ORAL HISTORY OF
ALAN ROSENTHAL

Eighth Interview – July 18, 2011

This interview is being conducted on behalf of the Oral History Project of the Historical Society of the District of Columbia Circuit. The interviewee is Alan Rosenthal and the interviewer is Judy Feigin. The interview took place at Alan Rosenthal's apartment in the King Farm subdivision in Rockville, Maryland, on Monday, July 18, 2011. This is the eighth interview.

MS. FEIGIN: Good morning, Alan.

MR. ROSENTHAL: Good morning, Judy.

MS. FEIGIN: When we left off, the Board was being abolished and efforts to lobby on its behalf were unsuccessful. Where did that leave you?

MR. ROSENTHAL: It left me with the need to find something else to occupy my time, and a few months prior to the word from the Commission that it was intending to abolish the Appeal Panel, I had decided that maybe my time had come to find something else to do, so it wasn't simply the abolition of the Panel that led me to go elsewhere, and the elsewhere was to the Personnel Appeals Board of the then General Accounting Office.

The Personnel Appeals Board was created by statute. It called for five judges, and its mission was to consider and to pass upon claims by GAO employees that they had been subjected to a prohibitive personnel practice. Today, the Board has also the authority to adjudicate labor disputes, disputes between management and the union, but at that time, it only considered prohibited personnel practice claims.

The structure of the Board was something like that of the National Labor Relations Board. The Board had a general counsel, and the general counsel's responsibility was to receive the claims of employees that they had been subjected to prohibited personnel practices. If the office of the general counsel, upon investigation, concluded that the claim was meritorious, then it would prosecute the claim before the Board. If it determined that it was not meritorious, the employee had the right to retain private counsel to prosecute the claim. In the first instance, the claim was heard by a single member of the Personnel Appeals Board, and his or her decision was then appealable to the full five-member Board. It could be appealed by either the employee, if he or she lost before the single judge, or by the agency, if it in turn had not prevailed before the single judge. So that was essentially the structure. The one unique feature of the Board was that the five-year term to which you were appointed was not renewable. It was five years, and then you were out.

MS. FEIGIN: And who appointed you?

MR. ROSENTHAL: The appointment was made by the Comptroller General, but there was a committee that screened the applicants, and on that committee were both representatives of the management and representatives of the employees. The employees designated somebody to represent them on the screening panel. So this panel made a recommendation to the Comptroller General, and he – it was a man at the time – acted upon that recommendation. So I

was appointed to this Board in the spring of 1991, and this was some three or four months before the abolition of the Appeal Panel.

I found the five-year service on the Personnel Appeals Board interesting. For two of those five years, I served as its chair, so I had some administrative responsibilities. The administrative responsibilities were made much less onerous by the fact that the Board had a perfectly magnificent executive director. Her name was Beth Don and I would be remiss if in the course of my recounting this oral history I did not take recognition of the fact that she was just great, and I have to say that she still occupies that position, even though it's now 20 years later.

There was nothing particularly remarkable about any of the cases that I heard during that period of time. I have to say, however, that early in my career on that Board, I had some question about my colleagues, and it had nothing to do with their legal acumen. A month or so after I joined the Board, I had a physical examination in which it was determined that I had some kind of growth on my lung, left lung to be specific, and I underwent an operation that removed what turned out to be an entirely encapsulated cancerous tumor. I might say that I've had no problems with it at all for 20 years since that operation, and it occasioned no difficulty. Because it was encapsulated, I didn't have to undergo chemotherapy or radiation or anything at all. But needless to say, there was a period of recovery. This was relatively major surgery, an operation on the lung.

It turned out that the then Board chairman had scheduled an oral argument in a very important case, and this was an oral argument before the entire Board, for some two weeks after my surgery. Well I made the request, which I thought was perfectly reasonable, to postpone the argument. There was nothing about the case that necessitated an immediate decision, and I thought, as I say, that this request was entirely reasonable, and it was rejected. The Board chairman said to me, "Well, of course, the oral argument will be transcribed, and you can read the transcript." And I said to him, "Well, what about my ability to ask questions?" [Laughter] That didn't make much of an impression upon him, so just two weeks after the surgery, I dragged myself out of my home and went down and participated in that oral argument, and returned home immediately thereafter. There were no ill effects, but needless to say, that left me with a rather sour taste in my mouth about the willingness of my colleagues to accommodate what seemed to me, again, to be a perfectly reasonable request. But that was the only actually unpleasant note in terms of my association with colleagues during the five years that I served on the Board.

