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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ADVISORY COMMITTEE ON REACTOR SAFEGUARDS
SUBCOMMITTEE ON ACRS REGULATORY POLICY AND PROCEDURES

Room 1167
Nuclear Regulatory Commission
1717 H Street, N.W.
Washington, D.C.

Wednesday, March 16, 1983

The Subcommittee on ACRS Regulatory Policy and
Procedures of the Advisory Committee on Reactor Safeguards met
at 9:05 a.m.

ACRS MEMBERS PRESENT:

HAROLD W. LEWIS, Chairman
FORREST REMICK

REGULATORY STAFF MEMBERS PRESENT:

JIM TOURTELLOTTE
GERRY CHARNOFF
RAY FRALEY

DESIGNATED FEDERAL EMPLOYEE:

MARVIN C. GASKE

ACRS FELLOW:

PAULETTE P. TREMBLAY

TR04
delete B. White

HEMLOCK

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MR. LEWIS: Welcome to the 476th meeting of the Subcommittee.

It would be very interesting for us to hear from you where we are with the administrative package, what is in it, how it is proceeding, how the schedule is, how it is going to be implemented; and as a secondary question, although we don't want to talk about the legislation which has already been submitted to the Hill, it would be nice to know, since so many people believe that many of the items in the legislative package could be accomplished administratively, it would be nice to know whether there is any schedule for cutting bait on the legislation and trying to crack on some of those issues instead of just putting them on the back burner because they are up on the Hill.

That is the class of things I would be interested in. Forrest, do you have anything?

MR. REMICK: No, I think you have covered it. I am particularly interested in knowing the proposed schedule, now, that the Regulatory Reform Task Force is working on: what items are they considering now, when do they propose to present them to the Commission.

Somewhere I read before, within the last couple weeks, I thought, where the Commission has apparently decided not to go with a policy statement on backfitting but letter of the

1 Staff. I would like to hear about that, what the significance
2 is of that.

3 MR. TOURTELLOTTE: Well, on the administrative package
4 for the most part, as far as I know right now, it is in that
5 report which we filed with the Commission in November of 1982.
6 There is one item which we did not include in this package
7 which we may develop -- I am working on it to some extent --
8 and that is a set of rules which would revise to some extent
9 the manner in which we handle standardization.

10 I had a set of rules drafted on it but I was not
11 pleased with the way that those rules developed in their final
12 drafting, so I did not include it in this November package.
13 There is a little more time now to look at that closer, and I
14 am going to be doing that in the next few months.

15 I have no schedule because if in fact it cannot be
16 developed to the point that I think it is worth presenting, I
17 simply would not present it. I'm hoping that we will be able
18 to make some progress.

19 As for what is in the package, in the November
20 package, of course it really falls into about three different
21 administrative areas.

22 MR. REMICK: Excuse me, Jim. When you say November
23 package, is that 82.447?

24 MR. TOURTELLOTTE: Yes, the draft report of the
25 Regulatory Reform Task Force on Licensing Reform.

1 The three parts of that administratively are for
2 convenience. One is backfitting, two is the hearing process,
3 and three is -- actuali; there are two parts to number three,
4 but they are so related that we put them together: that is,
5 the ex parte rule and the separation of functions rule. Those
6 two go together.

7 Then there is the revising of the role of the Staff
8 as a party. What I really meant is that revising the role of
9 the Staff as a party and the ex parte separation of functions
10 rules go together as a consideration.

11 Now on backfitting, we took that up with the Commis-
12 sion on March 1, and we started by considering the policy
13 statement which was developed and made actually part of the
14 November proposal. It comes toward the end of that. It is
15 Enclosure 2. The Commission was split on the question of
16 whether there would be a policy statement or a Staff require-
17 ments memo. They had a 2-2 split with the fifth Commissioner
18 not being there, and in order to move it along, why, the
19 Chairman agreed to change his vote and go with the Staff re-
20 quirements memo.

21 The significance of that is not terribly great, I
22 guess. The difference between a policy statement and a Staff
23 requirements memo is more one of public perception than anything
24 else. A policy statement has no legal effect. It is simply
25 an internal directive, and the Staff requirements memo is the

1 same thing, it's an internal directive.

2 The policy statement has a little higher profile and
3 I think it's probably a way of having the Commission to say this
4 is a very important subject of national concern and we are
5 placing it in the Federal Register to let you know we are doing
6 something about it. The Staff requirements memo, on the other
7 hand, is an internal directive that just goes to Bill Dircks and
8 says this is what you should do.

9 We have been drafting the Staff requirements memo in
10 association with some of the Staff, and as currently developed,
11 that Staff requirements memo will do three things. One, it
12 tells in a very straightforward manner, tells the EDO to ensure
13 that any changes proposed by the Staff which fit within the
14 definitions of backfitting in 10 CFR 50.109 are classified and
15 are only imposed if the findings by 50.109 are formally made
16 and documented.

17 Now, this is consistent with what the ACRS had said
18 earlier about backfitting, and that is that we don't need a
19 new rule, we just need the Staff to enforce the rule they have
20 got. That assessment, of course, is one that I don't entirely
21 agree with, but nevertheless, insofar as the ACRS is concerned,
22 we are doing what the ACRS wanted to do, and that is to tell
23 the Staff to impose the rules that are on the books.

24 MR. LEWIS: Well, being the ACRS doesn't make you
25 right, of course.

1 (Laughter)

2 MR. TOURTELLOTTE: Done in the proper spirit of
3 things, I'm sure.

4 (Laughter)

5 MR. REMICK: The definition of backfitting, then,
6 would be the current 50.109 definition, not the -- the 82.447
7 definition, is that right?

8 MR. TOURTELLOTTE: That is right. It would apply
9 only to systems, structures and components, whereas the new
10 rule includes some other things.

11 I was going to say there are two other parts to this.
12 The second part requires that the Staff in making their back-
13 fitting decisions and findings use the procedures that were
14 developed for CRGR in approving generic requirements. Those, I
15 believe, are found in Part 4, although I don't have the speci-
16 fic recollection. They include such things as specification
17 of the proposed backfit as it will be sent to the licensee,
18 review of relevant Staff papers and underlying Staff documents,
19 short and long-term requirements, whether the backfit defini-
20 tively settles an issue or may result in additional backfitting,
21 whether the proposed backfit relates to other requirements and
22 whether other reassessments will be required, does the backfit
23 involve computation analysis, engineering design or equipment
24 or structural modification, and that series of things that
25 are listed in the CRGR procedures.

1 Finally, the third part requires that the EDO provide
2 the Commission with a plan describing the procedures to be
3 followed in implementing the backfitting decisions, outlining
4 the process to be used, who will make those decisions and how
5 the decisions would be documented.

6 So it actually requires a little more than what the
7 Staff is currently required to do.

8 Now, let me tell you candidly that one of the argu-
9 ments that is currently in existence between the Staff and the
10 Task Force, or at least me, is that the Staff wants this to
11 only apply to plants which already have operating licenses.
12 The question is posed as to why they want to do that, and the
13 only answer -- and I qualify this -- the answer as I understand
14 it is that they don't really know how to implement 50.109 for
15 anything but plants that already have their operating licenses.

16 My response to that is that that isn't what the rule
17 says, and if the purpose of the directive is to say to enforce
18 the rule, then they ought to enforce the rule and they ought to
19 do whatever is necessary to figure out how to enforce that rule,
20 how to put it into effect. If it requires development of a
21 set of criteria along the lines that are outlined in the new
22 rule which we have proposed, then they can do that. But they
23 cannot simply sit back idly and say someone has passed a rule
24 and we don't understand how to enforce it.

25 MR. LEWIS: I guess I have -- you are way ahead of

1 me, I think, because I don't quite see how they can do it for
 2 either existing OLS or new plants. I always come a cropper on
 3 understanding what the criteria for backfitting could possibly
 4 be in the absence of some kind of risk-benefit analysis, and
 5 the Staff is notoriously unable to do risk-benefit analyses,
 6 and as you know, I have a problem believing that there is any-
 7 thing in the charter of this agency that makes it possible to
 8 do such things.

9 It is, of course, notorious that in the things that
 10 were done after TMI, there was very little analysis of any kind
 11 done to justify the extensive backfitting required of the
 12 existing plants. I just don't know how the Staff is going to
 13 do the analyses, and maybe I would know more if I had read
 14 50.109. Would I know more?

15 MR. TOURTELLOTTE: 50.109 is not going to tell you
 16 that, no.

17 MR. LEWIS: It says that you have to consider the --
 18 maybe I should read it. What in substance does it say? I
 19 should read it. You should go on while I read it.

20 MR. REMICK: I could see where the Staff could have
 21 a problem with the current 50.109 going back to the CP stage,
 22 but I agree with you that that is what the rule says and that
 23 is what the Commission should be implementing. I can see where
 24 the Staff would have greater difficulties doing it that way.

25 I do like, in part, at least, what is proposed in

1 447 where you are talking about new regulatory requirements or
 2 modification of regulatory requirements. You are not getting
 3 down to talking about systems and equipment and things like
 4 that. It would be easier to implement, I think.

5 MR. TOURTELLOTTE: You see, there is actually nothing
 6 in -- well, let's back up a minute and start in a different
 7 way. 50.109 is fairly vague.

8 MR. LEWIS: It sure is.

9 MR. TOURTELLOTTE: But regulations do not have to be
 10 extremely specific. They are in fact regulations. They are
 11 supposed to cover a broad range of circumstances and situations,
 12 and the regulator, in my view, is expected to come up with
 13 various plans to implement those regulations depending upon the
 14 circumstances which which they are confronted.

15 There is nothing in the new rule that could not be
 16 implemented under the current rule if they would simply adopt
 17 it as a management plan, and what is under the new rule is more
 18 specific and is more directive and, in fact, tells them how to
 19 do this.

20 MR. LEWIS: No. In fact, I know what is troubling me
 21 now. I agree with you on that that in fact I think this agency
 22 tends to be much too specific in its guidance in general. My
 23 problem is that as I read 50.109 now, which doesn't take very
 24 long because there are only a few words in it, it says that
 25 you can require backfitting, the Commission can, if it finds

1 that such action will provide substantial additional protection
2 which is required for the public health and safety, and the key
3 word is "required" there because that is very much in the eye
4 of the beholder.

5 If I were working for this agency and were asked to
6 come up with a plan to implement that, I don't see how I could
7 do it without requiring that some kind of PRA or at least some
8 kind of analysis be done of the effects of any given backfit.
9 It is contemplated that that is in the cards?

10 MR. TOURTELLOTTE: No, neither PRA nor the safety
11 goal are necessary for implementing the backfit rule, and in
12 my view it can be done through the exercise of scientific
13 technological judgment, if you will.

14 The logic that I use I have used, I guess, before,
15 but the simple fact is that for the past quarter of a century
16 or more, we have made judgments about what is required for the
17 public health and safety without a PRA and without a safety
18 goal, and if you concede that we have made those judgments
19 soundly, then you have to concede that we can make new judgments
20 soundly without a PRA and without a safety goal.

21 MR. LEWIS: I understand that, but in fact just to
22 carry that line a little bit further, how can we say that the
23 Staff hasn't been enforcing 50.109, because every backfit
24 requirement has presumably been the result of the educated
25 judgment of one of these people who for a quarter-century, to

1 use your words, have been performing so well? I don't see
2 what the difference is.

3 MR. TOURTELLOTTE: Well, I will point out that when I
4 say that it is a judgment, I also don't believe it is something
5 you pull out of a hat. There has to be some kind of an analysis
6 done.

7 MR. LEWIS: Okay. So that is what we are groping
8 for, how much analysis.

9 MR. TOURTELLOTTE: Yes, how much. The analysis does
10 not necessarily require a PRA or a safety goal, but it requires
11 some analysis. Frankly, the way I have observed it from maybe
12 a different angle is that some of these requirements will be
13 made, and if you ask a staffer why they want this requirement,
14 they have no answer. They had made no analysis. They had read
15 some book about some new idea and they just thought it was a
16 good idea, and without any specific analysis as to how it
17 applies to this plant or this set of plants, they just say, well,
18 it sounds like a good idea to me.

19 That, in my view, is not sound exercise of scientific
20 or technological judgment.

21 MR. LEWIS: Well, of course you know I agree with
22 that, but I'm having trouble defining what is --

23 MR. TOURTELLOTTE: And a good deal of what I did as
24 an attorney -- in other words, they always say why is an
25 attorney involved in this? And I ask myself that question a

1 lot when I wake up in the morning.

2 (Laughter)

3 MR. REMICK: Especially in the last year.

4 MR. TOURTELLOTTE: Yes, I do.

5 MR. LEWIS: That isn't what I think of when I wake up
6 in the morning.

7 MR. TOURTELLOTTE: You don't wonder why I'm doing
8 this?

9 (Laughter)

10 MR. TOURTELLOTTE: The real job that we had was to
11 make sure from a procedural standpoint that the Agency is not
12 acting arbitrarily or capriciously, and in so doing, what we
13 do, we take a fundamental problem, somebody on the Staff is
14 making a proposal and we don't know anything about it, but we
15 start out just as a matter of logic having them explain it to
16 us and why they are doing it.

17 I found through the years for the most part they
18 couldn't tell you why they were doing it initially. Now,
19 really what it amounted to, and I think this is poor regulation
20 as well, is that by the time we got through, we had a rationale.
21 But that isn't the way to impose backfits. It's not post hoc
22 rationalization. It is taking the time and effort to analyze
23 it before you impose it, and if you have a fairly good reason
24 for doing it, go ahead and do it. But that isn't what has
25 been happening.

1 MR. LEWIS: No, I realize that isn't what has been
2 happening, and the thing I am trying to understand is why under
3 the new rule things will be different or under the new Staff
4 directive things will be different, because unless one makes --
5 I guess there are two ways to go. One is to make explicit,
6 you know, as an extreme world, one might say you must do a
7 PRA, however imperfect. I don't support that because they do
8 too many. We don't need more bad PRAs in this world.

9 Another way is to say that big brother is looking
10 over you and just regard this as an exercise in sensitizing the
11 Staff to the fact that higher management believes that in many
12 cases they have been acting without adequate analysis. That
13 kind of sensitization may be better than any new rule. I
14 think that is what you were alluding to in the difference
15 between a policy statement and a Staff directive.

16 But other than sensitizing the Staff, I don't see how
17 you get by without really making very explicit what it is that
18 you expect from the Staff. I don't see what keeps them from
19 falling into the old ways even after the new memo is issued.

20 MR. TOURTELLOTTE: Well, the distinction between the
21 old ways and the new ways, I think, is fairly easy to pick
22 out. I mean the old way was to simply read some current report
23 that says this is a pretty good idea and then automatically
24 assign that to some specific plant or a group of plants. That
25 leaves out all of the considerations -- in other words, the

1 kinds of considerations were not made as following. It was not
2 considered what the potential reduction in risk to the public
3 of accidental off-site release of radioactive material was. It
4 was not considered the potential impact on the radiological
5 exposure a facility employs. It was not considered the instal-
6 lation and continuing costs associated with backfit, including
7 the cost of facility downtime or the cost of construction
8 delay.

9 It was not considered what the potential safety impact
10 of changes on plant or operational complexity, including the
11 effect on other proposed and existing requirements. It was
12 not considered the estimated resource burden on the NRC asso-
13 ciated with proposed backfit and the availability of such
14 resources, and it was not considered what is the potential
15 impact of the differences in the facility type, design or age
16 on the relevancy and the practicality of the proposed backfit.

17 Those are the kinds of things that we say they have
18 to consider.

19 MR. REMICK: When you say "have," that is in the
20 proposed --

21 MR. TOURTELLOTTE: That's in proposed rule.

22 MR. REMICK: Not in the requirements memo, though.

23 MR. TOURTELLOTTE: No. But in the requirements memo,
24 if you go over -- I mean, just take whatever those bullets are
25 in the procedures of CRGR, and you have got a mechanism for

1 them to at least think about it before they do it.

2 Now, let me say another caveat here, which is to some
3 extent in agreement with what you are saying, or at least
4 answers what is sort of a rhetorical question, what makes me
5 think that Staff is going to do anything differently than they
6 have done before.

7 The one great problem in this whole thing in manage-
8 ment. I mean the reason that 50.109 has not been followed for
9 12 years is because management hasn't chosen to follow it.

