

NUCLEAR REGULATORY COMMISSION

RETURN TO SECRETARIAT RECORDS

ORIGINAL

COMMISSION MEETING

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In the Matter of: PUBLIC MEETING

DISCUSSION OF REVISED LICENSING PROCEDURES

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AT: Washington, D. C.

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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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Public Meeting  
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DISCUSSION OF REVISED LICENSING PROCEDURES

Room 1130  
1717 H Street, N.W.  
Washington, D.C.  
Tuesday, May 19, 1981

The Commission met at 10:05 a.m., pursuant to  
notice.

BEFORE:

- JOSEPH HENDRIE, Chairman.
- JOHN AHEARNE, Commissioner.
- PETER BRADFORD, Commissioner.
- VICTOR GILINSKY, Commissioner.

Present for the Office of General Counsel:  
L. Bickwit, Esq.  
M. Malsch, Esq.

Present for the Office of the Secretariat:

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Samuel Chilk

Present for the NRC Staff:

A. Rosenthal

H. Shapar

A. Cotter

DISCLAIMER

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P R O C E E D I N G S

(10:05 a.m.)

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2  
3 CHAIRMAN HENDRIE: The Commission will come to  
4 order. We will embark once more on yet another in a series  
5 of Commission meetings on the licensing process.

6 We have for this meeting a series of papers from  
7 the general counsel. The first one I would like to deal  
8 with is the paper on a final rule amending Appendix B to  
9 Part 2. You will recall that we had agreed to go out for  
10 public comment on two possible changes to Appendix B.

11 One of them would reduce the review time taken by  
12 the Commission after an initial decision by a board from the  
13 expected three months to about two, and the other one would  
14 reduce it the whole three months.

15 There are also in that the consideration of the  
16 options, of course, of not changing Appendix B, that is, of  
17 leaving the three months review in place; and finally, there  
18 was the option of simply removing Appendix B completely and  
19 going back to the immediate effectiveness rule which had  
20 been in place before November of '79.

21 (At 10:07 Commissioner Bradford left the room.)

22 CHAIRMAN HENDRIE: Len, let me ask you to  
23 summarize, comments and your recommendations on the Appendix  
24 B rule.

25 MR. BICKWIT: The comments really related to those

1 four options, as you have seen in this paper, and the  
2 intervenor community was generally inclined to leave  
3 Appendix B as is or, as a fallback, to support option A as  
4 proposed.

5           The industry-oriented comments were generally  
6 inclined to go back to the immediately effectiveness rule  
7 or, as an alternative, to support option B as proposed.

8           (At 10:09 a.m., Commissioner Bradford returned to  
9 the room.)

10           MR. BICKWIT: We have recommended, not on policy  
11 grounds but to reflect our view that option A is more likely  
12 to receive three votes from this Commission, we have  
13 recommended that a variant of option A be adopted.

14           The issues that we want the Commission to focus  
15 on, assuming that observation is correct, the issues that we  
16 want the Commission to focus on is exactly what should the  
17 stay standard be; secondly, should there be a waiver  
18 provision which would allow a waiver to a more flexible  
19 degree than would the current waiver standard of 2.758.

20           That's about all I have to say.

21           CHAIRMAN HENDRIE: Since this isn't precisely a  
22 new subject and we have all anticipated the comments coming  
23 back in and so on, let me sample up and down the line and  
24 see if indeed option A is where there is a musterable  
25 majority. John, what would you --

1           COMMISSIONER AHEARNE: I would like to ask one  
2 question.

3           CHAIRMAN HENDRIE: By all means.

4           COMMISSIONER AHEARNE: Len, on page 13 you have, I  
5 believe, carried language of the previous, which talks  
6 about, as a result of analyses still under way the  
7 Commission may change its present regulations, et cetera. I  
8 would have thought that at some point that kind of language  
9 ought to be removed. And I raise the question, isn't it now  
10 that point?

11           MR. BICKWIT: I would agree, at some point it  
12 ought to be. I would be inclined to think that now is not  
13 the point, that you are out for comment with rules, proposed  
14 rules which are designed to provide a sufficient basis for  
15 granting a license, but you haven't adopted them yet. I  
16 would suggest coming back to this once they are adopted.

17           COMMISSIONER AHEARNE: I guess I would have  
18 thought that we were sufficiently close that --

19           MR. BICKWIT: What you are presently operating  
20 under at this point is the earlier policy statement, the  
21 December version of the policy statement. And that will be  
22 the operative guidance to the boards until you come to  
23 rulemaking.

24           COMMISSIONER AHEARNE: I understand that. My only  
25 point was that it seemed to be a little cleaner to not to

1 then at some later stage have to have another change.

2 Joe, without surprise, I'm sure you know that I  
3 would prefer the option B, because I believe that is the  
4 only one that really will end up with the Commission having  
5 an opportunity to seriously review the license. I don't  
6 believe that the option A will do that.

7 COMMISSIONER BRADFORD: I do prefer option A. I  
8 have made a number of small revisions to what OGC  
9 circulated, only one of which has any real effect on the  
10 option. I can circulate that at whatever moment you think  
11 is useful. But for purposes of just counting heads, count  
12 me as option A.

13 CHAIRMAN HENDRIE: Vic?

14 COMMISSIONER GILINSKY: I don't think it's any  
15 surprise to you that I'm an option A Commissioner.

16 CHAIRMAN HENDRIE: Since option A was your sort of  
17 counter-offer at the time we discussed changing Appendix B,  
18 why, I'm not surprised.

19 Let me note for the record that my preferences run  
20 as follows: A, reinstate the immediate effectiveness rule.  
21 Failing that, adopt option B and take the Commission out of  
22 at least the direct line of review after a licensing board  
23 has made the initial decision, although leaving them with  
24 the ability to get to it in three months.

25 Finally, working my way down, searching for two

1 other Commissioners whom I can join in creating a majority  
2 for action, option A I consider enormously better than the  
3 present situation and it is, after all, the place I have  
4 long since myself concluded that we would end up. It is  
5 also the basis for the present scheduling which the staff is  
6 reporting on cases.

7           And I will therefore, John, with recognition that  
8 if you were here and I were there --

9           (Laughter.)

10           CHAIRMAN HENDRIE: -- we'd be saying each other's  
11 speeches, I will vote for option A.

12           Now, that comes out not a formal action of the  
13 Commission. I would declare it simply establishes where the  
14 majority will lie on this.

15           Peter, let's talk about language and maybe let's  
16 thumb through this thing with Len, because there are some  
17 questions. Before you get started, let me ask Len one.

18           Expecting this, how come you provided in the SECY  
19 paper a draft of a new Appendix B? In it for operating  
20 licenses you incorporate a changed stay standard, "whether  
21 in the public interest" it's best to stay, whatever the  
22 nature of the issues, et cetera, et cetera. You did not,  
23 that I can see, include language to take up Duke Power's  
24 suggestion about waiving in a case where the Commission felt  
25 it had previously provided policy guidance.

1           What I wanted to ask was, you seemed to think  
2 there was some merit to providing that flexibility. To what  
3 extent would explicit language along that line increase the  
4 flexibility that it seems to me that the Commission has  
5 now? That is, at the present time if we adopt option A more  
6 or less as drafted, once the board issues an initial  
7 decision, then if the Commissioners conclude that, gee, the  
8 only issues they have been arguing about in this case are  
9 ones that we looked at, you know, in Smith Unit No. 2 two  
10 months ago, and it's settled and why are we doing this  
11 again, I would think Commissioners would just go ahead and  
12 vote the case out without taking the nominal 30 days or  
13 whatever.

14           Now, is there something else in the sort of waiver  
15 that Duke Power proposes that I don't see and would be  
16 advantageous?

17           MR. BICKWIT: I think they could do that. I think  
18 if the Commission plans to do that on occasion, it would be  
19 best to have something in the way of language in the rule to  
20 signal that possibility, to signal that they are not going  
21 to use their 30 days as a standard practice in circumstances  
22 where they feel they have provided policy guidance in  
23 earlier proceedings, for example.

24           COMMISSIONER GILINSKY: Wait a minute. As I  
25 understood the change, it would do away with the Commission

1 vote after the license altogether.

2 MR. BICKWIT: Yes. But the Commission would make  
3 the determination that it was going to waive the rule. So  
4 in effect you've got the Commission voting on something.

5 COMMISSIONER GILINSKY: Yeah. But Joe is talking  
6 about a situation where the Commission voted say the day  
7 after or the same day, or anyway immediately after.

8 CHAIRMAN HENDRIE: 48 hours or at dawn on Sunday.

9 COMMISSIONER GILINSKY: That's right, and you said  
10 if you're going to do that you ought to signal it in the  
11 rule. But what you're talking about in the rule is a change  
12 which would do away with this 6:00 a.m. Sunday vote.

13 MR. BICKWIT: I guess that's true, and it's a very  
14 minor difference.

15 COMMISSIONER AHEARNE: With your and Joe's  
16 interpretation, I don't see why you need any changes.

17 COMMISSIONER GILINSKY: That's what I think. If  
18 the Commission feels cheerful and happy about the result,  
19 they can vote ten seconds after the board decision has come  
20 down.

21 CHAIRMAN HENDRIE: I guess, Len, as I think about  
22 it the one proposition that having explicit waiver language  
23 might do for you is, as the case came along and it was  
24 recognizable as a narrow one and the issues have been dealt  
25 with before and your observer didn't see anything, it's

1 possible that you might come to us anticipating a board  
2 initial decision, say a couple of weeks or months  
3 beforehand, and say, we think this is a case where you need  
4 very little review. The Commissioners might agree and then  
5 vote not to review.

6           So then even before the initial decision issued,  
7 we have said, we've taken ourselves out of it.

8           MR. BICKWIT: For planning purposes, I think that  
9 would be helpful to the parties. I think the parties are  
10 aware of that.

11           CHAIRMAN HENDRIE: Well, it would be helpful to  
12 the parties, probably. But it seems to me that's the only  
13 case where it's apt to do much for you. Once the initial  
14 decision issues, then it's as much trouble to get  
15 Commissioners together and get them to agree not to review  
16 as it is to get them to agree there isn't much to review and  
17 get them to vote the damn thing out.

18           MR. BICKWIT: I agree. I almost agree. I think  
19 it's a little easier if you've got something in the rule  
20 that contemplates you're going to waive this on occasion to  
21 get them to the table and say, let's do this, let's take  
22 this track that we've got written down there in the rule as  
23 a track that we may take on occasion.

24           COMMISSIONER BRADFORD: Suppose you just changed  
25 "within 30 days" to be "not more than 30 days."

1 MR. BICKWIT: I think my point still stands. I  
2 think these are all rather minor distinctions.

3 CHAIRMAN HENDRIE: I like your word change,  
4 because I would hope that would be what we would do anyway,  
5 Peter. But it seems to me that it's so clear there are  
6 going to be very many cases where one would decide before  
7 the board's initial decision that one did not want to take a  
8 look at.

9 I don't know. Maybe -- I think Duke Power's  
10 recommendation is not without a certain cognizance of the  
11 status of Maguire.

12 (Laughter.)

13 CHAIRMAN HENDRIE: Now, Maguire is the last case  
14 we're ever going to see where there's going to be that sort  
15 of thing. Well, maybe we could just do something for  
16 Maguire in some civil case --

17 (Laughter.)

18 CHAIRMAN HENDRIE: Don't laugh. The laws of the  
19 United States are full of these kinds of things. They stay  
20 on the statute books for a hundred years, having been  
21 applied for the specific benefit of Minnie Smith in 1847 and  
22 it's still there.

23 Well, I don't know. Any inclination to -- I must  
24 say, I'm not myself that enthused about trying to find the  
25 right words to express the waiver.

1           Let me ask another related question, then, before  
2 I turn it over to Peter. As I read this thing and  
3 understand it, there is no profound analysis that the  
4 Commission is compelled to produce to show that it's done  
5 something meaningful in its review. It has a certain -- the  
6 proposition is that the Commission has decided that it wants  
7 at least a few days to look the case over and listen to your  
8 office and see if it sees any reason why the progress  
9 shouldn't go ahead out at the plant pending appeals and so  
10 on.

11           MR. BICKWIT: That's correct.

12           CHAIRMAN HENDRIE: And when it decides -- when the  
13 majority of Commissioners decide that the license can go  
14 ahead and issue, the Commission just says: Director of NRR,  
15 issue the license.