At the end of the five years, I was off the Board. Again, there was no possibility of serving on it for a second term, and for the next two-and-a-half years, I was in the only period of total unemployment since I graduated from law school, now 60 years ago. I can't say that I really

looked around for a job, but it wasn't a particularly happy time.

But we now come to early 1999, and I received a phone call from the then Chief Administrative Judge of the Nuclear Regulatory Commission's Atomic Safety & Licensing Board Panel, that was the trial board panel, whose decisions I had reviewed as a member of the Appeal Panel. Paul Bollwerk said to me that he had just been commissioned to conduct a special inquiry utilizing a task force into a claim that the NRC Office of Enforcement had bungled its investigation of an allegation that the officials of the Millstone Nuclear Power Station, which is located just south of New London, Connecticut, had retaliated against an employee that had been a whistle-blower. Paul told me that the chairman of the Commission had directed him to include in this task force four other persons, including one outsider, and Paul asked me whether I would be willing to serve as the outsider.

MS. FEIGIN: You were sort of an inside/outsider? [Laughter]

MR. ROSENTHAL: Well, I was an outsider at that point. As I say, I was totally unemployed. When he asked me whether I was willing to serve as the outside member of this task force looking into this claim, he told me that if I accepted it, I should be prepared to work on it 24/7, and this was because the then chairman of the Commission, Shirley Ann Jackson, had told Paul that he had six weeks in which to complete this project, and six weeks meant six weeks, not one minute beyond six weeks. And I think she threatened him

with I don't know what kind of consequences if the six weeks were not met [laughter].

I agreed to serve on this task force, and it was six weeks of I would say 60 hours per week of work. It was pressure that I hadn't been under for a long time previously, and I'm thankful to say that I have not been under that pressure since then. In any event, we completed the project in the six-week period and turned in the report, and I then returned to idleness [laughter].

In the summer of that year, I received a phone call from Paul Bollwerk, and he asked me whether I might be interested in joining the Licensing Board Panel as a part-time member. There was no thought on his part, and certainly no thought on my part, of possibly returning to full-time government employment after having, in 1988, decided that full-time was no longer something of interest to me. But I agreed to join the Licensing Board Panel, and I did so in October of 1999.

MS. FEIGIN: Was this on a contract basis?

MR. ROSENTHAL: I don't know if it was on a contract basis. I signed a letter agreeing to serve, and I serve on an annual basis. Now it begins on July 1 and goes through the following June 30, so I just renewed within the last month my appointment for another July 1 to June 30 year. Obviously I serve at the pleasure of the Chief Administrative Judge of the Panel. He decides whether he wants each of us part-timers to serve for another year.

I think I might have mentioned in my session dealing with the Appeal Panel that the Licensing Board Panel, on which I now serve, consists of a group of full-time lawyer members and full-time technical members, and a large number of part-time technical members. I'm the only part-time lawyer member. Part-time technical members are drawn from a variety of sources. Many of them are academics, teaching at universities, and many of them are retired from whatever their occupations might have been. In any case, I joined the Licensing Board Panel in the fall of 1999, so I've now been on it for I guess it's almost twelve years, if my arithmetic is correct.

In the early days on the Panel, the cases to which I was assigned were for the most part challenges to applications for license amendments that would approve decommissioning plans. These applications were filed by NRC licensees who had been engaging in some activity or another under the aegis of their NRC license. For one reason or another, the particular activity had terminated, and under the Commission's regulations, the licensee was then required within a year to submit a decommissioning plan to ensure that whatever radioactive material remained on the site would be handled in such a way as to pose no danger to the public health and safety. In many instances, some local group would oppose the decommissioning plan that had been submitted by the licensee, asserting that the plan was not sufficient to protect the public

health and safety.

