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NUCLEAR REGULATORY COMMISSION

IN THE MATTER OF:

PUBLIC MEETING

DISCUSSION OF SECY-79-397 - PROCEEDING TO ASSESS
COMMISSION CONFIDENCE IN SAFE DISPOSAL OF NUCLEAR WASTES

Place - Washington, D. C.

Date - Thursday, 27 September 1979

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

PUBLIC MEETING

DISCUSSION OF SECY-79-397 - PROCEEDING TO ASSESS
COMMISSION CONFIDENCE IN SAFE DISPOSAL OF NUCLEAR WASTES

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

Thursday, 27 September 1979

The Commission met at 9:35 a.m., pursuant to notice.

PRESENT:

- VICTOR GILINSKY, Commissioner (presiding)
- RICHARD T. KENNEDY, Commissioner
- PETER A. BRADFORD, Commissioner
- JOHN F. AHEARNE, Commissioner

ALSO PRESENT:

Messrs. Cunningham, Gossick, Bickwit, Ostrach, Hoyle, and
Dircks.

P R O C E E D I N G S

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2 COMMISSIONER GILINSKY: Let's get started. The
3 subject this morning is the nature of the proceeding that
4 the commission might conduct in order to assess where it
5 stands on the question of the safe disposal of nuclear
6 wastes, the commission's confidence in the eventual safe
7 disposal of such wastes and how that might relate to the
8 reactor licensing process.

9 We have a paper from both the general counsel and
10 the executive legal director on this. I take it the lead
11 was taken by the general counsel.

12 MR. BICKWIT: That's true.

13 COMMISSIONER GILINSKY: Are you prepared to
14 discuss that?

15 MR. BICKWIT: Yes.

16 COMMISSIONER GILINSKY: We are in single-wing
17 formation here, but I think we are ready to hear from you.

18 MR. BICKWIT: Fine. This was, as you said, a
19 joint paper -- general counsel's office and executive legal
20 director's office -- also coordinated with NMSS.
21 Steve Ostrach actually took the lead on it. I will take you
22 through the most basic decisions involved in the paper, and
23 then I am going to ask Steve to go through the component
24 questions.

25 The basic issue which has to be decided here is

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1 one which was discussed in pretty detailed fashion at the
2 last meeting on this subject, which is, basically: Do you
3 want to have a board or some other subordinate entity
4 conduct the basic aspects of this proceeding, including a
5 hearing if one is held; or do you want to have the
6 commission conducting all or part of that proceeding, all or
7 a major part of that proceeding?

8 In reviewing the transcript of the preceding
9 discussion, it was clear to us that a majority of the
10 commission favored involving the commission in a major way,
11 a way unlike the way it is involved in a typical rulemaking
12 proceeding, such as the clearance rule, in this rule.

13 I think the basic options available to you are:
14 to consider -- to reconsider that question and add to it a
15 subordinate question, which is: putting the options as best
16 we can, do you want the commission to handle proceeding,
17 including a hearing; do you want a board or other
18 subordinate entity to do it; or do you want the commission,
19 as we proposed, do you want to divide this proceeding into
20 two stages, having a subordinate entity conduct the first
21 stage of it, a preliminary stage, a prehearing stage and
22 have the commission if there is a hearing conduct that or
23 any secondary stage other than a hearing that might be
24 prescribed.

25 And I think, before we go through all of what we

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1 have proposed here, the commission ought to try to come
2 down on that particular question. We have presented pros
3 and cons. Pros and cons were presented in the previous
4 meeting. We can go through them, if you like, but to some
5 degree I think we would be reploting old ground if you did.

6 COMMISSIONER AHEARNE: Could you describe a little
7 bit about how you would see this individual that would be
8 running this prehearing process, pulling together the
9 material? Would you envision a special staff being attached
10 to him, an OP, OGC, someone to help pull this together, and
11 him making a presentation to the commission?

12 COMMISSIONER GILINSKY: Before you answer that,
13 is Steve going to run through --

14 MR. BICKWIT: Steve can run through --

15 COMMISSIONER GILINSKY: -- His paper briefly?

16 MR. BICKWIT: We can do it that way. But since so
17 much of what we say here is dependent on this threshold
18 decision, I think it probably makes sense for you to focus
19 on that before running through it.

20 COMMISSIONER GILINSKY: I don't think three of us
21 are going to decide how we are going to conduct that
22 proceeding here today.

23 MR. BICKWIT: That's your choice.

24 COMMISSIONER KENNEDY: I don't care.

25 COMMISSIONER GILINSKY: That's certainly our legal

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1 quorum of the commission.

2 COMMISSIONER KENNEDY: I am prepared to decide,
3 but I would like to hear Steve go down through the whole
4 panoply of issues and options as they have been described.

5 (At 9:45 a.m., Commissioner Bradford arrives.)

6 MR. OSTRACH: Commissioner, our understanding,
7 that the individual or presiding office would be assisted,
8 at least initially, perhaps by dedicated OGC or OPE person,
9 not full-time dedicated, but assigned OPE and OGC person.

10 The question of staff participation is one that
11 our office is studying in light of recent judicial decision,
12 the whole box officé decision, the Hercules decision, which
13 may or may not be applicable to the commission in this type
14 of rulemaking, and may or may not therefore place certain
15 constraints on the way in which staff can both be a
16 participant in the sense we describe it here and be involved
17 in directly advising the presiding office of the commission.

18 And I don't think at this time that we are really
19 prepared to discuss what our legal conclusion is on even the
20 options that are available to the commission. Certainly one
21 of them, if it were permissible, would be to either
22 assign --

23 COMMISSIONER KENNEDY: Excuse me. If that's the
24 case, I withdraw my comment earlier.

25 (Laughter.)

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1 COMMISSIONER KENNEDY: If you are not prepared to
2 discuss the legal implications of the options before us,
3 then I guess I don't feel prepared to make a decision as to
4 which options should be pursued.

5 MR. OSTRACH: That's one narrow option, of which
6 there are two different ways it can be accomplished. If the
7 commission desires the presiding officer to have assistance
8 of staff, there is no question that the outset of the
9 proceeding staff can designate certain individuals who would
10 be his assistants to work with him or in addition to him and
11 do that through the proceeding. Then there would be no
12 legal problems at all.

13 The only question is: Would staff have to
14 designate those people at the outset of the proceeding, or
15 could they wait until the end of the proceeding, and they
16 could be people who played a role in staff's participation.

17 While the legal requirement is something we're not
18 prepared to speak about, if the commission wished to avoid
19 the legal question entirely, we could simply draw the line
20 at the outset of the proceeding.

21 So, the question of whether or not you want the
22 presiding officer, if you should choose to have one, to have
23 staff assistants is one you can decide without worrying
24 about the legal implications, because regardless of how the
25 legal issue cuts, we can do it. It can be done legally.

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1 It's only a question of whether he gets his people from the
2 outset or whether they are parceled off to him at the end.

3 MR. BICKWIT: What Steve is referring to is the
4 whole issue of ex parte prohibitions in rulemaking is under
5 consideration by our office, and we don't feel you have to
6 make decisions on that question, especially since we plan to
7 be presenting recommendations shortly.

8 COMMISSIONER AHEARNE: I think we would have to
9 make a decision prior to the start of the hearing.

10 MR. OSTRACH: Yes.

11 MR. BICKWIT: We don't see any problem with that.
12 I just have a note here that the chairman's administrative
13 assistant says the chairman has no problem with the
14 commission taking action today.

15 COMMISSIONER AHEARNE: The rest of the question
16 was -- did you say that after this presiding officer had run
17 the process that he or she had under way and completed it
18 that they would then come and give a presentation or prepare
19 a package, here are the pertinent parts? What was that
20 communication like that you had in mind?

21 MR. OSTRACH: That could be done at the
22 commission's discretion. My personal expectation would be
23 that the presiding officer would prepare for the commission
24 something similar but grander than what the general
25 counsel's office does in an adjudication before the

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1 commission, a summary of the briefs, principal issues,
2 suggested lines of inquiry. I am assuming that the next
3 stage would be a hearing. He would summarize the position
4 to the parties as laid out. He might point to potential
5 inconsistencies or the fact that one participant had
6 strongly attacked the credibility of a certain argument of
7 another participant. He would suggest lines the commission
8 might wish to address in a hearing.

9 He would also, I expect, prepare a proposed second
10 prehearing order, which the commission itself would issue,
11 suggesting who the participants to be asked to participate
12 in the hearing would be.

