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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION
OFFICE OF THE SECRETARY

COMMISSION BRIEFING ON
IMPROVEMENTS TO 10 CFR 2.206 PETITION PROCESS

Nuclear Regulatory Commission
One White Flint North
Commissioners Hearing Room
11555 Rockville Pike
Rockville, Maryland
Thursday, May 25, 2000

The Commission met in open session, pursuant to
notice, at 1:29 p.m., the Honorable RICHARD A. MESERVE,
Chairman of the Commission, presiding.

COMMISSIONERS PRESENT:

- RICHARD A. MESERVE, CHAIRMAN
- NILS J. DIAZ, Member of the Commission
- EDWARD McGAFFIGAN, JR., Member of the Commission
- JEFFREY S. MERRIFIELD, Member of the Commission

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- 1 STAFF AND PRESENTERS SEATED AT THE COMMISSION TABLE:
- 2 WILLIAM TRAVERS, Executive Director for Operations
- 3 ROY ZIMMERMAN, Deputy Director, NRR
- 4 MARTIN VIRGILIO, Deputy Director, NMSS
- 5 MS. SUSAN BLACK, Deputy Director, DLPM, NRR
- 6 DAVID LOCHBAUM, UCS
- 7 JAMES RICCIO, Public Citizen
- 8 PAUL GUNTER, NIRS
- 9 ELLEN GINSBERG, NEI
- 10 ANNETTE L. VIETTI-COOK, Secretary
- 11 KAREN D. CYR, General Counsel
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[1:29 p.m.]

CHAIRMAN MESERVE: Good afternoon. This meeting is to meet with Staff and stakeholders to discuss the NRC Staff's proposed changes to the review process for dealing with petitions filed under Section 2.206 of the Commission's Regulations.

As I think everyone in the audience probably knows, Section 2.206 was first promulgated in 1974 to provide a mechanism by which any member of the public could request that the NRC take an enforcement action.

This was really quite a remarkable provision in the sense that it is not one that is compelled by any statutory requirement. It was intended to be an informal process, and as an incident to that, it doesn't have barriers that would otherwise arise in a hearing process, such as a demonstration that a petitioner establish standing in order to proceed.

In 1996, the Staff instituted a pilot program to develop and improved process for responding to these petitions, and most recently in 1999, the Staff has been seeking and evaluating stakeholders comments on how the process might be improved.

As a result of this effort, the Staff has planned changes to the process. This afternoon, we'll first be

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1 hearing from the Staff and a panel that will describe their
2 work, some of the changes that they propose.

3 And then we'll hear comments from a variety of
4 stakeholders. Why don't we proceed, but let me first turn
5 to my colleagues and see if they have any opening
6 statements.

7 [No response.]

8 CHAIRMAN MESERVE: Dr. Travers, you may proceed.

9 DR. TRAVERS: Thank you, Mr. Chairman. As the
10 first order of business, let me introduce the people at the
11 table: Marty Virgilio is the Deputy Director of Nuclear
12 Materials Safety and Safeguards Office; Roy Zimmerman, of
13 course, is the Deputy Director of the Office of Nuclear
14 Reactor Regulation, and to his left; Susan Black, who is the
15 Deputy Director of the Division of Licensing and Project
16 Management.

17 Could I have the first slide, please? Over the
18 past five years, the Staff has made a series of improvements
19 to the process for reviewing petitions filed pursuant to 10
20 CFR 2.206.

21 In late 1999, the Staff made a commitment to
22 present information to the Commission regarding recent
23 planned changes to the 2.206 process.

24 Subsequently on May 3rd, I provided a memo
25 describing the status of those planned changes, and, of

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1 course, today we're here to discuss those planned changes
2 with the Commission.

3 The changes we will discuss today are the result
4 of a focused effort to engage the principal stakeholders of
5 the 2.206 process; to clearly identify their concerns with
6 the process; and to develop improvements that are responsive
7 to those concerns.

8 Since the 2.206 process cuts across Program Office
9 lines, the Staff efforts to improve the process have
10 involved all of the principally-affected Offices, including
11 NRR, NMSS, and OE, and with outstanding assistance from the
12 Office of the General Counsel.

13 I'd like to turn it over to Roy Zimmerman, who is
14 going to further explain the nature and the schedule of some
15 of the planned improvements.

16 MR. ZIMMERMAN: Good afternoon. I'd like to have
17 the next slide, please.

18 Mr. Chairman, you covered much of the information
19 on Slide 2, so I won't repeat what you covered very
20 completely with regard to the purpose of 10 CFR 2.206, the
21 enforcement options that are available, as well as the fact
22 that it is an informal process.

23 And I'll move on to the next slide and spend a
24 couple of moments briefly discussing the basic process that
25 we follow.

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1 The Governing Management Directive associated with
2 2.206 is Management Directive 811, and following that
3 document, upon receipt, the petition is assigned to the
4 appropriate office for followup. Typically, NRR, NMSS, or
5 the Office of Enforcement are the locations by which the
6 petitions are reviewed.

7 A Petition Review Board is arranged and reviews
8 the incoming petition. It determines whether the petition
9 meets the criteria specified for 2.206.

10 It reviews whether there is a request for
11 immediate action, and it evaluates the scope and schedule of
12 review. The Petition Review Board is chaired by a Senior
13 Manager.

14 It includes representation of the technical staff,
15 the Petition Manager, who is a member of that Board, and
16 typically OGC is there to provide counsel.

17 Subsequent to that meeting, the assigned
18 Petitioner Manager will send an acknowledgement letter to
19 the Petitioner, a Federal Register Notice is issued. This
20 is, in fact, a public process. It also will go up on our
21 external website as well.

22 The Staff will review the petition, and will
23 respond by the Office Director's decision. We have a goal
24 of 120 days form the day of the acknowledgement letter of
25 issuance of our Director's decision.

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1 The Commission may choose to review the Office
2 Director's decision. The decision becomes final, Staff
3 action, after 25 days if the Commission has not elected to
4 review it.

5 Next slide, please. This slide identifies a
6 number of the contemporary concerns that we have dealt with
7 in interactions with petitioners over the last several
8 years.

9 The first couple are becoming a little bit more
10 historical now. There were concerns several years ago with
11 regard to the timeliness of our petitions.

12 To go back in time a little bit, in the 1997
13 timeframe, we had an average of about eight months for
14 completion of our decisions; in 1999, that was down to four
15 and a half months, so there has been improvement in that
16 area.

17 Another area that I think has a little bit of a
18 historical complexion is communications. Concerns over the
19 lack of consistency in providing periodic status updates to
20 petitioners: Frankly, the petitioners were interested in
21 getting an update on where these items stood in our review,
22 and our outreach could have been better.

23 The third bullet is associated with a number of
24 petitioners feeling that their concerns were not fully
25 considered. And I think that is to some extent, still a

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1 concern that is shared by some petitioners.

2 The issue of participation in the process is one
3 that we've turned our attention to. And Susie Black will
4 talk about that in considerable detail, but historically,
5 the petitioners have had a concern; they haven't felt that
6 they were part of the process.

7 They could not interact with the staff. They sent
8 in their petition, they would get updates, but there was not
9 much dialogue.

10 And last but not least, the lack of appeal process
11 is an issue that the petitioners have raised with us. As we
12 know, by rule, the Commission does not consider requests to
13 review Director's decisions, and a number of petitioners
14 feel that they lack avenues to challenge Staff Decisions.

15 We've been working on these, and Susie's
16 presentation will address what we have done to this point
17 and what our future plans are to be responsive to these
18 concerns.

19 MS. BLACK: Thank you. I'll be describing the
20 process today, and I know that it will sound like there's a
21 lot of steps, so I just wanted to let you know that when we
22 do receive a 2.206 petition, if there's an immediate safety
23 concern, we do address that before we go through all these
24 steps that take months.

25 And first of all, I'd like to describe the

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1 previous revisions to Management Directive 811. As Roy
2 said, that's the Management Directive that describes our
3 review process for 2.206 petitions.

4 There have been two recent revisions. The first
5 one in 1997 attempted to address the timeliness issue. And,
6 for example, we formalized the use of the Petition Review
7 Board at that time to provide for up-front planning and
8 coordination of the Director's decision.

9 Also, we added a requirement to track timeliness,
10 which improved timeliness quite a bit.

11 And then, based on a telephone survey of active
12 petitioners, as well as NRC experience, we did another
13 revision in 1999. That revision provided for greater
14 petitioner participation in the process and better
15 communications, once again.

16 Next slide, please. The 1999 changes included
17 providing an opportunity for the petitioner to address the
18 Petition Review Board prior to the Review Board making
19 decisions on the petition.

20 This ensured that the Petition Review Board
21 understood the petition, and also reduce the likelihood that
22 we would fail to address some of the petitioner's concerns.

23 We provided for increased communications between
24 the Petition Manager and the petitioner; we added a
25 requirement that the Petition Manager call the petitioner

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1 every 60 days. And they could no longer leave a voice mail
2 message; they had to keep trying, unless there was
3 absolutely no luck in getting through, but they had to make
4 several attempts.

5 We also added the petitioners to the service list
6 at that time. This ensures that the petitioner has all the
7 information relevant to its petition that he needs.

8 And the service list, if you don't understand what
9 that is, it's our way of sending our correspondence out.
10 People on our service list get copies of our correspondence.

11 The Petition Manager sends the licensee documents
12 relevant to the petition to the petitioner.

13 This goes on for up to 90 days after the
14 Director's decision is issued.

15 We also replaced the informal hearing process with
16 a Staff-petitioner-licensee meeting, and this really didn't
17 change much as far as what the meeting was. But it was a
18 misnomer; it was called a hearing, and it created confusion.

19 So we changed the name of the meeting at that
20 time, and also we removed one of the criteria that has to be
21 met to hold a hearing.

22 And finally, in the Director's Decision, we
23 acknowledge now that the petitioner has raised valid issues,
24 and we acknowledge any Staff actions that have been taken in
25 response to the issues that the petitioner raised, even

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1 though they may not be exactly what the petitioner asked for
2 in the petition.

3 If we've taken violations or any action against
4 the licensee, we'll talk about that in the Director's
5 Decision.

6 And we've changed the tone of our correspondence
7 to be friendlier and more positive.

8 Before I go to the next slide, though, I'd like to
9 describe these presentations to the Petition Review Board
10 which we instituted last year.

11 As I said, they are intended to give the Petition
12 Review Board better information about the petition, so that
13 they understand the issues before they meet. And we don't
14 discuss the merits of the issue; we just are just there to
15 take information, and ask clarifying questions.

16 But there have been concerns expressed that the
17 licensee is allowed to participate in these meetings -- you
18 could call them meetings -- and we think it's important to
19 understand that these petitions are raising safety concerns
20 about the licensee's facility, and the licensee is
21 responsible for that facility.

22 So we feel that they need to have this information
23 and be able to ask clarifying questions if they have
24 concerns about what the petitioner is bringing about about
25 their facility.

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1 Also in the past year, we really haven't followed
2 strict format for these presentations as we've learned with
3 each one we've gone through. We believe it's necessary to
4 establish a structure, but we want to maintain some
5 flexibility for the petitioners.

6 Petitioners may wish to participate by telephone.
7 In fact, for NRR, virtually all of the ones that we have had
8 have been by telephone, but NMSS had one where they actually
9 had a meeting.

10 But we think it's important for the petitioner to
11 be able to decide whether he wants to come here and meet in
12 person or do it by telephone. And they also may wish to
13 invite other people to listen in, which we had one telephone
14 conversation where one of the petitioners had invited a
15 large number of people and media to listen in on this
16 telephone conversation. And that was fine with us.

17 We also transcribe these meetings, and the
18 transcription becomes a supplement to the petition.

19 It should be noted, though, if immediate action
20 requests are included in the petition, that we can't wait
21 for a meeting to decide on the safety issues, or also to
22 decide on whether to plan a plant restart, we wouldn't hold
23 a plant down while we had a 10-day meeting notice out.

24 Next slide, Slide 7. The 1999 revision was an
25 interim step in addressing the concerns, and we understood

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1 that. We put a Federal Register Notice out in October of
2 1999, requesting comments on this version, and the comment
3 period ended January 31st. We also put the Management
4 Directive on the external website at that time.

5 We held a meeting on December 15th with David
6 Lochbaum of the Union of Concerned Scientists, Jim Riccio,
7 Public Citizen, and Ellen Ginsberg, NEI.

8 And at that meeting, we attempted to understand
9 all the concerns of the stakeholders, and we generally
10 agreed on potential solutions to the concerns.

11 We had a second meeting in February after the
12 public comment period ended, with Public Citizen, NEI, and
13 Winston and Strawn, in attendance at that meeting.

14 NEI was the only stakeholder to provide written
15 comments in response to the Federal Register Notice, and
16 their comments generally supported the solutions we had
17 discussed in the December meeting.

18 We looked at other sources for information,
19 including the Center for Strategic and International
20 Studies. They had provided some comments on the 2.206
21 process in their report last summer.

22 And we considered comments made at the Commission
23 meetings, for instance, the December 16th stakeholder
24 meeting, and the March 31st meeting on Risk-Informing the
25 Regulations.

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1 Next slide, please. After considering all of
2 these inputs, we proposed three planned changes to the
3 process: We are going to add an opportunity for petitioners
4 to address the Petition Review Board after the Petition
5 Review Board has had its initial meeting and determined such
6 things as whether the petition meets the criteria for
7 consideration.

8 This provides an opportunity for the petitioner to
9 comment on the decision, and to provide clarifying
10 information at that time, if they don't agree with the
11 decision.

12 It will also eliminate the stringent criteria for
13 the technical review meetings. This will make the process
14 more open and provide more opportunity for petitioners to
15 provide input to us.

16 And we'll provide petitioners and the licensees an
17 opportunity to comment on the proposed decisions. This
18 should address the lack of an appeal process without needing
19 a rule change that takes some amount of time and resources.

20 We also plan to rewrite the Management Directive
21 to make it easier to use and put it more in plain English.

22 Next slide, please. The first planned change will
23 is the petitioner will be informed of the Petition Review
24 Board recommendations regarding whether the criteria for
25 2.206 consideration has been met, whether immediate actions

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1 will be granted, and the scope and schedule of the review.

2 We will offer the petitioner an opportunity to
3 address the Petition Review Board at that time, and the need
4 for these meetings will be on a case by case basis depending
5 on what the petitioner desires. These will be similar in
6 format to the pre-PRB meetings. They will be flexible, and
7 depending on how the petitioner wants to hold the meeting we
8 will hold the meeting as they desire.

9 The petitioner comments will then be considered by
10 the Petition Review Board and after hearing from the
11 petitioner will address the comments in their
12 acknowledgement letter, or if we do not accept it as a 2.206
13 petitioner we will write them a letter addressing the
14 technical issues.

15 The current opportunity for the petitioner to
16 address the Petition Review Board before the meeting, before
17 its deliberations will be retained as an option, so we may
18 end up having two or three meetings with the petitioners
19 throughout the process.

20 The second change is we are going to eliminate the
21 criteria for the technical review meeting. These were
22 fairly stringent criteria and they were rarely if ever met
23 and we believe it is important to hold these meetings, so we
24 are going to eliminate those criteria.

25 The petitioner, licensee or the Staff can request

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1 this meeting. It should be noted the licensee or sometimes
2 others who may be impacted by the requested enforcement
3 action may participate in order to understand the issues and
4 the potential impact on their license.

