLYNN: In any case, we still feel that the relief asked for by the Applicant is appropriate. Essentially, the Applicant has volunteered the relief asked for in the original contention, and that is that there be a secondary system or a redundant system to back up the sirens.

The Applicant is, in effect, conceding -- or perhaps that is too strong a word -- is volunteering to provide additional coverage whether it is strictly required by law or not.

I want to say and make it very clear that FEMA does not concede that there is any deficiency in the coverage of the siren system, but were the Board to find that there were a deficiency, it seems beyond any question that the tone alert system that the Applicants are proposing to install would adequately address those deficiencies.

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The Board seems to be concerned with the margins of the coverage of the siren system; that is to say, in attempting to quantify the areas of the numbers of houses, the percentage of houses that are covered by the siren system, there are some ambiguities. The Board is struggling to come to some firm numbers on how many houses, how many people are covered.

And the purpose of the reopened hearing would be to fine-tune the evidence to determine whether the numbers we are talking about are in the 88 percent range or the 90 percent range or the 95 percent range.

The tone alert radios are site specific. The Applicant proposes to put one in every house. This system is highly targeted, and I submit that that sort of flexibility really overrides the question of whether the sirens will provide 88 percent or 90 percent coverage.

The point of the relief that the Applicants have offered is that we have a potentially highly effective system that will go quite a bit beyond what the sirens presently offer in the way of coverage.

So that really overshadows the issue of whether the sirens are 88 percent effective or 90 percent effective. We have something much more significant here; that is, something that approaches 100 percent coverage.

JUDGE KELLEY: We have to make that assumption.

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That is your argument, right?

MR. FLYNN: That would be the subject of the hearing.

JUDGE KELLEY: That is right, but we have to assume that the tone alert radios would be so effective that the siren coverage wouldn't much matter, whether it was 60 or 80 or 90?

MR. FLYNN: That is essentially what I am saying, that FEMA's position is that the band of coverage, the band of houses that would not be covered is significantly smaller with the tone alert radio system, at nighttime at least, than under the siren coverage system.

Thank you.

JUDGE KELLEY: As to the second five miles, the Board has not excluded that. That is still in the case.

If you are saying that the hearing on those other points, other than the tone alert radio, is unnecessary as to the second five miles, is that to say that you are stipulating the Board's tentative conclusions?

We have got to make conclusions out there, too.

MR. FLYNN: I have certainly got to say that the German study will yield more favorable numbers than the Horonjeff study.

JUDGE KELLEY: What if the Board takes the position that it has never been subject to cross-examination

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and we are not going to give it very much weight?

We are saying that is very interesting, but we have never heard from Mr. Krallmann or anybody else concerning his study and we are unwilling to give much weight to it.

If you assume that the Krallmann study is going to carry the day, I would just suggest to you that that, in my mind at least, is not so clear. Then you are back to the Horonjeff data, which brings you into the '60s. Then you have to assume -- which you are not yet entitled to do -- that we are going to accept these projections in the form of other cases.

So aren't there a lot of questions left in that area?

MR. FLYNN: FEMA remains persuaded that the system is adequate, but evidently the Board is still of an open mind and has not reached the same conclusion that FEMA has.

These questions have certainly been addressed at abundant length in the hearing that has already taken place.

So if the Board were to disregard or give no weight at all to the German study, then I would submit that the evidence has already been heard.

JUDGE KELLEY: But the questions we raise in our

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order are questions focused on gaps in the record as we saw it. Not only is it not abundant, we've got Mr. Kiest coming in and saying in the hearing, well, it is going to be zero essentially. Then he comes back and says, well, no, it is much different.

We still don't understand that. That is not an answered question. The only way we can get the answer to that question is to ask Mr. Kiest unless we decide for some reason it is not important.

But there are certainly questions.

MR. FLYNN: If the Board says there are questions, then indeed there are questions.

JUDGE CARPENTER: Mr. Flynn, I think it would be useful for you to try to look at our order from our perspective.

You used the word "coverage." Coverage, as we indicated, is not an issue here.

We accept Applicants' testimony that these sirens exist, that the energy that the sirens will put out is known, the distribution of that energy is known, et cetera. There is no issue of coverage.

The issue is how many people will still be asleep if the system is actuated and what number of houses should go unalerted for us to have reasonable assurance that there is no undue risk.

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That is what I seek to find from this record, and I am not there yet.

But it is not coverage. It is waking sleeping people that is the difficult technical issue here, with different lines of evidence, that the record presently doesn't lead to a clear resolution of those different lines -- three lines of evidence that we feel would greatly benefit exploration on the record about the relative merits of the three different lines of evidence, because we have to choose something, not necessarily an amalgam. If one of them comes closest to the truth in the scientific sense, I think we would like to reach that.

