NUCLEAR REGULATORY COMMISSION

IN THE MATTER OF:

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PUBLIC MEETING

DISCUSSION OF SECY-79-397 - PROCEEDING TO ASSESS

COMMISSION CONFIDENCE IN SAFE DISPOSAL OF JUCLEAR WASTES

Place - Washington, D. C. Date - Wednesday, 11 July 1979

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	2	NUCLEAR REGULATORY COMMISSION
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	5	PUBLIC MEETING
	6	DISCUSSION C SECY-79-397 - PROCEEDING TO ASSESS
	7	COMMISSION CONFIDENCE IN SAFE DISPOSAL OF NUCLEAR WASTES
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	9	Room 1130
	10	1717 H Street, N.W. Washington, D. C.
	11	Wednesday, 11 July 1979
	12	The Commission met, pursuant to notice, at 2:55 p.m.
1	13	BEFORE :
	15	DR. JOSEPH M. HENDRIE, Chairman
	16	VICTOR GILINSKY, Commissioner
	17	RICHARD T. KENNEDY, Commissioner
	18	PETER A. BRADFORD, Commissioner
	19	JOHN F. AHEARNE, Commissioner
	20	Messrs. Shapar, Gossick, Kenneke, Hoyle, Bickwit, Dircks,
	21	and Eilperin.
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2 CHAIRMAN HENDRIE: Okay. The subject of discussion is, I guess, also in part a question whether, but I would 3 think more particularly the nature of a proceeding that 4 the Commission would institute to satisfy the request of 5 D. C. Circuit in a recent decision which said that we should 6 give some indication of our confidence that waste can be 7 disposed of, at least to the extent that propositions to 8 enlarge the spent fuel pools at existing reactor sites bears 9 a reasonable basis for believing that the spent fuel pools 10 11 will not become the ultimate repository of the spent fuel 12 for a long time, or much beyond, at any rate, the operating 13 license period of a particular facility.

14 We have had some brief discussion of this subject 15 and the need for such proceeding in view of the court's 16 decision and other factors which gather before us in 17 connection with our discussions on the proposed S-3 rule 18 earlier, and we asked that some recommendations for the sort 19 of proceeding of how it might be formed in scope be made.

We have a paper from the Executive Legal Director, and I assume General Counsel is ready to comment and add his thoughts on the general subject.

Suppose I stop trying to collect a summary and introduction on this subject and see which of Len and Howard might like to take up the details.

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MR. BICKWIT: Well, it's Howard's paper.

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CHAIRMAN HENDRIE: Well, maybe since Howard has 2 got the paper in hand, he's got his elbows firmly on the 3 table, let me ask you to take us forward in this discussion. 4 5 MR. SHAPAR: I would be happy to defer. Mr. Chairman, as you indicated, we are here today 6 primarily because of the D.C. Court of Appeals decision 7 indicating that some sort of finding should be made in a 8 9 proceeding. The court did indicate in its own decision that 10 11 there were three basic options the Commission could use, folded into the S-3, and I think the previous discussion 12 indicated for many reasons that's not a very good idea 13 to use another generic proceeding, or go ahead and do it by 14 15 other appropriate means. 16 So the Commission does have options as to how it wants to go about setting up a proceeding to deal with 17 18

the question of its confidence or lack thereof in the ultimate safe disposal of high level waste, or some finding short of that.

I think it might be well if I just went ahead and described two sets of options for you which would briefly summarize the paper, and then I can get into as much further detail as you all would like.

The first set of options, I think, is what kind of

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1 a proceeding, and although the number of options of both 2 categories is infinite, these, I think, fairly portray the 3 basic practical and legal options. 4 First of the three options is to start a separate 5 rulemaking proceeding to determine whether the NRC continues 6 to have confidence that a safe, permanent method of waste 7 discosal can and will be available when needed, and whether 8 safe and adequate onsite or offsite storage capacity --9 COMMISSIONER KENNEDY: Is that "can and will"? 10 MR. SHAPAR: I believe those were your words, when 11 you denied the NRC petition. I just repeated them. 12 -- and whether safe and adequate onsite and 13 offsite storage capacity will be available until a permanent 14 method of other disposal is devised. 15 COMMISSIONER AHEARNE: That goes beyond --16 MR. SHAPAR: That goes beyond what the court 17 indicated, and a strict rule was necessary. 18 COMMISSIONER AHEARNE: That offsite storage would be 19 available? 20 MR. SHAPAR: The specific ruling of the court 21 asked the Commission to decide "whether there is reasonable 22 assurance that an offsite storage solution will be available 23 by the years 2007 to 2009." 24 COMMISSIONER AHEARNE: It doesn't address --Ace-Federal Recorters. Inc. 25 MR. SHAPAR: It does not address any specific

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ruling, but there are other factors that bear on that, both legal and otherwise.

The second one is iss e a policy statement, leaving the matter to individual adjudications. I don't know 4 of anybody on the Staff that would recommend that. I think 5 there are 21 proceedings, and whether this would become an issue, 6 maybe five or six are contested, something on that order, 7 would be an enormous duplication, I think, an unnecessary 8 duplication of effort to try this generic question over and 9 10 over again in individual proceedings.

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11 The third option would be to issue an advance notice of proposed rulemaking indicating an intent to hold 12 a rulemaking after the DOE GEIS is issued on commercial 13 waste management, and as the paper indicates, we think there 14 are several glaring disabilities to that course of action, 15 the main one being that the GEIS, I think, is directed at the 16 17 year 2000.

18 We are talking about a much broader question, and 19 I think it is fairly calculated to unnecessarily delay the 20 GEIS, but the main reason would be --

COMMISSIONER AHEARNE: I'm sorry, I'm really 21 22 missing -- the main reasons for not going to the -is essentially waiting until the GEIS or first the GEIS is 23 24 focused upon --

MR. SHAPAR: We think it has a much narrower focus

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than the decision which the Commission would be making. That's our feeling. 7

COMMISSIONER AHEARNE: What was the issue of delaying the proceeding?

5 MR. SHAPAR: Well, the GEIS is going along with 6 its own specified scope and broadened it. I think at this 7 time would hold up the issuance of it. I think unnecessarily. 8 I think it's also fair to say, however, and I think I see 9 the point that you're driving at. we certainly would 10 want to look at the GEIS in connection with the rulemaking 11 that we advocate.

I think that's perhaps your point.

13 COMMISSIONER AHEARNE: I was really just trying to 14 understand that.

MR. SHAPAR: All right. Then having made a selection among those options or any others that I brought to the table, it would seem this second set of options are fairly clear, and the set of options that has confronted this Commission several times in the last few years hold a generic rulemaking proceeding, what procedure, what kind of proceeding do you want.

The typical choices are notice and comment. I might add that as a legal matter, any of these probably will suffice under ordinary circumstances.

The first option would be --

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COMMISSIONER KENNEDY: In circumstances assuming they are either or are not ordinary they will suffice in these circumstances?

MR. SHAPAR. What I meant in my statement was
this: Vermont Yankee stands for the proposition that courts
are not supposed to dictate what kind of procedures this
agency uses, as long as it complies with the Administrative
Procedure Act. Notice and comment rulemaking is acceptable.

9 There was a sort of a caveat or exculpatory phrase 10 in the court's language about exceptional circumstances or 11 extraordinarily compelling circumstances or something like 12 that. We don't think it exists here. At least, I don't.

The second option would be a modified legislative type of proceeding, and that is we let anybody present testimony and evidence, and the Board asks questions and people can suggest questions for the Board to ask and the Board would have discretion whether to ask those questions or not.

Now. that is what is actually used in the S.3 proceeding. and the access proceeding. although the original notice indicated you could have hybrid, but the hybrid was not considered necessary.

23 COMMISSIONER GILINSKY: Let me ask you, what is a 24 possible outcome of these proceedings?

MR. SHAPAR A rule, I think.

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COMMISSIONER GILINSKY: That says what? Yes, you have confidence?

