

**ORIGINAL**

**UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION**

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In the matter of:

DISCUSSION OF SHOREHAM ORDER

Docket No.

CLOSED MEETING

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Location: Washington, D. C.

Pages: 1 - 41

Date: Thursday, April 26, 1984

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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

DISCUSSION OF SHOREHAM ORDER

CLOSED MEETING - EXEMPTION NO. 10

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

Thursday, April 26, 1984

The Commission convened in closed session at  
at 3:55 p.m.

COMMISSIONERS PRESENT:

- NUNZIO PALLADINO, Chairman of the Commission
- VICTOR GILINSKY, Commissioner
- THOMAS ROBERTS, Commissioner
- JAMES ASSELSTINE, Commissioner
- FREDERICK BERNTHAL, Commissioner

STAFF AND PRESENTERS SEATED AT COMMISSION TABLE:

- S. CHILK
- H. FLAINE
- M. MALSCH
- D. BERCOVITZ

AUDIENCE SPEAKERS:

- J. FOUCHARD

- - -

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P R O C E E D I N G S

CHAIRMAN PALLADINO: The meeting will please  
come to order.

I circulated a note earlier this afternoon  
that suggested that we have a short notice meeting, a  
closed meeting under Exemption 10 on the Shoreham matter.

Before we start, I would like to get a vote  
to hold it on less than one week's notice.

All those in favor say Aye.

CHAIRMAN PALLADINO: Aye.

COMMISSIONER GILINSKY: Aye.

COMMISSIONER ROBERTS: Aye.

COMMISSIONER ASSELSTINE: Aye.

COMMISSIONER BERNTHAL: Aye.

CHAIRMAN PALLADINO: Now I also would like to  
vote to close it on Exemption 10, agency adjudication.

CHAIRMAN PALLADINO: Aye.

COMMISSIONER GILINSKY: Aye.

COMMISSIONER ROBERTS: Aye.

COMMISSIONER ASSELSTINE: Aye.

COMMISSIONER BERNTHAL: Aye.

CHAIRMAN PALLADINO: All right.

Herzel, would you introduce the subject.

MR. PLAIN: Yes. Mr. Chairman, this morning  
our lawyers met with other lawyers in the case, in the

1 Shoreham case before Judge Gerhard Gesell whose case it  
2 really was in the first instance but wasn't available to  
3 deal with the temporary restraining order.

4 Judge Gesell made it fairly plain that as he  
5 saw it the real issue was schedule. This is the basis upon  
6 which the temporary restraining order was issued and while  
7 he indicated he wasn't prepared to disagree with his  
8 colleagues that the very tight schedule that had been  
9 granted was unreasonable, he did indicate that we can solve  
10 this problem and we should solve this problem by the  
11 lawyers agreeing on what is a reasonable time.

12 He said if you give me an agreement on that,  
13 I will deal with the case accordingly, which would probably  
14 indicate that he might favor not issuing a preliminary  
15 injunction.

16 In other words, the case is soluable on the  
17 basis of getting a reasonable agreement on a reasonable  
18 hearing period and that includes time for preparation of  
19 their cases.

20 Because there are two possibilities of not  
21 having that agreement necessarily, I have suggested that  
22 the Commission issue the order that is before you. Those  
23 two possibilities are the indicated intransigence of the  
24 plaintiff in the lawsuit who on a preliminary try by at  
25 least one of the parties indicated they didn't want to

1 agree to any settlement like that, and the possibility,  
2 too, that the Licensing Board might, unless brought into  
3 this picture, might not necessarily agree with whatever is  
4 agreed upon.

5           So to make clear to the parties and to the  
6 Licensing Board that this is an essential element to get on  
7 with this case, I suggested the draft order that the  
8 Chairman circulated before this previous meeting and hope  
9 that it is self-explanatory in its brevity and what it  
10 says.

11           In other words, the Commission would be  
12 directing the parties to confer among themselves and with  
13 the presiding Atomic Safety and Licensing Board as soon as  
14 possible with the objective of establishing a new schedule  
15 for further proceedings on the supplemental motion.

16           Such a new schedule would allow the parties a  
17 reasonable additional time for their cases. We suggest that  
18 by no later than noon, April 30, 1984, that is this coming  
19 Monday, the Chairman of the Licensing Board shall advise  
20 the Commission's General Counsel of the status of the  
21 conferences among and with the parties.

22           If it should turn out that the Board Chairman  
23 advises the General Counsel that no agreement among the  
24 parties on a schedule is possible, then we say the  
25 extraordinary circumstances of this case require that the

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1 Commission itself set a reasonable schedule.

2 And to make clear that we are not authorizing  
3 anybody to start up on any hearing based on the present  
4 status of the litigation, we add that the conduct of  
5 hearings is currently enjoined in accordance with the U. S.  
6 District Court's order of April 25, 1984.

7 COMMISSIONER GILINSKY: what does that mean?

8 MR. PLAINE: That means that by talking about  
9 scheduling and agreeing on scheduling they are not  
10 necessarily authorized to start up until the court  
11 authorizes this thing to go forward. This is all dependent  
12 on the court telling us. For example, we would hope the  
13 court would dismiss, if the TRO is still in existence, that  
14 it would dismiss the TRO and deny the issuance of a  
15 preliminary injunction.

16 CHAIRMAN PALLADINO: Does that mean then that  
17 if there is a reasonable schedule agreed to or one mandated  
18 by the Commission that it goes to the court?

19 MR. PLAINE: Oh, yes. That is the first place  
20 we would take. we would take it right to the court and  
21 indicate to the court that the parties have agreed, or in  
22 the alternative that the Commission has set a time which we  
23 think would be reasonable in light of all of the  
24 circumstances that have occurred to get on with the  
25 low-power hearing.

1 CHAIRMAN PALLADINO: There is one question I  
2 have.

3 MR. PLAINE: Yes, sir.

4 CHAIRMAN PALLADINO: It is now essentially  
5 close or business on the 26th. Noon of April 30 is only one  
6 and a half working days, and since we are talking about  
7 tight schedules, isn't that a bit unduly tight?

