NUCLEAR REGULATORY COMMISSION

ORIGINAL

COMMISSION MEETING

RETURN TO SECRETARIAT RECORDS

In the Matter of: PUBLIC MEETING

DISCUSSION AND POSSIBLE VOTE ON REVISED LICENSING PROCEDURES -- PROPOSED RULE CHANGE TO PART 2

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UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

DISCUSSION AND POSSIBLE VOTE ON REVISED LICENSING PROCEDURES --

PROPOSED RULE CHANGE TO PART 2

PUBLIC MEETING

Room 1130,
1717 H Street Northwest,
Washington, D.C.

Tuesday, October 13, 1981

The Commission convened on the above-entitled matter at 2:05 p.m., pursuant to notice.

BEFORE:

Nunzio Palladino, Chairman.
Victor Gilinsky, Commissioner.
Peter Bradford, Commissioner.
John Ahearne, Commissioner.
Thomas Roberts, Commissioner.

ALSO PRESENT:

F. Remick
T. Cotter

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A. Rosenthal
G. Cunningham
H. Shapar
B. Parler
W. Olmstead
J. Rodriguez
J. Aron

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P R O C E E D I N G S

CHAIRMAN PALLADINO: The meeting will please come to order.

The topic of today's meeting is the proposed changes to 10 CFR Part 2. There are several items that will be up for discussion, including the question of interrogatories, and management of discovery question on the compelling of oral arguments -- that the motions to compel discovery, and then the question of using express mail.

Whether or not we will get to all of them, we are not clear, but I thought we would start with the management of discovery.

We have a proposed rule discussion prepared by Mr. Cotter from the Atomic Safety & Licensing Board Panel, the chief administrative officer thereof, and I asked him if he would walk through the document that we have prepared and highlight its major features for us.

MR. COTTER: Thank you, Mr. Chairman.

The paper submitted to the Commission on October 9 recites the history --

COMMISSIONER AHEARNE: Late on October 9.

MR. COTTER: Late on October 9.

COMMISSIONER GILINSKY: What's the significance of that?

COMMISSIONER AHEARNE: I left, I guess, at five after

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6:00 on Friday, and it had not yet arrived. So I didn't get it.

MR. COTTER: Well, that's strange. It left our office about 4:30. We got the last input at a quarter after 4:00, I guess.

In any event, it recites the history of prior discussions of the interrogatory question which are contained in the original SECY paper prepared by OGC, 81-526, and this October 9 paper particularly addresses the Atomic Safety & Licensing Board Panel proposal on discovery which was more broadly framed than the original proposal which was focused primarily on control of the number of interrogatories, and whether or not they should be limited to 50 per person per proceeding.

This proposal adopts a proposal which has been developed by the Judicial Conference of the United States, and is aimed at an affirmative role for judicial officers in managing discovery in all proceedings.

It seeks to accomplish that purpose essentially in three principal ways:

First of all, it specifically grants an affirmative authority to the judicial officer to act to control discovery. There has been considerable discussion about whether that authority is not already implicit in the judicial officer's authority within the Commission and within the courts, but this makes the matter explicit and thereby puts an affirmative burden on the judicial officer to act to control discovery, but is

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1 significantly different from the general practice relating to
2 discovery, because the general practice is that discovery is a
3 thing to be conducted by the parties for the purpose of full
4 disclosure of all the information bearing on the controversy
5 by each party to each other party in the proceeding, and this
6 practice meant that normally the judicial officer would not
7 become involved in discovery unless a dispute arose between at
8 least two of the parties as to whether or not a matter was
9 required to be or should be disclosed.
10 The second element that this proposal injects into it
11 is to require the parties to discovery to make an affirmative
12 declaration in every request for or objection to any discovery
13 action within the proceeding; to make an affirmative declaration
14 that the action that they take in connection with the discovery
15 is based on, I think it was two or three different criteria,
16 one of which is that it is contemplated by the rules governing
17 discovery, or that it should be contemplated by the rules, or is
18 otherwise not done for negative purposes.
19 CHAIRMAN PALLADINO: What page is that?
20 MR. COTTER: It's page 7 and 8, addressing the
21 general question of certification and sanctions.
22 The specific criteria governing the certification by
23 the person seeking discovery or objecting to it is that the
24 action is interposed in good faith and not primarily for delay
25 or other improper purposes, but it is reasonable and not unduly

burdensome or expensive under the circumstances of the particular case; and in the first instance, that it is based upon the theory reasonable and warranted by existing law, or a good faith belief as to what the law should be.

Having made that certification, the party then becomes subject to sanction if it in fact turns out that the certification was incorrect.

On the other hand, if the certification is not made at the end of the discovery request, or were objection or other action, then that action can be ignored by the other party as of no force and effect.

Those are basically the three significant elements of this proposal, and it applies across the board, not simply to interrogatories, but to other forms of discovery, such as request for admissions, depositions and so forth.

CHAIRMAN PALLADINO: I only counted two. Can you go over them again?

MR. COTTER: The second two are tied together. The first is an affirmative burden on the judicial officer to assure that the discovery is not being abused or otherwise misused.

The second is an affirmative duty on the person seeking discovery to certify that it is essentially done in good faith.

And the third is if that certification is not present, either a sanction can be imposed or -- excuse me, if the certification is not present, the discovery request is of no

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1 force and effect. If the certification turns out to be improper
2 or false, the party making it is subject to sanctions.
3 Basically it's two affirmative duties; one on the
4 judicial officer and one on the party seeking discovery, and then
5 it spells out the consequences of failure to observe those
6 affirmative duties.
7 CHAIRMAN PALLADINO: In your proposal, you do not make
8 any statement about limiting the number of interrogatories, as I
9 understand it.
10 MR. COTTER: There is a general statement indicating
11 that it would be appropriate for the judicial officer, in carrying
12 out his affirmative duties, to indicate that a specific limitation
13 in interrogatories will apply at a given point in the given
14 proceeding.
15 It does not specify a specific number of interroga-
16 tories; that should be limited by the judicial officer, because we
17 felt there is so much variation among the cases or among the
18 issues at hand, and consequently among the discovery requirements
19 of all the cases, it would not be beneficial to do so.
20 CHAIRMAN PALLADINO: Are you in a sense, then,
21 encouraging the Licensing Boards to experiment with limiting
22 the number of interrogatories to some number?
23 MR. COTTER: I'm encouraging them to use their judgment
24 in the specific case.
25 CHAIRMAN PALLADINO: The reason I raise the question,

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1 under "Recommendations," the OGC recommends that the Commission
2 in the statement of consideration encourage Licensing Boards
3 to experiment with limiting the number of interrogatories to
4 50 or another appropriate number that one party may file in a
5 given proceeding against another party, without receiving the
6 consent of the Board to file additional interrogatories.
7 MR. COTTER: In answer to that, no, I am not encouraging
8 that. The word "experiment" troubles me, because we have an
9 unprecedented number of cases to be processed through licensing
10 hearings, and experiments, it seems to me, run the risk of
11 delaying those cases.
12 CHAIRMAN PALLADINO: Nevertheless, you are encouraging
13 them when they think it is appropriate to limit the number of
14 interrogatories?
15 MR. COTTER: That's correct.
16 CHAIRMAN PALLADINO: So I guess the spirit of that is
17 encompassed in what you are saying in this document, except
18 that you don't ask them to experiment, you ask them to --
19 MR. COTTER: I don't want to quibble with semantics.
20 Yes, that's correct.
21 COMMISSIONER AHEARNE: What would your position be
22 on the appropriateness of the Licensing Board Chairman limiting
23 the number of interrogatories?
24 MR. COTTER: I think the time and circumstances would
25 arise where it would be perfectly appropriate, but I don't think --

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1 COMMISSIONER AHEARNE: In advance?

2 MR. COTTER: Well, it depends how far in advance you
3 mean. I think it would be appropriate when you arrive, for
4 example, at the last SER supplement and you have some pretty
5 accurate idea at that point as to what issues you are dealing
6 with, and how many; then it seems to me that it could be done
7 in advance, yes.

8 CHAIRMAN PALLADINO: If you wouldn't do it in advance,
9 when would you do it?

10 COMMISSIONER AHEARNE: I thought that it might be
11 the idea, after a certain number of interrogatories had been
12 made, that the Board Chairman would step in and say, "That's
13 far enough."

14 I'm not recommending that, I just thought that
15 might be a concept.

16 MR. COTTER: That is certainly a possibility.

17 CHAIRMAN PALLADINO: In the recommendations, it is
18 stated because the ASLBP proposal, if implemented aggressively
19 by the Board, would substantially modify existing practice, OGC
20 recommends the Commission adopt a rule on nondiscriminatory
21 pilot basis and commit itself to examining the rule within six
22 months to a year after it's adopted.

