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1. Transcript of: Discussion of Revised Licensing Procedures May 26, 1981.
 - a. Memo from Paul Cotter to the Commissioners dated May 21, 1981, Subj: Proposed Sua Sponte Rule.
 - b. Memo from Paul Cotter to the Commissioners dated May 26, 1981, Subj: ASLBP Model Hearing Schedule.
 - c. Commissioner Ahearne's additional views on SECY-81-311 (to be printed in the Federal Register), dated May 26, 1981.

jake brown
41410

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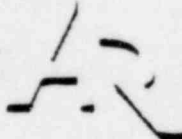
COMMISSION MEETING

In the Matter of: PUBLIC MEETING

DISCUSSION OF REVISED LICENSING PROCEDURES

DATE: May 26, 1981 PAGES: 1 - 81

AT: Washington, D. C.

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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PUBLIC MEETING
DISCUSSION OF REVISED LICENSING PROCEDURES

Room 1130
1717 H Street, N.W.
Washington, D.C.
Tuesday, May 26, 1981

The Commission met at 2:07 p.m., pursuant to
notice.

BEFORE:

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

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ALSO PRESENT:

- Samuel J. Chilk, Secretary
- Leonard Bickwit, Esq., General Counsel
- A. Rosenthal
- H. Shapar
- A. Cotter
- D. Rathbun
- H. Denton
- M. Malsch

DISCLAIMER

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P R O C E E D I N G S

(2:07 p.m.)

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3 CHAIRMAN HENDRIE: If we can come to order, the
4 Commission meets this afternoon for yet another in its
5 series of meetings on revised licensing procedures. The
6 last time we met we put out a policy statement and Appendix
7 B to Part 2, and had embarked on a discussion of sua sponte
8 powers of the Boards in licensing proceedings. That
9 discussion seemed to be running longer than I had
10 anticipated at the time and I cut it off. We will take it
11 up again today.

12 We also have today before us two rule changes in
13 Part 2. The first batch of Part 2 rule changes are in the
14 form of a proposed final rule on certain changes we had
15 agreed to a couple of weeks ago. The second batch of
16 changes would be for a proposed rule for comment carrying on
17 with certain other items.

18 Len, are you in a position to remind us a few
19 things about the sua sponte discussion and frame our getting
20 started on that matter?

21 MR. BICKWIT: I will try. There were a couple of
22 issues raised at the last meeting and I think the fix is
23 rather easy: One, that "certification" be changed to
24 "notification"; two, that it be understood that the--

25 CHAIRMAN HENDRIE: This is with regard to a

1 proposition in SECY 81-304--

2 MR. BICKWIT: Right.

3 CHAIRMAN HENDRIE: -- that the Boards get ready to
4 exercise the power, let the Commission know, and the
5 Commission would have some number of days to either say
6 something or remain silent. If they remained silent, the
7 Board would go ahead.

8 MR. BICKWIT: That's correct.

9 We modified the proposition to make clear that
10 it's 15 days from the receipt of notification. We also, in
11 response to John's question, stated that what we had in mind
12 in drafting this was that the Commission could say not only
13 "no," but could say we are not yet ready to decide the
14 matter and therefore toll the running of the clock.

15 We considered a point raised by Alan that you may
16 want to differentiate to the extent possible between items
17 which are in fact sua sponte, and actions which are within
18 the scope of issues that are in fact in controversy. We
19 went back to the drawing board to try to provide some
20 additional guidance on that matter, and what we have does
21 not provide much in addition but could be added rather
22 easily.

23 We simply would include in the rule language that
24 would read as follows: "The Commission recognizes that it
25 is common for Boards to raise questions about the subject

1 matter of the proceedings before them, so long as such
2 questions are reasonably within the scope of the matters in
3 controversy. They do not constitute the raising of an
4 issues sua sponte. The Commission recognizes further that
5 there may be close questions in some cases as to whether an
6 issue is or is not within the scope of matters already in
7 controversy. The Commission has confidence in the ability
8 of the Boards to make those decisions which will be
9 reversible only for a demonstrated abuse of discretion."

10 So that is an issue that we propose to resolve
11 that way. But we acknowledge that it is not clear guidance
12 to the Boards and we came up short in our efforts to draft
13 anything that was clearer.

14 CHAIRMAN HENDRIE: Len, is there a revised 304 or
15 a 304a that I should have and don't seem to have?

16 MR. BICKWIT: No, there is not. These are just
17 some proposals. A suggestion, I think, is that maybe there
18 should have been, and I take that as perhaps correct.

19 (Laughter.)

20 CHAIRMAN HENDRIE: No, I just wondered if I had
21 gotten something and didn't have it in hand.

22 MR. BICKWIT: All right. Then there was also a
23 suggestion in the original paper that we would extend this
24 to CP and OL amendments, and we have drafted language which
25 would allow that to be done. Now those are the --

1 COMMISSIONER AHEARNE: Wait, wait. I don't
2 understand how you could extend it to CP.

3 MR. BICKWIT: CP and OL amendments.

4 COMMISSIONER AHEARNE: Oh. Okay.

5 MR. BICKWIT: Those are the "small" questions that
6 we've attempted to address over the last week.

7 The larger question is whether there are three
8 votes for this concept, and that was unresolved at the
9 conclusion of the last session.

10 CHAIRMAN HENDRIE: There is a comment in Tony's
11 memorandum on the 304 paper down at the end where, after
12 making a basic argument that he doesn't think these changes
13 are necessarily a very good thing, that if the Commission
14 felt inclined to go ahead with something along this line,
15 that the sua sponte issues to be referred to the Commission
16 or the Commission notified the Board was about to take them
17 up be limited to those of a generic character. Or at least
18 that's the way I read your III, Tony.

19 MR. COTTER: I think that is a fair way --

20 CHAIRMAN HENDRIE: Thus attempting to separate
21 possible matters that the Board would take up on its own
22 into those unique to the case in hand, where you would
23 propose that there be no change in the present regulations
24 on sua sponte powers, as contrasted with those matters which
25 could be fairly considered generic -- that is, applying to a

1 number of cases -- and in those, the Commission would be
2 notified.

3 MR. COTTER: That's correct. The Panel felt and
4 does feel very strongly about the pursuit of the sub sponte
5 authority in connection with site-specific and
6 plant-specific questions.

7 COMMISSIONER GILINSKY: What's the rationale for
8 this distinction?

9 MR. COTTER: Well, that it --

10 COMMISSIONER GILINSKY: You would in both cases be
11 dealing with a specific plant. It's just that in some cases
12 the problem would have implications for other reactors and
13 for others it wouldn't.

14 MR. COTTER: That's right.

15 COMMISSIONER GILINSKY: Now why would you treat
16 them differently?

17 CHAIRMAN HENDRIE: I guess you could argue that
18 where an issue ran beyond the immediate case at hand and was
19 of interest for other cases, that the Commission's interest
20 in knowing the Board was going to take the matter unto
21 itself might be higher and the Commission might choose, for
22 instance, to say, wait a minute, that's a good question, we
23 ought to deal with that on a generic basis and we propose to
24 do so.

25 MR. COTTER: That's a fair statement. From my own

1 standpoint, I have a hard time envisioning what in effect is
2 in the nature of an appellate review of an immediate
3 question within an administrative hearing which relates
4 solely to the plant in question.

5 COMMISSIONER GILINSKY: Would it necessarily be
6 clear to the Board whether a problem was a generic problem
7 or not? It would see it in the context of that particular
8 case. Sometimes it would certainly be clear, but I would
9 think other times it wouldn't be clear.

10 MR. SHAPAR: I think it would be very difficult to
11 discern, certainly whether or not it's generic or
12 site-specific or plant-specific in many cases.

13 COMMISSIONER GILINSKY: Only the staff that
14 reviews a large number of applications --

15 MR. COTTER: Why do you say that? I don't see
16 that.

17 COMMISSIONER GILINSKY: -- would I think be in a
18 position to compare them. Not necessarily only the Staff,
19 but at least the Staff would be in a better position.

20 MR. COTTER: I don't see that it would be that
21 difficult. I don't know why you say that, Howard.

22 MR. SHAPAR: Experience.

23 MR. COTTER: Well, is there a specific instance in
24 your experience that you could cite?

25 COMMISSIONER GILINSKY: Tell us, Howard.

1 MR. SHAPAR: Well, let's take a look at an issue
2 like -- I'm not talking about any specific case -- whether
3 or not you need to apply an emergency plan to low power
4 operation. Is that generic or is it specific?

5 MR. ROSENTHAL: It's generic.

6 MR. COTTER: It's generic.

7 MR. ROSENTHAL: I've never had any difficulty
8 differentiating between site- or reactor-specific questions
9 and questions that had decided generic implications.
10 Sometimes you wouldn't know whether the issue would arise in
11 the context of other plants, and if so, how many. But you
12 would know at least that it was an issue that had that
13 potential and it wasn't one that was confined to the site or
14 reactor involved.

15 MR. SHAPAR: What about the Board decision on that
16 Florida case? Was that specific or generic?

17 MR. ROSENTHAL: Which one are you talking about?

18 COMMISSIONER BRADFORD: St. Lucie, I take it.

19 MR. ROSENTHAL: St. Lucie?

20 MR. SHAPAR: Yes.

21 MR. ROSENTHAL: Well, that was in the context of
22 the St. Lucie plant. That certainly had possible generic
23 implications.

24 MR. SHAPAR: Was it clearly specific or generic?

25 MR. ROSENTHAL: It was clearly -- It clearly had

1 the potential of involving other plants. Now if you've got
2 an issue as to what is the seismicity of the Diablo Canyon
3 site, that is clearly a site-specific issue and it does not
4 have that potential. But I think you can draw a clear
5 dichotomy between questions that are perforce reactor or
6 site-specific and questions which have a potential for
7 generic implications, even though you may not be able to
8 determine, as you couldn't determine at St. Lucie, how many
9 plants that might affect. I think that dichotomy is
10 possible.

11 MR. SHAPAR: Of course, since the rule is only
12 directed at notification and the Board is free to go ahead
13 and consider it unless the Commission says otherwise, I
14 really don't see any justification for trying to distinguish
15 between generic matters and specific matters.

16 MR. COTTER: Well, if you're sitting at a hearing
17 that you think has maybe one issue in it and you think it's
18 going to last two or three days, and then the question
19 arises and you have to notify the Commission, then you start
20 the 15 days running and you have to presumably recess the
21 hearing, indicate you can't complete the hearing at that
22 time. And you also, if I understand the amendment
23 correctly, may run into a situation where the Commission
24 finds that it cannot act, but it wants to take an active
25 review of the subject, and you would have to toll the

1 running of the 15 days, which could then extend it out for
2 an indeterminate period of time.

3 MR. SHAPAR: But why shouldn't the Commission have
4 the flexibility, if the issue is indeed sua sponte and is
5 not raised by any party, to refer the matter to the ACRS, to
6 call in an outside group; or if it's basically a legal
7 question, to decide the matter themselves? Why shouldn't
8 they have that flexibility?

9 COMMISSIONER BRADFORD: But Howard, don't we -- I
10 ask this with some trepidation as one of the creators of
11 this scheme originally --

12 MR. SHAPAR: I'm trying to support you,
13 Commissioner.

14 (Laughter.)

15 COMMISSIONER BRADFORD: Well, I've become a moving
16 target.

17 (Laughter.)

