

POOR ORIGINAL ORIGINAL

NUCLEAR REGULATORY COMMISSION

IN THE MATTER OF
COMMISSION MEETING ON S-3

Place - Washington, D. C.

Date - Tuesday, 29 May 1979

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1 UNITED STATES OF AMERICA
2 NUCLEAR REGULATORY COMMISSION

3 COMMISSION MEETING

4 on S-3

5
6 Room 1130
7 1717 H Street, N.W.
8 Washington, D. C.

9 Tuesday, 29 May 1979

10 The Commission met, pursuant to notice, at 3:25 p.m.

11 BEFORE:

12 DR. JOSEPH M. HENDRIE, Chairman

13 RICHARD T. KENNEDY, Commissioner

14 PETER A. BRADFORD, Commissioner

15 JOHN AHEARNE, Commissioner

16 ALSO PRESENT:

17 S. EILPERIN

18 L. Slaggie

19 G. Sege
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1 CHAIRMAN HENDRIE: Why don't we gather, on the
2 subject of the S-3 proceeding -- why don't I ask the counsel's
3 office to fill us in?

4 MR. EILPERIN: As you know, this meeting was
5 scheduled before Judge Leventhal's May 23rd decision in
6 State of Minnesota versus Nuclear Regulatory Commission. At
7 that point in time, prior to that decision, it had been hoped
8 that the Commission might again reconsider the statement of
9 considerations dealing with the S-3 rule in light of that
10 court decision.

11 I can briefly go through it, if you wish.

12 COMMISSIONER AHEARNE: Do you intend -- does the
13 general counsel intend to send us some sort of a summary
14 analysis of the significance of that opinion?

15 MR. EILPERIN: We certainly can do that and certainly
16 will do that.

17 COMMISSIONER AHEARNE: It seems to have been of
18 some significance to us.

19 MR. EILPERIN: Fine, we'll see to that.

20 We had sent up, in light of that decision, an
21 extension of the interim rule based upon the intervening
22 nature of the Court's decision.

23 COMMISSIONER AHEARNE: That's what had led me to
24 conclude that you'd be sending up an analysis of it.

25 MR. EILPERIN: Well, we skipped ahead one square and

1 actually set up, just for purposes of general discussion, the
2 sort of changes we would propose in the S-3 statement of
3 considerations based upon that. For the purposes of today's
4 discussion, we're not asking that the Commission vote on S-3;
5 we're not asking that the Commission vote on these proposed
6 changes.

7 We realize that those proposed inserts were sent up
8 very late in the day and that the Commission might want to
9 have that accompanied by an analysis of the Court's decision.

10 Essentially, what the Court's decision does is to
11 remand to the Commission, in the interest of sound administra-
12 tion, for the Commission to consider whether there's reasonable
13 assurance that an off-site storage solution will be available
14 by the years 2007 through 2009, the expiration of the plant's
15 operating licenses, and if not, whether there's reasonable
16 assurance that the fuel can be stored safely at the sites
17 beyond those dates.

18 The Court's decision comes in the context of two
19 spent fuel pool expansions which the Appeal Board had approved
20 and the Commission was planning to review; where excluded from
21 consideration in those proceedings were issues dealing with
22 both the environmental effects and safety issues of long-term
23 waste disposal.

24 The licenses were challenged by the petitioners.

25 COMMISSIONER KENNEDY: Would you remind me which

1 licenses?

2 MR. EILPERIN: Prairie Island and Vermont Yankee.
3 The licenses were challenged before the Court.

4 COMMISSIONER KENNEDY: Are there others affected
5 directly by this?

6 MR. EILPERIN: It's a generic issue, so I would
7 think -- and the Court recognizes it as a generic issue -- I
8 would think that in principle the Court's decision extends to
9 all spent fuel pool expansions in that general area. The Court
10 recognizes that it is a generic.

11 COMMISSIONER KENNEDY: The effect, then, is, until
12 the Commission completes a generic review, that the presently
13 requested fuel pool expansions cannot be licensed?

14 MR. EILPERIN: No, that's not the consequence.

15 COMMISSIONER KENNEDY: What is the consequence?

16 MR. EILPERIN: The Court's decision was quite clear
17 that it does not set aside or stay the challenged licenses.

18 COMMISSIONER KENNEDY: I read that. Precisely what
19 does that mean?

20 MR. EILPERIN: It says that they're not pulling the
21 approval for the spent fuel pool expansions that were
22 authorized by the Commission.

