

NUCLEAR REGULATORY COMMISSION

COMMISSION MEETING

In the Matter of: REVISING LICENSING PROCEDURES

DATE: April 22, 1981 PAGES: 1 - 79

AT: Washington, D. C.

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

REVISING LICENSING PROCEDURES

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Nuclear Regulatory Commission
Room 1130
1717 H Street, N.W.
Washington, D.C.

Wednesday, April 22, 1981

The Commission met, pursuant to notice, at 2:20 p.m.

BEFORE:

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

NRC STAFF PRESENT:

- LEONARD BICKWIT
- HAROLD DENTON
- ALAN ROSENTHAL
- TONY COTTER
- HOWARD K. SHAPAR

P R O C E E D I N G S

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(2:20 p.m.)

3

CHAIRMAN HENDRIE: If we can come to order, the Commission meets this afternoon for another in its series of meetings on revising licensing procedures.

6

I think what I would like to do this afternoon is get started on the policy statement. There are a couple of questions about what Commissioners might be willing to do about change in the threshold for contentions, and also whether Commissioners might want to say something about the sua sponte powers of the Board. Why don't I put those off until tomorrow.

13

Let's see. One of those things we have papers, and on the other we are about to have the last of the papers, is that correct?

16

MR. BICKWIT: (Nods affirmatively.)

17

CHAIRMAN HENDRIE: So I will defer those subjects until tomorrow.

19

What I would like to do now is to go to work on the draft policy statement and see how we do on that.

21

Now we have two objects to quibble on. There is a draft of the General Counsel in 81-202, a draft which I think continues to represent the proposal from our ad hoc licensing improvement group, is that right?

25

MR. BICKWIT: With one caveat. All members have

1 concurred in it, and one has not objected to it.

2 COMMISSIONER AHEARNE: Could you --

3 CHAIRMAN HENDRIE: No. Let's not examine that.

4 MR. BICKWIT: I just don't want to misrepresent it.

5 COMMISSIONER AHEARNE: At the appropriate time I
6 will ask for an explanation of it.

7 CHAIRMAN HENDRIE: Let's do that in just a second.

8 More recently, on the 21st of April came 81-202A
9 which was an insert where it was proposed to add two pages
10 of discussion of the use of sanctions versus a short
11 paragraph that had been in the earlier posting; so those are
12 202 and 202A then form together a proposed draft to look at.

13 We also have on April 21st a separate draft
14 Commissioner Bradford prepared.

15 Peter, where you have marked over a previous draft
16 is the previous draft the counsel's 202?

17 COMMISSIONER BRADFORD: Yes.

18 CHAIRMAN HENDRIE: I thought it was.

19 COMMISSIONER BRADFORD: Except that I did put 202A.

20 CHAIRMAN HENDRIE: Into it.

21 COMMISSIONER BRADFORD: Into it in the spirit and
22 the flesh.

23 (Laughter.)

24 COMMISSIONER BRADFORD: That is, the part I marked
25 "Alternative B" is in fact 202A revised.

1 CHAIRMAN HENDRIE: Yes, I have got you.

2 Okay. I would like to start struggling through
3 these things. I will look at yours, Peter, along with 202,
4 on which I guess I have some marks. What I would like to do
5 is turn to page 4, Roman III, Specific Guidance.

6 COMMISSIONER AHEARNE: You are skipping 202A?

7 CHAIRMAN HENDRIE: I am skipping 202A at the
8 moment. I am skipping the front end of this thing
9 altogether. Our differences across the table will come to
10 the front end. General guidance is the guideline section
11 and how precisely we want to frame that.

12 Animal hunting and long experience leads me to
13 believe that it is desirable to map out the areas of
14 agreement before mapping out the areas of disagreement and
15 thus create a sense of investment of the Commissioners in
16 the process which they hopefully will be sorry to lose by
17 subsequently being unable to compromise somehow on what will
18 inevitably be differences in attitude and flavor we would
19 like in the front end of this document, since I perceive
20 probably less argument at the back end than at the front,
21 and since unless challenged successfully by a majority, I
22 will just do it.

23 Let us start at Roman III. Now, here you wanted
24 to shorten this down.

25 COMMISSIONER BRADFORD: There is no magic to the

1 first sentence at all. The second and third seem to me to
2 be just self-evident.

3 COMMISSIONER AHEARNE: Self-evident? Do you
4 believe they are done?

5 COMMISSIONER BRADFORD: With the first and last
6 sentence they will be done together with other points that
7 are made all the way through here. If we want the boards to
8 set and adhere to reasonable schedules, I think all we have
9 to do is say that.

10 CHAIRMAN HENDRIE: Would you object all that
11 strongly to keeping some of that language even though it may
12 be saying the same thing in slightly different words?

13 COMMISSIONER BRADFORD: I would rather not,
14 because what I am trying to do is lessen the extent to which
15 this document leans on the Board members, and to be blunt
16 about it, treats them almost as children in telling them how
17 to conduct proceedings many of them have been conducting for
18 years.

19 So I have put the guidance generally in somewhat
20 more general terms while preserving what I take to be the
21 flavor in each one of these individual sections. So my
22 preference would be to do it the way I have it.

23 COMMISSIONER AHEARNE: Can I add a comment to that?

24 COMMISSIONER BRADFORD: (Nods affirmatively.)

25 COMMISSIONER AHEARNE: I do not think it is so

1 much treating them as children. I think it is more putting
2 the Commission on the line saying we endorse their doing
3 this. I would imagine and I still think in the past some of
4 the issues have been that the boards don't know where the
5 board is on a number of issues.

6 Certainly some of the debates we have had on some
7 of the procedural rules to establish in some specific
8 hearings would, I think, lead any board member to wonder if
9 they were to apply this type of time management. This is
10 obviously the Commission saying yes, we do agree.

11 COMMISSIONER BRADFORD: I just can't imagine that
12 the boards are in serious doubt that the Commission endorses
13 reasonable schedules and that every effort be made to adhere
14 to them.

15 CHAIRMAN HENDRIE: But you are willing to say
16 precisely that, okay?

17 COMMISSIONER BRADFORD: Right.

18 CHAIRMAN HENDRIE: And I am not sure why. Well,
19 aside from the aspect of the general flavor which you
20 mentioned, it doesn't seem to me that the other sentences
21 are obnoxious. It does suggest that the Board should
22 specify time frames for the actions where they think that
23 would expedite the proceedings.

24 COMMISSIONER BRADFORD: Well, by putting the word
25 "adhering" in the first sentence, I intended to capture

1 everything that I thought we ought to be saying in the next
2 two while really leaving it to the boards. They know what
3 10 CFR 2.711 says. If we say we want them to adhere to
4 schedules, that is the way they will do it, or at least that
5 is among the ways they will do it.

6 COMMISSIONER AHEARNE: I would be for keeping it.

7 CHAIRMAN HENDRIE: So would I.

8 Vic, where do you come out on that?

9 COMMISSIONER GILINSKY: It seems to me we can
10 rewrite this slightly to get the word "schedule" in. I
11 guess that is what I would do.

12 CHAIRMAN HENDRIE: Would you take a crack at
13 coming somewhere between?

14 COMMISSIONER GILINSKY: I will do that.

15 CHAIRMAN HENDRIE: I must say I don't have any
16 objections to the edits that have gone into the first and
17 last sentence. Does General Counsel want to comment on "at
18 least three working days" versus "well?"

19 MR. BICKWIT: I think "well" goes beyond "at least
20 three working days" and is a healthy change.

21 COMMISSIONER AHEARNE: May I ask another
22 question? General Counsel at the beginning indicated that
23 one of the working members did not object but did not concur.

24 CHAIRMAN HENDRIE: Oh, I am sorry. You are
25 right. Before I started this whole enterprise, I meant

1 after I laid out what documents we had at hand.

2 COMMISSIONER AHEARNE: I assumed you meant on each
3 issue.

4 CHAIRMAN HENDRIE: No, no. Let us do it
5 generically. Go ahead. Let's find out.

6 COMMISSIONER AHEARNE: If the member who was --

7 MR. BICKWIT: The name? Alan did not object, and
8 I will let him speak for himself as to why he did not concur.

9 MR. ROSENTHAL: Basically my feeling was that
10 although I did not have strong enough objections to some of
11 the provisions in here to warrant my swimming upstream
12 against the otherwise unanimous view, at the same time I
13 simply did not feel that I wanted to put myself on record as
14 affirmatively supporting some of these provisions.

15 CHAIRMAN HENDRIE: How about 3-A?

16 MR. ROSENTHAL: I didn't have any problem with
17 3-A. Well, as to that --

18 COMMISSIONER GILINSKY: The "no objection" applies
19 to the entire paper?

20 MR. ROSENTHAL: Yes. There is nothing in here I
21 strongly object to, but again, there were enough statements
22 that gave me some reason to pause that I just didn't want to
23 again go on record as affirmatively supporting it.

24 COMMISSIONER BRADFORD: There is some comment from
25 the floor.

1 CHAIRMAN HENDRIE: Harold, I'm sorry.

2 MR. DENTON: With regard to that particular
3 section we are scheduling for late '82 and '83 plants on the
4 basis of the schedule that the group could come up with, the
5 so-called eight-month schedule which more or less defer 10
6 months plus one, so it is an eleven months schedule.

7 I wonder whether the group had considered
8 attaching that schedule to this and calling it a standard
9 schedule. Otherwise you can read this and still not know
10 what the words themselves mean to be a standard case,
11 recognizing there is no particular standard, but it would
12 give some definitive time period that someone could read
13 this statement and infer what you really intended it to be.

14 COMMISSIONER GILINSKY: Could I ask Tony, do the
15 boards now have any instructions from you about setting
16 schedules?

17 MR. COTTER: Do you mean have I given them a
18 written memorandum saying set schedules?

19 COMMISSIONER GILINSKY: Well, written or oral.

20 MR. COTTER: I circulated this document. This
21 document is a product of the boards' thinking. And what I
22 look for in this document is a psychological club in the
23 proceedings.

24 COMMISSIONER GILINSKY: Circulating a draft
25 document is not the same thing as giving instructions.

1 MR. COTTER: No. I have not. They are doing it
2 though.

3 COMMISSIONER BRADFORD: The boards are setting
4 schedules?

5 MR. COTTER: Yes.

6 COMMISSIONER BRADFORD: Haven't they always set
7 schedules?

8 MR. COTTER: Yes. They are setting them more
9 frequently now.

10 CHAIRMAN HENDRIE: Hopefully a little tighter.

11 MR. COTTER: Within their judgment. It is a
12 matter for their judgment.

13 COMMISSIONER BRADFORD: Are their drawbacks to
14 Harold's suggestion?

15 MR. BICKWIT: May I respond to Harold's suggestion?

16 CHAIRMAN HENDRIE: Yes.

17 MR. BICKWIT: This is a matter which we have
18 advised to be taken up in the context of the rulemaking on
19 Part 2. That has been out for comment, and I would like to
20 advise the Commission on what those comments have been and
21 analyze it in that context; and one of the resolutions may
22 be to attach the schedule to this policy statement, but I
23 wouldn't want to prejudge that until we have an analysis.

24 MR. COTTER: I would like to comment on that,
25 too. To the extent that I have always thought of those time

1 frames as guidelines, I don't want to set up straw man
2 procedural wars over how rigid they are.

