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NUCLEAR REGULATORY COMMISSION

IN THE MATTER OF:

PUBLIC MEETING

DISCUSSION OF SECY-79-319
HEARING BOARD REPORT IN CLEARANCE RULE PROCEEDING

Place - Washington, D. C.

Date - Tuesday, 5 June 1979

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

PUBLIC MEETING

DISCUSSION OF SECY-79-319
HEARING BOARD REPORT IN CLEARANCE RULE PROCEEDING

- - -

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

Tuesday, 5 June 1979

The Commission met, pursuant to notice, at 1:45 p.m.

BEFORE:

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

PRESENT:

- Messrs. Murray, Bickwit, Stoiber, and Snyder.
- Ms. Nordlinger.

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CHAIRMAN HENDRIE: Let us start.

The subject this afternoon is the report of the Hearing Board in the clearance rule proceeding. The counsel's office has prepared a memorandum on the subject, and I guess is prepared to point out to us where we are and where we might go on this subject.

Perhaps I would do best in introducing the subject, simply to let Carl start.

MR. STOIBER: Marjorie Nordlinger was the lead attorney on this, and if it's acceptable, she can take just a few minutes to run through the alternatives presented in the paper and make a few short comments.

CHAIRMAN HENDRIE: Marjorie, why don't you also include a historical paragraph, pointing out where it all started and what brings us here.

MS. NORDLINGER: Well, I did include a few dates. I thought they would be of interest.

On March 17th of 1977, we published for public comment a proposed new Part 11 of the regs, and that would require certain persons with access to or control of special nuclear material to have security clearances, and the rules established the criteria to determine eligibility for such a clearance.

Then, due to the extent of public interest, on December 28 of 1977 the Commission published notice that there

1 would be a hearing, and that notice enumerated seven matters
2 or issues that the Commission deemed of particular importance.
3 On April 7th of '78 there was a notice of the appointment of
4 the Board, and following that the Board took over. It set up
5 procedures which allowed for the presentation of written
6 testimony. And then there were hearings on July 10th, 11th and
7 12th, which were in the main presentations of responses to the
8 Board's questioning.

9 The record closed on September 22nd of 1978, after
10 allowing for concluding statements, requests for cross-
11 examination and so on.

12 You might want to note that just before the close
13 of the hearings, on August 31st, the Commission asked the
14 Board, in addition to providing a summary of the record, to
15 give its recommendations on whether or not the proposed rule
16 should be adopted and provided that the Board could give some-
17 thing more than just a yes or a no answer to that, but would
18 elaborate and say to what extent certain parts of the rule
19 might be adopted or what kinds of changes would be made.

20 The Board's report was originally expected within
21 1978, but there was some slippage and it was filed on April 2nd
22 of '79. And as you know, the Commission was at that time
23 somewhat embroiled in other matters, and somehow or another
24 we seem now to be discussing what to do with the report up
25 until today.

1 The report recommended that the rule not be adopted,
2 and it based that recommendation on a discussion of some of
3 the issues that the Commission said should be dealt with in
4 the hearings, but principally the Board seemed to feel that
5 there had been a failure on the part of the staff adequately
6 to establish a need for the rule.

7 COMMISSIONER GILINSKY: Does this apply to clearances
8 for reactors as well as to the fuel cycle?

9 MS. NORDLINGER: Yes.

10 COMMISSIONER GILINSKY: They felt the need was not
11 established in either case?

12 MS. NORDLINGER: They separated it, and most of the
13 discussion was related to the need for reactors.

14 COMMISSIONER GILINSKY: I thought, if I can find it
15 here on the fuel cycle case, they indicated no view here on
16 access authorizations for individuals who might have control
17 over special material in fabrication plants and other such
18 cases.

19 Does the rule distinguish between the fuel cycle
20 and reactors?

21 MR. SNYDER: Not as presently drafted, I don't
22 believe.

23 The interesting thing about that nonrecommendation
24 is, you asked them for a recommendation.

25 COMMISSIONER AHEARNE: And they addressed the bulk

1 of the people.

2 COMMISSIONER GILINSKY: Why is it they made no
3 recommendation on the fuel cycle?

4 MS. NORDLINGER: I can't respond.

5 COMMISSIONER AHEARNE: I said they addressed the
6 bulk, the major issue, the very large number of people.

7 MR. SNYDER: There's a miniscule number of people
8 that don't have clearances right now that are in our licensed
9 fuel facilities.

10 COMMISSIONER GILINSKY: But still, that's where the
11 major problems are.

12 COMMISSIONER AHEARNE: I don't think that the proposed
13 rule specified that. We said address the impact of the
14 proposed rule. The proposed rule swept a very large number of
15 people in. Or I should say, you set up the proposed rule.

16 MS. NORDLINGER: You have identified only one of
17 the problems so far.

18 Furthermore, the Board seemed to feel that the
19 hearings had failed sufficiently to examine what might be
20 alternative programs, and that this was in part or largely a
21 result of an analysis that led to the conclusion that the
22 NRC could not provide its own program, but had to follow the
23 program established by the Secretary of Energy. This would
24 seem to be related both to a discussion of alternative
25 programs and to a discussion of the criteria that would be

1 used under an access program.

2 So that the Board seems to suggest, through its
3 report, that the view that the Commission is not able to
4 establish its own criteria and must follow the Secretary of
5 Energy led to an insufficient examination of alternatives,
6 both in the larger scale of what other possible forms an
7 approach to safeguarding these materials could take, and also
8 with respect to both the specific alternatives in dealing with
9 the actual criteria if it were established that a clearance
10 program based on a field, a background checkup, should be the
11 best route to follow.

12 And there were a few other small points that the
13 Board also felt had not been fully addressed during the
14 proceedings.

