

ORIGINAL

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

In the matter of:

COMMISSION MEETING

Discussion/Possible Vote on
Final Rule on Backfitting

(Public Meeting)

Docket No.

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1 UNITED STATES OF AMERICA
2 NUCLEAR REGULATORY COMMISSION
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5 DISCUSSION/POSSIBLE VOTE ON FINAL RULE ON BACKFITTING

6 Public Meeting
7

8 Room 1130

9 1717 H Street, N.W.

10 Washington, D.C. 20036
11

12 Wednesday, June 26, 1985

13 The Commission met in public session at 2:00 p.m.,
14 pursuant to notice, Nunzio J. Palladino, Chairman of the
15 Commission, presiding.

16 COMMISSIONERS PRESENT:

17 Nunzio J. Palladino, Chairman of the Commission

18 Thomas M. Roberts, Commissioner

19 James K. Asselstine, Commissioner

20 Frederick M. Bernthal, Commissioner

21 Lando W. Zech, Jr., Commissioner
22
23
24
25

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2 STAFF AND PRESENTERS SEATED AT COMMISSION TABLE:

3

S. CHILK

4

W. DIRCKS

5

M. MALSCH

6

J. TOURTELLOTTE

7

V. STELLO

8

9 AUDIENCE SPEAKERS:

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H. THOMPSON

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P R O C E E D I N G S

CHAIRMAN PALLADINO: Good afternoon ladies and gentlemen. This afternoon's meeting is for the purpose of discussing a draft final rule on backfitting.

The Commission issued a policy statement on September 22, 1983 in which it stated that it had completed initial review of NRC requirements of staff practices for backfitting and had concluded that existing backfitting regulations and past staff practices did not adequately identify and justify proposed new requirements.

The Commission stated that among other things it would initiate a rulemaking to replace the existing backfitting regulation with measures for long term management of the backfitting process.

The draft final rule that is before the Commission today is the product of a rulemaking process which was initiated by a Notice of Proposed Rulemaking in November of 1984 after publication of an Advanced Notice of Proposed Rulemaking and consideration of public comments.

I will ask Jim Tourtellotte, the chairman of the Regulatory Reform Task Force, to summarize the final draft rule on backfitting. I would also ask that he relate the views of the task force as well as summarize their activities on the draft final rule.

Thereafter, I suggest we hear from the NRC staff

1 which will carry the burden of implementing any rule on
2 backfitting. Staff comments might include staff views on the
3 draft final rule as well as the activities it anticipates for
4 implementing the rule.

5 I should also mention that I met with the members of
6 the Regulatory Reform Senior Advisory Group on June 21st.
7 While the group had no overriding objections with regard to
8 the draft bill, it did address and comment on one item which I
9 believe is worth having Jim Tourtellotte highlight during his
10 presentation.

11 Following our discussions, I would like to obtain at
12 least a preliminary indication of Commissioner positions on
13 the draft rule. Whether or not to call for a formal vote
14 today will depend on the comments received during the
15 discussion and the Commission's views on calling for a vote.

16 If we do not vote today, I suggest that we plan to
17 affirm in a public session our notation votes which might also
18 make specific comments on the details of the draft final rule
19 and accompanying statement of considerations.

20 Before we begin, do other Commissioners have opening
21 remarks?

22 COMMISSIONER ASSELSTINE: I have a procedural
23 question, I guess. I had hoped that before the meeting
24 although I guess with the lateness of the paper it was not
25 possible, that we would have gotten a document from the staff

1 indicating their position on this or if staff had differences
2 on the task force's proposal what those differences were, what
3 the basis for the differences or suggested modifications are
4 and then get the task force's comments on those.

5 If the staff in fact has some comments or concerns
6 on the task force proposed final rule, I for one I think would
7 like to see apart from the preliminary discussion we have at
8 the meeting today both a paper from the staff that lays those
9 out and justifications for them and then a paper from the task
10 force that responds to them.

11 CHAIRMAN PALLADINO: I can appreciate the
12 desirability of doing that. I understand that the staff
13 comments were considered by the task force. Some were
14 accepted. Some were not. The staff is prepared, I believe,
15 to put forth any of those that were not accepted for our
16 consideration.

17 But I do agree that a paper would be helpful and if
18 we so desire, we can have it after this meeting.

19 COMMISSIONER ASSELSTINE: All right.

20 CHAIRMAN PALLADINO: Any other comments?

21 COMMISSIONER BERNTHAL: I would just comment that I
22 think I agree at least in principle with what Jim has said for
23 different reasons perhaps. How many months has it been since
24 we talked about this issue?

25 CHAIRMAN PALLADINO: It depends on where you want to

1 start.

2 (Laughter.)

3 COMMISSIONER BERNTHAL: I mean, how many months has
4 it been before this Commission has sat here at this table and
5 talked about the backfit issue?

6 CHAIRMAN PALLADINO: I will ask SECY to check it.

7 COMMISSIONER ASSELSTINE: A good while but I think
8 the last Commission meeting was before the proposed rule was
9 issued for comment.

10 COMMISSIONER BERNTHAL: That is my recollection.

11 COMMISSIONER ASSELSTINE: The comment period closed
12 sometime ago.

13 COMMISSIONER BERNTHAL: I don't know about the rest
14 of you guys, but when I get a paper on June 19th on an issue
15 that we have not sat and seriously discussed for months and
16 months and months, I am just not smart enough to remember
17 everything that we talked about last time, and I am not
18 proposing to reach a final conclusion based on a paper that I
19 have had a couple of days to look at on an issue that really
20 is terribly important.

21 I think the Commission owes itself at least a modest
22 period of time now and if we need to have more than one
23 meeting so that we can all be brought back up to speed on what
24 the fundamental issues are that are at stake here.

25 COMMISSIONER ASSELSTINE: I think that is a very

1 good point.

2 CHAIRMAN PALLADINO: I have no objection to that but
3 I will note that the paper, I think, came on June 19th and
4 that meets our seven day rule. However, if we need more time
5 we will take the time.

6 COMMISSIONER BERNTHAL: Yes. Backfits are awfully
7 important though and I think we should proceed with some
8 deliberation in both senses of the word.

9 CHAIRMAN PALLADINO: All right. Nobody has
10 suggested that we shouldn't do that so I say if we need more
11 time, we will take more time. All right? Any other comments?

12 (No response.)

13 CHAIRMAN PALLADINO: Jim, would you go ahead?

14 MR. TOURTELLOTTE: Mr. Chairman, I suppose that if I
15 held a loftier position in government I might start out by
16 saying, "Here we go again."

17 (Laughter.)

18 MR. TOURTELLOTTE: But since I don't, I won't.

19 I would like to say though by way of background
20 information and to some extent it is what I intended to say
21 but it is also responsive to what Jim had expressed as his
22 concern earlier and that is that there has been a considerable
23 effort here on the part of both the task force and the staff
24 to work out a paper which was acceptable to both sides and for
25 the most part, there has been a sort of an integration of the

1 ideas of both the staff and the task force over the period of
2 the past couple of months.

3 As indicated in my cover paper, the SECY cover
4 paper, I reviewed the comments and presented a formal paper to
5 the task force itself for its consideration and to the EDO for
6 consideration by the staff on April 8 of this year.

7 The EDO worked on that. The staff worked on that
8 and they got papers back to us in mid-May and again in
9 late-May. A good many of the suggestions that were made by
10 the staff were incorporated into the paper and were considered
11 by the staff force after May 28 up through and including June
12 19th.

13 Right before the close of the time when the paper
14 was written, we had meetings with the staff and there were a
15 couple of areas where there were some disagreements that I
16 think probably are at least perhaps in the mind of the staff
17 were substantial and in the minds of the task force as well
18 but the task force made its decision on the basis of a
19 majority vote as to which way they would go and there were
20 some things that we decided were best not to include in the
21 rule for one reason or another.

22 But it was an effort that was, I think, conducted in
23 a spirit of trying to work these things out in a way that
24 would take the concerns of all sides and make a workable rule
25 and I think we have come up with a rule which is a vast

1 improvement over the rule even that went out for notice.

2 The paper itself for purposes of information is the
3 first 21 pages are simply notation of the comments that have
4 been made and a summarization of those comments.

5 Pages 21 through 24 briefly states what we propose
6 to be the Commission on some of those comments. Some of the
7 other comments are dealt with more directly in the rule and
8 the description of the rule.

9 There is also a very important matter of costs and
10 how costs would be considered in the application of the
11 backfit rule and that is on pages 24 through 26.

12 Then there is a description of the rule, statement
13 of considerations type of description, that elaborates on what
14 the rule means and how it is intended to be carried out. Then
15 the rule itself or the rule changes themselves are
16 incorporated in pages 36 through 41.

17 I would start by referring to the rule itself,
18 50.109 which is really at the heart of all of the changes.
19 There are changes proposed to 50.54(f) as you know and 2.204
20 and some change to Appendix D, as well, but those changes are
21 all conforming changes for the most part and relate in some
22 way to the 50.109.

23 When we started to review 50.109 in the task force,
24 the task force generally felt I believe that the way the
25 definition was set out and for that matter the organization of

1 the rule as set out in the Notice of Proposed Rulemaking was a
2 little bit confusing. So the first thing that we attempted to
3 do was to eliminate some of that confusion.

4 As you may recall, the noticed rule put the standard
5 in the first paragraph and then put the definition after the
6 standard and what we did was rearrange that. We put the
7 definition first. The second thing we did was in subparagraph
8 (2) is state clearly and succinctly--

9 CHAIRMAN PALLADINO: What page are you on now?

10 MR. TOURTELLOTTE: Page 38. -- is to state clearly
11 and succinctly that a documented analysis was required for
12 backfits. Subparagraph (3) states the standard and
13 subparagraph (4) states what the exceptions to the rule would
14 be.

15 Going back to page 37 and the definition, the
16 definition as it originally was proposed referred to the
17 backfitting as the imposition of regulatory requirements and
18 the comments that were received to a great extent were
19 critical of that because it was said that regulatory
20 requirements was only the cause and not the effect of
21 backfitting and that there should be a definition described in
22 terms of effect rather than in cause.

23 The way it was presented to the task force and the
24 task force seemed to agree was that there is no reason why
25 both cause and effect cannot be in the definition and such a

1 definition was fashioned and that is what is here today.

2 As you will notice, the first part of that
3 definition refers to modifications or additions to systems,
4 structures, components, designs, procedures or organization of
5 facilities. The second part of it which is the cause part,
6 "any of which may result from a new or amended provision in
7 the Commission rules or the imposition of a regulatory staff
8 position interpreting the Commission rules that is either new
9 or different from a previously applicable staff position."

10 We went through two or three different iterations on
11 that but it was pointed out by the staff that it is not just
12 the rules or orders that might cause a backfit, but rather
13 interpretations of rules where the rules themselves are not
14 clear.

15 So that part of the definition, I think, was
16 improved by the comments that we received by the staff.

17 The time elements that are listed on page 38 are the
18 same as the ones that went out in the Notice of Proposed
19 Rulemaking with the exception of number (4) and it became
20 noticeable to someone that we had failed to include the time
21 factors for standardized designs. So that was added.

22 Subparagraph number (2), as I have previously
23 stated, is a succinct statement that where a backfit is
24 involved, a systematic and documented analysis is to be used
25 to evaluate that.

1 The third paragraph which is the standard is taken
2 out of the Notice of Proposed Rulemaking just as the standard
3 was stated there. There are no changes to that standard. It
4 is set out in a separate paragraph again for clarity.

5 The fourth paragraph which appears on page 39 is the
6 item which you referred to in your opening remarks,
7 Mr. Chairman, as being an area where there was some difference
8 that I think probably deserves the consideration of the
9 Commission and further discussion.

10 What we attempted to do to begin with, the "(4) a
11 and b," someone pointed out should really be re-lettered "(4)
12 (i) and (ii)." So if you could make that change, I will make
13 reference to them in that way.