3 CHAIRMAN HENDRIE: No. I am inclined to think it
4 would be very useful to have that kind of general guideline,
5 and it would be clearly set out that way. I haven't felt it
6 was going to be useful to try to mandate, to say here is a
7 schedule; everyone stick to it come what may. As soon as
8 you do one of those things, you promptly start to treat all
9 of the special cases coming down the line. You might as
10 well promptly realize those.

11 I think nonetheless it would be very useful, as
12 Harold says, to have a sort of general prototype as an
13 example of a schedule for some totally mythical case which
14 is sort of average the Commission thinks and one the people
15 should work toward.

16 MR. COTTER: I will endorse that if you promise to
17 put in "general prototype" and "total mythical."

18 (Laughter.)

19 MR. BICKWIT: I should say that some of the
20 commenters have opposed even doing that on the grounds that
21 when you put in that kind of a schedule it tends to be
22 fleshed out by events even if events don't warrant the full
23 number of days of the schedule being taken. So that again I
24 would urge that no decision be reached on that now.

25 CHAIRMAN HENDRIE: I guess I have to believe that

1 if I am willing to say yes I will not try to set rigid
2 deadlines, because I recognize there may be special
3 circumstances when more time will be need, and I am willing
4 to trust the boards to deal reasonably with those. I have
5 to believe that there will also be circumstances when those
6 nominal times will not be needed and that the boards will
7 act responsibly not to extend things to the nominal times
8 when there is no need to.

9 MR. COTTER: I think I could say very safely that
10 human nature being what it is, one, the boards are extremely
11 conscious of the guideline time frames that have been
12 circulated and that they are doing everything within their
13 power to beat them within reason at the same time.

14 For example, we ran into a situation the other day
15 where there was a filing of 600 pages, and one of the
16 parties requested an extension of 30 days in order to review
17 the material, and another refused to agree to that, and the
18 board exercised their judgment and said that 30 days was a
19 reasonable request and was necessary to review it. And I
20 think you have hundreds of decisions like that in every
21 proceeding.

22 MR. ROSENTHAL: I might say that I fight that
23 schedule, assuming it is made clear that this is not a
24 mandatory schedule for application in all cases, less
25 troublesome than I find most of the rest of the paper.

1 I think my basic problem, as I explained before,
2 why I have found it difficult to affirmatively endorse it,
3 was not that there was anything or very much in here
4 specifically which I had trouble with, but it seemed to me
5 overall what the paper says to the licensing board is look,
6 we expect these cases to move forward as expeditiously as
7 possible and use the rules to that end, fairly applying
8 them. And I candidly state that I didn't understand and
9 still do not understand why there are eight or nine pages
10 necessary to convey that message.

11 And I cannot speak for the licensing board members
12 -- perhaps Tony can -- but I tend to think if I were a
13 licensing board member I would be offended by this paper.
14 That was the problem I had with it. To clarify my position,
15 more than just saying that this particular instruction or
16 that particular instruction is unwise. I think most of
17 these instructions are good.

18 My question is whether this is the kind of -- it
19 may or may not be that some boards, perhaps many boards,
20 have not been as diligent of the application of the rules
21 and have been unduly tolerant of delaying tactics or
22 whatever. It seems to me in general instructions to the
23 board that this is what our objective is within the
24 framework of due process and recognizing that people have to
25 have a reasonable opportunity to present their positions, to

1 use all of the tools at their disposal, read the rules if
2 necessary to ensure that due process does not translate
3 itself into unnecessary delay.

4 Now, if you are not confident in the ability of
5 your boards to understand what the rules calls for and what
6 tools are provided by the rules, it is a manifestation to me
7 of a lack of confidence of the boards to do their job.

8 MR. COTTER: I don't think there is any hint of
9 that, and I don't think that's the purpose of the paper.

10 MR. ROSENTHAL: I'm not suggesting it's the
11 purpose of the paper.

12 MR. COTTER: The boards read this paper as a
13 message to the parties over which they are presiding, and
14 the specifics of the message enhance the boards' use of the
15 rules with which they are fully familiar.

16 MR. ROSENTHAL: If you think it is useful for that
17 purpose, as I said, I was not swimming upstream against it.
18 I just did not want to affirmatively endorse it. I am not
19 trying to put a roadblock in its way.

20 MR. BICKWIT: I am glad to hear that.

21 (Laughter.)

22 MR. ROSENTHAL: In any case, I think this schedule

23 --

24 MR. BICKWIT: That's very reassuring.

25 MR. ROSENTHAL: I'm sure it is. The schedule is

1 something concrete, which again, as long as it is understood
2 it's simply guidance, could be useful.

3 COMMISSIONER BRADFORD: I think the general point
4 you make about a board member's perception of this would
5 certainly be mine. If I were a board member, I would be
6 livid.

7 MR. ROSENTHAL: Tony doesn't see it that way.

8 COMMISSIONER BRADFORD: I am telling you that I
9 would be as a board member livid. This document would tell
10 me the Commission did not trust me to run hearings
11 adequately. I would think it was bizarre that the same
12 Commission was thinking about making my decisions
13 immediately effective without further review.

14 COMMISSIONER AHEARNE: I disagree. Certainly my
15 support for this kind of document in no way goes to the kind
16 of criticism which you apparently if you were a board member
17 would feel would be perceived. I could only speak for
18 myself on my intent for trying to push this.

19 CHAIRMAN HENDRIE: Peter, it is also the case --
20 if board members take umbrage, I am sorry -- but I have had
21 occasions to look at some schedules for hearings, and here
22 is a schedule where it appears that the board expects the
23 evidentiary hearing to end on a certain date, and the
24 initial decision is to issue eight months later. And I say
25 gee, that seems like a long time to issue an initial

1 decision; and I must say where you find circumstances like
2 that, it seems to me that some expression -- and this really
3 is pretty mild --

4 MR. COTTER: No board that I know of ever did
5 that. That may be done from some other source but not one
6 of my boards.

7 COMMISSIONER BRADFORD: I have proposed revisions
8 which seem to pull the teeth of the worst of it. By and
9 large they don't go to the specific section. I think you
10 were wise to start with that, but I agree with Alan that the
11 document taken as a whole, especially the flavor of the
12 beginning where we say we've been telling you since 1972,
13 and you don't seem to have gotten the message. Here's how
14 we told it to you then and here's how we said it in '75, and
15 there's nothing else wrong with the process except you
16 haven't hurried fast enough. That is the part that I would
17 find appalling if I were a board member. That part was not
18 in the document Tony originally suggested to us.

19 As for the specifics, with the exception of this
20 one section at the beginning I think the changes I have made
21 are quite minor and ones I would expect we wouldn't have
22 much trouble with.

23 CHAIRMAN HENDRIE: I think that is true. That is
24 why, as you said, I am working the back end, and I would
25 really prefer to postpone the discussion about the front end

1 until we work through and see if we don't have pretty
2 general agreement.

3 Vic will take a crack at an intermediate sort of
4 diversion, and we can all look at that and come back to it
5 the next time we meet on B.

6 I guess it would not be correct to assume that
7 because there is no mark in yours that we are all
8 necessarily in agreement, so let me ask on B would people
9 like to --

10 COMMISSIONER AHEARNE: (Indicating.)

11 COMMISSIONER GILINSKY: (Nods affirmatively.)

12 CHAIRMAN HENDRIE: See? I will agree here, but I
13 shall be cut to the quick if at some point this document
14 does not say "as appropriate."

15 (Laughter.)

16 COMMISSIONER BRADFORD: That is negotiable.

17 CHAIRMAN HENDRIE: Are there others on C?

18 (No response.)

19 CHAIRMAN HENDRIE: D? Since you have eliminated
20 the "inter alia."

21 COMMISSIONER BRADFORD: I am following the
22 Gilinsky principle there.

23 CHAIRMAN HENDRIE: I wonder if that disallowed my
24 request to be told for the 417th time what the damned phrase
25 means.

1 MR. COTTER: Among other things.

2 MR. ROSENTHAL: If you didn't want that to be an
3 all-inclusive list, that is what the inter alia would serve
4 to indicate, that these were merely illustrative examples, a
5 favorite lawyer term.

6 CHAIRMAN HENDRIE: I have never encountered it
7 anywhere else.

8 MR. COTTER: You learn the first year of law
9 school always to leave a door open.

10 MR. ROSENTHAL: e.g. is another way.

11 CHAIRMAN HENDRIE: All right. I don't have any
12 problems with Peter's edits here. Are there other comments?

13 (No response.)

14 CHAIRMAN HENDRIE: E? Hearing no outcry I move to
15 F.

16 COMMISSIONER AHEARNE: I guess I would prefer an
17 explanation.

18 CHAIRMAN HENDRIE: Yes. I think -- well, Peter,
19 talk about the editing here. As I read it it was for
20 clarity rather than changes in substance.

21 COMMISSIONER BRADFORD: That was certainly true of
22 the first two, and I intended it to be true of the third as
23 well. I had difficulty weaving my way through the
24 prepositional phrases.

25 CHAIRMAN HENDRIE: "So that resources would not

1 unnecessarily be used, because of the uncertainties
2 regarding the definition of matters in controversy which
3 would exist without the ruling."

4 I think it is perfectly credible English grammar,
5 but it is splendid.

6 COMMISSIONER BRADFORD: I had no objection to the
7 thought if someone would feel more comfortable.

8 COMMISSIONER AHEARNE: Is any author willing to
9 speak up for that phrase?

10 MR. COTTER: I can't remember.

11 MR. BICKWIT: I am delighted to see it go.

12 MR. COTTER: I have to find out whether I am
13 guilty.

14 COMMISSIONER BRADFORD: Well, if no one speaks for
15 it, then I would certainly not oppose its omission.

16 COMMISSIONER AHEARNE: You did not like the
17 statement "The Commission will make its best effort to
18 answer the questions promptly?"

19 COMMISSIONER BRADFORD: Again, I have no objection.

20 CHAIRMAN HENDRIE: It is just bitter experience
21 speaking on our side.

22 COMMISSIONER BRADFORD: I have no objection to the
23 thought, and if any of you strongly prefer having it in, I
24 can live with it. I think it is implicit anyway.

25 CHAIRMAN HENDRIE: John, what is your preference?

1 COMMISSIONER BRADFORD: Again, I assume the appeal
2 board may always make its best effort.

3 COMMISSIONER AHEARNE: All right. We can just
4 drop it.

5 (Laughter.)

6 MR. ROSENTHAL: I would say if the licensing board
7 is going to get this kind of guidance, we should be in the
8 same boat. I don't have any problem with that as it applies
9 to the appeal board.

10 CHAIRMAN HENDRIE: But you are more likely to do
11 it than we are. That is the problem.

12 COMMISSIONER BRADFORD: Does it make an iota of
13 difference to you if that sentence were in there? Could you
14 imagine a situation in which one of these items would then
15 take priority over something when it otherwise would not?
16 Is that necessarily a good thing?

17 MR. ROSENTHAL: Speaking for the appeal board I
18 would say that they make a practice of giving expedited
19 consideration to requests for directed certification or
20 referred rulings. I don't think that that has worked to the
21 sacrifice of the cases, but we do have a sort of pecking
22 order in terms of how quickly we address matters, and it is
23 generally determined by a pragmatic test: is this something
24 that really requires prompt attention? Just as we give high
25 priority to appeals from decisions on intervention

1 petitions, so too we give them on certification.