MR. SHAPAR: It says confidence and, therefore, that issue is not an issue to be gone into over and over again in individual proceedings. That's what we have been doing up to now, and that's one of the challenges that took place in these court actions.

8 We were saying that based on -- in effect, based 9 on the Commission's expression of confidence, you didn't 10 have to litigate the waste question in these individual 11 proceedings. The attack essentially was on the ability to 12 rely on the Commission's expression of confidence which took 13 place not in the rulemaking proceeding, but in the denial of the 14 NRDC petition. That was a central issue in the court case.

15 COMMISSIONER GILINSKY: But this Board would be 16 saying that we, the Board, do or do not have confidence, and 17 we think that you should --

MR. SHAPAR: Certainly not. I don't think that would be available under any option. I think the Board merely ought to receive evidence for you, unless you adopt one of the other options, certify the record to you with or without recommendations, and you would make that decision. This is ultimately a Commission decision for sure.

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COMMISSIONER GILINSKY: So they are just collecting the evidence?

1 MR. SHAPAR: Yes, that's correct. That is the 2 option we recommended. 3 One of the other options you have is to do it 4 yourself, not have a Board, and that was suggested by Bill 5 Dircks, and I'll get to that in a minute. 6 MR. BICKWIT: Although it's within your option, 7 as I understand it, the Board would reach an initial 8 decision or recommend a decision. 9 MR. SHAPAR: Within your options, yes. Of course, 10 initial decision and recommended decision, of course, are 11 terms that are usually used, traditionally used with 12 adjudicatory matters. 13 COMMISSIONER GILINSKY: What I was trying to get 14 at is it seemed to me the question here is rather different 15 than the one say in the S-3 hearing, where one is asking ---16 CHAIRMAN HENDRIE: 7 curies for this and 12 curies 17 for that, and we decided those are the appropriate numbers 18 on a generic basis. This is not the same. 19 I was curious in precisely the same way as to what 20 it is, but the real part of it really is that it would be a 21 rule of the Commission that the ultimate waste disposal question 22 would not need to be litigated in individual proceedings? 23 MR. SHAPAR: That's correct. That would be the 24 effect. ce-Federal Reporters, Inc. 25 CHAIRMAN HENDRIE: The basis for that would be

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1 an expression of reasonable assurance? 2 MR. SHAPAR: And a detailed justification therefore. 3 I would also point out that S-3, of course, 4 was a rule. This one, I think, would and should be a rule, 5 and the Commission -- two other areas the Commission has not 6 delegated to anybody except on minor roles is rulemaking. 7 So this, for other reasons, would be a Commission decision. 8 Now the third option would be the hybrid, and the 9 hybrid is the kind that was used in S-3, and in the access --10 COMMISSIONER AHEARNE: You mean announced to be 11 used? 12 MR. SHAPAR: Yes. In other words, you would 13 announce it ahead of time as you do most proceedings, that if 14 certain selected issues were deemed -- the record wasn't 15 deemed good enough and you wanted to have adjudicatory 16 treatment of those issues, then there would be opportunity 17 therefor. 18 I indicated before that opportunity was 19 accorded the S-3 and the access one, and was not deemed to be 20 necessary for use. 21 The next option, of course, is the full 22 adjudicatory rulemaking procedure and the Commission has 23 used that before, an example being, of course, the ECCS. 24 Bill Dircks has suggested an option which I had not Ace-Federal Reporters. 25 suggested and it's included in the attachment to my paper.

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	,	It's really a suboption because it deals with how the rule-
	2	making proceeding is going to be conducted.
	3	Bill's suggestion is that instead of appointing
	4	a board to receive the evidence and the material that the
	5	Commission itself hear the matter.
	6	In connection with that, I thought it might be
	7	useful if I went back and took a guick look at how much
	8	time was used in the S-3 proceeding and the access proceeding.
	9	COMMISSIONER AHEARNE: Are those relevant?
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MELTZER T8 mml MR. SHAPAR: I think in the sense that it gives you 1 CR5873 an idea of what Staff resources might be needed to accord with 2 one of Bill's positions. 3 COMMISSIONER GILINSKY: Except it is likely to 4 be a very different proceeding that is conducted by the 5 Commission. 6 MR. SHAPAR: If you do not consider it relevant, 7 there is no need for me to bring it up. 8 (Laughter.) 9 COMMISSIONER KENNEDY: I would like to know how 10 11 much, how many. COMMISSIONER GILINKSY: I would like to know, too. 12 MR. SHAPAR: I will refer to Commissioner Ahearne 13 on this. 14 (Laughter.) 15 COMMISSIONER AHEARNE: I was only asking whether 16 it was relevant. 17 NOw I am certainly not about to require everything 18 that legal counsel says to be relevant. 19 (Laughter.) 20 MR. SHAPAR: I think it is relevant in a rather 21 amorphous sense. 22 CHAIRM N HENDRIE: You have hearings how many days 23 before the Board, I am curious, in each case? 24 Ace-Federal Reporters, Inc. MR.SHAPAR: All righ t. 25

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mm2	,	The actual there were 74 days between the start
C	2	of the hearing and the end of the hearing on the S-3
	3	proceedings. But, of those only 10 days were days of actual
	4	hearings.
	5	On the access proceeding, the time of actual
	6	the actual hearing days were three days.
	7	COMMISSIONER GILINSKY: It seems to me there are
	8	CHAIRMAN HENDRIE: Spread over what period?
	9	MR. SHAPAR: Between the 10th of July and the 12th
	10	of July.
	11	(Laughter.)
	12	A singular fact, both of those proceedings lasted
C	13	15 months from notice of hearing and the Board decision or
	14	Board recommendation.
	15	COMMISSIONER GILINSKY: It seems to me there is
	16	another possibility also.
	17	One would be for the Commission to conduct a portion
	18	of the hearing and decide which other parts ought to be dealt
	19	with by a Board perhaps conducting adjudicatory proceedings, or
	20	you could imagine a reverse procedure where certain aspects
	21	that would have been covered earlier could then be heard by
	22	the Commission.
	23	MR.SHAPAR: Yes, sir.
-ce-Federal Reporters	24	Remember now, this is Rulemaking. And Vermont
	25	Yankee stands for the proposition that all you need 250

mm3 1	as a minimum, generally speaking, is notice and comment.
2	You are perfectly free to devise any combination or
3	variation of procedures that you wish, and they all would be
4	legally unobjectionable provided that the record was adequate
5	to enable you to make a principal decision and to enable a
6	court to intelligently review the matter.
7	CHAIRMAN HENDRIE: Do you have any idea what the
8	Staff resource was in those two hearings?
9	MR. SHAPAR: I think Bill Dircks would be in a
10	lot better position to answer that than I.
11	MR. DIRCKS: I don't know about the access hearing,
12	but the S-3 hearing I don't have the numbers here. It is
13	the amount of I think we have had about five people tied
14	up on that, manyears tied up on that during the course of the
15	past year, year and a half, doing work, revising work, doing
16	narrative statements. And it is a matter of spreading them
17	it is a matter of picking them out of their ongoing jobs and
18	throwing them into this thing.
19	I mentioned staff resources in my paper. That is
20	only one point that I wanted to make.
21	I have not been around that long, but I have seen
22	a couple of these generic hearings go marching off into the
23	swamp and you never really see anything come back out of them.
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even know whether you could come up with a definitive finding 1 right now. I think what we have said, what the IRG has said, 2 is that we have got enough confidence to start some site 3 exploration work and site exploration work is going to go on 4 for a couple of work, site demonstration, site feasibility 5 studies. And no matter what you do now, I don't know what you 6 can come up with in the foreseeable time except to test the 7 national programs, see where it is going and see where the 8 major flaws are and see whether it is moving in the right 9 direction with the right amount of resources. 10

That type of decision, that type of information should come from sort of the recognized principles in the waste management area, and it should go directly to he recognized judges in the Commission area rather than having it filtered through some Board that is never really satisfied with any amount of information it gets.