13 COMMISSIONER AHEARNE: But you did not have in
14 mind, for example, a proposed finding?

15 MR. OSTRACH: Not at that stage, sir, not before
16 the hearing, if the commission wants a hearing.

17 COMMISSIONER AHEARNE: Thanks, Steve.

18 MR. OSTRACH: The overall structure we proposed
19 for the proceeding is phase I. It is one that can be
20 changed as the proceeding goes along, depending on how the
21 commission views the participation to date. The initial
22 stage would be publication of a detailed Federal Register
23 notice, somewhat along the lines of the one we attach to our
24 paper, set out the goals of the proceeding, and lay at least
25 tentative ground rules for the rest of the proceeding.

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1 It would provide that 30 days after publication of
2 the notice individuals or groups could file either comments
3 on the rulemaking in general or, if they wished a more
4 extensive role, file statements of intent to participate in
5 the rulemaking. Their statements of intent would identify
6 who they are, what their concerns are, what their
7 qualifications are to participate in the rulemaking.

8 Following that date, over the next 30 days the
9 presiding officer, should there be one, would work with the
10 groups of individuals that have identified themselves as
11 participants to attempt to achieve some consolidation and to
12 schedule the next stages of the proceeding.

13 In particular, he would try and reach agreement
14 amongst them as to the timing of the statements of position
15 and the cross statements of position.

16 Since, as we suggest, we believe it would be
17 helpful if certain of the government agencies that play a
18 lead role in waste disposal, particularly, DOE, gave their
19 statements earlier than the other participants' statements
20 so they could be addressed, the hearing -- the presiding
21 officer would attempt to work with the DOE representatives
22 and the other representatives to reach some sort of
23 agreement on deadlines of filing and again, to reach
24 agreements on consolidation so that there wouldn't be 30
25 filings on a certain issue or something, perhaps division of

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1 issues amongst the participants.

2 And to the extent there are any questions about
3 information, the availability of information, the presiding
4 officer would attempt to resolve those.

5 The DOE statement would be received. Following
6 that, the statements of the other participants would be
7 received. That's a total of approximately 120 days after
8 the notice of publication. Again, that's a flexible date
9 that the presiding officer would set in the scheduling
10 concerns. Another 60 days later, the cross statements.

11 We have given a fairly substantial amount of time
12 to the cross statements compared to the statements, saying
13 90 days to prepare the statements and 60 for the cross,
14 because we think that many of the participants, those with
15 less institutional resources, will attempt to make their
16 case largely in a counter-punching fashion, and so their
17 cross statements will be their major contribution and they
18 deserve a substantial amount of time to prepare those.

19 COMMISSIONER KENNEDY: Can the initial statements
20 then be reduced? Couldn't the time for the initial
21 statements be reduced?

22 MR. OSTRACH: The initial statements will be those
23 carrying the ball for the parties that are trying to carry
24 the ball. I think, in a sense, it is possible that parties
25 will break down into two groups: those suggesting their

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1 strong confidence that there will be a waste disposal
2 facility; and those questioning that; one suggesting there
3 is strong confidence --

4 COMMISSIONER KENNEDY: How about those that don't
5 care?

6 MR. OSTRACH: They will not have filed anything
7 and go about their lives, I suppose.

8 (Laughter.)

9 MR. OSTRACH: So, I think each group deserves a
10 substantial amount of time to file their statements.

11 After the cross statements have been received, the
12 presiding officer will summarize the documents, prepare some
13 sort of presentation to the commission, work with the
14 commission on the further stages of the hearing.

15 Should the commission decide at that time to
16 proceed with a hearing of the sort we have discussed in the
17 paper, which is a legislative hearing, the presiding officer
18 with the commission, the commission would issue a second
19 prehearing order which would specify which participant it
20 wished to hear from on what issues, allocate time, set
21 dates, and provide further procedures.

22 We would suggest, if you do go into a legislative
23 hearing, again, it would perhaps be best to go with the DOE
24 and the USGS witnesses first and have the other participants
25 have an opportunity to go second.

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1 COMMISSIONER GILINSKY: Who would conduct this
2 hearing at this stage?

3 MR. OSTRACH: At this stage, according to the
4 recommendation we have given here, it would be the
5 commission, the five commissioners chaired by the chairman.

6 MR. BICKWIT: With the assistance of a presiding
7 officer who conducted the preliminary stages of the
8 proceeding.

9 COMMISSIONER GILINSKY: But who will not have
10 conducted a hearing?

11 MR. BICKWIT: Right.

12 MR. OSTRACH: In this proceeding.

13 COMMISSIONER GILINSKY: In this proceeding.

14 MR. OSTRACH: Yes, sir.

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1 MR. OSTRACH: The second prehearing order would have
2 provided some procedure by which the participants would submit
3 questions to the Commission to ask of other participants, at
4 your discretion. We noticed the staff informed us in the S-3,
5 for example, these questions, referred questions, if you will,
6 took up by a substantial amount the bulk of time that was
7 actually spent in hearings. The questions asked by the
8 Hearing Board themselves and the direct statements of the
9 participants took up less time than referred questions.

10 So we would have to be careful in tailoring the
11 procedures of the hearing to allow an extensive amount of
12 time for that.

13 Following the hearing, the Commission could, if it
14 wished and it determined that it was appropriate, schedule
15 a cross-examination phase. If it did that, it would have the
16 cross-examination phase again conducted by the Commission,
17 chaired by the Chairman, with the assistance of the Presiding
18 Officer.

19 Following that phase, if there is any, we would
20 suggest that the Commission convene a working group that would
21 consist of OGC personnel, OPE personnel, appropriate staff
22 personnel.--I say "appropriate"; it depends on how it's
23 structured -- and a presiding officer to prepare a draft of a
24 rule and supporting statement of the Commission. It would
25 then be presented to the Commission, approved by the

1 Commission. Whether the Commission could publish that as a
2 final rule or an effective rule depends on the extent to which
3 that stated rule had been previously forecasted in the
4 original notice of rulemaking.

5 We believe that if the rule that is ultimately
6 promulgated is very similar to the policy set forth in the
7 denial of the NRDC petition in 1977, you could simply promulgate
8 it as a final rule. We have set forth that as one possibility
9 with sufficiently clarity in the proposed notice so that you
10 would not need to again publish it for comment.

11 If, however, the rule marked a change in policy or
12 was based on substantially different data, we believe you
13 would have to publish the rule as a proposed rule, solicit
14 35, 40, or 60 days more comment, and then analyze that comment,
15 and then publish it for a final rule. In our judgment, the
16 total amount of time this rulemaking proceeding would take
17 would be between 14 and 18 months.

18 The major uncertainties would be in the area of the
19 amount of time it would take to actually go from the hearing
20 to the issuance of a rule and also -- that would be it.

21 COMMISSIONER GILINSKY: The question comes up when
22 we discuss the possibility of Commission involvement, just
23 how much of the Commissioner's time would be involved here.
24 Do you have any estimate of that?

25 MR. OSTRACH: In the hearing itself, we estimate

1 ten hearing days would be fully adequate. And a hearing day
2 is not a full day, but the major part of your business day
3 would be spent in the hearings.

4 COMMISSIONER GILINSKY: This covers the first phase
5 or does it also allow for possible cross-examination?

6 MR. OSTRACH: That's the first phase. It would be
7 difficult to estimate how much time we'd spent in cross-
8 examination. I have no idea how many issues would be set for
9 cross-examination or how that would go.

10 COMMISSIONER GILINSKY: Have you considered the
11 possibility of the Commission, after having conducted the
12 first phase, asking the presiding officer to conduct hearings
13 on very specific questions, and then report back to the
14 Commission?

15 MR. OSTRACH: We haven't considered that, sir. That
16 would certainly be within the realm of possibility. I have
17 questions of concerns about the possibility of directing the
18 presiding officer to hold cross-examination. I believe those
19 who heard the direct statements should also hear the cross
20 on the direct statements.

21 But if it is a question of the need for further
22 hearings on selected issues and creation of a record, it
23 would be referred to the Commission.

24 COMMISSIONER GILINSKY: We're looking in more
25 detail on certain matters?

1 MR. OSTRACH: Certainly that would be feasible.

2 Again, the process that we outline here is capable
3 of such modification as the issue develops and as your percep-
4 tions of it change.

5 COMMISSIONER GILINSKY: There's no requirement that
6 there be a three-man board in the rulemaking, is there?

7 MR. OSTRACH: No, sir.

8 COMMISSIONER GILINSKY: You are finished?

9 MR. OSTRACH: No, sir.

10 COMMISSIONER GILINSKY: I'm sorry.

11 COMMISSIONER KENNEDY: He has hardly begun.

12 MR. OSTRACH: On the subject of the information
13 available to the parties, we suggest, since this is a rule-
14 making, we follow the precedent set in prior Commission
15 rulemakings of this scale and not simply comport it with the
16 10 CFR Part 2 adjudicatory position. Instead, we suggest what
17 be done is that the Commission itself establish a large data
18 base, which would consist of the IRG report, backup documents
19 on the IRG report, and the staff compile a document library
20 of what it believes to be the major waste-related documents,
21 waste as subject matter, not characterization.

