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OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 83-703 & 83-1031

TITLE FLORIDA POWER & LIGHT COMPANY, Petitioner v. JOETTE LORION, ETC.,
ET AL.; and UNITED STATES NUCLEAR REGULATORY COMMISSION AND
UNITED STATES, Petitioners v. JOETTE LORION, ET AL.

PLACE Washington, D. C.

DATE October 29, 1984

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IN THE SUPREME COURT OF THE UNITED STATES

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FLORIDA POWER & LIGHT COMPANY, :
Petitioner, :

v. : No. 83-703

JOETTE LORION, ETC., ET AL., :
and :
UNITED STATES NUCLEAR REGULATORY :
COMMISSION AND UNITED STATES, :
Petitioners :

v. : No. 83-1031

JOETTE LORION, ET AL. :

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Washington, D.C.
Monday, October 29, 1984

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:03 o'clock a.m.

APPEARANCES:

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HAROLD F. REIS, ESQ., Washington, D.C.; on behalf of the petitioners in 83-703.

MARTIN H. HODDER, ESQ., Miami, Florida; on behalf of

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the respondents.

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: The Court will hear arguments first this morning in Florida Power and Light Company against Lorion and the consolidated case.

Mr. Rothfeld, you may proceed whenever you are ready.

ORAL ARGUMENT OF CHARLES A. ROTHFELD, ESQ.,

ON BEHALF OF THE PETITIONERS IN 83-1031, PRO HAC

MR. ROTHFELD: Mr. Chief Justice, and may it please the Court, this case presents one narrow issue, whether the word "proceeding" is used in Section 189 of the Atomic Energy Act to refer to all proceedings or only to certain types of formal agency proceedings.

This case began when the respondents sent a letter to the Nuclear Regulatory Commission asking the Commission to suspend the license of the Florida Power and Light Company's Turkey Point nuclear plant.

Under the Commission's procedures, such a so-called Section 2.206 request from the public must be evaluated by the Commission staff. If the request is found to present a substantial health or safety concern, the Commission will issue an order to the operator of the plant asking it to show cause why its license should not be suspended, modified, or revoked.

Here, the Commission staff evaluated

1 respondent's request, in the process compiling a
2 547-page record. On the basis of this record, the
3 director of the Commission's Office of Nuclear Reactor
4 Regulation concluded that respondent's request did not
5 raise a substantial health or safety concern, and he
6 therefore issued an opinion declining to take action
7 against the plant.

8 Respondent then challenged this decision in
9 the Court of Appeals for the District of Columbia
10 circuit, but that court decided that it lacked
11 jurisdiction to hear the case. The court based its
12 decision on the language and the two-part structure of
13 Section 189.

14 Section 189(a) provides for hearings in
15 proceedings relating to the licensing of nuclear plants
16 that are held before the Commission. Section 189(b)
17 then makes provision for review in Courts of Appeals of
18 all orders entered during the course of proceedings of
19 the kind described in Section 189(a).

20 Here, the Court of Appeals read the word
21 "proceeding" in Section 189(a) to refer only to formal
22 agency action, and it therefore concluded that the types
23 of orders made reviewable in the Court of Appeals under
24 Section 18(b) are only orders entered during the course
25 of such formal proceedings.

1 The court therefore concluded that challenges
2 to the denial of Section 2.206 requests had to be
3 reviewed under an abuse of discretion standard first in
4 the District Court with the decision of those courts in
5 turn made reviewable in Courts of Appeals.

6 This system of judicial review devised by the
7 Court of Appeals in this case, which departs from the
8 practice followed in several of the circuits, finds no
9 support in the statutory language or legislative
10 history, and advances no identifiable interest to the
11 public.

12 If the Court of Appeals believed that the word
13 "proceeding" generally applies only to formal agency
14 action, it plainly was mistaken. The Administrative
15 Procedure Act, which is incorporated by reference into
16 the Atomic Energy Act, and therefore should control in
17 this case, defines the term "agency proceedings" to
18 include a wide range of agency action, formal and
19 informal.

20 Among other things, agency proceedings under
21 the APA include all agency process respecting the grant,
22 denial, or modification of a license.

23 QUESTION: Mr. Rothfeld, can I interrupt you
24 just a second to be sure I have your position correct?
25 Do you take the position that there was or was not a

1 proceeding within the meaning of the first sentence of
2 2239(a)?

3 MR. ROTHFELD: Justice Stevens, we believe
4 that there was such a proceeding.

5 QUESTION: There was a proceeding?

6 MR. ROTHFELD: Yes.

7 QUESTION: But it was not required. There was
8 no requirement that there be a hearing in that
9 proceeding.

10 MR. ROTHFELD: We believe that the agency had
11 discretion to dispense with the hearing if one was
12 unnecessary, as it was in this case.

13 QUESTION: And so the word "shall" doesn't
14 mean what it says?

15 MR. ROTHFELD: Well, this Court repeatedly has
16 indicated that statutes that create hearing rights
17 implicitly contain the understanding that administering
18 agencies can dispense with the hearing if one is
19 unnecessary, or when the person seeking the hearing
20 fails to advance any issue that a hearing might help
21 resolve.

22 QUESTION: In other words, the word "shall"
23 does not mean what it says?

24 MR. ROTHFELD: I think, as this Court has
25 indicated, "shall" should be read to contain the

1 understanding that Congress didn't want agencies to
2 conduct meaningless hearings, and I think that that --
3 the types of cases that have raised this issue really
4 make that clear.

5 I don't think there's any doubt that in a case
6 such as NRDC versus NRC, decided by the District of
7 Columbia Circuit, where the NRC concluded that it lacked
8 jurisdiction to consider the complaint, there would have
9 been no point in holding a hearing. It seems ridiculous
10 that Congress would have insisted that one be held.

11 Or, in a case where the person demanding a
12 hearing wants to raise issues that are outside the scope
13 of the proceeding, it would make little sense to insist
14 that --

15 QUESTION: Well, you may be entirely right.
16 The only thing I was questioning is whether it is
17 correct to say that there is no support in the statutory
18 language for the contrary view.

19 MR. ROTHFELD: I wouldn't say there is no
20 support in the statutory language. We acknowledge, I
21 believe, that the statute can be read as -- We think
22 that is a strained interpretation of the statute. I
23 think that is made -- in part is made clear by the
24 Administrative Procedures Act. The use of the word
25 "proceedings" refers to a wide range of informal agency

1 actions.

2 It is also made clear by the Hobbs Act, which
3 provides the vehicle for judicial review in this case,
4 the use of the word "proceeding" to refer to informal
5 agency action, and that, the Hobbs Act specifically
6 provides for review in Courts of Appeals of proceedings
7 in which hearings have not been held.

8 The Court of Appeals, as your question
9 suggested, based its decision on a semantic approach to
10 the language of Section 189. It entirely ignored the
11 APA and the Hobbs Act, and instead noted that Section
12 189(a) provides the hearing shall be held in proceedings
13 which raise licensing related issues before the
14 Commission.

15 QUESTION: Well, I suppose you would still say
16 it was a proceeding even if somebody, some court thought
17 that you had to have a hearing.

