

RETURN TO SECRETARIAT RECORDS

NUCLEAR REGULATORY COMMISSION

COMMISSION MEETING

In the Matter of: PUBLIC MEETING

DISCUSSION AND POSSIBLE VOTE ON REVISED
LICENSING PROCEDURES PROPOSED RULE
CHANGE TO PART 2

DATE: October 1, 1981 PAGES: 1 - 36
AT: Washington, D. C.

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REPORTING

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1 UNITED STATES OF AMERICA
2 NUCLEAR REGULATORY COMMISSION
3
4 DISCUSSION AND POSSIBLE VOTE ON REVISED LICENSING PROCEDURES
5 PROPOSED RULE CHANGE TO PART 2
6

7 PUBLIC MEETING
8

9 Nuclear Regulatory Commission
10 Room 1130
11 1717 H Street, N. W.
12 Washington, D. C.

13 Thursday, October 1, 1981

14 The Commission reconvened in open session on the
15 above entitled matter, having recessed the closed portion,
16 at 11:35 a.m.

17 BEFORE:

18 NUNZIO PALLADINO, Chairman of the Commission
19 VICTOR GILINSKY, Commissioner
20 PETER BRADFORD, Commissioner
21 JOHN AHEARNE, Commissioner
22 THOMAS ROBERTS, Commissioner

23 ALSO PRESENT:

24 S. CHILK
25 L. BICKWIT
 G. CUNNINGHAM
 B. PARLER
 A. ROSENTHAL
 T. COTTER
 F. REMICK

* * *

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1 P R O C E E D I N G S

2 CHAIRMAN PALLADINO: Well, ladies and gentlemen, I
3 wonder if we could reconvene.

4 This is a continuation of our Discussion on
5 Revised Licensing Procedures, Proposed Rule Change, Part 2.
6 This is an open meeting now which will address the question
7 of limiting interrogatories.

8 I wonder if General Counsel would introduce the
9 subject and review for us some of the pros and cons of
10 limiting interrogatories.

11 MR. BICKWIT: Also included in the proposed rule
12 that went out for comment was a section on limitation of
13 interrogatories.

14 What was proposed was that parties would not be
15 able to file more than 50 interrogatories per proceeding on
16 another party unless it could establish that three criteria
17 were met.

18 One, that a response to the extra interrogatories
19 is essential for the party to prepare adequately its case
20 taking into account the number of contentions in the
21 proceeding, the complexity of issues and timing of issuance
22 and number of staff for applicant documents;

23 Two, the information sought is not otherwise
24 reasonably available; and

25 Three, the party was not improvident in its

1 overall use of the first 50 interrogatories.

2 You have before you on pages 23 through 25 of the
3 paper we have been using the comments that were received.
4 Or analysis is basically one that has to be broken down into
5 that of the chairman of the Appeal Board, OELD and OGC on
6 the one hand, and the Licensing Board Panel, on the other.

7 The first three named offices believe that on
8 balance it makes sense to adopt something similar to the
9 proposed rule at least on a trial basis.

10 We would recommend modifying the rule as proposed
11 so that if any party consents to receiving more than 50
12 interrogatories in a proceeding that that of course would
13 govern.

14 The other modification we would suggest is the one
15 I mentioned before that you acknowledge that this is being
16 tried on a pilot basis and that the Commission expects a
17 evaluation of the experience with this after six months from
18 the time it takes effect.

19 Our feeling is that we are very unsure on the
20 basis of the comments and our analysis of the cases exactly
21 how this will work and therefor feel it has to be looked at
22 as a trial.

23 The three offices do not share the view of the
24 Licensing Board Panel that it would be counterproductive to
25 put this into effect on a trial basis.

1 I know Tony's view is that we are going to wind up
2 delaying the proceedings if we even institute this for a
3 limited period of time. I personally don't agree with that
4 view, but I think I will let Tony make his points at this
5 point.

6 COMMISSIONER BRADFORD: Let me ask just an
7 historical question, Tony. I thought this proposal
8 originally came up as part of this working group we had on
9 licensing problems last spring. Len referred to it as being
10 your view. I gathered, instead, this was much more what had
11 happened when this proposal was tried out on the Board
12 members as a whole.

13 MR. COTTER: I am not sure I understand.

14 COMMISSIONER BRADFORD: One, was the
15 50-interrogatory proposal something that you had objected to
16 when it was first floating around last spring?

17 MR. COTTER: Yes, I objected to it.

18 COMMISSIONER BRADFORD: Then, two, are the views
19 of this document your views or are they in fact a reflection
20 of the reaction that you got from across your membership?

21 MR. COTTER: It reflects some of my membership,
22 and I am not sure I can tell you how much. On any given day
23 half of them were out in hearings somewhere. I would say a
24 many consensus I guess.

25 MR. REMICK: I think what Mr. Bradford was

1 referring to at the panel meeting was a questionnaire was
2 put out when this was proposed. I don't know what the
3 results of that questionnaire were, but the panel was polled
4 at that time. I think that is what he is referring to.

5 MR. COTTER: I generally poll the entire panel on
6 any issues like this and do it in writing. I would say this
7 is the proposal, please give me your response. I would have
8 to go back and check to see how many written responses I got
9 and how many verbal responses.

