



Transcript of Proceedings

NUCLEAR REGULATORY COMMISSION

BRIEFING ON MARKEY LETTER

CLOSED MEETING

EXEMPTIONS 9(b) and 10

Tuesday, April 24, 1984

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Prepared by:
ANN TIPTON
Office of the Secretary

1 UNITED STATES OF AMERICA
2 NUCLEAR REGULATORY COMMISSION

3
4 BRIEFING ON MARKEY LETTER

5
6 CLOSED MEETING

7 Exemptions 9(b) and 10

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9
10 Room 1130
11 1717 H Street, N. W.
12 Washington, D. C.

13 Tuesday, April 24, 1984

14 The Commission convened in a closed session at 4:03
15 o'clock p.m.

16 COMMISSIONERS PRESENT

- 17 NUNZIO PALLADINO, Chairman of the Commission
- 18 VICTOR GILINSKY, Commissioner
- 19 THOMAS ROBERTS, Commissioner
- 20 JAMES ASSELSTINE, Commissioner
- 21 FREDERICK BERNTHAL, Commissioner

22 STAFF AND SPEAKERS SEATED AT COMMISSION TABLE:

- 23 S. CHILK
- 24 H. PLAINE
- 25 M. MALSCH
- J. ZERBE

AUDIENCE SPEAKERS:

- C. KAMMERER
- P. CRANE
- J. FOUCHARD
- N. HALLER

P R O C E E D I N G

1
2 CHAIRMAN PALLADINO: Please come to order. The
3 purpose of this meeting is to bring to the Commission's
4 attention for consideration Congressman Markey's April 24
5 letter requesting documents immediately.

6 We need to hold the meeting on less than one week's
7 notice and then vote to close the meeting, and I'll ask OGC to
8 give us the basis for closing the meeting.

9 MR. MALSCH: The basis would be primarily Exemption
10 which is to protect an ongoing adjudication and the reason
11 why I think it is reasonably applicable is that the principal
12 ground for withholding documents would be to protect the
13 ongoing adjudication. That would involve discussion of
14 adjudication, the bearing all these documents have on it.

15 We also suggest adding 9(b), frustration of purpose,
16 which would apply to the extent you couldn't decide whether or
17 not you could disclose the documents publicly without publicly
18 disclosing the document. That would be a subsidiary ground
19 for closing.

20 9(b) is a little risky because it goes against the
21 Common Cause case but, along with 10, it's not too bad.

22 COMMISSIONER BERNTHAL: If frustration was a crite-
23 ria, we could close everything. Refuse to release anything.

24 COMMISSIONER ASSELSTINE: I'm not persuaded of the
25 validity of either of those two grounds for closing the

1 meeting. So I'll vote to hold the meeting on less than one
2 week's notice but I won't vote to close it.

3 CHAIRMAN PALLADINO: Well, let's take the motions
4 separately, then. To vote to hold the meeting on less than
5 one week's notice.

6 (Chorus of ayes.)

7 CHAIRMAN PALLADINO: Any further discussion on the
8 vote to close the meeting?

9 COMMISSIONER BERNTHAL: Yes. You're saying that, in
10 your judgment, Marty, it's perfectly legitimate to close it on
11 Exemption 10, basically?

12 MR. MALSCH: On Exemption 10 and 9(b) is a little
13 more questionable but the facts are better than the Common
14 Cause case.

15 At least, if the meeting needs to get involved into
16 the closure of the contents of the document, the, obviously,
17 to open the meeting would frustrate the purpose of maybe not
18 disclosing the contents of the document. I don't know to what
19 extent we would get into a discussion of the contents of the
20 document. To the extent to which we do, 9(b) is reasonably
21 applicable.

22 COMMISSIONER ASSELSTINE: I can't see much basis for
23 discussing the contents of the transcript from yesterday's
24 meeting, quite frankly.

25 CHAIRMAN PALLADINO: That's only one of the

1 documents.

2 COMMISSIONER GILINSKY: Are you saying, Marty, that,
3 to the extent the transcript is not discussed in detail, the
4 rest of it would be openly disclosable? In other words, after
5 it goes through your review, it would be --

6 MR. MALSCH: Except for 10.

7 COMMISSIONER GILINSKY: That's covers the Shoreham
8 case?

9 MR. MALSCH: Ten covers the Shoreham case.

10 COMMISSIONER GILINSKY: Yes, but that's a delibera-
11 tion on the issues of the case.

12 MR. MALSCH: Well, it's the conduct of agency
13 adjudication and I think we're making an argument that, if the
14 document is withholdable from Congress it's because of the
15 need to conduct adjudication in a certain fashion. I think
16 it's a reasonable argument.

17 COMMISSIONER GILINSKY: I guess if Jim is uncom-
18 fortable about it, I'm uncomfortable about it.

19 CHAIRMAN PALLADINO: I feel comfortable in closing
20 the meeting.

21 COMMISSIONER BERNTHAL: I would vote to close it
22 with the usual proviso that we release those elements are
23 releasable, if they ever request the release of them.

24 MR. MALSCH: We're required to do that, in any
25 event. Every closed meeting transcript has to be reviewed.

1 COMMISSIONER BERNTHAL: Right.

2 MR. CRANE: Can I just add a note in my capacity as
3 Sunshine person?

4 (Laughter.)

5 COMMISSIONER ASSELSTINE: Mr. Sunshine.

6 MR. CRANE: I think, in working on responses to
7 congressional correspondence, there is a strong argument for
8 9(b) because, should we say such-and-such to the Congressman,
9 no, that will cause him to react in such-and-such a way.
10 Above all, let us not give him that impression. That is
11 frustration of purpose if the meeting is revealed, if ever
12 there was.

13 CHAIRMAN PALLADINO: So you're saying 9(b) is
14 stronger in your mind?

15 MR. CRANE: I think so.

16 MR. PLAINE: The key words of 9(b) are "likely to
17 significantly frustrate implementation of an agency action."

18 COMMISSIONER ASSELSTINE: Well, after Common Cause,
19 I'm not just convinced there's much of anything left of 9(b)
20 for this agency. The Commission almost went to jail on that,
21 once.

22 (Laughter.)

