

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the matter of:

STRATEGIES FOR POTENTIAL LITIGATION ON
TMI-1 STEAM GENERATORS

Docket No.

05000 289

CLOSED MEETING

Location: Washington , D. C.

Pages: 1 - 62

Date: 8 December 1983

8402100195 840203
PDR 10CFR
PT9.7 PDR

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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STRATEGIES FOR POTENTIAL LITIGATION ON TMI-1
STEAM GENERATORS

- - -

CLOSED -- EXEMPTION 10

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Room 1130
1717 H Street, N.W.
Washington, D.C.

Thursday, December 8, 1983

The Commission met, pursuant to notice, at
11:02 a.m.

COMMISSIONERS PRESENT:

NUNZIO PALLADINO, Chairman of the Commission
VICTOR GILINSKY, Commissioner
THOMAS ROBERTS, Commissioner
JAMES ASSELSTINE, Commissioner
FREDERICK BERNTHAL, Commissioner

STAFF AND PRESENTERS SEATED AT COMMISSION TABLE:

S. CHILK
G. CUNNINGHAM
H. DENTON
W. DIRCKS
M. MALSCH
H. PLAINE

AUDIENCE SPEAKERS:

E. CASE
R. VOLLMER
J. SINTO

P R O C E E D I N G S

CHAIRMAN PALLADINO: Good morning. This meeting will continue our discussions of the matter of the TMI steam generator license amendment, specifically we wish to discuss our litigation strategy should we be taken to court on our decision on the "significant hazards" determination.

Our litigative risk appears to be highest if we concur in the staff's recommendation. Therefore, presuming for the moment that the Commission does go along with the staff, I would like to begin the meeting by having the General Counsel discuss the steps we should take in preparing a defense.

Of course, I could ask also the other question, suppose we don't go along with the staff, then what is our litigative risk and what defense mechanisms should we be considering.

I pose the first question first, since I gather that is the greater litigative risk. So, before I begin, I would like to ask if this is agreeable to everyone or if there are some alternate approaches we might use.

COMMISSIONER ASSELSTINE: That is fine with me.

COMMISSIONER BERNTHAL: That is precisely what I would like to hear.

MR. PLAINE: Just jump right into it, right?

CHAIRMAN PALLADINO: Why don't we go right into it?

1 I do think it's important to stress another thing,
2 are we talking about the preliminary "no significant hazards"
3 consideration finding or the final, or both?

4 MR. MALSCH: Only the final.

5 COMMISSIONER ASSELSTINE: The final.

6 CHAIRMAN PALLADINO: And I d n't understand why
7 that should be so. There was a preliminary "no significant
8 hazards" considering finding made.

9 Then the staff started to work on the merits of
10 the case. There was a filing for hearing. Does that mean
11 they had to stop in order to protect their no significant
12 hazards consideration determination?

13 MR. MALSCH: No, it only means that they had to
14 then proceed to make the final determination.

15 CHAIRMAN PALLADINO: All right, so they proceeded
16 but they also were working on the merits of the amendment.

17 MR. MALSCH: Right.

18 CHAIRMAN PALLADINO: So, why does the final
19 become the case and not the preliminary?

20 MR. MALSCH: It's just like this because the
21 preliminary had no operative effect. It's like a proposed
22 rule if it doesn't proceed to the final.

23 CHAIRMAN PALLADINO: No, as I understand the law,
24 you make a preliminary --

25 MR. MALSCH: Right.

CHAIRMAN PALLADINO: -- finding. If there is a

1 request for a hearing, then you make a final finding.

2 MR. MALSCH: Yes, but the only purpose of the
3 preliminary finding is to obtain public comment and develop
4 an administrative record on the nature of the finding.

5 CHAIRMAN PALLADINO: Well, if there were no request
6 for a hearing, the preliminary finding would be the only
7 one that exists.

8 MR. MALSCH: But it wouldn't mean anything because
9 there would never be any need to make any finding at all
10 unless a hearing is requested. The issue would be moot.

11 CHAIRMAN PALLADINO: But you are saying if you make
12 the preliminary finding there is a request for a hearing, you
13 make a final finding, but you are not allowed to do any
14 work on the merits of the amendment in the process.

15 MR. MALSCH: No, no, no.

16 COMMISSIONER ASSELSTINE: No.

17 MR. MALSCH: The two can go along parallel tracks.

18 CHAIRMAN PALLADINO: Well, that is what I think
19 happened here.

20 MR. MALSCH: Oh, I'm sure that's --

21 COMMISSIONER BERNTHAL: But the point of the
22 preliminary finding, that point in time -- if I may butcher
23 the language -- where the preliminary finding is made
24 presumably is the point at which the staff is mentally at
25 least if you are -- I gather from the discussion yesterday

1 if you are going to interpret the law literally, that is the
2 point at which some might suggest they stop, perhaps take all
3 of the information up to that time but then they have to say,
4 based on the information that we know at this time, we have
5 to make a preliminary finding. All right?

6 MR. MALSCH: That's right.

7 COMMISSIONER BERNTHAL: So, it is a key point in
8 time, if I can say that, where they are requested to make
9 the preliminary finding.

10 But presumably, they are able to make use of all
11 technical information and all procedures up to that point
12 because that is the trigger point, really, where they are
13 required to make that judgment.

14 MR. MALSCH: That's right.

15 COMMISSIONER BERNTHAL: Okay. Go ahead.

16 CHAIRMAN PALLADINO: Now, having made that judgment,
17 are they precluded from working on the merits to protect
18 their position?

19 MR. MALSCH: No.

20 CHAIRMAN PALLADINO: Well, then I don't understand
21 some of the arguments. But that is why, I guess, we are
22 here.

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COMMISSIONER ROBERTS: But we have an instant case at hand.

MR. PLAINE: I understand. But I am suggesting --

COMMISSIONER ROBERTS: Well, we don't pick and choose these things.

MR. PLAINE: Well, I know. But your process, it isn't limited only to this one case. Harold described yesterday an on-going process in which hundreds of reviews are conducted.

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CHAIRMAN PALLADINO: But let's go back to the facts of the case. There was a preliminary no significant hazards consideration finding made and it was made without prejudging the merits.

MR. MALSCH: No, that's not --

COMMISSIONER ASSELSTINE: That's not clear from the documents.

COMMISSIONER BERNTHAL: Describe for me what it means if you say it is not clear. I mean, why do you say that?

CHAIRMAN PALLADINO: The document -- these things you quote came after that decision.

MR. MALSCH: That's true.

1 COMMISSIONER ROBERTS: We heard Harold tell us
2 yesterday that his initial decision did not address anything
3 more than what were the considerations.

4 MR. MALSCH: That is not very -- that is not
5 at all apparent from the documents that were issued. The
6 documents that were issued --

7 CHAIRMAN PALLADINO: Well, then that is a good
8 point to come back and check. But I was using his statement,
9 I say they made that one, and they presumably -- or at
10 least for the moment will you allow me to presume that they
11 made it as Harold said.

12 Now they start with a merits review. They hear
13 that there is going to be a hearing. Should they have
14 stopped the merits review so as to be able to protect the
15 no significant hazards consideration finding? You say, no,
16 they shouldn't have stopped.

17 So, they didn't, and that's their judgment. They
18 didn't stop. Now they come along and say, I am going to
19 make a no significant, final no significant hazards
20 consideration determination. Are they prevented from using
21 that information?

22 MR. MALSCH: I don't think they are prevented
23 from using the information. But I think the concept
24 originally was that there are two parallel tracks that you
25 can go along on reactor amendment requests. The minute the

1 request came in, two issues would surface.

