

# OFFICIAL TRANSCRIPT OF PROCEEDINGS

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Certification Rulemaking Procedures

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UNITED STATES NUCLEAR REGULATORY COMMISSION

\* \* \* \* \*

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.

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## P R O C E E D I N G S

[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

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

3  
4 **EXPLANATION OF WORKSHOP FORMAT**

5  
6 **MR. CAMERON:** We are using a panel format, and we  
7 hope that the panel format will also serve as a catalyst for  
8 audience participation.

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

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

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

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

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1 Illinois.

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

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

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

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

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

25 There are cards available for people to write

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

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

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

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

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

25 I would also remind you that you have an

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

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

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

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

19 [Pause.]

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

24 Marty?  
25

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1 BRIEF DISCUSSION OF DESIGN CERTIFICATION  
2 UNDER 10 CFR PART 52  
3

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

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

9 10 CFR Part 52 was adopted by the Commission in  
10 April, 1989. Its purpose is to achieve early resolution of  
11 licensing issues and enhance the safety and reliability of  
12 nuclear power plants through standardization.

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

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

21 There was a notice of proposed rulemaking, August  
22 23rd, 1988. We received numerous comments, and then in the  
23 usual course for rulemakings we analyzed the comments,  
24 prepared a notice of final rulemaking, which was, as I say,  
25 published on April 18, 1989.

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

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

13          Basically they provide as follows:

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

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

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

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

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

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

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

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1 proceeding where their input can have the maximum effect.

2 I should also note in conclusion that the U.S.  
3 Court of Appeals of D.C. Circuit issued a decision on Part  
4 52 just this past Friday. The decision generally upheld  
5 Part 52 against a challenge.

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

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

14 Thank you very much.

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

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

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

2 [Applause.]

3  
4 KEYNOTE ADDRESS BY

5 THE CHAIRMAN OF THE U.S. NUCLEAR REGULATORY COMMISSION,  
6 IVAN SELIN

7  
8 CHAIRMAN SELIN: Good morning, ladies and  
9 gentlemen. It's a great pleasure to join the welcome to all  
10 of you to this workshop for Procedures for Design  
11 Certification Rulemaking for Standardized Nuclear Power  
12 Plants. I hope and I believe that this meeting will be  
13 extremely valuable, not only in terms of the substantive  
14 contribution that it can make towards resolving the complex  
15 issues that will be addressed, but as part of a useful  
16 procedure.

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

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

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

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

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

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

8 This includes the NRC's own staff, the nuclear  
9 industry, and equally, it includes the public interest  
10 groups, the states and other federal agencies.

11 Parenthetically, I know that there's been some skepticism on  
12 the part of the public interest community as to how much the  
13 NRC takes the views of this community into account. I can  
14 only say that there have been a number of examples that  
15 should dispel any doubt on this score.

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

25 The answer, quite simply, is that we are

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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1 on, I'll try to answer them.

2 [No response.]

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

5 [Applause.]

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

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

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

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

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

3 MR. MIZUNO: Yes. Thank you.

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

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

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

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

24 MR. CAMERON: Thank you, Geary.

25 Bart?

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

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

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

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

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1 during the design certification rulemaking proceedings  
2 themselves.

3 As Geary indicated, the critical section is  
4 52.51(c) which provides that access to proprietary  
5 information in the design certification rulemaking will be,  
6 quote, "in the same manner and to the same extent", close  
7 quote, as in a licensing proceeding. This provision was  
8 added to the provisions of Part 52 after the Commission  
9 received its comments on the draft proposal for Part 52.

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

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

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

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

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

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

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

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1 is made available in licensing proceedings.

2 MR. CAMERON: Thank you, Mr. Cowan.

3 Susan, would you like to say something about  
4 this?

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

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

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

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

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

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

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

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1 formula for Coca Cola.

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

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

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

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

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

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

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

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

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1 Administration, I might add, and the Congress.

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

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

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

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

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1 confidential information that the Conference has undertaken  
2 to examine.

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

6 MR. CAMERON: Thank you very much, Bill.

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

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

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

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

10           Thanks.

11           MR. CAMERON: Thank you, Jim.

12           Steve England.

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

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

24           MR. CAMERON: Go ahead, Bart.

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

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

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

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

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

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

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

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

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

18           There are other difficult questions that had been  
19 raised in the OGC's preliminary recommendations and SECY 92-  
20 170 relating to the matter of use of proprietary information  
21 in the design certification rule and access to that  
22 information in connection with later licensing proceedings.

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

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

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

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

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

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

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

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

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1 that in the Administrative Procedures Act.

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

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

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

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

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

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

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

16           MR. MIZUNO: No.

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

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

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

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

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

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

21 I'll throw that open for the panel generally.

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

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

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

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

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

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

8 MR. CAMERON: Would anybody else like to comment?

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

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

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

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

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

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

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

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

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

7           MR. CAMERON: Thank you.

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

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

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

25           Is there some absolute requirement on NRC to

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

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

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

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

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

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

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

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

15 MR. CAMERON: Any other comments?

16 MR. MIZUNO: I am not finished yet.

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

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

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

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

8           MR. CAMERON: Thank you, Geary.

9           Does anyone else on the panel have a comment?

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

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

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

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

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

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

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

16 MR. CAMERON: Thank you very much.

17 Bill Olmstead?

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

25 The Office of Federal Register is not going to

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

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

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

13 MR. CAMERON: Thank you very much.

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

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

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

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1 I am Mike Blake with the Nuclear News.

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

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

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

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

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

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

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

8 So those would be three examples of information.

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

16 MR. CAMERON: Thank you.

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

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

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

24 MR. OLMSTEAD: Yes.

25 MR. ROWDEN: This would be dependent upon the

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1 terms of the DOE's Support Contracts.

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

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

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

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

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

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

4 MR. CAMERON: Thank you. Dan Berkowitz?

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

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

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

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

25 MR. CAMERON: All right.

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

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

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

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

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

1 MR. CAMERON: Thank you.

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

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

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

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

4           [No response.]

5           MR. CAMERON: Anything from the panel?

6           [No response.]

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

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

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

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1           We spent a lot more time than we usually would  
2 have on this particular issue, but I think that it was  
3 important enough to spend the time, and luckily we did have  
4 the time to spend. We're going to go on a break now, per  
5 the program agenda, and be back at approximately that time,  
6 10:45, maybe a little bit earlier. And we'll start up again  
7 with the second issue. Thank you.

8           [Brief recess.]

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

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

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

23           Thank you.

24  
25

1                   TIME FOR SUBMISSION OF WRITTEN COMMENTS  
2                   AND REQUESTS FOR INFORMAL HEARING  
3

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

10                  Basically, the only thing or the only possibly  
11 relevant section in Part 52 is Section 52.51(b), which  
12 provides for the opportunity for written comments in  
13 conformance with the requirements of the APA as well as the  
14 opportunity for hearing provided in that section. However,  
15 52.51(b) does not refer to or address the time for  
16 submission of either the written comments or the request for  
17 hearing.

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

25                  MR. CAMERON: Thank you, Geary.

1 Ms. Hiatt?

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

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

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

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

25 You also have an interface here with proprietary

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

8 I would note that 90 days is a very typical  
9 comment period for many major NRC rulemakings. Now, it is  
10 true that a standard design rulemaking is a rulemaking; it  
11 isn't your typical rulemaking with regard to the subject  
12 matter. In fact, I have seen a news account of the  
13 Westinghouse AP-600 application which indicates some 7300  
14 pages in length. And I would note that even for the typical  
15 rulemakings, the comment period is often extended beyond the  
16 90 days.

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

25 I would suggest at a very minimum 150 days for the

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

3 I think I will close on the note that this isn't a  
4 race. It's not like the Indy 500 where speed is of the  
5 essence. I think the goal of these proceedings should be to  
6 do the job right, to achieve a quality decision, and to make  
7 sure no stone has been left unturned in evaluating the  
8 safety of these designs because of the issue preclusion of  
9 52.63. This is the one chance you have to do it right, and  
10 that should be the goal, and expedience should be something  
11 secondary.