23 Then I think you recommend against the concept of a
24 pilot program.

25 MR. COTTER: Yes. I discussed that a bit in the text

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1 preceding this. I just don't see how you're going to set criteria
2 for it now and how you're going to measure it on a six-month
3 basis or even a year basis, for that matter.
4 I'd be happy, as I indicated to OGC, to have them
5 take over the responsibility for establishing criteria and
6 measuring it, and then reporting back on the effectiveness. But
7 there is so much variation among these cases that I just don't see
8 how you could do it.
9 CHAIRMAN PALLADINO: Suppose you didn't call it a
10 pilot program. Let's assume for the moment that we came down and
11 adopted your proposal. Could it not be set forth that we are
12 going to follow this from now on, and then take the initiative a
13 year later to review and see what we learned from it? Do you
14 think that would not be practical?
15 Somehow the concept of a pilot program, even though I
16 seem to be leaning that way earlier, I can see it does cause a
17 problem in the rule. But if you say this is what we're going
18 to follow, and then we ask later for a review or an evaluation
19 to see whether it's improved the process, could that not be
20 done?
21 MR. COTTER: It certainly could be done. It's within
22 your authority to do that. Whether it would be beneficial or
23 not, I can't answer you. Certainly any party to a proceeding
24 who knew that the discovery rules were going to be reviewed at
25 some later date, with an eye to examining whether or not they

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1 should be changed again, I think would fashion his discovery
2 tactics accordingly.
3 CHAIRMAN PALLADINO: That's why I was saying we
4 didn't want to call it a pilot program. This is what we're going
5 to follow, if we agree to do it, and then we can review it any
6 time, whether or not we've made an improvement in the process.
7 MR. COTTER: Yes, you certainly can.
8 CHAIRMAN PALLADINO: It wouldn't necessarily have to
9 be in the order.
10 MR. COTTER: I'm a little leary of responding to that.
11 The General Counsel might like that one better, as to whether or
12 not you are setting up a situation where parties to proceedings
13 could come back at you later and say that you really intended
14 this to be a pilot program, and made guinea pigs out of us.
15 CHAIRMAN PALLADINO: I think if we adopted it, I
16 would recommend not having it considered as a pilot program.
17 MR. COTTER: I'm not talking about how you would
18 present it prospectively. I'm talking about how it might be
19 reviewed or attacked retrospectively.
20 CHAIRMAN PALLADINO: Do you think it would hurt if
21 we did say in the rule that after a period of time, of a year or
22 more, we believe it would be appropriate to see what improvements
23 -- to review the process, to see what improvements might be
24 brought about?
25 MR. COTTER: I think that would be perfectly

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1 appropriate.

2 CHAIRMAN PALLADINO: There was another point in the

3 recommendations -- and I think this is your recommendation --

4 that the Staff should not be required to respond to interroga-

5 tories which seek to prove the Staff's thought processes, rather

6 than to obtain factual information with regard to the bases of

7 Staff conclusions.

8 MR. COTTER: I think that's the Appeal Board Chairman's.

9 CHAIRMAN PALLADINO: I'm sorry.

10 Do either of you find any problem with this recommenda-

11 tion?

12 MR. COTTER: I do, yes. My proposal is to the

13 contrary.

14 CHAIRMAN PALLADINO: You would say you would like to

15 require them to respond to their thought processes?

16 MR. COTTER: I think the material in the text

17 indicates that it has been the judicial experience at large

18 that it is extremely difficult to separate thought processes

19 from so-called facts, if you will, because ultimately -- and

20 particularly, it seems to me, in these cases -- because the

21 ultimate fact is somebody's judgment.

22 The Commission, for example, is considering the

23 application of probabilistic risk assessment. Much of what is

24 done in assessing the safety of reactors, as I understand it, is

25 based on that kind of approach, and it seems to me that the

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environment in which these reactors are reviewed in an adjudicatory process is heavily interlaced with ultimate opinions.

CHAIRMAN PALLADINO: Alan, would you like to speak to this?

MR. ROSENTHAL: I think it is quite possible to separate the two. Granted, as in many other areas, sometimes the line of demarcation is not that clear. What I had in mind, as I think I indicated, or at least endeavored to indicate at the last meeting in which the subject was discussed, was it seems to me to be quite reasonable to inquire of the Staff through discovery as to the data which it employed in reaching the conclusions which it reached; the analytical models which it used in working the data; all of which, it seems to me, falls within the category of factual information.

It seems to me to be inappropriate to say to the Staff, "Well, now," for example, "are you familiar with the work of X, Y and Z? And why is it that if you were familiar with their work and their approach to these problems, why didn't you use their approach rather than the one that you used?"

Now as I suggested at the last meeting, in the best of all possible words, in a limited time and limited Staff resources, there might be something to say for opening the whole book and calling upon the Staff in the discovery process to not only provide the bases upon which it acted, but also consider and set forth the reasons why it did not go down some other path.

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But again, it seems to me, that this is not the best of all possible worlds. There are time constraints and, even more importantly so, there appear to be substantial resource constraints. And it seems to me in the totality of the circumstances to be a fair compromise, if one might put it this way. I say compromise between the position which the Staff was initially expounding, of eliminating all discovery against it, and the other extreme of saying that I can go after the Staff on anything, to say, "You are entitled to go after the Staff, again you are entitled to know the basis upon which the Staff reached these conclusions, the data it employed, the methodology it utilized."

And that, in essence, Mr. Chairman, is where I come out. I think, as I said at the very outset, that's a line which in most cases can be readily drawn.

MR. COTTER: To sharpen this debate, I should comment that to the extent that a request such as that is asking the Staff in effect to do work for some other party to the proceeding, it seems to me that that would be patently improper and would not be allowable.

COMMISSIONER AHEARNE: When you ask them why they didn't do something, clearly you are asking them, in many cases, to develop additional work.

COMMISSIONER BRADFORD: Alan, are you saying that if during the hearing the Staff witness were summonsed and put on

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1 the stand and asked that same question, the presiding officer
2 would have a basis for disallowing it?
3 MR. ROSENTHAL: No, I don't think that one has to
4 equate what is appropriate on the discovery level with what is
5 appropriate during cross-examination. I think it's the Staff
6 witness at the hearing itself. I think it's fair game for
7 the Staff witness to be asked about somebody else's theories and,
8 indeed, not only is it fair game, but I think in the circumstances
9 where a Board is confronted with conflicting conclusions of
10 experts, based upon quite different analytic approaches, and
11 where the Board is going to have to make a choice between these
12 experts' conclusions, the Board would be remiss in the discharge
13 of its functions if it did not itself inquire of each expert
14 with regard to other experts' differing analysis or employment
15 of different data.
16 I am dealing here simply with discovery, and I just
17 think there is a practical reason for making the bounds of
18 discovery more restrictive than the bounds of examination at
19 hearing.
20 COMMISSIONER BRADFORD: But if the point of
21 discovery, as I had always understood it, is to save on hearing
22 time, then I don't see what you're gaining.
23 In fact, it seems to me you're losing.
24 MR. ROSENTHAL: Well, I think that pragmatic
25 experience does not bear out that theoretically valid point.

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1 It has not been my experience, in looking at a fairly substantial
2 number of these cases, that this voluminous discovery that has
3 gone on in advance has had much of an effect, if any, on limiting
4 the hearing time.
5 You know, if you look at it theoretically, one might
6 say, "Well, yes, if the Intervenor gets this full explanation
7 as to why the Staff went down the road it did, rather than some
8 other road, it may throw up its hands and say, 'Well, we're just
9 wrong about this,' and withdraw the contention."
10 Or they might refine, theoretically, the limits of
11 their cross-examination.
12 I just don't think, Mr. Bradford, that's the way it
13 works in practice.
14 MR. COTTER: How could you arrive at that conclusion?
15 What's the basis for that statement?
16 COMMISSIONER BRADFORD: Let me put it, perhaps, a
17 little more tactfully.
18 (Laughter.)
19 What, then, would the basis for allowing discovery at
20 all be, if it isn't --
21 MR. ROSENTHAL: I think what does happen sometimes is
22 that Intervenors who are somewhat skeptical as to whether the
23 Staff has indeed done any kind of real analysis at all, will, if
24 the Intervenor is able, through the discovery process, try to get
25 out of the Staff again what data it employed and what the

1 methodology was.

2 I think there have been instances in that circumstance
3 where it has either led to the withdrawal of a contention or
4 the nonassertion of a contention or, alternatively, has much
5 more narrowly focused the Intervenor's cross-examination of the
6 Staff at the hearing. Because if all the Intervenor knows is
7 that the Staff has reached "X" conclusion, and really doesn't
8 know the basis upon which the Staff got to that conclusion,
9 you are almost inevitably going to get a great deal of unfocused
10 cross-examination.

11 So I think it can be of substantial assistance to
12 the progress of the case to have the Staff's analysis and data
13 and all of that laid on the table.

14 I am not persuaded that allowing the Intervenors to
15 go into "why didn't you do it some other way," and "how, again,
16 about Expert X's approach to this" is going to be very -- is going
17 to save much time, and it's going to be, in any event, so I've
18 been led to understand -- Mr. Shapar can speak to that better
19 than I -- an enormous drain on limited Staff resources, which is a
20 factor I think one has to consider.

21 COMMISSIONER BRADFORD: I guess, though, I don't see
22 why the tendency to save time would be any less with regard to
23 the question of "why didn't you do it in some other way," than
24 it would be in the case of the question along the lines of "why
25 did you do it this way".

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COMMISSIONER AHEARNE: I thought the other question was "how did you do it."

COMMISSIONER BRADFORD: Well, same question.

COMMISSIONER AHEARNE: Not really. "How did you do it" could be taking up the methods of --

COMMISSIONER BRADFORD: Well, okay, but surely in order to give any meaningful answer to the question of "how did you do it," you'd have to say something about why you did it that way. And if it's purely a matter of a mathematical equation, then, of course. But it can't be that all that many of these questions are really directed to nothing more than eliciting an equation.

And even then, if there is an alternative equation, it seems to me to be fair enough to ask --

CHAIRMAN PALLADINO: Usually it relates to the assumptions being in the equation, rather than the equation itself. "Why did you make this assumption, rather than that assumption?"

COMMISSIONER AHEARNE: As opposed to eliciting the assumptions.

T.2 CHAIRMAN PALLADINO: Did you get your question answered? Why don't you rephrase the question?

MR. COTTER: Maybe I'd better have Commissioner Ahearne restate the question, to make sure I understand it.

COMMISSIONER AHEARNE: Go ahead.

CHAIRMAN PALLADINO: I have trouble putting the right

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1 answers to the right questions.

2 MR. COTTER: If the question says "why didn't you go

3 about resolving the question this way," after the person

4 answering it has stated how they went about it, the answer is,

5 "because I thought my way was better," and the discovery has

6 succeeded in identifying the issue, and at the trial the person

7 who thinks it should have been done another way then has the

8 burden of going forth with evidence to show not only that his

9 way is better, but the other way is somehow defective.

10 Now if the answer to the question looks at the question

11 and says, "Oh, maybe that's a good question; maybe I should

12 have done it the other way," then you get the longer answer.

13 COMMISSIONER AHEARNE: Then you would not allow a

14 question such as "explain why you did not use this other

15 technique"?

