

1 STATE OF NEW YORK  
2 PUBLIC SERVICE COMMISSION

3

4 Case 06-E-0894 - Proceeding on Motion of the  
5 Commission to Investigate the Electric Power  
6 Outages in Consolidated Edison Company of  
New York, Inc.'s Long Island City Network.

7

Procedural Conference  
90 Church Street  
New York, New York

8

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September 15, 2006  
11:00 a.m.

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11 PRESIDING:

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ELEANOR STEIN,  
Administrative Law Judge

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JEANNE O'CONNELL, R. P. R. (518) 271-7904

1 APPEARANCES:

- 2 For NYS Department of Public Service:  
Kimberly A. Harriman, Assistant Counsel  
3 New York State Department of Public Service  
Three Empire State Plaza  
4 Albany, New York 12223
- 5 For Consolidated Edison Company of New York, Inc. :  
Mary Krayeske  
6 Chanoch Lubling  
Marc Richter  
7
- 8 For NYS Attorney General's Office:  
Charlie Donaldson, Esq.  
NYS Attorney General's Office  
9 Environmental Protection Bureau  
120 Broadway  
10 New York, New York 10271
- 11 Mary Ellen Burns, Special Counsel  
NYS Attorney General's Office  
12 Public Advocacy Division  
120 Broadway  
13 New York, New York 10271
- 14 For NYS Consumer Protection Board:  
John M. Walters, Esq.  
15 NYS Consumer Protection Board Five Empire State  
Plaza Suite 2101  
16 Albany, New York 12223
- 17 For the City of New York:  
Michael Delaney, Esq.  
18 NYC Economic Development Corp.  
110 William Street, 4th Floor  
19 New York, New York 10038
- 20 Robert M. Loughney, Esq.  
Couch White L.L.P.  
21 540 Broadway, PO Box 22222  
Albany, New York 12201-2222  
22  
23  
24

JEANNE O'CONNELL, R. P. R. (518) 271-7904

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- 1 For Public Utility Law Project (via telephone):  
Ben Wiles, Esq.  
2 Public Utility Law Project  
90 State Street, Suite 601  
3 Albany, New York 12207-1715
- 4 For the New York State Assembly:  
John G. Williams, Esq.  
5 NYS Assembly

Program Development  
Agency 4, 12th Floor  
Albany, New York 12248

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1 JUDGE STEIN: This is case 06-E-0894.  
2 We are commencing a procedural conference on this  
3 case, the investigation of electric power outages  
4 in Con Edison's Long Island City network. I am  
5 Administrative Law Judge Eleanor Stein.  
6 I would like to take appearances now for  
7 the record. If people would like to identify  
8 themselves and who they represent.

9 MR. WALTERS: Your Honor, John Walters for  
10 the Consumer Protection Board.

11 MR. LOUGHNEY: Bob Loughney for the City  
12 of New York. I am with the law firm of Couch  
13 White. With me is Mike Delaney with the New York  
14 City Economic Development Corporation, city  
15 attorney.

16 MR. LUBLING: Chanoch Lubling for  
17 Consolidated Edison of New York, Inc. To my right  
18 is Marc Richter and next to him is Mary Krayeske.  
19 To my left is John Mucci, the company officer in  
20 charge of the investigation.

21 MS. HARRIMAN: For the Department of  
22 Public Service staff, Kim Harri man with counsel's  
23 office. With me today is Guy Mazza from counsel's  
24 office, along with Mike Worden to my left, who is

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1 the technical lead for the investigation. To Guy's  
2 right is Nancy Plotkin, the lead on the consumer  
3 issues, and assisting her is Stacy Hartwick to her  
4 right.

5 MS. BURNS: Mary Ellen Burns for the New  
6 York State Attorney General's Office. Also  
7 appearing is Charlie Donaldson from the office.

8 MR. WILLIAMS: John Williams. I am  
9 appearing for the New York State Assembly Majority.  
10 I am the energy counsel at the majority.

11 JUDGE STEIN: Thank you. Ben, do you want  
12 to put in an appearance?

13 MR. WILES: Ben Wiles for the Public  
14 Utility Law Project.

15 JUDGE STEIN: I would like to begin with a  
16 short discussion of the scope of the proceeding.  
17 Just for the purpose of clarification, this case  
18 was commenced on July 26, 2006. In addition, on  
19 September 8, 2006 the Commission commenced a second  
20 proceeding, which is 06-M-1078, instituting,  
21 directing an audit investigation of outages in Long  
22 Island City, Westchester, and the systemwide  
23 company response to emergency outage conditions and  
24 other issues.

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1 If that wasn't complicated enough, maybe  
2 you would like to update us on the third  
3 proceeding.

4 MR. WILLIAMS: Yes. I understand that a  
5 docket number has been assigned. A petition was  
6 filed--and don't hold me to the numbers right now.  
7 I believe it was about 14 or 15 Assembly members  
8 and I believe two or three Senators and other local  
9 Legislators in Westchester County, a petition was  
10 filed seeking a prudency review of Con Edison's  
11 spending on the distribution system. That was  
12 filed with the Commission yesterday.

13 JUDGE STEIN: Can I ask you how you see  
14 the relationship of that proceeding to the pending  
15 proceeding?

16 MR. WILLIAMS: Right. I will say that the  
17 petition was filed coming out of a hearing that the  
18 Assembly Committee on Energy and the Committee on  
19 Corporations held on August 30th. At that time  
20 there was an exchange with representatives of Con  
21 Edison, as well as the Public Service Commission,  
22 and during that, the course of that hearing, the  
23 committee chairs and committee members had  
24 indicated that they would be filing a prudency

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1 review hearing.

2 So, this is following up on information on  
3 that. I believe that the purpose of that was at  
4 the time indications at the hearing were being held  
5 that reviews of the company's emergency procedures  
6 would be initiated in Commission dockets, and there  
7 was a feeling that such review and investigation  
8 should span beyond merely looking at the emergency  
9 review procedures and whether and how those  
10 procedures were followed, and looking at a more  
11 comprehensive review of the company's expenses, and  
12 most particularly in relation to capital operating  
13 expenses regarding the distribution system.

14 JUDGE STEIN: I believe, if I understand  
15 the correspondence I read this morning from Albany,  
16 that the case number the petition has been given is  
17 06-M-1108. And obviously the Commission has not  
18 yet acted on your petition. It was filed  
19 yesterday. I don't know if everyone, all the

20 parties in this case, have had a chance to look at  
21 it. I am assuming you will make it available to  
22 anyone.

23 MR. WILLIAMS: Yes. Anyone that wants a  
24 copy, please just let me know.

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1 MS. BURNS: Is there a way you could make  
2 it available by service list to this proceeding?

3 MR. WILLIAMS: I could certainly do that.

4 MS. BURNS: Question or observation. One  
5 of the concerns the Attorney General's office  
6 brings to this proceeding, the first one we are  
7 here on today, is a question about whether the  
8 scope of the proceeding means to include what I  
9 gather are the concerns of the Assembly petition.  
10 Namely, not just what happened during the time  
11 period of the outage and how did it happen and so  
12 forth, which of course is very critical to  
13 understand, but also sort of how did we get there.

14 And especially in light of what I think  
15 our office highlighted in 1999 about possible  
16 problems with their system with the network in Long  
17 Island City and concerns looking forward at that  
18 time about how was Con Ed going to demonstrate that  
19 it was enhancing and spending enough money to  
20 upgrade and maintain reliability of its entire  
21 system.

22 Is that part of the scope of this

23 proceeding that we are here on today?

24 MS. HARRIMAN: Your Honor, just to clarify

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1 the record, I believe Mr. Williams characterized  
2 this proceeding as being limited to an evaluation  
3 of Con Edison emergency response plan, the  
4 adherence to that plan during the LIC outage event.  
5 I do not believe that's a correct characterization  
6 of the investigation.

7 If one is to review the July 26th Order  
8 that instituted this investigation, they would find  
9 about 13 different bullet points that laid out in  
10 detail what it was that staff was to investigate.  
11 That those bullet points range from customer  
12 communications, assessments to maintenance and  
13 operation assessment of how Con Edison has handled  
14 its distribution system on to what happened during  
15 the course of the event.

16 So, I believe that, in fact, this  
17 proceeding is much broader to scope than a simple  
18 assessment of the emergency response plan and the  
19 company adherence to it. That is part of the  
20 investigation and, in fact, we are anticipating a  
21 filing by the company and its own self assessment  
22 of how it has adhered to the emergency response  
23 plan, but it is by no means the sole focus of the  
24 investigation.

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1           MR. LUBLING: We are addressing later what  
2 the investigation will cover, but cover much more  
3 than our emergency response and certainly much more  
4 than just a focus on this one outage.