That is the purpose of the order.

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MR. FLYNN: Yes, Judge, I believe I understand what you're saying.

JUDGE CARPENTER: To the extent that an applicant regards this as just an academic exercise, it's still an issue, depending on how its own alert credibility comes out in the first five miles. It still will be something that we've got to look at at 5 to 10 miles, admitting that there are no simple numerical standards.

The way I read the Commission's final rule in the 5 to 10 mile zone, we still have to come to the reasonable assurance conclusion. That's the reason for wanting to have the record have just a little more explanation on the technical merits. We've indicated tentatively that we don't see the R. Lucas basis to be very substantial. There are no sounds like siren sounds in that whole data set, but we'd like to get the witness' opinion about that, et cetera.

To the extent that the record can reflect the views of what I personally consider to be two very well-qualified experts, we want to avail ourselves of that opportunity.

So if this contention had been settled and it was not necessary in the decision based on the record, that would be one thing. We still have to write an opinion and a decision based on the record that's before us. So I don't see that the Applicant's motion addresses that very

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clearly. They may consider the whole thing an academic exercise, but it remains to be an exercise that's got to be done.

MR. FLYNN: I hope I understand what you're saying, Judge Carpenter.

I think my original point was that if you look at the contention, it asks for a redundant system. The Applicant has essentially said, okay, we'll do that.

JUDGE CARPENTER: But apparently that didn't form a basis for settling.

MR. FLYNN: I'm sure Mr. Baxter can address that more effectively than I can.

JUDGE CARPENTER: Tell me, doesn't the contention say that the sirens will be inadequate and therefore, people won't wake up at night? Therefore, you ought to add a telephone system, as I recall.

MR. FLYNN: It did ask specifically for a telephone syste[illegible].

JUDGE KELLEY: But the thrust of it is, what you've got proposed there isn't going to wake people up at night, and Mr. Eddleman is contesting that.

Just coming forward and saying, "Hey, I've got a new system," is not necessarily going to satisfy him.

MR. FLYNN: Perhaps I'm oversimplifying it, but what are the types of relief that the Board could order? Additional sirens or a redundant system? That's what we're

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talking about now is a redundant system.

JUDGE KELLEY: Then you have a hearing on that redundant system. If that's sufficient, that's fine. If it's not, you condition the license or refuse to issue one until you get one that is good enough. The mere proffer of a new system, radios, telephone, or whatever, doesn't necessarily answer the question, as we see it.

Mr. Baxter.

MR. BAXTER: I'm not sure I can do justice to all the questions I've heard, but I'm sure you'll refresh me.

I might start off first with a proposition that the status of this case a short time ago was that the hearing was over, the record was closed, all proposed findings were in, and the matter is before the Board for decision.

It is the Board's own decision here to reopen the record sua sponte.

So some of Mr. Eddleman's arguments that there are some inherent rights that the parties have attached to these Board questions, I think, are not well-founded.

If the Board does decide at this point that it doesn't need additional information in certain areas to decide this case, the case is in a posture to be decided. We're not asking for summary judgment of any kind. The Board has the record; the Board has the proposed findings.

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So I think just because you at one time posed some questions to reopen the record, you are free to change your mind, just as you decided to have the hearing initially. And it is clear that we are not asking for a decision in advance that the tonal alert radios are adequate.

To some extent, our proposition carries with it the risk to the Applicants that, if in the limited reopened hearing, the Board should dcide that the tone alert radios were inadequate, that these other questions would have to be answered, and that we might have to come back yet a third time.

What we've simply done is the flow of logic in the additional items the Board requested in its January 16th memorandum and order, let it depose at the end, a question that says, not knowing how we're going to come out on the arousal probabilities, we think it is prudent at this point that ought to have some evidence on corrective actions in the first five miles, with a view toward, we'd have some basis for ordering corrective action, if we decided it was necessry.

We have simply, in the interests of trying to expedite resolution, jumped to the end of your order and said, we don't really need to debate it, but we're going to at least do this, and I understand Mr. Eddleman still

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contests, and we can have a hearing, and we're proposing to have a hearing on the adequacy of that augmentation system.

But it was our hope, it is our position that there is enough likelihood that this is going to resolve the matter for the first five miles, that we are willing to take the risk that the other questions need not be answered, and we could comment at some point as to why that's true.

I've tried to outline the logic in my motion, which was that if we are using our sound propagation estimates, which are, I think, larger than FEMA's, and we are using Horonjeff instead of Lucas, and Horonjeff clearly provides great arousal capability, it seems to me that we're going to get an ultimate number that's going to be larger than 88 percent.