15 We, after reading the Board's report, felt that the
16 best thing to do at this stage would be to ask for the staff's
17 comments on the report, and to see whether or not the staff
18 felt that there had been an adequate presentation that the
19 record was sufficient for a rule, admitting or allowing at
20 that point that there might be possibilities that the staff
21 would want to add to the record, and that then we might call
22 for comments from the other participants in the proceeding for
23 any new information on what the staff's submission was. And
24 after that, the Commission might be prepared to consider
25 whether or not it was going to adopt the rule or any part of it.

1 COMMISSIONER AHEARNE: I guess I'm sort of puzzled
2 by that, because we set up a Board and they addressed in part --
3 the people that were parties to it were the staff, and they
4 addressed the issue and concluded that there was inadequate
5 information presented to make the case for the rule. And so
6 I'm a little puzzled by why we would go back to one of the
7 parties and say, well, do you agree with the Board.

8 MS. NORDLINGER: Well, this is an informal rule-
9 making, Commissioner Ahearne. And we did not commit ourselves,
10 so far as I am aware, to following the recommendations of the
11 Board.

12 COMMISSIONER AHEARNE: No, my question was more,
13 do we think that the Board was inadequate in their review?

14 MS. NORDLINGER: Well, I'm not prepared to answer
15 that question. But I did think that it was possible, given
16 the fact that the staff's performance was brought into
17 question, that they might want an opportunity. And while it
18 seemed that it would be possible to invite the comments of
19 all the participants at once, which has been done, for instance,
20 in the S. 3 proceeding, I believe, in this case because the
21 staff's performance was more at issue, or that was where the
22 insufficiencies of the Board -- that the Board saw seemed to
23 lie, it seemed more reasonable and it would result in a lot
24 less paper moving around if we asked the staff to respond
25 first, and then allowed the parties to respond to what the

1 staff had to say, because that was really where their interest
2 was going to lie.

3 COMMISSIONER AHEARNE: But I guess my question would
4 be, it appeared to me in reading it that the Board had made a
5 very specific recommendation based upon the conclusion they
6 reached. I thought the conclusion they reached was that --
7 they had two parts: one was there was an inadequate justifica-
8 tion; but then the second part was, the crux of the issue was
9 whether or not we were required to use the DOE standards. If
10 the answer is yes, we are required, then consideration of
11 other alternatives, they said, didn't make any sense. And we
12 could either accept those standards or else go for other
13 legislation or get DOE to change the standards.

14 If the answer was no, then there was an opening
15 ground to consider alternatives. And their reading -- I think
16 they say in here that the staff admitted that they didn't --
17 on the last day of the hearings, the staff admitted that they
18 didn't really consider alternatives, they didn't evaluate
19 alternatives against the DOE.

20 And the Board goes on to recommend that the Commis-
21 sion ask its staff to evaluate that legal question: Do we or
22 do we not have to follow the DOE criteria.

23 So I guess I had expected the principal initial step
24 to be asking the general counsel to answer that question,
25 rather than going through another cycle on the parties

1 involved, and did the Board reach the correct conclusion, since
2 the Board specifically recommended we do something. And I
3 thought we had to face that question.

4 MR. BICKWIT: The Board also concluded that it was
5 not addressed to the extent that they would have liked to have
6 seen it addressed.

7 COMMISSIONER AHEARNE: Well, I would, as at least
8 one member of the Commission, I would turn to my general
9 counsel and ask. A Board has recommended the address of a
10 legal question. I would turn to them and ask them to address
11 that legal question, because in some sense the other element
12 of the legal part of the Commission staff has already addressed
13 that question.

14 MR. BICKWIT: The Board concludes they haven't
15 addressed it adequately.

16 COMMISSIONER AHEARNE: Right, but they have addressed
17 it and provided their advice to the staff, who then went into
18 this hearing.

19 MR. BICKWIT: I think it is a small point. I agree
20 with you that you ought to have the benefit of the general
21 counsel's office judgment. But it seemed to us that it would
22 be helpful in rendering that judgment to have a staff
23 analysis.

24 COMMISSIONER AHEARNE: Are you saying, then, the
25 conclusion you reached was we ought to ask ELD to provide an

1 analysis of whether or not we are required?

2 MR. BICKWIT: Yes, as part of an additional presen-
3 tation.

4 COMMISSIONER GILINSKY: Are we basically talking
5 about clearances for reactors? Because from what Bernie tells
6 me, the fuel cycle is effectively covered.

7 MR. SNYDER: I don't know how effectively it's
8 covered. But I think in terms of numbers, there is a very
9 high percentage.

10 COMMISSIONER GILINSKY: In the process of assigning
11 that security classification to the fuel cycle.

12 MR. SNYDER: That was approved by the Commission.
13 It was back three or four months ago.

14 COMMISSIONER GILINSKY: That only deals with
15 information.

16 MR. SNYDER: Yes, sir.

17 CHAIRMAN HENDRIE: That is, we declared that things
18 like safeguards -- accounting information, security plans,
19 physical security, associated studies in connection with those
20 materials at fuel cycle facilities -- to be national security
21 information, and anybody that must have access must have a
22 clearance.

23 COMMISSIONER AHEARNE: It was in that context that
24 we found that most of the people already there have that
25 national clearance.

1 COMMISSIONER GILINSKY: Presumably people working
2 there know where all the material is and they're already
3 covered by this.

4 MR. SNYDER: No, no. That is for information.

5 CHAIRMAN HENDRIE: Hold on. It is for information,
6 not access to material.

7 MR. SNYDER: It is not access to material and
8 production on the floor. That is what this is about. This
9 is access to physical materials. That is why. They tend to
10 overlap, but they are two separate things. It wouldn't neces-
11 sarily follow that a man who has clearance to access for
12 information would have access to the material.

13 COMMISSIONER GILINSKY: I guess I always looked at
14 it the other way, that we had an opportunity to arrange for
15 clearances to cover access to material; I felt that would
16 cover access to information.