One of these cases had been assigned to me almost immediately upon my arrival in late 1999, and today, July the 18th, 2011, the matter has not as yet been resolved [laughter]. It's an absolutely unbelievable case. It involves the United States Army. The Army has a proving ground out in Jefferson County, Indiana, which is on the Ohio River, about equidistant between Cincinnati to the north and Louisville to the south. The county seat is Madison, Indiana. Well, beginning in the 1980s, the Army was shooting off ammunition that was designed to test its capability to penetrate tanks. It required an NRC license because the ammunition contained a certain amount of depleted uranium, a radioactive material. In something like 1994, the Army stopped this activity of testing antitank munitions. Under NRC regulations, it should have submitted a decommissioning plan in one year. Instead, being the Army, it paid no attention to that requirement at all, and it was sometime around 1999 when it submitted its decommissioning plan to the NRC.

At the end of 1999, a local group filed a request for a hearing to challenge this plan, and I determined that the group had standing and had also submitted at least one acceptable contention. So I granted the hearing request and was prepared to move forward to consider the challenge to the plan. The Army said, "Please don't do that. We're going to come up with an entirely revised plan." So I put the case in mothballs, and a year or so

later, the Army came up with its new plan, and the Commission's regulatory staff said, "We're not going to even consider this plan because it's got so many defects on its face." So, said the staff to the Army, "Go back to the drawing board." The Army then came up with another plan, and the staff said, "Well, before we pass upon that plan, you have to conduct a survey of this site – they call it a site characterization – to determine where any spent munitions might be found on the site, etc. The Army said, "Well we can't do that, it's too dangerous, because there's a lot of unexploded munitions on the site." [Laughter] And I'm thinking to myself, wait a minute, this is the Army, which I thought had trained experts in dealing with unexploded munitions, UXOs I think they're called [laughter]. In any case, the Army said, "We can't do this; now what we would like is a license to continue to maintain the site without any kind of plan for ultimate decommissioning." Well, that was granted, but a year or two later, the Army came back and said, "Well, we changed our mind. We now can go forward with conducting the site characterization. I guess we did find some soldiers in our ranks who are capable of that kind of activity, but we want a period of five years in which to conduct the site characterization." This didn't sit too well with the local group, but we conducted a hearing and decided, with some reluctance, that the Army had made a good case for having this period of time to conduct the site characterization and to submit a new plan. So we granted them the five

years, which will run out this December. December 2011. By December 31, the Army will be required to submit a new plan with the site characterization as part of it. And this will be – what is it – 12 years since I got the case, and something like 17 years since the activity terminated.

Now I can't say that this is typical of the cases that I've handled, but it is an example of what can happen in the course of the operation of this bureaucratic maze, and I can say that I have one other case that has had an equally – or almost equally – long history without its being finally resolved. But, again, for the most part, these cases move forward with some degree of dispatch. I say "some degree," because the entire mechanism, adjudicatory mechanism that is, of the NRC is absurd. What our regulations require is – now I'm talking about the applications for permits to construct and to operate nuclear power plants – and there has been a renaissance in that area. Between 1983 and about 2006, a period of 23 years, there were no new applications filed for permits to construct and/or licenses to operate nuclear power plants. But there now are probably 20 such applications in the mill before licensing boards.

Now how does the adjudicatory process start? The Commission puts a notice in the *Federal Register* that an application has been filed by the XYZ Utility for a combined permit to build and license to operate a nuclear power plant at a particular site. These applications, I might say, nowadays almost all call for the construction of additional units on

existing sites, sites where there are already one or more nuclear power units. I think there's just one exception. I think there's one application that's been filed that calls for the construction of a nuclear power plant on a so-called virgin site.

Within 60 days of the notice in the *Federal Register* of this particular application, anyone desiring to challenge the application must file a hearing request. And that hearing request, in addition to establishing the standing of the particular hearing requestor to challenge the application, must set forth contentions that are deemed admissible under the provisions of the Commission's Rules of Practice. It must set forth in detail a solid basis – or bases – for challenging the particular application.

Now, environmental contentions must, in effect, challenge the Nuclear Regulatory Commission's fulfillment of its responsibilities under the National Environmental Policy Act. That Act, in the context of the NRC, requires the Commission staff to fully evaluate the environmental impacts that will be associated with the construction and operation of the facility, and to conduct a cost-benefit balance with respect to those impacts. So, the challenge on the part of the hearing requestor to the application must, insofar as concerns the environment, be challenging the staff's environmental assessment, which results in an Environmental Impact Statement.