8 (Laughter.)

9 MR. PLAINE: well, we don't have much time,  
10 Mr. Chairman. The court isn't going to play around with  
11 this for a long time. They have required the filing of a  
12 statement of law by tomorrow. He would probably set a  
13 hearing if it is necessary in very short order, but I am  
14 hoping that it won't be necessary.

15 COMMISSIONER GILINSKY: Let me ask you, what  
16 do you think is a reasonable schedule?

17 MR. PLAINE: I really haven't thought about  
18 it.

19 COMMISSIONER GILINSKY: well, we will be  
20 setting one next week.

21 MR. PLAINE: you may end up setting one next  
22 week, but maybe we can tell a little better by the results  
23 of the negotiations and the offers and counteroffers.

24 COMMISSIONER GILINSKY: well, it is going to  
25 be between zero and infinity I suspect.

1 (Laughter.)

2 MR. PLAINE: It will probably be somewhere  
3 between the time that originally you had been allowed and  
4 some other date.

5 COMMISSIONER GILINSKY: But let me ask you,  
6 are you talking about days, weeks or months?

7 MR. PLAINE: I think you are talking about  
8 several weeks.

9 COMMISSIONER GILINSKY: To the start of the  
10 hearing?

11 CHAIRMAN PALLADINO: Could you review the old  
12 schedule, the schedule that the court set aside?

13 COMMISSIONER GILINSKY: It started the other  
14 day.

15 MR. PLAINE: It started the other day.

16 COMMISSIONER GILINSKY: In other words, we  
17 allowed something to go forward that you thought ought to  
18 go forward in several weeks and we allowed it go forward in  
19 a day or two?

20 MR. PLAINE: Not in weeks, but we really  
21 thought the schedule was too tight.

22 (Laughter.)

23 MR. PLAINE: We did say that.

24 COMMISSIONER ASSELSTINE: In fairness I will  
25 support Herzel.



1 COMMISSIONER GILINSKY: I am not saying that  
2 you didn't provide that advice.

3 COMMISSIONER ASSELSTINE: That is right.

4 MR. PLAINE: If you look back at the  
5 memorandum that we provided, we drafted a memo that  
6 suggested a time schedule and, as I recall it, it was  
7 somewhere between six and eight weeks.

8 MR. MALSCH: I don't remember what ours was.  
9 The one that was ordered by the Licensing Board provided  
10 for I believe ten days discovery and four or five days  
11 testimony preparation, the testimony preparation to take  
12 place between Monday and Good Friday and the hearing  
13 scheduled for the following Tuesday.

14 MR. PLAINE: I think there were 11 working  
15 days allowed.

16 COMMISSIONER GILINSKY: I think that Easter  
17 and Passover, that probably played a role in that.

18 MR. PLAINE: Yes, all of that stuff.

19 COMMISSIONER ASSELSTINE: The frosting on the  
20 cake.

21 MR. PLAINE: The frosting on the cake,  
22 correct.

23 COMMISSIONER GILINSKY: Palm Sunday.

24 (Laughter.)

25 MR. PLAINE: You are talking about several

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1 weeks. It is possible that maybe two months is a reasonable  
2 time. I don't know at this point. I don't have any opinion  
3 on it.

4 CHAIRMAN PALLADINO: But in anticipation that  
5 we may have to face up to this next week, it would be well  
6 for us to get some guidance or be prepared to get some  
7 guidance.

8 MR. PLAINE: well, we will try to provide it.

9 CHAIRMAN PALLADINO: Rather than try to do it  
10 here quickly. But I still come to my question is April 30th  
11 too fast, and I only raise it because the issue is  
12 important.

13 COMMISSIONER GILINSKY: well, if we are  
14 talking about a schedule of several weeks, I don't  
15 understand what ---

16 MR. MALSCH: well, the parties have been  
17 arguing about this schedule matter now for the last two or  
18 three weeks. There has been at least two rounds of written  
19 pleadings, at least one round of oral argument before the  
20 Licensing Board and two rounds of argument before District  
21 Court judges. It is the same issue.

22 CHAIRMAN PALLADINO: But has anybody suggested  
23 or did the plaintiff say well, I think it ought to be this  
24 month?

25 MR. MALSCH: Oh, yes, they have made very

1 specific suggestions as to what they think reasonable  
2 schedules would be.

3 COMMISSIONER BERNTHAL: we got a thick packet  
4 of exchanges in fact at the last meeting.

5 COMMISSIONER GILINSKY: what is the spread?

6 MR. MALSCH: I may be wrong, but I think the  
7 difference is between Suffolk County's proposal for let's  
8 say a hearing over let's say two months from now and LILCO  
9 proposal that the hearing be over three weeks from now,  
10 something like that. They are fairly far apart. I think we  
11 are talking about a several month difference between  
12 Suffolk County and LILCO, but I would have to go back and  
13 check the arguments.

14 MR. BERCOVITZ: LILCO is willing to delay for  
15 three weeks.

16 CHAIRMAN PALLADINO: To what?

17 MR. BERCOVITZ: To delay for three weeks.

18 MR. PLAINE: Mr. Chairman, I don't feel badly  
19 about this happening over the weekend. They didn't have any  
20 problem bothering me all weekend with questions and with  
21 things about how we are going to handle all this stuff.

22 (Laughter.)

23 I spent my Saturday and Sunday dealing with  
24 all these parties, and I think they can do it again this  
25 weekend. Two in a row isn't that bad.

1 (Laughter.)

2 COMMISSIONER ASSELSTINE: The key point I  
3 think is that the Commission at this point, even where we  
4 are now, really doesn't have much time. If you are going to  
5 avoid getting into more trouble with the courts, the  
6 Commission is going to have to bite the bullet and set a  
7 more reasonable schedule very quickly.

8 MR. PLAINE: I will make a prediction where I  
9 generally don't. If we don't give the court something  
10 reasonable very shortly, you will get a preliminary  
11 injunction.