18 COMMISSIONER BRADFORD: Don't we in fact have that
19 option under the present scheme as well, simply by telling
20 OGC in the course of its monitoring of proceedings that
21 we're especially concerned about sua sponte matters and we
22 would like them to call them to our attention on a more
23 accelerated scale than even the normal monthly reports?

24 MR. SHAPAR: I think that's a fair point. I think
25 the candid answer to it would be that by having a sua sponte

1 rule it does as a practical matter cause the Boards to
2 exercise some self-discipline that might otherwise not be
3 applied.

4 MR. ROSENTHAL: It seems to me that the response
5 to Tony might be this. That is, that if this is truly a sua
6 sponte issue, one which is not within the scope of the
7 matters put in controversy, it oughtn't to be raised for the
8 first time at the hearing. If the Board is going to raise
9 that, they ought to raise it well before the hearing starts,
10 because it seems to me quite unfair to the parties to be
11 asked to address at a hearing an issue which is beyond the
12 pale of the -- beyond the scope of the issues that were
13 placed in controversy, without reasonable advance notice.

14 So I would ask you as a practical matter --

15 MR. COTTER: Well, the hearing is the exception to
16 the rule.

17 MR. ROSENTHAL: I would ask as a practical matter,
18 how often is it going to happen, or should it happen that in
19 the middle of a hearing a Board raises an issue that is not
20 interwoven with the matters in controversy, with the result
21 that the Board can, under the 15-day requirement, have to
22 adjourn? I don't think that should happen very frequently,
23 if at all.

24 MR. COTTER: I don't know that it has, but --

25 CHAIRMAN HENDRIE: Tony, don't most of these sua

1 sponte --

2 MR. COTTER: -- in the 12 cases in the last 6
3 years, so far as I know, they have all been before
4 hearings.

5 CHAIRMAN HENDRIE: Typically they come up when
6 people are arguing about contentions, don't they?

7 MR. COTTER: Yes.

8 CHAIRMAN HENDRIE: The Board gets interested in --

9 MR. COTTER: Sometimes they arise in
10 connection--

11 CHAIRMAN HENDRIE: -- some question which for one
12 reason or another is not accepted as a contention on behalf
13 of one of the parties.

14 MR. ROSENTHAL: It comes up that way, Mr.
15 Chairman, or it can come up during the course of the
16 examination prior to the hearing by the Board members of the
17 SER or some other document.

18 My point simply is that it ought to come up
19 considerably before the hearing, so that if the Board really
20 wants that issue explored the parties have appreciable
21 advance notice of the fact that they're going to be called
22 upon to address the question.

23 MR. SHAPAR: And I think that is when in fact when
24 they have arisen, early on in the proceedings when the sua
25 sponte authority has been used. As a matter of fact, the

1 only place they come in at the end of the hearing is when
2 the Appeal Board uses its sua sponte authority.

3 MR. ROSENTHAL: I might say, we don't have any
4 problem. I'm now just speaking in the context of the Appeal
5 Boards and their raising of sua sponte issues. Of course
6 they're in a difference context, but we have no problem with
7 15 days' notice.

8 COMMISSIONER GILINSKY: Why do we need the 15-day
9 period?

10 MR. ROSENTHAL: You're asking me?

11 COMMISSIONER GILINSKY: Yes.

12 MR. ROSENTHAL: I don't think -- If you recall, my
13 view of it is that there is no necessity for it. But there
14 was some concern expressed that this sua sponte authority
15 has been or might be abused by the Boards. My feeling about
16 that was that if there is that feeling and there is also the
17 feeling that, to avoid abuse, the Commission should have an
18 opportunity to look at what the Board proposes to do, that
19 this is a mechanism for accomplishing that purpose.

20 COMMISSIONER GILINSKY: Well, no, there is the
21 notification, and there is the 15-day waiting period.

22 MR. ROSENTHAL: Well, the Commission obviously
23 needs time -- I assume what will happen is: The
24 notification will go in the first instance to the General
25 Counsel as a practical matter, and the General Counsel I

1 take it needs some period of time in which to provide its
2 advice to the Commissioners; and then I take it the
3 Commissioners need some time in which to decide whether to
4 step in or whether to extend the period for stepping in or
5 whatever. That's what I understood the 15-day period was
6 for.

7 COMMISSIONER GILINSKY: Well, but it isn't as if a
8 lot is going to happen in 15 days.

9 MR. SHAPAR: Well, I would answer your question
10 differently.

11 CHAIRMAN HENDRIE: The 15 days is primarily to
12 provide some time after which the Board is free to go ahead
13 if it hasn't heard from the Commission. It's a compelling
14 mechanism on the Commission to -- so that the Board simply
15 doesn't refer an issue up here or notify the Commission and
16 then it doesn't hear anything and two weeks go by, and three
17 and four, and the Board doesn't know whether it can get on
18 with the hearing, or whether it's going to be told to treat
19 that issue or not, and --

20 COMMISSIONER GILINSKY: We can always step in,
21 even after the 15 days.

22 MR. SHAPAR: But resources may have been expended
23 on defining the issue --

24 MR. COTTER: Well, the 15 days are not really
25 compelling, because they can be suspended. So that it is

1 not a meaningful compulsion.

2 MR. ROSENTHAL: Well you can do that, but I would
3 certainly hope that the Commission would be able, either in
4 the 15 days or in whatever period it chose to extend that 15
5 days by, to make its determination; because it seems to me
6 it is very disorderly, if I may use that term --

7 CHAIRMAN HENDRIE: Disruptive to the hearing.

8 MR. ROSENTHAL: -- for the Board, 15 days go by,
9 there's nothing happened, the Board goes forward, the
10 parties prepare testimony, the Board is out there conducting
11 a hearing, and all of a sudden the word comes out that the
12 Commission has decided, for whatever reason, that it doesn't
13 wish the Board to explore that.

14 It seems to me that if the Board is going to move
15 forward and we're going to have a system where the
16 Commission is exercising this oversight, that the Board is
17 entitled to know within a particular period of time -- the
18 Commission again can extend it -- whether or not the
19 Commission is going to step in or not. I mean, the Board
20 and the parties should not be walking on eggshells,
21 wondering from day to day whether suddenly the plug is going
22 to be pulled.

23 MR. SICKWIT: I think the difference in part is
24 psychological, that if you have a 15-day period then the
25 Commission I think is more likely to step in on day 15 than

1 it would if you didn't, and the matter were being in fact
2 pursued. I think it is always easier to prevent the train
3 from starting than to stop it once it is in motion.

4 In addition, there is -- as Howard pointed out,
5 there is the resource consequence associated with what
6 happens during that 15 days if the Commission ultimately
7 decides that it's not a good idea to go forward.

8 On the other side is the interest involved in
9 allowing the Board to pursue in a free-flowing way the
10 matters that it considers ought to be raised. And I think
11 if there is one proposition you can agree on, the
12 Commission-- there will be fewer actual exercises of the sua
13 sponte authority if you've got a 15-day period than if you
14 don't.

15 I think it really ought to turn on how much you
16 want that power to be exercised, and how much in the way of
17 restraint you want to put on them.

18 MR. ROSENTHAL: Are you suggesting that the Boards
19 are going to be less prone to resort to that authority if
20 they have to give 15 days' notice?

21 MR. BICKWIT: Yes.

22 COMMISSIONER GILINSKY: I'm not sure that that's
23 right.

24 MR. ROSEN KAL: I can tell you that's not likely
25 to be the case with the Appeal Boards. I can't speak for

1 the Licensing Boards.

2 MR. BICKWIT: That would be part of my response.
3 The other part would be that the Commission would be more
4 likely to step in if it's got 15 days.

5 COMMISSIONER GILINSKY: I'm not sure.

6 MR. SHAPAR: I think Len is right, because I think
7 we've had some experience where the Boards are actually
8 making the finding that it is a serious matter before they
9 raise the issue. Now if the rules require that there be
10 notification when indeed they are purporting to use their
11 sua sponte authority, I think the fairness dictates the
12 answer that: Yes, there is at least a chance that the sua
13 sponte authority will be used less frequently.

14 COMMISSIONER GILINSKY: Well, there is certainly a
15 chance.

16 MR. SHAPAR: Well, I think it's human nature.

17 COMMISSIONER GILINSKY: Human nature also, it
18 seems to me, suggests that with this 15-day system, once the
19 Board has thrown it up here and the Commission hasn't acted,
20 in effect the Commission has approved that contention, and
21 the Board can then go and exercise it to the full, knowing
22 it's acting with complete Commission approval. So it's not
23 clear to me which way this would go.

24 MR. BICKWIT: Well, if you accept that the
25 Commission is more likely to come in --

1 COMMISSIONER GILINSKY: Oh, I don't know.

2 MR. BICKWIT: -- if there is a 15-day period, and
3 I think you would probably accept that, then I think it
4 follows that a Board is a little less likely to subject
5 itself to that if there is a 15-day period.

6 COMMISSIONER BRADFORD: Well, except when this
7 proposition came up about six weeks ago for the first time,
8 it seems to me that the meeting closed with someone-- I
9 think perhaps Victor-- having said that if all that was
10 involved was sending a note to the Commission, the Board was
11 in fact more likely to raise issues on its own than it was
12 if they had actually to take them up and pursue them on
13 their own hook; that we were likely to be deluged in fact
14 with memos saying: Wouldn't you like us to look into these
15 items? Whereupon at least some Commissioners were
16 sufficiently chilled by that idea that you will remember
17 that we went a month-and-a-half without discussing the sua
18 sponte rule.

19 (Laughter.)

20 COMMISSIONER BRADFORD: And it's only lately that
21 it has wormed its way back, and now we are treating with
22 equal seriousness the proposition that in fact there will be
23 far fewer sua sponte issues laid before us; and the fact is,
24 I guess, we just don't know.

25 MR. SHAPAR: I think we know.

1 MR. ROSENTHAL: We don't know, but I would again
2 say that where the Appeal Boards are concerned it's going to
3 be a totally neutral factor. It's neither going to increase
4 them nor decrease them, and I could also tell you --

5 COMMISSIONER GILINSKY: It's quite an oncus to
6 have on us.

7 (Laughter.)

8 MR. ROSENTHAL: -- that I would be extraordinarily
9 unhappy if it came to my attention that one of my Boards
10 decided not to explore an issue that they otherwise would
11 have explored simply because they have to put it up to the
12 Commission. I think indeed that that would be a derogation
13 of their responsibilities. I don't think it should have any
14 effect one way or the other, and I don't think in the case
15 of the Appeal Boards it will.

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1 COMMISSIONER AHEARNE: If I could speak in favor
2 of the proposal, let me just say this --

3 COMMISSIONER GILINSKY: If you could just get e
4 that statement --

5 CHAIRMAN HENDRIE: Another case where what we do
6 makes no difference.

7 (Laughter.)

8 COMMISSIONER GILINSKY: Another chapter of
9 "Nothing Matters."

10 (Laughter.)

11 COMMISSIONER AHEARNE: Well, I am not sure if it
12 is necessarily going to be a chapter of "Nothing Matters."
13 The Boards obviously can and will speak for themselves.

14 The purpose of my original memo months ago which
15 at least did discuss this particular issue was that I still
16 believe that the fundamental purpose of the operating
17 license hearing is, one, to resolve issues raised in dispute
18 by the parties to the hearing. Therefore, I do believe that
19 a Board raising an issue on a sua sponte is a sufficiently
20 unique situation that the Commission should be notified. It
21 should have that opportunity. And that is the main purpose
22 of my being interested in any of these approaches, including
23 this one.

