



Transcript of Proceedings

NUCLEAR REGULATORY COMMISSION

DISCUSSION OF SELECTION AND TRAINING
PROCESS FOR ASLBP MEMBERS

March 15, 1979

Pages 1 - 62

Prepared by:
C. H. Brown
Office of the Secretary

7904030101 ,

DISCLAIMER

This is an unofficial transcript of a meeting of the United States Nuclear Regulatory Commission held on March 15, 1979 in the Commission's offices at 1717 H Street, N. W., Washington, D. C. The meeting was open to public attendance and observation. This transcript has not been reviewed, corrected, or edited, and it may contain inaccuracies.

The transcript is intended solely for general informational purposes. As provided by 10 CFR 9.103, it is not part of the formal or informal record of decision of the matters discussed. Expressions of opinion in this transcript do not necessarily reflect final determinations or beliefs. No pleading or other paper may be filed with the Commission in any proceeding as the result of or addressed to any statement or argument contained herein, except as the Commission may authorize.

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

Discussion of Selection and Training
Process for ASLBP Members

Commissioners' Conference Room
1717 H Street, N.W.
Washington, D. C.

Thursday, March 15, 1979

The Commission met, pursuant to notice at 9:40 a.m.,
Joseph Hendrie, Chairman of the Commission, presiding.

PRESENT:

Chairman Hendrie
Commissioner Gilinsky
Commissioner Kennedy
Commissioner Bradford
Commissioner Ahearne

ALSO PRESENT:

J. Fitzgerald
L. Gossick
S. Chilk
J. Kelley
A. Rosenthal
J. Yore
R. Lazo
G. Sege

P R O C E E D I N G S

CHAIRMAN HENDRIE: The first subject this morning a discussion of a study that was carried out on the selection and training matters for the Atomic Safety and Licensing Board Panel Members.

Let's see, we have members of the Board and the Appeals Board here to help out. This study was mandated by the authorization act that we are operating under and we were due to report to the Congress on January 1st, but it became clear some time ago that the study was not completed in an orderly way by that time, and we talked to the committee staffs, and having an informal agreement to run over that time as necessary, I'm not sure what we have promised-- the submission date. Do you know Jim?

MR. FITZGERALD: I think that that was left open. Some time in March.

COMMISSIONER AHEARNE: There is a comment, I guess a paper that you sent up, somewhere saying that the Senate Authorization Committee hoped, to certainly get this by the end of March.

MR. FITZGERALD: Right.

MR. KELLEY: That was Congressional's view. We are going to have it up there before going back to the Hart Committee.

CHAIRMAN HENDRIE: Okay, let's see, should I ask

1 you, as one of the proprietories of the effort to start
2 out?

3 MR. FITZGERALD: Well, I would be happy to kick
4 it off with a little background of the origin of this
5 task, and also ---

6 COMMISSIONER KENNEDY: Could we start by assuming
7 that we have read the paper. Is that fair? I mean, I'm
8 just thinking of shortening the background so that we can
9 get through some of the agenda today so it won't be all
10 carried over until tomorrow, as usual.

11 COMMISSIONER GILINSKY: That's a novel approach.

12 COMMISSIONER KENNEDY: I'm just speeding the
13 licensing process.

14 COMMISSIONER GILINSKY: Here, here.

15 MR. FITZGERALD: Well, that eliminates most of
16 what I had to say.

17 (Laughter)

18 CHAIRMAN HENDRIE: Would you state your name for
19 the record, please?

20 COMMISSIONER KENNEDY: Think of what I have saved
21 you.

22 CHAIRMAN HENDRIE: I think you had better tough
23 the high points along the line, Jim, to lay the background
24 for the discussion.

25 COMMISSIONER BRADFORD: Fine.

1 MR. FITZGERALD: Well, in brief ---

2 COMMISSIONER KENNEDY: I'll try each time. The
3 record will continually be replete with efforts to move the
4 licensing process forward.

5 CHAIRMAN HENDRIE: I heartily endorse them.

6 MR. FITZGERALD: A couple of GAO reports issued
7 in the late winter or early spring of '78, particularly one
8 involving North Anna and Board Notifications, dealt also
9 with the general performance and qualifications of the
10 licensing boards.

11 GAO, in one of its reports, did find that there
12 were a lack of meaningful position descriptions for members
13 of the boards, little publicity with regard to vacancies
14 on the boards, and little attempt to establish the independence
15 of new members.

16 They found a lack of any attempt to evaluate the
17 performance of the boards, and raised the possibility that there
18 was no adequate formal training program for board members.

19 They recommended that minimum qualifications for
20 board membership be established, that the need for training
21 be determined, and that a competitive system of filling
22 vacancies be established.

23 The Chairman, in a letter in response to this
24 GAO report indicated that the PDs were being upgraded, that
25 greater publicity would be given to vacancies, and that an

1 expanded orientation program would be instituted.

2 Nevertheless, the section in the authorization
3 bill that had been drafted back in March and April of '78
4 persisted and ultimately got enacted in November. Your
5 response was to establish a working group with directions
6 to nail down or identify the present process, the present
7 process back then, for selection and training, identify
8 the process of an analogous group as far as selection and
9 training, which would be the administrative law judges
10 throughout the federal agencies; consult with people inside
11 NRC that are knowledgeable about the adjudicatory process and
12 also seek the views of people outside NRC for independent
13 view points for comments, ideas; then give to you a report
14 of any findings, opinions and recommendations that the
15 group might have.

16 We contacted outside people by a questionnaire
17 that we sent to a rather large sample of the practitioners
18 before the licensing boards. NRC practitioners, applicant
19 attorneys, state attorneys and also intervenor attorneys,
20 and some NRC staff management.

21 We also conducted personal interviews with members
22 of the licensing board, the Civil Service Commission's
23 ALJ office and several individuals knowledgeable about
24 adjudications generally. We also conducted some interviews
25 with NRC technical staff. A literature search was also done

1 with the help of the Administrative Conference that
2 identified several documents that dealt with ALJs, selection
3 and training. There is nothing that dealt with -- by the
4 Administrative Conference that dealt with the selection and
5 traning of licensing board members, specifically.

6 Then, working collegially, we came up with the
7 recommendations that are discussed at pages 34 thru 49 of
8 our report, and they are summarized in Section 6 on pages
9 49 to 51. The working group is here to discuss, answer any
10 questions that you may have.

11 CHAIRMAN HENDRIE: Okay. That wasn't too long.

12 Jim, you people are the beneficiaries of these
13 recommendations, why don't you -- we have a memorandum,
14 Bob Lazo sent it us, so why don't you hit the points in
15 there where you disagree or would like to see qualification
16 of the recommendations in the stud' summary.

17 MR. YORE: Well, first of all, I would like to
18 say that we think the working group did a very good job.

19 We have a few comments that I would like to
20 discuss or suggestions. These are mostly administrative
21 in nature, but perhaps they could be used as qualifications
22 in any transmittal that went to Congress with this report.

23 The first item is -- I have gone through the
24 page numbers here, is on page 50, and that is the interview --
25 the recommendation is that the candidates be interviewed by

1 five Commissioners. Quote: "Have all of the
2 Commissioners interview the three candidates referred by the
3 Steering Committee."

4 Well, there is a problem with scheduling with two
5 Commissioners, trying to conduct these interviews, and
6 five Commissioners does pose a problem. I am really bringing
7 this to your attention if this is necessary. We feel that
8 an interview by two Commissioners would suffice and I point
9 this out to you because ---

10 COMMISSIONER KENNEDY: Let me note for the record,
11 I have never had any difficulty in scheduling such interview.

12 COMMISSIONER BRADFORD: The problem isn't scheduling
13 the interview.

14 COMMISSIONER KENNEDY: Well, it is reaching
15 conclusions.

16 MR. YORE: Well, I didn't want to say that.

17 COMMISSIONER KENNEDY: Well, that suggests that
18 there must be some merit in the five Commissioners meeting
19 with them.

20 MR. YORE: I offer this for your task.

21 I think the report should be made clear that the
22 selection by the Commissioners is not limited to the names
23 submitted. Now, there is that flavor in it, even though
24 there is a qualification in the supplemental memorandum that
25 was sent, but the report itself seems to -- you could read it

1 that it would limit the choice of the Commissioners -- the
2 ones that are sent to them by Steering Committee.

3 The second point, on page 50, quote: "Discontinue
4 the practice of having new members observe a licensing board
5 proceeding before being assigned to the boards themselves."

6 We are opposed completely to this recommendation.
7 In fact, we think our people should go to more hearings,
8 observe more hearings, get more experience. In other words,
9 find out what public participation consists of at these
10 hearings. The intervention, the types of interventions
11 that are experienced. I think it would be really poor policy
12 not to let our people go -- let the new members go to observe
13 the hearings in progress.

14 Page 36, the members of the Screening Committee
15 should be drawn from both within and without the Commission
16 and the government. I think it provides for five or seven --
17 five to seven member selection committee.

18 Now, it should be noted that if we go outside
19 the Commission, as we understand it, then the procedure is
20 subject to the provisions of the Advisory Committee Act.
21 Now, correct me if I'm wrong, Jim, on that one.

22 MR. FITZGERALD: No, that's correct.

23 MR. YORE: That's the way I understood it.

24 This would put certain restrictions -- are these
25 added layers of procedures necessary to do this job? We

1 would suggest that it be left within the Commission. We
2 think other offices within the Commission should participate
3 in the Steering Committee, but if you go outside of the
4 government, I think you are going to have problems of
5 scheduling and so on.

6 COMMISSIONER AHEARNE: If you go to the Advisory
7 Committee format, do you have provisions for keeping the
8 meetings and closed and ---

9 MR. FITZGERALD: Yes, it does. They are closeable
10 under Exemption 6 of the Sunshine Act if you they are dealing
11 personal matters that might create an unwarranted invasion of
12 privacy.

13 I might add here that the judicial nominating
14 committees that are widely used now are chartered as
15 advisory committees. They have open sessions for organization
16 and that sort of thing, but when they are talking about
17 people's qualifications and what have you, they are done in
18 closed session.

19 MR. YORE: We believe that these committees should
20 be structured so as not to relinquish Commission control,
21 and it should be made clear in the report that there are
22 no restrictions on the authority of the Commissioners to
23 select. They are not bound by whatever the Steering Committee
24 is going to do.

25 COMMISSIONER AHEARNE: Could I ask Jim on that one:

1 I was a little unclear in reading Bob's comment on that
2 one. I wasn't really sure to what extent you had intended
3 to so-called limit the Commission's control.

4 MR. FITZGERALD: Well, we hadn't intended to limit
5 the Commission control, but we wanted to make it clear that
6 the Commission should pick from the three that they interviewed
7 in depth, and that you establish this elaborate procedure
8 for screening, in most instances.

9 Again, with a judicial nominating commission, the
10 President certainly isn't bound by the five names that go
11 up, although historically, generally, he picks from the five.

12 COMMISSIONER AHEARNE: But that was the ---

13 MR. FITZGERALD: But we had said extraordinary ---
14 I believe our phraseology was "absent extraordinary
15 circumstances" we would expect that the Commission would
16 pick from the three.

17 COMMISSIONER AHEARNE: Extraordinary circumstances
18 would include that none of the three seemed to qualify.

19 MR. FITZGERALD: A total failure of the process.

20 COMMISSIONER AHEARNE: Yes.

21 Then, Jim, to what extent did you believe that would
22 decrease Commission control?

23 MR. YORE: Well, it seems to me that the way the
24 report reads, if you don't get the wording that is in their
25 letter or the memorandum in the report, then the report is

1 quite restrictive.

2 I think, with the qualifying comment that is in
3 their memorandum, the supplemental memorandum, perhaps
4 clears it up.

5 COMMISSIONER AHEARNE: I see.

6 MR. YORE: But if the report is going to Congress
7 and you read that cold, I mean, you are stuck with it.

8 COMMISSIONER AHEARNE: Yes.

9 COMMISSIONER GILINSKY: Could I ask here if Jim is
10 going to respond to the various points, I wonder if we could
11 go back to the one about the recommendation that new members
12 not observe hearings. You seem to say here that the result
13 of this may be they could pick up bad habits is the way I
14 read it. That is a pretty damning statement. Is that what
15 you meant or?

16 MR. FITZGERALD: We feel that -- you know, if you
17 take the practice of observing hearings in a vacuum and
18 you have the new member viewing the best board imaginable,
19 it might be a useful tool.

20 However, the practice is, and it is kind of inherent,
21 to get a new member on you are going to send him out to the
22 next one or two or whatever, that are sitting, and we feel
23 that that's a catch-as-catch-can type of thing and they
24 could pick up bad habits.

25 COMMISSIONER GILINSKY: Still, there is something

1 about a real hearing that is hard to sense in any kind of
2 mock proceedings or training or whatever it is.

3 MR. FITZGERALD: Well, one point to keep in mind
4 is that as far as the attorney candidates are concerned,
5 the selection criteria includes an extensive participation in
6 the procedures.

7 COMMISSIONER AHEARNE: In administrative proceedings,
8 but not in the fairly unusual administrative proceeding of
9 the type of boards that we have.

10 MR. FITZGERALD: That's correct, but in contentious
11 administrative proceedings.

12 COMMISSIONER KENNEDY: Well, isn't this an argument
13 about nothing. These things aren't mutually exclusive, are
14 they?

15 COMMISSIONER AHEARNE: Well, the argument is,
16 though, Dick, they are recommending discontinuing the
17 practice, don't have new members go.

18 MR. YORE: Have a prohibition.

19 COMMISSIONER AHEARNE: Yes.

20 COMMISSIONER KENNEDY: Well, I'm just asking. They
21 don't need to be mutually exclusive. If you think they should
22 be, that's what I'm trying to find out.

23 MR. FITZGERALD: Well, certainly you could have
24 people going to actual hearings and observing and also
25 using training aids such as video tape.

1 COMMISSIONER KENNEDY: One might argue, indeed, if
2 one went to the training aid exercise where the ultimate in
3 perfection was displayed brilliantly so that they would
4 all comprehend it, and then they went to another hearing,
5 they might learn from that how not to do it.

6 MR. FITZGERALD: They might.

7 COMMISSIONER GILINSKY: Well, except the recommen-
8 dation is to discontinue the practice.

9 COMMISSIONER KENNEDY: Yes, I'm just ---

10 COMMISSIONER AHEARNE: Jim, like you. I'm against
11 that one.

12 MR. FITZGERALD: I would like to ask any of my
13 colleagues for any comments they might have on it.

14 MR. SEGE: I'd like to add a few words if I may.

15 One advantage of having a mock trial tapes is
16 that it doesn't have to be perfect. It can have errors in
17 it and it can then be critiqued, because it is performed
18 by actors and what is good about the performance can be pointed
19 out, what is bad can be critiqued. This is very difficult
20 to do with a real board.

21 COMMISSIONER GILINSKY: Well, but you seem to be
22 saying there are errors in real proceedings.

23 COMMISSIONER KENNEDY: Well, it is the real world,
24 you know. There is something to be said for living in it.

25 COMMISSIONER AHEARNE: Was this a unanimous

1 conclusion, Jim, of your ---

2 MR. ROSENTHAL: I strongly endorse this.

3 I think the problem with the neophyte, as it were,
4 observing an actual proceeding is that it may be difficult
5 for him to differentiate between what is good and what is
6 bad practice. He is just thrown out there and he sees the
7 proceeding going on for several days, he gets no guidance
8 of any kind.

9 Now, it seems to me that the risks of poor practice
10 being picked up, as it were, and being treated as the manner
11 in which one of these very unusual type of hearings that
12 we conduct, should be conducted, is sufficiently great that
13 this present procedure of sending the new member out,
14 usually to the first hearing after he has come on board, should
15 be discontinued.

16 So speaking for myself, as a member of the working
17 group, I wholeheartedly endorse the recommendation which was
18 to abandon this practice.

19 COMMISSIONER GILINSKY: Why wouldn't that usefully
20 supplement the other steps that you recommend -- the other
21 means for training board members.

22 I guess I'm kind of surprised that -- I wouldn't
23 be surprised if you said that there are other things that
24 are more useful, but I am surprised with the vehemence with
25 which you insist that this should be discontinued.

1 MR. ROSENTHAL: Well, I think it would be a
2 perfectly good practice if, which is not, it seems to me
3 feasible, the new member were accompanied by another non-
4 participating senior member who could, as the proceeding went
5 on, differentiate for the new member what is, again, good
6 as opposed to bad practice, but throwing that member out,
7 having him sit in the room, as it were, observing what is
8 going on without any opportunity for there to be subsequently
9 a critique of the manner in which that proceeding is conducted,
10 to assist the new member in differentiating between what was
11 good and what was bad hearing management practices, I think
12 is undesirable.

13 Now, the video tape, as has been suggested, you
14 can program it, write a script in which you can program in
15 good and bad management practices in a number of the
16 situations which board members may confront one case to
17 another. And the neophyte can see this, there can be
18 discussion of it involving both the new member's own
19 impressions and the impressions of more senior people. It
20 seems to me that that is not merely an extraordinarily
21 valuable tool, a much more valuable tool than observing on
22 your own a hearing without any guidance. And it seems to me
23 to avoid the pitfalls that are attendant on the present
24 procedures.

25 Now, I grant you, this is not a matter in which

1 reasonable minds cannot differ, I'm not suggesting Jim's
2 views on it are irrational. What I am simply saying is ---

3 COMMISSIONER KENNEDY: Just wrong.

4 (Laughter)

5 MR. ROSENTHAL: Well, it was a judgment of the --
6 it was a unanimous judgment of the four members of the
7 working group that that practice should be discontinued.

8 COMMISSIONER AHEARNE: What is surprising is, at
9 least as I read it, it seems to be an implicit judgment
10 that most of the boards will be filled replete with this
11 bad practice.

12 COMMISSIONER KENNEDY: Well, it implies something
13 else, it seems to me, as I listen to this, and I must say,
14 Allen, I was mystified. It seems to imply that these "neophytes"
15 to whom you refer are, indeed, just that. Individuals whose
16 experience, background and maturity is of such a level that
17 they cannot comprehend what they see in some rational way,
18 and learn from it without some tutorial assistance.

19 I can't accept that. Is it true?

20 MR. ROSENTHAL: I would say that there is some
21 truth to that, yes, given ---

22 COMMISSIONER KENNEDY: I'm shocked to hear that.

23 MR. ROSENTHAL: -- the special nature of our
24 proceedings.

25 Now, I would ---

1 COMMISSIONER KENNEDY: You ought to start back
2 earlier, then, at the selection process, because you know,
3 we are training people who may not be trainable.