17 MR. SNYDER: A production worker doesn't necessarily
18 have access to all of the security plans.

19 COMMISSIONER AHEARNE: But a production worker at a
20 fuel cycle facility, does he not have a clearance?

21 CHAIRMAN HENDRIE: He may or he may not.

22 MR. SNYDER: Well, if they are a DOE contractor,
23 chances are ten to one that he will.

24 COMMISSIONER GILINSKY: Well, there's something to
25 be said for just a single system.

1 CHAIRMAN HENDRICKS: Well, we've always agreed that if
2 there were going to be clearances at fuel cycle facilities,
3 because most of those that deal with special nuclear material,
4 with the highly enriched material, are DOE contractors, and
5 there the Department of Energy requires clearances of its
6 contractor employees to have access to that material. So that
7 means that a large body, if not all, of the employees of these
8 facilities get cleared because of that requirement. And we
9 have always agreed that if the residual group of employees at
10 these facilities that handle sensitive material were to be
11 cleared for any reason, that it would be the same system, the
12 national security system. I think we've always agreed.

13 Now, at the moment there is the requirement in a
14 fuel cycle facility, to the extent there are DOE classified
15 contracts, that the group of employees that touch those be
16 cleared. Then we have said that security plant information and
17 material accounting information is classified. So here is
18 another group who may -- who may not be completely identical
19 with the first group, but an additional circle, you see, in
20 which there has to be cleared.

21 That doesn't necessarily get everybody at a fuel
22 cycle facility who is a regular employee.

23 COMMISSIONER AHEARNE: It sounds like it gets
24 everybody who has either access to material or access to
25 information?

1 CHAIRMAN HENDRIE: No, because if it is not DOE
2 hydrogen-enriched material, if it's on its way to Fort St. Vrain,
3 for instance, it doesn't fall under either of these things. In
4 order to get that last group, why, you have to have clearances
5 for access to special materials.

6 COMMISSIONER GILINSKY: I guess I propose that we
7 solve that problem and separate it from reactors.

8 CHAIRMAN HENDRIE: I think whatever we do in terms
9 of going forward with this initiative or the offspring initia-
10 tives, indeed, that it ought to be separated. In many ways
11 it was an odd offspring included in here, because of the
12 general phrasing of the proposed rule. But this proceeding
13 has essentially not dealt with those remaining relatively few
14 employees at fuel cycle facilities handling sensitive materials
15 in any substantive way that I know of.

16 And as a matter of fact, because the record and the
17 recommendations fo the Board here run so much to the reactor
18 side, you could either start another proceeding or have a
19 notion that the Commission has the authority to just go ahead
20 and say national security clearances for access to material in
21 these facilities.

22 That is, I think we could separate that junk out and
23 just go ahead and implement it, and I doubt that there would
24 be much.

25 MR. MURRAY: Mr. Chairman, although the Board didn't

1 focus much attention on the fuel cycle facilities, the evidence
2 in the record is enormous on fuel cycle facilities.

3 CHAIRMAN HENDRIE: I should have said that. I'm
4 sorry, I should have said that. What I meant was that the
5 comment to the contrary is essentially, is very limited. The
6 Board hasn't said don't do that.

7 COMMISSIONER GILINSKY: I guess I'm rather surprised
8 that the Board concluded to have no recommendation on the fuel
9 cycle clearances. I find that rather astonishing.

10 CHAIRMAN HENDRIE: I think they saw it as more of
11 one package, and the major part of the package seemed to them
12 to have problems with it. So they felt unable to deal with
13 it.

14 COMMISSIONER GILINSKY: Well, it makes me wonder
15 what they were doing if they couldn't separate out the two
16 pieces.

17 COMMISSIONER AHEARNE: What were you people doing
18 when you put out that rule? You put out a rule that lumps all
19 these people together and asked the Board to analyze that. I
20 just read the Federal Register notice that is the instruction
21 to the Board, and it doesn't say: Here is this small group
22 which are the most important ones. It just lumps these three
23 classes together, the third class being transportation people.

24 CHAIRMAN HENDRIE: I think, as I keep commenting, I
25 have a hindsight, practically incomparable hindsight. And

1 it's clear that at the time we asked them--you remember, we
2 added the recommendations request at a later stage, and I
3 daresay at that time if we had gone on and elaborated a little
4 bit and said we would really like to have those recommendations
5 separated in terms of the various kinds of facilities, that
6 then we would have gotten that sort of response.

7 COMMISSIONER AHEARNE: The report indicates that the
8 staff had indicated there were just a very few people involved.

9 MR. MURRAY: I think one explanation for why they
10 were short of evidence on the fuel cycle side, notwithstanding
11 the apparent error there, is that they had dumped all over the
12 criteria and the criteria are common to both.

13 COMMISSIONER GILINSKY: My recommendation would be
14 to fix up the fuel cycle side and set the reactor part aside.

15 COMMISSIONER AHEARNE: Does anyone know what this
16 universe of uncovered people are on the fuel cycle side?

17 MR. MURRAY: It is probably no more than a couple of
18 hundred.

19 VOICE: It is about 25 percent of the people that
20 are in the production side of the fuel cycle facility. Now,
21 I don't know in terms of gross numbers. I can't tell you.
22 But it is around a couple of hundred.

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1 MR. SNYDER: We have those numbers. We can get
2 them.

3 VOICE: Depending upon how that requirement is
4 written, though, we have to be very careful with regard to
5 these now 29 research and test reactors that we have discovered.

6 COMMISSIONER GILINSKY: We would have to include
7 all facilities above threshold quantities.

8 VOICE: And those impacts may be beyond this
9 couple of hundred.

10 MR. SNYDER: That wasn't considered in our
11 hearing.

12 COMMISSIONER GILINSKY: Well, we have a problem.
13 But they have a problem that they are fooling around with
14 plutonium and highly enriched uranium.

