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**NUCLEAR REGULATORY COMMISSION**

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**IN THE MATTER OF:**

**PUBLIC MEETING**

**ORAL ARGUMENT IN THE MATTER OF DUKE POWER COMPANY  
(AMENDMENT TO MATERIALS LICENSE SNM-1773 -- TRANSPORTATION  
OF SPENT FUEL FROM OCONEE NUCLEAR STATION FOR STORAGE AT  
MC GUIRE NUCLEAR STATION)**

**Place -** Washington, D. C.

**Date -** Monday, 10 September 1979

**Pages** 1-40

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1 UNITED STATES OF AMERICA  
2 NUCLEAR REGULATORY COMMISSION

3  
4 PUBLIC MEETING

5 ORAL ARGUMENT IN THE MATTER OF DUKE POWER COMPANY (AMENDMENT  
6 TO MATERIALS LICENSE SNM-1773 -- TRANSPORTATION OF SPENT FUEL  
FROM OCONEE NUCLEAR STATION FOR STORAGE AT MC GUIRE NUCLEAR  
STATION)

7  
8 Room 1130  
9 1717 H Street, N. W.  
10 Washington, D. C.

11 Monday, 10 September 1979

12 The Commission met, pursuant to notice, at 11:55 a.m.

13 BEFORE:

14 DR. JOSEPH M. HENDRIE, Chairman

15 VICTOR GILINSKY, Commissioner  
16  
17

18 PRESENT:

19 Messrs. Bickwit, Mallory, Eilperin, Hoyle, McOsker, Sawyer,  
20 Roisman, Porter, Riley, and Christenberg.

21 \* \* \*  
22  
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## P R O C E E D I N G S

1  
2 CHAIRMAN HENDRIE: If we can come to order, why  
3 don't we get started. The Commission, which is limited just  
4 to the chairman this morning, meets this morning to hear  
5 oral argument in the matter of Duke Power Company -- I am  
6 sorry, I thought you weren't coming.

7 (Commissioner Gilinsky enters hearing room.)

8 CHAIRMAN HENDRIE: We meet this morning to hear  
9 oral argument on the matter of Duke Power Company, the  
10 amendment on Materials License SNM 1773, for transportation  
11 of spent fuel from Oconee Nuclear Station for storage at  
12 Maguire.

13 The meeting is an open meeting, and it is my hope  
14 that we can maintain it as an open meeting. However, if it  
15 becomes necessary to hear some of the material which is --  
16 which relates directly to routing and which would be  
17 considered exempt material, why, we will have to go into  
18 closed portion of the meeting.

19 Last Friday, the Commission somewhat abruptly  
20 issued an interim order suspending temporarily but going  
21 forward with the proceeding which was to have gone on this  
22 morning, to examine the question of whether we should  
23 continue -- we should protect certain information in this  
24 case.

25 Our purpose this morning is to examine whether

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1 that interim relief should be continued in effect to allow  
2 the Commission time to examine the merits of this case.

3 I will note that the other Commissioners will be  
4 reading the transcript of this morning's discussion and  
5 that, if we deal with the merits of the case, it will of  
6 course be on the basis of a quorum of the Commission, and  
7 that will be at some later time, presumably as soon as we  
8 can gather a quorum.

9 With at least that much introduction, let me ask  
10 the general counsel or Mr. Eilperin if they would like to  
11 add some further initial remarks here.

12 MR. EILPERIN: We have allotted the time to each  
13 party of perhaps 20 minutes.

14 CHAIRMAN HENDRIE: Yes. I would hope that we  
15 could hear the oral arguments in something like 15 or 20  
16 minutes per party, of those who want to speak. And if  
17 someone will give me some direction as to who would like to  
18 start, why, please go ahead.

19 MR. OLMSTEAD: I believe, Mr. Chairman, on behalf  
20 of the staff, I am Mr. William Olmstead, and I would like to  
21 go on behalf of our petition.

22 CHAIRMAN HENDRIE: Very good. Go ahead,  
23 Mr. Olstead.

24 MR. OLMSTEAD: Chairman Hendrie,  
25 Commissioner Gilinsky, the staff is here because they are

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1 confronted with a classical logical dilemma. The New  
2 American Heritage Dictionary defines a classical logical  
3 dilemma as "a choice between alternatives in an adversary  
4 proceeding where either alternative leads for forfeiting  
5 one's position."

6 In this particular case, we are confronted with  
7 precisely that, because we are told that we should provide  
8 specific factual information in order to show that our claim  
9 and specific in camera information in this case ought to be  
10 protected; and at the same time, we are told that we can't  
11 have an in camera proceeding in order to review that  
12 information and to verify that the staff's representation in  
13 that regard is correct. That's the first point I would like  
14 to make.

15 I do have a preliminary point dealing with an  
16 eminently reasonable request that was made of the staff. In  
17 the hearing when the board provided us 30 days to bring this  
18 appeal, Mr. Roisman, on behalf of NRDC, Mr. Riley, on behalf  
19 of CESG, the state, and other parties, pointed out that the  
20 30 days would run approximately two days before the hearings  
21 were to commence this morning before the licensing board  
22 here in Washington.

23 They asked that they be informed when the staff  
24 determined whether or not it would seek relief from either  
25 the appeal board or Commission. We found that request to be

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1 reasonable, and we indicated that we would do that.

2           However, due to mitigating circumstances which the  
3 staff feels surrounds this case and the procedural  
4 complexity of this case, that decision to seek review was  
5 not made until August 31. So, the parties and the  
6 Commission got very short notice of this appeal, and for  
7 that we are sincerely apologetic.

