

ORIGINAL
UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the matter of:

DISCUSSION OF SHOREHAM
LICENSING PROCEEDING

Docket No.

CLOSED MEETING

Location: Washington, D. C.

Pages: 1 - 125

Date: Monday, April 23, 1984

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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DISCUSSION OF SHOREHAM LICENSING PROCEEDING

- - -

CLOSED MEETING

(Exemption 10)

- - -

Nuclear Regulatory Commission
Room 1130
1717 "H" Street, N. W.
Washington, D. C.

Monday, April 23, 1984

The Commission met in closed session, pursuant to a vote of short notice, at 10:10 o'clock a.m., NUNZIO J. PALLADINO, Chairman of the Commission, presiding.

COMMISSIONERS PRESENT:

- NUNZIO J. PALLADINO, Chairman of the Commission
- VICTOR GILINSKY, Member of the Commission
- THOMAS ROBERTS, Member of the Commission
- JAMES ASSELSTINE, Member of the Commission
- THOMAS ROBERTS, Member of the Commission

STAFF AND PRESENTERS SEATED AT COMMISSION TABLE:

- S. CHILK
- H. PLAINE
- J. ZERBE
- M. MALSCH
- P. CRANE

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AUDIENCE SPEAKERS:

A. KENNEKE

E. GOODWIN

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P R O C E E D I N G S

1
2 CHAIRMAN PALLADINO: Good morning ladies and
3 gentlemen. This is a meeting on Shoreham Licensing Proceeding
4 but before we can proceed, I need a vote to hold this meeting
5 on less than one's week notice and a vote to close under
6 under exemption 10, agency adjudication. I wonder if we
7 could vote on both of them at the same time? I say aye.

8 COMMISSIONER ASSELSTINE: Aye.

9 COMMISSIONER BERNTHAL: Aye.

10 COMMISSIONER ROBERTS: Aye.

11 COMMISSIONER GILINSKY: I don't even know what it
12 is about. I am not going to vote but since you have the
13 meeting going, continue it.

14 CHAIRMAN PALLADINO: Friday afternoon, April 20th,
15 Mr. Herzel Plaine and Marty Malsch met with me to express
16 their concerns about substantive and procedural issues
17 regarding the April 6th Order of the Licensing Board on the
18 expedited hearing schedule on LILCO's supplemental motion
19 for a low-power operating license.

20 The concerns they expressed sounded significant
21 enough to me so I thought I should get advice from the
22 Commission. I then asked Commissioner Asselstine to join the
23 discussion. He was the only other Commissioner then available.
24 After the discussion I proceeded to contact other Commissioners
25 by telephone and talked to Commissioners Roberts and Bernthal.

1 I was not able to talk to Commissioner Gilinsky directly but
2 communicated with him through his office.

3 The net result of these conversations was that we
4 should meet this morning to hear and discuss OGC's concerns
5 and determine what action if any the Commission wishes to take.
6 I propose that we begin by hearing OGC outline his concerns
7 and possible approaches to resolving them and then we will
8 discuss the matter. OPE may also be able to contribute to the
9 discussion.

10 Do any other Commissioners have opening remarks?

11 (No response.)

12 CHAIRMAN PALLADINO: If not, let me turn the meeting
13 over to OGC.

14 MR. PLAINE: Yes, Mr. Chairman. The Shoreham matter
15 in connection with the low-power license issue was apparently
16 turned over to a special panel that had been set up with
17 the Chairman being Judge Miller and apparently got together
18 with the parties and set a rather tight schedule for both
19 the preliminary steps of both the hearing schedule and the
20 matter of discovery, et cetera.

21 COMMISSIONER GILINSKY: I wonder if we could back
22 and go over -- you say "apparently" turned over to a panel.
23 How did that happen?

24 MR. PLAINE: How did that happen? As far as I know
25 the Chairman of the Panel, Judge Cotter, on the basis that the

1 existing panel had a plate full to handle decided to separate
2 this issue and did establish a separate panel.

3 COMMISSIONER GILINSKY: Was this at the suggestion
4 of the Chairman? Were you involved with this, Joe?

5 CHAIRMAN PALLADINO: No. He called my office.

6 COMMISSIONER GILINSKY: Had you discussed anything
7 with him about it?

8 CHAIRMAN PALLADINO: I had had a meeting on
9 March 16 with the EDO, staff, General Counsel and Judge Cotter
10 to discuss the memo of March 9th in which the EDO had informed
11 us that the previous estimate of seven months delay had now
12 gone to 14 and the additional item was the Shoreham item. I
13 wanted to see if it was necessary to delay it as much as they
14 were indicating and what steps if any might be done to handle
15 things more expeditiously.

16 COMMISSIONER GILINSKY: I had heard somewhere and I
17 don't remember where that the entire case was going to be taken
18 away from the Panel and they struggled and decided they
19 didn't want to let go of it.

20 MR. PLAINE: I don't know anything about that.

21 CHAIRMAN PALLADINO: Then later he called my office
22 and said that they were going to appoint a separate panel.

23 COMMISSIONER GILINSKY: Did he talk about taking the
24 whole case away, the whole loaf?

25 CHAIRMAN PALLADINO: Bill Reamer probably talked to

1 them.

2 COMMISSIONER GILINSKY: I don't remember a Chairman
3 dealing with the Boards in this way before. You may have
4 dealt in an entirely proper way. I just don't know what
5 happened. But it leaves suspicions that are difficult to deal
6 with, difficult for you and difficult for the people who have
7 them.

8 CHAIRMAN PALLADINO: This is not the first time that
9 the Chairman has met. This was done earlier, I think, when
10 Ahearne was Chairman that they met.

11 COMMISSIONER GILINSKY: He may not have told us. I
12 just don't know. It is not the way things were done in the
13 past that I am familiar with. I think particularly in
14 sensitive cases, I think it would helpful. I am not going to
15 be here but just as a word of advice, that these things get
16 discussed by the Commission and if some action is going to be
17 taken or a Board change is going to get -- after all, these
18 things are very, very sensitive and they have a tremendous
19 impact on which way a case goes. It is not just a neutral
20 decision.

21 CHAIRMAN PALLADINO: I didn't make the decision that
22 they should have a different Board. I didn't make the decision
23 on their schedule.

24 COMMISSIONER GILINSKY: I think for the Chairman of
25 the Boards, you are making some pretty strong suggestions. I

1 just don't know how the thing actually happened. I was
2 disturbed to hear that at one point there was talk about
3 taking the whole thing away from the existing Board. They
4 apparently resisted this and this is the compromise that
5 emerged.

6 But these sorts of things, it seems to me, ought to
7 be known to the Commission and ought to be discussed with the
8 Commission. There is nothing wrong with trying to keep things
9 moving and come to decisions more quickly if that is possible.
10 There is no virtue in legal problems.

11 CHAIRMAN PALLADINO: I think the motion from LILCO
12 for low-power came after our March 16 memo and they responded
13 to it -- March 16 meeting.

14 COMMISSIONER ASSELSTINE: I think that is right, Joe.
15 The thing I didn't understand was you had sent a memo around
16 earlier on March 20 urging expedited action on a low-power
17 license and that was even before we received the LILCO motion.

18 CHAIRMAN PALLADINO: That is all right. I intended
19 that we discuss that.

20 COMMISSIONER ASSELSTINE: There wasn't even a motion
21 at the time for a low-power license.

22 COMMISSIONER GILINSKY: I see. We were setting up
23 a Board before there was a motion?

24 COMMISSIONER ASSELSTINE: At least there was
25 discussion urging expeditious action on the low-power license

1 and then the motion came in at I think 5:37 the same day.

2 COMMISSIONER GILINSKY: It raises pretty serious
3 questions as to how we are doing our business.

4 CHAIRMAN PALLADINO: My memo of March 20th was to
5 the Commission and it pointed out that there were possible
6 delays not only on Shoreham but Limerick and I suggested that
7 the Commission hold a special meeting to discuss the
8 problems.

9 COMMISSIONER GILINSKY: It would have been useful to
10 hold a meeting.

11 CHAIRMAN PALLADINO: We have one scheduled for
12 tomorrow. The actions of the Board, I believe, went on
13 independent of this action.

14 MR. MALSH: I can perhaps shed a little bit of light
15 on the Board thing. I was involved a little bit on the edges.
16 After the meeting between the Chairman, ourselves, EDO and
17 so forth, there appeared on my desk a draft notice from Tony
18 Cotter announcing a reconstitution of the Licensing Board.
19 I called Tony and asked him -- I told him that I was sort of
20 bothered by it on its face since it wasn't clear to me that
21 there was a scheduling conflict unless it was presumed that
22 the LILCO low-power motion is granted. At that time the
23 motion had been filed.

24 I didn't think that he, Tony Cotter, had the
25 authority to grant a low-power motion and then refer the motion

1 to another Licensing Board.

2 I also raised reservations about how the whole thing
3 would appear. He said, "Oh, no," that he had been advised by
4 Larry Brenner who was the Chairman of the other Licensing
5 Board that he, Larry Brenner, couldn't really give the low-
6 power motion any consideration at all either granting it or
7 denying it because he was so involved in the Limerick case
8 and therefore, Tony didn't feel that his appointment of a new
9 Board in effect prejudged action on the low-power motion.

10 He said that he would think about my problem about
11 appearances and call me back. He then called me back the next
12 day and said that they were going forward with it.

13 CHAIRMAN PALLADINO: With what?

14 MR. MALSH: And that they were going forward with
15 the reappointment of the new Licensing Board.

16 COMMISSIONER BERNTHAL: When did that happen, Marty?

17 MR. MALSH: It happened around the day or the day
18 before the second Licensing Board or the third Licensing Board
19 was appointed.

20 COMMISSIONER GILINSKY: I would add, I would think
21 twice before taking John Ahearne as a model.

22 CHAIRMAN PALLADINO: He was the Chairman.

23 COMMISSIONER ASSELSTINE: I think there is another
24 problem as well with the March 16th meeting. I understand
25 from Tony Cotter that there was discussion at the March 16th

1 meeting of the scope and type of issues that would be
2 considered in a low-power licensing proceeding with the staff.
3 I think there is a problem with that as well in discussing with
4 one party to the case without the opportunity for the others
5 to have any notice of the meeting or be provided an opportunity
6 to comment, a discussion of the type and scope of issues
7 that would be considered in a low-power proceeding.

8 CHAIRMAN PALLADINO: I think what came up was that
9 the only remaining issue was the diesel generator question
10 at least for low-power. There still remained the emergency
11 planning or preparedness for full-power.

12 COMMISSIONER GILINSKY: You are going to have to
13 live with these things but as I see it, you are wandering
14 into a legal morass needlessly. Why don't we go on.

15 CHAIRMAN PALLADINO: All right.

16 MR. PLAINE: What is before you to think about is
17 the order of the Licensing Board issued on April 6th which
18 does two things, I think, and maybe it does more than that
19 but the two major things are deciding on how it would handle
20 the diesel issue and setting up a schedule for the hearing.

21 COMMISSIONER GILINSKY: Can I just take you back
22 once more, the regular Board has settled all other issues
23 other than emergency planning, is that right?

24 COMMISSIONER ASSELSTINE: And the long term diesel
25 generator question.

1 MR. PLAINE: Yes, that is right.

2 COMMISSIONER ASSELSTINE: In fact, there are two
3 Boards, right? There is the separate Board that has the
4 emergency planning issue and then the original Board.

5 COMMISSIONER GILINSKY: You have three Boards that
6 we are dealing with?

7 COMMISSIONER ASSELSTINE: That's right.

8 COMMISSIONER GILINSKY: There is the main Board you
9 might say and then there is the Emergency Planning Board and
10 then there is the low-power diesel generator Board.

11 COMMISSIONER ASSELSTINE: Right.

12 MR. MALSCH: In fact, if the hearings go ahead as
13 scheduled, there will be two licensing boards presiding over
14 different aspects of the same case in two adjoining hearing
15 rooms in Long Island.

16 COMMISSIONER GILINSKY: Does the main Board have to
17 pass on the rulings of the other Boards or are they all acting
18 independently?

19 MR. MALSH: They are all acting independently.

20 MR. PLAINE: They are independent.

21 COMMISSIONER GILINSKY: So they have separate
22 pieces of the case and are working independently.

23 MR. PLAINE: That's right.

24 COMMISSIONER ASSELSTINE: And the diesel generator
25 is divided between two Boards.

1 COMMISSIONER GILINSKY: We are operating at a high
2 peak of efficiency here.

3 COMMISSIONER ASSELSTINE: Particularly when you
4 consider the expedited schedule.

5 COMMISSIONER GILINSKY: Okay.

6 MR. PLAINE: Now with respect to the low-power diesel
7 issue, this Panel reached a conclusion that it didn't have to
8 apply the General Design Criteria in this case. The main
9 criteria is GDC-17 and has taken the stance that if the
10 reactor is as safe at low-power without the diesel as it would
11 be safe if the plant were at full-power with the diesel, then
12 they don't need to apply GDC-17 which relates to it.

13 COMMISSIONER GILINSKY: They are basically using
14 the Commission's safety goal as long as the same level of
15 safety or danger is there.

16 MR. PLAINE: That's right.

17 COMMISSIONER GILINSKY: Doesn't that get you into
18 trouble with emergency planning?

19 COMMISSIONER ASSELSTINE: Sure.

20 MR. PLAINE: It does get you into trouble and that
21 was one of the reasons we wanted you folks to take a look at
22 it and see whether or not you wanted to stand with that.

23 COMMISSIONER GILINSKY: Specifically with emergency
24 planning because it says it is then as dangerous at low-power
25 as it is at full-power and you don't have the emergency

1 planning in place.

2 COMMISSIONER ASSELSTINE: That's right.

3 MR. PLAINE: Right.

4 CHAIRMAN PALLADINO: However, they did discuss that.
5 They didn't draw any conclusion about it as I recall. They are
6 not unaware of the emergency planning problem.

7 COMMISSIONER GILINSKY: Who is they?

8 CHAIRMAN PALLADINO: The people who issued this
9 order.

10 COMMISSIONER ASSELSTINE: The new Board.

11 MR. PLAINE: If you look at enclosure one of that
12 packet of papers that was given to you.

13 COMMISSIONER GILINSKY: Where is that, Joe?

14 CHAIRMAN PALLADINO: One place is on page nine.
15 "It has been held that the emergency planning measures
16 required for low-power licenses are not the same as those
17 required for full-power operation...".

18 COMMISSIONER GILINSKY: But that assumes a lower
19 level of risk. He was going to head for the same level of risk.

20 COMMISSIONER BERNTHAL: I just think on the whole
21 question of emergency planning, then the burden of proof gets
22 shifted to the licensee if not to us to prove that the level
23 of risk for emergency planning is not equivalent to that of
24 full-power. We discussed this before on the phone, Joe, and
25 I just think you are into a never ending morass that certainly

1 won't do anybody any good.

2 COMMISSIONER GILINSKY: Let me ask you another thing.
3 In all these discussions involving the risks and so on we
4 are always talking about off-site risks. What about on-site
5 risks? Do we not consider them? We do regulate worker
6 exposure.

7 MR. PLAINE: I think in emergency planning when
8 you are dealing with low-power, the staff generally has taken
9 the view that you don't concern yourself with the on-site
10 risks.

11 COMMISSIONER GILINSKY: Why not?

12 MR. PLAINE: Because they were minimal and so forth
13 and I am not quite sure of their total reasoning but in any
14 event, I think they have reached that result.

15 COMMISSIONER GILINSKY: I think all those
16 calculations have to do with off-site risk.

17 MR. MALSCH: The Commission's emergency planning
18 rules make it clear that on-site emergency planning is a
19 relevant consideration for a low-power license because there
20 is a concern about the protection of workers and plant
21 personnel. I am not sure to what extent that is factored
22 into the Board's standard. I assume it would be. I would
23 think it would have to be.

24 COMMISSIONER GILINSKY: So it is a factor. The
25 question is how you deal with it. We do protect the worker.

1 MR. MALSCH: That's true.

2 CHAIRMAN PALLADINO: Would that not come out in the
3 low-power hearing?

4 MR. MALSCH: I assume it would. I don't know
5 what particular issues the parties are focusing on at this
6 point but as a matter of law, it is a valid consideration for
7 low-power license. It is a valid consideration even for
8 emergency planning consideration for the low-power license.

9 CHAIRMAN PALLADINO: Do you want to go ahead,
10 Herzel?

11 MR. MALSCH: The Board order does talk about
12 protection afforded to the public.

13 CHAIRMAN PALLADINO: What page is that?

14 MR. MALSCH: Page four. I would be surprised if
15 the Board was using "public" in any kind of specific sense
16 to exclude on-site.

17 CHAIRMAN PALLADINO: Whereabouts on page four?

18 MR. MALSCH: Page four, first full paragraph, fourth
19 line. What I am looking at is April 20, 1984. Let me get
20 the other one.

21 COMMISSIONER GILINSKY: Let me ask you. Suppose
22 this Board held the hearing and ruled favorably and said that
23 the diesels were okay for low-power. Short of the Commission
24 voting, does that then permit -- let's see. The Commission
25 doesn't deal with low-power.

1 MR. MALSCH: Right.

2 COMMISSIONER GILINSKY: Would that allow the staff
3 to issue a license? There is no separate finding on emergency
4 planning that needs to get made on low-power?

5 COMMISSIONER ASSELSTINE: On-site.

6 MR. MALSCH: The staff would have to make all the
7 findings.

8 COMMISSIONER GILINSKY: But the Emergency Planning
9 Board doesn't have to deal with it.

10 COMMISSIONER ASSELSTINE: That's right.

11 COMMISSIONER GILINSKY: That is as a result of some
12 previous Commission ruling, I assume.

13 CHAIRMAN PALLADINO: Say that again, Victor.

14 MR. MALSCH: It is the way the proceeding has been
15 divided up. Effectively all emergency planning issues which
16 are relevant to low-power are now before this third Licensing
17 Board.

18 COMMISSIONER GILINSKY: Everything on low-power is
19 before this new Licensing Board.

20 MR. MALSCH: Everything, but it turns out --

21 COMMISSIONER GILINSKY: Everything on low-power.

22 MR. MALSCH: The only things that remain for
23 litigation relative to low-power happen to be emergency
24 planning.

25 COMMISSIONER GILINSKY: And the diesel generators.

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MR. MALSCH: And the diesel generators.

COMMISSIONER GILINSKY: So they have both of those items.

MR. MALSCH: It has been understood that as far as emergency planning is concerned that off-site planning is not an issue and I don't think the parties have raised any issues so far about on-site planning at least not that I am aware of.

COMMISSIONER GILINSKY: What do you mean, off-site planning is not an issue?