5           JUDGE STEIN: I would just like to follow  
6 up with staff on the moment and then get to that.  
7 There are, and I would certainly refer the parties  
8 to the 13 paragraphs in the Commission Order that  
9 lay out the Commission's view of the scope, and  
10 certainly most of those are worded really very  
11 expansively, but my question to you is: Has staff  
12 been able to take a relatively expansive view in  
13 terms of how the investigation is going on and look  
14 at some of the broader issues that Ms. Burns is  
15 raising at this point, or is that in the future?

16           MS. HARRIMAN: Yes. In fact, staff has  
17 taken an expansive view. For example, for  
18 operation and maintenance accounting, staff is  
19 looking at annual expenditures on capital projects  
20 ranging over a number of years and with attention  
21 to the investments in the LIC network they are  
22 taking a systemwide look.

23           But, again, with attention to the LIC  
24 network and addressing was their sufficient

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1 investment in capital infrastructure in this area

2 of the system, but by all means the goal of the  
3 investigation is to be one that looks at topics in  
4 general and focuses specifically on how the topics  
5 affected the LIC network, and the recommendations  
6 no doubt that come out of the staff report will be  
7 recommendations applicable to LIC as well as all  
8 the operating networks. Again, the examination by  
9 staff is one that is broad in scope.

10 JUDGE STEIN: Thank you.

11 MR. DONALDSON: I believe that answered  
12 the point.

13 JUDGE STEIN: There is, obviously this is  
14 a very high profile crisis and there has been,  
15 there are many fora in which examinations of these  
16 events are taking place, and I am concerned to  
17 maximize our ability to address the issues of the  
18 Commission Order as thoroughly and expansively as  
19 possible and to ensure that parties who are  
20 participating in this proceeding can make sure  
21 their issues are heard here as much and to as great  
22 extent as possible, kind of without regard to all  
23 the other tables around which people are meeting  
24 and discussing these issues so we can be confident

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1 in our outcome.

2 MR. LOUGHNEY: On behalf of the city,  
3 obviously we have a very large interest in what  
4 happened and trying to determine what happened, and  
5 maybe more importantly trying to come up with

6 recommendations that will prevent something like  
7 this from happening again.

8           So, I know we haven't gotten to what the  
9 actual process is going to be, but I thought it  
10 might help to give you an idea of what the city is  
11 doing. We have retained a number of experts.  
12 Those experts have been involved in most of the  
13 testing that's been conducted, usually with staff  
14 and Con Ed personnel. We are looking very hard at  
15 what the causes were and we hope to come up with  
16 some final reporting at some point.

17           I guess in adopting proceedings in this  
18 case, I would want to make sure--I am asking your  
19 Honor to take into consideration some of the  
20 parties other than staff may have very detailed  
21 recommendations, very detailed observations, about  
22 what happened, and that all be given a chance to  
23 become part of the public record.

24           JUDGE STEIN: I appreciate that, and my

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1           own view is that the more information and the more  
2 concerns that can be aired in this proceeding and  
3 they can end up before the Public Service  
4 Commission, to the extent there are issues of  
5 concerns and findings that are under the  
6 jurisdiction of the Commission, the more that can  
7 be at this table and this proceeding and in the  
8 staff process the better.

9                   And so I would certainly welcome, to the  
10 extent parties are willing to, all of your input.  
11 If you have information or other investigation that  
12 you wanted to add into this, I think that would  
13 make for a more--the most rational and productive  
14 process in the end. So I am going to be  
15 encouraging that to the extent parties are willing  
16 to do that.

17                   One of the reasons I wanted to have this  
18 meeting was to sit down with each other, look at  
19 how do we craft a process that maximizes that  
20 participation, so that in the end the final product  
21 that staff is putting together and will in some  
22 form be before the Commission, has the benefit of  
23 the wisdom and experience and the different points  
24 of view of the people around this table and the

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1 people from western Queens who were not able to  
2 participate today. I would recommended maximum  
3 participation to the extent parties want to  
4 provide.

5                   MS. BURNS: In terms of that, maybe you  
6 are going to get to this on the agenda, we concur  
7 that maximum participation is the best way to go  
8 about this, and we are prepared to engage in that  
9 process in the Attorney General's Office as opposed  
10 to go off and do our own investigation, which we  
11 will hold in abeyance and, you know, try to  
12 participate fully here.

13           I think what would best make that possible  
14           for all the parties is, and maybe this is  
15           happening, but some way of being assured that  
16           responses to interrogatory requests and other forms  
17           of discovery or copies of documents, written  
18           responses, whatever the flow of discovery that is  
19           being done and responded to by anyone, that copies  
20           of that information, those documents, those  
21           responses, be made available to parties who wish to  
22           have them.

23           I guess that probably goes into the  
24           confidentiality issue, which maybe you don't want

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1           to address right this second. And along with that,  
2           I would urge if there are interviews had or  
3           depositions taken on the record that transcripts of  
4           those depositions be made available as appropriate  
5           and that parties be alerted to at least the fact  
6           that interviews took place and who they were with,  
7           and if anything is put in writing regarding those  
8           that parties appropriately have an opportunity to  
9           have access to those.

10           I think that would make for the most  
11           efficient process rather than, for example, Con Ed  
12           getting five requests to interview Mr. Or Miss so  
13           and so by five different parties, although maybe  
14           some of that is not able to be avoided.

15           MR. LUBLING: We have been following the

16 regulations. We have, all parties have circulated  
17 the interrogatory requests to all other parties and  
18 those parties that requested copies of requests  
19 have been getting them. I believe New York City  
20 and others have been getting our responses to all  
21 the parties.

22 MS. HARRIMAN: I think there may be a  
23 situation, and perhaps Mary Ellen can let us know,  
24 there may be a situation the request either was not

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1 provided or was not observed by the company to  
2 provide responses, because if you haven't been  
3 getting the responses...

4 MR. LUBLING: They haven't asked for  
5 responses.

6 MS. HARRIMAN: I just want it clear on the  
7 record nothing was being deprived of the Attorney  
8 General's office.

9 MS. BURNS: We are not suggesting that.

10 MR. LUBLING: The only response we have  
11 not provided to other people, and that's going to  
12 be subject of protective orders, are things that  
13 are confidential, primarily customer lists, and  
14 those other parties who wanted it would have to  
15 sign the protective order.

16 Even under the protective order I am not  
17 sure how much liberty we are at to release other  
18 people's information without their permission.

19 MS. HARRIMAN: To address the issue of  
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20 interviews, staff made it clear to the parties we  
21 are conducting interviews of various company  
22 personnel. As part of the conference call that  
23 preceded the letter we submitted to Your Honor, we  
24 gave our commitment to the parties to provide them

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1 a list of the individuals that we have interviewed  
2 or intended to interview, and the title of the  
3 individuals, to the extent we could the topic  
4 matter discussed in the interviews. Sometimes what  
5 we believe to be the topic going in doesn't  
6 ultimately end up being the topic discussed for  
7 various reasons. That list is up to date.

8 We will be doing, again, interviews next  
9 week and, again, will send you notification to the  
10 parties with the names of the individuals we  
11 interviewed and title, and hopefully as best we can  
12 the topic matter to be covered.

13 With regard to memorialization of what  
14 takes place during the interview, really, this is  
15 about as informal as it can get. If it was up to  
16 staff it would be just technical folks speaking to  
17 technical folks, but attorneys are present and the  
18 only real role we have is to take notes. They are  
19 not very good notes given the fact we are not  
20 technical individuals and we try to assist the best  
21 we can.

22 And so I do not feel comfortable that

23 those notes would even be beneficial to folks  
24 because, again, it is a very informal process and

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1 you are having a non-technical person jotting down  
2 as fast as they can any bits of pertinent  
3 information. No depositions have been noticed as  
4 of yet and formality or procedures applicable to  
5 depositions I believe a topic for later discussion.

6 If we have a technical conference that  
7 obviously, per your ruling or notice, Your Honor,  
8 would be open to the public and would have a  
9 transcript available to all, as well as potential  
10 depositions.

11 JUDGE STEIN: Let me just clarify. So, I  
12 am assuming from your description the interviews  
13 are off the record.

14 MS. HARRIMAN: Yes.

15 JUDGE STEIN: And are they--is this kind  
16 of a preliminary information gathering process that  
17 we will then formalize into what you want to have  
18 on the record at a later date?

19 MS. HARRIMAN: We may have on the record  
20 discussions with some of the individuals that we  
21 have interviewed but, really, the interviews are  
22 our way of getting a first-hand account of what was  
23 going on and discussing technical issues we may not  
24 have been aware of prior to those interviews.

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1           It's also a way of connecting the dots as  
2 far as individuals who were involved during the  
3 event, having discussion with the company. So, we  
4 may choose to do a more formal either a deposition  
5 or request individuals be present at technical  
6 conference, but may not.