8           However, in view of the novel policy and legal  
9 issues, I would like to move directly to the issues that you  
10 asked us to address this morning; namely, whether specific  
11 routes are already in the public record of this proceeding;  
12 number two, whether it's possible to discuss the general  
13 routing rather than the specific routing in this proceeding;  
14 and number three, what the harm to the public interest would  
15 be from disclosure.

16           Taking the first point, the staff representation  
17 to the licensing board to the appeal board and to the  
18 Commission is that the specific routes now approved for Duke  
19 Power Company are not in the record of this proceeding.  
20 Now, that representation was made to the licensing board,  
21 but the licensing board based its finding on its "belief  
22 that most of the route information was already public."

23           A close examination of the records will show that  
24 that belief is based on looking at a map of the state and  
25 assuming that most of the route has to be on Interstate 85.

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1 That belief is based on an argument by counsel in the  
2 proceeding, both the applicant and Mr. Roisman, on behalf of  
3 the NRDC, which said that since the Commission's rule was to  
4 avoid the transport of spent fuel through congested areas  
5 and the only congested area on this route was Charlotte,  
6 therefore ipso facto the route changes must involve only  
7 that area of the route around Charlotte, therefore, less  
8 than 10 percent.

9 Applicant's counsel, of course, was in the  
10 position of representing a client who was appealing the  
11 staff's denial of its primary route which was precisely up  
12 Interstate 85 and through Charlotte, and that appeal was not  
13 finalized to the director of NMSS until Friday afternoon, at  
14 which time the director denied that appeal.

15 So, the only party who had no interest in the  
16 routes in terms of whether they should be protected under  
17 the Commission's new rule was the NRC staff, and the staff's  
18 position was the Commission's policy, which became effective  
19 in July, should be applied in this case, and that means  
20 treating specific route information confidential.

21 The staff maintains that an in camera review of  
22 that information by the decisionmaking official -- either  
23 the licensing board, the appeal board, or this Commission --  
24 is the only way to verify for certain that those routes are  
25 not in the public record of this proceeding.



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1           The staff is prepared to make the offer of proof  
2   that it was prepared to make before the licensing board in  
3   this proceeding, if the Commission so desires.

4           The second point that I wish to address that the  
5   Commission raised in its order was whether general routing  
6   information, rather than specific routing information, will  
7   be sufficient to conclude the record in this proceeding.  
8   NRDC has a sabotage contingent. On the record at  
9   transcript 3221, counsel for NRDC indicated that he wished  
10   to cross-examine on whether the route approved for Duke  
11   Power Company complies with the Commission's regulation.

12           Now, to some degree, that can be done generally.  
13   It is possible, however, that specific route information  
14   will be needed to verify certain aspects of that  
15   contention. Carolina Environmental Study Group has a  
16   contention concerning health effects to people along the  
17   specific route. There already has been cross-examination in  
18   this record about the population along the originally  
19   proposed route which is in the public record, on which  
20   specific cross-examination has been allowed.

21           And finally, I might point out that the licensing  
22   board itself thought that information on the routes of the  
23   specific -- of a specific nature -- would be necessary. An  
24   implication to that effect can be found at transcript page  
25   3225.

MM 1 Now, turning to the third aspect of the

2 Commission's order -- namely, harm to the public interest --  
3 the Commission's new rule, which became effective in July,  
4 is to prevent hijack and sabotage of spent fuel shipments in  
5 congested areas. Two concerns: One is interception of that  
6 shipment in a congested area; two is interception of that  
7 shipment and movement of it to a congested area.

8 The board ruled that the regulations became  
9 effective in July were not applicable. You will find that  
10 at transcript 3237. The appeal board apparently accepted  
11 that rationale, citing Wolf Creek, for the proposition that  
12 proprietary information which has become a matter of the  
13 public domain is no longer entitled to protection.

14 The staff would suggest to the Commission that  
15 it's not entirely clear that Wolf Creek applies in this  
16 situation. And you may wish to have that briefed by the  
17 parties. I would point out two distinctions that ought to  
18 be made on the Wolf Creek case.

19 First of all, the Wolf Creek case involved a  
20 situation where company confidential competitive information  
21 was at stake. The company wanted to protect the  
22 information. The company was not directed by the NRC to so  
23 protect the information, and requested protection for the  
24 information. In such circumstances, when that information  
25 became a part of the public domain, the appeal board ruled

MM 1 that that information was no longer entitled to protection.

2 I would contrast that, however, with the Indian  
3 Point decision, which you will find at 8 AE 420 ALAB 228 and  
4 the Porta County chapter of the Isaac Walton League of  
5 America v. AEC 380F(630), where it was agreed that in the  
6 securities area, security information was entitled to  
7 protection. In the Indian Point case, we were dealing with  
8 plant-specific security plans when a new Commission  
9 regulation went into effect. At that point, the appeal  
10 board held it no longer had any discretion under the  
11 regulation; it was bound by it. And we submit to you that  
12 that's the case here.

13 Furthermore, this is consistent with Commission  
14 practice. It's our understanding that in the Virginia  
15 Sunshine Case v. Hendrie, staff affidavits were prepared and  
16 filed in that case following the promulgation of your rule  
17 saying that this was now current Commission practice, which  
18 is the position that the staff attempted to take before the  
19 licensing board.

20 Having addressed the three points in your order, I  
21 would like to summarize.

22 Number one, the staff's contention is the routes  
23 have not been disclosed in this case. Two, there are  
24 contentions in this case which may require the parties to  
25 have access to this information, which they can have under

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1 protective orders pursuant to the Diablo Canyon decision,  
2 and that that information may be relevant to existing  
3 contentions, and it may be necessary to have some in camera  
4 review of that specific information for them to formalize  
5 their contentions.

