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**NUCLEAR REGULATORY COMMISSION**

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**IN THE MATTER OF:**

**COMMISSION MEETING**

**DISCUSSIONS OF PROCEDURES FOR STAFF NOTIFICATION  
TO BOARDS OF RELEVANT AND MATERIAL NEW INFORMATION**

**Place -** Washington, D. C.

**Date -** Tuesday, 24 January 1978

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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION

DISCUSSIONS OF PROCEDURES FOR STAFF NOTIFICATION  
TO BOARDS OF RELEVANT AND MATERIAL NEW INFORMATION

Room 1130  
1717 H Street, N.W.  
Washington, D.C.

Tuesday, January 24, 1978

The Commission met, pursuant to notice, at 3:15 p.m.

BEFORE:

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

P R O C E E D I N G S

CHAIRMAN HENDRIE: Okay, Mr. Case.

We have Dr. Volgenau, and others coming in at 3:30. Why don't we kick off and go on this subject.

Vic is just outside and will be in momentarily.

The subject is further discussions of procedures for staff notification to boards of relevant and material new information, and Mr. Case and Mr. Boyd and his staff, Mr. Rosenthal with the appeals board, Mr. Yore from the licensing panel -- Mr. Boyd is ready.

Mr. Shaypar plays a --

MR. SHAYPAR: Minor, unimportant role.

CHAIRMAN HENDRIE: It's your paper, Ed. Why don't you go ahead.

MR. CASE: Roger will go ahead. He'll go through the paper.

MR. BOYD: Let me say at the onset that included over the last two months that the act of notifying boards is much, much simpler than trying to explain anybody, either in writing or orally, how to do it.

We've made an attempt in the paper, and I tried to boil that down to a series of viewgraphs to punch out the significant factors in our consideration.

As everyone will recall, back on October 19 we briefed the Commission on the matter of board notification and

1 a proposed general way of including the past practices. The  
2 practices, as everybody remembers, were set forth in McGuire,  
3 the appeal board decision of McGuire in '73.

4 (Viewgraph is shown.)

5 MR. BOYD: Another aspect of it in Vogtle in '75,  
6 pointing out that, in fact, McGuire talks to a reporting require-  
7 ment and not to the boards to decide whether such information  
8 would be disclosed that would require significant safety or  
9 environmental issues and that would give rise to further con-  
10 sideration.

11 The Commission, in its North Ana decision, pointed  
12 out very specifically -- and I repeated it on the viewgraph --

13 (Viewgraph is shown.)

14 MR. BOYD: -- as a quote, that the licensing board,  
15 the parties, and the public have a right to be promptly  
16 informed of a discovery before staff evaluation of that dis-  
17 covery and regardless of whether the record is technically open.

18 It's the guidance of McGuire, Vogtle, and that North  
19 Ana opinion that has directed the staff along its past and onto  
20 its present proposed board notification practice.

21 CHAIRMAN HENDRIE: Could I ask a question, a minute,  
22 since Alan is here.

23 In the comment in Vogtle which were -- let's see --  
24 now, were those yours or the licenses?

25 MR. ROSENTHAL: Ours.



1 CHAIRMAN HENDRIE: You said there what you had meant  
2 in McGuire.

3 MR. ROSENTHAL: Yes. We've indicated that McGuire,  
4 as indicated on the viewgraph, established simply a reporting  
5 requirement.

6 (Viewgraph is shown.)

7 MR. ROSENTHAL: And that it was then the responsi-  
8 bility of the boards on obtaining the information supplied in  
9 compliance with the reporting requirements laid down in McGuire  
10 to determine whether or not the safety or environmental issue  
11 was presented, was of such significance as to require further  
12 consideration.

13 CHAIRMAN HENDRIE: That's a determination left to  
14 the boards, and a piece of information filed; and this is quite  
15 apart from whether, in filing that piece of information, the  
16 staff regards it as relevant material under what will turn out  
17 to be alternative 1 here, or simply we happen to get it, we  
18 happen to generate it, and thought you ought to have it as an  
19 alternative 3.

20 MR. YORE: In McGuire, as I recall it, the board had  
21 already finished the hearing when the applicant changed their  
22 quality assurance program, which was one of the issues in that  
23 proceeding.

24 Is that right, Bob? You were chairman of the board.

25 VOICE: Yes, Jim; that's correct. The board was

1 writing its initial decision at the time the QA program was  
2 changed.

3 MR. SHAYPAR: The timing of it was different, but  
4 the principle, I guess, for the purposes of this discussion --

5 MR. BOYD: McGuire established the concept of "rele-  
6 vant and material new information being provided to the board,"  
7 and furthermore made the point that staff and applicant should  
8 have the obligation to do this.

9 In Vogtle it says how the board will decide what  
10 to do with it. Okay.

11 I'd like to indicate on the next chart we were on --

12 COMMISSIONER KENNEDY: I'd like to ask whether Vogtle  
13 modified rather than simply extended the ruling. It seems to  
14 be, but you think not?

15 MR. ROSENTHAL: I do not think it was a modification  
16 at all. I think it was just making it clear that what McGuire  
17 dealt with was the obligation of the staff to report relevant  
18 and material information, making it clear what happened with  
19 that information was the board's responsibility.

20 COMMISSIONER KENNEDY: So, in the first case, the  
21 McGuire case, responsibility for determining what is material  
22 and relevant is placed in the staff.

23 MR. CASE: Right.

24 COMMISSIONER KENNEDY: What to do with material and  
25 relevant information submitted by the staff, is that a matter

1 for a board to decide?

2 MR. ROSENTHAL: So, too, in Vogtle. Vogtle did not  
3 change that. They're both, in my judgment -- both of those  
4 decisions are perfectly consistent.