22 Furthermore, we believe this would be supplemented
23 by a requirement that any participant making an assertion or
24 raising a point would be required to supplement their state-
25 ment with the documents that underlie that, thus making them

1 available for attack or rebuttal in the cross statements.
2 In this fashion, we believe the Commission -- that all the
3 participants would have access to all of the material which
4 the Commission could rely on in the rulemaking. We believe
5 that is fully adequate to satisfy -- certainly it's adequate
6 to satisfy due process administrative procedure. We believe
7 it's a fair way of ensuring all parties access to the same
8 information, without bogging down the proceeding with extra-
9 neous matters about discovery and what people have on their
10 minds.

11 COMMISSIONER BRADFORD: Why is discovery an extraneous
12 matter?

13 MR. OSTRACH: It may be an extraneous matter if it
14 turns up material that is not otherwise going to form the
15 basis for the Commission rulemaking on this issue.

16 COMMISSIONER BRADFORD: Presumably, it wouldn't
17 turn up material that didn't form the basis for one of the
18 parties' conclusions, or else they wouldn't furnish it.

19 MR. OSTRACH: They wouldn't have sought discovery,
20 sir?

21 COMMISSIONER BRADFORD: I assume what the discoveries
22 will go to is the basis for the conclusions that the parties
23 stated.

24 MR. OSTRACH: Yes, an attempt to produce evidence
25 from another party.

1 COMMISSIONER BRADFORD: Do all discovered documents
2 automatically go into the record?

3 MR. OSTRACH: Yes, sir, unless they are produced
4 under a protective order or some such similar device.

5 It is, of course, true that the parties can volun-
6 tarily conduct discovery amongst themselves without invoking
7 process, administrative process, and to the extent that they
8 do that, those documents would go into the public record.
9 They could adopt an open files policy.

10 COMMISSIONER BRADFORD: Let's see. If a party
11 discovers a set of documents from another party, you are
12 saying that, regardless of whether, upon reading through them,
13 the party perceives or feels they are of any use, they all go
14 into the record and must in some way be read and considered
15 by the decisionmaker?

16 MR. OSTRACH: They don't have to be read and consi-
17 dered by the decisionmakers, no, sir. If no party points to
18 them, I don't see why the decisionmaker would come across
19 them himself. They will just accumulate in the file.

20 COMMISSIONER BRADFORD: So they wouldn't clutter
21 things up very badly.

22 MR. OSTRACH: No, sir. They would distract the
23 parties' attention. They would lead to the introduction of
24 concerns. There would be discovery arguments. The imposition
25 of a discovery requirement might serve as an impediment to

1 parties -- participants willing to participate in the rule-
2 making.

3 I believe you can say that it is one thing to accept
4 as a burden that you have to prepare a statement and support
5 your statement; it's another thing to subject yourself to
6 extensive discovery process that can be conducted against
7 you by other participants, and that you have to participate in.

8 We suggest that the Commission could keep, as a
9 safety valve, a very, very strict discovery rule, providing
10 that the process could be used -- and this was as it was done
11 in GESMO in ECCS, that in exceptional circumstances, when the
12 Commission itself finds that compelling justification has been
13 shown, compelled discovery under subpoena could be achieved.

14 COMMISSIONER BRADFORD: What does the exceptional
15 circumstances test add to that statement? Why aren't compelling
16 circumstances enough? Why isn't the compelling showing --

17 MR. OSTRACH: Frankly, I copied that, sir, from the
18 previous two rulemakings. I would guess that the extra value
19 of the exceptional circumstances is that it indicates the
20 Commission doesn't expect, at least prospectively, that this
21 be done very often in the proceeding; that compelling justifi-
22 cation isn't something that will come up all the time. It is
23 a different factor.

24 COMMISSIONER BRADFORD: I would think that if I felt
25 compelled by the showing, I wouldn't want also to have to

1 find that the circumstances were exceptional.

2 What would be the drawback to making discovery --
3 making the availability of discovery an item for comment by
4 the parties in the first round of their submissions? Pre-
5 sumably, at that point any party who felt that if discovery
6 were allowed he would probably stand up -- it could alert us
7 to the matter.

8 MR. OSTRACH: Perhaps I will address the first
9 round of comment. To the extent that the discovery question
10 remains open, subject to subsequent change, you run the risk
11 that parties are not -- well, that they presumably will be
12 simultaneously going ahead with their statements and partici-
13 pation.

14 If you then change your mind and discover you have
15 just set -- you have set yourself back two steps, since you
16 are now starting parties all over again with discovery, which
17 has to be completed before they again prepare statements.

18 COMMISSIONER BRADFORD: I'm not talking about a
19 change of mind. I'm just talking about discovery prior to
20 the hearing itself, based on the written submissions.

21 MR. OSTRACH: Oh, that wouldn't have any -- in other
22 words, a party suggests he needs discovery to test the under-
23 lying assertion in such and such a document; they have some
24 reason to believe that a participant may have another study
25 that refutes their position. That could be a matter that

1 could be provided for in the second prehearing order. I
2 don't think that would necessarily disrupt the function of the
3 proceeding at all. It could very easily be accommodated at
4 that stage.

5 There are two other factors that should be pointed
6 out. All government agencies, Commission and Department of
7 Energy, are subject to the FOIA. So, while there's no discovery
8 as such provided against the Commission, the availability of
9 the FOIA insures any relevant documents any participant wants
10 to get from a government agency, they'll be able to get their
11 hands on. I believe discovery rules in these circumstances
12 would be coextensive with the FOIA.

13 COMMISSIONER BRADFORD: That's probably right,
14 perhaps except for the timing. I think before I relied exclu-
15 sively on the FOIA, I want to be sure that the times for
16 responses and appeals under the FOIA were consistent with the
17 schedule we set for the hearing.

18 MR. OSTRACH: If anything, they would be shorter.
19 The FOIA, speaking as a practitioner, has extraordinarily
20 painful time deadlines: 10 days for initial response, 20 days --
21 10 working days for initial response, 20 working days for
22 appeal. Traditionally, discovery response time is 30 days.
23 A negative response only triggers an effort to enforce.

24 I would think the FOIA would be at least as speedy
25 as discovery. The one difference, I suppose, is the FOIA

1 type proceeding isn't so clearly linked to the rulemaking
2 proceeding so that a party could transfer to the presiding
3 officer and the Commission his concerns that he was being held
4 up or that he needed some additional time because his requests
5 weren't being met.

6 But I think in practical terms, I don't think that
7 would be a problem.

8 COMMISSIONER BRADFORD: That's one. The other is
9 the final arbiter under the FOIA, short of the courts, is the
10 agency itself from which the document is being sought. If it
11 were being sought under discovery, then it's conceivable that
12 the presiding officer would wind up reviewing a particular
13 document and deciding on its pertinency or other --

14 MR. OSTRACH: I believe with respect to another
15 agency -- I'm not --

16 MR. BICKWIT: I think so.

17 MR. OSTRACH: I imagine the Commission does have an
18 authority on that. Section 161(c) in the Atomic Energy Act
19 gives us authority over other agencies of the government. So
20 I imagine the Commission could issue compulsory process against
21 another agency to support a discovery claim. I would think
22 that would be a rather extraordinary set of circumstances
23 and one that I think the Commission would probably wish to
24 avoid if at all possible.

25 COMMISSIONER AHEARNE: Could I ask a question on

1 the discovery process. Down at this end of the table, at
2 least, there are some of these subtle nuances that I'm not
3 very familiar with. Let's consider two organizations that
4 come in to participate in our rulemaking. One is, let's say,
5 an industrial organization, the other a public interest group.
6 If they agree to participate and we have discovery, do I
7 understand correctly that our rules then allow us -- give us
8 some legal framework to enforce the right of one of those to
9 extract from the other documents, written material, et cetera,
10 in their files?

11 MR. OSTRACH: If we impose the Part 2 discovery
12 rules, yes, sir.

13 MR. BICKWIT: Which are not imposed automatically.
14 They apply only to adjudications.

15 COMMISSIONER AHEARNE: And the link ends up going
16 back to the Atomic Energy Act, some specific provision that
17 gives us that authority?

18 MR. BICKWIT: Subpoena power.

19 MR. OSTRACH: Right. At least in my opinion, for
20 what it's worth, I believe that traditional discovery rules
21 simply are appropriate in rulemakings. In rulemakings the
22 Commission is supposed to accumulate a record and make its
23 decision based on that. In adjudications, the situation
24 normally is that parties present views and the Commission
25 approves one or the other party's set of views. So the

1 party should hold himself up to be viewed by the other parties.
2 In this case, participants just bring whatever trinkets they
3 wish to, and it's from those the Commission is supposed to
4 make its decision.