10 MR. LEWIS: I agree with that.

11 MR. TOURTELLOTTE: Currently management is saying, we
12 didn't know how to follow it. I'm not sure that that was the
13 same motivation earlier on. I'm not sure but what it wasn't
14 just a little bit more like regulatory arrogance that put us in
15 a position of thinking that we didn't have to follow this be-
16 cause whatever we were doing was done in the name of safety.

17 But you know as well as I do, you can't just come up
18 and say I'm doing this in the name of safety. You can go up
19 on the top of a building and put an inner tube around your
20 waist and jump off in the name of safety, but you're going to
21 make a big splash when you hit. Doing things in the name of
22 safety is not always in the best interest of what we're doing.

23 MR. REMICK: Jim, I think the Commission has to
24 accept some blame, too, for not seeing that 50.109 was imple-
25 mented.

1 MR. TOURTELLOTTE: Sure.

2 MR. REMICK: The Staff was at fault, but I think the
3 Commission knows that there is a regulation there and certainly
4 knew that it wasn't being followed and certainly doesn't follow
5 it all the time by itself.

6 MR. TOURTELLOTTE: As a matter of fact, we discuss
7 reform and they know backfit is one of the issues, and the
8 Commission itself will impose a classic backfit and never make
9 an analysis.

10 MR. LEWIS: No. In fact, the Commission, I think,
11 deserves not just part but all the blame for the --

12 MR. REMICK: They are responsible, sure.

13 MR. LEWIS: It is responsible for this agency. But
14 the thing that is troubling me, Jim, is that I can see this
15 developing into a requirement for the generation of more
16 paper before what would have been done is done anyway. I am
17 trying to get away from the pro forma handling of these re-
18 quirements and sort of groping -- again using that word -- for
19 what it is, other than sensitization to the fact that the
20 Commission really wants them to go more rationally on backfit-
21 ting, that will be done differently.

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1 MR. TOURTELLOTTE: I wish I could tell you that this
2 exercise was not going to generate more people, but it is. And
3 I wish I could tell you that there is a way to do it without
4 generating more people but I do not believe there is. It is
5 one of those unfortunate things where you know perhaps if
6 people had done the right thing to begin with, we would not
7 be discussing this and there would not be any need for reform.

8 As I indicated, too, the regulation, if it were, say,
9 properly understood in the philosophical sense, and if people
10 had been interested in seeing that its intent was met all
11 these years, then the instances where there would have been
12 abuse of the system would have been very, very small, and we
13 probably wouldn't be talking about it as a rule change. We'd
14 be talking about it in terms of some kind of staff discipline
15 on an individual basis. But that isn't the way it's happened,
16 and we're at a different juncture now.

17 MR. REMICK: There is one advantage of either putting
18 out a policy statement or a requirements memo, and that is
19 it puts the Commission on record of what it hopes and wants
20 the Staff to do; and I think this, hopefully, will build up
21 the backbone of Applicants and Licensees to appeal cases
22 that they differ with the Staff.

23 From that standpoint, I think a policy statement is
24 perhaps better because it gets the wider distribution, but I
25 don't think it matters whether it's a policy statement or a

sc 1 1 requirements memo; but the policy statement does get that
2 broader conception that it's a policy change or something
3 like that.

4 MR. TOURTELLOTTE: I think that's -- that was
5 my position, and it was the position shared by Commissioners
6 Roberts and Palladino. But the thing split, and the Chairman
7 wanted to just get it out and do something. So in any
8 event, had Commissioner Gilinsky been there he probably
9 would have voted the other way anyway.

10 MR. REMICK: Is one of the reasons to go the
11 requirements memo route is the fact that quite often with
12 policy statements it's not a requirement to go out for
13 public comment on a policy statement, although I don't
14 think it's mandatory. Was that part of the discussion,
15 the fact that you could get something out quicker as a
16 requirements memo?

17 MR. TOURTELLOTTE: No my understanding was that
18 it just really wasn't important.

19 MR. LEWIS: What is the status of it now?

20 MR. TOURTELLOTTE: We're trying to work it out
21 with the Staff. My guess is if the Staff wants to limit
22 the Staff requirements memo, which I find a little peculiar,
23 the Staff making a recommendation as to what they should
24 be required to do, nevertheless, I have learned that this
25 isn't an ordinary management structure, so --

1 MR. LEWIS: Thank god.

2 MR. TOURTELLOTTE: Nevertheless, if they insist
3 on only applying it to operating licenses, then what we'll
4 probably do is give it to the Commission and note the
5 difference of opinion and let the Commission decide what
6 they want to do.

7 MR. LEWIS: Well, I'm just having trouble understanding
8 so many things this morning. I'm having trouble understanding
9 why the Staff believes that there's a distinction in their
10 ability to implement this for operating licenses and new
11 plants.

12 Isn't it the same procedure that will be used,
13 the same bullets, the same criteria?

14 MR. TOURTELLOTTE: I think their problem is that
15 they don't have a clear picture of what a new requirement
16 is.

17 MR. LEWIS: I see.

18 MR. TOURTELLOTTE: If they have a developing
19 code, for instance, is that a backfit or is that a change.
20 And they have used a rationale, which in my view is a
21 copout, for years to get around the backfit rule; and
22 they have used it so long that I think they really believe
23 it.

24 MR. LEWIS: I see.

25

1 MR. TOURTELLOTTE: And that is that this is not a
2 requirement -- this is not a new requirement. This is a
3 requirement to meet the regulations. The regulations have
4 always been there, and this requirement is simply to meet
5 the regulations.

6 Now, why would I say that's a copout? We'll try
7 a little logic if we can. If they say it's to meet the regu-
8 lations, they're talking about all the regulations. If the
9 backfit rule is a regulation, that's one of the regulations
10 it has to meet. And if it has to meet that one regulation,
11 then they're required to analyze it before they impose it,
12 and so they can't say that -- they can't -- to determine
13 whether it is a backfit or not. And so it is a new require-
14 ment to meet some part of the regulations.

15 Our regulations say that when you have a requirement
16 like that and it involves an alteration, a modification of
17 system, structure or component, you have to analyze it and
18 demonstrate that it is going to provide a substantial addi-
19 tional protection.

20 Our regulations say that, but what they're saying
21 is it's a requirement that is necessary to meet the regula-
22 tions, all except 50.109, which we don't have to look at
23 because it's necessary to meet the other parts of the
24 regulations.

25 MR. LEWIS: Since you're talking logic, you're

1 coming perilously close to some of the classic logical
2 dilemmas having to do with the set of all sets which have
3 the property that the set itself is not a member of that set,
4 Lord Russell's original paradoxes that led to some of the
5 great logical progress in our time. Very subtle stuff. We
6 shouldn't deal with that in this building.

7 MR. TOURTELLOTTE: I fear that it's so subtle that
8 it's plum evaded some of the Staff.

9 (Laughter.)

10 MR. REMICK: Isn't it that the Staff has trouble
11 because -- if it were a standardized plant they probably
12 would have no difference in the amount of trouble between
13 doing it for an OL or CP. This is a case now where the
14 design is ongoing after the CP, and decisions are being made,
15 and the question is whether that decision leads to a piece
16 of equipment, whether that's backfit or that's -- or, you
17 know, a requirement to meet the regulations.

18 I can see under the current policy where design
19 and construction is going on after the issuance of a CP that
20 they will have a difficult time saying is that a backfit or
21 is that what we would normally have required. I can see the
22 difficulty, but I'm not saying that they should therefore
23 not to do it, because the rules say they should do it after
24 the CP. But I can understand their difficulty, at least I
25 think I can.

1 MR. TOURTELLOTT: Well, you know, another miscon-
2 ception that not only the Staff has, but I think several
3 members of the Commission have, is that the design as it
4 develops or because -- the design is only developed to 20,
5 30 percent that a CP issues. Actually, within a year of the
6 CP, 85 to 90 percent of the design is determined by reason
7 of the design decisions that have been made at that point.

8 It may be that the actual specification of the pump
9 and that sort of thing are not yet written down, but they
10 have been determined; and that, I think, is one of the things
11 that poses a problem in terms of the actual implementation
12 of the design and the regulation of that implementation.

13 MR. LEWIS: Many of the safety issues aren't resolved
14 then until that final specification is really made, and the
15 rules for lubricating linkages and so forth are really written
16 down. So whereas the design may be determined, it still isn't
17 complete. And there are a whole class of other issues that
18 are certainly --

19 I guess that I'm also -- let me try you out on another
20 issue, the question of meeting the regulations. One of the
21 problems that I guess that I noticed cropping up from time
22 to time around here is failure to appreciate the difference
23 between meeting the regulations and making nuclear power safe.
24 And adherence to the regulations is a way, but there is more
25 to that than safety; and I guess I have in mind a classic

1 case in which an alleged analysis was done on a plant require-
2 ment in which one of the officials in the same agency was
3 asked whether they'd considered the decrease in safety that
4 would be occasioned by removing this particular item from the
5 plant, and the answer was there was no decrease because they
6 hadn't been allowed to take credit for that part of the
7 original licensing anyway. And that's a misunderstanding of
8 the difference.

9 So I guess I continue somewhat troubled by the
10 problem of turning the Staff loose to make the analyses that
11 are contained in these bullets, although these are all good
12 things, and somehow assuring that there's reasonable quality
13 to these analyses; that is, that they're taken seriously.
14 And if the Staff resists them, of course they will generate
15 paper and not be taken seriously; and in the end it becomes,
16 as has been said several times, a genuine management problem;
17 that is, is the Commission going to take this agency in hand
18 and make it a safety agency.

19 MR. TOURTELLOTTE: That is one of the things that
20 I've tried to make a point of every time I've had occasion to
21 speak about this, and that is that all of these rules mean
22 nothing if you don't have a management that is really inter-
23 ested in carrying out the rules and the overall general purpose
24 of the agency itself, which is protection of public health
25 and safety, and the other things that are set out by the

1 statute relative to what is inimical to the common defense
2 and security.

3 MR. LEWIS: But, of course, that language dates back
4 from the time when it was the AEC, and the AEC, of course, had
5 a much larger role in the common defense and security than NRC
6 does now. So in a certain sense I think that's vestigial
7 language, and the mission of this agency is really -- its
8 principal mission is the public health and safety.

9 MR. TOURTELLOTTE: Well, I don't doubt but what it's
10 the principal interest is the protection of public health and
11 safety. I don't believe, though, that we have a tunnelized
12 directive. I think that you have to consider the natural
13 consequences of everything that you do, and I cannot believe,
14 for instance, that we should make decisions that are not
15 in the national interest.

16 MR. LEWIS: I, please, never suggested that. I just
17 am trying to -- you know, you mentioned whenever you talk
18 about these things. I always tried to emphasize the primary
19 mission of public health and safety in this agency, because
20 it's too easy to diffuse that objective around here.

21 MR. TOURTELLOTTE: Well, I've always, you know,
22 everything that anybody ever does they do in the name of
23 the public health and safety, you know, whether it's safe
24 or not.

25 MR. LEWIS: Well, you know, I read something a month

1 or two ago, and I simply don't remember what the specific issue
2 was, but it was a Staff document which had a title that said
3 that on this particular thing they were going to as required
4 consider the costs and benefits of this proposed change. And
5 I simply don't remember what the change was, and I eagerly
6 thumbed through to that section in the report, and I found
7 that it stated that the benefits were that this would enhance
8 the public health and safety, and the costs were that it would
9 cost the utility \$462,000, period, end of discussion.

10 And I'm trying to grope for -- that's the third time
11 I've used that word -- for why it won't go on like that when
12 this new paper is generated.

13 MR. TOURTELLOTTE: Well, I've no guarantee that it
14 won't, and we can only hope that all of the discussion that
15 takes place and perhaps some of the directives will create a
16 new and different atmosphere on how they're going to approach
17 this difficult stuff.

18 MR. REMICK: What kind of a timetable are you on
19 the draft of the regulatory requirements memo?

20 MR. TOURTELLOTTE: Oh, last Friday, last Friday.
21 The real problem that I have -- I mean we came up with it
22 in about a day, and our primary difficulty is that the Staff
23 took a while, and as of yesterday afternoon they are now
24 going to circulate it to all their major office directors
25 before they approve it; so I don't know whether we'll get it

1 out this week or not.

2 MR. LEWIS: They want to circulate it regionally,
3 too?

4 MR. TOURTELLOTTE: It could be that they'll send it
5 to the IAEA.

6 MR. LEWIS: I see. It'll make everything much
7 more efficient.

8 MR. REMICK: Marv, I assume we'll get a copy as
9 soon as it's available to the Commission offices.

10 MR. GASKE: (Nods affirmatively.)

11 MR. TOURTELLOTTE: I'm hoping that we'll be able
12 to get it out this week, but I'm not sure. If we don't get
13 it out this week, it'll probably be the week -- another week
14 after that. I'll be gone all the following week. I perhaps
15 can do it over the phone.

16 MR. REMICK: Then you're going to start on the
17 proposed rule change?

18 MR. TOURTELLOTTE: Yes. We have -- I got into a
19 brief discussion of the proposed rule change with the Commis-
20 sion on the first, and we're going to take that up again on
21 the 31st.

22 The chief disagreement that exists between the Staff
23 and the task force -- and I use the term "task force" advisedly,
24 because I don't like to speak for all the members. So if I
25 use the first person, it's because I feel more comfortable

1 speaking for myself.

2 The chief problem we have is that the Staff does not
3 believe that the new Section 2.810 should go into effect
4 insofar as rulemaking is concerned. They don't have any
5 problem with the standards that are set out there being
6 incorporated into 50.109, but they don't want them to be
7 applied to rulemaking.

8 And my view is that a new requirement is a new
9 requirement, no matter whether you impose it by rule or
10 whether you impose it by a bulletin and an order of whatever
11 it is. And if we have a new requirement on a plant or for
12 a group of plants, we should have a fairly substantial analysis
13 of the implications of that requirement, in any event.

14 I use again for my logic that if you accept, as the
15 Staff seems to accept, that imposition of a backfit can have
16 safety implications which are, a) positive, b) neutral, or
17 c) negative, the only way that you can determine whether it has
18 one or the other effect is through analysis. And we should
19 not be excused from making an analysis simply because we're
20 putting something out for rulemaking. If we do that, we are
21 leaving open the question of whether it is positive, whether
22 it is neutral or whether it is negative in safety effect.
23 And while we can afford, we can afford as an agency in follow-
24 ing our mandate to leave open the first two questions, we
25 cannot leave open the third question as to whether it has a

1 negative implication or not, and therefore, we have to have
2 the analysis, and that's why I believe very strongly that
3 rulemaking should undergo the same kind of analysis or a
4 similar kind of analysis to determine what the effects are.

5 MR. LEWIS: I'm glad to hear you speak of the pos-
6 sible negative effects of change, because there is the pithy
7 old engineering saying "If it ain't broke, don't fix it. And
8 many -- there is a lot of wisdom, as there is in all old
9 pithy sayings, and there are a number of cases in which changes
10 have had negative effects.

11 For example, I believe that the major accident at
12 Crystal River 3 was caused by this agency because of a require-
13 ment that a subcooling margin meter device be installed, and
14 as it turned out, it was installed improperly and shorted out
15 the control system at that plant. And the Commission I
16 guess takes the position that well, heck if you order people
17 to do things, you have a right to expect them to do it well,
18 but, of course, there's always a probability that it will not
19 be done well. And this happens, you know, fairly often in
20 the real world. So that is an important consideration, but
21 it is a very hard one to quantify.

22 I read in some piece of paper that crossed my
23 desk in the few days I've been home since I was last in
24 this building, that the circuitbreakers at Salem had been
25 overhauled the previous month. I don't know if that's true

1 or not, but I found that in one piece of paper, and it was
2 very interesting if they were because this might well be in
3 the same ballpark -- too frequent overhauls are a bad thing,
4 too.

5 MR. TOURTELLOTTE: Well, along those same lines,
6 one of the arguments that I've advanced in association with
7 backfit is also related to the -- I don't know if it's an
8 engineering principle or not, but it's certainly a logical
9 principle -- and that is, any time that you add anything to
10 a machine, it makes it more difficult to operate to maintain,
11 and that's one thing. And the other thing is there are more
12 things that can go wrong with it.

13 MR. LEWIS: Absolutely.

14 MR. TOURTELLOTTE: So given that, and that operation
15 and maintenance is an important part of safety, and that things
16 going wrong with something are an important part of safety,
17 then I think we ought to be very careful about what it is
18 that we require as an addition to something that we have
19 already said is a safe machine.