12 MR. MALSCH: well, it could be even worse than  
13 that. There have been threatened discovery and depositions  
14 against Chairman Palladino, Mr. Cotter, Mr. Miller and Mr.  
15 Denton.

16 (Laughter.)

17 COMMISSIONER ASSELSTINE: Of course, that  
18 could all take place quite apart from whether the schedule  
19 gets settled or not. That is right.

20 COMMISSIONER BERNTHAL: Did you get that list?

21 (Laughter.)

22 MR. FOUCHARD: I did.

23 (Laughter.)

24 MR. MALSCH: Dan was at the argument this  
25 morning and you might have him fill you in on exactly what

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1 went on.

2 MR. BERCOVITZ: The judge felt that the NRC  
3 was being very unreasonable in not even talking to the  
4 parties and saying why didn't you make an attempt at some  
5 accommodation on the schedule. The judge says we can  
6 proceed and litigate or you guys can all sit down like  
7 reasonable people and negotiate.

8 He made the NRC's pleadings due tomorrow and  
9 he gave Suffolk County until next Tuesday for their  
10 pleadings. We felt that was sort of a hint to us.

11 (Laughter.)

12 Next Thursday is going to be the hearing on  
13 the jurisdictional questions and he actually may go and  
14 hear the preliminary injunction next Thursday which will go  
15 more to the merits of the whether he should preliminarily  
16 enjoin this.

17 I think his decision will be influenced  
18 greatly by how reasonable he thinks the NRC is being. If  
19 the Commission would act before next Thursday and would  
20 negotiate with the parties and come up with some schedule  
21 or if the parties couldn't agree, order some schedule. If  
22 we had something other than what where we are today to  
23 defend, he may throw the whole thing out, and if we could  
24 also get this matter of the depositions and the  
25 disqualification thrown out at the same time.

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1           The longer he takes the whole case, the worse  
2 it is going to get for us really.

3           CHAIRMAN PALLADINO: You have explained it.

4           (Laughter.)

5           CHAIRMAN PALLADINO: Well, are there any other  
6 questions or comments on this order?

7           (No response.)

8           CHAIRMAN PALLADINO: Are you ready to vote on  
9 the order?

10          (Commissioners nodding in the affirmative.)

11          CHAIRMAN PALLADINO: All those in favor of  
12 issuing this order indicate by saying Aye.

13          COMMISSIONER BERNTHAL: Aye.

14          CHAIRMAN PALLADINO: Aye.

15          Did you vote Aye?

16          COMMISSIONER ROBERTS: I said Aye.

17          COMMISSIONER GILINSKY: I abstain since I was  
18 not in favor of the premises on which this hearing was  
19 based. I thought we should have stepped in and redirected  
20 the hearing board.

21          CHAIRMAN PALLADINO: Where we were stepping in  
22 was on a different aspect of it.

23          Go ahead.

24          COMMISSIONER ASSELSTINE: I also am going  
25 abstain. I don't have any problem with reading the order to

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1 the parties right away, but before the order goes out  
2 tonight I want about half an hour to put together some  
3 additional views that basically say that I think the  
4 Commission should have stepped in on Monday and stayed this  
5 whole thing and deal with both the substantive issues and  
6 the procedural irregularities about this case.

7 CHAIRMAN PALLADINO: Now what will you do? Is  
8 that attached to the order?

9 COMMISSIONER ASSELSTINE: I will attach it to  
10 the order.

11 CHAIRMAN PALLADINO: Is that the usual  
12 procedure?

13 MR. MALSCH: That is the usual procedure.

14 COMMISSIONER GILINSKY: I would expect to  
15 agree with that.

16 COMMISSIONER BERNTHAL: If this thing is going  
17 to be strung out now, it seems to me the Commission might  
18 do well to reconsider. Since time now is no longer totally  
19 under our control I guess we might ---

20 COMMISSIONER ASSELSTINE: That is a  
21 possibility.

22 CHAIRMAN PALLADINO: To consider what?

23 COMMISSIONER ASSELSTINE: Stepping in.

24 COMMISSIONER BERNTHAL: The issue itself, the  
25 issue we chose not to consider at the time, earlier this

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1 week.

2 MR. PLAINE: Well, can't that also be done  
3 once the injunction is lifted? My feeling is that by  
4 raising issues that are not in the court at this point ---

5 COMMISSIONER BERNTHAL: I am not suggesting we  
6 do that instantaneously. I am saying that as it appears  
7 right now there is a considerable period of time where such  
8 judgments by the Commission would not have to be made in  
9 haste on the policy issue.

10 It might be the better part of valor to get  
11 the thing cleaned up. Given the risk that I think we all  
12 agree is still there, we may have another go-around when we  
13 are all finished or supposedly finished with this.

14 MR. PLAINE: That was why I would suggest that  
15 possibly the two Commissioners who want to write something  
16 on the other matter would hopefully refrain from doing it  
17 in connection with this sole issue.

18 The only issue that the court sees at this  
19 point is the element of time. They are not concerned with  
20 the other issues. The court says that is the thing that  
21 this case was decided and that is the one thing that I  
22 think can disappear if you handle the time.

23 Now what if he issues an order dismissing? At  
24 that point you are perfectly free to reopen the whole  
25 matter of whether or not the hearing is being conducted on

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1 a proper basis, and I think that is the time, if the  
2 Commission doesn't do it, that your views on not doing that  
3 are very appropriate. But to do it in this connection ---

4 COMMISSIONER GILINSKY: Except this order,  
5 Herzel, says that if parties won't agree, the Commission is  
6 going to set a schedule which will be the basis for going  
7 forward with the hearing which means that we agree with the  
8 basis on which the hearing is going forward.

9 COMMISSIONER ASSELSTINE: And we don't.

10 COMMISSIONER GILINSKY: One simply cannot  
11 remain silent about that.

12 COMMISSIONER ASSELSTINE: That is right.

13 CHAIRMAN PALLADINO: I think it is important  
14 to indicate why you were for staying it. It was on a  
15 different basis than the timetable alone.