16 MR. COTTER: I have been trained never to give a

17 yes or no answer. I'd have to look at the specifics, but generally,

18 no.

19 CHAIRMAN PALLADINO: I thought that's what Alan was

20 saying.

21 MR. BICKWIT: It sounds like your positions are

22 exactly the same.

23 CHAIRMAN PALLADINO: Yes, it sounds like they are

24 the same, and I thought they were different.

25 MR. COTTER: Well, it could be, except that Alan is

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more likely -- more inclined to state a generalization than I am on this subject, for two reasons:

One, I am hesitant because I know I have an instinct for the variations that the question comes up in.

And two, it still remains a matter of individual judgment for individual Boards.

CHAIRMAN PALLADINO: Well, now, on page 13, it says:

"Accordingly, OELD and ASLBP have agreed to assign representatives to address these questions and work out principles to resolve them."

And one of the questions I think that paragraph refers to is the question you raised that begins at the bottom of page 11 and goes to the top of page 12:

"OELD has cited the specific example of an interrogatory asking if a staff member read a certain document in reaching his conclusions and, if he has not, requesting him to read it and state whether and how it might change his conclusions."

Were you making that study, or was the study being made?

MR. COTTER: No. As a result of preparing this paper, the Executive Legal Director and I had a conversation, in which we agreed that would be a good way to approach things, since nothing has been done so far.

MR. SHAPAR: Unless the Commission could resolve that

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matter here, in which case that study would not be necessary.

CHAIRMAN PALLADINO: Is the study underway?

MR. SHAPAR: No. We are awaiting the outcome of this meeting.

CHAIRMAN PALLADINO: I thought you said here, accordingly, you have agreed to assign representatives. Okay. It's not underway.

MR. SHAPAR: No.

COMMISSIONER AHEARNE: But with respect to that specific issue in your proposed language, you have:

"The discovery sought is unreasonably cumulative or obtainable from some other source or method, is either more convenient, less burdensome or less expensive."

I gather, worded that way, the fact that it would be a burden on the Staff to review some additional work and comment on it, since that could not be obtained in another way, since the Staff is being asked to review it, it wouldn't fall under this. So I gather --

MR. COTTER: You raised two questions:

One, the definition of a burden; and two, whether it would be more easily obtained through some other discovery device.

In other words, the preparation of a written answer to an interrogatory might be more time-consuming than simply sitting down and talking.

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COMMISSIONER AHEARNE: Let me refocus the question, or rephrase it:

I gather by the fact this is something that has to be worked out, ELD has raised the issue that discovery asks the Staff's opinion of a document which they have not read; and if it has not read it, requesting the Staff to read it and state how it might change the conclusions.

Now I don't think you can argue that that is not a task laid on the Staff.

MR. COTTER: True.

COMMISSIONER AHEARNE: It is a task you are asking them to do which they would not have done.

MR. COTTER: I don't know how frequently this question has been asked.

COMMISSIONER AHEARNE: The fact it has been raised and it is something that has to be worked out, I gather that some people have read the rule you have proposed as that is permissible?

MR. BICKWIT: I don't think that follows. In fact, it clearly does not follow from the Licensing Board's paper in which they say:

"On first blush, this would appear clearly burdensome, and a showing could be made to the licensing boards. . ."

COMMISSIONER AHEARNE: But that's not what the word is. The word doesn't say "clearly burdensome."

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1 MR. BICKWIT: Let me finish the sentence:

2 ". . .a showing could be made to the licensing

3 boards that the interrogatory would not 'serve any substantial

4 purpose,'" which are words used in the rule.

5 So I think it was intended so as not to preclude the

6 rejection of that particular discovery request on the basis of

7 this particular language. I think it was not tied down --

8 COMMISSIONER AHEARNE: But it's not a priori rejected?

9 COMMISSIONER BRADFORD: No, that's right.

10 MR. BICKWIT: That's right.

11 COMMISSIONER AHEARNE: Immediately it's clear. It's

12 asking the Staff to do something they haven't done, still is not

13 grounds for rejection?

14 MR. BICKWIT: A priori grounds for rejection.

15 It may well be grounds for rejection.

16 COMMISSIONER AHEARNE: It may well be, but it's not --

17 MR. BICKWIT: That's right.

18 MR. ROSENTHAL: That's the kind of thing that ought

19 to be absolutely outlawed. I don't think there ought to be an

20 obligation on the part of the Staff to have to come in and

21 satisfy a Licensing Board. That's burdensome. It seems to me

22 to be so far beyond the realm of permissible discovery, as

23 discovery is generally understood, that it ought to be ruled out.

24 CHAIRMAN PALLADINO: But it would not be ruled out

25 under cross-examination; do I understand that correctly?

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1 MR. ROSENTHAL: No. On cross-examination, you can
2 ask a witness whether he's read a particular document. If he
3 says he hasn't read it, that's the end of it.
4 COMMISSIONER AHEARNE: Go read it.
5 (Laughter.)
6 MR. ROSENTHAL: Well, you can read to him a section
7 of the document and say, "All right, now, do you have an opinion
8 on that?" And he may have an opinion, or he may not, but
9 certainly if the bounds of discovery, as the term is commonly
10 understood today, are broad enough to entitle someone on discovery
11 to say to his adversary, "You go and read a particular document,
12 if you haven't already read it, and tell us what you think
13 about it," I just don't understand the first concept of
14 discovery limitations.
15 COMMISSIONER BRADFORD: Are you saying they are that
16 broad?
17 MR. ROSENTHAL: No, I am saying it is impermissible,
18 as I understand it -- I have never heard of an instance of
19 discovery where an obligation was put upon the discoveree to go
20 and read some document which he had not read up to that point,
21 and to come in --
22 MR. COTTER: Unless it's a controlling regulation of
23 his own agency.
24 CHAIRMAN PALLADINO: Well, I think an administrative
25 judge would have to be alert to the fact that some of these

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1 questions might be pertinent.

2 Incidentally, when you used the words "on first blush,"
3 when I read that, I expected to find "but." Whenever somebody
4 says "on first blush, it looks like this, but," and I had a little
5 trouble with understanding whether or not I missed the "but,"
6 but that's a minor point.

7 Well, I wonder if ELD has any comments on this point.

8 MR. SHAPAR: Well, I had a few general points.

9 CHAIRMAN PALLADINO: All right.

10 MR. SHAPAR: As I indicated in my memo to Tony, which
11 is attached to the paper, I can summarize my basic position in
12 one or two sentences.

13 I don't have any objection to Tony's proposal, but I
14 have doubts as to whether or not it would really do the job that
15 we want done, and I would have no problem with adopting it, but I
16 would go further and impose a 50-interrogatory limitation.

17 That's not nearly as important as addressing the
18 problem of probing the Staff's mental processes, which was my
19 original suggestion. I would like to put the thing in context.
20 This whole discussion generated from a particular problem -- by
21 this "whole discussion" I mean not only discovery, but improvements
22 in this process.

23 We were concerned about the impacted cases and we
24 were concerned about the use of Staff resources. My original
25 proposal was to abolish discovery against the Staff based on

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1 those premises as the single most important proposal that could be
2 adopted to save time and have significant impact on the impacted
3 cases.
4 That proposal was not adopted by the Commission, and
5 I went to a secondary proposal. I did mention the experience
6 with respect to limiting interrogatories, and someone else picked
7 that up. But then I pushed, most recently, looking at what had
8 transpired at the past, at the idea of hitting the chief abuse
9 from my perspective, which is massive abuse of discovery against
10 the Staff, and in particular probing their mental processes.
11 Now I think we can work out very easily a definition
12 as to what ought to be revealed in that context and what ought
13 not to be. Clearly the Staff ought to be able to state what its
14 conclusion is and what the basis for its conclusion is, and what
15 its methodology is, but as far as being asked questions about
16 have they read this, what do they think of somebody else's
17 opinion -- if you're looking for a balance here and you're working
18 in the context of these impacted cases and inadequate Staff
19 resources, then here is a place where I think the balance can be
20 achieved rather easily, and I don't consider it a difficult job
21 at all to work out a rule that will protect the Staff, assuming
22 that the Commission is still unwilling to simply do what they
23 can legally do, and that is abolish discovery altogether against
24 the Staff.
25 Now the question has been raised, well, if you can't

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1 ask it on discovery, why can't you ask it on cross-examination, and
2 you don't save any time at all?
3 Well, in theory there is some merit to it. In practice
4 I don't think it holds up. The resources of all parties are
5 somewhat limited when you get to the actual hearing, and the
6 hearing grinds people down.
7 COMMISSIONER BRADFORD: I think we are now getting
8 to the bottom of this.
9 MR. SHAPAR: I take it you want candid expressions of
10 opinion here, so that no one is left with any disillusionment.
11 It is standard to ask the Staff or another party a
12 question like, "Have you read this other book? And if you
13 haven't, will you read it and give your opinion."
14 How does the Staff respond to this interrogatory?
15 This question came up at the last meeting when I wasn't here.
16 I'll tell you how the Staff responds to it:
17 If we think not answering the question will delay
18 the hearing, we'll pull up our socks and answer the question.
19 In other words, even though the question is perfectly
20 outrageous in our opinion -- and there are a good many of them --
21 and it turns out we are near the hearing and we can get to hearing
22 fast, and particularly if it's an impacted case, we will pull out
23 the resources and answer the questions.
24 Now, with the problem of the impacted cases and the
25 drain on Staff resources, we are starting to get stickier about

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1 answering interrogatories that we consider to be particularly
2 outrageous, and we have started to object.
3 There is no general rule against demanding that a
4 Board intervene, as someone indicated at the last meeting. That
5 policy is essentially unchanged. And except for that, we are
6 getting a little stickier about answering questions that we don't
7 think should be asked.
8 So it's really a rather complex mix of how we answer
9 to interrogatories. If we think it's going to hold up an
10 impacted case and we can answer it without too much of a drain
11 on Staff resources, we'll try to answer.
12 On the other hand, if we get deluged with 200
13 interrogatories, and we have been, with many subparts, and it's
14 calling for disciplines like geology that we don't have, that
15 will impact on other impacted cases, because the disciplines are
16 in short supply, then we damned well will object to the interroga-
17 tories and try to get the Board to rule on it.
18 The Boards have been part of the problem here,
19 because the typical attitude in the past has been, "Well, why not
20 go ahead and answer the question, anyway?"
21 So the Staff really hasn't had any feeling of security
22 about objecting, based on responses some Boards -- not all --
23 have given in the past.
24 MR. COTTER: If that's the kind of problem you've had,
25 you should have brought it to my attention. This is the first

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1 time I've heard of this.

