

RETURN TO SECRETARIAT RECORDS

NUCLEAR REGULATORY COMMISSION

IN THE MATTER OF:

COMMISSION MEETING

OPEN SESSION

POLICY SESSION 77-56

Place - Washington, D. C.

Date - Wednesday, 7 December 1977

Pages 1 - 135

Telephone:
(202) 347-3700

ACE - FEDERAL REPORTERS, INC.

Official Reporters

444 North Capitol Street
Washington, D.C. 20001

NATIONWIDE COVERAGE - DAILY

DISCLAIMER

This is an unofficial transcript of a meeting of the United States Nuclear Regulatory Commission held on DEC 7 1977 in the Commission's offices at 1717 H Street, N. W., Washington, D. C. The meeting was open to public attendance and observation. This transcript has not been reviewed, corrected, or edited, and it may contain inaccuracies.

The transcript is intended solely for general informational purposes. As provided by 10 CFR 9.103, it is not part of the formal or informal record of decision of the matters discussed. Expressions of opinion in this transcript do not necessarily reflect final determinations or beliefs. No pleading or other paper may be filed with the Commission in any proceeding as the result of or addressed to any statement or argument contained herein, except as the Commission may authorize.

cr5792
MEER/mm

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

COMMISSION MEETING

OPEN SESSION

POLICY SESSION 77-56

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

Wednesday, 7 December 1977

Meeting in the above-entitled matter was convened
at 9:45 a.m., pursuant to notice, JOSEPH HENDRIE, Chairman,
presiding.

PRESENT:

JOSEPH HENDRIE, CHAIRMAN
RICHARD KENNEDY, COMMISSIONER
VICTOR GILINSKY, COMMISSIONER
PETER BRADFORD, COMMISSIONER

H. Shapar	R. Mallory
L. V. Gossick	J. Kelley
J. Nelson	L. Slaggie
A. Kenneke	J. Murray
J. Yore	K. Pedersen
J. Fouchard	B. Snyder
A. Rosenthal	S. Eilperin
S. Myers	D. Rathbun

C O N T E N T S

mm	1		
	2		<u>PAGE</u>
	3	1. SECY-77-574, Review of Policy Concerning Use of Cameras During NRC Licensing Hearings.	3
	4	2. Briefing on SECY-77-391, Reducing Procedural Cost Burdens for Participants in Commission Proceedings; and Discussion of Procedural Assistance in S-3 Fuel Cycle Rulemaking.	58
	5		
	6	3. Discussion of Mr. Pollard's Request to Participate in NRC Meetings on UCS Petition.	107
	7		
	8		
	9		
	10		
	11		
	12		
	13		
	14		
	15		
	16		
	17		
	18		
	19		
	20		
	21		
	22		
	23		
	24		
Ace-Full Reporters, Inc.	25		

P R O C E E D I N G S

CHAIRMAN HENDRIE: Okay, since we are all gathered, why don't we come to order.

The Commission is meeting this morning to review its policy with regard to the use of cameras and such matters at Licensing Board hearings.

There is a basic discussion paper from Mr. Fouchard's office, and Mr. Yore and Mr. Rosenthal, whose interests are acutely affected by these considerations.

MR. SHAPER: I think Mr. Yore is the real party of interest.

CHAIRMAN HENDRIE: Well, since Mr. Rosenthal has to review everything Mr. Yore does, why --

MR. ROSENTHAL: Also, I don't think it is beyond the realm of possibility that a camera might show up at one of our Appellate proceedings, dull as they might be.

CHAIRMAN HENDRIE: True, true.

Okay, Joe, why don't you go ahead.

MR. FOUCHARD: Thank you, sir.

(Slide.)

I thought I would go through the basic paper very briefly. As all of you know, this is not an issue that is unique to the Nuclear Regulatory Commission. It is an issue which has, I guess, been around since two honorable professions of journalism and law have locked horns. I can't speak for the

1 older of those two professions, but certainly from the standpoint
2 of the journalistic profession, there isn't even unanimity
3 with respect to camera coverage of trials.

4 I noticed a recent piece by Richard Salant,
5 President of CBS News in the New York Times in which he
6 indicated that he thinks his profession may be going at it the
7 wrong way. They have argued successfully, he says, in some
8 instances, that microphones and cameras be permitted at
9 court trials, but he notes that the complexities there are
10 rather enormous.

11 He does argue, however, that cameras should be
12 permitted at appellate proceedings, and of course, the thrust
13 of his comment was that cameras and broadcast coverage should
14 be permitted of important matters before the Supreme Court,
15 namely the Bakke case.

16 So, as I say, there isn't even unanimity within
17 the broadcast profession itself.

18 Basically, I think the issues itself are rather
19 straightforward; can camera coverage be permitted of all
20 licensing and appellate hearings without creating distractions
21 which are unacceptable and without otherwise impinging on the
22 licensing process.

23 The other side of the coin, it seems to me is; are
24 the information needs of the public being served when television,
25 which is certainly one of the principal news mediums in the

1 world today -- certainly the recent events in the Middle East
2 would demonstrate that -- are not permitted to cover NRC
3 hearings with their cameras.

4 (Slide.)

5 Our present policy is that cameras are prohibited
6 during the period of time when the hearing is actually in
7 session. The Licensing Boards, and I believe the Appeal Boards
8 also have generally granted a few minutes of shooting time at
9 the outset of the hearing right before it commences, and we
10 also permit cameras in the hearing room before and after the
11 hearings and during recesses.

12 Tape recorders are permitted to be used while the
13 hearing is in session; and I think it is fair to say that
14 there have been a minimal distractions at best, from that
15 policy.

16 As the Commission knows this policy has been
17 challenged on a number of occasions recently by news media in
18 Seattle and Oklahoma City and Louisville, and also by the Radio-
19 TV News Directions Association. In each of those instances
20 we promised to take a fresh look at our policy.

21 (Slide.)

22 The AEC reviewed its policy on several occasions.
23 On each occasion it remained with the policy which I have
24 outlined for you.

25 In 1971 the Atomic Energy Commission asked the

mm 1 Administrative Conference to examine governmentwide, the
2 possibility of using cameras in the Administrative Proceedings.

3 The Administrative Conference, by split vote,
4 recommended that with certain restrictions, cameras be
5 permitted in proceedings in which there was broad public
6 interest.

7 Subsequent to that time the AEC again reviewed its
8 policy and said, no, thank you.

9 Early in '75 --

10 COMMISSIONER KENNEDY: What was their reason?

11 MR. FOUCHARD: Their reasoning was pretty much along
12 the lines that it would be too distracting, sir. And pretty
13 much as I will get to in Alternative I, actually.

14 COMMISSIONER BRADFORD: Distractive to who, Joe?

15 MR. FOUCHARD: Distractive to the proceeding.

16 COMMISSIONER BRADFORD: You can't distract a
17 proceeding. Which individual would be distracted?

18 MR. FOUCHARD: Witnesses, board members.

19 CHAIRMAN HENDRIE: Reasonably distractive individuals.

20 MR. FOUCHARD: Participants. That was the
21 reasoning.

22 COMMISSIONER BRADFORD: Was there actually -- I mean
23 did people assert the witnesses would be -- would somehow
24 lose concentration and be unable to testify?

25 MR. FOUCHARD: I think it was partially that,

mm 1 partially posturing, partially, you know -- I don't know
2 that much --

3 COMMISSIONER BRADFORD: What kind of posturing?

4 It seems to me there are a lot of sort of generalized
5 fears behind the policy that we need to take a hard look at
6 them.

7 How much can a witness actually do by way of
8 posturing in front of a Licensing Board?

9 MR. FOUCHARD: You are kind of putting me in a
10 position of arguing against myself.

11 But in any event there was concern --

12 CHAIRMAN HENDRIE: Then you know the argument.

13 COMMISSIONER BRADFORD: I am not asking you to
14 argue at all. I am just curious about the history of the logic.

15 MR. FOUCHARD: I think the logic was that the
16 cameras would interfere with the testimony of the witnesses;
17 that it would possibly lead to grandstanding or to playing to
18 the cameras.

19 It also was a concern that if we permitted lights,
20 it would, after a certain period of time, get awfully
21 uncomfortable.

22 COMMISSIONER BRADFORD: Well lights are another
23 matter.

24 MR. FOUCHARD: Yes, they are a separate matter
25 entirely, it seems to me. That was the general, I think,

mm

1 gut feeling of the Commission at that time.

2 As Mr. Yore has indicated, only the FCC has
3 adopted the Administrative Conference recommendation at the
4 federal level. There is a considerable amount of activity
5 at the state level. I think the Commerce Commission now
6 permits cameras. This was after a hassle which was somewhat
7 similar to our own, only on the state and local level.

8 There is a move afoot, of course, in the House
9 of Representatives of the Congress to permit camera coverage.
10 I think they actually --

11 COMMISSIONER KENNEDY: Of the actual sessions.

12 MR. FOUCARD: Yes, sir.

13 COMMISSIONER KENNEDY: As contrasted with the
14 Committee meetings, which are often --

15 MR. FOUCARD: Yes, sir. I think it is up to the
16 Committee chairman, as I understand it.

17 So the House is moving in this direction. I
18 think the basic issue in the House, as I understand it, is
19 who will operate the camera, possibly.

20 (Slide.)

21 The alternatives are pretty straightforward. One
22 is to retain the present policy. It does maintain the decorum
23 of the proceeding, eliminates the distractions, doesn't
24 influence the behavior of the witness or the participants,
25 and I think an important point also is that we frequently use

mm

1 federal courtrooms for our hearings, and this is the only
2 alternative which is acceptable to the federal courts. Most
3 judges just do not permit cameras, certainly in their courtrooms,
4 and some federal judges even go so far as to bar them from
5 the court buildings without permission of the U.S. Marshall.

6 COMMISSIONER KENNEDY: Is that a general proposition?
7 That is, if a courtroom is empty, it can't be photographed?

8 MR. FOUCHARD: In many cases this is true, yes, sir.

9 MR. ROSENTHAL: The camera will not be permitted in
10 the courtroom at all whether it is being used by the court
11 itself, whether it is being used by another instrumentality
12 such as an administrative agency, or whether it stands vacant.

13 Virtually universal policy is no television cameras
14 in the actual courtrooms. And as Mr. Fouchard indicates, in
15 some instances the courts have even applied that to other
16 areas in the building.

17 COMMISSIONER BRADFORD: Who is going to be distracted
18 in an empty courtroom by television cameras? What possibly
19 justification is there for that course other than perhaps
20 the judge's fear if they ever let the cameras in they will never
21 get them out?

22 MR. ROSENTHAL: I think that is probably, in some
23 instances, is the nose of the camel under the tent.

24 I suppose in other instances it is just a feeling
25 that -- perhaps an unjustified feeling -- that it somehow

mm 1 denigrates the dignity of the premises to have cameras.

2 Now of course I can't imagine why a television station
3 would want to send cameras up to an empty courtroom anyway.
4 But as a practical matter you are talking about a courtroom
5 which is in use either by the court itself or by a federal
6 agency which has borrowed it. But, as to that, as far as I know
7 there are no exceptions in the federal judicial system to the
8 prohibition against cameras in the courtroom when it is in use.

9 MR. SHAPAR: Just another example of judicial tyranny.

10 (Laughter.)

11 MR. FOUCHARD: Well I believe it varies from judge
12 to judge. I have had cameras in federal courtrooms at Licensing
13 Board hearings, but those were under our procedures before and
14 after. So it varies from judge to judge is my experience.

15 But generally speaking, I think that is true.

16 MR. YORE: But not during the sessions.

17 COMMISSIONER KENNEDY: That is not a matter of the
18 judge's concern, that is a matter of our own concern?

19 COMMISSIONER BRADFORD: That is the judge's concern.

20 COMMISSIONER KENNEDY: The judge would say you can
21 have the thing before or after the hearing, but not during
22 the hearing.

23 COMMISSIONER BRADFORD: And again obviously the
24 judge's concern, because it isn't any proceeding of his, it
25 is just --

mm 1 MR. YORE: That is going to be a precedent for him
2 the next time he has a trial.

3 COMMISSIONER BRADFORD: So it is really just saying
4 that it will look bad if we say yes and he says no?

5 COMMISSIONER KENNEDY: The next question is, is
6 the use of federal courtrooms all that essential to us?

7 MR. YORE: Well, I think it is. I think if we
8 didn't have the use of courtrooms, why the proceedings would
9 be far less orderly and effective than they are today.

10 COMMISSIONER KENNEDY: Why?

11 MR. YORE: Because the atmosphere at a Holiday Inn
12 or a motel, trying to run an adjudicatory proceeding, is just
13 not conducive to a good --

14 COMMISSIONER KENNEDY: There are other kinds of
15 good federal buildings.

16 MR. ROSENTHAL: Not adequate facilities.

17 I might say, Commissioner Kennedy, the Appeal Boards
18 as a matter of inflexible, up to this point, policy, have
19 utilized when they have heard argument outside of Bethesda
20 where we, of course, use our own hearing rooms, utilize
21 either federal or state courtrooms, and it is our strong feeling
22 that this adds an essential element to the dignity of the
23 proceedings and we would be very, very unhappy about being
24 required because of a relaxation of the camera policy or some
25 other reason, to resort to motels and --

mm

1 MR. YORE: Gymnasiums.

2 MR. ROSENTHAL: -- and gymnasiums and other types
3 of facilities.

4 Also, I might say the federal courtroom gives us a
5 measure of protection. I think we cannot get away from the
6 fact that a number of our proceedings have been confronted
7 with threats of disturbances.

8 If you are in a federal courthouse you have got
9 resort, if necessary, to the Marshall service. And just the
10 fact that the Marshall service is available frequently serves
11 as a deterrent to attempts at disruption.

12 Now that is not the camera policy as such, but it
13 certainly, it seems to me, is an element of this consideration
14 in that if the Commission were to relax the camera policy, I
15 would be hopeful that the Commission would make it clear that
16 the first priority is the acceptability of the space even if
17 it meant, in the particular instance, that because it was a
18 federal courtroom, under local ground rules television coverage
19 would not be permitted.

20 MR. SHAPAR: But hearings in the past have in fact
21 been held in non-federal courtrooms.

22 MR. YORE: Where there is no courtroom available.

23 COMMISSIONER BRADFORD: How many times has anybody
24 attempted to disrupt an NRC hearing?

25 MR. YORE: Quite often.

1 COMMISSIONER BRADFORD: What form does a disruption
2 take?

3 MR. YORE: Demonstrations. We have got one case
4 which I would like to save until my presentation, if you don't
5 mind. But, Columbia University, where a group of students
6 came in and conducted -- said they were going to absolutely
7 break up the hearing. This was in Manhattan in the Federal
8 Courthouse, Customs Courthouse in New York City.

9 COMMISSIONER BRADFORD: And you are going to talk
10 about that more during your presentation?

11 MR. YORE: Yes, I would like to.

12 MR. FOUCHARD: I think it is fair to say though,
13 that that is more the exception than the rule.

14 MR. YORE: Well, Hartsville, Skagit, I can
15 name quite a few.

16 COMMISSIONER BRADFORD: Except, a demonstration is
17 one thing. How many of those have actually been undertaken
18 with an intent to prevent the proceedings from going forward?

19 MR. YORE: That was the only one, I think. The
20 others were just -- were so disorderly that they had to either
21 recess the thing until things calmed down, or to ask the people
22 to leave the room.

23 MR. FOUCHARD: Well, we have already discussed
24 some of the cons with respect to TV News Industry. Their
25 position is obviously Alternative I, and they have stated

mm 1 it to us on numerous occasions.

2 (Slide.)

3 Alternative II is to permit cameras on an unrestricted
4 basis. It certainly would open up news coverage; certainly
5 would satisfy the TV and newspaper cameramen, and it is conceiv-
6 able that it could provide some better understanding of the
7 licensing procedures.

8 The cons are that it would be difficult, it seems to
9 me, under conditions of lights, to carry out an orderly
10 procedure. It would be uncomfortable and movement of cameras
11 certainly would be a distraction to the proceedings, to the
12 witnesses, to the boards.

13 It is conceivable the quality of decisionmaking
14 could be impaired. And, of course, it is contrary to the rules
15 of federal courts.

16 (Slide.)

17 Alternative III is --

18 COMMISSIONER KENNEDY: Can I ask about providing a
19 better understanding of NRC licensing proceedings. How would
20 that work?

21 My own impression of TV news is that it doesn't
22 contribute too greatly to the understanding of much. If one
23 looks at a typical TV news segment, it is less than a minute
24 in duration.

25 Now, I'm not sure what that contributes to the

mm 1 general learning process. Could somebody explain that to me?

2 COMMISSIONER GILINSKY: Walter Cronkite won't like
3 this.

4 (Laughter.)

5 COMMISSIONER KENNEDY: He has heard it before from
6 people far more erudite than I.

7 MR. FOUCHARD: That's true.

8 (Laughter.)

9 COMMISSIONER GILINSKY: How do you know that's true?

10 (Laughter.)

11 COMMISSIONER KENNEDY: I accept the compliment.

12 MR. FOUCHARD: If you are going to walk the plank,
13 do it with your eyes open.

14 (Laughter.)

15 I think that the contribution to understanding the
16 procedure basically involves knowledge on the part of more
17 people; one that there is such a proceeding; two that their
18 people can be heard; and three, their concerns are taken into
19 account.

20 Now I cannot give you an informed judgment as to
21 how much of that will occur. I think some. But basically, I
22 think that is the answer to your question, sir.

23 COMMISSIONER KENNEDY: Is it argued ever that it
24 would be better to have the TV news segment of a minute, at
25 least carry 30 seconds of that minute, inside where in fact the

mm 1 proceeding itself is occurring as contrasted with outside
2 where only a demonstration is occurring?

3 Is that an argument?

4 MR. FOUCHARD: See, that is what is occurring today,
5 Mr. Kennedy, because they can't get into the hearing room.

6 COMMISSIONER KENNEDY: That will be helpful.

7 MR. FOUCHARD: Because they can't get into the hearing
8 room, they are doing one-on-one interviews outside the hearing
9 room with the various participants. This is not under the
10 restrictions of the hearing rooms, so the individuals who are
11 interviewed may have free range to say whatever they please.
12 That is what is happening today.

13 COMMISSIONER KENNEDY: Which is probably not helpful
14 in the context of better understanding of the hearing process.

15 MR. FOUCHARD: In my judgment, no.

16 COMMISSIONER KENNEDY: Okay. Thank you.

17 MR. FOUCHARD: The third alternative is to permit
18 cameras, do not permit lighting, and to make them operate from
19 fixed positions.

20 This obviously would open up to a great extent. That
21 There is less possibility of distractions, would meet the
22 needs of most TV stations. I emphasize most because the modern
23 minicams which are being used here in Washington and most of
24 the large cities may not be available in Dubuque; they may
25 not be available in Long Island. The larger cities do have

mm

1 them and they can shoot without light.

2 They would prefer light. They would much prefer
3 light in here. This is a poorly lit-room from the standpoint
4 of television, for example. So a lot depends on your local
5 lighting efficiency.

6 Again we get to the, might provide better under-
7 standing pro, which is, I guess, somewhat debatable.

8 COMMISSIONER KENNEDY: This would allow distractions.

9 MR. FOUCHARD: Yes, sir. The cons, some distractions are
10 still possible. Witnesses would know that they are on camera.

11 There would be some small amount of noise from
12 the cameras. The modern minicams are pretty quiet, but the old
13 movie cameras, or television cameras still make some noise.

14 There is always the possibility that this would
15 encourage demonstrations or tailored presentations. And it
16 is contrary, of course, to the rules of federal courts.

17 COMMISSIONER KENNEDY: How would that work, encourage
18 demonstrations and tailor presentations? How would you
19 visualize that happening? What does it imply, what does it
20 mean?