18 MR. ROTHFELD: Absolutely. The argument that
19 respondent made in the Court of Appeals was precisely
20 that, that a hearing should have been held in this case,
21 and that on remand is the type of issue that respondent
22 is free to argue with. The Commission abused its
23 discretion in refusing to hold it.

24 QUESTION: Is it your view that every time
25 some member of the public writes a letter to the agency

1 and says, I would like you to revoke the license of this
2 utility, that that is enough to start a proceeding?

3 MR. ROTHFELD: Yes, that is our position.

4 QUESTION: Every letter constitutes the
5 commencement of a proceeding?

6 MR. ROTHFELD: That's true. Every letter in
7 fact initiates a fairly formal agency process in
8 response.

9 QUESTION: And if the agency just writes back
10 and says, we're too busy, we're sorry, we can't do it,
11 that would then be appealable to the Court of Appeals?

12 MR. ROTHFELD: Technically, I think that would
13 be a proceeding within the meaning of the APA and Hobbs
14 Act, but that will never occur, because the agency had
15 obligated itself in Section 2.206 to respond in detail
16 to all the factual allegations or complaints presented
17 in letters to the agency, and to issue a formal opinion
18 articulating its rationale and addressing those points
19 in detail if it declines to take further action.

20 So, those are fairly elaborate agency
21 processes which lead to the disposition of licensing
22 related matters, which is the APA --

23 QUESTION: Mr. Rothfeld, how many letters of
24 the kind that Justice Stevens was asking about does the
25 agency get in a month or a year? Do you have any

1 idea?

2 MR. ROTHFELD: My understanding is that in the
3 past ten years -- this process began with the
4 promulgation of Section 2.206 in 1974. In that ten-year
5 period the agency has received about 200 letters.

6 QUESTION: There must be some favorite
7 correspondents that you don't start a proceeding to
8 answer.

9 MR. ROTHFELD: Well, under the agency
10 procedure, it has obligated itself to respond to each of
11 these in detail.

12 QUESTION: All right.

13 QUESTION: And I suppose under the statute it
14 could change that rule, couldn't it? Couldn't it set up
15 a class of letters that wouldn't require such formal
16 investigation?

17 MR. ROTHFELD: I think it could. In fact,
18 before the promulgation of Section 2.206, there was no
19 qualification on the agency to respond in detail. But I
20 think any time the agency's case to disclose a matter
21 related to licensing is prevented, too, if that is in
22 fact the procedure.

23 QUESTION: Any such exchange of letters you
24 have, agency changes through any such exchange of
25 letters would give rise to an appealable order,

1 appealable to the Court of Appeals?

2 MR. ROTHFELD: Well, presumably it would be
3 challenged in some court, if not in the Court of
4 Appeals. An action could be commenced in the District
5 Court and then brought to the Court of Appeals to compel
6 the agency and to argue the agency's views and its
7 discretion to take action.

8 So the only question here is whether or not
9 the agency's disposal of these licensing related
10 issues --

11 QUESTION: Does the record show how many
12 letters of this kind the agency receives in a year?

13 MR. ROTHFELD: It varies from year to year,
14 Justice Powell, but I think in a typical year it ranges
15 from ten to thirty.

16 QUESTION: What would happen if 400 or 500
17 were filed? I suppose you don't know, but it is a
18 curious provision.

19 MR. ROTHFELD: If a tremendous number of
20 letters were presented, it would present a burden for
21 the agency's -- but the agency has obligated itself to
22 do so, and Congress has obligated the courts to do so.
23 There is really no way around it.

24 QUESTION: Well, the Court of Appeals decision
25 rationale wouldn't -- change the court you go to on

1 review.

2 MR. ROTHFELD: That's true.

3 QUESTION: So any one of these letters, if you
4 answer it and say, scrry, George, that is reviewable in
5 the District Court under the Court of Appeals.

6 MR. ROTHFELD: That is true, Justice White,
7 and that, in fact, is one of the problems with the Court
8 of Appeals analysis. It simply would double the burden
9 of the courts by making every one of these actions
10 reviewable first in the District Court under an abuse of
11 discretion standard, and then the same recrd would be
12 reviewed in the Court of Appeals.

13 QUESTION: Well, Mr. Rothfeld, the respondent,
14 of course, argues that Congress limited jurisdiction of
15 the Court of Appeals to cases in which formal hearings
16 had been held, so there would be an adequate record for
17 review by the appellate court, which of course is the
18 typical situation for an appellate court review.

19 Now, how do you respond to that in cases where
20 a hearing is denied? What assurance do we have that
21 there would be the kind of record that would be
22 appropriate for appellate court review?

23 MR. ROTHFELD: Justice O'Connor, the agency
24 has taken action to assure that in every one of these
25 cases there will be an adequate record. The person

1 filing the Section 2.206 request is always free to
2 submit whatever factual material or legal arguments he
3 or she thinks will support their claim.

4 The agency has then obligated itself by its
5 decisions and in Section 2.206 to address those facts in
6 detail and to write an opinion articulating its reasons
7 if Section 2.206 --

8 QUESTION: Well, I guess here the respondent
9 contends that he was unable to submit additional
10 information to the NRC.

11 MR. ROTHFELD: Well, in this case, respondent
12 originally sent a brief letter. Respondent was free
13 initially to submit whatever she wished in this case,
14 and is free to submit another Section 2.206 request
15 presenting factual material that she believes the agency
16 should have considered but didn't consider.

17 No one is foreclosed from presenting such
18 material, and this case demonstrates --

19 QUESTION: And didn't you suggest that perhaps
20 whether there should have been a hearing is still open?

21 MR. ROTHFELD: That issue was never decided by
22 the Court of Appeals. The court simply dismissed the
23 case for lack of jurisdiction, and on remand that is the
24 type of issue that should be addressed. Absolutely,
25 Justice White.

1 QUESTION: Let me ask you a practical
2 question, counsel. In the Commission, I assume, as in
3 most courts, when a matter comes in that is categorized
4 as a proceeding or a case, it is given a number. Now,
5 you mentioned the 200 letters over a period of ten
6 years, I think it was. Did every one of those letters
7 get a number, or was there some selection? Some of them
8 got numbers and were treated as a proceeding, and some
9 didn't? Is that the way it works?

10 MR. ROTHFELD: I can't speak to every one of
11 these letters in years past. This case certainly
12 received a number and was treated as a proceeding. A
13 docket was created containing files submitted by the
14 agency, and my understanding is that when each of these
15 things comes in, because the agency has obligated itself
16 to address the facts, to issue an opinion, everyone is
17 treated as an independent proceeding in which a record
18 of that sort is created.

19 QUESTION: You say each one. Do you ever have
20 any answer that says, we have examined all of the
21 questions, and we find no merit in any of them, period?

22 MR. ROTHFELD: I am not aware that the agency
23 has done that, Justice Marshall.

24 QUESTION: Well, you have seen agencies do
25 that, haven't you?

1 MR. ROTHFELD: I haven't seen this agency do
2 it in this context. And the agency's rules are designed
3 to prevent that from happening by obligating the agency
4 to explain its rationale.

5 QUESTION: Why would the agency want to
6 prevent that from happening? I would think, you know,
7 given, you know, everyone has some experience --
8 everyone in public life has some experience with citizen
9 letters, but given the receipt of 200 letters over a
10 period of ten years, that the agency would want kind of
11 a short form reply to some people, just saying, we have
12 considered what you have to say and there is nothing to
13 it, period. What would be wrong with that?

