

ORIGINAL

NUCLEAR REGULATORY COMMISSION

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IN THE MATTER OF:

PUBLIC MEETING

DISCUSSION OF SUA SPONTE REVIEW STANDARDS AND HANDLING OF  
GENERIC UNRESOLVED SAFETY ISSUES

Place - Washington, D. C.

Date - Monday, 11 December 1978

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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

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PUBLIC MEETING

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DISCUSSION OF SUA SPONTE REVIEW STANDARDS AND HANDLING OF

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GENERIC UNRESOLVED SAFETY ISSUES

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

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Monday, 11 December 1978

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The Commission met, pursuant to notice, at 3:00 p.m.

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BEFORE:

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DR. JOSEPH M. HENDRIE, Chairman

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VICTOR GILINSKY, Commissioner

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RICHARD T. KENNEDY, Commissioner

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PETER A. BRADFORD, Commissioner

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JOHN F. AHEARNE, Commissioner

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

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CHAIRMAN HENDRIE: Sua sponte.

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The subject seems to be of less interest than the last.

I'm disappointed. Okay. This item grew out of some discussion the commissioners had about an appeal board ruling. I guess the majority of us felt it best to discuss the matter in a generic context, rather than under the heading of that particular ALAB number which I don't remember at the moment.

This, then, intends to be that discussion.

So, Peter, in many ways, this is --

COMMISSIONER BRADFORD: It is half mine and half John's. I think it has two focuses. One is the handling of generic issues and licensing process, and the other is whether rules really should contain these phrases that constrain the licensing boards or the appeals boards from looking at matters that are not contested by the parties, situations in which extraordinary circumstances or sparingly, or whatever, else.

For my part, the primary concern is getting that restrictive language out of the regulations.

COMMISSIONER KENNEDY: I am persuaded of that notion, except that I can't figure out what it means, because I don't know how Israeli constrains them now, if at all. Do we know anything about that? Can we discuss that later?

MR. SHIELDS: Yes.

gsh

1 CHAIRMAN HENDRIE: I think Bill can cover that among  
2 other things.

3 Shall we launch the council?

4 MR. KELLEY: Bill Shields here has done the  
5 laboring force on this, and I would ask him to summarize his  
6 key points.

7 I would make a general observation: I don't think we are  
8 here this afternoon with a paper that purports to be an  
9 exhaustive analysis of a problem area. This is rather a look  
10 at it, and some suggestions for other things that you might  
11 want to do.

12 Bill?

13 MR. SHIELDS: As you pointed out, Mr. Chairman, this  
14 matter arose out of ALAB 491 in the North Anna proceeding,  
15 which was a sui sponte review by the appeal board of the  
16 record in that case.

17 And the appeal board looked at the entire record, including  
18 uncontested issues, among which were generic issues, and  
19 made several notes in the course of the decision about the  
20 scope of review that they are able to exercise on uncontested  
21 issues. And in particular, in that case, on uncontested  
22 generic issues.

23 I should point out at the beginning that we are talking  
24 mainly about the operating license stage. There is not much  
25 question that at the construction permit stage, the licensing

gsh 1 board can engage in a quite thorough review of the documents  
2 before it and, of course, we'll look at generic questions at  
3 that time.

4 The problem is presenting —

5 COMMISSIONER AHEARNE: I suggest that since Peter  
6 is the dominant —

7 CHAIRMAN HENDRIE: Oh, I didn't see him leave. I  
8 didn't see Peter leave. What did you say, Bill, that drove  
9 him from the room?

10 MR. SHIELDS: I didn't mean to offend him. I was  
11 noting that we were mainly talking about the operating  
12 licenses stage at the construction permit stage, the generic  
13 issues, as I understand it, looked at more closely.

14 The problem that arises, though, is that by their nature,  
15 generic issues frequently cannot be resolved at the  
16 construction permit stage. This is something that is pointed  
17 out in ALAB 491, that in many cases, the board has the  
18 opportunity to look at the issue. But the problem might be  
19 that it will be one that is resolved in the course of  
20 construction.

21 It is one that the applicant is not prepared at that time  
22 to say exactly how it is going to fix for that particular  
23 plant. It may even be an issue that won't affect reactor  
24 operations until sometime into the plant's operating period.

25 So the fact that the licensing board can get into these

gsh 1 matters in some detail at the construction permit stage is  
2 not a complete answer to the problem.

3 Getting more directly to the sui sponte standards which  
4 are discussed somewhat in ALAB 491, we point out in our  
5 paper where the standards originate.

6 Actually, I think although I haven't been here very long,  
7 I am told that the standards of this type have been part of  
8 the commission's rules for quite a number of years.

9 But the specific language that is found in the rules  
10 governing the review by the board at the operating license  
11 stage -- terms such as "extraordinary circumstances,"  
12 "sparingly," "serious safety matters," derive from the  
13 commission's decision at Indian Point for 1974, which  
14 summarized that decision briefly on paper.

15 The contention was made in that case by the intervenors  
16 that the licensing boards were required to explore all of the  
17 issues presented, generic or otherwise, whether or not they  
18 have been placed in controversy.

19 The licensing board had agreed in that case, and the  
20 appeal board disagreed and asked the commission for guidance.  
21 And the commission held at that time that neither of the  
22 extreme cases was the correct interpretation. Neither were  
23 the boards required to examine uncontested issues, nor were  
24 they going to be forbidden to examine them. But, rather, they  
25 could review such issues under a fairly restrictive standard.

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1       There wasn't much explanation of the case. The case is  
2 attached to our paper. It is a fairly brief opinion.

