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CR 4961
BUD/DORA

UNITED STATES NUCLEAR REGULATORY COMMISSION

COMMISSION MEETING

ON

REFORM LEGISLATION

Room 1141
1717 H Street, N.W.
Washington, D.C.

2:55 p.m.

Wednesday, 21 September 1977

Pages: 1 - 126

COMMISSIONERS PRESENT:

JOSEPH M. HENDRIE, Chairman
RICHARD KENNEDY, Commissioner
VICTOR GILINSKY, Commissioner
PETER BRADFORD, Commissioner

DISCUSSANTS PRESENT:

EDSON CASE
HOWARD SHAPAR

Academy of Federal Reporters

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The initials appearing in the lefthand margin, i.e., WW and JB, indicating corrections are those of Wm. White and Jake Brown, Office of the Secretary.

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P R O C E E D I N G S

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CHAIRMAN HENDRIE: Okay, this is back on the beginning,
back on the findings. How do some of these strike you?

COMMISSIONER GILINSKY: Are we looking at Howard's
alternatives?

CHAIRMAN HENDRIE: Yes, I've got the alternatives.

COMMISSIONER GILINSKY: I notice "reasonable assurance" in
every one of them. Both pages.

CHAIRMAN HENDRIE: He feels strongly about it.

MR. SHAPAR: That's what the regulations say now.

CHAIRMAN HENDRIE: I think that whatever --

COMMISSIONER GILINSKY: "Reasonable assurance"?

MR. SHAPAR: Yes.

Just making an honest man out of you.

COMMISSIONER KENNEDY: Reasonable assurance of what?

MR. SHAPAR: That the reactor can be constructed and
operated safely.

COMMISSIONER KENNEDY: Are they going to ask for
more than reasonable assurance?

MR. SHAPAR: Yes.

COMMISSIONER KENNEDY: Can anyone get it?

MR. SHAPAR: No.

COMMISSIONER KENNEDY: Then it no longer becomes
reasonable.

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CHAIRMAN HENDRIE: That sounds like they discussed

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1 dialogue before they came in here.

2 COMMISSIONER KENNEDY: It's only that these lawyers
3 have been training me.

4 CHAIRMAN HENDRIE: Well, I think that you go away
5 from that language and qualify it a -- yes, go ahead.

6 COMMISSIONER GILINSKY: It seems to me that there are
7 two separate question. One is how high you set your safety
8 levels, your goals, whatever. The other is what chance do you
9 have that they are being met.

10 CHAIRMAN HENDRIE: That's certainly true. I think it
11 might be sort of an untenable decision to say that we have very
12 high standards, and then at some point, mushy assurance that
13 they are being met. You're really in an untenable position.
14 I think what you say is that you have set standards which are
15 stringent enough to provide an adequate level of safety.
16 Indeed, this level of safety provides reasonable assurance that
17 these facilities can be operated without undue risks to the
18 health and safety of the public and adverse effect on the
19 national defense and security, and so on. And that's the
20 complete formal configuration in which we have to operate.

21 COMMISSIONER GILINSKY: Well, but "undue risk" has
22 got to relate to some kind of standards. Somewhere there has
23 got to be a standard.

24 CHAIRMAN HENDRIE: Well, it's a judgmental standard
25 it has been ever since 1947, or '6, or '8, or whenever we got

1 the Act passed.

2 COMMISSIONER GILINSKY: That's right, but then --
3 well, I guess, you know, then earlier --

4 CHAIRMAN HENDRIE: Look, let me -- I wonder whether
5 this had some of the thoughts -- think about the following as
6 language in alternative B. "The NRC should exercise its
7 independent statutory responsibilities so as to require high
8 standards for safety that provide reasonable assurance of
9 the protection of public health and safety and the common
10 defense" and so on and so on.

11 I think you dare not go away
12 from "reasonable assurance of protection of the public health
13 and safety." That is the basis on which, in fact, we have
14 regulated this industry for 10 these many years and to have
15 other language which will carry different implications in the --
16 you know, come in now on a statutory basis --

17 COMMISSIONER GILINSKY: I guess I understand
18 reasonable assurance as these standards being met. What is the --

19 COMMISSIONER KENNEDY: I don't know what that means,
20 what he just said.

21 CHAIRMAN HENDRIE: Well, I think it is equivalent
22 to the sort of thing I suggested is a way of saying that.

23 COMMISSIONER GILINSKY: I wrote something here. I'm
24 not sure I like it myself, but it says something like "The
25 Congress recognizes that absolute safety is an understandable

1 goal and generally that increased cost is attached to increased
2 cost in safety, and that such costs are a factor in devising
3 safety standards and regulations. The NRC should cover subject
4 matters on such items related to statutory responsibility so
5 as to provide a high level of protection of public health and
6 safety.

7 MR. CASE: Except that last part --

8 CHAIRMAN HENDRIE: I like it except I think the
9 last line by virtue of going away from the classic language
10 of the last quarter century, and again in the last line as you
11 went over it, the high standards of safety that provides or
12 could provide a reasonable assurance, that should be public
13 health and safety.

14 COMMISSIONER GILINSKY: But, you know, at the same
15 time, we've only said the risks are minimal, I mean that is
16 sort of a reasonable assurance. I would think the reasonable
17 assurance, for example, you audit an application, all right.
18 in regard to standards.

19 MR. CASE: I don't have complete issue.

20 COMMISSIONER GILINSKY: Right. That's where
21 reasonable assurance comes in.

22 COMMISSIONER KENNEDY: Reasonable assurance standards
23 are being met?

24 MR. CASE: No. The bottom line is leaving a chance
25 there is no risk.

1 COMMISSIONER KENNEDY: That's right.

2 COMMISSIONER GILINSKY: Then you are stuck with the
3 word "undue." I don't -- you know, that has been interpreted
4 to mean a high level of safety.

5 MR. CASE: Yes. Compared to the risks. A high level
6 of safety.

7 COMMISSIONER GILINSKY: I'm all for indicating that
8 there are bailouts, but at the same time I think we ought to
9 be saying that we are setting high standards of safety.

10 MR. CASE: I haven't got any problems with that as
11 long as it is a finding that is made for all of these 25 years
12 hasn't changed.

13 COMMISSIONER GILINSKY: I wasn't aware of the precise
14 wording.

15 COMMISSIONER BRADFORD: Is it reasonable assurances
16 and no undue risk.

17 MR. SHAPAR: Reasonable assurance, reasonable is not
18 in the statute.

19 COMMISSIONER GILINSKY: Right. It's the "undue"
20 that tells you what this active standard is.

21 MR. CASE: The standards say do not endanger public
22 health and safety.

23 COMMISSIONER GILINSKY: Basically they do relate to
24 the standard.

25 COMMISSIONER KENNEDY: Isn't the "undue" the word

1 which the ACRS uses?

2 MR. SHAPAR: That's not correct. "Undue" relates to
3 the risk of issuing the license, and you make that finding in
4 connection with every license you issue.

5 COMMISSSIONER KENNEDY: That's right.

6 COMMISSIONER GILINSKY: Yes, but, you know, sure
7 it's been --

8 MR. SHAPAR: It's mandatory. The statute requires
9 you to make that finding.

10 COMMISSIONER GILINSKY: From a judgmental standard,
11 whatever that means.

12 MR. SHAPAR: It's very imprecise, amorphous.

13 COMMISSIONER GILINSKY: But nevertheless, there is
14 some kind of standard. If nothing else, there is an historical
15 standard used there comparable to what we have been doing in
16 the past.

17 MR. SHAPAR: Well, we use the word "reasonable" in
18 our rules, interpreting "undue" in the statute.

19 COMMISSIONER GILINSKY: Well, I'm not --

20 MR. SHAPAR: Look, if "reasonable" bothers you ==

21 COMMISSIONER GILINSKY: The "reasonable" doesn't
22 bother me in the sense there's a limit to what you can do to
23 check out if things are okay. I mean that --

24 CHAIRMAN HENDRIE: But you want the thought about
25 high standards for safety.

1 COMMISSIONER GILINSKY: Yes. And what I am --

2 CHAIRMAN HENDRIE: Let me suggest again to see if by
3 any chance it might resolve this fully. I think that could be
4 reasonably put into the same thought: "Should exercise its
5 responsibility to require high standards for safety that provide
6 reasonable assurance."

7 COMMISSIONER KENNEDY: What was that again?

8 CHAIRMAN HENDRIE: It would be: "The NRC should
9 exercise its independent statutory responsibilities to require,"
10 use, or utilize, whatever you like, but I'll say "to require
11 high standards for safety that provide," or "to provide reason-
12 able assurance of protection of the public health and safety."

13 MR. SHAPAR: You don't need "safety" twice. "High
14 standards."

15 COMMISSIONER GILINSKY: I guess I would have said
16 that it should exercise its responsibilities in such a way to
17 have reasonable assurance that these standards will be met. In
18 other words, we don't have infinite number of inspectors, we
19 don't spend an infinite amount of time in review. It seems to
20 me that is where the "reasonable assurance" comes in.

21 MR. SHAPAR: I don't think that's right.

22 CHAIRMAN HENDRIE: That's a quote from the regula-
23 tions. That's part of it but not all of it.

24 MR. SHAPAR: You have a large number of points in
25 the spectrum where you can set the standards in the first place.

jeri 1 I don't think, as a matter of fact, the standards
2 have always been put up at the top notch in the spectrum.

3 COMMISSIONER GILINSKY: Well, but the standards are
4 tied into that "undue." Into the reasonable assurance.

5 CHAIRMAN HENDRIE: And there may be places where there
6 aren't --

7 MR. CASE: The standard versions of the construction
8 permit say there is reasonable assurance that . . . the proposed
9 facility can be constructed and operated in these locations
10 without undue risk to health and safety.

11 COMMISSIONER GILINSKY: Right. Those standards, if
12 complied with will not --

13 (Simultaneous conversation.)

14 COMMISSIONER GILINSKY: The way I would say it, the
15 way I have always thought of it, is that "Those standards
16 provide for no undue risk to the public." And you have carried
17 out a number of reviews that reasonable assurance that that,
18 in fact, is the case.

19 MR. SHAPAR: Remember, you are issuing licenses,
20 not just based on standards; you're basing it on the qualifi-
21 cations of the applicant. You're also basing it on engineer-
22 ing judgments, on matters that don't fall precisely within the
23 purview of the standards. So you have got a mixed bag there.

24 COMMISSIONER GILINSKY: I guess that's probably
25 right. I mean reasonable assurance of the public health and

1 safety doesn't sound like very much. Now if you say, "undue
2 risk," then you really sort of piled it on the word "undue."

3 MR. SHAPAR: Well, to get at that point, why on
4 Alternative B don't you simply cross out the word "reasonable"
5 on assurance, and let the three factors that you suggested
6 carry the job by themselves?

7 *as to protect?*
8 ~~of these -- (inaudible)~~
9

10 MR. SHAPAR: I'm sorry, I didn't hear that.

11 COMMISSIONER BRADFORD: Supposing you just had
12 "so as to protect"?

13 MR. SHAPAR: All right. So as to protect the
14 public health and safety. I think that's even better. Then
15 taking into account -- and those are essentially the three
16 factors that Commissioner Gilinsky suggested this morning.

17 CHAIRMAN HENDRIE: How about that?

18 COMMISSIONER GILINSKY: So now what's happening --

19 MR. SHAPAR: It now rates the nuclear --

20 (Simultaneous discussion.)

21 COMMISSIONER BRADFORD: I didn't mean to deal with
22 anything more than the problem of reasonable assurance.

23 COMMISSIONER GILINSKY: Do we have to sort of arrive
24 at the final language? Because I don't think there's that
25 much difference in philosophical terms.

CHAIRMAN HENDRIE: I think that's right.

jeri 1 COMMISSIONER KENNEDY: One would never know until
2 one sees the language which comes out to be explicit.

3 CHAIRMAN HENDRIE: I was hoping to nail down some
4 language because I got a feeling that we need to, if we are
5 going to be effective with our suggestions that we are going to
6 have to move forward. I tell you, we are going to lose the
7 quorum but if you could leave me some sort of option to discuss
8 individually with you specific language and so on -- what, are
9 you going to be around at all?

10 COMMISSIONER GILINSKY: Until when?

11 CHAIRMAN HENDRIE: Will you be back in the office
12 tomorrow?

13 (Discussion off the record.)

14 CHAIRMAN HENDRIE: And I think a thing like this if
15 could settle on it would be a very useful thing to have in
16 the bill.

17 MR. CASE: Mr. Chairman, I would like to make another
18 suggestion. Whatever you put at the end should say, "should
19 continue to exercise." That gives a flavor of whatever the
20 words are, we are doing the same thing that we have been doing.

21 MR. SHAPAR: You notice, though, that I have
22 "continue" in Alternative A but not on B. The only reason I
23 didn't put it in Alternative B -- and it could go in, as Ed
24 suggests -- the only reason I didn't put it in was introducing
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25 flatly the concept of the costs being given consideration. I

1 don't know that many Commissioners would have agreed that in
2 fact was done in the past.

3 CHAIRMAN HENDRIE: I think your remark is -- let us --

4 COMMISSIONER KENNEDY: But, however, we would certainly
5 agree that considering, or taking into account an adequate
6 level of security as a paramount consideration, there's a
7 continuation.

8 MR. SHAPAR: Yes, I would.

9 COMMISSIONER KENNEDY: So you could say continue to
10 take into account -- to continue to recognize that safety itself
11 is a paramount consideration.

12 CHAIRMAN HENDRIE: Let me jot down some things that
13 we would like, that we could agree that ought to be reflected
14 in this language. And then if you give me a little latitude
15 to -- when are you going to leave?

16 COMMISSIONER KENNEDY: I'll be around Friday.

17 CHAIRMAN HENDRIE: You'll be around Friday. We might
18 be able to get together then and trade some language.

19 COMMISSIONER KENNEDY: Friday morning.

20 CHAIRMAN HENDRIE: We're not going to be able to do
21 that on more than just maybe just this one issue. We can't
22 defer the bill on over -- you aren't going to have time to
23 deal with any more than that.

24 But let's see, the elements, I think -- gee, Ed,
25 are you nervous about the past? I'm not.

1 MR. CASE: No, I'm not nervous about the past. I'm
2 afraid people will read this to be a different standard than
3 we have had in the past. That's the problem.

4 CHAIRMAN HENDRIE: Okay. "Continue" ought to be used
5 in connection with the assurance of health and safety. And
6 common defense and security. It ought to be used with regard to
7 the further things about cost and balance and so on.

8 Secondly, I would like to keep in the thing those
9 thoughts about that absolute safety may be desirable but you
10 can't get there and that the costs of regulatory requirements
11 deserve some consideration.

12 COMMISSIONER GILINSKY: I wouldn't use the words
13 "regulatory requirements." I would just as soon say increase
14 safety requirements.

15 CHAIRMAN HENDRIE: Safety requirements? Or increased
16 safety requirements?

17 COMMISSIONER KENNEDY: Well, a lot of them aren't
18 necessarily just safety requirements.

19 COMMISSIONER GILINSKY: We are getting into a whole
20 another -- we are talking here about setting --

21 MR. CASE: But there is a balance already in ...
22 and environment.

23 COMMISSIONER GILINSKY: I would say just recognize
24 that costs of increased safety are a factor --

25 CHAIRMAN HENDRIE: Increased safety, that's good.

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1 COMMISSIONER GILINSKY: Now, I don't mind using this
2 language we have in the regulations saying "reasonable assurance
3 with no undue" whatever it is, if you then say, since we are
4 starting to spell things out more than we have ever done, let's
5 spell out the word "undue." Congress intends "undue risk" to
6 means that there is a high level of protection.

7 COMMISSIONER KENNEDY: And what does a "high level
8 of protection" mean?

9 COMMISSIONER KENNEDY: Well, you know, these are
10 kind of semi-rhet^{er}oic here, but it's got nothing to do with --

11 COMMISSIONER KENNEDY: What's the difference between
12 "undue" and "high level"? We're substituting one piece of
13 rhetoric for another.

14 COMMISSIONER GILINSKY: Well, we are being a little
15 more explicit. We're being more explicit on the economic
16 side plus a little more explicit on the safety side.

17 COMMISSIONER KENNEDY: As has been pointed out, for
18 25 years, we have been making a determination and the ACRS
19 includes in its letters, that there is no undue risk. Now we
20 are going to substitute something for that after 25 years; so
21 whatever it is --

22 COMMISSIONER GILINSKY: The point is, this should
23 not be taken as a message that you're supposed to let up or
24 go easy.

25 COMMISSIONER KENNEDY: Agreed.

jeri 1 Supposing we say "The Commission should also give
2 the costs of regulatory requirements appropriate consideration
3 while continuing to recognize that safety itself is the paramount
4 consideration.

5 COMMISSIONER GILINSKY: Why don't we just think
6 about it.

7 CHAIRMAN HENDRIE: I wish you would all draft a
8 thing and I will come around and bother you about it, okay.
9 You're not going to be here tomorrow.

10 COMMISSIONER BRADFORD: Can I suggest one other
11 thing.

12 COMMISSIONER KENNEDY: I will be.

13 CHAIRMAN HENDRIE: You will be, okay.

14 (Discussion off the record.)

15 I would just tag the phrase "for any energy source"
16 on the end of "absolute safety being an unattainable goal."
17 I don't think there's any reason --

18 COMMISSIONER KENNEDY: I think that's an excellent
19 point. That's something we were talking about in a different --

20 COMMISSIONER GILINSKY: Picks up number 3 or 14,
21 or something.

22 CHAIRMAN HENDRIE: I think it's a very useful
23 thing; good. We will certainly do that. And other wording,
24 please exercise your ingenuity and then come -- I will be
25 around to see you and please develop a very compliant mood so

1 we can reach compromises and go forward with something. Because
2 I think this is -- we're grappling with what is, over the long
3 pull, likely to be one of the more important elements. If we
4 can agree on it, if Congress would go forward with it, I think
5 it would be a very fine -- it wouldn't in fact make the bill
6 well worthwhile in itself --

7 COMMISSIONER KENNEDY: It would hardly justify its
8 title of regulatory reform.

9 CHAIRMAN HENDRIE: Well, true. Okay, onward.

10 Now, on page 2 of the additional -- those two sheets
11 you have got, we had to get over here to where was that, Peter?
12 Page 4 or 5 or thereabouts.

