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UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

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DISCUSSION OF GRAND GULF ORDER

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PUBLIC MEETING

- - -

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

Friday, June 1, 1984

The Commission met, pursuant to recess, at 2:22 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
- J. LIEBERMAN
- G. CUNNINGHAM
- W. DIRCKS
- M. MALSCH
- H. PLAINE

AUDIENCE SPEAKER:

T. NOVAK

VIA TELEPHONE CONFERENCE CALL:

- H. DENTON
- J. O'REILLY

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P R O C E E D I N G S

1  
2 CHAIRMAN PALLADINO: Good afternoon, ladies and  
3 gentlemen.

4 The subject of this afternoon's meeting is the Grand  
5 Gulf plant which is currently operating under NRC license  
6 condition that restricts the operation to low power levels.

7 Recently, the staff issued an order which requires  
8 the Grand Gulf licensee to inspect immediately one of its  
9 TDI diesel generators that is the source of on-site emergency  
10 AC power.

11 That order also permits continued low power  
12 operating during the inspection work of the diesel.

13 On May 24, 1984, the Commission was briefed by the  
14 staff on these activities. The Commission took no action at  
15 that time.

16 On May 30, 1984 the General Counsel's Office advised  
17 the Commission in a memorandum of its views that the staff's  
18 order stood on weak ground.

19 On May 31, 1984 Commissioner Gilinsky requested that  
20 the Commission immediately rescind the staff order. He also  
21 proposed that the plant be shut down.

22 In today's meeting, I suggest, the Commission first  
23 address the questions about the staff's order. Thereafter, we  
24 can address the proposal for shut-down of the plant. If this  
25 approach to conducting today's meeting is acceptable to the

1 Commission, then I further suggest that OGC summarize its  
2 position to begin today's discussion, and that we then should  
3 hear from OELD regarding the OGC position.

4 Do other Commissioners have opening remarks?

5 COMMISSIONER ASSELSTINE: No.

6 COMMISSIONER BERNTHAL: Well, I would just comment  
7 that it was my understanding from yesterday's scheduling  
8 meeting, Mr. Chairman, that today's meeting was going to be  
9 confined to a discussion of the General Counsel's memorandum  
10 of May 30. Meaning that my understanding was that we were  
11 going to discuss the procedural implications of that memo  
12 and what options might be available to us.

13 CHAIRMAN PALLADINO: I do remember a discussion in  
14 which we agreed we were not going to take up the question of  
15 the enforcement package.

16 COMMISSIONER BERNTHAL: That's right.

17 CHAIRMAN PALLADINO: It was independent of this  
18 question. I don't remember that, although it may have been  
19 said, and I haven't had a chance to look at any transcript.

20 COMMISSIONER BERNTHAL: I believe that it was  
21 pretty clear.

22 COMMISSIONER ROBERTS: Crystal clear.

23 CHAIRMAN PALLADINO: Well, I have to be advised by  
24 what the Commission --

25 COMMISSIONER GILINSKY: I guess I missed the



1 significance of this back and forth.

2           COMMISSIONER BERNTHAL: I think you weren't here  
3 during that part of the meeting yesterday. And the point was  
4 that the idea of the meeting originally was -- and I think  
5 should remain today -- a discussion of the General Counsel's  
6 memorandum.

7           Now, I know that you have circulated a memo as  
8 of yesterday, Victor, that raises much broader issues, and  
9 I am prepared to discuss those in a timely fashion. But I  
10 don't think that they were on the agenda today initially and  
11 I don't intend to take up the broader issues today.

12           COMMISSIONER GILINSKY: Well, you can, I think --  
13 depending on how you come out on the General Counsel's  
14 memorandum -- but if you conclude that you agree with it, then  
15 it seems to me you can't escape dealing with the implications  
16 of that which are that the order is not a valid order. In  
17 which case the permission which has been granted has to be  
18 rescinded, and so on.

19           I don't think you can back away from that. If you  
20 are talking about other aspects or other problems at the  
21 plant, that's another matter.

22           COMMISSIONER BERNTHAL: Well, I agree. I mean, we  
23 will have to see where the discussion of the General Counsel's  
24 memorandum leads us. But that was the agreement that I think  
25 we had yesterday. To be sure, you weren't here during that

1 part of the scheduling meeting.

2 COMMISSIONER GILINSKY: You know, it would be odd --  
3 well, let's just see where it goes. I mean, I don't expect  
4 to be restrained by any artificial --

5 CHAIRMAN PALLADINO: Any other comments?

6 COMMISSIONER ROBERTS: I just remind you what I  
7 told you, I am leaving at 3:30.

8 CHAIRMAN PALLADINO: Yes. I would like to do it  
9 expeditiously --

10 COMMISSIONER BERNTHAL: We've got one hour.

11 CHAIRMAN PALLADINO: -- if it's possible.

12 I should also note that I believe we have Harold  
13 Denton and Jim O'Reilly from Region II on the phone. Can we  
14 have confirmation that you are there?

15 MR. CHILK: Yes. Why don't you tal -- Harold?

16 MR. DENTON: This is Harold, I am here.

17 MR. CHILK: Okay.

18 MR. O'Reilly: This is O'Reilly, and I am here.

19 CHAIRMAN PALLADINO: Okay, thank you. We may have  
20 questions for you. They are both out of the area.

21 Okay, I wonder if we could turn the meeting over to  
22 OGC to discuss --

23 COMMISSIONER GILINSKY: (Inaudible)

24 CHAIRMAN PALLADINO: -- his position.

25 MR. PLAINE: I am going to ask my deputh, Marty

1 Malsch, to lead the discussion.

2 MR. MALSCH: Let me be as brief as I can. We  
3 entered into this complicated matter at the request of  
4 Commissioner Bernthal, who asked us to look over the record  
5 to see whether we saw any legal problems with the staff's  
6 action, issuing the immediately effective order in the Grand  
7 Gulf case.

8 Basically, I think, there are two legal principles  
9 involved, and then there is a question of application of  
10 those legal principles to the Grand Gulf case.

11 The two legal principles are, first, that the  
12 Commission does have authority when the public health and  
13 safety demands it, to take immediately effective action  
14 amending the license. That authority, I think, is fairly  
15 inferred from the Atomic Energy Act and the broad grant  
16 of authority to the Commission in the Atomic Energy Act to  
17 protect and promote the public health and safety.

18 It is also recognized in the legislative history  
19 of the Sholly Amendment.

20 But as a correlary to that, our memo says that  
21 the Commission does not have any authority to amend the  
22 license prior to offering or completing any required  
23 proceeding when there is no public health and safety or  
24 common defense and security basis, or it has no authority  
25 to amend the license on pure public interest grounds.

1           Second, the other legal principle is that -- is  
 2    a principle which finds application in a kind of narrow  
 3    situation where public health and safety would require you to  
 4    suggest that action be taken to amend the license when that  
 5    amendment puts the licensee in conflict or in violation of  
 6    another provision of the license.

7           That is the situation here where the staff action  
 8    directing the Grand Gulf licensee to disassemble and inspect  
 9    one of the diesel generators in turn ran into -- caused a  
 10   problem of compliance with another technical specification.  
 11   And the issue there is whether the Commission's enforcement  
 12   flexibility is so narrow that in that situation its only  
 13   option is either to do nothing or to take action which  
 14   requires that the plant be shut down.

15           Our memo discusses the various approaches to this  
 16   kind of peculiar situation and concludes that in an appropriate  
 17   case a reasonable argument can be made for looking at the  
 18   situation as a whole and not restricting the Commission's  
 19   flexibility to doing all or nothing.

20           The difficulty we have with Grand Gulf is  
 21   application of those principles to the facts in Grand Gulf.  
 22   The staff appears to have told the Commission at the  
 23   Commission meeting that the plant after issuance of the order  
 24   was as safe as the plant before issuance of the order.

25           If that is the case, then the effect of the order



1 on public health and safety at operation at five-percent  
2 power was essentially awash, that there was no effect. If  
3 there is no effect, then there is no health and safety grounds  
4 for the enforcement order, at least not in an immediately  
5 effective enforcement order prior to affording the right to  
6 a hearing, and therefore the necessary premise for taking  
7 immediate action is missing.

8 That was the basic problem we have with Grand  
9 Gulf -- not so much the legal principles involved but whether  
10 the principles properly applied to the Grand Gulf case.

11 That's, I think, essentially our memo.

12 CHAIRMAN PALLADINO: Okay, should we hear from  
13 OELD before we start to raise questions? I suggest we do.

14 MR. CUNNINGHAM: Let me start by acknowledging  
15 that this is a close legal question, and very respectable  
16 legal arguments can be made in support of any of the possible  
17 outcomes here.

18 Nonetheless, we do have several points of dis-  
19 agreement with the General Counsel's analysis.

20 I would like to start with one point which only came  
21 to our attention during lunch today, as we tried to prepare  
22 for this meeting. The OGC memorandum refers to a 1980  
23 memorandum prepared by their office which rehearsed many of  
24 the same issues present here, including the question whether  
25 public interest can be a factor, and specifically the question

1 of whether you can issue an immediately effective order which  
2 has both elements moving in the direction of enhanced safety  
3 or more stringency, and elements of relaxation.

4 The General Counsel's memorandum in which it was  
5 specifically noted that ELD did not concur, concluded that  
6 there was significant litigative risk to such an approach.  
7 That was the approach called the "Rules Approach" or "Option  
8 2" in the paper.

9 The Commission met and discussed that paper with  
10 both the General Counsel and the Executive Legal Director, and  
11 voted to reject the General Counsel's advice at that time,  
12 and to direct the staff to incorporate the so-called "Rules  
13 Approach." It was called a rules approach because it said  
14 that 2.204 of the Commission's regulations means exactly what  
15 it says when it says that you may issue an immediately  
16 effective amendment when the public health, safety, or  
17 interest require it.

18 That phrase, "Public health, safety, or interest"  
19 is also the statutory phrase of interest here in Section 9(b)  
20 of the Administrative Procedure Act.

21 So, the approach adopted in this order which did  
22 emphasize public interest, we believe, was consistent with  
23 prior Commission direction. And I think that is the principal  
24 point of disagreement we have with the Office of General  
25 Counsel, as to what extent can you consider the public interest.

