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NUCLEAR REGULATORY COMMISSION

IN THE MATTER OF:

PUBLIC MEETING

DISCUSSION OF DRAFT POLICY STATEMENT
ON COMMISSION PARTICIPATION IN LICENSING
ACTIONS

Place - Washington, D. C.

Date - Thursday, 11 October 1979

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

DISCUSSION OF DRAFT POLICY STATEMENT
ON COMMISSION PARTICIPATION IN LICENSING
ACTIONS

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

Thursday, 11 October 1979

11 The Commission met, pursuant to notice, beginning
12 at 9:30 a.m.

13 BEFORE:

- 14 JOSEPH M. HENDRIE, Chairman,
- 15 VICTOR GILINSKY, Commissioner,
- 16 RICHARD KENNEDY, Commissioner,
- 17 PETER A. BRADFORD, Commissioner,
- 18 JOHN F. AHEARNE, Commissioner.

19 ALSO PRESENT:

- 20 Leonard Bickwit, Esq.
- 21 Stephen S. Ostrach, Esq.
- 22 Martin Malsch, Esq.
- 23 Lee Gossick,
- 24 Robert Lazo, Esq.
- 25 Alan Rosenthal, Esq.
- Howard Shapar, Esq.

P R O C E E D I N G S

1
2 CHAIRMAN HENDRIE: Why don't we start the meeting
3 and get the transcript rolling?

4 The Commission meets this morning to continue its
5 discussion of procedures for Commission review of license
6 applications. There was a meeting a week ago today on this
7 subject when we discussed (a) an Interim Policy Statement which
8 in fact has gone out and (b), the outlines of a policy state-
9 ment on Commission participation in licensing actions. We
10 argued back and forth over some proposed options and alterna-
11 tives and seemed to come rather decently to agreement, not
12 total to be sure, but general agreement, on a Commission parti-
13 cipation procedure.

14 We directed the General Counsel, with the help of
15 the Appeals Board members and so on, to draft that up.

16 We have the Counsel's draft policy statement back.
17 It came to us yesterday. I got mine at about 2:00 in the
18 afternoon, and we meet this morning on it.

19 Len, perhaps you'll march us through the draft and,
20 Commissioners, please make comments, ask questions, and argue
21 the points as we go along.

22 MR. BICKWIT: Fine.

23 I'd like to proceed by flagging issues for you that
24 we feel need some additional explanation, letting those that
25 we feel don't simply sit.

eh?

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On page 2, the first full paragraph that starts with:

"The Commission has now determined that, until further notice, adjudicatory proceedings concerned with such new licensing action will be conducted as described below."

We have not come to grips with one particular problem that this sentence and perhaps some others raise. It's clear to us that you don't want to apply this procedure where the license is already issued. It is also clear to us that where neither a license nor an initial decision has issued, you do want to apply this procedure.

What we are not entirely clear on is what happens where a decision has been issued but no license has been issued.

COMMISSIONER AHEARNE: Can you give an example?

MR. BICKWIT: The only example I know of is North Anna. There may be others. But my understanding is that this particular problem is restricted to the North Anna situation.

I should remind everybody that we are now talking about a specific case if that is the circumstance.

What we would suggest is that you not apply this procedure to matters under review by the Appeal Board in that case but that you recognize that the license cannot be issued under your previous policy statement by the Staff without further action of the Commission. Just what that means is something

eb3 1 that we will have to address later in this meeting, that that
2 be the protection that the Commission has and that you not
3 feel the need to get additional protection by applying the
4 entire procedure to the current Appeal Board review.

5 If that recommendation is accepted, to make clear
6 that that's the way you would go, we would suggest this altera-
7 tion. Where it says:

8 "The Commission has now determined that,
9 until further notice, adjudicatory proceedings con-
10 cerned with such new licensing actions will be con-
11 ducted..."

12 Instead of "concerned with such new licensing
13 actions" the words would be inserted: "...adjudicatory
14 proceedings which have not, as of the date of this statement,
15 resulted in a complete initial decision by a licensing
16 board."

17 COMMISSIONER AHEARNE: You're saying North Anna is
18 the only case in which a licensing board has made a decision
19 but the appeal board has not?

20 MR. BICKWIT: Where the licensing board has made a
21 decision and no license has issued.

22 COMMISSIONER GILINSKY: What would you do in un-
23 contested cases?

24 MR. BICKWIT: We reach that at a later stage in
25 this paper. And you're going to have to resolve that. We

WRR/wbl 1 haven't had substantial guidance on that question.

2 What you have done is, you've said in uncontested
3 OL cases, no license will issue without further action of the
4 Commission. I suggest you take up that whole question of what
5 "further action of the Commission" means when we reach that
6 stage in this particular paper.

7 You will have to decide whether that means affirma-
8 tive action by the Commission, check-off by the Commission,
9 or whatever.

10 COMMISSIONER GILINSKY: What is "check-off?"

11 MR. BICKWIT: Well, what it means, in my own mind,
12 is the procedure that you used where it was up to the Staff
13 to determine that Davis-Besse or Rancho Seco was to go back
14 up, but that when the staff came in and briefed you there
15 would be some discussion. And it did not, in those cases,
16 involve an affirmative decision by the Commission to bring
17 those plants up, but it was understood rather clearly that the
18 staff was not going to bring those plants up if the Commission
19 indicated some displeasure with doing so.

20 COMMISSIONER GILINSKY: "Check-off" seems to carry
21 a sense of the Commission not doing anything, just checking a
22 box. That's why I object to it every time it is raised.

23 MR. SHAPAR: Doesn't the policy statement say,
24 if my memory serves me correctly, that the staff won't issue
25 any licenses without further action of the Commission?

WFB/wb2 1 MR. BICKWIT: Yes. And as to what that means, I
2 suspect different people have different concepts.

3 COMMISSIONER GILINSKY: Well there could be various
4 kinds of actions, but inaction is an action.

5 COMMISSIONER KENNEDY: I'm delighted to hear that
6 because it must be clear that I certainly agree with it.

7 COMMISSIONER GILINSKY: We're going to pocket that.

8 MR. BICKWIT: There are case holdings, or court
9 holdings that say inaction is action.

10 COMMISSIONER AHEARNE: Pardon me for continuing
11 to try to understand, but--

12 COMMISSIONER KENNEDY: That's what he said. I
13 thought he said it was action. That's why I was agreeing with
14 it. I certainly agree with the courts. Their wisdom has never
15 been a doubt in my mind.

16 COMMISSIONER AHEARNE: So you're saying this would
17 apply only to North Anna because that's the only case that
18 of-- what kind, now?

19 MR. BICKWIT: The only case that I know of -- and
20 I would like to hear the boards contradict that if it is
21 wrong.

22 MR. LAZO: I believe you're quite correct; it's
23 the only case. 1313 007

24 MR. BICKWIT: It's the only case where an initial
25 decision has been issued but a license has not been issued.

WTR/wb3 1 COMMISSIONER AHEARNE: An initial decision has
2 been issued.

3 Now are there cases where an initial decision has
4 been issued and the appeal board still has it under considera-
5 tion?

6 MR. BICKWIT: Yes. But the license has issued.
7 And I assume the Commission doesn't want to apply that to those
8 situations.

9 COMMISSIONER AHEARNE: I see.

10 Well, can I ask the status of North Anna as far
11 as the appeal board is concerned?

12 MR. ROSENTHAL: The appeal board has signed off
13 on all matters in that case except for two. These were safety
14 issues, one relating to pumphouse settlement, the other
15 relating to the probability that a turbine missile would hit a
16 vital safety structure. Those issues were raised by the
17 appeal board sui sponte during its review. There was no appeal
18 taken from the licensing board's decision.

19 The appeal board held itself an evidentiary hearing
20 on those two issues in June. Quite recently the proposed
21 findings of fact and conclusions of law from the parties were
22 all received. And the board decided that case and it now in
23 the process of preparing its decision.

24 COMMISSIONER AHEARNE: Thank you.

25 MR. BICKWIT: Without objection we'll adopt this

1313 008

WTR/wb4 1 language which will clarify that position.

2 COMMISSIONER AHEARNE: That would then move the
3 North Anna case over until a clarification of what "further
4 action by the Commission" means?

5 MR. B. CKWIT: Right. It will be treated as an
6 uncontested license.

7 COMMISSIONER AHEARNE: On that same page, could I
8 ask a further question?

9 I have a little problem with your three reasons.
10 I would prefer to strike the first one and only use the second
11 two. Because, at least in my mind, it's a combination of the
12 second two, and the first is not really a relevant issue.

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

14 CHAIRMAN HENDRIE: I don't either.

15 COMMISSIONER KENNEDY: I don't either. But that is
16 not consistent with my memory of the discussion. But it
17 doesn't make any difference.

18 MR. BICKWIT: On page 3 I simply want to point out,
19 at the top, that what we are doing here is rulemaking; that
20 what one can do by rule one can only undo by rule. I guess
21 there are caveats to that, however.

22 Thus, what we are doing is amending the rule 2,764,
23 and we're doing it -- we're making that amendment effective
24 immediately.

25 We're making two findings here which allow the

131.3 009

WFR/wb5 1 Commission to do that. One is that this is a non-substantive
2 rule of practice that gets you out from under the requirement
3 for notice and comment.

4 COMMISSIONER KENNEDY: Are we just saying that is
5 the case, or is there genuine justification to suggest under
6 the rule and precedent that that in fact is true?

7 MR. BICKWIT: I'd say that there is. But I would
8 say it is fuzzy. It is clearly a rule of practice in the sense
9 that it is part of Part 2 of your Rules of Practice. As to
10 whether the APA means all rules of practice by its use of the
11 term "rules of practice" is not entirely clear to me. And
12 since this profoundly affects substantive rights it is--

13 COMMISSIONER KENNEDY: That's the reason for my
14 question. Clearly it does.

15 MR. BICKWIT: Yes. For that reason we suggest
16 that you say both that it is a rule of practice -- which it
17 is -- and, secondly, that you make the finding in case a court
18 would hold that it was not a rule of practice within the mean-
19 ing of the APA, while admitting it's a rule of practice within
20 the meaning of our rules, that you also make the finding that
21 it would be contrary to public interest to have notice and
22 comment.

23 COMMISSIONER KENNEDY: Before you get to the public
24 interest question, it is describing it as a non-substantive
25 rule of practice--

WTT/wb6 1 MR. BICKWIT: I think that's a good point. I
2 would be more comfortable with that word out.

3 MR. SHAPAR: I think the word "internal" should
4 come out, too. I don't think that's accurate.

5 COMMISSIONER KENNEDY: I would not think so either.

1.175 6 COMMISSIONER AHEARNE: Len, you have already put it as
7 a difficult situation. I would be hard to defend calling it
8 significantly affecting the substantive rights but being non-
9 substantive.

10 MR. BICKWIT: That's right.

11 COMMISSIONER KENNEDY: That's the reason for my
12 question.

13 So we're striking the words "internal" and "non-
14 substantive;" is that correct?

15 MR. BICKWIT: Okay. We strike "non-substantive".

16 COMMISSIONER KENNEDY: Howard suggests "internal."
17 And it seems to me he also has a point.

18 MR. BICKWIT: I don't understand the point.

19 MR. SHAPAR: Well it obviously affects third
20 parts, and referring to it as an internal rule I think is
21 somewhat-- Isn't it a term of art, though, in the APA, "rules
22 of procedure?"