14 MR. ROTHFELD: We don't submit that there
15 would be anything wrong with that, but the Commission in
16 the exercise of its discretion has decided that given
17 the magnitude of the safety issues involved it would
18 treat these things seriously, and will address each one
19 in some detail.

20 We certainly don't suggest that the Atomic
21 Energy Act obligates them to do this, and the agency, as
22 I said, began doing this ten years ago. Presumably if
23 these things began to create a tremendous burden on the
24 agency's resources, it would be free to change its
25 procedures to address that.

1 And to respond just a little bit more fully to
2 Justice C'Connor's question. In this case, there was a
3 547-page record containing the materials that --

4 QUESTION: Well, is there anything in the
5 agency's regulations that would ensure that in every
6 case of a denial of a hearing, that there is enough of a
7 record that it would be appropriate for appellate court
8 review?

9 MR. ROTHFELD: Well, I think there is, because
10 the agency has obligated itself to articulate its
11 rationale and explain the basis upon which it --

12 QUESTION: What regulation are you referring
13 to?

14 MR. ROTHFELD: Section 2.206 itself obligates
15 the agency to do that, and that will lead to the type of
16 record that the Courts of Appeals regularly review in
17 cases of informal adjudication and moving. So long as
18 the agency has articulated its rationale in an
19 intelligent way --

20 QUESTION: May I ask -- have you finished your
21 answer?

22 MR. ROTHFELD: Yes.

23 QUESTION: A question about 2.026(b) which
24 says that after you get a request within a reasonable
25 time you will decide either to institute the request of

1 proceeding or that no proceeding will be instituted, and
2 is it your position that the decision of whether to
3 institute a proceeding is the proceeding that you are
4 talking about?

5 MR. ROTHFELD: I think the agency has used the
6 term "proceeding" to mean different things in different
7 contexts.

8 QUESTION: Where in the regulation does it use
9 the word "proceeding" the way you are using it today?

10 MR. ROTHFELD: In the regulation itself, it
11 does not. But in the agency's --

12 QUESTION: Nor in the statute.

13 MR. ROTHFELD: Nor in the statute. Well, we
14 suggest the statute uses the term "proceeding" in accord
15 with the way it is used in the APA and the Hobbs Act,
16 both of which were incorporated into the statute.

17 QUESTION: But not in accord with the way it
18 is used in the regulation.

19 MR. ROTHFELD: The agency orders interpreting
20 the regulation have used the term "proceeding" in a
21 variety of ways, has characterized the agency processes
22 that go on, but prior to the denial of a 2.206 request
23 as proceeding, as we point out in our reply brief, it
24 has also referred to Section 2.206 requests as requests
25 to institute show cause proceedings or enforcement

1 proceedings or informal proceedings, but I don't think
2 the agency intended to interpret the word "proceeding"
3 by issuing its regulations in Section 189(a). In fact,
4 the agency consistently has taken the position that
5 denials of a Section 2.206 requests are appealable to
6 the Courts of Appeals, therefore are necessarily orders
7 entered in proceedings of the kind described in Section
8 189(a).

9 QUESTION: May I ask just one other question
10 about the Court of Appeals? Did the court dismiss this
11 on its own motion?

12 MR. ROTHFELD: Yes, it did. It is one of the
13 problems created. The jurisdictional point was never
14 addressed in the briefs by the parties, and the opinion
15 actually was circulated to the full court before the
16 parties had an opportunity to file a petition for
17 rehearing en banc, so the issues were never really fully
18 addressed by the court.

19 If there are no further questions, I will
20 reserve the remainder of my time. Thank you.

21 CHIEF JUSTICE BURGER: Mr. Reis.

22 ORAL ARGUMENT OF HARCID F. REIS, ESQ.,

23 ON BEHALF OF PETITIONERS IN 83-703

24 MR. REIS: Mr. Chief Justice, and may it
25 please the Court, I would like to emphasize at the

1 outset that in deciding this case, the Court below gave
2 no consideration whatsoever to the relationship of the
3 judicial review provision in the Atomic Energy Act,
4 Section 189, the section we are dealing with now, to the
5 overall scheme of regulation which the Act put into
6 effect.

7 Now, whether they didn't do it because they
8 did not permit briefing of the issue, and whether they
9 simply overlooked it, or whether they considered the
10 matter not to be relevant, I of course do not know,
11 because they simply didn't consider it at all.

12 I submit, however, that however lacking in
13 neatness the language of Section 189 is, that this is a
14 very important matter to be considered in interpreting
15 the section.

16 Now, a very important, if not the most
17 important objective of the Atomic Energy Act of 1954 was
18 to make it possible for the first time for private
19 ownership and operation of nuclear power reactors, and
20 the most important -- that private ownership and
21 operation was the course to be made subject to a very
22 close type of regulation, and perhaps the most important
23 instrument of such regulation was licensing.

24 The Act made it a crime to own or operate a
25 nuclear reactor without a license, and provided

1 elaborate provisions in Section 189 for how licenses
2 were to be issued and provide for their revocation.

3 Viewed from this point of view, what you had
4 was an Act which was creating a large national
5 administrative system in which licensing was key.
6 Section 189 therefore provided that in any proceeding
7 respecting the issuance, amendment, or suspension of a
8 license there would be Court of Appeals review.

9 This, of course, was wholly consistent with
10 this idea of a national system of regulation in which
11 licensing was key. It provided for judicial review of
12 any proceeding, and it did not necessarily turn, as
13 courts which have considered the question before, for
14 example, D.C. Circuit, when it first considered this
15 question, it made it applicable to proceedings relating
16 to licenses at any stage.

17 Accordingly, earlier, this, the D.C. Circuit
18 determined that consideration of the jurisdiction of the
19 question whether enforcement or licensing action should
20 be undertaken was the first stage of a proceeding of the
21 type that Section 189 expressly conferred authority on
22 the Courts of Appeals to review.

23 QUESTION: The Commission's brief, Mr. Reis,
24 tells us that on the basis of a 547-page record, the
25 director issued a decision on November 5th denying the

1 respondent's request. The respondent's request had been
2 filed by letter on September 11th, 1981.

3 Now, was that 547-page record made in direct
4 response to the September 11th letter of the respondent,
5 or was it made independent of that but in some way
6 related to it?

7 MR. REIS: I think the answer is, it is
8 related to it, and I would like to explain why, if I
9 may.

10 QUESTION: Related to it but independent?

11 MR. REIS: Related to it. Well, if I explain
12 the relationship, I think I may answer it best, if I
13 may.

14 What happened was, the letter asked that the
15 Turkey Point unit be shut down immediately. It asked
16 that -- I believe I am quoting it, but it was pretty
17 close to that -- be shut --

18 QUESTION: Would you raise your voice a
19 little, Mr. Reis?

20 MR. REIS: The letter asked that the Turkey
21 Point unit be shut down immediately, that consideration
22 be promptly given to suspension of the license, and the
23 director's response to that request was, as the
24 respondent herself characterizes it in her brief, at
25 Page 2, I believe, as prompt.