MR. MALSCH: Under the Commission's regulations you don't have to have --

COMMISSIONER GILINSKY: Okay, so it is as a result of a Commission regulation.

MR. MALSCH: Right.

COMMISSIONER ASSELSTINE: Right.

COMMISSIONER GILINSKY: Okay. I remember that one. So basically if they get an approval from Mr. Miller and his friends, then the staff can issue a license.

MR. MALSCH: Correct.

CHAIRMAN PALLADINO: Herzel, do you want to go on?

MR. PLAINE: You have that issue of the application of the general design criteria in that area and then you have the scheduling problem. The schedules are apparently fairly tight.

COMMISSIONER ASSELSTINE: I don't think there is any

1 apparently about it. Look at the schedule. It is tight.

2 MR. PLAINE: The parties such as Suffolk County
3 and the State of New York are complaining about that. Indeed
4 they kept me busy over the weekend telephoning and telling me
5 that they were in the process of bringing up a motion for the
6 district court to enjoin the holding of the hearing to
7 commence Tuesday and putting me on notice that they would be
8 appearing there.

9 Originally they intended to appear in the morning.
10 After I got notice of this it seemed to me that it would be
11 useful at least to let them know that the Commission had had
12 this telephone conversation or telephone conversations Friday
13 night in which apparently you arrived at a decision to meet
14 this morning and discuss the whole issue of the Board's order.

15 I think they have thought better of moving in the
16 first thing this morning and are apparently sitting by
17 awaiting what you might do this morning before they file in
18 the district court.

19 Now whether they have any standing to stop the
20 holding of the hearing, I think, is very doubtful but
21 nevertheless, I am sure they will try. I have been informed
22 again that it was not only Suffolk County but the State of
23 New York enjoining together. So we have that little nuance
24 added to the situation.

25 So basically before you are two issues, the basic

1 issue of how the Board will deal with the general design
2 criteria in determining the diesel issue for low-power and
3 whether or not you think that the schedules are too tight
4 for a useful full hearing.

5 COMMISSIONER GILINSKY: Why don't we agree that
6 whatever we do the Commission will pass on low-power operation
7 of this plant. That seems to be what Hunton and Williams
8 expect us to do.

9 MR. PLAINE: I suppose at some point you will, sure.

10 COMMISSIONER GILINSKY: Normally we would not.

11 MR. PLAINE: I see what you are getting at. Yes,
12 I see it.

13 COMMISSIONER GILINSKY: I thought you would.

14 COMMISSIONER ASSELSTINE: I would agree with that,
15 Victor, but I don't think that is sufficient to deal with the
16 problem.

17 COMMISSIONER GILINSKY: I find this as just sort of
18 a safety net.

19 COMMISSIONER ASSELSTINE: Starting point.

20 COMMISSIONER GILINSKY: Before we get into the ins
21 and outs of this thing and I am not sure how I would come out
22 on it myself. It seems to me whatever one does, whatever we
23 do, we ought to agree that the Commission will pass on low-
24 power operation or fuel-loading. In fact, that is what LILCO
25 lawyers say. They say that the Board will determine that

1 either a basis has been laid for fuel-loading on low-power
2 operation at Shoreham or that it has not. The Commission will
3 surely review this matter at that time with the benefit of the
4 record, et cetera, which is why they are urging us not to hold
5 it up.

6 In fact, we would not normally review it.

7 COMMISSIONER ASSELSTINE: That's right.

8 CHAIRMAN PALLADINO: We would have that option even
9 at that time.

10 COMMISSIONER GILINSKY: I think we ought to agree
11 to that and state that.

12 CHAIRMAN PALLADINO: What if we did nothing? What
13 is the consequence of doing nothing and letting the Board go
14 forward? Could you present what you see on that?

15 MR. PLAINE: It seems to me you might have a decision
16 that is challengeable because this is a little unusual.

17 CHAIRMAN PALLADINO: What is unusual?

18 MR. PLAINE: I think it is unusual in the sense
19 that I don't think so far the Boards have disregarded general
20 design criteria where appropriate in connection with low-
21 power licenses and it may be that you don't want to lose the
22 general argument that you have that you do treat low-power
23 quite differently from full-power.

24 CHAIRMAN PALLADINO: This would not give a precedent
25 setting decision necessarily.

1 MR. PLAINE: Not necessarily.

2 CHAIRMAN PALLADINO: It would certainly affect what
3 happens at Shoreham.

4 COMMISSIONER GILINSKY: Everything sets a precedent.

5 CHAIRMAN PALLADINO: We can always review the basis
6 afterwards.

7 COMMISSIONER GILINSKY: But you can't re-do what you
8 have done unless you agree that you will pass on this low-
9 power decision.

10 CHAIRMAN PALLADINO: You don't have to agree until
11 you see it.

12 COMMISSIONER ASSELSTINE: Except once that decision
13 is out, if you haven't indicated that you are going to review
14 it first, the staff is going to issue that license.

15 COMMISSIONER GILINSKY: Right. Assuming the hearing
16 goes forward and I am not sure myself whether it ought to or
17 not, it would have a very healthy effect on everyone if they
18 understood that this was going to be reviewed by the Commission.

19 CHAIRMAN PALLADINO: Let me still follow through on
20 what if we do nothing. I would just like to know what the
21 impact would be.

22 MR. PLAINE: In administrative law the fact that a
23 decision is made in one case doesn't necessarily become a
24 binding precedent on the issuing for other cases. On the
25 other hand, you can't escape the fact that when you do

1 something on one case the fact that it looks like another case
2 does have some influence because people begin to cite it.

3 The fact that you may not have passed on the issue reduces
4 its effect as a precedent. So you don't necessarily establish
5 a precedent by doing it the way the thing is going right now.

6 COMMISSIONER GILINSKY: Well, you would be. The
7 fact is the Commission is aware of it. If it is not stepping
8 in and allowing this to happen, there isn't any question
9 that it has the approval of the Commission.

10 COMMISSIONER ROBERTS: Not necessarily. This is
11 the beginning of the process.

12 COMMISSIONER GILINSKY: Yes, necessarily.

13 COMMISSIONER ROBERTS: It has to go to the Appeal
14 Board.

15 COMMISSIONER GILINSKY: Oh, come on.

16 COMMISSIONER ROBERTS: Sure. Don't tell me "Oh,
17 come on."

18 COMMISSIONER GILINSKY: That is all very well. The
19 fact of the matter is that everyone understands that the
20 Commission is watching carefully and it has orchestrated
21 this process and allowed it to go on.

22 CHAIRMAN PALLADINO: It hasn't orchestrated --

23 COMMISSIONER ROBERTS: I haven't orchestrated any-
24 thing.

25 COMMISSIONER GILINSKY: You will have. That is what

1 we are talking about.

2 COMMISSIONER ROBERTS: That is a mischaracterization.

3 COMMISSIONER GILINSKY: I think it is a pretty fair
4 characterization. In any case that is going to be the
5 situation. The question is do you want to review that
6 decision before it goes into effect or not?

7 CHAIRMAN PALLADINO: The purpose of this limited
8 evidentiary hearing it says, "... established by the Board is
9 to determine whether or not there is reasonable assurance..."
10 as stated in the previous sentence. The previous sentence
11 is, "The operation of the facility in conformity with the
12 rules and regulations of the Commission includes the possi' il-
13 ity of low-power operations equal to the full-power requirements
14 of GDC-17 provided that as the staff states it can be found
15 by the Board that there is reasonable assurance that the low-
16 power activities can be conducted with the protection of the
17 public at least equal to the protection afforded at full-power
18 operations with the approved disel generators. The purpose of
19 the limited evidentiary hearing established by the Board is
20 to determine whether or not there is such reasonable
21 assurance." So they will come out and make a decision
22 as to whether or not there is reasonable assurance, that the
23 low-power activities can be conducted with protection of the
24 public at least equal to protection afforded at full power
25 with the approved diesels.

1 COMMISSIONER GILINSKY: What is the scope of the
2 hearing? Are they just going to talk about the diesel
3 generators or what?

4 MR. MALSCH: The LILCO proposal involves an argument
5 that their off-site power supply --

6 COMMISSIONER GILINSKY: But there are all sorts of
7 other points such as you have a very inexperienced staff,
8 you are starting off a new plant and probably all sorts of
9 mistakes in it as there are in every plant. Will they be
10 talking about these things?

11 MR. MALSCH: I don't think so.

12 CHAIRMAN PALLADINO: I think those were adjudicated
13 before. I have to defer to OGC to tell us.

14 COMMISSIONER GILINSKY: It is interesting.

15 MR. MALSCH: Intervenors have raised an issue
16 regarding the security applicable to some of the off-site
17 power supplies. That is the only really new issue that I am
18 aware of.

19 CHAIRMAN PALLADINO: Is GDC-17 quoted properly on
20 page seven of the April 6th order in the footnote? It says,
21 "GDC 17 requires that electric power systems assure that in the
22 absence of either the onsite or offsite power system, (1)
23 specified acceptable fuel design limits and design conditions
24 of the reactor coolant pressure boundary are not exceeded as a
25 result of anticipated operational occurrences and (2) the core

1 is cooled and containment integrity and other vital functions
2 are maintained in the event of postulated accidents."

3 COMMISSIONER GILINSKY: By implication Miller is not
4 just throwing out the design criteria of low-power, he is
5 throwing them out all together. What he is saying in effect
6 is that what matters is a certain level of safety not the words
7 in the criteria and that so long as that level of safety is
8 maintained or danger then the particular wording of the
9 criteria is not relevant.

10 Now that is something I would think the Commission
11 would want to think over.

12 CHAIRMAN PALLADINO: Where does he say that, Vic?

13 COMMISSIONER GILINSKY: I said by implication.

14 COMMISSIONER ROBERTS: It doesn't say that.

15 CHAIRMAN PALLADINO: It doesn't say that. I have
16 read this at least three times now.

17 COMMISSIONER GILINSKY: But that is what he is
18 saying. What he is saying is that what matters is the level
19 of safety not the wording of the criteria.

20 CHAIRMAN PALLADINO: I didn't get that.

21 COMMISSIONER GILINSKY: I did. It is the clear
22 implication of what he is doing.

23 COMMISSIONER ASSELSTINE: To answer your question,
24 Joe, I am looking at criterion 17 now and what they have done
25 is they have excerpted a few portions of it and they have left

1 out the other parts. They have left out the requirement that
2 there be an on-site and an off-site electrical system to
3 permit functioning of systems, structures and components
4 important to safety and the rest of it.

5 CHAIRMAN PALLADINO: Would you read some of the
6 others aloud? Jim, would you mind?

7 COMMISSIONER ASSELSTINE: Okay. "Electric power
8 systems. An onsite electric power system and an offsite
9 power system shall be provided to permit functioning of
10 structures, systems and components important to safety. The
11 safety function for each system assuming the other system is
12 not functioning shall be to provide sufficient capacity and
13 capability to assure that (1) specified acceptable fuel design
14 limits and design conditions of the reactor coolant pressure
15 boundary are not exceeded as a result of anticipated opera-
16 tional occurrences and (2) the core is cooled and containment
17 integrity and other vital functions are maintained in the
18 event of postulated accidents."

19 Then it goes on and there are another three more
20 paragraphs.

21 MR. MALSCH: I think the reason the Board left it
22 out was because the staff who is the originator of this
23 argument also left it out in its paper to the Licensing Board.

24 COMMISSIONER GILINSKY: The originators of what
25 argument?

1 MR. MALSCH: This concept, this argument.

2 COMMISSIONER GILINSKY: It is not the company?

3 MR. MALSCH: No. I think it is the staff who
4 originated this argument.

5 COMMISSIONER GILINSKY: Well! It is a creative
6 regulation.

7 CHAIRMAN PALLADINO: I have to admit that that
8 gave me a lot of problem. As a matter of fact, I was
9 itching to pick up the phone and say to somebody like Harold
10 Denton and say, "Do you really mean this?" Of course, I knew
11 that was improper.

12 COMMISSIONER ASSELSTINE: It does seem to me
13 that there are three issues that involved here that really
14 call out for Commission attention now. The first of them
15 is, is the Board interpretation the correct one that the
16 general design criteria do not apply to low-power operation,
17 they only apply to full-power operation and as long as you
18 can make this comparable safety level argument that that is
19 good enough.

20 It seems to me that that is the kind of question
21 that ultimately we really ought to speak to. It is not
22 something I don't think that is going to be clear in the
23 legislative history or the history of the regulations. It is
24 a policy issue. It is a question that has not come up before.
25 It is one that we really ought to address.

1 CHAIRMAN PALLADINO: Jim, what do you base that
2 issue on?

3 COMMISSIONER ASSELSTINE: The Board's order that
4 basically says that they review the design criteria as
5 applying -- they buy off on the interpretation offered by
6 the staff that the design criteria don't apply to low-power
7 operation, that you have to read them in conjunction with
8 whatever the other regulation is, the low-power license
9 regulation. The Board has essentially decided that issue.

10 CHAIRMAN PALLADINO: What page is that?

11 MR. MALSCH: It begins on page eight and nine and
12 going on through.

13 CHAIRMAN PALLADINO: Does it say it so explicitly?

14 MR. MALSCH: That is certainly the thrust of the
15 argument.

16 CHAIRMAN PALLADINO: That is an issue that is very
17 critical to my thinking. That is why I want to spend just a
18 minute making sure that we know what it is that we raising as
19 an issue.

20 MR. MALSCH: Let me say that is very clear because
21 if you look at the whole proceeding, Suffolk County's
22 principal argument against the holding of an expedited
23 hearing was that the motion for a low-power issue on its
24 face should be denied because it was in non-compliance with
25 the general design criteria. The only answer that has been

1 offered by anybody in opposition to that argument is the
2 general design criteria do not apply.

3 CHAIRMAN PALLADINO: Where does it say that? I
4 thought that is what they were going to try to adjudicate.

5 COMMISSIONER ASSELSTINE: Isn't it on page five and
6 six. On page five it says, "Based upon a consideration of the
7 LILCO motion and the facts alleged in its attached affidavits,
8 the matters contained in the responsive filings of the other
9 parties and the arguments of counsel in depth, the Board
10 concludes as follows...". Item three on page six, "The
11 provisions of Section 50.57 regarding low-power operations must
12 be read together with the requirements of GDC-17 concerning
13 emergency power needs for full-power operations."

14 CHAIRMAN PALLADINO: That says that you should pay
15 attention to GDC-17.

16 COMMISSIONER ASSELSTINE: It says you read it in --

17 COMMISSIONER GILINSKY: I think he really meant it
18 the other way around.

19 COMMISSIONER ASSELSTINE: That's right.

20 CHAIRMAN PALLADINO: If he had meant it the other
21 way around, I would be inclined to agree with you but it
22 says you have to read number 50.57.

23 COMMISSIONER GILINSKY: We know what he meant.

24 COMMISSIONER ASSELSTINE: Then you read it with
25 four though which says, "If the evidence shows that the

1 protection afforded to the public at low power levels without
2 the diesel generators required for full-power operations, is
3 equivalent to or greater than the protection afforded to the
4 public at full-power operations with approved generators, then
5 LILCO's motion should be granted." Then they get their low-
6 power license. The only way you can read three and four
7 together is to accept the staff's argument that the GDC-17
8 does not apply at low-power operation.

9 COMMISSIONER GILINSKY: It is really number four
10 that pinpoints the problem.

11 MR. PLAINE: What about what they say on page 12,
12 "Looking at the provisions of GDC-17..." Read that whole
13 paragraph.

14 COMMISSIONER ASSELSTINE: Yes. That right?

15 CHAIRMAN PALLADINO: "It is unreasonable to refuse
16 to consider the terms of Section 50.57 as applied to the
17 requirements of GDC-17."

18 COMMISSIONER GILINSKY: I guess the thing that
19 surprises me is he doesn't make mention of emergency planning
20 which given that he is talking about the same level of risk,
21 you would think it would have to be in place. Does he deal
22 with it anywhere?

23 CHAIRMAN PALLADINO: I thought he did, Victor, but
24 not in great detail.

25 MR. MALSCH: What they tried to argue was that

1 this argument regarding equivalency in risk was supported by
2 past precedent in the San Onofre case where the license had
3 been approved without an off-site emergency plan based upon
4 a similar kind of standard.

5 COMMISSIONER GILINSKY: But there I am sure, I don't
6 remember the details, we assumed that the risk was much
7 lower.

8 COMMISSIONER ASSELSTINE: That's right.

9 MR. MALSCH: That the basis was a lower risk so the
10 case that was cited does not apply.

11 COMMISSIONER GILINSKY: Here he is caught either
12 way.

13 MR. MALSCH: That was the case on the staff side,
14 also.

15 COMMISSIONER GILINSKY: If he is going to approve a
16 situation in which the risk is equivalent, the risk of full-
17 power nevermind whether you can do that given that we have
18 these general design criteria, but assuming you did, you would
19 run into the situation that you need to have adequate
20 emergency preparedness. Since so far as I know that is not in
21 place, you can't use that equivalency of risk as an argument
22 for approving the license. If you had the emergency planning
23 structure in place, then you would have passed that test and
24 you would have to go to the question of whether the general
25 design criteria apply or do not apply. But here just on the

1 face of it, it just doesn't work.

2 CHAIRMAN PALLADINO: This is why I thought it was
3 significant enough to deal with it.

4 COMMISSIONER ASSELSTINE: I agree.

5 COMMISSIONER GILINSKY: I vote to have a meeting.

6 CHAIRMAN PALLADINO: I knew you would vote to have
7 a meeting.

8 COMMISSIONER BERNTHAL: You are almost an hour too
9 late.

10 COMMISSIONER ASSELSTINE: I think that is the first
11 issue that the Commission ought to come to grips with. The
12 second issue is the justification for an expedited hearing with
13 the kind of schedule and time table that the Board has
14 adopted in this case. We all heard just a couple of weeks
15 ago from the staff in connection with the WNP-2 license that
16 a low-power license for a boiling water reactor just doesn't
17 give you very much. You have to ask yourself with literally
18 months ahead to resolve the long-term diesel generator issue,
19 what is the urgency of this kind of a very compressed time
20 schedule for the low-power licensing proceeding. It is not at
21 all clear to me that there is a basis for that.

22 MR. PLAINE: The Board has provided its answer.
23 The Board says if you accept and the Board says "we," the
24 business of how you handle the design criteria then on page
25 13, "Although LILCO's motion for a low-power license could

1 probably be ruled upon without further evidentiary hearings
2 upon affidavits and counteraffidavits, the Board believes that
3 the record would be more complete by granting a limited
4 evidentiary hearing on an expedited basis." They tie in
5 their very tight schedule to what they regard as a very
6 limited need for hearing if you accept their premise on the
7 basic issue. That is how they get that way. Now whether
8 or not you think that is true may depend a little bit on
9 how the issue is explained.