2 One would be, can we approve this amendment, will
3 it present undue risk to public health and safety.

4 And then the separate procedural question, does
5 it present significant hazards consideration.

6 I think the concept was to run along parallel
7 tracks. That at the same time the staff was initiating its
8 safety evaluation, it would be making a proposed interim
9 draft, no significant hazard consideration determination.

10 I suspect the concept was that well before the
11 staff got near to completion of its statement of view on
12 the safety review track, it would be making a final no
13 significant hazards consideration determination on the other
14 track.

15 COMMISSIONER BERNTHAL: But that didn't happen
16 in this case.

17 MR. MALSCH: That didn't happen in this case. But
18 the principle is, I think, the same.--

19 CHAIRMAN PALLADINO: Why do you say --

20 MR. MALSCH: -- that the tracks were supposed to
21 be --

22 CHAIRMAN PALLADINO: How could you make the tracks
23 separate? I don't even find how you can make -- it's the
24 same group of people. They are looking at the merits. They
25 are also going to make a final no significant hazards

1 consideration finding. How can you separate the thing?
2 It's an artificial separation.

3 COMMISSIONER BERNTHAL: Guy has a point.

4 MR. CUNNINGHAM: Yes, as we drafted the proposed
5 rule and it became a final rule, we considered whether you
6 should have the two track and end up with a document
7 called the final significant hazards consideration determination
8 issued prior to the completion of the safety review. We
9 rejected that.

10 The contemplation was that the two would always,
11 the final SER and the final significant hazards consideration
12 determination, would come out together because only when
13 you reached the point where you were prepared to issue the
14 amendment was the question of whether a prior hearing was
15 necessary, relevant. So, you didn't need a significant
16 hazards consideration.

17 MR. MALSCH: I couldn't get that from the --

18 COMMISSIONER ASSELSTINE: I don't even think you
19 need that question, though, to still be able to make a
20 separation between the significance of the issues that were
21 considered and how you resolved those issues at the end.

22 If you want to make the argument that the only
23 issue you have to look at is whether there -- it's the
24 bottom line one on the merits. You can make that. I think
25 that's a loser. But I still think you could make the

1 argument that there is a distinction between the two.

2 And I think you can still make that judgment of
3 whether there were significant issues involved at any time
4 in the process. It doesn't matter whether you have completed
5 your review or whether you --

6 CHAIRMAN PALLADINO: They said that --

7 COMMISSIONER ASSELSTINE: That's what Harold said
8 yesterday. I agree with Marty, when I read the documents,
9 I didn't come across, come away with the feeling that the
10 staff had made a judgment first that there were not
11 significant issues involved in this process.

12 And second, that when they completed their review,
13 that there was not any significant risk or hazard involved
14 in the process. I did not come away with the sense that
15 the staff had made those two separate judgments either
16 early in the process or at the end of the process.

17 Instead, it looked like to me, that what the staff
18 was doing was resting very heavily on the second judgment
19 which is, we have looked at this. We have done an evaluation.
20 We have concluded there is no real risk involved in this.

21 MR. CASE: We have published a preliminary
22 significant hazards consideration. That was done, was
23 published in the Federal Register well before --

24 COMMISSIONER ASSELSTINE: I certainly read that,
25 though, even at that point, as resting more on the second

1 kind of judgment than the first.

2 (Simultaneous conversation.)

3 MR. MALSCH: Let me read you what I read to be
4 the operative part of the preliminary notice which the staff
5 published.

6 CHAIRMAN PALLADINO: Where are you?

7 MR. MALSCH: This is the notice that the Commission
8 published on May 31, 1983. It says, "The Commission,
9 however, proposes to determine that the application does not
10 involve a significant hazards consideration because
11 compensatory measures will be employed to provide a level of
12 safety in operation with the repaired generators commensurate
13 with that anticipated of the facility had it not experienced
14 or needed to repair steam generators." In other words, the
15 level of safety will be the same afterwards as before.

16 That is the same kind of determination the staff
17 has made in its final judgment.

18 MR. DENTON: Read the next sentence, too.

19 CHAIRMAN PALLADINO: You say that's the same as
20 they made in the final, is that right?

21 MR. MALSCH: The famous special kind of judgment.

22 CHAIRMAN PALLADINO: Okay. Go ahead and read the
23 next.

24 MR. MALSCH: The next paragraph?

25 MR. DENTON: The next sentence that speaks to it,

1 it will be restored.

2 MR. MALSCH: "The Commission is seeking public
3 comments?"

4 MR. DENTON: I thought the staff was deliberately
5 asked, was put in the role that we are in, when the
6 Commission decided -- we are in the posture now of issuing
7 a preliminary, doing the safety review, and then issuing a
8 final.

9 Commissioner Asselstine proposed, when this was
10 first considered, that it would go, issue a preliminary, a
11 final, and then the staff would do a safety review. That was,
12 as I recall, the essence of your proposal, and the Commission
13 didn't accept that approach.

14 So, I thought the Commission said, do the
15 preliminary; do your safety review to confirm whether you
16 made the right one or not, and then do a final. So, that
17 is the way at the moment we have been doing all of them,
18 preliminary, do a review, and then make a final.

19 CHAIRMAN PALLADINO: Can I ask, Jim, in your
20 thought process you are saying, make a preliminary; then
21 you make the final, then you do the work.

22 Well, now, you start with the preliminary and
23 let's assume there is no request for a hearing for a few
24 days and you start the merits review. Then there comes a
25 request for a hearing. And in order to protect the most

1 significant hazards finding, you have to stop that review.

2 COMMISSIONER ASSELSTINE: No, I am not saying that,
3 I don't think so. What I am saying is, when you do the
4 review you get to the end of the process and you do the
5 review, and you make your final determination.

6 I would say that the right determination for the
7 staff to make for the no significant hazards consideration
8 finding is whether they had to address or consider significant
9 safety issues in connection with this amendment.

10 I would say if their conclusion is, yes, we had
11 to come to grips with significant safety issues, even if,
12 their bottom-line conclusion was, we have resolved those
13 satisfactorily, this is not an amendment that would qualify
14 for a no significant hazards consideration judgment.

15 CHAIRMAN PALLADINO: So, you are saying, any
16 time you have to do any analysis or test --

17 COMMISSIONER ASSELSTINE: No.

18 CHAIRMAN PALLADINO: -- that you preclude --

19 COMMISSIONER ASSELSTINE: No, I am not saying that.
20 What I am saying is, you have to make a judgment about the
21 significance of the issues that are involved. A part of that
22 is the amount of analysis you have to do. But I would not
23 say that's controlling. I would not say that's controlling.

24 COMMISSIONER ROBERTS: Well, I certainly would not
25 say it's controlling at all.

1 COMMISSIONER BENRTHAL: Jim, you have said, you
2 have used, I think, a key phrase here, "we have had to
3 consider." That somehow implies when they make their
4 final judgment, that means that between the May date that
5 the request came in and the period during which all this
6 testing and what not goes on, you are saying that the very
7 fact that during that period they were considering what
8 you regard as significant safety issues in itself then
9 says that there was a significant hazard, regardless of
10 what the outcome was on the data.

11 COMMISSIONER ASSELSTINE: That's right.

12 CHAIRMAN PALLADINO: But they never said these
13 were significant safety issues

14 COMMISSIONER ASSELSTINE: That's what we heard
15 yesterday from the staff.

16 CHAIRMAN PALLADINO: As a matter of fact, they
17 said they were not significant safety issues. They said --

18 COMMISSIONER ROBERTS: On its face --

19 MR. CASE: My problem with what Jim says is, that
20 might be a way to decide significant hazard considerations.
21 But that is not what the rule says.

