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NUCLEAR REGULATORY COMMISSION

IN THE MATTER OF:

ADJUDICATORY SESSION 78-8

DISCUSSION OF COMMISSION REVIEW OF MIDLAND
AND AFFIRMATION ITEM

Place - Washington, D. C.

Date - Thursday, 16 February 1978

Pages 1 - 9

Telephone:
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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

ADJUDICATORY SESSION 78-8

DISCUSSION OF COMMISSION REVIEW OF MIDLAND

AND

AFFIRMATION ITEM

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

Thursday, February 16, 1978

The Commission met, pursuant to notice, at 11:50 a.m.

BEFORE:

- DR. JOSEPH M. HENDRIE, Chairman
- PETER A. BRADFORD, Commissioner
- VICTOR GILINSKY, Commissioner
- RICHARD T. KENNEDY, Commissioner

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P R O C E E D I N G S

1
2 CHAIRMAN HENDRIE: Okay, let's get underway.

3 Jim, you said you could do it in less than 15
4 minutes. I bet you you can't.

5 MR. KELLEY: The proposition that is before the
6 house is whether or not we should extend the Commission review
7 until after the remand hearing in the Midland case to determine
8 the imposition of antitrust conditions, the remedial phase
9 of the hearing.

10 We did call for views from the parties; we did
11 get views back now from the Staff and the Justice Department
12 and the intervening municipalities, and the applicant,
13 Consumer's Power. Everybody but the applicant favors deferring
14 Commission review.

15 COMMISSIONER KENNEDY: What was his reason for not?

16 MR. KELLEY: There were essentially two reasons:
17 one was the contention that a lab for 52 was wrong in serious
18 respects, and that it was misleading for the industry and
19 would affect industry planning, and that the Commission should
20 step in and correct the industry errors so the industry could
21 know what the rules of the game are.

22 A second contention was that, on the assumption that
23 they could come up here and win hands down, the quickest way
24 was for the Commission to step in now.

25 You could make all sorts of assumptions trying to

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1 figure delay and speed going down that road. If you come in
2 now, there still has to be a remand that would take longer.

3 So one could argue that back and forth. I think
4 that the contractor is an important consideration in
5 assessing that claim. It's very true that the Appeal Board
6 has now spoken on a lot of substantive antitrust issue, and
7 the Commission hasn't. And there's going to be a period of
8 time, if you don't review now, during which that will be the
9 law, and possibly the Commission will change its place.

10 The Consumer Commission says this could delay
11 commission resolution by years. I don't think that's accurate.

12 COMMISSIONER KENNEDY: I would hope not.

13 MR. KELLEY: I did talk with the Chairman of the
14 Remand Board, Marshall Miller, who I think is a very able man.
15 And I asked him, what do you think, Marshall, in terms of time.
16 And he said he thought he could hold this hearing and be
17 through this phase of it, certainly, in less than 6 months;
18 maybe more like 4.

19 I would say realistically, if you defer, it will
20 come back up here in about a year. But given the time frames
21 we're operating in, I don't think that's bad. And I think
22 the downside of going in other directions could be longer.

23 In favor of extending -- and I can extend or
24 shorten this as much as you wish -- but I do think that as the
25 Staff pointed out there's going to be some wasted effort. If

kw 3

1 you take it now, you'd have to take it again later, because
2 you can't look at these things as abstract, theoretical
3 propositions. You're going to have to get into the record
4 to some extent, and that means some trips into a big record,
5 which I think would be undesirable.

6 It does seem to me that the place for Commission
7 policy judgment is going to be primarily at the remedial stage.
8 The antitrust laws require whatever they require; appeal
9 boards have a lot to say on that, but that is sort of an
10 abstract, intellectual exercise.

11 It's quite another matter, it seems to me, to figure
12 out, well, what's your final liability in antitrust, and what
13 are you going to do about it? Are you going to make them
14 sell a piece of the plant? Are you perhaps going to ask all
15 sorts of things? You're going to have a lot of discretion in
16 that area.

17 That's where it seems to me that policy guidance
18 is going to come in very strongly, and much less so at this
19 stage, in the posture of this case.

20 There was a concern, expressed by Commissioner
21 Bradford but I think shared by all of you, about impact on
22 other cases. The Staff has come back and said that they think
23 that deferring will not significantly impact other cases.
24 There are not an awful lot of other cases. I was rather
25 surprised at the shortness of the list; like six pending cases

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1 now, and a couple of them before the appeal board.

2 So we don't want to have a situation where we've got
3 20 ongoing hearings, and a concern that there may be something
4 seriously wrong with 452, and therefore they're marching down
5 the wrong road.

6 There are relatively few hearings on going, and
7 we have the Staff's judgment that deferral would not have
8 significant impact in those terms.

9 CHAIRMAN HENDRIE: So your recommendation is that
10 in order -- let's see, this is order on a motion by applicant.

11 MR. KELLEY: No, the applicant came in -- I want
12 to make two additions. Attachment 2 is a proposed order.

13 The applicant came in and said, "Review it now,
14 but we want more time and more pages -- two more pages on
15 our petition to explain what's wrong with 452." That's a
16 motion before the house.

