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NUCLEAR REGULATORY COMMISSION

ORIGINAL

COMMISSION MEETING

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In the Matter of: PUBLIC MEETING
ORAL PRESENTATIONS ON CRBR

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1 UNITED STATES OF AMERICA
2 NUCLEAR REGULATORY COMMISSION

3 ORAL PRESENTATIONS ON CRBR

4
5 PUBLIC MEETING

6 Nuclear Regulatory Commission
7 Room 1130
8 1717 H Street, N.W.
9 Washington, D. C.

10 Wednesday, December 16, 1981

11 The Commission met, pursuant to notice, at 10:35
12 a.m..

13 BEFORE:

14 NUZIO PALLADINO, Chairman
15 PETER BRADFORD, Commissioner
16 VICTOR GILINSKY, Commissioner
17 JOHN AHEARNE, Commissioner
18 THOMAS ROBERTS, Commissioner

19 ALSO PRESENT:

20 Messrs. Chilk, Bickwit, Remick, Treby,
21 Silverstrom, Thomas, Wallace, Greenberg, Sherr, Von Cannon,
22 and Ms. Breckenridge, and Ms. Finamore.
23
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P R O C E E D I N G S

(10:35 a.m.)

CHAIRMAN PALLADINO: The meeting will please come to order.

This morning the Commission will hear from interested parties on the procedures for handling the Department of Energy's exemption request for the proposed Clinch River breeder reactor. In particular, the Commission is interested in receiving the parties' views on what NRC body should make the decision on the request; that is, the NRC Staff, an adjudicatory board after a trial-type hearing, or the Commission itself.

Before hearing from the parties, let me briefly sketch the background of the matter. On November 30, 1981, the Department of Energy for itself and on behalf of its co-applicants, Project Management Corporation and the Tennessee Valley Authority, requested NRC authorization under 10 CFR 50.12 of the Commission's rules to conduct site preparation activities. The proposed activities would include site clearing, grading, excavation, and construction of temporary support and certain service facilities.

DOE requested authorization to begin these activities in March of 1982. On December 9, 1981, the Commission met to discuss the procedures for handling the DOE request for an exemption. At that meeting the

1 Commission reaffirmed its desire to give the parties to the
2 CRBR licensing proceeding an opportunity to give their views
3 on the procedure for handling the DOE request.

4 A meeting to receive those views had been
5 scheduled for December 11, 1981. However, at the request of
6 the Natural Resources Defense Council the meeting was
7 postponed until today, December 16.

8 As I said, the purpose of the meeting is to hear
9 views on the procedures for handling the CRBR exemption
10 request. The parties should not address the question of
11 whether the DOE request should be granted or denied. The
12 parties will be afforded the opportunity to address that
13 question at a later date.

14 With this background, I would like to ask my
15 fellow Commissioners whether they have any other statements
16 to present at this time?

17 (No response.)

18 CHAIRMAN PALLADINO: Seeing none, let me turn now
19 to the oral presentations. We will hear first from the
20 Applicants, DOE, Project Management, and TVA. They will
21 have 20 minutes to present their views, not counting
22 questions we might ask. Thereafter, NRDC, on behalf of
23 itself and the Sierra Club, will have 20 minutes for their
24 presentations.

25 Finally, I understand that the State of Tennessee

1 would like to make a statement, and we will follow that then
2 with a statement from the State of Tennessee. And we can
3 allow up to 20 minutes there also.

4 So with that, let me turn the meeting over to Mr.
5 Edgar and Mr. Silverstrom, who will make the presentations
6 on behalf of the Applicants.

7 MR. EDGAR: My name is George Edgar. I am a
8 partner in the Washington law firm of Morgan, Lewis, and
9 Bachius. I represent one of the three co-Applicants,
10 Project Management Corporation. With me here today are
11 representatives from the Department of Energy and TVA, and
12 perhaps they could introduce themselves.

13 MR. WALLACE: I am Louis Wallace, Deputy General
14 Counsel of the Tennessee Valley Authority. And we appear
15 here in support of the requested authorization. Mr. Edgar
16 will handle the presentation for us.

17 MR. SILVERSTROM: I am Leon Silverstrom, Assistant
18 General Counsel for the Department of Energy.

19 MR. EDGAR: I have two preliminary matters. The
20 first is that Representative Bouquard's office has given me
21 this morning a copy of a letter to the Chairman of the
22 Commission concerning the request. I would like to
23 distribute that to the Commission on their behalf, and we
24 will assure that copies are made available in the public
25 document room.

1 CHAIRMAN PALLADINO: Do you see any problem with
2 that?

3 COMMISSIONER BRADFORD: That may not be
4 necessary. Have we seen the letter?

5 COMMISSIONER AHEARNE: Expedited mail service.

6 (Laughter.)

7 (Document distributed to parties.)

8 MR. EDGAR: The second item, preliminarily, is
9 that yesterday we filed with the Commission a one-page
10 Applicant's proposed schedule for review of 50.12 request.
11 I assume the Commissioners have that. If not, I have
12 brought extra copies with me. We have also served the NRDC
13 and others by hand.

14 CHAIRMAN PALLADINO: I believe we all have
15 copies.

16 MR. EDGAR: Mr. Chairman, we will make our
17 presentation brief. The Section 50.12 request was
18 accompanied by a legal memorandum filed on behalf of the
19 Applicants. Section 4 of that legal memorandum expresses
20 our view that the Commission should decide the request.

21 In our view, only the Commission has the authority
22 to grant relief under Section 50.12. The request involves
23 important matters of policy. The circumstances are truly
24 exceptional. And we think the Commission is best equipped
25 to decide this matter. We see no value in referral to a

1 licensing board. We think that the Commission is the
2 decisionmaker of last resort and that the issues are
3 appropriate for the Commission to decide.

4 Additionally and, we think, the more significant
5 factor here, having established who should decide the point,
6 the real question is what the procedure is that should be
7 employed. And our one-page handout addresses that point.
8 Let me try to summarize it with reference to five basic
9 elements of this proposed schedule.

10 The first element is that we believe that there
11 should be a period for public comment. We have assigned
12 four weeks for that period. We think it is important,
13 particularly in view of the national character of the
14 project, that broad public comment should be obtained.

15 The second element of the proposal is that there
16 should be an opportunity for response. We think in the
17 interest of completeness of the record, we think also in the
18 interest of having the issues narrowed for the Commission's
19 decision, that a response would be appropriate and useful.

20 The third element that we have provided is a
21 procedure for having questions from the Commission to
22 whomever may be in possession of information which is of
23 value to the Commission. We have established a period of
24 four weeks in which the Commission would pose questions in
25 writing to any party. Those are the noted milestones 3 and

1 5 on the schedule. We think it is important to emphasize
2 here that having a procedure for written questions has the
3 following advantages:

4 One, it is fair. It gives everyone notice of the
5 Commission's questions.

6 Secondly, we think it is a matter of good business
7 practice. It provides a permanent record. It provides a
8 clear record.

9 Thirdly, we think it puts the right emphasis on
10 substance. It satisfies the Commission's need for
11 information of a substantive nature.

12 Lastly, without getting into the rather complex
13 question of ex parte contacts, we think that this approach
14 will avoid whatever risks of a legal nature that would
15 reside in the ex parte issue.

16 COMMISSIONER AHEARNE: What ex parte situation do
17 you perceive existing now?

18 MR. EDGAR: I do not perceive one existing. We
19 think it could be avoided altogether by establishing a
20 regular procedure for written questions and answers.

21 COMMISSIONER AHEARNE: But you do not see one
22 existing?

23 MR. EDGAR: Not at this point in time; I know of
24 none.

25 COMMISSIONER AHEARNE: So there really would not

1 need to be, as far as you can see legally, any reason to
2 avoid something which does not exist?

3 MR. EDGAR: No. I cannot disagree with your
4 statement. But under the facts here, I would have to
5 disagree. Our concern is this: that (a) we think the
6 Commission needs a vehicle for asking questions and getting
7 information from those people that have relevant
8 information. We think there ought to be a regular or
9 disciplined system for doing that.

10 Written questions assures that the record is
11 permanent and, more significantly, that everyone who may
12 have an interest is aware of that communication. Thus,
13 there cannot be an ex parte problem under a regime for
14 written questions and answers. I am anticipating the
15 problem, if you will.

16 The fourth feature of our proposal is that the NRC
17 Staff would prepare an evaluation report in week 10, which
18 would address the 50.12 request, the comments, any responses
19 thereto, and, of course, any Commission questions and
20 responsive answers.

21 The idea here would be to provide a mechanism for
22 harnessing the Staff's expertise and apply that in a
23 disciplined way. We think that that mechanism would provide
24 a means of narrowing the record, of defining the issues for
25 the Commission, and for an evaluation on a preliminary basis

1 of the relevant factors.

2 The last feature of our proposal involves that of
3 oral presentation. That is item 9 on the agenda. The oral
4 presentation would serve three functions.

5 First, it would again, having narrowed the issues
6 through the Staff evaluation report, provide a means for the
7 Commission to ask pointed questions and to resolve those
8 issues which are critical to its decision.

9 Secondly, it would provide a means for the
10 Commission to reap the benefit of the Staff report and for
11 the parties to provide their final input to the Commission.

12 The final consideration would be that it provides
13 an important public appearance that the Commission is indeed
14 seeking broad participation.

15 (At 10:45 a.m. Commissioner Gilinsky arrives at
16 meeting.)

17 MR. EDGAR: I might note in this regard that the
18 schedule contains two milestones which lead to the oral
19 presentation. The first is 6 and the second is number 8.
20 Under these milestones the Commission would ask for notice
21 or provide notice of the opportunity for oral
22 presentations.

23 It would provide that notice to those who submit
24 comments and, in turn, give those people an opportunity to
25 respond and request the opportunity to make an oral

1 presentation. This would enable the Commission to manage
2 the presentations such that it was consistent with an
3 efficient procedure.

4 In summary, we believe that the procedures that we
5 have established and proposed here will provide for
6 meaningful public participation, it will satisfy the
7 Commission's need for substantive information, and it will
8 provide an efficient and meaningful means of resolving the
9 Section 50.12 request.

10 With that, Mr. Silverstrom has a brief remark.

11 CHAIRMAN PALLADINO: May I ask you a question on
12 step number 8. You say due date for response to notice by
13 any person desiring opportunity for oral presentation.
14 Would this be any person who has previously made comment, or
15 do you mean any person?

16 MR. EDGAR: Yes, sir. If you look at number 6,
17 the Commission would provide notice of opportunity for the
18 presentation by persons submitting the comments. Then those
19 individuals responding could be grouped into categories of
20 proponents, opponents, and others.

21 CHAIRMAN PALLADINO: But you do imply that the
22 person who is referred to under 8 would have been a
23 commentor.

24 MR. EDGAR: Yes, that is correct.

25 CHAIRMAN PALLADINO: Okay.

1 MR. SILVERSTROM: With the Commission's
2 permission, I would simply like to take a moment to
3 emphasize what we consider to be the eminent common sense of
4 the procedure that we proposed. What we think we have is an
5 R&D project deemed extremely important by the Department,
6 repeatedly endorsed by the administration in the face of
7 pressing budget problems, endorsed by the President of the
8 United States, continuously funded and supported in the
9 Congress.