22 COMMISSIONER ASSELSTINE: Okay.

23 MR. CASE: The rule says, you look at whether
24 the probability of an accident is increased, the consequences,
25 accident of a new type, a reduction in margin of safety, and

1 that is just what we looked at in the preliminary and final
2 significant hazards consideration.

3 We didn't look at those other factors that you
4 talked about because they are not in the rule.

5 COMMISSIONER ASSELSTINE: All right. Then I
6 would -- okay, then my concern, I guess my problem is that
7 the rule violates the statute if you interpret the rule that
8 way.

9 COMMISSIONER ROBERTS: Well, that's arguable.

10 CHAIRMAN PALLADINO: The law oversimplifies the
11 situation. It says, everything is divided into two parts,
12 significant and not significant. Actually, there is a
13 spectrum and we have to go in there and somewhere say, here
14 is where the dividing line is.

15 We said, the dividing line will be established by
16 these criteria and we said, hey, that's great, let's use
17 that. Now, why do we say that's at variance with the law?
18 The law said you will divide them arbitrarily into two
19 packages and we said, here is the dividing line. Everybody
20 said that's great. The Congress didn't come back and
21 say, your dividing line is wrong.

22 So, I don't see that that's at variance with the
23 law.

24 COMMISSIONER ASSELSTINE: Well, maybe what I should
25 do, I can be quiet --

1 (Simultaneous conversation)

2 COMMISSIONER ASSELSTINE: -- because my arguments
3 are going to be laid out the other way. Go ahead.

4 CHAIRMAN PALLADINO: No, we are testing, I am
5 testing mine.

6 COMMISSIONER ROBERTS: Jim, let me ask you
7 something -- and I don't mean to flip words around I don't
8 know -- would you agree that the staff followed the
9 regulation?

10 COMMISSIONER ASSELSTINE: I would have read one
11 regulation a little bit differently. I would have read
12 the regulation --

13 COMMISSIONER ROBERTS: Excuse me, I am not asking
14 whether you like the regulation as written.

15 COMMISSIONER ASSELSTINE: Okay, if you read --
16 I can't give you a "yes" or "no" because my answer is, if
17 you read the regulation literally, I would say the staff
18 followed the regulation.

19 If you read the regulation in the context of a
20 legislation and its history, which is the focus on the
21 nature of the issues involved and not on the merits of the
22 judgments on those issues, I would say, no.

23 COMMISSIONER BERNTHAL: But then --

24 MR. VOLLMER: That's the point I would like to
25 address a minute because everybody wants to read the word

1 "considerations" out of the regulation.

2 COMMISSIONER ASSELSTINE: I don't think about it.

3 MR. VOLLMER: Okay, but my problem with your
4 formulation is, you want to read out "unreviewed" as well
5 as "reviewed" safety issues, both of them. And the
6 traditional application of this has been, an issue may be
7 a significant safety issue and still not pose a significant
8 hazards consideration because it's previously reviewed.

9 COMMISSIONER ROBERTS: Okay, then.

10 MR. VOLLMER: And what the staff is saying in
11 this case is that the issues that they had to review were
12 not previously unreviewed in the extent that they were
13 significant. So, that means under the regulation as it is
14 written that they- don't pose significant new hazards
15 considerations.

16 And the word "new" is in there both in the
17 legislative history as the Congress understood it, and as it
18 is implemented in the regulation.

19 So, I don't think you can just say "significant
20 safety issues," it's got to be significant "new" safety
21 issues.

22 MR. MALSCH: Well, were any of the issues here
23 previously reviewed by the staff for this case?

24 MR. VOLLMER: Well, that's the issue you get into
25 when you look at whether you are going to accept the

1 experience in the industry using this repair technique as
2 the basis for saying it was well-accepted technology and
3 therefore did not pose an unreviewed question.

4 MR. CASE: That's the nub of the argument, if you
5 will, can you take into account industry experience in
6 defining "new."

7 CHAIRMAN PALLADINO: But you always take
8 experience, you can't make a technical judgment without all
9 the experience. Suppose we had identified that is a
10 generic problem where the rolling is better than kenetic
11 expansion and we did all the work and say, hey, kenetic
12 expansion is better, let's encourage them to use it. Then
13 somebody comes in with an application and then you say,
14 well, we are not permitted to use that experience?

15 MR. MALSCH: Well, I think the problem is, though,
16 that your line of argument is irrelevant to the way the
17 staff approached the problem.

18 CHAIRMAN PALLADINO: I don't understand that.

19 MR. MALSCH: Because staff says, it doesn't make
20 any difference how we reached the conclusion that there is
21 no significant additional risk. The only important thing
22 is that there was none.

23 No, wait a minute. The approach that we were
24 suggesting is, if you could say that -- take as an example
25 the issue of the validity of the repair technique, that it is

1 a widely accepted technique and there just is no serious
2 question but that it applies here. That would go strongly
3 to suggest that that is not a significant technical concern.
4 Therefore, that issue is not a significant hazards
5 consideration.

6 CHAIRMAN PALLADINO: I thought they did that as --

7 MR. CASE: But the test part that showed it was
8 not significant in the field as compared to the fact it was
9 run before the amendment was received and before we made
10 our preliminary finding. It was part of the record at that
11 time, before that time. It didn't come after our preliminary
12 finding.

13 MR. MALSCH: I understand that.

14 MR. CASE: So, it's part of the industry experience
15 available to make the determination.

16 MR. MALSCH: I don't have too much difficulty
17 taking into account in deciding whether the issue was a
18 serious one or not. But I think that is not the way the
19 staff approached it.

20 MR. DENTON: I would have problems saying we did
21 not consider the factors that we did consider in the review.
22 It seems like you want to push us to something we didn't do
23 in order to make the legal argument cleaner.

24 I have always seen this issue as procedural versus
25 substantive. You could have a procedural requirement, you

1 could put someone in a room who would look at all the
2 amendments as they came in and his only question would be,
3 does this thing raise any safety questions staff might be
4 interested in or the public might be interested in. If so,
5 go out with it and get public comment, and then do it one
6 way.

7 The other way is to do it for some substance to it,
8 and I felt that's the way the Commission's regulation has
9 and it says, determine if operation under this amendment
10 would result in increased risk, consequences, or margin.

11 So, we have tended to do one with substance. But
12 I can't say the staff does not do a technical review of
13 the repair to see if six inches versus eight inches, versus
14 five inches in the repair is the correct one to restore the
15 plant.

16 I did want to call the Commission's attention to
17 the fact that we are in court in Florida on a refueling, and
18 we made a preliminary finding of a new core reload in
19 Turkey Point where they have gone to some new fuel to
20 minimize thermal shock and minimize embrittlement to the
21 reactor vessel, and that has required some new correlations
22 in order to keep the peaking factors in the core within their
23 proper bounds.

24 So, we are in court already and maybe Marty
25 should talk about that one. It is the same -- to me it is

1 a very similar issue to the one we have been talking about in
2 TMI. We did a safety review of this new core. It's
3 certainly in a safe direction, it reduces embrittlement,
4 the rods are the same length. But there are some different
5 compositions inside the rods that the industry had to develop
6 some new ways of dealing with, and we had the review.

7 So, it seems to be a very similar kind of case and
8 that one is already there. So, maybe you ought to mention
9 that one too, Marty.

10 MR. MALSCH: Yes, I don't know enough about it
11 other than we are in court on that subject this morning.
12 I don't know whether the operation should be enjoined.