5 COMMISSIONER KENNEDY: Here, it says, on the view-  
6 graph, McGuire established no more reporting requirements. It  
7 seems to me it established something more than that. It placed  
8 upon the staff the responsibility for determining what it should  
9 report, which is that which is material and relevant.

10 MR. ROSENTHAL: That's right.

11 MR. BOYD: But as I recall, Mr. Kennedy, the words  
12 that were used there in that opening sentence are essentially a  
13 quote from the Vogtle decision. That it be no more than a  
14 reporting requirement is taken from the Vogtle decision.

15 You do bring up a point, though, that would probably  
16 appreciate an adjunct, and that is also in McGuire. There was  
17 a clear point made that, in the event the staff cannot determine  
18 whether a piece of information is relevant or material, it  
19 should be sent to the board and let the board decide that.

20 MR. CASE: Err on the side of sending it; I think  
21 that's the case.

22 MR. BOYD: And this sort of guidance is what's led  
23 us to this present evolutionary position.

24 As an aside, I'd like to point out that since  
25 McGuire, back in '73, we were able to identify at least 125



1 specific examples of boards notifications.

2 (Viewgraph is shown.)

3 MR. BOYD: We can't comment on whether there should  
4 have been 175 or whether there should only have been 100. But,  
5 in fact, I think it does establish that the staff since 1973  
6 has been following this requirement.

7 I also would point out that we established a formal  
8 written-down procedure in 1976, following a Commission meeting  
9 back in June of that year, and that the practice was extended  
10 to consider notifications of boards in more than one proceeding.  
11 Something relevant and material in one proceeding may, in fact,  
12 also be relevant and material in other proceedings, and our  
13 procedures covered that at that time.

14 When we briefed the Commission on October 19 --

15 (Viewgraph is shown.)

16 MR. BOYD: -- we pointed out a number of difficul-  
17 ties with the present practice. One was the difficulty in  
18 trying to establish specific and uniform criteria for judging  
19 relevancy and materiality. It also became obvious to us that  
20 some sort of followup and recordkeeping system was needed, so  
21 that if you supply some information to the board you must at  
22 some later time get back with them and properly dispose of it,  
23 at least in the view of the staff. This was being done, but  
24 it was certainly not being done systematically.

1 handling internally generated information within the staff, com-  
2 pard to the relatively simple matter of handling information that  
3 is provided by applicant, vendors, outside information. That  
4 was a problem, I think, in handling things uniformly.

5 We also indicated -- and I think there was general  
6 agreement around this table -- that whatever the new practice  
7 is, it should be agency-wide. Now, the term "agency-wide" was  
8 used then, and I'm using it now. Probably toward the end of  
9 this discussion we will have some points as to what that defini-  
10 tion should encompass. But, in any event, it's taken by us to  
11 mean the whole staff, not just NRR.

12 There are a number of solutions to the problems that  
13 we've had.

14 (Viewgraph is shown.)

15 MR. BOYD: Some are going to be the specific pro-  
16 posals, alternative 1 versus alternative 3, described in the  
17 paper. A number of them are independent of the alternative,  
18 and I thought I'd focus on these and bring them up.

19 The first one is the strong feeling on the part of  
20 the staff, based on the guidance and reactions received to date,  
21 that these relevant and material determinations should be inter-  
22 preted liberally. I think we get some of that from McGuire,  
23 where it was pointed out, as I just said, that if you can't  
24 make the determination, send it to the board and let them make  
25 the determination.

1           Anything -- and in trying to come up with a defini-  
2           tion we've come across the words that say any new information  
3           that could reasonably be regarded as putting a new or different  
4           light upon an issue before the board or as raising a new issue  
5           which the board could inquire into under its sua sponte authority  
6           -- the point is, however we would do this, we would propose,  
7           independent of any alternative, to do it very liberally. It's  
8           obvious that recordkeeping and followup systems should be  
9           established, at least -- and as we pointed out in the paper --  
10          for handling information provided subsequent to the start of the  
11          hearing.

12                 As you will find out in this presentation, the staff  
13          now proposes a very specific distinction between what it would  
14          do before a hearing starts and what it would do after a hearing  
15          starts. And we also will make the point, if I don't right now,  
16          that prior to this consideration there was no distinction drawn  
17          and no guidance given, even though I think there may have been  
18          intuitive feeling that we were only talking about when does a  
19          hearing start.

20

21

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1 Frankly, in the staff's deliberation to date  
2 and in the preparation of this policy paper, we could find  
3 no basis to draw this distinction.

4 MR. CASE: No logical basis.

5 MR. BOYD: The matter of internally generated information,  
6 we think, as we described in the paper, can be appropriately  
7 handled, and we would draw a line, again, independent of  
8 the alternatives, that when we get to the point where the  
9 staff determines it is necessary to get more information  
10 about this problem, whether from applicant vendors or  
11 what, that now is the time and not before to be providing  
12 such internally generated information to the Board.

13 (Slide.)

14 MR. CASE: This takes it away from the musings of a person's  
15 mind to the point where there has been a collective judgment  
16 that it's important enough to ask an applicant how he's  
17 going to handle this problem or has handled it, or we go  
18 to a vendor which would represent a number of applicants  
19 saying, how do you think that this problem should be  
20 handled in your type of design. That would be the trigger  
21 point where we think it would reach material relevancy  
22 and, therefore, be sent to the affected applicant. It's  
23 a relatively easy thing to administer, and I think it  
24 makes sense from a technical standpoint.

25 CHAIRMAN HENDRIE: It's a fairly low threshold.

sp2

1 MR. CASE: It's a fairly low threshold.

2 MR. BOYD: It would be lower in some cases where  
3 there were a draft proposed staff position that we're going  
4 forward to our internal RQC review, and we would propose  
5 with the same sort of logic to get it through such a  
6 review before we would have it approved to the point of  
7 making it worthy of Board notification.