20 MR. LEWIS: We who fly single engine airplanes
21 always say that the problem with twin engine airplanes is
22 that you have twice the chance of an engine failing.

23 (Laughter.)

24 MR. REMICK: Jim, I'm not sure I understand the
25 Staff's concern with 2.810. Is there concern that that

1 would codify the factors that are to be included in the
2 analysis? Is that your concern? Or that you would require
3 analysis for proposed rulemaking? I'm not quite sure I
4 understand that.

5 MR. TOURTELLOTTE: I think their problem is that
6 they don't believe they can do it because they believe it would
7 require an analysis of every plant for a rule. In other words,
8 before you passed the rule you would have to analyze each
9 plan on an individual basis.

10 MR. REMICK: So they're not in favor of doing
11 analysis for a proposed rule, is that your concern?

12 MR. TOURTELLOTTE: Right.

13 MR. REMICK: And it has nothing to do with the
14 set of factors that are identified necessarily, or have they
15 been defining those?

16 MR. TOURTELLOTTE: No. The set of factors for
17 a specific plant, the fact that 50.109, they would take those
18 factors and move them into 50.109. They'll accept that.

19 MR. REMICK: That I can understand, okay.

20 MR. TOURTELLOTTE: But their real problem is in
21 order to pass a rule, we have to go out and analyze the
22 effect of this rule on 76 plants.

23 MR. REMICK: Yes.

24 MR. TOURTELLOTTE: Now, my answer to that is no,
25 I don't think so. I think you can make a generic analysis,

1 and if indeed somebody doesn't agree with your generic
2 analysis, somebody sitting out there, we have 2.758 which says
3 they can come in and say that the rule doesn't apply to them
4 and show why it doesn't apply. But we should at least make
5 the initial effort to determine on a generic basis what the
6 effect of the backfit is across the board.

7 We have a few of my associates who are pedanticists,
8 and they say that like, for instance, take item number 6, the
9 potential impact of the differences of facility-type design
10 or age on the relevancy and practicality of the proposed
11 backfit. They say well, you couldn't possibly do that unless
12 you go out and look at every plant, because how are you going
13 to know the age of the plant.

14 The answer to that is you make a determination about
15 once you know what the backfit is, you have some idea of what
16 the cost and the benefits of it are, you know how long it's
17 going to take to implement it. It's obvious, for instance,
18 if it takes five years to implement it, that you don't have
19 to apply this to plants that only have five years left on
20 their license. I mean it would be a ridiculous thing to
21 ask somebody to add something to their plant that is not
22 going to be completed until after the plant is no longer
23 operational.

24 When you get to plants perhaps with ten years of life
25 left on their license, then you get into a little more

1 difficult situation. But perhaps, depending on the amount
2 of expenditure, it's not that difficult either. I mean you'd
3 have to consider those. But you can categorize plants by
4 age just as you can categorize them for other purposes.

5 MR. LEWIS: It's probably a mistake to take it as
6 gospel that when a plant reaches the end of life it will no
7 longer be operational, because I'm personally convinced people
8 do take much more interest in annealing pressure vessels in
9 place as more plants come near the end of their life as
10 compared with the cost of a new plant or other means of making
11 the same electricity.

12 So it's not beyond the realm of possibility that
13 all the plants out there will go on for a long, long time.

14 MR. TOURTELLOTTE: I think a number of them will,
15 too, but, however, you do have the caveat that if they are
16 going to get an extension of license, then you can require
17 that backfit that you did not require because you thought
18 it was going to expire.

19 I'm talking about the potential impact of differences
20 in design as well. I mean you're going to be looking at
21 every facet of -- you have to look at every facet of the
22 design.

23 Now, that's not what that's intended to do. It's
24 just that, you know, maybe you don't want to do the same thing
25 for HTGRs that you do for BWRs or whatever the -- you know,

1 a broad kind of a design classification is, it doesn't mean
2 that you have to look at the specifics of each plant design
3 and go through point by point.

4 MR. REMICK: Jim, I had an editorial question con-
5 sistent with apparently what Staff has said. But I wondered
6 why these six factors weren't in 51.109 rather than 2.810, and
7 then if one was going to have them apply to rulemaking, it
8 just makes a statement that the factors in 51.109 should be
9 used in an analysis if you had a proposed rulemaking.

10 It was just an editorial question, and I thought
11 why was it put here rather than 51.109.

12 MR. TOURTELLOTTE: Well, we've done it. We've put
13 it in 2.180 and cross-referenced it to 51.109. It could have
14 been done exactly the opposite way.

15 MR. REMICK: To me logically it should be the other
16 way. It's a trivial point, but I thought maybe there was
17 something I was missing on why it was done that way.

18 MR. TOURTELLOTTE: 51.109 was already along the
19 way it was. 2.180 wasn't.

20 MR. LEWIS: Since you had backfitting out of your
21 hair as of last Friday, what is the schedule for the rest
22 of the administrative package? What is happening?

23 MR. TOURTELLOTTE: Well, backfitting is not out of
24 my hair because we're --

25 MR. LEWIS: I know that.

1 MR. TOURTELLOTTE: Because we've got that on the
2 31st as well.

3 MR. REMICK: On the 31st are you just going to
4 discuss in general again, or are you going to have a package
5 before the Commission as a proposal for a proposed rule?

6 MR. TOURTELLOTTE: This is the rule. We'll be
7 taking up the rule on the 31st.

8 MR. REMICK: Oh, okay.

9 MR. GASKE: Jim, could you go through the situation
10 where the Licensee wishes to make a change, particularly when
11 the Staff agrees that it's a worthwhile change as far as
12 backfitting is concerned?

13 MR. TOURTELLOTTE: Well, nothing in this prohibits
14 the Licensee from doing voluntary backfits, and what they
15 would have to do is essentially provide their own analysis of
16 why they want to backfit. They usually don't do that unless
17 it somehow improves their operation or some -- and, of course,
18 operation is a broad thing. They're concerned about safety,
19 too, because they've got an investment.

20 MR. GASKE: But even if the Staff agrees it's a
21 good thing, they still have to make the analysis.

22 MR. TOURTELLOTTE: Oh, yes. For the same reasons.
23 We can't afford to allow Licensee to take an action which
24 alters something as system, component, procedures, organiza-
25 tion, whatever fits in the definition of backfit, if it could

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have a negative safety implication.

MR. GASKE: But it seems like if it's his money, if he wants to do something good, then cost-benefit criteria don't seem like they should be applied.

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MR. TOURTELLOTTE: Well, cost benefit, incidentally, does not come into play under this rule or, in my view, under any rule except where fundamental safety is no longer in question. Fundamental safety has to be there, and it doesn't make any difference what it costs to get there. If you can't get there economically, then you shouldn't build the plant or operate it. But once everybody agrees that there is an acceptable level of safety, it seems to me that that, in and of itself, makes it necessary to consider very carefully whether you want to change that machine or not.

And one of the factors that you might reasonably consider, although there is no mandate to consider it under the statute, -- neither is their prohibition to considering it -- you should consider what the economic costs are.

MR. REMICK: You say acceptable level of safety. Is that synonymous with acceptable level of risk to the public?

MR. TOURTELLOTTE: Again, I don't think that you have to quantify it. All you have to do is agree that this plant is a safe plant. I mean we've got 76 of them out there and we've never had a PRA for any of them, to get them licensed. Now, some of them are doing PRAs now, and I guess some of them have PRAs. But it wasn't necessary for us to make a determination initially as to whether they were safe or not.

MR. LEWIS: Well, a determination was made, in your words, that they were adequately safe and they had an adequate

1 level of safety. I'm not sure what you mean by fundamental
2 safety, but that's another matter. But as you know, I think
3 it would be a terrible mistake to go to a point at which had
4 explicit criteria, bottom line criteria, quantitatively stated
5 for what the required safety level is. I agree that the
6 adequate level of safety is determined by acceptance within the
7 social structure.

8 MR. TOURTELLOTTE: I agree with what you're saying.
9 I was going to add that one of the other problems I always seem
10 to run up against is the problem with logic.

11 But what a lot of people fail to appreciate is that
12 any quantification or any quantification system that you come
13 up with ultimately premised on judgment. Quantification does
14 not have any kind of divine inspiration. It is simply taking
15 numbers and assigning numbers to some judgment that you've made.
16 And so in my view, it doesn't make any difference whether you
17 use numbers that speak in another language about what the
18 judgment is that has been made, or whether you just make the
19 judgment in words. It's the same thing.

20 MR. LEWIS: Then we will not put you in charge of
21 designing a rocket that will go to the moon.

22 (Laughter.)

23 MR. TOURTELLOTTE: Well, I'm not saying that numbers
24 are not valuable, but numbers are just another language for
25 judgment.

1 MR. LEWIS: Oh, absolutely. The thing that we're
2 looking for is analysis, not necessarily numbers. And analysis
3 can be done in many languages. It so happens that numbers are
4 far and away the best language to do analysis of technical
5 things.

6 MR. TOURTELLOTTE: It's a way of getting a common
7 understanding I think among scientists and technologists about
8 what they are doing and how they're proceeding.

9 MR. LEWIS: It's really much more than that. But
10 we're off the subject here, although that's an interesting
11 conversation.

12 But what about the rest of the package? What's the
13 schedule on that?

14 MR. TOURTELLOTTE: On April 14th, we're going to take
15 up the ex parte separation of functions rule and revising the
16 role of staff as a party.

17 MR. LEWIS: Take it up with the Commission, you
18 mean?

19 MR. TOURTELLOTTE: Yes. Now, revising the role of
20 the staff as a party means the proposal has been made. It
21 really means that the staff generally will not be a party to
22 the proceedings and will do so only while in the exercise of
23 their discretion to participate as a party.

24 The reason for that is that -- mostly, I think it
25 is associated with perception problems about the role of the

1 staff as an adversary both to intervenors and to licensees, and
2 also because sometimes we are not regarded as being an adversary
3 of the licensee because we've already settled all of our
4 differences before we get to the hearing. And most licensees
5 do not want to take the staff on in a hearing, so they make
6 all of their adjustments, they give in before we ever get there
7 so that when we go to the hearing it appears as though the
8 staff and the licensee are against the intervening group.
9 Which is partially true, but then, of course, the intervenors
10 are there because they have stated as a contention that the
11 licensee has not done its job on safety and the staff has not
12 done its job on safety, and it is very difficult for the staff
13 to remain neutral when they're under attack.

14 So, that's probably the primary reason. Now another
15 reason for revising the role of staff as a party is if they
16 are no longer parties in the case, then they can converse more
17 freely with the commissioners. The ex parte rule would not be
18 applying to them with the degree of severity that it has in
19 the past.

20 Now along these same lines, then, we're also
21 talking about changing the rules on ex parte separation of
22 functions, and there are two proposals. One proposal is just
23 a slight loosening up of the current policy in allowing people
24 who are in supervisory positions to make communications with
25 the Commission.

1 The other one purports to take advantage of a rule
2 under the Administrative Procedures Act that says in initial
3 licensing cases -- which is all we're talking about here --
4 that the separation of functions rule does not apply. And so
5 it's almost quoted from the APA that that is the case

6 Now, in what has to be regarded as supreme legal
7 effort to find problems, the most common criticism of this
8 is that the section on separation of functions applies to
9 communications between the staff and the Commission. The
10 section of the APA on ex parte communications talks about
11 communications between the decisionmakers of the agency and
12 anybody outside the agency. So those are communications
13 external.

14 While the separation of functions section has an
15 exemption for initial licensing cases, the ex parte section
16 has no such limitation. Therefore, my colleagues in the
17 General Counsel's office say if you have the exception to
18 the separation of functions rule and the staff communicates
19 with the Commission, they can no longer -- since the Commission
20 is a decision-making body, they become a part of that decision-
21 making process and they can no longer communicate with the
22 licensees.

23 That means the licensee would have to come in and
24 process his application without ever talking to the staff.
25 Not likely. And my argument against that is that it is

1 contrary to ordinary statutory interpretation which is that
2 statutes which are passed are not interpreted in such a way
3 as to negate each other. That is, it is not generally con-
4 sidered that Congress would pass a law giving you with one
5 hand and taking away with the other. And I don't know how
6 that will turn out, but my guess is not very well.

7 MR. LEWIS: I, being not of a legal bent, I guess in
8 both senses of the word "bent", I have trouble understanding
9 why it's in the interest of safety to inhibit any communication.
10 If I were Emperor, I would think that the Nuclear Regulatory
11 Commission is responsible for insuring an adequate level of
12 safety for a nuclear plant, and they ought to do it by getting
13 their hands on all relevant information from the staff, from
14 the licensee or prospective licensees, from the people on the
15 street, from the intervenors, from thee and me, and in their
16 infinite wisdom, put this whole collection of information
17 together and decide whether the plant is adequately safe.

18 And I have trouble understanding any element of law
19 that says that if you have less information you can do the
20 job better, and that's inherent in all of these things we're
21 talking about.

22 MR. TOURTELLOTTE: Well, I understand what you're
23 saying, and I at least agree with where you're going in this
24 case for initial -- for licensing situations involving public
25 health and safety.

I'll tell you what the reasoning behind it is, the advocacy of the ex parte rule, is to keep people from affecting the judge. It's sort of like if you were in another situation, didn't involve this situation, but if you were in another situation where you had a regulatory agency, you have the three parts of government which are melded into one, and you have also the three parts of the justice system, which are melded into one. That is, the investigatory, the prosecution and the judgment are all in one person.

Now, the reason they have the separation of functions rule -- had the separation of functions rule -- originally was to make sure that somebody within an agency did not investigate, decide to prosecute and also decide to judge somebody who's sitting on the outside.

MR. LEWIS: Well, I understand that.

MR. TOURTELLOTT: But, they also said but for licenses that shouldn't apply because we're not talking about whether a rate, a certain rate is given here or anything -- we're talking about the issuance of a license. It is a permit that is granted by the government to do something. It is a privilege and, therefore, the separation of functions shouldn't apply.

But also understand that in the history of things, you're basically talking about the agency and one party who applies. Where you really get into problems here is because we've got intervenors in this kind of a group today, which is

1 different from the way things were going in 1946. There
2 weren't a whole of intervenors when the APA was passed.

3 Because in any event, the person who has the right
4 to complain about ex parte communications should be the guy
5 who is the subject of the licensing action, who is the
6 licensee. And they don't care, generally. They don't care
7 about that kind of communication. Intervenors do care, and
8 it's for that reason that we have a different situation and
9 a different problem.

10 MR. LEWIS: Well, I understand what you are saying,
11 I really do. My problem is I am an ordinary, mediocre
12 physicist and, therefore, I understand that all these things
13 are guaranteed, are in place to essentially guarantee fairness
14 in the process, the term whispering to the judge and that sort
15 of thing, and the structure is designed to guarantee fairness.

16 Fairness is a good thing, obviously, but there is
17 also a public interest in the quality of the results, and
18 sometimes the strictures that are necessary to insure fairness,
19 which are all these things about separation of powers, the
20 not being investigator and so forth, may be antithetical to
21 the quality of the results. And one is making a trade there;
22 whereas, I don't believe that anyone should whisper in the
23 ear of the judge without the judge making a memo or telling
24 the other parties that, indeed, he has had a conversation with
25 so-and-so who said such-and-such. I still think that the

1 quality of the result, as distinguished from the fairness or
2 perceived fairness, which is probably just as important in the
3 process, is also a matter of public interest, and if quality is
4 enhanced, the more information you have. We make very many
5 mistakes in life, but we make few of them because we knew too
6 much, and I am worried that that value isn't as stridently
7 protected as the value of fairness.

8 MR. TOURTELLOTTE: It isn't even considered. It's
9 not a matter of whether it's stridently protected; it isn't
10 even considered.

11 MR. LEWIS: Well, that's what troubles me.

12 MR. REMICK: But it still can be accomplished. One,
13 we're talking about this exclusion only being in cases that
14 are being litigated, while other matters, the Commission is
15 free to talk to the staff.

16 The other thing is, if the Commission wishes to talk
17 to the staff it can do that. It just has to let the other
18 parties know and give them the opportunity to be there. So
19 there are ways around it. It makes it more difficult, but
20 there are ways around it.

21 I'm not defending it. I agree, I think something --
22 I'm in favor of some change in ex parte and a separation of
23 functions that would enable it.