23 MR. BICKWIT: Practice and procedure.

24 I have no problem with striking "internal."

25 Now with respect to-- We'd talked about exceptions

WPB/wb7 1 from the requirement of notice and comment. The APA also
2 requires that final rules be published and not made effective
3 for thirty days. And the contrary to the public interest
4 finding will also allow you to come out from under that
5 requirement, as well as the requirement for notice and comment.

6 At the bottom of page 3--

7 COMMISSIONER AHEARNE: Will you explain what you
8 mean by that sentence?

9 MR. BICKWIT: That sentence? Yes,

10 We're acknowledging something that was acknow-
11 ledged at the previous meeting, which is that the Commission
12 contemplates some changes in the substantive requirements to
13 be imposed on licensees, but that most of those changes can be
14 done through interpretation of the rules rather than through
15 changes in the rules. And we are making the statement that in
16 the future we expect our rules to be interpreted somewhat dif-
17 ferently than they have been in the past.

18 In many cases the rules are extremely vague.

19 COMMISSIONER KENNEDY: But we are the interpreters
20 of the rules.

21 MR. BICKWIT: That's right.

22 COMMISSIONER KENNEDY: We are saying that therefore
23 we will be interpreting them differently than we have in the
24 past. We are serving notice on the public that that is the
25 case.

WPB/wb8

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MR. BICKWIT: And on the boards.

COMMISSIONER KENNEDY: And on the boards; right.

MR. BICKWIT: We're suggesting the boards do that so that we won't have to completely undo what--

COMMISSIONER AHEARNE: You're asking the boards to give consideration to the implication those regulations and-- I assume there is a preposition missing.

MR. BICKWIT: Yes, "for."

COMMISSIONER AHEARNE: You're asking them to give consideration to the implications, so you're asking the boards to draw their own conclusions as to what those implications would be. Is that another way of saying that the boards should feel themselves not bound to previous interpretations of the regulations?

MR. BICKWIT: That's what it is meant to say.

The next sentence goes further, it goes beyond that and says the boards should not feel obligated to issue a license when it finds that all the regulations have been met.

You have a number of appeal board decisions which, if followed, would require the issuance of a license whenever a determination was made that the regulations were met.

COMMISSIONER KENNEDY: I want to be sure that we understand the import of that sentence, and so I would like to read it.

1313 013

"It should be understood that as a result

WRB/wb9

1 of analyses still under way the Commission's regula-
2 tions and regulatory policies may be further changed
3 and thus compliance with existing regulations may
4 no longer be sufficient to provide reasonable assur-
5 ance that the public health and safety will be ade-
6 quately protected."

7 That, it seems to me, has definite relevance to
8 all existing licenses. And the question is: Is that what we
9 intend to say in this document?

10 COMMISSIONER AHEARNE: Why did you not, Len, say
11 "may no longer be sufficient to warrant approval of the license
12 application?"

13 MR. BICKWIT: I would have no problem with
14 phrasing it that way. The understanding is that the reason
15 it would not is that a finding of adequate protection would not
16 be possible.

17 COMMISSIONER GILINSKY: Well we have continually
18 upgraded standards for licenses over the years. It's the same
19 problem we face every time you add another requirement.

20 COMMISSIONER KENNEDY: I understand that.

21 CHAIRMAN HENDRIE: But we don't normally issue this
22 kind of a statement.

23 COMMISSIONER KENNEDY: Nor do we say all actions
24 in the past have been inadequate to protect the public health
25 and safety. And it seems to me that's the implication of the

WPR/wb10 1 statement. I just want to be sure we understand what we're
2 saying. I may be misreading it, but it seems to me that that's
3 the way it can be interpreted. And we need to understand what
4 it says and what it is intended to say.

5 COMMISSIONER GILINSKY: Well the law speaks of the
6 adequate protection of the public health and safety. And to
7 get over that line has required more in recent years than it
8 did in past years.

9 MR. SHAPAR: I think there's a lot of cases that
10 say, appeal board cases and others that say that if the applica-
11 tion demonstrates that all the regulations have been met the
12 license must issue. Now this is a departure from that.

13 MR. ROSENTHAL: I didn't read it as such.
14 I thought what it was saying was that the existing regulations
15 and regulatory policies may be changed. If they are changed--

16 COMMISSIONER KENNEDY: That's the first part.

17 MR. ROSENTHAL: Then it says, "...and thus..."
18 "Thus." So it ties with the first part. "...compliance
19 with existing regulations may no longer be sufficient
20 to provide reasonable assurance..."

21 If you read it with the word "thus" in there, at
22 least as I read it, it was not altering the appeal board's
23 line of decisions that the regulations --that compliance with
24 whatever regulations, or regulatory policies are in effect at
25 the time, is sufficient to warrant issuance of a license.

1313 015

W /wb11

1 I read this to suggest that there may well be changes in regula-
2 tions and regulatory policy, and thus compliance with existing
3 regulations may no longer be sufficient, etc. And that would
4 be perfectly consistent with the appeal board's line of cases,
5 because the appeal boards have always recognized that the
6 standard in determining reasonable assurance is the regulations
7 and regulatory policy that exist at the time that the matter
8 comes to the appeal board, and that these are always subject
9 to change from time to time.

10 CHAIRMAN HENDRIE: Alan, wouldn't you get where you
11 want to go -- which is to, first, note that, as a result of
12 analyses still under way, the regulations and policies may be
13 further changed, and then get immediately to the result by
14 deleting from there on down to the beginning of the next
15 sentence?

16 The point you're making is that licensing boards
17 are to be alert for what they perceive to be close call
18 situations, where they perceive that indeed regulations may
19 change, and that therefore on the particular point at issue
20 they are being asked to try to signal that as a point for
21 consideration in the subsequent fast track appellate review
22 and Commission thing. And I think you could just go for the
23 word "changed" in the fourth line, put a period there, and
24 then start "The Commission expects the licensing boards...."

WFB/wb12 1 such as "substantial" or "considerable" in talking of these
2 changes in regulations? The regulations are continually being
3 changed. They have been changed for the past twenty-five
4 years.

5 COMMISSIONER KENNEDY: And there has always been,
6 in that connection, decisions to be made as to backfitting
7 requirements.

8 COMMISSIONER AHEARNE: You mean make it "sub-
9 stantially changed?"

10 COMMISSIONER GILINSKY: I don't know that it's the
11 right word. But we are in a period where the rate of change
12 is going to be greater than it was in the past.

13 COMMISSIONER AHEARNE: "Significantly."

14 COMMISSIONER GILINSKY: Therefore one needs to
15 pay particular attention to these decisions. Because otherwise--

16 COMMISSIONER AHEARNE: --we're just pointing out
17 the obvious.

18 COMMISSIONER GILINSKY: --we're just pointing out
19 the obvious.

20 COMMISSIONER AHEARNE: Yes.

21 MR. BICKWIT: Well, one question you have to con-
22 front is, Do you want the boards to be required to issue a
23 decision in the circumstance where it's pretty obvious to them
24 that Commission policy is changing or has changed but hasn't
25 reached the point of changing the regulations?

WDB/wb13

1 I think it's a perfectly acceptable way to go,
2 either of those ways is a perfectly acceptable way to go.
3 We assumed that you would prefer that the decision not be
4 issued in those circumstances. But if you want the decision
5 issued, and to change the policies on review as to the particu-
6 lar case, I see no problem with it.

7 MR. ROSENTHAL: You are hypothesizing, Len, a
8 situation in which a Board would conclude that while all
9 existing Commission regulations were fully complied with
10 nonetheless it was not in a position to say that the construc-
11 tion and operation of the reactor would provide the reason-
12 able assurance?

13 COMMISSIONER KENNEDY: That's what I think the
14 sentence says.

15 MR. BICKWIT: That's what it's meant to say. And
16 it is meant to-- I can see why you read it the way you did,
17 Alan. But what it was designed to do was to overrule those
18 appeal board decisions.

19 COMMISSIONER KENNEDY: What it seems to me it
20 does inevitably is to throw the entire regulatory process into
21 a cocked hat. Now I think we ought to understand that that's what
22 we are doing, because that's what it is.

23 Am I correct, Alan?

1313 018

24 MR. ROSENTHAL: Well I don't know whether I would
25 have characterized it in those colorful words. But I have,

V 3/wb14 1 quite frankly, the same concern that you do.

2 I don't understand--

3 COMMISSIONER KENNEDY: And so do your colleagues.

4 MR. ROSENTHAL: --how possibly an adjudication
5 can be conducted on that basis. I mean, when the parties
6 to a licensing proceeding come before a licensing board they
7 have to have some idea as to precisely what the ground rules
8 are. And the ground rules now on the safety side are fashioned
9 in terms of, or with reference to the outstanding statutory
10 and regulatory provisions and any other kind of guidance that
11 the Commission may have provided.

12 Now if an applicant is at this point confronted
13 with the words, Well, sure, come on in and tell us that your
14 application is in full compliance with all outstanding Com-
15 mission regulations and directives, but that may not be enough,
16 then some member of the licensing board may decide the Com-
17 mission has been resting on its oars and the Commission should
18 have some additional regulatory requirement, and even though
19 it hasn't, the licensing board is going to turn the application
20 down. That's not adjudication. I mean, it may be something
21 else, but it is far removed from anything that I have ever
22 been led to understand falls in the realm of adjudication.

23 MR. SHAPAR: Beyond that, I think there's an
24 important point here. If we look at the Commission's purpose
25 in setting this thing up, I thought the main purpose was to

WFR/wb15

1 give the Commission the last word, not to say that the boards
2 would be implementing different regulations but that even if a
3 board makes a favorable decision, that the decision would be
4 stayed until the Commission decided whether new requirements
5 were met. I don't think the Commission, at least based on prior
6 discussions, meant to delegate that kind of authority to the
7 boards.

8 CHAIRMAN HENDRIE: I think that's right. And that's
9 why I suggest again that one cures what seems to me to be a
10 difficulty by just deleting from the word "changed" down to
11 the start of the next sentence, and to leave the admonition
12 from the Commission to the licensing boards to pay particular
13 attention to analyzing the evidence on particular issues where
14 they think there's a close call, since those are the ones that
15 are apt to be the subject of particular Commission attention
16 and very possibly further guidance and change in regs, and so
17 on. And I thought that was what we wanted from the boards
18 rather than--

19 COMMISSIONER GILINSKY: Would you keep the last
20 part of that sentence? Because the boards now have the
21 power to--

22 CHAIRMAN HENDRIE: Oh, absolutely. That's very
23 important. Yes. 1313 020

24 MR. BICKWIT: What was your suggestion?

25 CHAIRMAN HENDRIE: Put a period after the word

WR-3/wb16 1 "changed" in the fourth line, and then delete from there to the
2 end of that sentence, starting again with "The Commissior.
3 expects * * *" and then go to the end of the paragraph.