2 I think as far as I am concerned that that is a
3 statement I can certainly live with, and I do not think it
4 would have any --

5 COMMISSIONER BRADFORD: I think what offended me
6 about it, and mildly so, was it seemed to me it would be to
7 perfect existing practice, and there was no reason for us to
8 be urging it on you.

9 MR. ROSENTHAL: As long as we are going to give
10 these directions to the licensing board, I think it would
11 have the advantage of letting the licensing board know it is
12 not only they who are getting the exhortation. That's the
13 only advantage I can see to it.

14 MR. SHAPAR: Maybe the way to phrase it is the
15 appeal boards will do it and the Commission will do it when
16 appropriate.

17 (Laughter.)

18 CHAIRMAN HENDRIE: I like that.

19 (Laughter.)

20 COMMISSIONER BRADFORD: The broader point you just
21 made, though, Alan, I think there isn't any doubt whether
22 this entire document applies to the appeal board in those
23 situations where you take evidence.

24 MR. ROSENTHAL: Which I hope will not be too many
25 more.

1 (Laughter.)

2 COMMISSIONER BRADFORD: I understand. It isn't
3 that you would be being treated differently in the same
4 situation.

5 MR. ROSENTHAL: No. I think it is fair to say
6 that even though we do occasionally take evidence, this
7 would be interpreted as being directed essentially at
8 licensing boards rather than appeal boards.

9 COMMISSIONER AHEARNE: I have no feelings about it.

10 CHAIRMAN HENDRIE: Strong feelings to keep it in?

11 (No response.)

12 CHAIRMAN HENDRIE: Take it out.

13 (No response.)

14 CHAIRMAN HENDRIE: I don't know.

15 MR. COTTER: I like it.

16 COMMISSIONER BRADFORD: If anybody likes it, leave
17 it. I don't dislike it that much.

18 CHAIRMAN HENDRIE: As April's contribution to the
19 Richard A. Kennedy memorial --

20 MR. BICKWIT: This wouldn't go far enough.

21 (Laughter.)

22 CHAIRMAN HENDRIE: Within 30 days?

23 (Laughter.)

24 MR. BICKWIT: Upon pain of.

25 (Laughter.)

1 COMMISSIONER BRADFORD: Would you believe 30 days?

2 (Laughter.)

3 COMMISSIONER AHEARNE: Tony, let the record show
4 it is because of Mr. Cotter's statement that I am in favor.

5 CHAIRMAN HENDRIE: You can add me in there. I
6 think it is useful for assorted reasons, although it is not
7 a great hanging point. You can count me in for leaving it
8 in. Leave it in.

9 And F? Going once.

10 (No response.)

11 G?

12 (No response.)

13 H?

14 COMMISSIONER BRADFORD: Let me ask about G. How
15 would the board encourage a party to invoke summary
16 disposition? Please make a motion.

17 MR. COTTER: That's perfectly possible.

18 MR. SHAPAR: Sure. They can invite a motion. The
19 board could say it seems to me this particular issue seems
20 appropriate for summary disposition. Is anyone going to
21 sponsor it? If they agree the party would prepare the
22 necessary papers.

23 COMMISSIONER AHEARNE: That raises a question.
24 Why would the board invite that motion?

25 MR. SHAPAR: To speed the process.

1 COMMISSIONER AHEARNE: But why would the board
2 take that step? Because --

3 MR. COTTER: Because the particular question --

4 CHAIRMAN HENDRIE: Watch out, watch out. He's
5 going to refer you to that case again.

6 (Laughter.)

7 COMMISSIONER AHEARNE: Well, if they didn't think
8 it was worth it, why couldn't they just dismiss it without
9 asking for the summary motion?

10 MR. COTTER: Because they would need some sort of
11 test of whether or not there are facts to support it.

12 COMMISSIONER BRADFORD: Can they not do this on
13 their own motion? Can they not just tell the party that
14 they are going to rule out the convention unless something
15 further is forthcoming?

16 MR. ROSENTHAL: They would have to have some kind
17 of record.

18 MR. BICKWIT: Not under the rules they can't.

19 MR. ROSENTHAL: Not under the rules.

20 CHAIRMAN HENDRIE: That is what John is
21 complaining about. Do you remember the case?

22 COMMISSIONER BRADFORD: This is a sua sponte power
23 you would give them?

24 (Laughter.)

25 CHAIRMAN HENDRIE: That's right.

1 COMMISSIONER AHEARNE: This is not looking into a
2 new issue. This is an issue that has been raised.
3 Apparently here is an issue by the way this is being
4 discussed or talked about which the board thinks isn't worth
5 it.

6 MR. SHAPAR: That raises another question. Why
7 would a party not have gotten the idea themselves? The
8 answer to that question is it does take time and resources
9 to prepare motions for summary disposition depending on what
10 type of contingent is involved, and there are tradeoffs
11 involved in that kind of analysis. For example, the
12 estimate may be it may take two or three hours of hearing
13 time to actually go to hearing on it versus a week's
14 preparation on a motion for summary disposition with the
15 affidavits and everything else. Those kind of tradeoffs are
16 being made all the time.

17 COMMISSIONER BRADFORD: Alan doesn't look as
18 though he believes it.

19 MR. ROSENTHAL: I have frankly shot my bolt on
20 biomass.

21 (Laughter.)

22 This debate is going on in perpetuity, and I guess
23 that what to do with it is going to come up when, as and if
24 there is an intervention rule amendment before the house.

25 COMMISSIONER AHEARNE: You are saying, I guess all

1 of you who are familiar with the regulations governing the
2 boards, that the board does not have its own authority to
3 say to the person raising the contention that so far you
4 just haven't made a case.

5 MR. BICKWIT: It has the authority to reject the
6 contention if the standard is not met, but once it is in the
7 summary disposition rule is operative and can be invoked by
8 a party.

9 MR. ROSENTHAL: They certainly can say to the
10 parties from where we sit we don't have a record on this
11 thing, but from where we sit it seems to be somewhat
12 doubtful as to whether there is a genuine issue of material
13 fact on this. We are not prejudging it, but we think this
14 would be a very appropriate subject for the parties to get
15 back there and explore; and we would like to see a motion.
16 If in fact the adversary of the sponsor of the contention
17 concludes that it does not present a genuine issue of a
18 material fact, there is nothing wrong with that.

19 I took it that that is basically what the drafters
20 of this had in mind.

21 CHAIRMAN HENDRIE: That is the way I read it.

22 MR. COTTER: It may be debatable, but I do not
23 believe that we have fully in our proceedings the equivalent
24 of the civil proceeding failure to state a claim upon which
25 relief can be granted. We have it only to the extent that

1 it is perhaps a challenge to a rule.

2 MR. BICKWIT: I think the analogy is in contention
3 practice.

4 MR. COTTER: (Nods affirmatively.)

5 MR. BICKWIT: If the board decides against the
6 admission of the contention, it is analogous to deciding
7 that a claim cannot be defined.

8 MR. SHAPAR: The rule that says the basis of the
9 contention needs to be stated in your petition for leave to
10 intervene. There is also an existing policy document of the
11 Commission, Appendix 80, Part 2, which gives further
12 guidance, such as a matter outside the jurisdiction of the
13 Commission will not be admitted as an issue. That, plus the
14 practice, add up to I think what is an equivalent to what
15 Tony brought up.

16 MR. COTTER: And does not go as far as I believe
17 Commissioner Ahearne would like it to.

18 MR. SHAPAR: But that is another matter which the
19 Commission has reserved on today, and that is, raising the
20 contention barrier earlier in the process.

21 CHAIRMAN HENDRIE: H?

22 (Laughter.)

23 (No response.)

24 CHAIRMAN HENDRIE: I?

25

1 COMMISSIONER AHEARNE: When the Board is going
2 through its initial decision writing then it does not in
3 general have either explicit or implicit guidelines, that
4 every contention that is admitted must be addressed
5 explicitly?

6 MR. COTTER: I don't believe it does. It has
7 always been my view of administrative practice that you only
8 address those matters that you think are significant.
9 Simply had an all inclusive phrase at the end saying,
10 "everything else has been considered and deemed not worthy
11 of discussion."

12 MR. BICKWIT: I think there is some case law that
13 encourages the Board to decide the matter on its own even if
14 no proposed findings have been filed, but there is no right
15 to it.

16 COMMISSIONER AHEARNE: I guess I am making the
17 same point Peter is aiming at, probably, that it sounds like
18 the Board right now can choose not to address explicitly an
19 issue on which there has not been a proposed finding. In
20 fact it sounds as if you are saying they can, in addition,
21 choose not to address an issue on which there was a proposed
22 finding if they conclude that is not a significant issue.

23 MR. BICKWIT: I was not saying the second, but the
24 first. Yes, they can. This is encouraging the finding of
25 the proposed filings by suggesting that if they are not

1 filed the Boards may not address it.

2 COMMISSIONER AHEARNE: Do they have to address it
3 if there are contentions upon the Board having finished the
4 hearing, they have concluded it is not significant? Must
5 they address it if there is a proposed finding?

6 MR. BICKWIT: Yes.

7 COMMISSIONER AHEARNE: That's in the proposed
8 finding?

9 MR. BICKWIT: I don't know, but I cannot imagine a
10 process under which they have admitted the contention there
11 is a proposed finding. You have proposed findings of fact
12 and law and the Board simply ignores the filing.

13 COMMISSIONER AHEARNE: So, what you are saying is
14 that the threshold they actually use on whether it is
15 significant or not--

16 MR. BICKWIT: The significant threshold will come
17 into play if there is no filings.

18 COMMISSIONER AHEARNE: Right.

19 MR. ROSENTHAL: I think under present practice
20 without contrary instructions from the Commission we would
21 take a rather dim view of the Licensing Board decision which
22 totally ignored a contention admitted to the proceeding on
23 which there were proposed findings. And I think that is the
24 general expectation that the Board is going to say something
25 on it, and I don't mean they will necessarily write reams if

1 in fact they think it is a frivolity. But they have got to
2 do something with it.

3 COMMISSIONER AHEARNE: What would the Appeal
4 Board's position be on an admitted contention on which the
5 proponent of that contention did not file a proposed finding
6 and the Licensing Board did not address that contention?

7 MR. ROSENTHAL: Well, the Appeal Board--well, it
8 might depend upon the particular circumstances, but I think
9 certainly I could say that the Appeal Board would not regard
10 that as per se improper the Licensing Board's failure to
11 have addressed it. I think as I indicated a minute ago the
12 Board would, if there were proposed findings in there. Now,
13 if the contention was introduced into the proceeding which
14 went to a serious safety matter and there were 500 or 600
15 pages of transcript which suggested there was some merit to
16 that contention, and the Board ignored it simply because the
17 intervenor who proposed the contention didn't put up
18 proposed findings, I think we would probably have something
19 critical to say about that.

20 COMMISSIONER AHEARNE: What was the problem this
21 paragraph is attempting to address?

22 MR. BICKWIT: The problem is you might have
23 parties entering subject matter into the record and then not
24 filing proposed findings. Proposed findings, it was felt,
25 are helpful in expediting the proceeding because they focus

1 the Board on the questions, and those findings can sometimes
2 be adopted by the Board.