2 MR. SHAPAR: This was long before you were here,

3 Tony, and cured everything.

4 (Laughter.)

5 CHAIRMAN PALLADINO: Can I ask you a question,

6 Howard? If somebody said, "Have you read this? If not, please

7 read it and give me an opinion," would the answer be, "No, I have

8 not read it, no, I will not read it, and no, I will not give

9 an opinion?"

10 MR. SHAPAR: Yes. And we have done that.

11 CHAIRMAN PALLADINO: How many times has that

12 question been asked?

13 MR. SHAPAR: Well, I have some examples, if the

14 Commissioners would like to hear some examples.

15 MRA COTTER: I don't want examples. I just

16 just want to know how many times. How many times has it been

17 asked?

18 MR. SHAPAR: Well, you can go back and read the record

19 as well as I, Tony, if you want a really serious answer to that

20 question.

21 COMMISSIONER BRADFORD: Howard, I would welcome your

22 examples, but let me try to understand some of the other things

23 you said.

24 First of all, when you say impacted cases, what do

25 you mean? There are no impacted cases any more. They have all

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disappeared.

MR. SHAPAR: I don't want to get into that debate now. Whatever you call an impacted case.

COMMISSIONER BRADFORD: Well, it was your phrase, not mine.

MR. SHAPAR: I saw a recent letter of yours that said it had gone down from 42 months to 21 months, so I assume there's 21 months spread out some place.

COMMISSIONER BRADFORD: I think actually Commissioner Gilinsky and I said zero to five, most of which are in Diablo Canyon.

The business about mental processes being the most important point, other than simply eliminating discovery, if I remember rightly, I hadn't even heard about the mental processes concept until Alan raised it at the last session.

MR. SHAPAR: It was part of my proposal in the last Staff paper that wen t up to the Commission, annexed to the Staff paper.

COMMISSIONER BRADFORD: How was it that all through the spring when we were grinding away on this issue, this type of concern about mental process-related questions never arose?

MR. SHAPAR: Every time you turn me down on something, I bring something else up.

(Laughter.)

COMMISSIONER BRADFORD: That's what I thought, but that's

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1 different from saying it's the most important thing currently
2 before the Commission.
3 CHAIRMAN PALLADINO: We apparently did not explore
4 mental processes deeply enough.
5 Howard, there are several of us that would like to hear
6 a couple of examples.
7 MR. SHAPAR: As I understand, in the last discussion
8 you asked three questions that I guess somebody was supposed
9 to provide answers to.
10 As the meeting was reported to me, question No. 1 was
11 examples of interrogatories propounded to the Staff in certain
12 of our proceedings which seek to probe the Staff's mental
13 processes.
14 Question No. 2, information as to whether the Staff
15 is now applying a new policy in responding to discovery requests
16 received from the parties in our licensing proceedings. I believe
17 I have answered that, unless you would like me to elucidate
18 further.
19 COMMISSIONER BRADFORD: The only question I have
20 there is whether it's possible to ascertain what the impact
21 of the Staff's new policy has been. Have you had enough rulings
22 to say?
23 MR. SHAPAR: I don't think so. This is largely by
24 feeling and by gut. When it becomes intolerable in our mind,
25 depending on the resources that are available, and also as to

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1 whether or not we think not answering it and requiring rulings
2 by the Board will delay the case, and that's the one thing we
3 try to avoid.
4 The third question was what is the Staff's experience
5 with regard to the manner in which the Licensing Boards have
6 responded to the recent Commission policy statement concerning
7 expedited hearings?
8 My answer to the last question is mixed. Some Boards,
9 I think, are making a good faith effort to comply with the
10 policy statement, and so I phrased this very carefully. Let me
11 state it this way:
12 With respect to other Boards, I have been unable to
13 discern any overt indicia that would indicate that the Boards
14 are indeed trying to comply.
15 MR. COTTER: I am sure you'll be happy to give me
16 numbers and particular Boards, as one administrative officer to
17 another.
18 MR. SHAPAR: I'll be glad to.
19 MR. COTTER: I have heard nothing to date.
20 CHAIRMAN PALLADINO: I thought we were going to get
21 examples of --
22 COMMISSIONER AHEARNE: You're getting examples of
23 something else.
24 (Laughter.)
25 MR. SHAPAR: All right. Now I think when I give you

1 these examples, your next question is going to be what did the
2 Board do about it, and I think we have people here who can
3 respond to the history of these interrogatories.
4 All right, now, I want to turn to General Counsel
5 for a minute. You heard the context of this discussion. Is
6 there any problem, as far as you are concerned, in my going
7 ahead and giving examples in this context?
8 My own opinion is there is no problem, but I want to
9 make sure you agree.
10 MR. BICKWIT: The answer I have been giving is if
11 the Commission feels that it needs this, and feels so with good
12 reason, then there is no problem.
13 MR. SHAPAR: Okay.
14 CHAIRMAN PALLADINO: Do you have to identify the case?
15 MR. SHAPAR: Not unless you ask me to. Why don't I
16 start off by not, and see how we go?
17 MR. COTTER: Could you do it by year?
18 MR. SHAPAR: By year?
19 MR. COTTER: By year the question was asked.
20 MR. SHAPAR: I'll tell you whether I think it's a
21 current case or not. That's the best I can do. But we can
22 provide you the information later if you want it.
23 "Compare the quantity and quality of research and
24 data that were available in the SONGS geoscience review for the
25 Newport-Inglewood Fault Zone. The segment of the OZD offshore

1 from SONGS, the Cristianitos Fault, and the Cristianitos zone of
2 deformation.
3 "Do you agree that it would be helpful if quality
4 and quantity of data in the OZO and OZD were closer to that
5 available on the Newport-Inglewood fault zone?"
6 COMMISSIONER BRADFORD: I didn't understand that.
7 (Laughter.)
8 You did a masterful job of concealing the proceeding
9 in that one.
10 (Laughter.)
11 COMMISSIONER AHEARNE: He spelled it. He didn't
12 pronounce it.
13 MR. SHAPAR: "Compare the amount of trenching done
14 on the Cristianitos fault zone done by SONGS applicants to the
15 amount of trenching that has been done along the Verona Fault
16 by the applicants at the Vallecitos Nuclear Center in Northern
17 California, since a new fault was discovered near the reactor
18 there by the USGS in September 1977.
19 "Compare the amount of offshore research done by
20 the applicants for the Diablo Canyon reactors with the amount
21 of offshore research done by the applicants at SONGS. Include a
22 comparison of the amounts of money spent on geological and
23 seismic research by the two applicants.
24 "Please compare the amounts and types of research
25 on offshore geology and seismology done by the applicants at

1 Diablo Canyon to that done by the applicants for SONGS 2 and 3."

2 Those are some examples.

3 COMMISSIONER AHEARNE: Only the first one, referred to

4 thought process. The others were examples of work being asked,

5 a comparison of amount of work done in the trenching, and a

6 comparison of resources. But only the first one asked for --

7 MR. SHAPAR: We are using mental processes as a

8 shorthand.

9 CHAIRMAN PALLADINO: Maybe that's the point to clear

10 up, that the Board chairmen should make sure that work that is

11 put on the Staff is actually needed for this case. Maybe there

12 is a better way of saying it.

13 MR. SHAPAR: Actually the proposal that I made in

14 the Staff paper that went up to the General Counsel, to which

15 my proposal was an attachment, did have some criteria for just

16 that purpose; namely, that it was necessary to put the

17 preparation of the Intervenors' case -- they couldn't get it

18 elsewhere, and that there were a couple of other criteria as well.

19 Those are some examples of the type of interrogatories

20 that we're getting.

21 (Whereupon, at 2:55 p.m., Commissioner Gilinsky

22 left the meeting room.)

23 MR. ROSENTHAL: I would say with respect to these

24 comparisons, the Staff is being asked to make, those would be

25 beyond permissible discovery under any test, as I had suggested;

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that asking the Staff to read a book and comment on it would be beyond the pale.

I don't think discovery is at all designed, under anybody's test, to permit a question which calls upon the Staff to perform further analysis, either by way of comparing A with B or otherwise.

MR. SHAPAR: I thought someone would raise that question, because really it follows from the context, and the answer, I think, is if you have an amorphous rule, like don't unduly oppress the parties, and those are the standards you have to use, history has shown those amorphous standards don't work out very well.

COMMISSIONER AHEARNE: Did the Staff object to those interrogatories?

MR. SHAPAR: Some we did, and some we didn't.

COMMISSIONER AHEARNE: Take the comparisons.

MR. SHAPAR: The Staff objected to it.

COMMISSIONER AHEARNE: What did the Board rule?

T.3 MR. OLMSTEAD: We got most of the objections sustained. One of them wasn't, and the Board decided to go into that matter on its own motion.