13 MR. DENTON: We have not issued a final on that
14 one, but it seemed to have the same kinds of elements in
15 that we issued a preliminary. There were no comments on
16 the preliminary one.

17 Then the applicant came in, finally he could not
18 run it full power without some new correlation in peaking
19 factors, proposed another amendment. We issued that one
20 to deal with some of these complications that arose.

21 A person then wrote in saying it did have some
22 new hazards consideration. We have not issued our final
23 yet. He went to court to enjoin operation with this new
24 core and we are about to decide whether we issue a final or
25 not. So, I think the topic we are talking about today is

1 germane to potentially a wide class of amendments and not
2 just the one under consideration.

3 MR. MALSCH: I'm sure that's right. I think the
4 issue we are debating here, in fact there are hundreds of
5 license amendments being processed annually.

6 CHAIRMAN PALLADINO: I want to remind you, we
7 still have two questions. One, whether or not the paper
8 supports the position that Harold took yesterday with regard
9 to this preliminary, no significant hazard consideration.

10 COMMISSIONER ROBERTS: Well, can't we fix that?

11 MF. PLAINE: Yes.

12 CHAIRMAN PALLADINO: But I want to come back to
13 whether or not the facts support his position, and then,
14 let's see, I forgot what the other one was. I will remember
15 it while I turn the floor over to Fred Bernthal.

16 COMMISSIONER BERNTHAL: I still want to see if
17 I understand here what the key procedural flaw is. And
18 I must say when I first read Herzel's memo it seemed very
19 clear to me that you guys -- we, not you guys -- had a
20 real problem here. But yesterday we went through this
21 long procedure which at the very least convinced me that
22 staff acted reasonably in good faith.

23 Now, whether they screwed up the procedure is
24 another matter. And from your comments, Jim, it seems to
25 me that the focus -- and I think that is what Marty is

1 saying -- is not even on the final finding but it's sort of
2 on the process leading up to the final finding.

3 And you are saying that by the very process itself,
4 that you have gone through hot testing, that you have
5 considered significant safety issues in the process up to the
6 final decision, that leads me to believe that the key is
7 really this preliminary thing. And the fact that in the
8 preliminary judgment they mentioned in their submittal for
9 public comment that there were certain safety issues to be
10 considered.

11 Am I wrong, or is that where the key procedural
12 flaw is as you see it? I really would like to get at the
13 point where we have made a mistake here, if we made a
14 mistake. Then my question -- if you can keep a couple of
15 questions in mind -- is whether we are not really at that
16 point questioning staff's technical judgment ultimately.

17 I mean, isn't that really the key issue that they
18 have made a technical judgment in the preliminary
19 consideration?

20 MR. MALSCH: Let me at least try.

21 COMMISSIONER BERNTHAL: Go ahead.

22 MR. MALSCH: I think since they simply have
23 done the evaluation, as Commissioner Asselstine pointed out,
24 I think we need to look back on the process and decide whether
25 the process really to the staff judgment on whether the

1 amendment presented undue risk to public health and
2 safety, required staff to address significant technical
3 concerns.

4 Now, evidence that there were indeed technical
5 concerns -- I don't know how significant they were -- can
6 be found in some of the preliminary reports of the
7 consultants that say, "Hey, listen, in the process of
8 reviewing this we need to address the following considerations."

9 CHAIRMAN PALLADINO: Was that before the May 9th
10 or May 31st?

11 MR. MALSCH: I think it was before the May 31st
12 notice.

13 COMMISSIONER ASSELSTINE: Yes.

14 MR. MALSCH: But I think --

15 CHAIRMAN PALLADINO: The ones you quote here
16 were after.

17 MR. MALSCH: I don't think --

18 CHAIRMAN PALLADINO: Go ahead.

19 MR. MALSCH: But in addition to those, I think
20 if you tracked through the staff's safety evaluation, you
21 would see along the way additional issues surfacing, getting
22 addressed and then being resolved in the process.

23 MR. CASE: That's one of those issues which
24 is significant.

25 COMMISSIONER ASSELSTINE: That's exactly the issue.

1 MR. MALSCH: That's the question.

2 Now, I don't know whether they were or not, but I
3 will say that from my reading of the documents the staff
4 does not support the proposition that they were not. Now,
5 maybe they were not, but the documents don't say the

6 Instead, the documents say, we have looked at
7 these issues, we resolved them. And the bottom line is
8 that this plant, when we turn to its original licensing
9 date --

10 COMMISSIONER ASSELSTINE: That's right.

11 MR. MALSCH: -- it doesn't present any significant
12 additional risk.

13 COMMISSIONER BERNTHAL: But having made the
14 initial, the preliminary judgment -- unfortunately I don't
15 have in front of me when the various technical questions
16 were raised following that preliminary judgment -- but having
17 made the preliminary judgment, let's just assume for the
18 moment that in fact they acted reasonably and that based on
19 the data they had at that point it was a good technical
20 judgment there are no significant issues.

21 Now, there may have been other things that came
22 in between then and the issuance of the final determination.
23 But doesn't it sort of flip the burden of proof if they make
24 that initial finding, then somehow the equity of it seems
25 to me to be that when you make your final finding, although

1 there may have been questions raised in that process and
2 although you might have argued that if you were forced to
3 stop at any point in the process it might have been
4 different, that when you finished the hot testing and all
5 the data were in at the time that you made your final finding,
6 it concurred with the initial finding in that both stages,
7 the beginning and the end, it was a reasonable conclusion.

8 MR. MALSCH: I understand that, it could be a
9 bette example, what I think your problem is.

10 Let's suppose the safety of the plant depended upon
11 an accurate count of the number of bricks in the foundation.
12 You would look at that at the outset and say, "It is not at
13 all obvious to me what the answer to that question is. It
14 is clearly going to take a lot of time and resources to
15 count them."

16 So, if you approached the question at the initial
17 outset it strikes that that would be a significant technical
18 issue, using that terminology.

19 But let's suppose then you go out and hire 500
20 people to count the bricks one by one and tally them up.
21 And a year later, after spending, you know, two-hundred man-
22 years and a million dollars counting bricks you come up with
23 the results.

24 It strikes me that you could look back and say, "By
25 God, there just is no doubt at all that is the correct result."

1 And looking back on the process you might be able to
2 conclude that indeed what I thought might be a significant
3 technical issue on reflection turns out not to be one.

4 COMMISSIONER BERNTHAL: Ah, but see, you are
5 arguing the opposite point.

6 MR. MALSCH: What I am saying --

7 COMMISSIONER BERNTHAL: My argument was that
8 initially they said that they thought it was --

9 MR. MALSCH: I know that.

10 COMMISSIONER BERNTHAL: -- not a technical issue.

11 MR. MALSCH: I will say that there is room for
12 argument, I suppose, that what Congress had in mind was
13 just the preliminary state judgment. But I don't think we
14 are willing -- I don't think we would go that far. I
15 think we would say, "You can't take into account the review
16 process as it has been conducted and do a kind of a
17 retrospective judgment on how, having completed the review,
18 whether the issue still appeared to be at least a significant
19 one.

20 CHAIRMAN PALLADINO: But how can you flaw the
21 procedure where you made the preliminary one. Now you
22 made that, and let's assume for the moment you made that.
23 Now you go to the merits. Are you prevented, must you
24 again say, "Oh, I found this without the merits?" I
25 think the preliminary one is the only one we are talking

1 about. And is the only one the law addresses.

2 MR. MALSCH: Well, let me say first of all, the
3 preliminary judgment --

4 CHAIRMAN PALLADINO: Talks about the outset.
5 (Simultaneous conversation.)

6 MR. MALSCH: Okay, the judgment the staff made
7 was not a judgment about safety concerns. They made the
8 same kind of judgment at the outset that they have reported
9 now in the final.