16           MR. BICKWIT: That was contemplated.

17           CHAIRMAN HENDRIE: So I don't see any great  
18 agonizing set of findings that we have to rise to, no six  
19 criteria under Section 120, whatever it is.

20           Okay, Peter -- since I'm looking your way, I may  
21 want to make sure that I don't leave John with his hand up,  
22 because he's been on the road half the night and if we leave  
23 him there very long he'll go to sleep.

24           (Laughter.)

25           CHAIRMAN HENDRIE: Do you have anything?

1           COMMISSIONER AHEARNE: No. I just intend to have  
2 a short dissent.

3           CHAIRMAN HENDRIE: Well, short, but I trust  
4 peppy.

5           COMMISSIONER AHEARNE: I would say peppy.  
6 (Laughter.)

7           CHAIRMAN HENDRIE: Peter, you had some things you  
8 wanted to whack at?

9           COMMISSIONER BRADFORD: Let me circulate it. With  
10 one exception, they aren't substantive. And it's really --

11          CHAIRMAN HENDRIE: Would SECY like to have one for  
12 the record?

13          COMMISSIONER BRADFORD: There may be a couple of  
14 others available for Messrs. Shapar, Rosenthal and Cotter.  
15 Bill, do you have any spares?

16          CHAIRMAN HENDRIE: Now this comes right out of the  
17 paper, I take it. The base document is in fact the draft  
18 final rule and the SECY paper?

19          COMMISSIONER BRADFORD: Yes.

20          CHAIRMAN HENDRIE: Okay.

21          COMMISSIONER BRADFORD: If you want to deal with  
22 the substantive one first, it's on page 14A.

23          CHAIRMAN HENDRIE: This kind of contradicts my  
24 proposition of approach these things starting with the  
25 least, but let's try it.

1 COMMISSIONER BRADFORD: It's down at the bottom.  
2 Don't worry about the underlining.

3 CHAIRMAN HENDRIE: Len?

4 MR. BICKWIT: On the substantive proposal, I  
5 certainly don't have any problems with that. What you're  
6 shifting is you're making a standard request -- it was  
7 contemplated that the Commission could request comments.  
8 You're making a standardize request for them, telling the  
9 parties --

10 CHAIRMAN HENDRIE: Or if not request, telling them  
11 they are acceptable and will be accepted and promptly  
12 filed.

13 MR. BICKWIT: Right.

14 CHAIRMAN HENDRIE: John?

15 COMMISSIONER AHEARNE: Well, actually it does two  
16 things, I think. First, it will tend to lengthen the time  
17 for the Commission review, both because -- it says five  
18 days, but since it's in the mail I think the Commission will  
19 feel obligated to review it even if it takes ten days. And  
20 in general, then OGC will take a certain amount of time to  
21 review the submission before summarizing and coming to the  
22 Commission. But I think it will guarantee a slightly longer  
23 review.

24 On the other hand, it begins to move it toward  
25 where there might be something actually meaningful about

1 this Commission review, because I seriously doubt that in  
2 the absence of the participants pointing out with any kind  
3 of focus where the issues are, within that short period of  
4 time the Commission would be able to do much other than  
5 either go yea or nay on an insubstantial amount of  
6 information.

7 So I think Peter's proposal would be a good one.

8 COMMISSIONER GILINSKY: Your first point, about  
9 the mail -- you said something about it being in the mail.  
10 This has to be received within five days.

11 COMMISSIONER AHEARNE: Yes. But the way the whole  
12 process works on rule comments and everything else, I think  
13 if the Commission got a substantial block of paper and it  
14 was a couple of days late, I just don't see the Commission  
15 saying, well, too bad, I'm not going to look at it.

16 COMMISSIONER BRADFORD: I agree with you, there's  
17 no control over this. But it oughtn't to be a substantial  
18 block of paper. For one thing, there really isn't any  
19 time.

20 COMMISSIONER AHEARNE: Well, except that I would  
21 imagine that in most cases people who are in opposition to  
22 the plant will have a sense early on that they are not going  
23 to succeed in their arguments, so that they will be  
24 preparing at the same time.

25 COMMISSIONER BRADFORD: I agree with that and

1 that's -- in a sense, it cuts both ways. It would suggest  
2 they really ought to be ready before the decision comes out  
3 with whatever they're going to send in.

4 COMMISSIONER AHEARNE: I'm sure they will.

5 COMMISSIONER BRADFORD: The importance is lessened  
6 somewhat by the fact that the Commission can go to the  
7 proposed findings of fact and other documents to discover  
8 what the parties thought were important when the hearing  
9 itself was concluded. But this does give them a chance to  
10 sharpen their points in the specific context of immediate  
11 effectiveness,

12 COMMISSIONER AHEARNE: On balance, as I say, I  
13 think it will lengthen the time. But I've all along felt if  
14 the Commission is going to have any kind of meaningful  
15 review, it will take a longer period of time. And this  
16 would help. It would be a meaningful review. So I think it  
17 would be a good change.

18 COMMISSIONER GILINSKY: What about limiting the  
19 length of the submissions, so you don't just get proposed  
20 findings sent up to you?

21 COMMISSIONER BRADFORD: I said they ought to be  
22 brief. Do you want to put a specific number on that?

23 COMMISSIONER GILINSKY: I don't know. I'm just  
24 wondering about that. What we really want is a very brief  
25 note that comments on the decision rather than to get the

1 proposed findings.

2           COMMISSIONER AHEARNE: What you would like is the  
3 knowledgeable participants to, in a very terse fashion,  
4 point out, here is the key point or points that you ought to  
5 be aware of in the review or to think about.

6           COMMISSIONER GILINSKY: I wonder if even a  
7 five-page limit would not be unreasonable.

8           CHAIRMAN HENDRIE: I would keep it brief. Comment  
9 and received in five days, that's a sort of -- it seems to  
10 me that -- I'll tell you what, Peter. On the basis that in  
11 most cases where the Commission decides it ought to hear  
12 from the parties, however, quickly, this will put that  
13 process in motion automatically and people will know about  
14 it even before the initial decision. So that any case where  
15 the Commission decided as part of our 30 days we'd like to  
16 hear what everybody has to say real quick, sort of one last  
17 paragraph apiece, this will be best.

18           COMMISSIONER BRADFORD: I see what you're saying.  
19 You're trading maybe up to five days in those cases where  
20 the Commission could otherwise do it within a day or two as  
21 against the situation in which the Commission would start on  
22 day one to ask for comments and therefore --

23           CHAIRMAN HENDRIE: Or the Commission starts on day  
24 one when the initial decision arrives on the doorstep, and  
25 hems and haws and ten days later decides, well, why don't we

1 see what everybody has got to say, everybody submit one page  
2 on the following subject, you know. And then you've got to  
3 wait five or ten days to prepare and a few days for it to  
4 come in. And you're way down the line.

5 COMMISSIONER BRADFORD: Fair enough.

6 CHAIRMAN HENDRIE: This puts it ahead, and I guess  
7 on that basis -- and I might guess that there is at least a  
8 reasonable chance that the Commission might ask for  
9 reasonable comments from parties, you know, some reasonable  
10 fraction of cases -- I guess I find this probably overall  
11 not to be a thing which extended the process; in a given  
12 case, maybe slightly, but probably overall in most cases  
13 probably moves it.

14 MR. ROSENTHAL: What do you mean by within five  
15 days of the board's decision? Because if you mean within  
16 five days of the day that the board's decision is issued,  
17 many of the parties won't have the board's decision by that  
18 time.

19 CHAIRMAN HENDRIE: That will make the comments  
20 brief.

21 (Laughter.)

22 MR. ROSENTHAL: Well, you've got to bear in mind  
23 that the board's decision issues in Bethesda. It's sent  
24 downtown. Sometimes if it's issued on a Friday it may not  
25 be served until the following Monday. It's received two or

1 three days later. And there's the five days before they  
2 have an opportunity to write it, let alone transmit it and  
3 get it into the hands of the Commission, since it must be  
4 received --

5 MR. COTTER: Normally these kinds of things are  
6 phrased in terms of receipt of.

7 MR. BICKWIT: But if you go where you're headed,  
8 then the ten-day period with respect to low power licenses  
9 is --

10 MR. ROSENTHAL: I'm raising the point that this is  
11 written as a rubber sandwich in terms of comments. It  
12 doesn't accomplish anything.

13 (Laughter.)

14 CHAIRMAN HENDRIE: Well, it depends. What it  
15 says, for the great majority -- for the majority of parties,  
16 it won't need comment. What it means is the Commission will  
17 accept a brief comment post the initial decision from any  
18 party. But it's got to be fast if it's going to be  
19 compatible with the Commission's schedule.

20 And all parties are then on notice that if they  
21 want to make a comment on the initial decision they are  
22 going to have to make their own arrangements to have speedy  
23 access to the initial decision and have speedy delivery of  
24 their comments here to the Commission. And indeed the mail  
25 won't do it. If they want to sit in California and wait for

1 the mail to get there from Bethesda and then mail something  
2 back, they aren't going to make it.

3           And all I can say is that the California  
4 interventions are sufficiently well funded to arrange for  
5 representation here.

6           MR. ROSENTHAL: It would seem to me there would  
7 have to be an obligation on the part of licensing boards to  
8 notify the parties by telephone on the date of issuance,  
9 because otherwise, unless there's somebody permanently  
10 stationed in the East-West Towers, they'd have no way of  
11 knowing.

12           COMMISSIONER GILINSKY: We do not normally notify  
13 the parties of when a decision is going to come down?

14           COMMISSIONER BRADFORD: Probably not, because  
15 there's no short time like this.

16           MR. ROSENTHAL: My understanding is that we do not  
17 have a set practice. The appeal boards do. The appeal  
18 boards on any major decision will notify the parties by  
19 telephone.

20           COMMISSIONER GILINSKY: Well, presumably the date  
21 is pretty well known several days in advance, because you  
22 must just be duplicating the thing.

23           MR. COTTER: Yes, we send it down for  
24 distribution.

25           MR. BICKWIT: Well, why don't we so provide it in

1 here.

2 COMMISSIONER GILINSKY: But we've got to do our  
3 part, too.

4 CHAIRMAN HENDRIE: So provide what?

5 MR. BICKWIT: That there will be telephone  
6 notification in these cases.

7 MR. SHAPAR: Do you want to put that in the rule?

8 MR. BICKWIT: No.

9 MR. SHAPAR: I didn't think so.

10 MR. BICKWIT: I don't know why not.

11 MR. SHAPAR: It doesn't bind the public. It's  
12 just an internal practice. It can be done by "order," I  
13 mean in quotes.

14 MR. BICKWIT: I don't care how we do it.

15 CHAIRMAN HENDRIE: It seems to me it's more an  
16 internal practice matter and the boards can simply tell  
17 parties the last time they see them at the hearing that if  
18 any party would like to be notified by telephone when the  
19 board decision or partial decision is about to issue. My  
20 guess is the board clerks do that on request normally.

21 MR. COTTER: We can do it.

22 COMMISSIONER GILINSKY: How far in advance could  
23 you inform someone of a decision about to come down?

24 MR. COTTER: In advance of the issuance?

25 COMMISSIONER GILINSKY: Yes.

1           CHAIRMAN HENDRIE: Probably not more than a few  
2 days.

3           MR. COTTER: I'd be happy to call them up once  
4 that's done, but --

5           COMMISSIONER AHEARNE: He's not saying the  
6 substance of it.

7           MR. COTTER: I understand.

8           COMMISSIONER GILINSKY: When is a decision dated?  
9 Is it when it's signed or when it is actually released?

10          MR. ROSENTHAL: Released. I don't know about the  
11 licensing boards, but we don't always know very far in  
12 advance what our issuance date is going to be. We always  
13 have people who tinker around with the decision at the last  
14 moment. For most decisions, Xeroxing is not an extensive  
15 period of time.

16          We wouldn't be able, in the context of an appeal  
17 board, to give in most cases very much advance notice.

18          COMMISSIONER AHEARNE: So when you say telephone,  
19 what you do is, when it's released you call them?

20          MR. ROSENTHAL: That's right. Or what will happen  
21 frequently is --

22          CHAIRMAN HENDRIE: When you know it's on the way  
23 downtown or when you've stopped tinkering with it and it's  
24 gone to the Xerox machine, so the final thing is going to go  
25 downtown --

1           MR. ROSENTHAL: That's right. But usually when we  
2 make our telephone notification the opinion is actually  
3 available within an hour if someone wants to send up for  
4 it. But that involves people who are in town here.