10 On top of the congressional funding and support,
11 we have strong legislative history emphasizing the need to
12 proceed promptly with as little delay as discretion will
13 allow, so as to minimize the effect of the unrecoverable
14 delays of the past.

15 There is no question that unless the Commission
16 approves the site preparation activities by March, the
17 project is going to be sitting dead in the water, unable to
18 proceed for an extended period of time, at tremendous cost
19 to the taxpayers.

20 This is, to us it appears, the clearest possible
21 example of a situation where Commission action is the pacing
22 item for a project. So we came to you and filed with you a
23 request for action under an existing longstanding regulation
24 which, by its terms, applies precisely to such a situation.
25 We are not asking for anything new or unprecedented.

1 We think it is important to emphasize that under
2 these procedures we are describing, no issues will be
3 avoided in the underlying licensing proceeding when they
4 resume. There still will be hearings. The parties will
5 have an opportunity to have all the trappings of
6 adjudicatory proceedings on the project. No alternatives
7 are going to be foreclosed.

8 With respect to these particular procedures which
9 Mr. Edgar just summarized, we think it gives everybody an
10 opportunity to make a case, respond to the other parties'
11 presentations, and make oral presentations to the
12 Commission. It gives the Staff a defined role. It gives
13 the opportunity for the Commission to ask questions of all
14 the parties. It avoids legal problems that could be
15 suggested with such things as ex parte questions.

16 We are going to move as expeditiously as you
17 permit us, and we hope the procedure sounds right to you.
18 That is about it.

19 COMMISSIONER BRADFORD: Why had you not filed for
20 a 50.12 exemption back in 1976?

21 MR. SILVERSTROM: At the time, of course, it was
22 not necessary. That is the simplest answer. What makes it
23 necessary now is the scheduling situation. Because of the
24 delay, as I said, you clearly have a situation now that
25 barring Commission action this thing is going to sitting

1 dead in the water. You would not have had that situation in
2 '77 when you had the suspension, because everything was
3 right on track.

4 You could have had the hearing, and it was
5 anticipated that right after the hearing there would have
6 been a Commission decision that would have followed right
7 along with the project schedule. The interim period has
8 resulted in a situation that now everything stops if we do
9 not go this track. It is a clear difference.

10 CHAIRMAN PALLADINO: Any other questions?

11 COMMISSIONER AHEARNE: I had just two, just to
12 sort help me understand as we try to address which procedure
13 to follow, which basically your schedule looks pretty good.
14 I would like to see how this fits into it.

15 I guess just a preliminary question is who is
16 speaking for the Applicants, or should I --

17 MR. EDGAR: I am speaking for the Applicants.

18 COMMISSIONER AHEARNE: Do you intend to ask the
19 licensing board to be started up?

20 MR. EDGAR: Yes.

21 COMMISSIONER AHEARNE: Is that request --

22 MR. EDGAR: It is unrelated to that. The two are
23 unrelated.

24 COMMISSIONER AHEARNE: Do you expect it to come,
25 though, during this period of time?

1 MR. EDGAR: Yes.

2 COMMISSIONER AHEARNE: I guess I will reserve the
3 second question.

4 COMMISSIONER GILINSKY: I wonder if you want to
5 say a word about how you reckon the costs, or is that
6 something you want to leave for future presentations?

7 MR. EDGAR: We would prefer to leave it for the
8 future. We will be prepared to provide that information in
9 some detail. I am not, quite frankly, Commissioner
10 Gilinsky, prepared to discuss that with you in any detail.
11 All I can tell you right now is that it is not a simple
12 escalation. In other words, taking total costs or sunk
13 costs and applying 8 percent, it is not that. It is a
14 detailed rack-up of two separate time-phase schedules, and
15 from that extracting the difference and then the monthly
16 cost of delay.

17 But having said that, you have just scraped the
18 bottom of my barrel of knowledge, and if you ask me one
19 question, you will get an "I don't know."

20 (Laughter.)

21 COMMISSIONER BRADFORD: Well, now, let's see,
22 though.

23 (Laughter.)

24 COMMISSIONER BRADFORD: We have a motion pending
25 before us that states a cost figure.

1 CHAIRMAN PALLADINO: Say that again?

2 COMMISSIONER BRADFORD: We have a motion pending
3 before us that ascribes the cost of the delay, and it is a
4 precise figure. Is there no one at the table who knows how
5 it was arrived at?

6 COMMISSIONER AHEARNE: That is not the issue that
7 they were asked to come here today on. We specifically
8 asked--

9 COMMISSIONER BRADFORD: John, they signed a letter
10 to us that contains a figure. I am just asking if anybody
11 can defend it.

12 MR. EDGAR: I can explain, and I have explained
13 the fundamental assumptions within that calculation. I
14 assumed that Commissioner Gilinsky wanted to go into
15 detail. I am not prepared to do that. I can tell you the
16 basic assumptions and the methods employed in the
17 calculations, but I cannot go, for example, into each line
18 item of the two cost estimates and explain each item. We
19 will be prepared to do that, but I am not prepared to do it
20 today.

21 MR. SILVERSTROM: Just to clarify, if I understood
22 the thrust of your question, Commissioner, we will be doing
23 that in this exemption proceeding. That is, we just thought
24 that was part of the merits of this exemption request rather
25 than how should the Commission go about considering those

1 merits. But it will be part of this exemption request that
2 we would propose to give you all the details you need.

3 COMMISSIONER AHEARNE: Peter, the reason I raise
4 the objection is that I think that is a critical question,
5 and I expect to hold them to their answers on that issue as
6 a very important issue. But I would want it to be raised to
7 people who are prepared to defend that number in detail.

8 COMMISSIONER GILINSKY: I must say my reaction to
9 the schedule is that it is a fairly generous one or extended
10 one. I am a little surprised that you have proposed a
11 schedule of this length.

12 MR. EDGAR: Well, we put a great deal of thought
13 into that. It is strange, for example, of the industry to
14 be accused of being not ambitious enough about schedules.
15 We think, however, that if you examine these intervals, that
16 these are reasonable intervals and that it will be difficult
17 to compress them much more than that.

18 Let me give you several examples of this line of
19 thought. The first is, between milestones 1 and 2 you have
20 four weeks for comment. That could be compressed. But I
21 really think, given the size of the request package and
22 people's need to review it and provide meaningful comment, a
23 month is not unreasonable there. It could be compressed,
24 but I doubt substantially.

25 In terms of response, that is intervals 3 and 5,

1 we think two weeks is about the best that one could do. I
2 could do that in a week, but we would have people up all
3 night, too. The important thing is to make sure those
4 responses are accurate and beneficial.

5 The next thing that we have said is four weeks for
6 a Staff evaluation. That would be milestones basically
7 between milestones 4 and 7. Once the responses are in, then
8 the Staff would have a period of one month to do the
9 evaluation.

10 In the meantime, you should note that straddling
11 that are possibly Commission questions. I would guess that
12 there would be written questions. So that the Staff in
13 effect is running its evaluation in parallel with the input
14 from the Commission questions and answers. So four weeks
15 seems about right there.

16 The only luxury item in the schedule, in our
17 judgment, is between milestone 7 and 10, which is the time
18 period between the Staff evaluation and the final decision.
19 But we have added in there the oral presentation, and again
20 it is difficult to compress that much more. That is the
21 rationale, and that is how we arrived at the schedule.

22 COMMISSIONER GILINSKY: Thank you.

23 CHAIRMAN PALLADINO: Any other questions?

24 COMMISSIONER BRADFORD: Yes. Let's see. As I run
25 through this I do not, for example, see much opportunity for

1 cross examination or serious inquiry by the parties into the
2 positions put forward by each other. Am I right about
3 that?

4 MR. EDGAR: We did not provide a period for cross
5 examination.

6 MR. SILVERSTROM: There is, of course, the
7 opportunity for the parties to respond to each other's
8 presentations.

9 COMMISSIONER BRADFORD: But for example on
10 questions like the cost figures -- well, let us see. What
11 kind of probing do you contemplate other than whatever
12 questions that happen to occur to the Commission?

13 MR. EDGAR: Well, we would have a comment period.
14 We would have the Commission with responses. We would have
15 a Staff evaluation. I would think all of those --

16 COMMISSIONER BRADFORD: The comment period is not
17 going to do very much, because that starts at week zero and
18 is based on, if I understand it correctly, nothing more than
19 materials already in hand.

20 MR. EDGAR: Yes. And I would assume someone could
21 review those materials, comment meaningfully, and point out
22 what they might believe to be deficiencies.

23 COMMISSIONER BRADFORD: But they would not even
24 have the cost methodology available to them.

25 MR. EDGAR: It is stated in the site preparation

1 activities report.

2 COMMISSIONER BRADFORD: But beyond that?

3 MR. EDGAR: The backup papers, for example? They
4 are not available, but they could be made available. I
5 would anticipate that that question is going to come up from
6 either the Commissioners or the Staff, so the information
7 will be there. That is one of the reasons we suggested the
8 written questions and written answers approach, so that that
9 would be a matter of record and that the interested persons
10 would have access to it.

11 CHAIRMAN PALLADINO: Might I ask the General
12 Counsel, could we not in any order that we issue ask for
13 more detailed information on the cost?

14 MR. BICKWIT: That is right. I think you could.
15 I am wondering whether the backup materials that you have
16 talked about could be provided, say, within a week?

17 MR. EDGAR: I will check that. I am just not in a
18 position to know that right now, but we will certainly get
19 back and talk about when we can get it in.

20 COMMISSIONER AHEARNE: But in any event, we could
21 certainly make that part of the order.

22 CHAIRMAN PALLADINO: Yes.

23 COMMISSIONER AHEARNE: Which would at least have
24 then that information available for comment on the
25 responses.

1 Any other questions?

2 (No response.)

3 CHAIRMAN PALLADINO: Thank you, gentlemen.

4 MR. GREENBERG: Thank you.

5 CHAIRMAN PALLADINO: And we will now ask the
6 representative from NRDC and the Sierra Club to join us at
7 the table.

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1 CHAIRMAN PALLADINO: Mr. Greenberg, I gather you
2 are going to make the presentation, and will you introduce
3 your colleagues, please?

4 MR. GREENBERG: Yes, I will, Mr. Chairman.

5 I am Eldon Greenberg with the law firm of Tuttle
6 and Taylor. I am here today representing the Intervenor,
7 Natural Resources Defense Council, and the Sierra Club. To
8 my right are Ms. Barbara Finamore and Mr. Jacob Sherr of the
9 Natural Resources Defense Council.

10 We appreciate and welcome the opportunity today to
11 submit our views with respect to the procedures to be
12 followed in handling Applicant's request for a 50.12
13 exemption.

14 We filed yesterday an extensive brief on this
15 issue. That brief elaborates at some length on the merits
16 as we see them relating to the procedural questions before
17 the Commission, but I will try to avoid, in accordance with
18 your directive, any discussion of the merits this morning
19 except to touch on the kind of issues we think are
20 important, and focus rather on the procedures which we think
21 are most appropriate for the Commission to follow in dealing
22 with this request.