Lots of times the Boards have difficulty meeting, 17 they reschedule themselves, and these proceedings go on for 18 years.

I would think in this case the Commission could 20 basically almost test the water to see where the confidence 21 lies now and agree to come back to it in two years to see 22 where the site exploration work is going. It is going to be 23 a phased type of thing. What you should be doing is bring 24 ycarcelf up to date to see if the program is still moving 25 252

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satisfactorily across the board from government agencies and 1 2 the states. I don't know how much more technical work or depth 3 you should get into, than to see it on the broadest possible 4 5 basis. COMMISSIONER AHEARNE: I agree with your position, 6 Bill. I think that we ought to do it for the reasons that 7 you and Vic have both pointed out. But one thing puzzled me 8 about your paper in here, and that was there was an implication 9 that if the Commission did it, that the STaff resources, your 10 staff would have to be substantially less than any of the 11 other mechanisms. 12 MR. DIRCKS: You have to realize that piece of 13 paper was put together overnight in a reaction to Howard's 14 15 paper. 16 (Laughter.) MR. SHAPAR: It was a Commission deadline, not 17 18 HOward's. MR.DIRCKS: We got it, and we wanted to get our 19 views in. 20 COMMISSIONER KENNEDY: In the interests of making 21 sure that the proceeding got going. 22 CHAIRMAN HENDRIE: But I think one of Bill's points, 23 as I read the paper, is that if the Commission chooses to hear 24 Ace-Federal Reporters, Inc. this thing to help its judgment in the matter, it will be 25 553 253

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listening to people mostly from outside the Staff.

COMMISSIONER AHEARNE: Certainly.

CHAIRMAN HENDRIE: And I think Bill has been seeing 3 this as not the sort of proceeding where we are delicately 4 balancing this calculation against that one, and so on, but 5 rather as he says, seeing what the national program is, what 6 various experts can summarize in their views, and then making 7 a judgment call. 8 And I think his sense is that is likely to be less 9 burdensome on his staff by way of preparation, than if they are 10 a principal party before a Board in a more formal setup. 11 COMMISSIONER AHEARNE: It wasn't clear that even in 12 a Board, the primary evidence wouldn't be from those same outside 13 people. 14 The only thing I wanted to understand, whether 15

Bill's conclusion was, if the Commission heard it, that his staff would not need to be involved. And I doubted that that was going to be the case.

MR. DIRCKS: I would like, though, to have the Staff involved like any outside group. I mean, two things that I think we could basically contribute is; one, and explanation of the comments that we are coming up with on the GEIS, and two, an explanation of the basis for the regulatory program that we are developing.

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But many times I have seen -- and I am only looking

at it through the "dark glassly" --1 (Laughter.) 2 -- through the "glass darkly" is that the Board's never really 3 get a feel, I think, for what the Commission wants. 4 COMMISSIONER AHEARNE: Bill, I do agree with that. 5 I was afraid what you were really underlying, saying, 6 was if the Commission heard it, that NMSS who, after all, does 7 have a lot of people at this stage who know more about waste 8 management and technology than anybody else, they are the 9 ones who participated so heavily in the IRG, that nevertheless 10 if the Commission heard it, that somehow we would turn to 11 somebody else, a consultant or maybe OPE to help us with all of 12 the material that we nevertheless would still be getting. And 13 I doubted that was going to be the case. 14 I would expect at some stage we would ask NMSS for 15 16 some help. MR. DIRCKS: We would be around to help. But I 17 think the important thing is, I think the Commission has a feel 18 for what it wants, and if the Commission was asking the questions 19 directly, it wouldn't be one of these things of passing them 20 21 through the mail drop. MR. SHAPAR: I would like to make two points on this 22 23 thing, though. To the extent that this discussion has given anyone 24 Ace-Foders Reporters, Inc. the idea that maybe the Commission, if it decides to hear it 25 553 255

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itself, can sit back and hear ultimate conclusions from somebody and then say, we now have confidence or don't have confidence. This record has got to be a pretty good record.

COMMISSIONER AHEARNE: That's why I said NMSS is going to be involved here, because we are going to have a lot of material coming in.

MR. SHAPAR: I am staying out of that issue.

8 The other point I wanted to make is, whichever 9 way you decide to go, I think this discussion and prior experience 10 in other rulemakings illustrate the wisdom of specifying what 11 the role of the Staff is.

There has been all kinds of misunderstandings about that role from the Staff having the burden of proof to prove something in a rulemaking proceeding, to being a party like any other party.

16 Now the role of the Staff can be anything you want 17 the role of the Staff to be, from not being there, which is an 18 option, to taking on some sort of obligation to assure that the 19 record is the best it can be, or merely to present its own 20 views. But whatever that role is from your perspective, ought 21 to be specified so that the Board understands it in the even 22 there is a Board, and the world understands it. And that, 23 unfortunately, has not been true in the past.

COMMISSIONER KENNEDY: Have you finished with your presentation?

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1 MR. SHAPAR: Yes, sir. 2 COMMISSIONER AHEARNE: Bill, you people are 3 reviewing the GEIS draft? 4 MR. DIRCKS: Yes. 5 COMMISSIONER AHEARNE: But in your comments you also 6 pointed out that you took exception with one of thepoints in 7 Howard's paper, and you said that the GEIS review is of second 8 priority to your staff. 9 I wasn't sure how to interpret that in the sense 10 of, did that mean that you weren't going to meet some deadline 11 in getting it reviewed? 12 MR. DIRCKS: In ranking them, what we are doing out 13 there -- of course we put first priority ingetting out the 14 standards criteria. We have approximately 3 to 4 people 15 assigned full time toworking on the comments on the draft GEIS. 16 There is another 15 or so throughout the rest of the agency 17 that is working on these comments, too. 18 The first drafts are coming in within the next 19 week or so. I have a draft of the Staff comments on the GEIS. 20 COMMISSIONER AHEARNE: Do you still intend to meet 21 the August deadline? 22 MR. DIRCKS: We will have it by the end of August 23 with full comments on the GEIS. But I keep pleading resources. 24 It is this meeting of standards and criteria in order to give Federal Reporters, inc 25 some guidance to DOE in their first repository application which

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is working on sort of a deadline now.

COMMISSIONER AHEARNE: So you still are going to --I think you had agreed to Peter that you would meet some deadline.

MR. DIRCKS: Yes, whatever deadlines, dates were on that schedule.

COMMISSIONER AHEARNE: You are still on that schedule? And when you talk about the concern about siphoning off large amounts of resources on these other mechanisms, that was really more of a warning to us that you have these other fixed batch of people that are knowledgeable, and they are doing one thing now?

MR. DIRCKS: Overall.

COMMISSIONER KENNEDY: If Howard is correct, which I assume that he is, with respect to the quality of the record that is going to have to be developed, it seems to me there is no question as to whether resources will be different, resource requirements will be different simply because the Commission hears the matter.

20 You know, I am convinced that the resource require-21 ments will be the same.

MR. SHAPAR: Of course that does depend to a large extent on the role we define for the Staff, which is an open decision at this moment.

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COMMISSIONER AHEARNE: Could I ask you a question

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about your paper?

MR. SHAPAR: Certainly.

COMMISSIONER AHEARNE: Two questions.

First, you appear to make the point that if we go to the rulemaking and do not wait ontil the GEIS, that that would satisfy the pending Presidential request.

MR. SHAPAR: I think so.

COMMISSIONER AHEARNE: Putting aside the question of 8 whether we should be concerned about the pending Presidential 9 request, which is a separate issue, I thought the Presidential 10 request, at least the paper that Bill sent us, was to comment 11 upon the GEIS, the final GEIS. 12

13 Number one, whether DOE findings, based on its 14 GEIS are appropriate, and, number two, whether or not the 15 Commission currently has reasonable confidence that radioactive 16 wastes provided by nuclear power reactors can and will, in 17 due course, be disposed of safely. 18

MR. SHAPAR: Two things in the draft report.

COMMISSIONER AHEARNE: Right.