1           We agree with the proposition stated in their  
2 paper that you can never simply relax a safety requirement  
3 in the name of some vague public interest reason. But we  
4 believe that you can consider the order as a whole and  
5 consider that there is a public interest in moving in the  
6 direction of safety, that is, increased assurance of the  
7 reliability of the generators and couple that with both a  
8 relaxation of the LCOs and compensating measures so that there  
9 is no actual diminution of the safety protection available  
10 to the public.

11           And I might point out that the staff mentioned --  
12 as I think Marty just pointed out -- that it had some  
13 disagreement with the reference to relaxation in that order.  
14 Darrell Eisenhut specifically refused to concede at the  
15 last meeting that the order was in fact a relaxation. He  
16 said that when you look at the change in the LCO plus the  
17 new requirements that were imposed, the net result was a  
18 level of safety at least as great as was previously in effect.

19           The General Counsel's memorandum, I think, also  
20 implies that we never issue immediately effective orders on  
21 the basis of public interest, but rather only on the grounds  
22 of some imminent health and safety problems. I think the  
23 Commission experience is to the contrary.

24           In the West Valley case, for example, public  
25 interest grounds were invoked to require resolution of long-

1 term safety issues sooner rather than later. Similarly, in  
2 construction permit cases, Midland and Zimmer being the  
3 most notable, it was generally thought that there was no  
4 immediate health and safety significance because you are  
5 only talking about construction, not operation. But immediately  
6 effective orders affecting construction were issued on the  
7 basis of public health and safety.

8 That was also the case in most of the orders  
9 implementing NUREG-07-37, the TMI orders.

10 So, I think there is substantial precedent for  
11 that type of action.

12 The General Counsel's memorandum also discusses  
13 Sholly and implies that the only time when you can avoid the  
14 requirements of the Sholly Amendment to issue an immediately  
15 effective amendment is when there is an imminent threat to  
16 health and safety. I am not sure that that proposition has  
17 been extensively debated, but I would note that it is a  
18 routine practice to issue immediately effective orders that  
19 don't have imminent health and safety factors -- an example  
20 are the numerous orders that have been issued requiring  
21 management audits, Nine Mile Point, Midland, and other plants.

22 COMMISSIONER ASSELSTINE: But are you aware of any  
23 instances in which, since the Sholly Amendment was passed,  
24 orders have been issued that amend licenses?

25 MR. CUNNINGHAM: That's my point, that many of the



1 orders that we have issued do amend licenses. Is that  
2 right, Jim?

3 The management audits may not have been amendments.

4 COMMISSIONER ASSELSTINE: I don't think they were.

5 MR. LIEBERMAN: Well, the authority that we cite  
6 for orders of management orders is among others Section 103,  
7 in order to assure that if the order is violated, we will  
8 be able to impose sanctions under Section 234 where you  
9 need to have a license amendment versus just an order issued  
10 under Section 161.

11 MR. CUNNINGHAM: I guess the final point I would  
12 make with respect to the OGC analysis is, their paper states  
13 that the Sholly emergency procedures could be invoked to  
14 dispense with notice and comment if we were to have the  
15 licensee request an amendment and try to effectuate such  
16 an amendment promptly.

17 I think the legislative history makes it clear that  
18 we could not do that. The legislative history of the  
19 emergency procedures speaks in terms of taking and operating  
20 commercial nuclear power plants off the power grid. Our  
21 regulations do have an additional shortcut procedure for  
22 exigencies, a term with which we have not had much experience  
23 and have not defined.

24 But if we were to go that route, there could be  
25 substantial difficulties with trying to implement Sholly

1 on a prompt basis. It is the view of the staff, though,  
2 with whom I have consulted, that the no significant hazards  
3 consideration finding could be made. The problem would be  
4 the procedural one of the time for notice and comment.

5 I think that's the gist of what we wanted to say  
6 in response to the General Counsel's memo. We are, of course,  
7 prepared to answer questions.

8 MR. MALSCH: Can I just offer a few comments?

9 First, I think our analysis proceeds on the basis  
10 of what the earlier OGC memo referred to as the rules  
11 approach and what our memo referred to as the view as a whole  
12 approach. So, there is no disagreement as to that. We are  
13 following the Commission guidance a number of years ago that  
14 resulted from the memo which I cited.

15 So, there is no disagreement here about what Guy  
16 referred to as use of the rules approach and what we refer  
17 to as the view as a whole approach.

18 CHAIRMAN PALLADINO: But I didn't get any sense from  
19 your memo that the 1980 document had been rejected by the  
20 Commission.

21 MR. CUNNINGHAM: Let me be careful when I characterize  
22 it as a rejection. OGC set forth three options, two of  
23 which the rules approach which the Commission adopted, and  
24 one other they characterized as having significant litigative  
25 risk, and they recommended that the solution to the problem

1 was to seek legislation.

2           The Executive Legal Director at the time at the  
3 Commission meeting argued that there was no litigative  
4 risk. The vote sheets indicate -- well, it's not clear what  
5 they indicated. Then-Chairman Hendrie had some question about  
6 whether there was litigative risk.

7           But the vote specifically in terms of rejection  
8 was to reject the suggestion of seeking legislative relief,  
9 but instead to go with the rules approach. And I think  
10 implicit in there at least is, if not rejection of the  
11 litigative risk concept, at least reflection that it was  
12 not overriding.

13           MR. MALSCH: One think I think we should point out,  
14 that the Commission in fact sought legislative relief that  
15 asked for authority from the Congress to issue orders effective  
16 immediately whenever the public health and safety, or  
17 interests so required. And that relief was not forthcoming  
18 from the Congress.

19           COMMISSIONER GILINSKY: Let me just interject  
20 here --

21           MR. CUNNINGHAM: That was the Sholly relief. But  
22 let me just point out also that we have never regarded Sholly  
23 as applying to orders but only to requested amendments. But  
24 that may be the core issue here as to whether that practice  
25 is of concern to the Commission and is appropriate.

1 MR. MALSCH: I have two other small points. One  
2 is, I think that the Commission's immediately effective  
3 orders regarding construction permits have a public health  
4 and safety basis. I do not think that they are based purely  
5 on public interest grounds. I think that there is ample  
6 public health and safety ground for issuing an immediately  
7 effective order against a construction permittee in situations  
8 where to do otherwise would result in a situation where it  
9 would be impossible to make a proper safety finding at the  
10 operating license stage.

11 CHAIRMAN PALLADINO: But you are talking about a  
12 future potential problem, and that's what this one is.

13 MR. MALSCH: No, no, I am talking about a present  
14 safety problem.

15 CHAIRMAN PALLADINO: During the construction permit,  
16 there is no current safety problem. It's a potential safety  
17 problem when you come for an operating license.

18 MR. MALSCH: Well, I think it's enough of a current  
19 problem to warrant immediately effective action.

20 CHAIRMAN PALLADINO: Well, but the action here  
21 was that we ought to inspect that diesel because when you  
22 come up for full power, that's going to be an important  
23 issue and they ought to do it now.

24 COMMISSIONER GILINSKY: They can also continue on  
25 one leg at the same time.



1 MR. MALSCH: Well, there are two issues. The  
2 first question is -- putting aside the details -- is it or  
3 is it not the staff's position that issuance of the order in  
4 Grand Gulf was necessary to protect the public health and  
5 safety.

6 Now, our only point was that since the staff told  
7 the Commission that the safety at low power was about the  
8 same after the order as before, it follows by definition that  
9 there can't be a pure safety basis for the order.

10 CHAIRMAN PALLADINO: But just a potential one in  
11 the future.

12 MR. MALSCH: Well, that's true, except a potential  
13 one in the future. The difficulty with that as an argument  
14 is -- and I think that is in the abstract a plausible  
15 argument and in the abstract will be a basis for the  
16 Commission to issue an immediately effective order or demand  
17 for the information.

18 The difficulty I have with that is, you don't need  
19 enforcement action to get that. The Commission had already  
20 informed the licensee that it would not get a full power  
21 license without the information. There is no need to issue  
22 an enforcement order to get that information, all the staff  
23 had to do would be to sit back and let the licensee either  
24 provide the information or challenge the staff's substance  
25 of safety view that the information was needed. There is no

1 need for any enforcement action.

2           COMMISSIONER GILINSKY: Or require they disassemble  
3 the diesel. The problem is allowing them to go forward on  
4 the basis of relaxed conditions on on-site power.

5           MR. DIRCKS: But that differs from what Marty just  
6 said. He said you don't have to issue an order to require  
7 something. You just said, or require them to strip down the  
8 diesel. I mean, that's --

9           COMMISSIONER GILINSKY: Well, if you feel strongly  
10 enough about it, that's what you do. But the real point  
11 here is, the difficulty is the relaxation. And let me add  
12 here --

13           CHAIRMAN PALLADINO: Now, wait a minute, he uses  
14 the word "relaxation." The staff never admitted that there  
15 was a relaxation.

16           COMMISSIONER ASSELSTINE: Well, whether they  
17 admit it or not --

18           COMMISSIONER GILINSKY: Well, it was.

19           COMMISSIONER ASSELSTINE: Yes, as far as I am  
20 concerned, there was too.

21           (Simultaneous conversation)

22           MR. DIRCKS: Now you are trying to switch the  
23 staff's tail here. If you find there is a safety problem  
24 that is one thing. If you want to say the staff find a  
25 safety problem --

1 CHAIRMAN PALLADINO: That's another.

2 MR. DIRCKS: -- that's another. They haven't found  
3 it.

4 COMMISSIONER GILINSKY: Let me just make another  
5 point here which is that we are talking about a second order  
6 problem in the technical sense.

7 The first order problem is that these diesels  
8 don't satisfy the basic criteria of the regulations, and  
9 the plant is being allowed to go forward, never mind whether  
10 this order was issued or not, on a basis which was not  
11 permitted at Shoreham, for example.

12 MR. CUNNINGHAM: That was discussed at last  
13 week's Commission meeting, and Harold Denton pointed out that  
14 the licensee intended to run off an exemption request. And  
15 the question then was, does the admitted violation require  
16 an immediate shut-down.

17 COMMISSIONER GILINSKY: Well, I must say I didn't  
18 buy his argument at all. It's one thing to say that a  
19 failure to comply with some technicality in a minor regulation  
20 doesn't mean a plant has to shut down.