10 COMMISSIONER GILINSKY: The Board is explaining
11 why it is doing as much as it is doing.

12 COMMISSIONER ASSELSTINE: That's right.

13 CHAIRMAN PALLADINO: They also rely on the PPG
14 guidance on the next page on page 14.

15 COMMISSIONER GILINSKY: Does that apply to the
16 Board?

17 CHAIRMAN PALLADINO: Yes. We stated it and
18 restated it and reinterrated in our latest one.

19 COMMISSIONER ASSELSTINE: It seems to me that there
20 is a legitimate issue here that the Commission ought to look
21 at in terms of what is the basis for and the justification
22 for this kind of expedited proceeding particularly when it
23 is very likely that whatever decision is reached or if a
24 positive decision is reached, one basis for challenge
25 against that will be that you didn't give us a fair opportunity,

1 that this time table was so compressed that it denied us
2 fair opportunity to get a fair hearing on this issue.

3 CHAIRMAN PALLADINO: They discussed that.

4 COMMISSIONER ASSELSTINE: The Board does. What I
5 am saying is that there is a real question in my mind at
6 least about the basis for the Board's decision.

7 CHAIRMAN PALLADINO: But why should we interfere
8 with the Board.

9 COMMISSIONER ROBERTS: Good point.

10 CHAIRMAN PALLADINO: The Boards handle these kinds
11 of things all along.

12 COMMISSIONER ASSELSTINE: Ordinarily I would say
13 we shouldn't interfere in these kinds of things but there
14 is another element which is my third issue and that is Mr.
15 Miller's conduct as chairman of this Board in dealing with the
16 Suffolk County attorney and I think that issue raises a third
17 question about whether you just have a Board that is out of
18 control in this case.

19 This is the order to show cause on disciplinary
20 action against one of the attorneys. When you look at the
21 totality of the circumstances in this case, it looks very bad.
22 I don't think that a Board decision given the totality of
23 the circumstances in this case stands much of a chance of
24 surviving judicial review. If that is the case, the time to
25 fix things is now not after you have a Board decision whenever

1 it is, another month or so down the road. The Commission is
2 really going to look foolish if at that point we step in and
3 say, "Wait a minute. The basis for this hearing was wrong.
4 We don't read the general design criteria that way. We think
5 the hearing schedule was entirely too short and what is more,
6 we have questions about the behavior of the Chairman of the
7 Board." If that is the time you step in and do something,
8 you are really going to look foolish rather than now before
9 that hearing gets started.

10 COMMISSIONER GILINSKY: Let me just say that that
11 was in part my suggestion or least tentative suggestion. It
12 is better to do it then than after the plant goes into
13 operation.

14 COMMISSIONER ASSELSTINE: I certainly agree with
15 that. It is much better for the Commission to do it then
16 than for the court to turn right around and do it for the
17 Commission.

18 COMMISSIONER GILINSKY: That is why I suggested
19 that if we do nothing else, let's agree that we will pass
20 on the low-power license.

21 COMMISSIONER ASSELSTINE: I agree with that. That's
22 true.

23 COMMISSIONER ROBERTS: I will not agree to that.

24 COMMISSIONER BERNTHAL: Jim, what about if your
25 concern is over the question of the necessity for an expedited

1 proceeding, what about asking the Board here today, for
2 example, simply directing the Board to ask the parties to
3 present arguments to justify an expedited proceeding?

4 COMMISSIONER ASSELSTINE: The proceeding starts
5 tomorrow. The expedited hearing starts tomorrow. If you have
6 a concern about that, the Board has already made its decision.
7 The Board has said, "We think an expedited proceeding is
8 appropriate and here is the order and we are going to march
9 ahead on that path."

10 COMMISSIONER BERNTHAL: But it has not allowed yet
11 I guess any of the parties to comment on that, has it?

12 COMMISSIONER ASSELSTINE: I think it did. Yes.
13 The Board has made its decision.

14 COMMISSIONER GILINSKY: Having an expedited schedule
15 doesn't bother me as much as the basis on which the thing
16 is proceeding. If it was sort of soundly based, then you could
17 argue whether people are getting enough time or not.

18 COMMISSIONER BERNTHAL: How could you come back if
19 the Board has already heard as the basis for its own finding
20 whatever statements the parties care to make about an
21 expedited proceeding, how then could you come back later and
22 say that you had been unfairly dealt with?

23 COMMISSIONER ASSELSTINE: Because the court can say
24 that this schedule was inherently unfair. It was so short
25 that it deprived these people the opportunity to present

1 their case.

2 COMMISSIONER BERNTHAL: Have the parties argued that
3 precise point?

4 MR. MALSCH: Yes, twice.

5 COMMISSIONER ASSELSTINE: Yes. And the Board has
6 its decision.

7 CHAIRMAN PALLADINO: The Board is authorized to make
8 a decision on that.

9 COMMISSIONER ASSELSTINE: That is certainly true.

10 CHAIRMAN PALLADINO: The procedure ones do not give
11 me a problem. I would have had a different view on the
12 Suffolk County official but that is beside the point. I
13 think the major issue is the substantive issue on the general
14 design criterion.

15 COMMISSIONER ASSELSTINE: I agree with that. I
16 think that is the principal issue but I think the other two
17 are serious issues as well and I don't think it is beside the
18 point on what the Chairman did on the disciplinary matter.
19 That is something that is also going to influence a court
20 when it looks at the overall fairness of this hearing.

21 CHAIRMAN PALLADINO: Let me go back to the substantive
22 issue. It didn't occur to me that the general design criteria
23 did not apply to low-power.

24 COMMISSIONER ASSELSTINE: I agree with that, yes.

25 CHAIRMAN PALLADINO: This is the one that I am

1 struggling with. But so far as the rest of it --

2 COMMISSIONER GILINSKY: There is more to it than
3 that though. There is the relationship with the emergency
4 planning as well. In other words, he wants to turn on a
5 reactor at a level of risk that normally requires emergency
6 preparedness without that emergency preparedness.

7 CHAIRMAN PALLADINO: I am sorry. I didn't hear
8 you.

9 COMMISSIONER GILINSKY: It is a related point but
10 it seems to me that there is the additional point that
11 Mr. Miller is talking about turning on a reactor at a level
12 of risk that normally is expected to be accompanied by
13 emergency preparedness.

14 COMMISSIONER ASSELSTINE: That's right.

15 COMMISSIONER GILINSKY: In this case he wants to
16 dispose of the emergency preparedness.

17 MR. KENNEKE: OPE has had some preliminary thinking
18 going on this morning and maybe we can offer it here, that
19 item four in the Board's order --

20 CHAIRMAN PALLADINO: Item four on what page?

21 MR. KENNEKE: Page seven. It talks about protection
22 equivalent to or greater than afforded at full-power. It is
23 ambiguously worded but one possible way to read that would
24 steer you in a safer direction so-to-speak and the kind of
25 implication that Commissioner Gilinsky raises may be avoided.

1 CHAIRMAN PALLADINO: Say that again.

2 MR. KENNEKE: You can read it a number of ways,
3 protection equivalent. It is a way of reading it in your
4 trusting to the Board that they will read it. It is clear
5 and obvious on the face of it that there is no off-site
6 plan that is in place and approved so that would seem an
7 obvious fact that they would have to start with. Assuming
8 that to be the case then you would have to assume that the
9 conditions that --

10 CHAIRMAN PALLADINO: May we have one conversation
11 at a time. I would like to hear both.

12 MR. PLAINE: Yes. I am sorry, Mr. Chairman.

13 MR. KENNEKE: Assuming that the Board did take as a
14 given that there was no off-site planning then the conditions
15 that underlay the Commission's rule on low-power without
16 off-site planning would have to apply. There were three bases
17 for that, two related basically to the fission products in the
18 core, the first and the third of the three points. One was
19 that in effect your consequences would be small because the
20 amount of activity collected there wouldn't be large and
21 the third had to do with how fast things would go and largely
22 that is related to the amount of fission products.

23 The middle one however seems significant. Let me
24 read the second item. "At low-power there is a significant..."
25 and this was the Commission's assumption for approving the

1 low-power rule, "... that at low power there is a significant
2 reduction in the required capacity of systems designed to
3 mitigate the consequences of accidents compared to the
4 required capacities under full-power operation." Now if the
5 Board were to read what they say is protection equivalent to
6 to be to show that that reduced capacity is not further
7 reduced by the lack of the diesel generators, you would be off
8 into the situation that the Commission itself foresaw in
9 putting out the low-power emergency planning rule without
10 getting into the kind of philosophical divergencies that
11 Commissioner Gilinsky has raised.

12 That is at least one thought.

13 COMMISSIONER GILINSKY: Come again?

14 CHAIRMAN PALLADING: I am not sure I follow that.

15 MR. KENNEKE: You are throwing around the terms
16 "risk" and "safety levels" and so on. If you read it
17 narrowly the word "protection" could be specifically that
18 these three conditions would not be significantly different.
19 Then you would seem to be in a situation where the criterion
20 would be not any different than you are assuming in low-power
21 operation.

22 COMMISSIONER BERNTHAL: It is very nice to go through
23 all sorts of intricate analyses but I must say that we have
24 to think about public perception of what is going on here
25 and to me I always try to separate two things when we run into

1 these situations. One is what the real hardware physical
2 facts of the plant are and the others are procedural morass
3 as it usually is that we get ourselves into and see if the
4 two can be reconciled somehow. I just don't see how you avoid
5 the appearance, public appearance, here of something that
6 was not properly handled.

7 If you essentially ignore the emergency planning
8 criteria that you normally apply at full-power and try to go
9 at low-power where you have said yourselves that the risk
10 is the same and I should say "we," Joe, I am using "you"
11 rhetorically here, if we have said that the risk is the same
12 then almost independent of all the other arguments we raise
13 here we have ourselves into something that should require a
14 very careful and I should say rather lengthy deliberations.
15 I don't see how we escape that dilemma.

16 However we try to escape it based on intricate
17 arguments, it is not going to play that way to the public.
18 That is the problem I have and probably not to the Boards.

19 CHAIRMAN PALLADINO: First of all, we have to
20 satisfy ourselves. I am not saying that we ignore the public
21 but we certainly have to first satisfy ourselves. I am sorry
22 but I didn't catch the point that you were trying to make.

23 COMMISSIONER GILINSKY: I didn't either.

24 CHAIRMAN PALLADINO: I almost thought I caught it
25 but I couldn't repeat it.

1 COMMISSIONER BERNTHAL: That in itself is a message,
2 I think. It just isn't going to wash.

3 MR. KENNEKE: Commissioner Bernthal's point is
4 exactly the point. The question is how is the Board going
5 to use this criteria. How is it going to interpret that
6 criterion?

7 CHAIRMAN PALLADINO: Criterion 17.

8 MR. KENNEKE: Item four on page seven, the one
9 that we started the meeting with.

10 CHAIRMAN PALLADINO: All right. Let's read it.
11 "If the evidence shows that the protection afforded to the
12 public at low power levels without the diesel generators
13 required for full-power operations, is equivalent to or
14 greater than the protection afforded to the public at full-
15 power operations with approved generators, then LILCO's motion
16 should be granted." What are you saying about this?

17 MR. KENNEKE: The issue is raised as to whether or
18 not this was throwing all of the Commission's previous rules
19 and guidance out the window to some degree. There is one way
20 at least that we have identified this morning in our thinking
21 within which if the Board were to interpret it that way I
22 think they would be on grounds that are consistent and
23 completely in conformance with the Commission's existing rules.

24 COMMISSIONER ASSELSTINE: What was the third
25 component again?

1 MR. KENNEKE: There were three components. Let me
2 read the three so you have them.

3 COMMISSIONER ROBERTS: From what are you reading?

4 MR. KENNEKE: I am reading from the Statement of
5 Considerations to the Commission's Rule, July of 1982 on
6 low-power operation without off-site planning. There were
7 three factors that were central. First, the fission product
8 inventory during low-power testing is much less than during
9 higher power operation due to the low level of reactor power
10 and short period of operation. Second, at low power there
11 is a significant reduction in the required capacity of systems
12 designed to mitigate the consequences of accidents compared
13 to the required capacities under full power operation. Third,
14 the time available for taking actions to identify accident
15 causes and mitigate accident consequences is much longer than
16 at full power. This means the operator should have sufficient
17 time to prevent a radioactive release from occurring. In the
18 worst case the additional time available at least ten hours
19 even for a postulated low likelihood sequence, et cetera,
20 et cetera.

21 COMMISSIONER GILINSKY: But they all spell low risk.
22 That is what they are talking about.

23 MR. KENNEKE: These are the Commission's words.
24 That is my point.

25 COMMISSIONER GILINSKY: But they all spell lower

1 risk.

2 MR. KENNEKE: I am saying that you can use that term
3 but if you stick to the meaning of these clearly given here
4 that if they were to demonstrate that that second condition
5 applied, the first and third it seems obvious.

6 COMMISSIONER ASSELSTINE: I don't know.

7 COMMISSIONER GILINSKY: What do you mean, "the
8 second condition applies?"

9 MR. KENNEKE: The first and third seem obvious
10 and are going to be true in any event.

11 COMMISSIONER GILINSKY: Right.

12 MR. KENNEKE: It is the second one whether or not --

13 COMMISSIONER GILINSKY: The assumption there is
14 that you have all your emergency systems and they are sized
15 for full-power operation so they would overwhelm a low-power
16 accident.

17 COMMISSIONER ASSELSTINE: That's right.

18 COMMISSIONER GILINSKY: Here you are talking about
19 the opposite situation.

20 MR. KENNEKE: Not quite that.

21 COMMISSIONER GILINSKY: That is precisely what the
22 meaning of that is.

23 MR. KENNEKE: It says that the Commission is
24 assuming that at low power there is a significant reduction
25 in the required capacity of systems designed to mitigate the

1 consequences.

2 COMMISSIONER GILINSKY: Right but the meaning is
3 that the systems are there for full-power and what you need
4 is only a fraction of that capacity.

5 COMMISSIONER ASSELSTINE: Yes.

6 MR. KENNEKE: Correct. Now the question is whether
7 or not you have the diesels where one of those systems are
8 not or whether without them those systems that are required
9 to --

10 COMMISSIONER GILINSKY: You are getting yourself
11 into a lot of trouble here.

12 COMMISSIONER ROBERTS: Not necessarily.

13 MR. KENNEKE: It is an interpretation that is
14 consistent with your prior rulings.

15 COMMISSIONER GILINSKY: I don't think so at all.

16 COMMISSIONER ASSELSTINE: I agree with Victor.

17 MR. ZERBE: That is what they have to prove, that
18 they met those criteria.

19 COMMISSIONER GILINSKY: Good luck!

20 MR. ZERBE: If they didn't, it wouldn't be
21 acceptable.

22 COMMISSIONER GILINSKY: It reminds me of the story
23 of Douglas Fairbanks when he was once asked to do a stunt and
24 he used to do his own stunts and he was asked to do a stunt
25 by the director and he said, "No, this one is hard," and the

1 director said, "Oh, it is easy. You have done this a million
2 times." Fairbanks says, "Here, you take the wig," and the guy
3 broke his back or something.

4 MR. KENNEKE: Am I clear, Mr. Chairman, at least on
5 the point that I am making?

6 COMMISSIONER BERNTHAL: I find it interesting
7 that you commented and didn't you say ten hours? Did the
8 Commission say ten hours?

9 MR. ZERBE: Yes.

10 COMMISSIONER BERNTHAL: The footnote here says
11 55 minutes LILCO is arguing and if you remove the conservatisms
12 they have 110 minutes or three hours. I don't know how they
13 get 110 minutes or three hours. That sounds like two to me.
14 Maybe it is a misprint. That is what the licensee is
15 arguing.

16 COMMISSIONER ROBERTS: Where is that?

17 COMMISSIONER BERNTHAL: This is on page four of the
18 order.

19 MR. KENNEKE: The two hours is without power and the
20 ten hours was the additional time available which could
21 eventually result in release. So it is the time to release
22 as opposed to being the time without power.

23 COMMISSIONER GILINSKY: The notion there in that
24 number two was that you had enormous pumping capacities sized
25 to remove heat from a full-power core that had been operating

1 for some time and they ought therefore to be some factor more
2 than adequate for low-power accidents. The question was not
3 addressed what if you don't have it. It was never even
4 contemplated that you would not have any of these full-power
5 systems.

6 COMMISSIONER ASSELSTINE: Because everybody assumed
7 the general design criteria applied to low-power as well as
8 full-power.

9 COMMISSIONER GILINSKY: It just doesn't make any
10 sense to me.

11 COMMISSIONER BERNTHAL: The problem is, Joe, it seems
12 to me that on these highly controversial and highly politicized
13 plants situations that the perception of what we are doing is
14 just terribly important and the perception here if you sort of
15 charge down the path that we are charging down right now is
16 a no-win situation. I suspect the court will see it that way
17 although I am not a lawyer.

18 COMMISSIONER GILINSKY: I think you are right
19 although I have to agree with Joe. I think the starting point
20 has to be what you think meets the statutory test.

21 COMMISSIONER BERNTHAL: That is what I call
22 hardware.

23 CHAIRMAN PALLADINO: Perception has a lot of aspects
24 to it. It can also be a perception that no matter when a
25 utility asks for something they are going to get slow action.

1 You may say that this is super expedited. That is one thing.
2 But I think we have to be careful what we say because after
3 this the Boards won't know what to do.

4 COMMISSIONER GILINSKY: I think both points of view
5 are right. I think the starting point has to be the
6 statutory test. I also think we can't ignore the fact that
7 the case is one that particularly has attracted a lot of
8 attention and that was one of the reasons why I said that
9 I felt particularly here we ought to be approving the low-power
10 operation.

11 MR. PLAINE: Mr. Chairman, could I pick up on what
12 Fred Bernthal had to say. Maybe the way to cut through this
13 is to make sure that you heard the parties on this.

14 CHAIRMAN PALLADINO: That we heard the parties?

15 MR. PLAINE: That we hear the parties on this
16 matter so that we don't appear to be acting arbitrarily. What
17 we could do is to ask for temporary stay, we would
18 temporarily stay the start of the hearing tomorrow, notice
19 the parties to come in here and argue their contentions on
20 Thursday or Friday.

21 COMMISSIONER GILINSKY: Argue what?

22 MR. PLAINE: Whatever their contentions are with
23 respect to these two substantive issues, both the interpretation
24 of the rule and the question of schedules which basically is
25 really a concomitant to what you decide on the rule. If you

1 agree with the Board that this is not such a great issue
2 and that it could even have been disposed of by affidavits
3 obviously they don't need a heck of a lot of time. On the
4 other hand, if you think that they are wrong and you decide
5 to tell the Board to take a different tact, then I think that
6 both the course of the hearing and perhaps its length may be
7 slightly different.

