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NUCLEAR REGULATORY COMMISSION

IN THE MATTER OF:

PUBLIC MEETING

DISCUSSION OF PETITION FOR HEARING BY NRDC IN TARAPUR MATTE

Place - Washington, D. C.

Date - Tuesday, 21 November 1978

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

PUBLIC MEETING

DISCUSSION OF PETITION FOR HEARING BY NRDC IN TARAPUR MATTER

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

Tuesday, 21 November 1978

The Commission met, pursuant to notice, at 9:55 a.m.

BEFORE:

DR. JOSEPH M. HENDRIE, Chairman

RICHARD T. KENNEDY, Commissioner

PETER A. BRADFORD, Commissioner

JOHN F. AHEARNE, Commissioner

P R O C E E D I N G S

CHAIRMAN HENDRIE: I think we may as well go ahead. The Commission meets this morning to discuss a petition for hearing in the Tarapur license matter, the current Tarapur license. The Commission, I think, ought to start out by hearing from the general counsel's office.

MR. STOIBER: Thank you, Mr. Chairman. The purpose of this meeting is to discuss the issue of whether or not the Commission will order a hearing or other public proceedings involved with the issuance of export license XSNM-1222, which is the latest in the series of export license applications for shipment of low enriched fuel to the government of India for use in the Tarapur facility.

The matter before the Commission now is only the hearing issue, not the issuing -- the substance involved with the issuance or denial of license application.

And I thought I would divide my comments this morning into two parts. First of all, I think it important at this stage to get a clear idea of the chronology for the decision that the Commission faces, how the present matter stands with respect to the statutory deadline set forth in the Nuclear Nonproliferation Act.

And after I have discussed that briefly, then I would mention some of the legal issues which the Commission would want to consider in considering the issue of whether

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david2 1 or not to actually convene a hearing or to otherwise have
2 public written comments.

3 Now, the chronology of the decision, as you
4 know, under the Nonproliferation Act, the Congress intended
5 that ordinarily the Commission act within a 60 day period
6 after the receipt of the executive branch views on the
7 license application.

8 On September 18 of this year, the NRC received
9 the executive branch views indicating their belief that
10 all the licensing criteria were met and other statutory
11 requirements had been fulfilled and that the license should
12 be authorized.

13 That gave 60 days in which the Commission could
14 then pose additional questions or issues to the executive
15 branch. On November 17th our staff did submit such a
16 request for additional responses on several issues to the
17 executive branch, thereby in our view legally tolling the
18 statutory 60 day time period.

19 Therefore, the 60 day period will in fact begin
20 to run again at the point at which the executive branch
21 has furnished us a complete set of responses to the issues
22 or the questions we have raised. I understand from the staff
23 that this is anticipated to be done in the form of a
24 briefing. I am not sure of what the scheduling will be on
25 that, but in terms of thinking about how the time limits run,

david3 1 I assume that if the Commission were able to schedule a
2 briefing in the first week of December, that means that the
3 first 60 day period would then run at approximately February 2
4 through 6 during that week. That would mean that the
5 Commission would be expected to decide within that period --

6 COMMISSIONER KENNEDY: Excuse me, could you go
7 back over that date again?

8 MR. STOIBER: All right. If the answers to the
9 Commission's additional questions are received during this
10 briefing which might occur during the first week of
11 December, the first 60 day statutory period would then run
12 into approximately the first week of February and therefore
13 that would set that first date.

14 Now, in addition to the additional questions,
15 the tolling of the statute there's a second means of tolling
16 the statutory time limits, and that is if the Commission
17 embarks upon public proceedings under its rules --

18 COMMISSIONER KENNEDY: Excuse me, could I go
19 back now; I want to be sure I've got this 60 in my mind. I
20 want to be sure I am remembering these dates which are
21 coming more rapidly than I as a fairly inept historian can
22 swallow.

23 On September 15, 1978, something like a year after
24 the license application was filed, the executive branch did
25 write us a letter saying we think this license ought to issue.

david4 1 So now what we have said is by the application of the
2 statute and various steps taken under it, we are talking
3 about sometime in February when our time limits sort of
4 run out.

5 MR. STOIBER: That's correct.

6 COMMISSIONER KENNEDY: Provided no additional
7 questions are asked.

8 MR. STOIBER: Well, no additional questions may
9 now be asked, since the first 60 day period has run.

10 COMMISSIONER AHEARNE: We can ask the questions,
11 but it won't extend it.

12 MR. STOIBER: That's right. It won't extend the
13 time.

14 COMMISSIONER KENNEDY: So it is February 1979
15 when the time finally runs out.

16 MR. STOIBER: Unless the Commission embarks upon
17 proceedings for receiving public participation in the license,
18 at which time another rule or another tolling of the statute
19 begins.

20 This is a more open ended legal effect without
21 the kind of precise limits that you see in the rest of the
22 statute. What the statute merely requires is that the
23 additional 60 days begins running when the Commission's
24 public proceedings are terminated.

25 We have some guidelines in our new Part 110 of our

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1 regulations about how we expect the Commission to proceed,
2 but it would be possible for the Commission to adopt a rather
3 flexible or even extending the process of public proceedings,
4 which would continue past the first of the year or even
5 beyond.

6 COMMISSIONER KENNEDY: Only at the conclusion of
7 which -- an announcement of which, I suppose, we make. We
8 now say our proceeding, whatever it is, in fact is completed.
9 Only then the 60 days begins to run once again.

10 MR. STOIBER: That's correct.

11 COMMISSIONER KENNEDY: How do we determine when in
12 fact the public proceeding has been completed?

13 MR. STOIBER: Oh, I think that would be a decision
14 of the majority of the Commission that the public proceeding
15 had been completed and therefore the additional 60 day
16 period for Commission decision was operating.

17 COMMISSIONER KENNEDY: It could theoretically go
18 on for sometime while even the question as to whether the
19 proceeding has been terminated is debated.

20 COMMISSIONER BRADFORD: It's an interesting
21 question, isn't it? If two Commissioners can call for a
22 hearing, the question is how long two can keep it going?

23 (Laughter.)

24 COMMISSIONER KENNEDY: It takes a majority to end
25 it.

CHAIRMAN HENDRIE: Two to start and three to stop?

MR. STOIBER: Two to keep it going under our rules, not by statute. Presumably, the majority could then vote to change the rule --

COMMISSIONER KENNEDY: Change the rule -- or I am misunderstanding. I thought you said that once -- two Commissioners can initiate the hearing. We discussed that once before, indeed, in the Tarapur matter.

Two Commissioners can initiate a hearing, but I understood you to say that a majority of the Commission could then determine that it has been -- that proceeding has been completed.