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

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

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

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

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

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

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

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1 further time is necessary.

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

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

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

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

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

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1 There is kind of a paranoia or a schizophrenia in the paper  
2 about Section 189 and what kind of hearing this is; whether  
3 it's an adjudication on the record, or whether it's a  
4 rulemaking under 553, and there's lots of discussion about  
5 554 versus 553 procedures. I think it complicates how one  
6 thinks about this.

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

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

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

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

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

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

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

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

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

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

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

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

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

25 And those are, if the FDA design certification

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

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

11 MR. CAMERON: Thank you very much.

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

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

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

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1 comment period.

2 MR. CAMERON: Thank you.

3 I would open it up to the panel generally.

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

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

12 The 90-day period is in reality at least a 180-  
13 day period. I have minimal confidence that that 90 days  
14 necessary to prepare the rule is actually going to be only  
15 90 days.

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

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

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1 90 days, is reasonable. Beyond that, it ought to be a  
2 matter of the Commission exercising its informed discretion  
3 in a fact-specific context.

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

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

21 MR. CAMERON: Very true.

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

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

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1 21, that at least some of them OGC recently anticipated  
2 would be the case simply because that was the current  
3 practice of the NRC staff.

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

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

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

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

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

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1 are being put before us.

2 MR. CAMERON: Thank you.

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

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

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

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

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

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

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

3           MR. CRUTCHFIELD: Sure.

4           MR. CAMERON: Thank you.

5           Anybody in the audience have a question?

6           [No response.]

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

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

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

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

25

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1                   MECHANISMS FOR EARLY PUBLIC PARTICIPATION

2

3                   MR. MIZUNO: As is evidenced by the discussion of

4 the two previous subjects in this first session, the issue

5 of how long a written public comment period is to be

6 provided and, I guess, more generally, the whole perceived

7 public legitimacy of this rulemaking process will depend, in

8 large part, upon the opportunities for the public to know

9 that there is a design certification application being

10 conducted and for them, if not to participate, to certainly

11 at least be aware and to have access to relevant information

12 with respect to the application and the NRC staff's review

13 of that application.

14                   The issues to be addressed in this portion of the

15 panel session are whether or what kinds of opportunities can

16 be provided for the public to make itself known on issues as

17 they are considered by the NRC staff and the Commission in

18 preliminary form prior to the onset of the formal

19 rulemaking, i.e., the issuance of the Notice of Proposed

20 Rulemaking.

21                   Some of the issue that could be considered early

22 on would be, for example, application of standards,

23 technical standards, beyond the current regulatory

24 requirements, i.e., some of the technical subjects that were

25 covered in SECY Papers 90-106 and 91-262; proposed staff

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

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

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

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

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

25 MR. CAMERON: Thank you.

1 Ms. Hiatt?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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1 rulemakings in particular.

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

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

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

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

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

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

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

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

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

5 MR. CAMERON: Thank you, Mr. Rowden.

6 Let's go to Mr. Olmstead.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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1 before.

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

6 MR. ENGLAND: No.

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

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

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

25 And where they want more control over the

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

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

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

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

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

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

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

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1 negotiate a settlement on their own.

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

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

20           MR. CAMERON: Thanks, Mr. Olmstead.

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

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

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

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

20 MR. CAMERON: Thank you for those thoughts.

21 Mr. England?

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

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1 most important part.

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

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

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

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

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

19 [Laughter.]

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

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

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

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

19 MR. CAMERON: Thank you.

20 Mr. Olmstead?

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

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1 find it so troubling.

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

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

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

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

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

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

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

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

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

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

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

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

17 MR. CAMERON: Thank you.

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

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

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

25 I must admit, I may later regret having put that

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1 forward, because I'm not sure what the implications are,  
2 both in terms of time and schedule, and whether it can be  
3 done, much less whether it would require a change to Part  
4 52, which I do not advocate. But it seems to me maybe --  
5 there is a thought that occurred to me that this might be an  
6 appropriate thing to consider.

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

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

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

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

16 MR. CAMERON: Susan Hiatt.

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

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

4 MR. CAMERON: Thank you.

5 Mr. Olmstead?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

17 Does anybody want to handle that?

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

25 MR. CAMERON: Thank you.

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

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

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

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

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

8 [Pause.]

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

25 MR. ROWDEN: The answer is yes. From our

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

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

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

12 [Laughter.]

13 MR. ROWDEN: Perhaps the four-day version.

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

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

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

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

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

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

6 MR. CAMERON: Thank you.

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

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

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

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

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

22 MR. CAMERON: Thank you very much, Geary.

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

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

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

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## A F T E R N O O N S E S S I O N

[1:25 p.m.]

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

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

## I N F O R M A L H E A R I N G S

12  
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14  
15 MR. MIZUNO: I believe the first subject in this  
16 panel session is on informal hearings. As you know, section  
17 52.51(b) provides for an opportunity for an informal hearing  
18 before an Atomic Safety and Licensing Board. Some of the  
19 issues that we might discuss with respect to that are the  
20 fact that section 52.51(b) sets no threshold for requesting  
21 an informal hearing -- i.e., there are no special  
22 requirements in the section with respect to circumstances  
23 under which an informal hearing can be granted. Does  
24 everyone who requests a hearing get a right to have a  
25 hearing, or should there be some sort of additional

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

6 MR. CAMERON: Thank you, Mr. Mizuno.

7 Mr. Bishop?

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

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

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

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

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

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

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

6 MR. CAMERON: Thank you, Mr. Bishop.

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

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

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

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

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

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

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

12           MR. CAMERON: Thank you very much.

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

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

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

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

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

17           I guess that's it.

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

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

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

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

11 MR. CAMERON: Thank you very much.

12 Mr. England?

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

24 MR. CAMERON: Thank you.

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

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1 before we go to Mr. Rowden?

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

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

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

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

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

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

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

14 MR. CAMERON: Thank you.

15 Mr. Mizuno?

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

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

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

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

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

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

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

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

23 MS. HIATT: We do it now.

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

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

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

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

25 Now, the Commission's providing an avenue for

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

5 MR. CAMERON: Any other comments up here?

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

10 [Laughter.]

11 MR. CAMERON: We have all copies of that.

12 MR. ROWDEN: Do you get royalties, Bill?

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

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

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

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

1 MR. CAMERON: Thank you.

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

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

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

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

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

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

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

25 MR. CAMERON: Anybody else in response to that

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1 question?

2 [Pause.]

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

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

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

11 MR. ROWDEN: Would you repeat the criteria?

12 MR. OLMSTEAD: Okay. I'm essentially reading from  
13 the chapter on availability of review. It starts on page  
14 310: "Rightness and Pre-Enforcement Review."

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

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

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

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

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

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

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

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

19 MR. CAMERON: Thank you very much.

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

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

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

13  
14 REQUESTS FOR ADDITIONAL HEARING PROCEDURES  
15 AND FORMAL HEARING  
16

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

1 resolved with sufficient accuracy except in a formal  
2 hearing.

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

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

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

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

9 MR. CAMERON: Thank you.

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

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

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

7 MR. CAMERON: Thank you.

8 Mr. Olmstead, any comments on this particular  
9 issue?

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

12 [Laughter.]

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

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1 MR. CAMERON: Thank you.

2 Mr. Brew, do you have anything to say?

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

15 MR. CAMERON: Thank you very much.

16 Mr. England?

17 MR. ENGLAND: I really have nothing on this.

18 MR. CAMERON: Okay.

19 Do we have any other comments by the panel?

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

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1 presumably great weight would be accorded that  
2 recommendation.

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

20 MR. CAMERON: Thank you.

21 Does anybody else on the panel have a comment?

22 [No response.]