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MM 1 COMMISSIONER BRADFORD: Of course, whether the
2 trinket is brass or gold may require it be tested.

3 MR. OSTRACH: One further point the NRC staff
4 under any -- even apart from a Commission audit -- well, the
5 Commission and the staff together always have this authority
6 to issue subpoenas, and if a party makes a compelling case
7 that it needs information, as I said, there is no question
8 that the information can be gotten. That is because of the
9 Commission's power to achieve it to satisfy its own needs.

10 COMMISSIONER GILINSKY: It wasn't entirely clear
11 from the paper what role you envision for the NRC staff.

12 MR. OSTRACH: No, sir.

13 MR. BICKWIT: That's the next item.

14 MR. OSTRACH: That is the next item there. The
15 role we see for the staff is the role of an informed
16 participant but not the lead participant. Waste disposal
17 is -- we believe that we have the concurrence of NMSS in
18 this. Staff might wish to speak for themselves.

19 Waste disposal is not a subject over which staff
20 has a preeminent lead role in dealing with the technology and
21 advancing the subject. And, therefore, we don't believe
22 that the staff should be required to go first and present a
23 case that everyone else attacks. We believe to the extent
24 that anyone plays a lead role in the Commission's waste
25 confidence finding, we think it's more appropriate it be DOE

1 and USGS and that staff play a role as an informed
2 participant like other informed participatns.

3 COMMISSIONER GILINSKY: I guess I want to put it a
4 little bit differently, although we come out in the same
5 place. I wonder whether NMSS ought to have to take a
6 position at this point --

7 COMMISSIONER AHEARNE: Are you saying, Vic, you
8 believe they should, or are you questioning whether they
9 ought to?

10 COMMISSIONER GILINSKY: Questioning whether they
11 ought to. What is involved here really ultimately is
12 whether the Commission feels sufficiently secure about waste
13 disposal that it is prepared to go forward with reactor
14 licensing, which is not a responsibility of NMSS'.

15 COMMISSIONER KENNEDY: It is a reponsibility of
16 NMSS, though, is it not, to reach some judgment as to the
17 waste question itself?

18 COMMISSIONER GILINSKY: Certainly they are going
19 to have to reach a judgment on a license application that is
20 presented to them. But do they need to have a view of, you
21 might say, the grander questions at this point?

22 COMMISSIONER AHEARNE: Perhaps you might ask
23 Bill's opinion.

24 COMMISSIONER KENNEDY: Let me say, I think I see
25 the difference you are drawing. I think it is not

1 appropriate to take a position as to the grander issue, that
2 is whether reactor licensing ought to go forward in the
3 circumstances.

4 It seems to me, however, equally true, they are
5 both in a position to -- and it seems to me obligated to
6 give the Commission their best judgment based upon the facts
7 and understanding of the situation as they know it. And
8 it's that that I would expect they would be doing. They
9 would not be recommending to me whether my decision ought to
10 be to go ahead with reactor licensing. That's a different
11 question.

12 COMMISSIONER GILINSKY: Okay. That was the
13 difference I was trying to develop.

14 COMMISSIONER KENNEDY: Is that it?

15 COMMISSIONER GILINSKY: Yes.

16 COMMISSIONER KENNEDY: Do you agree again with the
17 second --

18 COMMISSIONER GILINSKY: I certainly would like to
19 hear their views on where we stand on waste disposal.
20 Perhaps Bill could sit at the table with all of us -- I
21 meant later, but go ahead.

22 (Laughter.)

23 COMMISSIONER AHEARNE: Let him address the
24 procedural question as opposed to the substantive one.

25 COMMISSIONER KENNEDY: Unless he's prepared to

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1 take the rest of the morning, give us a simple solution.

2 MR. DIRCKS: The whole thing right now. I think
3 I followed the general train -- (inaudible) -- certainly what we
4 want ourselves to come out with whatever technology is -- if
5 you have been tracking where we are going on the general
6 statement of policy we are proposing to use in the formation
7 of this rule, we envision quite a long trek before we come
8 up with any judgments as to where DOE is going, and that
9 takes us through a series of steps. We wouldn't want to
10 prejudge whether or not DOE can get to the final end or not
11 until we see much more data coming in and much more
12 activity. -- (Inaudible.)

13 We can give you a pretty good summary of where we
14 think the path should take us, the various steps we think
15 we would have to travel before we would make a licensing
16 decision on the repository, and we can lay that out.

17 COMMISSIONER AHEARNE: I think that's the
18 appropriate action for NMSS. I more view them as a
19 responsible staff section to say, "Here is what would be
20 required in order to have a licensable facility, a
21 licensable technology." I don't believe it is their
22 position to say, "And we are confident that someone can get
23 there."

24 COMMISSIONER GILINSKY: Let's see. Have you
25 exhausted yourself, or are we still --

mccMM 1 MR. OSTRACH: I've exhausted myself and the role
2 of the staff.

3 COMMISSIONER GILINSKY: I wanted to give Guy an
4 opportunity to present his comments when you finished.

5 MR. BICKWIT: On this question, I am not clear on
6 where the sense is. Is it the sense of the Commission
7 that -- it's clear that the sense of the Commission is that
8 the staff should not come in and say, "We're sufficiently
9 confident that we recommend that the Commission should go
10 ahead with reactor licensing."

11 But is it the position of the Commission that the
12 staff should not --

13 COMMISSIONER KENNEDY: Wait. If that happened to
14 be the view of the staff, and I'm not suggesting that it is
15 or should be, but you are certainly not suggesting that if
16 it happened to be their view, they shouldn't put it forward,
17 are you?

18 MR. BICKWIT: I thought that was the suggestion.

19 COMMISSIONER GILINSKY: What I was saying is, I
20 didn't want to force them into taking a position.

21 COMMISSIONER KENNEDY: That's different. I don't
22 think they should be forced to take a position, but neither
23 do I believe they should be precluded, that the proceeding
24 should preclude them from doing it, if they believe they're
25 prepared to do so.

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1 COMMISSIONER AHEARNE: I think they should be
2 precluded from it.

3 COMMISSIONER KENNEDY: I can't agree to that.

4 COMMISSIONER BRADFORD: I would want to think a
5 little bit more about it, but before I endorse Dick's
6 proposition, I guess I would say that if the staff were
7 going to make that link, they ought to involve NRR as well
8 as NMSS in drawing that conclusion -- that if there is going
9 to be a spillover into the area of reactor licensing and
10 locations, it ought to be a coordinated staff position and
11 not come simply from the office that doesn't deal with
12 reactors.

13 COMMISSIONER KENNEDY: I always speak of the staff
14 as a unity.

15 COMMISSIONER BRADFORD: None of which is to say
16 they ought to do it, but if it goes in that direction, I
17 think it should involve both offices.

18 MR. BICKWIT: I think my question is answered,
19 that the Commission is not together on this issue.

20 (Laughter.)

21 COMMISSIONER KENNEDY: That's perceptive.

22 (Laughter.)

23 MR. OSTRACH: The only other matter that I do wish
24 to discuss is --

25 COMMISSIONER KENNEDY: We are finished discussing

1 that particular part. There's another question about role
2 of staff.

3 What assurance do we have that other federal
4 agencies are going to act as is proposed here? Are they in
5 fact going to pick up this role and come forward and argue a
6 case? Are we sure of that? Do we have a way of compelling
7 them to do so?

8 COMMISSIONER GILINSKY: Well, if they aren't, I
9 suppose it would affect our confidence.

10 (Laughter.)

11 COMMISSIONER KENNEDY: I accept that.

12 MR. OSTRACH: As a practical matter, I can't
13 imagine any way we could actually compel the other federal
14 agencies to play an active role in the proceeding. We can
15 probably obtain documents in their possession, if push came
16 to shove, but in terms of getting their active participation
17 as experts and taking the lead role, there is certainly no
18 formal legal way that could be done.

19 COMMISSIONER AHEARNE: I agree with Vic. After
20 all the Energy Department has the prime responsibility for
21 the federal government for establishing the program, and if
22 they would not choose to participate, that certainly would
23 be a very strong argument in favor of concluding one doesn't
24 have sufficient confidence.

25 MR. OSTRACH: Yes, sir.

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1 COMMISSIONER KENNEDY: There are circumstances in
2 which they might feel it inappropriate to do so wholly aside
3 from the technical questions. For example, if the President
4 has not acted yet on the IRG Report, given any sign as to
5 what he believes as to its conclusions, and that is -- I
6 read in the papers, and that's all I know -- not an unlikely
7 situation.

8 Then one asks, what would the Energy Department
9 feel free to do? I don't know the answer to that, but I can
10 see a circumstance in which they might say, "We think it
11 inappropriate to sit here and try to argue a case when we
12 don't even know whether the case already put forward is
13 considered acceptable by the Chief Executive Officer." And
14 that's the reason for my question.

