

NUCLEAR REGULATORY COMMISSION

ORIGINAL

COMMISSION MEETING

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In the Matter of: DISCUSSION OF REVISED LICENSING  
PROCEDURES

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DATE: March 31, 1981 PAGES: 1 - 70  
AT: Washington, D. C.



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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

DISCUSSION OF REVISED LICENSING PROCEDURES

Room 1130,  
1717 H Street Northwest,  
Washington, D.C.

Tuesday, March 31, 1981

The Commission met at 2:05 p.m., pursuant to  
notice, Joseph Hendrie, Chairman of the Commission, presiding.

Commissioners Present:

- Joseph Hendrie, Chairman.
- John Ahearn, Commissioner.
- Victor Gilinsky, Commissioner.
- Peter Bradford, Commissioner.

NRC Staff Present:

- H. Shapar
- A. Rosenthal
- R. Lazo
- E. Hanrahan
- W. Dircks

Present for the Office of General Counsel:

Leonard Bickwit, Esq.  
Martin Malsch, Esq.

Present for the Office of the Secretary:

Samuel Chilk

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DISCLAIMER

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P R O C E E D I N G S

1  
2 CHAIRMAN HENDRIE: Come to order.

3 Commissioner Bradford will join us forthwith.

4 The Commission meets this afternoon to continue its  
5 amazing forward progress in the matter of addressing the  
6 licensing delays and licensing procedures.

7 (Commissioner Bradford entered the room  
8 at 2:06 p.m.)

9 Let me see if I can review the bidding to date,  
10 and counsel can help me through this. Since I just talked to  
11 him an hour or two ago about it, why, I hope I can get it largely  
12 right.

13 We have considered a number of items. I am looking  
14 primarily at page 5 of General Counsel's Memorandum of March  
15 10. Let's see, the question about rulemaking on TMI issues.

16 We directed the Staff to take a crack at putting  
17 NUREG 0737 in rule form for consideration by the Commission.  
18 That's due about the middle of April. The 18th was mentioned  
19 at an earlier date, and I assume the Executive Director,  
20 since it is not due today, has a free ride by saying it's on  
21 schedule.

22 Any comments?

23 MR. DIRCKS: When you are dealing with things two or  
24 three weeks away, it's on schedule.

25 CHAIRMAN HENDRIE: I figured that. That's a

1 reasonable proposition.

2 We also considered -- we are preparing to consider  
3 our revisions to 10 CFR 2.714, the rule on contentions.

4 Oh, gee, we have a couple of prior notes on it, and  
5 the counsel's office says it is about to have a further paper  
6 on the subject to us.

7 (Commissioner Bradford left the room at  
8 2:07 p.m.)

9 I would propose then that we not chew on that at  
10 this meeting. Hopefully we can come around to it next week.

11 On financial qualifications, a possible change in  
12 the rule is there. There was a paper to come back from the  
13 Staff. It has come back. I have seen a couple -- at least  
14 one, maybe two -- I guess two Commissioner comments on it.  
15 I find counsel's office itself has a couple of comments, and is  
16 addressing those to the Executive Legal Director.

17 What I would suggest is that we not try to deal with  
18 that at this meeting. It seems to me those exchanges will  
19 settle out, and we ought to be in a position to come to action  
20 on it next week.

21 COMMISSIONER AHEARNE: I would note that if either  
22 you or Peter should agree with Vic, I have agreed with him. It  
23 would require some, I think, substantial revision.

24 CHAIRMAN HENDRIE: I would --- I must say my  
25 inclination was to agree with Vic's comments, and I think all I

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want to do is just see what the nature of this exchange is between the legal offices. My guess is it will not upset the direction that you and Vic are already going.

On the question of rulemaking on various generic issues, primarily under NEPA, you remember we had the ad hoc group headed by OGC which was to sort and recommend.

I understand they have sorted and are about to recommend. Apparently looming somewhere over our heads there are several papers about to fall upon us.

We also have SECY 31-69, which dealt with the need for power question. I think we can consider those as a group down the line.

MR. SHAPAR: There's also a paper that should be reaching you momentarily on site considerations at the OL stage, and that should be issued any day.

CHAIRMAN HENDRIE: Hopefully, we can consider this, in one of the continuations of this meeting at an early time.

There are questions of a better definition of the scope of sufficiency challenges under the policy statement on TMI of last December.

I would propose that those we will deal with later on this afternoon, because I would like to go at the end of the public session to a closed session to try to straighten out language in the Diablo order.

(Commissioner Bradford entered the room at

2:10 p.m.)

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There are still, I guess, some wording differences that it seems most useful for us to just meet together to straighten out.

We decided at a previous meeting not to consider further on the basis that there was not -- clearly not a Commission likely majority action possible on cross-examination, the Prairie Island rule particularly, or for provisions to reduce the quorum for Licensing Boards to one person.

What I would like to do this afternoon is to deal first with the remaining, I trust not too serious, word differences between us and the Appendix B rule, which you remember we have agreed to send out for comment on a reasonably expedited schedule.

But the condition on that was that we agree on the wording. We have some agreements to work out.

After that discussion, I would like to turn to the general propositions and some thoughts in particular -- John, you have some, and Peter has some, and Vic and I may contribute on an ad hoc basis.

I would hope that would lead us particularly to getting some sense of where the Commission stands with regard to sua sponte authorities of the Boards and the Appeal Board.

And then, as I say, finally I would like to come to a point where we will close the meeting, go into an adjudicatory session, and deal with the Diablo issue.

1           So that's the program I propose for us.

2           The Appendix B of Part 2 proposed rule draft, you have  
3 just had one of the counsel's late-flying papers land in front  
4 of you. I take it -- now, let's see, Len, could you tell me --  
5 there was a March 23rd memorandum in which you circulated some  
6 changes that Vic had proposed in the language.

7           This latest thing, the new thing on the table, I  
8 trust, points those out as well as any other.

9           MR. BICKWIT: This is designed to include all of the  
10 Gilinsky changes and all of the Ahearne changes. They are  
11 shown on the draft except in the case that we regarded them as a  
12 rather minor stylistic significance, or in the case of a re-  
13 shuffling of sections where there was no change in text.

14           So what you have there is the order that you would  
15 put out if you accepted all the Ahearne changes and Gilinsky  
16 changes and had no additional changes.

17           CHAIRMAN HENDRIE: Since we probably ought to pace  
18 through this on the same piece of paper, what do you say we  
19 take the General Counsel's latest and pass once through it.  
20 Fair enough?

21           I think you've got a change that comes before that  
22 main document starts. I don't know whether that gives you a  
23 free one or not.

24           I think I didn't have any objection to it.

25           COMMISSIONER AHEARNE: I had accepted all those

1 changes.

2 CHAIRMAN HENDRIE: You accepted all of this. Well,  
3 we got a free ride from that.

4 Any problems with these?

5 COMMISSIONER BRADFORD: No.

6 CHAIRMAN HENDRIE: Okay. Page 2?

7 COMMISSIONER BRADFORD: What is the basis for  
8 saying the Appendix B to Part 2 was an interim response? Does  
9 the document say so on its face?

10 MR. BICKWIT: It was always, to my mind, intended  
11 as such. I don't know whether the document says so on its  
12 face, but I think if you look at the transcripts, you will find  
13 it was assumed to be that way.

14 COMMISSIONER AHEARNE: It certainly was on my part.

15 COMMISSIONER BRADFORD: I would just say it was  
16 adopted in response to the TMI accident.

17 COMMISSIONER GILINSKY: I had not noticed that, but  
18 I would also prefer to drop the --

19 CHAIRMAN HENDRIE: I guess I don't care all that much  
20 since we did not revoke 10 CFR 2.764, but suspended it, why, I  
21 think you could make a case that the language now in the rule  
22 book is interim, but I frankly do not care.

23 John?

24 COMMISSIONER AHEARNE: Well, factual accuracy --  
25 obviously we did not say interim, so then it depends upon the



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1 recollection of the individual. All I would say was that my  
2 sense was the intent was it was going to be interim, but  
3 clearly if it did not say so and it was not a majority of the  
4 members that way, then --

5 COMMISSIONER GILINSKY: It says partial response.

6 MR. BICKWIT: Let me say there is a footnote to  
7 2.764 which refers to a temporary suspension of the rule. So  
8 I think the record does document what the Commission had in  
9 mind was a temporary or interim response.

10 COMMISSIONER BRADFORD: Okay, it says that, the  
11 Commission did have that in mind.

12 CHAIRMAN HENDRIE: Good. "Interim" stays. Others  
13 on page 2?

14 Page 3.

15 COMMISSIONER BRADFORD: Well, let's see what -- I  
16 think I would drop the words between "reassignment" and  
17 "construction" in the middle of the second paragraph.

18 CHAIRMAN HENDRIE: Since I think it is fairly clear-  
19 cut that the fact that construction of a number of plants will  
20 be finished prior to issuance, unless, of course, the Congress  
21 plunges through and does heroic things, why, I think I have  
22 no objection to just striking the --

23 COMMISSIONER AHEARNE: I'm sorry, Peter, what did  
24 you wish to strike?

25 COMMISSIONER BRADFORD: Just the words from "it appears

1 through "not altered."

2 CHAIRMAN HENDRIE: It just says as a direct result  
3 of these reassignments, it appears. I think probably  
4 "that construction of a number of plants," right?

5 COMMISSIONER BRADFORD: Wait a minute. No, I would  
6 just drop the "it appears that" and go right from "reassignments"  
7 to "construction."

8 COMMISSIONER AHEARNE: I agree with you.

9 CHAIRMAN HENDRIE: All right. Vic?

10 So ordered.

11 Others?

12 COMMISSIONER BRADFORD: I'm trying to run back and  
13 forth from the earlier draft to this one.

14 Let's see. There was an earlier reference to  
15 \$100 million per plant. Is that gone?

16 MR. BICKWIT: Yes.

17 COMMISSIONER BRADFORD: Good riddance.

18 CHAIRMAN HENDRIE: I always preferred \$1 million  
19 a day as a nice round resonant phrase.

20 COMMISSIONER BRADFORD: I would prefer to say the  
21 full Appendix B reviews of all operating license decisions may  
22 no longer be necessary. That is, I think I'm prepared to  
23 adopt one or another of these alternatives after comment, but  
24 rather than commit myself right now, I would like to make that  
25 decision at the point at which we are really prepared to go



1 ahead.

2 COMMISSIONER AHEARNE: I guess I think that we have  
3 now said enough places that we are going to do one or the  
4 other, I thought.

