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NUCLEAR REGULATORY COMMISSION

IN THE MATTER OF:

COMMISSION MEETING
TARAPUR EXPORT LICENSE

Place - Washington, D. C.

Date - Thursday, 23 February 1978

Pages 1 - 21

Telephone:
(202) 347-3700

ACE - FEDERAL REPORTERS, INC.

Official Reporters

444 North Capitol Street
Washington, D.C. 20001

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

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COMMISSION MEETING
TARAPUR EXPORT LICENSE

Room 1130
1717 H Street, N. W.
Washington, D. C.
Thursday, February 23, 1978

The Commission met at 3:20 p.m., Joseph M. Hendrie,
Chairman, presiding.

COMMISSION MEMBERS PRESENT:

- Joseph M. Hendrie, Chairman
- Richard T. Kennedy
- Victor Gilinsky
- Peter Bradford

P R O C E E D I N G S

1
2 CHAIRMAN HENDRIE: If we could come to order.

3 The Commission is meeting this afternoon to discuss
4 the National Resources Defense Council petition on Tarapur
5 Export License XSNM-1060.

6 There is also a connection to the license 1222
7 by virtue of a consolidation motion, I guess.

8 I understand from papers at hand that there is still
9 further paper to come in from the Department of State. I
10 contemplated canceling this meeting on that account the other
11 day and decided on balance that it would be better for us to
12 go ahead and hear the matter laid out in at least this initial
13 fashion by the staff.

14 We can hear some options from the Counsel's Office.
15 I think the Office of Policy Evaluation has a contribution
16 to make. I do not anticipate any really major Commission
17 actions this afternoon in light of the still-to-come document.
18 But I think it is useful for us to begin to close with this
19 matter.

20 Commissioner Kennedy and I will both be away portions
21 of next month. And we ought to begin to get our thoughts in
22 hand.

23 Should I start, Jim, with you or with Carl?

24 MR. SHEA: I would think Carl.

25 MR. STOIBER: I think I will play the role of

1 interlocutor, Mr. Chairman, if you don't mind --

2 CHAIRMAN HENDRIE: Please do.

3 MR. STOIBER: -- and call on my other colleagues as
4 we reach those portions of the discussion that they will be
5 contributing on.

6 MR. KENNEDY: May I ask one minor procedural question
7 before you begin?

8 We have a letter dated February 21 from the Department
9 of State commenting on the petition. Are we to receive still
10 more comments?

11 MR. STOIBER: Yes. I believe the letter indicates
12 that this is by way of the Executive Branch submission on the
13 issue of whether or not a hearing should be held on license
14 No. XSNM-1060.

15 The Department of State also indicates that it
16 intends to supplement the record by provision of additional
17 information, hopefully in the near term. And this material
18 will not relate to the hearing question, but relate instead
19 to a substantive license grant question.

20 Mr. Chairman, there are really three decisions
21 which confront the Commission in this matter which is now
22 almost reaching its second anniversary as the first petition
23 in this matter was filed in March of 1976.

24 The first issue is the request for resumption of
25 the hearings along the same lines as were conducted in July

1 of 1976.

2 The second issue is the question of consolidating --

3 CHAIRMAN HENDRIE: Carl, would that be a resumption
4 or simply a new hearing? Isn't this a different license or
5 is it --

6 MR. STOIBER: The petition asks for a resumption
7 of the hearing. In the past, we have treated the whole pro-
8 ceeding as a matter involving a nuclear supply relationship
9 and not one which is basically tied to individual licensing
10 matters if it can be regarded as either.

11 CHAIRMAN HENDRIE: Okay.

12 MR. STOIBER: The second question involves a request
13 that pending license XSNM-1222 which is the follow-on license
14 for the next shipment of Tarapur fuel be consolidated with
15 the present license. That perhaps is an action that the
16 Commission might be prepared to act on today.

17 And the third question is whether or not the
18 Commission is prepared now or at some near point to act on
19 license XSNM-1060.

20 You have a variety of papers before you reflecting
21 the views of the staff, the Executive Branch, the petitioners,
22 and a paper from the General Counsel's Office outlining some
23 alternatives. What I thought might be profitable to do today
24 would be for me to outline the alternatives for Commission
25 action on the request for resumption of hearings; for the

1 staff to perhaps discuss what additional material might be
2 expected from the State Department in its supplementary
3 response as indicated in the February 21 letter from Mr.
4 Tarnoff; and perhaps also some discussion on the staff's
5 view of the substance of granting license XSNM-1060.