15 And then, I guess, I would not necessarily agree
16 that that represents a cause for assuming that we should
17 take that as an evidence that there is no basis for
18 confidence. It's an evidence that there is an inherent
19 difficulty internally in the government in coming to grips
20 with certain kinds of questions.

21 But that's a different problem altogether.

22 COMMISSIONER AHEARNE: I accept it somewhat
23 weakens the confidence, then, that the government could come
24 to grips on the problems and solve them.

25 COMMISSIONER KENNEDY: That may be, but I don't

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1 know whether we're here to describe that or discuss it or to
2 reach conclusions as to it.

3 COMMISSIONER AHEARNE: Probably not this morning.

4 COMMISSIONER KENNEDY: Or even at that
5 proceeding. Well, anyway that's the reasons for my
6 question.

7 MR. BICKWIT: And you accept that it was answered?

8 COMMISSIONER KENNEDY: Yes.

9 MR. OSTRACH: The final point is that there are a
10 considerable number of spent fuel pool expansion proceedings
11 now pending before the Commission. We suggest in view of
12 the fact that the DC Circuit did not vacate the proposal for
13 spent fuel pool expansion in Vermont Yankee and Prairie
14 Island that the Commission permit those proceedings to
15 continue on the basis they are now proceeding, which is they
16 don't now consider health and safety of radiological impact
17 from storage after the expiration of the operating license.

18 However, the spent fuel -- the licenses that are
19 granted as a result of the spent fuel pool expansion be
20 subject to modification based upon whatever conclusions were
21 reached in the Commission's rulemaking.

22 COMMISSIONER BRADFORD: Steve, have we -- could
23 you compare that to what we did, say, when the appeal was
24 vacated, the S-3 proceeding? Have we ever previously said
25 that an issue that the Commission itself considered is up

1 for grabs in the sense of an ongoing rulemaking -- is not
2 litigable in individual proceedings pending that ruling?

3 MR. OSTRACH: Well, sir, the answer depends on
4 exactly how you define what the Commission is saying about
5 this issue. Certainly if we characterize the Commission as
6 still being bound by the denial -- or still accepting to
7 some extent a denial of the NRDC rulemaking petition, it
8 would be in a situation somewhat similar to that that you
9 were in while you had the interim S-3 rule that existed
10 while you were updating the S-34 rule in light of the Court
11 of Appeals' Vermont Yankee decision.

12 And at that time you allowed licensing to proceed
13 on the basis of the interim rule, subject to change on the
14 basis of how the rulemaking finally turned out.

15 I think the answer to your question of what we
16 suggest here is analogous to what the Commission has done --
17 depends on the Commission's determination of where it is.
18 The DC Circuit did not make a Commission policy that was
19 applied in Prairie Island and Vermont Yankee. If the
20 Commission wished to vacate the underlying policy, saying
21 the whole question is open, then you would be presented with
22 a difficulty in justifying continuation of licensing on the
23 basis of a vacated policy.

24 COMMISSIONER AHEARNE: Steve, could you explain,
25 if I now look to the Federal Register notice, page two, the

1 top of page two which runs from the bottom of page one,
2 explain really what you have in mind there? What would end
3 up happening in the relationship of that S-3?

4 MR. OSTRACH: Our understanding is that that is
5 essentially a situation similar to that that would have
6 existed if the NRDC petition of denial had been an
7 affirmative act of rulemaking.

8 COMMISSIONER AHEARNE: Does this essentially say
9 that if we make the finding, then the rule will essentially
10 remove from consideration any aspect of some of the parts of
11 the S-3 table?

12 MR. OSTRACH: It was not intended to do that,
13 sir. The intent was only that parties could not litigate
14 the issue of an environmental or radiological impacts of
15 spent fuel remaining on site after the expiration of the
16 license, because the Commission would have determined that
17 the spent fuel was not going to remain on site.

18 COMMISSIONER AHEARNE: But it's solely during the
19 period of time it's on site?

20 MR. OSTRACH: Yes, sir. That is the only issue
21 that we intend to take out.

22 COMMISSIONER AHEARNE: I see. I read it, whatever
23 happens after there's a spent fuel remaining on the site,
24 and any remaining environmental implications of that, that
25 was my reading.

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1 MR. OSTRACH: No, sir. The intent only was
2 that --

3 COMMISSIONER AHEARNE: During its time on site.

4 MR. OSTRACH: Yes. Since it wouldn't be on site,
5 there is no need to consider what happens to it if it had
6 remained on site.

7 COMMISSIONER KENNEDY: Does "safely disposed of
8 off site", the language at the very bottom of page one mean
9 disposed of or could it mean "temporarily stored" off site?
10 For example, the AFR question?

11 MR. BICKWIT: It means the combination. It could
12 mean "safely stored" until a safe means of disposal is
13 found.

14 MR. OSTRACH: One point that I didn't mention in
15 discussing the body of the paper was the economic issue. We
16 suggest the Commission address -- take care of the economic
17 cost issue in this rulemaking proceeding in the same way
18 they did in the S-3, which is -- an issue will be the
19 economic impracticability of any suggested scenario.

20 For a scenario to be considered available, it must
21 be shown not to be economically impractical. But the
22 Commission would not delve into the actual dollar cost of
23 the scenario of whether it's a good buy -- the same approach
24 the Commission took in the S-3 rulemaking for the waste
25 facility there.

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COMMISSIONER AHEARNE: You would retain the threshold concept, though?

MR. OSTRACH: Yes.

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1 COMMISSIONER GILINSKY: Does that pretty well take
2 care of OGC's presentation?

3 MR. OSTRACH: Yes, sir.

4 COMMISSIONER GILINSKY: Would you like to add
5 something to that?

6 MR. CUNNINGHAM: Not a great deal. As you know,
7 it's a joint paper. ELD subscribes to the presentation of
8 the Office of General Counsel this morning.

9 I think I would like to, however, just add emphasis
10 to two points made by Steve. One is on the matter of discovery.
11 I would strongly endorse the notion that limited adjudicatory
12 discovery should not be part of this rulemaking for, I think,
13 three reasons:

14 The first: I don't think that that type of discovery
15 is necessarily useful in a rulemaking. It certainly is not as
16 well adapted as it is to the testing of positions which is
17 common to adjudication.

18 Secondly, I think it is bound to add substantial
19 time, if unlimited discovery is permitted, to the ultimate
20 determination of the proceeding.

21 And thirdly, I think it may have an impact on the
22 willingness of certainly groups with limited resources to
23 participate, if they know they're going to be subject to
24 discovery which could be burdensome.

25 COMMISSIONER BRADFORD: You're not disputing the

1 proposition that we can find that out?

2 MR. CUNNINGHAM: I'm not at all. As Steve emphasized,
3 the Commission has a variety of tools by which it can get the
4 information it feels is needed.

5 COMMISSIONER BRADFORD: No, I'm sorry. We think we
6 can find out whether parties will be deterred from participating
7 simply by asking them to comment on that at the beginning.

8 MR. CUNNINGHAM: No, I don't agree with that. I'm
9 just offering my prediction on what the answer will be.

10 MR. BICKWIT: Are you suggesting that there be
11 comment on the general standards for discovery at the beginning
12 of this proceeding? Is that your suggestion?

13 COMMISSIONER BRADFORD: My initial thought really
14 was in response to Steve's point that parties would actually
15 be deterred from participating, would be that we can make the
16 availability of discovery, I guess including the standard --
17 we could request parties to comment on that in their initial
18 submission.

19 MR. BICKWIT: There would be no problem with that if
20 you had this judicial officer, presiding officer. He could
21 certify that question up to the Commission.

22 COMMISSIONER BRADFORD: I must say I would be very
23 interested in knowing what percentage of the parties would
24 actually say that they would withdraw if discovery were
25 allowed.

1 COMMISSIONER AHEARNE: Can you make any kind of
2 just a rough estimate of -- you mentioned that it would extend
3 the time, make it longer. Do you have a rough feeling on --
4 either Steve or you?

5 MR. BICKWIT: In the TMI-1 proceeding, we calculated
6 60 days for discovery. That's using our rules under Subpart (B).

7 MR. OSTRACH: I believe it would probably take more
8 time in a rulemaking like this. You've got more expertise,
9 Guy, than I, but my impression is past Commission rulemakings,
10 discovery problems have delayed matters. Considerable time
11 has been spent while the parties have done nothing but engage
12 in discovery, document exchange and document production, to
13 the preclusion of efforts directed specifically in preparing
14 their statements.

15 MR. CUNNINGHAM: I gather the sentiment here, if
16 there was to be discovery, it would be only after statements
17 of position. Discovery would go toward the bases of those
18 positions. If that assumption is correct, then you can perhaps
19 minimize the time for discovery.