1 What he did was amass the existing material
2 relating to the matter. He went to the material
3 publicly at hand within the Commission, and if you look
4 at the record in this case, what you will find is, there
5 were not, for example, submissions in response to this
6 thing, to this letter, as respondent suggests.

7 We, for example, Florida Power and Light, the
8 licensee, did not file a response. It was not because
9 we didn't know it was there, but because we thought that
10 the material was available to the director.

11 If you look at his decision, he looked at
12 material relating to the two technical questions, steam
13 generators and pressurized thermal shock, amassed them,
14 saw, appraised the nature of the supposed threat, put
15 this together in a coherent opinion.

16 In effect, he gave Ms. Lorion exactly the
17 response she had asked for. That is, he gave immediate
18 consideration to it, and then, on the basis of the
19 existing technical material, some of which had been
20 previously submitted by us, some of which had been
21 previously prepared by the NRC staff which was dealing
22 with this technical problem. He advised Ms. Lorion why
23 he was not going to take the action she wanted.

24 Now, I think I have answered your question,
25 Mr. Justice.

1 QUESTION: But then it is pretty clear that
2 that 547-page record was not put together in any kind of
3 an adversary proceeding.

4 MR. REIS: That is correct. We didn't file
5 briefs, she didn't file another brief, and so on.
6 Nevertheless, it can still be regarded as a proceeding.
7 Rulemaking, for example, is very frequently based upon
8 comments, technical information, and that kind of
9 material.

10 QUESTION: Mr. Reis, may I ask you a question
11 about the 547-page record that the Chief Justice
12 mentioned?

13 Supposing there were no such record, but all
14 we had before us were the letter from your opponent and
15 a reply that simply said, we are not going to institute
16 a procedure, proceeding because the procedures already
17 in place are adequate to protect the public health and
18 safety, period, and then there was review.

19 Would you say that would be reviewable here?
20 Would the case be any different? Does the 547-page
21 record add or subtract from the issue at all?

22 MR. REIS: Under the -- I think the answer is
23 that if there was a process, that it would be
24 reviewable. You might have difficulties in reviewing it
25 without a record, as with the District Court, since the

1 standard is arbitrary and capricious.

2 So far in the seven or eight cases which have
3 been decided, which have gotten to the courts, the
4 records have been adequate for judicial review. No
5 court --

6 QUESTION: Well, Mr. Reis, if they aren't,
7 they could be sent back.

8 MR. REIS: Precisely. And they could be sent,
9 remanded for the creation, the establishment of a better
10 record, or they could be reversed if it was on its face
11 arbitrary and capricious, but --

12 QUESTION: How could it ever be arbitrary and
13 capricious for the director to say, we have a lot of
14 people who are studying these things constantly, and we
15 have concluded there is no need for this action?

16 MR. REIS: I think so, and there are a number
17 of other --

18 QUESTION: You think it could be arbitrary and
19 capricious?

20 MR. REIS: -- questions that indicate that the
21 court is somewhat puzzled as to why the Commission
22 didn't do it, and I can't speak for the Commission, but
23 I think that Mr. Rothfeld has suggested the answer, and
24 that is that as long as there is this kind of public
25 concern for the use of atomic energy, and as long as the

1 Commission feels it is able to handle the matter in this
2 way by giving serious consideration to requests, not
3 matter how frivolous, then it is doing it this way. It
4 may have to change.

5 QUESTION: If the Court of Appeals on
6 receiving a file of the kind we have been talking about
7 with virtually nothing in it, the Court of Appeals,
8 Courts of Appeals frequently remand a case for the
9 development of an appropriate record, and that could be
10 done here, could it not?

11 MR. REIS: Yes, sir, it certainly could.

12 QUESTION: But in effect what your -- what I
13 gather your response earlier was, that the Commission
14 had this problem under study for a long time independent
15 of the papers which were sent on September 11th by the
16 respondent, and it simply used the materials it had on
17 this subject to respond to her claim.

18 MR. REIS: Yes. And I might say that in
19 putting that together in one package and making it clear
20 why it was doing what it was doing, and what it was
21 taking into consideration, it was making it possible for
22 the Court of Appeals to review the matter. It was not
23 one of these situations in which they said, no, this is
24 silly, we are not going to do it. We know better than
25 you.

1 QUESTION: The court didn't undertake to look
2 at it at all.

3 MR. REIS: No, because it found that it had no
4 jurisdiction to handle the matter.

5 CHIEF JUSTICE BURGER: Very well.

6 MR. REIS: Thank you.

7 CHIEF JUSTICE BURGER: Mr. Hodder?

8 ORAL ARGUMENT OF MARTIN H. HODDER, ESQ.,

9 ON BEHALF OF THE RESPONDENTS

10 MR. HODDER: Mr. Chief Justice, and may it
11 please the Court, Ms. Lorion has alleged essentially
12 there is a ticking nuclear time bomb in her back yard.
13 The Commission has admitted that reactor pressure vessel
14 embrittlement is a serious and unresolved safety issue,
15 but it has declined to implement a hearing in which to
16 consider her concerns.

17 The utility denies the problem is severe. The
18 question before the Court is, where is that factual
19 dispute to be resolved?

20 QUESTION: Your client went to the Court of
21 Appeals, didn't she?

22 MR. HODDER: Yes, Your Honor. She --

23 QUESTION: Now you are taking the position --

24 MR. HODDER: -- brought an appeal before the
25 Court of Appeals because it was her belief based on the

1 existing seven or eight cases that that was the
2 appropriate path on appeal, having been denied the
3 relief she sought by the director's decisions, which
4 were then known as director's denials.

5 QUESTION: But now you are taking the opposite
6 position?

7 MR. HODDER: I don't follow that observation.

8 QUESTION: That jurisdiction is in the
9 District Court.

10 MR. HODDER: We were overjoyed to find the
11 decision of the Court of Appeals that jurisdiction lay
12 in the District Court, because one of our major concerns
13 in this case and the first consideration or challenge is
14 that there has been an abuse of agency discretion on the
15 part of the Commission.

16 We have just considered here this morning the
17 version of the government and the agency on formulation
18 of the existing record, but the fact is that the record
19 that was assembled was selective and ex parte in nature,
20 and because no opportunity was given to my client to
21 participate, she did not participate in formulation of
22 the record.

23 Indeed, by definition of the 2.206 process, by
24 its very nature, one cannot participate if one is a
25 petitioner or a requester.

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QUESTION: You want a hearing?

MR. HODDER: It was our request --

QUESTION: Do you now, at this stage? Are you seeking a hearing?

MR. HODDER: Yes, we --

QUESTION: Where you could put in evidence.

MR. HODDER: My client, of course, seeks that opportunity, and one of the --

QUESTION: Is there anything to prevent you from starting a proceeding more formally? Without regard to whether the first was or was not a proceeding, is there any bar to your presenting your claims to the Commission now, irrespective of what this Court does?

MR. HODDER: The government has argued that one could renew the request in a new and separate 2.206 request, but that would require new information not previously submitted. Since the decision was made on the basis of the issue we wish to be heard, we are unable on that particular issue, which is reactor pressure vessel embrittlement, to resubmit the question in a way that it could be considered new.

Therefore, we persist on our request that there be an enforcement proceeding or a hearing on the substantial issue of material fact that we have raised, because the issue raised here is acknowledged to

1 constitute an unresolved safety issue, and the record
2 relied upon the Commission in denying the relief sought
3 is incomplete.

