

NUCLEAR REGULATORY COMMISSION

ORIGINAL

COMMISSION MEETING

RETURN TO SECRETARIAT RECORDS

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In the Matter of: PUBLIC MEETING

DISCUSSION OF REVISED LICENSING PROCEDURES

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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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PUBLIC MEETING  
DISCUSSION OF REVISED LICENSING PROCEDURES

Room 1130  
1717 H Street, N.W.  
Washington, D.C.  
Tuesday, May 26, 1981

The Commission met at 2:07 p.m., pursuant to  
notice.

BEFORE:

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

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ALSO PRESENT:

- Samuel J. Chilk, Secretary
- Leonard Bickwit, Esq., General Counsel
- A. Rosenthal
- H. Shapar
- A. Cotter
- D. Rathbun
- H. Denton
- M. Malsch

DISCLAIMER

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1 proposition in SECY 81-304--

2 MR. BICKWIT: Right.

3 CHAIRMAN HENDRIE: -- that the Boards get ready to  
4 exercise the power, let the Commission know, and the  
5 Commission would have some number of days to either say  
6 something or remain silent. If they remained silent, the  
7 Board would go ahead.

8 MR. BICKWIT: That's correct.

9 We modified the proposition to make clear that  
10 it's 15 days from the receipt of notification. We also, in  
11 response to John's question, stated that what we had in mind  
12 in drafting this was that the Commission could say not only  
13 "no," but could say we are not yet ready to decide the  
14 matter and therefore toll the running of the clock.

15 We considered a point raised by Alan that you may  
16 want to differentiate to the extent possible between items  
17 which are in fact sua sponte, and actions which are within  
18 the scope of issues that are in fact in controversy. We  
19 went back to the drawing board to try to provide some  
20 additional guidance on that matter, and what we have does  
21 not provide much in addition but could be added rather  
22 easily.

23 We simply would include in the rule language that  
24 would read as follows: "The Commission recognizes that it  
25 is common for Boards to raise questions about the subject

1 matter of the proceedings before them, so long as such  
2 questions are reasonably within the scope of the matters in  
3 controversy. They do not constitute the raising of an  
4 issues sua sponte. The Commission recognizes further that  
5 there may be close questions in some cases as to whether an  
6 issue is or is not within the scope of matters already in  
7 controversy. The Commission has confidence in the ability  
8 of the Boards to make those decisions which will be  
9 reversible only for a demonstrated abuse of discretion."

10 So that is an issue that we propose to resolve  
11 that way. But we acknowledge that it is not clear guidance  
12 to the Boards and we came up short in our efforts to draft  
13 anything that was clearer.

14 CHAIRMAN HENDRIE: Len, is there a revised 304 or  
15 a 304a that I should have and don't seem to have?

16 MR. BICKWIT: No, there is not. These are just  
17 some proposals. A suggestion, I think, is that maybe there  
18 should have been, and I take that as perhaps correct.

19 (Laughter.)

20 CHAIRMAN HENDRIE: No, I just wondered if I had  
21 gotten something and didn't have it in hand.

22 MR. BICKWIT: All right. Then there was also a  
23 suggestion in the original paper that we would extend this  
24 to CP and OL amendments, and we have drafted language which  
25 would allow that to be done. Now those are the --

1           COMMISSIONER AHEARNE: Wait, wait. I don't  
2 understand how you could extend it to CP.

3           MR. BICKWIT: CP and OL amendments.

4           COMMISSIONER AHEARNE: Oh. Okay.

5           MR. BICKWIT: Those are the "small" questions that  
6 we've attempted to address over the last week.

7           The larger question is whether there are three  
8 votes for this concept, and that was unresolved at the  
9 conclusion of the last session.

10          CHAIRMAN HENDRIE: There is a comment in Tony's  
11 memorandum on the 304 paper down at the end where, after  
12 making a basic argument that he doesn't think these changes  
13 are necessarily a very good thing, that if the Commission  
14 felt inclined to go ahead with something along this line,  
15 that the sua sponte issues to be referred to the Commission  
16 or the Commission notified the Board was about to take them  
17 up be limited to those of a generic character. Or at least  
18 that's the way I read your III, Tony.

19          MR. COTTER: I think that is a fair way --

20          CHAIRMAN HENDRIE: Thus attempting to separate  
21 possible matters that the Board would take up on its own  
22 into those unique to the case in hand, where you would  
23 propose that there be no change in the present regulations  
24 on sua sponte powers, as contrasted with those matters which  
25 could be fairly considered generic -- that is, applying to a

1 number of cases -- and in those, the Commission would be  
2 notified.

3 MR. COTTER: That's correct. The Panel felt and  
4 does feel very strongly about the pursuit of the sua sponte  
5 authority in connection with site-specific and  
6 plant-specific questions.

7 COMMISSIONER GILINSKY: What's the rationale for  
8 this distinction?

9 MR. COTTER: Well, that it --

10 COMMISSIONER GILINSKY: You would in both cases be  
11 dealing with a specific plant. It's just that in some cases  
12 the problem would have implications for other reactors and  
13 for others it wouldn't.

14 MR. COTTER: That's right.

15 COMMISSIONER GILINSKY: Now why would you treat  
16 them differently?

17 CHAIRMAN HENDRIE: I guess you could argue that  
18 where an issue ran beyond the immediate case at hand and was  
19 of interest for other cases, that the Commission's interest  
20 in knowing the Board was going to take the matter unto  
21 itself might be higher and the Commission might choose, for  
22 instance, to say, wait a minute, that's a good question, we  
23 ought to deal with that on a generic basis and we propose to  
24 do so.

25 MR. COTTER: That's a fair statement. From my own

1 standpoint, I have a hard time envisioning what in effect is  
2 in the nature of an appellate review of an immediate  
3 question within an administrative hearing which relates  
4 solely to the plant in question.

5           COMMISSIONER GILINSKY: Would it necessarily be  
6 clear to the Board whether a problem was a generic problem  
7 or not? It would see it in the context of that particular  
8 case. Sometimes it would certainly be clear, but I would  
9 think other times it wouldn't be clear.

10           MR. SHAPAR: I think it would be very difficult to  
11 discern, certainly whether or not it's generic or  
12 site-specific or plant-specific in many cases.

13           COMMISSIONER GILINSKY: Only the staff that  
14 reviews a large number of applications --

15           MR. COTTER: Why do you say that? I don't see  
16 that.

17           COMMISSIONER GILINSKY: -- would I think be in a  
18 position to compare them. Not necessarily only the Staff,  
19 but at least the Staff would be in a better position.

20           MR. COTTER: I don't see that it would be that  
21 difficult. I don't know why you say that, Howard.

22           MR. SHAPAR: Experience.

23           MR. COTTER: Well, is there a specific instance in  
24 your experience that you could cite?

25           COMMISSIONER GILINSKY: Tell us, Howard.

1 MR. SHAPAR: Well, let's take a look at an issue  
2 like -- I'm not talking about any specific case -- whether  
3 or not you need to apply an emergency plan to low power  
4 operation. Is that generic or is it specific?

5 MR. ROSENTHAL: It's generic.

6 MR. COTTER: It's generic.

7 MR. ROSENTHAL: I've never had any difficulty  
8 differentiating between site- or reactor-specific questions  
9 and questions that had decided generic implications.  
10 Sometimes you wouldn't know whether the issue would arise in  
11 the context of other plants, and if so, how many. But you  
12 would know at least that it was an issue that had that  
13 potential and it wasn't one that was confined to the site or  
14 reactor involved.

15 MR. SHAPAR: What about the Board decision on that  
16 Florida case? Was that specific or generic?

17 MR. ROSENTHAL: Which one are you talking about?

18 COMMISSIONER BRADFORD: St. Lucie, I take it.

19 MR. ROSENTHAL: St. Lucie?

20 MR. SHAPAR: Yes.

21 MR. ROSENTHAL: Well, that was in the context of  
22 the St. Lucie plant. That certainly had possible generic  
23 implications.

24 MR. SHAPAR: Was it clearly specific or generic?

25 MR. ROSENTHAL: It was clearly -- It clearly had

1 the potential of involving other plants. Now if you've got  
2 an issue as to what is the seismicity of the Diablo Canyon  
3 site, that is clearly a site-specific issue and it does not  
4 have that potential. But I think you can draw a clear  
5 dichotomy between questions that are perforce reactor or  
6 site-specific and questions which have a potential for  
7 generic implications, even though you may not be able to  
8 determine, as you couldn't determine at St. Lucie, how many  
9 plants that might affect. I think that dichotomy is  
10 possible.

11 MR. SHAPAR: Of course, since the rule is only  
12 directed at notification and the Board is free to go ahead  
13 and consider it unless the Commission says otherwise, I  
14 really don't see any justification for trying to distinguish  
15 between generic matters and specific matters.

16 MR. COTTER: Well, if you're sitting at a hearing  
17 that you think has maybe one issue in it and you think it's  
18 going to last two or three days, and then the question  
19 arises and you have to notify the Commission, then you start  
20 the 15 days running and you have to presumably recess the  
21 hearing, indicate you can't complete the hearing at that  
22 time. And you also, if I understand the amendment  
23 correctly, may run into a situation where the Commission  
24 finds that it cannot act, but it wants to take an active  
25 review of the subject, and you would have to toll the

1 running of the 15 days, which could then extend it out for  
2 an indeterminate period of time.

3 MR. SHAPAR: But why shouldn't the Commission have  
4 the flexibility, if the issue is indeed sua sponte and is  
5 not raised by any party, to refer the matter to the ACRS, to  
6 call in an outside group; or if it's basically a legal  
7 question, to decide the matter themselves? Why shouldn't  
8 they have that flexibility?

9 COMMISSIONER BRADFORD: But Howard, don't we -- I  
10 ask this with some trepidation as one of the creators of  
11 this scheme originally --

12 MR. SHAPAR: I'm trying to support you,  
13 Commissioner.

14 (Laughter.)

15 COMMISSIONER BRADFORD: Well, I've become a moving  
16 target.

17 (Laughter.)

18 COMMISSIONER BRADFORD: Don't we in fact have that  
19 option under the present scheme as well, simply by telling  
20 OGC in the course of its monitoring of proceedings that  
21 we're especially concerned about sua sponte matters and we  
22 would like them to call them to our attention on a more  
23 accelerated scale than even the normal monthly reports?

24 MR. SHAPAR: I think that's a fair point. I think  
25 the candid answer to it would be that by having a sua sponte

1 rule it does as a practical matter cause the Boards to  
2 exercise some self-discipline that might otherwise not be  
3 applied.

4 MR. ROSENTHAL: It seems to me that the response  
5 to Tony might be this. That is, that if this is truly a sua  
6 sponte issue, one which is not within the scope of the  
7 matters put in controversy, it oughtn't to be raised for the  
8 first time at the hearing. If the Board is going to raise  
9 that, they ought to raise it well before the hearing starts,  
10 because it seems to me quite unfair to the parties to be  
11 asked to address at a hearing an issue which is beyond the  
12 pale of the -- beyond the scope of the issues that were  
13 placed in controversy, without reasonable advance notice.

14 So I would ask you as a practical matter --

15 MR. COTTER: Well, the hearing is the exception to  
16 the rule.

17 MR. ROSENTHAL: I would ask as a practical matter,  
18 how often is it going to happen, or should it happen that in  
19 the middle of a hearing a Board raises an issue that is not  
20 interwoven with the matters in controversy, with the result  
21 that the Board can, under the 15-day requirement, have to  
22 adjourn? I don't think that should happen very frequently,  
23 if at all.