5 The Staff will hold these meetings whenever they
6 are considered to be beneficial to the review and we will
7 normally notice these for the 10-day period that Management
8 Directive 3.5 stipulates. Next slide.

9 The third proposed change addresses the lack of an
10 appeal process. The petitioner and the licensee will
11 receive the proposed Directors Decision for comment and a
12 copy will be made available to the public at that time.
13 Comments will be addressed as part of the final Directors
14 Decision, and this ensures that the petitioner's concerns
15 are fully aired before a final decision is made.

16 The 2.206 process contributes to our goal of
17 maintaining safety and we believe these three process
18 changes will improve the overall process by obtaining
19 greater input from the petitioner during the review. We
20 will also have more contact with the petitioner so that the
21 petitioner will not be surprised by the decision.

22 Public confidence should be increased, we think,
23 by these process changes, and the input from the petitioner
24 and the licensee will help ensure that we have the most
25 complete information when we do prepare the Directors

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1 Decisions. Next slide, please.

2 While those are the benefits, they come with costs
3 in resources and timeliness. There will be increased
4 resources needed to review the petitions primarily due to
5 the significant increase we think we will have in meetings
6 with the public and with the petitioners and the Staff
7 effort to address comments that we receive on the Directors
8 Decisions.

9 NRR and NMSS will be affected the most by these
10 resource needs.

11 The review time will be probably extended by about
12 30 days due to the time we will provide the petitioner to
13 comment on the Directors Decision as well as the time it
14 will take us to resolve the comments and prepare another
15 Directors Decision or the final Directors Decision.

16 Now timeliness is an issue that we discussed in
17 the December 15th meeting, and I did commit to try to
18 improve our timeliness. We say 120 days after the
19 acknowledgement letter is the maximum amount of time, and we
20 are going to try to hold to that, but it should be noted
21 that a lot of these process improvements that we are talking
22 about may end up impacting timeliness, but we will always
23 keep an eye on the schedule and try to do the best that we
24 can. Next slide, please.

25 The schedule for the implementation of these

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1 changes is we intend to begin to implement these at the end
2 of next month. We are going to publish a draft revision of
3 Management Directive 8.11 in the Federal Register by the end
4 of July and ask for public comments. We will provide a
5 30-day public comment period. We will consider these
6 comments as well as any lessons learned throughout our
7 implementation period and issue a final revision in October
8 of this year.

9 MR. ZIMMERMAN: To summarize, I think we have had
10 good interaction with the petitioners over time in the areas
11 of concern. I think in many of those areas we have been
12 able to take steps to address and improve our responsiveness
13 in those areas.

14 That is something the Commission has tasked us to
15 do in a Commission tasking memorandum.

16 It is important that that connection be
17 strengthened because this is an important source of
18 information for us. We need to have the information that
19 petitioners can provide us because under the performance
20 goal of maintain safety this information is valuable for us
21 to have it, to assess it, and to ensure that we are
22 satisfying our obligations for protection of public health
23 and safety, so we have agreed with many of the comments that
24 there are steps that we can do to make it easier for the
25 petitioners to interact with us by having an opportunity to

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1 address the PRB at the front end to make sure that we are
2 not talking past each other, that the Board is meeting and
3 understands what the concerns are, that afterwards is
4 another opportunity now to reengage the Board, to understand
5 the decision that the Board came to, to challenge, to
6 question how that decision was made.

7 There may be cases where there's agreements to
8 disagree, but it provides those additional nodal points for
9 that discussion to take place, and then at the end of the
10 process the importance of providing an opportunity back to
11 the petitioner to be able to take a look at the draft
12 Directors Decision and be able to see whether there's a
13 logic and a technical flow that makes sense or whether they
14 want to come back and reengage, that there are factual
15 errors in our review, to provide us additional information
16 that supports the concerns, so we have agreed with the
17 comments to try to create additional opportunities for
18 interaction.

19 In the eye of the beholder it could look as though
20 it's taking us a long time. I tend to think we have gone
21 through -- we used the word "transition" quite a bit this
22 morning -- this process continues to go through a transition
23 but I firmly believe that the Staff has been aggressive in
24 trying to engage petitioners in various settings to gain
25 feedback and to move forward.

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1 As we move forward from this point, we need to
2 engage our petitioners again down the road. As we plan to
3 move forward with these changes and put them into our
4 Management Directive we are going to need that feedback on
5 whether these changes are accomplishing their intended
6 purpose.

7 I would say that there is a certain degree of
8 transition that we find ourselves in here, but I think it is
9 moving in the right direction.

10 DR. TRAVERS: That completes our presentation, Mr.
11 Chairman.

12 CHAIRMAN MESERVE: Good. Thank you very much.

13 Let me turn to my colleagues first for comments
14 and questions. Mr. Merrifield.

15 COMMISSIONER MERRIFIELD: Thank you very much, Mr.
16 Chairman.

17 To go back to one of the things that Mr. Zimmerman
18 said, this is an important source of information and one
19 that I think the Staff and the Commission treats very
20 seriously as a facet of our enforcement arm.

21 That having been said, while it is an essential
22 part it does need to be balanced against other resources
23 that we use in enforcement, and certainly I think we need to
24 be mindful of that as we have our discussions today.

25 In the presentation they will be making on the
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1 next panel, Mr. Lochbaum has a series of recommendations for
2 how he believes this process could be improved.

3 On the surface I believe Mr. Lochbaum's
4 recommendation Number 4 appears to be reasonable, requiring
5 us to send petitioners a document that in plain English
6 explains how the process works rather than simply the
7 Management Directive 8.11.

8 Do we have a document of that nature that we send
9 to licensees, and if not, what kind of resource implications
10 would be involved in creating such a document?

11 MR. ZIMMERMAN: We agree with Recommendation 4.
12 The Management Directive is a little cumbersome. As Suzy
13 Black was indicating, it is something that we think needs to
14 be revised. It is difficult for the petitioner to be able
15 to navigate through that document and find their interest.

16 When we issue an acknowledgement letter, we send a
17 pamphlet that is much more in a plain English format and
18 explains the process and then we also offer that if there
19 are questions based on this to please contact us so we can
20 discuss the way the process will work, so this is sent with
21 the acknowledgement letter.

22 As we go through the transition we have been
23 describing we will need to continue to update this document.
24 This version was last updated in April, 2000 so it is pretty
25 current, but even some of the things we have been talking

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1 about today will need to find their way into this document
2 in the not too distant future.

3 COMMISSIONER MERRIFIELD: Okay, so it is your
4 intention to engage with Mr. Lochbaum to try to enhance that
5 document to make it most useful for users?

6 MR. ZIMMERMAN: Yes.

7 COMMISSIONER MERRIFIELD: Fine. On his Slide 3,
8 Mr. Lochbaum asks why licensees are invited to participate
9 in the PRB meetings. I am wondering if you could comment on
10 that.

11 MR. ZIMMERMAN: Again, as Suzy indicated, the
12 licensees have the primary responsibility for the safety of
13 their facility and we believe that it is important and that
14 they have a right to be able to be made aware of the
15 concerns that have been raised.

16 They need to assess the safety significance of
17 those concerns just as we do. They may elect to take
18 action, immediate action, based on what they are hearing,
19 and we don't want to filter that information.

20 We feel that we need to carry out our
21 responsibilities regarding oversight to ensure that public
22 health and safety is maintained but that first line is the
23 utility so we see that they are the licensee and they carry
24 that responsibility.

25 DR. TRAVERS: There is another element to that

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1 that maybe Steve would elaborate on better than I, but in
2 most instances what we are talking about are petitions for
3 enforcement action against a licensed organization or
4 individual, and so I think part of the premise in inviting
5 the licensees to the meeting includes recognition that there
6 is a potential enforcement action against that organization
7 and they should be given an opportunity to understand what
8 is going on in that regard.

9 MR. BURNS: I think that is a fair statement.

10 MR. ZIMMERMAN: The other thing I would add is we
11 do have a desire even with the additional pieces that we are
12 providing to this process to try to maintain the flexibility
13 and the simplicity of the process if we can. It was devised
14 as an informal process.

15 If it is felt that it is more effective and
16 efficient to bring the appropriate parties together, it will
17 allow us to conduct our business in the most efficient way,
18 we see that benefit as well.

19 MR. BURNS: One other thing I might add is I think
20 that since the early days of the regulation I think what the
21 Staff is doing is frankly consistent with the earliest
22 provision for the regulation, which would be that the
23 affected licensee would be provided a copy of the petition
24 and so that it is a public process and in that sense going
25 to some participation or attendance at that PRB type meeting

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1 is consistent with the long spirit I'd say of 2.206.

2 DR. TRAVERS: In allegation space too, there's
3 sort of a comparable if somewhat distinct process, but where
4 issues of safety are raised we very often turn those issues,
5 even if we don't breach confidentiality, we turn over the
6 issue for the licensee to deal with since they are
7 principally responsible for safety at their facility.

8 MS. BLACK: I would like to add one other thing to
9 that --

10 COMMISSIONER MERRIFIELD: I have another question,
11 but okay.

12 MS. BLACK: I think I created some of this
13 confusion because at the beginning of these telephone
14 conferences I basically state the purpose of it, and I don't
15 think I always consistently said that the licensee was a
16 participant.

17 I think I might have only said that one time, but
18 specifically one time I said the licensee was there as an
19 observer, which might have created this confusion.

20 The reason I did that is because we had contacted
21 the licensee before the phone call to say do you want to
22 participate in this call? They said no, we want to be an
23 observer. So that is why I mentioned it at the beginning of
24 that one.

25 That was the one with a lot of press on, and I

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1 thought it could create the situation that the press would
2 consider the licensee not saying anything as acquiescence,
3 that what the petitioner was alleging was true, so I wanted
4 to make it clear that they were just observers as opposed to
5 participants in that meeting.

6 COMMISSIONER MERRIFIELD: Okay. Although we
7 publish these Directors Decisions, these are not subject to
8 review by the Office of General Counsel. They used to be,
9 apparently. Before I became a Commissioner, the Commission
10 had made a decision that OGC review would not be required
11 anymore.

12 What kind of resources with OGC prior to that, and
13 is this a significant staffing issue?

14 MR. BURNS: I think probably I should answer that.
15 I'd correct the premise, slightly.

16 Under the current process, as the Staff has
17 described, the Office of General Counsel participates in all
18 the PRB meetings.

19 We also participate in terms of advising the Staff
20 and potentially drafting the decision on those that raise
21 legal issues, and in some cases, that are primarily legal in
22 nature.

23 There are a few pending right now, for example,
24 that are primarily jurisdictional type issues. So, we have
25 a participatory role in that.

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1 Where we have pulled back -- were pulled back from
2 a couple years ago, it was primarily in those that were
3 essentially questions about the Staff's technical judgment
4 where the petition might raise that, for example, as a
5 result of this inspection, the Agency should do this or
6 that.

7 It primarily is a technical judgment, and that's
8 where we are not been as involved in the last couple of
9 years. Resource-wise, we used to -- I think we used to
10 spend about two direct FTE per year.

11 We are somewhat under one FTE now. Again, part of
12 that was a resource issue in terms of legal risks from the
13 2.206 process versus other things. They tend to be lower,
14 and that was part of the judgment made in prioritizing the
15 relative significance of legal work in the Office.

16 But to simply answer your question, it's probably
17 another -- about another FTE resource.

18 COMMISSIONER MERRIFIELD: Okay. Part of what my
19 understanding was that a part of what that effort was to do
20 was to perhaps, for lack of a better word, an editing
21 function to put them in a format that was consistent, along
22 with the way we had done it previously.

23 Okay, my only last little question -- and let me
24 clarify. Ms. Black, you said your intention is to try to
25 maintain the overall timeliness, the 120 days, despite the

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1 extension?

2 MS. BLACK: Well, we're going to try to maintain
3 120 days to the draft decision, but then the amount of time
4 we provide the petitioner will depend on how complex the
5 issues are.

6 I think we'll interact with them and make a
7 determination, once they see the Director's Decision, how
8 long they will need to comment on it.

9 COMMISSIONER MERRIFIELD: But this wouldn't affect
10 the amount of time that the Commission would have to respond
11 to the review?

12 MS. BLACK: No.

13 COMMISSIONER MERRIFIELD: Which is ten days?

14 MR. BURNS: Twenty-five days.

15 COMMISSIONER MERRIFIELD: Twenty-five days?

16 MR. BURNS: Subject to your extension, too.

17 COMMISSIONER MERRIFIELD: Thank you.

18 CHAIRMAN MESERVE: Thank you very much. I just
19 have a few questions.

20 In describing the meetings, the slides dealing
21 with the meetings, Slide 9 and Slide 11, talk about the
22 possibility of meetings. It says that as to the post-PRB
23 meetings, that the need for such a meeting will be
24 determined on a case-by-case basis.

25 Then, similarly, in Slide 11, in talking about the

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1 technical meeting, you say the Staff will hold meetings
2 beneficial to review. That sounds, from the bullets and the
3 slide as if the Staff is going to make a decision on whether
4 or not to hold a meeting.

5 But when you described them, it was as if anytime
6 anybody asks for a meeting, you'll hold one.

7 MS. BLACK: Well, especially --

8 COMMISSIONER MERRIFIELD: Which is it?

9 MS. BLACK: Especially the first one, that
10 post-PRB meeting, case-by-case, if we agree to everything
11 that they've asked for, I don't think they'll want a
12 post-PRB meeting, probably.

13 And so we would always give them that if they
14 asked for it.

15 And I think we intend to be very flexible on the
16 technical meetings, too. So I would say that more or less,
17 we are going to accept their request for a meeting. I can't
18 imagine a situation where we won't.

19 COMMISSIONER MERRIFIELD: I think the message that
20 we want to give is the fact that if one of the parties has
21 an interest in having that meeting, and there is legitimacy
22 to that, then the meeting will be held, and I think that
23 will be virtually all the cases.

24 CHAIRMAN MESERVE: But you are reserving the right
25 to say no, on occasion, if circumstances are such that you

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1 don't think it's necessary?

2 MR. ZIMMERMAN: If it reaches the level that it
3 meets the criteria for a 2.206, and there is a request for
4 additional discussion, we will grant that meeting. So I
5 think the answer, more plainly, is just yes, we'll be having
6 those meetings.

7 CHAIRMAN MESERVE: Mr. Lochbaum, in his comments,
8 is going to tell us that he thinks that these meetings ought
9 to be held pursuant to Management Directive 3.5. What are
10 the implications, if you were to pursue that in connection
11 with these 2.206 meetings?

12 MS. BLACK: Any meeting by telephone really
13 doesn't follow Management Directive 3.5. Management
14 Directive 3.5 specifically states it's for a meeting where
15 the participants are at a particular site.

16 It also requires a notice, a 10-day notice,
17 generally, but you can hold -- you can shorten that time
18 period if there is a need to hold a meeting quicker.

19 And so I think we are, in essence -- as the long
20 as the petitioner wants to hold a meeting in person as
21 opposed to by telephone, we'll follow 3.5.

22 He might also -- I don't understand whether he has
23 a concern about the licensee participating. He may be under
24 the impression that if it's under 3.5, the licensee would
25 not be permitted to participate; but we don't interpret 3.5

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1 that way. We still think the licensee would be permitted to
2 participate.

3 CHAIRMAN MESERVE: Okay. Good. Commissioner
4 Diaz?

5 COMMISSIONER DIAZ: Yes, I think that was one of
6 my key questions, is how do we address the issue of the
7 public meeting, and 3.5. So I guess we will wait to hear
8 from Mr. Lochbaum, what angle are we looking at this,
9 because that's an important issue.

