NUCLEAR REGULATORY COMMISSION

ORIGINAL

COMMISSION MEETING

In the Matter of: PUBLIC MEETING

BRIEFING BY THE AD HOC COMMITTEE ON
REGULATORY REFORM

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1 UNITED STATES OF AMERICA

2 NUCLEAR REGULATORY COMMISSION

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4 BRIEFING BY THE AD HOC COMMITTEE ON REGULATORY REFORM

5

6 PUBLIC MEETING

7

8 Nuclear Regulatory Commission

9 Room 1130

1717 H Street, N.W.

10 Washington, D.C.

11 Tuesday, August 31, 1982

12 The Commission convened, pursuant to notice,

13 at 10:05 a.m.

14 BEFORE:

15 JOHN AHEARNE, Commissioner

VICTOR GILINSKY, Commissioner

16 JAMES ASSELSTINE, Commissioner

17 STAFF AND PRESENTERS SEATED AT COMMISSION TABLE:

18

S CHILK

19 L. BICKWIT

G. CHARNOFF

20 G. EDGAR

S. LONG

21 R. REDMOND

A. ROISMAN

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DISCLAIMER

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1 P R O C E E D I N G S

2 (10:05 a.m.)

3 COMMISSIONER AHEARNE: Good morning. Chairman
4 Palladino apologizes for not being here this morning.
5 He became sick over the weekend and is still not feeling
6 well, so he will not be here today. To the members of
7 the group, he asked me to apologize on his behalf.
8 A few opening remarks that he would have given
9 had he been here I think are appropriate. I am pleased
10 to welcome on the Commission's behalf the available
11 members of the Ad Hoc Committee for Review of Nuclear
12 Regulatory Licensing Reform proposals, under the
13 chairmanship of Mr. Gerald Charnoff.
14 In November 1981, Chairman Palladino announced
15 the formation of the NRC Regulatory Reform Task Force to
16 develop legislative and administrative recommendations
17 on actions which can improve the licensing process. The
18 Commission then established the Ad Hoc committee in
19 March of 1982 as part of its overall effort to address
20 nuclear licensing regulatory reform.
21 The purpose of creating the Ad Hoc committee,
22 from whom we will hear today, was to provide the
23 Commission with an independent assessment of
24 recommendations made by the Regulatory Reform Task Force.
25 The subject of today's briefing is the

1 proposed legislative package entitled Nuclear
2 Standardization Act. This package was formally referred
3 to the Ad Hoc committee in June and it was published in
4 the Federal Register together with the Commission's
5 request for public comment. Today's briefing will not
6 address the public comments, but rather will center on
7 the Ad Hoc Committee's report.
8 This report was published. It is dated August
9 16th. The committee's report is a valuable and
10 important contribution to the Commission's consideration
11 of licensing reform. I would like to thank the members
12 of the committee, and particularly the chairman, for
13 their efforts.
14 In a minute I will ask Mr. Charnoff to take
15 over the meeting to present the report and make any
16 other points he or his committee members wish to
17 present. But first, I will ask either Commissioner
18 Gilinsky or Commissioner Asselstine or both if they have
19 any comments to make.
20 COMMISSIONER GILINSKY: I don't have any
21 comments but I have a question. My memory has been
22 washed clean by my vacation.
23 (Laughter.)
24 MR. CHARNOFF: You're fortunate.
25 (Laughter.)

1 COMMISSIONER GILINSKY: Is this the Chairman's
2 committee or the Commission's committee or what?
3 COMMISSIONER AHEARNE: The Commission agreed
4 on the membership of the committee, and the Chairman
5 asked for the -- actually made the contacts. But as I
6 recall, he did come to all of us and we all agreed.
7 COMMISSIONER GILINSKY: Do you regard this as
8 a report to the Commission, or the Chairman? Who has
9 been paying you, Bob?
10 (Laughter.)
11 MR. CHARNOFF: We regard it, I think, as a
12 report to the five commissioners, or as many
13 commissioners as are interested.
14 (Laughter.)
15 COMMISSIONER GILINSKY: Fair enough.
16 COMMISSIONER AHEARNE: I assure you it is five
17 who are interested. Any other questions or comments?
18 COMMISSIONER ASSELSTINE: I would just like to
19 make one brief comment. I know that at the time this
20 organization, your group, was formed I was on the Hill
21 and I wasn't at the Commission yet, and I know there was
22 a very strong feeling down there that the Commission and
23 the public and the Congress would all benefit from
24 having a group such as yours look at the Commission's
25 legislative proposals and subsequently, the more

1 detailed legislative proposals beyond standardization
2 a.. the administrative recommendations.
3 After reading the report, I was very pleased
4 with the job that you all have done. This is a very
5 contentious issue, and I for one, -- and I think all of
6 the Commissioners probably would share this, too --
7 appreciate the spirit in which you all pursued this task
8 and the evident effort to give this a very thorough
9 review and to try as much as possible to develop a
10 consensus view on the proposals that you had before you.
11 That is about all I would add at this point.
12 COMMISSIONER AHEARNE: All right, Gerry.
13 MR. CHARNOFF: Let me say I do want to
14 introduce the members of the committee. On my left is
15 Steve Long and George Edgar, and on my right, Tony
16 Redmond and Bob Roisman. Dave Stevens called yesterday
17 and apologized that he was unable to come in from
18 Washington for this meeting.
19 I might say, Commissioner Asselstine, that we
20 all felt that this matter deserved a great deal of
21 attention, and I think all members of the committee gave
22 it that kind of attention. I think we met six times and
23 then there was individual effort with regard to writing
24 pieces of the report so that the committee could
25 function.

1 The other strong observation I would make from
2 this particular exercise is that it is perfectly obvious
3 that a number of us come from different points of view
4 and different academic and professional training.
5 Nevertheless, we were easily able to arrive at some very
6 strong consensus positions that are reflected in the
7 report.

8 Where we did disagree -- you will note there
9 are some individual statements at the end -- they are
10 really small compared to the overall consensus that was
11 arrived at, without the need for large amounts of
12 compromise. That struck me as being rather important in
13 terms of the diversity of the members of this group.

14 It was a good exercise and I think we have
15 worked well together. And to the extent you wish to
16 call on us to review the remaining legislative
17 proposals, if any, and the administrative reforms, we
18 would be pleased to function in that area.

19 I would like this morning just to take a few
20 minutes and give an overview, if you will, of what is in
21 the report, and then ask individual members of the
22 committee, if they wish, to comment on any piece of the
23 report, or all of it if they wish, and then allow for a
24 question and answer discussion.

25 I won't take very long in this, but it seems

1 to me it would be useful. We did have in the report an
2 Executive Summary as well as a detailed discussion. Our
3 approach was, at the outset, not to attempt to redraft
4 the proposal. We felt that we were unable to devote the
5 kind of time that would be necessary for that, so we
6 devoted ourselves primarily to a constructive -- we hope
7 constructive -- critical review of the proposals.
8 I would like to just run through some of the
9 major features of the consensus, or the consensuses that
10 I found in the group. I think first --
11 COMMISSIONER GILINSKY: I wonder if I could
12 ask you, before you get going on this proposal, if you
13 could say a word about what this is designed to improve
14 or fix? In other words, the problem as you see it?
15 COMMISSIONER AHEARNE: Are you asking for what
16 problem that they see should be fixed? Or their
17 interpretation of what the problem is that the proposed
18 bill is designed to fix?
19 COMMISSIONER GILINSKY: Well, I think I would
20 ask what problems they think ought to be fixed, which I
21 assume is the basis for your own proposal.
22 MR. CHARNOFF: Yes. I think implicit -- Well,
23 I don't know that we have our own proposals in here so
24 much as our reaction --
25 COMMISSIONER GILINSKY: Or suggestions.

1 MR. CHARNOFF: -- to how to go about doing
2 what the proposed legislation was intended to do. I
3 think implicit rather than explicit in our report is the
4 sense that the current regulatory process deserves
5 regulatory reform. I think we would probably -- I am
6 not sure we would all formulate it the same way -- but I
7 think we would probably acknowledge that the present
8 process has a number of significant questions or
9 problems associated with it.
10 I think we would think, for example, that
11 decision schedules are unpredictable. I think we would
12 be concerned -- we have been concerned with the fact
13 that determinations, whether made through the hearing
14 process or through the regulatory process in its broad
15 sense, lack stability. We are concerned that there has
16 been no reasonable definition of the purpose of a public
17 hearing, and that the lack of that has created a number
18 of questions in the conduct of public hearings: the
19 role of the staff, the role of intervenors, the
20 requirements imposed upon intervenors, the nature of the
21 testimony and the extent to which a whole variety of
22 issues that may be unrelated to the specific safety
23 concerns of this Commission should or should not be
24 presented within a forum.
25 All of those things, it seems to us, have

1 complicated the hearing process and have made the
2 regulatory review process so uncertain that from an
3 industry standpoint where industry is committing itself,
4 -- or at least has been; I am not sure it is doing that
5 anymore -- committing itself to very large investments
6 in large power plants with the unpredictabilities
7 associated with that.

8 I think this is clearly a deterrent to further
9 consideration. I am not at all saying that were these
10 problems resolved, we would suddenly see a rash of new
11 orders. We certainly won't, for a variety of other
12 reasons that are not material at this point.

13 But I think you can understand why, whether it
14 is a privately owned operation or a publicly owned
15 operation, there may be questions of prudence associated
16 with committing the kind of commitments that are
17 required on certain schedules, both as to approvals and
18 as to completion of facilities.

19 I think, too, that from the standpoint of
20 members of the public who are concerned with the
21 specific proposals to locate nuclear plants in and
22 around their backyards, it has never been made totally
23 clear as to what their rights or obligations are. It
24 seems to move around from proceeding to proceeding.
25 There are exhortations from time to time as to what they

1 have to put up upfront that are not implemented when
2 push comes to shove.
3 There are questions as to the availability of
4 information that should or should not be made to
5 third-party intervenors freely, voluntarily, and
6 otherwise, all of which we think come about as a result
7 of a failure of all of our history of the last 15 or 20
8 years to sharply define by this time what the purposes
9 of the public hearing process is all about.
10 And finally, the question of stability of
11 decisions both as to design decisions and information
12 requirements, which is not uniquely a problem associated
13 with the public hearing, but is related to staff,
14 agency, and public hearing decisions. This has been a
15 mounting problem which has caused, in part, our large
16 amount of increases in cost and time schedule.
17 And there has been a feeling that while the
18 Commission has a regulation on its books relating to
19 backfitting -- I think there is a clear consensus that
20 that particular regulation has not been implemented with
21 any vigor with regard to staff proposals to change
22 matters that have been previously determined. We are
23 not saying that there aren't reasons why past decisions
24 shouldn't be reviewed or re-examined. We are saying,
25 however, that we need some rigor with regard to that

1 matter.

2 It is out of that basic approach -- and I

3 would be glad to have other members of the committee

4 perhaps talk to that at this time -- that we were able,

5 I think, to relate to the proposed Standardization Act

6 in the manner in which we did.

7 COMMISSIONER AHEARNE: Would perhaps any other

8 members like to comment?

9 MR. ROISMAN: I would just add to that, sort

10 of if you will a further elaboration of the question of

11 stability that at least from my perspective, that one of

12 the important reasons for doing the reform is that the

13 hearing process and the total review process has

14 demonstrably failed too often.

15 The number of times that the Commission's

16 hearing boards, appeal boards and even the commissioners

17 themselves have concluded that a plant was essentially

18 okay either for environmental and safety reasons, and

19 then discovered that they had not found out what was

20 really wrong with it. Plants get cancelled on the basis

21 of considerations which were arguably to be part of the

22 environmental review process. They were too expensive,

23 they weren't really needed, there were alternatives

24 available.

25 A system that has got as much attention to it

1 as a decision on whether or not to build or operate a
2 nuclear power plant should, given the number of times
3 the Commission has had to make that decision -- which is
4 not great, say, compared to the number of times other
5 permitting agencies make permit decisions -- should have
6 a better track record than that.
7 There is something fundamentally wrong with
8 the system if it doesn't happen just once or twice but
9 happens on a much more extended basis. And the safety
10 matters, of course, are of great concern. But the
11 economic considerations that result in cancelled plants
12 because considerations were not properly made at an
13 earlier stage are equally of concern.
14 I think that that has to do as much with
15 stability as anything else. The failure of the decision
16 to be more likely right than not is a fundamental reason
17 why the process should be made better.
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1 COMMISSIONER AHEARNE: Anyone else?
2 COMMISSIONER GILINSKY: I do not want to hold
3 you up any more, but at some point I wonder if you could
4 address whether these sorts of problems that you have
5 raised are problems that need to be dealt with by
6 sharpening the management of the agency or are problems
7 that need more structural solutions, changes in the
8 statutes and so forth.
9 MR. CHARNOFF: I will try to address that in
10 certain areas when I get to that today if you would
11 like. I would say just partly in reply to something
12 Tony mentioned, I think I too am concerned with the
13 question of how do we make errors, if you will, in the
14 decisions.
15 I must say, though, that I would approach this
16 problem a little bit more modestly in the sense that I
17 am not so sure what we can do with the process is going
18 to be able to provide better decisions with regard to
19 some of the questions we ask of the process.
20 And particularly, I have in mind some of the
21 issues that Tony was concerned with; namely, how did we
22 fail to predict more accurately what was going to happen
23 10 years down the road when we advanced arguments for
24 why we need a plant or why we do not need a plant.
25 COMMISSIONER AHEARNE: Perhaps before we get

1 into the areas of disagreement, you could quickly
2 summarize the concensus areas.
3 MR. CHARNOFF: That was not a disagreement; it
4 was an observation that I thought was philosophical.
5 Namely, that we ought not to ask of the system more than
6 it can deliver.
7 COMMISSIONER AHEARNE: I suspected it might
8 lead us into a longer discussion.
9 MR. CHARNOFF: The proposed act clearly is
10 intended to encourage the location of preapproved
11 designs on preapproved sites and limit the process
12 related to approving that to something called one-step
13 licensing and then, parenthetically, to give the
14 Commission -- it is intended to give the Commission
15 something called more authority to control or direct its
16 hearings than it now has in existing legislation.
17 I think stated in that conceptual framework we
18 do not disagree that that is a desirable goal. Our main
19 concern with the proposed act is that it is so focused
20 in on that that I think it has failed and we think it
21 has failed to deal with the realities that are related
22 to those kinds of proposals.
23 We think that if one is to perform the
24 regulatory process an agency just gets so many chances
25 on the Hill, it seems to me, to approach that kind of

1 question that it ought to be done in a large sense
2 rather than a narrow sense; that is, we ought not to be
3 fragementing the proposals.
4 So the one basic observation we make is that
5 it is important to take into account not only the
6 proposals that are involved in the proposed
7 standardization act but the other proposals that we have
8 not yet seen which may, frankly, may remove or modify a
9 number of our concerns. But those relate to the
10 administrative reforms, and we are told perhaps
11 additional legislative proposals.
12 We think that any such proposal should require
13 for one explicit consideration of the purpose of the
14 public hearing insofar as we are dealing with that. We
15 think that in that regard, while we have attempted to
16 list some of the possible purposes of the public
17 hearing -- and by all means we did not list exhaustively
18 what might be a complete list -- but among those that we
19 discussed we easily concluded on a consensus basis that
20 the purpose of the public hearing is dispute resolution.
21 We think that the sharp formulation of the
22 purposes of the public hearing helps answer or will lead
23 to answers to a number of other questions related to the
24 conduct of the public hearing. For example, if one
25 focuses on the question of dispute resolution, it

1 immediately focuses on the question of how do you define
2 at the outset what the dispute is, how much information
3 must you have at the outset to establish that there is a
4 dispute.
5 Now we did discuss, in answer to your question
6 Commissioner Gilinsky, whether one needs legislative
7 relief towards this matter or whether one could do this
8 by internal reform or better management. In our view,
9 it probably is sterile to argue, or unproductive to
10 argue, whether the Commission has this authority in the
11 present words in the Atomic Energy Act as amended or
12 whether it does not. Because what we are looking for,
13 again on a consensus basis, is to attain the objectives
14 in such an explicit manner with sufficient backing from
15 appropriate authorities, i.e., Congress and this agency,
16 that we remove or reduce the chances of litigation and
17 contentiousness down the road on some of these matters.
18 Certainly the hearing format and the hearing
19 mode has been a contentious matter in the past. We
20 think it is time to make the Congress face up to the
21 question of what kind of hearings it wants with respect
22 to nuclear power plant licensing.
23 In that regard, we think that the exercise of
24 discussing purposes is very important and should be an
25 integral part of the proposal. We think, too, that the

1 statute or the proposal should include explicit
2 consideration of NEPA and other environmental matters
3 and see how that fits into the various proposals.
4 We discuss this in our paper in the context of
5 early site review. There are important NEPA and
6 environmental matters that could or could not be
7 considered or should or should not be considered at the
8 early site review that really need clear delineation at
9 the outset if we are going to understand how the process
10 works. We are not necessarily talking about
11 modification or amendment of NEPA, but we are talking
12 about integration of NEPA. This may not necessarily
13 require congressional approval, but it certainly would
14 be well if the proposal was advanced to Congress in such
15 a way that its awareness of it would give sanction to
16 what you are proposing to do.
17 In this regard, we found that the proposed
18 legislation was just silent on this matter. It could be
19 again that that would be handled in the administrative
20 reform package. In our view, those questions are
21 important and require explicit consideration now.
22 The third matter that I would focus on is the
23 question of stability or stabilization of design
24 decisions and regulatory requirements. We think that
25 there has to be some articulated reasonable standard for

1 limiting reopening by the Staff or by third parties of
2 issues that have been resolved between the Staff and the
3 licensee or at a public hearing or wherever.
4 The industry has been beseiged at this point
5 by changes in requirements and informational
6 requirements to the point where it has significant
7 effects. Now maybe it is that the technology is not
8 mature enough to enable us to attain the degree of
9 stability we require. Perhaps that is what all this
10 means, perhaps not. To the extent we are allowing
11 plants to continue to be operated and to be licensed, I
12 presume that we are at a stage of maturity that is
13 beyond that. So that we need a formulation that is
14 rather strongly articulated which serves in the first
15 instance at least as a guide or a directive to the
16 Staff.
17 COMMISSIONER GILINSKY: How do you interpret
18 the failure of the present backfitting rule. As you
19 say, it is not applied, or very often at any rate.
20 Would a new rule be dealt with differently?
21 MR. CHARNOFF: I think this does become a
22 management question. Our proposal, by the way, just to
23 respond to that, is one that calls for a strong
24 management initiative. That is, we do not accept the
25 formulation in the proposed legislation which includes a

1 standard which we think is just prone to further
2 litigation and contentiousness.
3 What we really call for is a strong insistence
4 by you gentlemen as Commissioners that at least as to
5 recommendations by the Staff that there be a rigorous,
6 intelligent, rational process made at a high enough
7 level finally within the Staff where there is an
8 articulation of the proposed change; the reasons for the
9 change; the benefits of the change; the costs or
10 consequences of the change, whether they be financial or
11 whether they be technical; the impact of that particular
12 change from a safety standpoint on the particular plant
13 in such a way that you as a Commissioner reading that
14 paper could reasonably conclude that the Staff has
15 thought its way through clearly with respect to any of
16 the changes that it is proposing.
17 We think that the failure to see that -- and
18 we have not seen that as a regular matter -- has been a
19 source of great concern. We would apply the same logic
20 to changes advanced by third parties and to some extent
21 to changes proposed by applicants once an approval has
22 been made. We think that approvals, once made, if the
23 process has been reasonable, gives some degree of
24 assurance that that approval is right. And there ought
25 to be a very strong burden on those who wish to make

1 that change.