3 MR. SHAPAR: In theory, the Board can reach a
4 decision more quickly if it has proposed findings in front
5 of it than if it does not.

6 COMMISSIONER AHEARNE: I understand the theory.
7 My question is: I can see one or two issues. On Issue 1,
8 there have been difficult issues heard in the evening on
9 which proposed findings were not filed requiring the Board
10 to do a lot more digging through than they would have
11 normally. Issue 2, that the people were dilatory in coming
12 in with their proposed findings, and this was a threat. I
13 didn't know whether this was addressing either of those or
14 just the theoretical concept.

15 MR. BICKWIT: I cannot give you a factual basis.
16 Theoretically, it was addressed to both of those theoretical
17 possibilities.

18 COMMISSIONER BRADFORD: I had originally struck a
19 dissection not for any of those reasons. In fact, having
20 heard this discussion I don't have a problem with the first
21 two sentences. My problem comes with the third sentence.
22 There, Allen, I thought I was remembering that the
23 indecisions or conversations, at least, you had indicated a
24 concern back along with the Licensing Board that simply
25 adopted proposed findings of fact, proposed by one party or

1 another without any independent analysis or reasoning of
2 their own.

3 MR. ROSENTHAL: Yes, I have been critical of that,
4 but it still seems to me that proposed findings serve a very
5 useful purpose, and I am somewhat offended, frankly, when a
6 party introduces a particular issue into the proceeding and
7 then it is litigated. When it comes around to proposed
8 findings time nothing is submitted.

9 COMMISSIONER BRADFORD: What I was saying is the
10 third sentence originally troubled me, and perhaps I
11 overbroadly struck the whole thing. The third sentence, it
12 seemed to me, invited the Boards to do exactly what I
13 remember the Appeal Board had on occasion frowned strongly
14 on in the past.

15 MR. ROSENTHAL: Maybe it is susceptible to
16 interpretation. I didn't read it that way. Again, I would
17 want to stress that I certainly was not suggesting that
18 Licensing Boards cannot carry over into decisions proposed
19 findings.

20 COMMISSIONER BRADFORD: No, I understood that.

21 MR. ROSENTHAL: As I think I have indicated, I
22 have seen from time to time a decision which was almost
23 cover to cover a carbon copy of what had been submitted by
24 one of the parties and that troubled me.

25 MR. COTTER: I would be interested to see which

1 one that is.

2 MR. ROSENTHAL: To see?

3 MR. BICKWIT: I think it is just a policy
4 question. Do you want to encourage this practice? If so,
5 keep the third sentence. It doesn't say much. You will
6 have more adoption of proposed findings of parties than if
7 it's in there, if it's not in there. If you don't want to
8 encourage it, take it out. If you want to encourage it,
9 leave it in.

10 COMMISSIONER BRADFORD: Well, I would drop it.
11 The fact is the Boards will do a moderate amount of it
12 anyway.

13 COMMISSIONER AHEARNE: You then would have no
14 problems with the first two sentences?

15 COMMISSIONER BRADFORD: I would have no problem
16 with the first two sentences.

17 COMMISSIONER AHEARNE: Fine.

18 CHAIRMAN HENDRIE: Drop the last sentence and
19 restore K to its rightful place.

20 COMMISSIONER AHEARNE: Is the phrase, "fair and
21 thorough" a better more explicit definition of "high
22 quality"?

23 MR. BICKWIT: I think that is what the authors
24 meant, "fair and thorough".

25 COMMISSIONER AHEARNE: I was sure I could have

1 gotten a more humorous answer out of you all.

2 (Laughter.)

3 COMMISSIONER BRADFORD: I am happy with that one.

4 CHAIRMAN HENDRIE: How about appeal proof?

5 (Laughter.)

6 COMMISSIONER BRADFORD: That's great.

7 COMMISSIONER AHEARNE: Oh, no, no, no. You don't
8 really want that. Fair and thorough is fine.

9 CHAIRMAN HENDRIE: Let's see. The Commission
10 expects the decisions not only to continue to be fair and
11 thorough, but also that the decisions will be issued as soon
12 as practical up to the proposed findings of fact and
13 conclusions of law. How about a period?

14 COMMISSIONER BRADFORD: Good.

15 CHAIRMAN HENDRIE: We owe it to ourselves and
16 mankind to try to make it run briskly on through. If the
17 plant is ready, that's fine. If it isn't we can stand
18 around and charge negative interest or something.

19 MR. BICKWIT: Not only that, this statement as
20 drafted applies not only to OL proceedings, but all kinds of
21 adjudicatory proceedings.

22 CHAIRMAN HENDRIE: Of course.

23 COMMISSIONER BRADFORD: Except that the beginning
24 section in either form focuses pretty specifically on the OL
25 plants.

1 MR. BICKWIT: It is obvious that if you accept
2 that language that that will be the motivation for this
3 statement. Nonetheless, it applies even to enforcement
4 proceedings.

5 COMMISSIONER BRADFORD: I must say, Joe, I don't
6 mind saying somewhere in here it is a goal of our operating
7 license process that it should be concluded, assuming that
8 the plant is qualified by the time itself is completed.

9 CHAIRMAN HENDRIE: But I think that should go back
10 in the early parts. Yes, I think that is helpful. When we
11 say it I think that we note that that is particularly the
12 case with regard to operating license proceedings where you
13 have something which is maybe in a situation where it could
14 operate if the proceeding were finished and not characterize
15 the statement. I would like to have it in there, but back
16 here to say the reason we want the decisions to issue is to
17 ensure that the plants will operate is to get the proceeding
18 over.

19 COMMISSIONER BRADFORD: Okay.

20 CHAIRMAN HENDRIE: The last paragraph?

21 COMMISSIONER BRADFORD: Again, it's not what I
22 really minded, but we seem to be setting ourselves up as a
23 brooding omnipresence.

24 CHAIRMAN HENDRIE: I was looking at the
25 accordingly one, and I wanted to ask Tony if there was any

1 problem with that. I assume since he agreed with it, there
2 wasn't, but I wanted to give him a chance.

3 MR. COTTER: I think I wrote it the first time.

4 CHAIRMAN HENDRIE: All right. The Section 4
5 Commission Monitoring, yes, I have no objection to dropping
6 that. Okay, we now have a Section 3, except that Vic needs
7 to do some drafting on A, which we will look at.

8 Now, let's go back and take a look at the front
9 end of the thing. One and two. Well, let's try one.

10 Peter?

11 COMMISSIONER BRADFORD: Do you want me to describe
12 the theory of what I have done?

13 CHAIRMAN HENDRIE: I think I perceive it, but you
14 know, as the inventor you are entitled to explain.

15 COMMISSIONER BRADFORD: Well, basically the
16 document as drafted seemed to cite the wrong history. That
17 is, it is after all since TMI we have spoken to the general
18 policy of how licensing proceedings ought to be conducted.
19 And it just didn't seem to me to be right to be saying to
20 the Boards that the only thing basically we saw wrong with
21 the licensing process was that it moved too slowly. It is
22 going back and saying, as I mentioned earlier, we told you
23 how to do this in '72. We told you again in '75 and now we
24 are really telling you. It just wasn't quite the flavor I
25 thought should come out of this document. So, what I was

1 trying to do was reference it to a somewhat different piece
2 of history that suggested that while we were indeed
3 interested in expediting and we did indeed have a particular
4 set of problems on our mind at the moment, we also retained
5 an interest in a balanced process.

6 COMMISSIONER AHEARNE: If I could speak to that
7 for a moment.

8 CHAIRMAN HENDRIE: John.

9 COMMISSIONER AHEARNE: I agree and disagree or
10 disagree and agree. I disagree that it's the first time we
11 have spoken to the Boards. We have spoken to the Boards
12 several times since Three Mile Island. The most explicit
13 initial was when we basically told them, stop, because the
14 staff is not ready to come to you on a whole host of
15 things. So, we don't want you dealing with these issues.

16 The second time we spoke to them we said since we
17 haven't yet reached a final conclusion on a number of these,
18 we don't want any of your decisions to be final until we
19 have looked at them. So, I would say in general we've
20 spoken to the Boards a number of times.

21 COMMISSIONER BRADFORD: In a general sense, yes,
22 but not really about the licensing process and its inner
23 workings.

24 COMMISSIONER AHEARNE: It's not the process, but
25 we have spoken to them about the kinds of issues to which

1 they were supposed to particularly react to. Modifications
2 of what were and were not issues as a result of Three Mile
3 Island. I just wanted to say that. On the rest of it I
4 would agree with your point. I had no problem with Tony's
5 original background, so I think that whereas the OGC
6 proposal goes too far in one way, I would suspect your's
7 goes too far in the other direction. Tony's was just a
8 basic statement.

9 CHAIRMAN HENDRIE: Now you are going to make me
10 look for another paper.

11 COMMISSIONER AHEARNE: Well, here (indicating).

12 CHAIRMAN HENDRIE: Do you have it?

13 COMMISSIONER GILINSKY: Do you mean Tony's
14 original?

15 CHAIRMAN HENDRIE: Yes.

16 COMMISSIONER GILINSKY: No, I don't have it.

17 COMMISSIONER BRADFORD: I do.

18 CHAIRMAN HENDRIE: It is pretty snappy and to the
19 point I must say.

20 Now, if we wanted to look at Tony's version--

21 COMMISSIONER AHEARNE: As an alternative I would
22 have no problem if it started with Peter's mark-up on Page
23 2.

24 COMMISSIONER GILINSKY: I was going to suggest we
25 start with Peter's mark-up on Page 2, but add something at

1 the end of the statement along the lines of Peter's first
2 page, not necessarily using those quotes, just so it is
3 clear that this is not a broad side against the hearing
4 process that we want the system to function better, and it
5 ought to. But at the same time make clear that we think the
6 hearing process is important.

7 CHAIRMAN HENDRIE: How does that strike you, Peter?

8 COMMISSIONER BRADFORD: That sounds fine.

9 CHAIRMAN HENDRIE: As the basis for further work?

10 COMMISSIONER BRADFORD: Yes. There is one other
11 thought on Page 1 I would like to salvage if I could. The
12 last three sentences, which isn't really directly tied into
13 what came before it, and which Tony could hardly have
14 written in to his own proposal.

15 COMMISSIONER AHEARNE: I would be willing to buy
16 starting with "The Commission appreciates".

17 COMMISSIONER BRADFORD: I would suggest keeping
18 that regardless of whether you rewrite what comes before it,
19 because it is really a separate thought.

20 COMMISSIONER AHEARNE: And we could leave "for
21 other places."

22 COMMISSIONER BRADFORD: It doesn't have to be kept
23 right there.

24 COMMISSIONER AHEARNE: We could leave for other
25 places the discussion of who made the problems.

1 COMMISSIONER BRADFORD: Right.

2 CHAIRMAN HENDRIE: Why don't we start at the top
3 of Peter's Page 2 and get the thrust of the things which
4 follow, and at some point in that or at the end of it then
5 these last three sentences on Peter's Page 1 would appear.
6 I don't know whether--how much of the quotes and so on are
7 appropriate.