21 MR. FOUCHARD: I think it implies sir, that as we
22 have seen, people who know they are on camera, frequently
23 will take that opportunity to conduct themselves in less than
24 an orderly way.

25 COMMISSIONER KENNEDY: Actors all.

mm

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

MR. FOUCHARD: Yes.

COMMISSIONER GILINSKY: Couldn't it work the other way?

MR. FOUCHARD: It could work to the -- but probably not.

COMMISSIONER GILINSKY: That's an interesting view.

MR. FOUCHARD: Well, I have watched enough demonstrations on television, Mr. Gilinsky, to believe that human nature works in that direction.

(Slide.)

Alternative IV is to permit cameras for only the limited appearances with restrictions of Alternative III. The limited appearances, of course, are not part of the evidentiary record. They would go partway in opening up the hearings. Again, some of the same pros and cons exist there.

For my part, the Office of Public Affairs, I would like to see us attempt a trial period, the televising of our hearings with the restrictions of Alternative III. This is with the proviso that obviously we not try to intrude on the policies of the federal courts, and we not permit a change in the camera policy to influence our selection of space for hearings.

(Slide.)

If we normally try for federal courtrooms, I think we

1 should continue to try for federal courtrooms.

2 My problem is, in Oklahoma City where we hold a
3 hearing in a gymnasium, or in a Corps of Engineers auditorium.
4 Hearings to many people outside of Washington means more public
5 meeting than it does adjudicatory type hearing. We have
6 certainly tried --

7 COMMISSIONER KENNEDY: That's its purpose isn't it?

8 MR. FOUCHARD: Public meeting?

9 COMMISSIONER KENNEDY: Yes.

10 MR. FOUCHARD: The hearing? No, sir, that is
11 adjudicatory.

12 COMMISSIONER KENNEDY: Of course it is adjudicatory,
13 but it is also public. The purpose of holding it in the country-
14 side rather than in Bethesda is to get participation.

15 MR. FOUCHARD: Indeed. Right.

16 COMMISSIONER KENNEDY: And attendance.

17 MR. FOUCHARD: What I mean by that is, that the
18 proceedings are conducted not as normal public meetings or
19 town meetings are, but under restrictions of the rules of
20 evidence.

21 COMMISSIONER KENNEDY: Simple, orderly procedure.

22 MR. FOUCHARD: Simple, orderly procedure.

23 Well, I would prefer to see us try for six months,
24 where we use facilities that are not in the federal courts,
25 and see if the distractions which we are concerned about are

mm

mm 1 real.

2 COMMISSIONER KENNEDY: Would you rule it out in the
3 federal courts, if indeed the federal courts would make it
4 possible to use it?

5 MR. FOUCHARD: No, sir, I would not.

6 COMMISSIONER KENNEDY: Would you rule out attempts
7 to get the federal courts to let us use them?

8 MR. FOUCHARD: I believe it would be unwise for us
9 to try to change the procedures of a local judge. I think rather
10 than --

11 COMMISSIONER KENNEDY: Well one can always ask, can't
12 they?

13 MR. FOUCHARD: Well yes, certainly.

14 COMMISSIONER BRADFORD: Well at the moment aren't we
15 asking whether the cameras can come in before and after the
16 hearings, or do we just allow that on our own?

17 MR. FOUCHARD: We allow that on our own. Of course
18 if the rules of the house are they are not permitted, why then
19 we have to follow the rules of the court.

20 MR. ROSENTHAL: I think if we let the judge feel that
21 we were pressuring him into relaxing or changing his policy to
22 our benefit, the end result would be we would be denied the
23 courtroom. I think it would be very unwise to endeavor to
24 persuade the particular district court to alter an established
25 policy of that court for our benefit.

1 COMMISSIONER BRADFORD: Let me understand what
2 the basis of this absolute -- well, I mean the taxpayers build
3 these buildings, and taxpayers pay judges' salaries.

4 The judge didn't build this courtroom, he doesn't
5 own this.

6 MR. ROSENTHAL: The judge does, as a practical
7 matter, Mr. Bradford, own his courtroom. You may think, and
8 correctly so, that the taxpayers' money is behind it, but my
9 experience has been that within the confines of a particular
10 federal courthouse, the chief judge, or a collegial group of
11 judges are absolute dictators as to what goes on.

12 The General Services Administration of New York
13 tried to alter some of the ground rules in Foley Square and
14 were told by the District Court for the Southern District of
15 New York, that the General Services Administration would be
16 in jail if they pursued it.

17 So I think we can start with the proposition
18 whether or not this is good, bad or indifferent, this is, in
19 fact, life.

20 COMMISSIONER BRADFORD: Well what is the source of
21 his authority?

22 MR. ROSENTHAL: Mr. Shapar would say judicial
23 tyranny. I don't know what the source is.

24 MR. SHAPAR: I would.

25 MR. ROSENTHAL: It is the power of the judiciary, is

mm 1 what it comes down to.

2 COMMISSIONER GILINSKY: We seem to have uncovered
3 something.

4 MR. FOUCHARD: Well as I said at the outset --

5 COMMISSIONER KENNEDY: I don't think uncovered it.--

6 MR. NELSON: May I add, I fully agree with what Allan
7 is saying about the power of the United States District judges
8 over their courts and the Court of Appeals as well. We all
9 know what happened when people wanted the Fifth Circuit to
10 move out of the Louisiana Fisheries and Wildlife building in
11 the French Quarter and start holding hearings elsewhere. It
12 took years before that ever happened, 10, 20 years.

13 And from the viewpoint of litigation, I would like
14 to advise the Commission against any attempt to pressure any
15 federal judge to allow --

16 (Laughter.)

17 MR. YORE: Hear, hear.

18 MR. NELSON: Part of what we get paid for is to do
19 business with those judges, and I don't want to do business
20 with them or have our people do business with them after
21 they have gotten through with Joe or somebody leaning on them
22 about their camera rules.

23 I would think that would be a most unwise course of
24 action.

25 MR. FOUCHARD: My problem is at the Holiday Inn --

mm

1 COMMISSIONER GILINSKY: I don't want to be the one
2 to persuade the judge either.

3 COMMISSIONER KENNEDY: This is less judicial
4 atmosphere than I had hoped for.

5 MR. SHAPAR: I would still submit that there is a
6 difference between pressuring a court and asking in a well-
7 modulated voice.

8 MR. ROSENTHAL: Well, the judge may conclude the
9 request as being pressure. It all depends on the judge.

10 MR. FOUCHARD: Well, I think that this can also
11 be turned around and used as a trial for the television
12 industry. The television industry wants to come into hearings.
13 Whether they can come in and do their business in an orderly
14 fashion, I believe they need to demonstrate. And this would
15 offer that opportunity.

16 COMMISSIONER BRADFORD: Of course there isn't any
17 real doubt about that, is there? I mean in terms of the
18 technology. They can set up the cameras pretty unobtrusively.

19 The real question is what will then happen when
20 the cameras are there. You can't really hold them responsible
21 for the behavior of the spectators or witnesses.

22 MR. FOUCHARD: I agree with that. I think,
23 Mr. Bradford --

24 COMMISSIONER KENNEDY: Well just to a point that's
25 true. One should never forget that the television news media

mm 1 stages a good deal of what one sees, arranges for indeed the
2 right people to be appearing at the right time.

3 It is their business. I applaud them for doing it
4 so well, but one should never assume what is going to happen
5 is a wholly and totally unrehearsed operation. Never assume
6 that.

7 COMMISSIONER GILINSKY: Are you saying that
8 intervenors are going to be --

9 COMMISSIONER KENNEDY: I didn't use the word
10 "intervenors" at any point in my comment, did I?

11 COMMISSIONER GILINSKY: Well anyone appearing at
12 these hearings would be --

13 COMMISSIONER KENNEDY: I am saying the television
14 news media can pick out who they please to film.

15 CHAIRMAN HENDRIE: It has already happened, Vic.

16 COMMISSIONER KENNEDY: And arrange some of the things
17 they will say at the point they are being filmed. It has
18 happened.

19 CHAIRMAN HENDRIE: It has happened without TV
20 broadcasts. There have been hearings in which the whole tone
21 of the proceeding suddenly goes through an abrupt change
22 because the guy from the local newspaper has dropped in and
23 it is his 15 minutes that afternoon at the proceedings to
24 see what is going on, his deadline is half an hour later, and
25 bang, all of a sudden people are on their feet shouting and

mm 1 carrying on in order to make the next morning's paper.

2 He leaves, plunk, everything changes again.

3 So indeed, it does happen.

4 COMMISSIONER KENNEDY: But this is a fact that one
5 has to deal with.

6 CHAIRMAN HENDRIE: It is a fact that has to be
7 dealt with. I don't regard it a compelling circumstance here.

8 MR.NELSON: It is a fact that Joe apparently
9 recognizes.

10 CHAIRMAN HENDRIE: There is a fair question of how
11 much educational value and communication value there is in
12 very short, what may be from at least -- bound to be from at
13 least one or another of the parties to use, a prejudicially
14 edited 15-second segment.

15 On the other hand, you could get precisely the same
16 effects now from coverage outside the hearing room.

17 MR.FOUCHARD: Indeed, in the printed press also, sir.

18 CHAIRMAN HENDRIE: That's right, the print journalist
19 is free to come in, make his notes and go and say what he will.

20 So again, you know, one can't regard those consider-
21 ations as compelling. They are simply circumstances to recognize.

22 Had you pretty well finished running through? You
23 have run out of alternatives?

24 MR. FOUCHARD: Yes, I have run out of alternatives.

25 CHAIRMAN HENDRIE: Let's eee. Jim, do you and Allan

mm 1 want to proceed? Both?

2 I assume you have your choice as the first.

3 MR. YORE: Since we are the ones that have to go
4 out into the wastelands and grassroots and face the public,
5 I guess I ought to go first.

6 COMMISSIONER KENNEDY: I hope there is a difference
7 between the grassroots and the wastelands.

8 (Laughter.)

9 MR. YORE: Well anyhow, I think our paper indicates
10 that we are opposed to any change in the present policy.

11 It has been the goal of the boards to try to have
12 as effective and orderly proceedings as possible. And we
13 don't feel that putting us on television is going to help
14 attain that goal.

15 Now, the policy that we have today has been the
16 policy of the Commission under nine -- under the leadership of
17 nine chairmen. It has been a policy for 30 years.

18 Having been here for those years, I think I could
19 spend all this morning recounting experiences which we think
20 would have an impact -- this change would have an impact on
21 our program. But I would like to have just a few minutes to
22 describe to you this Columbia University proceeding which we
23 mentioned previously.

24 This was a hearing at the Federal Courthouse, the
25 Customs Courthouse in the Lower Manhattan, and it was on the

mm 1 application of the Columbia University for research reactors.

2 Now the first day of the hearing there were no
3 cameras whatsoever. A large group of alleged college students
4 came in at the beginning of the hearing and indicated that
5 they were going to break up this hearing, conduct a demonstration.
6 I say alleged students because they looked kind of old. I don't
7 know what the age level at Columbia is, but it is too bad Peter
8 isn't here he might -- well, furthermore, if they were college
9 students, their vocabularies were very limited because all that
10 they used were four-lettered words.

11 So the four-letter words were all over the place,
12 and finally the demonstration was getting to the point where
13 we had to call the Marshalls.

14 The Marshalls came in and this is a big, distraction
15 to a proceeding to have screaming males dragged out of the
16 courtroom by the U.S. Marshall.

17 Well, the point of the story is this, and the
18 reason I am bringing it out, because I think it brings out the
19 attitude, reflects the attitude of the TV media.

20 The next day the cameras were all there.

21 COMMISSIONER GILINSKY: In your hearing room?

22 MR. YORE: Right outside, at the entrance.

23 The TV representatives indicated that they had
24 heard there was a lot of action the day before and where is the
25 action today?

mm 1 And we said, well, there isn't any action today,
2 it was yesterday. And we asked them, do you want to interview
3 the parties, representatives of the parties and find out what
4 this is all about?

5 And they said, no, that won't be necessary. And they
6 packed up their equipment, and disappointed, went off to get
7 some other action in the Big Apple.

8 In other words, they were there for the demonstra-
9 tion, that type of activity. They weren't there to find out
10 what the proceeding was all about and they left.

11 COMMISSIONER GILINSKY: What does that prove?

12 MR.YORE: I think that is typical of the attitude of
13 the TV media.

14 COMMISSIONER GILINSKY: Wait a minute. I guess I
15 don't follow that.

16 You had a demonstration when you didn't have any
17 TV. So what does that prove about having TV?

18 MR.YORE: Well, I think if we did have -- we had the
19 cameras in there, why there would be more demonstrations than
20 there are today.

21 COMMISSIONER GILINSKY: Maybe.

22 MR. YORE: Could be, but this is our thought.

23 Now we feel that this proposal creates a forum for
24 actors, because people when they are on camera, really --
25 human nature being what it is, it seems that they have a

mm 1 different attitude than they do when they are sitting in an
2 orderly proceeding under normal circumstances. We see it on
3 Candid Camera, we see it in sports spectacles where they pan
4 the crowd and the people -- it is just a natural attitude,
5 acting up before cameras.

6 COMMISSIONER GILINSKY: Some Congressional hearings
7 are on camera. What do you think of that experience?

8 MR. YORE: Well, I think there is some of it there.
9 But that is under very tight control, Congressional hearings.

10 COMMISSIONER BRADFORD: Was the demonstration in New
11 York about the most serious one you have had?

12 MR. YORE: We had one at Hartsville where you had
13 the union representatives who were in favor of the application.
14 Then you had the environmentalists who were opposed to it.
15 And that one was outside the courtroom, and we had to call the
16 local police to break that one up.

17 But the courtroom was so small that they couldn't
18 get into it, so maybe that is one advantage of having a small
19 facility.

20 COMMISSIONER BRADFORD: Small and secure.

21 COMMISSIONER KENNEDY: That would argue for holding
22 all of your hearings in Bethesda. There wouldn't be any
23 local demonstrators.

24 MR. YORE: Well, we feel the people have a right to
25 know what is going on. They have -- if you are building a gas

mm 1 station you have a zoning hearing in Bethesda. It gives the
2 people an opportunity to participate.

3 COMMISSIONER KENNEDY: But that also argues for as
4 open a facility as possible.

5 MR. YORE: True.

6 But on the other hand, it is not an adjudicatory
7 proceeding which ours is.

8 Now the survey which we conducted which we got the
9 information we did get from the Administrative Conference, as
10 Joe has pointed out, there is only one agency, and that is the
11 Federal Communications Commission which is permitting cameras
12 at their adjudicatory proceedings. And we feel that the FCC
13 is not typical of the other agencies in this respect.

14 We feel when one considers the nuclear debate today
15 and one only gets to look at what is going on in Seabrook,
16 that the other agencies have less reason for following the rules
17 of the federal court than does the NRC.

18 As far as the six-month business, we feel once you
19 go down this road, why it is going to be extremely difficult
20 to ever come back. You might as well feel that the decision has
21 been made.

22 In brief, your goal has been to try to have as
23 orderly and effective hearings. We don't think TV will help
24 us in doing that, and therefore we recommend that we continue
25 to follow the rules of the federal courts.

mm

1 MR. ROSENTHAL: Well I might say at the outset that
2 I do not think that the fate of the Republic hinges upon the
3 outcome of this particular issue.

4 Having said that, it does seem to me --

5 COMMISSIONER KENNEDY: That relieves me.

6 (Laughter.)

7 MR. ROSENTHAL: -- on balance, that there is good
8 reason to retain the present policy.

9 I would say in the first instance that I entertain
10 the greatest skepticism that the informational needs of the
11 public will be served to any extent by permitting televised
12 coverage, and I say that for essentially the same reasons that
13 were alluded to earlier by Commissioner Kennedy.

14 What we are talking of here is not gavel-to-gavel
15 coverage or coverage of a significant segment of the proceedings.
16 What we are talking about in virtually all instances is a 30-
17 second, or perhaps 60-second segment on the evening news, and
18 I would submit to you gentlemen that even making all allowances
19 for the good faith and good judgment, if you will, of the TV
20 producer who makes the determination as to what will be shown
21 in that 30-second to 60-second segment, that it will scarcely
22 provide the public with any real perspective regarding what
23 is transpiring at that hearing.

24 Now, in terms of the public being informed that a
25 hearing is going on, I can assure you that the newspapers in

mm 1 these areas, give quite extensive coverage to the proceeding.

2 And so I would think that any literate member of the
3 public would be fully aware of the fact that there is a hearing
4 without having to resort to the 30- or 60-second segment on the
5 news.

6 So I say on that side of it, that there is no dis-
7 cernible public benefit.

8 And indeed, as I understand it, the requests for a
9 relaxation of the camera policy are not coming from members
10 of the public, persons who are unable to attend these hearings
11 but have an interest in them and therefore would like to see
12 television coverage of them. The requests, as I understand it,
13 are coming exclusively from the news media, television and
14 radio stations themselves.

15 Now I don't think it is an accident that on the
16 federal side of the ledger, no court or federal agency, apart
17 from the Federal Communications Commission --

18 COMMISSIONER KENNEDY: And the Congress.

19 MR. ROSENTHAL: Well, I was going to finish --
20 permits the televising of adjudicatory proceedings.

21 And I do submit that there is a distinction between
22 the televising of an adjudicatory proceeding and the televising
23 of a legislative-type hearing. The courts have recognized in
24 many different contexts, that the rules that govern a legisla-
25 tive-type hearing and the rules that govern a judicial or a

mm 1 quasi-judicial type proceeding can well and should well be
2 in some respects, different.

3 COMMISSIONER KENNEDY: Could you explain why, Allan?

4 MR. ROSENTHAL: Yes. Because in the context of an
5 adjudicatory proceedings, the determinations are being made on
6 that basis of a fixed record. These are determinations really
7 of quite a different stripe than those --

8 MR. YORE: Almost like the difference between
9 rulemaking.

10 MR. ROSENTHAL: Yes, they are not policy-type
11 decisions. The strictures on the conduct of judicial proceedings
12 for that reason have always been considerably tighter. But even
13 if you allowed for the fact that there is an analogy, possible
14 analogy between the legislative and the judicial proceeding, I,
15 myself, have seen a few legislative proceedings on television
16 and I think an enormous amount of posutring goes on.

17 Indeed, I would say without meaning to be disrespect-
18 ful, that some of these proceedings that have been televised
19 have had at least some of the aspects of a circus.

20 I think this is the kind of thing that we are trying
21 to avoid.

22 Now, again the point I would want to stress is, if
23 I thought that there was really a significant public advantage
24 to be derived from televising these proceedings, I would say yes,
25 we should assume the risks that go along with it and go ahead

mm 1 and do it. At least on a trial basis.

2 Not seeing any discernible public benefit, I do
3 not perceive any good reason why we should assume these risks,
4 and I think the risks are real ones.

5 Now I am not concerned about myself about people
6 being disruptive in the normal sense. What I am concerned about
7 is posturing, playing for the cameras. It certainly does go
8 on. I have even seen in appellate proceedings, which provide
9 many fewer opportunities for stage acting, if you will,
10 lawyers turning it on and turning it off based upon the presence
11 or absence of a representative of the news media. And that
12 does not add to the proceeding. It does not add to the dignity
13 of the proceeding, and I would submit that it is extremely
14 important that the dignity of these proceedings be maintained.
15 That is one of the reasons that we stress the use of a federal
16 courthouse.

17 Some people might say it really doesn't make any
18 difference whether you are in a federal courthouse or the
19 Holiday Inn. There is an atmosphere, and it is an important
20 atmosphere insofar as I am concerned.

21 I think it adds a great deal to the adjudicatory
22 type proceeding. And I think what you open the door to here
23 is posturing. And it is not simply on the part of witnesses.
24 If anything, it is more likely to be on the part of lawyers.