24 MR. COTTER: I don't know that it has, but --

25 CHAIRMAN HENDRIE: Tony, don't most of these sua

1 sponte --

2 MR. COTTER: -- in the 12 cases in the last 6  
3 years, so far as I know, they have all been before  
4 hearings.

5 CHAIRMAN HENDRIE: Typically they come up when  
6 people are arguing about contentions, don't they?

7 MR. COTTER: Yes.

8 CHAIRMAN HENDRIE: The Board gets interested in --

9 MR. COTTER: Sometimes they arise in  
10 connection--

11 CHAIRMAN HENDRIE: -- some question which for one  
12 reason or another is not accepted as a contention on behalf  
13 of one of the parties.

14 MR. ROSENTHAL: It comes up that way, Mr.  
15 Chairman, or it can come up during the course of the  
16 examination prior to the hearing by the Board members of the  
17 SER or some other document.

18 My point simply is that it ought to come up  
19 considerably before the hearing, so that if the Board really  
20 wants that issue explored the parties have appreciable  
21 advance notice of the fact that they're going to be called  
22 upon to address the question.

23 MR. SHAPAR: And I think that is when in fact when  
24 they have arisen, early on in the proceedings when the sua  
25 sponte authority has been used. As a matter of fact, the

1 only place they come in at the end of the hearing is when  
2 the Appeal Board uses its sua sponte authority.

3 MR. ROSENTHAL: I might say, we don't have any  
4 problem. I'm now just speaking in the context of the Appeal  
5 Boards and their raising of sua sponte issues. Of course  
6 they're in a difference context, but we have no problem with  
7 15 days' notice.

8 COMMISSIONER GILINSKY: Why do we need the 15-day  
9 period?

10 MR. ROSENTHAL: You're asking me?

11 COMMISSIONER GILINSKY: Yes.

12 MR. ROSENTHAL: I don't think -- If you recall, my  
13 view of it is that there is no necessity for it. But there  
14 was some concern expressed that this sua sponte authority  
15 has been or might be abused by the Boards. My feeling about  
16 that was that if there is that feeling and there is also the  
17 feeling that, to avoid abuse, the Commission should have an  
18 opportunity to look at what the Board proposes to do, that  
19 this is a mechanism for accomplishing that purpose.

20 COMMISSIONER GILINSKY: Well, no, there is the  
21 notification, and there is the 15-day waiting period.

22 MR. ROSENTHAL: Well, the Commission obviously  
23 needs time -- I assume what will happen is: The  
24 notification will go in the first instance to the General  
25 Counsel as a practical matter, and the General Counsel I

1 take it needs some period of time in which to provide its  
2 advice to the Commissioners; and then I take it the  
3 Commissioners need some time in which to decide whether to  
4 step in or whether to extend the period for stepping in or  
5 whatever. That's what I understood the 15-day period was  
6 for.

7           COMMISSIONER GILINSKY: Well, but it isn't as if a  
8 lot is going to happen in 15 days.

9           MR. SHAPAR: Well, I would answer your question  
10 differently.

11           CHAIRMAN HENDRIE: The 15 days is primarily to  
12 provide some time after which the Board is free to go ahead  
13 if it hasn't heard from the Commission. It's a compelling  
14 mechanism on the Commission to -- so that the Board simply  
15 doesn't refer an issue up here or notify the Commission and  
16 then it doesn't hear anything and two weeks go by, and three  
17 and four, and the Board doesn't know whether it can get on  
18 with the hearing, or whether it's going to be told to treat  
19 that issue or not, and --

20           COMMISSIONER GILINSKY: We can always step in,  
21 even after the 15 days.

22           MR. SHAPAR: But resources may have been expended  
23 on defining the issue --

24           MR. COTTER: Well, the 15 days are not really  
25 compelling, because they can be suspended. So that it is

1 not a meaningful compulsion.

2 MR. ROSENTHAL: Well you can do that, but I would  
3 certainly hope that the Commission would be able, either in  
4 the 15 days or in whatever period it chose to extend that 15  
5 days by, to make its determination; because it seems to me  
6 it is very disorderly, if I may use that term --

7 CHAIRMAN HENDRIE: Disruptive to the hearing.

8 MR. ROSENTHAL: -- for the Board, 15 days go by,  
9 there's nothing happened, the Board goes forward, the  
10 parties prepare testimony, the Board is out there conducting  
11 a hearing, and all of a sudden the word comes out that the  
12 Commission has decided, for whatever reason, that it doesn't  
13 wish the Board to explore that.

14 It seems to me that if the Board is going to move  
15 forward and we're going to have a system where the  
16 Commission is exercising this oversight, that the Board is  
17 entitled to know within a particular period of time -- the  
18 Commission again can extend it -- whether or not the  
19 Commission is going to step in or not. I mean, the Board  
20 and the parties should not be walking on eggshells,  
21 wondering from day to day whether suddenly the plug is going  
22 to be pulled.

23 MR. BICKWIT: I think the difference in part is  
24 psychological, that if you have a 15-day period then the  
25 Commission I think is more likely to step in on day 15 than

1 it would if you didn't, and the matter were being in fact  
2 pursued. I think it is always easier to prevent the train  
3 from starting than to stop it once it is in motion.

4 In addition, there is -- as Howard pointed out,  
5 there is the resource consequence associated with what  
6 happens during that 15 days if the Commission ultimately  
7 decides that it's not a good idea to go forward.

8 On the other side is the interest involved in  
9 allowing the Board to pursue in a free-flowing way the  
10 matters that it considers ought to be raised. And I think  
11 if there is one proposition you can agree on, the  
12 Commission-- there will be fewer actual exercises of the sua  
13 sponte authority if you've got a 15-day period than if you  
14 don't.

15 I think it really ought to turn on how much you  
16 want that power to be exercised, and how much in the way of  
17 restraint you want to put on them.

18 MR. ROSENTHAL: Are you suggesting that the Boards  
19 are going to be less prone to resort to that authority if  
20 they have to give 15 days' notice?

21 MR. BICKWIT: Yes.

22 COMMISSIONER GILINSKY: I'm not sure that that's  
23 right.

24 MR. ROSENTHAL: I can tell you that's not likely  
25 to be the case with the Appeal Boards. I can't speak for

1 the Licensing Boards.

2 MR. BICKWIT: That would be part of my response.  
3 The other part would be that the Commission would be more  
4 likely to step in if it's got 15 days.

5 COMMISSIONER GILINSKY: I'm not sure.

6 MR. SHAPAR: I think Len is right, because I think  
7 we've had some experience where the Boards are actually  
8 making the finding that it is a serious matter before they  
9 raise the issue. Now if the rules require that there be  
10 notification when indeed they are purporting to use their  
11 sua sponte authority, I think the fairness dictates the  
12 answer that: Yes, there is at least a chance that the sua  
13 sponte authority will be used less frequently.

14 COMMISSIONER GILINSKY: Well, there is certainly a  
15 chance.

16 MR. SHAPAR: Well, I think it's human nature.

17 COMMISSIONER GILINSKY: Human nature also, it  
18 seems to me, suggests that with this 15-day system, once the  
19 Board has thrown it up here and the Commission hasn't acted,  
20 in effect the Commission has approved that contention, and  
21 the Board can then go and exercise it to the full, knowing  
22 it's acting with complete Commission approval. So it's not  
23 clear to me which way this would go.

24 MR. BICKWIT: Well, if you accept that the  
25 Commission is more likely to come in --

1           COMMISSIONER GILINSKY: Oh, I don't know.

2           MR. BICKWIT: -- if there is a 15-day period, and  
3 I think you would probably accept that, then I think it  
4 follows that a Board is a little less likely to subject  
5 itself to that if there is a 15-day period.

6           COMMISSIONER BRADFORD: Well, except when this  
7 proposition came up about six weeks ago for the first time,  
8 it seems to me that the meeting closed with someone-- I  
9 think perhaps Victor-- having said that if all that was  
10 involved was sending a note to the Commission, the Board was  
11 in fact more likely to raise issues on its own than it was  
12 if they had actually to take them up and pursue them on  
13 their own hook; that we were likely to be deluged in fact  
14 with memos saying: Wouldn't you like us to look into these  
15 items? Whereupon at least some Commissioners were  
16 sufficiently chilled by that idea that you will remember  
17 that we went a month-and-a-half without discussing the sua  
18 sponte rule.

19                   (Laughter.)

20           COMMISSIONER BRADFORD: And it's only lately that  
21 it has wormed its way back, and now we are treating with  
22 equal seriousness the proposition that in fact there will be  
23 far fewer sua sponte issues laid before us; and the fact is,  
24 I guess, we just don't know.

25           MR. SHAPAR: I think we know.

1           MR. ROSENTHAL: We don't know, but I would again  
2 say that where the Appeal Boards are concerned it's going to  
3 be a totally neutral factor. It's neither going to increase  
4 them nor decrease them, and I could also tell you --

5           COMMISSIONER GILINSKY: It's quite an onous to  
6 have on us.

7           (Laughter.)

8           MR. ROSENTHAL: -- that I would be extraordinarily  
9 unhappy if it came to my attention that one of my Boards  
10 decided not to explore an issue that they otherwise would  
11 have explored simply because they have to put it up to the  
12 Commission. I think indeed that that would be a derogation  
13 of their responsibilities. I don't think it should have any  
14 effect one way or the other, and I don't think in the case  
15 of the Appeal Boards it will.

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1           COMMISSIONER AHEARNE: If I could speak in favor  
2 of the proposal, let me just say this --

3           COMMISSIONER GILINSKY: If you could just get e  
4 that statement --

5           CHAIRMAN HENDRIE: Another case where what we do  
6 makes no difference.

7           (Laughter.)

8           COMMISSIONER GILINSKY: Another chapter of  
9 "Nothing Matters."

10          (Laughter.)

11          COMMISSIONER AHEARNE: Well, I am not sure if it  
12 is necessarily going to be a chapter of "Nothing Matters."  
13 The Boards obviously can and will speak for themselves.

14          The purpose of my original memo months ago which  
15 at least did discuss this particular issue was that I still  
16 believe that the fundamental purpose of the operating  
17 license hearing is, one, to resolve issues raised in dispute  
18 by the parties to the hearing. Therefore, I do believe that  
19 a Board raising an issue on a sua sponte is a sufficiently  
20 unique situation that the Commission should be notified. It  
21 should have that opportunity. And that is the main purpose  
22 of my being interested in any of these approaches, including  
23 this one.

24          COMMISSIONER GILINSKY: From what Tony says, we  
25 are notified.

1           COMMISSIONER AHEARNE: Vic, the notification that  
2 occurs sort of, that by keeping track and such -- you have  
3 been here longer than any of us; you know there is a  
4 blizzard of paper. That just is not the same. The reason--  
5 you can see the Licensing Board is very disturbed by this  
6 proposal, very disturbed by it. Whether it is a good or bad  
7 proposal, it is obviously a significantly different  
8 proposal.

9           COMMISSIONER GILINSKY: What I am saying is if the  
10 Commission is interested, then the General Counsel's office  
11 will collect those pieces of paper and put them in front of  
12 you. And the only thing at issue here is whether you want  
13 to formalize it further and introduce a 15-day delay.

14           COMMISSIONER AHEARNE: Or notification.

15           MR. SHAPAR: The General Counsel's office may have  
16 difficulty in spotting when that authority is exercised if  
17 the Board doesn't make the finding that is in the  
18 regulations. And I am saying that the Boards are not in all  
19 cases making that finding.

20           COMMISSIONER GILINSKY: Well, maybe the Board  
21 ought to make the finding. Well, Tony said they did. And  
22 if they do not, I assume they will.

23           MR. BICKWIT: I think something can be done about  
24 it short of going --

25           MR. COTTER: It could be a statement of an

1 advocate's position and that would be one party to the  
2 proceeding.