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1           Number 3, that the public interest which your regula-  
2 tion was designed to protect will not be protected by the  
3 release of this information; namely, that public interest was  
4 to prevent making it easy for saboteur to get access to  
5 specific route information so that he could plan an attack on  
6 a fuel shipment and move it into a congested area and thus  
7 harm the public.

8           Counterbalancing that is the interest in the parties  
9 in having access to that information which they can have under  
10 Diablo Canyon in order to pursue their contentions. The Staff  
11 feels, in the balance, the Commission's regulation ought to be  
12 applied in this case. Consequently, we would recommend the  
13 following:

14           That you have in camera review of the specific route  
15 information if there is any doubt in your mind with regard to  
16 the Staff's representation on point number 1, namely that the  
17 specific route information is not putlic.

18           Number 2, that you make your protective order, which  
19 you issued on Friday, permanent.

20           And number 3, that you direct in camera proceedings  
21 on any contentions which require the revelation of specific  
22 route information in this case.

23           I would like to reserve a few minutes time for  
24 rebuttal.

25           COMMISSION GILINSKY: Could I just ask you one

1 question? What is the precise nature of this information? Is  
2 it the route? Does timing come into it?

3 MR. OLMSTEAD: Part of the testimony which the Staff  
4 has prepared for cross-examination on the contention would  
5 include timing. The information, as it came up in the hearing  
6 at this point, is the specific routes.

7 COMMISSIONER GILINSKY: Is there one route, or are  
8 there alternative routes?

9 MR. OLMSTEAD: There are alternative routes, sir.  
10 Duke's primary route was disapproved. That was the route that  
11 was published in 1978. They came in with alternative routes  
12 after the rule became effective in July, and the Staff is  
13 protecting those routes at this point.

14 COMMISSIONER GILINSKY: Thank you.

15 MR. OLMSTEAD: Any other questions?

16 (No response.)

17 CHAIRMAN HENDRIE: Not at the moment, I guess.

18 COMMISSIONER GILINSKY: Let me ask you one more  
19 question. You are saying that even though there are several  
20 routes, and knowing them would not necessarily tell you exactly  
21 which way the fuel is moving in each specific instance or when  
22 it was moving. Nevertheless, that is information which should  
23 be protected?

24 MR. OLMSTEAD: Yes, and there is a reason for that,  
25 and I hesitate to go too much further into what the reason is.

1 I think when you see the routes you can see immediate-  
2 ly what the reason is.

3 COMMISSIONER GILINSKY: Thank you.

4 ORAL ARGUMENT BY TONY ROISMAN

5 MR. ROISMAN: Mr. Chairman, Commissioner Gilinsky, if  
6 I had my way, I'd take a week recess, because I learned of the  
7 oral argument this morning, about an hour and a half ago. The  
8 telephonic message to my office at 5:30 on Friday did not reach  
9 me until I reached the hearing room this morning.

10 In addition, of course, the Staff's paper didn't  
11 reach me until several hours after they reached you, which was  
12 a little puzzling since your office and my office are only a  
13 block away from each other.

14 So I am going to start and talk about something you  
15 probably don't want me to talk about, and that is why the  
16 Staff should be allowed to get away with this and why you  
17 knuckled under to the Staff putting you in this kind of a bind.

18 Now, the Staff does this all the time, and you know  
19 it. The Staff is slow and in some respects incompetent in get-  
20 ting its hearing records together, so they spend an inexcusable  
21 almost 30 days of a 30-day stay trying to figure out whether to  
22 take an appeal. They made their decision on the 31st of August,  
23 but they didn't tell any of us about it. They didn't tell us  
24 until the papers were filed, so we had even no lead time to  
25 know this was coming, no opportunity to prepare for it, no



1 opportunity to do our own research on it; and, quite frankly, I  
2 think I speak for all the parties when I say that we assumed,  
3 when the Staff didn't take its appeal within a few days after  
4 the conclusion of our hearings that were held in Charlotte in  
5 late July/early August, that it must have meant that the Staff  
6 was not intending to take an appeal at all.

7           The Staff was not only failing to keep to a reasonable  
8 schedule in taking this appeal, but it allowed the hearing to  
9 disclose the bulk of what are going to be the routes of the  
10 transshipment of this spent fuel without taking any actions at  
11 any earlier stage in the hearing even though the Sandia  
12 Laboratory report, which was the genesis for the regulation  
13 which the Commission has now promulgated on this subject, had  
14 been out for several months. The Staff simply didn't do its  
15 work.

16           COMMISSIONER GILINSKY: Can I stop you for a moment?

17           MR. ROISMAN: Yes.

18           COMMISSIONER GILINSKY: Isn't the key question whether  
19 the public would be harmed by further disclosures. The Staff  
20 may have or may not have acted improperly. That's something  
21 that ought to be dealt with.

22           MR. ROISMAN: I confess if it were not the case that  
23 the Staff's position is frivolous on the merits, it would be  
24 harder for me to make the argument about the Staff's conduct.  
25 But nonetheless, this kind of sad conduct is always putting the

1 Commissioner's in this kind of a position and putting us and  
2 the public in this kind of a position. The public's position  
3 is not going to be adequately represented here to you, and there  
4 is no way that it could be. The Staff spent 30 days meditating  
5 about this. They had plenty of time to pull all of their  
6 record references, all of their citations -- you heard them this  
7 morning tell you that there are some affidavits in the record  
8 of a case involving the Commission, a District Court case in  
9 which some affidavits were put in by the Staff about the routing  
10 question. I've never seen those. I didn't learn about them  
11 until I saw the Staff's document. I had no way to get to those,  
12 because the public document room was closed by the time I got  
13 my copy of it.