25 And I will say in that connection I am not referring

1 exclusively to intervenor lawyers. I am referring to lawyers
mm 2 on both sides of these controversies.

3 And it just seems to me that there is no reason why
4 we should be, if you will, the pathfinder here; why we should be
5 the agency that says the judgment that has been made by the
6 federal courts, the judgment that has been made by other
7 federal agencies, is a judgment that really does not recognize
8 the public interest, and that we are going to arrive at a
9 different concept of the public interest and go forward in this
10 area.

11 For those reasons I would recommend that the present
12 policy be retained. I would add simply only again, that if
13 the policy is relaxed, I do hope that the Commission will make
14 it clear that space is the first consideration, because I
15 would really be extremely distressed if I were confronted with
16 a situation where, when we went out into the field, or the
17 Licensing Board went out into the field and there was a
18 federal courtroom available, required to eschew the use of
19 that federal courtroom simply because under the ground rules
20 which we would have to observe, we couldn't use the space,
21 and resort instead to what, from our standpoint would be clearly
22 less desirable quarters.

23 MR.YORE: This happened in Portland where we were
24 having the hearing in the Federal Courthouse, and of course,
25 the television people couldn't come in and they said, well

1 why don't you move, move from the courthouse and go someplace
2 where we can televise.

3 Well, we didn't buy that one.

4 CHAIRMAN HENDRIE: Howard, do you want to add
5 something from the side of one of the parties in these
6 enterprises?

7 MR. SHAPAR: I will be very brief on this.

8 The recommendation that was submitted in the paper
9 by Joe Fouchard was to be tried on a six-month basis. I am not
10 impressed with the slippery-slope argument, that we are
11 inevitably committed to this new policy, if we change it for
12 six months and can't back off. I think we can.

13 The one argument that convinces me more than any
14 other is the possibility of distraction. I think we can find
15 out. I think we can learn something in six months.

16 I would add one other thing. I think quite clearly
17 this is the wave of the future. State courts are beginning to
18 experiment with television, the British Parliament is doing it,
19 the House of Representatives is thinking of it, the FCC has
20 started it. There is no reason why the NRC has to be the last
21 one on line. We don't necessarily have to be the first one
22 either.

23 So, I would try it on a six-month basis. If there
24 are distractions we can back off, and I think we can back off
25 on the basis of demonstrated distractions.

mm
1 To the extent there is posturing, the judges know
2 how to deal with posturing; they make their decisions on the
3 record. This is nothing new. And there is posturing now in
4 terms of the written press conference. So, there may be
5 additional posturing.

6 If there are distractions at the end of six months,
7 then we simply back off and we give as the reason the fact
8 that the proceedings were being disrupted and the participants
9 were distracted.

10 I would not be the last agency. FCC has gone first.
11 I would try it on a six-month basis.

12 COMMISSIONER KENNEDY: Can I ask, if we would do this,
13 follow the caveat which you believe, Al, to be important, that
14 is if we are to do it, space availability comes first.

15 Is that not inevitably placing pressure on the
16 federal judiciary? Because what it is saying to the public is,
17 the NRC is fully prepared to allow television coverage with
18 the media; it is the federal judiciary with whom you have your
19 argument, not the NRC; if only they would let us do it we would.

20 Isn't that what they would say?

21 MR. ROSENTHAL: I had not thought about that.

22 Upon quick reflection I think that that is a valid
23 point, and that is what I would add as another reason to the
24 reasons I had previously assigned for not going this route.

25 I think that that possibility certainly does exist.

mm

1 CHAIRMAN HENDRIE: Jerry, would you comment?

2 MR. NELSON: You might be able to mitigate that by the
3 wording of the policy.

4 If it is the kind of policy that says NRC is in favor
5 of television cameras and points the finger at the judge, I
6 would think that would be unfortunate.

7 If it is phrased in terms of the rules about
8 camera coverage shall be the rules in effect by those who have
9 superintendence of the building, something of that nature, it
10 might be a little less direct.

11 We supported Joe's proposal on an experimental basis
12 with the notion that if bad things happen, we can say bad
13 things happened and we are therefore not going to continue it.

14 I would agree with Howard, that to do it for six
15 months does not commit us to do it for eternity.

16 I would strongly urge that there be no attempt by
17 gentle persuasion, pressure, or any form of communication, to
18 change the opinion of a single member of the federal judiciary
19 about what he or she wants to do in their respective courtrooms.
20 With that qualification we would support an experimental program,
21 worded, I hope, with a view to somewhat diminishing the problem
22 that Commissioner Kennedy properly points out.

23 There is that risk which I don't think we thought
24 about. But the more I think about it, the less I really worry
25 about it. Judges know that TV men are banging on the doors

mm 1 trying to get in all the time and they would probably just
2 take this as another opportunity by the industry to try to
3 get things changed. I don't think it is fair to blame the
4 NRC for following the rules of the land they are in. In this
5 case they are in, say the United States District Court in the
6 District of Massachusetts. It is not unreasonable to say that
7 we live by the rules of the chief judge here, to Station WBZ,
8 let's say.

9 COMMISSIONER KENNEDY: Could I ask if that is the case,
10 A, and B, it is also the case that both Mr. Yore and Mr. Rosenthal
11 indicate that by all odds wherever possible, that they would use
12 such courtrooms, what is this policy?

13 It is a nonpolicy.

14 MR. NELSON: No, it is a policy that where they
15 can't find one --

16 MR. SHAPAR: Well hearings have been conducted in
17 places other than federal courts.

18 COMMISSIONER KENNEDY: How often?

19 MR. YORE: Quite a few places where you can't find
20 courtrooms. I'd say 50/50.

21 MR. ROSENTHAL: It probably will not affect the
22 Appeal Panel to any great extent, because we have always been
23 able to find a courtroom, and it has usually be a federal one.

24 COMMISSIONER BRADFORD: Courtrooms tend to be located
25 in population centers. I guess nuclear plants sometimes aren't.

mm

1 MR. YORE: This applies also to state courts, too,
2 because we follow the rules of state courts as well.

3 MR. NELSON: If this produced pressure on the
4 judiciary in any way, Joe, why couldn't we say that the
5 experiment is a failure and terminate it?

6 Wouldn't that be one of the grounds?

7 COMMISSIONER KENNEDY: Failure would be on the part
8 of the judiciary, this is my point.

9 MR. SHAPAR: Only if you start on loose cases.

10 (Laughter.)

11 MR. NELSON: Well, it would be a failure as far as
12 the judgement goes. That's a practical view.

13 COMMISSIONER BRADFORD: I think you might have some
14 difficulty selling that one, Jerry.

15 MR. NELSON: I'm speaking seriously to the
16 problem Mr. Kennedy raised, which I think is a very fair observa-
17 tion; that is that there might be an indirect kind of pressure
18 brought by the network or the media upon the judges that would
19 say look, this is your policy.

20 If we see that sort of thing developing, can't we
21 get out from under?

22 MR. ROSENTHAL: You won't lose the case. What we will
23 lose is the courtroom, and that is what is the concern of mine,
24 that the judge is not going to decide cases, he is going to say,
25 look, when I offer my courtroom to the NRC, what I get is a lot

1 flak from the news media. And the simplest way out is just to
2 tell the NRC we cannot make the courtroom available.

3 MR.YORE: Which they have done.

4 MR. ROSENTHAL: I mean these judges have total
5 control over it. They don't have to offer us the courtroom.

6 MR. NELSON: You are dealing with individuals in every
7 district, too, Mr. Kennedy. And they are not at all fungible
8 to these purposes.

9 COMMISSIONER KENNEDY: I understand.

10 Of course if that were the case, and the policy were
11 to have -- the policy could be applied in cases other than
12 courtrooms, the fewer the courtrooms, the broader the application
13 of the policy.

14 CHAIRMAN HENDRIE: Well that sort of tilt to the
15 thing is just an inevitable situation.

16 It appears to me that a few things come through
17 clearly, at least to me. One of them is that whatever decision
18 the Commission might make in this matter, it seems to me that
19 we ought to make very clear we support the boards and the
20 Appeal Panel in their desire to have maximum use of federal,
21 state courtroom facilities for proceedings that are carried
22 on outside of their own headquarters in Bethesda.

23 I agree that there is a considerably improved
24 atmosphere to conduct the sort of proceedings that they have
25 to conduct when the surroundings are in a court building. I

mm 1 think it is a valid consideration and I think we ought to
2 support them strongly.

3 It does seem to me that we move towards a time
4 in which the technology of television broadcast coverage begins
5 to allow a comparable level of noninterference with the pro-
6 ceedings that presumably applies to print journalism. We
7 never contemplated that a meeting nominally open to the public,
8 a print journalist couldn't sit in any part of the auditorium
9 and make his notes and then go off. And as the technology,
10 use of natural-light cameras and so on improves so that the
11 physical distractions to the process become reduced, then I
12 think the distinction between television coverage and print
13 journalism coverage diminishes and it becomes harder and harder
14 to see it as a fundamentally different proposition.

15 Having floodlights, you know, and all of the people
16 carrying the floods back and forth and traipsing all over seems
17 to me an unendurable circumstance for the general practice of
18 licensing hearings, and I would not support that.

19 It does seem to me that fixed locations, natural-
20 light cameras are not an unreasonable proposition.

21 Let me see if I can locate a Commission consensus.
22 Maybe I am incorrect in sensing one, but let me see if I can
23 find one along a viewpoint, and then sort of creep up and see
24 where we are on an overall decision.

25 First, would you agree with me that we ought to

mm 1 protect in whatever policy we go forward with, the boards'
2 and the Appeal Boards' access to and use of federal and state
3 courtrooms?

4 COMMISSIONER GILINSKY: What does that mean?

5 CHAIRMAN HENDRIE: It just means that in whatever
6 policy we adopted we would make clear that the adoption of that
7 policy was by no manner or means intended to deny use of these
8 facilities to the board.

9 In particular, I have in mind that if you say I
10 would like to try some camera access for a while, I don't want
11 the boards to be pressured to move out of the courtrooms
12 because those at least in the federal system by and large they
13 can't use the cameras.

14 I think that pressure is bound to be exerted from
15 the people on the TV industry side who are interested in the
16 coverage, and I think the Commission would need by explicit
17 statement to provide protection to the boards against that
18 pressure. I think they would be unable to stand very success-
19 fully against it on their own without explicit Commission
20 support.

21 So what I have in mind would be an explicit state-
22 ment by the Commission on the question of whether or not
23 camera coverage is permitted in a given courtroom or facility,
24 is not a consideration for the boards to take into account in
25 deciding --

1 COMMISSIONER GILINSKY: Well certainly not during
2 this six-month period. It was only a trial anyway.

3 CHAIRMAN HENDRIE: Yes.

4 COMMISSIONER BRADFORD: I think I'm inclined in a
5 different direction.

6 Yes, federal, state courtrooms are good places to
7 hold hearings. I spent five years presiding over hearings in
8 gymnasiums, Holiday Inns, law school auditoriums, civic centers
9 within the very limited state of Maine, in which civic
10 demonstration is not as normal a means of demonstration as it
11 is in some parts of the country. And we didn't have much
12 trouble with it.

13 Now those places are not as good places to hold
14 hearings. But there are grades of difference. That is, an
15 auditorium is not a bad place to hold a hearing. A basketball
16 gymnasium leaves a little bit to be desired, but even that
17 isn't impossible.

18 MR.YORE: Especially when there is a game going on.

19 (Laughter.)

20 COMMISSIONER BRADFORD: My feeling is, first of all,
21 that the experiment is a good one.

22 But secondly, that to the extent that one does feel
23 that whatever increased public access television coverage
24 affords is desirable, that rather than to encourage the boards
25 to avoid it, what we ought to say is that some kind of good

mm 1 faith effort ought to be made to find a good facility to which
2 access was possible. Or, at the very least, that if we are
3 going to stay in the federal and state courtrooms, that I
4 guess as Howard put it, in the lightest possible and most
5 deferential possible way, the judges at least be asked whether
6 they opposed camera coverage in proceedings that are not
7 court proceedings.

8 I just think that to say that we are going to open
9 it, but that we are going to abide without even raising
10 the questions, by the rules of the local courts, in many
11 cases will result in noncoverage.

12 CHAIRMAN HENDRIE: Okay, so you -- that thrust is
13 somewhat different from the one that I would have proposed
14 both extended, and as a somewhat different direction.

15 So I will count you as not part of my consensus.

16 COMMISSIONER GILINSKY: Let me understand --

17 COMMISSIONER KENNEDY: You may count me with Peter.
18 This is precisely the view that I was expressing earlier. I
19 think it would be a nonpolicy in effect to say on the one hand
20 we want the widest possible use, but we certainly want no
21 effort made which would in any way inhibit the use of federal
22 and state courtrooms. On the other hand say, and we will abide
23 by whatever existing rules there are without even questioning,
24 when as Howard rightly suggests, certainly we could go in a
25 deferential way and inquire.

mm 1 If we haven't done that, it seems to me we haven't
2 tried to implement a policy at all.

3 MR. YORE: I think we have inquired, Commissioner
4 Kennedy, whether cameras can be used before and after, and
5 during recess time in federal courts. We have done that.

6 COMMISSIONER GILINSKY: Let me ask you this. What
7 fraction of the hearings right now is taking place in federal
8 courtrooms?

9 MR. YORE: Federal and state courtrooms. I would say
10 at least 50 percent.

11 But to break it down between federal and state, I
12 would have to check.

13 COMMISSIONER GILINSKY: But some of the states allow it?

14 MR. YORE: Some do, some don't.

15 COMMISSIONER GILINSKY: So you are really talking
16 about the federal courts.

17 MR. YORE: Quite a few state courts do not, though;
18 do not permit cameras.

19 COMMISSIONER GILINSKY: So perhaps a third of the
20 hearings would be in places where cameras are off limits?

21 MR. YORE: I would say --

22 COMMISSIONER GILINSKY: So, by going forward with
23 an experiment, basically, we would be capturing two-thirds of
24 the hearings, which seems like a reasonable experiment for
25 six months. We would just see.

1 CHAIRMAN HENDRIE: Okay. I think I see where we
2 stand on the courtroom question.

3 Now let me see if I can get a stronger agreement
4 with regard to the fixed-position, natural-light requirement.

5 COMMISSIONER BRADFORD: I have no difficulty with
6 that.

7 CHAIRMAN HENDRIE: Victor?

8 COMMISSIONER KENNEDY: I agree.

9 CHAIRMAN HENDRIE: I think that one, at least, is
10 clearcut.

11 Particularly in view of Vic's note that you capture
12 a fair part of the hearing market for potential coverage, do
13 you feel it necessary if we talk about a trial program --
14 the words, "the seeking out of facilities where coverage
15 would be possible"?

16 COMMISSIONER BRADFORD: Let me put that this way:
17 I would certainly prefer to do the trial program that simply
18 if we could not agree on this question, not to do it at all.

19 I would think we would want, though, at least to
20 say that in cases where the hearing would be held in the courts,
21 the question should be raised with the presiding judges,
22 obviously, tactfully.

23 COMMISSIONER KENNEDY: And with the full understanding
24 that whatever his judgment was, we would accept.

25 COMMISSIONER BRADFORD: My own preference would be

mm 1 also for a requirement that a good-faith effort be made to
2 secure a facility in which coverage were possible, and yet at
3 the same time that offered the advantages of a courtroom in
4 terms of something approximating similar decorum.

5 At least in some areas, for example, law schools
6 have facilities of that sort they might make available. Or
7 maybe you want to stay off university campuses after your
8 experience, Joe.

9 But there are other public facilities.

10 I suppose that is not absolutely essential, at
11 least during an experimental period. I think I would turn to
12 it if it turns out that in most areas the coverage had not
13 generated serious problems.

14 CHAIRMAN HENDRIE: I prefer to leave -- if you can
15 stand it -- I would prefer to leave it out in considering a
16 trial period.

17 COMMISSIONER BRADFORD: Leaving out even requests to
18 the judges?

19 CHAIRMAN HENDRIE: No. I think if Jerry thinks we
20 can keep from beginning to lose cases if the query is put in
21 a tactful --

22 MR. NELSON: If you mean that in every case someone
23 from the United States Nuclear Regulatory Commission is
24 supposed to go to the chief judge or the respective district
25 court, or the chief judge of the court of appeals and say,



mm 1 judge, won't you let the TV cameras in, in as diplomatic and
2 as gentle and as appealing a way as possible, I would advise
3 against that policy.

4 You are free to ignore that advice, if you wish.

5 It seems to me that the stakes of this agency with
6 the federal judiciary are very high, and arguably more important
7 than television cameras.

8 There are judges in this land who hold grudges, who
9 will remember that, who don't like the media, who get misquoted
10 all the time. There are other judges who will sit there ration-
11 ally and calmly and discuss the matter with you.

12 At the very least, give the people enough discretion
13 to stay away from "old Judge So and So" if they know that this
14 is going to send him up the wall.

15 Can't we do that?

16 Can't it be a case-by-case judgment?

17 MR. FOUCHARD: If you will give him the list, Jerry.

18 (Laughter.)

19 MR. ROSENTHAL: I think the other thing you ought
20 to bear in mind, is that these policies with respect to the
21 use of television cameras in particular courtrooms, these in
22 many instances -- I would say in most instances -- are not ones
23 that any single judge is empowered to put forth --

24 MR. NELSON: They would be in judicial conference.

25 MR. ROSENTHAL: -- or to hold back in the particular

mm 1 case.

2 I think it is really fair to say that to go through
3 the motions, I, as Jerry, would strongly counsel against it.
4 But we could go through the motions of politely asking the
5 judge to change his policy for our benefit, or for the benefit
6 of our relaxed camera policy. I think you ought to recognize,
7 however, that the likelihood that a policy would be relaxed
8 for our benefit in any particular court is extraordinarily
9 remote. So what we are really talking about is, we are either
10 allowed to use these federal courthouses, and if we do use them
11 there is no television; or -- and I would be horrified if it
12 came to this -- we will be put under some obligation to forego
13 the courthouse.

14 I just don't think that these requests in the real
15 world are going to get you anywhere. These are ingrained
16 policies, they are uniform, basically uniform federal policies
17 and the judges are not going to open the door to us simply
18 because we have chosen to be a pathfinder again in this area.
19 That is the real world, and I think you ought to face this
20 question in that light.

21 Would you disagree with me?

22 MR.NELSON: I agree with everything you say.

23 MR. YORE: I agree 100 percent, too, because I
24 think the judges out there are doing us a favor in letting us
25 use their courtrooms. If we change their whole system, they are

mm 1 going to be mighty mad.

2 COMMISSIONER BRADFORD: But they are only doing us a
3 favor within what may be the real world. But it is within the
4 preposterous proposition that they, paid by the taxpayers,
5 control facilities built by the taxpayers. This isn't General
6 Motors' boardroom that they built and they own, these are public
7 facilities. And if they aren't using them they ought to be
8 available to other public agencies.

9 MR. NELSON: That is good theory.

10 (Laughter.)

11 MR. FOUCHARD: May I suggest a possible compromise
12 here.

13 If it is determined first that a hearing should be
14 located in a federal court for various and sundry reasons, then
15 it seems to me that after that determination is made, we should
16 go to the judge or to his clerk and say, do you have any
17 objection to -- and if the judge says yes, that finalizes the
18 matter as far as I am concerned.

19 I think it is fair to say that the judges, federal
20 judges included, have permitted cameras into our hearings. I
21 have had them there.

22 MR. YORE: No, not in the hearing itself.

23 MR. FOUCHARD: In the hearing room. Right.

24 So cameras have been in federal courtrooms in the
25 United States, where they would not permit similar camera

1 coverage in their own proceedings. I mean I have had them
2 there, I know they are there.