3 MR. SHAPAR: No more of an advocate than you,  
4 Tony.

5 COMMISSIONER GILINSKY: I thought you said that is  
6 your current practice to issue an order.

7 MR. COTTER: Yes.

8 COMMISSIONER GILINSKY: So there will be an  
9 order. And if the Commission is interested -- and I think  
10 they should be interested -- that order is going to appear  
11 on your desk.

12 COMMISSIONER AHEARNE: And I believe that that  
13 order, in effect, ought to be an order or a request to issue  
14 an order, whichever it is, that there ought to be a period  
15 of time before it takes effect.

16 COMMISSIONER GILINSKY: Well, the reason I raised  
17 the question about that is, I wondered if you were not  
18 introducing a cumbersome element that complicates things,  
19 rather than --

20 COMMISSIONER AHEARNE: It does. It does  
21 complicate it. Absolutely.

22 COMMISSIONER GILINSKY: But not necessarily one  
23 from your point of view that is going to work to reduce the  
24 number of these issues. I think it is just going to  
25 complicate. I am not sure, but at least I think it has the

1 potential for just complicating things procedurally.

2           COMMISSIONER AHEARNE: Vic, you are right. It may  
3 increase the number of issues. But whichever way it cuts,  
4 it will definitely mean that the Commission has formally--  
5 because I am sure the General Counsel will, if there is a  
6 15-day in there, make sure that we get that in front of us  
7 within those 15 days -- we will have formally have had an  
8 opportunity to look at it, which cuts in my direction that I  
9 am interested in in saying that a Board raising sua sponte  
10 is an unusual situation.

11           MR. ROSENTHAL: You also ought to remember that  
12 frequently the Board will identify the issue it is raising  
13 on its own in the midst of a long prehearing conference  
14 order, which is essentially addressed to other matters. It  
15 may be on page 18 that the Board notes that it has called  
16 upon the parties to address this issue. And I think it is  
17 putting a substantial burden on the General Counsel's  
18 office-- although Len can speak for himself -- to have the  
19 monitors responsible for reading those things with such care  
20 and so rapidly that they pick up those things. At least, if  
21 it is a separate piece of paper, then the focus is right on  
22 it.

23           COMMISSIONER GILINSKY: All right. I thought it  
24 was. I didn't realize it could be part of --

25           MR. ROSENTHAL: That is not necessarily the case,

1 because I just saw one in the two couple of days.

2           COMMISSIONER GILINSKY: Okay. Suppose we have a  
3 separate piece of paper which then appears here; and the  
4 Commission, if it is interested, will deal with it. I  
5 wonder whether the 15-day or whatever-day period it is, is  
6 something --

7           MR. ROSENTHAL: But if the Commission does not  
8 deal with it promptly -- I mean, my concern about the 15  
9 days, or the reason that if there is going to be specific  
10 notification when the Commission has the opportunity to  
11 again pull the plug, I am very anxious to have there a set  
12 period, because I do not want, frankly, the Commission to  
13 have a blank check in that regard. I do not think it is  
14 fair to the Board.

15           COMMISSIONER GILINSKY: The Commission always has  
16 a blank check.

17           MR. ROSENTHAL: Well, not as a practical matter  
18 because if --

19           COMMISSIONER GILINSKY: Well, but this is going to  
20 depend on how many of these issues the Commission decides to  
21 knock out of the hearing. If the Commission seldom does  
22 this, then people are not going to be on tenterhooks if the  
23 Commission is not going to do it.

24           MR. ROSENTHAL: We are always on tenderhooks. If  
25 the Commission is constantly doing it, well, then, I suppose

1 we --

2 MR. ROSENTHAL: Well, we are always on  
3 tenderhooks, because you never know when is the first time  
4 it is going to happen. I would be very hopeful-- I want to  
5 be perfectly candid about this --

6 COMMISSIONER GILINSKY: I know what you are  
7 saying.

8 MR. ROSENTHAL: -- that the Commission not  
9 exercise the clear authority it has to do this at any time  
10 down the road. I think that this Commission owes it to the  
11 Boards, if it is going to reserve this right, to exercise it  
12 within a prescribed period, whether it be 15 days or 20 days  
13 or whatever; and that it be an extraordinarily rare instance  
14 that the period has gone by without there being an extension  
15 when the Commission pulls that plug.

16 COMMISSIONER GILINSKY: But we are going from  
17 questioning these issues to giving them the stamp of  
18 approval in a way that cannot be undone --

19 MR. COTTER: That is the major question I have.

20 COMMISSIONER GILINSKY: -- which seems to be going  
21 to the opposite extreme.

22 MR. ROSENTHAL: I do not think it is necessarily a  
23 statement of approval. You do not have to regard it as  
24 affirmative approval. It is just that you are not going to  
25 step in.

1 COMMISSIONER AHEARNE: It's not disapproval.

2 MR. ROSENTHAL: That does not mean that you are  
3 affirmatively endorsing what the Board has done. There  
4 seems to me to be a middle range. On the one hand --

5 MR. COTTER: But does it not open up the  
6 Commission to the charge that they have prejudged the  
7 issue?

8 COMMISSIONER AHEARNE: No, it does not. The  
9 Boards, as Vic has pointed out many times, the Boards are  
10 the agents of the Commission. If they are out there to  
11 resolve these issues in dispute, here comes a time when the  
12 Board decides: In addition to the issues in dispute among  
13 the parties, they want to raise something. They are out  
14 there as the agents of the Commission. But by this process  
15 that has been proposed, it does not say the Commission is  
16 stamping it with approval; it is just that there is a formal  
17 mechanism for the Commission to note that the Board is now  
18 taking that step and is not disapproving it.

19 MR. COTTER: If you could keep it that simple.

20 COMMISSIONER GILINSKY: It seems to me there will  
21 be a tendency to regard this as a Commission approval,  
22 because just as Alan says, he wants to have some confidence  
23 that the Commission is not going to step in after that  
24 point. So the Commission after 15 days is saying, "Wait a  
25 minute, let's not give them that approval. So-and-so is out

1 of town, and we cannot round up the group. And we will  
2 extend it another five days, another ten days." And when  
3 you let it in, it is going to be late.

4 I think it is just going to mess up hearings. I  
5 would have the Commission-notify period, notified more  
6 formally than now.

7 MR. BICKWIT: Mr. Chairman, I think you have got  
8 two propositions on the table -- and I do not hear any minds  
9 being changed --

10 (Laughter.)

11 MR. SHAPAR: One with notice and one without.

12 COMMISSIONER GILINSKY: We have not heard from  
13 Joe.

14 CHAIRMAN HENDRIE: Let me see if people are ready  
15 over here to signal generally where they come out. The  
16 discussion, hopefully, has gone on long enough to bring back  
17 to mind last week's discussion.

18 The general proposition is to ask the Boards to  
19 notify the Commission when they propose to take up an issue  
20 in an OL proceeding or possibly also CP and OL amendments  
21 when they propose to take up an issue on their own hook.

22 The intent, of course, is to give the Commission a  
23 chance to say, "Wait a minute. We would prefer to see that  
24 dealt with some other way."

25 How do sentiments stand along the table with

1 regard to the basic proposition of Commission notification  
2 when the Boards intend to take an issue up on their own? Is  
3 it a majority that leans in that direction?

4 COMMISSIONER GILINSKY: (Nodding affirmatively.)

5 COMMISSIONER AHEARNE: (Nodding affirmatively.)

6 CHAIRMAN HENDRIE: Peter, I have read a "nod" on  
7 either side of me. What is your feeling?

8 COMMISSIONER BRADFORD: I am all for having the  
9 Commission notified. I think after all I have heard about  
10 the tangles and signals and tealeaf-reading that would go on  
11 in the Boards, I would just as soon for the time being task  
12 OGC to be the one who notifies us. If we want the Boards to  
13 say they will use red-lined paper when the decision contains  
14 a sua sponte concern to make it easier for OGC to pick it  
15 up, all right.

16 But for me, it would be enough just to have OGC  
17 let us know on an expedited basis which of the cases that  
18 they are now looking at pick up sua sponte issues, and then  
19 we can decide whether we want to do anything about it.

20 CHAIRMAN HENDRIE: Would I read that to say you  
21 would not be in favor of a rule change which would say the  
22 Boards notify us?

23 COMMISSIONER BRADFORD: Right.

24 CHAIRMAN HENDRIE: You would say that?

25 COMMISSIONER GILINSKY: Let's see. Is it

1 necessarily a rule change?

2 MR. BICKWIT: Not necessarily.

3 COMMISSIONER GILINSKY: I would just think as a  
4 matter of practice there is a rule, and with a standard for  
5 the Boards taking up these issues. Now, if they have not  
6 been making a finding according to that rule, perhaps they  
7 ought to. It seems to me that does not require a rule  
8 change.

9 COMMISSIONER BRADFORD: Joe, is this before us at  
10 the moment in sort of a rule-change or no-rule-change  
11 posture? Or is it potentially part of whatever the 311  
12 package is that is going out for comment?

13 CHAIRMAN HENDRIE: I have been regarding it as a--

14 COMMISSIONER AHEARNE: Proposed rule change.

15 CHAIRMAN HENDRIE: -- as a potential rule change,  
16 which, if it gained a majority in some form or another,  
17 would be added to the items for that--

18 COMMISSIONER BRADFORD: For the 311 package?

19 CHAIRMAN HENDRIE: -- for the proposed rule for  
20 comment thing. That was the way we framed it originally.

21 COMMISSIONER AHEARNE: It was a proposed rule  
22 change or rule practice.

23 CHAIRMAN HENDRIE: I suppose, depending on the  
24 formality with which one wanted to note notification  
25 requirements, it could be a less formal direction to the

1 Boards. I guess for myself if we are going to do it, I  
2 would prefer to see it in a rule.

3 MR. SHAPAR: There is a certain advantage in  
4 having it in the rule to know that the internal practices of  
5 the Commission would mean that if it is raised sua sponte  
6 that the rule will say that the Commission may elect to take  
7 it out of the hearing.

8 COMMISSIONER AHEARNE: Since the proposed approach  
9 was weaker than I had originally hoped for and I compromised  
10 myself down to this stage, I would see no real value in  
11 doing less than the one we have here proposed.

12 CHAIRMAN HENDRIE: Than the 304 proposal?

13 COMMISSIONER AHEARNE: As Len had modified it.

14 CHAIRMAN HENDRIE: Perhaps with Len's  
15 modifications.

16 COMMISSIONER AHEARNE: So I would not be in favor of  
17 having just added another monitoring burden to OGC. And I  
18 just do not believe that saying we have the inherent  
19 authority to step in any time; while I certainly agree with  
20 that, I do not think that accomplishes as much as I had  
21 hoped to accomplish.

22 COMMISSIONER BRADFORD: But nothing good will  
23 happen unless we step in explicitly. That is, one of the  
24 worst things that could happen would be for the Boards--  
25 Alan's point to the contrary notwithstanding -- not be to

1 flag an issue. Because, as I understood it, the point of  
2 the rule that we are considering is to give the Commission a  
3 chance to say, "Wait a minute: (a) we do not think you ought  
4 to raise it," or, (b) we think ACRS or the staff ought to be  
5 taking it up, or (c) go ahead and do it.

6 But you lose the opportunity to follow step (b)  
7 entirely if the Board is simply deterred from raising the  
8 issue at all. So I think whatever option one follows, one  
9 still wants the Commission to be aware that the Board has a  
10 concern and not simply have the Board be deterred from a  
11 general rumbling from above from raising issues at all.

12 COMMISSIONER AHEARNE: I am certainly confident  
13 for myself that the approach that was proposed would not  
14 deter any Board that really had a concern.