20 The danger always is that if you allow discovery,
21 you then get into arguments about the scope of discovery.
22 And while I wasn't focused on the earlier discussion, I
23 detected an underlying assumption that we were talking about
24 discovery of documents that existed, what did you rely upon.
25 But if we talk about other types of discovery, such as

1 interrogatories, requiring the framing of answers, then you
2 do run a severe risk, I think, of argument about what's a
3 proper question. And it could drag on.

4 COMMISSIONER AHEARNE: That particular aspect,
5 though, that would go beyond what would be available --

6 MR. CUNNINGHAM: That's right. Under FOIA, you are
7 only going to get what exists. You can't require the generation
8 of documents or answers.

9 COMMISSIONER GILINSKY: Do you see any difficulty in
10 Mr. Bradford's proposal to --

11 MR. CUNNINGHAM: Ask for comment?

12 COMMISSIONER GILINSKY: -- ask for comment at the
13 outset on proposed discovery procedures and asking for what
14 impact that might have on participation of potential partici-
15 pants?

16 MR. CUNNINGHAM: I see no difficulty with it. I
17 would just suggest, if it's done, it ought to go in the very
18 first notice.

19 COMMISSIONER AHEARNE: Now, see that thought -- at
20 least I thought you said that you did see a difficulty.

21 MR. BICKWIT: I think Steve was responding to a
22 different question on the issue. I don't see any difficulty.

23 COMMISSIONER AHEARNE: The point was that if you're
24 not -- if you do not open the issue of discovery during that
25 initial period of time, that you will then find that people

1 might not be focusing upon the preparation of their statements.

2 MR. BICKWIT: But all we would be asking for comment
3 on would be those procedural benefits of going forward with a
4 discovery process. We wouldn't be asking for comments on
5 particular discovery requests.

6 COMMISSIONER AHEARNE: I understand that. But I
7 thought his point then -- maybe I just misunderstood it. I
8 thought his point was that if you go out with two things, one
9 the notice of this proceeding, and second, a notice of comment
10 on the procedural question of discovery, that you then put
11 people in the position, if they're going to rely on the second
12 let's say they're going to rely on a positive yes answer, that
13 on the first they don't devote that length of time they would
14 have otherwise devoted to the preparation of their statement,
15 because they're waiting for the discovery to occur.

16 COMMISSIONER KENNEDY: That's what I thought.

17 MR. OSTRACH: That's what I said, Commissioner. I
18 believe there might be some risk. I don't know how serious
19 a risk it would be.

20 (At 10:33 a.m., Commissioner Bradford left the room.)

21 COMMISSIONER KENNEDY: It seems to me logical to
22 assume that if the choice is between no discovery and some
23 discovery, whatever its character may be, the individual is
24 going to wait a bit before he initiates preparation of a
25 statement to find out which course that's going to be, because

1 he may, if it's going to be some discovery, want to wait until
2 he sees what he gets.

3 MR. BICKWIT: He isn't preparing a statement in the
4 first instance.

5 COMMISSIONER KENNEDY: But he's going to start
6 thinking in those terms, hopefully.

7 MR. BICKWIT: That's true.

8 COMMISSIONER KENNEDY: If you ever plan to get the
9 proceeding finished.

10 MR. OSTRACH: As proposed, at least it's our office's
11 opinion that we have allowed enough room for discovery in those
12 cases where a real need for it is shown. We think we have, on
13 the other hand, imposed barriers for parties using discovery,
14 participants using discovery simply because it's there. Maybe
15 we will find some fishing expedition type discovery. By
16 requiring a showing of compelling -- we would expect that a
17 skilled and experienced presiding officer would be able to
18 give the Commission very pointed recommendations on what
19 process of discovery he receives.

20 I don't think it is likely that you would miss
21 anything that would be of importance.

22 COMMISSIONER KENNEDY: I noted on page 11 that you
23 suggest that we should not determine initially the precise
24 procedures for the hearing until we have received written
25 statements to determine what procedures are best adapted to

1 resolving the issues. And I wondered how much time you
2 visualize that might take.

3 MR. OSTRACH: Developing the procedures of the
4 hearing, sir?

5 COMMISSIONER KENNEDY: Yes.

6 MR. OSTRACH: Not an extensive amount of time at all.
7 Assuming that the Commission -- the choices before the
8 Commission would be three, primarily: either go with a legis-
9 lative hearing of the type we described here, go with an
10 adjudicatory hearing, or do without a hearing entirely. Or
11 perhaps there might be a fourth, which would be to ask -- as
12 Commissioner Gilinsky suggested, in a sense remand for special-
13 ized hearings on certain issues before the presiding officer.

14 The choice having been made amongst those leading
15 contenders, I see no reason why it would be a difficult task
16 to come up with an acceptable source of procedure. One gets
17 the parties or the participants on the telephone: We think
18 A and B should work together. How about a half an hour? How
19 much time do you need? Well, you know, your witness has
20 vacation plans.

21 Those are minor details I don't see requiring signi-
22 ficant Commission time or very much in the total sense of the
23 presiding officer's time.

24 COMMISSIONER WAHEARNE: Is the reason you have not --
25 you are not trying to get us too specifically now, because

1 there are pros and cons that will be clarified by the submis-
2 sions, or because you doubt that we can reach a decision?

3 COMMISSIONER GILINSKY: Don't make him answer that.

4 MR. OSTRACH: I think I would have to answer the
5 former, sir. The question of whether or not you believe there
6 is a need -- the real choice, I believe, is between a legisla-
7 tive hearing and an adjudicatory hearing. I believe the
8 Commission has shown great interest in having a hearing. The
9 choice between those things, I think, depends upon the
10 Commission's perception of what the nature of the issues are.
11 Are they the sort of issues that the Commission really will
12 feel the need for cross-examination on. And I don't think
13 that that's a decision that could profitably be put to the
14 Commission now, because you haven't got the issues presented.
15 You will only have them after you've seen the statements.

16 COMMISSIONER AHEARNE: But I thought that that
17 decision you were speaking about would be the one that would
18 decide between a legislative hearing period and a legislative
19 hearing followed by a selected set of focused issues under
20 cross-examination.

21 COMMISSIONER KENNEDY: That's one option. Another
22 option is for an adjudicatory hearing.

23 MR. BICKWIT: Or no hearing.

24 COMMISSIONER AHEARNE: And you believe there is
25 sufficient doubt as to what the issues are at the present

1 time that it would be unwise to choose now the form of that
2 hearing?

3 MR. OSTRACH: I don't believe there would be anything
4 significantly gained. The main reason we try and specify
5 procedures as far in advance as possible is to guide the
6 parties' conduct. I don't think the parties need to know now,
7 it does them any good, to know what the Commission's thinking
8 is. I believe it helps the Commission by retaining flexibility.

9 MR. BICKWIT: In the notice, we do set out the
10 tentative conclusion and say: Unless different procedures
11 are arrived at, here's where we're going.

12 COMMISSIONER AHEARNE: I know.

13 COMMISSIONER GILINSKY: I wonder, Lee, whether you
14 have anything to add on the question of staff participation
15 and the role of the various offices in such a proceeding?

16 MR. GOSSICK: No. Of course, in Mr. Kennedy's view,
17 certainly NMSS and NRR and possibly even others can be
18 involved. But I guess I come back to the point that
19 Commissioner Ahearne made: If they are not asked to take a
20 position with regard to their view as to, you know, the
21 availability of the technology to be able to handle the waste
22 matter, clearly it seems to me that it is up to DOE or whoever
23 else, whatever body, to present that convincingly to the
24 Commission, so that you can make a decision on it.

25 But I can think only -- it's up to the staff

1 primarily, under those conditions, to present to you their
2 assurance as to the degree that you can see that we would be
3 in a position to license such a facility whenever the applica-
4 tion and facts are presented to the staff or licensee.

5 I don't think I have anything else to add.

6 COMMISSIONER AHEARNE: I would think if we restrict
7 NMSS to the role I described, which I think is their appropriate
8 one, saying here is what we believe to be necessary, that that
9 would neutralize them to the extent of addressing the substan-
10 tive question that the hearing would be involved in, and
11 therefore would have a greater chance of us being able to also
12 use their technical expert knowledge in assisting us.

13 COMMISSIONER GILINSKY: I must say that I am inclined
14 to feel that if the staff has a strong view one way or the
15 other, based on their technical judgment, I wouldn't keep them
16 from expressing it.

17 COMMISSIONER KENNEDY: I would hope not.

18 COMMISSIONER GILINSKY: It seems to me the concern
19 was more that they would be pressed to take a view when they
20 were not prepared in fact to take one.

21 COMMISSIONER KENNEDY: As a practical matter, if they
22 were asked a question, I suppose the issue would come down to:
23 Are we saying that they should decline to answer? If they were
24 asked a question and had an answer which they believe to be
25 correct from their own perception, it seems to me they ought

1 to answer it.