MR. SHAPAR: You realize it takes time to object and for the Board to rule. If you had a clear-cut rule, depending on what you decide, whatever it is, and the rules say you can't do this, and it has rather specific criteria as to what's

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1 permissible, then you don't waste time going to the Board and
2 objecting, because the rule should take care of it.
3 COMMISSIONER BRADFORD: But the rule never takes
4 care of it unless you're objecting. That's what you're saying,
5 they won't file it because --
6 MR. SHAPAR: They won't file it after --
7 COMMISSIONER BRADFORD: But if instead you say you
8 can have 50 interrogatories, and you get questions like that
9 in the 50, you're going to have, if anything, more of a problem,
10 rather than less in getting rid of them, because there will be
11 some tendency on the part of the Boards to feel, well, the
12 Commission put in the 50 rule, we'll grant considerable latitude
13 within the 50.
14 MR. SHAPAR: You've got a potential mix here that I
15 think, as Commissioner, you have to balance out. You've got
16 Tony's proposal which in effect says to the Board, "Get involved
17 more yourselves and control discovery without waiting for the
18 parties to come to you."
19 I consider that a noble aspiration. My only reserva-
20 tion is about whether or not it will work, based on past
21 experience with that kind of injunction to Boards.
22 Let me finish, Tony.
23 And the other proposals are the 50 interrogatory
24 limitation. None of these are mutually exclusive. And more
25 importantly, some kind of protection for the Staff, where you

1 have a real serious problem.

2 I think you have to ask yourself are there now abuses

3 to the discovery process? And I think clearly the answer is yes.

4 COMMISSIONER BRADFORD: I'm not sure we know that,

5 Howard. That's one of the things that bothers me. We have just

6 imposed a much greater mandate on the Boards to in general be

7 more active managers of the hearing process, and we have told

8 the Staff that they can object to some discovery requests perhaps

9 in a manner different than what they did before. And one of

10 the difficulties with trying to decide how much further to go at

11 this point is that we really don't know how well that effort is

12 working out.

13 MR. SHAPAR: Commissioner, the common perception is that

14 discovery is being massively abused in the federal courts, and

15 whether rightly or wrongly there is a perception that discovery is

16 being abused in all regulatory agencies.

17 MR. COTTER: There is some evidence somewhere, and

18 based on what I have heard this afternoon, I'm wondering if we

19 have again spent another hour and a half on a nonproblem. If

20 the best you can come up with is three questions, only one of

21 which may have to do with the mental process, and one of which

22 was ruled on favorably to the Staff, I do not see a demonstration

23 of a problem.

24 I hear rhetoric, and that's all I see.

25 CHAIRMAN PALLADINO: Tony, how long does discovery

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take in the average case?

MR. COTTER: I don't know if I can answer that.

CHAIRMAN PALLADINO: Five months? Six months? Is it that order of magnitude, or are we talking five weeks or six weeks?

MR. COTTER: It would be more the former than the latter, but I don't know that any data has been compiled on this.

MR. SHAPAR: Four to six months, I would say.

The only nonproblem I've heard, by the way, discussed today, at least from the discussion, is whether or not the Commission is inclined to make this an interim rule.

Let me just point out that the Commission can put this out as an interim rule if they want to, and there is no strong reason or sensible reason I have heard against it. Or they could put it out as a final rule, and say in the statement of consideration, "We intend to reconsider this in six months or eight months," or not even put in a time period.

CHAIRMAN PALLADINO: I was going to make a proposal, but I first wanted to find out whether any Commissioners felt they were leaning toward fixing the number of interrogatories.

COMMISSIONER AHEARNE: Well, for myself, as I unfortunately did not, from one circumstance or another, get to this until today, because it arrived after --

CHAIRMAN PALLADINO: But the limit on the interrogatories was in the other --

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COMMISSIONER AHEARNE: I understand that, but part of that discussion last time was to ask Tony to come up with this proposal.

CHAIRMAN PALLADINO: I gather that was in part because I didn't see a leaning toward interrogatories, and I am really re-raising the question.

COMMISSIONER AHEARNE: Until I read through this carefully, I cannot answer your question.

CHAIRMAN PALLADINO: But prior to having received this?

COMMISSIONER AHEARNE: Prior to having received it, I had been leaning away from a limit on interrogatories.

CHAIRMAN PALLADINO: How about you, Tom?

COMMISSIONER ROBERTS: My inclination is not to limit the number.

COMMISSIONER BRADFORD: Don't look at me.

(Laughter.)

CHAIRMAN PALLADINO: I thought maybe I had three votes without voting.

COMMISSIONER BRADFORD: I am not inclined to limit the number.

CHAIRMAN PALLADINO: Well, I've got to say, neither am I, based on the arguments presented in here. But I do find there are some things we can do, based on this paper and the discussion I have heard:

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1 One, I do think that we can ask the Boards to take
2 control of the discovery process along the lines outlined in here.
3 I think it is appropriate to ask the individual to certify and
4 then be subject to either denial of their petition, if they are
5 not honest, or sanctions, if it turns out later -- and I believe
6 that there is a need to limit the kind of questions that relate
7 to the Staff's thought process, although I think it goes further
8 than that. It's actually laying on additional work on the Staff,
9 and if that could be rewritten, I think it would be helpful.
10 So I would propose that we do adopt this, but I
11 would propose that it be done not on a pilot basis, but that we
12 just do it, and I would not mind saying in the -- I guess --
13 what is this, a rule -- that we would like to examine this at the
14 end of the year, or will examine it at the end of the year to see
15 what improvements have come about as a result of it.
16 COMMISSIONER BRADFORD: I have John's problem in
17 terms of having it seen it only a little while ago. I don't
18 object in principle to going in this direction, and I guess I
19 would like to look more closely at the wording of the certifica-
20 tion, but I have no problem with the concept.
21 I am doubtful that we will come up with wording that
22 I would be very comfortable with -- maybe we will -- on the
23 business of inquiring into the Staff's mental processes or
24 requiring new work.
25 My information there is, to follow the point that Alan

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1 has made, that this should not be permissible even under the
2 existing rule, and in the absence of some showing that in fact
3 the Staff has been required to go out and do extensive new
4 work, to let that be part of the larger order that we are giving
5 to the Board.
6 But if you would like to have language --
7 CHAIRMAN PALLADINO: Here is the problem I have: You
8 propose -- you identify the way you analyze the problem. You
9 identify the assumptions, and you identify the method, and you
10 say here is my conclusion.
11 Now there may be a dozen different ways of doing it,
12 and it may all lead to the same conclusion, but that's not
13 necessarily apparent at the time the question is asked, so there
14 is a whole slew of other alternative methods that someone could
15 ask you about and say, "Have you done it?" And if you say no,
16 there is an implication that you have not been complete.
17 I think that in most of these situations, it is
18 appropriate if you have a good, sound way of analyzing it, you
19 don't have to show that it's better than any other way of analzying
20 it.
21 However, where I have a little bit of problem with
22 this is when we come to the assumptions, because if you say I
23 analyzed it by this method, Joe Blow's method, and I say, oh,
24 but an important and inherent part of Joe Blow's method is this
25 assumption, which I think is not appropriate, I think when you

get to the assumptions behind some of these methods, I believe it is important to discover why that assumption was used.

Now that's where I'm having a little problem with this, because assumptions are the bane of most engineering calculations, and too often they go unrecognized by the people making the calculation.

So now after having said that, how do you write this?

MR. BICKWIT: The way you have formulated your proposal, you preclude only requests to do additional work. That would not preclude questions with respect to assumptions or why you did not go down alternative paths. You've got three recommendations.

CHAIRMAN PALLADINO: But I don't want to have to say, look, there might have been three paths, I chose this one, it's adequate and I showed that it's adequate, and therefore I don't have to explore the other alternative paths. I say that's okay, I shouldn't have to answer why I didn't go down the alternative paths.

However, if in the path I chose there is an underlying assumption about which I would like your understanding of why it is applicable, maybe I would ask why is it applicable in this case. I'd say that is something reasonable.

MR. BICKWIT: I must say I have a hard time differentiating between the two concepts. In the one case you are saying it's all right to have to justify an assumption, and in

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1 my terminology, an assumption may lead you down a given path.

2 CHAIRMAN PALLADINO: I agree.

3 MR. BICKWIT: So that I think it's hard to say no

4 questions about paths, but questions about assumptions. I would

5 say you ought to deal with them both the same way, and I think

6 most of the recommendations you have got are to the effect that

7 questions with respect to why you didn't go down another path

8 ought not to be permissible.

9 My own inclination is to the contrary, that I don't

10 really feel that that would be an exceptional demand on the Staff,

11 but this is not my field.

12 COMMISSIONER AHEARNE: It could well be, because to

13 answer completely, let's just take two places. You've done one,

14 you've gone through all the calculations and reached a conclusion.

15 To really answer completely why you didn't do the other, you do

16 the other, and you do the whole calculation, and then you compare

17 it and you show that, yes, the answer is approximately the same.

18 MR. BICKWIT: I think those are distinguishable

19 questions; one, why didn't you do the other; and two, do the

20 other. And it seems to me that everyone is together on saying

21 -- everyone is together except maybe for Peter, I don't know --

22 on precluding the request to do the other.

23 The hard question that remains unresolved is how do

24 you deal with questions, "why didn't you do the other"?

25 COMMISSIONER BRADFORD: I don't mind precluding doing

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1 the other, but I'm prepared to say that in most cases I could
2 bet I could almost compel the Staff witness to do it on the
3 witness stand, if it came to cross-examination.
4 MR. ROSENTHAL: Discovery, after all, is to get the
5 basic facts underlying your opponent's position, so you can deal
6 with it at trial.
7 Where I come from, it is enough if the Intervenor is
8 aware of what the assumptions are that the Staff employed, because
9 then he can prepare for trial, and if he's got somebody who's
10 going to be prepared to take on those assumptions, then that
11 person can be produced and can deal with it.
12 I agree with the General Counsel that I think the
13 distinction that the Chairman made, I would have some problems
14 with. Where I come out, though, is on exactly the opposite
15 side. I don't see any reason at all, taking discovery again
16 in its traditional sense and its traditional purpose, for requiring
17 the Staff to say anything more than these were the assumptions
18 that we employed, and if you don't like those assumptions, then
19 we'll meet you in hearing on them, and you can cross-examine
20 our witnesses on the validity of those assumptions, or you can
21 produce your own witness who will challenge it.
22 And I think maybe it's just that I have a different
23 view -- it's quite apparent a different view -- than Commissioner
24 Bradford does as to what the function of discovery is, and what
25 really the line of demarcation is, as to what is appropriate

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1 discovery and appropriate cross-examination.