15 COMMISSIONER BRADFORD: Let's see. Of course,  
16 that is the one we have been going back and forth on  
17 intermittently. Len's point was that it would.

18 COMMISSIONER AHEARNE: I think it would deter  
19 Boards from raising issues that did not in their mind rise  
20 to one of really a serious concern.

21 MR. COTTER: I think the Boards would clearly take  
22 it as a slap in the face, and there is a good chance that  
23 they would simply abandon the authority entirely. So you  
24 could accomplish that.

25 COMMISSIONER AHEARNE: Tony, you have now cut it

1 both ways. You have said just now, you said they would take  
2 it as a slap in the face and abandon the authority. And  
3 then previously here you said that you felt that some of the  
4 members would perhaps not even be able to sign off on the  
5 license.

6 MR. COTTER: Well, I think those who felt that way  
7 would quit.

8 COMMISSIONER AHEARNE: Well, if telling the agents  
9 of the Commission that if they go beyond the issues of a  
10 fact raised by the parties means that they pick up their  
11 marbles and go home, I guess it might be best that those who  
12 really feel that way should.

13 MR. COTTER: I would think so.

14 COMMISSIONER GILINSKY: I didn't follow this  
15 closely. Who stays and who goes?

16 (Laughter.)

17 MR. ROSENTHAL: The thick ones.

18 COMMISSIONER AHEARNE: The soreheads.

19 COMMISSIONER GILINSKY: Do we get to stay?

20 (Laughter.)

21 COMMISSIONER BRADFORD: No, Vic, you're out. I'm  
22 sorry.

23 (Laughter.)

24 COMMISSIONER AHEARNE: Unfortunately, our rules  
25 and edicts don't apply to us.

1 (Laughter.)

2 CHAIRMAN HENDRIE: It seems to me that where a  
3 Board has an issue which is not raised by one of the parties  
4 which they think is significant to the case and meets the  
5 test under the sua sponte rule as it now stands, that they  
6 raise it. And if they are asked to notify the Commission,  
7 then at some period or not in which the Commission is  
8 expected to act, I do not see that the Boards will not raise  
9 issues on the one hand where they would previously.

10 If that is the case, then they have been raising  
11 issues on an improper basis, and I do not think the Board  
12 members who have raised it would buy that. Nor do I expect  
13 to see a great rush of issues filed.

14 I do think if we are -- I guess, on balance, I  
15 think there is some merit to the notification process. My  
16 own view is that if there is a notification requirement,  
17 then indeed there ought to some limited time within which  
18 the Commission expects to act, and failing any action within  
19 that time, then the Board simply goes ahead as it chooses.

20 I totally agree with Alan that I think it would  
21 not be helpful to simply drift along not knowing whether the  
22 Commission is going to do anything or is not going to do  
23 anything on an issue, so that notification period, no  
24 further specification of what happened, I think leaves the  
25 system uncertain as to where it goes after the

1 notification. I think you want to leave the system so that  
2 after a brief time for the Commission to consider what it  
3 might want to do at the Commission, that either the machine  
4 goes ahead and works as it would have anyway or the  
5 Commission takes a positive action.

6 Now the "positive action" can be an extension of  
7 the 15 days, but that requires a majority of the Commission  
8 to agree to extend it. That is a positive action. Or it  
9 can lay down some opinion on how or why or whatever it wants  
10 the Board to do about the issue.

11 But I think that configuration where notification  
12 and then if nothing has happened up here in some not too  
13 long a period of time, that the Board simply goes ahead is  
14 the right configuration to leave it. It clears the air with  
15 regard to the Board's plan and the hearing on the issue.  
16 You need some days, I guess. It is a pity it has to be a  
17 15-day delay, but that is perhaps not unreasonable.

18 COMMISSIONER GILINSKY: That may be right if the  
19 Commission is going to adopt the habit of frequently  
20 knocking issues out, if that is the way it turns out; then  
21 you have a pretty uncertain situation when one of these  
22 issues is raised. And unless that uncertainty is relieved  
23 by the expiration of the time period of a sort, you are  
24 still up in the air.

25 But I guess I do not view things operating that

1 way. The Commission can give guidance on what constitutes a  
2 serious safety issue in dealing with opinions after the  
3 fact. In other words, we can deal with things on appeal and  
4 speak to these issues.

5           Now the reason there is interest in being able to  
6 deal with them more quickly is a feeling that somehow some  
7 of these hearings may get out of hand, get off the track on  
8 issues that ought not to be in there, or whatever. So you  
9 have this opportunity to step in and do something else about  
10 it if you want to. And it seems to me that being notified  
11 presents you with that opportunity, but I would not think  
12 that it is something that would be exercised frequently.

13           CHAIRMAN HENDRIE: But even if it is not, unless  
14 you have, in effect, a cutoff period for Commission action,  
15 why you leave things very uncertain amongst the parties and  
16 the Board members as to what in fact is going to happen with  
17 regard to that issue. They are going to be very hard put to  
18 go confidently ahead on the assumption that in only one out  
19 of four cases does the Commission say anything. This may be  
20 the fourth case.

21           It creates then an uncertainty in the proceeding,  
22 which I think is not in the least helpful. In fact, I can  
23 see Boards trying to take up other matters and this one is  
24 still laying around and finally they get other matters  
25 pretty well taken up, I can see Boards coming back a second

1 time, saying, "Well, are you going to do anything about this  
2 or not? We are getting ready to close down the record and  
3 go off and write a decision."

4           COMMISSIONER GILINSKY: Well, the uncertainty  
5 comes from the fact that the Commissioners have expressed an  
6 interest in these issues that they didn't express earlier.  
7 Now the whole thing has gotten turned around. I mean, from  
8 questioning these issues, we are now getting in a position  
9 of needing to somehow give them some degree of approval so  
10 that everybody can go on and do their job, because "Although  
11 the Commission has expressed interest in sua sponte issues,  
12 that one is okay, you can go on."

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1           COMMISSIONER AHEARNE: I still differ with that  
2 interpretation of what it would lead to. But I believe the  
3 interpretation still would be that the Commission has said  
4 that if a Board is raising an issue sua sponte, that is an  
5 unusual event.

6           COMMISSIONER GILINSKY: Well, that is in the  
7 rules. There's a finding that needs to be made, and you can  
8 ask the Board to make the findings explicitly. That's  
9 perfectly reasonable.

10          COMMISSIONER AHEARNE: I don't think that the rule  
11 really is that clear or that good. If we want the operating  
12 license to be a complete review like the CP, then we ought  
13 not to worry about contentions and all of those to start  
14 with. It isn't. The primary purpose, at least in my view,  
15 is to resolve the issues raised by the parties.

16          COMMISSIONER GILINSKY: Look, it's an important  
17 part of the review process, as Peter just mentioned.

18          COMMISSIONER AHEARNE: I didn't hear that.

19          COMMISSIONER GILINSKY: You may not have. The  
20 record may not have caught it. But the fact is that, you  
21 know, given the practice of building plants and reviewing  
22 them, that is the first time you get to see the full plant  
23 and the full design. And it isn't as if you're just  
24 crossing a few "t"s and dotting some "i"s. Now it is true  
25 that under the law you don't have a hearing unless someone

1 asks for a hearing, which puts the operating license hearing  
2 on a different footing than the construction permit hearing.

3 But there may well be issues, or the Board may  
4 come across matters that have safety importance, and it  
5 would be very odd to tell them that they just ought to look  
6 the other way.

7 COMMISSIONER AHEARNE: I am not saying that,  
8 Victor.

9 COMMISSIONER GILINSKY: I know you are not saying  
10 that. Right.

11 COMMISSIONER AHEARNE: You know very well I'm not  
12 saying they ought to look the other way. What I am saying  
13 is that in those issues that are brought up by the Board  
14 itself, I do not see anything wrong -- and in fact, I think  
15 there is a very definite positive side -- to first have to  
16 come back to the Commission and notify us.

17 COMMISSIONER GILINSKY: I don't think there's any  
18 difference about notification. The reason I brought it up,  
19 even though I don't think that is what you're saying, is  
20 that these tilts are important. You are pushing things in  
21 one direction or another. You are telling them, you know,  
22 less issues, less concerns and so on.

23 COMMISSIONER AHEARNE: No.

24 COMMISSIONER GILINSKY: Well, that's the practical  
25 effect.

1           COMMISSIONER AHEARNE: The practical effect, I  
2 hope is to try to get across -- at least the primary  
3 purpose, is to resolve those issues raised by the parties.  
4 And if they see something that is important, it's not that  
5 they should submerge it, but that should be sufficiently out  
6 of the norm that they've raised it to us.

7           COMMISSIONER GILINSKY: Well, first of all, there  
8 is a rule with a standard. If that standard isn't clear,  
9 then we can give instructions as to how that standard is to  
10 be applied and we can give examples.

11           If that isn't enough, we can certainly make sure  
12 that when such issues are raised we will be aware of it in  
13 time to head off any long-term investigation, certainly  
14 because --

15           COMMISSIONER AHEARNE: That's what this does  
16 exactly. It lets us become aware of it when they are  
17 raised, and it puts in place a system in which if we want to  
18 head it off we would have to take action in a fixed period  
19 of time.

20           COMMISSIONER GILINSKY: Well, look, the only  
21 difference is this fifteen-day business, which I think  
22 introduces complications of both kinds. It's just not clear  
23 what that does. Frankly, I'm uncomfortable with it. It may  
24 just encumber the process. It may put a stamp of approval  
25 on issues that I am not sure I want to give at that point.

1 It's that part of it that I must say I'm not in favor of,  
2 and I am not sure which way it cuts to be absolutely frank.

3 COMMISSIONER AHEARNE: Yes. I can see the point.

4 COMMISSIONER GILINSKY: And I don't think, even if  
5 it would have the effect that you think it will have, which  
6 is unclear, I don't think very much is lost by dropping it.

7 COMMISSIONER BRADFORD: Without asking anybody to  
8 name specific cases, most of which are after all still  
9 likely to come before us, could someone review the bidding  
10 for me as to just how many sua sponte contentions they have  
11 in mind when you, John or Howard, that they feel that this  
12 is a matter of submergence? I know of a couple, but --

13 COMMISSIONER AHEARNE: Peter, I have been trying  
14 to say here for months: I'm not raising this because of a  
15 specific case or cases.

16 COMMISSIONER BRADFORD: Okay.

17 COMMISSIONER AHEARNE: I have been trying to get  
18 across the point that I have been myself working through  
19 what I believe --

20 COMMISSIONER BRADFORD: No, no, I understand the  
21 concept.

22 COMMISSIONER AHEARNE: -- to be a rational  
23 framework for the hearing process.

24 COMMISSIONER BRADFORD: I understand that.

25 COMMISSIONER AHEARNE: And in going through that,

1 I finally reached the conclusion for the operating license  
2 that the rational framework was for the Boards to be  
3 deciding the disputes, et cetera, et cetera, between the  
4 parties and so forth. So I can't give you examples, because  
5 it wasn't generated by an example.

6 COMMISSIONER GILINSKY: It was pure logic.

7 COMMISSIONER AHEARNE: An attempt.

8 COMMISSIONER BRADFORD: I must say that when I  
9 originally signed on to this vessel it was from a very  
10 similar analytical process. As I have seen the troubles and  
11 agony that it seems to be causing, I have come to the  
12 conclusion that the demands of logic alone would be  
13 satisfied by a less formal treatment of it, which is why I  
14 find myself coming down on the side of having the Commission  
15 take a harrier look at sua sponte concerns, but not doing it  
16 through a formal process.

17 CHAIRMAN HENDRIE: I tell you what, with the  
18 superior perceptive abilities that the possession of the  
19 gavel gives me --

20 COMMISSIONER BRADFORD: Oh, my God.

21 (Laughter.)