The problem is that at that early stage, the staff hasn't even

embarked upon its environmental assessment. It will have received from the applicant for the permit an environmental report, which the applicant must submit, but it will not have the staff's action on that report in the form of an environmental impact statement. Now, to be sure later on, when the environmental impact statement is filed, the hearing requestor, now presumably an intervenor, its hearing request having been granted, will have the opportunity to put in new contentions. But it really makes very little sense, in my judgment at least, to require a challenger to an application for a permit to construct and license to operate a nuclear power plant to do anything more than establish standing before the staff has completed its work. But that's the way it goes.

In the now almost twelve years that I have been back at the NRC, the most significant matter that I've worked upon has involved the proposed Yucca Mountain high-level waste repository in the state of Nevada. Now a little bit of history. Obviously, one of the major issues regarding the generation of electricity through the use of nuclear power is what to do with the spent fuel. Currently, the spent fuel is retained onsite, either in a pool of water or in dry casks on the surface of the land.

Now, it was long ago recognized that this was not a very good long-term storage of nuclear waste, and so back in 1982, and that's almost 30 years ago, the Congress enacted the Nuclear Waste Policy Act of that year in which it directed the Department of Energy to come up with plans

for the construction of an underground repository to which the spent nuclear fuel that was being amassed at these various sites could be transferred for permanent storage. The Department of Energy, as required by the 1982 Act, embarked upon the study of a large number of possible sites for this repository, and eventually there were three sites that were selected for further consideration. One of them in Deaf Smith County, Texas; another on the Hanford Reservation in the State of Washington.

MS. FEIGIN: An Indian reservation?

MR. ROSENTHAL: No, no. This was a reservation that actually had nuclear activity on it, definitely not an Indian reservation. And finally, Yucca Mountain, which is located some 100 miles northwest of the City of Las Vegas, adjacent to the Nevada test site.

Of these three sites, Yucca Mountain was eventually selected, and it was selected under the aegis of amendments to the Nuclear Waste Policy Act in 1987. The Act specifically provided that the Department of Energy was to consider only Yucca Mountain. The suspicion in some quarters is that Yucca Mountain was selected because it was in a state which had relatively little political influence – at the time, at least. Yucca Mountain having been selected, it was supposed to receive spent fuel by January 31, 1998. That's a few years ago [laughter]. In point of fact, the application for a permit to construct Yucca Mountain was not filed with the Nuclear

Regulatory Commission until June 2008. In other words, more than ten years after the facility was supposed to be up and running.

MS. FEIGIN: Is there a reason for that?

MR. ROSENTHAL: Well, the reason for that is that the Department of Energy spent how many years – 1987 to 2008 – investigating the site, preparing its application, and in the course of doing all of that, spending probably $12 billion. Just to construct a tunnel, a five-mile-long tunnel, under the mountain, DOE expended $2 billion. I might say I went through that tunnel at one point. They had a tram that went through it. They were conducting investigations – geological investigations, hydrological investigations – under this tunnel, or at various locations through the tunnel.

Now, before the application was filed, and this, as I say, was in June of 2008, there were licensing boards that were very active, and they were active because there were a number of pre-application discovery issues that had arisen. I had the dubious pleasure of serving on the so-called pre-application board that adjudicated these issues, and the issues were being adjudicated between, on the one hand, the Department of Energy, which was the proponent of the proposal, and on the other hand, the objectors, which were principally the state of Nevada, but in addition to that, the state of California – Yucca Mountain is very close to the California border – and certain other governmental entities within Nevada. Well the application was filed in June 2008 and Nevada and these other

opponents filed something over 300 contentions in opposition to Yucca Mountain, which raised an enormous number of both safety and environmental issues. The Department of Energy, supported by the Nuclear Regulatory Commission staff, responded to these contentions by saying that virtually every one of them should be rejected because they didn't comply with the Commission's regulations regarding what was necessary in order to have a contention admitted for litigation.

In the spring of 2009, a little less than a year after the application was filed, three separate licensing boards went to Las Vegas to the Commission's hearing facility that had been built there specifically for the purpose of the Yucca Mountain adjudication to hear oral argument on the 300-and-some-odd contentions and the objections that had been filed in virtually all of them. The contentions were divided up between these three boards, and each board spent one day listening to oral argument on their segment of the overall —

MS. FEIGIN: Just one day?