14           You're being asked to take it on faith. Your General  
15 Counsel's office presumably has the affidavits; I don't.

16           Now, there's a public interest involved in seeing to  
17 it that you have a chance to make the right decision. We don't  
18 have to worry here. We've already got three Licensing Board  
19 members and three Appeal Board members who have already said  
20 that this isn't worth a whit in terms of being up in front of  
21 the Commissioners.

22           You wouldn't have to worry. They're fairly competent  
23 -- those six people. So I'm not concerned. My conscience isn't  
24 bothered by telling you it would be perfectly responsible for  
25 you to say to the Staff, "This is too late. You've had two

1 bites at this apple; you've lost both of them; you've done your  
2 work very incompetently, and we will not contenance it by giving  
3 you the benefit of our review of what six very competent people  
4 have already told us."

5 Now, I think that's a respectable thing for you to  
6 do, so I'm not bothered by that. I think it's a legitimate  
7 issue in this case, whether the Commissioners should take their  
8 time to look at an issue when the Staff wasn't willing to do  
9 its work properly.

10 And I think it's important, if you don't ever put your  
11 foot down to the Staff, they will continue to do this. This  
12 isn't the first time it's happened; it won't be the last time,  
13 because they'll always get away with it. It's just like a  
14 child who learns that the parent will always give in in the end  
15 if they throw their tantrum.

16 Mr. Olmstead has thrown his tantrum, and you are giving  
17 in. They threw the tantrum last Friday; they rushed up to you  
18 with their papers; they said, "The world is going to come to an  
19 end." Three technical people and three lawyers said, "No. No,  
20 the world isn't coming to an end. It's a perfectly reasonable  
21 order."

22 I think the Commission should simply have not taken  
23 review of the matter at all, but I will get to the merits next,  
24 if you like.

25 COMMISSIONER GILINSKY: I would.

1 MR. ROISMAN: All right. We have two sections of the  
2 regulation that are involved, 2.790(d) and 73.37. You can read  
3 them in as much detail as you like, and there isn't a work in  
4 there that says anything about keeping the routes for spent  
5 fuel shipments confidential. There is nothing in the  
6 Commission's 73.37 regulation which says that touting informa-  
7 tion is even relevant to safeguards.

8 If you take a look at that section, you will see that  
9 it even has in it provision to allow the shipment of spent fuel  
10 by rail.

11 Now, I don't want to go into great detail, but you  
12 know the options on rail are somewhat limited. Routes are not  
13 a big secret item, and nobody thought that knowing the route of  
14 the spent fuel shipment was the key to the safeguards question.

15 When you promulgated the regulation back in June 15th  
16 of this year, you said, "The focus of concern" -- and I'm  
17 quoting from the Federal Register now -- "is on possible  
18 successful acts of sabotage in densely populated urban areas.  
19 That's what you were concerned with, and of course that's what  
20 the Sandia Laboratory addressed. There was no record in front  
21 of you to suggest that knowing routing information was the  
22 crucial flaw in the shipment of spent fuel. The concern was  
23 that a saboteur might grab that shipment in a highly populated  
24 area, and then by using shaped charged and other devices dis-  
25 cussed in the Sandia Laboratory, threatened to release that

1 material. And because there would be so many people around,  
2 the threat would be so much more critical if it were made near  
3 downtown Charlotte than if it were made out where there were  
4 only a few cows and people around who could be easily moved out  
5 of the area. That was the focus of the concern.

6 COMMISSIONER GILINSKY: How do you react to the point  
7 that the material could be moved into a populated area?

8 MR. ROISMAN: I believe you covered that by making  
9 sure the truck would be disable. In other words, you addressed  
10 the problem of keeping it out of the populated -- my purpose  
11 here is not to argue with you about whether your regulation  
12 went far enough, but I think you tried to address those ques-  
13 tions.

14 First, don't deliberately go through a populated  
15 area. And even that, you didn't say it was prohibited. You  
16 said it should be avoided if at all possible. And the Staff  
17 has interpreted that, in this case, as requiring that it not  
18 go at least through the Charlotte area, which is the most  
19 densely populated of the areas on the original proposed route,  
20 not the only densely populated area. So routing doesn't seem  
21 to have been crucial. You didn't think it was crucial.

22 Now, 2.790(d) relates to not the question of whether  
23 or not everything an Applicant submits in response to a  
24 Commission safeguard regulation should be kept secret. That  
25 section says, in pertinent part, "The correspondence to and

1 from the NRC which identify a Licensee's or Applicant's pro-  
2 cedures for safeguarding license, special nuclear material, or  
3 detailed security measures for the provision of protection of  
4 the license facility or plant in which licensed special nuclear  
5 material is possessed, and in the statement of considerations  
6 with reference to that promulgated provision, the Commission  
7 said -- and this is back in 1976 in the Federal Register --  
8 41 Federal Register 11808. They clarified a provision of the  
9 proposed regulations and said, to clarify it, that "such  
10 documents would be withheld from disclosure if they identify  
11 security measures."

12           So the key is that the Applicant is not to disclose  
13 a security measure. That's what we're trying to avoid.

14           Now, nothing in your regulations, as now promulgated,  
15 or in your statement of considerations in support of them, or  
16 in your underlying document prepared by Sandia, which generated  
17 it all, suggests that knowing routes had a security measure  
18 concern. Now that's not an illogical position.