8 CHAIRMAN HENDRIE: That sounded different.

9 MR. CASE: Usually. But there may be some  
10 cases where you decide you have to go ahead and seek a  
11 solution to a problem before you can wait for RQC. And  
12 then, once you go to the applicant or vendor to get how  
13 it's going to be handled or how it should be handled,  
14 that would be the trigger. In most cases you'd go to  
15 RQC before you'd take that action, but I wouldn't want  
16 to say in every case.

17 CHAIRMAN HENDRIE: Before you'd go out for  
18 more information?

19 MR. CASE: For any information, information  
20 that the staff doesn't have left to its own devices.

21 COMMISSIONER KENNEDY: If it decided to get  
22 more information, that would trigger it.

23 MR. CASE: Yes, sir.

24 COMMISSIONER KENNEDY: Whatever the nature  
25 of that information.

sp3

1 MR. BOYD: It's got to be a mechanism where it  
2 becomes a serious significant -- and if I don't use the  
3 word "significant" -- if it's tested in those decisions  
4 -- but once it becomes significant and it takes management  
5 attention to decide what to do with it, and that decision  
6 indicates that something should be done in a dispositive  
7 way, then we would react, under this system, and notify  
8 the boards.

9 MR. CASE: Recognize, it's quite similar to  
10 the Alternative 3 situation where we're suggesting where  
11 we went to an applicant and say in the normal review of  
12 the case, we think we have a problem with the way you're  
13 proposing this thing. That's the same kind of a trigger  
14 point, where you're going back to the company based on  
15 your evaluation of his information and asking for more  
16 information. It's a similar trigger point.

17 CHAIRMAN HENDRIE: Does it include going out to  
18 the technical assistance contractors?

19 MR. CASE: No.

20 CHAIRMAN HENDRIE: That's regarded as, in  
21 effect, in-house?

22 MR. CASE: Yes.

23 CHAIRMAN HENDRIE: What's clear is, there's  
24 been a long struggle to find some mark point in the  
25 consideration of internally generated matters which

sp4

1 doesn't require great agonizing appraisals for each blasted  
2 one in order to decide whether it's matured into a relevant  
3 and material matter. And the difficulty of finding such a  
4 thing suggests that if you think this one is workable,  
5 why, I'm sufficiently impressed that you think you've got  
6 a workable one, sufficiently impressed not to quibble  
7 about whether the threshold level is right or not. It may  
8 be a low threshold with a difficulty of finding such mark  
9 points.

10 MR. BOYD: We did find a technical issue that  
11 at the time we didn't realize we were applying this test  
12 to, but in fact as a reaction it was exactly what we did,  
13 and it did result, in fact, in a number of boards being  
14 notified. We hadn't postulated this at that time. It was  
15 just our normal reaction in doing business.

16 CHAIRMAN HENDRIE: Okay. Onward.

17 MR. BOYD: I make the point that it'd help solve this  
18 problem to make it an "agencywide" practice. When you  
19 develop a practice, it should be followed by NRR for its  
20 cases and NMSS for its cases, and have all other program  
21 and staff offices supply information to these two offices  
22 that they consider might be relevant material, and leave  
23 it up to either NRR or NMSS to sort the thing out and decide  
24 in collaboration with OELD whether or not to send it forward.

25 (Slide.)



sp5

1           The application of these board notification  
2 procedures to a certain extent is also independent of the  
3 alternative chosen. As we see it, information would be  
4 provided to the licensing board during the course of the  
5 proceeding, which is, I would remind everybody, very  
6 early in the licensing process under the restructured  
7 rules. The board is formed and takes some sort of quasi  
8 judicial jurisdiction over the proceeding very early on.  
9 It would continue from that point until the issuance of  
10 the initial decision. It would go to the appeal board.  
11 Information would be provided to the appeal board during  
12 the period of its review, and in fact, to the Commission  
13 during the period of its review. And I think there have  
14 been some cases where we have done this.

15           Again, there is the point which is already  
16 developed that it would also be independent, and it would  
17 have to consider boards in other proceedings if the  
18 information were relevant material to these other  
19 proceedings.

20           (Slide.)

21           Another distinction that is drawn in the paper  
22 is that between a construction permit and operating license  
23 and an amendment to an operating license.

24           We feel very comfortably that these procedures  
25 clearly apply to construction permit proceedings on all

sp6 1 relevant and material matters. We have made the point,  
2 and I believe Mr. Case did in some of his recent testimony,  
3 that an operating license proceedings where one could argue  
4 that it's limited to the issues in controversy or matters  
5 raised by the Board, that notwithstanding any information  
6 of relevant material to the ultimate safety and  
7 environmental issues, the licensing of the plant would be  
8 supplied to the board regardless of whether they were  
9 issues placed in controversy. And that goes beyond  
10 McGuire, because McGuire just dealt with issues in  
11 controversy. But I don't see how the board or a board  
12 can exercise its sua sponte responsibility under Indian Point to  
13 look at matters beyond those matters it considers to be  
14 significant unless it has all the information.

15 MR. CASE: The question is, where do you draw  
16 the line. The staff is proposing not to draw it between  
17 the CPs and OLs but in fact to draw one between OLs and  
18 amendment hearings. As everyone appreciates, a hearing  
19 with an operating reactor involves a specific issue where  
20 there has been the need for a hearing only on that issue,  
21 and there the staff would propose -- I think, logically --  
22 to limit information flow to those specific issues  
23 considered in the hearing. So we would propose to draw  
24 the line at that point.

25 CHAIRMAN HENDRIE: Let's see. In OL proceedings

sp7 1 does this then result in a flow-in to the boards -- in  
2 effect, a gratuitous flow of material which would not  
3 otherwise occur?