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

5 But I would like a response to what has been said from this side
6 of the table.

7 MR. OSTRACH: Two points, Mr. Chairman.

8 First of all, I think Judge Rosenthal -- Mr. Rosenthal
9 does an injustice to his abilities to conduct adjudication.
10 I don't believe that this--

11 CHAIRMAN HENDRIE: But not to outguess this Com-
12 mission, from what he's saying.

13 . (Laughter)

14 MR. OSTRACH: I think there would be nothing
15 impossible in a situation where compliance with the regulations
16 created a presumption of adequate protection for the public
17 health and safety, subject to rebuttal, if a party could show
18 that nonetheless in a particular area -- we have something
19 similar to that already in the regulations, in 10 CFR 2.758, the
20 provision--that a showing could be made that in a specific
21 case a regulation is no longer appropriate to do justice, I
22 don't find it inconceivable that the Commission might want to
23 set up a situation where a party could show that in a particular
24 area the Commission's formally printed regulations haven't kept
25 up with the Commission's own development and the Commission's

WRB/wb17

1 own thinking, so that compliance with that regulation shouldn't
2 be sufficient to insure a license approval.

3 The question is, Does the Commission want a
4 licensing board that is convinced that a regulation no longer
5 is sufficient to adequately protect the public health and
6 safety--

7 MR. BICKWIT: In the view of the Commission.

8 MR. OSTRACH: Yes; its view of what the Commission
9 thinks. --to, nonetheless, issue a decision?

10 There's nothing wrong with that. You're providing
11 that the Commission itself will pass upon the license issuance--

12 COMMISSIONER KENNEDY: Which is why I thought we
13 were doing it.

14 MR. OSTRACH: You're just sort of forcing a
15 licensing board to sort of grudgingly say, We think this is a
16 terrible idea but by what we're bound by we're approving the
17 issuance.

18 There's no problem there. If that's the way you
19 want it we'll change the language.

20 There is one problem, however, Mr. Chairman. The
21 Commission cannot ignore its own regulations either. When a
22 case comes to the Commission, if the regulations have all been
23 complied with but you no longer believe the regulations are
24 sufficient to protect the public health and safety, unless
25 you put in some language here now to indicate that this policy

WPR/wb18

1 has been changed I believe there can be a serious argument
2 that you're going to be bound to do just what the licensing
3 board is bound to do, say: Oh, gosh, these are-- Well, none-
4 theless.

5 And I think that at the last you ought to make it
6 clear that the Commission may determine in specific cases that
7 compliance with the existing regulations is not sufficient to
8 protect the public health and safety. Because you might want
9 to do that when the case gets to your level.

10 MR. SHAPAR: Of course the Commission has control
11 over the stay as to whether or not the license will be issued.
12 But beyond that the Commission itself has rulemaking authority.

13 MR. OSTRACH: We think it would be best, though,
14 if you intend the change the regulations in a specific case, to
15 say it.

16 CHAIRMAN HENDRIE: Isn't it enough to know that
17 indeed the regulations and regulatory policies may be further
18 changed?

19 MR. OSTRACH: I would at least add a phrase "in a
20 specific case," or something like that, to make it clear that
21 you're considering a situation, when the case comes to you you
22 look at the regulations as they're applied in that case and
23 you realize that regulation is no longer sufficient, you want
24 to change the regulation, Can you do it in that case without,
25 as Mr. Shapar suggested, a disingenuous process of staying it
while you rush out the other door and change a rule and then

WRB/wb19

1 say, Oh, gee, now we can-- the new rule applies.

2 I would rather you make it clear--

3 COMMISSIONER AHEARNE: If we could leave personali-
4 ties out of it.

5 MR. OSTRACH: It was Mr. Shapar's suggestion, sir;
6 that's all.

7 I think it would be more direct if the Commission
8 indicated here that it might be planning on changing its
9 regulations in a specific case.

10 COMMISSIONER GILINSKY: I'd like to see some words
11 like "considerably" or "in important respects."

12 COMMISSIONER AHEARNE: It seems I have this
13 feeling of deja vu, that we've been through this before.
14 But let me say: it appears we're back on the issue of there
15 are three options: we can either not have any boards go forth
16 until the Commission has resolved all the policy questions, or
17 we can have the boards resolve the policy questions, or we can
18 have the policy questions alerted, that here's where they are
19 and we have to end up deciding on them.

20 Now I had thought that last time we had come out
21 on that third option. I thought that the boards, the licensing
22 board in reviewing these issues were to make recommendations
23 where there were close calls, and alert in their decision that
24 Here's a close call we had to make. And I would view that
25 kind of a close call as being a situation where the regulation

WDB/wb20 1 says this is sufficient, they suspect it's going to change,
2 they have to go with the regulation. That's this kind of a
3 situation where they alert. And I thought also then that the
4 appeal board was going to do the same thing in their quick
5 review as it outlines here, that they will then identify to
6 the Commission where a policy is unclear at the present time
7 or a policy decision has to be made.

8 I didn't see in the description of the licensing
9 board, though, that aspect. I would have thought that
10 it would be appropriate to say that because a substantial
11 change is made, may occur, that there will be these kinds of
12 situations, and that the licensing board should alert.
13 What you have here is, "The Commission expects the Licensing
14 Boards to pay particular attention in their decisions to
15 analyzing the evidence***" I think you ought to go on and
16 point out that the licensing board should explicitly call
17 attention to that. And that's the same kind of a thing; they
18 ought to be calling attention to any place where they are
19 interpreting existing regulations and regulatory policies
20 differently, due to the implications.

21 Those are the areas where you expect the licensing
22 board to have alerted both the appeal board and use that
23 they've done something differently or made this kind of close
24 call.

25 MR. BICKWIT: Fine. But you're still left with

1313 025

WRB/wb21

1 the point that Steve raises with respect to the Commission.

2 COMMISSIONER AHEARNE: I have no problem with
3 appropriately chosen words there to point out that the
4 Commission has this potential change. I am concerned about
5 the licensing board making that change.

6 MR. BICKWIT: I understand, But with respect to the
7 Commission I think the exchange between Howard and Steve is an
8 important one. Do you want to say that the Commission can
9 only deny the license if its existing regulations are met, if
10 it chooses to amend the regulations. And my advice is that
11 you ought not to say that.

12 COMMISSIONER GILINSKY: Why not say in here:
13 "And the Commission, when it takes up the matter, may decide
14 that--"

15 MR. OSTRACH: That's all we suggest, sir.

16 COMMISSIONER BRADFORD: Are we then leaving it in
17 a way that the licensing board and the appeals board in fact
18 will issue a license if they are in compliance with -- issue a
19 decision to the effect that a license would issue?

20 MR. SHAPAR: But flagging points that ought to be
21 brought to the attention of the Commission that trouble it.

22 COMMISSIONER AHEARNE: Not necessarily trouble
23 them, but notice that here is something. 1313 026

24 COMMISSIONER BRADFORD: Well what's that going to
25 do to rulings on questions such as whether a particular

WPR/wb22

1 contention with regard to emergency preparedness ought to be
2 heard at all at the licensing board level?

3 MR. BICKWIT: They will have to follow the
4 existing regulations.

5 COMMISSIONER BRADFORD: When the emergency prepared-
6 ness issue then gets to the Commission, the record will reflect
7 a bunch of rulings made on the basis of the existing regula-
8 tions even though the Commission's attitude on emergency
9 preparedness may be completely different?

10 MR. BICKWIT: That's right.

11 COMMISSIONER BRADFORD: So that we would then have
12 to remand the issue, reopen it, and take evidence anew.

13 COMMISSIONER AHEARNE: Unless we had already made
14 that decision explicitly and changed it.

15 COMMISSIONER BRADFORD: Even then, anything that
16 has gone on before the licensing board, any cases that have
17 been closed out will be based upon the record. It doesn't
18 reflect that this area, or operator training, or reactor
19 instrumentation--

20 COMMISSIONER AHEARNE: In those cases they will
21 have to be remanded anyway.

22 COMMISSIONER BRADFORD: We're going to be remanding
23 a lot of cases, then.

24 MR. SHAPAR: From a practical standpoint I think
25 I ought to point out that at least one of the parties would be

1313 027

WPR/wb23

1 alert to impending changes in Commission policy and urging
2 that position before the Board.

3 COMMISSIONER BRADFORD: But it won't make any
4 difference if the position is in compliance with the existing
5 regulations.

6 MR. SHAPAR: I'm just saying that in the practical
7 world, looking at your suggestion, it won't be handled 100 per-
8 cent, but close to it.

9 COMMISSIONER GILINSKY: Aren't you talking mostly
10 about interpretation of the regulations rather than the regula-
11 tions themselves?

12 MR. BICKWIT: For the most part. You've dealt
13 with that in the previous sentence. But you will have
14 situations -- and emergency planning appears to be one of
15 them -- where we're talking about changes in the regulations.

16 COMMISSIONER GILINSKY: Well it seems to me the way
17 to handle this problem is for the Commission to provide
18 guidance on specific issues as rapidly as possible.

19 MR. SHAPAR: And that point is well made in this
20 draft.

21 MR. ROSENTHAL: It does also seem to me that if
22 the concern is that contentions will be excluded and that at
23 a subsequent time the Commission will determine that the
24 contention under its new policy should have been admitted to
25 the proceeding, thus there has to be considerable additional

WPR/wb24

1 evidentiary hearing, that problem can be, if not obviated, at
2 least reduced if the Commission from time to time indicates
3 to the boards -- and it can do this without a change in
4 regulation -- that this particular type of contention should be
5 admitted to the proceedings and heard.

6 It's much easier to do that in sort of an informal
7 way than it is to informally tell the boards, You've got to
8 deny a license in these circumstances even though this is not
9 as yet reflected in a regulatory requirement.

10 I think it is very easy for the Commission to deal
11 with -- to stay on top of these problems that deal with the
12 matter of contentions and what is actually heard during the
13 course of a proceeding.

14 MR. BICKWIT: Fine. Well shall we strike the
15 language the Chairman referred to, and then in the Commission
16 section make clear that it is not -- that it is no longer the
17 policy of this Commission that if all of its regulations are
18 met that it is therefore necessarily the case that a license
19 shall issue?

20 We'll phrase it more gracefully than that, but--

21 COMMISSIONER KENNEDY: We'll have to come and dis-
22 cuss the implications of such a statement, I hope. I hope
23 the erudition already expressed from our legal colleagues
24 will be able to enlighten us further.

1313 029

25 COMMISSIONER BRADFORD: I would strike the words

NRB/wb25

1 between "sufficient to" and "warrant," but I would leave the
2 rest of that or make whatever changes were necessary to bring
3 it in line with Alan's original understanding of it.

4 CHAIRMAN HENDRIE: That would also do it for me,
5 Peter.

6 COMMISSIONER AHEARNE: And I would like some
7 language in there saying that the licensing board is supposed
8 to alert, or recommend in its decision--

9 CHAIRMAN HENDRIE: It could be a last sentence:
10 "The Board should make note of such issues."

11 COMMISSIONER KENNEDY: What is it we're proposing?

12 MR. BICKWIT: I think there are differences in
13 the Commission on this question. If you strike everything
14 between "sufficient" and "to warrant," from what I hear
15 Commissioner Kennedy saying, he may have an objection to that.

16 COMMISSIONER KENNEDY: We've listened to thirty
17 minutes of discussion which would essentially be ignored by
18 that proposition.

19 COMMISSIONER BRADFORD: My proposition had two
20 steps to it. One was that, and the other was to, whether by
21 footnote or by some alteration of the remaining language, make
22 it clear we were giving that sentence, Alan Rosenthal's original
23 reading of it, rather than the complete overruling of the
24 proposition that the regulation--

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25 COMMISSIONER KENNEDY: Something like that, if I
could see it, might be helpful.