21 It's quite another thing to talk in the same vein  
22 about basic safety regulations of the Commission. And I  
23 think he was drawing improper conclusions.

24 CHAIRMAN PALLADINO: I wonder if I could pose a  
25 couple of questions.

1 COMMISSIONER GILINSKY: Sure.

2 CHAIRMAN PALLADINO: We have a circumstance now  
3 and the question I have, does continued operation of this  
4 plant at five-percent power under the conditions it is now  
5 operating with constitute an unacceptable risk. And I think  
6 I have to ask the staff that, they are the technical people.

7 COMMISSIONER GILINSKY: It is, first of all, out of  
8 conformance with the regulations.

9 CHAIRMAN PALLADINO: No, first of all --

10 COMMISSIONER GILINSKY: Now, wait a minute, Joe.  
11 That question, seems to me, would properly come up in the  
12 context of an exemption. The company is free to ask for an  
13 exemption at any time.

14 CHAIRMAN PALLADINO: Let me finish.

15 COMMISSIONER GILINSKY: And that's the kind of  
16 question you would deal with in considering an exemption.

17 CHAIRMAN PALLADINO: Well, we could have had two  
18 sets of circumstances. If it's unacceptable, then there is  
19 cause for immediate shut-down. If it's safe, then you have  
20 the question, is it in compliance with the regulations or  
21 isn't it.

22 If it's safe but not in compliance with our  
23 regulations, then there is the question, is there a need for  
24 enforcement or exemption.

25 COMMISSICNER GILINSKY: What is your standard of



1 safety? The regulations embody what the Commission thought  
2 the standard of safety was.

3 CHAIRMAN PALLADINO: No.

4 COMMISSIONER BERNTHAL: I think that you have  
5 turned it around, though, Victor, and this gets back to a  
6 fundamental philosophical question which I think we have  
7 discussed before.

8 The first question is whether public health and  
9 safety is protected. The second question, in my judgment,  
10 is whether -- I believe the words you were using the other  
11 day were that our regulations were subject to the strictest  
12 interpretation.

13 The first question, is public health and safety  
14 protected --

15 COMMISSIONER GILINSKY: And what is your stand on  
16 that?

17 COMMISSIONER BERNTHAL: And I think there was a  
18 strong argument made by the staff that public health and  
19 safety was protected in this case. That's the only point I  
20 would make.

21 CHAIRMAN PALLADINO: Yes, and that's why I started  
22 looking at the public health and safety issue.

23 COMMISSIONER GILINSKY: On the basis of what?

24 COMMISSIONER BERNTHAL: On the basis of a fairly  
25 long string of arguments, some of them technical. We can

1 have Harold comment --

2 COMMISSIONER GILINSKY: I must say, I regard that  
3 as a pretty informal way to deal with an issue of this sort.  
4 I must say that.

5 COMMISSIONER BERNTHAL: Informal or otherwise,  
6 let's hear from Harold, he is on the phone.

7 COMMISSIONER GILINSKY: The Commission has for many  
8 years required these sorts of power systems for plants at  
9 the point that they turn on, and there is a good reason for it.

10 But now, if you think that it ought not to be  
11 required in this case, that's something that ought to be  
12 considered as a special exemption.

13 CHAIRMAN PALLADINO: But the staff did make a  
14 finding, I believe, that operation under the conditions that  
15 exist --

16 COMMISSIONER GILINSKY: What you are saying is,  
17 the regulations --

18 CHAIRMAN PALLADINO: Excuse me, let me finish the  
19 sentence, I'm sorry.

20 No, I said there were parts to this question.  
21 First is the public health and safety question. If there is  
22 a public health and safety risk that is unacceptable, then  
23 you do one thing.

24 If it is safe and doesn't violate specs -- I mean  
25 the regs, that's one case. If it's safe and it's not in

1 compliance with our regs, then you decide what you want to  
2 do about it. And I was pointing out, there are things you  
3 can do, if you want to do anything about it.

4 COMMISSIONER GILINSKY: What you are saying is  
5 that the judgment of a staff person supersedes all the  
6 regulations.

7 CHAIRMAN PALLADINO: Well --

8 COMMISSIONER BERNTHAL: That is absolutely not  
9 true. The judgment of the Commission while you were not  
10 here was that public health and safety was adequately  
11 protected. That's where we start here. And then we go to  
12 "parsing" and picking at regulations -- at least that's my  
13 judgment.

14 COMMISSIONER ASSELSTINE: No, I think you are wrong,  
15 Fred. It seems to me that if you have a body of regulations  
16 and a plant for some -- and you have requirements in a  
17 license and a plant for some reason does not meet those, then  
18 our regulations and our whole regulatory process lays out  
19 an orderly way to examine the health and safety question of  
20 whether in that situation a plant ought to be permitted to  
21 continue to operate.

22 I think the key question here is the approach that  
23 the staff has used. In essence, I think, what the staff has  
24 done is said, "We can make a back-of-the-envelope estimate of  
25 what the health and safety risk is here, and because we think

1 it's low enough, we can use a very different approach,"  
2 an approach that is not -- I don't believe -- envisioned  
3 either under the Atomic Energy Act or under our regulations,  
4 to reach the conclusion that we want to reach, which is to  
5 keep this plant running.

6 I would argue that's exactly the backward approach.  
7 What you do is, you first determine whether the plant meets  
8 our regulations and the requirements in its license. If it  
9 doesn't, then you follow the orderly procedural process that  
10 the law and our regulations set forth for examining the  
11 safety sufficiency.

12 And I would submit that the result of that is a  
13 much more complete and careful, and tested analysis than  
14 the kind of analysis we heard last week which really was a  
15 back-of-the-envelope kind of estimate with a good deal of  
16 uncertainty associated with it.

17 CHAIRMAN PALLADINO: But we have a circumstance  
18 here now where the plant is operating under certain conditions,  
19 and is there a safety issue that requires us to shut down.  
20 I think the staff's position on this is very significant,  
21 they are the technical experts and I think we ought to hear  
22 from the staff. That's why I asked Harold Denton to be on  
23 the line.

24 Can you hear us, Harold?

25 MR. DENTON: Yes, I can, most of it.



1 (Laughter)

2 COMMISSIONER ROBERTS: Be selective.

3 CHAIRMAN PALLADINO: Well, the question I would  
4 like to hear your comment on is, does continued operation of  
5 this plant at five percent power under the conditions it is  
6 now operating constitute an unacceptable risk and if so, or  
7 of not, why.

8 MR. DENTON: Let me tell you how we approached  
9 that question, Mr. Chairman. I don't have anything more to  
10 say than I said the last time.

11 What went into the action that we took, we had  
12 determined that the adequacy of these diesels had not been  
13 adequately demonstrated to meet GDC-17. We have been  
14 trying to prevail upon the licensee to do the necessary  
15 inspection to determine that question one way or another.

16 In view that they had gas turbines, but the gas  
17 turbines were not qualified for an external event such as  
18 tornadoes or earthquakes, that the gas turbines should be  
19 started and operated under conditions -- off-site power,  
20 they would provide a fairly reliable source of power.

21 We think that the order, contrary to what OGC  
22 said, we think that the order goes in the same direction  
23 because it refuses to tie that the plant safety relies on  
24 the gas turbine for power upon loss of off-site power, and  
25 based upon our look at the requirements of this reactor when

1 it is operated only at low power, it is our view that the  
2 operation does not represent an undue risk to public health  
3 and safety under the conditions of the order that we issued.

4 CHAIRMAN PALLADINO: Do you consider continued  
5 operation of the plant at five-percent power under the  
6 conditions it's now operating at, are you -- well, I don't  
7 want to put words in your mouth.

8 MR. DENTON: I'm saying operation under the  
9 restrictions of the order that is in question, in our view  
10 does not represent an undue risk to public health and safety  
11 and I think it's in a safe direction compared to the --  
12 requirements on this licensee in that it adds additional  
13 requirements on the gas turbines and the one diesel that is  
14 there, and it reduces the amount of time the plant may be  
15 dependent on these gas turbines if in fact -- diesel turns  
16 out to be unsatisfactory.

17 CHAIRMAN PALLADINO: Well, let me ask you another  
18 question, Harold -- I don't know whether you will answer it  
19 or ELD, or someone else.

20 You are saying it is safe. But now I think you have  
21 said it's not in compliance with our regs. Then I ask, is  
22 there a need for enforcement or an exemption? Is there  
23 need for an enforcement and why?

24 MR. CUNNINGHAM: I think that's more properly a  
25 question I can answer.

1           COMMISSIONER GILINSKY: May I read a part of, just  
2 the beginning of the introduction of the General Design  
3 Criteria, two sentences? That might be helpful.

4           It says, "The principal design criteria establish  
5 the necessary design, fabrication, construction, testing  
6 and performance requirements for structures, systems, and  
7 components important to safety, that is, structures, systems  
8 and components that provide reasonable assurance that the  
9 facility can be operated without undue risk to the health  
10 and safety of the public."

11           And that ought to be the starting point of the  
12 Commission.

13           CHAIRMAN PALLADINO: Yes.

14           COMMISSIONER GILINSKY: Now, there may be  
15 exceptions to that, but there is a way to deal with exceptions.  
16 And it isn't just the judgment of a staff member, even if  
17 he is the Director of Nuclear Reactor Regulations.

18           MR. DIRCKS: You might hear what the Commission  
19 said back some time ago on this subject.

20           MR. CUNNINGHAM: Well, I agree with what Commissioner  
21 Gilinsky said, that the starting point is the regulations  
22 and if we find noncompliance, there is a way to deal with it.

23           Back in the UCS petition for emergency action  
24 some years ago, the Commission adopted the staff position  
25 which was that while a violation of a regulation does not

1 by itself result in a requirement that a license be suspended,  
2 if public health and safety is threatened as a result of a  
3 discovered violation, prompt remedial action must be taken.

4 The staff submits that a wide range of remedial  
5 actions are available to the Commission, including shut-down  
6 of reactors. The Commission agrees with the staff that a  
7 violation of a regulation does not of itself result in a  
8 requirement that a license be suspended.

9 The difference between this case and Shoreham is  
10 that in Shoreham there has been the license and the  
11 Commission has acknowledged that there is at least a  
12 possibility an exemption can be granted, that is, one can  
13 be requested and it will be litigated as to whether or not  
14 it will be granted.