4 MR. ROSENTHAL: I tend to think, in the first place,
5 with respect to technical members ---

6 COMMISSIONER KENNEDY: Ah, there's the trouble.

7 MR. ROSENTHAL: -- this is the first exposure of
8 a technical member, normally, to the adjudicatory process,
9 in general, and more particularly, our rather odd form of
10 adjudicatory process.

11 I think there is no reason at all to assume that
12 a new technical member, comes to the task, I don't care
13 how carefully he is selected, with a firm understanding of
14 what his role is. That is something that he has to be
15 taught.

16 With respect to the lawyer members, I would hope
17 that the selection process would work in such a manner that
18 most of the -- not all of the lawyer members would have had
19 some solid foundation in administrative adjudication, but
20 having said that, I must also point out that too, our
21 proceedings are quite different from the type of adjudication
22 that most of the new lawyer members, if they are coming
23 from the outside world, have experienced.

24 So I would say, yes, I have some doubt as to
25 whether, in the case of most of these members they would be

1 able, at the outset, to differentiate between the good and
2 the bad.

3 CHAIRMAN HENDRIE: Let's suppose, for purposes
4 of discussion, that the system indeed provides a set of
5 imperfect proceedings, and we nevertheless have to try to
6 carry out the training exercise. The preparation of the
7 sort of video tape/mock hearings that the panel has
8 suggested is a fine idea, properly done, it is an excellent
9 training tool, very valuable. Properly done, it is also
10 going to chew up substantial chunks of senior board member's
11 time.

12 Considering the rate at which we turn over board
13 members, I wouldn't be surprised but what you would actually
14 save senior member time by sending new members to actual
15 proceedings in company with a training advisor, in effect.
16 Because, I think, by the time you get through trying to put
17 together the video tape series and be satisfied that you have
18 covered all the situations, you will have put in a good many
19 man months of board chairman, vice chairman, and senior
20 member time.

21 Now, if that can be done, if that taping -- that
22 kind of mock hearing exercise can be done -- worked into this
23 schedule, why I would think that would be fine and much to
24 be desired. But I think you have to recognize that it is
25 going to be a time-consuming thing. Those sorts of --

1 the preparation of that sort of film doesn't come easily.

2 Further, I would say that -- well, I recognize
3 the difficulty of getting new members exposed to bad
4 practice, why I think the real hearing situations -- it would
5 be just too valuable to abandon the practice of their going
6 there.

7 - COMMISSIONER KENNEDY: Too, I might even suggest that
8 if they are that bad, they ought to be discontinued and
9 the hearings themselves be reconvened.

10 CHAIRMAN HENDRIE: Well, I would hate to have
11 Commission meetings critiqued on ---

12 COMMISSIONER KENNEDY: Apropos of earlier
13 comments this morning.

14 CHAIRMAN HENDRIE: I think the point of where a
15 new member does attend an actual hearing that it would
16 seem to me to be reasonable there be an attempt to select
17 and schedule that attendance so that one of the senior members
18 of the board can, indeed, go along and provide the kind of
19 critique that would be useful in pointing out, oh, either
20 different ways of handling situations that come up, or what
21 seemed to be errors, if any.

22 COMMISSIONER GILINSKY: We are only talking about,
23 what, one or two new members a year, aren't we?

24 MR. YORE: Yes. Two or three.

25 COMMISSIONER GILINSKY: And ---

1 CHAIRMAN HENDRIE: And if for each one of those
2 either the board chairman or vice chairman or one of the
3 senior members had to go and attend a couple of days of
4 hearing with him to say, now, that wasn't the way to do that.
5 At recess I will tell you how we prefer to do that or whatever.
6 It still strikes me as not a prohibitive time investment,
7 and indeed, as I say, I suspect that is probably the smaller
8 time investment than plunging in and trying to prepare the
9 sort of tape samples that would be very valuable, although
10 as I say, I think that would be a very interesting and useful
11 exercise.

12 I would recommend to the Commission that we suggest
13 to the writers of the report that the abandonment of this
14 practice or discontinuance language be modified to suggest
15 that attendance at hearings would be, for experience, would
16 preferably -- I don't want to make iron rules, but preferably
17 be in company with a senior member of the board who could
18 offer commentary as appropriate and so on, and also, that
19 the tape -- that mock hearings recorded on tape and so on,
20 as a training tool, indeed is to be encouraged.

21 COMMISSIONER KENNEDY: Let me add that there have
22 been some language this morning which implies, which I'm
23 sure no one intends and that is that in fact, a new board
24 member arrives on the scene and as he puts his briefcase
25 down, he picks up his suitcase and goes to the hearing, not

1 having yet been told what city he is in. Now, I don't think
2 that is the case nor certainly not intended to be the case.
3 In fact, he does know a good deal about what is going on,
4 what his role is or at least should, before he goes out to
5 any hearing. And to the extent that that may not be the case,
6 I would hope that surely that could be easily corrected by
7 simply the kind of reasonable and effective orientation that
8 our to precede his attendance at any kind of a hearing.
9 Then with that view, I would certainly second the Chairman's
10 proposal.

11 COMMISSIONER AHEARNE: Let me ask Jim, what ---

12 MR. KELLEY: Let me just comment about the format
13 as it occurs to me you might ask the board.

14 It seems to me that the board, as a collegial body,
15 came up with this report and the recommended whatever they
16 recommended. If following this discussion they have seen
17 the light and they want to abandon that -- I don't know.
18 The report is the report. I think you ought to just reject
19 that part of it if you don't agree with it.

20 COMMISSIONER KENNEDY: What we are talking about
21 is something that should be put in a letter from us forwarding
22 the report ---

23 MR. KELLEY: Well, however you want to say it, but
24 I think that is a point that should be brought up.

25 COMMISSIONER KENNEDY: Yes, that's correct.

1 CHAIRMAN HENDRIE: Well, did the Congress ask us
2 to appoint a committee to make a report to the Congress,
3 upon which we would comment or did it ask for the Commission
4 to make a study and report to the Congress? If it is
5 latter, then by George, it is the five of us on this side
6 of the table who are reporting and you gentlemen, I'm sorry
7 to say, are assisting us in drafting a report. If we don't
8 agree with the draft, well, I'm sorry.

9 COMMISSIONER KENNEDY: You exercised your right to
10 forward your path.

11 (Simultaneous voices.)

12 CHAIRMAN HENDRIE: But if it says Commission
13 report, why --- you know.

14 COMMISSIONER AHEARNE: Could I ask Jim another
15 question that is related to the earlier part. It is your
16 group's conclusion -- it wasn't clear to me when I read
17 through your report. It wasn't clear to me that your group's
18 conclusion is that the current level of training provided
19 is inadequate, is adequate and might be improved, or is quite
20 good?

21 MR. FITZGERALD: I would say -- I don't think we
22 characterized it as such ---

23 COMMISSIONER AHEARNE: I know. That's why I'm asking.

24 MR. FITZGERALD: -- most of the training that
25 is being afforded, we see as good. We recommend the

1 continuance of most, if not all, of the training that is
2 presently being afforded, annual meetings, the legal counsel ---

3 COMMISSIONER AHEARNE: Let me get specific then.
4 The impression that I had was that one of the major mechanisms
5 of training for a new board member is in what this turmoil
6 actually is like, and the procedure is to go to these
7 hearings.

8 Now, you make a very major point that that's really
9 a bad idea, shouldn't do it.

10 MR. FITZGERALD: Right.

11 COMMISSIONER AHEARNE: Now, you go on to say or
12 your point was in here that as one of the interviewees had
13 suggested perhaps this video/mock trial would be a good
14 idea and you don't go into much more elaboration, other than
15 saying in a recommendation to consider the use. So if one
16 explicitly took into -- put into effect what you have
17 recommended, you would cancel attendance at the hearings and
18 you would have another study on whether or not the mock trial
19 approach would be a useful one. So at that stage, we would
20 no longer have that element. There wasn't any -- what
21 seemed to me, a specific recommendation which would say:
22 here's how you would go about training a board member in
23 what is being done in a hearing. So that led me to my
24 question, should I therefore conclude that what is currently
25 being done in the training on how the board actually operates

1 is adequate from your point of view?

2 MR. FITZGERALD: Well, speaking for myself, I
3 believe that what is being done with the exception of sending
4 board members to view actual hearings, is good practice, but
5 should be beefed up as we recommend it.

6 COMMISSIONER AHEARNE: Well, the recommendations are,
7 for example, continue the briefings of the individual, which
8 is sort of more of the same. The only difference, at least
9 that I thought you are recommending, was a consideration
10 which interpret it as a study.

11 MR. FITZGERALD: Well, we were recommending, for
12 example in the training area, that a vehicle be developed,
13 such as minute taking, whereby people that are absent from
14 the annual meetings, Monday morning meetings of where
15 training type of information is put out ---

16 COMMISSIONER AHEARNE: That's a continuation. That's
17 not the new member focus.

18 MR. FITZGERALD: That's correct. It is not part of
19 the orientation.

20 COMMISSIONER AHEARNE: So you are saying then, as
21 far as the new member orientation is concerned, the current
22 approach, even dropping out their attending the boards, in
23 your view, the current approach is quite adequate.

24 MR. FITZGERALD: Well, speaking for myself, I think
25

1 that I contemplate it, regardless of how we may have said it,
2 that video taping, developing a formal training aid in that
3 regard would be done, but we may have come to it differently.

4 COMMISSIONER AHFARNE: That's not what you said.

5 MR. ROSENTHAL: May I address that.

6 I don't think that we recommended any new techniques
7 apart from the video taping. But we have some very specific
8 recommendations as to what should be the content, content, of
9 the indoctrination. The operation goes on, presumably, in
10 the same way it has in the past. They are provided with
11 materials, they are subjected to orientation sessions,
12 presumably run by senior members. We propose the continuation
13 of that. We are very specific, again, as to what we think
14 should be covered, and I have no way of knowing whether all
15 of these matters are covered in what we regard as the
16 appropriate depth, at this time. So I think it is very
17 difficult to say -- at least I would find it very difficult
18 to say whether the orientation of the new members is or is
19 not adequate at this point. We have some ideas as to how it
20 ought to be run in terms of the content and the focus --
21 it is a different focus, obviously, for the lawyers and
22 the technical members.

23 CHAIRMAN HENDRIE: If I go back and see whether I
24 get shaking or nodding or something else of the heads along
25 the table with regard to this thing, as I say, I would

1 suggest that we frame it in terms that it is preferable
2 that new members observing hearings be accompanied by a
3 senior member, at least part of the training staff or the
4 panel who can provide some guidance on whether what he is
5 seeing is good, bad or indifferent, and that we encourage
6 the preparation and use of such things as mock hearings
7 and video tape as training devices. But I think we have to
8 recognize that the whole development of those things is apt
9 to be some time off.

10 Jim, when you get ready to train Vic for Palo Verde,
11 I'd like to review with you, who is going to go with him to
12 his reservation hearing ---

13 MR. YORE: The first thing to train him on is how
14 to walk through snow at the Dulles Airport.

15 CHAIRMAN HENDRIE: Snowshoes? Every board member
16 is issued snowshoes?

17 MR. YORE: That's what they had to go through.

18 COMMISSIONER GILINSKY: We'd perform miracles being
19 out there.

20 CHAIRMAN HENDRIE: That's right. You would already
21 be out to the pre-conference with this background.

22 COMMISSIONER GILINSKY: It's too late.

23 (Laughter)

24 CHAIRMAN HENDRIE: Other comments here?

25 COMMISSIONER GILINSKY: Are they planning on other
points?

1 CHAIRMAN HENDRIE: Well, on this point.

2 COMMISSIONER GILINSKY: Fine, I agree.

3 COMMISSIONER KENNEDY: I agree. Provided it says
4 these two things are not mutually exclusive.

5 CHAIRMAN HENDRIE: Right.

6 Okay, now, other points?

7 MR. YORE: I've got some more.

8 CHAIRMAN HENDRIE: Let me go back.

9 We talked about the Screening Committees and the
10 three candidates to be presented to the Commission. A
11 recommendation that all Commissioners interview. I wonder
12 if we could go back for a minute and see if we could get
13 a sense of the Commission on where we are on that point,
14 in which there is some difference of opinion between the
15 recommendation of the group and what the board's response is.

16 COMMISSIONER AHEARNE: I thought they were ending
17 up being relatively similar.

18 CHAIRMAN HENDRIE: Well, I didn't quite -- it
19 wasn't clear to me what the Commission's view was.

20 MR. FITZGERALD: With regard to limiting yourself
21 to the three, another thing that we didn't mention is, of
22 course, you could reject the three and call for further
23 screening of a further search for a candidate. You wouldn't
24 have to pick anyone from the ---

25 CHAIRMAN HENDRIE: Is that noted now?

1 COMMISSIONER AHEARNE: Page 36.

2 MR. ROSENTHAL: Bottom of page 36 reads, and I quote:

3 "Barring extraordinary cause for not doing so, the
4 Commission should fill the vacancy by the appointment of
5 one of the three committee nominees."

6 Now, I don't interpret that as imposing any kind
7 of iron-clad operation. Indeed, there is no way the
8 Commission could abdicate that responsibility. The theory here
9 is that the Commission itself is not obviously in a position
10 to devote the time necessary to the carrying out of a proper
11 screening process. It's a selection committee -- a screening
12 committee has been established as the judicial screening
13 committees are established, it spends a great deal of time
14 on it.

15 Now, the Commission, obviously, and what we contem-
16 plate by extraordinary cause, but I thought that would have
17 been obvious, would have been if the Commission interviews
18 these three candidates, my recommendation is that all five
19 Commissioners do that, and the Commission then gets together
20 collegially and says, my God, I don't know where the
21 Screening Committee possibly came up with these three
22 lugheads. In that circumstance, certainly the Commission
23 would have not merely the right, but the obligation,
24 considering the importance of these positions, to dispatch
25 all three candidates and then, perhaps dispatch the Screening

1 Committee to get new ones and then embark upon the task.

2 But, I frankly don't understand this problem.

3 It seems to me, that as written here, there is no
4 implication, no possible implication that we were suggesting
5 that -- however the Commission may have regarded these
6 three candidates after interviewing them, nonetheless, they
7 were iron-clad bound to take one.

8 COMMISSIONER KENNEDY: I would only suggest, which
9 I think is the point which the Chairman may have been alluding
10 to earlier, that it might be just a little clearer that that
11 is your intent, because it left me with the impression that
12 we would have had to have found each of the three candidates
13 in dire jeopardy of immediate indictment in order to find
14 the one qualified. And I don't think that's what you intended,
15 but ---

16 MR. ROSENTHAL: That's clearly not what we intended,
17 and obviously ---

18 CHAIRMAN HENDRIE: Allen, I think that's just
19 right, but faced with language, except in extraordinary
20 circumstances and so on, why I must say, I would much rather
21 deal with language that says the Commission will select
22 from among the three presented by the Screening Committee,
23 except for good cause or for ---

24 COMMISSIONER KENNEDY: Extraordinary.

25 CHAIRMAN HENDRIE: No, just for good cause. --

1 including a feeling on the Commission's part that it
2 would prefer to see a panel of more qualified candidates
3 or something like that. Language like extraordinary --
4 except in extraordinary circumstances or cases or so on,
5 erects, what seems to me to be an unnecessary threshold.
6 If indeed the intent is to allow the Commission to say, well,
7 these are three interesting candidates but on balance we would
8 prefer to see another panel.

9 COMMISSIONER BRADFORD: There are a couple of points.

10 One is that we are sending this to the Congress as
11 our document, therefore, it isn't as though this were something
12 being imposed on us by the group that has done the drafting.
13 So, in effect, it is our language.

14 Secondly, I don't think this language is overly
15 strong, given the other recommendations in the report. I
16 mean, they are recommending a very extensive screening, a
17 full check out of all sorts of references, not just the ones
18 provided by the applicant, including people who have known
19 and practiced with or been involved with them. It really
20 would be extraordinary, assuming those other steps were
21 carried out, that the Commission could not pick a satisfactory candidate
22 from among the three -- whatever you call them, survivors --
23 at that screening. From my part, the language is fine.

24 COMMISSIONER AHEARNE: I would tend to agree with
25 Peter. Also, I think with that kind of tight language, the

1 Screening Committee would probably be willing to work a lot
2 harder.

3 CHAIRMAN HENDRIE: Dick, what's your preference?

4 COMMISSIONER KENNEDY: Well, my own preference
5 would be to make the language reflect a little bit more
6 accurately what I suspect the situation really is (a), and
7 (b) what was intended by the drafting group in the first
8 instance. I think it is only a matter of the way the words
9 are written, not the intent. I think we are all saying
10 the same thing, and generally, I agree with Peter, of course,
11 we -- I think if it were to say in the normal course, it
12 would be expected -- the Commission would expect to make its
13 choice from among the panel presented to it by the Screening
14 Committee. I think that's the case, but to say barring
15 extraordinary cause for not doing so, which, as I say, sounds
16 to me like an immediate indictment.

17 I don't think that's what's intended here. There may
18 be a number of good reasons why the Commission would think
19 that perhaps a wider selection -- a wider number from whom
20 to select might be useful in a given circumstance.

21 CHAIRMAN HENDRIE: Vic, what's your feeling?

22 COMMISSIONER GILINSKY: Well, I think if we understand
23 what is intended, I think the language is okay. I thought
24 John made a good point in that if you expect people to
25 engage in this review and work hard at it as they would have

1 to, they really have got to have a feeling that they are
2 doing something that is really going to result in one of
3 their choices that are chosen, except really in extra-
4 ordinary circumstances. I think we understand what we mean
5 by that.

6 I don't know that we have to have the word
7 "extraordinary." I think something along the lines is
8 appropriate.

9 COMMISSIONER KENNEDY: It is only the word
10 "extraordinary" which troubles me. I think it is the majority
11 kind of ---

12 CHAIRMAN HENDRIE: It hinges precisely on that.

13 COMMISSIONER KENNEDY: I agree with you as well.

14 CHAIRMAN HENDRIE: I would use the kind of language
15 that Commissioner Kennedy has cited and say the Commission
16 intends to make the selection among the three and not use,
17 "except in extraordinary cases."