10 Another suggestion that has been made is to expand
11 the 2.206 review beyond requests for enforcement actions. I
12 know this came out partly in the stakeholder meetings.
13 Where is your thinking in that area?

14 MR. ZIMMERMAN: We're not making recommendations
15 to the Commission to expand the scope. We think that the
16 purpose of this regulation was quite clear when it was
17 initially promulgated and view it again as an informal
18 process for members of the public to get concerns in front
19 of us of public health and safety for which enforcement is
20 appropriate.

21 So we are not making recommendations to expand
22 that scope.

23 COMMISSIONER DIAZ: All right. Is there any
24 consideration being given to any other type of informal
25 process that might allow them to bring issues? If this is

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1 safety issue, there's no problem, right? I mean, it -- as I
2 understand Ms. Black, that immediately address that.

3 But other issues that do not, you know, are in the
4 enforcement area -- I can't -- I'm trying to remember
5 clearly, but it seems to me like there was a concern that at
6 times, they do want a communication line to address an
7 issue, and that the 2.206 was very rigid, always requesting
8 an action.

9 If there was no action requested, was there a
10 communication line established?

11 MR. ZIMMERMAN: I think there are probably several
12 that come to mind. The allegation process, which is not a
13 public process, is one that is available for which a safety
14 concern can be raised where enforcement does not have to be
15 suggested or recommended.

16 But there is also ability just to interact with
17 the Staff. We respond to considerable correspondence,
18 routinely, that is forwarded to the different Offices.

19 And those lead to communications back and forth in
20 written fashion, telephone calls, meetings. So I would view
21 that we're approachable in terms of when there are concerns
22 that members of the public have, to be able to talk with us
23 through various different means to raise their concerns and
24 for us to respond to those.

25 MS. BLACK: I might add that there is the petition

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1 for rulemaking process, too, if they think it's a general
2 safety concern, and not specific to a plant.

3 COMMISSIONER DIAZ: Also, you know, I don't think
4 we acknowledge this, but in a certain way, I guess, you
5 know, our other processes, when we finish inspections, when
6 we have public meetings regarding, you know, an issue at a
7 plant, those are also providing opportunities for people to
8 access the process, even if it's not a 2.206.

9 MR. ZIMMERMAN: Definitely.

10 COMMISSIONER DIAZ: And they do use those
11 opportunities?

12 MR. ZIMMERMAN: Yes.

13 COMMISSIONER DIAZ: All right. Thank you, Mr.
14 Chairman.

15 CHAIRMAN MESERVE: Good. Commissioner McGaffigan?

16 COMMISSIONER MCGAFFIGAN: Okay. Several of my
17 questions are going to come from the followon testimony as
18 well. The concern about Management Directive 3.5, I'm
19 reading Mr. Lochbaum who will get a chance to address this
20 later. It's not so much the telephone, he's trying to
21 preclude the efficiency of the telephone, as he's trying to
22 get the 10-day notice.

23 And either he or others -- I think it's actually
24 Mr. Riccio who criticizes the current Indian Point 2
25 petition, the rush to have a meeting without notice, when it

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1 was clear that that plant wasn't going to start up in the
2 next ten days.

3 So, can you explain the thought process as to why
4 there was a rush to have that meeting? At least they felt
5 rushed.

6 MS. BLACK: I think that's -- generally when we
7 get a petition, we try to hold these telephone calls
8 expeditiously. Our Petition Manager is told that we are
9 supposed to have a very timely Petition Review Board to
10 address it.

11 And in that case, they contacted petitioners and
12 may have rushed them a little bit more than they needed to
13 in that situation.

14 COMMISSIONER McGAFFIGAN: The contrast in the
15 testimony, if I recall, is between Salem, where there was,
16 you know, no rush, and he's saying that it's because that
17 one's operating, as opposed to the one that's shut down
18 we're in a rush.

19 MS. BLACK: Well, if we did have to address that
20 petition before restart, we would have needed to start it
21 expeditiously. At that time, I mean, in hindsight now, we
22 know it was months, but at that time we didn't realize how
23 long it would take.

24 I think that at that time, restart was considered
25 to be possible in a couple of weeks, if I remember. I was

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1 up in a meeting for that. It was two or three weeks they
2 were talking about restarting.

3 You know, hindsight always make it seem laughable,
4 but at that time, they were thinking they'd finish their
5 inspections, wouldn't find anything else, and restart the
6 plant.

7 And so we were trying to --

8 COMMISSIONER McGAFFIGAN: That was clearly a best
9 case estimate.

10 MS. BLACK: Right. And I think the timeliness,
11 the rush, it's ingrained in our Petition Manager to hurry
12 up. And I think they tried to pressure the person in the
13 Salem petition, too, but I think he was just out of town,
14 and then unavailable for another week.

15 It was very unusual to have a two-week time period
16 between when we get a petition and when we have this
17 telephone call. It's typically within the first week.

18 COMMISSIONER McGAFFIGAN: Okay.

19 MR. ZIMMERMAN: If I can just add a little bit to
20 that, I think that if there is not a need for there to be a
21 rush, we should try to accommodate the petitioner in a
22 reasonable amount of time the individual needs to move the
23 date a little bit one way or the other, and it's not the
24 type of concern that is of such safety significance that it
25 can't wait.

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1 However, for plants that are on the verge of
2 startup in a short period of time, we try to do our review
3 as expeditiously as we can, and to re-contact that
4 petitioner to give that petitioner the information prior to
5 that plant restarting.

6 We don't always succeed, but we try to be very
7 responsive.

8 COMMISSIONER McGAFFIGAN: I understand that. Is
9 the Staff -- you know, we don't want to over-regulate this
10 area. I understand the concern of having a rush meeting
11 when perhaps it's fairly clear to most that if the plant
12 isn't going to start up soon, is it the Staff's concern,
13 though, that if you had a process which said there will be a
14 ten-day period as a matter of course before -- or a ten-day
15 notice before a meeting, that you'd set yourself up for sort
16 of a gaming situation where you get 2.206 petitions by the
17 dozen every time a plant was about to start up, scheduled
18 every ten days so the plant would never start up again?

19 Or is it gaming considerations that you're trying
20 to preclude here or what?

21 MR. ZIMMERMAN: No, I think we've been clear with
22 petitioners and through communications with the public in
23 various meeting settings, that we are not looking at
24 delaying the restart of a facility because a 2.206 has come
25 into us.

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1 You know, we will work as promptly and
2 aggressively as we can to get that information, and to do
3 the review as promptly as we can.

4 But unless there is such safety information that
5 is presented and is supportable, it will protract beyond the
6 restart of that facility, and if it turns out that the
7 petition claim is valid, and that plant -- actions need to
8 be taken against that plant after we complete our review,
9 then we could find ourselves in a situation of taking action
10 against that facility at that time, which could include an
11 order to shut down.

12 That potential is there, so we try to avoid --
13 I'll use the same term, in terms of the gaming, and we try
14 to make that very clear to petitioners; that coming in on
15 the eve of restart is not going to result in us delaying the
16 restart of that facility.

17 In terms of how the meetings are conducted, I have
18 had some conversations with Mr. Lochbaum about a meeting.
19 It was the technical meeting on River Bend about a year and
20 a half ago, at least a year ago. The licensee was there and
21 Mr. Lochbaum made his presentation and the licensee made its
22 presentation.

23 Mr. Lochbaum actually left because he had a plane
24 flight. He got upbraided about that at the Reg Info
25 Conference and his explanation was I don't have any chance

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1 to interact with these guys anyways because of the way the
2 meeting is conducted.

3 Is there an opportunity, if they are both
4 participants, both the licensee is a participant and the
5 petitioner is a participant, do you conduct the meeting sort
6 of with no interaction allowed between those two or not?

7 MS. BLACK: I haven't personally been involved in
8 one of those meetings.

9 MR. VIRGILIO: Commissioner McGaffigan, I can just
10 cite an example we did just recently on Envirocare and a
11 petition we had in that case.

12 COMMISSIONER McGAFFIGAN: The FUSRAP one?

13 MR. VIRGILIO: The FUSRAP one where we had all the
14 parties present at the meeting. We had it as a public
15 meeting. We provided the 10 day notice before the meeting
16 and there was an opportunity to interact.

17 We allowed the parties an opportunity to interact
18 with each other to ensure that all the questions were
19 answered. It allowed us as the Petition Review Board an
20 opportunity to learn, because we had both a request for an
21 immediate action on the table and a decision to make as to
22 whether we were going to accept that petition or not, and it
23 was very helpful.

24 COMMISSIONER McGAFFIGAN: Mr. Zwolinski wants to
25 say something.

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1 MR. ZWOLINSKI: Yes, John Zwolinski with the
2 Staff.

3 I have chaired a number of the Petition Review
4 Board meetings and I have chaired technical meetings that
5 have taken place at Browns Ferry site, for example, at which
6 time the petitioner raises new or different concerns. The
7 licensee is afforded an opportunity to make whatever
8 statements they wish and as the Chairperson for that
9 particular, those boards I afford the parties the
10 opportunity to address the NRC Staff with observations and
11 views and not spar with each other.

12 COMMISSIONER McGAFFIGAN: So you don't have them
13 sparring with each other, but through the Chair, as
14 everything is supposed to be done in the Senate, through the
15 Chair people can have some pretty good arguments -- is that
16 true or not?

17 They are perhaps not sparring but, Mr. Chairman, I
18 would like to point out that the licensee has just said
19 something that is a total crock and for the following five
20 reasons. Do you allow that to happen? Or I would like to
21 suggest that the petitioner is smoking controlled substances
22 for the following five reasons --

23 MR. ZWOLINSKI: Respectfully, Commissioner
24 McGaffigan, we have not run into that opportunity and not
25 had that particular dialogue.

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1 COMMISSIONER McGAFFIGAN: Well, that particular
2 dialogue perhaps not, but --
3 [Laughter.]

4 COMMISSIONER MERRIFIELD: Our petitioners are
5 perhaps not as colorful as the Commissioner.

6 COMMISSIONER McGAFFIGAN: I don't know who chairs
7 the River Bend failed fuel meeting, but would you have
8 allowed interaction between Mr. Lochbaum and the River Bend
9 licensee at the end through the Chair if they wanted to
10 say -- make comments about each other's presentation?

11 MR. ZWOLINSKI: If we can go back to the comments
12 made by Ms. Black and Mr. Zimmerman, indeed it is an
13 opportunity for discovery by the licensee and if they are
14 seeking clarifying information, I would allow the question
15 to be posed to the petitioner.

16 COMMISSIONER McGAFFIGAN: And the petitioner to
17 pose questions to them as well, if they have presented some
18 evidence that they believe refutes the petition?

19 MR. ZWOLINSKI: Right, if it is justifiable, but I
20 would not allow sparring between the two parties.

21 MR. ZIMMERMAN: Again I think some of this needs
22 to be viewed on a case by case basis. If both the
23 petitioner --

24 COMMISSIONER McGAFFIGAN: I can't imagine in that
25 FUSRAP meeting didn't have some sparring between them. It
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1 was all lawyers. All lawyers do is spar, right?

2 MR. BURNS: They are civilized about it.

3 MR. ZIMMERMAN: If the petitioner and the licensee
4 are both willing to carry on discussion and that is going to
5 help us to effectively and efficiently move the process
6 along, then we should be supportive of that.

7 If on the other hand there is going to be
8 accusations, it's going to become accusatory and it is going
9 to deteriorate we have the responsibility of getting the
10 information, so if we serve as this --

11 COMMISSIONER McGAFFIGAN: Okay, so you don't want
12 McGaffigan in those meetings talking about controlled
13 substances.

14 MR. ZIMMERMAN: I think the point that I want to
15 make is that the flexibility is important to this process.

16 Some of the criticism that we have received is we
17 don't do it exactly the same each and every time. I don't
18 think we want to do it exactly the same each and every time.
19 We want to maintain some of the informality that allows the
20 licensee and the petitioner to engage when the setting and
21 the environment is right and conducive to it, and if it is
22 not right then we'll serve in more of an officiating role
23 but it will make our job a little bit more difficult because
24 it will take us a little bit longer because we won't have
25 the efficiency of that discussion.

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1 We will have to engage them separately, but if
2 that gets us where we need to go, in a productive,
3 professional manner, then that is the tool that we would
4 use.

5 COMMISSIONER McGAFFIGAN: Could I ask one last
6 question? This really goes to Mr. Burns. I think it's in
7 Mr. Gunter's testimony he suggests a rule change that would
8 essentially allow after the 25 days to respond to a
9 Commission review of whatever or perhaps he envisions us to
10 throw it to an appeals court, we can't do that by rule.

11 Could we possibly burden the Federal courts? Not
12 that I am advocating this, but is his -- Mr. Riccio suggests
13 a statutory change which would obviously empower the rule
14 change that Mr. Gunter talks about, but the Gunter rule
15 change which he says we can do administratively if we so
16 desire, I suspect we would have some court telling us -- and
17 I am not a lawyer -- that what the hell are you guys doing
18 here?

19 MR. ZIMMERMAN: I think you also might have the
20 Congress in the absence of -- the Congress decides --

21 COMMISSIONER McGAFFIGAN: Right.

22 MR. ZIMMERMAN: -- in part reviewability. The
23 Congress hasn't chosen to do that.

24 Our position in this case, sustained by three
25 circuit courts of appeal, is well within -- is not

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1 NRC-unique. It follows from the Supreme Court's decision in
2 Heckler v. Chaney.

3 It seems to me that merely by providing for such
4 review I don't think we can bootstrap ourselves into
5 judicial review.

6 There are some circumstances where the agency
7 narrowly confines itself to do certain things in certain
8 ways which agencies don't tend to do in enforcement, in the
9 enforcement area. There is an argument that review might be
10 available if the court of appeals so found.

11 Heckler v. Chaney, the other thing I ought to
12 mention about it is that it does leave open a possibility
13 that if the court saw an utter abdication of the agency's
14 responsibility that it would not hide behind the lack of
15 reviewability. The fact of the matter is that is a very
16 tough test.

17 Even before the day that such petitions were not
18 reviewed, no court of appeal reversed the NRC on a 2.206
19 decision that was reviewed in the court of appeals.

20 So I have grave doubts that the agency merely by
21 announcing can empower the court. An agency can't empower a
22 court of appeal to have jurisdiction.

23 COMMISSIONER McGAFFIGAN: I agree. I just want to
24 make sure that the lawyers are on the same page as I was.

25 MR. BURNS: One thing I might add to the

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1 discussion with respect to your last question, one of the
2 things -- and I think this comes out of the broader efforts
3 that I know Chip Cameron and others have worked on with
4 respect to public communications and public meeting
5 processes -- I think one of the dilemmas, particularly
6 because the Staff has moved toward a process where you have
7 more meetings with respect to 2.206 is although it may be a
8 case by case, sort of an understanding of the ground rules
9 that both petitioners and licensees or others who may be
10 affected by the petition have coming into those meetings
11 might be useful because, you know, I can understand a
12 petitioner who comes in, says yes, I want to present my case
13 but I don't want to feel like I am going to be cross
14 examined by a battery of lawyers for the utility.

15 In the same way, the utility may want to just sit
16 there silently, which is my understanding of what they often
17 do, so there may be a process of engagement. It may be as I
18 think you are suggesting almost more the legislative style
19 type process, but I think it may still be important to sort
20 of understand ground rules -- what would these meetings look
21 like -- rather than sort of fix on them when we get to the
22 meeting.