17 You would be extending your time for review on
18 your own motion. You're simply taking a look at this and
19 saying, not now but later. That's what this order would do.

20 I would like to make a couple of additions to this.
21 This order says we're going to extend the time to consider
22 petitions for review. I'm sure they'll be forthcoming.

23 I think you should also extend the time for review
24 on your own motion. So I would like to put in some words that
25 would do that. I would like to add a sentence which says

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1 approximately this at the very end: "Consumer Power Company's
 2 motion of January 4, to extend the time for filing petitions
 3 for review, and to enlarge the PACE limitations on such review,
 4 is denied without prejudice to its right to renew such a
 5 motion following appeal board review at the remand proceedings."

6 In other words, I can come back next year and make
 7 the same request, and it would be entertained. But that
 8 motion is before the house; I think it should be acted upon.
 9 I think that's the way to do it.

10 COMMISSIONER BRADFORD: I'm voting.

11 (Laughter.)

12 CHAIRMAN HENDRIE: I perceive a sudden hunger for
 13 decision.

14 Those in favor of Counsel's proposal?

15 (Show of hands.)

16 CHAIRMAN HENDRIE: So ordered.

17 COMMISSIONER KENNEDY: I would like to talk on the
 18 matter we were discussing informally earlier.

19 I do think it would be good to reexamine the question
 20 that was put before the Commission in 1973 to take a look at
 21 what the Commission's general policy posture is.

22 AND I think it would be useful to get it updated to
 23 the extent it's appropriate, and put it before us. And if at
 24 that point we conclude that we were comfortable where we
 25 are for the time being, fine. But I think we ought to at least

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1 think about that in today's climate, and looking ahead to
2 tomorrow's world.

3 MR. KELLEY: We can simply do that in our office,
4 if it's not too much trouble, Jerry, and we can work out some
5 sort of allocation of it, as to who does what.

6 But I would think all three offices could have some
7 input to discussing the situation with the Commission and the
8 apparent alternatives.

9 COMMISSIONER KENNEDY: We'd appreciate it.

10 CHAIRMAN HENDRIE: It may be you'll conclude that
11 this is not the right time to go forward with such a thrust,
12 but maybe it would be good to know that we think that.

13 MR. KELLEY: I take it your asking for what I could
14 call sort of a preliminary assessment, and not an exhaustive
15 study of the matter?

16 COMMISSIONER KENNEDY: I guess that's right. I
17 would like to feel comfortable with whether we're letting the
18 statutes be written by the courts. I'm not sure that's the way
19 all the best law is made.

20 MR. KELLEY: We'll certainly give you our assessment
21 of that.

22 CHAIRMAN HENDRIE: Please do.

23 MR. KELLEY: I'll recirculate this order with the
24 changes I mentioned.

25 CHAIRMAN HENDRIE: Yes, of course.

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1 MR. KELLEY: But I think we can get it out today.

2 CHAIRMAN HENDRIE: And similar to the previous one?

3 COMMISSIONER KENNEDY: I would like --

4 CHAIRMAN HENDRIE: That order be circulated too.

5 COMMISSIONER KENNEDY: I would like to suggest

6 that on this one that we vote now, and we don't have to get
7 it back.

8 CHAIRMAN HENDRIE: That's exactly right.

9 MR. KELLEY: I told you the points I wanted to make,
10 and I thought there was agreement.

11 COMMISSIONER KENNEDY: Absolutely.

12 CHAIRMAN HENDRIE: We have an affirmative vote.
13 There's no need to vote again.

14 MR. KELLEY: You mean the prior order? I'm not
15 quite clear.

16 CHAIRMAN HENDRIE: No, no, no; the prior matter
17 that we just talked about.

18 MR. KELLEY: Oh, oh, oh, the ALARA thing.

19 CHAIRMAN HENDRIE: We had a vote and settled it.
20 But you know, as always, the language should circulate so
21 that people can see the things they thought would be in it
22 are indeed in it.

23 MR. KELLEY: I gathered from sitting here that
24 Bob Minogue would have the lead on doing that.

25 CHAIRMAN HENDRIE: Well, it'll be some place.

1 Okay, Sam. Will you conduct us in an affirmation item?

2 MR. CHILK: The subject is SECY-78-33, compliance with
3 SEC 1(d) of NRC Authorization Act for FY '78, advanced reactor
4 safety contracts. The law requires you to consider the recom-
5 mendations made by ACRS regarding the proposed research.

6 ACRS has written that they indicate the scope and
7 direction of this program are appropriate. If there's a need
8 for it, the general counsel has recommended that you indicate
9 your concurrence with this, and place it on record by issuing
10 a memorandum to the staff, which was attached to the paper.

11 All of you voted for it. Commissioner Gilinsky
12 made a comment indicating he would like the staff reaction to
13 the recommendation, but that's not a bar; that doesn't change
14 his approval of the paper.

15 I'd like to ask you to affirm.

16 CHAIRMAN HENDRIE: Those in favor, please raise their
17 hands.

18 (Show of hands.)

19 CHAIRMAN HENDRIE: So ordered.

20 Thank you very much.

21 (Whereupon, at 12:00 noon, the hearing in the above-
22 entitled matters was adjourned.)

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