23 MR. MALSCH: Well, actually there might not be but
24 the Assistant General has advised us that he would be willing
25 to take up the Common Cause-type case again under better

1 facts.

2 COMMISSIONER ASSELSTINE: So, what we're doing is
3 providing a guinea pig for Justice to go back to the court.

4 MR. MALSCH: I think this is a much better case than
5 we had in Common.Cause. I have to admit that there were some
6 problems with the Common Cause case.

7 CHAIRMAN PALLADINO: Are you ready to vote on
8 closing the meeting?

9 COMMISSIONER ASSELSTINE: I'm ready.

10 CHAIRMAN PALLADINO: All those in favor of closing
11 the meeting say "aye."

12 COMMISSIONER BERNTHAL: - Aye.

13 COMMISSIONER ROBERTS: Aye.

14 CHAIRMAN PALLADINO: Aye. Those opposed?

15 COMMISSIONER ASSELSTINE: No.

16 CHAIRMAN PALLADINO: Any abstentions?

17 (Laughter.)

18 COMMISSIONER BERNTHAL: It's all right, Victor, you
19 don't go to jail anyway.

20 COMMISSIONER GILINSKY: I'm somewhere between
21 abstaining and "no."

22 (Laughter.)

23 CHAIRMAN PALLADINO: Well, the majority has agreed
24 to close the meeting.

25 COMMISSIONER BERNTHAL: Do they only put in jail the

1 three that voted to close it -- is that how it works?

2 COMMISSIONER ASSELSTINE: I hope.

3 COMMISSIONER BERNTHAL: Them, plus the lawyers who
4 advise them.

5 COMMISSIONER ASSELSTINE: That's right.

6 CHAIRMAN PALLADINO: Congressman Markey, in letters
7 dated March 28 and April 12, requested all documents leading
8 to our resulting from my March 20 memo to the Commissioners on
9 licensing delays. All documents, since March 20, on the
10 subject of licensing delay, including licensing delay in-
11 volving Shoreham, the identification and description, in-
12 cluding documents of all communications with Lilco and Execu-
13 tive Branch representatives on Shoreham. I think, also, they
14 requested the transcript of yesterday's meeting.

15 I believe that the Commission should discuss the
16 Markey request and that's the reason I asked for the meeting.
17 I think we have both legal and policy questions to address. I
18 believe OGC is prepared to brief us on the legal rights and
19 obligations and we should also hear from OCA on some of the
20 past experiences of a similar kind.

21 Do other Commissioners have any comments they would
22 like to make at the moment?

23 (No response.)

24 CHAIRMAN PALLADINO: Well, let's turn it over to OGC
25 and hear what they have to say.

1 MR. PLAINE: On the legal aspect, there are two
2 bases to be looked at. One is the so-called Pillsbury doc-
3 trine that resulted from the case of Pillsbury Corporation
4 against the Federal Trade Commission, decided by the Fifth
5 Circuit in 1966, which was a question of congressional probing
6 of an agency's deliberative processes in an adjudication which
7 is still in progress and whether or not that didn't constitute
8 improper pressure on the agency.

9 The second possible basis is the balancing of the
10 Congress' right to know against the agency's right to maintain
11 its deliberative processes free from inhibitions on the give
12 and take of opinions and ideas. The balancing, basically, of
13 what might be described as congressional pressure for a
14 decision in a certain way as against what we sometimes refer
15 to as the subsection 5 exemption under the Freedom of Informa-
16 tion Act.

17 Each of them offer possibilities of making a good
18 case given what is involved here is a pressure for a decision,
19 in this case aimed, perhaps, almost entirely at the Chairm.n,
20 at this point, and it seems to me that one could make those
21 arguments.

22 I guess you balance against that some of the practi-
23 cal aspects of engaging in a contest with the Congress on this
24 matter, and maybe it's useful to hear from Carl Kammerer on
25 what was a similar argument that was made and resulted in a

1 sort of a draw, if you will, in a case not so many years ago.
2 Do you think it's proper to have that now, Mr. Chairman?

3 CHAIRMAN PALLADINO: Yes.

4 COMMISSIONER ASSELSTINE: I would just ask one
5 question before that, Herzel. Wouldn't you say, though, that
6 the letter we received a couple of weeks ago from Congressman
7 Bevill and his colleagues on the Appropriations Subcommittee,
8 that asked for -- really basically called for a specific
9 decision in another case, Diablo Canyon, is much more intru-
10 sive than these kinds of letters we've been getting from
11 Markey that are asking for documents and information.

12 COMMISSIONER GILINSKY: What did that letter say?

13 COMMISSIONER ASSELSTINE: It complained about our
14 earlier decision not to go ahead with the low power license in
15 Diablo.

16 COMMISSIONER GILINSKY: Oh, yes.

17 COMMISSIONER ASSELSTINE: And urged expeditious
18 action to correct that mistake, which seemed to me a lot more
19 intrusive than these kinds of letters that are simply asking
20 for answers to questions or information.

21 MR. PLAINE: Well, was the other accompanied by
22 anything more than just simply making that statement?

23 COMMISSIONER GILINSKY: It didn't have to be.

24 COMMISSIONER ASSELSTINE: No, it didn't have to be.

25 CHAIRMAN PALLADINO: We get a lot of letters from

1 congressmen --

2 COMMISSIONER ASSELSTINE: We get letters all the
3 time from people telling us what we're doing wrong or what
4 decisions we're supposed to be making. I'm not sure this is
5 any different. .

6 CHAIRMAN PALLADINO: But, if Congress doesn't have
7 the privilege of probing into the deliberative process, then
8 what's the basis for their needing the documents? They're not
9 fulfilling the function that they have.

