NUCLEAR REGULATORY COMMISSION

In the Matter of: COMMISSION MEETING

DISCUSSION OF REVISED LICENSING PROCEDURES

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UNITED STATES OF AMERICA

NUCLEAR REGULATORY COMMISSION

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DISCUSSION OF REVISED LICENSING PROCEDURES

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Nuclear Regulatory Commission
Room 1130, 1717 H St., N.W.
Washington, D. C.

Thursday, May 7, 1981

The Commission met, pursuant to notice, at 2:10 p. m., JOSEPH M. HENDRIE, Chairman of the Commission, presiding.

BEFORE:

JOSEPH M. HENDRIE, Chairman of the Commission

VICTOR GILINSKY, Commissioner

PETER A. BRADFORD, Commissioner

JOHN F. AHEARNE, Commissioner

ALSO PRESENT:

SAMUEL J. CHILK

LEONARD BICKWIT, JR.

WILLIAM J. DIRCKS

HOWARD SHAPAR

ALAN S. ROSENTHAL

TONY P. COTTER

MARTIN MALSCH

WILLIAM J. OLMSTEAD

HAROLD DENTON

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DISCLAIMER

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P R O C E E D I N G S

CHAIRMAN HENDRIE: If we could come to order, the Commission meets this afternoon to continue its discussion of revised licensing procedures.

Yesterday morning we were in full flight on a discussion of ways to try to move the front end of the hearing process along in a reasonable way, and there were discussions about requiring people to serve papers on one another in a hearing by air mail or messenger or whatever, and also discussion of possibly limiting, except where good cause was shown to expand the number, the number of interrogatories per party.

Now, we asked the counsel and his ad hoc group on licensing to retire to their chambers and come back with a proposition, and I am pleased to see that they have been able to do so.

Since I just laid eyes on it, and I have only turned the front page, why, it will be a help to me if the counsel will lead us through it, please.

MR. BICKWIT: Fine. What you have here is simply an outline of the major issues, as far as we can determine them, that are involved in putting together any proposed rule change.

Our recommendations are those of the OELD, the appeal board, and our office, except where otherwise noted.

The boards, as I understand it, still have not reached recommendations on these points, but, Tony, if you want to

support or dissent from any of these, fine.

What I mean by recommendation is that if the Commission wants to go in this direction, this is what these offices believe is the most acceptable way of doing that.

MR. COTTER: I just saw it about five minutes before Commission Ahearne did, and I do have most of the panel members in a seminar in Gaithersburg right now, and I plan on polling them tomorrow morning.

MR. BICKWIT: I see. The first issue that occurred to us is on whom are the interrogatories we are talking about being served. We talk about limited interrogatories. As to which recipients are we limiting these interrogatories, and the major options are to shield the staff only, or to shield all parties.

COMMISSIONER AHEARNE: I am confused. I thought we were talking about interrogatories by ---

MR. BICKWIT: We do talk about that later in this outline, but the issue I want to focus on now is whatever we set as a limit for interrogatories and whoever we place that limit on as a means of limiting interrogatories by a given party, who is shielded by the rule? That is the issue I am trying to isolate.

COMMISSIONER AHEARNE: Is it a shield? Aren't you raising a separate question? Are we talking about a shield, or are we talking about a constraint?

MR. BICKWIT: We are talking about some kind of

constraint, I think.

COMMISSIONER AHEARNE: Right. But you can have the constraint with or without the shield.

MR. BICKWIT: I was using shield and constraint interchangeably.

COMMISSIONER AHEARNE: But they are different, because the constraint is the person proposing the interrogatories. That is a constraint.

MR. BICKWIT: I am saying that whatever constraint we impose on that person, it is a separate issue to determine who is going to be shielded by that constraint, and that is the issue I would like to focus the Commission on in either one.

COMMISSIONER AHEARNE: If I could just beg your indulgence, though, let me ask this. I am still confused, because there is one question which goes back to, do we shield the staff from discovery, and that would be a shield. But I don't understand, are you saying -- let's just suppose that we were to have 50 interrogatories. I thought what we had been discussing is, a party would have 50 interrogatories to use.

MR. BICKWIT: Yes.

COMMISSIONER AHEARNE: Now are you saying that in addition you would be considering whether that 50 limit would only apply to against the staff, or are you saying that in addition to the limit of 50 you would also have the question whether any should be applied against the staff?

MR. BICKWIT: I am not sure I understand your options, so let me try to rephrase it. I am saying that whatever constraint you impose by virtue of this rule, is it to -- can I use the word -- benefit the staff by saving staff resources, or is it to benefit all the parties in the proceeding? Are we talking about something that will free up staff resources and therefore can be used as an argument by staff to keep down the number of interrogatories served on staff? Or are we going to make the decision that all parties will benefit from this?

COMMISSIONER AHEARNE: So, you would say, for example, under your option A, if we went with A, and we sent to a 50 limit, then the 50 limit would only be 50 by the party on the staff, and they could have any number on anybody else?

MR. BICKWIT: That is right. Now, as you see, our recommendation was, whatever rule we come up with, our recommendation was to apply the limit so that all parties had something in the way of a shield. And the arguments are pretty straight-forward.

CHAIRMAN HENDRIE: I don't think you need to belabor them. It seems to me evidently reasonable.

MR. BICKWIT: I think by no belaboring them the Chairman was suggesting that I not make them.

CHAIRMAN HENDRIE: Precisely. Let well enough alone. I don't know, do we really need -- just elemental fairness, it would seem to me ---

COMMISSIONER BRADFORD: Fine. Assuming one chooses either A or B, yes, that is right.

MR. BICKWIT: All right, shall we move on to the second.

The issue is whether whatever rule we propose or adopt in this area should apply to all proceedings, or should it apply to a segmented, just a group of proceedings? And as we suggested, the most logical grouping short of applying them to all proceedings would be one that excluded enforcement and antitrust proceedings, on the grounds that the motivation for this proposal has been to ease the burden on staff resources, particularly NRR non-antitrust resources. It is not I&E and NRR antitrust resources that are of concern in this exercise, although there may be some concern about them, and therefore it could be argued that the way to go is to apply this restriction only with respect to the proceedings listed in (b).

We recommend applying it to all proceedings on the basis that it promotes evenhandedness and conserves all of the resources of the agency. And if the Commission regards this as a good idea, then probably it would want to apply it to all its adjudications.

COMMISSIONER AHEARNE: Well, fortunately, I have never had to go into an antitrust case in any depth, but I don't know whether they are sufficiently dissimilar that the arguments on making this a good point for other proceedings would fail. And

perhaps those who are more versed in the antitrust hearings could speak to that.

MR. COTTER: Most of them are settled as a result of extensive prehearing and discovery. When they go to trial, they can last as long as a year or more. I would say they are dissimilar.

COMMISSIONER BRADFORD: Well, I suppose that they are not for these purposes unlike a hotly contested licensing proceeding. I mean, they are complex, the facts are economic rather than technical, but the same kind of impulse to inquiry there. My guess is the number of interrogatories against the staff would tend to be less and against the parties more in relation to each other. But as long as the board has the discretion to take into account the nature of the proceeding, I guess I don't see any reason for treating them differently.

I am still not sure that the overall approach is a good idea, but if I accepted the approach, I think I would apply it to antitrust proceedings as well.

MR. ROSENTHAL: I think it is perfectly clear that in antitrust proceedings the parties would be pounding at the door seeking a considerable relaxation of the 50 restriction. But this would have the advantage of requiring them really to focus on the need for a particular interrogatory or line of interrogatories, because they are going to have to persuade the licensing board that there is a justification for it.

So, with the recognition that in a typical antitrust proceeding 50 would be a sparse number indeed, I do support the recommendation that antitrust proceedings be included.

MR. SHAPAR: Our licensing proceedings have been described in a number of places as among the most complex proceedings -- I am referring to the typical health and safety and environmental. I don't view our antitrust proceedings, although they are long and they are difficult, as exceeding in complexity a hotly contested health and safety and environmental case. And beyond that, as Commissioner Bradford indicated, should there be special circumstances, the approach would be if you can show good cause for extending the number. But I don't think the distinction between the antitrust and the health and safety would warrant a different approach.

MR. BICKWIT: I assume the concensus is for our recommendation?

COMMISSIONER BRADFORD: Well, at the end one has to have a vote on the whole concept.

MR. BICKWIT: No, no. Clearly, as I said, these are recommendations based on the assumptions.

CHAIRMAN HENDRIE: Lacking objection along the table, why, plunge forward with the exposition is my suggestion.

MR. BICKWIT: All right. In item 3, assuming you have a defined limit of, say, 50 interrogatories, the question is 50 interrogatories by a party on what? And the alternatives we pose

are 50 per party per other party in the case, 50 per contention, 50 per subject.

COMMISSIONER GILINSKY: If you were going to do it by contention, presumably you would have a different number.