7           Each interview is really at a preliminary  
8 stage of investigation. More often than not they  
9 generate follow up to get to another individual and  
10 interrogatories as a result of what we have  
11 learned. Again, those interrogatories are  
12 circulating to all the parties.

13           MR. WALTERS: I just have one point to  
14 follow up on what Kim was speaking of. I am a  
15 little confused.

16           Kim, when you were talking about  
17 depositions or interviews that may lead to  
18 depositions and you meshed in within their talk  
19 about the possible technical conference, were you  
20 envisioning that you would be conducting  
21 depositions at a technical conference?

22           MS. HARRIMAN: No.

23           MR. WALTERS: Would the depositions be  
24 open to parties that are active in these cases or

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1 in this case?

2 MS. HARRIMAN: I believe the prior  
3 conversati on we have had regarding depositions we  
4 were reserving judgment on party participation in  
5 those depositions. We talked about during the  
6 conference call depositions are normally a party on  
7 party activity where a transcript is created as far  
8 as how they have been handled in the civil courts  
9 outside of an administrative proceeding, but we  
10 don't, we haven't taken a position one way or  
11 another.

12 And it was not until notice was going to  
13 be issued and we believed we were going to go to  
14 depositions we would convene a meeting of the  
15 parties to request how to handle depositions. I do  
16 not believe depositions would be conducted at a  
17 technical conference.

18 MR. LOUGHNEY: I think all the other  
19 parties have reserved--if staff asked for  
20 depositions those parties may ask to be party of  
21 those depositions to sort of prevent a duplication  
22 of it.

23 MR. WALTERS: You were contemplating that  
24 would be something discussed at a technical

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1 conference?

2 MS. HARRIMAN: Not at a technical  
3 conference. We would contact the parties in  
4 advance of issuing a notice for depositions and  
5 discuss the process and hope to come to some sort

6 of agreement. If no agreement was reached, we  
7 would utilize Judge Stein in helping to resolve any  
8 dispute concerning how it would be conducted and  
9 who is invited.

10 The technical conference I am referring to  
11 is the one mentioned in the Judge's ruling,  
12 procedural ruling, and where the judge was  
13 broaching the topic of a technical conference, and  
14 that would be on the record but different, in my  
15 view, from a deposition.

16 MR. LUBLING: All I wanted to add, in  
17 addition to the interviews, staff is out in the  
18 field and does speak to company people outside of  
19 all of you, so we have no idea, but they do get  
20 technical advice, technical information.

21 MS. HARRIMAN: That, yes, that is correct.  
22 We do have staff personnel in the field and they do  
23 have occasion to talk to personnel from the  
24 company. And I can be honest in saying sometimes,

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1 probably most times, I don't even know when that  
2 takes place. It's just they come upon crews and  
3 talk to them.

4 MR. LUBLING: The company has encouraged  
5 people to exchange information with staff.

6 MR. WALTERS: Your Honor, the reason I  
7 broached that is we were interested, like other  
8 parties, in fully participating in the proceeding.

9 We are limited in the resources we have and,  
10 frankly, we are going to have to rely to a great  
11 extent on staff's report or investigation.

12 At one point there was discussion, and I  
13 don't know if this is the proper time to bring this  
14 up, discussion of certain meetings that might occur  
15 with staff and other parties in sort of an update  
16 manner on what the investigation was.

17 I wonder what the status of that was. Are  
18 you still amenable? I know there was some  
19 discussion whether on or off the record, I don't  
20 remember, that the staff would have agreed to meet  
21 with parties under the confidential agreements and  
22 sort of update parties.

23 Our concern is we are going to get a  
24 report in November, whatever the time frame is,

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1 December, January, and have a limited period to  
2 respond to that and be sort of in the dark as far  
3 as obviously on the technical issues, but on some  
4 of the other issues that might have been part of  
5 the investigation. In order to fully contribute to  
6 whatever process is set up here, we were interested  
7 in that and I think at the last discussion we had  
8 there was some bantering about of that. I wonder  
9 where that was.

10 MS. HARRIMAN: Staff is definitely open to  
11 having--and I think the judge termed it staff  
12 presentations during the course of the

13 investigation, because we do share the view that  
14 there is a need to have party participation. And  
15 to the extent that we can get input from parties  
16 where we can take that input we will. And so we  
17 want to have appropriate forums to provide that,  
18 not just when we get to the end date we have a  
19 product that's released to the Commission.

20 So, first we started going backwards from  
21 a draft report we committed to provide to the  
22 parties for informal comment. That's kind of like  
23 the end state. What comes between now and that  
24 point are staff presentations. Due to the fact

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1 that we weren't sure whether or not like a 3.9  
2 notice would be applicable to hold parties to  
3 confidentiality, we felt the next best thing would  
4 have a confidentiality agreement executed among the  
5 parties because there is a sensitivity that we need  
6 to have a complete report to be released to the  
7 public, or at least a draft report where we invite  
8 informal party comment, and we don't want to have a  
9 situation we are having information sharing with  
10 parties and information being subsequently provided  
11 to the outside world that may not be entirely  
12 accurate because we are at an interim phase of the  
13 investigation.

14 Again, we want to share information with  
15 the parties. We just want to be very prudent in

16 how we do that. So, by all means we are not  
17 looking to prevent or preclude parties from  
18 participating in the investigation to the extent  
19 that we are able to share information with them as  
20 we go through the course of the investigation.

21 I think the issue that was left from the  
22 conference call we had was just the discussion of  
23 what would a confidentiality agreement look like  
24 and how would the parties best protect their own

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1 interest in executing one. That still is left to  
2 be worked out.

3 JUDGE STEIN: Let me throw in a little  
4 more information about how I envision what we are  
5 calling a technical conference, since I was the one  
6 that brought it up in the first place, and I would  
7 really like parties and staff in particular to  
8 think about whether this would be a useful forum.

9 And essentially the idea is to have a day  
10 or two that's open to all parties, and we will have  
11 to think about it and discuss the confidentiality  
12 issues, but essentially an opportunity for exchange  
13 and discussion of the technical matters with  
14 subject matter experts from Con Edison and from  
15 staff and from other parties, for that matter.  
16 Probably in the interest of efficiency and focus,  
17 parties would be invited to feed their questions or  
18 their areas of concern to staff ahead of time and  
19 staff would take the lead on raising questions and

20 beginning discussion and so on.

21 And some of the ones that I have done in  
22 the past have included an opportunity for technical  
23 experts on all sides of the table to discuss  
24 matters with each other, to capture some of that

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1 productive exchange and discourse among people who  
2 really understand the workings of the system in a  
3 very informal setting, although generally on the  
4 record.

5 And it's kind of a hybrid form. I am not  
6 selling it particularly, but I did want to let you  
7 know it's an option. It's not that dissimilar from  
8 a staff briefing of parties or staff presentation,  
9 but it allows for other parties to engage in an  
10 information gathering exercise with Con Edison as  
11 well as through staff.

12 So, I would like you to think about that,  
13 if parties think that would be a productive forum  
14 and what issues it might raise for them. If it  
15 sounds too labor intensive in terms of the  
16 resources parties want to bring to the process, if  
17 parties prefer to have briefings from staff or Con  
18 Edison about the status of the investigation, I  
19 would like to hear from you about that over the  
20 next few days so that we can look at what form is  
21 likely to be the most productive.

22 MS. BURNS: Judge Stein, do you or others

23 have a thought about what point in the  
24 investigation would be most useful to have that

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1 kind of a conference? Would it be more after lots  
2 of information has been amassed and then people  
3 kind of wanting to talk about that or draw  
4 conclusions and so forth, or is it more information  
5 gathering in and of itself?

6 JUDGE STEIN: I think that's really up to  
7 the parties.

8 MR. LUBLING: One good thing. We thought  
9 after we issue our report, which is going to be  
10 in--say that we have a 105 report. There is a  
11 Commission regulation that requires us to report  
12 60 days after the end of the event on our emergency  
13 preparedness, emergency response. We are preparing  
14 that report.

15 However, rather than just issue that  
16 report and then have a separate report on our  
17 interim investigation, we are doing a comprehensive  
18 investigative report and we are going to be asking  
19 the secretary to extend that deadline of the 105  
20 filing that we--just emergency preparedness portion  
21 of it so we can issue it together with the large  
22 report. And we expect to have that I think  
23 October 4th--September 25th. And we  
24 would--October, the Friday after. I don't have a

1 calendar. We are going to look at the dates.

2 JUDGE STEIN: Let's get a date.

3 MR. LUBLING: Our request for the  
4 extension will be coming to all parties. We expect  
5 to do that today or latest Monday. I am sorry,  
6 Friday the 6th, October 6th, not the 4th. I  
7 misspoke. So, we will get that request with a copy  
8 to all parties.