I recognize you have to make a decision for the second five miles. I wasn't trying to state that that was unimportant or hypothetical anymore. What I am saying is that you have enough in the record to say that if we substituted Horonjeff in Mr. Kiest's analysis, we know we're going to come out larger than 88 percent.

How important is it to determine whether that's going to be 92, 91 or 95, when we think, under the legal analysis you've presented that substantially in compliance with the design criteria for the second five miles.

JUDGE KELLEY: Let me just interrupt you there

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now. Under the analysis that you just made, it seems to me, for the second five miles, that you are assuming, for one thing, an informal arousal rate that gets up, I think you said, to about 88. The Board did not, in its last order, mean to or imply that we were making any finding at all about a formal alert. We simply said in the context of Question 6, let's assume a certain rate. I don't have to paraphrase. Yes, number 6 on page 10. We said, if it's assumed that the Board's computation for alerting in the five-mile EPZ, based on Horonjeff of 62.8 percent is the best estimate.

A high side estimate for a formal alert at 15 to 20 is after that. This produces a 15-minute alerting estimate, 7833.

When we said high side estimate, that's not a tentative view that it is that. That's just a for the sake of argument kind of statement. That's all we intended by that.

We've not made any judgment at all on informal alert. It may be that your position will prevail and maybe it won't, but that's purely a hypothesis, not a finding.

MR. BAXTER: I understand that, Judge Kelley, but I also have the impression that you're not asking for any additional evidence on the informal hearing, so it's there.

JUDGE KELLEY: You are wherever you are. It

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may come out 18 percent or it may come out zero or somewhere in between. But it did seem to me that your argument assumed, when you said come up at 88 percent that you had a pretty high -- what I'm characterizing as pretty high, your estimate of informal alert.

MR. BAXTER: The way the estimate it breaks down is, we calcaluted using Lucas in our sound propagation estimates, 69 percent arousal for the whole 10-mile area just from sirens.

We added 3 percent more because the population is already awake. Then that got us 72, and formal notification is 16 more.

JUDGE KELLEY: And you say that I think you get around 69 in the 5 to 10?

MR. BAXTER: We get 69.4 in the 0 to 5, and we got 69 overall.

JUDGE KELLEY: So it's the same.

MR. BAXTER: It's the same, but if we used Heronjeff instead of Lucas, we would get higher than that.

JUDGE KELLEY: And I think that's an area where we'd like to find out why. I'll take Judge Carpenter's lead on that.

JUDGE CARPENTER: Mr. Baxter, in view of Mr. Kiest's computation, which gave a result in the 0 to 5-mile zone of --

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MR. BAXTER: -- 69.4.

JUDGE CARPENTER: --69.4 percent. If you compare that with the Board computation, which is tentative, for comment, as shown on page 8 of the order, using Hononjeff, I calcuate 62.8 percent. If I'd used Lucas, I would have gotten a considerably smaller number. So obviously, I don't understand the basis for Mr. Kiest's calculation, or I'd be able to reproduce it.

MR. BAXTER: The basis for Mr. Kiest's calculation, Judge Carpenter, is, of course, the basic testimony we've put into the record. He didn't change that. We have gone over your calculation, and we think there's an unfortunate, to some extent, mixing and selection process that went on here that took some elements of the FEMA case and some elements of ours, and it doesn't, in our view, technically add up well.

We duplicated your calculation for Krallmann and got 81.5, using your methodology.

We tried to do the 62.8 and got something 3 or 4 percent higher. So somewhere there in the house counts or something else, there's just a mathematical error, but the biggest other difference is your assumption for 4, where you use Dr. Nehnevajsa's housing distributions, instead of the housing distribution Mr. Kiest used.

We think our analysis is sound, as it was put

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together. It can change this one element, but to mix and match all the various elements of the Staff and Applicant testimonies as you've done here, you get different numbers than we do; that's correct.

So I am relying, when I say we calculate 88 percent, that's the way we calculate it in the record, and I hope the basis for how we calculated it is clear. If we calculate it the same way, not using Dr. Nehnevajsa's housing count distributions but using everything else you did, just substituting Horonjeff for Lucas, we definitely get a higher number than 69.4, and we get 69.4 using Lucas.

JUDGE KELLEY: I guess what we're doing here, gentlemen, we're illustrating whether there's a question or not, not what the answer to the question is.

JUDGE CARPENTER: You see, Mr. Baxter --

MR. BAXTER: If the Board feels that it cannot rely on any party's analysis as presented, and that is necessary to try and combine, to pick from the various elements in your decision, then I think we do have a disagreement about that. It doesn't mean you can't do it, but it means we don't endorse it, and I was falling back on the proposition that if tone alert radios are put in miles -- we are putting tone alert radios in the first five miles, then under almost any of these estimates, before you add informal notification, we're going to get so close that by

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the time you add informal notification, there should be a legitimate question.