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

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

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

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

20 MR. CAMERON: Thank you.

21 Does any other panelist have a comment on that  
22 question?

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

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1 correct then one has to stay in the context of 553. Even  
2 when you're talking about additional procedures, you still  
3 have to talk about participation and parties and who they  
4 are and the definition of the scope of the proceeding in the  
5 context of its being a 553 proceeding. That's significant  
6 because, on page 50 of the paper -- this is back on judicial  
7 review a little bit -- the statement is made that it's OGC's  
8 preliminary review that persons should be required to have  
9 requested an informal hearing and, if granted, participated  
10 fully in the hearing in order for persons to be deemed to  
11 have exhausted their administrative remedies. That is not  
12 the law, as I understand it, under section 553. It is the  
13 law, as I understand it, under section 554. So one needs to  
14 be careful here that you don't turn what you want to be a  
15 553 proceeding into a 554 proceeding, because when you get  
16 into all of these discussions about pivotal issues of fact  
17 and cross examination and adequacy of contentions and  
18 standing you're starting to make it sound like an  
19 on-the-record proceeding.

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

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

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

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

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

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1 That's my only point.

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

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

8 [No response.]

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

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

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

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

6 What you're cautioning is in adding certain  
7 additional procedures or stating certain supposed  
8 requirements, the Commission can inadvertently turn this by  
9 some sort of procedural alchemy from a 553 proceeding into a  
10 554 proceeding. That is not what we want to do. I don't  
11 think that that's what the SECY paper does. We will  
12 certainly be sensitive to that in reviewing it for purposes  
13 of our final comments.

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

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

22 MR. CAMERON: Thank you.

23 Any further questions?

24 [No response.]

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

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

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

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

20 Mr. Mizuno?

21  
22 SCOPE OF LICENSING BOARD AUTHORITY

23  
24 MR. MIZUNO: This might be the most contentious  
25 issue that we discuss this afternoon. As was originally

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

4 The OGC paper discussed three alternatives.

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

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

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

17 The relevant regulatory provisions are Section  
18 52.51(b) and (c), and although they do refer to the  
19 authority of the licensing board, it is not clear from  
20 reading those sections how the licensing board should be --  
21 what kind of authority it should have vis-a-vis compiling  
22 the record versus recommending a decision versus actually  
23 making a decision.

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

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

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

12 MR. CAMERON: Thank you.

13 Steve England.

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

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

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

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

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

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

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

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

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

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1 features whatsoever.

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

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

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

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

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

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

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

3 For somebody that has been involved with Licensing  
4 Boards with agencies and Licensing Boards for the last 25 or  
5 30 years, and all the work that they have done, there is  
6 certainly not any question of their competency. That is a  
7 non-issue.

8 MR. CAMERON: Thank you, Mr. Parler.

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

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

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

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

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

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

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

19 MR. CAMERON: Thank you very much.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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1 MR. CAMERON: Thank you very much.

2 Mr. Olmstead?

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

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

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

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

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

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

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

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

20           MR. CAMERON: Thank you very much.

21           Ms. Hiatt.

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

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

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

11 I guess -- what more do you want?

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

25 You did mention the interface with the separation

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

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

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

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

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

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

25 MR. ROWDEN: Are you talking about rulemaking?

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1 MR. OLMSTEAD: Yes.

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

3 MR. OLMSTEAD: Was that just GESMO?

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

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

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

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

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

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

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

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

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

11 MR. MIZUNO: Have a question.

12 MR. CAMERON: Go ahead, Mr. Mizuro.

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

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

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

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

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

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1 MR. CAMERON: Is that satisfactory, Gary?

2 MR. MIZUNO: Yes.

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

6 [No response.]

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

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

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

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

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

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

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

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

17 Mr. Mizuno.

18  
19 CONDUCT OF INFORMAL HEARING

20  
21 MR. MIZUNO: Once again, the relevant section that  
22 we're dealing with is Section 52.51(b), and basically it  
23 provides that the procedures for an informal hearing must  
24 include the opportunity for written presentations made under  
25 oath or affirmation and for oral presentations and

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

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

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

16 MR. CAMERON: Mr. Brew?

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

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

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

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

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

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

25 It would seem a reasonable step would be if the

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

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

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

23             That's about it.

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

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1 MR. BISHOP: Let me just begin, then. I guess  
2 maybe in the break, I've thought of a way to resolve the  
3 problem that we got into right at the end, at least the  
4 conversation that Bill and I had about whether this was a  
5 553 or a 554 proceeding.

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

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

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

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1 that's my sense.

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

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

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

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

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

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

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

6 MR. CAMERON: Thank you. Ms. Hiatt?

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

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

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

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1 really see the need to dictate this so strictly.

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

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

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

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

25 It is the burden of the Applicant as the

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

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

15 MR. CAMERON: Thank you, Mr. Rowden.

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

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

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

6           MR. CAMERON: Thank you very much.

7           Mr. Olmstead.

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

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

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

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

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

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

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

25 It seems to me that there are more flexible ways

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

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

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

18 MR. CAMERON: Thank you.

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

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

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

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

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

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

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

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1 that open mind.

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

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

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

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

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

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

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

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

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

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

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

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

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

25 MR. BISHOP: But that says they come forward with

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

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

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

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

9 MR. BISHOP: There is no problem.

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

12 MR. CAMERON: Ms. Hiatt?

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

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

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1 is there might not be a tremendous amount of public interest  
2 with ABWR and the Combustion Engineering System 80+  
3 precisely because these are very large plants, and my guess  
4 is that no utility in this country is going to be ordering a  
5 1200, 1300 megawatt plant any time in the future.

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

13 MR. CAMERON: Thank you, Ms. Hiatt.

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

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

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

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

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

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

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

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

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

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

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

23 MR. CAMERON: Anybody else up there?

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

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

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

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

25           Generally our view is if you do a good job of

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

17 Any comment from the panel?

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

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

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

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

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

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

18 I think that I would be at liberty to reveal the  
19 reasons why based on my conversations with Mr. Mariotte, and  
20 basically, in their view, and I would emphasize this is  
21 their view of the process, they don't believe that a 10 CFR  
22 52 process for design certification, site review, et cetera,  
23 is really meant to foster effective public participation in  
24 terms of revealing whether there is a defect in a design, or  
25 with a site, or with a reactor after construction, and that

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

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

6 Are there any other comments?

7 Dan Berkovitz.

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

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

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

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

5           On the other hand, regarding the applicant on page  
6 30 of the paper, the proposal says, "Since the applicant has  
7 the most concrete interest in the design certification  
8 rulemaking, it would seem entirely natural to regard the  
9 applicant as a party in an informal rulemaking with a right  
10 to respond to motions, requests, and presentations of  
11 commenting parties."

12           I am not sure what the concrete interest is that  
13 the staff paper is identifying there that entitles anybody  
14 to anything beyond the minimum that the APA rulemaking  
15 procedures would apply, if it is a concrete interest because  
16 they have spent a substantial sum on the design, and that  
17 they are the one that is actually going to build it, I am  
18 not sure that that is an interest that is recognized by the  
19 Atomic Energy Act since the Atomic Energy Act gives hearing  
20 rights and ability to participate to any person that might  
21 be affected by the proceeding, not to somebody who has a  
22 concrete interest, or has spent a lot of money.

23           On page 45, the same difference is pointed out. I  
24 think Bill Olmstead commented on this also where it says,  
25 "Common sense suggests that the applicant, as a proponent of

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1 the design, should be permitted to address the questions  
2 raised by a commenting party questioning any aspect of the  
3 acceptability of the design."

4 So there is a concept of due process being  
5 afforded to the applicant beyond the minimum required in the  
6 APA. It is a concept that you are in a proceeding, and you  
7 have a right to respond to something that might affect your  
8 interest.