9 Shortly after that--we were envisioning  
10 that this report will be hundreds of pages--that we  
11 would have a technical conference where Con Ed  
12 panel would present, would explain the report,  
13 present the conclusions, the recommendations and  
14 give people an opportunity to ask questions.

15 And we thought that could be under the  
16 process or format that Judge Stein outlined in her  
17 ruling, procedural ruling, where we could be on the  
18 record, but if everybody were to funnel questions  
19 rather than just everybody throwing questions,  
20 first hear us out. We will have everybody there  
21 who prepared the report and then entertain  
22 questions and we can have a follow up if people  
23 would like to go back and read parts and come back.  
24 That's one technical conference we could have.

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1 JUDGE STEIN: I would like to ask--I am

2 trying to understand the relationship between your  
3 investigative process and the staff investigative  
4 process. So, in the process of doing your own  
5 investigation and preparing your own report, is  
6 there some back and forth with staff's concerns or  
7 is this really internal?

8 MR. LUBLING: This is entirely internal.  
9 Obviously we answer a lot of interrogatories and  
10 that gives us a focus of what the report should  
11 cover. If people are asking interrogatories on a  
12 matter, we are trying to cover that as well.  
13 Trying to be a comprehensive report of what  
14 happened and what could be done in the future.

15 We also have a second investigation by an  
16 independent group that we have hired and staff's  
17 investigation and the city is doing an  
18 investigation as well, as far as we know. There  
19 are several investigations.

20 What I was referring to was just Con  
21 Edison's internal investigation headed by Mr.  
22 Mucci. At the technical conference it would make  
23 it easier for the parties either after they read it  
24 or before they read it an opportunity to ask

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1 questions.

2 MR. LOUGHNEY: Your Honor, two things.  
3 One on timing. I think that a meeting either with  
4 Con Ed presenting or with staff presenting, I don't  
5 think they should be mutually exclusive. It may be

6 the meeting with Con Ed is necessary. It may be  
7 also the parties should have a means to meet with  
8 staff.

9 In terms of timing, the problem is the  
10 right time some time after the report is issued.  
11 There's still a lot of interrogatory responses.  
12 Still a lot of data gathering still going on. And  
13 just by the timing of how the responses are coming  
14 in and follow up, probably going to use most of  
15 September, I think, to get through the discovery  
16 process, at least. And so some time after that and  
17 after the Con Ed report is issued seems to me it  
18 would be an opportune time to have the meetings.

19 But I do want to emphasize I don't think  
20 the Con Ed presentation should preempt the possible  
21 meeting with staff doing the presentation or other  
22 parties having an interactive discussion of what's  
23 been found to date.

24 MR. WALTERS: Can I ask a question on

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1 section 105 report? Would that--it's not  
2 encompassing the entire scope of the proceeding or  
3 the questions--are the issues only limited to the  
4 actual responses?

5 MR. LUBLING: Right. If we were to do a  
6 section 105, we do the emergency preparedness, the  
7 communications, the responses. Not the root cause,  
8 not how to implement future recommendations. We

9 are envisioning a more comprehensive report  
10 inclusive of section 105 requirements.

11 MR. LOUGHNEY: So, this report will try to  
12 address a lot of the issues that the Commission  
13 raised in the Order instituting the proceeding?

14 MR. MUCCI: It's going to answer all the  
15 technical issues about what happened, what caused  
16 it, what could we do to prevent it, what we could  
17 do to improve. Be comprehensive.

18 MS. HARRIMAN: I just want to make a  
19 point. We are not opposed to a technical  
20 conference presented by Mr. Lubling to focus on the  
21 company's presentation. We prefer that conference  
22 happen after we had a reasonable time to digest the  
23 filing.

24 And as far as reference to a staff

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1 presentation, we don't believe that the offer from  
2 staff to confer with the parties about where we are  
3 in the investigation would rise to the same level  
4 as the technical conference envisioned with the  
5 company's report. We would not do such a meeting  
6 on the record.

7 And again, we would have confidentiality  
8 concerns that may be applicable to the technical  
9 conference for the company's report, but mainly  
10 because in a part 105 filing to the sense it does  
11 not contain redacted portions will be a public  
12 record filed in this case.

13 MR. LUBLING: We don't envision our report  
14 will have any confidentiality assertions. We are  
15 going to make it public. As far as I understand  
16 for security reasons we don't, but otherwise we  
17 don't envision it.

18 JUDGE STEIN: I am hearing three different  
19 models in terms of kind of information gathering  
20 events that we might adopt any one or all of. One  
21 is what we have called, people have been referring  
22 to as a staff presentation or staff briefing. Off  
23 the record probably, confidential probably, as an  
24 opportunity for parties to get an update from staff

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1 on the state of their process. Where we stand,  
2 what the big issues are, and so on.

3 The second is the Con Edison proposal for  
4 a session in which they would present their section  
5 105 report after it's filed with the Commission  
6 either on the current schedule or after granting of  
7 a request for postponement until October 6th.

8 And the third model is more free flowing  
9 exchange of information on the record with experts  
10 from Con Edison available to answer technical  
11 questions, probably posed by staff, with the  
12 participation of other active parties in  
13 identifying areas and posing questions.

14 MR. WORDEN: I would envision if the  
15 company makes its presentation following that

16 presentation we would have the free flowing Q&A you  
17 described there. Is that what you envisioned?

18 MR. LUBLING: Yes. If it's on the record  
19 it's easier if it's funneled through one person  
20 other than throwing questions and not having an  
21 order.

22 JUDGE STEIN: I am distinguishing those  
23 two because it seems to me that proposal or offer  
24 by the company makes the topic of the discussion

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1 the company's investigation and report, and the  
2 staff investigation and report is related by a  
3 separate process.

4 So, and I am not coming to a conclusion  
5 here. I am just trying to clarify what I see as on  
6 the table right now at least three or maybe only  
7 two possible ways to go about maximizing party  
8 participation in the process.

9 I do want to keep the focus on the staff  
10 investigation because, as I read the instituting  
11 Order, and the charge from the Commission is for  
12 staff to present this report to a session of the  
13 Commission following a full investigative process.

14 So, in a sense, the product of this  
15 process is a staff report that, as I understand the  
16 correspondence to date, has been subject to advice  
17 and comment by asking other active parties prior to  
18 the file being presented to the Commission. So, I  
19 am trying to keep the focus on that.

20 MS. BURNS: I think there are three parts,  
21 three different ways of discussing the information,  
22 all important, and I do think I would underscore  
23 that I am sure Con Ed will do an extensive and  
24 comprehensive report about the matters as to which

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1 they are interested, which I am sure will be of  
2 interest to everyone else, including staff, but it  
3 does seem to me what is equally and more important  
4 is sort of what the staff is looking at and what  
5 the whole comprehensive range of inquiry may be,  
6 and the issues that arise and issues the parties  
7 are concerned with and staff, I believe, is  
8 concerned with.

9 And so I think it really is important to  
10 have a staff briefing of some sort, and that the  
11 way this goes, as you are suggesting, really  
12 emanating from the staff's investigation and what  
13 they want to share with us and hear from us.

14 So, I guess maybe the one suggestion I  
15 would have to the three prongs, based on what  
16 somebody said over here, pointing to Con Ed and the  
17 City, maybe, is that the free flowing technical  
18 conference that you, Judge Stein, seem to also be  
19 envisioning, I think would not be purely on the Con  
20 Ed internal report they present to you, but also to  
21 what the staff is doing.

22 There may be a lot more there. That

23 would n' t be good if we j ust focused on the Con Ed  
24 internal report.

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1 MS. HARRIMAN: I think a couple of things.  
2 First, the company's report that they intend to  
3 submit on October 6th will be one piece of staff's  
4 investigation. It certainly will be a valuable  
5 tool in conducting our own investigation, but will  
6 by no means serve as the sole basis for that.

7 Ms. Burns' recommendation as far as staff  
8 providing a briefing, we do intend to provide the  
9 briefing. What I want to be clear on is this offer  
10 is for a briefing of technical --what we would have  
11 technical staff there ranging from accountants to  
12 consumer service representatives to engineers.  
13 That offer would be an offer of off the record  
14 discussion in which case we would not invite Con  
15 Edison. We want to make that clear.

16 The investigation has to proceed with as  
17 much independence given this hybrid that we find  
18 ourselves in, and we believe that it will be  
19 critical to preserve that going forward while  
20 allowing maximizing, to the greatest extent  
21 possible, party participation.

22 So, we are willing to offer an off the  
23 record discussion with our experts present with the  
24 active parties, but we will not invite Con Edison

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1 to that discussion.