16 COMMISSIONER ASSELSTINE: Well, that was one  
17 element, in my judgment. Remember I had three elements and  
18 this was one of my three elements was the timing.

19 CHAIRMAN PALLADINO: Well, the order that was  
20 about to go out didn't have that, although there were  
21 drafts that had it.

22 COMMISSIONER ASSELSTINE: But it didn't  
23 matter because you stayed ---

24 COMMISSIONER GILINSKY: Well, I must say the  
25 reason I was inclined to drop that item is simply because

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1 I thought the other was more important and I thought it  
2 would be useful just to concentrate on the one important  
3 point, not that the others weren't valid as well.

4 CHAIRMAN PALLADINO: well, if you write  
5 something, I may have to write something also.

6 COMMISSIONER GILINSKY: but then we get into  
7 the problem that I think Fred is ---

8 COMMISSIONER ASSELSTINE: Fred raises an  
9 interesting point.

10 COMMISSIONER BERNTHAL: I really would urge  
11 you to consider that we may want to make a judgment on  
12 taking up the policy matter.

13 COMMISSIONER ASSELSTINE: why isn't now the  
14 time to make that decision though? I mean if the Commission  
15 is inclined now to look at the basic issue that is the  
16 premise for this hearing first and foremost, why isn't now  
17 the time to do that, to go back to the court and say, look,  
18 the Commission has decided in light of all that has  
19 happened that we are going to stay the Licensing Board's  
20 hearing and that we are now going to ask the parties to  
21 come before the Commission and the Commission is going to  
22 consider the key substantive question, and based upon how  
23 the Commission resolves that question, the Commission will  
24 decide whatever has to be done in terms of a schedule for  
25 any further hearings.

1           If we are considering doing that anyway, why  
2 isn't that the thing to do right now?

3           COMMISSIONER GILINSKY: In fact, as I recall  
4 it, Joe, you were troubled about the premises of the  
5 hearing as well.

6           COMMISSIONER ASSELSTINE: That is right.

7           COMMISSIONER GILINSKY: You said if we are  
8 going to go down this other route, you were worried about  
9 three weeks or some number of weeks that things would be  
10 held up. Now that is going to happen now anyway. In fact,  
11 it is going to be much longer than three weeks.

12           COMMISSIONER BERNTHAL: But there are two  
13 issues and it seems to me especially since we are faced  
14 with this immediate question of meeting the court's  
15 requirements, that really is a scheduling matter. When  
16 would the hearing itself then under some guesstimate of a  
17 reasonable schedule actually begin? Has anybody got an  
18 answer to that?

19           CHAIRMAN PALLADINO: Which hearing, the one  
20 that the ---

21           COMMISSIONER BERNTHAL: The Licensing Board's  
22 hearing, the substantive hearing.

23           COMMISSIONER GILINSKY: But it seems to me  
24 that if we would look into the basis for the hearing, as we  
25 were about to do earlier, it would moot the schedule

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1 question.

2 COMMISSIONER ASSELSTINE: That is right.

3 COMMISSIONER BERNTHAL: But the schedule once  
4 established, and that was the reason for my question, could  
5 very well get us out of this situation on which we disagree  
6 as to whether we should issue a stay to the Board itself  
7 which is an extraordinary step. We don't very often do  
8 that. I guess we almost never do that when a hearing is in  
9 progress.

10 If we have got two or three weeks to consider  
11 the matter, the policy matter in the way in fact that I  
12 know Jim suggested it ought to be considered with the staff  
13 and others coming in, we can just do that, and we will as a  
14 matter of fact, depending on what that schedule is, finish  
15 the policy issue before the Board reconvenes.

16 MR. PLAINE: You can actually schedule a  
17 meeting on this subject without writing any separate views  
18 at this point ---

19 COMMISSIONER BERNTHAL: That is right and that  
20 is the point.

21 MR. PLAINE: --- and right here and now  
22 decide that we will reconsider now this hearing shall be  
23 conducted substantively.

24 COMMISSIONER ASSELSTINE: But if the  
25 Commission is going to do and is willing to do that, then

1 why let the hearing go forward. It seems to me what you  
2 want to do now is say the Commission has decided it is  
3 going to stay the hearing and it is going to consider the  
4 substantive issue itself. And once it makes that decision,  
5 then the Commission will decide on a schedule for any  
6 further ---

7 COMMISSIONER BERNTHAL: why stay it  
8 unnecessarily though, Jim? The question that I still  
9 haven't gotten answered is when is it going to start even  
10 if we didn't stay it?

11 COMMISSIONER ASSELSTINE: If you didn't stay  
12 it and if you didn't get involved at all, it is probably  
13 going to be a few weeks, isn't it?

14 COMMISSIONER BERNTHAL: well, then I see no  
15 reason at all to stay it. We can surely decide the policy  
16 matter, and we were talking at one point in the space of a  
17 week or ten days.

18 COMMISSIONER GILINSKY: Except when you say a  
19 hearing, a hearing is about a specific subject on a  
20 specific basis, and the basis is that order.

21 COMMISSIONER ASSELSTINE: That is right.

22 COMMISSIONER GILINSKY: what would your  
23 preliminary hearing be about? You have got to say some kind  
24 of hearing is going to take place later. well, obviously,  
25 it is ---

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1                   COMMISSIONER BERNTHAL: Why is it an injustice  
2 to anybody if they are going to take weeks and if the rules  
3 of the game change in the space of ten days?

4                   COMMISSIONER GILINSKY: well, it is up to you.  
5 You have got to figure out how you want to sort this out. I  
6 think as you said the better part of valor here is to -- I  
7 thought it was you who said that -- was to reconsider at  
8 this point and go back to where we were.

9                   COMMISSIONER BERNTHAL: I am trying to remove  
10 the nettlesome issue on which we disagree of a stay which  
11 it appears to me is unnecessary.