1313 030

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1 I could judge better when I saw it.

2 CHAIRMAN HENDRIE: Please try something along that
3 line. That does sound -- it deals with a particular problem
4 of whether you're throwing out that line of cases.

5 COMMISSIONER KENNEDY: So long as the language
6 remains, however, that there is the one other question which,
7 if the language we're going, we needn't worry about. If the
8 language is to remain, there is still a further question the
9 way the sentence is now phrased, where it says, "and to warrant
10 approval;" two aspects:

11 First, the compliance with existing regulations
12 may no longer be sufficient to provide for the public health
13 and safety. That's one thing. And, on the other hand, neither
14 is it sufficient to warrant the issuance of a license. Those
15 are two different things. And I don't think that's what was
16 intended.

17 If it is intended 'd come back to an original and
18 earlier point, that means all existing plants meeting existing
19 regulations are not adequately protecting the public health
20 and safety by our own statement. And I'm not sure that that's
21 what we want -- well, I don't know, do we want to say that?

22 COMMISSIONER BRADFORD: That's the language I'm
23 proposing to take out.

24 COMMISSIONER KENNEDY: Okay.

1313 031

25 COMMISSIONER GILINSKY: I don't think it carries

r 'agb2 1 that implication with it. But, so far as I'm concerned, it
2 could go out.

3 MR. BICKWIT: I don't either.

4 COMMISSIONER KENNEDY: There's an old statement
5 about it is, after all, in the eye of the reader.

6 CHAIRMAN HENDRIE: I think there is this difficulty
7 as it stands, but I think the later suggestion for redrafting
8 here deals reasonably with it.

9 MR. BICKWIT: We can redraft it.

10 CHAIRMAN HENDRIE: And then down at the end of
11 this paragraph, we'd want some sentence that the board should
12 make special note of such issues -- the boards in their
13 decisions.

14 Okay. Onward.

15 MR. LAZO: Mr. Chairman, may I ask Len first
16 before we go on:

17 The sentence at the end of page three that ends
18 on the top of page four is troubling me a little bit, and I
19 wonder if there's a missing word there.

20 MR. BICKWIT: There is. Between "implications" and
21 "those," the word "for" is missing.

22 MR. LAZO: Yes. All right. Thanks. 1313 032

23 CHAIRMAN HENDRIE: That converts it to a sentence.

24 MR. SHAPAR: What do you mean when you're saying
25 to regulatory policies, are you referring to Staff guides or

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1 formal Commission statements of policy?

2 MR. BICKWIT: The whole shooting match.

3 MR. SHAPAR: Everything?

4 CHAIRMAN HENDRIE: I think so, don't you?

5 MR. ROSENTHAL: I also take it there was no
6 intended implication here that every change a regulation
7 might have the -- would necessarily have the effect of requiring
8 the rejection of the application or further proceedings on
9 remand. The change in regulations, I assume, come in various
10 shapes and sizes with differing implications in terms of whether
11 the issuance of the license should be further held up.

12 CHAIRMAN HENDRIE: Just so.

13 COMMISSIONER GILINSKY: Can we add something like
14 any further change --

15 COMMISSIONER AHEARNE: To stress the substantial
16 aspect of the changes, I would agree with that.

17 MR. OSTRACH: "In important respects."

18 MR. BICKWIT: On page five --

19 COMMISSIONER AHEARNE: You have used two different
20 forms for the review of the Appeal Board. That is, you
21 specified in one case when a stay motion is filed, and in the
22 other case where a stay motion is not filed. Why didn't you
23 just put it all together? Because you're basically asking the
24 Appeal Board to review rapidly whether or not a stay should be
25 imposed, independent of whether there is a.... 1313 033

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MR. BICKWIT: We impose some time period.

COMMISSIONER AHEARNE: The 60 days, though, is going to be independent of whether a stay is filed, isn't it?

MR. BICKWIT: I think we could collapse those two sentences.

MR. SHAPAR: I think we define stay, isn't that the answer to the Commissioners' question? I mean, for the purposes of this document, a stay means beyond the stipulated period.

MR. BICKWIT: Is that the answer to the Commissioners question?

COMMISSIONER AHEARNE: Not really, because I thought the issue was you've got 60 days, the Appeal Board is supposed to make its review and pass on, independent of whether or not the stay motion is filed. If a stay motion is filed, then it does one thing. If the stay is warranted, it still has to have --

MR. BICKWIT: I think we can collapse the two sentences, if that makes you feel better.

COMMISSIONER AHEARNE: I was just questioning.

COMMISSIONER KENNEDY: I have a question which I think is probably related to this. It says that: 1313 034

"If no stay papers are filed, the Appeal Board shall, within the same time period (or earlier if possible)" -- which is the 60 days -- "analyze the

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1 record and the decision below on its own motion
2 and decide whether a stay is warranted. It shall
3 not, however, decide that a stay is warranted without
4 giving the affected parties an opportunity to be
5 heard."

6 Once it decides that the parties deserve to be
7 heard, is it not automatically staying the matter until the
8 hearing is completed?

9 MR. ROSENTHAL: No, only to be heard on the question
10 of whether a stay is warranted. Under the present situation,
11 the Appeal Board will not consider staying the Licensing Board
12 decision unless an application for a stay is filed by one of
13 the parties.

14 Under this procedure, in all cases, whether a stay
15 application is filed or not, the Appeal Board will look at the
16 question as to whether a stay is warranted. If, in a case in
17 which no stay application has been filed, the Appeal Board
18 considers that there may be warrant nonetheless entering the
19 stay, before that stay is entered the parties would be given
20 an opportunity to be heard, and that is on the question of
21 a stay, and that is simply a matter of fundamental due process.

22 COMMISSIONER KENNEDY: I'm only asking if all of
23 that occurs within the previously stated 60 days. And, if not --
24 Oh, it is? All of that must occur and that hearing occur within
25 that 60 day period?

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MR. BICKWIT: That's right.

COMMISSIONER KENNEDY: That's what I wanted to be sure of.

CHAIRMAN HENDRIE: Unless you advance to the top of page six where you say:

"If the Appeal Board is unable, within a 60-day period to" --

COMMISSIONER KENNEDY: That's a different question.

MR. ROSENTHAL: The answer to your question, Commissioner, is yes, the Appeal Board will move with dispatch. And I can tell you that on a stay application, the Appeal Board has no problem at all about directing the parties to appear on six, eight or 24 hours notice before it. So we have no doubt that we can accomplish that within the period indicated.

COMMISSIONER KENNEDY: Fine.

MR. SHAPAR: I read it the same way, and I have no trouble with the formulation. But as I recall the previous Commission discussion, the way I understood it was that there would not be an Appeal Board decision, there would be an Appeal Board recommendation to the Commission, and the Commission would decide it based on the Appeal Board recommendation.

MR. BICKWIT: I understood it that way also.

COMMISSIONER KENNEDY: That's page six.

MR. SHAPAR: You're talking about decisions, though, in some of this.

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1 MR. BICKWIT: I understood it that way. It just
2 struck me as making no essential difference. There's no
3 essential difference between a recommendation and a decision
4 which must be reviewed.

5 MR. SHAPAR: And I have no problem. I just wanted
6 to bring it to your attention that you were talking the last
7 time about a recommendation rather than a decision.

8 CHAIRMAN HENDRIE: Since it is reviewable, I agree,
9 I have no problem with it.

10 MR. BICKWIT: It's just easier to draft that way.

11 On page five, if we are all on that page, we have
12 said safety or environmental issues in each case, except with
13 respect to item one toward the bottom of page five, and we would
14 insert "or environmental" after "safety."

15 COMMISSIONER GILINSKY: Where is that?

16 MR. BICKWIT: About two-thirds of the way down,
17 the words: "create novel safety issues" are found. And we
18 feel that ought to say "safety or environmental issues."
19 That is simply conforming that to the posture of the rest of
20 the statement.

21 MR. SHAPAR: I guess the significance of this
22 paragraph is that beyond the standard reasons for granting a
23 stay, which are in the regulations, the Appeal Board recommendation
24 these two additional criteria will be weighed on the stay matter.

25 MR. BICKWIT: That's exactly right. The rules do

b gb8 1 provide that you have a public interest criterion. However,
2 without making these changes, we feel the Boards might be --
3 the Appeal Board not be hemmed in by previous interpretations
4 of the Virginia Petroleum Jobbers case and the rules accomodating
5 it.

6 COMMISSIONER BRADFORD: I agree with your change,
7 but let me just ask if you can name off the top of your head
8 a novel environmental issue that arises from Three Mile Island.

9 MR. BICKWIT: Citing low level regulation releases
10 whether the Commission would find those were Three Mile Island
11 issues.

12 MR. SHAPAR: Psychological injury?

13 COMMISSIONER KENNEDY: Is that environmental
14 or is that public health?

15 MR. SHAPAR: It could be environmental.

16 COMMISSIONER KENNEDY: Psychological harm to people
17 is environmental, as contrasted with public health?

18 MR. SHAPAR: Could be.

19 MR. BICKWIT: Public health issues are environmental
20 issues within the meaning of NEPA.

21 COMMISSIONER BRADFORD: But also safety issues?

22 COMMISSIONER KENNEDY: Yes.

23 MR. SHAPAR: It's not a very clear line in the law,
24 but you'll have the pleasure of being able to deal with it.

25 MR. BICKWIT: Can we move to page six?

1 CHAIRMAN HENDRIE: Please do.

2 MR. BICKWIT: I just want a flag at the bottom of
3 the paragraph carrying over from page five, the last sentence
4 of that paragraph. It does skew matters in a way that may not
5 have been clear from the discussion of last week providing
6 that the Appeal Board will conduct its normal review while
7 the Commission is considering whether to stay the matter. We
8 think that's good policy but want to flag it for your considera-
9 tion.

10 MR. ROSENTHAL: It says unless otherwise ordered
11 the Commission retains full control to direct that a different
12 course be pursued.

13 CHAIRMAN HENDRIE: I think that was clearly the
14 direction we were set upon the last time we discussed these
15 various options. I'm glad to see you've got it in the draft
16 or somebody got it in the draft.

17 Onward.

18 MR. BICKWIT: The next sentence, I simply want to
19 point out that this is Howard's point, the point that Howard
20 raised at the last session, that the Commission does have the
21 right to step in at any point and grab an issue, even before a
22 decision is reached on that issue at the Licensing Board stage.

23 COMMISSIONER BRADFORD: What does the last sentence
24 on page six mean?

25 MR. BICKWIT: That we are not providing a right to

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1 file new pleadings after the pleading with respect to a stay
2 has been filed at the Appeal Board level. You make your case
3 to the Appeal Board and the Commission at the Appeal Board level

4 COMMISSIONER BRADFORD: Well, let's see. Supposing,
5 though, that a party -- or the context in which a party could
6 now take an issue to the Commission while it was ostensibly pending
7 at the Appeal Board level. Say they felt that Alan Rosenthal
8 had demonstrated a conscionable bias toward them....

9 MR. ROSENTHAL: We're only biased against the
10 Staff.

11 COMMISSIONER BRADFORD: All right. Well let's say
12 the Staff felt that.

13 MR. BICKWIT: The judgment is made here that in
14 effect what you have is an Appeal Board recommendation to the
15 Commission. In light of that, it seems reasonable to provide
16 the parties one shot in filing their particular proposals with
17 respect to what the final decision ought to be. If the Appeal
18 Board differs with that decision, they have stated what their
19 position is and the Commission can then decide the issue. We
20 could provide an additional filing; our view was that it was
21 not necessary.