8 COMMISSIONER ROBERTS: Herzel, why do you issue a
9 stay? Don't you issue a stay to correct an injury or a
10 prejudice? Who is being injured? Who is being prejudiced?

11 MR. PLAINE: Only to prevent the hearing from
12 starting off on the wrong foot. That is all. That is what
13 you are trying to do.

14 CHAIRMAN PALLADINO: I didn't mind your first one
15 but the second one gives me a problem unless the decision on the
16 first one impacts on the schedule. If we are going to decide
17 whether or not the general design criterion 17 is to apply to
18 low-power, that decision could very much affect the scheduling.

19 COMMISSIONER ASSELSTINE: That's right.

20 MR. PLAINE: Of course. That is exactly the point.

21 CHAIRMAN PALLADINO: I would hate to get in and start
22 to fuss around with Board schedules.

23 MR. PLAINE: I think you have to start first with
24 the substantive issue. You start with that and you make a
25 decision after you have heard the parties on whether or not

1 they really have a good point. If they convince you that the
2 Board is on the wrong foot, it is only then that you have to
3 get into scheduling, I think.

4 COMMISSIONER ROBERTS: I have to say then that we
5 don't need an Appeals Panel.

6 COMMISSIONER GILINSKY: We don't.

7 (Laughter.)

8 COMMISSIONER ROBERTS: If you follow that line of
9 reason, why do we have an Appeals Panel? .

10 MR. PLAINE: Hold on. You could turn a thing like
11 this over to the Appeals Panel but I think the Appeals Panel
12 itself would probably need the guidance of the Commission as
13 to what this particular --

14 COMMISSIONER ROBERTS: Why don't we let the process
15 take place? We have a process.

16 COMMISSIONER ASSELSTINE: The question is not a
17 matter of interpreting what the Commission intended by its
18 rules to start with. It is a gut policy issue. Does the
19 Commission expect its general design criteria, the most
20 fundamental safety requirements in our regulations, to be met
21 before a plant gets a license whether it is low-power or
22 full power? That is the issue. That is a fundamental policy
23 judgment and the place to make that judgment is right here.
24 It is not something that a Board can look at the history of
25 the regulation and how they were developed.

1 COMMISSIONER GILINSKY: The question is should the
2 plant be allowed to operate before it does?

3 COMMISSIONER ASSELSTINE: That's right.

4 COMMISSIONER GILINSKY: You might think of this as
5 the Safety Bill of Rights.

6 (Laughter.)

7 COMMISSIONER BERNTHAL: It is just not clear to me,
8 Joe, that we do the licensee any favors if we defer judgment
9 on policy questions and let them go through this whole
10 process and then suddenly it comes before us not to mention
11 ourselves because we are under the gun then in a sense and the
12 license may ultimately end up being further delayed than they
13 would if we simply cleaned it up to begin with.

14 I still don't understand incidentally how you
15 escape this dilemma on emergency planning. We keep touching
16 that and backing away from it.

17 COMMISSIONER ASSELSTINE: You can't.

18 COMMISSIONER GILINSKY: It seems to be at a minimum
19 you ought to be telling the Board to include that in its
20 deliberations. That has to be a factor.

21 CHAIRMAN PALLADINO: The interaction of the two, I
22 think is very important. If the Board is right on the general
23 design criterion and the process loses emergency planning,
24 I don't think you are any farther ahead on any plant.

25 COMMISSIONER GILINSKY: We could simply direct a

1 question how he rationalizes, how the Board rationalizes
2 their approach with the requirements on emergency planning.

3 CHAIRMAN PALLADINO: Let me hear Herzel's proposal.

4 MR. PLAINE: My feeling is that the delay that
5 you cause might be something like a week or ten days at the
6 most.

7 CHAIRMAN PALLADINO: Let me hear the proposal
8 before we talk about any delays.

9 MR. PLAINE: My proposal would be to temporarily ask
10 the Board to postpone its hearing until the Commission has had
11 an opportunity to hear from the parties on the two principal
12 issues, namely the question of the application of the guidelines
13 and the question of the schedule. In fact, you could even
14 phrase it "the concomitant schedule."

15 CHAIRMAN PALLADINO: That bothers me if you throw
16 in schedule.

17 MR. PLAINE: I say "concomitant" schedule.

18 CHAIRMAN PALLADINO: I am not sure I understand what
19 that means.

20 MR. PLAINE: Because it depends on shorthand for
21 saying that if you agree with -- if you end up agreeing that
22 some of the parties and the Board have taken the right tact,
23 you might end up agreeing that the schedule is sufficient.
24 On the other hand, if you direct them to make a change in
25 what they are doing, you might have to also ask them to allow

1 more time.

2 CHAIRMAN PALLADINO: That I would understand. Now
3 you want more than just to hear them.

4 MR. PLAINE: I want you to hear them. That is all.

5 CHAIRMAN PALLADINO: Hear them and then we have to
6 do something.

7 MR. PLAINE: Then you do something.

8 CHAIRMAN PALLADINO: We hear their arguments and
9 then make a decision on something. That is what I am trying
10 to get to.

11 MR. PLAINE: A decision on what basis shall the
12 Board goes forward.

13 CHAIRMAN PALLADINO: We would give guidance to the
14 Board on this issue, the general design criteria.

15 MR. PLAINE: Whether you decide that they are doing
16 all right or whether we want to modify it.

17 CHAIRMAN PALLADINO: So you are proposing that the
18 Commission hear the arguments of the parties on the applicabil-
19 ity of the general design criterion 17 and the interrelation
20 with emergency planning.

21 MR. PLAINE: Right.

22 CHAIRMAN PALLADINO: You would temporarily stay the
23 action of the Board until you hear this and provide guidance
24 to the Board on this matter.

25 COMMISSIONER GILINSKY: You were talking about a

1 hearing when?

2 MR. PLAINE: I would say Thursday or Friday.

3 COMMISSIONER GILINSKY: You are talking about one
4 of the biggest issues in this whole complex of regulations
5 whether the general design criteria should apply and you are
6 going to give people two days. I think that crazy.

7 MR. PLAINE: How about Friday? They are ready to
8 go. They are supposed to be ready to go tomorrow.

9 COMMISSIONER ASSELSTINE: They have already argued
10 this issue.

11 MR. PLAINE: They have argued this before. You
12 haven't heard the argument. That is the point. They have
13 argued it before the Board.

14 CHAIRMAN PALLADINO: You are saying that we are still
15 on the critical path at least for low-power.

16 MR. MALSH: I will say this. They have argued this
17 matter twice before. We have done some research and there is
18 no precedent. There is no prior Board decision which reaches
19 a similar holding. There is no law to cite to speak of so it
20 is not something that requires exhaustive research. I think
21 it is a matter of policy --

22 COMMISSIONER ASSELSTINE: Policy decision.

23 MR. MALSH: -- in carrying forward as we have here
24 today the implications of the argument. It does not take a
25 lot of time or legal research.

1 MR. KENNEKE: I just want to be clear, Mr. Chairman.
2 Are you all making the assumption that the Board has said
3 that GDC-17 doesn't apply?

4 COMMISSIONER ASSELSTINE: Yes.

5 MR. KENNEKE: Is it really being read that way?

6 COMMISSIONER ASSELSTINE: Yes.

7 MR. KENNEKE: It is a question of how you interpret
8 GDC-17.

9 COMMISSIONER ASSELSTINE: No.

10 MR. KENNEKE: Where are the words for that?

11 COMMISSIONER ASSELSTINE: We went through that
12 already. It is items three and four together.

13 CHAIRMAN PALLADINO: Let's find the words.

14 MR. MALSH: I think they are implicit in the order
15 but you have to understand LILCO's problem to read them
16 correctly. LILCO in going before the Board with their low-
17 power license was asked whether the motion for low-power
18 license would require a hearing on the Trans American diesel
19 which were LILCO's proposed on-site emergency power supply
20 in accordance with GDC-17.

21 LILCO said, "No, we are not using those at all for
22 purposes of our low-power motion. For purposes of our low-
23 power motion, we have no emergency on-site power supply."

24 COMMISSIONER ASSELSTINE: That's right.

25 MR. MALSH: At that point Suffolk County said, "Well,

1 if you have no emergency on-site power supply, I read GDC-17
2 as saying you must have one. Therefore, there is no need
3 for any expedited hearing, Licensing Board. You can simply
4 deny their motion out of hand on the grounds that there is
5 non-compliance with the Commission's regulations."

6 At that point the staff stepped in and said, "Ah,
7 not so fast. We don't think you have to read the general
8 design criteria that way. You should harmonize the general
9 design criteria with 50.57(c) which is the low-power motion
10 authority and grant the license if you can show that the
11 risk is equivalent to full-power."

12 So it is implicit in the Board's order that general
13 design criteria 17 does not apply because if it did apply
14 they would have been forced to grant Suffolk's County motion
15 to deny the license application out of hand for non-compliance.

16 MR. KENNEKE: Aren't they supplying additional
17 alternatives as sources of on-site power?

18 MR. MALSCH: No. It is all off-site.

19 MR. KENNEKE: I thought they were bringing in some
20 temporary gas turbines?

21 MR. MALSCH: Yes, but they are characterized as
22 off-site.

23 CHAIRMAN PALLADINO: What does deadline blackstart
24 mean?

25 MR. PLAINE: Where is that?

1 CHAIRMAN PALLADINO: On page three of the order,
2 it says, "Whether emergency power sources available are
3 sufficient to ensure public health and safety during low-power
4 testimony," and they are going to supply "... one 20 megawatt
5 gas turbine (deadline blackstart)...". I didn't know what
6 that meant.

7 MR. PLAINE: Deadline blackstart?

8 CHAIRMAN PALLADINO: Did I read that wrong?

9 COMMISSIONER ROBERTS: No. You read it absolutely
10 literally. I would like to know to.

11 COMMISSIONER BERNTHAL: It doesn't say specifically
12 whether that is on-site or off-site and I must say that I
13 am confused about that.

14 MR. MALSCH: They clarified that during the course
15 of the prehearing discussions.

16 COMMISSIONER BERNTHAL: All right.

17 CHAIRMAN PALLADINO: Are they off-site?

18 COMMISSIONER BERNTHAL: I guess. Is that what you
19 are saying, Marty?

20 MR. MALSCH: They are physically on-site but for
21 purposes of this motion, LILCO has said that they are all off-
22 site.

23 COMMISSIONER BERNTHAL: Because they don't meet the
24 design criteria, okay.

25 MR. MALSCH: They don't meet other design criteria.

1 COMMISSIONER BERNTHAL: Like seismic qualifications,
2 I gather.

3 MR. MALSCH: Right. They meet none of the other
4 criteria so to avoid application of the criteria that might
5 otherwise apply, they have characterized them as off-site.

6 COMMISSIONER ROBERTS: But, in fact, these are
7 available.

8 MR. MALSCH: That's right. LILCO asserts that
9 they are.

10 COMMISSIONER ROBERTS: Yes, I understand.

11 MR. MALSCH: In fact, some of them are actually
12 geographically located either on-site or so close to the site
13 that you wouldn't be able to tell the difference.

14 CHAIRMAN PALLADINO: The major question at the
15 bottom is they have not been designed as safety related to
16 the system.

17 Did you have another point?

18 MR. KENNEKE: No. I was going to read part of it
19 but I see that it is applicable to on-site and if the
20 definition is that they are not on-site, I guess we have some
21 difficulty.

22 CHAIRMAN PALLADINO: Does anybody know what deadline
23 blackstart means?

24 COMMISSIONER BERNTHAL: I assume that if you
25 separate those two words, maybe that is what it means but I

1 have no idea. "Dead Line Black Start," perhaps.

2 COMMISSIONER GILINSKY: I must say that this
3 confirms me even further in my view that the staff ought not
4 be in these hearings. Here is the staff concocting arguments
5 on how all this can be rationalized and I must say that even
6 though you didn't tell them anything about the hearings, this
7 is after your meeting with them on the speeding up the
8 process so the effect of it is inevitable. You have them
9 go back and think, "Well, how can we speed up this process?"
10 I am not suggesting that you did anything proper mind you
11 but that is intrinsic in the way the system works.

12 CHAIRMAN PALLADINO: I expect them to use all their
13 normal good judgment.

14 COMMISSIONER ASSELSTINE: You expect too much.

15 CHAIRMAN PALLADINO: Just as I expect other
16 Commissioners and members of the staff to use their normally
17 good judgment.

18 COMMISSIONER GILINSKY: I think it really undermines
19 the whole process.

20 CHAIRMAN PALLADINO: I don't think so. I think if
21 we get into the procedural one, I would probably argue. I
22 am still not entirely satisfied on the general design
23 criterion question.

24 COMMISSIONER BERNTHAL: Is someone going to define
25 "deadline blackstart" for us?

1 COMMISSIONER ROBERTS: We seem to be getting zero
2 response.

3 MR. GOODWIN: Deadline blackstart. "Blackstart"
4 means the diesel or gas generator requires no external source
5 of power to start it just its own included batteries and
6 "deadline" means that it is capable of energizing whatever
7 transmission lines are required to get from the power source
8 to what will utilize the power.

9 MR. MALSCH: On the on-site/off-site, let me just
10 read you a portion of the transcript. This is LILCO's
11 counsel speaking in response to a question about how come
12 your temporary diesels are not seismically qualified.

13 "Judge, the power sources that we are talking
14 about the 20 megawatt gas turbine, the mobile diesel engines,
15 they are part of the off-site system. They are enhancements
16 to that off-site system. As such, they are not required to be
17 seismically qualified."

18 COMMISSIONER BERNTHAL: Required to be is different
19 from how nice it would be if they were as back-up systems.

20 MR. MALSCH: Right.

21 COMMISSIONER GILINSKY: What are we going to do?
22 We can go forever.

23 CHAIRMAN PALLADINO: Herzal has proposed a course of
24 action if I can summarize it to see if I understand it, that
25 the Commission issue a temporary stay order staying the

1 hearings proposed by the Board until the Commission has heard
 2 the arguments for and against the elimination of the general
 3 design criterion number 17 for low-power and its interrelation-
 4 ship with the emergency planning and has offered guidance to
 5 the Board on this matter and he also suggested that we hold
 6 this presentation on Friday the 27th and after we have heard
 7 them then we have the problem of making our decision on
 8 guidance.

9 That is the part that gives me a problem. I can
 10 see three weeks go by on that matter. If the Commission will
 11 agree to give it as reasonably prompt attention as it can,
 12 then I wouldn't feel so badly about that.

13 I will admit that depending on the guidance we may
 14 have to remand this back to the Board to reconsider its
 15 schedule.

16 COMMISSIONER GILINSKY: What happens if the
 17 Commission says, "No, you can't use this sytem."

18 CHAIRMAN PALLADINO: Don't we send it back to the
 19 Board and say, "Now reconsider it."

20 COMMISSIONER GILINSKY: What is the effect on the
 21 plant?

22 MR. MALSCH: I would say that I think that means
 23 the motion has to be denied out of hand.

24 COMMISSIONER ASSELSTINE: That's right.

25 MR. MALSCH: There is no effort made by LILCO to

1 show compliance with the general design criteria.

2 MR. KENNEKE: As a legal matter that is correct.

3 Would they then be available to come back with a better
4 technical justification? That would still be legitimate?

5 COMMISSIONER ASSELSTINE: They could try.

6 MR. PLAINE: They could try, sure.

7 CHAIRMAN PALLADINO: I guess they always can try.

8 MR. PLAINE: Sure.

9 CHAIRMAN PALLADINO: Another complicating factor
10 that I hesitate to bring up but when I read the financial
11 qualification question, it seems to raise even more difficult
12 ones for Shoreham, low-power.

13 COMMISSIONER GILINSKY: There are a few others in
14 there..

15 CHAIRMAN PALLADINO: Yes, but I meant since we
16 are talking about Shoreham. Let me hear what people have to
17 say about Herzel's proposal.

18 COMMISSIONER ASSELSTINE: I would agree with it.

19 CHAIRMAN PALLADINO: What about you, Vic?

20 COMMISSIONER GILINSKY: I don't know. I want to
21 hear what my friend, Tom, has to say about it?

22 COMMISSIONER ROBERTS: I think it is a bad idea. I
23 would not go foward in that manner. I would do nothing and
24 let the process run its course.

25 CHAIRMAN PALLADINO: Why would you do that? I am

1 just trying to get you to articulate it for the record.

2 COMMISSIONER ROBERTS: We have a Board and the Board
3 has issued an order and that order is subject to all sorts of
4 reviews. I don't care if you want to argue that this is some
5 great major policy issue. I don't think we ought to dip down
6 and get involved in every Board order.

7 CHAIRMAN PALLADINO: Or any Board order.

8 COMMISSIONER ROBERTS: I don't see any egregious
9 harm to anyone. I fail to understand who we are depriving of
10 their rights or their privileges or their ability to partici-
11 pate in our process.

12 COMMISSIONER GILINSKY: Are you comfortable with
13 letting this plant turn on?

14 COMMISSIONER ROBERTS: It hasn't reached that issue
15 yet. A license is not going to issue tomorrow.

16 COMMISSIONER BERNTHAL: I think Tom's point of view
17 is a legitimate one. We are in a kind of a no-win situation
18 though. My concern, Tom, is that we will end up with this
19 same unpleasant mess in front of us with still more encumbrance
20 at some future date. You may well be right but frankly I would
21 prefer to cut our losses and decide the policy issue now to
22 put it bluntly. You may well be right. It might be better of
23 to let the thing run its course but we may end up delaying
24 things further if we do that.

25 CHAIRMAN PALLADINO: The Board may decide issues the

1 same way we decide them.

2 COMMISSIONER BERNTHAL: May very well. It just seems
3 like we are in the midst of something here that does come down
4 to a policy question and I don't see frankly why the Board
5 needs to take this as a rebuke of any kind if this thing is
6 handled as a policy issue. It is very clear that it is a
7 larger policy issue and if we treat it that way, I don't see
8 that it is a rebuke to anything that the Board has done.

9 COMMISSIONER ROBERTS: That is all very well and good
10 to say, Fred, and I understand and I understand your attempt
11 but it isn't going to be read that way.

12 COMMISSIONER BERNTHAL: You may be right. I would
13 hope it would be.

14 COMMISSIONER ROBERTS: It is unrealistic to think
15 that.

16 CHAIRMAN PALLADINO: That is why it is important
17 if you are going to say that, that it be a policy issue and
18 not get mucked up in the scheduling.