10 COMMISSIONER ASSELSTINE: I guess I'm not prepared
11 to tell Congress what is their --

12 CHAIRMAN PALLADINO: Well, we have in the past -- or
13 the Commission has.

14 COMMISSIONER ASSELSTINE: Well, we can hear from
15 Carl.

16 MR. KAMMERER: It seems like you guys don't want to
17 make the decision.

18 COMMISSIONER ROBERTS: No, I'm ready.

19 COMMISSIONER ASSELSTINE: I've made the decision.

20 MR. KAMMERER: It seems to be what's at issue, here,
21 is whether or not the giving of these documents would help the
22 member of Congress make his case that the Chairman has pre-
23 judged this issue and, if you start with that premise, it
24 seems that the advice that counsel has given you is that it
25 could be withheld under one or both of those exemptions and I

1 think that we have that authority and that responsibility, in
2 the agency, to review all requests that come to us in just
3 that light -- what is our responsibility -- and I think it's
4 to protect the integrity and the efficacy of the decision-
5 making process, in this case, and we ought to do what we
6 should do to keep that document from this gentleman.

7 COMMISSIONER ROBERTS: You're quite persuasive.

8 COMMISSIONER GILINSKY: Eloquent.

9 COMMISSIONER ROBERTS: Right.

10 (Laughter.)

11 CHAIRMAN PALLADINO: Do you have any other points
12 that we should consider?

13 MR. PLAINE: I don't think we do. Do you have any?
14 Do you have any, Pete?

15 CHAIRMAN PALLADINO: I had a question for Carl,
16 while you're thinking.

17 MR. PLAINE: Okay.

18 CHAIRMAN PALLADINO: You didn't go to the one case
19 that was identified that took place in 1979. Could you brief
20 us on that?

21 MR. KAMMERER: That was a similar situation. Let me
22 see, "similar." No. It was a case where another chairman was
23 asking for the names that were under consideration for what
24 ultimately turned out to be the Rogovan Commission on Three
25 Mile Island accident.

1 In that case, the then Commission said, "No, we're
2 not going to reveal those names to you. We're not going to
3 give you the transcript" -- which is what he was requesting in
4 that instance -- so that he could see the names of the indivi-
5 duals that were under consideration, and the Commission was
6 quite firm in its decision to withhold that document from
7 Congress.

8 Now, what did ultimately occur is that, after
9 certain iterations of requests for the document, then the
10 Commission authorized me to take the document up to that
11 congressman, that chairman, and to have him read the document
12 -- only he -- in front of me, and I came back with the docu-
13 ment. So we did not --

14 COMMISSIONER ROBERTS: Did he read it?

15 MR. KAMMERER: He thumbed through several pages of
16 it but did not comprehensively --

17 COMMISSIONER GILINSKY: He said, "Oh, hell --"

18 MR. KAMMERER: That's right. And his staff did not
19 read it. It was the member, himself, who looked at it. He
20 thumbed through several pages and gave it back to me and I
21 returned it to the Commission.

22 CHAIRMAN PALLADINO: What steps were in the pro-
23 cesses of reaching the decision to --

24 COMMISSIONER ROBERTS: Stonewalling, of course.

25 MR. KAMMERER: That's a good one. No, no. You do

1 have the exemptions that the General Counsel has mentioned and
2 I believe that's the way you should go.

3 COMMISSIONER GILINSKY: Let me ask you, is he
4 getting whatever other documents he was interested in? He
5 seems to have worked up his temperature on not getting some
6 other things. What's the status of those requests?

7 CHAIRMAN PALLADINO: I'll give you my impression but
8 then I'll check with staff. My impression is that we have
9 been pretty liberal on giving him most of the documents he's
10 asked for. Occasionally, we tell him -- well, I guess in many
11 cases we tell them, "These haven't been released. We would
12 ask you to not release them," and we did have an agreement
13 whereby he said he wouldn't release them.

14 Then there was a question where they quoted one, and
15 then they finally agreed, "Well, all right, we'll include not
16 quoting them as part of the agreement."

17 MR. MALSCH: One thing occurs to us. I'm not
18 exactly sure of the extent of the documents we're talking
19 about but if we're talking about, for example, memoranda of
20 conversations with Lilco or memoranda of conversations or
21 meetings which memoranda were provided to members of the
22 staff, then there would be deliberative process privilege
23 that would apply to those.

24 This privilege would only apply to intra-
25 Commissioner office --

1 COMMISSIONER ASSELSTINE: Directly related to the
2 adjudication.

3 MR. MALSCH: -- directly related to the adjudica-
4 tion.

5 COMMISSIONER ASSELSTINE: That's right.

6 MR. MALSCH: OGC memoranda, OPE memoranda. The
7 materials from staff or provided to staff or materials related
8 to meetings with Lilco would not be subject to this kind of
9 privilege.

10 CHAIRMAN PALLADINO: Most of us didn't write any
11 memo but I guess we could, saying what we discussed.

12 MR. MALSCH: I have memoranda from three of you of a
13 conversation with the Lilco board chairman. That would not be
14 subject to this kind of a privilege.

15 COMMISSIONER ASSELSTINE: Yes. What would, of the
16 documents he's asked for so far, apart from the transcripts of
17 yesterday's meetings?

18 MR. MALSCH: Well, for example, our memoranda to you
19 all measures to expedite Shoreham would be covered by the
20 privilege. I honestly don't know what else is covered by the
21 document.

22 COMMISSIONER ASSELSTINE: Okay.

23 MR. MALSCH: The transcript certainly would be --
24 the transcript of yesterday's meeting.

25 COMMISSIONER ASSELSTINE: Right.

1 MR. PLAINE: That was our primary document.

2 MR. MALSCH: That was the principal focus of our
3 analysis.

4 COMMISSIONER GILINSKY: I have to say, for myself, I
5 guess I have mixed feelings about this. I think, in some
6 respects -- I don't think it bears on the Chairman's actions
7 one way or the other, but I think it would serve the public
8 interest to release the transcripts of yesterday's meeting. I
9 think it would be highly illuminating. Whether or not it's
10 protected by laws is another matter.

11 COMMISSIONER ASSELSTINE: I would agree with that.

12 CHAIRMAN PALLADINO: How about some of these other
13 things? And, incidentally, would that include, for example,
14 suppose my legal assistant gives me a note.

15 COMMISSIONER GILINSKY: That's protected.

16 MR. MALSCH: I think that's protected.

17 CHAIRMAN PALLADINO: Is that protected?

18 COMMISSIONER GILINSKY: Sure.

19 CHAIRMAN PALLADINO: Now, Herzal, then I sent one to
20 the Commissioners on the 5th in which I said, "I vote for
21 Option 2" -- I'm going through those that I know of.