MR. STOIBER: Yes.

COMMISSIONER KENNEDY: Okay.

Presumably, however, unless one could muster a majority for this purpose, it could go on for, you know, into the aeons of the future.

COMMISSIONER BRADFORD: Well, I want to make clear that I'm speaking in the abstract.

(Laughter.)

Not in this particular case.

COMMISSIONER KENNEDY: So am I, I hope.

COMMISSIONER BRADFORD: But I'm not sure I agree with the general counsel's office interpretation of what it would take to bring the hearing to an end.

david7 1 COMMISSIONER KENNEDY: I was asking because
2 I simply didn't know, and now I would gather that we are
3 not all that clear, and I think we ought to be sure on that
4 before we begin this discussion.

5 COMMISSIONER AHEARNE: Could someone give me a
6 background, a fairly unusual procedure by which a minority
7 can initiate the action?

8 MR. STOIBER: This was the decision of the
9 Commission based largely, I think, on the Supreme Court
10 practice of granting certiorari for review. In other words,
11 in the Supreme Court it only takes a vote of four of the
12 nine justices --

13 COMMISSIONER AHEARNE: Thank you. You have just
14 answered the question in a way that you may not realize
15 either.

16 (Laughter.)

17 COMMISSIONER KENNEDY: We need to go back though
18 to the point because, Peter, I asked the question -- I
19 thought I understood what you said -- I was accepting it.
20 Peter has some difficulty --

21 COMMISSIONER BRADFORD: I haven't thought about
22 it at all before.

23 COMMISSIONER KENNEDY: We need to get that clear,
24 it seems to me.

25 COMMISSIONER BRADFORD: Yes. And it's probably
largely up to us as to how we interpret the rules. It may

david8 1 turn out that a majority can interpret them in whatever
2 way the majority sees fit at the time. But it does seem
3 a little curious that you would start a hearing because
4 two Commissioners felt that there was something on which
5 the hearing or further proceedings was required, that the
6 next day a majority, the same three who voted against it
7 on day one could close it down on day two as having been
8 completed.

9 COMMISSIONER KENNEDY: That hadn't occurred to me.
10 I assumed that once the proceeding had been elected, then
11 proceedings do normally run a certain course; that is,
12 in deciding to have a proceeding, you also decide generally
13 the format in which it's going to take place, the time limit
14 it's going to take to complete it, or to get the papers in,
15 if that's what it is, or hold the hearing, and then decide
16 on it.

17 But then the question is: would there be room
18 to continue the proceeding if someone thought that that was
19 desirable? That was my question.

20 Your point is a different one, and that's an
21 interesting question too. That hadn't occurred to me.

22 MR. STOIBER: I would point out two things. First
23 of all, the point you make, Commissioner Kennedy, is right,
24 that although the two Commissioners can order a hearing, it
25 takes a voting majority of the Commission to determine the

david9 1 form and the chronology of the hearing, and this certainly
2 implicates a majority approval of at least the process.

3 COMMISSIONER KENNEDY: Which normally encompasses
4 the time period in which it's going to take place.

5 MR. STOIBER: The second point also is that as a rule
6 of the Commission, it might well take a rule making public
7 notice and the other procedures to change the rule of two.
8 having clarified or obfuscated the chronology --

9 (Laughter.)

10 CHAIRMAN HENDRIE: It's not clear to me that that's
11 true or which way it's true.

12 (Laughter.)

13 At any rate, Commissioner Ahearne has a further
14 question.

15 COMMISSIONER AHEARNE: It's obvious from the
16 bill that the executive branch question must be within the first
17 60 days.

18 MR. STOIBER: Yes.

19 COMMISSIONER AHEARNE: When must the decision
20 for public hearing occur?

21 MR. STOIBER: I believe it is the view -- it is
22 the view of the general counsel's office that the decision to
23 embark upon public proceedings must be taken either within
24 the first 120 days or if the period for Congressional
25 authorization has been tolled by virtue of additional

David10 1 questions, then it must be taken within that period in
2 which the president may not authorize the export.

3 In other words, it may be taken at any time
4 until the president has in fact authorized the export by
5 executive order.

6 COMMISSIONER AHEARNE: Are you saying that the
7 call for the public hearings stays the president's action?

8 MR. STOIBER: Yes.

9 COMMISSIONER AHEARNE: And that stay of the
10 president's action can occur any time up to the point that
11 he has actually committed the action?

12 MR. STOIBER: Yes.

13 COMMISSIONER AHEARNE: So there is not even the
14 120 day constraint.

15 MR. STOIBER: Well, you see the president's action
16 is not automatic.

17 COMMISSIONER AHEARNE: I understand that.

18 MR. STOIBER: So if he has chosen not to take
19 that decision at that time, that still provides the
20 Commission with the legal latitude to embark upon public
21 proceedings.

22 COMMISSIONER AHEARNE: I would imagine we would
23 always have latitude to embark upon public proceedings.

24 My question is: is the way the law written such
25 that once we embark on a public proceeding that the law

david11 1 requires him to stay his action?

2 MR. STOIBER: Yes.

3 COMMISSIONER AHEARNE: Interesting. And the
4 legislative history supports that interpretation?

5 MR. STOIBER: Yes, it does.

6 COMMISSIONER AHEARNE: One other question: is
7 there anything in the legislative history or the bill that
8 indicates that there can only be one such public hearing?

9 MR. STOIBER: No, there is not.

10 COMMISSIONER AHEARNE: So that at least -- and
11 I recognize this is again purely academic -- in theory if
12 you had a Commission in a position where three believed that
13 an action should go forward and two believed it should not,
14 that that too could always consistently call for a public
15 hearing.

16 The public hearing could be held, the three
17 votes to go ahead; the two can call for another hearing, and
18 as long as the two kept calling for a public hearing, the
19 president could not take action.

20 MR. STOIBER: Unless the Commission changed its
21 rule.

22 COMMISSIONER AHEARNE: But under the current
23 procedure --

24 COMMISSIONER BRADFORD: I had thought about that.
25 I'm not sure whether the Commission rule will in fact allow

david12 1 for two public hearings. Are you confident in saying that
2 there could be any number of public hearings on one
3 application?

4 MR. STOIBER: The way the statute is written,
5 it states --

6 COMMISSIONER BRADFORD: There might be a limit
7 on the willingness of the public to participate, of course.

8 COMMISSIONER KENNEDY: Not if we pay for them on
9 the one hand and provide them free services and extend so
10 on the other. What difference does it make? They can
11 sit here all day long on our payroll.

