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1612 K St. N.W., Suite 300
Washington, D.C. 20006
(202) 293-3950

UNITED STATES NUCLEAR REGULATORY COMMISSION

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PUBLIC WORKSHOP

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STANDARD DESIGN CERTIFICATION RULEMAKING PROCEDURES

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Capitol Hyatt Regency Hotel
Columbia Ballroom B
400 New Hampshire Avenue, N.W.
Washington, D.C.

Monday, July 20, 1992
9:05 o'clock a.m.

ANN RILEY & ASSOCIATES, Ltd.
Court Reporters
1612 K. Street, N.W., Suite 300
Washington, D. C. 20006
(202) 293-3950

PARTICIPANTS:

IVAN SELIN, Chairman, U.S. Nuclear Regulatory Commission
CAROL ABBOTT, USNRC Office of the Controller
DAN ABELES, Westinghouse Electric Corp. (Penn.)
ALAN BEARD, Halliburton NUS
MARK BEAUMONT, Rockville, Maryland
ROBERT BELL, JR., ABB Combustion Engineering (Conn.)
DAN BERKOVITZ, Nuclear Regulation Subcommittee, Committee on Environment and Public Works, U.S. Senate
ROBERT BISHOP, NUMARC
MIKE BLAKE, Nuclear News
ERNEST L. BLAKE, Shaw, Pittman, Potts & Trowbridge, Washington, D.C.
PAUL BOLLWERK, USNRC Atomic Safety & Licensing Board Panel
BERNARD BORDENICK, USNRC Office of the General Counsel
THOMAS BOYCE, NRR
JAMES BREW, New York State Public Service Commission
CHARLES BRINKMAN, ABB Combustion Engineering (Conn.)
GREGORY A. BROWN, Stone & Webster Engineering Corporation
WAYNE BURNSIDE, USNRC Division of Security
FRANCIS (CHIP) CAMERON, USNRC Office of the General Counsel
RAMSEY COATES, Westinghouse Electric Corp. (Penn.)
BARTON COWAN, Eckert, Seamans, Cherin & Mellott, Pittsburgh, Pennsylvania

PARTICIPANTS (Continued)

DENNIS CRUTCHFIELD, NRR
LILLIAN CUOCO, OGC Representative, Tennessee Valley Authority
JAMES M. CUTCHIN, USNRC Office of the General Counsel
AL CYMBALUC, Akin, Gump, Hauer & Feld, Washington, D.C.
GEORGE DAVIS, ABB Combustion Engineering (Conn.)
LEE DEWEY, USNRC Atomic Safety and Licensing Board Panel
EVELYN DIDIER, Trends Publishing
JOSEPH R. EGAN, Shaw, Pittman, Potts & Trowbridge, Washington, D.C.
STEVE ENGLAND, Illinois Department of Nuclear Safety
MICHAEL FINKELSTEIN, USNRC Office of the General Counsel
NORMAN FLETCHER, USDOE Office of Nuclear Energy
HERBERT M. FONTECILLA, Virginia Power
JIM GLEASON, USNRC Atomic Safety and Licensing Board Panel
ALEX GLENN, Newman & Holtzinger, Washington, D.C.
JAY GUTIERREZ, Newman & Holtzinger, Washington, D.C.
ELISE HEUMANN, USNRC Office of the Comptroller
ADRIAN HEYMER, NUMARC
SUSAN HIATT, Ohio Citizens for Responsible Energy
ROGER HUSTON, Rockville Licensing Manager, Tennessee Valley Authority
JENS ISEMO, Embassy of Sweden Science Office

PARTICIPANTS (Continued)

EMILE JULIAN, USNRC Office of the Secretary
KATHRYN KALOWSKY, Winston & Strawn, Washington, D.C.
ARMAND LANGMO, Bechtel Power Corporation
NICK LIPARULO, Westinghouse Electric Corp. (Penn.)
JOHN S. LOOMIS, Sargent & Lundy, Chicago, Illinois
MARTIN MALSCH, USNRC Office of the General Counsel
REGIS MATZIE, ABB Combustion Engineering (Conn.)
JAMES P. McGRANERY, JR., Dow, Lohnes & Albertson,
Washington, D.C.
BRIAN McINTYRE, Westinghouse Electric Corp. (Penn.)
THERESA MEISENHEIMER, Bechtel Power Corporation
HOMI MINWALLA, Roy F. Weston, Inc., Washington, D.C.
GEARY MIZUNO, USNRC Office of the General Counsel
JANICE MOORE, USNRC Office of the General Counsel
THOMAS MOORE, USNRC Atomic Safety & Licensing Board Panel
JAMES MUCKERHEIDE, Massachusetts Emergency Management Agency
RAYMOND NG, NUMARC
WILLIAM OLMSTEAD, Administrative Conference of the U.S.
JANICE OWENS, Ogden Environmental and Energy Services,
Fairfax, Virginia
WILLIAM PARLER, USNRC Office of the General Counsel
MICHAEL PHILLIPS, Newman & Holtzinger, Washington, D.C.
DENNY POPP, Westinghouse Electric Corp. (Penn.)

PARTICIPANTS (Continued)

MICHAEL RAFKY, USNRC Office of the General Counsel
CAL REID, DOE Plant Design Control Office
MARK ROWDEN, Fried, Frank, Harris, Shriver & Jacobson, Washington, D.C.
MARK SANFORD, New Generation Development Manager, Tennessee Valley Authority
LEE S. SCHROEDER, Office of Science & Technology Policy Assistant Director, Executive Office of the President, Washington, D.C.
JOSEPH SCINTO, USNRC Office of the General Counsel
HOWARD K. SHAPAR, Shaw, Pittman, Potts & Trowbridge, Washington, D.C.
IVAN SMITH, USNRC Atomic Safety and Licensing Board Panel
JOHN SUTTON, Yankee Atomic Electric Co. (Mass.)
ROBERT E. SWEENEY, STS, Bethesda, Maryland
CHARLES THOMPSON, DOE Office of Regulatory Development Director
DEAN TOUSLEY, U.S. House of Representatives
WILLIAM TRAVERS, NRR
STUART TREBY, USNRC Office of the General Counsel
PHIL TROY, Newman & Holtzinger, Washington, D.C.
GEORGE O. URQUHART, Virginia Dept. of Energy Services
JEFFREY WINTON, NRR

PARTICIPANTS (Continued)

ELIZABETH YEATES, USNRC Office of the Secretary

MARIAN ZOBLER, USNRC Office of the General Counsel

I N D E X

PROCEEDINGS

[9:05 a.m.]

WELCOME

MR. CAMERON: Good morning, everyone. I would like to welcome you to the Workshop on the Procedures for Commission Certification of Reactor Designs. My name is Chip Cameron. I am a Special Counsel for Public Liaison and Waste Management in the Office of General Counsel with the Commission and I am going to serve as the Moderator for the discussions today.

We have an excellent group of panelists who will be discussing the issues, and from the registration list I might add that it looks like we have an excellent audience as well.

We are looking forward to an invigorating discussion of the issues connected to the procedures for design certification and we're hopeful that this will help us to illuminate the Commission's decision-making process on establishing the design certification procedures.

Before we get into the actual panel discussions, we are honored to have Dr. Ivan Selin, the Chairman of the Commission, to kick off our workshop with a keynote address. Unfortunately, like so many people, he is stuck in traffic right now and will be here shortly. What I thought I would do is to start going over some of the ground rules for the

process that we are going to be using today in the panel discussion while we are waiting for Dr. Selin to arrive.

EXPLANATION OF WORKSHOP FORMAT

MR. CAMERON: We are using a panel format, and we hope that the panel format will also serve as a catalyst for audience participation.

Our panel is drawn from a variety of points of view -- industry, government, citizens groups. NRC is also represented on the panel. The NRC representatives are not here to take positions on the issues, but they are here to listen to what the other panelists and the audience says on the issues and to provide clarification and insight on the relevant parts of the NRC regulatory process.

I am going to ask the panel members to identify themselves when they get up there after the Chairman's speech, but I thought that I would run down the list to give you an idea of who is here.

We have Susan Hiatt, who is the Director of the Ohio Citizens for Responsible Energy and she is the author of a response that I believe is in your materials to the NUMARC proposal on design certification.

We have Steve England, who is the Chief Legal Counsel from the Department of Nuclear Safety, State of

Illinois.

We have Jim Brew, who is an Assistant Counsel with the New York State Public Service Commission.

Bill Olmstead is with us. He is the Executive Director for the Administrative Conference of the United States.

We have representatives from the nuclear industry -- Mr. Bob Bishop, Mr. Mark Rowden, and joining us on the panel for the first issue of the day, proprietary information, we have Mr. Bart Cowan, who is going to provide the industry overview on that particular issue.

From the NRC Staff we have Geary Mizuno, who is the senior attorney in the Office of General Counsel, and we have Mr. Dennis Crutchfield, from the Office of Nuclear Reactor Regulation.

There's a number of issues on the agenda today and all of these issues deal with various aspects of the types of procedures that might be used in certifying a design, and we are going to have a different panelist lead off on each of these issues with a five minute presentation on their thoughts on the particular issue; then we are going to go to the other panelists in turn; then we'll proceed to an open discussion among the panelists, and then we will go to the audience for questions of the panelists.

There are cards available for people to write

their questions down if that is what they would prefer, but you are fully welcome to come up to the microphone at any time and ask your question, state your position, whatever. I would only ask you either if you are using the mike or if you are using the cards to just state your name and your affiliation.

At the end of issue, I'll try to provide a summary of the discussion up to that point, and Geary Mizuno from the Office of General Counsel is going to begin each session with a short overview of the issues in that session to provide you with a context for the discussion.

We have a lot of information to try to pack into a short amount of time today, and I don't want to rush anyone. I want to make sure that we hear all of your views, but I would ask each panelist and also the audience to try to be concise. Try to avoid repetition in your remarks.

It may be necessary at some times for me to cut the discussion short, and I hope no one takes offense at that. It may be necessary to keep things moving along.

We will have time later in the day for raising issues that were not discussed earlier in the day, that were not discussed during the panel sessions or to answer any questions that did not get raised during the main body of the workshop.

I would also remind you that you have an

opportunity to file written comments on the design certification procedures within 30 days of this workshop and we encourage you to do so.

This might be an opportune time to have each of the panel members identify themselves for you so that you will know who they are when they get up there.

First we have Susan Hiatt from Ohio Citizens for Responsible Energy; Steve England from Illinois Department of Nuclear Safety; Jim Brew, Assistant Counsel, New York State Public Service Commission; Bill Olmstead, Administrative Conference of the United States -- right there; Bob Bishop, industry representative; Mark Rowden, who is going to be joining him for most of the day; and Bart Cowan, who will lead off with "Proprietary Information" right there.

Geary Mizuno is streaming in the back door. He is from the Office of General Counsel. Dennis Crutchfield is in the back of the room.

[Pause.]

MR. CAMERON: I would like to now go to Marty Malsch, who is the Deputy General Counsel for Licensing and Regulation and have Marty give you an overview of the 10 CFR Part 52 process before we get into our actual discussions.

Marty?

BRIEF DISCUSSION OF DESIGN CERTIFICATION

UNDER 10 CFR PART 52

MR. MALSCH: Good morning, everybody. I'll be pretty brief.

Let me just summarize basically what the Part is all about, leading to a little bit of introduction as to what the workshop is all about.

10 CFR Part 52 was adopted by the Commission in April, 1989. Its purpose is to achieve early resolution of licensing issues and enhance the safety and reliability of nuclear power plants through standardization.

The Part 52 rulemaking was a highly public process. It began or it traces its origins back to a policy statement on nuclear power plant standardization that was published in September, '87 and there was a 45 day comment period on the policy statement.

There were then public workshops held on standardization policy and possible standardization rulemaking during the comment period.

There was a notice of proposed rulemaking, August 23rd, 1988. We received numerous comments, and then in the usual course for rulemakings we analyzed the comments, prepared a notice of final rulemaking, which was, as I say, published on April 18, 1989.

The final rule provides for early site permits, which provide for early resolution of siting questions; design certifications, which provide for early resolution of design questions; and combined licenses, which provide for upfront approval of final designs as a part of the early application for construction permits and operating licenses.

The focus here of the workshops is of course on design certification. On design certification the rule has requirements for the technical contents of applications. Various kinds of information requirements are set forth. There are then the basic procedural structures for conducting the rulemaking are set forth.

Basically they provide as follows:

The public is provided an opportunity to submit written comments on a proposed design certification rule. This is consistent with the normal minimum requirements of the Administrative Procedure Act, Section 4. But the Commission also went beyond the minimum APA requirements and provided the public an opportunity to request an informal hearing for an Atomic Safety and Licensing Board.

Finally, the Commission also authorized the Board to request authority from the Commission to use additional procedures and perhaps in some cases convene a more formal proceeding. It is of course the purpose of this workshop to provide information to the Commission to assist it in

developing in more detail how these rulemaking procedures might actually be carried out.

The Commission would issue a design certification in a rulemaking proceeding. The Commission rejected the concept of doing this by licensing, so it's a APA rulemaking proceeding. It issues the rule after the Staff has issued a FDA, Final Design Approval, after it has conducting a rulemaking, received a report from the ACRS and decided that the application for design certification meets the applicable standards and requirements of the Act and the Commission's regulations.

Once issued, a design certification can then be referenced in construction permit applications or combined construction permit and operating license applications.

In general, the issues resolved in a design certification rulemaking may not be relitigated or reheard in subsequent proceedings on applications for construction permits, combined construction permits and operating licenses or operating licenses, so the design certification rulemakings represent a truly national rulemaking proceedings in which there can be early resolution of siting questions before there are any utility commitments to a particular design.

It is also an opportunity for interested groups to marshal their resources and focus on one proceeding and one

proceeding where their input can have the maximum effect.

I should also note in conclusion that the U.S. Court of Appeals of D.C. Circuit issued a decision on Part 52 just this past Friday. The decision generally upheld Part 52 against a challenge.

I am sure most of may not have had an opportunity to read the decision. I have only had a chance to scan it myself, but I thought I should just mention that as a background for the rulemaking.

With that, let me pass on here to the rest of the workshop. I hope it will be a fruitful workshop. We are very interested in hearing all of your input on actually how to conduct these design certification rulemakings.

Thank you very much.

MR. CAMERON: Thank you, Marty. As I mentioned, before we get into the actual panel and audience discussions on the issues today, we're privileged to have Dr. Ivan Selin, the Chairman of the Nuclear Regulatory Commission, as our keynote speaker.

Dr. Selin joined the Commission as Chairman in July of last year. He came to us from the State Department where he was the Under Secretary of State for Management. Since joining the Commission, he's been a strong advocate of full and open participation in Commission decisionmaking, and this workshop is one example of that commitment.

I'd like you to join in welcoming Dr. Ivan Selin.

[Applause.]

KEYNOTE ADDRESS BY

THE CHAIRMAN OF THE U.S. NUCLEAR REGULATORY COMMISSION,

IVAN SELIN

CHAIRMAN SELIN: Good morning, ladies and gentlemen. It's a great pleasure to join the welcome to all of you to this workshop for Procedures for Design Certification Rulemaking for Standardized Nuclear Power Plants. I hope and I believe that this meeting will be extremely valuable, not only in terms of the substantive contribution that it can make towards resolving the complex issues that will be addressed, but as part of a useful procedure.

As Marty said, we want to ensure that the Commission makes its decisions with the benefit of the view of all those with knowledge and expertise to contribute. The workshop can play a major role in helping answer a crucial question which is, how a final design approval, that is, a staff review of a design for a nuclear plant, can best be translated into a rule which is applicable potentially to many facilities. It comes at a time when the NRC staff is making substantial progress towards completing the reviews

of the General Electric Advanced Boiling Water Reactor and the ABB Combustion Engineering System 80+ Standardized Systems. The NRC has never certified a design.

While the industry and the NRC have had some experience with standardization concepts, the principal practice in licensing a plant in this country has proceeded on a case-by-case basis with one-of-a-kind designs and laborious individualized regulatory reviews. This has meant an enormous commitment of resources on all sides, for industry, for Government, and also for the Intervenors in nuclear power plant licensing proceedings who have made their cases over and over again in different adjudications.

Rulemaking on standardized designs is the opportunity for all concerned to apply the intellectual and economic resources efficiently by resolving design issues at what might be termed the "wholesale," rather than the "retail" level. There is a parallel, I think, between the principle of early identification and resolution of reactor design issues and the rationale of this workshop.

Here, to be sure, we are designing legal procedures, not hardware, but likewise, we are breaking new ground and facing questions which are novel and intricate. As with hardware design, it is simply common sense to identify troublesome issues and to solicit expert advice before, not after, crucial decisions are made.

I would like to stress that our purpose is not solely to draw on the expertise of those within the nuclear industry or the NRC staff, but also, and equally important, to have the benefit of other, possibly conflicting points of view. The workshop reflects our conviction that for sound decisions which will pass the test of time, we need the contribution of many diverse groups.

This includes the NRC's own staff, the nuclear industry, and equally, it includes the public interest groups, the states and other federal agencies. Parenthetically, I know that there's been some skepticism on the part of the public interest community as to how much the NRC takes the views of this community into account. I can only say that there have been a number of examples that should dispel any doubt on this score.

A recent one, for instance, is the Yankee Rowe case, where a public interest group brought forward its concerns and the Commission stopped to listen. It may be asked, why should there be a workshop if the NRC is committed to paying attention to what the interested public has to say? Why not just solicit written comments and written viewpoints? Why should individuals and groups, companies and states be asked to come here at their own expense to discuss these issues in person?

The answer, quite simply, is that we are

interested not just in the views that each of you brings to the table initially, but also in your thoughts on each other's positions. What I am suggesting is not a debate, not a negotiation in the usual sense of the word, but an interactive process in which the give and take among the participants can illuminate positions and priorities, and ideally can suggest where common ground and compromise are feasible.

By now, I'm sure you've all received the memo prepared by the NRC's Office of General Counsel, analyzing some of the issues involved, making some preliminary recommendations, and attaching submissions from the Nuclear Management Resources Council and the Ohio Citizens for Responsible Energy, as well as some others. I think this is a useful document as a point of departure for discussions before this workshop, but I stress, don't be put off by the fact that we are organizing our discussions today, around a document containing preliminary recommendations.

None of the recommendations made in the paper is fixed in concrete. Obviously, we need something to work from, and it's a good document. I trust that participants, in addition to commenting on what is in the memorandum, will not hesitate to put forward their own proposals.

The paper identifies several significant issues which need to be settled and are before you for discussion

today. I don't propose to catalog all of them here, but I would like to mention two in which I have a particular interest:

The first issue is the use of proprietary information in the design certification rulemaking. The staff, in making their final safety determination, will have to review and evaluate proprietary information. The design certification rule is required to be published in the Federal Register, which raises two related questions:

First, how can the staff which reviews and evaluates proprietary information, incorporate the results of proprietary information into the design certification rule without compromising the proprietary nature of the information?

The second is whether and how commenters and other participants in the rulemaking can obtain the proprietary information that they need in order to effectively participate in this proceeding? This is a difficult question and there are no easy answers. In fact, I'm not absolutely sure that there's an answer at all, but we do look forward to hearing what the workshop participants have to say on this point.

The second issue of special concern is the scope of the authority to be given to the Atomic Safety and Licensing Board. To put it another way, what is the

appropriate role of the Licensing Board in the design certification process?

On one end of the spectrum, the Licensing Board might compile a hearing record to present to the Commission. At the other end, the Board might provide a recommendation to the Commission which would have some weight. There's a spectrum of possibilities between the two, and, again, I don't think the answer is clearly self-evident.

I'd be most interested -- the Commission would be most interested in the outcome of your discussions on this topic.

In conclusion, I would like to thank all of you for your participation in this workshop. Interchanges such as these serve everyone's interests. For all our differences, past and present, each of us here today has at least one goal in common, that any and all nuclear power plants, now or in the future, should be well designed, well built, well run and well regulated for the protection of the health and safety of all Americans. Your participation in this workshop contributes to accomplishing this paramount objective. Once again, I thank you in advance for your participation.

I didn't actually come to answer questions. I mean, it's a real workshop to come on. But if there are any particular questions before I move on and the workshop comes

on, I'll try to answer them.

[No response.]

CHAIRMAN SELIN: Thank you very much, and I hope it's a fruitful day.

[Applause.]

MR. CAMERON: Why don't the panelists come up and join me on the dias and we'll get started with the first issue.

I think you have an idea of how the panel is going to be run. What I'd like to do is just go down the panel again to identify everybody: Bart Cowan, Mark Rowden, Bill Olmstead, Susan Hiatt, Steve England, Jim Brew, Dennis Crutchfield and Geary Mizuno.

As the Chairman noted, the issue of proprietary information is a very important issue in the design certification procedures, and because of that, we're leading off with that issue. We're going to ask Geary Mizuno first to provide us with a context for the proprietary information issue, and then I'm going to ask Bart Cowan to give us a presentation of the industry view on that, and then I would like Susan Hiatt from the Ohio Citizens for Responsible Energy to provide us with five minutes or so on her position on proprietary information.

Geary, would you like to lead off and give us context?

USE OF AND ACCESS TO PROPRIETARY PORTIONS OF THE DESIGN CERTIFICATION APPLICATION

MR. MIZUNO: Yes. Thank you.

Generally, the subject of proprietary information is related to the question of the extent and timing of public access to that information and how that access affects the nature, schedule and timing of the design certification rulemaking activities.

There are basically two issues that are raised in this area, the first being, can proprietary information be incorporated into the design certification rule, and the second is, is there a public right to renew proprietary information and, if so, the extent of that right in the context of a design certification rulemaking.

As we see it, the public actually comprises two subgroups. First are individuals who only wish to comment in written form on the proposed rule, and the second is individuals who wish to request a hearing in the design certification rulemaking.

The relevant regulatory provision in Part 52 is Section 52.51(c), which discusses the extent to which the rule is going to be -- the design certification rule can contain information that is public.

MR. CAMERON: Thank you, Geary.

Bart?

MR. COWAN: We believe that there are several fundamental principles that are at work here when we're dealing with proprietary information. First, there is a strong public policy interest in affording protection to information which has a commercial value against disclosure.

That public policy interest is reflected in the provisions of the Atomic Energy Act itself, of the Administrative Procedure Act, of the Freedom of Information Act, and indeed of a host of Federal laws and regulations.

At the same time, there is also a public policy interest that must be accommodated in supporting public participation in the context of the design certification rulemaking, and the proprietary information discussion revolves around those two very important public policy interests.

There are different time frames and different contexts when we're talking about proprietary information. Our focus today is going to be on the access to proprietary information during the design certification rulemaking, but there is also, in terms of time frame and context, the time during the NRC's technical review, the treatment of proprietary information once the design certification rule has been adopted, and the treatment of proprietary information in the subsequent combined license proceedings. As I say, today our focus is going to be on the access

during the design certification rulemaking proceedings themselves.

As Geary indicated, the critical section is 52.51(c) which provides that access to proprietary information in the design certification rulemaking will be, quote, "in the same manner and to the same extent", close quote, as in a licensing proceeding. This provision was added to the provisions of Part 52 after the Commission received its comments on the draft proposal for Part 52.

We interpret the provision as it's written to mean that persons who qualify as parties in the design certification rulemaking hearing can obtain access to proprietary information in the same manner and to the same extent as they could were this a licensing proceeding under Part 50. That is, they can obtain access by signing a non-disclosure agreement with the owner of the information or, if a suitable arrangement cannot be made with the owner of the information, they can obtain access through a suitable order by the NRC Hearing Board, which provides access to proprietary information while providing for protection of that information in the order.

Proprietary information, in our judgment, should be made available only to qualifying parties in the design certification rulemaking hearing and, as I said, the first access attempt should be through the owner of the

information, and if that fails, then through the Board.

There should be enforceable sanctions for violation of proprietary information agreements or proprietary information orders. Our experience in licensing proceedings has shown that it is rarely necessary to take any movement on sanctions despite the fact that in licensing proceedings, there have been many instances of disclosure agreements being signed and proprietary information being furnished.

Depending on the access source, however, there needs to be some mechanism for enforcing the proprietary agreements or the proprietary orders.

Section 52.51 in our judgment does not contemplate access to proprietary information during the application review period or the comment period. Access to proprietary information has not been afforded in the past in other rulemaking proceedings during these periods of in comparable periods in licensing proceedings under Part 50.

The suggestions in the SECY 92-170 that access to proprietary information should be made by use of the public document room and the signing of generic proprietary agreements to the public document room in our judgment is not workable and, more important, it is not in accordance with the provisions of 52.51(c) because it is not in the same manner and to the extent that proprietary information

is made available in licensing proceedings.

MR. CAMERON: Thank you, Mr. Cowan.

Susan, would you like to say something about this?

MS. HIATT: First, I would note that the availability of proprietary information has already become a problem. In the Union of Concerned Scientists' Advanced Reactor Study of July, 1990, the authors of the study devoted a special section which discussed their difficulty in obtaining a lot of really basic design descriptions for the three designs which they looked at. They highlighted this as a significant issue which is going to come up during this design certification rulemaking is that there needs to be a proper balance struck between the commercial interests of the vendors on one hand and the public interests in reactor safety, reliability, economy and the ability to participate on the other hand.

I think you have to accord access to this information not only to the qualified participants in the hearing but also to persons who may be submitting written comments as well.

I am likewise concerned about the procedure which was outlined in the OGC SECY paper, the idea of just simply going to the PDR and signing and agreement and getting the information. I think there's a potential for abuse there.

I am not sure that the information would remain protected for very long. I think you'd need to have some type of enforcement and sanctions, although I think that is going to create a significant administrative burden on the NRC because I would think you'd have to provide some kind of due process mechanisms so that persons are not falsely accused of disclosing the information and punished for that without some opportunity to prove their innocence.

But I am not sure there is something better than the OGC proposal. I recognize the industry's right to protect the commercial interest through proprietary information, but I think the public also has a right to review information which is material to the outcome of the standard design certification rulemaking, again, whether they are simply commenters or they are actual participants in a hearing.

As the UCS Report notes, what people really need to know are descriptions of the safety and balance of plant systems, descriptions of plant structures, basic information on volumes, pumping rates, et cetera, for plant systems.

I think maybe the industry needs to challenge themselves a little bit in some of this. I have looked at proprietary information obtained under a protective agreement and I'm always baffled by what the big secret is. It's not like the Colonel's eleven herbs and spices or the

formula for Coca Cola.

I think a good example of this was the General Electric Reed Report. When that was released in 1987 there really weren't any secrets revealed or surprises there. All those issues had been openly discussed and evaluated in the SERs for years and I think GE did damage to its own reputation by keeping that report secret for so long. I think the public perception was that they were hiding something terrible, so I think the industry also needs to challenge itself. Does it really need to be kept proprietary?