4 And the Commission itself shared the concerns
5 of Ms. Lorion, and I believe it is Item 21 in the joint
6 appendix in the case below. The Commission used another
7 show cause device similar to the 2.202 show cause
8 process that my client sought, but without the teeth in
9 it, and without the requirement of a hearing.

10 In other words, the Commission had requested
11 information on August 21st from the utility noting that
12 the Turkey Point reactors were in a site specific
13 category which was causing them to reach levels of
14 concern. These reactors --

15 QUESTION: Mr. Hodder, would you say the
16 Commission's response to your client's letter was in the
17 nature of saying the facts you allege are not so, or
18 that even if the facts you allege are all true, it is
19 still no reason for concern under the law?

20 MR. HODDER: I think the Commission fairly
21 addressed the question. I don't think they denied the
22 issue that there existed a problem, but the question is
23 before this Court and before the director at the time
24 the request was made, is how much information did the
25 Commission utilize in reaching their decision.

1 You see, you cannot not find that there is an
2 abuse of discretion, because the 50.54 request for
3 information under a show cause request under the
4 Commission's other rule hadn't been answered by the
5 utility at the time they issued their decision in this
6 case.

7 QUESTION: But I am not quite sure what your
8 answer to my question is. Is the Commission's response
9 to your client's letter essentially that as a matter of
10 fact, you are wrong, or as a matter of law, you are
11 wrong?

12 MR. HODDER: I think that as a matter of fact,
13 of course, is the response.

14 QUESTION: So you say you should have a
15 hearing because you have made allegations of fact that
16 if you could support them would be legally significant,
17 and the Commission has just chosen to, what, disregard
18 those allegations of fact?

19 MR. HODDER: Of course. We raised an issue of
20 material fact that we seek to litigate, and the
21 Commission disagrees with us.

22 QUESTION: Well, do you agree, Mr. Hodder,
23 that it is reasonable to conclude that the statute only
24 requires a hearing when the requesting party makes a
25 certain threshold showing of health or safety risks or

1 allegations?

2 MR. HODDER: Of course, I think that that is
3 the basis for the definition of the rule. It is my
4 belief that the --

5 QUESTION: Well, is that a reasonable
6 interpretation of the statute, do you think?

7 MR. HODDER: I think that it is a reasonable
8 interpretation of the statute, and the client has made
9 such a showing. The agency, on the other hand, hasn't
10 been able to show otherwise, because they answered
11 before they had all the information in.

12 You have to understand that in review of the
13 record that the agency did assemble, which was
14 fortuitously complete in some respects, the Turkey Point
15 reactors, unlike other reactors in the United States,
16 fell into a worst case category.

17 They, having been designed in the late
18 sixties, early seventies, had engineering flaws designed
19 into them that weren't apparent at the time, like Pinto
20 automobiles with their bad gas tanks, because as the
21 copper which inadvertently was introduced into the
22 reactor pressure vessel began to cause embrittlement, it
23 became apparent to everyone at the Commission and
24 members of the public as well that these particular
25 reactors, eight in all, the Turkey Point ones being the

1 worst in the category, subcategory, worst subcategory of
2 the total of eight, were so bad that the Commission
3 itself saw fit to request this additional information
4 from the utility company.

5 The utility company had not responded at the
6 time the director denied the relief Ms. Lorion sought.
7 I say that that is an inadequate basis for refusal to
8 act, and that therefore he abused his discretion.

9 Ancillary to that is the next issue of whether
10 or not Ms. Lorion's contentions are correct or not.

11 QUESTION: Well, you went to the Court of
12 Appeals on appeal, and one of your claims was, I
13 suppose, that you were entitled to a hearing.

14 MR. HODDER: When we went to the Court of
15 Appeals --

16 QUESTION: Wasn't that one of your claims?
17 You were entitled to a hearing?

18 MR. HODDER: Of course, we felt that the --

19 QUESTION: That's what you wanted.

20 MR. HODDER: -- director abused his discretion
21 by not implementing a hearing under 2.202.

22 QUESTION: And if the Court of Appeals
23 decision is sustained, you are going to be in the
24 District Court claiming that you were entitled to a
25 hearing.

1 MR. HODDER: If we go into District Court, we
2 would seek to utilize the Federal Rules of Civil
3 Procedure and examine in that court the existing
4 record's adequacy by presentation of evidence and --

5 QUESTION: But you will be asking the judge to
6 remand it to the agency for the hearing.

7 MR. HODDER: No, sir. No. We would --

8 QUESTION: Would there be a de novo hearing?

9 MR. HODDER: We feel that based on
10 interpretation of the law and the nature of the 2.206 --

11 QUESTION: My point is, my point is, though,
12 the Court of Appeals never decided, never got to the
13 question of whether you were entitled to a hearing.
14 They just dismissed you for want of jurisdiction.

15 MR. HODDER: That's true.

16 QUESTION: And if we affirm -- if we reverse
17 them and say they have jurisdiction, they are going to
18 have to face up to your claim that you are entitled to a
19 hearing.

20 MR. HODDER: Of course. That is the first
21 consideration that that court would --

22 QUESTION: Well, you may win.

23 MR. HODDER: Of course.

24 QUESTION: They may remand and say the agency
25 abused its discretion in not giving you a hearing.

1 MR. HODDER: Of course. I understand that.
2 And of course we should also take note of the fact that
3 were we to find jurisdiction in the Court of Appeals
4 initially in this case, the Hobbs Act would require that
5 the case be remanded to the District Court in any event,
6 because it fits the definition under 2347(b)(3) that
7 requires --

8 QUESTION: Is that normal for a case to come
9 from an agency to a Court of Appeals, and then for the
10 Court of Appeals to remand the case to the District
11 Court?

12 MR. HODDER: Well, that is the result we are
13 trying to avoid this morning.

14 QUESTION: I thought you said --

15 MR. HODDER: Because that would impose an
16 extra tier of review which --

17 QUESTION: Will you answer my question?

18 MR. HODDER: Yes, sir.

19 QUESTION: I thought you said that the Hobbs
20 Act required that result just now.

21 MR. HODDER: I didn't hear you, sir.

22 QUESTION: I thought you said that the Hobbs
23 Act required the result that a case coming from an
24 agency to the Court of Appeals should be remanded to the
25 District Court.

1 MR. HODDER: By examination of the facts in
2 this case, that would be the result were we to find
3 jurisdiction in the Court of Appeals and then apply the
4 Hobbs Act. I am only pointing out that the result would
5 be the same in any event based on our interpretation of
6 the Atomic Energy Act and the Hobbs Act.

7 QUESTION: May I ask kind of a threshold
8 question that I have never thoroughly understood in this
9 case? If you assume that a proceeding doesn't start
10 until -- well, that this is not a proceeding that we
11 have here, where is there any statutory duty in the
12 Commission to have anything more than the kind of
13 prosecutorial discretion that a prosecutor in a criminal
14 context would have?

15 What statutory obligation is there to
16 institute proceedings? Isn't it -- Why couldn't one
17 argue that it is totally within the discretion of the
18 agency? And if there is a statutory obligation, what is
19 the standard in any statute that tells when they have to
20 institute proceedings?