12 COMMISSIONER BRADFORD: That would take a majority
13 vote then.

14 MR. STOIBER: See, the way the statute is written, it
15 ties the public procedure issue to our regulations. It
16 was written, however, if the Commission has commenced procedures
17 for public participation regarding the proposed export
18 under regulations promulgated, so the Congress was in fact
19 prevalidating the approach that the Commission would adopt
20 under its regulations.

21 CHAIRMAN HENDRIE: Okay, John?

22 COMMISSIONER AHEARNE: Well, I think I understand
23 it. I'm not sure it's okay.

24 MS. BECKER: I don't think our rules really
25 contemplate more than one hearing. It may be a hearing that's

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1 very extensive, and that takes a long period of time and
2 that broken up with maybe time periods in between when
3 the proceedings aren't being held.

4 COMMISSIONER KENNEDY: That would be the question
5 of when the Commission concluded that in fact that its
6 hearing had been concluded.

7 MS. BECKER: Yes.

8 MR. STOIBER: See, the operable statutory language
9 is not "hearing." The operable statutory language is
10 "procedures for public participation." And that could I
11 assume be a series of hearings or other procedures or
12 whatever.

13 COMMISSIONER KENNEDY: Written submissions
14 followed by oral hearings followed by further written
15 considerations? I suppose limitless opportunities.

16 CHAIRMAN HENDRIE: Before you plunge ahead, for
17 whatever the theoretical possibilities within the framework
18 of the statute may be, it seems to me that it is very
19 unlikely that there would be multiple hearings or that if
20 we decided to have a hearing, we wouldn't try to move
21 expeditiously to a reasonable process that would have a
22 beginning, a middle, and an end.

23 COMMISSIONER BRADFORD: At least the latter two.

24 CHAIRMAN HENDRIE: At least the latter two.

25 By way of some definition --

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COMMISSIONER KENNEDY: We have some notable ones which have beginnings and middles and never have come to an end.

COMMISSIONER BRADFORD: We had one yesterday, I think.

(Laughter.)

CHAIRMAN HENDRIE: By way of definition, I think it's clear that the Commission -- that if a hearing is decided in this case, a so-called public proceeding would commence with the Commission's order that such is to be the case and would terminate with the Commission's final order, memorandum and order on the matter.

MR. STOIBER: Closing the record or whatever decision it took at that point. In the last proceeding, the --

CHAIRMAN HENDRIE: So there are -- the beginning and the end are marked by fairly specific events, namely the issuance of the Commission memorandum and order.

MR. STOIBER: Yes, if the prior proceedings are followed. And I think the present rules were modeled on the prior hearing. The Commission held the public hearing and then stated at the hearing that the record would remain open for two weeks for receipt of additional materials. And then the proceeding would be closed, and that would be the point at which the additional 60 days would run.

CHAIRMAN HENDRIE: I see. So one could define.

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1 in fact the start.

2 MR. PEDERSEN: It's not necessarily the
3 Commission's decision that would end it. That may follow
4 substantially after the proceedings.

5 COMMISSIONER KENNEDY: But if that were the case,
6 it would have to occur within the 60 days.

7 MR. PEDERSEN: In fact, that's when the 60
8 day period would begin to run, at the end of the proceeding.

9 MR. STOIBER: So merely to reiterate, the
10 Commission would have an additional 60 days after the
11 receipt of additional executive branch views on the issues
12 which have been raised by the staff, presumably until
13 approximately the first week in February to decide whether
14 it would embark upon additional public proceedings.

15 At the first week in February, the president
16 then is legally -- and the Commission has not gone forward
17 to public proceedings, the president is legally able then
18 to authorize the export by executive order.

19 COMMISSIONER AHEARNE: I'm sorry. I keep trying
20 to find that place in the bill. Ken, you said public
21 proceedings are not finished until the record is closed,
22 essentially, but they are completed prior to the decision being
23 made based on those proceedings.

24 MR. PEDERSEN: What I said was that the Commission
25 could by some act terminate the proceeding.

1 CHAIRMAN HENDRIE: And start the 60 day clock
2 running again.

3 MR. PEDERSEN: And terminate the proceeding;
4 not at the same moment announce its decision on whether or
5 not to authorize the license. That was my point.

6 COMMISSIONER AHEARNE: But isn't it also
7 consistent to say that the proceedings are not terminated
8 until the decision is made based on those proceedings?

9 MR. STOIBER: The Commission could also take
10 that view.

11 COMMISSIONER AHEARNE: So it's not automatic?

12 MR. STOIBER: No, it is not.

13 MR. PEDERSEN: It depends on how you would define
14 the proceeding. I was thinking in terms if you had a
15 hearing, the Commission could determine the record was
16 closed. It would consider no further submissions.

17 CHAIRMAN HENDRIE: It would seem to me, John, that
18 unless the Commission defines otherwise, that the final
19 memorandum and order marks the end of the proceedings. So
20 if we don't say anything otherwise, why it seems to me that
21 proceeding until the final memorandum and order issues,
22 it is still going on and the 60 day clock isn't running.

23 However, counsel says we could define an
24 earlier time for the clock to start running again.

25 COMMISSIONER KENNEDY: I had forgotten, in the

1 very first Tarapur matter, it seems to me that after
2 hearings had been held, proceedings, the issuance of the
3 order itself of the Commission in the matter took some
4 several weeks.

5 COMMISSIONER BRADFORD: I've heard stories to
6 that effect.

7 COMMISSIONER KENNEDY: I am just trying to --

8 COMMISSIONER BRADFORD: It's before my time. I
9 can't be responsible for that case.

10 COMMISSIONER KENNEDY: Neither could some of us
11 who were here. But the point is that we are talking about
12 next February. Now if next February based upon what the
13 Commission has ascertained from its briefings, et cetera,
14 it decides then it would like to have a hearing, it could
15 do it, whereupon, the 60 day clock isn't running yet.

16 So that gets it from February, the 60 day --
17 no, it gets it to some indeterminate point. Let's say the
18 proceedings take 30 days, okay? So that's March and then
19 the 60 day clock begins to run, maybe. At the end of March,
20 April, and May --

21 CHAIRMAN HENDRIE: There are only two 60 day
22 clocks, right?

23 MR. STOIBER: Right.

24 CHAIRMAN HENDRIE: The first 60 day clock and
25 the second 60 day clock; the second clock runs 58 days and

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1 then you have a hundred day hearing. When the hearing
2 ends, you've got two days to reach the end of the
3 statutory period.

4 COMMISSIONER KENNEDY: That's a pretty good
5 way to do business, I think, two days to make a decision.

6 MR. STOIBER: But that's not the way -- no,
7 the 60 day clock runs only upon completion of the public
8 proceedings, and that occurs when the Commission says
9 it happens.

