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2 UNITED STATES OF AMERICA  
3 NUCLEAR REGULATORY COMMISSION  
4 OFFICE OF THE SECRETARY

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6 COMMISSION BRIEFING ON  
7 IMPROVEMENTS TO 10 CFR 2.206 PETITION PROCESS

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10 Nuclear Regulatory Commission  
11 One White Flint North  
12 Commissioners Hearing Room  
13 11555 Rockville Pike  
14 Rockville, Maryland  
15 Thursday, May 25, 2000

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

19 COMMISSIONERS PRESENT:

20 RICHARD A. MESERVE, CHAIRMAN  
21 NILS J. DIAZ, Member of the Commission  
22 EDWARD McGAFFIGAN, JR., Member of the Commission  
23 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  
12  
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14 PERTINENT PORTIONS OF THE PAGES THAT  
15 FOLLOW ARE SIDE-BARRERED.  
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1 P R O C E E D I N G S

2 [1:29 p.m.]

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

8 As I think everyone in the audience probably

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 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 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

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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 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 scram indicator that was petitioned, where  
20 we do say no, and the Staff urges us, at least in the scram  
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