JUDGE KELLEY: In the second five?

MR. BAXTER: In the first five. In the second five, we think you ought to rely on the independent approaches done by competent experts for FEMA and Applicants, who did it a different way, with different sounding propagations, different housing distributions, different assumptions about background noise and informal notification, and still came out with the same answer, and we submit that there should be enough there for the Board to rely on without doing its own individual calculation, and that we don't need to determine how much higher than 88 percent it would be, if we just substituted Horonjeff for Lucas.

JUDGE KELLEY: You jsut finished the point I was making earlier. Perhaps it's obvious already, but when I talked to you, assuming or not assuming formal notification the kind of scenario I wondered about is this: if you've got a combination of siren awakening, plus informal alerting, assuming you count some of that, and you're up in the high '80s, then you look at the Commission's reconsideration statements that were quoted, it would seem, speaking just for myself, that you're home free, in the high '80s. Then it wouldn't much matter whether it was really

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91 or something different. I agree with that, but if you're alerting percentage is down in the 60s somewhere, and the Board decides that informal alerting is entitled to 10 percent, it's not so clear that at 75 you're up to standard. And I don't know how the evidence would unfold, but it just seems to me that that's one scenario that needs to be considered.

MR. BAXTER: Again, though, we were not asked to put on anything more in formal notification. We think it should be relied upon. We've already briefed all that. All I've tried to do here, and frankly, not considering the detailed calculations, but the two findings I read here were, one, we prefer Mr. Kiest's sound propagation contours over FEMA's.

Number two, we prefer Horonjeff over Lucas, we think.

So what I was addressing is that that's the only parameter we change in Mr. Kiest's calculation. We do not get 62.8. We get something higher than 69. And when we add on a percentage of the population already awake, in our estimate of informal notification, we're going to be into the 90s, and we didn't think it was worth trying to establish.

JUDGE KELLEY: 69 plus 3 plus 18. Is that how you get into the 90s?

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MR. BAXTER: No, it would be higher than 69, but why calculate how much it is? With Lucas we get from 62 to 79 to 88. For example, I agree there are some other questions like your item number 3, about the on the record calculation Mr. Kiest did for what the arousal percentage would be at 60 dB. He made an error in there, and he realized that after he wrote his letter to the Commissioners. As we've said before, there isn't 60 dB outside the window, except in very, very, very small percentages of homes, and there's more than one individual in 80-some percent of these homes. So I agree that's a question.

But we submit to you it's not an important one, given the state of the record.

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JUDGE CARPENTER: Mr. Baxter, since we are trying to get your comments and have sort of paused in the middle of commenting on the motion to allow for comments, I would like to contribute a little more perspective.

There is a formal alerting system in addition to the sirens called rad alert. The weight that one can give to that depends on how many houses you expect are going to be dark, and the policeman is going to have to stop and go in and wake people up, as to how fast he can cover his route.

So in my mind, it is significant whether there are a hundred houses on the route or 500 houses on the route, both of which are a small percentage of the total number of houses in the EPZ. Whether or not that individual can successfully wake those people up does depend on how many places he has to stop.

We would like to get the best estimate, after the siren alerting system has been actuated, how many there are that the primary backup the counties have gone to the trouble of planning to do this. They are a credible part of the FEMA strategy, and whether it is credible at 3:00 o'clock in the morning depends on how many houses -- how many people are not awake.

That is why it is very desirable to get as accurate an estimate as possible.

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MR. BAXTER: All I can say, Judge Carpenter, is if you are really interested in how many houses mobile alerting net will take care of, we wouldn't stop at 15 minutes either. Our estimates go up considerably with the passage of time as to what the arousal rates would be because the cars are not going to be able to blanket the EPZ in 15 minutes. They are located in towns, and they get there as fast as they can.

But even if there were 500 houses, I would submit to you they are going to be distributed over that 10-mile area.

JUDGE CARPENTER: Mr. Baxter, you are coming to a conclusion. I am not stating a conclusion. I am simply saying that that is part of the analysis.

We want to have as good an estimate of the number of houses, and as I read the Commission's endorsement of 0654, it does accept up to 45 minutes to essentially achieve 100 percent.

So that is credible, but it remains to be seen. If there are a very large number of houses, then I think one would have to question whether or not that can be accomplished.

I haven't come to any conclusion about that because I can't even get started on it in terms of being comfortable that we have the best estimate of how many

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houses are going to be unalerted.

That is where we are today.

JUDGE KELLEY: Mr. Baxter, anything else?

MR. BAXTER: No, that is it.