3 COMMISSIONER GILINSKY: Suppose we go forward on
4 an experimental basis. We may decide at the end of six months
5 that it is really a good idea to have cameras there, it is
6 pretty valuable and more important than being in a federal
7 courthouse.

8 Or, we may decide that they are disruptive or
9 whatever, and we don't want them at all and it would be just
10 a problem.

11 And I don't know that we need to face all these
12 issues.

13 CHAIRMAN HENDRIE: I must say my own position on the
14 thing swings on whether or not we end up forcing the boards out
15 of these facilities. And if that is the price to pay for it,
16 then I am going to vote against allowing camera coverage.

17 COMMISSIONER GILINSKY: But you may change your mind
18 in six months.

19 CHAIRMAN HENDRIE: I agree with that. True.

20 COMMISSIONER KENNEDY: I don't see how asking the
21 clerk or the judge whether he would permit them, and then
22 abiding by whatever his answer is, forces us out of the
23 courtroom. I just can't conceive of this.

24 CHAIRMAN HENDRIE: Well it seems to me that if you have
25 some occasion to go to town, and there is a federal courthouse,

1 and you go there and it is the first time you are there, and
2 you ask the clerk, presumably -- you don't deal with the judge
3 but with his staff -- whether the policy would allow --

4 MR. NELSON: It all depends, Mr. Chairman. You can't
5 make these general, sweeping statements about these individuals.
6 You will get some that say, "They want to talk about cameras,
7 send them up. Let me see them. Come on in, Mr. Nelson, let's
8 discuss cameras. Who do you represent?"

9 CHAIRMAN HENDRIE: The Nuclear who?

10 (Laughter.)

11 MR. NELSON: "I'll tell you about cameras. Let me
12 tell you the last time. . ." And the guy has got you pinned to
13 the wall.

14 And if you want that stuff going on and you want to
15 run that risk, all right.

16 What I am trying to suggest is what the agency
17 does --

18 COMMISSIONER KENNEDY: What is wrong with that?

19 MR. NELSON: What is wrong with that? Nothing is
20 wrong with it --

21 COMMISSIONER KENNEDY: Is it that you don't wish to
22 be lectured a bit by the judge?

23 After all, we sit here getting lectures from you
24 regularly.

25 CHAIRMAN HENDRIE: He is worried about constructing

mm 1 an image in the federal judiciary that this agency is apt to
2 open their courtrooms one way or another, and whatever trace
3 prejudicial effect that has in some cases --

4 COMMISSIONER KENNEDY: I have greater faith in
5 the people who we will be proposing to be asking this question
6 of, than to suspect that the results of asking the question
7 would be, the judge would conclude that we were out to bust
8 his courtroom. I don't think that that is what our people would
9 propose at all.

10 MR. NELSON: There are two comments floating about,
11 and I would like to respond to both of them.

12 The first seems to deal with the matter of being
13 lectured to by federal judges. There is nothing wrong with
14 that, Commissioner. It has happened to me for over 17 1/2
15 years of federal service --

16 COMMISSIONER KENNEDY: That is why I was surprised.

17 MR. NELSON: -- ranging from criminal cases
18 arguing for the death penalty, to motor carrier railroad orders,
19 licensing orders of the Atomic Energy Commission, labor
20 disputes, environmental cases and litigation up and down the
21 line in the Circuits and in the District Courts.

22 I have taken plenty from the judges through the
23 years, and God willing, I hope to be around for many more
24 years to take it.

25 What is wrong about it is this: We have had a case

mm 1 pending in the Southern District of New York, sir, that raises
2 very important questions of preemption of the state's role in
3 regulating radiological health and safety which we contend is
4 our role, not the state's role.

5 If I have got to go in there and wrestle with that
6 judge about some camera policy and see him two or three months
7 later and try to argue a case in front of him, we have set
8 in motion a chain of events which may not be too helpful to
9 the advocacy on behalf of the United States Nuclear Regulatory
10 Commission.

11 COMMISSIONER KENNEDY: And you are carrying advocacy
12 to its extreme, extremely well, I would add.

13 The point is, and I keep coming back to this, I am
14 not suggesting anybody go in and hand wrestle a judge for the
15 use of his courtroom. I am asking only that we, in the
16 proper and deferential way, go to the judge or whoever it is,
17 in his court is the person to go to and say, A, we would like
18 to use this court for this proceeding that we have coming up,
19 it is an adjudicatory proceeding of the agency; and, B, if it
20 were possible to do so, we would like to have camera coverage
21 of the proceedings.

22 The guy says, you can use the courts, but over my
23 dead body will anybody bring a camera in here; I would conclude
24 the conversation has ended, except to say, thank you very much,
25 we really appreciate the use of your courtroom and we obviously

mm

1 will abide by the rules that you set for it.

2 COMMISSIONER GILINSKY: This was Commissioner Kennedy's
3 idea, anyway.

4 (Laughter.)

5 COMMISSIONER BRADFORD: I think that is a very fair
6 statement of my own views of the matter.

7 COMMISSIONER KENNEDY: I can't conceive of what is
8 wrong with approaching him that way.

9 If that is going to decide cases for us, I submit
10 that we are in a lot deeper trouble than I think.

11 COMMISSIONER BRADFORD: The only context we can put
12 it in perhaps is our own. If people came to us and said, can
13 we put television cameras, can we borrow your conference room
14 and put television cameras in, we might well say no, but I
15 don't think that the next time they came before us as advocates
16 that we might --

17 MR. ROSENTHAL: You might not give them your hearing
18 room again, however if the news media then got on the phone
19 with you and said, here is this agency, is using your hearing
20 room, and they are perfectly prepared to have the proceedings
21 televised, but you are blocking it.

22 I think that rather than go through that hassle
23 again, the next time around you would deny them the facility.

24 COMMISSIONER KENNEDY: Al, if that is the problem,
25 then I think that is what we need to discuss here. That is

1 precisely the question I raised before, is the results of what
2 we might do.

3 MR. ROSENTHAL: I think that is a possible result.
4 And I again get back to the fact -- I think what really is at
5 the bottom of all of this are two considerations: How important
6 you regard television in terms of informing the public; and how,
7 on the other side of this, how important you regard our having
8 access to courtrooms.

9 Now you may have just a different perception than we
10 do, but I think that our use of federal courtrooms will be
11 jeopardized by this policy.

12 You may not think it is important that we use
13 courtrooms. I think it is extremely important, Mr. Yore thinks
14 it is extremely important.

15 On the other hand, as I said at the outset, I don't
16 see that the public's needs, informational needs, are going to
17 be fulfilled by television.

18 So I would come down on a different balance than you
19 are coming down with. But I just hope that you appreciate the
20 fact that you go this route even on a trial basis, you are
21 putting into jeopardy our use of courtrooms. Now if that isn't
22 a matter of importance to you, well, we will live with what
23 you decide. But it is a matter of importance to us.

24 CHAIRMAN HENDRIE: Okay.

25 Now this session has run 32 minutes overtime. I do

mm 1 not perceive in the Commission a sufficient proximity to any
2 sort of consensus position that I could hope to move us toward
3 in the next minute or two.

4 I therefore declare this session --

5 MR.YORE: Mr. Chairman, could I have just one
6 statement please?

7 CHAIRMAN HENDRIE: I would prefer it to move. I
8 have two urgent matters to get to, Jim.

9 MR.YORE: Well, if you go ahead with this, we hope
10 that Joe will help us with manning the cameras at the hearings
11 and havea representatives there.

12 We are also short on blue shirts. We don't have any
13 of the attire to be appearing before cameras.

14 CHAIRMAN HENDRIE: We will discuss procedural assis-
15 tance next. I suppose you can file a claim under that.

16 (Laughter.)

17 MR.YORE: We hope that Joe helps us out.

18 MR. FOUCHARD: Happy to. Always have been.

19 CHAIRMAN HENDRIE: I would like to move the
20 Commission immediately to discussion of the next subject.
21 This concerns the procedural costs that participants have in
22 Commission proceedings, and is brought to us with some urgency
23 in the sense that we need to decide whether or not the
24 Commission is going to offer some procedural assistance,
25 transcript making and service and the like to participants in

mm 1 the S-3 hearing.

2 This is moving forward, if we are going to do
3 anything for people in the S-3 hearing, we need to make that
4 decision and get it done and underway. And if we are not, it
5 probably would be helpful to the parties to have that clear so
6 that they don't move ahead and engage in the enterprise if they
7 feel they really can't afford it without assistance.

8 There is, at the same time before the Commission,
9 a paper dealing with the general question of procedural assis-
10 tance to parties at proceedings in all Commission proceedings.

11 It has been requested that we have at least a summary
12 briefing, and in view of the time it will have to be a summary
13 briefing on that general proposition to provide a context for
14 the Commission's decision on assistance to the S-3 participants.

15 I must warn you that there is yet one more
16 matter on the Commission's agenda this morning, and that I
17 intend to turn to that matter at whatever stage this discussion
18 is in at a quarter of twelve. I would hope we could decide
19 one way or another with regard to the S-3 help before we get
20 to the time deadline. Otherwise we will adjourn for that.

21 Now, do we have someone who would like to talk to
22 us about the general proposition?

23 Jim, I guess in a pretty summary fashion, let's then
24 try to put S-3 into place, a specific proposal against that
25 background, and see where we come out.

mm

1 MR. KELLEY: I will try to summarize briefly the
2 thrust of what we had to say in our paper last summer. It is
3 a matter of talking about different kinds of assistance and
4 then deciding, given those different kinds of assistance, who
5 do you render it to; everybody, or some smaller group.

6 And we addressed four kinds in that paper. One is
7 the matter of in-house copies of filings. Our current rule
8 requires everybody to file an original and 20, 20 total.
9 When you come in with a motion, there are 20 copies, under the
10 rule. And there are costs of reproduction associated with
11 that.

12 And so the possibility of assistance here is just to
13 say file an original and two, and we will run our machine and make
14 copies. This is for internal distribution, essentially.

15 The second category is transcripts in hearings.
16 Now again it can be a rulemaking, it can be adjudication. The
17 thrust of our earlier paper was towards adjudication. And the
18 transcripts are most useful, I think, in adjudicatory context
19 because you have an ongoing hearing day after day and
20 participants, it is helpful to them to have a transcript before
21 the next day starts so that they can review the testimony
22 and prepare questions and staff out the case.

23 So the idea there was the possibility of free
24 transcripts to participants.

25 And then the third category was the matter of service.

mm 1 Here you are talking essentially mailing costs and the actual
2 process of stuffing envelopes and whatever else associated
3 with that.

4 And here the idea would be that the parties would
5 send their filing to us and the secretary here would Xerox
6 and mail to everyone on the service list.

7 There there is a separate problem that is a serious
8 problem. You build in some delay. And the reason is because
9 you use the mails twice.

10 Now there is a fourth category we didn't make a
11 recommendation on. It is not an urgent, immediate problem,
12 and that is the idea of consideration of free security
13 clearances, which run about \$1000 apiece, to people who want to
14 litigate an issue involving classified information.

15 We did not make a recommendation on that for various
16 reasons set forth in the paper.

17 In terms of costs, the Secretariat did do a survey
18 of cases in 1976 and came up with what is conceivably some
19 rough estimates, but I think they are adequate ballpark
20 estimates. The numbers in our paper assume that the assistance
21 we are talking about would go to everybody, not just needy
22 people, however you are going to define needy.

23 Talking about the category assistance to everybody,
24 the reduction from 22 is a part of a larger figure which is
25 the service number. Roughly, maybe this would run \$75,000 a

mm
1 year to Xerox these filings and make the other 18 or 20,
2 whatever we need, internally.

3 The free transcript proposal -- and this is a free
4 copy to every party to the various proceedings, is in the
5 neighborhood of \$250,000 a year.

6 And the service proposal -- this is serving every-
7 body's papers, is in the neighborhood of \$150,000 a year.

8 So you are talking, if you went with all three, you
9 are around possibly, a little under half a million dollars a
10 year.

11 Now there are various fine cuts one can make, but
12 the biggest cut would be if you decided on some definition of
13 need, to only give it to people who are determined to be in
14 need of this. The idea being that their participation would
15 somewhat be impaired if you didn't give it to them.

16 And again, very roughly, I think you can cut those
17 numbers about in half if you talk about giving it only to the
18 needy as opposed to everybody. In a licensing case, I don't
19 see how a utility that has to show financial qualifications
20 can, at the same time, plead lack of funds to buy a transcript.

21 There are certain other participants in an antitrust
22 case, and I think participants that can probably afford it.
23 Interested states could afford it.

24 What you are talking about are intervenor groups.

25 COMMISSIONER KENNEDY: Interesting, we had some

mm 1 states that claimed they couldn't.

2 COMMISSIONER BRADFORD: That is really a decision of
3 priorities, though. The Attorney General's Office wants to spend
4 the money somewhere else.

5 COMMISSIONER KENNEDY: So it is in most cases.

6 MR. KELLEY: In the need area, very brief, I'm
7 trying to hold the time down -- I think what you have to realize,
8 if you establish a need test, there has to be some consideration
9 of, are you going to litigate and argue about this, or just take
10 the person's word for it?

11 Our original suggestion was, it really didn't get
12 to that because we recommended giving it to everybody.

13 In the S-3 paper that comes after that, our office
14 leans towards a rather simplified showing of need, and that
15 would contemplate really that you are not going to argue about
16 this. Somebody comes in and says that they need it, it is a
17 practical matter they are going to get it, subject to some sort
18 of control of abuse power of the board.

19 But that is the way we were leaning in that regard.

20 Those are, I think, the highlights of what we had to
21 say. We did recommend, our office did recommend in favor of
22 cutting the copies from 20 to 2, providing free transcripts
23 with the subsequent suggestion possibly a cutback to the
24 certification of need people rather than everybody.

25 And the sticky problem of delay in adjudication, we

1 said in the first paper, we said we would look into this some
2 more because it seemed to us there may be some big bulky papers
3 that could cut down on costs, we could serve them, but not
4 everything. And that way your delay factor would not be very
5 significant.

6 We have done some looking into that.

7 Rich, what kind of paper do you think we might serve
8 without causing delay?

9 MR.MALLORY: The ones we ought to serve would be
10 bulky papers where our service would help people, but papers
11 that aren't filed very often so that there wouldn't be -- we
12 wouldn't be delaying the procedure very often.

13 It seems that testimony, which is filed several
14 times during a proceeding; proposed findings of fact, proposals
15 of law, which are filed once at the end; motions and answers
16 on summary disposition which usually aren't filed at all,
17 but are very bulky when they are, would be the kind of things that
18 could be served without delay, and a large number of papers of record.

19 MR. KELLEY: So we haven't finished looking at
20 this, we are in the process.

21 If we find on the basis of a study of some dockets,
22 that you could serve half the papers without any delay, it
23 seems to us that would be worth doing.

24 If that review suggests that you are going to build
25 in delay, except for a few papers, then maybe it isn't worth

mm 1 doing and we still have to individual --

2 MR. SHAPAR: We dug up a few facts on this that
3 we can give you briefly in a few seconds.

4 Jim Murray did the work.

5 MR. MURRAY: Well I think it is of interest in the
6 S-3 proceeding that we have been through thus far, if you
7 assume three extra days which is kind of optimistic for mailing,
8 you would have three extra days for the secretary to have to
9 mail them as well as receive the papers.

10 You would have one day for the secretary to reproduce
11 and mail the papers, and I regard this very optimistic since
12 some of the filings run into hundreds of pages. And I think
13 if you do file papers for people they will be less inhibited
14 in the length of their papers.

15 So you would have four days added to every service
16 deadline. Thus, in the S-3 proceeding thus far, over two
17 weeks of additional time would be taken because there is a
18 deadline for submitting testimony, a deadline for proposed
19 questions, a deadline for objections and a deadline for
20 answers to questions, a total of 16 days which, depending on
21 how seriously you view the time constraints, is involved.

22 This wasn't mentioned in the papers before you on
23 the S-3.

24 MR. KELLEY: This may shift us up to S-3. I sort
25 of tried to summarize briefly what we had to say. Now Jim has

mm 1 got some numbers on S-3, if you want to shift to that.

2 CHAIRMAN HENDRIE: Why don't you go ahead with that.

3 MR. SHAPAR: These numbers, I think, would be typical
4 of any proceeding, the time delay, which is the only point we
5 had to bring up.

6 CHAIRMAN HENDRIE: Now, with regard to the S-3,
7 let's talk about that one.

8 MR. KELLEY: Leo had the lead on that paper.

9 Do you want to summarize the situation with S-3 and
10 what you are recommending?

11 MR. SLAGGIE: Well, the rulemaking is a bit different
12 from the adjudicatory procedures in some important ways.
13 There are many more participants. Generally we have something
14 like 34 participants in the S-3 rulemaking, so the service burden
15 of course can be substantial for those who have to send out
16 these papers.

17 Also, the participants tend to be scattered around
18 the country rather than localized as they might be with a
19 specific installation that you are considering.

20 So this has an effect on the need for transcripts,
21 for example.

22 With regard to a service delay that you have just
23 mentioned, because there are so many participants in a rulemaking,
24 we have not advocated for S-3, that everybody be given
25 this free service; only those that would come in and certify

mm 1 need.

2 We believe there would be no more than ten of the
3 participants that would come in and sign an affidavit to the
4 effect that they need service and free transcripts.

5 Under these circumstances, not all of the filings
6 will be delayed by the need for mailings, only those from say
7 the ten people in the free service.

8 Because of this, I don't think it would be necessary
9 to allow quite so much time between filings to allow for this
10 extra delay. For example, at the beginning of a filing period,
11 presumably the majority of the participants who would not be
12 receiving free service would send all their material out to
13 everybody and you would be getting that to respond to right at
14 the start of the filing period, so you have got something to
15 work on, in a short, for the three days while you are waiting
16 to hear, get the filings from people who are getting free
17 service requirement.

18 Also at this stage in S-3, I believe Jim, we are
19 down to how many more filings?

20 MR. MURRAY: I think we have got two more.

21 MR. SLAGGIE: Two more filings. Okay.

22 COMMISSIONER KENNEDY: Would the 16 days be on
23 each of those filings?

24 MR. MURRAY: Four days.

25 MR. SLAGGIE: So I don't think at this stage any

mm

1 delays would be associated with the service would be
2 significant.

3 Also, as far as making a distinction between who
4 is needy and who isn't, it is probably more important in a
5 rulemaking where you have so many participants, rather than
6 give free service out to 34 people, you could give them out
7 to 9 or 10.

8 As far as the need for free transcripts, I would
9 agree with Jim that the need for transcript is probably most
10 acute in an adjudicatory procedure where you have an ongoing
11 cross-examination and you want to see exactly what somebody
12 said yesterday so you can ask them a question today.

13 Now we are not doing that in S-3, so there will be
14 questions by the Hearing Board, but if there is going to be
15 cross-examination, which the Commission hasn't yet decided, it
16 would be in a subsequent hearing later. However, I believe it
17 is still open for participants to make suggestions to the
18 Hearing Board for questions to be asked while the proceeding
19 is going on. The Hearing Board hasn't yet set up a specific
20 mechanism, but the kind of thing that I would anticipate would
21 be that the Board, at the conclusion of a day, would say, if
22 you have any questions to suggest that you want the Board to
23 ask on what you heard today, suggest them now and maybe we
24 will ask them tomorrow.

25 Now, in order to keep up with something like that

mm 1 it is certainly helpful to have a transcript in hand.

2 It is also true that the informal methods used in
3 an adjudicatory hearing where, I believe the Staff has an
4 extra transcript that can be shared out, is not going to do
5 work nearly so well when you have 9 or 10 people who, presumably,
6 will need transcripts, that don't have them and are somehow
7 trying to share one or two transcripts that may be around. So
8 here I think you kind of have a cancellation, the need for the
9 transcript is not quite so acute because you are not cross-
10 examining right then. On the other hand, it is much harder to
11 get your hands on one because there are more people who are
12 trying to share the limited number of extra transcripts available.