9 On the other hand, the Commission says, "Similar  
10 considerations do not necessarily exist to provide a  
11 commenting party the right to rebut an applicant or a staff  
12 response. By participating in an informal hearing, the  
13 commenting party is enjoying an opportunity which was not  
14 required to be provided by law."

15 I think there is a difference in the treatment  
16 there provided to the public and to the applicant who the  
17 Commission has identified as having a concrete interest,  
18 whatever that may be.

19 On the one hand, the public is told, you are not  
20 entitled to anything beyond what the APA provides you for a  
21 rulemaking."

22 On the other hand, the applicant, or some due  
23 process is provided, a right to respond, and various rights  
24 that are not generally in the informal rulemaking.

25 So, I think, the Commission, if it is going to

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1 provide differences in rights, it is going to have to do a  
2 better job of explaining what the reasons are for that  
3 disparate treatment other than just saying, "Well, you are  
4 not entitled to more under the informal rulemaking  
5 procedures, therefore, you don't get it."

6 I would just like to make that comment.

7 MR. CAMERON: Would either of the industry  
8 representatives like to address that comment?

9 MR. ROWDEN: I would be happy to add a comment,  
10 although I think the staff ought to respond to the criticism  
11 of its paper.

12 I have no difficulty with the suggestion Dan has  
13 made that there should be further explanation of what that  
14 concrete interest is on the part of the applicant which puts  
15 it on a somewhat different footing procedurally than those  
16 who are requesting a hearing.

17 I have, from the standpoint of those who have been  
18 involved over many years, and with many hundreds of millions  
19 of dollars of investment in developing designs for  
20 submission in FDA and design certification applications, no  
21 difficulty in understanding what the concrete interest of  
22 the applicant is quite apart from its commercial interest in  
23 exploiting that design once it is approved.

24 Remember, we are talking about the triggering of a  
25 hearing, and the issues that are to be considered in the

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1 hearing. This is something that is going to take place when  
2 some other party, some other person, I should say, requests  
3 that an informal hearing be instituted by the Commission and  
4 requests that certain issues be considered in the hearing.

5 To have the applicant which has developed the  
6 design, which is the proponent of the design certification  
7 application automatically entitled to participate in the  
8 hearing is something which seems to me fundamentally  
9 equitable and sensible from the standpoint of conducting a  
10 proceeding which is going to give rise to a fully developed  
11 record for Commission consideration. So I have no  
12 difficulty with that aspect of it.

13 With regard to the rights of rebuttal, I have  
14 commented on that before, and my remarks are in the  
15 transcript of this proceeding, and I won't repeat myself. I  
16 will just end with the same observation I have made before.

17 If someone as astute as Dan has difficulty in  
18 discerning the rationale for this, I think that in the final  
19 Commission position paper that rationale ought to be  
20 explicated to a point where it is fully understandable.

21 MR. CAMERON: I guess I would just add that the  
22 whole purpose of this workshop is to identify any potential  
23 problems like that so that they can be rectified in the  
24 final staff paper, and I would ask Mr. Mizuno if he would  
25 like to make any comments at this point?

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1 MR. MIZUNO: No. Just that I think I understand  
2 your point, and, as Mr. Cameron said, the purpose of this  
3 workshop is to raise the concerns, and to the extent we will  
4 review your comment, and I understand it, and I think that  
5 some improvement can be made in further explicating what we  
6 are talking about.

7 Just briefly, I guess, just off the top of my head  
8 here, the interest that I was thinking about was that  
9 looking at the design certification, and the applicant's  
10 interest, the Commission had a choice in design  
11 certification as to whether it was going to approve or  
12 certify a particular nuclear power plant design through a  
13 licensing process, or through a rulemaking process, and for  
14 various reasons the Commission chose a rulemaking process.

15 My own personal opinion is that, although the  
16 particular forum that they chose clearly affects the  
17 procedural rights and responsibilities of the parties, and  
18 of the Commission itself -- I mean, if we are going through  
19 a rulemaking, we have to comply with the APA's requirements  
20 for rulemaking. I would tend to look upon it and say,  
21 "Okay, what are the interests of the parties, and I tend to  
22 look at the applicant or the proponent, in this case the  
23 vendor, of a certified design as being more akin to what I  
24 will call an applicant in a traditional licensing  
25 proceeding.

1           That is the kind of concrete interest I was  
2 talking about, that we clearly do not have a situation  
3 where, in a typical rulemaking, we are just issuing  
4 generally applicable generic standards. Here we are talking  
5 about approval of a specific design. To the extent that  
6 this kind of rulemaking tends to be analogous to other  
7 situations with other agencies that also approve specific  
8 products, or specific standards that are, I guess, proposed  
9 by a specific applicant, I would say that what we are  
10 talking about, and what our paper is geared to provides a  
11 very similar kind of rights and responsibilities for an  
12 "applicant" in those other agency proceedings.

13           MR. PARLER: Mr. Cameron, the question suggested,  
14 in one part, the fact that the Commission had decided this,  
15 that and the other. As was pointed out on several occasions  
16 during the workshop, the Commission hasn't decided anything  
17 about these procedures; they've only approved having a  
18 workshop on the basis of the document that the General  
19 Counsel's Office prepared.

20           Beyond what has already been said, the suggestion  
21 that the preparers of the paper for which I am responsible  
22 attempted to slant the levelness of the playing field, that  
23 was not intended. I would emphasize the point that you made  
24 that the purpose of the workshop is to ensure -- and also  
25 Mr. Rowden said -- that any uncertainties or ambiguities in

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1 that regard or of that type are taken out of the papers.  
2 So, we are indebted to Mr. Berkowitz for raising that for  
3 clarification on our part.

4 MR. CAMERON: Thank you, Mr. Parler. Mr.  
5 Olmstead?

6 MR. OLMSTEAD: Yes, I think that Dan pointed out  
7 the two passages. Before, I had only pointed out this one  
8 on page 45, but the other one, you're also correct. I think  
9 that this is the issue I was trying to raise earlier today  
10 about confusing rulemaking with initial licensing, because  
11 what's being done is, the Applicant here is being treated as  
12 though the Applicant is applying for initial licensing under  
13 the Administrative Procedures Act.

14 If that's the way you treat them, then you have  
15 the 189 issue as to what kind of a proceeding this is. If  
16 this is initial licensing, then you have the on-the-record  
17 issue. But, in fact, this is really not an Applicant; this  
18 is a vendor, and it's being treated as rulemaking, so then  
19 the question is, why should they be treated differently than  
20 any other party?

21 So, I thought it was very helpful to clarify that,  
22 and that was really the kind of issue I was trying to get at  
23 earlier today when we were talking about it.

24 MR. BISHOP: The answer simply is, because they  
25 are different. We'll look forward to seeing that

1 explanation further expanded upon.

2 MR. CAMERON: Mr. Cowan?

3 MR. COWAN: I would like to add a couple of  
4 comments on the debate over ADR. First of all, I would  
5 associate with Mark Rowden's comment that we will take a  
6 closer look at various ADR techniques, hopefully being  
7 guided somewhat by Bill Olmstead in that closer look.

8 I would note that I have had personally some  
9 experience in alternative dispute resolution in the context  
10 of litigation. I am perhaps not as enamored of ADR as some  
11 of the comments here by Mr. Olmstead would suggest some  
12 people might be.

13 Section 52.51 of 10 CFR Part 50 currently requires  
14 -- requires -- an opportunity for an informal hearing before  
15 an Atomic Safety and Licensing Board. It sets up the  
16 process by which designs get certified. That rule, which  
17 was only adopted some two and a half years ago and has never  
18 been put through the process yet, was adopted after a very  
19 lengthy rulemaking process with very lengthy consideration  
20 of how the ASLB should participate, what the proper  
21 procedure should be for design certification, whether it  
22 should be by license or by rulemaking, and if by rulemaking,  
23 whether there should be notice and comment or something  
24 beyond notice and comment, and if beyond notice and comment,  
25 whether it should involve the ASLB or not involve the ASLB,

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1 and if beyond notice and comment, whether it should involve  
2 formal adjudicatory procedures or merely legislative type  
3 hearings.