14 Subparagraph (4)(i) was actually originally a part
15 of the original rule and would have been subparagraph (b) of
16 the original rule and that is that it is not stated precisely
17 the same way but the idea that backfit rule does not apply in
18 compliance matters really was a part of the original rule
19 itself and also was part of the rule that we retained when we
20 went out for Notice of Proposed Rulemaking.

21 So there isn't anything in the concept of exempting
22 or excluding compliance matters from application to the
23 backfit rule.

24 The second point there, (ii), however, was a matter
25 which was raised during the course of comments. Actually, it

1 had been raised in Commission discussions as well, that where
2 the Commission is attempting to assure that there is a level
3 of safety at a plant that is consistent with the standard of
4 undue risk that the backfit rule in that case should not be
5 applied to requiring an analysis or the use of the standard
6 prior to the time that that backfit is imposed.

7 There was a difference of opinion that developed
8 between the task force majority and the staff itself in that
9 the staff would strike the word "modification" as it is set
10 there and would substitute the words "an immediately effective
11 regulatory action."

12 The reason for that and Vic Stello is sitting here
13 and perhaps he can articulate it more carefully if I miss
14 this, but the idea is that the modification itself or a
15 backfit rather should be analyzed if there is time to analyze
16 it and the only time that we would not have time to analyze it
17 is if immediately effective regulatory action were required.

18 The argument on the other side of that is that if
19 you say that you are only going to apply this exception in an
20 immediately effective circumstances or in emergency
21 circumstances, then it is going to make it more difficult for
22 the staff to require information under 50.54(f) and there is a
23 counter argument to that.

24 The counter argument to that is no, under 50.54(f)
25 if there is any request that is made that is within the

1 licensing basis of the plant, then the rule is not going to
2 apply anyway and if it is made outside the licensing basis of
3 the plant, then there should be an analysis of some kind or an
4 evaluation that will justify that modification or requesting
5 that information.

6 There is another argument that says keep
7 modification the way it is as well. As you will notice in the
8 preamble to these exceptions being stated, it says that the
9 analysis is not required and the standard does not apply where
10 the staff finds and declares with appropriate documentation
11 for its finding that this modification is necessary and it
12 goes on to say in the closing line of that subparagraph that
13 such documentation shall include a statement of the objectives
14 of and reasons for the modification and the basis for invoking
15 the exception.

16 So the feeling is that even with the language the
17 way it is that the potential for arbitrary and capricious
18 action on the part of someone in the staff or the potential
19 for abuse of the exception is greatly minimized.

20 This is a matter I think which the Commission should
21 discuss until it is satisfied as to which way it will go.
22 Because we presented this paper as a task force paper, I did
23 not include those other words in there as an alternative, but
24 I did know that I would discuss it with you because I think it
25 is a key point.

1 There may be one or two other differences which Vic
2 Stello will want to discuss but I think that is probably one
3 of the most important ones.

4 The rule after the exceptions are set out there,
5 subparagraph (b) is simply the grandfather clause. It says
6 that subparagraph (a) does not apply to backfits imposed prior
7 to the effective date of this rule.

8 Subparagraph (c) sets out the different factors
9 which would be considered as appropriate in the staff's
10 evaluation. I would point out that there are some words which
11 the task force inserted in this subparagraph that is a little
12 bit different from the rule as it went out but it also perhaps
13 gives greater flexibility to the staff in applying the rule.

14 That is down at about line four under (c). It says,
15 "... and in addition will consider information available
16 concerning such of the following factors as may be appropriate
17 and any other information relevant and material to the
18 proposed backfit."

19 So there is an opportunity for the staff to say
20 within certain reasonable bounds what of these might be
21 appropriate in some cases and in some cases, they may not be
22 appropriate.

23 On page 40, under (d)--

24 COMMISSIONER ASSELSTINE: And they are not all
25 inclusive, I take it, as well?

1 MR. TOURTELLOTTE: These are not all inclusive.
2 That is right. They may decide in setting up, for instance,
3 manual chapter, they may decide to consider other things.

4 Subparagraph (d) on page 40 states again quite
5 clearly, "No licensing action will be withheld during the
6 pendency of backfit analyses required by the Commission's
7 rules."

8 Again, if you go back to the general concept that
9 what is being required is something that is beyond the current
10 licensing basis of the plant and the current licensing basis
11 of the plant is presumed to insure the public health and
12 safety, the idea of this subparagraph is to assure that
13 licensing actions go on in their ordinary course of business
14 pending the backfit analysis and that backfit analysis are not
15 used as a method of holding up licensing actions.

16 Finally, subparagraph (e) places the responsibility
17 for implementation of the backfit rule and the analyses
18 required, places that responsibility with the Executive
19 Director for Operations or his designees. That is pretty much
20 consistent with what went out in the original rule.

21 The other parts of the rulemaking are 50.54(f) and
22 Appendix D and 2.204. They simply make reference to 50.109 or
23 50.54(f) as it may apply to information requests and 50.54(f)
24 includes a provision that says if an information request
25 relates to a backfit for which analyses is required then such

1 a request must be evaluated prior to its issuance to assure
2 that it is justified in view of the potential safety
3 significance to be addressed.

4 CHAIRMAN PALLADINO: What page are you reading from?

5 MR. TOURTELLOTTE: Page 37.

6 CHAIRMAN PALLADINO: All right.

7 MR. TOURTELLOTTE: Section 50.54(f) is on pages 36
8 and 37.

9 CHAIRMAN PALLADINO: All right. Thank you.

10 MR. TOURTELLOTTE: Now there is another difference
11 that came up between the task force and the staff relative to
12 50.54(f) and that suggestion was made to the task force and
13 the task force considered it and they rejected it but it is
14 also a matter which I think the Commission may want to
15 consider and it is a matter which I am certain that Vic Stello
16 will want to address.

17 CHAIRMAN PALLADINO: What was the matter?

18 MR. TOURTELLOTTE: The staff suggestion relative to
19 the sentence that begins, the first full sentence at the top
20 of page 37, line three, where it starts, "Each information
21 request..."

22 How they would have that read would be and these
23 words do not appear there, "Except for information sought to
24 verify licensee compliance with current licensing basis for
25 that facility, each information request..." and then they

1 would strike the phrase that says, "which relates to a backfit
2 for which analysis is required under 50.109(a)." So after the
3 word "request," they would strike everything down to
4 "50.109(a)."

5 COMMISSIONER ASSELSTINE: Who is they?

6 MR. TOURTELLOTTE: The staff. Let me read it for
7 you the way the staff would have that sentence read. "Except
8 for information sought to verify licensee compliance with the
9 current licensing basis for that facility, each information
10 request must be evaluated prior to issuance to ensure that the
11 burden to be imposed on respondents is justified in view of
12 the potential safety significance of the issue to be addressed
13 in the requested information."

14 So I think that, too, is an exception that was taken
15 to the task force approach and frankly, it was an oversight of
16 mine. I had not really considered that prior to this time
17 until I talked with Vic Stello right before the meeting.

18 I think that is something that he will want to
19 discuss and he probably will want to discuss with you as well
20 the proposed changes over here on page 39 under (4)(ii).

21 COMMISSIONER BERNTHAL: Sorry, Jim. Tell me again
22 exactly what you are striking on page 37.

23 CHAIRMAN PALLADINO: I was going to suggest, do you
24 have it written out so that we can have it in front of us?

25 MR. TOURTELLOTTE: We could xerox this.

1 CHAIRMAN PALLADINO: If you could xerox this, it
2 would be helpful.

3 COMMISSIONER ASSELSTINE: I think this points up the
4 kind of concern I had about trying to follow what is going on
5 here.

6 CHAIRMAN PALLADINO: If we get that, that will
7 help. Did you have anything that would help on following the
8 other changes?

9 MR. TOURTELLOTTE: Yes. I had also some possible
10 word changes.

11 CHAIRMAN PALLADINO: This is for the other one?

12 MR. TOURTELLOTTE: Yes. These are what I have just
13 discussed.

14 CHAIRMAN PALLADINO: I appreciate that.

15 MR. TOURTELLOTTE: I might add, since I look at
16 these possible word changes, I notice that under subparagraph
17 (2) it also came up, and this came up during the course of the
18 senior advisory group meeting as you may recall, Mr. Chairman,
19 that the rule as proposed here left out something that we had
20 in the Notice of Proposed Rulemaking and that is there would
21 be an after-the-fact analysis for backfits imposed under
22 emergency conditions.

23 That was left out because the staff wanted it left
24 out and the task force agreed that it would be left out of the
25 rule. However, during the course of discussions and before

1 the senior advisory group it was suggested by someone to be
2 put back in there. So it is put in there solely to focus your
3 attention on the fact that that difference does exist.

4 CHAIRMAN PALLADINO: Jim, I am having trouble with
5 the one that says proposed word changes and it looks like it
6 starts on page 38, is that right, just to put it in
7 perspective?

8 MR. TOURTELLOTTE: Yes.

9 CHAIRMAN PALLADINO: Then it goes on to page 39 and
10 then -- oh, I see, that is (i) and (ii).

11 COMMISSIONER ASSELSTINE: Whose are these?

12 CHAIRMAN PALLADINO: Yes, now whose are these?

13 MR. TOURTELLOTTE: These are the changes I just
14 discussed.

15 COMMISSIONER ASSELSTINE: These are yours?

16 MR. TOURTELLOTTE: Well, partially. Actually some
17 of these word changes came up during the course of discussions
18 both at the task force -- after we met with the staff and
19 after I met with the senior advisory group, I met again with
20 the task force and, for instance, the wording at 39, to try to
21 make it clearer that it wouldn't be -- in order to justify or
22 give greater support to leaving (ii) the way it was, it was
23 suggested that you use the words "documented evaluation"
24 instead of "documentation" because it implies that more is
25 going to be done than simply shoveling in some pieces of

1 paper, that there would be some well-considered action that
2 would be taken.

3 The modification under (i), changing the word
4 "backfit" to "modification" would probably be appropriate
5 because under the terms of the definition of backfitting,
6 under 50.109, a change for compliance really would not be a
7 backfit. It would be a modification but it would not be a
8 backfit.

9 Then under (ii) what you are seeing there is a
10 change that would accommodate the staff's different wording if
11 you were to decide that that was the change you were going to
12 make and then the last paragraph, documented evaluation for
13 the same reason as it was substituted for documentation.

14 COMMISSIONER ASSELSTINE: These, I take it, have not
15 been approved by the task force?

16 MR. TOURTELLOTTE: That is right. They are not
17 approved by the task force and they are only presented here
18 because I knew that the staff was going to be taking the
19 position on (ii) that it is going to take and what I tried to
20 do was say, "Okay, if you want to change the rule consistent
21 with what the staff wants on that, this is the way you can
22 change it."

23 CHAIRMAN PALLADINO: Maybe I can add a point of
24 perspective. It is my understanding that the task force
25 supports what was in the basic document.

1 COMMISSIONER ASSELSTINE: All right. So they
2 reviewed these and rejected them.

3 CHAIRMAN PALLADINO: I don't know. Let me just say
4 what I know and that is that the task force supports what is
5 in the document.

6 COMMISSIONER ASSELSTINE: All right.

7 CHAIRMAN PALLADINO: These proposed changes evolved
8 or it was Jim's effort to try to accommodate some of the
9 comments that were made in the meeting of the senior advisory
10 group. So he was performing a service on behalf of at least
11 the senior advisory group or that part of the senior advisory
12 group that was pushing this point.

13 So we have two items, that one for page 38 and 39
14 and then the one change that was called to our attention on
15 page 37. These are the two so far. Maybe they are the only
16 two. All right.

17 MR. TOURTELLOTTE: Beyond that, I don't really think
18 there is a whole lot to discuss about the rule. In terms of
19 what the rule means, as I indicated the description of the
20 rule starts on page 26 and goes through 34 and I would assume
21 that to some extent you might say it starts on 24 as well
22 because there is the consideration of costs factor which is a
23 very important principle.

