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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the matter of:

BRIEFING ON CRIMINAL VS CIVIL
INVESTIGATIONS

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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BRIEFING ON CRIMINAL V. CIVIL INVESTIGATIONS

- - -

PUBLIC MEETING

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

Monday, April 9, 1984

The Commission met, pursuant to notice, at 10:25 a.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
G. MESSENGER
B. HAYES
J. MURRAY
J. FITZGERALD
M. MALSCH

AUDIENCE SPEAKER:

R. FORTUNA

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P R O C E E D I N G S

CHAIRMAN PALLADINO: Good morning, ladies and gentlemen.

The Commission meets this morning to discuss the agency's conduct of civil and criminal investigations and the relationship between such investigations.

By memorandum dated September 1, 1983, I requested OGC, OIA, and OI to develop a Commission paper addressing NRC's conduct of civil v. criminal investigations for our consideration. The paper was provided to us in December, SECY-83-497, and forms the basis for our discussion today.

The Commission has asked OGC to take the lead in presenting the issue this morning. We also have the Director of OI and the Acting Director of OIA at hand to participate in the discussion.

Are there any additional comments from Commissioners at this time?

COMMISSIONER ASSELSTINE: I don't think so. I think it's useful to have this meeting. We did get the paper in December and the paper indicated that there were a few areas where OGC, OI, and OIA felt that they could use some guidance from the Commission in trying to work with Justice in developing a Memorandum of Understanding in this area.

I think it is useful to have this meeting and to try

1 and provide that guidance and find out where we are in
2 moving ahead with the MOU.

3 COMMISSIONER BERNTHAL: In fact, in retrospect it's
4 too bad that we didn't meet earlier on this.

5 COMMISSIONER ASSELSTINE: Yes.

6 CHAIRMAN PALLADINO: Any other comments? Then let
7 me turn the meeting over to general counsel's representative.

8 MR. FITZGERALD: The paper that you have before
9 you discusses two general areas of concern that had been
10 issues in the investigations area for some time. That is
11 the authority and responsibility for NRC to conduct criminal
12 investigations and the relationship of the agency with the
13 Department of Justice when the Department has on occasion
14 requested that the Commission stay its investigation or
15 enforcement action until completion of a Department action.

16 The purpose of this meeting and the paper is to
17 flesh out these areas and to provide OI with guidance to go
18 to the Department and work out a Memorandum of Understanding
19 on these general areas, and working out specific implementations
20 within that guidance.

21 Now, on the civil v. criminal investigation
22 question, as the paper points out, the investigation that is
23 conducted by OI into a violation, or suspected, alleged
24 violation of our regulations, would basically be the same
25 whether it is labelled civil or criminal. An investigation

1 is a systematic, patient, objective inquiry into the facts
2 of a particular instance.

3 To be sure it is a criminal investigation,
4 additional rules might apply, such as not being able to use
5 administrative subpoenas, for example, and a criminal
6 investigator would be armed with certain additional powers
7 that a civil investigator might, such as the power to arrest.

8 However, the investigation generally would be run
9 pretty much along the same lines. The real dividing line
10 between these investigations is the purpose for which the
11 investigation is going to be put. Is it going to be to
12 secure enforcement of our civil regulations or orders, or is
13 it for a criminal enforcement purpose.

14 We believe --

15 COMMISSIONER ASSELSTINE: Or both.

16 MR. FITZGERALD: Or both. The "or both," following
17 up on that, frequently this inquiry, an investigation
18 conducted by the NRC, can be put to both uses. A common
19 situation is for the NRC to investigate a suspected
20 violation of our regulations.

21 If that violation is willful, then it may be a
22 criminal violation because Section 223 of our Act provides
23 for willful violations of the Atomic Energy Act and
24 regulations promulgated under particular sections of the
25 Atomic Energy Act, that a criminal penalty is permissible or

1 available.

2 The question of willfulness, however, is something
3 that OI under the policies that the Commission has blessed
4 will look into, and it is relevant to the Commission's
5 business and mission because if the regulatory violation is
6 willful, an increased penalty -- civil penalties or other
7 enforcement action -- will be considered.

8 Now, we believe that the Commission -- and OGC
9 has taken this position in the past -- that the Commission
10 does not have independent authority to conduct criminal
11 investigations. However, at the request of the Department
12 of Justice for assistance to the Department in fulfilling its
13 mission, we believe the Commission does have authority to
14 grant that request.

15 That means that a major subject for the Commission
16 to determine is when a request such as that comes before,
17 you, what is the response; what criteria would dictate the
18 type of response in any particular case.

19 COMMISSIONER BERNTHAL: I guess I don't know whether
20 you have a lengthy formal presentation or not, but one thing
21 that I would like to have you focus on to some extent is
22 a better definition -- and the Commission needs to think of
23 this too -- what "assist" means, really.

24 Assist can mean lots of things. It can mean that
25 our Office of OI would essentially do the work and report to

1 DOJ when it is finished. We maybe do need to take a look at
2 that. But I don't want to interrupt your train of
3 presentation.

4 MR. FITZGERALD: I believe that that's one of the
5 areas that guidance should be provided to OI, should they
6 only engage in helping out the Department of Justice in a
7 criminal investigation in conjunction with the FBI, or should
8 they basically, on occasion, be all alone in the investigation,
9 subject only to general guidance by a Department of Justice
10 attorney or a grand jury.

11 COMMISSIONER BERNTHAL: Let me just say at the outset
12 too that my concern here is that the job be done, to be sure,
13 by somebody. But also that our -- well, as we used to say
14 back in Nebraska, "That our eyes not be bigger than our
15 stomach when we are looking at a plate in front of us." We
16 have a limited staff; we've got a lot of work to do here and
17 it seems to me we ought to try and make sure that we get
18 the things done that we need to do and not be doing things
19 the Department of Justice can do better and can do for us.

20 So, that is sort of one of the areas that I want to
21 focus on. Go ahead.

22 CHAIRMAN PALLADINO: Incidentally, I think that is
23 of interest to all of us, at least I am interested in that.

24 COMMISSIONER ASSELSTINE: Yes.

25 MR. FITZGERALD: Well, OIA, OGC, and OI in this

1 paper recommend that the Commission in appropriate circumstances
2 assist the Department of Justice.

3 CHAIRMAN PALLADINO: It doesn't say that, does it?
4 I thought it says "conduct."

5 COMMISSIONER ASSELSTINE: The way the options were
6 formulated was "conduct," yes.

7 CHAIRMAN PALLADINO: Yes, "Will conduct
8 investigations," and I have comments on that.

9 COMMISSIONER ASSELSTINE: Yes.

10 MR. FITZGERALD: Okay, I understood it as comply
11 with the DOJ's request for assistance in the conduct of
12 criminal investigations.

13 COMMISSIONER ASSELSTINE: Yes.

14 CHAIRMAN PALLADINO: Incidentally, you say that
15 an investigation can serve both criminal and civil purposes,
16 or civil and criminal purposes. And yet, on page 3 you do
17 talk about the differences and you mention them earlier,
18 between criminal and civil investigations, at least in the
19 footnote.

20 It seems to me that the procedures regarding
21 criminal safeguards do affect that collecting. You can't do
22 exactly the same thing under our procedures as the FBI could
23 do under theirs.

24 MR. FITZGERALD: That's right. There is a
25 difference in -- for example, we can use administrative

1 subpoenas in our fact gathering, the FBI can't. On the other
2 hand, the FBI in a criminal investigation is armed with a
3 pretty good arsenal of powers that we don't have access to --
4 grand jury subpoenas would be one instance.

5 CHAIRMAN PALLADINO: But aren't the criteria
6 different and the purpose, anyhow? The criteria determine
7 how far you go, I presume.

8 MR. HAYES: You mean in terms of thoroughness of
9 the investigations, Mr. Chairman?

10 CHAIRMAN PALLADINO: No, in terms of whether you
11 are proving beyond a reasonable doubt in a criminal case,
12 or whether the preponderance of evidence in a civil case.
13 Could we discuss them, so I understand them?