JUDGE KELLEY: Okay. I will make a quick sweep.

Mr. Eddleman, any further comments?

MR. EDDLEMAN: Judge, I think my positions on the record are pretty clear in this. I don't want to bore the Board with repeating them. They are in my proposed findings, and so on.

JUDGE KELLEY: Okay. Mr. Flynn, anything else?

MR. FLYNN: No, your Honor.

JUDGE KELLEY: That covers the arguments on the motion. We would like to move right into this discovery dispute.

This discovery dispute between Mr. Eddleman and FEMA arises out of Mr. Eddleman's Interrogatory No. 11, which he posed to FEMA, seeking documents identified in response to interrogatories.

The response from FEMA was to the effect that all identified documents other than predecisional papers and handwritten notes either had been or would be made available.

FEMA then asserted that predecisional documents and handwritten notes were protected against disclosure

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pursuant to cited positions in their CFR and our CFR. That, in turn, is a cross-reference to the paraphrase of Exemption 5 of the Freedom of Information Act which disallows discovery with respect to internal memoranda, usually called predecisional documents.

We had some preliminary discussion of these disputes on file, and among other things, Mr. Flynn referred us to an Appeal Board case which turned out to be quite pertinent, the case of Long Island Lighting. It is in 19 NRC 1333.

The Board reviewed it. I sent a copy to Mr. Eddleman. The Board has studied that particular case. It is our tentative view, at least, subject to comment, that the case is on point on the law and with respect to the procedure that is to be followed in resolving a dispute of this kind.

I will just briefly read a few pertinent sentences.

Quoting from page 1341 of the case:

"The deliberative process privilege, protection of discovery. Governmental documents reflecting advisory opinions, recommendations, and deliberations comprising part of a process by which governmental decisions and policies are

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formulated, the privilege may be invoked in NRC proceedings. It is a qualified privilege, however, which can be overcome by an appropriate showing of need. A balancing test must be applied to determine whether the litigant's demonstrated need for the documents outweighs the asserted interest and confidentiality. In this respect, the government agency bears the burden of demonstrating that the privilege is properly invoked, but the party seeking the withheld information has the burden of showing that there is an overriding need for its release."

Those are the abstract legal principles established by the Appeal Board. As to the papers themselves, we asked for and have received from FEMA, through Ms. Moore of the NRC Staff, a set of papers which I can briefly describe.

These were served, I should add, only on the Board. The purpose was in camera inspection by the Board to determine whether they came within the privilege. Mr. Eddleman has not had them.

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What this group of papers is essentially is six different papers, some of several pages, and they are, as we read them, the field notes of evaluators who were actually at the exercise, some five different evaluators, two papers by one evaluator and one each by the rest.

One thing I wanted to get clear, Mr. Flynn, there was a reference in here in your initial pleading and I think in other places to notes on the one hand and predecisional documents on the other, and I took predecisional document to mean a draft of a report, a memo, something of that sort. We don't have anything but the notes.

Are there other papers that fall within the description?

MR. FLYNN: To my knowledge, your Honor, there are no other papers.

I spoke this morning with Glenn Woodard, who is the Chief of the Natural and Technological Hazards Branch of our Region 4. He indicated to me that there were no others and that he would check to make sure and get back to me if he found anything.

He did not get back to me before I left.

JUDGE KELLEY: I think, then, we can proceed on the assumption that what we have before us is what is within the described category.

Mr. Eddleman, let me just pause for this point.

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I have read some abstract law. You have read the case.

In terms of the law and procedure, do you have any problem with the Board's amplification of the law I quoted?

MR. EDDLEMAN: Not the part quoted, Judge. The one difference I see that is majcr between these cases is that I don't think it has been shown that these aren't simply factual documents.

The LILCO case involves things that are totally intermingled, that can't be separated out, and I don't concede that at all in this case.

JUDGE KELLEY: I was going to speak to that. The point you are making is useful, anyway. The point is perfectly valid.

In addition, I don't want to suggest that the LILCO case is 100 percent analogous in all respects. The facts will say that it is different later in the proceeding. The people involved were different. There were a numbers of differences discussed later on in the opinion. This was just after the initial statement of principles as a springboard for us to proceed.

I think I can answer the point. In fact, I was about to speak to the point you just made; that is, whether the information in these documents contains segregable factual material or whether it is all intermingled and not

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really segregable.

We have read the documents in question, all of them, and it is our judgment that they are intermingled. They are largely opinion. There are some facts sprinkled here and there, but they are largely conclusionary documents, such as is this, that, or the other thing adequate; is the work holding up, and so on?

So in our judgment, we don't have a situation where we can segregate out factual material. You have to take that on faith because you can't review it of course, but that is our judgment.