24 The business on 24, 25 and 26, I would say however,
25 I believe, on the basis of the conversations we had the other

1 day at the senior advisory group that both legal offices agree
2 that this is an accurate description of the cost
3 considerations factor as it applies to this rule and that the
4 cost element is being properly considered if you are going to
5 have it considered in conjunction with this rule. I believe
6 that accurately reflects that.

7 What I am saying is that I believe both legal
8 offices have signed off on that part of the rulemaking and the
9 statement of considerations. I think that is important.

10 CHAIRMAN PALLADINO: I wonder if OGC has any comment
11 on that or not?

12 MR. MALSCH: I think that is true. Although if you
13 made one of the changes suggested to paragraph (4), that would
14 no longer be true.

15 CHAIRMAN PALLADINO: Which is that?

16 COMMISSIONER ASSELSTINE: That is (ii).

17 MR. MALSCH: If you limited the exclusion in (ii) to
18 emergency situations, an analysis of the role of costs in the
19 rule would no longer support the rule.

20 COMMISSIONER ASSELSTINE: Correct.

21 MR. MALSCH: You would have to do some additional
22 analyses.

23 COMMISSIONER ASSELSTINE: That's right.

24 MR. TOURTELLOTTE: Why is that?

25 MR. MALSCH: You would be saying that safety cost

1 trade-offs are appropriate even in deciding in non-emergency
2 situations what is undue risk to the public health and safety
3 which is something you disclaimed doing in the analysis that
4 supports the rule.

5 COMMISSIONER ASSELSTINE: That's right.

6 CHAIRMAN PALLADINO: But that is not so. It says
7 the factors may include cost. When you are doing undue risk,
8 you shouldn't include cost except insofar as costs might
9 affect the alternative you picked to meet the undue risk.

10 MR. MALSCH: That's true in which case I think
11 though the rule could be a little bit misleading because if
12 you are going to read the listing of the factors in that
13 fashion, there is no need for any paragraph (4) at all.

14 CHAIRMAN PALLADINO: That is why my comment at the
15 meeting was why don't we say that for determining no undue
16 risk you don't consider risk except perhaps to the extent that
17 costs may enter into the selection of the approach. Somehow,
18 I still think that would be a valuable thing to put in there
19 somewhere.

20 MR. MALSCH: I think that is a useful addition.

21 MR. TOURTELLOTTE: I certainly don't have any
22 difficulty with that but I would point out the words that the
23 task force added--

24 CHAIRMAN PALLADINO: At what page

25 MR. TOURTELLOTTE: On page 39 at the bottom of the

1 page, what they really say is "such of the following factors
2 as may be appropriate will be considered." Consequently, if
3 it were not legally appropriate to consider cost, then those
4 costs would not be considered and that is by definition of the
5 rule itself.

6 Also, on pages 24 and 25 which is the later
7 statement with which I agree, it is stated in there however
8 that where there are alternatives for achieving the
9 improvements which have different associated costs, such costs
10 may be considered.

11 CHAIRMAN PALLADINO: Where are you?

12 MR. TOURTELLOTTE: The very last line on page 24 and
13 the top of page 25.

14 COMMISSIONER ASSELSTINE: But only for the purposes
15 of deciding among alternatives not for purposes of deciding
16 whether to do something else.

17 MR. TOURTELLOTTE: That's true. What I am saying is
18 that if you read what (c) actually says, how (c) actually says
19 you will use these following factors and I guess I disagree
20 although I disagree with what Marty says is that if you change
21 (4)(ii) in the fashion that the staff has suggested that you
22 automatically invalidate the costs analysis section, I don't
23 believe that is true because of the qualifying words in
24 subparagraph (c).

25 You are not saying anywhere that you are going to

1 consider costs as a determining factor of whether to actually
2 put into place a modification that is necessary to assure
3 public health and safety because if it becomes apparent during
4 the course of the analysis that it is required for that
5 purpose then costs will no longer be a factor.

6 CHAIRMAN PALLADINO: I understand that but those are
7 subtleties that escape one on first reading. I would suggest
8 that we somewhere either as a footnote or a parenthesis of
9 wherever indicate that for determination of no undue risk,
10 cost is not a factor except insofar as it applies to the
11 selection of alternatives.

12 That would at least help me. I don't know if it
13 would help the legals.

14 COMMISSIONER ASSELSTINE: Does the standard though
15 even make sense?

16 CHAIRMAN PALLADINO: What page?

17 COMMISSIONER ASSELSTINE: I don't think the standard
18 makes sense either. I guess what I like is the formulation
19 here on page 39 under (4). If you have a judgment that this
20 particular action is necessary to prevent undue risk to the
21 public health and safety, why go through an analysis on the
22 standard or any of this other stuff. If you have that
23 judgment, that is it. You look at alternatives to assure
24 adequate protection of the public health and safety but why go
25 through an analysis that is aimed at looking at all of these

1 other things even setting aside the cost part?

2 I guess I agree with Marty that it is appropriate to
3 leave it under (4) and formulated the way it is in the RRTF
4 proposal.

5 MR. TOURTELLOTTE: Let me say that regarding the use
6 of the standard that if there is something that is necessary
7 to assure that there is no undue risk to the public health and
8 safety, it is going to automatically meet the standard. It
9 will be something that will be necessary. It will be
10 substantial qualitatively if not quantitatively and it will be
11 something that will affect the overall protection of the
12 health and safety.

13 I think as far as having to meet the standard, the
14 standards are going to be met one way or the other if you are
15 going to show that something is necessary to assure there is
16 no undue risk to the public health and safety.

17 CHAIRMAN PALLADINO: Can I make sure I am
18 following? If I read the present page 39 it says that these
19 analyses don't apply in the case of modification necessary to
20 assure that the facility poses no undue risk to the public
21 health and safety.

22 COMMISSIONER ASSELSTINE: Right.

23 CHAIRMAN PALLADINO: Therefore, you don't do that
24 analysis.

25 COMMISSIONER ASSELSTINE: Yes.

1 CHAIRMAN PALLADINO: This modification that was
2 handed out says that the analyses don't apply if an
3 immediately effective regulatory action is necessary to assure
4 that the facility poses no undue risk to the public health and
5 safety.

6 However, it implies to me that if you have time you
7 even do the analysis for this case.

8 COMMISSIONER ASSELSTINE: That's right.

9 CHAIRMAN PALLADINO: The problem with doing the
10 analysis for this case is that it applies that you use cost
11 and that is where I would say that I could go along with the
12 modification, the revision providing it said that in this case
13 of (ii) that costs will not be a factor in these analyses
14 except insofar as they apply to selecting among alternative
15 ways of achieving it.

16 Then I think it would satisfy Marty's need and it
17 would satisfy the other needs.

18 COMMISSIONER ASSELSTINE: Except what would be the
19 objective then of doing the analysis? If you know that it is
20 something that is necessary to assure that the facility poses
21 no undue risk to the public health and safety, I guess I don't
22 see the purpose in doing the analysis.

23 COMMISSIONER ROBERTS: Wait a minute. This is
24 confusing. Are the two of you mixing up analysis with the
25 documented evaluation? You are losing me?

1 COMMISSIONER ASSELSTINE: Yes.

2 CHAIRMAN PALLADINO: Yes, we are.

3 COMMISSIONER ROBERTS: There is a difference.

4 MR. MALSCH: Whatever it would be, it would be to
5 justify the conclusion that in fact this is necessary.

6 COMMISSIONER BERNTHAL: Yes. That is a good point.

7 COMMISSIONER ROBERTS: It is not, the quote "backfit
8 analysis" that is mentioned earlier.

9 MR. MALSCH: I think the difficulty is you really
10 shouldn't read this as an exclusion from requiring them to do
11 something rational and supported by documented analysis. It
12 is merely an exclusion from the requirement to do a particular
13 kind of analysis.

14 COMMISSIONER ASSELSTINE: Exactly.

15 MR. MALSCH: In which costs plays a particular kind
16 of role.

17 COMMISSIONER ASSELSTINE: that's right.

18 COMMISSIONER ROBERTS: I don't think it is hard to
19 differentiate between backfit analysis and documented
20 evaluation.

21 CHAIRMAN PALLADINO: I think you make a good point.

22 COMMISSIONER ROBERTS: Marty, you are shaking your
23 head.

24 MR. MALSCH: No. I have no difficulty with that but
25 if people want to expand on what is meant by documented

1 evaluation, I don't have any problem with that either. I
2 understood the distinction when I read the rule. I had no
3 difficulty with it.

4 COMMISSIONER ASSELSTINE: But for something that is
5 not necessarily an immediately effective action the way this
6 proposal here is set up is you would have to go through the
7 normal backfit analysis.

8 CHAIRMAN PALLADINO: That's right.

9 COMMISSIONER ASSELSTINE: If you bought this as
10 opposed to documented evaluation.

11 CHAIRMAN PALLADINO: That's right.

12 COMMISSIONER ASSELSTINE: Which doesn't make much
13 sense to me. That is what I had problems with, too.

14 CHAIRMAN PALLADINO: I don't know that it doesn't
15 make sense.

16 COMMISSIONER ASSELSTINE: Why would you do it then?

17 CHAIRMAN PALLADINO: To make sure what your
18 intuition tells you is supported.

19 COMMISSIONER ASSELSTINE: But if you have a
20 documented evaluation that is focused on explaining that
21 particular item, it seems to me that does it.

22 CHAIRMAN PALLADINO: No. The documented evaluation
23 does not apply to the thing that is not covered by (ii), does
24 it?

25 COMMISSIONER ASSELSTINE: Sure it does.

1 COMMISSIONER ROBERTS: That is exactly what it
2 applies to.

3 COMMISSIONER ASSELSTINE: That is precisely it.
4 Such documentation shall include a statement of the objectives
5 and reasons for the modification and the basis for invoking
6 the exception. That is under the RRTF proposal.

7 CHAIRMAN PALLADINO: Let me read this.

8 COMMISSIONER ASSELSTINE: I think Tom is right. You
9 have two different kinds of documentation.

10 COMMISSIONER ROBERTS: One is the backfit analysis.

11 COMMISSIONER ASSELSTINE: One is this cost benefit
12 backfit analysis.

13 COMMISSIONER ROBERTS: Which could include cost
14 considerations.

15 COMMISSIONER ASSELSTINE: That's right. It seems to
16 me that you don't want that to apply in cases where the staff
17 can say that this is something that is necessary to assure
18 that the facility poses no undue risk.

19 COMMISSIONER ROBERTS: That is what this is and it
20 is not going to be quote "the backfit analysis" but there is
21 going to be --

22 COMMISSIONER ZECH: A staff position that says you
23 need it.

24 COMMISSIONER ROBERTS: --a statement of the
25 objectives and the reasons for the modification and the basis

1 for invoking the exception. I see nothing unreasonable about
2 that.

3 COMMISSIONER ASSELSTINE: That is what the RRTF
4 proposal does. I don't think that is what this new change
5 does.

6 COMMISSIONER ROBERTS: I don't think they are that
7 dissimilar.

8 MR. TOURTELLOTTE: What is being suggested I think,
9 Tom, is if you change the word from modification to an
10 immediately effective regulatory action, you are actually
11 narrowing the area that you are going to cover by this
12 exception so that everything that formerly -- just any
13 modification whether it was immediately necessary or not was
14 going to be covered by the exception. Now you are only
15 covering a smaller area.

16 So all that is outside that area even though it
17 is a modification that is to assure public health and safety,
18 there has to be an analysis done for it.

19 COMMISSIONER ASSELSTINE: A backfit analysis.

20 MR. TOURTELLOTTE: And it would be a backfit
21 analysis.

22 COMMISSIONER ROBERTS: Not a documented evaluation.

23 MR. TOURTELLOTTE: Not a documented evaluation.

24 COMMISSIONER ROBERTS: I don't think there is any
25 great confusion about that.

1 MR. TOURTELLOTTE: The real problem is in the area
2 of -- I would agree that if you knew immediately that this was
3 necessary to assure that there was no undue risk, chances are
4 you don't really need to analyze it if you really knew that.