23 COMMISSIONER MERRIFIELD: Just by way of a
24 clarification, I know Commissioner makes comments about
25 lawyers. I happen to have had a discussion with

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1 Commissioner McGaffigan's son, who is in high school, and
2 has some interest in becoming a lawyer, so perhaps
3 Commissioner McGaffigan will be dealing with this for far
4 longer than he would like.

5 [Laughter.]

6 COMMISSIONER McGAFFIGAN: I will try to dissuade
7 him.

8 CHAIRMAN MESERVE: I would like to thank the Staff
9 very much for a helpful discussion.

10 Let me call on our second panel. The second panel
11 consists of David Lochbaum, from the Union of Concerned
12 Scientists, James Riccio from Public Citizen's Critical Mass
13 Energy Project, Paul Gunter from the Nuclear Information and
14 Resource Service, and Ellen Ginsberg, here on behalf of the
15 Nuclear Energy Institute.

16 Good afternoon, and thank you for coming.

17 MR. GUNTER: Thank you.

18 CHAIRMAN MESERVE: As I think you know, we request
19 that you keep your statements brief so that we can have an
20 opportunity for a questions and answers interchange with
21 you.

22 Mr. Lochbaum, why don't you proceed?

23 MR. LOCHBAUM: First, I'd like to introduce or
24 point out our new logo. We created this three weeks ago,
25 and we think it's going to make us 43 percent more

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1 efficient.

2 COMMISSIONER McGAFFIGAN: Is that a butterfly?
3 MR. LOCHBAUM: Yes, and I think it's the globe,
4 the world. It looks better in color.

5 [Discussion off the record.]

6 MR. LOCHBAUM: In the past three years, or since I
7 joined UCS, I've submitted at least ten 2.206 petitions on
8 behalf of UCS. Only one of the Director's decisions that
9 are received really address the issues I raised in the
10 petitions.

11 And I think that goes to the root cause of what
12 our problems, our major problems with the process are. And
13 because that's the root cause, I don't think the changes to
14 Management Directive 8.11 are going to solve that problem.

15 Slide 3, please. The Staff is proposing to permit
16 earlier interaction with petitioners. I think that's a
17 positive step.

18 But the Staff doesn't want to conduct those
19 interactions in accordance with Management Directive 3.5.

20 To clarify why we think 3.5 is important is
21 because that's the Directive for conducting public meetings
22 by the Staff. It allows meetings to be called on a hour's
23 notice. It just has certain management levels that have to
24 approve waiver of the ten-day policy.

25 But more importantly, from our standpoint, it

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1 dictates who participates in the meeting and how observes or
2 who does not participate in the meeting. We have been on
3 the short end of not participating in meetings far too
4 often, and the industry and NEI are on the -- get automatic
5 tickets to participation, and that's wearing very, very
6 thin.

7 Slide 4, please. The Staff is proposing to lower
8 the threshold for holding public meetings, which we think is
9 a good idea, but, again, only if they're conducted in
10 accordance with Management Directive 3.5.

11 As far as 3.5, I heard the Staff earlier say that
12 if the petitioner wants to attend the PRB in person, then it
13 will be conducted in 3.5. Well, for all my future
14 petitions, I'm not going to do it by phone anymore. That
15 was an easy one for me to figure out.

16 Slide 5, please. The Staff is proposing to allow
17 the petitioners to review the draft denial, 30 days before
18 the final denial is issued.

19 We think this change is better, but still
20 unacceptable. A car doing 80 miles per hour in a school
21 zone is better than a car doing 90 miles per hour, but
22 neither is acceptable.

23 Directors' Decisions, because they fail to address
24 the issues raised in the petitions are essentially a
25 bureaucratic equivalent of uh-huh responses.

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1 The Staff is proposing to allow petitioners to
2 review draft decisions, and essentially ask, are you sure of
3 the same folks that rendered the initial decision. That's
4 not an effective field process, nor is it fair.

5 Plant owners who disagree with the Staff decisions
6 on backfits or license renewal, can appeal decisions to the
7 EDO, and ultimately to the Commission, but petitioners do
8 not have these rights.

9 I understand the regulation doesn't allow
10 petitioners to appeal decisions to the Commission, but it
11 doesn't preclude appealing them to the EDO. I don't know
12 why that wasn't considered as a option.

13 I think the most frustrating aspect of this
14 situation is that we know the Agency can do better. Fewer
15 than half of the allegations that UCS has submitted to
16 Regions I and III, the past three years, have been
17 substantiated by the Staff.

18 In fact, none of the petitions that -- none of the
19 allegations I've submitted to Region III have been
20 substantiated, but in every case, they have provided a good
21 justification. You know, they investigated and came to a
22 conclusion that there was no validity to it.

23 So, it did not -- the denials were perfectly
24 acceptable, because they were fully justified. That's
25 totally different with petition space.

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1 So, what's the difference between the allegation
2 process and the petition process? To me, I think the key
3 difference is that the Regions handle the allegations, while
4 Headquarters handles the petitions.

5 Before joining UCS, when I worked at Brown's
6 Ferry, at Grand Gulf, at Hope Creek, Susquehanna, and
7 Fitzpatrick, we knew that our chances of winning a dispute
8 with the NRC Staff increased as we escalated it from the
9 Resident to the Region to the Headquarters.

10 Bumping an issue to NRR virtually guaranteed a
11 victory, no matter how bad the fact set was against us.
12 From talking with former colleagues, including some who now
13 work for the NRC, that's still true today.

14 I sincerely believe that NRR decides issues more
15 on their political merits than on their technical merits.
16 Consequently, the Staff cannot address the technical issues
17 raised in petitions because it would undermine the political
18 decisions made.

19 Directors' Decisions remind me a lot of the 50.59
20 evaluations that were prepared by plant owners 15-20 years
21 ago. This Agency heavily criticized plant owners then when
22 they spent a lot of time examining things that were true,
23 but not relevant to the issue at hand, or when they simply
24 reiterated the questions and restated the questions in the
25 evaluation.

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1 Those shoddy 50.59 evaluations were not accepted
2 by the NRC Staff, which, by the way, usually consisted of
3 Resident or Regional Inspectors.

4 Indian Point 2 is a recent example. On September
5 15th of last year, we submitted a petition seeking to keep
6 Indian Point 2 shut down until there was reasonable
7 assurance that the systematic breakdowns were corrected,
8 along with all past safety margin reductions that resulted
9 from those breakdowns.

10 The August 31st, 1999 emergency at IP-2 revealed
11 all too clearly, how bad things were at this facility. The
12 plant owner allowed the August event to occur through
13 negligence, and compounded that error with unbelievable
14 nonchalance.

15 John Rogge of your Region I staff, told me that
16 managers and supervisors at IP-2 went home around 4:30 that
17 afternoon, even though one safety bus was only being powered
18 from the station batteries.

19 Two hours later, those batteries depleted,
20 prompting an emergency to be declared. Nevertheless, the
21 NRC Staff ignored this evidence of gross misconduct and
22 allowed IP-2 to restart.

23 Five months to the day after a petition was
24 submitted, IP-2 experienced another emergency. This
25 emergency was also preventable.

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1 The plant owners had indications of problems in
2 1997, but it failed to act upon them. More misconduct.
3 Had the Agency dealt responsibly with our
4 September 1999 petition, this emergency in February would
5 not have happened.

6 I say this, not with the benefit of hindsight, but
7 with the benefit of lack of shortsightedness.

8 Slide 6, please. At best, two of the three
9 changes proposed by the Staff are positive. In our books,
10 66.6 percent is not a passing grade.

11 Slide 7, please. We think it's important that
12 petitioners be given an effective appeal process until such
13 time as the NRC Staff really begins addressing the issues
14 raised in the petitions.

15 An effective appeal process is not asking NRR for
16 a political decision of another flavor. Perhaps 2.206
17 petitions should not be assigned to the Director of NRR, but
18 to the Regional Administrators in hope of getting
19 technically-oriented, rather than politically-motivated
20 Directors' decisions.

21 We cannot overemphasize how important it is for
22 the NRC Staff to conduct all meetings in accordance with
23 Management Directive 3.5. Slide 8, please.

24 We don't think that plant owners should be given
25 privileges within the petition process that petitioners do

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1 not have outside of it. In addition to a level playing
2 field, we all need to be playing the same game.

3 Make no mistake about it, games, indeed, are being
4 played. Consider our most recent Indian Point 2 petition
5 about its steam generators.

6 We formally asked Mr. Collins's permission for Mr.
7 Joe Hopenfeld of the NRC Staff to attend this meeting and
8 discuss his differing professional opinion. We didn't want
9 him to talk about our petition, just talk about his issues.

10 Our request was denied because federal law
11 prevents a federal employee from representing a
12 non-governmental organization in a proceeding before the
13 Government.

14 The fact that we had made it very clear that Mr.
15 Hopenfeld would not be representing our issues, was ignored
16 by the Staff.

17 At the onset of that public meeting, I immediately
18 turned our presentation over to a member of Congresswoman
19 Anita Lowey's staff, who proceeded to read the
20 Congresswoman's statement of support for our petition.

21 The NRC Staff allowed Congressional staff to
22 speak, but silenced the member of its own staff at this
23 meeting.

24 We also invited Mr. Peter Crane to make a
25 presentation about potassium iodide. Before Mr. Crane was
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1 allowed to make his presentation, he first had to endure a
2 nuclear inquisition by the NRC Staff.

3 The Staff questioned whether Mr. Crane had any
4 right to speak at the meeting since he was not a member of
5 UCS, of Public Citizen, of NIRS, of NEI, or of the Pace Law
6 School Energy Project which were -- except for NEI, which
7 were the petitioners in the process.

8 If you don't believe me, read the transcript of
9 this meeting. A few weeks after this debacle, the NRC Staff
10 met with ConEd, also about IP-2 steam generators.

11 The official NRC public meeting notice, which I
12 have here, lists only -- the only non-NRC participants at
13 this meeting as being three members of the ConEd staff. I
14 attended this meeting as an observer and watched folks like
15 Tom Pitterly of Westinghouse and somebody from Altran
16 Corporation make lengthy presentations for the ConEd to the
17 Staff.

18 The NRC Staff did not challenge any of these
19 non-ConEd folks like they did Mr. Crane. I would suggest
20 strongly to you that you direct the NRC Staff to formally
21 apologize to Mr. Crane for their unfair and unwanted abuse
22 of him at that meeting.

23 By the way, I also have the public meeting notice
24 for the meeting we had on Indian Point 2. Notice that
25 although we requested the meeting -- it was our request --

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1 ConEd was given an automatic seat at the table. Compare
2 that to the earlier meeting notice where it was ConEd's
3 meeting, but Paul Gunter and Jim Riccio and I attended that
4 meeting in the audience. We were out in the peanut gallery.
5 We were not given a seat at the table.

6 I heard the earlier panel talk about the reason
7 for that was that there were safety issues being discussed.

8 We weren't there to see people's wardrobes or
9 anything else; we were there to talk about safety issues,
10 but were not given a voice.

11 On May 15th, I participated in the Petition Review
12 Board teleconference for our latest petition. True to form,
13 this was completely unlike all previous PRB telecons.

14 The new wrinkle this time was the NRC Staff
15 encouraging the plant owner to cross examine me. On two
16 separate occasions, the NRC Staff asked the plant owner's
17 representative if they had any questions for me.

18 Curiously, I was never asked once if I had any
19 questions for the plant owner's representative.

20 What's even more curious is Management Directive
21 8.11. It discusses the petitioner being involved in the PRB
22 telecon or meeting, but is completely silent on the plant
23 owner's participation.

24 The NRC has taken that silence to mean that it can
25 permit the plant owner to not only participate, but take an

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1 active role in cross examining the petitioner.

2 Again, you don't have to take my word for it; read
3 the transcript.

4 Since the NRC Staff doesn't even bother following
5 Management Directive 8.11, debating various revisions to
6 this procedure seems rather pointless to me.

7 In conclusion, UCS doesn't believe that the
8 changes proposed by the Staff will significantly improve the
9 2.206 process. If you have a bag of garbage, and you dump
10 it into a box, gift-wrap it and tie it with a bow, you still
11 have garbage.

12 The Staff, with these proposed changes, is
13 essentially gift-wrapping its garbage. Please don't make
14 public petitioners choose between garbage in a pretty box
15 and garbage in a brown paper bag. Get rid of the garbage.
16 Thank you.

17 CHAIRMAN MESERVE: Mr. Riccio?

18 MR. RICCIO: Good afternoon. My name is James
19 Riccio. I'm a Senior Analyst with Public Citizen.

20 It is a pleasure to once again present our views
21 to the NRC. I want to say at the outset that I appreciate
22 the efforts that have been made by the NRC Staff to improve
23 the 2.206 process.

24 While I'm not convinced that the suggested
25 improvements will repair the process, I withhold my

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1 judgment, pending their implementation and the disposition
2 of the petitions currently before the Commission.

3 To start off, I agree with David that I believe
4 the Staff's treatment of Mr. Crane was thoroughly
5 unprofessional, and that he deserves basically an apology.
6 But I'll move on from that.

7 I have been participating in NRC meetings on ways
8 to improve this process for nearly a decade. I have been
9 engaging the NRC so long on this issue that my original
10 point of contact has since passed away.

11 During that time, I have seen Commissioners and
12 Senior Management come and go. I've seen four different
13 Chairmen, over a dozen different Commissioners, four
14 different EDOs, several different machinations of Senior
15 Management, and precious little has actually changed.

16 My experience with the 2.206 process leads me to
17 the conclusion that it is basically a device that allows the
18 NRC to shunt aside, the public's legitimate safety concerns
19 into a regulatory cul de sac where the issue is left until
20 rendered moot.

21 As far as I'm concerned, the 2.206 process is
22 still only good for one thing: Generating enough media
23 attention to embarrass this Agency into taking action.

24 The Commission need look no further than the
25 shutdown of the D.C. Cook power plant in Michigan to see

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1 this point exemplified. On October 9th, 1997, Mr. Lochbaum
2 submitted a petition on the Cook plant, basically requesting
3 that the plant not be allowed to restart until the design
4 and licensing basis issues were resolved.

5 The Commission acknowledged that petition in
6 December of '97, and on a relatively routine basis, UCS
7 would call and check as to the status of the petition.

8 On or about January 6, 1998 UCS contacted the
9 petition manager to inquire as to the status of the petition
10 on Cook's restart activities. He was informed that the
11 restart was imminent despite the fact that UCS's petition on
12 Cook requested that it be prevented from operating until the
13 issues were addressed.

14 At that time UCS was informed that their petition
15 would be addressed after NRC allowed D.C. Cook to restart.
16 The only thing that precluded that plant from restarting
17 were basically media calls and contacting Congress that was
18 done by Dave.

19 Since that time the NRC has issued more than 15
20 inspection reports attempting to address the design and
21 licensing basis inadequacies that form the basis of UCS's
22 petition. I have included a list of the inspection reports
23 so the Commission can grasp the extent of the problems
24 identified by the Staff and after UCS was informed that
25 restart was imminent.

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1 While I realize that volume doesn't necessarily
2 equate with significance, there is a recent NUREG that is
3 out for comment where basically there is 141 issues, five of
4 which at Cook rose to the level of making the accident
5 sequence precursor program, so there were some significant
6 issues that the Staff was going to basically "roll" until
7 after the plant was restarted. It doesn't make a heck of a
8 lot of sense.