23 We have three basic points, and I might as a
24 preface to those points say that what we have tried to do in
25 elaborating our views on procedures is to distinguish what I

1 would consider to be factual questions of the sort which
2 require testing in an adjudicatory context from questions
3 which are of a legal and policy nature and could be dealt
4 with on a threshold basis by the Commission itself.

5 It is our view that there are matters of law and
6 policy presented by the application which are appropriate
7 for a threshold decision by the Commission. It is also our
8 view that a decision on those issues will conclusively
9 result in the denial of the application.

10 If, nonetheless, after review of those threshold
11 issues the Commission deems that further consideration is
12 warranted, then it is our judgment that an adjudicatory
13 hearing is required to resolve contested factual issues.

14 I must emphasize that it is a licensing, and
15 normally in licensing the burden is on the applicant to
16 demonstrate that its project complies with the rules and
17 regulations of the Commission.

18 COMMISSIONER GILINSKY: When you say require, do
19 you mean required by law?

20 MR. GREENBERG: I think there is a strong
21 argument, Commissioner Gilinsky, that an adjudicatory
22 hearing under Commission precedent is required by law when
23 there are contested issues of fact, yes, and we cite cases
24 in our brief to that effect.

25 Beyond that, I would like to pick up for a second

1 on Commissioner Bradford's point. What is significant to me
2 about the schedule proposed by the Applicants is that there
3 is no initial presentation of the Applicant's case. The
4 comments which are asked for are made in a vacuum without
5 the detailed backup material, without the presentation, and
6 indeed with only relatively sketchy argument. I don't know
7 how sufficient comments could be made under such a procedure.

8 Furthermore, there is no provision in the
9 schedule, as Mr. Edgar candidly admitted, for any
10 cross-examination of the assertions made by Applicant.
11 Finally, it is our judgment that a licensing board, if we
12 get to the stage of having an adjudicatory hearing, is best
13 suited to hold that hearing and make an initial decision.

14 Now, with respect to the law and policy issues
15 made by the application, the Commission is well aware that
16 Section 50.12 is a very narrow exemption. There is very
17 little precedent for its application, and Commission policy
18 makes it quite clear that it is only to be used in emergency
19 and exigent situations, in essence the procedure that can be
20 invoked in some circumstances to avoid and LWA-1 hearing.
21 However, it is our judgment, looking at the precedents, that
22 after the LWA procedure was adopted in 1974, there has
23 really been no contested proceeding in which a 50.12
24 exemption has been granted.

25 The fact of the matter is if construction work is

1 to proceed in advance of a construction permit, the
2 ordinary procedure has been to obtain a limited work
3 authorization.

4 COMMISSIONER AHEARNE: Mr. Greenberg, are you
5 getting to the merits of --

6 MR. GREENBERG: No, this is by way of background.
7 But I do think it is important to set the context, Mr.
8 Ahearne, of this request. This request is unprecedented in
9 terms of the dollars involved and in terms of the nature of
10 the reactor at issue, the Clinch River Breeder Reactor.
11 Ordinarily we might see such a request as properly being
12 taken up by the Licensing Board in the first instance in the
13 context of a reactivated licensing. We do believe that the
14 Commission has the power to decide major legal and policy
15 issues raised by the request, and we believe it should do
16 so.

17 In our judgment it makes no sense to go through a
18 hearing process before a Licensing Board if ultimately the
19 decisions on those factual issues that the Board considers
20 will essentially be irrelevant to the outcome of the case.
21 In essence what I would analogize our position to be is that
22 we can deal with the application in the first instance as if
23 on a motion to dismiss in a federal court proceeding. The
24 Commission can decide as a matter of law and policy that
25 there is simply no basis for granting the exemption

1 accepting all of the facts which the Applicants assert to be
2 true as true.

3 I won't go into detail in terms of outlining what
4 we believe to be these determinative policy and legal
5 questions. We have doubts with respect to the applicability
6 of Section 50.12. We don't believe there is any
7 congressional mandate to expedite licensing. We believe
8 that issuance of the exemption would undercut the purpose of
9 the very proceeding itself, that is, to demonstrate the
10 licensability of the Clinch River Breeder Reactor.

11 We believe that granting an exemption would
12 foreclose important environmental contentions which we make
13 in the proceeding, and we believe the environmental record
14 which the Commission has before it, the record compiled of
15 1975, '76 and '77, is incomplete and provides an
16 insufficient basis for a decision.

17 Now obviously, in suggesting that the Commission
18 decide these threshold issues we believe there should be
19 some clear groundrules for participation of the parties.
20 While we do not see an adjudicatory hearing necessary to
21 resolve these threshold questions, we certainly believe that
22 there should be an opportunity for all parties to present
23 their views to the Commission.

24 We have no objection to this kind of time frame
25 suggested by the Applicants for parties to the proceeding to

1 submit their views and legal arguments with respect to the
2 appropriateness of their request. We also have no objection
3 to non-parties being involved in this proceeding. Indeed,
4 Section 2.715 of the Commission's regulations allows
5 non-parties to participate.

6 Now, if we move to an adjudicatory proceeding we
7 think the only sensible way to proceed is to limit that
8 proceeding to the parties.

9 COMMISSIONER AHEARNE: But you say you don't see
10 the adjudicatory process as necessary?

11 MR. GREENBERG: To resolve the threshold issues of
12 law and policy without reviewing the underlying contentions
13 of the Applicants. Now, if the Commission believes there
14 are no threshold bars to the consideration or the further
15 consideration of the request, then we believe a more complex
16 set of procedures is required. We are left with factual
17 issues: How great is the cost; how great is the delay, is
18 anything more than inflation involved?

19 COMMISSIONER GILINSKY: Is there a notion that
20 that phase would follow the one outlined in the submission?

21 MR. GREENBERG: Yes, Mr. Commissioner. How great
22 is the delay? How complete is the design? Are there
23 alternate productive uses of the funds in the DOE budget for
24 this reactor project, and so forth?

25 COMMISSIONER GILINSKY: Do you feel that these are

1 so complicated or involve so many facts that the Commission
2 couldn't handle them in the process outlined there?

3 MR. GREENBERG: Commissioner Gilinsky, the
4 Commission certainly has the power to conduct adjudicatory
5 hearings. It has rarely done so.

6 COMMISSIONER GILINSKY: Suppose without
7 adjudicatory hearings? I don't recall us ever having
8 conducted a full-blown --

9 MR. GREENBERG: I am not aware of any.

10 COMMISSIONER GILINSKY: -- adjudicatory hearings,
11 but we have on occasions spent a day on a hearing and gotten
12 into a fair bit of detail. Do you feel that this case
13 involves more than we could cope with on that basis?

14 (Laughter.)

15 MR. GREENBERG: I don't want to make any judgments
16 about the ability of the Commission to cope or not to cope.
17 In the ordinary course, Commissioner Gilinsky, an Atomic
18 Safety and Licensing Board would deal with these kinds of
19 factual issues. The Board has experience in dealing with
20 those factual issues, and in every contested case in the
21 past in which an exemption has been proposed, there has been
22 an adjudicatory hearing before the Board in the first
23 instance.

24 COMMISSIONER AHEARNE: Could you answer Mr.
25 Gilinsky's question, though? Do you feel the Commission

1 could not address those issues in a non-adjudicatory way?

2 MR. GREENBERG: I feel it could not address them
3 in a non-adjudicatory way; yes.

4 COMMISSIONER BRADFORD: So you feel it is a matter
5 of law?

6 MR. GREENBERG: I think there is a very strong
7 argument under Commission precedent that a hearing is
8 required. In fact, I think Commission precedent is split on
9 this issue. If one looks at the Shear and Harris case, a
10 case heavily relied upon by the Applicants, there is an
11 indication by both the Commission decision and the Appeal
12 Board decision that an adjudicatory hearing is not required
13 under Section 50.12.

14 Nonetheless, it is interesting to note in the
15 Shear and Harris case that an adjudicatory hearing was
16 ordered, nonetheless. The Commission said it is not
17 required but we think as a matter of policy it is
18 appropriate.

19 In other cases such as the Waterford case, an
20 earlier case decided in 1973, the Commission seemed to
21 indicate that the law did require the holding of an
22 adjudicatory hearing when there are contested issues of
23 fact.

24 As you know, Commission precedent often involves
25 mixed questions of law and policy. Sometimes it is hard to

1 determine whether they were talking as a matter of law or a
2 matter of policy.

3 COMMISSIONER AHEARNE: So when you say you don't
4 think the Commission could handle this in a non-adjudicatory
5 manner, you just finished pointing out that the legal
6 question is not absolute. So are you saying that you do not
7 believe we could get at the true facts?

8 MR. GREENBERG: I am saying that an adjudicatory
9 hearing is the only way to effectively get at the true facts
10 of the case, yes, Commissioner Ahearne. I think there is
11 strong Commission precedent to that effect. Indeed, I think
12 it is a fair argument that as a matter of law, and I am
13 prepared to argue as a matter of law that a hearing is
14 required.

15 CHAIRMAN PALLADINO: When you say the adjudicatory
16 way is the only way to get at the facts, is this because of
17 the cross-examination principle or what?

18 MR. GREENBERG: Essentially because of the rules
19 of procedure that are applied in an adjudicatory context
20 where a party puts on his case, and the other parties have
21 an opportunity to cross-examination, to test those factual
22 assertions, to sift out mere contentions from contentions
23 that have a real factual basis. I don't think there is any
24 way other than in an adjudicatory context to get to all the
25 facts.

1 CHAIRMAN PALLADINO: That's interesting. Not
2 having been a lawyer, I haven't gone through it, but I have
3 spent many a years getting to facts in other ways.

4 (Laughter.)

5 CHAIRMAN PALLADINO: I just find it surprising
6 that you say that is the only way of doing it. You may
7 claim it is the best way, but --

8 MR. GREENBERG: I may reflect my lawyer's bias,
9 Mr. Chairman.

10 CHAIRMAN PALLADINO: Thank you.

11 MR. GREENBERG: And I am willing to admit that.
12 Although I must say I have been involved in proceedings
13 before the Commission in which adjudicatory hearings were
14 not held. I was involved in the Tarpoor licensing hearing
15 in 1976 and 1977, and I will say for my own part that I was
16 frustrated in that proceeding by an inability to be able to
17 cross-examine the applicant and the Government and elucidate
18 in a manner that I thought was satisfactory all the facts
19 with respect to the application.

20 I should emphasize, moreover, that in this
21 proceeding we are not just talking about facts with respect
22 to costs and delay. Under Section 50.12 there are four
23 specific criteria which have to be met. The Commission has
24 to determine whether there are significant adverse
25 environmental impacts. That means examining the on-ground

1 activities, determining what the effects on the water table
2 are and determining what the effects on the hardwood are, a
3 wide range of environmental questions.

4 This application involves moving some 2.5 million
5 plus cubic yards of fill, it involves major excavation, it
6 involves building a large quarry. It is in prime bottom
7 land. There are a number of environmental questions that
8 are raised by the extent of the construction activities that
9 are proposed here. And I have to emphasize we are talking
10 about \$88 million of on-the-ground construction.

11 I don't just think it is a simple matter to
12 determine whether those activities have a significant
13 environmental effect or not. It needs to be probed in a
14 hearing.

15 Similarly, redressability is an issue under
16 Section 50.12. The Commission has to determine whether the
17 environmental effects of the activities can be redressed.
18 That means examining the costs associated with cleaning up
19 the Clinch River site should it ultimately be determined
20 that the CRBR should not be built there.