4 MR. BOYD: It would be difficult for the staff  
5 to determine that. Owing to the board's sua sponte  
6 responsibility from the staff point of view, we can say,  
7 yes, this is gratuitous, because we don't think the  
8 board's interested in this. But I don't think we're in a  
9 position to know whether the boards might be interested  
10 in this.

11 CHAIRMAN HENDRIE: Let's see. Up to the time  
12 of filing of the staff's file safety analysis, the safety  
13 analysis report at the OL stage, and the supplement that  
14 immediately follows after ACRS review and so forth, it  
15 has been the staff's intention at least to include within  
16 that report everything that it thinks the board ought to  
17 think about.

18 MR. CASE: The whole case.

19 CHAIRMAN HENDRIE: In the case -- in this  
20 regime, however, there would, in addition to the staff  
21 safety analysis report and its supplements after the ACRS  
22 letter, being from sort of the beginning of the  
23 establishment of the report, a sort of gentle, general  
24 rain upon the proceedings of items coming in that would  
25 get classed as relevant material.

sp8 1 The same is true for construction permits, of  
2 course.

3 MR. BOYD: You've explained the next slide  
4 slightly better than I could, Mr. Chairman.

5 (Slide.)

6 Another distinction to be made on the application,  
7 which, again, is independent of the alternatives, is the  
8 consideration of what would do before the start of the  
9 hearing, what one would do after the start of the hearing.

10 As we pointed out a little bit earlier, this  
11 sort of thinking evolved in this staff study. As far as  
12 she staff sees, there is no present distinction drawn  
13 between before or after the start of the proceeding, as far  
14 as staff obligation to notify boards.

15 MR. CASE: Or to start after the hearing.

16 MR. BOYD: Or -- excuse me -- to start after  
17 the hearing. We are, however, proposing in the event of  
18 either alternative selected that routine information flow,  
19 whatever it is, before the start of the hearing --

20 (Slide.)

21 -- will not be accompanied by specific relevant  
22 material determinations. The staff would make the  
23 assumption that the material that it provides in the form  
24 of the FES, the site suitability report, the SER, any  
25 supplements to its testimony constitute identification of

sp9 1 all relevant material matters and, in fact, the staff  
2 assessment of the significance of those matters. It's  
3 only after the hearing starts that each piece of information  
4 sent to the boards would ultimately be followed at the  
5 soonest possible time as some sort of staff assessment of  
6 its significance.

7 And, I think, implicit in whatever new procedure  
8 comes out of this deliberation, the distinction will have  
9 to be made between what the staff does before the start  
10 of a hearing and after.

11 Putting it another way, I think the Commission  
12 has to be in a position to either agree or disagree with  
13 us. I think the boards and the panels have to be in a  
14 position to either agree or disagree with us; that the  
15 distinction that we feel we're making that wasn't there  
16 before from this and, as you can see in the paper --

17 CHAIRMAN HENDRIE: Hang on.

18 MR. BOYD: Go ahead.

19 CHAIRMAN HENDRIE: Before the start of the  
20 hearing, then -- and I'm not quite sure how that point  
21 would be marked. It might be with the filing of staff  
22 testimony of something like that.

23 MR. BOYD: Approximately.

24 CHAIRMAN HENDRIE: Not necessarily the banging  
25 of the gavel.

sp10

1 MR. BOYD: Yes; quite so.

2 CHAIRMAN HENDRIE: All right. You would say,  
3 look, while these things arise in the turmoil of the  
4 staff's general operation in this area and we'll flip  
5 these out to boards sort of as they come along, and in a  
6 given proceeding then you won't have, you know -- here  
7 they'll come, plopping one after another on the table.  
8 In due time the staff will come in and overhear and put  
9 down its safety evaluation report, or SER, its final  
10 environmental statement, its testimony, and so on. And  
11 in those documents it will treat the things that it thinks  
12 the board ought to pay attention to.

13 MR. CASE: We will have considered all these  
14 parts of papers as part of the staff review.

15 CHAIRMAN HENDRIE: If you think any one of  
16 these odd pieces that's fallen in during the preceding  
17 months is important for the board to consider, you're  
18 mention it over here. If you don't think it's important,  
19 you won't mention it.

20 MR. BOYD: Right.

21 CHAIRMAN HENDRIE: One might then ask, well,  
22 okay, why did we put all this extra paper before the board,  
23 at least up to this time.

24 MR. CASE: My answer would be, we considered  
25 that to be in the course of our review -- we considered it

1 enough to write the applicant a question about it and  
2 evaluate his answer. So we considered it in our review.

3 Now, whether that's material and relevant --  
4 material and relevant -- it's anybody's choice as to what  
5 it means. I can't find any definition that anybody or the  
6 lawyers will stand behind. Some days they tell me "material"  
7 means the same as "material"; the other day, "relevant"  
8 means the same as "material."

9 Of course, it does. You have to deal with all  
10 of them.

11 MR. SHAPAR: I suppose there's another reason,  
12 if you're planning to go this route. The board has just  
13 been sitting there doing nothing while the staff is getting  
14 ready, and they are theoretically reviewing the application  
15 and getting ready for the case. So I suppose one could  
16 make the argument to getting this information to them  
17 would be useful to perform their preparations for their  
18 eventual hearing of the case.

19 I think one could make it reasonable.

20 MR. CASE: I think it is. We'll talk about what  
21 we consider to be significant in our SER. If there's  
22 another issue that we haven't talked about, we'll have our  
23 witnesses there, and the board can ask them, well, what  
24 about this -- what did you do with this or that piece of  
25 information in your review -- and our witnesses can answer

spll



spl2 1 the question.

2 MR. BOYD: As it evolves out of the discussion,  
3 the staff in the paper takes a view relating to the  
4 restructured rules back in 1972. Before that time, as I  
5 recall, boards were impaneled very late in the licensing  
6 process. It was, in fact, about that time that they were  
7 impaneled very early in the process. Boards are involved  
8 very early.