Our judgment is reviewable ultimately. If you take it up on appeal, eventually, then they will read the same paper and maybe they won't agree.

But we are going to take the position -- this Board is -- that it is intermingled fact and opinion and not segregable.

MR. EDDLEMAN: Okay. As you say, it is real difficult for me to dispute that, not having seen --

JUDGE KELLEY: It is impossible, I grant you that. But that is just the way the system is set up.

Let me just go on with a couple more comments, then we can get to some more discussion.

We also conclude on the basis of our in camera review that these documents are properly within the

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category of predecisional documents; that is to say, they are documents to which the privilege can apply unless a showing of need counterbalances the weight of the privilege.

What they are essentially is input to the final Commission -- not Commission -- the final FEMA exercise report and finding, reflecting opinions of these various evaluators. So we think the privilege does apply.

That just leaves the question then of whether Mr. Eddleman's need for these documents should outweigh the privilege, which, as I noted, is a so-called qualified privilege, and included in that would be whether there might either be or have been other means by which to get this information.

Mr. Eddleman, do you want to take a few minutes to make an argument for need?

MR. EDDLEMAN: Yes, sir.

The first thing I would want to do -- it may not be exactly on the point you are mentioning -- Mr. Flynn invoked the exemption in 2790, transcript 10,307, referring to 2790(a)(5), exempting interagency or intraagency memoranda or letters which would not be available by law to a party other than the agency in litigation.

I believe the accual text says "with the Commission," although the transcript says "but." I am not

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sure how that came about, but at any rate, my point here is a simple one.

Obviously, if this stuff had been generated by some other party, like a CP&L consultant had written this stuff or a consultant to me had written this stuff, it would be discoverable.

JUDGE KELLEY: It might be.

MR. EDDLEMAN: So the question is: does that exemption have any strength under those circumstances?

I don't think it does.

The other question is: do I have a need for it?

Of course, this is very difficult to address without having seen what it says.

JUDGE KELLEY: That is undoubtedly true.

MR. EDDLEMAN: In this case here I am, I am a party litigating a contention, and the LILCO Board holding -- as it says at 19 NRC 1348, the Board emphasizes the preliminary nature of its conclusion and the narrowness of its holding, and it goes on to say -- I am quoting from 1348:

"The whole deposition or cross-examination of sponsoring witnesses who reviewed documents voluntarily released and may appear that there are good and sufficient

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reasons to warrant disclosure, such as significant differences of opinions among members writing the report on different issues affecting the adequacies of LILCO's plan. It may turn out that the sponsoring witnesses are unable to defend or explain adequately the underlying basis of FEMA's determination."

The point I would emphasize is that if there are some disagreements in here, some things in here that don't match what FEMA has made available to the Board and the public and me, the only way I can find that out and use it is to have access to the documents.

Now, virtually the only other way the stuff can become available -- you know, I have pursued some of this under the Freedom of Information Act and gotten the same answer. They will not reveal any of this information -- the only other way I can see that it would have bene conceivably available would be to depose the FEMA witnesses.

But FEMA hasn't identified who their witnesses are. It is not even clear that FEMA is going to put up as witnesses the people who wrote these documents. If you put somebody up who didn't write it and you ask them about it,

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what good is their opinion?

JUDGE KELLEY: Have you asked them who their evaluators were?

MR. EDDLEMAN: I don't think so. I think I did ask them to identify the authors of all the documents. I asked them to identify the documents.

They asserted the privilege, but I don't think they even identified the documents.

JUDGE KELLEY: You mean the documents we have here today?

MR. EDDLEMAN: Yes, sir. In other words, there is an interrogatory in there that asks to identify the authors of the documents, but they didn't identify the documents. So I don't believe they have identified the authors either.

So the answer is "yes." I asked them, but they didn't answer me.

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JUDGE KELLEY: Assuming the Board says that we're now swayed by your need description to disclose the documents, would that suggest a deposition?

MR. EDDLEMAN: I can do that.

JUDGE KELLEY: I'm not suggesting we would do that. I'm just asking whether that's part of what you're asking for.

MR. EDDLEMAN: I could go with a deposition. I presume if they identify the authors of this, I could subpoena them into the hearing. Those are two alternatives.

JUDGE KELLEY: This is if you survive summary disposition; right?

MR. EDDLEMAN: Yes, sir.

JUDGE KELLEY: You can't assume there's going to be any point at this hearing. You may get past that or you may not.

MR. EDDLEMAN: Right. And we can't assume there won't be either.

JUDGE KELLEY: True. Are you requesting that?

MR. EDDLEMAN: Sir?

JUDGE KELLEY: Are you requesting an opportunity to depose one or some of these people?