13 And finally, as far as the specific S-3 proceeding
14 goes, the Courts have stressed the need for ventilation of all
15 the issues. The persons who are most likely to ventilate the
16 issues in a way that would oppose what the Commission has done
17 in the past on this, would be the persons who are requesting
18 assistance. And I think it puts the Commission in a better
19 light to be giving these people the maximum opportunity to
20 participate.

21 It seems that the availability of free transcripts
22 and assistance with service would further that aim in the S-3
23 proceeding.

24 MR. MURRAY: Just a couple of points.

25 In the first place, there is no mechanism for

mm

1 questioning after a day's proceedings that I am aware of.
2 And in view of the guidelines laid down by the Commission for
3 this proceeding, personally I would object to it, if that would
4 be all right.

5 Number two, when we provide free service for a single
6 participant in a proceeding, however many there are, that is
7 going to delay it a minimum of four days for every filing
8 period, unless, of course, you throw away the simultaneous
9 filing requirement, which gives somebody an advantage.

10 CHAIRMAN HENDRIE: What is the simultaneous filing
11 agreement?

12 MR. MURRAY: When a deadline for filing something
13 occurs, everybody has to meet that deadline, unless good cause
14 is shown for not doing so.

15 This way one party would file it with the secretary
16 and nobody would get his papers -- anybody else would get his
17 papers for four more days. So he wouldn't have the benefit
18 of whatever it was he was filing for an extra four days. And
19 an opportunity to respond would be reduced by that period.

20 CHAIRMAN HENDRIE: Well I think you end up having
21 to build in allowance for that.--

22 MR. MURRAY: Yes.

23 CHAIRMAN HENDRIE: -- serving time.

24 MR. MURRAY: If you can tolerate, as an example, in
25 the S-3 proceeding, 16 additional days to where we are now, we

mm 1 just all filed our responses to questions, there is no problem.

2 It is a question of timing, I just wanted to point
3 out, because it didn't seem adequately ventilated that there
4 was a significant -- depending on how you look at it -- time
5 penalty with this approach. It may be worthwhile.

6 MR. SLAGGIE: In S-3 where we have only a limited
7 number of filings remaining for this specific procedure, these
8 would be --

9 MR. MURRAY: Limited number of filings. It has
10 been my experience that of all of the rulemakings
11 on record that we have had thus far, that filings occur weekly;
12 people file motions and motions need to be responded to.

13 So I don't have any sanguine hope that we would be
14 able to avoid, say 20 or 30 more filings before the proceeding
15 is over.

16 MR. NELSON: Is the 20 copies rule in effect in that
17 proceeding, Jim?

18 MR. MURRAY: I don't believe so.

19 It is certainly not the adjudicatory rule on 20
20 copies does not apply here. But everybody has to serve everybody
21 else, and when there are some 35 or so participants, you have
22 got to make 35 copies.

23 MR. SHAPAR: Of course this whole discussion has been
24 about the legislative phase of S-3.

25 The Commission has held up the possibility of moving,

mm

1 possibly, into an adjudicatory phase. I would assume that
2 whatever rule is urged with respect to the adjudicatory phase --
3 for the legislative phase, -- would apply just as well for the
4 adjudicatory phase. But this factor needs to be considered in
5 that context as well.

6 COMMISSIONER KENNEDY: Could I ask, Jim, if you are
7 talking -- you say you are not sanguine that we won't be
8 facing perhaps 20 more filings.

9 How many more days delay does that imply? 4 days
10 each? That is 80 days of filings?

11 MR. MURRAY: At a minimum, Commissioner Kennedy.
12 Some of these filings, as I say, we filed something over 600
13 pages in response to questions, and we had filed upon us on
14 that same day, something more than that in response to questions.

15 These things have to be digested and responded to
16 within a time period. If the secretary can reproduce 1000 pages
17 or whatever and turn it around in only one day, then it will only
18 be 4 days of delay, assuming a 3-day mailing period. If not, --

19 COMMISSIONER KENNEDY: That is 4 days for each of
20 those filings?

21 MR. MURRAY: Yes, sir.

22 COMMISSIONER KENNEDY: That is 80 days.

23 MR. MURRAY: 4 times 30.

24 COMMISSIONER KENNEDY: Or, 120.

25 MR. MURRAY: I don't mean that every filing, every

mm 1 motion would have to be responded to by every party, but --

2 COMMISSIONER KENNEDY: But if it has to be responded --

3 MR. MURRAY: But the notion that we have all finished
4 with our filings in the S-3 proceeding, and at least that one
5 we can try it in, I'm not as certain that that is the case.

6 COMMISSIONER KENNEDY: If I understand procedurally what
7 occurs, if any party desires to respond, the time must be
8 provided.

9 MR. MURRAY: That's correct.

10 COMMISSIONER KENNEDY: So that one party's response
11 will consume the time.

12 MR. MURRAY: That is correct, but it may not, for
13 example, inhibit the ongoing hearing, let's say, if it is just
14 a motion to do something with respect to the hearing. It may
15 not inhibit continuation of the hearing. So that in that sense
16 it might not delay things.

17 And I would agree that maybe those sorts of filings
18 have come to near an end.

19 CHAIRMAN HENDRIE: Let's see, the provision of
20 transcripts is not a delay question?

21 MR. MURRAY: No, sir.

22 MR. SLAGGIE: I would like to point out with
23 regard to the delay question--

24 CHAIRMAN HENDRIE: The serving business, taking 2
25 copies instead of 20 and cycling it ourselves, does involve

mm

1 this delay, and the other thing --

2 MR. MURRAY: No, that's a bit different.

3 Those 20 copies are for internal use and they are
4 generally not the kind of thing that have to get to people
5 immediately. They are informational copies rather than action
6 copies.

7 MR. KELLEY: It is also not in S-3, right?

8 MR. MALLORY: Yes.

9 MR. KELLEY: 20 and 2 is not in this proceeding, not
10 in S-3.

11 MR. MALLORY: That reduction would occur in
12 adjudication. In adjudication the party also serves every party;
13 he would serve the Staff, the Applicant --

14 CHAIRMAN HENDRIE: I am just trying to sort out the
15 several proposals, the several legs to the support table; the
16 ones which have delays, eventual delays associated with them
17 and those that don't.

18 It seems to me that transcripts don't, these filings
19 do.

20 What was the other thing?

21 MR. MALLORY: The reduction of 20 copies to 2,
22 that would be filed on the Secretary in adjudication.

23 CHAIRMAN HENDRIE: That has some delay built into
24 it also?

25 MR. MALLORY: No, I don't think it does. The party

mm 1 also serves all the other parties in addition to those 20
2 copies. Every party gets his copy immediately. Reducing
3 20 to 2 means that informational copies that normally circulate
4 around in the Commission and wind up at various offices would
5 be delayed, but that would not cause the hearings to be delayed.

6 CHAIRMAN HENDRIE: Well, if it cuts down on time for
7 people's -- if it cuts down on the capacity to respond until
8 you have gotten copies reproduced and in hand, why then --

9 MR.MALLORY: But the people who are responding,
10 it will be served directly outside of the Secretary's reproduc-
11 tion papers.

12 In other words, there are two separate proposals.
13 One is reduce the copies from 20 to 2; another one is that we
14 reduce the copies even further by not requiring people to serve
15 them on the parties.

16 The first of those does not delay the proceedings,
17 the second does.

18 MR. SLAGGIE: I think it is helpful to keep in mind
19 that the significance of delay in rulemaking is perhaps
20 different from the significance of delay in a licensing
21 proceeding. In a licensing proceeding, one of your goals, of
22 course, is to get the license out. In a rulemaking proceeding,
23 your overall goal --

24 (Laughter.)

25 MR. SHAPAR: I don't think that S-3 is the best

mm 1 example of that proposition with an 18-month deadline.

2 MR. NELSON: The question is, had it been done right
3 years ago in the Atomic Energy Commission, it would have been
4 over already, but let's not go through that.

5 Mr. Chairman, on the point of delay, there is always
6 the possibility which we tried to envision in the draft, of
7 giving some discretion to the Board to control this, so that
8 if there really are these 20 filings and the potential for 80
9 days of delay, and the Hearing Board sees it coming, they
10 could stop it, say the proceeding is dragging, this is taking
11 too much, this is not the kind of a pleading that requires
12 service in our judgment, or any other thing in the discretion
13 of the Board.

14 I merely suggest that might be one way to have an
15 escape valve if delays became inordinate.

16 MR. MALLORY: I think another way is when the
17 rulemaking begins to look more like an adjudication, to use
18 the procedures we have proposed for adjudicatory hearings.
19 When there are motions that are more typical of adjudication
20 and are typically short, I believe they would not necessarily
21 be served. It is the 200-page testimony.

22 MR. MURRAY: There is no provision for oral motions,
23 for example, in the S-3 proceeding. And if it is patterned
24 after the GESMO, which it is seeming to be, they won't let the
25 lawyers talk very much in that hearing room, so it is all going

mm 1 to be done by paper.

2 And it has not been my experience, necessarily,
3 that motions are all that short; 30, 40 pages.

4 MR. MALLORY: Would you compare them to the
5 testimony?

6 MR. MURRAY: Short, compared to the testimony, yes.

7 MR. MALLORY: So that we could help people substan-
8 tially by serving testimony even if we decided that motions
9 required too quick a turnaround.

10 MR. MURRAY: I wouldn't characterize how helpful
11 that would be. But it would be helpful.

12 CHAIRMAN HENDRIE: Let's see, the delay is an
13 unfortunate aspect.

14 How much of the money turns out -- the financial
15 assistance turns out to be in that?

16 MR. SLAGGIE: In S-3?

17 CHAIRMAN HENDRIE: No, in the portion of the
18 assistance which is involved with delays in the proceeding.

19 Is it 5 percent, or 95 percent that makes the
20 difference?

21 MR. SLAGGIE: Well, the cost is probably, oh
22 roughly, half. I would say the cost splits, free transcripts
23 and free service. At this stage it is a little hard to estimate
24 because many of the big filings are already past.

25 In our memorandum we gave you some figures which I

mm 1 got from the docketing service branch to the effect that it
2 would cost about \$4000 to provide free service for all
3 participants, not just the 9 or 10 that we would expect would
4 have requested it.

5 But since that time, filings have gone by. We estimate
6 now no more than 2000, and a similar figure for the non-delay
7 part in the free transcript.

8 CHAIRMAN HENDRIE: There is one other way you could
9 do it. Rather than our taking filings from the parties, making
10 copies and mailing them out, would be to simply provide some
11 reimbursement or partial reimbursement for the parties for
12 such a mailing.

13 MR. KELLEY: You may run into a legal problem there.
14 You are on the head of a pin, perhaps. I can see that
15 functionally they appear to be the same.

16 CHAIRMAN HENDRIE: I think we would run into the
17 court case --

18 MR. KELLEY: There would be an objection that this
19 is funding intervenors. In a sense it is, you are handing
20 out money.

21 MR. NELSON: I am not sure of the postal aspects of
22 this. We could send them out in franked envelopes and try
23 to bill people for those expenses. That may even be a
24 violation of the franking privilege.

25 CHAIRMAN HENDRIE: I wasn't thinking about franks.

mm 1 I was thinking about letting them mail the thing and let
2 them come in and say, my postage bill was \$100; say all right,
3 we will pay half, all or whatever.

4 But I see you may indeed run back on the court
5 case as a matter. We may not have much luck there.

6 MR. KELLEY: I hate to admit that the legal answer
7 could be different between the two, because functionally they
8 are the same thing. But I still think somebody would raise
9 the question.

10 MR. NELSON: Well the NRC itself has thought that
11 there was a distinction.

12 CHAIRMAN HENDRIE: Peter, comment?

13 COMMISSIONER BRADFORD: In terms of the practicality
14 of the transcript, maybe I am thinking less now of the S-3 than
15 in general, but rather than making free transcripts all the
16 time, is there something to be said for a rule that says that
17 in cases where we are convinced they are necessary, free
18 transcripts, but no more than three or four to any one
19 proceeding?

20 MR. KELLEY: I suppose it becomes a question of
21 whether it is worth the argument in a given case.

22 Somebody could say, you should have given me a
23 transcript, my participation was impaired, therefore throw out
24 the licenses. Is it worth hassling over that, or give them
25 to everyone?

mm

1 COMMISSIONER BRADFORD: If they don't get one now,
2 they can make that argument, truly, if there were 3 or 4 -- you
3 wouldn't make them -- if you did that, you had 10 people who
4 thought they deserved them, presumably they would be
5 generally available on a schedule the parties worked out among
6 themselves -- you wouldn't say that 4 could get them --

7 MR. KELLEY: I thought you were distinguishing, Joe
8 gets them, but Harry doesn't. You are saying 3 or 4 that would
9 be available?

10 COMMISSIONER BRADFORD: To the parties.

11 MR. NELSON: There is still a point to be made, Jim,
12 that there may be an argument well, why did we not get it in
13 this case when other people got it in case A?

14 It is no answer to say you weren't entitled to it
15 in the first place, so it is just an act of administrative
16 grace. You are not entitled to an appeal from a criminal
17 conviction except insofar as Congress gives you one, but when
18 they give it it has to be done fairly, there can't be abuses
19 of discretion and so on and so forth.

20 There is plenty of doctrine in the law for things
21 for people that weren't originally entitled to, but once they
22 get in there, had to be done right.

23 COMMISSIONER BRADFORD: But the whole point you are
24 making implies that whether you give them to everybody in a
25 given proceeding or --

mm

1

MR. NELSON: Goes to the picking of the case.

2

MR. BRADFORD: -- or 4 out of 10.

3

4

The only way to get around that is to give them to everybody at every proceeding?

5

MR. NELSON: Or 3 out of 4 in every proceeding.

6

7

8

9

I thought you had two ideas, Commissioner; one that the cases would be picked in which you do it; and two, when you said you would do it you would make, say 3, instead of for everybody.

10

COMMISSIONER BRADFORD: No, just the second point.

11

MR. NELSON: Just the second point.

12

13

14

15

I don't see too much trouble with that. There would be a lot of argument between the people as to who gets what copy and when it is available and so forth. That would be costsaving.

16

17

18

19

COMMISSIONER BRADFORD: As to the other point that you make, are you saying that if we do it in S-3, the way we get out of doing it in all those rulemakings, is to say that S-3 was a pilot?

20

21

22

23

24

MR. NELSON: It is not only a pilot, it is unique because of the subject matter; because of the language of the Court of Appeals calling for this ventilation; the criticism that the Court made of the Agency's prior proceedings. In our view the case is distinguishable, yes.

25

Now that will not preclude people from arguing, if we

mm

1 did it in S-3, please you did it for me in S-3, do it for me
2 in this case. The potentiality is always there.

3 We believe it is distinct..

4 COMMISSIONER KENNEDY: Has that arisen as the
5 result of the GESMO experience?

6 Has that argument been made?

7 MR. NELSON: Only in this case, I guess.

8 Do we know of any other case, Leo, where people
9 have pressed for procedural assistance other than S-3?

10 MR. SLAGGIE: In GESMO.

11 MR. NELSON: I mean as a result of GESMO.

12 MR. SLAGGIE: This is the only one I know.

13 COMMISSIONER KENNEDY: Have they cited GESMO as
14 a basis for their argument, you did it in GESMO, why not do it
15 here?

16 MR. SLAGGIE: No, nobody recited that.

17 COMMISSIONER KENNEDY: Okay. That is significant.

18 MR. MALLORY: I think one problem with making a
19 small number of transcripts available in rulemaking, is that
20 when the hearings are over and people scatter back across the
21 country, no one who hasn't bought a transcript, any longer has
22 access. You don't have the opportunity to have one available
23 when you prepare your arguments, unless you plan to stay in
24 Washington where the transcript is, and incur the costs of
25 staying or flying back more times. So that there is that

mm 1 difference when you make them available on less than one per
2 person.

3 COMMISSIONER BRADFORD: Now these parties, what are
4 they doing now? They are not getting next-day transcripts.
5 You are also saying that they just simply aren't getting
6 transcripts at all except insofar as they may go to a Public
7 Document Room?

8 MR. MALLORY: Yes, that's right.

9 MR. SLAGGIE: A Public Document Room has one, and
10 you have certainly nine or ten people that would not have
11 their own.

12 COMMISSIONER BRADFORD: And each Public Document
13 Rooms has one, or is it just the one here?

14 MR. SLAGGIE: Just one here.

15 MR. MALLORY: In rulemaking. Adjudications there is
16 one here and where the hearing is held.

17 MR. SHAPAR: The local Public Document Room and the
18 one here in Washington.

19 MR. MALLORY: Now I think there is probably more
20 disagreement over whether we might serve people documents and
21 the problems that delay causes there, than over transcripts
22 and perhaps over reducing copies from 20 to 2.

23 MR. MURRAY: We don't disagree with that.

24 MR. SHAPAR: I don't think there is any disagreement
25 on the transcripts. The only disagreement, I think, is on the

mm 1 service.

2 MR. NELSON: You are talking about in S-3 or
3 generically?

4 MR. SHAPAR: Generically.

5 MR. NELSON: How about reducing from 20 to 2?
6 That always seemed to me to be a good candidate.

7 MR. SHAPAR: Who are the others within the Agency
8 that are getting the 18 copies? That hasn't been brought out
9 up until now.

10 MR. NELSON: Various offices.

11 Kathy?

12 MS. MASON: It is Chase's slots, and I couldn't
13 tell you off the top of my head. It is an extra copy to ELD,
14 maybe a copy to you all, an extra copy to the Licensing Board,
15 an extra copy to Appeal Board that gets served.

16 MR. SHAPAR: The reason for that question was,
17 whether or not the people receiving them participate in the
18 responses. If they do, then maybe in effect it is delay time.
19 If they don't, there is none.

20 MR. MURRAY: Sometimes it is the engineer down the
21 line who is really working on the problem and needs to have a
22 copy and the only copy he can get is the one counsel has, and
23 counsel is using it. If that is the case --

24 MR. NELSON: I just want to point out there is a
25 distinction, because that is a requirement we impose for our

mm

1 convenience. That is different from helping the intervenors
2 push their case.

3 MR. MURRAY: True.

4 MR. SHAPAR: That is a point well taken.

5 MR. NELSON: This is a problem we are fashioning to
6 help ourselves.

7 MR. SHAPAR: I certainly don't view it in the
8 same dimension as the service problem.

9 MR. NELSON: To me it is a little easier.

10 MR. SHAPAR: Yes. Me, too.

11 MR. MALLORY: You also don't have mailing time.

12 There is the reproduction time, but the mailing --

13 MR. SHAPAR: That's right. That is why it is not as
14 serious a problem.

15 MR. SLAGGIE: One more question with regard to
16 delay.

17 You do expect a posthearing statement to be filed
18 by most of the participants?

19 MR. MURRAY: It is in the rules for the proceeding.

20 MR. SLAGGIE: Okay, now there would be -- is there
21 any potential for delay in providing free service on that
22 statement, which is likely to be fairly bulky.

23 MR. MURRAY: Four days at that stage is not going to be
24 that significant.

25 MR. SLAGGIE: At that point there doesn't seem like

mm 1 there is any significance. So it would be at least possible
2 to offer free service for that major filing without any delay
3 whatsoever.

4 MR. MURRAY: That would only impinge on the person
5 with whom it is filed, which would be the Commission.

6 MR. SHAPAR: I don't think the Commission necessarily
7 wants to be in a position, though, of picking and choosing
8 between which filings are going to be handled in a certain
9 way and other filings in another. That is not the best position
10 to be in.

11 MR. NELSON: Well the Hearing Board has the
12 acquaintanceship with the case to make an intelligent judgment
13 about that, I would think.