24 However, there's one thing you haven't mentioned and
25 I think there is a compelling argument on whether there is an

1 exemption for separation of functions if the initial licensing
2 process is litigated. You haven't addressed that, and it seems
3 to me that that is a compelling argument that should be
4 considered. Is there truly an exception in initial licensing --

5 MR. TOURTELLOTTE: It doesn't make any difference
6 whether it's litigated or not. If the --

7 MR. REMICK: Aren't there many people who disagree
8 with that?

9 MR. TOURTELLOTTE: The exemption is in the section
10 on adjudications in the APA. It's made in two or three
11 different places in the APA; the distinction is made there.
12 And the --

13 MR. REMICK: So you don't think that's a good
14 argument at all.

15 MR. TOURTELLOTTE: The legislative history suggests
16 that the reason for it is that initial licensing is more like
17 rulemaking because of its generic application. And that
18 was the argument that was made by people on the floor. That's
19 all the legislative history says about it.

20 And my honest analysis of what has gone on, it has
21 to do with more than this. But back before the APA was
22 written in 1946, it started out in the thirties, and Roosevelt,
23 because there had been a lot of activity in administrative
24 agencies, he ordered this study by the Attorney General. The
25 Attorney General did a study. The American Bar Association

1 took up a study. The American Bar Association came out with
2 a proposed bill which was very adjudicatory in nature. And
3 Roosevelt vetoed that bill. And the ABA was very much in
4 favor of having stiff adjudicatory procedures, and then after
5 Roosevelt vetoed that, then another bill came out which was
6 sort of a product of the Attorney General's report of 1941
7 and some work that had been done after the war on it, and it
8 finally got through Congress in 1946.

9 Maybe my fellow lawyers don't like to hear this,
10 but I think what has happened through the years is that the
11 lawyers won out. They wanted adjudicatory procedures to be
12 used, and every device and every mechanism that could be used
13 to subvert the APA as it was originally written and intended
14 to be carried out, has been used by lawyers who are actually
15 in practice to change the direction of the APA, to one which
16 would be commensurate with what the profession thought it
17 should be initially. So we are in a position where we want
18 to adjudicate everything, even though it's not suitable for
19 adjudication.

20 MR. REMICK: That really doesn't have any direct
21 bearing on separation of function, though, exemption, does it?
22 Whether it's adjudicated.

23 MR. TOURTELLOTTE: Certainly it does. The initial
24 licensing exemption has never been used by any agency since
25 it's been in effect. And why has it not been used by any agency?

1 It hasn't been used because every lawyer who wants adjudicatory
2 procedures throws up the ghost of due process.

3 MR. REMICK: So you're saying that there are people
4 who feel strongly, though, that if it's litigated the exemption
5 doesn't apply. That was my original point. I thought there
6 was a difference among legal people. How does the General
7 Counsel's office come out on that one? Do they agree with you
8 or not? I honestly don't know.

9 MR. TOURTELLOTTE: I think -- the General Counsel's
10 office I think is probably resigned to the fact that the
11 legislative history is what it is. What is in there is in
12 there. The fact is that nobody who is a lawyer has ever
13 suggested to the Commission that this is something that they
14 could take advantage of, because nobody particularly ever
15 wanted to do that. And what the General Counsel's office has
16 come out with is the Catch-22 that I mentioned. That is, if
17 you take advantage of the separation of functions exemption,
18 you're caught by the ex parte rule. So you can't do it. And
19 as far as the argument goes that Congress wouldn't pass
20 mutually exclusive sections of the legislation, they ignore
21 it.

22 MR. REMICK: But am I correct that --

23 MR. TOURTELLOTTE: That was with the old general
24 counsel; I don't know about the new one.

25 MR. REMICK: When you say general counsel, are

1 you referring to Crane and Winner? Is that their position or
2 is there a separate general counsel position on that?

3 MR. TOURTELLOTTE: No, I'm talking about the general
4 counsel's office. And I said that was with the old general
5 counsel, but I'm sure that's the way Marty Malsh feels and
6 most of the people down there.

7 You know, we've got a bunch of adjudica files in
8 the agency and they used to think the only way to handle any
9 dispute that exists between men is to go to court, and I don't
10 believe that. I'm a trial lawyer, and for that matter I've
11 had more trial experience than anybody in the agency, either
12 here or outside, and I love to go to court. But I don't
13 believe that's the only way to resolve disputes between people,
14 and not only that, I think it's probably thepoorest way to
15 resolve disputes.

16 And the administrative process was created in the
17 first place because Congress believed that the courts were
18 not a good way to handle administrative affiars. And somehow
19 through the years we've managed to work everything back around
20 where okay, we can't go to the courts but we're going to
21 create our own courts. Everything is just like a court. We
22 fashion our rules of procedure after the Federal Rules of
23 Civil Procedure. Everything is judicial, everything is the
24 way that lawyers understand best. It's pragmatic.

25 MR. LEWIS: That was an eloquent speech and very

1 interesting. In the course of it you said that no agency had
2 ever taken advantage of the initial licensing.

3 MR. TOURTELLOTTE: None to my knowledge.

4 MR. LEWIS: Including all regulatory agencies.

5 MR. TOURTELLOTTE: Correct.

6 MR. LEWIS: Is it your feeling that other regulatory
7 agencies -- maybe this isn't a proper question -- are as
8 infested by the legal process as this agency is? I get the
9 impression that there's more latitude in the Act than has been
10 utilized in this agency.

11 MR. TOURTELLOTTE: No. There's some validity to what
12 you say. I think our agency has been sort of under the yoke
13 of extremely pedantic legal interpretation for years. The
14 limitations that it has placed upon the way that we do things
15 is I think probably significant.

16 And there is a mentality which exists in the terms
17 of legal policy, which has a devastating effect on our
18 effectiveness as a regulatory agency, and that is that the
19 policy is that -- spoken or unspoken -- that we don't run
20 any legal risks. You run zero legal risk, and the few times
21 that we've run a legal risk we've won hands down. That's
22 because we are so far inside the margins of legal risk that
23 we have very little chance of being patted down.

24 Now, the times that we have lost, really lost -- and
25 I'm talking about the Supreme Court; you have to rule out the

1 D.C. Court that has its own -- they don't even have their own
2 drummer. They have their own drum. And they change the rhythm
3 at will. But the only time that we really lost is when the
4 Commission has insisted on pursuing a particular course of
5 action without regard to what the legal consequences are.

6 And we really haven't lost all that much. If you
7 examine all the cases, we haven't lost -- . But you see, in
8 terms of making a large public policy and in terms of implementing
9 it on a day-to-day basis, the world picture of public policy,
10 you simply can't afford to approach it from a no risk standpoint.
11 I mean, life is full of risk, and every -- I mean, we don't
12 even have a zero risk mentality in administering safety. But
13 there is a mentality which is actually associated largely with
14 the Department of Justice. The Department of Justice doesn't
15 like to lose a case, and the nice thing about the Department
16 of Justice is they've got so many thousands of cases, they can
17 afford to just summarily not prosecute all those cases that
18 they might lose, so that they have -- everybody who is in the
19 Department of Justice has a 98 percent record. They've got a
20 98 percent record because, you know, they catch most people
21 redhanded. And anybody where there's a risk, they're just not
22 even going to prosecute them.

23 And that kind of mentality has permeated our agency
24 for years and years. In my view -- this is all personal
25 opinion. I'm not speaking for anybody but me.

1 MR. LEWIS: The analogue of that is -- in part of
2 my other life I helped design military systems, and people
3 always ask for warning systems that have absolutely no possi-
4 bility of giving a false alarm, and the best way to design
5 such systems is when they never detect anything, and it's a
6 fairly close analogy to this.

7 This state of mind which permeates the agency -- and,
8 of course, we all see it -- I'm not quite clear where it comes
9 from, to what extent it's tradition, to what extent it's the
10 staff or the office directors or the commissioners, and I don't
11 particularly want to lay blame. Is there any possibility of
12 moving toward a riskier position through the administrative
13 reform package?

14 MR. TOURTELLOTTE: No.

15 MR. LEWIS: None. Thank you. That's a succinct
16 answer.

17 MR. TOURTELLOTTE: It's a management problem, and
18 it's -- you know, you're talking about people are here who
19 have been here for years, and this is the way they operate,
20 and they're accustomed to operating that way. From a managerial
21 standpoint, I think if there were someone who really understood
22 that to be a problem, they could say look, it may be that there
23 is a risk involved here, but what are the consequences of the
24 risk? The consequences are okay, we may lose on this issue,
25 we may even lose to the Supreme Court. But do we have a

1 legitimate social end that we're trying to achieve.

2 If we have a legitimate social end, and we can't get
3 Congress to do anything about it, let's let the courts tell us
4 that we can't achieve it, and then we can go to Congress and
5 say the courts say we can't do this, and we really have an
6 overwhelming need in the interest of public health and safety
7 to do this. So if you want us to do what you say we're supposed
8 to do, you've got to give us these additional approaches through
9 legislation or something.

10 I can give you an example. When I was at the
11 Federal Power Commission several years ago, NEPA came about,
12 passed the National Environmental Policy Act, and I drafted
13 the regulations for NEPA. And as I drafted the regulations,
14 I did it very straightforwardly and the way that I thought
15 it should be done in order to accomplish what had to be
16 accomplished.

17 I took them in and they wanted to change them in
18 certain respects, and one of the things they wanted to change
19 was to require that anybody who is an applicant is the one
20 who would do the environmental impact statement. I said that
21 isn't what the law says and you can't do that. They said we
22 understand that, but Congress has not given us anything in
23 our budget.

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1 MR. TOURTELLOTTE: We get hauled into court in what
2 is now known as the Green County case, a famous early case
3 along with Calvert Cliffs. The courts say you can't do that
4 and they sent it back and then I took the old regulations and
5 forwarded them and then they passed the new regulations. But
6 we go to Congress and say, look, they say we can't do that, we
7 don't have the people, we tried, and you have got to do some-
8 thing.

9 Congress authorized another 100 people or so, whatever
10 it was, to accomplish that purpose. But the worst thing in
11 the world is not to lose the case. Losing the case is not the
12 end, and a lot of people just don't understand that.

13 MR. LEWIS: I won't tell you the James Thurber fable,
14 but there is a fable whose moral is never lean over too far
15 backward to avoid falling flat on your face. It's a good fable
16 to read.

17 (Laughter)

18 MR. REMICK: Jim, two members of the Task Force
19 apparently differ on the ex parte, at least two members of
20 the Task Force, on the ex parte in separation of function, and
21 have drafted a separate version which seems very simple and
22 straightforward. Will the Commission discuss that on the
23 30th, 31st? Is that up as an option to them?

24 MR. TOURTELLOTTE: As far as I know, it is.

25 MR. REMICK: They have gotten a copy of that. But

1 you don't know if they plan to discuss that.

2 MR. TOURTELLOTTE: I don't know. I would imagine
3 they would. They have a different legal philosophy than I do,
4 and their legal philosophy is tied up in what I call due
5 process-itis: that is, that everything is a due process problem.
6 I don't think everything is a due process problem, but
7 certainly --

8 MR. REMICK: This seems to be accomplishing very
9 much what one of your options was but it was just written
10 differently, and very concisely, I thought.

11 MR. TOURTELLOTTE: Yes.

12 MR. REMICK: Doesn't it accomplish one of -- I would
13 say Option A, I guess, of yours. Doesn't it accomplish the
14 same thing?

15 MR. TOURTELLOTTE: Well, fundamentally Option A is
16 Cy Winter's option. I don't recall specifically what theirs
17 was right now, or what the difference between that and this
18 other option was. I went in originally with five options, and
19 it was decided, I think in your advisory group or something, to
20 narrow it down to two options, and those were the two options
21 that we picked.

22 MR. LEWIS: I thought you were finished. You were in
23 midsentence and I didn't recognize it. Forgive me. In the
24 of things that we have talked about, we have talked about
25 backfitting, ex parte and that sort of thing, the hearing

1 process was also on your list. What is the schedule for doing
2 something on that?

3 MR. TOURTELLOTTE: I have no time specified on the
4 hearing process. I would guess that it would come up either a
5 couple of weeks after the ex parte separation function, the
6 role of the Staff discussion, which would put it around the
7 1st of May.

8 MR. LEWIS: First of May? Could you remind me what
9 the specific proposals are or should we read them?

10 MR. TOURTELLOTTE: The proposals are rather numerous.
11 There are about 25 different --

12 MR. LEWIS: Oh. Well, then don't.

13 MR. REMICK: I think Paulette did a good job of
14 summarizing those.

15 MR. LEWIS: I know she did. I just --

16 MR. TOURTELLOTTE: The important thing about the
17 hearing process to understand, I think, is that we try to
18 address what I perceive to be the real problem of the hearing
19 process, and that is the quality of the process. Too often in
20 the past people have mistaken effect for cause because the
21 time involved always seemed to be a great amount of time. Time
22 was perceived to be a problem.

23 Time is not the problem. Time is a function of the
24 process and is not the process itself, and if you improve the
25 quality of the process, then time will take care of itself. To

1 improve the quality of the process, we really aimed at three
2 different areas. One is what kind of issues will initiate
3 a proceeding in the first place. What kind of a threshold, what
4 kind of quality do we have to have for an issue to initiate a
5 proceeding. The second is what are the things that go on within
6 the hearing process itself that perhaps could be changed to
7 improve the quality. And thirdly, what goes on in the decision-
8 making process that could improve the quality of the process.

9 In the first instance we talked about a screening
10 board which would screen contentions that come in, and the
11 reason for separating those out, separating a screening board
12 from licensing boards, is that it would give a central clearing
13 house for contentions, whereas now you might have, although it
14 doesn't happen very frequently, you might have a contention
15 that is admitted in one proceeding and is not admitted in
16 another proceeding.

17 The question is, why does that happen? Well, this
18 way you would have a central clearing house. Now, the people
19 on the other side of that say this is an affront to the licens-
20 ing boards as they currently exist and they are capable of
21 deciding the issues that they are to litigate and the like.

22 MR. REMICK: Jim, isn't this like it was up until
23 a couple of years ago? There was more than one screening
24 board. They appointed a board to consider the contentions and
25 the interest of the party, and then what happened, they started

1 then making that same board the hearing board if there was a
2 hearing. I agree that if you had one, and maybe eventually
3 you would even have to have two groups that you had consistency,
4 it would be a real improvement. I personally feel that, but I
5 don't see a major change from what actually was practiced a
6 couple of years ago with the exception that you didn't try to
7 limit it to just one screening board but there were a number of
8 them.

9 MR. TOURTELLOTTE: That is the chief distinction.
10 A few years ago they had a two-step process, and to say you are
11 just returning to the old process, that is not true because in
12 the old process, as you pointed out, they appointed a board
13 for screening purposes but they wound up appointing the same
14 board to hear the case, on the theory that that board was al-
15 ready familiar with the issue.

16 MR. REMICK: Yes, that's it. That's it. And I have
17 to admit that at that time, that seemed sensible: once you
18 heard all the arguments on the contentions and when you are
19 already up to speed, why not continue if there was a hearing?
20 I agree. I think one screening committee or board would be
21 good.

22 MR. TOURTELLOTTE: There is another thing which is
23 psychological, and that is the question of whether some
24 licensing boards may feel that they have a vested interest in
25 an issue and therefore might let an issue in which is otherwise

1 questionable because they want to explore it during the course
 2 of the proceeding. There would be no such driving mechanism
 3 for the screening board because they are not going to be hearing
 4 it later on.

5 Now, whether that actually exists or not is kind of
 6 difficult to prove. It is, I think, something that some people
 7 sense about the process, and it may be valid or not.

8 The part, I think, also about the screening process
 9 that I think is really important is that the rules would raise
 10 the threshold for admission of contentions to require that only
 11 issues of genuine -- only issues involving matters of --

12 MR. REMICK: Factual issues in dispute.

13 MR. TOURTELLOTTE: Genuine issues of fact in dispute.

14 MR. REMICK: That language isn't proposed in 447.
 15 I was surprised. Genuine issues of fact. That terminology is
 16 not exactly used, which I was surprised. It is slightly dif-
 17 ferent wording.

18 MR. TOURTELLOTTE: But actually the standard is not
 19 too different from the standard currently except in this case it
 20 requires a tendering of evidence to demonstrate that fact, and
 21 the tendering of evidence, it is thought, will probably limit
 22 to some extent what it is that we litigate. The problem is --
 23 and a classic case is in the Allen's Creek case, the biomass
 24 thing, where in fact the Licensing Board said this is a fri-
 25 volous issue, and it was the Appeal Board that said, well,

1 frivolous or not -- they didn't say this, but Alan Rosenthal
2 says it when he talks about it, or said it when he talked about
3 it -- doesn't make any difference whether it is frivolous: if
4 they have stated it, we have to litigate it.