12                   COMMISSIONER ASSELSTINE: I don't think you  
13 can remove it.

14                   COMMISSIONER GILINSKY: well, look, you were  
15 arguing that it was necessary.

16                   COMMISSIONER BERNTHAL: It was when we were on  
17 that fast track timetable, but it isn't now if they are not  
18 going to start in weeks.

19                   COMMISSIONER GILINSKY: but the argument you  
20 were making was that -- well, I suppose it was related to  
21 the time to a certain extent.

22                   COMMISSIONER BERNTHAL: It certainly was.

23                   COMMISSIONER GILINSKY: But you were also  
24 saying, if I recall, that the basis of the thing just  
25 wasn't right.

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1                   COMMISSIONER BERNTHAL: You are absolutely  
2 right, but I also felt we shouldn't take extraordinary  
3 action unless there was some consensus here, and a stay is  
4 a kind of extraordinary action that I see as being  
5 unnecessary at this point.

6                   COMMISSIONER GILINSKY: well, I hope we get a  
7 consensus because we conducted an experiment, we have now  
8 got the result and that ought to resolve whatever doubts  
9 there were and we can now do something different.

10                  MR. MALSCHE: Let me just say something. I  
11 think we should understand that when we asked the parties  
12 to negotiate with the Board and propose a schedule, what we  
13 will get back from them is a schedule on the Licensing  
14 Board's assumptions as to a substantive basis.

15                  If the Commission then decides to change the  
16 ground rules, then you will have to go back and revisit the  
17 schedule question.

18                  MR. PLAIN: well, you can do that in two  
19 orders though. There is no need to do it in one order. You  
20 can simultaneously issue another order in which you  
21 indicate that the Commission is going to meet on the  
22 subject of the subject matter, if you will, of the renewed  
23 hearing.

24                  COMMISSIONER ASSELSTINE: It just doesn't seem  
25 to make any sense to me to say to the parties and the Board

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1 on the one hand go ahead and establish a schedule on the  
2 assumption that this going to go ahead just the way it is  
3 now, but on the other hand say and by the way, the  
4 Commission isn't at all sure that that is the way it is  
5 going to go and we have decided to take this issue up  
6 ourselves. It is inconsistent.

7 COMMISSIONER GILINSKY: I can't remember our  
8 ever doing that.

9 COMMISSIONER BERNTHAL: As a practical matter,  
10 it isn't going to make any difference if they don't start  
11 for weeks and we do our work expeditiously. I am not  
12 unwilling to consider that the alternative, which also  
13 doesn't matter except for the extraordinary action and the  
14 disagreement among the members of the Commission, that you  
15 issue a stay which is meaningless and you lift the stay  
16 knowing that it is going to be weeks anyway before they  
17 start. well, okay.

18 COMMISSIONER GILINSKY: No, no. I mean the  
19 point here is that the Commission in looking into the basis  
20 for the hearing would be saying that it has some doubts  
21 about the basis for the hearing and therefore there is no  
22 point in having that hearing go forward until this  
23 Commission resolves its doubts and at that point they will  
24 issue a schedule.

25 COMMISSIONER BERNTHAL: If we issued a stay,



1 what would be the effect on this schedule business in the  
2 courts? It is mooted and nothing happens?

3 COMMISSIONER ASSELSTINE: That is right.

4 CHAIRMAN PALLADINO: well, it is not clear to  
5 me though that the basis for the hearing was necessarily --  
6 they postulated to make certain determinations and then  
7 they will go ahead in certain ways, but they didn't say ---

8 COMMISSIONER GILINSKY: You don't have to say  
9 now that it was wrong, but if you have sufficient doubts  
10 about it that you want to take a look at it, then it seems  
11 to me it makes sense to hold things up and say we are going  
12 to take a look at it and decide what we think this hearing  
13 ought to be about.

14 CHAIRMAN PALLADINO: I can see us doing that  
15 in a lot of hearings. .

16 COMMISSIONER GILINSKY: well, listen, I told  
17 you the story about taking the wig.

18 CHAIRMAN PALLADINO: Tell us another time.

19 COMMISSIONER GILINSKY: I will tell you  
20 another time, but you have gone forward, the courts have  
21 stopped you and it seems to me you ought to rethink it. It  
22 is not a matter of ---

23 CHAIRMAN PALLADINO: we have got this on tight  
24 schedule.

25 COMMISSIONER GILINSKY: well, I will tell you,

1 if you want to push your luck, that is okay with me.

2 COMMISSIONER ASSELSTINE: That is the tip of  
3 the iceberg, Joe.

4 COMMISSIONER GILINSKY: what I am saying is  
5 you might have been right and the courts might have found  
6 differently, but they didn't.

7 COMMISSIONER ASSELSTINE: The substantive  
8 issue though, and the one that I agree I think, and there  
9 may be more agreement here than we realize, is that we may  
10 very well end up in a situation where we further delay the  
11 licensee as we go down the line here and all this stuff  
12 gets done if we do nothing right now on the policy issue.  
13 They may end up back in court and may lose. I think that is  
14 what General Counsel has told us.

15 In fact, they were I think originally arguing  
16 the the high odds that that would be lost in court. Since  
17 the timing issue is no longer before us, and I don't  
18 particularly care about these arguments of sequence, the  
19 thing I agree on is that we ought to reconsider whether to  
20 take up the policy issue itself. There is now time.

21 COMMISSIONER ASSELSTINE: I would be in favor  
22 of reconsidering our earlier action and in essence  
23 reversing our earlier nonaction and now say that the  
24 Commission should step in, stay any further hearings by the  
25 Licensing Board and take the issue up directly.

1 COMMISSIONER GILINSKY: Do you still have that  
2 order, Sam?

3 (Laughter.)

4 CHAIRMAN PALLADINO: I hope somebody kept it.

5 COMMISSIONER GILINSKY: See if you can find  
6 it.

7 (Laughter.)

8 CHAIRMAN PALLADINO: Well, let's see, with  
9 regard to this order, Jim ---

10 COMMISSIONER ASSELSTINE: I would abstain on  
11 this order.

12 CHAIRMAN PALLADINO: But you are going to  
13 append remarks.

14 COMMISSIONER ASSELSTINE: That is right. But I  
15 think now is the time. If we are going to step in and deal  
16 with this, now is the time rather than issuing this order.  
17 We should do it right now.