I think you do have a significant problem too if you have commenters relying on and citing proprietary information in their written comments. How do we deal with those comments? We have experience in hearings with in-camera proceedings and that but we don't really have experience in rulemakings and I think that may become part of a protective agreement that there is a special instruction on how you handle those comments.

My experience with protective agreements has been they are between the vendor or the owner of the information and OCRE and myself and the NRC really isn't involved, and you know, I have had no problem with that, but I think you have got to have a public mechanism but you also have to provide protection.

I don't think there are easy answers here. I am not sure there's something than the system proposed in the OGC paper. That's about it.

MR. CAMERON: Thank you, Susan. What I would like to do now is to go to the other panelists to discuss this issue and I would just note one thing. It is useful to refer to the, quote, "OGC proposal," unquote, as a shorthand way of talking about a straw man. I would emphasize though that the Commission and the Office of General Counsel have an open mind on these issues. The Office of General Counsel had to start somewhere with trying to resolve these and that is what is reflected in the SECY paper, but I would just emphasize that there is no hard and fast position at this point.

I would like Bill Olmstead to -- do you have anything to say on this issue, Bill?

MR. OLMSTEAD: Well, this is not one of the issues that I find the most interesting from the standpoint of the Administrative Conference, but I would point out two factors that will kind of put into context the remarks that I wish to make later on about the preliminary proposal.

That has to do with the assumption here that everything has to be a controversy and adjudicated, as opposed to using techniques of consensus, which as some of you know, the Conference is very eager in pursuing as is the

Administration, I might add, and the Congress.

In this context, I would point out that under the negotiated rulemaking act, which was passed by the Congress in 1991, there are provisions for treating confidential communications in a consensual context, and when we get into discussing how those devices might be used later on, people might want to look at those provisions because they do provide some new ways of looking at, protecting information that a party to a negotiation wants protected and allows for some neutral evaluation of whether that information ought to be protected and whether that information has some use to the issues that are being negotiated, so there are some new ways of treating this.

The second thing that I might point out is Conference Recommendation 84-6, which deals with the International Trade Commission and the disclosure of confidential information, contains some criteria on broader disclosures that I think may be useful for you to look at.

One of the most significant things I think that it says is that disclosures should only be made in categories where party analysis of such information is likely to assist the Commission's investigation without impeding its fulfillment of statutory deadlines.

I think if you look by analogy to that recommendation, there is some suggested approaches to

confidential information that the Conference has undertaken to examine.

As you may or may not know, International Trade deals with these issues evermore frequently because of the growing concern about international competitiveness.

MR. CAMERON: Thank you very much, Bill.

I'd like to go to Jim Brew now for comments.

MR. BREW: The only additional comment that I would make would be to second Mr. Olmstead in that regard. An observation that I have from working in other regulated industries as well as electric is that having administrative proceedings in which some or many of the parties have confidential or proprietary information that may have a bearing on the proceeding is hardly unusual. It's in fact relatively commonplace in the communications industry. For that reason, it's not unusual for the administrative agency to establish a workable process for accommodating the desire to keep trade secret information that way while allowing the process to move forward.

The New York PSC established trade secret regulations five or six years ago, partly in response to developments involving greater competition in the telecommunications industry, and there is no reason why the NRC can't establish a reasonable process for providing access, while still providing reasonable protection.

The big problem I see is the greater the treatment of proprietary information and the greater the level of exclusion, the bigger the hole you have in your process for reviewing the reactor designs, and to the extent that your ultimate goal is not just assuring complete and comprehensive technical review, but public acceptance of the process, you want to encourage an overall buy into the process, and that means greater access to information, not less.

Thanks.

MR. CAMERON: Thank you, Jim.

Steve England.

MR. ENGLAND: This is not an issue which I have experience with, but my sense is that the model discussed by Mr. Cowan strikes me as being more workable than the PDR model.

I guess I would raise the question, though, to Mr. Cowan: Why would it not be possible to enter into the confidentiality agreements even in the comment period if a responsible public interest group or a state or an organization of states, for instance, wanted to have access and was willing to sign an agreement earlier on in the process? What's wrong with that?

MR. CAMERON: Go ahead, Bart.

MR. COWAN: Well, there are a couple of problems.

Anyone is entitled to make a comment in the comment period. It's not limited to public interest groups and to responsible or -- and to states.

Among those who we think might be interested in seeing proprietary information are representatives from competitors and form foreign entities. They are equally entitled in the comment period to make comments on the design. Whether they do it or not is a different question.

The industry historically has not been concerned in the context of a hearing where the issues are relatively well defined, and therefore the proprietary information to be obtained is relatively focused with making that proprietary information available to intervenors or to states. Indeed, there is a well worked out system that the NRC has been using for years to make such information available in the context of specific issues, specific contentions with a hearing board in place.

On the other hand, in the comment period it is an open-ended type of process. There could be five, there could be 50, there could be 500 commentors.

To the extent that you broaden the universe of those who have access to proprietary information, you make it very difficult and probably impossible to protect the proprietary information. So it's basically a practical question in the comment period.

If you were to go to some type of process in the comment period, you would need to have carefully thought out standards before you could make proprietary information available. But even there, that does not solve the problem of what happens if 200 people or 200 potential commentors ask for proprietary information. It's just an unmanageable task to police that proprietary information.

MR. CAMERON: I would just open it up to the panel for general discussion, anybody who wants to comment or question.

MR. ROWDEN: If I might -- Mark Rowden -- let me address something that the Chairman raised in his opening comments. I do not want it to be taken as an omission on our part that the comments that have been made thus far have addressed only the matter of access to proprietary information during the run up to and in the course of the design certification rulemaking hearing.

There are other difficult questions that had been raised in the OGC's preliminary recommendations and SECY 92-170 relating to the matter of use of proprietary information in the design certification rule and access to that information in connection with later licensing proceedings.

We do have a position on that. Those are basically legal questions. We are going to address it in a prepared paper. But lest the Chairman go away with the

impression that we've given no thought to those matters up until now, let me make a couple of observations.

Our thinking is along a three-track approach. The first aspect, the first track so to speak, relates to the issue we're discussing now. It's not simply a question of protecting proprietary information; it's a recognition that the staff, the agency, needs to have access to all of the information which is required for it to make sound safety decisions.

To that extent and because we want to minimize the issue of proprietary information to something that is at an irreducible minimum, all of the vendors are examining the submissions that had been made and are in the course of preparation with the view to, if I may characterize it as de-proprietorizing the information that is submitted on the document. That's a process that's underway, and we think it's going to be quite useful in addressing the problems that the staff paper foresees down the road.

We do believe, however, that although Tier 1 of the Design Certification Rule must be and will be totally non-proprietary, there may well be instances where there will be references to proprietary information in the second tier of the Design Certification Rule. We visualize those references or use of proprietary information as falling into two categories:

One is what I would call the mere reference category. In other words, information which would not provide a part of Tier 2, but simply be a documentation of the source of the information for the content of Tier 2, the Standard Safety Analysis Report. We do think, however, that there may well be a third category where the rule, as adopted by the Commission, will not incorporate proprietary information as generically applicable requirements, but will approve methods individual to the vendor for demonstrating conformance with the generically applicable requirements.

This is not something that we have invented; this tracks a prior position which the Commission has taken in dealing with the proprietary information issue in the Emergency Core Cooling System rulemaking proceeding. We think that that provides a very useful and legally valid mechanism for dealing with that.

Before I leave it, just so I can give you a completely rounded picture of our position, we're not totally comfortable with the position that the Staff characterizes as one informally communicated by the office of the Federal Register that in the context of the NRC licensing process, proprietary information cannot be incorporated by reference in a proposed rule. We would like to explore further, the matter of access to that information by the class affected, which is an exception provided for

that in the Administrative Procedures Act.

But irrespective the applicability of that exception, I think that the three-track approach that we have suggested offers a legally valid and policy sound mechanism for dealing with the necessity for use of proprietary information in design certification rulemaking.

MR. CAMERON: Thank you. Does anybody else want to say anything?

MS. HIATT: I guess I would question access to information by the classes affected. One of the things about this whole process and the Part 52 is when you certify a standard design, it can conceivably be used anywhere in the United States, so you're really talking about the entire population of the country being within that class affected.

These proceedings are going to be open to any person at the comment stage, at least with the written comments, and I think that in order to provide meaningful comments, you have to have some sort of access and you have to protect the information as well. I would just note a recent ACRS letter which talked about testing an analysis program to support a simplified BWR design certification. Eight references were cited, two of them were GE proprietary and the other one was Applied Technology Restriction, which is a DOE form of confidentiality restricting distribution of information.

It's going to be a very difficult balance, protecting the commercial interest and the public interest and having a meaningful opportunity to really comment on these designs and participate in a hearing. I might open another can of worms by drawing out another instance of confidential information:

Would there be any safeguards information involved here? I would think that the vulnerability of the design to radiological sabotage might be an issue in these proceedings, and not just proprietary and commercial interests you have to consider with the safegaurds, but obviously the security and safety interests there, too, how to protect that.

MR. CAMERON: Gary, do you want to comment on the safeguards aspect?

MR. MIZUNO: No.

MR. CAMERON: I guess I phrased that the wrong way.

MR. CRUTCHFIELD: Dennis Crutchfield. I'll comment on the safeguards aspects. There are some design aspects of the facility that are covered, and there is some safeguards evaluation that goes on. However, matters dealing with security force size, training locations, et cetera, will be handled at the COL at that time, because it's more site specific than design specific at this point.

MR. ROWDEN: Just to clarify the record, Susan, the class affected exception has nothing to do with access to proprietary information during the course of the design certification rulemaking. I think that has to be dealt with on independent grounds.

The class affected exception deals with the requirement for publication of the proprietary information, any proprietary information that's contained in the final rule. That relates to who would have access to that information during the course of a COL proceeding which referenced that design.

Our position there would be that any legitimate Intervenor in that proceeding would have access to that proprietary information.

MR. CAMERON: By picking up on a point that Steven England brought up and a response from Mr. Cowan, could you structure criteria that would allow states, Intervenors, and others to have access during the rulemaking comment period to proprietary and somehow put limitations on potential competitors?

I'll throw that open for the panel generally.

MR. ROWDEN: The answer is, should the Commission decide as a matter of policy to allow access in some limited form to commenters, in contrast to what 52.51 now provides, which limits it to parties to the hearing, at least as we

read it, we would have to -- or we would urge that appropriate qualification criteria be adopted.

Our problem is not with potential Intervenors or with public interest groups. I think the track record there has been very good in terms of the protectability of the information. We think also that potential competitors would be very prudent with regard to their access to, and certainly their misuse of that information. The matter of foreign sources having access to that information raises a more difficult set of problems and beyond that, there is the issue that's identified in SECY 92-170 and that is what I would call -- with apologies in advance to any of that class that is in this room -- the information merchants that prowl the public document room for information, and whose business -- and god bless commerce, but nevertheless -- whose business is to purvey that information.

The fact is, if you open it up to unrestricted access, non-discriminatory access, if you will, you do raise a whole host of problems. Now, those problems are compounded by the process of which the SECY paper proposes for permitting access, so I think these two areas intersect with each other.

But the answer, in the abstract, is, although we might disagree over what those qualification criteria should be, yes, I think appropriately demanding qualification

criteria can be devised to allow those who have a legitimate need -- and there I agree with Susan, that the nexus ought to be need, a legitimate need for access to that information so that they can participate in the design certification rulemaking, can have that access, but this isn't something that just lends itself to a general fishing expedition or worse.

MR. CAMERON: Would anybody else like to comment?

One other issue that might be profitable to discuss is Susan Hiatt's point about challenging the industry in terms of whether the information really needs to be protected. Does either Mr. Cowan or Mr. Rowden have any comment on that?

MR. COWAN: Well, the industry, as the NRC is aware, uses some very strict tests as to whether or not information is in fact proprietary. When we are dealing with evolutionary or advanced plants, we are talking about technical designs that have features that have either not been seen or are more advanced than those previously seen and therefore features that indeed from a technical standpoint are proprietary and did take a lot of investment to develop and would be of use to others if they could obtain that information concerning those features without the types of work that are necessary so that there is indeed a significant amount, although in overall context,

relatively small, but nevertheless very significant proprietary information aspect to both the evolutionary and the advanced plants.

The industry is always looking at proprietary information in an attempt to minimize the amount of proprietary information and nonetheless protect the basic commercial value of the core of proprietary information.

I think you are going to find in these applications when we end up that proprietary information will be a relatively small subset of the total amount of information that is available to the public.

MR. ROWDEN: I would just not only second what Bart Cowan said but say that we accept Susan's challenge and lay down one of our own.

We accepted it in a sense in an anticipatory way because the vendors are going to vet the proprietary submissions that have been made thus far with a view to de-proprietarizing those submissions to the maximum irreducible extent possible.

The challenge I would lay down, and I think that Susan's already recognized this, is the need to recognize the value to the process of proprietary information, not simply from the commercial standpoint of the industry but from the public interest standpoint of furthering the safety interests of the process.

The fact is that vendors are called upon and others are called upon to make significant commitments which do have a safety payoff to them in many instances, not simply a commercial payoff and I think it is necessary in devising the ground rules for access to proprietary information to bear that in mind.

MR. CAMERON: Thank you.

MR. ROWDEN: I might add -- let me just add one further thing, since you brought up the Reed Report, which may be a poor example in one sense but a good example in another. The fact of the matter is I would argue that there is a very strong public interest in protecting the integrity of a process which leads an organization to undertake a critical self-examination of what has been done and I would not dismiss that as something that has value as far as the safety aspects of the Nuclear Regulatory Process are concerned.

MR. CAMERON: Thank you. We are going to go to the audience for questions right now.

If you do have a written question that you have, please hold it up and Terry will pick it up. As I have mentioned before, feel free to come up to the mike to ask questions. We do have one question so far for the whole panel really.

Is there some absolute requirement on NRC to

publish rules subject only to Office of Federal Register, approval of incorporation by reference, if the Office of Federal Register doesn't approve publication of the rule, where are we left? If the rule isn't published, can it be valid?

Geary, you probably should start off with that and I take it the question relates to the whole process of publication in the Federal Register.

MR. PARLER: Excuse me, Chip. This is Bill Parler. For the transcript you might want to identify the source of the question.

MR. CAMERON: Unfortunately, this question does not have an affiliation or a name, and I would just like to ask people to put their affiliation or name on the question cards also. This one doesn't, so we'll just go ahead with it anyway.

MR. MIZUNO: Well, the requirement for publication initially springs from the Administrative Procedure Act and the Office of the Federal Register has promulgated requirements in 1 CFR, Section 51, Part 51, which set forth the procedures by which the Office of the Federal Register will approve incorporation by reference.

Incorporation by reference is specifically allowed under certain conditions in the Administrative Procedure Act and basically the Office of the Federal Register regulations

codified the requirements of the APA in Section 51.7, and although Mr. Rowden is correct in noting that there is a provision that incorporation by reference is permitted where the material to be incorporated is, quote, "reasonably available to and useful by the class of persons affected by the publication," there is also and in fact it is their first requirement here. It indicates that it must be, quote, "published data, criteria, standards, specifications," et cetera, et cetera.

The argument or the point of contention in our discussions, in OGC's discussions with the Office of the Federal Register was focused not only on the reasonably available test but also on the requirement for, quote, "publication."

MR. CAMERON: Any other comments?

MR. MIZUNO: I am not finished yet.

MR. CAMERON: Oh, I'm sorry, Geary.

MR. MIZUNO: As far as what would occur from a legal standpoint if the Office of the Federal Register failed to approve publication of the rule, I guess as an abstract matter, the NRC could bring suit against the Office of the Federal Register, but I've never heard or seen any cases in my research that had that. I am not sure whether that would be even permitted. That is something that would have to be looked at, I guess.

MR. CAMERON: Mr. Parler doesn't appear to be overly enthusiastic about that approach.

MR. MIZUNO: And if it isn't published, then it would not be -- the rule itself would not be legally valid, although it would be effective against persons who had actual notice of the regulation but as a general matter would not be legally effective.

MR. CAMERON: Thank you, Geary.

Does anyone else on the panel have a comment?

MR. COWAN: Yes. We would agree, the Office of the Federal Register's Regulations in 1 CFR Part 51 provide for an implementation of the statutory authority that that office has to decide what should be published in the Federal Register.

It is clear that Part 51 of Title I contemplates that there can be incorporation by reference of information in regulations.

The real question comes down, when you are talking about proprietary information, as to what extent can the NRC utilize proprietary information and make it available in its process for rulemaking, and then have proprietary information as a backup to its rule without having the proprietary information in the rule itself.

As Mark said earlier, Tier 1, which will be the published major portion of the rule, will be non-

proprietary, both the description of the design, and the inspections test analysis and acceptance criteria will be totally non-proprietary. The generically applicable provisions of the design that are in Tier 2 will also be non-proprietary.

We think, within that framework, it is possible that the Office of the Federal Register will permit incorporation by reference as, indeed, they have in at least two other instances in Nuclear Regulatory Commission regulations.

Incorporation by reference of proprietary information of a limited type to show and demonstrate how a vendor can meet the generically applicable regulations. That is the discussion we would like to have, and we would like to see instituted with them.

MR. CAMERON: Thank you very much.

Bill Olmstead?

MR. OLMSTEAD: I had occasion in the securities and exchange context, and the banking agencies to deal with what the agency thought was an intractable problem with the Federal Register with respect to incorporation by reference, and it is my opinion that this is one of those cases where, if you ask the wrong question, you will get the answer you don't want.

The Office of Federal Register is not going to

take a position that anybody can incorporate secret information, confidential information, or any other information that the public can't get access to by using the Federal Register.

That is a lot different than saying that the statement of consideration, or statement of basis for a rule might not include confidential information, and then the rule, itself, does not.

I think this is a case where one has to think about what it is they want to do, and how they want to use the information, and then make sure that they do it in a way that is consistent with 1 CFR.

MR. CAMERON: Thank you very much.

I would like to move on to another question. Again, this one does not have any identification on it. The question is, what has to be protected, innovations in subsystems that might have applications outside nuclear power -- for example, instrumentation?

It would be nice to hear examples of what an applicant considers proprietary. What about proprietary information from work derived from DOE funding for first-of-a-kind engineering, can this be kept exempt from public disclosure, if it is publicly funded?

MR. M. BLAKE: For the purpose of the record, I asked that question.

I am Mike Blake with the Nuclear News.

MR. CAMERON: Mr. Cowan or Mr. Rowden, would you like to address that?

MR. COWAN: I can address it in a couple of contexts.

First of all, there are some aspects of the design in connection with the advanced plants that represent new or innovative ways of handling and solving engineering problems in the plants.

One example would be the passive core cooling system in the AP600, which is really the heart of the passive design of the AP600. A lot of engineering effort went into developing that passive core cooling system, and the design descriptions, the details of the design descriptions would be proprietary.

Second, there is proprietary information in connection with some of the charts, and some of the drawings relating to other systems, details mainly of how the engineering ultimately is performed, that would be proprietary.

Third, there are some areas that we normally don't think about as proprietary, but would be, for example, in connection with at least some of the applications, there are sections on human factors engineering. Human factors engineering is something that has grown increasingly

important since Three Mile Island, and there are approaches to human factors engineering, and techniques utilized in human factors engineering that are not only applicable to the nuclear industry, but would be applicable in other industries as well. Large portions of those approaches represent new and innovative ways of dealing with human factors engineering, and would be proprietary.

So those would be three examples of information.

As I say, the great bulk of the information relating to the design of the plants is non-proprietary. We are dealing with a relatively small collection of information. So when we single out in terms of proprietary information types of proprietary information, I don't want to leave the impression that proprietary information is a huge amount of any of these applications; it is not.

MR. CAMERON: Thank you.

I would like to get a question from the audience now.

MR. OLMSTEAD: Could I interrupt you for just a minute. You had a second part of that question that I don't want to miss.

MR. ROWDEN: The second part relating to DOE funding?

MR. OLMSTEAD: Yes.

MR. ROWDEN: This would be dependent upon the

terms of the DOE's Support Contracts.

I think we have to bear in mind, however, that these are cost-sharing contracts. Simply because there is government money that funds part of the contracts does not mean that information which is developed at the expense of the designer cannot receive proprietary protection, but this would be a matter of contract between the individual vendor and DOE.

MR. CAMERON: We have one quick comment from Susan, and then we will go to Dan Berkowitz.

MS. HIATT: I guess the problem I had with what you just said, Mr. Cohen, about the AP-600, that not much of that is proprietary, but you're talking about the AP-600's passive core cooling system and that's the heart of the design. I would think that is of utmost safety importance, and that's exactly the type of thing to which the public commenters and Intervenors need to have detailed access so that the adequacy of that design can be proven.

MR. COWAN: Let me comment: Most of the information on that, on the passive core cooling system, is non-proprietary. There are non-proprietary descriptions of the passive core cooling system. There are aspects of it then that flesh that out that are proprietary.

Of course, the position would be on that or anything else that parties to the rulemaking hearing who

have issues in those areas are certainly entitled to receive and review that proprietary information, even on the passive core cooling system or any other particular system.

MR. CAMERON: Thank you. Dan Berkowitz?

MR. BERKOWITZ: This is just a followup on the question and response on the innovations in, for example, the passive core cooling system, the technological innovations and the new systems that are developed. Isn't there some system where you can get patent protection for these designs, and if there's somebody that takes your designs and copies your work, then there would be some type of infringement? Is that system applicable?

MR. COWAN: There are patents on some aspects of the designs, I'm sure, for all of the advanced plants. But patents do not fully solve the problem. To the extent that you have patent protection, of course, you are protected under the patent system, but there are things that you cannot fully protect through patents.

MR. CAMERON: Thank you. We have one last written question from an unidentified person. How much of a problem would it be if proprietary information was just left for the COL proceeding? Who would like to try to field that one?

MR. ROWDEN: I think the staff ought to answer that first, and we'd be happy to contribute our views.

MR. CAMERON: All right.

MR. CRUTCHFIELD: Clearly, if you left the proprietary information for the COL hearing, one of the attempts that you're trying to do with Part 52 is get early resolution of issues. If you left it toward that period, any changes that may come out as a result of the review of that COL information would clearly then impact the certification that you set forth previously, so it would have a negative effect on the certification process.

You wouldn't be resolving all of the issues that you potentially could.

MR. ROWDEN: We would agree with that, basically, and I would add to that. We don't want to distort the nature, the fundamental nature of the design certification review and approval process. If proprietary information is legitimately needed for the conduct of that review, it ought to be there, both for purposes of issue resolution and also because you want a sound decision.

I think we're basically in agreement that we want to have a docket record which includes the information which is necessary to approve the design. The mechanisms for doing that, we think are available.

As a matter of fact, I'm encouraged by what I hear at this panel. I think there are more areas of consensus than there are of disagreement, and I think that there are means that are emerging for resolving the disagreements.

MR. CAMERON: Thank you.

MR. OLMSTEAD: I would like to add one thing, just to keep it clear in my mind. I assume, in all this discussion about proprietary information, which is usually the case in other agencies, that the issue is raised first by the applicant. In other words, I would assume that applicants do not put proprietary information in, unless they have some good faith belief that that information is necessary to support their application in the first instance.

So that at least initially, the information isn't in the record unless there's a belief it's necessary to make the necessary findings. The secondly, if that's the case, it would only become an issue if the staff reviewer agrees with that decision as well. At that point, you're starting to narrow the issues down to those who are most in need of the information in order to address the issue that's before the Commission.

MR. COWAN: Most of the information falls into the category of source or supporting information that backs up the application. We believe the NRC staff has to be free, and, indeed, must take account of all information which it receives when it is reviewing the application, proprietary and non-proprietary. But most of the proprietary information will be source or supporting information.

MR. CAMERON: Okay, we're getting towards the end of our time here. Are there any final questions from the audience?

[No response.]

MR. CAMERON: Anything from the panel?

[No response.]

MR. CAMERON: Okay, I think that you can see from this discussion that there is a number of contexts in which proprietary information is important. Several panelists have highlighted the need for the information. Other panelists have talked about the manageability of the scheme that would be proposed to handle disclosure, particularly during the comment period on a proposed rule.

No one seems to be very enthused about the idea about the PDR handling it, but yet we haven't come up with any satisfactory alterative. I think that there were some useful suggestions made in terms of consensus building, other ways to devise a scheme to protect proprietary information while still providing access.

We heard some comments about challenging the industry to make sure that the proprietary data really needs to be there, and I think we have heard some responses to that. Also, there seems to be some dispute about exactly what the legal situation is with the Federal Register about the incorporation by reference.

We spent a lot more time than we usually would have on this particular issue, but I think that it was important enough to spend the time, and luckily we did have the time to spend. We're going to go on a break now, per the program agenda, and be back at approximately that time, 10:45, maybe a little bit earlier. And we'll start up again with the second issue. Thank you.

[Brief recess.]

MR. CAMERON: We're going to get started with our second session, if everybody could come back in the room, please, and get to their seats.

Our second issue for discussion this morning is the time for submission of written comments and requests for informal hearing. Before we get into that, I'd like to welcome Mr. Bob Bishop to the panel, and also just remind you that if there are other comments on proprietary information or any other topic, we're going to have time at the end of the day for a wrap-up for further questions on any of these things, so remember that.

I'll turn to Mr. Mizuno for a context on this issue, and then I'm going to ask Ms. Susan Hiatt to give us a five-minute presentation on it.

Thank you.

TIME FOR SUBMISSION OF WRITTEN COMMENTS
AND REQUESTS FOR INFORMAL HEARING

MR. MIZUNO: Okay. Generally, the topic of discussion is the time for submission of our written comments in the notice and comment phase of the design certification rulemaking, and also the time, both in terms of the length of time and the timing itself, of any requests for hearing that may be submitted.

Basically, the only thing or the only possibly relevant section in Part 52 is Section 52.51(b), which provides for the opportunity for written comments in conformance with the requirements of the APA as well as the opportunity for hearing provided in that section. However, 52.51(b) does not refer to or address the time for submission of either the written comments or the request for hearing.

Basically we have three issues here. The first is how long should the public have to submit written comments in the written comment phase; the second is how long should the public have to request an informal hearing, request for additional procedures or a formal hearing; and finally, when should these requests be submitted in order to be deemed timely requests.

MR. CAMERON: Thank you, Geary.

Ms. Hiatt?

MS. HIATT: I think we have to start out with the OGC paper which established the 90-day time period after the publication in the Federal Register of the notice for proposed rulemaking in which interested parties are required to submit written comments, file a request for a hearing if they so choose, and you have to get into some of the standards for that as well.

One of the standards for requesting a hearing, the threshold is that you have to include your written presentation as well as written comments, and you also have to include qualifications, expert qualifications of persons who can contribute something to the hearing, which I think is really an expert qualification standard, so they're going to have to define expert witnesses as well.