10 COMMISSIONER BRADFORD: I wasn't really after a
11 nose count. My impression in reading your memo of September
12 8th was that it was a summary of the panel consensus rather
13 than your personal views on the matter.

14 MR. COTTER: I think that is correct. As I recall
15 how I developed this, I think I gave one aspect of it to the
16 Vice Chairman - Technical and asked him to conduct a pool
17 and I think he was the one who generated some of this data
18 on you would get 1.6 interrogatories per contention and that
19 sort of thing and other bits and pieces of it came from
20 other parts of it.

21 CHAIRMAN PALLADINO: Was consideration given to so
22 many interrogatories per contention rather than some
23 arbitrary limit irrespective of the number of contentions?

24 COMMISSIONER BRADFORD: We did discuss before
25 putting this out for comment last spring, and I must say I

1 don't remember exactly the thrust of the discussion. I
2 think the conclusion was that that was not a useful approach
3 to limiting the interrogatories because ---

4 MR. BICKWIT: Or was it limiting contentions?

5 (Laughter.)

6 CHAIRMAN PALLADINO: After contentions had been
7 remitted, did they make valid contentions?

8 MR. BICKWIT: The point I was making was one of
9 the negatives associated with that was that it would provide
10 a strong incentive to get as many contentions into the case
11 as possible.

12 CHAIRMAN PALLADINO: But these would be admitted
13 contentions?

14 MR. BICKWIT: Right.

15 CHAIRMAN PALLADINO: If you admit them all, then I
16 guess you would have to suffer all the questions.

17 COMMISSIONER BRADFORD: What happens then if you
18 get into a fair amount of gamesmanship over whether a
19 particular worthwhile contention can be split into two or
20 three parts, all of which would get admitted and all of
21 which would carry a number of interrogatories, and then
22 there will be all sorts of motions for consolidation which
23 normally would be fairly easy and quick to act upon but
24 which will carry real significance if they start dividing
25 contentions down and the Boards are going to find themselves

1 ruling on a whole separate set of actions while the
2 proceeding was going on.

3 CHAIRMAN PALLADINO: Maybe we had better let Tony
4 go ahead.

5 Did you have a comment you wanted to make, Tom?

6 COMMISSIONER ROBERTS: (Nodding No.)

7 CHAIRMAN PALLADINO: I gather you were going to
8 comment on ---

9 MR. COTTER: I would just be reiterating what I
10 have said in print.

11 CHAIRMAN PALLADINO: Well, why don't you summarize
12 it. Much of what I read on interrogatories was a few
13 meetings ago.

14 MR. COTTER: The first point to me is that 50 is
15 so arbitrarily low as to guarantee that there will be a
16 subsequent series of rounds of motions practiced whereby
17 those people who need more than 50 interrogatories will go
18 ahead and file them and the party against whom they file
19 them will object to them. Under this proposal the Board
20 will then have to look at every single question that is
21 asked to find out whether it is necessary and sufficient and
22 presumably then we will have to issue some kind of a written
23 ruling. So the potential for consuming Board time I think is
24 enormous.

25 Remember that the system is supposed to be a

1 voluntary system which takes place principally with notice
2 to the Board but outside of the Board's cognizance. Now,
3 you are going to shut the Board into the process and make it
4 even more formal by requiring more pleadings and that sort
5 of thing.

6 Maybe it would be useful to look at a set of
7 interrogatories and get some feel for what it is you are
8 talking about. Question one might be who is your witness
9 and what is his name and address. Under this principle I
10 suppose the identity of the witness and his addresss would
11 be two interrogatories, I don't know, and you haven't even
12 gotten to the point where you are asking anything
13 substantive.

14 In interrogatory practice a lot of what you do is
15 establish a factual context against which your substantive
16 questions are asked.

17 CHAIRMAN PALLADINO: Tony, would some other
18 arbitrary limit be more acceptable, like a hundred?

19 MR. COTTER: No. For example, in some of the
20 post-TMI proceedings where the license has been held up
21 because of TMI issues only and the rest of the proceeding
22 has already been taken care of you might end up with one or
23 two contentions in the whole thing.

24 CHAIRMAN PALLADINO: I was just trying to find out
25 whether you were proposing 50 or whether you felt that was

1 just too low. Were you proposing the concept of limiting
2 the number of interrogatories in principle or where you
3 looking at the specific number?

4 MR. COTTER: I have two positions or responses to
5 that. The specific number to me is absurd. It is
6 meaningless. It will generate work. The principle of
7 limiting interrogatories to some number I don't react as
8 violently to, particularly if the number were something like
9 100 for contentions or something. I think you might be able
10 to live with something like that.

11 But basically and ultimately the purpose of
12 discovery and interrogatories, as you said, is to make sure
13 that all sides have all the information related to the case
14 in the other party's possession. Then when that is
15 accomplished, to the extent that discovery is then used as a
16 device for burdening the other party, then it is the
17 discretionary responsibility of the Boards to step in and
18 stop that and we presently have a device for them to do that
19 in the rules. The party can object to a particular set of
20 interrogatories or a particular interrogatory as either
21 burdensome or unnecessary or what-have-you.