15 In this case, the license has been issued. An  
16 exemption has been or will shortly be requested, and the  
17 question is, do you shut them down pending the processing  
18 of that exemption.

19 I submit that the Commission precedent, the recent  
20 D.C. Circuit Court that talked about a prosecutorial  
21 discretion, established quite clearly that you don't have to  
22 shut them down if you don't see a health and safety reason  
23 to do so.

24 COMMISSIONER GILINSKY: Let me ask you, there was  
25 a Board notification back in when, April, on diesels?



1 MR. CUNNINGHAM: I don't know the date. I am sure  
2 there was a -- there were several, probably.

3 COMMISSIONER GILINSKY: When the company and others  
4 were notified that the diesels could not be regarded as  
5 reliable. What action was taken at that time?

6 MR. CUNNINGHAM: I'll have to defer to the  
7 technical staff, either Harold or Tom Novak is with us, he  
8 may know.

9 COMMISSIONER GILINSKY: Was any action taken? In  
10 effect, at that point the company did not have qualified on-  
11 site power.

12 MR. NOVAK: Well, the staff took no immediate action.  
13 The Board notification --

14 COMMISSIONER GILINSKY: Did you evaluate anything,  
15 did you do anything?

16 MR. NOVAK: I think implicitly, yes. We have  
17 always --

18 COMMISSIONER GILINSKY: Implicitly?

19 MR. NOVAK: Well, in a sense that we have always  
20 recognized the questionable reliability of that diesel for  
21 a substantial period of time when the plant was shut down,  
22 we knew that. And when it did restart, consistent with that  
23 decision to permit restart, we recognized the reliability of  
24 the diesel.

25 I think this decision on the --

1           COMMISSIONER GILINSKY: It seems to me the plant  
2 should not have been allowed to restart at that point without  
3 an exemption having been granted, if it was proper to grant an  
4 exemption.

5           MR. DIRCKS: You know, at this point what we are  
6 saying is, is there a safety reason to shut down the plant.  
7 The answer is, no.

8           Is there a legal reason not to shut down the plant?  
9 The answer is probably, yes.

10           Is there a reason, if you want to find it, to shut  
11 the plant down? The answer, if you look over in OGC's  
12 court, the answer is, yes.

13           The decision is yours. I don't think you have to  
14 get the staff to come up here and go through some sort of an  
15 act of mea culpa. The point is --

16           COMMISSIONER GILINSKY: I would not dismiss the  
17 safety reason at all, let me say.

18           MR. DIRCKS: You what?

19           COMMISSIONER GILINSKY: I would not dismiss the  
20 safety reason at all.

21           MR. DIRCKS: Then, if you don't dismiss it, then  
22 you got to put your analysis, I guess, up against the staff  
23 analysis.

24           COMMISSIONER BERNTHAL: Yes, I was going to say,  
25 can you suggest to us why you think public health and safety

1 is threatened by the current operation?

2           COMMISSIONER GILINSKY: I think, as we said, the  
3 starting point out to be these regulations. We've got a  
4 plant that's got a lot of problems.

5           COMMISSIONER BERNTHAL: No, I'm taking about --  
6 let's separate legal and procedural matters here from the  
7 technical and scientific matters. Are there technical and  
8 scientific reasons to suspect public health and safety is  
9 threatened?

10           COMMISSIONER GILINSKY: I'm just not impressed  
11 with the analyses that have been presented up to now. I  
12 think they are fairly casual. Obviously, the risk at low  
13 power is less than it is at full power.

14           But you've got a plant that has had a lot of  
15 problems of all sorts, and I would just not dismiss the low  
16 power risks.

17           Now, that is a subject which is properly considered  
18 in an exemption request and they turn out an exemption is  
19 properly granted.

20           CHAIRMAN PALLADINO: We have a plant with an  
21 operating license and if we are going to shut it down, we've  
22 got to have a reason, and it's got to be public health and  
23 safety. And if we don't have a public health and safety  
24 reason for shutting it down, then we don't shut it down. And  
25 I think that's very important.

1           If we say they are out of compliance and it's due  
2 to their own fault and not ours, then we could take an  
3 enforcement action. We don't have to take an enforcement  
4 action, we have gone in a number of times without taking an  
5 enforcement action where we think the circumstances warrant.

6           COMMISSIONER GILINSKY: Well, let me say, you have  
7 emphasized the importance of dealing with this sort of a  
8 physical side of things as opposed to the paper side.

9           Why would you deal with a plant differently that  
10 has a piece of paper signed by the NRC and one that doesn't?

11          CHAIRMAN PALLADINO: For the same reason --

12          COMMISSIONER GILINSKY: Shoreham and Grand Gulf  
13 are in exactly the same situation physically.

14          CHAIRMAN PALLADINO: It's the same reason that the  
15 law permits a licensed driver to drive, and an unlicensed  
16 driver not to drive. The license is a very important step.  
17 So, you don't dismiss it.

18          COMMISSIONER GILINSKY: Well -- to Fred you would  
19 seem to be more persuaded by the physical side of things.

20          CHAIRMAN PALLADINO: Well, but I think first of all  
21 we need to know whether there is a public health and safety  
22 issue. I have not heard anything that convinces me there is.

23          Now, we seem to be in a procedural morass that  
24 we seem to confront more every day than the public health  
25 and safety issues. I'm willing to --



1           COMMISSIONER GILINSKY: Well, let me tell you,  
2 there are just a whole lot of reasons why this plant ought  
3 not be operating right now, amongst -- but to stick to this  
4 subject that we are dealing with here, it isn't just GDC-17,  
5 it's half a dozen other GDCs which reference the power supply.

6           So, you are really talking about something like  
7 six or eight general design criteria which are not satisfied.

8           COMMISSIONER BERNTHAL: Let me just comment on the  
9 argument that Harold made, and he'll have to interrupt or  
10 correct me if I am wrong here.

11           I think that my understanding when this case was  
12 presented to us was that had the staff done nothing today,  
13 that plant would still be running. And that in fact the  
14 staff issued an order that in effect was the more conservative  
15 order, telling the licensee, "You ought to go ahead and  
16 tear down the diesel today and repair it."

17           They could simply have told the licensee, "You  
18 may repair that diesel at some point, for example before you  
19 go to full power." There were other options available. But  
20 I think the argument that Harold made -- and I think  
21 justifiably -- was that he chose to take a conservative  
22 option here.

23           There was only the suspicion that there might be  
24 something wrong with that diesel generator. There was not  
25 known fact. And in fact, the licensee may find out on tearing

1 it down that there is nothing wrong with it.

2 COMMISSIONER ROBERTS: In fact, to be precise, they  
3 are tearing it down to inspect it, not necessarily to repair  
4 it. Is that not correct? You said "repair."

5 COMMISSIONER BERNTHAL: To inspect, I'm sorry.  
6 To inspect, repair was the wrong word. You are quite right.

7 COMMISSIONER GILINSKY: First of all, I would say  
8 the thing shouldn't be running because it doesn't satisfy  
9 the basic criteria unless they got an exemption.

10 Number two, if we feel they've got to tear down  
11 the diesel, they've got to tear down the diesel. But they  
12 should not have a special dispensation to run with less  
13 diesels in the meantime.

14 Any plant in the country, even if it had qualified  
15 diesels, would have had to shut down in 72 hours.

16 CHAIRMAN PALLADINO: Not necessarily.

17 COMMISSIONER GILINSKY: Oh, yes, absolutely.

18 CHAIRMAN PALLADINO: At five percent?

19 COMMISSIONER GILINSKY: Absolutely.

20 COMMISSIONER ASSELSTINE: Yes.

21 COMMISSIONER GILINSKY: Unless it got special  
22 dispensation of this sort which, so far as I know, has never  
23 been given. So, they are playing it in the worst case.

24 CHAIRMAN PALLADINO: But we have a situation here  
25 now where, let's assume they are out of compliance. We need

1 to decide whether we want enforcement action or there is an  
2 exemption. If the exemption is on its way, then it doesn't  
3 make sense to do anything until that is processed because  
4 there is no health and safety issue that would force you to  
5 shut it down.

6 So, I think from that standpoint we have to decide  
7 if we want to take enforcement action or await the exemption  
8 and process it and not shut it down when there is no health  
9 and safety reason to shut it down.

10 COMMISSIONER ASSELSTINE: I'd like to ask Harold a  
11 couple more questions, if I could. Are you still there,  
12 Harold?

13 MR. DENTON: Yes.

14 COMMISSIONER ASSELSTINE: Has the licensee been  
15 maintaining that it is essentially ready to go for full  
16 power operation?

17 MR. DENTON: The only other issue that's still  
18 being reviewed is the one filing the tech specs, and I think  
19 they recognize that these were the two issues that had to be  
20 resolved.

21 But Mr. Novak is in the meeting and perhaps is in  
22 closer contact with the licensee.

23 MR. NOVAK: Well, I can answer the question the  
24 following way: The licensee proposed to make certain changes  
25 to the technical specifications prior to exceeding five percent,

1 a limited number of those.

2 In discussions with the staff, we informed the  
3 licensee that we would not support proceeding above five  
4 percent until all of the tech spec changes necessary were  
5 accomplished.

6 He did take on that task. We are at the point  
7 today where we have effectively marked up the technical  
8 specifications to where now the staff agrees that all of the  
9 changes necessary to support full power operation are  
10 identified and known.

11 The licensee now will go back and formally submit  
12 these as amendments. His schedule is probably by the 16th  
13 of June to have these formally submitted to the staff. We  
14 then would consider them as part of the full power amendment.

15 COMMISSIONER ASSELSTINE: So, assuming that given  
16 where the tech spec situation stands now, that is something  
17 that will be resolved fairly quickly.

18 If the staff had simply said -- without issuing an  
19 order in this case -- "We are not going to accept these  
20 diesels for full power operation unless you have torn them  
21 down and done this further detailed inspection, and you are  
22 on notice, licensee, that we are not going to accept them,  
23 period." Not issue an order or anything else.

24 Would the licensee have had any alternative in that  
25 case other than to do exactly what you ordered them to do



1 in the order, which is as quickly as possible begin to tear  
2 down the diesels and do the inspections?