3       It does rely on a judicial decision. The Union of  
4 Concerned Scientists v. AEC, a 1974 case which basically  
5 holds that that interpretation of the Atomic Energy Act, that  
6 the eventual functioning of the licensing boards is to  
7 review the submissions by the staff and the applicant for  
8 their sufficiency, and to decide issues that are placed in  
9 controversy.

10       Something that isn't in our paper that also might be  
11 looked at is cited by the appeal board, ALAB 491. There was  
12 a decision also by the appeal board in the Midland proceeding,  
13 ALAB 123, in which the role of the licensing boards is  
14 examined. And it takes basically the same position as the  
15 court took in the opinion of Concerned Scientists v. AEC,  
16 that the basic role of the licensing boards is to, again,  
17 review the materials that are presented to it and decide  
18 issues that are placed in controversy.

19       And they don't serve as an additional level of research  
20 or review, but rather, are there to make sure that the  
21 staff and the applicant have done their job and to decide  
22 questions that are placed in controversy.

23       And so, the standard, as I say, the standards that are  
24 in the rules now that govern sui sponte review by the  
25 licensing board and the appeal board at the operating license

gsh

1 stage basically come from the Indian Point decision of 1974.

2 The rationale is found in part in that decision. The  
3 commission stated there that there is a presumption that the  
4 parties have shaped the issued, particularly because the  
5 hearing follows comprehensive reviews by the regulatory staff  
6 and advisory committee on regulatory safeguards.

7 The philosophy of that case, I think, is the philosophy  
8 that has been followed for some years that the licensing  
9 board or the appeal board is really not intended to get into  
10 matters that are either not presented by the parties or  
11 are not in some sense serious matters that they feel have not  
12 been covered by the staff or the —

13 COMMISSIONER AHEARNE: Would you repeat that last  
14 point, Bill?

15 MR. SHIELDS: I'm saying that the rationale behind,  
16 it appears to me, the Indian Point decision, is something that  
17 I guess has been a continuing parts of this kind of rule —  
18 that the basic function of the licensing boards is to fold.

19 It is adjudicatory in the sense that they are there to  
20 decide questions in controversy. And it is a record reviewing  
21 function.

22 The fact that this case that is cited here likens it to  
23 a court of appeals reviewing the district court record for  
24 the sufficiency of the evidence on a given point to make sure  
25 that the staff and the ACRS have done their job, essentially,

gsh 1 rather than attempting to do a very detailed review of all  
2 of the issues, all of the problems that are presented by  
3 the license application.

4 So it is a lesser function in the ACRS. The main reliance  
5 is on the staff of the ACRS.

6 The board is there essentially in a reviewing function.

7 COMMISSIONER AHEARNE: But the Indian Point decision  
8 made it very clear it was not ruling the boards out of that.

9 MR. SHIELDS: Right. It definitely did not take  
10 the opposite position.

11 COMMISSIONER AHEARNE: Well, more than that, it was  
12 very explicit in not ruling on it.

13 CHAIRMAN HENDRIE: Furthermore, it said insofar as  
14 any previous board decisions suggested that was the case --

15 COMMISSIONER AHEARNE: Regulations. It was wrong.

16 CHAIRMAN HENDRIE: Board decisions interpreted the  
17 regulations that way, those decisions were without precedential  
18 value by --

19 MR. SHIELDS: Right. The decision was quite strong  
20 on both sides. Neither of the extreme positions were  
21 correct that the boards are in an intermediate position of  
22 having the ability to look at issues that seem to them have  
23 not been dealt with properly and that present a serious  
24 concern for that reactor application.

25 So that is the genesis of the rules as they currently

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1 stand. And the generic issues problem works its way into  
2 this in the sense that generic matters are just another  
3 set of issues that are covered in license applications.

4 And so they get reviewed under the sui sponte standard  
5 in the same way as other issues would be. In fact, generic  
6 issues are plant specific issues in any given application.

7 The basic parts of the generic issues program are set out  
8 to some extent in ALAB 444, which has been discussed here  
9 earlier. And that relative part of that decision is  
10 attached here and describes the task action plan and so on.  
11 And some of the discussion earlier this afternoon mentioned  
12 that the staff is now moving in the direction of complying with  
13 ALAB 444, and, indeed, with ALAB 491, which puts a little more  
14 gloss, maybe a little more teeth, into the requirement that  
15 generic issues be properly addressed in the SER so that the  
16 reviewing board, licensing board, appeal board that is  
17 operating under the sui sponte rule can basically look at  
18 the SER, the main staff submission, and be able to tell  
19 whether or not the generic issues have been adequately  
20 examined by the staff.

21 The comments that were made in ALAB 491 indicated that in  
22 some cases, the SER was a little too brief, and, in fact,  
23 just made a reference to some other portion of the record,  
24 but actually did not go into in some detail, anyway, as to  
25 how that particular generic issue had been resolved as to

gsh 1 that particular plant.

2 The appeal board had to go searching through other parts  
3 of the record to assure itself on all but one of the issues,  
4 the turbulences issues, that generic issues had in fact been  
5 looked at by the staff.

6 So it would appear that at present, the upshot of the  
7 two ALABs would be that the staff will be required to be  
8 more complete in their submissions to the boards on how  
9 generic issues are being resolved in an individual case,  
10 whether or not they are contested. And as the previous  
11 discussion indicated, the staff is starting to do that in  
12 the two cases I mentioned. And I assume they will continue  
13 that program.

14 As a practical matter, and this is something that could be  
15 looked into further in this paper, as Jim indicated in the  
16 beginning, it is just a beginning on some of the subjects,  
17 nearly all of our construction permits and operating license  
18 proceedings are contested.