10 COMMISSIONER AHEARNE: It's a new 60 days.

11 MR. STOIBER: It can say that happens when the
12 last witness utters the last --

13 CHAIRMAN HENDRIE: It's a new 60 days --

14 MR. STOIBER: New 60 days.

15 MR. PEDERSEN: We never held a proceeding before
16 under these procedures, so we never had to consider clock and
17 when they started.

18 CHAIRMAN HENDRIE: Let me ask the following
19 question --

20 COMMISSIONER KENNEDY: That's right, so we're
21 up to June now, by my counting.

22 CHAIRMAN HENDRIE: On the assumption that only
23 one hearing will be allowed by the Commission to occur,
24 you could in fact have an initial period of 59 days, at
25

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1 the end of which the staff asks questions. Good.

2 The second 60 day clock now starts to run. You
3 have another 59 days -- oh, I'm sorry. When the executive
4 branch answers, the second 60 day clock starts to run. You
5 now run 59 days, and the Commission declares a hearing.
6 When the hearing is over --

7 COMMISSIONER KENNEDY: Essentially where we
8 are at the moment.

9 COMMISSIONER BRADFORD: No, we're not a 120 days.

10 COMMISSIONER KENNEDY: We haven't got there.

11 CHAIRMAN HENDRIE: We're at the first 59 days.

12 COMMISSIONER KENNEDY: That's right.

13 CHAIRMAN HENDRIE: And after the hearing is over,
14 then the third 60 day clock can run.

15 COMMISSIONER KENNEDY: Right?

16 MR. STOIBER: That's correct. And I think it
17 important to point out here just in terms of legislative
18 history, that there was a great deal of debate about whether
19 there should be any limits on the Commission decision at all.
20 and therefore, although these limits might seem rather
21 flexible, it was the product of a legislative compromise
22 between those who wanted limits and those who did not.

23 COMMISSIONER AHEARNE: Let me see if I understand
24 something. It sounds like there are really no limits.

25 COMMISSIONER KENNEDY: True. You understand it very

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1 well.

2 COMMISSIONER AHEARNE: We can call for a hearing,
3 as you said before, at any time. So even after that clock
4 has run for the 120 days and it goes over to the executive
5 branch, we can then at any time prior to the president
6 making his decision call for hearings.

7 MR. STOIBER: Yes.

8 COMMISSIONER AHEARNE: And if we conclude that a
9 decision does not mean -- that the proceedings do not end
10 until we actually put out a decision, and since it takes
11 a majority to put out a decision, we could essentially never
12 put out a decision, because we could always find some
13 problem with the decision, and so that never having put
14 out a decision, the proceedings would never end, certainly
15 for rule making.

16 COMMISSIONER KENNEDY: Some of us in a circumstance
17 of that kind would write a letter to the president saying
18 you ought to do something, chief.

19 COMMISSIONER AHEARNE: But if I understand what
20 you said before about the law, the president cannot act
21 until we finish our pleadings.

22 MR. STOIBER: I believe that that is the correct
23 interpretation of the law.

24 COMMISSIONER AHEARNE: So if I interpret it
25 correctly, then, a majority of the Commission can basically

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1 prevent the president from ever issuing --

2 COMMISSIONER BRADFORD: Let me just make one
3 point. There is a certain mischeif in discussing
4 theoretical possibilities, but last spring, in fact, the
5 Commission did split two-two-two on a Tarapur export,
6 and at that point we didn't even have a potential majority
7 to bring the thing to an end, that in fact the Commissioners
8 didn't behave in a filibuster-oriented way, but once we
9 realized the situation was deadlocked, we voted to defer
10 it over to the president.

11 I think it would be a mistake as a result of
12 this theoretical discussion to in any way suggest that
13 the Commission had any intention of simply letting the thing
14 go on.

15 COMMISSIONER AHEARNE: Peter, I have been spending
16 several months trying to understand this act.

17 COMMISSIONER BRADFORD: I didn't mean you were
18 suggesting it, John, I just didn't want the suggestion to
19 become a --

20 COMMISSIONER AHEARNE: And this was what I felt
21 was a fascinating nuance embedded in the act.

22 COMMISSIONER BRADFORD: That's probably true, but
23 if anything, we're in better shape now than we were last
24 spring to bring things to an end, numerically speaking.

25 COMMISSIONER AHEARNE: Thank you. You don't have to

david22 1 explain.

2 (Laughter.)

3 CHAIRMAN HENDRIE: All right. Now, Carl,
4 onward, and let us turn from this fascinating procedural
5 discussion and see if we can close on the merits of the
6 case.

7 MR. STOIBER: I think now it might be useful
8 to take a brief look at the standards which the Commission
9 would apply in reaching its decision on the hearing issue.
10 I should point out first, I think, and most importantly
11 that the petition for hearing filed by the intervenors,
12 NRDC, Sierra Club, and Union of Concerned Scientists, do not
13 raise the standing or the interest issue under the Atomic Energy
14 Act.

15 They have instead briefed the question from the
16 point of view of the statutory criteria set forth in 126(b)2b,
17 that they think a hearing is desirable or should be ordered
18 by the Commission because, number one, it would be in the
19 public interest, and number two, it would assist the
20 Commission in making its statutory interpretations or its
21 determinations under the act.

22 So therefore we do not have before us a situation
23 where you need to examine in detail this situation of the
24 intervenor, his possible interest, or things of that nature.
25 The only two bases for decision set forth in the statute are

david23 1 the public interest determination and the assistance of
2 the Commission. These are basically policy issues. Whether
3 or not you feel the record has been as fully developed as
4 you would wish to see it, whether or not perhaps the
5 prior proceedings have supplied you with sufficient information
6 on which to make your judgment, whether or not there are
7 other factors which might lead you to conclude that some sort
8 of public airing of the issues either would be helpful to
9 you or to the public interest or injurious to you and the
10 public interest; in that regard, you have before you the
11 views of the intervenors as set forth in their petition of
12 both February 14th and their renewal petition of October 31st.

13 You have before you the view of the executive
14 branch opposing the grant of hearing. You have the staff
15 views also suggesting that a hearing not be granted. And
16 that is basically the issue one has to resolve now.

17 A second range of issues arises if you decide
18 or if two of you decide that some sort of public participation
19 is desirable. The Commission must then go on to determine
20 whether it would be in the form of written comments under
21 Part 110.84 of your regulations, or whether you would want
22 to convene some type of oral hearing under subpart J
23 of your regulations.

24 The matters are all outlined in our memorandum of
25 November 2nd, on pages 3 and 4 where we have set out a

1 tentative oral hearing if you decide to go that way.