23 COMMISSIONER KENNEDY: Yes. That's not what I'm
24 speaking of. I'm talking about those not yet authorized.

25 MR. EILPERIN: That's correct. I was going to reach

1 that momentarily.

2 The end of the Court's opinion, in footnote 19 --
3 footnote 10, excuse me -- says that the Commission may integrate
4 the issues which the Court has remanded to it with the pending
5 S-3 proceeding, designate a follow-on generic proceeding, or
6 follow such other courses as it deems appropriate. And to my
7 mind, what the Court is saying in that footnote is that the
8 Commission is at liberty to hold a generic proceeding, generic
9 rulemaking proceeding which is dealing with the issues identified
10 in the Court's opinion, and that the Commission is not bound in
11 that determination from deciding requests for spent fuel pool
12 amendments during the pendency of that generic situation.

13 COMMISSIONER AHEARNE: Steve, did they talk about the
14 balance of these cases?

15 MR. EILPERIN: Excuse me?

16 COMMISSIONER AHEARNE: On page 16 they talk about
17 the balance of these cases. Are they speaking there of the
18 other? This is the top of the page, third line from the end
19 of their opinion.

20 MR. EILPERIN: What "the balance of these cases"
21 means is that the Court disposed of the petitioner's contentions
22 that we had to hold some sort of adjudicatory proceedings and
23 ruled against them on those issues. So that --

24 COMMISSIONER AHEARNE: Strictly on the adjudicatory
25 aspect. It comes back to us for further consideration. Now,

1 what does that exactly mean?

2 MR. EILPERIN: The Court specified what it meant, and
3 that is, for further consideration whether there is reasonable
4 assurance that an off-site storage solution will be available
5 by the years 2007 to 2009, the expiration of the plant's
6 operating licenses, and, if not, whether there's reasonable
7 assurance that the fuel can be stored safely.

8 COMMISSIONER AHEARNE: I mean specifically --that's
9 speaking of the balance -- of these remaining two cases,
10 Vermont Yankee and the Prairie Island. Does that mean it
11 goes back to the Licensing Board, the Appeal Board, it stays
12 with us?

13 MR. EILPERIN: It goes back to the Commission and
14 the Commission can then enter whatever order it deems appro-
15 priate in terms of how the Commission is to handle this.

16 COMMISSIONER AHEARNE: So that as far as those two
17 cases are concerned, there's still another action that we have
18 to eventually address?

19 MR. EILPERIN: That's correct. The Commission
20 itself, if it wanted simply the Appeal Board to conduct that
21 proceeding, the Commission would have to order the Appeal
22 Board to do that.

23 We had proposed, in the changes in the S-3 statement
24 of considerations, we had proposed that one would not want the
25 issue decided in individual adjudicatory proceedings, that the

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1 issue is a generic one and it should be decided in a generic
2 proceeding. It left up for later consideration by the
3 Commission what particular procedures it would want followed
4 in a generic proceeding.

5 The Commission, of course, can order more than
6 notice and comment or make it more adjudicatory.

7 COMMISSIONER KENNEDY: I noted the Court was somewhat
8 more explicit in this regard than I had anticipated they would
9 be in talking about essentially the legislative character.

10 MR. EILPERIN: Yes. I think the Court's decision is
11 a very fine decision and a very fine opinion, and I think that
12 the Court is making quite clear that the kinds of predictions
13 that are involved in trying to predict whether or not wastes
14 will be safely disposed of for many, many thousands of years
15 is a prediction and is the kind of judgment that is not
16 similar to someone going through a red light, with someone
17 going through an intersection where the light was read. It's
18 not susceptible to that kind of precise factual judgment. And
19 there's a clear reflection of that in the opinion.

20 COMMISSIONER BRADFORD: I don't know that that tells
21 you what the procedure should be.

22 MR. EILPERIN: No. The Court certainly has said
23 that the Commission has a free reign in choosing what
24 procedures it wishes. And we thought the Commission --

25 COMMISSIONER KENNEDY: The Court specifically says,

1 quote:

2 "The breadth of the questions involved and the fact
3 that the ultimate determination can never rise above prediction
4 suggests the determination may be a kind of legislative
5 judgment for which rulemaking would suffice."