14 MR. FITZGERALD: Well, you are talking about the
15 burden of proof --

16 CHAIRMAN PALLADINO: Yes, and that influences --

17 MR. FITZGERALD: -- in a formal hearing.

18 CHAIRMAN PALLADINO: And that influences, I guess,
19 how far you go in an investigation.

20 MR. FITZGERALD: Generally, I don't believe it
21 would. I think you would be out to do -- I believe that
22 Ben would consider in any case, even if it was just for a
23 purely civil purpose, he would gather all the information that
24 was available, with due regard to some limits as far as
25 accumulative evidence. But he would be out to find out

1 exactly what happened and to prove it convincingly because
2 you would need that in order to make your regulatory decision --
3 you or I&E, or whatever.

4 CHAIRMAN PALLADINO: Well, are there any cases
5 where we would decide we have gone far enough on the need
6 for our civil enforcement action where Justice may decide
7 we ought to go further for criminal purposes?

8 MR. FITZGERALD: Yes, sir. For example --

9 CHAIRMAN PALLADINO: So, that is the substance of
10 my question, then.

11 MR. FITZGERALD: It may be that the elements in
12 a particular case, the elements of a crime with the criminal
13 case, may have an additional element that would not be
14 present in our civil case, and Ben's investigation would
15 simply not address that point. You would end up with a
16 situation where 80 percent of the elements had been
17 investigated and proven out but because he wasn't doing a
18 criminal investigation, he wouldn't have pursued that other
19 part of the case.

20 When it went to the Department of Justice, the
21 Department would see that there was a void and would
22 require before they made a decision, would require a
23 further investigation.

24 CHAIRMAN PALLADINO: Well, but that then does
25 come to the question I raised. Even though we say, "Well,

1 we are going to do a thorough investigation, when we are
2 satisfied we have done the civil portion and we don't go any
3 farther, then we haven't quite done what you said they can
4 do.

5 MR. FITZGERALD: No, I meant that frequently the
6 civil investigation will be basically coextensive with the
7 criminal investigation because willfulness, for example, is
8 an element that we would pursue for our own civil ends, and
9 that element also would be of interest to the Department of
10 Justice because it would go to make out the criminal violation.

11 And frequently, you would find that the Department
12 would not need to do any further investigation to pursue a
13 criminal case in such a case as that than what OI had
14 already gathered.

15 Now, it can be -- another example, however, is
16 they have a different standard of proof, as you mentioned.
17 They also have frequently to take items before juries, lay
18 juries. They may want further cumulative evidence or further
19 investigation because they believe that it will enhance their
20 likelihood of bringing in a successful prosecution.

21 I have been in the Department of Justice and I
22 know that you can work a case ad infinitum, never satisfied,
23 trying to create that perfect case. But you don't have to
24 create a perfect case.

25 But if you are going to have to bring it to trial,

1 you may want to create a perfect case. In that instance
2 where the OI investigation has been given to the Department,
3 it is quite possible that a Department attorney may want to
4 improve on perfection by doing a little further investigation.

5 CHAIRMAN PALLADINO: Well, the reason my question
6 comes up, this paper implies that if OIA doesn't do enough
7 so that it covers all aspects of the possible outcomes, then
8 it's an incomplete investigation. And I don't think that
9 in every case that should be the situation because if they
10 go through doing all the civil -- getting all the civil
11 information including whatever the Act says about wrong,
12 willful wrong-doing, their job may be done and going further
13 may not be called for.

14 MR. FITZGERALD: I agree with that, Mr. Chairman.

15 CHAIRMAN PALLADINO: But this implies that anything
16 that is not complete is faulty and doesn't cover that
17 particular circumstance.

18 COMMISSIONER ASSELSTINE: Gee, I guess I didn't
19 get that sense when I read the paper. I think Jim's right
20 the way he has characterized it, is that for most cases our
21 investigation is going to pretty much be coextensive with
22 whatever might be needed in the criminal area. You may have
23 a few instances --

24 MR. FITZGERALD: But you would draw the line, stop
25 the investigation when it is complete for our purposes.

1 COMMISSIONER ASSELSTINE: For our purposes, that's
2 right, that's right.

3 COMMISSIONER BERNTHAL: But you do get into this
4 funny situation that we did in one or two cases recently
5 where we have work for our purposes that still needs to be
6 done, and you refer it to the Department of Justice and
7 all of a sudden we are under a restraint from the Department
8 of justice, a request that we can't easily ignore, to suspend
9 some of the inquiries that we might need for our civil
10 purposes.

11 CHAIRMAN PALLADINO: Yes.

12 COMMISSIONER BERNTHAL: And it just seems to me
13 that when we initiate an investigation, our purposes should
14 be served first. We have a responsibility under the law to
15 get our job done, and exactly where things get turned over,
16 with the danger then that we will be asked to stop what we
17 are doing I'm not sure. But that is a situation that I would
18 not like to see us in again.

19 COMMISSIONER ASSELSTINE: That's the second problem
20 we are talking about.

21 MR. FITZGERALD: That's a separate question. Also,
22 it raises a further detail. You are referring to the criminal
23 referral area. The one subject that needs to be addressed
24 in an MOU would be, when do you first bring to the
25 Department's attention -- formally or informally -- a

1 suspected criminal violation, only at the conclusion of
2 the investigation or at the first nuance of it that you
3 strike out in the field.

4 (Commissioner Gilinsky enters room.)

5 COMMISSIONER BERNTHAL: Well, that raises an
6 interesting point that I had not thought of before, actually,
7 and that is whether there is anything within the law that
8 requires us to make immediate notification. Are we permitted
9 to go along for what could be perhaps some at least weeks
10 or months carrying out a civil investigation when we know
11 full well that there may be evidence of criminal wrong-
12 doing?

13 MR. FITZGERALD: I believe that that has been
14 looked into and that the basis of our referral responsibilities
15 is spelled out in an Attorney General's memorandum. I have
16 not seen a copy.

17 COMMISSIONER BERNTHAL: Could you summarize that
18 in ten words or less?

19 CHAIRMAN PALLADINO: We are getting far afield from
20 my question. I think these are valid points --

21 COMMISSIONER BERNTHAL: I'm sorry.

22 CHAIRMAN PALLADINO: But I did want to point out
23 that on page 3 it says, "Terming the investigation 'civil'
24 means only that there is a valid NRC civil enforcement
25 purpose and, therefore, that criminal safeguards and procedures

1 are not required. It does not mean that different facts will
2 be developed or that different matters will be investigated."

3 And yet, there are circumstances where different --
4 the investigation would go further if it were purely criminal.

5 MR. FITZGERALD: That's correct.

6 MR. HAYES: Yes, there are circumstances where
7 that happens.

8 CHAIRMAN PALLADINO: So, that's where I got this
9 feeling that an investigation has to be thorough and yet
10 it can't be thorough in every case. At least it should
11 allow for the fact that we may have served our civil
12 purpose in all regards and there still be things to be
13 investigated for criminal purposes.

14 MR. FITZGERALD: Right, although I would
15 consider that that is a thorough NRC investigation --

16 CHAIRMAN PALLADINO: Well, that's --

17 MR. FITZGERALD: -- if it is thorough for our
18 civil purpose.

19 CHAIRMAN PALLADINO: Well, that isn't stated
20 anywhere.

21 MR. FITZGERALD: Okay.

22 COMMISSIONER BERNTHAL: But it is so intertwined
23 with this question, it seems to me when you sniff out and
24 suspect criminal wrong-doing, that you lay yourself open to
25 having to suspend, shortening the civil part of the

1 investigation. I just think that's key to the process.

2 COMMISSIONER ASSELSTINE: There are two, I think
3 there are two parts of it, Fred. One part is when either
4 formally or informally do you want to bring an item like
5 this, or are we required to bring an item like this to the
6 Department's attention.

7 The second is, if they ask us not to go forward,
8 then what do we do in response to that.

9 COMMISSIONER BERNTHAL: Yes.

10 COMMISSIONER ASSELSTINE: And how do we negotiate
11 a workable process that lets us notify them when we think
12 there is something that involves potential criminality and,
13 at the same time --

14 COMMISSIONER BERNTHAL: Yes.

15 COMMISSIONER ASSELSTINE: -- be able to complete
16 and perform, and satisfy our civil responsibilities.

17 CHAIRMAN PALLADINO: Well, do you have any further
18 guidance as to when we have to tell DOJ of suspected
19 wrong-doing?

20 MR. HAYES: Let me give you my views.

21 COMMISSIONER GILINSKY: When we have reasonable
22 grounds to believe that criminal matters may be involved. It
23 is always a matter of judgment.

24 MR. HAYES: It certainly is always a matter of
25 judgment and an interpretation of the facts presented in our

1 report, as this Commission is fully aware of on a recent
2 case, and there are differences of opinion by reasonable men.