19           If you look at the record of this proceeding -- and  
20 I'm sorry I can't give you the exact transcript pages -- you  
21 will see there was some extensive discussion, and the Staff  
22 witness -- I believe it was a Mr. Glen -- testified when we  
23 were arguing about whether people would be exposed to radiation  
24 just when the truck was moving along the road, the shine that  
25 comes out of the cask, and he said, "Well, nobody is going to

1 get near this vehicle, because it's going to be clearly marked  
2 on the side with a great big sign that warns people that there's  
3 radioactive material in there."

4 I think the Chairman of the Licensing Board put it  
5 aptly: "It sounds like someone is trying to hide an elephant  
6 in the tulips." This is not some secret, clandestine shipment  
7 that's taking place of a little bit of plutonium hidden away  
8 in somebody's handbag. We are moving a huge tractor trailer  
9 truck with an enormous cask on it, clearly marked that it's  
10 radiation material.

11 Now, anybody -- if we're talking about anybody who  
12 wants to sabotage one of these, we already know this isn't a  
13 casual saboteur. They have to do a little planning. They have  
14 got to have their detailed material available to break open the  
15 cask. No big trick to stand in front of the Duke Power  
16 Company's plant at Oconee and watch for the trucks. Anything  
17 that's smaller than an elephant you don't have to follow; and  
18 anything as big as an elephant with a big mark on the side of  
19 it, you know that's a spent fuel shipment.

20 COMMISSIONER GILINSKY: You would not have us withhold  
21 route information at all then?

22 MR. ROISMAN: Absolutely not. I don't think it makes  
23 any sense. But you don't have to reach that issue in this  
24 case. I think the Staff is trying to make you think you do  
25 have to reach that issue in this case. You don't have to reach



1 it here because it's all been made public already. Virtually  
2 everything is there.

3 Now, the Staff says, "Well, we're only talking about  
4 counsel's representations." And I agree, if it's counsel's  
5 representations; it wasn't an innocuous counsel, it was  
6 Mr. McGarry, who was counsel for the Applicant, who made it  
7 quite clear that he had direct knowledge of what the proposed  
8 routes that were submitted to the Commission Staff -- and he's  
9 the one who said, at transcript page 3046. "I believe, for the  
10 record and the Board's edification -- I believe Mr. Roisman is  
11 correct." This is after I had made the allegation that  
12 essentially 90 percent of the route was already known.

13 And what we're talking about here is avoiding  
14 Charlotte. For all intents and purposes, the route that has  
15 been provided the Board previously in the EIA, for all intents  
16 and purposes, is the same route except for that bypass, at least  
17 in one or two of the alternatives -- three alternatives have  
18 been approved.

19 I admit I haven't seen the routes, but I think we are  
20 blinking reality. And the Staff's discussion in its motion  
21 that technically it's not in the record simply presumes that  
22 nobody could read the record and figure out that if you look at  
23 all the maps, and you see that the Applicant desperately wants  
24 to stay on the interstates anyway, they have offered affidavits  
25 in the public domain in the form of testimony that's to be

1 presented at the hearings this week indicating that they think  
2 it's safer to move shipments on interstates than it is to move  
3 them on lesser roads. For purposes of safeguarding, one doesn't  
4 have to think that it's very unlikely that the Applicant's routes  
5 include as much interstate as they could possibly get away  
6 with; and there's basically only two involved here, and one of  
7 them is I-77, and one is I-85.

8           So you didn't have to look beyond this record to find  
9 anything. The record already indicates to you that most of the  
10 route is already available, and what isn't available will be  
11 known to anybody who knows what one of those big yellow and  
12 black signs look like.

13           And that will put them into it.

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1 All of that puts me into the question, all right,  
2 where does the public interest lie in this case. As the  
3 Commission is aware, the Natural Resources Defense Council  
4 has been one of the leading proponents of tougher safeguards  
5 regulations across the board with regard to special nuclear  
6 material, and we were one of the people urging in this case  
7 that the ability to ship without having any safeguards provi-  
8 sions applied to these shipments created a real danger.  
9 Therefore, we were happy and applauded the implementation of  
10 these regulations.

11 But we think that foolish safeguards make no sense  
12 at all. Safeguards that give one the impression that things  
13 are safe when they are not may cause people to take less  
14 safe measures than are really needed.

15 The escorts, the armed escorts, are the key to the  
16 safeguards here. The communications system that is set up  
17 between the truck and anyone outside, the mechanism for  
18 disabling the truck so that it can't be moved, so that the  
19 guy who is driving it -- and of course, the quality assurance  
20 and the implementation of those measures by the Applicant are  
21 key. That's where the safeguards will come, not in this  
22 fictional frivolous routing information.

23 But the public has another side to it. The public  
24 side relates to their need and desire to know whether they  
25 are going to be subjected to shipments of radioactive wastes

1 through their communities. Now, I think the Commission can  
2 take official notice, if we had had time, we could have  
3 brought you affidavits that the public is concerned. They  
4 want to know: Is it coming through my town? And quite  
5 frankly, I think the public would read any decision here to  
6 close the routing information from public scrutiny not as a  
7 safeguards measure, because the public is smart enough to see  
8 that's not any use, but rather as an attempt to keep the  
9 public, if they wish to protest the routing of that, from  
10 being able to stand up and protest it with their placards in  
11 town meetings, as has happened in many other parts of the  
12 country where the routing of wastes were known.