13 COMMISSIONER BRADFORD: This wasn't mine, I don't
14 think.

15 MR. SHAPAR: Two is to reflect Commissioner
16 Kennedy's thought about the staff is supposed to serve the
17 public interest, the second sheet.

18 CHAIRMAN HENDRIE: Ah, this is still a finding.
19 Back to the findings.

20 COMMISSIONER BRADFORD: This is labeled as a new
21 fourth finding, is it?

22 MR. SHAPAR: The underlined language is the addition
23 to the fourth finding.

24 COMMISSIONER BRADFORD: I see.

25 COMMISSIONER GILINSKY: Do we need a reasonable

1 assurance and all that, because this is getting to be a little
2 overkilled. Can't we just say that the participation of the
3 staff is a further instance of protection.

4 MR. SHAPAR: You don't need "reasonable" there; it
5 was intended to key into the other page.

6 COMMISSIONER GILINSKY: Further into the protection
7 of the public health and safety.

8 MR. SHAPAR: Yes, you could delete it.

9 You might want to mesh it though with whatever you
10 agree upon on Friday, I would point out.

11 COMMISSIONER GILINSKY: I don't see -- what is all
12 this?

13 MR. SHAPAR: This was intended to do as you
14 directed --

15 COMMISSIONER GILINSKY: I am still unclear whether
16 we are setting the record straight and in fact they did protect
17 the public interest, or that we are admonishing them?

18 COMMISSIONER KENNEDY: I think we should be setting
19 the record straight that that is what they have been doing and
20 are expected to continue to do. In other words, it would seem
21 to me appropriate that the recognition of the role which the
22 staff has played in the public interest in the past should be
23 recognized, compliments, and they be admonished to continue it.

24 MR. SHAPAR: And should continue to be improvements,
25 I would add there.

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1 COMMISSIONER BRADFORD: It's pretty hard. Well,
2 maybe you can do it with a word like continue. It's pretty
3 hard to use legislation historically like that. I guess the
4 word continue would do it. You can do that better in the
5 legislative history. In legislation, it normally speaks of the
6 future. .

7 COMMISSIONER GILINSKY: Well, the first part is
8 certainly comparable to the future. It sounds like the
9 future. You're talking about "should be." So we are really
10 saying that the staff -- this is what the staff should do.

11 CHAIRMAN HENDRIE: I think -- and then you get down
12 to participation by the staff should continue to be in further-
13 ance. I agree with what you say, Peter, but here I don't find
14 it objectionable. The thought it carries to me is that it
15 certainly should be in the future and if it hasn't always been
16 always been in the past, it should have been.

17 COMMISSIONER KENNEDY: The legislative history
18 clearly indicates that that's what it has been.

19 CHAIRMAN HENDRIE: Or should have been, if it was
20 not always so.

21 COMMISSIONER KENNEDY: The Committee report would
22 indicate that that has been the intention, that has been the
23 way in which the staff has conducted itself, and considered
24 itself, and it has been admonished to continue to do so.

25 CHAIRMAN HENDRIE: That seems all right. And then

1 cut the -- put a period there, semicolon, I guess, after
2 interest.

3 COMMISSIONER KENNEDY: Does one need the other?

4 MR. SHAPAR: Yes, I think so.

5 CHAIRMAN HENDRIE: Do you think we need the tailend?

6 MR. SHAPAR: Yes.

7 MR. SHAPAR: The reason being that unlike most
8 regulatory agencies, this Commission does not have a public-
9 interest charter.

10 COMMISSIONER KENNEDY: That's correct.

11 MR. SHAPAR: So if you give the staff a different
12 charter from the charter of the agency, you are causing your-
13 self problems in having arguments that our jurisdiction goes
14 beyond health and safety and common defense and security.

15 COMMISSIONER KENNEDY: Economic questions and all
16 the others.

17 MR. SHAPAR: That's correct.

18 COMMISSIONER GILINSKY: What about -- (inaudible.)

19 MR. SHAPAR: I would suggest that we could handle
20 this very easily by combining a thought of Commissioner Brad-
21 ford and the problem of Commissioner Gilinsky by simply saying
22 that "And participation by the staff of the Nuclear Regulatory
23 Commission in the licensing and hearing process should continue
24 to be in the furtherance of the public interest in protecting
25 the public health and safety and the common defense and security."

jeri 1 I think that would combine everybody's ideas.

2 COMMISSIONER KENNEDY: Sure.

3 COMMISSIONER BRADFORD: How about "you should
4 continue to further"?

5 MR. SHAPAR: Better.

6 COMMISSIONER KENNEDY: Continue to further?

7 MR. SHAPAR: Should be to continue to further.

8 COMMISSIONER BRADFORD: Or how about you should
9 continue to further?

10 MR. SHAPAR: All right. "Should continue to
11 further." "In protecting the public health and safety."

12 COMMISSIONER BRADFORD: I've never been able to
13 give that phrase any context.

14 CHAIRMAN HENDRIE: Do you need to say anything about
15 the environmental impact?

16 MR. SHAPAR: No, you don't, because the basic
17 structure of the Atomic Energy Act is to talk only about
18 public health and safety and the common defense and security.
19 NEPA takes care of our additional authorities, but not through
20 the Atomic Energy Act.

21 CHAIRMAN HENDRIE: That's right; I agree with you.

22 Okay, let us try it that way.

23 MR. SHAPAR: Only one other thought on that, and that
24 is you might want to change it to make it consistent with what-
25 ever you agree on on Friday. Because you have got a comparable

1 phrase in there: "Protecting the public health and safety"
2 which you want to discuss.

3 CHAIRMAN HENDRIE: We'll keep it in mind. I'll
4 keep it in mind.

5 Onward. Let's see, you were going to get a para-
6 graph up there on page 4 or something like that.

7 COMMISSIONER BRADFORD: I did on page 4 -- 6 I
8 think.

9 COMMISSIONER KENNEDY: Bottom of page 5, top of
10 page 6. Paragraph B.

11 COMMISSIONER BRADFORD: Right. I did put a para-
12 graph together on that. Howard has now warned me that I have
13 done much more than I intended to do with it though. He says
14 I have now made the whole thing applicable to research reactors.
15 But that I can deal with fairly easily. Although one of the
16 phrases I took out was "for industrial and commercial purposes"
17 I can just put that back in.

18 The other problem, Howard, seems to me to be just as
19 much a part of what you have got as what I have got. You have
20 the language "or part thereof."

21 MR. SHAPAR: But you see, I could have handled it
22 by rulemaking to put, for example, the amendments in a certain
23 category, whereas by putting "the six or more months" in there,
24 then you are bound by the six-months for everything. I wouldn't
25 have that problem.

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1 COMMISSIONER BRADFORD: I see.

2 MR. SHAPAR: That was the *kernel that went by,*
~~---(inaudible.)---~~

3 Now, I don't know that it would give us any problems
4 in connection with amendments or that type of thing, but I
5 guess it could.

6 MR. CASE: Well, the way it is written it applies
7 to the customs, custom-operating license, I think. Can't
8 you broaden it to include everything.

9 COMMISSIONER BRADFORD: What is a custom-operating
10 license?

11 MR. CASE: This is primarily, as I read it, dealing
12 with standard applications. Am I right, Howard?

13 MR. SHAPAR: Yes.

14 MR. CASE: But I think you go beyond that in your
15 language.

16 COMMISSIONER BRADFORD: Okay, I'll put "for
17 industrial or commercial purposes" back in again. Forget about
18 that --

19 MR. CASE: You have power reactors.

20 COMMISSIONER BRADFORD: Right.

21 COMMISSIONER KENNEDY: But it's all power reactors.
22 Standard and nonstandard.

23 COMMISSIONER BRADFORD: Right. But that was true
24 of the language in the old one, too.

25 COMMISSIONER KENNEDY: I don't believe so.

jeri 1 MR. SHAPAR: Wait a minute. It's "A person propos-
2 ing to obtain any approval by rule or regulation or manufactur-
3 ing license."

4 COMMISSIONER KENNEDY: We can straighten that out.

5 COMMISSIONER BRADFORD: All I intended to do by
6 taking out the "by rule or regulation or manufacturing" was
7 just to say "any" because it seemed to me -- how many ways can
8 you get approvals.

9 MR. SHAPAR: Well, I guess the only problem that is
10 really left, Commissioner, is whether or not we would want the
11 six months to apply to amendments to construction permits and
12 operating licenses.

13 COMMISSIONER BRADFORD: Okay, as a practical matter,
14 I take it you wouldn't --

15 MR. SHAPAR: I don't know. I know people who would
16 know.

17 CHAIRMAN HENDRIE: Now these amendments come up
18 and you are asked to deal with -- numbers of times you are
19 asked to deal with --

20 MR. CASE: Part thereof, in the original, only
21 dealt with applications of rulemaking or approval of a manu-
22 facturing license or preliminary design, or part thereof.
23 Relative to amendments, changes, or parts of those amendments --
24 (inaudible.)

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1 COMMISSIONER BRADFORD: If you went back to the
2 original language, difficult though it is, part thereof I
3 guess really is right. I didn't read it that way. I
4 think probably one doesn't have to read it that way. But
5 all that is for clarification. WE don't have to take
6 time on it now. I guess the serious question is whether the
7 six months -- as far as I am concerned, there is no
8 reason --

9 MR. CASE: If you put the six months in as it
10 is presently written, then it doesn't apply to amendments,
11 so there is no real problem.

12 MR. SHAPAR: You can do it by rule-making anyway,
13 be as specific as you want to be and you wouldn't be
14 bound by the six months.

15 COMMISSIONER BRADFORD: I would rather have
16 the six months in and make it clear you don't intend it to
17 apply to amendments.

18 MR. SHAPAR: We could do that.

19 COMMISSIONER BRADFORD: That would be fine with
20 me, and just forget about my lawn-mowing operation --

21 MR. CASE: *that's in any application.*
~~(Inaudible)~~

22 CHAIRMAN HENDRIE: We could tuck in some language
23 to get amendments out of it, then I think the six months, at
24 least at the moment I don't see where there is difficulty,
25 and maybe if there is, it will come up in testimony before

DB2 1 the Congress and then we can see if we have overlooked
2 some fundamental proposition.

3 Onward.

4 COMMISSIONER BRADFORD: I also redid the next
5 one, with no intention to change the content, but just
6 to try and make it into something I could understand. I
7 defy anybody to --

8 MR. CASE. Oh? What's it for?

9 MR. SHAPAR: The only thing we added in there
10 is --

11 COMMISSIONER BRADFORD: Well, you made no ^{changes} ~~changes~~
12 in there. It is all out of the Atomic Energy Act, and ^{scared} ~~sacred~~
13 though that is, I can't really tell what it means.

14 MR. SHAPAR: The Atomic Energy Act is probably
15 one of the worst written statutes on the books.

16 CHAIRMAN HENDRIE: I hesitate to ask, but did
17 you draft that?

18 MR. SHAPAR: The answer, Mr. Chairman, is Hell no.

19 COMMISSIONER KENNEDY: On the other hand it is
20 still by and large on the books, and some twenty years
21 later, which says something.

22 CHAIRMAN HENDRIE: But I don't want to discuss
23 what.

24 COMMISSIONER KENNEDY: That suggests an awful
25 lot of people have made an awful lot of interpretaions and
they have all stood up.

DB3

1 CHAIRMAN HENDRIE: "As required by rule, regulation
2 or order" --

3 COMMISSIONER BRADFORD: Maybe the best way to do
4 this, I didn't intend to change its meaning, would be if
5 we could just get agreement that if Howard agrees that I
6 haven't in fact changed the meaning --

7 CHAIRMAN HENDRIE: I would be glad to put you two
8 together to discuss what the nuances are, okay? I think
9 that is an excellent way to do it. Okay? Onward. Page 7,
10 8, 9, 10 --

11 COMMISSIONER BRADFORD: Wait a minute.

12 CHAIRMAN HENDRIE: If you are going to stop to
13 blink, Peter --

14 COMMISSIONER BRADFORD: 7 I had no problems with.
15 I take it we have surrendered on reactor safety.

16 CHAIRMAN HENDRIE: Yes. Okay.

Mr. Kelly:
17 VOICE: Line 5, 104(a), should that be 104(b),
18 a typo?

19 MR. SHAPAR: I don't think it is a typo. I will
20 check it out.

21 CHAIRMAN HENDRIE: "Any application under Section
22 104(a) or (c)" it says. You think it may be something else.
23 Put a circle around it, Howard, and put a question mark
24 on it.

25 MR. CASE: Can I raise a question there? Howard

DB 4 1 will kill me.

WW 2 MR. SHAPAR: I want you to know that we no longer
3 suppress dissent.

4 MR. CASE: Right. The ACRS -- question. Should
5 you put in there ought to be a mandatory review of
6 applications for rules approving final designs.

7 CHAIRMAN HENDRIE: I don't think so, because the
8 Committee will want to review those, and I think the
9 Commission will want them to review, and if somebody found
10 it necessary to their peace of mind to make it statutory
11 why okay, but I have no doubt whatsoever that both we and
12 they will want their consideration on these things.

13 MR. CASE: It just strengthens the hand in moving
14 back from the hearing requirements for those facilities,
WW 15 when they are ready to go ^{ahead.} ahead.

16 CHAIRMAN HENDRIE: Yes. It could be put in, but --

17 MR. CASE: Okay.

18 COMMISSIONER BRADFORD: On dispensing with ACRS
19 reviews, it says the Committee may dispense with such
20 reviews. Should we say "all of part of such review"?
21 Do you want to have them either do the review or dispense
22 with all of it?

23 MR. SHAPAR: To give the flexibility, the
24 proposed legislative history can make it clear they can
25 review either part of an application or the whole application

DB 5

1 and would continue to do so.

2 COMMISSIONER KENNEDY: You could put in --

3 COMMISSIONER BRADFORD: This is five lines up
4 from the bottom, page 7.

5 MR. SHAPAR: The idea being all or part of such
6 review?

7 COMMISSIONER BRADFORD: Yes. Should they have
8 to state in that letter why review is not warranted?

9 MR. CASE: No.

10 COMMISSIONER BRADFORD: As a receipt of that
11 letter, I would like to know.

12 MR. CASE: It would take them as much time to
13 write that letter saying why the review is not warranted
14 as --

15 MR. SHAPAR: That has been the argument against
16 putting in this requirement. *h* The argument the other way for
17 keeping it in is the public is damn well entitled to know
18 when ACRS chooses not to review something.

19 MR. CASE: He wants the reasons in there, I believe.

20 COMMISSIONER BRADFORD: Yes, I mean if they are
21 capable of making up their mind it doesn't need reviewing,
22 they ought to be able to say why not.

23 MR. CASE: The problem is you have 15 people to
24 agree to why not. They all may agree it shouldn't be
25 reviewed, but all have different reasons.

ww

DB6

1 CHAIRMAN HENDRIE: They will agonize at considerable
2 length over reasons, I can assure you.

3 COMMISSIONER BRADFORD: I am sure that is right. But
4 for them to agree that something shouldn't be reviewed,
5 it seems to me there has got to be something they can
6 set down on paper.

7 COMMISSIONER GILIN: I presume the answer
8 in almost every case will be that reactor is very much
9 like some other reactor. Isn't that going to be
10 true in ^{almost} ~~almost~~ every case?

11 MR. SHAPER: I would think so.

12 CHAIRMAN HENDRIE: No new issues.

13 COMMISSIONER GILINSKY: Yes, so why can't they
14 have sort of a standard paragraph. I mean if that is not
15 the answer --

16 MR. CASE: It is just not their way of doing
17 things.

18 COMMISSIONER BRADFORD: If I am going to get a
19 letter from the ACRS saying this application didn't need
20 review, I guess I would like to know why they felt it
21 didn't.

22 COMMISSIONER GILINSKY: No new issues.

23 MR. SHAPAR: Of course you would have the option
24 to require them to do it anyway.

25 COMMISSIONER GILINSKY: How would you know --

7
1 In other words, I guess in a situation where
2 each guy has a different reason --

3 COMMISSIONER KENNEDY: But we could require them
4 to tell us the reason.

5 MR. SHAPAR: If you require them to tell you the
6 reason by a working accommodation. The question is whether
7 or not you want to write it into the statute.

8 COMMISSIONER BRADFORD: I would want to know the
9 ^{reasons} ~~reasons~~ if I got a letter like that.

10 COMMISSIONER GILINSKY: Well, it seems to me
11 there is a world of difference --

12 CHAIRMAN HENDRIE: ⁵ Would you settle on -- I
13 would like to give them some suggestion that while a brief
14 summary of their reasons would be desirable, that they
15 needn't agonize extensively and write a great long treatise
16 on why not.

17 So language along the lines of "may dispense
18 with such review and report by notifying the Commission in
19 writing that", what, "all or part of such review
20 by the Committee is not warranted" --

21 COMMISSIONER GILINSKY: Say "because", like
22 it raises no significant issues.

23 CHAIREMAN HENDRIE: What I want is a summary
24 providing a summary statement as to the reasons.

25 COMMISSIONER BRADFORD: "Review by the Committee

8 1 is not warranted and summarizing the reasons therefor."

2 COMMISSIONER KENNEDY: Together with a brief
3 statement of the reasons for their conclusion.

4 CHAIRMAN HENDRIE: Something along that line,
5 okay? How about that? If we get a summary statement,
6 or some brief statement, something ^{like} ~~like~~ that in there, I
7 think the flavor then is okay.

8 Otherwise I can see a four-page --

9 MR. SHAPAR: I will come up with something.

10 I would mention one practical point. It took
11 about three years of agony to get the Committee to agree
12 to this language.

13 I just raise that as a practical point.

14 COMMISSIONER KENNEDY: Did the Committee have to
15 agree to this language?

16 CHAIRMAN HENDRIE: They will be asked, but I
17 have felt that I would prefer not to ask the Committee to
18 consider preliminary versions of a bill. When we know
19 what the Administration wants to send to the Congress, then
20 that text ought to go to the Committee and say, you know,
21 for your information and we would be glad to have any
22 comments you may want to make, note particularly section so
23 and so, which refer to the Committee. Then they will
24 reply. They will get their chance then.