3 What I have attempted to do over the last year or
4 so is to provide the Commission and the staff with a thorough,
5 complete investigation that hopefully satisfies our regulatory
6 needs. That is my first objective. And most recently I went
7 so far as to write a letter to a Regional Administrator and
8 ask that particular administrator, does this investigation
9 meet your regulatory needs and be guided by "yes" or "no" or
10 additional questions.

11 Upon receiving input from the staff at that point,
12 then we looked at it for potential criminal sanctions. There
13 may or may not be some there. And if we feel as though at
14 least there is a potential, or suspected, or -- I forgotten
15 the Attorney General's language in that area, but then we
16 refer those particular cases where in our view there may be
17 some criminal sanctions, to the Department for their review.

18 But at the same time, we can provide to the
19 Commission and the staff a completed report and a completed
20 investigation that we can take whatever regulatory sanctions
21 the Commission desires at that point.

22 Now, the second issue concerning what happens upon
23 request from the Department of Justice that we suspend or
24 abate, or what have you, enforcement action. That particular
25 issue I was in hopes of addressing in the Memorandum of

1 Understanding with the Department of Justice. That is one
2 reason why we have asked for this particular Commission meeting
3 early on and, as the Commission is aware, it has been post-
4 poned two or three times.

5 But my view today is that that Memorandum of
6 Understanding will set forth specific time frames and specific
7 guidance as to how long the Department can review that
8 report prior to taking some stance, either "yes" or "no" in
9 terms of, "Yes, we are going to pursue it" or, "No, we are
10 not," or whatever.

11 I am hoping, you know, for 60 days. I chose 60
12 days because it usually takes the staff anywhere from 30 to 45
13 to come up with an NOV -- a Notice of Violation -- if the
14 staff is obliged to do that. So, I thought 60 days would be
15 a negotiable figure with the Department. It would not, at
16 least in my view, have a negative impact on the Commission,
17 and the staff, in taking subsequent enforcement action and,
18 hopefully, everyone would be satisfied with that arrangement.

19 CHAIRMAN PALLADINO: Then, whatever MOU you do
20 negotiate, you will come back to the Commission with.

21 MR. HAYES: Certainly.

22 COMMISSIONER ASSELSTINE: Yes.

23 MR. HAYES: Certainly.

24 CHAIRMAN PALLADINO: I appreciate it. I just
25 wanted to say it.

1 MR. HAYES: I was trying to get some guidance from
2 the Commission prior to going to the Department of Justice,
3 and I share with you, you know, a couple of the points that
4 I think definitely have to be answered in that particular
5 Memorandum of Understanding, and some of my views, at least
6 going in negotiating with the Department in hopes that it
7 meets the Commission needs as well.

8 COMMISSIONER BERNTHAL: How long have you been
9 sharing on those negotiations, Ben? I mean, they have been
10 underway for some time now.

11 MR. HAYES: Well, we had an initial meeting with
12 the Department of Justice, I and my staff, and then the
13 Commission tasked OIA to prepare this paper. We suspended
14 our negotiations with the Department pending some guidance
15 from the Commission.

16 I wanted to avoid the situation where we would go
17 down there and try to strike some compromise and then come
18 to the Commission and, say, you know, the Commission would
19 correct me. We have to have something to go bargain with
20 from you gentlemen first.

21 COMMISSIONER BERNTHAL: Is there any sense, or would
22 it be appropriate for you to give us any representation of
23 the nature of discussions, whether there were any preliminary
24 conclusions or thoughts that arose out of your negotiations
25 before you suspended them?

1 MR. HAYES: Well, in our first meeting there had
2 been some preliminary work done by, I think, Jim Cummings,
3 and there had been some drafts prepared. So, we are starting
4 with that.

5 I felt that the Department of Justice was very
6 open with us and actively would like to solidify these
7 arrangements in a more formal understanding to avoid some
8 problems we have had in the past.

9 So, I think they are in the same situation we are,
10 they would like to have some of these points put in some
11 written doeucment so that both agencies know what each agency
12 is committed to.

13 COMMISSIONER BERNTHAL: Yes, I'm sure that's true.
14 But I was really asking for any substantive thoughts that might
15 have come out of your early discussions.

16 MR. HAYES: No. My first discussion was basically
17 to introduce the staff members collectively, the Department
18 and the OI staff. At that point, we had set an estimated
19 completion date of December of last year, and we had designated
20 people to start, really, the groundwork and to start working
21 together.

22 But I don't think we are going to have a serious
23 problem in coming to some compromise position with the
24 Department. Again, I think they are as anxious as we are to
25 get rid of the shadows and put something in proper perspective.

1 I think they would entertain anything that we would
2 want to propose to them that was reasonable.

3 COMMISSIONER GILINSKY: Let me say, I found this
4 to be a sensible paper on a difficult subject.

5 CHAIRMAN PALLADINO: Under the recommendations for
6 guidance you say, "That the Commission authorize OI to state
7 in its negotiations with DOJ that NRC, in appropriate
8 circumstances, will (i) conduct investigations at DOJ's
9 request."

10 My feeling would be that we should say, "(i)
11 assist in the conduct of investigations at DOJ's request."

12 COMMISSIONER ASSELSTINE: Yes, I would agree with
13 that. Yes, I think that's right.

14 CHAIRMAN PALLADINO: And "(ii) it says, "Defer
15 investigation or enforcement action at DOJ's request."

16 To be consistent with what OGC has been doing, I
17 put the word "written" request --

18 COMMISSIONER ASSELSTINE: Yes.

19 CHAIRMAN PALLADINO: -- as another matter. And then
20 I would be also inclined to append that under that sentence --

21 COMMISSIONER BERNTHAL: Joe, I'm sorry, where are
22 you?

23 CHAIRMAN PALLADINO: On page 12 --

24 COMMISSIONER ASSELSTINE: Page 12.

25 CHAIRMAN PALLADINO: -- of the paper, item No. 1.

1 COMMISSIONER BERNTHAL: Okay.

2 CHAIRMAN PALLADINO: And (ii) says, "Defer
3 investigation of enforcement action at DOJ's" -- and I
4 have inserted "written request."

5 COMMISSIONER BERNTHAL: Yes.

6 CHAIRMAN PALLADINO: And then I would add, "providing
7 there are no health and safety concerns which prompt immediate
8 administrative action by NRC." I think we have to protect
9 ourselves with that.

10 COMMISSIONER ASSELSTINE: Yes.

11 MR. HAYES: Well, I would assume the staff would
12 take those actions even during the investigative process
13 or prior to it.

14 CHAIRMAN PALLADINO: Well, you are seeking guidance
15 and I want to make sure that one is in the guidance.

16 COMMISSIONER ASSELSTINE: Yes, I agree. Yes.

17 COMMISSIONER GILINSKY: I think that sounds fine.

18 COMMISSIONER ASSELSTINE: Yes. I would even raise
19 the point that Fred raised earlier. Is it realistic or
20 feasible to say, "Look, what we would like to do is get our
21 civil investigation done. At that point we'll tell you
22 that we have completed our investigation. We will identify
23 any potential criminal items that we think might be of
24 interest to you. We will give you our investigation materials
25 and then ask for your judgment about whether we can go ahead

1 or whatever." Trying to formalize the time of notification
2 at that point. Is that a realistic thing?

3 MR. HAYES: In the transmittal letter itself, then.

4 COMMISSIONER ASSELSTINE: And work out the details
5 of the kind of thing that you mentioned, the 60-day period
6 where they can decide whether to take prosecutorial action
7 in a particular case and hopefully get a decision at the end
8 of that time. And if they don't want us to go ahead, require
9 a written notification of that from someone in a fairly
10 senior level in the Department headquarters -- maybe pick
11 where that level is.

12 COMMISSIONER GILINSKY: Is 30 days too hosrt?

13 MR. HAYES: For review? I would think so. In
14 my opinion 30 days is too short. Yes, sir.

15 COMMISSIONER ASSELSTINE: And I guess I would say
16 if they are going to ask for an extended delay, (1) there
17 ought to be a written notification and, (2) they ought to
18 give us the reasons in the letter why they think we can't
19 go ahead.