18 So I think, in order to help us divide the house,
19 why you need to sort of vote "yea" or "nay" on extraordinary
20 and then we can go on to the other point.

21 COMMISSIONER GILINSKY: I think I could accept
22 exceptional or some other word that might be a little softer.

23 CHAIRMAN HENDRIE: I think a majority forms around
24 the language as drafted by the committee. Let us accept
25 that as the decision of the Commission.

1 I will note that it is my own opinion that that
2 language binds the Commission to one of the three candidates.

3 COMMISSIONER BRADFORD: Well, it also ---

4 COMMISSIONER KENNEDY: Well, let me note that that
5 is not my understanding from all of the discussion here.

6 CHAIRMAN HENDRIE: Well, it is my understanding
7 that that's not what they meant, but I say I think they have
8 not drafted the language to accurately reflect what they meant,
9 and it is what the language says down the line that will be
10 controlling, and not what they meant.

11 COMMISSIONER BRADFORD: Also, it does depend, I
12 think on adopting this type screening process as set forth.
13 I don't think any of us want that language and a casual
14 screening process.

15 CHAIRMAN HENDRIE: Well, let's turn not to the
16 screening process. It has been recommended ---

17 COMMISSIONER BRADFORD: Are we accepting the
18 "all five Commissioners interview"?

19 COMMISSIONER KENNEDY: I certainly do.

20 CHAIRMAN HENDRIE: Well, I want to talk about that,
21 too. Do you want to have all five interview?

22 COMMISSIONER KENNEDY: I certainly do.

23 COMMISSIONER AHEARNE: Yes.

24 COMMISSIONER GILINSKY: (Nods in the affirmative.)

25 CHAIRMAN HENDRIE: All right.

1 Now, with regard to the Screening Committee. There
2 was a question raised about whether the membership of the
3 Screening Committee should be kept inside the organization
4 in which you would not have an entity subject to the Federal
5 Advisory Committee Act or whether, as the recommendation goes,
6 you would include other people on it and that they would be
7 subject to the Advisory Committee Act.

8 COMMISSIONER AHEARNE: Other people -- I vote.

9 CHAIRMAN HENDRIE: Dick?

10 COMMISSIONER KENNEDY: I can see advantages either
11 way. I have no objection to outsiders.

12 COMMISSIONER GILINSKY: I think it would be useful
13 to have outsiders on it.

14 COMMISSIONER BRADFORD: I agree.

15 CHAIRMAN HENDRIE: Okay.

16 COMMISSIONER GILINSKY: I'd like to say a word about
17 the qualifications of members.

18 CHAIRMAN HENDRIE: All right, please do.

19 COMMISSIONER GILINSKY: I was pleased to see that
20 in the list of special qualifications for lawyer members,
21 you had Item 4, "willingness to address and master scientific
22 issues in the past and form judgment on them."

23 I think there ought to be something comparable for
24 technical members, and I don't think I see it, replacing
25 scientific with legal or something like that.

1 COMMISSIONER AHEARNE: Do you mean willingness to
2 address and master legal issues in the past and form judgment
3 on them?

4 COMMISSIONER GILINSKY: Yes.

5 COMMISSIONER KENNEDY: You would have to speak to
6 the Bar Association on that.

7 COMMISSIONER GILINSKY: Is there some reason you
8 left that out?

9 MR. ROSENTHAL: If I may address that, the answer
10 to that question is "no". I think that selection, that point
11 is well taken. I might just note that certainly on the appeal
12 panel our two technical members have no reluctance at all to
13 play lawyer, and indeed, I think from time-to-time they
14 indicated their manifested view that they are better lawyers
15 than the lawyers are. I would tend to say ---

16 COMMISSIONER KENNEDY: Is there another judgment on
17 that question?

18 MR. ROSENTHAL: I doubt it.

19 I have to say that because Dr. Buck isn't here to
20 rebut anything that I might have said against that judgment.

21 No, I would accept, myself, I can't speak for the
22 other members of our working group, the suggestion that there
23 ought to be a parity there, because I think the thought we
24 were trying to convey, and we should have done it both ways,
25 was that all three members of the board have responsibility for

1 casting votes on every issue that arises in the course of
2 that proceeding. Now, there has to be, obviously, a certain
3 amount of deference on the part of the lawyers to the
4 technical members on highly complex technical issues, and I
5 would hope, as I said, we don't always see it on the appeal
6 panel, that there would be a similar deference the other
7 way. But I, myself, would have no problem at all with the
8 qualification for -- special qualification of technical
9 members being amended to indicate a willingness to address
10 and master legal issues that exist in the case and pass
11 informed judgment on them.

12 MR. FITZGERALD: I would agree.

13 COMMISSIONER AHEARNE: Me too.

14 COMMISSIONER KENNEDY: So would I.

15 (Other Commissioners nod in the affirmative.)

16 CHAIRMAN HENDRIE: Please do it.

17 Let me note a couple of items in passing and then
18 come to one of the more difficult issues.

19 First, with regard to the study of the use of
20 part-time members. There was not, I think, disagreement on
21 the part of the panel without such a study being conducted, but
22 you did note in your memorandum several aspects that ought to
23 be taken into account in such a study. I would think it
24 reasonable that those things, in fact, be taken into account,
25 that is, the comments of the panel chairman, go into the

1 recommendations for such a study. Any objection to that?

2 COMMISSIONER AHEARNE: I would prefer the way the
3 Chairman phrased the recommendation, also. He said to
4 undertake a study on how they are used, and I think that's
5 much better than the way it is phrased, as to whether there
6 is a necessity to continue.

7 COMMISSIONER KENNEDY: Agreed.

8 (Other Commissioners nod in the affirmative.)

9 COMMISSIONER AHEARNE: I think, particularly in
10 the sense of the technical members, I think it is much more
11 of a question of how they are used and whether there is
12 a necessity.

13 CHAIRMAN HENDRIE: Yes.

14 My second item of this lower key nature, I notice
15 that Bob Lazo's memorandum says he doesn't think that the
16 discussion of the legislative history in the report does
17 justice to the Commission's answer to the GAO reports.

18 I guess I would simply recommend to the drafters of
19 the report, consideration of the comment and see whether there
20 is anything else you think appropriate to put in to the
21 background language. I wouldn't propose that we argue here
22 over whether particular paragraphs ought to appear or not.

23 Now, it seems to me that the recommendation about
24 panel management reviewing and criticizing procedural aspects,
25 at least in the decisions and the conduct of hearings, sort of

1 a peer group review aspect, is a central point and probably
2 the most important aspect of the discussion this morning.
3 The study members are for it and the panel management is
4 against it.

5 I'm curious. Jim, if we were talking here about
6 the selection and training of appeal board members, would you
7 think it a good idea to have a certain amount of peer review
8 and discussion of ---

9 MR. YORE: And how.

10 (Laughter)

11 MR. YORE: Well, that was my fourth item here.

12 On management review, shall I give my thoughts on
13 that one at this time?

14 CHAIRMAN HENDRIE: All right.

15 MR. YORE: On page 51, paragraph 6 and 7 refers to
16 an assessment of the style and not the substance of a
17 decision after it has been issued.

18 This poses, certainly, quite a few administrative
19 questions, but I have no problem with that recommendation.
20 It is going to create difficulties in administration, but
21 we do raise an issue ---

22 COMMISSIONER KENNEDY: What's the nature of these
23 difficulties?

24 MR. YORE: Well, this is not done contrary to what
25 the working group said in their memorandum of February 27th.

1 This is the memorandum following up the comments that were
2 received from our office. They say that chief ALJs do
3 exercise this type of quality control.

4 Now, if this statement is meant to imply that this
5 is a common practice in other agencies, why it is incorrect
6 and I asked Bob Lazo to make a survey of this, and Bob,
7 could you enlighten us on what you found out relative to
8 other agencies and chief ALJs?

9 MR. LAZO: Well, we did make a study.

10 I would, of course -- starting out, you remember
11 that Mrs. Sally Greenberg of OPM, in her briefing last month
12 on the Senior Executive Service did state that this was
13 a very rare practice among chief ALJs, that it was not the
14 normal. In fact, I think she said that any ALJs that followed
15 this practice, that went out with one of their administrative
16 law judges would take a taster with them before they went
17 to lunch. But we have also touched ---

18 CHAIRMAN HENDRIE: That may not be an argument
19 against institution of the practice, but only an indication
20 of how badly it is needed.

21 COMMISSIONER KENNEDY: Or the quality of the
22 restaurants.

23 (Laughter)

24 MR. LAZO: We have spoken, also, to a recently
25 retired chief administrative law judge, he's got 30 years

1 in government service, he served as an ALJ in three different
2 administrative agencies and he is quite familiar with the
3 practice among the federal agencies, and informs us that
4 it simply is not the common practice. So if ---

5 CHAIRMAN HENDRIE: Is it never done?

6 MR. LAZO: No, we can't say that. In HEW, the
7 Social Service Administration does try and conduct a review,
8 but ---

9 CHAIRMAN HENDRIE: Well, I'll understand the
10 statement then, not to indicate that it is a common practice,
11 but at least it is not an unknown practice either.

12 MR. LAZO: That really was our only point.

13 CHAIRMAN HENDRIE: Yes, good.

14 MR. YORE: And I think it should be noted that for
15 several years now, we have been having monthly meetings with
16 our board chairman to get ready for the Commission meeting,
17 at which the questions of scheduling and productivity are
18 discussed.

19 So our only point -- I think that this can be
20 done, it has problems, I think that it might be worth while
21 because some people might say, well, this, now, is a tricky
22 way of back-door approach to putting the screws on our
23 board chairman, our board members, that the Commission, in
24 any referral to the Congress reaffirm the independence of the
25 boards in deciding these cases. They are not doing it with

1 the ALJs, it is not a common practice with them. And if
2 we are doing it with our board members, it may raise
3 questions.

4 COMMISSIONER KENNEDY: I agree with that.

5 CHAIRMAN HENDRIE: I think, certainly, being very
6 clear and explicit, and if necessary in the report reiterate
7 the proposition that the sort of review and critiquing we
8 are talking about here, does not deal with the merits of
9 the case, but with the procedural aspects, and that the boards
10 are, indeed, independent on the merits of the case. I think
11 that's a very important thing and ought to be done.

12 COMMISSIONER AHEARNE: Could I ask Jim a question
13 on -- I'm not sure I understand what the recommendation was.

14 I was having a little difficulty understanding
15 exactly what you had in mind in the sense. Are you saying
16 that the panel management should review every decision and
17 provide a critique on it, and should they review in detail,
18 every transcript and provide a critique on that?

19 MR. FITZGERALD: No, I don't think they were contem-
20 plating that every transcript be reviewed and every
21 decision be reviewed, but that some be reviewed. Not that
22 it be -- as we understand the current practice, this simply
23 is not done.

24 COMMISSIONER AHEARNE: I understand that.

25 MR. FITZGERALD: -- And that we think that there is

1 no problem with it being done, and indeed, it would tend, over
2 time, it could upgrade the quality of the decisions in
3 terms of writing style and reasoning.

4 COMMISSIONER AHEARNE: Fine. With that understanding,
5 I have no problem with it.

6 CHAIRMAN HENDRIE: Now, there were a couple of
7 matters raised, Bob, in your memo with regard to the legal
8 aspects of such review. The study group wrote back and says
9 it would make it clear that it applies to procedural aspects
10 and not to the merits, there ought not to be a problem. Is
11 that ---

12 MR. YORE: I think maybe I could clear that up, Joe.

13 This is my last point, by the way. A troublesome
14 area for us is the subject of peer review, as distinguished
15 from this "after the decision is issued."

16 Now, this is before the decision is issued.

17 COMMISSIONER KENNEDY: You mean the peer review?

18 MR. YORE: The peer review.

19 CHAIRMAN HENDRIE: Oh, yes, yes. That's right.

20 This is a little different animal. Just so.

21 MR. YORE: That's right.

22 The way the recommendation is stated on page 51,
23 paragraph 8, it says, quote: "Encourage board members to
24 seek informal peer review of decisions prior to issuance,
25 by available panel colleagues."

1 Now, first of all, I just want to throw in the
2 point that we are working under strict time constraints. This
3 15-day business of getting a decision out in an uncontested
4 case, 35 days in a contested case, forgetting that. We
5 think this is ----

6 CHAIRMAN HENDRIE: If you made those dates more
7 frequently, I would score the point higher.

8 MR. YORE: Okay. I'll check that.

9 We think this is contrary to section 2.791(c), on
10 its face it is contrary which states that in a contested
11 proceeding, members of the boards cannot discuss any fact
12 in issue with members of the panel appointed by the Commission
13 from which members of the Atomic Safety and Licensing Boards
14 are drawn. So that has to be rewritten. But if the intent
15 of the recommendation is that it only applies to style
16 versus substance ---

17 COMMISSIONER KENNEDY: After the fact.

18 MR. YORE: No, this is before.

19 COMMISSIONER KENNEDY: All right, style before the
20 fact.

21 CHAIRMAN HENDRIE: This is a decision in draft form,
22 presumably.

23 MR. YORE: For our board members to go around to
24 their peers and say, hey, how do you like my sentence
25 structure, my rhetoric on this thing, without getting into

1 the issues in controversy which are the sexy items.

2 I think that we are treading on dangerous ground.

3 CHAIRMAN HENDRIE: It doesn't grab you likely?

4 MR. YORE: No, because I know if I'm on a case, it is
5 the issues and controversies that I want to talk about.

6 I don't want to talk about my sentence structure and the
7 way I'm saying it.

8 Now, perhaps the rule should be changed, and we
9 noticed, just in going through some of our records, that OGC
10 does have a proposed revision which is out in the Federal
11 Register right now, it has more to do with the Sunshine Act,
12 but it does revise 2.719 and you can read it if you wanted
13 to that it would eliminate this.

14 Now, I don't know what the intent of that revision
15 is.

16 MR. ROSENTHAL: May I address that, because peer
17 review is a customary, almost universally followed practice
18 of the appeal panel.

19 Now, we do not get in on peer review into matters
20 of fact that are in controversy. And that is absolutely the
21 only thing that the section to which Jim has referred, has
22 any application at all. Our opinions, my opinions, the
23 opinions of my colleagues in draft, are circulated to other
24 board members, all very informally, there is no formal
25 procedure.

1 CHAIRMAN HENDRIE: Well, other panel members, not
2 necessarily on the particular board.

3 MR. ROSENTHAL: That's correct. I may be sitting
4 on a board with Farrar and Buck, let's say, and I will
5 give a draft, frequently, to Salzman, Sharfman, Johnson.
6 What I get back is not: gee, your factual determination
7 here is all wet. That is something that they plainly
8 cannot get into, and they wouldn't take the time to comb
9 a voluminous record to determine whether our factual
10 determinations were right or wrong. What I frequently will
11 get back is either, one, that paragraph here is very muddy,
12 at least it is to me. I mean, you are close to the case,
13 you may know exactly what you had in mind, but as an outsider
14 reading that paragraph, I don't understand what you are
15 driving at. Or two, I think a certain legal holding you
16 have in there is either doubtful and you may want to
17 reconsider it, or at the very least, you have got to set
18 forth a lot more foundation for that legal conclusion that
19 you have.

20 Now, I can tell you this is a practice that is
21 followed in the courts of appeals, when I clerked 25 years
22 on the Court of Appeals for the District of Columbia circuit,
23 the judge I worked for, when he drafted an opinion, sent it
24 around not merely to his two colleagues on that case, but
25 he sent it around also for information to the other judges.

1 Now, those other judges, just as the other panel
2 members, have no control over them. If they make a
3 recommendation and the three members of the board that are
4 sitting on that case and have decisional responsibility wish
5 to reject it, so be it. But I cannot believe, I cannot believe
6 that there can be a really serious contention made that this
7 kind of informal peer review, where the peers are available
8 on the organization of the decision, the reasons that have
9 been assigned, everything except passing judgment upon the
10 facts which is precluded, I cannot believe that that kind of
11 peer review can have any other effect than to improve the
12 quality of decisions. It has in the appeal panel, and I
13 can't imagine why it wouldn't have that same effect on the
14 licensing board panel.

15 CHAIRMAN HENDRIE: And you believe that the language
16 that Jim quotes, which is amply dealt with by making it clear
17 that the merits of the case are at issue.

18 MR. ROSENTHAL: No, factual merits. There is nothing
19 in that section that precludes another board member coming
20 to the board that has the case and saying, we think your
21 legal conclusion is all wet.

22 Now, the board that has the case doesn't need to
23 agree with that. It has got the decisional authority.
24 Absolutely the only thing that is covered by that provision
25 of the regulations is facts that is in issue, on its face.

1 That is all that it addresses and for good and sufficient
2 reason, and as I said, we certainly didn't have that in mind,
3 and indeed, as a practical matter you are not going to get
4 one board commenting on -- rather outsiders to the board,
5 commenting on the facts, because those outside members,
6 undoubtedly will not examine the transcript, won't have the
7 time or the inclination to do it.

8 MR. LAZO: Mr. Chairman?

9 CHAIRMAN HENDRIE: Yes.

10 MR. LAZO: May I just add that we have always
11 lived by 2.719 in a very vigorous fashion and believe that all
12 members within an individual board, in a contested case,
13 should not consult in any way or manner with any other
14 person, that they alone are going to make that decision.

15 I should point out that 2.719 does not apply to
16 the appeals board. They are not used to it and it just doesn't
17 apply to them and never has.

18 MR. YORE: We are the only ones that are mentioned
19 specifically in the regulations.

20 MR. LAZO: That's right.

21 COMMISSIONER AHEARNE: Jim, what is the General
22 Counsel's reading on the legality of that?

23 MR. FITZGERALD: We see no problem with discussing
24 things other than facts. The board is bound to make a
25 decision based on the record, getting facts from extraneous

1 sources, that would be improper. But discussions of legal
2 conclusions and the like, no problem.

3 COMMISSIONER AHEARNE: I think the issue we have
4 here ---

5 MR. FITZGERALD: I'm speaking of myself, not the
6 General Counsel's office.

7 COMMISSIONER AHEARNE: Yes. I think what we have
8 here is a legal question, and I don't get the sense that
9 there is a disagreement that could it be done, it would be
10 a good idea, the issue is, can it be done.

11 CHAIRMAN HENDRIE: No, I think there is at least
12 some difference, because ---

13 COMMISSIONER AHEARNE: Well, what Bob has just said
14 is they really interpret it as it would be illegal for them
15 to do it.