18 COMMISSIONER GILINSKY: It seems to me from  
19 your point of view that it is perfectly reasonable to say  
20 that in view of the court's actions you are faced with a  
21 different situation.

22 COMMISSIONER ASSELSTINE: That is right. Your  
23 arguments about delay I don't think exist any more.

24 COMMISSIONER BERNTHAL: That I agree with. I  
25 am trying to see if we can seek a compromise here on

1 procedure and I would have hoped we could.

2 MR. PLAINE: I am still bothered by the fact,  
3 Mr. Chairman, that all you do is confuse the court now. The  
4 Court has told you plainly that the only issue he sees  
5 before him is this scheduling issue. That is the  
6 unconstitutional denial of right that the other District  
7 Court judge found. He says that is the only thing that is  
8 troubling me in this case, and I can dispose of this court  
9 limitation by dealing with that if you will give me a  
10 reasonable schedule.

11 That other matter of reconstituting the type  
12 of hearing you want is something that you can take up just  
13 as soon as you know that you are not faced with a  
14 limitation on ever going forward with this.

15 COMMISSIONER GILINSKY: Herzl, you are  
16 talking tactics and we are talking strategy.

17 COMMISSIONER ASSELSTINE: That is right.

18 (Laughter.)

19 MR. PLAINE: Well, if you can explain the  
20 difference between tactics and strategy, I will be willing  
21 to accept it then.

22 CHAIRMAN PALLADINO: Well, let's see, we have  
23 three votes to go ahead with the order. I am not trying  
24 to ---

25 COMMISSIONER ROBERTS: You are going to have a

1 long night when you say your fellow Commissioners'  
2 comments.

3 COMMISSIONER BERNTHAL: well, Joe, I mean I am  
4 willing to go ahead with the order, but I am concerned  
5 about the issue that counsel has raised here, that if you  
6 are going to end up with drawing the other issue into what  
7 is this procedural matter, then ---

8 COMMISSIONER ASSELSTINE: And if you go ahead  
9 on this course, what you will in likelihood do is delay the  
10 start of the hearing now for probably at least a couple of  
11 weeks to work out a more reasonable schedule only to get to  
12 the end of the line where all of the sudden you find that  
13 you have serious substantive problems.

14 The same kind of substantive and fairness  
15 problems that OGC discussed before at our earlier meeting  
16 are still going to be there when this Licensing Board  
17 hearing gets done.

18 COMMISSIONER BERNTHAL: I don't disagree with  
19 any of the substantive part, and I agree that you may end  
20 up in court and lose on the substantive issue. But, for  
21 example, what is wrong with the idea here of, as Herzog has  
22 suggested, issuing two orders? I mean we issue this one and  
23 agree to meet and consider the substantive issue and then  
24 we finish that and we issue another order.

25 COMMISSIONER GILINSKY: Because for the reason

1 Marty pointed out that if in fact you make any changes in  
2 that hearing, you are going to have to redo the schedule,  
3 or you may have to redo the schedule.

4 COMMISSIONER ASSELSTINE: That is right.

5 CHAIRMAN PALLADINO: I thought our proposal  
6 was that you would take it out of the hearing board's hands  
7 and you would settle the substantive issue by the  
8 Commission. I thought that is what you were proposing so  
9 there would be no hearing.

10 COMMISSIONER ASSELSTINE: well, it depends  
11 upon how the Commission comes out on the substantive issue.

12 CHAIRMAN PALLADINO: Refresh my memory. wasn't  
13 that the essence of the order or whatever ---

14 COMMISSIONER GILINSKY: It was actually Fred  
15 who was saying that we ought to rule from the bench, so to  
16 speak.

17 COMMISSIONER BERNTHAL: On the policy matter  
18 only.

19 COMMISSIONER GILINSKY: We could dispose of it  
20 right here and not bother with having a hearing.

21 CHAIRMAN PALLADINO: I thought that was where  
22 we were coming out last week.

23 COMMISSIONER ASSELSTINE: No. well, it was for  
24 a hearing before the Commission on the policy issue. Now  
25 Marty did point out that if the policy issue is resolved

1 one way, then that essentially means no further hearing. If  
2 the policy issue is that general design criteria apply to  
3 low-power licenses as well as full-power licenses, then for  
4 all practical purposes there is probably no hearing at all.

5 COMMISSIONER GILINSKY: Sorry. I meant no  
6 hearing before the Commission on the question.

7 COMMISSIONER BERNTHAL: Yes, that right. I  
8 wanted to make the record clear on that.

9 MR. PLAINE: I still don't see why you can't  
10 do it in two pieces so as not to confuse the court. Why  
11 confuse the court with your internal problems.

12 COMMISSIONER ROBERTS: Are you saying that the  
13 dissenting remarks would confuse the court?

14 MR. PLAINE: It is conceivable. He will wonder  
15 well, what is up that I don't understand?

16 (Laughter.)

17 COMMISSIONER ASSELSTINE: He may get  
18 interested.

19 MR. PLAINE: what he has done is he has  
20 analyzed what the arguments are and he has looked at what  
21 the ---

22 COMMISSIONER GILINSKY: But you are focused on  
23 winning a narrow point.

24 MR. PLAINE: I am not talking about winning,  
25 Mr. Chairman, I mean Commissioner.

1 (Laughter.)

2 I just promoted you inadvertently.

3 (Laughter.)

4 I am talking about not confusing issues that  
5 are not really being considered by the court. The judge  
6 wants to dispose of this ---

7 COMMISSIONER ROBERTS: I think they understand  
8 exactly what you are saying.

9 COMMISSIONER ASSELSTINE: we understand,  
10 Herzel. Tom is right:

11 CHAIRMAN PALLADINO: But one thing the court  
12 has got to understand ---

13 COMMISSIONER ROBERTS: I am sympathetic to  
14 your position now.

15 CHAIRMAN PALLADINO: One thing the court has  
16 got to understand is this group is like a court and we have  
17 dissenting opinions. Now if there is a dissenting opinion,  
18 then that sort of requires an opinion from the majority.  
19 That is why I said well, maybe I have to append something.

