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**NUCLEAR REGULATORY COMMISSION**

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**IN THE MATTER OF:**

POLICY SESSION 78-4

**Place -** Washington, D. C.

**Date -** Wednesday, 18 January 1978

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UNITED STATES OF AMERICA  
NUCLEAR REGULATORY COMMISSION  
POLICY SESSION 78-4

Commissioners' Conference Room  
1717 H Street N.W.  
Washington, D.C.

2:15 p.m., Wednesday, January 18, 1978

The Commission met, pursuant to notice, for  
discussion of SECY-77-616, Export/Import Regulations, Part 110.

PRESENT: Commissioners Hendrie, Glinsky, Bradford  
and Kennedy.

1 CHAIRMAN HENDRIE: We discussed the matter of  
2 the proposed part 110 regulations, the reformulation or  
3 perhaps a gathering together in one place would be a better  
4 way to put it, of the Commission's export-import regulations  
5 in connection with a general briefing on international programs  
6 about a week or two ago.

7 We scheduled the discussion today against the  
8 possibility that it would be helpful in bringing the Commission  
9 to an agreement on those things, and to have the opportunity  
10 for further discussion. So we are gathered on the subject  
11 here once more.

12 Are there particular matters that you would like  
13 to bring us up-to-date on?

14 MR. GOSSICK: We don't have any presentation or  
15 anything, other than just to address the questions the  
16 Commission may have as a result of our briefing on the matter  
17 last week, and any study that you have made of it.

18 COMMISSIONER GLINSKY: I have a question. It goes  
19 to the matter of our procedures in reviewing these applications,  
20 whether or not, for example, they come up before the  
21 Commission.

22 We discussed this last time, and I raised then the  
23 question did our announcement of these procedures have to be  
24 in the form of a rule, and to what extent does this constrain our  
25 flexibility in dealing with these applications.

1 I wonder if we could go over that again. You  
2 seemed to indicate, Howard, as long as we weren't making any  
3 sweeping changes in practice that one could depart from the  
4 procedures laid down in the rule, because they were described  
5 as the normal procedures.

6 MR. SHAPAR: Insofar as the internal review within  
7 the Commission of these applications --

8 COMMISSIONER KENNEDY: You mean within the Commission  
9 and the staff.

10 MR. SHAPAR: And the staff, or the entire establish-  
11 ment, actually, I would think the Commission has flexibility  
12 to depart from this, and to establish a different way of  
13 reviewing them.

14 I suggested, however, when this question came up  
15 before if it was the Commission's intent to do it on a  
16 general basis, that the rules ought to reflect the actual  
17 manner in which the Commission proposes to do its business.

18 COMMISSIONER GLINSKY: Let me tell you why I  
19 raise this. I think it is entirely proper that certain  
20 categories of licenses should be handled routinely by the  
21 staff, because they are routine, at least they fit certain  
22 categories which have been given a blessing by the Commission  
23 and they don't differ all that much from the earlier ones  
24 that had been approved.

25 But occasionally, for one reason or another, one

1 may want to look at one or another of these licenses. Now if  
2 you are departing from an established practice, and this is  
3 known, the departure itself becomes a delicate matter, or  
4 could become a delicate matter.

5 So I wouldn't want us to be constrained by that and  
6 come to the conclusion we ought not to review it, because in  
7 reviewing it we are raising questions about a particular license,  
8 singling it out in a way that might seem awkward.

9 MR. SHAPAR: If you are talking in terms of reviewing  
10 additional matters other than those specifically mentioned  
11 in the rule -- as I recall the rule, it provides the necessary  
12 flexibility without any departure from the rules for you  
13 to review these additional applications.

14 COMMISSIONER GLINSKY: We would not have to make  
15 any specific announcement of that?

16 MR. SHAPAR: That is correct. The rules provide  
17 for it.

18 MR. GUHIN: It says "except as the Commission may  
19 provide otherwise." It is page 91, sub part (e). "Except  
20 as the Commission may provide otherwise, applications will be  
21 reviewed by the Commission."