4 The NRC, in its wisdom, determined that there  
5 should be rulemaking that should involve the ASLB and that  
6 should involve procedures that go beyond notice and comment,  
7 including a legislative type hearing, and an opportunity  
8 under certain circumstances for an adjudicatory hearing.  
9 What I'm hearing now, and what worries me about ADR is that  
10 we are talking now about grafting an additional process onto  
11 a well-thought-out Commission decision two and a half years  
12 ago, and if I can take you back to 1988 and 1989, and,  
13 indeed, throughout the 1980's, the major criticism of the  
14 Commission's regulatory and licensing regime was that it  
15 lacked stability and lacked predictability in the sense that  
16 you couldn't tell when you started a process, where you were  
17 going and you couldn't tell what the procedures would be as  
18 you were going through the process.

19 The driving consideration behind the adoption of  
20 Part 52 and, indeed, beyond the adoption in both the House  
21 and the Senate, although not yet legislation, of the current  
22 national energy strategy bill as it relates to nuclear  
23 licensing, was to put some predictability, consistency and  
24 stability into the licensing process.

25 One of my concerns, although, as I say, we ought

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1 to examine at least some aspects of the ADR to see if there  
2 is anything worthwhile doing, but one of my concerns is that  
3 we are now introducing and imposing upon new designs or  
4 proposed new designs, proposed advanced designs, as they  
5 will affect the passive plants, a degree of instability and  
6 a degree of uncertainty, and we are walking way in large  
7 measure from the known to the unknown in terms of how to  
8 resolve the various disputes.

9 I would put in that caution, and as I approach  
10 questions of whether or not we should, for the passive  
11 plants, from the industry standpoint, look at ADR, and I  
12 will have a very skeptical approach to the extent that we do  
13 not understand and will be, frankly, unwilling to enter into  
14 a path that is a great uncharted course.

15 Let me add a couple of other comments: The  
16 designs for the advanced plants, the designs for both the  
17 evolutionary and the passive plants are very complex. One  
18 of the aspects of design certification is the requirement  
19 that there is a substantial amount of design information  
20 provided up front in the process. That is one of the  
21 tradeoffs for the current process, is that the industry,  
22 funded in part by the Department of Energy and in part by  
23 the utilities and in part by the vendors, will have to put  
24 in a substantial amount of effort, up front, in order to get  
25 the designs certified.

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1           Now, there is a difference between notice and  
2 access to information while those designs are being  
3 reviewed, and participation in the technical review process  
4 being undertaken by the regulatory staff when the vendors  
5 submit designs. It may be perfectly acceptable -- in fact,  
6 I think it is appropriate that there be notices, that there  
7 be access to information, be it the SECY practice or certain  
8 other practices that can be used during the process before  
9 we get to the hearing stage.

10           I question whether it is appropriate or whether it  
11 is useful to have participation in the technical review  
12 itself being undertaken by the regulatory staff. In  
13 summary, I'm not sure that the gains that I perceive  
14 outweigh the drawbacks that I perceive.

15           A final note: There seem to be some implications  
16 that in order to show fairness in the proceedings, and in  
17 order to pass muster with the courts, we have to go to some  
18 type of procedure like an ADR procedure. I would reject  
19 that concept. I think the Commission's licensing process,  
20 while there are many areas where I think it is cumbersome  
21 and have disagreed with it in the past, I think that the  
22 Commission's licensing process has stood the test in the  
23 courts pretty well as a process.

24           I suggest to you that the decision that came down  
25 last Friday is evidence that at least prima facie, the

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1 regime for licensing set up in Part 52 will also pass muster  
2 by the courts, and I reject the idea that the reason to go  
3 to ADR or any other type of alternative -- any type of  
4 alternative process is to show a certain fairness.

5 There are those who will never be satisfied with  
6 the fairness of the NRC's process. There are those who are  
7 always satisfied with the fairness of the process. It  
8 doesn't in my judgment turn on whether we have ADR or  
9 whether we have licensing through the traditional processes  
10 or through the process set forth in Part 52.

11 MR. CAMERON: Thank you, Mr. Cowan. Would anybody  
12 on the panel like to respond or make any comments on Mr.  
13 Cowan's statement?

14 MR. OLMSTEAD: Sure.

15 MR. CAMERON: You knew I was looking at you.

16 MR. OLMSTEAD: Right. Bart is very good at  
17 setting up strawmen and knocking them down and so I don't  
18 wish to be understood as agreeing that I am advocating  
19 throwing out the rules the Commission have and then  
20 substituting in their place something called ADR.

21 That is not what I have been trying to get across  
22 today. There is rulemaking and there is adjudication under  
23 the APA. This rule, Part 52, is a hybrid that essentially  
24 says this is rulemaking but in addition, we are going to  
25 have some adjudicative features but we are not going to call

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1 it 554 or 556 adjudication.

2 Then there are some criticisms, some of which I  
3 think are quite legitimate, of this process taken by itself  
4 with nothing more as to whether or not if you are going to  
5 provide a procedure, is the procedure fair given the time  
6 restrains that are imposed upon it.

7 What I have been trying to get across today is  
8 that depends. If there is a process leading up to it in  
9 which there has been full and effective participation, I  
10 don't think anybody is going to be successful challenging  
11 this procedure, particularly since it goes beyond 553  
12 rulemaking.

13 On the other hand, if it is put up and used in a  
14 fashion in which it appears to a person looking at it from a  
15 common sense point of view, that one or more parties did not  
16 get a fair chance to put their views forward, then no matter  
17 whether it goes beyond 553 or not since the agency put it in  
18 place, the court is going to hold the agency's feet to the  
19 fire in using the process and making it fair.

20 That is why I was suggesting earlier this morning  
21 that there were a number of different techniques that could  
22 be used along the way even before the notices called for in  
23 Part 52 to assure that those allegations of fairness could  
24 not be made and to ensure that people could participate in  
25 the process and take ownership of the process and maybe even

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1 resolve issues without going as far as Part 52.51 requires.

2 I don't think Bart and I disagree on the law. I  
3 think we may have some disagreements as to what different  
4 activities would wrought.

5 MR. CAMERON: Ms. Hiatt.

6 MS. HIATT: Yes. I would merely note that I don't  
7 think that anything in Part 52 would prohibit the NRC from  
8 exploring some additional concepts, some of the ADR  
9 concepts, and I think you have to have an open mind and try  
10 to experiment in some of these things or you are never going  
11 to make any progress.

12 I don't think it would hurt to try it. If you  
13 find that it doesn't work, then you don't do it again. I  
14 think people should give it a try. I think it can work.

15 MR. CAMERON: Thank you very much. Are there any  
16 other comments or questions from the audience before we move  
17 on to our last topic of the day?

18 [No response.]

19 MR. CAMERON: All right. Our last topic is  
20 separation of functions and ex parte limitations. I suppose  
21 I should try to summarize but I don't think I could  
22 summarize that last session.

23 But we did start out with Mr. Brew who made a  
24 basic point on the conduct of the informal hearing, that the  
25 concern at this point should be to make sure that the

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1 process is very deliberative and that all the issues have  
2 been fully explored and that more flexibility should be  
3 permitted in terms of expanded time frames and other issues.

4 We also saw the 553 or 554 issue come up again  
5 with some of the informal or the procedures laid out for the  
6 conduct of the informal hearing. Mr. Bishop talked about  
7 the reason for the informal hearing is to make sure that a  
8 full record is developed and that the Board's questioning on  
9 issues is to ensure that the focus is sharpened in terms of  
10 the record being developed.

