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NUCLEAR REGULATORY COMMISSION

IN THE MATTER OF:

MEETING

DISCUSSION OF TESTIMONY ON
PROPOSED LICENSING LEGISLATION

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Date - Monday, 8 May 1978

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NOTES&TAPES

UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

MEETING

DISCUSSION OF TESTIMONY ON
PROPOSED LICENSING LEGISLATION

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

Monday, 8 May 1978

The Commission met, pursuant to notice, at 3:10 p.m.

BEFORE:

DR. JOSEPH M. HENDRIE, Chairman

PETER A. BRADFORD, Commissioner

RICHARD T. KENNEDY, Commissioner

PRESENT:

HOWARD SHAPAR, Executive Legal Director

C. STOIBER

M. MALSCH

ALSO PRESENT:

E. CASE

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P R O C E E D I N G S

CHAIRMAN HENDRIE: Counsel has recommended that we are having a general discussion about the legislation, this is the thrust of this. Howard is going to walk us through this bill and we can discuss sections of it, ask questions and so on.

The recommendation is that when we are doing that, the meetings -- I don't know whether he said should be open or could be open. I guess, should be open. So we voted to open this one and similar meetings of the same nature.

When we come to close on the specific testimony, what is the recommendation there?

MR. STOIBER: The recommendation is that they can be closed. It would require specific analysis of the question of frustration of purpose. And one would have to make a case for each one of those on that basis. But it can be done either way from the Commission's viewpoint.

CHAIRMAN HENDRIE: At any rate, we are open this afternoon.

I see that we have been supplied with actual copies of the bill. It looks much more formidable in this form at this point than it did when it was just a typed draft that I could make marks on.

MR. SHAPAR: Commissioner Kennedy points out if you have the Senate version, that will work as well, because they are identical bills.

1 CHAIRMAN HENDRIE: What is the Senate number?

2 MR. SHAPAR: 2775.

3 CHAIRMAN HENDRIE: Howard.

4 MR. SHAPAR: I will start off with a few general
5 comments in an attempt to focus this a bit, and then Marty
6 Malsch is prepared to go through it section by section as long
7 as your patience will endure.

8 CHAIRMAN HENDRIE: Victor anticipates a short meet-
9 ing.

10 Do you have someplace you want to go at 3:30?

11 COMMISSIONER GILINSKY: No, no.

12 CHAIRMAN HENDRIE: I am sorry. Go ahead.

13 MR. SHAPAR: Most of the NRC recommendations that
14 have been given to DOE in the past have been accepted and
15 incorporated in the DOE bill.

16 You will recall there are four basic comments
17 reflected in the bill. No. 1, improve coordination of federal
18 and state agency reviews. No. 2, accommodation of early site
19 reviews of early site reviews and preapproved standardized
20 designs. Third, minimizing duplicative need for power and
21 environmental reviews on the part of the states and NRC. And
22 fourth, a pilot program for funding Intervenors.

23 And, of course, all those four basic concepts are
24 still included in this bill.

25 Other main features -- very quickly -- are the combined

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1 CP and OL, relaxation of the mandatory ACRS review, elimination
2 of the mandatory CP hearing, the idea of interim operating
3 license, interim amendments to operating licenses, and a rather
4 forceful expansion of the public notice requirements that are
5 in the Atomic Energy Act.

6 Two points that I would specifically bring to your
7 attention are the fact that the NEPA hearings would be hybrid;
8 a hybrid of legislative and/or adjudicatory. Whereas, health
9 and safety reviews would be adjudicatory, as they are now.
10 This feature came in very late. I think this is the first --
11 the DOE bill is the first time that incorporated that concept.
12 We hadn't seen it before.

13 The other major point you might want to focus on
14 is the fact that the state decisions would be binding on NRC
15 whether or not the state program had been approved by the NRC.
16 I think that Marty will deal with that at some length in his
17 comments.

18 The final point I wanted to mention is that although
19 I indicated at the beginning that most of the Commission's
20 comments on earlier versions have been incorporated, not all of
21 them have. I have asked Marty to bring to your specific
22 attention those points that you made before that are not now
23 incorporated in the DOE bill.

24 With those general comments, Marty will take you
25 through it section by section.

1 MR. MALSCH: I can either go through section by
2 section, the way the bill is organized, or go through the
3 more important sections first and pick up some of the nitty-
4 gritty sections later on. It makes no difference to me.

5 CHAIRMAN HENDRIE: Why don't we start at the
6 beginning and pick up the --

7 COMMISSIONER GILINSKY: Just tell us when you come
8 to an important section.

9 CHAIRMAN HENDRIE: Rap on the table.

10 MR. MALSCH: Well, the first section is the title
11 of the bill. There is nothing terribly controversial about
12 that.

13 The second section is a collection of findings and
14 purposes. The Congress would recognize in Section 2 that a
15 clear and coordinated energy policy consistent with sound
16 safety and environmental controls must include an effective
17 and efficient licensing process. which meets -- for reactors
18 which meet applicable safety and environmental criteria.

19 For the most part, the findings and purposes don't
20 cause any problems.

21 A couple of the sections are a little outdated.
22 For example, Section 2-A-5, which talks about states which do
23 not elect to make site-specific environmental facility determi-
24 nations. Then in that case the national interest requires or
25 wants federal exercise of that authority. This may be a

1 carryover from earlier versions of the bill which called for
2 a federal preemption of NEPA responsibilities where the states
3 didn't have an approved program. It is probably a draftsman-
4 ship problem.

5 And similarly, Section 2-A-6, which says it is in
6 the national interest that planning for energy facility siting
7 and need for power determinations be made consistent with
8 national energy priorities. That was in there originally
9 because it was a corollary feature to what was then Section
10 111, which was a big DOE-assisted program for coordination
11 and aid to states.

12 MR. SHAPAR: Which was very controversial and was
13 attacked by Interior, particularly, and was dropped for the
14 first time from this version.

15 COMMISSIONER KENNEDY: I'm sorry, which one was
16 this?

17 MR. MALSCH: It's finding in Section 2-A-6, which
18 is in the middle of page 3.

19 On page 4, finding 8, about siting construction of
20 reactors being facilitated by the use of standardized nuclear
21 power reactor designs. That is actual NRC-suggested language
22 in its comments to OMB.

23 A finding that the national interest requires
24 reactors be sited away from population centers has been deleted
25 from this bill in accordance with an NRC-OMB comment.

1 Finding 9 on page --

2 COMMISSIONER BRADFORD: Which comment was that?

3 MR. MALSCH: This was a comment by NRC to the
4 effect that that ought to be deleted, primarily because it
5 didn't serve any operative effect in the rest of the bill.

6 COMMISSIONER BRADFORD: We made that comment on the
7 population centers?

8 MR. MALSCH: That's right. In our comments to OMB.

9 MR. SHAPAR: Those are the only formal comments
10 I think that the Commission had ever sent over to OMB.

11 COMMISSIONER BRADFORD: Other than our own draft of
12 the bill?

13 MR. MALSCH: Which came before then; that's right.

14 So when I talk about NRC comments, I am always
15 referring to the October 26, '77 comments.

16 One thing that might be significant here is Finding
17 9 on page 4, which talks about the NRC continuing to exercise
18 its independent statutory responsibility to protect the public
19 health and safety and common defense and security.

20 Taking into account that there is no such thing as
21 absolute safety and that the costs of additional safety require-
22 ments should be given considerations, and that adequate pro-
23 tection of the public health and safety is a paramount consi-
24 deration. This is very similar to language we have seen before.

25 COMMISSIONER KENNEDY: It says "the paramount."

1 MR. MALSCH: The paramount consideration. In fact,
2 the word "paramount" was added as an NRC suggestion in the OMB
3 comments.

4 What is interesting about here is a recognition of
5 something that has been very controversial, and that is that
6 safety, the cost of additional safety requirements should be
7 given consideration. That's arguably something new, not before
8 seen in the Atomic Energy Act.

9 MR. SHAPAR: This reflects the discussions that this
10 Commission had on this very point before.

11 CHAIRMAN HENDRIE: I think we worked over that
12 language way back in September, something like that.

13 Marty, back on item 8 under findings, there isn't an
14 difficulty with "site-specific environmental determinations,"
15 is there?

16 MR. MALSCH: I don't think so.

17 CHAIRMAN HENDRIE: There may be a difficulty with
18 "general facility need determinations," since the states aren't
19 asked to elect to do that, but doesn't the language now say
20 they will do it.

21 MR. MALSCH: There is a problem because in later
22 sections of the statute, there is reference to something
23 called a "generic future need for electric power," which is
24 supposed to suffice for needer purposes at the site permit
25 stage. And apparently states are to do that as well as

1 provide specific facility need determinations at the construc-
2 tion permit or combined permit and license stage.