19 At this point, on a rough figure, that the operating  
20 licenses might be 70 percent, but I am not certain about  
21 that.

22 COMMISSIONER AHEARNE: I'm sorry, I missed that.

23 MR. SHIELDS: That the majority of our operating  
24 license proceedings are now contested, and certainly, the  
25 majority of construction permit proceedings are contested.

gsh

1 And also, as a practical matter, the licensing boards, I  
2 don't think, or the appeal boards, except possibly for some  
3 of the language in which this latest ALAB felt extremely  
4 constrained by the language that is in the rules. My general  
5 impression, talking to some members of the staff, is that  
6 if they see an issue which concerns them, which they feel  
7 has not been dealt with by the staff or the applicant, that  
8 is enough for them to go further and do it.

9 And I don't think there is this general feeling the  
10 word "extraordinary" and the word "sparingly" makes it  
11 impossible for them to look at things that don't appear to  
12 them to have been adequately covered.

13 This doesn't, of course, really solve the problem in the  
14 case where you have an uncontested operating license proceeding  
15 because at that point, you won't have a license report. And  
16 in that case, if some of the generic issues that were raised  
17 at the construction permit stage were moved forward because  
18 there was no fix available at that time, you would not get  
19 a second board review except, and if you are dealing with  
20 not contested, it would only be under the sui sponte review  
21 standards.

22 I guess the justification for that, again, is that the  
23 basic reliance has been in the past or the basic reliance  
24 has been placed on the staff and ACRS in making sure that the  
25 generic questions have been dealt with and the recent decisions

gsh

1 out of the appeal board indicate that although the issues are  
2 apparently being dealt with, they are not always setting out  
3 the rationale to the documents that are being reviewed by  
4 the boards when there is a board formed.

5 Nevertheless, there is the problem of issues going past  
6 the construction permit stage and not being looked at again  
7 by a licensing board.

8 It is difficult to fix that without getting the boards  
9 much more deeply into the process by altering the rules.

10 For example, forming a licensing board in every operating  
11 license case or, as suggested here, another possibility would  
12 be to form licensing boards to specifically examine generic  
13 issues.

14 I guess where we come out on this after looking at both  
15 questions and the way they are related is that the sui suponte  
16 system that we have which basically relies on the staff, the  
17 ACRS is a good one that goes somewhat limit the role of the  
18 adjudicatory boards in going into things that were not  
19 presented to them in a contested way.

20 I guess we wouldn't have any problem with softening the  
21 language somewhat. For example, taking the word  
22 "extraordinary" out and leaving "simply serious safety matter"  
23 or "significant safety matter." The word "sparingly," again,  
24 is one which is really a very vague word that can be  
25 interpreted in many ways.

gsh

1 I think that a softening of this language should not be  
2 a problem. On the other hand, I think that putting the  
3 boards more deeply into the business of becoming another  
4 level of review, particularly on generic questions, might be  
5 a very difficult process that the boards are not really  
6 equipped to perform.

7 And in our overall structure, this has not been their role  
8 in the past to really perform another detailed review of these  
9 issues, and that possibly, the suggestion that we make in  
10 the paper that a possible way to get at the generic issues  
11 by the commission would be a more direct liaison with the  
12 staff, meetings and papers, other methods, to make sure that  
13 the staff is addressing generic issues properly and the  
14 generic program is going forward and these issues are being  
15 taken care of in an individual licensing proceeding.

16 There are some problems there in addressing those in  
17 individual cases which are not going to come through the  
18 adjudicatory process.

19 On the other hand, I think that it would be possible for  
20 the commission to assure itself that generic issues are being  
21 considered carefully by the staff.

22 COMMISSIONER GILINSKY: Why do you stress the  
23 question of generic issues? Wouldn't this apply to any  
24 issue?

25 MR. SHIELDS: Well, changing the sui sponte standard

gsh

1 would apply to any issue, because as it is, the sui sponte  
2 standards apply to generic as well as issues that are  
3 specific to the plant alone.

4 So if you do alter that standard, then you would alter it  
5 as to all issues, unless you deliberately tried to make a  
6 distinction between the two.

7 I don't think that would be a useful distinction simply  
8 because generic issues are plant specific as well.

9 So the two are related only in the sense that sui sponte  
10 standards apply both to generic and nongeneric questions.

11 On the other hand, you can get directly at the generic  
12 issues without necessarily altering the sui sponte review  
13 standards.

14 COMMISSIONER BRADFORD: My concern would have been  
15 the same. If it had been an entirely different issue in the  
16 Vepco case, the susceptor, the appeals board, or it could have  
17 been the licensing board, apparently, at least in that one  
18 footnote, straining rather hard against a leash that they  
19 felt was precluding them from asking questions or raising  
20 an issue they might otherwise have raised.

21 And on reading of the rules, it seemed to me that both  
22 the rule that applies to the appeal board and the rule that  
23 applies to the licensing board are stricter than they need  
24 to be.

25 I think Bill's point is well taken: the structure itself

gsh 1 is a useful one. One doesn't want the licensing and appeals  
2 boards duplicating the staff function and the ACRS function.  
3 But at the same time, this extraordinarily exhortative  
4 language about staying out of areas that have not been under  
5 contest seems to me to go further than is wise. And if it  
6 is going to affect the boards the way it apparently affected  
7 the appeals board in the Vepco case, I would trim the language  
8 back to the point where it says what we really need to say  
9 and no more.