2 MR. LUBLING: We are not inviting staff to  
3 our discussion either.

4 (Laughter)

5 Your Honor, I don't understand the basis  
6 for that. I mean I can't force us into the  
7 discussion that staff has with other parties, but  
8 as far as I know this is a public investigation. I  
9 don't see why Con Edison would be excluded from  
10 discussion of areas of concern.

11 There is nothing--at best we can add  
12 information that would dispel that concern, but if  
13 nothing else we would just know where this  
14 investigation is going. I don't see the horror of  
15 having Con Edison there, but lawyers can have  
16 discussion at any time.

17 MS. HARRIMAN: That point is the seminal  
18 point, which is parties can have discussions at any  
19 time and we are exercising our ability to have  
20 those discussions and to invite who we choose.

21 I want to make it clear that the staff  
22 report ultimately I foresee being an issue for some  
23 sort of formal comments. I am sure Con Edison will  
24 exert their rights to provide comments on.

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1 Also, I think in the beginning of this

2 procedural conference, Your Honor, you mentioned  
3 these other proceedings that are throughout, and so  
4 we cannot be--we can't keep in hindsight the fact  
5 there have been calls for prudency proceedings and  
6 some of the information we may be sharing with  
7 parties could ultimately end up in a prudency  
8 proceeding. So we have to be mindful of where this  
9 investigation could ultimately lead.

10 And, again, that is why we have chosen to  
11 offer the investigation for the staff briefings to  
12 only the active parties and not to Consolidated  
13 Edition.

14 MR. LOUGHNEY: Your Honor, I have a  
15 question. With respect to the other proceedings,  
16 the audit proceeding which has already been  
17 instituted and then the Assembly's petition, I  
18 guess we don't know what the Commission is doing  
19 with that yet. What is the impact on the audit  
20 proceedings of what we are doing here and  
21 Assembly--potential impact of what the Assembly  
22 would do? Do we expand the scope of this or  
23 determine another process? Maybe just the audit  
24 proceeding, what is that going to do of the

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1 procedures we are talking about here?

2 JUDGE STEIN: Do you want to speak to  
3 that?

4 MS. HARRIMAN: Sure. We discussed  
5 internally what the impact from the case dealing

6 with the audit on emergency responses going into  
7 both LIC and the outages in Westchester would have  
8 on this proceeding, and as far as we have been able  
9 to determine as a staff team working on the  
10 investigation is that the audit that is  
11 contemplated by that Order is a very broad in scope  
12 audit focusing on emergency response plans, and  
13 adherence to those plans and would entail the  
14 procurement of a consultant, which would have to  
15 comply with various state provisions, which could  
16 put basically the start of the investigation a  
17 roughly four-month window from now.

18           Given the need to provide a report by the  
19 end of the year or thereabouts, we believe that  
20 staff team--our product will be finished either  
21 very close to or prior to the commencement of the  
22 work in the investigation dealing with the audit.  
23 And that, in fact, the recommendations that we may  
24 produce as a staff could be taken up in that

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1 broader investigation and audit and hopefully  
2 provide some insightful information to that audit  
3 process.

4           As far as the prudence filing by the  
5 various members of the Assembly, Senate and Local  
6 Legislators, we believe that the initial fact  
7 finding into the event is still going on and that  
8 as those who participate with the proceeding know,

9 there is a prima facie case that needs to be made  
10 by any entity bringing a prudency proceeding. And  
11 we believe it's premature at this point to state  
12 definitively whether or not staff believes there is  
13 sufficient evidence to make a prima facie case in  
14 prudency.

15 And we would like to work through the  
16 investigation, issue our report in a timely manner,  
17 and ultimately have the Commission or the judge  
18 determine whether or not there is a sufficient  
19 basis to go forward with the prudency proceeding.

20 MR. LOUGHNEY: Essentially from staff's  
21 standpoint we are moving forward with this  
22 proceeding and the other proceedings will be later?

23 MS. HARRIMAN: Yes.

24 JUDGE STEIN: Let me suggest that I think

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1 parties have raised some complex questions, and in  
2 terms of to return to what we are mainly  
3 discussing, what are the processes we can put in  
4 place to both expedite and facilitate party  
5 participation in the staff investigation, and the  
6 one factor we haven't discussed is that all of the  
7 resources of all the parties who are civilly  
8 engaged in the process are already fully engaged  
9 and actually doing the investigation.

10 I am cognizant of that, that to adopt a  
11 process that doesn't stop the investigation in  
12 order to have full participation. That said, I

13 would like to put the procedural questions to rest  
14 quickly, and what I would like to do is I would  
15 like to give everyone an opportunity to think it  
16 over and e-mail any other thoughts that you would  
17 like to add to what you put on the record today.

18 So, I would like to hear from parties, if  
19 you have anything to add, no later than Wednesday,  
20 September 20th, at the close of business by e-mail  
21 to me, and copies to all parties with any other  
22 suggestions or what your principal concerns are  
23 about the different formats we have discussed,  
24 taking into consideration the real world

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1 consequences of further burdening those who are  
2 conducting the investigation as well as the need  
3 for full participation. And then I will issue a  
4 ruling setting some process in motion immediately  
5 thereafter.

6 Any questions about that?

7 MR. DELANEY: I have one related question.  
8 I know Kim said the approximate goal for this is  
9 the end of the year, and I know that the Chairman  
10 has said that obviously thoroughness will prevail  
11 over any scheduling as such, but if there were to  
12 be federal action on the request to go out to  
13 October 6th, and if there were to be a Con Ed  
14 conference presumably in mid to late October  
15 addressing that, would that change the schedule or

16 do you still see approximately the end of the  
17 calendar year as the goal for completion?

18 MS. HARRIMAN: Our goal as stands is still  
19 the end of the calendar year. I believe the judge  
20 put in the release of the staff draft report  
21 November 2006. We obviously view November 2006 to  
22 be very close to the end of November 2006 rather  
23 than the beginning.

24 So, what we can commit is that obviously,

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1 Mike, as we get in the company's filing and we have  
2 the technical conference, we will be in a much  
3 better position after that point to reassess where  
4 we are in the investigative process, to determine  
5 whether or not the end of the year deadline we have  
6 self imposed is manageable.

7 JUDGE STEIN: Let me follow up on that. I  
8 think we moved on to the next agenda item, thank  
9 you very much, seamlessly, which is schedule. I  
10 would like to set what I have described as a  
11 working schedule, understanding that it is subject  
12 to change.

13 Based on the scope I think of intervening  
14 events and so on at the request of parties, I would  
15 like to establish a schedule. And I am hearing you  
16 say that you have no objection to a schedule which  
17 is premised on, as I read the Commission's  
18 instituting Order, the submission to the Commission  
19 of a staff investigation report, that that's the

20 final product is the report submitted to the  
21 Commission.

22 MS. HARRIMAN: That's what we have been  
23 tasked with by the Commission. That is our charge.

24 JUDGE STEIN: Are you looking toward the

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1 December session?

2 MR. LOUGHNEY: While Kimberly contemplates  
3 that, I would like to point out that I think other  
4 parties may have significant responses to the staff  
5 report or supplementary to the staff report, and  
6 determining the schedule. If we are going to say  
7 draft staff report is issued in late November, I  
8 think it would be unfair to the other parties to  
9 put a very short comment period on top of that  
10 because we would be reacting to the staff report  
11 and then trying to get something before the  
12 Commission in December. Just seems a little  
13 unreasonable to me.

14 But my main point is that the reply  
15 comments, if that's what we do in terms of  
16 procedures, may be extensive. I am talking from  
17 the city standpoint may include affidavits or  
18 reports by our own experts who have been looking at  
19 this and it's going to be a very sizable record  
20 that's going to be produced.

21 Again, to summarize, I don't know it's  
22 realistic to think the Commission will be able to

23 act in December. I just don't see it.

24 MS. HARRIMAN: Can we go off the record

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1 for a moment?

2 JUDGE STEIN: Yes.

3 (Discussion held off the record.)

4 JUDGE STEIN: Ms. Harri man.

5 MS. HARRIMAN: Yes, Your Honor. Just to  
6 address Mr. Loughney's concern about the time, the  
7 deadli nes associated with getting i tems to the  
8 Commi ssi on by the end of the year and having staff  
9 submit a draft report by the end of November, staff  
10 believes that the report that they issue to the  
11 Commi ssi on in December will be an i nformati onal  
12 i tem to the Commi ssi on which would not necessari ly  
13 requi re Commi ssi on acti on.

14 That being said, the type of comments that  
15 we would look for on the draft report from staff in  
16 sometime mid to late November would be one of  
17 i nformal i n nature. Subsequent to the staff's  
18 fi nal report, the Commi ssi on would then determine  
19 to the extent it wanted to provide a formal set of  
20 comments, and that could i nclude a noti ce from the  
21 State Admi ni strative Procedure Act noti ced in the  
22 State Registry where parties would have the  
23 opportuni ty to provide a more formal set of  
24 comments that could i nclude the affi davi ts Mr.