2 But I agree with you, they should not be driven to
3 that. If the answer to the question is we don't know or we
4 are not prepared to make that judgment, that's the answer to
5 the question.

6 MR. GOSSICK: I think one should also point out that
7 you may not find a monolithic kind of position here. There
8 may be a divergence of views that you have to contend with.

9 COMMISSIONER KENNEDY: That's what the hearing is
10 about.

11 MR. GOSSICK: Right.

12 COMMISSIONER GILINSKY: Are there any other views
13 on this proposed statement? Do you feel that you are ready to
14 go forward with it?

15 COMMISSIONER AHEARNE: I think I am.

16 COMMISSIONER KENNEDY: I am, with the understanding
17 that I mentioned earlier, that we are not ignoring by the word
18 "disposed" at the bottom of the page 1 --

19 COMMISSIONER AHEARNE: It could probably easily be
20 revised to say "restored."

21 COMMISSIONER KENNEDY: Or "disposed."

22 MR. BICKWIT: "Restored or disposed."

23 COMMISSIONER KENNEDY: That would take care of my
24 problem.

25 COMMISSIONER GILINSKY: And how about including a

1 question at this point of possible participants, on the way
2 discovery would be handled and what impact that might have
3 on their participation?

4 COMMISSIONER KENNEDY: Well, I personally would
5 accept the staff view here. I agree with it that discovery
6 is not needed, and indeed probably not merited, and that it
7 might cause -- I think it would have -- it's likely to cause
8 some further delay.

9 However, as a general proposition, if we want to ask
10 parties what they think of it, I am always for that. So I have
11 no objection to it.

12 COMMISSIONER AHEARNE: If you come up with some kind
13 of a sentence or paragraph to put that idea in, I wouldn't
14 object.

15 MR. BICKWIT: With the idea that the decisions would
16 be certified up to you on that.

17 COMMISSIONER AHEARNE: I would appreciate seeing
18 the paragraph before it gets out.

19 MR. BICKWIT: We assumed you would appreciate it.
20 We assumed you would see it.

21 COMMISSIONER GILINSKY: Could we, then, agree on this
22 proposed notice, subject to seeing the specific changes?

23 COMMISSIONER KENNEDY: The two modifications?

24 COMMISSIONER GILINSKY: Yes.

25 COMMISSIONER AHEARNE: Yes.

1 COMMISSIONER KENNEDY: Yes.

2 COMMISSIONER GILINSKY: And approving those.

3 John?

4 COMMISSIONER KENNEDY: I do.

5 COMMISSIONER AHEARNE: I do.

6 COMMISSIONER GILINSKY: Thank you. I think we have
7 taken care of Mr. Bradford's concerns.

8 COMMISSIONER AHEARNE: I'm sorry. Could I ask one
9 other question? You had pointed out this remaining on-site.
10 Could you put in a clarifying something to make it clear that
11 what you are addressing here is that it's remaining on-site
12 during the time it's on site.

13 MR. OSTRACH: If it's all right with the other
14 Commissioners, I think that the point was clear and we will
15 work with Commissioner Ahearne's office to get language that's
16 satisfactory.

17 COMMISSIONER GILINSKY: The proposed change sounded
18 satisfactory to me.

19 COMMISSIONER KENNEDY: Batch it all together and send
20 it all out.

21 COMMISSIONER GILINSKY: Anyone else who has anything
22 else to add on this question?

23 (No response.)

24 COMMISSIONER GILINSKY: See if you can get

25 Mr. Bradford, just to make absolutely sure that we have in

1 fact taken care of his concerns.

2 MR. OSTRACH: My understanding, if we have a moment,
3 is that the paragraph you are speaking about would be a para-
4 graph just after the questions of discovery, that we say: "The
5 Commission, however, is considering whether to also have
6 adjudicatory discovery procedures. We wish the parties to
7 comment on this, and in particular, whether, if such
8 procedures were added, they would affect or deter them from
9 participation. They should file their comments in the 30-day
10 period, the very first round of comments or statements of
11 intent to participate."

12 And I suppose we would also say the presiding officer
13 is directed to refer to the Commission immediately his
14 recommended --

15 COMMISSIONER AHEARNE: Right, whatever that was.

16 COMMISSIONER KENNEDY: With a summary.

17 MR. OSTRACH: With a summary of positions and
18 recommendations.

19 (At 10:45 p.m. Commissioner Bradford entered the room.)

20 MR. OSTRACH: This is in addition to the notice on
21 page 29 of the draft notice. Add a new paragraph saying:

22 "However, the Commission is also considering whether
23 to also provide adjudicatory discovery procedures. The
24 Commission wishes participants to discuss this and say whether
25 it would affect or deter their participation. They should file

1 their comments on this 30 days after the notice of hearing.
2 The presiding officer will summarize their comments and send
3 a recommendation to the Commission for prompt resolution."

4 COMMISSIONER BRADFORD: That seems fine.

5 MR. OSTRACH: There is one remaining question that
6 I think the Commission will have to deal with separately.

7 COMMISSIONER BRADFORD: Let's see. Steve, I take it
8 that also means for the moment you would scrub the part that
9 states the standard in terms of "extraordinary circumstances"?

10 COMMISSIONER AHEARNE: No, I think that would stay in.

11 COMMISSIONER GILINSKY: Wait a minute.

12 COMMISSIONER BRADFORD: I would not do that.

13 COMMISSIONER AHEARNE: I would.

14 COMMISSIONER KENNEDY: I would.

15 COMMISSIONER GILINSKY: Can we just go back to that
16 point? Where is that?

17 MR. OSTRACH: Top of page 9 of your notice.

18 MR. CUNNINGHAM: May I suggest, what you might want
19 to say: "It's the Commission's present intention that requests
20 for interrogatories, depositions and other forms of discovery
21 will not be entertained," et cetera, and then the other para-
22 graph.

23 COMMISSIONER KENNEDY: That's all right.

24 COMMISSIONER AHEARNE: That's all right.

25 COMMISSIONER BRADFORD: No, I don't think so. It

1 would suffice if we took out the words "in exceptional
2 circumstances."

3 COMMISSIONER GILINSKY: I was just going to propose
4 that. It seemed to me that tilted too far in one direction
5 and really raises a question of --

6 COMMISSIONER BRADFORD: I would also change the
7 negative to positive, "will be entertained upon a showing of
8 compelling justification," et cetera.

9 COMMISSIONER GILINSKY: That seems a reasonable
10 change to me.

11 COMMISSIONER AHEARNE: No.

12 COMMISSIONER GILINSKY: What is the exceptional
13 circumstances?

14 COMMISSIONER AHEARNE: I guess I tend to lean against
15 the use of discovery. Changing it to the positive would be a
16 leaning forward, and I couldn't go along with it.

17 COMMISSIONER GILINSKY: I must say, in acting on the
18 matter, I had assumed that we had left it open, in fact asking
19 for comment on it, and did not realize that these words were
20 staying in.

21 Now, let's see. You think "exceptional circumstances"?

22 COMMISSIONER AHEARNE: "Exceptional circumstances."
23 I would have to go back and try to check some legal termino-
24 logy. I'm afraid now we may be playing around with words of
25 art.

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COMMISSIONER BRADFORD: This is my revenge for
Three Mile Island, this discussion.

(Laughter.)

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1 COMMISSIONER AHEARNE: Could you clarify that?

2 COMMISSIONER BRADFORD: Just that now it's my turn
3 to use terminology.

4 COMMISSIONER AHEARNE: I see.

5 So, Len, what is the significance of "exceptional
6 circumstances coupled with compelling justification"?

7 MR. BICKWIT: It's what Steve said previously,
8 that the understanding is that this would not be done
9 often.

10 COMMISSIONER AHEARNE: But to a layman, either of
11 those would suffice.

12 MR. BICKWIT: It's possible. The commission is
13 indicating it will not find compelling circumstances often.
14 If you take "exceptional circumstances" out, the commission
15 is not indicating that.

16 COMMISSIONER AHEARNE: My point is: to a layman,
17 the "compelling justification" would mean that there is a
18 rationale why you should do it, and that's what "compelling"
19 is.

20 MR. BICKWIT: Right.

21 COMMISSIONER GILINSKY: "Compelling" is pretty
22 strong.

23 COMMISSIONER AHEARNE: So, if you add "exceptional
24 circumstances," you're telling me that overrides
25 "compelling." That would mean in some cases it would be

MM 1 compelling in which you ought to do it but it's not
2 exceptional so you wouldn't do it. And that leads to my
3 confusion. That's why I am asking is there a legal link of
4 some kind.

5 MR. BICKWIT: I don't think that's what is
6 intended. It is simply saying, when this language was
7 written, it is the understanding it will be the unusual case
8 in which compelling circumstances are found, but the
9 compelling circumstances test is the only test that's going
10 to be used.