2 Where we come out is that we need an internal

3 strong management directive that the rationale be

4 articulated forcefully. I am mindful of, to some extent

5 in my own personal view, a deficiency, if you will, in

6 the ACRS process. I for one had always thought the ACRS

7 was a great process, but they have failed insofar as the

8 ACRS report is concerned. The ACRS report is simply

9 conclusory.

10 I think that if we had insisted that that kind

11 of organization or this type of process we are talking

12 about now in backfitting had required not a

13 one-paragraph or a one-page or two-page type report but

14 a sufficient number of pages to include the rationale

15 for the decisions it is making, that that decision

16 process would be significantly improved.

17 COMMISSIONER AHEARNE: Just as a slight aside,

18 I suspect one of the problems with that last proposal is

19 that the ACRS letter represents something that at any

20 given time 10 to 15 people can agree to, and as a result

21 it tends not to have a lot of that detail because --

22 COMMISSIONER GILINSKY: All of whom are trying

23 to catch a plane.

24 (Laughter.)

25 COMMISSIONER AHEARNE: When you begin to put

1 in all that detail, the length of time it would take to
2 get the letter out would increase substantially.
3 MR. CHARNOFF: I have no doubt that that is
4 true. As a personal aside, going back to the early days
5 of the ACRS I remember I was counsel to it for about two
6 meetings and I made this recommendation to it.
7 (Laughter.)
8 COMMISSIONER AHEARNE: But you are persistent.
9 MR. CHARNOFF: I have been patient. But I am
10 not making the proposal now for the ACRS. You know, it
11 is interesting because the fact is that this committee
12 came at this problem that you presented to us from very
13 many different persuasions, if you will. We were able
14 to deliver what I consider to be a reasonably good
15 document in terms of an exposition of views. We had
16 about 3 months to do it and it was not a 3-day exercise
17 but I think we tried very hard to do it.
18 COMMISSIONER AHEARNE: Yes.
19 MR. CHARNOFF: I think what we are now talking
20 about is not the ACRS.
21 COMMISSIONER AHEARNE: Yes. I understand.
22 MR. CHARNOFF: I am really talking about some
23 place reasonably high in the Staff apparatus that gets
24 the proposals and insists upon that articulation of
25 rationality.

1 COMMISSIONER AHEARNE: You mean something
2 similar to the system we now have set up?
3 MR. CHARNOFF: If that gets published and it
4 is available and so on, I think the answer is yes. I
5 think that it would work.
6 COMMISSIONER GILINSKY: Let's see. What do
7 you mean by that?
8 COMMISSIONER AHEARNE: The CRGR process.
9 COMMISSIONER GILINSKY: What do you mean by
10 "gets published"?
11 MR. CHARNOFF: I think people should see those
12 papers which reflect the view of that committee that
13 says that.
14 COMMISSIONER GILINSKY: That sounds
15 reasonable.
16 MR. CHARNOFF: It seems to me it ought to be
17 out.
18 COMMISSIONER AHEARNE: Let me contrast --
19 MR. CHARNOFF: I am not asking for public
20 comment on it or anything else. It does seem to me
21 there is a prophylactic value in getting papers
22 published that serves to require a lot more rigor in
23 recommendations.
24 COMMISSIONER GILINSKY: Keeping a record of
25 the administrative decisions.

1 MR. CHARNOFF: Yes.

2 COMMISSIONER AHEARNE: Let me contrast two
3 things, Gerry, that you have discussed. You mentioned
4 in response to Commissioner Gilinsky's question about
5 whether we could make these changes in the general
6 process or whether a statutory change was required. You
7 pointed out that it was really time to have it addressed
8 in the statute and you felt it was probably not
9 worthwhile to argue about whether or not we could make
10 the changes.

11 MR. CHARNOFF: I was referring there, of
12 course, to the hearing process. I am not necessarily
13 including this last matter.

14 COMMISSIONER AHEARNE: I understand that. But
15 now let me transfer over to the backfit issue. It seems
16 to me you have a similar type of situation; namely, can
17 we do this by our own regulation or should we put
18 something into the statute. I am a little puzzled by
19 your answers. They seem to be different in the two
20 different cases.

21 MR. CHARNOFF: Let me say I do not have any
22 objection to a stabilization provision in the statute.
23 I think that it would be well to have it, given the fact
24 that we have not been terribly satisfied with the
25 regulation that has been on the books for the last dozen

1 years or so.

2 I do not see any need, though, for legislation

3 for it, but I do not think there is any objection to

4 having Congress face that question too because there is

5 an inherent question in here. The inherent question

6 is: Is it possible and reasonable for this government

7 to insist upon certain changes in new plants that it is

8 does not insist upon being imposed on old plants.

9 This bothers a lot of people in terms of does

10 that mean old plants are less safe. It may be true, and

11 it may not be true. But the conceptual problem inherent

12 in that kind of position, it would be well to have

13 Congress address. In that area, a backfit provision or

14 concept might be very useful.

15 It certainly is not essential. Whereas the

16 public hearing process is such that so many people get

17 involved in that and there is so much judicial review of

18 that that, in our view, clear consideration of that

19 matter by the Congress could only be helpful rather than

20 detrimental, whereas in the backfit area I do not think

21 there is any objection to having Congress address it. I

22 do not know that it is essential.

23 Certainly, I want to speak for myself on that

24 because I do not recall any discussion in our group of

25 congressional attention to this particular matter.

1 COMMISSIONER ASSELSTINE: But, Gerry, you are
2 of the view that the fundamental problem in the backfit
3 area is not the standard, not the decisional test that
4 is set forth in 50.109, it is a management problem in
5 the way that that decision is reached by the agency.
6 MR. CHARNOFF: I think that is right. On the
7 other hand, I think that we do have a fundamental
8 problem with the standard that is proposed in the
9 proposed statute. I think we all agreed that the
10 standard that was proposed in the proposed statute would
11 probably lead to more contentiousness and probably
12 assumes too much as to our capability to quantify risk
13 at this point to provide any particular benefit.
14 I think that it would just slow things down or
15 cause more dispute when we are trying to focus on the
16 merits of issues rather than on procedural methods.
17 COMMISSIONER GILINSKY: It is worth saying,
18 and I am sure everyone here is aware of it, but
19 nevertheless that one reason for the tremendous amount
20 of backfitting is that we just got going very fast, we
21 increased the size of reactors and the complexity
22 rapidly on the assumption that if things turned up that
23 we needed to change, we are going to change them. And
24 inevitably, they did turn up, just because that happens
25 every time you get into a new technology.

1 MR. CHARNOFF: I indicated that, that this
2 might be a reflection of the degree of maturity of the
3 industry. On the other hand, there is something called
4 a rash of changes that comes up sometimes that does not
5 necessarily reflect the thought that we are trying to
6 ask you to impose upon the Staff so that there is a
7 discipline not just to reduce numbers but to make sure
8 they are worth doing.
9 COMMISSIONER GILINSKY: I agree with you.
10 MR. CHARNOFF: We can find historical reasons
11 for this, and we can relate it to the matter you have
12 discussed, we can relate it to TMI. But we could also
13 find, I am sure, that at times people have pet schemes
14 that they think are well and ought to be pushed.
15 COMMISSIONER GILINSKY: Oh, sure. We all know
16 that. And I think it is also true that one needs to
17 face the question of the extent to which you are going
18 to change the reactors that are already built as opposed
19 to making changes in the future.
20 For myself, I do not have any difficulty in
21 applying a different standard to the ones that are built
22 as opposed to the ones that are going to be built. We
23 do that throughout industry with airplanes and
24 everything else. But it always comes down to a matter
25 of degree: How different? And then you often have a

1 dispute.

2 MR. CHARNOFF: You have touched on an

3 important point that I did not yet relate to, which is

4 that we do feel that the backfit problem is not just a

5 problem as defined in the proposed legislation which is

6 a problem related to standardized plant approvals. If

7 anything, that backfit problem applies in spades today

8 to plants in being, both in operation and in

9 construction, and a handle has to be gotten on that.

10 This is not a plea to reduce changes, it is a plea for

11 disciplined changes.

12 COMMISSIONER AHEARNE: Just to keep this in

13 perspective, would it be correct to say that you did not

14 examine the structure that we have been attempting to

15 put in place with the CRGR?

16 MR. CHARNOFF: That is correct. We did not.

17 COMMISSIONER AHEARNE: So we should not view

18 the comments you are making as a conclusion that the

19 current system we are trying to put in place is

20 inadequate?

21 MR. CHARNOFF: I think what we were trying to

22 say is that the system that has been in place over time

23 has not worked.

24 COMMISSIONER AHEARNE: Yes.

25 MR. CHARNOFF: Some of us, maybe all of us,

1 are mindful of some of the efforts you have been making,
2 and we have not reviewed that from any standpoint.
3 COMMISSIONER AHEARNE: Fine. I just wanted to
4 make sure we had that.
5 MR. CHARNOFF: That's absolutely correct.
6 MR. ROISMAN: I think one thing in reference
7 to Commissioner Asselstine's question regarding the
8 present standard, I think that in our proposal we do not
9 suggest necessarily the retention of the standard but
10 propose something, if you will, what we think is more
11 pragmatic: Basically, that you should never change a
12 previous decision if the statute does not require it;
13 that, in other words, one of the things, the reason the
14 Staff or an intervenor or applicant would go through a
15 process of saying I would like to make a change is to
16 show through this rational statement why the statute,
17 whether it is for environmental or safety reasons,
18 requires that the change be made.
19 The present standard is sort of more like a
20 threshold of substantiality that gets you into the
21 question of deciding whether to have that change at
22 all. What we are saying is, do not worry about the
23 question of the threshold so much; make a statement that
24 is rational, that lays out all of your reasons, and at
25 the end show why the statute requires the change. If

1 the statute does not require the change, it ought not to
2 be made.
3 COMMISSIONER GILINSKY: But it will always
4 come down to the judgment of people in charge.
5 MR. ROISMAN: Absolutely.
6 COMMISSIONER GILINSKY: And the discretionary
7 standard is going to be a general one.
8 MR. ROISMAN: That is right. But what we were
9 trying to do is get away from the premise that I think
10 is in the proposed legislation, and it is in the present
11 rule as well, that by the use of some magic combination
12 of words you could somehow or other get around the fact
13 that it is ultimately a matter of judgment, and that the
14 only real test on all the judgment is to ask the person
15 or persons making the judgment to give a full
16 explanation of why they reached that conclusion and see
17 if doing that produces a change in their thinking.
18 The late Judge Leventhal in many opinions,
19 some of which were written about decisions of this
20 agency, stressed the value of stating a rational basis
21 for making decisions as actually helping to ventilate
22 the thinking process of the decisionmaker and maybe
23 making the decisions better. I think all we were trying
24 to do is sort of apply that concept to proposed
25 changes.

1 Now there was a second factor. That was that
2 a prerequisite to a change getting into this category,
3 if you will, was the principle that the change related
4 to a matter which had been totally resolved before and
5 that the only issues that remained with respect to the
6 matters were essentially the inspection and testing
7 decisions that had to be made.

8 So that if you had a situation in which under
9 current law a construction permit type decision were
10 made and the decisionmaker withheld final decisions and
11 said this is a tentative decision which we do not have
12 all the information on, as you are authorized under CP
13 decisions to do, then the change requirements would not
14 be the same.

15 It would not be any restriction on the ability
16 to make a change there. But if you have said, I have
17 locked it up, this is a final decision, and you have
18 enough information that you can say that intelligently,
19 then these backfitting or stabilization standards would
20 be applicable.

21 COMMISSIONER AHEARNE: The second case is the
22 one that would apply were one to extend this kind of a
23 standard to current plants.

24 MR. ROISMAN: Yes, that is right.

25 MR. REDMOND: I would just like at this point

1 maybe to make a clarifying remark that touches I think
2 on some comments that you made, Tony, and it is also
3 reflected in our summary section. I believe perhaps the
4 summary is a little too strongly stated on this question
5 of what changes would be considered approprirate or
6 allowed.

7 I believe the threshold level that they are
8 required by statutory requirements is perhaps too
9 stringent, particularly in the case where the proponent
10 of the change is the applicant where there may be
11 economic or technical value in the change, but
12 nevertheless the change may not lessen in some sense the
13 overall safety of the plant.

14 I think the body of the report elaborates a
15 little bit on that, but I think in the executive summary
16 it perhaps comes out too strongly that there is a common
17 threshold which is very severe which would be applicable
18 to all parties, including the applicant. And I think
19 that perhaps is too strong a simplification.

20 COMMISSIONER AHEARNE: You are saying that
21 you, if I read the statement saying that the proposed
22 change is required to meet statutory requirements, you
23 are saying one would be hard-pressed to find a statutory
24 requirement that the plant be economic?

25 MR. REDMOND: That is right.

1 COMMISSIONER AHEARNE: And as a consequence,
2 if the change did not affect the safety but was for
3 economic reasons you are concerned that this would not
4 meet this criterion.
5 MR. REDMOND: There could be many reasons why
6 an applicant may have proposed a change which would not
7 lessen the overall safety considerations but may have
8 some intrinsic value, and I do not think the applicant
9 should be precluded or put too heavy a burden on
10 proposing such a change.
11 MR. CHARNOFF: I do not think we were
12 eliminating the operative effect of section 50.59, which
13 does function in this area to some extent.
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1 But I think we are talking about any of the --
2 what Tony had in mind and what I think I had in mind
3 were any significant safety matter once decided ought to
4 remain decided, but that still leaves a lot of room for
5 some of the matters Bob was just referring to, and the
6 operative effect of a provision such as Part 50, 10 CFR
7 50.59.
8 MR. ROISMAN: Let me say one thing of concern
9 on that issue. What Bob has expressed and what I
10 expressed are not exactly consistent. That is because
11 we were not exactly in agreement on the point. I think
12 that when you open up the can of applicant proposed
13 changes that "keep the level of safety at the same
14 point," you begin getting into that very complicated
15 and, as best as I can determine as a lawyer and not as a
16 technical person, totally unresolvable problem that if I
17 increase the safety over here by a factor of X, and
18 reduce it over here by a factor of X, does the total
19 safety of the plant remain the same or not?
20 I think it has something to do with apples and
21 oranges. So I don't think Bob and I are really in
22 agreement, and I think, frankly, the committee kind of
23 finessed the point.
24 I think what Bob was making clear was in the
25 summary, we may not have had enough finesse on that

1 particular point.

2 COMMISSIONER AHEARNE: You see, Gerry, even

3 this committee operated as --

4 MR. CHARNOFF: One more meeting would have

5 done it.

6 (Laughter.)

7 MR. CHARNOFF: Let me touch on two other

8 matters if I can and then turn the floor over. We

9 considered the proposal that was in the draft with

10 regard to the deferral on energy determinations to an

11 agency such as FERC. You will notice that we were

12 rather negative with regard to that specific proposal.

13 I think it should be understood that we think

14 the idea of deferral to other competent agencies where

15 other competent agencies function well with adequate,

16 fair processes is something we do not oppose. We were

17 puzzled by the need to push for the energy

18 determinations to be made by FERC, when to the best of

19 our knowledge, FERC has not been making those

20 decisions. And to the best of our knowledge, those

21 kinds of decisions, even if erroneous, are made better

22 by the people in the local region and not necessarily by

23 the people here in Washington.

24 COMMISSIONER GILINSKY: Are you saying there

25 are better ones out there?

1 MR. CHARNOFF: The fact is that the thing that
2 concerns Tony so much is that people said yes here, but
3 they really said yes out there quite a bit, too. The
4 process is difficult and the problems of projecting need
5 relate to so many matters, and it is not just a question
6 of what will the demand be, but what will the factors
7 that affect the demand --
8 . COMMISSIONER GILINSKY: I think the logic
9 there was everyone of these bills starts off saying
10 energy generation is of interest to the federal
11 government because it crosses state lines and so forth.
12 The electrons don't know where they are coming from.
13 And it used to go on in the earlier drafts that the need
14 for power would be delegated to a particular state body,
15 and that seemed to me to be inconsistent.
16 MR. CHARNOFF: Some of us think there is a
17 question with regard to how to best handle proposals
18 relating to large plants which might service one or more
19 states. I think there is a problem out there. That is
20 my personal view.
21 COMMISSIONER AHEARNE: Our attempt to resolve
22 that problem was to go to the closest available body
23 which could cross state boundaries.
24 MR. CHARNOFF: But we felt that that problem,
25 which is really not unique to nuclear, should not be --

1 we should not try to resolve it through the nuclear
2 regulatory reform process for two reasons.
3 First, there are a lot of considerations out
4 there that apply, whether the proposal is nuclear or
5 otherwise. Secondly, because of the politics of the
6 situation. And this is a small part, if you will, of
7 the regulatory reform problem.
8 We could see -- to the extent we are such
9 smart tacticians on this matter, we could see
10 difficulties in moving the regulatory reform package
11 through, and tackling, if you will, this very small
12 problem from a nuclear standpoint but very large from a
13 lot of other standpoints. That would probably paralyze
14 the possibility of getting this through.
15 COMMISSIONER AHEARNE: Let me point out first
16 that as long as you admit the possibility that the NRC
17 would have to do some of it -- which is the case -- if
18 you say well, let the states do it, there are some
19 states that don't require a need for power
20 determination.
21 MR. CHARNOFF: That is correct.
22 COMMISSIONER AHEARNE: Then the NRC would have
23 to maintain the expert ability to do that. We haven't
24 been all that good in the past. And I would think it
25 would be useful for us to try to restrict ourselves to

1 things we might be good at.

2 MR. CHARNOFF: We are not saying that you
3 should stay in the business of projecting need.

4 COMMISSIONER AHEARNE: The second question is
5 who should do it? And that is where we ended up running
6 into various similar problems that have been discussed.
7 There are state boundaries that have to be crossed.

8 Tony, a few minutes ago, mentioned one of the
9 difficulties he saw failing in the process of
10 addressing, which was an accurate projection of need. I
11 would suspect that in the future, that might even be a
12 more contentious issue of what is the real need. We
13 were trying to find some organization.

14 Now, you might say well, why not go to the ERA
15 which is in the business of forecasting need. If it is
16 still there, that might be an option.

17 I think our approach was to try to find some
18 organization which would be more likely to be expert at
19 developing a good projection.