2 The chronology would be somewhat briefer if you
3 decide merely to take written comments and if you decide
4 not to hold any kind of public proceeding. Then we
5 would have to prepare an order to that effect supplying
6 your reasons for the denial of the hearing.

7 So basically it comes down to a policy issue
8 of whether or not you feel additional proceedings would be
9 of assistance to you.

10 COMMISSIONER KENNEDY: Could you remind me
11 whether the petitioner has suggested that what he would have
12 to offer would substantially advance the state of knowledge
13 beyond that presented before the Congress in the hearings
14 which it held on the previous licensing, licensing 1060,
15 I believe it was.

16 MR. STOIBER: I think the only assertion he
17 makes in that regard is that further examination of the
18 most recent information available would assist the
19 Commission further and that the issues which he raises --
20 and there are basically three of those -- the issue of
21 the implications of the SSIR report with respect to the
22 adequacy of IEA safeguards --

23 COMMISSIONER KENNEDY: Not discussed in the
24 Congressional hearing?

25 MR. STOIBER: Yes, it was discussed in detail.

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1 COMMISSIONER KENNEDY: So coming back to my
2 question: is he alleging that he has additional information
3 to present on this since it was -- my recollection was that it
4 was discussed at those Congressional hearings extensively.

5 MR. STOIBER: I don't believe he asserts he has
6 additional information, however --

7 COMMISSIONER KENNEDY: I'm trying to think of
8 whether it would help us. That's the question I'm trying
9 to ask.

10 MR. STOIBER: I think he indicates that he has
11 a viewpoint and might be able to submit analysis from a
12 different point of view.

13 COMMISSIONER KENNEDY: Different from that that
14 he presented in the Congressional hearings? That's what
15 I'm asking.

16 The purpose of my question is to help me arrive
17 at some judgment as to whether the criterion of additional
18 assistance to the Commission would be met.

19 MR. STOIBER: I think not different from the
20 viewpoint he presented, but different from the formal
21 materials already before the Commission from the staff and
22 the executive branch.

23 And the other issues that he raised were the
24 adequacy of Indian assurances on nuclear explosives --

25 COMMISSIONER KENNEDY: Could the Commission in that

david26 1 regard without engaging in another public proceeding --
2 could the Commission vote to include in its record for
3 consideration of this particular licensing matter the
4 record which committees of the Congress amassed on the
5 previous hearing as guidance to the Commission?

6 MR. STOIBER: I believe that's certainly
7 appropriate.

8 COMMISSIONER KENNEDY: Okay, thank you.

9 COMMISSIONER AHEARNE: Carl, you gave a list of --
10 you ran down the list of the views that we have in front of
11 us, and I think you mentioned that there were the
12 petitioner's views and executive branch views. I just got
13 a copy handed to me of an executive branch view dated
14 November 15th, which isn't the executive branch view that's
15 in Appendix C, and I was just curious. Were there any
16 other last minute arrivals?

17 MR. STOIBER: I think the 15th --

18 COMMISSIONER KENNEDY: We're dealing with a
19 different paper --

20 COMMISSIONER AHEARNE: I'm dealing with 596.

21 COMMISSIONER KENNEDY: This is the license itself.

22 COMMISSIONER AHEARNE: Well, the paper that I got
23 from the general counsel doesn't have any executive branch
24 views attached to it.

25 MR. STOIBER: We had submitted our on November 2nd,

david27 1 and the executive branch views on the hearing have not
2 come until the 15th, so we were unaware of what position the
3 executive branch --

4 COMMISSIONER AHEARNE: All I'm saying is: are
5 there any other last minute -- trying to shovel through
6 this to make sure I have --

7 CHAIRMAN HENDRIE: You ought to have a staff paper
8 dated November 14th.

9 (Chairman Hendrie indicating to Commissioner Ahearne.)

10 COMMISSIONER AHEARNE: That's in the November 20th
11 staff paper, the staff response. That is in the November
12 20th package. What is not in the November 20th package is
13 the November 15th executive branch views.

14 MR. STOIBER: One has to keep these things on
15 parallel tracks. The hearing issue is a separate issue than
16 the issue of whether or not the license should go forward.
17 And so we have essentially two sets of responses, one on
18 the hearing issue and one on the license proper.

19 COMMISSIONER BRADFORD: The tracks do cross a
20 little; that is, if you feel you have all the information
21 you wanted for the merits of the facts, based
22 on the papers of the merits, then you wouldn't --

23 COMMISSIONER AHEARNE: At the moment I'm really at
24 a very simple question, which is just to make sure I have
25 the right sets of papers. I have the November 20th paper.

david28 1 In the November 20th paper, Appendix B, is a memorandum
2 in support of the motion for further hearings. So that
3 led me to believe that this paper had something to do with
4 that.

5 There is also an NRC staff answer to the
6 memorandum in support of hearing. Now that really led me
7 to believe that perhaps this paper was addressed in the
8 hearing. And then when I moved to Appendix C in which
9 the reference at least refers -- the first two papers are
10 the memo from petitioners and staff response, which I have
11 just read, indicates there was a hearing.

12 Then Appendix C is the executive branch views,
13 but the Appendix C executive branch views is not the
14 November 15th executive branch views in the hearing.

15 So I'm just trying to see, do I have all the
16 views on the hearing that have come in to date.

17 MR. STOIBER: I think you have everything, as
18 long as you have the November 15th views from the executive
19 branch on the hearing issue.

20 COMMISSIONER AHEARNE: All right.

21 MR. SHEA: I might just say that the staff in
22 putting together the paper you have just gone through had
23 not received at that time the executive branch views of
24 November 15th on the hearing. This is the first awareness
25 that we have of that. There was a direct communication to the

david29 1 Commission because of the nature of the hearing.

2 COMMISSIONER AHEARNE: Well, my direct
3 communication was that I leaned over and asked John what
4 paper was Carl referring to, and he pulled one out and then
5 went and made me a copy.

6 COMMISSIONER KENNEDY: Just to close that loop
7 a little bit, on page 20 of the paper which Commissioner
8 Ahearne has been alluding to, it notes that the executive
9 legal director indicates that it may comment on that paper
10 separately.

11 Will it have any relationship to the hearing
12 question, any comment that ELD might offer.

2 13 MS. BECKER: No, it will go to the substance.

begin 3 14 COMMISSIONER KENNEDY: What ELD is saying about
15 the hearing issue, we know.

16 MS. BECKER: That's right.

17 MR. STOIBER: So you have everything.

18 COMMISSIONER AHEARNE: That's not obvious that
19 I have everything we seem to know about.

20 MR. STOIBER: You have everything I have.

21 CHAIRMAN HENDRIE: There has been no paper thus
22 far identified and brought to your attention which you have
23 you think, probably?