14 MR. SHAPAR: Well, I would suspect that if you
15 hand out discretion on an item like that, that it is only
16 going to be exercised in one manner.

17 COMMISSIONER KENNEDY: Uniformly --

18 MR. NELSON: Fairly.

19 MR. SHAPAR: Fairly.

20 COMMISSIONER KENNEDY: --and uniformly.

21 (Laughter.)

22 MR. SHAPAR: In the interests of justice.

23 COMMISSIONER BRADFORD: Supposing the standards
24 against which discretion were made, were that it not be
25 applied in cases that would delay the proceeding, but would

mm 1 be in all others, the only discretion then is the determination
2 whether or not delay is --

3 MR. SHAPAR: Yes.

4 MR. MALLORY: If it is a decision that takes time,
5 then that will add delay in itself, if it has to be considered
6 whether we service this paper or not, and if it there is any
7 substantial time involved.

8 MR. SHAPAR: You would be getting arguments too,
9 Commissioner, about whether or not it was likely to delay or
10 not, you can count on that.

11 CHAIRMAN HENDRIE: Did you comment specifically on
12 the S-3 proposal, other than sort of noting the delay problems?

13 Are you for it or agin it on balance?

14 MR. SHAPAR: Well, I would take into account there
15 maybe a subsequent adjudicatory phase, so I would like to
16 know whether or not the recommendation is intended to include
17 the adjudicatory phase as well for S-3.

18 MR. NELSON: Why should we cross that bridge now?

19 MR. SHAPAR: If your answer is that you are not
20 recommending it.

21 MR. NELSON: The answer is no, I never even thought
22 about that. I thought this was an experiment for the case as
23 we now know it.

24 COMMISSIONER KENNEDY: That doesn't make common
25 sense to say that we would do this experiment for this phase

mm
1 of the hearing. We anticipate that there may be another phase
2 to the same proceeding.

3 MR. NELSON: If nothing intervenes in the meantime,
4 Commissioner, I would think we probably would want to follow
5 the same approach.

6 COMMISSIONER KENNEDY: That answers Howard's
7 question. I think the assumption has to be there is a
8 reasonably high probability that we would be following the
9 same approach, and that is what he ought to plan on answering
10 his question on.

11 MR. NELSON: Subject to a showing that it really
12 did produce an 80-day delay, in which case the Commission
13 might want to cut it out or sharpen it up.

14 MR. SHAPAR: In response to your question, Mr. Chairman,
15 the thing that bothers me most is the delay factor, and I
16 think from the Commission's vantage point, you know the
17 problems with S-3, you know the 18 months cutoff period which
18 can't be extended. It is a question of how much delay means
19 to you in terms of S-3.

20 I personally feel we could accept the delay that
21 is involved here, but I would make a strong dichotomy between
22 that and the general proposition of service and of delay
23 affecting other proceedings. I think we can accept, based
24 on my knowledge of the status of S-3, I think we can accept
25 as a direct response to your question, the delay involved in

1 the S-3 proceedings.

2 But I wanted the Commission to have forcefully
3 brought to their attention that there is a delay factor in S-3.

4 CHAIRMAN HENDRIE: Okay.

5 Let me see if I can --

6 COMMISSIONER KENNEDY: I have a question.

7 Are we going to discuss the broader question --
8 we are going to do that later, are we not? We are not concerned
9 with all of its ramifications today?

10 CHAIRMAN HENDRIE: Right.

11 I was going to suggest and hope that we might
12 arrive at a decision that I asked you, to see if I can find
13 piecemeal some agreement.

14 It seems to me that the providing of transcripts
15 to participants who are willing to file an affidavit that
16 they are having financial problems and would appreciate,
17 need that sort of assistance is a reasonable enough proposi-
18 tion.

19 COMMISSIONER KENNEDY: That goes to the question
20 I was setting up. That is going to be the criteria. I guess
21 I need to know something about, what is the certificate or
22 affidavit, what is its force in fact?

23 CHAIRMAN HENDRIE: Simply a statement of need.

24 COMMISSIONER KENNEDY: Then that goes to something
25 that was in the more general paper, which I want to be sure

mm
1 that I understand what it means.

2 It says in that general paper in this respect, on
3 page 3:

4 "We expect that well-established groups, such
5 as the Sierra Club and the NRDC would apply for
6 assistance under this standard. And it is intended
7 to include them. However, we expect that license
8 applicants and industry members with resources
9 orders of magnitude in excess of even the well-financed
10 intervenor groups will not apply and the certification
11 procedure was intended to exclude them."

12 Could you tell me how it includes one and excludes
13 the other?

14 How does it do this? What is it that they are
15 supposed to say and how is it that they are supposed to
16 certify to this?

17 And what is the effect of the certification, and
18 what responsibility develops upon us in accepting the
19 certification?

20 MR. MALLORY: I think the form of the certification
21 would be one of the group's, or the person's ability to
22 participate in a proceeding would be substantially impaired
23 without the procedural assistance.

24 COMMISSIONER KENNEDY: He says this?

25 MR. MALLORY: He says that.

mm

1 And he provides a -- I think a very brief statement
2 of his finances indicating something like his overall financial
3 position and the amount of money he has allocated for the
4 proceeding.

5 COMMISSIONER KENNEDY: Does he indicate to us the --
6 I am forced to recall Mr. Bradford's comment earlier, where
7 the availability of funds in many cases is a matter of priority,
8 it is an allocation question.

9 Now, does he indicate to us the order of priorities
10 of his allocation of available funds?

11 Suppose, you know, it would be perfectly reasonable
12 to say that he has no funds at all, he only has \$10 million,
13 but he has no funds whatever for this purpose because he
14 has allocated all \$10 million to other purposes?

15 MR. MALLORY: If that was really the case he
16 couldn't participate because there wouldn't be anything for
17 him to file.

18 He has to have money to generate the things and file,
19 and people who are going to --

20 COMMISSIONER KENNEDY: He borrows from the \$10
21 million which he intends to pay back, so that he won't, in any
22 way, impair the other prospect that he has.

23 MR. KELLEY: I don't think we contemplated an
24 elaborate demonstration of internal budgets and in-depth
25 consideration in this kind of a certification. It is something

mm 1 fairly short.

2 It does contemplate, as Rich said, intervenor
3 groups who were established and have some money, but will
4 simply say that we would be impaired without this, and indeed
5 we would contemplate less participation unless you give it to
6 us.

7 In that instance, our proposal contemplates
8 acceptance of the certification and provision of assistance.

9 MR.NELSON: We thought, right or wrong, that it would
10 chew up more time and be more costly, to get us into some
11 involved showings and determinations about need than it would
12 be to file the affidavit and get on with it.

13 Certainly to put this agency in the role of second-
14 guessing priorities would be a very difficult position for
15 the US NRC.

16 COMMISSIONER KENNEDY: Well we just did it.

17 MR.NELSON: You would have to say --

18 COMMISSIONER KENNEDY: That is exactly my point. I
19 think that is exactly what this paper says we have done and we
20 propose to do. It says:

21 ". . .we expect that license applicants and
22 industry members with resources orders of magnitude
23 in excess of even the well-financed intervenor groups
24 will not apply and the certification procedure was
25 intended to exclude them."

mm

1 The point is, they may well have an allocation of
2 resources which doesn't contemplate a further effort in this
3 regard, and they will have to readjust all of their priorities.
4 They may have in such a case, by this definition that you
5 are giving me, the same kind of need. But it says here the
6 procedure was intended to exclude them.

7 And I guess I don't understand the reasoning.

8 CHAIRMAN HENDRIE: I think all you would ask is for
9 a party to file an affidavit with the Board saying that he
10 did not have the financial resources to make an effective
11 contribution without whatever procedural assistance would be
12 offered here.

13 The Board would take that under advisement, and
14 construct a reasonable proposition; they would say okay, if
15 not they would say no.

16 If they get such a proposition from -- I don't know --
17 Commonwealth Edison, why I would be surprised if the Board
18 wouldn't find that curious, to say the least.

19 MR. NELSON: That is exactly what was intended.

20 COMMISSIONER KENNEDY: I think I might find it in some
21 of the well-established intervenor groups, whose resources are
22 extensive indeed, as we have already seen in at least one
23 proceeding here, on their own demonstration.

24 CHAIRMAN HENDRIE: Similarly, if you got a filing
25 like that from -- I don't know -- the State of Illinois, why

mm
1 you would be pretty surprised about that, too.

2 COMMISSIONER KENNEDY: We have had a case in which
3 a state indicated it was hardpressed, and indeed --

4 COMMISSIONER BRADFORD: You got it from New York
5 State.

6 CHAIRMAN HENDRIE: That is a different case.

7 MR. KELLEY: They would qualify.

8 (Laughter.)

9 MR. SHAPAR: They would file a pauper's oath, and
10 you wouldn't look behind it.

11 MR. MALLORY: I think the one distinction we are
12 drawing here between say the Sierra Club, who certified to
13 us in the GESMO proceeding that they had about a \$6 million a
14 year budget, or something on that order, and people with
15 budgets on the order of hundreds of millions of dollars.

16 COMMISSIONER KENNEDY: No, no, no. Wait, wait.

17 Hundreds of millions of dollars to a utility are
18 not hundreds of millions of dollars for intervention or
19 participation in a proceeding. They are hundreds of millions
20 of dollars to operate a plant and a facility, for Christ
21 sake.

22 That is our problem here. We just don't differentiate
23 between the resources the individuals, corporations or whatever
24 have available to participate in this kind of proceeding.
25 We have the unique notion that all of the resources of the

mm

1 corporation are available for participation before this
2 Commission. That simply is not true, and no Public Utilities
3 Commission would permit it.

4 Now that is our problem. You know, we are talking
5 about hundreds of millions of dollars. They don't have
6 hundreds of millions of dollars to come before this Commission.
7 They probably have fewer than the 6.

8 MR.MALLORY: I don't think the Commission was saying
9 in GESMO that they have \$6 million to come before it in GESMO,
10 the Sierra Club had all \$6 million to come before us in GESMO,
11 or that that ought to be made available, or that the Sierra
12 Club ought to be expected to detour all those funds to
13 participate in GESMO. And that a small, probably only a small
14 fraction could be expected to be made available there.

15 CHAIRMAN HENDRIE: Well, an alternative requiring
16 some sort of certification, is to offer the procedural assistance
17 to all parties, and that certainly is a possibility.

18 MR. MALLORY: We think this is an improvement on
19 it because it cuts down the amount of assistance that we give
20 without incurring what we think will be substantial costs into
21 a GESMO-like investigation on a filing.

22 CHAIRMAN HENDRIE: In effect this would say that a
23 participant can receive these procedural assistance measures
24 if we agree to them, simply on his own statement that he
25 needs them in order to contribute effectively?

mm
1 MR. MALLORY: That is essentially true.

2 There would be some information behind it, but it
3 would not be looked at very carefully in the average case.

4 CHAIRMAN HENDRIE: Then one would leave it to the
5 parties to decide whether they want to make that statement
6 on their behalf or not.

7 COMMISSIONER KENNEDY: There is egalitarianism
8 carried to its ultimate. It is a relief program under the
9 guise of procedural assistance.

10 If procedural assistance has any merit, it seems
11 to me it is because it enables the proceeding which the
12 Commission is conducting to go forward more effectively and
13 completely. And in such a case I think to the extent procedural
14 assistance is afforded, it should be afforded across the
15 board with that precise purpose in mind, whatever the cost
16 might be.

17 CHAIRMAN HENDRIE: I have no fundamental difficulty
18 with across the board. I think it will turn out to be
19 anomalous in a number of cases, and will raise some questions
20 that we will have difficulty with.

21 MR. MALLORY: Well we don't have substantial troubles
22 with that because we proposed it in the first place.

23 This one we think saves money without being unfair.
24 And the primary advantage certainly, when you are concerned
25 with things like transcripts and copies, is a savings of money.

mm

1 CHAIRMAN HENDRIE: Do you suppose you could manage
2 a series of votes or quick expressions with regard to some
3 standard for assistance, if such were to be offered.

4 How many would be in favor of all participants
5 without qualification?

6 I take it you would?

7 COMMISSIONER KENNEDY: I would.

8 COMMISSIONER GILINSKY: Could we just check on what
9 the differences in expenditures would be?

10 MR. NELSON: Our paper shows doubled.

11 COMMISSIONER GILINSKY: A factor of two.

12 MR. KELLEY: Is this just S-3, or generically?

13 COMMISSIONER KENNEDY: That is all we are talking
14 about today, S-3.

15 MR. NELSON: I assume the same double assumption
16 would apply.

17 COMMISSIONER GILINSKY: We are just talking about
18 S-3?

19 CHAIRMAN HENDRIE: We are talking about S-3 and
20 the total sum of money is not really -- it is small enough
21 so that it is not a significant issue against the budget.

22 MR. KELLEY: Leo, didn't you say about ten people
23 might qualify?

24 MR. SLAGGIE: We got a feeling about ten people.

25 I should say I would be rather surprised if

mm

1 Commonwealth Edison came in and asked for assistance.

2 MR. NELSON: Well the question is, suppose it were
3 made available to everybody, including the Commonwealth Edisons
4 and everybody else?

5 COMMISSIONER KENNEDY: All participants. 34 or 35,
6 correct?

7 MR. MURRAY: That is correct, Mr. Commissioner. I
8 think some of the participants, however, have consolidated
9 so the exact number of parties filing serving may be less.

10 CHAIRMAN HENDRIE: One of the things we haven't
11 noted is that these procedural assistance measures do tend
12 to remove incentives to consolidate, which in many ways are
13 useful in the sense of, well --

14 COMMISSIONER KENNEDY: Which is a good point.

15 CHAIRMAN HENDRIE: -- let me go down the line.

16 For all parties? A vote for all parties is
17 obvious.

18 Against all parties then might or might not be
19 in favor of asking them to express, you know, say that they
20 need the help and so on.

21 COMMISSIONER GILINSKY: I missed part of the session.
22 I would like to rehear it, first.

23 COMMISSIONER BRADFORD: Perhaps in S-3 it doesn't
24 make a big difference one way or the other. Conceptually I have
25 some difficulty I think with extending assistance to all

mm 1 parties. Utilities, after all, are in a situation where,
2 granted they can't devote all their revenues and moneys to
3 proceedings before the Nuclear Regulatory Commission. Neverthe-
4 less they can recover, or they can use as a basis for setting
5 rates, all of their expense in participating in regulatory
6 matters.

7 COMMISSIONER KENNEDY: But in that case, Peter, all
8 we are doing is taking it out of one pocket from the taxpayer
9 instead of another. And I would suggest that it would be a
10 hell of a lot better in the long run to put it up for what
11 it is. Let the taxpayer see the cost of the regulation he is
12 getting in a direct sense, and not put it in his rates.

13 COMMISSIONER BRADFORD: Except that it is a different
14 set of taxpayers. That is, let's just assume -- I don't know
15 whether it is true or not -- the State of North Dakota has no
16 nuclear plants. Nevertheless the citizens of North Dakota
17 pay federal taxes. So they will start paying for the S-3
18 proceedings, for this part of the S-3 proceeding, whereas they
19 don't now.

20 You can have a fine abstract argument about whether
21 that was good or bad. But there is some difference.

22 COMMISSIONER KENNEDY: Agreed.

23 COMMISSIONER BRADFORD: I guess on balance I
24 would, for the S-3 proceeding, just as soon go ahead with --
25 on the transcript question, go ahead with the ODC recommendation

mm

1 of transcripts to people willing to certify need.

2 In my own mind, looking further ahead, I think maybe
3 a more sensible formulation would have to do with some percentage
4 of those certifying need, or with a fixed upper ceiling on the
5 number of transcripts, depending on the proceeding. Then
6 people would want -- and they might be available to all parties.
7 But then people who wanted to be sure that they had their
8 own transcripts the next day could pay for it, and those who
9 were indigent or for other reasons didn't feel it worthwhile,
10 could avail themselves of the communal transcript.

11 COMMISSIONER GILINSKY: I would say that our
12 decision be affected by what the difference would be one way
13 or the other in terms of money. In other words if --

14 CHAIRMAN HENDRIE: It is like \$2000 one way and
15 \$4000 the other?

16 COMMISSIONER GILINSKY: In this case it really doesn't
17 make a difference.

18 COMMISSIONER KENNEDY: We are not settling any cases
19 except this one, as I understand it.

20 COMMISSIONER GILINSKY: I was just looking ahead a
21 little bit.

22 MR. SLAGGIE: I would like to make a point about the
23 cost of the transcripts.

24 The \$2000 cost of the transcripts assumes that we
25 use the Commission's duplicating facilities. Now if we do

mm
1 that the transcripts will probably arrive not precisely at
2 the time the hearing opens, but a couple of hours later.

3 Now our feeling was that because there is no cross-
4 examination going on in this, and these things -- under these
5 circumstances we can give it out free anyway, that that is an
6 inconvenience which is relatively minor, that it is well worth
7 imposing on people who take free transcripts.

8 On the other hand, if you were extending this
9 service to absolutely everybody, the people who were to take
10 transcripts duplicated by the Commission would be getting them
11 later than what they get now when they order them directly
12 from the contractor.

13 Now how that will fuzz things up I am not entirely
14 sure.

15 COMMISSIONER GILINSKY: What I mean is this. If
16 we would normally be supplying free services for a small
17 fraction of the participants, then it doesn't make sense to
18 extend it to everybody.

19 CHAIRMAN HENDRIE: I think the estimate is like 10
20 out of 30.

21 COMMISSIONER GILINSKY: I guess, you know, if we
22 are really talking about half, it may well make sense just to
23 do -- (Inaudible.)

24 CHAIRMAN HENDRIE: So you tend to vote for asking
25 for an application saying I need the help?

mm
1 COMMISSIONER GILINSKY: I think in this case -- if
2 this is a typical case, I guess I would give it to everybody.

3 CHAIRMAN HENDRIE: You would go for everybody.

4 COMMISSIONER GILINSKY: Yes.

5 MR. NELSON: Aren't you forcing utilities to take
6 the federal money if it is there?

7 COMMISSIONER KENNEDY: You are not forcing anybody
8 to do anything.

9 MR. NELSON: If I am running a utility and I see
10 NRC is going to pay for this stuff, I am going to come in and
11 get my money.

12 Do you want to produce that result?

13 COMMISSIONER BRADFORD: In fact the State Commissioner
14 would want to know why you didn't do that.

15 CHAIRMAN HENDRIE: Well look, I feel a need to
16 move the Commission forward.

17 I have got two votes to give it to everybody, right?
18 I believe I read that right.

19 This is just with regard to the standards you would
20 impose if we decided on assistance.

21 I am going to ask you in a minute now about
22 transcripts and so on. This is just strictly S-3. Okay?

23 I'll vote all participants, and declare that we
24 have marked out that little piece. Okay?

25 COMMISSIONER BRADFORD: Okay. You three have voted

mm
1 all participants.

2 CHAIRMAN HENDRIE: Okay.

3 Now question, it seems to me that the provision of
4 transcripts is a pretty straightforward position. It doesn't
5 involve delays.

6 Can we agree to that?

7 COMMISSIONER KENNEDY: Agreed.

8 CHAIRMAN HENDRIE: I'll vote for it.

9 Peter? Just S-3s.

10 So ordered.

11 Now, with regard to the reduction to 2 from 20
12 copies in the required filings with the Commission.

13 MR. KELLEY: That is not in S-3.

14 CHAIRMAN HENDRIE: That is not in S-3. Okay, strike
15 that. Sorry about that.

16 With regard to the provision of service, we get it,
17 make copies, send it out to everybody. That does involve a
18 delay.

19 It has been judged probably endurable in S-3,
20 although it could run -- it could add substantial number of days,
21 in fact, to the overall proceedings, if as we get down the line
22 there gets to be a lot of filings. I don't know.