2 COMMISSIONER BRADFORD: I don't think our difference is

3 in the function of discovery,Alan, I think it's in whether one

4 serves that purpose by allowing somewhat more latitude.

5 MR. COTTER: There's also a corollary that's related

6 to this, in what Alan is saying and Howard averred to it earlier.

7 Howard put it in terms of answering the question if it will

8 serve not to slow down an impacted case.

9 You also answer questions during discovery for the

10 purpose of eliminating a possible issue from the trial, because

11 you know that the answer will satisfy the question.

12 CHAIRMAN PALLADINO: But there is a point that Alan

13 brought out, and I heard you say it before, but I didn't focus

14 on it, and that is that you have the opportunity to challenge

15 assumptions during the hearing process itself.

16 MR. ROSENTHAL: If you know what the assumptions are,

17 then you know what you have to meet, and that's what discovery is

18 all about.

19 CHAIRMAN PALLADINO: So a question about what

20 assumptions did you use, that would be allowable, even under

21 this restrictive --

22 MR. ROSENTHAL: In my view of it, that goes into

23 factual information.

24 CHAIRMAN PALLADINO: Let me modify my proposal and

25 get rid of that little caveat and say in my proposal, I would say

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we should have something in there about not requiring the Staff to respond to interrogatories which seek to probe the thought process or place additional work, uncalled-for additional work on the Staff.

MR. BICKWIT: On the thought process terminology, I must say until this meeting I had a completely different understanding of what thought processes meant, and my remarks at the last meeting were directed to back-up calculations as the classic example of thought processes.

Now if that is not what is included within the definition of thought processes -- and it sounds like from this discussion it is not -- I think that has to be made absolutely clear if you're going to use that term.

CHAIRMAN PALLADINO: I was going to suggest that our learned colleagues, learned in the legal profession, try to reword that so that it could serve our purpose better.

COMMISSIONER BRADFORD: I think we have enough to go on to draft something that will meet that criteria.

CHAIRMAN PALLADINO: Since a number of Commissioners did not get this until very late, why don't I let my proposal stand for their consideration between now and the next meeting, and I will see if I get any objection to asking that the appropriate parties get together and try to fix this up to meet this proposal.

COMMISSIONER AHEARNE: Yes.

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1 COMMISSIONER BRADFORD: Joe, when you broaden the
2 concept of thought process, keep in mind what will happen. The
3 basis for trying to deal with this kind of issue through
4 discovery is one person, a Staff witness, will sit down and take
5 however long it takes to write out the answer and send it back
6 to the person who proposed the question.
7 If instead you leave it to the hearing process to
8 drag out that same information, you will have that same witness
9 having journeyed to whatever part of the country he has to go to,
10 sitting on a witness stand with a lawyer trying as best he can
11 to elicit the same information from him, hour after hour, in a
12 hearing room, with all the parties, including the Board members,
13 essentially sitting there spinning their wheels through the same
14 period of time.
15 And the underlying principle of discovery is that it's
16 supposed to be a faster way of getting at the same information.
17 Now, granted, if you allow very broad questions and
18 fishing expeditions, it can become a waste of time. But once there
19 is general agreement that the information is legitimately sought
20 after, then the basic principle is it's generally more efficient
21 to get it through a well-managed discovery process, than to use
22 hearing time.
23 CHAIRMAN PALLADINO: If my understanding is correct,
24 what work has been done, the basis for the calculations, the
25 basis for the conclusion, the assumptions, are all set forth on

1 what could be asked about in the discovery process, and then the
2 individual party that receives the answers has to decide what, if
3 anything,he or she wants to do about it.
4 COMMISSIONER BRADFORD: That's right. And I had
5 thought the assumptions had begun to float loose again.
6 CHAIRMAN PALLADINO: No. I erased the part that
7 spoke about assumptions, because I figured, well, as long as
8 some place in the process you can ask the question about it, I'd
9 be inclined to go ahead.
10 The only time assumptions are important is when they
11 are in controversy and usually they don't come up unless they
12 are in controversy, in controversy in the general sphere of
13 knowledge in that area.
14 For example, you try to talk about pressure drop with
15 two-phase flow, and I don't care what assumption you make, you
16 can argue about it.
17 COMMISSIONER BRADFORD: But it is shorter to have that
18 discussion in essay form. You see, what Howard is talking about --
19 CHAIRMAN PALLADINO: No, you can find that discussion
20 in almost any textbook.
21 COMMISSIONER BRADFORD: But that makes it easier to
22 cite it for purposes of discovery.
23 CHAIRMAN PALLADINO: But the applicability to your
24 particular problem may be different. I don't know, we're getting
25 far afield.

1 COMMISSIONER BRADFORD: But there's a legal tactic
2 at play that you ought to be aware of. What the Staff wants,
3 and Howard was quite candid in laying it out, they know the
4 parties are going to be worn down, day after day in the hearing;
5 that somebody who can barely afford to pay his lawyer at all is
6 going to be a lot less able to get the same information if the
7 hearing goes on for six or seven days, then if the guy has to
8 spend half a day writing down discovery requests.
9 That's one of the reasons I've been concerned that
10 we have the Staff here at the table, and we don't have any other
11 parties, because they're here as advocates.
12 COMMISSIONER AHEARNE: Can I ask at least two points
13 on the last point?
14 I'm sure that Tony and Alan did not view themselves
15 as the Staff.
16 COMMISSIONER BRADFORD: The Staff are not Tony and Alan.
17 Howard is the Staff.
18 COMMISSIONER AHEARNE: But we have other people here
19 in addition to ours, and it seems to me Alan was making a very
20 persuasive argument.
21 But, Peter, isn't it correct in general that it is not
22 just we or some of us who have been concerned about the development
23 of the application of discovery?
24 Maybe I have just had a bad selection of writings to
25 read, but it appeared to me this was a problem that the ABA and

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1 others have been focusing upon; that is the concern about the
2 way discovery is practiced.
3 COMMISSIONER BRADFORD: That's why we have told
4 the Boards to manage it better, and we don't yet know how that
5 effort has worked out.
6 COMMISSIONER AHEARNE: I just wanted to make sure.
7 CHAIRMAN PALLADINO: There isn't that much about
8 management of discovery. This is specific to management of
9 discovery, and I think supplements the previous statements on
10 this subject.
11 COMMISSIONER BRADFORD: As I say, my concern is as a
12 general point, but to the extent that we are now going to start
13 defining particular categories of discovery that we want the
14 Boards to rule negatively on, I think that's a mistake.
15 CHAIRMAN PALLADINO: If there is strong differences of
16 opinion on the way that last point should be stated, we might get
17 more than one input.
18 Well, can we leave that as I described a minute or
19 two ago?
20 Yes?
21 MR. BICKWIT: Before you do, I would just like to lay
22 out an issue for the Commission when they consider the matter,
23 and come back to the table, that one of the values I see in
24 Tony's proposal is that it will allow a Board to engage in
25 unusual methods of discovery as opposed to the usual, and to

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1 permit, in lieu of discovery, informal document exchanges and
2 colloquies; further, to permit pre-clearance of all discovery
3 requests through the Board.
4 These are matters which I think the Board ought to
5 try out.
6 COMMISSIONER AHEARNE: There is a lot of informal
7 exchange of documents now.
8 MR. BICKWIT: There is that, but under existing rules
9 it cannot be in lieu of discovery, and it cannot be associated
10 with pre-clearance requirement. This is to me the most
11 controversial feature of what's being proposed. I'm on board
12 with it, but I think the Commissioners ought to think pretty
13 seriously about it.
14 CHAIRMAN PALLADINO: Okay.
15 MR. COTTER: Can I add one point?
16 I'm concerned about the mental process area in this
17 respect: It seems to me that this Commission, more than any
18 other government agency with which I have had contact, is inclined
19 to jump into and make decisions on procedural matters such as
20 this, that the legal profession as a whole has been wrestling with
21 over a much larger scale, a longer period of time.
22 And I would urge caution on the Commissioners in
23 connection with any revision of or specific language on the
24 subject of mental processes beyond what is presently offered,
25 because I think that there are so many pitfalls that are available

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1 there, that an affirmative thrust forward could be counterproductive,
2 as we say in the government these days.
3 CHAIRMAN PALLADINO: Tony, would it be appropriate
4 or desirable or helpful if we, in a sense, threw it back to the
5 panel by this way, that you don't explore the thought processes
6 unless it can be shown to the satisfaction of the Board that
7 this is necessary to complete the discovery process?
8 MR. COTTER: That's essentially the standard that's
9 in there now. Will answering the question serve a substantial
10 purpose in connection with litigation.
11 CHAIRMAN PALLADINO: But this speaks more specifically
12 to the fact that for this class of questions, the person who is
13 raising it has to show justification that asking this question is
14 an appropriate exemption to the rule.
15 MR. ROSENTHAL: There would have to be a standard,
16 wouldn't there, against which the Board would measure whether
17 there was a need to permit that kind of discovery or not.
18 MR. SHAPAR: I would agree. I think the Commission
19 needs to articulate a standard that will bind the parties and
20 the Boards.
21 MR. COTTER: There is a lot of law available in cases --
22 CHAIRMAN PALLADINO: The more I try to get into
23 trouble, the more I try to be specific. I'm going to leave it
24 to the appropriate legal minds to guide us on this and come up
25 with a proposal, and if you feel that there are two alternatives

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that we ought to consider because of differences of viewpoint, I would say we should listen to both. If we can leave that for now, we have two other items that relate to proposed changes in 10 CFR Part 2.

The next one is to permit the Licensing Board to order oral responses to the motion to compel discovery, and the other one has to do with use of express mail, and I wonder if OGC would just refresh our memory and highlight the arguments on this issue.

MR. BICKWIT: On the first, permitting Licensing Boards to order parties to provide oral responses to motions to compel, three offices are in support of adopting a variant of the rule. That is OELD, the Appeal Board, and OGC.