9 D.C. Cook has now been shut down for over two and
10 a half years yet the NRC Staff was on the verge of allowing
11 the reactor to restart in January of '98. In retrospect, I
12 do not believe that the NRC can claim that the shutdown was
13 not warranted from a safety perspective. That being the
14 case, I am at a loss to explain how NRC was going to allow
15 D.C. Cook to restart.

16 Regardless of the answer, the process didn't work.
17 The public should not be forced to resort to media
18 tactics in order to get safety concerns addressed by this
19 agency.

20 In April I participated in two Petition Review
21 Board meetings within a span of 48 hours. Both petitions
22 address the potential for steam generator tube ruptures.
23 While I believe the introduction of the PRB is a positive
24 step in the process, I was struck by the disparity in these
25 two meetings.

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1 The first, concerning Salem, was conducted in what
2 was generally the form of a public meeting scheduled well in
3 advance so the PRB -- and with the media and public allowed
4 to observe if not participate. The second, concerning,
5 Indian Point 2, was held at a moment's notice. At that
6 point not all petitioners could make the telephone
7 conference. I requested a slight delay. I am talking a day
8 and I was rebuffed by the Staff. The only reason that
9 explains this disparate treatment between the two meetings
10 is the status of the reactor. Salem was operating. Indian
11 Point 2 was shut down with steam generator tube issues.

12 Even when we had that meeting the restart schedule
13 was out, and there was no way that they were going to get
14 that plant up and running in the time that was going to
15 interfere with a day or two delay in our conference call.

16 It is basically my view that the only reason that
17 we were treated in that manner was because the plant was
18 shut down and the utilities wanted a restart.

19 Now according to Mr. Travers' memo which we were
20 asked to comment upon, technical meetings and petitioners'
21 meetings with the PRB are held in conjunction with the 2.206
22 reviews and are considered public meetings in the context of
23 3.5. Technical meetings will be given as much advance
24 public notice as possible, and then it goes on to say that
25 such meetings are not normally noticed, however that public

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1 observation is permitted.

2 The status of the reactor the licensee's desire to
3 operate shouldn't determine how we are treated in a meeting.

4 Mr. Travers can't have it both ways. He can't
5 simultaneously claim that technical meetings will be given
6 as much advance notice as possible, and acknowledge that
7 such meetings are not normally noticed.

8 All Petition Review Board meetings should be
9 public meetings and should be properly noticed regardless of
10 the status of the reactor in question. In retrospect, the
11 delay of a day or two in holding the PRB would not have
12 interfered with the Staff's scheduled restart of Indian
13 Point 2.

14 In fact, at the May 3rd meeting with the licensee
15 a full six weeks after the PRB, the NRC still had not
16 received all the information it had requested from
17 Consolidated Edison regarding the steam generator tube
18 rupture.

19 As noted in Mr. Travers' memo, another option
20 would be a changed rule to allow petitioners to appeal
21 Directors Decisions. While we appreciate the NRC affording
22 the public an opportunity to review the Directors Decisions
23 prior to it being finalized, I do not believe this can take
24 the place of a legitimate appeal process. I have grave
25 doubts as to the efficacy of appealing 2.206 Directors

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1 Decisions to the Commission and I have little confidence
2 that rehashing of the Staff's conclusions will result in an
3 equitable resolution of the petitioner's concerns.

4 I realize that the Office of General Counsel's
5 narrow interpretation of 2.206 petitions to merely cover
6 enforcement actions is primarily geared towards precluding
7 the possibility that these petitions are ever subject to
8 judicial review. However, I believe that the potential for
9 judicial review of these decisions is the only thing that
10 may legitimize this process.

11 Perhaps the next time the Commission goes to
12 Capitol Hill in an effort to alter American citizens' rights
13 under Section 1.89(a) of the Atomic Energy Act, it can
14 include a provision establishing judicial review of 2.206
15 petitions. Such a provision was introduced into legislation
16 in 1991 but never was enacted into law. However, given the
17 record of this agency over the past decade, perhaps the next
18 Congress will be more amenable to passing such legislation,
19 and I have included the statutory language that was
20 introduced by Peter Kostmeyer for your consideration.

21 I believe that the enactment of this provision
22 would restore some balance and accountability to NRC's
23 handling of the petitions.

24 Additionally, the knowledge that NRC's discretion
25 is not unlimited and that the NRC could be held accountable
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1 by a court of law would help to enhance public confidence in
2 the NRC and its regulatory decisions.

3 Despite nearly a decade of frustration with NRC
4 and its handling of these petitions I will continue to use
5 the process and I will continue to work with NRC in an
6 attempt to achieve a fair and equitable process.

7 I will continue to use it not because I believe
8 the process works, but because is the only avenue that we
9 have been afforded to protect the legitimate safety concerns
10 that basically affect our families, homes and communities.

11 I thank the Commission for your time and
12 consideration and I would be happy to answer any questions
13 you might have.

14 CHAIRMAN MESERVE: Thank you. Mr. Gunter.

15 MR. GUNTER: I fully appreciate the opportunity to
16 address the Commission and Staff today.

17 The May 5th, 2000 memorandum from NRC Executive
18 Director of Operations to the Commissioners focuses on
19 planned changes to the adequacy and viability of the
20 petition process itself.

21 The concerns and issues addressed in the memo's
22 background are not new to those of us who have participated
23 in the petitioning process over the years, nor are they
24 close to resolution. These issues remain basically
25 repetitions of problems identified and reviewed by NRC in

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1 public stakeholders' meetings that NIRS has participated in
2 June of 1993 and identified in SECY-93-258 and again
3 addressed in the December '96 pilot program from improved
4 process and again in 1999.

5 So as it has been referred to before, the public
6 as the proverbial Charlie Brown is once again being asked to
7 have a run at this issue one more time at the request of the
8 NRC.

9 There is one central concern of public confidence
10 with past and present 2.206 petitions that is not addressed
11 by the memo. It is a widely-perceived lack of impartiality
12 on the part of Staff and the Commission to fairly review
13 2.206 petitions under due process and appropriately mitigate
14 safety issues of significant economic consequence of the
15 nuclear industry.

16 Do the numerous affected public interest groups
17 that NIRS works with on a daily basis at reactor sites
18 around the country feel that they are being given a fair
19 shake by Staff and the Commission to address safety issues
20 that have come to the public's attention? Unfortunately,
21 the answer is still no.

22 I would like to make my point by providing the
23 Commission with an example stemming from a petition
24 submitted by NIRS, the oldie-but-goodie and unfortunately
25 still unresolved fire safety issues raised by Thermo-Lag

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1 330-1, fire barriers, panels and wraps for cable trays and
2 conduits. Inoperable Thermo-Lag 330-1 fire barriers once
3 used for the protection of safe shutdown capability stand as
4 an enduring example of how the petition process has failed
5 public safety and due process, and as a result of NRC
6 demonstrated lack of impartiality in this failed petition
7 process continue to undermine public safety as the
8 fundamental fire protection issues raised in the petition
9 and denied by the NRC go unaddressed.

10 NIRS filed it 2.206 petitions on Thermo-Lag on
11 July 21st and August 12th of 1992, requesting enforcement
12 action for immediate suspension of operating license in lieu
13 of the removal of Thermo-Lag 330-1 fire barriers and
14 replacement with qualified fire barriers.

15 On August 19th, 1992 the Staff rejected the
16 petitions in their entirety although in apparent recognition
17 of the fire hazards the Staff said it would issue a generic
18 letter on the matter in the near future.

19 On February 4th, 1993 the NRC issued its final
20 Directors Decision rejecting the NIRS petitions.

21 While the NRC tacitly acknowledged the merit of
22 the issue by continuing to pursue the issue of open items
23 with a NUMARC task force and ultimately the issuance of
24 confirmatory action orders, the Commission denied the NIRS
25 petitions on the basis that they lacked merit.

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1 NRC effectively denied NIRS and its informed
2 sources further active and meaningful participation in the
3 regulatory and mitigation process of these bogus fire
4 barriers.

5 For the purpose of time I will focus on just one
6 issue raised in the NIRS petition. That is the seismic
7 qualification of fire barrier material.

8 In its July 1992 petition NIRS was concerned based
9 on reliable information that Thermo-Lag would break apart
10 under seismic load, fall from cable trays and conduits it
11 was designed to protect, it would shatter in large and heavy
12 sections so as to shear power instrumentation and control
13 cables for safe shutdown.

14 Staff accepted the mechanical properties and
15 computer generated findings of a consultant of Thermal
16 Sciences, Incorporated, the manufacturer of the failed fire
17 barrier system, then under extensive investigation by the
18 OI, OIG, and the DOJ. The company's consultant was used to
19 dismiss the NIRS petition in part with regard to the
20 contention that the barriers lacked independent physical
21 testing of the material's seismic qualification.

22 Subsequently, industry tests concluded the
23 material's mechanical properties were significantly lower
24 compared to those used by the TSI consultant. A review of
25 the material indicated that there could be a variance in the

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1 weight and the thickness of the material panels by as much
2 as 45 percent.

3 On October 27th, 1995 NRC issued Information
4 Notice 95-49, Seismic Adequacy of Thermo-Lag Panels, which
5 states, "The effects of the variations could be
6 nonconservative when the maximum unit weight of the fire
7 barrier and its accessories, wire mesh staples and bands, is
8 higher than the nominal values considered in determining the
9 loads on the raceways and their supports and anchorages."

10 The information notice required no licensee
11 action.

12 On December 10th, 1997 NRC issued Notice 95-49
13 Supplement 1, Seismic Adequacy of Thermo-Lag Panels,
14 informing the licensees that the Agency had contracted the
15 National Institute of Standards and Technology to further
16 test the material property of Thermo-Lag. The information
17 notice concludes, "The dynamic forces granted by such
18 accelerations could detach large pieces of Thermo-Lag panels
19 from the cable trays which in turn could act as missiles and
20 jeopardize the safety functions of safety-related equipment
21 and components in the vicinity. However, the potential for
22 such hazard depends on the plant-specific installation,
23 spatial separation, and sustained elevated temperature."

24 Still the information notice required no action on
25 the part of licensees.

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1 The NIRS petition on this issue and several
2 additional issues was already rendered moot by a much
3 earlier Directors Decision.

4 Nearly eight years after the submittal of the NIRS
5 petition, however, the industry and the NRC are in a morass
6 regarding the same basic fire protection issue created by
7 the industry's end run approach to the costly removal of
8 Thermo-Lag and replacement with qualified fire barriers.

9 The NRC now finds itself mired ever deeper in the
10 post-fire safety shutdown circuit analysis, also known as
11 fire-induced circuit failures or hot shorts.

12 We believe this is all to the detriment of public
13 safety. From our perspective, if the mission of the NRC is
14 to protect public health and safety it should welcome the
15 2.206 petitioners' aggressive participation in a meaningful
16 process to hasten the resolution and enforcement of safety
17 issues. As it is, the NRC is currently completely
18 unaccountable for its decisions on 2.206 petitions.

19 As was suggested in that 1993 meeting of 2.206
20 petition stakeholders and now again today, if the Commission
21 wants to restore public confidence in the 2.206 it can begin
22 the process administratively. The NRC can amend its
23 regulations in Part 2 to change the relief provided for the
24 petition for a manageable standard of judicial review to
25 apply.

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1 This Commission could demonstrate leadership as an
2 advocate for due process by making such administrative
3 changes and rendering Heckler v. Chaney moot.

4 We fully support Public Citizen's call for an
5 amendment to the Atomic Energy Act for judicial review of
6 the 2.206 petition by a court of competent jurisdiction.

7 I would just reiterate that the NRC could
8 voluntarily make that change administratively and in so
9 doing make significant gains in the arena of public
10 confidence. A sample of the amended language is attached to
11 my statement for your review.

12 I would just add also that over the years as we
13 have watched the process of the NRC interaction that we have
14 seen examples where the NRC Commission has taken such issues
15 as the use of 10 CFR 50.59, taken it up by the Commission
16 for application to the decommissioning process, and it did
17 raise a row but I think that there should be an opportunity
18 here for us to extend an invitation to the Commission to
19 begin this process and to be able to open this up for
20 judicial review through your actions. Thank you.

21 CHAIRMAN MESERVE: Ms. Ginsberg.

22 MS. GINSBERG: Thank you, Mr. Chairman and thank
23 you for the opportunity to address the Commission on the
24 important 2.206 process. In the interest of time and
25 consistent with the Chairman's opening remarks, I wonder if
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1 we could go immediately to Slide 3, please.

2 In looking at the changes to the 2.206 process, it
3 was very important to us that the process be maintained for
4 the purpose for which it was originally intended. As the
5 Chairman initially said, 2.206 is a creature of agency
6 action. It is designed with a particular and we would state
7 a relatively narrow purpose in mind. It is to provide an
8 informal but a structured process by which any member of the
9 public can raise a concern and request enforcement action be
10 taken at one or more facilities.

11 Conversely, 2.206 is not designed to be the
12 principal means by which safety concerns are identified and
13 resolved, and we think the changes to the 2.206 process must
14 always be implemented bearing that important parameter in
15 mind.

16 The point is that the NRC must take steps to
17 ensure that the petitioner's expectations are consistent
18 with the purpose of the process -- that is, what it is and
19 what it is not intended for.

20 I would note that, at the risk of saying something
21 that everybody here already knows, the NRC has
22 responsibility to protect the public health and safety and
23 not the public, and while certainly the 2.206 process
24 supplements the NRC's opportunity to learn of potential
25 safety issues and address them, the 2.206 process is not the

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1 primary regulatory process by which safety issues are or
2 should be identified and/or addressed. Next slide, please.

3 It is critically important in considering changes
4 to the 2.206 process that the NRC ensure that there's
5 procedural and substantive fairness. We looked at this
6 process and determined what aspects or attributes we
7 believed would ensure that procedural and substantive
8 fairness are maintained. We have long supported in all
9 agency action, be it rulemakings, licensing hearings,
10 license renewal actions as well as 2.206, efficient
11 processes that yield timely decisions, and while timeliness
12 is somewhat of a subjective concept, 120 days here appears
13 to be reasonable.

14 With respect to the use of the Petition Review
15 Board, this seems to be an appropriate way to allow
16 petitioners and the NRC to develop a better understanding
17 earlier in the process about the issues at hand.

18 I would stress at this point, however, that
19 licensees must be able to provide information at this stage
20 and throughout the process as they clearly have the greatest
21 knowledge about the state of their plants. They are very
22 interested in knowing allegations about safety issues that
23 might be relevant to their plants and they also can
24 contribute effectively to resolving the issue quickly.

25 I would agree with the comments that were made
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1 earlier by both Commissioner Merrifield and in Dave
2 Lochbaum's slides that the NRC does need a clearer way to
3 explain the 8.11 Management Directive and that the
4 communication process is dependent upon people understanding
5 what it is that this process bears and how it is going to be
6 implemented.

7 We also think that Dave Lochbaum made a good point
8 when he talked about the clarity of the decisions. I think
9 that is a function of two things.

10 First, decisions should be written to the extent
11 possible in plain English, and second of all, they should
12 address in the petition expansively enough so that someone
13 without the NRC's understanding of the issue can see the
14 basis for the Agency's conclusions. Next slide, please.

15 [Pause.]

16 MS. GINSBERG: I believe you skipped one -- back
17 one slide. Thank you.

18 Going to this point about the decisions on the
19 petitions being supportable and understood, I think it is
20 very important to understand what the statistics related to
21 the 2.206 process represent. To look at the pure numbers of
22 the petitions filed versus those approved is not an accurate
23 way to portray the effectiveness of the 2.206 process.