24 COMMISSIONER GILINSKY: From what Tony says, we
25 are notified.

1 COMMISSIONER AHEARNE: Vic, the notification that
2 occurs sort of, that by keeping track and such -- you have
3 been here longer than any of us; you know there is a
4 blizzard of paper. That just is not the same. The reason--
5 you can see the Licensing Board is very disturbed by this
6 proposal, very disturbed by it. Whether it is a good or bad
7 proposal, it is obviously a significantly different
8 proposal.

9 COMMISSIONER GILINSKY: What I am saying is if the
10 Commission is interested, then the General Counsel's office
11 will collect those pieces of paper and put them in front of
12 you. And the only thing at issue here is whether you want
13 to formalize it further and introduce a 15-day delay.

14 COMMISSIONER AHEARNE: Or notification.

15 MR. SHAPAR: The General Counsel's office may have
16 difficulty in spotting when that authority is exercised if
17 the Board doesn't make the finding that is in the
18 regulations. And I am saying that the Boards are not in all
19 cases making that finding.

20 COMMISSIONER GILINSKY: Well, maybe the Board
21 ought to make the finding. Well, Tony said they did. And
22 if they do not, I assume they will.

23 MR. BICKWIT: I think something can be done about
24 it short of going --

25 MR. COTTER: It could be a statement of an

1 advocate's position and that would be one party to the
2 proceeding.

3 MR. SHAPAR: No more of an advocate than you,
4 Tony.

5 COMMISSIONER GILINSKY: I thought you said that is
6 your current practice to issue an order.

7 MR. COTTER: Yes.

8 COMMISSIONER GILINSKY: So there will be an
9 order. And if the Commission is interested -- and I think
10 they should be interested -- that order is going to appear
11 on your desk.

12 COMMISSIONER AHEARNE: And I believe that that
13 order, in effect, ought to be an order or a request to issue
14 an order, whichever it is, that there ought to be a period
15 of time before it takes effect.

16 COMMISSIONER GILINSKY: Well, the reason I raised
17 the question about that is, I wondered if you were not
18 introducing a cumbersome element that complicates things,
19 rather than --

20 COMMISSIONER AHEARNE: It does. It does
21 complicate it. Absolutely.

22 COMMISSIONER GILINSKY: But not necessarily one
23 from your point of view that is going to work to reduce the
24 number of these issues. I think it is just going to
25 complicate. I am not sure, but at least I think it has the

1 potential for just complicating things procedurally.

2 COMMISSIONER AHEARNE: Vic, you are right. It may
3 increase the number of issues. But whichever way it cuts,
4 it will definitely mean that the Commission has formally--
5 because I am sure the General Counsel will, if there is a
6 15-day in there, make sure that we get that in front of us
7 within those 15 days -- we will have formally have had an
8 opportunity to look at it, which cuts in my direction that I
9 am interested in in saying that a Board raising sua sponte
10 is an unusual situation.

11 MR. ROSENTHAL: You also ought to remember that
12 frequently the Board will identify the issue it is raising
13 on its own in the midst of a long prehearing conference
14 order, which is essentially addressed to other matters. It
15 may be on page 18 that the Board notes that it has called
16 upon the parties to address this issue. And I think it is
17 putting a substantial burden on the General Counsel's
18 office-- although Len can speak for himself -- to have the
19 monitors responsible for reading those things with such care
20 and so rapidly that they pick up those things. At least, if
21 it is a separate piece of paper, then the focus is right on
22 it.

23 COMMISSIONER GILINSKY: All right. I thought it
24 was. I didn't realize it could be part of --

25 MR. ROSENTHAL: That is not necessarily the case,

1 because I just saw one in the two couple of days.

2 COMMISSIONER GILINSKY: Okay. Suppose we have a
3 separate piece of paper which then appears here; and the
4 Commission, if it is interested, will deal with it. I
5 wonder whether the 15-day or whatever-day period it is, is
6 something --

7 MR. ROSENTHAL: But if the Commission does not
8 deal with it promptly -- I mean, my concern about the 15
9 days, or the reason that if there is going to be specific
10 notification when the Commission has the opportunity to
11 again pull the plug, I am very anxious to have there a set
12 period, because I do not want, frankly, the Commission to
13 have a blank check in that regard. I do not think it is
14 fair to the Board.

15 COMMISSIONER GILINSKY: The Commission always has
16 a blank check.

17 MR. ROSENTHAL: Well, not as a practical matter
18 because if --

19 COMMISSIONER GILINSKY: Well, but this is going to
20 depend on how many of these issues the Commission decides to
21 knock out of the hearing. If the Commission seldom does
22 this, then people are not going to be on tenderhooks if the
23 Commission is not going to do it.

24 MR. ROSENTHAL: We are always on tenderhooks. If
25 the Commission is constantly doing it, well, then, I suppose

1 we --

2 MR. ROSENTHAL: Well, we are always on
3 tenderhooks, because you never know when is the first time
4 it is going to happen. I would be very hopeful-- I want to
5 be perfectly candid about this --

6 COMMISSIONER GILINSKY: I know what you are
7 saying.

8 MR. ROSENTHAL: -- that the Commission not
9 exercise the clear authority it has to do this at any time
10 down the road. I think that this Commission owes it to the
11 Boards, if it is going to reserve this right, to exercise it
12 within a prescribed period, whether it be 15 days or 20 days
13 or whatever; and that it be an extraordinarily rare instance
14 that the period has gone by without there being an extension
15 when the Commission pulls that plug.

16 COMMISSIONER GILINSKY: But we are going from
17 questioning these issues to giving them the stamp of
18 approval in a way that cannot be undone --

19 MR. COTTER: That is the major question I have.

20 COMMISSIONER GILINSKY: -- which seems to be going
21 to the opposite extreme.

22 MR. ROSENTHAL: I do not think it is necessarily a
23 statement of approval. You do not have to regard it as
24 affirmative approval. It is just that you are not going to
25 step in.

1 COMMISSIONER AHEARNE: It's not disapproval.

2 MR. ROSENTHAL: That does not mean that you are
3 affirmatively endorsing what the Board has done. There
4 seems to me to be a middle range. On the one hand --

5 MR. COTTER: But does it not open up the
6 Commission to the charge that they have prejudged the
7 issue?

8 COMMISSIONER AHEARNE: No, it does not. The
9 Boards, as Vic has pointed out many times, the Boards are
10 the agents of the Commission. If they are out there to
11 resolve these issues in dispute, here comes a time when the
12 Board decides: In addition to the issues in dispute among
13 the parties, they want to raise something. They are out
14 there as the agents of the Commission. But by this process
15 that has been proposed, it does not say the Commission is
16 stamping it with approval; it is just that there is a formal
17 mechanism for the Commission to note that the Board is now
18 taking that step and is not disapproving it.

19 MR. COTTER: If you could keep it that simple.

20 COMMISSIONER GILINSKY: It seems to me there will
21 be a tendency to regard this as a Commission approval,
22 because just as Alan says, he wants to have some confidence
23 that the Commission is not going to step in after that
24 point. So the Commission after 15 days is saying, "Wait a
25 minute, let's not give them that approval. So-and-so is out

1 regard to the basic proposition of Commission notification
2 when the Boards intend to take an issue up on their own? Is
3 it a majority that leans in that direction?

4 COMMISSIONER GILINSKY: (Nodding affirmatively.)

5 COMMISSIONER AHEARNE: (Nodding affirmatively.)

6 CHAIRMAN HENDRIE: Peter, I have read a "nod" on
7 either side of me. What is your feeling?

8 COMMISSIONER BRADFORD: I am all for having the
9 Commission notified. I think after all I have heard about
10 the tangles and signals and tealeaf-reading that would go on
11 in the Boards, I would just as soon for the time being task
12 OGC to be the one who notifies us. If we want the Boards to
13 say they will use red-lined paper when the decision contains
14 a sua sponte concern to make it easier for OGC to pick it
15 up, all right.

16 But for me, it would be enough just to have OGC
17 let us know on an expedited basis which of the cases that
18 they are now looking at pick up sua sponte issues, and then
19 we can decide whether we want to do anything about it.

20 CHAIRMAN HENDRIE: Would I read that to say you
21 would not be in favor of a rule change which would say the
22 Boards notify us?

23 COMMISSIONER BRADFORD: Right.

24 CHAIRMAN HENDRIE: You would say that?

25 COMMISSIONER GILINSKY: Let's see. Is it

1 necessarily a rule change?

2 MR. BICKWIT: Not necessarily.

3 COMMISSIONER GILINSKY: I would just think as a
4 matter of practice there is a rule, and with a standard for
5 the Boards taking up these issues. Now, if they have not
6 been making a finding according to that rule, perhaps they
7 ought to. It seems to me that does not require a rule
8 change.

9 COMMISSIONER BRADFORD: Joe, is this before us at
10 the moment in sort of a rule-change or no-rule-change
11 posture? Or is it potentially part of whatever the 311
12 package is that is going out for comment?

13 CHAIRMAN HENDRIE: I have been regarding it as a--

14 COMMISSIONER AHEARNE: Proposed rule change.

15 CHAIRMAN HENDRIE: -- as a potential rule change,
16 which, if it gained a majority in some form or another,
17 would be added to the items for that--

18 COMMISSIONER BRADFORD: For the 311 package?

19 CHAIRMAN HENDRIE: -- for the proposed rule for
20 comment thing. That was the way we framed it originally.

21 COMMISSIONER AHEARNE: It was a proposed rule
22 change or rule practice.

23 CHAIRMAN HENDRIE: I suppose, depending on the
24 formality with which one wanted to note notification
25 requirements, it could be a less formal direction to the

1 Boards. I guess for myself if we are going to do it, I
2 would prefer to see it in a rule.

3 MR. SHAPAR: There is a certain advantage in
4 having it in the rule to know that the internal practices of
5 the Commission would mean that if it is raised sua sponte
6 that the rule will say that the Commission may elect to take
7 it out of the hearing.

8 COMMISSIONER AHEARNE: Since the proposed approach
9 was weaker than I had originally hoped for and I compromised
10 myself down to this stage, I would see no real value in
11 doing less than the one we have here proposed.

12 CHAIRMAN HENDRIE: Than the 304 proposal?

13 COMMISSIONER AHEARNE: As Len had modified it.

14 CHAIRMAN HENDRIE: Perhaps with Len's
15 modifications.

16 COMMISSIONER AHEARNE: So I would not be in favor of
17 having just added another monitoring burden to OGC. And I
18 just do not believe that saying we have the inherent
19 authority to step in any time; while I certainly agree with
20 that, I do not think that accomplishes as much as I had
21 hoped to accomplish.

22 COMMISSIONER BRADFORD: But nothing good will
23 happen unless we step in explicitly. That is, one of the
24 worst things that could happen would be for the Boards--
25 Alan's point to the contrary notwithstanding -- not be to

1 flag an issue. Because, as I understood it, the point of
2 the rule that we are considering is to give the Commission a
3 chance to say, "Wait a minute: (a) we do not think you ought
4 to raise it," or, (b) we think ACPS or the staff ought to be
5 taking it up, or (c) go ahead and do it.

6 But you lose the opportunity to follow step (b)
7 entirely if the board is simply deterred from raising the
8 issue at all. So I think whatever option one follows, one
9 still wants the Commission to be aware that the Board has a
10 concern and not simply have the Board be deterred from a
11 general rumbling from above from raising issues at all.