And my only point was that I thought the wording, 20 if there should be some weight given to meeting that pending 21 request, if it comes, would be with reference to the final 22 GEIS. And so that it would not meet the condition if we were 23 to go ahead without it. 24

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MR. SHAPAR: I guess ordinarily one comments on the

drafts, and I guess I had assumed the comments would be on mm12 1 the draft. 2 MR. DIRCKS: I think the request will be on the 3 final. 4 CHAIRMAN HENDRIE: It seems to me that even if we 5 had conducted a proceeding of some kind, and completed it, we 6 get the final GEIS and the request, or have had the request, 7 I would regard it as an obligation to read the final GEIS and 8 look again and answer the question. 9 COMMISSIONER AHEARNE: My only point was --10 CHAIRMAN HENDRIE: On the other hand, it is also 11 possible the way these things go, that one might be still in 12 mid-proceeding. 13 MR. DIRCKS: And more effectively, it would be more 14 effective to base your review on the review of the final 15 GEIS, because that plus the IRG report represents the maximum 16 effort that has been expended in this area. 17 You would have all the comments that would come in on 18 the GEIS, and you would also see how DOE has responded to those 19 comments. 20 MR. SHAPAR: Looking at it another way, I guess you 21 could say anybody -- I don't think anybody would urge that you 22 not look at the GEIS as part of the rulemaking. 23 The question is whether or not you wait until 24 or-Federal Reporters, Inc. that comes out to get started. 553 260 25

COMMISSIONER AHEARNE: I was really asking a much smaller question, and that was really the consistency with meeting the Presidential request.

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The second issuewas, I think the first question I asked when you started: Is it your judgment that we could fulfill the responsibility of responding to the Court were we to address solely the question whether offsite storage would be available?

9 MR. SHAPAR: All right, Steve may have -- Eilperin 10 may have his own views on that, and I will give you mine. I 11 don't think we are far apart.

I think the holding of the Court, in my opinion, clearly is the narrow issue as to whether or not offsite storage will be available by the year 2007 or 2009. However, I have to add, even though that is the holding, there is language in the decision that impliedly says if this gets back to us and you are stopped there, you may be in trouble.

And I just can't discount that.

Now you can line up ten lawyers on that one and
ask them how much weight they give to that caveat, and you
are liable to get ten different answers.

It disturbs me somewhat that my direct answer to your question is, the holding of the Court is only the narrow one that I have mentioned.

Now I have got eight reasons why you ought to go

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further.

C	2	COMMISSIONER AHEARNE: I wasn't inclined to say
\sim	3	that we shouldn't. I was again just trying to be sure
	4	MR. SHAPAR: Steve, do you want to add to that?
	5	MR. EILPERIN: I would go further.
	6	You know, if all you decide is you can move it from
	7	Vermont Yankee someplace else on a temporary basis, the next
	8	question is, okay, you have to decide why that other place is
	9	an okay place, and why that is not going to turn into a
	10	permanent disposal facility, or if it is going to turn into a
	11	permanent disposal facility, why is it an okay permanent
	12	disposal facility.
	13	COMMISSIONER AREARNE: But I think you are asking
	14	there the broader responsibility we have.
	15	And what I was really asking is, did the decision
	16	of the Court, which seemed to be a much more narrow one, really
	17	require that broader question.
	18	I think, personally, we have to address the broader
	19	question. But I am still trying to understand what is required
	20	by the Court.
	21	MR. EILPERIN: I think in a sense it is a hypothetical
	22	question. I think if the Commission didn't go a step further
	23	there would be a petition in the next day asking it to do so,
Ace-Federal Reporters,		and it would be confronted with that.
	25	COMMISSIONER AHEARNE: Yes, but the Court itself, 553 262

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mm15 1	the Court decision itself does or does not require us to
2	address
3	MR. EILPERIN: I agree with Howard that it can be
4	written narrowly. But as I pointed out in my memorandum, there
5	is also language in the Court decision which has important
end T8 6	points in it.
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COMMISSIONER AHEARNE: Howard, is there a type of 1 proceeding in where there is a notice, comments, then cross-2 3 comments? MR. SHAPAR: No reason why you couldn't do that. 4 You could do it. It probably has been done, I'm not aware 5 of any, but it is legally permissible. 6 COMMISSIONER AHEARNE: And then after that, if 7 necessary you would then hold a hearing or -- that is an 8 9 oral presentation question? MR. SHAPAR: I have one caveat to that. 10 11 Whatever the rules of game are, my recommendation would be that you declare them ahead of time so that when 12 people are getting ready to present their evidence, they know 13 how much they have got to present at each stage. And this 14 15 has not always happened. The rules sometimes get changed in a rulemaking 16 proceeding, and everybody feels that they really didn't have 17 a fair crack at it because had they known they were going to 18 get a second bite at the apple, they would have handled their 19 20 presentation differently. I repeat, my only caveat would be, whatever you 21 decide on, if you are going to provide these other opportunities 22 23 you say it clearly at the beginning. COMMISSIONER BRADFORD: Howard, are you assuming 24 Federal Reporters a proceeding in which all parties are equal, in effect? That 25

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if anyone chooses to participate, he has sort of the same RMG 2 1 right to present evidence and present comment, what have you, 2 as DOE or the Staff? 3 MR. SHAPAR: Yes. You know, it is typical, there 4 aren't any parties as such in a rulemaking proceeding. 5 COMMISSIONER AHEARNE: I can correct part of your 6 answer. It is inconsistent with what you said earlier. 7 I don't think he is automatically assuming that the 8 Staff is a party, because that was one of the issues you left 9 open to us to make clear. 10 11 MR. SHAPAR. I said the role of the Staff, but there really aren't any parties as such to rulemaking, unless you 12 want to make it a formal rulemaking. People show up and they 13 14 give evidence, and the Board asks or the Commission asks them 15 questions. COMMISSIONER KENNEDY: I think Peter had a different 16 17 question, though, didn't you? COMMISSIONER BRADFORD: Well, I um following a 18 19 different thought anyway. 20 I guess DOE had some hundreds of commentators in the 21 course of the IRG. COMMISSIONER AHEARNE: I think it was 3000. 22 23 COMMISSIONER BRADFORD: Well, first of all, Bill, 24 how do you see the Commission handling a proceeding with 3000 -ederal Reporters 25 MR. SHAPAR: Consolidate. Make people consolidate. 553 265

There are other devices like that you can use. 1 RMG 3 COMMISSIONER KENNEDY: My impression is that without 2 3 NMSS resources. (Laughter.) 4 MR. DIRCKS: But with the Commissioners sitting 5 there paying attention, I think. 6 (Laughter.) 7 COMMISSIONER KENNEDY: That would be remarkable. 8 MR. SHAPAR: Thatwould be illegal, Bill. 9 MR. DIRCKS: I don't know how it is handled legally, 10 but I would imagine whether the Commission has a feeling of 11 confidence in a national program, I just would wonder why 12 you would want to have, say, the local professor of zoology 13 112 13 T.C.B.T. 14 from ---COMMISSIONER BRADFORD: Well, that was what I was 15 trying to get a feel for. 1111111 16 MR. SHAPAR: To relieve you of the burden of having 17 to sit to listen to evidence. 18 COMMISSIONE: BRADFORD: Well, if we are in fact to 19 preside over the proceeding, I don't see any way to do it if-20 there are -- well, 3000 obviously is completely unmanageable, 21 but even 100 parties who wanted to participate in that with 22 any degree of length of thoroughness. 23 So I think, we in all probability are talking about 24 Ace-Federal Reporters, Inc. a proceeding, certainly that is run by the Commission, and which 25 553 266