5 COMMISSIONER BRADFORD: Joe has said he was optimistic  
6 that he could get a majority and invited us to correct him if he  
7 was wrong, and I did not correct him.

8 CHAIRMAN HENDRIE: I understand we moved ahead to  
9 other subjects at that point.

10 COMMISSIONER BRADFORD: Which means my present  
11 frame of mind is that I am in agreement, that I think we can,  
12 but in the event that something between now and then should  
13 persuade me I have been too hasty, I would just as soon not  
14 make the commitment to say "may longer be" doesn't after all  
15 alter --

16 CHAIRMAN HENDRIE: I don't have any objection to it.  
17 If it stayed this way, why, I would not feel that accepting  
18 that wording tied everybody's vote down to the positive, anyway,  
19 and the Commission will decide what the Commission will decide.

20 "Reviews of operating license decisions may no  
21 longer be," is that it?

22 COMMISSIONER BRADFORD: Yes.

23 CHAIRMAN HENDRIE: Page 4.

24 COMMISSIONER GILINSKY: I prefer that the "will  
25 ordinarily" in the middle of the page, just because the "may

1 issue" seems to me too tentative.

2 COMMISSIONER AHEARNE: I felt that was probably  
3 more accurate a description of what would happen. I don't  
4 think we know. We have never done one.

5 CHAIRMAN HENDRIE: Let's see.

6 COMMISSIONER GILINSKY: Well, look at the top of the  
7 page. You see "will be postponed." The fact is, you could  
8 run the process in less time, you could say "could be postponed,"  
9 but we are taking this as the guiding schedule, and it seems to  
10 me we ought to assume that it is not going to be kept.

11 COMMISSIONER AHEARNE: Well, I guess then --

12 CHAIRMAN HENDRIE: Your change was to say the license  
13 was --

14 MR. BICKWIT: "Will ordinarily" was deleted.

15 CHAIRMAN HENDRIE: Oh, I see. That was the deletion.

16 COMMISSIONER AHEARNE: We have a schedule which is  
17 sort of an expeditious schedule, so I don't think we should  
18 say "will ordinarily," if we want to --

19 COMMISSIONER BRADFORD: That's what you deleted.

20 COMMISSIONER AHEARNE: No, "will ordinarily" --

21 COMMISSIONER BRADFORD: -- is what you deleted.

22 CHAIRMAN HENDRIE: That's why he said "may issue  
23 within" --

24 COMMISSIONER AHEARNE: Do you want to say Schedule B  
25 envisions, is based on, is predicated on, or believes that?

1 COMMISSIONER GILINSKY: We could do that, but then  
2 you'd have to change the wording at the top, too, to say that  
3 the schedule is designed to lay out the number of days that are  
4 required for the various stages of review.

5 It seems to me "will ordinarily" is a pretty  
6 reasonable statement, and would go along with the statement at  
7 the top of the page.

8 COMMISSIONER AHEARNE: Well, I won't argue any longer.  
9 I wanted to page sure that the point was heard.

10 COMMISSIONER BRADFORD: That's all right with me,  
11 "will ordinarily."

12 CHAIRMAN HENDRIE: I prefer "may issue," but we'll  
13 vote for "may ordinarily" in order to -- "will ordinarily,"  
14 "will issue ordinarily."

15 Other?

16 Let's move forward to page 5.

17 COMMISSIONER AHEARNE: I will stick with my language.  
18 If you want to join them, then you go that way, but I think  
19 the best we can say is that is our target.

20 CHAIRMAN HENDRIE: You would prefer the aim would be  
21 for Commission review ordinarily to be completed within?

22 COMMISSIONER BRADFORD: The original language  
23 was "Commission review would ordinarily be completed."

24 MR. BICKWIT: Yeah.

25 COMMISSIONER GILINSKY: It does not bother me in

1 this --

2 COMMISSIONER BRADFORD: I suppose one could say  
3 something like the Commission intends to complete its reviews  
4 within 10 days.

5 COMMISSIONER AHEARNE: Fine.

6 CHAIRMAN HENDRIE: Say it again.

7 COMMISSIONER BRADFORD: The Commission intends to  
8 complete its reviews, and then you pick up the language.

9 CHAIRMAN HENDRIE: Other?

10 There's a splendid sentence in the middle there.

11 Let's see.

12 "The Commission would state the reasons for its  
13 further consideration of time required for a stay decision.  
14 The Licensing Board's initial decision would be considered  
15 stayed, pending the Commission's" -- the insert is "stay ruling"?

16 No, taken out. Okay. Good.

17 Other comments?

18 6.

19 COMMISSIONER BRADFORD: On 6, why does the first  
20 paragraph, the conclusion there, restrict the review to  
21 significant TMI-related policy issues?

22 Supposing somebody came in with significant safety  
23 issues that had nothing to do with TMI?

24 MR. BICKWIT: This was drafted as best we could to  
25 reflect what we heard coming from this end of the table. Now

1 obviously if that's not your concept, you can change it.

2 COMMISSIONER BRADFORD: I guess he's talking to you  
3 or me.

4 MR. BICKWIT: That's right.

5 COMMISSIONER GILINSKY: What's this, now? Will the  
6 Commission stay review? I don't remember this. He must have  
7 meant you, Peter.

8 (Laughter.)

9 I would drop the TMI-related. Is that your sugges-  
10 tion? Yeah, I would take it out.

11 CHAIRMAN HENDRIE: A period after 2.788, then?

12 COMMISSIONER BRADFORD: I hadn't gone that far. I  
13 was just going to drop the words "TMI-related."

14 CHAIRMAN HENDRIE: Okay, "focus narrowly on  
15 significant policy issues identified by the Commission." Okay.

16 COMMISSIONER GILINSKY: The policy in the sense  
17 of what? Of important? What is the policy issue?

18 COMMISSIONER AHEARNE: That sounds like the question  
19 of the reorganization plan, and I think the answer is everything.

20 MR. BICKWIT: I think once you have taken --

21 COMMISSIONER GILINSKY: Something we consider  
22 important?

23 MR. BICKWIT: As I said, this is designed to reflect  
24 your concept. If that is not your concept --

25 COMMISSIONER GILINSKY: I don't think I would use

1 the word "policy."

2 CHAIRMAN HENDRIE: "Significant issues identified  
3 by the Commission."

4 COMMISSIONER GILINSKY: That's fine.

5 CHAIRMAN HENDRIE: I wish I knew whether I was  
6 improving the language by doing this.

7 Okay, page 7.

8 COMMISSIONER BRADFORD: Let's see. On 7, the time  
9 savings would be at least the 70-day difference.

10 (Laughter.)

11 COMMISSIONER AHEARNE: What?

12 COMMISSIONER BRADFORD: I'm wondering -- let's see,  
13 how can you save more than that?

14 COMMISSIONER GILINSKY: Because he figures we  
15 wouldn't have met the 80 days.

16 (Laughter.)

17 CHAIRMAN HENDRIE: John's view, with which I must  
18 say I agree, is that the 80-day Appendix B procedure is more  
19 likely to average out to 90 and, on occasion, could go beyond  
20 that, and is fairly unlikely to run less than that, because  
21 less than that really presses the Appeal Board very hard under  
22 the present Appendix B.

23 COMMISSIONER BRADFORD: What you're saying is that  
24 under this proposal, unless in fact somebody got a stay, the  
25 additional time would always be zero?

1 CHAIRMAN HENDRIE: Yes.

2 Actually it would be at least -- in practical fact,  
3 it is at least this 79.7 day difference, because when there is a  
4 plant ready to go, the Director of Reactor Regulation does  
5 not normally wait 10 days, if it's really ready to go.

6 Now obviously if they are still doing inspection check-  
7 off, checklist items out at the plant, why, then he doesn't  
8 issue until they are done. But if it's all ready and everything  
9 is go and the only thing that's waiting is whether he puts  
10 pen to paper, he puts it there pretty fast.

11 However, --

12 COMMISSIONER BRADFORD: Is there any difficulty  
13 with inserting the word "operating license" between "NRC" and  
14 "adjudication" in the line just above "regulatory flexibility"?

15 MR. BICKWIT: No, I think that is useful.

16 CHAIRMAN HENDRIE: Operating license? Adjudications.  
17 We have said we would deal with the CP question in connection  
18 with a separate item.

19 Okay, page 8. Going once, twice.

20 COMMISSIONER BRADFORD: I would like to get rid of  
21 the word "otherwise," in the fourth line, Option A, the  
22 word "appropriate" in the sixth line, the word "appropriate"  
23 again in the next-to-last line.

24 The legal feeling of those changes, I think, is nil.  
25 I have a hatred of the word "appropriate."



1 CHAIRMAN HENDRIE: Let's see. Go back and tell me  
2 where we are.

3 COMMISSIONER BRADFORD: On page 8, in Section 1, the  
4 fourth line "and otherwise," and the sixth line, "appropriate,"  
5 and the next-to-last line "appropriate."

6 CHAIRMAN HENDRIE: You want to take out "and other-  
7 wise" in the fourth?

8 COMMISSIONER BRADFORD: And I guess, now that I look  
9 at it, I would run the word "outline" together.

10 CHAIRMAN HENDRIE: And you want to -- "and otherwise"  
11 in the fourth line, "appropriate" in the second line?

12 COMMISSIONER BRADFORD: "Appropriate" in the sixth  
13 line.

14 COMMISSIONER AHEARNE: It says "option."

15 CHAIRMAN HENDRIE: I am looking at you to see what  
16 your view of his option is.

17 COMMISSIONER AHEARNE: Although I usually prefer  
18 appropriate things, but --

19 CHAIRMAN HENDRIE: Yes, how come you're letting him  
20 mark up your option this way?

21 Any problems from the counsel? Can you see  
22 "otherwise" and the "appropriates" needed?

23 MR. BICKWIT: No.

24 CHAIRMAN HENDRIE: Struck.

25 Also "outlined" is one word.



1 Page 9?

2 10?

3 11?

4 COMMISSIONER BRADFORD: On 11, I guess I would be  
5 happier with the tone of that first paragraph if it just  
6 said that instead "the Commission shall, promptly." It just  
7 said, "The Commission will, upon receipt of the Appeal Board  
8 decision," and I would drop the phrase in the preceding lines,  
9 including the period, "prior to the issuance of the Licensing  
10 Board's initial decision."

11 MR. BICKWIT: This was designed just to pick up the  
12 existing Appendix B, since the concept was not to change Appendix  
13 B with respect to construction permits.