13 There is a real public concern with this, and I  
14 would ask the Commissioners to take a look at the transcript  
15 of the Kemeny Commission proceedings that were held two weeks  
16 ago, the one at which Mr. Denton showed up prepared to present  
17 one piece of testimony and the Washington Post scooped him  
18 by reporting on something that he had not told the  
19 Kemeny Commission about.

20 The whole day was devoted to the Kemeny Commission's  
21 reaction to the fact that they learned about it indirectly.  
22 I think that is a lesson in human psychology. I think the  
23 people who suddenly see one of these trucks moving through  
24 their town with the big yellow and black circle on it -- and  
25 they're going to see it, because you encourage them to move

1 by day, and that's right for safeguards -- are going to be  
2 much more upset about seeing that thing rumbling down their  
3 street than they ever would be if they had known in advance  
4 it was coming and had been able to accept it.

5 Deal with the protests. They get more upset by the  
6 secret shipment, and I think that's where the public is going  
7 to react.

8 Finally and lastly, we are told that under the  
9 Diablo standard, if this information were kept private, we  
10 would still be able to participate in the proceeding. Now,  
11 I think the staff is being disingenous with you on this.

12 Number one, I made very clear on the record in  
13 arguing this question -- and this was on the day -- it was  
14 on August 7, 1979 -- that one of the principal concerns that  
15 we had was that our experts would not participate in a closed  
16 or in camera session, and the reason they wouldn't participate  
17 in that session was because they already have, through the  
18 public domain, confidential information which they can discuss  
19 publicly because they got it publicly. If they ever go into  
20 an in camera session, they will be subject to the potential  
21 for harassment by someone saying it was in the in camera  
22 session they learned their information.

23 So both Doctors Cochran and Tamplin would not  
24 participate in an in camera session.

25 In addition, if the Commission looks at the

1 subsequent history of the Diablo Canyon case, what the  
2 Commission will find is that David Comey, the late David Comey,  
3 who served on many expert safeguards panels and a consultant  
4 to the ACRS on that subject, was himself denied access to the  
5 safeguards information in the Diablo case, under the inter-  
6 pretation of what the Diablo standard meant.

7           The staff is not offering us any open invitation  
8 to participate. They apply a very strict standard. And the  
9 standard applied by the Licensing Board in the Diablo case  
10 when they applied the rule was essentially, if you didn't  
11 work with the nuclear industry and have direct personal  
12 knowledge of all the safeguards information from your work,  
13 you weren't an expert.

14           So I think it is misrepresentation to suggest to you  
15 that all of us who are now in the hearing, this very narrow  
16 group of the public, will even be able to see this safeguards  
17 information. Under the Diablo standard, that's certainly an  
18 open question.

19           In conclusion, this is a know-nothing case. It  
20 doesn't belong in front of you, even on the merits. And on  
21 top of that, you have simply encouraged the staff to pull  
22 this kind of shenanigan again. There's a hearing going on  
23 now out in Bethesda and I should be there. But I can't  
24 because in order to meet the staff's artificially created  
25 set of deadlines, you had to hold your hearing simultaneously

1 with that hearing. So Mr. Riley is not here and the  
2 State of South Carolina and their representatives are not  
3 here, because they are out at the hearing.

4 I haven't been able to write a response to the  
5 staff's document as it now appears. I haven't been able to  
6 look at the citations they have given you. I haven't had an  
7 opportunity to check the case involved in the Virginia  
8 protesting group, the "Sunshine Alliance." You don't have the  
9 benefit of any of that. You yourselves are down to two; you're  
10 below a legal quorum.

11 We are acting under pressure, all because the staff  
12 can't get its act together. Now, how do you make the staff  
13 do its job right? You punish them when they don't, until they  
14 learn. What you have done is, they have acted wrong and you've  
15 given them a lollipop.

16 I urge you to dismiss the appeal, not to decide it,  
17 and let the Licensing and Appeal Board decision stand.

18 Thank you.

19 CHAIRMAN HENDRIE: Done under 20 minutes. Very good.  
20 Let's see. You wanted a couple of minutes to  
21 respond?

22 MR. OLMSTEAD: Yes, sir.

23 COMMISSIONER GILINSKY: Before you start, could I  
24 ask you: Are these trucks in fact marked clearly as containing  
25 radioactive material?



1 MR. OLMSTEAD: Yes, they are, sir. And I would like  
2 to address that point, if I might.

3 COMMISSIONER GILINSKY: Can I ask you one more  
4 question. Are the local authorities informed that such  
5 shipments will be made through their areas?

6 MR. OLMSTEAD: My understanding is they are informed,  
7 with the request that they keep the information confidential.  
8 And with one exception, that has been respected throughout the  
9 country.

10 COMMISSIONER GILINSKY: Well, how can the fact that  
11 the trucks pass through the area be confidential if they're  
12 clearly marked?

13 MR. OLMSTEAD: Well, I think what we are missing  
14 here is the point, and the point is, how does one find out  
15 what all the routes are so that they can be absolutely certain  
16 that the truck is going to pass by the point at which they  
17 wish to sabotage it. And the security people tell me that  
18 their concern is that, if we are able to prevent them from  
19 knowing the specific route, that then one is forced to follow  
20 these trucks all along the route to find out what the route  
21 is, and the chance of detection is much greater because the  
22 truck drivers are trained to observe following cars.

23 And one would also have to wait outside the plant  
24 gate, waiting for a shipment, thus enhancing the likelihood  
25 of detection.