16 CHAIRMAN HENDRIE: It is more than that, he is saying
17 they have never done it and so ---

18 COMMISSIONER AHEARNE: Because it is illegal.

19 CHAIRMAN HENDRIE: Well, I don't think he said
20 it's illegal, he said that they have read 719 in an
21 exceptionally rigorous fashion. The implication is perhaps
22 more than is required, that they are purer than Caesar's
23 wife in this matter.

24 I think the question here is: Does the Commission
25 think that this sort of pre-publication of a decision,

1 circulation for whatever comment one may get, a useful thing
2 which is likely over time to contribute to an improvement
3 in the quality of the decision. If we think that's the
4 case, then the legal question is dealt with, I think, in a
5 straightforward way and I would outline a way to do it in
6 a moment. But let me see first ---

7 COMMISSIONER AHEARNE: Fine.

8 CHAIRMAN HENDRIE: -- where the sentiment is
9 along the Commission for that sort of circulation.

10 COMMISSIONER KENNEDY: How much time is it going
11 to take? Let me just note that however desirable it may
12 be, the English language is a very complex instrument and
13 I have noticed that there are a substantial number of superbly
14 qualified editors at all levels of this Commission. Well, let
15 me say that I'm not sure that the time benefit ratio would
16 add up to any significant improvements. I would like to know
17 whether in fact it is going to take a lot of time. How much
18 time would it take to do this reasonably?

19 COMMISSIONER AHEARNE: They have never done it.

20 COMMISSIONER GILINSKY: Well, as I understand what
21 Allen is saying ---

22 COMMISSIONER KENNEDY: Well, you know, let's ask
23 Allen.

24 COMMISSIONER GILINSKY: -- he isn't talking about
25 editorial changes, he is talking about whether the opinion

1 makes sense or whether parts of it make sense.

2 MR. ROSENTHAL: I'm not talking about the Harper and
3 Rowe editorial type of changes.

4 COMMISSIONER KENNEDY: I'm speaking about natural
5 tendency of human beings.

6 MR. ROSENTHAL: In the case of the appeal panel, the
7 time that is involved is negligible, that normally ---

8 COMMISSIONER KENNEDY: "Negligible" being?

9 MR. ROSENTHAL: "Negligible" possibly being an hour
10 or an hour and a half. The other board member sits there,
11 reads the decision, he isn't, remember, going back and looking
12 at records or anything. He is reading the decision, and he
13 is reading it basically from the following standpoints: Does
14 the decision make sense in all respects or are there portions
15 of it that are elliptical. Is the decision badly organized,
16 broadly speaking. Are there legal determinations made in
17 that decision that are not adequately explained or suspect.

18 Now, if he goes back to the author of the decision
19 and says to him, I've got these problems, and the author
20 says, on reflection, I think you are right; and the author
21 then takes two or three days to revise it. That two or three
22 day delay, in my judgment, is well worth while in terms of ---

23 COMMISSIONER KENNEDY: If that is the kind of
24 time we are talking about, then I would have no objection.

25 MR. ROSENTHAL: Well, that's what we are talking about,

1 and I'm not saying that the licensing board panel should
2 circularize it to a 50 people, to wait for people to come
3 back from out-of-town assignments. I'm talking about when
4 the decision is completed there are a couple of people around
5 that office that have the hour or two to spare, to read the
6 decision over promptly, not to put it aside and get to it
7 in three or four weeks. I'm talking about dealing with it
8 immediately, fine.

9 Now, if on the other hand the decision is completed,
10 there is nobody around that is in a position to serve that
11 function, reading it over within a reasonable period of time,
12 within a matter of hourse, or 24 hours, then obviously if
13 there is some necessity to get that decision out it goes
14 out. We weren't suggesting that there be some kind of
15 rigid requirement that there be peer review in every case
16 by "X" number of peers. We just offered this as what would
17 seem to us as a technique which would, where it was practical
18 to utilize it, improve the quality of the decisional process
19 in the decisions that are rendered. And I just didn't adhere
20 to that view.

21 COMMISSIONER KENNEDY: I would have no problem with
22 that.

23 MR. YORE: Jim Kelley is here, maybe he could
24 comment on this revision of 2.719 ---

25 CHAIRMAN HENDRIE: No, I don't want to talk about

1 now, I want to find out if the Commission is interested in
2 peer-review in the context in which we have been discussing it.

3 COMMISSIONER AHEARNE: Yes.

4 COMMISSIONER KENNEDY: Yes.

5 COMMISSIONER GILINSKY: (Nods in the affirmative.)

6 COMMISSIONER BRADFORD: (Nods in the affirmative.)

7 CHAIRMAN HENDRIE: Now, let us please -- would
8 you please go back and look at your language on this
9 particular recommendation and make sure that it reflects the
10 flavor that Allen has just given us here, that this is not
11 to be regarded in the sense that every draft decision must
12 have comments from one or two or three people, willy-nilly
13 in time -- never mind the time, that this is a device for
14 hopefully to provide some improvement. It doesn't have to
15 occur on every one, it is not expected to take long periods
16 of time. Reviewers are not expected to sit down and draft
17 documents -- their comments on draft opinions. It is
18 a verbal exchange between members of the board as practical.

19 Okay, now if the language fairly reflects that,
20 why okay. I don't remember it well enough --

21 MR. ROSENTHAL: The language is at the bottom of
22 page 47. It is the last paragraph.

23 CHAIRMAN HENDRIE: Don't read it to me. I just
24 want to make sure that the report ---

25 COMMISSIONER KENNEDY: I think the language would be

1 improved by a sentence specifically addressing the
2 factual question which has been discussed, which it does now
3 contain.

4 CHAIRMAN HENDRIE: Yes.

5 Now, let us ---

6 COMMISSIONER KENNEDY: Elliptically, it does, a
7 peer view could help it.

8 CHAIRMAN HENDRIE: Yes.

9 Now, let us turn to the legal question. Since
10 this is what we think it reasonable to do, we now have some --
11 a few differences of opinion as to whether 719 clearly
12 allows this or clearly forbids it. There are two ways that
13 one can deal with that.

14 One of them is for the report to say the Commission
15 reads 2.719 as follows and then put in an interpretation.
16 This is just a report to the Congress, nevertheless, if we
17 couch it in that term -- in those terms, why I would think
18 it would be useful legislative history if anybody every wanted
19 to litigate over this matter.

20 The second way to deal with it is to go back and
21 run a rule change.

22 COMMISSIONER KENNEDY: I don't think the rule
23 needs a change.

24 MR. YORE: My question is whether the revision that
25 is in the Federal Register right now, does revise this whole

1 question.

2 COMMISSIONER KENNEDY: I don't know.

3 MR. YORE: Make it moot.

4 This was published on March 1st and ---

5 CHAIRMAN HENDRIE: I don't know. Anybody chance
6 an opinion, Jim? Either Jim, any Jim.

7 MR. KELLEY: This memo of February 15th quoting
8 719 (b) and (c), Bob, is that your memo?

9 MR. LAZO: We are talking about the proposed change
10 to 719.

11 COMMISSIONER KENNEDY: Well, since nobody knows,
12 could we get an opinion and get it like this afternoon or
13 maybe in the next 20 minutes? If somebody wrote it, they
14 ought to know what it meant.

15 CHAIRMAN HENDRIE: Let me propose the follow-
16 to the Commission with regard to the legality question.

17 The Commission is clearly in favor of this sort
18 of informal trading of views of panel members on draft
19 decisions, good. May we ask the assembled intellectual might
20 of the board and General Counsel and the study group to
21 decide, (a) whether you need a rule change, and if you do
22 to tell us and we will do it; or (b) if it is good enough
23 as it is to please write a piece in the report that says
24 the Commission reads 719 not to prohibit or preclude this
25 sort of exchange, and so on and so on. So whatever you

1 collectively think is the right solution, please do that.
2 Okay? But I think it is clear enough where we would like
3 to go, and I don't think we then have to struggle to do that.

4 Well, we got through that in better shape than I
5 thought, actually.

6 What about minutes of panel meetings? Or, if
7 the panel says, Gee, we don't want to take minutes, and
8 the other fellows come back and say, wait a minute. We
9 didn't mean transcripts or trying to reduce all the give and
10 take to summary statements, but ---

11 (Commissioner Ahearne departed the meeting. 11:15)

12 MR. YORE: We have no objection to summaries, no.

13 CHAIRMAN HENDRIE: Sort of summary minutes that
14 say, you know there was a discussion of this point and ---

15 COMMISSIONER KENNEDY: A slight modification of
16 the language, because when it said minutes, I had assumed
17 that it was a detailed ---

18 MR. YORE: We call it a transcript.

19 COMMISSIONER KENNEDY: -- Then it can be corrected
20 a little bit such as summary minutes or something of that
21 sort.

22 CHAIRMAN HENDRIE: Yes, if the language said
23 summary minutes or something like that, the sense would come
24 through.

25 The Committee use to take great minutes of this
kind, you know, after an hour's desperate in-fighting among

1 the members with bodies all over the floor, the minutes would
2 say there was discussion of the following point, you
3 know, and then they would go on to the next subject.

4 MR. FITZGERALD: That's not the type of minutes we
5 had in mind.

6 COMMISSIONER KENNEDY: It was a forthright exchange
7 of view.

8 CHAIRMAN HENDRIE: No, but the minutes also put
9 down any conclusions and the fact that there were flesh
10 wounds all over the place seemed neither here nor there to
11 us in terms of the record of the meeting.

12 Okay, I take it with that sort of understanding
13 that summary minutes then doesn't ---

14 MR. YORE: It's no problem.

15 COMMISSIONER GILINSKY: But I think that Jim's
16 remark is important here. You mean minutes that reflect the
17 flavor of what went on.

18 CHAIRMAN HENDRIE: These kind of minutes reflect
19 conclusions reached, other important ---

20 COMMISSIONER KENNEDY: The basic rationale for
21 reaching it.

22 CHAIRMAN HENDRIE: -- other important points like
23 that. If there is a two-hour hot and heavy discussion over
24 whether to do it this way or that way, what comes out is
25 the conclusion and not Mr. so and so said this and Mr. so and

1 so said that. I think what they are worried about on the
2 panel is having -- is a mandate to keep a sufficiently
3 detailed minute which attempts to reflect the course of
4 the argument and so on. It certainly is not what I
5 intend, and if it is what the study group intended, why
6 then we have got a different view, but they come back on
7 the -- in answer to the comments and say, the term "minutes"
8 was not meant to suggest a transcript or reduce to writing
9 all the give or take. We expect concrete suggestions,
10 consensus of conclusions, good points made, and the like would
11 be included and distributed. Discretion could be used on
12 what to include.

13 Now, I think that's a fine prescription by what
14 I mean by summary minutes, and if we are agreed on that,
15 why good. We have got that one settled, good.

16 (The Commissioners nod in the affirmative.)

17 CHAIRMAN HENDRIE: It seems to me that that
18 covers -- Do you have other points that you would like to
19 comment on and ---

20 MR. YORE: Only one other statement and that is,
21 whatever is wrought here, it is our understanding will not
22 apply retroactively to the selections that are in process
23 now for the panel?

24 CHAIRMAN HENDRIE: Do you mean on the selection
25 process?

1 MR. YORE: The candidates we have now, please
2 let us proceed under the old system until we get those ---

3 CHAIRMAN HENDRIE: I would propose to decree the
4 process which has been underway on the candidates now being
5 considered, must surely meet anyone's requirement for length
6 and tortuousness. So I would think we have accomplished
7 the intent of this and I wouldn't make it retroactive.

8 Now, what other things do we need to get to get
9 up to a final stage here?

10 Does the working group feel that it ---

11 COMMISSIONER GILINSKY: There's the vice chairman
12 problem.

13 CHAIRMAN HENDRIE: Vice chairman problem? Is there
14 a vice chairman problem?

15 COMMISSIONER KENNEDY: Everybody agrees, don't they?

16 MR. YORE: We haven't had one for 8 years. We
17 made a position.

18 CHAIRMAN HENDRIE: Anybody have any feeling about it?

19 COMMISSIONER KENNEDY: I agree with the recommen-
20 dation.

21 CHAIRMAN HENDRIE: Okay, the working group have
22 any -- does it seem clear enough to you so that you could
23 move ahead to whatever modifications that are indicated out
24 of this meeting and we could get final with the report?

25 MR. FITZGERALD: Yes. I would propose that we

1 address a memo to you that would be viewed as a supplement
2 on some of the points that came out of today's discussion,
3 clarifying or adding a sentence that that's what our thought
4 was or whatever on some of these points.

5 COMMISSIONER GILINSKY: Well, weren't we talking
6 about rewriting the report ---

7 COMMISSIONER KENNEDY: Why can't we simply redraft
8 the pages of the paper.

9 CHAIRMAN HENDRIE: I'd like to be able to answer
10 "yes" when the senator says, have you got that report with
11 you, Mr. Hendrie?

12 MR. ROSENTHAL: One thing, Mr. Chairman, that sort
13 of puzzles me was, I thought that our responsibility was
14 not to render a report to the Congress, but was to render
15 a report to the Commission, whatever action the Commission
16 might or might wish to take.

17 Now, this is under date of January 31st, the report
18 of the working group, and this is clear, from this morning's
19 conversation the Commission has decided to alter, at least
20 one of our recommendations, that dealing with the observance
21 of licensing board proceedings and wanted to also alter some
22 of the language that we have employed in other instances.

23 Now, it would seem to me that this report speaks
24 for itself, that what is needed on top of it, we can prepare
25 it, is a -- some kind of transmittal indicating that the

1 Commission has approved ---

2 COMMISSIONER KENNEDY: Al, please, please. Please
3 stop, Al. For God's sake, what is this institution coming
4 to. All we are asking for is a little staff support.

5 Now, Mr. Chairman, may I suggest we simply take
6 this report, hand it to OPE and see if we can't get it done
7 this afternoon, and I think we can.

8 CHAIRMAN HENDRIE: I think ---

9 COMMISSIONER KENNEDY: Jesus Christmas sakes.

10 CHAIRMAN HENDRIE: Why don't we ask OGC ---

11 COMMISSIONER KENNEDY: Somebody. A little staff
12 support is all we are asking for.

13 CHAIRMAN HENDRIE: -- to -- Let us regard the
14 working group, then, as discharged and we will take this
15 report ---

16 COMMISSIONER KENNEDY: Yes indeed, and with thanks
17 and appreciation.

18 CHAIRMAN HENDRIE: -- and your company will put in
19 the things the Commission would like it to make it a
20 Commission report.

21 I don't want to send to Congress a report that
22 says, we have had the staff do this and we disagree with
23 recommendations 5, 6, and 7. They would like to have a
24 report ---

25 COMMISSIONER KENNEDY: We will simply refer to this

1 chart which will show you the various pages, which if we just
2 had time we would have changed, you can change them in your
3 staff. I think that would be a great idea.

4 CHAIRMAN HENDRIE: I've got to go forward with a
5 report which says here are the Commission's recommendations,
6 and what we are doing is adopting the bulk of this report,
7 but we want some changes in some places and modifications in
8 others, additions and so on. Will OGC please do that if you
9 think it is clear. You can get advice and help from the
10 ex-members of the working group ---

11 COMMISSIONER KENNEDY: Provided they don't have to
12 write you a letter.

13 CHAIRMAN HENDRIE: -- and can do this within an
14 hour or two.

15 COMMISSIONER KENNEDY: Let me commend, by the way,
16 the members of the appeals panel for the obvious attentive-
17 ness to the rapid reading courses. I think it is a remarkable
18 achievement that 70 and 80 page reports are read and
19 commented upon within an hour. We need a lot more of that.

20 CHAIRMAN HENDRIE: I took it to mean an hour by
21 the appeals board time-keeping mechanism ---

22 (Laughter)

23 CHAIRMAN HENDRIE: -- which may or may not ---

24 MR. ROSENTHAL: I will note, however, that we do
25 try to keep most of our decisions well below 70 pages, although

1 there have been a few spillovers.

2 COMMISSIONER GILINSKY: This is with their hour glass.

3 CHAIRMAN HENDRIE: Yes.

4 COMMISSIONER GILINSKY: It is a very good report.

5 COMMISSIONER KENNEDY: An excellent report.

6 CHAIRMAN HENDRIE: Yes, a nice piece of work and
7 you all certainly have the Commission's thanks.

8 (Whereupon, the Commission meeting on the above-
9 entitled matter was concluded at 11:15 a.m. and the Commission
10 moved on to other business.)
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555



SECRETARIAT RECORD COPY

March 6, 1979

MEMORANDUM FOR:

Chairman Hendrie
Commissioner Gilinsky
Commissioner Kennedy
Commissioner Bradford
Commissioner Ahearne

FROM:

for Leonard Eickwit, Jr., General Counsel
Al Kenneke, Acting Director
Office of Policy Evaluation

SUBJECT:

SELECTION AND TRAINING PROCESS FOR
LICENSING BOARD MEMBERS -- REPORT
TO CONGRESS

As you will recall, Section 7 of this year's authorization act requires the Commission to study and report to Congress on the process of selecting and training Licensing Board members, including recommendations for improvement. A report was originally due on January 1, 1979, but prior to that time we obtained informal permission to report somewhat later (exact date not specified). It would be prudent to have the Commission's report to the oversight committees before you appear again before the Hart committee, the originators of this requirement. It now appears that you may have hearings before the Hart Committee in the latter part of this month, perhaps the week of the 19th. Accordingly, we think the Commission should now focus on the report and attempt to reach consensus by the end of next week. Because the Working Group you designated to develop a report has done what we believe is a good job, and because the comments on their report have not produced many major differences of opinion, we think this time schedule is realistic.

By cover memorandum of January 31, 1979, the Working Group submitted its report to you. Thereafter, the Secretary's Office circulated the report to Commission offices for comment. OGC and OPE responded with an unqualified endorsement, recommending that you adopt the report. By memorandum of February 15, 1979, the Licensing Board Panel submitted a

Contact:

James L. Kelley
634-3224

110-11

March 6, 1979

number of comments on the report, including some significant differences of opinion. On February 28, 1979, the EDO also commented on the report, basically endorsing its recommendations. At that juncture, we felt it would be useful to get the Working Group's responses to the more significant critical comments of the Licensing Board Panel. The Working Group provided responsive comments in a memorandum dated February 27.

