



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D.C. 20555

July 12, 1991

OFFICE OF THE
SECRETARY

James P. McGranery, Jr.
Dow, Lohnes & Albertson
1255 Twenty-Third Street, N.W.
Washington, D.C. 20037

RE: FOIA Appeal 91-A-14-C

Dear Mr. McGranery:

This letter responds to your May 22, 1991 appeal of the agency's denial of certain documents identified on Appendices E and F of our April 23, 1991 response to FOIA 90-568. In response to your appeal, the withheld material was again reviewed. On the basis of this review, it has been determined that document E-2 should be released.¹ It is enclosed with this letter. With respect to the attachments to document E-2 and the balance of the denied material, I affirm the agency's decision to deny disclosure.

Withheld Documents

Document E-2 is a memorandum from the Secretary of the Commission to the agency's Executive Director for Operations ("EDO"). In this memorandum, the EDO is advised of the Commission's directions regarding the licensing scheme for the decommissioning of early shutdown plants. The withheld attachments to this document are all drafts of this memorandum and a related document which reflect the various "mark-up" revisions, questions, and comments of the Commissioners and their staff.

Document F-2 is a memorandum from the EDO and the General Counsel to the Commission. By this memorandum, the EDO and the General Counsel sought the Commission's approval and adoption of proposed policy relating to the environmental review of actions associated with decommissioning prematurely shut down power plants. Contrary to your contention that this document is strictly informational, this memorandum relates to a significant policy issue and contains the legal staff's discussion of available options for implementing the policy, analysis of the pros and cons of each option, and recommendations regarding which option to adopt.

Document F-4 (SECY 90-299) is a memorandum which the agency's Deputy General Counsel prepared for the Commission's consideration and use in responding to petitions to intervene and requests for hearing in the Shoreham operating license amendment proceedings. The memorandum contains discussions regarding this adjudicatory proceeding and forwards a draft order reflecting

¹You are also advised that document F-10, SECY 90-421, and the vote sheets of Commissioners Rogers, Curtiss, and Remick have been placed in the agency's Public Document Room. Copies of these documents are enclosed with this letter.

the Deputy General Counsel's analysis and proposals for responding to the petitions filed in the proceedings.

Document F-5 consists of the Affirmation Vote/Response Sheets of the Commissioners on the proposals contained in SECY 90-299. Contrary to your contentions in the letter of appeal, these vote sheets do not reflect the final decision of the Commissioners. Rather, these sheets reflect the Commissioners' preliminary vote, their comments and their proposed revisions to the substance of the proposals contained in the draft order which was forwarded with the memorandum. These sheets are circulated among the Commissioners for review, consideration, and concurrence in the views expressed.

In your letter of appeal, you state that the moment the vote sheets are submitted to the Secretary, they cease to be predecisional. It is unclear how the submission of the vote sheets to my office (the office responsible for incorporating each Commissioner's suggested revisions into the draft order and circulating the revised order to the office which originates the memorandum and finally to the Commissioners for the final vote)² transforms these predecisional documents into post-decisional ones. It is our view that the vote sheets are not transformed but remain predecisional. On occasion, a Commissioner will make a discretionary release of his vote sheet. Indeed, Commissioners Rogers, Curtiss and Remick have made discretionary releases of their vote sheets relating to document F-10. That discretion, however, has not been exercised here.

Documents F-6 and F-7 are talking points papers prepared for a Commissioner's use in formulating policy regarding the decommissioning of early shutdown plants.

Exemption 5 of the Freedom of Information Act, 5 U.S.C. 552 (b) (5) was properly invoked as the basis for withholding these documents. For one, the withheld material is predecisional in that it was created prior to the Commission's adoption of final policy on the decommissioning of early shut down plants. Moreover, the information is deliberative, for it reflects the give and take exchange of ideas and opinions between the Commission and its staff and legal offices.

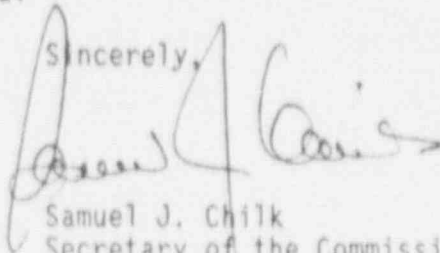
Disclosure of this material would undermine the agency's decisionmaking process by stifling the open and frank exchange of ideas. Additionally, disclosure of this predecisional information could constitute the premature disclosure of proposed policy and not necessarily the policy finally adopted. To the extent the withheld documents contain factual information, this information is inextricably intertwined with exempt material and therefore impossible to extricate.

²The Commissioners cast their final votes during an affirmation session. Following the affirmation session, a Staff Requirements Memorandum ("SRM") is issued which records the final votes. The SRM is made available to the public.

Moreover, Documents E-2 and F-2 also contain legal advice prepared for the Commission by attorneys in its Office of General Counsel. Accordingly, these documents are protected by the attorney-client privilege. Exemption 5 protects these documents from mandatory release for this reason as well.

This represents final action on your May 22, 1991 appeal. Judicial review of this decision may be obtained in the United States District Court in the district in which you reside, or have your principal place of business, or in the District of Columbia.

Sincerely,

A handwritten signature in dark ink, appearing to read "Samuel J. Chilk", written over a horizontal line.

Samuel J. Chilk
Secretary of the Commission

Enclosures: As Stated