22 COMMISSIONER GLINSKY: What does that mean?

23 MR. SHAPAR: Number 4 says "any license application  
24 determined to warrant review by the Commissioners" which  
25 might mean one phone call from a Commissioner.

1           COMMISSIONER GLINSKY: Does it mean the Commission  
2 would have to vote to look at a license?

3           MR. SHAPAR: No.

4           COMMISSIONER GLINSKY: One Commissioner could bring  
5 a license before the entire Commission?

6           MR. SHAPAR: I think that might be over-extending  
7 it to say that.

8           MR. STROIBER: You could change that subsection  
9 4 to say "any other license application determined to warrant  
10 review by any Commissioner."

11           COMMISSIONER GLINSKY: So one Commissioner could bring  
12 it before the other Commissioners?

13           MR. SHAPAR: If you made that change. I don't think  
14 the language now could be read to mean one Commissioner could  
15 do it at the present time.

16           COMMISSIONER KENNEDY: What would you consider the  
17 language now to say?

18           MR. SHAPAR: At least the fariest reading would be  
19 a majority, the way I read it now. If your intent is to have  
20 one Commissioner, it is easy enough to specify it.

21           MR. GUHIN: We could make that clear. The review  
22 by the Commissioners is not referring to the Commissioners  
23 making a decision. The reason it is less specific than in  
24 the proposed rules is because the Staff could set it up. You  
25 could say any license application determined by the staff or

1 by a Commissioner to warrant review by the Commission.

2 COMMISSIONER GLINSKY: I think that would be  
3 preferable.

4 COMMISSIONER KENNEDY: Commissioner?

5 COMMISSIONER GLINSKY: Yes.

6 COMMISSIONER KENNEDY: It seems to me if any one  
7 of us wanted a license review by the body, I can't imagine  
8 any of the rest of us would say Heavens no.

9 CHAIRMAN HENDRIE: I agree with that. I think that  
10 was the intent.

11 Further, I agree with you it would be cumbersome  
12 to have it come up and require a quorum of the Commission.  
13 We would have to schedule a meeting and so on. So the  
14 language would read "Any application determined by the staff  
15 or any Commissioner"?

16 MR. GUHIN: "Any other license application determined  
17 by a Commissioner or the staff to warrant review by the  
18 Commission." The determination is by a Commissioner or  
19 by the staff.

20 CHAIRMAN HENDRIE: Is that the way it ought to read?

21 MR. SHAPAR: Yes.

22 MR. GUHIN: "Any other license application determined  
23 by the staff or any Commissioner to warrant review by the  
24 Commission."

25 COMMISSIONER GLINSKY: You are saying so long as

1 this then doesn't result in a wholesale departure from the  
2 present rules --

3 MR. SHAPAR: If there is a category or kind of  
4 application you would routinely want to review, I would think  
5 it would be desirable for you to reflect that in the rules  
6 as the normal practice.

7 COMMISSIONER KENNEDY: Couldn't the Statement of  
8 Considerations indicate that, that that is the understanding  
9 of the Commission, the meaning of it?

10 MR. SHAPAR: You mean without making the change we  
11 just discussed?

12 COMMISSIONER KENNEDY: No. Commissioner Glinsky  
13 has a slightly different point. The one we just took care  
14 of, the language takes care of the problem I think we all  
15 see. But there is an additional point which I understand  
16 him to be suggesting, that under the normal circumstances as  
17 stated in the rule, this is the way things would work.

18 Now since the rule says that is the way we are  
19 going to do business, if we decide in some case not to do  
20 business that way, are we going to have to make some big  
21 thing out of it because we are departing from the rules?

22 You say no, because there is enough flexibility in here  
23 to permit that, so long as it is not a regular and routine  
24 departure from the rules.

25 Can't we just indicate that is our understanding  
and intention by a simple statement somewhere in the

1 Statement of Considerations?

2 MR. SHAPAR: Yes indeed we can.

3 COMMISSIONER GLINSKY: Let me ask you one more  
4 thing. As I remember, it speaks of reload of fuel requiring  
5 approval if the application falls into a certain category, and if  
6 the original core has been approved, something like that.