MR. ROSENTHAL: Just one day. So that the total oral argument went to three days. Three full days of argument on the objections to these contentions. On the day that I sat as a member of one of the three boards, I requested and obtained the privilege of making an opening statement on my own behalf in which I said that if, as I thought was very likely to be the case, the Board ended up finding that the vast majority of these contentions were admissible, there

were very serious questions in my mind – or there would be very serious questions in my mind – regarding the credibility of both the Department of Energy and the NRC staff. These objections were ridiculous. In fact, Nevada was represented by a former deputy general counsel of the Nuclear Regulatory Commission, and if there was anybody who knew how to file contentions that were in compliance with the Commission's regulations, it was that gentleman.

I don't think that my message was favorably received by the Department of Energy counsel or the staff counsel, but they didn't say anything in response. It turned out that we admitted all but about 15 of the contentions, which bore out how ridiculous these objections were. In any case, we were then prepared to move forward on the 300-plus admitted contentions when last March – March a year ago, that is – 2010 – the Department of Energy filed a motion to withdraw its application. Was the motion based upon a claim that the Department of Energy has suddenly discovered that there are safety or environmental problems with Yucca Mountain that cannot be overcome? Absolutely not. The motion was based solely upon policy considerations, and the foremost policy consideration being guess what? DOE just woke up to the fact that there is a lot of local opposition to this proposal in the state of Nevada.

Needless to say, Nevada welcomed this withdrawal, but it did not sit that well with the states of Washington and South Carolina, in

particular, both of which have a lot of nuclear junk accumulated on sites in their states and had been counting upon Yucca Mountain to get rid of it. So, the motion to withdraw the application was duly opposed by those states, among others, and the opposition was based upon the claim that the 1987 amendments to the Nuclear Waste Policy Act that designated Yucca Mountain as the sole site prohibited the Department of Energy from withdrawing the application that that very Act required it to file. The argument was that under the statute, DOE was required not only to file but to prosecute the application, and it was for the Nuclear Regulatory Commission then to make a decision as to whether Yucca Mountain cut the mustard in terms of safety and environmental considerations.

The Board (not including me) assigned to consider the motion to withdraw took note of the fact that the 1987 Act also permitted a challenger to the motion to go directly into court without exhausting administrative remedies, a very unusual provision. And indeed, the Board noted, Washington and South Carolina had done just that. They had gone to the District of Columbia Circuit challenging before that court, as before the Licensing Board, the motion to withdraw the application.

At this point, the Board said to the Commissioners, "We don't see any cause to pass upon this motion to dismiss, any objection to it. The matter is before the court, the court is going to decide it in any event, so it's going to be simply a waste of resources for us to proceed with this

matter." The Commission's response was, "You're going to decide it, and moreover, you're going to decide it in 30 days." To which the Board responded, "We can't do it in 30 days. We haven't gotten the briefs yet, let alone the oral argument, but we will issue a decision as rapidly as we can following the oral argument."

In fact, within a month of the oral argument, on the 29th of June, 2010, the Board issued its decision holding that the Department of Energy did not have the authority to withdraw its application. The Board agreed with South Carolina and Washington State that, under the provisions of the Nuclear Waste Policy Act, the Department of Energy had to prosecute its application, and it was for the NRC to decide whether to grant or to deny it. DOE immediately appealed the Board's decision to the Commission, supported, of course, by Nevada. Today, July 18, 2011, this is almost thirteen months since the rendition of the Licensing Board decision, and the Commission has not as yet publicly announced whether or not it will review the Licensing Board decision.

Rather surprising isn't it? The Board was given a month to decide the case, and the Commission in thirteen months – almost thirteen months – has not as yet publicly announced whether it will review the decision. Now, is this because the Commission has not voted on this matter? There was a Congressional hearing a few months ago addressed to the question of what's going on here, and the four commissioners who are participating

in this matter – the fifth commissioner had recused himself because he had had some involvement with Yucca Mountain before coming on the Commission – testified under oath that they all had voted last October. Well why, you might ask, has there been no decision? The reason that there has been no decision is that the chairman will not allow there to be a formal vote. What happens regarding Commission decisions is the commissioners all submit their votes on a sheet, and then, at a meeting, their votes are confirmed. The chairman will not allow there to be a confirmation meeting. And why is that? Because the chairman is totally opposed to the Yucca Mountain project. He has one commissioner with him. There are two commissioners who wish to uphold the Licensing Board decision. What happens if there's a 2/2 split, as there was here? The decision below is affirmed, and that is not what the Commission chairman wanted. What he wanted, and what he's now accomplishing unilaterally, is killing the project in a different way.