24 The fact that a relatively small number of
25 petitions are granted evidences the effectiveness of the

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1 Agency's other primary regulatory systems, and we would be
2 strongly concerned about a reversal in the statistics, if
3 the NRC were not catching most issues through its other
4 regulatory processes but rather leaving them to the public
5 to be caught through the 2.206 process. Next slide.

6 One point on the use of the stakeholder process to
7 ensure that the Agency obtained input and insights from the
8 many stakeholders who may have views on the subject. I
9 think initially the Agency took a rather narrow approach,
10 during a survey of just petitioners without asking others to
11 participate, but I am pleased to say that the Agency has
12 opened up the opportunity to provide insight to the Agency.

13 We have participated in a number of the meetings,
14 have submitted comments, and believe that that is a very
15 productive way to analyze various problems. We are
16 supportive of the changes. We think these issues need to be
17 addressed and the process made more user friendly, and could
18 not have made those points as effectively were we not part
19 of the public meetings. Next slide, please.

20 This slide is entitled, "Conclusions," please.

21 At bottom, our view is very positive with respect
22 to the actions the NRC has taken to try and change, which is
23 to say improve the 2.206 process. We believe that once the
24 agency made the decision to use this process, and by no
25 means is it a statutory requirement, that it should have the

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1 attributes of timeliness, transparency, responsiveness and
2 clarity of decision-making and we think that the current
3 changes will yield those results and are looking forward to
4 its implementation to see if we are correct in our
5 prognostication. Thank you very much.

6 CHAIRMAN MESERVE: Thank you. I would like to
7 thank all of you for your presentations.

8 I have a few questions, and then I will turn to my
9 colleagues.

10 Mr. Lochbaum, the Staff in making their
11 presentation to us had emphasized, I think was trying to
12 emphasize that some of the changes that they are proposing
13 are ones that are intended to provide capacity for the Staff
14 to assure that they are addressing the issues that the
15 petitioner has presented and that the idea of having more
16 meetings, the notion of having a draft Directors Decision
17 that would be subject to review is intended to make sure
18 that there is communication between the petitioner and the
19 Staff and that they have a meeting of the minds as to what
20 the issues are, and that the petitioner will have an
21 opportunity to see what the Staff's response is and to
22 comment on whether it disagrees, whether he or she
23 disagrees, and so forth.

24 Do you see these -- I recognize you would like to
25 have judicial review, but do you see that -- or some type of
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1 Commission review or some kind of appellate review.

2 I would like to ask the question of whether,
3 failing that, whether you see these changes that the Staff p
4 proposes as ones that are helpful nonetheless, maybe not
5 going far enough, but are they headed in the right
6 direction?

7 MR. LOCHBAUM: They are better than what we had,
8 but I don't think they go far enough.

9 I did not in this presentation or on the handouts
10 call for judicial review. I would like not even to have any
11 appeal. I would like for the first response to be right --
12 if it takes 180 days to get it right, let's get it right.

13 Failing that, you know, I don't think the reason
14 none of the Directors Decisions in the past have addressed
15 my issues is because the Staff didn't understand my issues.
16 I don't think that has anything to do with it. I don't
17 think there is a single case where I confused the Staff with
18 what we submitted, so giving me another opportunity to
19 provide the same information to a Staff that is for whatever
20 reason not listening I don't think will do it.

21 That is why I kind of recommended kicking it to
22 the Regional administrators, because we have had in Region I
23 and Region III our success rate is very low. Region III we
24 haven't had yet an allegation substantiated, but the process
25 is sound, so I don't look at whether a Directors Decision

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1 coming back positive as being the measure of the thing. It
2 is the process, and the process for petitions is not good
3 right now.

4 CHAIRMAN MESERVE: You have obviously had a lot of
5 experience, and I can't comment knowledgeably about the
6 things that you described.

7 I am struck, however, by the Staff's coming to us
8 and saying that they perceive a value in preserving
9 flexibility in how they deal with different cases, given the
10 different kinds of circumstances that arise, and I am
11 fearful, however, that they differ in the way they have
12 handled one case from another, that that is creating
13 problems and people are perceiving in either one or the
14 other cases that they have been handled in a way that is
15 inappropriate and that that is a source of grievances.

16 Laying aside any motives, and let's presume for
17 the moment the Staff is trying to handle these
18 appropriately, do you -- how shall we handle this? Is it
19 better to preserve this flexibility so that the Staff can
20 get to a resolution in a way that they think is the most
21 efficient, or is it better to have this be a rigid process
22 that may take us through steps that are unnecessary?

23 MR. LOCHBAUM: I am not against flexibility. I
24 think flexibility is good, and I think the Staff has been
25 very accommodating to the -- in some respects to the needs

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1 of the petitioners. The Salem petition, where they adjusted
2 because one of the petitioners wasn't going to be there,
3 showed a degree of flexibility on the Staff's part that is
4 commendable, so I am not -- I don't think that's bad.

5 I do recognize that flexibility causes at least
6 the potential for a perception that one or other of the
7 parties down the road may not be treated fairly as a result.

8 But also I think one of the problems that the
9 process has had is there's been such a high turnover, or
10 musical chairs on the part of the Staff handling this issue.

11 The earlier panel said that the licensee has
12 always been a participant in the process in the PRBs. That
13 is simply not true. Paul Gunter and I were on the telecon,
14 and the petitioner wasn't involved. I was on the second one
15 and the petitioner was involved because I gave him the
16 telephone number. I didn't think it was fair for me to talk
17 about issues and the licensee be excluded so I gave them and
18 few other people the telephone number, so that is how the
19 licensees got brought into the process.

20 I recognize that I am criticizing something I did
21 myself by allowing the licensees to participate but under
22 3.5 there is a process that defines who participates and who
23 doesn't, so I think that would control the excesses that I
24 have done in the past as well as those of the Staff.

25 CHAIRMAN MESERVE: Thank you. Mr. Riccio, your

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1 statement indicated you have some disagreement with the
2 limitation of the 2.206 process to enforcement matters.

3 I wondered what other kinds of things you think
4 should be brought into it.

5 MR. RICCIO: It was more of a comment about the
6 way the Staff continually attempted to narrowly define the
7 2.206 as to only -- it was more of a point saying that you
8 didn't want judicial review and to open up the discussion of
9 judicial review than it was about other things that might
10 fall in.

11 I would basically stick to enforcement action at
12 this point until we kind of work through it and actually
13 make this process work and then we can discuss other issues
14 that may be able to fall into a similar process.

15 CHAIRMAN MESERVE: Mr. Gunter, your main theme was
16 that there is a widely perceived lack of impartiality by the
17 Commission when it handles these matters and you suggest
18 that the solution for that is obviously to have, and you did
19 suggest, judicial review as the mechanism for providing some
20 discipline in the process.

21 I think you heard the discussion earlier that that
22 likely would require some action by the Congress amending
23 our statute. It would not be something that we probably
24 could do ourselves.

25 I wonder if there is anything that is short of
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1 judicial review that you think we should implement that
2 would improve the perception of partiality?

3 MR. GUNTER: Well, I would have to give that some
4 thought, but right off the top of my head at this stage of
5 the game I think that we really do need something on the
6 order of independent review from the Commission.

7 CHAIRMAN MESERVE: So the fall-back would be some
8 kind of an internal, within the Agency, review process you
9 think would be the next best thing?

10 MR. GUNTER: I think that we have concerns -- we
11 have seen concerns at every level of staffing, and if not
12 with our organization from other organizations out in the
13 field that we work with, so I don't know that I could
14 readily agree with that, that the fall-back is ever at this
15 point within the Agency.

16 That is why we believe that even taking it before
17 judicial review, you know, there's still some concerns in
18 that regard, but I think it does at least take it out into
19 the realm of a more independent process.

20 MR. RICCIO: If I could just interject, as Steve
21 had pointed out, when there was judicial reviewability of
22 2.206 petitions the Agency was given a lot of discretion and
23 actually as I think you said was never overturned, so I
24 don't believe we would be opening any floodgate either by
25 affording judicial reviewability.

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1 The only reason I am asking, I prefer that the
2 system work, but absent that I want to have some recourse,
3 and to my mind thus far the system hasn't worked.

4 CHAIRMAN MESERVE: I think it would probably be an
5 abuse of discretion standard by which our actions would be
6 reviewed, in which case --

7 MR. RICCIO: A high standard.

8 CHAIRMAN MESERVE: -- the courts would be quite
9 tolerant of what we did.

10 Ms. Ginsberg, I think that it was implicit in your
11 comments, but I wanted to make sure I understood. Are you
12 supportive of the various proposals that the Staff has made
13 to us today for changing the 2.206 process?

14 MS. GINSBERG: We support the proposals on greater
15 communication, on timeliness.

16 One of the things that was captured in I believe
17 it was the memorandum from the EDO suggested that we might
18 support a change to the rule regarding an appeal, and that
19 we had not supported. I don't know whether it was a
20 statement that was made that was misunderstood or there
21 wasn't clarity in the discussion, but we are not supporting
22 taking this process much further than where it currently
23 stands, and using it for the purpose which we believe it
24 already serves.

25 I guess I would add that our position with respect
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1 to judicial review and a variety of other of the proposals
2 regarding appealability, in a word it would be how much is
3 enough?

4 First, there's an opportunity to go before the PRB
5 prior to the time the PRB reaches the decision, and then you
6 go to the PRB following -- a post-PRB meeting. There is an
7 opportunity to discuss the draft Directors Decision. At
8 some point, from our perspective, the Agency, which is
9 charged with oversight of the licensee and responsibility
10 for ensuring public health and safety has to be the
11 decision-maker, and it strikes me that some of what we are
12 talking about is less process and more results and I think
13 as I said in my comment the fact that few of these petitions
14 are granted does not mean that the process is broken.

15 Certainly it wasn't as user friendly in the past
16 as it could be.

17 CHAIRMAN MESERVE: Well, the Staff actually did
18 not recommend any changes to us in terms of appeal.

19 I was asking about the specific issues that they
20 have recommended to us, the preparation, for example, of a
21 provision for a draft Directors Decision for comment to the
22 petitioner and various other changes in the process.

23 Are those ones that NEI supports?

24 MS. GINSBERG: Yes.

25 CHAIRMAN MESERVE: All right. Commissioner Diaz?

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1 COMMISSIONER DIAZ: Thank you, Mr. Chairman.

2 Let me just start with a small comment. Really
3 some of these processes are a little bit one step removed
4 from us and so I hesitate sometimes at engaging in it, but
5 there is one thing that I have gathered from my time in here
6 is that I believe in any of these processes it is vitally
7 important that the licensee be involved. I don't see how we
8 can remove the licensee from the process at any one time.

9 The way that we engage in the process is different
10 issue, but the licensee engagement, I consider it a vital
11 component of the process.

12 Having said that, Mr. Lochbaum, you made at the
13 very beginning a statement that I think I have heard before,
14 and I am beginning to get very curious about it. The
15 statement is that in your last 10 petitions only one time
16 was the issue addressed, and I don't think you mean that it
17 wasn't seen, that it wasn't looked at, but you mean that
18 your main issue was not addressed in the review board, in
19 the final decision -- is that what you mean, that the issue
20 that you brought up was really not addressed?

21 MR. LOCHBAUM: In only one case, and that one case
22 was D.C. Cook. The other nine cases, the issues, the safety
23 issues that UCS raised were not addressed.

24 COMMISSIONER DIAZ: Not addressed at all?

25 MR. LOCHBAUM: It was the same plant. A lot of

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1 times the Staff would talk about the same plant that we
2 talked about but the issue itself was not at all addressed.

3 COMMISSIONER DIAZ: You know, I know that this is
4 work but I really would appreciate if you could take out of
5 those nine cases one individual main issue that you think,
6 that you will send it to us so we will look at it.

7 MR. LOCHBAUM: I have got plenty to choose from so
8 that would be easy.

9 COMMISSIONER DIAZ: Just one. Just one.

10 MR. LOCHBAUM: That's fine.

11 COMMISSIONER DIAZ: Just one issue that we can
12 see, because I think, you know, I think sometimes it might
13 be a matter of interpretation but you are not calling this a
14 matter of interpretation. You think the issue was not
15 addressed?

16 MR. LOCHBAUM: The issue wasn't addressed. It
17 might be if the issue had been addressed the outcome would
18 still be the same. I am not going to say that had the issue
19 been addressed it would have been different because I don't
20 know that.

21 COMMISSIONER DIAZ: No, no, I -- no, I'm not
22 dealing with that. It's if the issue was not addressed,
23 thank you.

24 And going back to something we have beaten, but in
25 the use in the 3.5, what is missing from what the Staff

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1 proposes, presently, which I understand its approaches,
2 formal use -- what is missing from that approach to what you
3 would like to see? What is the gap?

4 MR. LOCHBAUM: Well, 3.5, as I understand it,
5 defines who the participants to a meeting are. And whenever
6 possible, there is a ten-day notice period. You know if
7 there are reasons why that can't be done, and there is a
8 process for controlling that.

9 So we think that's fine. The Management Directive
10 is basically a free-for-all. I mean, there is no control
11 over who participates.

12 As I said, this last time I was cross -- there was
13 the opportunity to cross examine me. That was totally new.

14 Whereas, 3.5 lays out how the process works, who
15 is involved, and that is the process. If you start having
16 umpty-dump -- that's not the right number -- many procedures
17 that control how you interface with the public, then that
18 means the public has understand all these different
19 processes.

20 Right now, all I've got to do is tell people to go
21 to 3.5, and that dictates how you interface with the public.
22 You ought to have only one of these things.

23 COMMISSIONER DIAZ: But you realize that entices
24 an organization that sometimes might even be cumbersome to
25 the process, that you might not get the timeliness and the

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1 attention that you want.

2 So, you know, it might be that it needs to be
3 better defined, but to enter into a -- you know, what 3.5
4 does establish a clear, you know -- and I understand the
5 process. But that process might not be the thing that you
6 precisely want, which is the timeliness and responsiveness.

7 MR. LOCHBAUM: I guess that the related concern
8 was that when OGC talked to us about why 8.11 was okay and
9 not 3.5, they basically said 3.5 controls meetings that are
10 not done under 8.11, and you could create any procedure and
11 do anything you wanted to.

12 So now you could create a procedure to have the
13 meeting with the licensees on license renewal under 6.8 or
14 whatever, and conduct them on five minutes' notice.

15 Now, you know, 3.5 is no longer controlling how
16 you conduct public meetings. It allows the staff or creates
17 the potential for abuses of the ten-day notice and the other
18 nice features of 3.5, if you start allowing all these
19 procedures to wreck havoc with those principles.

20 It literally took UCS two years to get the Staff
21 to start following 3.5. I mean, I have a letter from Sam
22 Collins who said they did an audit in less than half the
23 time they were following the ten-day notice rule.

24 So we've spent a lot of time getting the Staff to
25 follow 3.5, only to have the Staff say we'll start creating

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1 all these other procedures because you were hitting us too
2 hard now on 3.5 now.

3 COMMISSIONER DIAZ: Okay, so it's not only the use
4 of 3.5 for the 2.206, but, you know, it is actually having
5 one process that you can see that is more appropriate?

6 MR. LOCHBAUM: 3.5 was out there, and Staff wasn't
7 following it. If you start having more than one process of
8 the Staff to conduct meetings, it gets less and less likely
9 that the Staff will be following those processes.