5 My view is that it takes more than just stating some-
6 thing. You should not have to litigate frivolous issues. In
7 fact, it is against the rules of ethics in our profession to
8 even propose to litigate a frivolous issue. It is just as
9 unconscionable to me, if it is against our professional ethics,
10 that somehow the courts say, well, it may be against your
11 ethics but we have got to litigate it anyway because it is a
12 frivolous issue. I don't think any court would litigate what
13 they perceive to be a frivolous issue and they would dismiss
14 it out of hand and they would take their chances on appeal.

15 Anyway, the tendering of evidence is an extremely
16 important part of this overall package. There are other things
17 that have been done relative to discovery and other items which
18 are time-consuming items, but you see, my view is that if you
19 raise the threshold, if you require tendering of evidence, you
20 are not going to run into those issues unless you have an
21 important issue to consider. And if you have an important issue
22 to consider, we ought to have discovery and we ought to have
23 these other mechanisms that are devised to make sure that a
24 complete analysis takes place.

25 Then finally, we have some things that alter how,

1 for instance, cross-examination is conducted. Oftentimes cross-
2 examination was just kind of an open fishing expedition. There
3 are some rules now that require cross-examination plans.
4 Although licensing boards have off and on required cross-
5 examination plans, there wasn't specification as to what a
6 cross-examination plan was, and the rules tell what one is and
7 how to make one, and that is basically a fault tree analysis,
8 cross-examination.

9 Finally, in the decision-making thing we call for sort
10 of the elimination of the appeal board as an independent
11 reviewing agency and putting them directly under the Staff
12 control of the Commission and making them an opinions and review
13 type of board. The question is how much of this is controver-
14 sial, and I would say all of it.

15 (Laughter)

16 MR. FRALEY: There is also one other thing which is
17 a spin-off from the decision. I think they added that any
18 board decision that has generic implications now has to be
19 entered into the rulemaking process.

20 MR. REMICK: And as you have it now, the Board would
21 do that, but I think the licensing boards have suggested it
22 might be better for the Staff to do that since they are in a
23 better position to know the generic importance of a decision.

24 Have you given any more thought to that since 447?

25 MR. TOURTELLOTTE: No. It was done because it seemed

1 to be something that was in the hands of the Licensing Board.
2 I have no preference as to whether the Licensing Board initiates
3 it or the Staff. It might be better if the Staff does it.

4 MR. REMICK: The legal staff certainly ought to be
5 able to put this in perspective, where licensing boards are kind
6 of hit or miss, you know, and the ELD --

7 MR. TOURTELLOTTE: I am not really wed to any of
8 the words particularly in all these suggestions as long as the
9 general purposes are accomplished. I don't particularly care
10 how they are done.

11 MR. FRALEY: Jim, could I ask a question? There is
12 one other thing. There is a place in the regulations someplace
13 where it says that it is not permitted to challenge Commission
14 regulations at case hearings. That would still be a guide used
15 by the screening panel?

16 MR. TOURTELLOTTE: Yes.

17 MR. FRALEY: That would still stand.

18 MR. TOURTELLOTTE: Yes.

19 MR. LEWIS: Just back for one minute to the tendering
20 of evidence and then we ought to wrap this up because I guess
21 we have Gerry Charnoff coming at 11:00, and we will want a
22 five-minute break before then. But on tendering evidence, of
23 course, the custom on just what that means will have to be
24 developed in usage, and because an opinion presumably isn't
25 evidence, and whether a reference to a handbook is evidence and

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1 that sort of thing that has to be done by practice. Will the
2 practice be determined by the hearing boards? That is, is it
3 envisioned that the hearing board will, as it is now consti-
4 tuted, will determine what is sufficient evidence to meet the
5 threshold requirement?

6 MR. TOURTELLOTTE: It depends. It may well turn out
7 that there is no screening board, in which case it would be the
8 licensing boards.

9 MR. LEWIS: Yes, but if there were a screening board.

10 MR. TOURTELLOTTE: If there were a screening board,
11 it would be the screening board that would determine in the
12 first instance whether sufficient evidence had been --

13 MR. LEWIS: Okay. I was worried about uniformity,
14 but if there is a screening board, you would take care of
15 uniformity that way.

16 MR. TOURTELLOTTE: Yes.

17 MR. LEWIS: Okay. That would set the precedence.

18 MR. REMICK: Jim, there is one thing on cross-examina-
19 tion that I don't recall if there is any change or not. Would
20 a party be able to make their case purely on cross-examination
21 with no direct testimony, or is that eliminated now? I forget.

22 MR. TOURTELLOTTE: I would say not, because of the
23 contention threshold situation.

24 MR. REMICK: Yes, okay. You are right. That should
25 throw it out.

1 MR. FRALEY: But a hybrid hearing, I think, starts
2 off with written testimony anyway, doesn't it, and cross-
3 examination is an exception, really.

4 MR. TOURTELLOTTE: Yes. I guess that is something
5 else I should mention, that I am having some of these rules
6 redrafted to implement the hybrid hearing process without
7 legislation, and the hybrid process is pretty much what was
8 envisioned with this kind of a situation any way because the
9 idea was that everything could be decided on the basis of writ-
10 ten submittals, if necessary; oral argument can be held but is
11 not mandatory. In most instances I would believe it would be.
12 If I were on a licensing board or a screening board, I would
13 want to see these people and hear what they had to say. Not
14 only that, I think it is fair.

15 MR. REMICK: What you get in writing is very, very
16 guarded. You want to sit down and talk it over.

17 MR. TOURTELLOTTE: Now, what goes on after that,
18 however, I think it depends upon whether an evidentiary showing
19 has been made, a substantial evidentiary showing has been made.
20 That is going to be judgment.

21 MR. LEWIS: Yes, I understand.

22 I hate to break up, but --

23 MR. REMICK: Just one additional question on something
24 you just introduced. You proposing revisions. Are those
25 going to be to the Commission before the 31st? On adding the

1 hybrid. Are you proposing rewriting and that is going to be
2 part of your presentation on the 31st?

3 MR. TOURTELLOTTE: No, the 31st is backfitting.

4 MR. REMICK: Excuse me. I'm sorry. April 14th.

5 MR. TOURTELLOTTE: April 14th is ex parte and role of
6 Staff, so the hybrid stuff won't come up till the 1st of May.
7 I have already had it redrafted. I have had it drafted once,
8 but when they drafted it, they did not do precisely what I
9 wanted them to do, which was to devise a system where the
10 decision on tendering of evidence was not made until after all
11 the written stuff was in and all the oral arguments had been
12 made. Somehow, I don't know how, they came up with this, but
13 they drafted the hybrid process and then advised me that the
14 regulations were conflicting because it would make it an
15 impossible burden to in the first instance have an evidentiary
16 showing when the purpose of the first part of the hybrid process
17 is simply to air your views.

18 So I am going back to fix that, but that won't take
19 very long.

20 MR. REMICK: One last question. Do you see anything
21 in here that is proposed on the things that are coming up on
22 the administrative area that changes in any way the role of
23 ACRS in these activities? I didn't detect anything.

24 MR. TOURTELLOTTE: No.

25 MR. REMICK: Do you foresee ACRS providing comments

1 on the backfitting? It seems to me that that is definite
2 safety-related consideration. Do you know of any provision
3 where ACRS is going to be asked to comment on backfitting or
4 anything like that? You are not requesting it, necessarily.

5 MR. TOURTELLOTE: I am not requesting and not not
6 requesting. Certainly if they -- you know, we provided copies.
7 If the ACRS wants to comment on them, I would welcome the
8 comments.

9 MR. LEWIS: We may. Let me end with one rhetorical
10 question on what Forrest just brought up. Does the fact that
11 there is nothing in here that changes the role of ACRS reflect
12 a view that ACRS operations are now perfect? That is a rhetor-
13 ical question.

14 (Laughter)

15 MR. TOURTELLOTE: I will give you a rhetorical
16 answer: no.

17 MR. LEWIS: In that case, why didn't you do your
18 job?

19 MR. TOURTELLOTE: I will tell you what: I have
20 limited resources. As far as that goes, I think this is a
21 point that should be made, that the proposals that the
22 Regulatory Reform Task Force has made, and certainly the
23 proposals that I have made for changing things in the Agency
24 are nowhere close to being comprehensive, in my view, as to
25 what should be done to really reform the Agency; but I have

1 very limited resources, and what I did was pick out the most
 2 important issues first and we addressed those, and what
 3 happens after this is anybody's guess.

4 MR. LEWIS: I am delighted to share the view that
 5 you just expressed.

6 Let's give ourselves, let's say, a ten-minute break.

7 (Recess)

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1 MR. LEWIS: Let's get started.

2 We're here to sort of move along in our discussion
3 of regulatory reform, and in particular, we're interested in
4 the administrative package that's being developed now that
5 the legislation has gone over to the Hill, and DOE legislation
6 will soon go over to the Hill, and we can expect six years
7 of hearings on those issues. We're now ready to talk about
8 the thing that NRC believes it can accomplish without legis-
9 lation, although in the end if the legislation that's been
10 sent over doesn't pass or passes in a greatly different form,
11 there will again come up the question of what in those
12 legislative packages actually did not require legislation.
13 But for the moment we'd like to talk about the thing that
14 are in the administrative package now. And I guess we'd love
15 to hear what you're doing about it, what you're saying about
16 it.

17 And we've had a conversation with Jim Tourtellotte
18 this morning about backfitting, about ex parte, about separation
19 of powers, a little bit about the hearing process and those
20 things, which I guess is the sequence of events. So we
21 turn ourselves over to you.

22 What are you guys doing about these things?

23 MR. CHARNOFF: You may be further ahead than we
24 are.

25 MR. LEWIS: That's all right. You'll back up --

1 MR. CHARNOFF: It was easy to deal with the
2 legislative package. That was only a quarter of an inch
3 thick. The administrative package seems to be larger.

4 We've had two meetings of our group on the admini-
5 strative package, and we're meeting again tomorrow. We will
6 tomorrow begin reviewing a first half of a draft report. That
7 first half of the draft report will address some of the issues
8 in this package, and the reason we've broken it in two is
9 that the Commissioners are meeting now on this thing that's
10 not on the question of backfitting, and we wanted to be sure
11 that our views on that portion of the administrative package
12 are presented to the Commission. And we're meeting with the
13 Commission I think Wednesday or Thursday on that matter.

14 So we have a draft report which will be reviewed
15 by the full committee tomorrow which addresses three or four
16 matters. It addresses backfit. It addresses the proposals
17 to deal with the -- to establish a springing board. And it
18 addresses the question of restructuring the Appeal Board.
19 And we have not reached any concensus positions on most of
20 the other matters. That will probably come in a later report
21 sometime in April or May when we meet again on that.

22 And maybe what I should do is review that I think
23 we will be saying on those three matters.

24 MR. LEWIS: That would be very helpful.

25 MR. CHARNOFF: We are also tomorrow going to take

1 another look at the Commission's legislative package. The
2 Chairman sent it to us for one more look even though it's all
3 the way up there. And I'm not at all sure what the views of
4 the committee will be. I think by and large on that aspect
5 of it we think that the Commission reflected a number of our
6 views. For example, we do endorse the idea -- I'll take a
7 minute on that, and then I'll get into the administrative
8 reform.

9 I think that we do endorse the ideas of the one-step
10 licensing or the combined CPOL provided there is a recognition,
11 as there is in this legislation now, that certain issues cannot
12 be decided at the outset, and therefore, there has to be a
13 phasing of certain issues. But the concept is one stop on
14 different issues.

15 We do endorse the idea of early site review and of
16 design review and discrete portions of design review; and the
17 Commission has picked up the discrete. One of the issues --
18 the essence of many of our comments was to be sure the legisla-
19 tion does not block the procedures or lock the Commission in
20 but to give it flexibility. So that now this draft package
21 does recognize the concept of looking at discrete portions
22 of a plant, for example, in the design review or does recognize
23 that the Commission could review discrete portions of site
24 characteristics.

25 MR. LEWIS: Could I just interject one thing? You

1 mentioned the word "lock" which reminded me of something
2 that was contentious at ACRS the other day. In the proposed
3 legislation in the reliance on competent local, regional and
4 state authorities for a need for power, and alternate source
5 of power and that sort of thing, I think it's a mistake to
6 delegate irrevocably in the legislation instead of the previously
7 heavy reliance, because then you make yourself hostage to
8 an unknown local board.

9 Do you have a view on that?

10 MR. CHARNOFF: We did not like the former recommenda-
11 tion which was -- in the early draft which was to defer to
12 a federal agency's determination to meet the power. And we
13 recommended that they look at local agencies and look not
14 only at the need for power but at the alternatives question.

15 MR. LEWIS: Right.

16 MR. CHARNOFF: And the reason why philosophically
17 it's not as dramatic a problem as you're concerned with is that
18 as a practical matter, if the local agencies that have
19 cognizance over the finances of these utilities, the rate-making
20 agencies, say you shall not build a nuclear plant, it really
21 doesn't matter what all of us here in Washington say. The
22 utilities are not going to build a nuclear plant.

23 If they say that you don't need it because you have
24 too much power, or they say they'd rather see you go to a
25 coal or a hydrogen unit, they can do that. And so while it's

1 nice to say that in the national interest there may be
2 national concerns that should be reflected in the decision to
3 override that matter, that's not happening even in this
4 legislation or even in the form of legislation that we've
5 talked about in your concept, which is that you generally will
6 look to but not necessarily be exclusively bound by.

7 The difficulty there is that I don't think the
8 Congress or the agencies or even the utilities or the utility
9 commissions are ready to recognize a deferral to something
10 here in Washington that is going to commit them to building
11 a plant that they're local ratemaking agencies are not going
12 to do. And that can be a very traumatic event down the road
13 when and if local agencies, I presume, will be slow to
14 authorize a new nuclear plant that a company or the national
15 interest may require. And I think there will be pressures
16 coming about by ten years from now perhaps to do that. But
17 that's going to require some institutional restructuring that
18 I don't think is capable of being handled in this.

19 So that while there is a locking in and an absolute
20 deferral to those agencies, it probably recognizes the
21 reality; and I don't think we have any objection to it.

22 MR. LEWIS: I don't particularly want to argue or
23 belabor the point, but I guess I understand that it may not
24 make a practical difference. I don't see that as a justifica-
25 tion for writing it into law because --

1 MR. CHARNOFF: Well, the value of writing it into
2 law is that if we're going to have to rely on those agencies
3 or those agencies are going to have the effect or the influence
4 that they have anyway, then let's not do it twice at the
5 federal level because it's superfluous. That's what the law
6 says.

7 MR. LEWIS: No, no. I agree with deferring to the
8 local and regional agencies. I'm on record as having recom-
9 mended that long ago. But without essentially delegating
10 your power to them.

11 MR. CHARNOFF: I think that that's probably appearances,
12 because I think the reality is --

13 MR. LEWIS: I understand that.

14 MR. CHARNOFF: -- You don't have to defer, and if
15 we're going to, then let's not have 14 other parties say the
16 NRC ought to get into that. And, in fact, it reflects some
17 of your views and the Commission's post-TMI that said let's
18 get those matters out of the agency. Let's not have the
19 Commissioners focus on those irrelevancies.

20 MR. LEWIS: Anyway, I didn't want to break your
21 chain of --

22 MR. CHARNOFF: Perhaps the -- and I'm not sure
23 how the full committee will react tomorrow -- but I know my
24 concern is that perhaps the principal failing of the proposed
25 legislation is that it still fails to come to grips with the

1 purpose of the public hearing process.

2 I and we, I think, endorse getting this up to the
3 Hill and let Congress grapple with the matter; but it bothers
4 me that we have not come to grips in that legislation with the
5 public hearing process. There is a proposed finding that it
6 is to resolve material issues. That's a help. That's a start.
7 But the implications of that aren't carried through. For
8 example, is the purpose of a public hearing to review the
9 quality of the Staff's work? My view is that it's a lousy
10 way to do it if that's what we're going to rely upon. And
11 we've got to do it more systematically within the agency,
12 perhaps with the aid of the ACRS.