3 I guess what I am saying is, I don't see that you  
4 got any benefit at all from issuing this order. I think if  
5 you had simply told the licensee, "You have to do this  
6 inspection, otherwise we are not going to consider your  
7 application for a full power license or not act on it,"  
8 the licensee wouldn't have had any other alternative than to  
9 do just exactly what it is doing now, proceed immediately  
10 to do the inspection.

11 I guess I don't see any public benefit in this  
12 order, quite frankly. The only thing it seems to me the  
13 order accomplishes is to give the licensee the amendment  
14 to its license that it needs in order to keep running while  
15 it does the inspection.

16 MR. DIRCKS: That's different from what you said  
17 last week, though, Jim. You agreed that the staff did well  
18 by moving this issue up --

19 COMMISSIONER ASSELSTINE: That's right. What I  
20 am saying now is, now that I understand what the situation is,  
21 I'm not sure I even see a benefit in issuing the order. What  
22 I heard last week was, we got a great benefit by issuing  
23 this order because we got them to do something that they have  
24 been refusing to do. And it seems to me that, after  
25 reviewing OGC's paper, that they are right. The same, exact

1 same --

2 MR. DIRCKS: They didn't add any more facts in that  
3 memo than we had last week.

4 COMMISSIONER ASSELSTINE: Well, I guess I just got  
5 the fact now that --

6 MR. DIRCKS: I think what you are trying to do is  
7 saying that if you were in the staff, you would have done  
8 something differently.

9 CHAIRMAN PALLADINO: But if you accomplished the  
10 same thing, what was wrong with the --

11 MR. DIRCKS: The judgmental fact here, that the  
12 staff may have been running out of patience, that they wanted  
13 that licensee to move off dead center to get those diesels  
14 stripped down and repaired.

15 COMMISSIONER ROBERTS: Repaired or inspected?

16 CHAIRMAN PALLADINO: Inspected.

17 MR. DIRCKS: Inspected, or whatever it is. Maybe  
18 you are saying we should have indicated, "We warn you, you  
19 are not going to get your license until you get those things  
20 inspected." But of course, we have been criticized in a  
21 number of other cases where we didn't warn or didn't take  
22 drastic action with plants under construction, that we should  
23 have stepped in and gotten corrective action at an early  
24 stage before that plant moved too far into its constructive  
25 phase.

1           But again, I just hate to be here arguing with the  
2 Commission on this thing. I think what we are trying to do  
3 is, I think the staff took responsible, sensible actions  
4 here. The Commission, some members, are disputing the record  
5 of judgments made.

6           If the Commission -- and the Commission knew this  
7 when we have been debating this issue of Grand Gulf for  
8 several months now. You were put on notice and you were  
9 given a copy of the order that allowed them to go back and  
10 do low power testing.

11           The issue is, you know, you could have stepped in  
12 at any time. I don't want to put the staff in here arguing  
13 one way or the other with you. We presented our side. We  
14 are not trying to hide anything. If the majority wants to  
15 pull back and suspend it, we'll do it.

16           But I just don't like the position of having the  
17 staff here --

18           CHAIRMAN PALLADINO: But now, there is one point  
19 on which we do depend on the staff, and that is on the  
20 technical adequacy and acceptability.

21           MR. DIRCKS: They maintain. If you talk to Harold  
22 and Jim O'Reilly, they will maintain and they will keep  
23 maintaining that there is no safety grounds for suspending  
24 the license. If you have a policy --

25           COMMISSIONER GILINSKY: The question is really, is

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1 there adequate public health and safety reason and interest  
2 reason for relaxing the license.

3 COMMISSIONER ASSELSTINE: That's right.

4 COMMISSIONER GILINSKY: And relaxing the regulations.  
5 That's what we are doing.

6 MR. DIRCKS: But the thing hasn't been relaxed  
7 for the past year and-a-half. It has been operating down  
8 there under some sort of a low power license. It hasn't  
9 been relaxed.

10 COMMISSIONER GILINSKY: It shouldn't have been from  
11 the time we decided, you decided, that these diesels did  
12 not meet the regulations, and we are talking about half a  
13 dozen regulations.

14 MR. DIRCKS: The Commission was aware of those  
15 facts, Victor, and you could have stepped in at any time  
16 to change it.

17 COMMISSIONER GILINSKY: Well, let me say, I don't  
18 think we were fully aware of all this and hadn't taken a  
19 position on it until the Shoreham case.

20 MR. DIRCKS: No, you were aware of the diesel  
21 problem when the company came up here to brief you on this  
22 situation. You were aware of this --

23 COMMISSIONER GILINSKY: Not aware of the fact that  
24 it did not meet the regulations, in fact, until recently.

25 COMMISSIONER ASSELSTINE: That's right.



1 CHAIRMAN PALLADINO: Well, they never made a  
2 finding before the Shoreham case.

3 MR. DIRCKS: Disingenuous --

4 COMMISSIONER ASSELSTINE: That's right, yes.

5 (Simultaneous conversation)

6 COMMISSIONER GILINSKY: We dealt with the Shoreham  
7 case and this case is essentially identical.

8 COMMISSIONER ASSELSTINE: Yes. In fact, the staff  
9 even said at the Shoreham oral argument that one of the things  
10 they were looking for from the Commission was guidance on  
11 this very issue because it would apply not only in the case of  
12 Shoreham but in the case of other plants, and Grand Gulf was  
13 specifically mentioned as one of them.

14 COMMISSIONER GILINSKY: If I could pursue this  
15 point, Bill. The reason I asked the question was because I  
16 was left with the impression from the Shoreham argument that  
17 this case was very different, and in fact this one did meet  
18 the regulations.

19 But in any case, that has been cleared up.

20 MR. DIRCKS: But you knew the diesel issue has been  
21 pending for --

22 COMMISSIONER GILINSKY: Right.

23 MR. DIRCKS: You knew that Grand Gulf had the  
24 same type of diesels that we had been looking at.

25 COMMISSIONER GILINSKY: Right.

1 MR. DIRCKS: You knew the plant has been under a  
2 low power license for a year and-a-half.

3 You knew it had been down and you knew that it had  
4 been allowed back up in April.

5 Now, I'm not saying that you don't have any reason  
6 to step in again if you want it to stop. But I'm saying  
7 that the stream of judgments made, there has been no, in our  
8 view, no irregularities, no improprieties, or no straying  
9 from the straight and narrow.

10 If in your judgment at any time you want to step in  
11 and suspend the license, give us the order.

12 COMMISSIONER GILINSKY: Well, I had some things to  
13 say about that some time ago, even before the Shoreham  
14 business, on other grounds. But on the diesel business, it  
15 really didn't come to a head until after the Shoreham case.  
16 And for the Commission to act differently in this case, I  
17 think, would be extremely odd.

18 COMMISSIONER ASSELSTINE: Bill, let me go back --

19 COMMISSIONER GILINSKY: And there is a way for the  
20 company to present an exemption request and for the Commission  
21 to act on it. So, it is not a question of ruling out the  
22 operation of the plant. It is making sure the regulations are  
23 observed and the matters handled in an orderly fashion.

24 CHAIRMAN PALLADINO: I wonder if I could make a  
25 couple of observations. I think we come down to two basic

1 basic issues:

2           One is whether or not this plant, as it is  
3 operating today, is operating under acceptable risk conclusions.  
4 And if it is, then do we want to take any action, enforcement  
5 action, with regard to noncompliance with regs.

6           There is another question. Did the staff approach,  
7 when it generated this order, was it right or whatever you  
8 want to say about it.

9           I should point out that the order has built into  
10 it its own self-correction. That if anyone feels that it was  
11 wrong, they have a right to appeal for a hearing. So, that's  
12 a self-correcting --

13           COMMISSIONER ASSELSTINE: If the licensee --

14           CHAIRMAN PALLADINO: Well, I'm not quite clear, but  
15 the point is, I don't think we can go back and correct  
16 history, and I don't think we have a health and safety basis  
17 for taking any action against the licensee.

18           I think in view of the exemption request that is on  
19 its way, I think it would be imprudent to try to make some  
20 changes in the next few days just to wait for the exemption  
21 to be acted upon.

22           COMMISSIONER GILINSKY: You are sending an extra-  
23 ordinary message to the organization because not every one  
24 of these cases comes to you.

25           CHAIRMAN PALLADINO: Well, this is an extraordinary

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1 situation.

2 COMMISSIONER GILINSKY: What you are saying in  
3 effect is that the judgment of the staff members supersedes  
4 all the regulations.

5 CHAIRMAN PALLADINO: No, I did not. I said if it  
6 is safe and doesn't meet compliance, then we have to decide  
7 whether we are going to take enforcement action or entertain  
8 an exemption.

9 COMMISSIONER BERNTHAL: Victor, at least you have  
10 to grant that we could sit here and argue, I suppose, about  
11 technical and public health and safety issues, which I would  
12 still submit are the primary question here, but we also  
13 could argue about the procedural and legal question, and  
14 the question of our regulations.

15 And at least you have to concede that we have in  
16 front of us two experts in that area who clearly disagree  
17 on the course that the staff has followed. Frankly, I take  
18 a certain perverse pleasure in watching the lawyers argue  
19 over this issue, and we would probably be better off to just  
20 let them argue today.

21 But the fact is, there is an honest difference of  
22 opinion on the question of our regulations and whether the  
23 staff acted properly under our regulations. And I think you  
24 have to at least concede that much.

25 CHAIRMAN PALLADINO: And even the OGC has said



1 that one position is less defensible than the other. I  
2 don't remember exactly the words.

3 COMMISSIONER GILINSKY: He said the legality was  
4 questionable.

5 COMMISSIONER ASSELSTINE: That's right.

6 CHAIRMAN PALLADINO: I would have to ask for an  
7 interpretation.

8 COMMISSIONER GILINSKY: I think they were being very  
9 kind.

10 COMMISSIONER ASSELSTINE: Yes.

11 CHAIRMAN PALLADINO: Well, let me get back to  
12 the basic question, since our time is going to run out  
13 shortly.

14 COMMISSIONER ASSELSTINE: I've got a couple more  
15 specific questions before you get to the broad ones, if that  
16 is okay.