19 COMMISSIONER BERNTHAL: Precisely.

20 CHAIRMAN PALLADINO: Except insofar as the guidance
21 may affect the scheduling.

22 COMMISSIONER GILINSKY: It will indicate that they
23 got too big for their britches.

24 COMMISSIONER ROBERTS: Who is they?

25 COMMISSIONER GILINSKY: The Board. I am agreeing

1 with you.

2 CHAIRMAN PALLADINO: How did you come down with
3 regard to Herzel's suggestion?

4 COMMISSIONER BERNTHAL: I am in favor of doing what
5 counsel suggests at this point. It seems the prudent way to
6 proceed.

7 COMMISSIONER ROBERTS: I wonder if everybody has
8 read the April 20th Board Order denying Intervenor's Motion
9 to Vacate Order?

10 COMMISSIONER ASSELSTINE: I have.

11 CHAIRMAN PALLADINO: Any particular point on that
12 that you would like to make?

13 COMMISSIONER ROBERTS: Starting at the bottom of
14 page four. "There is a continuing refrain in the voluminous
15 papers filed in this proceeding about 'due process of law'..."

16 CHAIRMAN PALLADINO: Read it all.

17 COMMISSIONER ROBERTS: "There is a continuing refrain
18 in the voluminous papers filed in this proceeding about 'due
19 process of law', but little analysis of that principle itself.
20 The due process clauses of the United States Constitution pro-
21 vide as follows: 5th Amendment: No person shall... be
22 deprived of life, liberty, or property, without due process of
23 law...' 14th Amendment: No state shall make or enforce any
24 law which shall... deprive any person of life, liberty, or
25 property, without due process of law...'. The 5th Amendment

1 applies only to the federal government, and the 14th amendment
2 applies to the States. If and only if the evidence shows that
3 under the applicable NRC regulations and based upon substantial
4 evidence, LILCO is entitled to low-power testing or operations,
5 then to refuse or delay such low-power license could itself
6 amount to a deprivation of property without due process of law.
7 In other words, 'all parties are entitled to due process; none
8 has a monopoly on that principle"

9 "Finally, we note that the Intervenors' Motion to
10 vacate contains ad hominem insinuations and pejorative
11 innuendoes concerning the NRC that border on the scurrilous.
12 Most of these smear-type utterances are based on papers or
13 letters outside the record and irrelevant to this proceeding.
14 The Staff properly 'categorically rejects' such insinuations,
15 which do not honor to the attorneys who propagate them."

16 "For the foregoing reasons, the Intervenors' Motion
17 filed April 16, 1984, is denied...".

18 COMMISSIONER BERNTHAL: It sounds like a little
19 bad blood there.

20 COMMISSIONER ROBERTS: That is pretty heavy language.

21 CHAIRMAN PALLADINO: I had marked a paragraph on
22 page three. "The Board has carefully considered all of the
23 arguments advanced by the Intervenors in support of their
24 joint Motion to vacate, and it finds that they have not shown
25 any new or different grounds other than those raised in the

1 past which were denied. No significant new arguments or facts
2 are addressed to support their conclusionary complaints and no
3 useful purpose would be served by rehashing dilatory
4 objections."

5 My inclination would be to do nothing and let the
6 process go forward.

7 COMMISSIONER ROBERTS: That would certainly be mine.

8 COMMISSIONER GILINSKY: Is that what you really
9 want to do?

10 COMMISSIONER ASSELSTINE: It really is, Joe?

11 COMMISSIONER BERNTHAL: I think we ought to
12 straighten it out, Joe. Your suggested pathway might have
13 some chance of being wiser than the other one of going ahead
14 and hearing the policy issue but at this point it just seems
15 to me that for a whole variety of reasons including how it
16 would be perceived publicly, I think we ought to do that
17 and clear it up.

18 I see no way out. We have talked about lots and
19 lots of things here but nobody has suggested a logical way
20 out of this bind that we get into on emergency planning.

21 COMMISSIONER GILINSKY: How do you explain that?

22 CHAIRMAN PALLADINO: I would expect the Board to
23 address that issue.

24 COMMISSIONER GILINSKY: But they seem to show no
25 sign of doing that. They just seem to have omitted it all

1 together. It seems to be a lapse on their part.

2 CHAIRMAN PALLADINO: I wouldn't mind asking them
3 to include that in their consideration. It may be a little
4 bit late to tell them that but I think it will come up. It
5 can't help but come up.

6 COMMISSIONER GILINSKY: Let me ask you this. Can
7 you contemplate their approving it on that basis without
8 emergency preparedness?

9 CHAIRMAN PALLADINO: I don't want to prejudge the
10 issues.

11 COMMISSIONER GILINSKY: Do you see any way out of
12 it? That is all I am asking you.

13 CHAIRMAN PALLADINO: I don't have to at the moment.
14 Otherwise, I would prejudge the issue.

15 COMMISSIONER GILINSKY: Why are we meeting then?

16 CHAIRMAN PALLADINO: I read the order more carefully
17 and it didn't sound as bad as I thought it was sounding when
18 I heard Marty Malsch and Herzel Plaine on Friday.

19 COMMISSIONER BERNTHAL: Let me just ask counsel
20 this question again. I know you said it one way or another
21 in the course of the conversations here. Suppose we did
22 nothing and suppose the Licensing Board went ahead and made
23 whatever findings it might address in whatever direct or
24 indirect ways and it appears to be more indirect, the question
25 of emergency planning, what would be the likely outcome in your

1 judgment?

2 MR. PLAINE: This afternoon we will be faced of
3 course with dealing at least temporarily with a motion before
4 a court to stay the hand of the Board but on the long range
5 matter, I suppose you might find a good deal of sentiment
6 building up later on if the Board goes the way it seems to be
7 going for the matter to be dealt with by the Appeal Board and
8 the Commission and you might change your minds then, I suppose,
9 or you might affirm what is done. I don't know.

10 COMMISSIONER BERNTHAL: But beyond that, suppose
11 we did not change the mind of the Board and assuming the
12 Appeal Board agreed with them because that, I think, somehow
13 has to underlie the argument to postpone taking part in this
14 at this point.

15 COMMISSIONER ASSELSTINE: Except that I don't even
16 think that you get to that point, Fred, because if a low-power
17 license will issue right after the Licensing Board's decision,
18 you won't have an Appeal Board decision.

19 COMMISSIONER BERNTHAL: That is what I am asking.

20 COMMISSIONER ASSELSTINE: It will right in on the
21 Licensing Board's decision.

22 COMMISSIONER BERNTHAL: Good point.

23 COMMISSIONER GILINSKY: You will be trying to get a
24 stay, I suppose.

25 COMMISSIONER BERNTHAL: I assume so. So my question

1 then really is one of what in your judgment happens in the
2 courts?

3 MR. PLAINE: It is hard to tell. It is so much of
4 a guessing game.

5 CHAIRMAN PALLADINO: Let me ask you, suppose we go
6 this route, the one that Herzel proposed.

7 COMMISSIONER ROBERTS: What are we going to do after
8 we hear from the parties?

9 CHAIRMAN PALLADINO: Then how long will it take us
10 to decide one way or the other?

11 MR. PLAINE: I think what you do is you say one of
12 two things. You say we think the Board is on the right
13 track. We have heard all the arguments about it and we are
14 satisfied that this is the way they should go and the hearing
15 should resume and resume on the schedule that they have or
16 if you want to modify it on a slightly modified schedule or
17 whatever.

18 The other course is to say to the Board, we think
19 the posture that you are in right now might lead to serious
20 consequences of a different sort and we suggest for those
21 reasons and we will spell them out, I suppose, that you handle
22 this particular substantive issue in a different way and in
23 connection with that our suggestion about scheduling would be
24 to give them a little more time or something of that sort.
25 That is basically the only real two issues. I wouldn't even

1 get into the one about the rebuke of the lawyer. I would leave
2 that alone.

3 CHAIRMAN PALLADINO: I hate to get into that.

4 MR. PLAINE: That can die of itself. The Judge can
5 simply decide not to press the issue.

6 CHAIRMAN PALLADINO: Let's assume we did it on
7 Friday. Next week we won't make a decision.

8 COMMISSIONER BERNTHAL: We won't?

9 CHAIRMAN PALLADINO: Unless you make it by Monday
10 or Tuesday and even if I stay here on Wednesday, Thursday
11 and Friday, there are others --

12 COMMISSIONER BERNTHAL: What is happening next week?

13 CHAIRMAN PALLADINO: I presume I have the right week.

14 COMMISSIONER GILINSKY: It is going to take more
15 than a week.

16 COMMISSIONER BERNTHAL: I have to leave by Wednesday
17 afternoon, the second.

18 COMMISSIONER GILINSKY: You are not going to crank
19 out a decision on a subject like this in two days.

20 CHAIRMAN PALLADINO: So then when do we come back?

21 COMMISSIONER GILINSKY: Even if it is unanimous,
22 you won't get it.

23 CHAIRMAN PALLADINO: So then the week of May 7th.
24 So we are putting on it at least a minimum of two weeks delay.

25 COMMISSIONER ASSELSTINE: That's right.

1 COMMISSIONER GILINSKY: That is the minimum realistic
2 schedule.

3 CHAIRMAN PALLADINO: But I think we ought to try in
4 that time.

5 COMMISSIONER GILINSKY: Are you changing your mind?

6 CHAIRMAN PALLADINO: I have a problem on the
7 general design criteria because I believe they should not
8 just very easily be dismissed for low-power but it is not
9 clear to me that they have necessarily decided that. That
10 is why I was looking for where is it that so clearly says
11 that they have decided that. That could change my mind.

12 COMMISSIONER GILINSKY: Well, he said that it is
13 okay to go with low-power if the risk is the same as full-
14 power.

15 COMMISSIONER BERNTHAL: They come very close to
16 saying that.

17 MR. KENNEKE: If the protection is the same. They
18 didn't say risk.

19 CHAIRMAN PALLADINO: Let's see what evidence they
20 have and make the decision. If they come out right, they
21 will have a good decision and if they don't treat this subject
22 right, then we can step in.

23 COMMISSIONER GILINSKY: Are you willing to agree
24 that no matter what the Commission will pass on low-power
25 for a low power license --

1 CHAIRMAN PALLADINO: I would rather make the other
2 decision and not that one.

3 COMMISSIONER GILINSKY: Then I guess I will vote
4 for the hearing.

5 CHAIRMAN PALLADINO: If we are going to get something
6 temporarily stayed, we have to get something out quickly.

7 MR. PLAINE: I have a draft of an order that can
8 use a little mark-up. Why don't I just shift it around.

9 CHAIRMAN PALLADINO: Can we take five minutes to just
10 walk down the hall?

11 COMMISSIONER GILINSKY: I have to leave here in a
12 couple of minutes and I imagine Tom does, too.

13 CHAIRMAN PALLADINO: What about this afternoon?

14 COMMISSIONER BERNTHAL: I have to leave in about
15 three minutes.

16 CHAIRMAN PALLADINO: Instead of having the management
17 meeting this afternoon, why don't we continue with this?

18 COMMISSIONER ASSELSTINE: Okay, and mark-up the
19 order.

20 CHAIRMAN PALLADINO: At least we can spend a few
21 minutes looking at this.

22 COMMISSIONER GILINSKY: I think we have to review
23 the questions pretty carefully.

24 COMMISSIONER ASSELSTINE: I agree.

25 COMMISSIONER GILINSKY: In fact, I think we ought

1 to review those over lunch. I don't think we should just do
2 this at the table here.

3 COMMISSIONER ASSELSTINE: I agree.

4 COMMISSIONER ROBERTS: Two o'clock this afternoon?

5 COMMISSIONER GILINSKY: All right. Done.

6 COMMISSIONER BERNTHAL: This is as important item
7 that we were going to discuss at the management meeting today
8 and I would prefer at least for my part to urge the Chairman
9 to go ahead and hold that meeting even if has to be delayed.

10 COMMISSIONER ASSELSTINE: Sure. I would be for
11 that.

12 COMMISSIONER ROBERTS: How long do you think this
13 will take?

14 COMMISSIONER BERNTHAL: Beats me! I would hope
15 we will finish this in 20 or 30 minutes, Tom.

16 (Whereupon, the Commission meeting was adjourned at
17 11:45 o'clock a.m., to reconvene at 2:00 o'clock p.m., the same
18 say.)

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AFTERNOON SESSION

(2:07 p.m.)

CHAIRMAN PALLADINO: Let's come to order.

We had the draft order and stay, and I have provided some comments. Commissioner Asselstine had provided some comments independently.

COMMISSIONER ASSELSTINE: Yes.

CHAIRMAN PALLADINO: And we have Commissioner Gilinsky's comments.

COMMISSIONER ASSELSTINE: Right.

CHAIRMAN PALLADINO: I can highlight mine. At the top I said: "I had not made up our mind on whether or not to vote for the modified order."

I am not going to vote for it and I will have some additional comments before we get very far into this meeting.

But I did have a couple of suggestions, mainly to sharpen it and see if we could improve it. I did insert the word "temporarily," but that's not a very strong point.

I did think it would be helpful if the Commission would indicate that it will attempt to resolve its guidance or to issue its guidance by a given date and suggested May 11. I also suggested we focus on General Design Criterion 17 because if we get into all of the design criteria, I'm not sure if we are not broadening it beyond what the

1 applicant has asked for.

2 And then I suggested also that the last two items
3 about "afforded sufficient time to prepare their case" and
4 the attorney to show cause, I suggested deleting those.

5 Now, Jim, maybe you could highlight yours.

6 COMMISSIONER ASSELSTINE: Okay. I just tried to --
7 mine are fairly minor changes, I think. Just to clean up the
8 first question on the general design criterion, break it out
9 into two separate questions with the three sub-parts of
10 Question 2.

11 My personal preference would be to leave in the
12 questions on sufficient time and on the Show Cause Order,
13 but I also recognize that at least with regard to the last
14 one, I didn't think there was agreement on that one this
15 morning. I think I might add a sentence or two to the order,
16 "Additional view," just indicating that I would have been
17 willing to consider that question as well.

18 MR. PLAINE: You are talking about the lawyer --

19 COMMISSIONER ASSELSTINE: Yes. But I recognize
20 that I don't think there was a majority in favor of
21 considering that issue as well.

22 CHAIRMAN PALLADINO: May I ask you with regard
23 to the first question, what do you think of General Design
24 Criterion 17 being --

25 COMMISSIONER ASSELSTINE: I'd be willing to focus

1 on 17, yes.

2 CHAIRMAN PALLADINO: I think we are better off if
3 we do.

4 COMMISSIONER ASSELSTINE: Yes. And I guess I'd
5 be willing, in terms of your suggestions to add in the other
6 part about attempting to provide our guidance by May 11, yes.

7 CHAIRMAN PALLADINO: Okay. And I had also suggested
8 that the meeting be at 10 a.m. on April 27.

9 COMMISSIONER ASSELSTINE: That'll be fine with me,
10 too.

11 CHAIRMAN PALLADINO: All right. Do you have those?
12 Fred, do you have --

13 COMMISSIONER BERNTHAL: Yes, I agree that the
14 fourth, third, fourth -- the third point as it read
15 originally, I guess I agree with you, Joe, that we ought to
16 drop that. In fact, I thought we had virtually already
17 decided not to comment on that issue at this morning's
18 meeting.

19 And I also have no problem of dropping what was
20 Point No. 2 there. I, at the risk of confusing what appears
21 to be some consensus -- in the hope of getting greater
22 consensus, I guess, if it's possible -- I would like to hear
23 us discuss a little bit at least why it is that we want to
24 go and do what will be a two and-a-half or so week operation
25 here if we already virtually know what the likely position

1 of the Commission on that issue might be, which is really
2 the general design criterion issue. And I think Victor in
3 many respects has -- he has reworded what the sense of the
4 order is but probably highlighted it far more starkly and
5 clearly than perhaps the order itself does.

6 (Commissioner Gilinsky enters room.)

7 COMMISSIONER BERNTHAL: Those, really, are the
8 questions. And if we know what the Commission position on
9 those is going to be, why don't we just go ahead and issue
10 guidance here today, or tomorrow, or the next day, by the
11 end of the week perhaps, and let that be that?

12 I am certainly open to persuasion. But I would like
13 to hear some comments on that.

14 CHAIRMAN PALLADINO: Well, we did get a request
15 from LILCO, at least, that they wanted to address the issue
16 before any significant stay is granted. I forgot how they
17 worded it.

18 MR. PLAINE: You may want to hear from the staff,
19 too, why do they --

20 COMMISSIONER BERNTHAL: Well, I understand that.
21 But is the record insufficient? Is the record incomplete
22 such that we simply cannot, from a reading of the record,
23 make our judgment on this policy matter?

24 Will there be new arguments and presentations
25 made and added to the record as it stands before us?

1 MR. MALSCH: I think the record is fairly complete.
2 It's just the lingering uncertainty that maybe we have missed
3 something or misunderstood something; or that somehow the
4 communications in writing in the Board's words have not
5 conveyed what the parties really have in mind.

6 That's the thing I would be most concerned about,
7 going ahead right now.

8 COMMISSIONER BERNTHAL: Well, okay. But I also
9 note the legitimate concern that I think the Chairman has
10 on the time that entails, in going through what is our concern
11 that we might have missed something.

12 MR. MALSCH: One possibility -- just to offer
13 something up -- would be to offer guidance and then invite
14 the parties to ask the Commission to reconsider within some
15 time.

16 COMMISSIONER GILINSKY: If they so choose.

17 MR. MALSCH: If they choose.

18 CHAIRMAN PALLADINO: If what?

19 MR. MALSCH: If they so chose.

20 COMMISSIONER ASSELSTINE: Yes.

21 MR. MALSCH: That would give them the option of
22 either accepting what the Commission offered and going ahead
23 on that basis, or asking the Commission to reconsider and
24 hope to persuade the Commission to go along some different
25 course.

1 COMMISSIONER BERNTHAL: I mean, in one sense that's
2 the mode we are in, with admitted possible exceptions, on
3 the Commission. But it appears that we are in a mode coming
4 very close to that in any case, that -- I don't want to say
5 our mind is made up, please try and confuse us with further
6 facts. But it's something that is close to that.

7 COMMISSIONER GILINSKY: Well, I suppose the
8 difference would be that if we went forward with a hearing
9 the "delay" would be on our account, you might say. Whereas,
10 if we went with Marty's approach --

11 COMMISSIONER BERNTHAL: That's right.

12 COMMISSIONER GILINSKY: -- it would be up to the
13 parties to decide if it was worth their time to pursue the
14 question.

15 CHAIRMAN PALLADINO: The other thing is, if it's
16 going to take two weeks to consider after we hear the oral
17 argument, then it should take two weeks from the time you
18 read the material to reaching a decision.