10 CHAIRMAN PALLADINO: Incidentally, the other thing
11 I wanted to remember was, you asked for the next sentence,
12 the next sentence was the right one. Did you find the
13 right sentence?

14 MR. MALSCH: Yes.

15 MR. CUNNINGHAM: I have it.

16 CHAIRMAN PALLADINO: It sounded like it was
17 pertinent.

18 MR. MALSCH: If you mark it up, I can read it here.

19 CHAIRMAN PALLADINO: It sounded like it was
20 pertinent.

21 (Simultaneous conversation.)

22 CHAIRMAN PALLADINO: Marty is going to read this
23 sentence.

24 MR. DENTON: It was part of the same sentence.

25 The question is, as the staff saw it at the time in May here,

1 was whether or not operation with this amendment would pose
2 the kinds of issues presented in 50.92, and what this answered
3 was that it did not involve a significant safety consideration
4 because compensatory measures will be employed to provide
5 a level of safety commensurate with that anticipated at
6 the facility if it had not experienced a need to repair the
7 steam generator.

8 I think the distinction being, we, the staff did
9 not have a problem then and today concluding that operation
10 with steam generators repaired by this technique would not
11 present new risk.

12 Now, the only question was, was the repair
13 adequate. We did a lot of review on the repair to be sure
14 they had all the right factors in place and that went on
15 and on for quite a while.

16 The real issue seems to be, people want to push
17 us into this procedural -- I mean, are we dealing in a
18 substantive world or are we dealing in a procedural world.
19 That is the difference I see in trying to read it. I felt
20 the regulation as finally approved put us in this mode of
21 issue a preliminary with our best judgment in it; do the
22 review, and then at the end see whether or not the review
23 had confirmed the preliminary one or not.

24 If it didn't confirm it, we would change it. If
25 it did confirm it, and it confirmed our view that operation

1 did not pose new risks that increased the probability,
2 consequences, or margin. Now, it could be done a lit of
3 different ways, and Marty seems maybe want to do it a
4 different way.

5 COMMISSIONER ASSELSTINE: Harold, you know, I
6 would be the first to agree that the reading you are
7 giving of the regulation is one fair reading of the
8 regulation. I could certainly understand how you read it
9 that way.

10 MR. MALSCH: I agree with that, also.

11 COMMISSIONER ASSELSTINE: Yes. I don't disagree
12 with that at all. I didn't even focus as much on that,
13 quite frankly, when we adopted the rule as I should have,
14 and I did not flag a specific concern about that.

15 My concern, I think the one that Marty has too,
16 that if you read the regulation that way and apply it that
17 way in a particular case like this, that that approach is
18 one that creates a real potential for a successful challenge,
19 based upon the statute and the legislative history.

20 CHAIRMAN PALLADINO: How would you read it?

21 COMMISSIONER ASSELSTINE: I would read it the
22 procedural way. I would say what you are supposed to look
23 at, both at the preliminary stage and at the final stage,
24 is the question of the significance of the issues involved
25 relating to the three factors spelled out in the rule. Are

1 there significant issues related to those three factors
2 that you have to consider in reaching your judgment on the
3 validity of this amendment.

4 If there are significant issues related to those
5 three factors, I would say it is not a new significant
6 hazard consideration amendment.

7 If you can say either at the beginning or at the
8 end that there just aren't significant issues, you didn't
9 have to deal with significant issues related to those
10 factors, then I say you are home free.

11 CHAIRMAN PALLADINO: Well, didn't he do that that
12 at the preliminary?

13 COMMISSIONER ASSELSTINE: It sounds like from
14 what the staff said yesterday and said today -- well, I
15 don't know. I mean Harold, I thought, was saying, we really
16 did focus on the substantive development, that's the way
17 we read the rule.

18 I thought Ed was saying, well, we did both. But
19 it's not reflected -- at least I didn't read the documents
20 as reflecting that the staff did both, either at the
21 preliminary stage or more particularly at the final stage..

22 COMMISSIONER BERNTHAL: Let me just -- I want
23 to speak specifically, if I might, to the point that Jim
24 raises. You intermixed the terminology "significant issues"
25 with "significant hazards." You exchanged them and maybe

1 that --

2 COMMISSIONER ASSELSTINE: The significant hazards
3 consideration. I read that as saying, are there significant
4 safety issues involved.

5 COMMISSIONER BERNTHAL: It means the same thing,
6 in other words because what I wonder is whether --

7 COMMISSIONER ASSELSTINE: The legislative history
8 mixes the language up, too. People talk about significant
9 safety questions, amendments involving significant safety
10 questions.

11 COMMISSIONER BERNTHAL: But it almost brings me
12 to the technical question of whether we are not in the same
13 vein arguing about repair versus hazards in operation.

14 Now, there is no question -- and this point came
15 up yesterday -- that there was a repair process where our
16 staff were very sensitive to the repair being carried out
17 properly. But that at no point did they have any doubt --
18 I gather -- that if the repair were done properly by this --
19 from the research that had been done a year earlier by
20 this proven technique that in fact then there was no
21 significant hazard for operation of the steam generators.

22 That, then, gets back again to the question of
23 whether in your mind -- you know, I am really inquiring as
24 to your legal judgment here -- whether in your mind any
25 repair technique of this magnitude for a nuclear steam

1 generator just automatically would have raised significant
2 hazards considerations for operation, as opposed to the
3 repair process.

4 Now, is that irrelevant if you are trying to make
5 your case in court or not?

6 COMMISSIONER ASSELSTINE: I think that is part of
7 the question how significant the issue is involved in this
8 kind of a repair technique in this application.

9 MR. MALSCH: That means that the NRC itself
10 described what it meant by no significant hazards
11 consideration when it went before the Congress to get the
12 Shelly --

13 COMMISSIONER BERNTHAL: But for operation, see.
14 I think that is the key that Harold focuses on.

15 MR. MALSCH: But they were described as, "Amendments
16 that involve no significant questions of public health
17 and safety." Amendments that, "do not have much to do
18 with safety."

19 I mean, even the Commission's own description
20 of the amendment to the Congress emphasized not the bottom
21 line, significant additional risk, but rather the emphasis
22 was on the significance or existence of safety questions.

23 CHAIRMAN PALLADINO: But at the preliminary stage,
24 that is exactly the finding they made.

25 MR. MALSCH: That is not -- I don't know what

1 they had in mind.

2 CHAIRMAN PALLADINO: You try your information but
3 if you don't allow us to use the technical knowledge we
4 have gained over the lifetime of man, we can't make any
5 judgments. You have to make a judgment.

6 MR. MALSCH: I agree. I think you can use the
7 information. I think the critical question is how do you
8 use the information. I think that there is no question
9 but that you can use it. But it is how you use it. It's
10 a hard line --

11 CHAIRMAN PALLADINO: Well, I don't know what you
12 mean, how you use it.

13 MR. MALSCH: Whether you use it to conclude that
14 things are okay or whether you use it to conclude that
15 things are okay but, "Boy, we sure had to wrestle with some
16 tough ones to reach this conclusion."

17 COMMISSIONER ASSELSTINE: That's right.

18 COMMISSIONER BERNTHAL: But not on the fundamental
19 issue of whether, if the repair was carried out correctly,
20 the steam generator would be safe to operate. Maybe that's
21 not important.