17 CHAIRMAN PALLADINO: All right.

18 COMMISSIONER ASSELSTINE: One had to do with the  
19 technical specifications that they are operating under even  
20 now. As I understand the tech specs, they speak in terms of  
21 having a certain number of operable diesel generators available.

22 And I was real interested in hearing what the  
23 staff's definition of "operable" was because it seemed to me  
24 that operable would mean qualified and reliable diesel  
25 generators, such that the staff has assurance that the things

1 will work and perform their intended function if called upon  
2 to do so. Or is the staff using a different definition of  
3 operable, and whether they think the TDI diesel generators --  
4 if they agree with my definition of operable -- are operable,  
5 the one that is not torn down.

6 MR. NOVAK: My definition of "operable" is as it  
7 is stated in the tech spec, there is a definition of  
8 operability.

9 COMMISSIONER ASSELSTINE: Which is?

10 MR. NOVAK: That it must perform in accordance  
11 with the surveillance test and requirements. Those diesels --  
12 and there are two, there is one of the TDIs and there is  
13 another EMD diesel that is tested and is required to meet the  
14 surveillance test.

15 I think Mr. O'Reilly will give you certainly his  
16 definition of when his resident inspectors will declare a  
17 piece of machine to be inoperable based on the surveillance  
18 test. The licensee also can declare it inoperable.

19 The gas turbines are considered to be operable, they  
20 are satisfying the technical specifications. That is what I  
21 would consider to be the working definition of operability.

22 COMMISSIONER ASSELSTINE: So, it's not in any way  
23 the kinds of reliability and dependability elements that are  
24 built into GDC-17.

25 MR. NOVAK: I would say that we have defined

1 operability as it is intended to be applied, as it is  
2 defined in the technical specifications.

3 COMMISSIONER BERNTHAL: Well, let's get down to the  
4 point. I visited Grand Gulf not so long ago and someone here  
5 is going to have to help me with the numbers. But can you  
6 recite for me, refresh my memory, how many times they have  
7 stopped and restarted those diesels prior to disassembling  
8 them again, or the one?

9 MR. NOVAK: I can give you my recollection. In  
10 fact, the TDI diesels at Grand Gulf have had a very good  
11 starting history, on the order of some 200 starts with, I  
12 think, one or two recorded failures to start.

13 Members from Mississippi Power and Light are here  
14 today and can give you probably a more factual response. But  
15 clearly, the operating history of MP&L in terms of these  
16 diesels has been good, judged by relative standards.

17 COMMISSIONER BERNTHAL: So, the point is, and my  
18 recollection was that they said that the particular diesel  
19 generator that is now in some state of disarray was stopped  
20 and started on the order of a hundred times. I would just  
21 suggest that under any circumstance you might attach a one-  
22 percent probability, then, that the next time they attempt to  
23 start it, that it won't start and perform as specified.

24 CHAIRMAN PALLADINO: Our time is running out  
25 insofar as maintaining a full Commission is concerned. I

1 would like to hear whether any Commissioner has a proposal  
2 to make. I think we ought to consider it.

3 COMMISSIONER GILINSKY: Let me ask you this, has  
4 there ever been any site-specific analysis of the safety of  
5 operating at low power at Grand Gulf? Has MP&L submitted  
6 anything, have you reviewed anything?

7 MR. NOVAK: Well, as part of the FSAR, certainly,  
8 the reliability of the off-site power was reviewed.

9 COMMISSIONER GILINSKY: No, I mean the risk of  
10 operating at low power, which has been judged here by you to  
11 be low. Does this reflect a study of Grand Gulf, of this  
12 reactor at the site?

13 MR. NOVAK: MP&L has made its arguments that  
14 operation at full power does not represent a risk to health  
15 and safety of the public. They believe the reliability of  
16 the diesels has been demonstrated thus far at their site.

17 They have not, to my knowledge, specifically come  
18 in with a five percent. They will be doing that with the --  
19 they will be making a formal submittal as part of the  
20 exemption --

21 COMMISSIONER GILINSKY: Your judgment on the low  
22 risk at this site is based on sort of general grounds, I  
23 take it.

24 MR. NOVAK: No, sir, not general. Specifically,  
25 part of the final safety analysis report.



1                   COMMISSIONER GILINSKY: Is there a study dealing  
2 with the risks of operation at low power at MP&L, some  
3 document, some piece of paper that has been signed off?

4                   MR. NOVAK: Nothing other than what we have  
5 submitted as part of the order. There is a safety evaluation  
6 that is discussed, and that is the degree of formality.

7                   COMMISSIONER GILINSKY: Let me say, the general  
8 design criteria reflect a great deal of thinking in this  
9 Commission years back, a great deal of work. It has gone  
10 through a process of review. Those are the basic requirements  
11 of the Commission.

12                   If you think they are wrong, perhaps we ought to  
13 change them. But let's propose a change. But to just  
14 casually set them aside and say they can otherwise be  
15 casually set aside, I think is to set a terrible precedent.

16                   COMMISSIONER BERNTHAL: They haven't been casually  
17 set aside, I would suggest, and there should be no implication  
18 or suggestion taken that they would ever be casually set  
19 aside.

20                   COMMISSIONER GILINSKY: Well, it reflects the  
21 answer I just got, there is no study on this.

22                   CHAIRMAN PALLADINO: Now, wait a minute, there are  
23 many studies on this question. You asked about site specific  
24 and he spoke to the site specific point of it.

25                   COMMISSIONER ASSELSTINE: The analysis we were

1 given last week was an analysis for a different plant, was  
2 a BWR-5, which in itself had acknowledged uncertainties, and  
3 that was the basis for the very brief low power analysis that  
4 we were given last week.

5 CHAIRMAN PALLADINO: There have been other analyses  
6 on the difference in risk between low power and full power  
7 with those kinds of conditions.

8 COMMISSIONER GILINSKY: I mean, I don't want to  
9 go to the other extreme and exaggerate the risks to low  
10 power, they are definitely lower than full power.

11 But the fact of the matter is that the Commission  
12 ought to stick to its regulations. That ought to be the  
13 deciding point.

14 And what you are doing is sending a message out  
15 that these regulations really don't mean anything. And that,  
16 I think, is just a terrible --

17 (Simultaneous conversation)

18 COMMISSIONER GILINSKY: And we are also saying,  
19 let me give you another statement here which is, you are  
20 confirming the comment of the LILCO lawyers which is that it  
21 was their misfortune to be caught up in a hearing, and that's  
22 why they are being treated differently.

23 The Commission ought to have uniform safety  
24 standards.

25 CHAIRMAN PALLADINO: Let me take control of this

1 meeting for the next five minutes.

2 (Laughter)

3 CHAIRMAN PALLADINO: If you want to do something,  
4 now is the time to make the proposal. Now, Victor, you had  
5 requested that the Commission consider immediately rescinding  
6 the staff order.. You also proposed that the plant be shut  
7 down. Do you wish us to take action on these questions?

8 COMMISSIONER GILINSKY: I do, yes -- rescinding  
9 that part of the staff order which relaxes the conditions on  
10 on-site power.

11 CHAIRMAN PALLADINO: Would you state it again? You  
12 want to rescind that portion of the order that does what?

13 COMMISSIONER GILINSKY: That relaxes the conditions  
14 on on-site power. Or you can --

15 COMMISSIONER BERNTHAL: I don't think that properly  
16 states the case.

17 CHAIRMAN PALLADINO: Well, but that's what he  
18 wants to vote on.

19 COMMISSIONER ASSELSTINE: That modifies the  
20 technical specifications, limiting conditions for operation.

21 CHAIRMAN PALLADINO: Now, wait, let's get them --

22 COMMISSIONER BERNTHAL: Let's get your case as  
23 positively as possible.

24 CHAIRMAN PALLADINO: Excuse me, could you state the  
25 motion you would like a vote on?

1           COMMISSIONER GILINSKY: Well, I think, frankly,  
2 the basic question is that the plant doesn't satisfy the  
3 design criterion and ought not to operate until an exemption --  
4 until such time as an exemption is granted.

5           CHAIRMAN PALLADINO: That's a slightly --

6           COMMISSIONER GILINSKY: That's really the basic  
7 problem. This adds another problem which is that, given the  
8 plant's, the diesels -- if you accept the diesels, even then  
9 there is a problem with the order.

10          CHAIRMAN PALLADINO: So, you are proposing that  
11 we not allow this plant to operate until there has been  
12 action on this exemption order; is that it?

13          COMMISSIONER GILINSKY: Until -- that's right,  
14 until the Commission has acted on the exemption request.

15          CHAIRMAN PALLADINO: Okay. Any further comment on  
16 it? Let me call for a vote on that issue.

17                 All those in favor indicate by saying aye.

18          COMMISSIONER GILINSKY: Aye.

19          COMMISSIONER ASSELSTINE: Aye.

20          CHAIRMAN PALLADINO: All those opposed, indicate  
21 by saying aye.

22          COMMISSIONER BERNTHAL: Aye.

23          COMMISSIONER ROBERTS: Aye.

24          CHAIRMAN PALLADINO: Aye.

25                 Now, let me ask another question. Did you have



1 another question to propose that the plant be shut down, or  
2 is that contained in your first one?

3 COMMISSIONER GILINSKY: Well, I would say even  
4 if you accept the failure to comply with this design criterion,  
5 there is an additional problem posed by this order, and I  
6 don't think this order ought to be permitted to remain in  
7 force.

8 CHAIRMAN PALLADINO: And what was the additional --

9 COMMISSIONER GILINSKY: Let me just state it  
10 simply. I would rescind this order.

11 CHAIRMAN PALLADINO: I thought we voted on that.

12 COMMISSIONER GILINSKY: Well, if you have, then so  
13 much for that. You are talking about the previous meeting or  
14 what?

15 CHAIRMAN PALLADINO: No, right now. I thought  
16 that was --

17 COMMISSIONER GILINSKY: No, that was another point.  
18 That was on the question of whether you are going to apply  
19 the general design criteria. You decided not to.

20 CHAIRMAN PALLADINO: Just restate, then, your  
21 second -- restate your second --

22 COMMISSIONER ASSELSTINE: I think your second  
23 proposal was my proposal last week, wasn't it, that at least  
24 that portion of the order --

25 COMMISSIONER GILINSKY: Right.

1                   COMMISSIONER ASSELSTINE:  -- that modifies the  
2 technical specifications for the plant, the limiting condition  
3 for operation, that that portion of the order be rescinded.