9 Information -- whatever is appropriate,  
10 relevant material to them, in our argument, as we'll  
11 finally get to it, is that that information should be  
12 provided. But early on there is a board.

13 It isn't -- as I tried to point out in the  
14 paper, we can't imagine to think about it when the  
15 restructured rules were set down in '72, all of this  
16 information that we're going to propose in Alternative 3,  
17 it was decided to send it to the parties.

18 MR. SHAPAR: There's really a point that's  
19 very basic here, and that's we're trying to establish a  
20 rationale for what the Commission might want to do.

21 The sua sponte review system that we have is  
22 pretty alien to almost any other type of administrative  
23 agency or the courts. The usual regime is that the  
24 parties handle their own controversies and submit  
25 evidence they think is important to their case, and the

spl3 1 judge decides it, or the administrative agency decides.  
2 The problem here is more difficult, because the Commission  
3 has decided -- and I think, wisely -- that the board ought  
4 to have an independent sua sponte rule. In effect, they're  
5 acting like ombudsmen, if you want to use that word. Now,  
6 if they have been given that role, they have to have a  
7 data base on which to decide whether or not they want to  
8 raise new issues. If we don't give them the data base,  
9 then they can't perform the sua sponte review role which  
10 the Commission has given them.

11 So the reason for this information is not because  
12 any of the parties necessarily think the board ought to  
13 get this information and develop their own case and put  
14 on their own evidence; they're giving the board the  
15 information as part of the data base that the board needs,  
16 presumably, to carry out the sua sponte review role the  
17 Commission has created for them, and I think that  
18 distinction is very important.  
19  
20  
21  
22  
23  
24  
25

spl3

end#7

gsh

1 MR. ROSENTHAL: Mr. Chairman, my silence at  
2 this point should not be construed as acquiescence.

3 MR. SHAPAR: I concur.

4 CHAIRMAN HENDRIE: I might comment.

5 It seems to me that some different conclusion  
6 might follow once the hearing is started, the staff has  
7 then filed its principal papers, and if it has things  
8 that come up after that point, then perhaps what are you  
9 going to do with the stuff?

10 MR. ROSENTHAL: My difficulty is this: under  
11 alternative 3, the staff, as has been indicated, would  
12 uncritically supply the boards with all correspondence  
13 and documentation between staff and applicant relevant  
14 to the specific application.

15 What relevant to the specific application means,  
16 as I understand it, having to do with that reactor.

17 (Slide.)

18 MR. ROSENTHAL: Now I would put it to you that  
19 there is absolutely no way in connection with the review  
20 of the issues that are presented to us or in connection  
21 with our sua sponte review that we can handle that kind  
22 of information.

23 A substantial portion of it will have utterly  
24 no significance to any issue which, conceivably, could  
25 bear upon the ultimate judgment which the licensing or

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1 appeal board must make. That ultimate judgment is should  
2 the license application be granted and, if so, subject to  
3 what conditions?

4 We've already experienced what I think is the  
5 bear tip of this iceberg. Virginia Electric and Power  
6 Company, in the last weeks, doubtless, has a reaction  
7 perhaps in the view of some, an overreaction, to the  
8 events of December. They have started the file with us  
9 in the North Anna operating license docket, copies of  
10 all of its correspondence with the staff.

11 In doing it, their lawyer has said that this  
12 is being done out of an abundance of caution. He doesn't  
13 think it has any bearing on anything that might come  
14 before the appeal board in that docket.

15 As matters now stand, the operating license  
16 procedure has not reached the appeal board.

17 We've been confronted with discussions of a  
18 number of incidents that have occurred -- a voltage  
19 regulator had some kind of operational problem -- it has  
20 taken the time of my technical advisor to go through these  
21 letters that are coming in almost daily to report back to  
22 me, I suppose also to my colleagues on that board, as to  
23 whether there's any possible significance to any of this  
24 information.

25 You multiply that in terms of hundreds, if not

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1 thousands of pieces of paper and there's no way in which  
2 we can make any kind of meaningful use out of it.

3 I think what we're going to confront is a  
4 defeat, as a practical matter, of the reporting requirement,  
5 the defeat of it in the sense that certainly, staff is  
6 going to report by way of furnishing all of this documentation  
7 and critically report to us everything that passes back  
8 and forth between them and the applicants.

9 We're not going to be able to come to grips  
10 with that wealth of material and, therefore, essentially,  
11 it's going to be worthless.

12 And if the reporting requirement is going to  
13 mean anything, and really mean anything, it seems to me  
14 that there has to be some kind of standard employed for  
15 determining whether there is any reasonable basis for  
16 concluding that a piece of information has potential  
17 relevance to some issue that the board will be called upon  
18 to decide.

19 Now the boards, even with their sua sponte  
20 responsibilities, are not general overseers of the applicant's  
21 conduct in pursuing either the construction of the plant  
22 or its operation.

23 That's not the function of the boards.

24 Even with the sua sponte jurisdiction, the boards  
25 have a relative rate limited area in which they operate.

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1 And a very small percentage of this information will be  
2 of any possible relevance to issues which the board might  
3 consider.

4 Now there is another way, as I indicated in  
5 my own memorandum, that this can be handled, if the  
6 Commission so desired, and that is to enlarge the staffs  
7 of the licensing board panel and the appeal board panel  
8 to add to those staffs a retinue of technical advisors  
9 whose function would be to screen all of this material  
10 to add to the staffs of the respective panels docket  
11 clerks who handle this material.

12 And I might say in the case, at least, of the  
13 appeal panel, it might require a considerable extension  
14 of our present docket room space, which is barely  
15 adequate to handle the material that we now get.