11 I think the last major point that we addressed  
12 here is again the advisability of trying to use negotiated  
13 rulemaking or some ADR or participative process to try to  
14 resolve some of the issues that might come up in the  
15 informal hearing.

16 One message before we go on for Joe Egan, there is  
17 a phone message for you out at the desk.

18 Our last topic is separation of functions and ex  
19 parte limitations. Once again, we will turn to Mr. Mizuno  
20 and Mr. Olmstead is going to take the lead on addressing  
21 this one and possibly we might hear some more about  
22 negotiated rulemaking ADR. I don't know. But Geary, would  
23 you like to provide the context.

24 SEPARATION OF FUNCTIONS AND EX PARTE LIMITATIONS

25 MR. MIZUNO: I hope that we can start off with the

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1 premise that this is a rulemaking but the crucial task, I  
2 think, for the Commission here is not simply to comply with  
3 the Administrative Procedures Act, the strict requirements  
4 of the Notice and Comment Informal Rulemaking requirements  
5 of the APA in Part 52 but to also assure openness in the  
6 process and public confidence in the design certification  
7 rulemaking.

8 The topics of separation of functions and ex parte  
9 limitations are basically geared to trying to enhance the  
10 perception to the public that the process is legitimate.  
11 Separation of functions, at least the way that OGC has  
12 defined and discussed it in our paper, is the issue of  
13 communications between the agency decision maker, in this  
14 case it would be the Commission, and agency representatives  
15 with advocacy or regulatory functions.

16 The issue of ex parte limitations is the issue of  
17 communications between the agency decision maker and outside  
18 individuals.

19 MR. CAMERON: Thank you, Mr. Mizuno. I will turn  
20 it over to Mr. Olmstead at this point.

21 MR. OLMSTEAD: I have lost sight of the conference  
22 recommendation on this subject, but suffice it to say that  
23 there is one and it is explicated in our handy-dandy blue  
24 book in a chapter on off-the-record ex parte communications  
25 in rulemakings. So anything that I have to say that is

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1 inconsistent with what is in there, go with what is in the  
2 book.

3           There are two things that I thought that I would  
4 share with you that I think are important in this area. One  
5 is the definition of the record. Many agencies,  
6 particularly in rulemaking proceedings, have trouble  
7 defining the record. It isn't until they get sued and it  
8 goes to the Federal court that there is some attempt to  
9 define completely what the record is.

10           I think that as a consequence they get into  
11 trouble dealing with separation of functions ex parte type  
12 issues and I say, "type" issues because they don't really  
13 apply to rulemakings as you know because they don't have a  
14 clear idea of what they are going to call the record.

15           So I think that one of the most important things  
16 that can be done and NRC really doesn't have a lot of  
17 trouble in this area because of their use of docket numbers  
18 now which was instituted a lot of years ago and so generally  
19 what is in the docket is in the record.

20           But if there is not a clear definition of  
21 constitutes a record, it gets very hard to address  
22 separation of functions and ex parte communications both for  
23 the Commissioners and the staff and for anybody on the  
24 outside looking in trying to figure out whether particular  
25 actions or activities are improper.

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1           The second point I would like to make is that  
2 under the APA if we take this out of the rulemaking context  
3 and talk about initial licensing, separation of functions  
4 doesn't apply either in initial licensing or in rulemaking.

5           So to talk about impermissible contacts as a  
6 matter of law between anybody on the agency staffs and the  
7 decision maker is really kind of a non-starter in terms of  
8 the law of the case as it were.

9           So what we are really talking about is the Home  
10 Box Office kind of case where parties outside of the agency  
11 with substantial interest in the outcome of the rulemaking  
12 attempt to influence the agency outside of the record or  
13 outside of the process that the agency provided for  
14 everybody else to participate in.

15           It is those kinds of contacts and information that  
16 the courts struggle with. Once we have identified those as  
17 the problem, those are the things that we want to look at  
18 and analyze and see whether the rules are adequate to deal  
19 with them or not.

20           We need to differentiate between written and oral  
21 because I think it is pretty well accepted now that oral  
22 communications with the decision maker of whatever sort are  
23 so incapable of being policed that the courts aren't going  
24 to mess with them much. So basically, we are really talking  
25 about written communications and that then brings us back

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1 full circle to talking about what constitutes the record.

2 In my experience since I have gone to the  
3 Administrative Conference, I think the NRC has a pretty good  
4 record in dealing with these ex parte separation of  
5 functions matters by merely documenting the information and  
6 putting it in, quote, "the record" thereby giving all  
7 parties who are interested in the proceeding an opportunity  
8 to know what it is that is being communicated and to  
9 determine for themselves whether they want to rebut it or  
10 not. After all, in this area that is what is required.

11 MR. CAMERON: Thank you, Mr. Olmstead. Would  
12 either of the industry representatives like to address this?

13 MR. ROWDEN: I won't give you as learned a  
14 tutorial as Bill has on this subject. I am simply going to  
15 vote it up or vote it down. The point has already been made  
16 several times that there is no legal requirement for ex  
17 parte constraints or separation of functions limitations.

18 Nonetheless, we would support the ex parte  
19 constraints that the staff proposes. We think it will  
20 enhance the credibility and objectivity of the decision  
21 making process to exclude party communications to the  
22 Commission, those who advise the Commission once the  
23 Commission has determined that a hearing will be held.

24 One is very easily tempted to slip over and make  
25 the same sort of judgment with regard to separation of

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1 functions. As a matter of fact, from the standpoint of  
2 industry participants in the process there is much to be  
3 said in terms of self-interest for insisting on separation  
4 of functions limitations having a totally transparent  
5 process, knowing what the staff is communicating to the  
6 Commission. We have a long track record of experience in  
7 this regard which leads us to believe that we are better  
8 served if we know what those communications are.

9 On the other hand, I would have to say that I  
10 personally and my colleagues have very severe reservations  
11 about applying that particular constraint in this particular  
12 proceeding.

13 It is not simply because it is legally not  
14 required. It is because I think it unnecessarily hobbles  
15 the Commission. It is a self-imposed limitation if not a  
16 self-inflicted wound with regard to the Commission's ability  
17 to obtain the most knowledgeable advice from the members of  
18 its staff without the fetters which the SECY paper would  
19 impose on such communication.

20 Again, I would refer back to the antecedents of  
21 the rulemaking hearing. We have a process in which the  
22 Commission has been consulting on a very close, might I even  
23 say intimate basis, with its staff from the very inception  
24 of this process on policy issues, on technical issues, in  
25 the review of the staff's approval of the final design

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1 approval, in the formulation I would assume of the proposed  
2 rule.

3 To impose additional or new constraints on the  
4 Commission at a time in the decisional process when it may  
5 be most important for it to have unfettered communication  
6 with the expert staff seems to us to be something which is  
7 unwise as a matter of policy.

8 I know the Commission hasn't spoken to this issue  
9 as Bill Parler has emphasized repeatedly on other issues.  
10 We would urge the staff to re-think this in the light of  
11 those considerations.

12 In our view, the price to be paid for the  
13 supposedly image benefits that the proceeding would derive  
14 from the application of separation of functions is  
15 outweighed by the substantive costs that I think the process  
16 would have to bear.

17 On balance, we would conclude that separation of  
18 functions should not be applied here. I would only add the  
19 further observation that if contrary to the wisdom and  
20 insight we have attempted to contribute on this issue, the  
21 Commission should adopt separation of functions constraints  
22 that it be done in a way which causes minimum impact on the  
23 conduct of the proceeding and that it seems to us to be an  
24 overly zealous exercise of separation of functions to apply  
25 those limitations not only to formal staff communications to

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1 the Commission in the form of SECY papers which the staff  
2 would make publicly available but to constrain individual  
3 Commissioners or their staffs from communicating with the  
4 expert regulatory staff. We think that that is an  
5 unnecessary further step.