13 If that's true, then do we really have to have
14 the public hearings, wait until after the Staff review is
15 done and perhaps the Staff's role gets changed if we say that
16 the Staff's review is not the subject of a public hearing.

17 And so that package doesn't go far enough, and I
18 would hope that in our letter tomorrow we will flag that kind
19 of an issue. But I'm not sorry that the legislation has
20 gone up, and I think those of us who care will probably appear
21 before congressional committees, and we'll present this con-
22 cern. I'm not so sure it's a winner. The tendency is, as you
23 no doubt recognize, that public hearings are equivalent to
24 sainthood, and you've got to give that opportunity.

25 MR. LEWIS: I'm certain we will all appear, and

1 I'm certain we will present these views, and I'm certain we
2 will have very little effect. But I agree wholeheartedly with
3 your comment. We've had fights at ACRS because I believe that
4 one should start the whole issue of public participation by
5 asking yourself what is the best way to assure relevant public
6 input in the interests of the safety of the reactor, not in
7 the interest of the fairness of the democratic process.

8 MR. CHARNOFF: I think that's right. Fairness is
9 important, but it is not the purpose of this whole process.

10 MR. LEWIS: It's secondary, that's correct.

11 MR. CHARNOFF: Anyway, so that's on the legislation,
12 and I don't know where we'll come out on that. But I'm hoping
13 that we'll try to recognize that tomorrow.

14 Let me focus then if I can on the backfit process.
15 I think there there were a number of questions that come up.
16 One is to what should the backfit process apply. And I think
17 the majority on our committee clearly are sympathetic with
18 the task force's recommendation that it ought to apply to all
19 new regulatory requirements post-construction permit issuance.
20 And there are two statements that are involved in that state-
21 ment.

22 One is does it apply after a construction permit
23 or after the operating license. Our view would be it ought
24 to be after the construction process.
25

1 The second, more sophisticated question is does it
2 apply only to those matters that are determined as a specific
3 matter explicitly in the construction permit process or even
4 in the construction permit hearing. What if there was a change
5 in something that wasn't specifically recognized in the
6 construction permit process, explicitly?

7 Most of us feel that any change after you've got
8 a construction permit from whatever the ground rules were,
9 whether explicitly or implicitly recognized, whether litigated
10 or not, ought to be subject to the backfit rule. And that is
11 a reflection of the fact that we believe, the majority on the
12 committee believes that designers, constructors and operators
13 do pay attention to this whole background of requirements
14 when they come to designing and building their plants, and
15 any change reflects a perturbation in those set of assumptions.

16 There is a minority point of view, Tommy Roisman's,
17 which would probably be more limited. He would say it ought
18 to be limited only to those requirements that are explicitly
19 defined in the process; and he might even go further than
20 that and narrow it to those that are defined in the public
21 hearing. So that may be a matter of controversy within our
22 committee -- I'm not sure -- but I think the majority is where
23 I would characterize them. I think that's an important matter
24 to reflect upon.

25 In our view, the papers clearly state what the

1 regulatory reform task force is after. We're not so sure
2 the proposed regulation recognized that it did as much as
3 the background papers do, and we're urging that that be
4 clarified.

5 Perhaps the next matter that is important in the
6 backfit process is the process that this regulation calls for,
7 and generally speaking, we endorse this requirement in the
8 regulation that there be a systematic written, documented
9 set of considerations that go into the imposition of a new
10 requirement. I think that was our view right at the outset,
11 that we all are believers that if we put pencil to paper and
12 we ask people to do more than just write a conclusion, that
13 that process itself compels a better result than if people
14 could talk about it or if they just write a conclusion.

15 Related to that is whether or not that documented
16 analysis should be reviewed at some high level within the
17 agency. In our view it should be; whether it has to be the
18 EDO or something below the EDO is not material, but it ought
19 be much higher than way down in the bowels of the organization
20 for the same reason, that is, that there is a discipline
21 that comes out of that process through the review side.

22 There is in connection with this backfit proposal
23 a set of five or six criteria that the regulation would say
24 ought to be considered. We have some reservations about the
25 text of at least one or two of those. One is the extent to

1 which the backfit, the merits of the backfit proposal should
2 depend upon the impact on the resources within the agency.
3 We find that very hard to understand. But it is otherwise
4 meritorious in terms of plant design, plant operation, plant
5 safety.

6 I guess we don't care whether it requires a lot or
7 a few resources. It's irrelevant within the agency.

8 MR. LEWIS: It would enforce discipline within the
9 agency if they were to make a list of the relative importance
10 and priorities of the things everyone in the agency does, so
11 if they need resources, they can take it from the bottom of
12 that list.

13 MR. CHARNOFF: That's a management function, but
14 that doesn't get into the qualitative judgment of is a
15 particular factor, so that particular criterion bothered us
16 a little bit.

17 We can understand why it's important from a
18 management standpoint, but it's hardly a criterion for
19 determining the merits of a backfit proposal.

20 The other one, which I think is just a drafting
21 fluke, is that they tried to put the criteria all in the
22 backfit related to rulemaking, and then adopt it for a specific
23 plant. And they got into a bind --I think it's a drafting
24 problem-- that they want to consider the age of plants and
25 so on. We're talking about backfit for one specific plant

1 in one case and backfit for a group of plants in the other.
2 That criterion I think is the sixth or seventh. It just
3 makes no sense. I really think that's a drafting fluke rather
4 than a thought-out position.

5 MR. REMICK: Do you feel that those factors should
6 be in the 51.109 rather than in --

7 MR. CHARNOFF: In both. For purposes of drafting
8 ease they put it in the one dealing with the rulemaking and
9 adopted it. It probably ought to be in both separately so
10 that you know what you're dealing with, but that really is
11 easily rectifiable.

12 There is an interesting question on our committee
13 where we, again the majority, would feel that the listing of
14 the criteria explicitly and having them explicitly considered
15 is a good idea. It disciplines the process again. It makes
16 people think of the relevant matters.

17 There is a point of view, the minority point of view,
18 that if you do that, you might be missing the important ques-
19 tions or you might be constraining the Staff in some way. We
20 don't -- the majority doesn't read that as constraint. You
21 can list all the things that bother you, but you at least
22 ought to answer these pertinent factors. And it seems to me
23 from a management standpoint that's a perfectly useful way to
24 go about it. And I think we ought to commend the task force
25 on that.

1 On the whole I think that the backfit proposal
2 is a good step. There is a related backfit proposal that
3 goes to the question of requests for information which has
4 a different set of standards or a different standard where
5 they had to weigh the merits against the burden on the
6 Applicant. Again, there's a little difference, majority
7 versus minority, on the committee where the minority sees
8 the burden on the Applicant as not an important issue. We
9 really view that as a shorthand way of stating look, if you're
10 going to ask the Applicants to answer questions, many of which
11 require tests and what not, you really ought to consider those
12 burdens. Those burdens pass through to society, and they
13 are societal costs. And it really goes to a harder philosophical
14 question. We always use to say in this agency that cost
15 doesn't matter, but the fact is cost is implicitly considered,
16 if not explicitly considered, so why not recognize it
17 explicitly and then deal with it. If the matter is very
18 important and costs are high or low, it could affect that
19 matter. It's not decisive, but we ought to know what it is.

20 So, again, we view that as being important. On the
21 other hand, we do have to worry, I think about hamstringing
22 the reviewers to the point where the burden of asking a
23 question is so onerous to them that they're going to be
24 disinclined to ask a question. I don't think these regulations
25 will stop that, but I do think that there has to be some

1 sensitivity on the part of management that the guy down there
2 who has to worry about raising the question and doesn't get
3 overwhelmed by the process and therefore doesn't ask the
4 pertinent questions.

5 But I think that the concept of having a management
6 discipline on all of this is certainly a reasonable thing.
7 One could argue that it doesn't have to be in the regulations,
8 that it could be a legitimate management constraint. Putting
9 them out for regulation, however, is probably protective given
10 the atmosphere we're working in. If ever a supervisor tells
11 somebody not to ask a question, ten years later you might be
12 on page 1 of the Washington Post. At least it's a process and
13 it's out. I think there's value in doing it.

14 MR. LEWIS: No, no. You alluded to a problem that
15 I have, which is that of course the fact that many of these
16 things have been done without proper analysis or indeed without
17 any analysis at all is dreadful. That's evidence of manage-
18 ment laxity within this agency. As you quite rightly say,
19 it could have been done without regulation. It's just like
20 setting a style. Just like we say in licensing a nuclear
21 plant that the style of the top management and its attitude
22 toward safety is what filters down through the system. And
23 that's just as true here as it is out in the utility.

24 By that same token, I have trouble understanding why
25 issuance of the rule or the staff guidance or whatever it's

1 going to be is going to change anything unless --

2 MR. CHARNOFF: Well, it puts the ball where it's
3 appropriate. You know, utilities have complained for many
4 years that they're being asked too many questions and so on.
5 Now with this in the regulation, how many utilities will step
6 up to the mark, they don't like to confront the Staff. But
7 at least they can say you know, you didn't go through that
8 process; and they can go to the executive director of operations
9 or the Commissioners and they can say I'm sorry, until you
10 go through that process, we don't have to do it.

11 So the value of the regulation is it says to the
12 utility be a man, fellas, or woman, and stand up to these
13 guys and demand your rights. Now, whether that will happen
14 or not, I don't know; but there's a related benefit to this
15 process, I think, and it's one of our recommendations, that
16 to the extent the requests for information rely again upon a
17 documented justification for it, even though with different
18 criteria than the backfit criteria, we suggest that that docu-
19 mentation be required to be made public, and indeed given to
20 the guy from whom the information is being requested. A, it
21 will show the justification for the question; B, it will help
22 explain the question.

23 It is bound to enhance better technical communica-
24 tion. So there really is a value in putting it out, and one
25 can say well, why in the regulation, why not -- because in the

1 regulation it now says we're now dealing as equals. There
2 are some ground rules you've got to follow, and I've got a
3 right to insist that you abide by them.

4 MR. LEWIS: Well, I understand that, and that's
5 positive. I agree completely. It presumes that the justifica-
6 tion when written will be more than pro forma. The thing that
7 I worry about is that unless the management style makes it
8 clear that the intent is to be really quite serious about
9 justifying requests for information and backfit, that there
10 will develop a pattern of pro forma adherence to the paper
11 generation process which will be no different from what we
12 have now.

13 MR. CHARNOFF: That's correct. I mean that's very
14 important, and yet there has to be a fine balance; that is,
15 that you've got to assure that management cares that the quality
16 of those documents is high, and yet at the same time that that
17 does not become an absolute block to people raising questions.
18 And it's going to require a sensitive manager, and I think the
19 Commission's going to have to pay some attention to that. But
20 the only way that question comes up to the Commission in a
21 serious way other than internally is for the utility Licensee
22 to say hold on, that's not good enough.

23 MR. LEWIS: Well, you're right. If --

24 MR. CHARNOFF: Now, they've never done that, they're
25 not likely to do that, but in an egregious situation they will

1 do that. And I think the time is coming where the costs of
2 some of these things are getting so high, or similarly, fines
3 have never really been imposed by any utility. But the cost
4 of getting so silly in the large range is that they're justify-
5 ing battle, and so we're going to have battles. I don't know
6 how productive they will be, but we're going to have a battle.

7 I think the same thing will happen with requests
8 for information. If the request demands a lot of information
9 and a lot of thought and the justification for it is less than
10 good, somebody's going to stand up there and say let's fight
11 this one out.

12 MR. LEWIS: But there's a cost in fighting with
13 the regulatory agency.

14 MR. CHARNOFF: Yes. I don't know how real it is,
15 but I know we've all dreamed that it's there, and we've lived
16 by it, and I think it probably is costing industry too much.
17 I mean there hasn't been a healthy enough tension. I'm not
18 looking for a battle, but I think there hasn't been a healthy
19 enough tension.

20 And I know that I've sat in -- and I can remember
21 this goes way back into the '60s -- I remember where staff
22 members would say put another pump here or another pump here,
23 and I remember the issue was we're right up against licensing,
24 and one of the staff members in one case I can recall saying
25 specifically it's all of \$100,000. Why not do that? To which

1 the utility president or vice president said that's right,
2 all of \$100,000. Let's get on with it. Well, that's a heck
3 of way to make decisions.

4 MR. LEWIS: Well, there's something I saw last week,
5 and I guess I can't mention the utility involved, but it was
6 a request for relief from a frequent testing requirement in
7 which the utility claimed that frequent testing was jeopardiz-
8 ing the plant, that it was required only of them, and then
9 they said and in fact it was never a good thing, but we had
10 to accept it at the time of licensing as the price of getting
11 our license.

12 That was, you know, a serious accusation, and it
13 is symptomatic of a real disease.

14 MR. CHARNOFF: That's interesting. I mean that
15 is probably an honest reflection of what has happened. But
16 I know that this concern of frequent testing is something that
17 I'm sure you've heard of. I was just out at a plant last
18 week, and the plant manager was telling me about how often
19 they have to test the diesels, and the result is they're
20 burning up the diesels in the testing process.

21 MR. LEWIS: That's absolutely right.

22 MR. CHARNOFF: Now, maybe you have to do that
23 to assure reliability, but I wonder if that is --

24 MR. LEWIS: Well, there is a fairly well-established
25 discipline on how often you ought to test. They used to

1 strike -- or where's the fine balance between that, knowing
2 that they're going to work and making them not work. And I
3 am not sure that discipline is well understood in this agency.
4 And in this particular cause, which is documented, is a case
5 in which really extraordinarily frequent testing is required
6 of these things at this plant alone and not in other plants
7 that have the same equipment. And lack of uniformity is a
8 disease.

9 MR. CHARNOFF: Well, this whole process now, I think
10 this process, there is something good in it. It's too bad
11 we had to come to do it by regulation, but I think that it is
12 a healthy way to do it. There will be a battle, I'm sure,
13 among people as to whether the backfitting has been excessive
14 or not excessive on the merits, and are there enough good
15 cases to show that's been excessive.

16 But independent of that struggle, there really is
17 nothing wrong with saying to people write your thoughts out
18 in a documented way, and that's really what the process seems
19 to be about; and it's challenging the senior management to
20 look at it.

21 People get known for it. I mean that's got to
22 be prophylactic and healthy.

23 MR. REMICK: The use of this in 50.54(f) letters,
24 would you apply those six factors or whatever number of
25 factors there are?

1 MR. CHARNOFF: No. We're satisfied that the
2 threshold there or the burden of test there is somewhat
3 different, somewhat less rigorous because it is still just
4 a request for information. We are saying specifically 50.54,
5 there ought to be a documentation. I'm not sure it's in that
6 rule today in 50.54. And that the documentation be forwarded
7 with the request for the information.

8 MR. REMICK: No, that's not -- it just says an
9 evaluation shall be performed.

10 MR. CHARNOFF: Yes. And we want that evaluation
11 made public and transmitted with it, because on one hand it's
12 disciplinary, and on the other hand we think it will help
13 to understand --

14 MR. REMICK: Oh, it should. So if they do come
15 back, the information applies to what they wanted.

16 MR. LEWIS: Is there resistance to making it --

17 MR. CHARNOFF: I don't have any idea. I haven't
18 had any discussion with them. I wouldn't think so. But it
19 strikes me as odd that they didn't put that in there. But
20 I don't want to infer anything from that. I wouldn't think
21 so.

22 I mean this agency has found one thing, that it
23 really can't title up documents anyway, so that I wouldn't
24 think that they would resist it. If anything, they live too
25 much out in the open, too little perhaps. But that's a statute

1 question.

2 Anyway, that's backfit, and so I think we will
3 basically that in a letter that should go out after tomorrow's
4 meeting and discuss that with the Commission next week. So
5 far as I know, that's the major issue the Commission is
6 grappling with in terms of administrative reform during the
7 month of March. I think I've been told that they want to do
8 something by the end of March.

9 I have one related question on backfit, though. I'm
10 sorry, I forgot about it. The Commission -- the Regulatory
11 Reform Task Force had also proposed that while this proposal
12 of theirs goes out for public comment that the Commission
13 ought to issue a policy statement -- you have a draft of it --
14 which in effect says live with your current rules, fellas.

15 Our view is that since the heart of this whole
16 backfitting proposal is the systematic, disciplined internal
17 review made public -- and that's the real heart of it -- which
18 could be done without a rule, that we would rather see the
19 policy statement put into effect on an interim basis, the new
20 rule rather than the old rule, and say fellas, while this
21 is out for comment we are going to follow these ground rules;
22 we are going to insist on these disciplinary evaluations --
23 disciplined evaluations, and we are going to make them public.