5           For those people that are out of town, normally,  
6 unless it's an applicant lawyer who's got some kind of  
7 arrangement with some local law firm, the out of town people  
8 say mail it to us. And if it's mailed to them, that's two  
9 or three days. And as I say, they would have about an hour  
10 to prepare these comments so they could get them mailed back  
11 and received within five days of the date of issuance.

12           COMMISSIONER AHEARNE: And even then that would be  
13 very uncertain.

14           MR. ROSENTHAL: Well you could receive telephone  
15 comments through the Commission duty officer.

16           (Laughter.)

17           CHAIRMAN HENDRIE: We've already got one man out  
18 there with the tape machines and so on.

19           COMMISSIONER BRADFORD: What would you think of  
20 actually going back to the old formulation as to low power,  
21 and moving the number of days up to say 10 for full power?  
22 Because as Alan points out this process is not likely to be  
23 meaningful in the low power cases. Just say that as to low  
24 power the schedule is such that the Commission won't --  
25 well, whatever the original language was.-- whatever the

1 original language was. There is no --.

2 COMMISSIONER AHEARNE: Ten days counted as --

3 COMMISSIONER BRADFORD: Ten days from issuance.

4 CHAIRMAN HENDRIE: I'll let John get his comment  
5 in. It sounds reasonable to me, because the thing that's  
6 pressing the time is the ten days for low power.

7 On the other hand, for low power you're not  
8 signing off on the plant for 30 years or something like that  
9 and the risks are enormously less for low power and you  
10 probably have a good deal less -- yes, I see a finger  
11 raised.

12 MR. BICKWIT: This now I think revives the Duke  
13 Power issue. You are now in the circumstance where you are  
14 saying each and every time there will be a ten-day delay  
15 with respect to the issuance of a full power license, and  
16 now you are no longer in the situation of saying that Duke  
17 Power's proposal is --

18 COMMISSIONER GILINSKY: Except you could approve,  
19 low power operation, and you can't permit more than low  
20 power for more than ten days anyway.

21 MR. BICKWIT: Assuming you have a low power  
22 license.

23 COMMISSIONER BRADFORD: I was going to suggest on  
24 that point, that is the case where the Commission really  
25 felt there was no reason to hold up at all -- I hadn't

1 thought of that when I wrote this originally -- but you  
2 could always put in at the end of the sentence, which now  
3 would apply only to full power, "unless the Commission  
4 decides to the contrary." That is, if one day when the  
5 Commission says, look, this is just not one that we have any  
6 doubts about at all.

7 COMMISSIONER AHEARNE: Anybody for option B?

8 (Laughter.)

9 CHAIRMAN HENDRIE: Say --

10 COMMISSIONER BRADFORD: You could simply let the  
11 parties know that comments wouldn't be received, and they'd  
12 probably get telephone calls to that effect before they  
13 receive the decision anyway.

14 COMMISSIONER GILINSKY: But since you have the low  
15 power option --

16 CHAIRMAN HENDRIE: They may already be there. I  
17 think in a good many of these cases either we will have some  
18 legislation that will allow us to uncork on the low power  
19 while the hearing is going on or, if not, people with plants  
20 that are ready will be pressing boards for low power  
21 permission, so that at least the near-term cases, like the  
22 next year and a half, I think you will more likely than not  
23 come to a full power decision with the plant already chewing  
24 away at fuel loading and low power tests.

25 COMMISSIONER GILINSKY: We won't get suggestions?

1 CHAIRMAN HENDRIE: How does that strike you?

2 MR. BICKWIT: I think that's fine.

3 CHAIRMAN HENDRIE: Let us do that, then. Okay.  
4 But I wouldn't put telephone notification. If you want to  
5 put something in the statement -- but I wouldn't even say it  
6 there.

7 I'll tell you what. I'll issue one of those  
8 yellow announcements to all employees. Answer the telephone  
9 will be the instruction.

10 Let's go back to page 1 of Peter's marked up  
11 version.

12 COMMISSIONER BRADFORD: The big deletion in the  
13 top and bottom is self-evident. The big one in the middle  
14 -- it just doesn't seem to me the reason we're doing this,  
15 unless the point occurs again later, is because of the  
16 progress we have made. The reason we're doing it is we have  
17 become aware that the progress we have made takes a little  
18 longer than it needs to and it's become apparent that time  
19 is of the essence in these cases.

20 COMMISSIONER AHEARNE: I will then point out in my  
21 dissent, I will add the comment that I think one of the  
22 reasons that the Commission should be making changes is  
23 because we have made progress in incorporating the safety  
24 requirements, because that at least was the original reason  
25 I voted for putting in Appendix B, because we did have those

1 uncertainties.

2           CHAIRMAN HENDRIE: Very good. Want to  
3 reconsider?

4           COMMISSIONER BRADFORD: No, that wasn't -- I think  
5 I agree with John about the original basis. It's just that  
6 my level of certainty hasn't been enhanced all that much  
7 because we've never used Appendix B in either a low power or  
8 a full power case. So I can't really say that we've tried  
9 it out and discovered that --

10          COMMISSIONER AHEARNE: Well, exactly, and that's  
11 why I would not be in favor of a change just because there  
12 appear to be some plants sitting impacted by Appendix B.  
13 The change I would be in favor of is because I think we have  
14 done enough review that we can now go back to a different  
15 phasing of the Commission involvement.

16          COMMISSIONER BRADFORD: The change on page 4 is  
17 the same.

18          CHAIRMAN HENDRIE: I don't have a comment with  
19 that. John, I think your comments would be similar.

20          COMMISSIONER BRADFORD: There's a change on page 5  
21 that is really a reflection of the change we've already made  
22 to page 14A. And then that really is it, except for other  
23 minor changes on 14A and 15. Now we are, I guess, adopting  
24 14A as against 14. OGC had set them out as alternative  
25 standards.

1           COMMISSIONER AHEARNE: I would certainly encourage  
2 that, for us to adopt 14A. I think it is good the  
3 Commission recognizes the public interest in taking the  
4 actions.

5           CHAIRMAN HENDRIE: What do you mean by that?

6           COMMISSIONER BRADFORD: I think he likes the  
7 flexibility, even if you would have gone for more.

8           COMMISSIONER AHEARNE: No, what I mean by that is  
9 that we have recently had big debates about what does the  
10 public interest mean, and some of the Commissioners have  
11 been unwilling to support the use of the phrase.

12          COMMISSIONER BRADFORD: Oh, I almost took it out  
13 here too, for reasons that I had doubts about in another  
14 context.

15          CHAIRMAN HENDRIE: There were a couple of things  
16 on page 15 that were okay. Go back to page 4 for a minute,  
17 about two-thirds of the way down, the benefit.

18                   (Laughter.)

19          CHAIRMAN HENDRIE: I'm not sure that thing says  
20 exactly what we mean. It's not your change, Peter. It's  
21 your change that drove me to read it yet again.

22          COMMISSIONER BRADFORD: Well, that's what I  
23 figured. I wasn't sure you would accept the sentence,  
24 anyway. But if you did, it seemed to me that it was a  
25 clarification of what was already there.

1           CHAIRMAN HENDRIE: Read that benefit and see if  
2 you think that's what the benefit is of the Commission  
3 taking a quick look at these things after the board.

4           COMMISSIONER BRADFORD: My guess is that it's  
5 probably accurate -- or at least more or less accurate for  
6 the Commission as a whole, while not necessarily being  
7 accurate for some of the individual Commissioners.

8           CHAIRMAN HENDRIE: I don't know.

9           COMMISSIONER GILINSKY: I guess I would change it  
10 or simply say "benefit of direct Commission" --

11          CHAIRMAN HENDRIE: Well, I'm not sure that the  
12 Commissioners are necessarily more adept at assuring  
13 conformance with Commission policy than the officers of the  
14 Commission, except that voting collegially the Commission  
15 can take a new policy or by edict mandate that whatever it's  
16 doing at the moment in fact is its policy, and obviously the  
17 officers can't do that.

18          MR. BICKWIT: It was meant to include that  
19 notion.

20          COMMISSIONER GILINSKY: For the benefit of the  
21 Commission decisionmaking and to the costs associated with  
22 that, leaving open what precisely that value is. I'm not  
23 sure we will all agree on it anyway.

24          CHAIRMAN HENDRIE: Yes.

25                 I wasn't arguing about whether there is one or

1 isn't one. But it just seemed to me that the phrasing here  
2 did not quite come to the sort of reasons that drew in at  
3 least advance as to why Commissioners ought to have their  
4 hands on these things. It was in fact precisely the act in  
5 being of having hands on that shows the merit in it.

6 COMMISSIONER GILINSKY: What about simply saying  
7 the benefit of direct Commission --

8 CHAIRMAN HENDRIE: Consideration?

9 COMMISSIONER GILINSKY: "Of nuclear power  
10 operating reactor licenses;" and then --

11 CHAIRMAN HENDRIE: Fine with me. John, do you  
12 have any objection?

13 COMMISSIONER BRADFORD: What was the word that  
14 comes after "Commission"?

15 MR. BICKWIT: "Consideration."

16 COMMISSIONER GILINSKY: Or "decisionmaking."

17 COMMISSIONER BRADFORD: "Consideration" is all  
18 right. I just didn't hear you.

19 COMMISSIONER GILINSKY: I think someone else  
20 actually spoke the word.

21 MR. BICKWIT: Well, that's the word I heard.

22 CHAIRMAN HENDRIE: Okay. Now how speedily can you  
23 drum up the language back on 14A?

24 MR. BICKWIT: I think the language on 14A is  
25 drummed up.

1           CHAIRMAN HENDRIE: Well, you're going to fix up  
2 Peter's 14A?

3           COMMISSIONER BRADFORD: That's right.

4           CHAIRMAN HENDRIE: To provide that for low power  
5 propositions the Commission --

6           MR. BICKWIT: I thought you were referring to the  
7 stay standard. Conforming to Peter's proposals will take no  
8 time at all.

9           CHAIRMAN HENDRIE: Okay. So the change you're  
10 going to make, it will be not necessarily identical but very  
11 closely along the lines at the bottom of 14A to -- I don't  
12 know. "In fuel loading and low power operating license  
13 matters, the parties shall have no right to pleadings, et  
14 cetera." I don't know whether you want to add "in view of  
15 the shortness of time in which the Commission expects to  
16 act." That's not necessary in my view, and I would be  
17 inclined to say no pleadings unless we ask for them. Okay?

18           And then go on to say: "For full power operating  
19 license matters and consistent with the target schedule set  
20 forth above, the parties may file," et cetera. That is  
21 Peter's comment, and make it received within ten days of the  
22 board decision, by which we understand the issuance of the  
23 board decision.

24           MR. SHAPAR: There are cases where you get  
25 something between full power and low power, and like one

1 request for 35 percent. Which of the two standards would  
2 apply?§

3 COMMISSIONER AHEARNE: Is low power defined in our  
4 either revised regulations or regulations? So then the low  
5 power is anything other than full power?

6 MR. BICKWIT: I think that's right.

7 COMMISSIONER GILINSKY: Well, we've been using the  
8 five percent break point.

9 MR. BICKWIT: But if it's a 50 percent license,  
10 does the Commission intend that there be a 10-day period or  
11 a 30-day?

12 CHAIRMAN HENDRIE: Well, steady now. I'm reminded  
13 that just because there is a problem, that doesn't mean  
14 there is a solution.

15 (Laughter.)

16 CHAIRMAN HENDRIE: That is, the universe of  
17 problems exceeds the universe of solutions, probably. And  
18 this one, while not being necessarily solutionless, I think  
19 there is no need to confront it.

20 If it's the first piece of permission to put fuel  
21 in a reactor that the Commission gets, then it isn't going  
22 to be 35 percent or 50 percent, because if it's 35 or 50  
23 percent it might as well be full power, okay. You're  
24 getting close enough to the fission product inventory so  
25 that you're going to have to make essentially the full power

1 safety case.

2           COMMISSIONER BRADFORD: Unless our rule is written  
3 in such a way that there is a great advantage in filing for  
4 99 percent, in which case we'll start seeing 99 percent  
5 applications.