12 COMMISSIONER AHEARNE: I am certainly confident
13 for myself that the approach that was proposed would not
14 deter any Board that really had a concern.

15 COMMISSIONER BRADFORD: Let's see. Of course,
16 that is the one we have been going back and forth on
17 intermittently. Len's point was that it would.

18 COMMISSIONER AHEARNE: I think it would deter
19 Boards from raising issues that did not in their mind rise
20 to one of really a serious concern.

21 MR. COTTER: I think the Boards would clearly take
22 it as a slap in the face, and there is a good chance that
23 they would simply abandon the authority entirely. So you
24 could accomplish that.

25 COMMISSIONER AHEARNE: Tony, you have now cut it

1 both ways. You have said just now, you said they would take
2 it as a slap in the face and abandon the authority. And
3 then previously here you said that you felt that some of the
4 members would perhaps not even be able to sign off on the
5 license.

6 MR. COTTER: Well, I think those who felt that way
7 would quit.

8 COMMISSIONER AHEARNE: Well, if telling the agents
9 of the Commission that if they go beyond the issues of a
10 fact raised by the parties means that they pick up their
11 marbles and go home, I guess it might be best that those who
12 really feel that way should.

13 MR. COTTER: I would think so.

14 COMMISSIONER GILINSKY: I didn't follow this
15 closely. Who stays and who goes?

16 (Laughter.)

17 MR. ROSENTHAL: The thick ones.

18 COMMISSIONER AHEARNE: The soreheads.

19 COMMISSIONER GILINSKY: Do we get to stay?

20 (Laughter.)

21 COMMISSIONER BRADFORD: No, Vic, you're out. I'm
22 sorry.

23 (Laughter.)

24 COMMISSIONER AHEARNE: Unfortunately, our rules
25 and edicts don't apply to us.

1 (Laughter.)

2 CHAIRMAN HENDRIE: It seems to me that where a
3 Board has an issue which is not raised by one of the parties
4 which they think is significant to the case and meets the
5 test under the sua sponte rule as it now stands, that they
6 raise it. And if they are asked to notify the Commission,
7 then at some period or not in which the Commission is
8 expected to act, I do not see that the Boards will not raise
9 issues on the one hand where they would previously.

10 If that is the case, then they have been raising
11 issues on an improper basis, and I do not think the Board
12 members who have raised it would buy that. Nor do I expect
13 to see a great rush of issues filed.

14 I do think if we are -- I guess, on balance, I
15 think there is some merit to the notification process. My
16 own view is that if there is a notification requirement,
17 then indeed there ought to some limited time within which
18 the Commission expects to act, and failing any action within
19 that time, then the Board simply goes ahead as it chooses.

20 I totally agree with Alan that I think it would
21 not be helpful to simply drift along not knowing whether the
22 Commission is going to do anything or is not going to do
23 anything on an issue, so that notification period, no
24 further specification of what happened, I think leaves the
25 system uncertain as to where it goes after the

1 notification. I think you want to leave the system so that
2 after a brief time for the Commission to consider what it
3 might want to do at the Commission, that either the machine
4 goes ahead and works as it would have anyway or the
5 Commission takes a positive action.

6 Now the "positive action" can be an extension of
7 the 15 days, but that requires a majority of the Commission
8 to agree to extend it. That is a positive action. Or it
9 can lay down some opinion on how or why or whatever it wants
10 the Board to do about the issue.

11 But I think that configuration where notification
12 and then if nothing has happened up here in some not too
13 long a period of time, that the Board simply goes ahead is
14 the right configuration to leave it. It clears the air with
15 regard to the Board's plan and the hearing on the issue.
16 You need some days, I guess. It is a pity it has to be a
17 15-day delay, but that is perhaps not unreasonable.

18 COMMISSIONER GILINSKY: That may be right if the
19 Commission is going to adopt the habit of frequently
20 knocking issues out, if that is the way it turns out; then
21 you have a pretty uncertain situation when one of these
22 issues is raised. And unless that uncertainty is relieved
23 by the expiration of the time period of a sort, you are
24 still up in the air.

25 But I guess I do not view things operating that

1 way. The Commission can give guidance on what constitutes a
2 serious safety issue in dealing with opinions after the
3 fact. In other words, we can deal with things on appeal and
4 speak to these issues.

5 Now the reason there is interest in being able to
6 deal with them more quickly is a feeling that somehow some
7 of these hearings may get out of hand, get off the track on
8 issues that ought not to be in there, or whatever. So you
9 have this opportunity to step in and do something else about
10 it if you want to. And it seems to me that being notified
11 presents you with that opportunity, but I would not think
12 that it is something that would be exercised frequently.

13 CHAIRMAN HENDRIE: But even if it is not, unless
14 you have, in effect, a cutoff period for Commission action,
15 why you leave things very uncertain amongst the parties and
16 the Board members as to what in fact is going to happen with
17 regard to that issue. They are going to be very hard put to
18 go confidently ahead on the assumption that in only one out
19 of four cases does the Commission say anything. This may be
20 the fourth case.

21 It creates then an uncertainty in the proceeding,
22 which I think is not in the least helpful. In fact, I can
23 see Boards trying to take up other matters and this one is
24 still laying around and finally they get other matters
25 pretty well taken up, I can see Boards coming back a second

1 time, saying, "Well, are you going to do anything about this
2 or not? We are getting ready to close down the record and
3 go off and write a decision."

4 COMMISSIONER GILINSKY: Well, the uncertainty
5 comes from the fact that the Commissioners have expressed an
6 interest in these issues that they didn't express earlier.
7 Now the whole thing has gotten turned around. I mean, from
8 questioning these issues, we are now getting in a position
9 of needing to somehow give them some degree of approval so
10 that everybody can go on and do their job, because "Although
11 the Commission has expressed interest in sua sponte issues,
12 that one is okay, you can go on."

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1 COMMISSIONER AHEARNE: I still differ with that
2 interpretation of what it would lead to. But I believe the
3 interpretation still would be that the Commission has said
4 that if a Board is raising an issue sua sponte, that is an
5 unusual event.

6 COMMISSIONER GILINSKY: Well, that is in the
7 rules. There's a finding that needs to be made, and you can
8 ask the Board to make the findings explicitly. That's
9 perfectly reasonable.

10 COMMISSIONER AHEARNE: I don't think that the rule
11 really is that clear or that good. If we want the operating
12 license to be a complete review like the CP, then we ought
13 not to worry about contentions and all of those to start
14 with. It isn't. The primary purpose, at least in my view,
15 is to resolve the issues raised by the parties.

16 COMMISSIONER GILINSKY: Look, it's an important
17 part of the review process, as Peter just mentioned.

18 COMMISSIONER AHEARNE: I didn't hear that.

19 COMMISSIONER GILINSKY: You may not have. The
20 record may not have caught it. But the fact is that, you
21 know, given the practice of building plants and reviewing
22 them, that is the first time you get to see the full plant
23 and the full design. And it isn't as if you're just
24 crossing a few "t"s and dotting some "i"s. Now it is true
25 that under the law you don't have a hearing unless someone

1 asks for a hearing, which puts the operating license hearing
2 on a different footing than the construction permit hearing.

3 But there may well be issues, or the Board may
4 come across matters that have safety importance, and it
5 would be very odd to tell them that they just ought to look
6 the other way.

7 COMMISSIONER AHEARNE: I am not saying that,
8 Victor.

9 COMMISSIONER GILINSKY: I know you are not saying
10 that. Right.

11 COMMISSIONER AHEARNE: You know very well I'm not
12 saying they ought to look the other way. What I am saying
13 is that in those issues that are brought up by the Board
14 itself, I do not see anything wrong -- and in fact, I think
15 there is a very definite positive side -- to first have to
16 come back to the Commission and notify us.

17 COMMISSIONER GILINSKY: I don't think there's any
18 difference about notification. The reason I brought it up,
19 even though I don't think that is what you're saying, is
20 that these tilts are important. You are pushing things in
21 one direction or another. You are telling them, you know,
22 less issues, less concerns and so on.

23 COMMISSIONER AHEARNE: No.

24 COMMISSIONER GILINSKY: Well, that's the practical
25 effect.

1 COMMISSICNER AHEARNE: The practical effect, I
2 hope is to try to get across -- at least the primary
3 purpose, is to resolve those issues raised by the parties.
4 And if they see something that is important, it's not that
5 they should submerge it, but that should be sufficiently out
6 of the norm that they've raised it to us.

7 COMMISSIONER GILINSKY: Well, first of all, there
8 is a rule with a standard. If that standard isn't clear,
9 then we can give instructions as to how that standard is to
10 be applied and we can give examples.

11 If that isn't enough, we can certainly make sure
12 that when such issues are raised we will be aware of it in
13 time to head off any long-term investigation, certainly
14 because --

15 COMMISSICNER AHEARNE: That's what this does
16 exactly. It lets us become aware of it when they are
17 raised, and it puts in place a system in which if we want to
18 head it off we would have to take action in a fixed period
19 of time.

20 COMMISSIONER GILINSKY: Well, look, the only
21 difference is this fifteen-day business, which I think
22 introduces complications of both kinds. It's just not clear
23 what that does. Frankly, I'm uncomfortable with it. It may
24 just encumber the process. It may put a stamp of approval
25 on issues that I am not sure I want to give at that point.

1 It's that part of it that I must say I'm not in favor of,
2 and I am not sure which way it cuts to be absolutely frank.

3 COMMISSIONER AHEARNE: Yes. I can see the point.

4 COMMISSIONER GILINSKY: And I don't think, even if
5 it would have the effect that you think it will have, which
6 is unclear, I don't think very much is lost by dropping it.

7 COMMISSIONER BRADFORD: Without asking anybody to
8 name specific cases, most of which are after all still
9 likely to come before us, could someone review the bidding
10 for me as to just how many sua sponte contentions they have
11 in mind when you, John or Howard, that they feel that this
12 is a matter of submergence? I know of a couple, but --

13 COMMISSIONER AHEARNE: Peter, I have been trying
14 to say here for months: I'm not raising this because of a
15 specific case or cases.

16 COMMISSIONER BRADFORD: Okay.

17 COMMISSIONER AHEARNE: I have been trying to get
18 across the point that I have been myself working through
19 what I believe --

20 COMMISSIONER BRADFORD: No, no, I understand the
21 concept.

22 COMMISSIONER AHEARNE: -- to be a rational
23 framework for the hearing process.

24 COMMISSIONER BRADFORD: I understand that.

25 COMMISSIONER AHEARNE: And in going through that,

1 I finally reached the conclusion for the operating license
2 that the rational framework was for the Boards to be
3 deciding the disputes, et cetera, et cetera, between the
4 parties and so forth. So I can't give you examples, because
5 it wasn't generated by an example.

6 COMMISSIONER GILINSKY: It was pure logic.

7 COMMISSIONER AHEARNE: An attempt.

8 COMMISSIONER BRADFORD: I must say that when I
9 originally signed on to this vessel it was from a very
10 similar analytical process. As I have seen the troubles and
11 agony that it seems to be causing, I have come to the
12 conclusion that the demands of logic alone would be
13 satisfied by a less formal treatment of it, which is why I
14 find myself coming down on the side of having the Commission
15 take a harder look at sua sponte concerns, but not doing it
16 through a formal process.