22 CHAIRMAN HENDRIE: I pronounce that there is no  
23 clearcut majority one way or another on this issue, and we  
24 will therefore turn to the proposed final rule on certain  
25 changes to Part 2 that we agreed to some time ago. With

1 regard to sua sponte matters, I don't know. I think I'll  
2 leave it standing.

3 MR. BICKWIT: Mr. Chairman, let me just go to the  
4 well one more time, I'm sure unsuccessfully. Would there be  
5 a majority in favor of putting out an option A-option B type  
6 of rule?

7 COMMISSIONER AHEARNE: Would you care to specify  
8 what A and B would be?

9 MR. BICKWIT: Yes. "A" would be what's proposed  
10 in the SECY paper; "B" would be notification with no  
11 fifteen-day period.

12 MR. SHAPAR: And get comments on both.

13 COMMISSIONER AHEARNE: Always in favor of  
14 receiving public comment.

15 ~~COMMISSIONER GILINSKY: I want to think about that.~~

16 (Laughter.)

17 CHAIRMAN HENDRIE: We will mull it further, then.  
18 We might see what the language would look like. You seem to  
19 have some language anyway which could form a 304a. If you  
20 feel this prospect worthy of the staff work, why do a 304a  
21 with the options appended.

22 MR. BICKWIT: Can I feel out whether I think it's  
23 worthy?

24 CHAIRMAN HENDRIE: I will leave it to you as to  
25 whether you think it worthwhile to advance a 304a.

1 MR. BICKWIT: That's the way I like to proceed.

2 CHAIRMAN HENDRIE: All right, good.

3 Now somewhere down in here I have other matters.

4 I think it is 310 isn't it?

5 COMMISSIONER AHEARNE: Yes.

6 COMMISSIONER GILINSKY: Could I just ask Tony  
7 something?

8 CHAIRMAN HENDRIE: Pray do.

9 COMMISSIONER GILINSKY: Is your practice modified  
10 by any of this discussion? In other words, will you put out  
11 an order on -- Let me ask you this. What do you think of  
12 the idea of putting out a separate order when you do take up  
13 an issue of this sort and send us --

14 MR. COTTER: I can, as a matter of practice send  
15 copies of any sua sponte questions that we have raised.

16 COMMISSIONER GILINSKY: Well, you said earlier  
17 that you always issue an order when you take up such an  
18 issue, but Alan points out this may be buried in another  
19 order. Is there any difficulty about separating that out  
20 with a separate order?

21 MR. COTTER: No.

22 COMMISSIONER GILINSKY: In effect, when you have  
23 an order, the Board would then be making the finding  
24 required by the rule? Is that right?

25 MR. COTTER: (Nods in the affirmative.)

1                   COMMISSIONER GILINSKY: The board would be saying,  
2 "We find this to be a" -- Is that what you do, Alan?

3                   MR. ROSENTHAL: Well, implicitly, but I don't  
4 think we've ever felt it necessary to parrot that language.  
5 I mean, we understand what the standard is, and if we raise  
6 an issue sua sponte we have made the implicit, if not  
7 explicit, determination that this is a serious safety --

8                   COMMISSIONER GILINSKY: Do you refer to the rule  
9 at all?

10                  MR. ROSENTHAL: We may or may not. We never felt  
11 under --

12                  COMMISSIONER GILINSKY: Do you say, "Hear ye, hear  
13 ye, this is a sua sponte issue"?

14                  MR. ROSENTHAL: Well, usually we do in some form  
15 acknowledge the fact that we are going beyond the matters in  
16 controversy, but we don't necessarily cite the rule, let  
17 along quote it.

18                  MR. COTTER: No. It would be added as a Board  
19 question. So it is separately and clearly identified as a  
20 separate --

21                  COMMISSIONER GILINSKY: Is the Board in its mind  
22 aware that it's a --

23                  MR. SHAPAR: Sometimes the Boards make the  
24 findings that it's a serious matter, and sometimes they  
25 don't.

1 CHAIRMAN HENDRIE: Explicitly.

2 MR. SHAPAR: That's right.

3 MR. ROSENTHAL: We've never felt obligated to make  
4 an explicit finding.

5 MR. COTTER: It's a little like gilding the lilly  
6 if you are raising a separate question. To my mind, it is a  
7 redundancy. That is a standard that you raise in the  
8 question.

9 COMMISSIONER GILINSKY: Well, only if it's clear  
10 to everyone that it is a separate question.

11 MR. COTTER: It is, because the parties have been  
12 told to address it.

13 COMMISSIONER GILINSKY: And it's not one that they  
14 had raised. I see.

15 MR. ROSENTHAL: Whereas, again, still there's room  
16 for question as to whether it is in fact a sua sponte  
17 question or merely an adjunct of some matter already in  
18 controversy.

19 COMMISSIONER GILINSKY: I was wrong.

20 (Laughter.)

21 COMMISSIONER GILINSKY: I even spilled my water.

22 CHAIRMAN HENDRIE: I thought if I gave you enough  
23 rope there, why you would eventually get it tangled around  
24 your feet.

25 (Laughter.)

1                   CHAIRMAN HENDRIE: Don't you feel better about 15  
2 days now?

3                   (Laughter.)

4                   CHAIRMAN HENDRIE: Okay, on to 81-310. We have  
5 here language prepared by the General Counsel which purports  
6 to reflect our agreements and conclusions of a week or two  
7 ago on certain, I would say, not very earthshaking changes  
8 to Part 2. This now would be the final rule following on a  
9 splendidly successful publication for comment of proposed  
10 changes. I say that because it had probably as good a  
11 response as anything we have done around here in some  
12 years.

13                   COMMISSIONER AHEARNE: The one was using the media  
14 for scrap.

15                   CHAIRMAN HENDRIE: So I take it the Commissioners  
16 have studied this document for a fare thee well, and that we  
17 are practically prepared for a final vote.

18                   Questions? Comments?

19                   COMMISSIONER BRADFORD: Yes, at the bottom of page  
20 nine, why are we writing in an "unusual circumstance," a  
21 standard that doesn't appear in the rule itself -- the  
22 section beginning, "Although Boards are authorized...?"

23                   MR. BICKWIT: That appeared to us to be the sense  
24 of the Commission, that this schedule would be adhered to  
25 unless there were unusual circumstances.

1           COMMISSIONER GILINSKY: What's the standard in the  
2 rule.

3           COMMISSIONER BRADFORD: Well, the rule itself  
4 gives a certain number of days.

5           MR. BICKWIT: "Except as otherwise afforded by the  
6 presiding officer." There is no standard in the rule.

7           COMMISSIONER BRADFORD: I guess I would drop those  
8 two sentences. We have set forth the number of days in the  
9 rule itself. It's self-explanatory. If we want to put in  
10 language about more compressed filing schedules and unusual  
11 circumstances, it ought to go in the rule, but I personally  
12 wouldn't.

13          MR. BICKWIT: It's just a question of how the  
14 Commission wants to express itself.

15          CHAIRMAN HENDRIE: The page 9 section in question  
16 has to do with the Commission's discussion of these  
17 changes--

18          COMMISSIONER BRADFORD: Right.

19          CHAIRMAN HENDRIE: -- rather than the rule, and it  
20 would seem to me a useful expression of opinion.

21          COMMISSIONER GILINSKY: What about dropping this  
22 "absent unusual circumstances" and saying something about  
23 the Boards making an effort to meet that schedule?

24          COMMISSIONER BRADFORD: You could, but they're  
25 going to do it anyway. The Commission has just put in a

1 rule now which gives a particular number of days for parties  
2 to file, and it said for all parties to file and that seems  
3 to me to be enough.

4 (Pause.)

5 CHAIRMAN HENDRIE: John?

6 COMMISSIONER AHEARNE: I'm waiting. Vic seems to  
7 be trying to work out some modified language.

8 COMMISSIONER BRADFORD: There's something about  
9 putting in a particular number of days and then going into  
10 some detail about that the Board is only, in unusual  
11 circumstances, to go beyond it, but should not hesitate to  
12 squeeze it down. That seems to me to give a sort of  
13 one-sided tilt to the way we expect the Board to approach  
14 the schedule.

15 I mean, I suppose that we could expand it and say  
16 it seems like if these schedules were worked on in fairness  
17 to the parties, then they could be expanded and if there  
18 were no unfairness, they could be contracted.

19 CHAIRMAN HENDRIE: But since we've expanded the  
20 schedule on the one hand and unless you propose that simply  
21 protraction of coming to a decision in these cases has  
22 intrinsic in it some merit that I just don't perceive, I  
23 think the whole thrust of the enterprise is to say: Let us,  
24 compatible with fairness to the parties' positions and so  
25 on, get on to decision in these cases. And, having extended

1 the time for these filings --

2 COMMISSIONER BRADFORD: Fair enough, Joe.

3 CHAIRMAN HENDRIE: -- you know, because people  
4 weren't meeting them, then I think it is not unreasonable to  
5 say: We think this is good enough. If there are unusual  
6 circumstances, okay, you can deviate.

7 On the other hand, if it is a simple case,  
8 everybody can file and the Board can act more quickly, why  
9 good. Do it. You know, I don't see a why it is prejudicial  
10 in any sense.

11 COMMISSIONER BRADFORD: Well, except the phrase  
12 that you put in isn't in here. That is -- I've forgotten  
13 already exactly what it was, but the phrasing in which you  
14 worked in the word "fairness" doesn't appear in those two  
15 sentences at all. It's just essentially a further  
16 instruction to err on the side of shoving things along  
17 unless one balances it off by saying that we expect the  
18 whole scheduling process to be used in a way that first  
19 contributes to fairness. You know, one can go into the  
20 litany again about "fairness," "predictability," and  
21 "expedition" --

22

23

24

25

1           CHAIRMAN HENDRIE: But at the head of this page we  
2 say the reason we're doing this is that experience  
3 indicates, and so on and so on, "the applicant frequently is  
4 unable to file its proposed findings within a prescribed  
5 20-day period," and the Board has to establish another  
6 schedule anyway; we are modifying it to make it more  
7 realistic. Okay? So we shove out the applicant's time  
8 another ten days. Everyone else gets the same delta off of  
9 that point that they had before and -- I guess that's  
10 right.

11           COMMISSIONER BRADFORD: Yes. I mean, I agree with  
12 what we've done. I'm not trying to back off of that. I  
13 just think that there is a little bit of a twist being given  
14 in the last two sentences and am proposing that they be  
15 stricken.

16           CHAIRMAN HENDRIE: I guess I prefer to retain  
17 them. John?

18           COMMISSIONER AHEARNE: Vic was trying --

19           COMMISSIONER GILINSKY: Let's see if we can work  
20 something out. Let's see if we can work this thing out.

21           CHAIRMAN HENDRIE: What sort of "working out" did  
22 you have in mind?

23           COMMISSIONER GILINSKY: Well, either sticking in  
24 your phrase or changing the "unusual circumstances" or doing  
25 something that will --

1           COMMISSIONER AHEARNE: I think I'll probably buy  
2 what Vic will come up with in some modification. I'll  
3 accept it.

4           CHAIRMAN HENDRIE: All right. Let's pass on to  
5 other points.

6           COMMISSIONER BRADFORD: I have only one other,  
7 which I think is probably less difficult. That's in the  
8 middle of page 12. There is a sentence about establishing  
9 time limits for responses on a case-by-case basis not being  
10 a profitable use of the Board's time. It's probably true,  
11 at least in this case, but I think I would still drop it,  
12 just because there are a number of cases in which we do in  
13 fact let the Board establish limits for responses and I  
14 don't think we lose a thing by taking that sentence out.