6           CHAIRMAN HENDRIE: I'm just saying the first thing  
7 we'll see, if you're going to see something which allows the  
8 plant to get started, the first thing you're going to see is  
9 the five percent sort of thing. So if it's that sort of a  
10 thing, then the ten days will clearly operate.

11           For the next ones on up the line, if there is  
12 another one before full power, I would just say the  
13 Commission shape it as it suits. If we find out the board  
14 is going to deal with a 35 percent interim stage, why, OGC  
15 can tell us that's apparently going to come and we decide  
16 what we do about the review.

17           I just don't see it's worth trying to spell out  
18 here every conceivable circumstance. And I must say, I just  
19 don't think we're going to have cases like that.

20           COMMISSIONER BRADFORD: That's probably right,  
21 although I would be reluctant to lay down a standard that  
22 anything other than full power was low power, just because I  
23 think that would start to encourage the 99 percent.

24           CHAIRMAN HENDRIE: Oh, I think that's right.  
25 Again, I would not interpret it, for precisely the reason

1 that as you come down from full power the fission product  
2 inventories do not get down to the place where you can see,  
3 gee, this operation, you know, is just almost sort of  
4 trivial compared to full power operation, until you get  
5 substantially down and until the mode of operation is indeed  
6 not one in which there are weeks of running at the allowed  
7 power to build up the equilibrium inventories.

8           So I think low power, full power, is sufficient  
9 language here and I don't see a need to define it beyond  
10 that. Okay. Now, with that understanding about the way the  
11 language goes on 14A, would you be agreeable with being  
12 asked to vote on it with the understanding that you got a  
13 look at that language before it issues, but that we will not  
14 need to come to the table and vote again, you know, unless  
15 there turns out to be enormous confusion or disagreement  
16 over the 14A language and I have to bring it back?

17           COMMISSIONER BRADFORD: The only other reservation  
18 I would have is, John is still circulating a --

19           COMMISSIONER AHEARNE: It will take me about a day  
20 to draft that.

21           COMMISSIONER BRADFORD: -- a separate comment.  
22 And I'm certainly prepared to vote for this in principle.  
23 If John makes some really telling points, I would want to  
24 reserve the --

25           COMMISSIONER AHEARNE: I don't think there will

1 be--

2 COMMISSIONER GILINSKY: Do you guarantee a  
3 percent?

4 COMMISSIONER AHEARNE: No, I guarantee that they  
5 will be unemotional and short.

6 CHAIRMAN HENDRIE: Len, if I concur in John's  
7 comment --

8 (Laughter.)

9 CHAIRMAN HENDRIE: -- do I also vote for the  
10 rule?

11 All right. Those in favor of amending Appendix B  
12 to part 2 as discussed this morning, please indicate by  
13 saying aye.

14 COMMISSIONER BRADFORD: Aye.

15 COMMISSIONER GILINSKY: Aye.

16 CHAIRMAN HENDRIE: Aye.

17 COMMISSIONER AHEARNE: No.

18 CHAIRMAN HENDRIE: The motion carries three to  
19 one. There will be an amendment to Appendix B which will  
20 have hopefully the effect, in spite of John's pessimism on  
21 the point, of reducing Commission review time after an  
22 initial decision from a prospective three months to a  
23 prospective one month.

24 We still have time to make further progress at  
25 this point. On to the policy statement, I think. Would you

1 rather do that or would you rather take up the sua sponte?

2 MR. BICKWIT: I'd rather do the policy statement.

3 COMMISSIONER BRADFORD: I guess I would too, just  
4 because I haven't even had time to look at Tony's.

5 MR. BICKWIT: I think it's one that's in reach of  
6 getting out. And also, if by any chance it does take us to  
7 the end of the hour, it will give people a chance to read  
8 Tony's memo on sua sponte.

9 COMMISSIONER AHEARNE: We spent a lot of time  
10 starting with Tony's memo back in March, and in two and a  
11 half months we ought to be able to get a response to it.

12 CHAIRMAN HENDRIE: Picky, picky, picky.

13 MR. ROSENTHAL: March 25. Almost three.

14 CHAIRMAN HENDRIE: Now let's see, on the policy  
15 statement my notes indicate that we were to have a new draft  
16 from OGC with the various improvements that had been made  
17 incorporated in it. We have that. What's the number? SECY  
18 81-202(c) is the version.

19 We were going to have some adjusted words in  
20 Sections 3A and 3D. I think you adjusted at least the 3D.  
21 Vic has a counterproposal for adjusting 3D which I thought  
22 was pretty good. So I'm prepared to vote your 3D without  
23 further ado.

24 COMMISSIONER AHEARNE: I would like to ask Vic one  
25 question.

1 CHAIRMAN HENDRIE: please do.

2 COMMISSIONER AHEARNE: Vic, you say in your first  
3 page, down at the bottom, "The boards are reminded that they  
4 may limit the number of interrogatories." Under what  
5 regulation would they be doing that?

6 COMMISSIONER GILINSKY: I thought --

7 CHAIRMAN HENDRIE: Ask Tony to answer and explain  
8 you don't want to preempt the board chairman, and allow him  
9 to answer it.

10 MR. COTTER: I would assume that the references  
11 are to discovery, which is protected because it's burdensome  
12 and considered unnecessary, and there's some kind of  
13 protective motion filed.

14 COMMISSIONER GILINSKY: I thought yesterday or the  
15 last time we talked about this someone asked that question  
16 and the answer was that the board could limit discovery if  
17 --

18 MR. BICKWIT: That was the answer I gave, although  
19 I also agreed that it would be cleaner to do this by  
20 rulemaking.

21 COMMISSIONER GILINSKY: Well, we have a rule in  
22 the works.

23 COMMISSIONER AHEARNE: No, I know that. I was  
24 just questioning. It wasn't clear to me that right now the  
25 boards can limit the number of interrogatories by say, if

1 they find the benefits from such interrogatories outweighed  
2 by the burdens imposed. I think Tony's answer was that if  
3 the parties on which the interrogatories are filed come back  
4 and make a case, that this can be very burdensome,  
5 unreasonable and so forth, that the board then could. Is  
6 that your point?

7 MR. COTTER: Yes. I wasn't talking in terms of an  
8 arbitrary imposition of some fixed number on that specific  
9 situation.

10 CHAIRMAN HENDRIE: Do the board's supervisory  
11 powers under part 2 as it stands at the present -- without a  
12 motion from a party objecting to discovery, could the board  
13 simply reach down and say, listen, that's excessive, quit  
14 it?

15 MR. SHAPAR: I think that would be questionable,  
16 because you've got a standard for discovery, of the  
17 production of relevant evidence. You have another rule that  
18 says that if it's oppressive or harassing that it can be  
19 limited on that basis. I think Tony's answer is right.

20 COMMISSIONER BRADFORD: It's pretty hard to find  
21 something oppressive or harassing before the party objects  
22 to it.

23 MR. COTTER: I would take exception to that. I  
24 think my own personal view is that as a matter of  
25 responsibility for managing the proceeding that they could

1 within limit take some action.

2 CHAIRMAN HENDRIE: But if the party on whom the  
3 interrogatories were being served seemed to shrug and not  
4 care, why, the board is not very likely to say anything.

5 MR. COTTER: I'm not about to address what would  
6 not appear to be a problem.

7 COMMISSIONER AHEARNE: My raising the question  
8 wasn't meant to imply that I didn't think that the board  
9 should not be interested. And I think you're right, Vic,  
10 this does pick up the sense of the answer last time. Just  
11 in thinking about it more, it didn't seem to me that the  
12 boards really had the kind of flexibility that was in mind.

13 COMMISSIONER GILINSKY: Well, modify it so that it  
14 conforms with the rules.

15 CHAIRMAN HENDRIE: About the fourth line from the  
16 bottom, "The boards are reminded that," and then it seems  
17 you need a comma, "in response to whatever kinds of motions"  
18 -- what's the right language in response to a motion?

19 COMMISSIONER GILINSKY: I would put it after  
20 "find." They may limit the ones if they find, comma.

21 CHAIRMAN HENDRIE: Good. What kind of a motion is  
22 it?

23 MR. BICKWIT: It's an objection or a motion for a  
24 protective order, one or the other.

25 But I agree with Tony that there may well be

1 authority on the part of the board to limit even before the  
2 filing of such a motion or objection. I'll admit it's not  
3 --

4 COMMISSIONER AHEARNE: We have a question --

5 MR. BICKWIT: I'll admit it's fuzzy--

6 MR. SHAPAR: A split among the lawyers.

7 MR. ROSENTHAL: I'm very doubtful.

8 CHAIRMAN HENDRIE: The chief judge of the appeals  
9 board is saying, boy, you bring an appeal up to me in which  
10 some boards' discovery -- why, I'll fix them.

11 MR. BICKWIT: It's not three to two among the  
12 lawyers.

13 CHAIRMAN HENDRIE: Who's the third? Which way?

14 (Laughter.)

15 MR. SHAPAR: You don't get two votes.

16 MR. BICKWIT: I only had one.

17 MR. ROSENTHAL: Apart from the question of whether  
18 the board can do this sua sponte or not, it seems to me that  
19 the standards for relieving a party of the obligation to  
20 respond to interrogatories are clear at this point, on  
21 burdensomeness, relevance, et cetera. Why the boards have  
22 to be reminded of the fact that there are these standards  
23 which they can police, at least upon application by a party,  
24 is frankly totally unclear to me.

25 It's another matter as to whether you want to get

1 into the restriction of the number of interrogatories, and  
2 it's a matter on which the Commission, as I understand it,  
3 is still under advisement or is going down. But anyway,  
4 that's a separate and distinct matter.

5           But in terms of no arbitrary restrictions, it's  
6 simply a matter of the board policing the process so that  
7 there is an avoidance of burdensome discovery, irrelevant  
8 discovery. That's fairly, I would think, clear to the  
9 boards at this point. And it would seem to me, quite  
10 candidly, to be rather demeaning to the boards for the  
11 Commission to remind them of this tool that is available to  
12 them to control discovery.

13           CHAIRMAN HENDRIE: Alan, it is the fate of all of  
14 us, I by Congressional Committees, you by the Commission,  
15 and lawyers in cases by you, and staff engineers by the  
16 lawyers and cases. But one can see this chain stretching  
17 out into the remote distance. It is all our fates to be  
18 reminded periodically of things which in principle we know  
19 perfectly well and in principle are carrying out.

20           MR. ROSENTHAL: If that's the case, I would  
21 shorten this by saying simply to the boards: Boards,  
22 remember that you have the power to control discovery and go  
23 and exercise those powers, rather than trying to fiddle with  
24 a lot of refined language.

25           MR. COTTER: I would endorse that to the extent

1 that picking out interrogatories, which is only one  
2 discovery tool, which is perhaps where this whole  
3 conversation got hung up --

4 CHAIRMAN HENDRIE: Well, the paragraph is  
5 provided, because we're looking at the matter specifically  
6 of limiting interrogatories.

7 MR. SHAPAR: Well, I think there is a legal  
8 question here. Clearly from this discussion, I think Alan  
9 and I would say that you have standards now in your rules.  
10 If those standards are met, the guy is entitled to submit  
11 his interrogatories. And besides, he's on the appeal board  
12 and he's going to rule that way.

13 But we don't want ping-pong played here.

14 MR. COTTER: Well, since, it's an interlocutory  
15 matter, I don't imagine it ever came to it.

16 COMMISSIONER BRADFORD: Well, he would have an  
17 opportunity, but not on an interlocutory basis.

18 CHAIRMAN HENDRIE: We're going to have to take  
19 strong measures, Vic. Now listen, all you experts over  
20 there. Assuming we want to say something in sentence two of  
21 this paragraph, "Pending a decision on the proposed rule,"  
22 --

23 MR. SHAPAR: "Limit interrogatories in accordance  
24 with the Commission's rules" would do that.

25 MR. COTTER: In the inherent authority of the

1 presiding officer.

2 CHAIRMAN HENDRIE: "The boards are reminded that  
3 they may limit the number of interrogatories in accordance  
4 with the Commission's rules."

5 MR. SHAPAR: Correct.

6 CHAIRMAN HENDRIE: And you were trying to cork in  
7 something else, but that covers it, doesn't it?

8 MR. BICKWIT: The rules pick up your point.

9 MR. SHAPAR: His argument is that the general  
10 authority of the board would override the particular rule.  
11 Alan and I don't think so.

12 MR. COTTER: Well, you're talking about a  
13 particular rule that protects a particular party, and I'm  
14 talking about general authority.