RMG 4

has to be in a couple of steps, one of which people present 1 their views, or their views will be read. 2 But as far as any proceeding, any further proceeding 3 in which the Commissioners ask questions of particular parties, 4 I should think we would want to choose fairly narrowly just 5 who it was we wanted to question. 6 We would want some capable representation from those 7 who felt that the Commission ought not to have confidence. 8 We would want representation from those who felt the Commission 9 ought to have confidence. 10 But there is no way in the world that we could have 11 144 100 parties. Of course, Howard said they don't have to be 12 parties -- 100 participants. 13 MR. DIRCKS: And I think if the Commission heard 14 the hearing itself, you would get people at the top coming in. 15 You would get John Deutch, who I am sure as the head of the IRG 16 reporting on the IRG, and presenting the report. 17 I don't know. Howard maintains you would get the 18 same sort of representation before a hearing board. But I 19 would just --20 COMMISSIONER GILINSKY: I would be surprised. 21 MR. SHAPAR: I would get a letter from the Commission 22 asking John Deutch to appear before the Commission. I think 23 24 it would produce him. -Federal Reporters, COMMISSIONER AHEARNE: I agree with Howard. I think 25 553 267

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RMG 5	1	you would get equivalent representation.
	2	On the other hand, I think this is an issue that
\sim	3	is going to be really resolved, even with a limpy record, it
	4	is going to end up being a very judgmental conclusion. I
	5	think it is going to be the Commission that has to reach the
	6	judgment.
	7	COMMISSIONER GILINSKY: There is, of course, the
	8	question of the demeanor of the witness.
	9	MR. SHAPAR: I am not really in a rulemaking
	10	procedure.
	11	(Laughter.)
	12	COMMISSIONER AHEARNE: We have to end up making the
6	13	decision, so I think we ought to end up hearing it.
	14	COMMISSIONER BRADFORD: Or at least hearing the
	15	sort of crucial part of it.
	16	COMMISSIONER AHEARNE: That's right. As opposed to
	17	having someone else doing that for us.
	18	MR. SHAPAR: I would make one caveat on that, though,
	19	and I am thinking of having a board to hear all the evidence.
	20	And then you say, "But I want to hear from X, Y,
	21	and Z, and only them."
	22	I think that that invites
	23	COMMISSIONER AHEARNE: I was more, I think responding
	24	to what I thought Peter was suggesting. A written first stage,
Ace-Federal Report	25	and then a second, and selected focus.
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COMMISSIONER KENNEDY: That's, I think, what Howard is addressing.

3	MR. EILPERIN: I would point out that in the GESMO
4	hearing procedures, the Commission specified quite clearly that
5	the hearing board may request or order any full participants
6	who have substantially the same interest and proceed to raise
7	substantially the same questions to consolidate the request
8	for discovery, presentation of evidence, suggestions of
9	questions to the hearing board, including statements of
10	participants and questions on cross-examinations on particular
11	issues.
12	So that it is certainly within the Commission's
13	power to either request people to produce themselves or to
14	order them to consolidate their positions and make them much
15	more manageable.
16	MR. SHAPAR: It is not only feasible, but frequently
17	used in big, rulemaking procedures. It is a common device of
18	consolidation to force participants to get together.
19	COMMISSIONER KENNEDY: But that is a slightly
20	different proposition than the one I understood Commissioner
21	Bradford to be making.
22	COMMISSIONER BRADFORD: It is aimed at the same
23	end.
24	COMMISSIONER KENNEDY: I am not sure it is the same
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1	My understanding of your view was, and correct me
2	please if I am wrong, but my understanding was that you had in
3	mind having gone through written submissions, we would conclude
4	that certain of these parties we would like to address
5	certain of these participants more fully.
6	Those and only those would be invited to submit
7	oral testimony. Now, that's what I thought you were suggesting
8	as a means of sort of controlling the matter.
9	COMMISSIONER BRADFORD: My fundamental suggestion
10	was that we have some need to get control of the matter.
11	I had suggested, my thought was the one way to do it would be
12	to have a first stage and a second stage.
13	Other possibilities would be to give notice of a
14	proceeding, get in response to that notice a list of potential
15	participants, and a statement of what their interest would
16	be. And then do some consolidating at that point in time.
17	CHAIRMAN HENDRIE: Could you take written comments
18	from anybody who wanted to send them in, and then shake them
19	down on the basis of the arguments they were making in those
20	comments, and say we would be willing and would like to hear
21	from somebody representing this point of view?
22	Or this point of view these 114 folk is that
23	practical?
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RMG 8	1	than trying to hear from all 114 of them in 5 minutes.
C	2	CHAIRMAN HENDRIE: And it may be more practical
0	3	than trying to set them up and consolidate them on the basis
	4	of just an initial listing of
	5	COMMISSIONER BRADFORD: One paragraph statements?
	6	CHAIRMAN HENDRIE: Yes.
	7	MR. BICKWIT: The hearing is discretionary. The
	8	comment period is not. So you have the authority to do that.
	9	COMMISSIONER KENNEDY: We do back to the point that
	10	you made in this regard. Could you restate it now?
	11	MR. SHAPAR: I was just addressing the point, I
	12	guess, in the framework of which I understood it may be
2	13	incorrect - was having the hearing board listen to all the
	14	participants.
	15	As to whether or not the Commission can say, "I would
	16	like to hear personally from X, Y, and Z to the exclusion of
	17	all others."
	18	I think the optics of that and the fairness would
	19	militate against it. But I think there are ways of conserving
	20	the Commission's time, either by narrowing the issues in which
	21	you want to hear people speak, or by forcing consolidation
	22	so that you can really reduce the number of arguments that
	23	are brought forward before you.
Ace-Federal Report	24	COMMISSIONER GILINSKY: Why can't you make that
Add-Proteral mayore	25	kind of decision? After all, you read the written submissions
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and decide on that basis, or for other reasons, that these seem RMG 9 1 to be the persons who have the most to offer in the way of 2 helping us decide the question. 3 MR. SHAPAR: I think probably you legally could, 4 and I guess I refer to my last set of remarks to optics, and to 5 what some people might construe to be fairness. 6 MR. BICKWIT: Iwould agree. 7 COMMISSIONER AHEARNE: You would agree with what? 8 MR. BICKWIT: That you can, and that the limiting 9 factor is only appearance. 10 MR. SHAPAR: But I wouldn't discount it in this 11 particular proceeding. 12 COMMISSIONER KENNEDY: Because it goes to the 13 question of fairness. 14 MR. SHAPAR: And the importance of the issue. end #9 15 16 17 18 19 20 21 22 23 24 Ace-Federal Reporters, Inc. 25 272

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1 COMMISSIONER AHEARNE: I quess I would still comedown on the side of not-hearing board on the notice and comment 2 3 cycle, and then additional comments. And then a selection from 4 that leaving open the possibility of selection of people 5 for us to hear directly. COMMISSIONER BRADFORD: I think I would also leave until 6 7 that next stage some procedural decisions on just how that 8 second stage is to operate because there is a range of 9 questions. 10 COMMISSIONER AHEARNE: Yes. 11 MR. SHAPAR: Wouldn't you want to announce at the 12 beginning what all the opportunities were for participation 13 down the line? See, otherwise, people who want to participate 14 may decide, well, if I get a further crack at it. I will put on my testimony in a certain way. If I think I only have one 15 16 opportunity, they'll handle it in a different manner. 17 COMMISSIONER BRADFORD: It certainly is necessary 18 to announce the second stage and conceivably, to announce as 19 much about it as possible. 20 I just don't know and wouldn't expect to know until I've had a chance to think about the comments. What, for 21 22 example, I would want to do about discovery, whether I would 23 think 1t appropriate to fund any party's presentation of 24 their views. 25 COMMISSIONER AHEARNE: I would really like to hope

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1 that people would try to give us good comments as they could.
2 I'm a little disturbed by the idea that they might try to
3 forego the first stage in the hopes of coming into the second
4 stage.

5 MR. SHAPAR: It's been known to happen. COMMISSIONER AHEARNE: On the issue of discovery -6 CHAIRMAN HENDRIE: I think it would be useful to try 7 to thrash, obviously not this afternoon, but in the coming 8 weeks, to try to thrash out as much of this sort of thing as 9 we possibly could to see where each of our initial views and 10 thrusts lay and argue back and forth and see what develops. 11 As a consensus. I think. I have a strong inclination 12 that Howard's plea to the maximum extent possible - a full 13

15 I have just got a sense that that's a very desirable 16 thing to do.

array of the procedure be laid out at the beginning.