If they want to use formal hearings or use any further Subpart (g) procedures, they have to request that too, all within this 90-day time period. I think that's asking a bit much.

In an ideal world, where public interest groups would be well funded and adequately staffed, maybe 90 days would be sufficient. But reality is otherwise, and I think you really need to accommodate those parties having limited resources in the interest of fairness.

You also have an interface here with proprietary

information. If the first time proprietary information becomes available under any type of protective agreement is when the Federal Register notice is published, then for the first time, you're -- this is the only opportunity to start reviewing this information, whereas maybe some of the non-proprietary material was available before. But that puts an additional burden on the parties.

I would note that 90 days is a very typical comment period for many major NRC rulemakings. Now, it is true that a standard design rulemaking is a rulemaking; it isn't your typical rulemaking with regard to the subject matter. In fact, I have seen a news account of the Westinghouse AP-600 application which indicates some 7300 pages in length. And I would note that even for the typical rulemakings, the comment period is often extended beyond the 90 days.

A good example of this was the rulemaking on environmental review for license renewal. It originally had a 90-day comment period. It was extended for another 90 days, for a total of 180 days, and the reason given for the extension was due to the large amount of documentation and materials which needed to be reviewed. Well, I have seen that quantity of information, and it is certainly much, much less than 7300 pages.

I would suggest at a very minimum 150 days for the

period in which to submit the written comments or request a hearing, preferably maybe 180 or more.

I think I will close on the note that this isn't a race. It's not like the Indy 500 where speed is of the essence. I think the goal of these proceedings should be to do the job right, to achieve a quality decision, and to make sure no stone has been left unturned in evaluating the safety of these designs because of the issue preclusion of 52.63. This is the one chance you have to do it right, and that should be the goal, and expedience should be something secondary.

MR. CAMERON: Thank you very much. I would like to turn to Mr. Bob Bishop for a comment.

MR. BISHOP: I guess there are a couple of points I would make at the outset. First of all, I think there's no question about what the legal requirements are, versus the policy judgments that must be made. I think the legal requirements are very clear, and, fundamentally, they're not very supportive of Susan's position.

I think the public policy arguments, however, may work in the other direction. The Agency's got to ensure that there's enough time to satisfy the legal requirements. There is no legal requirement as to the length of the comment period. So, we go quickly into the public policy judgment:

We agree with the NRC's preliminary recommendation that 90 days is appropriate. I'd comment on Susan's comment about the volume of this material and certainly it is very extensive. However, the access does not begin with the Notice of Public Comment.

There have been a lot of opportunities for public participation all the way through the process, including this workshop today. Now, it's true we don't have at our hands, the detailed design information, but nor are we starting the process at this point.

There have been a number of SECYs that have gone into a number of the substantive issues that are going to be designed in the design certification process, as well as these kinds of procedural matters. I think it's also appropriate to know that after the final design approval, there will be a 90-day period that transpires, so the design will certainly be known at that point, and that's separate from the 90-day period associated with the Notice and comment on the Design Certification Rule itself.

So, right there, you're at 180 days, plus, when the full design has been made available. I think the proprietary information is certainly a troublesome issue and its availability, as the previous panel discussed, is something that we're going to have to work through as well, but I don't see that as necessarily suggesting that a

further time is necessary.

I think, yes, speed is not of the essence, but finishing the race is vitally important, and that requires deliberate attention to the schedule and moving on to decisionmaking. I think that the process that the NRC has outlined is a reasonable one. It may not be the one that we would advocate, but it's certainly one that I think demonstrates a wise political judgment, and is an appropriate balance of the public participation issue with the need to make a timely decision on this process.

MR. CAMERON: Thank you, Mr. Bishop. Mr. Olmstead?

MR. OLMSTEAD: I want to get into the type of proceeding that this paper suggests more in the next item in the agenda, but I would like to point out that there are two assumptions in the paper at page 20 and 21, dealing with the reason for the 90-day comment period.

One is that the time available to the public for assessing and evaluating the technical merits of the design certification application actually begins at some earlier time, and that there's these provisions for advanced notices of proposed rulemaking and other mechanisms that are kind of unspecified for public participation.

The second one is that whether we're to have 90 days or 150 days has to do with greater public acceptance.

There is kind of a paranoia or a schizophrenia in the paper about Section 189 and what kind of hearing this is; whether it's an adjudication on the record, or whether it's a rulemaking under 553, and there's lots of discussion about 554 versus 553 procedures. I think it complicates how one thinks about this.

But if we're thinking about it just sole in terms of notice and comment rulemaking, the pragmatic way to look at rulemakings and the sufficiency or adequacy of the notice has to do with how intractable the issues are, how the technical the issues are, and how much process the Agency has had before the comment period.

A simple notice and comment rulemaking to change a number in a rule that's of long standing in an agency can be done on a 20-days notice, 30-days notice. I think the shortest time period I know in the reported cases is 15 days. So, it is true that there is no legal requirement as to what the length of the notice is, but I think courts find ways to reverse cases where the notice period is obviously unfair, and that's going to depend upon the context in which the notice was provided.

If the party complaining about it has been involved for two years prior to that time, extensively in different kinds of procedures, they're going to have less of a case than if the first time the agency has asked for their

views, is at the Notice of Proposed Rulemaking stage, and then 90 days later, they want to close off all discussion, after they've had a two-year interaction with the particular applicant.

So, it's difficult for me to comment on whether I think 90 days' notice is going to give greater public acceptance and whether it's going to be adequate to address the technical merits, unless I know what the front end of the rule provides and how it's been implemented. But I think that all of these factors weight heavily in favor of having the public involved in some kind of consensus building process earlier and continually through the staff review of the application.

MR. CAMERON: Thank you very much. I'd like to go to Mr. James Brew, if he has any comments.

MR. BREW: Just briefly, my reaction was somewhat similar, again, to Mr. Olmstead's. The 90-day comment period is a little bit troubling if you're assuming that there is not going to be advance notice that access to proprietary information remains unsettled up until the point where you're releasing the proposed rule, and that there hasn't been a great deal of interaction on the details of the proposals previously.

I think it's important, particularly in this type of a rulemaking, that the considerations that determine the

time allowed, are very practical ones. Given the finality of the decisions and how it's going to be applied, you really do need to have a process that, both from a legal and a practical perspective, provides the opportunity that it was intended to provide.

So, I'm not prepared to say that 90 days is inadequate or not, but it seems that if you're going in the direction that the OGC draft was talking about, that you probably do need more time.

MR. CAMERON: Thank you very much. Mr. England?

MR. ENGLAND: I think my position on this changed, the more I thought about it, and I ended up being more confused than when I started out. My initial reaction was that 90 days was too short for something of the complexity of this sort of rule, but then as several of the panelists have discussed and the OGC discusses in the paper, there is the possibility for involvement before that, which would certainly mitigate the 90-day period.

But then I ended up reading what seemed to me to be the last statement from OGC on this recommendation, and I ended up confused. And I'm looking at the first full paragraph on page 21 of the paper, and it seems to me that OGC is recommending a 90-day comment period with four qualifications.

And those are, if the FDA design certification

application is reasonably complete, if reasonable early notice is provided of the pendency of the certification application, if the draft SER of the design certification FDA are noticed and made available, and if there is reasonable access by interested members of the public to proprietary portions.

As someone who drafts rules and statutes from time to time, I find that very confusing, and I don't know how you put that into a rule that's going to make sense to everybody and is going to keep you out of litigation.

MR. CAMERON: Thank you very much.

Mr. Mizuno, would you like to make any comment on that from the OGC point of view?

MR. MIZUNO: I guess to address Mr. England's point or to kind of help him understand what we were doing there, these were just our recommendations of considerations to be given for the Commission to determine whether to establish in the notice of proposed rulemaking a 90-day period for comment.

So these caveats, if you want to call them that, would not actually be incorporated into any particular rule, but rather these are just factors to be considered by the Commission when they decide to issue the notice of proposed rulemaking, what time period should be set forth in that notice of proposed rulemaking for the length of the public

comment period.

MR. CAMERON: Thank you.

I would open it up to the panel generally.

MR. ROWDEN: Just an observation. Obviously we're interested in administrative efficiency in the conduct of the rulemaking proceeding and the most effective application of resources.

We also, I think, ought to make it clear are not interested in this proceeding being viewed as a kangaroo court, and there ought to be a reasonable period of time for formulation and submission of comments.

The 90-day period is in reality at least a 180-day period. I have minimal confidence that that 90 days necessary to prepare the rule is actually going to be only 90 days.

I think our position is that that is presumptively a reasonable period of time. That six-month period is presumptively a reasonable period of times and the departures therefrom, as in the case of every other rulemaking, ought to be dependent upon fact-specific submissions made to the Commission by those who are proponents for an additional period of time.

So I agree with the comment that was made before. You cannot view this in the abstract. As a guideline proposition and as a point of departure, that 90 days, plus

90 days, is reasonable. Beyond that, it ought to be a matter of the Commission exercising its informed discretion in a fact-specific context.

MR. OLMSTEAD: I can't resist adding one other thought that just occurred to me when I was listening to Mr. Rowden's comments. That is that if this rule, notice of proposed rulemaking were derived through a negotiated rulemaking process, it would be our position that 30 days was adequate.

MR. ROWDEN: We are anticipating another item on the agenda, but I would anticipate the comments that you will be hearing when that item comes up for discussion. We have a great deal of difficulty in seeing how a rule of this breadth and complexity, which is the issue that we're discussing now, and calling for the sort of technical judgments that it does call for as contrasted to policy decisions or economic balancing of interests, how this type of rule lends itself to negotiated rulemaking. But that will be a subject for interesting dialogue when we get to the latter part of the agenda.

MR. CAMERON: Very true.

Anybody else on the panel have some comments on this issue?

MR. MIZUNO: I guess I just wanted to add that, again referring to these factors that we discussed on Page

21, that at least some of them OGC recently anticipated would be the case simply because that was the current practice of the NRC staff.

For example, the question of reasonably early notice is provided of the pendency of the certification applications. The NRC staff is currently publishing notices of docketing of certification applications, and so I guess that particular caveat or that factor would be fulfilled.

In addition, as I understand it, it is the staff's intent that as the SERs for the design certification and FDA are issued, there will be also notice in the Federal Register. Perhaps Mr. Crutchfield could address that.

MR. CRUTCHFIELD: The staff does intend to issue in the Federal Register notice of the final safety evaluation report available.

With General Electric, that's going to be in the August time frame. We expect there will be some additional work to resolve some open issues which should probably take us to the end of the year before it will be likely that an FDA will be available. So there will be an additional period in there when the SER is out before the FDA is noticed for certification rulemaking.

So it would appear that there would be sufficient time for those that are interested in commenting on it to become aware of it and to review the 7,000-odd pages that

are being put before us.

MR. CAMERON: Thank you.

How about questions from the audience on the time for submission? Go ahead.

MR. ENGLAND: While the audience is thinking, I guess that leaves us with the proprietary information question.

MR. MIZUNO: Well, actually, it still leaves open the -- Mr. Crutchfield was referring to the fact that final SERs would be available. Our paper referred to draft SERs. So that's earlier in the process and that's something that has to be considered. I mean, that's a policy issue, whether we should have notice not only of the final SERs, but of the draft ones.

I mean, there is -- I think we'll be getting into that, or we might talk about that also in the next portion of the panel proceeding where we talk about early public participation.

MR. ENGLAND: Okay. What is the staff's recommendation on public access to proprietary information? At what point in time would that be allowed?

MR. CRUTCHFIELD: I guess from the technical staff point of view, from the time of the application. I wouldn't have a problem with it being publicly available provided the appropriate protection is --

MR. ENGLAND: Then we're into the procedures of implementing that.

MR. CRUTCHFIELD: Sure.

MR. CAMERON: Thank you.

Anybody in the audience have a question?

[No response.]

MR. CAMERON: Okay. I guess the suspense has been building all morning about the next topic, and that seems to keep coming up, and we might as well move right into that, have a brief summary on the adequacy of the time period.

It was pointed out that there is potentially a lot of material to go over in this 90 days and a lot of other things to do connected to that.

It was also noted that there is some opportunity for prior involvement in the process. A very good point was made about it all depends on the context of what you're dealing with here; and finally, consensus building techniques, the implications of that were brought up.

The issue that we're going to be dealing with next is other types of techniques to bring the public into the design certification process, and there are several that are noted there. I'm going to ask once again for Mr. Mizuno to set the stage for us and then to ask Ms. Hiatt to present us with her thoughts on these issues.

MECHANISMS FOR EARLY PUBLIC PARTICIPATION

MR. MIZUNO: As is evidenced by the discussion of the two previous subjects in this first session, the issue of how long a written public comment period is to be provided and, I guess, more generally, the whole perceived public legitimacy of this rulemaking process will depend, in large part, upon the opportunities for the public to know that there is a design certification application being conducted and for them, if not to participate, to certainly at least be aware and to have access to relevant information with respect to the application and the NRC staff's review of that application.

The issues to be addressed in this portion of the panel session are whether or what kinds of opportunities can be provided for the public to make itself known on issues as they are considered by the NRC staff and the Commission in preliminary form prior to the onset of the formal rulemaking, i.e., the issuance of the Notice of Proposed Rulemaking.

Some of the issue that could be considered early on would be, for example, application of standards, technical standards, beyond the current regulatory requirements, i.e., some of the technical subjects that were covered in SECY Papers 90-106 and 91-262; proposed staff

findings on specific technical areas during the FDA review, and by that I mean the comments on the proposed staff SERs that may be issued.

Finally, whether there are unique or previously unconsidered procedural issues relevant to the conduct of the design certification rulemaking which may come up, not at this time, but only after considering some technical issues, or for whatever reason.

The opportunities for any public participation could be provided in a variety of ways. One that has been used in the past in other rule makings of which I am familiar are advanced Notices of Proposed Rulemakings, in which the Commission publishes a notice and presumably a discussion of some particular area of interest that the Commission wishes to receive public comment on, and a written public comment period would be provided for people to submit written submissions.

The Commission could also hold workshops, such as this, to allow the NRC staff to discuss areas, or to make presentations, and to then receive the comments from the public.

Finally, there is the use of negotiated rulemakings, an other area, and similar types of mechanisms for getting the public involved.

MR. CAMERON: Thank you.

Ms. Hiatt?

MS. HIATT: My basic position on this is that we need to have more early mechanisms basically because Part 52 does eliminate the opportunity for public participation on design issues in case-specific licensing proceedings.

I think it is essential that early mechanisms exist for public involvement in the standard design certification process. Such early mechanisms would help compensate for the reduced participation at the COL stage on plant design.

Again, in an ideal world, I think we know that people would read the Federal Register and be well aware that these designs are under consideration, and would participate fully in the procedures that are available to them.

I think, again, we have to face reality which is otherwise, that people, for the most part, are not proactive, and they are not only reactive, they are crisis oriented. They often don't become involved until they perceive the crisis which, in this arena, means the nuclear plant has been proposed for someone's backyard. Of course, at that point, it is too late to raise the design issues under Part 52.

Therefore, a for greater public awareness of these issues, and of the need to become involved, I would

encouraged the use of workshops, public meetings, publication of an advanced notice of proposed rulemaking, and I would also favor the use of negotiated rulemaking.

My experience with NRC rulemaking says that there is often a much greater opportunity for a more meaningful discussion of issues and options at the advanced notice stage than at the final proposed rulemaking stage, where the options have, more or less, been narrowed and almost cast in stone. Early involvement is truly the key to having a good impact.

I think there also could be a great benefit both the NRC and the industry from a public perception standpoint of using such mechanisms which, I think, would help convey the message that openness is the way the NRC is doing its business, and I think that the industry could also benefit from that.

We may also need such mechanisms to counter the public perception which may have been created by some of the debate over the one-step licensing legislation. I think some of the oversimplification of those issues may have left the impression with members of the public that there are no more mechanisms for public input. We know that isn't true, but I think that perception may very well be there.

I guess I am also encouraged by the discussion on intervenor funding in the OGC paper that such congressional

prohibitions may not apply to such early mechanisms. I think that is one of the really basic problems that we have, the public interest groups are not well funded, and they are not well staffed. I think you would see a greater quality of input if they had more resources.

As I noted in my comments on the NUMARC proposal, I think negotiated rulemaking may be a very attractive option for considering here. While you are dealing with policy and technical issues, I am not sure you could separate them. I think if something can be litigated, it can be negotiated, and I think the net resource savings for all parties, if you get involved in negotiations, you may have more agency resources being expended up-front, but you may have a net resource advantage, if you can avoid hearings and judicial review thereby.

I really think this is something that ought to be tried. I think there is a great potential there. I think you could add a lot of improvements in dealing with things like proprietary information. You have more of a climate of trust with limited parties where you don't have to worry about everybody coming in and getting it.

I think you have a real potential here, and I think it is ideally suited for this type of thing.

MR. CAMERON: Thank you very much. Mr. Bishop or Mr. Rowden?

MR. BISHOP: I agree with a lot of what Ms. Hiatt said. Alas, I disagree with a fair amount as well. I think there is no question the public participation early and thoroughly will assist everybody. Nobody wants to see a decision, no matter what that decision is, that subsequently is overturned in court. It has to be a sound decision if it is going to get the public support and fundamentally it has to be a sound decision if the NRC is really operating in the public interest, which by law it is required to do, so we favor early public participation.

We think that the system that is already in place has provided a great many opportunities and there will certainly be more. Virtually all of these possibilities save one, the negotiated rulemaking, have been addressed, are in place. Meetings between vendors and the Staff, ACRS meetings, Commission meetings on Part 52, on the fundamental policy decisions as well as now we're getting into some of the design aspects -- those have all been public.

There's been great reporting on it in the press. I think there's no question that people who are interested have the opportunity to follow along and to be a part of that process. I don't think that that necessarily says however that we have to go t some of the extremes, in my view, that one might conceivably address.

I frankly don't think that a workshop like this is

the way to solve a technical issue. I don't think that a negotiated rulemaking is the way to solve technical issues which are inherent in complex designs. I mean perhaps my imagination isn't broad enough to figure out what are we doing to decide whether there should be two or three condensate pumps in this kind of a forum.

I think those technical issues fundamentally come down to engineering judgment and that is the NRC's responsibility. Our responsibility is to ensure that there is understanding of what the system is and what the process is and that everybody has an opportunity to participate appropriately. That doesn't mean that everybody has a chance to do everything at any time now or into the future.

This process is set up to try to achieve certain goals, all of which the NRC has concluded are in the public interest and therefore I think a reasoned process is the appropriate one and I think the opportunities for a public process and public participation that are being pursued by the Agency are in fact reasonable and do accomplish that end.

Notice of docketing -- I mean I won't go through all of them but I think they have been well laid out and I think that the public has been advantaged by the process the NRC is using and intends to use, with the exception and I'll turn to my colleague Mr. Rowden to discuss negotiated

rulemakings in particular.

MR. ROWDEN: Well, I will take your invitation to extend beyond that.

Some of what I am going to say is a matter of personal opinion, although I suspect it corresponds with those in the industry who have been considering these issues.

I'd start out by saying that public participation quite obviously is an important part of the nuclear licensing and regulatory process. I would emphasize the words "important" and "an." Both of those I think have to be considered. It is not the only aspect to the nuclear licensing process. As a matter of fact the end result of that process should be sound decisions, not decisions which represent homogenized results.

I have no difficulty with a concept of and would actively support early public involvement in the contribution of views on issues which lend themselves to public participation and I certainly would support the sort of informational workshops and public meetings that the NRC has been holding on the design certification review process for some time, another one of which is going to take place tomorrow.

I think the public does have something to contribute on policy issues. I think when legal questions

or process questions arise in the course of implementing the Part 52 process, the public ought to be heard. As a matter of fact, the Commission has periodically throughout the course of its implementation of Part 52 offered just such opportunities and I am not talking just about this workshop. I am talking about the opportunity that is provided for public comment on the various SECY papers, something which the industry in terms of self-interest has obviously taken advantage of but which other members of the public have not, even though the NRC has made that opportunity widely known.

I have difficulty in the concept of brokering the resolution of technical issues in a way so that it achieves some sort of undefined consensus approval. I don't think that makes sense in terms of allocation of resources. I don't think it makes sense in terms of efficiency of process, and most important of all, I don't think it makes sense in terms of the soundness of the safety technical decisions that are reached, so I think one has to be discriminating in differentiating between issues in which early public participation can not only be advantageous in terms of image but value in terms of public input, as contrasted to those issues which simply don't lend themselves to that.

Again, that is my basic problem with regard to negotiated rulemaking. I don't think that the concept of

negotiated rulemaking lends itself to application in dealing with the technical review of a complex design such as the ones that would be involved in design certification review and approval.

MR. CAMERON: Thank you, Mr. Rowden.

Let's go to Mr. Olmstead.

MR. OLMSTEAD: Well, I have been building you up to this gently this morning but I will be very blunt now.

The Administrative Conference of the United States is charged under the Negotiated Rulemaking Act and the Administrative Dispute Resolution Act with consulting with federal agencies with respect to alternatives to the traditional adversarial process and finding ways of getting better governmental decisions through creative uses of mediation, arbitration, negotiated rulemaking, many trials.

Every agency is supposed to be developing an ADR policy. The NRC has given us an early draft of such a policy and we have commented back to them on it, as well as some 25 other federal agencies to date and there will be some 80 federal agencies that we'll provide comments on their policies some time in the next two to three months.

As many of you know, we have been having extensive workshops and seminars for federal agencies on this subject around the Government and these agencies range from the technical to the non-technical. As a matter of fact, I want

to read you two sentences out of one of our materials on Alternative Dispute Resolution where we talk about ADR being useful "when some or all of the issues are of a technical nature and trial on the merits would be very long and/or complex."

Excuse me, but I think that defines NRC proceedings. It is not I think true to intimate that a consensual process leads to a decision that is technically accurate or less safe. If it does, the participants in that consensual process haven't done their job, most particularly the agency hasn't done it's job, but Congress has sent a clear message to agencies that they are to use Alternative Dispute Resolution techniques. The Vice President's Council on Competitiveness has developed and the President has issued an executive order directing agencies of the federal government to use these techniques.

Now I recognize they can't direct NRC to do so but it is clearly a bipartisan policy of our Government that alternatives to traditional litigation are to be tried by federal agencies in dealing with federal programs and disputes.

I do not want that to sound overly negative, although I know it does, but I think that people have to make a good faith effort to try to find devices, whether those are early, neutral evaluation, or mini-trials or

negotiated rulemaking, to involve the affected interests in a federal program, both public and private, in discussing the issues and developing more creative ways to deal with them so that we avoid the costs of litigation.

The Environmental Protection Agency, as you may know, has used negotiated rulemaking to very great effect in some of the most complex technical matters in the Government, as has the Department of Transportation. The Department of Labor is now using them in OSHA rulemakings.

So, I think that agencies are finding that they can use these techniques to great advantage, and that consensual resolution actually reduces the time, rather than increases the time that it takes to complete federal regulation. Now, all of that has been very general and I would like to get into some specific give and take about how these techniques are used, but I would ask that people not rule out of their mind, through some stereotype as to what consensual resolution means, the use of consensual techniques for involving people who have different perspectives on an issue.

That is not to say that you're going to get some lawyer from Dubuque coming in and talking to some physicist from MIT and trying to arrive at consensus. That's not what consensus means at all. It means bringing people who are technically competent in a particular issue together and

having some kind of effort made to find the interests at stake, and getting the assistance of some neutral party to develop consensus-building techniques.

I sound a good deal more radical here than I sound in the conference itself. My staff is a lot more radical than I am on the subject of negotiated rulemaking and, in my opinion, sometimes a bit too rigid, because they have a checklist of things that are laid out in the paper here that they think you should always do in every negotiated rulemaking.

I tend to think that what you have to do is pick and choose from those techniques that work best, and develop a process for the particular issues involved that will lead to the right kind of consensus, but I do think that spending some time going out and doing what we call convening, namely, attempting to identify the diversity of interests and viewpoints on particular issues, and bringing people who are knowledgeable about those issues together for discussion, can lead to agreements among these people which can enable the agency to move forward more smartly on the rulemaking front.

I recognize that sometimes this appears to be a challenge to traditional practice, but I don't really think it is. I think it probably takes as much time, but of a more creative and constructive sort than what's been used

before.

I don't know if I should define things like early, neutral evaluation and mini-trials and other settlement techniques, Chip, or not? Does everybody know what those are?

MR. ENGLAND: No.

MR. CAMERON: I think it would be useful to, at some point during this discussion, to define these terms, because I think the importance is that there is a full range of techniques that could be applied, rather than just one, for example, negotiated rulemaking. If you'd like to do that quickly right now, why don't you do it?

MR. OLMSTEAD: I'll take the -- I'm going to take this summary quickly out of the book that we put out called Implementing the ADR Act, Guidance for ADR Specialists. There are people in the NRC that have copies of this publication.

But the simplest form is mediation, which, we indicate, is appropriate when the parties are looking for a substantial level of control over the resolution of the dispute. Now, notice the words, "the parties." The parties doesn't mean parties in terms of adjudication; it means people who would be affected by a particular action of the agency.

And where they want more control over the

resolution of the dispute, mediation is indicated. Also, where the parties expect to have or have an ongoing relationship, there is the suggestion in the paper that that may not be the case here, but I would suggest that most of the national organizations that would help local citizens are well known as far as the public interest side of the equation goes. Certainly the states are well known, and the key players in the industry are well known.

Communication between the parties has broken down to a significant degree, or suspicion or personality clashes have developed; I would suggest that you might find some of that in the issues that you're talking about. The legal standards for decision are fairly clear, or neither party has a need to clarify them. There are multiple issues to be resolved. That's for mediation.

If you move up a step then, you can go to early, neutral evaluation, which is a device used where you bring an expert in that's viewed as a neutral by all of the parties and the parties present their view of the dispute to the expert. The expert then indicates how they would see the issue being resolved and then the parties, on the basis of that early, neutral evaluation, go back and finish their discussions with each other in a negotiation.

It's indicated when the top decision makers of one or more parties could be better informed about the real

strengths and weaknesses of their particular position, one of the things that we find in disputes is, frequently, the people that are talking to one another have no authority to actually resolve the dispute. So, there needs to be a mechanism to bring key issues up to the level of the real decision maker, whoever that may be. It may be a vice president, it may be a president, it may be the Chairman of the Commission, it may be a director of a Division in the Commission, but there needs to be some way for the key decision makers to know what the key elements of the dispute are.

Then we have mini-trials. Mini-trial is getting the key decision makers in front of a decision maker who's set up to hear the strongest points on both sides of a disputed issue, and then indicate to these decision makers, how that person might decide it. We find that moves negotiations forward, once the key decision makers know how strong or weak their case is.