10 COMMISSIONER DIAZ: Okay, all right. Well, 2.206
11 is a little different than others, so it might.

12 MR. LOCHBAUM: It's way different.

13 COMMISSIONER DIAZ: All right. Mr. Riccio, I want
14 to quote something that you say, which I'm not sure you
15 meant it in that way, but I really want to know the answer.

16 You said at the end that the 2.206 is the only
17 avenue the public has been afforded to address the
18 legitimate safety concerns of the nuclear reactor threat to
19 our families, homes, and communities.

20 Is that --

21 MR. RICCIO: I would add allegations as well.

22 COMMISSIONER DIAZ: Yes, allegations, and other
23 processes that we have when something --

24 MR. RICCIO: It's just the main process by which
25 the public engages.

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1 COMMISSIONER DIAZ: Okay, but you can -- you have
2 many other avenues, really.

3 MR. RICCIO: Congress, too.

4 COMMISSIONER DIAZ: Also, I believe that you might
5 be underestimating the statement that, you know, you can
6 only use it to alert the media and the Congress. That's
7 quite powerful in itself.

8 MR. RICCIO: My point was that we shouldn't have
9 to resort to media tactics in order to get these issues
10 addressed.

11 We come here in good faith, and we expect to be
12 treated in good faith. And when we have to resort to going
13 to the media or going to a Congressman in order to get a
14 legitimate safety concern addressed, then the process isn't
15 working.

16 COMMISSIONER DIAZ: Mr. Gunter, I think you have a
17 long history with Thermo-Lag, and I'm not going to really be
18 a little on the point, but it is really a long and
19 protracted history, and I think the Commission has been
20 trying to address it.

21 But in the last, say, year, do you see a movement
22 in this process that will allow you better participation and
23 make the process more fair? I'm not saying that it's
24 perfect.

25 MR. GUNTER: I think that the fact that we do have
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1 a seat at the table speaks a lot to that. I don't know that
2 that generally affords the public at large, though -- the
3 issues are daunting, and particularly raising them to the
4 level of the NRC is a daunting process.

5 After following it through, I think we've gained
6 -- we've learned the ropes, so to speak, but it is -- there
7 are issues that the general public does become aware of that
8 this process right now doesn't afford an open avenue.

9 And I think it can be improved. I think that
10 there are overtures for approval.

11 COMMISSIONER DIAZ: All right, thank you. Ms.
12 Ginsberg, I think I'm going to reverse the question here.
13 Do you think that licensees are afforded fair and equitable
14 participation in the 2.206 process?

15 MS. GINSBERG: I think that licensees ought to
16 have the opportunity to participate in the 2.206 process,
17 given that the action requested affects them very directly.

18 COMMISSIONER DIAZ: Do you think they're having
19 that opportunity?

20 MS. GINSBERG: I guess I need more data to answer
21 that question with any great confidence. I have not heard
22 great complaints about the licensee participation, but
23 before I answer that with any certainty, I'd like to make
24 sure that the new process, that we take into account how
25 that's working.

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1 COMMISSIONER DIAZ: All right, thank you. Thank
2 you, Mr. Chairman.

3 CHAIRMAN MESERVE: Commissioner McGaffigan?

4 COMMISSIONER MCGAFFIGAN: I'm going to stay with
5 Commissioner Diaz's line of questioning in one respect. Mr.
6 Lochbaum, the notion that some of the 2.206 petitions do not
7 address your concern, the vast majority, except for D.C.
8 Cook, the one I was most involved in -- because you did
9 write to us in April of '99, I believe. Somewhere in this
10 pile I have it.

11 You asked us to look at the River Bend decision.
12 And I did. And I think the Commission, as a whole, did.

13 And I actually found that quite responsive to the
14 questions you raised. I mean, you were raising some issues
15 as to whether they were outside of their design basis.

16 I brought it along with me here. The Staff went
17 to some length to explain their overall policy with regard
18 to failed fuel.

19 And then they went to some length to explain why
20 the apparent inconsistencies in documentation of the
21 licensing basis had -- weren't inconsistent in the Staff's
22 view.

23 So, we then did something, as I think I said at
24 the stakeholder meeting last December, we did something a
25 little extraordinary that in addition to telling you that

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1 you didn't have a petition right to the Commission in our
2 letter back to you -- I think I have it here -- we went on
3 to say that, you know -- that's the usual boilerplate --
4 that the Commission has found the Staff's reasoning and
5 statement of regulatory requirements, guidance, and
6 practices, fully satisfactory with regard to the fuel
7 defects cited in your petition.

8 So, I mean, we -- I actually thought Mr. Collins's
9 Director's Decision in that instance was a fairly -- it was
10 probably the most comprehensive statement of our policy with
11 regard to failed fuel that you will find anywhere.

12 Don't you agree, or what?

13 MR. LOCHBAUM: No, it's in the category of not
14 hitting the mark. I thought that that issue might come up,
15 so I brought a licensee event report dated March 1, 2000
16 that Entergy submitted on River Bend.

17 This is after our petition was denied.

18 COMMISSIONER McGAFFIGAN: Right.

19 MR. LOCHBAUM: Entergy reported that they found
20 that that was a common node failure that affected the entire
21 batch of fuel. There were only a few that were all the way
22 through, but there was -- the entire batch of fuel was
23 affected by this common node failure. And there was no way
24 of knowing until they shut down and examined it.

25 The petition that we provided, and in the

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1 testimony we made in the meeting or the hearing, actually,
2 until I left for my plane, was the Staff looked at normal
3 operation of the plant, not if the plant suffered an
4 accident with the preexisting failures, the degradation of
5 the fuel cladding.

6 This document proves that there was significant
7 cladding degradation at River Bend, which is what we said,
8 and which you would have never known until you shut down.

9 Had this plant suffered a control rod drop
10 accident, a main steam line break, any one of the credible
11 accidents that are within their design and licensing basis,
12 with the cladding in that shape, there's no analysis on the
13 planet that I'm aware of that would say that workers and the
14 public would have been protected.

15 The existing analyses that that plant has today
16 still don't address that condition. So I would say that the
17 Staff did not do a -- the spelling was impeccable, but I do
18 not think they addressed the issues we raised.

19 I went to great lengths in that petition, or the
20 report that was attached to that petition to go through a
21 50.59 evaluation. I've done literally hundreds of those
22 when I worked in the industry. I showed -- each one of
23 those questions came up that it was an unreviewed safety
24 question.

25 And the Staff didn't address that. I had that

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1 reviewed by a number of peers that work in the industry in
2 fuel groups throughout the country, including one that works
3 for GE's fuel fabrications, or what used to be GE's fuel
4 fabrication facility in Wilmington, North Carolina.

5 None of them disagreed with me on the facts.

6 COMMISSIONER McGAFFIGAN: Well, again, I'm not in
7 a position to -- you're catching me by surprise with the
8 licensee event report. I'd suggest that there should be
9 avenues for you to continue to have this discussion with the
10 Staff.

11 And that gets to my second line of questioning, so
12 why don't I get to that? How would you see a public meeting
13 ideally held with regard to a 2.206 petition? And I start
14 from where Commissioner Diaz is. I think the licensee has
15 to be there.

16 So the question is -- and I'll get on later to
17 whether you can be at the meeting that you felt excluded
18 from between IP-2 and the Staff, but let's say right now
19 it's a meeting that -- the primary purpose of which is to
20 discuss your petition, and we believe the licensee should be
21 there. I almost think it's a copout to the licensee to say
22 they're an observer at that point, but let's say they have
23 that right to take on observer status.

24 I'd prefer them to participate. How would you
25 conduct -- how would you have the meeting conducted?

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1 MR. LOCHBAUM: I know how I'd picture that. I
2 just don't know how to procedurally make it happen. It
3 would be nice for all the parties, the NRC Staff, the
4 petitioners, and representatives of the licensee to sit at a
5 table, discuss the issues, find out if there are any merits
6 to the issues.

7 Perhaps the issues were raised on an incomplete
8 dataset of whatever. Get that on the table.

9 If there are issues that are still remaining on
10 the table after that dialogue, discuss what kinds of
11 information would need to be answered or to be gathered to
12 address the remaining issues on the table.

13 You know, what is the resolution path of these
14 items? And that -- I don't think that's pure fantasy
15 because Ed Baker is here. That is not unlike what Region
16 III does for allegations.

17 When I make an allegation to Region III, somebody
18 calls me up and says, what are your issues? They want to
19 make sure they understand them. And here's what we're going
20 to do to address them.

21 They don't guarantee me the answer will be yes or
22 no, but they --

23 COMMISSIONER McGAFFIGAN: And the in the
24 allegation process, the licensee probably isn't there,
25 right? It's between you and the Staff?

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1 MR. LOCHBAUM: That's because of confidentiality.

2 COMMISSIONER McGAFFIGAN: Right.

3 MR. LOCHBAUM: But at least as far as, you know,
4 the discussion of the dialogue, it's a substantive dialogue.

5 And when I get the response, after I've agreed to
6 what bits of data need to be gathered, it's very difficult
7 for me to say, you know, I'm dissatisfied with that.

8 COMMISSIONER McGAFFIGAN: As we are sitting here,
9 I'm looking at the 3.5. I'll tell you that if -- that's not
10 exactly -- you know, totally clear, either.

11 And there are exceptions. I mean, there are a lot
12 of exceptions, and isn't clear, in looking at it, that 8.11
13 is a reference in 3.5, but I can't find where it says it's
14 an exemption, except that it says enforcement meetings are
15 exempt from the public meeting process.

16 So we do have multiple. I know you'd like us to
17 have the same meeting each time, but it strikes me that just
18 3.5 lays out, with the possible exception of 8.11, a whole
19 series of things where we are going to do it differently.

20 But with regard to meetings, in general, I mean --
21 one of the thoughts I have -- you sent me another letter,
22 and the Commission has seen that letter. I shared it with
23 the Commission.

24 It struck me that in this other letter, you were
25 suggesting that -- I wasn't totally clear what you were

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1 suggesting.

2 That you should have participant status.
3 essentially that's what you said in your testimony earlier
4 today with regard -- or maybe it was Mr. Riccio -- with
5 regard to the IP-2 case.

6 That this later meeting where Westinghouse was
7 allowed to testify, although they weren't on the participant
8 list, et cetera, you would have liked to have been something
9 -- the three of you -- something other than an observer.

10 If we had a process whereby for meetings that were
11 announced in advance like that one was, it has a boilerplate
12 that this is, you know -- here are the participants -- you
13 could petition for participant status.

14 It's much the same -- I think the reason we -- the
15 licensees -- you've heard Mr. Ginsberg talk -- the reason
16 the licensees are present for 2.206 is we think they should
17 be; they're ultimately responsible, but also because if we
18 announce the meeting with you under the 3.5 process, they
19 probably petition to be a participant, or we'd have made
20 them a participant in advance.

21 But some sort of process which for a limited
22 number of cases, perhaps cases -- meetings that are relevant
23 directly to the 2.206 that's before us, have some sort of
24 process where you, where the public seeing a meeting could
25 petition, say I'd like to be a participant, and I think the

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1 standard that Ms. Black used earlier was something like
2 beneficial to the purpose of the meeting.

3 I forget her exact words, but the word, beneficial
4 was in it.

5 Will that work? I mean, how do you see evening
6 the playing field, assuming we're going to have the
7 licensees in the 2.206 meetings? What sort of process do
8 you see to allow you some limited rights to be in the other
9 meetings?

10 MR. LOCHBAUM: Well, when I heard the first panel
11 discuss that, why the licensee has to sit at the table,
12 because they're the ones that are primarily responsible of
13 the plants, we're representative of public interest groups.

14 We represent the people that live around the
15 plants, who, if the licensee doesn't do a good job, could be
16 hurt or killed by those things.

17 So I think that while the licensee needs to be
18 involved, I think we share that need. I think that's the
19 point we're raising.

20 And I don't think you disagree with that.

21 COMMISSIONER McGAFFIGAN: No, I don't. The
22 problem, I think, that the Staff perceives with opening up
23 all meetings to everybody is that they can't get their work
24 done.

25 It's one thing to have the three of you there

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1 talking specifically about issues with regard to steam
2 generators and being as up on them as they are, or in the
3 case of River Bend, their fuel issues.

4 It's quite another thing to have someone there who
5 might simply pound the table and say I don't know why you're
6 having this meeting, the plant should be shut down, it
7 should have been shut down, should never have been opened,
8 and that's their sole contribution to the meeting.

9 MR. LOCHBAUM: Right.

10 COMMISSIONER MCGAFFIGAN: So how do you help us
11 make the distinction where it's beneficial to the purpose of
12 the meeting to have folks there and to involve folks, but we
13 can also get our work done with the licensee, and process
14 the license amendment, decide whether restart is
15 appropriate, do whatever the purpose of that particular
16 meeting is.

17 MR. LOCHBAUM: Well, I think Management Directive
18 3.5 or whatever the controlling process is, there should be
19 a clearly defined list of participants. And the Staff, in
20 the last year or so, has done a very -- I think, made a lot
21 of progress in reaching out to more stakeholders, and
22 including those stakeholders at the table as a participant.

23 In addition, there are clearly people who attend
24 meetings because they are interested in the subject. So
25 they're observers or whatever.

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1 I think the Staff's initiative to reach out to
2 stakeholders should be continued, to have more people who
3 are interested in various subjects be given the opportunity
4 to be a participant.

5 COMMISSIONER McGAFFIGAN: See, one of the
6 problems, one of the things -- and I don't want -- I won't
7 go much longer on this

8 One of the problems -- one of the attachments to
9 the letter that you had was a public meeting that I know you
10 are interested in. I know you're interested in it, as a
11 Commissioner.

12 I'm not sure the Staff -- it was a spent fuel pool
13 meeting. And I know of your interest in spent fuel pools at
14 Millstone and other places. But the Staff -- we're a fairly
15 stovepiped organization, and the person putting out that
16 meeting notice doesn't necessarily know that Dave Lochbaum
17 is interested in spent fuel pool issues.

18 So, unless everything has to go to the top and
19 say, yes, I know -- or everything has to be coordinated with
20 everyone, in which case you never get anything done -- there
21 has to be some sort of failsafe where if you're interested
22 in spent fuel pool issues and have something constructive to
23 contribute, you can get in the meeting as something other
24 than an observer.

25 But that doesn't mean -- I'm looking for that

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1 happy medium.

2 MR. LOCHBAUM: Well, I was going to -- I don't
3 know if it's medium or not, but maybe it's small. I was
4 going to try to provide that in that at all meetings,
5 regardless of the participant list, I think there should be
6 some time reserved for the end. I'm not going to say it
7 should be five minutes or whatever, but I think there should
8 be some time reserved for the end for people to who attend
9 the meeting, who are not at the table, to ask questions, or
10 if there are references to documents made during meetings
11 that I don't know about, or other people might not know
12 about --

13 So I think that that should become the norm.
14 Right now it happens occasionally, but it's not the norm, by
15 any means.

16 MR. RICCIO: If I could interject, I think that
17 one of your concerns is precluded by the review of the
18 petition to begin with. You know, if the Staff wouldn't
19 turn letters into petitions, they wouldn't have people
20 coming in and pounding the table saying shut the damn thing
21 down.

22 If someone is going to go to the trouble of going
23 through the -- formulating a real petition --

24 COMMISSIONER McGAFFIGAN: I wasn't talking about
25 petition meetings in that case. I was talking about if

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1 we're having a meeting on a license amendment, that sort of
2 meeting that Dave wanted to go to on spent fuel pools, I
3 think, at a TVA plant, how do we draw the line as to who
4 should participate in that meeting, which might even be at
5 the site.