10 COMMISSIONER AHEARNE: I was puzzled as I tried to  
11 struggle through this, trying to understand where the boards  
12 have really been limited and why. And I find a case, other  
13 operating license case, I guess it's Monticello earlier this  
14 year where the chairman of the operating license board said  
15 during the course of the hearing board, raised a number of  
16 questions on its own.

17 The board would be remiss in issuing an order leading to  
18 the granting of a license if there remained in its mind a  
19 major issue concerning the safety of the plant or its  
20 environmental impact.

21 Certainly reading the order back in '74, the commission's  
22 order on Indian Point, it was very clear it is unacceptable  
23 as an argument that this commission can examine issues never  
24 raised by the parties, but the licensing appeals boards cannot.

25 That is unacceptable.

gsh

1 As Joe pointed out, there is a footnote saying,  
2 regrettably, some have read our existing regulations as  
3 proscribing any inquiry by the boards. Insofar as any board  
4 decisions have interpreted regulations in this restrictive  
5 manner, they have no further precedential effect.

6 COMMISSIONER BRADFORD: But Vepco came after that.

7 COMMISSIONER AHEARNE: The commission at least was  
8 saying that the boards certainly, both the licensing and  
9 the appeal boards, have the authority to go beyond.

10 I'm not really sure what the appeal board in that particular  
11 issue was struggling against. But at least as far as the  
12 record that I could find, the commission's decisions seem to  
13 be no proscription for a board constraining itself if it  
14 thought there was anything significant that they --

15 COMMISSIONER BRADFORD: That certainly should be  
16 clear. And yet, apparently it wasn't to the board in the  
17 Vepco case.

18 Now, one way to have dealt with that would have been to  
19 have reviewed the Vepco case and just reasserted the Indian  
20 Point language again as, in effect, being our interpretation  
21 that sparingly and in exceptional circumstances don't mean  
22 very much.

23 It seems to me it would be cleaner just to clean those  
24 words out of the regulation. You would not thereby change  
25 the structure. You would still have regulations in both cases

gsh

1 that required the board to feel that a serious safety issue  
2 existed before it conducted a separate inquiry.

3 All you would be rid of are the adverbs and prepositional  
4 phrases that go a step beyond and say, by God, it really  
5 better be extraordinary before you --

6 COMMISSIONER AHEARNE: I think we both agree that,  
7 at least I think you agree, the commission's order on which  
8 all of this rests is nothing with which we disagree.

9 COMMISSIONER BRADFORD: Indian Point.

10 COMMISSIONER AHEARNE: Right.

11 COMMISSIONER BRADFORD: Right.

12 COMMISSIONER AHEARNE: So then, the issue is how has  
13 that been interpreted? I think that if we make a change, what  
14 we are really saying is that there are a number of boards,  
15 et cetera, who have not been doing things correctly, and I  
16 would like to make sure I understand that because, otherwise,  
17 we would be telling the boards that have been interpreting  
18 this in a certain way that, no, you are wrong. You have to  
19 go much beyond that, because we are removing something that,  
20 in a sense, is a constraint.

21 And that is my question to the general counsel. Has that  
22 been the case? Have the boards felt hampered by this?

23 MR. KELLEY: Well, I would make a couple of comments.  
24 The short answer to your question, I don't know. And I would  
25 like to ask Tom what his perspective is.

gsh 1 But I might just give you a little history here that I  
2 do know, and that is where these words came from —  
3 "sparingly" and "restrained" and so on.

4 They are not the product of notes and comments in the  
5 study. This came up, and Jerry Nelson thought it was about  
6 right, and so did Burns Emmett, and so we wrote it up this  
7 way. And the AEC voted it up. But there was never any  
8 proceeding on this.

9 On the other hand, I did think that the clarifying changes  
10 were just put in later as clarifying changes.

11 On the other hand, they were thinking about what, I think,  
12 could be a significant problem. And I would like to hear  
13 Tom's view on how the board is treating this. But my own  
14 feeling would be that some caution is in order here if you  
15 are thinking in terms of trimming back the rules.

16 I think I would certainly go for notice and comment and  
17 see what particularly the utilities felt about this. I think  
18 they might — you know, you may not agree with it, but I  
19 think they may view this as pretty important.

20 What do we say?

21 COMMISSIONER GILINSKY: For opening up.

22 MR. KELLEY: Exactly. A whole new can of worms.

23 Tom, what do you think the boards have been doing? Did they  
24 go ahead and —

25 MR. ENGELHARDT: We have not recently noticed any

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gsh 1 timidity on the part of any of these boards in an operating  
2 license mode asking questions that are not directly involved  
3 with the controversy between the various parties in the  
4 proceedings.

5 They have on their own initiative explored issues that they  
6 felt, individual members felt or the group collectively felt,  
7 were worth of further explanation.

8 We would anticipate that with the add-on of the appendices  
9 to the safety evaluation report for the operating license  
10 cases, which will identify all of the, for example, the  
11 unresolved or generic safety issues, that we may see more  
12 exploration by the boards into the areas, into those area  
13 than has been the case before and that was reflected in this  
14 matter of concern in the River Bend and the North Anna  
15 licensing decisions that we have been discussing here.

16 COMMISSIONER BRADFORD: Tom, how can you say you  
17 haven't seen any restraint when you have got the Vepco case  
18 two months ago?

19 MR. ENGELHARDT: Well, I can indicate in the recent  
20 past, I have been involved as a panel member in a number of  
21 these meetings with licensing boards. And in the conversations  
22 that have been involved in those meetings, there has been a  
23 general expression of view that none felt constrained at all  
24 in connection with pursuing matters, safety matters, that they  
25 observed themselves in the course of an operating license

gsh

1 proceeding. They did not feel constrained to raise a question  
2 that they thought was legitimate and was worthy of raising.