20 MR. CHARNOFF: A number of us have gone
21 through the NRC hearings where at a time, at least early
22 in the NEPA world, you did invite FERC or the FERC
23 predecessor, FPC people, to testify on behalf of your
24 own staff witnesses. I don't know of anybody who is
25 particularly thrilled by the quality of that particular

1 performance, and I think that to say well, we are not
2 very good, let's give it to FERC, is an interesting
3 response.
4 I think we are not saying -- and I think this
5 group recognizes that this agency really should focus on
6 the significant safety and the significant environmental
7 matters and not get distracted by these other matters.
8 However, the question that you are trying to
9 resolve and the response that you propose to it is very
10 troubling. Because the problem goes much beyond the
11 area of nuclear. And FERC just doesn't strike us as
12 being the right answer.
13 There may be an appropriate need for a
14 regional entity or state entities with more competence
15 or states where they don't deal with it, but I think
16 maybe that's a question you should pose to the Congress
17 and not try to respond to it.
18 MR. EDGAR: I think there is another
19 perspective on this. I think you should start with the
20 question of what do you mean by certification. In my
21 mind, certification connotes some formal process of
22 approval of a capacity addition. I can only speak
23 secondhand from conferring with some of my colleagues
24 who practice in this area.
25 FERC jurisdiction today over electrical rate

1 matters is rather limited. It is largely confined to
2 wholesale rate matters, and the amount of electricity
3 sold in the United States that passes through something
4 that could approach a certification process at FERC is
5 rather small. And the "certification decisions" as we
6 know them in the United States are made primarily at the
7 state level, and when they are, there is a
8 non-uniformity as among jurisdictions concerning the
9 type of certification and the nature of the
10 certification in scope and even procedural differences.
11 If the intention of the bill is to confer new
12 authority on FERC, in my mind that is a much larger
13 issue, and that should be explicitly stated and that
14 should be studied.
15 When I grappled with this problem, I could see
16 the central logic of reposing the certification
17 authority in an interstate authority. But I would
18 recommend strongly that you talk to FERC firsthand and
19 get their view on what their current jurisdiction is,
20 what their current practice is, and whether this is
21 workable.
22 I do not consider sending a FERC witness over
23 to an NRC proceeding to constitute certification. On
24 the other hand, there are many state agencies, public
25 utility commissions in the United States that do certify

1 capacity additions, do it well, do it reliably. And in
2 my view, there would be no reason at all that the NRC
3 could not reliably and properly rely in such a
4 certification and accept it without further review. But
5 I think the question needs a little more fundamental
6 study.

7 It may be impractical, but I think FERC is a
8 starting point to give you some insight into what is out
9 there as far as the existing practice.

10 COMMISSIONER AHEARNE: It turns out FERC has
11 send us comments saying they do not have the statutory
12 authority.

13 MR. EDGAR: That is what I thought.

14 COMMISSIONER AHEARNE: The general sense of
15 their letter is they are not particularly interested.

16 (Laughter.)

17 MR. EDGAR: And now that you offer it --

18 MR. ROISMAN: I think you have identified,
19 Commissioner Ahearne, an aspect of the problem that we
20 were also aware of, which is that where the state is not
21 going to do it, what do you do.

22 I think one thing we wanted to state strongly
23 was that where the state does do it, you ought to let
24 them do that. Or if they have a regional entity that
25 does it, you ought to let the regional entity to do it.

1 And that in a way, there is a built-in protection. The
2 utility can't go ahead unless it has what the requisite
3 requirements say. Perhaps you can dump the issue of
4 whether you can build a plant in Wisconsin to supply
5 power to Minnesota, but if you have to get the
6 permission of both states to do it, that takes care of
7 the problem. You either get two yeses or one no and
8 throw the project out.
9 With respect to those places where the state
10 or regional body is not making it, rather than looking
11 necessarily to FERC -- and what you really want to do is
12 you want to recognize what I think is an obvious fact,
13 that the Commission has done a miserable job when it has
14 had to do its own "need for power" considerations. In
15 fact, I don't mind stating on the public record it is a
16 disgrace, and the record proves me right.
17 But what you can do is go and contract with
18 one of the states to do it for you, if necessary.
19 Maryland, Steve Long's state, has done a fairly credible
20 job of this. They have a pretty good system working.
21 Before you go hand it over to FERC and say here is a hot
22 potato; we have never solved it, and FERC has already
23 told you yes, neither can we -- go to the people who
24 have been in the business.
25 Ultimately, it may be that in the best of all

1 possible worlds, you would like to have national energy
2 policy done by a national body, but it seems to me that
3 will come from the bottom up, not from the top down. It
4 will come only when the states decide they want to go to
5 regional bodies and the regional bodies decide they want
6 to go to a national body, and not from up here. And
7 then if you try to stick anything in that looks like it
8 was trying to establish a national body, I think that
9 the prediction that Gerry made is more than apt. This
10 legislation would never see the light of day. Not
11 because it wasn't meritorious, but because you would
12 have added to it that one little issue that touched on
13 the rights of states, and you have representatives of
14 all those states who have to decide whether to approve
15 this legislation.
16 COMMISSIONER AHEARNE: Just because it is a
17 public record, as you mentioned, I think I would have to
18 say that perhaps our record is as bad as you described
19 it to be, but you and I both spent some time a few years
20 ago looking at a lot of people who did predictions and
21 as I recall, no one was doing it well.
22 MR. CHARNOFF: I wasn't talking about the
23 accuracy of it; I was talking about the quality.
24 (Laughter.)
25 It doesn't matter if it is accurate, as long

1 as the quality is good.

2 (Laughter.)

3 COMMISSIONER AHEARNE: Go ahead, Gerry.

4 MR. CHARNOFF: The last matter I would like to
5 talk about is a thread that runs through most of our
6 comments that relates to something called flexibility.
7 We have found in the proposal some language here and
8 there that smacked of some what we would consider to be
9 rigidity that was unnecessary.

10 For example, -- and this one is not in the
11 legislation itself but it is included in the legislative
12 history of the analysis -- talking about whether or not
13 standardization or one-step licensing should apply.
14 One-step licensing might apply only to standardized
15 plants or standardization and so on should only apply to
16 -- I think the language was -- essentially complete
17 designs for whole new nuclear plants to be located at
18 multiple sites.

19 It was our view that the concept of regulatory
20 reform should be addressed to the question of where
21 there is a significant enough question related to a
22 discrete matter that can be resolved, the process ought
23 to allow for the matter to come to the agency for its
24 resolution so that one doesn't have to deal with
25 essentially complete nuclear plants for the purposes of

1 finality. One might deal with substantial parts of an
2 essentially complete nuclear plant but not in their
3 entirety.
4 One doesn't necessarily have to limit
5 standardization to a plant design that would be used at
6 multiple sites. One could envision -- years back we
7 talked about nuclear parks. One could envision a
8 standardized design good for ten to --
9 COMMISSIONER GILINSKY: I think the multiple
10 sites was really intended to mean for multiple use; that
11 you simply knew at the outset that this was eligible for
12 multiple use.
13 MR. CHARNOFF: Multiple use at one site.
14 COMMISSIONER GILINSKY: Or other sites,
15 whatever. In other words, you expected to build more
16 than one, or at least wanted permission to build more
17 than one.
18 MR. CHARNOFF: Well, obviously standardization
19 should have that concept that we are not looking at a
20 single plant.
21 On the other hand, we thought that there is no
22 reason why one-step licensing couldn't apply to a
23 complete custom plant, if you have, or an applicant has
24 a proposal to build a plant that is, from a design
25 standpoint, of that degree of finality that your staff

1 could look at it.

2 COMMISSIONER GILINSKY: I don't think it was

3 intended that it would not apply to a plant for which

4 you had that degree of finality of design. The point is

5 simply that that design would, once it had received that

6 approval, would be eligible for further use.

7 MR. CHARNOFF: The standardization I was

8 talking about --

9 COMMISSIONER GILINSKY: At least, that is my

10 thinking.

11 MR. CHARNOFF: I think we would agree. It

12 seems that the legislation is cast in the context of

13 those kinds of rigid formulations that are probably not

14 central to what you want and would limit its beneficial

15 use.

16 COMMISSIONER GILINSKY: But it does seem to me

17 that the notion of having a design or -- we can't say

18 the final design; that means every last bolt and so on;

19 that is why we say essentially final design -- as soon

20 as we figure out what that means. I think that is an

21 important concept. I don't think you can give

22 substantially final approval until you have what is a

23 substantially final design.

24 MR. CHARNOFF: We didn't quarrel too much with

25 that. We did grapple a little bit, and we came up with

1 a probably useless formulation that is more than the
2 PSAR and less than the FSAR. And the term "essentially
3 complete final" doesn't I think offend any of the
4 conversations we had in our group. I think we were
5 troubled more by the fact that that was addressed to
6 something called a whole or essentially whole nuclear
7 plant.

8 The early site formulation seems to be to
9 either give a complete review or a complete sign-off to
10 an early site, rather than to pieces of it if somebody
11 has portions of it. It is that type of approach.

12 COMMISSIONER GILINSKY: It has to be pieces
13 that can be separated reasonably.

14 MR. CHARNOFF: The conventional one we talked
15 about for early sites, we talked about the seismic
16 requiremens of the site. We saw no reason why an
17 applicant, whether it is a state agency or a local
18 agency or a utility or anybody who is acquiring sites,
19 could not come to you and get a determination as to what
20 the seismic requirements for that site would be.

21 That is a separable, discrete type of
22 question. The legislation doesn't quite entertain
23 that. There is a provision towards the back of the
24 section dealing with early sites that probably reflects
25 an intent to allow that. But it wasn't nearly as

1 explicit as it ought to be.

2 COMMISSIONER GILINSKY: I think there you are
3 just getting into the difficulties of having a lot of
4 pieces of reviews around, and it may be that one can
5 accommodate that and it may be that sometimes they
6 cannot.

7 MR. CHARNOFF: It is conventional today to
8 talk about the benefits of the marketplace. But in our
9 view, the marketplace does provide a number of
10 restraints. We really don't think an applicant for an
11 early site review or a portion of it or a design would
12 come up to you with a lot of fragmented pieces because
13 it is expensive to him as well as to the agency. So
14 that the marketplace does have some restraints
15 somewhere, and we think that it would focus in on the
16 discrete portions, and you would have the reserved right
17 to entertain any other thoughts to decide what is
18 discrete enough to decide --

19 COMMISSIONER AHEARNE: But you don't want to
20 preclude that.

21 MR. CHARNOFF: We don't want to preclude that.

22 COMMISSIONER GILINSKY: When we start talking
23 about pieces of the plant itself, it is a little harder.

24 COMMISSIONER AHEARNE: That seems to have come
25 up also in the comments, the distinction between NSSS

1 and the balance of plant.

2 MR. CHARNOFF: Yes. There are interfaces but

3 there are values to having that available for review, it

4 seems to us. And certainly, it ought not to be

5 precluded by legislative fiat.

6 COMMISSIONER GILINSKY: From our point of

7 view, you were talking about stability and not opening

8 these issues up again and so on. Everytime you are

9 talking about pieces, at some point you have to put

10 together the pieces. Sure, you have parameter ranges

11 and everything else, but you really have to check again

12 whether it all fits together. And the more pieces there

13 are, the more interfaces there are. They increase

14 rather more rapidly.

15 MR. CHARNOFF: And I don't disagree with what

16 Tony said before, either. We are talking about that

17 quantum of material that allows for enough finality so

18 that you can intelligently sign off on it. You may have

19 interfaces you have to look at later, but once you have

20 that, that is finally enough for you to look at. And

21 your process ought to be open for proposals.

22 Whereas, the legislation is cast in language

23 that may not reflect your intent, but is cast in

24 language that would suggest somebody has to come forward

25 with the whole thing to make this work.

1 MR. ROISMAN: I think our concern was to leave
2 you the flexibility. It may be that particularly those
3 of us who are lawyers here -- Bob might be able to deal
4 with you on the merits, Commissioner Gilinsky.
5 Certainly, the rest of us can. But if an applicant
6 comes up to you and says look, I think I have something
7 that is discrete enough, and here is my reasoning and my
8 explanation, and deals with the concern that there might
9 be an interface problem later on because the applicant
10 doesn't want to come up with a proposal that will have a
11 relook down the road. So they will have to think that
12 through.

13 If they come up with that, the legislation
14 ought to give you the option, if you want to take it, of
15 saying hey, that looks like a good idea. Let's give you
16 a discrete review on that particular aspect of the
17 design or aspect of the site or aspect of the
18 environmental issues.

19 COMMISSIONER AHEARNE: Discrete review meaning
20 final approval?

21 MR. ROISMAN: Yes. You now have it, and that
22 is it.

23 COMMISSIONER GILINSKY: Subject to checking
24 all the interfaces. In other words, anyone that comes
25 this way has to understand the degree of finality is

1 simply less when you come with pieces. It just can't be
2 any other way.
3 MR. CHARNOFF: That is correct, but that
4 reminds me of another thought. When we were looking at
5 the one-step licensing proposal, it seemed to suggest
6 that the one step would involve approval, and then
7 perhaps nothing else needs to be done. What we were
8 recognizing is (a) that the one step may not be total
9 because there are certain issues that can't be handled
10 at the early stage, and (b) there is necessarily some
11 question that is going to be looked at by this agency,
12 and the legislation ought to be clear that everybody
13 recognized that so that nobody is kidded by that
14 proposal.
15 COMMISSIONER GILINSKY: I must say I go along
16 with one-step design approvals, but the more I think
17 about this subject the more I think one does not want
18 one-step approval. It may be that you don't want
19 hearings at these other steps; that may be a whole
20 separate issue. You may want to have a hearing at a
21 certain stage. Other things are set for hearing; other
22 things are not.
23 But I think that particularly as the plant
24 gets close to operation, there ought to be hold points.
25 I don't know that I would call it licensing approval,

1 but at least hold points at certain stages. I think
2 that is the way it is done in a lot of places in other
3 areas, and as a plant stars operating, that is the first
4 time all of these things come together with the design,
5 the people and everything, and there ought to be formal
6 checkpoints, it seems to me.
7 MR. CHARNOFF: I think you are probably
8 correct, and I don't think we would disagree with that.
9 I think you have said something that is very important.
10 But some of us had in mind at least when we talked about
11 the function and the purpose of a public hearing, that
12 there will be certain places where you have to say here
13 a hearing is appropriate, and here a hearing may not be
14 appropriate.
15 I think all of that is what needs to be
16 addressed in this total package called regulatory
17 reform. We do have a hiatus in nuclear power plants.
18 We have time to do it. It is in that context that we
19 think all of the questions that were inherent in your
20 particular last observation really need explicit
21 consideration. And perhaps all of them or a substantial
22 part of them have to be addressed by the Congress,
23 because there is room for debate on these issues.
24 MR. REDMOND: Gerry, I would just like to add
25 that in our discussions I think our concerns on this,

1 going from one-step licensing to multi-step licensing, I
2 had the concerns you had about the interfacing problems,
3 and it does give some proliferation of regulatory
4 activity.
5 I guess I was persuaded, though, in the final
6 analysis by the arguments for flexibility and the fact
7 that the Commission would reserve the discretion as to
8 what kinds of issues they would consider for individual
9 consideration and approval. But again, to preclude in
10 the language of the act that kind of flexibility seemed
11 to us to be perhaps going too far.
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1 COMMISSIONER AHEARNE: I do not think there is
2 any chance. I doubt if the Commission would endorse,
3 and I am sure the Congress would not approve, a proposal
4 that would say that one-step means that once approved, 5
5 to 7 years before constructed and going into operation,
6 the agency never looked at it. That just would not
7 happen.
8 MR. CHARNOFF: The draft does not include
9 anything like that either.
10 COMMISSIONER AHEARNE: So the concept on
11 one-step is really talking about the hearing process and
12 recognizing that there has to be agency approval in a
13 different mechanism.
14 MR. CHARNOFF: Maybe there is a final point I
15 should make: that we were very concerned that when it
16 came to the question of the hearing function, when it is
17 to be available and so on, this proposal has kind of a
18 backdoor approach to the question. I think these
19 questions of the nature of the hearing, when it is to be
20 allowed, when there are not to be present and so forth,
21 are all sorts of questions that the legislation must
22 deal with. That is important not only to get a national
23 consensus, it is really very important for those who
24 propose to step into this particular area to know what
25 they are facing.

1 While there are risks in presenting those
2 questions, it seems to me that we have to deal with
3 those questions as a society and get that clarified, so
4 that rather than take it as a backdoor approach and then
5 perhaps giving the Commission more authority to do this
6 with rulemaking authority, that it might be subject to
7 judicical review.
8 These are the kinds of questions that Congress
9 really ought to address. I think the best thing we
10 could do is to present these kinds of questions
11 intelligently to the Congress and let them debate them.
12 COMMISSIONER GILINSKY: Let me ask. You said
13 as part of the purpose of the hearing, you said you
14 thought it ought to be principally, if not solely, a
15 resolution of disputes among parties. Congress must
16 have had more in mind when they made hearings mandatory
17 at the construction permit stage. I think originally it
18 was at the operating license stage, and they backed away
19 from that.
20 You are saying we ought to back away from the
21 construction permit stage. What would you say has
22 changed since Congress put that into the law?
23 MR. CHARNOFF: That calls for a speech, I
24 guess. But when Congress mandated the mandatory hearing
25 in 1957, that was one of the conditions of the

1 Indemnification Act. It really arose out of a specific
2 accident, the handling of the PRDC application by the
3 then Commissioner. It was, in effect, a price that that
4 Commission had to pay; namely, that there would be a
5 statutory ACRS with a statutory ACRS report that would
6 have to be disclosed and that there would have to a
7 public hearing.

8 Congress was just bent in 1956 and 1957 on
9 getting that agency decisionmaking that reflected itself
10 in the Commission's decision in 1956, I guess it was, on
11 PRDC out in the open. They just wanted an open record.
12 That later became the vehicle for something called
13 public information, public education, public acceptance,
14 during the early 1960s. Do not forget that whole period
15 of time was one of basically one of uncontested hearings.

16 The difference has been that we have a have
17 more contentious society since the late 1960s. We have
18 many issues that people have become concerned about, and
19 that activity alone has changed the nature of the public
20 hearing.