24 That seems a reasonable basis to plunge ahead.

25 Carl, you were in mid-discussion.

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1 MR. STOIBER: I was merely indicating the
2 issues raised by the petitioners. I mentioned the
3 first two, the SSIR, the adequacy of no explosive
4 assurances, the status of spent fuel return negotiations,
5 and the fourth one, the need for fuel issue.

6 These are the points that the petitioner
7 would expect to address in any further public proceedings.
8 There has been, of course, a lot of material submitted to
9 the Commission on these issues; however the petitioner
10 believes that submitting additional information and
11 analysis would be useful to the Commission in this regard.

12 And I think it's up to the Commission to make a
13 judgment on whether or not it believes that that additional
14 process would be helpful to them.

15 COMMISSIONER AHEARNE: Jim, these are the types of
16 questions that we asked the State Department to provide us
17 answers for.

18 MR. SHEA: Yes.

19 MR. STOIBER: I suppose at this point the issue
20 also becomes one of timing because, as I stated before,
21 the Commission has until the first week of February to
22 decide whether it wishes to order further proceedings.
23 It could speed the process considerably if two of the
24 Commissioners did decide they wanted public proceedings by
25 ordering at this time and getting the ball rolling.

1 On the other hand, it might be something that
2 would come out of the briefing by the State Department that
3 would change the Commissioners' views and therefore convince
4 people to await the decision on a hearing.

5 COMMISSIONER KENNEDY: When is that briefing
6 scheduled?

7 MR. SHEA: It is not yet definitely scheduled.
8 It looks as if the week after next is the most likely time
9 for it, assuming availability of all the Commissioners.
10 Bill Nosenso said he and Joe Nye expect to be available that week.

11 MR. CPLINGER: He was not sure about Joe.

12 MR. SHEA: He was not completely sure about Joe. At least he
13 thought that was possible. So we're trying to pin that
14 down. I believe the Commissioners are available that week,
15 at least some portion.

16 MR. STOIBER: I raise this issue only to make
17 it clear that the Commission does have time to revisit the
18 issue of the hearing after it has received the briefing.
19 That has to be weighed against the desirability of expeditious
20 treatment of these matters.

21 COMMISSIONER KENNEDY: If given -- given the
22 nature of the issues which the petitioner suggests he would
23 like to and is prepared to provide further information to
24 Commission on, and given the extensive hearings that were held
25

david32 1 earlier by the Congress, looking into the general question
2 as it related to the earlier license 1060, but looking
3 at the issue in a broader sense, I think, as I recall
4 through several of the discussions, looking at the issue
5 in the broader sense than just the particular license,
6 it being the vehicle, but rather not necessarily just
7 the product, would it not seem reasonable to even now
8 to ahead and ask for public comment in the nature of
9 written submissions with the normal period of time for
10 such proposals, what 30 days? It could even be less than
11 that, I should think in the circumstances.

12 15 days I should think would be more than enough.

13 MR. STOIBER: That course is of course provided
14 in the regulations.

15 COMMISSIONER KENNEDY: Is 15 days too short a period
16 in the normal circumstances?

17 MR. STOIBER: That's a matter of judgment. I would
18 think it somewhat short.

19 COMMISSIONER KENNEDY: But 30 days would not be
20 too short, would you say?

21 MR. STOIBER: I would not. It depends on the
22 extent to which the intervenor would want to make use of
23 the Freedom of Information Act to secure additional materials
24 upon which he might want to base analysis or views.

25 COMMISSIONER KENNEDY: Does this schedule that is

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1 proposed in -- yes, it does. It represents some 15 plus
2 days. It includes a period of discovery. The oral
3 hearing schedule proposed in the letter --

4 MR. STOIBER: Yes, on page 4 of our November 2nd
5 memorandum --

6 COMMISSIONER KENNEDY: It shows a discovery
7 period of something of the order of 15 days.

8 MR. STOIBER: This is assuming the participants
9 would file such a request. It's not necessarily clear that
10 they would, but if they did, which they did in fact in the
11 last proceeding.

12 COMMISSIONER AHEARNE: What is a written hearing,
13 Carl?

14 MR. STOIBER: I beg your pardon?

15 COMMISSIONER AHEARNE: What is a written hearing?

16 MR. STOIBER: Under the Administrative Procedure
17 Act, a hearing need not necessarily be oral in order to
18 qualify as a hearing. Under our regulations, subpart 1110.85,
19 we have described a hearing consisting of written
20 comments, and that would be an order by the Commission
21 stating the issues that it wished to have addressed,
22 providing a list of the participants who would be expected
23 to comment, and stating time limits within which the
24 receipt of comments would be received.

25 COMMISSIONER AHEARNE: Does that or does that not
envision comments on comments?

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1 MR. STOIBER: It might well. You might adopt
2 a proceeding in which written comments were filed and then
3 an opportunity provided for additional rebuttal or
4 comments on the comments.

5 COMMISSIONER AHEARNE: You are scheduled to have
6 on page 4 -- at least my copy refers to that as a schedule
7 for a written hearing; is that correct?

8 MR. STOIBER: Under number one?

9 COMMISSIONER AHEARNE: Under two.

10 MR. STOIBER: Under two?

11 COMMISSIONER KENNEDY: It says if a written
12 hearing were held --

13 MR. STOIBER: That would be an oral hearing.

14 COMMISSIONER AHEARNE: But it says if a written,
15 so that's not what it meant?

16 MR. STOIBER: That's wrong. That should be if
17 an oral hearing were held. That's an error.

18 COMMISSIONER AHEARNE: Is it appropriate to ask
19 or can it be answered here, when is the fuel needed and is
20 that a question? That is, A, is it germane to this meeting,
21 today's issue; and B, an open hearing. Can we discuss it?

22 MR. PEDERSEN: Clearly it's germane in the sense
23 that the need for fuel is one of the issues that the
24 petitioner has raised. It's also an issue that this
25 Commission has visited on numerous occasions. Prior to the

david35 1 last time the Commission dealt with Tarpur, it had
2 before it an analysis, one analysis, at least, done by
3 my office that spoke to that question, and we are redoing
4 that analysis at this very time and updating it.

5 COMMISSIONER KENNEDY: The executive branch
6 also --

7 MR. PEDERSEN: And the executive branch as a regular
8 matter of course supplies its views on these matters. So,
9 it's germane, certainly. I do not think you have before
10 you today the answer to that, and I would think that would
11 be -- also you will probably get some discussion of that in
12 your briefing, which I think is one of the issues Joe
13 Nye was interviewed to discuss.