MR. BICKWIT: That is true. Probably you would have a much smaller number.

COMMISSIONER AHEARNE: There is a fourth option that I guess you excluded because you didn't think it made sense, which would be, X number of interrogatories by a party.

MR. BICKWIT: That is right, by a party per case, yes.

The recommendation was by a party per party. Our feeling was that if you do it per contention, you will proliferate, it will be an inducement to proliferate contentions. If you do it per party, you maxirize the flexibility of the party on whom the limitation is placed. As you point out, it is going to be a much smaller number if you apply it per contention or per subject. If you expand the number and say it is per party, then the party on whom the limitation is placed can allocate among contentions as that party chooses.

COMMISSIONER BRADFORD: Who decides how the subject areas fall out? Presumably the board.

MR. BICKWIT: That is right. A problem we see is that if it is done by subject area, you have difficult judgment calls that you are adding to this procedure in the case of every proceeding. It would be hard to determine exactly what the

subject area ought to be, whereas if you go with (a) or (b), it is going to be pretty obvious how many parties there are and how many contentions there are. The subject area, (c), has an advantage over (b) in that it won't lead to the proliferation of contentions within subject areas. If you went with (b), there would be a tendency on the part of parties to expand the number of contentions, look at a given subject area and decide how many contentions can I get into that subject area. That problem is cured by (c), but I think (c) creates the other problem of raising the difficulty of judgment calls as to what is a subject area.

On balance, we felt that the flexibility associated with (a) made the most sense.

COMMISSIONER BRADFORD: This is the first of several of the items through here that raises a question that seems to me to be one of the basic difficulties with this approach. Essentially, it is going to require, at least under (c) and under (a), if you get motions to go beyond 50, I should think it is going to require the boards to step in at that point and actually review all the proposed interrogatories.

MR. BICKWIT: If more than 50, assuming the number is 50 ---

COMMISSIONER BRADFORD: That is true for (a). If one chose (c), of course, they would have to do it -- they would probably have to ---

MR. BICKWIT: If your point is that the boards would have to review the specific interrogatories to decide whether the number, whatever it is, that is specified is exceeded, that is certainly the case. That is contemplated.

COMMISSIONER BRADFORD: I guess one of the questions here, and we can't really get at it perhaps until you have had a chance to talk with the board members, is just how much board time is likely to get tied up in administering any kind of interrogatory limitation.

MR. BICKWIT: It is difficult to estimate. I guess our conclusion is, whatever that time is, it is going to be greater in the case of (c) than in the case of (a) and (b).

COMMISSIONER BRADFORD: And if a party wants to ask the 51st question, is that going to require the board to review all 51 or only the 51st?

MR. BICKWIT: Well, that is reached in another issue down the road.

MR. COTTER: I think it is pretty clear that there is some sentiment -- I can't speak precisely, but there is some sentiment in the boards in favor of limitations on discovery. But I think it is also equally clear that these kinds of numbers are going to mean that in virtually every case the board is going to have to go through another round of motions practice because there will be requests for more interrogatories than the largest number presented here. Wouldn't that be your instinct,

MR. SHAPAR: Yes. I am also thinking that it makes a good deal of difference when that motion practice occurs. If it occurs in the early part of the proceeding when there is dead time, tnat is one thing. If it occurs after the SSER is published, that is another thing. That hurts.

COMMISSIONER AHEARNE: That is sort of obviously when it is going to occur.

MR. SHAPAR: But at that time they will be directed at the staff.

COMMISSIONER GILINSKY: What would a party do, then? Reserve some questions, like holding five minutes for rebuttal?

MR. BICKWIT: I assume that is what would be done.

COMMISSIONER AHEARNE: Well, it depends on the choice that the next one he is coming to -- one of the options they looked at was the number of interrogatories per NRC document.

MR. BICKWIT: Shall we move on?

CHAIRMAN HENDRIE: Please do.

MR. BICKWIT: Item 4 is similar in nature to item 3, that you are really asking, do you want to maximize the flexibility afforded to the party on whom the limits are placed, or do you want to try to tailor the thing to given portions of the proceeding or portions of the subject matter. And our feeling again was to maximize flexibility and have whatever limit is selected cover the entire proceeding.

In particular, with respect to item (b) here, we see

that as potentially counterproductive in the sense that it would encourage a lack of fragmentation of the SERs, which is just the other direction from the one in which we have been proposing to move, which is to fragment it as much as possible, get as much of it out as soon as possible. This could encourage the staff to delay the earlier fragments until the end, since it would know that there was a limit on each supplement, that applied to each supplement. The staff might be inclined to reduce the numbers of supplements around.

COMMISSIONER GILINSKY: One hopes that the business of having fragmented the boards is a temporary, contemporary thing.

MR. BICKWIT: I am not so sure that I would confine my advice on that to simply the near term. I think there is some advantage, as a general proposition down the road, to getting portions of the SER done as early as possible and not waiting for the entire analysis before coming forward with portions of it. This will enable proceedings to move faster.

COMMISSIONER AHEARNE: Perhaps fragment is a bad word.

MR. BICKWIT: Fragmentation is a bad word because it has a negative connotation. I think apart from that it does represent the situation.

Item 5.

COMMISSIONER GILINSKY: I want to ask Tony, you were saying that the number, or you referred to the largest number as 75, whether you think that number is unreasonable or whether it is

just lower than the number of interrogatories that have been usual in cases and therefore you expect the requests to increase the number?

MR. COTTER: I am giving you a real judgment call, but my judgment is that with respect to both operating license and construction permit cases that it is unreasonable, given the diversity of subject matter in those two cases.

COMMISSIONER GILINSKY: But I thought that Howard or someone said that the typical number was like 100, and in complicated cases that it was like 200.

MR. SHAPAR: That is right.

COMMISSIONER GILINSKY: And if a typical number is like 100, and people aren't particularly constrained to develop really good questions or ration them, then why would 75 or even 50 be unreasonable? Is the number like 100?

MR. OLMSTEAD: It is like 100 for each proceeding. Now, in some of these cases you can have the proceeding divided, so that you, in a sense, have your hearing separated in time sufficiently that you would get double that. In other words, if you had two weeks to the hearing and then for some reason there was a delay of a year and then you had another two weeks, then you would have a greater number of interrogatories because of the need for an additional round of discovery. But under these proposals, presumably the board would allow for that and change the limit in that proceeding.

MR. COTTER: When you say proceeding and talk about separate proceedings and using the number 100, I have no feel for this. Are you considering the general practice now that the environmental aspect is taken care of first and that the safety aspect is taken care of second, and is your 100, then, the total for both of those proceedings?

MR. OLMSTEAD: No. If your environmental and safety would come together, as they have in some cases, then you tend to get about the same amount of preparation, just because the parties are working on the case at the same time. However, if those cases are separated by four to six months or twelve months, then you are going to have some doubling up, because the party is going to come back in and replow the ground the second time.

COMMISSIONER GILINSKY: Aren't they usually separate?

MR. OLMSTEAD: They are usually separated, but in a normal -- before TMI they weren't separated by very much. It is not uncommon to have your environmental hearings and then a month later have your safety hearings.

MR. COTTER: I am not sure what you mean by replowing the ground.

MR. OLMSTEAD: If the witnesses change and the documents change, then people come in and ask the same discovery questions again.

MR. COTTER: I was thinking of the subject matter. The environment and safety are two different subject matters.

COMMISSIONER GILINSKY: But in considering the cases that are ahead of us, the 10 or 20 or however many, what is the situation going to be? Are you going to have separate environmental and safety hearings, and what would the total number of interrogatories be, in your view?

MR. OLMSTEAD: In most of the near term cases, you are essentially talking about safety hearings. So, that figure would hold true. Now, as you get out into the next fiscal year where the environmental hearings aren't done, then you might want to consider them as two separate proceedings.

COMMISSIONER GILINSKY: So, is your recommendation to assign 50 to each one?

MR. OLMSTEAD: No.

COMMISSIONER AHEARNE: You shifted from factual to policy.

MR. SHAPAR: I want to point out that in the event interrogatories can't be asked, the questions can be asked on cross-examination during the hearing, and there you have a policy or pragmatic tradeoff. The idea of discovery is to expedite the hearing and so that nobody is surprised and you know what to prepare for. That doesn't mean the question isn't going to get asked. If they want to ask a question and they don't get a chance to ask it on discovery, they will ask it on cross, and you will pay a price, but I don't think it is a one on one price, or even close to it.

COMMISSIONER BRADFORD: In the courts that have limited discovery and interrogatories, what was the number that they routinely used?

MR. OLMSTEAD: The maximum was 50, and most of them were in the 20 to 30 range.

COMMISSIONER BRADFORD: Do you have any idea what percentage -- I don't know quite the way to ask the question because the cases are so different -- but how often did they tend to have to go over the allowed limit?