3 COMMISSIONER BRADFORD: But here is a board that  
4 cited this language, and just, we want to be very clear that  
5 we haven't done any more than this because of this language  
6 in the commission's regulations.

7 It is all very well that 95 percent of the board members  
8 beats their chest and flexes their muscles, but here is an  
9 actual case which seems to have gone the other way.

10 MR. SHIELDS: It is important to understand, I  
11 think, what the appeals board did in that case, which is that  
12 they did go through the entire record and did look at each  
13 one of the generic items and did satisfy themselves in all  
14 cases, but ones they had been resolved.

15 And in fact, on the turbine missiles issues, they were  
16 not satisfied and remanded it to the licensing board or asked  
17 for a staff affidavit rather than for further information.

18 They did cite to the language, and I think quite properly,  
19 in indicating what their review was; namely, that their  
20 review was of the documents that have been presented. They  
21 didn't attempt to do a research program on these subjects,  
22 but rather, searched through the record, which they found  
23 unsatisfactory in certain respects.

24 COMMISSIONER AHEARNE: But there are also two points  
25 that they raised. Go ahead, I'm sorry.

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1 COMMISSIONER GILINSKY: I was just going to say, if  
2 you read the language of the regulations, it is pretty  
3 constraining. It says that the Board should not consider  
4 serious safety issues except in extraordinary circumstances.

5 Now, I think the "serious" is okay, and maybe the  
6 "extraordinary circumstances" is okay. But when you put them  
7 together, you come out with something that is really very  
8 extremely constraining, if you take it literally.

9 COMMISSIONER AHEARNE: Now, how do you interpret it?  
10 It says -- having both of those, the extraordinary circumstance  
11 is the serious safety.

12 COMMISSIONER GILINSKY: Maybe I am reading it  
13 incorrectly.

14 COMMISSIONER BRADFORD: No, I think you are reading  
15 it correctly. What has happened is in the Indian Point case  
16 the Commission decided to read it against the plain meaning of  
17 the language.

18 COMMISSIONER AHEARNE: The Indian Point case, Peter,  
19 is very clear.

20 COMMISSIONER BRADFORD: But it is different from the  
21 plain meaning of the regulations. The Commission in effect  
22 read away the troublesome part, the troublesome but  
23 fundamentally accurate reading of the regulation, as Vic has  
24 just suggested, that to achieve the effect in the Indian Point  
25 case, you don't need the word, "sparingly and in extraordinary

pmcc 2 1 circumstances."

2 The Commission simply read the regulation as though  
3 those words weren't in it.

4 COMMISSIONER AHEARNE: The Commission used  
5 extraordinary circumstances in the Indian Point case.

6 COMMISSIONER BRADFORD: That's right. But it  
7 didn't read into that anything more than a determination that  
8 a serious safety environmental --

9 COMMISSIONER AHEARNE: As that is the extraordinary  
10 circumstance.

11 COMMISSIONER BRADFORD: That's right.

12 MR. KELLEY: Do you think the reg as written goes  
13 beyond and tightens up?

14 COMMISSIONER BRADFORD: As the reg is written, yes,  
15 but I suppose -- I don't know anything about two different  
16 regs, but let me just speak generally and then in both of them.  
17 Well, it doesn't tighten up what Indian Point says.

18 COMMISSIONER AHEARNE: It repeats the Indian Point  
19 language.

20 CHAIRMAN HENDRIE: The Indian Point language says  
21 the power in this circumstance should be exercised sparingly,  
22 A, and utilized only in extraordinary circumstances where the  
23 Board concludes that a serious safety, et cetera, matter  
24 remains.

25 The regulation says --

pmcc 3 1 COMMISSIONER BRADFORD: That's not what it says.

2 It stops with extraordinary circumstances, period.

3 CHAIRMAN HENDRIE: Let me read the part that I am  
4 reading on Indian Point. It is the --

5 COMMISSIONER BRADFORD: I am sure Indian Point, but  
6 that's not the regulation.

7 MR. KELLEY: Which page of the reg are you looking at,  
8 Pete?

9 COMMISSIONER KENNEDY: Which paragraph is it in the  
10 regulations?

11 CHAIRMAN HENDRIE: Six.

12 The regulation says matters not put in controversy  
13 by the parties will be dealt with by the presiding officer only  
14 in extraordinary circumstances, where he determines that a  
15 serious safety environmental or common defense and security  
16 matter exists.

17 Let me read you what Indian Point says.

18 COMMISSIONER BRADFORD: I'm sorry --

19 CHAIRMAN HENDRIE: Utilized only in extraordinary  
20 circumstances where a board concludes that a serious safety or  
21 environmental issue remains.

22 COMMISSIONER BRADFORD: That's the Licensing Board  
23 regulation. I was reading the Appeals Board regulation.

24 COMMISSIONER GILINSKY: They are essentially the  
25 same.

pmcc 4

1 COMMISSIONER BRADFORD: I would like to think so.

2 CHAIRMAN HENDRIE: Essentially the safety  
3 environmental, defense matter, and in the last line will be  
4 exercised sparingly, only in extraordinary circumstances.

5 COMMISSIONER BRADFORD: The first sentence is fine.  
6 In a proceeding on an application for an operating license  
7 where the Atomic Safety and License Appeal Board determines  
8 that a serious safety environmental and common defense and  
9 security matter exists that had not been raised by the  
10 parties, it may give appropriate consideration to that matter.

11 That is fine. As far as I'm concerned, that is all  
12 that needs to be said. But it then goes on to say the  
13 authority; which is the very authority in a preceding sentence  
14 of an ASLAB, to consider such matters will be exercised  
15 sparingly and only in extraordinary circumstances.