14 COMMISSIONER BRADFORD: These are probably changes  
15 I should have made a long time ago.

16 CHAIRMAN HENDRIE: I don't mind if we've got the  
17 right to step in at any earlier stage of the proceeding, why,  
18 it must include the period prior to issuance of the Licensing  
19 Board's initial decision.

20 John?

21 COMMISSIONER AHEARNE: Peter, run again the changes  
22 you want to make.

23 COMMISSIONER BRADFORD: Drop everything between  
24 the commas, that is from "proceeding" down to "decision."

25 Then I would change in the next line down instead of,

1 "The Commission shall promptly," I would just say, "The  
2 Commission will."

3 COMMISSIONER AHEARNE: Out of curiosity, why do  
4 you object to the "promptly"?

5 COMMISSIONER BRADFORD: Well, because we are not  
6 in effect regulating ourselves, and it seems to me the mature  
7 way to say this is just to state what we will do and then do it.  
8 To put in exhortative language from ourselves today to ourselves  
9 tomorrow --

10 CHAIRMAN HENDRIE: There are occasions when I like  
11 to do that. This is not one where I feel I need to defend this.

12 COMMISSIONER AHEARNE: Did you say you also disagree  
13 with the last -- the addition that I picked up?

14 COMMISSIONER BRADFORD: No. I take it that is in the  
15 previous Appendix?

16 COMMISSIONER AHEARNE: Yeah.

17 CHAIRMAN HENDRIE: Instead of, "The Commission  
18 shall promptly," up above, it was, "The Commission will, upon  
19 receipt," et cetera, et cetera. Is that right?

20 COMMISSIONER BRADFORD: Is there a reason why that  
21 change got dropped in transition?

22 MR. BICKWIT: No, it was just an oversight. You mean  
23 the last sentence of that paragraph?

24 COMMISSIONER BRADFORD: Yes.

25 MR. BICKWIT: Just an oversight.

1 COMMISSIONER BRADFORD: No problem.

2 CHAIRMAN HENDRIE: The rest of 11?

3 12?

4 COMMISSIONER BRADFORD: 12 is another of those  
5 "shall promptly."

6 CHAIRMAN HENDRIE: We have another of those "shall  
7 promptly."

8 MR. BICKWIT: You will have to conform the bottom of  
9 12 to your concept as it now understood, in that we had put  
10 in the last line "a serious Three Mile Island-related safety  
11 issue."

12 COMMISSIONER BRADFORD: And I think if you just  
13 took Three Mile Island-related accident out.

14 CHAIRMAN HENDRIE: And struck the serious safety  
15 issues?

16 COMMISSIONER BRADFORD: You could actually drop that  
17 whole sentence, but I take it it's in there just to give the  
18 parties some guidance as to what they can expect out of all  
19 this.

20 MR. BICKWIT: That's right.

21 COMMISSIONER BRADFORD: What is the purpose -- I'm  
22 sorry, can we go on to page 13?

23 CHAIRMAN HENDRIE: Yes, I would like to do so.

24 COMMISSIONER BRADFORD: The last three lines on page  
25 13, "except that no stay shall be issued without giving the

1 affected parties an opportunity to be heard."

2 Is that a requirement?

3 MR. BICKWIT: No, I don't believe it was. It was a  
4 concept that was in Appendix B, and we decided to incorporate it;  
5 as a result, I think the Commission has pretty wide latitude  
6 here, since they could make the decision effective immediately,  
7 period.

8 COMMISSIONER BRADFORD: Your concept is, though, if  
9 the Commission saw something initially troublesome, that we  
10 might want to stay the decision, it would therefore stay at  
11 least for the period?

12 MR. BICKWIT: That's right.

13 COMMISSIONER BRADFORD: Prior to giving parties a  
14 hearing, or at least a chance to file the papers, it would  
15 state what the issue was and invite their comment on whether  
16 a stay was an order?

17 MR. BICKWIT: That's right, but I don't think it's  
18 legally required.

19 MR. ROSENTHAL: Let me suggest it might be changed  
20 to indicate no stay pending full consideration of the matter  
21 on the merits shall be issued.

22 COMMISSIONER BRADFORD: There would have to be some  
23 kind of a stay just to get the matter ---

24 MR. ROSENTHAL: That's right, and it does seem to me  
25 whether required or not, fundamental fairness would warrant

1 granting a party an opportunity to be heard before there was a  
2 stay that extended for a protracted period of time, while the  
3 merits of the Licensing Board's decision were being considered.

4 On the other hand, it seems to me there is nothing  
5 wrong with the Commission on an ex parte basis issuing an  
6 interim stay which would --

7 COMMISSIONER BRADFORD: Does it have to issue a stay,  
8 Alan? Isn't there a stay --

9 MR. ROSENTHAL: It says stay in effect. Well, that's  
10 right, in a sense it's an automatic stay, until the Commission  
11 acts one way or the other. But it does seem to me that what  
12 the Commission would readily say during this period that it has  
13 to act is that on a temporary basis we are continuing the  
14 automatic stay, and we will now allow the parties to be heard  
15 on the question as to whether the temporary extension of this  
16 stay should be continued for the duration of the review of the  
17 Licensing Board's decision.

18 MR. BICKWIT: Well, you are narrowing it. I mean  
19 initially we have been talking about stays imposed by the  
20 Commission for any purpose. If you want to say only stays  
21 that would pending full consideration on the merits, then you  
22 are narrowing the original concept. I don't know if you want  
23 to do that.

24 COMMISSIONER BRADFORD: But you were thinking then  
25 that if for some reason the Commission needed to go either beyond

1 the 10 or 30 days, say, after the 15th or 31st day that it  
2 would have to grant a hearing?

3 MR. BICKWIT: No, but I do have in mind that if it  
4 was going to impose any stay of any sort, pending consideration  
5 of part of it on the merits, or pending its own inquiry into an  
6 area that might be of some extensive period of time, that it  
7 would allow the affected parties an opportunity to be heard.

8 COMMISSIONER BRADFORD: But the difficulty, I guess  
9 -- and I think it's largely semantic -- is in fact the Commission  
10 doesn't need to issue a stay here because the operation is  
11 already stayed under this option.

12 MR. BICKWIT: That's true, but the whole concept here  
13 is that it would.

14 COMMISSIONER BRADFORD: Yeah.

15 MR. BICKWIT: That if you don't act within 20 days,  
16 you are going to say something.

17 CHAIRMAN HENDRIE: 30 days.

18 MR. BICKWIT: If you don't act within 30 days, you are  
19 going to say something. The opinion of the Commission was  
20 somewhat different when we apposed these kinds of concepts.

21 (Laughter.)

22 CHAIRMAN HENDRIE: I await your proposition.

23 COMMISSIONER BRADFORD: How about "except no  
24 extended stay on the merits shall be issued without giving the  
25 parties an opportunity to be heard"?



1 MR. BICKWIT: What do you mean by stay on the merits?

2 COMMISSIONER BRADFORD: Well, what do you mean by  
3 stay?

4 (Laughter.)

5 MR. BICKWIT: I have in mind that what the Commission  
6 would be doing in imposing a stay would not be to rule on the  
7 merits, but rather to take an interim decision that would say  
8 this plant cannot operate until some analysis of the merits is  
9 conducted.

10 A stay on the merits, I think, is not what you meant.

11 COMMISSIONER BRADFORD: Okay.

12 MR. BICKWIT: How about just "no extended stay"?

13 COMMISSIONER BRADFORD: "No extended stay" is fine.  
14 I guess I would make it "extensive," since "extended" might just  
15 be one day beyond the 10.

16 CHAIRMAN HENDRIE: Extensive?

17 COMMISSIONER BRADFORD: Yes.

18 In the next paragraph, how much of a production does  
19 it become if the Commission should go to the 12th day instead  
20 of the 10th? Is it on the 10th day all we will get -- we will  
21 get a statement of some sort?

22 MR. BICKWIT: Yes.

23 COMMISSIONER BRADFORD: Since the makeup of the  
24 Commission has in fact changed, I would be inclined to delete  
25 that sentence. I don't at all mind having an understanding or

1 maybe even writing it down that if we were going to go a long  
2 time beyond that 10 or 30-day period, we would explain why, but  
3 I cannot see putting out a separate decree to explain that the  
4 rule will be forthcoming three days later.

5 CHAIRMAN HENDRIE: You would delete from where to  
6 where?

7 COMMISSIONER BRADFORD: I would just delete this  
8 sentence, beginning, "If the Commission does not," in the next  
9 paragraph.

10 CHAIRMAN HENDRIE: And then what do you do with the  
11 last sentence?

12 COMMISSIONER BRADFORD: Let's see. I think it still  
13 runs with the first one, doesn't it?

14 MR. BICKWIT: The last sentence of that paragraph?  
15 I thought you wanted to delete that. I really don't see any  
16 need for it.

17 COMMISSIONER BRADFORD: In that case, it's in the  
18 event that the Commission does not act timely within these  
19 time periods, the initial decision will be considered -- your  
20 point, as I understood, is that we don't need it. Okay, I'll  
21 delete that, too, then.

22 CHAIRMAN HENDRIE: They are cutting up your option,  
23 Vic.

24 COMMISSIONER AHEARNE: And they're reinforcing mine.

25 CHAIRMAN HENDRIE: If you don't mind, why, I don't.



1 COMMISSIONER BRADFORD: That's my last.

2 CHAIRMAN HENDRIE: If you would like to retain it,  
3 Vic, why, I will vote with you and see if that will take care  
4 of another one.

5 (Laughter.)

6 COMMISSIONER BRADFORD: Then I'd have to have my own  
7 option.

8 COMMISSIONER GILINSKY: What have you done now, taken  
9 out the --

10 COMMISSIONER BRADFORD: Taken out the part where  
11 we promise to behave ourselves.

12 COMMISSIONER GILINSKY: Why don't you go on and let  
13 me think about this one?

14 CHAIRMAN HENDRIE: All right. While Vic is thinking,  
15 page 14?

16 Page 15?

17 16?

18 COMMISSIONER AHEARNE: 17?

19 CHAIRMAN HENDRIE: We are having a short relaxation.

20 COMMISSIONER BRADFORD: I have no changes on the  
21 remaining pages.

22 CHAIRMAN HENDRIE: Okay, John, 17?

23 18?

24 19?

25 20?

1 Back to 13, how did the conference come out?

2 COMMISSIONER GILINSKY: Well, I will go along with  
3 the change which seeks to --

4 CHAIRMAN HENDRIE: "The Commission intends," in the  
5 first line, delete from "if" in the middle of that paragraph  
6 on through to the end of the paragraph. We've got a deal.