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1 Loughney mentioned.

2           So, I do understand Mr. Loughney's concern  
3 regarding the ability of parties to have enough  
4 time to digest the draft report by informal  
5 comments, but I want the record to be clear that,  
6 in fact, that most likely will not be the only  
7 opportunity for parties to comment on staff's  
8 report, and that it's very likely, I believe, that  
9 a more formal set of comments will be invited by  
10 the Commission and it will--most definitely is  
11 required under the law should the Commission direct  
12 the company to implement either Con Edison  
13 recommendations or any other parties'  
14 recommendations.

15           MR. WALTERS: We have a similar concern on  
16 the informal timing Kim just discussed, but  
17 appreciate her elaborating further on the  
18 additional opportunity the parties would have for  
19 input on this. Still have a concern it might be a  
20 little bit of a quick turn around when getting it  
21 at the end of November on the informal comments.

22           I know Kim said that there would be  
23 another additional opportunity, but just on the  
24 first product that might still--we think still

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1 think that might be a little too quick.

2 MR. LOUGHNEY: One other concern. Ms.  
3 Harri man is saying there will be additional  
4 procedures after the Commission gets the staff  
5 report, but we don't know that for sure. We don't  
6 know what the Commission is going to do with the  
7 report. I mean I guess my lingering concern is the  
8 parties here have a full opportunity to present  
9 their observations, conclusions, recommendations to  
10 the Commission in a way that will be included in  
11 the record for the Commission's consideration.

12 I appreciate what you are saying, but I  
13 don't know what the Commission is going to do with  
14 the report. Likely they will issue for comments.  
15 I guess that's a concern I still have. It would be  
16 nice if the Commission would tell us that.

17 MS. HARRIMAN: Yes, since none of us can  
18 speak for the Commission. If the Commission,  
19 though, is to implement recommendations, any  
20 recommendations, regardless of whether they come  
21 from active parties or staff, they have to take  
22 procedures as required under the State  
23 Administrative Procedure Act which requires them to  
24 notice and act on comments on a 45-day window.

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1 So, I think what we are trying to do is  
2 preserve the informal nature of staff's  
3 investigation to provide comments on a draft  
4 report, and preserve that process and make that  
5 distinct from the more formal process that you

6 would see of comments filed under the State  
7 Administrative Procedure Act.

8 Now, the judge, as all judges can, has her  
9 own ability to set up a more formal comment process  
10 that is not controlled by what the Commission  
11 ultimately decides to do with the staff report. We  
12 have no objection to that if that satisfies  
13 parties' concern there will not be a second round  
14 of comments of more further formal nature.

15 I wanted to preserve the informal nature,  
16 so it's more like a dialogue, whether it's on the  
17 papers or another staff briefing or do both, of  
18 what the offer is from staff, which is unique in  
19 the sense I don't believe staff in previous  
20 investigations of this nature has done before.

21 We want to recognize the uniqueness of  
22 events and high level of party participation. We  
23 want to make the pursuit beneficial for staff in  
24 the product. We want to submit to the Commission

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1 so that they have a more informal back and forth  
2 with the parties first, but I understand completely  
3 your concern about not having the more formal  
4 opportunity to provide affidavits and other  
5 information for the record.

6 MR. WORDEN: And the timing issue. You  
7 need more than a couple days.

8 MS. HARRIMAN: On the timing issues for

9 the informal comments, we were talking about as far  
10 as staff team contemplating a two- to three-week  
11 window. We don't want to presume what parties  
12 would need. If you have an idea of how long you  
13 would need, then we will work from there.

14 JUDGE STEIN: And please include your  
15 concerns on these issues if you are going to send a  
16 follow up letter. I also am hoping that if we can  
17 craft a workable more or less iterative process  
18 using informal discussions with staff or briefs or  
19 technical conferences and the Con Ed 105 offer,  
20 then parties will have had considerable opportunity  
21 to shape the inquiry before even the draft report  
22 is issued, so it's not going to be, shouldn't be  
23 entirely--I mean maybe it will be full of  
24 surprises, but parties should certainly feel they

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1 have been part of an iterative process by then.

2 But I think I understand the concerns, and  
3 please do elaborate on them to the extent and  
4 perhaps prioritize them if you would like to follow  
5 up with the e-mail. And clearly we are trying to  
6 craft a process and a schedule in an absurdly short  
7 period of time to do what we are trying to do.  
8 Let's put one on paper. If it's not working we'll  
9 modify as necessary.

10 I would like to go to the question of  
11 confidentiality agreement and those issues have  
12 come up several times and I would like to go to

13 that. I would like to just spend a minute together  
14 talking about the issue of public participation.

15 We have discussed party participation. I  
16 am not sure how much we want to talk about that  
17 today, but Chairman Flynn has noted several times  
18 publically that the Commission envisions additional  
19 public statement hearings or other form of public  
20 participation. And I believe I noted that in my  
21 ruling and my interest in having some kind of  
22 public forum or back and forth events established  
23 in the course of the same schedule so that members  
24 of the public--and held in Long Island City

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1 community so members of the public can learn about  
2 what's going on, because I think things have moved  
3 on since the original round of public statement  
4 hearings, so all of us can hear the concerns that  
5 customers continue to have.

6 I would like to have set a schedule for  
7 those as well, so that we fold in the public  
8 participation process into the rest of the enormous  
9 amount of work everybody is doing. And I know that  
10 the representative for the Queens Power for the  
11 People group, Ms. Anya Mukarji-Connolly, couldn't  
12 be here today, but they have offered to help with  
13 identifying--they raised issues about location, how  
14 much notice, availability of translators.

15 I have asked her to assist all of us in

16 identifying what are the relevant languages, what  
17 in their views are the best locations, where is the  
18 best way to get notice out to the community. She  
19 was very interested in doing that. I am hoping  
20 your office, Nancy, can work with her and other  
21 parties that are going to participate in that  
22 process and set up I would like to see at least two  
23 additional forums. I think that people in the  
24 community are expecting that.

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1 MS. HARRIMAN: Your Honor, staff of the  
2 Office of Consumer Services has begun looking at  
3 setting up additional statement hearings and  
4 focusing in the area of mid October. They are  
5 working and have reached out to Power for the  
6 People representatives in setting up those  
7 meetings.

8 And as far as the issues of language  
9 barriers, translators will be present at these  
10 public statement hearings to facilitate complete  
11 and thorough public involvement.

12 And the same thing--newspaper publications  
13 are being contemplated for those public statement  
14 hearings as well, as we have done in the past,  
15 outreach to various community boards and local  
16 legislators to get the word out. But both Nancy  
17 and Stacy are working with the representatives from  
18 Power for the People and various community groups  
19 to make sure it is more publicized. We are looking

20 at afternoon and evening sort of set up for these  
21 public statement hearings similar to what we have  
22 had in the past.

23 JUDGE STEIN: Do you have dates?

24 MS. PLOTKIN: Looking at mid October.

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1 MS. BURNS: Just a question, informational  
2 questions. Those sorts of hearings, are you going  
3 to be--is the Commission staff going to be making  
4 any presentation or is it all gathering information  
5 from the public who make statements?

6 MS. HARRIMAN: In the past the public  
7 statement hearings have been a form for information  
8 gathering. There have been public statement  
9 hearings where staff has provided a short  
10 informational presentation and then the public is  
11 invited to provide comment.

12 I think that we need to just be careful in  
13 the sense this is an investigation, and so by mid  
14 October we will be in the preliminary stages or  
15 hopefully the mid stages of the investigation, and  
16 so we have a concern that the information that we  
17 share may be one of a recount of the event rather  
18 than why the event took place. And as well we have  
19 concerns in being in that sort of a forum and  
20 giving a false expectation by our mere presence and  
21 willingness to provide a presentation we are going  
22 to give answers as to why it happened. And so we

23 have some concern with that.

24 As in the past, we definitely will have

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1 consumer service representatives able to talk to  
2 customers and have information relevant, whether  
3 it's claims processes or how can you provide  
4 comments in the proceeding, but at this point I  
5 don't have a clear picture as to what presentation,  
6 if any, staff would be making at the beginning of  
7 public statement hearings.

8 MS. BURNS: One thing I am thinking in  
9 another context is it was the competition  
10 proceeding on the comp three on the telecom side,  
11 there was at some point a set of statement hearings  
12 that the Commission held in which--but it was after  
13 there was--I don't exactly remember the point.  
14 Maybe there was a staff proposal as to what they  
15 recommended.