With the report, the critical comments and the responses in hand, we think that the report is now ripe for Commission consideration. We are in basic agreement with the responses of the Working Group to what appear to be the two most significant criticisms of the Licensing Board Panel -- relating to a screening panel for candidates and peer group review of Board decisions. We do not believe that either of these recommendations, as envisioned by the Working Group, raises significant legal problems, and we think both recommendations are sound from a policy perspective.

Attached are the following documents:

1. The Working Group's report to you;
2. Comments provided by the Licensing Board Panel and the EDO;
3. Working Group responses to Licensing Board Panel comments.

We suggest that the report and comments be the subject of a meeting during the week of March 12. Should the Commission, following consideration, decide to endorse the report without major change, then the report as written could be forwarded with a relatively simple transmittal letter, possibly containing some additional thoughts and/or qualifications. Should the Commission have major problems with the report (which we do not envision), some other format, substantial additional work, and a further extension of time may be necessary.

Attachments:

1. Working Group's Report, 1/31/79
2. Lazo memo to Commission, 2/15/79
3. Gossick memo to Commission, 2/28/79
4. Working Group's memo to Kelley, 2/27/79

cc: OCA
SECY



UNITED STATES
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD PANEL
WASHINGTON, D. C. 20555



SECRETARY RECORD COPY

February 15, 1979

MEMORANDUM FOR: Chairman Hendrie
Commissioner Gilinsky
Commissioner Kennedy
Commissioner Bradford
Commissioner Ahearne
Robert M. Lazo
FROM: Robert M. Lazo, Acting Chairman
Atomic Safety and Licensing Board Panel
SUBJECT: WORKING GROUP'S REPORT -- REVIEW OF SELECTION AND
TRAINING PROCESS FOR ATOMIC SAFETY AND LICENSING
BOARD PANEL MEMBERS

POOR ORIGINAL

By memorandum dated February 8, 1979, Mr. Chilk advised Mr. Yore that the Commission requests that he provide them with his comments and recommendations relative to the above-identified Working Group's report. We have reviewed the report and the recommendations and wish to make the following comments on its content.

At the outset, we believe the discussion of the legislative history of Section 7 of Public Law 95-601 does not adequately set forth the Commission's responses to the GAO letter reports. For instance, the Commission did not acknowledge that the two proceedings which were the subject of GAO's report to Congressman Beville, were unjustifiably delayed at all, let alone that some of the delay was attributable to the Licensing Boards. Further, the discussion of the legislative history does not point out that the additional comments of the Panel Chairman, which accompanied the Commission's response to the GAO report to Senator Hart, took issue with the findings of the GAO report.

We have the following comments on the recommendations.

We believe that the recommendation concerning the establishment of screening committees for candidates for vacancies may go too far in the direction of relinquishing the Commission's control over the selection process. In addition, the requirement that, barring extraordinary cause, one of the three committee nominees be selected, may be an undesirable curtailment of the appointment authority of the Commission. We do not disagree that the addition of representatives of other carefully selected Commission offices to the interviewing group might be

useful. However, we believe both the legality and propriety of this recommendation should be subject to further study. We note also that its implementation undoubtedly would lengthen the selection process.

We wish to point out that the qualifications which the working group recommended be adopted for membership on the Panel have been used by the Panel for a long time and that new members routinely receive voluminous written materials for study, including the Atomic Energy Act, the Commission's Regulations, the AEC and NRC issuances, and are briefed on significant judicial and administrative interpretations of the Act and Regulations. Further, new lawyer members are furnished available material to assist them in understanding the technical issues with which they must deal.

We have no objection to a study of the necessity of continuing to utilize part-time members. Part-time members have had a vital role over the past 16 1/2 years in assisting the Commission in the discharge of its public hearing responsibilities. If a study is conducted, it should focus not only on the time which part-time members typically have available to devote to the Panel's work, but on the advantages which accrue from their use. Some of these advantages may be quickly catalogued: geographic and institutional balance in the Panel's membership, independence, availability of a wide variety of disciplines, and economy (part-time members have performed up to eight man-years of work per year). We note that very often part-time members who can no longer devote the necessary time to the Panel do withdraw, and that the Panel's current management practices seek to assure the availability of part-time members prior to assigning them to cases. We will also study these management practices to determine whether they can be improved so as to better utilize part-time members.

The Panel has for the past five years oriented new members along the lines set forth in Section V.B.1 of the Report, and has begun to introduce new members to the members of the Appeal Panel. However, we disagree with the recommendation that the practice of having new members observe a hearing be discontinued. The difficulties of conducting a hearing cannot be gleaned from the cold pages of a transcript, nor can study and briefing fully prepare one for the job. It is most desirable that each new member have an opportunity to observe these difficulties and their solutions first-hand before being placed on a hearing board. What appear to be "bad habits" to the transcript reader are often the exercise of the skills necessary to conduct a hearing smoothly. We would prefer in the future to have new members observe more hearings before being assigned to a Licensing Board.

POOR ORIGINAL

The recommendation that the continuing education of Panel members include annual meetings with representatives of the "nuclear bar" and periodic interdisciplinary meetings is viewed as a good idea. However, it should be noted that the Panel is operating on a tight travel budget and additional funds will have to be requested to conform with this recommendation.

We do not believe it advisable to take minutes of Panel meetings. One of the chief values of these meetings is the fact that members are free to express their opinions fully. Minute-taking would inhibit this freedom. We will study other ways in which the content of the Monday morning meetings can be brought to part-time members' attention. As of the first of the year, the Legal Counsel's memoranda were placed on a projected semi-monthly schedule so as to provide a more timely comprehensive reporting service of significant judicial and administrative developments.

For the reasons set forth by the Panel Chairman and Executive Secretary in their interviews, we do not believe that Panel management should review and criticize decisions and the conduct of hearings. We note that many of those interviewed by the Working Group share the view that this practice, if implemented, would be a dangerous course which could easily impinge on the decision-making independence of the Boards. Given the present lack of statutory independence of Panel members, we believe such criticism by Panel management to be particularly inappropriate. Even without it, as we noted in our response to the GAO report to Senator Hart, reversals and remands from the Appeal Board have occurred at a rate of 12.5%. A comparable figure for the U.S. District Courts is 14.6%.

The Working Group's recommendation regarding peer review presents two considerations. First, it is contrary to 10 CFR § 2.719 insofar as it applies to contested cases. Section 2.719(b) and (c) provide:

(b) In any adjudication, the presiding officer may not consult any person other than a member of his staff on any fact in issue unless on notice and opportunity for all parties to participate, except (1) as required for the disposition of ex parte matters as authorized by law and (2) as provided in paragraph (c) of this section.

(c) In any adjudication for the determination of an application for initial licensing, other than a contested proceeding, the presiding officer may

POOR ORIGINAL

consult (1) the staff, and (2) members of the panel appointed by the Commission from which members of atomic safety and licensing boards are drawn: Provided, however, That in adjudications in which exceptions to the initial decision may be taken to the Atomic Safety and Licensing Appeal Board, the presiding officer shall not consult any member of the Atomic Safety and Licensing Appeal Board or any fact in issue.

Second, it is not practical. There is great pressure on hearing boards to complete proceedings and the decisions are written under very limited time constraints. There simply is not time to pass draft decisions around for peer comment and then discuss those comments, particularly when board members are widely separated geographically.

We concur with the recommendation that the Vice Chairman's vacancy be filled. However, we note that the Panel has operated for eight years without a Vice-Chairman and during that period of time the position of Executive Secretary has evolved into what essentially is a Vice-Chairman position. If this recommendation is adopted, the Panel will need another position.

This Panel memorandum has been discussed with Mr. Yore and it has his concurrence.

cc: Leonard Bickwit, OGC
Kenneth Pedersen, PE
Lee V. Gossick, EDO
James R. Yore, ASLBP

POOR ORIGINAL

CONTACT:
R. M. Lazo
27842



NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

FEB 28 1979

MEMORANDUM FOR: Chairman Hendrie
Commissioner Gilinsky
Commissioner Kennedy
Commissioner Bradford
Commissioner Ahearne

FROM: Lee V. Gossick
Executive Director for Operations

SUBJECT: WORKING GROUP'S REPORT--REVIEW OF SELECTION AND
TRAINING PROCESS FOR ATOMIC SAFETY AND LICENSING
BOARD PANEL MEMBERS

This responds to the Secretary's request of February 8, 1979 for comments on and recommendations relative to the Working Group's report.

The recommendations of the Working Group appear well designed to accomplish the goal of strengthening the selection and training of members of the Atomic Safety and Licensing Board Panel. I would recommend that they be adopted by the Commission.

There are, however, two matters which I would like to bring to the attention of the Commission with respect to certain of the recommendations. In connection with the recommendations dealing with the selection of new members, care should be exercised that appropriate consideration is given to established requirements for the selection of government employees. In particular, it should be noted that all criteria used either to judge basic qualifications or to rank qualified candidates should be validated in accordance with the Uniform Guidelines on Employee Selection Procedures. Furthermore, selection devices, such as interviews, must be designed to insure that only relevant job-related techniques are used. The Division of Organization and Personnel stands ready to assist in this regard.

With respect to the recommended continuing education of members of the Panel, it is noted that the annual meeting of the entire Panel is recommended for continuance. If, however, this annual meeting were to take on the dimensions of the recently concluded seminar program conducted for the Panel by the National Center for Administrative Justice, consideration must be given accommodating the expense of such an effort. It would appear appropriate that

POOR ORIGINAL

The Commission

- 2 -

if such a seminar is contemplated that it be budgeted by the Panel and addressed in budget discussions with the Commission.

~~THOMAS Lee V. Gossick~~

Lee V. Gossick
Executive Director for Operations

cc: L. Bickwit, OGC
OPE
J. Yore, ASLBP
A. Rosenthal, ASLAB
Secy
NRR
Director, Public Affairs
Director, Congressional Affairs

POOR ORIGINAL



UNITED STATES
NUCLEAR REGULATORY COMMISSION
WASHINGTON, D. C. 20555

February 27, 1979

MEMORANDUM FOR: James L. Kelley, Deputy General Counsel

FROM: *JS* James A. Fitzgerald, GC
AS Alan S. Rosenth, ASLAP
TR Theodore R. Quay, OPE
GS George Sege, OPE

POOR ORIGINAL

SUBJECT: WORKING GROUP'S REPORT -- REVIEW OF SELECTION
AND TRAINING PROCESS FOR LICENSING PANEL MEMBERS:
RESPONSE TO LICENSING PANEL COMMENTS

The Acting Chairman of the Atomic Safety and Licensing Board Panel, in a memorandum dated February 15, 1979, provided the Commissioners with comments on the subject report. In response to your verbal request, we have reviewed the Acting Chairman's submittal. We are pleased to furnish our views on those areas in which you expressed an interest.

First, we do not agree with the Acting Chairman that the use of screening committees might improperly curtail the Commission's appointment authority. To the contrary, we see these committees as a useful aid in the exercise by the Commission of that authority, not an erosion of it. The Commission obviously does not have the time available itself to undertake the screening of a possibly substantial number of candidates -- a process which is obviously most time-consuming if performed with the necessary thoroughness. It should also be kept in mind that we did not recommend that the Commission be placed under a rigid obligation to appoint one of the committee's nominees. Although we would expect such an appointment would be made in most instances, the Commission would remain free to reject all of the nominees if it regarded none of them to be well-qualified.

Second, the Acting Chairman disagrees with our recommendation that the practice of having new members observe a hearing be discontinued. We recognize that observation of a well-run hearing might be a good training device. But there is no assurance that the hearing to which the new member is assigned as an observer (which is customarily the next scheduled hearing) will be well-run; if it is not, erroneous impressions may well be obtained with respect to how hearings should be conducted. A much more useful and reliable training tool would be videotapes of mock hearings, in which both good and bad hearing management techniques could be programmed into the script. The tapes could be discussed, and performances evaluated, without embarrassment to Panel members (which would not be the case were there critiques of real hearings or tran-

Contact:
James A. Fitzgerald, GC
63-43288

James L. Kelley

-4-

scripts of such hearings).

Third, the February 15 memorandum raises the spectre of minute-taking of Panel meetings inhibiting the participants. We stated that we felt it important to convey the essential content of all meetings to those who were unable to attend. The term "minutes" was not meant to suggest a transcript or reducing to writing all the give-and-take at the meetings. We expect that concrete suggestions, consensus conclusions, good points made, and the like would be distributed. Discretion could be used on what to include.

Fourth, the Acting Chairman claims that management review and peer review are inappropriate. We strongly disagree. There is nothing illegal about management review of a decision once it has been rendered for the purpose of assessing not the correctness of the decision reached, but, rather, how well it was organized and written and whether the Board sufficiently articulated the basis of its findings and conclusions. If handled judiciously by Panel management, as we expect it would be, there should be no problem. Chief ALJs do exercise this type of quality control.

The Acting Chairman believes that peer review would contravene the provisions of 10 CFR §2.719. But that Section applies only to "facts in issue"; it does not proscribe solicitation of the views of peers on legal questions or matters of format and style. We, of course, did not contemplate that peers would be asked to comb records and to provide comment on factual matters; rather, our recommendation was in terms of the members of the Board inviting a few other available Panel members to read the decision in draft and to make suggestions respecting possible improvements in such areas as comprehensibility, organization and completeness of the discussion of the points covered in the decision. We reiterate our opinion that there is nothing at all improper about such informal consultation. Moreover, except in those rare instances when a decision must be rendered on an emergency basis, we think that soliciting informally the comments of a few, available brethren would not occasion undue delay.

cc: Robert Lazo, ASLBP

POOR ORIGINAL



Transcript of Proceedings

NUCLEAR REGULATORY COMMISSION

DISCUSSION OF SECY-79-82 - STAFF COMMUNICATIONS
WITH THE COMMISSION

March 15, 1979

Pages 1 - 51

Prepared by:
C. H. Brown
Office of the Secretary

DISCLAIMER

This is an unofficial transcript of a meeting of the United States Nuclear Regulatory Commission held on March 15, 1979 in the Commission's offices at 1717 H Street, N. W., Washington, D. C. The meeting was open to public attendance and observation. This transcript has not been reviewed, corrected, or edited, and it may contain inaccuracies.

The transcript is intended solely for general informational purposes. As provided by 10 CFR 9.103, it is not part of the formal or informal record of decision of the matters discussed. Expressions of opinion in this transcript do not necessarily reflect final determinations or beliefs. No pleading or other paper may be filed with the Commission in any proceeding as the result of or addressed to any statement or argument contained herein, except as the Commission may authorize.

POOR ORIGINAL

1 UNITED STATES OF AMERICA
2 NUCLEAR REGULATORY COMMISSION
3

4 Discussion of SECY-79-82 - Staff
5 Communications With the Commission
6

7 (Open to Public Attendance)
8

9 Commissioners' Conference Room
10 1717 H Street, N.W.
Washington, D. C.

11 Thursday, March 15, 1979
12

13 The Commission met, pursuant to adjournment, at
14 11:30 a.m., Joseph Hendrie, Chairman of the Commission,
15 presiding.
16

17 PRESENT:

18 Chairman Hendrie
19 Commissioner Gilinsky
20 Commissioner Kennedy
Commissioner Bradford
Commissioner Ahearne

21 ALSO PRESENT:

22 L. Gossick
23 J. Hoyle
T. Engelhardt
J. Fitzgerald
24 R. Minogue
H. Denton
25 J. Davis
W. Dircks
S. Levine
R. Budnitz
A. Kenneke

P R O C E E D I N G S

CHAIRMAN HENDRIE: If we could convene on the matter of Staff Communications with the Commission, paper 79-82 which recommended implementation of some recent provisions in the law. I think there were several concurrences.

Commissioner Bradford did not concur and suggested that it would be useful to have some discussion, which ---

COMMISSIONER BRADFORD: Actually, I think it was Vic who suggested the discussion. I agree with him.

CHAIRMAN HENDRIE: Well, whenever we have a belief by one of the Commissioners that some discussion would be useful, why that is certainly all that is needed to key a meeting of such.

Lee, would you like to outline the provision of law and just very briefly what is recommended in the paper and then we can move on.

MR. GOSSICK: Right. I can go through it very quickly, Mr. Chairman.

As everyone is very familiar, the Energy Reorganization Act of '74, in Section 209 provides that the directors of three statutory offices, NRR, NMSS and Research, may communicate with or report directly to the Commission as he deems it necessary to carry out his responsibilities.

Now, particularly in Section 209 B, the same Act

1 states that "... the Executive Director shall not limit the
2 authority of the director of any component organization
3 provided for in the Act..." the ones I just named, "... to
4 communicate or to report directly to the Commission when
5 such..." again "... director of a component or organization
6 deems it necessary to carry out his responsibilities."

7 Now, the Authorization Act of 1979, Public Law
8 95-601 amended this provision by adding the words "...not-
9 withstanding the preceding sentence, each such director
10 shall keep the Executive Director fully and currently
11 informed concerning the content of all such direct
12 communications with the Commission..." and by "such direct
13 communications" it refers back to the matter of when it is
14 necessary in the eyes or in the mind of a director of a
15 component organization as necessary to carry out his
16 responsibility.

17 Now, in amending this section, the Congress and
18 the Senate report, 95-848 said that "Although the amendment
19 itself only applied to the three offices with statutory
20 access to the Commission, it is expected that this procedure
21 will be to all administrative staff units. It is expected
22 that this will be a useful step in improving the management
23 of the NRC operations."

24 Now, in the paper that I sent down on the 1st of
25 February, 79-82 to implement this amendment, I proposed the

1 following:

2 First, there is a memorandum from the Chairman to
3 the EDO expressing the Commission direction that the staff's
4 business with the Commission be conducted through the EDO and
5 where that is impracticable, whatever the reason, that the EDO
6 be informed of any direct communication of a substantive
7 nature. I want to under line substantive nature. Here,
8 judgment has to be exercised by the office directors, of
9 course, and of the intention to meet with the Commissioners
10 involving the agency. This memo from the Chairman also would
11 require that the EDO be advised of written communications
12 received from the Commissioners involving agency matters
13 if such communications are not routed through the EDO.

14 Secondly, as a part of the paper, to clearly lay
15 out this provision of the Energy Reorganization Act as
16 amended, I recommended to you, for your approval, a separate
17 Manual Chapter 0202, entitled "Staff Communications With the
18 Commission," in order to properly, I believe, separate it
19 from the matter to whom the office directors report. And
20 the intent of the Congress, separate that matter from the
21 intent of the Congress that there be a relief valve, if
22 you will, whereby the office directors who might feel that
23 they are being suppressed in expressing their views, may
24 communicate directly with the Commission.