7 Did we already vote this thing out? Okay, let's  
8 see how fast you can get it in the Federal Register, Sam. 5:00  
9 o'clock?

10 MR. CHILK: I'll try. You make the changes and I'll  
11 get on with it.

12 CHAIRMAN HENDRIE: Okay. Well, bit by bit.

13 Let's see, remind me again how long this was going  
14 out for? 20 -- was this a 20-day proposition or 30? 30 day.  
15 All right. 30-day comment. Okay.

16 Now give me five seconds to shuffle papers.

17 What I would like to turn to are some general points  
18 of view about what it is we are attempting to achieve in the  
19 hearing process, and then after some general layouts, to see  
20 how that might reflect in terms of Commissioners' views on these  
21 sua sponte authorities of the Boards --

22 COMMISSIONER BRADFORD: Do I want John's and my  
23 memo?

24 CHAIRMAN HENDRIE: I think so, yeah.

25 COMMISSIONER BRADFORD: Go ahead and get it. I'll

1 be right back.

2 (Commissioner Bradford left the room at 2:55 p.m.)

3 CHAIRMAN HENDRIE: Well, since you're still with us,  
4 John, --

5 COMMISSIONER AHEARNE: Shouldn't we discuss our two  
6 memos?

7 CHAIRMAN HENDRIE: Well, that's a question -- they  
8 were closely held, and it depends upon your wishes. We could  
9 either make them available -- apparently it's going to have to  
10 be after the meeting, rather than right now, because I don't  
11 think we've got copies of any.

12 My thought was that if you wanted to outline the  
13 thrust of your views, we would get the same sort of an approach  
14 from Peter, and the discussion would be on the basis of that  
15 layout, rather than pieces of paper.

16 I have no objections to *it going out, but they were*

17 COMMISSIONER AHEARNE: I guess what I will then do  
18 is, there were some typographical changes and I will make those  
19 changes and give them to SECY, *Tomorrow to distribute --*

20 (Inaudible.)

21 CHAIRMAN HENDRIE: You will then make it available?

22 COMMISSIONER AHEARNE: I will make it available  
23 tomorrow, if anybody is interested.

24 CHAIRMAN HENDRIE: Okay, then, I think, Sam, what we  
25 ought to do, in addition, is to have copies, as John marks them

1 up, available on the back table the next time the Commission  
2 meets on this A series of meetings.

3 (Commissioner Bradford returned to the  
4 room at 2:58 p.m.)

5 These are the big picture memos. John raised the  
6 question about making his memo available. He said, I think,  
7 what he would do is clean up some typos in it, so it would be  
8 available tomorrow, and my suggestion was it would be available  
9 then from SECY tomorrow or soon after, and the next time we  
10 had one of these meetings, why, SECY could have copies.

11 Now yours was even more --

12 COMMISSIONER AHEARNE: I hadn't realized we were  
13 going to have a formal discussion, but --

14 CHAIRMAN HENDRIE: I thought we would let them debate,  
15 and you and I would judge.

16 COMMISSIONER AHEARNE: I'm not sure they are  
17 necessarily inconsistent.

18 CHAIRMAN HENDRIE: No, they're not. I must say, I  
19 have read them, they are certainly points of -- why don't  
20 you launch the general proposition, John, and then let's hear  
21 Peter's side?

22 COMMISSIONER AHEARNE: All right.

23 Well, I guess it starts from the basis of trying to  
24 rethink, or perhaps to think through what are the purposes of  
25 the hearing? Why do we have them? And I tried to outline some

1 arguments that have been -- some reasons that might be the  
2 reason for hearings, such as to satisfy the requirements of  
3 the Atomic Energy Act and Administrative Procedures Act; to  
4 contribute significantly to ensuring adequate protection of  
5 the public health and safety; and to build public confidence and  
6 understanding in NRC licensing.

7           Going through those, I conclude that the current  
8 process that we have does not necessarily serve the public good  
9 in the way that perhaps the original drafters of our enabling  
10 act intended.

11           I tried to propose then, that given the problems  
12 that I see, what are some of the changes that might be able  
13 to take place to improve those, although I think the  
14 fundamental objective -- and I believe Peter has mentioned it --  
15 is that we ought to be trying to establish what are the purposes  
16 of the hearings and ensure that whatever system we put in place  
17 tries to accomplish the purposes that we believe ought to be  
18 accomplished.

19           Now the changes that I suggested, at least initially,  
20 are -- the first is -- and it goes along with what Tony Cotter  
21 had originally proposed, that is some type of directive to the  
22 Boards which would be emphasizing the current authority of the  
23 Boards and laying out some specific guidelines that we would  
24 urge or require the Boards to follow. But it was very much in  
25 line with what Tony had originally proposed, and I thought that

1 using Tony's had the particular advantage, since it was generated  
2 by the Boards, that they would consequently have a stronger  
3 sense of following through on guidance which they originally had  
4 suggested.

5 I believe the contention threshold should be raised,  
6 putting aside the arguments that we all participated in on  
7 Allens Creek. I believe it is important to try to specify  
8 what are the purposes of having contentions heard, and then to  
9 place some specific set of requirements on how those ought to be  
10 addressed.

11 As you mentioned in the beginning of the meeting,  
12 the General Counsel is addressing the contention issue, so I  
13 don't propose to speak any further on it, because that is being  
14 developed in a separate approach.

15 I believe what the Board is responsible for should be  
16 addressed. With respect to the sua sponte rule, I have three  
17 proposals:

18 The first proposal is to eliminate it; and that  
19 would be based on the concept that the role of a Board is to  
20 address contested issues, and to serve as the adjudicator on  
21 issues of -- true issues being raised by the parties in the  
22 case, and then deciding amongst or between them. That would  
23 then be a complete elimination.

24 If there is no support for eliminating the role, then  
25 I believe that we should restructure the process by which the



1 issues are raised, and I suggest that Board certification to  
2 the Commission, a question I believe should be raised before  
3 requiring the parties address it. That would serve to emphasize  
4 the unusual nature of that kind of inquiry. And if there is  
5 no support for that, then I think we at least should reemphasize  
6 the boundaries which were established, and I have the quote  
7 from a case at Indian Point in which the Commission had spoken  
8 to what were the outlines or the boundaries in which sua sponte  
9 should be explored.

10 I think the General Counsel has been looking into  
11 some of the recent issues with respect to unresolved safety  
12 issues, and at least when I was looking at those, it seemed to  
13 be very clear that we ought to be getting some better guidance  
14 to the Boards on the boundaries.

15 I think we ought to, if we do go down this path  
16 that we are on, which places great emphasis upon holding to  
17 schedules and upon the Board making decisions in a timely  
18 fashion, we should also be willing to give greater deference  
19 to the Boards' judgment.

20 And as a consequence, I think we ought to be willing  
21 to abide by Board decisions, particularly in many procedural  
22 decisions.

23 With respect to sanctions, I think at the present  
24 time the sanctions are, to some extent, in the regulations and  
25 the Board is able to use them, but we, I don't believe, have

1 urged or stressed or required the Boards to impose those sanctions  
2 and I think there are at least several sets of sanctions I am  
3 speaking about:

4 First, in the Appeal Board, in the OPS case, for  
5 example, said there should be communication via the Board when  
6 the Staff does not meet its hearing responsibilities, and I  
7 believe, for example, the EDO should be told for each schedule  
8 commitment by the Staff and then any failure to meet such  
9 commitment, because the element of the parties that the Board, I  
10 think, has the weakest hold on, is the NRC Staff. They have  
11 more explicit sanctions available to them on the other parties,  
12 but the control they have over the Staff seems to be very weak,  
13 and I think at least we ought to try to make an explicit tie  
14 and the EDO would be the effector or the person on whom that  
15 burden would rest.

16 The Applicant obviously has an incentive, and I think  
17 we ought to make it very clear by documenting delays of meeting  
18 commitments by the Applicant, because if they do not meet  
19 commitments that have been established, and they have agreed  
20 to, they should not at a later stage come around and complain  
21 about delays in the process.

22 With respect to other parties, I think the penalties  
23 that Tony outlined should be used. If we focus the hearing  
24 on more important issues, then that should avoid dissipation of  
25 intervenor resources, as well as Staff resources, and I think



1 the threat of throwing out a contention might be more realistic  
2 if we do clarify the responsibility of the Boards to pursue  
3 issues.

4 At the present time it is not particularly effective,  
5 I think, to strike a contention and have the Board turn around  
6 and adopt it as a Board question.

7 We have spoken about interim licensing legislation  
8 in other fora, and those are basically the points I wanted to  
9 make.

10 As I said earlier today, I believe if we do not  
11 address the process itself and try to get in our own minds a  
12 clear picture of what role the Board process is supposed to  
13 serve and lay that out fairly explicitly, I would expect that  
14 we -- probably not all the members of this Commission -- would  
15 be asking the Congress for full power interim legislation.

16 CHAIRMAN HENDRIE: Peter, why don't you outline in a  
17 similar way your general thrust?

18 COMMISSIONER BRADFORD: Well, my focus was really only  
19 on the first step of what John has talked about. That is, it  
20 seems to me if we really want to undertake an overall review  
21 of the hearing process, we have to be able to agree on some kind  
22 of statement among ourselves as to what we expect of it.

23 I think the material I circulated is probably better  
24 responded to on the first go-round in writing. That is, if each  
25 of you has something you want to add, considerations I didn't

1 have in, and others might want to delete some that I did, or we  
2 could just talk about whether the basic statement of whether what  
3 hearings are all about is in the ball park.

4 I really had not intended to do much more here than  
5 quickly set down the type of thing that might serve as the  
6 charter for telling people who are familiar with the licensing  
7 process to see whether in fact these goals were being served and  
8 if not, why not.

9 I feel uncomfortable dealing with a number of the  
10 specific proposals that John and others have made outside of  
11 the context of a more comprehensive evaluation of the process.  
12 That is, one may or may not agree that sua sponte review is  
13 causing a great deal of trouble, or -- the fact is that the  
14 changes that I would want to make to any one piece of the  
15 package, I would rather make with some sense of what I want  
16 the whole end result to look like.

17 As you all know, I am very much of the view that  
18 whatever streamlining we undertake has to go hand in hand with  
19 strengthening the ability of people who are serious about  
20 meritorious contentions to pursue them through the process.

21 So I resist just going in and sort of taking a  
22 shark-like bite out of -- perhaps the easy target in terms of  
23 something that seems painful to us at the moment. I'd  
24 rather agree on the charter than send a group out to do  
25 an evaluation for us of what changes were really necessary

1 to assure that that charter was being met.