MR. EDDLEMAN: Certainly.

JUDGE KELLEY: Under what circumstances?

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MR. EDDLEMAN: Given that they won't release the documents, the alternative is to depose them or to bring them in as witnesses, assuming the things get past summary disposition.

JUDGE KELLEY: I'm thinking, for one thing, about, again, I'm not proposing any of this, I'm just trying to see whether it's something that's possible under the schedule for summary disposition. I believe your response is due next week; correct?

MR. EDDLEMAN: The 13th.

JUDGE KELLEY: Are you proposing to depose them before that or after that?

MR. EDDLEMAN: Well, I guess it would be quite difficult. We could presumably do it under the sort of tape recording system that we had earlier and maybe even by telephone, if it were necessary. If it's necessary to do it within that time frame, I'd certainly go with that. Of course, another thing to do would just be to see if it survived summary disposition. If it doesn't, then the issue is moot.

JUDGE KELLEY: You mean go ahead and respond without this information, and if you survive summary disposition, you'll pursue it later?

MR. EDDLEMAN: I just realized that I shot myself in the foot there. Let me take that back if I may.

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JUDGE KELLEY: You're not committed to anything you've said. We're just considering. Mr. Flynn wil have his opportunity to comment on the whole idea.

MR. EDDLEMAN: What I wanted to amend myself to was that, obviously, if the information that's available in these documents would help me stave off summary disposition -- I'm in kind of a Catch-22 here. If I can't get the information and I get summary disposition on account of the fact that I can't get the information that would help me stave it off, then I'm stuck.

JUDGE KELLEY: With some hesitation, I'll offer you an observation. Having read these documents and it's only my conclusion and nobody else's, and you can take it or leave it for whatever it's worth, but if I were litigating this from your side of the bench, and I wanted these documents for my case, I guess what I'm really looking for, among other things, one of the things I'd be very interested in would be something I would call a "smoking gun," some very negative piece of information that was at odds with the report. I will tell you, having read these over, I didn't find such a thing in these papers. Now I don't want to be held to that in any strict sense. You might very well disagree with me, if you read it. But I thought they were roughly consistent with the final report.

I didn't measure them line for line against the

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report, but I read them.

And for whatever that's worth, I offer it.

MR. EDDLEMAN: Judge. Let's take that again, just for the sake of argument.

Assume that judgment turns out to be absolutely correct, no matter who's making the judgment. Then the question is, given that the information in these things is consistent with the final report, why withhold them?

JUDGE KELLEY: I think I'll leave that to FEMA, but I might just say that the agencies, generally, as a matter of principle, don't like to cut loose this kind of material. They can't say that any particular piece of paper is all that damaging, but on the other hand, they're either going to keep their drafts or they're not. At least, that's what I've often heard.

You can ask Mr. Flynn.

Well, let me pass it to Mr. Flynn for a moment and see what reaction he has to these discussions we've been having.

MR. FLYNN: Thank you, your Honor. I think these documents have taken on a certain mystique, precisely because we've said that we don't want Mr. Eddleman to have them, and it might be that if we did, he'd be very disinterested in what they have to say. I'm in the same position that he is in that it happens that I have not seen

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the documents either. They were passed on to the Board without going through my office, but I think that puts me at a certain advantage in making this argument, in that it forces me to focus on the overriding principles rather than the details of the case, and as the Board has already pointed out, the party moving for the disclosure, has to show an overriding need.

The government has strong interest in protecting its decisional process, and the way that overriding need is shown, is through the mechanism of the in camera inspection in a showing that the information in the documents, number one, is relevant or discoverable, in the sense that it's likely to lead to the discovery of admissable evidence.

Two, that the information there is important. I'll explain what I mean by that in a moment.

And thirdly, that it's otherwise unavailable.

I think the Board has already addressed the question of the availability of the information in these documents by pointing out that by and large, it appears to be consistent with the findings that have already been expressed publicly.

Now when I indicated that the party moving for disclosure must show that the information is important, what I mean by that is that the information must be something more, something that the moving party would like to see, has

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some interest in seeing, that the information might confirm what he already knows.

If that's all that we're talking about, it doesn't overweigh our interest in protecting our decisional process. Perhaps the smoking gun was the best analogy. If there was something that would lead to a significant new avenue of inquiry, then I would be inclined to agree that's important enough to overweigh our interest in protecting our decisional process.

I gather from everything that I've heard today that there really isn't anything in the body of material we're talking about that.would lead us into a an area that hasn't already been explored in the discovery process.

JUDGE KELLEY: Let me ask you just a couple of logistical type questions. There are some not inconsiderable practical problems associated with formal depositions, as you know. I would guess these evaluators who made these notes -- are these people in Atlanta, or were they likely to be?