20 CHAIRMAN PALLADINO: Yes. And I think when we
21 say "written request," we ought to say from whatever level.

22 COMMISSIONER ASSELSTINE: Yes.

23 CHAIRMAN PALLADINO: What did you say?

24 COMMISSIONER ASSELSTINE: Vic said Assistant
25 Attorney General.

1 COMMISSIONER GILINSKY: Yes.

2 CHAIRMAN PALLADINO: I don't know what level that
3 is.

4 MR. FITZGERALD: Who is the Assistant Attorney
5 General, Criminal?

6 MR. HAYES: Steven Trott.

7 MR. FITZGERALD: That's possible. You might
8 consider the Mark Richard level which would be --

9 COMMISSIONER ASSELSTINE: Is that Deputy Assistant?

10 MR. FITZGERALD: -- Deputy Assistant.

11 MR. HAYES: Yes.

12 MR. FITZGERALD: I think that that might be a
13 more workable level.

14 COMMISSIONER ASSELSTINE: Okay.

15 COMMISSIONER BERNTHAL: How thoroughly have we
16 checked to see what other agencies, what other arrangements
17 are made between similar agencies and DOJ? Do we have a
18 feeling for that? Surely, they can't be --

19 MR. FITZGERALD: A number of them have Memoranda
20 of Understanding, not all. I don't believe that the subject
21 of exactly what relationships other agencies have has been
22 explored in great detail.

23 I do know that recently I was having discussions
24 with an SEC attorney in their Enforcement Section and they
25 came up with a suggestion that might be worth pursuing, at

1 least looking into further for the NRC. They have a criminal
2 referral and they also make -- they grant access to their
3 files without referral on occasion. The Department will
4 request access to their files and the Commission will
5 determine whether or not to grant it.

6 If the Commission does grant it, then there never
7 will be a referral. If the Department will run with it
8 and either determine that there is nothing worthy of
9 prosecution further work or will determine that indeed there
10 is and will proceed accordingly with a grand jury investigation,
11 than alternative of granting access strikes me as being
12 something that the Commission might want to explore further.
13 That could be done under this Memorandum of Understanding.

14 COMMISSIONER ASSELSTINE: Yes.

15 MR. FITZGERALD. Because it is apparently formally
16 worked out with the Department.

17 COMMISSIONER BERNTHAL: How would that practically,
18 then, change how things might happen? Does that mean that
19 it would greatly diminish the chances of our being asked to
20 suspend investigations, since they would have access to our
21 files? Other than the fact that I gather there would --

22 MR. FITZGERALD: I'm not sure it would have any
23 effect such as that. It is conceivable that it might just
24 simply have the effect, in particular cases, of never
25 resulting in a formal referral. But that can be a desirable

1 end in a particular case where there may be a statement to
2 the formal referral even where we don't see that the case
3 is very prosecution worthy from our own particular perspective
4 and may be reluctant to formally refer the matter because
5 of kind of a reluctance to attach that stigma to someone,
6 should it become known.

7 COMMISSIONER BERNTHAL: I guess I would like to
8 see some thoughts on that because that is an idea that maybe
9 we ought to think about.

10 CHAIRMAN PALLADINO: Which idea?

11 COMMISSIONER BERNTHAL: Well, the question of whether
12 we should do as the SEC does, namely make our files available
13 to DOJ short of -- I gather you are saying short of a formal
14 referral. And that the advantage of that might be that we
15 would have a better chance to avoid this unhappy situation
16 where we have to suspend our civil work while waiting for
17 them to make a judgment on the criminal merits of the case.

18 COMMISSIONER ASSELSTINE: Ben, what do you think?
19 Do you have thoughts on it?

20 MR. HAYES: Well, I think while that may solve
21 one problem, it may put the Commission in a situation where
22 the investigation is being more dictated by the Department of
23 Justice and we may lose our subpoena authority because we
24 are not a criminal investigative arm per se but yet, the
25 Department of Justice which is a criminal arm of the

1 government is well in on the case early.

2 So, I would think that we would have to really
3 do some additional thinking on that.

4 MR. FITZGERALD: I would agree with that, Ben. But
5 I think you are assuming a fact that is not in evidence, that
6 this doesn't have to occur early on. This can also occur
7 later on.

8 COMMISSIONER GILINSKY: Let me ask you, why do we
9 need to stop our investigation after we have referred a case
10 to the Department of Justice?

11 CHAIRMAN PALLADINO: That's a good question.

12 COMMISSIONER GILINSKY: Why can't we just go on and
13 put no time limit and if they come around sometime, that's
14 fine. If they don't, we are doing our work.

15 CHAIRMAN PALLADINO: They are supposed to request
16 this.

17 MR. HAYES: The Commission can do that.

18 COMMISSIONER ASSELSTINE: Yes.

19 COMMISSIONER BERNTHAL: That's a very good question.

20 MR. HAYES: By statute, I think, the Commission
21 can do that.

22 CHAIRMAN PALLADINO: But suppose they request our
23 deferring any action?

24 COMMISSIONER GILINSKY: Well, that's something we
25 would have to consider. Obviously, we are going to cooperate

1 with them and we have to discuss it.

2 CHAIRMAN PALLADINO: Well, I wanted to come back
3 to that policy question. I think you are touching on it
4 where it says, "The Commission authorize OI to state in its
5 negotiations with DOJ that the NRC, in appropriate
6 circumstances, will..."

7 What are the appropriate circumstances, and does
8 NRC have any say in what the appropriate circumstances are
9 at the time that the questions come up?

10 MR. FITZGERALD: Okay, I would think that
11 availability of manpower would be --

12 CHAIRMAN PALLADINO: Well, I --

13 COMMISSIONER ASSELSTINE: I think he is on the
14 second part, deferring?

15 CHAIRMAN PALLADINO: No, I am just on Item No. 1
16 where it says that the NRC in "appropriate circumstances,"
17 and does NRC have any say in the appropriate circumstances.
18 Can we put something in there --

19 COMMISSIONER ASSELSTINE: Oh, yes.

20 CHAIRMAN PALLADINO: -- that would give us a place
21 in determining.

22 COMMISSIONER GILINSKY: Well, I think we are the
23 ones who decide --

24 CHAIRMAN PALLADINO: Well, I'd like that clear.
25 It's not always that clear.

1 COMMISSIONER BERNTHAL: I'm just not sure that you
2 can write clear rules on some of these things.

3 CHAIRMAN PALLADINO: I agree.

4 COMMISSIONER BERNTHAL: That may be the problem.

5 COMMISSIONER ASSELSTINE: Yes.

6 COMMISSIONER BERNTHAL: And it may well be that we
7 need to deal with these somewhat on a case-by-case basis.

8 Nevertheless, Victor's point is a key one, and I
9 have never understood why we have to stop anything. I gather
10 it has to do with witnesses clamming up or --

11 MR. FITZGERALD: Well, we don't have to stop. It's
12 clear that we don't have to stop.

13 COMMISSIONER GILINSKY: That has to do with after the
14 point at which the Justice Department shows some interest
15 in taking action. But if we simply referred something, the
16 chances are they won't take any action. I think that's what
17 the statistics probably show.

18 And it raises the question, you know, why should
19 we be holding up.

20 MR. FITZGERALD: But we don't have to stop.

21 CHAIRMAN PALLADINO: Except we had one --

22 MR. FITZGERALD: Only when we receive a request.

23 COMMISSIONER BERNTHAL: But we had some rather
24 persuasive arguments given us why we must suspend 60 days
25 and then another 60 days, as I recall.

1 MR. FITZGERALD: Yes, sir, but that was in response
2 to a request.

3 COMMISSIONER GILINSKY: I see.

4 MR. FITZGERALD: The normal matter is not to
5 receive any requests at all.

6 COMMISSIONER GILINSKY: I see. So, the 60 days
7 only starts if we have gotten a request from them.

8 COMMISSIONER ASSELSTINE: A request, that's right.

9 MR. FITZGERALD: That's right. And normally what
10 you have happen is that the matter is referred by OI to
11 I&E and the regions at the same time that it is referred to
12 the Department of Justice.

13 COMMISSIONER ASSELSTINE: Right.

14 MR. FITZGERALD: And I&E and the region consider and
15 evaluate an enforcement action and, indeed, make enforcement
16 decisions based on that investigation without consulting with
17 the Department or anything else.