Frequently, key decision makers are only talking to their own lawyers; they're not talking -- not really seeing the other side's strength, and so we have mini-trial. Settlement judges, the Federal Energy Regulatory Commission is really taking the lead in this area. They pull issues out of formal adjudication and put them in front of settlement judgments where the parties are not able to

negotiate a settlement on their own.

Finally, non-binding arbitration where parties are looking for quick resolution and prefer a third-party decision maker, but would like a role in selecting who that decision maker might be. So, that's kind of a quick overview of the mediation techniques that can be used in negotiation in helping people move past intractable technical issues so that they are able to negotiate among themselves to get results that they all feel are better than just throwing the thing into a forum where everybody loses control of the dispute.

The thing we want to emphasize to decision-makers -- and I really need to make this pitch to an audience that has more technical decision-makers than lawyers in it -- is that the key is, it empowers that decision-maker to control the affairs of the their own program, rather than turning it over to an adjudicative process. With that background, I would like to talk about negotiated rulemaking in greater specificity.

MR. CAMERON: Thanks, Mr. Olmstead.

Let's go to the state governments and see what their views are on this. Mr. Brew?

MR. BREW: I fail to see where the down side is in trying alternative dispute resolutions. If you're going in saying, It won't work; we won't try it, you're just dooming

yourself to greater length in litigation as you go along, since ultimately you're going to try to resolve those issues either through testimony and cross examination or written comments. The experience that I have seen in rulemakings in New York is that there are all sorts of options, as you mentioned, for early participation, and they work. You draw interested parties into the process. There's a free exchange of information. A lot of unnecessary barriers get broken down. You get to what are the real issues better, through successfully using informal mechanisms than simply relying upon the papers or the litigation process.

It seems that, looking for example at what the EPA did in its acid rain rules, through the Acid Rain Advisory Committee, where it actively sought the view of the different parties in developing those rules, which was very successful in some areas and didn't work so well in others -- but the fact that you can't guarantee success doesn't mean that the exercise is pointless, either. I think in this sort of arena it would probably be extremely useful.

MR. CAMERON: Thank you for those thoughts.

Mr. England?

MR. ENGLAND: I don't really have any personal experience with ADR, but I think that the key point is that, whatever mechanism should be used, there should be no compromise on important safety issues. That seems to be the

most important part.

MR. CAMERON: Okay. I'll open it up to the panel to respond to any points that other panelists have made.

MR. ROWDEN: I wouldn't want my comments to be considered a response, but, since people are speaking directly -- indeed, even bluntly, as Bill said -- let me speak with equal directness and bluntness. I have no difficulty with the concept of alternative dispute resolution. We utilize it as a substitute for litigation and recommend it to our clients for very practical reasons. I think one ought to, however, bear in mind the difference between litigation and the process of administrative decision-making, in terms of what the end objectives are.

Basically, the objective in litigation is to resolve disputes. Whether they're rightly or wrongly resolved is not inconsequential, but it's not the driving consideration. The utilization of alternative dispute mechanisms there, which basically comes down to a matter of litigation and business judgement as to what you ought to accept and what not to accept, is a perfectly sound -- indeed, useful -- mechanism.

I think, when we move into the area of administrative decision-making, where the end result should not be simply resolving disputes, but resolving them correctly, as the last panelist just indicated, we have

different considerations involved. I have no problem in conceptualizing certain types of alternative dispute resolution mechanisms, some of which are already in place, although not identified as such, in the present Commission process, as being an appropriate adjunct to design certification or rulemaking. However, I think, based upon over four years of involvement in the formulation and support of an actual final design approval and design certification application, and with some awareness of the complexity of the issues, the volume of the information and the nature of not simply the participants but what, in many respects -- and I say this with regret, but it's true -- are the combatants in the nuclear process, I believe that to say that negotiated rulemaking, as such, can be applied across the board to such a process is -- and I never thought I would make this observation with regard to the Administrative Conference, which I was once a member of -- romantic in its conception.

[Laughter.]

MR. ROWDEN: I think that we have to break it down to issues and we have to break it down to particular modes of enhancing public participation. As I said, not only do I have no difficulty with, but I would encourage, the process of greater public involvement earlier in the application review steps, in contributing their views on policy issues

and process issues. I have a great deal of difficulty in brokering decisions on technical issues.

MS. HIATT: Regarding the remark about combatants, I think we are all aware of the very bitter and pulverized nature of much of the debate over nuclear power, but one of the things I've noticed about consensus-building processes -- and I participated in one at the state level, the State of Ohio Citizens Advisory Council on Nuclear Power Safety -- is that the process itself has the amazing ability to lessen that type of bitterness and pulverization, and it really has the power to change the attitudes of some of the participants towards each other, towards agencies, towards the very issues involved. In some ways, I almost think the process is more important than the product, although I think the product can be very valuable, as well.

I wouldn't write it off simply because there are combatants involved here. The process can actually lessen some of that hostility.

MR. CAMERON: Thank you.

Mr. Olmstead?

MR. OLMSTEAD: I don't think there is as much disagreement here as people might think. I think, though, that there is somehow a concept of what negotiated rulemaking is that I probably wouldn't agree with. I can't get to that until we get to some specifics as to why you

find it so troubling.

I think that Susan is right, that negotiated techniques, where I've seen them used, whether you use the whole panoply of ADR techniques, which is the thing called negotiated rulemaking -- because that's really all of them put in one process -- or you pick and choose the ADR techniques that are appropriate in the particular issue, the purpose of it is to reduce the level of unhelpful and non-productive dispute and to increase the level of helpful and creative problem-solving, so that all of the interests of the people who are involved are recognized at the appropriate time.

Now, what I would think is, if you look at this draft paper by stepping back from it and saying, Really, what are we talking about here, there is something striking about it that, if you think about it a minute, commends negotiated processes to you. That is that there is almost an explicit assumption in this paper that the only people at the time of the licensing proceeding who are going to have any issues are non-industry people. Why is that? It can't be that the Staff is just rubber-stamping the application, because if that's what they're doing then they're not doing their job. It must be that the disputes that arose between the Staff and the industry applicants have somehow been resolved. All that alternative dispute resolution says is,

If there is a process by which disputes are being resolved that is less controversial and less combative, then you ought to take the techniques that work in that process and apply them to everybody.

I would submit that what it does is commend more joint sessions with the Staff, the industry, and the potential interests that are affected, earlier on, with some kind of consensus resolution mechanisms in place that have been thought of in advance and that people have kind of signed on to. To me, that's what you're talking about if you're talking about negotiated rulemaking.

MR. CRUTCHFIELD: Speaking for the Staff -- I guess I've been quite for most of this and one who will be directly involved in it -- I'm not sure Mr. Rowden's term, "combatants," necessarily meant the public interest groups, but perhaps the Staff and the vendors could also be considered combatants. In many cases, the resolution that comes out of those interactions is not necessarily a consensus process, but the Staff imposing its position onto the particular applicant, saying, In order for us to make our safety finding, it will be done XYZ way. The vendor either agrees, or he withdraws, or we go somewhere else.

The Staff doesn't have a problem with early involvement of parties who are interested, whether they're industry representatives, public interest groups, et cetera.

As a matter of fact, I think we sent some folks out to the Ohio consumer advisory council, or whatever their name was, to get involved early with that activity.

One of the problems that the Staff has is, we agree with Mr. England: There should be no fundamental negotiation of safety involved. The Staff does not want to negotiate safety away. We don't want to be involved in a process where we achieve or obtain a level of safety that we're comfortable with and we feel meets the regulations, has appropriate margin. We don't want to negotiate that away. I don't think the Staff would stand for that.

Another aspect that is a curiosity to me is, what does this process say for the stability that was supposed to be imposed by Part 52? Part 52 was supposed to involve decision-making up front, before soil had been turned over, concrete poured, et cetera. If we get into this process too late into the game, as perhaps we may be with the first two applications, it could add substantial instability to the process. I guess we're concerned about that, also.

MR. OLMSTEAD: I want to quickly clarify one thing. Nobody should ever be trained to negotiate away fundamental positions. The whole business of Roger Fisher's Getting to Yes book, which I urge you all to read, if you haven't done it, is that no party to a negotiation should ever take a fundamental issue and negotiate it away.

Safety, as far as the Staff is concerned, would be a fundamental issue, so obviously you would never agree in any negotiation to something that you thought compromised safety.

MR. MIZUNO: I want to add just a little bit to Mr. Crutchfield's remarks, which is that, at least from an OGC standpoint, we didn't think that alternative dispute resolution was going to be possible for the first two design certification, because the review is so far along. What we had anticipated seeing is looking forward and saying, Where we have more time, where the applications have yet to be docketed or have just been recently docketed, but we are looking forward to anywhere between an 18-month to a two-year time period for the Staff to review the application -- this is the time now to discuss whether there are opportunities available for these types of things.

MR. CAMERON: Thank you.

MR. BISHOP: If I may, like Mr. England, I want to confess to not having had much experience with this, so a lot of this is a question of first impression to me. I got to skimming through the points that are covered in SECY-170 here, about the Administrative Conference and their description of conditions conducive to negotiated rulemaking. I have to admit to kind of stepping back and taking as a given that the issue that I think we would all

agree with, about the fundamental compromising of safety. I just wonder if we may not, for the purpose of this discussion this morning, be correctly focused. My point is that, by definition, to have alternate dispute resolution, you've got to have a dispute. I wonder at what point one reaches a dispute where these techniques may come to hand.

One thing that occurs to me, notwithstanding what the provisions of Part 52 say, is, once issues have in fact been joined, technical issues, after the documentation has been provided, has been reviewed -- contentions, if you will, in a licensing context, which most of us are most familiar with -- discrete issues have been identified, maybe that's the point where alternate dispute resolution mechanisms could be pursued, in place of what is now -- and I'm not by any means advocating a change to 52, but right now the process envisions the formal process leading to, perhaps, if the Commission decides it's necessary, a more formal process. But I wonder if a going-in position, at least for further consideration, ought not to be, maybe neither of those steps are required, and maybe there is in fact a place for alternate dispute resolution in that process at that point, rather than our mind's eye now saying, Well, you know, the whole design will be subject to alternate dispute resolution and negotiated rulemaking.

I must admit, I may later regret having put that

forward, because I'm not sure what the implications are, both in terms of time and schedule, and whether it can be done, much less whether it would require a change to Part 52, which I do not advocate. But it seems to me maybe -- there is a thought that occurred to me that this might be an appropriate thing to consider.

MR. ROWDEN: Let me just add something to what Bill has said before. He has laid down a challenge for us to be flexible and open-minded, in terms of evaluating various means of alternative dispute resolution. I don't think anybody has a closed mind to doing something better. God knows, the system certainly is perfectable.

I would lay down a challenge to you. I would like you to withhold your judgement as to the utility of negotiated rulemaking until you see the first design in the form of a final design approval, accompanied by a description of the contents of tier 1, including the inspections tests analysis, and acceptance criteria, looking at that and evaluating the utility of alternative dispute resolution mechanisms in that context. Everybody has agreed that those mechanisms -- although, as a matter of fact, they have been available on discrete issues throughout the process, because of the opportunities the Commission has afforded for public participation -- but everyone has agreed that, as a generic proposition, you can't apply negotiated

rulemaking to the first design certification applications. I have serious reservations as to whether it's utilizable to later applications, but at least I think we ought to have the benefit of looking at the product that one is dealing with before one reaches a conclusion.

I tend to agree with you, however, that there may be areas of potential common agreement here. I don't think all agencies are fungible. I don't think agency programs are fungible. I don't think all agency issues are fungible. I think we ought to look at them selectively, and I think you ought to be sufficiently open-minded, as I think we would be prepared to be, to look at the issues that would be involved in design certification, to see what alternative dispute resolution mechanisms -- not just negotiated rulemaking -- might be effectively utilized.

MR. CAMERON: Susan Hiatt.

MS. HIATT: I would like to make a quick comment regarding the possibility of negotiating away fundamental safety positions. I really don't see that happening here. I think what would be under negotiation is really an issue of how safe is safe enough and what would the appropriate margins be. Would there be severe accident mitigation features? What would be the appropriate criteria for the containment? Should it be designed to withstand severe accident phenomena? I think you might be talking about

those types of issues, which I certainly think would be open to negotiation. I don't really see any fundamental position, really, being open to attack there.

MR. CAMERON: Thank you.

Mr. Olmstead?

MR. OLMSTEAD: I think I agree with everything that both Susan and Mark said. One of the problems, I think, in that people react negatively to the term "negotiated rulemaking" is that they assume that every issue in a rulemaking may be up for grabs. My experience is that that's not really what happens in most negotiated rulemakings. In most negotiated rulemakings there are specific issues that specific interests bring to the table, and they need resolution on them.

The other thing that is important about this -- this is a process question. The fact is, in something as complex as a design, different decisions are made at different levels in different degrees of detail. One of the things that one needs to sort out is where the appropriate level for a decision for a particular of detail is. The Commission is not going to make all of the safety decisions in the detail that they are made at some level in the Staff. All of the safety decisions are not going to even be reviewed by the Staff; they're only going to review a certain percentage of them. Some of those decisions are

going to be made in the utility organization, and some of those decisions are made in the vendor organization.

What one needs to do is sort out what kinds of decisions are going to be made where and talk about what kinds of disputes are going to occur where and, when you've got that sorted out, talk about what kinds of processes one ought to use with those disputes at those points. That's really what I mean when I talk about the process of negotiated rulemaking: to make sure that you don't end up having a dispute about a particular issue at the wrong place, where the decision can't be made, or where the parties and interests can't effectively be heard. I think those process issues can be sorted out than has been the history in the nuclear industry and that people can sit down and figure these things out so that you don't get to, if we go back to this 90-day period, a place where everybody feels irrevocably committed and somebody who hasn't been a part of the process suddenly says, I have a right and an interest to be heard and need 180 days to do it.

That's really what I'm talking about when I talk about a negotiated rulemaking process. I'm not talking about negotiating every single issue that would be in the design application around a table, with a group of lawyers yelling at each other.

MR. ROWDEN: Lest I offend anybody here, I would

have to say that, when the term "negotiated rulemaking" is bruited about within the nuclear industry, the immediate object lesson that comes to mind is the high-level waste management negotiated rulemaking, which I think many believe -- rightly or wrongly -- was an enormously costly and not a very efficient way of going about a decisional process.

MR. OLMSTEAD: Since I am the one that was the Staff negotiator in that rulemaking, I just have to note my disagreement with that. I will indicate that one of the problems we had in that rulemaking, quite frankly, was that the industry did not take it seriously until the last minute. As a consequence, the other participants in that negotiated rulemaking process, who were busy dealing with their organizations in a serious way, were prepared to go forward, and the industry participants, who didn't think it was going to work, didn't really get engaged in the process until the last minute.

MR. ROWDEN: If you could have seen some of the legal bills that were submitted, I don't think you would abide by that.

MR. CAMERON: We should have negotiated those hourly rates, perhaps.

I don't want to get into a discussion about the high-level waste negotiated rulemaking. I think we could have a workshop on that itself. It's not a bad idea,

perhaps, but I would like to give the audience to ask some questions. I do have two questions here, and I believe this one was submitted by Mr. Cowan. Correct me if I'm wrong about this one.

If you use alternative dispute resolution, either negotiated rulemaking or something short of that, is there any rule for a Licensing Board? That is, doesn't the use of these techniques eliminate any rule for the Board? Secondly, what is the role of the Commission itself in this type of process?

MR. OLMSTEAD: Two answers to two questions: The first one is, the Commission could use members of the Licensing Board, if they wished to, for some of the -- For instance, FERC uses their ALJs as settlement judges and neutrals in some of their ADR processes. I believe that the Department of Labor does so, too. That's one use for your Licensing Board. They certainly could be used as far as the early, neutral evaluation that I talked about earlier.

But the role of the Commission is as it defines it, but in negotiated rulemaking the Commission is not obligated to do any more than to indicate that it will publish the results of the consensus, as was seen in the high-level waste rulemaking, where you had a change in the membership of the Commission. The Commission changed the final rule from the proposed rule, and it was clearly their

right to do so. The only thing that they are committing to do in a negotiated rulemaking process is to objectively take the results of the consensus and deal with it, or consider it.

The Conference feels that the best way for the head of an agency to interact with the negotiations is to have a mechanism by which they have input into the positions that the agency is taking in the negotiations, so that the negotiator for the agency ought to be in direct and regular contact with whoever is going to be the decision-maker. In this case, that would be the Commission.

MR. CAMERON: I will give Mr. Mizuno an opportunity if he wants to comment on those questions from the OGC point of view.

MR. MIZUNO: Well, I was going to comment, but Mr. Olmstead accurately answered the question. The only thing I could add, though, is that I think the Commission has a lot of flexibility as to where and in what circumstances it wants to use alternative dispute resolution, whether it be at a very advanced stage or, as Mr. Bishop suggested, perhaps when issues are more defined, once you're in an informal hearing stage. So we're not just simply limited to the use of negotiated rulemaking to come up with a consensus proposed rule, but those same kinds of techniques could be also used later in the stage, to try and obtain a consensus

once issues have been defined in a contention forum. I think that that would be consistent; I mean, that could be worked in within the existing framework of Part 52.

MR. CAMERON: Yes. I think the next question highlights what both Mr. Bishop and Mr. Mizuno are pointing out: that there is a variety of places where consensus techniques, including negotiated rulemaking, might be used on the route to the final design decision, rather than looking at the use of these techniques purely from the point of view of a yes or a no on design certification. This comes from Mike Blake, of Nuclear News. If a technical issue is contested, it seems that a prerequisite for resolution would be an agreement by all parties that the database is adequate. Would this require specialized testing to produce data that satisfies everyone, and who would pay for this?

Does anybody want to handle that?

MR. CRUTCHFIELD: If you did get in a dispute among the parties and the parties included the public interest groups or states or whatever and there was an agreed-upon need for additional testing, obviously the applicant would be the one that would be required to pay that bill. It would be part of the certification-rulemaking fee process.

MR. CAMERON: Thank you.

MR. OLMSTEAD: I don't necessarily agree with the assumption in the question that the -- The Staff frequently asks for more data -- that's fairly typical -- but it is not very typical, at least in the mediations that I've seen in other agencies, for there to be too many of these kinds of contests. Usually the parties are pretty well in agreement, if they're technically competent -- if the negotiators are technically competent -- as to what constitutes adequate data for particular purposes.

MR. ROWDEN: This brings to mind another point, and I raise it out of ignorance more than anything else, because I'm not familiar in detail with what the Administrative Conference has proposed, and I'm not familiar at all with what NRC's so-called draft response, but my assumption is that, if alternative dispute resolution mechanisms are to be utilized, there have to be mechanisms which can't be imposed from the top down. Whatever the validity of your comments about the high-level waste management proceeding, the fact of the matter is, they have to be entered into by all of the parties willingly.

Maybe it's an option that the parties ought to be able -- particularly the applicant, which has the biggest stake -- and I'm not sure I agree about the cost allocation here; let me note that for the record -- Maybe it's something that the parties, including the applicant, ought

to have the discretion to utilize, rather than their being directed to utilize it by the Commission. But, again, this is a matter that I don't think you can deal with in the abstract; I think you have to deal with specific issues and specific techniques.

MR. CAMERON: How about anybody else in the audience? Are there any other questions out there?

[Pause.]

MR. MALSCH: I just had thought as I was listening to the discussion about negotiating on basic safety questions. The observation that occurred to me was, as a practical matter, if the alternative dispute resolution process takes place after issuance of the Staff's safety evaluation report, the effect is likely to be that the safety conclusions in the SER will be the minimums, and negotiation will proceed from there. From that standpoint, the vendor might see this as sort of a no-win proposition. On the other hand, if you begin the negotiation earlier on, before issuance of the Staff SERs, then it might be difficult to define the issues for resolution with any specificity, and the process might become kind of unmanageable. I was wondering whether people had thought about that and had any reaction to this sort of preliminary observation that I had.

MR. ROWDEN: The answer is yes. From our

standpoint, those are the two basic considerations that give us concern about applying that to the design certification process.

MR. BISHOP: My further problem is that I look through these conditions conducive that the Administrative Conference sent out -- and perhaps it shows my lack of experience in this area, but I don't see many of them that seem to me to be naturally able to be satisfied in this context of the design certification rulemaking.

MR. OLMSTEAD: I can see you need to be in our two-day course.

[Laughter.]

MR. ROWDEN: Perhaps the four-day version.

MR. OLMSTEAD: I must say that the people that become convinced that this is the way to go -- and I say this in all seriousness -- are the ones who have gone through some of the -- I hate to call them role plays, but they're sample intractable environmental disputes that we give people the opportunity to negotiate, and they work with experienced mediators to work through those problems, and they usually come out convinced that it's a lot better way to do it.

In answer to Marty's question, I would agree -- I would say yes to the first one, but, as to the second one, I don't know that you have to get yourself wrapped around that

axle. It seems to me that the applicant has disputes with the Staff. It is also possible that the public interest groups would have disputes with the Staff. I mean, it's not a matter that the Staff and the applicant and the center and the right and everybody else is to the left of center. People have different views on different things at different times. If they're all dealing on the same table at the same time, it seems to me that you could, prior to the Staff's SER coming out, have a lot of input from the public that would be useful. As a matter of fact, my experience was that, unless they've changed dramatically, NRR used to have public meetings where they got public input at the same time that they were asking questions from the Staff. There is no reason that those mechanisms can't be a part of this process.

MR. CRUTCHFIELD: But they already are. They already exist. We still do have public meetings, and at the end of the public meetings there is an invitation to members of the public who wish to speak up, to speak up. They aren't involved in the back-and-forth, give-and-take process, but they are provided the opportunity to say their piece.

MR. OLMSTEAD: Right. The problem I have there is just the opportunity to say their piece. If their opportunity is just to say their piece and then you say,

Well, hold it until the litigation some time later and don't have a mechanism to resolve that issue to everybody's satisfaction so you foreclose it from litigation later, all you're doing is allowing a laundry list of things to be put in litigation to be built up.

MR. CAMERON: Thank you.

We're almost at the end of the morning session. I guess, in summary, I would say that many people have brought up the need for greater participation in the design certification process, particularly because of reduced participation later, at the COL stage. There is a possibility of resource savings using participative techniques. There is a concern over how consensus-building techniques could actually resolve complex technical issues and whether safety might be compromised in some way. Mr. Olmstead has spoken about the availability of several techniques, and other panelists have talked briefly about examples that they have seen where consensus-building techniques have been useful in addressing technical issues. The NRC Staff has tried to emphasize the dichotomy between -- or the difference between -- using consensus-building techniques for the second round of license application, as opposed to those that are already in the pipeline at this point. We have had some discussion about the fact that the techniques do not have to necessarily be used on the

yes-or-no decision on whether a design could be certified but could be used at several other points along the way, in terms of reaching agreement on methodologies or whatever. People have talked about the fact that we need to look at the specifics of how it can be used.

So we have seen, I think, some good opportunities for use, some skepticism about how it might be used. But the most important question is really to get down to the specifics, to see if it is feasible to use it in some part of the process.

Before we go for lunch, I would inform you that the transcript is being made, obviously, of the workshop, and there are forms out at the registration desk where you can order a transcript directly from the stenography company. You can also get a copy through the public document room, if I'm not mistaken about that; correct?

MR. MIZUNO: The transcripts will be placed in the PDR as soon as possible, and they'll be there for public inspection. Copies are available for the usual copying fee. I'm not sure whether it's cheaper to copy it at the PDR or to obtain it directly from the reporting company.

MR. CAMERON: Thank you very much, Geary.

Let's be back at 1:15 for the beginning of the afternoon session. Thank you.

[Whereupon, at 12:15 p.m., the meeting adjourned

for the luncheon recess, to reconvene at 1:15 p.m.]

AFTERNOON SESSION

[1:25 p.m.]

MR. CAMERON: I would like to welcome you back from lunch. We're ready to begin the afternoon session. We're going to be following the same format that we used in the morning session.

Our first topic for this afternoon is informal hearings. Again I'll ask Mr. Geary Mizuno to give us a context for that, and then I'm going to turn to Mr. Bob Bishop to give us a five-minute or so presentation on the industry viewpoint on that issue.

INFORMAL HEARINGS

MR. MIZUNO: I believe the first subject in this panel session is on informal hearings. As you know, section 52.51(b) provides for an opportunity for an informal hearing before an Atomic Safety and Licensing Board. Some of the issues that we might discuss with respect to that are the fact that section 52.51(b) sets no threshold for requesting an informal hearing -- i.e., there are no special requirements in the section with respect to circumstances under which an informal hearing can be granted. Does everyone who requests a hearing get a right to have a hearing, or should there be some sort of additional

requirements that should be met? If so, what should those criteria be. Another issue is, assuming that there are criteria that have to be met, who should rule on whether those criteria have been met, the Commission on the Licensing Board?

MR. CAMERON: Thank you, Mr. Mizuno.

Mr. Bishop?

MR. BISHOP: Rather than try to summarize our position in detail -- you've all got it in your packages there -- let me summarize it in broad brush. It's a question, once again, of what the law requires versus a public policy decision might be made by the Commission, what's in the public interest. Neither the APA -- the Administrative Procedure Act -- nor case law requires a hearing in a rulemaking context, so, to the extent that one is provided, that's certainly in addition to what the law requires.

That having been said, we have some suggestions in our paper. We fundamentally agree that the OGC's position, albeit somewhat different, represents a sound policy decision. We think that the recommendations that they make are consistent with the purpose of the hearing -- and let me just briefly underscore that -- which is to contribute to the development of a record on controverted issues in a manner that is neither wasteful of agency resources nor

unfairly restrictive in terms of the participation by those interested in the rule, including members of the public. We agree, further, with OGC that the parties should be limited to the issues that they raised; to do otherwise is to encourage a broadening of the proceeding beyond that which we believe to be an appropriate decision.

Although the NRC's preliminary recommendation is silent on it, we do think that there is a specific role for the states that we would encourage the Commission to consider, not unlike that which is provided in section 2.751 in the licensing context: that, if the Commission deems that that participation would be helpful, consistent with the principles established for this proceeding, then the states ought to be encouraged to take a role in that. Fundamentally, again, it is the Commission's policy decision.

Our comments, I think, are very clear with respect to the provisions we think should apply to someone requesting an opportunity for an oral presentation. That's that they should, among other things, provide a statement of their qualifications, the precise issue that they would intend to raise in that oral presentation, the outline of the presentation, including, as appropriate, those parts of the rule or the application that they are challenging, and an explanation of why they believe that an oral presentation

is necessary to achieve the Commission's goals, in terms of providing an adequate record or the most expeditious ways to resolve controversies.

With that, I'd be happy to respond to the comments.

MR. CAMERON: Thank you, Mr. Bishop.

Ms. Hiatt, would you like to say a few words on this issue?