21 Applicants assert that can be done for \$8.2
22 million. That is an assertion that needs to be tested in an
23 adjudicatory proceeding. How did they arrive at that
24 figure? What does redressability involve? How many people
25 do you need to do it? What adverse impacts are associated

1 with redressability itself?

2 Once again, if you look at what the Commission has
3 done in the past in Shear and Harris, and Waterford, the
4 Commission has said let's deal with those in the context of
5 an adjudicatory hearing before a licensing board. That is
6 the proper forum to deal with those complex factual issues.

7 COMMISSIONER GILINSKY: Could I ask you, and I am
8 not sure this is the right time to ask you the question, but
9 let me try anyway. Is your principal concern the
10 environmental impact? Or is it the impact on the rest of
11 our process of granting an exemption?

12 MR. GREENBERG: We have two concerns. The
13 concerns with respect to the rest of the process I think are
14 addressed in our focus on the legal and policy questions.
15 The environmental concerns are real. They are related to
16 the site construction activities. We feel we have a right
17 as a party to the proceeding to challenge the claims that
18 particular site preparation activities have a significant
19 adverse environmental effect.

20 COMMISSIONER AHEARNE: You mean raise the claim.

21 MR. GREENBERG: Yes.

22 COMMISSIONER AHEARNE: You want to challenge that
23 claim that they have an adverse effect.

24 MR. GREENBERG: Excuse me if I misspoke.

25 COMMISSIONER AHEARNE: You can go ahead, if you

1 wish.

2 MR. GREENBERG: Our point, Commissioner Ahearne,
3 is that we feel we should be able to take on the contention
4 of the Applicants that there are not significant
5 environmental effects as a result of site preparation
6 activities of this magnitude.

7 Now I think it follows, it obviously follows from
8 all I have said that I think the licensing board is the best
9 equipped to handle these issues. The licensing board in
10 this case is familiar with the CRBR project. There were two
11 years of proceedings before the licensing board from 1975 to
12 1977.

13 COMMISSIONER AHEARNE: Are those members still
14 members of the licensing board?

15 MR. GREENBERG: I believe some of them are
16 although I cannot vouch for that. There were
17 interrogatories passed back and forth among the parties.

18 COMMISSIONER AHEARNE: I was trying to draw the
19 distinction. You say the licensing board is familiar. Are
20 you saying the people are familiar or there is a body of
21 paper?

22 MR. GREENBERG: I am suggesting that the people
23 are familiar. It is my understanding -- Mr. Sherr informs
24 me that there is a substantial overlap between the
25 membership of the Board in the 1975-77 period and the

1 membership of the Board today.

2 COMMISSIONER BRADFORD: Substantial meaning one,
3 two, or three?

4 (Laughter.)

5 MR. SHERR: We will get that precisely.

6 MR. GREENBERG: Let us supply that for the record.

7 COMMISSIONER BRADFORD: You don't have to supply
8 that. It is easier for us to find out.

9 COMMISSIONER AHEARNE: The point is you are saying
10 there is this knowledge but you are not really sure.

11 MR. GREENBERG: It is my recollection that the
12 chairman of the Board is the same.

13 MR. COCHRAN: Marshall Miller is the Chairman of
14 the Board and he is still there.

15 MR. GREENBERG: I should mention that the
16 Licensing Board in that period, 1975-77, did pass on all the
17 contentions of the applicants to determine whether they were
18 -- I'm sorry, intervenors to determine whether those
19 contentions were admissible in the proceeding. Several of
20 those contentions relate to site suitability, contentions to
21 which we attach a great deal of importance.

22 As I mentioned earlier, it is Commission policy
23 generally to let a licensing board, not necessarily a
24 particular board, to deal with these kind of factual
25 issues. I would refer the Commission specifically to the

1 decision in the Washington Public Power case in 1977 where
2 it went out of its way to emphasize that these kind of
3 factual issues are best dealt with by the licensing board.

4 COMMISSIONER GILINSKY: Now as a practical matter,
5 turning this over to a licensing board would in effect be
6 denying the exemption request, wouldn't it?

7 MR. GREENBERG: I don't believe that, Commissioner
8 Gilinsky. First of all, the March 1982 start-up date which
9 has been suggested by the Applicant is a purely arbitrary
10 date as far as I can tell. There is no reason why it
11 should start up any more in March 1982 any more than in June
12 1982 or August 1982, or some date further off. There is an
13 incremental increase in costs according to applicants if
14 there is a delay of one month, two months, three months or
15 so forth, but there is no magic to March of 1982.

16 Beyond that, at least in past cases the licensing
17 boards have been able to deal with issues such as those
18 raised by this application in a fairly expeditious manner.
19 In the Shear and Harris case, which we cite in our
20 memorandum and whose chronology we lay out, the entire
21 process from the decision of the Commission that there
22 should be a hearing to the hearing itself before the
23 licensing board to a final decision by the Commission was
24 only three months from March of 1974 to June of 1974, so I
25 do not think it is at all impossible for this matter to be

1 decided by a licensing board within a relatively compressed
2 time scale.

3 COMMISSIONER AHEARNE: Was that request given to a
4 sitting board?

5 MR. GREENBERG: Yes, it was.

6 COMMISSIONER AHEARNE: So it was a board already
7 immersed in the details of the things.

8 MR. GREENBERG: Yes. But as I mentioned, we have
9 a board here with at least some overlap and familiarity with
10 the proceedings in the Clinch River Breeder Reactor.

11 COMMISSIONER AHEARNE: But the last time they met
12 was about four years ago?

13 MR. GREENBERG: Correct. In sum, let me reiterate
14 our basic view. The Commission should proceed to set a date
15 for hearing threshold law and policy arguments. We don't
16 object to the kind of schedule proposed by the Applicants.

17 If it determines that those law and policy
18 arguments are not conclusive, that they don't require denial
19 of the application, then the case should be remanded to the
20 Board with the direction to hold a full hearing on the
21 merits and make an initial decision.

22 Thank you.

23 COMMISSIONER BRADFORD: Let's see. How necessary
24 do you feel any further proceedings are? Could the
25 Commission decide it tomorrow, if it wanted?

1 CHAIRMAN PALLADINO: Say that again?

2 COMMISSIONER BRADFORD: I am wondering how
3 necessary Mr. Greenberg feels any further proceedings are.
4 Could the Commission simply decide to grant or reject the
5 exemption request tomorrow, if it wanted?

6 MR. GREENBERG: I think in fairness to all the
7 parties, Commissioner Bradford, they should at least be
8 given an opportunity to comment on the what we consider to
9 be these threshold legal and policy questions. I am not
10 sure that all the parties have understood that they have had
11 that opportunity. The State of Tennessee which is a party
12 to the proceeding, for example, has not yet expressed its
13 view. But I certainly think the Commission could proceed
14 quite rapidly to decide those basic legal and policy
15 questions.

16 COMMISSIONER BRADFORD: As a matter of law,
17 though, are we barred from passing on the request without
18 further comment?

19 MR. GREENBERG: It depends, it seems to me,
20 whether you consider that the other parties to the
21 proceeding have been given adequate notice of their
22 opportunity to present their views. I think there is an
23 argument that they have. They could be here today arguing
24 on the merits and they are not.

25 MR. BICKWIT: We haven't asked them to.

1 COMMISSIONER BRADFORD: You view this as being
2 part of the proceeding, then.

3 MR. GREENBERG: I absolutely do.

4 COMMISSIONER BRADFORD: Where does that leave you
5 in terms of considerations like the Commission's ex parte
6 rules?

7 MR. GREENBERG: I think the ex parte rule should
8 apply.

9 COMMISSIONER AHEARNE: Why?

10 MR. GREENBERG: Because I think this is part and
11 parcel of a licensing proceeding. This is an extraordinary
12 procedure. The applicant is coming in and asking the
13 Commission for an extraordinary relief outside the normal
14 course of the licensing, outside the normal course of the
15 hearing before a board, but I see no reason why ex parte
16 rules should not apply.

17 CHAIRMAN PALLADINO: Do you see any reason why
18 they should apply?

19 MR. GREENBERG: In a non-adjudicatory context, and
20 that is what we are talking about, to the extent that the
21 Commission is going to decide law and policy issues, I don't
22 think the ex parte rules are critical. If we go into a
23 discussion of the facts and need to develop a record with
24 respect to the facts, then it seems to me that ex parte
25 rules are critical and required.

1 MR. GREENBERG: Yes. I would assume the Staff
2 would be a party.

3 COMMISSIONER AHEARNE: That is all I had.

4 COMMISSIONER BRADFORD: I am sorry; that last
5 twist lost me. Is the Staff not already a party to the
6 proceeding?

7 MR. GREENBERG: Yes, and I would assume -- Well,
8 my point was, Commissioner Bradford, that the Staff would
9 certainly be a party to the adjudicatory hearing.

10 COMMISSIONER AHEARNE: It is not clear yet that
11 this proceeding is already cranked up.

12 CHAIRMAN PALLADINO: Can I ask a question in a
13 different vein? I want to be sure you are through on this
14 one.

15 COMMISSIONER BRADFORD: Yes.

16 CHAIRMAN PALLADINO: You indicated that there is
17 no rush -- there is no mandate for expeditious handling, and
18 yet you call attention in your own presentation to the fact
19 that the Omnibus Budget Reconciliation Act of 1981 does call
20 for construction of the CBR in a timely and expeditious
21 manner. Does that not speak to the need for timely
22 action?

23 MR. GREENBERG: The question, Mr. Chairman, is
24 "expeditious," or the use of the word "expeditious" by
25 Congress can be equated with what the invocation of Section

1 50.12 is. That is, the invocation of a special exemption to
2 be used only in what the Commission in the past has called
3 extraordinary emergency or exigent circumstances.

4 CHAIRMAN PALLADINO: Does the Congress ever speak
5 in those terms?

6 MR. GREENBERG: The Congress has never used those
7 terms. It has used the term "expedited," "timely," but in
8 our judgment those terms can in no way be equated with the
9 kind of extraordinary exemption which the Applicants are
10 seeking here. We just do not seek a mandate for it.

11 CHAIRMAN PALLADINO: Well, do you imply from the
12 Congress' wording that we should take all the time that we
13 need? I attach some significance to the words "timely and
14 expeditious," and I was curious about your reaction.

15 MR. GREENBERG: I think the Commission can
16 proceed-- I would read that as an injunction for the
17 Commission not to delay, not to footdrag, to proceed in an
18 appropriate, orderly, and timely way. That does not mean,
19 it seems to me, to rush headlong into a decision.

20 CHAIRMAN PALLADINO: Well, they would not have had
21 to put these words in unless they had some special meaning.
22 I do not have that much experience with reading what the
23 Congress says, but it is my impression that when they put
24 them in they have some meaning over and above the usual
25 procedures.

1 MR. GREENBERG: Well, I must say, my impression
2 with Congress is that the word "expeditious" or "timely" is
3 often put in a piece of legislation because the expectation
4 is otherwise that a particular project or proceeding will be
5 snarled in the bureaucracy endlessly. So that one finds
6 these terms like "expeditiously" in all kinds of
7 legislation. That does not mean, as I said earlier, that
8 the ordinary Commission licensing practice should be
9 ignored.