24 And I think that during this period of time while
25 the rule is out for comments -- it could be two months or a

1 year depending upon the history here, let's get some experience
2 with it and see how it works.

3 MR. LEWIS: That makes a lot of sense.

4 MR. CHARNOFF: And so we are going to make that
5 comment. I'm sure we're going to make that comment: live
6 by this new rule. Even though the old rule is on the books,
7 there is nothing at odds with fairness or anything else to
8 live by this rule. And I think that's important.

9 MR. REMICK: Personally I like the definition of
10 backfitting better in the proposed rule than in the old one.

11 MR. CHARNOFF: That is correct.

12 MR. REMICK: And I thought why not apply it.

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1 MR. CHARNOFF: As I said, that can be done
2 independently of the rules, so why not just do that as a policy
3 statement?

4 MR. REMICK: The thing we were told this morning
5 is that they're apparently not going with a policy statement;
6 they're going with a staff requirements memo rather than a
7 policy statement, not that that has any --

8 MR. CHARNOFF: I guess I don't care about the form
9 of that, but did he say -- did Tourtellotte say which way
10 they're going? Are they doing to adopt the new rule on an
11 interim basis? I don't know why we have to go train people
12 to do something for something that is clearly interim. Let's
13 go to the new game.

14 MR. LEWIS: That makes a lot of sense. And you,
15 presumably have that in your letter.

16 MR. CHARNOFF: Yes, we will say that in our letter
17 and -- well, it's in the draft now, and we will say that to--
18 some of us will say that to the Commission.

19 MR. REMICK: Jerry, if they did go with the new, I
20 can see then that perhaps there might be an advantage to all
21 the policy statements for public comment because you are --
22 you're changing.

23 MR. CHARNOFF: I would be inclined to sort of put it
24 out. Now, the policy statement doesn't have to go out for
25 comment because the rule is up for comment, but the public

1 should know you're doing that. And, indeed, the utilities
2 should know you're doing it so that the utilities can react to
3 these documented evaluations and see if they're going to be men
4 about it.

5 MR. REMICK: But if the public is going to know, it's
6 probably better as a policy statement, I should think.

7 MR. CHARNOFF: What was his view as to why it should
8 not be a policy statement?

9 MR. REMICK: From his standpoint, I don't think it
10 matters one way or the other. And I asked was it so that the
11 staff requirements can get out immediately, and the tendency
12 might be on a policy statement to put it out for public comment,
13 although not mandatory. He said no, that was not a consideration.

14 MR. LEWIS: I think his main argument for the policy
15 statement this morning was that it's a little more visible;
16 just a matter of the appearance.

17 MR. CHARNOFF: Yes, we think it ought to be visible.

18 MR. REMICK: It is, because it goes into the rules
19 and regulations.

20 MR. CHARNOFF: Sure. And it gives us some rights.
21 It's not quite a rule, but it gives us some rights, and if
22 this process or this tension is to be created constructively,
23 I think the right should be there.

24 But I would go right to it if we think this makes
25 sense, and it's very hard to get anybody to say, no matter how

1 you view nuclear power, to say that an honest, disciplined
2 process isn't a good thing to do. So, that's Backlick.

3 The other -- the second matter we're going to talk
4 about is the proposed establishment of a screening board.
5 Are you folks interested in that?

6 MR. LEWIS: Yes. We're interested in everything.

7 MR. CHARNOFF: That is the proposal to establish a
8 licensing board on a semi-permanent basis, I guess, which would
9 review all requests for hearings or petitions for intervention --
10 same thing -- and review contentions, and review the sua sponte
11 initiatives by licensing boards.

12 I must say that my first reaction to that when I
13 first saw it was positive. I thought gee, that sounds like a
14 good idea, to get more uniformity, and the more I thought about
15 it, -- and our committee almost unanimously feels that it's a
16 bad idea. It's a bad idea because if we're going to have three
17 members decide that the petition should be granted, the conten-
18 tions to be considered and the conditions to be considered in
19 the hearing, and then another board has to resolve those
20 contentions, first, there could be a divergence between the
21 definition of what the contentions are by the screening board
22 and what the resolving board thinks are the issues. It doesn't
23 matter how artfully they're drafted, there still are problems.

24 Second, the conditions that might be imposed in
25 connection with any admitted contentions have to be enforced

1 by the second board, and where we have come out is just provide
2 the criteria, fellows, to the licensing board to make them live
3 with it. If you want to have high standards or high thresholds
4 for admission of contetions, say so and make it clear what they
5 are. If you want to have high standards for standing for
6 intervenors to get in, say so and tell them what it is.

7 And then the Commission, from time to time, ought
8 to be much more aggressive in policing these things and reaching
9 down and saying when they were faced. But if you establish
10 this centralized screening board and the implementing board,
11 if you will, or the resolving boards, you're probably creating
12 another issue for litigation in the courts. Rather than
13 becoming more efficient and more controlling, we may have set
14 up another issue for people to contest one another, or
15 certainly more contentiousness; whereas, the licensing board
16 says this is the issue, this is what we meant; let's hear it on
17 that issue. Then somebody else comes in and says but that's
18 not what the screening board meant; let's go back to them and ask.

19 I'm not sure that it's worth the gamble, in effect.

20 MR. REMICK: There would be greater consistency,
21 though, with the screening board, don't you agree, on the --

22 MR. CHARNOFF: On the application of criteria. But
23 part of that is because we really have had very soft and wooly
24 criteria.

25 MR. REMICK: That's right. Basically none in recent

1 years. The appeal board has slowly whittled away any criteria.

2 MR. CHARNOFF: Yes. Well, I happen to be -- and I'm
3 going to get to that later -- I'm the big respecter of the appeal
4 board, except in this area. I really think the appeal board
5 has made much of the idea of criteria for admission of conten-
6 tions and parties.

7 MR. REMICK: In discretionary intervention, too, I
8 think.

9 MR. CHARNOFF: Yes. But that can be done away with.
10 All the Commission has to do is issue a policy statement or a
11 reversal in a case, or reach down and say that's not it at all,
12 or issue some criteria and rules.

13 It's hard to do, but I think that it's probably
14 better to do. And so our view is that that screening board
15 proposal, while at first blush looks appealing -- and I really
16 have to tell you that for several weeks I thought that was
17 really a good idea -- I'm just not sure that we're going to
18 gain that much from it. And if you start thinking about it as
19 a lawyer and what issues do I want to take to the court of
20 appeals, that's a nice one. They resolved the wrong issue,
21 Judge.

22 (Laughter.)

23 And why give them that? Why give anybody that issue? I don't
24 think it's worth it.

25 The related purpose of the screening board was to

1 control sua sponte, or to review and determine sua sponte. And
2 there, I must say we've had long and extended discussions in
3 the committee on this whole issue of sua sponte, and I think
4 we've got a consensus. I'm sure there's some minor disagreement
5 here and there.

6 Certainly, the majority feels there's really basically
7 no room for sua sponte review by licensing boards. What I mean
8 by that is we are all in agreement that if a licensing board,
9 in reviewing a document, sees a question that bothers it -- and
10 we're assuming the licensing boards are competent and, therefore,
11 significant if they raise a question to be identified. But it
12 hasn't been raised by a party, so it's not an issue in dispute
13 between the parties. And don't forget the legislation says the
14 purpose of the hearings is to resolve issues in dispute among
15 the parties.

16 MR. LEWIS: Factual issues.

17 MR. CHARNOFF: But if a licensing board -- if you,
18 Forrest, are on a licensing board and you raise the question,
19 well, we ought to regard the fact that you raised that as being
20 important. And what we say you ought to do with that is you
21 ought to write a letter to Harold Denton or to Bill Dircks or
22 to Joe Palladino, saying you know, this is not an issue in
23 dispute in the hearing but I've looked at this and this has two
24 pumps and I think it ought to have three, or, it has three and
25 it ought to have two. I'm really concerned about this.

1 We ought to ask you, just like we asked the staff,
2 to document why you're concerned. Write your letter and have
3 Harold Denton or NRR or Dircks or Joe Palladino write, but get
4 a response to you that's public, that says you're right, we're
5 going to look at it for this reason, or we'll look at it and
6 we'll let you know, or whatever, or you're wrong. But that's
7 not something for the licensing board to resolve. It is not an
8 issue in dispute for the parties.

9 MR. REMICK: Let me explain where I have a problem,
10 and it comes down to the definition of sua sponte. I have no
11 problem with that where it's truly a new issues. But let me
12 give you an example of one that was called sua sponte. And I
13 can talk about it, it's a case completed.

14 It was a spent fuel pool, and during the limited
15 appearances a fellow got up who had been on the maintenance
16 staff of that plant, and this was a proceeding just on spent
17 fuel pool. He claimed that they couldn't safely do this because
18 when he worked in that plant, he went by this heat exchanger
19 and pump where boron was -- it was wired with boron and it was
20 dripping down and accumulating on this device and so forth.
21 He claims he complained about this and so forth and nothing
22 was done and this thing was leaking.

23 It so happens it was a part of the spent fuel cooling
24 system. It's a heat exchanger used for that. Okay. Well, gee,
25 that seems like something -- we're talking about spent fuel

1 pool and enlarging it and so forth and putting more fuel in,
2 and that's a related question. So we asked the staff and the
3 applicant to please have somebody address that. It went over
4 big, of course, with the public. Somebody was there listening
5 to him, which you just have to when you have hundreds of people
6 out there, or at least you should be. That was considered a
7 sua sponte question.

8 To me, that's not sua sponte. It was related to the
9 proceeding. Nobody had challenged --

10 MR. CHARNOFF: Well, I think it's neither sua sponte
11 nor an issue indispute. Let me try to give a little history,
12 because I can relate to that. I made a speech in the early
13 1970s that we really have missed the boat on the limited appear-
14 ances. That is, people do come out, and while a lot of it is
15 silly, some of it is real. And what we ought to do, and
16 where most licensing boards fail -- not all -- there ought to
17 be a required response on the last day of the hearing.

18 MR. REMICK: I agree with that wholeheartedly.

19 MR. CHARNOFF: By a member of the staff and a member
20 of the utility to every item in the limited appearance state-
21 ments. And it's final -- the board has nothing to do with that.
22 So when I say it's not sua sponte in the sense that I don't
23 think the board ought to raise an issue for it to resolve
24 because there's no dispute between the parties.

25 I have no difficulty with the board saying hey, that

1 guy raised a question; I'd like you to look at it. And you look
2 at it and you've got to come back either during the hearing or
3 even after the hearing, I don't care, but it's public. And some
4 board members, following that speech, did start a process -- not
5 all -- where they required us at least in writing to take all of
6 those limited appearance statements, and the staff and the
7 applicant both had to file a piece of paper with the board and
8 mail it to each of the limited appearances so that there is a
9 written response to his or her concern, or to all of them.
10 Actually, we did it as a package, so everybody got everything.
11 So at least there was a response.

12 And I think that's terribly important. Otherwise,
13 we treat the limited appearances disingenuously. We tell them
14 we're going to hear what you have say, and then we want to
15 ignore it.

16 MR. REMICK: And they get awfully frustrated.

17 MR. CHARNOFF: And that's silly. Now, it's true
18 that they can't always -- it would be best if the utility or
19 the staff could answer the question right there while the fellow
20 is there because the public comes in on the first day and the
21 second day and then they disappear. They're not there three
22 months later. That's why the mailing to them of the response
23 is a very important way of doing it. It's conceivable that
24 you can't answer some of the things orally right there, nor
25 should you have to. But I do agree with the need to respond to

1 that. But that's not sua sponte.

2 MR. REMICK: But unfortunately, sua sponte is --

3 MR. CHARNOFF: What happens is the board members have
4 picked that up and said I want to get the answer and then I
5 want to look at the quality of the answer and I want to resolve
6 it. That's sua sponte, and that's wrong.

7 MR. REMICK: Although in this case, I would say since
8 it was really related to the spent fuel pool and that was a
9 proceeding --

10 MR. CHARNOFF: But they wanted -- A is the intervenor
11 and B is the utility. Did A pick it up?

12 MR. REMICK: No, they were not arguing it.

13 MR. CHARNOFF: Then it's not an issue. You see,
14 that's why this definition of a hearing is very important, and
15 at least progress has been made in the proposed finding in the
16 legislation, but that's what the hearings were all about.

17 And we have to examine -- having made that statement
18 it's not clear to me the commissioners have carried through from
19 there and said now what does that mean. I think it means,
20 taking your example, that there's no dispute, it's not part of
21 the hearing. Yes, you can raise the question, you're the board
22 member and you can say Harold Denton, damn it, I want an answer
23 from you. I'm not adjudicate that answer; I just want an answer,
24 and I want it in public. And if I don't like the answer you
25 can't deny the license or do anything else, but you can write a

1 letter to Dircks or to Joe Palladino, which is still public, and
2 say I've got a crappy answer from Denton. That's effective,
3 that's another way of resolving problems. If we keep our eye
4 on the ball of what the public hearing is about.

5 So what we're really saying is we don't need a
6 screening board to define or to control sua spontes, because
7 the sua sponte issue ought to be handled outside of the hearing,
8 raised by the hearing board outside of the hearing, by the
9 written request for the information justified. I really do
10 think the licensing board members have to do more than have a
11 gut feeling. Justify it. And then the staff writes back and
12 says that's a good question or a bad question or we're not even
13 going to follow it up because it's a silly question.

14 And then you can carry on your correspondence with
15 them and with their superiors, and they're not going to fool
16 around with you.

17
18 MR. REMICK: And I assume that what you're saying
19 here is on the assumption that the mandatory CP hearing would
20 no longer exist. So that the hearing --

21 MR. CHARNOFF: Yes. If you have a mandatory CP
22 you have a different question. What is the role of the board.
23 But presuming that that's gone and the sole issue is contro-
24 versy resolution, that's --

25 MR. REMICK: I have no differences. As long as you're

1 sitting there trying to do a job and a question comes up and
2 you have concern and you would like to know more about it, if
3 you are precluded from doing it, I agree, you probably --

4 MR. CHARNOFF: When we say the licensing board
5 members are competent to resolve disputes, we can't be in the
6 position of saying the licensing board members, I don't care
7 what you see -- can't do it.

8 MR. REMICK: Yes. You won't get good people if you
9 can't -- can you imagine that limitation on ACRS? You can ask
10 certain questions and other ones you can't.

11 MR. CHARNOFF: And it denies what you're telling the
12 public. But that doesn't mean that having asked it, you
13 adjudicate it.

14 MR. REMICK: I agree.

15 MR. CHARNOFF: And it doesn't mean that it has to be
16 done even before you write your decision. You might write a
17 letter to Denton and it may be a month later. It's got to be
18 done and it's got to be done to you, and it should be made
19 public, and then you have the responsibility to police it by
20 way of replying to his superior if you don't like it. Or,
21 write a letter back saying I like it. I mean, closing the
22 loop is kind of important on this question.

23 So we don't need a screening board for that, is
24 really where we're coming out. So we're going to be negative
25 I think on the screening board.

1 The last item we're going to talk about at this stage
2 is the proposal to restructure the appeal board admin assistants
3 and put them within the staffs of the commissioners. And we
4 are uniformly against that, and partly, that reflects the fact
5 that in our view, and certainly mine, the appeal board is a
6 class act. They do exactly what we're saying. They do write
7 their decisions very well. They sometimes come out with
8 positions that I don't agree with, and I think on some of the
9 procedural things they have been unnecessarily loose on getting
10 the hearing process started.

11 But I really fault the commissioners in the past for
12 not reaching down and saying that's wrong. But the appeal
13 board -- it may be just the current composition. It has -- and
14 Alan Rosenthal, one of the most competent guys in all of
15 government agencies writing decisions. And he has gotten people
16 on that staff who are really quality. Every decision they
17 write is readable, and they give the guidance to people that
18 a lot of the licensing board decisions haven't quite lived up
19 to.

20 Moreover, if you abolish them, you are really going
21 to put more things on the plate of the commissioners than I
22 think they are really able to cope with, even if these guys on
23 the staff are with them. And I think that our saying that the
24 people who are going to retained also says the commissioners
25 ought to review those matters on their own, and being more active

1 as to reviewing it, they don't have to see and deal with every
2 matter the appeal board deals with. You can see what happens
3 at current Commission meetings with matters. And my own view
4 is that that part of it is -- it would be a mistaken for another
5 reason, I guess, because I don't think you would get the kinds
6 of people the appeal board has been successful in getting if
7 they would be hidden in offices of the commissioners and be
8 anonymous people. It would become like the CAB was and the
9 FPC. They don't write classy decisions.