3 I think the language here in 5 is a carryover from
4 prior versions of the bill.

5 The version of the bill now says that where states
6 don't have an approved program and don't elect to do the NEPA
7 reviews, then the NRC shall have exclusive authority as against
8 the states to make the NEPA determinations. That is kind of
9 silly because the states don't make NEPA determinations anyway.

10 So even where the states don't now have an approved
11 program, they would not be ousted of authority to do environ-
12 mental acceptability evaluations or need for power evaluations.
13 As a matter of fact, the bill requires certificates of need
14 even quite apart from the fact as to whether or not a state
15 has an approved program.

16 CHAIRMAN HENDRIE: What fix would the language need?
17 What fix would need to be made to the language here?

18 MR. MALSCH: Well, the easiest thing would be to
19 just take 5 and 6 out. That would be the simplest thing.
20 It could be made -- it could be redrafted so as to be in
21 conformity with Section 1 -- I guess it is 95 -- which is the
22 NDEPA delegation provision. But then it wouldn't sound very
23 forceful and you would wonder why Congress thought it suffi-
24 ciently significant to put in the findings and purposes.

25 MR. SHAPAR: And not have any operating sections

1 following.

2 MR. MALSCH: Right.

3 MR. SHAPAR: It is a floating finding without any
4 follow-up.

5 COMMISSIONER GILINSKY: Is the standardized
6 facility design ever defined?

7 MR. MALSCH: No, it is not defined.

8 The actual language in Finding 8, I think is -- it
9 is NRC-suggested language.--

10 COMMISSIONER GILINSKY: One of the purposes of
11 the Act is to facilitate use of standardized facility designs
12 for nuclear power reactors.

13 MR. MALSCH: I suppose you could say that Section
14 194, which is the section dealing with standardized design
15 is sort of self-defining. It is anything that has been approved
16 in a rulemaking or manufacturing license proceeding, under
17 this bill by definition because a standardized design.

18 In that sense, it is a shorthand way of referring to
19 designs approved under Section 194.

20 CHAIRMAN HENDRIE: Okay. Onward.

21 MR. MALSCH: As I indicated, Section 111, which had
22 appeared in prior drafts of the bill, which is a DOE-assisted
23 program of funding states to come up with facility planning,
24 has now been deleted. It turned out to be very controversial.

25 We had had no comments on that provision except to

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1 note to OMB that, however, it was drafted it should be drafted
2 so as to make it clear there was no federal preemption of
3 state planning. But as I say that section has now been
4 dropped, so the issue is moot.

5 COMMISSIONER BRADFORD: For the moment. I gather
6 the dropping is not permanent.

7 MR. MALSCH: For the moment.

8 MR. MALSCH: There was talk within the last month or
9 so about DOE drafting up a separate bill to address this.
10 I don't know what the status of those drafting efforts are.

11 MR. SHAPAR: In fact, they said during discussions
12 that they did plan to draft a separate bill. I haven't heard
13 any word that they have dropped that idea, but I haven't heard
14 of any progress about it either.

15 COMMISSIONER BRADFORD: Other than the fact it was
16 going to be submitted in April.

17 MR. SHAPAR: No time limit that I know of in
18 connection with this bill has ever been made.

19 MR. STOIBER: They have reserved a section for it,
20 too; you notice they go to 112.

21 MR. MALSCH: We already have a 111 in the act now.
22 Does the Nonproliferation Act add a section 111. I think it
23 does.

24 Well, in any event.

25 Also, I think DOE planned, at least in the later

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1 stages of planning, to have a section that would deal not only
2 with nuclear facility siting, but also with energy facility
3 siting, So in that respect what DOE had in mind might have
4 gone beyond the original concepts of this bill to other kinds
5 of energy facilities.

6 Section 1 deals with advance planning and early
7 notice. It is probably for the most part new authority for
8 the Commission except for the provisions regarding advance
9 notice in "B" are probably not new authority and the partici-
10 pation in the DOE programs is not that clear but that is
11 probably not new authority either.

12 MR. SHAPAR: This language, with the exception that
13 Marty mentioned, is very close to the bills that the Commission
14 and the AEC proposed before.

15 MR. MALSCH: In prior comments NRC indicated that it
16 had no particular problem with this provision so long as
17 it was clear that long-range planning would not turn out to
18 limit the scope of issues in any later NRC proceedings. In
19 fact, some language in the earlier version to that effect was
20 deleted at NRC suggestion.

21 112-A is simply a provision which authorizes the
22 Commission to encourage people who are coming in for permits
23 and licenses to engage in open, advanced planning for the
24 facilities and sites.

25 CHAIRMAN HENDRIE: When you read page 6, lines 8,

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1 9 and 10, that comment about priorities for reviewing licenses
2 and permits has been in there for a long time. I still don't
3 read it as compelling anything upon us that we might not want
4 to do, do you?

5 MR. MALSCH: It says we shall established guidelines
6 for participation in the planning, and shall established
7 priorities. So if we had any doubts about maybe not doing
8 anything, I think this language would cause us a problem, or
9 it could.

10 MR. SHAPAR: I think we must do something.

11 MR. MALSCH: Do something; it doesn't say precisely
12 what it is, we we have an awful lot of leeway.

13 COMMISSIONER GILINSKY: Something like what?

14 MR. MALSCH: Well, the most obvious thing, I suppose,
15 would be to, in cases of a conflict in Staff resources, to give
16 priority to those applications that have been through some
17 sort of advance planning process.

18 COMMISSIONER GILINSKY: What would that mean?

19 MR. MALSCH: Treat them first.

20 COMMISSIONER GILINSKY: I mean what would the
21 advance planning process involve?

22 MR. MALSCH: Well, the bill is not specific.
23 Presumably it would mean a state system of yearly advance
24 notice, public comment on statewide plans, utility plans,
25 periodic updating by the utility of need for power forecasts

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1 and sites, and things of that sort.

2 COMMISSIONER GILINSKY: Let's see, this is utility
3 planning, isn't it?

4 MR. MALSCH: That is right.

5 COMMISSIONER GILINSKY: Rather than state planning.
6 It is making use of state planning.

7 MR. MALSCH: That's right. Presumably you would have
8 utility planning dovetail in with the state planning. Otherwise
9 the purpose wouldn't be completely fulfilled.

10 COMMISSIONER GILINSKY: Aren't the utilities considered
11 to be doing advance planning now, or is this something that
12 goes beyond what is being done now?

13 MR. MALSCH: I think they are all doing advance
14 planning. I don't think it is anywhere near as clear that that
15 advance planning is as open to public participation as this
16 section contemplates.

17 MR. SHAPAR: This particular provision has been
18 in earlier bills proposed by AEC and NRC and always it was
19 very controversial with the industry. The industry always
20 unloaded on this particular provision. I have not seen the
21 comment on the current bills that have gone through the same
22 kind of criticism that has occurred in the past. They were
23 very sensitive to this provision.

24 COMMISSIONER GILINSKY: Do we have a pretty clear notion
25 of what this implies?

MR. SHAPAR: It is very open-ended discretion for the

DB 2

1 Commission. There is no legislative history up to now that
2 would indicate exactly what Congress has in mind. So it
3 would be up to the Commission to work out in rule-making.

4 COMMISSIONER GILINSKY: This is being proposed to
5 the Congress?

6 MR. SHAPAR: That's right.

7 COMMISSIONER GILINSKY: So it isn't what Congress has
8 in mind, it is what somebody else had in mind.

9 MR. SHAPAR: No, but the Administration is making
10 legislative history all along. It is pretty open-ended discretion
11 the way it is worded now.

12 MR. MALSCH: Also I believe this language was in
13 prior Joint Committee bills in the 93rd or 92nd Congress.
14 So it has a history associated with it at least of being in the
15 bill, although not necessarily history as to what exactly
16 was meant by it.

17 MR. SHAPAR: It was in the last bill sent over by
18 the NRC.

19 CHAIRMAN HENDRIE: Generated here or --

20 MR. SHAPAR: Generated here.

21 CHAIRMAN HENDRIE: We have to run an ad in the
22 company paper saying anybody old enough to remember those
23 days, who remembers what we had in mind, report at headquarters
24 to be questioned.

25 MR. MALSCH: Actually it wasn't originated by NRC,

DB3 1 it was put in the bill a number of years ago as a result of a
2 Joint Committee staff markup. That is where it appeared.

3 CHAIRMAN HENDRIE: And we just kept regurgitating it.

4 MR. MALSCH: No one could think of anything real bad
5 about it, so it stayed in there.

6 MR. SHAPAR: The actual father of that language is
7 James Ramey. It was in the NRC bill, and it was in
8 prior AEC bills.