MR. OLMSTEAD: That is kind of hard to figure out because it is a relatively new trend. The judicial conference tells us that it is not very frequent because the judges are being rather harsh about the specificity of the interrogatories. If they review the interrogatories asked and find that they were not articulate, they are not inclined to grant additional interrogatories, plus they tend to view the parties as being able to use other means to obtain the information.

COMMISSIONER BRADFORD: Other means meaning depositions?

MR. OLMSTEAD: In the federal court cases. Of course, in our proceedings you also have the Freedom of Information Act for documents, as far as the staff goes. You have the deposition process, and you have the technical documents of record. And if a party in response to a request for additional interrogatories could show that the information essentially was there and just hadn't been read, I would think that that would cause a

decision-maker to wonder whether somebody had prepared well enough to be asking interrogatories.

COMMISSIONER BRADFORD: I keep hearing the FOIA offered as an alternative. To what extent is the FOIA really useful in the context of adjudicatory proceedings?

MR. OLMSTEAD: Most of our experienced counsel use it, as opposed to document interrogatories.

MR. SHAPAR: The reason being that the FOIA has the time constraints.

MR. OLMSTEAD: And you don't have to show relevance.

MR. BICKWIT: But it is confined to documents. It doesn't deal with the situation where the mental processes of the staff are probed.

COMMISSIONER BRADFORD: When you talk about the courts tending to be harsh as to specificity, is there a tendency in those courts to limit the number of interrogatories to get single questions framed in such a way as to pick up the basis for the opinion of every witness in the case?

MR. OLMSTEAD: There are usually single questions as to instead of asking, identify your witness on this contention, identify your witness on this contention, et cetera. There is usually one question.

COMMISSIONER BRADFORD: Identify all the witnesses on all questions.

Just as a general matter, if you had filed 100

interrogatories in a recent case under the old rules, do you have any doubt that you could basically ask for the same information in, say, 30 interrogatories, if you had to keep it to that number?

MR. OLMSTEAD: I would have to spend more time writing them than I do now.

COMMISSIONER BRADFORD: It would become an art, but do you doubt that you could do it?

MR. OLMSTEAD: I think I could do it. The main thing I do now is I tend to take the ones that we have used that have been successful and cut and paste them. What this rule would do is force me to write them specifically targeted to the case I am in.

MR. SHAPAR. But it would take the attorney's time to do that, and the attorney's time is very valuable is the premise we are working on.

COMMISSIONER GILINSKY: There is nothing comparable in a normal trial to supplements to the safety evaluation, is there? In other words, a party here is faced with just a problem in rationing interrogatories, I would think.

MR. OLMSTEAD: If you are talking about a million dollar lawsuit, which in the article that was discussing that, essentially in the federal district court, when you are talking about complex litigation, you do have economic changes within the corporations that are involved. So, you do have new

information constantly coming on record of all the cases in trial preparation. The problem the courts have is somewhat different than ours in that they have docket backloads that prevent them from being able to go to trial when the parties are ready to go to trial. So, there is a constant flow of new information occurring over that period that does create a problem similar to what we have, although not precisely the same.

COMMISSIONER GILINSKY: I see.

CHAIRMAN HENDRIE: That is an interesting question. If you use less than your 50 in this case, can you carry them forward into the next case?

MR. SHAPAR: Or sell them to another party.

(Laughter.)

MR. COTTER: We can have a black market in interrogatories.

CHAIRMAN HENDRIE: I can see where the staff is going to want a purchase fund for buying up contentions.

MR. BICKWIT: It is a little like getting a license issued before construction is complete and you get a credit.

MR. SHAPAR: I think there is a point here that perhaps should be emphasized, and that is, the fact that the courts are beginning to do this is as a result of the perceived recognition that the discovery is being abused in the court process, and no one really argues about that. It is being abused in the courts. And a lot of articles have been written

about it, and part of the response to that is limitation of interrogatories.

So, I think a question you would want to ask yourself is, do you think the interrogatories are being abused in our process. And I think the answer to that is yes.

COMMISSIONER AHEARNE: You not only tell us the question, but you give us the answer.

MR. COTTER: The other thing the courts are doing in this area, or what the majority of the courts are doing in this area is telling their judges to control discovery.

MR. SHAPAR: But that is not the point I made. I am saying that the reason they have chosen a method of doing it is a response to a perceived recognition that the discovery process is being abused.

MR. COTTER: I endorse that concept, and I am saying the majority response to it is for the individual judges to control the cases and the discovery.

MR. BICKWIT: Item 6 is "what constitutes an interrogatory." If there are to be 50 interrogatories, what exactly are you applying the number 50 to? And the options that we have suggested are, each question or subpart of a question, whether or not designated as such, is an interrogatory; and then the second option is ---

COMMISSIONER GILINSKY: Let me ask you, suppose you wanted certain information about various items of equipment.

Suppose you said environmental qualification, which can cover, you know, hundreds of items, would that be one question or a question for each item?

MR. BICKWIT: It would be impossible to answer all the questions that you are going to raise in this area.

COMMISSIONER GILINSKY: I guess my question really is, in practice is it -- you know, obviously there are going to be gray areas, but is this a workable proposition to say this is a question or this is two questions?

MR. BICKWIT: I think so. That was the reaction we got.

MR. ROSENTHAL: The judges are confronted with this. I think the point that has to be made here is you cannot, of course, lay down precise guidelines to cover every possible situation. It has to be drawn broadly, and you have to then trust the judgment of your adjudicators. And that is essentially the way the system operates in the courts.

Now, it is quite true, just as no two judges might view the question the same way -- one judge might regard it as being one question and another judge might regard it as being three questions. So, too, you are going to undoubtedly have different reactions on the part of different licensing boards. But that is just the nature of the beast.

COMMISSIONER GILINSKY: You are saying it is a workable proposition?

MR. ROSENTHAL: Yes, I think it is a workable proposition

COMMISSIONER AHEARNE: Len, what does the second part of part (b) mean? I don't understand what that excepts.

MR. BICKWIT: I gather it is often a practice to say, to ask the question, is X true and if so, what is your reasoning. The question is, is that two questions, is that two interrogatories, or one interrogatory. We say that is one interrogatory.

MR. ROSENTHAL: It is just like saying, do you believe X, and if so, why. That is frequently the case. The first part of it calls for essentially a yes or no, or a very short answer, and then the second part of it is asking what is the basis for the conclusion stated in the short answer.

MR. SHAPAR: If someone wants to ask an applicant an interrogatory like do you believe this plant is safe and why, I think he could skip the first part and just go to the second.

COMMISSIONER AHEARNE: I would think so.

MR. COTTER: And that means it is one question.

MR. BICKWIT: Once you have a rule like this, there will be a tendency for those putting forward interrogatories to have run-on sentences, to just ask as part of one question the following questions, and we are saying that that will not do, except when the run-on sentence is, is this true and if so, please state your reasons.

MR. COTTER: Anotner example is, identify the names of all persons who have knowledge of a particular item and for each

such person list their name, address, phone number and the nature of their knowledge. That is one question.

COMMISSIONER BRADFORD: Is that, in fact, one question? I mean, those are subparts.

MR. BICKWIT: I am afraid I missed the hypothetical. I have a feeling there won't be a clear answer, though.

MR. COTTER: Name, address and nature of the information that all those individuals having information for a particular question.

COMMISSIONER AHEARNE: I think what you are beginning to prove is, as that article pointed out, the real problem of discovery is the people who practice it and the motives that they have in the practice.

MR. SHAPAR: No, that wasn't the point of the article. The point of the article was the judges were at fault. That was the clear thrust of the article.

CHAIRMAN HENDRIE: Well, it could be name and qualifications, if we come to that. It seems reasonable that where a part of an answer is yes or no, or John Smith, and then they want to know why, why, that is okay, that is one question.

Next. Let us snap through these.

MR. BICKWIT: Next is what standard is to be applied for going beyond the limit, whatever limit is set, and we pose to you two basic options. The second option, it should be noted, would focus on the nature of the interrogatories that were within

the limit and make it relevant, how needful the proponent of the interrogatory was with respect to those as well as the one in question. And on balance we think that really does have to be looked at.

If you don't look at that question, then you may have wasteful activity with respect to those that fall within the limit and reserving until item 51 an interrogatory for which a case is irresistable. I am not saying that that tactic is going to be used, but I think you have to build into your standard the prospect that it might be.

COMMISSIONER BRADFORD: So the answer really is yes, then, to the question of whether at the time the 51st question is submitted the board has to review all 51.

MR. BICKWIT: If you pick option (b), the answer is yes. If you pick option (a), the answer is no. And we recommend option (b).

MR. SHAPAR: But review in the sense of applying the standard, merely just looking at the basic kinds of questions asked and was it done providently or improvidently.