6 With respect to the question of hearings, in my
7 memorandum of February 21, following after page 4, I outlined
8 five alternatives for possible Commission action with
9 respect to this request. There are probably variations of
10 those five possibilities also that may arise.

11 But I would just briefly summarize each of them.

12 First of all, the Commission could, of course,
13 determine it had sufficient information on which to act on
14 the license and decline to hear further information views from
15 the petitioners. That would basically require a finding at
16 least under the new Part 110 that a further oral hearing or
17 written hearing would not be in the public interest.

18 And we have outlined in the paper some of the bases
19 which the Commission could deduce in reaching that kind of
20 a decision.

21 The second option would be to order oral legis-
22 lative-style hearing of the type conducted in 1976. This
23 basically would be granting the request of petitioners, and
24 we have also outlined on page 5 the potential time schedule
25 for such hearings. As we have indicated there, we find it

1 difficult to conceive of a reasonable schedule for such
2 hearings that would be able to occur much before the first
3 part of April.

4 And the reason for this time schedule largely involves
5 the procedures that we have established under Part 110 for
6 the receipt of possible questions to be asked of people
7 testifying at such hearings, Freedom of Information Act requests
8 for additional information, and the like.

9 The third possibility would be to, instead of grant-
10 ing an oral hearing modeled after the earlier hearings, order
11 some type of written hearing. We think also a 30-day time
12 period would perhaps be a minimum time frame in which to
13 order such a hearing.

14 Thirty days is generally a traditional time period
15 for public comment on issues of this type.

16 Fourth would be to deny a hearing with respect to
17 license XSNM-1060, the license presently before the Commission
18 and to order a generic or general hearing on new developments
19 which have occurred since the last hearing on the U. S.-
20 Indian nuclear supply relationship. This would have certain
21 advantages.

22 First of all, it would not encumber action on
23 license XSNM-1060 and would permit a somewhat more extended
24 time frame for such hearings. And it would also allow the
25 Commission to take into consideration the additional material

1 to be received from the State Department.

2 The fifth option would be to deny any form of
3 hearing, yet to defer decision on whether or not to hold some
4 sort of hearing on XSNM-1222 or generic hearing until some
5 further point.

6 Those are basically the options which we have out-
7 lined in the paper, and I would be prepared to discuss any
8 of them now if you have questions.

9 CHAIRMAN HENDRIE: Tell me some more about four.

10 MR. STOIBER: Alternative four would be an action
11 similar to the action the Commission took last year in the
12 summer of 1977 by which it would consolidate the follow-on
13 license, XSNM-1222 with the present proceedings, thereby
14 preserving the rights of the petitioners in this matter,
15 keeping it a live matter for the Commission, and also preserv-
16 ing the legal posture of the litigants in the Court of
17 Appeals.

18 MR. KENNEDY: Could you explain the status of that
19 situation at the moment?

20 MR. STOIBER: The Court of Appeals, of course, heard
21 argument on this matter -- the question of the standing of
22 petitioners to seek a hearing as a matter of right. And the
23 second related question of what kind of a hearing they would
24 be entitled to if they had established standing.

25 They have received argument on this in December of

1 1976 and have taken no action with respect to that matter up
2 to the present time.

3 My own judgment would be that since the Court was
4 aware of the fact that we were promulgating a new set of
5 regulations and also that the Congress was considering these
6 issues also that they were staying their hand until some
7 resolution of the matter might possibly be forthcoming from
8 Congress.

9 In my own view, the Nuclear Nonproliferation Act of
10 1978 substantially resolves the question of the nature of the
11 hearings which petitioners would be entitled to in any
12 export licensing proceeding.

13 We would expect, the General Counsel's Office, to
14 be forwarding a supplementary memorandum of law to the Court
15 of Appeals discussing the new legislation and its impact
16 on the lawsuit at the time the President signs the legislation
17 which we expect to be perhaps within the next week to ten
18 days.

19 So that is the present posture of the litigation.
20 We believe that it supports the position that the Commission
21 took in the litigation and allows the Commission to go forward
22 with legislative-style hearings as we did in the summer of
23 1976.

24 I believe Ken had some thoughts about the time-
25 table that we are operating on and whether or not the

1 Commission should prefer action.

2 Perhaps you would like to give some comments on
3 that.

4 MR. PEDERSEN: I wouldn't go beyond the sentiment I
5 expressed in my memo to you on February 21. I would think that
6 one of your major concerns about whether to go forward with
7 a hearing on a discretionary basis would be a determination
8 of whether you felt there was a need to further elaborate the
9 public record here.