20 COMMISSIONER GILINSKY: At that point a  
21 vicious circle becomes a descending spiral.

22 COMMISSIONER ASSELSTINE: That is right.

23 (Laughter.)

24 CHAIRMAN PALLADINO: But that court has to  
25 understand that there is a majority that has voted and then

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1 somebody disagrees with them and that doesn't make for  
2 confusion.

3 MR. PLAINE: Well, you lose time though  
4 because this is something that ought to be at least read by  
5 the parties.

6 CHAIRMAN PALLADINO: Well, let me ask, if  
7 there is dissenting opinion, can the order go forward  
8 without an offsetting opinion by ---

9 COMMISSIONER ROBERTS: Well, I don't think you  
10 would want that.

11 COMMISSIONER GILINSKY: well, the order is the  
12 opinion of the Commission.

13 COMMISSIONER ASSELSTINE: That is right.

14 COMMISSIONER ROBERTS: Yes, but you are going  
15 to raise another issue other than the narrow issue.

16 COMMISSIONER ASSELSTINE: That is right.

17 COMMISSIONER GILINSKY: Oh, sure, you can say  
18 anything you want in there.

19 COMMISSIONER ASSELSTINE: But there is an easy  
20 way to solve that problem, and that is what you can do is  
21 just read the order to the parties tonight on the phone  
22 and say that the order will issue in the morning and have  
23 all the opinions with the order issued in the morning.

24 CHAIRMAN PALLADINO: Another way is to issue  
25 it tonight and reissue the dissenting and other opinions

1 tomorrow.

2 COMMISSIONER ASSELSTINE: I want the opinion  
3 attached to the order.

4 COMMISSIONER BERNTHAL: Gentlemen, I must say  
5 that I think, and let me say this for the record since we  
6 will probably have a demand for a closed transcript again,  
7 I think we have got our heels dug in again and we are  
8 arguing matters that relate more to where we wanted to be  
9 and principles that are too deeply entrenched rather than  
10 the practical solutions here.

11 COMMISSIONER ASSELSTINE: I guess I disagree.  
12 I think the fundamental question still is whether the  
13 Commission is willing to step into this proceeding and  
14 address the significant issue.

15 COMMISSIONER BERNTHAL: And I agree with that,  
16 but the question is now?

17 COMMISSIONER ASSELSTINE: There is only one  
18 way to do it.

19 CHAIRMAN PALLADINO: Now wait a minute. Three  
20 of us didn't agree last week. Now everybody has a right to  
21 change their minds. The process does allow for review at  
22 the end and I don't know whether it is necessarily wrong.

23 COMMISSIONER BERNTHAL: Yes, but that concerns  
24 me. The review at the end, we have had counsel's opinion on  
25 that.

1 CHAIRMAN PALLADINO: Well, but then you might  
2 have the benefit of all the input from the parties and from  
3 the Board.

4 COMMISSIONER ASSELSTINE: But, Joe, you have  
5 heard from the General Counsel's office that given the  
6 totality of circumstances surrounding this case now, they  
7 don't believe it is likely that that final decision is  
8 going to be able to survive judicial review when you get  
9 there.

10 COMMISSIONER GILINSKY: I don't know how much  
11 longer we can protect you, Joe.

12 (Laughter.)

13 COMMISSIONER ASSELSTINE: That is right.

14 CHAIRMAN PALLADINO: I didn't think you were  
15 trying to protect me. I don't need any protection. I didn't  
16 generate the order of the hearing board.

17 (Laughter.)

18 COMMISSIONER ASSELSTINE: Well, let's not  
19 discuss that any further.

20 COMMISSIONER BERNTHAL: It is a good thing it  
21 is only the words that appear in the transcript.

22 CHAIRMAN PALLADINO: We have a majority that  
23 says to go out with this order and we have the indication  
24 that we are going to get at least one dissent and possibly  
25 a joint dissent by two people. I guess if we go that way I

1 would want to review that and see whether or not I want to  
2 add something.

3 COMMISSIONER GILINSKY: I think it is  
4 essential that the order not go out without those  
5 additional comments. That would be utterly and totally  
6 unprecedented.

7 CHAIRMAN PALLADINO: Oh, I thought we had  
8 done things before ---

9 COMMISSIONER GILINSKY: Not without the  
10 agreement of the individuals.

11 MR. PLAINE: What about Commissioner  
12 Asselstine's suggestion that we read the order itself to  
13 the parties and then you can take your time in getting your  
14 views out. At least we would get it started I would hope.

15 COMMISSIONER BERNTHAL: Let me try once more  
16 to urge though that we do by whatever mechanism consider,  
17 and I guess, Joe, this is something I would like you to  
18 consider, that we ought to think about addressing the  
19 policy question whatever the procedural mechanism might be.

20 CHAIRMAN PALLADINO: All right. Let me ask Jim  
21 a question.

22 If we agree to readdress the policy question,  
23 would you still put your dissenting remarks and we have  
24 picked a time. I don't know how soon we can be ready. I am  
25 not saying how I am going to vote, but apparently ---

1                   COMMISSIONER ASSELSTINE: The problem I have  
2 is then what happens to the hearing? I mean if you are  
3 really saying to the Board go ahead and work something out  
4 and go ahead with the hearing, but at the same time you are  
5 saying but the Commission itself is prepared to take up  
6 this policy question and decide it before that hearing goes  
7 ahead, it still doesn't make much sense to me, but that is  
8 what I want.

9                   what I would like to see if the Commission  
10 address the policy issue before the Licensing Board is  
11 allowed to go ahead with the hearing on the basis that  
12 they are now proceeding.

13                   COMMISSIONER GILINSKY: See, you are saying in  
14 this order that if they don't come to an agreement, you are  
15 going to set a schedule for them and that is it.