MR. ROSENTHAL: I don't think that would take very long. It is not going to require a close analysis of each of the first 50. I think a judge can take a good look over the 50 and get a pretty quick feel for whether or not this particular party had been using the 50 interrogatories as a matter of right promiscuously or not.

COMMISSIONER BRADFORD: What are the court standards here? Is this typical? Do the court standards differ much?

MR. SHAPAR: The court standard, I think, is good cause.

COMMISSIONER BRADFORD: No more than that, just for good cause?

MR. SHAPAR: That is my understanding.

1B MR. BICKWIT: Number 8 here, we think the answer is obvious, that you don't want to tell a party in a current proceeding who has already filed 45 interrogatories that he has now got five to go, or worse, if he has filed 55 that he is over the limit, that he has to give five back.

COMMISSIONER AHEARNE: But would you say that if he has already started filing interrogatories?

MR. BICKWIT: I would say that anything filed is grandfathered.

COMMISSIONER AHEARNE: Okay. But if this were to go into effect, from that point on he is limited to 50.

MR. BICKWIT: That is right.

On item 9, the recommendation is that motions to compel should be permitted. I am not clear on whether OELD joins in that recommendation.

MR. SHAPAR: I am torn on this one, because you will have gone two steps forward and one or one and a half steps back. You are going to lose time there, at least 30 days or mo with

the motions practice.

Another option would be that you don't allow motions to compel, but you say that if people don't answer the interrogatories decently that sanctions will be applied.

MR. BICKWIT: I guess our view is the motion logical sanction to compel an answer to the questions.

MR. SHAPAR: But you are paying a price for it, and you are paying a very heavy price in terms of the limited good this restriction on interrogatories will do. The whole purpose of it is to pick up time.

MR. BICKWIT: There is no doubt this is a big price.

MR. SHAPAR: And you wiped out most of the time saving by allowing motions to compel.

MR. BICKWIT: I think that is clear.

COMMISSIONER AHEARNE: Wait. There is a flaw based upon the answer we heard yesterday.

MR. BICKWIT: Yes. I accepted your proposition because I didn't buy the answer.

COMMISSIONER AHEARNE: I see.

MR. BICKWIT: On item 10 we recommend that the boards should be provided with discretion to require oral responses to motions to compel. That was part of the recommendation on item (a)(1) of yesterday.

COMMISSIONER AHEARNE: They don't have that now?

MR. BICKWIT: They don't. As we read the rules, there

is a right to file a response to a motion. The discretion relates to the time allowed, but a right to file, in my view, is a right to a written response.

CHAIRMAN HENDRIE: So, what is the recommendation here?

MR. BICKWIT: The recommendation is that the boards would have ---

CHAIRMAN HENDRIE: Then why does mine say (b)?

MR. BICKWIT: I can't answer that question. On second thought I think (a) is preferable.

Then this is an item we discussed yesterday relating to express mail, and again we recommend that the boards, at their discretion, be permitted to cut down the time for service.

COMMISSIONER AHEARNE: This would be for all parties, that they would be allowed to require all parties?

MR. BICKWIT: That is right. What is contemplated is that they would use this when the issue was on the critical path, there was some great need for expedition, and they wanted to meet that need. And it could be phrased so as to confine them, their discretion, to those periods, but I don't think it is necessary.

COMMISSIONER AHEARNE: I gather, though, that your schedule on the next page is based upon their requiring it.

MR. BICKWIT: That is right. I would suggest the Commission urge the boards to require it where this activity takes place on the critical path.

CHAIRMAN HENDRIE: I would like to look at that

schedule.

COMMISSIONER AHEARNE: Could I ask two questions on this?

CHAIRMAN HENDRIE: All right.

COMMISSIONER AHEARNE: The first question: Air express mail can be very expensive. Now, I don't know, other than the staff, who sends voluminous filings. I am sure that it would be substantial costs to the NRC. Do some of the other parties have voluminous filings?

MR. BICKWIT: I am sure they do. We are talking about, in the typical case, service by intervenors of interrogatories on the staff.

MR. OLMSTEAD: We frequently have voluminous filings by all parties in complex cases, although it is not infrequent for the intervening groups and applicants and the staff to use air express now among themselves, even though they all compute the times based on the five days for mail. We are doing that in two cases at this very day, air expressing one another from California to here so that we all have the necessary time to review.

COMMISSIONER AHEARNE: Is that intervenor the State of California?

MR. OLMSTEAD: No. One of the parties if the State of California and the other one is a group known as Joint Intervenors, and they are using air express.

COMMISSIONER AHEARNE: I was just obviously concerned about the potential large financial burden on the groups.

MR. BICKWIT: I think that concern is well placed.

COMMISSIONER AHEARNE: The other question I had was on the responses that -- I will pass that. That was on the summary, and that is another issue.

CHAIRMAN HENDRIE: The schedule, if I look at the one which is attached to this paper, I add to it what, 15 days to prepare contentions, revised contentions?

MR. BICKWIT: I would think maybe even ten. We haven't really focused on that question, but I think ---

CHAIRMAN HENDRIE: So, at 85 we would prepare our revised contentions, and at 87 parties receive them, the staff receives them and everybody receives them, right?

MR. BICKWIT: Right.

CHAIRMAN HENDRIE: Now, that brings us to some sort of a reference point that I can go and look at that same point on other tracks. Furthermore, before we go away from the proposed schedule that is hung on the back of your interrogatory limitation memorandum, are these times practical?

MR. BICKWIT: I would like to hear comment from others on it. My assumption is that they are, but I would like to hear comments.

MR. SHAPAR: They look reasonable.

CHAIRMAN HENDRIE: You know, here comes the SSER and

the parties get it. Now they have got ten days to prepare interrogatories and motions, or additional ones, and so on. As I go through, why, somebody holler if he doesn't think it is practical.

COMMISSIONER AHEARNE: There are probably not too many people here that are the ones that prepare interrogatories on the SSER.

COMMISSIONER BRADFORD: That is one point. The other is that in the public comments I guess we did have some that said that even the -- which was it, the proposed rule line was impractical. So, I think to the extent that those comments can be carried over to this one, to the extent that the times are the same.

CHAIRMAN HENDRIE: But you remember in the proposed rule, what it said was the SSER issues and then there is a 25 day period, and at the end of the 25 day period it did the equivalent of what it now takes us 87 days to do.

COMMISSIONER BRADFORD: Yes. I don't know where the concern was. If it is there, then you are right. They are 50 days better off, 62 to be precise.

CHAIRMAN HENDRIE: Okay. The telephone conference, the staff gets 12 days to answer the first 50, from day 14 to 26.

COMMISSIONER AHEARNE: Is that enough?

CHAIRMAN HENDRIE: What do you think?

MR. ROSENTHAL: I will defer to OELD.

COMMISSIONER AHEARNE: I think for purposes of answering the question you ought to assume that unresponsive replies will be honored with a motion to compel, and so the pressure then will be to make sure on the staff that each response is really responsive.

MR. DENTON: We don't make unresponsive replies, and that is why I think we are complaining today about the number of interrogatories. So, I don't think the quality would change.

COMMISSIONER AHEARNE: But that is why the question is, to do 50 is 12 days an adequate period of time?

MR. DENTON: Obviously, we can handle 50 in 12 days. You are just paying the price that the staff may not be working on unresolved safety issues, TMI action plans.

The tend to fall within one discipline. In other words, usually there is a major issue or two in the hearing. So, it doesn't involve the entire staff. But we do have entire branches who in this process, during this interrogatory period, aren't working for you or I, they are answering interrogatories for a week or ten days, and I envision that we would have to assign more and more branch members to answer them during this 12 days period. We would have to throw a lot of resources if they required substantive replies.

We don't have any trouble with the factual ones, like the example, state your witnesses and their skills and so forth. It is this probing the mind, what did you mean somewhere and

provide a complete rationale.

So, it seems a little short in time, 12 days in terms of working days isn't a lot.

COMMISSIONER AHEARNE: I don't think these are working days.

MR. DENTON: That is what I mean. They aren't that many in working days and they are calendar days. But it seems worthwhile to me to try to keep the number down.

MR. BICKWIT: The courts have found periods of time longer than this to be impractical under the federal rules. However, I would defer to the staff on whether this is a job that can be done.

COMMISSIONER AHEARNE: Wait a minute. You are saying they have found the times longer ---

MR. BICKWIT: Longer than this to be impracticably short.

MR. COTTER: The standard term was about 20 days, and that normally was subject to extension.

MR. BICKWIT: But I think a better gauge is not those court cases, but the staff responses to what job can be done in what period of time.

MR. OLMSTEAD: I think there needs to be an element of pragmatism injected here.

COMMISSIONER AHEARNE: We are talking about the schedules.