17 CHAIRMAN HENDRIE: I tell you what, with the
18 superior perceptive abilities that the possession of the
19 gavel gives me --

20 COMMISSIONER BRADFORD: Oh, my God.

21 (Laughter.)

22 CHAIRMAN HENDRIE: I pronounce that there is no
23 clearcut majority one way or another on this issue, and we
24 will therefore turn to the proposed final rule on certain
25 changes to Part 2 that we agreed to some time ago. With

1 regard to sua sponte matters, I don't know. I think I'll
2 leave it standing.

3 MR. BICKWIT: Mr. Chairman, let me just go to the
4 well one more time, I'm sure unsuccessfully. Would there be
5 a majority in favor of putting out an option A-option B type
6 of rule?

7 COMMISSIONER AHEARNE: Would you care to specify
8 what A and B would be?

9 MR. BICKWIT: Yes. "A" would be what's proposed
10 in the SECY paper; "B" would be notification with no
11 fifteen-day period.

12 MR. SHAPAR: And get comments on both.

13 COMMISSIONER AHEARNE: Always in favor of
14 receiving public comment.

15 COMMISSIONER GILINSKY: I want to think about that.

16 (Laughter.)

17 CHAIRMAN HENDRIE: We will mull it further, then.
18 We might see what the language would look like. You seem to
19 have some language anyway which could form a 304a. If you
20 feel this prospect worthy of the staff work, why do a 304a
21 with the options appended.

22 MR. BICKWIT: Can I feel out whether I think it's
23 worthy?

24 CHAIRMAN HENDRIE: I will leave it to you as to
25 whether you think it worthwhile to advance a 304a.

1 MR. BICKWIT: That's the way I like to proceed.

2 CHAIRMAN HENDRIE: All right, good.

3 Now somewhere down in here I have other matters.

4 I think it is 310 isn't it?

5 COMMISSIONER AHEARNE: Yes.

6 COMMISSIONER GILINSKY: Could I just ask Tony
7 something?

8 CHAIRMAN HENDRIE: Pray do.

9 COMMISSIONER GILINSKY: Is your practice modified
10 by any of this discussion? In other words, will you put out
11 an order on -- Let me ask you this. What do you think of
12 the idea of putting out a separate order when you do take up
13 an issue of this sort and send us --

14 MR. COTTER: I can, as a matter of practice send
15 copies of any sua sponte questions that we have raised.

16 COMMISSIONER GILINSKY: Well, you said earlier
17 that you always issue an order when you take up such an
18 issue, but Alan points out this may be buried in another
19 order. Is there any difficulty about separating that out
20 with a separate order?

21 MR. COTTER: No.

22 COMMISSIONER GILINSKY: In effect, when you have
23 an order, the Board would then be making the finding
24 required by the rule? Is that right?

25 MR. COTTER: (Nods in the affirmative.)

1 COMMISSIONER GILINSKY: The board would be saying,
2 "We find this to be a" -- Is that what you do, Alan?

3 MR. ROSENTHAL: Well, implicitly, but I don't
4 think we've ever felt it necessary to parrot that language.
5 I mean, we understand what the standard is, and if we raise
6 an issue sua sponte we have made the implicit, if not
7 explicit, determination that this is a serious safety --

8 COMMISSIONER GILINSKY: Do you refer to the rule
9 at all?

10 MR. ROSENTHAL: We may or may not. We never felt
11 under --

12 COMMISSIONER GILINSKY: Do you say, "Hear ye, hear
13 ye, this is a sua sponte issue"?

14 MR. ROSENTHAL: Well, usually we do in some form
15 acknowledge the fact that we are going beyond the matters in
16 controversy, but we don't necessarily cite the rule, let
17 along quote it.

18 MR. COTTER: No. It would be added as a Board
19 question. So it is separately and clearly identified as a
20 separate --

21 COMMISSIONER GILINSKY: Is the Board in its mind
22 aware that it's a --

23 MR. SHAPAR: Sometimes the Boards make the
24 findings that it's a serious matter, and sometimes they
25 don't.

1 CHAIRMAN HENDRIE: Explicitly.

2 MR. SHAPAR: That's right.

3 MR. ROSENTHAL: We've never felt obligated to make
4 an explicit finding.

5 MR. COTTER: It's a little like gilding the lilly
6 if you are raising a separate question. To my mind, it is a
7 redundancy. That is a standard that you raise in the
8 question.

9 COMMISSIONER GILINSKY: Well, only if it's clear
10 to everyone that it is a separate question.

11 MR. COTTER: It is, because the parties have been
12 told to address it.

13 COMMISSIONER GILINSKY: And it's not one that they
14 had raised. I see.

15 MR. ROSENTHAL: Whereas, again, still there's room
16 for question as to whether it is in fact a sua sponte
17 question or merely an adjunct of some matter already in
18 controversy.

19 COMMISSIONER GILINSKY: I was wrong.

20 (Laughter.)

21 COMMISSIONER GILINSKY: I even spilled my water.

22 CHAIRMAN HENDRIE: I thought if I gave you enough
23 rope there, why you would eventually get it tangled around
24 your feet.

25 (Laughter.)

1 CHAIRMAN HENDRIE: Don't you feel better about 15
2 days now?

3 (Laughter.)

4 CHAIRMAN HENDRIE: Okay, on to 81-310. We have
5 here language prepared by the General Counsel which purports
6 to reflect our agreements and conclusions of a week or two
7 ago on certain, I would say, not very earthshaking changes
8 to Part 2. This now would be the final rule following on a
9 splendidly successful publication for comment of proposed
10 changes. I say that because it had probably as good a
11 response as anything we have done around here in some
12 years.

13 COMMISSIONER AHEARNE: The one was using the media
14 for scrap.

15 CHAIRMAN HENDRIE: So I take it the Commissioners
16 have studied this document for a fare thee well, and that we
17 are practically prepared for a final vote.

18 Questions? Comments?

19 COMMISSIONER BRADFORD: Yes, at the bottom of page
20 nine, why are we writing in an "unusual circumstance," a
21 standard that doesn't appear in the rule itself -- the
22 section beginning, "Although Boards are authorized...?"

23 MR. BICKWIT: That appeared to us to be the sense
24 of the Commission, that this schedule would be adhered to
25 unless there were unusual circumstances.

1 COMMISSIONER GILINSKY: What's the standard in the
2 rule.

3 COMMISSIONER BRADFORD: Well, the rule itself
4 gives a certain number of days.

5 MR. BICKWIT: "Except as otherwise afforded by the
6 presiding officer." There is no standard in the rule.

7 COMMISSIONER BRADFORD: I guess I would drop those
8 two sentences. We have set forth the number of days in the
9 rule itself. It's self-explanatory. If we want to put in
10 language about more compressed filing schedules and unusual
11 circumstances, it ought to go in the rule, but I personally
12 wouldn't.

13 MR. BICKWIT: It's just a question of how the
14 Commission wants to express itself.

15 CHAIRMAN HENDRIE: The page 9 section in question
16 has to do with the Commission's discussion of these
17 changes--

18 COMMISSIONER BRADFORD: Right.

19 CHAIRMAN HENDRIE: -- rather than the rule, and it
20 would seem to me a useful expression of opinion.

21 COMMISSIONER GILINSKY: What about dropping this
22 "absent unusual circumstances" and saying something about
23 the Boards making an effort to meet that schedule?

24 COMMISSIONER BRADFORD: You could, but they're
25 going to do it anyway. The Commission has just put in a

1 rule now which gives a particular number of days for parties
2 to file, and it said for all parties to file and that seems
3 to me to be enough.

4 (Pause.)

5 CHAIRMAN HENDRIE: John?

6 COMMISSIONER AHEARNE: I'm waiting. Vic seems to
7 be trying to work out some modified language.

8 COMMISSIONER BRADFORD: There's something about
9 putting in a particular number of days and then going into
10 some detail about that the Board is only, in unusual
11 circumstances, to go beyond it, but should not hesitate to
12 squeeze it down. That seems to me to give a sort of
13 one-sided tilt to the way we expect the Board to approach
14 the schedule.

15 I mean, I suppose that we could expand it and say
16 it seems like if these schedules were worked on in fairness
17 to the parties, then they could be expanded and if there
18 were no unfairness, they could be contracted.

19 CHAIRMAN HENDRIE: But since we've expanded the
20 schedule on the one hand and unless you propose that simply
21 protraction of coming to a decision in these cases has
22 intrinsic in it some merit that I just don't perceive, I
23 think the whole thrust of the enterprise is to say: Let us,
24 compatible with fairness to the parties' positions and so
25 on, get on to decision in these cases. And, having extended

1 the time for these filings --

2 COMMISSIONER BRADFORD: Fair enough, Joe.

3 CHAIRMAN HENDRIE: -- you know, because people
4 weren't meeting them, then I think it is not unreasonable to
5 say: We think this is good enough. If there are unusual
6 circumstances, okay, you can deviate.

7 On the other hand, if it is a simple case,
8 everybody can file and the Board can act more quickly, why
9 good. Do it. You know, I don't see a why it is prejudicial
10 in any sense.

11 COMMISSIONER BRADFORD: Well, except the phrase
12 that you put in isn't in here. That is -- I've forgotten
13 already exactly what it was, but the phrasing in which you
14 worked in the word "fairness" doesn't appear in those two
15 sentences at all. It's just essentially a further
16 instruction to err on the side of shoving things along
17 unless one balances it off by saying that we expect the
18 whole scheduling process to be used in a way that first
19 contributes to fairness. You know, one can go into the
20 litany again about "fairness," "predictability," and
21 "expedition" --

22

23

24

25

1 CHAIRMAN HENDRIE: But at the head of this page we
2 say the reason we're doing this is that experience
3 indicates, and so on and so on, "the applicant frequently is
4 unable to file its proposed findings within a prescribed
5 20-day period," and the Board has to establish another
6 schedule anyway; we are modifying it to make it more
7 realistic. Okay? So we shove out the applicant's time
8 another ten days. Everyone else gets the same delta off of
9 that point that they had before and -- I guess that's
10 right.

11 COMMISSIONER BRADFORD: Yes. I mean, I agree with
12 what we've done. I'm not trying to back off of that. I
13 just think that there is a little bit of a twist being given
14 in the last two sentences and am proposing that they be
15 stricken.

16 CHAIRMAN HENDRIE: I guess I prefer to retain
17 them. John?

18 COMMISSIONER AHEARNE: Vic was trying --

19 COMMISSIONER GILINSKY: Let's see if we can work
20 something out. Let's see if we can work this thing out.

21 CHAIRMAN HENDRIE: What sort of "working out" did
22 you have in mind?

23 COMMISSIONER GILINSKY: Well, either sticking in
24 your phrase or changing the "unusual circumstances" or doing
25 something that will --

1 COMMISSIONER AHEARNE: I think I'll probably buy
2 what Vic will come up with in some modification. I'll
3 accept it.

4 CHAIRMAN HENDRIE: All right. Let's pass on to
5 other points.

6 COMMISSIONER BRADFORD: I have only one other,
7 which I think is probably less difficult. That's in the
8 middle of page 12. There is a sentence about establishing
9 time limits for responses on a case-by-case basis not being
10 a profitable use of the Board's time. It's probably true,
11 at least in this case, but I think I would still drop it,
12 just because there are a number of cases in which we do in
13 fact let the Board establish limits for responses and I
14 don't think we lose a thing by taking that sentence out.