18 It's only when a request comes in. In the instance
19 that you are talking about, indeed, a request did come in
20 and then the question is --

21 COMMISSIONER ASSELSTINE: How do you handle it.

22 MR. FITZGERALD: -- how do you handle it. How
23 should we respond.

24 COMMISSIONER ASSELSTINE: So, our posture would
25 be, we are making a referral in this case. You should know

1 we are going ahead on this. Then, if we get a request that
2 we defer action, then at that time give them a limited amount
3 of time to decide whether they are going to act or not, and if
4 they want any further extension beyond that time, we would
5 have to consider it on a case-by-case basis.

6 CHAIRMAN PALLADINO: Well, in the case, though, we
7 just continued delaying. Now, that doesn't mean that it
8 has to continue as long as --

9 COMMISSIONER ASSELSTINE: That's right. That's
10 right.

11 COMMISSIONER GILINSKY: Well, how many cases have
12 there been, really?

13 MR. HAYES: That we have deferred to the
14 Department?

15 COMMISSIONER GILINSKY: No, where they have come
16 back and say, hold up.

17 COMMISSIONER ASSELSTINE: Just a couple, right?

18 COMMISSIONER BERNTHAL: Not many.

19 CHAIRMAN PALLADINO: They generally stop all
20 important ones. How many times have we been requested to
21 hold up our investigation, pending further action by the
22 Department of Justice?

23 COMMISSIONER ASSELSTINE: Or enforcement action?

24 MR. HAYES: I can only think of one utility, but
25 of cases only two that I can think of.

1 COMMISSIONER GILINSKY: So, two, two cases altogether.
2 That's not a whole lot.

3 MR. HAYES: Yes.

4 COMMISSIONER GILINSKY: I wouldn't expect this to
5 happen very often.

6 MR. HAYES: Two out of literally hundreds.

7 COMMISSIONER ASSELSTINE: That's right.

8 COMMISSIONER GILINSKY: So, we are really talking
9 about the extreme end of this --

10 MR. HAYES: You are talking about the rare
11 exception rather than the mondaine day-to-day business that
12 OI and the Department of Justice does on a continual basis.

13 COMMISSIONER ASSELSTINE: Yes.

14 COMMISSIONER BERNTHAL: Maybe it's best --

15 CHAIRMAN PALLADINO: There is another one where
16 the staff has recommended that we wait. So --

17 COMMISSIONER GILINSKY: Still, three out of a
18 hundred --

19 CHAIRMAN PALLADINO: -- I would say it's a small
20 number.

21 COMMISSIONER ASSELSTINE: That's right.

22 COMMISSIONER GILINSKY: The main thing is to make
23 sure we do our work well.

24 CHAIRMAN PALLADINO: However, somehow I get the
25 feeling that we feel constrained after we have given something

1 to the Department of Justice.

2 COMMISSIONER GILINSKY: Well, we shouldn't.

3 COMMISSIONER ASSELSTINE: That's right.

4 COMMISSIONER GILINSKY: The problem here historically
5 has been that referring or contemplating referral has slowed
6 things down here or, in some cases caused us not to take
7 action at all. I am talking about events that predate Ben's
8 appearance here.

9 MR. HAYES: That's one of the positions that I
10 took early on was to --

11 COMMISSIONER ASSELSTINE: That's an example, too.
12 That's correct.

13 MR. HAYES: -- was to complete the investigation
14 so the Commission could go about its regulatory business.
15 I'm not a proponent of what I call "premature referral" to
16 the Department or to any other agency. We take care of our
17 needs and then evaluate the product for any additional
18 ramifications.

19 I think the Department would respect that.

20 MR. FITZGERALD: The Department's general
21 position, I think historically, has been that the NRC is
22 free to take -- assuming the investigation is completed --
23 is free to take enforcement action if it is necessary to
24 protect public health and safety.

25 They then move on, however, and say that civil

1 penalties, however, are -- I believe their attitude is more
2 that that's mere money and that we should stay our hand in
3 enforcing a civil penalty collection action hearing thereon
4 pending their making their decisions in the criminal frame-
5 work.

6 Now, we would say that even the imposition of a
7 civil penalty has a logical health-and-safety connection
8 in construct, backing it up, and to be sure that's the case
9 they understand that. But they would see that the mere
10 collection of money is, you know, that can wait.

11 But if the plant -- or if there is an immediate
12 threat to public health and safety, feel free, go ahead. We'll
13 take our chances with the criminal.

14 CHAIRMAN PALLADINO: Can I go to the policy
15 part of your recommendations? It seemed to me there are
16 several policy questions we need to address.

17 First, with regard to the loaning of investigators
18 to the Department of Justice. In a couple of cases you have
19 come to the Commission and asked the Commission's permission
20 to loan these individuals, and in one case you just -- you
21 did not come back and asked the Commission and just loaned
22 them.

23 I think a policy question we ought to address, and
24 that is that the loaning of investigators to the Department
25 of Justice should require Commission approval because it

1 does impact on your limited resources and it would relieve
2 you of feeling the direct pressure of taking your limited
3 resources and giving them to the Department of Justice.

4 MR. HAYES: At this point --

5 CHAIRMAN PALLADINO: That's one. I've got four of
6 them.

7 MR. HAYES: All right. At this point, on that
8 particular issue, I think we have discussed that previously
9 and we have made available -- the OI organization has made
10 available -- one investigator this year, is all, I think
11 for a maximum of two weeks if I am not mistaken, Mr.
12 Chairman. That's the extent of --

13 CHAIRMAN PALLADINO: There were three cases. I
14 don't want to mention them.

15 MR. HAYES: There may have been three cases, but
16 I'm talking about the actual use of Commission resources.
17 It was very limited.

18 CHAIRMAN PALLADINO: I have to ask myself the
19 question, in considering the pressure on the investigations
20 and number of cases that are pending, why should we be
21 giving some help on this particular case. I think that's a
22 question the Commission ought to consider in each case.

23 COMMISSIONER GILINSKY: Well, you know, we don't
24 ask I&E when they have somebody help out at FEMA or any
25 number of other agencies, or state agencies.

1 CHAIRMAN PALLADINO: They've got more resources.

2 COMMISSIONER GILINSKY: Well, I think that's a very
3 good point. I think the main thing to make sure is that
4 Ben's got enough people, which we really --

5 CHAIRMAN PALLADINO: We are waiting for that
6 authority.

7 COMMISSIONER BERNTHAL: It hasn't been easy.

8 CHAIRMAN PALLADINO: I still --

9 COMMISSIONER GILINSKY: That's really what we ought
10 to be placing our effort on. I think as far as having
11 somebody help out for three weeks, I think we really have
12 to leave it to his judgment.

13 CHAIRMAN PALLADINO: Well --

14 COMMISSIONER ASSELSTINE: Yes.

15 CHAIRMAN PALLADINO: -- in two cases he came back
16 and asked the Commission. On the third case, he did not.
17 And I say, "Well, I think he ought to come back to the
18 Commission." That's my opinion.

19 Now, if you want to settle it that he doesn't have
20 to come back, well, that's another position. I think that
21 is a guidance that we ought to give him.

22 COMMISSIONER GILINSKY: I think you ought to check
23 periodically the extent to which he does this.

24 CHAIRMAN PALLADINO: Well, after he's done it,
25 there is little --

1 COMMISSIONER GILINSKY: Well, but then you are not
2 talking about resources. Then you are talking about being
3 unhappy about him helping out the Department of Justice --

4 CHAIRMAN PALLADINO: No, I'm not unhappy about his
5 helping out the Department of Justice. I'm looking at where
6 our priorities lie, and sometimes they are lying in a different
7 direction.

8 COMMISSIONER ASSELSTINE: But I guess my sense is,
9 nobody is more sensitive to that problem than Ben is, since
10 he is the one that has the responsibility to get these things
11 done.

12 I guess I would leave it to Ben's judgment. If
13 he feels that -- if the situation ever arises where he is
14 getting a lot of requests that it looks like are going to put
15 a burden on him, then I think he is free to come back to us
16 and say, "Look, I'm prepared to say no on this one because
17 I think it's really going to create a problem for us."

18 But the sense I get from Ben is that it's not a
19 problem yet at least.

20 MR. HAYES: Well, we have basically, in some
21 instances, turned down the Department of Justice requests
22 for assistance. I am hopefully very judicious with the
23 Commission's resources. That's why a few months ago when
24 this issue was discussed before the Commission, I told you
25 that we were going to have day-to-day managerial involvement

1 of my staff to ensure that our resources were being applied
2 to Commission regulatory needs, even though we are assisting
3 the Department as opposed to other investigative matters
4 that the Department might be pursuing. I watch it very closely.