MR. OLMSTEAD: Yes, I understand. Most of the people here are making assumptions about the adversary nature of interrogatory responses that don't exist when the party agrees they have to respond. If I have a problem, or if another attorney has a problem because a question is going to take a few extra days to respond to, you pick up the phone and call the opposing counsel and say, we want to respond to your interrogatory but it is going to take us an extra couple of days to do it; he says fine, and the board never hears about it. That is the end of it.

COMMISSIONER AHEARNE: But that is not when you have this kind of a schedule.

MR. OLMSTEAD: It is when you have this kind of a schedule if you are not going to get a motion to compel. You are only going to get a motion to compel where you are not going to respond.

COMMISSIONER AHEARNE: I think you are making my point but in a different way. I think what you are really saying is that on a lot of the questions, if they are hard, 26 days is not correct.

MR. OLMSTEAD: The rule currently is 14 days, and we currently make that, I would say, 95 percent of the time.

COMMISSIONER AHEARNE: Fourteen days from day zero, SSER published?

MR. OLMSTEAD: No. From the time we get a request, a

set of interrogatories until we must respond, we have 14 days. This schedule provides 12. And we normally are ready to respond, it is in ELD for review and discussion with the witnesses a coupld of days before that.

If we feel there is additional information that ought to be provided, it is at that time that we make some other arrangement. But we generally can meet those times if we are not inundated with a tremendous number of questions to answer. And then Harold's people do start to scream because it does impact their other work more significantly.

MR. COTTER: I thought that was your point, though, that you were inundated with too many questions, and that would suggest that you normally don't meet that.

MR. OLMSTEAD: But I think there is a lot of informality associated with this. I mean, every single question doesn't raise an adversarial relationship with the parties in the proceeding. There is a lot of negotiation that goes on and agreement among the parties as to what is feasible, and it is only in those areas where I, as an attorney, feel that that question is improper and the other party feels it is very proper that you get into the situation where you are into the motions to compel.

MR. COTTER: Well, there are other situations where, for example, you think the question is proper but you might not want to answer it fully, and so you give an evasive answer, and

then they file a motion to compel, or vice versa, as the case may be.

MR. OLMSTEAD: Well, I suppose. I don't think that happens very often.

MR. SHAPAR: I think you ought to edit that one. It doesn't happen very often as far as staff responses are concerned.

MR. COTTER: I didn't mean to limit that to the staff as a matter of practice in discovery.

CHAIRMAN HENDRIE: Now, there is something like 27 days in here that do associate with the motion practice on the motion to compel. It does move it along, doesn't it?

MR. BICKWIT: It does. I think you have to understand that there will be fewer motions to compel with this change and there will be fewer granted with this change than under the previous schedules, so that there will be many more times where the full 75 days is not taken than with respect to the previous schedule.

COMMISSIONER BRADFORD: Why is that?

MR. BICKWIT: Because as Bill has pointed out, so many of these motions to compel are because the staff simply won't answer the question, and here you are going to have some kind of board determination at the outset as to which questions must be answered and which needn't be answered. So, the motions to compel will deal only with situations where the staff has

answered the question but has done it inadequately.

COMMISSIONER BRADFORD: Isn't that only true is you get more than the allowed number of questions? Is the board going to review them anyway if there are 40?

MR. BICKWIT: I would assume not, but in each case the staff knows, even if it is within the 50 or over the 50, the staff knows that it must answer the questions. The staff will answer the questions. So that the only motion to compel that lies will be with respect to an inadequately answered question.

COMMISSIONER BRADFORD: Why does the staff know that it must answer a question that the board hasn't reviewed?

MR. BICKWIT: The board will have reviewed the questions that staff receives. If leave is granted above the 50, the staff will know -- we are assuming that if it is within the 50 that staff knows that it has got to answer that question.

MR. ROSENTHAL: Not if it is irrelevant.

COMMISSIONER BRADFORD: That is what I was after.

MR. ROSENTHAL: I think the point, though, Commissioner Bradford, is that where you are dealing basically within a limitation of 50 -- sure, it may be extended, but you are not dealing with 200 or 250 or some other vast number -- it is much less likely that you are going to get a fight between the staff and the other parties over particular interrogatories. To be sure, if there is one that is clearly out of the ballpark in that 50, the staff might come in and complain about it. But there

is a much greater incentive if the staff is confronting 200 interrogatories and the OELD is trying to protect NRR's resources for the staff to be in there refusing to answer and producing a motion to compel.

MR. BICKWIT: May I just respond to your reference to irrelevant questions? We are assuming with this schedule that it will be standard practice for the proponent of the interrogatory to go before a board and say, I want to exceed this limit. The board, if they adopt the standard that we have used, will look not only at the overage, but at those within the 50.

MR. ROSENTHAL: I understand that. I am talking about the case of where the party is confining the number of its interrogatories to 50 or less, and puts up a couple that staff thinks are way out in left field.

MR. BICKWIT: In that case you won't even go before a board and you will reduce the early part of the schedule. In either case this is a much softer number in the sense that it won't be used nearly as often as under the previous schedule.

COMMISSIONER BRADFORD: In theory that ought to be right. The reason I think it may not be, though, is the exchange I had earlier with Bill where I think we agreed that a party that was using 100 questions under the old rule might be able to do it in 30 on this one. That is, just by making one's questions more sweeping. The parties may wind up asking for the same amount of information from the staff that they were, and then

whatever percentage of those questions that the staff was resisting before, they will have to resist again within the confines of the 50. Obviously that is not going to be true in all cases. There are going to be some parties who, when they focus on the need for 50, are just going to drop some questions. But to the extent that the art does get developed to the point where people can ask for everything that they want to within 50 questions, I don't see that there is going to be a lot of ---

COMMISSIONER AHEARNE: Then that won't have any impact, or wouldn't have any negative impact.

COMMISSIONER BRADFORD: No, that is right. It won't make things worse. But I am just saying that it seems to me a lot of the same exposure is going to exist within the 50 questions. The same kinds of issues are going to arise in roughly the same quantity as was the case with the 100 of the more carelessly thrown together questions, if you will.

MR. COTTER: I would assume there would be a certain amount of argument over preciseness of questions. Frequently a response to an interrogatory is that it is either too vague or it is too broad, and I assume there would be some motions practice going back and forth over that, because if you are limited to a specific number of interrogatories you are going to try and, as you say, cram as much into them as possible and make them as broad as possible.

MR. OLMSTEAD: Two points. Yesterday we were talking

about the discovery against the other parties preceding this set of schedules we have, which I assume would still be the case. And secondly, the line we are looking at is the last line, which says limit interrogatories or higher standard, which includes the assumption that in that case the staff would use 2.720(h)(2), which forces the board to rule on the interrogatories prior to the staff answering.

COMMISSIONER BRADFORD: Of course, once you have that, then, of course, the staff is going to answer everything that survives that.

MR. OLMSTEAD: Right, and you are not going to have the motion to compel.

MR. BICKWIT: You will have fewer motions to compel.

CHAIRMAN HENDRIE: Where does that appear in this schedule? It does not?

MR. BICKWIT: No, it does not appear in the schedule.

CHAIRMAN HENDRIE: What would one do to this schedule to put it in?

MR. BICKWIT: What I would do is, you may remember that when we estimated an eight month schedule we said for planning purposes assume ten months, because if you have a schedule that is designed for eight months, it is going to last for ten months. I would include it in some sense in estimating what kind of planning assumption you ought to make. I would be much less inclined to say that if you have got an eight month schedule with

this kind of activity comprising 75 days of it that you are going to have to allow for two months for things to go wrong. I would be more inclined to allow for one month for things to go wrong, because you may well be getting a month's credit or more.

CHAIRMAN HENDRIE: But if I just wanted to see in a given case where everything was going to bump along sort of as bad as it can go, but people were -- well, where is there in here some coverage for the proposition that the boards were going to take a look at the interrogatories before the staff answers?

MR. BICKWIT: That is in here. That is the beginning of this schedule.

MR. OLMSTEAD: Chairman Hendrie, if you will take the last line on your time line that we gave you yesterday, where it says limit interrogatories or higher standard, and go to day 64, and make that day 73, and add nine days all the rest of the way out, you will have it.

CHAIRMAN HENDRIE: No, I think I have to make it 75 and then add ---

MR. BICKWIT: There is 15 for revised contentions.

CHAIRMAN HENDRIE: But somebody told me we could do 10 for contentions.

MR. BICKWIT: That is right.

CHAIRMAN HENDRIE: That is how I got it. You were saying one of your assumptions on that last line was that boards were going to take a look at the interrogatories or the staff

answered them. Now, that is not what is going on here.

MR. BICKWIT: That is what is going on in this schedule and the schedule that we have been reviewing. The board is looking at the interrogatories before staff answers them.

CHAIRMAN HENDRIE: Where do they do that?

MR. BICKWIT: They do that on day 19. They have their conference. And on day 29 they rule on whether those interrogatories were proper.