14 It's very closely associated, for example, with
15 the reracking that's going on at Tarapur, because that's
16 affecting the power at which they're running the plant.
17 They don't want to get stuck with a lot of spent fuel right
18 now, so there's a lot of variables involved, and we're
19 looking at that question.

20 COMMISSIONER AHEARNE: I gather in 1976 there was
21 a hearing on Tarapur?

22 MR. STOIBER: Yes, there was a two day oral
23 hearing held in July of that year; something on the order of
24 11 witnesses were heard and about 300 or 400 pages of
25 testimony developed.

david36 1 COMMISSIONER AHEARNE: Is that the only hearing
2 on an export that the Commissioners held?

3 MR. STOIBER: That's right.

4 COMMISSIONER AHEARNE: Can you explain what were
5 the criteria that were applied at that time as to why
6 there should be a hearing; in particular compare them with
7 apparently no hearing being held in I guess 1060.

8 MR. STOIBER: The judgment of the Commission was
9 basically on the grounds that it felt the additional
10 material might help it reach its statutory common defense
11 and security finding and that it would be in the public
12 interest to afford these petitioners an opportunity to
13 publicly air their views.

14 COMMISSIONER KENNEDY: Granting them the hearing
15 as a matter of judgment, not as a matter of right.

16 MR. STOIBER: That's right. And there was another
17 dimension there also that I might mention. The Commission
18 stated in its order that this was frankly an experimental
19 procedure that it wanted to use to determine whether hearings
20 in export licensing proceedings generally -- you have to
21 recall that at that time the petitioners were requesting
22 this as a matter of right under the Atomic Energy Act,
23 would in fact be useful in ventilating the kinds of issues
24 that the Commission faced.

25 COMMISSIONER AHEARNE: Did the Commission reach any

david37 1 judgment as to the utility of that experiment?

2 COMMISSIONER KENNEDY: Several, all different.

3 (Laughter.)

4 MR. STOIBER: The Commissioners have reached
5 judgments. The Commission as a collegial body, I don't
6 think has made any statement about that, except in testimony
7 there have been certain allusions to the fact that it
8 provided some assistance, but at the cost of other
9 difficulties.

10 COMMISSIONER AHEARNE: Was the issue of a hearing
11 addressed by the Commission for the last spring's 1060
12 proceeding?

13 MR. STOIBER: Yes, it did. It said it did not
14 feel that a hearing on that license would be in the public
15 interest, it would assist it, but it would reach a decision on
16 the companion license which it consolidated with this
17 proceeding as a whole, would be reached that -- well, at
18 this time.

19 COMMISSIONER AHEARNE: Can you tell me what
20 the differences are in the general counsel's view, at least,
21 between the case we have before us now and 1060, particularly
22 focused on why should the Commission see a difference
23 leading to a different conclusion.

24 MR. STOIBER: I don't think there are primarily
25 legal factors. I think it comes down to a matter of the

david38

1 judgment of the individual Commissioners about how fresh
2 the information was in their mind and other additional
3 material that would be useful to them.

4 COMMISSIONER BRADFORD: There was also a
5 very strong allegation of urgency of decision, even as
6 distinguished from a question of need, just an energy need
7 for a decision, as apart from the need for the fuel before
8 us last spring.

9 I would have to review the papers myself to
10 see how explicitly that weighed in the Commission decision.
11 I know it was a factor in my own thinking.

12 MR. STOIBER: To be extremely candid, one of
13 the other factors was that the Commission was facing
14 imminent loss of its quarum and ability to act on any of
15 these licenses.

16 COMMISSIONER BRADFORD: Of course, we didn't
17 know Joe was going skiing.

18 (Laughter.)

19 We knew he was going skiing. We didn't know he
20 wouldn't come back.

21 COMMISSIONER AHEARNE: The general counsel may
22 have known something he didn't tell you.

23 CHAIRMAN HENDRIE: You didn't have any detailed
24 idea about my skill levels and inclinations.

25 MR. PEDERSEN: I would like to respond a little

David39 1 more, Commissioner, to your question. I think many factors
2 are the same. I think a lot of the issues that are
3 raised by petitioners now are the issues that were raised
4 by petitioners earlier. But things happen with time.
5 For example, since that time you have had the Congressional
6 hearings in which there was even further discussion of
7 these and more opportunity for public debate, and so on.

8 That's on one side, so to speak. On the
9 other side there are some questions about whether this
10 particular fuel, the timing of it isn't different. For
11 example, the argument has been made that this fuel would not
12 go into the reactor, probably, this shipment, until after
13 the 18 month cutoff.

14 And whether that should have any relevance or
15 not, I'm not prepared to address today. But there are
16 differences. Whether a hearing would enlighten those
17 differences, I have an opinion on that, but that's neither
18 here nor there.

19 But there are similarities and some significant
20 changes.

21 MR. SHEA: That's right. I think Ken is right.
22 There are a few changes closer to the March '80 date, and
23 also I think there are some more recent statements by the
24 Indian officials that have been made with regard to this
25 export and are noted in submission by the NRDC.

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1 CHAIRMAN HENDRIE: Let me seize upon a moment
2 of silence to note that I do not propose to ask for a vote
3 this morning on the hearing question. Vic wasn't able
4 to be here and would like to get his vote in. It would
5 seem to me that we can make our views known to one another
6 on the hearing question on a notational basis or we
7 might simply delay that decision until after briefing.

8 COMMISSIONER KENNEDY: Could we get an informal
9 expression of views, remembering that it only takes two
10 people to suggest a hearing, to call for a hearing.

11 I am concerned about delaying until after the
12 Nye briefing a week and a half hence, maybe two weeks
13 hence, you see, because then if we are going to have one,
14 we might as well get the thing started and save the two
15 weeks.

16 And if two people want it, well then the rules
17 say we're going to have it. We can have an informal
18 expression of views and not take the formal vote.

19 CHAIRMAN HENDRIE: What I would propose -- it
20 seems to me that whether to have a hearing or not is a
21 fairly straightforward question. I would suggest that we
22 let the secretary come around and collect the ballots, just
23 go ahead and vote on it.

24 COMMISSIONER KENNEDY: We have got two questions.

25 CHAIRMAN HENDRIE: But by following that procedure --

david41 1 COMMISSIONER KENNEDY: If you're going to have
2 one, which way?

3 Written submissions or an oral hearing?

4 CHAIRMAN HENDRIE: That's a question I would like
5 to raise.

6 COMMISSIONER AHEARNE: I don't think that is a
7 simple question, whether it's written or oral.

8 CHAIRMAN HENDRIE: True, and furthermore I
9 ask the counsel, is the form, whether it's written comment
10 submission or an oral? Is that at the choice of two
11 Commissioners or is that a decision of the majority?