Now I guess whether we can do it in toto, I don't know because I think you are right. I certainly can see it. In one sense you are right. That is, if they knew right now whether the comments were going to be, you know, like the volume of this room or were going to be this much, why, that makes a very substantial difference in the second thing.

But I think I can see where the mean of the distribution probably tends to lie. And it does seem to me that there's likely to be an awful lot of comment. I'm sorry

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373.10.3		39
gsh	1	I interrupted you.
	2	COMMISSIONER AHEARNE: No, no. I thought you were
	3	going to try to reach a decision today.
C	4	CHAIRMAN HENDRIE: Oh, no.
	5	COMMISSIONER AHEARNE: Fine.
	6	(Laughter.)
	7	COMMISSIONER AHEARNE: Then there are a few other
	8	questions I can ask of a few of the lawyers particularly.
	9	CHAIRMAN HENDRIE: Ask your questions.
	10	The thing I think we should try to work toward today
	.11	is to evolve the next step in the development of options,
	12	recommended courses - you know, here we are dealing with the
	13	question, should we have a proceeding? We haven't talked
	14	about that much. I don't think there's much doubt that we're
6	15	going to have to have a proceeding.
	16	If we don't, why, the circuit will assist us.
	17	So we're going to have a proceeding. We got
	18	clarified at least for Vic and me. How: it gets to be a
	19	rule-making on this reasonable assurance judgment thing.
	20	We are talking about options. We seem to be now
	21	focusing attention on the commission trying to be the what
	22	do you call it the first primary board, the hearing board?
	23	COMMISSIONER AHEARNE: Or the proceeding board.
	24	CHAIRMAN HENDREI: As the case may be. Okay, that is,
	25	I think we're making useful progress at the discussion and I'd

373.10.4 like us to conclude this discussion at some point being able 1 gsh to say to assemble the staff and commissioners ; 2 Here's how we get the next step down the road 3 4 toward the decision and see, hopefully, a fairly detailed way out on where we're going and how to get there. 5 But please go ahead with your questions. 6 7 COMMISSIONER AHEARNE: As I said, my conclusion is. where at least I'm coming out is that we ought to be that 8 proceeding board and we ought to have a series of notices 9 10 and comments leaving open the ability to narrow it down to hear peole ourselves after that. 11 I don't have much more in the way of detail to put 12 13 on it. My only one remaining question was on this issue of 14 discovery, this is more of a technical question. If you were to say yes, we will have discovery - do we have any authority 15 16 to have that extend to outside the NRC? 17 MR. SHAPAR: Yes. But let me point out discovery in 18 most rule-makings is handled pretty easily. Number one, the 19 staff discorges all its documents. That's number one. 20 COMMISSIONER AHEARNE: That's NRC. 21 MR. SHAPAR: And of course the Freedom of Information 22 Act recourse is available, not only against us, but against 23 other government agencies. COMMISSIONER AHEARNE: Sure. But that's available 24 25 in dependent of any decision we make. What I was asking is

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gsh	1	there any decision we make which has a function of enabling
	2	information to be obtained
	3	CHAIRMAN HENDRIE: Sure, you can open private parties
C	4	to discovery.
	5	MR. EILPERIN: Section 161(c) of the Atomic Energy Act
	6	will allow you to subpoena information and get that
	7	from people who are not participants in the particular
	8	proceeding.
	9	MR. SHAPAR: As a matter of fact, the Commission faced
	10	this one time a long time ago - they never had to use it
	11	in connection with Tarapur, and it was in connection with
	12	making a finding of practical value and they needed information
	13	from a manufacturer who was not a licensee but merely a
	14	vendor.
a second a s	15	Same question: Could they subpoend the information?
	16	The legal conclusion at that time was yes.
	17	COMMISSIONER KENNEDY: Could any other party or any
	18	other participant do so?
	19	MR. SHAPAR: They could ask us. They would come to
	20	us and ask us to issue a subpoena to get information for them.
	21	That would be the mechanism.
	22	COMMISSIONER KENNEDY: A number of minor matters
	23	would come before the commission then to be resolved.
	24	MR. SHAPAR: If you went that route. The question is
	25	where is the bulk of the information now? I guess it's with
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1 CHAIRMAN HENDRIE: I would think so. 2 COMMISSIONER AHEARNE: That could be fascinating. 3 COMMISSIONER KENNEDY: Could I ask the staff to 4 assist me in thinking the problem through? And I understand 5 the merits of the proposition as you have put them forward, 6 Bill. 7 What I don't yet understand are the implications in 8 terms of resources. And I haven't heard anything this 9 afternoon that has helped me very much in understanding that. 10 So I wish the staff would, as early as convenient, look hard 11 . of this question of resources. And in doing so, Howard, I 12 would like you to make an estimate on whatever basis you can 13 of what you guess - I use the word "guess" advisedly - to 14 be the time that will be required in terms of review and 15 the time that will be required in terms of actual hearing on 16 the part of whatever board it is - that is be it a 17 specially appointed board or the cormission to reach the 18 decision. 19 MR. SHAPAR: You realize we don't know the number of 20 21 participants? 22 COMMISSIONER KENNEDY: I understand that. But you know that there are a number of things which can at least draw 23

a range. And within that, then, making the best - and that

was the reason that I used the word "guess."

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I understand that there obviously are going to be 2 large error bands, but not as large as there are today.

3 MR. BICKWIT: Are you including within your request 4 the pre-hearing activity of the hearing board ruling on 5 procedural motions?

COMMISSIONER KENNEDY: Certainly, all of which will
 have to be done by whatever board that is.

8 COMMISSIONER AHEARNE: Steve, could I ask you one 9 other question? I'm really fascinated by that. You mean, 10 for example, the National Academy of Sciences could be subpoenaed to give us all the information or give someone, a 11 party, all the information that you have in your files 12 13 relating to the waste management study that you did for the 14 NRC or the Atomic Industrial Forum could be subpoenaed to 15 give us all the information you have relating to problems 16 associated with disposal of nuclear waste? Or NRDC could be subpoenaed to give us all the information you have in any 17 18 of your documents?

MR. EILPERIN: Let me read you 161(c). I mean people can refuse the commission subpoena, and then the commission has to enforce it in court. Then there could be questions of reasonableness and things like that.

23 But the commission actually is a rather powerful 24 body.

(Laughter.)

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gsh	1	MR. BICKWIT: It's frightening.
	2	CHAIRMAN HENDRIE: How little you know us.
	3	(Laughter.)
<u> </u>	4	MR. EILPERIN: Let me read it to you.
1.4	5	Congress intended the commission to be rather
	6	powerful. 161(c) says in performance of the functions, the
	7	commission is authorized to make such studies and
	8	investigations, obtain such information, hold such meetings
	9	or hearings as the commission may deem necessary or proper
	10	to assist it in exercising any authority listed in this act
	11	or in the administration or enforcement of the act, or in any
1919 80	12	regulations or orders issued thereunder.
	13	To such purposes, the commission is authorized to
	14	administer oaths and admonitions, or by subpoena, require
5	15	any person to appear and testify to appear and produce
	16	documents at any designated place.
	17	Witnesses subpoenaed under this section shall be
	18	paid the same fees in mileage as you pay witnesses in the
1.1	19	district courts of the United States.
1.6	20	CHAIRMAN HENDRIE: You cannot only make them produce
	21	it; they have to bring it here. How about that?
	22	MR. SHAPAR: I think that's correct, but I think
	23	there may be a caveat or a special rule with respect to your
	24	ability to subpoena another government agency.
	25	COMMISSIONER AHEARNE: I was thinking more of
		(Inaudible.)