15          CHAIRMAN HENDRIE: I don't have a problem with  
16 that.

17          COMMISSIONER GILINSKY: Everybody seems to be for  
18 dropping it.

19          CHAIRMAN HENDRIE: Other?

20          COMMISSIONER BRADFORD: No.

21          CHAIRMAN HENDRIE: Let's see. There is an amended  
22 page 14 and 15 which came around --

23          COMMISSIONER AHEARNE: Last week.

24          CHAIRMAN HENDRIE: -- a bit later. I take it that  
25 the amended pages are the operative ones, Len?

1 MR. BICKWIT: Yes.

2 CHAIRMAN HENDRIE: Anything else?

3 COMMISSIONER AHEARNE: Nothing.

4 COMMISSIONER BRADFORD: No.

5 CHAIRMAN HENDRIE: All right. We will put this  
6 matter off and see what Vic produces for page 9 and come  
7 back to it next time.

8 SECY 81-311. We had asked Len to prepare, back to  
9 back in the middle of the month, the 12th I think, we had  
10 asked Len to prepare proposed rule for comment drafts for  
11 three items: a limit on interterritories, some requirements on  
12 contentions; and some requirements on occasion for fast  
13 transmission of filings, briefs and so on.

14 So we have that now in the paper labeled 81-311,  
15 I guess as a piece of material to go out for comment, a  
16 proposed rule to go out for comment. I don't have any  
17 objections to it that I recall. Other comments?

18 COMMISSIONER AHEARNE: Len, I think I've asked  
19 this question many times, but let me just ask it again. On  
20 page 10, number 3, you are firm in your position that  
21 currently the Commission's regulations permit the parties to  
22 file responses to motions to compel. It's not a matter of  
23 discretion with the hearing officer?

24 MR. BICKWIT: That's right. Written responses.

25 COMMISSIONER AHEARNE: I guess my only other

1 comment is that if the Commission goes and puts that out I  
2 will have additional comments that I would like attached to  
3 it.

4 CHAIRMAN HENDRIE: On this number three?

5 COMMISSIONER AHEARNE: No, no. On this proposed  
6 rule.

7 CHAIRMAN HENDRIE: Oh, good.

8 COMMISSIONER AHEARNE: I just happen to have it.

9 CHAIRMAN HENDRIE: He happens to have a copy with  
10 him.

11 (Mr. Chilk distributes the document.)

12 (Pause.)

13 MR. COTTER: Is that a typo in item 3, line 2,  
14 "members" instead of "numbers"?

15 COMMISSIONER AHEARNE: Yes.

16 MR. COTTER: It's not a Freudian slip, is it?

17 CHAIRMAN HENDRIE: It's that DOD sort of personnel  
18 language.

19 (Laughter.)

20 CHAIRMAN HENDRIE: Other comments?

21 COMMISSIONER BRADFORD: Let's see. This opens up  
22 an intriguing field of endeavor. I hadn't thought about  
23 other areas in which I might comment, but I think I'll  
24 forego that.

25 CHAIRMAN HENDRIE: If he gets comments and then

1 goes final --

2 (Laughter.)

3 COMMISSIONER BRADFORD: I think he has a problem  
4 at that point.

5 CHAIRMAN HENDRIE: Then what do we do?

6 (Laughter.)

7 MR. BICKWIT: I think he will be very happy in his  
8 own little world.

9 COMMISSIONER AHEARNE: Steadily shrinking.

10 (Laughter.)

11 COMMISSIONER BRADFORD: Actually, let's see. That  
12 may be an interesting question. Supposing one Commissioner  
13 requests comments as a general matter in a request for  
14 comments and gets them. Can those comments then be a valid  
15 basis for a Commission action? That is, is the public on  
16 notice through this?

17 MR. BICKWIT: I would say not.

18 COMMISSIONER BRADFORD: The way we've handled that  
19 in other situations -- and let me just ask you if you wanted  
20 to think about trying to pose it differently -- is of course  
21 you remember in the emergency planning rule we actually went  
22 with alternative formulations.

23 COMMISSIONER AHEARNE: I tried that earlier.

24 COMMISSIONER BRADFORD: Did you try that with  
25 these?

1           COMMISSIONER AHEARNE: Yes. I'd be delighted if  
2 we could do it that way, but there was not --

3           COMMISSIONER BRADFORD: I'm not wild about your  
4 provisions here. But on the other hand, I think it is not  
5 in my self-interest, looking at other matters in our future,  
6 to say that a particular Commissioner's preferred way of  
7 going about solving a problem ought to be denied the ability  
8 to seek comments simply because --

9           COMMISSIONER AHEARNE: I would be delighted to  
10 endorse that as an operating principle.

11          CHAIRMAN HENDRIE: I'd be glad to stick it in as  
12 an alternate.

13          COMMISSIONER BRADFORD: Can you think of a way to  
14 write a reciprocity rule into the procedural --

15                   (Laughter.)

16          COMMISSIONER BRADFORD: I think I would prefer to  
17 do that. It just doesn't seem to be the right thing to do  
18 to send it out in a form that will attract comments from  
19 people who don't understand that the comments can be the  
20 basis for action. But at the same time, I would like to  
21 hold out for the principle that if a Commissioner wants to  
22 get comments he ought to be able to in a way that can be  
23 used to urge Commission action in the future.

24          COMMISSIONER AHEARNE: Yes. That would be fine.

25          COMMISSIONER BRADFORD: Good.

1 CHAIRMAN HENDRIE: Write it in as an alternative.

2 MR. BICKWIT: All right.

3 COMMISSIONER BRADFORD: As a result of that, it's  
4 going to be another day or two. Let me just circulate. I  
5 have a number of scribbled one or two word changes through  
6 here. They don't amount to a whole lot. We could take them  
7 up right now, but since we are not going to take action  
8 today on this anyway, why don't I circulate these. Or would  
9 you rather take them now? It will probably take ten  
10 minutes.

11 CHAIRMAN HENDRIE: Why don't we thumb through and  
12 take the ones you have at hand, Peter.

13 COMMISSIONER BRADFORD: Okay. They're all at  
14 hand.

15 CHAIRMAN HENDRIE: If it looks like it is going to  
16 run -- We are not going beyond 4:00 in any case, and maybe  
17 something like quarter or ten to is my break point, but --

18 COMMISSIONER BRADFORD: Page 3, in the lower  
19 middle, "This requirement would help deter intervenors".  
20 Supposing one changes "intervenors" to "parties."

21 COMMISSIONER GILINSKY: Why don't we drop it all  
22 and just go: "This requirement would give other parties  
23 early notice of an intervenor's case"?

24 COMMISSIONER BRADFORD: Okay.

25 COMMISSIONER GILINSKY: What do you think of

1 that?

2           COMMISSIONER BRADFORD: That's fine, too. It  
3 would seem to me that there are more fish in this section  
4 than just intervenors.

5           CHAIRMAN HENDRIE: "This requirement," say it?

6           COMMISSIONER GILINSKY: "Would give other parties  
7 early notice of an intervenor's" -- You just skip to the  
8 next line.

9           COMMISSIONER BRADFORD: What I was really after  
10 was, do we mean it to apply only to intervenors? Or does it  
11 apply, for example, to states?

12          MR. BICKWIT: Well, the contention rule applies  
13 only to intervenors.

14          COMMISSIONER BRADFORD: It doesn't apply to  
15 states? Do we ever get intervenors who are essentially in  
16 support of the facility? I guess there are still --

17          MR. ROSENTHAL: Very rarely, but occasionally.

18          CHAIRMAN HENDRIE: But it's not out of the  
19 question.

20          MR. MALSCH: They have a hard time establishing  
21 standing. That's why typically you don't often have  
22 intervenors come in in favor of the application.

23          COMMISSIONER BRADFORD: Well, Vic's change is fine  
24 with me.

25          COMMISSIONER GILINSKY: I would change the "could

1 be determined" at the bottom of the paragraph, "or a  
2 contention that is found not to satisfy the requirement."

3 COMMISSIONER AHEARNE: Say that again, Vic?

4 COMMISSIONER GILINSKY: Change "could be  
5 determined" to "is found."

6 CHAIRMAN HENDRIE: "That is found not to satisfy  
7 requirements." "This is found not to," is that okay, Len?

8 MR. BICKWIT: Yes, that's fine.

9 CHAIRMAN HENDRIE: "Not to satisfy the  
10 requirements." All right. Next?

11 COMMISSIONER BRADFORD: I don't have anything more  
12 until page 6.

13 COMMISSIONER GILINSKY: Let's see. You do have a  
14 change on page 6?

15 COMMISSIONER BRADFORD: Yes.

16 COMMISSIONER GILINSKY: I do too.

17 CHAIRMAN HENDRIE: All right, let's bid for  
18 earliest change on page 6. Line 1?

19 COMMISSIONER GILINSKY: Reference to general  
20 cities --

21 COMMISSIONER BRADFORD: It's a tie.

22 COMMISSIONER GILINSKY: I would just drop those  
23 two pages.

24 COMMISSIONER AHEARNE: Two pages?

25 COMMISSIONER GILINSKY: Those two sentences, as

1 being unnecessary. Actually, that isn't that far wrong, but  
2 in this case I would just drop the two sentences.

3 COMMISSIONER AHEARNE: Well, are you saying that  
4 you would allow then just reference to a "report"?

5 COMMISSIONER GILINSKY: It depends.

6 COMMISSIONER BRADFORD: I could live with dropping  
7 it if in fact the intent is to work a substantive change in  
8 with what this says. It seems to me, though, that if  
9 reference to a report isn't good enough then we ought to say  
10 so, so that no one comes in and refers to a report.

11 CHAIRMAN HENDRIE: Yes. The intention clearly was  
12 to say, you know, if your reference is WASH-1400, what in  
13 God's name is anybody going to do that?

14 COMMISSIONER BRADFORD: Yes, you've got to state  
15 it.

16 CHAIRMAN HENDRIE: If you can't do better than  
17 that, why never mind trying to improve the specificity here  
18 of the citations for contentions. I think the sentence -- I  
19 think the thought behind the sentences needs to be  
20 expressed.

21 COMMISSIONER GILINSKY: Well, the thought behind  
22 the sentences is what we are about here. But when you start  
23 talking about specific pages, that might not be the right  
24 thing.

25 COMMISSIONER BRADFORD: I was going to delete both

1 "pages" and "sections" and just say "specific portions of  
2 the documents must be referenced."

3 COMMISSIONER GILINSKY: But on the other hand,  
4 there are other documents which are not lengthy and where  
5 reference to the document may be appropriate.

6 COMMISSIONER BRADFORD: Well, I was also going to  
7 take out "lengthy".

8 COMMISSIONER GILINSKY: And we are talking about  
9 whether the documents are lengthy or not.

10 CHAIRMAN HENDRIE: But then these two sentences  
11 which talk about "lengthy" or "general studies and reports"  
12 doesn't apply. I think you really need to keep the flavor  
13 of this, because I think this was part of the intent, was to  
14 try to clarify what you've got to do.

15 COMMISSIONER BRADFORD: What about "References by  
16 title to lengthy studies and reports would not suffice"?

17 COMMISSIONER AHEARNE: That's fine. But are you  
18 saying that you would then drop the "for example"

19 COMMISSIONER BRADFORD: No, I would leave that in  
20 except for the words "pages, sections or".

21 COMMISSIONER AHEARNE: What substantive change do  
22 you see that making?

23 COMMISSIONER BRADFORD: None, in fact.

24 COMMISSIONER AHEARNE: That is how it sounded.  
25 And so then I would have no problem with it.

1           COMMISSIONER GILINSKY: In some cases some of  
2 these may not be yet available. These happen to be  
3 documents that are available.