16 COMMISSIONER KENNEDY: Where is that?

17 MR. SHIELDS: That's what the Chairman was saying  
18 comes out of Indian Point.

19 COMMISSIONER BRADFORD: But it doesn't --

20 COMMISSIONER AHEARNE: Peter's point is, and I  
21 happen to agree with him on this, that somehow the way the  
22 regulation is written doesn't really -- it seems to modify and  
23 to say that there are two standards. One is that it is  
24 significant and, two --

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25 COMMISSIONER GILINSKY: That is to be eligible.

pmcc 5 1 COMMISSIONER AHEARNE: And two, then, there is  
2 something in addition extraordinary. The Indian Point is, the  
3 extraordinary thing is the significant safety, serious safety,  
4 environmental issue.

5 MR. SHIELDS: Which hasn't been --

6 COMMISSIONER AHEARNE: That is the extraordinary  
7 action, so it is only one test.

8 COMMISSIONER BRADFORD: That's right.

9 COMMISSIONER AHEARNE: And what Peter is saying now,  
10 he is interpreting Rosenthal, Barr and Buck as saying, "Look,  
11 here is this problem that the regulation forbids us."

12 I think that the regulation probably is badly worded.  
13 Put that aside for a minute. I am surprised if the conclusion  
14 is that Rosenthal, Barr & Buck, having found or believed that  
15 there is a serious safety environmental issue, would then say,  
16 "But we can't look at it."

17 COMMISSIONER BRADFORD: I think that is probably not  
18 what they did.

19 COMMISSIONER AHEARNE: Because I thought I'd read the  
20 second part of this -- remember, they had two reasons why they  
21 said they didn't look at it.

22 The first was in view of the limitations imposed by  
23 regulations and the fact that our review was necessarily  
24 unaided by any of the parties, we have not probed farther, and  
25 they end up, scrutiny at the substance will have to await a

pmcc 6 1 contested proceeding, which seemed to go to a theme which some  
2 of them at least have hit many other times, the best way to get  
3 any issue analyzed is to have it contested.

4 MR. SHIELDS: I think it is that additional problem,  
5 in that if you do alter the regulations, such that you are in  
6 a sense inviting the boards to go further than they currently  
7 feel constrained not to go, they do have this problem in that  
8 --

9 COMMISSIONER AHEARNE: Bill, is there any other case  
10 that you know of -- you say boards -- is there any other case  
11 that you know of where this has been interpreted as a  
12 constraint in not going farther?

13 MR. SHIELDS: I think the regulation is fairly  
14 frequently cited as a pro forma covering the review. I don't  
15 know of any case where a board has said that there is a  
16 serious issue, but nonetheless it will not, or it has a  
17 concern which it nevertheless --

18 COMMISSIONER AHEARNE: Do we know of any other cases  
19 where it has been cited as a constraint? I found that we have  
20 at least two cases. For example, the Monticello case, which I  
21 quoted, which is a recent case, an operating case, where  
22 obviously they felt no constraint.

23 MR. SHIELDS: I don't know of any such cases. I  
24 don't know if Tom knows of any or not.

25 MR. ENGELHARDT: No, I do not know of any.

pmcc 7

1 COMMISSIONER AHEARNE: Well, we had one case, and in  
2 this one case there are two reasons given.

3 MR. ENGELHARDT: But the second reason is also in  
4 fact a part of the regulation. That is, if the issue is not  
5 contested -- at any time an issue is not contested by the  
6 parties, you are not going to be able to count on a party  
7 helping you out in its resolution.

8 Now, it's true in this case apparently there aren't  
9 even any other parties there to ask. But they would always  
10 be free to decline because they have no resources or whatever.

11 COMMISSIONER AHEARNE: But it was a contested.

12 COMMISSIONER BRADFORD: The important thing is the  
13 issue is uncontested and not that there aren't --

14 COMMISSIONER AHEARNE: That's right, the uncontested.  
15 So we have one cite, and part of that cite is in the lack of  
16 having it being contested to provide clarity, they are  
17 deferring. So that is now part of one.

18 COMMISSIONER BRADFORD: All I am saying is that  
19 reason is always going to be present when this regulation is  
20 invoked. There will never be a situation to which two 78's --

21 COMMISSIONER AHEARNE: Oh, yes. No. All I am  
22 saying is the weakness of their going after it was they were  
23 interpreting it as two factors. Even if that regulation weren't  
24 there, that second weakness would still exist.

25 COMMISSIONER BRADFORD: That's true.

pmcc 8 1 COMMISSIONER AHEARNE: So we have one cite, and it  
2 is only half of that citation.

3 I am just trying to establish the magnitude of the  
4 restriction that appears to be present.

5 COMMISSIONER BRADFORD: What you are saying is  
6 without the regulation they would still have to be concerned  
7 with whether this --

8 COMMISSIONER AHEARNE: That's correct, because the  
9 footnote doesn't say the regulations permitted us to go after.  
10 It was in view of the regulations and the fact wasn't  
11 contested.

12 COMMISSIONER BRADFORD: That's true.

13 CHAIRMAN HENDRIE: I must say I read their footnote  
14 to be not a complaint against a limitation on their activities,  
15 but the regulations come about rather an attempt to be quite  
16 clear as to how far they have probed the matter, the simple  
17 explanation.

18 COMMISSIONER AHEARNE: Peter, do you believe that the  
19 constraint on the Licensing Board is also severe?

20 COMMISSIONER BRADFORD: I think that it is clear that  
21 the constraint on the Appeals Board is at least poorly worded  
22 and redundant. The constraint on the Licensing Board is  
23 ambiguous. It can be read to be redundant or it can be read to  
24 have the extraordinary circumstances.