2 I would not feel especially bound by existing law,  
3 although obviously the recommended changes would have to conform  
4 to those that we could achieve ourselves, those we would have  
5 to recommend new legislation on.

6 COMMISSIONER AHEARNE: As I said, Peter, I think  
7 that your approach is -- as you said, it is my first step, and  
8 I did not try to go very far in that direction.

9 As I finished, I endorsed the point that you make,  
10 that we ought to have a clear understanding of what the role is.  
11 Obviously for myself, in examining the process, I had reached  
12 some tentative conclusions on some of those steps. I wouldn't  
13 describe it as a shark bite or necessarily a streamlining, but  
14 more as an attempt to make a process more rational, at least  
15 more rational from my point of view. It's obviously a personal  
16 point of view.

17 COMMISSIONER BRADFORD: But what really needs to be  
18 done from here, Joe -- whatever, of course, you would like to  
19 do -- is to see if in fact there is a one or two-page statement  
20 of the purpose of the hearing process that the four of us can  
21 agree on. And if, in fact, you do that, then it seems to me  
22 quite a lot would follow from it.

23 COMMISSIONER AHEARNE: I would still urge us, if we  
24 could, to address some of the more specific things. For example,  
25 I think spending a long period of time working up a policy

1 statement on the Boards, I would argue, should not preclude us  
2 giving some sort of a policy statement to the Board, such as  
3 Cotter recommended, because that is more here how you should  
4 operate within the existing regulations.

5 COMMISSIONER BRADFORD: I don't agree with you in the  
6 abstract. Whether we can agree on a policy statement remains  
7 to be seen.

8 CHAIRMAN HENDRIE: I guess --

9 COMMISSIONER BRADFORD: What I would urge, Joe, is  
10 if I could get something back in written form by way of reaction  
11 to this, then I could pull a second round together and we would  
12 have something to talk about.

13 I don't know how much we can achieve. We can try it.  
14 But it's like going down a list of points this afternoon.

15 COMMISSIONER AHEARNE: I would also like, if I could,  
16 Peter, if you could respond to at least -- I tried to outline  
17 the questioned purpose of hearing, and I would appreciate any  
18 comments you want to add, because one of the problems I was  
19 having with responding to your rules that you have laid out is  
20 that I think there is a broader description of what is the  
21 purpose of the hearing that I would like to understand. That  
22 is the philosophical basis, and then understanding that, then I  
23 can more easily address what ought to be the rule.

24 COMMISSIONER BRADFORD: I guess I would think of the  
25 purpose in the abstract in rule 1 here as it is stated.

1           COMMISSIONER AHEARNE: Yes. What I tried to do --  
2 and it wouldn't probably be appropriate to embed in here, but I  
3 thought to describe in more detail what might be the purpose  
4 and the various ways of describing it. Some of the problems I  
5 see with using those as the purpose, at least in the way the  
6 systems work, and then in conclusion you can distill it out,  
7 but the way you have got it phrased, at least for me, is  
8 distilled so far that I am not really sure what is embedded  
9 there. And if you could just jot down your comments or  
10 pencil mark on my point, I would probably better understand  
11 it.

12           CHAIRMAN HENDRIE: It is not clear to me that John's  
13 purpose of hearings and your rule 1 are incompatible. In fact,  
14 I think some of them are.

15           COMMISSIONER BRADFORD: Some of them may be. John  
16 listed three different purposes, and to some extent, I guess  
17 all three of them are wrapped up in rule 1. But there is sort  
18 of an element, for example, to one of them that I wouldn't  
19 say was legitimate, and I don't think John really was, either.

20           COMMISSIONER AHEARNE: No, that's right. I was not  
21 saying that that should be a reason, but I am saying that that  
22 has been given as a reason.

23           CHAIRMAN HENDRIE: Furthermore, as long as the law  
24 requires hearings, why, you have hearings even where no  
25 party may want a hearing.



1           COMMISSIONER BRADFORD: Yes, that's what I meant when  
2 I said it seemed to me the starting point ought to be outside  
3 what the law required. Then we ought to be able to come back  
4 and say, look, this is crazy.

5           CHAIRMAN HENDRIE: I see. I see.

6           COMMISSIONER BRADFORD: In whatever sense it may --

7           CHAIRMAN HENDRIE: One of John's purposes -- one of  
8 several, to contribute to significantly assuring adequate  
9 protection of the public health and safety --

10          COMMISSIONER AHEARNE: Joe, as I said, these are  
11 the purposes I have seen in having our hearings described.

12          CHAIRMAN HENDRIE: Yes. Yes, to be sure. If one  
13 focused on that, one would, I think, go probably significantly  
14 different directions than one would either from your No. 1 or  
15 John's -- parts of John's No. 3, and there is a question here --  
16 I think a reasonable one -- as to where one wants to come down  
17 on this.

18          COMMISSIONER BRADFORD: Yes, but I don't think  
19 there is any sentiment at the table surely for stating that the  
20 hearings are the primary method of assurance in and of themselves,  
21 at least, that the public health and safety is protected.

22          CHAIRMAN HENDRIE: Well, I wouldn't make that  
23 assertion, I guess, because --- for assorted reasons, but --  
24 okay, that's in fact a useful point.

25                 Yes, sir, please.



1 COMMISSIONER GILINSKY: Well, isn't the reason for  
2 hearing in large part to protect private rights?

3 COMMISSIONER AHEARNE: In what sense do you mean that?

4 CHAIRMAN HENDRIE: Rights to what? A hearing, or --

5 COMMISSIONER BRADFORD: Well, certainly if you are  
6 going to deny a license, then the hearing that's available --  
7 at that point the hearing means quite a lot in terms of --

8 CHAIRMAN HENDRIE: The Applicant gets to argue on  
9 why you ought not to deny it.

10 COMMISSIONER BRADFORD: But I think it's also true  
11 that the hearing in a sense is to protect the rights of those  
12 who are going to be affected by the facility. I'm not sure  
13 what ~~(inaudible)~~ *Closer meant.*

14 CHAIRMAN HENDRIE: Yeah, I'm not sure where that  
15 leads me. What rights precisely are those? You know, here you  
16 come and you're going to build this power plant next to me,  
17 and Vic tells me I've got rights in this matter.

18 Now what rights do I have? Like liberty and the  
19 pursuit of happiness, I assume, among others.

20 COMMISSIONER BRADFORD: You may not have those. The  
21 only ones that you have that I don't see any point in our  
22 focusing on for purposes of anything we can do about it are  
23 the Constitutional rights; to the extent that you have  
24 Constitutional rights in relation to a decision like that,  
25 no recommendations of ours are likely to change it.

1           As to statutory rights, if we feel they really are  
2 working themselves out in a rational way with regard to the  
3 safe licensing of nuclear power plants, we can recommend changes;  
4 to the extent that you have rights that arise from our regula-  
5 tions, we can change that, too.

6           So much for rights.

7           (Laughter.)

8           CHAIRMAN HENDRIE: Sounds reasonable, but I don't  
9 know where it takes me.

10           COMMISSIONER BRADFORD: I think it really is circular.  
11 We really ought not to be trying to define what rights you have  
12 in terms of the system that there is a certain amount of dis-  
13 satisfaction with.

14           What we ought to be doing is trying to define what  
15 we think a reasonable system would afford. Then decisions  
16 on the rights we would want to confer on would fit in that  
17 definition.

18           CHAIRMAN HENDRIE: Can I get a comment from the  
19 counsel's end of the table?

20           MR. BICKWIT: I wouldn't let the Constitution stand  
21 in your way.

22           (Laughter.)

23           You can always propose an amendment.

24           CHAIRMAN HENDRIE: Mr. Shapar?

25           MR. SHAPAR: There aren't really any Constitutional

1 rights, as long as they can get into court. So as far as the  
2 options you have there, they are almost infinite. As to what  
3 rights they have now. It is obvious under the Atomic Energy Act,  
4 if they have an interest, they have a right to a hearing.

5 The Administrative Procedure Act tells you what  
6 rights they have there. The right to present evidence, cross-  
7 examination, and the right to have a decision on the record.

8 So those are the rights they have: a right to a  
9 hearing if they have an interest that may be affected, and  
10 those are the rights under APA. No right to discovery, I might  
11 add.

12 (Laughter.)

13 MR. BICKWIT: But I think the point Peter was  
14 making is that it would make sense to just look at what rights  
15 you ought to be protecting. Everything should be phrased in  
16 terms of an "ought" without regard to existing law, and then  
17 go on to formulate your recommendations.

18 COMMISSIONER GILINSKY: "Rights" is the wrong word.  
19 Private interests, I think, and that is all we talk about,  
20 persons affected.

21 MR. SHAPAR: Yeah.

22 But we hope our process serves some broader goal.  
23 At least that's the theory under which the Commission has  
24 been acting for a number of years.

25 Now whether that's true or not is something you all

1 may want to examine.

2 COMMISSIONER BRADFORD: Let me come at it another  
3 way:

4 We need to decide really whether we are prepared  
5 to undertake an overall review of this sort of the licensing  
6 process. If we are not, then it makes sense to go -- just to  
7 deal reactively with the various proposals that are coming in  
8 from various places over the next four or five months, much as  
9 we did in the last licensing go-round several years ago.

10 The choice is really between setting up some sort  
11 of working group within the agency ourselves and developing  
12 our own proposals, which I must say I would favor, and then  
13 the alternative of dealing reactively with proposed legislation  
14 that's clearly going to come in from a variety of quarters  
15 throughout this session of Congress.

16 COMMISSIONER AHEARNE: I guess I would say it in  
17 middle ground between those two, Peter.

18 COMMISSIONER BRADFORD: You are going to have to set  
19 up a working group, anyway, and then the working group may have  
20 to deal reactively.

21 COMMISSIONER AHEARNE: I think we could still amongst  
22 ourselves try to struggle through what we think the hearing  
23 process should accomplish, and then give some specific direc-  
24 tions to the Boards and so forth.

25 COMMISSIONER BRADFORD: You mean without undertaking

1 an overall --

2 MR. ROSENTHAL: If I may suggest one thought:

3 I would be hopeful that the first inquiry would be  
4 into whether in point of fact the hearing process contributes,  
5 to at least some extent, to the safety and the preservation  
6 of environmental values. Because if it doesn't, I have wasted  
7 almost nine years of my time, and it seems to me that it would  
8 be in the interest of the entire process, if you will, of  
9 licensing plants, if you went up and got the statute, the  
10 Atomic Energy Act, amended to eliminate the requirement of  
11 adjudicatory hearings altogether.