11 COMMISSIONER KENNEDY: Exceptional circumstances,
12 you mean.

13 COMMISSIONER AHEARNE: "Exceptional circumstances"
14 doesn't add anything.

15 COMMISSIONER KENNEDY: To me it was only
16 suggesting.

17 MR. BICKWIT: Yes.

18 COMMISSIONER KENNEDY: The compelling
19 justification is going to arise only in exceptional
20 circumstances.

21 MR. BICKWIT: That's the intention.

22 COMMISSIONER KENNEDY: That's what it says to me,
23 and that's what I assumed it meant, and that's exactly the
24 way I think it ought to be, as I indicated earlier. I have
25 no objection whatever to inquiring of the parties' views on

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1 this, and an option which is to provi
2 broader --

3 MR. BICKWIT: I that makes any difference, we can
4 revise the sentence to say "unless there is compelling
5 justification, therefore," and then add another sentence
6 saying "the commission would not expect this to happen
7 except in exceptional circumstances."

8 COMMISSIONER AHEARNE: Fine.

9 COMMISSIONER KENNEDY: That's what it says now, as
10 far as I am concerned. That's okay with me.

11 COMMISSIONER BRADFORD: It seems strange to me
12 that we are now being looked at ourselves by at least three
13 different groups: the Kemeny Commission, the Ragoven
14 investigation, the Hart committee -- all of which intend to
15 draw a combination of specific and general conclusions about
16 nuclear regulation and the way it perceives it.

17 None of them are talking about -- other parties
18 come to us with trinkets, upon which they will then base
19 some pretty sweeping conclusions about their degree of
20 confidence in the future of nuclear regulation. They are
21 sending their counsel out to do very close to the equivalent
22 of some aspects of discovery; in fact, taking depositions
23 and really probing the structure. That seems to me -- or at
24 least that potential method of inquiry -- seems to me more
25 consistent with the behavior of a group that really wants to

1 be in a position to test all of the assumptions, all of the
2 facts, all of the positions being alleged before it. And
3 all three of those groups are proceeding in that way.

4 Now, there are differences, of course, in the
5 structure of their inquiries, and the structure of this --
6 of what we're talking about doing here. But it is
7 interesting that not one of those groups chose as a method
8 of conducting their inquiry a process in any way analogous
9 to what we're talking about here.

10 COMMISSIONER AHEARNE: But, Peter, I haven't
11 assigned either of those groups that you have referenced
12 having cross-examination of the parties in front of them.
13 It appeared to me they are doing exactly what we are trying
14 to do. I don't read this discovery a restriction on us
15 finding out information. If it is, then please explain that
16 to me.

17 I thought the discovery provision we are debating
18 is the parties in front of us in what they can discover with
19 each other. I haven't seen any indication on either of the
20 organizations you mentioned to try to give us the authority
21 to dig into other aspects of it. Your analogy --

22 COMMISSIONER BRADFORD: In fact, we have that
23 authority. But there is a limit to how far the analogy can
24 be taken. But it does seem to me that discovery-type
25 proceedings commend themselves even to groups that are

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pv MM 1 trying to draw general conclusions about a pretty broad
2 subject.

3 Now, what we are talking about, cross-examination,
4 let me say I would feel less strongly -- I think the
5 possibility of cross-examination should be held open here
6 also, but I think if I were compelled to choose, I would
7 prefer to have discovery.

8 COMMISSIONER AHEARNE: If you see this as limiting
9 us, our presiding officer, in his or our ability --

10 COMMISSIONER BRADFORD: No, I don't.

11 COMMISSIONER AHEARNE: But that's the analogy, I
12 think, to the groups you're talking about.

13 COMMISSIONER BRADFORD: No, I am simply talking
14 about the ways in which those groups are going about drawing
15 information to themselves. Obviously, they don't have
16 exactly the same type of proceeding. They don't have a
17 rulemaking with many participants in it, but I don't think
18 that's to say for a minute that if they did they would not
19 be engaging in a process of discovery themselves.

20 COMMISSIONER AHEARNE: But I think in both of
21 those cases they are expressing a confidence in themselves
22 and their ability to carry out and find out the information,
23 and I would similarly hope that we would have that same kind
24 of confidence in our ability to find out the information.

25 COMMISSIONER BRADFORD: What they are saying is,

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1 in dealing with parties whose views they may have some
2 reason not to accept without some reservation, they are
3 going well beyond the simple expression of those views and
4 getting their hands on a great number of documents and
5 asking a great many questions.

6 COMMISSIONER AHEARNE: Which then the analogy
7 might then be that we ought to try to do that also.

8 COMMISSIONER BRADFORD: That would be another way.

9 MR. CUNNINGHAM: I think it is clear the procedure
10 recommended here preserves every tool the commission has to
11 do whatever probing it feels necessary. The discovery
12 controversy, as you point out, relates to parties vis-a-vis
13 themselves.

14 COMMISSIONER BRADFORD: Or each other..

15 MR. CUNNINGHAM: Each other. That's right.

16 COMMISSIONER GILINSKY: Let me just ask again how
17 you feel about the "exceptional circumstances." Do you feel
18 that needs to stay in there?

19 COMMISSIONER AHEARNE: Well, Len had proposed to
20 put in that second sentence, which I have no problem with.

21 COMMISSIONER GILINSKY: It still leaves in the
22 "exceptional circumstances." I am just asking whether you
23 feel that that has to be in there.

24 COMMISSIONER AHEARNE: I am still leaning in that
25 direction, yes.

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1 COMMISSIONER GILINSKY: It's a question of whether
2 we come to simple agreement on this question or not.

3 COMMISSIONER BRADFORD: Supposing that we write
4 the paragraph that Steve described and then simply state the
5 fact which is that the commission has not yet agreed upon or
6 has not decided the standard. It seems fairly clear that
7 among the four of us we haven't, and would welcome comment
8 on that subject.

9 COMMISSIONER BRADFORD: Or the alternative
10 stands. You can put forth the alternative stands, put
11 forward this; put forward the standard as I suggested; you
12 might modify it and put forward adjudicatory discovery, ask
13 for comment on them.

14 COMMISSIONER AHEARNE: Fine.

15 COMMISSIONER GILINSKY: Is that satisfactory,
16 Mr. Kennedy?

17 COMMISSIONER KENNEDY: Yes.

18 MR. OSTRACH: Pardon me. Just in terms of format,
19 would that leave in the language that is presently there at
20 the top of page 9?

21 COMMISSIONER KENNEDY: Modified as counsel
22 suggested.

23 MR. OSTRACH: Modified into two sentences --
24 (Simultaneous discussion.)

25 COMMISSIONER GILINSKY: Wait. I thought you were

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1 suggesting we leave it open and simply say we have not
2 decided on discovery procedures, and lay out three
3 possibilities.

4 MR. BICKWIT: That's right.

5 COMMISSIONER GILINSKY: That's what I thought.

6 COMMISSIONER KENNEDY: That's all right.

7 COMMISSIONER AHEARNE: Yes.

8 COMMISSIONER KENNEDY: Recognizing that I have
9 already stated my veiw of the matter clearly on the record,
10 I agree to putting it in.

11 COMMISSIONER AHEARNE: This would only then be
12 left as one of the alternatives.

13 COMMISSIONER GILINSKY: Right. We will not have
14 decided that question, which we will decide at some point,
15 hopefully, not too far in the distant future.

16 COMMISSIONER AHEARNE: Right.

17 COMMISSIONER GILINSKY: Can we modify our
18 agreement in that way?

19 COMMISSIONER KENNEDY: Right.

20 COMMISSIONER GILINSKY: We will still want to see
21 a precise --

22 MR. BICKWIT: Do you want to vote, Peter?

23 COMMISSIONER GILINSKY: I was asking Peter whether
24 he agreed.

25 COMMISSIONER BRADFORD: I don't think I ever quite

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1 got around to voting.

2 COMMISSIONER GILINSKY: What I thought I got from
3 Peter was the physical equivalent of a mumble.

4 (Laughter.)

5 COMMISSIONER BRADFORD: At least a moral
6 equivalent.

7 COMMISSIONER GILINSKY: And we will still want to
8 see the precise words on that basis --

9 MR. OSTRACH: Commissioner, one final point I want
10 to mention that need not be addressed today will be the
11 designation of the presiding officer. That will have to be
12 done separately by the commission.

13 COMMISSIONER GILINSKY: I understand.

14 COMMISSIONER AHEARNE: As you pointed out, some
15 checking will have to be done.

16 COMMISSIONER GILINSKY: Mr. Secretary, you will
17 make those modification?

18 MR. HOYLE: Yes.

19 COMMISSIONER GILINSKY: Thank you very much.

20 (Whereupon, at 11:00 a.m., the hearing was
21 adjourned.)

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