16 JUDGE STEIN: The white paper, staff white  
17 paper?

18 MS. BURNS: May have been after that. I  
19 have to go back and check. In other words, at some  
20 point where there was something being recommended,  
21 maybe, that there was a kind of presentation made  
22 to the assembled public that was there to make a  
23 statement and then there were the statements given  
24 and put on the record.

1           So, maybe you don't know what's going to  
2 happen subsequent to your filing the report with  
3 the Commission, but maybe one thought would be  
4 there would be further public statement hearings or  
5 public hearings or whatever the right phrase is at  
6 the point down the road where there is a report and  
7 it's being presented. I don't know when that would  
8 be. I am just throwing it out.

9           MS. HARRIMAN: Two things. In Washington  
10 Heights we did do informational type information to  
11 the public in advance of taking in their comments.  
12 Again, I am hopeful those informational type briefs  
13 were not conclusory on city events, but more  
14 information provided as to what happened as far as  
15 the chain of events and also describing the process  
16 we were undertaking for the investigation.

17           As to Mary Ellen's recommendation for some  
18 sort of public statement hearing for after the  
19 staff report is issued, we can take that back and  
20 look at that to see how it could fit in, whether or  
21 not that would be or how close it would be after  
22 the final report and how that would fold into the  
23 Commission's overall process, how it tends to treat  
24 the staff report, we would have to look at it.

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1           Take that back and discuss it internally.

2 MS. BURNS: Just a thought. Something  
3 less than a recommendation. More an observation.

4 JUDGE STEIN: I understand that you want  
5 to give some more thought to what can staff give  
6 back to the public at this point given that you are  
7 in the middle of an investigation, but I read all  
8 the transcripts of the public statement hearings  
9 you had, I know you have too, and all the e-mails  
10 and all the letters, and there are a lot of issues  
11 that are raised by members of the community,  
12 specific members, and it seems to me at the very  
13 least giving back to that community we have heard  
14 you on these issues, we are looking at them, will  
15 be done in December, whatever it is, I think is  
16 important, and that people express--even people who  
17 spoke at the public statement hearings expressed,  
18 along with many other emotions, gratitude to be  
19 listened to.

20 So, part of this process is saying to the  
21 community--I know this is an issue for the company  
22 as well--we are listening to you. We are hearing  
23 your concerns, here's what they are, we are looking  
24 into these. As always, there's some surprising and

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1 instructive reflections by the customers.

2 MS. HARRIMAN: Yes, Your Honor. I wanted  
3 to make it clear on the Commission's website for  
4 the investigation we have our own web link and  
5 transcripts from the public statement hearings have

6 been posted to that website, and several of us  
7 attended the public statement hearings and in fact  
8 concur with your Honor they were very informative  
9 and have aided in the investigation.

10 And so that sort of communications with  
11 the community members, that's not an issue. Again,  
12 we just want to be cautious in not giving false  
13 hope we are at a stage we can give conclusions why  
14 the events took place. We will have to be our own  
15 guardians of that concern when we speak to the  
16 community.

17 We are not opposed, as we said earlier, to  
18 giving a presentation comparable to what we did in  
19 Washington Heights, and even go a little further to  
20 the extent of we have heard your comments at the  
21 previous public statement hearings and taking them  
22 into consideration how we go about the  
23 investigation.

24 JUDGE STEIN: I appreciate your caution.

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1 Should we move on to the issue of confidentiality  
2 and then we can--off the record, people have  
3 expressed a number of concerns and observations  
4 about confidential exchange of information and that  
5 there is a proposal on the table from at least some  
6 parties to have a confidentiality agreement that  
7 would be executed. There is not one yet?

8 MS. HARRIMAN: Not one yet. We just

9 provided edits to the one circulated by Mary  
10 Krayeske. Minor edits I think.

11 MS. KRAYESKE: Con Edison provided staff  
12 with a draft protective order and we are waiting  
13 for staff's comments. Now that we received staff's  
14 comments we will circulate them to all the parties  
15 as well as your Honor either today or Monday to get  
16 any other feedback people might have. It's a very  
17 simple protective order, modeled after ones used in  
18 recent rate cases.

19 And on the back it's got a listing of the  
20 confidential documents that were provided. Con  
21 Edison was until recently providing any other  
22 documents to the records access officer. Right now  
23 it will begin to start providing staff with the  
24 confidentiality documents because we are hoping

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1 hopefully to get a protective order here and that's  
2 kind of where we are.

3 JUDGE STEIN: And does the agreement  
4 cover--what's the scope of the agreement? Does it  
5 cover all information?

6 MR. LUBLING: Discovery.

7 JUDGE STEIN: All discovery?

8 MS. KRAYESKE: All discovery.

9 JUDGE STEIN: And the underlying premise  
10 this is for discovery purposes without privilege as  
11 to whether any particular information will  
12 ultimately be granted trade secret protection?

13 MS. HARRIMAN: The agreement has steps  
14 taken by parties, not just staff, if there is a  
15 dispute as to the claim of confidentiality. The  
16 dispute will be the party will notify the company  
17 as to the dispute and, Your Honor, you would be  
18 provided that document to rule on the request for  
19 confidentiality.

20 Up until that point of a dispute the  
21 documents are treated as if confidential and I will  
22 let--I know right now there is two things we would  
23 like to have done with the protective order. One  
24 is that the Appendix A, because there was a number

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1 of documents that were provided to our records  
2 access officer in advance and even after the  
3 assignment of your Honor to this case, we would  
4 like the appendix to reflect all the confidential  
5 information that has been filed with the department  
6 in this proceeding precisely because something that  
7 was provided to the records access officer may  
8 serve as the basis for the staff report and/or we  
9 may have an objection to the claim of  
10 confidentiality on that information.

11 And we feel that it is a more efficient  
12 process to put in this document, the Appendix A to  
13 the protective order, all of the documents provided  
14 in this proceeding that are claimed to be  
15 confidential by the company.

16 I realize that may take some time from the  
17 company. We don't have a problem providing time  
18 for them to update the log accordingly.

19 MS. KRAYESKE: I am confused what you are  
20 asking for.

21 MS. HARRIMAN: You would take the  
22 appendix.

23 MR. LUBLING: What staff was proposing is  
24 that the appendix cover not only formal discovery

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1 but anything we provided in this investigation  
2 under trade secret?

3 MS. HARRIMAN: No. Anything that you  
4 provided us in response in an interrogatory that  
5 you provided to the record access officer. This  
6 list may already contain all that, but if we found  
7 other things I wanted to be clear on the record  
8 this Appendix A covers anything that's been filed  
9 as far as information request filed either with the  
10 records access officer or the judge that the  
11 company request confidentiality treatment.

12 I haven't had time to check this with the  
13 records access officer to make sure we covered all  
14 the material.

15 MR. LUBLING: The reason we sent it to  
16 staff first for comment is because I think, first  
17 of all, all the information was requested by staff,  
18 but much of this information I think could not be  
19 made available to other parties unless Your Honor

20 ruled otherwise, because they do contain  
21 confidential customer information.

22 That's our primary concern for  
23 confidentiality. And I think a lot of it is lists  
24 of customers in the area, and we just can't make

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1 that available without going back to customers and  
2 asking whether they are willing to have other  
3 parties have account numbers or locations or what  
4 their medical needs are.

5 MS. BURNS: When you say "customer" does  
6 that include public entities who are your  
7 customers, or large customers like--

8 MR. LUBLING: We have given staff all that  
9 kind of information, large customers, sensitive  
10 customers, individual customers, commercial  
11 customers, usually have names, account numbers,  
12 those with life sustaining equipment.

13 MS. BURNS: Are you seeking  
14 confidentiality for information regarding customers  
15 who are themselves public entities, of which there  
16 are a number of big ones?

17 MR. LUBLING: It may be included in the  
18 customer list, maybe a hospital, if that's what you  
19 mean.

20 MS. BURNS: I mean La Guardia.

21 MR. LUBLING: Maybe on the list of  
22 customers. If somebody asked us for La Guardia as

23 a customer I think we would--

24 MR. DONALDSON: Your Honor,

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1 confidentiality agreements have been, from the  
2 Attorney General's office, an ongoing problem  
3 because we have certain requirements under FOIL,  
4 but I simply want to--we have been able to work it  
5 out in the past. We will reserve and look at what  
6 we said here and we have our own investigatory  
7 powers. We are not proposing giving any of those  
8 up.

9 MS. BURNS: We have always been able to  
10 work out confidentiality agreements. I am sure we  
11 will be able to here. And the concerns for  
12 customer privacy I think are ones that Freedom of  
13 Information Law would also take.

14 MR. DONALDSON: I am sure we can work it  
15 out, but wait and see what the papers said.

16 JUDGE STEIN: Seems to me the first step  
17 of the agreement is parties will look at and make  
18 the decision and whether they can abide by those  
19 terms. If that presents a problem for any party  
20 and the party wants to proceed with other methods  
21 of participating, I don't think we can really  
22 address that until people have looked at the  
23 agreement and decided whether they have objections  
24 and can or can't participate.