5 CHAIRMAN PALLADINO: I wasn't aware of the ones
6 you turned down, maybe that would help me. You can do that
7 later.

8 MR. HAYES: Yes.

9 MR. MURRAY: Mr. Chairman, I am Jim Murray from
10 ELD. I felt compelled to come up here and talk a little
11 bit on this subject because the EDO has some resources
12 that are involved here, too. It's the technical people
13 out in the field who get involved with the grand jury, and
14 then we can't use them or can't do our inspections.

15 So, it's more than Mr. Hayes' resources when
16 the Commission agrees to assist the Department of Justice,
17 however they agree.

18 So, I would suggest that in making the decision
19 to assist the Department of Justice it indeed be done on a
20 case-by-case basis. We haven't seen that many cases come
21 along. And that the criteria for deciding what to do should
22 be as follows:

23 To what extent will a successful prosecution
24 assist the NRC's regulatory goals.

25 Would unsuccessful criminal prosecution be a risk

1 not worth taking.

2 And, is the potential benefit to NRC's regulatory
3 goals worth the expenditure of NRC resources, including the
4 loss of use of any personnel involved in grand jury proceedings
5 that will be required.

6 Those are admittedly very general criteria but they
7 need to be applied, it seems to me, on a case-by-case basis.
8 And the EDO would very much like to get involved with the
9 Commission decision to apply those criteria because it does
10 impact.

11 COMMISSIONER GILINSKY: It seems to me those are
12 useful things to inject into the process. But beyond that
13 we've also, I think, got an obligation to help them out to the
14 extent we can.

15 MR. MURRAY: No question about it, and 99 times out
16 of a hundred our goals are totally compatible.

17 CHAIRMAN PALLADINO: And I wasn't saying that we
18 were changing our objective. I was saying that loaning of
19 investigators to DOJ should require Commission okay, or
20 approval.

21 MR. MURRAY: Yes, sir. I was giving you some
22 more reasons why you might want to think so.

23 CHAIRMAN PALLADINO: I don't know, so far we have
24 heard two who say no and one who says yes. I don't know if
25 there are others.

1 COMMISSIONER ROBERTS: I'm going to agree with you,
2 Mr. Chairman.

3 CHAIRMAN PALLADINO: Insofar as guidance.

4 COMMISSIONER BERNTHAL: I'm sorry, I didn't under-
5 stand that we had a misunderstanding yet.

6 COMMISSIONER ASSELSTINE: The question is, do you
7 want to leave it with Ben and the EDO to decide --

8 CHAIRMAN PALLADINO: Loaning an investigator.

9 COMMISSIONER ASSELSTINE: -- whether to loan people
10 out, or whether it has to be bucked up to the Commission
11 every time.

12 COMMISSIONER BERNTHAL: It seems to me that what we
13 just heard are good, broad criteria to be used in making that
14 judgment.

15 I would like to get a better idea of how large
16 this problem really is. It sounds like it's --

17 COMMISSIONER ASSELSTINE: I don't think it's a
18 problem.

19 COMMISSIONER BERNTHAL: -- it's not a big problem.

20 CHAIRMAN PALLADINO: Well, then it's important that
21 it comes to the Commission.

22 COMMISSIONER GILINSKY: You mean we deal with
23 small problems?

24 (Laughter)

25 CHAIRMAN PALLADINO: We deal with small numbers.

1 We deal with small numbers of things. But this is no small
2 thing. Don't confuse numbers with significance.

3 MR. HAYES: The request from the Department of
4 Justice for resources to assist them in a grand jury action
5 has, over the last 13 or 14 months, has come in -- in written
6 form -- on three occasions.

7 I approached the Commission on one of those
8 requests and elected -- my view was not to participate.
9 The Commission agreed with that. The latest one was a vendor
10 case and both OI and the staff agreed to participate in that.
11 And the most recent one, the staff made an election to
12 participate also.

13 At no time have I, as the Director of OI, committed
14 staff to assist in a grand jury request. I have always gone
15 through the EDO. I have always gotten them to say "yes" or
16 "no" because it's his resources and not mine.

17 So, there is nothing -- you know, I just don't
18 go back without Bill Dircks' okay and say, "Yes, we are going
19 to provide technical assistance." That's his decision and
20 he has always made that decision.

21 And I presume he has used the criteria that OELD
22 has just set forth.

23 CHAIRMAN PALLADINO: Well, I still maintain that
24 loaning of investigators to the DOJ should involve
25 Commission approval. That's only one point. I don't know

1 if you got a feeling on that, Fred, or not.

2 COMMISSIONER BERNTHAL: It sounds like it's -- and
3 I still don't have any numbers. It sounds like it's such
4 a small fraction of cases, though, Joe, that I'm for preserving
5 flexibility on the part of staff if it really is not a major
6 problem.

7 I don't know whether you can give us some numbers.

8 MR. HAYES: Right now, OI has committed one
9 investigator. As I say, I think he has put in two weeks
10 over the last calendar year on a vendor case. We have just
11 most recently committed an OI investigator to assist in another
12 referral, but we have not, to my knowledge, done anything
13 with the Department on that issue.

14 From the staff's side, the staff has provided
15 technical resources to the grand jury investigation in
16 Harrisburg, I believe two people assisted that grand jury.
17 And most recently, the staff agreed to assist on the request
18 that I answered a few weeks ago from the Department. They
19 provided one technical person part time.

20 All of these arrangements with the Department of
21 Justice are purely part-time situations and we have very
22 little --

23 MR. MURRAY: Yes, but once they get contaminated
24 with the grand jury, they are out, period, whether it's part
25 time or not.

1 COMMISSIONER BERNTHAL: Let me summarize my thoughts
2 on this. It seems to me we ought to address the policy
3 issues that exist here in the broad sense and not try in
4 such a small number of cases, I think, constrict Ben's
5 freedom to operate.

6 The policy issues, as I see them, are one, that we
7 should give Ben some fairly definitive guidelines on which
8 to make his judgments. EDO's suggestions here might form the
9 basis for that.

10 Secondly, unrelated policy question -- well, it's
11 related, we have not talked about it yet, and that is who
12 refers these things to DOJ. Joe, you have a memo out that
13 I largely agree with on that.

14 Thirdly, I'm concerned that this policy statement
15 here, which you have softened from "conduct investigations"
16 to "assist in investigations," that may still not quite be
17 the right implication, it seems to me.

18 We may want to make sure that we cooperate in every
19 way necessary with DOJ, but that we not by any policy
20 statement give the implication that we are going to be
21 aggressive or proactive in achieving criminal investigation
22 of objectives. We have --

23 CHAIRMAN PALLADINO: I think that ought to get in the
24 policy statement in addition to some of the things we have
25 authorized Ben to negotiate. But I think our --

1 COMMISSIONER BERNTHAL: So. I'm not in favor at
2 this point, since the problem seems to be so small, of
3 putting into our policy statement there a direct requirement
4 that Ben consult with us every time he has a requirement to
5 loan one or two people.

6 CHAIRMAN PALLADINO: I don't think that the problem
7 is that small. Okay, but that at least for the moment
8 settles that one.

9 I do think in a policy statement we need to say
10 something about the health and safety concerns that require
11 immediate administrative attention.

12 COMMISSIONER ASSELSTINE: Yes.

13 CHAIRMAN PALLADINO: I think that should also get
14 into the policy statement. We ought to also give in the
15 policy statement the fact that we like the request for
16 deferring enforcement or investigation written and be at --
17 what did you say, the Deputy Assistant --

18 COMMISSIONER ASSELSTINE: Yes, either the Deputy
19 or --

20 CHAIRMAN PALLADINO: Now, I also have another one
21 that is more controversial, the one on which I signed a memo
22 this morning, and that is Commission involvement in material
23 false statement.

24 I still think that since we have put the curb on
25 I&E with regard to material false statements where they have

1 to come to the Commission, I think similar action ought to be
2 done with regard to referral of material false statements to
3 the Department of Justice because here again we can face
4 the situation where we can no longer proceed on an action,
5 depending on the reaction of the Department of Justice.

6 COMMISSIONER ASSELSTINE: No, but I don't see how
7 that's a problem if we are in agreement that we are going to
8 go ahead, absent their stepping in and saying, "You can't,"
9 and we have good reasons why you can't."