6 MR. CAMERON: Thank you, Mr. Rowden. Mr. Brew, do  
7 you have any words on this subject?

8 MR. BREW: Very quickly, at the PSC this is a  
9 relatively common problem particularly at the staff council  
10 level, you are often wearing multiple hats or different hats  
11 in different cases, whether it is advising the Commission or  
12 acting as an advocate so it is tough to draw a hard and fast  
13 line.

14 Certainly the notion of applying the ex parte rule  
15 makes sense or seems a reasonable approach here given the  
16 nature of the proceeding. I think that the suggested  
17 alternative on separation of functions may make a lot of  
18 sense here because it exacts a relatively small price to  
19 enhance the credibility of the process but makes it clear  
20 how the information is being transferred from staff to the  
21 Commission.

22 So that may be a pragmatic accommodation between  
23 some very conflicting options.

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

25 MR. ENGLAND: The OGC preliminary position struck

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1 me as cautious and well-reasoned and caused me no problems.

2 MR. CAMERON: On both ex parte and separation?

3 MR. ENGLAND: Yes.

4 MR. CAMERON: Thank you. Ms. Hiatt.

5 MS. HIATT: I would concur in that. I would  
6 support the OGC proposals on both ex parte and separation of  
7 functions.

8 MR. CAMERON: Mr. Bishop, any comment

9 MR. BISHOP: Nothing further.

10 MR. CAMERON: Does anybody on the panel want to  
11 ask questions about anybody else's positions?

12 [No response.]

13 MR. CAMERON: All right. Let's go to the audience  
14 and this is from Marty Malsch of the Office of General  
15 Counsel, NRC. Any need for separation of functions must  
16 derive from the perceptions of the NRC staff. As an  
17 advocate, can we dispense with staff as party advocate in  
18 these proceedings? Does everybody understand that  
19 question?

20 MR. OLMSTEAD: Yes, yes.

21 MR. CAMERON: Would someone like to take the first  
22 crack at answering that?

23 MR. ROWDEN: I guess if you are asking the  
24 question "can," I suppose in the abstract the answer is yes.  
25 If you ask the further question, "should we," my position

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1 would be a categorical no.

2 I don't see how the staff which has been  
3 conducting the review and which is in effect sponsoring the  
4 proposed design certification rule can absent itself from a  
5 party role in the proceeding.

6 This can become almost metaphysical. The staff is  
7 the staff, you know. They are a part of a governmental  
8 agency. The separation of functions limitation by design  
9 does not apply to staff agency communications in rulemaking.  
10 Again, it comes down to a question not simply of deciding a  
11 case or resolving disputes but having the soundest safety  
12 decision or soundest decision as you will from a policy and  
13 safety point possible.

14 From that standpoint, I would iterate once again  
15 my view that we ought not put constraints in the way of  
16 Commission communication with its staff. I understand the  
17 staff's sensitivity and perhaps the Commission's sensitivity  
18 to the perception problem.

19 I understand our own interest in knowing what  
20 those communications are but if I have to weigh those  
21 interests against the interest of reaching the soundest,  
22 substantive decision I would come out on the side of  
23 substance and communication.

24 MR. CAMERON: Mr. Olmstead.

25 MR. OLMSTEAD: I think I agree with that but once

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1 again, this is one of the areas that I think there is a  
2 history in the agency of the staff doing things in different  
3 ways than people are accustomed to. I submit an  
4 application, the staff reviews it, works out the differences  
5 it has with me and the application. Then it goes to hearing  
6 and then it goes to the Commission.

7 Today I hope I have kind of gotten through that if  
8 one has problems with the perceptions of the staff as an  
9 advocate of the application, one of the ways to do that is  
10 to re-think how the staff does the review in the first place  
11 and see them as intermediate decision makers where everybody  
12 can put their input into the staff before the decision is  
13 reached and let the applicant be the applicant and the  
14 advocate.

15 But that again is one of these things of how much  
16 of the process do you want to re-think. Everybody is  
17 comfortable with the way it traditionally has been and if  
18 you are comfortable with the way it traditionally has been  
19 then these perception problems arise and they need to be  
20 dealt with and the way the paper deals with them is  
21 reasonable, I think.

22 MR. CAMERON: Does anybody else have a comment on  
23 whether the NRC staff should remain as a party advocate in  
24 this rulemaking?

25 [No response.]

1           MR. CAMERON: The question comes from Bart Cowan  
2 on the separation of functions issue. Other than  
3 enhancement of its public image, is there any other reason  
4 for the Commissioners not to have unfettered access to its  
5 experts in the regulatory staff when considering design  
6 certifications? I suppose I would ask the NRC  
7 representatives to take a first crack at that.

8           MR. CRUTCHFIELD: The availability of the  
9 technical staff provides the Commission with some expertise  
10 that they don't already have. For example, a great deal of  
11 the design information that we are reviewing deals with new  
12 instrumentation and control systems, digitally based  
13 systems.

14           The staff, itself, is having a problem with  
15 resources and I am sure the Commission is having a problem  
16 with resources there, also. So the availability of the  
17 staff for the Commission provides to them a source for  
18 questions, answers, understanding and learning that they  
19 don't have traditionally right now. So cut them off from  
20 that, I think, would do a disservice to the Commission.

21           MR. CAMERON: I guess the answer then is there  
22 wouldn't be any reason to cut the Commission off.

23           MR. CRUTCHFIELD: I see no reason to cut them off  
24 from the staff.

25           MR. CAMERON: Mr. Brew.

1           MR. BREW: The basic question, while I wouldn't  
2 cast it in the terms Mr. Cowan has, goes to the ultimate  
3 acceptance of the product of the process. You are trying to  
4 tread a line between full technical access to the decision  
5 makers to get answers to their questions which happens all  
6 the time and the notion that the process is somehow wired.

7           If you don't recognize the latter, you are going  
8 to be courting trouble particularly if you have a process  
9 that isn't necessarily considered to be publicly above  
10 reproach to start with.

11           So I think a reasonable first step forward is to  
12 take an approach such as that recommended in the paper  
13 rather than to simply treat it as ignoring the problems that  
14 you can run into either from an appearance perspective or  
15 otherwise by being if not flippant or not as sensitive to  
16 the separations of functions problems.

17           MR. CAMERON: Thank you very much. Mr. England,  
18 any comment?

19           MR. ENGLAND: I certainly would see no reason to  
20 cut the Commission off from the good technical advice of its  
21 staff but I also see no reason why everything should be kept  
22 confidential. If it is good information and it doesn't get  
23 into proprietary rights, I would like if the staff knew that  
24 it would be subject to public scrutiny, they would probably  
25 do a better job in putting together the recommendations for

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1 the Commission.

2 MR. CAMERON: Thank you. Ms. Hiatt, any comment?

3 MS. HIATT: I Think logically with regard to the  
4 staff being a party, they should be a party. I think the  
5 problem that arises is a public perception problem that the  
6 staff and the applicant are some monolithic body and the  
7 staff is supporting the application.

8 Traditionally, the reason for that has been that  
9 the public does not get involved early on in the staff  
10 review. I think the involvement of people through the ADR  
11 process could probably help alleviate some of that because  
12 then they would be involved in the staff review or at least  
13 early on in the process instead of when you get to the  
14 hearing where it is staff and applicant versus the  
15 intervenor.

16 I would really just reiterate that I think that  
17 the SECY paper did a good job of balancing the various  
18 interests of having the communication between the  
19 Commissioners and the staff and also having the public  
20 process preserved as well.

21 MR. CAMERON: Thank you very much. Are there any  
22 other comments? Yes, Mr. Bishop.

23 MR. BISHOP: If I could just add a quick  
24 postscript, as I understand the staff's recommendation or  
25 let me rephrase that. If the Commission were to adopt the

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1 staff's recommendation on the separation of functions, I am  
2 presuming that as Mark as well explained the necessity, the  
3 benefit of having free and open dialogue between the  
4 Commission, the individual Commissioners, their staffs and  
5 the NRC staff, would not be in any way constrained unless  
6 and until issues are joined and particularly as they come  
7 joined to a hearing.