12 COMMISSIONER KENNEDY: That's a decision of the
13 majority, I believe.

14 MR. STOIBER: Yes.

15 COMMISSIONER KENNEDY: The form of the procedure --

16 COMMISSIONER AHEARNE: We're switching from
17 academic to --

18 COMMISSIONER KENNEDY: No, that's what the rules
19 say. Two Commissioners can call for a hearing, and then
20 the form the hearing should take falls under the normal
21 procedures of the Commission, as I understand the rules.
22 Isn't that correct?

23 MR. STOIBER: That would be our view.

24 COMMISSIONER BRADFORD: It's not a question I
25 have researched at all, and I don't want to start a

1 prolonged debate , so let me just reserve judgment.

2 COMMISSIONER AHEARNE: I think that that is a very
3 significant question, which type of hearing. And just
4 let me raise an additional part of the significance. If
5 you are putting on an oral hearing, you probably don't have
6 to be extremely explicit as to the questions that will be
7 addressed on the oral hearing.

8 If you are going out for a written hearing and
9 asking for comments to help you, you have to be, I
10 think relatively explicit. I think it would be more
11 difficult to be that explicit until we've heard the
12 State Department's hearing, briefing.

13 so probably where I would come out if I were
14 going for a written hearing would be to wait until after
15 the State Department. That would be the rationale because
16 I would want to ask probably for further reviews on that.

17 COMMISSIONER BRADFORD: I agree with that. I
18 think it's going to be very hard to define the scope of
19 really either type of proceeding until after we've heard
20 what the State Department has to say. It's also possible
21 to hold judgment on whether or not one wants oral
22 argument until one has the written materials in hand.

23 And then you can see whether there would be
24 any good purpose served by letting the parties take some
25 time to argue further orally on the basis of the written

1 submissions.

2 COMMISSIONER KENNEDY: One purpose that could
3 be served there of course is for the 30 day delay.

4 COMMISSIONER BRADFORD: Well, let me just indicate
5 again that if willful delay had been among the Commission
6 objectives on Tarapur last spring, it would have been
7 an easy time to do it.

8 CHAIRMAN HENDRIE: On these fairly difficult,
9 complex matters, the Commission at full speed forward is
10 not exactly the model.

11 Okay, I think further questions from Commissioners?

12 COMMISSIONER AHEARNE: No.

13 CHAIRMAN HENDRIE: I will ask the secretary to
14 poll around with a notational vote. I think on that vote
15 it would be helpful if the Commissioners would indicate
16 both hearing yes or no, and if yes, what type.

17 COMMISSIONER AHEARNE: And probably, if yes,
18 when. Should it wait for the State briefing or should we
19 go --

20 CHAIRMAN HENDRIE: I think -- what I propose is
21 the following: if two or more Commissioners want a hearing
22 and that develops from the vote, then I will ask the
23 counsel's office to begin to frame in more detail than he
24 has in the paper here the sort of schedule you might look
25 for, both for oral format and written format.

david44

1 Of course, if the votes are clear on oral or
2 written, we'll know which way to scope that, which way to
3 concentrate.

4 MR. STOIBER: We can prepare a draft order for
5 either eventuality so that you can see what that looks
6 like.

7 CHAIRMAN HENDRIE: Why don't you? But it's
8 quite possible we will have a vote.

9 Now, what it does seem to me is that the statement
10 of the scope of the hearing, if there is to be one, is
11 likely to be the place that the Commissioners will differ,
12 and there will be some difficulty in getting to reach the
13 language, and that indeed may need to wait for the
14 briefing, as John suggests.

15 COMMISSIONER KENNEDY: The scope could be a
16 fairly straightforward and all encompassing one; that is,
17 as the views of parties and desirability under the law
18 recognizing criterions under the law of issuing the proposed
19 license.

20 Let them comment and say anything they choose
21 and raise any arguments on any side of the issue that
22 they propose to raise, following which either they could be
23 argued orally in rebuttal or with a short comment period
24 on the comments. Otherwise, we never will get the order out.

25 MR. STOIBER: In its prior proceeding, the

david45 1 Commission did essentially that. It said in addition that
2 there wer certain issues which it thought were central
3 to its decision and that it would prefer that the
4 participants concentrate their remarks on it. It did not
5 limit participants to any particular issues, but it did
6 say, if you want to make best use of the material you are
7 going to submit, please emphasize these points.

8 COMMISSIONER KENNEDY: I would read lists that
9 anybody wishes to include in the interest of getting
10 something out.

11 CHAIRMAN HENDRIE: It certainly wouldn't hurt to
12 attempt to frame that language. It provides a starting
13 point and whether we can get a majority agreement to move
14 forward with it will remain to be seen.

15 Fair enough?

16 COMMISSIONER BRADFORD: Sure.

17 COMMISSIONER KENNEDY: Yes.

18 CHAIRMAN HENDRIE: Okay, is it clear where we're
19 going?

20 MR. STOIBER: I believe so.

21 CHAIRMAN HENDRIE: The secretary will circulate
22 a ballot, hearing yes or no, type of hearing, written or
23 oral; general counsel will draft, I guess, an array of
24 documents suitable for all outcomes.

25 How about that? Or at least have in mind --

david46

1 MR. STOIBER: We'll draft two orders, one for
2 written proceeding, one for oral.

3 COMMISSIONER KENNEDY: Leave blanks so people
4 can fill in by writing anything they like.

5 MR. STOIBER: We tried that on the last paper,
6 I think.

7 (Laughter.)

8 CHAIRMAN HENDRIE: I thought that was a notable
9 success.

10 COMMISSIONER KENNEDY: I'll agree to any question
11 anybody wishes to ask.

12 CHAIRMAN HENDRIE: But it may be that in a day or
13 two the nature of the vote will come clear and then you'll
14 know which option you are aiming at. I don't see any need
15 for you to prepare all possible options in detail. And
16 then we will see whether we're able to take action, if
17 a majority indeed will settle down on the direction and
18 nature of the thing, then we can get it on out by affirmation;
19 if not, I'll schedule a meeting so that we'll get a chance
20 to talk to each other about it and see if we can work it that
21 way.

22 COMMISSIONER BRADFORD: (Nodding affirmatively.)

23 COMMISSIONER KENNEDY: (Nodding affirmatively.)

24 CHAIRMAN HENDRIE: Very good. Thank you very much.

25 (Whereupon, at 11:00 p.m., the hearing was adjourned.)