DOE and the NRC both have totally dismantled their Yucca Mountain operation. Everybody that worked on Yucca Mountain in the Department of Energy is no longer assigned to that project. The NRC has shut down entirely its review of the Yucca Mountain proposal. The hearing facility in Las Vegas that was constructed solely for the purpose of conducting the evidentiary hearings on Yucca Mountain is being released. As of the end of this fiscal year, that's September 30, 2011, neither the

Department of Energy nor the NRC will have anybody working on Yucca Mountain. All of the people that had been working on it will be assigned elsewhere. All of the contractors that had been employed to work on it will be gone. Even should the court, which still has the matter before it, determine that the Licensing Board decision was correct, that under the Act in question DOE was required to prosecute the application, as a practical matter the project is probably dead.

Now, are these facts secret? No. Everybody knows what has happened here. And what it has done, among other things, has been to sadly impair the Nuclear Regulatory Commission's reputation as a nonpartisan regulatory agency. It's recognized far and wide that the chairman, for political reasons, has unilaterally destroyed this project. The political reason: Senator Harry Reid. The Majority Leader of the United States Senate, a Senator from the state of Nevada, has violently opposed this project from Day One, and the suspicion abroad – I think myself it's more than a suspicion – is that this is being done for Harry Reid's benefit as well as to make good on President Obama's commitment when campaigning in Nevada to scrub Yucca Mountain if elected president. So this is entirely a political decision, bearing in mind again that DOE did not claim in its motion to withdraw the application that the motion was based upon safety and/or environmental considerations.

MS. FEIGIN: You said last time that there's an irony in President Obama's position. I wonder if you could explain that for us.

MR. ROSENTHAL: I'd be happy to do so. There are more operating nuclear power plants in the State of Illinois than in any other state in the Union. As a consequence, there's more nuclear waste generated by power plants to be found in Illinois than in any other state. For that reason, it would seem that Illinois would have the greatest interest in seeing Yucca Mountain built so that the nuclear waste that's being generated in the state could be removed from it to the repository. I'm certain that, unlike President Obama, the senators and representatives from the state of Illinois are most anxious to have Yucca Mountain built, although apparently, at least with the Democratic members of Congress, Senator Reid carries enough influence that they're not raising an issue about it. It is my understanding that among the Republicans in the House there's a great deal of agitation over what's happened with respect to the Yucca Mountain application.

MS. FEIGIN: I sense a frustration on your part, and I wonder does this impact how you feel about decisions you make that go up to the Commission, that at least in some cases can be politically motivated?

MR. ROSENTHAL: Over the years, obviously, first as an Appeal Panel member and more recently as a Licensing Board member, I've had many decisions go to the Commission. I've been satisfied with some of the Commission outcomes.

I've been dissatisfied with others. But I have never previously felt that any Commission decision, whether on review of one of my decisions or a decision of a colleague, was motivated by partisan political considerations. I have thought that some Commission decisions over the years have reflected too cozy a relationship with the industry, but that was not a partisan political matter. And that, frankly, is what disturbs me the most about what has transpired with regard to Yucca Mountain.

I have devoted a very significant portion of my life to this Commission and its predecessor, and as a consequence, I take a substantial interest in how it's viewed by the public at large. It's for that reason that I deplore what has transpired with respect to the Yucca Mountain application in the course of the last year or so.

Now, I don't know what's going to happen from this point on. My oral history is about to come to an end. I would like to think that despite the current posture of this matter, Yucca Mountain will be revived. Now when I say "revived," what I'm talking about is the application. I'm not predicting at this point what will be the ultimate outcome of an evidentiary hearing on Yucca Mountain, should one occur. There are very serious safety and environmental issues that have been raised by the opponents, principally the state of Nevada, and it might turn out that their concerns will prove to have been totally justified, with the consequence that at the end of the day NRC boards and the Commission on its review will

determine that Yucca Mountain simply will not fly. My problem is that Yucca Mountain is being scrubbed – or at least an attempt is being made to scrub it – without the evidentiary hearing that seems plainly required, as the Licensing Board found, by the governing statute, and this is particularly appalling, in my mind, because there is no Plan B for dealing with the accumulating spent fuel.