25 COMMISSIONER KENNEDY: But it is an advisory

9 1 committee, is it not the Commission's responsibility
2 to determine what kinds of advice it seeks from the
3 committee?

4 CHAIRMAN HENDRIE: Of course.

5 MR. SHAPAR: I am afraid that question has been
6 answered by the Joint Committee, and it may no longer
7 still be good, since the Joint Committee is either dead
8 or about to become dead.

9 But this was a controversial matter sometime
10 ago, and Congress said that the Committee can damn well
11 look at anything they want to look at, irrespective of the
12 wishes of the Commission.

13 COMMISSIONER KENNEDY: On the other hand, did
14 it or did it not imply at that time that the Committee
15 did not have to look at something if the Commission asked
16 it to? Nor report to the Commission on something the
17 Commission asked --

18 MR. SHAPAR: I don't recall that coming up at all.
19 Only that they had a free fishing license.

20 COMMISSIONER KENNEDY: Yes. In other words,
21 it could go beyond what the Commission asked for, but
22 it could not deny what the Commission asked for. Is that
23 correct?

24 MR. SHAPAR: That didn't come up as far as I know.

25 CHAIRMAN HENDRIE: But that was the implication,

10

1 Okay, let us crash forward. Page 8? Page 9?

2 COMMISSIONER BRADFORD: On page 8, Howard, after
3 the first sentence in Section 185, on permits, in the
4 Administration draft there was a couple of instance in
5 there which purported to limit the length of time the permit
6 would be good for.

7 What was the thinking on that?

8 MR. SHAPAR: I guess we wanted the flexibility
9 of not being tied to a fixed period of time. If you all
10 feel comfortable with a time, set time for a site
11 permit, there is no reason why it shouldn't go in.

12 COMMISSIONER BRADFORD: That wasn't a site permit,
13 was it?

14 CHAIRMAN HENDRIE: Yes, this is the CP section,
15 185. What language do you have there, Peter?

16 MR. SHAPAR: Are you talking about the earliest
17 and latest completion dates?

18 COMMISSIONER BRADFORD: Yes.

19 MR. SHAPAR: That was something we have taken out
20 of the Atomic Energy Act in every version of the NRC bill
21 for the simple reason it was borrowed from the Federal
22 Communications Act, and found to be completely useless.
23 It served no purpose whatsoever.

24 CHAIRMAN HENDRIE: It just turns out to be
25 a thing that in almost every case comes up and requires the

11 1 Staff and the Commission to take --

2 COMMISSIONER BRADFORD: Action extending it.

3 It is in the Atomic Energy Act now?

4 MR. SHAPAR: Now. We took it out, it has
5 been taken out in every version, and it was barred from
6 the Federal Communications Act.

7 *Chairman Hendrie: And it hasn't been helpful at all.*
~~COMMISSIONER BRADFORD: (Inaudible)~~

8 MR. SHAPAR: Yes, that is exactly the reason.
9 Everybody was competing for licenses.

10 COMMISSIONER BRADFORD: It serves no purpose
11 in terms of keeping the permit up to date, in terms of
12 changes or anything?

13 CHAIRMAN HENDRIE: The staff cranks that lever
14 with even more vigor than might be desirable in all
15 circumstances.

16 Page 10.

17 COMMISSIONER GILINSKY: On page 9, I am comfortable
18 with calling this thing, this combined ~~per~~mit a combined
19 permit-operating license.

20 First of all, let me ask a question. What does
21 "commence operation" mean? Loading fuel?

22 MR. SHAPAR: Anything we say it means by rule-
23 making. The legislative history shows the introduction
24 of the hazard, which has traditionally been the loading
25 of fuel.

12 1 COMMISSIONER GILINSKY: Because, you know, we are
2 now calling a kind of approval an operating
3 license, which really is a good deal less than what an
4 operating license is now.

WW 5 In other words, we are giving somebody a piece
6 of paper who has really done a lot less than what people
7 now normally do for an operating license.

8 MR. SHAPAR: How a lot less? The only difference
9 I can see is no determination has been made that the plant
10 has in fact been built in accordance with the application
11 as amended. And pursuant to your request, that is now in
12 the statute.

13 COMMISSIONER GILINSKY: Well, that's right. I guess
14 I don't feel strongly about this --

15 MR. SHAPER: I will draft anything you like,
16 that you agree on.

17 COMMISSIONER GILINSKY: If it is anything less
18 than a review --

19 MR. SHAPER: I don't feel strongly about anything.

20 CHAIRMAN HENDRIE: The staff reviews a design
21 and analysis of various plant transients in an event.
22 At OL 5 you would expect to see the final design, and then
23 a complete set of analyses with correct operationg
24 parameters and so on in it.

25 On the basis of that, the Staff recommends an

13

1 an operating license, which then does not issue immediately,
2 because typically the Director of NRR hangs onto it until
3 the plant has satisfied a variety of completion and
4 inspection requirements.

5 Now in the combined CP-OL, the Staff gets in
6 and reviews that same final design and final set of safety
7 analyses, just a couple of years sooner, and once
8 more before he goes any place with it, he has to complete
9 the facility, and be inspected and be found to have lived
10 up to all of the terms and conditions.

11 I see less qualitative difference than you seem
12 to.

13 COMMISSIONER GILINSKY: Let me ask a question in
14 the other direction.

15 You say complying with the rules and regulations of
16 the Commission. Does that mean the ones at the time he
17 applied, or the ones since then?

18 MR. SHAPAR: Any that you put in effect as of
19 that time.

20 CHAIRMAN HENDRIE: Anything that is in effect
21 when he wants to operate he has to conform to.

22 MR. SHAPAR: Exactly.

23 COMMISSIONER GILINSKY: Isn't that a stricter
24 standard than we apply now?

25 MR. SHAPAR: No.

14

1 CHAIRMAN HENDRIE: No. We don't allow -- it
2 doesn't take an OL form out of his picket and sign it
3 for the plan now unless it is in conformity with the
4 Commission's rules and regulations, as they stand at the
5 moment he puts pen to paper.

6 COMMISSIONER GILINSKY: Just so we don't --

7 CHAIRMAN HENDRIE: The first thing you know
8 you will be complaining about all this backfitting the staff
9 requires.

10 COMMISSIONER GILINSKY: You mean to say there is
11 no cut off?

12 CHAIRMAN HENDRIE: No.

13 MR. CASE: You can make a cut-off in the regulations
14 you write. But if you make no cut off, there is no cut-off.

15 COMMISSIONER GILINSKY: I see.

16 MR. SHAPAR: Not only that, but you should know
17 that even if an applicant complies with all of the rules
18 and regulations of the Commission, and gets his operating
19 license, if, for some safety problem, it doesn't quite fit
20 within the context of the rules, you feel it is a safety
21 problem, you can shut him down.

22 COMMISSIONER GILINSKY: We are all familiar with
23 that. All right.

24 CHAIRMAN HENDRIE: I think that is pretty good
25 on balance. 10?

15

COMMISSIONER BRADFORD: Still on page 8,

"utilization of production facility other than a facility of the type specified in 2021 and 2022," isn't that a fairly tortured way of saying --

COMMISSIONER KENNEDY: Where is this?

COMMISSIONER BRADFORD: Two-thirds of the way down on page 8.

Isn't that a fairly tortured way of saying it? What we are really talking about are commercial light water power reactors. Do we want to be talking about, in various streamlined proceedings, if somebody comes in with I don't know, a heavy water reactor, a high temperature gas reactor, a re-processing plant --

MR. SHAPAR: You can take as many things out as you want. The thought was the one controversial thing around now is the breeder. This was picked up from the Administration bill. They wanted to knock out the breeder, because the breeder is so controversial, I assume.

If you feel there are other matters that you would like to knock out, we can knock them out.

COMMISSIONER BRADFORD: Well, as a practical matter --

MR. CASE: As a practical matter, it won't happen.

COMMISSIONER BRADFORD: Why don't you say light

16 1 water reactors here?

2 COMMISSIONER GILINSKY: We are looking for a
3 *standard* ~~stadard~~ application from General Atomic --

4 CHAIRMAN HENDRIE: Yes, for an HTGS?

5 MR. CASE: It hasn't been approved --

6 COMMISSIONER KENNEDY: But there is an application,
7 right?

8 MR. CASE: I don't believe there is any appli-
9 cation. For a standard design, yes, there is that.

10 MR. SHAPAR: How about a critical facility?
11 Wouldn't you want to do it for that?

12 COMMISSIONER GILINSKY: You are talking about
13 a combined --

14 MR. CASE: AGN 201, low one-tenth watt research
15 reaction. We haven't got a definition of light water
16 reactor, although we have horsed around.

17 MR. SHAPAR: If you use it, you will have to come
18 up with one. It is not a term of art.

19 COMMISSIONER BRADFORD: It seems to me this
20 potentially encompasses a lot of facilities we
21 are not ready to encompass.

22 MR. CASE: It says "may". You are not directed to.

23 COMMISSIONER KENNEDY: Yes. As long as it
24 does say "may", we can decide, whereas if it gets more
25 restrictive, when the time does come, if it does, we have to

17

1 go back for legislation to make it possible.

2 MR. SHAPAR: Also I couldn't imagine in my wildest
3 dreams someone coming in with a final design on a new
4 concept.

5 COMMISSIONER BRADFORD: No. Might you get somebody
6 coming in, because this language occurs throughout the bill,
7 might you get somebody coming for early siting or for
8 something other than the type of --

9 CHAIRMAN HENDRIE: Not a light water reactor.

10 COMMISSIONER BRADFORD: Yes. Supposing they came
11 in, you might want to consider whether or not --

12 CHAIRMAN HENDRIE: I suppose it gets you right
13 back to the same thing you do now.

14 MR. SHAPAR: I think it might depend on the
15 circumstances. I think you would want to fine tune it by
16 rule-making.

17 CHAIRMAN HENDRIE: It would be preferable to
18 deal with it by rule-making, rather than to be excessively
19 restrictive here in the statute, because then we may be
20 back in two or three years having to have legislation
21 in order to clear a path for a perfectly reasonable sort
22 of thing.

23 COMMISSIONER BRADFORD: As you say, we do have
24 the control over this, I guess. From our point of view I
25 think that should be adequate.

18

1 CHAIRMAN HENDRIE: Well I think if had my
2 druthers, I would strike this 202 language on the basis
3 that indeed we do have the powser and we are not about
4 to rush pell mell into things, but maybe --

5 MR. SHAPAR: Is that in view of the vote today?
6 I mean yesterday.

7 COMMISSIONER BRADFORD: About three lines below
8 that, where you say "in accordance with the rules and
9 regulations of the Commission," I suggest inserting what
10 I gather may already be in the rules and regulations, but
11 it says : "Provides reasonable assurance", and I had
12 "adequate protection of the public health and safety."
13 You might want to say "no undue risk."

14 MR. SHAPAR: That is in the regulations.

15 COMMISSIONER BRADFORD: I guess I would prefer to
16 see that in the statute. I just think -- my problem with
17 this whole section is there isn't anything resembling a
18 standard in it. The rules and regulations of the Commission
19 might change at some future time, although for the reasons Ed
20 already pointed out, after 20 years I guess it is unlikely.

21 It seems to me where you have a new type of
22 license, it ought to be pursuant to a statutory standard
23 that actually says what you are talking about.

24 MR. SHAPAR: There are only two or three statutory
25 standards, unde risk, not endangering the public health and

19 1 safety and maybe a third one that I can't recall, all relating
2 to utilization of facilities. But if you would like to
3 pick one or more, we can put them in.

4 COMMISSIONER BRADFORD: I would, if no one disagrees.

5 COMMISSIONER KENNEDY: I have no objection.

6 CHAIRMAN HENDRIE: I don't either.

7 Howard, if you discern any sort of structural
8 difficulty that follows from that, talk to Peter as you
9 will on other matters.

10 MR. SHAPAR: I certainly will.

11 CHAIRMAN HENDRIE: Okay? Onward.

12 COMMISSIONER BRADFORD: Would 60 day notice hurt
13 there?

14 CHAIRMAN HENDRIE: I would think not. Is 60
15 day notice okay?

16 MR. SHAPAR: Yes. It is where it would apply to
17 amendments is where it might pinch.

18 CHAIRMAN HENDRIE: Then what can you do to make
19 it 30 days at most for amendments?

20 MR. SHAPAR: Amendments are taken care of, this
21 doesn't apply to amendments. So it is all right.

22 CHAIRMAN HENDRIE: Onward. 9, 10?

23 MR. BRADFORD: Wait a minute. 10. In subsection
24 1, you have the Commission making all of the findings
25 required to be made prior to the issuance of a permit or

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1 license pursuant to the National Environmental Policy Act,
2 of '69.

3 Supposing the state is undertaking to make those
4 findings? Does that language cover that? Or would that
5 require the Commission itself to --

6 MR. SHAPAR: you are talking about the tie-in with
7 the other section that enables us to rely on it, we
8 could use that reliance authority to take this as well.
9 Because it says, if you get to the actual language,
10 "In preparing and considering any environmental impact
11 statement or conducting any other environmental review
12 pursuant to the ^{National} ~~National~~ Environmental Policy Act of
13 '69," et cetera, "the Commission shall" -- in certain cases
14 "and may" -- "rely on others."

15 MR. CASE: The Commission still has to make
16 the finding, even though it relies --

17 COMMISSIONER BRADFORD: Okay.

18 CHAIRMAN HENDRIE: Under the pattern here we
19 don't give up the fundamental responsibility to make
20 the findings.

21 What our suggestion does is to allow us to use
22 as a basis for those findings however much of the state
23 proceedings as are appropriate.

24 COMMISSIONER KENNEDY: Allows us to use or
25 require us to use?

CHAIRMAN HENDRIE: Allow, I think.

W W

1 MR. CASE: Allow, on the environmental work.

2 CHAIRMAN HENDRIE: Not on the need for power.

3 COMMISSIONER BRADFORD: On subsection 2, "finding
4 on the basis of the available information and review to
5 date."

6 What does that actually mean?

7 MR. SHAPAR: ^{fr} This merely is a codification of
8 our existing rule on limited work authorization. It means
9 that since the final review is not over, we issue
10 the LWA because the complete review process is not over,
11 we take what we have in hand to enable us to issue the
12 limited work authorization.

13 COMMISSIONER BRADFORD: Okay. In terms of the
14 timing, the way these things work, can that come at the
15 time when in fact the available information reviewed to date
16 is fairly limited?

17 MR. CASE: It has to satisfy our requirements.

18 MR. SHAPAR: You have to have reasonable assurance.
19 It is simply a recognition that there may be other
20 information that comes in later, because the construction
21 permit certainly hasn't been issued. This is ^apreliminary
22 step to the issuance of the LWA.

23 MR. CASE: It is in the context of if you are
24 reviewing a complete construction permit application.

25 COMMISSIONER BRADFORD: Right. But if the request

22

1 for the limited work authorization came early enough, I
2 suppose the available knowledge and review to date might
3 consist of very little except a statement from the applicant
4 that no harm would ensue.

5 MR. SHAPAR: That wouldn't meet your regulations,
6 because our regulations, during the process of the review
7 we would say that isn't good enough.

8 COMMISSIONER BRADFORD: But if you require it
9 on the basis of what you have to date --

10 MR. SHAPAR: But if they give us the information
11 too early and too sparse, we couldn't say that was reasonable
12 assurance.

13 COMMISSIONER BRADFORD: All right. I wouldn't
14 mind, if I were an applicant, trying to wind that one back-
15 wards, but I think you are right.

16 MR. CASE: I don't think you could get away with
17 it.

18 MR. SHAPAR: I think it has been tried.

19 CHAIRMAN HENDRIE: I think it has been tried.
20 I think he did well for a while, but fell into a trap the
21 Staff had laid for them.

22 MR. CASE: He might get the site approved and
23 never get the construction permit.

24 COMMISSIONER BRADFORD: In subsection 3, to the
25 extent that we are saying that -- maybe it is not part of

23

1 this subsection. Anyway, "conducted at the risk of the
2 Applicant," The Administration bill had in there something
3 about it shouldn't be part of a subsequent cost-benefit
4 calculation. Why are we ^{dropping} ~~keeping~~ that?

5 MR. SHAPAR: Say that again?

6 COMMISSIONER BRADFORD: It says "such activities
7 shall be conducted at the risk of the Applicant, and should
8 be subject to ratification and modification by the Commission
9 at any time.

10 The Administration bill went on to say -- and
11 I don't have the exact language --

12 MR. CASE: You have already made the NEPA findings,
13 by this time.

14 CHAIRMAN HENDRIE: That was just a misunderstanding
15 of the process in the NEPA bill. I mean in the Administration
16 bill.

17 MR. SHAPAR: I would like to point out again
18 that the only purpose of this section is sort of a
19 word of caution to confirm the ^{authority} ~~authority~~ that we always
20 thought we had to issue limited work authorizations. This
21 completely follows the existing practice and regulations.

22 MR. CASE: In that sense they are tested.

23 COMMISSIONER BRADFORD: As a practical matter
24 under the existing practice, to ^{what} ~~what~~ extent does a limited
25 work authorization ever exert a pressure for a particular

24

1 type of result later on? Does the applicant come
2 in and say "Look, I have spent a million dollars already".

3 MR. SHAPAR: You might also ask that question
4 in connection with the issuance of the operating license,
5 after the plant has been fully constructed.

6 COMMISSIONER BRADFORD: Yes, I understand what you
7 are saying.

8 MR. CASE: Because of this clause he can't do
9 safety work unless we are satisfied the safety work to be
10 undertaken under the LWA, there is no safety problem.

11 MR. SHAPAR: I would have to disagree with that
12 answer. I think the candid answer to his question is yes,
13 the more he has invested, the better position he is in to
14 exert pressure on us.

15 MR. CASE: Except I have to approve everything
16 he does.

17 MR. SHAPAR: You are saying that you can resist
18 pressure on all occasions and I am sure you can't.

19 COMMISSIONER GILINSKY: Well, no one has ever
20 been turned back at that point. Is that right?

21 *Shapar?*
MR. CASE: True. Nor has anyone been refused an
22 OL after he received a CP.

23 COMMISSIONER BRADFORD: At the bottom of the
24 page, is there a reason why you left local publication out
25 on this one, only publication in the Federal Register.