10 COMMISSIONER BRADFORD: It seems important at this
11 point to touch on something you discussed earlier but we did
12 not pursue with you, which is: Whether or not, in your
13 view, an adjudicatory hearing is a legal requirement as a
14 precedent to an exemption. That is, if in fact it is a
15 legal requirement, then one runs into the question of
16 whether Congress in using language like that would have
17 intended in some way to short-circuit the NEPA process.

18 I have not spent a lot of time with your brief, as
19 yet, but I have not come across that argument.

20 MR. GREENBERG: Well, we have not made that
21 argument, and I must confess that the Commission precedents
22 leave me somewhat at loose ends in trying to assess whether
23 an adjudicatory hearing is required as a matter of law. I
24 must say, I do not think the National Environmental Policy
25 Act requires an adjudicatory hearing.

1 Commission policy has been to hold one. There is
2 Commission precedent, as I mentioned earlier, to the effect
3 that an adjudicatory hearing should be held when there are
4 contested factual issues, as we believe there are here. Now
5 is that a matter of law? Is that a matter of policy? I do
6 not know. I think it is fair to argue that it is the law of
7 the Commission that adjudicatory hearings must be held when
8 we have contested issues, as we have in this case.

9 COMMISSIONER GILINSKY: How important do you think
10 it is that the project be subject to licensing at all?

11 MR. GREENBERG: Well, I think Congress made that
12 judgment in 1974, Commissioner Gilinsky, when the Energy
13 Reorganization Act was passed. Specific provision was
14 included to the effect that the Clinch River Breeder Reactor
15 be licensed by the Nuclear Regulatory Commission. And an
16 essential component of this project from day one has been to
17 demonstrate the licensability of breeder reactors in a
18 commercial context.

19 One of our central arguments on the merits, one of
20 our central threshold arguments is that if you start
21 deviating from standard Commission licensing practice, the
22 purpose of demonstrating licensability is substantially
23 undermined.

24 COMMISSIONER GILINSKY: Well, that was an original
25 purpose, but I think it is not clear that it still is the

1 purpose. Congress indeed has required that it be subject to
2 licensing, but we could ask Congress to reconsider that.

3 MR. GREENBERG: Commissioner Gilinsky, if Congress
4 decided that this reactor was not subject to licensing, I
5 would not be before you today and we would not have this
6 problem. But it has not.

7 COMMISSIONER GILINSKY: Well, I guess I am asking
8 how you would view such a recommendation for
9 reconsideration.

10 MR. GREENBERG: Well, I would have to consult with
11 my client, but I have a sneaking suspicion that my client
12 would be opposed to that.

13 (Laughter.)

14 MR. COCHRAN: We would favor that under the
15 condition that they terminated the project.

16 COMMISSIONER AHEARNE: Two questions. You had
17 mentioned at some point in the presentation what I
18 interpreted to be a conclusion that what has so far been
19 submitted by the Energy Department is inadequate for you to
20 provide comments.

21 MR. GREENBERG: Yes.

22 COMMISSIONER AHEARNE: So my question would be:
23 Since they have submitted at least two lengthy documents,
24 what are the weaknesses that you find that would preclude
25 your viewing them as being adequate to make comments?

1 MR. GREENBERG: Well, Commissioner Ahearne, I do
2 not understand how the Applicant arrived at a number of
3 their conclusions, particularly with respect to cost. It
4 seems to me those need to be tested.

5 I do not understand in every case how the
6 Applicant, despite the site preparation activities report,
7 arrived at certain conclusions, and their conclusions that
8 particular activities are not significant, or are not
9 important, or will not disturb the environment in a
10 meaningful way. Those are assertions where I feel that I
11 need to understand the basis.

12 COMMISSIONER AHEARNE: All right. My second
13 question was: Do you have any further comment on the
14 proposed schedule the Applicant submitted to us?

15 MR. GREENBERG: Well, as I said, if the schedule
16 were strictly limited to issues of law and policy and did
17 not deal with the broader range of factual issues that need
18 to be decided by the Commission, I would have no objection
19 to it. In fact, I think it could be compressed, as I
20 indicated to Commissioner Bradford.

21 COMMISSIONER AHEARNE: Now just as a hypothetical,
22 let us assume the Commission were to conclude that we would
23 address the issue by the Commission by a non-adjudicatory
24 manner, a legislative hearing, whatever. Would you then
25 have any comment on the schedule?

1 MR. GREENBERG: Quite frankly, I think we could
2 meet this schedule if the Commission did not proceed in an
3 adjudicatory fashion. I do believe, however, that there
4 ought to be a requirement up front for the Applicant to
5 produce all backup data, and any further argument that is
6 necessary to support the assertions that they make in the
7 site preparation activities report, and in their brief.

8 That having been said, I do believe that
9 proceeding with a schedule such as this, and without
10 allowing the parties an opportunity to cross-examine and
11 test the assertions of the Applicant would be fundamentally
12 deficient.

13 COMMISSIONER AHEARNE: Fundamentally deficient on
14 a policy standpoint? Or --

15 MR. GREENBERG: Both as a matter of law and of
16 policy, Commissioner Ahearne.

17 CHAIRMAN PALLADINO: May I follow up on your
18 previous question?

19 COMMISSIONER AHEARNE: Sure.

20 CHAIRMAN PALLADINO: Somewhere I thought I heard
21 you say, and I wrote it down, that there is no initial
22 presentation by the Applicant. Did you mean, no "adequate"
23 one?

24 MR. GREENBERG: Perhaps I should say no adequate
25 one. In the ordinary course --

1 CHAIRMAN PALLADINO: I just wanted to make sure
2 that I understood.

3 MR. GREENBERG: -- I would expect that the factual
4 underpinnings of an application would be laid out to a
5 licensing board, and would get into the nitty gritty and not
6 just be stuck with some very general assertion about what
7 this \$88 million is going to be spent for.

8 CHAIRMAN PALLADINO: Well, I gather there is
9 interest on the part of the Commission on cost data, and the
10 general counsel said we could include that as part of the
11 order, and there may be other items that the Commission
12 finds, depending on the way it wants to go. But likewise
13 would you also not have the opportunity to raise comments on
14 that presentation?

15 MR. GREENBERG: Well, that is provided for in the
16 schedule.

17 COMMISSIONER BRADFORD: Let's see. If I have
18 understood the point on the legal requirement for
19 adjudicatory hearings, it is not different from the
20 arguments that NRDC has made to this Commission on this same
21 point before. I guess the Irwin case is one that I have in
22 mind. You were not counsel in that case.

23 I do not know whether you were, or not; but it is
24 basically that same point, again.

25 MR. SHERR: Yes, Commissioner Bradford.

1 COMMISSIONER BRADFORD: I can go there for a
2 shorthand --

3 MR. SHERR: But we have felt that where there are
4 factual issues involved in a licensing proceeding, that it
5 is important that they be dealt with in an adjudicatory
6 mode.

7 COMMISSIONER BRADFORD: I am not talking so much
8 about policy, now, as about the argument that the
9 Commission's past practice rises to the level of a legal
10 requirement now that it offer adjudicatory hearings in a
11 NEPA context.

12 MR. GREENBERG: Commissioner Bradford, I suggest
13 that you do look particularly at the Washington Public Power
14 case. I am sure you will be discussing that with your
15 counsel, but that seems to me the case in which the
16 Commission has expressed in the strongest terms the need for
17 adjudicatory hearings with respect to Section 50.12
18 applications.

19 But that general view is expressed in a number of
20 the Commission's decisions, and indeed I can find not a
21 single decision in which the Commission has said that an
22 adjudicatory hearing is not appropriate in this context. I
23 am sorry, the one exception being the one case, the River
24 Bend case, where the intervenors did not contest the
25 granting of the exemption. There was no need for an

1 adjudicatory hearing there.

2 CHAIRMAN PALLADINO: Do you have any other
3 questions?

4 (No response.)

5 CHAIRMAN PALLADINO: If not, we thank you very
6 much.

7 MR. GREENBERG: Thank you.

8 MR. BICKWIT: I would like to get one point clear
9 in my own mind. Are you saying that the Commission
10 precedent is, or is not, compelled by statute?

11 MR. GREENBERG: I do not think it is compelled by
12 statute.

13 MR. BICKWIT: Thank you.

14 CHAIRMAN PALLADINO: Did you have anything more?

15 MR. BICKWIT: No.

16 CHAIRMAN PALLADINO: Thank you.

17 Now I understand we have a representative here
18 from the State of Tennessee, Mr. Von Cannon, who has a
19 statement to present on behalf of the State of Tennessee.

20 MR. VON CANNON: Mr. Chairman, Members of the
21 Commission:

22 My name is Ted Von Cannon. I am an Assistant
23 Commissioner in the Department of Economic Community
24 Development for the State of Tennessee.

25 I have with me to deliver to you a letter from the

1 Governor of the State of Tennessee, and I wish to enter that
2 into the record. I would like to read portions of that
3 letter, if the Commission so desires:

4 "Dear Chairman Palladino:

5 "The U. S. Department of Energy has provided me
6 with a copy of its recent request to the Nuclear Regulatory
7 Commission for authorization to commence site preparation
8 activities for the Clinch River Breeder Reactor plant
9 project which will be located at the Clinch River site in
10 Oak Ridge, Tennessee.

11 "The State of Tennessee wishes to express its
12 strong support for DOE's request. In particular, the State
13 believes that the delay already encountered by the project
14 must not continue. The procedures suggested by DOE in
15 regard to the Section 50.12 request will assure that all
16 environmental values are fully protected, and that
17 additional project delays are minimized.

18 "To assure that the NRC's review proceeds
19 expeditiously, the State is eager to assist the NRC in
20 connection with any matter within the State's regulatory
21 jurisdiction.

22 "I again reiterate our support for the total
23 project, and in particular our support for the current
24 request for the project to begin site preparation activities
25 in the spring of 1982. The State is willing to lend its

1 assistance in assuring an expeditious regulatory review for
2 the project by the Commission. We will cooperate fully with
3 you on subsequent licensing action on the project.

4 "Sincerely, Lamar Alexander, Governor of
5 Tennessee."

6 CHAIRMAN PALLADINO: Thank you very much. I will
7 have copies made and distributed. I will turn it over to
8 Secretary Chilk.

9 COMMISSIONER AHEARNE: Mr. Von Cannon, previously
10 the State was a participant in the currently closed and
11 deferred hearing. Is that correct?

12 MR. VON CANNON: Yes. I believe that is correct.

13 COMMISSIONER AHEARNE: Were they participating as
14 an interested state? Were they a party? Did they have
15 contentions?

16 MR. VON CANNON: I assume you are talking about
17 the intervention process?

18 COMMISSIONER AHEARNE: Yes.

19 MR. VON CANNON: The State's intervention. Yes,
20 there were three agencies that at that time did file
21 petitions for intervention, three executive agencies in the
22 State government.

23 However, we have discussed those intervention
24 situations with the agencies, and they are completely
25 satisfied that at the current time, particularly with the

1 site preparation prospects, there does not appear to be --
2 there are not any problems during this segment of the
3 activities.