There is some kind of commission that has been established by the president to explore other alternatives. In my mind, such commissions are created simply because there's no other alternative on the horizon. It's the absence of Plan B for disposing of this nuclear garbage, some of which I might say is military in nature. Yucca Mountain would not merely be housing the spent fuel from commercial nuclear power plants. It also would be housing nuclear waste that's generated by military operations.

So that's where it stands, and I don't know how it's going to turn out. As matters now stand, Yucca Mountain is dead. It might or might not be revived. I just think this is a very, very sad day in the history of the Nuclear Regulatory Commission over the now almost forty years of its existence.

MS. FEIGIN: I wonder now that you're on the initial panels, as opposed to an appellate panel, whether that changes your perspective at all. In other words, when you were on the appellate panel and you were reviewing these initial

decisions, you looked at them one way; now when you're looking at them, does it change anything for you?

MR. ROSENTHAL: Not really. I would like to think that I avoid some of the mistakes that as an appellate adjudicator I found in Licensing Board action [laughter], but I haven't found it substantially different. One of the things, though, that I should have mentioned is that I've been there, as I say, for almost twelve years, and I've conducted exactly one evidentiary hearing. Almost all of the cases that I've been on have been disposed of without the necessity of an evidentiary hearing. Now, I probably have conducted maybe 40 oral arguments on issues of standing, on issues of contention admissibility and the like, but that happens to have been the way it goes. I mention that because it demonstrates that as it's turned out, what I've done as a Licensing Board panel member has not been substantially different from what I did as a member of the Appeal Panel [laughter]. It's been basically hearing oral arguments on legal issues.

MS. FEIGIN: You work part-time now, but what does that mean? How much time do you devote to it?

MR. ROSENTHAL: Well unfortunately I'm not working as many hours these days as I would have liked. Four or five years ago, in anticipation of extended evidentiary hearings with respect to Yucca Mountain, as well as numerous evidentiary hearings in connection with the renaissance in applications for construction permits and operating licenses for new nuclear power plants,

the Licensing Board panel management decided to take on four additional full-time lawyer judges. Well, Yucca Mountain did not materialize, or at least it has not at this point. Most of the applications for construction permits and operating licenses for new nuclear power plants have not produced evidentiary hearings. The consequence is that the workload is now much less than had been anticipated. Obviously the full-timers have to be kept busy, and so I get what's left over, and these days it isn't very much. Most of my time I regret to state is devoted to the peer review of other Licensing Board members' work. And that's something that gets me into the office from time to time, but I would like to have more work than I now am given or that I'm likely to receive in the future. How long I'm going to stay on the panel remains to be seen. As indicated earlier, I signed up last month for another year, which will take me, health permitting, until June 30, 2012, and it remains to be seen whether I will continue. My present inclination is that if they continue to want me, I will stay with the panel as long as my health permits and there's at least something for me to do.

MS. FEIGIN: Let me just ask one closing question before we leave the Commission today. You said earlier that there was a long period without applications for new or expanding facilities and then there came a time more recently when they have started to come in. I assume the original hiatus might be related to Three Mile Island?

MR. ROSENTHAL: I don't know to what extent it was related to Three Mile Island. I think it was related more to considerations of economics. It requires an enormous sum of money to build these plants. In many states, you cannot put the cost of construction into your rate base until after the facility has gone into operation, so you've got significant borrowing costs associated with building them.

There was a time when it was thought that electricity generated by nuclear power would be too cheap even to meter, and that certainly was proved early on to be a total fallacy. I have even substantial doubt as to whether many of these proposed plants today – the ones that are going through licensing proceedings – will actually be built. In that connection, Dominion Power Company, which is across the river in Virginia, has a two-unit facility in operation at Lake Anna, down south of Fredericksburg. North Anna is the name of the facility. It applied for an early site permit for an additional unit or two on that site. When it came to the attention of a reporter, he asked the president of Dominion whether the application for this permit meant that Dominion was all ready to go with the building of an additional unit or two once it got NRC approval, and the president said, "If I answered that question 'yes,' my chief financial officer would have a heart attack." But even back in the 1980s it was becoming increasingly clear that there were definite economic obstacles to building these plants.

MS. FEIGIN: Why now then is there an increase in applications?