22 COMMISSIONER BRADFORD: I'm not urging that an
23 additional filing of the type be made, I just wouldn't want to
24 cut off any filings of a somewhat different sort that a party
25 might normally be able to make with the Commission on a matter...

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1 MR. BICKWIT: It was not our intention to do that.
2 We are dealing only with this novel stay situation.

3 COMMISSIONER AHEARNE: You mean they'd still have
4 no right to file pleadings with respect to the stay.

5 MR. BICKWIT: That's right.

6 COMMISSIONER BRADFORD: Why don't you add something
7 to that effect?

8 COMMISSIONER KENNEDY: What was that?

9 COMMISSIONER BRADFORD: I would suggest they add
10 a couple of words to make it clear in here that they weren't
11 eliminating filings that otherwise would be made.

12 CHAIRMAN HENDRIE: So it would be pleadings with
13 respect in particular to the Appeal Board decision that had then
14 come before the Commission, and that would leave all other
15 permissible direct pleadings to the Commission free to come.

16 MR. BICKWIT: Page seven presents the issue of
17 what time period should the Commission accord to itself in
18 making a decision on the stay question and what should be the
19 consequences of its failure to comply with that time period.

20 I can do no more than to read the two alternatives
21 that we put before you. On the one hand, we say:

22 "It is expected that the Commission will
23 issue a decision in each case within 20 days of receipt
24 of the Appeal Board's decision. If it does not act
25 within that time and if the Appeal Board has not stayed

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1 the Licensing Board's decision, then the license or
2 permit shall be issued in accordance with the initial
3 decision."

4 The alternative would be to simply provide that:

5 "It is expected that the Commission will
6 issue a decision within 20 days of the Appeal Board's
7 decision."

8 COMMISSIONER GILINSKY: Why don't you just put
9 brackets on the second sentence?

10 MR. BICKWIT: That's very perceptive.

11 CHAIRMAN HENDRIE: Let's see. We were divided
12 on this question before and counsel has provided us with two
13 versions of it. Why don't we argue it briefly and see whether
14 the majority --

15 COMMISSIONER KENNEDY: I would like to add a third
16 version.

17 CHAIRMAN HENDRIE: All right. Well we can always
18 -- even after we see where the general sentiment lies, we
19 can certainly talk about particular words in changing that.

20 What's the third one?

21 COMMISSIONER KENNEDY: I would have the first
22 sentence as it is at the top of the page, and then I would
23 substitute for the remainder:

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24 "If it does not act finally within that
25 time, it will state the reason for its further

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1 consideration and indicate the time it anticipates
2 will be required to reach its decision. In such
3 an event, if the Appeal Board has not stayed the
4 Licensing Board's decision, the initial decision will
5 be considered stayed pending the Commission's final
6 decision."

7 All I'm trying to do here is say we are either
8 going to act affirmatively or state why not and try to give
9 some estimate then when we will, which, it seems to me, is
10 consistent with the view stated on page three which I recall
11 for you when we said "because prior notice and comment
12 would further delay adjudicatory decisions being
13 rendered and from being addressed by the Commission
14 and so would be contrary to the public interest."

15 Now the fact that things are being delayed is,
16 we have already asserted, not consistent with the public interest.
17 And I'm suggesting here we then ought to indicate what we
18 plan to do, why we're holding it up, and then also indicate
19 our clear understanding that if we do not, what we have done,
20 whatever we like to call it, what we have done has stayed the
21 decision, that's all.

22 I'm just trying to call these spades what they are.

23 CHAIRMAN HENDRIE: Read it once again.

24 COMMISSIONER KENNEDY: "If it does not act

25 finally within that time, it will state the reason

17 'agbl4 1 for its further consideration and indicate the
2 time it anticipates will be required to reach
3 its decision. In such an event, if the Appeal
4 Board has not stayed the Licensing Board's decision,
5 the initial decision will be considered stayed
6 pending the Commission's final decision."

7 COMMISSIONER GILINSKY: If I understand it
8 correctly, it's basically a commitment to explain the reasons
9 for not having decided the case in 20 days.

10 COMMISSIONER KENNEDY: Yes.

11 CHAIRMAN HENDRIE: Or having decided the stay --

12 COMMISSIONER KENNEDY: And noting that if we have not
13 in fact, what we are doing is staying the decision. Whatever
14 we call it, that's what we're doing.

15 COMMISSIONER BRADFORD: But no license would be
16 issued until the --

17 COMMISSIONER KENNEDY: The decision is stayed.

18 COMMISSIONER GILINSKY: I think it is okay. I
19 would like to see it in writing.

20 COMMISSIONER BRADFORD: I think it is okay, too.
21 If the decision of the Appeal Board had been not to issue the
22 license, presumably the result of that would not be the issuance
23 of a license.

24 COMMISSIONER KENNEDY: No. 1313 044

25 MR. OSTRACH: Under the Commission requirements.

1 COMMISSIONER KENNEDY: Not unless the Commission
2 itself elected to do so. All it does is call for affirmative
3 action on the part of the Commission. In other words, to
4 avoid the problem we mentioned earlier about inaction turning
5 out to be action. It calls upon us to act in some way, even
6 to state that we are not going to.

7 CHAIRMAN HENDRIE: It sounds like it might be
8 a selling proposition, Dick. If I can't get you all to go
9 with bracket one, why I'll certainly support your proposal
10 in preference to bracket two.

11 COMMISSIONER KENNEDY: That sentence remains.

12 CHAIRMAN HENDRIE: I'm talking about the whole
13 bracket. I prefer to put fire under the Commission and make
14 it take an action in 20 days. If the action is that we're not
15 ready to issue, to say that. But there seems to be already a
16 majority sentiment to accept that. It does not result in any
17 issuance of a license in the absence of positive Commission
18 action but puts some language in that puts a little heavier
19 burden on us to propel us to either say yes or no or to say
20 why we are having trouble saying yes or no.

21 COMMISSIONER AHEARNE: I would have been silent
22 on the issue.

23 COMMISSIONER BRADFORD: You would have gone with
24 the second bracket?

25 COMMISSIONER AHEARNE: With neither.

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COMMISSIONER BRADFORD: You would have left the paragraph out altogether?

COMMISSIONER AHEARNE: Yes.

COMMISSIONER GILMSKY: I guess I probably would have, too. I think it's perfectly reasonable that we should explain --

CHAIRMAN HENDRIE: -- what we propose to do and how we hope to be able to do it?

COMMISSIONER KENNEDY: I just submit I feel if we don't we will relatively soon be asked to do so. I can't imagine an agency which is in the business of licensing just failing to do so over any period of time without stating its reasons, getting away with it. You know.

COMMISSIONER AHEARNE: I think that's certainly true, but I think the first few times around -- I feel uneasy about making the kind of commitment that at least gives the appearance that we think these issues are going to be readily resolved and rapidly. There are some of those major policy issues that I would suspect we will be trying to think through with some great care.

COMMISSIONER KENNEDY: If that's the case, that we feel we can't come to grips with it, then I think the public needs to know that.

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COMMISSIONER AHEARNE: If we had had a standard of, for example, rulemakings would finish by X time, if we were to

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1 meet all these deadlines, then I would feel this would be just
2 consistent with our practice. I'm a little uneasy about being
3 so efficient.

4 COMMISSIONER BRADFORD: I see your point. It might
5 be better to say the Commission will seek to issue a decision
6 than to say that it is expected, you're probably quite right.
7 I think the first couple of ones you cannot reasonably expect....

8 COMMISSIONER KENNEDY: I don't have any problem
9 with that so long as the other thought is contained in there.

10 CHAIRMAN HENDRIE: Will seek to issue? Start it,
11 "The Commission will seek to issue?"

12 COMMISSIONER GILINSKY: This is a decision on the
13 stay.

14 CHAIRMAN HENDRIE: This is a decision on the stay.
15 Do the next draft that way, with Dick's sentence
16 to follow.

17 The balance of the page.

18 MR. BICKWIT: The balance of the page presents the
19 issue we raised earlier in this meeting, which is what do you
20 want to do with respect to uncontested cases and uncontested
21 issues in contested cases.

22 COMMISSIONER AHEARNE: I don't see why it's only
23 the uncontested issue for the contested case.

24 MR. BICKWIT: Because that's the situation in
25 North Anna, it's a contested case.

1 COMMISSIONER AHEARNE: No, North Anna is separate
2 entirely because you've already gone through a decision.

3 MR. BICKWIT: It is not an uncontested case, it's
4 a contested case and you have to make a decision how you are
5 going to deal with that situation.

6 MR. ROSENTHAL: This language, if I may say so,
7 I think is very fuzzy. From the conversation I had with
8 Mr. Ostrach after I got a draft of this, I understood that what
9 is being referred to when they talk about uncontested operating
10 license proceedings is the Staff review, and that is conducted
11 in an instance where there is no adjudicatory proceeding.

12 Now I don't think the term "uncontested operating
13 license proceeding" is one that would normally be equated with
14 Staff review. And for that reason, I took the liberty of
15 drafting -- I did not have time to provide it to the General
16 Counsel's office before this came -- the General Counsel's
17 paper came to you -- of drafting an alteration of the first
18 sentence of the paragraph that begins on the bottom of page
19 seven.

20 CHAIRMAN HENDRIE: Give it a try.

21 MR. ROSENTHAL: It reads:

22 "The above set of interim procedures
23 apply only to matters considered in adjudicatory
24 proceedings involving nuclear power reactors and
25 so do not govern the issuance of an operating license

w /agbl9 1 in circumstances where either (1), no adjudicatory
 2 proceeding has been conducted on the merits of the
 3 application for a license or, (2), some of the matters
 4 considered in the course of the Staff review of the
 5 operating license application neither have been
 6 raised before nor determined by the Appeal Board in
 7 the adjudicatory proceeding which was conducted in the
 8 application."

9 Now this was merely intended -- I might say it is
 10 not a substantive alteration of the proposal of the General
 11 Counsel, it was merely intended to clarify the language.

12 What the General Counsel has in mind here is if
 13 there is no proceeding at all, no one has petitioned for inter-
 14 vention or the petitions for intervention are denied, and so
 15 the Staff is making the -- as it now stands, the Staff is the
 16 one that determines whether the license issues or not -- that
 17 these procedures would not apply in that circumstance, but the
 18 Commission would, as it says in the next sentence:

19 "Any such licenses will be issued only
 20 after action of the Commission itself."

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eh1 1 General Counsel would also apply that to the case
2 in which an operating license proceeding, an adjudicatory
3 proceeding is conducted but it is confined to issues (a) and
4 (b). And as to all other matters, the Staff under existing
5 procedures is, in the vernacular, calling the shots.

6 And General Counsel's proposal would be that in
7 those cases as well, the license would not issue without
8 Commission action.