15 CHAIRMAN HENDRIE: I don't have a problem with
16 that.

17 COMMISSIONER GILINSKY: Everybody seems to be for
18 dropping it.

19 CHAIRMAN HENDRIE: Other?

20 COMMISSIONER BRADFORD: No.

21 CHAIRMAN HENDRIE: Let's see. There is an amended
22 page 14 and 15 which came around --

23 COMMISSIONER AHEARNE: Last week.

24 CHAIRMAN HENDRIE: -- a bit later. I take it that
25 the amended pages are the operative ones, Len?

1 MR. BICKWIT: Yes.

2 CHAIRMAN HENDRIE: Anything else?

3 COMMISSIONER AHEARNE: Nothing.

4 COMMISSIONER BRADFORD: No.

5 CHAIRMAN HENDRIE: All right. We will put this
6 matter off and see what Vic produces for page 9 and come
7 back to it next time.

8 SECY 81-311. We had asked Len to prepare, back to
9 back in the middle of the month, the 12th I think, we had
10 asked Len to prepare proposed rule for comment drafts for
11 three items: a limit on interterritories, some requirements on
12 contentions; and some requirements on occasion for fast
13 transmission of filings, briefs and so on.

14 So we have that now in the paper labeled 81-311,
15 I guess as a piece of material to go out for comment, a
16 proposed rule to go out for comment. I don't have any
17 objections to it that I recall. Other comments?

18 COMMISSIONER AHEARNE: Len, I think I've asked
19 this question many times, but let me just ask it again. On
20 page 10, number 3, you are firm in your position that
21 currently the Commission's regulations permit the parties to
22 file responses to motions to compel. It's not a matter of
23 discretion with the hearing officer?

24 MR. BICKWIT: That's right. Written responses.

25 COMMISSIONER AHEARNE: I guess my only other

1 comment is that if the Commission goes and puts that out I
2 will have additional comments that I would like attached to
3 it.

4 CHAIRMAN HENDRIE: On this number three?

5 COMMISSIONER AHEARNE: No, no. On this proposed
6 rule.

7 CHAIRMAN HENDRIE: Oh, good.

8 COMMISSIONER AHEARNE: I just happen to have it.

9 CHAIRMAN HENDRIE: He happens to have a copy with
10 him.

11 (Mr. Chilk distributes the document.)

12 (Pause.)

13 MR. COTTER: Is that a typo in item 3, line 2,
14 "members" instead of "numbers"?

15 COMMISSIONER AHEARNE: Yes.

16 MR. COTTER: It's not a Freudian slip, is it?

17 CHAIRMAN HENDRIE: It's that DOD sort of personnel
18 language.

19 (Laughter.)

20 CHAIRMAN HENDRIE: Other comments?

21 COMMISSIONER BRADFORD: Let's see. This opens up
22 an intriguing field of endeavor. I hadn't thought about
23 other areas in which I might comment, but I think I'll
24 forego that.

25 CHAIRMAN HENDRIE: If he gets comments and then

1 goes final --

2 (Laughter.)

3 COMMISSIONER BRADFORD: I think he has a problem
4 at that point.

5 CHAIRMAN HENDRIE: Then what do we do?

6 (Laughter.)

7 MR. BICKWIT: I think he will be very happy in his
8 own little world.

9 COMMISSIONER AHEARNE: Steadily shrinking.

10 (Laughter.)

11 COMMISSIONER BRADFORD: Actually, let's see. That
12 may be an interesting question. Supposing one Commissioner
13 requests comments as a general matter in a request for
14 comments and gets them. Can those comments then be a valid
15 basis for a Commission action? That is, is the public on
16 notice through this?

17 MR. BICKWIT: I would say not.

18 COMMISSIONER BRADFORD: The way we've handled that
19 in other situations -- and let me just ask you if you wanted
20 to think about trying to pose it differently -- is of course
21 you remember in the emergency planning rule we actually went
22 with alternative formulations.

23 COMMISSIONER AHEARNE: I tried that earlier.

24 COMMISSIONER BRADFORD: Did you try that with
25 these?

1 COMMISSIONER AHEARNE: Yes. I'd be delighted if
2 we could do it that way, but there was not --

3 COMMISSIONER BRADFORD: I'm not wild about your
4 provisions here. But on the other hand, I think it is not
5 in my self-interest, looking at other matters in our future,
6 to say that a particular Commissioner's preferred way of
7 going about solving a problem ought to be denied the ability
8 to seek comments simply because --

9 COMMISSIONER AHEARNE: I would be delighted to
10 endorse that as an operating principle.

11 CHAIRMAN HENDRIE: I'd be glad to stick it in as
12 an alternate.

13 COMMISSIONER BRADFORD: Can you think of a way to
14 write a reciprocity rule into the procedural --

15 (Laughter.)

16 COMMISSIONER BRADFORD: I think I would prefer to
17 do that. It just doesn't seem to be the right thing to do
18 to send it out in a form that will attract comments from
19 people who don't understand that the comments can be the
20 basis for action. But at the same time, I would like to
21 hold out for the principle that if a Commissioner wants to
22 get comments he ought to be able to in a way that can be
23 used to urge Commission action in the future.

24 COMMISSIONER AHEARNE: Yes. That would be fine.

25 COMMISSIONER BRADFORD: Good.

1 CHAIRMAN HENDRIE: Write it in as an alternative.

2 MR. BICKWIT: All right.

3 COMMISSIONER BRADFORD: As a result of that, it's
4 going to be another day or two. Let me just circulate. I
5 have a number of scribbled one or two word changes through
6 here. They don't amount to a whole lot. We could take them
7 up right now, but since we are not going to take action
8 today on this anyway, why don't I circulate these. Or would
9 you rather take them now? It will probably take ten
10 minutes.

11 CHAIRMAN HENDRIE: Why don't we thumb through and
12 take the ones you have at hand, Peter.

13 COMMISSIONER BRADFORD: Okay. They're all at
14 hand.

15 CHAIRMAN HENDRIE: If it looks like it is going to
16 run -- We are not going beyond 4:00 in any case, and maybe
17 something like quarter or ten to is my break point, but --

18 COMMISSIONER BRADFORD: Page 3, in the lower
19 middle, "This requirement would help deter intervenors".
20 Supposing one changes "intervenors" to "parties."

21 COMMISSIONER GILINSKY: Why don't we drop it all
22 and just go: "This requirement would give other parties
23 early notice of an intervenor's case"?

24 COMMISSIONER BRADFORD: Okay.

25 COMMISSIONER GILINSKY: What do you think of

1 that?

2 COMMISSIONER BRADFORD: That's fine, too. It
3 would seem to me that there are more fish in this section
4 than just intervenors.

5 CHAIRMAN HENDRIE: "This requirement," say it?

6 COMMISSIONER GILINSKY: "Would give other parties
7 early notice of an intervenor's" -- You just skip to the
8 next line.

9 COMMISSIONER BRADFORD: What I was really after
10 was, do we mean it to apply only to intervenors? Or does it
11 apply, for example, to states?

12 MR. BICKWIT: Well, the contention rule applies
13 only to intervenors.

14 COMMISSIONER BRADFORD: It doesn't apply to
15 states? Do we ever get intervenors who are essentially in
16 support of the facility? I guess there are still --

17 MR. ROSENTHAL: Very rarely, but occasionally.

18 CHAIRMAN HENDRIE: But it's not out of the
19 question.

20 MR. MALSCH: They have a hard time establishing
21 standing. That's why typically you don't often have
22 intervenors come in in favor of the application.

23 COMMISSIONER BRADFORD: Well, Vic's change is fine
24 with me.

25 COMMISSIONER GILINSKY: I would change the "could

1 be determined" at the bottom of the paragraph, "or a
2 contention that is found not to satisfy the requirement."

3 COMMISSIONER AHEARNE: Say that again, Vic?

4 COMMISSIONER GILINSKY: Change "could be
5 determined" to "is found."

6 CHAIRMAN HENDRIE "That is found not to satisfy
7 requirements." "This is found not to," is that okay, Len?

8 MR. BICKWIT: Yes, that's fine.

9 CHAIRMAN HENDRIE: "Not to satisfy the
10 requirements." All right. Next?

11 COMMISSIONER BRADFORD: I don't have anything more
12 until page 6.

13 COMMISSIONER GILINSKY: Let's see. You do have a
14 change on page 6?

15 COMMISSIONER BRADFORD: Yes.

16 COMMISSIONER GILINSKY: I do too.

17 CHAIRMAN HENDRIE: All right, let's bid for
18 earliest change on page 6. Line 1?

19 COMMISSIONER GILINSKY: Reference to general
20 cities --

21 COMMISSIONER BRADFORD: It's a tie.

22 COMMISSIONER GILINSKY: I would just drop those
23 two pages.

24 COMMISSIONER AHEARNE: Two pages?

25 COMMISSIONER GILINSKY: Those two sentences, as

1 being unnecessary. Actually, that isn't that far wrong, but
2 in this case I would just drop the two sentences.

3 COMMISSIONER AHEARNE: Well, are you saying that
4 you would allow then just reference to a "report"?

5 COMMISSIONER GILINSKY: It depends.

6 COMMISSIONER BRADFORD: I could live with dropping
7 it if in fact the intent is to work a substantive change in
8 with what this says. It seems to me, though, that if
9 reference to a report isn't good enough then we ought to say
10 so, so that no one comes in and refers to a report.

11 CHAIRMAN HENDRIE: Yes. The intention clearly was
12 to say, you know, if your reference is WASH-1400, what in
13 God's name is anybody going to do that?

14 COMMISSIONER BRADFORD: Yes, you've got to state
15 it.

16 CHAIRMAN HENDRIE: If you can't do better than
17 that, why never mind trying to improve the specificity here
18 of the citations for contentions. I think the sentence -- I
19 think the thought behind the sentences needs to be
20 expressed.

21 COMMISSIONER GILINSKY: Well, the thought behind
22 the sentences is what we are about here. But when you start
23 talking about specific pages, that might not be the right
24 thing.

25 COMMISSIONER BRADFORD: I was going to delete both

1 "pages" and "sections" and just say "specific portions of
2 the documents must be reference!."

3 COMMISSIONER GILINSKY: But on the other hand,
4 there are other documents which are not lengthy and where
5 reference to the document may be appropriate.

6 COMMISSIONER BRADFORD: Well, I was also going to
7 take out "lengthy".

8 COMMISSIONER GILINSKY: And we are talking about
9 whether the documents are lengthy or not.

10 CHAIRMAN HENDRIE: But then these two sentences
11 which talk about "lengthy" or "general studies and reports"
12 doesn't apply. I think you really need to keep the flavor
13 of this, because I think this was part of the intent, was to
14 try to clarify what you've got to do.

15 COMMISSIONER BRADFORD: What about "References by
16 title to lengthy studies and reports would not suffice"?

17 COMMISSIONER AHEARNE: That's fine. But are you
18 saying that you would then drop the "for example"

19 COMMISSIONER BRADFORD: No, I would leave that in
20 except for the words "pages, sections or".

21 COMMISSIONER AHEARNE: What substantive change do
22 you see that making?

23 COMMISSIONER BRADFORD: None, in fact.

24 COMMISSIONER AHEARNE: That is how it sounded.
25 And so then I would have no problem with it.

1 COMMISSIONER GILINSKY: In some cases some of
2 these may not be yet available. These happen to be
3 documents that are available.