12 I think that is a fundamental point, and I am hearing  
13 today -- perhaps inaccurately -- some doubt, or at least question,  
14 in the Commission's mind as to whether this is in the case;  
15 a doubt, I must say, that has been expressed over the years  
16 in many other quarters, but I think that is fundamental, and I  
17 must say also that I think that question has to be answered  
18 before you address the question as to whether you are going to  
19 cut off the right of Licensing and Appeal Boards to raise  
20 safety and/or environmental issues on their own. Because I  
21 think that the two questions are inextricably interwoven.

22 And if, in fact, the Licensing and Appeal Boards are  
23 in the business of simply satisfying procedural rights of  
24 people who live close to the reactor, and it's sort of a  
25 form of charade, then I would certainly agree that the Boards



1 ought to be out of the business of examining issues that are not  
2 put into context, if not out of the business of adjudicating  
3 altogether.

4 On the other hand, if the conclusion is reached is  
5 that this adjudicatory process can make some -- and it does make  
6 some contribution to safety, obviously it isn't the whole ball  
7 game, obviously it's not even the lion's share of it -- but  
8 if it's making some contribution to safety, then it would seem  
9 to me that the answer to the sua sponte question might be  
10 entirely different.

11 But I would like to see somebody address that  
12 question. I think the Commission is entitled to an answer to  
13 that. I think the world at large is entitled to an answer to  
14 that. And I think most particularly the people who spend their  
15 professional careers in adjudication are entitled to that.

16 MR. BICKWIT: I don't agree with all of that. I agree  
17 with the portion that if the licensing process does not serve  
18 the public health and safety protection function that it's  
19 designed to serve, and it follows from that that sua sponte  
20 authority is not valuable, it doesn't follow on the other  
21 hand from the reverse conclusion that the licensing  
22 process does have some value, that the sua sponte --

23 MR. ROSENTHAL: That's your view. I have a different  
24 view.

25 MR. BICKWIT: I'm just saying one doesn't follow



1 from the other automatically. I did not say my view was the  
2 sua sponte process was not a good one.

3 I'm just saying you can come to the conclusion  
4 logically that the licensing process does serve a purpose,  
5 but that the sua sponte process is not worth the candle, and I  
6 think the Commission is missing --- I agree the Commission has  
7 to undertake -- I think the Commission should undertake an  
8 analysis of the big picture, and should determine whether this  
9 process as a whole is fulfilling its function.

10 But I do not think that all fixes of a lesser sort  
11 have to await the conclusions reached in that big picture  
12 analysis.

13 MR. SHAPAR: I'd like to make one point:

14 I agree with that substantially, but I think in  
15 response to Alan, if you-all reach the conclusion that the  
16 hearing process does not contribute to health and safety, you  
17 would still need a tribunal to adjudicate disputes between the  
18 parties to the proceeding.

19 Suppose you turned down, for example, or wanted to  
20 turn down a license application under any accepted theory  
21 these days, and looking at the experience of other agencies,  
22 that would have to be adjudicated. And it involves highly  
23 technical issues. So in either event, in the real world, you  
24 are going to need an adjudicator. And as long as nuclear power  
25 is controversial, you are going to have intervenors who have

1 disputes with the Applicant and Staff, and you need somebody  
2 to decide those disputes. So that's clear as a starting basis.  
3 Then you can argue about what kind of hearing you have. That's  
4 a different question.

5 And then you can add, do the hearings serve some  
6 other purposes? Does this Commission expect, based on experience  
7 of the hearings thus far conducted, to contribute to health  
8 and safety? That's subject to empirical analysis, although  
9 people can draw different conclusions from the evidence.  
10 You've got your records, you can take a look at the sua sponte  
11 issues and see how much time they have taken and see what the  
12 results of the probing has resulted in, in terms of both man-  
13 power costs and in terms of perhaps a change position.

14 We have facts on that, and it is not difficult to  
15 analyze either, although reasonable people can disagree about  
16 what the conclusion is.

17 So I would summarize this discussion by saying in  
18 any event you need a tribunal, and that's where I disagree with  
19 Alan most strongly. The question is, what additional purposes  
20 should the tribunal have, other than resolving disputes among  
21 the parties.

22 MR. ROSENTHAL: Let me take one second for response,  
23 and that is it may or may not be, as Howard says, a necessity  
24 for adjudicators, whether or not a contribution is being made  
25 to safety or the environment.

1 All I can say is -- and I think I speak at this point  
2 for all of my colleagues on the Appeal Board -- that none of us  
3 would remain here and spend our entire professional endeavor  
4 in adjudication, if we felt that there was not a contribution  
5 to the public health and safety and the environment at the end  
6 of that time. You would have to find somebody else to do it.

7 MR. LAZO: May I make a comment? Regarding the sua  
8 sponte benefits, Howard says these are usually visible and it's  
9 easy to determine how much time has been spent on them.

10 One of the large benefits of the sua sponte authority  
11 comes from the fact that it is often exercised right during  
12 the hearing process itself, during examination of witnesses  
13 by the Board. And if the Board was prohibited from going into  
14 areas where you have counsel standing up and saying, "Objec-  
15 tion, that's beyond the scope of direct testimony," the Board  
16 would be unable to pursue those matters and get the answers  
17 right then and there, at the time when the witnesses are  
18 present.

19 So this authority is exercised in almost every hearing.

20 MR. SHAPAR: I don't think that's a sua sponte point.  
21 Most of us were addressing, I think, the sua sponte question as  
22 basically whether or not a new issue that no party has ever  
23 raised should be injected by the Board.

24 Let me say on that, there has been a lot of confusion  
25 on this point. It's being portrayed as "either or." I don't

1 think anybody would say if the Board saw an issue that wasn't  
2 raised by a party, that nothing should be done about it. And  
3 what you have not discussed up to now is what the other options  
4 are for dealing with issues that have not been raised by a  
5 party, but have been raised by a Board.

6 I don't think anybody is arguing -- and I certainly  
7 wouldn't -- that nothing should be done about an issue that  
8 a Board sees has not been raised by a party.

9 COMMISSIONER GILINSKY: I thought that's what you were  
10 saying, weren't you, when you said drop it altogether? Because  
11 your first choice was to notify the Commission.

12 MR. SHAPAR: No, I don't think so. Because the  
13 Board doesn't deal with it, that doesn't mean it doesn't get  
14 dealt with. Let me give you an example --

15 COMMISSIONER GILINSKY: His option was the Board  
16 would communicate to the Commission that it had come upon an  
17 issue which it thought needed attention.

18 MR. SHAPAR: For example, suppose there's no hearing  
19 at all at the operating license stage. This Commission relies  
20 on the Staff to deal with all issues relating to an OL.

21 Now taking an operating license proceeding, where  
22 the only issue is a shipworm infestation from Barnegat Bay  
23 that the Intervenor wants to litigate. Suppose when the Board  
24 is reviewing that matter, it wants to raise Class 9 accidents.

25 Remember that if the shipworm issue wasn't raised,

1 there would be no hearing at all. Now suppose the Board does see  
2 Class 9 problem that the ACRS and the Staff missed. The fact  
3 the Board doesn't deal with it doesn't mean it doesn't have to  
4 get dealt with.

5 COMMISSIONER GILINSKY: Would you have the Board  
6 communicate with us?

7 MR. SHAPAR: They could communicate with the Staff.  
8 If there were no hearing at all, the Staff could handle it. They  
9 could bring the Commission's attention to it, as Commissioner  
10 Ahearne has suggested. The Board could request the Staff to look  
11 at it, send a copy to the Commission, the Commission could  
12 monitor the Staff's performance. But the question is, because  
13 the Board sees an issue that the parties haven't raised, does  
14 the Board have to decide, or are there other mechanisms within  
15 the Commission for dealing with a legitimately-raised issue,  
16 even though it hasn't been raised by a party? And I think  
17 that's the basic question, and it's not "either or."

18 COMMISSIONER GILINSKY: John, what did you mean  
19 when you said either or?

20 COMMISSIONER AHEARNE: What I meant was as far as  
21 the hearing was concerned, it would be dropped altogether.

22 COMMISSIONER GILINSKY: It would not in any way be  
23 handled in the hearing?

24 COMMISSIONER AHEARNE: That was the first option.

25 COMMISSIONER GILINSKY: You don't give the

1 Commission the option of dealing with it?

2 COMMISSIONER AHEARNE: That doesn't preclude it being  
3 sent to the Staff or somewhere else.

4 MR. SHAPAR: In fact, the Commission could monitor  
5 how the Staff could handle that issue. They could be monitored  
6 by the Board, the same as if there were no hearing at all,  
7 because the parties haven't raised the issue.

8 COMMISSIONER AHEARNE: As I tried to outline in my  
9 introduction, what I was trying to do is at least sketch out  
10 some of the areas of concern and then try to outline what I  
11 felt the Commission had to address, which does underlie what  
12 is the role of the hearing process.

13 MR. DIRCKS: And what you meant to see in the hearing  
14 is the perceived need for the hearing, the perceived need to do  
15 another review.

16 COMMISSIONER AHEARNE: But I think Alan's point is  
17 a very good one; that there ought to be some review -- and I  
18 guess I don't know how difficult that is. Howard says in some  
19 cases it is very easy. I would guess it's a lot more difficult  
20 than that.

21 MR. SHAPAR: It would only be a starting point, it  
22 wouldn't be conclusive.

23 COMMISSIONER AHEARNE: I think also that Nuclear  
24 Reactor Regulation has changed, and there are shifting periods  
25 of time, and it just seems appropriate for us to try to



1 examine what is the role for the future.

2 MR. BICKWIT: I agree, but the threshold question  
3 we have is to what extent do you hold up on other possible  
4 remedies while you are looking at that.

5 COMMISSIONER AHEARNE: On some of the issues I think  
6 we can go forward.

7 CHAIRMAN HENDRIE: It's perfectly reasonable and  
8 proper --

9 COMMISSIONER AHEARNE: Can I say one other thing,  
10 though? I have raised a lot of questions and concerns. I  
11 didn't -- I don't believe and I did not intend to indicate that  
12 I felt that all of the hearings that have occurred over many  
13 years have been a waste of time and not of significant help.

14 I am trying to say in examining this stage the  
15 direction that things I felt have been coming, and some primary  
16 actions we ought to examine and take. But we have gone through  
17 the development of nuclear power in this country over a period of  
18 some 25 years, and a large part of that development -- and one  
19 can argue about the success or failure, but as Commissioner  
20 Bradford has pointed out, we do have at the present time the  
21 largest number of reactors operating, and an equal number  
22 being built, and that is to a large extent due to the fact that  
23 a process was put in place that did enable construction permits  
24 and licensing permits to get issued in such a way that all of the  
25 participants, although in many cases disturbed by the results,

1 still the disturbance never rose to the level where the people  
2 who set up the process -- the Congress -- felt that it was not  
3 going right.