15 COMMISSIONER AHEARNE: The research and training
16 reactor was considered.

17 MR. SNYDER: But not to the extent -- the Staff
18 has only recently identified a larger number. We used to
19 talk in terms of six, and now they're talking in terms of
20 five times that.

21 COMMISSIONER AHEARNE: You mean since the hearing?

22 MR. SNYDER: Yes. It just came up a couple of
23 weeks ago.

24 COMMISSIONER GILINSKY: I would draw a sharp line
25 between the material problems and the reactor clearances for

1 facilities handling formula quantities of strategic nuclear
2 materials and those reactors which don't.

3 COMMISSIONER AHEARNE: Could I ask another back-
4 ground question, if I can, since I wasn't here when this rule
5 first went out to be addressed? What was it that you hoped
6 to resolve?

7 CHAIRMAN HENDRIE: Well, among other things, there
8 were the questions of implementation and what it all meant
9 under 355. One of the questions was: There, would not a
10 substantially more rigorous program of examination of the
11 antecedents of employees who were in a position to be close
12 to vital areas be very useful?

13 And the thought was: Yes, indeed, it may be; but,
14 on the other hand, there was recognition that you then brought
15 another, I don't know, 15-odd-thousand people under the
16 national security system, if these clearances were national
17 security clearances.

18 Now one time I managed to get, on a mixed vote through
19 the Commission, a legislative proposal to go up and establish
20 that authority -- under the law, to establish a clearance
21 program on a health and safety basis, primarily, so that you
22 could adopt your criteria for clearance for that purpose and
23 not have to have it identical to the classical national
24 security access to buy material standards. And we got that
25 to Congress, but it didn't go anywhere. And subsequently, since

1 the clearance part of it seemed to be the most controversial
2 area, we lopped that part off. The rest of it was that
3 proposed Part 147, which was resubmitted again this year and
4 is actually in the House Authorization bill as an amendment.

5 COMMISSIONER AHEARNE: So there was some concern in
6 the original putting out of the promulgation of the proposed
7 rule for the safety of reactors?

8 CHAIRMAN HENDRIE: That was the primary thing.

9 MR. MURRAY: The original Notice of Proposed
10 Rulemaking contained the following sentence, Mr. Ahearne:
11 "These regulations are being prepared to utilize the personnel
12 security program as a measure to protect against those
13 employed in the effective nuclear activity who might conspire
14 to steal or divert specialized nuclear material, or conduct
15 sabotage which would endanger the public by exposure to
16 radiation."

17 COMMISSIONER AHEARNE: So I don't think we can just
18 put aside -- and I think if we are putting aside completely
19 the question of reactor clearances, I think that we are going
20 too far.

21 I think we have to take some further steps, and
22 so I would end up getting back to -- and I'm not sure whether
23 it is a request to the General Counsel, or a request to the
24 General Counsel and DOE, or a request that they review to
25 address that legal issue that the Board thought was fundamental

1 to take that next step as far as reactor clearances are
2 concerned.

3 MR. SNYDER: I would like to remind the Commission
4 also that there have been some deferrals of things like pat-
5 down rules for reactors pending the outcome of this.

6 CHAIRMAN HENDRIE: John, that question we could
7 usefully have an opinion. I think we already have -- I
8 don't know whether, I assume the comments of counsel that
9 they reflected the ELD's position, I don't know that there's
10 any question in going back and asking ELD: Do you agree with
11 what you said at the hearing?

12 MR. MURRAY: Well, we could probably provide you
13 with more comprehensive explanation in a concise fashion.

14 CHAIRMAN HENDRIE: Well, that is possible. But
15 I think if you're going to ask some more lawyers about it,
16 why maybe we ought to ask the crowd who hasn't committed
17 themselves and see if they agree.

18 They could always go and ask Jim what the better
19 reasons were, but it appears to me that that question in fact
20 is a little narrower than it need be for our purposes. It
21 was correctly phrased by the Board in the context of this
22 rule, because of the way in which the rule was phrased, which
23 was to use 161(i) of the Atomic Energy Commission authority
24 for this clearance, and say -- and propose a rule that said
25 reactor people have national security clearances under the

1 authority of 161(i) of the statute.

2 Now indeed it seems to me you could still ask, if
3 we went that way, do we have to conform to the set of
4 criteria that DOE uses? And I don't know how that comes out.
5 My guess is: probably "yes," but that is a total layman's
6 opinion.

7 COMMISSIONER AHEARNE: I think there is another
8 legal opinion: that says "no."

9 CHAIRMAN HENDRIE: But it is a much less interesting
10 answer, to me, than the answer to the following question or
11 questions: At this stage, with the Board having said,
12 Look, the rule as proposed, at least as regards reactors,
13 does not seem to us to have been adequately supported, and
14 there are a number of problems, and we recommend you not rush
15 into this.

16 The Commission, nevertheless, has before it aspects
17 of trying to provide some reasonable framework in which people
18 at commercial power plants who have access to the guts of the
19 machine may reasonably be thought to be a stable and reliable
20 employee of the operating organization.

21 Now you don't need national security clearances to
22 do that, a number of people have said. So quite apart from
23 what 161(i) says about access to special nuclear material,
24 I would ask: Is it not well within the powers of the
25 Commission, would you think, to write the regulation along the

1 lines of the Board's recommendation, saying that employees
2 who have access to vital areas, there should be suitable
3 background screening by the employers, by the licensee who is
4 the employer of these individuals?

5 And the rationale to this is, you would just as
6 soon they did not create sabotage, and thereby raise health
7 and safety problems, or questions outside the boundary of
8 the site.

9 Now maybe if the answer is "no, you can't do
10 anything like that unless there is something specific in the
11 statute," why then I will think again. But it would seem to
12 me that under the general health and safety mandate, that as
13 long as we don't get too close to national security clearance
14 kinds of things and amplified and uniform application of
15 ANSI 1817, is it? would be a thing within our rulemaking
16 powers.