10 CHAIRMAN PALLADINO: Well, and suppose they have
11 reasons why you can.

12 COMMISSIONER ASSELSTINE: Well, then why is it
13 different than any of the others?

14 COMMISSIONER GILINSKY: What did you do with I&E?
15 I remember we had an argument about it.

16 (Laughter)

17 CHAIRMAN PALLADINO: Well, it's my understanding
18 that the procedure provides for Commission consultation on
19 any enforcement action that involves a material false
20 statement finding, but does not provide for Commission
21 consultation on referrals to Justice on material false
22 statements or suspected material false statements.

23 For consistency, and even more to make sure that
24 we retain our flexibility, that should be referred to the
25 Commission or consultation exist with the Commission.

1 That's another policy issue.

2 COMMISSIONER GILINSKY: Why did you single out the
3 material false statement?

4 CHAIRMAN PALLADINO: It's been singled out in I&E
5 enforcement.

6 COMMISSIONER GILINSKY: No, but why did you do it
7 there?

8 CHAIRMAN PALLADINO: I don't recall.

9 COMMISSIONER GILINSKY: Well, you were very
10 insistent about it at the time.

11 CHAIRMAN PALLADINO: Excuse me. I think that wh;
12 did "we" do it. I think "we" did it, I didn't.

13 (Laughter)

14 COMMISSIONER GILINSKY: "You" as plural as well.

15 (Laughter)

16 COMMISSIONER ASSELSTINE: That's right.

17 CHAIRMAN PALLADINO: I can take it plural. If you
18 would have said "we," that would have included you.

19 COMMISSIONER GILINSKY: Well, I didn't.

20 (Laughter)

21 CHAIRMAN PALLADINO: I don't know.

22 COMMISSIONER GILINSKY: Do you remember the argument
23 for that? Because if we can't remember it, we ought to
24 reverse it.

25 CHAIRMAN PALLADINO: No, I think we can go for

1 an amount.

2 COMMISSIONER ASSELSTINE: I think Victor has raised
3 a good question, why is it important that material false
4 statement violations come up here as compared to all the
5 others.

6 COMMISSIONER BERNTHAL: What fraction of referrals
7 are material false statement, as opposed to other things?

8 MR. HAYES: I'm sorry, Commissioner, I just don't
9 have a --

10 COMMISSIONER BERNTHAL: Is it small or large, or
11 most of them?

12 MR. MURRAY: It's bound to be small, Commissioner
13 Bernthal because what we call "material false statement" is
14 very, very rarely a criminal act. I don't know of any that
15 are criminal acts. They are 10.01 violations, 18 USC 10.01,
16 they are not violations of the Atomic Energy Act.

17 COMMISSIONER BERNTHAL: Of the things we refer to
18 DOJ, is what I am asking. Do they form the majority of the
19 things we refer to DOJ or is it --

20 CHAIRMAN PALLADINO: Incidentally, I do remember
21 some of the arguments. We have so much disagreement on what
22 a material false statement is, especially with respect to
23 omission, commission, and some of the criteria involved, it's
24 been a subject that the Commission hasn't been always in
25 agreement on. If the Commission can't always agree, I think

1 it should be discussed, depending on the circumstances of
2 the case.

3 COMMISSIONER GILINSKY: Well, it seems to me the
4 way to handle that is for the Commission to give guidance
5 on material false statements.

6 CHAIRMAN PALLADINO: It has attempted to, but it
7 hasn't always been consistent.

8 COMMISSIONER GILINSKY: But it's odd to single out
9 one kind of violation. What you are really doing is just
10 putting stumbling blocks in the way of --

11 COMMISSIONER ASSELSTINE: Yes.

12 COMMISSIONER GILINSKY: -- action in that particular
13 front as opposed to others.

14 CHAIRMAN PALLADINO: That's because the Commission
15 has -- this is no trivial matter. The Commission has spent
16 hours discussing many of these cases and has written opinions
17 that still are debated.

18 COMMISSIONER BERNTHAL: In fact, the rules of
19 Ben Hayes' own shop, I think, that went up to the Bell
20 Subcommittee, said from some time back -- as I recall -- that
21 referrals to the Department of Justice, oddly enough, were
22 to go through OIA which implied going through the Commission.

23 COMMISSIONER GILINSKY: No.

24 COMMISSIONER BERNTHAL: I thknk that's what was said.

25 (Simultaneous conversation)

1 COMMISSIONER GILINSKY: We did say to go through
2 OIA.

3 COMMISSIONER BERNTHAL: That's right.

4 COMMISSIONER GILINSKY: But OIA --

5 COMMISSIONER BERNTHAL: Reports to us.

6 COMMISSIONER GILINSKY: As does Ben.

7 COMMISSIONER ASSELSTINE: Yes, that's right.

8 COMMISSIONER GILINSKY: And OIA --

9 COMMISSIONER ROBERTS: Which is a mistake.

10 COMMISSIONER GILINSKY: Well, that's another issue.

11 COMMISSIONER ASSELSTINE: It is another issue, it's
12 not a mistake.

13 COMMISSIONER GILINSKY: The fact that it went
14 through OIA did not mean it went through the Commission.
15 It in fact did not.

16 COMMISSIONER BERNTHAL: Well, then one wonders
17 what the point of going through OIA was.

18 COMMISSIONER GILINSKY: There wasn't a whole lot of
19 point to it.

20 CHAIRMAN PALLADINO: Well, I think we modified that.

21 COMMISSIONER ASSELSTINE: That's right, it has been
22 modified.

23 COMMISSIONER GILINSKY: But it did not, those did
24 not go through the Commission.

25 COMMISSIONER BERNTHAL: The reason that I asked the

1 question, though -- I don't know whether you got an answer --
2 of what fraction referrals were, material false statement,
3 is that I would tend to agree, why single that out if that is
4 most of the cases?

5 COMMISSIONER ASSELSTINE: Yes.

6 COMMISSIONER BERNTHAL: Now, if it's a small fraction
7 then perhaps we have something to worry about.

8 MR. HAYES: I don't have the figures, Commissioner.
9 I can certainly provide them to the Commission. But the
10 normal material false statement is usually a document of
11 some type, presented to the Commission in some regulatory
12 proceeding or some review, or something of that nature. It's
13 a falsification of an entry in a required document.

14 COMMISSIONER BERNTHAL: I understand that, but
15 the question is --

16 COMMISSIONER GILINSKY: Well, you say a falsi-
17 fication. Actually, a material false statement is not --
18 that does not imply that it was done deliberately.

19 MR. HAYES: That's correct.

20 COMMISSIONER ASSELSTINE: That's right.

21 MR. HAYES: That's correct.

22 COMMISSIONER GILINSKY: And it would be only in the
23 case where it were deliberate --

24 (Commissioner Roberts leaves room.)

25 MR. HAYES: Deliberate, willful falsification.

1 COMMISSIONER GILINSKY: -- it would be eligible for --

2 COMMISSIONER BERNTHAL: Exactly.

3 COMMISSIONER GILINSKY: -- for referral to the
4 Department of Justice.

5 COMMISSIONER BERNTHAL: I think you are confusing
6 the question, though. The question was, of the things we
7 refer to DOJ, are these material false statement things most
8 of those. Until we give Ben some clear guidance on what
9 the Commission thinks about material false statement, maybe
10 we should consider everything that is referred to DOJ, just
11 as a routine matter. The Commission should make that
12 decision rather than Ben being stuck with it, at least until
13 he understands what our policy is on those things.

14 (Commissioner Roberts returns to room.)

15 MR. FITZGERALD: I am under the impression that a
16 large number of items are referred to DOJ. That is, a large
17 number of the investigations that do reveal action on which
18 we would take enforcement action, for example; not ones that
19 just turn out to be nothing.

20 Ben, do you have any idea how many referrals to
21 DOJ are made annually?

22 MR. HAYES: Yes. I think since the inception of
23 OI, which would be approximately 20 months, we are talking
24 somewhere between 10 and 14, I believe -- 12 and 14.

25 Is that close?

1 MR. FORTUNA: That's just since we've got the
2 referral responsibility.

3 MR. HAYES: Okay, so it would be about the last
4 year, then, we are talking 12 to 14 cases.

5 COMMISSIONER ASSELSTINE: Six months?

6 MR. FORTUNA: I would say the last six months over
7 a dozen, probably 20.

8 CHAIRMAN PALLADINO: Two a month?

9 Well, I was not proposing that we ask Ben to refer
10 everything to the Commission. I just selected material
11 false statement because it is one that has been a real problem
12 for the Commission, one on which we have had very confusing
13 writings; one on which we don't always get consistent answers,
14 and I think one that we ought to keep consistent between
15 OI and our practice with I&E.