8 COMMISSIONER GILINSKY: I was thinking of putting
9 this at the end of the whole statement.

10 CHAIRMAN HENDRIE: I see.

11 COMMISSIONER GILINSKY: I mean, usually, the ideas
12 in Peter's Page 1 are at least what I take to be the sense
13 of it.

14 COMMISSIONER BRADFORD: That's fine with me.

15 COMMISSIONER AHEARNE: I have no problem with his
16 changes on Page 2.

17 Let's see, before I scan down once more through
18 those changes, what I would suggest is if the document is
19 going to open here that we need a paragraph to go above the
20 place where it says "Historically NRC operating license
21 reviews have been completed and license issued." And I
22 think the kind of thing that it needs before that is--I
23 don't know. Maybe that first paragraph out of Tony's. "The
24 Commission has reviewed the docket of the OGC and the
25 current status of proceedings concerning public meetings,

1 and the Commission has examined at length all the major
2 components involved in licensing proceedings." And then
3 find a transition sentence that says, "We think it
4 appropriate," and not comment on the hearing process. What
5 I am looking for is a transition to get this business about
6 the OL delays framed so that it is an element, clearly an
7 outstanding element, but an element of the overall thing,
8 rather than the whole subject. Otherwise, the paper starts
9 out with the OL problem, and it seems to me we ought to say,
10 look, we are making a statement on the hearing process.
11 There are some correct problems of a fairly serious nature,
12 and then one might say particularly in the operating license
13 process, and then on to, "Historically, NRC has been able to
14 do this, but now we have this problem, and here is why. It
15 could be a very expensive proposition," which is the thrust
16 of the rest of it.

17 COMMISSIONER BRADFORD: It sounds fine.

18 CHAIRMAN HENDRIE: As long as I am waving hands
19 over words you haven't got to look at, why don't I try
20 something along that line or get Linda to try something
21 along that line just to get it started. If it looks like if
22 we stand back and it doesn't appear it is needed, we can
23 always go back and start out where you are at the top of
24 Page 2. It seems to me it needed a headline in there in the
25 editing.

1 COMMISSIONER AHEARNE: All of Page 2 is fine as
2 far as I am concerned.

3 CHAIRMAN HENDRIE: I don't have any problem with
4 the editing. It gets the point.

5 COMMISSIONER AHEARNE: And I don't have any
6 problem with the rest of that I on Page 3.

7 CHAIRMAN HENDRIE: The top of Page 3 it says, "The
8 Commission, therefore, is issuing this policy statement on
9 the need for the balance and efficient conduct of all phases
10 at the hearing process." It seems to me that after that
11 sentence is a prime opportunity for the three sentences at
12 the bottom of Page 1, and this would then form a paragraph
13 by itself.

14 COMMISSIONER BRADFORD: Yes, I think that that is
15 fine.

16 CHAIRMAN HENDRIE: And then I guess go on with the
17 balance of what you have there on Page 3 as marked up on
18 Page 3. Do I see agreement?

19 COMMISSIONER AHEARNE: Fine.

20 COMMISSIONER BRADFORD: (Nods affirmatively.)

21 CHAIRMAN HENDRIE: I see either nods or neutral
22 emotions. A circular motion of the head is neutral.

23 MR. COTTER: I should say the Board certainly
24 appreciates the sentiment expressed. I want to thank you in
25 the three sentences moving to Page 3.

1 CHAIRMAN HENDRIE: Enough of this coddling.

2 MR. BICKWIT: Aren't you going to insist on
3 starting the statement off with those sentences?

4 MR. COTTER: No, I am just happy to see it there.

5 CHAIRMAN HENDRIE: Okay. Now, what about general
6 guidance?

7 COMMISSIONER AHEARNE: I will go for Peter's as
8 long as it is attributed.

9 COMMISSIONER BRADFORD: You don't mean alternative
10 B?

11 CHAIRMAN HENDRIE: Instead of the Commission
12 thinks, well, you could say, "Commissioner Bradford thinks."

13 (Laughter.)

14 COMMISSIONER AHEARNE: Right.

15 CHAIRMAN HENDRIE: Maybe Version A could go back
16 in this new section.

17 COMMISSIONER AHEARNE: Lynn, had you intended for
18 the modifications in 202-A to say that you would keep the
19 first paragraph of general guidance?

20 MR. BICKWIT: That's right.

21 COMMISSIONER BRADFORD: Oh, I didn't understand
22 that.

23 CHAIRMAN HENDRIE: I think the first paragraph
24 aside from the fact that it states the obvious is not bad
25 stuff.

1 COMMISSIONER BRADFORD: Yes, I have no problem
2 with the first paragraph.

3 COMMISSIONER AHEARNE: I would like to say I
4 thought 202-A was well written and sound.

5 MR. BICKWIT: Well, you can't please everybody.
6 (Laughter.)

7 CHAIRMAN HENDRIE: The first paragraph is all
8 right with you?

9 COMMISSIONER GILINSKY: Yes.

10 CHAIRMAN HENDRIE: Under general guidance we will
11 keep the first paragraph and the ad hoc committee's
12 version. A little while ago there is a short section
13 paragraph at the bottom of Page 3 and the top of Page 4,
14 which is struck, and we now look at the ad hoc group's 202-A
15 and we'll look at Peter Bradford's editing on same.

16 We get almost to the middle of the page with that
17 change except Peter, could you--what is the incommensurate?

18 COMMISSIONER BRADFORD: If you can swallow that at
19 all, it ought to say safety or environmental. By the way,
20 the basic point is that it is conceivable that a Board
21 dealing with a party with limited resources and a serious
22 safety issue might for some reason feel a need to grant an
23 extension or a waiver of rules or procedures in some way and
24 the minute that gets done there is an element of prejudice,
25 at least to the applicant's interest in having a decision as

1 soon as possible, and also, perhaps, the applicant's
2 interest in not having the matter pursued further.

3 What I am saying is, if there is a serious safety
4 or environmental concern there and it does seem serious
5 enough that the Board is prepared to alter the schedule to
6 give a party with limited resources a chance to raise it
7 effectively, I think one must recognize there will be a
8 small element of prejudice, maybe a large element of
9 prejudice in getting the issue flushed out.

10 COMMISSIONER AHEARNE: This, of course, is
11 preceding a later discussion which at some other time we
12 will be having, but if it were not a serious safety or
13 environmental concern, in other words, if it were not
14 serious, would it have been in admitted contention?

15 COMMISSIONER BRADFORD: Possibly. The standard
16 for admission of contentions is not that they be serious
17 safety or environmental concerns.

18 CHAIRMAN HENDRIE: Just that they be related.

19 COMMISSIONER BRADFORD: I don't remember what the
20 exact words are.

21 CHAIRMAN HENDRIE: Related to safety or
22 environmental standards in some fashion.

23 COMMISSIONER BRADFORD: One can imagine to take a
24 bile mask, purely hypothetical situation, one which the
25 Board would not be inclined to be patient with.

1 COMMISSIONER AHEARNE: Except there are many
2 members at senior levels of the Commission who apparently
3 felt that was a serious issue.

4 COMMISSIONER BRADFORD: Who felt it was a
5 legitimate contention. Now, if that contention survived in
6 the proceeding, if the interpleaders had pleaded for vast
7 extensions of time in order to pursue some aspect of
8 discovery or anything else that went before summary
9 judgment, I can imagine the Board taking a fairly dim view
10 of granting those kinds of extensions if the issue were one,
11 and this is clearly suggested in the surviving paragraphs on
12 Page 2, when the Board starts balancing the seriousness of
13 the issue in with the other considerations. There may be
14 situations in which it would feel extensions were in order,
15 and that is really all I am trying to get at here. The
16 sentence as it stands without my insert to it really says
17 that the Board cannot take account of special circumstances
18 faced by a participant if it would result in prejudice to
19 other parties. And that seems to me to be a little bit
20 strong.

21 MR. BICKWIT: Our concept was basically that if
22 there is prejudice then it ought to be avoided, and if what
23 you have is a serious safety concern, that that is an
24 appropriate factor to consider in deciding what sanction is
25 appropriate. I think the Commission can go either way on

1 this, but I think what you are asking is should you take
2 into account the nature of the safety concern being pursued
3 in deciding what is right and wrong, or should you take that
4 into account in deciding what kind of sanction you are going
5 to impose, having acknowledged that it is wrong?

6 COMMISSIONER AHEARNE: Well, I will stick with
7 that.

8 COMMISSIONER BRADFORD: But the word "sanction" is
9 hard to deal with. There are sanctions which are pure
10 sanctions. That is, for example, of the ones listed here
11 warning the offending party. Of course, that doesn't really
12 prejudice their substantive ability to put on a case. On
13 the other hand, if you go to the sanctions involving denial
14 of cross examination or dismissal of the contention, then
15 you are really imposing a sanction which is not like a fine
16 or a penalty. It really says that regardless of the merits
17 of that contention it will not be in this proceeding any
18 more because you have violated a conduct.

19 MR. BICKWIT: That is the point I am making. That
20 is where you ought to weigh under this concept the nature of
21 the safety concern. Do you simply warn and grant the
22 extension, or do you throw the contention out? And I think
23 it is highly relevant to that decision what the nature of
24 that contention is.

25 COMMISSIONER GILINSKY: If it's a serious matter,

1 do you expect the Board to raise it itself?

2 MR. BICKWIT: That is an issue which maybe we will
3 come to. That is certainly an option if you stay with the
4 existing sua sponte rule.

5 COMMISSIONER AHEARNE: Peter, could you put your
6 point in? Well, first, if you don't disagree with Lynn's
7 argument that it shouldn't go to whether it is right or
8 wrong, but whether it should go to what sanction, could you
9 fold that thought in on the second page where he is saying
10 in selecting a sanction?

11 COMMISSIONER BRADFORD: My difficulty, though, is
12 with this sentence as it stands, because it really does say
13 that the only way you can take into account special
14 circumstances are ways that don't prejudice the position of
15 other parties. I think that that is too strong in the case
16 of serious concern.

17 If you have a situation in which someone says I
18 just cannot meet a filing deadline because my witness has a
19 schedule or what have you, and I need a 30-day extension, of
20 course the applicant and conceivably others will say, well,
21 that prejudice gives me 30-days worth. And in a case where
22 the contention did not strike the Board as all that
23 important even if it had gotten into the proceeding, maybe
24 one would be prepared to say we are not going to--we just
25 can't give you that sort of time. But if it really seemed

1 to be of fundamental importance, I would rather the Board
2 did feel that it could give the 30-day extension, even if
3 there were an element of prejudice.

4 MR. SHAPAR: Perhaps a way of assaulting it
5 quickly is to say that the Board should see that this does
6 not unduly prejudice other parties.

7 COMMISSIONER BRADFORD: If it says it does not
8 result in undue prejudice to other parties, I think that
9 would help.

10 CHAIRMAN HENDRIE: We don't need "undue" if we go
11 on.

12 COMMISSIONER BRADFORD: No. I am saying you can
13 substitute the phrase, depending on what you do with the
14 rest of it then.

15 CHAIRMAN HENDRIE: Does that seem somewhat--

16 MR. BICKWIT: Well, it is a different concept.
17 You are still sanctioning. The question before you is do
18 you want to sanction the failure to meet deadlines of the
19 Board because of special circumstances when that results in
20 prejudice? And the answer to that can be either yes or no,
21 but that is the question you want to address.