22 Then there's a limited distribution, Herzal Plaine
23 to the Commissioners. That was April 2. Let's see, what
24 else. Then I have a brief note from Fred Bernthal to me with
25 copies to Gilinsky, Roberts, Asselstine, talking about a

1 question whether the Commission can or should do anything to
2 attempt to expedite the proceeding further.

3 Then there's Roberts. "I favor no action on Shore-
4 ham." Then another batch of letters -- myself to the Commis-
5 sioners --

6 COMMISSIONER GILINSKY: Let's see, are we dealing
7 with the entire --

8 CHAIRMAN PALLADINO: I'm just going through those
9 that my staff has identified for me.

10 COMMISSIONER GILINSKY: We're not going to pass on
11 that.

12 CHAIRMAN PALLADINO: No. Then there's a document
13 here -- I don't know whatever happened to it. It looks like a
14 draft that my staff said we never sent. Here's another draft
15 that we never sent.

16 Then we've got the material that was handed out by
17 the staff when I met with the staff. I think we distributed
18 all that. Then there's a memo from Denton to Dircks. Then a
19 meeting I had with Secretary Hodell which I sent to -- I don't
20 know what else OGC has or anybody else has.

21 MR. MALSCH: All I have is, I think, is three other
22 collections of minutes and conversations with Lilco, our memo,
23 I think a draft of something we never sent, plus a huge
24 collection of staff documents which are miscellaneous notes,
25 draft SER --

1 CHAIRMAN PALLADINO: You mean your staff?

2 MR. MALSCH: No, EDO staff materials, which are not
3 covered by this privilege, and I don't whether I even have a
4 complete set of staff documents. This is just what I have
5 received so far.. In any event, the staff documents would not
6 be covered by that kind of privilege.

7 CHAIRMAN PALLADINO: Any other comments?

8 COMMISSIONER BERNTHAL: Joe, what are we talking
9 about here? Are we talking about only the stuff that's
10 addressed in the third paragraph of his letter and we've not
11 yet addressed the question of the transcript of yesterday's
12 meeting?

13 CHAIRMAN PALLADINO: Well, what about the transcript
14 of yesterday's meeting?

15 COMMISSIONER BERNTHAL: Pardon me?

16 CHAIRMAN PALLADINO: Do you have any thoughts on the
17 transcript of yesterday's meeting?

18 COMMISSIONER BERNTHAL: Well, it seems to me there
19 are almost two separate issues. One of them is this stuff
20 that floated around here which you've just gone through here,
21 which you've just gone through, and I'm not sure whether you
22 require our advice or is that a Commission decision whether to
23 release all of that stuff?

24 MR. PLAINE: Yes, it's a Commission decision.

25 COMMISSIONER BERNTHAL: All those various pieces of

1 paper and comments back and forth?

2 MR. PLAINE: Yes, it's a Commission decision.

3 COMMISSIONER GILINSKY: Well, each Commission is
4 free to release --

5 COMMISSIONER ASSELSTINE: -- his own.

6 COMMISSIONER BERNTHAL: His own, certainly, yes.

7 MR. PLAINE: Well, if you start with the transcript,
8 obviously that's a Commission decision.

9 COMMISSIONER BERNTHAL: Well, the transcript is
10 another matter, as far as I'm concerned. That's clear cut,
11 but this other stuff is partly your own decision, it seems to
12 me.

13 CHAIRMAN PALLADINO: Let me speak to the basic
14 question. It seems to me that, if the Congress granted us
15 certain rights to protect us from the activities of the
16 Congress itself, I think that, when we feel that the Congress
17 is transgressing its own rules, then we should stand up to the
18 right. Now, that's the gut feeling I have.

19 Whether or not to apply it to any particular case is
20 a different question but I think, once we start to say, "Well,
21 we'll give on this one," I think we're giving in on all our
22 deliberative processes and that's what concerns me. This
23 case, per se, may not concern me so much as the precedent that
24 might obtain.

25 Particularly -- and I feel more strongly on the

1 transcript question -- there is a transcript of this morning's
2 meeting that will become available that might actually clarify
3 some of the things we talked about yesterday and may clarify
4 even further some of the information he wants, and that's an
5 open transcript and he'll get that, but I'm concerned about
6 giving him a transcript on a meeting that involved, very
7 directly, our deliberative process.

8 COMMISSIONER ROBERTS: I would agree. I would
9 withhold the transcript of yesterday's meeting.

10 COMMISSIONER BERNTHAL: I agree. I must say that
11 I'm astonished that in a process where what we really did was
12 to take consideration -- it was a non-decision -- a considera-
13 tion of whether to intervene. Take the extraordinary step of
14 intervening in a licensing board proceeding and then decide
15 not to do that, a release of a transcript of that type could,
16 in itself -- assuming that it's not already released and we
17 understand it is, at least in the sub-sense --

18 COMMISSIONER ROBERTS: Oh, it is?

19 CHAIRMAN PALLADINO: It is?

20 COMMISSIONER GILINSKY: Where is it released?

21 COMMISSIONER BERNTHAL: We understand that people
22 pretty much know on the outside what happened in that meeting,
23 and that brings me to another point I would like to address,
24 but the sense of the meeting clearly is out of this room as of
25 about an hour after the meeting yesterday. Be that as it may,

1 I see no reason for us to release a transcript on a non-action
2 that involves what was a consideration of an extraordinary
3 intervention and, in fact, that was the principal basis of my
4 decision that we should not take an extraordinary action like
5 that when you've got a three-two, and a rather shaky three-
6 two, whichever direction you look at it, consensus or lack
7 thereof by the Commission.

8 Therefore, I simply don't believe we should -- we do
9 no favors to our own process and, therefore, I would not vote
10 in favor of releasing the transcript.

11 Let me just address the other issue since I've
12 commented on it indirectly, although I'm well aware of the
13 fact that it may serve the beliefs and inclinations of some of
14 my fellow Commissioners. I must say I'm to the point of
15 wondering whether we should ever vote to have a closed meeting
16 because these meetings, in fact, are not closed. The informa-
17 tion from them is on the street sometimes within minutes, and
18 certainly within hours, in almost every case. I've more than
19 once --

20 COMMISSIONER GILINSKY: Well, let's see, what is it
21 you're talking about? I understood that Public Affairs was,
22 in fact, going to inform people that there had been a vote.