9 COMMISSIONER GILINSKY: Did you expect we would
10 issue a separate statement covering those cases, Len?

11 MR. BICKWIT: It seems to me you've got to say some-
12 thing.

13 COMMISSIONER GILINSKY: Why don't we say we will
14 handle those cases separately and they will be the subject of--

15 MR. BICKWIT: You can do that. We saw no reason
16 to do that in a separate statement.

17 CHAIRMAN HENDRIE: Alan, make it clear
18 the case of an operating license case where there is an
19 adjudicatory proceeding going on there will be issues iden-
20 tified in that proceeding. Now what you're talking about here
21 are all other -- are issues that are not so identified as being
22 adjudicated or are not picked up by the Appeals Board on its
23 own motion, --

24 MR. ROSENTHAL: This would obviously --

25 CHAIRMAN HENDRIE: -- but not to the whole case.

2 1 MR. ROSENTHAL: No. This would obviously apply to
2 all operating license proceeding because there isn't an operat-
3 ing license proceeding, there never has been one, there never
4 will be one, which covers every matter that the Staff has
5 considered in the course of its review. The proceeding will
6 only again cover those issues which have been put into contro-
7 versy by a party, and those issues, if any, which either the
8 Licensing Board or the Appeal Board decided to raise on its
9 own initiative, and that obviously can't cover the waterfront.

10 So what the General Counsel, it seems to me, is
11 saying here is that in every operating license proceeding the
12 license does not issue without the express Commission action
13 and that with respect to the operating license in instances
14 where there is an adjudicatory hearing, the Commission would
15 presumably be focusing presumably upon those matters that were
16 in the Staff review that were not adjudicated.

17 Am I right on that?

18 MR. BICKWIT: Rather than go through your language
19 again, are you intending to cover with this statement the
20 situation where the Appeal Board is taking issue (a) and (b)
21 in your example?

22 MR. ROSENTHAL: Well, my redraft, Len, was intended
23 to be nothing more than what seemed to me to be a more
24 felicitous statement on what I assumed you intended.

25 MR. BICKWIT: What I intended was that the answer

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1 was yes to my question, that in the situation where the issues
2 were divided up, the Appeal Board taking (a) and (b) and the
3 Staff reserving to itself all the other issues, that the Com-
4 mission would get a crack under this statement at issues (a)
5 and (b) and the other issues through whatever mechanism we
6 provide.

7 MR. ROSENTHAL: These procedures would only apply --
8 the ones that are set forth in this paper would only apply if
9 those issues were actually adjudicated in the operating license
10 proceeding, either as the result of a contention or as a re-
11 sult of a sui sponti raising of the issue by the particular
12 board.

13 MR. BICKWIT: Yes, except with respect to North
14 Anna, in which case issues (a) and (b) will not come up.

15 COMMISSIONER BRADFORD: What's going to happen then
16 if there is something kicking around in the case that the
17 Commission finds troublesome?

18 MR. BICKWIT: That's what you've got to decide.
19 That is the issue that I think you have to focus on. In the
20 situation where you've got an uncontested case or a case in-
21 volving uncontested issues, how is the -- what procedure are
22 you going to use? We just said you're not going to use this
23 procedure. And the options are similar to the ones that you
24 have just considered with respect to the timing of your own
25 action under this paper.

ah-1 1 COMMISSIONER AHEARNE: Except in that case you have
2 no ex parte --

3 MR. BICKWIT: That's right. It's a lot easier.
4 But you have to decide, when the Staff comes in and says we
5 want to issue this license, what is the Commission's action
6 to be, if the Commission can provide that it shall not be
7 issued unless it takes formal action and it can set some time
8 limits on it, or it can go the route that you've gone with
9 respect to startup of B&W plants which were closed down as a
10 result of your own orders.

11 CHAIRMAN HENDRIE: Well, I think the language just
12 ought to say that in such cases, i.e., the ones we are now
13 trying to deal with, the Commission will review Staff recom-
14 mendations for issuance of a license and will make the final
15 decision on issuance.

16 MR. BICKWIT: Do you want to set a time limit?

17 CHAIRMAN HENDRIE: Well, I'm inclined to-- I'm a
18 little less inclined to feel the need to want a time limit
19 here than in the previous case; that is, where the case has
20 come down through the adjudicatory system of the Commission.
21 In that case the material -- the record and the material that
22 comes down to the Commission has had a certain discipline im-
23 posed upon it by the Licensing Board and by the Appeals Board
24 and I would trust is reasonably well organized at the time we
25 see it. And it would seem to me the Commission could, fairly

1 expeditiously, decide whether there still are issues in the
2 case that require that it be held while they are thrashed out
3 or whether the case can go ahead.

4 And I suppose it would depend on whether it were a
5 CP or an OL and various other kinds of things.

6 For this other category where the Staff says well,
7 we've studied whatever plant it is. There has been no pro-
8 ceeding so we are only talking about OLs, and probably not very
9 many of those, or no proceeding at all. The Staff comes and
10 their case may be indeed well disciplined and organized, or
11 it may not be well disciplined and organized. And it may be
12 easier for the Commission to deal with the issues, or it may
13 be harder for the Commission to deal with the issues.

14 And I think here I'd be less likely to build into
15 this statement language that we would seek to act within 20
16 days or something like that.

17 But I would think the procedure we would use would
18 be the kind we have had before where we don't have an ex parte
19 bar, we can simply sit down with the Staff and hear what they
20 think at a particular point, and discuss it with them, argue
21 with them, with ourselves, and whoever else is handy, and then
22 see what we want to do, sort of issue by issue.

23 MR. BICKWIT: Let me ask the hard question:

24 Do you have in mind that the Commission would take
25 a vote on the issuance of the license in that circumstance and

ah6 1 that the license would not issue unless the question were voted?

2 CHAIRMAN HENDRIE: Yes.

3 MR. BICKWIT: That wasn't hard.

4 COMMISSIONER BRADFORD: Let me try my hard question.

5 COMMISSIONER KENNEDY: What other options does it
6 have?

7 MR. BICKWIT: The other option was the one that
8 you've used in the case of -- I have to point this out -- in
9 the case of the B&W plants and restart. It did not take a
10 formal Commission vote to restart those plants.

11 COMMISSIONER KENNEDY: As a practical matter, the
12 Staff came before the Commission and the Commission has
13 certainly had the opportunity to do just that. It simply
14 elected not to and thereby in fact acquiesced in the Staff pro-
15 posal.

16 It seems to me that --

17 CHAIRMAN HENDRIE: Furthermore, Len, we may go
18 through-- I don't really think it is a difference. In the
19 B&W case the first ones to come back with the proposition,
20 "Okay, we've done the things you've said we ought to do, now
21 how about it?" We met and we voted on it.

22 As you went on down the line where the presentations
23 coming up were saying, "Okay, now Plant X has gotten into
24 shape as follows," it began to look very similar and we then
25 went over and the Staff checked on the Commissioners' offices.

eb7 1 If no Commissioner wanted to hear it and it looked all right
2 to him, why then it went.

3 Now what we've got here is clearly an interim pro-
4 cedure and some time down the line after we've heard the first
5 few, or however many, we can very well reach the same point
c3 6 in this procedure except, since this is a more formal pronounce-
7 ment, why we'd have to amend -- do any amending by way of a
8 further policy statement.

9 We could end up finding, for instance, that on CPs
10 from about the fourth one on down that they had so much simi-
11 lar configuration with regard to the major issues of importance
12 at that stage that it no longer seemed necessary for us to sit
13 here at the table and hear the specifics all again, and take a
14 vote.

15 I really don't see it as that much different, and I
16 think what we have contemplated is saying that the Commission
17 will take action on licenses where it does require positive
18 action. And that's pretty clearly the intent.

19 COMMISSIONER BRADFORD: But I still don't see how
20 this is going to work on uncontested issues in a contested case.
21 They're going to all travel up with the same piece of paper.
22 At the end of 20 days we're going to issue a statement about
23 what we're doing with the contested issues. Meanwhile, what do
24 we do with the uncontested issues? What point is there in
25 issuing something after 20 days on the contested issues if we

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1 are going to be dealing with the uncontested issues for another
2 six months?

3 CHAIRMAN HENDRIE: I guess there are two answers.
4 One of them is-- Maybe we'd prefer then to have the same kind
5 of -- seek like 20 days with regard to the uncontested issues
6 which I could stand but which didn't seem to me as urgent as in
7 the other cases.

8 The reason that 20 days-- It might very well turn
9 out to be there are other issues that the Commission wanted to
10 consider in this particular case and they would take longer.

11 COMMISSIONER BRADFORD: Part (b) of that question
12 on uncontested issues that come to you now from a Licensing
13 Board, what is the threshold you have to cross in order to
14 review those?

15 MR. ROSENTHAL: Are you talking about an operating
16 license proceeding?

17 COMMISSIONER BRADFORD: Yes.

18 MR. ROSENTHAL: The time --

19 CHAIRMAN HENDRIE: Uncontested issues refers to
20 everything in the case except what --

21 MR. ROSENTHAL: The Licensing Board again will have
22 addressed matters that have been put in controversy and possi-
23 bly matters which it has seen fit to raise on its own ini-
24 tiative as it has the power to do under the Rules of Practice.
25 So we will get a decision that will address certain issues.

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1 Some of them may possibly have been raised by the Licensing
2 Board. All right.

3 Our responsibility is to review all -- review the
4 Licensing Board's decision on all of the issues which it con-
5 sidered, whether it considered them in response to a conten-
6 tion or whether it considered them on its own initiative.

7 In addition to that we are free to raise issues on
8 our own and indeed, in the North Anna proceeding we did pre-
9 cisely that. The North Anna proceeding was one which-- The
10 operating license proceeding for North Anna was contested
11 before the Licensing Board. There were intervenors, an inter-
12 venor at least, and there were certain issues raised and they
13 were disposed of.

14 There was no appeal taken to us in that case, so
15 we reviewed it on our own initiative and my recollection is
16 that one of the two issues that we ended up with was one that
17 we had raised. The turbine missile issue, which we still have
18 before us in that case, was one that had not been raised on
19 the Licensing Board level either by an intervenor or by the
20 Board itself. We raised it on our own initiative, having
21 plucked it out of this list of floating generic issues that
22 were roaming around.

23 So that's the way we handled those cases.

24 Now when we get finished with it under these proce-
25 dures it goes up to the Commission. Obviously we would have

eb10 1 passed upon certain questions. We would have had to if there
2 was an operating license adjudicatory proceeding at all. But
3 then there would be the balance of them.

4 And I think the question that you have raised,
5 Commissioner Bradford, is a good one. In every one of these
6 cases, operating license cases, there are going to be what has
7 been referred to here as uncontested issues. I would have
8 preferred the term "matters that had not been placed in issue
9 and were simply subject to Staff review."

10 But call them what you will, there will be those
11 issues in those cases and therefore, it seems to me the ques-
12 tion does arise, if you have a 20-day period for examining
13 the matters that we touched upon but there was no period for
14 the balance, then the 20-day period in no operating license
15 case is significant since every operating license case will
16 have these matters which the Staff is considering which an
17 Appeal Board has never looked at.

18 COMMISSIONER BRADFORD: Because you'd be constrained
19 I guess either by the language you're suggesting or by the
20 language in here from looking at issues --

21 MR. ROSENTHAL: If we want to go beyond the matters
22 which the Licensing Board considered, we are constrained to
23 restrict ourselves to matters which seem to us to be of signi-
24 ficance.

25 COMMISSIONER BRADFORD: Right.

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1 MR. ROSENTHAL: That's the thrust of the Rules of
2 Practice.