10 I think it is going to be difficult for you to make
11 that judgment until you see the adequacy and the compre-
12 hensiveness of the promised State Department views that are
13 to be forthcoming.

14 MR. GILINSKY: Are they sending over an unclassified
15 statement?

16 MR. PEDERSEN: My understanding is, and Mike Guhin
17 has more detailed information on this -- he has been in con-
18 tact with them today -- this would be in a form that would be
19 nonclassified and that it would speak in large part to pre-
20 cisely the issues raised in the NRDC petition, particularly
21 with regard to the question of urgency in the spent fuel
22 storage.

23 MR. KENNEDY: It would be unclassified?

24 MR. PEDERSEN: My understanding is it would be
25 unclassified; that's correct.

1 I am also told that the State Department has
2 cautioned us or suggested there would be no major surprises in
3 it in terms of things that the Commission might not know.

4 MR. KENNEDY: Is that good?

5 MR. PEDERSEN: Well, I think the feeling is that the
6 Commission has information at its disposal that it has not
7 been able to make public because of its nature, classified
8 nature or otherwise. This would be an effort by the State
9 Department to be as forthcoming as possible on the public
10 record, but that for the Commissioners, it may not contain
11 anything of great newness.

12 Nonetheless, I think your decision as to whether
13 the public record requires further elaboration through hearings
14 will in many ways turn on how useful this document is and
15 whether in fact it provides sufficient information.

16 MR. GILINSKY: Sufficient information to discuss it
17 here today.

18 MR. PEDERSEN: It is not in our hands yet, but my
19 recommendation was that I don't see how you can make a deter-
20 mination as to whether or not to proceed with the hearing
21 until you have an opportunity to review that document. And
22 that's kind of where I would leave it.

23 MR. GUHIN: I might clarify that a bit, Ken. I
24 think State has talked with them this morning. And as they
25 said in the letter from Mr. Tarnoff that they expect that

1 this will provide substantively no new information to the
2 Commission and that the Commission has far more than they
3 will be able to provide in the unclassified response. But
4 that they are making every effort to address the issues which
5 were in the motions and to provide an unclassified really
6 analysis of developments since the July, 1976, hearings.

7 There may be a few items which are new information,
8 but which have no substantive impact on the matter before
9 the Commission. For example, GE's plans for reracking the
10 spent fuel, the details of that and this kind of thing.

11 MR. GILINSKY: And when is that coming over?

12 MR. GUHIN: They are estimating now that it will
13 take them a minimum of two weeks.

14 There is nothing new in the response they are
15 developing now. Obviously, if there were new diplomatic
16 developments or whatever, they would surely inform the
17 Commission. There could be developments in that sense of
18 which the Commission is not now aware in light of this or
19 in light of the license proceeding itself.

20 CHAIRMAN HENDRIE: Let's see, Mike, I had understood
21 that State was going to make it a little sooner than that.

22 MR. GUHIN: They are trying to --

23 CHAIRMAN HENDRIE: What do you think their estimate
24 as of today is more like two weeks?

25 MR. GUHIN: Ten working days. One could shorten that

1 if they wanted to work all weekend. But they are working
2 actively now. And, in fact, some of the things they found are
3 easier than they expected because indeed certain reports and
4 background material had been already typed up -- not in
5 anticipation of the questions, but just for the filing
6 purposes and declassification purposes.

7 But their best guesstimate this morning was about
8 ten working days.

9 MR. PEDERSEN: Mike, I understand some of that is
10 because they have to get certain information from India; is
11 that correct?

12 MR. GUHIN: Two points. Yes, that's right. They
13 want to get some of the most up-to-date information from India,
14 and one of the complications in that regard is that the people
15 at the nuclear fuel complex that will answer the questions
16 are now either out of the city or at the Tarapur site and so
17 will not be responding until, of course.

18 And I think another factor is just simply the
19 putting together process. And they cannot judge at this time
20 when they would get further information, you know, from
21 India. They have, I think, inhouse, even if that doesn't
22 come, the information a lot of which we have had and in fact
23 all of which we have had.

24 MR. GILINSKY: What is the point about speculating
25 about this document until we get it?

1 MR. GUHIN: I haven't speculated about it, only
2 except as to when it is coming. I don't think there is any
3 reason to speculate about its substance because I think we
4 know substantively what it will say.