15 COMMISSIONER BRADFORD: But the way it's phrased  
16 doesn't in fact pick up a particular rule. It picks up the  
17 rules.

18 CHAIRMAN HENDRIE: "That they may limit the number  
19 of interrogatories in accordance with Commission rules,"  
20 right, period.

21 MR. SHAPAR: It solves the question at the same  
22 time.

23 CHAIRMAN HENDRIE: That's been the outstanding  
24 characteristic of my administration.

25 Now, what else would be -- that was a good

1 discussion. John, where else are you here?

2 COMMISSIONER AHEARNE: That was my only question.

3 I'm afraid to ask any more. We may get further

4 improvements. I can accept the rest of it.

5 CHAIRMAN HENDRIE: How do you feel about Vic's

6 version?

7 COMMISSIONER AHEARNE: That's fine.

8 CHAIRMAN HENDRIE: I'll vote for it. Vic, you're

9 honor-bound to vote for it.

10 Peter?

11 COMMISSIONER BRADFORD: Fine.

12 CHAIRMAN HENDRIE: Good. Put Vic's 3D into the

13 policy statement as just amended.

14 Now with regard to the rest of the policy

15 statement, anybody got any problems with the edits and stuff

16 in the conversion? Does anybody know of anything in here

17 that I don't like?

18 (Laughter.)

19 COMMISSIONER BRADFORD: I think consistent with

20 Alan's point -- I'm sorry, this goes back to Vic's but not

21 to the part we were talking about. I guess I go back to the

22 original language on page 2. I think it's enough to remind

23 the boards in the preceding paragraph at the top of page 2.

24 CHAIRMAN HENDRIE: "The boards should manage and

25 supervise."

1                   COMMISSIONER BRADFORD: "Accordingly, the boards  
2 should manage and supervise."

3                   CHAIRMAN HENDRIE: Oh, okay. Sold, with agreement  
4 by all.

5                   Other comments on the policy statement? Len, we  
6 have a query. The hand markups in the draft version in  
7 202(c) are whose?

8                   MR. BICKWIT: Ours.

9                   CHAIRMAN HENDRIE: They are yours, reflecting  
10 either edits on rereading or assistance, edits, or  
11 wherever?

12                  MR. BICKWIT: They're just editorial.

13                  CHAIRMAN HENDRIE: Get rid of the word "exists"  
14 indeed. In my view any editorial change which removes the  
15 word "presently" as meaning now is to be desired. If  
16 civilization is to stagger forward another generation, we've  
17 got to hold the line on some of these things.

18                  MR. ROSENTHAL: I notice that Commission Gilinsky  
19 did use "presently" to mean now.

20                  CHAIRMAN HENDRIE: Where, where?

21                  MR. ROSENTHAL: In the first sentence of the  
22 second paragraph.

23                  MR. COTTER: I might note that the word  
24 "presently," the meaning is Elizabethan and Shakespearian,  
25 and current dictionaries give it both --

1 MR. SHAPAR: Fowler's modern English is not  
2 accepted.

3 CHAIRMAN HENDRIE: Make Vic's "now" obtained,  
4 okay?

5 COMMISSIONER GILINSKY: Okay.

6 CHAIRMAN HENDRIE: For Alan and me.

7 Other? Let me ask about 3A. I believe the 3A  
8 language is not changed from the last version.

9 MR. BICKWIT: It is changed back to the original  
10 SECY-202 with some edits.

11 CHAIRMAN HENDRIE: I see, okay.

12 MR. BICKWIT: I have to say, in reviewing the  
13 transcript, we will have to see as to exactly what the  
14 Commission consensus was. So we went back to that.

15 CHAIRMAN HENDRIE: Okay. Since I don't have any  
16 words that would do better than these --

17 COMMISSIONER BRADFORD: Vic, didn't you propose --  
18 where are we now? Didn't you propose --

19 COMMISSIONER GILINSKY: Well, --

20 COMMISSIONER BRADFORD: I thought we had at one  
21 time agreed to --

22 MR. BICKWIT: I have the papers, and Vic had a  
23 difference.

24 COMMISSIONER GILINSKY: Where is my version?

25 MR. BICKWIT: Would you like to see your version?

1           COMMISSIONER GILINSKY: No, no. This is another  
2 point. This has to do with the schedule.

3           CHAIRMAN HENDRIE: I think that's it, isn't it?

4           COMMISSIONER GILINSKY: Yeah, the first part.

5           MR. BICKWIT: Oh, here it is.

6           COMMISSIONER GILINSKY: Yeah, I thought this was  
7 what we had approved.

8           CHAIRMAN HENDRIE: Yeah, but that then meant --  
9 that was in the days when we were going to try to stick a  
10 schedule in here. And what I think we are headed for at the  
11 moment is not to put a schedule in here.

12           By the way, where does the schedule prospectively  
13 hang, Len?

14           MR. BICKWIT: Tony I gather is prepared to speak  
15 to where the boards are in relaxing the schedule.

16           MR. COTTER: We have an early draft.

17           CHAIRMAN HENDRIE: I like your first sentence.

18           COMMISSIONER GILINSKY: Which one?

19           MR. BICKWIT: And Peter had another version of  
20 this.

21           COMMISSIONER BRADFORD: Yeah, but I dropped mine  
22 when we agreed to send Victor off to prepare another one, I  
23 think.

24           MR. BICKWIT: I did not understand the Commission  
25 had reached agreement on Vic's.

1 COMMISSIONER BRADFORD: You may be right, now that  
2 I see the part about the standard schedule.

3 (Pause.)

4 COMMISSIONER GILINSKY: -- and they've got the  
5 last sentence here. And you also need to specify  
6 timeframes, and you just can't expect them to do all that.

7 CHAIRMAN HENDRIE: In some ways you're amplifying  
8 here. You're saying time frame for actions where the board  
9 deems that that will expedite proceedings. It's a little  
10 bit of an amplification.

11 COMMISSIONER GILINSKY: Well, you're getting down  
12 to more detail. But it seems to me that -- we're treating  
13 everyone like grown-ups. I thought it was really captured  
14 in a fairly firm statement.

15 CHAIRMAN HENDRIE: I would like to keep some of  
16 that stuff in here.

17 COMMISSIONER GILINSKY: Now this is a separate  
18 thing.

19 CHAIRMAN HENDRIE: And I think it is a useful  
20 one. I would just come in here. I would come in one place,  
21 I think, to get this thought.

22 Let's see, shall we extend our negotiations and  
23 see how the others feel? Shall we let them in on what we  
24 did?

25 Okay, the proposition is as follows. We start out

1 3A, "Time," with Vic's first sentence, to wit: "The  
2 Commission expects licensing boards to set and adhere to  
3 reasonable schedules for proceedings." We would then delete  
4 the 202(c) first sentence, which starts, "The fundamental  
5 ingredient." Okay.

6 Now, Vic and I are disagreeing on whether to  
7 delete the next sentence. I would keep it. He would delete  
8 it. And we would go on together concomitantly from there on  
9 to the end.

10 COMMISSIONER BRADFORD: I don't feel too strongly  
11 about whether or not there's another sentence there. I  
12 don't think the point is that the boards should set time  
13 frames where they feel that such delineations would -- or  
14 only where they feel that they would expedite proceedings.  
15 The end result if they're doing it right ought to be to  
16 expedite proceedings.

17 But what you're really talking about is giving a  
18 better overall organization to the proceedings, putting  
19 parties on notice of what's expected of them when, so that,  
20 for example, they don't surprise each other or unfairly  
21 burden each other. And then part of that also is that one  
22 wants to expedite it.

23 The schedules have a larger goal, and if you say  
24 you're only doing it to expedite then I don't think that's  
25 quite the right thing to say.

1 COMMISSIONER AHEARNE: I agree on that point.

2 CHAIRMAN HENDRIE: I think this is mounting up to  
3 it being easier to delete the sentence than to qualify it  
4 suitably by these objections. I'm beginning to regret I  
5 started the whole thing with 3A.

6 Okay. Vic's first sentence: "The Commission  
7 expects licensing boards to set and adhere to reasonable  
8 schedules for proceedings." Then it goes on, starting  
9 "concomitantly" and going on from there to the end of the  
10 draft. Okay, cut "concomitantly." Start it with "The  
11 boards." That got a round of applause.

12 Okay. Now, do the owners of the drafting rights  
13 on this document now understand where we are? Do the  
14 Commissioners understand where we are? Since the language  
15 is settled, subject only to producing a clean copy and  
16 somebody proofreading it, which seems to me could be done  
17 downstairs and so on, it seems to me that we ought to vote  
18 it out. It's been a long time coming and I don't think  
19 we're going to perfect it any more by reading the clean copy.

20 Is that all right?

21 COMMISSIONER BRADFORD: I think it is.

22 CHAIRMAN HENDRIE: I therefore propose to you that  
23 the policy statement as drafted and amended at this point in  
24 our discussion be issued by the Commission as soon as a  
25 clean copy and a proofread copy can be produced by the

1 assorted offices in the secretariat.

2 Those in favor?

3 CHAIRMAN HENDRIE: Aye.

4 COMMISSIONER AHEARNE: Aye.

5 COMMISSIONER GILINSKY: Aye.

6 COMMISSIONER BRADFORD: Aye.

7 CHAIRMAN HENDRIE: Carried unanimously.

8 Well, I'm sorry we don't have a license to take up  
9 here today.

10 COMMISSIONER GILINSKY: That's this afternoon.

11 CHAIRMAN HENDRIE: Well, I know. But you'll have  
12 had lunch and slowed down by that time. I may not be able  
13 to keep you to it.

14 Now I don't propose to quit. The other thing we  
15 had on the docket was this set of sua sponte propositions.  
16 I think we ought to discuss those for a bit.

17 Let me remark about scheduling, where we are going  
18 and what we are doing. You remember last time we instructed  
19 counsel to package together what we seem to have agreed on  
20 out of the part two rule changes as acceptable for Appendix  
21 B, which was coming separately, which we have done. He was  
22 also to package a proposed rule for comment with a possible  
23 limit on interrogatories, some stuff about contentions, air  
24 express filings, several things of that kind.

25 He has done that and we have the papers. But they

1 are rather recently arrived. It seems to me that those two  
2 points of final rule and some changes to part two proposed  
3 for comment rule and other changes to part two is a fitting  
4 subject for a meeting unto itself, rather than the last 30  
5 minutes of this morning. And so I propose, if it's all  
6 right with you, to hold those things until our next meeting  
7 on revised licensing procedures; also to go with that future  
8 meeting then is discussion about standard schedule.

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1           CHAIRMAN HENDRIE: Therefore, let us turn at this  
2 moment to, if I can find it, an object called SECY 81-304,  
3 proposed rule change on adjudicatory board's authority to  
4 raise issues sua sponte. We have had that since the end of  
5 last week.

6           We also have today a collection from Tony Cotter  
7 of the resumes of eminent American men of law, letters and  
8 science.

9           MR. ROSENTHAL: And women.

10          CHAIRMAN HENDRIE: And women. I'm sorry.

11          And to the front of that he has attached the  
12 latest entry in the ongoing efforts to set a record for most  
13 recently submitted memorandum.

14          MR. BICKWIT: Well, let me say, I think the reason  
15 for that is, through inadvertence on our part we did not  
16 coordinate this paper with Tony or with Alan, and Alan has  
17 communicated to us his views. And I knew that Tony's would  
18 be more voluminous and I asked him to furnish them to the  
19 Commission if he could.

20          MR. COTTER: It's my constituency.

21          CHAIRMAN HENDRIE: I guess my policy, Len, would  
22 normally be, either inform them in a lot of time or keep  
23 them totally in the dark. But these halfway measures only  
24 lead to confusion. I have no objection, which of the first  
25 two you follow. Just consistency, that's all.

1           Okay. Now the proposition. Len, why don't you  
2 outline the proposition in 304. We will have such  
3 countercommentary as people would like to offer briefly  
4 along the Commission table.

5           MR. BICKWIT: What we are trying to do here is  
6 pick up the drift of the discussion that the Commissioners  
7 had on this subject. And while in reviewing the transcript  
8 it was clear that there was no specific agreement, this at  
9 least was not objected to by Commissioners who talked about  
10 the concept.