25

1 Local publication seems to crop up everywhere
2 else.

3 MR. SHAPAR: You mean 60 days? Well, we have
4 the thing in connection with the original application, but
5 if you would like it here, okay.

6 COMMISSIONER KENNEDY: Where is that?

7 COMMISSIONER BRADFORD: The bottom of page 10.

8 CHAIRMAN HENDRIE: Okay?

9 COMMISSIONER BRADFORD: Page 11, I have nothing
10 on.

11 CHAIRMAN HENDRIE: All right. 12?

12 COMMISSIONER BRADFORD: 12, I have nothing either.

13 COMMISSIONER GILINSKY: There is an "e" missing --

14 CHAIRMAN HENDRIE: The spelling hasn't been
15 uniformly admiral through here. I found a "notwithstanding"
16 at some place, I believe on page 13 --

17 COMMISSIONER BRADFORD: There is a "b" that should
18 be "by". I ^{guess} ~~guess~~ that is one of the limitations of ^{the Mag Card} ~~(inaudible)~~

19 MR. SHAPAR: Where is the "e"?

20 COMMISSIONER BRADFORD: The 7th line down.

21 COMMISSIONER KENNEDY: Which page?

22 COMMISSIONER BRADFORD: Page 12. And you have the
23 same thing on 13 on the fourth line.

24 MR. SHAPAR: We will have to give that a close
25 reading.

26

1 CHAIRMAN HENDRIE: Now on page 13, let' see,
2 I am geting -- there are or aren't?

3 I would like to treat this rather briefly and see
4 if we can't agree. We have the first item previously
5 reserved that comes up on page 13 and the top of page 14,
6 the question of whether the Commissioner should be alloweed
7 standby power to issue an interim operating license in
8 advance of the conduct or completion of any required hearing,
9 with appropriation conditions, et cetera, et cetera.

10 We agree that we want this authority explicitly
11 in the statute for amendments to operating licenses. It
12 has been or I have argued, I guess, that it would very
13 desirable to have standby authority to issue an operating
14 license. But let me, since we have an interim--

15 MR. SHAPAR: An interim operating license.

16 CHAIRMAN HENDRIE: Well, an interim operating
17 license with appropriate conditions in advance of the
18 completion of the proceeding.

19 We have discussed it and had a chance to think
20 about it.

21 Why don't I just ask for an expression of yea
22 or nay down the table.

23 COMMISSIONER KENNEDY: Yes.

24 CHAIRMAN HENDRIE: I have a yea. Peter?
25 The Chairman gets to vote last, or maybe not at all.

27

1 COMMISSIONER BRADFORD: On the license itself,
2 I would say nay.

3 COMMISSIONER GILINSKY: I would say no, unless the
4 conditions are somehow, relating to a national emergency,
5 something like that.

6 COMMISSIONER BRADFORD: My concern is the standards.
7 If someone could draw up a set of standards as to when these
8 things should issue that are more specific than what we have
9 here, I might consider them.

10 CHAIRMAN HENDRIE: Would language along the lines
11 "urgent public need or national emergency" --

12 COMMISSIONER KENNEDY: It was indeed that context
13 that I was saying yea.

14 CHAIRMAN HENDRIE: I would like to go a little
15 beyond ^{national} ~~that~~ emergency, because if some region flat out
16 is not going to get through the winter without turning out
17 a lot of power.

18 COMMISSIONER KENNEDY: Declaration of a national
19 emergency is a rather difficult thing, although --

20 COMMISSIONER GILINSKY: (Inaudible)

21 COMMISSIONER KENNEDY: Yes, but you know the
22 Administration, the President does have a lot of authority
23 to declare certain areas as disaster areas, or other
24 circumstances which would justify an action.

25 COMMISSIONER GILINSKY: Then would you have a

28

1 hearing on that?

2 COMMISSIONER KENNEDY: Would he have a hearing?

3 *Commissioner*
1 GILINSKY: Would we have a hearing?

4 COMMISSIONER KENNEDY: I wouldn't think so.

5 COMMISSIONER GILINSKY: I mean not the President's
6 declaration of a national emergency. You are talking about
7 an urgent public need. It would seem to me you would
8 have to have a hearing to decide if there is an urgent
9 public need.

10 CHAIRMAN HENDRIE: I would think if the Commission
11 in its wisdom concluded there was an urgent public need,
12 which made it appropriate to go forward with an interim
13 operating license, appropriately conditioned, if nobody
14 objected to that action, I would see no reason to have a
15 hearing.

16 If somebody objected, a state or a party objected,
17 then presumably there would --

18 COMMISSIONER KENNEDY: I am visualizing a circum-
19 stance arising where a state proposes something, DOE
20 requests the Commission to act in this regard, you know,
21 why would we then sit -- we would be at that point a bit
22 in the mode of the Federal ^aPower Commission, we would be
23 determining the need for power.

24 COMMISSIONER GILINSKY: Well, first of all,
25 there has got to be somebody objecting, because presumably

29 1 that is what led to the situation that brought the
 2 request up here in the first place.

 3 MR. SHAPAR: Is your question do you have to have
 4 a hearing on whether or not there is an emergency?

 5 The answer is no. If you look at page 14
 6 you will see a special requirement for a Federal Register
 7 notice soliticing comments. If the idea is to allow the
 8 operation before you have your hearing on the substance,
 9 obviously there couldn't be a requirement to have a hearing
 10 on whether or not there is a need.

 11 COMMISSIONER GILINSKY: Why not?

 12 CHAIRMAN HENDRIE: In that case you might as well
 13 have the hearing on the original issue.

 14 MR. SHAPAR: It is a different subject.

 15 COMMISSIONER GILINSKY: Just because somebody
 16 calls over here from the Department doesn't mean there is a
 17 public need.

 18 MR. SHAPAR: Well, you decide whether or not
 19 there is a public need, whether somebody at Energy tells you
 20 so or not.

 21 COMMISSIONER GILINSKY: You know, depending on
 22 how you set up the procedures --

 23 MR. SHAPAR: And who is sitting as Commissioners.

 24 COMMISSIONER GILINSKY: Yes, you can have different
 25 outcomes.

 26 COMMISSIONER KENNEDY: I know, we don't -- we are

DB30 1 going to get ourselves back into the need for power issue.

2 COMMISSIONER GILINSKY: My inclination is to
3 say no, but I would be hard put to say you don't want
4 to turn on a plant when there is a national emergency,
5 something like that.

6 If you are talking about a judgment, it would
7 be nice to have the power, somebody calls from the Department
8 of Energy, you know, it ought not to be easy to turn the
9 plant on. I think it ought to be more than just --

10 CHAIRMAN HENDRIE: What would you do with the
11 governors of three states out here saying "Gentlemen, we
12 have to have this plant or there will be widespread hardship
13 in our area". What would you do then?

14 COMMISSIONER GILINSKY: Why can't you have a one-
15 day hearing, have them appear.

16 CHAIRMAN HENDRIE: What I would like to have is
17 something in the legislation that ^{would} ~~would~~ allow us to
18 give consideration to that situation.

19 What you are preparing to do is to just rule it
20 out, say well, in that case we will go to Congress and ask --

21 COMMISSIONER GILINSKY: No, I am saying what --

22 COMMISSIONER KENNEDY: Look, having been given
23 this authority, it seems to me we have to outline the
24 conditions under which we propose to execute that authority,
25 and we would do that, it seems to me, by regulation.

DB31 1 It does go out for public comment and the questions
2 we are talking about can be solved .

3 MR. SHAPAR: You can also say it is not
4 just how urgent it is, it would seem to me if you had a
5 very very serious safety problem, in litigation of that
6 issue, you might very well decide, no matter how urgent it is,
7 you are not going to allow it.

8 CHAIRMAN HENDRIE: I would say it would be better
9 not to have the power --

10 COMMISSIONER GILINSKY: I think there ought to be
11 a hearing before the Commission on any decision like that.

12 MR. SHAPAR: You indicated before expressed in
13 terms like national emergency.

14 COMMISSIONER GILINSKY: That sets it at a pretty
15 high level. If you start backing up on that --

16 CHAIRMAN HENDRIE: Hold up. I smell a possibility.
17 I was trying to use words like "^{urgent}~~urgent~~ public interest",
18 "public need," as well as "national emergency", to provide
19 a statutory description of the circumstances in which you
20 would contemplate an initial OL before you completed the
21 regular proceeding.

22 If you would prefer to do that qualification
23 by saying now with regard to an interim OL, I mean an
24 initial OL, before that could issue, the Commission has the
25 authority to do, but before that could issue, the Commission

32 1 has to hold a hearing on it, or there should be a hearing
2 before the Commission, why that would be fine with me.

3 I would think the circumstances in which we
4 would want to do this would be sufficiently rare and
5 pressing and particular that the Commission would indeed
6 would do the equivalent, and I would have no objection
7 to having a Commission hearing requirement in the statute
8 to make that explicit.

9 COMMISSIONER GILINSKY: Look, I think you ought
10 to have both, have the high standard and --

11 CHAIRMAN HENDRIE: Okay, urgent public need and
12 national emergency and a hearing. Can you do that, Howard?

13 MR. SHAPAR: I am not sure I understand it.
14 Urgent --

15 COMMISSIONER KENNEDY: Urgent public need.

16 CHAIRMAN HENDRIE: This is for an interim or initial
17 operating license in advance of completion of the regular
18 proceedings.

19 MR. SHAPAR: Okay.

20 CHAIRMAN HENDRIE: Before that, the qualifications
21 on that are urgent public need or national emergency,
22 and a hearing by the Commission on that question.

23 COMMISSIONER KENNEDY: Now wait just a second.
24 If a national emergency has been declared, what is it that
25 the Commission is going to decide?

33

1 CHAIRMAN HENDRIE: Whether the need for power is
2 sufficiently -- is the stronger force, or whether there
3 is some --

4 COMMISSIONER KENNEDY: What I am talking about
5 is the Commission -- the staff says to the Commission there
6 is a major safety question here, and indeed that is the
7 subject of the proceeding which is ongoing, and the reason
8 that we have not recommended or we have not acted on the
9 issuance of this matter, what are we going to decide?

10 On the other hand, if that is not the case, the staff
11 says it is not, if the staff is not saying that, and a
12 national emergency is declared, what is it then we are
13 going to say?

14 I am trying to figure out what the purpose of
15 the hearing is other than --

16 CHAIRMAN HENDRIE: To determine the urgent public
17 need.

18 COMMISSIONER KENNEDY: But if a national emergency
19 has been declared --

20 MR. SHAPAR: You have, on page 14 --

21 COMMISSIONER GILINSKY: A national emergency may
22 relate to something quite different than power.

23 CHAIRMAN HENDRIE: I haven't grabbed the
24 problem you are having.

25 COMMISSIONER KENNEDY: I thought we were talking

34

1 about a national emergency which, among other things,
2 required this action.

3 COMMISSIONER GILINSKY: The question is are you
4 using national emergency in the sense that the President
5 has declared, quote, a national emergency.

6 COMMISSIONER KENNEDY: We have to use the words
7 very carefully here. If we are talking about a national
8 emergency, that is what it takes. There is no such thing
9 as a national emergency, within quotes, unless the President
10 declares it. Isn't that correct?

11 MR. SHAPAR: I am not sure.

12 COMMISSIONER KENNEDY: The president has to declare
13 a national emergency.

14 MR. GOSSICK: Use the words "in the presence of
15 an urgent public need. "

16 COMMISSIONER KENNEDY: That is different. But we
17 are using both.

18 COMMISSIONER GILINSKY: He has a good example
19 of that in the railroad strike.

20 COMMISSIONER BRADFORD: When does the President
21 declare a national emergency. It isn't usually for rail
22 strikes.

23 *MR. STÖIBER*

23 *VOICE:* During the Korean War, President Truman
24 tried to nationalize the steel mills, and was not successful
25 because the Supreme Court in Youngstown Sheet and Tube
struck it down.

35

1

CHAIRMAN HENDRIE: Let me make a suggestion.

2

Let us delete the words "or national emergency" from the

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proposed language and leave it "urgent public need." In

4

that case the urgent public need might arise on a regional

5

basis, a need for power on a regional basis, or it might

6

blow out of some national situation. But in any case,

7

we ought to hear it and understand the nature of the need

8

and be quite clear that there is a pressing need for us

9

to consider allowing the plant to go into operation.

10

COMMISSIONER KENNEDY: Or else in such a case

11

to be in effect bypassing our own rules.

12

CHAIRMAN HENDRIE: Yes, sir. How does that strike

13

you?

14

COMMISSIONER KENNEDY: That's fine.

15

COMMISSIONER GILINSKY: I guess that is all right.

16

I guess I was -- this is a very exceptional thing.

17

COMMISSIONER KENNEDY: In fact the Commission is

18

going to have to hear the matter to decide --

19

COMMISSIONER GILINSKY: ^{to} There will be a hearing

20

before the Commission then?

21

COMMISSIONER KENNEDY: That's right.

22

MR. CASE: By the Commission, by you, yourselves?

23

MR. SHAPAR: Do you want the Commission itself

24

to conduct the hearing?

25

COMMISSIONER GILINSKY: Absolutely.

36

1 COMMISSIONER KENNEDY: I would say yes, wouldn't
2 you?

3 CHAIRMAN HENDRIE: Yes, because I am sure that
4 the circumstances in fact -- no Commission would
5 allow that to go just --

6 MR. SHAPAR: Now this is an adjudicatory hearing;
7 unless I say something different here, that is the hearing
8 you will be providing.

9 COMMISSIONER KENNEDY: An adjudicatory hearing?

10 MR. SHAPAR: That's correct. Unless you specify
11 differently, all hearing in licensing proceedings are
12 adjudicatory.

13 COMMISSIONER KENNEDY: In this case? My own
14 inclination would be no, it would be a legislative hearing.

15 COMMISSIONER BRADFORD: I would think an adjudicatory
16 hearing probably doesn't do much harm in a case like this.
17 And by harm, I don't mean harm, but I don't think it
18 delays very much either. It comes up quickly --

19 COMMISSIONER KENNEDY: Well, won't there be time
20 for discovery, cross-examination, and how long is that
21 going to take?

22 MR. SHAPAR: In an adjudicatory hearing, you have
23 all of the rights of discovery --

24 COMMISSIONER BRADFORD: Now what does a court do
25 when -- I guess what I conceive of is something akin to

37 1 a hearing on an injunction. You have a temporary
2 injunction, that can be done ex parte. But then a hearing
3 on whether or not to make the injunction permanent that
4 is a full-dress kind of thing, or is that just an o.
5 argument?

6 MR. SHAPAR: I think you have the right to
7 present evidence and cross-examination on the final injunc-
8 tion. Isn't that right?

ww 9 MR. REAMBER: I think so. You might get around
10 it by saying a hearing using expedited procedures, something
11 like that.

12 MR. SHAPAR: I would think you would want to give
13 yourselves flexibility to either hold it or not, as you
14 see fit

15 For example, the example we have in track 3 for
16 the marriage of the pre-approved site and the design,
17 you could use an adjudicatory hearing if you wanted to,
18 but you wouldn't be compelled to.

19 COMMISSIONER BRADFORD: What troubles me is not
20 the part about urgent public need. That I assume will
21 stand out quite clearly, even in the legislative format.
22 Cross-examination would be of limited value. But I take
23 it there is also a concern in here for ascertaining what, if
24 any, problems there are with turning on the plant.

ww 25 For that you might want to be ^{able} ~~able~~ to put somebody

38 1 under oath and have them tell you about it.

2 MR. SHAPAR: I guess the real question is whether
3 you want flexibility in here to depart from an adjudicatory
4 hearing or not.

5 COMMISSIONER BRADFORD: I don't mind having the
6 flexibility. I just think there might be some part of it
7 that you would want the cross-examination and sworn witnesses

8 MR. CASE: Write in flexibility and you can
9 do it any way you want.

10 COMMISSIONER BRADFORD: That is correct.

11 MR. SHAPAR: Let me ask one last question. I
12 think I have it now. With respect to amendments, are you
13 incorporating any of this with respect to amendments or
14 are you keeping the language for amendments as it is now?

15 CHAIRMAN HENDRIE: No, amendments go as they
16 are now. And you may need to separate them completely in
17 order to avoid tangling them up.

18 MR. SHAPAR: Yes, I realize that.

19 COMMISSIONER GILINSKY: If we are dropping the
20 words "national emergency" it would be nice to keep the
21 word "emergency" in. Urgent public need or emergency.

22 CHAIRMAN HENDRIE: If we stay away from the
23 national emergency, we get out of a certain nomenclature
24 which implies the President signing a paper and we are
25 not about to have a hearing to find out whether he actually

39 1 signed it or not.

2 COMMISSIONER KENNEDY: Or had the right to.

3 CHAIRMAN HENDRIE: Public need or emergency.

4 MR. SHAPAR: Public emergency or need, I would say.

5 COMMISSIONER GILINSKY: Something like that.

6 COMMISSIONER KENNEDY: Urgent public need or
7 emergency. That extends it rather broadly across the
8 spectrum.

9 CHAIRMAN HENDRIE: Onward.

10 COMMISSIONER BRADFORD: I am sorry. I skipped the
11 first half of page 13.

12 Is there any objection to doubling the notice
13 on those two? Up to 180, and 80.

14 CHAIRMAN HENDRIE: 30 days is already burdensome
15 on most amendments, at least a lot of amendments.

16 MR. SHAPAR: Right, amendments are still 30 days.

17 CHAIRMAN HENDRIE: The ^eCommission may dispense --

18 COMMISSIONER KENNEDY: At least 180 days prior
19 to granting --

20 CHAIRMAN HENDRE: I have lost it. Where is the
21 180?

22 COMMISSIONER KENNEDY: At the top. Is that what
23 you are talking about, Peter? It starts out on the other
24 page. "Any application under section" -- "such permit or
25 amendment thereto, " you want at least 180 days, Peter?

0 1 COMMISSIONER BRADFORD: Yes, the original
2 application. What I am thinking of there is that often these
3 early notices, I would think, enable the proceeding to
4 get off faster. And no one has, or no one is in a position
5 to come in and say "I have only had 30 days, I haven't got
6 my witnesses yet, my funds together," this or that.