CHAIRMAN HENDRIE: This just talks about additional interrogatories over the 50?

MR. BICKWIT: That is right.

CHAIRMAN HENDRIE: You mean to include here ---

MR. BICKWIT: I think the standard case is going to be tnat someone is going to want leave to go beyond the 50, and under those circumstances the board will be looking not only at what is over 50, but what is also proposed to be asked within the 50.

CHAIRMAN HENDRIE: Yes, but in rather a different way. They will be looking at the first 50 just to see if the fellow seems to have made reasonably efficient use of his 50. They won't be looking at them one by one in the sense that they would if there was a specific motion before them, say, from staff or counsel saying this particular interrogatory is too vague, we don't want to answer it.

MR. BICKWIT: I don't want to speak for the staff, but

I would assume that if the board says these 55 interrogatories are okay, the 5 do exceed the limit but we grant leave to file them, with respect to the 50 things look pretty good to us, there doesn't appear to be any abuse here, would staff in those circumstances be inclined not to answer one of the 50?

COMMISSIONER AHEARNE: On your schedule the staff has already answered those 50.

MR. BICKWIT: That is right. I am assuming that staff is going to answer those 50.

MR. OLMSTEAD: When we looked at the schedule, what we assumed was that we would use 2.720(h)(2) at day 19 if we thought the interrogatories were improper, namely the board would have to direct the staff to answer any.

CHAIRMAN HENDRIE: You would have to file those motions---

MR. OLMSTEAD: We would have to do that on day 19 on the schedule.

CHAIRMAN HENDRIE: You would have to do it before then. The board can't have a telephone conference on a motion that is in, you know, the ---

MR. BICKWIT: No. The staff would be answering that motion by telephone, and the board would be ruling on the basis of the staff answer.

CHAIRMAN HENDRIE: I see.

MR. COTTER: Len, I suspect you would get all kinds of objections to that procedure from the individual board members.

They would be very leery of it. In fact, the other day at the seminar somebody got up and proposed that all telephone conference calls be banned because when you get more than four people on the phone you can't hear anybody. There may be variations of that and you can work around it, I don't know.

MR. BICKWIT: If we pull back from that concept, then you are stretching the schedule a bit.

COMMISSIONER AHEARNE: In your schedule here you seem to have built in the staff responding to a motion to compel.

MR. BICKWIT: That is right.

COMMISSIONER AHEARNE: I thought our rules did not give that right.

MR. BICKWIT: There is a right to a motion to compel against the staff.

COMMISSIONER AHEARNE: Right. But for the staff to respond to that motion.

MR. COTTER: Orally.

MR. BICKWIT: I see. Whether there is a right to respond? I believe there is a right to respond.

COMMISSIONER AHEARNE: Well, I have in front of me -- I may be wrong, but it is a recent board, and it says, the governing rule of practice does not appear to contemplate a reply pleading to a motion to compel.

MR. BICKWIT: Well, I don't know where it says that in the rule.

MR. OLMSTEAD: We don't agree with that particular board decision, and there are conflicting decisions on that point.

MR. BICKWIT: Is that an ongoing proceeding?

MR. OLMSTEAD: Yes. I don't think you want to discuss it here.

COMMISSIONER AHEARNE: You are building in your schedule that provision.

MR. BICKWIT: Except the right to respond is taking very little time under this concept, because the response is by phone.

COMMISSIONER AHEARNE: But it is five days, since we are arguing in and out on a few days. And I just was wondering whether you were explicitly building in a right which didn't exist.

MR. BICKWIT: I guess it is questionable whether it exists.

MR. COTTER: Have you all thought about whether or not what impact this would have on voluntary discovery?

MR. OLMSTEAD: The way voluntary discovery normally works, it is truly voluntary.

CHAIRMAN HENDRIE: I don't see why it would make any difference at all. Why would it? The staff just puts the documents in the dockets file.

MR. COTTER: It is much more beyond that. The parties get together and frequently it is certainly conceivable that they

could take care of all discovery informally without going to any of this.

MR. ROSENTHAL: Well, if we think that voluntary discovery won't cost too much in terms of resources and it has a chance of saving time, we will continue.

MR. COTTER: I am thinking, for example, wasn't it up at Three Mile Island where they simply had the FEMA people come in and describe their practices and procedures and discuss it and answer questions and that sort of stuff, and as a consequence there was no FEMA discovery.

MR. OLMSTEAD: We try to do a lot of that. I think you have to realize, though, that discovery is used as a dilatory tool, and the fact that one may get a lot of voluntary compliance from the staff does not necessarily mean they are not going to file interrogatories on you.

CHAIRMAN HENDRIE: I seem to have a schedule here which runs 87 or whatever days, and may have to run somewhat more than that, because, A, that telephone conference at day 19 may not wash and have to be expanded into a week or two of coming and going; secondly, there isn't explicit note in here of allowing a party to complain that he doesn't like the interrogatories except that telephone conference. So, it could expand more than just a couple of days for rapid mailings each way, but to allow time for more things to go back and forth and be decided. Down along the line there is a place where interrogatories that are being

compelled on the staff are going to be answered in six days. Maybe that is practical, maybe not.

Now, this schedule gets us up to the place where revised contentions have been filed, and the board is now presumably ready to pick up the activity on these one line tracks that says prehearing conference.

MR. BICKWIT: So, that is 215 days.

CHAIRMAN HENDRIE: What is 215 days?

MR. BICKWIT: Beyond the 87 until you get to a board decision.

CHAIRMAN HENDRIE: Well, let's talk about that after a while. The question I want to raise is, there is a line that says present rule that gets me to this place that I think I am at 87 or 87 plus a couple. There is a line up there that says present rule that gets me there on day 64.

Now, I guess what you are going to explain to me is that that line doesn't have in it all of the problems laid end to end that this most recent schedule does. Otherwise, it appears to me that I am spending a lot of time figuring out ways to lengthen the overall hearing process. While, you know, life always has these ugly surprises in it, at least that was not my intention in this series of meetings.

MR. BICKWIT: You have rulings after 64 on the present rule. You have still got to serve the response and you have got to rule on the motions to compel. You have got to serve

those, and then you have further discovery responses. All of those things happen on the present rule after day 64.

CHAIRMAN HENDRIE: Does that all come out, then, approximately where we are on today's schedule?

MR. COTTER: I believe yesterday's testimony was 103 days under the present rule. Wasn't that the number you were using?

MR. SHAPAR: It is the testimony filing days. Bill will explain why.

MR. OLMSTEAD: You need to compare the testimony filing date on these lines, because the present rule is the only line that does not make the proposed rule assumptions. All of the changes that you have considered under the proposed rule resulted in a different time line, and so the rest of these lines compare to the proposed rule line.

So, if you want to see and compare what kind of time you are saving, the only common point on all the lines is the testimony filing date, which is required to be 15 days prior to the start of the hearing. So, if you will notice, on the present rule you get to that point at day 155. That subsumes within it the 103 days. Where the proposed rule, you don't have 103 days prior to that point, so those motions to compel and that motion practice has to be shown on the charts. And with this proposed schedule worked into the bottom line of that chart, I computed a testimony filing day at day 119.

MR. SHAPAR: As contrasted with?

MR. OLMSTEAD: With 155.

MR. BICKWIT: I think the easiest way to look at this, and correct me if you disagree, Bill, is that instead, if you look at the proposed rule and instead of zero to 25, you now have zero to 87, you have got where we now are, with one minor change, and that is the filing of proposed findings has expanded as a result of yesterday's action from 40 days to 55 days.

So, where you are is, you have 87 in lieu of 25, and 55 in lieu of 40.

CHAIRMAN HENDRIE: That adds 77 days.

MR. OLMSTEAD: That would make your testimony file day 147, rather than 155. So, you are saving eight days over the current rule under that calculation.

MR. BICKWIT: You want to know the sum total. I don't know whether that is where you are going, but the sum total, as I see it, under this schedule is 240 plus 77.

CHAIRMAN HENDRIE: That is going to be the best part of 317 days and a shade longer than ---

MR. BICKWIT: It is a shade longer than where you want to be, but as I said before, I no longer think it is appropriate to add two months to that for planning purposes, because what you have got here is a much softer schedule. I think it is much more appropriate to add something like one.

CHAIRMAN HENDRIE: I wouldn't add anything.

MR. BICKWIT: That is 11 months, 11 months is a cutback from the 12 to 13 months that was initially included in our Bevill schedule, so that you cut back one to two months the period of time between issuance of the SSER and the initial decision.

MR. SHAPAR: By subtracting the assumed margin.

MR. BICKWIT: By subtracting a month of it.

CHAIRMAN HENDRIE: I wouldn't put any margin in. The value in the sorts of limitations on the number of interrogatories that are in the current proposal then are twofold. First of all, it will save some staff resources if they have to answer fewer interrogatories. Second, they are much more likely to make these dates, and if you don't have that limitation and you have to struggle through 200 in 12 days, et cetera, you are much less likely to make it.