MS. HIATT: The only part of the OGC paper that I have very, very strong objection with the threshold for obtaining a hearing is that the requester essentially have an expert witness; it's really an expert witness standard that you have incorporated there: the requirement that the requester supply the qualifications or expertise. I think that's inappropriate on several counts. First, you have to recall, these are informal hearings in a rulemaking, and I don't think we need to start bringing the Rules of Evidence into it. I would also note that persons who do not have expert witness qualifications can, nonetheless, contribute to the record through the use of documentary evidence, through supplying questions. It's not only the expert witnesses who are the only people who have something valid to say here.

I would also note that the OGC proposal is somewhat redundant. One of the reasons noted on page 41 for

requiring the written presentation to be filed when the hearing is being requested is that such presentations will enable a judgement on whether the requester can contribute. I don't see why you need to impose yet an additional hurdle and burden for people to meet. I don't see why the quality of that presentation isn't enough. I think having this extra expert witness qualification is going to fuel a lot of suspicion and skepticism, that it's sort of a ploy to keep people out.

I do not, however, have an objection to a requirement that requesters make a showing that they can contribute something, but I would leave that undefined and keep it up to the Board's discretion, without insisting that expert qualifications be required. An example of a way persons can show ability to contribute is a track record in other proceedings. I would have no problem with having that third standard -- deleting "the appropriate qualifications or expertise" and replacing it with "the ability to contribute," "the ability to make a presentation," and "a showing that a hearing is needed."

I do think that the determinations on requests for hearings should be made by the Licensing Board, rather than the Commission. I think, if you start getting the Commission involved into what are traditionally routine case management procedures, you're losing something there.

As far as limiting parties' participation to the issues raised, I would note the paper does indicate that maybe other parties could add something there. I think that's another matter to leave to the Board's discretion. The Boards have the ability and expertise and practice in regulating these sorts of things so that they don't get out of hand, and they can keep order and keep things moving. I don't see the need to tie the Board's hands to all these specific little procedures. I think they can have the discretion to determine who can contribute and who can't. Let them make those decisions.

MR. CAMERON: Thank you very much.

Mr. Olmstead, do you have anything on that issue?

MR. OLMSTEAD: It is not an issue that is of great concern to me in the light of the other issues in the paper, but I would point out that the Conference had in 1972 adopted recommendation 72-5, which has to do with procedures for the adoption of rules of general applicability. I'm making some assumptions about the nature of these rules in referring to that recommendation, but that was a recommendation adopted before the Vermont Yankee case, at a time when the courts were busy fashioning hybrid rulemaking procedures and imposing them on the agencies. That's why the old Atomic Energy Commission had the ECCS rulemaking. The NRC, early in its history, had the GESMO rulemaking, in

that courts were starting to impose, through Mobil Oil v. FPC and other cases, the requirement that, where factual issues were being removed from individual licensing cases and being treated generically, the agency had to provide some kind of procedures that looked like trial-type procedures for specific issues of fact. The Conference recommended that Congress and the courts not do that, that they don't require agencies to adopt specific procedures. Then it indicated to agencies that, when they were considering procedures that went beyond notice-and-comment rulemaking, they should look at the circumstances, consider advisory committees, oral argument, the opportunity for parties to comment on each others' written or oral submissions, a public-meeting type of hearing, and trial-type procedures on issues of specific fact.

That seems to be the flavor that's in this draft for comment, hearkening back to that kind of hybrid procedure in rulemaking. As I indicated this morning, I would rather see you using consensual procedures, rather than trial-type, controverted-type procedures, but, assuming that one's going to use trial-type procedures and kind of go back to the standards pre-Vermont Yankee and talk about something other than notice and comment, what's in the paper is a reasonable effort to do the kinds of things people were thinking about then.

If that set of assumptions is correct, I would not see any particular liability in allowing the Licensing Board to decide whether the issues were factual or not and suitable for trial-type procedures. The reason I say that is that agencies that have been experimenting with informal adjudications, who have used non-trained presiding officers, have found frequently that the people who are not trained in the conduct of administrative, trial-type proceedings, take longer to get to the meat of the matter and get the issue resolved than the traditional administrative law judge type of presiding officer. I think that, in the eagerness to make sure that the Licensing Boards are controlled, I would not lose sight of the fact that frequently the best deciders of what's appropriate for trial and what's not appropriate for trial are those that are most skilled in conducting trials.

I guess that's it.

MR. CAMERON: Thank you very much, Mr. Olmstead.

We're going to go down to Mr. Brew.

MR. BREW: I don't have any particular reaction to the items under discussion, except that they indicate a general sense that the process itself is top-heavy; with a little bit of a push it's going to roll quickly downhill into sort of a chaotic and uncontrolled process. I think that's a presumption that really hasn't been justified yet.

Under a normal administrative process, it may be appropriate for the Board or the Commission to determine if a hearing is appropriate, but to spell out the precise threshold in advance seems a little premature. The same with limiting participation of parties to the issues which they first raised: once the comments are in and the Board can see how the issues are reasonably defined, they should be able to determine if reasonable limits are necessary. But to anticipate that in advance, as offsetting your worst procedural scenario, seems unnecessary going in.

MR. CAMERON: Thank you very much.

Mr. England?

MR. ENGLAND: As I understand the time frame, the time for submitting the written comments and the time for requesting the hearing is the same. One of the threshold items, or one of the criteria, to go along with request for a hearing is to submit the written presentations. It would seem to me that the way that would work out is that the parties or would-be parties would be submitting the written comments and the written presentation at the same time. That seems to me to be duplicative. Presumably they're going to be saying the same thing. I don't know why two different papers would be required.

MR. CAMERON: Thank you.

Mr. Mizuno, did you want to clarify on that point

before we go to Mr. Rowden?

MR. MIZUNO: Yes, because I recognize that the paper might have been less clear on that. It was OGC's concept that a person that requested a hearing might not want a hearing on all the subjects that he may want to comment on in the written notice and comment period, so we saw the written comments submitted as being sort of their full discussion of all the topics that they wish the Commission to consider, whereas the written presentation that would be submitted, attached to their request for a hearing, would be focused on the specific things, whether they be factual or policy-based, whatever they may be, that they wished to actually have explored further in the hearing. Although you could say that they're duplicative, in the sense that there is some overlap, we felt that the written presentations necessary to support the informal hearing would be much narrower and focused in on the specific topic of contention in the hearing.

MR. CAMERON: Mr. Rowden, would you like to say a few words?

MR. ROWDEN: Yes. I will not duplicate what Bob Bishop has already said about the reasonableness of the criteria. I do understand Susan Hiatt's concern about the language which reads, "appropriate qualifications or expertise." I had read that much more generously, I think,

in terms of my expectation as to how that would be applied. My assumption is that it was meant to convey an opening to what I believe should be the determinative criteria: ability to significantly contribute to the development of the record. I think that should be the touchstone. You don't necessarily have to be an expert, but you do need to demonstrate some qualification to make participation worthwhile.

As to who should make the determination with respect to admission of parties and issues -- should it be the Board or the Commission -- as I understand the Staff's proposal, logistically, it could only be the Commission, because, as I understand the structure, there would not be a Board in being until the Commission has determined there would be a hearing. Obviously, the Commission could alter that, but logistically, as it now stands, it can only be the Commission.

Quite apart from the logistics of the process, I think there are very strong substantive reasons why the Commission is going to be in a much better position to make that determination than any newly appointed Board. The design certification rulemaking is a very unique process. It is not like licensing proceedings, where Commission involvement is distant, if at all, until matters are presented to it in an appeal from an initial decision or in

its own review of an initial decision. This is a process which the Commission has been involved in, in one way or another, fairly intensively, not just on policy issues, but on technical issues, throughout the Part 52 adoption process, throughout the Part 52 implementation process, throughout the FDA review process, and will be, in terms of the process of formulating the proposed design certification rule. They are going to be much more knowledgeable than any Board would be -- any newly appointed Board would be, certainly -- as to what it believes is necessary to contribute to an adequate decisional record. I would rest my support for the Commission's making that determination on that consideration primarily.

MR. CAMERON: Thank you.

Mr. Mizuno?

MR. MIZUNO: Yes. To address Mr. Rowden's point about whether a Licensing Board is going to be convened at the time that the decision has to be made, it was OGC's view that the regulation, 52.51, basically was silent as to when the Licensing Board would be convened, so that there was sufficient flexibility for the Commission to either decide that it would make the decision on whether to grant the informal-hearing request or whether to adopt the procedure that is obtained in Part 2 under reactor licensing, in which, if the Commission receives a request for a hearing,

then it would convene a Licensing Board to hear that request.

MR. CAMERON: Would anybody else on the panel like to say something?

MS. HIATT: I guess I still do not see a reason to depart from the usual practice, even though this is a rulemaking; the Commission has been involved. Typically, in a normal licensing proceeding, when a request for hearing is received by the agency, a Licensing Board is appointed, and they can determine whether or not the standards have been met and whether there's a legitimate contention. Boards do this daily. I don't see how this is to sufficiently different that they can't do that in this proceeding, as well. I think you're again losing some of the administrative effectiveness of having a Board to do these things rather than having the Commission become involved in rather mundane matters, such as who is qualified to be a petitioner or a requester. I really think that should be left up to the Board.

I think that there's a real issue here, too, in terms of who is going to be requesting a hearing, that you haven't brought up. That's in the OGC paper about the exhaustion of administrative remedies for judicial review. In the OGC paper -- the one that's entitled "Judicial Review" -- if one has requested a hearing and, if granted,

fully participated in one: I think you're really undermining the basic premise of the paper, that hearings are to be used sparingly, only when they're really necessary, by having that provision in there. I think everybody is going to be requesting a hearing, whether they really want it or not, whether they're really qualified or not, just to preserve the right to judicial review. I think you've really just undermined the whole concept. Why bother having qualifications and everything else if everybody is going to be requesting a hearing under the one?

I would say that it is a rulemaking. Anybody who submits comments or requests a hearing had participated in the administrative agency's proceedings, and therefore they have standing to take it into court. I think that is something you're going to have to look at, because it just completely undermines the whole concept here.

MR. BISHOP: I guess the flip side of that, to me, is that, if you adopt, Susan, what I understand your position to be -- that anybody that's commenting would have a right to judicial review -- I think the process quickly is going to come to a halt. I just don't understand how that practice could work.

MS. HIATT: We do it now.

MR. ROWDEN: Let me just add a thought. Whether there's going to be judicial review is not going to be

determined by any SECY paper or by the Commission; it's going to be determined by the courts. If a commenter takes this to court, the Commission's position is essentially going to be immaterial. It will be a legal argument that they will present. The court will make a determination as to whether there is standing for judicial review. That's really enough said on that point. I don't think that that's a dispositive consideration in dealing with any of these issues.

MS. HIATT: I think it's going to affect the administrative burden on the NRC if people read this paper and that's adopted. Everybody's going to be requesting a hearing, and people are going to be going through the motions, even if they really don't want a hearing, just to have their day in court later. I really think you're going to get into a real log jam administratively. It's something you could have avoided.

MR. ROWDEN: I guess I would concur that they ought not to make a determination on that basis. Whether judicial review will lie at the end of the process to a commenter or not is going to be dependent upon how the court reads the Hobbs Act and the relevant case law, rather than what's said in this paper, or what the Commission says in this regard.

Now, the Commission's providing an avenue for

further recourse may influence the court's decision. I think that was what the paper was concluding, rather than simply that the Commission, by fiat, was decreeing who could seek judicial review or not.

MR. CAMERON: Any other comments up here?

MR. OLMSTEAD: Yes. This is as good a place as any for me to comment on judicial review in a more general context than in this regard. I recommend our excellent guide to agency rulemaking.

[Laughter.]

MR. CAMERON: We have all copies of that.

MR. ROWDEN: Do you get royalties, Bill?

MR. OLMSTEAD: No, unfortunately. I even sold this to agencies at $2 a copy even though it costs me $5 a copy because of the way the GPO statute works. But that's neither here nor there.

There is a question of pre-enforcement judicial review under the Hobbs Act and the standards of that review in a rulemaking like this, associated with what happens, then, when a particular site decides to take a particular design and match it up and whether or not the rule that was arrived at under Part 52 is now challengeable in the context of that individual licensing action. A lot of critical comment is being published on the Abbott Laboratories case, the National Industrial Contractors v. Osrix case, the Eagle

Pictures -- I'm just citing these from the book here -- case, in that, if you do certain things in the rulemaking, then you open certain challenges in judicial review and the individual licensing case. It seems to me that the paper needs to be expanded to discuss this a little more particularly, so that people understand how the Commission sees the Part 52 standardized certification working with the licensing proceeding and how they intend to handle the issues of judicial review.

I bring this up particularly because the OCRE comments, as I read them, questioned whether one wanted to assert the 2.206 rationale for purposes of judicial review, and that implicates this question I'm trying to describe, although I'm not doing it very well at the moment. In the Commission's rules, 2.206 is in subpart B, which is the enforcement section of the regulations. Thus, one would assume that the less generous pre-enforcement review standard that the courts have articulated would be applicable, which means that, with respect to factual issues implicated by the design certification, a party might well succeed in getting judicial review of the rule itself in the individual licensing case. I'm not saying that I know the answer to that, and I'm not telling you that that is the answer to that, but I think it is a serious legal issue that bears further explication in the paper.

MR. CAMERON: Thank you.

MR. ROWDEN: Well, it may be a serious legal issue that requires further examination -- and your having raised it, I think, makes it worthy of our examination now. Obviously, this is an unacceptable outcome, in terms of the finality that attaches to the rule, particularly in view of the court of appeals' decision that was handed down on Friday. We will take a look at that aspect of it.

MR. OLMSTEAD: If it helps the discussion here, I can identify the four factors for people: the likelihood that the rulemaking attracted widespread participation, the likelihood that it involves complex procedures or intensive exploration of issues, the likelihood that affected parties would incur substantial and immediate costs in complying, and the need for proper compliance with the rule on a national or industry-wide basis. Those are the suggested considerations to determine whether to limit the availability of review or not.

I just haven't sorted through in my own mind how that comes out, but I certainly think that, if I were dissatisfied with the outcome of a design certification, I would always keep in my quiver the bow that in the individual licensing proceeding I might have a right to challenge the rule on review using those criteria. Now, it is true, as a general proposition, the rule is not

challengeable when you have Hobbs Act review, but it's the factual application of the rule that is challengeable.

MR. CAMERON: How about some questions from the audience? Is there anybody out there with a question?

MR. BERKOVITZ: I have a question on the OGC proposals, what Susan was saying. If the person raises an issue that is worthy of an informal hearing, wouldn't that be the prima facie or conclusive evidence that that person has the ability to contribute significantly to the hearing? What else would you need? If the person can make the submission that, Here's an issue, and it's a legitimate issue and it's worth of an informal hearing, why do you need an additional qualification that this person has participated in trials or has expert witnesses, above and beyond just the original submission?

MR. ROWDEN: Because the premise of the rule or the procedures is that the putative party raising that issue is going to have to carry the laboring oar. I mean, this is a matter -- the matter being the hearing -- which is designed to resolve controverted issues. Unless the party raising the issue has the capability of making a contribution to the record, I think it undermines the basic concept of the type of hearing that has been proposed by the Commission.

MR. CAMERON: Anybody else in response to that

question?

[Pause.]

MR. CAMERON: This is for Mr. Olmstead from Mr. Parler of the NRC. If the criteria you mentioned are satisfied, what does this mean for issues being raised in the licensing proceeding?

MR. OLMSTEAD: The criteria for pre-enforcement judicial review?

MR. PARLER: If you satisfy the criteria, which way does it cut?

MR. ROWDEN: Would you repeat the criteria?

MR. OLMSTEAD: Okay. I'm essentially reading from the chapter on availability of review. It starts on page 310: "Rightness and Pre-Enforcement Review."

MR. PARLER: I might be able to find an answer in there.

MR. OLMSTEAD: I think you might understand it better if you read it from the book instead of hearing me characterize it. I admit to always having a headache every time I hear my attorneys debate this particular issue, because it seems like I never like the answer when they get done.

It was a fundamental of administrative procedure and administrative law when I was in law school that, if you had a rule, you couldn't challenge it. Once your rightness

had accrued and you had had your opportunity to challenge it and the time had run, you were through. The problem comes when you are trying to decide how the rule applies to factual situations, particularly if they're factual situations that weren't contemplated at the time the rule was applied, so courts have been struggling with that issue, and, in the process of struggling with that issue, they have come up with a variety of different ways around the general rule that you can't attack the rule.

As a consequence, in 1982 the Conference recommended, in recommendation 82-7, "Judicial Review of Rules and Enforcement Proceedings" -- and that's why I mentioned the subpart B part of the 2.206 criteria -- that Congress should consider whether or not the limit the availability of review at the enforcement stage by addressing the four factors I mentioned. The four factors are the likelihood that the rulemaking will attract widespread participation, the likelihood it would involve complex procedures or intensive exploration of the issues, the likelihood the affected parties will incur substantial and immediate costs in complying, and the need for prompt compliance with the rule on a national or industry-wide basis.

That came out of our recommendations. Since that time, there has been an article in the Tulane Law Review by

Paul Verkuil which has stimulated several other articles I can't recall right now, which have said that you will find court cases applying those criteria in trying to determine whether to permit an attack on the rule.

MR. ROWDEN: In that context, I take great comfort from Friday's court of appeals decision, because, in a rule sense, putting aside the availability of 2.758, which is a mechanism for challenging the applicability of a rule in a later proceeding -- putting that to one side, the issue that was squarely before the court, which divided the court -- fortunately, the majority was on our side -- was whether matters that weren't considered significant new information were nonetheless preclusive under the regime established by the Commission -- again, with an escape valve whereby you could address the Commission to act in its discretion. I will read that with very great -- As I say, I'm a subscriber to your publications. But I think that the NIRS decision is perhaps very helpful on that very point.

MR. CAMERON: Thank you very much.

I guess in summary we could say that we heard some views on the purpose of the hearing and the relationship of that purpose to the criteria for participation. We have heard some other views that the criteria go beyond what is necessary in this case and some thoughts on the ability of others, besides expert witnesses, to contribute to the

proceeding, and that the criteria should be the ability to contribute. This may be consistent with the existing language that is in the OGC paper at this point. We seem to have a division of opinion on whether the Licensing Board should be the body that's ruling on these issues or whether it should be the Commission itself. We closed with a very interesting discussion on judicial review here.

We're ready to move on to the next topic, which is requests for additional hearing procedures and formal hearings. Mr. Mizuno, I'll turn to you to try to context that for us and then ask Mr. Rowden to make a few comments on it. Than you.

REQUESTS FOR ADDITIONAL HEARING PROCEDURES AND FORMAL HEARING

MR. MIZUNO: Again, the relevant section is section 52.52(b). I guess it's the third and fourth sentences in that subsection, which basically indicate that the Board has the authority to request from the Commission the use of additional hearing procedures, such as direct and cross examination by the parties, or may request that a full, formal hearing under subpart G of 10 CFR Part 2, on, quote, "specific and substantial disputes of fact," unquote, necessary for the Commission's decision that cannot be

resolved with sufficient accuracy except in a formal hearing.

Basically, the issues to be addressed revolve around the timing and the criteria for determining whether the Board requests such authority to use additional procedures or full, formal hearing from the Commission.

MR. ROWDEN: Our position in this regard is fairly straightforward, although I must say that it has been modified somewhat in light of our reading of the SECY paper. We believe that a request at the time that is proposed in the SECY paper is appropriate. I think that there are conflicting considerations here, and it's a question of where you strike the balance. From the standpoint of the efficiency of the process and being able to structure the hearing appropriately in light of the procedures that are to be applied, there is much to be said, if it can be done -- I underline, if it can be done -- for raising the question of additional procedures or a subpart G hearing at the time a request for a hearing is made. If it can be done, I think a more orderly process, and one which is fairer to all the parties concerned, can be structured. I think, if you do it on that basis, however, you have to contemplate that, if such a request is denied or if, in the course of the informal hearing which does not entail the use of additional procedures or subpart G procedures, it becomes evident that

there is a basis for a request for those additional procedures' being employed, a further step in the process, and one which will entail loss of time, is going to have to be utilized. As I say, it's a question of striking a balance between two competing considerations.

We think the balance that is struck in the SECY paper is a reasonable one, probably the most practical one, given the circumstances.

MR. CAMERON: Thank you.

Ms. Hiatt, do you have anything to say at this point?

MS. HIATT: I guess my view of the timing of when the parties are to request formal procedures or additional subpart G procedures is that it ought to be one of two places and have an opportunity for both: either at the beginning, when the hearing is requested, or at the end, when the evidence is in. I think the process envisioned in the OGC proposal, that the parties make such requests when they're immediately aware of any evidence which would ask for that, may not be workable. It's going to lead to numerous disruptive requests filed throughout the hearing process. It's going to be diverting the attention of the Board and the parties from the hearing. I think it would be much more orderly to have two opportunities, at the beginning and at the end. Having the opportunity at the end

also allows for the cumulative impact of the evidence, in that, taken by itself, one piece of evidence may not be enough to trigger formal procedures, but the cumulative impact might be enough. I think having an orderly process, where it's beginning and end and not anyplace at all in the middle, would make for a much smoother hearing process.

MR. CAMERON: Thank you.

Mr. Olmstead, any comments on this particular issue?

MR. OLMSTEAD: As you heard this morning, I prefer negotiated rulemaking.

[Laughter.]

MR. OLMSTEAD: I don't understand why one would want to add this particular process to rulemaking. I guess I say that because I joined the NRC as a new government lawyer at the end of the ECCS proceeding, working for the man that spent two years of his life at it. I also was in the GESMO proceeding, which is cited through this paper, and I also did the negotiated rulemaking. Then I've gone to the Conference and seen all kinds of hybrid proceedings. I think that, if you truly are dealing with something that should be treated by 553 rulemaking under the Administrative Procedure Act, traditional litigation procedures like cross examination from multiple parties tends to be unproductive. That's just my experience. I'm not too enamored with it.

MR. CAMERON: Thank you.

Mr. Brew, do you have anything to say?

MR. BREW: It seems that in many respects the decision about when and how to fashion a formal hearing stems from the role ascribed to the Licensing Board. To the extent that it's acting as a limited magistrate -- and this is getting a bit ahead on your agenda -- needing to decide when a formal hearing needs to be requested and the process for doing so is going to drag out the process in a much more inefficient fashion than if the Board has the flexibility and discretion to determine how best to deal with the issues. I don't have so much a comment on how the paper describes the thresholds as that I think the process is a little bit backwards at that point.

MR. CAMERON: Thank you very much.

Mr. England?

MR. ENGLAND: I really have nothing on this.

MR. CAMERON: Okay.

Do we have any other comments by the panel?

MR. ROWDEN: Just one observation. I think the criticism made about who makes the decision is something that doesn't deal with the implementation of Part 52; it deals with the structure of Part 52 itself. Section 52.51 prescribes that it's the Commission that will make that determination, upon the recommendation of the Board, and

presumably great weight would be accorded that recommendation.

With regard to the basic issue, as my comments indicated, I think I and we have some degree of ambivalence as to what the appropriate point in time is to make this determination. I said on balance we think that the Staff has made the better case for a party or a putative party who believes that additional procedures or subpart G procedures will be required, when it files its proposed testimony or when it files, I guess -- not I guess; this is what the Staff has proposed -- when it files the outline of its proposed testimony, if that is known at that point in time, then that request should be made and ruled upon at that point in time, recognizing that some sort of good-cause means would have to be provided after the informal hearing has been concluded to determine whether indeed additional considerations dictate or support the use of those procedures or subpart G procedures after the informal hearing has been completed.

MR. CAMERON: Thank you.

Does anybody else on the panel have a comment?

[No response.]

MR. CAMERON: We do have a question from Mr. William Parler, general counsel of the Nuclear Regulatory Commission. Should an opportunity be provided for the

public to review all written comments submitted in the public comment period before submitting a request for additional procedures or a formal hearing? Secondly, would the comments be docketed and available as they are received?

Mr. Rowden, would you like to take a shot at that first?

MR. ROWDEN: At your invitation, sir. I see no reason for adding that additional step to the process. In theory, it might be useful to extend the process almost indefinitely by providing for opportunities for comment and to review the comments and to review the review of the comments. This is not to downgrade Mr. Parler's question, because it is a legitimate question. My own belief is that a party submitting comments and/or seeking a hearing ought to be able on the basis of its review of the material on the record, including the contents of the proposed rule, to make a determination as to whether it sees issues which should be considered in the hearing and to support its request for a hearing.

MR. CAMERON: Thank you.

Does any other panelist have a comment on that question?

MR. OLMSTEAD: I am starting to get one of my famous headaches here. This is a rulemaking under 553 of the Administrative Procedure Act. If that assumption is

correct then one has to stay in the context of 553. Even when you're talking about additional procedures, you still have to talk about participation and parties and who they are and the definition of the scope of the proceeding in the context of its being a 553 proceeding. That's significant because, on page 50 of the paper -- this is back on judicial review a little bit -- the statement is made that it's OGC's preliminary review that persons should be required to have requested an informal hearing and, if granted, participated fully in the hearing in order for persons to be deemed to have exhausted their administrative remedies. That is not the law, as I understand it, under section 553. It is the law, as I understand it, under section 554. So one needs to be careful here that you don't turn what you want to be a 553 proceeding into a 554 proceeding, because when you get into all of these discussions about pivotal issues of fact and cross examination and adequacy of contentions and standing you're starting to make it sound like an on-the-record proceeding.

I make that caveat because I am well aware of the problems of 189, which has been amended three or four times by Congress, not understanding what that statute is. It is an on-the-record statute, and it's not an on-the-record statute, because you have mandatory, no-party, no-issue hearings; that clearly can't be an on-the-record hearing; at

the same time, you have all kinds of rules about who a participant must be and what kind of notice must be put in the Federal Register for individual licensing cases, which smacks of on-the-record proceedings, and certainly the history of the agency has been that individual licensing proceedings have been treated as though they were on-the-record proceedings.

Most of the skilled practitioners in this room know full well what I'm talking about, but I think that you get into dangerous ground if you invite the corps to find that this particular rulemaking proceeding is in fact an on-the-record rulemaking proceeding under 189.

MR. BISHOP: And I don't think we are. I think it's a rulemaking proceeding, and that's what it is to begin with and to end with. The Commission's public policy decision to add additional opportunities for public participation is just that, but does not change the fundamental nature of the proceeding.

MR. OLMSTEAD: I understand that that's the intent, but when you start giving on-the-record attributes to these additional procedures that you're talking about here and you start talking about, if you don't take advantage of them and exhaust your administrative remedies unless you do these things, you start making the proceeding look like a 554 proceeding instead of a 553 proceeding.

That's my only point.

MR. BISHOP: And I guess I just don't understand how that could happen, that the agency could add any additional proceedings it'd like, and that still does not change the substance of the fundamental proceeding.

MR. CAMERON: Any further questions? Any further questions from the audience on this issue?

[No response.]