7 Now there are some otehr possible cases where there  
8 is a reactor abroad of perhaps U.S. supplied, perhaps not  
9 U.S. supplied, which we may have supplied with fuel at one  
10 point, and subsequent shipments may have come from other  
11 sources, and then we may again be supplying fuel.

12 How do you envisage dealing with these sorts of  
13 situations? Or did you really mean reactors that the U.S.  
14 supplied fuel right from the beginning and we are simply  
15 dealing with those situations?

16 MR. GUHIN: I think it is really dealing with the  
17 U.S. reactors and the initial cores coming from the U.S.  
18 If you had a reload coming, where we hadn't had a license  
19 before, obviously that would be sent by the staff to the  
20 Commission, because we had not had either the reactor or  
21 any fuel loading.

22 If you had a situation where you had U.S. fuel and  
23 then someone else's fuel, and then back to U.S. fuel, I think  
24 that would have to be determined on the basis of the circumstances  
25 of that case. That case hasn't arisen, and probably will not

1 arise for several years. Most of these fuel contracts right  
2 now are calling for at least 10 years' supply, and an option  
3 to renew after that time.

4           It is not a specific issue we addressed because  
5 we didn't see it arising in any timeframe with which we  
6 would have to be concerned. If, for example, there were an  
7 expanse of time between the Commission's action on a case and  
8 then you had someone else supplying for several years, and  
9 then we started to supply again, the staff would automatically  
10 assume that that is not a routine reload. That is, where  
11 we have been out of the business for a while and we would  
12 want to see about getting back into it.

13           CHAIRMAN HENDRIE: Presumably in reviewing such a  
14 resumption of supply, or perhaps initial taking up of  
15 supply, then the Commission could deal with the question of  
16 whether subsequent sequential reloads in the same series would  
17 or would not constitute routine reloads.

18           COMMISSIONER GLINSKY: It always seemed to me that  
19 the cases of application of these categories that are  
20 routine -- I wonder why the applications themselves don't cover  
21 this?

22           MR. GUHIN: Some have and some have not. Most are  
23 into the particular individual reload application, a few come  
24 in for two or three at a time. And we are in fact thinking  
25 about this very issue at the staff level, and hope to do a

1 piece on that, how one would want to look at multiples.

2 This is a question that has been around for a long time.

3 COMMISSIONER GLINSKY: That might simplify matters  
4 too.

5 MR. GUHIN: Absolutely.

6 CHAIRMAN HENDRIE: Peter, do you have a question?

7 COMMISSIONER BRADFORD: Yes. I don't have anything  
8 else on this point, though.

9 CHAIRMAN HENDRIE: On other points?

10 COMMISSIONER BRADFORD: Okay, sort of at random.

11 Under the exemption section now, is there anything about 110.11  
12 that would exempt spent fuel that is coming back for storage in  
13 a DOE facility?

14 VOICE: Would that be technically possible?

15 MR. GUHIN: Howard can answer the question whether  
16 it is technically possible. As a matter of fact, material  
17 today comes back to Savannah River for reprocessing, and  
18 it comes through the import license application and it is  
19 more or less like the export process; even though it is  
20 coming from DOE or to DOE, normally the imports have been  
21 subject to licensing by the Commission.

22 My assumption would be that would continue to be  
23 the case under the example you cite.

24 MR. SHAPAR: What do you mean by technically  
25 possible?

1 CHAIRMAN HENDRIE: Legally possible. Presumably  
2 it could be transported, but may it be transported?

3 COMMISSIONER BRADFORD: If under the DOE spent fuel  
4 program, as it eventually evolves, spent fuel is being  
5 sent back from foreign reactors for handling and storage  
6 by DOE, I wondered whether Section 110.11, item (a), would  
7 exempt that?

8 MR. SHAPAR: I think it would, if they chose to go  
9 the contract route. This is, of course, based on a provision  
10 of the Atomic Energy Act, an exemption that relates to  
11 contracts with and for the account of the Commission. It  
12 applies not just to export licenses, but across the board to  
13 all activities of DOE and you will find a similar provision  
14 in all of the parts of the regulations.