21 But beyond that, nuclear power is no longer
22 the great secret that it was in the late 1950s and 1960s
23 where one had to sell the product. There are lots of
24 plants out there today. The public, generally speaking,
25 is aware of that. So to approach this now and say, is

1 this the same as in the 1950s and the 1960s where public
2 education are getting it out in the open was the sole
3 issue would fail to recognize that it is really a rather
4 mature industry even if it is not mature technologically.
5 COMMISSIONER GILINSKY: Let me ask from
6 another point of view then. Suppose we went with this
7 formulation and said the purpose of the hearing was to
8 resolve disputes and the Commission seems to be telling
9 them now not to look into anything on their own. Would
10 it really change things an awful lot? Are the boards
11 really pursuing things all over the place?
12 MR. CHARNOFF: Well, let us just examine the
13 sua sponte question. Clearly, if the question is that
14 the adjudicatory program is designed to resolve disputes
15 coming to the agency from different points of view,
16 there really is no room for sua sponte review in that
17 sense.
18 COMMISSIONER GILINSKY: Suppose you eliminated
19 that. Do you see a big change in the hearings?
20 MR. CHARNOFF: I thinkthe next big change that
21 would come about would be the concentrated attention on
22 what it is to get a contention admitted. I think in the
23 early days when the issue was one of let us allow public
24 education to be the primary or a primary purpose, this
25 agency adopted a number of rulings in a number of cases

1 where if the board or the appeal board could determine
2 that a particular contention was marginally acceptable,
3 which was the common slogan at the time, it was admitted
4 with almost nothing to speak for it.
5 I do think that if we are talking about
6 dispute resolution, that connotes or carries with it the
7 concept that there has to be almost at the inception a
8 sufficient showing to show that there really is a live
9 dispute that this agency has an interest in hearing. I
10 think the practice has been quite uneven, even though
11 this agency has spoken a little better in those respects
12 of late. But I think the practice is still quite
13 uneven, and that would make a bg difference, yes.
14 COMMISSIONER GILINSKY: So there you see that
15 as an important difference in what sort of contentions
16 are admitted rather than the sua sponte area?
17 MR. CHARNOFF: I am not ranking them. I think
18 they both propose questions with regard to the function
19 of the hearing and how they work.
20 COMMISSIONER GILINSKY: In terms of the sense
21 of time and effort?
22 MR. EDGAR: I would like to respond that you
23 have to use Gerry's phrase, "an uneven practice." Some
24 board chairmen will treat that hearing as a trial and
25 come to a conclusion and get the evidence finished and

1 you finish. Other board chairmen view the function
2 rather broadly and in certain instances, putting aside
3 the term "sua sponte," will conduct the hearing in such
4 a way so that it is clear that the function of the
5 hearing is to serve as an independent review or
6 overcheck on the Staff, not to simply resolve the
7 dispute.
8 In my mind, the most fundamental thing that
9 could be done with the hearing process is for clear
10 management direction to be established. Once you have
11 established that direction, then you will have at least
12 some prospect for a uniform result. But today I do not
13 believe that the message is entirely clear.
14 You have made several sua sponte decisions
15 recently on review, and the message is becoming clear.
16 But until you do that, I do not know how you can manage
17 a process and expect a uniform review throughout that
18 process until you answer the question what are we doing
19 this for, why are we there?
20 COMMISSIONER GILINSKY: I would have to say
21 for myself, I do not see it as quite the clear blue
22 light that you see it.
23 MR. EDGAR: No. And let us not misunderstand
24 it. By simply stating the purpose, one does not bring
25 about dramatic improvement in the process. The process

1 itself has inherent difficulties. It is a difficult
2 process to manage, and I do not think there is any magic
3 solution.
4 All I am trying to suggest is that that is the
5 starting point. If you do not start in the right place,
6 you are not going to end up in the right place.
7 MR. LONG: I see a pitfall to statutory
8 prohibitions to sua sponte review, though. I agree with
9 the main body of the committee that that should not be
10 the primary function, because I do not think it would be
11 served adequately by the hearing board. I think review
12 of the Staff's analysis probably is more of a management
13 problem within the Staff or the Commission.
14 On the other hand, a statutory prohibition to
15 sua sponte review is going to put the ASLB members in a
16 rather strange position as they see things they think
17 are possibly relevant or may have been really initiated
18 by an admitted contention but may be a separate issue in
19 themselves.
20 If there is a statutory provision, you have
21 opened up a whole new area of litigation after the board
22 decision as to whether or not they properly heard that
23 and as to whether or not they properly rendered a
24 decision on the whole licensing question.
25 I think we may be getting more litigation out

1 of the statutory prohibition. So I would urge perhaps
2 an indication for a change in direction but nothing that
3 can be litigated in the statute.
4 COMMISSIONER ASSELSTINE: How does that happen?
5 MR. LONG: I was discussing this with an
6 attorney yesterday to try to get a better handle on it.
7 It is fairly infrequent, as I understand it, to have
8 either an administrative law judge or any other judge
9 limited in what they can consider in making a decision.
10 If such a limitation were put into the statute just
11 given, that there is a very contentious situation that
12 almost any handle that can be used to delay, if not
13 reverse, a decision is quite often taken.
14 I am urging that something that can be argued
15 as an indication that improper evidence was admitted to
16 the decision, that that kind of argument not be allowed
17 to be made unless there is really a good reason for it.
18 And I do not see that reason, I do not see where the
19 hearing boards are bringing up improper issues.
20 Tony's separate statement in the back was
21 alleging that the TMI hearing process at the operating
22 license stage would have been improved by the addition
23 of the incidents that occurred very close to that actual
24 hearing just before could perhaps have improved the
25 hearing had they been brought in. I do not see that

1 necessarily an intervenor would have been in a position
2 to bring those in, but an ASLB member may very well have
3 been.
4 COMMISSIONER GILINSKY: I will have to say for
5 myself, the way I view it is that these board members
6 are sitting there in my place, and I find it rather
7 awkward to tell them that they cannot look into
8 something that they think is really important. There is
9 a standard in the regulations. Maybe that threshold
10 should be higher.
11 But to tell them that they cannot inquire or
12 follow something they think is important from the public
13 health and safety viewpoint is something I cannot go
14 along with.
15 Let me just add that I think there does need
16 to be Commission review, even if it is a rather
17 abbreviated one that the Staff resolved. And if there
18 were rather formidable review by the Commission, then I
19 think one can do away with the process in the hearing.
20 MR. EDGAR: Let me suggest this. The very
21 point you just made is, I think, a good one. But let me
22 ask you, what do you do if you find a safety problem? I
23 think what you do is to refer it to the Staff and then
24 the Staff, if there is a problem, will take action.
25 Harold Denton has the authority to issue an

1 order to change a license. The I&E can go out and find
2 out what the problem is. Why does the problem have to
3 be interjected into a trial-type proceeding?
4 COMMISSIONER GILINSKY: It does not have to
5 be. I am not going to say it does.
6 MR. EDGAR: Why could the board, if they found
7 a legitimate concern, not refer it to the Staff for
8 resolution as you would do if you found that?
9 COMMISSIONER GILINSKY: Well, I might or might
10 not. You know, once you get into a hearing, the parties
11 adopt points of view, and they hold them rather firmly.
12 One of the other things I would do is I would
13 take the Staff out as a party in the hearing. Then I
14 think this approach might be a more workable one.
15 MR. EDGAR: Sure. I think it would be. And
16 perhaps if we established the purpose uniquely as to be
17 dispute resolution, that again would be consistent,
18 removing the Staff as a party.
19 COMMISSIONER GILINSKY: But I think when the
20 Staff takes a very firm position in the hearing and says
21 something is not absolutely required or is required or
22 whatever, you cannot then just refer some new
23 development to them and, with all due respect to them,
24 be sure you are going to get a fair hearing for the
25 Staff on that new suggestion just because they adopt a

1 certain point of view.

2 COMMISSIONER AHEARNE: Could I step in for a

3 moment? It is 11:25. I would like to give Gerry a

4 chance to make any last comments he wants and then let

5 the other members of his group make comments. And I am

6 sure that we have some additional questions.

7 MR. CHARNOFF: I think I have really spoken

8 enough. I would be happy to just turn it over to the

9 other members.

10 I do want to say that I think assigning this

11 problem to our group was a challenge to us, and the

12 contributions that everybody made to this panel were

13 substantial and the ability of all of us to work as well

14 as we did together was really a very pleasant experience.

15 COMMISSIONER AHEARNE: Other members?

16 MR. LONG: I think my opinion is very close to

17 the central opinion of the committee. I have two areas

18 of reservation, both of which I believe have been

19 discussed pretty much.

20 To just enumerate them, one was the sua sponte

21 review prohibition; the other was the problem of

22 defining a sufficiently discrete part of a nuclear steam

23 supply system that you could really make a decision

24 ahead of time and not exacerbate the problem that the

25 regulatory staff is already having in seeing

1 cross-linkages and interconnections for common-mode
2 failures. That is, different scenarios come up, they
3 feel they have to deal with different incident scenarios.
4 On the other hand, I think especially when you
5 get into the siting side of it, there are things that
6 come up that are on the critical path. Again, I think
7 it becomes a matter of management rather than statutory
8 design that the Commission should probably retain the
9 flexibility through the statute but be very careful how
10 it exercises that flexibility by management.
11 MR. EDGAR: I expressed my views on several
12 specific subjects. I am again in accord with the
13 central theme of the report.
14 Commissioner Gilinsky raised, I think, another
15 fundamental question: what should we do
16 administratively, what should we do by statute? With
17 one minor exception, I do not think there is anything in
18 here that you need statutory change to implement. And I
19 will identify that. The value of having Congress act is
20 that some of the policy implications are aired and
21 decided probably by the body that is best equipped to
22 decide those functions.
23 There are three things that Congress acting
24 will do: one, it will provide some impetus for
25 implementation; two, it will provide some permanence;

1 and three, it will inject permanence into the system.
2 I think the latter point is a key one in
3 connecction with the one area where I think you need a
4 statutory change. In my view, there are three
5 priorities here for the Commission, whether it is
6 administratively or by statute: backfit, which we
7 discussed earlier, and I think that ought to go
8 administratively;
9 The purpose of the hearings, which we have
10 discussed, which I think you need a minor statutory
11 change on that mandatory CP. You have an inconsistency
12 there. If you say that the purpose of the hearings is
13 dispute resolution, then you must go back and clean up
14 the mandatory CP issue;
15 In terms of format of the hearings, which we
16 have not discussed, I think what you have got is, at
17 least in my view, the Atomic Energy Act does not require
18 any change in order for you to apply informal hearings
19 to either rulemaking or S&N licenses. You have at least
20 an argument that has been made that no change is
21 required on CP an OL hearings under the Atomic Energy
22 Act.
23 But in my judgment, you should be very
24 explicit and you should get that nailed down in the
25 statute. Otherwise, the uncertainty that is going to

1 pervade the process will effectively hamstring the
2 reform effort.
3 The Sholley case is a perfect example where I
4 think everybody understood as a matter of practice what
5 the law was, but words in the statute were not as clear
6 as they could be. Now that needs to be cleaned up.
7 I would not rely, similarly, on the state of
8 the Atomic Energy Act for my authority to impose
9 informal hearings on the CPs and OLs.
10 And as a final note to that, our committee did
11 not address in any detail the specific format
12 questions. But I would like to express a personal view
13 that I would strongly urge you to consider a reform
14 which slants the format of the hearing away from the
15 trial-type process and toward more informal mechanisms
16 for consideration of issues, be it a hybrid hearing, be
17 it a legislative hearing.
18 But my personal view is that, given the nature
19 of the issues presented, that the trial-type process
20 does not work effectively and, indeed there are
21 preferable means for resolving disputes of this nature.
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1 COMMISSIONER AHEARNE: Bob?

2 MR. REDMOND: I believe I have already made
3 some qualifying remarks in our report that I thought
4 needed to be made. But for the record I would just like
5 to say, speaking for myself -- and I am sure the other
6 committee members -- I commend the Chairman on the fine
7 job he has done in coming in with this report in a
8 timely fashion.

9 MR. ROISMAN: I think on the question of
10 dispute resolution, we were all in agreement that that
11 was the purpose for the hearing. I think where we would
12 have disagreement is if and when we were asked as a body
13 to address the question -- well, what flows from that.
14 And, of course, in our report we don't really address
15 that question.

16 I wrote separate views on one thing I think
17 flows from it, but others were, in effect, expressed
18 today. I don't think it necessarily means that you
19 eliminate sua sponte review. I think the question of
20 whether you have it or don't have it is more semantic
21 than real.

22 In the real world, a member of the hearing
23 board that thinks there is a question that he thinks
24 ought to be answered before the hearing is completed
25 doesn't need to be told that he has the right to sua

1 sponte review in order to get the answer. He is a very
2 powerful individual in that hearing and he can plant the
3 bug in somebody's ear and make sure the issue gets in
4 there one way or the other. So if he is concerned
5 deeply enough, it will be there, so I don't really worry.
6 I think precluding it and saying you cannot do
7 it, cosmetically doesn't sound very good. It sort of
8 says hear no evil, see no evil, speak no evil.
9 But on the question of whether or not you
10 should raise the threshold for contentions, I don't
11 think that is related to the question specifically of
12 dispute resolutions. You can have a dispute that starts
13 as then-Judge Burger said in the United Church of Christ
14 case, as merely a complaining witness. That was his
15 standard that you treat a "intervening party as a
16 complaining witness." They make their statement and
17 then it imposes on the agency an obligation to
18 investigate the charges. Or whether you have to come in
19 here with a prima facie, and if you don't have a prima
20 facie case you can't get in. Either one involves
21 dispute resolution, and the threshold ties into a
22 different issue.
23 And there is one that I think the committee
24 did not reach agreement on and I wrote a separate
25 statement on; that is, how do you get the quality of the

1 disputes you are resolving improved. We really don't
2 touch on that in the main report. I think the reason we
3 have this disagreement is that while we all agree there
4 should be dispute resolution in the purpose of the
5 hearing, what we don't agree on is why. Why should it
6 be dispute resolution.

7 I think the reason it should be dispute
8 resolution is because they are real dispute; that
9 despite ACRS and staff reviews, they are not resolved
10 yet. There is a need for an independent body, and the
11 hearing boards are that independent body, to look at the
12 issues that the parties think are important enough that
13 their resolution needs to be made by somebody else, and
14 resolve them.

15 If that is the "why" for the dispute
16 resolution -- in other words, that there are real
17 disputes that have not been laid to rest yet -- then I
18 think it follows that every effort should be made to see
19 to it that the resolution of the dispute is based upon
20 the best reasonably available information and evidence.
21 That does not happen now and it does not happen for a
22 variety of reasons.

23 One, it doesn't happen because of the people
24 who are involved in the hearing. Only two of them
25 usually have enough resources to present all of the

1 evidence in support of their particular position; the
2 staff and the applicant. And the staff and the
3 applicant, in the great majority of cases, have the same
4 position.
5 That is not an immoral result; it is not one
6 that is necessarily objectionable. You can understand
7 how it happens in the nature of the staff review that
8 the applicant changes a lot. But the appliant and the
9 staff are very contentious if you compare what the
10 applicant proposes and what the staff and applicant
11 agree to. The staff knuckles down under a lot.
12 The other society, the people that didn't
13 agree with the way that issue was resolved, usually
14 don't have the same level of resources.
15 Now, I have often talked about, and this
16 Commission has often considered, should you give them
17 money so that if their resources don't at least match,
18 you give them equal access. And I am becoming
19 increasingly aware that that is an unpopular position.
20 COMMISSIONER AHEARNE: Particularly about a
21 mile and a half down the road.
22 MR. ROISMAN: That is right. It has not sold
23 well, even though the Commission has recommended it
24 twice.
25 So it occurred to me that from my own

1 perspective, I, too, wasn't thinking about it as
2 intervenor funding. That again went to the question of
3 why, if the reason the intervenor is in the hearing is
4 to "give them a chance to have their say", then the
5 intervenor funding makes sense. Give them enough money
6 so that they can say it as well as they can. I don't
7 see that as a reason for the hearing.

8 The reason for the hearing is to resolve these
9 disputes. Well, it doesn't matter that the source of
10 this legitimate dispute happens to be a little old lady
11 in tennis shoes who, as Dolly Reingold did when she was
12 involved in the Seabrook hearing, read an article about
13 earthquake probabilities in a magazine and thought gee,
14 I wonder if this plant has an earthquake problem, or
15 whether it comes from an esteemed scientist who has
16 spent years studying this particular proposal and comes
17 in as an intervenor in the hearing. A dipuste is a
18 dispute. It deserves, if it has merit, full
19 consideration.

20 So what I have proposed in separate views that
21 David Stevens and myself basically agreed on was a
22 mechanism by which, when there is a dispute there and,
23 in the judgment of the board, all the information that
24 could be reasonably presented wasn't available, that
25 some mechanism should be provided to make it available:

1 that there should be a way -- and there are many
2 different ways to do that.
3 You could say to the staff go out and get us
4 additional information. It might be a type of study, it
5 might be a particular individual, we want to hear Dr.
6 Smith on this question, or some combination of those.
7 Or the board itself would simply say okay, we are going
8 to retain some people and go to a consulting firm. You
9 might go to the ACRS as consultants or something like
10 that. Or to say to the party who raised the dispute who
11 didn't have the money to present the expertise, you
12 present the expertise, and if when you have presented it
13 it has made a substantial mark on this record that we
14 think is important, we will reimburse you for the cost
15 of that.
16 Any one of those, it seems to me, accomplishes
17 the same result. Now, that would not be a valuable
18 thing to do if there was no evidence or no significant
19 evidence that there was some value to having that kind
20 of dispute resolution; if everything is okay, if the
21 hearing is nothing but an unnecessary adjunct put in
22 there as a result of what we now probably all agree was
23 a group of reasons that are no longer valid.
24 The licensing board on a number of occasions,
25 the appeal board on a number of occasions, has pointed

1 to the hearings and the value they have had in improving
2 safety and environmental matters. No one is closer to
3 the process than they.
4 I think it would be unfair to suggest that
5 well, why wouldn't they say that? Their jobs depend on
6 it. If you ask any of them, they would tell you their
7 job is mean enough as it is without fighting to keep
8 it. I think they would say from their perspective, it
9 generally has happened. There hasn't been a marked
10 change in plant design or environmental protection.
11 In addition, even more dramatic may be the
12 issues that got raised and were not adequately presented
13 and ultimately were proven to have been correct. If you
14 go back through the history of Commission decisions in
15 the 1970s, you will find testimony of experts who were
16 unable really to present the best case. I was familiar
17 with some of them because I put them on the witness
18 stand and I know what they couldn't do because of their
19 lack of time and resources to do it, or in some cases,
20 because they were not expert enough.
21 But you will find people predicting in 1972
22 that the Seabrook Nuclear Plant would run into severe
23 economic problems --
24 COMMISSIONER AHEARNE: I have to step in.
25 This is one of the financial processes.