4                   CHAIRMAN PALLADINO:  All right, are you ready to  
5 vote on that question again?

6                   COMMISSIONER GILINSKY:  I am.

7                   COMMISSIONER BERNTHAL:  You know, Mr. Chairman, we  
8 did not schedule any votes today, and I must say that it was  
9 not the understanding that we were going to vote on these  
10 issues today.  And here we are, having issues popped at us  
11 that deal with one particular point of view.  And I think we  
12 ought to -- normally, the procedure is when you have votes  
13 that one discusses the particular elements of the vote.

14                   COMMISSIONER ASSELSTINE:  The purpose of the  
15 meeting, though, was to discuss an OGC memorandum that said  
16 that the order that was issued by the staff was of questionable  
17 legality, and in particular the portion of the order that was  
18 of questionable legality was the portion which relaxed or  
19 modified the limiting conditions for operation for the  
20 plant that are included in the technical specifications.

21                   So, I think my motion is perfectly in line with  
22 the topic of discussion for the meeting.  What in essence I  
23 am saying is that for the reasons that I gave last week and  
24 for the added reasons that are contained in the General Counsel's  
25 memorandum, that portion of the order should be revoked.

1 CHAIRMAN PALLADINO: I think we need to decide  
2 whether we want to do anything or not, and this is the vehicle  
3 for doing it.

4 COMMISSIONER ROBERTS: Well, the proposal I propose,  
5 the Commission not do anything.

6 (Laughter)

7 COMMISSIONER GILINSKY: That sounds familiar.

8 CHAIRMAN PALLADINO: However, we had the proposal  
9 by Commissioner Asselstine. I suggest we vote on it.

10 COMMISSIONER ROBERTS: All right.

11 COMMISSIONER BERNTHAL: Mr. Chairman, I am not  
12 suggesting that Jim's motion here is somehow out of line  
13 with the topic for discussion. But the agenda item for  
14 today was a discussion of this OGC document. And now suddenly  
15 to turn this into a series of votes, I think, is just  
16 inappropriate.

17 I am prepared to sit here and discuss for another  
18 half hour, but I would like some discussion if we are going  
19 to proceed with votes on this issue.

20 COMMISSIONER GILINSKY: Well, we had quite an  
21 extensive discussion. We have heard --

22 COMMISSIONER BERNTHAL: And a very wide-ranging  
23 discussion, I should say.

24 COMMISSIONER GILINSKY: Well, there is a time to  
25 make up your mind.

1           CHAIRMAN PALLADINO: Well, are you saying you don't  
2 want to vote on this?

3           COMMISSIONER BERNTHAL: If we are prepared to sit  
4 here and speak now to a motion that has been clearly stated --  
5 maybe there is no further discussion, but I think we should  
6 also hear then a discussion of the specifics of that motion.

7           MR. MALSCH: I would just like to offer one small  
8 comment. Even if you agreed with our legal memo, it doesn't  
9 necessarily follow that the plant must be shut down.  
10 Immediate actions to shut plants down are taken for safety  
11 reasons, and that gets you involved in the question of, is  
12 there a safety problem here or not.

13           I don't think we were suggesting that the plant  
14 should be shut down because of procedural problems.

15           COMMISSIONER GILINSKY: Well, we talked about  
16 General Design Criterion 17. There is also General Design  
17 Criterion 33 which is reactor coolant makeup; 34, residual  
18 heat removal, emergency core cooling; 37, testing and  
19 emergency core cooling system; 38, containment heat removal;  
20 41, containment atmospheric cleanup, and 44, cooling water,  
21 each of which reference in that design criterion the  
22 availability of qualified on-site power, reliable on-site  
23 power, and each of which would fail.

24           COMMISSIONER BERNTHAL: Well, I would suggest --

25           CHAIRMAN PALLADINO: Let me suggest, we got one



1 minute if we want to do anything. I would request your  
2 indulgence to vote on this question because if we take action  
3 on this question, at least we will have given guidance to the  
4 staff in the way we wanted to go.

5 COMMISSIONER BERNTHAL: I am not prepared to vote,  
6 Mr. Chairman, and I make a point of order here that at least  
7 let's ask whether there is anyone at the table, having heard  
8 the motion now, that would like to comment on the motion.

9 MR. CUNNINGHAM: I think it's the same motion we  
10 voted on last week. We made our case last week. We made  
11 our case again today, I see nothing to add from my  
12 perspective.

13 CHAIRMAN PALLADINO: And the only purpose for  
14 bringing it up is, Commissioner Asselstine is saying there  
15 was new information today and did that new information change  
16 anybody's vote, I think is the essence.

17 COMMISSIONER ASSELSTINE: That is in essence the  
18 question, that's right.

19 CHAIRMAN PALLADINO: And I think it would be wise  
20 to vote on that issue and close the meeting.

21 COMMISSIONER GILINSKY: Let's do that.

22 COMMISSIONER BERNTHAL: Are there any other comments?  
23 I gather not. All right.

24 CHAIRMAN PALLADINO: Are you willing to proceed?

25 COMMISSIONER BERNTHAL: Yes.

1 CHAIRMAN PALLADINO: All right, all those in favor  
2 of Commissioner Asselstine's motion indicate by saying aye.

3 COMMISSIONER ASSELSTINE: Aye.

4 COMMISSIONER GILINSKY: Aye.

5 CHAIRMAN PALLADINO: Those opposed say aye.

6 COMMISSIONER BERNTHAL: Aye.

7 COMMISSIONER ROBERTS: Aye.

8 CHAIRMAN PALLADINO: Aye.

9 I think that settles that issue. Now, from that  
10 I gather that we just let the staff proceed as it is going  
11 and we would expect the exemption request to come in and  
12 be considered by the staff.

13 MR. CUNNINGHAM: I understand that it is due  
14 Monday.

15 CHAIRMAN PALLADINO: Is there any further action  
16 we should take this afternoon? If not, thank you. We  
17 will stand adjourned.

18 (Whereupon, at 3:30 p.m., the meeting of the  
19 Commission was adjourned.)

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1 NUCLEAR REGULATORY COMMISSION

2 This is to certify that the attached proceedings  
3 before the Nuclear Regulatory Commission in the matter of:

4 Discussion of Grand Gulf Order

5 Date of Proceeding: June 1, 1984

6 Place of Proceeding: Washington, D.C.

7 were held as herein appears and that this is the original  
8 transcript thereof for the file of the Commission.

9 M. E. Hansen  
10 M. E. Hansen (Reporter)

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

OFFICE OF THE  
COMMISSIONER

May 29, 1984

The Honorable Morris K. Udall  
Subcommittee on Energy and the Environment  
Committee on Interior and Insular Affairs  
U.S. House of Representatives  
Washington, D. C. 20515

Dear Mr. <sup>Mo</sup>Chairman:

I am writing to bring to your attention the Commission's disregard of its safety regulations in a case that closely parallels that of Shoreham, on which you held a hearing recently.

After that hearing, I asked our staff whether the Grand Gulf plant, which has had diesel problems similar to those of Shoreham, met the General Design Criterion on emergency power supplies. The written answer I received was that it did not but that the plant would be allowed to operate at low power in spite of this because of the staff's view that operation at low power posed essentially no risks. This is precisely the argument the Commission rejected in the more heavily publicized Shoreham case. There, the Commission made clear that any departure from the safety regulations on power supplies could only be made if the strict standards for a formal exemption were met.

The situation at Grand Gulf is aggravated by the staff's decision to authorize the plant to operate for a number of weeks while one of its diesel generators is dismantled for examination. Normally, the plant would be required to shutdown within 72 hours.

As I was out of town, I urged Chairman Palladino not to permit operation of the plant unless the Commission was prepared to find that an exemption was warranted. I was especially concerned because of numerous outstanding problems at the plant including the adequacy of the license conditions and the operating staff. The Chairman called a meeting on the subject last Thursday. The Commission approved the staff's course, thereby abandoning the position it had taken in the Shoreham case. Commissioner Asselstine dissented.

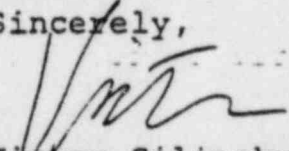
During the meeting, the staff argued, in effect, that a failure to comply with basic safety regulations did not in



itself require shutdown of a plant so long as the staff's seat-of-the-pants judgment was that the public was adequately protected. So much for having a predictable system of regulations.

These events are symptomatic of what has been going on at the Commission. It is essential that Congress maintain close oversight of NRC's activities to keep the system of safety regulations from unraveling.

Sincerely,



Victor Gilinsky  
Commissioner

cc: Rep. Manuel Lujan

May 30, 1984

MEMORANDUM FOR: Chairman Palladino  
Commissioner Gilinsky  
Commissioner Roberts  
Commissioner Asselstine  
Commissioner Bernthal

FROM: *HHEP* Herzel H. E. Plaine  
General Counsel

SUBJECT: STAFF'S MAY 22, 1984 ORDER IN GRAND GULF

This is in response to Commissioner Bernthal's request that OGC examine the legal bases for the staff's May 22, 1984 immediately effective order in Grand Gulf. The order imposed immediate requirements to disassemble one TDI diesel and to take other measures to compensate for the loss of the TDI diesel and the questionable status of the other TDI diesel, and relaxed a limiting condition for operation (LCO) so that plant shutdown would no longer be required with one TDI diesel out of service and being inspected. We find, based on the current record, that the legal basis is questionable. Our analysis is set forth below.

#### Analysis

The text of the order itself suggests two possible grounds for the order. The first is the need "to have increased assurance as to reliable onsite power" at low power operation. The second is "the public interest requires that the questions about the

reliability of the Grand Gulf diesel generators be resolved promptly."

A. Increased Low Power Safety

The increased assurance of safety at low power asserted as ground for the order is difficult to reconcile with other staff statements. Staff concluded in a May 24, 1984 memorandum to the Commission that the risk of low power operation with the questionable diesels was "exceptionally small" and that "the risk is not significantly increased by the total loss of the TDI diesel." At the May 24, 1984 Commission meeting, staff similarly advised the Commission that "our analysis shows there was no safety problem with continuing to operate there." Tr. p. 34. See also Tr. pp. 6 ("operation at low power did not pose an undue health and safety risk"), and 14 ("we believed the plant was adequately safe ...."). These statements suggest to us that in staff's view there was little or no safety problem with low power operation. It follows that there was little or no low power operation safety basis for any enforcement order, even an enforcement order limited to the TDI diesel inspection and related compensatory measures, but excluding the LCO change.