9 COMMISSIONER BRADFORD: Was it when Ramey was a
10 Joint Committee staff member or an AEC Commissioner?

11 MR. SHAPAR: This was in his tenure as a Joint
12 Committee staff member. He had set up a coordinating
13 committee of environmentalists, and this was intended, at least
14 in his mind, to be in the direction of the environmental review.

15 CHAIRMAN HENDRIE: Well, I don't know.

16 MR. MALSCH: Okay. 112 (b) is simply a provision that
17 provides for early advance notice of filing of certain kinds
18 of applications.

19 The language on page 7, lines 7 through 10, about
20 broad newspaper publication for approval of standardized
21 facility designs was added at the request of NRC. (c)
22 talks about the Commission participating in the adequacy of
23 reliability programs of DOE. It used to be the Federal Power
24 Commission. In our prior comments we had no problem with
25 this except that the earlier version would have required us to

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1 make information obtained from us as a result of our
2 participation in the program available to the public.

3 We suggested eitehr that be deleted or impose the
4 same obligation to make material poublic on DOE, which actually
5 ran the program.

6 The problem was that since it really is not our
7 program, if there is to be an obligation to make material
8 public, it ought to be on both NRC and DOE, not just on NRC.

9 The language imposing an obligation to make material
10 public has been deleted from this version of the bill, so the
11 issue has disappeared.

12 COMMISSIONER GILINSKY: What would be the nature
13 of our participation?

14 MR. MALSCH: I think we would be participating
15 as an observer capacity, primarily to find out information about
16 long range plans and forecasting.

17 COMMISSIONER KENNEDY: What is the Department of Energy
18 required to do under Section 202 (a) of the Federal Power
19 Act?

20 MR. MALSCH: They are not required to do much of
21 anything, it is a general provision whereby they have organized
22 reliablity regions and participate in general reliability
23 discussions. I don't think they have any formal authority to
24 promulgate reliability or adequacy standards under that
25 section. It is an information gathering kind of thing. That

5 1 was the original reason for including NRC in it.

2 We would profit in terms of information coming to us about
3 utility plans. And in that respect it was supposed to dovetail
4 in with the other provisions of the bill which talked about
5 long range planning, and advance notice. It is sort of
6 an add-on.

7 Section 185 is an amended version of present section
8 185. The first thing of interest appears on the bottom of page
9 7, beginning on line 22, and there we see for the first time
10 a requirement that the Commission not issue a construction
11 permit for a thermal neutron power generation facility unless
12 the state provides a certification of need for the facility.
13 And there are provisions on page 8 which detail exactly how the
14 state is to give that kind of certification.

15 In particular, it must be an application by the
16 utility, which will include a detailed statement of the reasons
17 for the need for power and conservation alternatives, and
18 there is a requirement that a certain kind of hearing be
19 held. This is something new.

20 In our prior comments we expressed a couple of
21 detailed comments on this in our comments to OMB. First we
22 commented that the provision should be confined to nuclear
23 power reactors. The original version had language which
24 made this restriction apply to research reactors and other
25 things. That has been cleaned up. And the NRC comment has been

6 1 accommodated. We had reservations about TVA and state
2 utilities possibly self-certifying, and questioned whether that
3 was a good idea. DOE hasn't amended the language to take
4 care of that problem, but the section analysis indicates that
5 the bill contemplates the certification would only come from
6 some public authority, and that state utility or something like
7 TVA could not issue its own certification.

8 In that case the state would have to constitute some
9 public authority to grant the certification.

10 MR. SHAPER: But they did not take our comment to
11 change the statutory language?

12 MR. MALSCH: No.

13 COMMISSIONER KENNEDY: It is the same, isn't it?

14 MR. SHAPAR: Not precisely the same.

15 COMMISSIONER KENNEDY: But essentially. For all
16 practical purposes.

17 MR. STOIBER: It depends on what other material
18 comes up in the legislative history. If somebody says something
19 or the House puts it in its report, you have confusion.

20 MR. MALSCH: Also the provision on lines 6 through 8,
21 page 8, to the effect that no public authority is authorized
22 to issue the certification when the requirements is waived
23 was added at the NRC suggestion. It also suggested a provision
24 that would have permitted the public authority to voluntarily
25 waive certification. That suggestion was not adopted.

7
1 MR. SHAPER: That was based on our experience with the
2 Water Act.

3 MR. MALSCH: The Waer Act has a requirement we get a
4 certification of compliance with Federal and state water
5 pollution standards. And that has a similar waiver provision
6 in it that has proved very useful.

7 COMMISSIONER GILINSKY: Could I go back to the first
8 sentence in this section? Is that the same as --

9 MR. MALSCH: That is in the present Act. Identical.

10 CHAIRMAN HENDRIE: Let's see. I see in making the
11 need determinations there is now a hearing under procedures
12 comparable to those that would be employed under the National
13 Environmental Policy Act. That repeats at subsequent
14 place where --

15 MR. MALSCH: Well, the same thing appears where there
16 is a similar requirement for certification for combined
17 permit and license.

18 It also appears in connection with the NEPA delegation
19 program, and was added as a corollary to the concept that was
20 added to the bill in the later drafting stages about hybrid
21 hearings on NEPA issues.

22 COMMISSIONER BRADFORD: What does it mean as a
23 practical matter? If we were enforcing that section today,
24 what would the resultant hearing look like?

25 MR. MALSCH: Well, that is not terribly clear.

8

1 This doesn't specify what the hearing is. The later
2 section in the bill does.

3 Let me see if I can find it. It is the NEPA delegation
4 section. It is on page 14, Section 189. That specifies
5 what kind of NEPA hearings the Commission is supposed to hold
6 and because of the comparable language, the states are
7 required to conduct something that is comparable.

8 There are some problems with that. For one thing,
9 it says "Hearings and decisions shall be in accordance with
10 Section 553 of Title V of the U.S. Code. Well, that doesn't
11 require any hearing, but just written comment. So right off
12 you have an awkward drafting problem, with the language talking
13 about hearings, yet the section referenced not requiring any
14 hearings at all.

15 MR. SHAPER: That is true of 189(a) of our own Act
16 though, where hearings used to imply both rule-making and
17 the adjudicatory process.

18 MR. MALSCH: Right, except this is clearly talking
19 about some adjudicatory process. It is a problem with drafting.
20 Beyond that, it is not clear what is meant by these kind
21 of hearings, because some place DOE in its analysis of the bill
22 indicated that-- well, it says here that you can hold more
23 formal hearings when necessary to resolve particular factual
24 or legal questions. DOE said in its analysis that a conflict
25 in expert opinion was not a "particular factual or legal
question."

9
1 For all practical purposes, that is about all our
2 proceedings are about, conflicts in expert opinion. So once
3 you decide that is a particular factual or legal question --

4 COMMISSIONER BRADFORD: Where does DOE say that?

5 MR. MALSCH: They say that some place in the analysis.

6 MR. SHAPER: They gave a section by section analysis
7 when they had their press conference putting out the bill.

8 COMMISSIONER BRADFORD: I think the understanding
9 under which I commented on this bill all along was that this
10 section would at least in theory -- this is the one on page
11 14 -- would permit us to continue to hold the same kind of
12 NEPA hearings we have always held.

13 MR. MALSCH: I don't know that that is clear. It
14 is probably true. But it does say "shall be in accordance
15 with section 553."

16 COMMISSIONER BRADFORD: And then the language after
17 that. I may have been wrong, but I had been assuming that the
18 language after that would have permitted the Commission to
19 continue to hold the type of hearings it holds now, where
20 it thought that was necessary.

21 I just assumed that that section didn't necessarily
22 change anything.

23 MR. MALSCH: That is probably true, with the caveat
24 that the waters were somewhat muddied by the statement of
25 DOE.

10

1 COMMISSIONER BRADFORD: That is the point that I am
2 coming to. If DOE feels differently, then I have a rather
3 different feeling about this whole section and its thrust on
4 hearings.

5 MR. SHAPER: I think there is a broader question,
6 perhaps, related to how do you justify a different kind of
7 hearing for NEPA issues than you do on health and safety issues.
8 I think that is really the question you need to confront.

9 COMMISSIONER BRADFORD: Yes. I assume the Commission,
10 in confronting that question in the past, has concluded that
11 you don't.

12 MR. SHAPER: Except the Commission never saw this
13 particular provision.

14 COMMISSIONER BRADFORD: No, I am leaving this particular
15 provision completely aside. I assume the Commission, in
16 constructing the format for its NEPA hearings, concluded they
17 should be the same as the health and safety hearings.