23 COMMISSIONER ASSELSTINE: Yes, right after the
24 meeting. That's right.

25 COMMISSIONER GILINSKY: Are you talking about

1 anything beyond that?

2 COMMISSIONER BERNTHAL: From a closed meeting?

3 COMMISSIONER ASSELSTINE: Yes. Joe just stood up at
4 the end of the meeting and said, "I think I have to tell --

5 MR. FOUCHARD: Hold it. I consulted with Herzel and
6 we were going to respond to inquiries and I believe we had two
7 -- one from Newsday and one from the Associated Press, and
8 maybe there were others -- that the Commission had decided not
9 to intervene and that, if we were pressed, we would say, "Yes,
10 there were three Commissioners --"

11 COMMISSIONER GILINSKY: What I'm asking is, are you
12 talking about anything beyond that?

13 MR. FOUCHARD: That's all that was said.

14 COMMISSIONER BERNTHAL: Yes. It's not just this
15 particular case, yesterday, and I was not aware of the fact, I
16 should say, that we had decided to release information.
17 First, on the fact there was a vote and, secondly, what the
18 vote was. I'm somewhat surprised that that comes out of those
19 meetings.

20 COMMISSIONER ASSELSTINE: Joe said it at the end of
21 the meeting.

22 MR. FOUCHARD: Wait a minute. I think Herzel
23 advised the parties to the proceeding.

24 COMMISSIONER BERNTHAL: This is not the first time
25 we have voted to close a meeting and we read about it in the

1 newspapers the next day. Now, that is a fact. Now, I don't
2 know how this place works, but I just wanted to --

3 COMMISSIONER GILINSKY: Well, you're talking about
4 you agree, in one case, and you put it in your opinion.

5 COMMISSIONER BERNTHAL: I'm sorry? What?

6 COMMISSIONER GILINSKY: I'm talking to Tom.

7 COMMISSIONER ASSELSTINE: That's true.

8 COMMISSIONER GILINSKY: So you've got to be careful
9 about that.

10 COMMISSIONER BERNTHAL: We put what in our opinion?

11 COMMISSIONER GILINSKY: Never mind.

12 COMMISSIONER ROBERTS: Never mind.

13 COMMISSIONER ASSELSTINE: It's a historical --

14 COMMISSIONER GILINSKY: It's water over the dam.

15 (Laughter.)

16 COMMISSIONER ROBERTS: Thank you for raising that --

17 COMMISSIONER GILINSKY: I shouldn't have raised it
18 but you provoked me.

19 COMMISSIONER ROBERTS: Well, I enjoyed it.

20 (Laughter.)

21 COMMISSIONER GILINSKY: That's as good a reason as
22 any. I must say, I'd enjoy seeing this transcript out.

23 COMMISSIONER ASSELSTINE: I would, too.

24 CHAIRMAN PALLADINO: We've had a request for it.
25 Maybe it's covered by his request. I don't know. It

1 certainly comes from his request.

2 COMMISSIONER GILINSKY: No, no. I don't mean this
3 one. I mean the one of yesterday's.

4 COMMISSIONER ASSELSTINE: Yesterday's, that's right.

5 CHAIRMAN PALLADINO: Or even this one.

6 COMMISSIONER ROBERTS: Well, you've got three votes
7 not to release the transcript of yesterday's meeting. All
8 right, what's next?

9 CHAIRMAN PALLADINO: Well, the other documents.
10 Herzel Plaine's documents, for example.

11 COMMISSIONER GILINSKY: What is that?

12 COMMISSIONER ASSELSTINE: The options paper on
13 expediting the --

14 CHAIRMAN PALLADINO: Yes -- the Shoreham proceeding.

15 COMMISSIONER ASSELSTINE: That was back when you
16 were talking about the Commission issuing an order directing a
17 schedule for the board's consideration of a low power license.

18 CHAIRMAN PALLADINO: And I think the draft order
19 that the panel board chairman sent down.

20 COMMISSIONER ASSELSTINE: All that stuff sure seems
21 pretty academic to me, at this point. I don't see what the
22 harm is, quite frankly, in releasing all of it.

23 CHAIRMAN PALLADINO: Only on the principle that, if
24 we're going to allow probing of how we voted, what our con-
25 siderations are, how we either changed our mind or held fast,

1 or whatever, I think --

2 COMMISSIONER ASSELSTINE: All that stuff, really,
3 wasn't even deliberation. The only thing I think can really
4 be fairly characterized as Commission deliberations in the
5 adjudication was yesterday's transcript. The rest of that
6 stuff, at this point -- ever since the board was established
7 and set up its own expedited schedule, all that other stuff
8 was academic, anyway, and Tom and Fred pointed out.

9 CHAIRMAN PALLADINO: How about statements that say,
10 "I would vote this way" or "I would vote that way" or "I
11 prefer this option over that option"?

12 COMMISSIONER ASSELSTINE: I'd leave that up to
13 individual Commissioners.

14 COMMISSIONER BERNTHAL: I'm not really interested in
15 getting the nuts and bolts of this piece of paper and that
16 piece.

17 CHAIRMAN PALLADINO: Are you say that, with regard
18 to the memos we wrote, leave it up to each Commissioner?

19 COMMISSIONER ASSELSTINE: Yes, and I'd say give them
20 the OGC stuff and Tony Cotter's things. Of course, I'd give
21 them the transcript, too.

22 CHAIRMAN PALLADINO: Any other preferences?

23 COMMISSIONER ASSELSTINE: I think the more you
24 withhold, the more you are going to feed his suspicions that
25 there's really something here. I don't think you're going to

1 solve the problem by refusing to give him this stuff.