25 I think another reason for separating this matter

1 out from the individual Manual Chapters from the three
2 statutory offices is to make it clear that it is intended
3 to make this relief valve, should it be needed, available
4 to all of the office directors reporting to the EDO.

5 I have discussed this paper and my recommendations
6 with the office directors, it is my understanding that there
7 is no disagreement with the basic philosophy involved,
8 however, one or two have expressed a view that they would
9 prefer to retain in their own Manual Chapter as it now
10 appears, these -- under the section "Supervision" the clause
11 from the Energy Reorganization Act as amended by the '79
12 Authorization Act providing for their communication directly
13 with the Commission and so forth.

14 COMMISSIONER GILINSKY: Why did you drop that in ---

15 MR. GOSSICK: Well, I think it is more appropriate --
16 it is not dropping it, it is just taking it out of that
17 Manual Chapter and moving it up front in our Manual Chapter
18 series under 0202, to make sure that it is understood that
19 it deals with communications with the Commission, and that
20 it doesn't have anything to do with matter of who they
21 report to.

22 I think that in the past this has led to some
23 confusion and difficulties, and I just think it is more
24 appropriate to have it pulled out as a separate matter in
25 a chapter, it is very brief, as you have seen as is attached

1 here, and also, to make it clear that that applies also to
2 any other office that reports to me. From the very outset,
3 I had it understood that all the people, if they felt that
4 I was suppressing them or that they had a view that they
5 wanted to take to the Commission, go ahead and do it. It
6 is not just the three major offices, or the three statutory
7 offices. So that's the reason for taking it out.

8 Now, the existing Manual Chapters are the proposal
9 for taking it out of the existing Manual Chapters. As I
10 have said, one or two of the office directors, and they can
11 speak for themselves, feel that they would like to see it
12 retained there.

13 COMMISSIONER AHEARNE: Lee, in the transfer forward
14 to 0202, did you retain that language, "... the director may
15 communicate with, when he deems it necessary to carry out..."?

16 MR. GOSSICK: Yes, sir. 0202 -- have you got it there?

17 Fine. It is right under Objectives: "Provide
18 for the implementation of the section in the 209 Act as
19 amended..." there's the whole thing, as amended by the
20 Authorization Act of '79.

21 COMMISSIONER AHEARNE: Yes, you are quoting the
22 Commission's implementation. I was finding it -- I didn't
23 find ---

24 MR. GOSSICK: The provision in the act is quoted
25 there exactly.

1 COMMISSIONER AHEARNE: Well, no. I understand that.
2 All I was saying is that in staff communication with the
3 Commision, the responsibilities list the advising of the
4 EDO. It doesn't have that particular phrase consistent
5 with "... the director may communicate," and I was wondering,
6 was there any particular reason why it didn't?

7 MR. GOSSICK: Well, this, of course, applies to --
8 Well, I think I see what you mean.

9 This is from 209(b) where it talks about my not
10 being able to limit such communications ---

11 COMMISSIONER AHEARNE: Yes.

12 MR. GOSSICK: There would be no difficulty,
13 certainly of adding that or pointing that in another part
14 209 that each of the three office directors have that, but
15 I thought that this ---

16 COMMISSIONER AHEARNE: Well, all I was pointing out
17 is that you had taken out that particular sentence from
18 each of the individual office manuals.

19 MR. GOSSICK: Right.

20 COMMISSIONER AHEARNE: And it never reappeared as
21 a responsibility anywhere else.

22 COMMISSIONER GILINSKY: Where does it reappear?
23 I thought you said you had transferred this to another place.

24 MR. GOSSICK: Well, I guess in our view, it is
25 covered by ---

1 COMMISSIONER AHEARNE: The quote of the ---

2 MR. GOSSICK: -- this quote in here, where it says:
3 "The Executive Director shall perform such functions..." and
4 so forth.

5 COMMISSIONER KENNEDY: It says in implementation of
6 Section 209(b).

7 COMMISSIONER GILINSKY: Can you guide me to that?

8 MR. GOSSICK: It is Enclosure 2 of the paper.

9 COMMISSIONER GILINSKY: Yes. It says ---

10 MR. GOSSICK: Now, there is a Footnote,
11 Commissioner Ahearne, ---

12 COMMISSIONER GILINSKY: Where does it say that?
13 I'm sorry, I'm ---

14 MR. GOSSICK: Right down under "Objectives" where it
15 is in single-space ---

16 COMMISSIONER KENNEDY: It's Enclosure 2, Vic.

17 COMMISSIONER AHEARNE: The first page of Enclosure
18 2, Vic. Chapter 0202.

19 COMMISSIONER GILINSKY: And where does it ---

20 COMMISSIONER AHEARNE: It's the middle of that
21 quote.

22 COMMISSIONER GILINSKY: I see.

23 MR. GOSSICK: But to your point, it would be simple
24 enough if you wanted to expand the Footnote there that points
25 out that it specifically established -- the Reorganization Act

1 specifically established these three offices, and as per
2 paragraph so and so -- but I thought it was redundant, maybe
3 not.

4 COMMISSIONER GILINSKY: Well, the Congress paid
5 particular attention to it, I would think ---

6 MR. GOSSICK: It can be added.

7 COMMISSIONER AHEARNE: Well, my only point was,
8 Lee, that under the "Responsibilities" you had an expansion
9 of three points which picked up the last sentence of that
10 quoted section.

11 MR. GOSSICK: Yes.

12 COMMISSIONER AHEARNE: And there was no fourth
13 point that picked up the middle sentence. And I was just
14 asking why.

15 MR. GOSSICK: I'm not sure I perceive exactly
16 what your problem is.

17 COMMISSIONER AHEARNE: The problem is: If I look
18 at "Responsibilities," a, b, and c on page two ---

19 MR. GOSSICK: Right.

20 COMMISSIONER AHEARNE: -- they really refer to the
21 "notwithstanding" the preceding sentence, "... each such
22 director shall keep the Executive Director fully and
23 currently informed concerning the content of all direct
24 communications with the Commission."

25 MR. GOSSICK: Right.

1 COMMISSIONER AHEARNE: There is no "D" which
2 addresses the preceeding sentence. The director can
3 communicate with or report directly to the Commission when --
4 if necessary to carry out his responsibilities, and it was
5 that sentence which had been deleted from each of the
6 office director sections.

7 MR. GOSSICK: Yes.

8 COMMISSIONER AHEARNE: And it would just seem to
9 be consistent. If quoting the section was going to be enough
10 and you didn't have to have A, B, and C and so it would have
11 seemed appropriate to put in a "D" under "Responsibilities"
12 that also ---

13 MR. GOSSICK: That repeated what is in there ---

14 COMMISSIONER AHEARNE: Yes.

15 MR. GOSSICK: Although, I would really -- I guess
16 that almost should be "A" and the rest of them follow, that
17 is ---

18 COMMISSIONER AHEARNE: Okay. Well, whatever.

19 MR. GOSSICK: I see your point, or as I say ---

20 CHAIRMAN HENDRIE: Put it in that way rather than
21 Footnote it.

22 COMMISSIONER AHEARNE: Yes. I was just asking
23 the question, it seemed to be consistent ---

24 COMMISSIONER GILINSKY: Let me ask you, Lee. You
25 said something about a proposed memo that the Chairman had

1 signed saying that basically the staff's business would be
2 run through the Executive Director, except, and you used
3 the word "impracticable." I guess I don't see it here, but
4 what did you mean by that?

5 MR. GOSSICK: Well, the intent of the Act, as in
6 the legislative history, that provision is in there, as I
7 say, this is sort of a relief valve or to prevent somebody
8 in the position of the EDO or whatever and was successful,
9 which is another question, of suppressing any officer
10 director's views and isolating that from the Commission.
11 That's what this whole thing, I think is saying.

12 COMMISSIONER GILINSKY: Well, what are we talking
13 about? Are we talking about the presentation of formal
14 Commission papers, or are we talking about ---

15 MR. GOSSICK: No.

16 COMMISSIONER GILINSKY: -- notes or are we talking
17 about communications, or are we talking about telephone
18 calls? What are we talking about?

19 MR. GOSSICK: This whole subject is wrapped around
20 the business of: one, who do the office directors report
21 to? And I'll give it to you straight, looking ahead to the
22 day when I'm going to be making out the Effectiveness Reports
23 or appraisals on all of the office directors. I think that
24 will help remove some of the question that we have had in the
25 past. It hasn't been clear, early on in the Commission, who

1 they reported to. In the initial delegation it was clear
2 what my responsibilities were, who I reported to and who
3 I was responsible for directing, but it didn't get into the
4 matter in the delegations to the directors of those offices,
5 who they reported to.

6 The provision in the Act that has been here all
7 along, has been used by some as an argument that says, "Hey,
8 I don't have -- you know, I coordinate with." In fact, that
9 was the fight that we had over the chapter on the NRR was
10 he wanted it to say he coordinates with the EDO rather than to
11 report so.

12 So in an attempt to get this straightened out in
13 '77, just before Marc left, there was this question over those
14 Manual Chapters and that issue was more or less, I thought,
15 put to bed.

16 The other events that have happened, of course,
17 pointed out that there still was a problem as to the matter
18 of the responsibility of keeping the EDO informed of
19 substantive, and I underline and put in capital letters.

20 COMMISSIONER GILINSKY: Well, what does that mean,
21 "substantive conversations"?

22 MR. GOSSICK: Things that have to do with policy
23 matters or that affect the agency operation in a substantive
24 way, and here, judgment obviously has to be applied. It is
25 up to the office directors and to me.

1 COMMISSIONER GILINSKY: Could you give me an example
2 of something on one side of the line and something on the
3 other side of the line?

4 MR. GOSSICK: Well, sure, I mean, a phone call
5 from you or any of the Commissioners to the staff asking
6 for information or going on a trip, give me some background
7 information, or just -- something that is to help get the
8 job done. Obviously, I don't want to be in the way of that,
9 I don't necessarily get involved if it isn't something that
10 isn't important.

11 On the other hand, if there is a task laid on the
12 staff by one of the Commissioners and it involves a certain
13 expenditure of resources, I think it is only proper that I
14 know about it, and that the office director know about it,
15 by the way. And in some cases that is not happening. And
16 I think the intent ---

17 COMMISSIONER GILINSKY: Well, are you not being
18 kept informed now?

19 MR. GOSSICK: I am by ---

20 COMMISSIONER GILINSKY: I mean, what is the problem
21 to which this is the solution?

22 MR. GOSSICK: Well, the problem, as I told you,
23 was really back to this provision in the law and the matter
24 that it has caused, or the situation that it has resulted in,
25 in some cases, where it isn't clear that the EDO is to be

1 kept informed on important matters.

2 COMMISSIONER GILINSKY: But the effect of this, it
3 seems to me, is to constrict the flow the information from
4 the staff to the Commission. The problem, it seems to me,
5 is not that you haven't been informed, it is that the
6 Commissioners are not informed.

7 MR. GOSSICK: There is certainly no intend here to
8 restrict -- and I don't think to hold up in any way, the flow
9 of information from the staff to the Commission.

10 COMMISSIONER GILINSKY: But it seems to me it has
11 that effect. It is hard to say just how ---

12 COMMISSIONER BRADFORD: Well, let me try a different
13 example, because the kind of thing that concerned me in non-
14 concurring: supposing you had a situation in which an
15 office director felt that a recommendation of some importance
16 was being held up at the EDO's level, perhaps because another
17 office did not agree with it or perhaps because you didn't,
18 but in any case that it had been there a while and was
19 urgent and he felt the Commission ought to know about it.
20 Now, we have an open door policy, of course, that extends
21 theoretically to everyone down to the GS-1 level. It seems
22 as though this would, take the office directors, it would
23 leave them the only people in the agency who could not
24 communicate with the Commissioner without having to ---

25 CHAIRMAN HENDRIE: Why does it prohibit the guy from

1 communicating with the Commission.

2 COMMISSIONER BRADFORD: Because he has got to
3 inform Lee if he is doing it.

4 (Simultaneous voices.)

5 COMMISSIONER AHEARNE: -- issues within his
6 responsibility.

7 COMMISSIONER BRADFORD: That's right.

8 COMMISSIONER AHEARNE: I guess I don't see
9 anything -- I think the fundamental -- as least as I perceive
10 the fundamental issue to be is: Does the EDO, is he the
11 agent that we, as a Commission, say: "It is your respon-
12 sibility to run the day-to-day operation of the agency, so
13 those office directors, therefore, work for you." That's
14 really the fundamental issue, and the ---

15 COMMISSIONER BRADFORD: That is a fundamental
16 issue, but even if the answer to that is "yes" you still
17 have to say: "... and therefore do we want to make them
18 the only people in the agency who cannot communicate something
19 to the Commission," ---

20 CHAIRMAN HENDRIE: I don't understand why you say,
21 "can't communicate with the Commission"?

22 COMMISSIONER BRADFORD: Well, let me finish the
23 sentence. The sentence ends: "... without informing
24 the EDO on a fully and currently basis."

25 MR. GOSSICK: Commissioner Bradford, if I may

1 address that very point, that is exactly the kind of a
2 situation where I would think this thing would come into
3 play, and he is certainly free, and any office director knows
4 that if he thinks I'm sitting on something unreasonably, he
5 is free to make that view known, and I don't know that it
6 has to be before, but I want to know about it afterwards, at
7 least, and I don't mean a month afterwards. But ---

8 COMMISSIONER BRADFORD: Well, I would assume, in
9 fact, that before he took that step ---

10 MR. GOSSICK: In most cases, I think would, but
11 I can visualize situations where they might feel compelled,
12 and maybe again, maybe I'm out of town or sick or something,
13 and it happens, but I would want to know about it rather than
14 go on for months without knowing that such communication
15 had taken place.

16 COMMISSIONER GILINSKY: Look, Lee, you are familiar
17 with the bureaucracy the words you have got here in the draft
18 memo from the Chairman that he advise you -- that office
19 directors advise you of their intentions to meet with the Commissioners
20 on matters involving the agency. That is bound to inhibit
21 communications between the staff and the Commission. It
22 can have no other effect but to do that, and the problem we
23 had in the last few days was that there wasn't enough
24 communication between the staff and the Commission, and between
25 you and the Commission. And I don't think we want to set up

1 another bottleneck here.

2 CHAIRMAN HENDRIE: Which problem, the five plants?

3 COMMISSIONER GILINSKY: The five plants.

4 CHAIRMAN HENDRIE: That's not correct. The staff,
5 the EDO and Mr. Denton did what they should do, they talked
6 to me. And if you have any problem with the Friday after-
7 noon communication situation, I invite you to criticize me,
8 but the staff did what they could do.

9 COMMISSIONER KENNEDY: Let me suggest that I have
10 no quarrel with what they did at all. They did what was quite
11 right. They did 20 percent of what was quite right.

12 It is not true staff did what was quite right in
13 its entirety by addressing only the Chairman of the Commission.
14 There are five Commissioners and the law says each one of them
15 is a 20 percent stockholder in the company. I intend to
16 get my 20 percent's worth, and let there be no mistake about
17 that.

18 COMMISSIONER BRADFORD: Well, I ---

19 CHAIRMAN HENDRIE: Harold asked me specifically if
20 he should call the other Commissioners and I said, in view of
21 the state of information and the time of day and day of the
22 week, let's wait until we know what is going on Monday
23 morning.

24 COMMISSIONER KENNEDY: In that case, I presume that
25 Harold is not going to ask that question again. He will know

1 what to do in the future.

2 COMMISSIONER GILINSKY: Well, these officers report
3 to the Commission as a whole. I think that's an important
4 distinction.

5 COMMISSIONER BRADFORD: Let me suggest ---

6 COMMISSIONER AHEARNE: Vic, I think there really
7 is a mixture of Commissioners though, because in that
8 particular case, you weren't faced with the issue -- I'm not
9 saying what should have happened then, all I'm saying is that
10 that is different than this issue, because in the case you
11 are mentioning, the office director recognized it was a
12 serious issue, went simultaneously to both Lee and to the
13 Commission as represented by the Chairman. So that isn't
14 the issue that is really here.

15 COMMISSIONER GILINSKY: Well, I don't want to replay
16 one, but I just simply raise it as an example of what the
17 communications problem is. It isn't that the EDO isn't
18 being informed ---

19 CHAIRMAN HENDRIE: What is being pointed out is
20 that it is not a valid example. There may very well be
21 others ---

22 COMMISSIONER GILINSKY: I think it is a valid
23 example.

24 CHAIRMAN HENDRIE: --- We may have complaints about
25 that one, but as John says, it isn't the case that is before

1 the house.

2 COMMISSIONER GILINSKY: Well, look, the EDO was
3 informed, he reports to the Commission. It seems to me that
4 he has an obligation to inform the Commission.

5 Now, what we are talking about is channeling more
6 things through the EDO, and the question I'm raising is: What
7 is that going to do for communication with the Commission.

8 CHAIRMAN HENDRIE: I don't think we are talking
9 about channeling anything more through the EDO ---

10 MR. GOSSICK: The standard practice here is --
11 Look, this thing was confused enough and I didn't mean to
12 use the word "confused" in a derogatory sense, but when
13 Harold called me on this thing, it was clear that there was
14 a lot of question about it, and I didn't want to take -- and
15 I normally don't, I asked Davis to call you when there is
16 some operation going on where he's the guy that has got the
17 facts directly. I want to know about it, obviously. I don't
18 intend, and I shall not, get in the middle and say, only I
19 now can call the Commissioners and tell them about this
20 drill, whatever is going on. I think you expect to get it
21 directly from the principal that is most involved, most
22 knowledgeable on the details of the subject.

23 So I don't intend to stand there like a valve and
24 say only I can now call the Commissioners. I don't intend to
25 change the routine one iota, and I don't know -- I understand

1 what the communication problem from the standpoint of lack
2 of generally keeping the Commission informed, that is, where
3 this matter is in issue. I certainly have not held up or
4 put the valve or plug on any request for information down
5 into the staff. It flows quite ---

6 COMMISSIONER GILINSKY: Well, I think there are
7 examples where things simply -- staff members or office
8 heads feel they have to coordinate or check with your office
9 or get your signature to send something up, there are
10 delays involved. Now ---

11 MP. GOSSICK: I don't think that delay, if you will
12 examine it, is an unreasonable delay in any event. There
13 isn't a piece of mail that stays in my office more than
14 24 hours, I can guarantee.