22 COMMISSIONER AHEARNE: You had made a proposal,
23 not a very counterproposal, but a proposal that instead of
24 limiting by specific number that instead that we adopt at
25 least a version of a proposed federal civil rule.

1 MR. COTTER: Yes.

2 CHAIRMAN PALLADINO: Which one was that? Was that
3 where they agree as to the number they are going to answer?

4 MR. COTTER: It is essentially a direction
5 re-emphasizing to the judicial or presiding officer to
6 control the situation. The federal courts clearly have
7 generated this proposal as the most acceptable because they
8 have run into problems with people abusing discovery and
9 abusing the interrogatory process and I think to a much
10 greater extent than we have.

11 CHAIRMAN PALLADINO: Is that on a particular page
12 of your write-up?

13 MR. COTTER: The proposal itself if attached to
14 the General Counsel's memo.

15 COMMISSIONER AHEARNE: You did not develop
16 specific language; isn't that correct?

17 MR. COTTER: No.

18 COMMISSIONER AHEARNE: What you had suggested I
19 had thought was to take the federal proposal which is
20 attached to General Counsel's memo, and then you also
21 indicated that specific authority could be added to empower
22 Boards to place specific limits on the number of
23 interrogatories on any contention following the last SSER.

24 MR. COTTER: Yes.

25 COMMISSIONER AHEARNE: So that would give the

1 Board the ability to settle in the judgment of the Board.

2 MR. BICKWIT: There is a summary of your proposal
3 on page 29, the last two paragraphs of page 29 of our memo.

4 MR. COTTER: I might comment that the proposal is
5 based on a much broader and more extensive study that was
6 conducted by the Federal Rules Committee.

7 CHAIRMAN PALLADINO: Don't the Boards right now
8 have the opportunity or the authority to limit
9 interrogatories?

10 MR. COTTER: Only if it is affirmatively requested
11 and grounds are established that some number of
12 interrogatories is burdensome.

13 CHAIRMAN PALLADINO: Now how would this
14 administrative rule change that? It would place the
15 responsibility for discovery not only on the Boards but on
16 the parties as well and would provide sanctions against the
17 party who did not in good faith abide by their provisions.
18 Well, that is rather general. I think the Boards have that
19 capability now, don't they, or am I wrong.

20 MR. COTTER: Well, they don't have it as an
21 affirmative authority. They have it as a responsive
22 authority, if you will.

23 COMMISSIONER BRADFORD: Tony, what is it that
24 prevents a Board from stepping in on its own? Does the
25 rules say that you have to be acting on a motion?

1 MR. BICKWIT: I think the rules give authority to
2 get discovery on all relevant matters unless a party meets
3 the criteria for a protective order. Those criteria deal
4 with excessive burden and annoyance. So that the Board can
5 say to a party of a major case that if you go beyond a set
6 number of interrogatories you thereby create excessive
7 burden and annoyance and that is the limit to the
8 interrogatories that you can put, except that you need to
9 establish that.

10 COMMISSIONER BRADFORD: Except that it is pretty
11 hard to establish that I guess without a party objecting.

12 MR. BICKWIT: That is right.

13 COMMISSIONER BRADFORD: But, on the other hand,
14 why should the Boards limit interrogatories if the parties
15 don't object?

16 CHAIRMAN PALLADINO: Why should they?

17 COMMISSIONER BRADFORD: Why should they unless a
18 party objects.

19 MR. REMICK: The objection is on a very limited
20 basis, a permitted objection, and that kind of objection
21 generally does not succeed and it is time consuming. It
22 takes up time while the Board is examining.

23 It seems to me in this area that a given is that
24 there is a great deal of unnecessary discovery. One
25 recognizes that a great deal of the information pertaining

1 to the issues in the case is available through the
2 applicant's various filings and from the staff's various
3 documents. I have seen a lot of this discovery which, it
4 seems to me, not only placed unwarranted burden on staff
5 resources by discovery against the staff, but in addition
6 really couldn't be justified.

7 Reasonable minds might differ as to whether it
8 would meet or would not meet the present standard of
9 oppressiveness or burdensomeness and it might have been
10 close to the line, but I think most objective observers
11 would have had to agree that it wasn't worth a candle, and
12 by the candle I mean the amount of time and effort that had
13 to go into these responses.

14 MR. COTTER: So far as I know, the staff has never
15 objected or never used the authority ---

16 MR. CUNNINGHAM: No, I don't think that is correct
17 at all. I think we are talking about two different things.
18 There is a provision in the rules that the staff is not
19 subject to discovery except by direction of the Board.
20 Historically the staff has not availed itself of that
21 protection because it knows the Board will say yes, the
22 information is necessary and go ahead and answer.

23 In fact, recently when we have started to invoke
24 that we have been subject to criticism by the Boards who say
25 that you are wasting our time making us rule on that. So

1 why don't you just answer the questions.

2 (Laughter.)

3 MR. COTTER: Well, it is my understanding that it
4 is just sort of a standard policy now that you refuse to
5 answer any interrogatories, is that correct, under that rule?

6 CHAIRMAN PALLADINO: You could refuse?

7 MR. CUNNINGHAM: I don't know what the standard
8 policy is, but the rule is being invoked considerably more
9 frequently.