11           Under it, as you can see, the board before taking  
12 up an issue sua sponte in an operating license proceeding --  
13 we would propose to expand that to CP and OL amendment  
14 proceedings -- would have to notify the Commission and the  
15 Commissioners would have 15 days in which to take some  
16 action to prevent the boards from implementing their  
17 intent.

18           And Alan has pointed out that throughout this  
19 proposed rule the words "certified an issue to the  
20 Commission" are used and that that could be confusing in  
21 that it could give the impression, one, that it's the  
22 substantive issue that's being certified; and secondly, that  
23 some action on the part of the Commission is required. Both  
24 of those notions could be inferred from the word  
25 "certification."

1                    So he suggests "notification" as an alternative  
2 and we would support that.

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1           COMMISSIONER BRADFORD: Am I wrong in thinking we  
2 discussed this last time and decided to go to comment with  
3 it?

4           COMMISSIONER AHEARNE: That is what I thought.

5           MR. BICKWIT: That is not what I thought.

6           (Laughter.)

7           COMMISSIONER AHEARNE: So much for that.

8           MR. BICKWIT: I may be wrong. What I thought was  
9 that we would send up to you this kind of paper because we  
10 were unsure where the Commission was on the concept. Our  
11 recommendation was that you go out for comment without more  
12 but --

13           CHAIRMAN HENDRIE: I think Len has got it right.  
14 My notes from the last meeting, Peter, is that Len was to  
15 get his new sua sponte rule proposal to the Commission, then  
16 we were to decide whether it should go out for comment and,  
17 if so, should it go out for those other Part 2 things or  
18 whatever. So I think he has got it.

19           COMMISSIONER AHEARNE: Well, except that what  
20 would come up is that if the Commission were to go out for  
21 comment independent of the past meeting, certainly even a  
22 strong supporter of change as I would want to have it out  
23 for comment.

24           COMMISSIONER BRADFORD: Were you a strong  
25 supporter of this change? I thought this was the one that

1 Victor and I initially supported and you and Joe opposed.

2 CHAIRMAN AHEARNE: No. Eliminating it. In other  
3 words, be more restrictive on it. I would certainly want  
4 comment on it.

5 CHAIRMAN HENDRIE: Well, let's see. The  
6 proposition is to put it out for comment.

7 COMMISSIONER BRADFORD: The proposition here is to  
8 make it immediately effective, isn't it?

9 MR. BICKWIT: I don't think so. A register notice  
10 announcing an immediately effective rule change. Of course,  
11 the recommendation is that we use it as a basis for further  
12 discussion.

13 COMMISSIONER AHEARNE: That is what I meant: for  
14 comment.

15 CHAIRMAN HENDRIE: We are talking about a proposed  
16 rule for comment.

17 COMMISSIONER AHEARNE: Right.

18 CHAIRMAN HENDRIE: I do not think we can  
19 contemplate going out and -- now, Tony, you need a chance to  
20 express your general admiration of the general counsel's  
21 propositions here.

22 COMMISSIONER AHEARNE: At some point before we  
23 break, I would like to ask a question.

24 CHAIRMAN HENDRIE: Would you rather hear Tony or --

25 COMMISSIONER AHEARNE: I am always glad to hear

1 Tony.

2 CHAIRMAN HENDRIE: I mean first or --

3 COMMISSIONER AHEARNE: Fine.

4 CHAIRMAN HENDRIE: Go.

5 MR. COTTER: I object.

6 CHAIRMAN HENDRIE: Sustained. That gets the point  
7 across. If only we could do it as well.

8 MR. COTTER: When there is no problem with sua  
9 sponte, I think it has been reasonably well established. It  
10 has not taken too much time. The director of NRR says it is  
11 not a problem. This is a major effort to address a  
12 nonexistent thing. In the course of doing that, we feel  
13 that it raises a number of problems. I fundamentally have  
14 still not adjusted to the manner in which the board's  
15 function in this agency -- it is much more limited and quite  
16 contrary to my experience.

17 But I do understand them to serve the purpose of,  
18 after mandatory reviews of construction permit proceedings,  
19 holding hearings on operating licenses and their amendments  
20 in those cases when an Intervenor has raised an issue in  
21 controversy which is feasible under the proceedings that we  
22 hold.

23 The difficulty that I have theoretically is the  
24 adjudicatory system functions here within the Commission is  
25 that the original decision is made on a preliminary piece of

1 paper -- that is, the construction permit design -- and that  
2 the actual construction of the plant is not completed on the  
3 average until, what, five or six years later.

4           We have certainly seen in the last 18 months to  
5 two years that a number of developments in the technology of  
6 the construction can take place which would require  
7 differences in the plant which is constructed and make it to  
8 some degree or other different from the plant which was  
9 designed.

10           Secondly, it has been my experience in the  
11 construction business in general for the last 30-odd years  
12 that nothing is ever built as it is designed, and it is  
13 different significantly from the way it is designed simply  
14 because when the practical people come to convert the paper  
15 into concrete and the components of the structure, they make  
16 changes.

17           And consequently, it seems to me that given that  
18 significant gap between what is originally proposed and what  
19 is actually constructed, that a limitation on the authority  
20 of those people who are to apply their expertise to evaluate  
21 the adequacy of the staff review of the construction, that  
22 that limitation is completely contrary to the mission of the  
23 Commission.

24           Now, as I understand the proposal, the purpose of  
25 it is to eliminate delay. I have not seen any evidence

1 anywhere on the table in the last four months that it has  
2 caused delay.

3           CHAIRMAN HENDRIE: But it is also a matter of  
4 staff resources.

5           MR. COTTER: The staff has said it is not a  
6 problem. The director stood up there about three months ago  
7 and said that.

8           MR. SHAPAR: That was in response to a specific  
9 question. I do not think it is fair to say it is the view  
10 of the NRR that it is not a problem.

11          CHAIRMAN HENDRIE: I think Dircks and Denton both  
12 made --

13          MR. COTTER: Well, if they think it is a problem --

14          CHAIRMAN HENDRIE: Well, they think it could be a  
15 problem.

16          COMMISSIONER AHEARNE: As a person who raised the  
17 issue earlier, it was not, as I tried to say in the past,  
18 because of potential problems with staff resources, it is my  
19 concept of what is the purpose of the hearing process.

20                 And the one point I really disagree with you,  
21 Tony, is that one could conclude from the way you phrased  
22 that answer that the only plants then that we should have  
23 confidence in being safely reviewed are those that go into  
24 the contested hearing and a board gets a crack at reviewing  
25 it. If it were not a contested hearing, therefore, there

1 would be no hearing, that we had to be very uneasy about  
2 it.

3 I just disagree that that is the purpose of the  
4 operating license hearings. And that is why I am in favor  
5 of this kind of restriction, because I believe that  
6 fundamentally the hearing is supposed to resolve issues in  
7 disagreement.

8 And I can see the advantage of the proposal that  
9 we have in this proposed rule, because it then does meet one  
10 of the objections that has been raised by a number of  
11 people, including yourself in this paper, of what happens if  
12 there is a serious issue that someone sees. Well, then,  
13 this would provide a mechanism to handle it.

14 MR. COTTER: I think there are two responses to  
15 that. One was, as I understand the history of the concept,  
16 the original mandatory review for an operating license was  
17 lifted in 1962 on the theory that the construction permit  
18 review had been thorough and that the operating license  
19 would follow soon after. And those two facts do not obtain  
20 now, because of the length of time between issuance of the  
21 construction permit license and the review for the operating  
22 license.

23 So while I am not obviously arguing contrary to  
24 the statute, I am saying that the rationale for the statute  
25 has not proved too valid.

1           MR. SHAPAR: I do not believe that was the premise  
2 for the '62 statute. The premise for that statute was a  
3 multiplicity of hearings in which the Congress felt at one  
4 time it was necessary. And this is sort of important in  
5 terms of understanding what the role of the board is.

6           At one time there was indeed a mandatory hearing  
7 at both the CP stage and a mandatory hearing at the OL  
8 stage. And in addition, the statute was interpreted in such  
9 a way that it was considered necessary to have a mandatory  
10 hearing for all amendments as well.

11           This got to be too much, and generally there is a  
12 form that says, "All these hearings were not necessary to  
13 protect the public health and safety." So about in 1962  
14 this mandatory hearing requirement at all stages was  
15 dissolved and the basic thrust behind it was you did not  
16 need that many hearings to protect the public health and  
17 safety.

18           As I indicated, it retained the mandatory hearing  
19 at the CP stage. They abolished any requirement whatever  
20 for hearing at OL stage unless an interested party requested  
21 a hearing. And there was also an opportunity for hearing on  
22 the amendments. But the only mandatory hearing was left at  
23 the CP stage. And I think that was the basic thrust of the  
24 '62 amendments.

25           MR. COTTER: Certainly, some of the instances in

1 the intervening years, Three Mile Island being an obvious  
2 one, suggest that that original consideration was not  
3 correct.

4           COMMISSIONER GILINSKY : Would your objections  
5 hold if the 15-day provision disappeared and was merely a  
6 matter of notifying the Commission that "The board is taking  
7 up the following issue"?

8           In fact, let me ask you, what is the practice of  
9 the boards when you launch on a new issue? Do you issue  
10 some piece of paper notifying the parties?

11           MR. COTTER: Yes. The board would notify the  
12 parties that have a particular question, yes.

13           COMMISSIONER GILINSKY: Why can that not be sent  
14 up to the Commissioners?

15           MR. COTTER: I have no objection to doing that.  
16 It is a public document. I mean, in a sense, it is sent up  
17 to the Commission, because all those papers and all the  
18 cases are filed here.

19           COMMISSIONER GILINSKY: Well, that could serve to  
20 notify the Commission with the general counsel being alert  
21 to these pieces of paper.

22           MR. COTTER: In that sense, that takes place now.

23           COMMISSIONER GILINSKY: So someplace between  
24 that, in which you seem to have no objection to in the  
25 proposal here which introduces a 15-day period, you cross

1 some sort of threshold.

2 MR. COTTER: I cross two thresholds. One, I think  
3 it is inappropriate to restrict the presiding officer.

4 COMMISSIONER GILINSKY: Well, it is the 15-day  
5 period then, because the notification is something that you  
6 apparently do not --

7 MR. COTTER: No, it is the restriction, whether it  
8 is 15 days or 24 hours or whatever it is. It is a  
9 restriction on the presiding officer in his hearing  
10 authority to conduct the proceeding and do the business.

11 COMMISSIONER GILINSKY: Where is the restriction?  
12 We can always do that right now.

13 MR. COTTER: As a practical matter you can, and as  
14 a practical matter that is why this will not work. You  
15 cannot do that either.

16 COMMISSIONER GILINSKY: Why not? Why can we not  
17 do it?

18 MR. COTTER: It is impracticable.

19 COMMISSIONER BRADFORD: Well, we could. We do  
20 not.

21 COMMISSIONER GILINSKY: Well, we have not. But we  
22 certainly can after the fact say that we think the following  
23 issues need to be considered; and we could, if that policy  
24 is not followed, reach down and say we do not think that --

25 MR. COTTER: I am not questioning your authority

1 to do that at all. Certainly you can do that.

2           What I am saying is, as a matter of running an  
3 administrative law or adjudicatory proceeding, it is  
4 contrary to logic and common-sense to reach into different  
5 parts or pieces of it and say, "We are going to reach into  
6 this piece and we are not going to reach into that piece and  
7 we are going to restrict it here and not restrict it there."

8           COMMISSIONER GILINSKY: It is not matter of  
9 degree. If you did it all the time, obviously, the system  
10 would break down. You cannot delegate the authority to  
11 people and expect them to run errands and --

12           MR. COTTER: I have great faith in the "thin edge  
13 of the wedge" concept. I just think it is repugnant to me  
14 to appoint a hearing officer and to give him a general  
15 delegation of authority, as you have done, and to set up his  
16 jurisdiction, and then to start interfering in individual  
17 cases at individual places.

18           CHAIRMAN HENDRIE: But it is less that proposed  
19 here than a consideration of that basic grant of  
20 jurisdiction.

21           MR. COTTER: I have no trouble with the basic  
22 grant of jurisdiction. But you are talking about reaching  
23 into individual cases and individual issues.

24           CHAIRMAN HENDRIE: Well, a proposal which has been  
25 discussed is simply to delete sua sponte powers in the

1 boards at the operating license stage to determine matters  
2 put in controversy by the parties.