17 MR. SNYDER: The problem is, the ANSI standard
18 that we do invoke is nonuniformly applied. And there are
19 apparently some difficulties in some cases.

20 CHAIRMAN HENDRIE: What would you think down at that
21 end, or at that end either?

22 MR. MURRAY: I would think that the Supreme Court
23 case of Snyder versus Schmitt would send us to get the
24 specific statutory authority and might give us a problem.
25 We're dealing with First Amendment rights, and the Supreme

1 Court seems to say that you need specific authorization. I
2 don't think it is all that clear, Mr. Chairman.

3 CHAIRMAN HENDRIE: Can you get me out of that?

4 MR. BICKWIT: Not at the moment, no. 161(i) by
5 its terms does extend this kind of thing. There is no doubt
6 about that. But running into constitutional interpretations
7 can cause problems.

8 COMMISSIONER GILINSKY: Does 161(i) give you
9 authority?

10 MR. MURRAY: We think it clearly does. I was
11 suggesting the Chairman's point.

12 COMMISSIONER GILINSKY: Oh, I see. Apart from
13 161(i).

14 CHAIRMAN HENDRIE: Because if I go with 161(i),
15 then I am hung with the answer to the question: Are you then
16 required to follow the criteria established by the old AEC
17 and now used by the Department of Energy in implementing
18 clearances under 161(i)?

19 COMMISSIONER AHEARNE: That's true, if you take
20 that legal position. That's why I say we ought to ask,
21 because that's what the Board said.

22 COMMISSIONER GILINSKY: These are the ones in
23 Part 10?

24 MR. SNYDER: Yes.

25 CHAIRMAN HENDRIE: You think we'd have trouble with

1 a rule which just said "operating employees who have access
2 to vital areas shall be" what? "selected"? "screened on the
3 basis"?

4 MR. MURRAY: If you're going to set up a clearance
5 program for these employees, I think you would have trouble
6 unless you based it on 161(i), because of the decisions of
7 the Supreme Court, which seems to say that you need to have
8 specific authorization in these areas -- specific statutory
9 authorization.

10 MR. BICKWIT: By the way, I don't think the
11 Commission ought to be basing its judgments on his representa-
12 tions at this point.

13 MR. MURRAY: I put them before you with all
14 modesty.

15 MR. BICKWIT: Until others have a chance to come t.

16 CHAIRMAN HENDRIE: I recognize that. But for
17 purposes of discussion, I think it is a helpful illumination
18 as to whether the problem areas may lie. Let me ask the
19 following:

20 The Commission, I would judge then, suppose we
21 came out and said persons with criminal records, including
22 two or more violations above a certain threshold of severity,
23 ought not to be employed in vital areas of power plants?

24 I suppose, similarly, if we passed a regulation
25 saying that certifiably insane persons ought not to be

1 employed at these plants, that would also run into precisely
2 the same authority?

3 MR. MURRAY: No, I think not. We are talking about
4 a full-blown clearance program based in the traditional way
5 that those clearance programs are structured.

6 CHAIRMAN HENDRIE: Well, how about 1817, the ANSI
7 standard?

8 MR. MURRAY: That is a clearance program.

9 CHAIRMAN HENDRIE: What do we say in the regulations
10 now?

11 MR. SNYDER: I think there is a reference to 1817.

12 CHAIRMAN HENDRIE: Is it in the regulations?

13 MR. SNYDER: I'm not sure.

14 CHAIRMAN HENDRIE: Or is it in the standard?

15 MR. SNYDER: It is a Reg Guide, I guess.

16 CHAIRMAN HENDRIE: There. That solves the problem.

17 We will put it in the Reg Guide. That is not a regulation.

18 MR. MURRAY: Mr. Chairman, to the extent that you
19 could distinguish between a reliability standard on the one
20 hand and a clearance program on the other, I think that a
21 reliability program could be supported.

22 But you can get into shady areas there.

23 COMMISSIONER AHEARNE: I don't think we should
24 try to bend words around when we're really trying to set up
25 something specific.

1 MR. MURRAY: Some of the things you mentioned were
2 in the nature of reliability, and probably would be okay to
3 set up as a standard, but they don't alone constitute a
4 clearance program in the way that phrase is normally under-
5 stood.

6 CHAIRMAN HENDRIE: I guess I don't quite understand
7 the difference.

8 COMMISSIONER AHEARNE: As you say, there are at
9 least two legal questions. And one is: Can you set up that
10 kind of an alternative program using other than 161(i)? And
11 if the answer is "no," then there is also that other question:
12 Can you, in 161(i), do we have to pin ourselves to the DOE
13 standards?

14 COMMISSIONER GILINSKY: There is also another
15 course which is to talk to DOE about these criteria. Have
16 they shown any interest in modernizing their criteria?

17 VOICE: They presently do have that under
18 review, and we have met with them and discussed it. They
19 are taking another look at it, and they have a study to
20 look at that, and they are supposed to get back to us shortly.

21 We don't know how quickly they will move.

22 VOICE: Mr. Commissioner, as of this morning
23 we expect a study from Battelle on the criteria to come
24 within a month or so. DOE plans to look at their information
25 criteria regulations within a year, and then their access

1 authorization regulations within the following year. So
2 within two years DOE expects to have revised regulations.

3 MR. SNYDER: I have a feeling that two years ago
4 they told us they were going to look at that, at least two
5 years ago.

6 CHAIRMAN HEND. : Two years ago we were looking
7 at it, too. The problem simply is that it is one very
8 difficult proposition to write down a set of criteria for
9 what you are going to look for in culling through a background
10 information on an individual and deciding does the individual
11 then fall in or out of the acceptable category.