21 MR. HODDER: I think the entire Atomic Energy
22 Act constitutes a very serious mandate to maintain the
23 safety of the nuclear power industry.

24 QUESTION: This specific provision, you just
25 kind of read it in the statute as a whole?

1 MR. HODDER: Yes, and failure to observe that
2 very serious mandate constitutes an abuse of agency
3 discretion.

4 QUESTION: But there is no statute that says
5 that in so many words?

6 MR. HODDER: Oh, yes, I think that one could
7 read Section 189(a) of the Act to show that parties are
8 entitled to a hearing if a requester seeks one, and any
9 proceeding for the --

10 QUESTION: 189(a). That is 2239(a). Is that
11 the same section?

12 MR. HODDER: Yes, sir. That's the section.

13 QUESTION: When you went to the Court of
14 Appeals, did you suggest to the Court of Appeals that
15 the record was inadequate for review?

16 MR. HODDER: Yes, I claimed at the Court of
17 Appeals level that the record constituted denial of due
18 process due to the fact of a selective ex parte --

19 QUESTION: Did you ask to have it remanded to
20 the Commission to give you the kind of a hearing that
21 you have been talking about?

22 MR. HODDER: Based on my best recollection at
23 that time, I felt that -- I believe I argued that it
24 should be remanded, and that there should be some type
25 of 2.202 hearing implemented. That is my best

1 recollection.

2 QUESTION: Any reason why that can't be done
3 now?

4 MR. HODDER: No, because then we would win,
5 and we would -- that is, if I am understanding your
6 question, and you were to remand to the agency --

7 QUESTION: Well, remand to the Court of
8 Appeals, and tell the Court of Appeals that it does have
9 jurisdiction, and to proceed, and then that would leave
10 the Court of Appeals free to tell you, tell everyone
11 that the record was not adequate for review and remanded
12 to the Commission to supplement the record.

13 MR. HODDER: Of course, that is very true, but
14 we must concern ourselves when we remand to the agency
15 with the effect that is going to have on the rule and
16 the previous teaching of this Court in the case Vermont
17 Yankee, because if we don't remand to the agency with
18 the direct proviso that they implement a 2.202 show
19 cause proceeding, which is what we are seeking, that is,
20 if anything else is requested, then you have a situation
21 where a Court of Appeals is tampering with the
22 procedure, the rule, 2.206, established by the agency in
23 engrafting its own notions of judicial procedure upon
24 that agency process, which is exclusive to the agency
25 and which the courts have been told not to do.

1 In other words, it is not the business of the
2 Courts of Appeals to amend their jurisdictional grant.

3 QUESTION: Mr. Hodder, I think I don't
4 understand your position that if the Court of Appeals
5 determined that, let's say, they do have jurisdiction,
6 and if it determined that a hearing should have been
7 allowed, why wouldn't it remand it to the agency rather
8 than to the District Court? I just don't understand
9 your position on that at all.

10 MR. HODDER: Well, of course --

11 QUESTION: Why doesn't the Court of Appeals,
12 if it has jurisdiction, look at the record that comes to
13 it from the agency to determine whether it was an abuse
14 of discretion to deny a hearing? And if, according to
15 the record, the Court of Appeals said that a hearing
16 should have been provided by the agency, wouldn't it
17 send it back to the agency, not the District Court?

18 MR. HODDER: Your view is absolutely correct
19 as far as it goes, but we must contemplate the nature of
20 the procedure upon remand, whether it is specifically
21 ordained that it be 2.202 or something else.

22 Because of the nature of the 2.206 process,
23 and its definition by the agency's rule, it is not a
24 proceeding under 189(a), because no rights as a party
25 attach to the requester under 2.206. Therefore, if we

1 mandate that the director take the decision back and
2 modify it, and consider this requester's views, then we
3 have tampered with that procedure established by the
4 agency for entertaining requests for enforcement
5 action.

6 If, on the other hand, we remand to the agency
7 with specific instructions that there was an abuse of
8 discretion, and that there should have been a show cause
9 proceeding implemented, then that would be a good
10 result, but we must always recognize that if the Court
11 of Appeals were to look at the Hobbs Act and its
12 provisions under 2347(b), it could in the alternative
13 remand the case to the District Court.

14 QUESTION: May I just pursue that a little
15 bit? I still don't understand.

16 The Court of Appeals' order that the case be
17 transferred to the District Court, and your brief asks
18 that that order be affirmed, so if you prevail here, you
19 will end up in the District Court, right?

20 MR. HODDER: Yes, and that result would please
21 us, because we support the decision --

22 QUESTION: Right, and what would you ask the
23 District Court to do, ultimately to decide the merits or
24 remand it to the Commission for it to have a formal
25 proceeding?

1 MR. HODDER: It would be our view that upon
2 remand to the District Court --

3 QUESTION: It is not remanded. It is just
4 transferred.

5 MR. HODDER: Transferred. Excuse me. I am
6 misusing the word, and I apologize.

7 QUESTION: Yes.

8 MR. HODDER: Upon transfer of the case to the
9 District Court, then the rights as a party would attach
10 for the first time.

11 QUESTION: Yes.

12 MR. HODDER: And this requester would then
13 have or proceed under the rules, the Federal Rules of
14 Civil Procedure, and shouldn't be able to --

15 QUESTION: To do what? To decide the case?

16 MR. HODDER: To examine the existing record
17 and to present evidence and testimony and cross
18 examination, and therefore develop a record that
19 adequately and fairly represents her views, which was
20 not the record established by the director below.

21 QUESTION: So you would make a record before
22 the District Court, and you would not go back to the
23 Commission?

24 MR. HODDER: If the case be transferred, yes.

25 QUESTION: In the District Court do you have

1 pleadings?

2 MR. HODDER: My presumption is that --

3 QUESTION: I am kind of old school, and I
4 think if you are going to have a case in the District
5 Court without pleadings --

6 MR. HODDER: Well, I think we would file an
7 amended complaint at that point, and we would avail
8 ourselves or seek to avail ourselves of discovery
9 rights, and then proceed under the Federal Rules of
10 Civil Procedure, and yes, there would be pleadings.

11 QUESTION: Could you have done that
12 originally?

13 MR. HODDER: Not under the definition of the
14 2.206 rule --

15 QUESTION: How can you do it now if you
16 couldn't have done it originally?

17 MR. HODDER: Because for the first time here
18 the rights of a party have attached because we raised an
19 issue of material fact that the Court finds worthy of
20 consideration.

21 QUESTION: I must say --

22 MR. HODDER: And that question, of course, is
23 whether or not it is safe to operate this plant at full
24 capacity, or whether it should be derated, that is,
25 reduced to the lesser capacity for safety

1 considerations, or perhaps shut down.

2 QUESTION: You are not then taking the
3 position that the District Court will be performing a
4 reviewing function, but rather it is just a brand new
5 lawsuit, and you just go right into discovery? You are
6 not limited to the record before the agency?

7 MR. HODDER: I believe that under the general
8 jurisdiction statutes that would admit us to the
9 District Court, which is 1331 --

10 QUESTION: So you think you are going into the
11 District Court bringing an original action, not a review
12 as you review Social Security cases or something like
13 that on the record that is before the agency?