15 COMMISSIONER AHEARNE: Vic, in a way that is the
16 issue.

17 COMMISSIONER GILINSKY: Well, I think there are
18 some examples. There is some head shaking out there, but
19 at any rate, I think ---

20 CHAIRMAN HENDRIE: Look, Vic, if there are a
21 couple of offices that disagree out there, it is the EDO's
22 function to try to thrash it out and see, indeed, if there
23 are reasonable accommodations that will put the staff all
24 together on a paper, or whether in fact it needs to come up with
25 the differing views separated out.

1 Now, if you propose that everybody in the agency
2 is just going to address a paper on every subject that is
3 of interest to them, willy-nilly to the Commission, I won't
4 have it. You can't run an agency that way That's what
5 this office is suppose to do out there is to coordinate
6 that stuff.

7 COMMISSIONER GILINSKY: Well, I guess that sounds
8 like a good idea.

9 We are talking here about conversations or
10 intentions to have conversations.

11 MR. GOSSICK: When it deals with the kind of matters
12 that are addressed in this clause in the Act, and it says when
13 they are necessary in the view of the office director, to
14 carry out his responsibility.

15 Now, I'm not interested in any other things,
16 social conversations or stuff that is just of routine nature.
17 When somebody comes down or proposes to come to a Commissioner
18 with an issue where I'm supposed to be involved in trying
19 to bring the staff together, or get for the Commission a
20 position, if there is a strong feeling on his part that he
21 wants to make his view known separately at any time, he
22 can do that. That's the intent of this legislation.

23 CHAIRMAN HENDRIE: The intent of the paper here is
24 simply that the EDO be informed when significant contacts
25 go on.

1 Now, if there is particular language in the
2 proposed documents that appear to go beyond that or not to
3 be the best way to frame it, why we don't have any objection
4 about fixing language, I must say ---

5 MR. GOSSICK: I know, none at all.

6 COMMISSIONER BRADFORD: My concern ---

7 CHAIRMAN HENDRIE: -- but let us understand the
8 thrust here.

9 COMMISSIONER BRADFORD: My concern is different
10 from that. It is that I don't think that the office
11 directors, as I say, it may even require changing the
12 legislation that Congress has just enacted, but I don't think
13 that they ought to be foreclosed from coming to the Commission
14 and conceivably from coming to the Commission under
15 circumstances in which it would be our choice to let the
16 EDO know what the concern was, rather than that they should
17 be compelled either by law or by Commission policy, (a) to
18 notify them of their intent or (b) to tell him that they
19 have been down here and talked to one or more Commissioners,
20 unless we ourselves feel that further closing of the loop
21 should take place.

22 COMMISSIONER AHEARNE: Peter, do you view the
23 office directors as working for the EDO?

24 COMMISSIONER BRADFORD: Well, for the time being,
25 the Manual Chapter, I think, makes it pretty clear that in

1 most situations the Commission has indicated that things
2 are charneled through the EDO.

3 COMMISSIONER AHEARNE: I'm asking: Do they work for
4 him?

5 COMMISSIONER GILINSKY: I'll answer that.

6 COMMISSIONER BRADFORD: Well, I have not really sat
7 down and thought about whether ---

8 COMMISSIONER GILINSKY: I would say in a limited
9 sense. There are certain questions which involve the agency
10 as a whole, there are administrative matters, there are
11 budgetary matters or matters which involve more than one
12 office which you look to the EDO ---

13 COMMISSIONER AHEARNE: How about in their role as
14 line management.

15 COMMISSIONER GILINSKY: I would say no. We don't
16 tell Lee to decide on questions having to do with these
17 five plants. We don't look to Lee to decide on matters
18 within Saul's purview, concerning the usefulness of certain
19 projects. But we do look to Lee to -- for a certain class
20 of activities and this is a peculiar kind of agency, and
21 each of these offices are repositories of special skills
22 and we look to them for matters that deal with these skills.
23 Those skills are not available in the office of the EDO.

24 CHAIRMAN HENDRIE: That's a facinating theory. I
25 would suggest that if you happen to be the commander of an

1 army, why the chief of the mortar platoon, you know, will
2 report directly to you because obviously, the intermediate
3 command levels don't have the mortar expertise to deal
4 with it.

5 COMMISSIONER GILINSKY: Well, the army is a different
6 sort of animal, but yes, ---

7 CHAIRMAN HENDRIE: Or any other sort of institution.

8 COMMISSIONER GILINSKY: Well, for example, Lee, did
9 you make the decision on the five plants ---

10 MR. GOSSICK: No.

11 COMMISSIONER GILINSKY: -- before the Commission?
12 Well, there you are.

13 MR. GOSSICK: I don't believe that Mr. Denton made
14 a decision on the five plants. He came down here before
15 the assembled group and then it was decided right here.

16 COMMISSIONER GILINSKY: Well, but the recommendation
17 was from him to us.

18 MR. GOSSICK: There was a paper -- because of the
19 press of time ---

20 COMMISSIONER GILINSKY: I think he made the decision.

21 MR. GOSSICK: Pardon?

22 COMMISSIONER GILINSKY: Oh, I think he did make the
23 decision, for his office.

24 Now, you can run it differently. You can --
25 there is another way of running this agency. You can say,

1 Lee, should these plants be closed or not, but we don't do
2 that, and I don't think you proposed to do that.

3 COMMISSIONER KENNEDY: Vic, I don't think that
4 that's the issue.

5 MR. GOSSICK: You are going to have to find a
6 pretty rare bird that sits in that seat if he is going to
7 be able to answer every question with authority across the
8 board ---

9 COMMISSIONER GILINSKY: Well, except in the army
10 you have to do that.

11 MR. GOSSICK: Except in the army it doesn't work
12 that way either, Victor, and I have been in the Air Force,
13 and I have worked along the lines that we are talking about
14 here for a good part of my life.

15 COMMISSIONER KENNEDY: I recognize those years
16 of experience is highly qualifying, but Victor, it doesn't
17 work like that.

18 COMMISSIONER GILINSKY: Well, I withdraw that.

19 MR. GOSSICK: I've had program directors ---

20 COMMISSIONER AHEARNE: I join Lee and Dick in ---

21 MR. GOSSICK: I've had people working for me in
22 charge of a major program where it was clearly understood
23 that at any time, if they had to they could go whistling past
24 me and my boss, a four star level, past the Chief of Staff
25 of the Air Force and right to the Secretary of Defense.

1 Now, he damned well better be smart enough to touch base
2 on the way up, if he can, if time permits, but more
3 importantly, he very well better make sure that everybody
4 knows where he has been on the way back. And this is not
5 an unusual situation.

6 COMMISSIONER KENNEDY: That's the only way an
7 organization can function. The alternative is anarchy.

8 MR. GOSSICK: Or is all tied up in bureaucracy and
9 nothing ever happens.

10 COMMISSIONER KENNEDY: That's right. That's what I
11 consider anarchy. I considered tied up bureaucracy to be the
12 closest thing to anarchy.

13 COMMISSIONER BRADFORD: How did you all ever
14 bring yourselves to vote for the open-door policy?

15 COMMISSIONER KENNEDY: I don't think there is
16 any inconsistency.

17 CHAIRMAN HENDRIE: There is nothing that has been
18 said here which is inconsistent with it.

19 COMMISSIONER BRADFORD: Well, it says that people
20 can go levels above the level that they are at and come
21 back down and not report to anybody on the way up and not
22 report to anybody on the way down.

23 COMMISSIONER AHEARNE: It is a standard operating
24 procedure.

25 CHAIRMAN HENDRIE: The open-door policy -- Jesus.

1 COMMISSIONER BRADFORD: I'm not suggesting
2 this would be standard either ---

3 CHAIRMAN HENDRIE: Peter, look ---

4 COMMISSIONER BRADFORD: Let me finish. I'm
5 suggesting that there may be situations in which office
6 directors will feel that they have something that ought
7 to be brought to a Commissioner's attention or to the
8 Commission's attention, and for one reason or another they
9 would find it difficult or impossible to do that if they
10 had to touch base with the EDO on the way, perhaps because,
11 as Lee indicated before, he plants to fill out their
12 rating charts at some point, and I'm saying that I would want
13 them to be able to do that.

14 COMMISSIONER KENNEDY: Let me assert one thing --
15 two things.

16 First, the extent that Mr. Gossick does fill out
17 the rating charts, whatever they may be called, for the
18 office directors, it is my assumption that in all such
19 systems, seniors will be reviewing that and that is us.

20 MR. GOSSICK: Certainly.

21 COMMISSIONER KENNEDY: Secondly, if was mentioned
22 that an office director might wish to bring a matter to the
23 attention of a Commissioner. Now, let me be very clear,
24 what I said a few minutes ago, that this is a 20 percent
25 stockholding operation, and anything that an office director

1 feels important enough to bring to the attention of a
2 Commissioner, he will bring it to the attention of Commissioners,
3 all five of them. And to the extent that that's not true,
4 I'll seek legislation to be sure it is.

5 COMMISSIONER AHEARNE: I tend to agree with that.

6 CHAIRMAN HENDRIE: Peter, I think the open door
7 thing is a difference in kind from what we are talking about
8 in the Manual Chapter.

9 The thrust of the open-door policy is that an
10 individual in the agency, at any level, including office
11 directors, who disagree with a policy, an action, personal
12 or otherwise, who wants to bring it to the attention of
13 somebody up the line, including Commissioners, and who
14 feels that there may be a personal jeopardy in so doing, is
15 offered whatever confidentiality the system is capable of
16 producing in bringing that up the line.

17 Now, I must say, if an office director feels
18 personally jeopardized in letting the EDO know that he has
19 either been to talk about a subject with the Commission or
20 is going to, why then I will class that as an open-door
21 policy and say that what we are talking about here doesn't
22 prevent him coming and talking in private.

23 I think what we are talking about here is the
24 conduct of the normal business of the agency ---

25 COMMISSIONER BRADFORD: As to that, I have no problem.

1 CHAIRMAN HENDRIE: And in that sense it seems to
2 me that it is very difficult to run a shop without trying
3 to keep the staff headquarters out there informed about what's
4 going on.

5 COMMISSIONER BRADFORD: I mean, to the extent that
6 this picks situations where memos haven't been routed to all
7 the places to which they are relevant and that sort of thing,
8 that's fine.

9 I have, I guess, the same problem with what Dick
10 and John just indicated in terms of its implications, for
11 the open-door policy, that is, should people on the staff
12 feel that they cannot, in fact, for the open-door policy,
13 come to one Commissioner without coming to all five. I
14 hadn't understood the policy worked that way.

15 COMMISSIONER AHEARNE: Peter, I think there is,
16 again, the distinction. Joe's distinction was the one that
17 I understood the open-door policy as applying to, in that
18 context versus a question of disagreement with the policy
19 of personal jeopardy involvement, I don't think there is any
20 restriction of to whom such an individual goes. On
21 substantive agency matters, I entirely agree with both Lee's
22 position and Dick's position. If it is an organization
23 that is going to run, it runs with a clear line of authority.
24 And if Lee is running that side of -- the operating side
25 of the agency, the office directors report to him and work

1 through him. I don't think anyone who is out there in
2 the agency has too much confusion about what that means.

3 The same way, though, that when that information
4 passes from Lee upwards past that point, these are now
5 substantive agency issues, I think it is five of us who get
6 that information. That's ---

7 COMMISSIONER GILINSKY: But how do you separate
8 the open-door communications from substantive ---

9 COMMISSIONER KENNEDY: Let me suggest, gentlemen.
10 If we are making a mockery of the concept of open-door, what
11 we are talking about is the senior officials of the agency,
12 for G d's sake. Open-door policy throughout the government,
13 as I have understood it, low these past 20 years, was to make
14 sure that those who were far down in the organization, who
15 couldn't possibly make their views known and get it through
16 bureaucracy because it would be impeded, it was to provide
17 a mechanism for them to do it. It wasn't to take the
18 agency heads and give them the opportunity to shoot off
19 their mouth. These are the most responsible people in the
20 organization. They are the people to whom our own authorities
21 have been delegated directly. Open door?

22 I would suggest that if a senior official of the
23 agency has a problem so serious and he believes the open-door
24 is appropriate, it is a matter that he ought to be taking up
25 with the five heads of the agency. And he would be very, very

1 remise if he did not do so. Let us not make a mockery of the
2 open-door policy. It is an important concept and one which
3 we have assiduously avoided compromising. Let us not do so
4 now.

5 COMMISSIONER BRADFORD: Well, from my own part, I
6 just don't agree with that statement of it.

7 CHAIRMAN HENDRIE: Vic, you had a finger up?

8 COMMISSIONER GILINSKY: Well, I guess I wasn't sure
9 I understood whether Dick was saying it was okay for them
10 to come up but they had to talk to all the Commissioners,
11 or it wasn't okay for them to come ---

12 COMMISSIONER KENNEDY: I'm saying the open-door
13 policy is not at issue here, certainly not in my view.

14 If there is an open-door question which afflicts
15 the conscience or concerns of one of the most senior
16 officials of the agency, he has an obligation to go to the
17 other senior officials of the agency, his bosses, all five
18 of them. And if he doesn't, I don't think he ought to be
19 a senior official with the agency. The open-door policy was
20 to make it possible for one of his underlinings to get by him,
21 if that is the word. It wasn't -- the question of his
22 getting around Lee Gossick in a case like that, all he is
23 going to do is say, I've got a problem, I'm going to go talk
24 to the Commissioners. What's Gossick going to say, you can't?
25 I don't think so. It wouldn't do him any good if he did.

1 The law makes it clear that they can. I don't know what the
2 debate is about.

3 COMMISSIONER GILINSKY: Well, I guess I thought
4 this was pretty sweeping language. You know, it is one
5 thing to keep the Executive Director informed of the flow
6 of business, and I think that properly should be, and I
7 think the papers flowing back and forth between the
8 Commissioners and the offices ---

9 COMMISSIONER KENNEDY: Vic, I don't have any
10 quarrel with any of that. What's that got to do with the
11 open-door policy?

12 COMMISSIONER GILINSKY: Well, we just put that label
13 on direct communications with ---

14 COMMISSIONER KENNEDY: Oh, don't. That's
15 precisely what I'm asking not be done.

16 COMMISSIONER GILINSKY: Let's drop the label.
17 Let's drop the label.

18 COMMISSIONER KENNEDY: Don't destroy a worth while
19 concept by pulling under that label all kinds of other things
20 that don't have anything to do with it.

21 COMMISSIONER BRADFORD: But the spirit of that
22 concept is that people in the agency feel that there is a
23 problem on which they need to communicate upwards can do so
24 in whatever manner seems to them best suited to once get
25 the problem brought upward and at the same time protect their

1 situation. And I don't care ---

2 COMMISSIONER KENNEDY: Of course, that is
3 precisely right and I can't ---

4 COMMISSIONER BRADFORD: I don't care what you
5 call it, I'm tired of being interrupted, and I'm also tired
6 of long speeches.

7 COMMISSIONER KENNEDY: All right. So am I.

8 COMMISSIONER BRADFORD: Good.

9 Once they communicate upward in whatever fashion
10 they choose, it is the responsibility of the people to whom
11 they bring their concerns to decide what happens next, and
12 it is not incumbent on them. I think this memo goes directly
13 against that spirit.

14 COMMISSIONER KENNEDY: Peter, those people work for
15 five people, not one.

16 COMMISSIONER BRADFORD: So does everybody in the
17 agency. That's the point about the spirit of ---

18 COMMISSIONER KENNEDY: No. The other people
19 in the agency work for one, their boss, whoever he is down
20 there. These people have five bosses and it is different.

21 CHAIRMAN HENDRIE: Peter, is it the memo -- the
22 draft memo that seems particularly bothersome to you ---

23 COMMISSIONER BRADFORD: Yes.

24 CHAIRMAN HENDRIE: -- rather than the language that
25 was proposed for the Manual Chapter?

1 COMMISSIONER BRADFORD: I have not focused as much
2 on the Manual Chapter. It is the draft memo and the effect
3 of absolutely closing off the office directors.

4 CHAIRMAN HENDRIE: Well, all right, look ---

5 COMMISSIONER GILINSKY: I also have ---

6 CHAIRMAN HENDRIE: Let me go in the following
7 direction.

8 We have already had comment about the proposed
9 Manual Chapter language, which is that under the proposed
10 new section there would be an explicit, where it says A, B,
11 and C, there would be a D, or maybe as you said, that one
12 ought to be A and the others slide down one, an explicit
13 recognition of that part of the law that says the office
14 directors in the performance of their duties can get to
15 the Commission, and putting that in, sounds to me like a good
16 idea.

17 There was -- some of the office directors, Lee
18 said, felt that in their own chapters, rather than delete
19 that line, that they would just as soon see it in there,
20 other things being equal, even though there was a new chapter
21 that also talked directly to those things, and I must say,
22 I wouldn't have any objection to it appearing both places.

23 MR. GOSSICK: I would prefer it would not appear
24 in the "Supervision" section. They want it in the Manual
25 Chapter, but somewhere else other than on the matter of who

1 they report to. I think that's an important point.

2 COMMISSIONER GILINSKY: What is the point?

3 CHAIRMAN HENDRIE: Okay. Well, let ---

4 COMMISSIONER GILINSKY: Could you just explain it?

5 CHAIRMAN HENDRIE: Well, let me get to that in
6 a minute because I want to get on and get the rest of the
7 thought in mind.

8 Now, that is the point that we then ought to discuss
9 and straighten out, but it seems to me the first one is clear.

10 Now, the third point would be, if the implementing
11 memoranda seems to have less or more, maybe, language that
12 everybody would find completely helpful, I think good, let's
13 see if we can fix that. And I wonder if you -- could you
14 take a crack at -- the sort of clarification which would
15 cure the difficulty that you perceive in it, because it seems
16 to me that in spite of the fact it has been a splendid week
17 for argument, and we are continuing it this morning, it is
18 quite a splendid argument. The differences may ultimately
19 not be that great.