22 MR. SHAPAR: I suppose you can argue there is
23 always a little prejudice when the Board extends a time
24 which other parties have taken into account and they are
25 scheduling. So, I guess in the real world, undue is

1 probably what we mean.

2 MR. COTTER: I think that is true. Prejudice
3 carries two connotations. One of them is that which goes
4 with dismiss with prejudice, which means a final elimination
5 of a right or remedy, and the second runs through all kinds
6 of shades of meaning in terms of a disadvantage or a
7 sanction or a curtailment of one party's right by virtue of
8 the leave granted another. So, that, to the extent that
9 someone is obligated to file something within 30 days and
10 they are given an extension of 30 days, in addition that
11 does prejudice the party to whom they are responding. But
12 it is not undue prejudice.

13 CHAIRMAN HENDRIE: Yes, I guess it is undue
14 prejudice that I mean. It is impossible to go along even in
15 part with any party's view on any issue without some small
16 increment of prejudice to other party's appearing.

17 COMMISSIONER AHEARNE: Except in some cases when
18 someone asked for an extension the other parties say they
19 have no objection. And then granting that extension, I
20 think would at least in normal times not prejudice them,
21 since they have already said they have no objection.

22 MR. COTTER: Or they are willing to swallow it.

23 CHAIRMAN HENDRIE: That's right. That just means
24 they are willing to swallow whatever increment of prejudice,
25 undue prejudice then to other parties, period.

1 COMMISSIONER AHEARNE: I would have preferred to
2 have followed Peter's point into the sanctions.

3 COMMISSIONER GILINSKY: How is that now?

4 COMMISSIONER AHEARNE: I was agreeing with Lynn's
5 point that the first issue is, is it right or wrong to have
6 this? In this particular case, extension. If it's wrong,
7 then--

8 COMMISSIONER GILINSKY: It's not right or wrong.
9 It's do we want to allow it or do we not want to allow it?

10 COMMISSIONER AHEARNE: The first question is,
11 should they meet their schedules, yes or no? And they don't
12 meet their schedule. Is that right or wrong? I thought
13 Peter's point was, well, whether you say that is wrong
14 depends upon the significance of the issue they are
15 raising. And in this proposal of OGC's, it is constructed
16 in such a way that says, yes, that is wrong, and then what
17 do you do about it being wrong? You put a sanction. But
18 that sanction then, the severity or type depends upon a
19 number of factors. I was saying that I felt that would be
20 the place to put the issue of is this a serious safety
21 question they have raised, or a series environmental
22 question that they have raised in addressing what is the
23 sanction.

24 MR. BICKWIT: May I try to sharpen this? I think
25 that this particular sentence confuses to some extent the

1 question of right and wrong and what kind of sanction is
2 involved. The next sentence does not. If you look simply
3 at the next sentence and start with the fact that a party
4 may have personal or other obligations or possess fewer
5 resources than others, to devote to the proceeding, does not
6 relieve it of the hearing obligations that must be met to
7 avoid such prejudice, to avoid prejudice to other parties.

8 COMMISSIONER BRADFORD: To avoid undue prejudice?

9 MR. BICKWIT: Then ask the question, are you
10 comfortable with the sentence in that way, or do you need
11 "undue" in there? I think that focuses the issue a little
12 better. You are then deciding is it okay not to meet your
13 schedule if prejudice results, or in some circumstances,
14 would you say it is permissible, it is okay?

15 COMMISSIONER BRADFORD: That as I say--the answer
16 to that to me seems to be clearly yes, in the context of a
17 party pursuing a contention.

18 MR. BICKWIT: I guess the question is in some
19 cases would you say there is no obligation?

20 COMMISSIONER BRADFORD: No. It is a balancing in
21 terms of how much additional time the party needs and how
22 seriously you take what it is they are--

23 MR. BICKWIT: And that is the question. Do you
24 balance the nature of the safety concern in determining what
25 the obligation is of the party to comply with the schedule?

1 COMMISSIONER BRADFORD: Yes.

2 MR. BICKWIT: Your answer is yes, and our proposed
3 concept was no, and that is really the issue you ought to
4 decide, and we can draft it any way you like after you
5 decide it.

6 COMMISSIONER AHEARNE: And that is where I was
7 coming down in agreement with Lynn. I would say, no, that
8 does not in any way relieve you of the obligation. But not
9 having met the obligation it is a factor and can be a major
10 factor.

11 MR. BICKWIT: In determining what should be done
12 about it?

13 COMMISSIONER AHEARNE: Right.

14 If they accept the first part which says, "The
15 Boards should take whatever steps are possible."

16 MR. BICKWIT: I am suggesting striking that for
17 purposes of focusing the issue. At least deal with the next
18 sentence.

19 COMMISSIONER GILINSKY: Then are you striking the
20 last part of that second sentence about prejudice, which
21 refers to the sentence you have just struck?

22 MR. BICKWIT: I would strike "such".

23 COMMISSIONER GILINSKY: Does not relieve it of
24 meeting its hearing obligations, period.

25 COMMISSIONER BRADFORD: Yes, that's right.

1 MR. BICKWIT: (Nods affirmatively.) If that is
2 the concept, the question again is, do you want to define
3 these obligations in terms of the seriousness, the safety
4 issue?

5 COMMISSIONER GILINSKY: It seems to me the only
6 way you can have a party lose its rights and in effect to
7 participate in the hearing because of lateness is if at the
8 same time you instruct the Boards to take these issues up on
9 their own if they are sufficiently serious. Then you can
10 just say, very well, if the parties haven't met the
11 schedule, they lose certain rights. But you cannot say that
12 no matter how serious the issue it will be dropped from the
13 hearing because someone missed a schedule.

14 COMMISSIONER AHEARNE: You can say if the Board
15 believes it is that serious an issue and the party has not
16 been pursuing its obligation, the Board can drop it from the
17 hearing. But, the Board can then refer it to the Commission
18 saying here is a serious issue which was raised and dropped
19 from the adjudicatory hearing because the party did not
20 pursue it.

21 COMMISSIONER BRADFORD: Except you will find up
22 losing more time than you will save that way.

23 COMMISSIONER AHEARNE: I don't think any at all in
24 my concept that I just outlined. You just leave it out from
25 the hearing.

1 COMMISSIONER BRADFORD: But suppose the Commission
2 then says take it out?

3 COMMISSIONER AHEARNE: I would assume, since it is
4 not part of the hearing, the Commission could examine the
5 issue on its own.

6 COMMISSIONER BRADFORD: I suppose it could, but at
7 that point somewhere you have a three-quarters prefiled
8 testimony that an expert was going to present, and I suppose
9 the Commission could fund him to finish it, but meanwhile it
10 has gotten out of the context of the proceeding.

11 COMMISSIONER AHEARNE: It would just explore that
12 issue as it explores them in uncontested hearings.

13 MR. COTTER: The more you talk or write about an
14 area like this the more traps you set. I think there are
15 sanctions in the proceeding. There are sanctions in the
16 rules, in the original statement that I proposed that said
17 there are sanctions in the rules and you should be aware of
18 them and they should be used in appropriate cases.

19 MR. BICKWIT: The problem I think is, I think the
20 Boards--and I am not the one who is the authority on
21 this--but I would think the Boards would want guidance on
22 the question of do we or do we not take into account the
23 particular circumstances of a party in deciding whether to
24 grant the extensions? It is a very basic point. I don't
25 think the Commission should decide on that.

1 MR. ROSENTHAL: That is one of the hardest things
2 a Board has to confront. It's one of the few things that is
3 covered in this paper, not in the rules. We see it all the
4 time. We have a party who doesn't need a deadline, doesn't
5 apply for an extension, and their explanation for all of
6 this is, you know, we have limited resources. We are not
7 like the applicant who has someone sitting on top of the
8 case at all times and we are all by ourselves and we were
9 out of the country for a week or two and we got back and
10 found your order, and all of that. Then the applicants come
11 back and stand up and say, look, if that person is going to
12 be a participant in this proceeding, they are going to be a
13 participant. They will be held to the same requirements as
14 anyone else. And if you go along with that at this point
15 the result will be two weeks delay and this, that and the
16 other thing. And this has a big price tag.

17 Now, I tend to think that is the one area in this
18 whole paper, from my vantage point, where the Commission
19 ought to be giving some guidance. To what extent does this
20 Commission wish the Boards to lend a sympathetic ear to that
21 kind of pitch, assuming that the Board feels in the
22 particular case that it is a genuine complaint? Now, you
23 can look at it in various ways. You can take the position
24 that, hey, if you come into one of these proceedings you
25 have got to live by the rules like anyone else.

1 MR. COTTER: Except the staff.

2 MR. ROSENTHAL: Oh, no. Well, the staff now is
3 under the whip; aren't they?

4 MR. SHAPAR: Why do you except the staff? The
5 staff is responsible to the Commission.

6 MR. ROSENTHAL: You could alternatively take the
7 position that you will be solicitous.

8 MR. SHAPAR: A much higher taxmaster I should
9 say.

10 MR. ROSENTHAL: You can't decide in policy
11 individual cases, but I really do think, and I speak now for
12 appeal boards, my own area of experience. But this is
13 somewhere where the Commission has to in the vernacular,
14 bite the bullet and give some indication to the Boards as to
15 how they want to approach this kind of situation, because it
16 arises all the time.

17 COMMISSIONER BRADFORD: Allen, I agree with what
18 you are saying, but I don't see how the two ways Lynn has
19 formulated the issue helps very much. In one case you are
20 deciding in advance that it is all right for impecunious
21 intervenors to slip deadlines a little bit. The alternative
22 is to say no, it is not all right. But we will take into
23 account the importance of your contention in deciding what
24 sanction to apply. It seems to me you will come out exactly
25 the same place, whichever way you state that dilemma. And

1 what the Commission really has to do is to lay down the
2 guideline as to what the factors it wants balanced are. I
3 suppose it could say it doesn't want any balancing done.
4 You meet the deadline or you are out.

5 COMMISSIONER AHEARNE: Peter, moving back to my
6 previous question. If there are contentions that are
7 admitted and are not serious ones, then there really is a
8 difference, because under the first formulation you take
9 into account whether the individual is impecunious or
10 whether or not they have an obligation, and it is irrelevant
11 how serious the issues are.

12 MR. BICKWIT: But weren't you going to incorporate
13 that concept in your formulation?

14 COMMISSIONER BRADFORD: Yes. Also, you get
15 smarter about the different issues and the different
16 intervenors as the proceeding goes along. It may be by the
17 end of the proceeding you can see that a particular
18 intervenor, even though he has pressed a serious
19 consideration, he isn't pursuing it very accurately, and
20 that might enter into the Board's consideration of what kind
21 of behavior it is willing to put up with. I am perfectly
22 prepared to say that we expect all parties to meet their
23 hearing obligations regardless of financial state. Where I
24 start having difficulty, though, is if the statement then
25 goes on to imply that the sanction for failure to meet your

1 obligation is dismissal of your contention, or should be
2 dismissal of your contention.

3 COMMISSIONER AHEARNE: It ought to be a
4 possibility.

5 COMMISSIONER BRADFORD: It is a possibility.
6 Maybe we don't differ that much. I am not saying it should
7 not be a possibility, but it ought to flow automatically. I
8 am a little bit lost as to where we now are with the actual
9 document here.