4 COMMISSIONER AHEARNE: But if the document is not
5 available --

6 CHAIRMAN HENDRIE: If it is not available, it's
7 not very clear to me how a contention can be based on it.

8 COMMISSIONER BRADFORD: That is a trickier point.
9 Supposing you intend through interrogatories and
10 cross-examination to show that the containment is
11 inadequate. What you state as a contention is that the
12 containment is inadequate. The facts I suppose would be
13 that experience at TMI showed that pressures up to whatever
14 numbers you wanted to put in -- and then it would suffice,
15 would it, at that point, to say that you intended to prove
16 that fact through the discovery and cross-examination
17 process?

18 MR. BICKWIT: It would if you could demonstrate
19 that you had any basis for thinking you could. I mean, it
20 would not be enough to say on each and every occasion, we
21 intend to develop through interrogatories this contention,
22 period.

23 COMMISSIONER BRADFORD: That's what I'm after.
24 What kind of a threshold do you have to get over at that
25 point? If you just came in and said, "The pressure vessel

1 in this reactor will fail, I'm going to show that on
2 cross-examination," the Board says: "Wait a minute, what
3 makes you think the pressure vessel would fail?"

4 MR. BICKWIT: I think you have to survive this
5 threshold of vagueness: You have to provide some reason for
6 the Board to believe that there are facts in your mind that
7 you intend to try to prove. The Board will not look at the
8 legal sufficiency of those facts to prove your case, but you
9 must demonstrate that there are some facts in your mind.

10 COMMISSIONER BRADFORD: I'm sorry, Joe. I waded
11 in in the middle of something you were saying.

12 CHAIRMAN HENDRIE: No, that's all right. I think
13 that was useful.

14 At the moment, I've got, "references by title to
15 lengthier general studies and reports would not suffice.
16 If, for example, the BEIR report or the Reactor Safety Study
17 is relied upon, specific portions of the document must be
18 referenced."

19 COMMISSIONER AHEARNE: (Nodding in the
20 affirmative.)

21 COMMISSIONER GILNSKY: (Nodding in the
22 affirmative.)

23 COMMISSIONER BRADFORD: (Nodding in the
24 affirmative.)

25 CHAIRMAN HENDRIE: I count three nods.

1 COMMISSIONER BRADFORD: I can live with that. But
2 Vic, do you still feel --

3 COMMISSIONER GILINSKY: I would want to strike the
4 two sentences, but ...

5 CHAIRMAN HENDRIE: Next? Page 6? Page 7?

6 COMMISSIONER BRADFORD: I would drop the "under
7 such circumstances" sentence at the bottom of the second
8 paragraph on 7, the reason being that since this document is
9 going out for comment, it is the kind of sentence I would
10 put in.

11 COMMISSIONER AHEARNE: I think you're right.

12 CHAIRMAN HENDRIE: In the statement of
13 considerations of the final rule, if warranted.

14 COMMISSIONER BRADFORD: Exactly.

15 COMMISSIONER AHEARNE: Yes.

16 CHAIRMAN HENDRIE: Struck. Got it, Len?

17 MR. BICKWIT: Yes.

18 COMMISSIONER GILINSKY: Where was this?

19 CHAIRMAN HENDRIE: On page 7.

20 COMMISSIONER GILINSKY: I would drop that entire
21 paragraph just as an unnecessary legalism, and in fact the
22 next paragraph too, listing all the cases.

23 COMMISSIONER BRADFORD: I wouldn't object to doing
24 that. I wound up starting to do it and then not doing it
25 because I thought it gave a potential commenter a target in

1 terms of a legal reasoning if they wanted to say --

2 COMMISSIONER AHEARNE: -- the basis for it is not
3 solid?

4 COMMISSIONER BRADFORD: -- that we were wrong. At
5 least this showed how we got there and they could point out
6 why in fact we misread the cases.

7 COMMISSIONER GILINSKY: Not how "we" got there.

8 COMMISSIONER BRADFORD: Sorry, how "they" got
9 there, how the agency got there.

10 (Laughter.)

11 COMMISSIONER BRADFORD: And they could therefore
12 try to talk "them, their, those," out of it.

13 COMMISSIONER GILINSKY: It's not any part of my
14 reasoning.

15 CHAIRMAN HENDRIE: It seems to me that it is
16 useful, as Peter says, to have some description of where we
17 think these provisions fit in the Commission's regulatory
18 structure and in the U.S. Code and the statutory structure.

19 COMMISSIONER BRADFORD: What I think is it's kind
20 of the equivalent of stomping good and hard on a hornet's
21 nest. If they want to do that, far be it from us to stay
22 here put.

23 (Laughter.)

24 CHAIRMAN HENDRIE: I don't know. Len?

25 MR. BICKWIT: I don't think that's a bad

1 description of it. It was designed to solicit comment on
2 our legal basis for this. It's certainly not going to hurt
3 the Commission's legal posture to take it out.

4 COMMISSIONER AHEARNE: But do you think it will
5 help your analysis --

6 MR. BICKWIT: It won't necessarily help.

7 COMMISSIONER AHEARNE: No, help your analysis of
8 the comments? You expect to get better comments --

9 MR. BICKWIT: That's right. Yes.

10 COMMISSIONER AHEARNE: -- if you do this. If so,
11 then I think you should.

12 MR. SHAPAR: You're going to undoubtedly get a
13 comment on the legality of the rule somewhere along the
14 lines of what this was designed to answer. So that I think
15 the question really in front of you is whether or not you
16 think you're going to get better comments by exposing your
17 rationale. And theoretically your answer to that question
18 is yes.

19 COMMISSIONER AHEARNE: Yes.

20 COMMISSIONER BRADFORD: I would drop this
21 parenthetical at the end of it. I think you really either
22 have to say more or say less.

23 MR. BICKWIT: Which?

24 COMMISSIONER BRADFORD: "Statutory words," sort of
25 a West's keynote heading.

1 MR. BICKWIT: I have no problem with that.

2 COMMISSIONER BRADFORD: It just repeats the
3 "furthermore" sentence from up above.

4 CHAIRMAN HENDRIE: Strike the parens. John would
5 leave it in; I would leave it in. Peter, are you still on
6 balance --

7 COMMISSIONER BRADFORD: The rest of it; yes.

8 COMMISSIONER GILINSKY: Sam renumbered it down,
9 but I would have left it out.

10 COMMISSIONER AHEARNE: You would leave it in?

11 COMMISSIONER BRADFORD: Not the parens.

12 MR. BICKWIT: Not the sentence "Under such
13 circumstances"?

14 COMMISSIONER BRADFORD: Right. Yes, that sentence
15 and the parenthetical thing I think everyone has agreed to
16 take out.

17 MR. BICKWIT: Okay.

18 CHAIRMAN HENDRIE: 7? 8, page 8? The bottom of
19 8?

20 COMMISSIONER GILINSKY: Just a minor point. I
21 would say, "may file an unlimited number of
22 interrogatories," rather than "without any specific limit."

23 COMMISSIONER AHEARNE: Yes.

24 CHAIRMAN HENDRIE: "May file an unlimited number
25 of"; delete "without any specific limit," okay.

1 MR. COTTER: That's not entirely correct, is it?
2 "An unlimited number"? You can't file an unlimited number
3 if it is burdensome, without any consequent benefit. There
4 are limitations within the rule.

5 MR. BICKWIT: Yes, that's right. I think you
6 ought to say "subject to limitations spelled out in the
7 rule," "substantive limitations spelled out in the rule."

8 COMMISSIONER AHEARNE: It sounds like "without any
9 specific" --

10 MR. COTTER: Yes, what is wrong with that? It
11 seems to me that "without specific limits" gives you --

12 COMMISSIONER GILINSKY: Yes, put it back.

13 MR. ROSENTHAL: Precisely the right --

14 CHAIRMAN HENDRIE: Vic retreats on that one.

15 Page 9. Peter?

16 (No response.)

17 CHAIRMAN HENDRIE: Vic, I see red marks.

18 COMMISSIONER GILINSKY: I would say down here that
19 "The Board may grant," and so on and so forth, "as set forth
20 in the rule if it determines that."

21 COMMISSIONER AHEARNE: Yes.

22 COMMISSIONER BRADFORD: Fine.

23 COMMISSIONER GILINSKY: And I would drop this
24 business about "improvidence."

25 COMMISSIONER AHEARNE: That is key.

1 COMMISSIONER GILINSKY: I would still drop it.

2 (Laughter.)

3 MR. BICKWIT: It is designed to deal with the
4 situation where the party stores up its best case for an
5 interrogatory until interrogatory 51 and it has a very
6 marginal case with respect to its first 50 interrogatories.

7 COMMISSIONER GILINSKY: It seems to me that there
8 are cases, if different from the ones that we heard about in
9 the courts, where documents come out along the way, and it's
10 a little harder to judge how many you're going to need
11 further down the road. And so I would, for that reason I
12 would take it out.

13 CHAIRMAN HENDRIE: One in, one out. Peter?

14 COMMISSIONER BRADFORD: Let's see. Does B give
15 you the power to give the Board the power to take that
16 consideration into account? That is, could the Board under
17 B, if it seemed that the party had been especially
18 improvident, say that the information had been reasonably
19 available through the first 50 interrogatories?

20 MR. BICKWIT: I think it would be stretching the
21 language.

22 MR. SHAPAR: C is really directed at another
23 problem.

24 MR. BICKWIT: I think the Board would look at this
25 standard and say, is that information contained in that one

1 interrogatory reasonably available?

2 COMMISSIONER GILINSKY: I mean, are parties going
3 to squander their interrogatories just in order to pounce on
4 the Board with one good question? That would not make
5 sense.

6 MR. SHAPAR: Lawyers have been known to engage in
7 tactics like this.

8 (Laughter.)

9 COMMISSIONER GILINSKY: But it sounds quite dumb.

10 MR. COTTER: Are you speaking from experience,
11 Howard?

12 MR. SHAPAR: It's a fact of life which Tony can
13 subscribe to.

14 (Laughter.)

15 COMMISSIONER BRADFORD: I --

16 COMMISSIONER GILINSKY: To waste your
17 interrogatories?

18 COMMISSIONER AHEARNE: They're not wasted.

19 COMMISSIONER GILINSKY: I only used two
20 Encyclopedia Britannica's today.

21 (Laughter.)

22 COMMISSIONER AHEARNE: I didn't use any.

23 COMMISSIONER GILINSKY: Clearly made to be
24 regulators.

25 (Laughter.)

1 MR. ROSENTHAL: That just shows the lack of a
2 legal education.

3 COMMISSIONER AHEARNE: Or the benefits of a lack
4 of a legal education.

5 MR. SHAPAR: Alan was the author of that C and I
6 think may be he ought to describe the basis on which he
7 advanced it. He convinced me.

8 MR. ROSENTHAL: I think it's important that there
9 be safeguards against the promiscuous use of
10 interrogatories. I am not suggesting at all that a party is
11 going to sit back there and say: Well now, what are the 50
12 most frivolous interrogatories I can come up with, and put
13 them in, just so they can pounce on the licensing Board with
14 51.

15 At the same time, I think that you will find that
16 there are people who, for whatever reason, do use their
17 interrogatories promiscuously. And it does seem to me that
18 if you have someone coming before the Licensing Board and
19 asking for, in effect, additional interrogatories, that it
20 is a fair inquiry as to how you used your first 50.