6 As I said, I thought that was a rather more specific
7 characterization by the Court than I would have anticipated it
8 would make.

9 COMMISSIONER BRADFORD: I think they left it up to
10 us.

11 COMMISSIONER KENNEDY: But it seems to me that in
12 leaving it up to us, it suggested a measure of guidance
13 beyond that which I would normally have expected to see.

14 COMMISSIONER BRADFORD: Yes, but don't do any less
15 than that.

16 MR. EILPERIN: We thought that the subject of what
17 procedures the Commission might choose would be the subject
18 of some discussion before the Commission, and for that reason
19 we were trying to divorce the S-3 statement of considerations
20 from that judgment about what procedures the follow-on
21 proceeding would utilize.

22 COMMISSIONER AHEARNE: Now, in various places in
23 this decision they refer to the current S-3 proceedings. What
24 is the relationship, the linkage that they make to it?

25 MR. EILPERIN: I think it's simply recognition --

1 well, to back up a bit, our brief before the Court had argued
2 that the Commission had considered, in promulgating the
3 interim S-3 rule in an effective generic proceeding, issues
4 dealing with whether wastes were likely to be disposed of --
5 well, whether wastes were likely to be disposed of. The S-3
6 proceeding had not been referred to by the Appeal Board. The
7 Appeal Board had simply made reference to the fact of the
8 Commission's denial of the rulemaking petition, denial of
9 NRC's rulemaking petition.

10 So in a sense, we have argued to the Court that the
11 S-3 proceeding had treated some of these issues which were
12 being raised by the petitioners, and that it was fair for the
13 Commission to treat generic issues outside individual regulatory
14 contexts.

15 It also advised the Court that S-3 dealt solely with
16 NEPA issues, and there may well be a more rigorous standard
17 in making safety judgments under the Atomic Energy Act. I
18 think the linkage was simply that the Court is aware of what
19 proceedings the Commission had before it, aware of the fact
20 that S-3 was looking at some of these issues in a NEPA
21 context, and wanted the Commission to have discretion about
22 whether or not the Commission wanted to fold this into its
23 ongoing S-3 proceeding or treat it in some other manner.

24 I think one thing that stands out quite clearly is
25 this decision was written in three weeks. The case was argued

1 May 2nd. The previous S-3 decision took something like a year
2 and a half for the D.C. Circuit to issue. Judge Leventhal was
3 well aware of what stage the S-3 proceeding was at. I made
4 representations to him along that line, sent him copies of the
5 Commission's extension of the interim rule. And I think one
6 reason for the Court's rather quick disposition of the case --
7 -- although I think it was a thorough disposition, it was still
8 a quick one -- was precisely to give the Commission an oppor-
9 tunity to decide whether or not it wanted to use the S-3
10 proceeding as it now stands to consider some of the issues
11 which the Court has isolated.

12 So in a sense, I think it was to give the Commission
13 more freedom than the Court acted this way.

14 CHAIRMAN HENDRIE: It seems to me that for our
15 purposes today I think it would be useful to have at least
16 some analysis of the decision. I think when we come in due
17 time -- not too long from now, I trust -- to look at the way
18 in which we ought to reflect the Columbia Circuit's, the
19 District Circuit's decision, in the S-3 statement of considera-
20 tions, we'll want to talk about -- to begin, I think, then to
21 have some idea of what we've got in mind by way of generic
22 proceedings, just because it may condition in some way the
23 reference to it. Or maybe it won't change the reference to
24 it at all. But nevertheless, I think most of us would feel
25 more comfortable having had some discussion amongst ourselves

1 as to the nature of that proceeding or what its timing might
 2 be. And that in turn may offer some guidance as to the
 3 precise words to go into the S-3 statement of considerations.

9 I think we need a little time to chew on that and to think
 about the draft that you've prepared and about the remarks
 that you, hopefully, will soon make to us about the decision,
 10 ment these you made now. And we'll then schedule a
 to discuss that and related matters in the statement
 11 siderations and see if we can come to grips with it.

For today, it's my pleasure to recommend to you once
 12 in that the interim rule be extended for good cause.

MR. EILPERIN: Better cause, I would say.

(Laughter.)

CHAIRMAN HENDRIE: I'm not sure that causes come
 13 good, better and best, the way the Sears, Roebuck catalogue
 used to. But if the last one was good, this one is, I would
 14 think, better.