5 I would also submit, however, that if you knew that
6 already it would be an emergency situation.

7 COMMISSIONER ASSELSTINE: Not necessarily.

8 MR. TOURTELLOTTE: Number two is if you don't know
9 that for sure, then you have to assume the conclusion that
10 this is, in fact, necessary to assure no undue risk in order
11 to apply the standard. You cannot assume the conclusion.

12 COMMISSIONER ASSELSTINE: That strikes me as "Stop
13 me. Stop me before I can kill again."

14 (Laughter.)

15 MR. TOURTELLOTTE: It is not really that at all.

16 COMMISSIONER ROBERTS: We have been trying to do
17 this for five years.

18 (Laughter.)

19 CHAIRMAN PALLADINO: Is that what we all bargained
20 for?

21 (Laughter.)

22 CHAIRMAN PALLADINO: Go ahead, Jim.

23 MR. TOURTELLOTTE: I am trying to explain what I
24 think the merits of that position are and that is that are
25 probably more cases and indeed, those areas where there is the

1 biggest problem that develops is in the area where people
2 are not certain whether something is necessary to assure that
3 there is no undue risk and in those cases where it is not
4 certain and there is time an analysis should be done and when
5 it is certain your analysis is already done probably and all
6 you have to do is write it down.

7 In any event there is something to be said for the
8 fact that the following factors as may be appropriate are the
9 factors that you consider. So this rule does not mandate that
10 even if you do a backfit analysis that in every circumstance
11 you would have to consider costs.

12 MR. MALSCH: I would disagree with that. The
13 standard requires consideration of costs.

14 COMMISSIONER ASSELSTINE: That's right.

15 MR. MALSCH: The standard itself requires some
16 consideration of costs. It specifically says --

17 MR. TOURTELLOTTE: That it is cost justified.

18 MR. MALSCH: That's right.

19 COMMISSIONER ASSELSTINE: Yes.

20 CHAIRMAN PALLADINO: That is why I asked the
21 question.

22 MR. TOURTELLOTTE: But if you have your little
23 footnote on (4)(ii), that would take care of that.

24 CHAIRMAN PALLADINO: That is why I say if we are
25 going to go with this, I think we need either a footnote or a

1 parenthesis that restates the fact that cost is not a factor
2 in making the no undue risk determination although it may be a
3 factor in evaluating alternative ways of achieving that.

4 COMMISSIONER ASSELSTINE: Let's try to struggle on.

5 CHAIRMAN PALLADINO: I was just trying to make sure
6 we understood it. All right.

7 COMMISSIONER BERNTHAL: There is nothing turgid
8 about this discussion!

9 (Laughter.)

10 CHAIRMAN PALLADINO: Does that cover this one?

11 MR. TOURTELLOTTE: Yes. I have no other comments.

12 COMMISSIONER ASSELSTINE: Are we going to hear from
13 Bill?

14 CHAIRMAN PALLADINO: Yes. Let's hear from Bill or
15 Vic or both.

16 COMMISSIONER ASSELSTINE: Bill, when you talk about
17 the staff's position too, could you tell us which staff it
18 is? Is it you? Is it Vic? Is it NRR? To what extent are
19 there any differences of viewpoint on any of the issues that
20 you think we should know about between those various
21 viewpoints?

22 COMMISSIONER ROBERTS: In forty-five seconds.

23 MR. DIRCKS: On the subject of backfitting?

24 (Laughter.)

25 COMMISSIONER ASSELSTINE: On any subject that you

1 think is significant in this rule.

2 MR. DIRCKS: I must say that this is the first time
3 that I have had the opportunity to talk about backfitting with
4 the Commission in I guess a year and a half and now I know why
5 I have avoided these sessions.

6 (Laughter.)

7 MR. DIRCKS: I go back, I guess, to where I was
8 about two years ago and say what is the issue on backfitting
9 and again I think it is a management issue and not an issue of
10 symbolism.

11 COMMISSIONER ASSELSTINE: Do we need a rule?

12 MR. DIRCKS: To the extent that other attempts have
13 failed to impose some sort of a discipline and formality in
14 the process, we need something.

15 I have looked at the rule and I must say after
16 listening to the legal experts talking here, maybe I have
17 missed something, but I see the rule basically as a procedural
18 requirement, as a framework for decision making. That is how
19 I have looked at the rule.

20 Maybe I have missed some of the nuances in the rule,
21 but I look at it as a framework for decision making.

22 I have looked at the nine factors which have been
23 termed the backfit analysis and almost spoken sometimes as a
24 dirty word or two dirty words. I don't think it really is. I
25 think it is a framework for rational decision making.

1 The issue, I think, is to get some record
2 established of why backfits are being required. I am not one
3 who would say that backfits also belong in an illegal
4 category. I think backfits are necessary when we are dealing
5 with the extent of complexity and the number of operating
6 plants we have today. Backfits will be required.

7 I really see then a need to get someone, a reviewer
8 or manager, to state why he wants a backfit, what he wants the
9 backfit for, what he hopes to achieve with that backfit.

10 I look at costs not so much as a balancing factor,
11 but more as an estimate of the magnitude of the item he is
12 requiring. I think it is a good test of a manager or a
13 reviewer within the staff offices to say that yes, I want this
14 particular backfit and here is my estimate of the costs and
15 why I think it is necessary.

16 I think that is what I look on the backfit analysis
17 to be. I did not look at this rule as some sort of a
18 threshold which has to be reached through some sort of a
19 mathematical calculation.

20 Now to the extent that the legal people say it is a
21 threshold type rule, that I think is the difficulty. I look
22 on it as a management framework, as a framework for decision
23 making much along the lines of my old National Environmental
24 Policy Act. That was an action forcing mechanism to get
25 people to make rational decisions.

1 I thought this rule was attempting to do that. I
2 think that people should be required to analyze and put down
3 on a piece of paper and justify not in multi-volume form but
4 some justification why a backfit is required.

5 The two areas that were discussed, one I think in
6 normal operational terms, I don't think if a situation arises
7 where you have to take corrective action you should be
8 required to go through much of a justification for that.

9 I think you should have a reason in mind but if the
10 reason is to stop a particular safety hazard, then I think the
11 staff should be able to issue an order for a shutdown and a
12 breathing spell.

13 Now once the staff then determines to backfit, to
14 put major modifications on a facility maybe to deal with the
15 undue risk that has been discovered, then I think the backfit
16 analysis should come into play. I see it as a two-step
17 process.

18 I think that maybe was behind this immediately
19 justifiable emergency situation, to stop something from
20 happening. The second step, how do we prevent the hazard
21 from continuing, that I look upon as a backfit that would fall
22 under this backfit analysis.

23 CHAIRMAN PALLADINO: Bill, does anything in this
24 rule prevent the staff from stopping a plant? I don't think
25 so.

1 MR. DIRCKS: I am not basing it on what could be
2 challenged in here. If it is necessary to make it explicit
3 that at any time a safety official in the agency sees an
4 emergency situation out there, there should not be any doubt
5 whatsoever he has the authority and responsibility and he
6 should be able to pay the price for it in second-guessing
7 later on. That should be made perfectly clear, that he has
8 the right to step in and stop a hazard from continuing.

9 CHAIRMAN PALLADINO: But he has that right even
10 under this?

11 MR. DIRCKS: He has that right but I think this w.
12 an attempt maybe to reestablish that right. If there is an
13 emergency situation out there, justifications should be made
14 but the action should be taken and that, I think, is needed.

15 Now the question of getting information which was
16 also discussed here, I think whenever an official in the
17 agency needs to get information, the burden should be on
18 letting him get that information but he should be able to
19 justify why he wants that information.

20 I don't see an inspector needing to go through or a
21 regional office needing to go through some sort of an analysis
22 in order to get information to determine whether a plant is
23 within license conditions or not.

24 That should be perfectly clear that he has that
25 authority.

1 To get information which might be termed a fishing
2 expedition, that is at the extreme. Yes, there should be
3 justification of why information is needed and to some extent
4 I would hope some cost factors should be considered not as a
5 balancing but just as an estimate to guide decision making. I
6 thought that was also contained in this.

7 CHAIRMAN PALLADINO: This talks of an evaluation
8 rather than a reason for asking the question and if evaluation
9 means the reason for asking the question, I could live with
10 evaluation but the person he has to satisfy presumably is you
11 based on what is in here.

12 MR. DIRCKS: Essentially, yes. I think that is a
13 point to be established. It says me or my designee. The real
14 benefits of the Commission moving on backfitting in this area
15 is to instill this in the responsible officials within the
16 agency.

17 I don't think it can be policed from the top. I
18 think it has to be a modification from within and again, it is
19 rational decision making you are asking for not sort of
20 knee-jerk, "let's backfit."

21 For years, we have gone through the problem in this
22 agency of many times not even knowing what backfits had been
23 imposed on facilities and for what reasons.

24 COMMISSIONER BERNTHAL: Why are we even dipping into
25 the area here of the circumstance where preservation of public

1 health and safety is at issue since are all clear, I think,
2 that that is not what we are talking about here primarily and
3 we talk about an after-the-fact documented evaluation that
4 presumably demonstrates that it was indeed necessary to carry
5 out an action to protect the public health and safety.

6 That is really almost an entirely other issue it
7 seems to me. I am just wondering whether it is wise even to
8 include that and muddy the principle objective here which is
9 all those other cases where you are making incremental
10 improvements of some kind that need to be justified on the
11 basis of some cost benefit analysis.

12 CHAIRMAN PALLADINO: I think you have to make a
13 statement that it doesn't include this. I think that is what
14 they are trying to do.

15 COMMISSIONER ASSELSTINE: I think it does more than
16 that though.

17 COMMISSIONER BERNTHAL: Exactly.

18 COMMISSIONER ASSELSTINE: That's right.

19 CHAIRMAN PALLADINO: Then we have to look at it
20 carefully.

21 MR. DIRCKS: I think those were the two areas.

22 CHAIRMAN PALLADINO: The only two areas.

23 MR. DIRCKS: In general, you should articulate wh
24 you want to backfit and you should go through some sort of
25 analysis of what you hope that backfit is going to achieve but

1 on the other hand you want to have it made very clear that
2 when a safety official within the agency sees a condition out
3 there, he should be able to step in and stop it.

4 CHAIRMAN PALLADINO: There is a difference between
5 stopping it and saying, "All right, now I want you to fix it
6 and I want you to fix it right now this way" or at least,
7 right now.

8 MR. DIRCKS: I was going to make that point, and
9 then preventing it from happening during the course of normal
10 operation. You stop something and then I guess you would
11 analyze it to assure that the backfit first of all would make
12 sense.

13 There may be several ways to approach the problem
14 and maybe you are putting the bandaid on the wrong lesion.

15 CHAIRMAN PALLADINO: Actually having been discussing
16 this with various people for quite a period of time, I feel
17 pretty good about it because we are down to where we have only
18 two issues and I can see a solution to both of them.

19 COMMISSIONER ASSELSTINE: I am not sure we are down
20 to two issues as far as I am concerned.

21 COMMISSIONER ROBERTS: Your optimism is refreshing.

22 CHAIRMAN PALLADINO: This is a business where you
23 have to have somebody stop the mystic.

24 COMMISSIONER ROBERTS: I am encouraging you.

25 CHAIRMAN PALLADINO: Go ahead. Continue, Bill.

1 MR. DIRCKS: That is what I saw backfit being all
2 these months and I think once it started getting into the
3 language of a rule, maybe I missed some of the finer points
4 as were discussed here today. I think every Commissioner
5 spoke out on this thing and Marty did, too.

6 I can sit and nod my head and agree with each
7 statement because I can see what is driving the issue. It is
8 the frailty of the language when you try to get these
9 principles established.

10 COMMISSIONER ASSELSTINE: If it is essentially a
11 management issue and if when you try to put this down into
12 words you get involved in all of these other complications
13 like are we going to have a standard, what is the standard,
14 when costs are considered and when they aren't, then is a rule
15 the right way to go? Or is building upon the kind of internal
16 direction that the Commission already gave a better way to go
17 in terms of dealing with the issue if it is really as you say
18 a management problem?