7 MR. SHAPAR: Under the present system, I
8 don't see any problem. There is one caviat. The whole
9 present system is structured on very early notice, and the
10 hearing does not take place until months later, until
11 the staff has completed its job of both the safety review
12 and the environmental review.

13 There have been critics of the system, among the
14 environmentalists and others, who say the system is skewed,
15 and what you really ought to do is set it down for
16 hearing real early, and then battle it out with the
17 staff and applicant and the intervenors, in which case your
18 180 days may cause you a lot of trouble.

19 The way we do things now, it could cause no
20 trouble.

21 I leave it up to you.

22 MR. CASE: I have problems. This is
23 amendments ~~to~~ CPs, amendments to site --

24 MR. SHAPAR: No.

25 COMMISSIONER KENNEDY: Site permit or amendment

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1 thereto, the Commission shall publish once in the Federal
2 Register, and twice in major newspapers, at least 180 days
3 in advance. Amendments. That is the way it reads.

4 CHAIRMAN HENDRIE: Well, six months on amendments --

5 MR. CASE: Even 90 days on amendments is too
6 long.

7 MR. SHAPAR: It says in parens 30 days in the case
8 of applications and amendments.

9 COMMISSIONER BRADFORD: Then the next sentence
10 says "the Commission can dispense with all of that stuff
11 if it makes a determination that there is no additional
12 risk, including --

13 MR. SHAPAR: One question at a time. What was
14 the question, Commissioner?

15 COMMISSIONER BRADFORD: I was trying to answer
16 a question rather than raise one. Yes, it does say including
17 amendments to site permits.

18 MR. CASE: ^hThen in this parenthetical thing where
19 it says only 30 days for operating license and amendments,
20 is that all amendments?

21 COMMISSIONER KENNEDY: I assumed it was amendments
22 to operating licenses.

23 MR. CASE: Just to operating licenses?

24 COMMISSIONER KENNEDY: So it is 180 days
25 for amendments.

MR. CASE: I think that is too much.

42 1 COMMISSIONER BRADFORD: Three months may also
2 be too much. What you want is a shorter period for amendments.

3 MR. SHAPAR: Yes. I guess we mean 30 days for
4 all amendments.

5 COMMISSIONER KENNEDY: Why don't you take the
6 word "amendment" out of "site permits," and deal with
7 amendments separately?

8 COMMISSIONER BRADFORD: The long time I am
9 interested in is for the permits themselves.

10 MR. SHAPAR: My answer would be the same, though.
11 Under the present system, 180 days wouldn't cause trouble.

12 COMMISSIONER BRADFORD: If you went to a situation
13 where the staff is on the same footing as everyone else,
14 then you would in effect have to require pre-notification
15 by the applicant.

16 MR. SHAPAR: It might work, but I haven't
17 thought it through.

18 CHAIRMAN HENDRIE: I thought we were going to get
19 through the interim rapidly. Did we come to a conclusion
20 there?

21 COMMISSIONER BRADFORD: Let me ask about the
22 next sentence down, notice of publication, after making
23 a determination that no additional risk to the health and
24 safety of the public is involved.

25 Is that something we can get away with? I mean --

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1 CHAIRMAN HENDRIE: That is what we do now.

2 MR. CASE: ^LThe words are a little different.

3 MR. SHAPAR: This was in response to a request
4 by this Commission in an earlier session. ^hThis is one of
5 the things I was asked to do, to raise the threshold in
6 connection with amendments.

7 CHAIRMAN HENDRIE: Okay, that don't have significant
8 safety issues.

9 COMMISSIONER BRADFORD: What would you do if you
10 were on the outside, and felt that particular amendment,
11 which the Commission said didn't have a significant safety
12 issue, did in fact have one?

13 CHAIRMAN HENDRIE: It's a great way to -- we get
14 a whole lot of amendments that come through to operating
15 licenses saying look, our Bingham pump is worn out and
16 we want to replace it with a Westinghouse pump, and the pump
17 characteristics, envelope those of Bingham and so on
18 and we can't see where it makes any difference, and the thing
19 is rattling and we don't think it will last past the
20 weekend, and we want to jump in and change the thing when
21 we shut the plant down the weekend. If we have to
22 notice that thing for 30 days, we have no way to deal with
23 those.

24 Now if somebody comes along and says wait a
25 minute, that is a safety issue, I think the Staff is mature

DB44

1 enough and technically sound enough to make a decision.

2 COMMISSIONER BRADFORD: If there was no notice
3 how would somebody even be in a position to come along
4 and say?

5 MR. CASE: What we traditionally do is post
6 notice.

7 CHAIRMAN HENDRIE: If they want to come in and say
8 that was a dumb decision, we will accept the challenge.

9 MR. SHAPER: ^{System --} The ~~system~~ the way it works now,
10 Commissioner, if it involves these hazards, there is a pre-
11 notice. If it doesn't involve the hazards-, we post
12 notice it.

13 COMMISSIONER BRADFORD: Okay. Could that be
14 put in here, a requirement to dispense with the pre-notice --

15 MR. SHAPAR: It is in there by --

16 MR. CASE: Well, it would be dispense with the
17 pre-notice. ^oYou could read it to say dispense with the
18 pre-notice.

19 MR. SHAPAR: Do you want to add the requirement
20 for post-notice?

21 COMMISSIONER BRADFORD: I would.

22 COMMISSIONER KENNEDY: Just stick with pre-
23 notice and forget the other thing. Or do you want to put it
24 both ways?

25 COMMISSIONER BRADFORD: Well, I guess what we

DB45

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are really saying in circumstances where the staff thinks it should, it can revamp the notice. What you are saying is you can never eliminate notice entirely. And there ought to be some way to say that in the statute, that the notice may take place after the fact, and if somebody wants to raise an issue, they can.

CHAIRMAN HENDRIE: There are places, isn't it in our regulations --

MR. CASE: It is in our regulations for the post notice.

ww

CHAIRMAN HENDRIE: That we notice in the Federal Register amendments to licenses.

MR. SHAPAR: Correct.

CHAIRMAN HENDRIE: I suppose one could build that into the statute.

COMMISSIONER BRADFORD: I don't think it is -- every time he answers a question like this, when I raise it here, he says "It is in our regulations, and we do that anyway." When you go before Congress and have to answer that same question that way, in effect you are saying just trust us to do it right. That applies very well in this room, but probably very badly out on the street.

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COMMISSIONER KENNEDY: If you can put it in, I agree with that principle, put it in here, why not.

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1 CHAIRMAN HENDRIE: Okay. I detect the five
2 seconds of silence declares we have completed our work
3 on the draft half way down page 14, and we will adjourn
4 this session so we may take up the now 30-minute late
5 matter of late running NRC petitions on low enriched
6 uranium exports.

7 May we have a determination from the Sunshine
8 boys?

9 VOICE: ^eWE re~~x~~commend that the transcript be
10 withheld until the current --

11 CHAIRMAN HENDRIE: On the same basis as
12 previously for these legislative sessions. All in favor?

13 (Chorus of ayes)

14 CHAIRMAN HENDRIE: It is so ordered.
15 Open the doors.

16 (Thereupon, the Commission adjourned this
17 session to consider other matters, the
18 session to be reconvened upon completion
19 of other matters on the same day.)

20

21

22

23

24

25

Take 2
DB-1

1 CHAIRMAN HENDRIE: Okay, let us move forward.

2 We are now in a closed session dealing with legislation.
3 A group like this ought to be able to shift gears in a
4 great hurry.

5 We are back on the middle of page 14, and are about
6 to charge ahead.

7 Dick will be back, he has to make a phone call. If
8 we hit anything ^{substantive} ~~substantive~~ here, we will hold it until
9 he gets back.

10 The next section just repeats the Atomic Energy Act
11 language on licensing boards. I don't see anything in
12 particular in that.

13 By the way, it is in here because --

14 MR. SHAPAR: (Inaudible.)

15 CHAIRMAN HENRIE: Okay. Early site approval and
16 standardization of utilization and production facilities,
17 the middle of page 15.

18 COMMISSIONER BRADFORD: Let me raise there the same
19 point I raised before, on utilization and production facilities,
20 if you are talking about a standard design submitted for
21 an HTGR, does that really -- (inaudible)

22 CHAIRMAN HENRIE: It might turn out in due time that
23 in fact if the gas-cooled people crank up their cause and
24 move forward, that in three or four years you might want to
25 look at a rule-making and not a standard design.

2 1 MR. CASE: They have their standard design application
2 in for our review.

3 COMMISSIONER BRADFORD: Yes, that's right, I was
4 thinking about that. It is like I said before, it is unlikely
5 that such a design you would have much experience with,
6 that we would be ^{prepared} ~~prepared~~ to approve a standard design, or
7 did I misunderstand.

8 VOICE: It would be difficult to pre-approve the site.

9 CHAIRMAN HENDRIE: I guess the reason I don't find
10 difficulty is that the concept of the standardized design
11 didn't require a plant that had been designed and that had
12 been built and operated, so you had a lot of experience
13 with it. Rather it had connotation in here that
14 here was a design, and we would expect the applicat to
15 develop rather more fully for us at the CP stage
16 and at the OL stage, than might be the case for a custom
17 application, and that the staff would review it with
18 particular vigor, that it would have in it, the standard part
19 of the design would have init special features which relate
20 to the interface between the part of the plant we review
21 and the rest of the plant, whereas in a custom application
22 you wouldn't have a design for the specific plant, and there
23 it is. And then in view of these special considerations,
24 the prospect was that one would be able to use that same
25 design, the review and safety analysis for this standardized

3 1 design on a number of applications. It is expected to do
2 that in fact.

3 So in encouraging people to come in with so-called
4 standardized designs, in fact what most of the standard
5 designs that we have processed are in fact designs that
6 haven't been built before, because everybody says oh,
7 well, if you are going to make a fancy thing, we will move
8 forward and put our best foot forward in a technological
9 and power production ~~sense~~^{sense}, to have the most saleable
10 product.

11 Now the gas-cooled guys didn't want to be left out
12 of the prospective benefits, they said look, let us do it
13 too, and the comment to them obviously was, and we made
14 it in a series of meetings, there has not been nearly the
15 exercising of the HTGR designs and safety issues that
16 there has been on the LWRs. We have only had Fort St. Vrain,
17 and it is not full commercial size, and so on.

18 But they said, look, if you don't allow us to
19 come and present a design under the standardization
20 policy, you in effect have made a decision very prejudicial
21 to our commercial interests and there is not, in our
22 fair, a fair basis for it, we are willing to provide you
23 more and extra in the way of detailed safety analysis and
24 so on, and expect you to do more and better in the way of
25 review, ask a lot more questions, we will gladly bear those

4 1 burdens, but don't rule us out of the benefits, otherwise
2 we will just get left by the wayside.

3 Since then they have had to pull out of the commercial
4 market anyway.

5 COMMISSIONER KENNEDY: They are talking about getting
6 back in.

7 MR. CASE: Yes, they are.

8 CHAIRMAN HENDRIE: They are now talking about getting
9 back in. I guess I would prefer to have in the Commission's
10 scope the ability to deal as it sees appropriate,
11 should that arise, rather than be limited in such a way
12 in the statute that you would have to go back to Congress
13 and say please rewrite section so and so and take three
14 words, and put in four words, because that is a very cumbersome
15 thing.

16 COMMISSIONER BRADFORD: We done' have to pick it up
17 now. The only concern that causes me problems is if I
18 understood a couple of pages further on correctly, this
19 ^{hearing on the} contemplates having a / standard design HTGR, heavy water
20 reactor, whatever, which would be a legislative type
21 hearing.

22 MR. SHAPAR: No, no. They could not get the
23 full advantage of track 3 unless there had been an opportunity
24 for an adjudicatory type hearing on the standard design.

25 CHAIRMAN HENDRIE: As it stands now. There is a

5
1 recommendation form OGC that we reconsider that standard
2 in fact, and maybe we ought to do that, unless there is
3 some intervening material.

4 COMMISSIONER BRADFORD: Well, there is, but
5 whichever you prefer.

6 CHAIRMAN HENDRIE: What is the intervening
7 material?

8 COMMISSIONER BRADFORD: It may be a failure of
9 memory on my part-- incidentally, there is a typo at the
10 top of page 16. But in an early siting situation, what
11 becomes the state peoples' responsibility? What happens?

12 MR. SHAPAR: The concept is, before the state
13 gets into it, we do as much of the environmental review
14 in connection with the approval of the site as we can
15 possibly do with the information at hand. It will be a
16 large part of the environmental review. It will be based
17 on assumed parameters for the design.

18 One thing that we probably won't be able to
19 do very effectively, if at all, is the need for
20 power part.

21 COMMISSIONER BRADFORD: I am ²assuming for the
22 moment the most you could ever require on need for power is
23 some vague certification from the state that it has performed
24 a study on their general energy needs in the future.

25 MR. SHAPAR. Yes, right.

WW

DB 6

1 COMMISSIONER KENNEDY: That arises only in a
2 particular plant context, at the time somebody is going to
3 build one.

4 MR. SHAPAR: Yes, but they could ask for an early
5 site, and I suppose have some kind of a thing in mind at
6 that time. ^{you} You don't know, you need flexibility obviously.

7 COMMISSIONER BRADFORD: ^{Does} Does NEPA apply to
8 early siting?

9 MR. SHAPAR: I think it does. I think it is a
10 major federal action affecting the quality of the environment.

11 COMMISSIONER BRADFORD: Okay, and under this
12 bill it would still apply?

13 MR. SHAPAR: Yes, it would still apply.

14 COMMISSIONER BRADFORD: Then the state could choose
15 to do the NEPA review on the early siting the same way --

16 MR. SHAPAR: It could choose, and if it did in
17 fact, we could rely on it the same as we could for any
18 other action, like a construction permit or operating
19 license.

20 COMMISSIONER BRADFORD: Are there hearings
21 involved in early siting now?

22 MR. SHAPAR: Yes, there are, an adjudicatory
23 proceeding. You have to go back to an earlier section of
24 189 of the bill to pick it up.

25 COMMISSIONER BRADFORD: Oh, I see. This is 192.

DB7 1 MR. SHAPAR: The hearing requirements are all
WW 2 in 189. An adjudicatory hearing would be held in
3 connection with an early siting .

4 COMMISSIONER KENNEDY: Is the decision to site
5 a coal or oil fired plant a major Federal action?

6 MR. SHAPAR: There's no Federal agency involved.

7 COMMISSIONER KENNEDY: That's what I thought.

8 CHAIRMAN HENDRIE: If somebody had to issue a
9 permit, it would be.

10 COMMISSIONER BRADFORD: The minute there is a
11 permit, which there usually is, of any sort --

12 CHAIRMAN HENDRIE: I don't think there is, because
13 I don't think there's a comparable proceeding.

14 MR. SHAPAR: Well, there might be circumstances
15 where it was on Federal land, or something like that.

16 COMMISSIONER KENNEDY: But not as a general rule,
17 no.

18 CHAIRMAN HENDRIE: I don't know how EPA gets
19 away with granting clean air stuff without doing NEPA.

20 MR. REAMER: I think it is in the statute.

21 CHAIRMAN HENDRIE: Gee, that was a neat piece
22 of craftsmanship on their part.

23 MR. SHAPAR: It is due to the fact that they
24 are an "environmental improvement" agency. You are not.

25 CHAIRMAN HENDRIE: I'm dreadfully sorry about that.

DB 8

1 COMMISSIONER KENNEDY: Can we be considered
2 neutral in the case?

3 MR. SHAPAR: I think you can have aspirations
4 for a higher status.

5 CHAIRMAN HENDIRE: Okay, let's see. Back to the
6 top of page 16. Did that help?

7 COMMISSIONER BRADFORD: Yes, it did. This begins:
8 "except as provided in 192," but let's see. Okay, that is
9 fine.

10 The Administration bill had language that appealed
11 to me at the end of this section, something to the effect
12 that these permits were good for ten years unless extended
13 by the Commission. Our present early site approvals are
14 good for five years, right?

15 MR. SHAPAR: I think site approval is for such a
16 period of time as we may specify by the rules.

17 CHAIRMAN HENDRIE: Under the proposed rules.

18 MR. SHAPAR: I think it is five years.

19 COMMISSIONER BRADFORD: It just seems to me it
20 would be sensible to put some end period in this. I don't
21 mind putting in that it can be extended. But after say
22 ten years, the people who live around it should have --

23 CHAIRMAN HENDRIE: I think we would end up having
24 to write a rule that said how long it was good for before
25 it got reviewed and so on.

DB9

1 COMMISSIONER KENNEDY: If you don't some period,
2 at least as long as ten years, you might as well just
3 not go through this exercise.

4 COMMISSIONER BRADFORD: If that is true, how
5 come the Commission's rules now say five?

6 CHAIRMAN HENDRIE: An ill-advised regulation.

7 COMMISSIONER KENNEDY: That is a question I have
8 raised a couple of times.

9 MR. SHAPAR: What period of time do you want to
10 pick?

11 COMMISSIONER BRADFORD: I would say ten.

12 MR. SHAPAR: Ten years, unless extended for good
13 cause.

14 COMMISSIONER KENNEDY: Extended for good cause?

15 MR. SHAPAR: Well, we will mesh it with the other
16 language.

17 CHAIRMAN HENDRIE: Is that the language you want?

18 MR. SHAPAR: I will mesh it with similar language,
19 found elsewhere.

20 CHAIRMAN HENDRIE: Okay, ten years.

21 MR. SHAPAR: To not exceed it, right?

22 CHAIRMAN HENDRIE: ⁵Right.

23 COMMISSIONER BRADFORD: Why doesn't the site
24 preparation stuff here, why not just use the standards
25 that apply in say section 185(b) to the same type of
activity?

10

1 MR. SHAPAR: Well-- you mean the limited work
authorization?

3 COMMISSIONER BRADFORD: Yes.

4 MR. SHAPAR: The theory here was, right or wrong,
5 that was one of the big carrots, that here, unlike in 185,
6 they had gone through a design review, with opportunity for
7 an adjudicatory hearing, they had gone through a standardized
8 design with opportunity for adjudicatory hearing. So they
9 had really at least two legs up, two long legs up on
10 someone who comes in for the first time on a custom plant
11 and asks to prepare the site.