2 CHAIRMAN PALLADINO: Now, incidentally, I think that
3 Norm Haller was called and the offer was made to come over and
4 read this stuff. I don't know if that's still a valid offer
5 or whether it would even be the substitute for Congressman
6 Markey's --

7 COMMISSIONER GILINSKY: Mr. Markey would come over?

8 CHAIRMAN PALLADINO: No, no. In this case, it was
9 Udell wanted to come over. Is that right?

10 MR. HALLER: This morning, Richard Udell, at the
11 meeting, suggested that he might --

12 CHAIRMAN PALLADINO: In a what?

13 MR. HALLER: In this morning's meeting, during the
14 meeting that the Commission held, Richard Udell came over and
15 sat down next to me and suggested that one option might be for
16 the Commission to let him come over and read the documents.

17 COMMISSIONER BERNTHAL: Including the transcript, I
18 presume.

19 MR. HALLER: At that time, the transcript was not
20 addressed.

21 COMMISSIONER BERNTHAL: Well, under no circumstance
22 would I permit Richard Udell to read the transcript. We may
23 eventually get to the point where Carl was last time around.

24 CHAIRMAN PALLADINO: Let's see, I vote not to
25 release the transcript.

1 COMMISSIONER BERNTHAL: That's right.

2 CHAIRMAN PALLADINO: Now, let me make another
3 approach. I still think we ought to assert our right because
4 I think we have to assert it just for the transcript purpose,
5 and whatever we do on the other items, and I haven't gotten
6 the vote, yet, on the OGC paper, we say that doesn't set a
7 precedent with regard to our rights, but I do think I need a
8 statement or a vote on whether or not a Commissioner is
9 willing to release the OGC memo and the handouts that we got
10 from the staff.

11 MR. PLAINE: Mr. Chairman, could I say something on
12 the OGC memos. I think, over the past year or more, we've
13 tried to provide you with legal advice which would help you
14 make up your minds about things without necessarily disclosing
15 those things to the public and we have deliberately written on
16 them "Limited Distribution" for that purpose.

17 Now, I recognize, after the thing is over, maybe it
18 no longer has significance but, while the process is on, it
19 seems to me we ought to bear the position to advise you
20 without having it publicly ramified all around -- people
21 criticizing or checking out what our advice is.

22 COMMISSIONER BERNTHAL: That's right.

23 MR. PLAINE: It would seem, therefore, if you're
24 going to start this business of giving up all the time, and I
25 know that we've given up on a number of occasions when I

1 thought they should not have been given up. Nevertheless,
2 they were given up, sometimes, without my even knowing it. It
3 seems to me that isn't a very smart way to try to run an
4 operation where you do need private advice from time to time.

5 I would hope you would stand firm at least once on
6 this issue. If you get licked on it, so you get licked, but I
7 would like to try.

8 CHAIRMAN PALLADINO: There is one problem. If we
9 don't release -- I'm not encouraging release of the OGC
10 document but suppose we don't release the OGC document and
11 then each of us sends a copy of a vote which says, "Option 2
12 is desirable because it could focus the hearing, et cetera, et
13 cetera; however, it concerns, et cetera," and so it tells you
14 a little bit about what Option 2 is and then I go on and talk
15 about Option 4, and so there's two out of the four, but still
16 that would not be the same as releasing your document. That's
17 my reaction to the subject.

18 COMMISSIONER BERNTHAL: We made a mistake in the
19 area, I think, once before -- I suppose, if I thought, I could
20 remember which one -- in releasing an OGC preliminary document
21 or a document, and I think, particularly in this case, because
22 of the nature of the document, that we shouldn't do that.

23 Now, if we're going to refuse to release the tran-
24 script of a meeting, then there isn't much logic in not
25 releasing that and then releasing the advice of General

1 Counsel that was the core of the discussion yesterday, in many
2 respects.

3 COMMISSIONER ASSELSTINE: I think what Herzel is
4 talking about is the options for expediting the proceeding,
5 back before the board adopted the expedited schedule. Isn't
6 that the document we're talking about?

7 MR. PLAINE: I think that was one of them.

8 COMMISSIONER ASSELSTINE: I don't think that formed
9 any basis for any discussion yesterday whatsoever.

10 COMMISSIONER BERNTHAL: I'm sorry. You're talking
11 about an earlier document.

12 COMMISSIONER ASSELSTINE: And as far as Herzel's
13 argument about this having some continuing relevance to the
14 proceeding, I think it is totally irrelevant to the rest of
15 the proceeding, now. I don't see what benefit is served by
16 withholding that particular document. I agree with you, if
17 you have an OGC paper that has some continuing relevance to an
18 ongoing proceeding, I'd say yes -- or one that involved a lot
19 of detailed reasoning and analysis. But what that was was an
20 options paper about the various options the Commission might
21 consider to get a low power proceeding going before the board
22 did it on its own.

23 I'm perfectly willing to make the fight, at some
24 point, about OGC documents, but it doesn't seem to me this is
25 the one to fall on our swords over.

1 MR. PLAINE: Well, that may be. I would have to
2 take a look at it. I don't remember it, now.

3 CHAIRMAN PALLADINO: I have it hear but I've lost it
4 for the moment.

5 COMMISSIONER GILINSKY: Why are we doing this?

6 CHAIRMAN PALLADINO: I just want to find it. I want
7 to get a vote on whether or not -- here it is.

8 COMMISSIONER GILINSKY: Joe, I just --

9 CHAIRMAN PALLADINO: The OGC paper, that's the only
10 vote, and then --

11 COMMISSIONER GILINSKY: I must say I can't partici-
12 pate. I have no idea what it is.

13 CHAIRMAN PALLADINO: At least the one I'm thinking
14 of is April 2.

15 COMMISSIONER BERNTHAL: Well, let me make clear that
16 I don't believe the OGC documents, or any documents, that
17 related to that meeting yesterday should be released. That
18 would be inconsistent with not releasing the transcript.

19 Joe, you have my permission to release any of those
20 memos, notes, whatever else, was related to our interoffice
21 communications of some of these things that you went over that
22 I might have authored. If you want me to do that rather than
23 you, I'd be happy to do that.

24 CHAIRMAN PALLADINO: Yes, I was going to adopt a
25 principle that each Commissioner decide for himself those

1 documents that he wrote --

2 COMMISSIONER BERNTHAL: I was just hoping I didn't
3 have to remember what they were.

4 CHAIRMAN PALLADINO: I was coming down to where we
5 decide on the OGC paper, the transcript, and I think the
6 handouts we got -- they were better covered today than they
7 were yesterday.