3 MR. COTTER: As they say in that case, call balls  
4 and strikes. I think you are wasting an awful lot of talent  
5 here if that is what you want. You should just have a clerk  
6 do that.

7 COMMISSIONER AHEARNE: Tony, are you saying that a  
8 resolution of the issues put in dispute by the parties are  
9 so easy that the resolution is trivial, that you do not need  
10 the board to resolve it?

11 MR. COTTER: No, I am not saying that. I am  
12 saying that if you are going to tie the hands of the people  
13 conducting these hearings that way by restricting what is a  
14 normal inherent authority of the hearing officer, then you  
15 are turning the proceeding into something else.

16 COMMISSIONER AHEARNE: Well, but when you say the  
17 "normal inherent authority," to start with, there are  
18 already constraints, and those are the constraints that are  
19 established by, if we make a --

20 MR. COTTER: It is limited jurisdiction.

21 COMMISSIONER AHEARNE: If we make a generic rule  
22 and there are some things that are automatically out of the  
23 purview of the hearing officer.

24 MR. COTTER: That is right.

25 COMMISSIONER AHEARNE: And the issue here is an

1 additional level of restriction in an operating license  
2 case.

3 MR. COTTER: There is a difference between  
4 restriction and jurisdiction. Jurisdiction says, "This is  
5 the territory over which you have authority." And the  
6 passing of a generic rule is the definition of that  
7 territory. The requirement that a hearing officer certify a  
8 question of judgment on an issue in a case up to the  
9 Commission, that is a restriction.

10 COMMISSIONER AHEARNE: Well, except that the  
11 question is not how does the hearing officer judge the issue  
12 in contention; it is should there be other issues in  
13 contention.

14 MR. COTTER: All right, I will accept that.

15 MR. BICKWIT: In the words of that case, the  
16 boards would not be asked to simply call balls and strikes  
17 with respect to the issues in contention; they would be  
18 adopting the normal administrative practice rule.

19 MR. COTTER: That is correct.

20 COMMISSIONER AHEARNE: May I ask Len a couple of  
21 questions?

22 CHAIRMAN HENDRIE: Pray do.

23 COMMISSIONER AHEARNE: Len, first you restricted  
24 it to operating license proceedings as opposed to operating  
25 license and, say, amendment.

1 MR. BICKWIT: No. We have drafted it that way,  
2 but in the cover memo we proposed, as does OELD, that it be  
3 expanded.

4 COMMISSIONER AHEARNE: Okay. I did not catch  
5 that. You have also on page 4, you have now expanded to  
6 also cover the appeal board. And you say that in a  
7 proceeding where, let's say, the appeal board determines  
8 that a matter existed has not been raised by the parties, do  
9 you mean raised by the parties at any stage in the earlier  
10 proceeding, specifically raised by the parties --

11 MR. BICKWIT: The first.

12 COMMISSIONER AHEARNE: Well, I understand that,  
13 but I just wanted to make sure I understood that that is  
14 what was meant here.

15 Now, when you have certification and as a result  
16 of Alan's suggestion, you would change it to notification,  
17 will that 15 days from the date of the notification, that  
18 would be the clock would start on the day the Commission,  
19 either SECY or OGC, whoever receives it, notifies. Is that  
20 correct?

21 MR. BICKWIT: Yes.

22 COMMISSIONER AHEARNE: So if the notification were  
23 by the rapid interagency mail service, that could be four or  
24 five days?

25 MR. BICKWIT: That is correct.

1 MR. ROSENTHAL: You might send it via Toledo and  
2 make sure the 15 days were consumed.

3 MR. BICKWIT: It would be 15 plus five. You would  
4 use the portion of the rules that says --

5 COMMISSIONER AHEARNE: But this is notification,  
6 and I assume notification is a receipt.

7 MR. BICKWIT: No, that was not intended. It was  
8 intended that the normal practice would apply. You file  
9 your notification, 15 plus 5 days later, the Commission has  
10 to act.

11 MR. ROSENTHAL: What is the five days for? To be  
12 served by mail?

13 MR. BICKWIT: Yes. It seems to me the rule that  
14 extended by five days, all of these requirements on  
15 recipients of pieces of paper --

16 MR. ROSENTHAL: Well, that's served by the United  
17 States Mail. I can get it in Mr. Fitzgerald's hands by  
18 Rapidfax within five minutes. There should not be any five  
19 days at all. I have some problems. I think 15 days ought  
20 to mean 15 days from the time that the general counsel's  
21 office actually has the notification in hand.

22 COMMISSIONER AHEARNE: I have to agree.

23 MR. ROSENTHAL: I do not see any reason for  
24 putting in a five-day mailing period.

25 MR. BICKWIT: I am just telling you what the

1 intent was.

2           COMMISSIONER AHEARNE: I would agree. It is 15  
3 days from receipt of that notification, and that  
4 notification could be done very rapidly. In some cases, it  
5 has taken a long time to get a notification.

6           MR. BICKWIT: That is not what it says, and it  
7 could be modified.

8           COMMISSIONER GILINSKY: Why do you need the 15-day  
9 period at all?

10           COMMISSIONER AHEARNE: Well, let me ask the other  
11 question. I guess I would prefer the 15 days to be tied to  
12 say that the "15 days without action by the Commission."  
13 And the reason I would like to put it that way is that 15  
14 days -- I imagine when the issue comes, that we will ask OGC  
15 to take a look at that issue, and if it is a complex issue  
16 it may take a little while to get that result. And then the  
17 Commission may wish to say, "This is a complex issue. We  
18 would like the board to hold on that until we resolve it."

19           MR. BICKWIT: Well, that is contemplated that the  
20 Commission can step in within that 15-day period and stop  
21 either temporarily or permanently the action of the boards.

22           COMMISSIONER AHEARNE: So your statement "the  
23 Commission directed not to consider" includes "not to  
24 consider at the moment" as well as "never"?

25           MR. BICKWIT: That is right. That was the intent.

1           COMMISSIONER AHEARNE: Oh, I see.

2           Okay, then the last question would be for Tony.

3 Tony, in your paper that you sent up this morning, you say  
4 that it could delay the process for requiring 15 days' delay  
5 when a party is urged that the board examination on admitted  
6 contention is actually a sua sponte question?

7           MR. COTTER: Normally, during the course of a  
8 hearing, the members of the board will have questions on any  
9 given contention.

10          COMMISSIONER AHEARNE: Right.

11          MR. COTTER: And if I were a party and did not  
12 want the issue to proceed, it certainly would always be open  
13 to me to say that the questioning has gone beyond the  
14 confines of the issue and that consequently it is a new  
15 question and that the board does not have the authority to  
16 proceed.

17          MR. ROSENTHAL: I think that is a substantial  
18 problem. I think if you go this route, you have got to be  
19 very clear in defining what is in fact a new issue as  
20 opposed to a board pursuing an existing issue, because Mr.  
21 Shapar and I have had disagreements over whether a  
22 particular appeal board inquiry represented an exercise of  
23 the sua sponte authority or was rather simply a pursuit of  
24 an issue that was already in contention, carrying that issue  
25 a little bit beyond the narrow confines of the contention

1 itself.

2 (Commissioner Bradford leaves meeting at 11:55.)

3 And if in fact a board strayed at all from the  
4 confines of that contention represents exercise of sua  
5 sponte authority subject to 15 days and all of this, there  
6 is an enormous portent for delay.

7 MR. SHAPAR: Of course, there is a portent for  
8 delay if the board takes a week to have a hearing on a sua  
9 sponte issue that the Commission does not think needs to be  
10 addressed at all.

11 COMMISSIONER AHEARNE: I think the point that --  
12 Ien, could you respond to that?

13 MR. BICKWIT: I am not sure I grasped the issue.

14 COMMISSIONER AHEARNE: The point I believe both of  
15 them are saying is that in a hearing, let us say, we have  
16 this rule in place and in a hearing a board member starts  
17 asking some questions. One of the parties says, "No, wait,  
18 that is beyond the framework of the contentions. You are  
19 now going into sua sponte, and you have to" --

20 MR. BICKWIT: The board will have to be the judge  
21 of that in the first instance. We have that problem under  
22 the existing rule.

23 (Commissioner Bradford returns to meeting at  
24 11:57.)

25 COMMISSIONER AHEARNE: You do say it is up to the

1 board to make that determination?

2 MR. BICKWIT: It is up to the board to make it,  
3 and under the existing rule the Commission can step in and  
4 say, "You are making it correctly," if it were monitoring  
5 the case.

6 MR. SHAPAR: And the parties really have no  
7 recourse, because they can object, but the board overrules  
8 them.

9 MR. ROSENTHAL: They can certainly request a  
10 recess, and if they are overruled they can apply to the  
11 Commission.

12 MR. SHAPAR: They can request it and it can be  
13 denied.

14 MR. COTTER: But they can apply to the Commission  
15 and the Commission can make up its mind.

16 COMMISSIONER GILINSKY: Does the board now find an  
17 issue is sua sponte?

18 MR. ROSENTHAL: The example that I had in mind a  
19 few minutes ago was in the Diablo security plan proceeding,  
20 where the board which had the adequacy of the security plan  
21 before it looked at the plan and one or two aspects of the  
22 plan they were concerned with that had not been specifically  
23 focused upon by the Intervenor, who, insofar as that board  
24 was concerned, they were not exercising their sua sponte  
25 authority. They had a question of the adequacy of the plan

1 before it. And this was just one or two little additional  
2 details.

3           On the other hand, when the executive legal  
4 director put its paper up a month or two ago, this was  
5 treated as having been an exercise by the board of a sua  
6 sponte authority.

7           Now, what the appeal boards do, at least, is if  
8 the board thinks that this is an exercise of sua sponte  
9 authority, it will so indict but --

10           MR. SHAPAR: That is not the case invariably with  
11 the hearing boards. In fact, on occasion there are  
12 objections by parties saying that the board in effect is  
13 exercising its sua sponte authority but it has not made a  
14 finding that it is a serious issue.

15           Even with the recent change in the Commission  
16 rules, the requirement is that only serious issues affecting  
17 public health and safety. And a board on occasion has not  
18 made that finding and has been asked to by a party. So it  
19 is not always the case that the hearing boards identify that  
20 they are indeed raising a sua sponte issue.

21           MR. COTTER: In a recent spent-fuel pool expansion  
22 -- I have forgotten the name of the case -- it was the first  
23 instance of double racking, and the physicist-engineer, a  
24 member of the board asked a considerable number of questions  
25 because he did not feel the staff had thought through, nor

1 had the Applicant, the details and the ramifications of this  
2 new storage configuration.

3           COMMISSIONER GILINSKY: But did he then identify  
4 that as --

5           MR. COTTER: He thought they were all within the  
6 realm of the issues that were presented.

7           COMMISSIONER GILINSKY: Well, then it is not sua  
8 sponte.

9           MR. COTTER: That is a good question.

10           (Laughter.)

11           MR. ROSENTHAL: The point I was making before is I  
12 think there has got to be some clarification. I do not  
13 think it is enough, as I think I heard Len suggest, that it  
14 is up to the board to decide whether it is or is not within  
15 the confines of the present case, or as a sua sponte  
16 exploration. I would agree, in the final analysis, it is  
17 for the boards to decide this.

18           But I think there has to be some generic guidance  
19 on this, because what the question really comes down to is  
20 whether sua sponte authority is being exercised only where a  
21 board is raising an issue that is quite discrete from the  
22 issues that have been put into controversy as opposed to the  
23 other theory that the board is to be considered as raising  
24 an issue sua sponte if, even though it is dealing with  
25 precisely the subject matter presented by contention, it

1 goes beyond the four corners of that contention.

2 I would like to see the Commission, if it going to  
3 impose some kind of requirement, that there be notification  
4 to it, lay down some guidelines so that the board is  
5 comfortable about whether in the particular instance it is  
6 or is not under an obligation to provide the notification.

7 MR. SHAPAR: I do not think it is practical to  
8 give that kind of guidance. I think the point is if it has  
9 been raised by a party -- it has not been raised by a party  
10 as sua sponte and it is not going to be possible to say  
11 where the interface is between expanding a contention and  
12 raising a new contention.

13 As a matter of fact, if it is considerable and  
14 legitimate concern, you might ask for comment on this  
15 specific point in the notice of proposed rulemaking.