MR. CAMERON: Okay. In summary, we heard Mr. Rowden talk about the point of -- oh, we do have one other question. Sorry. This is from Ivan Smith of the Commission's Atomic Safety and Licensing Board panel, and it's for Bill Olmstead. Did not the D.C. Circuit approve the GESMO rulemaking with the proviso that cross examination be afforded when discrete factual issues require? If so, what significance would this have?

MR. OLMSTEAD: That's true that they did, but that was pre Vermont Yankee, and post Vermont Yankee, the Supreme Court made it very clear that no agency had to go beyond notice and comment rulemaking in a 553 rulemaking. So since that time, most agencies have not gotten into providing 554 type procedures in 553 proceedings, and that, I believe, is where the law sits today.

MR. ROWDEN: I think that we're in basic agreement, with the caution that you noted. We view this

-- I think the NRC views this, as Mr. Bishop characterized it, as basically an informal rulemaking hearing with additional procedures then grafted on it, using the latitude that Vermont Yankee gave for the Commission to fashion its procedures.

What you're cautioning is in adding certain additional procedures or stating certain supposed requirements, the Commission can inadvertently turn this by some sort of procedural alchemy from a 553 proceeding into a 554 proceeding. That is not what we want to do. I don't think that that's what the SECY paper does. We will certainly be sensitive to that in reviewing it for purposes of our final comments.

MR. OLMSTEAD: I am glad you repeated that back to me because that's exactly what I was trying to say, except the procedural alchemy that I see is 189 itself, and that is a statute that has been interpreted to contain both an on-the-record requirement and not contain an on-the-record requirement.

MR. ROWDEN: Well, we may get some comfort from that from last Friday's Court of Appeals decision also.

MR. CAMERON: Thank you.

Any further questions?

[No response.]

MR. CAMERON: In summary, Mr. Rowden talked about

the question of where you strike the balance here, and he felt somewhat ambivalent about where the correct point might be.

Ms. Hiatt felt that the timing presented in the SECY paper would be fairly disruptive. We've had some skepticism about whether the Commission should even be embarking on these additional proceedings, either because, in the view of the administrative conference's representatives, negotiated rulemaking may be a better way to go, and also because of a basic complication about whether this really makes a 553 proceeding into something else, which has been countered, I believe, with, it's only an add-on on top of the 553 proceeding.

We're going to move to our last topic before the break, and that's the scope of Licensing Board authority. Once again, I'll ask Mr. Mizuno to give us a context on that issue, and Mr. England from the Department of Nuclear Safety, State of Illinois, is going to lead off with a brief presentation on that particular issue.

Mr. Mizuno?

SCOPE OF LICENSING BOARD AUTHORITY

MR. MIZUNO: This might be the most contentious issue that we discuss this afternoon. As was originally

written in our paper, the issue was, what authority the licensing board should exercise in conducting hearings in the design certification rulemakings?

The OGC paper discussed three alternatives.

The first was the licensing board acting as a limited magistrate who simply compiles and certifies a record to the Commission on controverted issues.

The second alternative is where the licensing board would act as a full magistrate in that it not only compiles and certifies a record to the Commission, but also recommends a decision to the Commission.

The final alternative would be the alternative that would be analogous to what occurs in a licensing proceeding in which the licensing board acts as initial decisionmaker with either a mandatory or optional review by the Commission.

The relevant regulatory provisions are Section 52.51(b) and (c), and although they do refer to the authority of the licensing board, it is not clear from reading those sections how the licensing board should be -- what kind of authority it should have vis-a-vis compiling the record versus recommending a decision versus actually making a decision.

Another aspect of this concept of the licensing board authority also involves the authority of the licensing

board to make sua sponte determinations with respect to, for example, whether to seek additional procedures from the Commission or to seek a formal hearing, authority for a formal hearing. 52.51(b) says that the board may request authority from the Commission.

The presumption is that the Board would do this only in response to requests from the parties, but it certainly doesn't say that explicitly. So the question is whether the licensing board should have that sua sponte authority where it finds that it's necessary even if a party does not actually make a request to the Board.

MR. CAMERON: Thank you.

Steve England.

MR. ENGLAND: The model that the OGC has recommended to the Commission is the Limited Magistrate Model. As Geary described, under that model the Board would develop a record, but would not resolve any controverted issues, or even make a recommendation to the Commission.

I would suggest that the OGC has glorified the model it has recommended by naming it Limited Magistrate. A better name, to my way of thinking, would be the perfunctory paralegal.

I have two paralegals on my staff, and they are not only allowed to give me recommendations, but they are actually encouraged to give me recommendations. As the OGC

recognizes, the Licensing Board ordinarily has two members with a technical background and a lawyer.

It simply does not make sense to me that the Commission would provide that the rulemaking procedures for a design certification must provide for an informal hearing before an Atomic Safety and Licensing Board, but the Board cannot even make a recommendation on the rulemaking.

As a policy matter, I would think that the Commission would want all of the responsible recommendations that it could get. In its preliminary paper, OGC reviews the pros and cons of the Limited Magistrate Model, and also addresses the objections to that model that were submitted by OCRE.

I am not familiar with the legal issues raised, but I do agree with OCRE's third issue, namely that the Limited Magistrate Model is a waste of the talent of the Licensing Board Panel.

OGC states that the "primary feature" of the Limited Magistrate Model is the rulemaking decision rests solely with the Commission. Philosophically, I have no disagreement with this feature.

I do, however, find it curious that the OGC's discussion of the Full Magistrate Model recognizes that it also honors the "primary feature" of the Limited Magistrate Model, but that the Full Magistrate Model has no negative

features whatsoever.

This would argue to me that the Full Magistrate Model is the preferred model. I disagree also with OGC's recommendation that the Licensing Board would have very limited authority to raise issues sua sponte.

In the one Licensing Board proceeding in which I participated, the Board raised several issues sua sponte. They were legitimate issues related to protection of the public health. The issues were resolved against the State of Illinois, as it turned out, but they were significant issues relating to chemical contamination.

Finally, I would suggest that the Full Magistrate Model might even shorten the duration of the hearing process by narrowing the issues to be reviewed by the Commission, and by the Licensing Board's weighing of the strengths and weaknesses of the contested issues.

I am left with the impression that OGC does not trust the ability of the Licensing Board Panel members to apply their skills and judgment. It seems to me if the Commission doesn't trust the skills and judgment of its Licensing Boards, it ought to get new people on the Boards.

MR. CAMERON: Does OGC want to clarify anything on that at this point?

MR. PARLER: It is not a question of trust. As you mentioned this morning, something had to be put together

for purposes of discussion, and we are here discussing the issue.

For somebody that has been involved with Licensing Boards with agencies and Licensing Boards for the last 25 or 30 years, and all the work that they have done, there is certainly not any question of their competency. That is a non-issue.

MR. CAMERON: Thank you, Mr. Parler.

Let's go to Ms. Hiatt for some comments at this point.

MS. HIATT: I would agree with Mr. England's statements.

I would note that counsel for the Licensing Board Panel, in the comments submitted with the SECY Paper, referred to this as the Potted Plant Model, the Limited Magistrate, and I think that is a very apt description of it, and I don't think it makes very appropriate, or efficient use of the Board's expertise, instead you have the Board acting, essentially, as a clerk.

I would prefer the Full Magistrate Model, which preserves the effective use of the Licensing Board's expertise without producing a decision that might be perceived as cast in stone, and thereby preserving the Commission's decisionmaking responsibility. I would also favor the board having full sua sponte authority.

I think we have to recognize that due to the issue preclusion of 52.63, this is really a one-shot deal. It is like speak now or forever hold your piece on these designs. This is really the only opportunity for public and Board scrutiny of the designs, and I think it is essential that we have more scrutiny and not less at that point.

I think the NRC's goal ought to be to have a quality decision to make sure that no issues have been left unresolved, or no stone left unturned, and I really think that having the Board fully involved would be the appropriate way to do this.

I would note that with the Full Magistrate Model, it is my understanding, that quite a few state agencies, like State PUCs use this. They have an administrative law judge who conducts the hearing, and then makes recommendations that are then non-binding on the Commission. It appears to work well, and I don't see why that can't be used here as well.

MR. CAMERON: Thank you very much.

I think we will go down to either Mr. Rowden, or Mr. Bishop.

MR. ROWDEN: I will take the lead on this one. I am sure Mr. Bishop will have some comments to contribute.

I don't know what was in the staff's mind in formulating this recommendation with which we agreed. I

know what the basis for our position is, and it is not a matter of whether the Board is trustworthy, or whether the Board has the necessary competence to perform initial decisionmaker, or full magistrate functions. It is a matter of the proper role of the Board in this proceeding.

Let me just skip over lightly the fact that we have had about six prior Commission rulemaking hearings in which the Board has played this role, has fully occupied its time and productively contributed to the decisionmaking record in discharging that role, and I include within that the trial type process used in the ECCS rulemaking.

The animating consideration in our view, with regards to the proper role of the Board and why the Limited Magistrate Model is the proper role, turns on one fundamental principle, and that is that the rulemaking hearing should not add another layer of review to the in-depth extensive reviews which will have been conducted by the staff, the ACRS, and, I might add, by the Commission itself by the time this gets to rulemaking.

The Full Magistrate Model, the initial decisionmaking model, sua sponte authority all violate that principle, and we are very strongly committed to that principle, a principle which has been adhered to in prior Commission rulemakings and which is particularly applicable here.

I return to the point I made before, the Commission itself has been directly involved in this process from the time of the filing of the first application in terms of the implementation of Part 52, the policy and technical issues that had been raised in the course of the final design approval review, and will be intimately involved in the formulation and promulgation of the proposed design certification rule.

It needs no assistance from another reviewing body in this regard. It will have had the benefit of the staff's views. It will have had the benefit of the views of the Advisory Committee on Reactor Safeguards, and it is now entitled to the full unfiltered benefit of the views of the parties to the design certification rulemaking hearing.

That is our position. That is the reason for our position.

MR. CAMERON: Thank you very much. Mr. Brew, would you like to say a few words on this issue?

MR. BREW: Even in the basic rulemaking context in other areas it is commonplace to have an Administrative Law Judge or designated representatives receive and address comments to prepare them for the decision-making body. It's no different here.

The comments mentioned earlier by Mr. England and by Ms. Hiatt are particularly compelling, that you are

assembling a technically competent Board to do essentially a ministerial function when they are the ones that first receive and accumulate the comments. Now to me it is particularly striking that their task, as I understand it, is to compile a record, which is either going to be simply a ministerial logging in of things or it is going to require some of the use of that expertise and competence for which they were first assigned to the Board.

That being the case, it is simply logical to ask them to apply that expertise in assessing the comments and determining how the record needs to be filled out. That would include their ability to sua sponte raise issues that they do not feel have been adequately address on the papers presented.

MR. CAMERON: So that would basically be the full magistrate's sua sponte?

MR. BREW: Whether they give a recommended decision or an initial decision in terms of its finality I think is a separate matter you can debate but I think the essential thrust of the point is that you have assembled a technically competent Board to review and analyze the comments and for the purpose of compiling the record I think we require them to apply their expertise and the Commission should have the benefit of that. Otherwise they are simply logging in whatever comes in the door.

MR. CAMERON: Thank you very much.

Mr. Olmstead?

MR. OLMSTEAD: There is another reason why a negotiated rulemaking would be better.

I tend to think that in rulemakings where the Commission has done this before that Mark Rowden is right about this particular issue but that gets back to me continuing to be troubled about getting it overly adversarial.

I am glad he mentioned the Advisory Committee on Reactor Safeguards. I might point out about negotiated rulemaking you are supposed to have an advisory committee and you have got a ready made one right there for processing this kind of information. I would think they would be ideal for that.

MR. CAMERON: Thank you very much. Mr. Bishop.

MR. BISHOP: Just perhaps one comment in summary. Of the six rulemakings that the Commission has used a magistrate kind of rule, a Board if you will, all six of them they have used the limited magistrate role. I think those proceedings have demonstrated that among other things a Board in that context is not a potted plant, that they contributed significantly to that process and significantly to the efficiency and effectiveness of that process in that rule.

It is a demanding role. It has been demonstrated to be an important role. It is not something that I think should be shrugged off. I would suggest that the OGC's position is well-founded and deserves no apology. I think it is an appropriate, reasoned, reasonable resolution, as is all of Part 52, to try to reconcile competing interests and those folks are going to have an important role.

I guess our view is to suggest that additional bells and whistles could always be added in a variety of different ways but you have to come down to the fundamental about what are you trying to do. You are trying to enable the decision-maker, without question the Commission, to come to a sound and effective decision.

We believe and believe very strongly, as you can tell, that the limited magistrate role is in fact the best way. There are a lot of ways that one could do a lot of things. We think that is the best way to do this particular one, and that goes for the lack of sua sponte authority as well.

MR. CAMERON: Thank you very much.

Ms. Hiatt.

MS. HIATT: I think there is an interface issue we have to look at as well, and that is the separation of functions issue, that if we employ separation of functions, which I think is a good idea, the Commission will then have

unavailable to them the very Staff people who are the most knowledgeable with regard to the designs. As counsel for the Board pointed out, that makes all the more desirable a reasoned decision by a Board acting as an impartial judge and decision-maker.

I guess I would also reply to Mr. Rowden's concern about you don't want another layer of review. Well, I think Part 52 has already eliminated possibilities for litigation of the site, or the design rather or any site-specific cases.

I guess -- what more do you want?

MR. ROWDEN: This gets down to the point of whether there are adequate means for public participation and I think the record here would not be complete if we did not acknowledge the multiple avenues for public participation that are provided in Part 52. It is not just that you are precluded from raising issues. It's that there will be prior proceedings at which these issues will be fully ventilated and resolved -- site issues, design issues, issues that were residual at the combined license stage and at the end of the process, at the pre-operational stage, compliance with the acceptance criteria -- so the aspect of public participation is I think a false issue with regard to this matter.

You did mention the interface with the separation

of functions issue. When we get to the separation of functions issue, we'll have comments on that which raise real reservations about what the Staff has proposed, although we did not tie the two together.

We would arrive at this position with regard to the role of the Board irrespective of the position that we take on the separation of functions issue.

MR. CAMERON: Thank you. Just out of curiosity, does -- no one has spoken for the licensing board as the initial decision-maker. I know we've been concentrating on the full versus limited magistrate and I know from what people have already said that some people would not support that.

I wonder does anybody have any comments in support of the licensing board as the initial decision-maker?

MR. OLMSTEAD: I would like to amend a little bit the prior experience with legislative type hearings in rulemaking with the Commission.

Marty Malsch probably knows this better than I but I think in some of those rulemaking notices there was a provision that was optional with the Commission in that the commission could call for a decision by the Board or might not call for a decision by the Board, depending on how that record developed in the particular case.

MR. ROWDEN: Are you talking about rulemaking?

MR. OLMSTEAD: Yes.

MR. ROWDEN: I think only one where they --

MR. OLMSTEAD: Was that just GESMO?

MR. ROWDEN: No, no. It wasn't GESMO. The one that dealt with access authorization.

MR. OLMSTEAD: Access, okay. I knew that they had done that before in one case.

MR. ROWDEN: Could I make a comment, not in support of an initial decision-maker function, but I think it underlines a basic difficulty in giving the Board anything more than the already-important authority to assure an adequate decision-making record, and that is, if this is a proceeding which I believe uniquely is going to involve the need to address policy issues of first impression.

I have specific reference in this regard, not exclusively, but certainly I would underscore this, the inspections, tests, analysis and acceptance criteria which, I venture to say, will probably be the focus of the design certification rulemaking hearing, this is something which I believe the Commission is singularly better equipped to deal with than any newly appointed Board in the process. That is my own view. It's a view shared by my colleagues in the industry, and I think it's a view that's borne out by several years of arduous experience in dealing with these issues.

MR. CAMERON: Thank you. We do have one question already from the audience. This is from Marty Malsch from the NRC. Does Mr. Rowden's argument prove too much; that is, the argument about the layer of review? If the purpose is not to duplicate the review of the staff, ACRS, et cetera, then why any hearings at all? Can the Board have a role beyond, quote, "duplicating," unquote, the role of the staff?

MR. ROWDEN: I think it can. As a matter of fact, I think the Commission has explicated that role; it's to assure that there is an adequate rulemaking effort on matters that are put in controversy by the parties to the rulemaking hearing. I think that's a perfectly legitimate function. It's consistent with the function that the Commission is assigned to Boards in rulemaking hearings in every prior case.

There has been one minor modification in mid-proceeding, as we discussed before, in connection with access authorization, and it has worked, I believe, very effectively. I indicated before -- and I won't repeat the arguments -- but I think it's singularly applicable here, even more than it was in the prior proceedings.

Above and beyond that, I'm not going to let anybody get away with this potted plant argument. Now, I urge you to take a look at the role assigned to the Board

and the specific authorities the Board was given in the GESMO proceeding which, I think, probably as much as any other proceeding, the model for what is in the SECY paper, and I can assure you, based upon my reading of that, including the Board's authority to ask its own questions, no simply questions put to it by the parties, its own questions on matters put in issue, so that it can assure that there is an adequate decision making record, the Board exercises extremely important and constructive functions for the Commission.

MR. MIZUNO: Have a question.

MR. CAMERON: Go ahead, Mr. Mizuro.

MR. MIZUNO: This is for either Mr. Rowland or Mr. Bishop. You mentioned six rulemakings, and I just am curious as to what they were. I knew about ECCS and GESMO, but as probably the youngest attorney here with the least amount of NRC history, I would appreciate you sharing with us --

MR. BISHOP: We'll find it quickly. It's at least in my briefcase, if not closer.

MR. OLMSTEAD: As low as practicable, the access rulemaking, that's two of them. If you give me a minute, I'll think of the other two.

MR. MALSCH: S-3 and S-4.

MR. OLMSTEAD: Yes, S-3 and S-4.

MR. CAMERON: Is that satisfactory, Gary?

MR. MIZUNO: Yes.

MR. CAMERON: How about some other questions from the audience? Any comments from any Board members or anybody else?

[No response.]

MR. CAMERON: Okay, well, in summary, we heard Mr. England and some of the other panelists talk about the fact that the limited magistrate model doesn't seem to take full advantage of the Board's capability, including making recommendations to the Commission.

We've heard Mr. Rowden talk about the fact that there is a vitality and a usefulness to the Board's role as set forth in the limited magistrate model, and that the basic principle behind the industry position here is to not add another layer of review to an already in-depth review of the design.

There doesn't seem to be any support for the Licensing Board as the initial rulemaker. We've heard some more about negotiated rulemaking possibilities from Mr. Olmstead.

I would just highlight Mr. Parler's remarks from before that the OGC preliminary recommendation was just that, a starting point for discussion purposes, and also on this particular issue, it didn't have any indications in

terms of either the competence or trust of the Licensing Board panel.

And we're running ahead of schedule right now, so it's time for a break, according to the agenda. So, let's break and be back here at, say, 5 after 3:00. That will give you about 20 minutes. Thank you.

We are going to start off our final two topics now, and I would remind you that we do have plenty of time at the end for questions on any of the topics that we've discussed today and for raising issues that haven't been raised already.

Our first issue is conduct of the informal hearing, and Mr. Mizuno is going to give us a short summary again, and Mr. James Brew from the New York Public Service Commission is going to be our lead-off panelist on this particular issue, conduct of the informal hearing.

Mr. Mizuno.

CONDUCT OF INFORMAL HEARING

MR. MIZUNO: Once again, the relevant section that we're dealing with is Section 52.51(b), and basically it provides that the procedures for an informal hearing must include the opportunity for written presentations made under oath or affirmation and for oral presentations and

questioning if the board finds them necessary for the creation of an adequate record or otherwise a most expeditious way to resolve controversies.

That subsection goes on to indicate that questioning in informal hearings will be done by members of the board, either using the board's questions or questions submitted to the board by the parties, and, as we indicated before, a board can also request authority for additional procedures or for a full formal hearing.

Basically, what we are concerned about in this session generally and in this topic in particular are the rights and responsibilities of each of the different parties in the proceeding, the applicant for the design certification, the NRC staff, and what I call the commenting parties, the members of the public that request a hearing.

MR. CAMERON: Mr. Brew?

MR. BREW: Yes. Thank you. I'd like to just briefly touch on a couple of items and then open it for more discussion. The first pertains to the time limits specified under the OGC draft, and just noting that OCRE has expressed concerns that the time periods are too short.

It seems at this point in the process, you've had comments, written comments that were filed, you've had a determination by the Commission that a hearing is appropriate, and your issue should be reasonably well

defined. It seems at that point the concern procedurally should be more deliberative than in rushing to close the door on the record.

So I tend to think that OCRE has a point, that at that point in the process, there should be some -- you should provide more flexibility as to the amount of time for proceeding with the oral presentations.

That being said, the thing that strikes me about the draft up to this point is that -- we've touched on it earlier; it just seems to be coming around again -- is that the process seems to be a bit confused as to the nature of the proceeding itself, whether it really is a 554 or a 553 type proceeding, and that confusion seems to pervade the recommendations.

The draft describes the commentors of proponents of the controverted issues. Now, in an adjudicatory proceeding, they presumably would have the burden of coming forward or the burden of proving their point, which means that they would generally go first and last. But in this process, they go first, but the applicant and the staff are the ones that provide the opportunity for a reply. It seems to me that the process is a little bit confused because it hasn't really specified who's responsible for what and tied the procedures to that.

It would seem a reasonable step would be if the

commentor has the responsibility for coming forward with explaining the -- giving initial oral presentation to be followed by a reply from the applicant and the staff, that the final rebuttal probably should come from the commentors.

The second area that I found a little bit confusing was the notion of the submission of questions to the board. While its intent is to be somewhat fluid, it seems, in order to suggest areas of questioning to fill out the record by the board, it suggests that a commentor that is submitting questions is basically prodding the board as to what it wants to be asked, which doesn't seem to make a whole lot of sense since you've submitted an outline of what your presentation is going to be, and you pretty much have the opportunity to say for yourself. You don't need to be prodded through a question.

What seems more appropriate for the questions would be for commentors to submit questions, not only subject areas that the board might ask it, but the questions that it would like to see the board ask the applicant and the staff, and it's not clear to me that that is sufficiently clear as to the intent of the questioning process and the submission of questions under the draft.

That's about it.

MR. CAMERON: Thank you very much, Mr. Brew. Let's go to either Mr. Rowden or Mr. Bishop for comment.

MR. BISHOP: Let me just begin, then. I guess maybe in the break, I've thought of a way to resolve the problem that we got into right at the end, at least the conversation that Bill and I had about whether this was a 553 or a 554 proceeding.

In my parlance, anyway, it might be helpful if we called it a 553, prime, to denote that it is basically a 553 proceeding, but with some extra added factors to it. In this context, going quickly back to Gary's lead-in, the role and responsibilities of the parties, let me just briefly underscore our position on that subject:

We think that the parties should be limited to the issues that they raise. We're frankly expecting that the issues raised will be issues that directly affect the application. Almost as a matter of course, I'm hard to find an exception to that, so, therefore, logically, the Applicant would be a party as to all issues, and presumably so with the staff.

I briefly described earlier, our context of the oral presentation and how those provisions would apply. I guess, Jim, in response to your question, perhaps mistakenly so, but I interpreted the OGC analysis to suggest that commenters would raise questions for the Board to potential consider asking of others, certainly not questions that they would the Board to ask of themselves, and, again, perhaps

that's my sense.

I think, going back to the fundamental again, the reason for this is to develop a hearing -- sorry, a record for the hearing. I think that the Board can and should demonstrate and has demonstrated that capability in the past. I think it's up for the parties to identify the issues, and the Board to sharpen the focus through its questioning of the parties, or pursuing questions that might be supplied to it, to ensure that that record is fully exercised on those particular issues.

A lot of the rest of the discussion, obviously, goes back to aspects that we've discussed earlier.

MR. CAMERON: Thanks, Mr. Bishop. Mr. England?

MR. ENGLAND: Just a few comments: I think I find myself in agreement with most of OGC's recommendations on the conduct of the hearing, with the exception of the provisional recommendation that a person requesting a hearing should not be allowed to participate in issues other than those raised by that person.

We've heard, and I think that this makes sense, that the staff and the Applicant is, in fact, a party for purposes of all issues, but that the other parties would not be. Partially, that seems inherently unfair.

If the concern is duplication of effort or wasting of time, I would think that the Board should have the power

to control that as part of its inherent power, rather than saying a party can't participate on particular issues. If the party has something meaningful to contribute on those issues, again, I think it's in the interest of the Commission to hear what that party has to say.

MR. CAMERON: Thank you. Ms. Hiatt?

MS. HIATT: I would agree with Mr. England's comments and Mr. Brew's as well. The problem that I really have with the NUMARC proposal was some of the very brisk scheduling pace, which would actually be dictated in the proposed rule, leaving the Board with virtually zero discretion, even to accommodate scheduling conflicts.

I think that those types of things, as well as whether or not parties should be allowed to participate -- Intervenors or hearing requesters or commenters, whatever you want to call them -- on issues which they themselves did not raise, I think these are all issues which should be left to the discretion of the Board.

The Board is quite capable of policing the conduct of the hearing and making sure you don't have a lot of duplication. They can enforce schedules. I think this is traditionally the Board's powers and it ought to remain so. Leave the Board with its traditional discretion in setting schedules and conducting the course of the hearing. That's what Boards are for, and they do the job well, and I don't

really see the need to dictate this so strictly.

MR. CAMERON: Thank you. Mr. Rowden, would you like to say anything on this?

MR. ROWDEN: Just a couple of comments to add to what Mr. Bishop said in response to some intervening observations. I do believe that it is appropriate to limit the participation of parties to the proceeding to issues which they have placed in controversy. This has been the accepted practice in Commission proceedings. I see no reason to depart from it here.

As a matter of fact, I believe it is the Board's rule to assure that there is an adequate record to resolve controversies, which means that the issues that are placed in controversy should mark the parameters of the parties' participation. This is also consistent with the threshold criteria for admission of issues and admission of parties, in terms of their ability to contribute to the proceeding.

I heard an observation before about the desirability of treating the -- I will call them Intervenors, although they're parties to the proceeding other than the Applicant and the staff -- allowing them to have the right of rebuttal on matters which they placed in controversy. We view the process somewhat differently, and not inequitably.

It is the burden of the Applicant as the

proponent, de facto proponent at least, of the design certification rule, and of the staff which, by the time we get to a design certification rulemaking hearing, has participated in the formulation, if not more of the proposed rule to justify the adoption of that rule. I think that's the laboring oar that they must carry, and that those who place issues in controversy should make their presentations, and then there should be an opportunity on the part of the Applicant and the staff, respectively, to respond to them.

That is the proper sequence for handling these matters. I think the staff properly looked at whether this process should be continued one further step or ad infinitum with rebuttals and surrebuttals, et cetera, and we think it's appropriate to cut it off at the rebuttal stage.