19 MR. PLAINE: Why do you need two weeks after --

20 CHAIRMAN PALLADINO: I proposed one week, but what
21 I heard was two weeks.

22 MR. PLAINE: Is it because the Commissioners
23 won't be present?

24 CHAIRMAN PALLADINO: In part. As I said, I was
25 willing to --

1 COMMISSIONER BERNTHAL: Why can't we hear -- if we
2 go this route, then to take it one step further, Herzel --
3 why can't we hear from these people just as soon as they can
4 all physically get down here and make a decision before all
5 of us fly tne coop next week?

6 CHAIRMAN PALLADINO: Or tomorrow. But I don't
7 think we could --

8 MR. PLAINE: Get them in here by tomorrow or
9 Wednesday, that's fine too, and try to make a decision on
10 Friday. If you are so close that you think right now --

11 COMMISSIONER GILINSKY: You have no written briefs --

12 CHAIRMAN PALLADINO: I think you want time to read
13 some of this material.

14 COMMISSIONER GILINSKY: You have no written briefs,
15 tnen.

16 MR. PLAINE: Well, all I'm suggesting -- I would
17 suggest, actually, that if the parties want to carry a
18 written brief and turn it in when they make their argument,
19 that's perfectly all right, too.

20 CHAIRMAN PALLADINO: But do we have material to
21 read right now?

22 MR. PLAINE: Well, you would have to go back to
23 the record.

24 COMMISSIONER GILINSKY: Let me tell you, I could
25 conceive of the Commission saying "no" on this basis. I

1 can't conceive of the Commission saying "yes" on this basis,
2 sort of on the fly. You know, a big decision. And to just
3 simply say, "Oh, sure, go ahead" on the basis of a little
4 oral argument just doesn't seem like the right way to do
5 things.

6 I could see saying "no," and saying, "Well, we
7 haven't heard anything to change our mind and so, forget it."
8 If that's what people have in mind, then we can, you know,
9 walk the last mile and see if there is anything there.

10 MR. PLAINE: It seems to me, Mr. Chairman, that
11 you could ask the parties if they want to carry a brief with
12 them and turn it in, that's fine, and try --

13 CHAIRMAN PALLADINO: Did you say the record --

14 MR. PLAINE: -- then try to give them a decision
15 sometime early next week. I can't see any reason you can't
16 do that, unless all of you are not going to be here.

17 COMMISSIONER GILINSKY: We could simply say, if it
18 is the sense of the Commission, that what was proposed by
19 the Board fails on account of the relationship with the
20 emergency preparedness. If there are some other arguments
21 that people want to present, to bring up, it would be up to
22 them.

23 COMMISSIONER ASSELSTINE: I think it's worth, if
24 we are going to hear from them, giving them a couple of days
25 to get ready. Admittedly, they have been over this ground

1 before, but I still think it's worth giving them a couple of
2 days to do it.

3 I wouldn't have any problem if we have the argument
4 on Friday, getting back together early next week and seeing
5 if we can reach a decision on what kind of guidance we want
6 to provide. I think it's entirely possible.

7 COMMISSIONER BERNTHAL: A couple of days from
8 today could be Wednesday, Jim, or even Thursday.

9 COMMISSIONER ASSELSTINE: That's right.

10 COMMISSIONER BERNTHAL: Why not?

11 COMMISSIONER ASSELSTINE: Okay.

12 CHAIRMAN PALLADINO: Thursday, now -- Wednesday,
13 you leave in the afternoon, Jim leaves in the afternoon.

14 COMMISSIONER ASSELSTINE: That's a week, Wednesday
15 a week.

16 CHAIRMAN PALLADINO: I was planning to --

17 COMMISSIONER BERNTHAL: No, this Wednesday or
18 Thursday.

19 CHAIRMAN PALLADINO: Oh, this one.

20 COMMISSIONER GILINSKY: Normally, you let people
21 write some things.

22 COMMISSIONER BERNTHAL: Hear the arguments.

23 COMMISSIONER ASSELSTINE: Yes.

24 COMMISSIONER GILINSKY: But you normally have them
25 submit a brief and, in fact, normally you let them respond

1 to each others' briefs so you have something in writing
2 from which you would ask questions, you have some idea of what
3 they are saying.

4 COMMISSIONER ASSELSTINE: Yes.

5 COMMISSIONER BERNTHAL: Well, okay, we could hear
6 them Friday, as earlier suggested. We promised a decision by
7 Tuesday or Wednesday of next week.

8 COMMISSIONER GILINSKY: Well, I think you can meet
9 and see what the sense of the Commission is.

10 COMMISSIONER ASSELSTINE: Yes.

11 COMMISSIONER GILINSKY: It may be possible to have
12 a decision.

13 COMMISSIONER ASSELSTINE: Yes.

14 COMMISSIONER BERNTHAL: Alternatively, is Marty's
15 suggestion one that might not work?

16 COMMISSIONER ASSELSTINE: Yes. My preference is --

17 COMMISSIONER BERNTHAL: I think Tom has a perfectly
18 defensible position on this thing. But if you are going to
19 take the decision that we ought to give the policy guidance
20 now rather than later, then by golly, we ought to do everything
21 we can to make sure that that's done quickly. It seems to me
22 we ought to be fairly --

23 COMMISSIONER GILINSKY: What position is defensible?

24 COMMISSIONER ROBERTS: Do nothing.

25 COMMISSIONER GILINSKY: Oh, do nothing.

1 COMMISSIONER ROBERTS: Do nothing, of course. Now,
2 I would change that position.

3 CHAIRMAN PALLADINO: And incidentally, even though,
4 you know, my comments said that I had --

5 COMMISSIONER BERNTHAL: It's always a good idea
6 to do nothing.

7 COMMISSIONER ROBERTS: We do that quite well.

8 (Simultaneous conversation.)

9 CHAIRMAN PALLADINO: I'm not convinced that we need
10 to do anything.

11 COMMISSIONER GILINSKY: Oh, you don't want to have
12 a hearing.

13 CHAIRMAN PALLADINO: I don't want to do anything,
14 yes.

15 COMMISSIONER ASSELSTINE: I think that if we had
16 the hearing Friday, the oral argument on Friday, we can agree
17 to have a meeting next Tuesday or Wednesday and see where we
18 are. I think I agree with Vic that if our decision is the
19 general design criteria apply to low power as well as full
20 power, it is more likely that you can reach a fast decision
21 on that and provide that kind of guidance to the Board very
22 quickly.

23 On the other hand, if the decision is they don't
24 apply and you have to come up with some new safety standard
25 for low power operation and you have to come up with a new

1 set of regulations that are going to apply to low power
2 operation and license conditions and all those things, that's
3 a much longer process and that's going to take more time and
4 thought.

5 But the first course, I think that decision is
6 fairly easy to reach in a very short time period.

7 COMMISSIONER BERNTHAL: What about Marty's suggestion,
8 what's wrong with that?

9 MR. PLAINE: What was that, again?

10 COMMISSIONER GILINSKY: Nothing.

11 MR. PLAINE: I don't quite understand it.

12 COMMISSIONER ASSELSTINE: Marty's proposal was,
13 provide the guidance and say, "This is the Commission's
14 guidance without hearing from the parties first." But
15 then saying, "If the parties have real problems with that,
16 there is an opportunity to come back and convince the
17 Commission that it's wrong.

18 MR. PLAINE: It reverses the process. Suddenly
19 you presume that the Board has acted wrongfully without even
20 hearing anybody.

21 COMMISSIONER BERNTHAL: "Wrongfully" is not the
22 right word. The Board has put itself in a position of
23 trying to make a policy judgment that some feel may come back
24 to us anyway, later. Some feel that we should make a
25 decision on that policy matter right now, as a Commission.

1 That's --

2 MR. PLAINE: We have also done it with the support
3 of the staff and I just think it ought not to reverse all
4 at once without at least finding out what --

5 COMMISSIONER ROBERTS: Victor, what are you
6 mumbling now? I want to hear it.

7 COMMISSIONER GILINSKY: It was merely a party.

8 (Laughter)

9 MR. MALSCH: Let me indicate, I stumbled -- over
10 noon -- I stumbled across the transcript. And during the
11 transcript the staff said that the staff position had been
12 specifically approved by Harold Denton.

13 COMMISSIONER GILINSKY: What does that mean?

14 MR. MALSCH: That the Board -- the staff offered up
15 this argument regarding GDC-17 and the equivalency standard,
16 and the Board said, "Are you authorized, how do I know this
17 is the official staff position." And the staff attorney
18 said, "It has been specifically approved by Harold Denton
19 and he sat in the room when I argued it."

20 So, just for whatever --

21 (Laughter)

22 COMMISSIONER ASSELSTINE: I guess the reason I
23 would suggest going with the argument first and then the
24 decision, Fred, is that regardless of which way the thing
25 goes, it does seem to me that the Commission stepping in at

1 this stage in a proceeding is an extraordinary step and to
2 make sure that we do understand the positions of all the
3 parties before we say something, I think we ought to hear from
4 the parties first and then provide whatever guidance we
5 want to, rather than the other way around.

6 People are going to be critical enough for the
7 Commission jumping in, in the middle of a proceeding anyway.
8 And if it appears that the Commission is jumping in without
9 giving people an opportunity to make clear what their
10 positions are, I just --

11 COMMISSIONER BERNTHAL: You sound like you are
12 arguing Tom's point of view here.

13 COMMISSIONER ASSELSTINE: Normally, I would agree
14 with Tom.

15 (Laughter)

16 COMMISSIONER ASSELSTINE: In fact, I argued Tom's
17 position when the majority of the Commission dived into the
18 Indian Point proceeding.

19 (Laughter)

20 COMMISSIONER GILINSKY: Well, I thought we should
21 have stepped in on Byron.

22 (Laughter)

23 CHAIRMAN PALLADINO: So, what do you want to do?
24 I had suggested the April 27 date because I thought you wanted
25 some time. But if you want to do it sooner --

1 COMMISSIONER BERNTHAL: I'm prepared to hear this
2 tomorrow if everybody else is, and I will promise you that
3 I'll have a decision on it by next week Tuesday, provided
4 we hear from them by Friday of this week.

5 COMMISSIONER GILINSKY: Well, you know, you just
6 can't --

7 MR. PLAINE: You can't just turn it on that fast.

8 COMMISSIONER GILINSKY: -- eliminate the possibility
9 that arguments will be presented that one had not thought of,
10 and are convincing.

11 COMMISSIONER ASSELSTINE: Yes.

12 COMMISSIONER BERNTHAL: Okay, I'm willing to hear
13 the arguments on Friday and decide by Tuesday.

14 COMMISSIONER ASSELSTINE: Yes.

15 COMMISSIONER BERNTHAL: That's a commitment that
16 I would make.

17 COMMISSIONER GILINSKY: I would say that we ought
18 to hear them this week and agree to meet Monday or Tuesday.

19 COMMISSIONER ASSELSTINE: Yes.

20 COMMISSIONER GILINSKY: And if we can come to
21 agreement, fine. But if we are really overturning established
22 procedures, then I just don't think you can just say --

23 COMMISSIONER ASSELSTINE: Yes.

24 COMMISSIONER GILINSKY: -- sure, throw the doors
25 open, do whatever you want.

1 COMMISSIONER BERNTHAL: But you overturn
2 procedures for substantive reasons and this, as we all agree,
3 I think, is a policy question that we have chosen to enter
4 into before it goes any farther down along.

5 COMMISSIONER GILINSKY: Yes, but you'd have to be --
6 if one went the other way, you'd have to be very careful on
7 how you put it all together, and I just don't think it's
8 something you can do in a day.

9 COMMISSIONER BERNTHAL: Well, yes, I'm not married
10 to that.

11 CHAIRMAN FALLADINO: Let's see, is there agreement
12 to try to do it Friday?

13 COMMISSIONER ASSELSTINE: It's fine with me.

14 COMMISSIONER BERNTHAL: Friday, or earlier.

15 CHAIRMAN FALLADINO: Well, the order has to have
16 something.

17 MR. PLAINE: Is there any reason why we can't also
18 insert that the parties are permitted or urged, if they wish,
19 to bring along a written summation of their argument?

20 COMMISSIONER GILINSKY: No, no, if you are going
21 to have it Friday, then I think they ought to have something
22 written handed in on Thursday.

23 MR. PLAINE: All right, if you want to do it that
24 way. They are encouraged to do so.

25 COMMISSIONER GILINSKY: Because then, if you are

1 telling them now, they can work tomorrow, Tuesday, Wednesday --

2 CHAIRMAN PALLADINO: Are you going to put a
3 sentence in about --

4 COMMISSIONER GILINSKY: They ought to hand something
5 in Wednesday night, frankly.

6 COMMISSIONER BERNTHAL: I'll settle for Thursday.

7 COMMISSIONER ASSELSTINE: Thursday, yes.

8 COMMISSIONER GILINSKY: Well, Thursday what,
9 Thursday night?

10 COMMISSIONER BERNTHAL: Thursday noon.

11 COMMISSIONER ASSELSTINE: Thursday noon, how
12 about that?

13 COMMISSIONER GILINSKY: Well, okay.

14 CHAIRMAN PALLADINO: So, you are going to put
15 something in --

16 MR. PLAINE: We'll put something like that in.

17 CHAIRMAN PALLADINO: All right. Does the Commission
18 want to say anything about, it's going to attempt to get --
19 issue its guidance by such and such a date?

20 COMMISSIONER GILINSKY: I wouldn't. I mean, I
21 would say that, you know, as quickly as possible or something
22 like that, yes. Certainly, that we will meet the following
23 week on it, that's fine.

24 CHAIRMAN PALLADINO: How would you like it --

25 MR. PLAINE: I'll try to get something like that in.

1 CHAIRMAN PALLADINO: The Commission will attempt
2 to issue its guidance as soon as, or as promptly, or
3 expeditiously?

4 COMMISSIONER GILINSKY: Yes. You could even
5 say, we'll meet on this the following week, Monday or
6 Tuesday, whatever.

7 CHAIRMAN PALLADINO: We only got Monday, Tuesday,
8 and Wednesday in the morning.

9 COMMISSIONER ASSELSTINE: Let's put it on for
10 Tuesday.

11 COMMISSIONER BERNTHAL: Hm?

12 COMMISSIONER ASSELSTINE: Let's put it on for
13 Tuesday of next week.

14 COMMISSIONER GILINSKY: Yes.

15 CHAIRMAN PALLADINO: Let's see what else goes out.
16 So, you are going to put something in there that the
17 Commission will try to issue its guidance expeditiously and
18 meet on the subject next week?

19 COMMISSIONER GILINSKY: Yes.

20 CHAIRMAN PALLADINO: All right.

21 Now, I raise the question about whether you want
22 to address all of the general design criteria, or Design
23 Criteria 17 which I think is the only one at issue. I think
24 if you get into all of them, you are going to maybe have
25 to face decisions that you don't really need to at this

1 present time.

2 COMMISSIONER ASSELSTINE: And we've got Vic's
3 revisions to the questions.

4 COMMISSIONER GILINSKY: I don't know whether you
5 have seen my --

6 CHAIRMAN PALLADINO: Yes, and I like the fact that
7 you limit it to 17.

8 COMMISSIONER BERNTHAL: Yes, I just --

9 COMMISSIONER GILINSKY: Well, I did take a que
10 from what you had in there and I said in there, would this
11 argument apply to all of them --

12 CHAIRMAN PALLADINO: What's that?

13 COMMISSIONER ROBERTS: He's asked the question,
14 does it apply to all.

15 COMMISSIONER ASSELSTINE: Yes, that's right.

16 CHAIRMAN PALLADINO: Where do you ask that
17 question?

18 COMMISSIONER ASSELSTINE: On two, the second part
19 of two.

20 CHAIRMAN PALLADINO: Yes, what is the legal basis
21 for --

22 COMMISSIONER ASSELSTINE: Yes. I mean, I think
23 it's a legitimate question to say, does it go beyond 17.

24 MR. MALSCH: Yes, I was going to say that other
25 criteria are implicated.

1 COMMISSIONER ASSELSTINE: That's right.

2 MR. MALSCH: One, two, and maybe other ones
3 because they are implicated from reading Criterion 17. So,
4 it isn't just Criterion 17, though that's the main one.

5 I think the argument is the same for all of them.
6 I think they are all --

7 CHAIRMAN PALLADINO: Well, if I were voting for
8 this, I'd use my leverage to get to 17 only. But since I
9 can't, all I can --

10 COMMISSIONER GILINSKY: Well, the emphasis is
11 certainly on 17.

12 COMMISSIONER ASSELSTINE: Yes, yes.

13 CHAIRMAN PALLADINO: Well, the way you ask it, I
14 think, is an improvement, Vic, focus it on 17 and then say
15 are there other problems. Okay.

16 What else do you want to do on --

17 COMMISSIONER ASSELSTINE: Vic, the only thing I had
18 a concern about was the last sentence on one. I guess I would
19 just leave it to the parties rather than asking the Board
20 as well, particularly if we are going to be acting --

21 CHAIRMAN PALLADINO: Could you say how you set it?

22 COMMISSIONER GILINSKY: I'll tell you why I put
23 the Board in only on that one because the Board had made a
24 ruling on that one. The others are really matters in
25 controversy. And the question is, did the Board take this

1 into account or not. Whether this is just an oversight or --

2 COMMISSIONER ASSELSTINE: Okay.

3 COMMISSIONER GILINSKY: Or did it consciously

4 decide to disregard --

5 COMMISSIONER ASSELSTINE: The emergency preparedness
6 requirement.

7 COMMISSIONER GILINSKY: I mean, there is some other
8 way to ask that.

9 COMMISSIONER ASSELSTINE: Yes.

10 MR. PLAINE: It is a rather unusual step. You
11 can do it if you want to.

12 COMMISSIONER GILINSKY: Yes.

13 COMMISSIONER BERNTHAL: I'm sorry, I'm --

14 CHAIRMAN PALLADINO: Yes, I'm sort of --

15 COMMISSIONER BERNTHAL: -- out of the loop here.

16 Are we now modifying Victor's revision and suggesting --

17 MR. PLAINE: It looks like we were --

18 COMMISSIONER ASSELSTINE: I'm asking a question
19 about the last sentence on --

20 MR. PLAINE: Number one of his --

21 COMMISSIONER ASSELSTINE: -- of his first question.

22 COMMISSIONER BERNTHAL: Yes. I'm not in favor, I
23 guess, of putting the Board in as well. And I also have a
24 comment on the last, Number 3. But let's -

25 CHAIRMAN PALLADINO: Are we still working on

1 Victor's? What are you going to do on Victor's?

2 COMMISSIONER ASSELSTINE: Yes. I would suggest
3 dropping the last sentence of No. 1, yes.

4 COMMISSIONER ROBERTS: Oh, I would love to hear
5 from the Board.

6 (Laughter)

7 MR. PLAINE: You'd love to hear from the Board?

8 (Laughter)

9 COMMISSIONER GILINSKY: I tell you why. I mean,
10 the Board has made a decision here and it would be interesting
11 to know whether they took it conscious of the emergency
12 preparedness problem or simply omitted it, or didn't think
13 of it, whatever.