16 I don't recommend that course because I don't  
17 think it is necessary.

18 My own judgment is that it is quite possible  
19 for the staff to make a judgment with respect to this  
20 wealth of material with respect to whether this material  
21 is of possible relevance to a matter the board has to  
22 consider.

23 And I would back that judgment by saying that  
24 it has met the test so far as I am concerned. The staff  
25 over the last three years, the life of this commission,

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1 operating under the McGuire-Vogtle procedures, have been  
2 fulfilling their responsibilities along this line quite  
3 satisfactorily.

4 I do not believe that there has been withheld  
5 from the boards during this period of time any information  
6 that was of real significance to an issue that the board  
7 had under consideration or the exercise of the sua sponte  
8 jurisdiction might appropriately have taken under its  
9 wing.

10 Now I realize that this has all stemmed from --

11 CHAIRMAN HENDRIE: Let me stop now and  
12 investigate some pieces of that.

13 These comments, most recent comments, would apply  
14 to the 125-odd filings that have been made by the staff.  
15 These include a lot of external material.

16 MR. CASE: Not much, but some internal.

17 CHAIRMAN HENDRIE: Some internal.

18 (Slide.)

19 CHAIRMAN HENDRIE: If the relevant and material  
20 standards that you've proposed for internally generated  
21 information had been in place, what's your guess about  
22 the number of items you would send forward?

23 MR. CASE: Certainly more, certainly more  
24 internally generated information.

25 COMMISSIONER KENNEDY: By a factor of what?



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1 MR. BOYD: The point is we're not that  
2 systematic in the past in determining -- just look at  
3 each piece of information and make a judgment. It's  
4 just as it flows. You know, you're stimulated to  
5 remember that we have to notify the boards.

6 However, with a systematic practice such as  
7 we're proposing, you would be digesting this information  
8 as it flows.

9 Now it's complicated further by the fact that  
10 our past practice did not involve the rest of the agency,  
11 the rest of the staff. It involved NRR. And I think  
12 there would be a build-up on internally generated  
13 considerations as a result of expanding this to encompass  
14 the entire staff.

15 MR. CASE: I appreciate what Alan says, but  
16 I simply can't jibe what we've been sending you over the  
17 last three years with a material and relevant standard.

18 It just doesn't fit. It's not consistently  
19 applied, and if I consistently apply it, then I'm to  
20 alternative 3.

21 Now the problem then is what should be my  
22 criterion? I say it's got to be different than material  
23 and relevant, because if I use that, you're going to get  
24 a lot more.

25 So I need something else. That's my problem.

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1 CHAIRMAN HENDRIE: Let's see. Alternative 3  
2 didn't really involve relevant and material standards,  
3 did it?

4 MR. BOYD: Prior to the start of the hearing it  
5 did not. The same is true with alternative 1.

6 MR. CASE: Let me examine that.

7 (Slide.)

8 MR. CASE: There's no standard applied once  
9 the information is generated. But if I have to ask  
10 myself is it relevant and material to my review that I  
11 ask the applicant this question, it's got to be, or  
12 else I wouldn't ask him the question. I don't  
13 frivolously ask applicants why is their design this way  
14 instead of that way?

15 It's got to be material to my ultimate  
16 determination. If it's material to mine, how can I then  
17 say it's not material to the board's? I've got to treat  
18 them the same as I treat myself, it seems to me.

19 MR. ROSENTHAL: It's difficult for me to believe,  
20 Ed, that every piece of paper that passes between the staff  
21 and the applicant is deemed by the staff to be relevant  
22 to the question which is before the board, which is whether  
23 a construction permit or operating license, as the case  
24 may be, should issue for that facility, and if so, on  
25 what terms and conditions?

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1                   Now I can't believe, for example, that when  
2                   Vepco informed you and at the same time informed us that  
3                   a crane ball had dropped three feet and that a voltage  
4                   regulator was out of whack, that the staff regarded that  
5                   kind of information as being of relevance on the question  
6                   as to whether Vepco should receive an operating license  
7                   or no. I just don't think so. It may be relevant in  
8                   terms of what the staff does in terms of its dealing with  
9                   Vepco on a day to day, supervisory basis.. But that's not  
10                  what the licensing appeal boards are about.

11                 MR. CASE: Alan, at that point, I don't know  
12                 whether that electrical thing is just something wrong with  
13                 that particular one they've got, or there's a generic  
14                 problem with the design.

15                 When I was first told there's a problem, I  
16                 simply don't know what it is.

17                 CHAIRMAN HENDRIE: It's also fair to recognize  
18                 that there's been a fair amount of urging of the staff  
19                 to be liberal in the extreme in the interpretation of these  
20                 and --

21                 MR. CASE: The commission's told me, send it  
22                 first, evaluate it later.

23                 That's what they told me.

24                 MR. ROSENTHAL: The only thing that really  
25                 concerns me is that I do not want it to appear that the

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1 boards are, in point of fact, evaluating oceans of  
2 material in circumstances where the boards aren't doing  
3 that because, as a practical matter, they can't do that.

4 In short, I do not want to be operating under  
5 false pretenses. All I'm really trying to convey to the  
6 commission is that, as matters now stand, given the  
7 staff that we have, there is no way in which it can be  
8 properly assumed that the documents that we would get  
9 under alternative 3 would be closely scrutinized by the  
10 appeal boards or by appeal panel staff members in search  
11 of some significant, possibly significant disclosure  
12 therein.

13 We just can't do it.

14 So if it's coming to us on this basis, it would  
15 be, in my judgment, simply a ritual.

16 MR. YORE: I concur with Alan. Just to give you  
17 a picture on how we're organized, to send all this material  
18 under alternative 3 to three member boards, we have never  
19 had technical assistance. We, too, have a very small  
20 docketroom. We've got two full-time people and one  
21 part-time person trying to control what we've got, and  
22 the docket room is bursting.