4 Secondly, we have also discussed this with our
5 legislative delegation, our federal legislative delegation,
6 and we understand that any recourse of action would be
7 handled through the Congressional format, as opposed to the
8 NRC.

9 COMMISSIONER AHEARNE: I do not think I understand
10 that last point. Would you explain that a little bit?

11 MR. VON CANNON: I think there were questions
12 concerning the socioeconomic impact of the project itself.
13 It is our understanding that those questions and relief
14 would have to be addressed through, or taken care of by
15 Congressional action, as opposed to NRC's. Now if --

16 CHAIRMAN PALLADINO: Were those the only issues
17 that you think would have to go through Congressional
18 action?

19 MR. VON CANNON: I believe that is correct.

20 COMMISSIONER AHEARNE: So do you expect the State,
21 then, to withdraw as a party?

22 MR. VON CANNON: We would be withdrawing during
23 the site preparation activities that, it was my
24 understanding, we were to discuss today.

25

1 CHAIRMAN PALLADINO: What is the status of the
2 State of Tennessee in this proceeding, do you know?

3 MR. BICKWIT: They are a party to the proceeding
4 at this point.

5 CHAIRMAN PALLADINO: Okay.

6 Any other questions? Mr. Roberts?

7 COMMISSIONER ROBERTS: I hope the Commissioner
8 will show the same deference to the Governor of Tennessee as
9 we do to the governors of other states.

10 (Laughter.)

11 CHAIRMAN PALLADINO: Any other questions by
12 Commissioners?

13 COMMISSIONER BRADFORD: You had in mind the
14 Governor of California?

15 MS. BRECKENRIDGE: Mr. Chairman, I am Lee
16 Breckenridge from the Attorney General's Office. I guess I
17 should state for the record that the Attorney General --

18 CHAIRMAN PALLADINO: I wonder if you might get by
19 a mike.

20 MS. BRECKENRIDGE: Yes. Mr. Von Cannon does not
21 speak for the Attorney General. I don't know what the
22 Attorney General's position will be on the merits of this
23 case, but I will have to report on this meeting to the
24 Attorney General. He had been a participant through Mr.
25 William Hubbard previously in these proceedings.

There has been no consultation, I am sorry to

1 report, between Mr. Von Cannon and the Attorney General
2 prior to this meeting, so we are both here.

3 COMMISSIONER AHEARNE: I see.

4 MR. VON CANNON: I did want to make this clear,
5 that the correspondence is from the Governor, and because of
6 the quickness of the action, they are trying to expedite the
7 correspondence.

8 COMMISSIONER AHEARNE: I am confused, Mr. Von
9 Cannon. I asked whether the state was a party and whether
10 the state was going to withdraw, and you said the state
11 would be at least for the site preparation part. Now, I am
12 not sure, then. Are you speaking for the people that were a
13 party?

14 MR. VON CANNON: I am speaking for the Governor.
15 We have a very unique situation in Tennessee.

16 (Laughter.)

17 Needless to say.

18 COMMISSIONER BRADFORD: I don't think it is all
19 that unique.

20 MR. VON CANNON: The Attorney General is not
21 appointed by the Governor. He would be acting as a legal
22 agent for the state, and that very simply will have to be -

23 COMMISSIONER AHEARNE: That is not unique. There
24 are other states in the same situation. So that actually,
25 then, you are speaking for one part of the state.

1 MR. VON CANNON: Yes. I am speaking for the
2 Executive Branch.

3 COMMISSIONER AHEARNE: But the Attorney General,
4 who is one of the participants here, is he representing a
5 separate issue? You are saying the Attorney General's
6 Office has not reached a conclusion.

7 MS. BRECKENRIDGE: We have not reached a
8 conclusion on the merits of these proceedings, and I would
9 hate to state at this point that we would want to withdraw
10 from the site preparation comments.

11 CHAIRMAN PALLADINO: You were invited to make
12 comments, were you not?

13 MS. BRECKENRIDGE: Yes, sir. I understood that
14 this hearing was on the procedures to be followed, and we
15 take no position at this time on that.

16 CHAIRMAN PALLADINO: All right, thank you.

17 Any other questions by members of the Commission?

18 (No response.)

19 CHAIRMAN PALLADINO: We thank you very much.

20 Now, our agenda said we might have a possible vote
21 on the procedural aspects of the CRBR matter. Rather than
22 rush into that, since we have been sitting here for a while
23 and to give us all a chance to reflect on what we have
24 heard, I am going to suggest we take about a ten-minute
25 recess --

1 (Laughter.)

2 -- and then come back and see to what extent we
3 want to address matters in the decision.

4 Okay, we will stand in recess for ten minutes.

5 (Recess.)

6 CHAIRMAN PALLADINO: Ladies and gentlemen, I
7 wonder if we might reconvene.

8 As I had indicated earlier, the agenda did call
9 for a possible vote on the matters discussed, particularly
10 the procedural matters regarding how the Commission wants to
11 handle the exemption. So I thought we would try several
12 questions. How far we go with these questions would depend
13 on the direction the Commission wishes to go.

14 The first question I would raise before the
15 Commission: Shall the Commission make the decision on the
16 DOE exemption request or should it defer that decision to
17 the staff or to an adjudicatory board? I thought maybe we
18 would see if there are any comments in this direction.

19 COMMISSIONER BRADFORD: It is a decision we may
20 have to revisit, but I think at least for the time being the
21 Commission should retain the matter.

22 COMMISSIONER GILINSKY: Yes, I think the
23 Commission should decide.

24 COMMISSIONER AHEARNE: Yes.

25 COMMISSIONER ROBERTS: Yes.

1 COMMISSIONER AHEARNE: There doesn't seem to be
2 anything here really that aren't issues that I feel are
3 either unique or major policy questions, and that is
4 appropriate for us to decide.

5 CHAIRMAN PALLADINO: Well then, may I take an
6 official vote? Is it the will of the Commission to make the
7 decision on the DOE exemption request, to have a vote on
8 that? ✓

9 COMMISSIONER AHEARNE: Yes.

10 COMMISSIONER ROBERTS: Yes.

11 COMMISSIONER BRADFORD: That wasn't quite what I
12 was suggesting. That may be what you are. I am saying that
13 at least for the time being it is appropriate for the
14 Commission to continue it before us. If in fact the
15 Commission decides to grant the request, then I would like a
16 little more time to digest the materials contained in the
17 submissions we got late yesterday afternoon and argued to us
18 today as to whether there needs to be a Board review of the
19 specific factual contentions.

20 CHAIRMAN PALLADINO: I was not implying that we
21 were making a decision to grant or not to grant, but that we
22 would make the decision on the DOE request and not have it
23 go to the staff or to an adjudicatory board.

24 COMMISSIONER BRADFORD: Right. And what I am
25 saying is that once we have heard whatever further

1 presentations we schedule, one possible outcome of that is
2 that the Commission will feel it is a matter of policy and
3 the exemption should be granted, but that as a matter of law
4 or practice, it wants first to test the factual allegations
5 through an adjudicatory proceeding.

6 CHAIRMAN PALLADINO: Are you saying that you are
7 willing to make a tentative decision but not a final
8 decision?

9 COMMISSIONER BRADFORD: That is a fair general
10 statement of it.

11 CHAIRMAN PALLADINO: But we do need to embark on a
12 course.

13 COMMISSIONER BRADFORD: Yes. I am prepared to
14 embark on a course that contemplates a Commission decision.

15 CHAIRMAN PALLADINO: Well, then my proposal would
16 be, based on the comments we have just heard, that we embark
17 on a course whereby the Commission rather than staff or an
18 adjudicatory board would address a decision the DOE
19 exemption request.

20 COMMISSIONER AHEARNE: I am in favor of that.

21 CHAIRMAN PALLADINO: Are you ready to vote on that?

22 COMMISSIONER GILINSKY: Aye.

23 COMMISSIONER BRADFORD: Aye.

24 COMMISSIONER AHEARNE: Aye.

25 COMMISSIONER ROBERTS: Aye.

1 CHAIRMAN PALLADINO: Aye. I gather that is
2 unanimous, then.

3 COMMISSIONER GILINSKY: Could you tell us what the
4 other two questions are?

5 (Laughter.)

6 CHAIRMAN PALLADINO: I am going to get to it.

7 COMMISSIONER GILINSKY: We are taking them one by
8 one?

9 CHAIRMAN PALLADINO: Now I will ask two other
10 questions now that I know which way the Commission wants to
11 go. My second question is: If the Commission is to make the
12 exemption decision, shall it do so with the combined
13 assistance of the staff and OPE and OGC? This was Option
14 1A(c) in the 12/9 OPE Options Paper. That would be my
15 second question.

16 And then what schedule should we follow: Do we
17 want to follow that suggested by the Applicant or do we want
18 some modification thereof or some other schedule? In
19 dealing with that question I have taken the Applicant's
20 proposed schedule, introduced a few suggested changes to
21 help sharpen up the question and indicate possible dates
22 that we might want to try to achieve. So those are the
23 remaining questions I have posed.

24 COMMISSIONER AHEARNE: And I will add an
25 additional question, which is that in going out with our

1 decision, which is then, I guess, a request for comments on
2 the merits, I would like us to be asking some specific
3 questions.

4 CHAIRMAN PALLADINO: When we look at the schedule,
5 I was going to propose that in view of the questions raised
6 this morning, that we specifically ask the Applicant to
7 provide the supporting information for the factual
8 assertions that they made and try to do so within an
9 expedited time period, the order of a week, and if that is
10 possible for them to meet to tell us how soon thereafter
11 they could do it. But now you are anticipating the details.

12 Well, I wonder if I could get a Commission vote on
13 shall the Commission proceed with the combined assistance of
14 the Staff, OPE and OGC, the option indicated as 1A(c) in the
15 12/9 OPE Options paper.

16 COMMISSIONER AHEARNE: Could I get some comments
17 from Len on this question of ex parte, which clearly affects
18 that question?

19 MR. BICKWIT: Our view is that no adjudicatory
20 hearing is required here, and the procedures of Part 2 do
21 not govern what the Commission is doing here. As a result,
22 we see no ex parte problem with respect to the staff. There
23 is a modified ex parte problem, in our view, with respect to
24 other parties in that you do have in an adjudicatory setting
25 a proceeding that is for all practical purposes of ex parte

1 analysis ongoing even though it is suspended.

2 If parties are to deal with the Commission on
3 matters which are in controversy in that proceeding, there
4 is no clear case law support for such exchanges to take
5 place consistent with the ex parte rule. I think a case can
6 be made that such exchanges are consistent, but the case law
7 support is not absolutely clear.

8 In the case of consultations with the Staff on
9 such matters, case law support is clear.

10 COMMISSIONER BRADFORD: Why is the Staff
11 different?

12 MR. BICKWIT: The case that we are relying on is
13 EDF v. EPA. The underlying rationale there was that the
14 Commission needs, in this case the administrator of EPA
15 needed the support of his technical staff to make certain
16 judgments on non-adjudicatory matters even though in an
17 adjudicatory context the Staff was operating as a party at
18 that very time on the very same facts.

19 So the distinction would be that a regulatory
20 agency needs to rely upon its staff in a way that it does
21 not need to rely upon other parties for its activities.