4 So I think the hearing process did serve a very  
5 valuable, useful and, I think, publicly rewarding function, and  
6 it might not be appropriate to modify it as I have proposed.  
7 But I think we ought to examine it.

8 CHAIRMAN HENDRIE: As I was going to say, it seems to  
9 me perfectly reasonable to try to take a broad look at it and  
10 try to see if we could in fact agree on a general statement of  
11 the purpose of hearings in our overall regulatory activity.  
12 At the same time we are also going to have to deal with bits  
13 and pieces, in part because they are thrust upon us; in part  
14 because our needs to establish how we are going to deal with  
15 Staff redeployments and schedules down line just means that we  
16 need to try to see how we are going to arrange our affairs  
17 for the next -- for the near term.

18 One of the problems always with a broad look is  
19 that it tends to stretch out in time, which is a characteristic  
20 you can see in such diverse activities as generic treatment  
21 of safety issues.

22 So I propose that we try to go in both directions  
23 simultaneously.

24 I suppose what one normally does from the Chair is  
25 to dole out the drafting task some place else, lest it come

1 to roost in one's own suite.

2 (Laughter.)

3 I think I will pass this one to the counsel's office  
4 and say from the front ends of two documents in hand, why don't  
5 you talk to people and try something?

6 I don't suggest that the two statements try to be  
7 melded, Peter, because I am not sure that they are quite written  
8 the same way, so that that is a possibility, or ought to be  
9 attempted, but using them as a general basis.

10 COMMISSIONER FRADFORD: Just as a countersuggestion,  
11 since I didn't really think of the one I articulated before  
12 as being anything other than an initial process, let me try  
13 one more whack at that. And I will do what you were suggesting  
14 to the General Counsel, which is to gather thoughts from each  
15 of you. I would just as soon refine it one more round.

16 CHAIRMAN HENDRIE: In fact, it would be more  
17 helpful. I doubt that the counsel would feel any sense of  
18 being passed over by that.

19 Now I think I will continue to have to draw us  
20 together on consideration of elements of the process, which we  
21 will very likely treat again in a more general and coordinated  
22 way. Just because, as I say, I think we have to do both things  
23 together, both do it piecemeal and try to look at the general  
24 picture.

25 One of the things that I have particularly in mind is

1 that I would like to see next week whether we can begin to  
2 coalesce or render a policy statement along the lines of the  
3 Cotter draft or the most recent General Counsel's draft, which  
4 includes comments from people, and there is a question mark in  
5 that draft.

6 It says, well, do you want to say anything, for  
7 instance, about sua sponte authorities? And it seems to me  
8 that there are in fact a whole range of things that one might  
9 say between saying nothing and I suppose the other extreme  
10 would be to say, you know, we abolish all such propositions  
11 forever and henceforth.

12 But there are a whole range of things in there.  
13 Among other things that I have in mind is, if as I suspect,  
14 there may not be -- there is not a majority of the Commission  
15 who would feel inclined to work toward some adjustment of the  
16 direction so the Commission --- there may nevertheless be a  
17 consensus that it would not be unreasonable to at least reiterate  
18 some of the language that has gone with the present authority  
19 in the past, because it is not clear to me that --

20 COMMISSIONER GILINSKY: What do we know at this point  
21 of the effects of sua sponte authority or not exercising it?

22 CHAIRMAN HENDRIE: Occasionally you find Boards  
23 who seem to take very enthusiastically the sua sponte powers,  
24 and will do things like saying, well, the Appeal Board told us  
25 to take unresolved safety issues very seriously, and here in this

1 spent fuel proceeding, we want to know, although no party is the  
2 least interested in it, what about every unresolved safety issue  
3 with regard to this spent fuel pool reracking?

4 And, you know, I don't know the merits of the  
5 proposition, and maybe it was a fair proposition for the Board  
6 to raise, but maybe it wasn't. And, you know, I don't think  
7 the intent was that the Boards just go into a hearing and then  
8 cast as broad a net as they can throw to see if they can find  
9 anything to prolong a discussion about it.

10 COMMISSIONER GILINSKY: Is that a real example?

11 CHAIRMAN HENDRIE: Yes.

12 COMMISSIONER GILINSKY: Howard, you were talking  
13 about having empirical evidence of how all this functioned. Is  
14 there something you could say about how this sua sponte authority  
15 has been exercised, and what effect that has had on hearings?

16 MR. SHAPAR: I think the fairest thing I can do is  
17 ask the Staff to go back and take a look at examples in the past  
18 where the sua sponte authority was used in coming up with new  
19 issues, and ask them three things:

20 Ask them to identify the issues; to give me an  
21 estimate of the manpower that it took to resolve it; and to  
22 take a look at what the result was after the issue was pursued.

23 I don't think you have the time or the patience to  
24 listen to all of them. The best I can do is give you one or  
25 two examples, to give you the flavor.

1 COMMISSIONER AHEARNE: Why not give us the paper?

2 MR. SHAPAR: It's in pretty rough shape.

3 COMMISSIONER GILINSKY: Could you give us an idea  
4 on how frequently this is used and what portion of the hearing  
5 is taken up with these sorts of issues?

6 MR. DIRCKS: Not only hearing; I think you have  
7 some estimates and they are on the manpower.

8 MR. SHAPAR: Let me give you one or two examples.  
9 Let me be as dispassionate as possible. Let me give you an example  
10 where the Board did change something, and where nothing was at  
11 least visible at the end of the probing, and I'll give you the  
12 estimate very quickly:

13 St. Lucie 2, after an effective CP was issued, the  
14 Appeal Board held further issues that are sua sponte issues  
15 -- hearing of sua sponte issues on station blackout. This  
16 required seven manweeks for one week of hearing; eight manweeks  
17 of attorneys' time for prehearing matters; and eight weeks of  
18 technical time spent over a year hearing. Total exceeded a  
19 half manyear.

20 This is a case where change was made, and I think  
21 it's the only one we identified. The CP was amended to  
22 require station blackout to be part of the design.

23 Now I'll give you an example on the other side.  
24 Lacrosse. There was a spent fuel pool proceeding. The Board  
25 raised the question of the need for power for three years.



1 The hearing was held on this issue for three days, and the  
2 appeals were taken both before and after the matter was litigated.  
3 No party had raised this issue.

4 In total, the Staff spent 1000 staffhours on this  
5 issue.

6 In addition, the Board raised 23 questions that  
7 were answered by affidavit. The Staff spent approximately 100  
8 staff hours on these questions.

9 At the conclusion of the hearing, the Board approved  
10 the spent fuel pool modification and found a three-year need  
11 for power. No license conditions were required.

12 COMMISSIONER BRADFORD: How in the world could the  
13 Staff spend 1000 hours over the need for power?

14 MR. SHAPAR: You're asking for a breakdown and I'll  
15 have to provide you with one.

16 COMMISSIONER BRADFORD: Well, no, that's going to  
17 take hours, too, but that seems to me to be --

18 COMMISSIONER AHEARNE: I would think you would  
19 want the Boards, though, to respond.

20 MR. ROSENTHAL: Any process is subject to abuse, and  
21 I don't know whether these particular instances represented an  
22 abuse or not. There is an old saying about throwing the babies  
23 out with the bath water.

24 I would also suggest that the standard that Howard  
25 is employing of whether a change was effected is not the proper

1 standard at all. I don't think it hinges upon that.

2 The Appeal Board, as you know, is presently engaged  
3 in the consideration of the turbine missile situation in the  
4 context of the North Anna Plant, which has, as I think you also  
5 know, a very bad turbine orientation.

6 Now I don't know whether out of this elongated  
7 process there is going to be any changes ordered. I would be  
8 very happy to defend, if called upon to do so, that as a  
9 responsible, worthwhile exercise, and I think it's much too  
10 simplistic to look at this in terms of whether or not the bottom  
11 line happened to be a change, any more than I think we may look  
12 at the Appeal Board's review of an initial decision on contested  
13 issues being worthwhile or not worthwhile, depending upon  
14 whether or not the Licensing Board is affirmed or reversed.

15 MR. SHAPAR: I wasn't suggesting it as the sole  
16 criterion. I was suggesting it as one thing.

17 COMMISSIONER GILINSKY: What about an overview?  
18 We are dealing at an anecdotal level.

19 CHAIRMAN HENDRIE: And, you know, if you cite three  
20 examples, why, those may be in fact three what I call pathological  
21 cases which are not characteristic of the body as a whole. So --

22 COMMISSIONER GILINSKY: I thought Howard had some  
23 sense of how frequently this was happening.

24 MR. SHAPAR: I asked them to go back to '72, when  
25 the rule was, I guess, put into effect, and they came up with

1 approximately -- a ball park estimate-- 15 cases, although --

2 COMMISSIONER GILINSKY: Out of what? 80 or something  
3 like that?

4 MR. SHAPAR: Yeah. There may have been more, because  
5 that was done very fast.

6 COMMISSIONER GILINSKY: One out of five proceedings, a  
7 question is raised by the Board on its own?

8 MR. SHAPAR: Maybe less than that.

9 COMMISSIONER GILINSKY: What fraction does that take  
10 up of one of those hearings, the one out of five?

11 MR. SHAPAR: We don't have that figure. We would  
12 have to develop that.

13 COMMISSIONER GILINSKY: I wonder if this whole issue  
14 hasn't gotten attention way out of proportion to --

15 COMMISSIONER AHEARNE: Since I raised the issue, let  
16 me then continue to the point I was trying to make. I wasn't  
17 trying to make it from the standpoint you had wasted a lot of  
18 Staff time, although I think in some cases it obviously does.

19 I was trying to make the point by at least  
20 illustrating two examples in which the concept of what the  
21 Licensing Board should be looking at -- at least my concept of  
22 what the role of the Licensing Board is -- was obviously separate  
23 and I believe that the Boards were doing it responsibly, because  
24 I think the guidance, at least in the time I have been on the  
25 Commission -- I cannot really speak for the historical past ---

1 in the time I have been on the Commission, the guidance I think  
2 that Licensing Boards have been given -- and I have really been  
3 focusing on Licensing and not the Appeal Boards -- as far as I  
4 can see, the guidance they have been given is to expand into a  
5 wider and wider scope.