14 MR. HODDER: I believe so. I believe that --

15 QUESTION: I don't know why you couldn't have
16 done that without ever taking this appeal.

17 MR. HODDER: The District Court might also
18 examine the question of abuse of discretion. I imagine
19 that the District Court could upon transfer remand to
20 the agency for a 2.202 proceeding if it is plowing new
21 ground, but in the event that they didn't implement that
22 remand, then we would be entitled as a party under 1331
23 and 1337 to proceed.

24 QUESTION: I would expect the government to
25 take the position that you are quite wrong about that. I

1 may be wrong. I don't know what is going on in this
2 lawsuit.

3 MR. HODDER: I suspect they would, Your
4 Honor.

5 QUESTION: Can you give me a case? Can you
6 give me a case, another case where this was done any
7 place?

8 MR. HODDER: Yes, there is a case known as --

9 QUESTION: Any place in the world.

10 MR. HODDER: A case where we have transferred
11 to the District Court and then the rights of a party
12 attach?

13 QUESTION: All I understand you transfer is
14 your original action. You are now saying that you
15 transfer a brand new action. That is what you said.

16 MR. HODDER: Well, the question is --

17 QUESTION: You can't transfer a brand new
18 action.

19 MR. HODDER: The question is how one perceives
20 the original request. The original request raised an
21 issue of material fact which might be adjudicated in an
22 adversary proceeding in District Court. That is our
23 contention. But there is another issue before that, and
24 that is whether or not the agency has committed an abuse
25 of discretion by denying the relief sought, which was a

1 2.202 proceeding. That would have to be decided first.

2 QUESTION: What relief do you want there?

3 QUESTION: That is the review. That is the
4 review proceeding. That is a review.

5 QUESTION: That is all it is.

6 MR. HODDER: That is a proceeding where
7 hearing rights would attach and an interested party
8 could participate under 2.202. You see, the 2.206
9 process is the threshold request. If the director
10 grants the request, then he implements under the 2.202
11 rule a full show cause proceeding where parties,
12 interested parties may participate, and the rights of a
13 party then attach.

14 QUESTION: A review proceeding is the exact
15 opposite of a de novo proceeding.

16 MR. HODDER: We are not seeking a de novo
17 proceeding.

18 QUESTION: I thought you said when you got
19 down to the District Court you start all over again with
20 discovery. If discovery is not de novo, I would like to
21 know what it is.

22 MR. HODDER: Well, I --

23 QUESTION: Have you had discovery before in
24 this case?

25 MR. HODDER: No, we never had even notice that

1 the director's decision --

2 QUESTION: Well, then, it is new, then, isn't
3 it?

4 MR. HODDER: In a sense, Your Honor.

5 QUESTION: Well, let's assume we affirm the
6 Court of Appeals. Then the next case comes up like
7 yours. If you don't like what the -- and you are turned
8 down, and you don't like the result, you then go right
9 into District Court. You don't go to the Court of
10 Appeals.

11 You go into the District Court, because you
12 have just been told that the Court of Appeals has no
13 jurisdiction, so you go right into the District Court,
14 and that is just -- you file a complaint to review the
15 agency's decision, don't you?

16 MR. HODDER: We could go into District Court
17 on a new case --

18 QUESTION: Well, how can you go to the Court
19 of Appeals? If we affirm the Court of Appeals, you know
20 that the Court of Appeals has no jurisdiction at all.
21 So you go to the District Court.

22 MR. HODDER: On future director's decisions,
23 that would be the result.

24 QUESTION: And what would you claim --
25 wouldn't you have to claim jurisdiction under 1331?

1 MR. HODDER: Yes. Yes, I believe that's
2 correct.

3 QUESTION: A review on the record, then, on
4 the record as it exists of 547 pages?

5 MR. HODDER: I believe that we could raise,
6 yes, a bifurcated argument alleging that that record and
7 decision constituted abuse of discretion.

8 QUESTION: But you say that you want to
9 supplement that record by discovery and by more
10 evidence.

11 MR. HODDER: If the Court were willing to
12 entertain an amended complaint that addressed the
13 material issue of fact raised by the requester when she
14 sought the initial relief, then we would seek to
15 litigate that de novo.

16 QUESTION: You would be seeking in the
17 District Court. Wouldn't you review under the
18 Administrative Procedure Act?

19 MR. HODDER: The Administrative Procedure Act
20 would control --

21 QUESTION: The Hobbs Act?

22 QUESTION: The Hobbs Act isn't the same thing
23 as the Administrative Procedures Act.

24 MR. HODDER: No, it isn't.

25 QUESTION: It is the review of

1 administrative --

2 MR. HODDER: It is a jurisdictional grant
3 contained in Section 189(b).

4 QUESTION: Of?

5 MR. HODDER: In other words, of the Atomic
6 Energy Act. They provide under -- see, first they
7 define the proceeding process, then they give the
8 jurisdictional grant. That is Section 189(b). And that
9 is the Hobbs Act.

10 And if you read the Hobbs Act, 2347(b)(3), you
11 see that were there to be original jurisdiction in the
12 Court of Appeals, then transfer to the District Court is
13 the only possible result on our reading of the Hobbs --

14 QUESTION: Counsel, you talk about filing an
15 amended complaint. Where is the original complaint?

16 MR. HODDER: Contained in the requester's
17 letter requesting enforcement action --

18 QUESTION: Is that a complaint?

19 MR. HODDER: It is the only complaint I can
20 deal with here.

21 QUESTION: Well, you know the complaint I am
22 talking about. The complaint under the rules.

23 MR. HODDER: Well, of course, I --

24 QUESTION: You really don't want to file an
25 amended complaint, you want to file an original

1 complaint in the District Court and start an original,
2 new action. Am I right or wrong?

3 MR. HODDER: I am not sure. I am plowing new
4 ground. It is my impression that I --

5 QUESTION: Well, would new ground be a new
6 case?

7 MR. HODDER: I think that we would file a
8 petition for review of an agency order in the District
9 Court, and all that entails.

10 QUESTION: That would give you discovery?

11 MR. HODDER: Since I am operating under the
12 Federal Rules of Civil Procedure, I believe I would be
13 entitled to discovery. Yes, Your Honor.

14 QUESTION: As I read Section 1631, which is
15 what the Court of Appeals relied on to transfer to the
16 District Court, all that does is say the District Court
17 may treat the case as though it were originally filed in
18 that court rather than the Court of Appeals, and
19 therefore it seems to me it is open to the government --
20 I don't know whether it's right or not -- it is open to
21 the government to say, since they decided it is not a
22 proceeding within the meaning of the statute, it is just
23 not reviewable at all.

24 The question of commencing proceedings to
25 revoke licenses and the like are committed to agency

1 discretion. I don't think they have conceded -- I may
2 be wrong, but I don't think they have conceded that
3 there is a lawsuit that is going to go forward in the
4 District Court.

5 MR. HODDER: Well, this Court --

6 QUESTION: And I don't think the Court of
7 Appeals order requires it.

8 MR. HODDER: This Court did not grant the
9 petition for cert on the issue of whether or not these
10 decisions were reviewable at all. If this Court were to
11 entertain that notion --

12 QUESTION: No, we granted cert on the question
13 of whether there was jurisdiction in the Court of
14 Appeals to review an order which at least on the face of
15 these documents does not appear in the proceeding. It
16 is an order refusing to commence a proceeding.