1 I might point out in that regard that at one point  
2 in the transcript of this proceeding Mr. Roisman, in represent-  
3 ing his position to the board, at transcript 3197, said:

4 "We share the concern that the Commission has  
5 expressed in its regulations and that the staff has expressed  
6 here, that the knowledge of where the transshipments are going  
7 to go is a significant fact which could be useful in an attempt  
8 to sabotage spent fuel, and we agree with the underlying  
9 premise of the Commission's regulations, which are that there  
10 is a genuine threat of sabotage of spent fuel."

11 I might point out that the staff also provided and  
12 marked to the Licensing Board Staff Exhibit No. 23, which is  
13 a memorandum to Mr. Chilk, Secretary of the Commission,  
14 dated June 25, 1979, from William J. Dircks, setting forth  
15 specifically the staff position that specific details of  
16 approved routes, strip maps and notices of shipments will be  
17 considered commercial license information pursuant to  
18 10 CFR 2790(d)(1).

19 So it's not true that Commission policy, at least as  
20 understood and interpreted by the staff, was not before the  
21 board, and it was very clear that routes fell under 2790(d)  
22 and nobody challenged the staff on that representation. The  
23 staff lost that issue solely because everybody stood up and  
24 said, we don't believe the routes could possibly not be in the  
25 record. But nobody ever looked at the routes to determine

1 whether they were in the record or not.

2 So what we have are representations. Mr. Roisman  
3 refers you back to Mr. McGarry, and if you will recall, I  
4 indicated in my opening that Mr. McGarry was representing the  
5 Applicant, who was appealing the staff's determination at that  
6 very moment, wanting to go back to the primary route and use  
e-3 7 I-85. The staff denied that appeal only last Friday.

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1 I'd also like to talk about hiding elephants in  
2 tulips versus the public interest, public need to know, for  
3 shipment. On the one hand, Mr. Roisman tells you you can't  
4 hide these trucks. They're very visible. And on the other  
5 hand, he says if the public doesn't know this information  
6 publicly, they will never know that a shipment is going by  
7 their house.

8 Now, the fact is they will know. The fact is that  
9 our regulations have uniformly been interpreted to allow  
10 public intervenors to intervene if they're within 50 miles  
11 of affected nuclear activities and in this particular case,  
12 most of the routes would fall within 50 miles of a line  
13 drawn between McGuire and Oconee.

14 So I think there is enough notice to the public  
15 that one had not ought to throw over the policy that the  
16 Commission established with the regulation, which is that  
17 there is a detriment to the public interest in allowing too  
18 much information to be available to potential saboteurs,  
19 thus enhancing the ability to sabotage the spent fuel  
20 shipment.

21 Now, I would like to speak to the Diablo standard  
22 for just a moment.

23 COMMISSIONER GILINSKY: Can I just ask you about  
24 these alternative routes you mentioned earlier? Is the idea  
25 that the shipments would go on one or another of these

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2 MR. OLMSTEAD: Yes. The staff has approved any  
3 combination of the approved routes. Now, what I can say  
4 publicly is that the staff issued NUREG-0561 in which it did  
5 indicate that congested areas must be missed by three  
6 miles. So what is known in this public record is that  
7 Charlotte must be missed by three miles. That's the extent  
8 to which anybody would know, factually, what the change in  
9 routes would be.

10 Now, you can base a lot of thinking on assumption  
11 and belief and if I were doing it this is the way I would do  
12 it. But the only way to know for sure is to look at the  
13 specific routes and decide if it's something you want to  
14 protect. And that's why the staff felt obligated to bring  
15 this matter to the Commission in spite of the fact that we  
16 had to wade our way through a procedural jungle to do it.

17 COMMISSIONER GILINSKY: Let me ask you, again, I  
18 think you've answered it but I want to be absolutely clear.  
19 Even though you have three alternative routes which are  
20 interconnected in various ways -- in other words, it can  
21 switch from one to another at various points, apparently --

22 MR. OLMSTEAD: Yes, sir.

23 COMMISSIONER GILINSKY: -- in some way that is not  
24 predetermined.

25 MR. OLMSTEAD: That's true.

1                   COMMISSIONER GILINSKY: You still regard those  
2 three lines as material -- as information which should be  
3 protected?

4                   MR. OLMSTEAD: Yes. And I think I can show you  
5 very readily, if you overlay the routes, why --

6                   COMMISSIONER GILINSKY: But you regard the  
7 explanation as being something that also ought not to be  
8 discussed?

9                   MR. OLMSTEAD: I have been informed by the client  
10 in NMSS that that information is considered by them to be  
11 proprietary and I am respecting their wishes in that  
12 regard. Now, I would like to address the Diablo standard.  
13 Mr. Roisman is right. He has indicated that his experts  
14 will not sign a protective order because one of their  
15 strategies is to not sign a protective order so they can  
16 demonstrate the vulnerability of these spent fuel  
17 shipments just based on public information.

18                   And I think that's a perfectly permissible  
19 strategy. What he didn't tell you is that he wouldn't  
20 himself take advantage of the opportunity to look at this  
21 information in order to prepare his case and his  
22 cross-examination of staff witnesses.

23                   With that in mind I would like to point out, too,  
24 that Mr. Roisman signed a brief to this Commission on  
25 September 7, 1979, and filed it, which I did not get this

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1 morning, myself.

2 Are there any other questions?

3 CHAIRMAN HENDRIE: Counsel?

4 MR. BICKWIT: I have one question of law that I  
5 would like to put to both the parties: the Commission has  
6 an interim protective order out. It has to make the  
7 determination of whether to continue that in effect. What  
8 standard should it use in making that determination? Where  
9 are the burdens in this case, according to the parties?