The Licensing Board does not agree with the proposal, it appears largely because of the view that the existing rules already allow the Boards the discretion to provide -- to order parties to provide oral responses.

My own view is that the rules don't presently allow that, and that a rulemaking is therefore in order if that's the way the Commission wants to go.

A number of issues were raised in the comment period, and the four offices would resolve them as follows:

The four offices do not believe that is necessary to have a court reporter transcribe the oral argument that's made. It would suffice, it appears to us, to have the Board issue a

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1 written order which would summarize the argument of the opponent
2 of the motion to compel, and then if the opponent was dissatisfied
3 with the summary, he could file a motion indicating that, in order
4 to change the summary.
5 The four offices also believe that the statement of
6 considerations should say that oral responses should only be
7 required where early completion of the proceeding is necessary,
8 and it should also specify that all parties are to be invited to
9 participate in any conference call associated with these oral
10 responses, and that the Board should take the call.
11 COMMISSIONER AHEARNE: If I could interject. By the
12 response, do you mean the response to the interrogatory?
13 MR. BICKWIT: No, the response to the motion to compel.
14 What you will have in a typical situation --
15 COMMISSIONER AHEARNE: Is it obvious there is a right
16 to respond?
17 MR. BICKWIT: My reading of the rule is that they have
18 a right to respond to that motion in writing, and what you are
19 doing --
20 COMMISSIONER AHEARNE: Is that an agreed interpretation?
21 MR. BICKWIT: Tony disagrees with that interpretation.
22 MR. COTTER: I said there was some question. My only
23 objection to the whole thing is there seemed to be lots of
24 contingencies hung on it. Otherwise, I agree.
25

end 3

1 MR. BICKWIT: I will read you the rule. 2.730(c)
2 says that within ten days after service of a written motion
3 or such other period as the Secretary and presiding officer
4 may prescribe, a party may file an answer in support of or
5 in opposition to the opposition. Filed to me means in
6 writing.
7 MR. SHAPAR: I agree. I think Len is correct.
8 COMMISSIONER AHEARNE: And it's clear that the
9 Board would have to wait for that response?
10 MR. BICKWIT: I believe so, yes. There's a right
11 to file. There is a right to have your filing considered.
12 CHAIRMAN PALLADINO: Now this oral presentation
13 would not necessarily have to be made with the Boards
14 sitting with all the parties present? It can be made by
15 telephone?
16 MR. BICKWIT: That's correct. We envision that it
17 would be done by conference call.
18 The four offices also don't believe that the rule
19 should afford parties the right to submit written pleading
20 following an oral argument and should not provide a minimum
21 time for preparation of a response. We simply think that in
22 a statement of considerations the Board should be advised to
23 give sufficient amount of time.
24 So basically the proposal of three offices is
25 along the lines that I have outlined with the licensing

1 board.

2 CHAIRMAN PALLADINO: Do any of our colleagues over

3 there on that side of the table have any additional

4 comments? Tony?

5 MR. COTTER: As I recall, my dissent is not really

6 a dissent of the proposal. It's a dissent to the

7 contingencies that I recall being associated with the

8 proposal.

9 COMMISSIONER AHEARNE: Which I think have been

10 modified.

11 MR. BICKWIT: I don't know whether they have been

12 modified to your satisfaction. Nonetheless, if you find

13 these acceptable that's fine.

14 CHAIRMAN PALLADINO: I gather you found this

15 unnecessary but you're not objecting?

16 MR. COTTER: That's correct.

17 CHAIRMAN PALLADINO: Are there any Commission

18 questions or comments?

19 COMMISSIONER AHEARNE: I gather there are changes

20 because Tony's memo referred, as one of the constraints

21 being required, was a court reporter and the OGC's memo

22 points out that it's not required. So I assume that there

23 had been some --

24 MR. BICKWIT: What our memo said is that the ASLB

25 people think this memo contains so many other constraints

1 concerning court reporter standards as to make its
2 usefulness questionable. I have to put to Tony whether it's
3 been modified sufficiently for you to get your support.
4 MR. COTTER: Certainly. You've got it.
5 MR. BICKWIT: Okay.
6 COMMISSIONER BRADFORD: Even though you still felt
7 it was unnecessary?
8 COMMISSIONER AHEARNE: But I thought his feeling
9 it was unnecessary was because he believed that they did
10 have the authority and Len's argument is his interpretation
11 -- if Tony agreed that they didn't then --
12 MR. BICKWIT: I read one rule. There is another
13 rule. There is a rule that gives the Boards general
14 housekeeping authority and I think your position was that
15 they could use that housekeeping authority to override the
16 rule I just read. I don't think the housekeeping authority
17 is designed to allow that.
18 MR. COTTER: It may not be allowed but they sure
19 are doing it.
20 CHAIRMAN PALLADINO: I find it impressive that we
21 have three legal counsel agreeing that this is something
22 necessary.
23 COMMISSIONER AHEARNE: As long as you don't ask
24 them what help it's going to be we're in good shape.
25 (Laughter.)

1 MR. BICKWIT: It's not being offered as a solution
2 to the world's problems.
3 CHAIRMAN PALLADINO: It's not clear to me whether
4 this will help or hinder. I hope it won't hinder.
5 MR. COTTER: I think it will help. I think it is
6 an affirmative encouragement to all the parties to settle
7 out the stuff by conference call instead of horsing around
8 with paper.
9 MR. BICKWIT: I don't think the Commission should
10 adopt it if it simply rests on the premise that it won't
11 hinder much.
12 MR. SHAPAR: I think we had better stop talking
13 right now.
14 (Laughter.)
15 CHAIRMAN PALLADINO: May I ask you a question of
16 guidance and I guess I'll begin with OGC. Would you
17 envision all the matters covered in this document to be one
18 rule?
19 MR. BICKWIT: I think it will depend on when we're
20 ready. If the Commission reaches agreement on this portion
21 of what was proposed earlier and the next portion, I would
22 suggest it would go out with the final rulemaking on those
23 matters.
24 CHAIRMAN PALLADINO: Suppose we went out and we
25 agreed on the last two items. Would that be appropriate to

1 send it out and when the interrogatories question gets
2 settled there might be another package and if the other
3 items get settled that would be another package?
4 MR. BICKWIT: Agreed.
5 CHAIRMAN PALLADINO: Can we touch base next on the
6 use of express mail? I thought by silence I had assent, but
7 I'd better not do that. I wonder if I might have a
8 Commission vote on the section to permit the licensing board
9 to order oral responses to motions to compel discovery.
10 COMMISSIONER AHEARNE: Aye.
11 COMMISSIONER BRADFORD: Aye.
12 CHAIRMAN PALLADINO: Aye.
13 COMMISSIONER ROGERS: Aye.
14 CHAIRMAN PALLADINO: So we have four votes in
15 favor.
16 COMMISSIONER BRADFORD: At some point it will be
17 adopted and we will have to approve it anyway.
18 CHAIRMAN PALLADINO: All right.
19 On the express mail.
20 MR. BICKWIT: On that matter all four offices
21 recommend that the proposed rule be adopted which would
22 permit a Board to order the use of Express Mail and thereby
23 shorten the period for service.
24 The four offices believe the statement of
25 considerations ought to spell out that it should be only in

1 cases where expedition is necessary and should also state
2 that parties who did not wish to bear the expenses
3 associated with this Express Mail procedure should be
4 afforded the option of filing the document by first class
5 mail three days early.
6 CHAIRMAN PALLADINO: Three days early?
7 MR. BICKWIT: That's right.
8 CHAIRMAN PALLADINO: What does that mean? You've
9 got to send it before you write it?
10 MR. BICKWIT: You send it before you have to send
11 it, before you would otherwise be required to.
12 CHAIRMAN PALLADINO: I see. You're saying you
13 still want it there by the day it's due.
14 COMMISSIONER BRADFORD: That's right.
15 CHAIRMAN PALLADINO: But if it takes more than
16 three days, as it sometimes does, what's the consequence?
17 MR. BICKWIT: The idea is the assumption is that
18 it would take five days and the party that is resisting the
19 expenditure of Express Mail would simply be asked to serve
20 it three days before the period for service would otherwise
21 expire.
22 COMMISSIONER BRADFORD: Len, your paper makes it
23 pretty clear that necessary means necessary in the case of a
24 facility that's going to be finished prior to the completion
25 of the operating license proceeding. I take it that is the

1 definition you're using?

2 MR. BICKWIT: That was not what I intended as an

3 exclusive list of situations in which expedition was

4 necessary. That was the classic case.

5 COMMISSIONER AHEARNE: He says, such as.

6 MR. BICKWIT: I'm glad I said "such as".

7 COMMISSIONER BRADFORD: Well, let's see. When

8 else might it be necessary? It's always nice to save time.

9 MR. BICKWIT: To give other examples, we discussed

10 the spent fuel pool expansion and the need to move quickly

11 in that area. I think it's hard to foresee all the

12 circumstances in which the Commission from a public policy

13 standpoint would be in a hurry.

14 COMMISSIONER BRADFORD: The Commission is always

15 in a hurry. We know that. The point is, when it's

16 especially in a hurry.

17 COMMISSIONER AHEARNE: Peter, I believe there are

18 cases in which I seem to remember that a Board has ordered

19 the use of Express Mail.

20 COMMISSIONER BRADFORD: In that case, of course,

21 the rule is unnecessary.

22 MR. SHAPAR: Another example would be an amendment

23 to the operating license with need for power and an

24 amendment for significant hazards consideration.