22 COMMISSIONER ROBERTS: Oh, I'm -- it may be.

23 MR. DENTON: We felt that was enough of a question.
24 If they had proposed to operate with a diesel generator
25 out of service we would probably come to a different issue

1 because that would have changed the nature of operation.

2 COMMISSIONER ROBERTS: The example that you
3 described, the eleven trying to probe you from memory, they
4 had a two-loop reactor and they wanted to operate with
5 one loop. That's significant.

6 COMMISSIONER ASSELSTINE: But if you applied that
7 logic, I don't see how you get away from the fact that any
8 repair is a no significant hazards consideration repair.
9 I mean, I don't see, for example, if you had a steam
10 generator replacement, if the licensee came in and said,
11 "Look, we are going to rip it out --

12 CHAIRMAN PALLADINO: A replacement, I don't care.

13 COMMISSIONER ASSELSTINE: Well, a replacement.
14 We are going to rip it out. We are going to use established
15 and proven welding techniques to put the new one in, and
16 there will be a brand-new steam generator.

17 MR. CASE: Just like the old one.

18 COMMISSIONER ASSELSTINE: Just like the old one,
19 original licensing basis.

20 COMMISSIONER BENRTHAL: What would your finding be?

21 MR. DENTON: Why, I think we would permit that
22 under 50.59 if it did not pose unreviewed safety questions
23 and was done exactly in accordance with the application,
24 it would be a repair.

25 The only reason this got in to us for review, as

1 we said, was because we had limited the repair criteria
2 to plugging. So, if they had repaired this one by plugging,
3 they would not have needed an amendment.

4 COMMISSIONER BERNTHAL: That is a key point.

5 MR. VOLLMER: The thing I have got to come back to
6 is, you have got to put "unreviewed" or "new" in your
7 formulation. We clearly do not require people to declare
8 something as a significant hazard if it has been previously
9 reviewed, no matter how significant the safety issues are
10 that are involved. Because if you have already reviewed it,
11 tested it, and approved it, then it's not an unreviewed
12 safety question.

13 And if it were by itself, it would not even have
14 to come in for amendment. It does not make any sense
15 at all to say that merely because it is a part of an amendment
16 package the utility has to have, that therefore you are going
17 to treat it as a significant hazards consideration for
18 purposes of prior hearing.

19 So, you have to realize that there may be safety
20 issues in there, but unless they are unreviewed or new, or
21 significant, they don't trip the criteria.

22 MR. MALSCH: Why did they get you here, though?

23 MR. VOLLMER: Because the amendment here was to
24 allow operation of a steam generator with a repair other
25 than by plugging.

1 MR. MALSCH: Right.

2 MR. VOLLMER: It was not to authorize the repair.
3 The amendment -- nothing in this amendment authorizes the
4 repair.

5 MR. MALSCH: So?

6 MR. VOLLMER: So, the question is, is this
7 methodology that is being used here one that gives you the
8 equivalent level of safety for that steam generator. That
9 is the issue. And the staff has consistently answered "yes"
10 to that question.

11 MR. MALSCH: That's the merit question all over
12 again.

13 COMMISSIONER BERNTHAL: But the point is that the
14 safety question, if any, was only in the repair and that's
15 not, as I understand it.

16 MR. MALSCH: Well, let me say that is not entirely
17 clear from the documents. For example, there was
18 extensive investigation and study as to whether materials
19 other than the steam generators were affected by the
20 corrosion. That in itself was an unreviewed safety question
21 and would require some effort to resolve. I wouldn't know
22 how to characterize it.

23 CHAIRMAN PALLADINO: You say not related for
24 the repair of the tubes?

25 MR. MALSCH: That is not directly related. If

1 you look at this and say the only issue is whether the tubes
2 were repaired properly, that does not take into account the
3 fact that a lot of effort was underway to determine whether
4 or not other repairs needed to be made.

5 CHAIRMAN PALLADINO: But that is not at issue here.

6 MR. MALSCH: Well, no. The minute you start to
7 define this narrowly, the minute you start to define the
8 amendment narrowly is only involving approval of completion
9 of the repair technique, then you end up having a lot of
10 other questions surfacing such as, should other components
11 have been repaired.

12 MR. CASE: That was not the subject of the
13 amendment. I grant you, in all regulatory responsibilities
14 we have to go up there and see if things happened that
15 they are not repaired yet.

16 MR. MALSCH: I agree.

17 MR. CUNNINGHAM: And that would be dealt within
18 the enforcement process.

19 MR. MALSCH: Wait a minute, think about this.
20 Let's suppose that there was, let's say the staff was
21 concerned, let's say this primary system piping was affected
22 by the corrosion and it was not apparent one way or the
23 other whether that was the case but the staff was concerned
24 about it.

25 Would operation of a reactor in the face of

1 uncertainty about corrosion in primary system piping pose
2 an unresolved safety question that would require a license
3 amendment under 50.59?

4 MR. CASE: It might, that is what you had to look
5 into.

6 MR. MALSCH: All right, okay.

7 MR. CUNNINGHAM: That's not a basis for denying
8 this amendment if you take enforcement action to say, "Don't
9 operate the reactor until we clear up that other question."

10 MR. CASE: on the primary system, that is an
11 enforcement type of action.

12 MR. MALSCH: Not necessarily because if you would
13 say that this presented an unreviewed safety question, then
14 the applicant needs an amendment to operate lawfully, and
15 that amendment goes to staff review of the extent of the
16 corrosion.

17 CHAIRMAN PALLADINO: But suppose there was no
18 repair necessary to the steam generator and the situation
19 obtained that you described, what would you do?

20 MR. MALSCH: You could be back in the same situation
21 here.

22 CHAIRMAN PALLADINO: But that's not related to
23 this case.

24 MR. MALSCH: Well, it would be. It would be --

25 CHAIRMAN PALLADINO: That's related to a different --

1 MR. MALSCH: -- it would be the minute you start
2 to construe this amendment extremely narrowly so as to exclude
3 a class of safety issues that are not directly related to
4 repair.

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CHAIRMAN PALLADINO: I still can't escape the
preliminaries. It seems to me that is crucial.

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MR. PLAINE: Well, but I am taking them step by
step now --

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CHAIRMAN PALLADINO: I gather we seem reluctant
to address, or there seems to be some reluctance to address
the preliminary no significant hazardous consideration
finding. I think that is crucial. That was the one that
was made, I think, in accordance to the rules.

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Then they started on the merits and after they

1 got the merits there is no reason why they should ignore the
2 merits and they say, yes, no significant hazards.

3 But as long as you are going to make a preliminary
4 one, that is the one that the law says, you do it at the
5 outset or at least the history says, do it at the outset.
6 And that's the outset.

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14 MR. CUNNINGHAM: But the question becomes, is it
15 no significant "new" safety question.

16 MR. MALSCH: That's fair.

17 (Simultaneous conversation.)

18 MR. PLAINE: That's fair.

19 MR. CASE: These three tests are a surrogate for,
20 are there any significant safety issues. That is what
21 the regulation says. The way to make that finding is to go
22 through those three tests.

23 (Commissioner Gilinsky enters hearing room.)

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MR. DENTON: It seems, though, the question is, if the staff sends out one question to an applicant on an amendment, obviously we don't ask the question unless we are interested in the answer. That answer trips it over, whereas if you push to the limit on the procedural side, anything we question, then, you would have enough opportunity for advance hearing on.

And we certainly sent out questions on this. That was the substance of the safety review. So, I can't put the staff down for thoroughly probing the adequacy of the repair. That is what they did in a normal safety review.

So, they don't want to say their questions were trivial questions. They asked a lot of probing questions and got answers back, all of which confirmed the conclusion that operation did not increase risk.