22 COMMISSIONER AHEARNE: That is even if the issues
23 are quite similar?

24 MR. BICKWIT: Even if they are identical. That is
25 not to say that we would not be prepared to argue that the
distinction oughtn't to be undercut in a given case in which

1 the Commission felt a great need to consult with particular
2 parties on similar matters. It is just that the cases have
3 not yet gone that far.

4 COMMISSIONER BRADFORD: But it does rest, then, on
5 regarding this whatever it is as not being part of the
6 adjudicatory proceeding.

7 MR. BICKWIT: It rests on that. And when I
8 advised on this matter at the beginning of the last meeting,
9 I advised that that was a matter that the Commission might
10 ultimately decide was not correctly analyzed by this
11 office. But it does not appear to have decided that given
12 that it has already made the decision that it wants to move
13 into a non-adjudicatory setting with respect to the actual
14 decision.

15 CHAIRMAN PALLADINO: Now, this, I gather, would be
16 using the staff in an advisory role in this particular
17 matter.

18 MR. BICKWIT: Yes.

19 COMMISSIONER GILINSKY: Does it matter whether the
20 staff has taken a position on this?

21 MR. BICKWIT: It doesn't.

22 COMMISSIONER GILINSKY: Have they?

23 MR. BICKWIT: On this particular question, no. I
24 assume they have taken a position on matters that are
25 related, but the case law, in our view, is firm support for

1 their being permitted to be advisers on these very same
2 matters.

3 COMMISSIONER AHEARNE: Given that position, I
4 would go along and support that option.

5 CHAIRMAN PALLADINO: Well, may I have a vote,
6 then, that the Commission in making the exemption decision
7 will do so with the combined assistance of the Staff, OGC
8 and OPE?

9 COMMISSIONER GILINSKY: I take it you are saying
10 we are free to call upon them to the extent we want to?

11 CHAIRMAN PALLADINO: I gather that OGC and OPE
12 feel they will need assistance from the Staff on some of
13 these matters.

14 COMMISSIONER BRADFORD: I don't think I personally
15 intend to call on the Staff for assistance on factual
16 matters, but I don't mind using them with regard to law and
17 policy.

18 CHAIRMAN PALLADINO: We are really only ruling on
19 their participation in this exemption decision.

20 COMMISSIONER AHEARNE: Aye.

21 CHAIRMAN ROBERTS: Aye.

22 COMMISSIONER GILINSKY: Aye.

23 COMMISSIONER BRADFORD: Aye.

24 CHAIRMAN PALLADINO: I would vote Aye. We are
25 unanimous on that. All right.

1 Then I think the third thing we need to do is
2 establish the schedule. I have taken the schedule proposed
3 by the Applicant and marked it up with some items that I
4 think will help us focus on some questions that we have not
5 totally addressed in that schedule, and I am going to hand
6 those out. I only have a few copies but I will just send
7 some down that way.

8 Going down the schedule, the first item they had
9 was a Commission decision on procedures and notice, inviting
10 public comment. I suggested this also be inviting public
11 comment and comments from government agencies, which would
12 include certainly DOE and perhaps Fish and Wildlife, and I
13 don't know who else might wish to do so. The suggested date
14 there for that would be, if the OGC could draft an order,
15 would be on 12/18.

16 COMMISSIONER BRADFORD: Before we go down this one
17 point by point, let me just suggest an alternative
18 formulation. It seems to me that I am not of the view that
19 broad-scale public comment is really needed or especially
20 helpful here. We have a diverse group of parties. They
21 don't necessarily represent all possible spectrum of
22 opinions but they represent those who have been concerned
23 enough about Clinch River to have been involved in it in the
24 past.

25 I would suggest that what we should really do is

1 formulate the questions that the Commission really wants
2 answered, take the initiative to put those forth ourselves
3 at the outset, give a period of, well, whatever seems
4 reasonable in light of the questions, but say somewhere
5 between a week and two weeks for a response, and then allow
6 a period to comment on the responses and oral presentation if
7 we wanted and then reach a decision.

8 I just don't think much is going to be gained by
9 throwing this case open to the full range of public comment
10 except to have an avalanche of papers which will distribute
11 pretty much across the views the parties are going to bring
12 to us in any case.

13 CHAIRMAN PALLADINO: Are you suggesting that this
14 be invited comment from the parties --

15 COMMISSIONER BRADFORD: I am suggesting we begin
16 by agreeing to shape the questions that we ourselves really
17 feel we need answers to.

18 CHAIRMAN PALLADINO: Well, as I indicated earlier,
19 as a part of this step, this step would allow roughly 30
20 days for comment. I was also going to suggest, based on what
21 we heard this morning, that we ask the Applicant to give
22 supporting data on the factual assertions and do so within a
23 week.

24 COMMISSIONER BRADFORD: My thought there is --

25 CHAIRMAN PALLADINO: That is separate from any

1 other comments that the might want to submit.

2 COMMISSIONER BRADFORD: My thinking there is that
3 there are probably a number of factual statements made by
4 the Applicant that will not seem to the five of us to be
5 essential in fact to the ultimate outcome, and that maybe we
6 can sharpen the issue somewhat as far as what we really do
7 want more detail on.

8 CHAIRMAN PALLADINO: Well, I would add
9 particularly cost information and any other items you would
10 suggest. I wasn't trying to decide what items would be in
11 there, but I do agree we should try to get those items in
12 which we have a significant interest identified in the
13 order, and ask for them early in the 30-day period so there
14 is adequate opportunity for people to comment.

15 COMMISSIONER GILINSKY: Peter seems to be asking
16 for, and it makes sense to me, basically a three-step
17 process rather than an eleven-step process. In other words,
18 start off with questions as Step 1, give the various
19 participants a couple of weeks, say, and say a week for
20 responses, comments on those, and then if we want one, an
21 oral presentation I think would be useful in a Commission
22 decision.

23 CHAIRMAN PALLADINO: Well, that is basically what
24 this says except it does use the word "public" instead of
25 "parties," which I would agree with.

1 COMMISSIONER GILINSKY: Except -

2 CHAIRMAN PALLADINO: And it gives additional time
3 for Commission questions that might arise after further
4 deliberation. So while it looks like a long list of items,
5 I think it is within the spirit of that approach. I am open
6 to --

7 COMMISSIONER BRADFORD: My suggestion would
8 essentially start with Step 3. I would have jettisoned the
9 first two steps except insofar -- and use some piece of that
10 time for the preparation of Commission questions.

11 COMMISSIONER AHEARNE: So Peter, what you are
12 saying is in some short time, I assume, for the Commission
13 to develop questions, and then to put that out. I assume
14 comments would be requested or imply information, but in
15 addition people could provide comments that they would feel
16 would be important to addressing the merits even if we
17 didn't ask the question?

18 COMMISSIONER BRADFORD: I think that is right. It
19 is almost inevitable that there will be a catch-all question
20 or two that we will include in that.

21 CHAIRMAN PALLADINO: But why should we delay going
22 out for those comments while we think up our questions?

23 COMMISSIONER BRADFORD: Because then we will have
24 the comments focused on the things that are really of
25 concern to us. The alternative -- let's leave aside a

1 moment the question of whether or not to get broad public
2 comment or just comment from the parties. The alternative
3 is to just let the parties start commenting at will now on a
4 fire-when-ready basis anything that occurs to you in 30
5 days, write it down and send it to us, and then we will read
6 through that and then we will tell you what we want to hear
7 more about, and we will begin sharpening the proceeding at
8 that point.

9 My feeling is we have got enough before us to do a
10 good deal of sharpening right now.

11 CHAIRMAN PALLADINO: Let's see. So you would
12 propose a Commission period to raise questions, and you
13 would say that goes from now to when?

14 COMMISSIONER BRADFORD: Well, the end of next
15 week, maybe.

16 CHAIRMAN PALLADINO: So that puts it --

17 MR. BICKWIT: That would be the middle of next
18 week.

19 COMMISSIONER BRADFORD: Well, whenever next week
20 ends, for all practical purposes.

21 (Laughter.)

22 But that is a deadline, in any case, that we are
23 setting for ourselves.

24 CHAIRMAN PALLADINO: You are proposing that goes
25 from 12/16 to 12/23.

1 COMMISSIONER BRADFORD: At the end of that time --

2 CHAIRMAN PALLADINO: An order.

3 COMMISSIONER BRADFORD: An order or a request for
4 further information. Whatever we call it, we would put out
5 a document.

6 CHAIRMAN PALLADINO: I would expect it to be a
7 two-part order: one, that we request specific information
8 from the Applicant. We do not at the same time go out for
9 comment from the parties? Or would you wait for that other
10 information to come? This is what I am trying to determine.

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1 COMMISSIONER BRADFORD: I would expect the parties
2 to deal with further information to the extent that it came
3 up in the time for responses and make sure that we allow the
4 time for responses to be long enough to make that a
5 meaningful proposition.

6 CHAIRMAN PALLADINO: Well, if we sent out a
7 request for further information to the Applicant, that would
8 go out presumably around 12/23 or whatever, shortly
9 thereafter, and then how much time would you give for a
10 response by the Applicant?

11 COMMISSIONER BRADFORD: I think we would want
12 everyone's responses at the same time. And I guess I would
13 put it somewhere -- I do not know what the days of the week
14 involved are -- but somewhere around the 10th of January,
15 the 10th to the 20th of January.

16 CHAIRMAN PALLADINO: There is something I am not
17 following. I thought the idea of your approach was to get
18 the Applicant to respond to some questions and then make the
19 responses available for public comment.

20 COMMISSIONER GILINSKY: Not necessarily. Just the
21 Applicant.

22 COMMISSIONER BRADFORD: As far as I am concerned,
23 the comment stage follows what we are talking about now.
24 That is, that material becomes available and then the
25 parties have from, say, the 15th of January to whatever date

1 seems reasonable, the 10th or 15th of February, to comment
2 on the material furnished by each other.

3 CHAIRMAN PALLADINO: Well, look at what is on
4 here. It says we would request comments on the 18th, and I
5 was going to add that we put in our order inviting comments
6 that the Applicant should get answers to certain specific
7 questions we may or may not be able to develop by the 18th
8 and then a month later get all the comments in.

9 So what we might do, if I understand what you are
10 saying, instead of the 18th, let us give ourselves until the
11 23rd to identify those questions and then make the date for
12 comment to be 1/23. Is that right?

13 COMMISSIONER BRADFORD: Yes.

14 CHAIRMAN PALLADINO: So we could make those
15 consistent by making that 12/23 up at the top. And I would
16 include in specific --

17 COMMISSIONER BRADFORD: I am not sure I would run
18 the response period out that far in the first round. I am
19 more interested in the second round, focusing on the data
20 provided in the first responses. I would like to drive out
21 the basic data fairly quickly. We have the basic arguments
22 already in hand.

23 CHAIRMAN PALLADINO: Well, we could still, by
24 issuing an order on 12/23, ask for comments by the parties,
25 from government agencies, and ask specifically that the

1 Applicant provide within a week of the order specific
2 responses to their factual assertions, especially the cost
3 and whatever else we may come up with. And that would be a
4 separate date for them for those particular items. And we
5 would allow comments to proceed until the 23rd of January.