1           MR. WILLIAMS: It will be an issue for the  
2 Assembly and the issue that I would bring up is I  
3 don't understand--I understand the need for  
4 confidentiality for customer information, and from  
5 what I understand it's also very voluminous so that  
6 maintaining confidentiality on certain of those  
7 issues I think is fine.

8           I don't understand, however, what the need  
9 for a blanket confidentiality on all exchange of  
10 information.

11           MR. LUBLING: There is an appendix that  
12 lists--in other words, we have 150 interrogatories,  
13 there is an appendix that lists the ten pieces of  
14 information that we provided, or 15 pieces of  
15 information that we have not provided to the other  
16 parties. Not talking about that at all.

17           MR. WILLIAMS: So I am understanding that.

18           MS. HARRIMAN: The information is more in  
19 the nature of maps of the areas where we have a  
20 security concern. Anything in the way staff  
21 approaches this, any information that would have  
22 grounds to be a FOIL request, is the first thing we  
23 apply looking at a claim for confidentiality.

24           We are reserving--you will see in the

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1           protective order--the right to object to a claim of

2 confidentiality. I can tell you right now some  
3 information on here the company claimed to be  
4 confidential we don't share that same view, and  
5 once the Order is in place we will exercise our  
6 rights underneath the Order to ask the judge for.

7 MR. WILLIAMS: The concern I bring up--  
8 thank you for the clarification--there may come a  
9 time if a party cannot enter into the protective  
10 order that doesn't close off access to all  
11 information, just that information?

12 MR. LUBLING: Right, absolutely.

13 JUDGE STEIN: Would you say up until now  
14 the bulk or majority of the information has been of  
15 a public nature?

16 MS. HARRIMAN: Absolutely, yes.

17 JUDGE STEIN: So, tell me by when I can  
18 expect or staff could expect to circulate to other  
19 parties.

20 MS. KRAYESKE: Con Edison has received the  
21 staff comments and I would say probably by about  
22 5:00 I can probably circulate to everybody. Before  
23 I go home tonight.

24 JUDGE STEIN: I would like to wrap this up

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1 as well next week, too. If Con Edison  
2 can--assuming there are no issues of substance,  
3 maybe there are.

4 MS. HARRIMAN: I asked my secretary to  
5 send our edits to the draft confidentiality

6 agreement to all the parties, so everybody should  
7 have that today. And so we are a little further  
8 ahead in the process than we lead the record to  
9 believe.

10 JUDGE STEIN: Well, can I, without unduly  
11 burdening staff and/or the company and/or the  
12 parties, ask for a completed confidentiality  
13 agreement also by close of business on Wednesday?

14 MR. LUBLING: Unless there are major  
15 issues.

16 JUDGE STEIN: All schedules are subject to  
17 revisions.

18 MS. HARRIMAN: Staff doesn't foresee a  
19 problem with that deadline.

20 JUDGE STEIN: Assuming all the issues are  
21 worked out and parties decided whether or not they  
22 would like to execute the agreement, why don't you  
23 include in that information also in your e-mails to  
24 me by close of business on Wednesday and I can

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1 issue an Order adopting the agreement and issue a  
2 ruling on process?

3 MR. WILES: Your Honor, I don't know  
4 whether it's because we are discussing  
5 confidentiality, but I really can't hear what you  
6 said.

7 JUDGE STEIN: I have asked--Kim has said  
8 that staff has circulated the Con Ed draft plus

9 their comments to all parties, and I am asking  
10 parties to let me know in the same e-mail letters  
11 that they are going to send me by close of business  
12 on Wednesday, September 20th, any last minute  
13 issues with regard to the confidentiality agreement  
14 so that I may adopt it in a protective order and  
15 also to let me know whether they are excluding it  
16 or not in the same communications.

17 MR. WILES: I think I took from the  
18 discussion so far the confidentiality agreement or  
19 proposal has only been circulated between staff and  
20 the company at this point.

21 MS. HARRIMAN: I asked my secretary to  
22 send that to all the parties and I will verify with  
23 her after this it has been done. If it hasn't been  
24 done already it will be done in a matter of

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1 minutes.

2 MR. WILES: I haven't seen this yet. We  
3 have traditionally had a little reluctance to  
4 create barriers of confidentiality when not needed  
5 and take the same position here. We haven't had  
6 the chance to take the position because we haven't  
7 seen what's being proposed today.

8 JUDGE STEIN: Very good. You should  
9 receive it shortly, and all parties can express  
10 their views of it in their filings next week.

11 MR. LUBLING: I would note what's being  
12 circulated is really a protective order that would

13 cover information supplied by the company to staff  
14 because, again, it contains--at least this was  
15 intended to cover things like customer records,  
16 customer accounts. I am not sure that even if  
17 other parties were willing to sign an agreement,  
18 confidentiality agreement, the company has the  
19 authority to release that information.

20 I just want to make it clear to the  
21 parties that certainly maps, if a party is willing  
22 to sign an agreement that would better keep the map  
23 under a secure method and protect against public  
24 disclosure, there would be no problem. There's

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1 just some information we feel we can only provide  
2 to staff and no other party.

3 MS. BURNS: Is that clear in the document  
4 that you are making that sort of distinction?

5 MR. LUBLING: No. This document was  
6 really fashioned after protective orders used in  
7 the electric case and steam case where no other  
8 party was interested in obtaining the agreement.  
9 This was an agreement between the company and  
10 staff. This particular document wasn't intended to  
11 have participation by other parties, but we will  
12 amend it.

13 Staff will be circulating one that really  
14 talks about the company and staff because it's  
15 fashioned after the rate case protective orders.

16 We will draft another paragraph or two giving every  
17 party the right to enter into the same type of  
18 agreement subject to the concern that I raised  
19 before where Con Edison doesn't feel it has the  
20 authority to release that information to others  
21 even with a confidentiality agreement even if the  
22 judge orders otherwise.

23 MS. HARRIMAN: I think the real key is for  
24 parties to try to work with the company. If the

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1 issue rises to the level, you go to the judge. For  
2 example, some cases customer information they just  
3 have to take out account number or phone number or  
4 give you more of a general overview what customers  
5 were five large customers, you know, along that  
6 line. I don't mean to make it a bigger issue than  
7 it could be in the long run.

8 MR. LUBLING: We have responded to  
9 information requests from customers from removing  
10 the same. You get customer one, two, three. If  
11 that suits your needs, certainly we can do that.

12 JUDGE STEIN: I would appreciate if you  
13 would, as you're finalizing the agreement, look for  
14 the opportunity to include a caveat about customer  
15 specific information or other things you consider  
16 are kind of ultimate confidentiality, or that in  
17 your view the company is not authorized to release  
18 to other than staff, or whatever your restriction  
19 is, I would like to have it included in the

20 agreement. And then of course parties can work out  
21 accommodations along the way just so that we know  
22 what the ground rules are.

23 Are there any other matters for this  
24 conference? Hearing none--

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1 MS. HARRIMAN: Your Honor, there is one  
2 more. For the staff briefings that we intend to do  
3 it will be a different confidentiality agreement  
4 than what you will be seeing on the close of  
5 business on Wednesday for the discovery related  
6 issues, but we have committed to work with the  
7 parties and we don't foresee a problem right now in  
8 reaching the agreement that we need to to feel free  
9 enough to have an open dialogue with the parties  
10 about the status or investigation, but obviously if  
11 we can't reach an agreement then we will utilize  
12 your Honor's input on getting to an agreement for  
13 us or at least mediating one.

14 And in advance of this and, again, I don't  
15 know exactly the date when we will schedule our  
16 first staff briefing, but well in advance of that  
17 we will circulate a confidentiality agreement with  
18 the parties for completion that would only be  
19 applicable to the staff briefings.

20 JUDGE STEIN: Okay. Any further issues?

21 MR. LUBLING: Would you like us to try and  
22 work out for our technical conference following the

23 report?

24 JUDGE STEIN: If you could propose one in

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1 your letter to me next week that would certainly be  
2 helpful.

3 MR. LUBLING: If you want, we could  
4 circulate among the parties and come to you for  
5 consensus.

6 JUDGE STEIN: I am always happy to have  
7 consensus. Let me remind you the only deliverable  
8 here is your correspondence to me. If people want  
9 to add concerns or proposals, joined or not joined,  
10 by close of business on Wednesday, September 20th,  
11 as to a process and schedule and follow up on the  
12 entry into a confidentiality agreement also by that  
13 date, and I will issue a ruling shortly thereafter  
14 adopting a schedule for the proceeding.

15 Thank you very much.

16 (Conference concluded.)

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