COMMISSIONER KENNEDY: Or at least as good.

CHAIRMAN HENDRIE: I think this has rather more
 15 class than the one we previously considered.

(Laughter.)

COMMISSIONER KENNEDY: I was at the last meeting and
 16 I thought that had a lot of class. I will not describe which
 17 class it was.

CHAIRMAN HENDRIE: Comment noted.

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1 The one question I would ask, Steve or Leo, you
2 recommended July 30th, two months. Is this because you
3 perceive complexity in the issue or you're just getting sick
4 and tired of issuing these orders every two weeks?

5 MR. EILPERIN: It was more that I did not want to
6 become an expert in writing extension notices. I thought --
7 I certainly don't think that the Commission will need that
8 length of time in order to dispose of this. I mean, one
9 reason for sending out at this stage some very initial thoughts
10 about what the S-3 statement of considerations might need to
11 reflect the Court's decision is simply to indicate what we had
12 in mind.

13 CHAIRMAN HENDRIE: Yes, I think it was helpful.

14 MR. EILPERIN: I certainly think the Commission
15 could dispose of this far more quickly than July 30th.

16 COMMISSIONER BRADFORD: Let's see. At some point
17 before July 30th we'll actually have seen the narrative.

18 MR. EILPERIN: I think the staff is aware that the
19 Commission will -- I think the staff is aware that the
20 Commission had wanted the narrative by June 30. I think that
21 was the awareness. That certainly was the memorandum of the
22 staff requirements, following the paper filing of the
23 February meeting, which did outline in part what was expected
24 in the narrative.

25 But I leave that up to the staff as to what their

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1 understanding is.

2 CHAIRMAN HENDRIE: I would guess somewhere close to
3 it, although I don't know how.

4 COMMISSIONER BRADFORD: Let me just add, is that
5 about a correct statement of the staff's understanding?

6 MR. MURRAY: I can't speak for the staff,
7 Mr. Bradford.

8 COMMISSIONER BRADFORD: Is there anyone here who can?

9 CHAIRMAN HENDRIE: I don't know. I haven't asked
10 Cunningham recently how he's coming with the thing, and I
11 don't know. I don't believe those groups have been heavily
12 impacted by TMI.

13 On the other hand, there are some -- there is some
14 carryover into that area -- other facilities, emergency plans
15 and so forth. So I can't tell whether things are interfering
16 at the moment, and I don't know whether he's sort of on
17 schedule.

18 In any event, when we see a narrative we'll certainly
19 want to discuss it here and out of Commission discussions,
20 perhaps a redrafting of those, would presumably come a filing
21 of that narrative for comment purposes in the Federal Register.
22 So that sort of picking up the narrative I think is down the
23 line, and I would not want to postpone the consideration of
24 the S-3 rule as we have it at the moment.

25 You know, in view of the history, Peter, I wouldn't

1 guarantee that you won't get there eventually, but I would
2 propose not to build that into anything that we do now. I
3 don't know.

4 What do you think? Could you make it June 30th?

5 COMMISSIONER AHEARNE: I guess I'm willing to defer
6 to Steve's jaded wisdom and go with July 30th.

7 COMMISSIONER KENNEDY: Without reference to the
8 state of Steve's wisdom, I would go with July 30th.

9 COMMISSIONER BRADFORD: It's all right with me.

10 MR. EILPERIN: We will certainly try and get a paper
11 to the Commission in a week's time.

12 CHAIRMAN HENDRIE: If you will come along with that.
13 Actually, because we've had a rather useful discussion here
14 about the background, the paper could briefly summarize the
15 points of the decision. And you might think a little bit
16 about when we go with the generic proceeding, because I think
17 some of that discussion, I think, is going to be necessary
18 before we're all ready to put the appropriate language into
19 the S-3 statement for consideration. And I would hope to be
20 able to schedule a Commission meeting for that purpose in
21 like two weeks.

22 All right. Let us agree, if you like, then, on
23 July 30th. What I will ask my colleagues to do is to join me
24 in voting in favor of the draft order prepared by counsel's
25 office.

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(A show of hands.)

CHAIRMAN HENDRIE: So ordered.

Thank you very much.

(Whereupon, at 3:30 p.m., the meeting was adjourned.)

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