18 MR. MALSCH: Except I don't think we had much choice,
19 because with NEPA worded as it is, once you do an impact
20 statement, the impact statement has to be considered in what
21 would be the ordinary Commission decision process. And since
22 the ordinary Commission decision process called for formal
23 hearings, I don't think we had much choice but to consider the
24 impact statement.

25 MR. SHAPER: We had no choice after Calvert Cliffs,

11 1 in my opinion, because I think Calvert Cliffs made that '
2 point very strongly.

3 COMMISSIONER BRADFORD: If the Commission did not hold
4 formal hearings on health and safety issues, then it would
5 not have had --

6 MR. MALSCH: That is correct, they would not have
7 done it.

8 COMMISSIONER BRADFORD: So agencies that have NEPA
9 responsibilities, but who don't use formal hearings for their
10 other responsibilities, don't have to use formal hearings?

11 MR. SHAPER: That's right. The common cliché
12 is that NEPA itself requires no hearings. In one sense that
13 is true, and in another sense it is not true, because if
14 they hold hearings otherwise, NEPA requires them to use the
15 same process for the NEPA issues.

16 MR. MALSCH: There is another problem with this and
17 that is this carves out a special exception for hearings and
18 decisions on NEPA issues, yet there are environmental issues
19 that fall under both NEPA and this Act, and other environmental
20 statutes.

21 So the fact that something is a hearing and decision
22 on an NEPA issue doesn't mean, taking this language literally,
23 that we might not have to hold a formal hearing on it because
24 the issue could arise under another Federal statute.

25 Throughout this bill in various places protection of the

1 environment is added as a substantive Atomic Energy Act
2 standard. Probably almost any issue you could raise under
3 NEPA you could raise under that standard. If that is the
4 case, it is kind of silly to talk about a special decision
5 procedure on NEPA issues, when the same issues also fall under
6 the umbrella of another statute.

7 COMMISSIONER BRADFORD: Maybe you said it and I
8 didn't pick it up, or maybe you haven't said it yet, but what
9 would the hearing requirement be under those other statutes?

10 MR. MALSCH: Generally that is not specified at
11 all. For example, the National Historic Preservation Act,
12 which doesn't specify any hearing, but requires agencies to
13 take into account impact on historic places.

14 What we have done traditionally is treat that like a
15 NEPA issue, treat it as an ordinary matter in the hearing and
16 decision process, which therefore involve formal hearings and
17 formal decisions.

18 We have never attempted to carve out special kinds
19 of procedures for different statutes. We just lumped them into
20 one. It was a lot simpler.

21 CHAIRMAN HENDRIE: Section 553 covers comment sorts of
22 things. What are 554, 556, and 557?

23 MR. SHAPER: Those are the adjudicatory requirements
24 of the APA.

25 MR. MALSCH: That is on-the-record formal hearings.

13

1 MR. SHAPER: Every time you see those three sections,
2 it means it is an adjudicatory hearing, such as we now conduct.

3 CHAIRMAN HENDRIE: Is there an APA section which
4 talks about legislative format?

5 MR. SHAPER: No. APA divides processes into two,
6 rule-making and adjudication.

7 The APA by itself doesn't require adjudication,
8 but the basic statute will frequently tie into the APA by
9 saying it must be adjudicatory.

10 Once the basic statute says adjudicatory, then the
11 APA tells you what the procedures are.

12 Our statute in effect implicitly, though not
13 explicitly, requires an adjudicatory hearing. That requires
14 us to follow those three sections of the APA.

15 CHAIRMAN HENDRIE: The intent here of the drafters
16 was to mandate hybrid formats.

17 MR. MALSCH: Right. Sort of like GESMO.

18 CHAIRMAN HENDRIE: For the environmental hearings,
19 with a legislative base format and then deal with factual
20 matters in dispute on a cross-examination basis. Does this
21 language do that? That is, if that were the intent, does this
22 language do it well or --

23 MR. MALSCH: Well, it does it. I wouldn't say it does
24 it well. It probably does it.

25 MR. SHAPER: I think it does it.

14

1 MR. MALSCH: The problem is referencing section
2 553, which does not apply to adjudicatory, and in this
3 context is an awkwardd statutory reference. But apart from
4 that, it is pretty clear what the intent is generally speaking.

5 MR. SHAPER: Are you saying that it requires hybrid
6 hearings, or that it authorizes hybrid hearings?

7 MR. MALSCH: I think literally it says "requires",
8 because it says "shall be in accord", except only where
9 necessary to resolve factual or legal questions may it be
10 formal.

11 MR. SHAPER: I think it is ambiguous, that is
12 probably the better reading. But as a practical matter, I would
13 think that the Commission might have trouble with the Congress
14 if it went ahead and decided to use complete adjudicatory
15 hearings for the NEPA issues with this language. The legis-
16 lative history I think will tellyou better, but I would
17 just keep that in mind, so if there is anyinclination on the
18 part of the COMmission to go beyond what this language says,
19 then I think you ought to make an effort to straighten out the
20 language.

21 MR. MALSCH: Beyond that, you want to make clear
22 whatever flexibility the Commission had under this, the states
23 would also have, if they are going to be imposed with a
24 requirement to conduct comparable hearings.

25 MR. SHAPER: I think the thinking behind the language

15

1 is that NEPA by itself doesn't require any hearing at all.
2 Therefore, in view of that, one could argue there ought to be
3 some flexibility with respect to the NEPA hearing in
4 contrast to the other issues. I think that is the thinking
5 behind it.

6 COMMISSIONER BRADFORD: Marty, come back a moment
7 to this point about DOE saying in their view this section would
8 not permit cross-examination in a situation where two expert
9 witnesses were giving conflicting opinions. You said it
10 would not permit. It would not even be within the Commission's
11 discretion to allow it?

12 MR. MALSCH: I don't think the comment was that
13 specific, you know, wasn't that clear. Basically what it
14 implied was that a conflict in opinion was not a factual or
15 legal question, within the meaning of this particular provision.

16 COMMISSIONER GILINSKY: What would be a factual
17 question?

18 MR. MALSCH: Oh, like you know, when did the review
19 begin, who said what to who and when, those kind of things.

20 COMMISSIONER BRADFORD: If two different experts
21 gave two different opinions about the effect of a power plant
22 discharge on striped bass, that would not, in DOE's reading
23 of the term "factual" be a factual question?

24 MR. MALSCH: That seems to be what they have said.

25 COMMISSIONER KENNEDY: It would not be a factual issue?

16

1 MR. MALSCH: It would not be a factual issue, no.
2 Whether or not they would persis in that interpretation at
3 present, I don't know. It is just kind of stretching things a
4 little bit.

5 COMMISSIONER KENNEDY: In such a case, how would that
6 be treated?

7 MR. MALSCH: Presumably it would be treated in the
8 legislative type format, with written comment and a legis-
9 lative type of hearing, but no opportunity to cross-examine
10 the experts as to why, given the same data base, they reached
11 different conclusions.

12 It is quite common in NRC hearings today to have
13 experts reaching different conclusions based on the same
14 data. In fact, a large part of NRC hearings are devoted to
15 exploration of just those kind of issues.

16 If that interpretation were to prevail, that would be
17 a significant inroad on the type of hearings we now hold. In
18 effect it is in line with a point of view which prevailed for a
19 number of years ago about NRC on-the-record hearings being
20 very unsuited for resolution of technical type of disputes
21 as opposed to factual disputes.

22 MR. SHAPER: The latest Ribicoff study, on the
23 Government Operations Committee, makes that point, too.

24 COMMISSIONER GILINSKY: What is the difference between
25 a technical dispute and a factual dispute?

17

1 MR. MALSCH: The section as drawn --

2 COMMISSIONER BRADFORD: An obvious difference between
3 a technical fact and a afact.

4 MR. MALSCH: Cases in which the resolution or the
5 decision depends upon who did what to who and when, pure facts,
6 rather than depends on just observations.

7 COMMISSIONER GILINSKY: Why isn't the effect of
8 the plant on striped bass a fact?

9 MR. MALSCH: It is not a fact because you don't
10 actually produce someone as a witness who says the impact is
11 going to be great, either because I am a striped bass, or I have
12 actually seen a trillion striped bass killed. There are
13 always predictions and extrapolations and opinions.

14 CHAIRMAN HENDRIE: They are always trying to
15 expand the scope. Now we are going to hear from the striped
16 bass.

17 MR. SHAPER: a number of striped bass have been
18 trapped on cross-examination though.

19 CHAIRMAN HENDRIE: I guess if you got two guys up and
20 one of them wanted to say in his judgment the correlation was
21 adequately conservative, and the other one wanted to say it
22 wasn't, I presume that would fall under the technical dispute.
inerting

23 MR. SHAPER: The/question in Vermont Yankee might come
24 out on the DOE thing as a fact.

25 CHAIRMAN HENDRIE: I thought the factual basis was

18

1 pretty well established.