17 MR. HODDER: I am following your argument to
18 some extent. I am only saying that this Court hasn't
19 taken up that issue, that there is a narrow
20 jurisdictional order before this Court, and were this
21 Court to seek our view on that issue, we would
22 respectfully ask the Court to be permitted to brief that
23 issue before the Court rules that such decisions are not
24 reviewable at all.

25 Certainly as a practical observation, as I

1 answered you earlier today, the Atomic Energy Act taken
2 in toto doesn't permit such an abuse of discretion that
3 would cause an atomic time bomb to be ticking in Ms.
4 Lorion's back yard without there being some recourse to
5 a court of law were she able to successfully show that
6 the agency has abused its discretion.

7 QUESTION: Well, there are situations in the
8 law where you have a time bomb ticking in somebody's
9 back yard and you go to the prosecutor and say, I want
10 you to arrest that man, and he says, well, I will think
11 about it, but you can't make him do it if he decides not
12 to do it.

13 MR. HODDER: That is true, Your Honor.
14 However, I think that there is a vast distinction that
15 can be drawn between the severity of these issues here
16 and the APA issue on, I think it is 706 of the APA where
17 they address the question of abuse of agency discretion
18 and do make it reviewable.

19 I feel that such issues are reviewable. I
20 would only say that I have tried to be of help to the
21 Court based on my understanding of the case. I would
22 say to this Court that if you seek to remand the case to
23 the agency, that you be careful to consider my
24 suggestion that we might go too far in engrafting the
25 Court of Appeals' concepts of judicial procedure by

1 tampering with the rule established by the agency, that
2 is, going against the teachings of this Court in Vermont
3 Yankee. And I thank you for hearing me today.

4 CHIEF JUSTICE BURGER: Very well, Mr. Hodder.

5 Do you have anything further, Mr. Rothfeld?

6 You have three minutes remaining.

7 ORAL ARGUMENT BY CHARLES A. ROTHFELD, ESQ.,
8 ON BEHALF OF PETITIONERS IN 83-1031, PRO HAC

9 MR. ROTHFELD: Yes, three quick points, Your
10 Honor.

11 First, in response to Justice Stevens'
12 question, the government has not conceded any of
13 respondent's points.

14 QUESTION: So that you may well take the
15 position in the District Court that this is an
16 unreviewable refusal to institute a proceeding.

17 MR. ROTHFELD: The Commission might very well
18 take that position, and certainly if there were District
19 Court proceedings, they would proceed on the record that
20 is in existence. I think this Court has repeatedly
21 indicated that whatever court is reviewing agency
22 actions, it would proceed on the record that exists, and
23 it would not -- the District Court would not be free to
24 create a record of its own.

25 QUESTION: Under the Administrative Procedures

1 Act, the District Court can reopen on its own. Can it
2 take testimony?

3 MR. ROTHFELD: I think so long as the record
4 is adequate to support the decision of the agency, the
5 court would have to review that record. If it concluded
6 that the record was inadequate to support the agency
7 conclusions, it could remand to the agency for further
8 proceedings.

9 QUESTION: Couldn't it take testimony itself,
10 though, under the APA?

11 MR. ROTHFELD: I am not sure if it could, Your
12 Honor. To the extent that the record in this case is
13 inadequate in some way, it would be open to whichever
14 court reviewed it, presumably the Court of Appeals, to
15 send it back to the agency.

16 QUESTION: Under the APA, if there were
17 jurisdiction, what would be the standard of review?
18 Would it be substantial evidence, or arbitrary and
19 capricious?

20 MR. ROTHFELD: Arbitrary and capricious, I
21 would think, because a hearing has not been held, and
22 the Atomic Energy Act does not require a hearing on the
23 record.

24 QUESTION: When you seek that kind of review
25 under the Administrative Procedure Act, what is your

1 jurisdictional basis?

2 MR. ROTHFELD: Well, it is not clear, as the
3 Court of Appeals noted, it is not clear precisely what
4 jurisdictional statute respondent could proceed under.
5 The Court of Appeals suggested general federal question
6 statute or --

7 QUESTION: What do you think? What do you
8 think when there is APA review in a District Court
9 because it isn't provided for somewhere else?

10 MR. ROTHFELD: Well, I think it is arguable to
11 proceed on one of those other statutes, but the
12 government has not conceded that it could, or that it
13 would be appropriate in District Court in any event.

14 QUESTION: I know you haven't, but my question
15 was, if you were going there, what would you suppose, if
16 you were going to try to go there, what jurisdictional
17 basis would there be in the District Court?

18 MR. ROTHFELD: If I were the respondent, I
19 would point to one of the statutes that were noted in
20 the Court of Appeals opinion, Section 1331, 1137. But
21 again, that would be as the respondent, and I am not
22 sure the Commission would agree.

23 QUESTION: Yes, I understand.

24 MR. ROTHFELD: Finally, I think that if the
25 Court of Appeals were to review this case and decided

1 the record was inadequate, there would be no bar in the
2 Hobbs Act to a remand to the agency.

3 The Hobbs Act provides for transfers to the
4 District Court only when genuine issues of material fact
5 are presented, and in this case there are no factual
6 issues. The question is whether the agency has properly
7 based its decision on the record before.

8 QUESTION: But your opponent disagrees. At
9 least I thought in answer to a colloquy he thought that
10 there were factual issues in the case.

11 MR. ROTHFELD: He presented factual
12 submissions to the agency, but the question for the
13 Court to decide is whether the determination that the
14 agency made is appropriately based on the record. The
15 Court -- I think as this Court has indicated repeatedly
16 in cases like Overton Park and Kemp versus Phipps, it is
17 not up to the Court to resolve these factual issues.
18 The Court can only review the accuracy of the agency's
19 action.

20 QUESTION: As I understand Mr. Hodder's
21 argument is that they have never had a chance to present
22 anything, to make a record here on which any court could
23 review.

24 MR. ROTHFELD: Well, respondent certainly had
25 an opportunity to present whatever factual material she

1 wished, and may present whatever factual material she
2 has not presented to this point.

3 QUESTION: Ordinarily, to present factual
4 material, you have at least an invitation to a hearing.
5 Is that not so?

6 MR. ROTHFELD: Only if it is a case of formal
7 adjudication or formal rulemaking. In many instances,
8 of informal adjudication or rulemaking, there are none.
9 The agency simply proceeds on whatever is submitted to
10 it by both sides. And in this case, the respondent or
11 someone in her position has an opportunity to submit
12 whatever factual materials he or she would like
13 considered.

14 Thank you.

15 CHIEF JUSTICE BURGER: Very well. Thank you,
16 gentlemen. The case is submitted.

17 (Whereupon, at 11:04 a.m., the case in the
18 above-entitled matter was submitted.)

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CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the

Supreme Court of The United States in the Matter of:

#83-703 FLORIDA POWER & LIGHT COMPANY, Petitioner v. JOETTE LORION, ETC., ET AL.; and
#83-1031 - UNITED STATES NUCLEAR REGULATORY COMMISSION AND UNITED STATES, Petitioners v.

JOETTE LORION, ET AL.

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

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