1 MR. ROISMAN: I think that the process that was being
2 talked about at that time was only a year or so before
3 the plant actually began construction. And the delays
4 that have transpired since that date are not traceable
5 to the process, because every chance that the intervenor
6 had to get an injunction, you guys have returned it.
7 They never got an injunction.
8 COMMISSIONER AHEARNE: Well, it is a longer
9 argument. As I recall, there were stops and starts and
10 stops and starts.
11 MR. ROISMAN: But not stops and starts that
12 were from the process we are talking about.
13 COMMISSIONER AHEARNE: I am just talking about
14 the prediction that it was going to fun into financial
15 problems.
16 MR. ROISMAN: I don't want to argue with you.
17 You guys might even get to see it again.
18 (Laughter.)
19 I will submit that when the opportunity comes
20 and if the Commission is interested, I could very easily
21 have presented to you documentation that will show that
22 when individuals are making predictions about why the
23 company had financial troubles and what steps it would
24 have to take, --
25 COMMISSIONER GILINSKY: You know, you are

1 taking an example of something we decided really ought
2 to be there in the first place.
3 MR. ROISMAN: I mentioned that R.B. Briggs,
4 who is a hearing board chairman, had raised the question
5 of radiation-induced embrittlement in pressure vessels
6 at Indian Point Number 2 in the 1970s, emegency planning
7 issues that have been raised consistently that after
8 Three Mile Island suddenly became the vogue, and the
9 Commission issues related to a variety of safety
10 features from electrical connectors on down to other
11 kinds of issues that have been raised and never
12 adequately, never thoroughly, never completely
13 addressed, and that the system would have benefited
14 tremendously.
15 This stability which all members of this
16 committee and I think the Commission members feel as
17 well feel would be a desirable thing would have
18 benefited if enough information had been there.
19 I think what is happening in the discussion of
20 the reform proposals is a failure to appreciate that no
21 matter how much you make the system smooth, you cannot
22 make it better if you do not attack this fundamental
23 question of the quality of the process.
24 Arguably, you can take the public out of it
25 altogether and still improve the quality, as long as you

1 recognize that there would be times when the staff and
2 the applicant would not put in the information that an
3 independent decisionmaker might think ought to be there
4 in order to resolve certain types of problems.
5 You are set up in such a way that the staff
6 and applicant are not supposed to do that. The
7 applicant certainly is not going to volunteer the
8 alternative decision on how you design the plant. And
9 the staff doesn't do it because their function is --
10 they have seen it as ultimately to defend their position
11 not to complete the record.
12 If you shift the staff's role, as Commissioner
13 Gilinsky suggests, and don't make them a party to the
14 proceeding, then maybe their job becomes filling in the
15 gap, watching the record and saying wait a minute, there
16 is a gap here; we are going to fill that in with some
17 additional information. Then your need to go outside
18 the staff's resources to provide additional information
19 goes down dramatically.
20 The proposal I make doesn't preclude the staff
21 from putting that information in all on its own for
22 submitting to experts' point of view where there is
23 legitimate disagreement, saying this is a dispute that
24 exists, here are the experts that have the two positions
25 on it; we will listen to what they say, resolve it, and

1 let's move on to the next issue.
2 If they don't do that and there is an expert
3 out there whose view is pertinent, the board ought to be
4 able to get that in and complete the record. I had
5 initially considered -- in fact, the record will show
6 that I would not support the refor·s in this proposal --
7 if there was not a mechanism by ich we could improve
8 the resolution. My separate vie do not state that.
9 The reason they dor t is that as we went
10 through the process of lo king at the reforms, I became
11 convinced and am convinced that the value of those
12 reforms is, in some way, unrelated to this other
13 question. I think they would be good, even if we don't
14 improve the quality of the hearing. I am not sure that
15 the margin of improvement would be very dramatic without
16 addressing the question of quality, but I think that
17 they are worth doing.
18 That is not to answer the question whether
19 that makes them politically saleable, but that answers
20 the question for me, personally. So although on the
21 record of the committee I have put in the caveat, I
22 think that as long as they are as we have proposed them
23 in here and there are some really critical compromises
24 in there, if you will, to me that if you changed one of
25 them I might change my opinion about that. But they

1 weren't compromises that were made. So at least
2 personally, I don't hold to that.
3 Lastly, I want to make quite clear, as I think
4 the other members of the committee have, in my
5 participation on this committee I represented only what
6 views I had. At this point, I have no clients that
7 relate to this issue and if I had, I wouldn't be
8 representing them here. So my views don't necessarily
9 represent the views of intervenors whom I no longer am
10 in the business of representing, and they may very well
11 have different views on these matters.
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1 COMMISSIONER AHEARNE: Addressing that last
2 point, I kow for myself in the names that I have
3 proposed, and agreeing on the final selection of people,
4 I was not viewing it, and I know the Chairman was not
5 viewing it as you people representing a series of
6 clients. We weren't looking at you representing the
7 State of Maryland or you representing intervenors, or
8 George the group of utilities or that Bob represented
9 the university. It was more that you people had, we
10 believed, expert knowledge of different facets, and we
11 were really asking for an advisory group to bring in
12 your individual expert knowledge, and I think that's
13 what we ended up with.
14 Let me ask a few questions, and I'll see if
15 the other gentlemen have any.
16 First, I would have to say that I found myself
17 in substantial agreement with your report, so therefore
18 I cannot really begin to ask a lot of questions about
19 why did you say something.
20 COMMISSIONER GILINSKY: You might have the
21 wrong answer.
22 COMMISSIONER AHEARNE: They finally got the
23 right answer.
24 (General laughter.)
25 COMMISSIONER AHEARNE: And seldom do you ask a

1 student who agrees with you --

2 MR. CHARNOFF: Look, we are very flexible, and

3 we will change that, if you would like, to put you in

4 that position.

5 COMMISSIONER AHEARNE: But since I had in the

6 past led the Commission or proposed to the Commission

7 that we had endorsed twice going forward with intervenor

8 funding, and I have been bloodied somewhat in the OMB

9 and Congress defending that, I found myself more in

10 agreement with Tony's dissenting views than the separate

11 views of the rest of you, so that while I was in

12 substantial agreement with the points you make that the

13 federal government is funded by the taxpayer and in

14 theory the NRC staff is representing the citizen, I

15 agree with that in theory, but I think the point,

16 nevertheless, ends up that many times institutions don't

17 really have the term that you have used frequently this

18 morning, the flexibility to look at an alternative

19 approach when the institution has basically, at least

20 one segment of it, reached its final position. And I am

21 sure you have seen that in many places. I have seen

22 that in a variety of government agencies. By the time

23 the decision reaches the top of the organization, it is

24 very, very difficult to get anything else looked at

25 because so much arguing has had to take place.

1 Now, many government agencies fund the kind of
2 alternative examination Tony was talking about. They
3 don't call it intervenor funding, they call it hiring
4 outside consultants or getting a consulting contract,
5 but in essence that is what happens.
6 So I guess I would be interested in perhaps a
7 little more explanation of why you disagree with what
8 Tony has just said.
9 I have read your views, but perhaps --
10 MR. CHARNOFF: Let me try a first response. I
11 appreciate what you are saying, that is, that there is
12 something called administrative decision inertia; once
13 made, it is hard to turn things around.
14 I have two reasons for being concerned with
15 let's use the term intervenor funding, otherwise
16 formulated by -- Tony has a different cast than that.
17 One is that in response to this question of how does one
18 monitor the staff, the Congress a long time ago
19 established the ACRS as a statutory group to provide
20 that outside consulting, wise man type of overview.
21 To my mind, that institution hasn't been used
22 to its best capability in terms of providing that kind
23 of review, and I would like to see attention paid to
24 that because I think the competence is there. I am not
25 sure the challenge has been there, nor that they have

1 met the challenge.

2 Second, I think that there is just too much
3 that is random in the concept of let's have something
4 called intervenor funding from time to time in order to
5 check on the quality of the staff. The need to check on
6 the staff and the institution is apparent. The concept
7 of doing it at random doesn't appeal to me because I
8 think it deceives us.

9 COMMISSIONER AHEARNE: But just to jump in,
10 Jerry, that wasn't the proposal Tony just described. I
11 thought what he was just describing -- that's why I was
12 asking for a response to what he described to focus what
13 he thought he was covering was a mechanism. If an
14 alternative issue has been raised, another issue, an
15 alternative approach in which more information is
16 requested, that there would be some way of getting
17 that. That was not really an audit of the staff, it
18 wasn't a check on the staff, it was a mechanism to get
19 further explanation.

20 MR. CHARNOFF: I think that's right, but I was
21 responding to the way you put the question, namely, how
22 does one protect against this institutional inertia?

23 COMMISSIONER AHEARNE: The momentum has been
24 built up and given direction, so now the inertia is
25 there, and a proposal to deflect has been raised. How

1 do you get that strength?

2 MR. CHARNOFF: First of all, I think I'm quite
3 sympathetic to the view of having the staff removed as a
4 party, which takes away some of the sting from the
5 issue, but I guess I come at it because -- maybe I'm
6 getting old -- because I'm cynical about experts, the
7 concept that Party A raises the issue and therefore
8 there is a dispute, now there ought to be a call upon
9 some expert. There are a lot of Ph.D.s out in the
10 country. We have produced a lot in the United States,
11 and I've found that -- I'm not angry at Ph.D.s. It's
12 very good.

13 (General laughter.)

14 MR. CHARNOFF: But I do think that what
15 happens --

16 COMMISSIONER AHEARNE: You demean my limited
17 currency.

18 MR. CHARNOFF: Spend it now. All of our
19 currency is getting diminished.

20 I have a lot of difficulty that a party to a
21 dispute needs then to call upon the tribunal before he's
22 present, to bring in the so-called expertise that is
23 lacking. The reason I say that is that I do find that
24 it is very hard, despite everything that lawyers try to
25 do or pretend to do in terms of qualifying or

1 disqualifying experts, to limit, if you will, the
2 availability of the pool of experts that ought to be
3 called in. I see in the proposal Tony has made the
4 potential for vastly more litigation, namely, the
5 failure to call upon this expert or that expert or
6 enough other experts when in theory this process does
7 call for review by an Applicant, review by a staff,
8 review by an ACRS, and still another level that may be
9 undefined and unquantified, carrying with it the
10 challenge that would be inherent in a decision to call
11 in Expert X or not to call in Expert X or not to call in
12 Y and Z in addition as experts when if a party has
13 sufficient ability to rise to that threshold that says
14 that there is an issue, then that ability also ought to
15 be sufficient to put the matter before the tribunal
16 without trying to fund that concept and saying
17 government, we need still a third and fourth level of
18 funding for it.
19 I am troubled by that because I think we would
20 approach the concept of dispute resolution in an overly
21 simplistic manner. The fact is that there are very
22 strongly held views on a lot of the issues that come
23 before this agency, and there is no question that
24 disputes will be presented and they will pass that
25 threshold. And then the strong issue will be, well, we

1 haven't called upon all those experts that are out
2 there, and we haven't called upon enough of them.
3 At some point we need some sort of internal
4 restraint, and the internal restraint is when is enough
5 enough? I am afraid that particular proposal that is
6 before us that I have disagreed with in my separate
7 views conflicts with my idea of what a representative
8 government is all about and conflicts with my concern
9 that we would not be able to draw the bounds around a
10 particular issue.
11 It is for that reason that I am opposed.
12 I guess the others of you here also joined
13 with me on that.
14 MR. LONG: I guess I'll lead off on that. My
15 feelings on this are predicated on a belief that there
16 are real issues and then there are what I call unreal
17 issues that appear in most of the licensing hearings.
18 There is an element in the hearings that has to do with
19 delay or especially with inflation levels as they are
20 now actually preventing by the way.
21 So I see a spectre in what it has proposed, if
22 the intervenor can bring forward the witnesses and the
23 Licensing Board as considering whether or not those
24 witnesses are really presenting something that we really
25 end up with a cadre of experts or perhaps semi-experts

1 operating on a contingency fee which to me would really
2 exacerbate the problems we have in the hearings now. It
3 is really a pragmatic feeling that the mechanism that
4 Tony has proposed just really would not improve the
5 quality of the dispute resolution at the hearing.
6 It is an interesting alternative to provide
7 the ASLB members a little bit more authority to seek
8 expertise. They can now direct staff to bring
9 information to them, and I have seen it done. They may
10 perhaps need some provision for funding to bring
11 expertise from outside the staff, and that may be worth
12 considering.
13 That is the sum of my worries and thoughts on
14 that.
15 MR. EDGAR: I won't repeat the written views
16 nor do other than endorse Jerry's points. But there is
17 one other perspective on this question that Steve's
18 remark prodded my memory.
19 As we have looked from time to time over the
20 last few years or so at the intervenors' funding
21 proposals, and as I have looked at several of those
22 proposals, I have seen practical problems of
23 implementation. I have seen some philosophical
24 disagreements with the proposals, and most of them were
25 predicated on the fact that there can be a substantial

1 contribution to the record, and that that is a worthy
2 public purpose, and therefore it ought to be publicly
3 funded.
4 There is one other outlook that perhaps might
5 be worthy of consideration. It also assumes that there
6 are a great deal of potentially worthy disputes out
7 there that if people had the means to raise, they would
8 raise; that there is a large population of issues that
9 are missing from the Staff's review and from the ACRS
10 review and the applicant's analysis.
11 Now, rather than to debate whether that is
12 true or not, we could have differing views on that
13 subject; why not put it to a market test? In
14 conventional forms of litigation of certain types, the
15 prevailing party gets fees. I would think at a bare
16 minimum, if you want public funding, that the first and
17 primary prerequisite is to prevail on the merits of an
18 issue. I have yet to see that surface in any form, way
19 or shape. That would at least test experimentally for
20 you whether there is a legitimate premise there, that
21 there are lots of unanswered issues.
22 Then, going beyond that, the question of the
23 Board retaining experts, it seems to me that the Staff
24 has a great deal to do. They have a great
25 responsibility in their role as the Staff. I strongly

1 favor that the Staff not be a party to the hearing, that
2 in many respects, making the Staff a party to the
3 hearings diverts their resources, diverts their
4 attention, and in effect creates the impression of a
5 fixed position. At least my experience has been with
6 the Staff that the position is not always fixed. If you
7 remove them from the hearing, that brings to mind some
8 of the stability discussion we had this morning. I see
9 a little contradiction in assuming that the Staff is
10 cast in concrete on one hand and then saying the Staff
11 is backfitting everybody with these rash of backfittings
12 on the other.

13 COMMISSIONER AHEARNE: Well, that's all right,
14 George.

15 MR. EDGAR: It seems to me that in those
16 circumstances that again the Board has a legitimate
17 safety issue or an intervenor can't pursue it. Matters
18 like that can be pursued by the Staff. They can be
19 evaluated by the Staff. But my problem is I don't see
20 that that all has to be done in a formal hearing
21 process. We can resolve issues without recourse to
22 trial type procedures.

23 I think we must presume that this agency staff
24 can pursue issues effectively and will attempt to make a
25 good faith resolution of a technical issue. I don't

1 think we need to have it all in the trial type
2 proceeding. I just think we have overjudicialized this
3 process. It has just reached proportions that are just
4 not serving the public interest.
5 COMMISSIONER AHEARNE: Bob?
6 MR. REDMOND: I guess I would just further add
7 some support to George's comments. I guess I would
8 support Tony's point that if we are going to be looking
9 for an improved hearing process, we certainly want to
10 try to find mechanisms that make that the best quality
11 type of process that we can. And part of that requires
12 to have all the significant information available to
13 resolve the dispute, and I think we ought to do that.
14 I guess where I would differ from Tony perhaps
15 is the mechanism for accomplishing that. Again, I would
16 tend to rely on the staff as the objective body of
17 expertise to consider those issues and relevant
18 information and come to some recommendation, assuming
19 that the Staff is not a party to the hearing.
20 Admittedly, when they are, that presents a different
21 situation. There must be some mechanism to handle that
22 special situation.
23 But the Staff I think needs to be relied upon
24 as a responsible body representing the public interest
25 and resolving these technical issues because I think

1 they are the experts, and they should manage that
2 technical review process.
3 So I do think that that is the direction I see
4 in trying to improve the quality, to perhaps make more
5 reliance on the Staff for that purpose, and thereby
6 hopefully improve the quality of the hearing process.
7 COMMISSIONER AHEARNE: Perhaps since we are
8 running quite late I will turn to first Commissioner
9 Gilinsky and Commission Asselstine.
10 COMMISSIONER GILINSKY: I have nothing
11 further. I just want to thank the group for turning out
12 an interesting report, and even more, for participat ng
13 in a very interesting conversation.
14 COMMISSIONER ASSELSTINE: I have just a couple
15 of questions.
16 I get the sense from what you all have said
17 this morning that we are not on the right track in how
18 we go about approaching licensing reform, and what
19 perhaps we ought to do is take a look at all the changes
20 we think ought to be made to the process, and then at
21 that point decide which of those changes need to be done
22 administratively and which of them need to be done by
23 legislation and which of them could perhaps be done
24 legislatively but might well benefit from legislative
25 ratification.

1 Is that the sense of all of you?
2 (Nods in the affirmative.)
3 COMMISSIONER ASSELSTINE: A couple of
4 questions on the form of the hearing, which is something
5 you all did not address specifically but some of you
6 have touched upon already.
7 I guess I wanted to get the reactions of more
8 of you, if you have comments on the hybrid hearing
9 approach.
10 Let me just tell you one concern I have at the
11 outset, particularly to an exclusively legislative
12 format. I guess the concern I had is if you have an
13 issue where you have a factual issue in dispute between
14 the partis, I have never -- I have not tried licensing
15 cases but I have reviewed a lot of records in these
16 proceedings and I've had a good deal of experience with
17 legislative hearings. My own experience has been that
18 it is somewhat more difficult to achieve a focused
19 record through a legislative hearing approach,
20 particularly where you do have a clear dispute on
21 factual matters. I guess for that reason I am somewhat
22 concerned about going to an exclusively legislative
23 format where you are talking about a fairly sharply
24 focused dispute on factual issues.
25 COMMISSIONER AHEARNE: But, Jim, if I could

1 interject a question, that isn't the hybrid hearing, is
2 it?
3 COMMISSIONER ASSELSTINE: My sense of the
4 hybrid hearing is that you would use the legislative
5 format originally to identify those issues where you do
6 in fact have a factual dispute between the parties, and
7 then at that point you would go to an adjudicatory
8 format to resolve those issues.
9 COMMISSIONER AHEARNE: Right.
10 COMMISSIONER ASSELSTINE: But there was some
11 discussion earlier about going to an exclusively
12 legislative format as well.
13 MR. CHARNOFF: I don't think we presented that
14 view. I know it's not my view. I would agree with you,
15 and I would be fearful of going to anything that was
16 exclusively legislative because of my concern with
17 regard to the number of Ph.D.s in the country. I do
18 find that --
19 COMMISSIONER AHEARNE: This is the lawyer
20 backlash.
21 MR. CHARNOFF: Cross examination is really
22 very helpful in terms of sharpening the issues and
23 defining qualifications and so on. I think that it is
24 an important safeguard that you must preserve. I would
25 really oppose abandoning that cross examination

1 opportunity.

2 MR. ROISMAN: I think part of the difficulty,

3 when you talk about the format of the hearing is that we

4 all realize it is really a dog fight down there in the

5 hearing between people who are unalterably opposed to

6 each other. We are not just talking about the kinds of

7 issues where one can say, well, I can see the other

8 guy's side, but I would sure like to have a crack at

9 making my point. You are dealing with people who are

10 really going to the mat. There is a lot of

11 contentiousness.