12 And no matter how you cut it, you're going to end
13 up with argument over those criteria. And maybe some of the
14 ones that were instituted a quarter of a century ago will
15 get a rewording and change. But I will bet you a cookie
16 there will still be a lot in there to give at least some
17 people agony and create difficult cases, and so on.

18 It just is an awkward matter. I'm not convinced
19 that for reactor or plant employees you need quite the same
20 sort of thing. At one point I thought that, well, okay, if
21 this clearance system -- it is a system which is in existence.
22 I don't know, there must be a third of a million people who
23 have these clearances now.

24 It seems to be workable, but I would say it is
25 the only system for trying to improve your assurance of

1 reliability of employees. And I'm perfectly willing to go
2 off in the direction of some of the industry standards on
3 reliability testing, or review of things that have been
4 suggested in this proceeding and in the literature on this
5 subject.

6 COMMISSIONER GILINSKY: Well, that is what has
7 been going on.

8 CHAIRMAN HENDRIE: It is what has been going on,
9 but I can see a certain amount of difficulty lying before us.
10 If we establish requirements that utility operating organiza-
11 tions be staffed according to these kinds of measures, and
12 that requirement or -- in quotes, now, you understand -- is
13 in staff positions and staff guidance, and we decide that it
14 can't be implemented with the regulations because it is
15 illegal, I've got a notion that puts the Regulatory Guide
16 and the staff positions in some doubt as to their implementa-
17 bility.

18 So I don't think just saying, well, it's too hard
19 a problem to deal with in terms of regulations, in view of
20 the legal problem, so we will just forget it and let it
21 drift, in the terms of let the staff not tell us what they're
22 doing, but go ahead and do it, I don't think that washes.

23 So I think we have to deal with it in some way.

24 COMMISSIONER AHEARNE: It sounds familiar.

25 CHAIRMAN HENDRIE: There are these two questions

1 that we have sketched here about what legal scholars would
2 deliver up on the matter. And I guess there is a third
3 question I would ask, which is only partly legal, and it
4 relates to what Jim Murray said.

5 And that is: Could somebody sketch out for us what
6 a reliability of the employee's program would look like versus
7 a clearance program? So that we can see if indeed we perceive
8 any arguable difference between them, and then might find that
9 indeed a reliability of the employee's program is within the
10 authority of this Commission to write rules about?

11 And then we could think about it along those lines.

12 MR. MURRAY: Mr. Chairman, we're not telling you
13 that you don't have authority to write a clearance program.

14 COMMISSIONER GILINSKY: What is this hangup about
15 criteria?

16 MR. MURRAY: We believe that the better view is
17 that we probably have to stick pretty close to the DOE
18 criteria.

19 CHAIRMAN HENDRIE: Well, that is a thing --

20 COMMISSIONER GILINSKY: We would be interpreting
21 them, in any case.

22 COMMISSIONER AHEARNE: That's true. But why can't
23 we implement the mass security clearance program for that,
24 and I hope we can identify whatever that universe is that
25 handle formula quantities and material.

1 CHAIRMAN HENDRIE: That is a separable item.

2 COMMISSIONER GILINSKY: Why don't we deal with the
3 problem that we all agree really needs to be dealt with?

4 COMMISSIONER AHEARNE: That is part of the problem
5 that I hope we all agree needs to be dealt with, and I think
6 we ought to do that. And in addition, I think we ought to
7 ask the General Counsel to tell us whether or not we have to
8 follow the DOE criteria.

9 If, as I suspect, the answer might be not, then
10 there is a reasonable alternative.

11 COMMISSIONER GILINSKY: Well, let's do that.
12 Develop a plan for dealing with the fuel cycle and ask the
13 General Counsel whether we need to follow the DOE criteria.

14 COMMISSIONER AHEARNE: Because the Board has come
15 up with a proposed reasonable alternative.

16 CHAIRMAN HENDRIE: Well, I must say, it seemed to
17 me that the Board was pointing in a reasonable direction.
18 Let's understand what we mean by "fuel cycle facilities."

19 COMMISSIONER AHEARNE: I said, "facilities to handle
20 strategic quantities.

21 COMMISSIONER GILINSKY: That is 5 kilograms and
22 above.

23 COMMISSIONER AHEARNE: In fact, the Board said
24 the research people agreed.

25 COMMISSIONER GILINSKY: Why would you treat them

1 any differently?

2 CHAIRMAN HENDRIE: The Board said, "do something
3 different for them," as I recall.

4 COMMISSIONER GILINSKY: I don't think they address
5 this whole area very clearly.

6 COMMISSIONER AHEARNE: It said, "The staff stated
7 that it was their intention to apply the rule only to those
8 in research and training facilities that possess formula
9 quantities of special nuclear material, because most of the
10 effects of research and training reactors have agreed with
11 the proposed revision. The Board recommends adoption."

end #2

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1 CHAIRMAN HENDRIE: You would propose to clear all
2 of the professors, students, and employees at a university
3 research reactor who entered the facility.

4 COMMISSIONER GILINSKY: Anyone who had access to the
5 material, yes, in the same way that a worker had access to it
6 on an assembly line.

7 CHAIRMAN HENDRIE: Even though the stuff is in the
8 core?

9 COMMISSIONER GILINSKY: Depending upon how it is
10 irradiated. It depends upon whether in the view of our staff
11 it can be taken out and used for explosive purposes. If it
12 is relatively easy to do that, then it hasn't been highly
13 irradiated. I would put it in exactly the same category as
14 material in the fuel cycle facility.

15 COMMISSIONER AHEARNE: That is saying that as long
16 as the fuel is in that kind of status, you have to have special
17 precautions as to who gets access to it.

18 COMMISSIONER GILINSKY: Right. I mean what makes
19 professors any different than anybody else? Or students, for
20 that matter?