8 I would think that prior to that time, I can think  
9 of no justification for imposing these artificial restraints  
10 with all of the price that would have to be paid because of  
11 that. So my suggestion would be if they are imposed, it  
12 would be at that time and for those issues alone.

13 MR. CAMERON: Thank you. How about any other  
14 questions from the audience on this issue or comments? I  
15 think there is one more out there. This is from Paul  
16 Bollwerk with the Commission's Atomic Safety and Licensing  
17 Board Panel.

18 If you do not require separation of functions, do  
19 you run the risk of staff acting as a conduit for ex part  
20 communication from parties to the rulemaking including  
21 applicants with whom the staff has contact and doesn't this  
22 in turn impede the staff from having frank discussions with  
23 other parties to the rulemaking? Is that understandable?

24 MR. ROWDEN: It is understandable and I guess my  
25 answer would be it depends on whether you have a

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1 conspiratorial perspective on life. The fact of the matter  
2 is all sorts of games can be played if you lack confidence  
3 in the players.

4 My own view is that the staff can be trusted in  
5 this regard. The parties had better be trusted or if they  
6 are not trustworthy subject to sanctions in the proceeding  
7 and that although I understand the possibility for something  
8 like this happening, I think the prospect for that is  
9 marginal at best and I do not think it outweighs the  
10 benefits of unfettered communication between the Commission  
11 and those members of the NRC who are the most knowledgeable  
12 who have spent years -- years -- working on this application  
13 and analyzing the technical issues.

14 MR. CAMERON: Thank you. Do any of the other  
15 panelists want to address Mr. Bollwerk's question?

16 [No response.]

17 MR. CAMERON: All right. That wraps up our last  
18 session and as Mr. Olmstead pointed out when he started the  
19 definition of a record is the key here in his opinion,  
20 documenting the information and putting it in the record and  
21 this has important implications for both separation of  
22 functions and ex parte.

23 I think most of our brother panelists agreed with  
24 the staff preliminary positions on both ex parte and  
25 separation of functions, however as Mr. Rowden pointed out

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1 on separation of functions, the staff position may  
2 unnecessarily complicate NRC decision making on design  
3 certification and that the staff should re-think its  
4 position there.

5  
6 FINAL QUESTIONS FROM AUDIENCE

7  
8 MR. CAMERON: We are at that point on the agenda  
9 where we would take final questions from the audience, final  
10 comments on whatever has been discussed today or anything  
11 else that is related that you want to comment on and I would  
12 also include the panelists in that invitation. In fact, I  
13 will start with the panelists. Are there any summary  
14 comments, closing remarks or other issues that people would  
15 like to address and Mr. Rowden, I will start with you.

16 MR. ROWDEN: Just an expression of appreciation  
17 for the opportunity to participate in the workshop, for the  
18 thought that went into its structuring and for your skill,  
19 patience and even-temper in conducting the panel and related  
20 proceedings and that is all I have to say.

21 MR. CAMERON: Thank you.

22 MR. BISHOP: I would just add my thoughts that I  
23 think that this has been productive in the sense that I  
24 think that we have all and certainly speaking only for  
25 myself, have more to think about.

1 I think some provocative ideas have been put  
2 forward and we have some further consideration of our  
3 position and that of others. We will certainly be looking  
4 forward to submitting comments during the comment period on  
5 this workshop and hopefully that will enable the agency to  
6 come to a better reasoned basis for its decision.

7 MR. CAMERON: Mr. Olmstead.

8 MR. OLMSTEAD: On behalf of the Conference, I  
9 thank you for the invitation today and the opportunity to  
10 explicate some of our work and for those of you who may not  
11 know it, this little panel discussion we have here is  
12 defined by the Administrative Conference as a form of  
13 alternative dispute resolution.

14 [Laughter.]

15 MR. CAMERON: Thank you. Ms. Hiatt.

16 MS. HIATT: I would likewise express my  
17 appreciation for the opportunity to participate in this  
18 process. I think it is something very beneficial and we can  
19 all learn from each other and hopefully provide a more  
20 meaningful mechanism for public involvement in future  
21 proceedings.

22 MR. CAMERON: Thank you. Mr. England.

23 MR. ENGLAND: I think we finally have consensus on  
24 something. I also would like to thank the NRC for the  
25 opportunity to attend and participate and hope that this has

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1       been helpful to you.

2               MR. CAMERON: Thank you, Mr. Brew.

3               MR. BREW: I would just like to commend you on a  
4 job well done as far as mediating the discussion throughout  
5 the day.

6               MR. CAMERON: Thank you. Mr. Crutchfield.

7               MR. CRUTCHFIELD: No.

8               MR. CAMERON: Mr. Mizuno.

9               MR. MIZUNO: I had a question which wasn't  
10 discussed so I wanted to get the panelists' views on it. I  
11 thought it was an important point but I thought it just went  
12 by which is OGC's paper had discussed having oral  
13 presentations and questions being submitted by the parties  
14 to the Board for their consideration without any finding by  
15 the Board that such oral presentations were necessary as is  
16 apparently contemplated by 52.51(b).

17               I just wanted to get the reaction of the panel to  
18 that since we were apparently deviating from the strict  
19 words of the rule.

20               MR. ROWDEN: I, for one, was persuaded by the  
21 explanation for that in the SECY paper and would support  
22 that approach.

23               MR. BISHOP: I think it may be only coincidental  
24 but I think you will find a similar concept addressed in our  
25 paper.

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1           MR. OLMSTEAD: I guess as the only person, I  
2 believe, in this room that participated in the GESMO  
3 proceeding or that was being done --

4           MR. ROWDEN: You are not the only one.

5           MR. OLMSTEAD: I think I was the only one sitting  
6 downtown then day after day listening to the written  
7 questions being read to the witnesses, questions tend to  
8 breed questions and one of the things that you should be  
9 aware of in that particular process is that all of these  
10 nice refinements that we have been talking about here today  
11 rapidly disintegrate and the Board gets interested in a line  
12 of questions that is provoked by one question and a whole  
13 series of other questions come out and so I think once you  
14 get into a hearing where this kind of a process is being  
15 worked, that both the participants and the Board pretty well  
16 do whatever they want to do with respect to questions.

17           MR. CAMERON: Does anybody else on the panel wish  
18 to respond to Mr. Mizuno's question?

19           MS. HIATT: I would likewise say that I found the  
20 discussion in the paper persuasive. What is the point of  
21 having a hearing if all you do is submit written  
22 presentations. I think the paper made a good point of that.

23           MR. CAMERON: Thank you very much. Do we have any  
24 comments or questions from the audience? Would anybody like  
25 to put their two-cents worth in on anything?

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1 [No response.]

2  
3 CLOSING REMARKS

4  
5 MR. CAMERON: I just would say that personally it  
6 was a pleasure for me to be up here with these panelists  
7 today. I think that they made some very insightful comments  
8 on the issues. They were very well prepared and I am sure  
9 that this dialogue will illuminate the Commission's decision  
10 making process on design certification.

11 We heard some affirmation on some of the points in  
12 the OGC paper, some new information. New perspectives were  
13 brought out. We have seen some areas of agreement, some  
14 areas of disagreement but more importantly, I think, that in  
15 most cases we have seen some ways to close the gap in some  
16 of these areas and I would just like you to join me in  
17 giving the panelists a big round of applause. I think they  
18 were great.

19 [Applause.]

20 MR. CAMERON: And don't forget about the written  
21 comment period. We will be glad to have those comments and  
22 transcripts will be available either from the stenographic  
23 company or from the PDR. Thank you very much.

24 [The above-entitled workshop was concluded at 4:55  
25 o'clock p.m.]

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