8 I would also send the transcript from this morning's
9 meeting when we get it, but that's an open meeting.

10 COMMISSIONER ROBERTS: If Udell was here, I think
11 the information is going to be transmitted.

12 CHAIRMAN PALLADINO: Well, let me ask for OGC to
13 identify which ones of its documents we need to vote on. I
14 know we have one of April 2. Is there another one that I may
15 have overlooked? That was on the Shoreham proceeding.

16 MR. MALSCH: The only that was sent to the Commis-
17 sion, I believe, on the subject of expediting the case was the
18 April 2 Shoreham memo.

19 COMMISSIONER ASSELSTINE: That's right.

20 CHAIRMAN PALLADINO: Do you have any expression on
21 withholding or transmitting that one?

22 COMMISSIONER ROBERTS: I would rely on the advice of
23 the General Counsel. If it's withholdable, I would be in
24 favor of withholding.

25 COMMISSIONER BERNTHAL: Is this the one that Herzel

1 is talking about now?

2 COMMISSIONER ASSELSTINE: Yes.

3 COMMISSIONER BERNTHAL: I suspect that that one is a
4 little tougher to justify. It sounds to me like it's water
5 over the dam.

6 COMMISSIONER ASSELSTINE: Yes.

7 MR. MALSCH: I will say that, when I drafted the
8 memo, I drafted it with the idea that it would likely be
9 disclosed.

10 (Laughter.)

11 COMMISSIONER BERNTHAL: There's a message in that
12 that, I might add, gets to the heart of why we shouldn't
13 always just keel over every time someone asks for an internal
14 document because, then, pretty soon we will get memos and
15 documents that are drafted under the presumption that they
16 will be released and those probably aren't the best memos to
17 get from staff, in some cases.

18 COMMISSIONER GILINSKY: Right.

19 CHAIRMAN PALLADINO: Well, I would propose to
20 withhold the OGC memo just to get a different point of view on
21 the table.

22 COMMISSIONER BERNTHAL: It's really very hard for me
23 to make that judgment because I would have to look at the
24 memo. Do I detect OGC waivering on whether they think that's

25 --

1 MR. PLAINE: I, personally, am not. Maybe some
2 others are.

3 (Laughter.)

4 COMMISSIONER ROBERTS: I'm with you.

5 MR. PLAINE: I'm not waivering.

6 CHAIRMAN PALLADINO: I didn't hear you, Herzel.

7 COMMISSIONER ROBERTS: He says he's not waivering.

8 COMMISSIONER ASSELSTINE: He says he still wants to
9 withhold it.

10 COMMISSIONER ROBERTS: He wants to withhold the
11 April 2. I'm within your hands.

12 CHAIRMAN PALLADINO: All right. I would propose to
13 withhold it.

14 COMMISSIONER ASSELSTINE: We ought to be able to
15 wrap this up pretty quickly.

16 CHAIRMAN PALLADINO: I will have to get from each of
17 you your decision on your own documents. I presume you two
18 are willing to --

19 COMMISSIONER ASSELSTINE: I'm willing to give up
20 anything I authored.

21 CHAIRMAN PALLADINO: I mean, will you help us find
22 them. I might not have them all.

23 COMMISSIONER ASSELSTINE: Sure.

24 COMMISSIONER GILINSKY: I thought we'd done that.

25 COMMISSIONER ASSELSTINE: I've sent Marty a memo

1 responding to one of Udell's questions. I'll check and see.

2 COMMISSIONER GILINSKY: I think I've turned every-
3 thing in. We've turned our pockets inside out.

4 COMMISSIONER ASSELSTINE: That's right. Nothing to
5 hide.

6 CHAIRMAN PALLADINO: While we're still deiberating

7 --

8 COMMISSIONER BERNTHAL: If you guys think you can
9 defend this, then I'll vote with the Chairman on it not to
10 release it.

11 CHAIRMAN PALLADINO: Let's see, do we have three
12 votes not to release the OGC memo.

13 COMMISSIONER ROBERTS: Yes, if, in their judgment,
14 they have a legal basis to do so. That's my condition.

15 COMMISSIONER BERNTHAL: It won't be more than 30
16 days, Tom.

17 MR. MALSCH: The April 2 memo goes to the merits of
18 these couple of issues. It does express OGC's view that the
19 Commission's regulations do not discriminate between low power
20 and full power of the general design criteria. It also
21 observes that the schedule adopted by the low power board is
22 tight without any apparent real benefits for LOCO in so doing.

23 COMMISSIONER BERNTHAL: There is that latter state-
24 ment in there somewhere toward the end.

25 CHAIRMAN PALLADINO: While you're debating that,

1 what about memos that I received or you sent, would you
2 identify those?

3 COMMISSIONER BERNTHAL: You can release anything I
4 sent. I've got no problem.

5 COMMISSIONER ROBERTS: I'll look into it.

6 CHAIRMAN PALLADINO: Well, we've got only until 6:00
7 o'clock, or thereabouts.

8 COMMISSIONER BERNTHAL: What happens, then?

9 COMMISSIONER GILINSKY: Life will go on.

10 COMMISSIONER ASSELSTINE: So, we've resolved the
11 transcript, we've resolved the OGC memo.

12 CHAIRMAN PALLADINO: There is the caveat that, if
13 OGC agrees there's a legal basis, and do I hear you on that?

14 MR. PLAINE: I still think that it's related to the
15 decision and I think it ought to stay out of the public
16 domain, at this point.

17 COMMISSIONER ASSELSTINE: All right. Then we've got
18 the question of our own originated documents. We'll take care
19 of that individually.

20 CHAIRMAN PALLADINO: What about documents between
21 administrative assistants or personal staff and the Commis-
22 sioner?

23 COMMISSIONER GILINSKY: I would say that's with-
24 holdable.

25 COMMISSIONER ASSELSTINE: Sure, that's withholdable.

1 CHAIRMAN PALLADINO: All right. Any the other class
2 that we ought to address that anybody thinks of?

3 MR. CRANE: Yes. I think if there are documents
4 that involve communications between Commissioners and the
5 licensing board or Commissioners and the staff --

6 MR. MALSCH: Or Commissioners and outsiders.

7 MR. CRANE: -- or outsiders, then you would have a
8 problem because, if you claim that they are germane to this
9 adjudication, then you have admitted to ex parte communica-
10 tions.