10 MR. BICKWIT: Can I try on that part? What I
11 would suggest is the second and third sentences be combined
12 so that they would read, "While the Board should endeavor to
13 conduct a proceeding in a matter which takes into account
14 the special circumstance faced by the participant, the fact
15 that a party may have personal or other obligations or
16 possess fewer resources than others to devote to the
17 proceeding, does not relieve it of the hearing obligations
18 which must be met to avoid prejudice to other parties."

19 COMMISSIONER GILINSKY: How about its hearing
20 obligations?

21 MR. COTTER: Period.

22 MR. BICKWIT: You could say "its hearing
23 obligations." "The hearing obligations which must be met to
24 avoid such prejudice," or, "The hearing obligations which
25 must be met to avoid undue prejudice."

1 COMMISSIONER BRADFORD: I don't have objections to
2 the sentence as you read it ending with obligations, but
3 that depends upon what comes next.

4 COMMISSIONER AHEARNE: In my naivete on this
5 terminology, I would have thought that if meeting its
6 hearing obligations is even stronger than meeting its
7 hearing obligations or the obligations must be met to avoid
8 prejudice to the other party's hearing obligations, I would
9 have thought would have meant that once they agree to a
10 schedule they would have to meet it, even if the other party
11 said it's all right to slip. But obviously, that is not.

12 COMMISSIONER BRADFORD: I think what we are
13 tending toward is accepting the formulation. If one
14 considers those things when it comes to sanctions, rather
15 than stating the principle.

16 COMMISSIONER AHEARNE: I certainly agree with
17 Lynn's rewrite.

18 CHAIRMAN HENDRIE: All right. Then we have
19 Lynn's. While the Board should endeavor to conduct the
20 proceeding in a manner that takes account of the special
21 circumstances faced by any participant, the fact that a
22 party may have personal or other obligations or possess
23 fewer resources than others to devote to the proceeding,
24 does not relieve it of the-- or its shape, or I would say
25 its hearing obligations.

1 MR. BICKWIT: Its hearing obligations.

2 CHAIRMAN HENDRIE: "Its hearing obligations. And
3 the proposition is to put a period.

4 MR. BICKWIT: (Nods affirmatively.)

5 CHAIRMAN HENDRIE: Very good. Then--

6 MR. BICKWIT: I would support Peter's deletion of
7 the next sentence.

8 COMMISSIONER BRADFORD: I originally deleted it
9 because it seemed to me to be pretty redundant, the second
10 sentence.

11 CHAIRMAN HENDRIE: Yes, okay. The next sentence
12 deleted--you struck all the way down and started at the top
13 of the next page, Peter, with "in selecting a sanction"? So
14 far we haven't mentioned sanctions, and I think maybe we
15 need something in here.

16 COMMISSIONER BRADFORD: Correct me if I am wrong.
17 Will this list of sanctions come as a revelation to the
18 Board members?

19 COMMISSIONER AHEARNE: It may come as a revelation
20 that the Commission is willing to endure the Boards using
21 them.

22 MR. COTTER: I certainly support that statement.

23 MR. BICKWIT: There are two different things here:
24 the listing of the sanctions is one concept. But there is a
25 sentence above that which goes beyond listing the

1 sanctions.

2 COMMISSIONER BRADFORD: Yes. All right, you are
3 right.

4 Now, there I guess I need a list of cases. I mean
5 the fact that there may be one case were Tom Bevill's
6 drifter causes trouble or some analogue to Tom Bevill's
7 drifter's trouble doesn't leave me prepared to turn the
8 screws on all proceedings everywhere if, in fact, there are
9 a number of cases in which sanctions have been applied or
10 haven't been, then perhaps I could be persuaded. I don't
11 know of them now.

12 MR. BICKWIT: This is the problem we always face.
13 We base these recommendations not on any knowledge of all of
14 the facts of all of the cases in the past, we base them
15 really on statements made from this side of the table
16 (indicating) that Boards have been reluctant to use
17 sanctions in the past, even though they clearly have the
18 legal authority to use them. I know of one case that I have
19 analyzed where I would not have been critical of the Board
20 for failing to use sanctions, and this sentence is worded so
21 that it is not critical of the Board. It simply states that
22 in the new climate the sanctions that have been used are not
23 appropriate to what should be done now.

24 COMMISSIONER GILINSKY: I would leave it out and
25 just go on and talk about what we thought should be done.

1 COMMISSIONER AHEARNE: Leave what out?

2 COMMISSIONER GILINSKY: It is the Commission's
3 view that sanctions have not been imposed on the past, et
4 cetera.

5 COMMISSIONER AHEARNE: I would obviously prefer to
6 leave it in.

7 COMMISSIONER GILINSKY: I don't think anyone here
8 has sufficient experience with the hearings to make that
9 statement on the basis of, you know, being able to back it
10 up.

11 MR. BICKWIT: I know I don't.

12 COMMISSIONER BRADFORD: More importantly, you
13 don't have to make it to make a broader point, that the
14 Commission is endorsing the use of sanctions in cases.

15 COMMISSIONER GILINSKY: You may well be correct.
16 I think it is just too susceptible of misunderstanding.
17 Let's just say what we think ought to be done.

18 COMMISSIONER AHEARNE: What I thought ought to be
19 done is more use of sanctions than have been used in the
20 past. So, I was endorsing this because it was saying what I
21 thought ought to be done.

22 MR. COTTER: I would like to review that with my
23 people.

24 CHAIRMAN HENDRIE: I think we break probably too
25 far in and too far out. I need to get from the agreed upon

1 sentence above which ends obligations, period. I need some
2 way to get into the question of sanctions. I need to say
3 something like, "when a participant fails to meet its
4 obligations, the Board should consider--"

5 MR. SHAPAR: Or the imposition of sanctions.

6 CHAIRMAN HENDRIE: Or something like that. And
7 then from there either go on and talk about the spectrum
8 from minor to severe, and for example, or not, depending
9 upon what we like. But anyway, that gets us to the top of
10 the next page where we can get into the business of
11 selecting a sanction. There are these things to be
12 considered. I think you want to get this stuff in the next
13 page in, but you need a transition.

14 MR. BICKWIT: Just take this one: "When any
15 participant fails to meet its obligation," in the sentence
16 that was struck, comma, and then you go from there to a
17 board, at the beginning of the next sentence, "a board
18 should consider the imposition of sanction against the
19 offending party."

20 CHAIRMAN HENDRIE: Is that okay with people?

21 COMMISSIONER BRADFORD: Well, my proposed
22 transition--but it depends upon wanting to jump all of the
23 way to the top of Page 2. It would be just to go from the
24 phrase, "its hearing obligations," where we start to, "in
25 selecting a sanction to meet these obligations, the Board

1 should consider--"

2 CHAIRMAN HENDRIE: That would do it. I just need
3 a transition.

4 COMMISSIONER AHEARNE: I think it is important,
5 very important, for them to know whether the Board would
6 approve the use of this list of sanctions. I could live
7 with your proposed modification.

8 CHAIRMAN HENDRIE: Which one?

9 COMMISSIONER AHEARNE: The one you proposed to
10 Lynn.

11 CHAIRMAN HENDRIE: You would prefer to have the
12 one that says--

13 COMMISSIONER AHEARNE: I would prefer to have it
14 as it is written.

15 CHAIRMAN HENDRIE: I understood that. But you
16 would prefer the longer formulation which allows one to go
17 through the list.

18 COMMISSIONER AHEARNE: Yes. I could agree with
19 dropping "The Boards for example could warn--"

20 CHAIRMAN HENDRIE: I must come to a stopping place
21 because both Commissioner Gilinsky and I are about to fall
22 under the table.

23 COMMISSIONER BRADFORD: You are all done at the
24 end of the next page, whichever way we come out on it.

25 CHAIRMAN HENDRIE: Peter, let me ask if you could

1 go along until further discussion, because it's the longer
2 one and one could strike more easily than put in.

3 Lynn, would you do II along the lines you just
4 said? Okay? That is, "When a party fails to meet its
5 obligation, the Board should consider the imposition of
6 sanctions against the offending party." Then strike the
7 next sentence. I think the spectrum comment, okay, and then
8 the examples. And then we can see how it lies to keep that
9 in or to make the shorter transition. I think there is
10 stuff on Page 2-- Does this adequately cover the point
11 about how you tailor the sanctions?

12 MR. BICKWIT: I don't think so. I think you need
13 to include Peter's concept in there.

14 CHAIRMAN HENDRIE: That's what I wanted. Does
15 that have to go over there or can it come in here?

16 MR. BICKWIT: I think it can.

17 CHAIRMAN HENDRIE: Would you please do that, then?

18 MR. BICKWIT: Yes.

19 CHAIRMAN HENDRIE: The last paragraph.

20 COMMISSIONER AHEARNE: I agree with Peter's.

21 MR. DENTON: I wanted to comment on the last one
22 only on the last two sentences in that I don't anticipate
23 such a gross number of slippages that we would have to
24 report on a monthly basis one memorandum covering all
25 proceedings I think it is appropriate we cover by memoranda

1 which would be served on all parties, and I hope that would
2 be rare.

3 COMMISSIONER AHEARNE: The person who should be
4 getting the memorandum is EDO, and this is an attempt to try
5 to get at the point that the Licensing Board has raised in a
6 number of places, and a number of Boards have raised the
7 issue. How do the Boards ensure that the managerial side of
8 the Agency is keeping abreast of slippages due to the staff?

9 COMMISSIONER BRADFORD: Let's see, is the EDO the
10 right person to put this duty on? There is often room for
11 some interpretation as to who is responsible for slippage.
12 Do we perhaps want to know about situations where in the
13 Board's judgment the staff is responsible for slippage.
14 Supposing that the EDO takes the position that sure, there
15 has been slippage in this case, but it is not us. It is the
16 Commission's fault.

17 COMMISSIONER AHEARNE: It says EDO should advise
18 the Commission and provide an explanation.

19 COMMISSIONER BRADFORD: But the EDO wouldn't
20 necessarily know that it's the Board's view that the Staff
21 is responsible.

22 MR. BICKWIT: The Board is given no role in this
23 particular paragraph.

24 COMMISSIONER AHEARNE: You are right, yes. The
25 Board should. My original concept is the Board should put

1 EDO on notice because he is the direct individual to push on
2 and then the Commission should also know.

3 COMMISSIONER BRADFORD: Fine.

4 MR. DENTON: If the Board were to play a role I
5 think you would want to know from the Board any parties who
6 were causing delays, especially from the EDO if the staff
7 were.

8 COMMISSIONER BRADFORD: But the point is, Harold,
9 the Board has sanctions they can easily apply against the
10 other parties. The party that the Board really doesn't have
11 an ability to apply much of sanctions against is the staff.
12 My original concept was that the Board should be encouraged
13 to utilize its sanction authority on the other parties, but
14 how do you come to grips with the staff side? And that was
15 to try to formalize a mechanism to put the EDO Commission on
16 notice.

17 MR. ROSENTHAL: It seems to me, though, if the
18 Boards are going to become involved in this process they
19 ought to be presenting their concerns to the Commissioners
20 and not--

21 MR. SHAPAR: By then the Commissioners will have
22 to go to the EDO and ask why there was a delay.

23 MR. ROSENTHAL: I don't think so.

24 MR. SHAPAR: The staff will tell the Commission in
25 some cases, because we didn't put enough people on it, and

1 in other cases because we were waiting for information from
2 the applicant. And I guess the Commission would want to
3 know that.