19 Part of what concerns me is the question of the
20 standard and what I hear you saying is that is not the
21 important part of this. The important part is the framework
22 for at least a disciplined review of every proposal, a
23 documented review of every proposal. That is what is really
24 needed out of all of this rather than perhaps something as
25 complicated and subject to differing interpretation as this

1 rule may be.

2 COMMISSIONER ZECH: Let me answer that if I may. I
3 think we need a rule. I think backfits and modifications and
4 you can call them all kinds of different things, alterations
5 but it is awfully hard to sort them out and put them in
6 perspective.

7 The whole system in my experience seems to need
8 discipline. There is no question about it. Certain backfits,
9 I think, are absolutely necessary. They have been. They have
10 proved to be the proper thing to do over a period of time. I
11 think though that there have been some that could be called
12 questionable.

13 COMMISSIONER ASSELSTINE: Which ones are those? Can
14 you give me a few examples?

15 COMMISSIONER ZECH: No, not right now but I am sure
16 there are lots of them.

17 There are modifications and there are other
18 modifications. I think the important thing is to realize that
19 what we are trying to do is to operate these plants safely,
20 trying to make good judgment calls. At least it is my
21 observation that in the staff those decisions have been made
22 generally properly.

23 But I do think at least and I can't give you any
24 specific examples but I can sure dig some up, I think, but
25 there have been and perhaps the staff would even agree,

1 modifications that were probably not really necessary.

2 I think from my tender observation from what I have
3 seen here is that I would say that we need a little more
4 completed staff work.

5 An awful lot of good work has gone into this very,
6 very important issue and it is really is important. I think
7 an awful good job has been done on the task force and the
8 staff and I think we are coming close to being able to make a
9 very important decision.

10 I generally agree with what Bill Dircks is stating
11 as his view of whether we need a rule in his words, not to put
12 words in his mouth but as I say, I think we need more
13 discipline to the system.

14 Public health and safety is what we are talking
15 about and I agree with Bill that we ought to be able to take
16 strong action on an engineering judgment if it looks public
17 health and safety is involved. But on lesser decisions than
18 that, analysis is probably appropriate. That helps us
19 discipline the system.

20 So in my view we need a rule in order to discipline
21 our whole backfitting and modification program but more than
22 that and I think that is what Bill has alluded to, too, and I
23 would really agree. More than that, what we really need is
24 the manual changes, the applicable manual chapter changes,
25 revised in my judgment so that the execution of this whole

1 program will really follow out what the rule is intended to
2 do.

3 So I think we need more formality in the form of a
4 rule but I do think that we need execution of a program in a
5 very formal and disciplined way and I think the manual change
6 that would follow this rule is equally important and perhaps
7 even more important than the rule.

8 CHAIRMAN PALLADINO: Actually, work has been going
9 on in parallel on both of them.

10 COMMISSIONER ZECH: I know that. I just want to
11 emphasize that the manual changes in my view is awfully
12 important.

13 CHAIRMAN PALLADINO: Yes. I would also like to
14 stress that there has been a great deal of work on this by a
15 lot of people and it is the first time on backfitting that I
16 have heard unless people are holding back some convergence on
17 a number of very important principles.

18 I think it is remarkable if it is true that the two
19 issues that we had presented to us now are the only ones
20 left. I think this rule is an important one to support and I
21 think we need the rule and I would like to see us resolve any
22 remaining questions and get the rule passed.

23 COMMISSIONER ZECH: I agree with that. I think we
24 should get on with it. I really do. We need to move out but
25 I do think that we still have some loose things to tidy up yet

1 and obviously other Commissioners have other thoughts on it,
2 too.

3 I don't think we are ready right at this moment as
4 far as I am concerned but I think we should move ahead with it
5 as fast as we can in an orderly fashion. It is a very, very
6 important issue. I know it has been going on for many years
7 but I think tremendous progress has been made on the part of
8 the staff and the task force and I, for one, commend them for
9 that.

10 CHAIRMAN PALLADINO: Let me ask a couple of general
11 questions. I don't know if the staff has any more comments.

12 COMMISSIONER ASSELSTINE: I would sort of like to
13 hear Bill's answer to my question.

14 CHAIRMAN PALLADINO: All right. Then I want to see
15 if any of the task force members have any comments they feel
16 they ought to make.

17 COMMISSIONER BERNTHAL: Where is Harold Denton
18 today?

19 MR. DIRCKS: Harold is being represented by Hugh
20 Thompson.

21 MR. THOMPSON: His wife had an operation today.

22 COMMISSIONER BERNTHAL: I see. I didn't mean that
23 in the sense that I thought he ought to be here necessarily.
24 What I meant is that Harold expressed some rather straight
25 forward opinions on this subject late in April and it seems to

1 me that we should listen carefully to our heard of Nuclear
2 Reactor Regulation.

3 MR. DIRCKS: Let me just mention that. I don't wa
4 the Commission to think that I am muzzling Denton. I am sure
5 that everything that I said this everything would be in
6 absolute agreement with what Harold is thinking.

7 I don't think there are any differences in our
8 view. I think Harold is as interested as I am in getting a
9 framework for rational decision making in this important area
10 of the Commission's activities.

11 I think he would also want to say that the safety
12 official would step in and take emergency action where
13 required. I don't think Harold would want to be without
14 restraint be letting information requests be passed on without
15 some review and decision making on the part of the Commission.

16 If Hugh has differences with that, he can say it
17 because he has been close to Harold over the last couple of
18 days but let me answer Jim's question.

19 Jim, it has been around for so many years. This is
20 not the first Commission that has grappled with this issue of
21 backfit. It has been presented in various forms to every
22 Commission that I have served under and that goes back to when
23 Bill Anders was the Chairman of the Agency and we had many
24 sessions on backfitting or ratcheting as it was called.

25 In those days, we were in less public forums but we

1 had lots of heated discussions on this issue. I think the
2 Commission has always been trying to get itself together and
3 say how do we answer this question of backfitting as a
4 Commission.

5 From my own perspective, I would rather see the
6 Commission say something however you see it but a rule is a
7 more formal way that the Commission acts. I would rather have
8 the Commission speaking out on this than have to live as we
9 have lived in saying the staff is sort of wallowing around
10 here and ordering changes without the knowledge and approval
11 of the Commission. I would rather see the Commission speak.

12 COMMISSIONER ROBERTS: Whether that is accurate or
13 not, that is the charge that is made.

14 MR. DIRCKS: That is the charge that is made and
15 think the Commission has been with us on almost every major
16 backfit expedition and I will cite the three major backfits.

17 COMMISSIONER ASSELSTINE: No question about it. the
18 backfitters have been on this side of the table. That is
19 true.

20 MR. DIRCKS: I would rather have the Commission s.
21 "Here is the decision making process for the agency on
22 backfitting." We can supplement it with manual chapters and
23 guidance and we will. But I think it is important for the
24 Commission in a very formal sense to say, "Here is the
25 outline."

1 CHAIRMAN PALLADINO: But still the charges have come
2 with the accusation that oh, this is haphazard. It wasn't a
3 disciplined process where this sets up a disciplined process.
4 If we had been doing a good job in the past, this should
5 result in no exclusion of appropriate backfits.

6 COMMISSIONER ASSELSTINE: Nobody is going to argue
7 against a framework for rational decision making but I think
8 the key question is which elements in this rule are necessary
9 for the framework for rational decision making and which
10 aren't and which have other complications that are associated
11 with them that are likely to create more difficulty or tie the
12 hands of the staff when they need to exercise their public
13 health and safety authority and create difficulties in that
14 way.

15 That, I think, is the fundamental question. It is
16 not whether to have a framework for rational decision making
17 or not. Nobody disagrees with that. The question is what
18 elements are necessary to do that and which ones are
19 mischievous or worse.

20 MR. DIRCKS: I think it is in the interpretation.
21 Reading the language of these nine factors here, I don't see
22 anything wrong with them. I think those are nine very good
23 questions to ask anyone who wants to impose multi-million
24 dollar decisions on anyone. He should be able to lay out the
25 rationale.

1 Where you are saying that there is mischief
2 involved--

3 COMMISSIONER ASSELSTINE: How about the standard?

4 MR. DIRCKS: Could it be a cost benefit standard
5 that you are imposing here?

6 COMMISSIONER ASSELSTINE: That's right.

7 MR. DIRCKS: If you don't reach a right cost bene-
8 ratio, forget about the backfit. I always looked upon that as
9 appropriate or will consider. I did not look at it and maybe
10 I would have been violating your rule right off the bat by not
11 going through an absolute cost benefit balance.

12 COMMISSIONER ASSELSTINE: I would like to ask you
13 before we meet again on this to look specifically at that
14 aspect of it, have Harold look at that aspect of it, and see
15 whether that is a troublesome part of this, whether it has the
16 potential for creating mischief or creating problems or
17 impeding the staff in what they think is necessary.

18 COMMISSIONER BERNTHAL: Bill, it seems to me what
19 you have been saying is that the problem here really has
20 boiled down in most cases and I suspect in the cases that are
21 largely undocumented in many respects and that therefore
22 become a part of folk lore and it is this kind of folk lore
23 that has given momentum to the idea that something has to be
24 done about this backfit situation and I think justifiably so.
25 The problem as you have described it, I noted the

1 use of the word "procedural," that what you are really talking
2 about here is a procedural requirement or amendment or change
3 to our regulations and as I read Harold's memorandum of April
4 30th, a similar flavor runs through that memorandum that
5 suggests that the real questions are maybe three.

6 One is a management question of somehow keeping your
7 people in line and making sure that they are carrying out a
8 rational decision making process and as we all know, it is
9 very easy for some government official to walk in and have an
10 argument with the utility and when push comes to shove, the
11 government official tends to win the argument even if he
12 hasn't necessarily demonstrated on some kind of record that he
13 is right.

14 To that extent perhaps it is partially management.
15 You, yourself, have used the word "procedural." So there is
16 an administrative, procedural flaw here somewhere that may be
17 in part addressed one hopes by the criteria and procedures set
18 up in this proposed rule.

19 Finally, Harold uses the term "definitions" or
20 "defining what is required." If it is a question of
21 understanding definitions and uniform application of
22 definitions, that isn't going to be helped by this rule in
23 many cases it seems to me.

24 Maybe the paperwork that comes out of the analysis
25 will impose a kind of uniform understanding but I guess I am

1 not entirely convinced that we will solve all of the problems
2 this way.

3 It sounds to me like that is what you are saying. I
4 also concur in your comments because we often ask the very
5 same comment if I can make an inappropriate comparison of the
6 Congress saying that you know, you need to say something about
7 this. Sure, we can do it ourselves but it is very important
8 that Congress say something.

9 The comparison is inappropriate but it sounds like
10 what you are saying is that the Commission really ought to say
11 something about this.

12 MR. DIRCKS: I made the analogy with the National
13 Environmental Act. In a way, it is procedural, but in another
14 way, it affected the way decisions came out.

15 There are many times when agencies prior to that Act
16 made all sorts of very valuable and worthwhile decisions in
17 their minds, but they never looked at the consequences of many
18 of those actions in other areas.

19 By forcing agencies and decisionmakers into a mold
20 established by Congress -- it may have been abused with
21 massive tons of paperwork -- but it at least forced agencies
22 into a uniform decisionmaking process that the Congress
23 established.

24 I'm making that analogy to the Commission here. You
25 lay out the framework that you want decisions made under, and

1 we can implement it. We only need implementing guidance and
2 discussion, but then we can implement it.

3 CHAIRMAN PALLADINO: I'd like to make a comment. I
4 reread -- if you call it a standard, page 24 -- maybe that
5 isn't what you call a standard, but it discusses the cost in
6 backfit decisions.

7 It's main thrust is an argument that we have the
8 right to do it under the right circumstances. I don't find
9 that it absolutely requires that we come up to some ratio or
10 that we have a standard that here you go, and here you don't
11 go.