5 MR. STOIBER: I think the point to consider here
6 also is that we really are faced with two different questions.

7 No. 1, what is going to be the effect of the new
8 information on the decision to either grant or deny the
9 license?

10 The second question is what relevance the information
11 might be on the question of whether or not to hold a public
12 hearing with respect to that license.

13 And one of the issues here is that it is obvious
14 from looking at the issues raised in the petition, the effect
15 of the SSR report, the Desai statements and the fuel return
16 questions that these are in fact new developments since the
17 hearing that we had in July; that the public record of the
18 Commission has not been developed on these issues. And so
19 those two questions really are separate, although related.

20 MR. KENNEDYP: Does that argue for a hearing, A,
21 at all? And if so, a hearing now or a hearing later after
22 consolidating either in the general sense or on subsequent
23 licenses?

24 MR. STOIBER: I would guess I would not be confident
25 in answering that question until I saw that the material

1 contained.

2 You might, for example, having received the
3 information which would be in the public domain conclude that
4 this sufficiently illuminated the public record that there
5 was no additional need for public hearings, although it might
6 cast your view on the substantive licence one way or the other.

7 On the other hand, you might feel that there were
8 questions raised in the material that you would like to have
9 explored in an additional hearing or proceeding before acting
10 on the license.

11 MR. PEDERSEN: I think that is the important part.
12 Substantively, as Mike says, there may be nothing new here.
13 I don't know. I wouldn't want to speculate. But in terms
14 of the public record, I think some of this material may very
15 well be new.

16 MR. STOIBER: Let me raise additionally a legal
17 point. And that is since we are not now operating under the
18 new Part 110, one legal issue arises. What vote of the Com-
19 mission would be necessary in order to hold a hearing?

20 As you know, under the new Part 110 rules, it takes
21 two to tango so to speak. Under the ad hoc procedures you
22 are operating with now, it would be, I assume, the majority
23 vote.

24 MR. GILINSKY: And when do the rules change?

25 MR. GUHIN: Two and a half months from now.

1 (Laughter.)

2 MR. STOIBER: Approximately sometime in May.

3 CHAIRMAN HENDRIE: If the Commission considers that
4 that procedural aspect of making a decision not to hold a hear-
5 ing decided what to put in the new rules -- we have done that
6 recently -- the fact that the rules are not formally there
7 bound in gold and leather does not change for me the fact
8 that the Commission has thought about this subject.

9 MR. KENNEDY: Or me.

10 CHAIRMAN HENDRIE: And so I will say if I find two
11 Commissioners who want to have a hearing on this subject, I
12 am going to vote with them to have it in order that they have
13 whatever --

14 MR. KENNEDY: That would make it unanimous in such
15 a case.

16 CHAIRMAN HENDRIE: -- the majority is necessary.
17 In other words, we are just not going to play games.

18 MR. BRADFORD: Wait a minute. We have to know what
19 will happen if you guys want a hearing.

20 (Laughter.)

21 CHAIRMAN HENDRIE: I am going to vote last.

22 MR. KENNEDY: It is going to give you the sensing of
23 how this works, Peter.

24 CHAIRMAN HENDRIE: So I think we are all pretty
25 well agreed on at least that procedural aspect.

1 MR. STOIBER: I take my statement back. There is no
2 legal question.

3 Let me proceed to the one issue where I think it is
4 possible that you could take a decision today. And that is
5 on the issue of consolidation.

6 I think if you examine the way the Commission has
7 treated these issues in the past and the fact that the follow-
8 on license does raise precisely the same policy and legal issues,
9 I would think the Commission might well be prepared to decide
10 today to issue a brief, one-page, order formally consolidating
11 the two licenses into one procedure.

12 That would at least clear that issue without much
13 discussion.

14 MR. GILINSKY: Would you run over what implies, Carl?

15 MR. STOIBER: Well, the implication, of course, is
16 that the Commission can then proceed to act on one license
17 without somehow rendering moot the legal issue which petitioners
18 have raised in the Court of Appeals because there is still a
19 matter before the Commission for Commission action. And that
20 means that it is still a live legal issue.