MR. CAMERON: Thank you, Mr. Rowden.

MR. BISHOP: May I just add one brief postscript, with respect to the brisk scheduling pace, we have never envisioned that to be a criteria that has criminal or civil sanctions if the Board doesn't meet that schedule, rather we look on it as a necessary measure of the need to add discipline to the process while not eliminating the flexibility that the Board has traditionally exercised.

I think that is important in the public interest for this process to be demonstrated to be an effective one, and that carries with it some degree of efficiency.

Yes, the brisk scheduling pace is there. I don't think that it is impossible, or even not likely to be met, but I think the Board has the authority, retains the authority, if it can't, for good cause, to set itself some other schedule subject to the Commission's overview.

MR. CAMERON: Thank you very much.

Mr. Olmstead.

MR. OLMSTEAD: I guess, at the risk of sounding like a broken record, I will point out on page 45 what I think gets right to the nub of the kind of theoretical problems I have, not with the proposed solution to the problem that is created, but with the problem itself.

It says there in that first full paragraph that, "common sense suggests that the applicant, as a proponent of the design, should be permitted to address questions raised by a commenting party questioning any aspect of the acceptability of the design," and then follows on by saying, "Since the staff is responsible for the review and documenting the reasons for acceptability, it makes sense to provide the staff with the opportunity to respond."

I agree that that is the traditional model that has been followed, but if one looks at the Administrative Procedure Act, and the concept, the concept is that you have a party seeking an authorization from an agency, namely the applicant, and other parties then are permitted to intervene

on specific aspects of that to the extent that they feel that the moving party is not entitled to the relief that they seek.

Yet, throughout this paper, the assumption is that by the time you get to the hearing, all of the issues of that nature are already resolved between the applicant and the staff through some earlier process, and only then are you involving the other affected interests.

The model that I would rather see, and the one that I think makes more sense is for the affected interests being confronted with the applicant's position at the time the staff is trying to resolve these issues, so that you arrive at some agreement, or settlement, or resolution of the issue at a time when time is not so critical, and when the applicant and the staff, and the other affected interests are not set in concrete with respect to what their respective positions are.

I think that the Commission has, both with the Advisory Committee on Reactor Safeguards, and with the staff review process, better forums for the resolution of a lot of these issue than waiting until after all of that is done, and then when everybody is in a hurry to move forward being confronted with other interests that haven't been identified to that point.

It seems to me that there are more flexible ways

to handle this kind of problem than just assuming that we are going to wait until the applicant and the staff are exactly in agreement before we have some kind of informal proceeding.

That is where I have my problem because, theoretically, if you look at the traditional 556 adjudication, you would not be assuming that the applicant would not be challenging the staff review, necessarily. The hearing is also an opportunity for an applicant to say, "I don't agree with how the staff proposes to dispose with this, that, or something else, in the application," and you would have issues that were put in controversy both by parties intervening in the application, and by the applicant.

That assumption doesn't seem to be in this paper because the assumption is that the applicant will accept whatever the staff has decided before the proceeding starts.

MR. CAMERON: Thank you.

Would either of the gentlemen from the industry like to comment on that?

MR. BISHOP: Just a couple of quick observations, and it may be because I haven't been to not only the two-day ADR briefing, but what I suspect may, in my case, need to be a two-month remedial course, but just a couple of quick observations.

I am hard pressed to think at this juncture, at least for the two plants whose design certification are well underway how one could step back and do that. I will admit that perhaps it is my lack of imagination of knowing how, at this juncture, even for those two plants, recognizing we are fairly far along in that, one can have any degree of confidence that one knows who the affected parties are or might be during this process, by this process, and what the issues are.

I think until you have some sense of the answer to both of those questions, I don't know how we can apply the eight criteria that the Administrative Conference set out for an example of a situation that might be conducive to some aspect of alternate dispute and resolution.

Maybe that is my lack of imagination, but that is the position in which I find myself on this.

MR. ROWDEN: I think I have exhausted myself, and I am sure Bill Olmstead, with my views on the benefits, and reservations I have about negotiated rulemaking as an ADR vehicle for design certification as contrasted to ADR processes applied selectively.

I would just share with you something that I shared with Bill during one of the recesses. I think we ought to have an open mind about utilizing ADR mechanisms in the licensing and regulatory process, and I believe I have

that open mind.

If you want to demonstrate its value, my recommendation would be to pick something as a demonstration target which holds a high prospect for successful application of an ADR approach, whether it is negotiated rulemaking or otherwise.

Bob Bishop made the observation that from a functional standpoint it is logistically impossible to apply the ADR process to either of the two evolutionary rulemaking proceedings. I have reservations about whether it is feasible as respects the advanced designs, but I would suggest that you find a crucible for testing ADR concepts which are less ambitious than that, if you want to demonstrate its viability.

The point I made before is one I want to emphasize again, no ADR process will work unless it has the consensual approval of all of the parties to that process, not the least of which are the applicants in the nuclear licensing and regulatory process.

I will tell you with the applicant community the jury is, at least, still out.

MR. OLMSTEAD: I would like to join in on that issue, since you brought it up, because I think there is some misunderstanding. When we use the term ADR, people have something in mind, and the idea is to have nothing in

mind because the process is what you structure. What works in one case may not work in another case, and how the parties come up with a process for resolving issues and controversies is what is important because, as you well know, there are people who are opposed to nuclear power wherever it occurs. That does not mean that you can't negotiate with them because they're going to have their position, but the idea is to identify those interests that they have that are cognizable and to try to come to resolution of those issues.

But the point I'm making is that sometimes perceptions of fairness -- and if a party doesn't have a perception of fairness and they go to the Congress and say, this game was rigged, it doesn't do you any good to have the fairest process in the world if the whole thing gets set aside or legislation gets passed or something else happens that's not what one would like to happen.

But you could, for instance, have a mediated fact-finding. You might have a mini-trial. You might bring the principals in and have the best case of both sides put on. The idea is that there may be a better time to do some of these things than after the review is completely done. The perception is that the Commission and its staff is set in concrete and all it's concerned about is, how do I get through this legal process as fast as possible? If that's

the perception on the outside as to what's happening in this process, I have to raise the question as to whether it has credibility.

If I look at the criticism that's made of this process at this point in time, there is a lot of focus on whether 90 days is enough time, or 30 days is enough time, and it's more on time than it is on the issues, and that's why I'm questioning whether this is the right place to do this kind of questioning, or whether you want to have this process somewhat earlier in time, whether you do it this way or you do it through some kind of mediated way, but at the time that the key issues are being raised and the questions are being asked and answers are being provided, isn't that the point in time at which to get all the affected interests, whatever they're going to be, and see what their point of view is?

As far as identifying the affected interests, let me make one comment in response to you, Bob. That is, if you can identify them at this point in time, I don't see why they can't be identified six months earlier.

MR. BISHOP: My point is I don't think we can.

MR. OLMSTEAD: Well, but you are going to have to identify them in order to have parties who are presenting questions to be asked.

MR. BISHOP: But that says they come forward with

some showing of the ability to raise a question that ought to be addressed.

MR. OLMSTEAD: But why can't that be done six months earlier?

MR. BISHOP: Well, it can't be done six months earlier than today because that's back then.

MR. OLMSTEAD: Well, that I understand. Talking about it in the abstract, there --

MR. BISHOP: There is no problem.

MR. OLMSTEAD: There is no problem with identifying the interests earlier, I don't think.

MR. CAMERON: Ms. Hiatt?

MS. HIATT: I think it would be rather easy to identify the interests. I think if you just publish an advanced notice of proposed rulemaking with an offer of negotiated rulemaking or some other type of ADR mechanism, the people who are interested in doing that, who are most likely the same people who would be involved in a hearing, are going to come forward. So I don't see why you can't identify them earlier. I mean, the people who are going to be interested at the hearing stage are going to be interested before, too.

I also might make a point with regard to what types of designs, whether it's the first two that are in the pipeline or farther on out, you might use it on. My guess

is there might not be a tremendous amount of public interest with ABWR and the Combustion Engineering System 80+ precisely because these are very large plants, and my guess is that no utility in this country is going to be ordering a 1200, 1300 megawatt plant any time in the future.

Smaller plants, like the AP-600, the passive plants, I see that as a realistic possibility of a utility maybe ordering one of them, and I would think therefore that's the type of plant that you might actually see in this country, and that's where the public interest in the United States would be. So I think maybe some of those procedures ought to be used on those designs.

MR. CAMERON: Thank you, Ms. Hiatt.

Anybody on the panel have anything more to offer before we go to the audience? Go ahead, Mr. Mizuno.

MR. MIZUNO: I just wanted to ask a question or to raise this to Ms. Hiatt, which is the NRC already has sort of a negative perception in the public interest community, and in fact, in this workshop, we had asked public interest groups to participate, and some of them turned us down, saying that they did not find the process to be a legitimate one.

What can the NRC do? If the Commission were to go out and say we're interested in obtaining public participation in the ADR concept resolution for a future

design certification, what could the Commission to do assure that -- or to at least maximize the perception in the public interest community that it is not a sham, but it's a real interest, because obviously the process is not going to function unless people who are most likely to be affected are involved. In any case, if you're going to ADR, you really do have to have the commitment of all parties to coming out and resolving issues.

MS. HIATT: Well, I think you have to recognize that the public interest community is not a monolithic body. There certainly is a division of views there, and some of the people are going to take a hard-line position and are not going to participate, and there's nothing anyone can do about that. But I do think there are some people out there, and I think there's going to have to be maybe an aggressive outreach program, who would be interested in participating in a responsible manner.

I think part of the problem is also funding. I think if there were some sort of intervenor funding available, which I understand might not be prohibited by the Congressional provision for such advanced notice types of stages, then you might have more of an interest by some of these groups in actually participating.

But I do think there are elements out there who would be interested, but I think it's going to take a rather

aggressive outreach function to get them involved, and there are going to be some people who you are not going to reach and they are not going to participate, and they are going to boycott the proceedings and then complain that the NRC was unfair to them when they didn't participate, and there's nothing anybody can do about that.

MR. BISHOP: But Susan, doesn't that suggest that the likely outcome is at best a series process, that we'll add another step into the process and we'll still have to go through the same process, whatever that is that the Commission establishes, in a more traditional way?

MS. HIATT: Well, I don't think you can ever eliminate that opportunity for written comments and the opportunity for a hearing, and it may be that you're going to have people requesting a hearing, and under the regulations, you can't eliminate that.

But I do think the people who are really the most interested and have the most to contribute would probably participate in the negotiated rulemaking, and that the people who boycotted that and then want to get into the hearing maybe wouldn't have that much to contribute. I think that's a realistic possibility.

MR. CAMERON: Anybody else up there?

MR. OLMSTEAD: I might add that to explain the convening process that's usually done for a structured

mediation, the idea is to go out and identify, as Susan has characterized it, some outreach, but you don't necessarily want to bring parties to the table who are not going to participate. I mean the purpose of it is not to generate interest in participating in a process that nobody would have participated in in the first place.

The objective is to flush out those things that are going to become participants at a process, that are going to not be in the interest of anybody, the agency or the other parties to the proceeding, at an early date. This is done by identifying interests, going around and talking to people in confidence -- under the Negotiated Rulemaking Act, this information is protected -- and finding out what the interests are and giving it an assessment which is given to the agency about what some of the problems and pitfalls are concerning who is out there and what they are likely to do in the future.

Then and only then, if the assessment is that something is to be gained by doing something like a mini-trial or like structured mediation or like early neutral evaluation, would you go forward with it, but if you do nothing, the likelihood is you are not going to see those particular type of interests until the last minute, at which point they are going to be demanding hearings.

Generally our view is if you do a good job of

convening early on and identify these interests properly you'll have a fairly good assessment or at least the agency will of whether this is a feasible process or not a feasible process and when the right time is to plug the process in.

MR. BISHOP: And I guess my fear is just that we are adding the process. In that context my sense is, and maybe that's just my natural pessimism, but my sense is what we are doing is we are adding something but if we are not able to resolve the dispute, then we could reach agreement with -- pick a number -- one, half a dozen, 25,000 of the parties but as long as there are others who are going to use the other process anyway, you really haven't gained much in terms of the effectiveness of the process, which is one of the goals that's being in the public interest.

MR. CAMERON: One of the things that I think you have to look at when you talk about not necessarily negotiated rulemaking but any sort of a consensus building or participative technique is that there may be certain points along the way for future designs where it would be beneficial to bring a group of affected interests in to look at various aspects of that and therefore come to a better decision and the theory is if there is a better decision being made on some aspect of it that people would be less likely to challenge it in the future or that it would be, it would withstand challenge easier.

I think we always come back to the point on this issue is that without looking at specifics and I think that this is what Mr. Rowden was talking about earlier this morning and I think that Ms. Hiatt and Mr. Olmstead would be fully supportive of this too, is to take a look at whether there are any specific points in the process where some type of a participative or consensus model may be useful and then see what the pro's and con's of that are, because it doesn't necessarily work for all issues, as we know.

MR. BISHOP: And as Mr. Rowden has said, I think this arrangement, this opportunity I think has been helpful. I think we have gotten some additional things to think about. I think there is value to that kind of participation and sharing of ideas.

I guess I am just not confident that I see the way clear to adopt negotiated rulemaking rather than what we have because I don't see the benefits of it or the likelihood of success. I go back to Mark's fervent suggestion that we ought to try it on something that is a little more manageable, rather than this whole process.

MR. OLMSTEAD: I don't want to be misunderstood here about this process versus the other process.

My problem is that when you look at the comments on this draft, the criticism is associated with whether there is an adequate time to prepare to go to litigation.

Now when one is down to the point that they are talking about whether they have got an adequate amount of time to litigate something as complicated as the design, it implies that something has happened earlier in the process that has led everybody to conclude that that is the only solution left.

If you end up at that point where somebody is trying to litigate essentially every element of the design, the schedules that were passed out this morning are overly optimistic, so if you don't do something in the front end to make people own the process so that this is a last resort instead of a first resort, I don't think you are going to meet the schedules that were on that list.

MR. ROWDEN: We are never going to satisfy everybody. There are accommodations that have to be struck and the Commission is ultimately going to have to make a policy judgment striking that balance. There are opportunities for participation in this process. I am not saying they are the optimum opportunities but they are manifold.

Those opportunities are quite often ones that are disregarded by people who complain at the back end of the process that they didn't participate at the front end of the process. I refer again to the numerous opportunities the Commission has given, maybe "numerous" is an overstatement

but multiple opportunities that the Commission has given for comments on SECY papers that have been prepared the Staff, submitted to the Commission with Staff recommendations.

The industry for reasons which are evident, reasons of self-interest, has very meticulously taken advantage of all of those opportunities. Others have not.

You know, in terms of sorting out the disparate considerations that one has to take into account, I am not sure, Bill, that the one that you mention should necessarily be dispositive. I think you have to weight the process, opportunities for participation as a whole, rather than to look selectively at what happens at the end of the process in making that judgment.

MR. MIZUNO: I guess I had an observation, basically just to respond to Mr. Rowden, which is simply that, at least from my perspective, unless -- while there may have been opportunities for the public to comment on certain SECY papers, with the exception of this one, I don't recall any notice in terms of a Federal Register Notice going out, and I would think that if we really want to give -- if we're really talking about outreach and to give a meaningful opportunity for the public to comment, you would have to say that we're talking about more than simply putting something into the PDR and having insiders know that a SECY paper is available there for them to comment. You

need to have something out there, perhaps not a formal ANPR, but something that says this is out there and the public has an opportunity to comment.

MR. ROWDEN: The mechanisms certainly are perfectible. I would suggest that there is a mechanism. I take advantage of that mechanism. I get on the service list. I get served with documents that are relevant to particular subject matter categories, or particular docket numbers.

The fact of the matter is, without taking the position that what is in place is the be-all and end-all of public participation, which, I think, none of us would do, I'm saying that in being asked, as I think you legitimately do ask, Bill, that we be open minded and flexible in terms of our approach to the matter of ADR, we ought to also take into account a variety of mechanisms which I consider to be legitimate parts of that ADR process which are either in place or could be, if they were perfected more, be put in place and utilized for those purposes.

MR. OLMSTEAD: I agree with that, actually. I think that there's an aspect of this that I just feel, all day, that I haven't been able to get across, and that's why I keep hammering away at it.

The industry has, as you point out very correctly, a very significant self-interest in making sure that they

exercise every opportunity to make their views known to the agency, and they don't need any additional motivation to do that. That is not true with all the parties that may come before the NRC. They have other motivations, not the least of which may be that they may want to participate at the time the agency least wants them to participate.

So that it's those interests that ADR is designed to get the agency to thinking about and getting to think about how do we manage our dispute mechanisms within our agency in an efficient way so that we identify interests and give them a reasonable opportunity that no court is going to disagree was a reasonable opportunity to come forward and participate in the process, and we make it sufficiently appealing to those interests that they feel that that's the best point in time to express whatever interest they have, so that they don't start affecting the agency's management of its program in an adverse way.

Now, we obviously can and do disagree about where is the proper place to put those kinds of processes would be, but traditionally in NRC practice, it's always been at the end. I am suggesting, I think, that it doesn't have to be at the end; that there's a lot more time during the staff review and that that many times, the appropriate level of decisionmaking is with the staff reviewer, and that tools to empower that review or to flush these issues out and address

them properly at that time are available and might be more productive than waiting to the end, although I'm not objecting necessarily to this particular format, because it's been used before and it's been used before successfully.

But I'm just suggesting that there are other ways to accomplish the legitimate objectives, which are to get through this process efficiently.

MR. ROWDEN: I think there's total conceptual agreement. My position, and, I think, Bob's position is, we would like to more carefully calibrate the costs and benefits of particular approaches as applied to particular issues before reaching a judgment as to whether it's worthwhile instituting those processes, but I think that they ought to be examined.

MR. CAMERON: Ms. Hiatt? If I could reinforce what Mr. Mizuno said about the SECY papers, I'd be happy to comment on some of these matters if I had know there was an opportunity to comment on them. If they'd been published in the Federal Register, that would be one thing, but they aren't.

I think you're assuming that there is public knowledge and accessibility that the insiders or the industry people have that is available to everyone else, and it isn't there. I mean, I read the Federal Register

religiously, and I have seen no notice that these papers are available for comment, and I think maybe that's part of the problem there; that there isn't sufficient public notice.

MR. CAMERON: Thank you. Anyone else on the panel? We do have a couple of -- one comment and one question and we'll turn to the audience for further questions after this.

This is a comment from Mike Blake of Nuclear News. As for -- and this has to do with involving citizens groups in the -- any type of decisionmaking process. "As for which organizations get involved when, the California Low Level Waste Site Development Process was carried out with the participation of the Sierra Club and the League of Women Voters. This did not prevent vocal opposition at a very late date by other groups that hadn't bothered to notice the issue earlier."

Any comment from the panel?

MR. OLMSTEAD: Yes. I happen to know about that because they've been bugging my office for ALJs to conduct the proceeding that the state legislature is now forcing them to conduct, which is precisely the point that I was trying to make earlier. If you don't do an aggressive job of getting these interests out early, and dealing with their concerns and taking away with the -- and taking away the argument that they haven't been fairly treated, then you run

into the very kind of problem that the state of California ran into in that case, which is, they go and make a persuasive case to the legislative body that they weren't treated fairly, and they get another crack at it.

So, they're now going around the circle the second time.

MR. CAMERON: This is a question also from Mike Blake of Nuclear News.

In connection with what Mr. Mizuno asked Ms. Hiatt about how to get the other groups involved, the handout showed that someone from NIRS -- that is the Nuclear Information and Resource Service -- was to be on the panel. Why did that person decide not to participate?

We did ask Mr. Michael Mariotte from NIRS to participate on the panel, and NIRS was evaluating up to last week about whether they would participate or not, and made the judgment that they would not join us today.

I think that I would be at liberty to reveal the reasons why based on my conversations with Mr. Mariotte, and basically, in their view, and I would emphasize this is their view of the process, they don't believe that a 10 CFR 52 process for design certification, site review, et cetera, is really meant to foster effective public participation in terms of revealing whether there is a defect in a design, or with a site, or with a reactor after construction, and that

they don't have the resources involved to fully explore a design to see if there are any defects in it and, since there is no formal hearing, they can't get discovery.

Basically, I think that is the gist of the NIRS's refusal to participate in this particular process.

Are there any other comments?

Dan Berkovitz.

MR. BERKOVITZ: I sort of have a general comment on comparing treatment on a couple of the issues.

Going back to the issue of what it takes for a member of the public to get into the proceeding, and the Commission is proposing that a member of the public who wants to participate, not only raise an issue, but actually that person has to have some special qualification where they can add to the proceeding.

Page 39 of the paper says, "OGC points out that all persons affected have the opportunity, provided by the APA in Part 52, to submit written comments. The APA does not require a hearing. The Commission has provided a hearing to afford the public an additional opportunity to present their concerns to the NRC. For these reasons, OGC recommends preliminarily that standards or criteria be adopted which would limit informal hearing to persons who can demonstrate that they will be able to participate in a meaningful manner."

So here the Commission proposal says, "You don't have anything beyond what the APA gives you and, therefore, we are going to impose a stringent qualification test on members of the public."

On the other hand, regarding the applicant on page 30 of the paper, the proposal says, "Since the applicant has the most concrete interest in the design certification rulemaking, it would seem entirely natural to regard the applicant as a party in an informal rulemaking with a right to respond to motions, requests, and presentations of commenting parties."

I am not sure what the concrete interest is that the staff paper is identifying there that entitles anybody to anything beyond the minimum that the APA rulemaking procedures would apply, if it is a concrete interest because they have spent a substantial sum on the design, and that they are the one that is actually going to build it, I am not sure that that is an interest that is recognized by the Atomic Energy Act since the Atomic Energy Act gives hearing rights and ability to participate to any person that might be affected by the proceeding, not to somebody who has a concrete interest, or has spent a lot of money.

On page 45, the same difference is pointed out. I think Bill Olmstead commented on this also where it says, "Common sense suggests that the applicant, as a proponent of

the design, should be permitted to address the questions raised by a commenting party questioning any aspect of the acceptability of the design."

So there is a concept of due process being afforded to the applicant beyond the minimum required in the APA. It is a concept that you are in a proceeding, and you have a right to respond to something that might affect your interest.

On the other hand, the Commission says, "Similar considerations do not necessarily exist to provide a commenting party the right to rebut an applicant or a staff response. By participating in an informal hearing, the commenting party is enjoying an opportunity which was not required to be provided by law."

I think there is a difference in the treatment there provided to the public and to the applicant who the Commission has identified as having a concrete interest, whatever that may be.

On the one hand, the public is told, you are not entitled to anything beyond what the APA provides you for a rulemaking."

On the other hand, the applicant, or some due process is provided, a right to respond, and various rights that are not generally in the informal rulemaking.

So, I think, the Commission, if it is going to

provide differences in rights, it is going to have to do a better job of explaining what the reasons are for that disparate treatment other than just saying, "Well, you are not entitled to more under the informal rulemaking procedures, therefore, you don't get it."

I would just like to make that comment.

MR. CAMERON: Would either of the industry representatives like to address that comment?

MR. ROWDEN: I would be happy to add a comment, although I think the staff ought to respond to the criticism of its paper.

I have no difficulty with the suggestion Dan has made that there should be further explanation of what that concrete interest is on the part of the applicant which puts it on a somewhat different footing procedurally than those who are requesting a hearing.

I have, from the standpoint of those who have been involved over many years, and with many hundreds of millions of dollars of investment in developing designs for submission in FDA and design certification applications, no difficulty in understanding what the concrete interest of the applicant is quite apart from its commercial interest in exploiting that design once it is approved.

Remember, we are talking about he triggering of a hearing, and the issues that are to be considered in the

hearing. This is something that is going to take place when some other party, some other person, I should say, requests that an informal hearing be instituted by the Commission and requests that certain issues be considered in the hearing.

To have the applicant which has developed the design, which is the proponent of the design certification application automatically entitled to participate in the hearing is something which seems to me fundamentally equitable and sensible from the standpoint of conducting a proceeding which is going to give rise to a fully developed record for Commission consideration. So I have no difficulty with that aspect of it.

With regard to the rights of rebuttal, I have commented on that before, and my remarks are in the transcript of this proceeding, and I won't repeat myself. I will just end with the same observation I have made before.

If someone as astute as Dan has difficulty in discerning the rationale for this, I think that in the final Commission position paper that rationale ought to be explicated to a point where it is fully understandable.

MR. CAMERON: I guess I would just add that the whole purpose of this workshop is to identify any potential problems like that so that they can be rectified in the final staff paper, and I would ask Mr. Mizuno if he would like to make any comments at this point?

MR. MIZUNO: No. Just that I think I understand your point, and, as Mr. Cameron said, the purpose of this workshop is to raise the concerns, and to the extent we will review your comment, and I understand it, and I think that some improvement can be made in further explicating what we are talking about.

Just briefly, I guess, just off the top of my head here, the interest that I was thinking about was that looking at the design certification, and the applicant's interest, the Commission had a choice in design certification as to whether it was going go approve or certify a particular nuclear power plant design through a licensing process, or through a rulemaking process, and for various reasons the Commission chose a rulemaking process.

My own personal opinion is that, although the particular forum that they chose clearly affects the procedural rights and responsibilities of the parties, and of the Commission itself -- I mean, if we are going through a rulemaking, we have to comply with the APA's requirements for rulemaking. I would tend to look upon it and say, "Okay, what are the interests of the parties, and I tend to look at the applicant or the proponent, in this case the vendor, of a certified design as being more akin to what I will call an applicant in a traditional licensing proceeding.

That is the kind of concrete interest I was talking about, that we clearly do not have a situation where, in a typical rulemaking, we are just issuing generally applicable generic standards. Here we are talking about approval of a specific design. To the extent that this kind of rulemaking tends to be analogous to other situations with other agencies that also approve specific products, or specific standards that are, I guess, proposed by a specific applicant, I would say that what we are talking about, and what our paper is geared to provides a very similar kind of rights and responsibilities for an "applicant" in those other agency proceedings.

MR. PARLER: Mr. Cameron, the question suggested, in one part, the fact that the Commission had decided this, that and the other. As was pointed out on several occasions during the workshop, the Commission hasn't decided anything about these procedures; they've only approved having a workshop on the basis of the document that the General Counsel's Office prepared.

Beyond what has already been said, the suggestion that the preparers of the paper for which I am responsible attempted to slant the levelness of the playing field, that was not intended. I would emphasize the point that you made that the purpose of the workshop is to ensure -- and also Mr. Rowden said -- that any uncertainties or ambiguities in

that regard or of that type are taken out of the papers. So, we are indebted to Mr. Berkowitz for raising that for clarification on our part.

MR. CAMERON: Thank you, Mr. Parler. Mr. Olmstead?