4           COMMISSIONER AHEARNE: But if the document is not  
5 available --

6           CHAIRMAN HENDRIE: If it is not available, it's  
7 not very clear to me how a contention can be based on it.

8           COMMISSIONER BRADFORD: That is a trickier point.  
9 Supposing you intend through interrogatories and  
10 cross-examination to show that the containment is  
11 inadequate. What you state as a contention is that the  
12 containment is inadequate. The facts I suppose would be  
13 that experience at TMI showed that pressures up to whatever  
14 numbers you wanted to put in -- and then it would suffice,  
15 would it, at that point, to say that you intended to prove  
16 that fact through the discovery and cross-examination  
17 process?

18           MR. BICKWIT: It would if you could demonstrate  
19 that you had any basis for thinking you could. I mean, it  
20 would not be enough to say on each and every occasion, we  
21 intend to develop through interrogatories this contention,  
22 period.

23           COMMISSIONER BRADFORD: That's what I'm after.  
24 What kind of a threshold do you have to get over at that  
25 point? If you just came in and said, "The pressure vessel

1 in this reactor will fail, I'm going to show that on  
2 cross-examination," the Board says: "Wait a minute, what  
3 makes you think the pressure vessel would fail?"

4 MR. BICKWIT: I think you have to survive this  
5 threshold of vagueness: You have to provide some reason for  
6 the Board to believe that there are facts in your mind that  
7 you intend to try to prove. The Board will not look at the  
8 legal sufficiency of those facts to prove your case, but you  
9 must demonstrate that there are some facts in your mind.

10 COMMISSIONER BRADFORD: I'm sorry, Joe. I waded  
11 in in the middle of something you were saying.

12 CHAIRMAN HENDRIE: No, that's all right. I think  
13 that was useful.

14 At the moment, I've got, "references by title to  
15 lengthier general studies and reports would not suffice.  
16 If, for example, the BEIR report or the Reactor Safety Study  
17 is relied upon, specific portions of the document must be  
18 referenced."

19 COMMISSIONER AHEARNE: (Nodding in the  
20 affirmative.)

21 COMMISSIONER GILINSKY: (Nodding in the  
22 affirmative.)

23 COMMISSIONER BRADFORD: (Nodding in the  
24 affirmative.)

25 CHAIRMAN HENDRIE: I count three nods.

1           COMMISSIONER BRADFORD: I can live with that. But  
2 Vic, do you still feel --

3           COMMISSIONER GILINSKY: I would want to strike the  
4 two sentences, but ...

5           CHAIRMAN HENDRIE: Next? Page 6? Page 7?

6           COMMISSIONER BRADFORD: I would drop the "under  
7 such circumstances" sentence at the bottom of the second  
8 paragraph on 7, the reason being that since this document is  
9 going out for comment, it is the kind of sentence I would  
10 put in.

11          COMMISSIONER AHEARNE: I think you're right.

12          CHAIRMAN HENDRIE: In the statement of  
13 considerations of the final rule, if warranted.

14          COMMISSIONER BRADFORD: Exactly.

15          COMMISSIONER AHEARNE: Yes.

16          CHAIRMAN HENDRIE: Struck. Got it, Len?

17          MR. BICKWIT: Yes.

18          COMMISSIONER GILINSKY: Where was this?

19          CHAIRMAN HENDRIE: On page 7.

20          COMMISSIONER GILINSKY: I would drop that entire  
21 paragraph just as an unnecessary legalism, and in fact the  
22 next paragraph too, listing all the cases.

23          COMMISSIONER BRADFORD: I wouldn't object to doing  
24 that. I wound up starting to do it and then not doing it  
25 because I thought it gave a potential commenter a target in

1 terms of a legal reasoning if they wanted to say --

2           COMMISSIONER AHEARNE: -- the basis for it is not  
3 solid?

4           COMMISSIONER BRADFORD: -- that we were wrong. At  
5 least this showed how we got there and they could point out  
6 why in fact we misread the cases.

7           COMMISSIONER GILINSKY: Not how "we" got there.

8           COMMISSIONER BRADFORD: Sorry, how "they" got  
9 there, how the agency got there.

10           (Laughter.)

11           COMMISSIONER BRADFORD: And they could therefore  
12 try to talk "them, their, those," out of it.

13           COMMISSIONER GILINSKY: It's not any part of my  
14 reasoning.

15           CHAIRMAN HENDRIE: It seems to me that it is  
16 useful, as Peter says, to have some description of where we  
17 think these provisions fit in the Commission's regulatory  
18 structure and in the U.S. Code and the statutory structure.

19           COMMISSIONER BRADFORD: What I think is it's kind  
20 of the equivalent of stomping good and hard on a hornet's  
21 nest. If they want to do that, far be it from us to stay  
22 here put.

23           (Laughter.)

24           CHAIRMAN HENDRIE: I don't know. Len?

25           MR. BICKWIT: I don't think that's a bad

1 description of it. It was designed to solicit comment on  
2 our legal basis for this. It's certainly not going to hurt  
3 the Commission's legal posture to take it out.

4 COMMISSIONER AHEARNE: But do you think it will  
5 help your analysis --

6 MR. BICKWIT: It won't necessarily help.

7 COMMISSIONER AHEARNE: No, help your analysis of  
8 the comments? You expect to get better comments --

9 MR. BICKWIT: That's right. Yes.

10 COMMISSIONER AHEARNE: -- if you do this. If so,  
11 then I think you should.

12 MR. SHAPAR: You're going to undoubtedly get a  
13 comment on the legality of the rule somewhere along the  
14 lines of what this was designed to answer. So that I think  
15 the question really in front of you is whether or not you  
16 think you're going to get better comments by exposing your  
17 rationale. And theoretically your answer to that question  
18 is yes.

19 COMMISSIONER AHEARNE: Yes.

20 COMMISSIONER BRADFORD: I would drop this  
21 parenthetical at the end of it. I think you really either  
22 have to say more or say less.

23 MR. BICKWIT: Which?

24 COMMISSIONER BRADFORD: "Statutory words," sort of  
25 a West's keynote heading.

1 MR. BICKWIT: I have no problem with that.

2 COMMISSIONER BRADFORD: It just repeats the  
3 "furthermore" sentence from up above.

4 CHAIRMAN HENDRIE: Strike the parens. John would  
5 leave it in; I would leave it in. Peter, are you still on  
6 balance --

7 COMMISSIONER BRADFORD: The rest of it; yes.

8 COMMISSIONER GILINSKY: Sam renumbered it down,  
9 but I would have left it out.

10 COMMISSIONER AHEARNE: You would leave it in?

11 COMMISSIONER BRADFORD: Not the parens.

12 MR. BICKWIT: Not the sentence "Under such  
13 circumstances"?

14 COMMISSIONER BRADFORD: Right. Yes, that sentence  
15 and the parenthetical thing I think everyone has agreed to  
16 take out.

17 MR. BICKWIT: Okay.

18 CHAIRMAN HENDRIE: 7? 8, page 8? The bottom of  
19 8?

20 COMMISSIONER GILINSKY: Just a minor point. I  
21 would say, "may file an unlimited number of  
22 interrogatories," rather than "without any specific limit."

23 COMMISSIONER AHEARNE: Yes.

24 CHAIRMAN HENDRIE: "May file an unlimited number  
25 of"; delete "without any specific limit," okay.

1 MR. COTTER: That's not entirely correct, is it?  
2 "An unlimited number"? You can't file an unlimited number  
3 if it is burdensome, without any consequent benefit. There  
4 are limitations within the rule.

5 MR. BICKWIT: Yes, that's right. I think you  
6 ought to say "subject to limitations spelled out in the  
7 rule," "substantive limitations spelled out in the rule."

8 COMMISSIONER AHEARNE: It sounds like "without any  
9 specific" --

10 MR. COTTER: Yes, what is wrong with that? It  
11 seems to me that "without specific limits" gives you --

12 COMMISSIONER GILINSKY: Yes, put it back.

13 MR. ROSENTHAL: Precisely the right --

14 CHAIRMAN HENDRIE: Vic retreats on that one.

15 Page 9. Peter?

16 (No response.)

17 CHAIRMAN HENDRIE: Vic, I see red marks.

18 COMMISSIONER GILINSKY: I would say down here that  
19 "The Board may grant," and so on and so forth, "as set forth  
20 in the rule if it determines that."

21 COMMISSIONER AHEARNE: Yes.

22 COMMISSIONER BRADFORD: Fine.

23 COMMISSIONER GILINSKY: And I would drop this  
24 business about "improvidence."

25 COMMISSIONER AHEARNE: That is key.

1 COMMISSIONER GILINSKY: I would still drop it.

2 (Laughter.)

3 MR. BICKWIT: It is designed to deal with the  
4 situation where the party stores up its best case for an  
5 interrogatory until interrogatory 51 and it has a very  
6 marginal case with respect to its first 50 interrogatories.

7 COMMISSIONER GILINSKY: It seems to me that there  
8 are cases, if different from the ones that we heard about in  
9 the courts, where documents come out along the way, and it's  
10 a little harder to judge how many you're going to need  
11 further down the road. And so I would, for that reason I  
12 would take it out.

13 CHAIRMAN HENDRIE: One in, one out. Peter?

14 COMMISSIONER BRADFORD: Let's see. Does B give  
15 you the power to give the Board the power to take that  
16 consideration into account? That is, could the Board under  
17 B, if it seemed that the party had been especially  
18 improvident, say that the information had been reasonably  
19 available through the first 50 interrogatories?

20 MR. BICKWIT: I think it would be stretching the  
21 language.

22 MR. SHAPAR: C is really directed at another  
23 problem.

24 MR. BICKWIT: I think the Board would look at this  
25 standard and say, is that information contained in that one

1 interrogatory reasonably available?

2           COMMISSIONER GILINSKY: I mean, are parties going  
3 to squander their interrogatories just in order to pounce on  
4 the Board with one good question? That would not make  
5 sense.

6           MR. SHAPAR: Lawyers have been known to engage in  
7 tactics like this.

8           (Laughter.)

9           COMMISSIONER GILINSKY: But it sounds quite dumb.

10          MR. COTTER: Are you speaking from experience,  
11 Howard?

12          MR. SHAPAR: It's a fact of life which Tony can  
13 subscribe to.

14          (Laughter.)

15          COMMISSIONER BRADFORD: I --

16          COMMISSIONER GILINSKY: To waste your  
17 interrogatories?

18          COMMISSIONER AHEARNE: They're not wasted.

19          COMMISSIONER GILINSKY: I only used two  
20 Encyclopedia Britannica's today.

21          (Laughter.)

22          COMMISSIONER AHEARNE: I didn't use any.

23          COMMISSIONER GILINSKY: Clearly made to be  
24 regulators.

25          (Laughter.)

1 MR. ROSENTHAL: That just shows the lack of a  
2 legal education.

3 COMMISSIONER AHEARNE: Or the benefits of a lack  
4 of a legal education.

5 MR. SHAPAR: Alan was the author of that C and I  
6 think may be he ought to describe the basis on which he  
7 advanced it. He convinced me.

8 MR. ROSENTHAL: I think it's important that there  
9 be safeguards against the promiscuous use of  
10 interrogatories. I am not suggesting at all that a party is  
11 going to sit back there and say: Well now, what are the 50  
12 most frivolous interrogatories I can come up with, and put  
13 them in, just so they can pounce on the licensing Board with  
14 51.

15 At the same time, I think that you will find that  
16 there are people who, for whatever reason, do use their  
17 interrogatories promiscuously. And it does seem to me that  
18 if you have someone coming before the Licensing Board and  
19 asking for, in effect, additional interrogatories, that it  
20 is a fair inquiry as to how you used your first 50.