25 COMMISSIONER AHEARNE: The Licensing Board goes on

pmcc 9 1 past that. It is under extraordinary circumstances where he  
2 determines that a serious safety environmental and common  
3 defense security matter --

4 COMMISSIONER BRADFORD: That's right. So I think  
5 that can be read the way Joe is reading it or the way the  
6 Appeals Board has read it.

7 I think if it said simply only where he determines  
8 that a serious safety, serious safety environmental or common  
9 defense security matter exists, it would say everything we  
10 really want to say, and nothing would be left. And then the  
11 ambiguity would be eliminated.

12 MR. KELLEY: Might it be a sensible step -- I think  
13 I understand what you are saying -- if we tried some draft  
14 provisions along those lines and maybe just as a first step  
15 tried it out on the board and in turn wait to see what their  
16 reaction would be.

17 COMMISSIONER AHEARNE: Is it possible to ask the  
18 Appeals Board what they meant, what the real problem was?

19 MR. KELLEY: No, not on a generic basis. That's  
20 really what I am saying.

21 COMMISSIONER KENNEDY: That is what he is saying.

22 MR. KELLEY: Ask him what are you saying, what did  
23 you mean, ask the Licensing Board, do you feel restrained by  
24 this?

25 COMMISSIONER KENNEDY: And this would be a way to

pmcc 10 1 correct the problem.

2 MR. KELLEY: What about this drafting change, and  
3 how about that? How's that?

4 COMMISSIONER AHEARNE: I would like to try that  
5 because, if they are really misinterpreting, because it  
6 appeared to me Indian Point was fairly clear.

7 COMMISSIONER BRADFORD: I agree with that, but I  
8 don't think you can square Indian Point with the Appeals Board  
9 regulation. You can't square it with one reading of the  
10 Licensing Board regulation because it is the same wording.

11 I think, unfortunately, as a regulation, riding  
12 apart from the rest of the language in Indian Point, it could  
13 also give rise to a different reading, but leave that alone.  
14 It hasn't.

15 CHAIRMAN HENDRIE: But the legislative history on  
16 the language in 2760-A --

17 COMMISSIONER BRADFORD: As long as everyone is always  
18 careful to go back to that, they will be fine.

19 CHAIRMAN HENDRIE: If there is anybody in the world  
20 which in fact ought to be familiar with and go back to the  
21 legislative history and to 2760-A, it is the Appeals Board,  
22 and I doubt very much they are in the least doubt as to where  
23 that language came from in the precise context.

24 So I think 2760-A, which is not quite identically  
25 but damn near identically the Indian Point language, is okay.

pmcc 12

1 COMMISSIONER BRADFORD: I would revise it anyway,  
2 just because I would rather say what we really ought to say.  
3 You can get into almost any kind of a hole by wording something  
4 incorrectly or imprecisely in the first place and then over the  
5 years becoming shy about changing it on the basis that someone  
6 will read more significance into the change than you intend.

7 If one has at least Joe's faith in the legislative  
8 history, you can always make clear at the time you make the  
9 change, you can put out a statement of consideration that  
10 covers the problem of whether you intend to work a sweeping  
11 change in the Commission's processes, or whether you are just  
12 clarifying.

13 COMMISSIONER KENNEDY:.. Draft that, too.

14 MR. KELLEY: I think we are talking about two  
15 alternatives. One is sort of minor surgery on the omelets,  
16 and the other one, that goes a little further, and then we  
17 couple that with a question of how have you been interpreting  
18 this? Is this a constraint?

19 And we send it out internally, mainly to the boards  
20 and ELD lawyers to comment on it.

21 CHAIRMAN HENDRIE: And I gather in either case, if  
22 something like this should go forward, we would want a  
23 Commission's statement of considerations that goes with it that  
24 says, "Now, for pity's sake, don't everybody start doing things  
25 radically different just because we have made what we think is

pmcc 11 1 There is a section over under, after you get started on the  
2 Appeals Board function in Roman VIII that is very nearly the  
3 Indian Point language.

4 And then this thing at the very end, which sort of  
5 scrambles everything up like an amulet, and if that were  
6 rewritten to repeat the Indian Point language, I certainly  
7 wouldn't have any difficulty with that unscrambling.

8 MR. SHIELDS: I think we have two problems here,  
9 though. The question would be whether we are simply going to  
10 alter the Appeal Board regulations so it conforms more closely  
11 to the Indian Point language, or whether we actually want to  
12 get rid of, say, the words, "extraordinary or sparingly."

13 CHAIRMAN HENDRIE: Well, I am for the first. But I  
14 think Peter would like the second.

15 COMMISSIONER BRADFORD: I would circulate it, I  
16 think, the version I would like to ask about, and obviously I  
17 can't object to other versions being asked about as well, but  
18 I would just drop the last sentence from the Appeals Board one,  
19 and I would drop the "in extraordinary circumstances" from  
20 licensing.

21 COMMISSIONER AHEARNE: And what I would like to do is  
22 find out from the Board whether they have been interpreting  
23 the existing regulations as more constraining than the Indian  
24 Point decision, and if so, then I would go along with revising  
25 it.

pmcc 13

1 a clarifying language --

2 COMMISSIONER AHEARNE: Why are you asking ELD?

3 MR. KELLEY: They are the lawyers that try these  
4 cases. I think I would like to have their opinion how it works  
5 in practice.