12 That is the theory of this section.

13 COMMISSIONER BRADFORD: They have got the pre-
14 approved site, they have got the pre~~x~~approve design --

15 MR. SHAPAR: I am sorry, I may have mis-spoken
16 there. I think this is just the pre~~x~~approved site.

17 MR. CASE: The theory is you have already made
18 those findings.

19 MR. SHAPAR: One leg up, not two.

20 CHAIRMAN HENDRIE: The previous section takes
21 a normal application and legitimizes in statutory form the
22 LWA we now do.

23 MR. CASE: The only finding you don't have to
24 make is _____ safety problems.

25 CHAIRMAN HENDRIE: Steady up. I am in midstream.

11 1 The previous one just says what you are doing
2 now with the LWA, that is okay. This one now says if you
3 have done the early site review, which includes almost
4 all of the NEPA review, everything except the specific need
5 for power determination, considered alternative sites and
6 all of the rest of it, and has included in that proceeding
7 the site-related safety aspects, because you are going to
8 have to deal-- whether a site can receive one of these
9 permits, it has to be adequate from a safety standpoint,
10 seismic and tornado design and so on.

11 If you have done that, then this thing says you can
12 go ahead now and dig the thing up. You have in fact at
13 that point done everything that you do in the LWA and
14 in fact a little more, because you have gone ahead and
15 set --

16 MR. SHAPAR: It doesn't say a little bit more.
17 But you have discretion in how you set your regulations.

18 CHAIRMAN HENDRIE: I think in practice the early
19 site permit, the review there, will provide a somewhat
20 more complete determination on the safety-related site
21 matters than the LWA does at the present time.

22 MR. SHAPAR: You may very well, when you write
23 your rules, decide that you want to let them go forward.
24 That's a good point.

25 COMMISSIONER BRADFORD: Under 185(b) you have a

12 1 NEPA responsibility and that is done away with here. By
2 done away with, I mean finished.

3 CHAIRMAN HENDRIE: Satisfied.

4 COMMISSIONER BRADFORD: Two is there is
5 reasonable assurance it is a suitable location.

6 MR. SHAPAR: That certainly has been done.

7 MR. CASE: The thing that may not be done is 3,
8 'and you decide that in the rules.

9 COMMISSIONER BRADFORD: Okay, now how clearly
10 ^{has} ~~has~~ 2 been done? That is a question I had later on anyway.
11 Is there a possibility that you have a standardized design ,
12 or I suppose in this case even a non-standard design
13 which was not suitable, even though the site itself had been
14 pre-approved.

15 MR. CASE: Yes.

16 COMMISSIONER BRADFORD: Do you contemplate that
17 these sites that are pre-approved are going to be suitable
18 for all types of nuclear facilities?

19 MR. CASE: It will be LWRs previously licensed
20 for construction by the Commission. Anything that fits in
21 that envelope. It wouldn't be for any of them. I don't know
22 what they might conceive. So in that sense you have made
23 the site safety finding, as well as the NEPA. And if it
24 doesn't match, then you can't go ahead.

25 MR. SHAPAR: You do have the prefatory language

DB13

1 under (b) that says "unless otherwise ordered by the
2 Commission." I threw that in to give the Commission residual
3 authority to stop it in cases where you thought the
4 circumstances justified it.

5 COMMISSIONER BRADFORD: But he is not going to
6 have to come forth for a specific application, is he?

7 MR. SHAPAR: But we will know he is doing it.

8 COMMISSIONER BRADFORD: I would hate to find out
9 about it --

10 MR. SHAPAR: He has to be an applicant. He has
11 to submit an application, so we damn well would know about it

12 COMMISSIONER BRADFORD: He has to submit the
13 application for the plant, but nothing in the application
14 says he is going to start running a bull dozer --

15 MR. SHAPAR: You can put a requirement in your
16 regulations to specify that. That is something I think
17 you would want to do in your regulations. When he submits
18 the application, the requirement is when does he intend to
19 start working.

20 COMMISSIONER BRADFORD: The answer here is you
21 will put it in the regulations. I do think when you go
22 before the Senate or whatever there are going to be an
23 awful lot of places where that is the answer --

24 MR. SHAPAR: Would you like to put in a requirement
25 that there must be notification in the application?

DB14

1 COMMISSIONER BRADFORD: I think so, yes.

2 MR. REAMER: Let me suggest another area where
3 comment may be adverse to this and may misunderstand our
4 intent. Something was mentioned in the meeting with the
5 states. Some states will read this section here, even though
6 it is not intended that way, to authorize work at a site
7 prior to obtaining a state approval, which may be required.

8 We have never taken that view as being the way
9 we would construe this section. But that very point was
10 brought up on Friday.

11 MR. SHAPAR: You mean it would pre-empt the
12 state?

13 MR. REAMER: That is right. The states have
14 read this as saying once you have the site permit from the
15 NRC, this section right here, once you file your application --

16 MR. SHAPAR: Let's solve that quickly by saying
17 "Nothing herein shall be construed as precluding compliance
18 with any applicable state requirements," something like
19 that.

20 CHAIRMAN HENDRIE: Okay, must give notice and
21 comply with the state laws.

22 COMMISSIONER BRADFORD: We keep saying for good
23 cause. When we make a good cause finding, do we just say
24 for good cause, or do we tell what it is?

25 MR. SHAPAR: We usually don't know what it is,

15 1 to tell you the truth. We fill it out by rule-making when
2 we can. Even there it is left rather vague.

3 MR. CASE: The question is does it have to be
4 in writing, all that.

5 COMMISSIONER BRADFORD: We it is just a little like
6 the ACRS thing. if you say "we hereby find good cause, go
7 ahead," that is a lot less satisfactory than saying "the
8 good cause is a, b, and c, go ahead.

9 MR. SHAPAR: We always give reasons, but there is
10 no standard usually beyond good cause.

11 COMMISSIONER BRADFORD: But we don't just say you
12 have shown good cause, go ahead.

13 MR. SHAPAR: No. Even when we extend the dates
14 in construction permits, we give a reason.

15 CHAIRMAN HENDRIE: Onward. I think we are on
16 page 17.

17 Now we ought to discuss the point you were about
18 to make with regard to the sorts of proceedings, and I also
19 want to discuss the OGC proposal that we reserve for
20 ourselves a flexibility on the type of proceeding, on a
21 rule-making proceeding that would approve a standard design,
22 or in the manufacturing license, making a rule out of the
23 manufacturing license.

24 And the suggestion of OGC points out that the
25 hybrid sort of proceeding of a GESMO type appears to OGC to

OGC

1 offer considerable advantages, in that the cross-examination
2 sort of features that people seem to be so fond of are
3 indeed available, but upon identification after an
4 initial part of the hearing of matters in issue, which
5 are appropriately dealt with by that procedure.

6 Now let me not try to explain it any more.
7 Would you like to say something further in behalf of this
8 proposition?

9 VOICE:(STaff) Our concern was there should be
10 an option which the Commission can consider.

11 COMMISSIONER GILINSKY: Why in those proceedings
12 as opposed to others? Why single out the so-called
13 rule-making proceeding, which is really like any other,
14 except --

15 CHAIRMAN HENRIE: ^DBecause these are rule-making
16 proceedings that are dealing with a series of highly
17 technical engineering arguments about levels of safety
18 and the nature of the design, and I think this opinion, in
19 part, reflects the painful memories of the ECCS hearing,
20 where a flat-out adjudicatory format on that sort of
21 issued turned out --

22 COMMISSIONER GILINSKY: Well, it would seem to me
23 -- I mean I --

24 CHAIRMAN HENRIE: ^DTurned out to be not all that
25 satisfactory.

17

1 COMMISSIONER GILINSKY: That may be a good
2 idea, but it would seem to me something that went across
3 the baord, or you wouldn't want it at all. In other words, if
4 we are going to restrict the hearings anywhere, I think I
5 would do it in the case of individual applications, where
6 whatever harm may ensue , it would be limited to that
7 reactor. If you get this one wrong, you may be getting a lot
8 of reactors wrong.

9 CHAIRMAN HENRIE^D: Well, yes. I think the concern
10 is that you may want to provide the hybrid format. It is
11 a way, in fact, of assuring that the technical issues are
12 adequately aired, rather than getting bound up in a
13 procedural circus.

14 COMMISSIONER KENNEDY: Moreover, is it not a
15 fairly widely held view, at least on the industry side,
16 that a full blown adjudicatory hearing, in the rule-making
17 context, would cause them not to be interested very
18 much in going the standard design concept.

19 CHAIRMAN HENRIE^D: Well, I have heard some arguments
20 along that line.

21 COMMISSIONER KENNEDY: I don't know how valid
22 they are.

23 COMMISSIONER GILINSKY: It just seems to me that --

24 CHAIRMAN HENRIE^D: It's hard to tell. I wish I
25 could plumb it, but I have had a lot of trouble.

18 1 COMMISSIONER GILINSKY: I find it rather odd
2 to talk about these kind of proceedings as rule-making,
3 which are somehow akin to, I don't know, they are
4 a lot closer to ordinary licenising proceedings. In facat,
5 they are very much like approval of, you know, any one of
6 the individual reactor applications.

7 CHAIRMAN HENDRIE: I think they will draw
8 enormously more interest. I think on any rule-making on
9 a standardized design or manufacturing license, you are
10 likely to have 30 or 40 intervening parties and --

11 COMMISSIONER KENNEDY: Has that been the experience?

12 CHAIRMAN HENRIE^D: We have never had one. We have
13 never had such a proceeding.

14 MR. CASE: Mr. Chairman, I would like to argue
15 strongly against the OGC proposal, and in favor of
16 Commissioner Gilinsky's position on this point.

17 CHAIRMAN HENRIE^D: Did you make a deal while
18 you were supposed to be making a phone call?

19 MR. SHAPAR: I am the only one that calls the
20 shots straight.

21 COMMISSIONER GILINSKY: Now you know why the ACRS
22 is called the Advisory Committee on Ed Case.

23 MR. SPAPAR^H: I think there are at least four
24 good reasons why you ought not to depart from the
25 adjudicatory procedure here.

19

1 Number one, remember that you are talking
2 about the marriage of a pre-approved site with a pre-approved
3 design, in order to get the full leverage of what that
4 offers in the CP stage. So this thing is off the critical
5 path, there is no requirement that you offer an adjudiscatory
6 proceeding in connection with rule-making. All the statute
7 says is if you want to get the full advantage of the
8 carrot offered at the construction permit stage on track
9 3, then since you are cutting down on the adjudicatory
10 proceeding there, which you are doing, you will at least
11 have offered an adjudicatory proceeding in connection with
12 the approval of the rule and the approval of the design.

13 I consider it almost unco ionable to attempt
14 to strike down the adjudicatory rights at the CP
15 stage and rely on something less than full adjudicatory
16 rights at the full design approval stage.

17 That is reason number one. Plus the fact you
18 are off the critical path, you are doing it way in advance.
19 That is reason number two.

20 Number three, you are going to offer the adjudicatory
21 hearing in connection with the manufacturing license. I
22 don't think anybody would suggest anything different there.
23 And that is another way of approving standardization.

24 Reason number four, the politics are horrible.
25 The first Administration bill, without adjudicatory hearings,

20

1 they goof off that track and for NRC to come in now
2 and favor something less than a full adjudicatory hearing
3 I would say would be the worst possible politics.

4 So on both logic, common sense, policy and
5 politics, I would urge strongly, in this case, for the
6 full adjudicatory hearing.

7 CHAIRMAN HENRIE: On both logic and prejudice.

8 COMMISSIONER BRADFORD: Is this a pure track 3
9 section now?

10 MR. SHAPAR: It could be a true track 3 or combined
11 track 3 and track 2.

12 CHAIRMAN HENRIE: That is, you could take a
13 combined --

14 COMMISSIONER BRADFORD: The preliminary design
15 being the combination?

16 MR. SHAPAR: You couldn't have a combined track
17 2 and 3 unless you were using a final design. Track 3, to
18 refresh everybody's recollection, track 3 being the marriage
19 of a pre-approved site and a pre-approved design, and
20 track 2 being the construction permit and the operating
21 license.

22 The only way you can marry the two would be you
23 had a final design available.

24 MR. REAMER: I gather certain issues that would
25 be decided in GESMO, had there not been a GESMO proceeding

1 and thus would have been decided in individual proceedings,
2 would have been decided by adjudicatory procedures. But
3 the Commission decided it was going to do a generic
4 approach, that they might use other procedures. So the
5 fact that in an individual proceedings, an issue would
6 be decided under adjudicatory procedures --

7 ^D
CHAIRMAN HENDRIE: Yes, I think -- I don't give
8 much weight to that. I think there is a certain amount
9 of trading going on, and I think the argument that if
10 you indeed are going to cut back very substantially on the
11 opportunity for an extended proceeding, public proceeding,
12 when the specific plant, the guy gives the CP, then
13 indeed part of the quid pro quo for that is that the things
14 you are using, both the site and the design you are going
15 to put there have had a pretty thorough going-over in the
16 public arena. I think people may feel that is a proper
17 balance.

18 MR. SHAPAR: It is out of the critical path
19 anyway.

20 MR. REAMER: In the sense of politics, it is
21 obviously something we defer on to you. If we were to
22 answer point by point the points that have been made, I think
23 there are answers to those.

24 CHAIRMAN HENDRIE: I must say I like the hybrid,
25 but I am inclined to think probably on balance that the

22 1 likelihood of being able to go successfully with it
2 is not great.

3 I am not at all sure the Commission would in
4 fact go that way.

5 COMMISSIONER KENNEDY: In setting the hybrid
6 thing, we are not ruling out the adjudicatory hearing.
7 They are getting that. It is only on some restriction as
8 to the total number of issues that are going to be considered.

9 MR. SHAPAR: Yes, but if you write that into the
10 statute, you would be litigating the color and dimensions
11 of that animal from now until Kingdom Come.

WW 12 COMMISSIONER GILINSKY: Does the Licensing Board
13 have the freedom right now to handle an adjudicatory
14 proceeding by first having kind of a legislative hearing
15 and the adjudicatory one later?

WW 16 MR. SHAPAR: I think in answer to that, I am
17 not entirely sure, but I would argue no. There is a lot --
18 I am sorry.

19 COMMISSIONER BRADFORD: I think as practical matter
20 it won't happen that way. You would have your legislative
21 type thing, but then anybody who wanted to get up and cross-
22 examine, you would be hard-pressed to shut them off.

23 MR. SHAPAR: He is talking about the licensing
24 board exercising authority in a licensing proceeding
25 on a construction permit or operating license. There the

23

1 legislative history is clear that it is an adjudicatory
2 proceeding that must be granted.

3 COMMISSIONER BRADFORD: So if they held a
4 legislative type thing first, it might do some good,
5 but if it didn't, they couldn't shut anybody off.

6 MR. CASE: It is limited appearances I think
7 essentially.

8 MR. SHAPAR: YOU are bound by sections 5, 6, and
9 8 of the APA.

10 COMMISSIONER BRADFORD: And the testimony would
11 have to be under oath?

12 MR. SHAPAR: I can't recall whether there is a
13 specific -- I think there is oath or affirmation, certainly
14 in our rules anyway.

15 COMMISSIONER GILINSKY: So the Commission can say
16 adjudicatory hearings is required everywhere, I mean I
17 have no objection to that, it might be a good idea across
18 the board.

19 ^{DE}
20 CHAIRMAN HENRI: Well, I think the consideration at
21 hand here, the one I want to stick to, is the specific
22 point in the layout under track 3, where you have an
23 early site review, you have done an early site review and
24 gotten a site permit, you have decided to use a design
25 which has been approved by rule, you want to be able to
file the CD and now move very aggressively forward with the

WW

24 1 plant and the opportunity for a public proceeding is
2 to be severely circumscribed by the legislation and our
3 rules at that point, and you want to be able to say in
4 defense of that, but, gee, that standard design really
5 had a good going-over back here in an adjudicatory hearing.

6 I am afraid that turns out to be a persuasive
7 argument.

8 COMMISSIONER KENNEDY: Logic suggests without
9 that kind of posture, it probably wouldn't survive.

10 COMMISSIONER BRADFORD: (Inaudible)

11 CHAIRMAN HENRI^{D E}: Which way?

12 COMMISSIONER BRADFORD: What I take it the
13 legislation is now, the full-blown adjudicatory hearing.

14 MR. SHAPAR: If they want to get the full advantage
15 of tract 3. It is not required, -they can go with the rule.

16 COMMISSIONER BRADFORD: That's right, if they
17 havean't gone that way, they get the full blown adjudicatory
18 hearing.

19 MR. SHAPAR: Yes.

20 MR. REAMER: Our experience early on with the
21 procedures we select here may suggest later down the road
22 some other legislative solutions that are needed.

23 If it turns out that standardized design
24 proceedings involving adjudicatory procedures become
25 burdensome.

DB 25

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CHAIRMAN HENRIE: If they go to pieces on us, that will sort of scotch the whole thing, and we will be somewhat embarrassed to come back and ask for changes.

MR. REAMER: You can always say you did your best.

CHAIRMAN HENRIE: Anyway, it is okay with you as it is?

COMMISSIONER BRADFORD: Yes.

CHAIRMAN HENRIE: If I try to put a hybrid in there, why then you would want to discuss it a little more, right?

COMMISSIONER BRADFORD: Yes.

CHAIRMAN HENRIE: I think he just convinced me.

COMMISSIONER BRADFORD: Is there anything to be said for requiring, before a construction permit is issued pursuant to this section the Commission shall find that the site is suited to the preliminary or final design that is being proposed? We may have the possibility of a site approved 10 years ago, the standard design five years later. There is no obvious reason why those two should not jibe.

MR. SHAPAR: Don't you think that the finding that we have here, the limited issue, that the purpose for which the design approval was originally given, because of the special circumstances, no longer holds true? I think that would pick up that point very well.

26 *an* 1 CHAIRMAN HENRIE: Let's see. You are pointing to --

2 COMMISSIONER BRADFORD: That would certainly
3 pick it up if we wanted to leave it to a member of the
4 public to come in and show --

an 5 CHAIRMAN HENRIE: That's right. The essential
6 finding the Commission has to make on a construction permit
7 does deal with the specific design and the specific site.

8 COMMISSIONER GILINSKY: Let's see, how would the
9 process work? The design is approved, he has got a
10 site. He submits an application to NRC.