MR. OLMSTEAD: Yes, I think that Dan pointed out the two passages. Before, I had only pointed out this one on page 45, but the other one, you're also correct. I think that this is the issue I was trying to raise earlier today about confusing rulemaking with initial licensing, because what's being done is, the Applicant here is being treated as though the Applicant is applying for initial licensing under the Administrative Procedures Act.

If that's the way you treat them, then you have the 189 issue as to what kind of a proceeding this is. If this is initial licensing, then you have the on-the-record issue. But, in fact, this is really not an Applicant; this is a vendor, and it's being treated as rulemaking, so then the question is, why should they be treated differently than any other party?

So, I thought it was very helpful to clarify that, and that was really the kind of issue I was trying to get at earlier today when we were talking about it.

MR. BISHOP: The answer simply is, because they are different. We'll look forward to seeing that

explanation further expanded upon.

MR. CAMERON: Mr. Cowan?

MR. COWAN: I would like to add a couple of comments on the debate over ADR. First of all, I would associate with Mark Rowden's comment that we will take a closer look at various ADR techniques, hopefully being guided somewhat by Bill Olmstead in that closer look.

I would note that I have had personally some experience in alternative dispute resolution in the context of litigation. I am perhaps not as enamored of ADR as some of the comments here by Mr. Olmstead would suggest some people might be.

Section 52.51 of 10 CFR Part 50 currently requires -- requires -- an opportunity for an informal hearing before an Atomic Safety and Licensing Board. It sets up the process by which designs get certified. That rule, which was only adopted some two and a half years ago and has never been put through the process yet, was adopted after a very lengthy rulemaking process with very lengthy consideration of how the ASLB should participate, what the proper procedure should be for design certification, whether it should be by license or by rulemaking, and if by rulemaking, whether there should be notice and comment or something beyond notice and comment, and if beyond notice and comment, whether it should involve the ASLB or not involve the ASLB,

and if beyond notice and comment, whether it should involve formal adjudicatory procedures or merely legislative type hearings.

The NRC, in its wisdom, determined that there should be rulemaking that should involve the ASLB and that should involve procedures that go beyond notice and comment, including a legislative type hearing, and an opportunity under certain circumstances for an adjudicatory hearing. What I'm hearing now, and what worries me about ADR is that we are talking now about grafting an additional process onto a well-thought-out Commission decision two and a half years ago, and if I can take you back to 1988 and 1989, and, indeed, throughout the 1980's, the major criticism of the Commission's regulatory and licensing regime was that it lacked stability and lacked predictability in the sense that you couldn't tell when you started a process, where you were going and you couldn't tell what the procedures would be as you were going through the process.

The driving consideration behind the adoption of Part 52 and, indeed, beyond the adoption in both the House and the Senate, although not yet legislation, of the current national energy strategy bill as it relates to nuclear licensing, was to put some predictability, consistency and stability into the licensing process.

One of my concerns, although, as I say, we ought

to examine at least some aspects of the ADR to see if there is anything worthwhile doing, but one of my concerns is that we are now introducing and imposing upon new designs or proposed new designs, proposed advanced designs, as they will affect the passive plants, a degree of instability and a degree of uncertainty, and we are walking way in large measure from the known to the unknown in terms of how to resolve the various disputes.

I would put in that caution, and as I approach questions of whether or not we should, for the passive plants, from the industry standpoint, look at ADR, and I will have a very skeptical approach to the extent that we do not understand and will be, frankly, unwilling to enter into a path that is a great uncharted course.

Let me add a couple of other comments: The designs for the advanced plants, the designs for both the evolutionary and the passive plants are very complex. One of the aspects of design certification is the requirement that there is a substantial amount of design information provided up front in the process. That is one of the tradeoffs for the current process, is that the industry, funded in part by the Department of Energy and in part by the utilities and in part by the vendors, will have to put in a substantial amount of effort, up front, in order to get the designs certified.

Now, there is a difference between notice and access to information while those designs are being reviewed, and participation in the technical review process being undertaken by the regulatory staff when the vendors submit designs. It may be perfectly acceptable -- in fact, I think it is appropriate that there be notices, that there be access to information, be it the SECY practice or certain other practices that can be used during the process before we get to the hearing stage.

I question whether it is appropriate or whether it is useful to have participation in the technical review itself being undertaken by the regulatory staff. In summary, I'm not sure that the gains that I perceive outweigh the drawbacks that I perceive.

A final note: There seem to be some implications that in order to show fairness in the proceedings, and in order to pass muster with the courts, we have to go to some type of procedure like an ADR procedure. I would reject that concept. I think the Commission's licensing process, while there are many areas where I think it is cumbersome and have disagreed with it in the past, I think that the Commission's licensing process has stood the test in the courts pretty well as a process.

I suggest to you that the decision that came down last Friday is evidence that at least prima facie, the

regime for licensing set up in Part 52 will also pass muster by the courts, and I reject the idea that the reason to go to ADR or any other type of alternative -- any type of alternative process is to show a certain fairness.

There are those who will never be satisfied with the fairness of the NRC's process. There are those who are always satisfied with the fairness of the process. It doesn't in my judgment turn on whether we have ADR or whether we have licensing through the traditional processes or through the process set forth in Part 52.

MR. CAMERON: Thank you, Mr. Cowan. Would anybody on the panel like to respond or make any comments on Mr. Cowan's statement?

MR. OLMSTEAD: Sure.

MR. CAMERON: You knew I was looking at you.

MR. OLMSTEAD: Right. Bart is very good at setting up strawmen and knocking them down and so I don't wish to be understood as agreeing that I am advocating throwing out the rules the Commission have and then substituting in their place something called ADR.

That is not what I have been trying to get across today. There is rulemaking and there is adjudication under the APA. This rule, Part 52, is a hybrid that essentially says this is rulemaking but in addition, we are going to have some adjudicative features but we are not going to call

it 554 or 556 adjudication.

Then there are some criticisms, some of which I think are quite legitimate, of this process taken by itself with nothing more as to whether or not if you are going to provide a procedure, is the procedure fair given the time restrains that are imposed upon it.

What I have been trying to get across today is that depends. If there is a process leading up to it in which there has been full and effective participation, I don't think anybody is going to be successful challenging this procedure, particularly since it goes beyond 553 rulemaking.

On the other hand, if it is put up and used in a fashion in which it appears to a person looking at it from a common sense point of view, that one or more parties did not get a fair chance to put their views forward, then no matter whether it goes beyond 553 or not since the agency put it in place, the court is going to hold the agency's feet to the fire in using the process and making it fair.

That is why I was suggesting earlier this morning that there were a number of different techniques that could be used along the way even before the notices called for in Part 52 to assure that those allegations of fairness could not be made and to ensure that people could participate in the process and take ownership of the process and maybe even

resolve issues without going as far as Part 52.51 requires.

I don't think Bart and I disagree on the law. I think we may have some disagreements as to what different activities would wrought.

MR. CAMERON: Ms. Hiatt.

MS. HIATT: Yes. I would merely note that I don't think that anything in Part 52 would prohibit the NRC from exploring some additional concepts, some of the ADR concepts, and I think you have to have an open mind and try to experiment in some of these things or you are never going to make any progress.

I don't think it would hurt to try it. If you find that it doesn't work, then you don't do it again. I think people should give it a try. I think it can work.

MR. CAMERON: Thank you very much. Are there any other comments or questions from the audience before we move on to our last topic of the day?

[No response.]

MR. CAMERON: All right. Our last topic is separation of functions and ex parte limitations. I suppose I should try to summarize but I don't think I could summarize that last session.

But we did start out with Mr. Brew who made a basic point on the conduct of the informal hearing, that the concern at this point should be to make sure that the

process is very deliberative and that all the issues have been fully explored and that more flexibility should be permitted in terms of expanded time frames and other issues.

We also saw the 553 or 554 issue come up again with some of the informal or the procedures laid out for the conduct of the informal hearing. Mr. Bishop talked about the reason for the informal hearing is to make sure that a full record is developed and that the Board's questioning on issues is to ensure that the focus is sharpened in terms of the record being developed.

I think the last major point that we addressed here is again the advisability of trying to use negotiated rulemaking or some ADR or participative process to try to resolve some of the issues that might come up in the informal hearing.

One message before we go on for Joe Egan, there is a phone message for you out at the desk.

Our last topic is separation of functions and ex parte limitations. Once again, we will turn to Mr. Mizuno and Mr. Olmstead is going to take the lead on addressing this one and possibly we might hear some more about negotiated rulemaking ADR. I don't know. But Geary, would you like to provide the context.

SEPARATION OF FUNCTIONS AND EX PARTE LIMITATIONS

MR. MIZUNO: I hope that we can start off with the

premise that this is a rulemaking but the crucial task, I think, for the Commission here is not simply to comply with the Administrative Procedures Act, the strict requirements of the Notice and Comment Informal Rulemaking requirements of the APA in Part 52 but to also assure openness in the process and public confidence in the design certification rulemaking.

The topics of separation of functions and ex parte limitations are basically geared to trying to enhance the perception to the public that the process is legitimate. Separation of functions, at least the way that OGC has defined and discussed it in our paper, is the issue of communications between the agency decision maker, in this case it would be the Commission, and agency representatives with advocacy or regulatory functions.

The issue of ex parte limitations is the issue of communications between the agency decision maker and outside individuals.

MR. CAMERON: Thank you, Mr. Mizuno. I will turn it over to Mr. Olmstead at this point.

MR. OLMSTEAD: I have lost sight of the conference recommendation on this subject, but suffice it to say that there is one and it is explicated in our handy-dandy blue book in a chapter on off-the-record ex parte communications in rulemakings. So anything that I have to say that is

inconsistent with what is in there, go with what is in the book.

There are two things that I thought that I would share with you that I think are important in this area. One is the definition of the record. Many agencies, particularly in rulemaking proceedings, have trouble defining the record. It isn't until they get sued and it goes to the Federal court that there is some attempt to define completely what the record is.

I think that as a consequence they get into trouble dealing with separation of functions ex parte type issues and I say, "type" issues because they don't really apply to rulemakings as you know because they don't have a clear idea of what they are going to call the record.

So I think that one of the most important things that can be done and NRC really doesn't have a lot of trouble in this area because of their use of docket numbers now which was instituted a lot of years ago and so generally what is in the docket is in the record.

But if there is not a clear definition of constitutes a record, it gets very hard to address separation of functions and ex parte communications both for the Commissioners and the staff and for anybody on the outside looking in trying to figure out whether particular actions or activities are improper.

The second point I would like to make is that under the APA if we take this out of the rulemaking context and talk about initial licensing, separation of functions doesn't apply either in initial licensing or in rulemaking.

So to talk about impermissible contacts as a matter of law between anybody on the agency staffs and the decision maker is really kind of a non-starter in terms of the law of the case as it were.

So what we are really talking about is the Home Box Office kind of case where parties outside of the agency with substantial interest in the outcome of the rulemaking attempt to influence the agency outside of the record or outside of the process that the agency provided for everybody else to participate in.

It is those kinds of contacts and information that the courts struggle with. Once we have identified those as the problem, those are the things that we want to look at and analyze and see whether the rules are adequate to deal with them or not.

We need to differentiate between written and oral because I think it is pretty well accepted now that oral communications with the decision maker of whatever sort are so incapable of being policed that the courts aren't going to mess with them much. So basically, we are really talking about written communications and that then brings us back

full circle to talking about what constitutes the record.

In my experience since I have gone to the Administrative Conference, I think the NRC has a pretty good record in dealing with these ex parte separation of functions matters by merely documenting the information and putting it in, quote, "the record" thereby giving all parties who are interested in the proceeding an opportunity to know what it is that is being communicated and to determine for themselves whether they want to rebut it or not. After all, in this area that is what is required.

MR. CAMERON: Thank you, Mr. Olmstead. Would either of the industry representatives like to address this?

MR. ROWDEN: I won't give you as learned a tutorial as Bill has on this subject. I am simply going to vote it up or vote it down. The point has already been made several times that there is no legal requirement for ex parte constraints or separation of functions limitations.

Nonetheless, we would support the ex parte constraints that the staff proposes. We think it will enhance the credibility and objectivity of the decision making process to exclude party communications to the Commission, those who advise the Commission once the Commission has determined that a hearing will be held.

One is very easily tempted to slip over and make the same sort of judgment with regard to separation of

functions. As a matter of fact, from the standpoint of industry participants in the process there is much to be said in terms of self-interest for insisting on separation of functions limitations having a totally transparent process, knowing what the staff is communicating to the Commission. We have a long track record of experience in this regard which leads us to believe that we are better served if we know what those communications are.

On the other hand, I would have to say that I personally and my colleagues have very severe reservations about applying that particular constraint in this particular proceeding.

It is not simply because it is legally not required. It is because I think it unnecessarily hobbles the Commission. It is a self-imposed limitation if not a self-inflicted wound with regard to the Commission's ability to obtain the most knowledgeable advice from the members of its staff without the fetters which the SECY paper would impose on such communication.

Again, I would refer back to the antecedents of the rulemaking hearing. We have a process in which the Commission has been consulting on a very close, might I even say intimate basis, with its staff from the very inception of this process on policy issues, on technical issues, in the review of the staff's approval of the final design

approval, in the formulation I would assume of the proposed rule.

To impose additional or new constraints on the Commission at a time in the decisional process when it may be most important for it to have unfettered communication with the expert staff seems to us to be something which is unwise as a matter of policy.

I know the Commission hasn't spoken to this issue as Bill Parler has emphasized repeatedly on other issues. We would urge the staff to re-think this in the light of those considerations.

In our view, the price to be paid for the supposedly image benefits that the proceeding would derive from the application of separation of functions is outweighed by the substantive costs that I think the process would have to bear.

On balance, we would conclude that separation of functions should not be applied here. I would only add the further observation that if contrary to the wisdom and insight we have attempted to contribute on this issue, the Commission should adopt separation of functions constraints that it be done in a way which causes minimum impact on the conduct of the proceeding and that it seems to us to be an overly zealous exercise of separation of functions to apply those limitations not only to formal staff communications to

the Commission in the form of SECY papers which the staff would make publicly available but to constrain individual Commissioners or their staffs from communicating with the expert regulatory staff. We think that that is an unnecessary further step.

MR. CAMERON: Thank you, Mr. Rowden. Mr. Brew, do you have any words on this subject?

MR. BREW: Very quickly, at the PSC this is a relatively common problem particularly at the staff council level, you are often wearing multiple hats or different hats in different cases, whether it is advising the Commission or acting as an advocate so it is tough to draw a hard and fast line.

Certainly the notion of applying the ex parte rule makes sense or seems a reasonable approach here given the nature of the proceeding. I think that the suggested alternative on separation of functions may make a lot of sense here because it exacts a relatively small price to enhance the credibility of the process but makes it clear how the information is being transferred from staff to the Commission.

So that may be a pragmatic accommodation between some very conflicting options.

MR. CAMERON: Thank you very much. Mr. England.

MR. ENGLAND: The OGC preliminary position struck

me as cautious and well-reasoned and caused me no problems.

MR. CAMERON: On both ex parte and separation?

MR. ENGLAND: Yes.

MR. CAMERON: Thank you. Ms. Hiatt.

MS. HIATT: I would concur in that. I would support the OGC proposals on both ex parte and separation of functions.

MR. CAMERON: Mr. Bishop, any comment

MR. BISHOP: Nothing further.

MR. CAMERON: Does anybody on the panel want to ask questions about anybody else's positions?

[No response.]

MR. CAMERON: All right. Let's go to the audience and this is from Marty Malsch of the Office of General Counsel, NRC. Any need for separation of functions must derive from the perceptions of the NRC staff. As an advocate, can we dispense with staff as party advocate in these proceedings? Does everybody understand that question?

MR. OLMSTEAD: Yes, yes.

MR. CAMERON: Would someone like to take the first crack at answering that?

MR. ROWDEN: I guess if you are asking the question "can," I suppose in the abstract the answer is yes. If you ask the further question, "should we," my position

would be a categorical no.

I don't see how the staff which has been conducting the review and which is in effect sponsoring the proposed design certification rule can absent itself from a party role in the proceeding.

This can become almost metaphysical. The staff is the staff, you know. They are a part of a governmental agency. The separation of functions limitation by design does not apply to staff agency communications in rulemaking. Again, it comes down to a question not simply of deciding a case or resolving disputes but having the soundest safety decision or soundest decision as you will from a policy and safety point possible.

From that standpoint, I would iterate once again my view that we ought not put constraints in the way of Commission communication with its staff. I understand the staff's sensitivity and perhaps the Commission's sensitivity to the perception problem.

I understand our own interest in knowing what those communications are but if I have to weigh those interests against the interest of reaching the soundest, substantive decision I would come out on the side of substance and communication.

MR. CAMERON: Mr. Olmstead.

MR. OLMSTEAD: I think I agree with that but once

again, this is one of the areas that I think there is a history in the agency of the staff doing things in different ways than people are accustomed to. I submit an application, the staff reviews it, works out the differences it has with me and the application. Then it goes to hearing and then it goes to the Commission.

Today I hope I have kind of gotten through that if one has problems with the perceptions of the staff as an advocate of the application, one of the ways to do that is to re-think how the staff does the review in the first place and see them as intermediate decision makers where everybody can put their input into the staff before the decision is reached and let the applicant be the applicant and the advocate.

But that again is one of these things of how much of the process do you want to re-think. Everybody is comfortable with the way it traditionally has been and if you are comfortable with the way it traditionally has been then these perception problems arise and they need to be dealt with and the way the paper deals with them is reasonable, I think.

MR. CAMERON: Does anybody else have a comment on whether the NRC staff should remain as a party advocate in this rulemaking?

[No response.]

MR. CAMERON: The question comes from Bart Cowan on the separation of functions issue. Other than enhancement of its public image, is there any other reason for the Commissioners not to have unfettered access to its experts in the regulatory staff when considering design certifications? I suppose I would ask the NRC representatives to take a first crack at that.

MR. CRUTCHFIELD: The availability of the technical staff provides the Commission with some expertise that they don't already have. For example, a great deal of the design information that we are reviewing deals with new instrumentation and control systems, digitally based systems.

The staff, itself, is having a problem with resources and I am sure the Commission is having a problem with resources there, also. So the availability of the staff for the Commission provides to them a source for questions, answers, understanding and learning that they don't have traditionally right now. So cut them off from that, I think, would do a disservice to the Commission.

MR. CAMERON: I guess the answer then is there wouldn't be any reason to cut the Commission off.

MR. CRUTCHFIELD: I see no reason to cut them off from the staff.

MR. CAMERON: Mr. Brew.

MR. BREW: The basic question, while I wouldn't cast it in the terms Mr. Cowan has, goes to the ultimate acceptance of the product of the process. You are trying to tread a line between full technical access to the decision makers to get answers to their questions which happens all the time and the notion that the process is somehow wired.

If you don't recognize the latter, you are going to be courting trouble particularly if you have a process that isn't necessarily considered to be publicly above reproach to start with.

So I think a reasonable first step forward is to take an approach such as that recommended in the paper rather than to simply treat it as ignoring the problems that you can run into either from an appearance perspective or otherwise by being if not flippant or not as sensitive to the separations of functions problems.

MR. CAMERON: Thank you very much. Mr. England, any comment?

MR. ENGLAND: I certainly would see no reason to cut the Commission off from the good technical advice of its staff but I also see no reason why everything should be kept confidential. If it is good information and it doesn't get into proprietary rights, I would like if the staff knew that it would be subject to public scrutiny, they would probably do a better job in putting together the recommendations for

the Commission.

MR. CAMERON: Thank you. Ms. Hiatt, any comment?

MS. HIATT: I Think logically with regard to the staff being a party, they should be a party. I think the problem that arises is a public perception problem that the staff and the applicant are some monolithic body and the staff is supporting the application.

Traditionally, the reason for that has been that the public does not get involved early on in the staff review. I think the involvement of people through the ADR process could probably help alleviate some of that because then they would be involved in the staff review or at least early on in the process instead of when you get to the hearing where it is staff and applicant versus the intervenor.

I would really just reiterate that I think that the SECY paper did a good job of balancing the various interests of having the communication between the Commissioners and the staff and also having the public process preserved as well.

MR. CAMERON: Thank you very much. Are there any other comments? Yes, Mr. Bishop.

MR. BISHOP: If I could just add a quick postscript, as I understand the staff's recommendation or let me rephrase that. If the Commission were to adopt the

staff's recommendation on the separation of functions, I am presuming that as Mark as well explained the necessity, the benefit of having free and open dialogue between the Commission, the individual Commissioners, their staffs and the NRC staff, would not be in any way constrained unless and until issues are joined and particularly as they come joined to a hearing.

I would think that prior to that time, I can think of no justification for imposing these artificial restraints with all of the price that would have to be paid because of that. So my suggestion would be if they are imposed, it would be at that time and for those issues alone.

MR. CAMERON: Thank you. How about any other questions from the audience on this issue or comments? I think there is one more out there. This is form Paul Bollwerk with the Commission's Atomic Safety and Licensing Board Panel.

If you do not require separation of functions, do you run the risk of staff acting as a conduit for ex part communication from parties to the rulemaking including applicants with whom the staff has contact and doesn't this in turn impede the staff from having frank discussions with other parties to the rulemaking? Is that understandable?

MR. ROWDEN: It is understandable and I guess my answer would be it depends on whether you have a

conspiratorial perspective on life. The fact of the matter is all sorts of games can be played if you lack confidence in the players.

My own view is that the staff can be trusted in this regard. The parties had better be trusted or if they are not trustworthy subject to sanctions in the proceeding and that although I understand the possibility for something like this happening, I think the prospect for that is marginal at best and I do not think it outweighs the benefits of unfettered communication between the Commission and those members of the NRC who are the most knowledgeable who have spent years -- years -- working on this application and analyzing the technical issues.

MR. CAMERON: Thank you. Do any of the other panelists want to address Mr. Bollwerk's question?

[No response.]

MR. CAMERON: All right. That wraps up our last session and as Mr. Olmstead pointed out when he started the definition of a record is the key here in his opinion, documenting the information and putting it in the record and this has important implications for both separation of functions and ex parte.

I think most of our brother panelists agreed with the staff preliminary positions on both ex parte and separation of functions, however as Mr. Rowden pointed out

on separation of functions, the staff position may unnecessarily complicate NRC decision making on design certification and that the staff should re-think its position there.

FINAL QUESTIONS FROM AUDIENCE

MR. CAMERON: We are at that point on the agenda where we would take final questions from the audience, final comments on whatever has been discussed today or anything else that is related that you want to comment on and I would also include the panelists in that invitation. In fact, I will start with the panelists. Are there any summary comments, closing remarks or other issues that people would like to address and Mr. Rowden, I will start with you.

MR. ROWDEN: Just an expression of appreciation for the opportunity to participate in the workshop, for the thought that went into its structuring and for your skill, patience and even-temper in conducting the panel and related proceedings and that is all I have to say.

MR. CAMERON: Thank you.

MR. BISHOP: I would just add my thoughts that I think that this has been productive in the sense that I think that we have all and certainly speaking only for myself, have more to think about.

I think some provocative ideas have been put forward and we have some further consideration of our position and that of others. We will certainly be looking forward to submitting comments during the comment period on this workshop and hopefully that will enable the agency to come to a better reasoned basis for its decision.

MR. CAMERON: Mr. Olmstead.

MR. OLMSTEAD: On behalf of the Conference, I thank you for the invitation today and the opportunity to explicate some of our work and for those of you who may not know it, this little panel discussion we have here is defined by the Administrative Conference as a form of alternative dispute resolution.

[Laughter.]

MR. CAMERON: Thank you. Ms. Hiatt.

MS. HIATT: I would likewise express my appreciation for the opportunity to participate in this process. I think it is something very beneficial and we can all learn from each other and hopefully provide a more meaningful mechanism for public involvement in future proceedings.

MR. CAMERON: Thank you. Mr. England.

MR. ENGLAND: I think we finally have consensus on something. I also would like to thank the NRC for the opportunity to attend and participate and hope that this has

been helpful to you.

MR. CAMERON: Thank you, Mr. Brew.

MR. BREW: I would just like to commend you on a job well done as far as mediating the discussion throughout the day.

MR. CAMERON: Thank you. Mr. Crutchfield.

MR. CRUTCHFIELD: No.

MR. CAMERON: Mr. Mizuno.

MR. MIZUNO: I had a question which wasn't discussed so I wanted to get the panelists' views on it. I thought it was an important point but I thought it just went by which is OGC's paper had discussed having oral presentations and questions being submitted by the parties to the Board for their consideration without any finding by the Board that such oral presentations were necessary as is apparently contemplated by 52.51(b).

I just wanted to get the reaction of the panel to that since we were apparently deviating from the strict words of the rule.

MR. ROWDEN: I, for one, was persuaded by the explanation for that in the SECY paper and would support that approach.

MR. BISHOP: I think it may be only coincidental but I think you will find a similar concept addressed in our paper.

MR. OLMSTEAD: I guess as the only person, I believe, in this room that participated in the GESMO proceeding or that was being done --

MR. ROWDEN: You are not the only one.

MR. OLMSTEAD: I think I was the only one sitting downtown then day after day listening to the written questions being read to the witnesses, questions tend to breed questions and one of the things that you should be aware of in that particular process is that all of these nice refinements that we have been talking about here today rapidly disintegrate and the Board gets interested in a line of questions that is provoked by one question and a whole series of other questions come out and so I think once you get into a hearing where this kind of a process is being worked, that both the participants and the Board pretty well do whatever they want to do with respect to questions.

MR. CAMERON: Does anybody else on the panel wish to respond to Mr. Mizuno's question?

MS. HIATT: I would likewise say that I found the discussion in the paper persuasive. What is the point of having a hearing if all you do is submit written presentations. I think the paper made a good point of that.

MR. CAMERON: Thank you very much. Do we have any comments or questions from the audience? Would anybody like to put their two-cents worth in on anything?

[No response.]

CLOSING REMARKS

MR. CAMERON: I just would say that personally it was a pleasure for me to be up here with these panelists today. I think that they made some very insightful comments on the issues. They were very well prepared and I am sure that this dialogue will illuminate the Commission's decision making process on design certification.

We heard some affirmation on some of the points in the OGC paper, some new information. New perspectives were brought out. We have seen some areas of agreement, some areas of disagreement but more importantly, I think, that in most cases we have seen some ways to close the gap in some of these areas and I would just like you to join me in giving the panelists a big round of applause. I think they were great.

[Applause.]

MR. CAMERON: And don't forget about the written comment period. We will be glad to have those comments and transcripts will be available either from the stenographic company or from the PDR. Thank you very much.

[The above-entitled workshop was concluded at 4:55 o'clock p.m.]

REPORTER'S CERTIFICATE

This is to certify that the attached proceedings before the United States Nuclear Regulatory Commission

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Marilynn Estep

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