6 CHAIRMAN HENDRIE: They are a nice bunch of fellows.

7 COMMISSIONER AHEARNE: That wasn't the issue I had in  
8 my mind.

9 MR. KENNEKE: Let me make an observation here that I  
10 think --

11 CHAIRMAN HENDRIE: Hold up. What is the problem?

12 COMMISSIONER BRADFORD: The point being ELD is an  
13 interested party in these cases.

14 COMMISSIONER AHEARNE: Right.

15 MR. KELLEY: No particular --

16 COMMISSIONER BRADFORD: I don't mind asking then,  
17 well, they will, I suppose, be able to keep in mind their  
18 perspective.

19 MR. ENGELHARDT: But the comments would come from the  
20 other members of the public, you might anticipate, when we go  
21 out with a proposed rule change, if it goes that way.

22 COMMISSIONER BRADFORD: If we went out.

23 MR. KELLEY: Just whatever internal knowledge we can  
24 get on a generic basis.

25 CHAIRMAN HENDRIE: Well, there is also a regulation

pmcc 14 1 writing section. ELD isn't all trial counsels in the active  
2 sense. There is also a regulation writing group.

3 Well, I don't know. If it is a problem for you --

4 COMMISSIONER BRADFORD: Well, I think we can --

5 COMMISSIONER AHEARNE: It was more a question --

6 COMMISSIONER BRADFORD: There is always a bit of a  
7 problem in keeping the function separate, but I think we can  
8 ask --

9 CHAIRMAN HENDRIE: All right.

10 MR. KELLEY: I have talked to Tom Whiter and Howard  
11 about a rule change, just about how we would split this up.  
12 But certainly I think I understand what you want, and I think  
13 we can work that out.

14 MR. KENNEKE: While you are thinking about rule  
15 changes, may I just make an observation This rule change  
16 would clarify the board's authority to look into issues on  
17 their own.

18 One of the things they point out in the ALAB 444 is  
19 how they want the staff to write these up in SER's. What I  
20 heard the staff say in the last meeting was that they intend  
21 to use the Section 210 definition they have come up with now  
22 as the list of issues that they would write up to be in the  
23 SER's.

24 MR. CASE: No, that is not our intent. Our intent is  
25 to discuss safety issues, category A's, category B's, at least.

pmcc 15

1 MR. KENNEKE: Well, I will repeat, I understood the  
2 staff to say they would be prepared to address them, should the  
3 Board require, but I understood -- I believe it was Harold who  
4 was talking at the time -- said to the effect they would just  
5 put in the SER's. I think you should clarify that at this  
6 point and make sure maybe you might want to have a rule to  
7 govern that also. Consider that possibility.

8 CHAIRMAN HENDRIE: I wouldn't think we would want a  
9 rule. These things come and go in a way that I hope the rules  
10 would not. Harold?

11 MR. DENTON: We didn't intend that what we provide  
12 the Congress limit the discussion, and up to now we have  
13 discussed all the ones in category A and all the ones in B.  
14 And we haven't been required to discuss the C's and D's yet in  
15 SER. I think that is the kind of decision we can just make  
16 anyway.

17 Obviously, Ed prefers to discuss A's and B's  
18 continually, and everyone is continuing that practice.  
19 Frankly, I have not made a decision whether to switch over or  
20 not. I was awaiting the results of this meeting to see what  
21 kind of list we ended up with.

22 There aren't that many differences, and we have in  
23 the past covered all the A's and B's.

24 CHAIRMAN HENDRIE: I guess in some sense I would be  
25 inclined to leave it up to the staff. They have responsibility

pmcc 16 1 to cover all the issues they think ought to be specifically  
2 noted in the case. If that is a prompting about generic  
3 issues, if you put too short a list in the SER, the boards  
4 are likely to invite you to supply further comments and  
5 testimony.

6 So anyway, you know what to do, and you will talk to  
7 people. And I guess then we will see it again. I hadn't  
8 noticed that the Appeals Board language here right at the end  
9 of this section --

10 COMMISSIONER AHEARNE: Maybe they felt the Appeals  
11 Board had to be constrained more.

12 COMMISSIONER AHEARNE: Maybe they have gotten sick  
13 and tired of copying these freezes out of Indian Point, and  
14 the drafter just let his imagination go.

15 COMMISSIONER BRADFORD: I'm not sure whether this  
16 one pre- or post-dates Indian Point.

17 MR. KELLEY: The rule change?

18 COMMISSIONER BRADFORD: The Appeals Board. Do you  
19 know the date?

20 COMMISSIONER KENNEDY: January, 1975.

21 CHAIRMAN HENDRIE: It postdates -- it was in a --

22 MR. SHIELDS: I think this was all one rulemaking  
23 package.

24 COMMISSIONER BRADFORD: 760 and 785.

25 CHAIRMAN HENDRIE: It references Indian Point as the

1 founding statement. That's why we accept going back to Indian  
2 Point.

3 MR. SHIELDS: I think it was just putting into two  
4 sentences what was said in one in the other. It looked the  
5 same, but it doesn't really have the same effect.

6 CHAIRMAN HENDRIE: I'm sure it was intended to read  
7 the same.

8 MR. SHIELDS: But it doesn't come out the same.

9 COMMISSIONER BRADFORD: The word, "sparingly,"  
10 almost enforces John's suggestion. Somebody felt they better  
11 put an extra loop around those.

12 CHAIRMAN HENDRIE: Okay. Does that take care of us  
13 on this issue for this afternoon? It seems to me it does.

14 The Commission gets another 30 seconds.

15 (Whereupon, at 3:50 p.m., the meeting was adjourned.)  
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pmcc 17

end t#4