45 373.10.9 CHAIRMAN HENDRIE: Government agencies would be gsh 1 2 FOIA. They do us on occasion. I notice. 3 MR. EILPERIN: I'm not at all sure that I would agree with Howard's caveat. 4 5 COMMISSIONER KENNEDY: That would be something I assume for the staff's further consideration. 6 7 MR. SHAPAR: No memorandum will be exchanged. 8 COMMISSIONER KENNEDY: At least you will be able to 9 arrive at a conclusion which you will share. 10 MR. EILPERIN: Usually there's a comity between 11 sister agencies and cooperation, so one does not have to resort to dragging somebody struggling. 12 13 MR. BICKWIT: We did research on one occasion whether the commission would have authority to subpoena from the 14 15 President's commission on TMI, and concluded, while we were 16 not about to advocate that, that yes, in fact -17 COMMISSIONER AHEARNE: I was really interested more 18 in one of these private organizations. 19 MR. SHAPAR: I think it's clearly under our 20 authority. 21 COMMISSIONER AHEARNE: Let me point out it is one on 22 behalf of the other. I will ask merely as an intermediary. 23 MR. SHAPAR: But it's to enable us to conduct an 24 authorized activity. 25 COMMISSIONER KENNEDY: Yes.

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CHAIRMAN HENDRIE: Now let me ask some more questions about staffing and resource, this on the basis that the commission might want to hear this matter itself.

When there is in a rule-making, typically there is a board that works on it — I guess not full time, but puts in a fair amount of time.

7 In the proceeding, typically, I think, the staff 8 has in mind, or we have told the staff to have in mind some 9 sort of Fule; that is, they are heading some place.

10 The staff bears a central role in the proceeding in 11 the Sense that they gather together materials, make analyses, 12 firm up their presentations and testimony when other parties 13 throw in differing views. Why, they will generally be staff 14 analyses of those, saying we don't agree for the following 15 reasons, or we do agree for the following reasons.

As the proceeding grinds to a close, there will be a weighty staff report that says, we believe that the hearing record supports the following rule. and quotes the rule. Here is why. And, you know, it's a major piece of analysis and synthesis pulling it together.

Here we have — the rule is a fairly simply stated proposition. But their arrival thereat may be very time consuming and complex.

Is staff going to play the same sort of role? Howard says that we can ask you to do whatever we like. But if the

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47 373.10.11 staff doesn't, who does? gsh 1 That is, it seems to me that there needs to be 2 at least one party in the proceeding that is trying to 3 gather everything together in a coherent fashion. 4 I'm not sure that you get out much easier than the 5 other options. 6 MR. SHAPAR: Well, you know, it really depends on the 7 procedure that you pick. It's very sensitive to the procedure. 8 For example, if you use a hearing board, you can ask - you 9 can really rely on the hearing board to go out and gather 10 information. If the participants are providing enough 11 information, they can make that known. 12 You can ask a hearing board to certify the record 13 without recommendation, which you have done in other 14 rulemakings. 15 COMMISSIONER GILINSKY: Then you have to bet 16 somebody to read the record. 17 MR. SHAPAR: Well, the commission has its own staff. 18 I should point out. 19 20 (Laughter.) 21 22 23 24 25

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	1	MR. SHAPAR: And other Commissioners in rulemaking
	2	have used that immediate staff for this kind of effort.
-	3	COMMISSIONER KENNEDY: They also read some of the
	4	record, or most of it if not all of it.
	5	COMMISSIONER GILINSKY: Well, I would be surprised
	6	if Commissioners read some of the records in some of the larger
	7	proceedings.
	8	CHAIRMAN HENDRIE: I would find it impossible.
	9	COMMISSIONER GILINSKY: It seems to me the question
	10	here is not one that turns on a mass of detail, you know, in the
	11	way of deciding on a facility design does. Every detail of
	12	design has got to be understood if you're to allow operation of
342	13	a facility.
	14	CHAIRMAN HENDRIE: I think that's right, but I think
	15	we would be confronted with massive detail, no matter how you
	16	thrash it out.
	17	MR. SHAPAR: Remember when you denied the PRDC
	18	petition. You did point to the literature in the field that
	19	was summarized. I mean, your decision on whether or not you've
	20	got confidence is going to have to based on the best technical
	21	data and opinion available. It just can't be a gut reaction.
	22	COMMISSIONER AHEARNE: But, as Bill points out, much
	23	of that has already been reviewed.
	24	MR. SHAPAR: What part would you give weight to?
Ace-Federal Rep	orters, Inc. 25	They're liable to have a conflict in expert opinion.
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1	COMMISSIOENR KENNEDY: There is.
2	MR. SHAPAR: Aren't you going to have to articulate
3	why you rely on some opinion but not on others?
4	MR. DIRCKS: How deep do you go into it? Do you go
5	into the migration rates of nuclides in various media, and then
6	do you force calculations to be made?
7	MR. SHAPAR: How long do a man's pants have to be
8	to reach the ground, Bill?
9	MR. DIRCKS: That's for people in your profession
10	to argue about.
11	(Laughter.)
12	MR. SHAPAR: President Lincoln asked that question.
13	MR. DIRCKS: Did he get an answer?
14	COMMISSIONER AHEARNE: He was in your profession.
15	MR. DIRCKS: It seems to me, in order to reach a
16	general statement of confidence, do you have to investigate in
17	depth all the various underlying technical documentation sup-
18	porting the geologic media of salt or granite or something else,
19	or can you basically take a judgment on where that program is
20	going and whether the resources are there?
21	I just don't think you are going to get very much
22	more of a level of confidence than the IRG has come up with,
23	and you've got to investigate where they went with that thing
24	and why there was dispute concerning that.
Ce-Fader Conters, Inc. 25	MR. SHAPAR: When you go out and you ask for comments

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1	in the rulemaking, you're going to get everything, I suppose.
2	Then what are you going to do? You're going to have to decide
3	how much is important and how much isn't.
4	COMMISSIONER KENNEDY: I guess my answer would have
5	to be that whatever other purpose may be served by this pro-
6	ceeding, its genesis is a court requirement which must be met.
7	And thus, we are answering the questions raised by those who
8	ask such questions as how long do the pants have to be. And if
9	it isn't going to answer those questions, then it's not going
10	to be a useful proceeding. It is only going to be leading to
11	more proceedings and more court hearings.
12	The purpose of the exercise should be to put that to
13	rest, not creste more.
14	CHAIRMAN HENDRIE: Watch out. We are not in a posi-
15	tion, and I don't think in the .ext year and some months before
16	this body, to extablish surety in questions which others have
17	been laboring over as recently as a month or two ago and have
18	had to say we think there is a reasonable basis to go ahead,
19	we have confidence that options will open up as we develop this
20	line or that line; we are not able to say precisely now that
21	this is the right path and the risks are thus and so in quanti-
22	tative detail.
23	I think, indeed, the judgment and confidence, if we

23 I think, indeed, the judgment and confidence, if we 24 are to make it, in part, does have to rest on assessments of the 30 national program and where it seems to be going and the

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reasonableness of it, as well as whatever we can form in the 1 way of, I guess, more basic judgments about feasibility and 2 3 probable infeasibility in the natural scope. When we get all through, though, why, I don't think 4 we will have been able to prove that waste disposal is per-5 fectly safe, or any particular level of safe. I don't think 6 we will have been able to prove much of anything. 7 COMMISSIONER KENNEDY: We're going to have to use 8 the word "proof." We're going to have to have a level which 9 fully substantiates whatever judgment we make in this regard. 10 That's my only point. It cannot be simply a sort of broad-11 brush, let's invite a few senior officials in and let them give 12 us a 30-minute presentation and we thank them, have a few ques-13 tions, send them on their way, and then ask some who take dif-14 ferences with those views, let them express those, then we sit 15 down and we make a judgment. That won't wash. 16 MR. DIRCKS: That's true it won't wash. But I think 17 it is, again, the general conclusion you have to come up with, 18 19 and not a specific technical conclusion. CHAIRMAN HENDRIE: It seems to me the court hasn't 20 asked for a very searching and detailed finding by the Com-21 mission. It just says: Look, Commission, you have reasonable --22 MR. EILPERIN: If I could give a little context. I 23 think, essentially, the way the case was presented to the court 24 cs-Federal Reportors, Inc. is that in the past the Commission has expressed its confidence 25