11 MR. SHAPAR: Yes, for a construction permit,
12 or combined construction permit and OL.

ww 13 CHAIRMAN HENRIE: He probably references his
14 report on the site that he filed earlier, he references the
15 standard design, you know, the ASSAR thing, and he then
16 will have to supply information with that filing which
17 covers the match of the plant to the site.

18 COMMISSIONER GILINSKY: Now is this just a table
19 or something?

ww 20 CHAIRMAN HENRIE: I expect it will be a couple
21 of books. And the staff will have to review and agree that
22 indeed it does fit, and even though it is standard design.

23 COMMISSIONER GILINSKY: So there will be a brief
24 staff review, with some kind of a report at the end?

ww 25 CHAIRMAN HENRIE: Well it is -- what we are

27 1 saying publicly is it will be a brief staff review.

2 COMMISSIONER BRADFORD: But it is limited to the
3 issue of the fit between the design and the site?

WW 4 CHAIRMAN HENRIE^D: Yes, and on each site you
5 are going to have a number of rather specific fitting
6 problems, interface problems between the design and that
7 specific site, and the applicant will have to submit
8 his specific design details that fit this standard plant
9 package on his site, and the staff will have to go
10 over those with regard to the safety question, and also
11 with regard to the conditions on the site permit and make
12 sure they match.

13 So indeed I think the Commission could not make
14 the finding without this specific review.

15 COMMISSIONER GILINSKY: So that will be a safety
16 evaluation report of sorts?

WW 17 CHAIRMAN HENRIE^D: I think there will have to be.
18 I don't think we could even move to a CP just saying well,
19 we approved that ten years ago, or five years ago.

20 COMMISSIONER BRADFORD: The only point I am
21 raising is nothing in section (c)(1) on page 17 now has
22 the Commission making any finding at all. It says "may
23 issue a construction permit or license" et cetera,
24 when the applicant has the standard design and the pre-
25 approved site.

DB 28 1 All I am suggesting is a sentence saying that
2 the Commission shall find that the site is suited to the
3 preliminary or final design.

4 MR. SHAPAR: I don't think your statement is
5 quite right, Commissioner, because there is a statutory
6 requirement that before you can issue a construction permit
7 you make the finding, the ultimate finding of no undue
8 risk to the public health and safety. You have to make
9 that.

10 The other part of it is I would anticipate a
11 whole bunch of staff requirements before they can sign
12 off on the construction permit in order to carry out that
13 statutory finding that I just mentioned.

14 COMMISSIONER BRADFORD: What is there
15 about this particular section that would necessarily key
16 you back to that general --

17 MR. SHAPAR: Because the statute -- you are
18 issuing a construction permit, or combined construction
19 permit and operating license, and there are statutory require-
20 ments attending on such an issuance.

21 COMMISSIONER KENNEDY: In the Atomic Energy
22 Act, to which this is only an amendment.

23 MR. SHAPAR: If you can't make that safety
24 finding, nobody is home free. And they would have to be
25 flushed out in regs.

29
(6:00p.m.)

1 The main center of attention, I think, would be
2 the interface.

3 COMMISSIONER BRADFORD: Maybe my question --

4 CHAIRMAN HENRIE: Is there any difficulty with
5 the proposed sentence?

6 MR. SHAPAR: That what?

7 COMMISSIONER BRADFORD: Just that before issuing
8 a construction permit pursuant to this section, the
9 Commission shall find the site is suited to the preliminary
10 or final design.

11 COMMISSIONER KENNEDY: Where would this be?

12 COMMISSIONER BRADFORD: I would put it right
13 after Title V of the U.S. Code there. Page 17.

14 I guess what I am really asking is does that
15 mean that the applicant in this situation takes on a burden
16 of a whole bunch of other findings that would have to be
17 made at that point pursuant to a section of the Act that
18 do not immediately appear here?

19 If the Commission has to make that full finding,
20 what would it do, reference its earlier proceedings?

21 MR. SHAPAR: Yes, I would think so. You would
22 rely as much as you thought it was discreet to rely on
23 the work that had been done before. You might want to
24 look at new information, I don't know. Those are the kinds
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1 of questions you are going to have to confront.

2 COMMISSIONER BRADFORD: If you really wanted the
3 section to convey to the industry the reassurance that
4 I take it we would like, it wouldn't do any harm to have an
5 additional paragraph spelling out how that would work.

6 And for the same reason, I became concerned about
7 the absence of the finding of the final design, I think
8 they would be concerned about the possibility of a whole
9 range of other issues.

10 But I -- it is getting late. If it is clear
11 that it will have to be made, then that would be fairly
12 cosmetic, and I don't see any reason to insist on it.

13 CHAIRMAN HENRI^D: In view of the hour, I would
14 prefer to pass on it at the time. If language occurs,
15 that seems especially good, you can suggest it.

16 COMMISSIONER BRADFORD: No, if the finding
17 has to be made pursuant to another section, there is
18 no need to address it.

19 For what it is worth, I have a lot less
20 on the rest, just a couple of pages.

21 CHAIRMAN HENRI^{D E}: Can you be here tomorrow?

22 COMMISSIONER KENNEDY: If it is necessary to do
23 so, if we start early enough, I wouldn't mind, and get
24 through by 10 or 10:30 in the morning.

25 CHAIRMAN HENRI^{D E}: We might end up having to do it.

31 1 But let's go forward for at least a bit longer
2 and see if we can't make progress.

3 On the balance of this section -- some of this
4 we had a chance to massage a little harder in earlier
5 proceedings than some of the boilerplate.

6 Can we advance to 193 on page 20? Or is that
7 too far a leap forward?

8 COMMISSIONER BRADFORD: Let me just get together
9 with Howard and perhaps if the staff sees no problem with
10 it, they can put it in and if they do --

11 COMMISSIONER KENNEDY: What was the problem?

12 COMMISSIONER BRADFORD: The 90-day notice and
13 30-day notice. I intended to double those, remember?
14 I thought it would give them more time before the proceedings
15 began.

16 But I notice Ed has left, and maybe the easiest
17 way is to check and see if there is any -- I take it
18 is correct and no harm is done, there is no objection to
19 that.

20 COMMISSIONER KENNEDY: In principle, if in fact
21 it will help the proceeding move forward, I would certainly
22 favor it. If, on the other hand, what it tends to do is
23 simply add that much more time to the proceedings, then
24 I guess I wouldn't see the wisdom of it. I guess you can
25 look at each one of them and decide.

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1 MR. SHAPAR: I think in principle it is a good
2 idea. The only problem is if we follow the way we do
3 business now, it would present no problem. You are not
4 talking baout amendments, but abour original authorization.

5 But if you move into a radically different kind
6 of system, where you start the hearing almost immediately
7 and let the staff do its work during the hearing process,
8 then there might be a problem there.

9 I haven't thought it through.

10 COMMISSIONER KENNEDY: Which was conceptually
11 what this part was about.

12 MR. SHAPAR: I don't think so.

13 *WN* COMMISSIONER ^N~~SHAPAR~~KENNEDY: It would get some of the
14 work underway.

15 CHAIRMAN HENDRIE: Offhand, I don't see a
16 problem with it.

17 MR. SHAPAR: Would an easy way of handling it
18 *WN* be to say 180 days unless the ^gCommission specifies
19 differently?

20 COMMISSIONER BRADFORD: That is all right. That
21 would solve the problem.

22 MR. SHAPAR: That would solve any possible problem.

23 COMMISSIONER BRADFORD: That is fine.

24 MR. SHAPAR: If you will tell me all of the places
25 where you want it, we can set it up that way.

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1 CHAIRMAN HENDRIE: There may be places where we
2 would expect the CP to issue, and this may be one of them,
3 and I would worry about, where we expect the CP to
4 issue in four or five months after filing an application,
5 question, could we notice a perspective CP issuance prior
6 to having received an application? I would suspect not.

7 So any time it looks as though the Commission's
8 proceedings would go, the total duration would go under the
9 180 days, then you will be in a situation that that
10 requirement will add whatever the delta time is.

11 COMMISSIONER BRADFORD: Unless you require
12 the utility to notify you in advance.

13 CHAIRMAN HENDRIE^{DE}: I think even at that, suppose we
14 had been noticed they are coming, or going to come in
15 in two months, and we think we can do the whole shebang
16 in four, I think we would still have a problem filing a
17 notice that we intend to, or may issue a CP, when we
18 don't even have an application.

19 I think that might be a little awkward.

20 COMMISSIONER BRADFORD: Yes, okay. I agree,
21 and I think 90 days is probably adequate for that type of
22 situation.

23 CHAIRMAN HENDRIE^D: In this case, w-here in fact
24 you are talking about a track which has a specifically
25 expedited CP configuration. This may be a place where you

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would really hang with the 90 days.

COMMISSIONER BRADFORD: I am not sure about the 30 at the bottom of the page though. Page 18.

CHAIRMAN HENDRIE: I don't have a problem, I guess, with increasing that, because it can hardly be a surprise to us that they are going to operate this plant. They have been out there building it for several years, so that wouldn't be a shock to us.

COMMISSIONER KENNEDY: Or to them.

MR. SHAPAR: Ninety, do you want that?

COMMISSIONER BRADFORD. Yes. One other word on that page troubled me, the word "factual", factual issues in dispute. Supposing there are non-factual issues in dispute?

MR. SHAPAR: The thought there is, and the traditional wisdom is that where an adjudicatory hearing is really useful is where you have material issues of substantial fact, something like that. That is the concept ^{reflected} ~~reflected~~ here. That is where adjudicatory proceedings really do their intended purpose, resolving disputed issues of fact.

COMMISSIONER BRADFORD: Okay, yes.

MR. SHAPAR: You need to tell me where you want the times, Commissioner. I am not sure from this discussion.

CHAIRMAN HENDRIE: I think for purposes of page

35

1 18, we decided it is 90 days. At the top, and 90 at the
2 bottom.

3 MR. SHAPAR: There were other places I think the
4 Commissioner had in mind.

5 COMMISSIONER BRADFORD: I will get those to you,
6 yes.

7 CHAIRMAN HENRI^{D E}: Page 19? Page 20?

8 COMMISSIONER BRADFORD: Under federal-state
9 cooperation, I threw in a sentence to the effect: "To the
10 extent that the capacity is to be sold in more than one
11 state, the Commission may accept the timely findings of all
12 such states, or may itself make the findings in the states
13 in which the plant is not located."

14 And later on I have a thought about regional
15 authorities, too.

16 MR. SHAPAR: Of course the Commission doesn't
17 have to accept it if it doesn't want to anyway, right?

18 COMMISSIONER BRADFORD: That's right. I am
19 ^{saying} ~~saying~~ we should be able -- I am still troubled by this
20 situation --

21 COMMISSIONER KENNEDY: Where it is located in one
22 state, and most of the power is going to other states?

23 COMMISSIONER BRADFORD: Yes, and they say we can
24 make the finding for 25 percent of the plant, but not
25 the rest.

36 1 MR. SHAPAR: If you give me the language, I will
2 crank it in.

3 COMMISSIONER KENNEDY: That sounds reasonable.

4 CHAIRMAN HENDRIE: I think there have been a
5 number of comments along this line, I expect you heard a
6 good deal of this from the state people.

7 COMMISSIONER BRADFORD: Yes.

8 COMMISSIONER GILINSKY: Let me ask you about this
9 business of things not being judicially reviewable.

10 COMMISSIONER KENNEDY: What page is that?

11 COMMISSIONER GILINSKY: Well, I don't know,
12 20, 21 and 22.

13 CHAIRMAN HENDRIE: Let's see, are we cleared on
14 page 21 before we take that up?

15 COMMISSIONER BRADFORD: Sub-section 3 on page
16 21, we still, it seems to be, to be blurred whether NEPA
17 continues to be in full force and effect, or whether we
18 are in effect saying that state certifications, state
19 environmental findings somehow leave us with NEPA.

20 MR. SHAPAR: This would modify, as I read it --
21 it is hard to say whether it would modify NEPA or not.
22 We must make all of the NEPA determinations that we need to
23 make. However, we must accept the plus side of
24 the cost-benefit balance. Of course NEPA doesn't say
25 anything about cost-benefit.

37 1 COMMISSIONER BRADFORD: Leave the NEPA power
2 out, because I think we have pretty well agreed we are
3 prepared to let the states do that.

WW 4 MR. SHAPAR: ^{ch} Then the answer is we are not changing
5 NEPA, except the court cases have said up to now at least
6 that you have go to do the work yourself. And that is
WW 7 why we are ^{saying} ~~saying~~ to that extent we are changing court
WW 8 constructions of NEPA. To the extent that the courts have
9 said the Federal agencies can't rely on others.

WW 10 COMMISSIONER KENNEDY: Which ^{is} in line with
11 the specific legislation which DOT had.

12 MR. SHAPAR: That is correct. There was much
13 argument about that DOT legislation, whether it was needed
WW 14 or not. ^g Some people argued they could do it anyway without
15 legislation.

16 COMMISSIONER BRADFORD: So what we are saying is
17 essentially the guidelines we will promulgate are such
18 that the way we now do things under NEPA will more or less
19 be preserved. Are you saying that the general NEPA mandate
20 will be carried out by the states? If we just threw
21 the whole thing over to them, we would have no quality
22 control at all.

23 MR. SHAPAR: I think more or less, but I have to
24 say that NEPA says nothing about hearings as such. NEPA
25 really catches the agency where it finds it. Calvert CLiffs

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1 said we did certain things with uncontested hearings
2 and certain things with contested hearings, and whatever
3 procedures we had, we couldn't discriminate against
4 environmental rpotection.

5 So NEPA caught us where it found us. And to
6 your question the answer is really the extent in your
7 procedueral guidelines that you want to take the way
8 we do business, and impose them on the states. I think
9 that is the fairest answer I can give you.

10 COMMISSIONER GILINSKY: You are setting up a
11 kind of state agreements program on NEPA, aren't you?

12 MR. SHAPAR: I think that is a good way of
13 putting it. Except as I understand the prior discussion,
14 you don't want to get into review of their substance
15 as such, but you want to pretty much set up procedural
16 guidlines, so they are fair abou the way they -- but
17 I don't think, on the other hand you want to say that each
18 state has got to grant an adjudicatory hearing, because
19 we now grant an adjudicatory hearing. You have that option,
20 of course, in the way you set your procedural guidelines.

21 COMMISSIONER GILINSKY: I am a little ~~troubled~~ ^{troubled}
22 by this. Suppose we do a review and we do a really bad
23 on some part of it.

24 COMMISSIONER KENNEDY: We, the NRC staff?

25 COMMISSIONER GILINSKY: Yes. I guess someone could
take us to court and review that. What happens in the case

39 1 it is farmed out to a state? Do you take it up to
2 the state court? is there a state proceeding or what?

3 MR. SHAPAR: Let me address that question. This
4 is a very very important question.

5 All we have said as far as judicial review,
6 which triggered the inquiry here, all it says is there
7 won't be judicial review in effect, by virtue of the fact
8 that we have used the state's work product in our proceeding.

9 Now whatever opportunities there are for review
10 of the state's work in the state, we don't affect it whatever,
11 which is why this language was drafted this way.

12 COMMISSIONER BRADFORD: But there won't be much
13 opportunity for review of the state's findings under state law
14 when what they are doing is carrying out our delegation
15 of NEPA.

16 MR. SHAPAR: I don't think there is any our
17 delegation of NEPA as such. We are not creating any
18 new obligation on the part of the states. I think the answer
19 is to the extent the states, 25 or 26 states, that have
20 mini-NEPA statutes, they are just as much subject, I assume,
21 in the states to state attack as our determinations
22 subject to Federal attack.

23 Now to the extent that those states don't
24 have full NEPA statutes, or the equivalent of a full NEPA
25 statute, people are going to take the state law where they

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1 find it and to the extent that they can attack the state
2 determinations by virtue of the fact that the state agency
3 is performing a state function, which is now judicially
4 reviewable in the state, that avenue of attack remains.

5 The part that is insulated, if anything is
6 insulated, is where the states aren't required, or
7 there is no statutory duty on the part of the state agency
8 to do anything, but they elect to come in and do environmental
9 work because we give them money, or anything else, but it
10 is no a required state function, they do it as a matter of
11 volition because we are giving them money or something.
12 Then there is no way I can see it could really be attacked
13 in the state because there is no state duty to do it. They
14 are doing it of their own volition.

15 It would also be insulated indeed in our
16 proceeding.

17 *BRADFORD:* COMMISSIONER: You say we are imposing no new
18 obligation on the state. That is true provided -- well,
19 first of all, is it true as to the procedural requirements?
20 If indeed we st up procedural standards, we are imposing
21 requirements on the states.

22 MR. SHAPAR: Not in the sense in which I think
23 the other Commissioners raised the question. They are doing
24 it because they awnt to do it, they want to meet our standards.
25 But the very fact that they choose to do environmental work

41 1 for us, how is a state citizen going to attack that?

2 COMMISSIONER KENNEDY: Since they are doing
3 it of their own volition --

4 MR. SHAPAR: There is no abuse of discretion on
5 their part, in terms of their citizens. I mean it is at
6 least judicially cognizable in the state, under state law.

7 COMMISSIONER KENNEDY: That would be true as
8 well, if we were to establish some standards in a
9 substantive sense.

10 MR. SHAPAR: It would be true as well, even
11 if the state imposes a duty on a state agency to do something,
12 or it doesn't. If it does, it is judicially reviewable
13 in those states.

14 CHAIRMAN HENDRIE: The only way we could make
15 something work that way would be to provide in the guideline
16 that the state had to pass laws that required it and so
17 on.

18 But I think that is a trifle much as a Commission
19 rule. It is possible, but I would not think we should
20 be laying down things like that.

21 MR. SHAPAR: Or you could say you only use
22 the system where the states indeed have NEPA statutes.

23 COMMISSIONER KENNEDY: The statute could say
24 that.

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1 MR. SHAPAR: Another option is to take out the
2 requirement of insulating it from judicial review.

3 Then you are throwing out the baby with bath
4 water for those states that do have a full NEPA statute.

5 MR. REAMER: Where you remove judicial review,
6 that provision is only for the states that didn't have
7 adequate review.