23 What is your feeling?

24 Let me start at this end this time.

25 COMMISSIONER BRADFORD: I guess I am not -- I mean

mm
1 I am concerned about the delay. I think the 20 to 2 is a good
2 idea. I'm sorry we can't do it in this case. It would be a
3 nice half measure.

4 CHAIRMAN HENDRIE: Yes. Could we impose the 20, and
5 then immediately remove.

6 (Laughter.)

7 COMMISSIONER BRADFORD: And I guess I take it to
8 be your consensus that it is more trouble than it is worth to
9 try and lay a standard that says we will do it for those
10 filings that don't involve delay and not for those that will.

11 MR.SHAPAR: I see potential for argument, may in
12 turn cause delay.

13 MR. NELSON: Well, you have got a good, firm,
14 aggressive Hearing Board there. I've known that chairman for
15 many years. He is not a man who is going to let people roll
16 him over.

17 MR. SHAPAR: But the standard itself may be hard to
18 apply.

19 MR. NELSON: Well, that is their business.

20 MR.SHAPAR: Good theory.

21 (Laughter.)

22 CHAIRMAN HENDRIE: It seems to me I've heard that
23 argument before.

24 Applicable what?

25 MR.SHAPAR: By the way I take it the decisions you

mm

1 are making now apply only to the legislative phase.

2 That's a question.

3 COMMISSIONER BRADFORD: I don't think we --

4 CHAIRMAN HENDRIE: Well, we haven't agreed that there
5 is going to be anything more than a legislative phase, and I
6 assume if we decide eventually on that question, we will have
7 to take with it whatever assistance is being provided to
8 this phase.

9 So this is specifically with regard to what is now
10 the S-3. Okay?

11 While Peter is mulling, let me go down and see what
12 you think.

13 COMMISSIONER KENNEDY: I'm for going ahead.

14 CHAIRMAN HENDRIE: You are for going ahead.

15 COMMISSIONER GILINSKY: I will follow the General
16 Counsel's recommendation.

17 COMMISSIONER KENNEDY: Which was?

18 MR. NELSON: Which contains a sentence about
19 revocable at the Board's discretion, Commissioner --

20 COMMISSIONER KENNEDY: That is one I do not agree
21 with.

22 MR. MALLORY: I think we do have to decide just
23 what is going to be served and what isn't, if not everything.
24 Or at least we have to --

25 COMMISSIONER KENNEDY: Everything. My vote was

mm 1 was for going ahead with everything.

2 MR. NELSON: In S-3 the proposal was for going with
3 everything.

4 CHAIRMAN HENDRIE: Everything.

5 So you wouldn't use Jerry's sentence then?

6 COMMISSIONER GILINSKY: I guess I was not here for
7 that.

8 COMMISSIONER BRADFORD: That hasn't been discussed
9 yet, that particular sentence.

10 I don't think we know what you have in mind it
11 being revoked for.

12 MR. NELSON: I don't either. It was just a general
13 residual discretion of the Hearing Board to enable them to
14 control this mechanism. It is obviously subject to abuse.
15 There can be delays, there can be papers filed that turn out
16 to be blathering nonsense, and they might want to say, I'm
17 going to stop paying for it.

18 I thought they have control of the hearing, we
19 ought to recognize that general control over this. It has
20 been pointed out that there is a potential for that being
21 counterproductive and so be it.

22 COMMISSIONER KENNEDY: How are they going to do this.

23 CHAIRMAN HENDRIE: The assumption is that the
24 assistance in service would be provided, unless the Board
25 took explicit action on the basis that it felt on a particular

1 COMMISSIONER KENNEDY: As a general proposition
2 all filings will be served by the Commission unless the
3 Board takes affirmative action to stop one.

4 Is that the proposition?

5 MR. NELSON: About what we had in mind.

6 COMMISSIONER KENNEDY: I'll agree to that.

7 That's not what you had in mind?

8 MR. NELSON: I was very conservative in this area.
9 I wanted to have somebody policing what was going on.

10 MR. KELLEY: He said about.

11 MR. NELSON: Yes, I wanted to have the power there,
12 somebody somewhere to cut it out if things go astray.

13 CHAIRMAN HENDRIE: With that understanding it is
14 okay with you?

15 COMMISSIONER KENNEDY: Agreed.

16 CHAIRMAN HENDRIE: Do I get a nod?

17 COMMISSIONER GILINSKY: (Nodding affirmatively.)

18 COMMISSIONER BRADFORD: (Nodding affirmatively.)

19 CHAIRMAN HENDRIE: Okay. So ordered.

20 I'm only 22 minutes late.

21 Let us move to the next question.

22 I'm sorry, I'll be able to introduce this. I have
23 an appointment on the Hill at 12:30 which I am going to leave
24 in three minutes for. So I am going to have to leave the
25 Commission to deal with it. I think it has to be dealt with

mm

1 and has to be dealt with now.

2 I am sorry to say I have to leave you in the lurch
3 on such short notice.

4 It involves a request by the Union of Concerned
5 Scientists that Mr. Pollard be allowed to participate in either
6 the next, or presumably an appropriate meeting of the Commission
7 on the petition by the Union of Concerned Scientists in
8 connection with the tests on electrical connectors and
9 cables and so on.

10 The General Counsel, Mr. Pedersen, will speak to
11 this in a moment.

12

13

14

15

16

17

18

19

20

21

22

23

24

25

1 CHAIRMAN HENDRIE: Okay, have we got the appropriate
2 people on hand with the appropriate papers?

3 Now, I'm going to leave you the gavel, Dick, and
4 my apologies for the circumstances and my best wishes in the
5 effort. And I will leave, as I go I leave the Commission for
6 whatever use it may be in effect my proxy to vote one vote for.

7 It is my view that on balance this is -- and under
8 the sorts of procedures that the general counsel discussed --

9 COMMISSIONER BRADFORD: Joe; just as a technicality,
10 let's count that as one vote for. I don't know if proxies are
11 legal or not.

12 CHAIRMAN HENDRIE: I'll tell you, I didn't want to
13 walk out, you know, and sort of leave the thing blank and then
14 in effect have ducked at least having my views known --

15 COMMISSIONER KENNEDY: Since there will be at some
16 point in the discussion a proposition which will follow another
17 request that opportunity be provided for others to appear, are
18 you voting on that as well? Are you voting on that question,
19 Mr. Chairman?

20 CHAIRMAN HENDRIE: I'll leave you my opinion on it. It appears to
21 me that in this particular case, the union and Mr. Pollard have
22 a particularly central role in the matter, that the letter from
23 Troy Conner representing such utilities -- indeed, they repre-
24 sent a group of people who indeed have an interest in it;
25 but who, if they are all to be heard, extend the range of

FMG 2 1 having to listen to people far beyond anything I think reason-
2 able.

3 And I would therefore vote yes on UCS and no on --

4 COMMISSIONER KENNEDY: Could I note before you leave
5 that in stating that even though everything you say is true,
6 it would be a very extensive thing, perhaps, but I would doubt
7 that they would all wish to appear individually.

8 But let me just point out that in one case, at least,
9 one of these utilities -- and after all, they do have some
10 interest in the proposition; it is their plant we're talking
11 about, not Mr. Pollard's -- I would just call attention to
12 their feelings about these things which it seems to me we
13 need to know the facts about.

14 I quote: "Mr. Pollard relies on factual distortion."
15 That's a fairly serious point being made by one of these
16 parties, who would presumably like to be heard.

17 Well, I've said it.

18 CHAIRMAN HENDRIE: Well, the Commission may decide
19 that it ought to hear at least a limited number of other par-
20 ties. And I don't think you can regard my views as a vote,
21 Pete, because, you know, presumably, the Commission has to
22 discuss --

23 COMMISSION BRADFORD: I was just concerned with the
24 technicality over whether a proxy was usable.

25 COMMISSION GILINSKY: No, it can't be used.

RMG 3

1 COMMISSIONER KENNEDY: Can't.

2 COMMISSIONER BRADFORD: That's what I thought. I
3 only meant if Joe intended to vote he should vote now.

4 COMMISSIONER GILINSKY: We have a peculiar statute
5 that doesn't permit that.

6 (Chairman Hendrie leaves.)

7 COMMISSIONER GILINSKY: Very well, Jerry, are you
8 going to go with this matter?

9 MR. NELSON: Yes, sir. This matter arose, a letter
10 dated November 17, 1977, filed by council for the Union of
11 Concerned Scientists in which she states the following:

12 "In addition, UCS requests that prior to ruling,
13 the Commissioners call Mr. Pollard to appear before you to
14 answer any questions which you may have. If any further
15 Staff briefings are scheduled we request Mr. Pollard be
16 permitted to participate, along with the staff along with an
17 equal footing."

18 Leaving the equal footing language to one side for
19 a moment, because I think that raises special questions, there
20 is before the house the question whether Mr. Pollard ought to
21 be allowed to participate in that meeting at all, any way,
22 under any structure.

23 Our recommendation was that the Commission should
24 exercise its discretions to allow him to participate in the
25 meeting. And I should talk about law and I should talk about

PMG 4

1 policy to try to not mix the two up.

2 The law of this case is that there almost isn't any
3 law. This is an ad hoc proceeding. It is not a proceeding
4 that is an adjudication. It is not the kind of proceeding that
5 our regulations deal with. There aren't any --

6 COMMISSIONER KENNEDY: Could I interrupt there,
7 Counsel. It is a proceeding which is not even before a Com-
8 mission. Isn't that correct?

9 There is a petition. The petition is before the
10 staff at the moment, isn't that correct?

11 MR. NELSON: I don't believe that's right, sir.

12 COMMISSIONER KENNEDY: What is the status of this
13 matter?

14 MR. SHAPAR: I think under the rules it should have
15 been addressed to the staff. It would have been, had the rules
16 been followed. However, the Commission has the matter of
17 discretion which, of course, it can elect to exercise besides
18 this matter itself.

19 So the Commission, in my opinion, does have the
20 matter now.

21 COMMISSIONER KENNEDY: Okay.

22 MR. NELSON: The question, then, is really one of
23 discretion, and this is one of the most highly discretionary
24 areas of procedure of all of them, even if this were an ad-
25 judication, and even if we were talking about oral argument.

1 The Supreme Court has made clear that no one has the
2 right to that kind of oral argument. That when you make judg-
3 ments about oral arguments, you do it on a case-by-case basis
4 according to the circumstances.

5 Even if this were oral argument, the rule is this
6 in not a matter under our decisions for broadside generalization
7 and indiscriminate application. It is rather one for case-to-
8 case determination, through which alone account may be taken
9 of differences in the particular interests affected, circum-
10 stances involved, and procedures prescribed by Congress for
11 dealing with them.

12 They were there avoiding and reversing a lower
13 court which had held that kind of right to have oral argument
14 before an agency. So a doctrine has grown up that is highly
15 discretionary.

16 I think I can say with some confidence that if you
17 were to deny the request, and if Mr. Pollard sued, he would not
18 get the case reversed. -- the Union of Concerned Scien-
19 tists would not get the case reversed on that ground alone.
20 That would not be reversible error to refuse to have Mr.
21 Pollard participate in the meeting. You may lawfully deny
22 this request.

23 COMMISSIONER BRADFORD: What about one and not the
24 other?

25 MR. NELSON: One and not the other, we think, is a

RM 6
1 more difficult problem. But we think at this time, the only
2 issue before the house is whether there is an emergency, and
3 if so, whether the emergency relief is called for.

4 We think that with respect to that question only,
5 the interests of Mr. Conner are not so substantially different
6 from the interests of the staff as to render it that helpful
7 to the Commission to hear from Mr. Conner on that question.

8 COMMISSIONER KENNEDY: When, then, did we get 43 --
9 is that the correct number -- of responses to request for
10 comment on the petition?

11 MR. NELSON: Well, I cannot speculate about why
12 people file papers. But if we turn to Mr. Conner's paper --

13 COMMISSIONER KENNEDY: We all thought they had a
14 direct specific interest. I just read a sentence from one.
15 I have all the others here.

16 MR. NELSON: Of course they do, Commissioner. I'm
17 not suggesting they don't have an interest. They have a very
18 deep, important interest in the economics of the situation and
19 their obligations to serve their areas. Of course they do.

20 COMMISSIONER KENNEDY: Which is different, it seems
21 to me, in a very significant way, than that of the staff.

22 MR. NELSON: For long-run purposes, it very well may
23 be. For the question of whether there's an emergency which
24 warrants shutting down reactors, it seems to me they would have
25 a different view if the staff were coming down and saying,

7
1 "There is an emergency, shut down reactors."

2 Then the Commission ought well to consider including
3 utility participation in its deliberation, if it includes any-
4 body. But the way the case is shaping up, based on pleadings
5 filed yesterday, the staff is saying there is no emergency,
6 don't shut down any reactors.

7 Mr. Conner -- his sole comment, as I understand it,
8 consists of these two pages filed here in November and he says,
9 among other things, "We believe that the staff analysis of and
10 response to the use of the UCS petition entitled" -- and then
11 he entitles the petition -- "dated November 9, 1977, and
12 transmitted to the Commissioners on that date by Edson G. Case
13 clearly and succinctly demonstrate that the relief sought by
14 UCS is completely unwarranted. We incorporate that evaluation
15 herein.

16 "Actions taken and presently underway by the staff,
17 licensees and applicants regarding fire protection criteria for
18 nuclear power plants provide adequate protection for the public
19 health and safety. Moreover, the relief requested because of
20 failures of certain electrical connectors under test provisions
21 is broad and overreaching and should be dealt on a plant-by-
22 plant basis. There are few facilities having specific con-
23 nectors in locations where they would be exposed to post-LOCA
24 conditions.

25 "For the above reasons, the UCS petition should be

8
1 denied."

2 I don't see in that any suggestion that that gentle-
3 man has no studies, no developments, anything to bring to bear
4 on the decision that isn't already here in the staff presen-
5 tation, nor do I see that suggestion in the letter of yesterday
6 which simply says, fairly enough, "If you are going to hear
7 that side, hear us, too."

8 That, I think, is a contention which might have some
9 merit if the Commission were -- heard the staff and heard Mr.
10 Pollard and was about to say, "We don't believe the staff, we
11 do believe Mr. Pollard. There is an emergency."

12 I think at that point the Commission might very well
13 wish to invite Mr. Conner and other representatives in on a
14 manageable basis to participate in the discussion.

15 COMMISSIONER GILINSKY: You would then reconsider
16 ~~after~~ hearing the staff --

17 MR. NELSON: I would say, Commissioner, it's not a
18 question that the Commission need resolve now. You need not
19 vote Mr. Conner's request up or down now in order to say we will
20 allow Mr. Pollard to participate in the discussion of whether
21 there is an emergency.

22 If the Commission then takes that under advisement
23 and it begins to look like the Commission believes that some
24 emergency action is warranted, at that point the Commission
25 would appropriately turn to the question of participation of

9
1 Mr. Conner or others, assuming it were the kind of emergency
2 that could abide a few days or a week, and the circumstances
3 seem to show that this one has.

4 COMMISSIONER BRADFORD: Jerry, if Mr. Pollard simply
5 had written the Commission, and ~~we~~ ^{he} were the only ones that
6 wanted to hear him, and I said -- and if I were the only one
7 that wanted to hear him, and I said, "Come in, what do you have
8 in mind, would I then -- would the same questions in any way
9 arise with regard to individual commissioners, arise in
10 regard to Commissioners as a whole should I then have
11 Mr. Conner come in also to tell me what's on his mind?

12 MR. NELSON: Well, I think that would be a question,
13 really, for your own professional discretion and judgment,
14 Commissioner. I don't think there would a law that would re-
15 quire you to do so.

16 COMMISSIONER BRADFORD: How is an individual
17 Commissioner's posture any different from that of the Com-
18 mission as a whole in this situation? Aren't we talking about
19 our collective calendars rather than our personal calendars?

20 MR. NELSON: I think collectively or individually.
21 If you start talking to one side -- now, putting aside adjudi-
22 cations and ex parte problems that we don't have -- if you
23 start talking to one side, i.e., Mr. Conner or Mr. Pollard,
24 and then end up voting for that side, and the other fellow is
25 knocking on the door and you won't let him in, I have some

PM 10: 1 trouble with that, too. That bothers my fundamental sense of
2 fairness. And more importantly than mine, it might bother the
3 United States Court of Appeals' fundamental sense of fairness.
4 But matters, I don't think, are at that pass yet.

5 What the record now shows is that Mr. Pollard says
6 there's an emergency, and action is called for. The staff has
7 filed extensive documents that there isn't one. They explain
8 what they have done, what they have found.

9 We are just not sure that utilities, particularly
10 Mr. Conner's papers, which seem to endorse the staff, would be
11 all that different in terms of content or input, whereas Mr.
12 Pollard would undoubtedly bring to bear a perspective that is
13 not otherwise at the table.

14 COMMISSIONER KENNEDY: Would Mr. Pollard's perspec-
15 tive, as brought before the Commission at the table, an oral pre-
16 sentation then be available to all the parties who have commented
17 on this matter?

18 MR. NELSON: Well, pursuant to the Commission's new
19 procedures, we have unofficial transcripts of open meetings,
20 and I assume there would be a transcript of his remarks which
21 people could read.

22 COMMISSIONER KENNEDY: Wouldn't we be advised to,
23 in that case, to have an official transcript in order that all
24 parties could? After all, we have already, on the basis of
25 his written filing, the Union of Concerned Scientists written

1 filing, we have already asked the views of all the participants.
2 We are not admitting what, for a nonattorney's viewpoint, seems
3 to be another filing on the part -- we are talking about
4 suggesting the submission of another filing.

5 He is presenting to the Commission -- at least, or
6 would be in the circumstances -- additional evidence. But
7 that evidence would not be available to any other parties unless
8 all of those parties, all 43 or whoever it was, was able to
9 be present here in the room.

10 MR. NELSON: Well, without quarreling with what the
11 word evidence means, if we mean that he might be actually having
12 new studies, information, documents, something of that nature --

13 COMMISSIONER KENNEDY: Well, if he isn't --

14 MR. NELSON: -- why hasn't that been filed already?
15 He's got that kind of thing. I thought he simply wanted to
16 clarify questions that might be asked about the record as it
17 now stands. I didn't understand that he was going to request
18 to introduce new evidence.

19 MR. EILPERIN: I think I disagree with the general
20 counsel on this.

21 MR. NELSON: Good.

22 MR. SHAPAR: I do, too. You go first.

23 MR. EILPERIN: I really think that --

24 COMMISSIONER KENNEDY: There must be some implication
25 that I do as well.

12
1 MR. EILPERIN: I think Mr. Conner has a distinct
2 interest and that if we allow one party to speak --

3 COMMISSIONER KENNEDY: Are you speaking of just Mr.
4 Conner because he wrote a letter, or are you speaking about the
5 other parties, all of whom have filed statements?

6 MR. EILPERIN: I think there certainly is a distinct
7 interest of the guy whose plants are at risk. I think that one
8 way to handle the problem --

9 COMMISSIONER KENNEDY: Who Mr. Conner purports to
10 represent, at least in some part.

11 MR. EILPERIN: I think -- okay, I think one way to
12 handle the problem like this, of sort of duplicative responses,
13 is to have the staff go before any private party. And then the
14 Commission can say, "We don't want you to duplicate any infor-
15 mations which the staff has already given us."

16 And that way you can cut down on what the private
17 parties happen to bring up, and limit the information they
18 bring up so it doesn't duplicate what the staff has given.

19 But I think that the rationale that it looks as if
20 we're leaning towards voting to deny the fact that there's an
21 emergency, so therefore, since we're leaning that way, there's
22 no need to hear from the party who also takes that position,
23 I don't find a very persuasive rationale.