23 We think we have the answer to the problem now,  
24 and that is, we're interested, and the boards are  
25 interested, in the final position, final formal position, of

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1 the staff.

2 Now the paper talks to the start of the hearing.  
3 We don't think this is the correct point to mark it.

4 The final formal position of the staff on  
5 environmental matters is contained in the final  
6 environmental statements in the site suitability statement.

7 That's the time when they evaluate all this  
8 material that's going on, all the questions and answers.  
9 They've assessed it, they've evaluated it, and they come  
10 up with their final position.

11 We would say after the site suitability reports  
12 are issued, then the boards would like every piece of  
13 correspondence from that time on; that is, we go to  
14 alternative 3 with an assessment attached to the particular  
15 document, or as soon as possible thereafter, because any  
16 of that material after that final report has been issued  
17 could change the report, might change the report.

18 So we would go for alternative 3 at that point.

19 Now on the health and safety thing, the  
20 final formal position of the staff is in the safety  
21 evaluation report. Supplement 1 considers everything that  
22 the ACRS has brought out.

23 So we say have the alternative 1 up to the  
24 issuance of the final health and safety reports. Then after  
25 that go into alternative 3 and give us everything.

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Now that's our solution, our recommendation.

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1                   Then we don't have all this flood of mail  
2 prior to these final reports.

3                   MR. CASE: I have no problem with whatever  
4 you decide. But with that proposal, I've got to know  
5 more specifically what, if anything, beyond what the  
6 boards presently get before the start of the hearing do  
7 they want. Nothing more? Not if the world falls down?  
8 Do they want chloride seams that might be discovered  
9 during the course of an applicant's geological investigation?

10                  Under what Mr. Yore is proposing, they would  
11 get that.

12                  MR. YORE: You'd cover that in your reports.

13                  MR. CASE: I don't think I would cover that  
14 fact.

15                  MR. YORE: And if it comes after your final  
16 reports, tell us about it.

17                  MR. CASE: I'm not telling you when I find out.  
18 That's what the commission told me to do under North Anna.  
19 Send it first, I'll evaluate it later.

20                  I've got so many instructions, I can't do it.

21                  CHAIRMAN HENDRIE: You're a little overconstrained.  
22 That's the problem.

23                  There are some manpower costs associated with  
24 these alternatives. The ones reported in the staff paper  
25 did not reflect an input from the panel in the appeal

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1 board session.

2 MR. BOYD: Yes, that's correct.

3 MR. CASE: I must say they were done more for  
4 comparative purposes the way we originally did them, rather  
5 than for their absolute accuracy.

6 MR. BOYD: In fact, in our view, it's still  
7 going to be difficult to see much difference in impact  
8 between alternative 1 and alternative 3, as these have  
9 evolved.

10 Certainly, after the hearing, after the start  
11 of the hearing, there's not much difference.

12 CHAIRMAN HENDRIE: Well, that's not differences  
13 between these approaches after the hearing starts, but  
14 what is being proposed over here is sort of alternative  
15 three-fourths. It's not alternative 1.

16 The reason is that your alternative 1 requires  
17 a relevant and material standard for material to be  
18 filed with the boards. And you, under present instructions,  
19 would feel it necessary to interpret that in a very  
20 liberal sense with regard to internally generated  
21 information.

22 I assume that all of the external material, even  
23 now in effect, goes. Okay?

24 MR. CASE: That's not so, not before the hearing.

25 CHAIRMAN HENDRIE: Not before the hearing?



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1 MR. CASE: They do not get our questions.  
2 Everybody else, all parties to the proceedings but the  
3 boards get them.

4 CHAIRMAN HENDRIE: If somebody filed you, --

5 MR. BOYD: There is a difference. We have  
6 a slide on this if you'd like to see it.

7 CHAIRMAN HENDRIE: At any rate, that emphasizes  
8 the point even more.

9 What I'm saying is that you don't seem much  
10 difference between alternative 1 and 3 because the  
11 difference between them is only that in one you would  
12 exercise relevant and material standard and you feel  
13 you would have to interpret that so liberally that it  
14 would turn out to be the next thing to everything.

15 MR. CASE: That's correct, sir.

16 CHAIRMAN HENDRIE: What's being said over here  
17 is quite different. It's being said here that that's too  
18 loose a standard to apply and that there ought to be some  
19 suitable standard which would really very much limit the  
20 number of pieces of paper over and above the staff's  
21 final environmental statement, safety evaluation report.

22 MR. CASE: I think that's what Alan is saying  
23 but I don't think that's what Jim is saying.

24 CHAIRMAN HENDRIE: They sounded an awful lot  
25 alike to me.

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1 COMMISSIONER KENNEDY: There was some  
2 difference.

3 MR. BOYD: There is a difference that will give  
4 us some problem in trying to interpret what Mr. Yore  
5 suggests as a way to go. But could I go through a couple  
6 of slides that show, I hope, the differences between these  
7 alternatives.

8 I have two slides that focus on this. In fact,  
9 one deals with before the hearing starts and the other  
10 after the hearing starts.

11 (Slide.)

12 If you focus on the differences before the  
13 hearing starts, you find in alternative 1 today the boards  
14 are getting the SAR, the ER, all the amendments, the FES,  
15 the site suitability report, our SER, all the supplements,  
16 and any hearing-related matters between the parties,  
17 discovery hearing-related matters and everything, plus  
18 everybody's direct testimony. And all of this stuff is  
19 coming during the course of the review.

20 Under alternative 3 before the start of the  
21 hearing, we would, of course, continue all of this and  
22 add another pile of information, which we estimated in one  
23 particular case to be about 18 inches high.