10 MR. COTTER: The staff is refusing to answer
11 interrogatories under that rule and saying in effect to the
12 applicant you have got to go to the Board and get them to
13 tell us to answer them.

14 CHAIRMAN PALLADINO: Can I just ask one little
15 question. If there is an interrogatory to which the staff
16 answer is well, look in the SAR and it is in there. Is that
17 a sufficient response at the present time?

18 MR. CUNNINGHAM: It would depend on the nature of
19 the question. One of the problems that the staff finds in
20 answering discovery is that the question will be asked what
21 is the basis for the conclusion at such and such a page of
22 the SER.

23 MR. ROSENTHAL: That ought to really be out in any
24 event. I mean, it is one thing to seek specific factual
25 information to an interrogatory and it is another thing, in

1 my judgment at least, to be probing the staff's thought
2 processes through interrogatories. I think that is
3 impermissible and that is actually what most of this is
4 about as a practical matter. A lot of the specific factual
5 information is available in the various documents that are
6 issued by the staff or by the applicant. What is being
7 sought by and large is, as Guy indicates, well, how did you
8 fellows get to that conclusion?

9 CHAIRMAN PALLADINO: Do you feel it is improper to
10 ask the rationale?

11 COMMISSIONER BRADFORD: Why is that improper?

12 MR. COTTER: I don't understand that at all. The
13 ultimate evidence is that expert opinion.

14 MR. ROSENTHAL: I think that is an improper use of
15 interrogatories.

16 COMMISSIONER GILINSKI: Would it be improper in a
17 deposition?

18 MR. ROSENTHAL: I think that is basically the kind
19 of thing that if this issue goes to hearing, the sponsors of
20 that document are there and they can be examined. I am not
21 saying that in the best of all possibly worlds where you had
22 a staff of several thousand members available to discharge
23 all of these functions and you could set aside a group of
24 these people who would be professional thought process
25 revealers ---

1 (Laughter.)

2 MR. ROSENTHAL: I just myself think that given the
3 real world that confronts us that that is an improvident
4 utilization of staff time. I hate to be in the position of
5 agreeing with Howard Shapar on anything, and this may be the
6 first time.

7 (Laughter.)

8 COMMISSIONER BRADFORD: Alan, why is it going to
9 take less time for the staff to respond to that question by
10 sending a witness to Phoenix or some such place to face it
11 on cross-examination especially if it may well be the kind
12 of issue that is going to come up more than once?

13 MR. ROSENTHAL: Well, because for one thing, if
14 you have seen some of these interrogatories what you have
15 got is a very substantial number of unfocused questions
16 which they have to sit there and respond to in writing.

17 If you have got a Licensing Board chairman who is
18 on the job a lot of that kind of questioning that goes on in
19 this interrogatory form will not be permitted in a hearing.
20 That is one answer I can give you.

21 COMMISSIONER BRADFORD: Well, it won't be
22 permitted perhaps in the form of how did you arrive at this
23 conclusion, but what will be permitted is a series of
24 questions lasting half a day that get to basically the same
25 result.

1 MR. ROSENTHAL: I mean, this is something on which
2 I think reasonable minds will differ. My perception of it
3 is again formed from tracking some of the discovery practice
4 in a number of cases. I am not a precise authority on all
5 the case law that has evolved in the judicial arena with
6 respect to interrogatories, but my impression is that
7 basically the purpose of interrogatories is to elicit
8 factual information. I don't think that there is any legal
9 constraint upon putting out of bounds the underlying thought
10 processes.

11 The staff represents that this is an enormous
12 drain on its time and I must say that having seen some of
13 the products of these interrogatories back and forth that I
14 can readily believe it.

15 Now, my thought about this endorsing, as Len
16 indicated, the basic proposal to try it out, is I have no
17 way of knowing at this point, and I don't think any of us
18 has any way of knowing, whether in fact this is going to
19 speed up the process or delay it or whether it is going to
20 put unreasonable restrictions on the ability of intervenors
21 to get information or whether it won't.

22 I think in this area the proof is necessarily
23 going to be in the pudding and I would put it into effect on
24 a trial basis and see what happens.

25 I just say I am persuaded in this area, unlike the

1 contentions area, with all due respect to Commissioner
2 Ahearne, that something has got to be done, if nothing else
3 on a trial basis, to see if we can't bring under control
4 what seems to me a process that has run amuck.

5 CHAIRMAN PALLADINO: Alan, I find it a little hard
6 say that it is inappropriate to ask the rationale or how you
7 got to that conclusion, because when you talk about legal
8 arguments the rationale is the most important part and the
9 conclusion sometimes seems almost unimportant.

10 (Laughter.)

11 CHAIRMAN PALLADINO: No, seriously, if you got to
12 the right answer for the wrong reason in the legal context
13 you would fault the decision.

14 MR. ROSENTHAL: That is quite right.

15 CHAIRMAN PALLADINO: Now why would it be wrong for
16 an intervenor to come in and say, well, I would like to know
17 how you got there, and it may be a perfectly reasonable
18 question and a perfectly reasonable answer.

19 MR. ROSENTHAL: Let me say two things to that.

20 First of all, in terms of the ultimate decision of
21 the issue, there is no question that the reasoning is an
22 important aspect of it and, indeed, I think that the Board
23 would be remiss, for example, in allowing an expert witness
24 to merely state some conclusions without giving the reasons
25 for them.