3 COMMISSIONER AHEARNE: That's fairly broad lati-
4 tude.

5 MR. ROSENTHAL: Right. But as I suggested earlier,
6 there's going to be no case in which, on our own initiative,
7 we are going to touch every single thing that the Staff con-
8 sidered in the course of its review, so I think you can rest
9 assured that there will be a gap of some magnitude between
10 what we look at and between what the Staff has looked at in
11 the course of its customary review of operating license appli-
12 cations.

13 MR. SHAPAR: Do you need a separate procedure for
14 these issues? The Commission has the same sui sponti authority
15 that Alan does, so if you get the case, why do you have to make
16 this dichotomy between contested and uncontested issues, and
17 complicate it?

18 COMMISSIONER BRADFORD: I was asking two questions.
19 The answer to the first one I think is the one Joe suggested
20 and that is we can, at the end of 20 days, say the reason we
21 haven't issued the license yet is because there are other
22 issues in the case.

23 But I also wanted to be sure that the language Alan
24 had suggested, if in fact that's the language we go with,
25 didn't in any way constrain the Appeal Board's ability to look

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1 at matters that hadn't been placed in controversy when the
2 case came to it.

3 MR. ROSENTHAL: Again I was merely trying to re-
4 state the General Counsel's proposition, but I didn't under-
5 stand the General Counsel's proposition to have any such res-
6 triction.

7 MR. BICKWIT: Clearly it didn't.

8 COMMISSIONER KENNEDY: Nor indeed, I would agree
9 with Commissioner Bradford, should it, but it seems to me
10 what we want is the present situation continued; that is, that
11 within the Rules of Practice you select those issues that you
12 consider appropriate and significant and then deal with them.

13 So if the language does that, then --

14 CHAIRMAN HENDRIE: Okay.

15 MR. BICKWIT: What I would suggest, I would discard
16 your suggestion, Howard, in that if you do that in a situation
17 such as North Anna, once the Commission has passed, if you
18 have another situation like that, once the Commission has
19 passed on the contested matters, it will not see the uncon-
20 tested matters which may be, in the Commission's view, at the
21 heart of the matter.

22 MR. SHAPAR: Why isn't the Commission in essentially
23 the same position as the Board? The Commission is free to
24 raise a sui sponti issue. It has the same authority if not
25 greater authority than the Appeal Board to raise it. And any

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1 time the Commission sees an uncontested issue that it doesn't
2 think has had proper treatment and it wants to remand it for
3 a hearing, it can reach down and do it.

4 CHAIRMAN HENDRIE: Look, the intent in this policy
5 statement is to indicate the Commission's intention on the
6 so-called uncontested issues in contested cases and on con-
7 tested cases if there are any -- There is one that we will get
8 I guess -- to hear the Staff's, in effect, final proposition
9 on issuance of a license, and discuss it and see whether we
10 agree with that.

11 If we do we'll take a vote in the Commission and
12 tell the Staff to issue the license if that's what they've
13 recommended, and if not, make what adjustments are necessary.
14 And I think the policy statement ought to in fact indicate
15 that that is what the Commission will do, just so people won't
16 be in doubt.

17 We could certainly-- You know, we could not say
18 that but do it, but I think it would be generally more helpful
19 if we indicated that that's what we were going to do.

20 MR. SHAPAR: I agree. Suppose the Staff comes in
21 and says Yes and the Commission, having heard the Staff's
22 presentation, says No.

23 CHAIRMAN HENDRIE: Then it doesn't issue.

24 MR. SHAPAR: Yes, but when does the licensee or any-
25 body else have the right to be heard on the denial? It has now

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1 become a contested issue. He hasn't had his day in court.

2 MR. BICKWIT: Does he get it now?

3 MR. SHAPAR: Sure he does.

4 MR. BICKWIT: If the Staff says No, what happens?

5 MR. SHAPAR: Then it's a contested issue.

6 I'm simply asking a direct question.

7 MR. BICKWIT: It's the same principle.

8 MR. SHAPAR: No, it isn't because this won't come
9 about in terms of a disagreement between the Staff. That
10 should surface and become a contested issue. The Staff's re-
11 view is on the public record and we say what bothers us, so
12 that thing has never happened, and won't in the real world.

13 But this is different because you're asking the
14 Staff to come forward and explain its position on uncontested
15 issues. Now there's no problem if the normal course of events
16 transpires, namely, the Staff is willing to issue the license,
17 it hasn't been contested, and it will, but you review the
18 Staff's presentation and say No.

19 The only question I'm asking you, in that kind of
20 a situation, what do you foresee the chain of events will be?
21 How does that matter get litigated? Will you remand it back
22 and make it part of the full proceeding or not?

23 And that's what I see as the main problem between
24 this dichotomy between where you've got a contested case
25 having a parallel track for handling uncontested issues and

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1 another track for handling uncontested issues.

2 COMMISSIONER GILINSKY: I'd like to ask a procedural
3 question. Are we in effect scrubbing the second meeting we
4 had scheduled for this morning?

5 COMMISSIONER AHEARNE: I don't even know what the
6 second meeting is about.

7 CHAIRMAN HENDRIE: It depends on people's schedules.
8 It seems to me that the matter before us, which deals with
9 trying to get a statement out on what the whole Commission
10 adjudicatory system will do for the next year or so is suffi-
11 ciently important to keep driving on it.

12 If you have to sacrifice the next meeting why --

13 COMMISSIONER KENNEDY: As a matter of fact, I
14 thought in our recent statement we indicated we were going to
15 do that. It seems to me it's getting on with the public busi-
16 ness. It said we had received petitions from applicants in
17 a couple of proceedings requesting issuance of directives on
18 the way these proceedings should be conducted, and we said
19 this was an interim response and we would make a generic
20 policy decision.

21 And it seems to me that there can hardly be any-
22 thing more serious before us than that.

23 COMMISSIONER GILINSKY: Well, I think there is,
24 frankly.

25 COMMISSIONER KENNEDY: Well, I'm sorry, I do not.

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1 Unless somebody can tell me what it is, I certainly do not.
2 It seems to me that is the heart of the Commission's job. It's
3 business, and certainly nothing can be more significant to it
4 than that.

5 It is public health and safety, after all.

6 CHAIRMAN HENDRIE: It seems to me that we are
7 quite-- I think I am fairly close to being able to launch the
8 next draft of this statement and I'd like to get to that stage
9 rather than leave the tail end open.

10 Would you please redraft the bottom of page 7 using
11 Alan's language and then add to it the statement that the
12 Commission -- statements as suitable along the lines that the
13 Commission will review Staff recommendations to the effect that
14 a project is ready to have a license issued, or some such
15 language as that, and that license issuance will only be after
16 action of the Commission itself, as we said before.

17 MR. ROSENTHAL: Mr. Chairman, I have to address the
18 due process concern that Howard raises.

19 CHAIRMAN HENDRIE: The question of where one goes if
20 the staff says, Here's a case that's ready to go, coming up
21 this route, and the Commission says, We don't think it's ready
22 to go, and what is the redress there? It seems to me that
23 Commission action of that kind would be predicated on the belief
24 that some equipment or procedure or other arrangement in the
25 project that in the Commission's view was needed for public

pb17 1 safety was not adequately in place and that the license should
2 not issue presumably until it was or until suitable agreements
3 about getting it in place had been executed.

4 That is it seems to me that the Staff is not going
5 to come up and say the Updike project is now ready for a CP
6 and we're just going to sit here and say No, we don't like
7 the name and that's it, good-by.

8 So in that case I guess the applicant--

9 COMMISSIONER KENNEDY: We will come back to the
10 General Counsel's most -- one of his earliest statements this
11 morning, because it is precisely that kind of question that I
12 thought his statement was addressed to, is what is it we're
13 going to do?

14 Having said all this and all these beautiful words,
15 we have to have some idea of what it is we're going to do. The
16 public has a right to know.

17 CHAIRMAN HENDRIE: In this case, in such a case as
18 I've outlined, I expect the Commission will say that a license
19 ought not to issue until they have put in this piece of equip-
20 ment and the Staff is satisfied with it, or there is an agree-
21 ment to put it in on some schedule, or they institute this
22 procedure or this further arrangement with local authorities,
23 or whatever has progressed to a satisfactory stage. And we
24 would say that and they would get on with it.

25 Now suppose I want to argue the point and say No,

bl^o 1 this piece of equipment is not necessary, this procedure that
2 you want is not necessary. Since it's the Commission that's
3 making that decision it seems to me that's the final decision
4 of the agency and if they don't like it they can go to court.

5 MR. ROSENTHAL: No.

6 MR. SHAPAR: No. He's entitled to have a hearing
7 on the record.

8 MR. ROSENTHAL: A hearing has to be somewhere --

9 CHAIRMAN HENDRIE: Then he can petition for a hear-
10 ing.

11 MR. BICKWIT: The Commission is the Staff in this
12 particular situation. The Commission has the Staff functions
13 and you should follow the precise procedures that you would use
14 if the Staff said no.

15 COMMISSIONER BRADFORD: If we set up a hearing we
16 won't be functioning as the Staff.

17 MR. BICKWIT: No, but if the Staff said No, at the
18 last minute there would be a right to a hearing.

19 COMMISSIONER AHEARNE: Do we send it back then to a
20 Licensing Board?

21 MR. BICKWIT: We have to create a Licensing Board.

22 COMMISSIONER AHEARNE: Or do we hear it ourselves?

23 CHAIRMAN HENDRIE: It seems to me we could do any of
24 those.

25 MR. SHAPAR: The main point is as a matter of law,

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1 the issue can be litigated.

2 MR. ROSENTHAL: Before this agency.

3 CHAIRMAN HENDRIE: Well, maybe we ought to go ahead
4 and say --

5 COMMISSIONER KENNEDY: It ought to be made very
6 clear here that what we are doing is in no way disturbing that,
7 nor is it intended that we so do. It should be made very clear
8 here.

9 MR. SHAPAR: That's precisely why I suggested a
10 different option five minutes ago which was that you don't
11 have this duplicatory procedure, informal for uncontested
12 issues, but that you monitor the case and if you want an issue
13 you identify it as your own sui sponti issue the same way the
14 Appeal Board does.

15 CHAIRMAN HENDRIE: Howard, that's not what the
16 Commission wants to do, for God's sake. On such things we want
17 the Staff to come in and say We've thought about it, we believe
18 we are ready to issue on the following bases, and have an
19 opportunity to discuss those points with the Staff and decide
20 whether we agree.

21 To expect us to, in some magical fashion, reach down
22 into the mechanism and pull all of those things up in our
23 direction just isn't what the Board here wants. We want to do
24 what we did in the B&W cases, have the NRR come in when they
25 think they're ready to go and say We think it is ready to go,

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1 Commission, and here are the points, and here's why.

2 And then we'll agree or we'll disagree, or agree and
3 disagree in part.

4 I just don't find in your suggestion any way for
5 that to occur except for me to issue a letter to the Staff
6 saying Well, I've been watching a case, Staff, and I want you
7 to come up and do the following.

8 If that's going to be the thing I do in every case
9 I think we could just as well write it down here and let every-
10 body know now that that's going to be the case.