6 COMMISSIONER AHEARNE: I guess I would have
7 trouble with that one modification. I was with you all the
8 way up to the last point. For me, the most important pieces
9 of information are going to be the responses to the
10 questions that we ask. And to say that we will put an order
11 out on 12/23 and give them seven days to respond means --
12 this is a very bad time to try to get a crash effort, to get
13 what to me would be the crucial information.

14 CHAIRMAN PALLADINO: I recognize that, and I was
15 going to say the seven days were mentioned, but these
16 particular seven days are bad and give them until -- well,
17 at least even the 30th, until the end of the first week in
18 January. It still gives us responses to our questions about
19 halfway through the comment period and gives us a chance to
20 begin to assimilate those.

21 COMMISSIONER AHEARNE: Joe, why could you not just
22 modify this to 12/23, as you had said, which would give us a
23 chance to work up the questions, and whether you slip this
24 to 1/23 or not is all right, and then just keep the rest of
25 the schedule?

1 CHAIRMAN PALLADINO: Yes, that is what I was
2 trying to get at.

3 COMMISSIONER GILINSKY: Why do you need such an
4 extended schedule after 1/23?

5 CHAIRMAN PALLADINO: You are going to get comments
6 back, let us assume, on either the 18th or 23rd. Then we
7 may or may not have any questions. That was a new twist,
8 something I did not have. And then you notice I put double
9 asterisks. Now it should say, "If no further questions are
10 proposed, a two-week additional period for responses would
11 not be needed, and the remaining portion of the schedule
12 would be modified accordingly."

13 COMMISSIONER AHEARNE: I guess to answer Vic, why
14 do we need such an extended schedule? I guess, initially,
15 the Applicant proposed it, and the major Intervenors said
16 they could live with it, with the caveat if we did go down
17 the route of the nonadjudicatory, they could live with that
18 schedule. And I am not --

19 COMMISSIONER GILINSKY: Every one of these steps
20 ties up a lot of people. It seems to me we should just
21 schedule the oral presentation for a week after the
22 responses, second round of responses are due. We can deal
23 with whatever questions we have at that point and decide as
24 soon thereafter as we are comfortable deciding.

25 CHAIRMAN PALLADINO: Well, this is not that much

1 different. We get our comments back by the 23rd of January,
2 and we do have, I guess, a period there, I was proposing
3 2/16 notice of orals.

4 COMMISSIONER GILINSKY: Here you have oral
5 presentation at 3/5. Why not have it at 1/30?

6 COMMISSIONER AHEARNE: Maybe a resolution, Joe, is
7 to take this with that slight modification as a tentative
8 approach, and we can always, after we see the response to
9 the comments, then decide whether or not we want to shorten
10 it up. But I cannot make that decision until I see the
11 answers.

12 CHAIRMAN PALLADINO: Okay, let us aim for trying
13 to get an order or request out by the 23rd. We try to
14 identify the questions that we particularly want the
15 Applicant to address. And in the meanwhile, having heard
16 you various comments or with appropriate Staff people -- I
17 presume that might be OPE and OGC, to make a suggested
18 schedule with the alternatives depending on when we get
19 them. Does that sound reasonable?

20 Okay, so why do we not proceed that way.

21 Now, are there any questions, Len, that you had
22 specifically needed in the form of decisions at this point
23 to proceed with outside of the questions that we have that
24 have developed?

25 MR. BICKWIT: No, I think we are fine.

1 COMMISSIONER AHEARNE: I would like to raise one
2 additional question. Perhaps Len could think about it, or
3 anyone else. I am not sure whether it is appropriate to put
4 it in. An issue which has come up in both some of the
5 comments and I am sure is going to be a major one facing us
6 is this question of a congressional mandate. And I am just
7 not sure how to come to grips with that particular aspect of
8 it, how we decide what the particular congressional mandate
9 was.

10 COMMISSIONER GILINSKY: Read what they said.

11 CHAIRMAN PALLADINO: But do we have to have a
12 congressional mandate, as such? What importance are you
13 attaching to that?

14 COMMISSIONER AHEARNE: The question is if, as the
15 Applicant has made a strong point that there is, at least
16 the flavor I get, is that one of the key arguments they are
17 making is the congressional, for want of a better initial
18 word I will use mandate.

19 But I am not sure how to address that, because in
20 the past we have had a fairly difficult time extracting in
21 other cases what it was Congress was really speaking to, and
22 NEPA is a clear case of that.

23 I just wanted to raise this as a potential
24 question. If anybody has any good ideas, it would help.

25 MR. REMICK: Commissioner Ahearne, one of the four

1 factors relates to public interest. It seems like you
2 could ask the parties to address what weight the Commission
3 should give to any Congressional mandate or national policy
4 prior to your decision in deciding this.

5 COMMISSIONER AHEARNE: Forrest, I am comfortable
6 just for myself with deciding how I would come out, if I
7 only knew what that mandate was. My difficulty at the
8 moment is I am afraid what we are going to get is a variety
9 of individual letters from various people in Congress. That
10 is not the best way of trying to decide what was the
11 congressional mandate.

12 CHAIRMAN PALLADINO: Maybe you could be sure we
13 have the correct wording out of the legislative history.

14 MR. BICKWIT: Is your question are your options in
15 any way constrained by what the Congress has said?

16 CHAIRMAN PALLADINO: Or are they driven?

17 COMMISSIONER AHEARNE: No. It is trying to -- if
18 on our final judgment -- I can see us at some stage drafting
19 an order and part of it is going to speak to, in some sense,
20 the will of Congress, the intent of Congress. In the case
21 of the executive, it is very easy. In the final analysis
22 there is one person who speaks for the executive branch. So
23 that is fairly clear.

24 I am at the moment trying to grope with how do we
25 decide if the Congress is speaking on this issue, currently

1 it is not clear to me how to decide what that speech is,
2 what that sense of Congress is.

3 CHAIRMAN PALLADINO: Well, again, I think it would
4 be valuable to look at the legislative history and see what
5 words and how they are used in that history and that might
6 help us in our decision.

7 MR. BICKWIT: Mr. Chairman, one further matter you
8 left unresolved is whether you are asking for comment from
9 the public or comment from the parties.

10 CHAIRMAN PALLADINO: I would propose that it be
11 the parties, although the Applicant has suggested the
12 public. I would suggest it be the parties. And I do think
13 we will want to get comments from any government agencies
14 that are in the process. And I would leave it at that.

15 COMMISSIONER GILINSKY: Well, I envisaged us
16 directing questions at the parties, not only at the
17 Applicant. And I suppose if anyone else writes in, we are
18 not going to throw the response out, we are certainly going
19 to read it.

20 CHAIRMAN PALLADINO: Well, I would want
21 specifically to make sure the parties are invited to
22 comment, and I would like to make sure that any government
23 agency that has a role in this matter would be permitted to
24 comment. But I left the word "public" in there because that
25 was the suggestion of the Applicant.

1 But is it the sense of the Commission that they
2 would like to address the invitation to the parties? Len?

3 MR. BICKWIT: We have got some legal research in
4 progress on whether confining it to the parties creates any
5 problems. We do not believe it does, but we have not
6 finished that research. If the Commission wants to confine
7 it to the parties and we ultimately come to the conclusion
8 that it would be safer to expand it to the public, then we
9 will make that known and maybe will reconsider.

10 CHAIRMAN PALLADINO: Well, rather than take a
11 formal vote, let me find out how the sense is. Everything
12 else being equal so far as the law is concerned, is there a
13 preference for parties?

14 COMMISSIONER BRADFORD: There is on my part.

15 CHAIRMAN PALLADINO: How about yours?

16 COMMISSIONER GILINSKY: Well, as I said --

17 CHAIRMAN PALLADINO: Subject to the input.

18 COMMISSIONER GILINSKY: Asking questions of the
19 participants.

20 CHAIRMAN PALLADINO: I am not excluding asking
21 those questions.

22 COMMISSIONER GILINSKY: No, no. I understand.
23 That is what I see that first stage as, getting the
24 responses. So I would direct it to the parties, too.

25 COMMISSIONER ROBERTS: We would direct it to the

1 public to cure the possible problem Len is talking about.

2 CHAIRMAN PALLADINO: If there is a possible
3 problem.

4 COMMISSIONER GILINSKY: We will turn around.

5 COMMISSIONER AHEARNE: Joe, when you say address
6 it to the parties, what would you do with material that
7 comes in? As Vic says, people can still write in. What
8 would you do with that information?

9 COMMISSIONER BRADFORD: Well, as long as it is not
10 part of the proceeding, we can obviously read whatever we
11 get. The difference is whether we get everybody all excited
12 and fired up to comment, as against --

13 CHAIRMAN PALLADINO: My own feeling was not that
14 strong. That is why I left "public" in there. My slight
15 preference was for parties. But if you have interested
16 public members that want to comment, I would certainly take
17 into account their comments.

18 COMMISSIONER AHEARNE: Len, when we reach our
19 decision on this, what kind of a status does all this
20 information have that comes in? Is this a decision that is
21 to be linked to that information? Is it an on-the-record
22 decision?

23 MR. BICKWIT: I think you would have to establish
24 the record that what was the basis for your decision. I
25 think there is a very good chance that whatever decision you

1 reach would want to be litigated, and you would want a
2 record that was adequate for judicial review.

3 COMMISSIONER AHEARNE: I guess, on balance, we
4 will focus the question, but we might as well just ask the
5 public, and then you have got everything wrapped up.

6 COMMISSIONER BRADFORD: Well, let us see, does
7 that mean you have to start building Federal Register
8 publication times into this?

9 CHAIRMAN PALLADINO: I guess I am going to defer
10 my vote until I hear what the legal counsel has after
11 research. So you have raised the question. We have not
12 answered it. But, in part, because you indicated you may
13 have some more information to supply us.

14 COMMISSIONER GILINSKY: Let us see, Len, if this
15 is not part of the adjudication, how could that be a
16 problem?

17 MR. BICKWIT: That is the problem, that this is a
18 completely separate matter. If this is a completely
19 separate matter from the adjudication, then why are we
20 asking for comment only from the parties to that
21 adjudication?

22 CHAIRMAN PALLADINO: We will await your research.

23 COMMISSIONER GILINSKY: What is the reason?

24 MR. BICKWIT: I do not know what your reasoning
25 is. I was hoping it would not go that way, so we could

1 avoid the problem.

2 CHAIRMAN PALLADINO: Well, if it is going to avoid
3 the problem, having heard your last comment, I would tend to
4 lean more toward the public comment.

5 COMMISSIONER BRADFORD: It is not in my interest
6 to do so. But let me counsel you by saying that if the
7 reason you are doing this is to avoid the legal problem, you
8 are not going to avoid --

9 CHAIRMAN PALLADINO: Yes, you are still going to
10 give us the research. I am not counting this as a final
11 vote.

12 Okay, are there any other issues that we should
13 address on this matter?

14 (No response.)

15 CHAIRMAN PALLADINO: Okay. Thank you all very
16 much for coming. And we stand adjourned.

17 (Whereupon, at 12:35 p.m., the Commission was
18 adjourned.)

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NUCLEAR REGULATORY COMMISSION

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

in the matter of: ORAL PRESENTATIONS ON CRBR - PUBLIC MEETING

Date of Proceeding: December 16, 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.

Jane W. Beach

Official Reporter (Typed)

Jane W. Beach

Official Reporter (Signature)