MR. BICKWIT: You have a period of time under this schedule, this 75 day schedule, where I would assume that in a large number of cases one month of that is coming out.

CHAIRMAN HENDRIE: That is why I wouldn't add a month, because when I talk about an average case, which I don't know the particulars yet, for purposes of downstream scheduling of staff reviews, you know, if this schedule is going to be as often minus a month as plus, then I ought to use it without the month gratuitous factor thrown in. And then what will happen is, I will win some and lose some, and on average come out about

right. But it sure seems tedious. It takes five months to get the testimony filed no matter what we do, apparently.

MR. BICKWIT: As has been pointed out, there are options that could cut that down which the Commission is not inclined to take.

CHAIRMAN HENDRIE: Yes. 147 was the current number?

MR. OLMSTEAD: That is if you use the assumptions that he was reading to you. If you want to take that line 3 and overlap part of this process with the revised contentions and prehearing conference, you could file testimony on day 119. But then you are compressing the schedule a little bit. I can walk you through that and tell you how it would work.

CHAIRMAN HENDRIE: Yes, I guess you had better.

MR. OLMSTEAD: If you take the schedule you have got at day 73, which is staff response to additional interrogatories, and substitute that for day 64 on that last line, then day 79 remains revised contentions and becomes day 85 off of this chart. Your prehearing conference order then becomes day 100, and your board ruling becomes day 110, and that ruling date can also be the date for ruling on any motions to compel that might have been filed.

Then your testimony file date -- I mean your responses to any additional interrogatories ---

CHAIRMAN HENDRIE: Wait, you just lost me. The board ruling on motions to compel occurs on this schedule back at

day 65.

MR. OLMSTEAD: Okay. That is taken care of. But if you overlap this, the point I am making is you have got a prehearing conference and a board ruling date there that can clean up any of these other discovery problems that have been raised.

Let's just leave day 65 alone. The testimony file date is the day 119. You are essentially reducing the period for filing testimony by 15 days.

CHAIRMAN HENDRIE: Fifteen days from what?

MR. OLMSTEAD: The proposed rule has 30 days in there for filing of testimony. I am pulling that out because of this elongated discovery procedure that you have overlapped here, and because they get the initial response to interrogatories at day 73. So that from that point on the party that is revising their contentions knows what the discovery information is and what their revised contentions are. All they don't have is a board ruling. So, they essentially have that time which exceeds 30 days to prepare testimony, from day 73 to day 119.

So, rather than leave 30 days to prepare testimony in there, you can reduce that time.

MR. BICKWIT: Do you regard that as reasonable?

MR. OLMSTEAD: If I am the party revising my contentions and I have all the responses to discovery I am going to get, 30 days from that point to prepare testimony is amply

sufficient.

Now, the other parties are at a slight disadvantage because they don't know yet just which contentions the board is going to let in. But for the most part they are going to know what the contentions are by that time. It is as though you are awaiting a motion for summary disposition ruling and you haven't got it yet. You go ahead and prepare on the contention and if you get summary disposition you stop the effort. That has just recently happened to us in several cases.

Then you can stay on that 279 day schedule, because the party has 30 days to prepare the testimony. You are just overlapping it.

CHAIRMAN HENDRIE: The rest of you talk among yourselves for a while. Commissioners, let me address myself to you.

On the basis that either you may share some of my inability to follow the arithmetic here, or that you understand it perfectly but are willing to allow me the luxury of wallowing around until I understand it, what I am going to suggest is that we ask the ad hoc group, please, Bill, with your participation, to -- I don't care whether you do it on a time line like this one, but if you do, make it big enough so I can read the numbers. Or, if you do it this way, that is fine, too.

What I would like to have is the present situation as best we understand it, and the situation which would prevail

under -- let me ask them to do it for this limitation of 50 and the board looks at an appeal for more and motion to compel and so on, because I am not asking you for an opinion at this time about it, but it is still at least a possible practice that we take up.

What is happening is that the numbers, that these assorted things don't go together, and every time I think I am beginning to see where it fits together, why, somebody says something else which just leaves me flat out in left field again. It is nobody's fault.

Now, if you find in these schedules, as would not surprise me a bit, that in fact there is not such a thing as a simple single line with series steps, but rather more some possible parallel lines and so on, why, I invite you to try to find a way to summarize that for the uninitiate like myself.

Now, I would like to come back, then, to this subject come Tuesday next when the meetings previously scheduled have both -- it turns out they have decayed and the new schedule will give us an opportunity to meet again.

That gives you some time to sort these things out.

MR. SHAPAR: Are those the only two lines that you want? Do you want any other comparisons?

CHAIRMAN HENDRIE: I will look down the table and say it seems to me that it is conceivable that votes could be scraped up for air express, you know, the fast mailing and stuff,

and maybe an initial limitation on the number of interrogatories, and my guess is that I couldn't scrape up votes for anything more than that in this line.

Now, does anybody dispute that?

COMMISSIONER AHEARNE: I think you are right.

CHAIRMAN HENDRIE: And I would like to continue to probe, then, these two avenues in terms of a possible schedule, and in terms of what might then follow to complete the Part 2 rule changes.

Now, when we know how all of that goes, then I think we can complete the policy statement. But at the moment, why, it seems to me that I need to ask staff to regroup the literature of these times lines to help me, and that is not something that is handy to do right here at the table with everybody waiting for the next development. And I think just the two time lines. It is, in effect, the top one and the bottom one, except this business of what happens -- you know, you did the bottom one on the basis that the boards were going to look at all of the interrogatories in the first instance and say, answer this pile, don't answer that pile, right?

MR. OLMSTEAD: Right.

CHAIRMAN HENDRIE: Now, that is not in the ad hoc group's plan and schedule.

MR. OLMSTEAD: But the rule is, 2.720(h)(2) is certainly still in the rules.

CHAIRMAN HENDRIE: But there is a rule which says if you don't like one you can ask the board to look at it.

MR. OLMSTEAD: Nobody can ask the staff interrogatories if the staff objects without first getting a board ruling.

CHAIRMAN HENDRIE: And that is the present rule.

MR. OLMSTEAD: That is the present rule.

CHAIRMAN HENDRIE: So, you can, in effect, without any rule change at all, compel that look by the board on any interrogatory that you think improper.

MR. OLMSTEAD: That is right.

CHAIRMAN HENDRIE: It seems to me reasonable to build that practice into this schedule.

MR. BICKWIT: Mr. Chairman, I think it is in this schedule.

CHAIRMAN HENDRIE: Okay, you think it is in. Good. When the thing is redrafted, you know ---

COMMISSIONER BRADFORD: If the Commission just said in its policy statement we are concerned about abuse of discovery, we expect the staff to use 2.270(h)(2), and the boards to manage, what are the impediments to having that work itself out in at least as sensible a way as the much more detailed instructions that we are considering now?

MR. BICKWIT: Well, the only difference, I think, is the limitation on interrogatories.

COMMISSIONER BRADFORD: Well, I am even wondering about

that. For one thing one could, of course, put a limitation into a statement like that, but even if you didn't, the question is whether you start with 50 and then have the boards review it and work up, or whether you put a statement in saying we expect the board to manage the interrogatory process and avoid abuse of discovery, in which case the board would have to review the interrogatories and perhaps work down. But the net result, in theory, ought to be that the same amount of information, namely that which the board thought important, would get exchanged.

MR. ROSENTHAL: Except if the board is confronted with 200 interrogatories and there is no fixed limitation and all of those 200 interrogatories are in the ballpark in the sense that they are at least arguably relevant, et cetera, what basis would the board have for saying, well, staff, you only have to answer 50 or them or 75 of them or whatever?

The advantage of having the limitation is that the ---

COMMISSIONER BRADFORD: Are you saying, Alan, the board couldn't adopt 50 as a number on its own?

MR. ROSENTHAL: Well, I don't know on what basis. Obviously, I suppose, if someone came in with 3,000 interrogatories the board might say harrassment. But it is a little bit difficult if a party is coming in, there is no limitation fixed, and the party comes in with a large group of them and the staff goes in and says, well, we can't say that these are not relevant, but there are a great number of them here

and they seem to us to be, some of them at least, of relatively little advantage, particularly balanced against the cost in staff resources.

MR. SHAPAR: But the present rule does say as far as the staff is concerned that the interrogatories against the staff are only when it is necessary to a proper decision and the information is not obtainable elsewhere.

MR. ROSENTHAL: Yes, I appreciate that.

MR. BICKWIT: There is no doubt that if you have a limit and say you can only go beyond it under certain circumstances, even if it is precisely the circumstances that are in the present rule, it is going to be much more rare that the limit is exceeded than if you have no limit whatever.