14 CHAIRMAN PALLADINO: Well, I believe it's unlikely
15 that all involved personnel on the Board, the NRC staff,
16 and the applicant have overlooked the concerns that are
17 troubling the Commission. It just seems inconceivable to me.

18 COMMISSIONER GILINSKY: Well, it seems to me if
19 the Board has anything further to say on this, it would be
20 interesting to hear from them.

21 CHAIRMAN PALLADINO: So would I, if I thought we
22 were going to hear them.

23 COMMISSIONER BERNTHAL: Why do you -- say again
24 why you don't want the Board to come, Jim?

25 COMMISSIONER ASSELSTINE: I just felt -- it seemed

1 to me that the --

2 COMMISSIONER GILINSKY: I guess I would --

3 COMMISSIONER ASSELSTINE: -- it's more appropriate
4 to have the parties since taking it out of the Board's
5 hands --

6 COMMISSIONER GILINSKY: I wasn't thinking of the
7 Board appearing here. I was thinking of the Board sending
8 something.

9 COMMISSIONER ASSELSTINE: Yes.

10 COMMISSIONER GILINSKY: So, it was just a matter of
11 responding to the question. Or I would put it, you could put
12 it in terms of, if the Board has anything it would like to
13 add, then the Commission would welcome any further comments.

14 COMMISSIONER BERNTHAL: Isn't it -- yes, it's kind
15 of a funny situation where a judge, as it were, appears
16 before a higher court; is it not? He could certainly choose
17 to write additional comments, I guess.

18 MR. MALSCH: Well, the other parties might force
19 the judge or whoever would appear, to appear in a position of
20 an advocate for its own order --

21 COMMISSIONER ASSELSTINE: That's right.

22 MR. MALSCH: -- rather than a judge.

23 COMMISSIONER BERNTHAL: Yes.

24 MR. PLAINE: And then there are three of them, you
25 want all three here?

1 COMMISSIONER GILINSKY: Well, I was just thinking
2 in terms of a written submission. The administrative process
3 ought to be flexible.

4 (Laughter)

5 MR. PLAINE: I've rarely seen it. There was a
6 time in some agencies where they used to allow the judges
7 to appear while the Commission was debating its order. I
8 don't remember whether they let them argue, but they did let
9 them listen and while they were getting torn apart, they were
10 listening.

11 (Laughter)

12 COMMISSIONER BERNTHAL: Nothing wrong with that.

13 MR. PLAINE: But that's been abolished in most
14 places. I don't know of any place that does that today.

15 COMMISSIONER ASSELSTINE: I still think it puts
16 the Board in a little bit of an awkward position. We are
17 taking the issue out of their hands and we are saying we
18 are going to decide it.

19 COMMISSIONER GILINSKY: All right.

20 CHAIRMAN PALLADINO: So, you are crossing out the
21 last sentence on Number 1? Are you putting Number 1 the
22 way Commissioner Gilinsky has it?

23 COMMISSIONER ROBERTS: Victor, why did you give in
24 so easy?

25 (Laughter)

1 COMMISSIONER GILINSKY: Well, I wouldn't have
2 given in.

3 (Laughter)

4 COMMISSIONER ROBERTS: It's out of character.

5 COMMISSIONER GILINSKY: Huh?

6 COMMISSIONER ROBERTS: It's out of character.

7 COMMISSIONER BERNTHAL: Well, it's still possible,
8 is it not? The Board is free to submit further comments.
9 I mean, this certainly does not prevent them from submitting
10 comments.

11 COMMISSIONER GILINSKY: I would say the
12 Commission would at least be prepared to entertain any further
13 comments from the Board, or something. You know, if they
14 want to say something further on their order, explaining it
15 in any way, the Commission would be pleased to --

16 COMMISSIONER BERNTHAL: Aren't they smart enough
17 to know that, though?

18 COMMISSIONER GILINSKY: Probably not.

19 (Laughter)

20 COMMISSIONER GILINSKY: I would, you know, at
21 least put it in -- give them the opening if they would like
22 to add something.

23 COMMISSIONER ASSELSTINE: I'll go that far, yes.

24 COMMISSIONER GILINSKY: Why don't we do that, just
25 say the Commission --

1 CHAIRMAN PALLADINO: will entertain any comments
2 the Board may wish to submit?

3 COMMISSIONER GILINSKY: Just say, "Should the
4 Board wish to invite -- answer this question as well, the
5 Commission would be pleased to have -- to receive its
6 comments as well."

7 COMMISSIONER BERNTHAL: Or, "Supplement its earlier
8 comments on this issue."

9 COMMISSIONER GILINSKY: Fine.

10 COMMISSIONER ASSELSTINE: Okay

11 CHAIRMAN PALLADINO: Did Herzal hear it?

12 COMMISSIONER BERNTHAL: I don't know.

13 MR. PLAINE: Let me hear that again, Fred. "Should
14 the Board decide to supplement," what?

15 COMMISSIONER BERNTHAL: I would just -- yes,
16 supplement its earlier comments on this issue, or these
17 issues, or something. I don't know whether that's better or
18 not. It sounds like it's a little --

19 MR. PLAINE: Its earlier discussion, maybe?

20 COMMISSIONER BERNTHAL: Whatever.

21 COMMISSIONER ASSELSTINE: Yes.

22 COMMISSIONER GILINSKY: The Commission would be
23 pleased to have a submission from the Board as well.

24 MR. PLAINE: I take it a written submission?

25 COMMISSIONER GILINSKY: Written submission.

1 COMMISSIONER BERNTHAL: Yes, a written submission.

2 MR. PLAINE: A written submission.

3 COMMISSIONER GILINSKY: Let me tell you what I had
4 in mind on that third one. You may feel it's going back to
5 all these arguments we have had about experience of operating
6 staffs.

7 The point here is, are they merely looking at the
8 reliability of these diesels as opposed to reliability of
9 the safety-grade diesels and leaving it at that. There is
10 a great deal more to calculating, you know, the relative
11 risks in the two situations.

12 COMMISSIONER BERNTHAL: Cutting me off the path
13 here.

14 COMMISSIONER GILINSKY: And while the risks of an
15 accident are less at low power, the likelihood of an
16 accident is a good deal greater because of these sorts of
17 factors. I mean, you know, you are going through a shake-
18 down period. You've got -- in any plant -- you've got
19 things connected up wrong. This is when you find out.

20 Now, has that sort of thinking been factored in or
21 is it simply a mechanical comparison of the reliabilities of
22 two diesel systems.

23 COMMISSIONER BERNTHAL: Let me just, without
24 responding directly, Victor, I think in a sense it's setting
25 up a straw man, though because, obviously, they haven't

1 literally calculated risk equivalence that takes into
2 account these things, nor could you, it's not possible.

3 And what I was going to suggest is that the
4 second sentence there just be modified as follows: "To what
5 extent does this justification take into account calculation
6 of risk equivalence" -- I'm sorry, let me reread that.

7 "To what extent does this justification take into
8 account calculation and/or engineering judgment in assessing
9 risk." Something like that.

10 CHAIRMAN PALLADINO: I think you are broadening
11 the whole issue much broader than you need to if you are
12 going to try to get a --

13 COMMISSIONER BERNTHAL: But aren't they --

14 CHAIRMAN PALLADINO: -- focused decision.

15 COMMISSIONER BERNTHAL: But isn't that what you are
16 really getting into, that somehow --

17 CHAIRMAN PALLADINO: I don't know.

18 COMMISSIONER BERNTHAL: -- they are making a
19 calculation, and I suspect it's a calculated engineering
20 judgment. That's all you could possibly do in such short
21 a period of time.

22 COMMISSIONER GILINSKY: Well, then I would put
23 it this way: What is the basis of any calculation of risk --
24 why don't you say that? That way, they'll have to just
25 display their assumptions, whatever they are.

1 COMMISSIONER BERNTHAL: What is the basis of any
2 calculation of risk equivalence? I guess I don't have any
3 problem with that.

4 COMMISSIONER ROBERTS: It's better than what's
5 there now.

6 COMMISSIONER GILINSKY: Hm?

7 COMMISSIONER ROBERTS: It's better than what's
8 here now.

9 COMMISSIONER GILINSKY: You are afraid of an
10 experience.

11 (Laughter)

12 MR. PLAINE: Vic, would you repeat that slowly?

13 COMMISSIONER GILINSKY: I'm just saying, what is
14 the basis of any calculation of risk equivalence.

15 MR. PLAINE: What is the basis --

16 CHAIRMAN PALLADINO: Equivalence of what?

17 COMMISSIONER GILINSKY: Well, low power and full
18 power, the kind of thing he talks about.

19 CHAIRMAN PALLADINO: You want to say that, what
20 is the basis of calculation risk equivalence --

21 COMMISSIONER GILINSKY: Why, then you have to go
22 into low power with these diesels versus full power with
23 better diesels. You would have to explain that all.

24 CHAIRMAN PALLADINO: Just so they understand what
25 you want.

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MR. PLAINE: Have you finished the sentence?

COMMISSIONER GILINSKY: Yes. I thought that was clear, but if it isn't clear, we'd better add something.

COMMISSIONER BERNTHAL: Maybe we should not use the word "calculation," that implies numbers and stuff that we know they --

COMMISSIONER GILINSKY: Well, why not say, "Any calculation or judgment of risk equivalence," why don't we say that? "What is the basis of any calculation or judgment of risk equivalence at low and full power," something like that.

CHAIRMAN PALLADINO: Do you know what to do, Herzel?

MR. PLAINE: I think I have it now. After the first sentence, "What is the basis of any calculation or judgment of risk equivalence at low and at full power?"

COMMISSIONER ASSELSTINE: Yes.

MR. PLAINE: Okay.

CHAIRMAN PALLADINO: At low power and at full power, if you are not going to say this.

COMMISSIONER GILINSKY: Right.

CHAIRMAN PALLADINO: At low power and at full power.

MR. PLAINE: Right.

CHAIRMAN PALLADINO: Now, those are going to be

1 substituted for the sets of questions here.

2 MR. PLAINE: Those three, right?

3 COMMISSIONER BERNTHAL: And then we are striking
4 the last sentence in Number 1.

5 COMMISSIONER GILINSKY: Well, we changed it.

6 COMMISSIONER BERNTHAL: We chanced it, rather,
7 yes.

8 COMMISSIONER ASSELSTINE: That's right.

9 CHAIRMAN PALLADINO: Now, what are you doing with
10 the last --

11 MR. PLAINE: Excuse me. Those three questions
12 become the substitute for anything we have written on our
13 page. Okay.

14 COMMISSIONER BERNTHAL: Does anyone from General
15 Counsel's Office want to comment now on our butcherings?

16 CHAIRMAN PALLADINO: Well, there is more. What
17 do you want to do with the old questions. What were they,
18 2 and 3?

19 MR. PLAINE: What about time, do you want to omit
20 time altogether?

21 COMMISSIONER GILINSKY: Well, concentrate what
22 is really the need of this.

23 COMMISSIONER ASSELSTINE: Yes. As a practical
24 matter, I think that the substantive issue will drive the --

25 MR. PLAINE: Will drive it too.

1 COMMISSIONER GILINSKY: We are giving them even
2 less time than the Board has given them.

3 COMMISSIONER ASSELSTINE: Yes. Yes. I would be
4 willing to leave off the time.

5 COMMISSIONER ROBERTS: That's right.

6 COMMISSIONER ASSELSTINE: Yes. Although,
7 presumably on issues that they have already argued. Yes.

8 COMMISSIONER GILINSKY: Now, with those changes,
9 can we get unanimous approval?

10 COMMISSIONER ROBERTS: Of course not.

11 COMMISSIONER BERNTHAL: So, we'll get this
12 Thursday, midnight; is that what the --

13 CHAIRMAN PALLADINO: No, I have additional comments
14 if you would like to see them.

15 COMMISSIONER ASSELSTINE: Marty, do you have any
16 problem with that --

17 COMMISSIONER ROBERTS: I may have additional --

18 COMMISSIONER ASSELSTINE: -- the revisions of
19 the questions?

20 MR. MALSCH: No.

21 COMMISSIONER ASSELSTINE: Okay. Three doesn't get
22 into the merits of the issues that the Board would later have
23 to consider, is the only question I had. I guess not.

24 MR. MALSCH: You could change, "What is the basis
25 for any calculation or judgment" to "what would be."

1 I think it's a small point, though.

2 COMMISSIONER ASSELSTINE: Okay. Right, okay.

3 MR. PLAINE: I have a comment from one of my staff
4 whose judgment I value.

5 CHAIRMAN PALLADINO: Give one to General Counsel.
6 Give two to General Counsel.

7 MR. PLAINE: It is that it may not be wise to make,
8 in effect make the Board an adversary. It could result in
9 public humiliation and so forth.

10 I just have a feeling you can do this job without
11 involving the Board.

12 COMMISSIONER GILINSKY: Well, we can drop that. It
13 seems to me we are just leaving the Board an opening. It's
14 certainly not required to or even requested to respond.
15 The way we changed it was, "Should the Board wish to --

16 MR. PLAINE: Yes, you do have it in that form.

17 CHAIRMAN PALLADINO: Well, I --

18 MR. PLAINE: It may be very well. I just think
19 they would regard it as a direction.

20 COMMISSIONER GILINSKY: Well, you can soften it
21 further if you can find some way to do it. It wouldn't
22 bother me a bit, or put it in the most --

23 CHAIRMAN PALLADINO: Well, let me see what your
24 wishes are. You wish OGC to put this together and issue it
25 this afternoon, or, b) come back to you and say, "Any last-

1 minute objection?"

2 MR. PLAINE: We'd like to put it together in any
3 event so that we don't lose more time.

4 COMMISSIONER GILINSKY: I think you better put it
5 together today, if we are going to do it in Friday.

6 COMMISSIONER ASSELSTINE: Yes, I agree. I agree.

7 CHAIRMAN PALLADINO: All right.

8 COMMISSIONER GILINSKY: Since we have agreed on
9 the questions, the rest of it is --

10 CHAIRMAN PALLADINO: So, you are going to trust OGC
11 to get this out?

12 MR. PLAINE: You want me to read it again once
13 more?

14 MR. MALSCH: I don't know, we might try to read it
15 to you right now and get --

16 COMMISSIONER GILINSKY: Yes, I think that might be
17 a good idea.

18 COMMISSIONER ASSELSTINE: But on this other point,
19 you want to let -- is it Peter that had the concern that --

20 MR. PLAINE: Yes, Peter has a concern. Pete, do
21 you want to talk to that for a minute?

22 MR. CRANE: Thank you.

23 My concern is, if we give them the opportunity to
24 speak to it it's like letting -- giving Don DeLorean the
25 free choice of whether he wants to testify in his own defense.

1 If there is nothing said, it may be taken -- the Board my
2 realistically feel that with an opportunity to address the
3 issue, it must address the issue or be presumptively in error.

4 That if you still -- you've got a proceeding that
5 is already characterized by bad blood between the Board and
6 the parties, and if you have set up a structure under which
7 the Commission may be finding --

8 COMMISSIONER GILINSKY: Well, let me ask you, can
9 you conceive of no circumstances in which the Board might
10 want to say something?

11 CHAIRMAN PALLADINO: Would they feel inhibited from
12 saying it to the Commission, if we didn't invite them?

13 COMMISSIONER GILINSKY: You know, this has all
14 moved pretty fast.

15 COMMISSIONER ROBERTS: Yes, that's an under-
16 statement.

17 COMMISSIONER GILINSKY: You know, I'm certainly not
18 wedded to this. It just seemed to me useful to give them an
19 opening. It does seem the useful thing to give them an
20 opportunity if they want to expand on what they said, which
21 was fairly cryptic.

22 MR. CRANE: Well, my own view -- for what it's
23 worth -- is that one expects of every Board and every court
24 that it says what it thinks in its orders and takes the
25 legal consequences, and doesn't depend on being being given

1 an opportunity to explain to the reviewing court what it
2 really meant or --

3 COMMISSIONER ASSELSTINE: Yes.

4 COMMISSIONER GILINSKY: Anyway, I'm prepared to go
5 either way on this. I guess I would leave it in, but if
6 others want to take it out --

7 COMMISSIONER ASSELSTINE: I guess I'd still feel
8 more comfortable keeping the Board out of it.

9 COMMISSIONER BERNTHAL: Let's pull it out because
10 it is true that somehow, if they say nothing, then it's kind
11 of guilt by omission.

12 COMMISSIONER ASSELSTINE: Yes.

13 COMMISSIONER ROBERTS: I'd leave it in.
14 Joe, what are you saying?

15 CHAIRMAN PALLADINO: I said I'd take it out, but
16 I don't want to put the Board --

17 (Laughter)

18 COMMISSIONER ROBERTS: It's out.

19 CHAIRMAN PALLADINO: Even though I vote with you
20 on the issue as a whole.

21 COMMISSIONER GILINSKY: Tom and I are locked up
22 again.

23 COMMISSIONER ROBERTS: Locked up.

24 (Laughter)

25 CHAIRMAN PALLADINO: We are either three to two, or

1 two to one, whichever way you want to --

2 COMMISSIONER GILINSKY: Yes.

3 CHAIRMAN PALLADINO: Well, do you want to --

4 COMMISSIONER ASSELSTINE: Let's run through it
5 fast.

6 COMMISSIONER GILINSKY: Why don't you just read
7 through it?

8 MR. PLAINE: So, we are starting out with an
9 Order and Stay as the title. "The Commission has decided
10 to provide guidance on the conduct of proceedings on
11 Applicant's March 20, 1984 supplemental motion for a low
12 power operating license. It does so pursuant to its general
13 supervisory power over pending adjudication, e.g., Public
14 Service, New Hampshire, Seabrook, et cetera.

15 "Guidance will be provided after receiving oral
16 argument" -- now, we didn't get anything about -- "oral
17 argument by parties beginning on -- beginning at 10 o'clock,
18 Friday, April --

19 CHAIRMAN PALLADINO: Twenty-six.

20 MR. PLAINE: Twenty-six, is that?

21 COMMISSIONER ASSELSTINE: Twenty-seven.

22 MR. PLAINE: "twenty-seven."

23 Now, this was about briefs. Is that something
24 that we want to see them file beforehand, or do you want --

25 COMMISSIONER GILINSKY: Absolutely.

1 MR. MALSCH: No, I've got something, suggested
2 language, at the end of the order.

3 COMMISSIONER ASSELSTINE: That's right.

4 MR. PLAINE: To address that?

5 MR. MALSCH: Yes.

6 MR. PLAINE: Okay, fine. Very good.

7 "Thirdly, further Commission order, the proceedings on
8 the supplemental motion for low power are stayed and the
9 hearing currently scheduled to begin tomorrow, April 24, 1984
10 is postponed."