24 This additional information turns out to be things  
25 like questions to the applicant, staff positions to the

gsh 1 applicant, meeting memorandum. You have a meeting with  
2 the applicant. We indicate what happened and what  
3 positions were taken, things like that.

4 There are other staff documents that are  
5 generated for one reason or another with the PDR. They're  
6 made available to the public, they're sent to the parties.  
7 We proposed under alternative 3 to send these routinely  
8 to the board. We receive consultant reports from the ACRS,  
9 usually before the ACRS meeting.

10 The opinions of these consultants in these  
11 reports, these we propose to retain and so forth.

12 CHAIRMAN HENDRIE: I notice I've also got a filing  
13 from the advisory committee executive secretary that  
14 says, look, some of our consultants report in writing and  
15 not always. Some of them report orally. And if you get  
16 sort of an odd mix of file consultants reports, suppose  
17 the people who think that a thing is not safe and have  
18 said so orally, and all the consultants who say it's  
19 great have said so in writing. And the only things you  
20 put in the record are the writing things.

21 You've got a distorted opinion. And the view  
22 of the ACRS is you're much better off dealing with the  
23 considered view of the committee in shaking all of this  
24 material down, rather than simply filing on the record  
25 of the case.

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1 MR. CASE: But it's in the public document  
2 room. The same material is in the public document room.

3 MR. BOYD: And it has been sent to the staff.

4 COMMISSIONER KENNEDY: You would have reduced  
5 it to some kind of memorandum, wouldn't you, if you got  
6 an oral statement.

7 MR. CASE: The Chairman is talking about ACRS.  
8 They sometimes report orally their meetings.

9 MR. BOYD: To the committee.

10 MR. CASE: Many of which are transcribed.

11 CHAIRMAN HENDRIE: Look, I'll tell you where  
12 I come out at 10 minutes after 4:00 in the afternoon.  
13 The staff has a problem. I at least recognize the problem  
14 as a very big one.

15 The licensing staff needs some instructions from  
16 the commission. It's now operating under a set of  
17 instructions which, as you feel compelled to interpret  
18 them, just are very difficult.

19 Now there is a paper here with a couple of  
20 alternatives in it, but they are alternatives seen through  
21 the staff's eyes. Okay?

22 I would very much like to see what the panel and  
23 appeal board point of view might be if it could be reflected  
24 as a policy option, to see if there is there the possibility  
25 of definitions of policy directions which would make sense,

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1 fill all the needs, avoid some of the difficulties.

2 MR. CASE: I'd like to suggest we maybe reverse  
3 what we've just done here. I would love to have a proposal  
4 from them and see if, in seeing that, whether we think it  
5 makes sense and can live with it, as they have reacted  
6 to our proposal.

7 CHAIRMAN HENDRIE: I don't know. What are the  
8 practicalities? I'll talk to Jim. He has more people.

9 MR. YORE: Well, I can't argue about that.  
10 No, we'll get together. We'd be happy to do it.

11 You mean get together with Al to try and work up  
12 something?

13 CHAIRMAN HENDRIE: Yes.

14 MR. YORE: Sure.

15 CHAIRMAN HENDRIE: Which would be either an  
16 addendum to, or perhaps worked into, an amended paper, staff  
17 paper, which would reflect the views of the manpower costs,  
18 because I think those are of interest.

19 It has to deal with problems that the staff has  
20 in interpreting in view of the instructions given to date,  
21 relevancy and materiality.

22 MR. YORE: As far as I'm concerned, I'm ready  
23 to work to try to come up with something.

24 MR. ROSENTHAL: I think, if I may say so,  
25 Chairman Hendrie, one of the things that the commission may

gsh

1 have to focus on is the matter of how it regards sua  
2 sponte responsibilities of the boards, because I tend to  
3 think that the staff perceives those responsibilities as  
4 being broader than I frankly perceive them. And I think  
5 this is intimately involved in this whole question.

6 MR. CASE: I agree.

7 MR. ROSENTHAL: Because how much information  
8 should be routinely supplied to the board obviously  
9 hinges, at least in part, upon what the breadth of the  
10 boards' responsibilities are.

11 MR. YORE: This is particularly true with  
12 reference to the operating license cases.

13 CHAIRMAN HENDRIE: I think it would be appropriate  
14 to address some remarks to that point to see whether it's  
15 practical and whether the commission, in fact, is able  
16 to come to a consensus and more precisely define. It may  
17 not be. It's been a matter which has sort of existed  
18 through the years, and I don't recall it ever having been  
19 very precisely defined.

20 MR. ROSENTHAL: You heard Howard Shapar  
21 characterize it as an ombudsman role. And I would have to  
22 say that while that term is somewhat amorphous, I would  
23 have to dispute that that is our role, at least as I  
24 presently understand it.

25 And this is one of the reasons why I think that

gsh 1 this is really part of the whole question.

2 MR. CASE: It's clear our proposal was in that  
3 sense that it was an ombudsman's role, I believe.

4 CHAIRMAN HENDRIE: Okay. Well, I would ask  
5 for some further work here.

6 By the way, I thought the set of slides were  
7 very good. I'm sorry you didn't get all the way through  
8 them, but I think you'll be able to use most of them  
9 again.

10 MR. BOYD: You don't need to worry about that,  
11 Mr. Chairman. I found the paper was hard enough to write.  
12 But when I got to the point of the proposed instructions  
13 from the EDO back to the staff, that flowed just  
14 beautifully. Then when I got to the point of trying to  
15 create the slide, that was the easiest part of it.

16 But I've now come to the point where this is  
17 totally saturated, and we just reuse. We don't need to  
18 work on it any more, as far as I'm concerned.

19 MR. CASE: We appreciate the time. It's a  
20 difficult subject.

21 (Whereupon, at 4:15 p.m., the hearing was  
22 concluded.)

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