4 CHAIRMAN HENDRIE: Look, rewrite this last
5 paragraph so that when the staff is responsible for a delay
6 the Board notifies the Commission and the EDO will then
7 explain to the Commission in a separate memorandum why that
8 has occurred; okay?

9 COMMISSIONER AHEARNE: Just as an aside, let me
10 point out that I found the EDO to be, when I raised similar
11 points in the past with him, he is very responsive. And in
12 the cases in which I raised it, that information had not
13 been brought to his attention. I must say the EDO is much
14 more responsive on issues raised through him than the
15 Commission usually is on issues raised to it.

16 MR. ROSENTHAL: That is perverse.

17 COMMISSIONER BRADFORD: The EDO's freedom of
18 thought in those situations is more limited than the
19 Commission's.

20 CHAIRMAN HENDRIE: Put a footnote, copy to the
21 EDO; okay?

22 Now, Peter, you have an insert in here which I
23 don't understand.

24 MR. BICKWIT: Yes, I have trouble with that.

25 CHAIRMAN HENDRIE: Why don't we just say when the

1 NRC staff is responsible for the delay of a proceeding--I
2 don't know, the Board will or should notify the Commission?

3 COMMISSIONER BRADFORD: That is probably all
4 right. The word "obligation" is here. It seems to me to
5 refer to hearing obligations. And what I am trying to get
6 after is that after all we considered the staff to have
7 broader obligations than merely getting papers filed on
8 time.

9 CHAIRMAN HENDRIE: Why don't we cut it back to
10 delaying the proceeding, because that is really what we are
11 after here.

12 MR. COTTER: I would like to suggest that that
13 paragraph be more in the form of a footnote.

14 COMMISSIONER AHEARNE: Why?

15 MR. COTTER: Because it sounds to me the Board is
16 being told that as far as running its proceeding is
17 concerned, it should say to the staff, if you don't do what
18 I tell you I will tell on you. I think it is demeaning.

19 MR. BICKWIT: It was the potential that it be
20 demeaning that had us put the obligation not on the Board
21 but on the staff itself.

22 MR. COTTER: I think it is demeaning to the Board
23 in the proceeding.

24 MR. SHAPAR: I vote for a footnote, but for
25 different reasons.

1 (Laughter.)

2 CHAIRMAN HENDRIE: All right. I guess I am not
3 going to get out of this so quickly. A little more
4 discussion. You would prefer not to have the Boards--

5 MR. COTTER: This is a direct admission that the
6 Board doesn't have control over its own proceeding with
7 respect to its staff.

8 COMMISSIONER AHEARNE: But, Tony, the Boards have
9 sent us essentially statements saying that, expressing
10 frustration.

11 MR. COTTER: I haven't really gotten into it yet
12 because I would throw the staff out of one of these
13 proceedings if they don't meet their deadlines one of these
14 days.

15 CHAIRMAN HENDRIE: What did you say in your
16 section?

17 MR. BICKWIT: I don't think anything.

18 MR. COTTER: I said there are sanctions, use
19 them. The Commission wishes to emphasize the failure of
20 anybody to comply with any obligation imposed by the
21 Commission, so an obligation without good cause will result
22 in appropriate sanctions which would include in extreme
23 cases dismissal of that party from the proceeding period.

24 COMMISSIONER GILINSKY: Including this staff?

25 MR. COTTER: I would love it.

1 COMMISSIONER GILINSKY: Actually, I wonder why the
2 staff is at some of the proceedings at all.

3 MR. COTTER: Me, too.

4 (Laughter.)

5 COMMISSIONER AHEARNE: That is a different
6 discussion. That was last year

7 (Laughter.)

8 CHAIRMAN HENDRIE: Yes. That is a different
9 discussion.

10 MR. COTTER: That was a different decade.

11 CHAIRMAN HENDRIE: There isn't any other footnote
12 in this document and I am not sure it qualifies under the
13 Administrative Procedures Act without any footnotes. Is
14 that the case?

15 MR. BICKWIT: I know you want to get out of here,
16 but our concept was just put the obligation on the staff to
17 inform the Commission where there has been a delay. The
18 staff is supervised by the Commission and ought to be able
19 to--

20 MR. SHAPAR: The staff, rather than the EDO? You
21 are making a distinction between them.

22 MR. BICKWIT: No, I am making the distinction
23 between the Board and staff. I am saying why not simply
24 have the staff acknowledge when it has not met its deadlines
25 and let the Commission know of that.

1 MR. ROSENTHAL: Does the Fifth Amendment come into
2 the picture?

3 (Laughter.)

4 MR. COTTER: I think that is more acceptable, much
5 more acceptable.

6 COMMISSIONER BRADFORD: But the paragraph is
7 drafted to address a set of concerns the Board has raised to
8 us.

9 MR. COTTER: I thought we were applying
10 across-the-board. This is what it said up until then, and
11 then it had a little requirement for the staff to report to
12 the EDO when they ran into a problem.

13 CHAIRMAN HENDRIE: Yes, well, I don't mind. John
14 would like to say Boards tell us when the staff and the EDO
15 can explain? Tony said he'd just assume that staff
16 recognize its own delay-inducing proclivities and report
17 itself to the Commission so the Board didn't have to. And I
18 don't much care.

19 COMMISSIONER BRADFORD: Why don't we just let the
20 footnote say the full range of sanctions, whatever they are,
21 apply to the staff as well. In addition, the Board should
22 let the Commission know.

23 COMMISSIONER AHEARNE: I would oppose that. We
24 are tied so many times by this so-called and I am sorry, ex
25 parte rule. One of the things we are tied in is we don't

1 really know what the staff is doing in these hearings. We
2 don't know about their presentation of testimony, the
3 details of the problems they are struggling with. To then
4 also say, besides which we aren't even going to try when
5 they are delaying things to find out about it to move them
6 forward, we will wait until the Board issues a sanction to
7 them. The Boards and the staffs are two elements who in
8 theory are part of the same agency.

9 COMMISSIONER BRADFORD: Let me try it another
10 way: Do you want to know every time the staff is at a
11 deadline? It is easy to figure that.

12 COMMISSIONER AHEARNE: I want the Boards to go to
13 the EDO when the staff is missing its deadline so the Board
14 should be telling the EDO their people have not met their
15 deadlines. And if this is becoming a problem, the EDO
16 should be coming to us on it.

17 COMMISSIONER BRADFORD: Well, it is easy to lay
18 the duty on the staff to send a copy of any requests for an
19 extension of deadlines up to us. What gets harder?

20 COMMISSIONER AHEARNE: At times the staff isn't
21 making requests for extensions. They seem to be just coming
22 in at some stage and saying, well, we are just not ready

23 COMMISSIONER GILINSKY: Should the Boards apply
24 sanctions to the staff as well as to others?

25 MR. ROSENTHAL: Suppose that the staff is late on

1 an SER? What are you going to say, you are out of the
2 proceeding? We will go ahead without the SER?

3 COMMISSIONER AHEARNE: The staff is not a party
4 like the other parties.

5 MR. DENTON: We tend to be a check valve. If we
6 are not there it is because we haven't completed an
7 affirmative finding. We could always go ahead on schedule
8 and say, no, we don't think it meets GED Schedule 33. The
9 reason for the delay is we are trying to get information to
10 determine the other side of the question.

11 MR. COTTER: I think it would be very interesting
12 if you threw the staff out.

13 MR. ROSENTHAL: Me, too.

14 MR. COTTER: I bet the industry might have
15 something to say about it.

16 MR. SHAPAR: And I think it would contribute to
17 public health and safety.

18 COMMISSIONER BRADFORD: Oh, please.

19 (Laughter.)

20 MR. ROSENTHAL: Does your client endorse that
21 statement?

22 (Laughter.)

23 COMMISSIONER BRADFORD: As a practical matter I
24 think Harold's point is quite right. You cannot throw the
25 staff out without terminating the proceeding. There are

1 findings the Agency has to make.

2 MR. COTTER: That's precisely my point.

3 COMMISSIONER AHEARNE: But, Tony, these are
4 elements--that both the staff and the Board are elements of
5 the Commission, and when one element of the Commission does
6 not meet its obligations the appropriate way for that to be
7 resolved is not for the other agent to say, you're out.

8 MR. COTTER: That's correct. The appropriate way
9 is for the presiding Board to say, you will have that piece
10 of work in by such and such a time after the staff has said
11 how many man hours or whatever it is it would take to do
12 that. And then the staff would be required to respond to
13 that.

14 MR. SHAPAR: And that is the question: Whether or
15 not the Board does or the Commission is going to establish
16 the Commission's resources and how?

17 MR. CORNELL: You also run into a problem. One
18 Board might say you have to have this one, and another--the
19 staff only has finite resources and it goes back to how you
20 want to manage it.

21 COMMISSIONER AHEARNE: That goes back to my
22 point. The only thing to do is to call this delay to the
23 attention of the EDO because that is the place where under
24 our assistant those resources are controlled and allocated.
25 I think the things I called to the EDO's attention he had

1 not known about.

2 MR. SHAPAR: The same members of the staff can be
3 working on an uncontested case reviewed by the Commission,
4 and the same people could be needed in a hearing case.

5 CHAIRMAN HENDRIE: Enough. The only question I
6 have with regard to this paragraph is, is the staff counsel
7 and the project manager going to tell the EDO they are
8 having to drag foot in a proceeding, and the EDO then has to
9 explain to the Commission? Or do we ask the Boards to rat
10 on them? Okay? Draft it so the staff is expected to tell
11 the EDO when they are filing for extended time and he will
12 provide explanations as he thinks necessary. A number of
13 these will be quite routine, and I would not expect him to
14 write us a memorandum for routine ones. Where he has a
15 problem and it is hanging things up, then I expect him to
16 write us a memorandum. Okay? Write it in that fashion and
17 we will look at it again. Okay?

18 COMMISSIONER AHEARNE: We will look at it.

19 CHAIRMAN HENDRIE: Since we are now half an hour
20 past the point which Commissioner Gilinsky and I became
21 physiologically unable to deal with this matter, I declare
22 this matter-- Wait, you are going to redraft two?

23 MR. BICKWIT: (Nods affirmatively.)

24 CHAIRMAN HENDRIE: Also redraft--

25 MR. BICKWIT: Redraft the whole thing?

1 CHAIRMAN HENDRIE: Yes, I am going to try
2 something. If you will come and see me, I will wave hands
3 over that piece of language I was going to do. You are
4 going to try a thing at the beginning. 3-A.

5 COMMISSIONER GILINSKY: (Nods affirmatively.)

6 CHAIRMAN HENDRIE: So, you have that to pick up.
7 Okay. Let's try to do it then real quick, maybe this
8 afternoon, in the hopes that we don't lose momentum on
9 this. Okay?

10 (Whereupon, at 4:30 p.m., the hearing adjourned.)

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NUCLEAR REGULATORY COMMISSION

This is to certify that the attached proceedings before the

in the matter of: Commission Meeting

Date of Proceeding: April 22, 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.

Sharon Filipour

Official Reporter (Typed)

Sharon Filipour

Official Reporter (Signature)