12 What troubles me about the hybrid hearing --

13 and I had a small contact with it during the time I

14 worked on the GESSMO hearings, when they were in

15 existence, is it looks like they create more places for

16 that inherent contentiousness to find outlet in

17 irrelevant issues. If two people are disagreed as to

18 whether a particular emergency plan for a plant is going

19 to be adequate, one says it is inherently inadequate,

20 you should never license the plant; the other says it is

21 perfectly good, we can put it here, what you would like

22 to not have happen is for them to spend any significant

23 time arguing about peripheral issues, about whether they

24 are going to argue about that issue. You would like

25 them to get in there and argue about that issue.

1 The hybrid hearing invites first, a
2 legislative type hearing. All right, we have already
3 taken a lot of time on a legislative type hearing. Then
4 a series of hearings on which of the legislatively
5 presented points of view deserve the next step. The
6 next step, as it was in GESSMO, just might be
7 discovery. It has got to see some more information, how
8 did you reach that conclusion, Doctor? We now have
9 discovery.
10 Now we have another set of hearings on how
11 many of the next set of issues deserve to move to the
12 next plateau, the next plateau being we are going to
13 have some cross examinations. And each of those
14 decisions is a point of contention. Each one is one on
15 which the parties spent a lot of time fighting. Each is
16 subject to review by a court. And from the standpoint
17 of the Agency, and again, from the standpoint of
18 stability, the one kind of decision which this agency
19 has uniformly been successful in deciding, in not
20 getting review of substantive issues, every judge, no
21 matter how nastily they may have written about the
22 Commission at any time, you ask them to decide whether
23 it should be pump A or pump B, and they say that is the
24 agency expertise. What they will review is your
25 decision to keep an issue in, put an issue out.

1 And it seems to me that the hybrid hearing
2 will create a new era of litigation unparalleled in this
3 Agency that will cause more turmoil and confusion -- and
4 remember, I speak now from the perspective of a former
5 intervenor counsel, that every time the Commission steps
6 in the wrong procedural hole, it is like creating a
7 little time bomb. It is ticking. It ticks along going
8 through a whole hearing, having stepped in the wrong
9 hole, and you don't find out that it was the wrong hole
10 until three years later, or in the case of nuclear
11 waste, ten years later, and then all of a sudden, boom,
12 the thing explodes and hundreds of hours of hearing
13 time, thousands, are down the tubes.
14 So I thin the hybrid would be a terrible
15 mistake. What's wrong with the present hearing is what
16 basically I submitted in that letter to you, John, and
17 Jim, I think I sent you a copy of that relatively
18 recently -- what's wrong with it is what you were
19 raising before, the question of management, not so much
20 agency management but hearing management. You do have
21 these two parties who are prepared to go to the mat,
22 gouge each other, stick each other in the eye. You have
23 got a referee in there, but if you have ever watched a
24 professional boxing match, some referees let them get
25 away with murder, but the really good guys who do the

1 heavyweight championship, they never let them do that.
2 And you have got some hearing board members
3 who are very good. You could give them more guidance,
4 more tools, more help that would enable them to force
5 these parties who would like to strangle each other if
6 they had the chance, to act like ladies and gentlemen.
7 And some of it has to do with discipline. Make them do
8 their homework before they get to the hearing.
9 I have been in hearings with some of the best
10 trial counsel that the industry can put up, and still I
11 watch those guys sit there and off the top of their head
12 do cross examination of my experts because nobody told
13 them that two weeks before the hearing they should have
14 presented a cross examination outline and say where the
15 heck they were going and what they were about. And I
16 have committed the same sin. Without discipline, I am
17 going to spend my time doing other things also.
18 There are ways to make that contentious
19 process work without trying to change the structure of
20 it and create a whole new area of contentiousness. It
21 doesn't need a statutory change. It does need some
22 important reform changes, which is one reason I felt so
23 strongly about talking about these proposals here. I
24 would like to see what the administrative package has to
25 offer on the hearing prospect, because I have some very

1 strong views.

2 MR. CHARNOFF: I would like to add another

3 thought on this, if I can.

4 The problem is -- now that I've got the

5 floor.

6 MR. ROISMAN: You guys are forgetting who is

7 the referee and who is the boxer. He's gouging again.

8 (General laughter.)

9 MR. CHARNOFF: We have this debate about

10 hybrid hearings.

11 COMMISSIONER AHEARNE: I was going to ask him

12 and George what their feelings were.

13 MR. CHARNOFF: Our problems have not really

14 been, with rare exception, the cross examination time.

15 The problem has been getting to the hearings. So the

16 focus on changing from the cross examination mode to

17 something called a legislative type hearing is really

18 nothing more than I think a cosmetic answer. I agree

19 with Tony that you will end up with all those procedural

20 questions and we are still not responding to the

21 problem.

22 If you have cross examination, maybe the

23 hearing lasts another week or two or a month. That's

24 not where our dilemma has been over time in this

25 particular industry. There have been some rare

1 exceptions where things have gotten out of order, but
2 they really have been aberrations.
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1 The focus on going to legislative hearings
2 doesn't do very much.
3 COMMISSIONER GILINSKY: You used the example
4 of the GESSMO hearing. I thought that was always held
5 up as an example of a hearing in which the board was
6 doing a good job, where the parties felt comfortable
7 with the legislative format as opposed to having cross
8 examination. Am I wrong?
9 MR. CHARNOFF: Well, under the heading of true
10 confessions, I will tell you that from the perspective
11 of those of us who hoped that before the hearing ended,
12 the President would stop reprocessing, we couldn't have
13 asked for a better format than that. It didn't, and all
14 I had to do was just sit in my office and just let the
15 string play out.
16 We had so many places where we could keep the
17 hearing going on. You see, the legislative witness can
18 be as explosive as he wants to, and nobody questions
19 him. He can get up and make any irrational statement he
20 wants.
21 COMMISSIONER GILINSKY: Wait a minute. The
22 board is --
23 MR. ROISMAN: If you remember in the hearing
24 process there, the first process was that you submitted
25 your testimony, what you were going to present. Then

1 you submitted to the hearing board what you wanted them
2 to ask as questions. The first step of GESSMO was going
3 to be that the board would ask some questions, so then,
4 those were submitted and the other parties submitted
5 answers to that, complaining about why your questions
6 shouldn't be asked, they were irrelevant and so forth.
7 And that in itself -- I don't remember all the timing --
8 that was about three months.
9 As I remember, we got our testimony in around
10 September and we didn't get the hearing board to sit
11 down and start the hearings until the late part of that
12 year or the beginning of the following year.
13 Then after they had asked their questions, we
14 had another round when we could then say well, your
15 questions were all right, but you see, you didn't have
16 the right sting, you didn't follow up right.
17 COMMISSIONER GILINSKY: Are you saying the
18 process dragged out more, longer than it would have
19 otherwise?
20 MR. ROISMAN: That is right. If you just said
21 to the parties, I want you guys to get in there and I
22 want you lawyers to -- you know, you consolidate the
23 parties and so forth; all the things I think make sense
24 in the hearings. I think it would have ended quicker if
25 it had -- if you had gone directly to that.

1 And with respect to Gerry's question about how
2 quickly do you get to the hearing, I think the discovery
3 process is also inordinately long. But I will point out
4 to you that one of the chief reasons for its length is
5 the tremendous use of interrogatories which require a
6 written statement and then a 30-day period to respond
7 and then objections and all that, which are used
8 exclusively by intervenors because it is all they can
9 afford.

10 COMMISSIONER AHEARNE: Let me ask George if he
11 has comments to criticism of the hybrid hearing.

12 MR. EDGAR: Yes. I think there is a place for
13 techniques of cross examination. When I hear the
14 description of the GESSMO hearings and difficulties
15 encountered, I am somewhat sensitive to that. But I
16 also sat through 123 full days personally of hearings in
17 the ECCS proceedings, and that is not the way to do it,
18 either.

19 What I think the Commission ought to look for
20 is some means of -- even if it is experimental -- trying
21 to find a more rational approach. I have been at
22 hearings where the cross examination, as Gerry
23 indicated, is not all the lengthy. It is pointed, it is
24 controlled by tough board chairmen, and that process is
25 manageable.

1 The discovery process, on the other hand, for
2 the most part, I just think it is non-productive.
3 Applicants file interrogatories against intervenors, and
4 intevenors say I don't know, that is your burden. On
5 the other hand, intervenors file interrogatories against
6 applicants and they have a big pile of information, and
7 we generate these piles and piles of discovery, but to
8 what purpose? Is it constructive, is it leading
9 anywhere?
10 Well, for the most part, no. It is just
11 lawyers and technical people all melded together in this
12 one process, generating information that is not going
13 anywhere. It doesn't have a substantive purpose. Do we
14 have to put the premium on those types of elements of
15 the process? I agree with Tony, a deposition will get
16 you more, more quickly and more meaningfully.
17 If cost is a problem, and if the purpose of
18 discovery is really to find the other person's
19 information, I see no reason why tape recordings
20 couldn't be made under stipulation with certain
21 safeguards. That is not inordinately expensive, you do
22 not need a transcript to do that. I mean, that has been
23 tried in certain jurisdictions. I recognize there are
24 certain limitations to it, but there ought to be some
25 searches for a way to get this process in a little more

1 manageable form.

2 The elements are there, but the process today

3 does not work very efficiently.

4 MR. ROISMAN: Let me just say that the point

5 George is making --

6 COMMISSIONER AHEARNE: I have to close soon.

7 MR. CHARNOFF: You don't know how to get the

8 floor, Tony.

9 (Laughter.)

10 COMMISSIONER GILINSKY: I want to announce

11 that I am addicted to lunch.

12 (Laughter.)

13 MR. ROISMAN: The lengthy interrogatories that

14 George is concerned about are all the wrong kind of

15 interrogatories, he is absolutely right. They are all

16 the questions you would like to ask the experts

17 yourself. The only interrogatory you really ought to

18 ask is give me every document you looked at. Then after

19 you have got the documents, then you would like to talk

20 to the people, then you ought to go to hearing. It is

21 an intermediate step which slows the thing down.

22 I don't know that tape recordings are

23 necessarily the answer, but I think you can see in there

24 the germ of the source of the big problem.

25 COMMISSIONER ASSELSTINE: Do any of you favor

1 retaining the staff as a party in the hearings?

2 MR. LONG: I would say something, one thing in
3 favor of it. I am not sure I would actually prefer
4 retaining them as a party. There has to be something
5 that hangs over the staff's head that makes them put
6 forth a quality presentation, and I am not sure that if
7 they are not a party, if they are sort of the
8 already-approved expert that the board will rely upon,
9 that that quality may not slip.

10 COMMISSIONER ASSELSTINE: I guess the second
11 question I had is aren't there some practical
12 difficulties in taking the staff out? For example,
13 since they are the authors of the EIS and the SAR?
14 Isn't it very difficult, as a practical matter, to get
15 them out?

16 MR. EDGAR: Technically, yes. I mean, they
17 are a legitimate -- there are instances where the staff
18 is indispensable on certain issues. You cannot avoid
19 having staff testimony. But by the same token if in a
20 given hearing you have an array of 10 issues, 2 of which
21 go to let's say ultimate conclusions in the SES analysis
22 that only they can address, then they would come on with
23 witnesses for those issues. But otherwise, there may be
24 8 other issues where their presence and their testimony
25 would not be necessary.

1 MR. ROISMAN: What you could do is consider
2 applying the consolidation rule to the staff and the
3 applicant, forcing them to consolidate on the issues
4 where they have no substantial differences. Then where
5 they either have a disagreement as in the EIS or SER, --
6 they have to be different because one is written by the
7 staff only -- let them make their own presentations.
8 COMMISSIONER ASSELSTINE: The question of the
9 standardized design approvals, it seems to me there is
10 at least some cost involved in pre-approval of
11 standardized design, particularly binding pre-approval
12 in terms of public participation because in many
13 instances the people who are going to be most concerned
14 about a facility located in the vicinity of where they
15 live simply are not going to know at the outset when a
16 standardized design is reviewed and approved, and which
17 design it is going to be. Or if there is ever going to
18 be a plant in the vicinity where they live.
19 Do I take it from, I guess, the lack of any
20 opposition on that point in the report that you all are
21 basically of the view that the advantages you get by
22 focusing on the review and approval of standardized
23 designs outweigh that cost, at least in terms of --
24 MR. CHARNOFF: Well, we discussed that, Jim,
25 in the context of there really has to be adequate public

1 notice of that standardized design, such that -- I
2 recall one of our conversations where utility X came in
3 with a plant design, had it approved, and then it was
4 proposed for standardization. To the extent that people
5 in other locations other than that particular utility
6 had not been on notice before, then the issue might be
7 up for grabs again.

8 But insofar as what might be called a
9 conventional standardized design that was submitted to
10 the agency for approval, the notice provisions would
11 have to be very clear on their face as to what their
12 intentions are for that particular design.

13 COMMISSIONER AHEARNE: But realistically,
14 Gerry, even reading newspapers with respect to -- let us
15 say we had published in every major newspaper in the
16 country in the Notice section that a standardized design
17 had been filed for approval. In most areas of the
18 country, people are just not going to pay any attention
19 to that unless there happened to be a site established
20 in which the issue had been raised.

21 MR. CHARNOFF: There is a risk there, but
22 there has been an emergency public interest movement
23 that are somewhat national type organizations who would
24 not let that moment go by.

25 COMMISSIONER ASSELSTINE: As a practical

1 matter, I am not sure it should.

2 MR. CHARNOFF: Or we could turn it over to

3 FERC.

4 (Laughter.)

5 MR. ROISMAN: And I think it also somewhat

6 runs into the issue of whether the purpose of these

7 hearings and decisions is to let everybody have their

8 say, or getting these illegitimate disputes resolved.

9 COMMISSIONER AHEARNE: Yes. That is the

10 better counter to your question.

11 COMMISSIONER ASSELSTINE: I guess the last

12 question I would raise is on the one-step licensing

13 proposal. Shouldn't we retain, or should we retain, I

14 will put it in the neutral, an opportunity to obtain a

15 hearing on any issue that cannot be resolved at the

16 early stage? Issues like whether the plant has been

17 built in conformance with the application or the

18 license, whether the emergency plan requirements for the

19 plant have been met, whether the utility has the

20 capability and the people to operate the plant safely?

21 That, it seems to me, as a practical matter will not be

22 resolved at the initial stage.

23 MR. CHARNOFF: Our report explicitly

24 recognizes the fact that you are not going to have

25 certain issues resolved at that early pre-construction

1 stage. I think there is room for discussion, and we
2 have not had it, of the type of question Commissioner
3 Gilinsky raised; that is, do all of those issues lend
4 themselves to an opportunity for public hearing down the
5 road. I think many do and perhaps some don't. We
6 certainly did not address that within our committee, but
7 I think that is one of the questions that does have to
8 be raised.

9 But we did recognize that one-step licensing
10 was not a simple one-step operation, because of the fact
11 that certain issues just are not there at that
12 particular time.

13 MR. EDGAR: We discussed, but we did not --
14 three examples you used are interesting because I think
15 everybody saw a problem with the emergency planning
16 issue. How could you do that early on? So that had to
17 be an open issue, it seemed. Or, I don't know, didn't
18 we reach a final conclusion on that?

19 MR. ROISMAN: Yes, we did.

20 MR. EDGAR: But the first of the items you
21 mentioned, which was is the plant built in conformity
22 with the license, was one our discussion revolved around
23 the notion of inspection and test, and at least we had
24 something in mind like what Commissioner Gilinsky
25 suggested, a series of checkpoints, formal check-offs

1 and staff documentation that things had been done in
2 accordance with the license.
3 So one issue would be -- your first issue
4 would be outside the hearing process, and the second
5 would be in under those examples. And as to the first,
6 if there were a problem generated as a result of
7 substantial safety problems emerging, well, that might
8 be in as well.
9 MR. ROISMAN: I think we saw the first issue
10 that if you did the one-step licensing along the lines
11 of the kind of finality we talked about where the only
12 thing that was left for the staff to do was the
13 inspection and testing procedure, then that issue that
14 was left you didn't need to necessarily have a hearing
15 on. If it turned out that something changed, the
16 applicant changed it or they said well, we were planning
17 to do it this, but we are going to do it that way, you
18 would now have an issue.
19 We broke it down somewhat as to whether it
20 would be better to have a show cause hearing or a
21 regular hearing on it and so forth. But I think we felt
22 that if properly done, a one-step licensing proceeding
23 with the applicant complying with what it was they said
24 they were going to do, that what you had left was a more
25 than ministerial category and probably did not need a

1 hearing.

2 COMMISSIONER AHEARNE: Okay. Gerry,

3 gentlemen, I think we all thank you very much. I expect

4 that we will be taking you up on the recommendation in

5 here, and as we get all of this put together, perhaps it

6 would be useful to have you come back. I think that

7 would certainly be useful. I certainly myself am in

8 agreement with most of the things, the points you have

9 made. And also this morning, it was helpful to clarify

10 for many of us, and perhaps we can get a picture of the

11 final proposal we ought to make and the final actions we

12 ought to take internally.

13 So thank you all very much.

14 (Whereupon, at 12:28 p.m, the meeting was

15 adjourned.)

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NUCLEAR REGULATORY COMMISSION

This is to certify that the attached proceedings before the

COMMISSION MEETING

in the matter of: PUBLIC MEETING - Briefing by the Ad Hoc Committee on Regulatory Reform

Date of Proceeding: August 31, 1982

Docket Number:

Place of Proceeding: Washington, D. C.

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

Jane N. Beach

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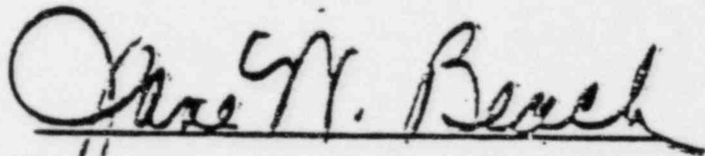

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the objectives of the change; a quantification of the impacts and the benefits of the change, to the extent possible; a consideration of alternatives to the change; and a reasonable implementation schedule. The purpose of such an analysis would be to require the staff to set out whether the proposed change is required to meet the statutory requirements and why. Organizationally, within the NRC an appointed group of senior officials should be charged with reviewing and approving each such analysis. A similar systematic analysis should be required for changes proposed by applicants and third parties, to the extent practicable.

As a final note, there was disagreement within the Committee as to the need for special provisions in regard to backfits proposed by members of the public. Under existing law, a licensee has a right to a hearing on any order imposing a change in a previously approved matter, and as a matter of logic, Section 196 would impose a burden of persuasion on the party, e.g. the Regulatory staff, seeking such a change. On the other hand, when a third party, such as an intervenor, seeks such a change, his remedy is under 10 C.F.R. § 2.206 and he would not have the opportunity for a hearing as a matter of right. One view is that this is fundamentally unfair, contending that it results in an imbalance of rights among parties who may have participated in the initial licensing proceeding. According to this view, the showing of conformance with the

backfit criteria -- when the proponent of the change is a member of the public -- should be considered by a panel convened from the licensing board roster of members rather than by the staff. The majority view is that the Section 2.206 procedure is consistent with longstanding principles of administrative law which recognize a licensee's vested rights and the presumptive validity of an existing license. Moreover, if incentives for standardization are desirable, maintenance of existing law -- notwithstanding the apparent imbalance of rights -- would seem desirable.