16                   COMMISSIONER ASSELSTINE: And it goes ahead on  
17 the same basis.

18                   COMMISSIONER GILINSKY: Never mind that it is  
19 going to be a longer schedule than before, but you are  
20 putting yourself squarely behind the Board's order.

21                   COMMISSIONER ASSELSTINE: That is right.

22                   MR. PLAINE: But if in the meantime you have  
23 changed the facts by indicating that you want what is  
24 really a longer hearing, well you do that. There is nothing  
25 to prevent you from doing that.

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1                   COMMISSIONER GILINSKY: Let's be frank here.  
2 If you are really thinking over whether this is the right  
3 course for the hearing, then the natural thing is to decide  
4 on the hearing after you have rethought that course.

5                   Now what is at stake here is whether one is  
6 seen as having changed positions or appearing weak perhaps  
7 or caving into the court or God knows what else. I think  
8 one ought to put these things out of one's mind. In fact, I  
9 think had you known that the court was going to strike this  
10 thing down, I think you would have acted differently.

11                  COMMISSIONER ROBERTS: No, not necessarily.

12                  CHAIRMAN PALLADINO: As a matter of fact, I  
13 was surprised that the court never went into irreparable  
14 harm. There is one party getting harmed and another one I  
15 am not sure what the harm is.

16                  COMMISSIONER GILINSKY: well, let's see, would  
17 you have gone forward with your previous decision if you  
18 had known the court would have issued a restraining order?  
19 I don't think so.

20                  CHAIRMAN PALLADINO: That sort of hints at a  
21 hypothetical question.

22                  COMMISSIONER GILINSKY: I think it was on the  
23 assumption that it would pass mustard. Now you might have  
24 been right, but as it turned out it wasn't right.

25                  COMMISSIONER BERNTHAL: But if you stand back

1 and look at this whole thing dispassionately, we have got a  
2 hearing process that is ongoing and there is the matter of  
3 the timetable and what-not. The Commission is certainly  
4 free at any point, regardless of what the Board is doing in  
5 its hearing process and the court has mandated about  
6 putting out schedules, we are free to make a decision and  
7 hold your own separate little conclave on a policy  
8 question.

9 That is all I am suggesting, that we proceed  
10 as though we see there is a policy issue here and let's  
11 take it up and let the other stuff proceed.

12 MR. MALSCH: Let me just make a possible  
13 suggestion. Suppose we added into this order a statement to  
14 the effect, if the Commission agreed, that the Commission  
15 has decided that it should on its own initiative and on an  
16 expected basis take up the following questions and then  
17 list the ones we that were agreed upon in the previous  
18 order. Then invite the parties as a part of their  
19 scheduling discussions to include agreement or not on  
20 whether the hearing should or should not go forward pending  
21 completion of the Commission's guidance.

22 COMMISSIONER ROBERTS: No.

23 COMMISSIONER GILINSKY: You are committing  
24 regulatory suicide.

25 (Laughter.)

1                   COMMISSIONER ASSELSTINE: You really don't  
2 realize what you are doing to yourselves on this. You are  
3 not making the situation any better. You really aren't.

4                   CHAIRMAN PALLADINO: Well, but here a hearing  
5 board sets its basis and says you have got to show whether  
6 certain things are right or wrong or whether they are true  
7 or not true. Here we think we ought to do it on an  
8 expedited basis and here is our schedule, and we say well,  
9 we let hearing boards do this all the time and let them do  
10 it. Now the court says the Board went too fast.

11                   COMMISSIONER ASSELSTINE: All right. So in  
12 essence what you are saying is you are satisfied with the  
13 course the Board is going on and the only concern you have  
14 is about the timetable. If that is the way you feel, then  
15 by all means you should go with this order. That is what  
16 you should do.

17                   You should only set aside this order and do  
18 something else if you feel that now is the time for the  
19 Commission to get involved on that policy issue. If you  
20 don't feel that way, you should go with this order. No  
21 question about it.

22                   COMMISSIONER BERNTHAL: well, in any case,  
23 regardless of what happens here and whose views are  
24 appended and what-not, we are free to take up a policy  
25 issue at any time and maybe that is the thing we ought to

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1 think about.

2 COMMISSIONER ASSELSTINE: Sure.

3 MR. PLAINE: Mr. Chairman, have we agreed that  
4 this will be the Commission's order?

5 CHAIRMAN PALLADINO: What I understand this to  
6 be, and maybe we need to confirm it, that we will wait for  
7 the appending remarks before we issue the order, but we  
8 will read it to the parties tonight.

9 COMMISSIONER GILINSKY: I think you ought to  
10 tell the parties that additional remarks will be available  
11 in a written version.

12 COMMISSIONER ASSELSTINE: That is right.

13 COMMISSIONER GILINSKY: But otherwise that is  
14 fine.

15 MR. FOUCHARD: well, indeed, but once Herzl  
16 reads the order to the parties, it becomes a public matter.

17 I guess what I would propose to do is not  
18 volunteer this information, but after you have read it to  
19 the parties, I expect I am liable to get some calls this  
20 evening. My phone rings after hours, too. Acknowledge that  
21 this is what the Commission plans to do and that an order  
22 will issue tomorrow and there will be some views of  
23 individual Commissioners.

24 COMMISSIONER BERNTHAL: That sounds good to  
25 me.

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CHAIRMAN PALLADINO: The closed meeting is  
adjourned.

(Whereupon, at 4:40 p.m., the closed meeting  
adjourned.)

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CERTIFICATE OF PROCEEDINGS

This is to certify that the attached closed proceedings before the NRC Commission in the matter of DISCUSSION OF SHOREHAM ORDER taken on Thursday, April 26, 1984 in room 1130 at 1717 H Street, N. W., Washington, D. C. were held as herein appears and that this is the original transcript thereof for the files of the Commission.

Mary C. Simons  
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Official Reporter - Typed

*Mary C. Simons*  
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Official Reporter - Signature