2 MR. SHAPER It seemed pretty clear to me, too.

3 CHAIRMAN HENDRIE: Of course we lost.

4 MR. SHAPER: That was because of the witness.

5 CHAIRMAN HENDRIE: Yes. Other discussion here?

6 MR. MALSCH: kay, back to page 8, section 185.

7 There is a basic problem with this concept of a certification
8 of need as a prerequisite to issueing permit or as is
9 required in 185(b) on page 9, combined permit and license. And
10 that is that the provision provides that the certification
11 shall constitute a definitive determination of the need for the
12 power to be produced by the facility for the purposes of any
13 other provision of Federal law.

14 There is a -proble there, and that is that need
15 for the plant is also covered by the later NEPA delegation
16 section, which is Section 195. The problem arises because
17 this would appear to say that a state will have a definitive
18 say on need for the plant, even though it does not have
19 an approved NEPA program, and even though the process whereby
20 it reached that decision did not comply with NEPA, which would
21 be the case if it were to have an approved program.

22 CHAIRMAN HENDRIE: But isn't the process by which
23 it reaches that determination on need, whether it is an
24 approved program or not, controlled by, after holding a hearing
25 under procedures comparable to those?

19

1 MR. MALSCH: Yes. That issue is the same, because
2 whether it is a NEPA program or this, it is the same hearing
3 requirement. The problem would arise if, for example, someone
4 raised a question for example does the state have to circulate
5 a draft conclusion about need for the plant prior to making a
6 determination under this section.

7 Under the NEPA program, it might have to, because
8 it has to comply with NEPA, and that could include the
9 requirement that you circulate a draft, although that is
10 not precisely clear.

11 Here there is no such requirement. SO you have
12 two avenues open to the states so far to achieve the same
13 objective in getting a determinative role on the need for power
14 questions, the certification provision under 185, and the NEPA
15 program provisions under Section 195.

16 The two don't exactly fit.

17 MR. SHAPER: And a third one as well.

18 MR. MALSCH: There will be a third one we will get
19 into later, and that is the res adjudicata provision, which
20 also enables the state to make a decision beyond or outside
21 of the context of an approved NEPA program. We will get to
22 that in a minute when we come to Section 189.

23 Under this provision, the state has to defend
24 its determination in a certification hearing in the Federal
25 court, and any action authorized under NEPA. It is a little

20 1 unclear as to which Federal court the section is talking
2 2 about, whether the district court or the court of appeals.

3 MR. SHAPER: Probably the district court. It
4 4 perhaps should be the other one.

5 MR. MALSCH: Yes, otherwise you end up with a strange
6 6 situation, with the review proceedings pending on the same
7 7 license in both the court of appeals and district court. That
8 8 could be kind of awkward.

9 COMMISSIONER BRADFORD: In an earlier section it says
10 10 if no public authority is authorized to issue such certification,
11 11 the requirement for certification shall be waived.

12 That means, does it, if a state doesn't authorize
13 13 an authority to make certification, we are not saying the NRC
14 14 or DOE or anyone else makes the certification? We are just
15 15 saying there won't be one?

16 MR. MALSCH: Wouldn't be one. That is the way I
17 17 read it.

18 COMMISSIONER BRADFORD: And the facility will be
19 19 deemed to be necessary.

20 MR. MALSCH: No, because NRC still has to make its
21 21 NEPA determination. And then the issue would be controlled by
22 22 the NEPA delegation section.

23 CHAIRMAN HENDRIE: It falls back to sort of where it
24 24 is now.

25 COMMISSIONER BRADFORD: That is clear, is it? It

21

1 does say the requirement for certification shall be waived.
2 You are reading that to mean a requirement for certification
3 pursuant to this particular section?

4 MR. MALSCH: That's right. I don't read it as
5 saying for example that if the utility has a state law require-
6 ment to get a certificate, that that is waived. That would be
7 treated as a separate state requirement unaffected by this.

8 Although I think as a practical matter, if there
9 is such a requirement in the state, if that requirement is
10 satisfied, it would meet the requirements of this Act. I think
11 that was probably what DOE's intent was.

12 The next section of interest is 195(b), on page 9,
13 which gives new authority to the Commission to issue combined
14 construction permits and operating licenses, where the application
15 contains sufficient information.

16 Under this section the Commission can issue these
17 combined nlicenses only for thermal neutron power generation
18 facilities. There is a section, section 189, a mandatory
19 hearing requirement before the Commission can issue one of
20 these combined permits and licenses, and a later opportunity
21 for hearing prior to facility operation on whether, as a
22 result of significant new information or a signifiant
23 new issue or violations of some Commission requirements, there
24 should be some modification in the plant, or other action
25 taken that will provide substantial additional protection.

22

1 In our comments to OMB we had expressed no
2 problems with the basic concept. We didn't have any particular
3 detailed comments that were taken up in this DOE draft.
4 We did have a couple of comments that weren't accommodated.
5 In particular, we wanted the combined permit and license concept
6 extended to all facilities except DOE demonstration plants,
7 and not just thermal neutron power generation facilities.
8 We wanted in here a finding that the Commission would be
9 required to make prior to operation hat paralleled the hearing
10 requirement in Section 189, namely, a finding that there was
11 no significant new information or violation that would cause
12 us to modify the plant or take other appropriate action.

13 MR. SHAPER: I think it is significant that although
14 the bill would relax the mandatory hearing requirements, the
15 CP would impose one for the combined CP and OL. This particular
16 provision came rather late in the drafting of the bill, and I
17 don't think the Commission ever had a chance to focus
18 on this provision.

19 COMMISSIONER KENNEDY: I thought we had some discussion
20 of that and generally felt that a hearing ought to be required
21 for some such combination. That is my recollection.

22 COMMISSIONER BRADFORD: When did this section come in?

23 MR. SHAPER: Late in the process. You mean the
24 requirement for a mandatory hearing, even though no one
25 requests one?

23

1 COMMISSIONER BRADFORD: Yes.

2 MR. SHAPER: It was late in the drafting process.

3 COMMISSIONER BRADFORD: You are saying the section
4 itself was not here?

5 COMMISSIONER KENNEDY: Yes. My recollection is we
6 had discussed this section on more than one occasion.

7 MR. MALSCH: This is pretty much the same as the
8 version we saw in October. What has been changed substantially
9 is 189, the whole hearing section, that has been reorganized
10 and redrafted.

11 CHAIRMAN HENDRIE: The language in here, at the
12 bottom of page 10, and top of page 11, is: "Prior to the
13 commencement of operation, the Commission shall find that the
14 facility has been constructed and will operate in conformity
15 with the combined construction permit and operating license,
16 the provisions of this Act, and the rules and regulations," and
17 so on.

18 What is the difference then from the Commission's
19 comment about making a finding?

20 MR. MALSCH: We had commented that there ought to
21 be a requirement in here for a specific finding by the Commission
22 prior to operation. If there are no significant new issues
23 or is no significant new information or no significant violation
24 that would cause us to modify the plant design or take other
25 action., if those circumstances exist under this Act, there

24

1 may be a hearing in the pre-operation stage. Our comment
2 was if that kind of thing triggers a hearing, there ought to be
3 a requirement that the Commission make a finding on it. That
4 suggestion was not accommodated.

5 As a practical matter, if the Commission staff is
6 to be in a position to make a recommendation whether there ought
7 to be a hearing, it is going to have to make a finding along
8 those lines anyway. So it is probably not important.

9 MR. SHAPER: But we haven't heard any good reason
10 why they haven't accommodated our comment either.

11 CHAIRMAN HENDRIE: Okay.

12 MR. MALSCH: The next section is 185(c), page 11.
13 This is simply an embodiment of our present TWA regulations.
14 There are some minor changes to accommodate the NEPA delegation
15 section in this bill. We had expressed no problems with it.
16 In fact, the language has been modified to make it clear, as
17 was not clear in the October draft, that it isn't sufficient
18 that there be an impact statement, you also must find that
19 the impact statement is adequate and make findings on all NEPA
20 issues.

21 MR. SHAPER: I think one of the key points here, we
22 never had explicit statutory authority for our sanctioning
23 process for LWAs. We think it is implicit in the Act, we
24 think it would be sustained, but it has never been explicitly
25 sanctioned in our statute. It has never been attacked, either.

25

1 MR. MALSCH: We had suggested here in our October
2 comments that just as there had to be a certificate of need
3 for the plant before we could issue a permit or combined permit
4 and license, there should also be a certificate need
5 required before we could issue an LWA.