21 MR. GILINSKY: But the licenses still remain distinct?

22 MR. STOIBER: Yes, they do. That does not mean
23 that one must take action on both licenses at the same time.

24 MR. KENNEDY: It means that one could take action,
25 for example, to issue the license 1060 without any prejudice.

1 MR. STOIBER: That's correct. To XSNM-1222, the
2 following license.

3 MR. KENNEDY: Or the decision as to a hearing in
4 that connection.

5 MR. STOIBER: Right. And in fact, it would be
6 inappropriate to act upon license 1222 because the Executive
7 Branch views on that license have yet to be received.

8 MR. KENNEDY: All rights of the parties, all
9 interests of the parties, are protected?

10 MR. STOIBER: Yes.

11 CHAIRMAN HENDRIE: Your paper notes that the Depart-
12 ment of State does not object to consolidation. The staff
13 does not object to consolidation. Is that it?

14 MR. STOIBER: That's correct.

15 CHAIRMAN HENDRIE: I don't know who speaks for
16 State, but I assume you understand their point of view.

17 MR. SHEA: Their position. That's in writing in
18 their letter from Tarnoff of February 21, the last paragraph.

19 CHAIRMAN HENDRIE: Since the petitioners have made
20 the motion, I assume that they feel that their interests would
21 not be jeopardized by consolidation.

22 And I take it your advice is that the Commission's
23 range of options and general position in the matter is not
24 degraded and may even be improved by consolidation.

25 MR. STOIBER: Just so.

1 CHAIRMAN HENDRIE: Well, as I seldom find a matter
2 so unanimously agreed to as this moral, upright, in accordance
3 with God and motherhood and everything, I seize upon it with
4 joy.

5 Do you want to consider consolidation further?

6 We could draw straws to see who defends it and who
7 who attacks it. Why don't we simply agree it seems a useful
8 thing to do, and it is out of the way.

9 I would ask you then to vote to consolidate.

10 (Hands were raised.)

11 So ordered.

12 With regard to the hearing, if State comes forward
13 about the 9th of March, two weeks from today, or a couple of
14 days later, maybe two weeks from this coming Monday, the
15 Commission could consider that matter, but with one of us
16 absent.

17 Now, let's see, someplace here it says the tenth
18 through the end of the month.

19 MR. KENNEDY: I'll be back before that date as
20 proposed as a hearing date. I would be back before that.
21 Actually, I'll be back before the second -- the 30th or 31st.

22 CHAIRMAN HENDRIE: Question: do you feel we need
23 a full panel of four to meet again and determine the hearing
24 question?

25 MR. KENNEDY: I would be guided by whatever judgment

1 my colleagues reach.

2 MR. BRADFORD: Have we clearly got an option?

3 CHAIRMAN HENDRIE: Well, it is sort of an at-our-
4 option matter. We could decide that, indeed, the four of us
5 should sit down together and make such a decision, or we
6 might decide, if the Commission has a quorum when we get the
7 paper from State, we proceed to meet on it.

8 MR. KENNEDY: That would be wholly acceptable to me
9 on whatever grounds.

10 CHAIRMAN HENDRIE: I think it is not unreasonable
11 if it were a majority requirement of the Commission. I
12 would think then everybody ought to be present to get his vote
13 in. There is a lower threshold here.

14 I have no objection to you going ahead and meeting
15 in my absence. Dick says none in his.

16 MR. KENNEDY: Two of them can't meet.

17 CHAIRMAN HENDRIE: True.

18 MR. KENNEDY: It has to be a quorum.

19 CHAIRMAN HENDRIE: True. True. But we will have
20 one.

21 MR. KENNEDY: Yes.

22 CHAIRMAN HENDRIE: I will go, and you will be here.
23 Then you will go, and I will be here.

24 And I trust that both of you will be here minding
25 the store.

1 Okay. I think, then, we ought to delay until we
2 get the paper unless you are prepared now to make a decision.

3 MR. BRADFORD: No, I would be in favor of waiting
4 for the paper.

5 CHAIRMAN HENDRIE: I was looking at my calendar
6 because if we agreed, for instance, that we really ought all
7 four to be here, then I can see it going all the way to the
8 second of April, the first week in April, before one could
9 close on a decision. And I would wonder in that case whether
10 that wouldn't encourage me to try to make a decision now so
11 that various preliminaries could get underway if they were
12 to be.

13 Well, I don't know that we need to cover that.

14 Does anyone see any need for any further discussion
15 on the Tarapur license matter?

16 (No response.)

17 In that case, let me declare that session of the
18 meeting complete.

19 (Whereupon, at 3:50 p.m., the meeting was
20 adjourned.)

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