11 MR. MALSCH: No. The last version I had, we had
12 changed, "Pending the issuance of the Commission's guidance,
13 the proceedings on the supplemental motion --

14 COMMISSIONER ASSELSTINE: Yes.

15 CHAIRMAN PALLADINO: Say that again?

16 MR. MALSCH: "Pending the issuance of the Commission's
17 guidance, the proceedings on the supplemental motion for low
18 power are are stayed, and..."

19 MR. PLAINE: Good for you, right. I see what
20 you have done. So, let me read that paragraph again.

21 "Pending issuance of the Commission guidance, the
22 proceedings on the supplemental motion for low power are
23 stayed and the hearing currently scheduled to begin tomorrow,
24 April 24, 1984 is postponed.

25 "During oral argument, the parties" -- how about

1 this, "at --

2 CHAIRMAN PALLADINO: I thought you were going to put
3 a sentence in there about, "The Commission will attempt to
4 issue its guidance as expeditiously and has planned a meeting
5 for next week."

6 MR. PLAINE: You want to throw that in there?

7 COMMISSIONER ASSELSTINE: Yes.

8 CHAIRMAN PALLADINO: Or you can put it at the end.

9 COMMISSIONER ASSELSTINE: Yes, or we can put it
10 at the end, Marty.

11 MR. MALSCH: It would go nicely right here, I
12 think.

13 COMMISSIONER ASSELSTINE: Okay.

14 MR. PLAINE: You want to throw that right in?

15 MR. MALSCH: Yes.

16 MR. PLAINE: You want to read it?

17 COMMISSIONER BERNTHAL: Joe, let me just comment.
18 I'm somewhat surprised. I assumed that you wanted to go
19 ahead with this order, and I find now that you do not.

20 CHAIRMAN PALLADINO: I thought I did Friday, and
21 then read the order and hesitated over it, and decided, no.

22 COMMISSIONER BERNTHAL: Why don't -- let's get
23 this wording straightened out, and then I guess I'm going to
24 withhold my vote on this issue until we have a chance to
25 talk. I think the rest of the votes are pretty well fixed

1 firmly, and I will inform the Commission before 3 o'clock
2 of what my vote is.

3 COMMISSIONER GILINSKY: I thought I was a --

4 (Laughter)

5 (Simultaneous conversation)

6 MR. PLAINE: Well, it won't take me long. We'll
7 restate it --

8 COMMISSIONER BERNTHAL: Let's get our wording
9 straightened out here.

10 COMMISSIONER ASSELSTINE: Ten minutes, Fred.

11 CHAIRMAN PALLADINO: Go ahead.

12 MR. MALSCH: The Commission plans to provide its
13 guidance as soon as expeditiously possible, and has scheduled
14 a meeting the week of April -- blank -- which is next week.
15 I didn't have my calendar in front of me.

16 CHAIRMAN PALLADINO: The week of -- April 30
17 is Monday.

18 MR. MALSCH: Okay.

19 CHAIRMAN PALLADINO: All right. We haven't
20 scheduled one yet. I think you better say "will schedule
21 a meeting."

22 MR. MALSCH: Okay.

23 MR. PLAINE: Now, that's going to be a closed
24 meeting, isn't it?

25 CHAIRMAN PALLADINO: I would expect it to be.

1 MR. MALSCH: Okay.

2 MR. PLAINE: Now, I would say: "At oral argument,
3 the parties should be prepared --

4 CHAIRMAN PALLADINO: You might want to listen.

5 MR. PLAINE: "At oral argument, the parties should
6 be prepared to address the following questions:

7 "1. The Board's order states that at low power
8 operation without on-site emergency diesels is equivalent
9 in public risk to full power operation with such diesels
10 when the low power authorization should be granted. In these
11 circumstances, what justification is there for waiving the
12 emergency preparedness requirements applicable to full power
13 operation?

14 "2. What is the legal basis for holding that
15 General Design Criterion 17 is not applicable for low power
16 operation? Would this argument apply to other general
17 design criteria" -- plural, all right? Spell it out, too,
18 criteria.

19 "3. What is the technical justification for
20 authorizing low power operation without the on-site electric
21 power system required by General Design Criterion 17? What
22 is the basis of any calculation or judgment of risk equivalence
23 at low and full power?"

24 MR. MALSCH: And then I have added, "Parties
25 may also submit written answers to these questions. Any

1 answer should be in the hands of the Commission by noon,
2 Thursday, April 26, 1984."

3 COMMISSIONER ASSELSTINE: Good.

4 COMMISSIONER GILINSKY: I would say "should,"
5 rather than "may."

6 MR. MALSCH: Okay.

7 COMMISSIONER GILINSKY: You might say "brief,"
8 put in the word "brief" somewhere.

9 MR. MALSCH: Okay.

10 MR. PLAINE: I'm thinking of "memorandum," don't
11 make it so formal.

12 COMMISSIONER GILINSKY: Yes, a brief memorandum.

13 MR. PLAINE: All right, or just a memorandum.

14 COMMISSIONER GILINSKY: A memorandum.

15 COMMISSIONER BERNTHAL: That's not a brief.

16 CHAIRMAN PALLADINO: Yes, but briefs --

17 MR. PLAINE: Don't formalize it so heavily.

18 MR. MALSCH: Okay.

19 MR. PLAINE: If they write us a letter, that's
20 good enough.

21 MR. MALSCH: "And parties should also submit
22 written memoranda on these questions. Any memoranda should
23 be in the hands of the Commission by noon, Thursday,
24 April 26, 1984."

25 COMMISSIONER ASSELSTINE: Good.

1 CHAIRMAN PALLADINO: Then, do you say, additional
2 remarks are appended, or --

3 COMMISSIONER ASSELSTINE: April 26.

4 CHAIRMAN PALLADINO: What's that?

5 COMMISSIONER ASSELSTINE: April 26.

6 MR. PLAINE: Noon, April 26.

7 MR. MALSCH: Oh, did I -- the 26th, okay. Sorry.

8 MR. PLAINE: Your question, Mr. Chairman, was?

9 CHAIRMAN PALLADINO: What do we say about appended
10 additional remarks? We put a sentence --

11 MR. MALSCH: Yes, we usually had --

12 COMMISSIONER GILINSKY: Assuming we (inaudible)

13 (Laughter)

14 COMMISSIONER GILINSKY: They may be our memoranda.

15 COMMISSIONER ASSELSTINE: That's right.

16 (Laughter)

17 COMMISSIONER BERNTHAL: You may have a chance to
18 incorporate this in your views.

19 MR. MALSCH: These are the separate remarks by
20 Commissioners blank and blank --

21 (Laughter)

22 CHAIRMAN PALLADINO: I'll give you a copy of my
23 additional remarks.

24 (Laughter)

25 MR. PALINE: Do we have, do we have in mind any

1 time limitation on each party?

2 COMMISSIONER GILINSKY: Yes, I think we better
3 do that.

4 CHAIRMAN PALLADINO: On the what?

5 COMMISSIONER ASSELSTINE: Yes.

6 COMMISSIONER GILINSKY: I think that --

7 MR. PLAINE: How many parties do we have?

8 MR. GILINSKY. A maximum of an hour a side.

9 COMMISSIONER ASSELSTINE: Licensee, New York
10 Suffolk County --

11 (Simultaneous conversation)

12 COMMISSIONER GILINSKY: Half an hour a side?

13 Ten minutes a side?

14 (Laughter)

15 COMMISSIONER ROBERTS: An hour each? You've got
16 to be kidding.

17 COMMISSIONER GILINSKY: On a side.

18 COMMISSIONER ROBERTS: Sir?

19 COMMISSIONER GILINSKY: On a side, not a party.

20 COMMISSIONER BERNTHAL: How many sides are there?

21 (Laughter)

22 COMMISSIONER ASSELSTINE: How about half hour each
23 party?

24 COMMISSIONER BERNTHAL: There are only two around
25 here?

1 CHAIRMAN PALLADINO: How many parties are there?

2 COMMISSIONER BERNTHAL: At least three.

3 MR. MALSCH: There are four principal parties. I
4 don't know if there are any, you know --

5 COMMISSIONER ASSELSTINE: A half hour each, yes.

6 COMMISSIONER GILINSKY: Well, why don't we say
7 a half hour each including questions?

8 (Laughter)

9 CHAIRMAN PALLADINO: You want me to enforce that?

10 COMMISSIONER ASSELSTINE: No. It may take longer
11 than that on questions.

12 CHAIRMAN PALLADINO: I trust if you have valid
13 questions, it's my view that Commissioners should be, insofar
14 as possible, be given a chance to ask their questions.

15 COMMISSIONER GILINSKY: Well, I would just ask
16 them during the presentation.

17 MR. PLAINE: Insofar as possible --

18 CHAIRMAN PALLADINO: What?

19 MR. PLAINE: Say, insofar as possible, each side
20 will be given -- each party will or each side?

21 COMMISSIONER ASSELSTINE: Each party.

22 COMMISSIONER ROBERTS: Each party.

23 COMMISSIONER ASSELSTINE: Thirty minutes each, yes.

24 COMMISSIONER GILINSKY: But not for a presentation
25 30 minutes, that's an awfully long time.

1 COMMISSIONER ASSELSTINE: Yes. Twenty minutes
2 each?

3 MR. PLAINE: Not to exceed?

4 COMMISSIONER ASSELSTINE: Give them 20 minutes for
5 their presentation and then questions and answers are on
6 top of that. That's probably --

7 CHAIRMAN PALLADINO: Yes, I figure it's usually,
8 if you give them 20 minutes and the Commission --

9 COMMISSIONER GILINSKY: I would say 15 minutes.
10 I would be saying --

11 COMMISSIONER ROBERTS: Ten?

12 CHAIRMAN PALLADINO: No.

13 COMMISSIONER ASSELSTINE: No.

14 (Laughter)

15 COMMISSIONER GILINSKY: I was going to give them
16 the same amount of time, but I think their presentation ought
17 to be ten, you know, given a total time of a half hour.
18 We may run over, but --

19 MR. MALSCH: Why don't we say, "The parties will
20 each have 15 minutes to address the Commission?"

21 COMMISSIONER GILINSKY: Yes.

22 MR. MALSCH: We ought to give the order of
23 presentation, also.

24 COMMISSIONER ASSELSTINE: Yes.

25 MR. MALSCH: The normal order would be, applicant

1 first, then intervenors, then staff.

2 COMMISSIONER ASSELSTINE: Fine.

3 COMMISSIONER GILINSKY: And who are the fourth?

4 Two intervenors?

5 COMMISSIONER ASSELSTINE: Two intervenors, state
6 and the county.

7 MR. PLAINE: Can't you allow for rebuttal of about
8 five or ten minutes?

9 COMMISSIONER GILINSKY: Yes, I think you ought to
10 give people five minutes rebuttal. Plus five minutes rebuttal.

11 COMMISSIONER ASSELSTINE: All right.

12 CHAIRMAN PALLADINO: Okay?

13 COMMISSIONER ASSELSTINE: Good.

14 CHAIRMAN PALLADINO: Anything more on this subject?

15 COMMISSIONER GILINSKY: Put down, Mr. Roberts
16 has lunch at 12 o'clock.

17 (Laughter)

18 COMMISSIONER ROBERTS: Absolutely, every day.

19 CHAIRMAN PALLADINO: Okay, we'll address rejuggling
20 the schedule at Agenda Planning.

21 COMMISSIONER ASSELSTINE: Okay. If Fred will let
22 us know --

23 CHAIRMAN PALLADINO: What are you going to do, are
24 you going to go out with --

25 COMMISSIONER ASSELSTINE: Fred has to talk to you.

1 COMMISSIONER BERNTHAL: You don't have my vote yet
2 on this because I was under the misimpression that you wanted
3 to proceed this way, Joe, and I, out of courtesy, want to
4 talk to you about that.

5 CHAIRMAN PALLADINO: I said this morning I didn't
6 want to. Then I allowed my staff to say, "Well, I haven't
7 quite made up my mind," and when I came in I said, "No, I
8 hadn't made up my mind."

9 COMMISSIONER BERNTHAL: Okay.

10 CHAIRMAN PALLADINO: It's the same as this morning.

11 COMMISSIONER BERNTHAL: Okay.

12 MR. MALSCH: If Commissioner Bernthal doesn't
13 vote now, the Commission will have to reconvene.

14 COMMISSIONER BERNTHAL: I will vote. Oh, you
15 mean you must reconvene to take my vote?

16 MR. MALSCH: Yes.

17 COMMISSIONER GILINSKY: That's the law.

18 COMMISSIONER ASSELSTINE: Yes.

19 COMMISSIONER BERNTHAL: In a closed meeting.

20 MR. MALSCH: We tried to change it but were not
21 successful.

22 COMMISSIONER GILINSKY: Well, we could wait a
23 couple of minutes.

24 MR. MALSCH: Any kind of meeting, it does not make
25 any difference.

1 COMMISSIONER BERNTHAL: We are in a management
2 meeting here, and --

3 COMMISSIONER GILINSKY: Why don't you just step
4 out for two minutes and we'll wait?

5 COMMISSIONER ROBERTS: Sure.

6 COMMISSIONER ASSELSTINE: Yes.

7 (Whereupon, at 2:59 p.m. a recess was taken until
8 3:21 p.m.)

9 CHAIRMAN PALLADINO: Let's reconvene from our
10 brief recess. Fred, do you want to speak?

11 COMMISSIONER ASSELSTINE: Yes. Let me just explain
12 what's behind this little recess here.

13 My feeling is that if we are going to intervene
14 in what is a normal procedure around here with the Board
15 hearing a case, that that should be an extraordinary
16 circumstance on which we should have some degree of consensus
17 on the Commission.

18 Therefore, in view of the fact that we clearly
19 don't have a clear consensus, I'm going to withdraw my
20 suggestion that we intervene at this time and revert to
21 my one-time held position that we should simply let the
22 matter proceed according to the book for the time being.

23 COMMISSIONER ROBERTS: Terrific.

24 COMMISSIONER BERNTHAL: Therefor, I'm voting with
25 the Chairman on this issue.

1 CHAIRMAN PALLADINO: All right. Now, what do we
2 do as a vehicle for the others to state what they want to
3 state? Can they just issue statements?

4 (Laughter)

5 COMMISSIONER ROBERTS: Oh, oh.

6 COMMISSIONER BERNTHAL: I told you were were
7 helping you draft your statement. It wasn't wasted time.

8 COMMISSIONER GILINSKY: Well, I don't know, is
9 there any need to give a statement?

10 COMMISSIONER ROBERTS: We didn't take any action.

11 COMMISSIONER BERNTHAL: That's right.

12 COMMISSIONER ASSELSTINE: I don't know, I may just
13 do a memo to you, documenting the problems that I see and
14 the reasons why I think we should have stepped in at this
15 point. But that -- yes, that's probably what I'll do.

16 CHAIRMAN PALLADINO: We do nothing thia afternoon.

17 COMMISSIONER ASSELSTINE: That's right.

18 CHAIRMAN PALLADINO: Who do you have to inform of
19 what?

20 MR. PLAINE: Well, there are a few people like the
21 fellow who -- the file has a motion for a stay in the U.S.
22 District Court. I have to telephone him. I have to telephone
23 the various other parties, I think because they are all
24 expecting something to happen.

25 COMMISSIONER BERNTHAL: Tell them nothing happened.

1 MR. PLAINE: Tell them nothing happened.

2 COMMISSIONER GILINSKY: Well, let me ask you this --

3 COMMISSIONER ROBERTS: Nothing happened.

4 MR. PLAINE: That's right.

5 COMMISSIONER GILINSKY: Do you want at least to
6 agree that the Commission will pass on low power authorization
7 before it becomes effective?

8 COMMISSIONER ASSELSTINE: Yes, I would certainly
9 recommend that.

10 CHAIRMAN PALLADINO: I would wait. The Commission's
11 rules provide the means to stay the effectiveness of the
12 Board's decision and when we get such a request, we address
13 it.

14 COMMISSIONER GILINSKY: Well, I guess all I
15 can say is, good luck.

16 COMMISSIONER ASSELSTINE: Yes.

17 COMMISSIONER GILINSKY: Because while I didn't
18 think that matters of public appearance should dictate, I
19 think the earlier comments that were made here are right.

20 COMMISSIONER ASSELSTINE: Yes.

21 COMMISSIONER GILINSKY: And the Commission is going
22 to look terrible.

23 CHAIRMAN PALLADINO: And incidentally, I don't
24 know how this hearing is going to come out. I would hate
25 to predict it.

1 COMMISSIONER GILINSKY: Well, I guess we ll just
2 wait and see.

3 COMMISSIONER ASSELSTINE: We'll have to see, that's
4 right.

5 COMMISSIONER BERNTHAL: It may well be that this
6 exercise today will be sufficient to achieve the desired
7 objective, but I don't know.

8 COMMISSIONER ASSELSTINE: I don't see how it can.
9 (Laughter)

10 CHAIRMAN PALLADINO: You never know.

11 All right. Well, then are we done on this issue
12 for today?

13 COMMISSIONER ASSELSTINE: Yes.

14 COMMISSIONER ROBERTS: Yes, we are done.

15 CHAIRMAN PALLADINO: Okay. I guess we ought to
16 adjourn the meeting.

17 (Whereupon, at 3:25 p.m. the meeting of the
18 Commission was adjourned.)

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NUCLEAR REGULATORY COMMISSION

This is to certify that the attached proceedings before the
Nuclear Regulatory Commission

in the matter of: Discussion of Shoreham Licensing Proceeding

Date of Proceeding: Monday, April 23, 1984

Docket Number: _____

Place of Proceeding: Room 1130, 1717 "H" St., N.W.
Washington, D. C.

were held as herein appears, and that this is the original
transcript thereof for the files of the Commission.

Marilynn M. Nations

Official Reporter (Typed)

Marilynn M. Nations

Official Reporter (Signature)

CERTIFICATE OF PROCEEDING

1
2 This is to certify that the attached proceedings before the
3 NRC COMMISSION

4 In the Matter of: Discussion of Shoreham Licensing Proceeding

5 Date of Proceeding: 23 April 1984

6 Place of Proceeding: Washington, D. C.

7 were held as herein appears, and that this is the original
8 transcript for the file of the commission.

9
10 Elizabeth Hansen
11 Official Reporter - Typed

12 Elizabeth Hansen
13 Official Reporter - Signature
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