16 COMMISSIONER GILINSKY: If you cannot draw that  
17 distinction, then what are we talking about?

18 MR. SHAPAR: We are talking about clearly where  
19 the matter is not a contention. If you want an example made  
20 out of thin air, one I have used before, if the contention  
21 in the case is shipworms in Barnegat Bay and the hearing  
22 board wants to bring up a Class 9 accident, that is clearly  
23 a sua sponte issue.

24 MR. ROSENTHAL: Nobody would disagree with that.  
25 But that class of cases I was raising falls on a --

1           MR. SHAPAR: I think you will find those areas to  
2 be rather rare. And what I think you are doing is taking  
3 these rare disagreements and saying it is difficult in the  
4 ordinary case to tell what is indeed a sua sponte issue. I  
5 think history tells us that is not true. In most cases  
6 where we have identified sua sponte issues, there has not  
7 been any disagreement about the fact they were sua sponte  
8 issues.

9           MR. COTTER: Yes, because the board identified  
10 them as such. That is not hard.

11          MR. SHAPAR: Not necessarily.

12          COMMISSIONER GILINSKY: When you enter upon a new  
13 area that was not raised by one of the parties, you issue  
14 some sort of order or statement?

15          MR. COTTER: Identifying it as a board question.

16          MR. SHAPAR: That is not always the case, no.

17          COMMISSIONER GILINSKY: Will that be uniform  
18 practice from now on?

19          MR. COTTER: It always has been.

20          MR. SHAPAR: No.

21          MR. COTTER: One of the advocates takes a  
22 different view.

23          MR. SHAPAR: You can go back and track the record.

24          COMMISSIONER GILINSKY: It sounds like there is no  
25 objection to that being uniform practice.

1 MR. SHAPAR: That is fine. It ought to be uniform  
2 practice.

3 MR. BICKWIT: It sounds like the rule would  
4 virtually require that it be uniform practice, because you  
5 have got to make a determination. I read that to mean you  
6 have got to --

7 COMMISSIONER GILINSKY: He is doing that now and  
8 that piece of paper comes to your office; right? That seems  
9 to me to constitute notification of the Commission, so long  
10 as your office is monitoring the proceedings.

11 Now, how much time elapses from the time you issue  
12 such a -- what is it -- a statement, an order, a question?

13 MR. COTTER: It would be an order identifying  
14 board questions.

15 COMMISSIONER GILINSKY: -- until the wheels start  
16 turning. Or do they start turning immediately in terms of  
17 effort being expended on the part of parties, the board, on  
18 that particular issue?

19 MR. COTTER: The wheels would effectively start  
20 turning immediately.

21 COMMISSIONER GILINSKY: And do these things tend  
22 to -- I am sure they vary -- but typically, issues that get  
23 dealt with over a short period of time, a long period of  
24 time, are we talking about days, weeks, months?

25 MR. COTTER: Some of them will run the length of

1 the proceeding. Others will be resolved, because the  
2 Applicants will be responsive to the problem which has been  
3 identified, and it will not go all the way through the  
4 hearing process.

5           COMMISSIONER GILINSKY: I guess what I am getting  
6 to is I wonder whether the practice of simply notifying --  
7 having these pieces of paper go to the general counsel's  
8 office and the general counsel monitoring the proceedings  
9 does not satisfy what is, you know, the object of the  
10 proposed rule.

11           MR. COTTER: I think it probably would.

12           COMMISSIONER GILINSKY: If the Commission wants to  
13 act, it can act. And it can certainly act after the fact in  
14 decisions on appeal. And it can certainly reach into  
15 proceedings if it feels that it has been exceeded by some  
16 unreasonable margin.

17           COMMISSIONER AHEARNE: At least in my view that  
18 would not meet the --

19           COMMISSIONER GILINSKY: What is it that is  
20 achieved by this 15-day business?

21           COMMISSIONER AHEARNE: Well, if it is 15 days in  
22 which the Commission takes some action, then what is  
23 achieved is to reiterate that the fundamental purpose of the  
24 operating license hearing is to resolve issues in dispute  
25 and that going beyond issues in dispute is an extraordinary

1 occurrence.

2           COMMISSIONER GILINSKY: Well, do you think that  
3 less issues will be dealt with in this way? Is that the  
4 idea? Do you think this will be a hurdle?

5           COMMISSIONER AHEARNE: As I have tried to say many  
6 times, I am trying to construct, at least for myself, a  
7 framework of what the hearing process should be. And in my  
8 mind, the operating license hearing should be a resolution  
9 of issues raised in dispute by the parties. And that is why  
10 you even have the hearing.

11           And so, going beyond -- and I will grant Tony's  
12 argument that there are a lot of very competent people on  
13 the boards, and so if they see something that the staff or  
14 ACRS has missed, that there then should be an opportunity  
15 for them to address that. But since that, to me, is a  
16 separate step in what the hearing process is, then I see it  
17 as needing some formal mechanism for an additional  
18 delegation of authority, and that additional delegation of  
19 authority is accomplished by this proposed rule.

20           COMMISSIONER GILINSKY: You are just saying it is  
21 closer to --

22           COMMISSIONER AHEARNE: Pardon me?

23           COMMISSIONER GILINSKY: Well, the delegation of  
24 authority is in the Commission's rules, and presumably the  
25 same standards would be applied either way, and you would be

1 notified. And the only difference is that on some issues,  
2 if you objected, you could not catch it to nip it in the  
3 bud.

4           COMMISSIONER AHEARNE: No; the fundamental  
5 difference, Vic, is what is the approach that all  
6 participants, including the board, take when they go to the  
7 operating license: Is it another level of an independent  
8 technical review, or is it a process to resolve issues  
9 raised in dispute by the parties?

10           I see the trend going towards the former. I am  
11 reaching the conclusion that it ought to be the latter.

12           MR. COTTER: I understood the purpose of it was --

13           COMMISSIONER GILINSKY: If you want to change the  
14 Commission's rules on sua sponte altogether, I understand  
15 that. But here we are just talking about the Commission  
16 having -- being notified so that if it wants to reach down  
17 it can reach down.

18           What I am saying is that the present process, if  
19 carried out with a little more alertness, will give you the  
20 same notification that the proposed rule gives you.

21           COMMISSIONER AHEARNE: It might give the same  
22 notification. It would not have the same philosophical  
23 impact.

24           COMMISSIONER GILINSKY: It will not inhibit the  
25 boards as much, or what? I am not sure it would not cut the

1 other way.

2           COMMISSIONER AHEARNE: It is a pejorative word  
3 that implies a real negative. I am trying to reiterate the  
4 point that I see the purpose of the operating license  
5 hearing to be a resolution of hearings of dispute. And if  
6 you expand beyond that purpose, then that ought to be a more  
7 formal step.

8           MR. COTTER: The adequacy of the staff's review?

9           CHAIRMAN HENDRIE: No. In fact, before 1975 the  
10 OL hearings were precisely as John would --

11          MR. COTTER: I am not talking about the findings.  
12 I am talking about the adequacy of the review.

13          MR. SHAPAR: That is initially in the uncontested  
14 case at the CP stage, as I recall the rules.

15          CHAIRMAN HENDRIE: And the operating license stage  
16 you only have a hearing if your parties want one. And in  
17 order for the parties to stay and put contentions on the  
18 table and get them accepted and up until, what, 1975, those  
19 were the only items that could be talked about in operating  
20 license hearings.

21          The boards did not rule on the adequacy of the  
22 staff's review, because in most cases -- in fact, in all  
23 cases -- there were very large portions of the staff review  
24 which ever came before the board, because they were not part  
25 of the argument over a contention.

1           At the present time, a very large part of the  
2 staff review at the operating license stage does not come  
3 before the boards. But if the boards think it is their  
4 mission to expand the scope of the OL hearing and in fact do  
5 a de novo review or at least an oversight review in the way  
6 they do at the construction permit stage, then that is a  
7 totally different concept of the hearing at the operating  
8 license stage.

9           Between us, I think, the regulations are on my  
10 side and John's.

11           MR. COTTER: The boards do not think they could do  
12 that, because there is no way they could conduct that kind  
13 of review.

14           CHAIRMAN HENDRIE: That is one of the practical  
15 reasons that they are not invited to in the regulations.  
16 Okay. You know, what we are arguing about is whether the  
17 boards should have the authority to pick up an issue on  
18 their own at the OL stage or what sort of limitations on  
19 that authority which they now have might want to be  
20 imposed.

21           But I do not think that any of us here are  
22 suggesting that it is the function of boards in operating  
23 license hearings to determine the adequacy of the staff  
24 review of the application for an operating license. That is  
25 not the way the regulations read. That has not been the

1 practice.

2           And, you know, one of the things that gives me  
3 concern is that I suspect in fact there are board members  
4 out there who think that either is their mission or ought to  
5 be their mission and are moving in that direction. And that  
6 is one of the reasons I am on the side of trying to prevent  
7 some limitation of sua sponte power, lest it be turned, in  
8 fact, into a general movement of board practice in that  
9 direction.

10           There is a substantial difference between the  
11 directions the board takes, it seems to me, in a  
12 construction permit case that is uncontested where the board  
13 specifically looks at what the staff has done and the  
14 application and sees if there is an adequate basis for the  
15 findings there.

16           But that is not the way the law lays out the OL.  
17 So, you know, I have got a lot of problems hearing about  
18 boards having a responsibility to judge whether the staff  
19 has done an adequate review at the operating license stage.  
20 But in the frame of a particular contention, obviously the  
21 staff has its view, as do the other parties, and they could  
22 make their case, and the board decides.

23           MR. ROSENTHAL: I do not think the appeal boards  
24 have that view of their function. On the other hand, it is  
25 certainly true that it would be an enormous shot with the

1 members of the appeal panel -- and I make specific reference  
2 to the technical members -- if sua sponte powers were  
3 stricken.

4           Now, they are not suggesting that a plant that  
5 does not go through an OL adjudicatory proceeding is  
6 perforce unsafe. What they are saying is that if they are  
7 brought into the proceeding, the happenstance somebody filed  
8 a contention, but there they are and they see something  
9 which to them poses a very serious safety question, they  
10 feel they have to be able to explore that.

11           And I just tell you it is not a view that they are  
12 ombudsmen, that their stamp of approval on the entire  
13 reactor is necessary to ensure safety or anything else. I  
14 recognize some of these facilities will be licensed for  
15 operation without any board being involved at all.

16           But it is just simply there they are, they have  
17 been put in this case, and if they see something they regard  
18 as serious, they feel that they have a professional  
19 responsibility to get into it. And I can tell you that my  
20 colleagues -- and I think I speak for them directly -- would  
21 have a great deal of difficulty signing off a particular  
22 plant within the confines of a contested issue if, in doing  
23 that, they would have to turn their back on some other  
24 serious problem. That is the way they see it.

25           COMMISSIONER AHEARNE: That is the same point that

1 Tony made. The question, whether people would be able to --  
2 members would be able to sign off. Of course, I think that  
3 the proposed rule would provide the mechanism for that  
4 member who believes there is a serious safety issue to raise  
5 that with the Commission.

6           CHAIRMAN HENDRIE: That argument comes not from  
7 the proposition that if there is a serious safety question,  
8 the board ought not to ask, the board ought to just leave it  
9 alone, but rather on the one hand how it should be treated  
10 and on the other that probably, from my standpoint, the  
11 concern is -- the indication in one or two cases, at least  
12 -- is that what constitutes serious a health, safety, or  
13 environmental question, that the threshold may be moving  
14 downward.

15           For instance, it is not in the least clear to me  
16 why in the spent-fuel pool case the whole range of  
17 unresolved safety issues, generic unresolved safety issues  
18 on the Commission's list is necessarily a set of issues in  
19 that case, and what does it have to do with the spent-fuel  
20 pool?

21           The rest of us need to get to lunch. Let me  
22 suggest that -- why don't we come back, since the  
23 proposition here was to decide whether or not this paper or  
24 some version of it should or should not be considered for  
25 proposed -- for comment. And since we have got the Part 2

1 things to consider that way, why don't we stop now and pick  
2 this up as part of the next discussion, which would be on  
3 the 26th?

4           Okay. Thank you.

5           (Whereupon, at 12:20 p.m., the Commission  
6 adjourned.)

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NUCLEAR REGULATORY COMMISSION

This is to certify that the attached proceedings before the  
COMMISSION MEETING

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in the matter of: Public Meeting - Discussion of Revised Licensing  
Procedures

Date of Proceeding: May 19, 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

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Official Reporter (Typed)



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Official Reporter (Signature)