10 MR. OLMSTEAD: That was one of the things that  
11 caused the staff a great deal of consternation in coming up  
12 here. Our petition for review is not filed as of right,  
13 therefore we have not attempted to meet the Virginia  
14 Petroleum Jobbers standard. We have not captioned it a  
15 petition of reconsideration.

16 We are saying to the Commission as though in  
17 equity, Commission, you have the inherent supervisory  
18 authority as you described it in the Seabrook case, to step  
19 into a licensing proceeding when you think your policy is  
20 about to be violated. We're asking you to exercise that  
21 discretion. We don't feel that that the Commission itself  
22 is bound by any standard to exercise that authority, so we  
23 are essentially here in a persuasive mode, namely, as we  
24 understand your policy, we think you are applying it in that  
25 way. If we are wrong, say so. The information will be



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1 public and we'll all go back to the hearing.

2 If we are right, we ask you to look at this  
3 information in camera and determine for yourself if it's  
4 the type of information that you want protected, and if so,  
5 direct the Licensing Board to protect it.

6 MR. BICKWIT: Mr. Roisman?

7 MR. ROISMAN: I think the difficulty is that it's  
8 clear, it's a fact case. In a fact case I think the staff  
9 clearly has the obligation of burden. The burden, I think,  
10 is under Petroleum Jobbers. I don't think we've played games  
11 about it. We've got two boards that have said this  
12 information can be released, and we've got a board that's  
13 got a hearing that's going on right now.

14 And this morning that board ruled in response to a  
15 staff request, that it will not allow any testimony to  
16 discuss specific routing until it hears from this  
17 Commission. I think you've got to apply that standard. I  
18 think your problem is what to do about the facts.

19 Mr. Olmstead said, I'm quoting from another counsel, and  
20 he's quoting from documents that aren't in the record.

21 I mean, it's a mess, but standard is going to be  
22 -- the burden is on the staff and it should be the standard  
23 like Virginia Petroleum Jobbers. I don't think you're  
24 dealing here with -- I don't think there's any violation of  
25 any Commission policy. At a minimum, the worst that you

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have got here, the application of a Commission policy to a specific set of facts.

There's no policy that says this information shouldn't be released. So there's no presumption running through the staff in that regard.

MR. BICKWIT: We have no more questions.

(Counsel Bickwit and Chairman Hendrie conferring.)

1 CHAIRMAN HENDRIE: I think we will then stand  
2 adjourned on this matter until the rest of our colleagues get  
3 a chance to read the transcript and we have a chance to discuss  
4 the merits and see where we want to go.

5 I'm sorry we had to haul you all down here on  
6 Monday morning instead of allowing you to enjoy the more  
7 beneficial climate in Bethesda.

8 Thank you very much.

9 MR. ROISMAN: Can I just ask one procedural  
10 question, Mr. Chairman?

11 CHAIRMAN HENDRIE: Yes.

12 MR. ROISMAN: I think at least the parties in the  
13 proceeding and the Board are going to want to have some idea  
14 as to what the status of the existing protective orders the  
15 Commission has issued and some concept of decision date. We  
16 have got a hearing that was to have ended this Friday. So if  
17 I could take back to them, or at least if this transcript  
18 could reflect something on that, if you can say anything to  
19 that, it would be helpful.

20 CHAIRMAN HENDRIE: Let me see what I can indicate  
21 along that line. Commissioner Gilinsky and I are not -- do  
22 not constitute--although I'm sure the two of us would agree  
23 that we could make a reasonable decision, we nevertheless do  
24 not constitute a working quorum of the Commission. The  
25 protective order then will have to stand until we can gather

1 a quorum together to discuss what action the majority wants to  
2 take. I would hope that that would take place in the next  
3 couple of days.

4 We have three Commissioners at least physically  
5 present in the Washington area. Commissioner Bradford is  
6 simply hopelessly tied up today with other matters. So that  
7 three of us ought to be able to get together in the next  
8 couple of days and to get on to the parties' decision on the  
9 protective order.

10 MR. OLMSTEAD: I would like to clarify one matter.  
11 We are prepared to give you in camera the specific route  
12 information, which is the same information we were prepared  
13 to give to the Licensing Board and the Appeal Board. Are you  
14 wanting to review that now and hold it over for your quorum,  
15 or are you considering taking it?

16 MR. ROISMAN: I would like to say one thing to that.  
17 I will strongly protest any attempt for this Commission to  
18 decide the case on the basis of information that I will not  
19 have seen. And I have not even had proffered to me a proposed  
20 protective order for me to sign.

21 I want to make clear, as a lawyer, I can read it  
22 and make legal arguments. But when I do cross-examination, I  
23 often like to have the benefit of my experts. But I have not  
24 even seen a protective order submitted to me for that.

25 I would strongly protest the Commission deciding

1 this case for me on the basis of information that counsel has  
2 not seen and not had an opportunity to address to the  
3 Commission any argument about. I also don't think it's  
4 relevant.

5 CHAIRMAN HENDRIE: That suggests that should, at a  
6 further meeting, the Commission want to hear about the specific  
7 routing information, you would like an opportunity to at  
8 least consider attending under an appropriate protective  
9 order?

10 MR. ROISMAN: Yes, that's correct, Mr. Chairman.

11 CHAIRMAN HENDRIE: I think we ought to simply close  
12 for the moment, and the Commissioners can see whether they  
13 feel they want to have that further information. As soon as  
14 we can come to any view there, why, we will let you know.

15 All right. Thank you very much.

16 (Whereupon, at 12:45 p.m., the hearing was  
17 adjourned.)