E. Deferral to FERC with Respect to Need for Power Determination

The current version of the legislative package provides, in Section 185B, that

> In making a determination on the issuance of any permit or license, the Commission is authorized to rely upon the certification of need for power made by the Federal Energy Regulatory Commission or its successor. If the Commission declares its reliance upon such certification, it shall constitute a definitive determination of need for the power to be provided by the facility for the purposes of any other provision of Federal law administered by the Commission.

An earlier version of the legislative package had provided that "the Commission is authorized to rely upon the certification of need for power made by competent Federal, regional, or state government organizations."

The Committee considered at length several ramifications of this proposal, and was able to reach consensus on several points:

(a) There are benefits of regulatory efficiency and accuracy to be gained by providing to the Commission the authority to rely upon the expertise of other government entities in this subject area.

(b) The legislation should allow the Commission broad capability to accept need determinations made by state agencies or other competent government organizations, as originally proposed, rather than restrict it to determinations made by the FERC.

(c) This legislative package is not the appropriate instrument for revision of the extant authority distribution between the federal and state governments in the area of public need certification for electric power units.

(d) It will be necessary to explicitly delineate (in the administrative package) the necessary content and form of any such certification in order to avoid ambiguity concerning which of the several facets of a need determination are covered.

The Committee considers the need issue to encompass the spectrum of factors inherent to generation planning. Not only must future increases in electric power demand be projected, but means of influencing those increases should be considered and the best means of meeting total future power demand must be addressed. Most of these factors, of course, are utility or region specific; they do not lend themselves readily to broad federal plans. Some members of the Committee believe that the existing system of state regulatory authorities, as supplemented by regional organizations, is best suited to consider these factors in reaching determinations of need for proposed new units. Neither the NRC nor the FERC appears to possess sufficient resources or expertise to assume these duties on a national or regional basis. (Moreover, there is at least some doubt as to FERC's current authority to perform such certifications.) In the case of federally authorized power authorities, however, federal agencies could be utilized as the appropriate sources of need determinations for the Commission. Consequently, the Committee recommends that the Commission be given the authority to accept need certifications from a variety of sources. Of course, there may be circumstances where there is no other agency certification or where a certification may be incomplete; in such circumstances, the NRC will have to determine the matter.

The Committee sees a critical need for the Commission to delineate the necessary content of an acceptable certification in its forthcoming administrative package. This should include, among other things, an explicit statement of the issues considered and the decisions made.

Concern was expressed by some members of the Committee that the variations in procedure, including opportunity for public participation, among such a wide variety of potential certifiers could, in some cases, lead to acceptance of inferior quality "need" determinations, compared to what might be achieved through the NEPA review process and by the ASLB. Specifically with respect to FERC, in the absence of established procedures or practice with regard to "need" certifications, there may be questions concerning whether FERC procedures would provide an airing of the issues equivalent to the current NRC procedures. The Commission, outside the docket of any specific license application, should determine whether the procedures utilized by potential certifiers are substantially equivalent to NRC procedures. That determination should be binding and not subject to review by any court or in any NRC licensing proceeding. One member of the Committee, however, believes that under no circumstances should the Commission put itself in a position of judging the adequacy or fairness of procedures utilized by state agencies.

Concern has been expressed by some members of the Committee that new preemption arguments may be made possible under the presently proposed legislative package. The replacement of the state and local governments by FERC in succeeding drafts, coupled with the comments of Commissioner Gilinsky at the April 16, 1982 Commission meeting (Tr. pp. 63-65), could result in future arguments over legislative intent. We believe that is not the intention of the Commission and it should make this clear.

Revised Hearing Procedures

Amendments in 1957 to the Atomic Energy Act of 1954 provided for mandatory public hearings at both the construction permit and the operating license stages for nuclear power reactors. Ever since 1957, the focus of legislative reform of the nuclear regulatory process has been on the public hearing. In the 1960's, the mandatory hearing at the operating license stage was deleted and the institution of atomic safety and licensing boards was created. More recently, the so-called "Sholly" amendments in the NRC authorization legislation addressed the requirement of public hearings in connection with operating license amendments. And, of course, legislative proposals in the 1970's were concerned with the format and timing of hearings, particularly at the operating license stage.

The proposed Act reflects yet another attempt to integrate the public hearing meaningfully into the licensing process -- at least for standardized plant design approvals, for early site approvals and for issuance of a combined construction permit and operating license for a standardized nuclear power plant. In all three instances, Sections 194d, 193d and 185c, respectively, of the proposed legislation would allow for reform of the public hearing process by inclusion of the phrase "after providing an opportunity for public hearing." The insertion of this phrase, according to the section-by-section analysis, was "to assure flexibility of the hearing process for standardized plants," and to avoid the application of the public hearing provisions in Section 189a of the Atomic Energy Act of 1954, as amended, to the one-step proceedings for standardized plants and to the proceedings for standardized plant design approvals and early site approvals.

Whether Section 189a requires very formal adjudicatory procedures or whether it allows a flexible approach to establishing hearing procedures, in our view a serious effort to reform the public hearing process should involve much more explicit proposals to the Congress.

We understand that the Commission's Regulatory Reform Task Force is developing further legislative proposals which may include, among other things, clarification of the Commission's discretion in selecting hearing formats under Section 189a.

Similarly, the Task Force's development of a package of administrative reforms may also deal with hearing formats. Without having those proposals before us, we are not now in a position to comment specifically on the Commission's intended implementation of Sections 185c, 193d and 194d.

Nevertheless, it is our view that, if the reform package is intended to provide more certainty to the regulatory process, and to thereby lessen the risk of endless litigation involving challenges to the hearing procedures, explicit consideration by Congress of the public hearing process should be encouraged. In this regard, a vague reference in the section-by-section analysis to attaining "flexibility of the hearing process" is not sufficient.

Beyond this, we question whether the lack of specific reference to Section 189a in proposed Sections 185c, 193d and 194d is sufficient to exclude judicial application of Section 189a to such proceedings and particularly to amendments and extensions of such permits/licenses and approvals. If avoidance of unnecessary litigation is the goal, this issue should be addressed directly.

In our view, both the Commission and the Congress should explicitly address such fundamental questions as:

(a) the purpose of the public hearings;

(b) the appropriate parties to such hearings;

(c) the role of the NRC Staff in such hearings and the proper standard for sua sponte reviews by the licensing boards;

(d) the timing of such hearings;

(e) the appropriate utilization of formal adjudicatory and less formal processes;

(f) the desirability of intervenor funding;

(g) the appropriate threshold level for purposes of defining an issue in dispute; and

(h) the desirability of applying such reforms only to standardized plants and early site reviews as distinguished from current plant designs.

At the outset, it is important to confront and define the purpose of the public hearings. For out of such definition, guidelines could emerge for responses to the other issues listed above. The definition of the appropriate public hearing process does not carry with it any constitutional requirements. There is no constitutional right to a public hearing and certainly not to a particular form of public hearing, so long as considerations of fairness are satisfied. Surely many -- indeed most -- decisions which affect the lives of many people are made without imposition of particular constitutional concepts. The choice to include an opportunity for public participation in the regulatory process is that of Congress; it

is not dictated by elevated principles of due process. That being the case, the question remains: What is or should be the purpose of the public hearing process?

(1) Should it be to build public understanding of, and public confidence in, nuclear power and the staff review?

This, at one time, was a stated purpose of the mandatory public hearing procedures. While those procedures probably have resulted in more disclosure of the safety considerations associated with nuclear power as compared with most other industrial activities, it is probable that the Commission's public hearing procedures have not led to a significant level of public understanding of, or confidence in, the regulatory process. Indeed, the formalities of those proceedings, although perhaps necessary to safeguard the rights of participants, may have led to misunderstanding of nuclear power and the nature of the staff review. We urge that this not be adopted as a purpose for the public hearing and that alternate means be considered for educating the public.

(2) Should it be to test the adequacy of the Regulatory Staff's review of the application?

At one time, this too was a stated function of the hearing process, whether the hearing was contested or not. As contested hearings became routine, licensing boards gradually

focused almost entirely on the contested issues before them and abandoned their independent efforts to test the adequacy of the staff review. While disputes as to specific issues surely result in a testing of the validity of the staff's review process, it is clearly episodic only. The hearing process does not provide a systematic check of the adequacy of the staff review, absent a specific dispute. Other mechanisms for this task should be sought. For example, review groups within the staff and the Advisory Committee on Reactor Safeguards acting openly and in a systematic manner could provide a more efficient means of testing the staff review. Nevertheless, a minority of the Committee holds the view that some limited independent testing of the staff review process could be of benefit.

(3) Should it be to allow the expression of conflicting political views?

Public hearings held before licensing boards cannot, by their nature, resolve the larger political disputes surrounding the societal decision relating to whether to utilize nuclear energy to provide electric power. That type of political decision is uniquely appropriate for legislative bodies. Therefore, public hearings should not be directed at responding to conflicting political views.

(4) Should it be to resolve disputes?

This is the classic function of the public hearing process. Members of the public and competing interests in possession of facts or views contradictory to those of the applicant or license holder could benefit the decision-making process by presenting those facts and views to the agency. The public hearing provides such an opportunity and should allow for the testing of such facts and views. Under the circumstances there should be no opportunity for sua sponte review by licensing boards, nor should the boards be expected to reach conclusions related to matters beyond the scope of the disputes before them. If the sole purpose of the public hearings is the resolution of disputes -- and this is the view of the majority of this Committee -- then absent a matter in dispute, there should be no public hearing.

We have not attempted to be exhaustive with respect to either the purposes of the public hearing or the issues to be addressed in connection therewith by the Congress or the Commission. Nor have we arrived at a consensus on each of these matters. We have unanimously concluded, however, that reform of the regulatory process requires explicit consideration of these matters by the Congress. Applicants, be they private or public bodies, can no longer be expected to commit a few billion dollars to a single power plant without having an adequate appreciation that the hearing process will be better

focused and better managed than it has been in the past and with less risk of contentious litigation and judicial review. Similarly, interested states and third party intervenors cannot be expected to invest the necessary effort to make the process work better without a better appreciation of the focus and purpose of the public hearings. Thus the Commission should first determine the purpose of the public hearing process and then decide the issues affected by that determination.

We find the consideration of the public hearing process in the proposed Act to be unacceptably brief and indirect. Nor are we persuaded that reform of the public hearing process should be initiated only in the context of standardization proposals. The issues listed here transcend such proposals; they apply equally to plants now under construction or in operation.

Conclusion

We have concluded that the present hiatus -- if that is an appropriate term -- in new nuclear plant proposals provides an opportune time to review and reform the regulatory process. The reform proposals should address the regulatory process as it applies to both the plants in operation or under construction as well as any prospective new plants.

The Proposed Nuclear Standardization Act of 1982 reflects a serious effort to address the major problems in the

regulatory process as it would apply to prospective new plants. Certainly early site approvals, standard plant design approvals, combined CP/OL's and stabilization criteria reflect serious proposals for consideration by the Congress. In our view, however, the proposals do not adequately address important current problems, nor are they sufficiently comprehensive in their consideration of the problems to which they are addressed. It would be better, in our view, to first develop the remaining legislative proposals and administrative reforms now under consideration by the Regulatory Reform Task Force. In that comprehensive context, the overall reform proposals could be considered in a more meaningful fashion.

SEPARATE VIEWS

OF

ANTHONY Z. ROISMAN

The report of this Committee represents a substantial effort to accommodate the views of all of its members and produce a consensus. Each of us on one or more issues would have taken a somewhat different view were it not for our desire to reach a consensus, a desire motivated by our belief that the failings of the present licensing process are so severe and so long-standing that a new and better process, even if not a "perfect" process, is preferable to no change. The principal report focuses on those aspects of the hearing process which if modified will make it operate more smoothly and efficiently. In short, we address proposals which will reduce the total elapsed time required to decide whether to build and operate a nuclear power plant.

While this efficiency will undoubtedly _indirectly_ improve the quality of the presentations at the hearings by allowing each party to better focus its efforts on the principal matters in dispute, it does not _directly_ improve the quality of the hearing. Yet in the last analysis if the primary function of the hearing is dispute resolution, the most important task of the hearing is to assure to the fullest extent possible that the dispute is correctly resolved. This is particularly true here where the incorrect resolution of a safety issue can and has caused significant damage. Thus, for instance, it is now undeniable that all parties would have ultimately benefitted if the hearings on Three Mile Island, Unit 2 had included an

analysis of the incident which had occurred at the Davis-Besse plant several months earlier and which was ultimately the initiator of the Three Mile Island accident. Such an analysis would have slightly lengthened the hearing but the benefits of full knowledge of and remedies for those events before operation began would have far outweighed any conceivable cost of delay.

How then can a licensing reform package not only properly make the hearings more efficient but also make them more effective? On this point the Committee was unwilling to reach a consensus and thus I have prepared and submitted separate views.

The key ingredient to assure better quality in the hearings is to assure that as to legitimate matters in dispute, the decision-makers have the benefit of the most reliable and complete record reasonably attainable. Thus, for instance, a hearing board should not have to conclude that although significant additional evidence was available -- such as the testimony of a particular expert -- nonetheless a disputed issue would be resolved without that evidence because no party offered the expert. Does this happen? Absolutely, as the hearing board or appeal board members will attest. Does the absence of such additional information adversely affect the public? Yes, as Three Mile Island so dramatically illustrates. How can the problem be solved? There are several possible solutions.

First, hearing boards could be given the authority to direct the Staff to retain particular experts or particular types of experts to do an analysis on and present testimony with respect to a disputed issue as to which the board was aware that significant relevant information would not otherwise be presented. Second, the board itself could retain such experts for the purpose of the hearing. Third, upon application of a party who demonstrated its lack of sufficient financial resources, the board could tentatively agree to reimburse that party for the cost of such presentations to the extent the board concluded after hearing the evidence that it was of significant value in resolving the disputes.

The benefits of a system such as this are significant. First, there is a positive incentive to the staff to see to it that its own presentations fully encompass all relevant evidence (not merely that evidence which supports the staff conclusions), thus avoiding the need for the board to invoke any evidence gathering authority. Second, it provides a premium to the party in the hearing that fully develops in a rational way its contention by assuring that such a contention will not fail for lack of competent evidence. Contentions for which no competent technical evidence is reasonably available will be inherently less worthwhile to pursue. Third, by establishing a mechanism that assures a full exploration of disputed issues which have substantive merit, the Commission

can more properly -- both legally and politically -- establish high standards for an issue to be allowed into the process. Since the function of the hearing under this regime would be dispute resolution and not a vehicle to allow every interested person to express his view regardless of the merits of that view, the Commission could probably demand that for a disputed issue to be admitted to the hearing, there must be _prima facie_ evidence that it is valid. Interested parties could focus their limited resources on making that showing on those meritorious issues, confident that if they met that threshold the disputed issue would be fully developed. Finally, and most importantly, the decision whether or not and how to build and operate a nuclear facility would more likely be correct, thus better protecting the public interest and in the end improving the stability of the decisions made.

The majority of the Committee presented essentially philosophical objection to this proposal. It centered on the premise that the process should be "neutral" and avoid favoring one party over any other party. Already the process fails in this neutrality since significant financial help is provided to the industry through taxpayers supporting research and development to better able nuclear facilities to pass muster in the hearings. And, of course, taxes pay for the staff participation and involuntary utility rates pay for the applicant participation. It was also observed that it is the staff's job

to fully explore all relevant issues. If the staff fully presents all relevant data as to a disputed matter, the board will not order production of additional evidence. If not, then the staff has not fulfilled its function and the board must see to it that the gap is filled.

Finally, the majority of the Committee argues that in any event, a contested proceeding is not the best way to resolve these disputes and particularly a contested adjudicatory hearing. This would argue for abolition of all hearings and elimination of all fair mechanisms for resolving what are undeniably real disputes. The majority wisely does not argue this logical extreme and if, as we all acknowledge, a legal mechanism for dispute resolution should exist, then it is far better to assure a full evidentiary presentation as a prerequisite to the dispute resolution. In fact, it is hard to imagine that the "collegial" decision-makers suggested by the majority would be satisfied to decide disputed issues without all the relevant data before them.

In the last analysis, the essential consideration must be that the decision-maker has available a substantially complete record in order to decide the significant issues presented. Only in this way will we achieve the legitimate goal of the hearing: to produce as nearly as reasonably possible a correct result. It is this goal which the present system does not now achieve, but could with the modifications proposed here.

SEPARATE VIEWS

OF

GERALD CHARNOFF, GEORGE L. EDGAR,
STEPHEN LONG, ROBERT F. REDMOND

In his separate views Mr. Roisman contends that, once a dispute is accepted for resolution by a licensing board, the assigned board should be authorized to (a) direct the staff to retain particular experts to present testimony on the disputed issue, (b) itself retain such experts, or (c) tentatively agree to reimburse a party -- needing such funds -- for the cost of its presentation if it determines that such presentation "was of significant value."

We disagree with this proposal. It is neither necessary nor desirable as public policy; it is not necessary as a stimulus to public participation.

Both we and Mr. Roisman agree that the primary, if not the sole, purpose of the public hearing is the resolution of disputes. And Mr. Roisman apparently agrees that the Commission "could" -- may we say "should" -- "probably demand that for a disputed issue to be admitted to the hearing, there must be _prima facie_ evidence that it is valid," at least if the proposal is accepted. It does not follow, however, that the proposal is sound.

The Roisman proposal is a refined version of intervenor funding proposals which have regularly been rejected by the Congress. The proposal fundamentally is at odds with the philosophy of a regulatory system under which a government agency is staffed and funded at great public expense to assure

the public health and safety. That agency and its staff are charged with making an independent review of licensing requests from the standpoint of the public interest. The proposal is premised on the proposition that the regulatory agency will not be ably staffed or will not obtain the services of competent expert consultants; therefore, the proposal would equip the licensing boards to overcome such alleged agency staff deficits. This, however, would only provide, as noted in the Committee Report, an episodic check on the staff. We would urge a more systematic review program if that is required.

As between private disputants, the law and the process should remain neutral. The funding authority proposed by Mr. Roisman would serve to promote more litigation, further complicate and protract the hearing process, divert public resources, and most likely divert Commission attention from its principal task of managing the agency and its staff.

While the adversary process may be well suited to resolving ordinary disputes, we do not believe it is the best way to arrive at fundamental safety and environmental decisions of a technical nature. This is best done by objective and competent experts engaged in direct informal discussion and evaluation of technical analyses and data. The adversary process does not facilitate that kind of interchange or the clarification and resolution of technical issues. The Roisman proposal, on the other hand, would place more emphasis on the

adversary process for these purposes. It is not an appropriate policy.