21 It's no different than the way that I would treat
22 my children in terms of their allowance. They come and seek
23 monies above and beyond their allowance, and I want to know
24 how they spent the amount that they had to use without any
25 restriction or supervision. And if they use their allowance

1 promiscuously, then I take a very dim view about giving them
2 more. Now, I hate to analogize lawyers with children,
3 but--

4 COMMISSIONER AHEARNE: Go ahead, go ahead.

5 (Laughter.)

6 DR. ROSENTHAL: But I think in the real world you
7 are going to find that --

8 COMMISSIONER GILINSKY: I'll tell you what. I'll
9 go along with this if you'll change "improvident" to
10 "promiscuous."

11 (Laughter.)

12 COMMISSIONER BRADFORD: Let me suggest a middle
13 ground. Supposing you just make as part A, to add it at the
14 end of the phrase, "after staff/applicant documents" "and
15 the party's use of its first 50 interrogatories." -- I'm
16 sorry, "the party's use of its first 50 interrogatories was
17 not unreasonable."

18 What you're then doing is throwing that in as one
19 of several things to be balanced together with the
20 desirability of the information, rather than making it a
21 separate hurdle which if you fail you are out. That is, if
22 it looks as though the 51st question is a really important
23 one, even if you have some doubts about the wisdom of the
24 first 10 interrogatories, you can still allow it. Whereas,
25 the way it is formulated now, no matter how attracted the

1 Board is to the first 51st question, if it feels it was
2 improvident, it's actually somewhat closer to the process I
3 go through on my children's allowance, also.

4 MR. ROSENTHAL: You're more lenient than I am.

5 COMMISSIONER BRADFORD: Yes, that may be true.

6 COMMISSIONER AHEARNE: You may have more
7 interrogatories to spend.

8 COMMISSIONER GILINSKY: Why don't we throw it in
9 that way.

10 COMMISSIONER AHEARNE: I would prefer to keep it
11 separate, but let me ask a question.

12 Len, do you read the 3 the way it's written that
13 if the fifty-first was really very clearly an important
14 issue, and the Board concluded that the party had been
15 improvident in the sense that they had wasted, had put in
16 four or five that really were frivolous, that no matter how
17 important the fifty-first was they would not accept it?

18 MR. BICKWIT: Yes, that's the way I would read it.

19 COMMISSIONER GILINSKY: Well, let me ask you
20 this. You are getting specific. "Improvident" is wasting
21 four out of fifty?

22 COMMISSIONER AHEARNE: Well, I asked --

23 MR. COTTER: That doesn't make any sense, I'm
24 sorry.

25 COMMISSIONER GILINSKY: They are the ones who

1 decide it.

2 COMMISSIONER AHEARNE: I was asking Len, who wrote
3 this, what his --

4 COMMISSIONER GILINSKY: Oh. Okay.

5 COMMISSIONER AHEARNE: You see, I had sort of
6 expected him to say that four or five -- wasting four or
7 five isn't improvident, but that is not what he said.

8 COMMISSIONER GILINSKY: That's what I would have
9 thought.

10 MR. SHAPAR: But of course the Board in that
11 circumstance could ask the question itself.

12 COMMISSIONER GILINSKY: You mean the question that
13 is asked --

14 MR. SHAPAR: If that was a good question but the
15 party had exhausted his 50 interrogatories.

16 COMMISSIONER GILINSKY: But that's if they retain
17 their sua sponte powers.

18 COMMISSIONER AHEARNE: But that is an
19 interrogatory on an accepted contention, isn't it?

20 MR. ROSENTHAL: In the real world, the Board is
21 not going to go down each of those 50 interrogatories and
22 pass an individual judgment as to whether on a scale of one
23 to ten this is one to ten. What the Board is going to do is
24 to look at the 50 collectively and come to an overall
25 conclusion as to whether this person was improvident,

1 promiscuous or whatever the term might be. I think that's
2 the reality of it.

3 COMMISSIONER AHEARNE: Sure. Right.

4 COMMISSIONER GILINSKY: I think if there is one
5 extreme, if 50 questions have been wasted and they are all
6 dumb, or useless, or beside the point, or whatever, then
7 you're not dealing with a serious participant. But if you
8 start talking about four or five out of the 50, it's a
9 different story.

10 MR. BICKWIT: How about ten?

11 COMMISSIONER GILINSKY: Well, that's why, you
12 know, I was inclined to leave it to the Board. And if you
13 want to throw it into A, go ahead and throw it in.

14 CHAIRMAN HENDRIE: How do you feel after that last
15 exchange?

16 COMMISSIONER AHEARNE: Well, I'm a lot more
17 comfortable with Alan's response.

18 CHAIRMAN HENDRIE: How do we phrase it?

19 COMMISSIONER AHEARNE: But let's ask Tony how he
20 would view it?

21 MR. COTTER: I don't. I don't have any feelings
22 about this one or any other. The only thing I see of any
23 significance in here is if you are going to try and impose
24 some sort of quantitative limit across the Board, regardless
25 of what the case is, that you pick some reasonable number.

1 Off the top of my head, 100 would be more reasonable than
2 50.

3 What you do after that doesn't make any
4 difference, because essentially again you are talking about
5 the responsibilities of running a hearing.

6 MR. BICKWIT: If you put the words after "not" "as
7 a general proposition" then I think Alan's interpretation is
8 made clear and mine is rejected.

9 COMMISSIONER AHEARNE: In other words, "was not
10 improvident as a general proposition"?

11 MR. BICKWIT: Yes.

12 COMMISSIONER GILINSKY: What does that mean?

13 COMMISSIONER AHEARNE: These are now lawyers
14 talking to each other other.

15 MR. BICKWIT: No. It is then clear that what the
16 Board is directed to do is just look at the general tenor of
17 the interrogatories and --

18 COMMISSIONER AHEARNE: One by one.

19 COMMISSIONER BRADFORD: The way I think I would do
20 it is put --

21 MR. BICKWIT: -- it would not leave room for my
22 interpretation.

23 COMMISSIONER BRADFORD: -- I would put "overall"
24 in front of "use."

25 MR. BICKWIT: All right.

1 COMMISSIONER AHEARNE: "In its overall use."

2 MR. BICKWIT: Yes.

3 COMMISSIONER AHEARNE: That would be fine.

4 CHAIRMAN HENDRIE: That sounds better.

5 COMMISSIONER BRADFORD: I'm still happier putting
6 it in A. But if it were left to C, I would put "overall
7 use."

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1 COMMISSIONER AHEARNE: You would feel, Len, that
2 would move it absolutely into Alan's general balance?

3 MR. BICKWIT: Yes.

4 COMMISSIONER AHEARNE: That is more comfortable to
5 me.

6 CHAIRMAN HENDRIE: With that change, I think as an
7 Item C it would stand, particularly for a comment stage.

8 COMMISSIONER BRADFORD: Okay.

9 CHAIRMAN HENDRIE: I think it would be more useful
10 as a C at the comment stage, and certainly bring people's
11 attention to it more.

12 Page 9, going once.

13 COMMISSIONER GILINSKY: Let's see. I say, "This
14 rule is designed to alleviate" just drop this "if adopted
15 would be designed" -- just "This rule is designed to
16 alleviate strains."

17 CHAIRMAN HENDRIE: Len, do you have that?

18 MR. BICKWIT: No.

19 CHAIRMAN HENDRIE: Fourth from the bottom line.
20 "This rule is designed to curtail," et cetera, et cetera.

21 COMMISSIONER GILINSKY: "To alleviate," did it not
22 say?

23 CHAIRMAN HENDRIE: I am sorry. "To alleviate."
24 "This rule is designed to curtail the abuse of the discovery
25 process" --

1 COMMISSIONER AHEARNE: No. I think Vic is
2 proposing --

3 COMMISSIONER GILINSKY: I am proposing "to
4 alleviate" --

5 COMMISSIONER AHEARNE: -- for dropping the
6 "curtail the abuse of the discovery process". In my mind,
7 it could be "designed to curtail abuses of the discovery
8 process," but that is more based upon the Law Journal
9 articles on the general cases. I have no problem dropping
10 it.

11 CHAIRMAN HENDRIE: Peter?

12 COMMISSIONER BRADFORD: That is fine.

13 CHAIRMAN HENDRIE: "Is designed to alleviate
14 strains."

15 Page 10? The clock is running out here.

16 Page 11?

17 (No response.)

18 CHAIRMAN HENDRIE: Page 12.

19 (No response.)

20 CHAIRMAN HENDRIE: Page 13, 14.

21 MR. BICKWIT: I have one on 13. It is a question
22 that I think you have to face. We have drafted this so as
23 to leave intact the standard for interrogatories against the
24 staff for the first 50 interrogatories.

25 CHAIRMAN HENDRIE: Yes.

1 MR. BICKWIT: I must say, as I read through it
2 just before this meeting, my impression was the Commission
3 wanted to do otherwise; it wanted to have a lax standard for
4 the first 50 and to apply a very stiff standard when you
5 went above 50.

6 But you ought to face that question. And I guess
7 part of the reason I assumed the Commission wanted to do
8 otherwise is that it is a little bit illogical to say we
9 have got a real tough standard under 50 and a real tough
10 standard over 50 and have the two standards be pretty much
11 comparable.

12 So that it strikes me that a more logical approach
13 is to have standards that clearly differentiate, that can be
14 clearly differentiated below and above 50 interrogatories.

15 COMMISSIONER AHEARNE: You are talking about with
16 respect to interrogatories on the staff?

17 MR. BICKWIT: Against the staff, yes.

18 COMMISSIONER AHEARNE: So I guess you are also
19 proposing to eliminate the standard, the differential
20 standard against the staff for below 50?

21 MR. BICKWIT: That is right. Or to propose some
22 alternative standard but one that was clearly more lax than
23 the standard to be applied above 50.

24 CHAIRMAN HENDRIE: Tell you what: You have just
25 run flat out of my understanding, and willingness to

1 understand. Why don't we pick up next time your page 9
2 language [Commissioner Gilinsky] and see how we like it,
3 this point which Len can explain to us, and I will be more
4 amenable to being educated. And then we will look and see
5 if there is anything on page 14.

6 COMMISSIONER BRADFORD: But you have to conform
7 the standard on 14 to the change we already made in the
8 text.

9 CHAIRMAN HENDRIE: Yes. That, at least.

10 MR. BICKWIT: I hope we are up to that.

11 CHAIRMAN HENDRIE: Okay, 9, 13, and 14, for next
12 time.

13 What did you say about a different document?

14 COMMISSIONER GILINSKY: Nine is in one document;
15 13 and 14 are in another document.

16 COMMISSIONER AHEARNE: But the pages are right.

17 COMMISSIONER GILINSKY: I think we better adjourn.

18 (Laughter.)

19 CHAIRMAN HENDRIE: Hey, that's right. In some
20 document someplace. Yes. 9 in the other one, 13 and 14
21 here. Right?

22 COMMISSIONER GILINSKY: Yes.

23 CHAIRMAN HENDRIE: Okay. Thank you very much.

24 (Whereupon, at 4:00 p.m., the meeting of the
25 Commissioners was adjourned.)

NUCLEAR REGULATORY COMMISSION

This is to certify that the attached proceedings before the
COMMISSION MEETING

in the matter of: Public Meeting - Discussion of Revised Licensing
Procedures

Date of Proceeding: May 26, 1981

Docket Number: _____

Place of Proceeding: Washington, D. C.

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

Jane W. Beach

Official Reporter (Typed)

Jane W. Beach

Official Reporter (Signature)