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COMMISSIONER BERNTHAL: Well, it's significant safety question for operation following a repair properly carried out, it seems to me. I think Jim has laid before us a very good analogy and I confess somewhat to my surprise, Harold says, "Yes, you can lock in a whole new steam generator and carry out your repair and we would allow that without a significant hazards finding."

(Simultaneous conversation.)

MR. DENTON: Provided it's identical to the one that we --

COMMISSIONER BERNTHAL: That's right, provided it's identical.

(Simultaneous conversation.)

COMMISSIONER BERNTHAL: But then I also have to come back and ask the question for the repair process, suppose they had repaired this steam generator by plugging -- let's just suppose that's what was done, the same magnitude of repair -- would you have argued that that required a significant hazards --

1 COMMISSIONER ASSELSTINE: Oh, no because it is
2 not an amendment to the license. What triggers this whole
3 business is the fact that the process used by the licensee
4 in this case would require an amendment to the license. That
5 is why we have to go through this.

6 MR. CASE: That's -- to your steam generator.

7 COMMISSIONER ASSELSTINE: All right, okay.

8 (Simultaneous conversation.)

9 COMMISSIONER GILINSKY: That why in previous
10 proceeding and where hearings took place would have
11 encompassed that.

12 MR. CASE: It has to change.

13 MR. SINTO: Excuse me, I am Joe Sinto.

14 COMMISSIONER ASSELSTINE: Go ahead.

15 MR. SINTO: We have been talking about the
16 hypothetical.

17 COMMISSIONER ASSELSTINE: Yes.

18 CHAIRMAN FALLADINO: About the what?

19 MR. SINTO: We have been talking about hypothetical
20 steam generator replacements. We have had three real ones.

21 (Simultaneous conversation.)

22 MR. SINTO: It wasn't simply the matter of
23 heliporting the steam generator out of place --

24 (Laughter)

25 MR. SINTO: The containment opens and has to be

1 changed. The biological shields around the steam generator
2 had to be modified, there was concrete that was knocked out
3 and replaced. There were at times, at the initial submittal
4 the question of whether the reinforcement rods on a pre-
5 stripped concrete structure had to have holes punched in
6 them.

7 Those were the kinds of questions that were
8 involved in that real case.

9 COMMISSIONER ROBERTS: But then, on the other
10 hand, are there containments today where you can replace
11 the steam generator?

12 COMMISSIONER GILINSKY: Could I ask a question of
13 Herzl before he leaves?

14 CHAIRMAN PALLADINO: Excuse me, Herzl?

15 (Simultaneous conversation.)

16 COMMISSIONER GILINSKY: Can I just ask a brief
17 question of you before you leave?

18 MR. PLAINE: I have to go.

19 CHAIRMAN PALLADINO: Go ahead.

20 COMMISSIONER GILINSKY: It will just take 30
21 seconds. I apologize for not having been here. But I wonder,
22 quite apart on how you come out in this case, are we agreed
23 on the interpretation of the law, what the consideration
24 means?

25 MR. PLAINE: This is a serious point.

1 COMMISSIONER GILINSKY: It seems to me there are
2 two questions --

3 MR. PLAINE: There are two views.

4 COMMISSIONER GILINSKY: -- one is, what is the
5 interpretation of the law.

6 MR. PLAINE: Yes.

7 COMMISSIONER GILINSKY: And the other is, how do
8 you apply it in this case, and whether the "considerations"
9 means that there was an important question, however you
10 resolved it, or whether it means that in the end it turned
11 out okay.

12 MR. PLAINE: I think the difference is between
13 the definition I think Harold Denton has applied, namely,
14 no significant additional risk as the test -- significant
15 safety questions. That is the word where the difference is.

16 CHAIRMAN PALLADINO: But there is another
17 interpretation that has to be made. Does it apply only
18 to the preliminary? Does it not apply to the preliminary,
19 does it only apply to the final?

20 The interpretation is that you use it at the
21 outset. At the outset they made a finding -- at least they
22 so claimed -- they made a finding without consideration of
23 the merits. They said there were no significant safety
24 concerns, and then they proceeded to go to look at the merits.

25 So, I think procedurally they are okay. But we

1 need your interpretation as to whether a final --

2 COMMISSIONER GILINSKY: What is your interpretation
3 of whether the law requires there to be --

4 MR. PLAINE: A significant safety question.

5 COMMISSIONER GILINSKY: -- question. Okay. I guess
6 I am inclined to that interpretation. You can still come
7 out both ways on this, it seems to me, in this case. But
8 it is important that we agree on what --

9 COMMISSIONER BERNTHAL: Agree on what the law is.
10 I think if Guy would give his opinion, it might be somewhat
11 different.

12 MR. CUNNINGHAM: I was going to observe that to a
13 large extent this debate is a repeat of the debate at the
14 time the Commission adopted the rule. Ed Case and I were
15 sitting here at the table and he was asked to describe in
16 some hypothetical case how you would decide whether or not
17 there are no significant hazards considerations as a pro-
18 cedural matter, the issue rather than the merit.

19 How can you ever decide that there is no increase
20 in risk without looking at the merits? I think it was the
21 general feeling that there has to be some look at the merits.
22 And yet, we were also looking at the legislative history
23 where Congress was well aware of the criteria which we have
24 been applying for 15 years, and said those appeared to be
25 the right criteria.

1 There was some uneasiness, I think, at the time
2 the rule was adopted that there was bound to be a mixing
3 of the merits and the issue.

4 MR. CASE: It was not a clear separation.

5 MR. CUNNINGHAM: It wasn't a clear separation and
6 there couldn't be a clear separation.

7 CHAIRMAN PALLADINO: Okay.

8 MR. CUNNINGHAM: That is part of the undercurrent
9 the last two days of meeting here, have we mixed them too
10 much.

11 COMMISSIONER GILINSKY: Jim brought up the
12 alternative that we apparently considered at the time, which
13 is no significant risk, which I guess Joe Hendrie advocated.

14 MR. CASE: That was at some earlier time frame.
15 The Commission went to Congress and asked them to change
16 the law.

17 COMMISSIONER GILINSKY: Well, in any case, that
18 seems to be -- I mean, you seem to be acting as if that
19 were --

20 COMMISSIONER ASSELSTINE: The law.

21 COMMISSIONER GILINSKY: -- the law.

22 MR. DENTON: No, we are just following the
23 regulation, not over whether that's the proper way to do it.

24 MR. DIRCKS: Literally, we follow the regulation.

25 COMMISSIONER ASSELSTINE: Well, I would say there

1 are two ways to read the regulations. You all read it
2 one way, I can certainly understand why you read it that way.
3 My problem is, I view reading the regulations that way as
4 being inconsistent with the statute. But I understand that
5 that is not the judgment you all made. You took the
6 regulations, you read them literally, and you applied them
7 that way.

8 COMMISSIONER GILINSKY: When we adopted those
9 regulations, we unfortunately dropped a number of examples
10 which would have been very helpful here.

11 COMMISSIONER ASSELSTINE: But I think it's also
12 fair to say that one of the reasons the staff is here is,
13 they want guidance from us about whether they are flying
14 this in the right way, which puts it right square in our lap.

15 (Simultaneous conversation.)

16 MR. CASE: Considerations, they are not dropped.
17 The examples don't help. We have to deal with this problem.

18 CHAIRMAN PALLADINO: I am still concerned by
19 the fact that we don't want to refer to the preliminary
20 no significant hazard consideration. That was the outset
21 and they claim that they made it without addressing the
22 merits.

23 Now, after you have made that, I think you have
24 complied with the Shelley Amendment. They used those
25 criterion making them, then they went ahead with the merits.