11 COMMISSIONER ASSELSTINE: That's right.

12 COMMISSIONER ROBERTS: I volunteer all my correspon-
13 dence to the hearing board.

14 CHAIRMAN PALLADINO: I didn't follow you, Peter.

15 MR. CRANE: My point is that, if there are communi-
16 cations and one hold them back from the Congress saying, "You
17 can't have these. They are relevant to the adjudication," and
18 it turns out that they are off-the-record communications, then
19 one has admitted to ex parte contact.

20 (Whereupon, Commissioner Gilinsky left the room.)

21 COMMISSIONER ASSELSTINE: That's right.

22 COMMISSIONER BERNTHAL: That's great.

23 CHAIRMAN PALLADINO: What about drafts of memos that
24 weren't sent but kept entirely within the office.

25 MR. PLAINE: I think you're entitled to withhold.

1 CHAIRMAN PALLADINO: I'm asking for guidance because
2 we're going to try to make the decision within the hour and,
3 while I've got the benefit of this talent, I want to take
4 advantage of it.

5 COMMISSIONER BERNTHAL: I think Senator Simpson is
6 right. Maybe, if we just didn't have any lawyers at all in
7 this agency -- sorry, you guys.

8 CHAIRMAN PALLADINO: We voted on not to release
9 yesterday's transcript, we voted not to release OGC's legal
10 opinion of April 2, and we've agreed that each individual
11 Commissioner would release his memos, as he sees fit, and I
12 think most of us will release them but I may want to talk to
13 General Counsel on one or two of mine. We'll leave it up to
14 each Commissioner.

15 For anything we don't send them, we've got to make
16 sure it's covered so that I don't say, "We've sent you all
17 these classes of things" and then we find out we didn't.

18 COMMISSIONER ASSELSTINE: Yes.

19 CHAIRMAN PALLADINO: You're going to send all yours?

20 COMMISSIONER BERNTHAL: Yes.

21 CHAIRMAN PALLADINO: Tom wants to look at his.

22 COMMISSIONER BERNTHAL: Are we finished with this?

23 CHAIRMAN PALLADINO: And I intend to look at mine
24 with the probability of sending most if not all.

25 COMMISSIONER BERNTHAL: I just want to say that I'm

1 quite serious, though, and want staff to hear the comment
2 about closed meetings.

3 I may have slipped up myself, and I'm sure we all
4 do, from time to time, and I still have to be instructed on
5 where I did that, if I did, but --

6 COMMISSIONER ASSELSTINE: Not, it was Tom that I
7 think Victor was talking about.

8 COMMISSIONER BERNTHAL: Oh, I see, okay. But a
9 closed meeting is a closed meeting and I am not going to vote
10 to close meetings, after a while, if we don't all understand
11 that. That was the simple point that I wanted to make.

12 COMMISSIONER ASSELSTINE: I'm for that, Fred, I'm
13 for that.

14 COMMISSIONER BERNTHAL: I know you are. You're
15 going to get there one way or another, Jim.

16 (Laughter.)

17 MR. PLAINE: Fred, I misunderstand, I think. Are
18 you talking about the fact that we had to notify the parties,
19 yesterday, as to the result of the --

20 COMMISSIONER BERNTHAL: No, Herzel. Yesterday, I
21 understand there is apparently some question about what we
22 wanted to release and decided to release, but it is a fact
23 that we too often here, very quickly, not only the outcome of
24 the a vote but the contents of a closed meeting on the street
25 or read it in the newspaper the next day.

1 All I'm saying is, that if that pattern persists --
2 and I'm not pointing the finger at anybody but, if it per-
3 sists, then there's no point in closing meetings.

4 MR. PLAINE: Of course, I agree.

5 COMMISSIONER BERNTHAL: That's all that I'm saying.

6 MR. PLAINE: Yesterday, I know I talked about the
7 fact that we had this obligation to counsel because they were
8 waiting on us before they took certain actions and I think we
9 agreed on a simple statement that the Commission met and
10 decided not to intervene, and that's all that we agreed upon.

11 COMMISSIONER BERNTHAL: That's all we agreed on.
12 That's correct.

13 MR. PLAINE: And that was transmitted to the
14 parties.

15 COMMISSIONER BERNTHAL: That is not all that was
16 available.

17 MR. FOUCHARD: Your point is most valid, Mr.
18 Bernthal, irrespective of yesterday.

19 CHAIRMAN PALLADINO: I want to touch on one item,
20 though, before we close. Are you going to give me a legal
21 opinion on the basis to support the votes on the transcript
22 and OGC? In other words, you gave us orally what you thought
23 the basis was, but we're going to have to transmit something.
24 Maybe we could get a transmittal letter together.

25 MR. PLAINE: Do you want to use it as part of the

1 transmittal letter?

2 CHAIRMAN PALLADINO: I think we have to.

3 MR. PLAINE: I guess you might want to. I would
4 guess we would help draft the letter that you send out.

5 CHAIRMAN PALLADINO: Yes. Now you've said the right
6 thing.

7 MR. PLAINE: Right. Is the letter going out today?

8 CHAIRMAN PALLADINO: No, I don't think the letter
9 will go out today. I think we'll communicate what our deci-
10 sion is and what we are doing.

11 We will stand adjourned.

12 (Whereupon, the foregoing meeting was adjourned at
13 4:50 o'clock, p.m.)
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2 NUCLEAR REGULATORY COMMISSION
3
4

5 This is to certify that the attached proceedings before the
6 Commission in the matter of: Briefing on Markey Letter,
7 held on Tuesday, April 24, 1984, at 1717 H Street, N. W.,
8 Washington, D. C., were held as herein appears, and that
9 this is the original transcript thereof for the file of the
10 Commission.
11
12

13 Elizabeth Ann Tipton
14 Official Reporter (typed)

15
16 Elizabeth Ann Tipton
17 Official Reporter (Signature)
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