12 I would urge everyone to read it carefully, and
13 maybe there's some addition that needs to be made, but I don't
14 think it imposes a strong cost/benefit standard that says
15 "above this threshold, it's an acceptable backfit; below this
16 one, it isn't."

17 COMMISSIONER BERNTHAL: Well, it can't, can it, Joe?

18 CHAIRMAN PALLADINO: I know.

19 MR. MALSCH: I think you're right. The rule does
20 not impose a cost/benefit ratio requirement. It merely
21 requires that you do an analysis of a particular sort, which
22 in some unspecified manner, left to the judgment of the
23 reviewer, cost is a consideration.

24 COMMISSIONER ASSELSTINE: Other than a substantial
25 increase test.

1 MR. MALSCH: A substantial increase, that's right.

2 COMMISSIONER ASSELSTINE: And if you look at the
3 benefit side in the list of items, which that focuses on
4 offsite releases of radiation and harm to the public.

5 MR. MALSCH: Yes.

6 CHAIRMAN PALLADINO: But it is all part of a
7 disciplined approach to looking at the issue. I would urge
8 that we not give up going with a rule. I would urge that we
9 take advantage of the extensive thinking that's gone on on the
10 part of a lot of people on the Staff and try to make this so
11 it satisfies whatever questions you, as individual
12 Commissioners, may have.

13 But if we were to drop this ball now, I think we
14 would step back ten years.

15 MR. MALSCH: Let me just make one comment. In a
16 sense, if nothing happens with this exercise, we still have a
17 backfit rule. It's existing 50.109.

18 CHAIRMAN PALLADINO: That's right.

19 MR. MALSCH: And so any manual chapter or management
20 instruction or policy statement would need to be measured up
21 against that existing rule, which would cause us some
22 difficulty, because no one has ever been able to figure out
23 what the heck the existing rule means.

24 [Laughter.]

25 MR. MALSCH: So I think you've got a choice of

1 either fixing it up or getting rid of it. I think doing
2 nothing leaves the existing rule in place, which seems to be
3 unsatisfactory to most people.

4 COMMISSIONER ASSELSTINE: I would agree, Joe. I'm
5 not opposed to fixing the rule and finalizing it. But what I
6 do want to understand is what this rule does and see if there
7 is some mischievous or worse elements in it that are subject
8 to misunderstanding, argument, confusion, uncertainty, and if
9 so, make sure that we get those things fixed, make sure that
10 what we have is a framework for rational decisionmaking and no
11 more. I think that's what we need. What we don't need are
12 more problems or actual impediments to the Staff being able to
13 do its legitimate job.

14 COMMISSIONER BERNTHAL: You make a good point,
15 though. The rule is silent on what the real standard is going
16 to be. It's easy to say, "Do a cost/benefit analysis." We
17 don't know what that means yet.

18 And in fact, at some point here in the near future,
19 we're going to be talking about a safety goal, and we're also
20 going to be talking about the very issue that we've been
21 discussing in connection with the severe accident rule or
22 policy statement recently.

23 It's all part of the same issue, and this doesn't
24 say anything about it. Until we address that issue and set
25 the standard through the safety goal and the issue of what we

1 mean by cost/benefit, we'll get a lot of paper, but there will
2 be no standard.

3 CHAIRMAN PALLADINO: But I think this rule does a
4 number of very important things, and it's consistent with some
5 of the things that Bill has said.

6 It took some time for me to discover that the EDO
7 was not even a part of the process of backfitting, and we
8 have, in this rule, given him the responsibility for managing
9 backfitting. And that was a very important step, and I think
10 that's what motivated him to get this manual's chapter activity
11 underway.

12 COMMISSIONER BERNTHAL: The good old days are over,
13 Bill.

14 [Laughter.]

15 CHAIRMAN PALLADINO: Well, I think that's an
16 important step. It does say, look, we want a disciplined way
17 of making decisions. We want an analysis before we go impose
18 it. And the third thing is, yes, you may use cost in
19 considering backfitting, as long as you're not trying to reach
20 the threshold of no undue risk, and if you are, then you don't
21 consider cost except in picking the alternative to achieve it.

22 And I think those are very important principal
23 features.

24 Now the fact that a couple of points get technical
25 in their wording is unfortunate, but nevertheless, I don't

1 think they're so overwhelming that we can't fix it up. As a
2 matter of fact, if we went with the rule the way it is, I
3 think we could come out and live happily and do our job. If
4 we did the way the proposed change is, I think we'd have to
5 make a little bit of modification to make it work, but I think
6 it could be made to work.

7 I am concerned just a little bit about when we say
8 evaluation before you ask for information, because as a design
9 engineer, I remember sometimes wanting information when I just
10 wasn't quite satisfied that something was right. And that's
11 why when I got to that part, I tended to say, well, give me
12 the basis for it -- the basis for it or give me the reason for
13 it. I'd say, if that's the evaluation, then that's fine.
14 And I'm willing to buy evaluation, if that's the will of the
15 Commission. I'd be inclined to maybe change it to "the basis
16 for," but I'm even willing to put a footnote after
17 "evaluation," and say "basis for."

18 But I think we've got a rule that has a number of
19 very important components, and I'm interested in
20 Commissioners' comments or questions, so that these matters
21 can be addressed.

22 I don't know if the Commission wants to hear from
23 anybody else at this point.

24 MR. DIRCKS: May I just clarify the record, though?

25 CHAIRMAN PALLADINO: Yes.

1 MR. DIRCKS: I got a note saying that Harold did not
2 support -- he did suggest that the rule was not needed, and I
3 wanted to get that clear.

4 CHAIRMAN PALLADINO: Well, unfortunately we have a
5 rule.

6 MR. DIRCKS: You would not disagree, I think, on the
7 decisionmaking framework aspect that I talked about.

8 COMMISSIONER ZECH: I would suggest, since we have
9 Vic Stello at the table, maybe Vic would like to say something
10 to us.

11 CHAIRMAN PALLADINO: We'd welcome his comments.

12 COMMISSIONER BERNTHAL: On the other hand --

13 [Laughter.]

14 MR. STELLO: I think I'd rather not, but --

15 [Laughter.]

16 MR. STELLO: The question was asked in terms of
17 what's been said here represents Staff view or EDO views. I
18 at least ought to describe what we've been doing briefly and
19 how we have assured ourselves that we had agreement of the
20 Staff to go forward, and that was in anticipation that perhaps
21 the Commission would get a rule out quickly.

22 Back in February when they sent us some instructions
23 and told the EDO get clicking, we developed a manual chapter,
24 hopefully just to start to move to develop the procedures that
25 would be necessary to effectively manage the backfit process.

1 We developed that manual chapter and have it out in
2 anticipation of identifying where the bugs would be and have
3 it as an interim use document in the meantime.

4 In preparing that document, which incidentally is
5 consistent with the rule that you are now considering -- and I
6 don't believe it would substantially have to change, no matter
7 which way you resolve these smaller issues -- but we did go
8 out and sought to get everyone's agreement. And based on the
9 comments that we've had, everyone is in agreement with that
10 manual chapter, which essentially, as I said, embraces the
11 rule you are now considering.

12 In preparing the comments back to Tourtellotte,
13 which Jim got, I believe, in May, the response of all of the
14 offices was sought in agreeing on how to respond back to
15 Tourtellotte. Those comments endorsed the document that went
16 forward that Bill signed, with the exception that Bill has
17 noted from Denton, who suggested, was there really a need for
18 a rule, because the manual chapter, in his view, may, in fact,
19 solve it.

20 In any case, the manual chapter is going to be
21 necessary, rule or not, for sure. He made that observation.

22 So there have been two opportunities. We've gone
23 back to the Staff to assure that the process that we're trying
24 to put in place, there's agreement.

25 We also indicated and told the Commission we were

1 going to go and hold training exercises in all of the Regions
2 and in all of the major Program Offices to reach down and get
3 to the Staff and make the Staff understand the process that
4 we're trying to put in to place to control and manage
5 backfitting. And I might add parenthetically that the
6 feedback I have has been very positive, both in terms of the
7 manual chapter -- I think, Commissioner Asselstine, you
8 commented, you thought it was pretty good yourself.

9 COMMISSIONER ASSELSTINE: I did, as a matter of
10 fact.

11 MR. STELLO: And that's generally the perception
12 that we have, that it's a pretty good document.

13 I think I just made a false statement. I think the
14 industry is not quite happy with it. I don't -- I'm not so
15 sure I know where they stand. They somehow have gotten a copy
16 of it, and I don't think they're too happy.

17 With respect to the comments that we have talked
18 about on these two issues, we got Jim's paper over the weekend
19 before he was sending it to you, and there was only time over
20 that weekend to work within the EDO office on those two
21 points. With respect to those two points, we have not had an
22 opportunity -- it did not go back to the Staff, but those two
23 points are, in fact, consistent with what we have in the
24 manual chapter and, in fact, what we had in the earlier
25 version of the rule.

1 I might just then want to make one point, which I'm
2 getting very, very confused on, and that's the issue of the
3 way we have phrased in the present version, and at least say
4 what bothered me about it.

5 Page 39, the issue talks so much about that
6 "modification is necessary to assure that the facility poses
7 no undue risk."

8 Well, I hope that all modifications that we propose
9 on backfits are, in fact, for safety, that they all contribute
10 to being necessary. To phrase it this way would leave only
11 those modifications that did not meet the standard, which I
12 would interpret to mean those that were not necessary, since
13 it is either necessary -- the only thing that I have left is
14 those that are not necessary that would get a backfit
15 analysis, and I don't believe that that is at all what was
16 intended here.

17 COMMISSIONER ASSELSTINE: But, Vic, as I read the
18 whole discussion and the statement of considerations, the
19 effort seemed to be directed to drawing a distinction between
20 two categories of changes or requirements.

21 The first would be those things that are necessary
22 to provide an acceptable level of safety for the plant. The
23 statement was made, you know, "We think that our regulations
24 do that, the body of our regulations, but from time to time we
25 find things out that aren't" -- those things that are

1 necessary for an adequate level of safety.

2 Then when you've got a plant that comes up to that,
3 then you get into backfits, which are improvements in safety
4 above and beyond those things that we believe are necessary to
5 provide at least that minimum level of protection for the
6 plant. And I thought that this whole rule was aimed at that
7 second category and not at the first.

8 The way I read this, this particular exemption was,
9 it was intended to reflect that difference between those two
10 categories and to basically say, if it's something that falls
11 in that first category, something where the Staff says, "This
12 is necessary to provide that minimum level of safety that is
13 acceptable for the operation of this facility," that's not a
14 backfit. That's out from under this whole regime.

15 MR. STELLO: Let me tell you what my view is, and I
16 don't know whether we're in agreement or not, because I'm not
17 sure I fully comprehend everything that you were saying.

18 I think that the whole concept of undue risk is not
19 a very sharp, discrete line. It's a matter of judgment for
20 which you know that you're generally okay, but there is a time
21 -- and I have been in the position where I've had to make
22 those judgments, where I had to say, "This facility has to
23 shut down." I made the judgment that it wasn't safe enough.

24 Now, what I have to do after it's shut down, because
25 once it's shut down, it's safe -- that's backfit. Why ought

1 not that be analyzed and have a sensible solution as to what
2 it is that ought to be backfitted? I've taken the action.

3 In every case that I'm aware of -- and I know of
4 none -- where an action was necessary, where you start to
5 impose that fringe of undue risk, the action was necessary
6 quickly. We took an immediate regulatory action.

7 Under those conditions, I don't think you want
8 to be encumbered by doing analysis. But on all others, I
9 cannot understand why there is any question that you ought to
10 follow a sensible, manageable, accountable process for
11 imposing any other requirement beyond that.

12 COMMISSIONER ASSELSTINE: What if you have a
13 situation, though, in which you make a decision, you give a
14 plant a license on one set of assumptions. You assume a
15 certain level of reliability, a level of performance, a level
16 of acceptability throughout that plant. And then you find out
17 for some reason that that plant no longer meets them. There
18 is some flaw in the auxiliary feedwater system at Davis-Besse.