20 COMMISSIONER BRADFORD: I would be glad to do what
21 I can with the memorandum. I did indicate on my concurrence
22 sheet that as far as I was concerned I would seek the appeal
23 of that particular piece of legislation. It seems to me, as
24 I say, to be an internal management decision and I don't
25 think that -- I don't think that the problem, which originally

1 gave rise to the example which is used in the Senate report,
2 namely NUMEC, is any longer a valid model for the way the
3 agency functions. The Manual Chapter, which came much latter,
4 in the spring of '77, in any case eliminated that problem.

5 COMMISSIONER GILINSKY: If there was a problem.

6 COMMISSIONER BRADFORD: If there was a problem,
7 right.

8 CHAIRMAN HENDRIE: Let's see. I don't know where
9 that ---

10 COMMISSIONER BRADFORD: What I'm saying is I would
11 work on the memo to try and -- within the context of the
12 law, get rid of the main problems that I see in it, but I
13 myself would also urge that the Congress reconsider that
14 provisions. In saying that, I think I would have to
15 acknowledge that I'm sure I was consulted when it went
16 through and didn't then focus on the problems as I now see
17 them.

18 CHAIRMAN HENDRIE: Let me ask, what would you do
19 with the May '77 Manual Chapter provisions?

20 COMMISSIONER BRADFORD: I have not thought a lot
21 about that.

22 CHAIRMAN HENDRIE: In saying, well, why don't they
23 take the provision of the law back. Does that imply a basic
24 change in the configuration of the EDO and the principal
25 office directors, in your view?

1 COMMISSIONER BRADFORD: Well, I guess what is
2 troubling me about the law is if it can give rise to this
3 memo, then it is bringing about a change that I don't think
4 is desirable. I have not focused on the Manual Chapters
5 and I had not thought that there was so great a problem
6 involved -- in the time that I have been here and keeping the
7 EDO informed, that, in fact, we needed further legislation or
8 needed a memo of this sort to the extent that memoranda to
9 the staff or going out directly and imposing workloads that
10 Lee doesn't know about, I certainly agree that we ought to
11 do what is necessary to bring that under control, but that's
12 rather apart from congressional legislation.

13 CHAIRMAN HENDRIE: Well, I don't think we asked
14 for this provision. As a matter of fact, I can't remember
15 being consulted about it.

16 MR. GOSSICK: It came as a surprise, as far as I
17 can recall, it showed up.

18 CHAIRMAN HENDRIE: It popped up in the authorization
19 bill and ---

20 MR. GOSSICK: Ask Kevin, I think he was up there on
21 the Hill.

22 CHAIRMAN HENDRIE: Yes, Kevin. What did you do that
23 for.

24 (Laughter)

25 CHAIRMAN HENDRIE: And it seemed to me that what it

1 did was just put into the statute the thrust of the Commission
2 decision in the spring of '77 that, in fact, the EDO was
3 the principal officer who ran the staff on a day-to-day basis
4 on the Commission's behalf. But these information channels
5 established by statute, as well as the information channels
6 established by the Commission under the open door, continued
7 to be there and operative for the sort of normal day-to-day
8 operation of the staff, would look to the EDO to run it and
9 keep things coordinated.

10 So I didn't see any objection to the legislation,
11 and I hadn't encountered or sensed a thought yet that there
12 was a feeling, Peter, on your part that that basic configur-
13 ation for the organization of the agency was an incorrect
14 one. And it is still not clear to me that that's where you
15 are going.

16 COMMISSIONER BRADFORD: No, but up to now, I hadn't
17 had the feeling that if one of the office directors really
18 felt they had a serious problem with the EDO's office, and
19 I don't mean anything personal ---

20 CHAIRMAN HENDRIE: And wanted to come and talk
21 privately.

22 COMMISSIONER BRADFORD: -- And wanted to come and
23 talk privately, that they couldn't do that.

24 COMMISSIONER GILINSKY: Well, if we take the view ---

25 MR. GOSSICK: But this doesn't change that.

1 COMMISSIONER BRADFORD: I know, but they wanted
2 to come and talk privately, even without having themselves
3 to take the burden of going back and reporting to you on
4 the conversation. It seems to me that there are circum-
5 stances under which that really should be the decision of
6 the Commission, Commissioners that the office director
7 talks to, and not be a separate burden on the office directors
8 themselves.

9 MR. GOSSICK: I guess I find it very difficult to
10 stretch my imagination to where I'm such a problem on some
11 point that that would never ---

12 COMMISSIONER BRADFORD: That's why I tried to say
13 I didn't want to personalize it to you, Lee. The concern would
14 be the same if we were just looking at ---

15 MR. GOSSICK: Yes, okay.

16 COMMISSIONER GILINSKY: Why can't we take the view
17 that the Chairman just expressed, that this, in effect,
18 reflected or confirmed changes that were already made, and
19 why do we need to make any further changes. Are we not in
20 compliance with the law now?

21 MR. GOSSICK: There is nothing at all on the books
22 that recognizes it as far as NRC is concerned. Sure, there
23 is a phrase in the law, but I think, as in most other cases,
24 we try to reflect the provisions of the law.

25 COMMISSIONER GILINSKY: Well, there is something.

1 It says in the Manual Chapters the principal officers of
2 the Commission report to you, and I presume that they will
3 send you copies of -- Well, certain things just get routed
4 to your office, other things you properly ought to get
5 copies of and ---

6 MR. GOSSICK: I thought you were asking why did
7 I write this paper in the first place.

8 COMMISSIONER GILINSKY: Right. Yes, I am, since ----

9 MR. GOSSICK: Because the law needs to be reflected
10 in the Manual Chapters.

11 COMMISSIONER GILINSKY: Well, but as the Chairman
12 just expressed, in effect, the law confirmed what we had
13 already done and are we not in compliance with the law?

14 MR. GOSSICK: No, we are not. As long as we have
15 got one part of the law ---

16 COMMISSIONER GILINSKY: Is that the view of the
17 General Counsel?

18 MR. GOSSICK: The lawyers have been through this,
19 and right now, we are quoting in the Manual Chapter, a
20 provision of the Energy Reorganization Act and to leave it
21 silent an amendment for that act, it seems to me to be
22 lacking some where.

23 CHAIRMAN HENDRIE: I think you really need to take
24 recognition of the provision that have been enacted, and it
25 does strike me as peculiar that the manual would not reflect

1 that amendment in some way or other.

2 MR. GOSSICK: I guess I don't understand what the
3 objection is here, Victor. Let me ---

4 COMMISSIONER GILINSKY: Let me tell you, because
5 had you come up here and just said that you ought to
6 routinely be informed of matters that -- Commission papers
7 that come from the staff up through the Commission and
8 various other matters that follow in your province, that
9 would have been all right. But it seems to me you reached
10 beyond where you should have, and I find that pretty
11 disturbing, because ---

12 MR. GOSSICK: In what way?

13 COMMISSIONER GILINSKY: Well, look at this draft
14 memo for the Chairman. "Advise the EDO of subsequent
15 conversations."

16 You are not talking about papers, you are not
17 talking decisions, you are talking about conversations.
18 And if the intention is to meet with Commissioners.

19 MR. GOSSICK: Isn't that communicating with the
20 Commission as is addressed in the ---

21 COMMISSIONER GILINSKY: Well, I'll tell you. As I
22 understand the effect that that would have on this
23 organization with what little experience I have had with it,
24 the effect that it would have, in my view, would be to
25 constrict the flow of information from the staff to the

1 Commissioners. Now I regard that with some concern.

2 CHAIRMAN HENDRIE: Well, let's fix the language of
3 the draft memorandum. ---

4 COMMISSIONER GILINSKY: And I guess I'm concerned
5 that ---

6 CHAIRMAN HENDRIE: -- If it could be read that way,
7 let's fix it. It wasn't intended to be a throttling
8 directive.

9 MR. GOSSICK: Absolutely not, absolutely not.

10 The only reason for -- I suggested ---

11 COMMISSIONER KENNEDY: Why would it have that
12 effect, in your view, Vic?

13 COMMISSIONER GILINSKY: Well, I think it is fairly
14 obvious.

15 MR. GOSSICK: But isn't that what the law says?

16 COMMISSIONER GILINSKY: I don't think so. Look ---

17 COMMISSIONER KENNEDY: It's not all that clear to
18 me, that's why I asked.

19 COMMISSIONER BRADFORD: No, that's my problem with
20 the law. I'm less concerned with what Lee has done than with
21 the fact that it may not be a legitimate reading of the law.

22 COMMISSIONER GILINSKY: If that's what the law
23 says, then the law ought to be changed, okay. I agree with
24 Peter on that.

25 But it seems to me that a certain amount of common

1 sense is called for here.

2 MR. GOSSICK: I expect to do my best to exercise
3 it, Commissioner Gilinsky.

4 COMMISSIONER GILINSKY: Well, I want to be sure
5 that the words clearly indicate what kind of action is called
6 for.

7 MR. GOSSICK: Mr. Chairman, we were asked to have
8 the office directors here, they have been here for most of
9 the morning, expressing their views. I want to make sure
10 they have an opportunity to speak if they feel there is
11 something they want to say.

12 MR. LEVINE: I would like to say a few words.

13 First of all, I think -- we had a meeting in
14 Lee's office of which it was my understanding that all
15 five of us agreed that our Manual Chapter should be changed
16 to reflect the provisions about being able to communicate
17 with the Commission as well as keeping Lee informed.

18 Harold wasn't there, but Lee reported that Harold
19 wanted it, so I want to just be sure that all five of us
20 did understand that.

21 I think, from listening to this conversation it
22 has been very interesting. I think the problem is that too
23 many words have been written that if the memo from the
24 Chairman is dropped and that the new Manual Chapter is
25 dropped, the office directors' desires are implemented, then

1 it would be very clear what is going on. Lee will have,
2 in his chapter, this business about how to communicate with
3 the Commission and we will have our chapters. And certainly,
4 we ought to know what "keeping people fully informed" means
5 and that would take care of that and eliminate these words
6 that people find difficult.

7 CHAIRMAN HENDRIE: Do you mean the draft?

8 MR. LEVINE: This new chapter, 0202 or whatever it
9 is on Staff Communications with the Commission, which
10 incorporates some of the words from your memorandum.

11 I think that could perhaps solve the problem.

12 CHAIRMAN HENDRIE: You would propose to incorporate,
13 under the EDO and office director, existing chapters,
14 recognition of the ---

15 MR. LEVINE: Of the two laws.

16 CHAIRMAN HENDRIE: Well, of the amended language.

17 COMMISSIONER KENNEDY: And you have no difficulty
18 with that concept?

19 MR. LEVINE: None at all.

20 And I don't feel that that would inhibit me in
21 communicating to the Commission, as I feel it does now.

22 COMMISSIONER AHEARNE: But 0202 has just got the
23 same statements that Vic and Peter were having problems with.

24 MR. LEVINE: MY difficulty is that those words in
25 0202 imply other things beyond those in the law and I find

1 some difficulty with that.

2 COMMISSIONER AHEARNE: So you do have difficulties
3 with 0202?

4 MR. LEVINE: That's why I suggest eliminating it
5 and I sense that that's what ---

6 COMMISSIONER AHEARNE: I'm sorry. You would
7 eliminate 0202?

8 MR. LEVINE: Yes, eliminate 0202.

9 MR. GOSSICK: That was not clear in our meeting.
10 I thought you said it should be contained in the Manual
11 Chapters as now ---

12 MR. LEVINE: No, no. This is something that has
13 come to me since this morning.

14 MR. GOSSICK: Oh, okay.

15 COMMISSIONER BRADFORD: So the problem is extending
16 it to all other offices, as the Act?

17 MR. LEVINE: Put it in whatever office you want to.
18 I think that's the simple way to handle it.

19 CHAIRMAN HENDRIE: Bob?

20 COMMISSIONER GILINSKY: That seems like a sensible
21 approach.

22 MR. MINOGUE: I'm not going to make a long
23 statement, but I think that the wording in the legislation
24 should be reflected in the "Supervision" section for the
25 three statutory offices and the two non-statutory offices and

1 the other staff offices, I think are adequately covered
2 in describing the EDO's functions. I don't really see a
3 great need for this new section. I object to it and it
4 would really effect the the non-statutory people. I don't
5 see a great need for it.

6 CHAIRMAN HENDRIE: John?

7 MR. DAVIS: My impression of the paper when I
8 read it, it was to bring into words the existing practice,
9 and I have not felt at all inhibited in dealing with the
10 Commissioners. I have routinely, since I'm not a statutory --
11 I&E's not a statutory office, have kept Lee informed, either
12 before I dealt with the Commissioners or after I had dealt with
13 the Commissioners.

14 I was one, though, who felt that the wording should
15 be carried into the Manual Chapter, primarily because if
16 you change the wording, it may raise questions that there is
17 a new meaning intended. So carry the same language from the
18 Act into the Manual Chapters. But I have not, in any way,
19 felt inhibited, and I will say this, I will be surprised if
20 there is any office director, I would hope you would never
21 select an office director who would feel inhibited to come to
22 the Commissioners for any action, regardless of how it may
23 offend the Executive Director.

24 MR. MINOGUE: Can I add to my statement, Mr. Chairman,
25 that -- I appreciate John flagging that. I have probably had

1 more experience working with what, in fact, was this setup
2 than anybody else here, because I have been an office
3 director since the agency was created and always had certain
4 strings applied to me because of being non-statutory.

5 I have never felt inhibited. There have been
6 cases where the EDO and I fully didn't agree on something,
7 in which case he sent the paper up to the Commission with a
8 note indicating the areas where he didn't agree with me.
9 It wasn't stopped, and I never felt any constraint to push
10 the thing on through. I think it is a very workable process,
11 and I have been doing it since the agency was formed.

12 CHAIRMAN HENDRIE: Harold?

13 MR. DENTON: I think it is an important point.
14 I agree with Saul and my impressions would be to take my
15 Manual Chapter, leave in the words that are being proposed,
16 namely these words that say that I may communicate or
17 report directly to the Commission, but then follow that
18 sentence directly with words from the Act, namely, I shall
19 keep the EDO fully and currently informed at all times. That
20 would be my preference.

21 I think if you leave the words that are, may in
22 the future have implications for the selection of the office
23 director because then the words would read that even though
24 you served at the pleasure of the Commission, you are
25 supervised by the EDO and it leaves that question a bit

1 hanging there as to the relationship between the office
2 directors and the Commission and makes the EDO the supervisor
3 directly.

4 CHAIRMAN HENDRIE: Bill?

5 MR. DIRCKS: I'm the new boy on the block, but I
6 can see it from both angles. Having sat in Lee's office, I
7 can understand many of his problems. The uncertainty, I think,
8 of what is going on. Sitting in my current seat, I think
9 Harold has expressed my view about getting it into the
10 Manual Chapter under that "Supervision" heading that Harold
11 mentioned.

12 CHAIRMAN HENDRIE: Other comments?

13 MR. GOSSICK: Just let me say, I have no -- this
14 is not a crucial point to me if it is agreed that it belongs
15 here as long as it is totally there, as amended. I think
16 that's fine. I have to figure out the best way to make sure
17 that it is clear that the practice applies to the other
18 offices that report to me as well.

19 CHAIRMAN HENDRIE: John?

20 COMMISSIONER AHEARNE: Well, I have another
21 comment which really goes back to an earlier point I was
22 trying to make, that I think that there is, to me at least,
23 it is a more fundamental question of the relationship of
24 the office directors to the EDO, not in the policy disagreement
25 area, but in the more day-to-day operational area, which

1 relates to the other issue that I had suggested that we
2 incorporate in, this morning, which I don't think it is
3 going to be possible because of the lateness of the time But
4 I do want to mention, at least as I view this issue, which
5 is related to what role does the EDO play.

6 I think we have to, at some stage, address the
7 delegation of authority question which Vic had raised
8 last fall, and which apparently, and I wanted to ask Al or
9 Fitz, as I trace back, the question was raised and then in
10 November there was an outline of proposed scope of work and
11 the review, the latest response appears, and I don't want to
12 mischaracterize it, but the picture I get from it is that
13 not much has been done since ---

14 MR. KENNEKE: You are very kind.

15 COMMISSIONER AHEARNE: Since November when that
16 fairly elaborate scope of work was laid out, which sounded
17 and still sounded right. I guess I was a little disturbed
18 by the much more abbreviated scope of work that you have
19 now recently proposed.

20 But the larger question of what is the EDO's
21 role in the organization and what are the office director's
22 roles and what is our role, which I thought Vic was getting
23 at, but this delegation of authority question appears to me
24 to be one that we have just got to wrestle with. And I
25 don't think we are going to wrestle with it on this particular

1 issue here, but I -- if we do end up wrestling with that
2 and addressing it, why some of these questions will fall out.

3 CHAIRMAN HENDRIE: The time does run down, and I
4 think I'm going to have to adjourn this session.

5 Let me recommend the following: We have not, in
6 fact, picked up the status report that has been requested on
7 the delegation matters. It seems to me we probably ought
8 to. I'm not sure that I know quite where to recommend that
9 the business of getting the new provision of the law one
10 way or another into the manual, it is not quite fair to
11 suggest how that ought to go at this point. I think maybe
12 some of this further discussion, which would follow from
13 the status report and discussion of delegation of authority
14 would be needed.

15 What I suggest we then do is to hold for the
16 moment on 79-82. Sam, look for a place to schedule us back
17 on to a discussion, which we will understand next time will
18 focus less on, and I hope not very much at all, on proposed
19 language for the Manual Chapter, but rather focus on this
20 organizational question and the report on delegation of
21 authority when the status of that work is done.

22 I suspect that after that we may want to suggest
23 various ways to recast the proposals in 79-82, but I would
24 kind of like to hear that discussion before I do it.

25 It is clear that one option would be, as was

1 suggested here by several of the office directors, to include
2 the new statutory language, in addition to the sentence that
3 is already in there, in each of their chapters. Then Lee
4 has to figure out a way to extend -- to express the Commission's
5 wish that this right, I guess, of office directors is
6 extended to non-statutory offices up and down the line, and
7 I'm not sure whether that's best achieved by a couple of
8 sentences under each one or some other version of the general
9 chapter.

10 It appears to me that if one went in that direction
11 that there would probably -- I guess there would not, then
12 be any need for an implementing memorandum for me, is that
13 correct?

14 So maybe you ought not to move too speedily to
15 reflect on different language, Peter. We might pull out the
16 need for the base document.

17 Now, I do feel that I'm going to have to terminate
18 discussion on this subject at this point.

19 (Whereupon, the meeting in the above-entitled
20 matter was concluded at 12:35 noon.)
21
22
23
24
25