MR. FLYNN: I believe they're in Atlanta. They're all people from the government's regional offices in Atlanta or nearby.

JUDGE KELLEY: It's not too likely that they're in Raleigh, North Carolina?

MR. FLYNN: I would doubt that.

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JUDGE KELLEY: What I wanted to ask you was this: Mr. Eddleman wanted to simply talk with these people, some of them on the phone. Let me make a distinction here. You were saying, Mr. Eddleman, before, not without reason, that if you're giving a deposition, why not just give me the paper? I think the answer to that, you said, not on the phone, before, and I said it's a good point.

To me, the distinction is, you could talk to a person from an agency and ask him about his conclusions, what he thinks. What you can't do is say, and what did you say to your boss? And did your boss make you change the draft? And all that sort of thing. That's the internal process that's not available. So if you could just pick up the phone and ask questions and were to elicit the same thing, then there wouldn't be any point in this whole exercise.

What you are entitled to get from appropriate people is views on the merits.

What I was wondering is whether it would be possible for one, some or any of these evaluators, if Mr. Eddleman wants to pursue it, to just call them up and talk to them informally.

MR. FLYNN: That suggestion certainly has merit. I would like to explore that. I'll have to talk to the

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people involved.

JUDGE KELLEY: Mr. Eddleman, the practical problems are currently yours. If you've got people in Atlanta, you've got problems with transportation, court reporters, and who knows what else. If that will do you any good, if you want to pursue that, that is to say, an informal discovery, if you want to call it that. That might be an option, it appears, from Mr. Flynn's standpoint as well.

MR. EDDLEMAN: I'd certainly be amenable to that, Judge.

JUDGE KELLEY: I wonder if you could look into that. Give Mr. Eddleman a call and see if that can't be worked out. That would only then leave the question of schedule and how soon that could be done and whether this should affect the filing of summary disposition responses.

We're reluctant to change those dates. Can that kind of thing be done, if it's going to be done, by the middle of next week, so that you could file on time, Mr. Eddleman?

MR. EDDLEMAN: Judge, I think I could do it. I might need one more day. I might need to file Friday, instead of Thursday.

JUDGE KELLEY: I don't think anybody would object to one more day.

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Do I hear any objection to filing on the 14th instead of the 13th?

(No response.)

JUDGE KELLEY: Okay. So we'll advance the filing date to the 14th.

Mr. Eddleman and Mr. Flynn will be in touch with each other about the possibility of just phone conversations with whichever of these various evaluators were available. I don't know you'd make the choices. You can talk to all five, and I'll leave that to you, but the idea would be to not get into a formal deposition and just allow them to get some more information prior to his having to file any motion for summary disposition.

With that -- is that approach agreeable, Mr. Eddleman?

All right. Mr. Flynn?

MR. FLYNN: Yes, your Honor.

JUDGE KELLEY: So that's a compromise disposition of the dispute.

So ordered.

Could you just hold a minute while the Board confers about our posture.

(Discussion off the record.)

JUDGE KELLEY: The Board believes that it would be in everybody's interests to go ahead and rule on the

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motion now.

The motion to reconsider our January 10th order -- January 16, excuse me. The Applicant's motion to reconsider is denied. We feel that the issues raised in our order are still live issues. We feel that in order to get a reasonable assurance of what the issues involved here are, an accurate determination, based on available evidence, that we should pursue the lines of inquiry that are set forth in the order.

We welcome the Applicant's tone alert radio proposal, but we don't think that that addition makes the other issues moot.

So that motion is denied, and we will proceed as previously scheduled.

MR. EDDLEMAN: Judge, Mr. Flynn and I are still continuing negotiating about some of these other discovery matters. We hope to work that out, but we just wanted to report to the Board that we're still working on those.

JUDGE KELLEY: Okay. I'm just assuming, we've set a schedule for filing. I think the schedule's on track.

If you need to come to the Board, come ahead.

Is there anything else from anybody?

(No response.)

JUDGE KELLEY: Thank you very much. We're

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adjourned.

(Whereupon, at 2:10 p.m., the prehearing conference was adjourned.)

CERTIFICATE OF OFFICIAL REPORTER

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

NAME OF PROCEEDING: CAROLINA POWER & LIGHT COMPANY and NORTH CAROLINA EASTERN MUNICIPAL POWER AGENCY

(Shearon Harris Nuclear Power Plant)

DOCKET NO.: 50-400 OL

PLACE: BETHESDA, MARYLAND

DATE: WEDNESDAY, FEBRUARY 5, 1986

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

(sigt) David L. Hoffman

(TYPED)
DAVID L. HOFFMAN

Official Reporter
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