6 We had a similar comment on the later provision
7 which would authorize automatic commencement of construction
8 on a pre-approved site. We also suggested that there there
9 ought to be a certificate of need before construction could
10 commence.

11 MR. SHAPER: Those are both Commissioner Bradford's
12 points, I think.

13 MR. MALSCH: Those are not accommodated in this
14 version.

15 Although it requires the NEPA review be completed
16 and that review would presumably include a facility need
17 determination. Something which is, however, not the case
18 with the automatic commencement of construction on a pre-
19 approved site.

20 Page 12, lines 3 and 4, there is a provision
21 that says: "Such activities shall be conducted at the risk
22 of the applicant and shall be subject to termination or
23 modification by the Commission at any time."

24 This doesn't cause a problem, except the section analysis
25 indicates that this applies not only to safety review, but

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1 to the environmental review. In our comments to OMB we
2 expressed concern that the version as it was then worded might
3 overrule the Commission's Seabrook decision on sunk costs,
4 a decision which said in effect that as the utility expends
5 money, and commitments of resources build up, that that could
6 indeed have a role in the decision.

7 When considered along with the section-by-section
8 analysis that DOE prepared, it would overrule Seabrook,
9 or probably overrule Seabrook and say in these situations some
10 costs can influence the later decision.

11 CHAIRMAN HENDRIE: Can or can't?

12 MR. SHAPER: Can't. And that is a significant point
13 for the Commission to consider, I think.

14 MR. MALSCH: Next comes the hearing section, and that
15 is fairly complicated. What it comes down to is this: This
16 is an amended section 189(a). There is still a requirement for
17 formal, that is to say, on-the-record adjudicatory hearings in
18 licensing cases, except export cases, except there is a new
19 provision we discussed a minute ago about hybrid hearings on
20 NEPA issues, and on the particular kinds of findings which the
21 Commission has to make before it can issue interim licenses
22 and amendments, that is to say a finding of urgent public need
23 or emergency in the case of licenses or a finding of public
24 interest in the case of an amendment. Those hearings can be
25 informal or formal, depending upon how the Commission would choose.

27

1 There is a requirement for mandatory hearings on
2 combined permits and licenses on early site permits and on
3 standardized design approvals. Rule-making hearings, apart
4 from rule-making hearings and approving standardized designs,
5 would still be informal if the Commission wished to hold them
6 at all. In fact, the statute specifically keys into APA
7 Section 4, which is simply notice and comment rule-making as
8 the norm in the case of Commission rule-making proceedings.

9 There are new notice requirements. Generally
10 speaking, the notice requirements are 180 days advance notice
11 for major applications, and 30 days advance notice for
12 amendments.

13 The present standard in the Act for doing without
14 the advance 30 day notice for amendments to operating licenses
15 and construction permits has been changed. The present
16 statute says we can dispense with such advance notice, where
17 there are involved no significant hazards considerations.
18 Instead the language now talks about no significant additional
19 risks to the public health and safety.

20 I think this shifts the focus in those cases from
21 the degree of controversy involved, away from that to the
22 amount of additional risk involved. And that provision in
23 particular was added at NRC's suggestion.

24 There is an expanded res adjudicata provision --

25 COMMISSIONER GILINSKY: Would you go over that again?

28

1 MR. MALSCH: The present statute says there should
2 be 30 days advance notice for amendments to construction permit
3 and operating licenses, except the Commission can dispense with
4 the 30 days advance notice when it finds there are no significant
5 hazards considerations.

6 This modifies that and says instead that we can dispense
7 with that notice where there are no significant additional
8 risks to the public health and safety.

9 COMMISSIONER GILINSKY: How is that different from
10 significant hazards?

11 MR. MALSCH: The significant hazards consideration
12 finding tends to get influenced by the amount of controversy
13 and effort devoted to the review.

14 CHAIRMAN HENDRIE: I have been pushing for this for
15 more years than I can remember. The problem always was that
16 that hazards language for amendments introduced new language.
17 You know, if you go back and talk about changes in the risk
18 to the public health and safety, you are with the classical
19 language of the regulations, and people seem to have a
20 better instinct what to do with that. When you get to talking
21 about hazards, just because it was a different terminology,
22 there got to be peculiar, in my view, peculiar standards
23 that got built in. I think it is a good thing to get back
24 to that.

MR. MALSCH: One of the awkward things about the

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1 present standard is that you get let's say a safety evaluation
2 for review, which supported the conclusion that there were
3 no significant hazards considerations. Then the staff devotes
4 100 manhours to the safety evaluation. You say My God, there
5 are no significant hazards considerations, how did you spend 100
6 hours reviewing it.

7 The language tends to make the waters murky and
8 focus on the effort and controversy as opposed to substantive
9 changes in public health and safety or substantive changes in
10 design.

11 MR. CASE: I read them as Marty has. As presently
12 worded, and interpreted, it is a very difficult concept
13 for the technical reviewers to understand. They tend, as
14 Marty indicated, to measure the difference in risk with a
15 change and without a change. That they can understand and
16 converse well on.

17 COMMISSIONER KENNEDY: Risk to public health and
18 safety.

19 MR. CASE: Yes. But whether it involved a significant
20 question, a big question or a small question or an intermediate
21 question, they don't understand that. They know what the
22 result is.

23 COMMISSIONER GILINSKY: So this would catch less
24 items than the "no significant hazards"?

25 MR. CASE: I think it probably would, yes.

30

1 COMMISSIONER GILINSKY: That is the point you are
2 making?

3 MR. MALSCH: Not so much that, it would make the
4 process more clear and decisions more understandable and
5 easier to make.

6 CHAIRMAN HENDRIE: I think it would reduce the
7 number of items, but by virtue of the fact that the present
8 language keeps roiling up what seemed to me in the
9 days I was dealing directly with it, really matters that were
10 almost extraneous to the health and safety question.

11 MR. SHAPER: It would still be noticed by the way
12 if we keep our present rules. It would be post notice rather
13 than pre notice.

14 MR. MALSCH: There is an expanded res adjudicata
15 provision which I will discuss in a little more detail later
16 when we get to it.

17 There would still be mandatory hearings, as I said,
18 on combined permits and licenses, on site permits and
19 on standardized design approvals. There would no longer be
20 a mandatory hearing for a plain old simple construction permit.

21 COMMISSIONER KENNEDY: Is that likely to encourage
22 more people to move to look for a construction permit?

23 MR. MALSCH: I think as a matter of practice, so
24 few proceedings are uncontested now, it probably doesn't make
25 too much difference whether you abolish the mandatory hearing

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1 requirement or retain it. It will make a difference in
2 a few cases, but even in those few cases the impact on resource
3 is not terribly great.

4 NRC had a bunch of detailed comments on this
5 particular provision. Language was added at our request to
6 make it clear that the mandatory hearings on site permits and
7 standardized designs would be formal and not informal. That
8 has been clarified.

9 The notice periods, the general 180 days advance
10 notice for major license applications and 30 days notice for
11 amendments, that is all per NRC suggestion.

12 As I indicated, the language changing the standard
13 for elimination of pre-notice of amendments, that was added
14 at NRC suggestion. And the language making it absolutely clear
15 that the ordinary NRC rule would be by notice and comment
16 rule-making, that language was added at NRC suggestion.

17 However, we were opposed to the use of state
18 proceedings in the res adjudicata provision to limit issues
19 before NRC. Under the res adjudicata provision in this bill,
20 which appears in paragraph C on pages 17 and 18, NRC
21 hearings are limited to issues as to which there was no prior
22 opportunity for hearing in a prior proceeding before the
23 Commission or a state, unless the person requesting the hearing
24 before the Commission makes a prima facie showing that there
25 is significant new information relative to the issue and that

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1 information has been discovered since the prior state
2 or NRC proceeding, and as a result of this new information, it
3 is likely the site or facility will not comply with the
4 Act or the Commission's regulations.

5 In earlier comments to OMB, we had expressed reser-
6 vations about including state proceedings under this, and we
7 gave as our reason the fact that state proceedings on NEPA
8 issues were already covered by the NEPA delegation program
9 later in the bill and this was just confusing the issue.

10 In fact it does, because now a state wishing to have
11 an environmental or need decision by NRC can accomplish that
12 objective quite apart from a NEPA approved program, by simply
13 having a proceeding and have the issue either raised or
14 have the opportunity to have it raised.

15 In either case, unless new information comes to light
16 the state decision is binding on NRC. There are a couple of
17 other problems with --

18 MR. SHAPAR: As a fall back, what the Commission might
19 want to consider there is that it would only apply, if you
20 want it to apply, in all the state proceedings, to those that
21 are conducted in accordance with an NRC approved program.