21 It's no different than the way that I would treat  
22 my children in terms of their allowance. They come and seek  
23 monies above and beyond their allowance, and I want to know  
24 how they spent the amount that they had to use without any  
25 restriction or supervision. And if they use their allowance

1 promiscuously, then I take a very dim view about giving them  
2 more. Now, I hate to analogize lawyers with children,  
3 but--

4 COMMISSIONER AHEARNE: Go ahead, go ahead.

5 (Laughter.)

6 MR. ROSENTHAL: But I think in the real world you  
7 are going to find that --

8 COMMISSIONER GILINSKY: I'll tell you what. I'll  
9 go along with this if you'll change "improvident" to  
10 "promiscuous."

11 (Laughter.)

12 COMMISSIONER BRADFORD: Let me suggest a middle  
13 ground. Supposing you just make as part A, to add it at the  
14 end of the phrase, "after staff/applicant documents" "and  
15 the party's use of its first 50 interrogatories." -- I'm  
16 sorry, "the party's use of its first 50 interrogatories was  
17 not unreasonable."

18 What you're then doing is throwing that in as one  
19 of several things to be balanced together with the  
20 desirability of the information, rather than making it a  
21 separate hurdle which if you fail you are out. That is, if  
22 it looks as though the 51st question is a really important  
23 one, even if you have some doubts about the wisdom of the  
24 first 10 interrogatories, you can still allow it. Whereas,  
25 the way it is formulated now, no matter how attracted the

1 Board is to the first 51st question, if it feels it was  
2 improvident, it's actually somewhat closer to the process I  
3 go through on my children's allowance, also.

4 MR. ROSENTHAL: You're more lenient than I am.

5 COMMISSIONER BRADFORD: Yes, that may be true.

6 COMMISSIONER AHEARNE: You may have more  
7 interrogatories to spend.

8 COMMISSIONER GILINSKY: Why don't we throw it in  
9 that way.

10 COMMISSIONER AHEARNE: I would prefer to keep it  
11 separate, but let me ask a question.

12 Len, do you read the 3 the way it's written that  
13 if the fifty-first was really very clearly an important  
14 issue, and the Board concluded that the party had been  
15 improvident in the sense that they had wasted, had put in  
16 four or five that really were frivolous, that no matter how  
17 important the fifty-first was they would not accept it?

18 MR. BICKWIT: Yes, that's the way I would read it.

19 COMMISSIONER GILINSKY: Well, let me ask you  
20 this. You are getting specific. "Improvident" is wasting  
21 four out of fifty?

22 COMMISSIONER AHEARNE: Well, I asked --

23 MR. COTTER: That doesn't make any sense, I'm  
24 sorry.

25 COMMISSIONER GILINSKY: They are the ones who

1 decide it.

2 COMMISSIONER AHEARNE: I was asking Len, who wrote  
3 this, what his --

4 COMMISSIONER GILINSKY: Oh. Okay.

5 COMMISSIONER AHEARNE: You see, I had sort of  
6 expected him to say that four or five -- wasting four or  
7 five isn't improvident, but that is not what he said.

8 COMMISSIONER GILINSKY: That's what I would have  
9 thought.

10 MR. SHAPAR: But of course the Board in that  
11 circumstance could ask the question itself.

12 COMMISSIONER GILINSKY: You mean the question that  
13 is asked --

14 MR. SHAPAR: If that was a good question but the  
15 party had exhausted his 50 interrogatories.

16 COMMISSIONER GILINSKY: But that's if they retain  
17 their sua sponte powers.

18 COMMISSIONER AHEARNE: But that is an  
19 interrogatory on an accepted contention, isn't it?

20 MR. ROSENTHAL: In the real world, the Board is  
21 not going to go down each of those 50 interrogatories and  
22 pass an individual judgment as to whether on a scale of one  
23 to ten this is one to ten. What the Board is going to do is  
24 to look at the 50 collectively and come to an overall  
25 conclusion as to whether this person was improvident,

1 promiscuous or whatever the term might be. I think that's  
2 the reality of it.

3 COMMISSIONER AHEARNE: Sure. Right.

4 COMMISSIONER GILINSKY: I think if there is one  
5 extreme, if 50 questions have been wasted and they are all  
6 dumb, or useless, or beside the point, or whatever, then  
7 you're not dealing with a serious participant. But if you  
8 start talking about four or five out of the 50, it's a  
9 different story.

10 MR. BICKWIT: How about ten?

11 COMMISSIONER GILINSKY: Well, that's why, you  
12 know, I was inclined to leave it to the Board. And if you  
13 want to throw it into A, go ahead and throw it in.

14 CHAIRMAN HENDRIE: How do you feel after that last  
15 exchange?

16 COMMISSIONER AHEARNE: Well, I'm a lot more  
17 comfortable with Alan's response.

18 CHAIRMAN HENDRIE: How do we phrase it?

19 COMMISSIONER AHEARNE: But let's ask Tony how he  
20 would view it?

21 MR. COTTER: I don't. I don't have any feelings  
22 about this one or any other. The only thing I see of any  
23 significance in here is if you are going to try and impose  
24 some sort of quantitative limit across the Board, regardless  
25 of what the case is, that you pick some reasonable number.

1 Off the top of my head, 100 would be more reasonable than  
2 50.

3           What you do after that doesn't make any  
4 difference, because essentially again you are talking about  
5 the responsibilities of running a hearing.

6           MR. BICKWIT: If you put the words after "not" "as  
7 a general proposition" then I think Alan's interpretation is  
8 made clear and mine is rejected.

9           COMMISSIONER AHEARNE: In other words, "was not  
10 improvident as a general proposition"?

11          MR. BICKWIT: Yes.

12          COMMISSIONER GILINSKY: What does that mean?

13          COMMISSIONER AHEARNE: These are now lawyers  
14 talking to each other other.

15          MR. BICKWIT: No. It is then clear that what the  
16 Board is directed to do is just look at the general tenor of  
17 the interrogatories and --

18          COMMISSIONER AHEARNE: One by one.

19          COMMISSIONER BRADFORD: The way I think I would do  
20 it is put --

21          MR. BICKWIT: -- it would not leave room for my  
22 interpretation.

23          COMMISSIONER BRADFORD: -- I would put "overall"  
24 in front of "use."

25          MR. BICKWIT: All right.

1 COMMISSIONER AHEARNE: "In its overall use."

2 MR. BICKWIT: Yes.

3 COMMISSIONER AHEARNE: That would be fine.

4 CHAIRMAN HENDRIE: That sounds better.

5 COMMISSIONER BRADFORD: I'm still happier putting

6 it in A. But if it were left to C, I would put "overall

7 use."

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1 COMMISSIONER AHEARNE: You would feel, Len, that  
2 would move it absolutly into Alan's general balance?

3 MR. BICKWIT: Yes.

4 COMMISSIONER AHEARNE: That is more comfortable to  
5 me.

6 CHAIRMAN HENDRIE: With that change, I think as an  
7 Item C it would stand, particularly for a comment stage.

8 COMMISSIONER BRADFORD: Okay.

9 CHAIRMAN HENDRIE: I think it would be more useful  
10 as a C at the comment stage, and certainly bring people's  
11 attention to it more.

12 Page 9, going once.

13 COMMISSIONER GILINSKY: Let's see. I say, "This  
14 rule is designed to alleviate" just drop this "if adopted  
15 would be designed" -- just "This rule is designed to  
16 alleviate strains."

17 CHAIRMAN HENDRIE: Len, do you have that?

18 MR. BICKWIT: No.

19 CHAIRMAN HENDRIE: Fourth from the bottom line.  
20 "This rule is designed to curtail," et cetera, et cetera.

21 COMMISSIONER GILINSKY: "To alleviate," did it not  
22 say?

23 CHAIRMAN HENDRIE: I am sorry. "To alleviate."  
24 "This rule is designed to curtail the abuse of the discovery  
25 process" --

1           COMMISSIONER AHEARNE: No. I think Vic is  
2 proposing --

3           COMMISSIONER GILINSKY: I am proposing "to  
4 alleviate" --

5           COMMISSIONER AHEARNE: -- for dropping the  
6 "curtail the abuse of the discovery process". In my mind,  
7 it could be "designed to curtail abuses of the discovery  
8 process," but that is more based upon the Law Journal  
9 articles on the general cases. I have no problem dropping  
10 it.

11          CHAIRMAN HENDRIE: Peter?

12          COMMISSIONER BRADFORD: That is fine.

13          CHAIRMAN HENDRIE: "Is designed to alleviate  
14 strains."

15          Page 10? The clock is running out here.

16          Page 11?

17          (No response.)

18          CHAIRMAN HENDRIE: Page 12.

19          (No response.)

20          CHAIRMAN HENDRIE: Page 13, 14.

21          MR. BICKWIT: I have one on 13. It is a question  
22 that I think you have to face. We have drafted this so as  
23 to leave intact the standard for interrogatories against the  
24 staff for the first 50 interrogatories.

25          CHAIRMAN HENDRIE: Yes.

1 MR. BICKWIT: I must say, as I read through it  
2 just before this meeting, my impression was the Commission  
3 wanted to do otherwise; it wanted to have a lax standard for  
4 the first 50 and to apply a very stiff standard when you  
5 went above 50.

6 But you ought to face that question. And I guess  
7 part of the reason I assumed the Commission wanted to do  
8 otherwise is that it is a little bit illogical to say we  
9 have got a real tough standard under 50 and a real tough  
10 standard over 50 and have the two standards be pretty much  
11 comparable.

12 So that it strikes me that a more logical approach  
13 is to have standards that clearly differentiate, that can be  
14 clearly differentiated below and above 50 interrogatories.

15 COMMISSIONER AHEARNE: You are talking about with  
16 respect to interrogatories on the staff?

17 MR. BICKWIT: Against the staff, yes.

18 COMMISSIONER AHEARNE: So I guess you are also  
19 proposing to eliminate the standard, the differential  
20 standard against the staff for below 50?

21 MR. BICKWIT: That is right. Or to propose some  
22 alternative standard but one that was clearly more lax than  
23 the standard to be applied above 50.

24 CHAIRMAN HENDRIE: Tell you what: You have just  
25 run flat out of my understanding, and willingness to

1 understand. Why don't we pick up next time your page 9  
2 language [Commissioner Gilinsky] and see how we like it,  
3 this point which Len can explain to us, and I will be more  
4 amenable to being educated. And then we will look and see  
5 if there is anything on page 14.

6 COMMISSIONER BRADFORD: But you have to conform  
7 the standard on 14 to the change we already made in the  
8 text.

9 CHAIRMAN HENDRIE: Yes. That, at least.

10 MR. BICKWIT: I hope we are up to that.

11 CHAIRMAN HENDRIE: Okay, 9, 13, and 14, for next  
12 time.

13 What did you say about a different document?

14 COMMISSIONER GILINSKY: Nine is in one document;  
15 13 and 14 are in another document.

16 COMMISSIONER AHEARNE: But the pages are right.

17 COMMISSIONER GILINSKY: I think we better adjourn.

18 (Laughter.)

19 CHAIRMAN HENDRIE: Hey, that's right. In some  
20 document someplace. Yes. 9 in the other one, 13 and 14  
21 here. Right?

22 COMMISSIONER GILINSKY: Yes.

23 CHAIRMAN HENDRIE: Okay. Thank you very much.

24 (Whereupon, at 4:00 p.m., the meeting of the  
25 Commissioners was adjourned.)

NUCLEAR REGULATORY COMMISSION

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

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

Date of Proceeding: May 26, 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.

Jane W. Beach

Official Reporter (Typed)

Jane W. Beach

Official Reporter (Signature)