16 COMMISSIONER GILINSKY: Well, but the way for the
17 Commission to deal with that is for the Commission to make
18 up its mind not to take on the job of the staff.

19 COMMISSIONER ASSELSTINE: Yes.

20 CHAIRMAN PALLADINO: I'm sorry, on this one we have
21 a more complex problem, one on which we have acted with
22 regard to I&E.

23 COMMISSIONER ASSELSTINE: Well, I thought we had an
24 effort aimed directly at coming back to the Commission on
25 material false statements to try and develop some guidance on

1 that very point.

2 If that's the case, I agree with Victor, that's the
3 way to deal with it, not by pulling up the referrals.

4 MR. MURRAY: I'm reliably informed --

5 (Laughter)

6 MR. MURRAY: -- that we expect to have that paper
7 down here this week.

8 COMMISSIONER ASSELSTINE: Teriffic.

9 CHAIRMAN PALLADINP: Well maybe that --

10 COMMISSIONER ASSELSTINE: That's the vehicle for
11 dealing with it.

12 CHAIRMAN PALLADINO: If we can settle that, then I
13 wouldn't need the statement I have and then we might release
14 I&E. But if it doesn't settle it, I still would stick to my
15 guns.

16 I think the other one was -- I already mentioned --
17 and that is the basis on which we would delay enforcement
18 action.

19 COMMISSIONER ASSELSTINE: Yes.

20 CHAIRMAN PALLADINO: Those are the items I thought
21 we ought to add, plus the one that Fred caught up, we ought to
22 add to the policy statement.

23 COMMISSIONER ROBERTS: Well, to your "adds" I have
24 a proposed deletion which I don't think will find much favor,
25 but I think we have absolutely no business calling up contractors

1 and vendors in this policy statement. I think it is highly
2 arguable about whether we regulate contractors and vendors.
3 We regulate licensees.

4 CHAIRMAN PALLADINO: What page are you on?

5 COMMISSIONER ROBERTS: I'm in the proposed policy
6 statement, on page 12.

7 CHAIRMAN PALLADINO: Oh.

8 COMMISSIONER GILINSKY: Well, we fine vendors.

9 COMMISSIONER ASSELSTINE: Yes.

10 COMMISSIONER ROBERTS: We have, and it's questionable
11 whether we have that authority, in my opinion.

12 COMMISSIONER GILINSKY: They paid the fine.

13 COMMISSIONER ROBERTS: That doesn't have anything
14 to do with the rightness or the correctness of it.

15 MR. MALSCH: Well, in some cases we have clear
16 authority to fine a vendor, in other cases we do not.

17 COMMISSIONER ASSELSTINE: That's right.

18 MR. MALSCH: It depends on the situation.

19 COMMISSIONER ROBERTS: Exactly, I agree.

20 CHAIRMAN PALLADINO: How do you define a vendor in
21 this case?

22 MR. MALSCH: Well, non-licensees with some involvement
23 in plant operation or construction.

24 COMMISSIONER ASSELSTINE: But again, isn't the
25 place to deal with that issue when we look at the whole vendor

1 policy this year? That's another area where we've got a major
2 initiative. Who knows, we may end up licensing vendors.

3 COMMISSIONER ROBERTS: Oh --

4 (Laughter)

5 COMMISSIONER BERNTHAL: A cry of pain.

6 (Laughter)

7 COMMISSIONER ROBERTS: I remember what Victor
8 told me early on. He said, "Tom, in the private sector you
9 go for bucks. In the government you go for turf."

10 (Laughter)

11 COMMISSIONER ROBERTS: That was a very sound
12 advice. My experience would prove that you were entirely
13 correct.

14 (Laughter)

15 COMMISSIONER BERNTHAL: You've got to be careful,
16 Victor.

17 (Laughter)

18 CHAIRMAN PALLADINO: You got any more, Tom?

19 COMMISSIONER ROBERTS: No.

20 (Laughter)

21 COMMISSIONER GILINSKY: Thank God.

22 (Laughter)

23 CHAIRMAN PALLADINO: You've got any more, Fred?

24 COMMISSIONER BERNTHAL: No, I don't think I can
25 possibly add.

1 COMMISSIONER ASSELSTINE: I think we have given more
2 than enough guidance.

3 (Laughter)

4 CHAIRMAN PALLADINO: I'm going to make the following
5 suggestion --

6 COMMISSIONER ROBERTS: What guidance?

7 (Laughter)

8 CHAIRMAN PALLADINO: Now, wait a minute, I'm going
9 to make the following suggestion, that OGC rewrite the
10 1 and 2 recommendations to encompass what you think we have
11 said, such as "assist in the conduct of investigations,"
12 requiring "written requests from the Deputy Assistant
13 Attorney General."

14 COMMISSIONER ASSELSTINE: Yes.

15 CHAIRMAN PALLADINO: Putting in the provision that
16 there are no health -- that if there are health and safety
17 concerns that we are free to take prompt action.

18 I think some of these same points need to be
19 said in the policy statement. I think I lost on a couple of
20 the others, but I'm not going to give up. But I'll have to
21 give up for today.

22 COMMISSIONER BERNTHAL: Did you mention the broad
23 EDO -- these broad criteria so that Ben has some yardstick
24 to measure these things by?

25 CHAIRMAN PALLADINO: Well, it isn't only Ben that has

1 to measure them, the EDC has to measure them.

2 COMMISSIONER ASSELSTINE: That's right.

3 MR. MURRAY: Well, everybody, yes.

4 COMMISSIONER ASSELSTINE: Yes.

5 COMMISSIONER BERNTHAL: Us, too.

6 COMMISSIONER ASSELSTINE: The development of some
7 criteria.

8 CHAIRMAN PALLADINO: See, I wanted to put us in it
9 but the Commission said, "No, leave it to EDO and Ben Hayes."
10 So, we are out of it once we establish --

11 COMMISSIONER ASSELSTINE: To the extent that you can,
12 you can develop the criteria to be part of the Memorandum of
13 Understanding that would provide the framework, then.
14 Certainly, that will give us an opportunity to look at the
15 criteria.

16 COMMISSIONER BERNTHAL: Joe, I'm not saying, and I
17 did not say, I don't believe, that we should be out of it until
18 we get this policy issue settled. I think the guidance was
19 good that the Commission take charge of these material
20 false statement things until Ben has some clear guidelines.
21 He doesn't have those right now and so at least for the time
22 being, we ought to continue to look at this.

23 CHAIRMAN PALLADINO: What are you going to give us
24 guidelines on, material false statement?

25 MR. MURRAY: Yes. We have a staff paper that --

1 CHAIRMAN PALLADINO: Well, I wasn't talking about
2 material false statement, I was talking about loaning people.

3 COMMISSIONER BERNTHAL: Loaning people, okay.

4 CHAIRMAN PALLADINO: I'll hold on that one until
5 I read the paper. I think the others we covered in the first
6 part.

7 COMMISSIONER BERNTHAL: That's right.

8 CHAIRMAN PALLADINO: Now, you had another point
9 that you said ought to be included in the policy statement,
10 and I forgot what it was. But I agreed with it.

11 COMMISSIONER BERNTHAL: Well, I don't --

12 MR. FITZGERALD: Cooperate with the Department of
13 Justice rather than --

14 COMMISSIONER BERNTHAL: It was only a question of
15 whether even "assist" was not quite the right wording, and
16 I think they can play with that.

17 CHAIRMAN PALLADINO: Yes, our policy is to first
18 serve our civil purposes and then help DOJ.

19 COMMISSIONER ASSELSTINE: Yes. But I'm not sure
20 if there is much difference between "cooperate" and "assist."

21 CHAIRMAN PALLADINO: Yes.

22 COMMISSIONER ASSELSTINE: But it's certainly
23 different than "conduct."

24 (Laughter)

25 CHAIRMAN PALLADINO: Okay, any other comments on

1 this point?

2 Okay, thank you very much.

3 MR. HAYES: Thank you.

4 CHAIRMAN PALLADINO: We stand adjourned.

5 (Whereupon, at 11:25 a.m. the meeting of the
6 Commission was adjourned.)
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