6 The cases I saw indicated to me that it really was  
7 time that the Commission should speak to that.

8 COMMISSIONER GILINSKY: If they are looking at  
9 things which you don't regard as serious, that's something else.

10 COMMISSIONER AHEARNE: Which is exactly the issue  
11 that --

12 COMMISSIONER GILINSKY: But you're going beyond that,  
13 and we are talking about having them end possibly all together.

14 COMMISSIONER AHEARNE: I gave three options. What I  
15 was really attempting to do in a little bit more detail is to  
16 say we really ought to review what that function is, and at  
17 least clarify what the concept is.

18 COMMISSIONER GILINSKY: I think it's worth discussing  
19 whether the Board ought to just go ahead and adjudicate an issue  
20 or whether it ought to bring it to our attention. The Board is  
21 there in our place, and as I said earlier, I thought the hearings  
22 are undertaken in large part to protect private interests, because  
23 as Howard said, you have to adjudicate disputes. And one of  
24 the private interests, of course, is not to get irradiated.

25 But they are also there in our place, and if we were

1 reviewing the decision in detail of the Staff, we would inquire  
2 and if we came up on something we thought was pretty serious,  
3 we would pursue it.

4 Now it's a fair question whether the Board ought to  
5 just go ahead and pursue it on its own or notify us that it is  
6 pursuing it, or ought to ask us whether it should pursue it.

7 These are things we can think about.

8 MR. DIRCKS: Is this just the technical review  
9 you are looking for? It seems to me you are picking up  
10 sporadically. Is this the best way to pursue it? Are you  
11 missing some issues? Is it sort of a haphazard way? Is this  
12 the best way? I think that's the point.

13 COMMISSIONER GILINSKY: You've got a series of audits,  
14 just like the whole Staff review is an audit. It also misses  
15 issues.

16 MR. DIRCKS: Are these contested cases less safe  
17 than the ones that go through the hearing process?

18 COMMISSIONER GILINSKY: There is something about a  
19 contested case that --

20 MR. DIRCKS: It gives you a feeling of security,  
21 then.

22 COMMISSIONER GILINSKY: Now there is an issue that  
23 someone thinks is important to raise.

24 MR. DIRCKS: Who is raising it? The party who will be  
25 affected, or the Board, or somebody else?

1           COMMISSIONER GILINSKY: At the operating license  
2 stage, we know it is initiated by someone who is affected. But  
3 to get back to the question that you were raising in the first  
4 place, which is do we want to have a technical review. Well, I  
5 think we need to have an independent review of the original  
6 safety decision.

7           Now there are various ways you can do that. One way  
8 is for the ACRS to do it. I think in many ways the ACRS does  
9 not perform that function very well at the present time, anyway.

10           In part, it can be through the -- and I think it's  
11 something we need to think about, just how we want that done.

12           I do think it's important that there be some  
13 independent review. You have it, for example, in a somewhat  
14 different form in the area of airline safety, where you have  
15 the FAA and the NTSB.

16           MR. DIRCKS: That's an entirely different process  
17 from which they do the technical review.

18           COMMISSIONER GILINSKY: That's right. But you do have  
19 an independent oversight over a certain line of decisions made  
20 by the basic safety staff. Now I think you have to have that  
21 here, too. I think we ought to practice what we preach. We  
22 tell the Applicants that they ought to check and recheck and so,  
23 and have quality control and quality assurance. I think we need  
24 the same system here.

25           MR. DIRCKS: That's John's point, the whole hearing



1 process went on 25 years ago, and I think what has happened in  
2 the meantime, it has accumulated all these different motiva-  
3 tion purposes, and the --

4 COMMISSIONER GILINSKY: That's right, it was sort of  
5 originally, as far as I understand it, in a sense for show, and  
6 then it started to get taken seriously, and a lot of people got  
7 upset by that.

8 MR. SHAPAR: Not show, to educate the public.

9 COMMISSIONER GILINSKY: It was easy to get into these  
10 hearings because people figured if they came in and watched  
11 the hearing going on, they would like the plant better. Then it  
12 got taken up by people who had different -- you know, intended  
13 to do different things with these hearings.

14 MR. DIRCKS: You know, the adjudicating in some  
15 formal surroundings has never been in my mind a good way to  
16 resolve technical issues.

17 COMMISSIONER GILINSKY: I think the adjudicatory  
18 format, to my mind -- not as a lawyer -- stems from the fact  
19 that that is a traditional way of resolving private disputes  
20 and protecting private interests.

21 MR. DIRCKS: I think that's where we came across  
22 because we mixed it.

23 COMMISSIONER GILINSKY: It is mixed, and we've got  
24 to sort it out.

25 CHAIRMAN HENDRIE: Okay.

1 (Laughter.)

2 It's now quite clear to me what to do next. What  
3 we do next is that I declare that although I feel it has worn  
4 me down, that the discussion has had its purposes, perhaps as  
5 much at frustration at the direction as anything else.  
6 Commissioner Bradford has happily agreed to take another cut  
7 at here's what the whole thing is about in the broadest sense,  
8 being limited not by statute for that purpose.

9 The other thing which I would like to ask Staff  
10 to do, since there was a certain amount of waving around of  
11 alleged data ---

12 MR. SHAPAR: We were just responding to your questions.

13 CHAIRMAN HENDRIE: Howard, if you would please  
14 collect some kind of whatever you think you've got there  
15 which would give us some feeling as to what I will call the  
16 volume of sua sponte hearing activity compared to the total  
17 volume of all hearing activity. You know, if it's a half  
18 percent, in fact, why, it's hard to get greatly exercised about  
19 it. If it's 15 percent, why, then it's becoming a significant  
20 element, and then maybe there is more reason to --

21 COMMISSIONER GILINSKY: If it's only 15 percent of  
22 the hearings--

23 CHAIRMAN HENDRIE: But -- now my further admonition  
24 to you is, please summarize the results of the data in not less  
25 than two typewritten pages. Okay? And if you want to send

1 enclosures, why, okay, but you know, if you can't tell me  
2 what the summary of that is -- of those conclusions are in  
3 two typewritten pages, why --

4 MR. SHAPAR: We're going to give you one page.

5 MR. ROSENTHAL: You might suggest they exclude  
6 cases in which the Licensing Board raised an issue not because  
7 it had discretion to do so, but because it was legally obligated  
8 to do so. The case he cited of Lacrosse, the Licensing Board  
9 did not raise that question because it thought this was a  
10 serious issue and was exercising its discretion, but because it  
11 thought, correctly or incorrectly, that it was obliged by NEPA  
12 to raise it.

13 Now that's a completely different category of cases.

14 MR. SHAPAR: I don't agree at all. No party raised it.

15 MR. ROSENTHAL: That doesn't make any difference. If  
16 you are going to say that a Board is precluded from inquiring into  
17 a matter which it thinks is a matter of law, it's obligated to do  
18 simply because no party read the law as it read, then I think  
19 you have got extraordinarily serious problems.

20 I don't think that is what the Commission's discussion  
21 today had in mind. I thought it was in terms of the Board  
22 raising on its own initiative issues which it thought warranted  
23 exploration under the standards of 2.768.

24 CHAIRMAN HENDRIE: I don't see how you would  
25 distinguish between them, Alan. You don't have a category of

1 propositions on which, on the one hand, the Board thinks we  
2 ought to raise this issue no party has raised, because we are  
3 legally required; and on the other hand, here are an illegal  
4 set of issues.

5 COMMISSIONER AHEARNE: I would have felt that if the  
6 Board wanted to explore it, they should, I guess, have asked  
7 whether we wanted them to explore it.

8 MR. ROSENTHAL: What the Board would have to do then  
9 is simply seek a ruling from a higher authority as to what the  
10 statute requires. But it does seem to me that with due respect,  
11 there is a difference between the Board raising an issue because  
12 again it believes that that issue warrants explanation, and  
13 the Board raising an issue because it thinks its decision will  
14 be illegal if that issue is not explored.

15 Those, in my judgment, are two separate questions.

16 MR. LAZO: I'm wondering if Howard's data will  
17 include issues like Newboldt Island where the Board's inquiry  
18 had the dramatic effect of having the Applicant move the plant  
19 to another site.

20 CHAIRMAN HENDRIE: If you think that Newboldt Island  
21 moved elsewhere because of the Board's activity, forget it.

22 (Laughter.)

23 COMMISSIONER AHEARNE: Bob, I'm going to ask that  
24 specific question, because there was an example raised, I guess,  
25 in perhaps Tony Cotter's paper in which that was the argument

1 that was raised, and I have got to then ask, I guess, the Board  
2 and EDO, because I now have got in two different places two  
3 different groups saying the plant was moved because we did  
4 something.

5 The Board now says it and the Staff has said it, and  
6 maybe it was a happy conjunction, but --

7 MR. LAZO: Nothing ever got written down.

8 MR. SHAPAR: Only Ed Case knows the answer to that.

9 (Laughter.)

10 CHAIRMAN HENDRIE: Anyway, at this point, we have  
11 gone about as far as I want to go for today on this subject,  
12 and I therefore will ask my colleagues to join me in voting  
13 to have a -- now what do I need to do? Vote to close? I don't  
14 need to vote to have a short-notice meeting?

15 MR. BICKWIT: Yeah, I think you do.

16 CHAIRMAN HENDRIE: All right. This is because I  
17 would like to straighten out Diablo. I think we have all got  
18 another 10 minutes of energy left.

19 Those in favor of holding a short-notice meeting  
20 to straighten out the Diablo order wording, vote aye.

21 CHAIRMAN HENDRIE: Aye.

22 COMMISSIONER AHEARNE: Aye.

23 COMMISSIONER GILINSKY: Aye.

24 COMMISSIONER BRADFORD: Aye.

25 CHAIRMAN HENDRIE: Those in favor of closing the

1 meeting because it's an adjudicatory matter and the order will  
2 speak for itself, please vote aye.

3 Aye.

4 COMMISSIONER AHEARNE: Aye.

5 COMMISSIONER GILINSKY: Aye.

6 COMMISSIONER BRADFORD: Aye.

7 CHAIRMAN HENDRIE: So ordered. We will have 30  
8 seconds to reduce the attendance.

9 (Whereupon, at 4:00 p.m., the meeting was  
10 adjourned.)

11  
12  
13 \* \* \* \* \*



NUCLEAR REGULATORY COMMISSION

This is to certify that the attached proceedings before the  
NPC Commissioners

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in the matter of:

Date of Proceeding: March 31, 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.

ANN RILEY

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Official Reporter (Typed)



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Official Reporter (Signature)