25 COMMISSIONER BRADFORD: It's fine for me if we're

1 prepared to say in situations where the plant will otherwise
2 stand idle you can require Express Mail. But if the
3 "necessary" is to mean anything it has got to mean more than
4 just cases where it's nice to have the hearing over sooner
5 rather than later, because we always feel that way.
6 MR. ROSENTHAL: I don't think the Boards have
7 existing power to use Express Mail. If the Board did it I
8 think it was exceeding its authority. If nobody objected to
9 it, so be it.
10 MR. COTTER: I've been coming up here for the last
11 ten months kicking and screaming against everything I
12 consider to be an intemperate proposal and now I have a
13 chance to agree with something or other.
14 CHAIRMAN PALLADINO: We have as much trouble as
15 taking a yes answer --
16 (Laughter.)
17 COMMISSIONER AHEARNE: I was just asking two
18 questions -- (a) has the Board used it and (b) do you now
19 believe they have the authority?
20 MR. COTTER: I do not know whether the Board has
21 used it in the sense of requiring the parties to file.
22 MR. OLMSTEAD: It's been required in at least two
23 cases.
24 MR. BICKWIT: The rule says service may be made by
25 personal delivery, by first class, certified or registered

1 mail, including air mail, by telegraph or as otherwise
2 authorized by law. I read that as not including Express
3 Mail.
4 MR. ROSENTHAL: So do I.
5 MR. SHAPAR: So do I.
6 MR. ROSENTHAL: That's why I think it's necessary.
7 MR. BICKWIT: Now again there is that housekeeping
8 rule --
9 MR. ROSENTHAL: I was about to refer to it, I
10 don't feel strongly one way or the other.
11 MR. BICKWIT: -- that could be read as overriding.
12 COMMISSIONER AHEARNE: The other question: how
13 would you propose it be handled in areas where Express Mail
14 doesn't go?
15 MR. BICKWIT: That it oughtn't to be required.
16 This is a discretionary authority conferred on the Board. I
17 think the statement of considerations ought to say that
18 where it isn't provided it oughtn't to be required.
19 COMMISSIONER BRADFORD: The can-cannot principle.
20 MR. ROSENTHAL: It does seem to me that there
21 ought to be a reasonable, tightly drawn standard here
22 because Express Mail is extremely expensive and it is not
23 always easy for a party to resort to the alternative of
24 mailing the particular document three days earlier than the
25 deadline.

1 As you are aware, the time limits for most actions
2 under the Commission's rules are not terribly generous and I
3 think to impose that obstacle or penalty, if you will call
4 it that, of three days' advance mailing to somebody who is
5 either unwilling or, I would suspect in many cases, unable
6 to bear the freight, particularly when we have service
7 requirements around here that people have to serve on
8 everybody and their 34th cousins, because we do have
9 multiple party proceedings and I can see very readily an
10 express mail bill of $150 or $200 on one document.
11 And, therefore, I have a lot of sympathy for
12 Commissioner Bradford's concerns over what is necessary,
13 because I think it really has to be a case of clear, dire
14 necessity defined in some way rather than simply a desire on
15 the part of the Board to get so moving.
16 MR. BICKWIT: I think it would be very difficult
17 to define it. I think we would need some examples.
18 MR. COTTER: To the extent it's there I really
19 resent the implication that the Boards don't have any more
20 sense than that, honest to goodness. I really think it's a
21 waste of time.
22 CHAIRMAN PALLADINO: This is permitting them to do
23 it when they feel the circumstances are right.
24 COMMISSIONER AHEARNE: Nevertheless, I would share
25 Peter and Howard's view, because typically the largest

1 expense in order to afford it requires you to get it out
2 earlier, so given that one of these things arrives, usually
3 people have worked right up to the last minute to get it
4 done and the people who are least likely to be able to use
5 the Express Mail are going to be those having the hardest
6 time to get it done anyway.
7 MR. SHAPAR: As a general standard I would suggest
8 clearly necessary in the public interest and then give
9 examples. I think it's the best you're going to be able to
10 do.
11 COMMISSIONER BRADFORD: Perhaps that and a
12 sentence saying this would not include the normal licensing
13 proceeding.
14 CHAIRMAN PALLADINO: Well, subject to those kind
15 of thoughts may I have an expression by the Commissioners
16 with regard to this?
17 (A chorus of ayes.)
18 CHAIRMAN PALLADINO: Okay. Now let me ask you a
19 procedural question. We appear to be settled on two
20 points. Do you think that would be appropriate to write up
21 as an order?
22 MR. BICKWIT: As a rule.
23 CHAIRMAN PALLADINO: And submit it for
24 consideration. In the meantime I'm not sure who I should
25 address on this one -- in the meantime -- I'm going to

1 address it to Tony Cotter; if I'm wrong he'll tell me and so
2 will the others -- prepare an order with regard to
3 interrogatories along the lines that I identified earlier
4 where we asked the Board to take control of the
5 interrogatories and get the certification question and
6 include the statement or statements as options with regard
7 to the question of probing the thought process and laying on
8 work on the staff.
9 But I would expect you to work and solicit the
10 help of the appropriate people.
11 MR. COTTER: I will -- reluctantly, but I will.
12 (Laughter.)
13 CHAIRMAN PALLADINO: What's that?
14 MR. COTTER: I'm sorry.
15 CHAIRMAN PALLADINO: And bring that back to us as
16 a proposed rule and you bring the other two back as a
17 proposed rule. And the other item that we were discussing I
18 guess we have another week on. Okay.
19 Any other comments or questions?
20 COMMISSIONER BRADFORD: Just one small cloud on
21 the horizon. Tony has clarified a misunderstanding that I
22 had with regard to his proposal on interrogatories.
23 Unfortunately he clarified it against what I thought was the
24 better way to go. I thought for the Board to get involved
25 in reading all the interrogatories and reviewing them was

1 going to take some sort of motion from the parties
2 indicating a feeling that this was burdensome, and it still
3 seems to me to be a good idea.
4 It doesn't make sense to me to have the Boards
5 reading these things routinely and throwing them out on the
6 basis of their own impulses, even in cases where the party
7 was fully prepared to comply.
8 So while I'm still comfortable with leaving it to
9 the substantial discretion of the Board, I would like to
10 have some indication that a party objected to an
11 interrogatory before I would want the Board pitching it
12 out. We don't need to thrash that out today, but I had
13 thought that it was still part of the process and apparently
14 it is not.
15 CHAIRMAN PALLADINO: If there's a willingness --
16 suppose there is a willingness on the part of the staff to
17 answer the question. Would the Board still throw it out
18 under your proposal?
19 MR. COTTER: I think as a practical matter you are
20 addressing a theoretical possibility, if you will. As a
21 practical matter the Boards are not going to have time to
22 sit down and examine every interrogatory that comes in and
23 make decisions about them. And that's one of the things
24 that I have tried to avoid all the way through this because
25 they would have to do that if there was a specific numerical

1 limitation on interrogatories.

2 But it leaves them the ability when they see a

3 situation developing to act affirmatively without having to

4 have a request for relief from one of the parties.

5 CHAIRMAN PALLADINO: You understand my concern is

6 I don't see how they could ever validly see a situation

7 developing unless they had some indication from one of the

8 parties that they were beginning to feel burdened by the

9 discovery process.

10 MR. SHAPAR: They're served, are they not, Tony?

11 Copies are sent to the Board. I guess they wouldn't read

12 them carefully but they would be aware of what's going on

13 and also I guess I'd say if you are going to use the analog

14 of the Federal courts I wouldn't tinker too much with it

15 since it's been thrashed out after many months of debate

16 before this proposal was picked up.

17 MR. COTTER: I can think of at least two

18 situations off the top of my head where the Boards would

19 have acted affirmatively had they had the authority.

20 COMMISSIONER BRADFORD: But not without some sort

21 of motion from the parties.

22 MR. COTTER: Without a motion.

23 COMMISSIONER BRADFORD: What situations are those?

24 MR. COTTER: Well, they're active cases. I don't

25 think it would be appropriate for me to say.

1 CHAIRMAN PALLADINO: If I were on a Board and I
2 saw questions go back and forth how would I know which ones
3 to throw out and which not to throw out unless somebody came
4 in and complained and said, my God, you're really burdening
5 us with all these questions. All I need is one.
6 MR. COTTER: It's my legal training.
7 CHAIRMAN PALLADINO: I don't find that satisfying,
8 but I had said only one, so I'd better not ask for another.
9 COMMISSIONER BRADFORD: Tony, several times
10 questions about active cases have come up and Len keeps
11 telling us that we can in fact hear it.
12 MR. BICKWIT: You can hear it. I didn't say you
13 could wrestle blood out of a stone.
14 COMMISSIONER BRADFORD: I must say I offhand can't
15 think of cases where I would want the Boards coming in
16 without hearing from the parties at all and I don't mind how
17 you disguise the activeness of the case. I wouldn't give
18 the initials of the generating station if I could help it.
19 MR. COTTER: The particular one I was thinking of
20 was not an operating license or operating reactor.
21 COMMISSIONER BRADFORD: But why would the Board
22 disallow an interrogatory, say, without hearing from the
23 party that it was burdensome?
24 MR. COTTER: You all are focusing on specifically
25 disallowing an interrogatory and I am focusing on the

1 parties -- the Boards bringing the parties in and saying sit
2 down and stop this nonsense with all the changed
3 interrogatories going back and forth and start disclosing
4 what it is you want and focusing on the issues and managing
5 this exchange of information which has become bogged down in
6 the formalities of writing out questions and writing out
7 answers.
8 COMMISSIONER BRADFORD: That makes sense. It's a
9 different -- it is a different kind of action, though, from
10 actually ruling against a proposal by one of the parties.
11 It seems to me we've gone far enough.
12 CHAIRMAN PALLADINO: I think it also sets further
13 criterion on which decision would be made which I found very
14 valuable, but that may be because I don't have that legal
15 training.
16 Okay, any other points?
17 Well, thank you very much and the meeting will
18 stand adjourned.
19 (Whereupon, at 3:50 o'clock p.m., the meeting was
20 admourned.)
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25

NUCLEAR REGULATORY COMMISSION

This is to certify that the attached proceedings before the

COMMISSION MEETING

in the matter of: Discussion and Possible Vote on Revised Licensing Procedures -- Proposed Rule Change to Part 2 - PUBLIC MEETING

Date of Proceeding: October 13, 1981

Docket Number:

Place of Proceeding: Washington, D. C.

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

Ann Riley

Official Reporter (Typed)

Ann Riley

Official Reporter (Signature)