MR. ROSENTHAL: I think they're hopeful of getting all kinds of federal government benefits of one kind or another. There is a federal government impetus to increase the use of nuclear power for the generation of electricity, but it remains to be seen how many of these plants actually get built.

MS. FEIGIN: You said earlier that the way the system works is a bit awkward in that the environmental assessments are written after you file your opposition to them, so is it ultimately that you can amend your opposition?

MR. ROSENTHAL: Well, yes. You can file what the Commission for a long time characterized as late contentions, which carried an onus. Really they should be described as new contentions. Once there are new developments, you can file new contentions addressed to the new developments.

My view of it, as I indicated earlier, is that at the threshold state, all that a prospective opponent should have to do is to come in and establish standing, that he has a basis for complaining about the particular facility. Then everything should be kept in a state of suspension until the staff has completed its technical review. The technical review consists of issuing an environmental impact statement addressed to the environmental impacts and a final safety analysis report which is addressed to the safety issues. What happens now is hearing request filed, opposition filed by the applicant, usually joined by the Commission staff. The Board then passes upon the hearing request, decides whether there's standing, decides

whether there's at least one admissible contention, and then guess what happens? The case goes into suspension for a year, two years, while the staff is conducting a technical review. It makes utterly no sense. I'm just waiting for some young administrative law professor who's faced with publish or perish [laughter] to come up with a scathing *Law Review* article addressing this system which for my money would have made Lewis Carroll and Alice in Wonderland proud.

MS. FEIGIN: Alan, maybe since you're not working as many hours as you had hoped, you can start working on that article [laughter].

MR. ROSENTHAL: Obviously, as long as I remain in the employ of the NRC, even on a part-time basis, it would be very poor form, I think, for me to attack the Commission's procedures. Needless to say, I'm not the only one who is mystified by them, and particularly, there are boards that are now handling these power plant cases, which I am not. It's sort of frustrating when they go through the preliminary stages and they hold oral arguments on contention admissibility and standing and all of that and then they come down with their decision on what contentions are admissible and what are not, and then they just do nothing for a year or two in the case, waiting for the technical review to be completed. And I would have to say in that regard that the staff is pretty good about the technical reviews in the power plant cases, in getting them completed seasonably. But in the decommissioning cases, or in the license extension cases, they take

centuries.

If I may just add one other thing before we close it out, on license extensions. You have a license and it's for a term of years, and now you want to get it renewed. Here is a perfect example of the flaws associated with the renewal process. In one of these cases a month before the license was to expire the licensee filed its renewal application. This happened to be for a uranium mine. Because the licensee had filed the application a month before the license was to expire, under the Commission regulations, the license thus remained in effect until such time as the renewal application was adjudicated, on the opposition of residents of an Indian reservation who claimed that this mine's operations had been polluting its waters and had caused all kinds of ailments to the residents of the reservation. Now, their hearing request was granted two years ago. Have their claims been heard yet? No they haven't. And why is that? Because the Commission staff has not completed its technical review of the license renewal application, and it now looks like it'll be another year before this matter reaches a hearing. So what's the current situation? The situation is that for at least three years this mine will continue in operation, notwithstanding the claim of the Native Americans that the mine operations are causing them substantial physical injury, without any hearing on the merits of that claim. Is that reasonable? No. But that's the way the system works, and I have to say that while the Commission puts

enormous pressure on the licensing boards to get their decisions out, particularly where it's an application for a permit to build a nuclear power plant, and to operate it, in these cases such as the one I just referred to, no pressure on the staff at all. It's a disgrace. But that's the way that the system operates. If I were the Native Americans in this uranium mine case, I would be in court claiming that there has been a denial of due process and that because of the fact that the agency has dragged its feet so long, the principle of exhaustion of administrative remedies simply doesn't apply. But this is the way it goes.

So, what I'm saying is that there's a lot wrong in my judgment with the way that the administrative adjudicatory process operates. There's one irony here, which is that while it's to the advantage of the licensee seeking an extension to wait until a month before its license expires to apply for the extension, most of the utilities seeking extensions of their operating licenses apply for the extensions 10 and 15 years before the license expires because they want the certainty as early as possible that they'll get the license extension.

MS. FEIGIN: Interesting.

Well thank you very much for walking us through this. I appreciate it enormously.

MR. ROSENTHAL: It's been a pleasure once again. I guess there'll be one more session.

MS. FEIGIN: I look forward to it.