8 MR. SHAPAR: That is complicating a very very
9 complex system already.

10 COMMISSIONER BRADFORD: That is right, but
11 to have 26 states, if that is the right number --

12 MR. SHAPAR: That is the right number I think.
13 I don't know.

14 COMMISSIONER BRADFORD: There are probably more,
15 because I bet alot of those mini-NEPAs are not in fact
16 mini-NEPAs but are called that. There was a misc
17 in the states. In which all of the state findings or
of them could be made in however erratic a fashion as a
state does these things, and then not be subject to review
20 from ther on. We would be completely bound by a finding
21 that lobster larvae love hot water, or wahtever the
22 particular finding is.

23 MR. SHAPAR: What do you mean we would be bound
24 by it? We wouldn't have to be bound by it unless we chose
25 to rely on it.

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1 COMMISSIONER KENNEDY: That's right, we don't
2 have to accept any of it.

3 COMMISSIONER GILINSKY: Well, let's see, you are
4 setting up a system, and encouraging them to do all of
5 this, you haven't done it yourself, and then at the end
6 of the process, you say wait a minute, we don't like the
7 way you have done this, we are going to have to do it all
8 over again, it seems to me it is not likely to work that
9 way.

10 MR. SHAPAR: No, that is what the guidelines
11 I would assume are for, to at least give some kind of assurance
12 of a respectable work product.

13 COMMISSIONER GILINSKY: That they have qualified
14 people and reasonable procedures and seem to be behaving
15 themselves --

16 MR. SHAPAR: Whatever you want to write for guidance.

17 COMMISSIONER BRADFORD: It doesn't ^{clearly} ~~clearly~~
18 state here that compliance with the guidelines was
19 reviewable in a proceeding before us.

20 MR. SHAPAR: Remember, that was one of the
21 decisions you made in the earlier sessions, was to leave that
22 out.

23 COMMISSIONER BRADFORD: I didn't recall that.

24 MR. SHAPAR: I am sorry, it was in the earlier
25 version, compliance with the guidelines would be insulated --

DB44

1 COMMISSIONER GILINSKY: I thought we had
2 separated procedures from substance.

3 MR. SHAPAR: Both of them were made
4 non-reviewable before, compliance with the guidelines
5 and the adequacy of the work product.

6 I understood the decision before to be to knock out the
7 insulation of the compliance of the guidelines from judicial
8 review.

9 COMMISSIONER BRADFORD: That is right. My only
10 point is that I am not sure that is clear here.

11 COMMISSIONER GILINSKY: (Inaudible)

12 MR. SHAPAR: We ^{have} ~~have~~ not specifically or explicitly
13 insulated from judicial attack whether or not the state
14 complied with our guidelines.

15 COMMISSIONER GILINSKY: That is subject to
16 judicial review?

17 COMMISSIONER BRADFORD: That is our intention.
18 All I am saying is the language does not really achieve
19 that, I don't think.

20 If you were defending something, somebody made
21 a guidelines attack in effect he would have to be challenging
22 the adequacy of the decision, data, analysis, or conclusions,
23 at least in the sense of the way in which they were reached.

24 MR. SHAPAR: He could simply say you are not
25 following your own statute and your own rules and regulations

45 1 and you should not rely on this at all, because your
2 regulations and the statute require you to rely on it only
3 if you meet the criteria. If the state program does not
4 meet the criteria, I want to litigate that in your proceeding
5 to determine whether or not you can properly rely on the
6 state work product.

7 COMMISSIONER GILINSKY: What would you be arguing
8 about? The number of PACs they have?

9 MR. SHAPAR: Whatever the guidelines say.

10 COMMISSIONER KENNEDY: It is not clear to me that
11 -- the point is made at the top of page 22, and it is not
12 clear to me that that is what it says.

13 MR. SHAPAR: I am sorry, what says?

14 COMMISSIONER KENNEDY: That it says that the
15 procedural aspects are insulated -- excuse me, are reviewable.

16 MR. REAMER: It ^{relies} ~~relies~~ on a kind of by implication.
17 I basically think that it does show what Howard says, but
18 you have to get there through the back door. You have
19 said certain things are not reviewable by implication.

20 CHAIRMAN HENRIE^D: If it comes to a question of
21 finding grounds to sue the agency, I haven't noticed any
22 lack of ingenuity.

23 COMMISSIONER BRADFORD: But the phrase "the
24 adequacy of such decision," the adequacy of a decision
25 in a procedural --

DB 46

1 COMMISSIONER KENNEDY: The adequacy of our
2 decision.

3 COMMISSIONER BRADFORD: Yes, but in this case the
4 adequacy of the state's decision.

5 COMMISSIONER KENNEDY: No. Is it? I thought
6 it was the adequacy of our decision.

7 MR. REAMER: No, it is the state's decision, and
8 I think it is the substantive adequacy that is basically --

9 MR. SHAPAR: That's right.

10 COMMISSIONER BRADFORD: Yes, but the word "substantive"
11 isn't there. And if it isn't there, then the adequacy
12 of the decision has to include the procedural adequacy.

13 MR. SHAPAR: We can put in the word "substantive"
14 *WW* Xif that would solve the problem.

15 COMMISSIONER BRADFORD: That would help.

16 MR. SHAPAR: That certainly was the intent.

17 COMMISSIONER BRADFORD: I just think slowly.

18 CHAIRMAN HENDRIE: It didn't make me happy, but
19 that was the intent.

20 MR. SHAPAR: Yes, ther were varying degrees
21 of enthusiasm.

22 COMMISSIONER KENNEDY: Let's think about what
23 that really means, and whether saying that -- yes, it
24 does accomplish something. But I think that Commissioner
25 Bradford is right, when it comes to looking at our own

47 1 position on this matter, I can imagine a case in which
2 the question of whether the procedural guidelines have been
3 followed, talking about how many guys they have, what their
4 qualifications are. Every one of them will be subject to
5 challenge, I would think.

6 MR. SHAPAR: That follows the discussion you
7 had before about this at a prior time.

8 COMMISSIONER KENNEDY: Yes. I am wondering what
9 the implications are. I guess that doesn't -- it helps
10 some, but not all that much.

11 CHAIRMAN HENDRIE: I don't quite catch the
12 thrust. It appears to me that there will indeed in spite
13 of these provisions be a good deal of judicial exercise
14 trying to demonstrate we have followed our own procedures.

15 COMMISSIONER KENNEY^D: Or that the states have
16 followed our procedures.

17 CHAIRMAN HENDRIE: Yes, but that was the view of
18 the Commission earlier on. I don't know that I detect any
19 majority support for putting back in the insulation of
20 the procedural aspects here.

21 What is the language you are going to use? The
22 adequacy --

23 ^{MR.} SHAPAR: Substantive adequacy.

24 CHAIRMAN HENDRIE: That again keys the thing, and
25 I think all atomic energy lawyers from sort of C minuses

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1 on up will perceive the target and the aperture to
2 shoot at it, and will fire vigorously.

3 Do we need --

4 COMMISSIONER BRADFORD: I would like to brood
5 overnight, if I can, on the possibility of changing that
6 around to an affirmative formulation, that is, say only the
7 conformance to the Commission's guidelines should be reviewable,
8 something of that nature.

9 COMMISSIONER KENNEDY: We are as a body convinced
10 that the guidelines should be limited only to procedural
11 ones, that indeed we should not be setting or establishing
12 any kind of standards in terms of substantive review.

13 COMMISSIONER BRADFORD: That is right, assuming
14 four reasonably minded men can ever agree on the difference
15 between procedure and substance, I agree with you.

16 COMMISSIONER KENNEDY: But here I think there is
17 no question about what this is saying. All we are talking
18 about is you guys have got to have 10 guys of this type,
19 and you should have a hearing of this kind, and you
20 certainly should have gone through the right kind of discovery,
21 all of the parties should have their opportunity to --

22 MR. CASE: I don't know, I think you could
23 conceivably say in covering fish you have got to consider
24 the following aspects, and list ten aspects. I think those
25 are procedural.

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1 MR. SHAPAR: I think that proves conclusively
2 Mr. Bradford's point.

3 COMMISSIONER GILINSKY: I just would like to
4 see this all laid out.

5 COMMISSIONER KENNEDY: If it goes that way, I
6 am a little less concerned about what we are doing here.

7 MR. CASE: I would like it to go that way.

8 COMMISSIONER KENNEDY: It seems to me that is
9 the only way we are going to be sure we have a product at
10 the end of this process which the Staff can fairly be
11 expected to accept. And that is what is at issue. We have
12 got to set up a regime here in which the Staff is going
13 to be provided something from the states, which there is
14 a reasonable prospect they can say "This pretty adequately
15 covers" --

16 MR. CASE: Before the fact.

17 COMMISSIONER KENNEDY: Because the Staff is going
18 to have to make a decision that in fact NEPA has been
19 satisfied, isn't it?

20 MR. SHAPAR: In view of this discussion, could I
21 just raise another option for you that may, I think, solve
22 part of these problems?

23 That is, forget about insulating judicial attack,
24 forget about criteria, give yourself the authority to rely
25 on the word product of the states, make the need for power

50 1 flat out we must accept, and to the extent we rely
2 on state work product, we will have to defend it.

3 COMMISISONER GILINSKY: I think I would be more
4 comfortable with that.

5 CHAIRMAN HENDRIE: I think that is a great difficulty.
6 This staff then -- in that case, let's withdraw the
7 section, because you put the Staff, the Environmental
8 Division, in a position where they are going to have to
9 conduct a parallel and subsequent review, which reproduces
10 the state stuff in order to be able to go forward and
11 testify as expert witnesses on it in detail.

12 MR. SHAPAR: Except the statute contemplates,
13 Mr. Chairman, consultative discussions with the states. The
14 way I see it working is when the application comes in, or
15 even before that, the Staff and the state staff get together
16 and decide what part of the environmental review, with
17 money coming forward --

18 CHAIRMAN HENDRIE: I am sorry, Harold Denton
19 can't defend a state product.

20 MR. SHAPAR: Then the state could come forward
21 with its own witnesses and help us defend it.

22 COMMISSIONER GILINSKY: I don't see why you have
23 to do it all over again. There are a lot of calculations
24 involved. You just have to understand them.

25 MR. REAMER: Howard, doesn't the DOT statute

51 1 make the state officer the responsible Federal official
2 for purposes of the EIS? Why couldn't you designate
3 the state official for the purposes of the findings and the
4 decisions the state has made to be the responsible Federal
5 official

6 SHAPAR: I can't recall if that is so or not.
7 It may be a very complicated structure which
8 was tailored to the way the _____ program arose --
9 I am not sure it would work here.

10 MR. REAMER: I think it could work here.

11 MR. CASE: I don't see how you correlate .. (inaudible)

12 MR. SHAPAR: They are having a good deal of
13 difficulty coming up with --

14 COMMISSIONER KENNEDY: My difficulty, I think,
15 is the same one that Ed. has.

16 CHAIRMAN HENDRIE: I don't understand what that
17 is.

18 MR. CASE: My difficulty is unless I can be
19 fairly well assured the state is going to do a good job
20 beforehand, by covering the right subjects, having the
21 right talent and all of that, the thing comes in here,
22 I see it is no damn good, then I have to do the review
23 and I am on the critical path.

24 COMMISSIONER KENNEDY: That's right.

25 MR. SHAPAR: What about my suggestion, you

52 1 that you are going to get together with the state on an
2 informal basis at the beginning and divide up the environmental
3 review.

4 CHAIRMAN HENDRIE: You are going to have a
5 set of guidelines.

6 MR. CASE: On how he does it, what he considers
7 in his review. Once he says he is going to do that, has
8 the talented people, then there is a high probabiliy, it
9 seems to me, that his product is acceptable.

10 CHAIRMAN HENDRIE: Yes. What's your problem?

11 MR. CASE: My problem is if these are only
12 procedural guidelines, do I have the authority to tell him
13 what kind of subjects he must cover in his review of fish,
14 for instance?

15 COMMISSIONER KENNEDY: And essentially how he
16 must cover them.

17 CHAIRMAN HENDRIE: Of course. That is what a
18 procedure is.

19 MR. CASE: Then I am satisfied.

20 COMMISSIONER KENNEDY: Then we need to be more
21 explicit, it seems to me, to be sure that is what we are
22 talking about.

23 CHAIRMAN HENDRIE: Of course. You say you will
24 cover fish, and the species as follows: A,B,C,D,E,F,G.

25 MR. CASE: And give him Reg. Guide 4.1, or whatever
it is for that?

1 CHAIRMAN HENDRIE: Yes, essentially yes. There
2 may be places in Reg. Guide 4.2 where it says, I don't
3 know, you are supposed to -- the water is not supposed to
4 be hotter than 18 degrees. That is substance. Take that
5 out. And you have to find that more than 55 percent of
6 the fish eggs do something or other. That is substance.
7 Take that out.

8 But the fact that you have to count the fish eggs
9 and determine the fraction that get killed in passage through
10 the condenser, that is procedure. Okay? And you can lay that
11 out, for God's sakes, in telephone book sized documents,
12 which I trust you won't do, but in principle you could.

13 COMMISSIONER KENNEDY: That is a little different
14 than the way procedure was being described the other day,
15 and it takes care of my concern, if that is what we are
16 talking about. I don't think that is the way either of us
17 understood it the other day.

18 VOICE: Yes, it's a little different, but I am
19 glad to accept it.

20 COMMISSIONER KENNEDY: Yes, I am delighted.
21 That resolves my problem.

22 MR. CASE: Get that in the legislative history,
23 will you?

24 COMMISSIONER KENNEDY: I think that would take
25 care of Peter's problem as well.

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1 CHAIRMAN HENDRIE: And you have a leaving problem?

2 COMMISSIONER GILINSKY: Yes, I have to leave.

3 I only have this and one other item that I was going to
4 raise, a matter of wording on page 25.

5 MR. SHAPAR: I borrowed that from the Kennedy bill.

6 COMMISSIONER GILINSKY: I guess I would, you know,
7 just say proper behaviour is something --

8 COMMISSIONER KENNEDY: We are going to get to that
9 when we discuss that whole section.

10 CHAIRMAN HENDRIE: What does that word mean?

11 MR. SHAPAR: It means stubborn, recalcitrant.

12 COMMISSIONER BRADFORD: That is not all it
13 means. It is morally-- moral suasion... I will accept the
14 dictionary --

15 CHAIRMAN HENDRIE: It sounds like the right word.
16 Do you have an objection to it?

17 COMMISSIONER GILINSKY: I don't know, it's a --

18 MR. SHAPAR: Its a legal term of art.

19 COMMISSIONER KENNEDY: I would like to discuss the
20 entire section. Indeed I will.

21 (Simultaneous conversations, inaudible)

22 COMMISSIONER GILINSKY: It is not clear to me
23 how that thing would work, I am not sure --

24 CHAIRMAN HENDRIE: Well, I think, you know, there's
25 a lot of terrain out there to be worked over in some detail.

55 1 It seems to me that the framework here is one within
2 which you can work out those things, by retaining to
3 us specifically the NEPA responsibilities. The only place
4 you are really relieved of that is the need for power,
5 and we have all agreed on that.

6 *u w* For ~~the~~ rest, the question of accepting state
7 analyses and so on, we will do a good deal of feeling our
8 way along I am sure, and negotiate on a state by state
9 basis, and probably plan by plan.

10 But the framework strikes me as -- but it seems
11 to me on the particular point that we have stalled on here,
12 the effort was to avoid making a piece of state analysis
13 subject to whatever proceeding the state may require or
14 challenge in the state court may be permitted. And then
15 putting it in our report and making it liable for attack
16 again, both in our proceedings and in the Federal courts,
17 and I am not at all sure that the State of New Mexico is
18 going to be glad to send its people up here to defend it
19 on our behalf.

20 I think furthermore if it is challengable in our
21 proceedings, we have always found it very difficult not to
22 have a staff member, professional staff member, who is able
23 to step forward and testify as an expert witness.

24 When our stuff comes from the laboratories, there
25 is a staff engineer who has work with him in the preparation

56 1 of that stuff, has reviewed it, and is prepared to --

2 COMMISSIONER KENNEDY: I never have understood
3 why we just didn't get the guy from the lab to come
4 in and be the witness.

5 CHAIRMAN HENDRIE: We do. But we also have
6 a cognizant staff, an environmental specialist, who was
7 the overviewer.

8 COMMISSIONER GILINSKY: What can't we treat the
9 states like -- (inaudible)

10 MR. SHAPAR: As an option.

11 COMMISSINER GILINSKY: I am not sure that this
12 isn't okay, but I guess it is not clear to me what
13 the remedy is, if a state does a consistently bad job and
14 it requires review, would you pull back the qualifications
15 of a state? I mean, I haven't thought it through,
16 and I guess it is just not clear to me that this does the
17 trick. Maybe it does.

WW 18 COMMISSIONER BRADFORD: There is another point on
19 another section that is worth considering here, too. Consider
20 what happens if it doesn't fly. Supposing that it-- I assume
21 that those groups that are partail to NEPA --

22 COMMISSIONER KENNEDY: Okay. We are adjourning,
23 but I assume we are going to discuss this further. If we
24 are going to do it, I would urgently ask it be very early
25 on Friday morning.

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1 CHAIRMAN HENDRIE: 8:30 Friday morning.

2 Do I need a vote to hold it?

3 COMMISSIONER BRADFORD: It is a continuation.

4 CHAIRMAN HENDRIE: Who is the sunshine
5 man.

6 MR. REAMER: We recommend that we treat the
7 transcript of this proceeding the same way we have
8 treated the transcripts of all of the others.

9 CHAIRMAN HENDRIE: It is so ordered.
10 Now I am compelled against -- if there is objection
11 to holding a meeting at 8:30 on Friday morning to continue
12 this discussion? Do we need a vote to hold it?

13 MR. REAMER: Probably not, but I would like to
14 have an opportunity to check that.

15 COMMISSIONER KENNEDY: Well, why don't we just
16 vote?

17 CHAIRMAN HENDRIE: In that case, I call for
18 a vote to hold a meeting on short notice, and a vote
19 to close it if such a vote is necessary.

20 COMMISSIONER KENNEDY: Aye.

21 CHAIRMAN HENDRIE: All right, it is so ordered.

22 (Thereupon, at 6:45 p.m. the meeting was
23 adjourned, to reconvene at 8:30 a.m.

24 Friday, September 23, 1977.)
25