The need for increased assurance of safety at low power as a ground for the order becomes even more questionable if one factors in the LCO change, which removed a safety limitation on operation. Staff advised the Commission that the level of plant

safety at low power was "at the same level [after the order] as it was before." Tr. p. 45. See also Tr. p. 46 ("Now, I think it probably came out about equal"). If ~~this~~ advice is correct, then the order had no effect on public health and safety at low power, and cannot be justified on that ground.

B. Need to Resolve TDI Issues

Perhaps in recognition of the problems with a safety justification related to low power operation that are discussed above, CELD advised the Commission that "it was primarily public interest" that justified the order. The order itself cites the need to resolve the TDI reliability issue as the relevant "public interest" factor. This, of course, would justify only the TDI inspection portion of the order. However, the public interest in avoiding plant shutdown served as the basis for the LCO relaxation. Tr. pp. 30-31, 43-44.

We believe that a need to resolve the TDI reliability issue on a timely basis, free of the pressures and concerns that inevitably arise when issues remain unresolved up until the last minute before scheduled operation, offers an arguable safety justification for that aspect of the order requiring a TDI inspection. An order demanding information from a TDI inspection, but not amending the low power license, could have been issued under section 161c. and o. of the Atomic Energy Act and 10 CFR §§ 2.102(a) and 50.55 of the NRC regulations.



We believe that the LCO relaxation, standing alone, runs into legal difficulties. The so-called "Sholly Amendment," section 189a.(2) of the Atomic Energy Act, provides literally that "the Commission may issue and make immediately effective any amendment to an operating license, upon a determination by the Commission that such amendment involves no significant hazards consideration ...." No such determination was made here. If the Sholly Amendment provides the exclusive means for issuing an immediately effective license amendment, then staff's order cannot stand.

The Sholly Amendment legislative history suggests that section 189a.(2) is not the exclusive means for issuing immediately effective license amendments. The Conference Report recognizes that, apart from Sholly,

The Commission already has the authority to respond to emergencies involving imminent threats to the public health or safety by issuing immediately effective orders pursuant to the Atomic Energy Act or the Administrative Procedure Act. And the licensee itself has authority to take whatever action is necessary to respond to emergencies involving imminent threat to the public health and safety. E.R. Rep. No. 97-884 at p. 38, 97th Cong., 2d Sess. (September 28, 1982).

The limits of the Commission's authority to take action to respond to "emergencies" to protect health and safety are uncertain. However, clearly that latitude does not include taking action to relax a safety limit on "public interest" grounds. Indeed we are not aware of NRC or AEC ever asserting

such a "public interest" authority in their entire regulatory histories.\*

However, the Grand Gulf order is complex. The order includes, at least arguably, both measures which enhance safety (timely information on TDI diesels and other compensatory measures), and measures which detract from safety (the LCO relaxation). The question is whether the order can be viewed as a whole, or must be viewed piecemeal. If the order must be justified piecemeal, then the LCO relaxation must fail for the reasons discussed above.

This type of order has been discussed before in a memorandum from the General Counsel, dated January 28, 1980, entitled "Immediately Effective License Amendments" (SECY-80-53). That memorandum concluded that the "viewed as a whole" approach presented litigative risks. The enactment of the Sholly Amendment, with the legislative history cited above, increases those risks.

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\*The Administrative Procedure Act's requirement that a licensee be given notice and a chance to bring its activities into compliance before proceedings to suspend or revoke are instituted does not apply "in cases ... in which public health, interest, or safety requires otherwise." 5 U.S.C. § 558(c). However, this provision does not, by its terms, relieve an agency from other procedural requirements in its organic statute (such as the Sholly Amendment). However, some authority to take immediately effective action to protect public health and safety, NRC's paramount concern under the Act, can fairly be inferred from the broad grant of authority in the Atomic Energy Act. However, that broad grant of authority does not include action to further broad "public interest" goals.

On the other hand, the "viewed as a whole" approach has the advantage of enforcement flexibility. It allows NRC to choose the enforcement objective (plant shutdown, plant derating, or additional requirement), and then tailor the enforcement actions to achieve that objective. If one adopts the piecemeal approach, then NRC is faced with the limited choice of shutdown or no action in those situations where other intermediate enforcement actions would violate other license conditions. This limitation could have the unfortunate effect of discouraging enforcement action in difficult cases, to the detriment of public health and safety.

We think that this "viewed as a whole" approach presents considerably more litigative risk than the piecemeal one, but that a court might be convinced by the need for flexibility in an appropriate case.

#### Conclusion

The LCO relaxation in the Grand Gulf order can be justified only if the order is viewed as a whole. As a general proposition, such an approach presents greater litigative risk than an approach that would require an independent justification for each part of an enforcement order, but has an advantage of enforcement flexibility, and could withstand judicial review in an appropriate case.

However, the Grand Gulf order presents a weak case, even if the order can be viewed as a whole. Even viewed as a whole, the safety

advantage of the order is unclear. If, as staff stated, the level of safety with the order is about the same as before without the order, then the order has no safety benefit. All enforcement actions directed at safety must have some overall safety benefit to withstand scrutiny.

The order might be viewed as having the net safety benefit of a timely resolution of the TDI diesel reliability issue. However, it is difficult to construct a strong justification along these lines. This is because the same result could be achieved without any enforcement action by simply seeking Commission concurrence with staff's position that no license above 5% power can be issued without the TDI diesel inspection information. It would be then up to licensee to challenge the Commission's decision that such data is needed, or proceed to obtain the data by disassembling the diesel and requesting an amendment modifying the LCO to permit interim operation. Such an amendment would be subject to Sholly.

We believe that this alternative course was (and still is) the preferable one from the standpoint of litigative risk in this particular case. Licensee could very easily and quickly apply for the necessary LCO license amendment, and staff could proceed to make the appropriate no significant hazards consideration determination. Prior notice and public comment on the no significant hazards consideration finding could be dispensed with under section



189a(2)(C) of the Atomic Energy Act and 10 CFR § 50.91(a)(5) of NRC's regulations. These provisions allow such dispensation in cases where failure to act in a timely way would result in plant shutdown. Efforts should still be made to advise the State prior to issuance of the amendment. See 10 CFR § 50.91(b)(4).

We would note that even if one were to agree with use of the "viewed as a whole" approach here, and not to adopt our alternative approach, a temporary relaxation of the LCO pending satisfaction of the TDI inspection order is the most that is justified.

cc: OPE  
SECY  
EDG  
ELD  
NRR



OFFICE OF THE  
COMMISSIONER

RECEIVED BY 5/31  
UNITED STATES  
NUCLEAR REGULATORY COMMISSION  
WASHINGTON, D.C. 20555

COMVG-84-11

May 31, 1984

MEMORANDUM FOR THE COMMISSIONERS

SUBJECT: GRAND GULF LOW POWER OPERATION

It is clear from the May 30, 1984, OGC memorandum that the staff's Grand Gulf Order which amended the plant license is illegal insofar as it relaxed the requirements for emergency power. The Commission must act immediately to rescind that element of the Order. The plant should be shut down until the regulations can be met, the adequacy of the plant license process determined, and the health and safety of the public assured. To do otherwise would be a countenance flagrant violation of the Commission's regulations.

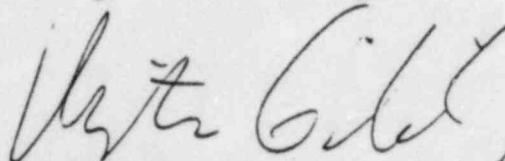
Let me remind you that the staff stated in its May 24, 1984, memorandum to the Commission that the plant does not meet the requirements of 10 CFR 50 General Design Criterion 17. Nor do I think it meets the requirements of the several additional GDC's, each of which refers to the availability of emergency power.

- GDC-33 Reactor Coolant Make-up
- GDC-34 Residual Heat Removal
- GDC-34 Emergency Core Cooling
- GDC-37 Testing of the Emergency Core Cooling System
- GDC-38 Containment Heat Removal
- GDC-41 Containment Atmospheric Cleanup
- GDC-44 Cooling Water

Let me also stress that the plant's internal safety review process has been recognized to be inadequate and not in compliance with the regulations. Nor has NRC's review been satisfactory. The Director of Licensing referred to the license review process as inadequate. The NRC approved at least nine Technical Specifications and amendments for non-existent equipment. Moreover, substantial numbers of documents which underwent safety review by MP&L's management and which were submitted to the NRC under oath have been found to be false. Over 300 Technical Specifications and over 5600 pages of the Final Safety Analysis Report have

required correction after they were submitted. The causes for the massive management review breakdowns has not yet been determined by the staff nor so far as I know have actions been taken that would prevent recurrence.

SECY please track responses by c.o.b. today.

A handwritten signature in dark ink, appearing to read "Victor Gilinsky", with a stylized flourish at the end.

Victor Gilinsky

cc: SECY  
OPE  
OGC

3/84

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FROM: SECY OPS BRANCH cc: OPS File  
C&R (Natalie)

Attached are copies of a Commission meeting transcript(s) and related meeting document(s). They are being forwarded for entry on the Daily Accession List and placement in the Public Document Room. No other distribution is requested or required. Existing DCS identification numbers are listed on the individual documents wherever known.

Meeting Title: Discussion of Grand Gulf Order

Meeting Date: 6/1/84 Open  Closed

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ITEM DESCRIPTION:	Copies Advanced to PDR	*	Original Document	May be Dup*
1. TRANSCRIPT w/ <del>5/29</del>	1	*	1	—
2. <u>5/29/84 Letter from Comm. Gulinsky to Long Udall</u>	1	*	—	1
3. <u>5/30/84 Memo from H. Plaine to Commissioners</u>	1	*	—	1
4. <u>COM VG - 84 - 11 - Memo (5/31/84 from Comm. Gulinsky to Commissioners</u>	1	*	—	1
5. _____	—	*	—	—

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