24 MR. NELSON: I'm not suggesting prejudgment, Steve.
25 I'm suggesting Mr. Conner's position takes on meaning only if

1 the Commission takes action adverse to its clients in the
2 emergency phase of this case. Otherwise it's an academic com-
3 plaint.

4 COMMISSIONER GILINSKY: Let's see, do we have to
5 deal with this letter which just came in -- in effect, today,
6 at this meeting? In other words, can't we --

7 MR. NELSON: We have to do something about his letter.

8 MR. SNYDER: It came in yesterday.

9 MR. NELSON: It's a fair request, fairly presented.

10 COMMISSIONER GILINSKY: But your earlier suggestion
11 was we really didn't have to vote it up or down at this meeting.

12 MR. NELSON: We could vote to defer it pending
13 determination of the emergency decision, or indeed, pending
14 what you hear at the emergency meeting.

15 COMMISSIONER KENNEDY: You know, with all due re-
16 spect, Counsel, I am not sure that I can accept that legal
17 reasoning. And indeed, we will debate it at some length as
18 long as the meeting continues, or as long as I am permitted to
19 do so.

20 I think we need to deal with this letter because it
21 is the fundamental question of who should be admitted before
22 the Commission. That's the question.

23 Now, we started out discussing should Mr. Pollard
24 be. We are now having a long debate, not about whether Mr.
25 Pollard should be, but rather should Mr. Conner be.

P. 14

1 It seems to me the question is first should Mr.
2 Pollard be admitted. Then if it is decided that Mr. Pollard
3 should be, then the question is on what grounds is he, and should
4 not others with an equal interest also be admitted. That, it
5 seems to me, that's the line of reasoning that needs to be
6 followed.

7 COMMISSIONER GILINSKY: All right, let's take this
8 a step at a time. Jerry, are you finished with your presen-
9 tation?

10 MR. NELSON: I wanted to say if you break it up
11 that way, you may trap us into an unmanageable meeting which
12 you don't really intend to do, I don't think, Commissioner.

13 If you vote yes, let's hear Pollard, and then there
14 are 23 other people, we may be in the picture for hours.

15 MR. EILPERIN: You can force consolidation on
16 utilities, I would think.

17 MR. NELSON: Well, you can force consolidation of
18 common interest. And what we think here is that for purposes
19 of whether there's an emergency, that there's a common interest.

20 COMMISSIONER KENNEDY: Well, that's my view.

21 MR. NELSON: Well, let the regulatory staff --

22 COMMISSIONER KENNEDY: A view which I simply do not
23 share. You have not persuaded me yet.

24 COMMISSIONER GILINSKY: Do you want to address this,
25 Jim?

1 MR. PEDERSEN: Yes. I agree, I guess, with the
2 general sentiment of the Commission. I certainly agree with
3 what Jerry said so far, that Mr. Pollard, I believe, has made
4 a case to participate.

5 I, myself, am a little less certain on Mr. Conner.
6 Let me say a couple of words in that regard if I may.

7 I think if the Commission is going to begin to go
8 down this path of letting people who file petitions come and
9 speak to it, it has to do so with an understanding that it can
10 somehow manage that process. This is a discretionary choice
11 you have.

12 I think you have to do so with some kind of idea in
13 your mind that you can apply judgments, that there are criteria
14 that you can apply in terms of deciding who you will hear from
15 and who you won't.

16 Jerry has suggested one criterion which Commissioner
17 Kennedy has rejected, that notion of the extent to which the
18 contribution would give you a different perspective from that
19 in which the majority -- in the case, the unanimous view of the
20 staff -- presents to you.

21 To my own mind, that's a workable distinction. I
22 believe it is the kind of distinction, kind of one of several
23 that you're going to have to start being prepared to draw if
24 you start down this path. And I think you should have no
25 illusions about this. You will be called upon to start making

16
1 distinctions about who you will and won't hear from.

2 Okay, one more point.

3 I think there is a choice here. You have to decide,
4 also, not only if Mr. Pollard should be allowed to participate,
5 but shouldn't he be allowed to participate in tomorrow's meeting,
6 and secondly, if Mr. Conner is to participate, should he also
7 be allowed to participate in tomorrow's meeting?

8 It seems to me you could agree to let Mr. Pollard
9 participate tomorrow, because his concern is directly with the
10 emergency situation. And yet, for Mr. Conner, if you choose,
11 the opportunity to also participate and be heard from before
12 you render your final decision in this matter which, I under-
13 stand, is set for another week or so away.

14 You need not choose to let both of them participate
15 tomorrow.

16 COMMISSIONER GILINSKY: Can I stop you for a minute?

17 Jerry, you're suggesting Mr. Pollard's participation
18 tomorrow, aren't you?

19 MR. NELSON: Yes.

20 COMMISSIONER GILINSKY: Very good.

21 MR. NELSON: With or without Mr. Conner is a second
22 question.

23 MR. PEDERSEN: You were asking whether we had to
24 vote up or down on Conner today. I'm saying you have a choice
25 of not voting up or down on his participation tomorrow,

1 necessarily.

2 COMMISSIONER GILINSKY: Peter --

3 COMMISSIONER KENNEDY: Could I ask something about
4 that tomorrow business? It has been the longstanding view of
5 the Commission repeated -- and I must say, unanimously by us
6 and urged upon us, although urging was not necessary by the
7 eminent counsel -- that the public should be given the fullest
8 opportunity to participate in these matters. And here's a
9 matter where the public -- 43 of them -- have written us.

10 And we are going through the unseemly exercise of
11 putting up what will be a unique proposition by the Commission
12 to allow someone, a petitioner to come before us and make an
13 oral statement on less than 24 hours notice. I consider that,
14 gentlemen, unseemly, and will so vote.

15 COMMISSIONER GILINSKY: To do it at all, or to do
16 it with --

17 COMMISSIONER KENNEDY: No, to do it without proper
18 notice.

19 COMMISSIONER GILINSKY: So you're really against the
20 entire proposition, because there's not 24-hours' notice.

21 COMMISSIONER KENNEDY: I am against having it tomor-
22 row. I am against having it on one side. If we're going to
23 have it --

24 MR. NELSON: In fairness to Mr. Kennedy's view --

25 COMMISSIONER KENNEDY: It should be done with proper

P. 18

1 notice and it should be done with proper participation.

2 MR. NELSON: Mr. Conner suggests that problem of
3 notice in his letter. He evidently happened to know about the
4 meeting, because he saw the meeting announcement, and he
5 practices here. It was a short notice announcement. And
6 people who aren't here or don't practice here or don't have
7 those advantages that watch the hearing room like some of the
8 big firms -- I'm sorry, the public document room -- may not
9 even know the schedules.

10 So that in fairness to that argument, I want to
11 bring that fact before the Commission. And one could also
12 argue, if you want to hear from Mr. Conner or have him partici-
13 pate, why not any number of other parties or interests on that
14 side who don't necessarily know about it. That's a fair argu-
15 ment that can be fairly made. All I'm suggesting is you
16 don't necessarily have to cross that bridge.

17 MR. SHAPAR: I want to
18 give you a somewhat different perspective, although I don't
19 disagree with any of the basic conclusions that have been
20 expressed at this table, but I don't think that the proper
21 setting has been given for what kind of proceeding this is,
22 or for what the correct criterion is to apply.

23 This is supposed to be a 2.206 proceeding, which
24 means that the letter should have been filed with the staff,
25 and the staff acted upon it. The Commission recently changed

19
1 its rules to say that no longer would it entertain any appeals
2 from the staff decision on a 2.206. The Commission, of course,
3 has the discretion to waive its own rules, which it did in this
4 case. I am merely pointing this out by way of background.

5 So as far as the law is concerned, I think it's
6 quite clear the Commission has decided to act initially in lieu
7 of the staff to decide a matter. But the basic format is still
8 2.2.06, although part of the formality has been waived.

9 2.206 was intended to be, and always was, a very
10 simple way of allowing a member of the public to come in and
11 ask the Commission to do something, and the Commission would
12 simply give its reasons whether the staff acted on it. The
13 Commission acted on it, and that was the end of it.

14 The only requirement under your rules is that you
15 explain the basis for what you are doing.

16 Now, the idea of having a hearing in the sense that
17 the Commission has gone about doing this, is a fine act of
18 discretion, but it goes beyond any requirement of the regula-
19 tions, and beyond any requirement of law whatever.

20 So as far as --

21 MR. NELSON: Excuse me.

22 MR. SHAPAR: Excuse me. As far as I'm concerned,
23 as far as exposing Mr. Pollard's request and exposing Mr.
24 Conner's request, the criterion is quite simple.

25 If you think it would be helpful to hear from Mr.

20 1 Pollard, then you should, by all means hear from Mr. Pollard.
2 If you think it would be helpful to hear from Mr. Conner, then
3 by all means you should hear from Mr. Conner. You don't need
4 any notice, you don't need anything except a determination
5 that it would help you to listen to these two gentlemen, one
6 or the other.

7 Now, at that point, what enters into it is merely
8 fairness and common sense. If you think you would feel uncom-
9 fortable about hearing from Mr. Pollard without hearing from
10 Mr. Conner, then you can schedule 1/2 hour or 15 minutes or
11 1/2 day as you see fit.

12 But the only criterion that I see involved here is
13 whether you think any presentation would be helpful to you
14 in deciding the matter, whether it's the emergency matter or the
15 long-term matter. And there are no legal inhibitions here
16 whatever.

17 COMMISSIONER BRADFORD: Let me just ask you if that
18 is the general view that there is no attorney at the table who
19 feels that hearing from one, would then compel us to hear from
20 the other in terms of any substantive --

21 MR. NELSON: I don't want to go that far. I think
22 it depends upon how the case ends up at the end.

23 Let's take the opposite side of the coin. Suppose
24 you heard from Mr. Conner, and refused Mr. Pollard. And then
25 found that there was no emergency, and everything was fine

21 1 based on Mr. Conner's arguments.

2 It seems to me that the Union then would have a
3 decent argument in the Court of Appeals of a denial of funda-
4 mental fairness. I think fundamental fairness is at stake
5 here, but I just don't know that you have to make a judgment
6 that it requires opening the doors to everybody at this stage
7 of the game, at the emergency phase. It may later on.

8 I'm with Howard up to a point.

9 MR. SHAPAR: This is not in the petition. If you've
10 got any case law that mandates on the part of any court any
11 particular procedures for acting on a procedure, I'm unaware of
12 that law, Jerry.

13 MR. NELSON: The administrative due process.

14 COMMISSIONER KENNEDY: Let me just say that without
15 any intention to suggest that this is a correct statement, let
16 me just read the statement. All I'm saying is that some people
17 believe that what Mr. Pollard is saying is not correct. And
18 they have told us so.

19 MR. NELSON: And the regulatory staff has said
20 that's so.

21 COMMISSIONER KENNEDY: They have said he relies on
22 factual distortions. No, you know, for us then to listen --
23 and I'm fully prepared to do so, without having heard, having
24 given the others, those who believe, or say they believe that
25 he is relying on factual distortions-- I have no indication

22 1 that that is true. All I know is what they say. But for them
2 to have said that and us, in the meantime, listening to Mr.
3 Pollard without ever having heard the other side of this argu-
4 ment, it seems to me does bear on this question of fundamental
5 fairness.

6 MR. NELSON: If that were the case, I would agree
7 with you, Commissioner. Where we differ is the judgment that
8 we make, or some of us make, that that side of the case has been
9 presented for purposes of the emergency question by the regu-
10 latory staff.

11 MR. SHAPAR: Has the

12 MR. NELSON: The staff has pointed out errors in
13 Mr. Pollard's position.

14 COMMISSIONER GILINSKY: We have some problems here
15 time problems which I think we're going to have to accommodate.
16 My own inclination is to take these a step at a time to deter-
17 mine whether Mr. Pollard should be heard tomorrow, and to put
18 off to another day the question of whether Mr. Conner should
19 be heard, and any other petitioners.

20 COMMISSIONER KENNEDY: We're raising the question of
21 whether Mr. Pollard should be heard tomorrow. Let's talk about
22 that, forget Mr. Conner.

23 COMMISSIONER GILINSKY: Right.

24 COMMISSIONER KENNEDY: Let's talk about Mr. Pollard
25 tomorrow.

RM 23

1 COMMISSIONER GILINSKY: Yes.

2 COMMISSIONER KENNEDY: I think it is unseemly on our
3 part to hear Mr. Pollard tomorrow. It's an open session. We
4 should give the public the fullest opportunity to be present and
5 hear what Mr. Pollard has to say. I am sure that Mr. Pollard would
6 wish this and I certainly do.

7 And I think, by and large, this Commission has con-
8 sistently said -- and I fully have supported it, consistently
9 said -- indeed, it is -- it has stopped certain proceedings
10 in order that time could be given to assure appropriate notice.

11 If we are going to have open meetings, if we are
12 going to have full participation, and if we are going to have
13 the public listening to what we hear and what we know, then I
14 think we ought to set this off for such a time it would give
15 that kind of notice, and let as many people come and hear as
16 we can get in the room. Not rush, with less than 24 hours
17 notice, notice that will not even get out, indeed, unless people
18 rush to their telephones as, indeed, they usually do.

19 COMMISSIONER GILINSKY: Well, but we're dealing with
20 a matter which is said by some degree an emergency matter. And
21 so by putting it off you are in effect disposing of it in a way
22 that you may not want to.

23 COMMISSIONER BRADFORD: And also, in this particular
24 instance, after all, there has been notice out for 2 or 3 days
25 now that we were today considering whether to allow him or to

24 1 invite him or whatever the correct verb is, to appear tomorrow.

2 COMMISSIONER KENNEDY: Given the basic fundamental
3 doctrine that they would have the assumption that there was a
4 50 percent chance. Certainly. A 50 percent chance, the answer
5 would be no.

6 COMMISSIONER BRADFORD: Well, at least they would be
7 on notice.

8 COMMISSIONER KENNEDY: And indeed it should be re-
9 called, as Mr. Conner's letter did, that that didn't even get
10 noticed until yesterday.

11 COMMISSIONER BRADFORD: Yes, but they would at least
12 be on notice that if they cared, it would be worth calling up
13 sometime this afternoon and find out what the Commission's
14 decision is. It isn't as if the first inclination they have had
15 this might happen would be something published as a result of this meeting.

16 COMMISSIONER KENNEDY: I would be interested in
17 reviewing the transcript on this point the next time the ques-
18 tion of notice arises, because I want us all to keep recalling
19 what I believe to be double standards.

20 COMMISSIONER GILINSKY: Well, I will propose that
21 we vote on the question of whether Mr. Pollard should be heard
22 without any prejudice as to whether Mr. Conner ought to be
23 heard at some later point, take that up at another meeting.

24 COMMISSIONER KENNEDY: I vote no.

25 COMMISSIONER GILINSKY: I vote yes.

G 25

1 COMMISSIONER BRADFORD: I would vote yes.

2 COMMISSIONER KENNEDY: It is only on the question
3 that we are taking it in that way. I want Mr. Pollard to be
4 heard. I want the record to be very clear on this. I want
5 Mr. Pollard to be heard, but I want it to be in the full sun-
6 shine. I want him to be heard in circumstances in which other
7 parties whose basic judgments are challenged by Mr. Pollard
8 are given the opportunity to be present and state their view
9 on the issues heard by Mr. Pollard.

10 Now, I'm only citing what I believe to be a fair
11 proposition of the basic fundamental fairness doctrine I know
12 governs the Commission's actions. That's the reason for my
13 vote.

14 MR. SNYDER: May I make a suggestion that we make
15 43 phone calls after this meeting? That's not impossible.

16 COMMISSIONER GILINSKY: I think that would be ade-
17 quate notice.

18 COMMISSIONER KENNEDY: I think that less than that
19 would be doing the Commission a disservice.

20 COMMISSIONER GILINSKY: I think we ought to notify
21 Mr. Conner.

22 MR. NELSON: You may wish to have Mr. Conner avail-
23 able at the meeting in case something is said that leads the
24 Commission to want to question him. There's no rule that would
25 preclude you doing that tomorrow.

26

1 COMMISSIONER GILINSKY: Jerry, you indicated in your
2 note that it said that if we do grant this request, Mr. Pollard
3 should be advised of the nature of these meetings and the extent
4 to which -- where you said open meetings are not part of the
5 formal or informal record of decisions or matters discussed
6 therein.

7 MR. NELSON: That's correct.

8 COMMISSIONER GILINSKY: Okay, Mr. Pollard should be
9 so notified.

10 COMMISSIONER KENNEDY: I will be filing a written
11 opinion on my decision, a written statement on my decision.

12 COMMISSIONER GILINSKY: Okay.

13 MR. NELSON: Does the Commission wish to rule out
14 Mr. Conner, or to instruct that he may be here in case somebody
15 wants to question him?

16 COMMISSIONER KENNEDY: He has every right to be here.
17 This is a public meeting.

18 COMMISSIONER GILINSKY: I don't want to rule him out.

19 COMMISSIONER BRADFORD: By rule out you didn't mean
20 exclude?

21 MR. NELSON: There's a difference between someone
22 coming to an open meeting on the Sunshine Act, and someone
23 coming knowing that the Commission may want to propound ques-
24 tions to him, sir. That's the difference I'm trying to suggest.
25 And do we want to convey that suggestion to Mr. Conner?

1 COMMISSIONER GILINSKY: For myself, I would not
2 expect to hear from Mr. Conner at tomorrow's meeting.

3 COMMISSIONER KENNEDY: If you convey that instruc-
4 tion to Mr. Conner, then I would be perfectly prepared to vote
5 yes on the proposition. It is only that that I'm saying, because
6 I will be sure that Mr. Conner is offered a question.

7 (Laughter.)

8 Under the basic fairness doctrine.

9 COMMISSIONER BRADFORD: Well, I suppose that if
10 Commissioner Kennedy wants to question Mr. Conner at tomorrow's
11 meeting, I would certainly vote that he be given that oppor-
12 tunity. It doesn't seem to me to be the best of all possible
13 ways to hear from Mr. Conner.

14 COMMISSIONER GILINSKY: Well, I would propose that
15 we go forward on the course that we voted on to hear from Mr.
16 Pollard and to deal with Mr. Conner's appearance at a later
17 point.

18 COMMISSIONER KENNEDY: At what point are we going
19 to have a meeting? May I call for that date?

20 COMMISSIONER GILINSKY: Well, I don't have the
21 schedule in front of me here.

22 COMMISSIONER KENNEDY: Well, we have a secretary
23 here.

24 COMMISSIONER GILINSKY: We can deal with that.

25 COMMISSIONER KENNEDY: At a subsequent meeting with

28
1 what was proposed here -- and I think it would be useful, since
2 the subsequent meetings seem to be on very short notice these
3 days -- which is not consistent with the basic policy of the
4 Commission -- I think it would be useful if we could determine
5 what the date of that meeting is now, since it will be certainly
6 less than 1 week.

7 MR. PEDERSEN: There is a meeting on the schedule
8 on the Commission for briefing on this subject on December 22nd.

9 COMMISSIONER KENNEDY: 22nd of December?

10 MR. PEDERSEN: Is the next scheduled meeting.

11 COMMISSIONER KENNEDY: That doesn't seem, to me, to
12 give Mr. Conner very much of an opportunity.

13 So it seems to me what we're saying is, if we're
14 only going to discuss his appearance at that time, we are
15 suggesting that we will allow the whole matter to be resolved
16 by total default. If Mr. Conner had anything to say, or those
17 he represents had anything to say, it will certainly at that
18 point be too late for them to say it.

19 COMMISSIONER GILINSKY: Well, I don't think it will
20 be, and I think this is something that the Chairman might use-
21 fully participate in. And so I think that we ought to take
22 it up at a meeting in the near future.

23 (Whereupon, at 12:45 p.m., the hearing was adjourned.)

24

25