21 CHAIRMAN HENDRIE: It seems to me that when we talk
22 about safeguards of the rules and so on, we said that stuff
23 that is in the core and has some level of activation falls outside
24 the rule. There was a discussion later on that increased the
25 number where there was concern that the peripheral elements in

gsh 2 1 some of -- in many of the research reactors would not maintain
2 100R at three feet radiation level, and then come under --
3 bring those things back on to the upgrade.

4 COMMISSIONER GILINSKY: Well, we've obviously got
5 to have some sort of criteria for self-protection and material
6 that falls on one side of it would be treated the same as
7 fuel cycle facilities and the other side of it wouldn't.

8 CHAIRMAN HENDRIE: Well, perhaps I delude myself
9 but I continue to see some faint difference between irradiated
10 fuel in the core of a machine and the stuff along the
11 production line of a fuel material processing plant in terms
12 of steelability and usability and convertability and general
13 hazard to the public.

14 COMMISSIONER GILINSKY: I think that we have agreed
15 that above some level of radiation, that is the case.

16 COMMISSIONER AHEARNE: Do you draw that distinction,
17 Joe, before the fuel is loaded into the reactor?

18 CHAIRMAN HENDRIE: In the safeguards, as I recall
19 the safeguards rule, you would implement special provisions while
20 y had the stuff on site and you cranked the machine up. And
21 if you had more than a certain amount on the irradiated fuel,
22 . . you sent the fuel back to the fabricator, let him keep it in
23 the vault.

24 It looked as though there were going to be ways there
25 to work out reasonable accommodations, or at least there were,

gsh 3
1 until this latest ring around about radiation level and
2 maintaining that 100R per hour rate came up.

3 And I don't know where it all falls now.

4 COMMISSIONER GILINSKY: Jim, has spoken for the
5 LDE. Is there any overall staff view on this?

6 MR. GOSSICK: No, I don't think so, frankly. I have
7 not had the staff together to have a discussion about this.

8 MR. MURRAY: We did talk to the staff on this
9 and anything I said is consistent with the staff's views.

10 CHAIRMAN HENDRIE: I think it would be useful to look
11 at how a separated out fuel cycle rule might look, fuel cycle
12 facility clearance rule might look, on the one hand, as a
13 draft. And for the rest, I think somebody ought to crank away
14 on the three sorts of things that I've suggested, sort of
15 starting at the narrowest one, it seems to me. If we hang some
16 sort of clearance or other employee approval procedure on 161(i),
17 we do get the classic part 10 criteria whether we like it or
18 not? Yea or nay, or maybe, I guess. There is always a
19 possibility.

20 The second question is --

21 MR. SNYDER: Also, if you don't adopt that, what
22 criteria do you use?

23 CHAIRMAN HENDRIE: The second question is, that
24 keeping in mind for reactor personnel, I don't know that there's
25 anything about the bad saying, national security clearance --

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1 that makes me feel so especially good that we need that
2 nomenclature. An appropriate reliability program would do fine
3 and recognizing that there is some possibility that we could
4 create a difference between reliability programs and clearance
5 programs.

6 Is there some room under the statute that would give
7 us authority to put in right of rule with some requirements in
8 it for some review of employee reliability on health and safety
9 grounds and without hanging on this 161(i) access language.

10 And then, thirdly, the one -- how could one shape an
11 explanation of a program which would be, in quotes, "a reliability
12 program versus the clearance program of 161(i)." And is there --
13 can a difference be made that would be supportable and
14 on which one would feel that litigations -- in which one would
15 feel one's litigation risks were not all that large for being
16 overturned on it.

17 Because it seems to me that if the answer to the
18 latter two questions is, yes, you can do, you could find that
19 authority and you could make that distinction and go that way.
20 Then I think there is a direction to go which is the one the
21 board has recommended.

22 And we could then work further down that line.

23 Mr. Bickwit. Mr. Chairman, I think it would be
24 preferable to have the staff tackle those questions and to put
25 its analysis on the record rather than our seeking the staff

gsl. 5

1 advice and then formulating our own analysis. And then for us
2 to give you our analysis based on the staff's analysis and
3 anybody else, any other parties to this proceeding who might
4 want to respond to it.

5 Mr. Murray. Whatever you wish, Mr. Chairman.

6 Ms. Nordlinger. Also, I just wanted to add that
7 our paper that I sent up made no attempt to recommend to the
8 commission what it ought to do about the board's report. We
9 were just dealing with the fact that there were certain
10 deficiencies in it.

11 I think there might be some further question of
12 whether or not the commission is just going to adopt recommendation
13 of the board with regard to some of the issues, psychological
14 testing and whatever, that I think require some greater
15 examination.

16 CHAIRMAN HENDRIE: I think I need to know where I
17 stand with regard to these other questions. If, for instance,
18 it comes down that, no, you can't make a difference, then that
19 is worth arguing ultimately between a reliability program and
20 a clearance program.

21 There's only one kind of clearance program and the
22 only way you can support it is 161(i), and the only way that
23 you can do that is to use the Part 10 criteria and call it a
24 national security clearance.

25 Then I think we scratch our heads and start thinking

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1 about sort of new approaches. If the answer is yes, that it
2 looks like we could shape an approach that would go that way,
3 then I think some of the questions that you talk about arise
4 and then we would have to see whether we think the record in
5 this proceeding would support those directions or whether we
6 would, in effect, be launching a new venture upon which this
7 record could always be used as a base and referred to, but
8 which would need to be supplemented.

9 COMMISSIONER GILINSKY: It seems to me a national
10 security program flows from executive order authority; whereas,
11 161(i) is a different sort of animal.

12 CHAIRMAN HENDRIE: I may be using not quite the right
13 nomenclature. Every time I said national security clearance,
14 I have meant a clearance under 161(i).

15 COMMISSIONER GILINSKY: I think an important distinction
16 here is the statutory basis for this. And there isn't for the
17 other. And I think it is not a good idea to extend national
18 security programs to the purely private sector to cover
19 activities which really are private.