1 I also think that there is nothing wrong on the
2 interrogatory level of us saying, if this is the conclusion
3 that you have reached, what facts do you base that
4 conclusion on? I don't regard that as being thought
5 processes.

6 Many of these interrogatories, and perhaps Guy or
7 Bill speaking for the staff here this morning can elaborate
8 upon it, but many of the interrogatories that I have seen
9 have gone far beyond that. What they are really trying to
10 do is to test through the means of an interrogatory an
11 entire philosophy, methodology and the rest of it rather
12 than simply getting at what is the underlying facts upon
13 which that thesis rests.

14 Now, again, if we were talking about a world in
15 which there were a limited number of people available to
16 address interrogatories, fine. I mean, I am a great
17 believer in having as much out on the table in advance as
18 possible. That is the theoretical objective of us all. But
19 the staff tells us, and I think quite correctly, that it has
20 got extraordinarily severe manpower problems and the lines
21 have to be drawn somewhere, and I am just telling you that
22 is where I would draw the line.

23 I think that the 50 interrogatory limitation might
24 have the effect of concentrating these inquiries on the
25 basic facts, just what facts did the staff employ in

1 reaching these conclusions and avoid two things: one, some
2 of these thought processes inquiries; and, two, requiring
3 the staff to come up with factual information on matters
4 which there are other readily available sources to obtain
5 that information.

6 I mean right now what they just use the staff for
7 in many instances is a substitute for any kind of research
8 on their own. They just go to the staff and use them for
9 such as a fishing expedition and ask the staff to put it all
10 before them.

11 COMMISSIONER BRADFORD: But, Alan, even conceding
12 that there is a problem here, it seems to me that in the
13 contentions area we are talking about an approach that,
14 whatever its underlying basis, has in effect managed things
15 better by looking at them according to a set of standards.

16 What is suggested here is analogous to saying each
17 party can have three contentions. I must say there is a lot
18 that appeals to me in Tony's proposition which is what
19 really should be happening here is not an arbitrary
20 numerical limit but a requirement on the Boards to exercise
21 a certain amount of management in this area as well
22 regardless of the numbers.

23 MR. ROSENTHAL: They have to have some kind of
24 standard. As Howard Shapar stresses, there are a number of
25 United States District Courts, to be sure most of them in

1 rural areas, but there are a couple in metropolitan areas,
2 in San Diego there is one, for example, which have employed
3 limitations. So this is not unheard of and some of those
4 districts have gotten cases which have been quite complex,
5 although maybe not quite as complex as some of ours.

6 MR. COTTER: I don't think that limited
7 interrogatories are applicable to complex proceedings at
8 all. Limitations have never been applied to complex
9 proceedings.

10 MR. ROSENTHAL: As I understand the rules, they
11 make not exceptions, those districts that have those rules
12 that they apply now.

13 MR. COTTER: That is not how I heard it down at
14 the ABA conference a couple of weeks ago.

15 MR. ROSENTHAL: The rules on their face don't make
16 the exception. How they are applied, I don't know. B

17 Again, I am not suggesting that this is, nor is
18 the General Counsel's Office nor is the ELD suggesting that
19 this is necessarily the answer. I think the suggestion on
20 the part of those two offices and myself is simply that it
21 is time to address this problem and the problem really does
22 exist and this is a way of doing it and let's try it out and
23 see what happens. I frankly see nothing wrong with that.

24 COMMISSIONER BRADFORD: First of all, the staff
25 now has begun to contest interrogatories and we don't have

1 much experience yet with what happens when the Boards have
2 to rule on those types of issues. For all we know the
3 problem is going to diminish substantially in response to
4 the actions the Commission took last spring.

5 CHAIRMAN PALLADINO: What was done last spring?

6 COMMISSIONER BRADFORD: Well, we just put out a
7 policy statement which, among other things, reminded the
8 Boards that they did have the authority to manage the
9 interrogatory process and I gather the staff has taken some
10 heart from that. Whether it has begun to object to all
11 interrogatories or to some seems to be ---

12 CHAIRMAN PALLADINO: Would it be possible to
13 supplement that with qualitative criteria for admitting or
14 not admitting interrogatories such as you said, those that
15 probe the thought processes? I am not suggesting that that
16 be one. I am just saying such as that.

17 MR. CUNNINGHAM: In fact that particular proposal
18 was recommended in the ELD attachment to the SECY paper we
19 have. We have specific proposal language which would
20 prohibit the probing of thought processes. It appears at
21 page 7 of that ELD attachment.

22 CHAIRMAN PALLADINO: Attachment 1?

23 MR. CUNNINGHAM: It is Appendix 1 to the staff
24 paper.

25 MR. BICKWIT: It is worded as "In addition to the

1 limitation on interrogatories," those 50.

2 MR. CUNNINGHAM: That is right. We clear support
3 the limitation on interrogatories and propose that the
4 Commission consider the addition.

5 COMMISSIONER BRADFORD: The Boards, on the other
6 hand, propose just to use qualitative criteria in their memo
7 of September 14th.