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	1	that waste would be disposed of safely, that there was a major
	2	study the IRG report which laid out certain uncertainties.
-	3	And esssentially, what the court is asking is for the Commission
	4	to look at that new information that has come to pass, to take a
	5	look at the IRG study and the supporting information, and express
	6	its current views based on that most recent information about
	7	what level of confidence the Commission has.
	8	I think it's, in a sense, the court is saying: Will
	9	you please address the latest information that has been a
	10	assembled and give us your evaluation.
	11	MR. SHAPAR: The court did use the words "reasonable
	12	assurance" in the actual holding. But don't forget that the
C.	13	word "safely" is part of the equation.
	14	COMMISSIONER AHEARNE: "Safely" in what sense?
	15	MR. SHAPAR: Storage.
	16	CHAIRMAN HENDRIE: Well, let's see. Since the hour
	17	goes on and we need some time to think about this and to have
	18	further discussion, I guess what I would like to do is to see
	19	now what we ought to ask assembled staff to help us with for
	20	the next in preparation for the next meeting.
	21	And it seems to me that it would be useful if the
	22	assorted legal officers and Bill Dircks, whose shop will bear a
	23	heavy burden one way or another in this matter, could please
	24	try to get together and look toward some analysis and discus-
Ace-Federal Reporters,		sion for the Commission of the path that we have been talking

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about here for the last 45-odd minutes. That is, the Commission
-- and I shudder to contemplate it -- hearing this proceeding
itself, and with a format which might go something along the
line that Peter outlined, and some thought to -- it would be
useful, it would seem to me, to have some discussion, perhaps
some options presented about how we might manage that.

I would be interested in opinions, certainly, on any 7 differing opinions as to legality, propriety, practicality, or 8 what have you, of such a course. And I think it would also be 9 helpful if the legal shops, in particular, think a little bit 10 about these questions that extend beyond possible notice and 11 comment, beyond the notice and comment stage, and begin to look 12 to questions like how would one either select among participants 13 if a selection was considered acceptable and what the debits 14 are in that, how, if suggested, the appearance would be lousy, 15 or how one might arrange consolidation to keep the number of 16 actual parties in further -- in actual live proceedings before 17 the Commission down to a manageable number and still get the 18 viewpoints on questions like should there be discovery in a 19 case like this, what does it mean here. 20

It's not so clear to me, in view of the ultimate product, which, I assume, is a statement the Commission does or does not choose one, and have confidence and so on, it is not so clear to me that it is quite the same as many cases where discovery is appropriate. But I think some thought would be

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useful, and some recommendations. 1 I think questions about how that second stage of the 2 Commission proceedings -- that is what I will call the "live" 3 hearings, in my ignorance of better terminology -- what the for-4 mat might be. I trust you will keep into account that if the 5 Commission does this, that I am going to have to go away to 6 school for a year or two, if we are going to have very formal 7 proceedings. 8 COMMISSIONER AHEARNE: I suspect we can provide 9 somewhere in the staff advice on how to. 10 MR. EILPERIN: You already have a gavel. 11 (Laughter.) 12 CHAIRMAN HENDIRE: Actually, I was thinking that an 13 application to carry a pistol might also be a useful --14 (Laughter.) 15 MR. BICKWIT: Is there a Commission leaning at this 16 point on whether you want the formal proceedings? 17 COMMISSIONER AHEARNE: What formal proceedings? 18 MR. BICKWIT: As part of the hearing. 19 COMMISSIONER AHEARNE: You mean a formal hearing as 20 part of the proceeding? 21 MR. BICKWIT: Yes. Formal procedure. 22 CHAIRMAN HENDRIE: Peter is the direction I would 23 look to hear a general vote of support for that. 24 Ace-Federal Reporters, Inc. Would you comment? 25

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1	COMMISSIONER BRADFORD: I would, at least at this
2	point, keep open the possibility of several measures. I don't
3	know that I would opt for it in fact, I don't think I would
4	opt for full adjudicatory or full legislative. But, as I said
5	before, I wouldn't rule out on the basis of comments, A, want-
6	ing to make a decision to fund one or more parties in the
7	presentation of views; B, at least at that point wanting to be
8	able to listen to arguments, written presumably, rather than
9	oral, as to what the gains from discovery or interrogatories
10	might be, and, by the same token, listen at that time also to
11	argument on whether or not we ought to have corss-examination.
12	I am not ready to say at this time that any of them
13	are clearly required, but I guess I would lean in the direction
14	of feeling, at least as to discovery and interrogatories or
15	cross-examination, that probably I would want to that I would
16	want the possibility of at least one of them.
17	CHAIRMAN HENDRIE: But at least a full-dress adjudi-
18	catory proceeding doesn't seem to be
19	COMMISSIONER BRADFORD: I guess I am not even abso-
20	lutely sure what that means.
21	CHAIRMAN HENDRIE: I am not, either.
22	COMMISSIONER BRADFORD: We can certainly do without
23	a jury. Whether, for example, having a decision made strictly
24 Ace-Federal Reporters, Inc.	on the record made under oath, what that entails it's always
25	seemed to me that you can take a spectrum between adjudicatory

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and legislative type hearings. There isn't just a clear fall on one side or the other. For the purposes of the ADA, yes, there are some things that are adjudicatory and some that aren't. But as far as our ability under our own discretion to go beyond legislative, there just isn't any clear point at which you fall over into hearings. There is just a set of proceedings you can add as the basis of notice and comment.

CHAIRMAN HENDRIE: I guess what I was asking was, 8 then, it seemed to me that what you were saying was that you 9 wanted to look at some of these procedures in the range, but 10 you weren't saying, "By George, this thing ought to be all the 11 way over at the adjudicatory side of the scale." And I think 12 there is very little point in the staff then exercising much 13 thought about that extreme, but rather concentrate on the ele-14 ments you have mentioned as options and how they might fit in. 15

16 COMMISSIONER BRADFORD: The judges don't have to 17 wear wigs.

CHAIRMAN HENDRIE: Well, if we're going to have 80degree rooms, why, we're going to have to have nylon wigs, at any rate.

COMMISSIONER GILINSKY: It seems to me that after we get into this, there may be certain issues that you want -may want to handle in a special way, look at discrete questions in more depth or with expanded procedures.

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CHAIRMAN HENDRIE: As I say, I think it will be

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useful to have some discussion and see how far we can foresee. Maybe we can't do it in total.

COMMISSIONER KENNEDY: I think that's true, Vic, to 3 the extent that we agree that it is. I think we ought to try 4 5 to spell it out as best we can at the outset in an initial 6 ruling. I agree -- what I am saying, I guess, is I agree 7 wholeheartedly with Howard's point, that at the outset people ought to know where this is going, and as discretely and pre-8 cisely as we can, we ought to spell out for them how it is going 9 to get there so they know what to do, just in fairness to them. 10

11 CHAIRMAN HENDRIE: Now, have all of us wandered 12 around the subject enough so that there is at least -- so that 13 the staff offices have at least the impression that you know 14 what the next step is, and then I will declare my thanks to you 15 for this meeting and adjourn it before you have a chance to ask 16 more explicit questions which I couldn't begin to answer? And 17 I don't care whether it's one paper or three papers or 2-1/2 18 papers; please settle among yourselves --

MR. SHAPAR: I would think you would want the general counsel's view at this point, rather than mine. I think it's reached the stage where you ought to have your own immediate adviser --

CHAIRMAN HENDRIE: I think we just went over into CHAIRMAN HENDRIE: I think we just went over into that. I will leave you to thrash out amongst yourselves. (Whereupon, at 4:20 p.m., the hearing was adjourned.)

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