11 MR. SHAPAR: You understand you're free to talk
12 to the Staff while the case is going on.

13 COMMISSIONER GILINSKY: Let me understand Howard's
14 proposal a little better.

15 MR. SHAPAR: If it will advance things I'll be glad
16 to withdraw it.

17 MR. BICKWIT: I certainly think it would.

18 MR. SHAPAR: I was looking not in your direction
19 but in that direction.

20 MR. BICKWIT: Although your suggestion is included,
21 your suggestion is included in the statement.

22 COMMISSIONER GILINSKY: You're suggesting we limit
23 ourselves to specific issues that we ask to be brought up here?

24 MR. SHAPAR: No, not exactly that. What troubles
25 me about this is that if you follow this procedure the end of

b2 1 the line may be that you disagree with the Staff, which is fine,
2 and you say you want another piece of equipment over and above
3 what the Staff has required.

4 Now under the law as I understand it, and I don't
5 think any lawyer at this table disagrees, if the applicant
6 disagrees he is entitled as a matter of right to a hearing on
7 the record. Okay?

8 That's going to hold the whole-- If that does
9 happen, and maybe, you know, it's a Class IX situation--
10 Perhaps I should use some other terminology.

11 If that does happen, then the delay is inevitable
12 and the delay is substantial. Now I'm trying to find a way of
13 precluding that worst-case situation, and one way of doing it
14 is to act essentially the way the Appeal Board acts, plus the
15 fact if the issues are uncontested, as I view your present
16 ex parte rule, you can be talking to the Staff all along on
17 matters that are not substantive matters in issue.

18 So you can get briefings from the Staff in the middle
19 of a case, and another month later as many briefings as you
20 want. And if you're not satisfied with all those briefings
21 and you see an issue that the Appeal Board is missing and the
22 Staff is missing and the Hearing Board is missing, then set
23 it down as an issue sui sponti and let the responsible Boards
24 deal with it before the process reaches the end, and you're
25 not setting up the dichotomy of two different approaches, an

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1 on-the-record approach and an informal approach.

2 CHAIRMAN HENDRIE: Look, take the case of Salem
3 which is ready damn near to go right now.

4 MR. SHAPAR: That doesn't apply here because-- I
5 would apply it just the way you want to go on Salem because
6 there's no hearing at all.

7 I'm only talking about a situation where you've got
8 a hearing.

9 CHAIRMAN HENDRIE: I see.

10 But it still requires this process of the Commission
11 getting interim briefings during the progress of the case
12 to try to identify all of those things which ultimately it
13 would have wanted to deal with specially, and then to get those
14 into the existing -- into the on-going hearing on that case.

15 And it just seems to me that the sense of the
16 Commission's desire for involvement was Yes, there may indeed
17 be and there certainly will be briefings on generic areas as
18 we go down the line, but the involvement in licensing was
19 rather to take a look at the case when it had matured just
20 about to the issuance stage and see if we believed that every-
21 thing that should be included was included.

22 And I find it difficult to --

23 COMMISSIONER GILINSKY: Something that Howard said
24 appeals to me which is that in this phase that's covered by
25 the proposed statement the Commission ought to be keeping a

eh23 1 closer watch on the licensing process in general.

.. 2 We've written into the statement that none of us ad-
3 mits our ability to reach down and take up issues just as --
4 you know, ability we had before. And I think that we should
5 be paying much closer attention to the process quite apart
6 from having set up procedures for the Appeal Board to monitor
7 decisions and then convey to us its recommendations on stays.

8 And I wonder whether we couldn't follow Howard's
9 approach, at least to the extent feasible; that is, it wouldn't
10 rule out --

11 CHAIRMAN HENDRIE: Actually, it wouldn't require
12 any change here but you still have to decide what you're going
13 to do with uncontested issues, whether you want a chance to
14 review them with the Staff or whether you -- that is, whether
15 you want the Staff in effect to bring them to you in summary
16 form at some point, or whether you want to leave it to the
17 Commission to reach in and identify them itself, but keeping
18 close track of the proceedings.

19 I don't think it is in any way-- You know, the
20 ability to do that or the proposition that we do that, I don't
21 think is affected in fact by the language here.

22 COMMISSIONER GILINSKY: No, it means assigning a
23 certain number of persons to engage in activities.

24 COMMISSIONER AHEARNE: I thought that had been al-
25 ready the understanding, going back several meetings before.

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1 I thought we had agreed that we were going to have to monitor
2 all those proceedings.

3 COMMISSIONER GILINSKY: Is that the case in the
4 General Counsel's office?

5 MR. BICKWIT: Do we monitor now? We don't, except
6 in particular proceedings.

7 I thought Howard's suggestion that we do so was a
8 good one, and that we should try to do that.

9 The question raised by the Chairman is if something
10 slips through our fingers, which it just might, do you want
11 the final look at what the Staff has done?

12 COMMISSIONER AHEARNE: I thought the question is
13 when does the Staff give that final look?

14 MR. BICKWIT: That question-- I would suggest they
15 ought to give it to you after you have dealt with the Appeal
16 Board situation.

17 MR. ROSENTHAL: I don't follow this. Early on in
18 the proceeding, if there is an operating license proceeding
19 at all, everyone will know what matters have been placed in
20 controversy. They'll know what are the ones that are going
21 to go through the adjudicatory process.

22 Now to be sure in a particular case there may be
23 additional issues considered by the Board on its own initiative,
24 the Licensing Board or an Appeal Board. But the shape of the
25 proceeding in most instances is pretty well determined early on.

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Now if you've got an operating license proceeding that is likely to go for a year, a year and a half or whatever, through the Licensing Board and the appellate stages, now what is wrong with the Commission, during that period of time, being briefed by the Staff on matters that have not been placed in controversy, because otherwise if the Commission is going to take the first look at the so-called uncontested issues after the Appeal Board decision, then you might as well scrap the whole 20 days again as applies to operating license proceedings because in all of those proceedings you're going to have the Commission, over a period that is undoubtedly going to extend far beyond 20 days, sitting down with the Staff or whatever, discussing with them the aspects of the review which were not encompassed by the very limited number of issues that got considered in the adjudicatory proceeding.

COMMISSIONER KENNEDY: Putting things sequentially which could be done in parallel; it seems to me you're right.

MR. BICKWIT: You raised the question to me I thought.

MR. ROSENTHAL: Well, wherever.

COMMISSIONER AHEARNE: Can I ask a question in clarification of what he's saying?

Let's suppose there's an issue, Alan, that is not placed in controversy, and so the Staff reviews it with us and at some stage either the Licensing Board or the Appeal Board places it in controversy.

eb26 1 Is there any legal problem now with us having
2 addressed directly the Staff on that issue?

3 MR. ROSENTHAL: No, I don't think so. General Counsel
4 might have a different view. I don't think so, so long as
5 your conversations with the Staff were prior to it being made
6 an issue.

7 I think once it became an issue and then was going
8 to come up to you through the adjudicatory chain you would have
9 to terminate, because you have discussions with the Staff I
10 assume about particular reactors before they get into adju-
11 dication all the time.

12 COMMISSIONER AHEARNE: So there's no problem with
13 isolating out not the fact that that reactor is now going into
14 a proceeding but the specific issue with regard to that reactor?

15 MR. ROSENTHAL: I don't think you would want to talk
16 to the Staff before you determine whether there was going to
17 be a contest, an adjudicatory proceeding and if so, what were
18 the matters being put in controversy, and I don't think you
19 would want to discuss with the Staff any of the matters that
20 were in controversy.

21 I don't think that there's a problem about your
22 discussing with the Staff matter X and it later turns out that
23 an Appeal Board or a Licensing Board raises X on its own ini-
24 tiative, just so long as that discussion took place before it
25 became an adjudicatory matter.

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1 MR. BICKWIT: I agree, I don't think there's a
2 problem. But -- and this is the only "but" which accounts for
3 our sequential suggestion rather than moving in parallel, is
4 that you're going to get into cumbersome situations. If you have
5 the Staff in here in a contested case and you're talking about
6 uncontested issues, I can see situations where they will just
7 slop over into the contested matter and it's going to make for
8 some difficulties.

9 We will have to be sitting here with some difficul-
10 ties.

11 CHAIRMAN HENDRIE: Well, but the way this thing
12 lays out, the Licensing Board comes to its initial decision
13 and there then ensues a two-month period in which the Appeal
14 Board is grinding on the case, and then get 20 days beyond
15 that in which the Commission hopes to be able to say something.
16 Maybe this will take more time is what we say, but we say
17 something.

18 So you've got 80 days after the initial decision
19 of the Licensing Board so that the -- You know, to some extent
20 the dust and fury of the controversy is at the lower level but
21 would have died a little bit, and you have three months, blasted
22 near, to have a series of discussions with the Staff on the
23 so-called uncontested items to see what we think of those.

24 So that as you come toward the end of this period
25 it seems to me you might very well be in shape to know what

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1 you thought about the uncontested issues, and you're now at the
2 60-day point with the Appeal Board's view on contested ones.
3 And you might indeed be able to draw rapidly then to a con-
4 clusion, at least I would hope we would, on most cases.

5 MR. BICKWIT: Agreed. I simply don't think you
6 ought to obligate yourself to deal with these prior to the
7 Appeal Board decision. I think it would be difficult to--
8 There will be some situations where it will be difficult and
9 you shouldn't set up a procedure where in all cases you'll be
10 going in parallel, recognizing that in some cases you'll have
11 to go sequentially.

12 COMMISSIONER AHEARNE: But you're not foreclosing
13 it because there's a lot of interactions about the points that
14 both Howard and Alan raise; since you are inclined to step
15 into the middle of a year and a half proceeding, it would be
16 beneficial.

17 CHAIRMAN HENDRIE: Well, a while ago I sketched out
18 some comments about what I thought the redrafting at the bottom
19 of page 7 and the top of page 8 ought to look like, and I
20 guess I haven't changed my mind.

21 In view of the comments about rights of parties over
22 here I guess I might add the policy statement could note that
23 the rights of applicants under whatever that provision of the
24 law is are not affected by this, an oblique way of saying if
25 you don't like what we decide in any particular case you've

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1 got a right to a hearing.

2 COMMISSIONER BRADFORD: Nothing in this policy state-
3 ment repeals the Constitution.

4 CHAIRMAN HENDRIE: I'm prepared to vote for that.

5 COMMISSIONER BRADFORD: The rest of it I think is
6 going to be fine as it is. I would like to see this last
7 paragraph written out.

8 CHAIRMAN HENDRIE: I think we would all like to see
9 the redraft. There are several places where language is
10 changed, and I don't propose to ask you right now to come to a
11 final decision on it because that will postpone things for yet
12 another hour while we go back and sort these things out.

13 But we'll see the language and we may want to argue
14 about it again.

15 What I propose is to tell the General Counsel to re-
16 draft it as rapidly as you can and get it back to us, and not
17 keep scheduling this back on the agenda, and see if we can
18 drive on through and accomplish an agreed-upon policy statement.

19 We owe it to ourselves, to the Boards, to the people
20 entangled in our processes, and people in general.

21 It sounds like a speech you were making, Vic, months
22 ago.

23 COMMISSIONER GILINSKY: We should have done this in
24 May. 1313 078

25 COMMISSIONER KENNEDY: One last question on this,

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Counsel.

It is your judgment that in fact the policy statement essentially as we have now discussed it and agreed will constitute an effective response to the petitions that are before us?

MR. BICKWIT: Yes.

COMMISSIONER KENNEDY: Okay.

CHAIRMAN HENDRIE: Good. Thank you very much.

(Whereupon, at 11:40 a.m., the meeting of the Commissioners was concluded.)

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