1 (Commissioner Gilinsky leaves hearing room.)

2 CHAIRMAN PALLADINO: The merits confirm that and
3 they make a final decision. We still feel the same way
4 here.

5 COMMISSIONER ASSELSTINE: Two points. One, I
6 think that Marty is right that what a court is going to look at
7 is the final determination. The preliminary versus final is
8 something that we created in the regulation in order to
9 accomodate the public comment requirement in the legislation.

10 I think what a court is going to look at is the
11 final determination because that is what has the operative
12 effect. That is what permits the amendment to be instituted
13 in advance of completion of the hearings.

14 But I think Marty is right on that. The final
15 one is really what the court is really going to focus on
16 more than the preliminary.

17 CHAIRMAN PALLADINO: Well, they could have made
18 a final one after they got the comment. That says you
19 can't go ahead with your merits review at the same time.

20 COMMISSIONER ASSELSTINE: Well, you and I have a
21 different view on whether you can make a decision on the
22 significance of the issues involved at the same time or even
23 after having made a judgment on the merits. I think you
24 can do that.

25 MR. MALSCH: Yes, I have an even more fundamental

1 problem with the determination, that is that it is -- I
2 can't speak to what the staff intended to say, but I will
3 say that as I would read it -- and I think anyone else would
4 read it -- it is as much a judgment about the merits as
5 the final determination.

6 COMMISSIONER ASSELSTINE: That is going to be my
7 second point.

8 MR. MALSCH: There is no discussion at all in the
9 staff's preliminary determination --

10 CHAIRMAN PALLADINO: Well, maybe we ought to fix
11 that up.

12 COMMISSIONER ASSELSTINE: And the fact of the
13 matter is, as Harold says --

14 (Simultaneous conversation.)

15 COMMISSIONER ASSELSTINE: -- the way they read
16 the regulation.

17 MR. MALSCH: The staff can fix up -- we can fix
18 anything up. Whatever you want to be your final decision,
19 decision rationale, you can have it be that. I mean, you
20 could modify what the staff did to comport with what the
21 staff really hoped to do in the preliminary determination
22 if that is what you would like to do.

23 But whatever it is you decide here on what the
24 staff may have done several months ago, you may use in making
25 a decision here but it's in and of itself it's not the basis

1 for a court review.

2 CHAIRMAN PALLADINO: Well, I think we are up to
3 the time. Let me ask you one question and then see if we
4 can give some guidance.

5 If we want to go the other way, is the problem with
6 defending it not significant, not great?

7 MR. MALSCH: I don't think it's significant.

8 COMMISSIONER BERNTHAL: Can you give us some odds
9 either way and maybe come up with three opinions here?

10 CHAIRMAN PALLADINO: Well, I was trying not to
11 prejudge how we are coming out, although I think I could do
12 it -- well, I'm not sure.

13 COMMISSIONER ROBERTS: It is unclear to me.

14 MR. MALSCH: Let me tell you what we are suggesting.
15 We are suggesting -- I think one problem that we have is
16 that I think the staff made a good-faith effort to comply
17 with the regulations as literally they were written.

18 COMMISSIONER ROBERTS: Jim doesn't disagree.

19 COMMISSIONER ASSELSTINE: Absolutely not.

20 MR. MALSCH: I think we have a problem with reading
21 them that way with the knowledge that we have of the
22 statute and legislative history. All right.

23 But the fact remains that the staff is using this
24 approach, I think, in every other amendment case that they
25 have. So, we are not really talking here about in a large

1 TMI-1, we are talking about the overall process.

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CHAIRMAN PALLADINO: Let me suggest, we are going to try to make a decision next Friday, we hope to get the notation votes before next Friday. But meanwhile you and the staff may want to think about how you would defend it, if it goes that way.

COMMISSIONER BERNTHAL: Can I make one comment? One of the things I wanted to talk about in this meeting -- and we are not going to have time -- is, Jim has raised a very important issue, I think. I wish we would have time for him to elaborate on it and this is a question which he probably knows better than anyone here, whether there was some understanding, and good-faith understanding, with the Congress that we might breach if we simply sort of plow ahead and cast our votes, and throw it to the wind, so to speak.

At the very least it seems to me that the posture that the Commission adopts, if the Commission chooses to find in favor of the staff here, in favor of this finding, I should say, it is terribly important that we

1 understand what's at stake here. We have made this finding
2 knowing full well what is at stake because we expect to be
3 taken to court and we are going to resolve this problem in
4 court.

5 I wish that we would give that some thought before
6 we just plunge ahead.

7 COMMISSIONER ROBERTS: But are you telling me that
8 I have some responsibility for some agreement Peter Bradford
9 may have made?

10 COMMISSIONER BERNTHAL: No, no. I am just saying
11 that we ought to give a little thought to the posture that
12 the Commission takes if it makes a decision of this type
13 because my understanding is that there were good-faith
14 understandings with the Congress.

15 COMMISSIONER ROBERTS: Between who?

16 COMMISSIONER BERNTHAL: Between the Commission,
17 the Congress -- I don't know. I mean, this is an issue --

18 COMMISSIONER ASSELSTINE: I think it's more a
19 question of the representations that the Commission made in
20 asking for this legislation, whether action in this particular
21 case is consistent with those representations.

22 COMMISSIONER ROBERTS: But do you feel any
23 obligation to withhold, to carry out a commitment Dick
24 Kennedy made?

25 COMMISSIONER ASSELSTINE: I don't feel any particular

1 obligation to carry out private commitments or whatever.
2 On the other hand, if the Commission represented this
3 authority as meaning one thing and it is going to turn around
4 and use it for something that is inconsistent with what
5 the Commission said it wanted when it asked for this
6 authority, then I think the one thing you ought to think
7 about is what that does to our relationships with the
8 Congress and particularly --

9 COMMISSIONER ROBERTS: But this is a different
10 Commission.

11 COMMISSIONER ASSELSTINE: Well -- okay.

12 CHAIRMAN PALLADINO: If I may make a suggestion --

13 COMMISSIONER ASSELSTINE: What I am saying is,
14 the Commission has long complained about getting legislation
15 from the Congress that is very prescriptive and detailed,
16 and it limits the flexibility of the Commission.

17 We have now asked for legislation that would give
18 us more flexibility in some areas. If the Commission has
19 gone to the Congress and said, "We want this authority
20 because we want to approve -- we've got a whole bunch of
21 routine amendments that are really inconsequential" and
22 the Commission turns around and uses this authority for an
23 amendment that is considerably more significant than that,
24 then I think that is going to have an impact in terms of
25 the kind of legislation the Commission may well get in the

1 future.

2 Once having been burned, those people may very
3 well not ever give us anything with much flexibility in the
4 future.

5 But that is a consideration.

6 CHAIRMAN PALLADINO: May I suggest that OGC, may-
7 be working with ELD, identify what we ought to read to get
8 the flavor of past commitments with the Congress.

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22 Well, okay, I think maybe we have done as much as
23 we can do this morning.

24 COMMISSIONER ASSELSTINE: Yes.

25 CHAIRMAN PALLADINO: We will stand adjourned.

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(Whereupon, at 12:10 p.m. the Commission adjourned,
to continue in open session.)

CERTIFICATE OF PROCEEDING

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

In the Matter of: Commission Meeting-Strategies for
Potential Litigation on TMI-1
Date of Proceeding: ember 1983

Place of Proceeding: Washington, D.C.

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

Elizabeth Hansen
Official Reporter - Typed

Elizabeth Hansen
Official Reporter - Signature