CHAIRMAN HENDRIE: It sounds to me like its big value is that it provides a considerable incentive for the practitioners to sharpen the questions in the first instance. Now, they may need more than 50.

COMMISSIONER BRADFORD: I think sharpen may be the wrong word. It may be very much the reverse.

CHAIRMAN HENDRIE: Well, at least think about it. I will tell you what it will give people pause about. It will give people pause about simply clipping out from the filing in some previous case 300 contentions that were made on a boiling water reactor and applying them to this one because it is a boiling water reactor. That in itself would be of value in terms of the

staff's problems in dealing with the volume of material.

Now, what does seem to me to be a head-scratcher is that as we look at the things, and the reason I want to look at the times lines and understand them better is, it begins to smell as though this question of staff resource may be, if there is an incentive to limit, it may be that rather than time.

Now, if that is the fact, why, I would kind of like to understand that better and see why, and that is one of the reasons I would like to see these two things worked out in a somewhat clearer presentation for me and talk about them Tuesday.

We may very well end up where you are going. It is possible.

COMMISSIONER BRADFORD: There is a variant of that, too, in which the Commission says that we expect the board to limit the number of interrogatories, but leave it to the board as to what the suitable limitation is per proceeding.

CHAIRMAN HENDRIE: Or could indicate a guideline number in the policy statement which wouldn't be binding, but it would only be a guideline number, just the way the schedule would be. But I think there still is also the possible option that we might decide that it is worth writing a rule, a Part 2 type rule.

COMMISSIONER AHEARNE: I am certainly in favor of the approach you take in limiting the interrogatory and am interested in seeing what the group comes up with. I am very interested in

getting feedback on Tony's discussion with the board members on these issues across that whole spectrum of questions that have been asked. But I would like to say, as I keep on trying to say, for myself, at least, I am very skeptical about fine tuned schedules, particularly when they start getting down to three and four and five day periods. And the value I think it would bring is it is another step in trying to tighten up and make a coherent, rational framework for the process.

CHAIRMAN HENDRIE: Well, it does that, John, and it has another use in the system. When we get through with this effort, get over the current surge of meetings, then whether the Commission agrees and publishes a guideline, sort of prototypical schedule, or whether we don't, I am going to ask the ad hoc group, and in particular put Tony in charge of it this time, to sit down and do a prototype schedule which the staff is then going to have to use to schedule its work for those out year cases. So that, you know, never mind if we show it to boards, the staff has to have some basis on which to schedule its work, and they have to know what the predicted hearing is in a case which is far enough down the line so that the particular features of the case haven't become distinct and you have a unique schedule for it.

So, it has that purpose, very important purpose in addition to trying to provide some guidance.

Okay. Now, this meeting was scheduled for an hour and a

half. We have managed that in good shape. But I don't want to go away from this subject just yet.

Could I ask Commissioners to search around in their papers and find their draft licensing policy statements, and in particular we have had a IV proposed by Commissioner Gilinsky. I made a major change in it, and Commissioner Bradford has made even more significant changes.

I would like to sample opinion up and down the table as to whether this is a washable proposition.

Since you were the last commenter, why, in the form in which I am looking at it, why, you are committed.

COMMISSIONER BRADFORD: Yes.

CHAIRMAN HENDRIE: Now let's back up the line. Vic.

COMMISSIONER GILINSKY: Well, let's see. Peter changed the meaning of the first sentence in paragraph two.

CHAIRMAN HENDRIE: I think paragraph one is good and everybody understands. John?

COMMISSIONER AHEARNE: Paragraph one is fine.

CHAIRMAN HENDRIE: Paragraph one has that little editorial thing in it, it stands.

COMMISSIONER GILINSKY: The way I had it, it was a comment on the present situation, and the way Peter has it, it is a prediction.

COMMISSIONER BRADFORD: For better or for worse, the present operating license situation is a product of the licensing

process as it stood, and these issues weren't, in fact, raised and resolved at the CP stage, and there is no way we can say about the present proceedings, that they shouldn't have the issues in them that they do.

COMMISSIONER GILINSKY: Actually, the way I meant it is not as an observation on the present, but on this system of licensing, and if you set it up in a reasonable way the operating license proceedings wouldn't have a burden that they now do. You might say have to.

COMMISSIONER BRADFORD: Yes. I started to put the word ideal or something in it and where, in fact, I put future.

COMMISSIONER GILINSKY: That is really what I meant, and I really would prefer to leave it that way, rather than make any predictions which depend on changes we haven't put in place, particularly since we are saying we need changes in the way industry operates.

COMMISSIONER AHEARNE: Vic, I guess my only question with the paragraph is, are you speaking to the boards in this paragraph?

COMMISSIONER GILINSKY: No.

COMMISSIONER AHEARNE: To the world.

CHAIRMAN HENDRIE: A general comment.

COMMISSIONER GILINSKY: To try to nudge things in a direction that ---

COMMISSIONER BRADFORD: Okay. I just want to make it

clear that it is not something you are expecting the boards to do something on.

COMMISSIONER GILINSKY: No.

COMMISSIONER BRADFORD: I don't mind changing future to ideal and going back to your language, except I think I would say that ours do now, rather than that they do now. What I am trying to get away from is the suggestion from us to the boards that they ought to be throwing the issues out.

COMMISSIONER GILINSKY: No, that is not what I meant.

CHAIRMAN HENDRIE: As a final matter, the Commission observes that in more ideal circumstances, or something like that, the operating license should not bear the burden of issues they do now, or would not bear. How would that be? Peter?

COMMISSIONER BRADFORD: I would get rid of it. I don't think I would say more ideal. I would just say, in ideal circumstances operating license proceedings should not bear the burden of issues that ours do now.

CHAIRMAN HENDRIE: I don't have any problem with that. John, how does that strike you?

COMMISSIONER AHEARNE: Fine.

CHAIRMAN HENDRIE: I don't have any problem with Peter's finall add-on. How about you?

COMMISSIONER AHEARNE: No.

COMMISSIONER GILINSKY: That is fine.

CHAIRMAN HENDRIE: Okay. Patch this on as IV.

Let's see, it goes in after L and before the Commission, Sam Chilk.

After listening to all of you on the schedules, I thought perhaps a certain specificity in direction might not be out of place.

Since we are all in such a great mood here, I want to do one more thing in the draft policy statement. With regard to J, sua [illegible] raising of issues by boards, taking into account the broad range of circumstances, I suggest we strike J and advance the other clauses. You had it struck there at one point, I think. I don't know what we would say about that which would garner a majority, and I just propose not to fool around with it.

COMMISSIONER BRADFORD: There goes Victor's and my own effort to expedite things, but all right.

MR. BICKWIT: That doesn't foreclose a rulemaking. It simply takes it out of this policy statement.

COMMISSIONER BRADFORD: That is really the point. I take it you are not dropping further discussion of sua sponte, or were you, as a subject for Commission attention? But you are just trying to get a policy statement out.

CHAIRMAN HENDRIE: Certainly not. It is just that it seems to me that from the policy statement standpoint that the value of getting the policy statement out is sufficient that it is not worth our wrangling to see if there is some particular finely tuned set of 103 words we could all stand on, each with his

own interpretation.

COMMISSIONER BRADFORD: I agree.

CHAIRMAN HENDRIE: Now, what that does with regard to the policy statement I will then declare is to bring us down only to a question of what we want to say about time and a prototype schedule under A, and coupled with that, and depending on how that goes, whether we want to say anything more or less or different about discovery.

COMMISSIONER BRADFORD: Right.

CHAIRMAN HENDRIE: And those, then, matters await some more haggling over the two time lines next Tuesday, and maybe we can close in then or soon after.

I thank you all very much.

(Whereupon, the meeting was adjourned at 4:05 p. m.)

NUCLEAR REGULATORY COMMISSION

This is to certify that the attached proceedings before the

NUCLEAR REGULATORY COMMISSION

in the matter of: Discussion of Revised Licensing Procedures

Date of Proceeding: Thursday, May 7, 1981

Docket Number:

Place of Proceeding: Room 1130, 1717 H St., N.W., Washington, D.C.

were held as herein appears, and that this is the original transcript thereof for the file of the Commission.

Marilynn M. Nations

Official Reporter (Typed)

Official Reporter (Signature)

TRANSMITTAL TO: XX Document Control Desk, 016 Phillips

☐ The Public Document Room

DATE: May 11, 1981

Attached is a Commission meeting transcript and related meeting document/s/. These are available for placement in the Document Control System so they will appear on the Public Document Room Accession List. Any document not stampted original should be checked for possible prior entry into the system.

1. Transcript of Discussion of Revised Licensing Procedures, May 7, 1981. (1 cy)

   a. Memo from Leonard Bickwit to the Commissioners dated May 7, 1981, subject: Limiting Number of Interrogatories Filed. (1 cy)

jake brown
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