20 In other words, they are not conducted on a contract
21 to the government. I think one ought to require a statutory
22 basis for any such extension of clearance programs and 161(i)
23 does provide such a basis.

24 That's why I've always preferred basing our programs
25 on that authority. If we're simply going to say that something

gsh 7 1 is dangerous and therefore, one ought to invoke national
2 security classification, then it's not clear where you draw
3 the line between reactors and dams and bridges and oil
4 refineries and God knows what else.

5 COMMISSICNER AHEARNE: Just so the questions don't
6 get lost --

7 CHAIRMAN HENDRIE: Wait a minute. Let me not go
8 away from that. Let me ask a moment -- would you tell me if
9 I go and ask the government of the United States for a
10 clearance to have access to special nuclear material under
11 161(i), wherein said clearance in any fashion at any step of
12 the way is distinguishable from what I would call the National
13 Security Clearance --

14 COMMISSIONER GILINSKY: It depends upon which
15 criteria. Each agency processes clearances and covers activities
16 within its purview. And it depends upon the criteria of the
17 agency.

18 I think other things being equal, it's desirable
19 that they be the same as DOE applies in our case. But I think
20 it seems to me that there is a great difference in not proceeding
21 on the basis of statutory authority as opposed to invoking the
22 authority pursuant to executive order.

23 MR. MURRAY: But the criteria would look largely
24 the same. Indeed, you recall staff papers which came to the
25 commission, indeed, before this rule-making got underway and

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1 which were sort of the progenitors for the rule-making itself
2 when all of this was discussed.

3 And it was pointed out that the staff attempted to
4 develop different criteria for access and you couldn't get
5 that far away to make that much difference.

6 We acknowledge that several existing criteria are
7 anachronistic.

8 COMMISSIONER GILINSKY: As I remember, and I may
9 be wrong, it wasn't a legal question. It was the commissioners
10 at that time did not want to depart from the criteria.

11 MR. MURRAY: There was certainly that element.

12 COMMISSIONER GILINSKY: I don't remember if it ever
13 came to a legal question whether we could require it.

14 MR. MURRAY: It was discussed.

15 COMMISSIONER GILINSKY: I just don't remember.

16 CHAIRMAN HENDRIE: You seem to be saying that -- I
17 don't know what you are saying. Do you think any sort of
18 review of reactor plant employees is appropriate?

19 COMMISSIONER GILINSKY: I would not at this point
20 start a clearance program to cover reactor employees.

21 CHAIRMAN HENDRIE: You just wouldn't have anything
22 in the regulations about employees at these plants?

23 COMMISSIONER GILINSKY: I'm not sure, but I'm
24 not ready to move forward with it now and my inclination is to
25 say probably not. I would not want to promulgate an NRC

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gsh 9 1 clearance program to cover the utilities.

2 But there is another point, which is that if one
3 does do it, I think that there's an important distinction
4 whether you use national security authority flowing from
5 executive order or whether you use statutory authority coming
6 from the Atomic Energy Act. And if it came to doing it, I
7 would prefer to use the Atomic Energy Act, as amended.

8 CHAIRMAN HENDRIE: That means the classic Atomic
9 Energy community clearances, the national agency background
10 check and review against the Part 10 criteria.

11 COMMISSIONER GILINSKY: I'm not sure because in the
12 past, those have been applied in other areas and we may be
13 free to adjust the criteria for our purposes.

14 I don't know the answer to that and that is why I
15 agree with John. We've got to try to get the answers.

16 COMMISSIONER AHEARNE: What I wanted to say is that
17 in this long list of questions that are being asked, I wanted
18 to make sure that two did not get lost. I think I understand
19 LED's position. I clearly don't have the same summary that
20 Jim spoke about, but I understand their conclusions.

21 And so at some point, I am going to be interested
22 in getting OGC's conclusion on whether or not we are required
23 to follow the criteria of DOE, and if it helps to have some
24 alternative. Bernie said, well, what alternative might you
25 have in mind as a working alternative? You would use at least

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1 what the board was saying here is an alternative that might
2 be usable.

3 The second is that in the construction of a segmented
4 out piece, I would like to see not only the fuel cycle
5 facilities, but to the extent that it is possible, handling
6 formula quantities of SNM, which does go into the transportation
7 area and does go into the research reactor area.

8 Mr. BICKWIT. I might say that we can go directly
9 to the OGC analysis, if the staff wants to rest on what it has
10 in the record as far as its own legal views on these questions
11 are concerned.

12 MR. MURRAY: We would be happy to provide that. We've
13 already got it written.

14 MR. BICKWIT: I mean the staff has considered these
15 questions to a greater extent than OGC has. And we would want
16 to go to the staff for its views. And the best way to do that
17 I think is on the record.

18 MR. MURRAY: But if you order us to do it, Mr.
19 Chairman, I would plead with you to change that last sentence
20 on the first page of the order, which says, further, the
21 staff should provide a legal analysis for its position that the
22 NRC must follow the standards for access.

23 CHAIRMAN HENDRIE: We are not going anywhere where
24 we're going to order.

25 MR. MURRAY: We did not take that position.

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1 CHAIRMAN HENDRIE: What I would ask is that some
2 material on these several items, as I have enumerated them,
3 be provided. And the counsel says that he thinks it would be
4 helpful if the staff provided those, in effect, on the
5 record. Just in the event, I might say, that we do move
6 forward within the context of this proceeding, why, that is
7 an appropriate way to go.

8 It may be that we would come to the point where we
9 would have to chuck the whole thing and say, well, you can't
10 win them all. Forget it.

11 COMMISSIONER AHEARNE: I don't think that we would
12 have to do that.

13 CHAIRMAN HENDRIE: Well, I think that that is
14 getting to be a good possibility. Okay. Thank you very much.

15 (Whereupon, at 2:55 p.m., the committee adjourned,
16 to move on to other business.)

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