6 MR. RICCIO: Then I would echo Dave's suggestions
7 about having at least a short question and answer period
8 afterwards. And actually it would be nice if you could
9 include the licensee.

10 I want to commend the Staff that during the IP-2
11 meeting, that weren't allowed to participate, because they
12 did, they stuck around for about easily a half hour or more,
13 answering our questions, discussing the issues, and I think
14 that was very helpful to us.

15 I wish the industry had bothered to stick around,
16 because we had a lot of questions for them, too, especially
17 the folks that weren't basically participating in the
18 meeting.

19 CHAIRMAN MESERVE: Good. Commissioner Merrifield?

20 COMMISSIONER MERRIFIELD: Thank you, Mr. Chairman.
21 I guess I'd like to start off with a little bit of a
22 comment. And that is I wouldn't want anyone to be left with
23 the impression that the Commission is a potted plant in all
24 of this.

25 We all receive from the Office of the Secretary, a
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1 copy of the Director's Decision, and we are given that so
2 that we can fulfill our obligation to review those and make
3 a decision whether to seek sua sponte review.

4 Now, for my part, I read all of those decisions.
5 And I also have my legal staff and my technical staff read
6 those as well to come up with a notion of whether we should
7 pursue sua sponte review or not.

8 Now, I realize that's not the same process that we
9 give petitioners an opportunity to point out disagreement in
10 the decisions, but it does -- I do mention that to point out
11 that the sua sponte review process is not meaningless.

12 I use by way of analogy, the negative consent
13 process that we have here at the Commission. Staff sends a
14 paper and the Commission gives an up or down vote, whether
15 it wants to take review on that, and frequently it does.

16 One of the things that the Staff proposed to do
17 was to allow comments on the draft proposal. Now, in your
18 slides, Mr. Lochbaum, on Slide 5, you state that you don't
19 think this is -- this is unacceptable, this is not
20 necessarily a good idea.

21 I would posit that at the very least, I think this
22 may provide the Commission with an opportunity for a clearer
23 understanding of your disagreement with a particular
24 decision.

25 Obviously that's not the equivalent of a review

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1 process, but I think it does give us an opportunity for a
2 greater insight into your concerns.

3 Now, what I may further posit is that perhaps --
4 and we can think about this -- perhaps a copy of those
5 comments should also be provided to the Commission so that
6 we would have the Director's Decision and a copy of the
7 comments of the petitioners and the affected party.

8 And as we go about our process of sua sponte
9 review, we would have the benefit of that, and be able to
10 make the decision of whether we felt it was appropriate for
11 us to take up that review or not.

12 I just was wondering what your thoughts were to
13 that concept?

14 MR. LOCHBAUM: Well, I guess as you started out
15 explaining that process, the question came to mind as to
16 whether if we provided comments on a draft decision, whether
17 the Staff would pass it along to the Commission or not.

18 I think that in recognizing that process -- and I
19 don't -- I never thought of the Commission as potted plants.

20 I think it's important that the Commission, as
21 they do that review, have benefit of comments from all
22 parties, whether it's the petitioner, the licensee or
23 whoever, so I think that would be -- I've never done that
24 review, but I can see how that would be valuable.

25 COMMISSIONER MERRIFIELD: I guess I'd maybe direct

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1 this to the legal counsel. Is there anything that would
2 prohibit us from merely attaching a copy of the comments of
3 the petitioners and the licensee to the materials of the
4 Director's Decision that's provided to the Commission?

5 MR. BURNS: No, no, not at all. My understanding
6 is -- and I won't speak for SECY now, but I presume now,
7 because obviously the petition itself, whatever comments or
8 response may have been filed by the licensee, are publicly
9 available documents.

10 Those are already -- those are available to the
11 Commission, internally. I'm not sure how the distribution
12 is, whether there's a second distribution when the decision
13 comes out, but they are certainly available to the
14 Commission. There would be no issue at all in terms of
15 seeing comments on a draft.

16 MS. BLACK: Hi, this is Susie Black. I'd like to
17 say that that was our intent; we would give you the
18 comments, and our resolution or our comments on their
19 comments, you might say.

20 COMMISSIONER MERRIFIELD: I would be, say, Mr.
21 Lochbaum's letter, or would it be your synthesis of his
22 comments? That's a difference there.

23 MS. BLACK: I think that's an option. We hadn't
24 really gotten down to the details of how we'd do it. I
25 mean, we could quote from the letter or we could just attach

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1 the letter and then provide our analysis of those comments,
2 either one.

3 COMMISSIONER MERRIFIELD: Or both.

4 MS. BLACK: Or both.

5 COMMISSIONER MERRIFIELD: Okay. Mr. Lochbaum,
6 we've had an ongoing discussion about 3.5 and 8.11. I
7 guess, in getting to the bottom of it -- and maybe I'm right
8 or wrong here.

9 Your position is that you want to have 3.5 and you
10 want that to be part of the process. But is the issue
11 really wanting 3.5 or is it the issue of wanting to have a
12 clear and consistent process so that from one 2.206 petition
13 process to the next, that there is a degree of consistency
14 as to how we treat petitioners, the licensee, how we see
15 comments?

16 I mean, is that really what you're driving at?

17 MR. LOCHBAUM: That's really it. I don't care if
18 it's -- I don't really -- I think it's easier if it would be
19 one procedure, but if it's a dozen procedures, that's fine.

20 It is the issue of -- I, and I think that other
21 members of the public lose confidence in an agency or
22 anybody when they don't do what they say they're going to
23 do.

24 If you look at Management Directive 8.11, it says
25 the PRB is between the petitioner and the Staff. And then

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1 all of a sudden, the licensee shows up.

2 So, if the Staff wants to do it some other way and
3 revise the procedure, do it some other way, but you've got
4 to do what the procedure says.

5 COMMISSIONER MERRIFIELD: Okay, well, obviously we
6 spend a lot of time thinking about how we improve our public
7 credibility around here, and that's obviously one we need to
8 at least take a look at.

9 Mr. Gunter, you've indicated that the NRC is
10 currently -- I don't know if I have the term exactly right,
11 but completely unaccountable for our decisions on the 2.206
12 petitions.

13 Having perhaps served over there for awhile, I
14 would posit that Congressional oversight provides an
15 opportunity for accountability for the Commission.

16 Indeed, we also invest a significant amount of
17 time, recently, in inviting the public to participate in
18 meetings such as this to provide an opportunity for comment.
19 I would hope that that would increase our level of
20 accountability.

21 Any comments on that?

22 MR. GUNTER: Well, I think that it also has to be
23 looked at in the context of what it takes to marshal that
24 kind of Congressional intervention.

25 I think it also speaks to the issue of how

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1 political the nature of this issue is. I frankly have
2 concerns that the way the wind is blowing in Congress should
3 determine the degree of scrutiny that particular safety
4 issues receive that may also be politicized within the
5 Agency itself.

6 COMMISSIONER MERRIFIELD: Well, I appreciate that,
7 and perhaps I'm more supportive of the current Congress than
8 you are.

9 But this isn't anything new we're talking about
10 here. I mean, the decisions relative to 2.206 and the
11 courts' decisions on that all date from the late 1980s.
12 There have been a number of Congresses since then, dominated
13 by both parties, I would point out, that have chosen not to
14 reverse the way that we go about reviewing these.

15 Do you want to respond?

16 MR. GUNTER: Again, I think that it's to the
17 advantage of the Agency, to bolster its claims to build
18 public confidence, to seek as many avenues as possible to
19 achieve its effort to build public confidence.

20 And I think that clearly, the more avenues you
21 provide, the more checks and balances in that effort.

22 COMMISSIONER MERRIFIELD: Well, I think that's a
23 fair comment. Obviously I think there's an intention on the
24 part of the Staff and there will further be an intention on
25 the part of, I presume, the Commission, to make changes in

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1 this process to make it more accountable and to increase our
2 public confidence.

3 And we'll certainly keep going with that spirit in
4 mind.

5 Ms. Ginsberg, you mentioned in your comments --
6 and I missed it, because it was relatively quick -- an issue
7 about timing. We heard some questions from the Staff about
8 how that 120-day schedule may be pushed off somewhat, given
9 the fact that we're incorporating some new opportunities for
10 public comment.

11 Now, it wasn't clear to me how far off that's
12 going to get pushed, but probably there will be some
13 push-out there.

14 Do you have any concerns, either way, relative to
15 timing of review of these petitions?

16 MS. GINSBERG: I was looking at it from a
17 historical perspective. In the past, the Agency has taken
18 perhaps too long to render decisions on these 2.206
19 petitions. Now I look at an objective of approximately 120
20 days, and that seemed very reasonable, given the nature of
21 these decision and the somewhat ambitious meeting schedule,
22 if you will, that the Staff has laid out.

23 So, my perspective -- the perspective of the
24 industry is, understanding that there will be some balancing
25 necessary to accommodate some of the exceptions, we think

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1 120 days is very reasonable.

2 COMMISSIONER MERRIFIELD: I also want to talk
3 about -- you mentioned a little bit about plain English --
4 and this is my last question.

5 I haven't reviewed these Directors' Decisions, as
6 is the case with other documents we have here. They are not
7 always -- I used the word, always -- a model of clarity of
8 plain English.

9 I directed a question in the earlier panel to the
10 issue of having attorneys review the Directors' Decisions,
11 which is a practice we used to have.

12 Now, part of that review process is for the
13 purpose of making sure that legally the documents are
14 appropriate, and that continues.

15 One of the other things I have been led to believe
16 is that also, attorneys were used in order to review the
17 documents and were making stylistic changes to perhaps make
18 them -- one could argue whether lawyers can speak in plain
19 English, but make them a little bit more plain English and
20 more consistent.

21 A decision was made by the Commission, because of
22 resource concerns and concerns by NEI and its members, who
23 were spending too much money that we need to cut costs, so
24 we don't do that review anymore.

25 Was that an incorrect decision, and should we

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1 engender some kind of a process to further clarify these
2 documents so that they are, indeed, consistently in plain
3 English?

4 MS. GINSBERG: I short, yes. As to whether or not
5 it's OGC that does the editing and the reviewing, I think
6 that the Agency ought to make that decision on its own. I
7 think lawyers are very adept at editing and making things
8 understandable, but I'm not sure the rest of the room might
9 agree with that.

10 [Laughter.]

11 COMMISSIONER McGAFFIGAN: Have you heard any
12 judicial decisions lately?

13 [Laughter.]

14 COMMISSIONER MERRIFIELD: I depends on the lawyer.
15 We have some very accomplished lawyers on this side of the
16 table.

17 I would -- well, that may involve additional time
18 and effort. I mean, I envision additional FTE time. Is
19 that something that would be --

20 MS. GINSBERG: I don't think it would necessarily
21 involve additional FTE. I don't think you need a department
22 of editing in order to get these decisions to read so that
23 someone who isn't necessarily a technical expert can
24 understand them.

25 I think that's -- the Agency ought to undertake

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1 that as an opportunity throughout the Agency in whatever it
2 puts out to the public. And I think that this is not unique
3 in that respect.

4 COMMISSIONER MERRIFIELD: Fair comment, fair
5 comment. Thank you, Mr. Chairman.

6 CHAIRMAN MESERVE: Good. I would like to thank
7 all of the --

8 COMMISSIONER McGAFFIGAN: Mr. Chairman, could I
9 just make a comment? Mr. Lochbaum made several sort of
10 allegations about the NRR staff and the Regions, and all
11 that.

12 I just want to say that this notion that if you
13 appeal higher in this body, you're going to get yes as the
14 answer; I hope that's not true. I don't think it's true.

15 I think you have people who are trying to make
16 their -- to do their job, based on the information that's
17 presented to them.

18 I can cite case, the 120-month update requirement,
19 the change in the scam indicator that was petitioned, where
20 we do say no, and the Staff urges us, at least in the scam
21 indicator, to say no.

22 And so I think you have it wrong. But I think you
23 need to have a dialogue with the NRR staff outside of this
24 meeting room, perhaps on that.

25 But I -- you basically have said that the whole

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1 group of people are incapable of making a decision because
2 they are all politicians. And I pride this place on being
3 non-political.

4 I mean, there's Republicans at that side of the
5 table, and Democrats at this side, but I haven't -- luckily,
6 Senator Lott and Senator Dashell do not have views on most
7 of these issues.

8 [Laughter.]

9 COMMISSIONER McGAFFIGAN: I think we're best
10 trying to deal with them on the technical merits, and I
11 think that's how we all try to deal with them.

12 So, you know, I don't know. You're saying that
13 there is this general view out there among some folks that
14 if the Resident will say -- is more likely to say no, so go
15 to the Region, and if the Region is going to say no, go to
16 the NRR, and then go to the Commission.

17 I mean, ultimately you're saying we're yes-men. I
18 don't see us that way. I just wanted to say that.

19 COMMISSIONER MERRIFIELD: Mr. Chairman, I would
20 agree with the sentiments of Commissioner McGaffigan. You
21 know, I wish we'd jumped on it sooner.

22 We have a very outstanding staff in NRR, and an
23 accusation that they're all a bunch of politicians, I think
24 is not correct, and I wouldn't want that to be left stand
25 without commenting on it.

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1 MR. LOCHBAUM: I guess I did say that they were
2 all, just the senior manager level.

3 COMMISSIONER MERRIFIELD: Listen, I think this
4 Commission has confidence in our senior managers. I want to
5 make it clear.

6 From my perspective, I do.

7 MR. LOCHBAUM: I do at the Regional level, at the
8 NRR staff, not at all.

9 MR. RICCIO: We would invite an opportunity to
10 discuss some of the decisions made by senior management. I
11 would love to know why Cook was going to be allowed to be
12 restarted.

13 COMMISSIONER MCGAFFIGAN: See, I think you have
14 that wrong, too. I mean, I honestly think there -- because
15 the senior managers ultimately came to us. I was here at
16 the time, and we were getting the entire time that David's
17 petition was before us in late '97, we were getting all
18 sorts of signals from the Staff that there was real merit in
19 what was going on there.

20 And it wasn't a surprise that the plant has been
21 down this long. I remember in late '97, early '98, the
22 words, denial, and all that being used.

23 Do I have the right year? Late '97?

24 MR. LOCHBAUM: Are you talking about the petition,
25 or are you talking about --

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1 COMMISSIONER McGAFFIGAN: Not denial of the
2 petition, denial about the scope of the issues, and that --
3 MR. LOCHBAUM: It didn't reach me, and the people
4 I've talked to since then. That's not the story I have
5 heard, so I don't know what --

6 COMMISSIONER McGAFFIGAN: Okay.

7 COMMISSIONER DIAZ: Now that it came out, I do
8 want to say that although I think a process can be improved
9 and that we're trying, I just want to assure you that, you
10 know, from a broad perspective of being in many, you know,
11 different places, the system must -- organization that I
12 have seen in the United States Government.

13 And, you know, the decisions are not political.
14 We might have processes that needs to be improved and
15 changed.

16 And sometimes the Staff is tied by those
17 processes. And the reason you are here is so we can find
18 where the knots are and help to make them better.

19 I sincerely believe that, thank you.

20 COMMISSIONER McGAFFIGAN: Okay, sorry.

21 CHAIRMAN MESERVE: With that, we stand adjourned.
22 [Whereupon, at 3:54 p.m., the briefing was
23 concluded.]

24
25

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