SEPARATE VIEWS

OF

DAVID W. STEVENS

I would like to associate myself with the views of Mr. Roisman relative to the establishment of conditions to improve the quality of the hearing process. I do not necessarily dissent from the views of the Committee relative to the ways which we have explored to improve the hearing process. I subscribe to them. The separate statement of the other members, however, appears to conclude that: (1) there is no need to further improve presentations made under a revised and improved hearing process by making limited financial support available where need is demonstrated, and (2) the adversarial aspect of licensing is found wanting and an atmosphere of information-sharing by experts in a relatively informal atmosphere would be a preferred approach. I doubt that under current conditions of public concern and uneasiness that such a technique, as is suggested by the latter proposal, is achievable. A central point with which we can all agree is that there probably is too much litigation and that in the interests of all, it should be reduced. That is not to say, however, that we can and should eliminate disputes. That will not happen. We can and should, and certainly the Committee has striven to suggest the kind of licensing structure which will, if executed, improve the efficacy of the process. We cannot will an elimination of disputes, but we may be able to confine them in a more appealing framework.

I am also persuaded that the members of the Committee who are hesitant about the impact of intervenor funding may have been persuaded by past, more comprehensive proposals and not by those presently advanced by Mr. Roisman. Funding of intervenors appears to be only a part of the proposal, not the central theme. And such support would not be automatic; it would be conditional.

I suspect that in a "pure" regulatory framework that there ought not to be a need for intervention -- that all analytical work would be comprehensive and inclusive of all relevant information on all substantive issues without added external input. That state may not be achievable in the foreseeable future. It can be argued that there are potential issues that may not have the proper exposure unless some supporting resources are made available. I would not feel comfortable in foreclosing that opportunity during the discussions on regulatory reform. I think that the proposal advanced by Mr. Roisman is cautious, relevant and should be further explored.

The desire of all of us on the Committee is common -- that we encourage a regulatory foundation that will permit identification and resolution of relevant issues on a timely basis. In doing so, we would hope to avoid the emotional contentiousness which permeates much existing regulatory review.

The regulatory process is not suitable for the promotion of philosophic views of individuals or groups. Generic considerations should take place in other, political forums. I would not support the utilization of scarce resources to advance a particular cause or position. I do not feel that is the case in this separate proposal. I think that is a proper concept to raise in our review of the regulatory reform proposals.

REPORT

of the

AD HOC COMMITTEE
FOR
REVIEW OF NUCLEAR REACTOR LICENSING REFORM PROPOSALS

August 16, 1982

From: Gerald Charnoff, Chairman
George L. Edgar
Stephen Long
Robert F. Redmond
Anthony Roisman
David Stevens

EXECUTIVE SUMMARY

The attached report represents the consensus of the members of this Committee with minor exceptions noted in the report. The report generally follows the outline of the proposed legislative package. However, a number of themes in the report represent crucial concepts which the Committee believes warrant special emphasis. The purpose of this brief summary is to highlight those themes and assure that their significance is not lost in the body of the report.

A. Scope of Legislative Proposal

We believe the Commission should send to Congress one comprehensive legislative proposal that addresses all of the licensing reform issues. Matters reportedly contained in the supplemental legislative proposals and administrative proposals being developed by the Regulatory Reform Task Force are so fundamentally interrelated with the present legislative package that they must be viewed in their totality to be properly evaluated. In addition, the proposals should not only address the hypothetical future where all plants are standardized designs proposed for pre-approved sites, but also the range of other possibilities including present plants.

B. Clarity of Proposals

In a number of instances, most notably the treatment of issues arising under the National Environmental Policy Act and the nature of the licensing hearing, the present package

contains vague language apparently intended to provide a subtle flexibility. We believe a sound legislative proposal must clearly address even the most controversial issues and provide the clearest possible resolution of them. Any time saved in the legislative process by glossing over these hard issues will only produce significantly larger delays in the subsequent judicial process as parties argue over the varying meaning of ambiguous phrases.

C. Flexibility of Proposals

A major goal of any reform package should be to assure flexibility in order to broaden its potential utility. Thus we have proposed that with respect to early site review, combined CP/OL reviews and standardized plant design, the statutory authority be written to allow the Commission to provide definitive and early resolution not only as to the entire site suitability issue, the entire combined CP/OL issues or the entire standardized design, but also to provide definitive and early resolution for discrete subsets of those issues to the extent they can be independently resolved. Similarly, issues whose final resolutions have to be postponed should not await some artificial future date to be resolved -- such as commencement of the operating license hearing -- but should be resolved as soon as they are ready for resolution. In the first instance, the principal initiator of the early resolution of an issue should be the proponent with respect to the issue.

D. Stability of Decisions

Although the legislative proposal more narrowly speaks of stability of standardized designs, it is clear that a principal benefit of the legislative package is stability of all decisions, not only those related to design. The Committee concluded that all decisions whether related to early site issues, design or combined CP/OL should essentially be final and subject to reopening only if very stringent thresholds are met and that the same standard should be applicable to all such issues in order to qualify for enhanced stability. Our standard is that no issue may be reopened, absent a special showing, if at the time of its initial resolution the only remaining regulatory responsibility with respect to such issue would be the verification of the design, and the inspection and testing necessary to determine whether the plant had been constructed in compliance with the approved parameters.

The re-opening of a previously determined issue -- which would include backfitting of new standards or new hardware -- should be allowed only where the proponent of the proposal provides to the extent practicable a fully developed statement of the rational basis for the proposal which demonstrates as a *prima facie* matter that the proposed change is required to meet statutory requirements.

E. Hearings

The Committee believes a full administrative/legislative package regarding modifications in the hearings should be developed as part of a single legislative proposal for licensing reform. We further believe that the first step to develop such a package is a determination of the purpose of the hearing. We believe the purpose of the hearings should be dispute resolution. Determination of the purpose of the hearing first will allow for easier resolution of the other issues related to the structure and procedures for hearings.

F. Energy Decisions

In the legislative proposals submitted to the Committee, the full range of energy decisions including need for power, alternative systems, conservation and the like, is to be resolved either by the NRC or the Federal Energy Regulatory Commission (FERC). In our view, states and some regional authorities are far better equipped to resolve these matters and to the extent their hearing procedures are substantially equivalent to NRC hearing procedures and to the extent they certify that they have in fact resolved one or more of these energy issues, the NRC should defer to them. Thus the legislative proposal should be amended to allow the Commission to defer to a variety of potential authorities as to energy issues.

G. Conclusion

This summary is not intended to touch on every point made in our report but only to highlight those aspects of the report which we believe are particularly important.

REPORT OF THE AD HOC COMMITTEE
FOR
REVIEW OF NUCLEAR REACTOR REFORM PROPOSALS

The Ad Hoc Committee for Review of Nuclear Reactor Reform Proposals has reviewed the proposed Nuclear Standardization Act of 1982 ("the proposed Act"). In this connection, we met to discuss the legislative proposals on six occasions; at one such meeting, we had a useful, extended discussion with Mr. Tourtellotte, Chairman of your Regulatory Reform Task Force.

The proposed Act is intended to provide for:

(a) Early Site Reviews;

(b) Standardized Plant Design Approvals;

(c) One-Step Licensing -- Issuance of a Combined Construction Permit/Operating License;

(d) Stability of Approved Standardized Plant Designs -- Protection Against Unwarranted Backfit Changes;

(e) Deferral by NRC to FERC with Respect to Need for Power Determinations; and

(f) Revised Hearing Procedures for Standardized Plant Design Approvals, Early Site Approvals and One-Step Licensing.

While the Ad Hoc Committee endorses the need for change in these areas, we disagree with:

(a) the scope of the proposed Act;

(b) important details of each of the provisions of the proposed Act; and

(c) the failure to make the intended purposes and characteristics of the public hearing processes explicit in the proposed Act.

We understand that the Commission staff intends to propose, later this summer, a package of administrative reforms and supplementary legislation. It is our conclusion that the Commission should not proceed with proposing the Nuclear Standardization Act of 1982 to Congress without full consideration of the supplementary legislation and administrative reforms now under preparation by the Regulatory Reform Task Force. While the broad features of the proposals were sketched for us by Mr. Tourtellotte, we, of course, did not have them before us. With such proposals on the table, it is possible that some of our opinions with respect to the proposed Act would be modified.

Scope of the Proposed Legislation

There is at least a hiatus with respect to new nuclear plant proposals. Accordingly, it is reasonable and wise to utilize this time period to develop a revised regulatory framework to accommodate such proposals, when and if they should occur. The proposed Act is prompted by the view that the licensing process would be improved if it encourages proposals to locate pre-approved standardized plant designs on

pre-approved sites. While this concept has much appeal, it presents a number of questions, which are discussed below. And, if the reform legislation is cast only in such concepts, it begs the question of regulatory reform for the existing nuclear power plants now under construction or in operation. These amount to more than ten percent of this nation's currently planned electric generating capacity; the uncertainty and inefficiency in the regulatory process surrounding these units is of current, significant national interest.

Moreover, it is possible that a renewal of interest in new nuclear power projects -- in Alvin Weinberg's terminology, a second nuclear era -- may involve plants of very different design, proposed perhaps by new social or economic institutions. In this regard, it is important that any new regulatory framework allow for considerable flexibility and refrain from insisting on formulations which would limit such new proposals only to more mature versions of the present plants. The proposed Act does not provide the desirable flexibility.

A. Early Site Reviews and Approvals

The Committee favors revision of the Atomic Energy Act to explicitly allow early consideration and resolution of site-related issues. An essential element of such a program is to assure that, upon their resolution, these matters would not be

subject to reconsideration at downstream stages of the licensing process in the absence of good cause.

The Commission should be authorized to allow proponents of specific sites to request and obtain a range of approvals and determinations, including:

(a) approval of a site for subsequent installation of a nuclear power plant having specifications within defined limits of design parameters which reflect the site characteristics;

(b) determination of environmental issues, where appropriate, including alternative sites and their rankings; and

(c) individual determination of specific site-related characteristics that could affect the design and/or installation of a nuclear power plant at that site.

While the Commission obviously has to define those characteristics of sites which it may consider significant in any specific instance, the proponent of a site should be permitted to selectively request those approvals or determinations it requires at any time for planning purposes.

In our view, the proposed Section 193 does not clearly allow this flexibility to site proponents, although Section 193g would seem to recognize the possibility of limited site characteristic determinations. Our concern is that, as

drafted, Section 193 appears to be focused primarily on overall site suitability determinations.

We believe the Commission should explicitly consider and determine when and how NEPA and environmental matters will be taken into account in the several site suitability determinations. Among the difficult issues to be addressed and resolved are:

(a) whether and which environmental determinations would necessarily require assessments of the cost of, and the need for power from, facilities which only later may be proposed for installation at the site;

(b) at what point in a site suitability determination would an environmental impact statement be required; and

(c) the stability of environmental determinations made prior to the preparation of an environmental impact statement.

The proposed Act implicitly recognizes the advantages to planners and the public alike in early selection and approval of power plant sites. We concur. We recognize too, however, that the planning process often involves sequential consideration of a variety of factors. The Commission's procedures should recognize this and allow for appropriate state agency and public participation in making binding determinations with

regard to such matters. In some states, state agency involvement in early site approval may be a necessity for its practical implementation.

The proposed Act is not sufficiently explicit with respect to the binding nature of such determinations. It addresses the matter only in terms of "validity" of the site permit for a term of years. The determinations and approvals made in the early site review process are essential premises for planners. The statute should clarify the extent to which such determinations and approvals can be reopened prior to or at any subsequent licensing stage, at the initiation of the staff or any party. The present draft is silent on these matters, although it would allow review -- presumably at least by the staff -- of "significant new information" at a renewal of a site permit. A "backfit" standard should be developed for application to these site approvals and individual site characteristic determinations. The standard should also be applicable to applications for renewal of such approvals and determinations. In our view, an appropriately formulated and implemented backfit provision would remove any need for a fixed statutory expiration period for the site approvals and determinations. In this connection, while we address below the matter of public hearings as they might apply to early site reviews and other matters, we note that the proposed Act is silent with respect to public hearing opportunities at the renewal stage of a site permit. The Commission's intent in this regard should be clarified.

B. Standardized Plant Design Reviews and Approvals

The section-by-section analysis of the proposed Act contemplates review and approval under Section 194 of an "essentially complete final design for a whole nuclear power plant usable at multiple sites." This definition is not explicitly included in the draft statute.

The Committee recognizes and endorses the value of standardized design reviews and approvals. Such review could reduce redundant staff review activities, and approved designs of whole nuclear plants could be matched with previously approved sites to expedite the regulatory process for purchasers and operators of such approved plants.

Nevertheless, we believe the limitation of Section 194 to essentially complete final designs for whole nuclear power plants would reduce the value and utility of the proposal. The statute should authorize the Commission to allow the submittal of designs of major safety-related systems or subsystems which represent sufficiently discrete major features of nuclear power plants so as to be amenable to independent review. Similarly, while the statute should facilitate the review of final designs, it should not insist on essentially complete final designs. We believe the value of this more flexible approach outweighs the potential benefit of inducing standardized plant design by limiting Section 194 (and Section 185) to such plants.

For purposes of standardization, the degree of finality should be measured by whether the proposed design can be subject to a reasonable backfit rule and whether, if constructed, the only regulatory responsibility would be the verification of the design, and the inspection and testing necessary to determine whether the plant had been designed and built in compliance with the approved parameters. This may not require at the standardized plant design review stage all of the detail that is now included in an FSAR. But it will require the definition by rule, or in individual case determinations, of detailed performance criteria for all safety-related plant systems and key safety components.

Under the proposed Act, standardized plant design approvals would be "valid" for a term of years. While we believe we understand the concept of validity here to disallow any modifications in the approval except through the backfit or design stability provisions in Section 196, it would be well to be explicit here.

Like the early site approval, the draft is inappropriately silent with respect to public hearing opportunities, if any, to be afforded in connection with amendments or renewals of standardized plant design approvals. In addition, an appropriately formulated and implemented backfit provision would remove any need for a fixed statutory expiration period for the design approval.

Our discussion below of Section 196 is also applicable to the criteria set out in Section 194e(2)(B).

C. One-Step Licensing

The Committee agreed that in appropriate cases, a single hearing on the principal issues related to whether to construct and operate a nuclear reactor at a proposed site is desirable. Although arguably much of this could be done without new legislation, it would be unwieldy, unreliable, and would cause much litigation and attendant delays to do it without legislation. The legislative proposal presented for review, however, was not deemed adequate, primarily because of its ambiguities and failure to address key concepts central to such a proposal. The justifications provided in the preamble to the legislative proposal were also judged to be inadequate and in some cases inaccurate.

Either a standardized design or a custom design, to the extent it contains the required detail, should be eligible to qualify for a combined CP/OL. To require a standardized design could limit the combined CP/OL to only a handful, if any, of licensing proposals and might have utility only years in the future. There is no apparent safety or environmental concern which would justify limitation of this concept to pre-approved standardized designs only. Although such a limitation might encourage standardization, we believe the flexibility afforded by our proposal outweighs such considerations.

As with standardized plant designs, the Committee is of the view that the Commission should have the authority to allow one-step review and resolution of sufficiently discrete major portions of the plant design which are amenable to independent approval. This would facilitate use of the benefits of combined hearings to the fullest extent possible without waiting for final designs on all parts of the plant.

The Committee also considered the level of design detail which should be required to be eligible for a combined CP/OL determination. Again, as with standardized plant designs, there was agreement that the standard for sufficiency of design detail in standardized plant designs should be sufficient to allow applicability of a reasonable backfit rule, and for those matters considered and determined at the CP/OL proceeding, what should be left would be only the verification of the design, and the inspection and testing necessary to determine whether the plant had been designed and built in compliance with the approved parameters.

The Committee recognized that certain matters, such as emergency planning, may not lend themselves to ultimate determination at the time of issuance of a combined CP/OL. Emergency planning, for example, would involve state and local authorities at a point many years before actual planning would be required, thus involving premature expenditures and possibly changing circumstances. One solution would be to defer this

kind of matter to a later time, considering only at the combined CP/OL stage, or at an earlier site approval proceeding, whether there were any peculiar local circumstances that would make development of an adequate emergency plan impractical. In the absence of such a finding, the CP/OL would issue, subject to a condition providing for later development and consideration of emergency planning. While this is a departure from a full one-step CP/OL proceeding and determination, the inherent flexibility it provides may be necessary for plant operating procedures and other issues. The responsibility for scheduling a timely submittal of such deferred matters would, of course, be that of the applicant initially, although the Commission should be able to establish scheduling guidance for such submissions.

The Committee considered the absence of an explicit backfitting provision applicable to combined CP/OLs. The absence of such a provision undoubtedly reflects the view that a combined CP/OL might only be issued in connection with an approved standardized plant design. While the text doesn't make this explicit, we noted our disagreement with such a limitation above. A combined CP/OL will only be meaningful if it is accompanied by meaningful assurances of design stability. The Committee agreed that all issues once resolved should remain resolved absent a showing which meets the requirements of a reasonable backfit provision.

The Committee also generally agreed that when the staff conducts its design verifications, construction inspection and testing, the details of those reviews and findings should be made publicly available. The Committee believes that any person should be able to obtain a hearing on the issue of whether the plant, as built, complied with the combined CP/OL conditions, if the person establishes by a <u>prima facie</u> showing that a significant safety or environmental issue was involved and that the plant did not meet the CP/OL requirements. However, the majority of the Committee believes that in such circumstances, the proper procedure to follow is that established in Section 2.206 of the Commission's regulations, under which the initial determination to convene a proceeding is made by the Director of Regulation. One member believes that the initial determination should be made by an independent decision-maker, such as an ASLB or ASLAB member. In any event, this matter merits explicit consideration by the Commission.

D. <u>Stability of Approved Standardized Plant Designs -- Protection Against Backfit Changes</u>

As is evident from the discussion above, an effective provision regarding design stability is essential to provide a strong incentive for early site approvals, standardized plant design approvals and combined CP/OL issuances. It is also important to the existing power reactors now under construction or in operation. In this regard, the explicit limitation in

the proposed Act of the backfit provision to approved final standardized plant designs only is wanting. Moreover, as a result of a drafting quirk, the intended provision would not seem to protect even the holder of a standardized plant design approval because, by its terms, it would apply only to a "licensee of, or license applicant for a production or utilization facility." To that extent, the incentive for a designer to seek a standardized design approval would be diminished.

The Committee believes that the backfit standard proposed is unworkable because it will not be possible to calculate societal risk with sufficient precision, and because we do not believe that a standard for "acceptable levels of risk" is close at hand. As a concept, the "acceptable level of risk" standard does not appear qualitatively different from the standard in the Commission's existing backfit regulation (10 C.F.R. § 50.109). (In that regard, there is little evidence that the NRC staff is currently abiding by the existing rule.) In our view, it would be a mistake to enact into law a requirement for quantification of risk when the tools for quantification and the standards for acceptance themselves would be likely sources of litigation.

A more workable formulation would be to require the staff to produce a systematic analysis setting forth a rational basis for any required change in design or operating limits (related to safety or environmental concerns), including a discussion of

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MEETING DATE: 8/31/82 Open ✓ Closed ___

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