19 Is it nearly as reliable as we assumed it was?
20 Pipes, boiling water reactor pipes, no one knew that there
21 would be cracks in those pipes. All of a sudden we find out
22 that the plant no longer meets the level of protection, the
23 level of safety, that was assumed and insisted upon when the
24 plant got the license.

25 Something has to be done to bring that plant back up

1 to that acceptable level of safety. For the life of me, I
2 don't understand why you would consider costs in making that
3 judgment, other than in comparing alternatives for bringing it
4 back to that acceptable level of safety.

5 CHAIRMAN PALLADINO: But I don't think this requires
6 cost in there.

7 MR. STELLO: I think those are excellent examples,
8 and they illustrate my point perfectly. The very first action
9 --

10 COMMISSIONER ASSELSTINE: I think you can make the
11 same argument for fire protection, environmental
12 qualification, and post-TMI changes.

13 Go ahead.

14 MR. STELLO: The very first action that I remember
15 this agency took when it was formed was an immediate action to
16 inspect BWR pipe cracking.

17 COMMISSIONER ASSELSTINE: Yes.

18 MR. STELLO: It took that action, so that it could
19 assure itself, it was still okay, it was safe.

20 COMMISSIONER ASSELSTINE: That's right.

21 MR. STELLO: Then when it was decided what more was
22 needed in terms of additional action -- you recognize that we
23 have been working on that now and trying to decide that issue
24 now for ten years -- and we have been considering all aspects
25 of every one of the elements that are contained in the backfit

1 rule as to what more we ought to do. And I think it makes my
2 point precisely.

3 The immediate action you had to take is, was there a
4 really major problem here? And we took the action and
5 immediately made the plant shut down and inspected it.

6 I agree completely, there ought not to be
7 encumbrances in the process, to make that decision, make it
8 and go. After that, what more did you need to do, we have
9 been considering for ten years. The same with the Browns
10 Ferry fire.

11 Immediately following the fire, we issued a number
12 of bulletins and made them take action. After that, we
13 considered rather carefully -- maybe not nearly carefully
14 enough when we issued Appendix R -- that's probably about the
15 most complicated rule -- the same with Appendix E following
16 TMI. We took a lot of actions, then carefully considered what
17 more we had to be doing.

18 The ATWS event at Salem, the same thing. We issued
19 the bulletins, got the information that we had to get to reach
20 the assurance that it was okay. Then we had a very
21 deliberative process about what more is needed.

22 And that is exactly the form that is built into the
23 proposal. I think it's very important to do it that way, or
24 it becomes an uncontrolled process.

25 COMMISSIONER BERNTHAL: I think the problem in

1 practice is going to be determining what is, quote, that
2 "original acceptable level of safety," Jim, and you're
3 assuming that there has been some quantitative or even
4 semi-quantitative assessment made back in presumably the early
5 '70s or whenever the plant was originally approved.

6 Until such day arrives that we really do believe and
7 rely on PRAs, and perhaps computers get big enough so that we
8 can do a thoroughly reliable PRA and a thoroughly reliable
9 cost/benefit analysis, we can't even do that today. We don't
10 know what was judged, other than in a broad engineering
11 judgment sense, in the early '70s when these plants were
12 licensed, what acceptable level of safety was.

13 COMMISSIONER ASSELSTINE: Well, it may not have been
14 quantified. I think in some respects it was; in others, it
15 was not, and others, it was a qualitative judgment.

16 But you guys missed out on the fun on Friday, but I
17 still have fresh in my mind the discussion we had before
18 Mr. Markey on Davis-Besse. And Harold said, "Look, I'm
19 concerned about that plant now, because the reliability of
20 that feedwater system, auxiliary feedwater system, isn't what
21 I thought it was. It isn't what we thought it was when we
22 licensed that plant. And I'm going to keep it shut down until
23 I'm satisfied that it is sufficiently reliable."

24 Now my view is, that's not a backfit, to determine
25 how to bring that system up to a level of acceptable

1 reliability. You may want to look at costs to decide what you
2 do to bring it up, which alternative among many you choose to
3 do that. But if that was what was deemed necessary when that
4 plant was given its license, and you find out that the system
5 is not sufficiently reliable, then that's not a backfit in my
6 mind; it's not a question of whether you decide to do nothing
7 or to do something. It's a question of what you do to bring
8 it up to an acceptable level of performance.

9 COMMISSIONER BERNTHAL: Sure. But let's not --

10 CHAIRMAN PALLADINO: But incidentally, we're not --

11 COMMISSIONER BERNTHAL: Joe, let me finish the
12 comment.

13 CHAIRMAN PALLADINO: I just want to say, we're not
14 saying that cost is going to be a matter.

15 Go ahead.

16 COMMISSIONER BERNTHAL: Let's not stick with the
17 straw man of Davis-Besse. I mean, the fact is, it could be
18 any pump in any plant. What this backfit rule will require --
19 and I still have some problems with this, frankly; I think we
20 need to clean up the language -- how does the language go? --
21 "substantial overall additional protection" or something like
22 that -- "to public health and safety" -- there is no
23 quantitative judgment on what the substantial overall effect,
24 frankly, of replacing or modifying that pump system at
25 Davis-Besse is, except that we rely on a person like Harold

1 Denton, who probably has a pretty good idea of what's needed
2 to bring it up --

3 COMMISSIONER ASSELSTINE: Well, in fact, I think
4 they have quantified it.

5 The other interesting thing about Davis-Besse and
6 why I think it's not just a straw man in this case, is, Harold
7 also said, people talk about us requiring things that are
8 unnecessary -- Harold also said on Friday that there should
9 have been a third auxiliary feedwater pump in that plant with
10 a diverse power supply.

11 COMMISSIONER BERNTHAL: They have quantified it
12 now. But we're talking -- earlier you were saying that we're
13 trying to bring it back to some standard of acceptable level
14 of safety that was established way back when, and you're
15 talking about Harold Denton's opinion.

16 Now I'm not disputing that his opinion, in the
17 case of Davis-Besse, is clearly one that we all take very
18 seriously.

19 COMMISSIONER ASSELSTINE: But the judgment ought to
20 be what's necessary to bring it up to the acceptable level,
21 not whether it meets some new test which is "substantial
22 additional protection" from the standpoint of overall --

23 COMMISSIONER BERNTHAL: But that's precisely my
24 point. I don't know what that acceptable level is for a lot
25 of plants. We have no original standard.

1 Now today's calculated PRA type of acceptable level,
2 there I'm with you, and there I think we can begin to talk
3 about something --

4 COMMISSIONER ASSELSTINE: I think, for example, in
5 feedwater systems, you'll find that there was a quantified
6 level five years ago, and at least according to what Harold
7 was saying on Friday, and we didn't require a change. Harold
8 now says --

9 CHAIRMAN PALLADINO: May I pick up on an item that
10 you just mentioned that I forgot to bring up?

11 On page 29, we say, "However, the Commission does
12 not intend the use of the phrase 'overall protection' in the
13 backfit standard to signal a departure from the traditional"
14 -- what is that? -- "reliance on defense in-depth for the
15 protection of public health and safety."

16 And after considering Davis-Besse, I suggest we put
17 the word "diversity" in there, because that is something
18 that's been drummed in my head since the first day, and I've
19 drummed into thousands of other people's heads, and I think
20 it's a very important point.

21 I just offer that, and I will record it in my
22 comments when I vote.

23 MR. MALSCH: One point that builds upon both what
24 Commissioner Bernthal said and what Vic Stello said.

25 This is a pretty decent rule, but it does have a

1 defect. It's the one that both of them alluded to. It's
2 going to require some careful judgments to be made in each
3 case as to whether the modification is operating above some
4 minimum or below it or at it.

5 COMMISSIONER ASSELSTINE: That's right.

6 MR. MALSCH: And, you know, there is no specified
7 quantitative level that establishes that minimum. It sort of
8 operates with a band in which judgment plays a very large
9 role. Moreover, people's concepts as to what presents undue
10 risk may evolve over time.

11 It might be possible to develop a backfit rule that
12 would even operate in that area, but it will be a lot more
13 complicated than the rule that this one sets forth.

14 CHAIRMAN PALLADINO: But at least this sets the
15 direction of where we're trying to go and establishes a very
16 important concept that will be worked out as part of the
17 management of backfitting.

18 MR. MALSCH: My suggestion is that if the Commission
19 should adopt this rule, it will be almost as important to
20 develop internal procedures for handling the analysis, it will
21 be just as important to establish internal procedures to
22 identify exactly what kinds of backfits fall into which
23 category or required analyses.

24 COMMISSIONER ASSELSTINE: That's right.

25 MR. MALSCH: And that's going to be no mean feat.

1 MR. DIRCKS: That's my point, though, Marty. The
2 more you try to overformalize this thing, you're not going to
3 get any benefits out of it. Davis-Besse, that's backfit. I
4 don't care whether it's to bring it up to undue risk or not
5 undue risk.

6 You're going to change the nature of that plant,
7 somehow or other, and it's good to at least get somebody to do
8 some pretty rigid thinking before you start ordering things.

9 I don't know whether it's going to bring it back up
10 to some level or not, but you are going to make major changes,
11 and I'd like to see some very rigorous analysis done.

12 COMMISSIONER BERNTHAL: Let me just ask this. I
13 think I know what the answer would be, but I think Vic has
14 raised a key point here.

15 Would the Davis-Besse modification be considered
16 essential to preserve a, quote, "acceptable level" to preserve
17 public health and safety, an acceptable level of what
18 protection --

19 COMMISSIONER ASSELSTINE: Would the third pump meet
20 this standard? Would improvements in the reliability of the
21 system meet the standard?

22 COMMISSIONER BERNTHAL: How do you decide?

23 COMMISSIONER ASSELSTINE: And which factors would
24 you consider?

25 MR. STELLO: Let me tell you how you don't decide.

1 Sitting here around this table now.

2 [Laughter.]

3 MR. STELLO: You go out, and you get all of the
4 facts, and you make sure that the problem that you're solving
5 is the right problem.

6 It may be the reliability of the aux feed pump; it
7 may not be. There may be other aspects of that facility which
8 are at the root of the problem that you really are going to
9 try to solve. That's what you have to get at and then make
10 the judgment.

11 It isn't clear to me at all that we know today what
12 it is that you need to solve that problem. More specifically,
13 based on everything I've seen thus far, it isn't clear at all
14 to me that if you had that other pump, it would have made any
15 difference at all anyway.

16 COMMISSIONER ASSELSTINE: That may well be, but it's
17 a different question.

18 MR. STELLO: But there is a serious problem at
19 Davis-Besse that if we solve, we may also solve the aux feed
20 pump problem as well. It may not. I don't know.

21 COMMISSIONER ASSELSTINE: Let me ask about cost.

22 MR. STELLO: The way to get it is to get the facts
23 first, make sure we understand the problem, and then go on
24 with the solution from there.

25 COMMISSIONER BERNTHAL: Yes, but you haven't really

1 gotten to the core of my question, which is, which bin is
2 going to fall into? Everyone is arguing in favor of the
3 proposition you've suggested.

4 Are we going to go out and order backfits that we
5 don't judge to be necessary for public health and safety?

6 MR. STELLO: Well, the way the rule is worded, those
7 are the only ones to be backfit. That's why I objected so
8 strongly. I think it's nonsense.

9 All of the backfits we require, at the time we
10 required them, there are a lot of them that we have required
11 that were wrong, that we shouldn't have required, that in fact
12 some of which made plants less safe, and we're going to try to
13 correct some of them we have and others we will.

14 But every time we make the judgment and impose the
15 backfit, we believe we are doing so for safety.

16 COMMISSIONER BERNTHAL: That's precisely the point.
17 That's the point.

18 MR. STELLO: And that's why I object to the way this
19 is worded. It leaves the impression that the only time you do
20 backfit is when it's not necessary for safety.