22 I might add in DOE's hearings before I think it was
23 one of the House committees, I think Congressman Bingham of
24 New York questioned whether this was really a res adjudicata
25 provision at all, since I think he expressed the opinion that

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1 res adjudicata only applied, as he knew it, to issues that
2 were in controversy and resolved, not the opportunity for
3 resolution and he gave the DOE witness a hard time.

4 COMMISSIONER GILINSKY: What does this mean? I
5 mean as a practical matter, suppose you had a standardized
6 design approved, you can never raise safety questions relating
7 to that design again, right?

8 MR. MALSCH: Unless you show significant new infor-
9 mation.

10 COMMISSIONER GILINSKY: That was not available at the
11 time.

12 MR. MALSCH: At the prior proceeding.

13 COMMISSIONER KENNEDY: Available or provided?

14 MR. MALSCH: It has to be new information that has
15 been discovered since the prior proceeding.

16 CHAIRMAN HENDRIE: But if you have gone through a
17 proceeding on a design, under the standard design, you would
18 presumably have a rule on the design, design 42-A is approved
19 as it stands, Commission rule number so and so. And that would
20 not be attackable, you wouldn't argue about that then.

21 MR. SHAPER: Except on the basis Marty just mentioned.

22 COMMISSIONER KENNEDY: New information that has
23 been discovered since the rule was approved?

24 MR. MALSCH: That's right.

25 CHAIRMAN HENDRIE: In which case you would petition
to have the rule-making re-opened or a rule-making --

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1 MR. SHAPER: You could also attack it in the CP
2 or combined CP and OL proceeding as this bill is written.

3 MR.MALSCH: It is a funny thing, under the present
4 law we can approve a design presumably by either rule or
5 manufacturing license. If we approved it by manufacturing
6 license, our present rules would call for a re-opening of safety
7 issues addressed earlier, using somewhat different standards
8 as are in the bill here.

9 If we approved it by rule, you would have to show --
10 either petition for a rule-making, which is outside of the
11 confines of a particular licensing case and would be dealt with
12 separately, or if you wanted to raise the issue in a case,
13 you would have to show some special circumstances in that case,
14 which is more restrictive than what this does for rules.
15 This would allow you to raise new issues about prior rules
16 in licensing cases.

17 So while this is pretty much the present practice
18 for manufacturing license design approvals, it is more liberal
19 in terms of raising issues in terms of approving designs
20 by rule.

21 Now this is the controlling provision here in the bill
22 about re-litigation of issues that have been approved in a
23 prior site permit or rule-making proceeding or manufacturing
24 license proceeding. Unlike earlier versions of the bill there
25 is no special section here addressed to the scope of hearings,

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1 or the scope of reviews in later construction permit
2 proceedings referencing pre-approved sites and designs.
3 This is all there is that deals with the value of a site
4 permit proceeding or manufacturing license or rule-making
5 proceeding in terms of limiting the issues in later licensing
6 proceedings.

7 So this is a fairly significant feature of the bill.

8 MR. SHAPER: It is one of the most important provisions
9 of the bill in terms of the controversy and in terms of overall
10 impact on the process. SO I am suggesting that it is something
11 the Commission will want to very carefully consider.

12 MR. MALSCH: On the one hand, it is telling people
13 who let's say live near a plant and would want to participate
14 fully in the proceedings, that they have got to have some
15 foresight and participate in the earlier site permit or design --

16 COMMISSIONER GILINSKY: How could they possibly know
17 about it?

18 MR. MALSCH: Well, that is a possible problem. On
19 the other hand, what it really does is it treats a licensing
20 proceeding before the Commission as if it were a rule-making
21 proceeding. The same problem about people being on notice
22 say five years before, that a standardized design proceeding
23 going on in Washington could affect them five years later,
24 that applies across the board.

25 COMMISSIONER GILINSKY: Or any one of ten standardized
design proceedings. Suppose you are sitting next to a

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1 pre-approved site, you have to get involved in every
2 standardized design proceedings if you want to cover all
3 your bases.

4 MR. MALSCH: I think one of the requirements for
5 a site permit application would be to indicate the type of
6 facility involved, so you probably know, I would think, which
7 proceeding to go to, assuming you were knowledgeable as to how
8 the process worked.

9 CHAIRMAN HENDRIE: The plant definition at the
10 early site permit stage will be broad enough so that any
11 current design, BW or PW or any vendor would come under it,
12 I am sure.

13 MR. MALSCH: The problem they would face is the same
14 problem they would face now under the Commission's present
15 rule, if faced with an approval of a design by rule or
16 approval of design by a manufacturing license. It is a
17 problem you always have with legislative type actions, they
18 have broad applicability and have an impact way in the future
19 and people affected by them may not have the opportunity to
20 participate in the earlier decisions.

21 MR. SHAPER: Under the Commission's present practice
22 and rules, any intervenor who comes into a case has to
23 accept the Commission's rules as written, and the only way
24 they can attack rules is the grounds mentioned before, and
25 that is that peculiar circumstances of the case make it unfair

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1 or unjust to apply the rule as written, as a general
2 proposition.

3 COMMISSIONER GILINSKY: Except we haven't used the
4 rule that way yet.

5 MR. MALSCH: Oh, no, we use them all of the time that
6 way.

7 COMMISSIONER GILINSKY: What I mean is we haven't gone
8 so far as to include the complete design.

9 MR. MARSH: No, or even approve major components.
10 But every day intervenors come into proceedings and seek to
11 raise issues that have been dealt with by rule and are told
12 "We are sorry, unless you can show special circumstances, you
13 have got to petition for rule-making," despite the fact that
14 they may not have even been around when the rule was
15 adopted.

16 So if you look at this as sort of investing a licensing
17 proceeding with sort of a rule-making character, it is not,
18 you know, outrageous. It is something that happens all of the
19 time.

20 COMMISSIONER BRADFORD: The two are not mutually
21 exclusive.

22 COMMISSIONER GILINSKY: We haven't done it on that
23 scale. And it is analogous to what we do now in a lot of
24 contexts, but on a much more limited scale.

25 MR. MALSCH: That's right. There was a problem

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1 with including in here state proceedings, as I said, for
2 example, that is a way to get state environmental acceptability
3 or need decisions binding, apart from an approved program.

4 Beyond that it is going to be awfully hard for the
5 Commission to decide in its proceedings which issues were
6 raised or even could have been raised in a variety of state
7 proceedings. That could be a difficult issue for NRC to
8 grapple with in a case, because depending on how that comes
9 out, an issue may or may not be able to be raised in a
10 Commission proceeding.

11 MR. CASE. Also I think one has to focus
12 on how it might work in a traditional CP proceeding,
13 and on the new standardized design and pre-approved site
14 combination. If you are talking about the current CP proceeding,
15 all you have the opportunity to litigate is the preliminary
16 design. Whereas in the OLD stage, you are talking about the
17 final design. So it is going to be pretty hard, I think, for
18 someone to try to cut off an issue at the OL stage, where
19 you dealing with the final design on the ground that they could
20 have litigated it at the CP stage. That will present
21 problems.

22 MR. SHAPER: They are litigated pretty freely right
23 now.

24 COMMISSIONER KENNEDY: Which is the same kind of
25 problems you have now.

1 MR. MALSCH: One final possible problem here is
2 that it isn't clear if this restricts the Commission from
3 raising an issue. If the Commission wished to reconsider an
4 earlier decision, and yet the facts were not changed, this
5 would arguably restrict the Commission's options, not just
6 intervenors. But the language is not terribly clear on that.

7 COMMISSIONER GILINSKY: What is a prima facie showing
8 here?

9 MR. MALSCH: It means if everyone else chooses to
10 do nothing, not file a shread of evidence, the case would
11 be enough to win, convincing on its face.

12 In effect it is going to require disclosure of almost
13 the complete case in advance, like a summary of direct
14 testimony, that type of thing will be required. That brings
15 us to the next provision --

16 COMMISSIONER KENNEDY: That is to avoid frivolous
17 intervention.

18 MR. MALSCH: That is right.

19 MR. SHAPER: That is to encourage meaningful inter-
20 vention, I would say.

21 COMMISSIONER KENNEDY: Okay. That is even better.

22 MR. MALSCH: The major thrust of this section is to
23 get issues raised and resolved early, rather than later.

24 The next section which is 159(a)(3) on page 18
25 and also section 192 on pages 19 through 21, deal with so-called

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1 interim licenses. In general they authorize the Commission
2 to issue an interim operating license or permit interim
3 operation in a case where a combined permit and license have
4 been issued prior to completion of some of the required
5 hearings. To issue such an interim license or amendment, the
6 Commission must find that there is an urgent public need or
7 emergency, and it must also find all of the hearings on
8 significant site-specific public health and safety and
9 common defense and security issues have been completed. The
10 requirements for interim amendments to operating licenses
11 are a little less stringent. They would require a finding
12 by the Commission itself that issuance of an interim license
13 would be in the public interest.