8 CHAIRMAN PALLADINO: What?

9 COMMISSIONER BRADFORD: The Boards in their memo
10 of September 14th proposed the use of qualitative criteria
11 without the numerical limitation.

12 CHAIRMAN PALLADINO: Without the number.

13 COMMISSIONER AHEARNE: I must admit that I found
14 this one in which we had the intervenors almost uniformly
15 opposed, but in addition a significant number of the
16 industry participants also opposed, as well as the Board
17 opposed which caused me to feel that if you have most of the
18 parties that are participants and normally people who are on
19 different sides all agreeing that this doesn't look like it
20 is that good an idea, and a real cynic would say this would
21 reduce the amount of business for lawyers so that they are
22 opposed to it more because they are lawyers, but putting
23 that cynicism ---

24 CHAIRMAN PALLADINO: The lawyers are on all sides.

25 (Laughter.)

1 COMMISSIONER AHEARNE: --- but putting that
2 cynicism aside it sounded like it might not be a good idea.

3 Then I was attracted to Tony's proposal that he
4 did make that seemed to go in a step of reinforcing the
5 concern that the Commission had in explicitly giving the
6 Boards the authority to limit interrogatories but leaving
7 them to the Boards' judgment. So that is where I guess at
8 the moment I would come out in endorsing Tony's proposal.

9 CHAIRMAN PALLADINO: I was leaning a little in
10 that direction and also puts some qualitative criteria on
11 the classes of questions that should not be allowed as
12 guidance.

13 COMMISSIONER BRADFORD: I would like to see those
14 criteria written out. I am a little uneasy about trying to
15 split, and maybe it can be done, but about trying to clearly
16 split off different categories of questions about the
17 process of reaching a conclusion.

18 MR. BICKWIT: My own feeling is that those are
19 probably the most valuable questions that can be asked of
20 the staff in discovery.

21 (Laughter.)

22 MR. BICKWIT: (Inaudible)

23 (Laughter.)

24 MR. BICKWIT: Well, in answer to John I should say
25 that the primary motivation for developing this proposal was

1 to save staff resources. The staff is one party that has
2 supported this particular proposal.

3 COMMISSIONER AHEARNE: No, I recognize that.

4 MR. COTTER: I was going to say in addition to the
5 question of resources the difference in approach with a
6 numerical limitation it is self-executing. If you get to
7 the more subject approach requiring the involvement of the
8 Board I think you build in time.

9 CHAIRMAN PALLADINO: But you still can petition to
10 go above 50 or whatever number you select.

11 COMMISSIONER BRADFORD: One of my misgivings with
12 the numerical approach is that I doubt it will be
13 self-executing really. Instead of asking please explain
14 your reasoning for this proposing in the SER and repeating
15 that nine or ten times, you get an interrogatory that says
16 please document your reasoning for everything on pages 5
17 through 20 and that will be one question. Then you will
18 have to come back to the Board and say, wait a minute, there
19 are 43 separate topics covered in there and that is 43
20 interrogatories and there will be a dandy argument about
21 whether it is one interrogatory or 43.

22 CHAIRMAN PALLADINO: And if you have an A, B, C in
23 a question, does this count? Are they part of one
24 question? I was going to ask that before.

25 MR. REMICK: Many times Boards will put in A, B, C

1 to try to simplify or consolidate and so forth, and if there
2 is a limit I am not sure they will succeed.

3 CHAIRMAN PALLADINO: But the more A, B, C's they
4 get in there the more they can pack into 50 questions if you
5 allow A, B, C to be part of one question. I don't know how
6 the Boards rule or what was intended on this.

7 If you have a limit of 50 questions would you then
8 limit the number of subparts they may have?

9 MR. COTTER: Oh, yes, I think that is in here.
10 There are no subparts.

11 MR. BICKWIT: "For purposes of this section each
12 subpart of a question is considered as an interrogatory."
13 That is what we said in the proposed rule.

14 COMMISSIONER BRADFORD: But, you know, all that
15 does is tax one's knowledge of grammar to cram all the
16 subparts into a single sentence.

17 MR. BICKWIT: I think there was always concern
18 that this was quite arbitrary and would lead to some
19 confusion. I think it is a more powerful limitation on
20 interrogatories than in the approach that has been suggested.

21 MR. COTTER: I might add that the Boards are
22 sympathetic to the staff's position when there is a load of
23 these questions that come in.

24 CHAIRMAN PALLADINO: Where does the staff think
25 that the number of questions gets excessive on them, 300?

1 MR. CUNNINGHAM: I don't know that you can put a
2 number on it in a particular case because it depends on how
3 skillfully their drafter is.

4 MR. COTTER: It also may depend on what area it is
5 in and whether the staff has stayed in that area or not.
6 That could be a major problem.

7 CHAIRMAN PALLADINO: I wasn't trying to fix it
8 precisely. I think if somehow intuitively somebody asked
9 the staff a thousand questions I would almost on the face of
10 it say, gee, that sounds awfully excessive.

11 Is it a hundred?

12 MR. COTTER: I guess if you were to ask the staff
13 the truthful answer is ---

14 (Laughter.)

15 COMMISSIONER AHEARNE: It is a very steep curve.

16 (Laughter.)