21 COMMISSIONER BERNTHAL: I think it's a question of a
22 confusion between the procedural part of this thing and the
23 standard to be met, and what we're really talking about here
24 is the standard to be met, it seems to me.

25 MR. STELLO: One last comment that I wanted to make

1 with respect to the issue that we're talking about, that we
2 have a debate on, and that's with respect to asking questions,
3 50.54(f) issues.

4 There is no question in my mind that the Staff needs
5 to have, without any analysis -- none -- not even an
6 evaluation, nothing -- when they are doing their reviews and
7 they're evaluating a plant against the licensing basis, those
8 kinds of questions and the need for information to make those
9 judgments, they ought to be able to go and get them.

10 When they fall outside of that licensing framework,
11 then I believe an analysis ought to be made to decide whether
12 or not that information is worthwhile information getting.

13 There is no prohibition -- you said when you were in
14 engineering, you needed information, you needed to get it for
15 sure. That's not prohibited. Nor if there's an event or an
16 incident or inspection. Those are clearly things that are
17 outside.

18 But once you fall outside of the licensing envelope,
19 then I believe at that point, in order to have an effective
20 management system for backfitting, you have to draw for the
21 Staff where it is that they need to raise the question. And
22 the Staff understands the licensing basis for the plant.

23 When they're outside of it, it doesn't mean that
24 they can't ask the question, but at least an analysis ought to
25 be required to make sure it's justified.

1 CHAIRMAN PALLADINO: Vic, I'll give you an example
2 of why I am concerned about this question of asking questions.

3 On one of the reactors, without specifying which one
4 it was, we had an airflow test, and we had crossflow in the
5 upper plenum, and we had shrouds around the control rods,
6 except that we couldn't have complete shrouds in about two of
7 them. And the airflow test kept telling us that at full flow,
8 these rods might hang up.

9 Now there are a lot of uncertainties in translating
10 airflow forces to hydraulic forces using water. But I said --
11 and this unit was being put up in Idaho, and it was forbidden
12 that thou shalt impose any new requirement while that plant is
13 being build -- well, I insisted that we should pull out the
14 rods one at a time with full flow to see if those two rods
15 were going to hang up. And that was a request for
16 information.

17 Now if I have to evaluate it, justify it beyond
18 that, my reason was, the airflow test gave us enough
19 uncertainty -- well, incidentally, when they made the test,
20 those two rods would hold up at full flow, so some adjustment
21 had to be made. The adjustment was the backfit.

22 But the request for information, I don't want to
23 restrict so much that I have to fight the whole
24 U.S. Government to get some attention to the information I
25 need.

1 So that's why if it's a request for information with
2 the reasons specified and the EDO is satisfied with the
3 reason, I said, fine, let it go. The word "evaluation," to
4 me, has just a little different context.

5 MR. STELLO: But I'm proposing that they don't even
6 have to come to the EDO.

7 CHAIRMAN PALLADINO: Oh. No. For the one I was
8 describing, I was getting information that affected a backfit.

9 MR. STELLO: But there --

10 CHAIRMAN PALLADINO: Or a possible backfit.

11 MR. STELLO: But the issue is within the licensing
12 framework. They're doing a review. Are the rods going to
13 hang up, or aren't they? Do I have data?

14 They don't have to come to the EDO and ask that.

15 CHAIRMAN PALLADINO: No, no. But that evaluation
16 had all been done. It was while the plant was being put
17 together, or just about at that time was ready to go to
18 operate, I made a request for information that changed the
19 whole process for at least a week or so, and I felt the
20 information was going to perhaps result in a backfit. I
21 wasn't sure.

22 COMMISSIONER ASSELSTINE: Let me try another example
23 on you.

24 Feed and bleed, as I understand it, is outside the
25 design basis. Why should you have to go through these

1 requirements or justify asking for information if you want to
2 ask somebody like Davis-Besse about what their feed and bleed
3 capability is, before you know whether it's going to result in
4 a change or not?

5 MR. STELLO: You wouldn't need to go through -- with
6 the changes we have made, you would not need to go through
7 anything at all.

8 COMMISSIONER ASSELSTINE: It's a potential backfit.

9 MR. STELLO: It doesn't matter. It's a result of --

10 COMMISSIONER ASSELSTINE: It's outside the design
11 basis.

12 MR. STELLO: But it's clear that it's a result of an
13 event and an incident that they have in evaluating and
14 understanding the consequences of that incident, and you don't
15 have to go through an analysis.

16 COMMISSIONER ASSELSTINE: How about before the
17 accident happens, rather than waiting for the accident to
18 happen?

19 MR. STELLO: Before the accident happened, there was
20 a generic evaluation done.

21 COMMISSIONER ASSELSTINE: Yes, but what you're
22 saying here is, to go back to Toledo Edison and say, "We want
23 to know about your feed and bleed capability before June 9th,
24 because we've got some concerns about it, and we want to get
25 it fixed," you're saying, "You're going to have to justify

1 that before you can do that." Otherwise you have to wait for
2 something serious to happen. Then you can go ahead and ask
3 for the information.

4 CHAIRMAN PALLADINO: You see, I want it so that when
5 you say, "Because I have some concerns," and that satisfies
6 Bill --

7 MR. DIRCKS: I think that's my concept of the way it
8 works. You need information, and here's where I need the
9 information. I think you have this potential safety problem.

10 I think that's the sort of rationale that I had in
11 mind.

12 COMMISSIONER BERNTHAL: Let me see if I can just
13 summarize what's troubling me about all this, because I'm not
14 sure myself, I guess.

15 It seems to me that somehow we're mixing
16 qualitative, judgmental standards with quantitative language
17 throughout this thing.

18 COMMISSIONER ASSELSTINE: That's right.

19 COMMISSIONER BERNTHAL: And I haven't quite got my
20 arms around it yet, but I have a feeling that that's going to
21 come back to haunt us.

22 COMMISSIONER ASSELSTINE: I think you're right.

23 CHAIRMAN PALLADINO: I think that's a
24 misconception. I would urge you to reread it and read it
25 carefully.

1 COMMISSIONER BERNTHAL: I have read it.

2 CHAIRMAN PALLADINO: I say, reread it. I've read
3 it.

4 COMMISSIONER BERNTHAL: And I know it's replete with
5 these mixtures, and that's exactly what I think Vic is talking
6 about here, because somehow there's supposed to be two bins,
7 one that rises to a certain level, another that doesn't.
8 That's not the real world.

9 There are reasonable evaluations that are made in
10 the gray area, I guess, that Marty was talking about.

11 CHAIRMAN PALLADINO: Well, I've read it. After
12 listening -- I've read it several times after listening to a
13 lot of different people, and I would encourage you to reread
14 it, because I don't think it's so quantitative so as to mix up
15 the conceptual part.

16 COMMISSIONER BERNTHAL: Well, Vic, does the rule, as
17 you read it, prevent you from getting any information that you
18 think you might need?

19 MR. STELLO: No.

20 COMMISSIONER BERNTHAL: I'm not concerned about that
21 aspect of it. I'm concerned about this question -- and I'm
22 not concerned about the procedural aspect, which I think has
23 been more the issue that the task force has focused on,
24 perhaps -- it's this question of standards and sort of, what
25 are you --

1 CHAIRMAN PALLADINO: We don't have any standards in
2 there.

3 COMMISSIONER BERNTHAL: -- what are you demanding?

4 CHAIRMAN PALLADINO: We don't have any standards in
5 there.

6 COMMISSIONER BERNTHAL: Do you want me to read them
7 to you? I think they're right in the rule.

8 COMMISSIONER ASSELSTINE: I think so, too.

9 COMMISSIONER BERNTHAL: Do we want to go on?

10 COMMISSIONER ASSELSTINE: We're probably at a good
11 stopping point.

12 CHAIRMAN PALLADINO: Let me ask the question of
13 where do we want to go with this? I really think that we are
14 within striking distance of having a good rule.

15 You can find fault with almost any rule that we come
16 up with. I would urge continuing, prompt attention to get
17 this rule out soon.

18 The reason why you haven't heard anything for six
19 months or longer is because every time we address it, we've
20 got some new nuance, and then new studies, and then we go on,
21 and the first thing you know, another six months has come
22 about, and then we say, "Ah, we haven't heard anything about
23 this for awhile, therefore, we have to dig into it some more."

24 Let me say, let's keep our nose to the grindstone on
25 this one and try to get it out within the next two weeks.

1 And I would say, raise your questions. If there are
2 questions on which we need discussion or you want more
3 discussion, I would say, let's have another meeting just as
4 promptly as we can schedule it and get it done.

5 I would also urge that when you reach the point that
6 you think, with modifications that you would suggest or
7 support, and you're ready to vote, I'd say give me a vote
8 sheet -- give it to SECY; excuse me -- I'll give him mine
9 also, as soon as I'm ready.

10 I think the discussion has been worthwhile. I don't
11 think there are all that many points. It is not a rule with a
12 lot of prescriptive literature that tells you, you do this,
13 you do that. It sets forth three important concepts:

14 One, the EDO manages; two, that we're going to make
15 evaluations; and three, costs can be considered under
16 appropriate circumstances.

17 To have that lost at this point or delay it for
18 another six months and have a manual chapter that now is
19 inconsistent with the rule that exists, where it could be
20 consistent with the rule we propose, I say it would be a
21 mistake if we let that happen.

22 Now let me ask you what you would like to do? I
23 would be prepared to go back and get my few comments, and I
24 would be prepared to give a notation vote. I don't know how
25 others of you would feel, but if you have more questions or

1 need more discussions, I would also work hard to get those
2 resolved or get the meetings under way.

3 COMMISSIONER BERNTHAL: I think a notation vote is
4 fine, and I couldn't agree with you more, that let's keep our
5 nose to the grindstone. The reason we have this problem is
6 because -- and it doesn't necessarily mean it's anybody's
7 fault -- these things lapse for six months, and the collective
8 memory is lost, and if we need to have another meeting or
9 whatever needs to be done, let's have the sweatbox principle
10 apply here -- I've been a longtime proponent of that -- and
11 finish it up this time, before we forget everything we just
12 talked about today.

13 COMMISSIONER ZECH: I agree. I think we ought to
14 move that expeditiously.

15 CHAIRMAN PALLADINO: Well, do you want another
16 meeting.

17 COMMISSIONER ROBERTS: No.

18 [Laughter.]

19 COMMISSIONER ASSELSTINE: I've got a batch of
20 questions for the Staff. I can let you know whether I need
21 another meeting after I sit down with them and go through
22 those things, but I will do that expeditiously.

23 CHAIRMAN PALLADINO: All right. Let me suggest,
24 then, that those of you who are ready to come up with your
25 comments and the notation vote, fine, do it.

1 If you have questions, get them as expeditiously as
2 you can, and if you determine that you need another meeting,
3 let's try to address it tomorrow at the agenda planning, if at
4 all possible.

5 COMMISSIONER ASSELSTINE: Okay, good.

6 CHAIRMAN PALLADINO: Okay?

7 COMMISSIONER ASSELSTINE: Fine.

8 CHAIRMAN PALLADINO: Is there anything more that we
9 should discuss at this time.

10 [No response.]

11 CHAIRMAN PALLADINO: Well, thank you very much. I
12 think it's been a very good meeting.

13 The meeting is adjourned.

14 [Whereupon, at 4:07 o'clock, p.m., the Commission
15 meeting was adjourned.]

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CERTIFICATE OF OFFICIAL REPORTER

This is to certify that the attached proceedings
before the United States Nuclear Regulatory Commission in the
matter of: Commission Meeting (Public Meeting)

Name of Proceeding: Discussion/Possible Vote on Final Rule
on Backfitting

Cocket No.:

Place: Washington, D. C.

Date: Wednesday, June 26, 1985

were held as herein appears and that this is the original
transcript thereof for the file of the United States Nuclear
Regulatory Commission.

(Signature) Marilynn M. Nations
(Typed Name of Reporter) Marilynn Nations

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