14 A finding by either the Commission or its designee
15 that in all other respects the requirements of the Act, including
16 all substantial health and safety and common defense and
17 security requirements have been met.

18 MR. SHAPER: This parallels pretty much what the
19 Commission considered before in its version that went over
20 to DOE. The one big change in the requirement is that any
21 health and safety issues be heard before you can apply the
22 authority.

23 MR. MALSCH: Right. The effect of that is that it
24 ends up being a provision that authorizes us to issue a license
25 prior to the completion of the NEPA hearings, but not prior to

41 1 completion of the Atomic Energy Act hearings. That is the
2 net effect.

3 The interim license and amendments are good for
4 12 months, but the Commission can extend them. They apply
5 to all production and utilization facilities, not just
6 thermal neutron generation facilities. The Commission itself
7 must preside over the hearings.

8 COMMISSIONER KENNEDY: My recollection is when we
9 discussed that, our view was it should be confined to --(inaudible)

10 MR. SHAPER: I don't think so. We wanted to get
11 in the converter and suggested different language which they
12 didn't pick up. Is that right?

13 MR. MALSCH: We had some suggestions they didn't
14 pick up. Most of them they picked up.

15 COMMISSIONER GILINSKY: What converter is this?

16 MR. SHAPER: As I recall the discussion revolved
17 around advance converters or St. Vrain, something like that.
18 One of you had a different kind of reactor other than the light
19 water reactor.

20 CHAIRMAN HENDRIE: It was trying to get the HTGR
21 in the same package as the other, and that had to do with that
22 thermal neutron power generating facility, rather than
23 a light water reactor facility. So we have got that. Here I
24 don't remember --

25 COMMISSIONER KENNEDY: Here we are beyond that. It
is all --

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1 COMMISSIONER GILINSKY: Talking about diffusion and
2 reprocessing.

3 COMMISSIONER KENNEDY: Exactly. The whole
4 fuel cycle. I am not objecting, I am just raising the
5 point and wondering what the rationale was.

6 CHAIRMAN HENDRIE: If you are going to have the
7 authority, you might as well have it for all facilities that
8 you license.

9 MR. MALSCH: Other things of interest are the fact
10 that the Commissioners themselves must preside over the
11 hearing to make the urgent public need or emergency finding in
12 case of licenses or the public interest finding in case of
13 amendments.

14 MR. CASE: It is a mandatory hearing?

15 MR. MALSCH: Yes, it is a mandatory hearing, but
16 the hearing procedure is completely discretionary with the
17 Commission. It can be informal or formal. And the selection
18 of the procedures is not subject to judicial review.

19 In our comments we had expressed no problems with
20 the basic concept. In fact, five specific comments we made
21 were accommodated. The three days advance notice requirement
22 for interim licenses and interim operation was added at
23 NRC's request.

24 The provision that requires advance notice, but no
25 specific time period in the case of amendments was added at

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1 NRC's request. The provision permitting the Commission to
2 commence and hold a hearing prior to expiration of the three-
3 day period, was added at NRC's request.

4 The provision that the NRC selection of hearing
5 procedures on the finding of the Commission, that that would
6 not be subject to judicial review, that was added at NRC's
7 request.

8 And also at NRC's request the provision was extended
9 to include not only interim licenses, but also operation of a
10 plant for which a design permit had been issued.

11 One suggestion by Commissioner Kennedy that the
12 three-day notice provision for interim licensing or operation
13 be waived upon making certain findings was not adopted.

14 The new material here, that the Commission didn't
15 see in the OMB comments, the item Howard just mentioned about
16 it is now required that all hearings on site-specific public
17 health and safety and common defense and security issues have
18 been completed, that is a new provision.

19 CHAIRMAN HENDRIE: That is all of the way through to
20 a decision, published decision, I take it? Or a decision of
21 the Board?

22 MR. SHAPER: It is not clear from the bill.

23 MR. MALSCH: In fact, there is a problem with this.
24 To what extent is it contemplated that the Commission itself
25 would get involved in what might be a premature decision on the

1 merits of safety and security issues; by virtue of
2 having defined that the hearings have been completed. For
3 example, if I were an intervenor intending to hold up an
4 interim license, I would argue there is such a fundamental
5 defect in the hearings, in fact in point of law the hearings
6 have not been completed, in spite of the fact the record had
7 been closed.

8 If that objection can be entertained, the Commission
9 might find itself getting snarled in matters then pending
10 before the licensing or appeal board.

11 This doesn't specifically require a decision. It
12 just says the hearings have to be completed. So it is not
13 too clear.

14 Also this was a substitution for a provision in the
15 draft that we reviewed that simply required that all other
16 substantive safety and security requirements had to be
17 complete, apart from the fact that the hearings may be required,
18 if it meant the Commission had to find the substantive
19 requirements had been met. That has been deleted. Although
20 it does appear in the amendment section, and by contrast one
21 could draw the argument that whereas you must find that all
22 substantive safety requirements had been met for amendments,
23 no such requirement needs to be made, be satisfied in the
24 case of licenses, which doesn't make a heck of a lot of sense.

25 In the past this has turned out to be a very

1 controversial provision. Environmental groups generally either
2 argue against it or for a very narrow concept, and industry
3 groups arguing for a very broad concept with a very loose
4 standard.

5 CHAIRMAN HENDRIE: Couldn't we find ourselves,
6 we could actually have an appeal directed to us on an
7 operating license proceeding, where the Board rendered an
8 initial decision, the Appeals Board had looked at it, and
9 be dealing with a request for an interim license at the same
10 time?

11 MR. MALSCH: Yes.

12 CHAIRMAN HENDRIE: That would be rather confusing.

13 MR. SHAPER: I think the intent of the language as
14 now drafted was sort of a compromise, that if it
15 were an honest to goodness health and safety issue of a kind
16 that there had always been a hearing on in the past, and
17 it was site-specific, that process had to be completed. But
18 if it were some minor item that didn't reach that status,
19 then the process ought to be flexible enough to accommodate
20 the interim operation.

21 Rightly or wrongly, I think that is the thrust of
22 the language as now written.

23 COMMISSIONER GILINSKY: Are there cases where
24 there are(inaudible)

25 MR. SHAPER: I think Ed Case can answer that better.

46 1 But I think in recent years the experience has
2 been that the operating license hearing has not been on the
3 critical path. When this provision appeared in prior years'
4 bills, the justification was it was needed for the possibility
5 that it might be a hang-up in the future. And if the
6 public interest considerations were dominant enough, we should
7 at least have that flexibility. There was one case, Point
8 Beach II, where I guess there was some hold-up and that
9 created considerable flap.

10 COMMISSIONER GILINSKY: Was that an environmental
11 matter?

12 MR. MALSCH: It was a combination of the two, it
13 was held up both for environmental and safety reasons.

14 COMMISSIONER GILINSKY: So this would not have applied
15 in this case?

16 MR. MALSCH: Well, it would have applied at a certain
17 point in the Point Beach proceeding. The proceeding proceeded
18 from safety issues to environmental issues. I think the
19 large -- well, it kind of switched back and forth. It is
20 possible if this had been in effect then, we could have
21 issued an interim license and saved them some time.

22 MR. SHAPER: Of course under the present system, I
23 guess the environmental review is finished before the safety
24 review, so that raises a question about how helpful --

25 MR. CASE: Usually, not in all cases.

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1 COMMISSIONER GILINSKY: Is that the only example?
2 When was that?

3 MR. CASE: 1973. Diablo, but that is not
4 the hearing process.

5 COMMISSIONER GILINSKY: But in Point Beach, the
6 environmental process dragged on after the safety process?

7 MR. CASE: I think it was cuaght up in Calvert
8 Cliffs and everything else.

9 MR. MALSCH: We had the safety hearing, that was
10 completed, and we went to the environmental hearing, and before
11 we finished that, fuel densification arose as a big safety
12 issue, so we had to have additional hearings on fuel densifi-
13 cation, so it sort of flip-flopped back and forth.

14 MR. SHAPER: That was the last case you tried, wasn't
15 it?

16 MR. MALASCH: Oh, I don't remember. It was a long
17 case.

18 MR. SHAPER: We had to get rid of him after that one.

19 CHAIRMAN HENDRIE: Took him out as trial counsel.

20 MR. MALSCH: Okay, that brings us to early site
21 reviews, Section 193.

22 CHAIRMAN HENDRIE: I have had a request that this
23 might be a good place to break the discussion and pick up
24 tomorrow afternoon and charge ahead.

25 (Thereupon, at 4:35 p.m. the discussion was concluded.)