17 MR. CUNNINGHAM: The staff is of the opinion that
18 given the tremendous amount of materials that it disgorges
19 in the documentation, the SER and the environmental reports
20 and so forth, that its position is well known to everybody
21 and there should be very little, if any, need for discovery.

22 MR. BICKWIT: They disgorge just about everything
23 but their thought processes which is what the intervenors
24 are interested in.

25 (Laughter.)

1 MR. CUNNINGHAM: I think even there the question
2 is in how much detail have these thought processes been
3 disgorged.

4 CHAIRMAN PALLADINO: Once you start to ask that
5 then the staff ought to be able to answer that or the
6 applicant. Now, if we go along with the fact that the
7 applicant has to set forth all the facts he is going to use
8 then can't there be questions such as how do you feel that
9 is pertinent and then you could ask as many questions of the
10 intervenor as the intervenor can answer of the staff. I
11 don't know if that gets you anywhere when you are all done.

12 MR. COTTER: This isn't a one-way street either.
13 The staff has occasion to serve interrogatories on the
14 intervenors.

15 COMMISSIONER AHEARNE: Yes, but as I have seen in
16 a couple of Boards recently that has not always proven to
17 elicit any response.

18 CHAIRMAN PALLADINO: Well, I don't know if we are
19 going to settle this.

20 COMMISSIONER AHEARNE: Could I ask Len a question?

21 CHAIRMAN PALLADINO: Yes.

22 COMMISSIONER AHEARNE: Len, I gather than Alan and
23 the staff strongly believes that matters of opinion, mental
24 process and other non-factual information are not
25 appropriate for the interrogatories, but you believe they

1 are appropriate?

2 MR. BICKWIT: Yes.

3 COMMISSIONER AHEARNE: Could you explain why you
4 believe that is appropriate?

5 MR. BICKWIT: I think the purpose of discovery is
6 to prevent surprise and to prepare people for the hearing in
7 a way that may trim down the hearing if we are fortunate.

8 I think what the intervenors are really interested
9 in knowing is how the staff did arrive at a given
10 conclusion. Then once they know it, they may regard that
11 reasoning as acceptable and they drop the contention.

12 COMMISSIONER AHEARNE: Now when you say how they
13 arrived at it, do you mean for a technical question to
14 demonstrate the calculations they went through, what were
15 the original facts which they started from, what were the
16 calculational methods, for example, what codes, or what
17 sheets of analysis?

18 MR. BICKWIT: I am a little out of my element, but
19 I think that is what I mean, yes.

20 MR. REMICK: I would be worried if through mental
21 process you mean excluding explanation of assumptions and
22 basic facts and so forth and how you got from the situation
23 that you are faced with to the conclusion you might have in
24 the SER.

25 It seems to me that some kind of a, and I don't

1 know if you call that a mental process or not, but I would
2 be worried if you excluded the -- (Inaudible).

3 CHAIRMAN PALLADINO: Especially assumptions.

4 COMMISSIONER AHEARNE: I haven't read these
5 interrogatories so I am not sure what they were striking
6 for. Alan, is that what they were looking for, the
7 calculations to get there or were they asking for more than
8 that?

9 CHAIRMAN PALLADINO: Or the assumptions.

10 MR. ROSENTHAL: Well, it obviously varies from
11 interrogatory to interrogatory and they have covered a lot
12 of territory. But many of the interrogatories that I have
13 seen have really said, all right, staff, you start at square
14 one and we want to know how you approached this problem and
15 what your philosophical, if I may use that term as applied
16 to scientific questions, what your philosophical approach
17 was and what your entire methodology was right down to the
18 very end.

19 In other words, they wanted in effect the member
20 of the staff who had been assigned to this project from the
21 beginning. He said, okay, analyze it beginning to end and
22 come out with the conclusions. He wanted that individual to
23 start with his first step one when he first got the
24 assignment and addressed it and follow it through every step
25 to the ultimate conclusion which the individual, if he did a

1 full job on it, it might be a full book. There are books
2 written on the analytic process that leads one to a
3 particular conclusion.

4 CHAIRMAN PALLADINO: When in your thinking did you
5 decide that this assumption was improper and then you
6 modified it.

7 MR. ROSENTHAL: They would trace right down the
8 line. You know, I have to agree with Len that in a perfect
9 world you should have all of the facts on the table. So I
10 think if the Commission is sensitive to the matter of staff
11 resources at all that this is something that hits us, too,
12 because a number of the cases that we are trying to push
13 through and have tried to push through over recent years
14 there have been all kinds of delays in getting hard staff
15 evidence and revelations of thought processes because the
16 staff doesn't have the resources to address it.

17 Now, I think something has to give and I think
18 this is it.

19 COMMISSIONER AHEARNE: I am uneasy because I would
20 expect if you ended up doing a technical calculation you
21 have your work sheets or whatever assisting you to do your
22 work and that ought to be producible. If it isn't, that
23 would be of some concern if you had reached a significant
24 conclusion without being able to do that. But if you have
25 done that, that should not be that much difficulty.

1 MR. CUNNINGHAM: Well, I would think that would be
2 reachable as a document.

3 MR. ROSENTHAL: But the next question though is
4 why didn't you do something else in the thought processes.
5 Once you begin producing sheets, then they say, well, now,
6 did you consider this other approach and, if not, why not.