10 This agency does, at least at the appealboard level,
11 and I must say that even from the judicial review standpoint,
12 while we've had our share of court reviews I think the appeal
13 board has done very, very well in writing their decisions in
14 such a way that they would stand judicial review pretty well.

15 So that if you look at it just from the standpoint
16 of how do we attract quality and keep it, I think that this
17 proposal to restructure the appeal board is dangerous and will
18 hurt us in the long run.

19 MR. LEWIS: It doesn't hurt to have your structure
20 reflect the people you have available fill it.

21 MR. CHARNOFF: That's right. Now, it may be that
22 if and when Alan and some of the others on there retire you get
23 a deterioration in quality, and maybe it ought to be folded
24 in, but if you've got good people and it has an established
25 reputation, I think, in Washington of being pretty classy in

1 terms of getting good people. Let's keep it because it attracts
2 the better people. And the boxes don't matter as much as the
3 people do, so I think that we really are quite uniform on that.

4 MR. REMICK: Would you restrict the appeal board on
5 sua sponte matters?

6 MR. CHARNOFF: I think the appeal board ought to be
7 restricted in the same way the licensing board is. Its function
8 is to resolve disputes. I think it should have the same
9 authority.

10 MR. REMICK: Should it independently review licensing
11 board decisions where there is no appeal?

12 MR. CHARNOFF: Yes, I don't have any problem with
13 that. I don't know how the committee feels about that. I
14 don't have a problem with that because it's functioning for
15 the Commission in doing it. I don't have a problem with that
16 at all.

17 MR. REMICK: Of course, the Commission has the
18 Office of General Counsel reviewing both what the licensing
19 board did and what the appeal board did, and you get all these
20 different layers and people bringing up --

21 MR. CHARNOFF: But you do have to only look at the
22 quality of the Commission memoranda and decisions compared
23 with the quality of the appeal board memoranda and decisions
24 to recognize what happens when you bury these folks in the
25 Office of General Counsel. This is not to disparage those

1 fellows; they've got a million other things to do, but they're
2 also not hired for that job. And the result is that the appeal
3 board decisions are really very impressive documents, and the
4 Commission memoranda are -- they're not terrible but they're
5 much more pedestrian, and I think it is strictly a function of
6 whether the people are out front writing their own decisions
7 or not.

8 I would have them review it. It's an interesting
9 question I don't think that our committee has discussed. I
10 personally would have them do it, but I would clearly restrict
11 them on the sua sponte side of the issue, to the same extent
12 that all of the other licensing board members are recognizing
13 the definition of what a public hearing is all about. It is
14 not to review everything that's going on. I'll raise that
15 with the group tomorrow. That's a good question.

16 MR. LEWIS: Of course, my problem is that I don't
17 think of the hearing process as being very effective in
18 resolving issues of technical dispute at all. That is to say
19 as has been pointed out to me frequently, there are other issues
20 that arise. Where there are issues of factual, technical issues,
21 the last way, as a physicist, that I would think of resolving
22 them is to have any hearing process whatever. I would resolve
23 them by bringing in the best people I could find to address the
24 issue.

25 MR. CHARNOFF: I think I mentioned before our

1 meeting and at our last meeting here -- and I may be alone on
2 this -- but I really would like to see, and it's why we're
3 driving so hard at focusing on what the hearing process is all
4 about -- I really would love to see an experiment where the ACRS
5 or some substantial portion of it is charged with resolving
6 the technical disputes in a contested hearing, and have the
7 lawyers sitting in the back of the room and have the technical
8 people on both sides get up and tell you folks what's right
9 and wrong. Have you questioned that. Dissertation stuff.
10 But then challenge you folks to write a decision as distinguished
11 from a bunch of conclusions.

12 I would love to see that. I think that they ought
13 to experiment with that. I think they ought to do that. In
14 one case, let's take all the nuclear safety issues. I don't
15 care about need for power or environmental matters. But I
16 would like to see them do that, and I would like to see the
17 legislation authorize them to do that. And see what happens.

18 MR. LEWIS: You know, several years ago, there was
19 this very short-lived proposal within the scientific world to
20 have a science court. I thought it was one of the dumbest ideas
21 I'd ever heard at the time.

22 MR. CHARNOFF: Well, I thought it was dumb because
23 frankly, we had had science courts in this agency, but nobody
24 has been willing to call it that. I mean, we really had it.
25 Whether it's your review or the licensing board hearings; those

1 are science courts.

2 MR. LEWIS: Yes, If that's the measure of the
3 way it works, I --

4 MR. CHARNOFF: Well, there was a heavy overload of
5 all the procedural stuff and nobody really looked at and said
6 how do we really look at it. But I would love to see the
7 Commission say we're going to have a hearing on this case, if
8 anybody wants it. If the issues come in and they are technical
9 issues, we reserve the right to take it away from the licensing
10 board and assign it with the following groundrules to the ACRS,
11 or some proportionately experienced group. And have that
12 decision of that ACRS be the decision of the agency, subject to
13 judicial review if you want, because you guys would have to
14 write the decision.

15 But I would love to see that happen. I think that
16 would be the healthiest thing in the world.

17 MR. REMICK: That would be an interesting experience
18 for the ACRS.

19 (Laughter.)

20 To have to put down its views that specifically and
21 address the issue rather than conclusions.

22 MR. CHARNOFF: Sure. This is hindsight, but one of
23 my big criticisms over the years is I think we got off on the
24 wrong foot.

25 MR. LEWIS: But you would make ACRS adhere to the

1 judicial format in doing this.

2 MR. REMICK: No.

3 MR. CHARNOFF: No. It would be much less judicial,
4 as I said. There wouldn't be any lawyers there.

5 MR. LEWIS: Okay, very good, I misunderstood the
6 sign of what you said about --

7 MR. CHARNOFF: You'd run it just the way you run it
8 now, except -- No. I'm saying that there would be technical
9 presentations. Each side can not only make their presentation;
10 they can raise the questions.

11 MR. LEWIS: I understand. In my profession, I don't
12 do this sort of thing for a living. I'm a physicist, and the
13 way we resolve technical disputes -- and we've had this conver-
14 sation before -- is we get the contestants and we get a black-
15 board and we shout, and then in the end somebody says by golly,
16 you were right and I was wrong.

17 MR. REMICK: The one difference is you don't have
18 the recourse of the courts. Once you decide it, and the person
19 you decided against is opposed, you don't have that recourse.

20 MR. CHARNOFF: Maybe one thing we can say is no
21 recourse to the courts in that case. But -- and that can be
22 done by statute. But you really do have the obligation to write
23 a reasoned decision.

24 MR. REMICK: Absolutely.

25 MR. CHARNOFF: I think that may be the difference

1 between those blackboard debates.

2 What would happen if we did that once? It would be
3 great.

4 MR. LEWIS: It would be great.

5 MR. REMICK: It would be interesting. The licensing
6 boards do it without a staff. The staff don't write their
7 decisions.

8 MR. CHARNOFF: You know, I was counsel to the ACRS for
9 one day at one meeting in 1957, and I urged Roger McCullough-- he
10 was then chairman -- that you've got to write long decisions,
11 and I wasn't counsel very long after that.

12 (Laughter.)

13 And I often look back and that and say, I wonder
14 whether we've made a mistake.

15 MR. LEWIS: You know, the mechanism by which ACRS now
16 writes its letters falls just short of perfect. It's one of
17 the most incredible mechanisms --

18 MR. CHARNOFF: And unfortunately, as a result, -- your
19 committee really make a lot of contributions, but the appearance
20 of it and the impact of it is diminished by the failure to
21 write the good reports.

22 MR. LEWIS: Yes, I agree completely, but it was very,
23 very hard. I sit on lots of other committees --

24 MR. CHARNOFF: With 15 egos on a committee, that's
25 very hard.

1 MR. LEWIS: Well, it's more than that. The history,
2 the form, is just very bad for writing decent letters. First of
3 all, 15 people can't write letters. I sit on other committees
4 in which we write letters and it's possible sometimes to get
5 out literate letters, but not from ACRS.

6 MR. CHARNOFF: The problem is it was cast in concrete
7 in the fifties, and I think that we really never had the effort.
8 But you know better than I would.

9 But that's the end of my message right now, and I --
10 if you could propose that, I would love to see that proposed.
11 I really think that's where the Congress -- that's a proposal
12 that Congress ought to grapple with. And my problem with that
13 legislative package is that it's not experimental enough.

14 MR. LEWIS: I should give you my draft additional
15 comments. I assume that ACRS -- informally, I assume ACRS
16 will never approve of that, but it has views not dissimilar
17 from some you have expressed here. But that's for your personal
18 use; it's not for public.

19 MR. CHARNOFF: Thank you. Now, there are a lot of
20 other proposals in the reform package. There are proposals
21 with regard to standing; what kind of intervenors ought to
22 get into it. We haven't really come to grips with that. There
23 are proposals with regard to the conduct of the hearing, which
24 we will get into, and they really go to the heart of this
25 hybrid process; as to whether that's a good idea or a bad idea.

1 That's in the legislation, too.

2 And then finally, there are proposals that you must
3 have talked about this morning; namely, how do you get rules
4 out of adjudicated cases. And one of the proposals is that
5 the licensing board or somebody else would recommend that a
6 generic matter emerge from this contest. There ought to be
7 a rule. Certainly, we have no objection to that. I think we
8 have a problem. We have talked about that one, but we haven't
9 put anything in writing yet.

10 Why should it depend upon the licensing board chairman
11 to propose that; any of the parties might propose it. The
12 staff might propose it, once you've made your decision. But
13 that's a procedural nuance.

14 MR. REMICK: We just barely touched on that this
15 morning. My view is that the staff, maybe ELD, is better
16 able to determine what is of generic importance, rather than
17 the board chairman.

18 MR. CHARNOFF: Actually, the way it's written it's
19 ironic that if the board doesn't do it, or the board chairman
20 doesn't do it, it sounds like it shouldn't be done. Whereas,
21 we really ought to be lose about that and allow anybody to say
22 well, out of this hearing we have these many pages of transcript;
23 let's make this a generic matter. So then the board can't do
24 it at its initiative; well, the staff could do it at its
25 initiative. But the concept is not a bad concept. I mean, it

1 is worthwhile to look at that concept.

2 There were some other recommendations relating to
3 some smaller matters like should the EDO issue the license
4 rather than the board or the NRR, and none of those are terribly
5 important. But we will be looking at those, and we will be
6 getting another draft out somewhere in the future.

7 MR. LEWIS: Well, I think we'll be continuing our
8 dialogue as all these develop anyway, and it's something to
9 look forward to in the future.

10 MR. CHARNOFF: Will you be, or have you already
11 written a letter to the Commission on the legislative package
12 or not yet?

13 MR. LEWIS: We're in the midst of drafting it. We
14 had a draft letter yesterday which had a greater measure of
15 agreement, I must say, than I expected, so I think that
16 actually a probability that we'll get out a letter in the
17 next meeting has gone from zero to something finite.

18 MR. CHARNOFF: You have that privilege. We have to
19 get it out.

20 MR. LEWIS: Well, it isn't a privilege; it's a right.

21 MR. CHARNOFF: Yes. Well, you'll be called tomorrow
22 anyway, I'm sure, when and if they start their legislative
23 hearings. The ACRS always gets going for that.

24 MR. LEWIS: Oh, yes, I have no doubt that we will
25 be called upon.

1 MR.CHARNOFF: I don't think the DOE bills have gone
2 forth yet.

3 MR. GASKE: No, apparently not.

4 MR. CHARNOFF: I understand from trade press that
5 Representative Ottinger is preparing a draft which will go --
6 Dick Ottinger of New York -- which is a reaction from him to
7 the Con Edison hearings at Indian Point, which will urge more
8 and greater hearings on each amendment.

9 (Laughter.)

10 So there'll be something on their plate at Congress,
11 and you said it might take six years. I think that's probably
12 not unreasonable. It took five years to get an AFR bill out of
13 the Congress.

14 But what's significant -- and we are, and I'm sure
15 you will be looking at it, too -- we really have looked at the
16 administrative reform package assuming no legislative change,
17 and we may have to revisit that if there are legislative changes.
18 But the fact is that most of these issues can be handled by
19 regulation. That doesn't mean Congress -- I differ with Vic
20 Gilinsky who thinks maybe we shouldn't go to Congress on this.
21 But I think we ought to put this issue of what is the hearing
22 all about before Congress. It's the only way it will get
23 accepted.

24 MR. LEWIS: But I don't think that the six-year life
25 of the legislative decision ought to deter the agency from doing

1 those things which it can do administratively.

2 MR.CHARNOFF: That's exactly correct. And we are
3 going to say that, and I hope you will say that. I think
4 that's very important.

5 MR. LEWIS: I hope we will say that, too, because
6 this agency does have a tendency to find excuses not to do
7 things.

8 MR. CHARNOFF: Yes. The backfit rule can be done
9 right away. The raising of contentions could be done right
10 away.

11 MR. LEWIS: Oh, absolutely.

12 MR. REMICK: The Commission a year and a half ago
13 was just ready -- they had reached agreement on raising
14 thresholds, and the Regulatory Reform Task Force was appointed
15 and one of the commissioners said why should we decide it; let's
16 give it to the Regulatory Reform Task Force, and they took a
17 year and a half on it. And what's in here is basically what
18 the Commission agree on, on contentions and on discovery.
19 Basically what's in here is what a year and a half ago they
20 were, after many meetings, had come to internal agreement.

21 MR. CHARNOFF: Those things can be done, and most
22 of these things can be done. I'm not sure about the hybrid
23 hearing. I think the hybrid hearing probably now, in light
24 of all the history of how we've interpreted the Act in the past,
25 probably ought to require legislative sanction. But apart from

1 that, almost everything else here can be done.

2 MR. REMICK: How about the mandatory CP?

3 MR. CHARNOFF: You're stuck with them.

4 MR. LEWIS: But we don't have to worry about that for
5 the next few years.

6 MR. REMICK: No, no. But if you want to get it
7 passed, now is the time to be pushing for it.

8 MR. CHARNOFF: Incidentally, there was something in
9 the legislative package that I didn't choose to even make an
10 issue of in the draft I was writing the other night, with
11 regard to the mandatory ACRS review, it would amend it to
12 include amendment to site permits and designs and so on. And
13 my reaction was I don't have a problem with amendments to the
14 standardized designs and so on, coming to -- do you really want
15 to be bothered with amendments to site permits and so on? Is
16 that necessary? Has anybody thought about that? I did not
17 raise it, and maybe I ought to.

18 MR. REMICK: Mostly, that's environmental matters
19 really.

20 MR. CHARNOFF: Sure. And this would make it mandatory
21 that you review all site suitability determinations, and I can
22 see why maybe you ought to look at those. We all have some
23 question about looking at those at the outset. But certainly,
24 amendments thereto to be of mandatory nature is just overloading
25 the burden, I think.

1 MR. REMICK: That's a good thought.

2 MR. CHARNOFF: That's all I have for you.

3 MR. REMICK: Thank you very much.

4 MR. LEWIS: We're very grateful for your willingness
5 to come again, and we may make this a six-year dialogue.

6 (Laughter.)

7 MR. CHARNOFF: If I get a draft out this week, why
8 don't I send you a copy?

9 MR. LEWIS: We'd very much like to see it, because we
10 will be saying something, hopefully, about all of these things.

11 MR. CHARNOFF: Okay. I'm going to try to get something
12 out of the committee tomorrow, which would mean I would get it
13 out Friday. Are you meeting this weekend on this?

14 MR. LEWIS: No.

15 Thank you very much.

16 (Whereupon, at 12:22 p.m., the meeting was
17 adjourned.)

18
19 HEMLOCK
20 BRASABLE
21 COTTON CONTENT
22
23
24
25

CERTIFICATE OF PROCEEDINGS

I hereby certify that the transcript of proceedings
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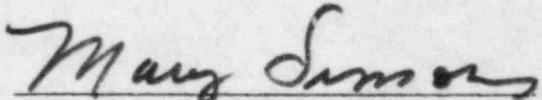
Date: March 16, 1983

Time: 8:30 a.m.

Place: Washington, D.C.

is true and correct.

MARY SIMONS


Mary Simons