7 CHAIRMAN PALLADINO: If you think you are going to
8 get a lot out of the calculation book, I think you are being
9 a little misled. There are times when you have the
10 calculations very nicely worked out and there are times when
11 you said, oh, well, no, wait a minute, we have got different
12 assumptions. You go back and you say, oh, now they have
13 changed the dimensions from 52 inches to 63, so you cross
14 that out and you go down here and you have iterations on
15 these. While you do try to keep a logical calculation book,
16 not everything is as straightforward because you might have
17 a date up here, 12/25/81 and then you may have to come back
18 in '82 and make a revision on that calculation.

19 I am just saying it is not as definitive as you
20 want and it is not always clear, although I try to do it,
21 what the assumptions are and that is very important. So you
22 might end up with a whole stack of stuff that someone would
23 have to take quite a bit of time to go out and develop a
24 chronology. Now if you could satisfy their question by
25 giving them a Xerox, that would be one thing, but I don't

1 know that you could do that.

2 COMMISSIONER AHEARNE: On this one I guess I have
3 more misgivings.

4 CHAIRMAN PALLADINO: I don't know where to go on
5 this one either. I wasn't trying to take exception as to
6 where we ought to go.

7 MR. COTTER: The difficulty that is really I think
8 underlying this question is that as a rule intervenors do
9 not have the funds to take depositions which is the normal
10 discovery process. You would hit round one with some
11 interrogatories to set up some premises and then you would
12 take the person's deposition. That is a much more efficient
13 and expeditious way of doing things than trying to write out
14 a question that a lawyer can't duck. I think that is where
15 this problem comes up.

16 COMMISSIONER AHEARNE: As far as staff resources,
17 is that obvious? Just as an aside, if you were concerned
18 about staff resources isn't it obvious that having the staff
19 deposed is less of a burden on the staff resources?

20 MR. CUNNINGHAM: I don't think it is obvious. My
21 guess would be it probably is more efficient. The time
22 spent in answering some of these interrogatories and having
23 them reviewed up a management chain and re-reviewed ---

24 COMMISSIONER AHEARNE: All I remember is a small
25 experience in the Defense Department in having to go through

1 two large cases, one in which I was deposed several times
2 and one in which I just had to write out the answers. Both
3 were burdensome, but I thought the deposition ended up
4 requiring even greater work.

5 CHAIRMAN PALLADINO: We are past our allotted
6 closing time. I wonder if we might try to focus on these
7 two points.

8 One, flesh out a little bit the approach where you
9 place more responsibility on the Board to flesh the
10 questions out.

11 COMMISSIONER AHEARNE: You mean Cotter's approach?

12 CHAIRMAN PALLADINO: Yes, Cotter's approach.

13 And maybe a little more thought on some of the
14 criteria one might use to accompany that.

15 Then the other part that I was hoping that we
16 might focus on was that I wasn't quite clear why a pilot
17 test was no good ---

18 (Laughter.)

19 CHAIRMAN PALLADINO: Why all of the sudden a pilot
20 test was a feasible thing for questions.

21 (Laughter.)

22 MR. BICKWIT: I wasn't clear on that either.

23 CHAIRMAN PALLADINO: I was wondering whether you,
24 working with Tony, might pull together something that we
25 might consider in terms of put the responsibility on the

1 Board, and perhaps Alan contributing anything he wants on
2 the excessive criteria might go along with that, and then
3 prepare that for another meeting which I don't think we have
4 yet scheduled but we will schedule in the agenda session.

5 In the next meeting I would also like to address
6 why it is felt that the pilot test here would be feasible.

7 COMMISSIONER BRADFORD: Is it too early to ask
8 whether there has been any significant change in the impact
9 on the staff as a result of its policy of objecting to
10 interrogatories? I don't mean for this meeting but maybe if
11 you could go back and at least ask around a little and let
12 us know.

13 MR. CUNNINGHAM: We will do some checking. I
14 don't know the answer to that.

15 COMMISSIONER AHEARNE: I guess a larger part of
16 that is has there been any significant modification of the
17 impact on the staff resources as a result of the
18 Commission's policy directive?

19 COMMISSIONER BRADFORD: That is right, although it
20 will be easier for the staff to I think look at it in terms
21 of the objections it has raised and how they have been ruled
22 on and whether the interrogatories have been narrowed or
23 eliminated.

24 CHAIRMAN PALLADINO: Unless there is something
25

1 urgent to come up now, I would suggest that we stand
2 adjourned.

3 (Whereupon, at 12:25 p.m., the meeting adjourned.)

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NUCLEAR REGULATORY COMMISSION

This is to certify that the attached proceedings before the
COMMISSION MEETING

in the matter of: PUBLIC MEETING - DISCUSSION AND POSSIBLE VOTE ON REVISED
LICENSING PROCEDURES PROPOSED RULE CHANGE TO PART 2

Date of Proceeding: October 1, 1981

Docket Number: _____

Place of Proceeding: Washington, D. C.

were held as herein appears, and that this is the original transcript
thereof for the file of the Commission.

Mary C. Simons

Official Reporter (Typed)

Mary C Simons

Official Reporter (Signature)