15 COMMISSIONER KENNEDY: In fact, it says we are  
16 not going to license the government's business.

17 MR. SHAPAR: That is essentially the thought behind  
18 it. The technical term is "contracts with and for the  
19 account of the Commission," the Commission meaning the old  
20 Commission that is now fragmented into NRC and DOE.

21 Whether or not they would actually seek to use  
22 that exemption is something I can't answer. Maybe Mr. Guhin  
23 can.

24 CHAIRMAN HENDRIE: I think it is too soon to tell  
25 what direction that policy would take.

1 MR. GUHIN: The law says they do not have to have these  
2 activities licensed?

3 MR. SHAPAR: A contract with and for the account of  
4 the Commission is the term of art in the statute.

5 MR. STROIBER: I would guess, since we have quite  
6 a bit of time before any policy like that is put into effect,  
7 the Congress would be looking at these issues fairly closely  
8 and probably indicate its intentions fairly clearly about what  
9 it wanted the Commission involvement in this process to be  
10 and the rule could be changed relatively quickly in view of  
11 those expressions.

12 MR. SHAPAR: You mean a change in the statute or  
13 some other expression of Congressional sentiment?

14 MR. STROIBER: I assume the activity would have to be  
15 supported by appropriations or some other funding.

16 MR. SHAPAR: Of courses there is the related matter  
17 of government-to-government transfers which is also not  
18 subject to licensing, which is also a matter I am sure the  
19 Congress is deeply interested in. That is a related area,  
20 but the principle is the same. Certain governmental activities  
21 are not subject to licensing.

22 CHAIRMAN HENDRIE: Please go on, Peter.

23 COMMISSIONER BRADFORD: Again, would it be difficult  
24 or detrimental to this section to draw it in such a way  
25 that it did not at this point in time exempt that type of

1 activity?

2 MR. SHAPAR: this purports to reflect a statutory  
3 exemption which is now part of the statute.

4 COMMISSIONER BRADFORD: So what you are saying is  
5 under the statute they could do it, even if we didn't have  
6 the regulation?

7 MR. SHAPAR: That's right.

8 CHAIRMAN HENDRIE: We could probably do it even if we  
9 did have the regulation.

10 COMMISSIONER GLINSKY: I just wondered if we should  
11 go on and indicate this activity ought to be licensed. Are  
12 we merely stating a legal fact?

13 MR. SHAPAR: I think we are stating a legal fact.

14 MR. DORIAN: What we have done in the regulations  
15 is incorporated the other parts of the regulations, 36, 50  
16 and 70, all of which had the same intentions as these  
17 regulations except these regulations are now so written so  
18 it hits you in the face.

19 COMMISSIONER KENNEDY: I read in the paper that  
20 that trend is commendable.

21 MR. SHAPAR: I am not sure we were completely  
22 responsive to the last question of Mr. Bradford. One change  
23 we could make, to be responsive to your thought, is not to  
24 attempt to fill out in the regulations what the statute says,  
25 but to use the actual statutory language, which is "contract

1 with and for the account of DOE," and leave it at that,  
2 if that would relieve any of your problem.

3           What we did do was to use exactly the same format  
4 we used in other parts of the regulations, to define what  
5 a contract with and for the account of the Commission is,  
6 without making any changes whatever.

7           COMMISSIONER BRADFORD: We have never defined that any-  
8 where?

9           MR. SHAPAR: This is the definition you see in the  
10 rules.

11           COMMISSIONER KENNEDY: It is in the rules elsewhere,  
12 all of the parts Don mentioned.

13           COMMISSIONER BRADFORD: It is the same language which  
14 appears elsewhere in all of your rules?

15           MR. SHAPAR: Exactly.

16           COMMISSIONER BRADFORD: Can somebody lay out for me  
17 what the line is between an adjudicatory and legislative  
18 type hearing?

19           MR. SHAPAR: The traditional distinction between  
20 a legislative and adjudicatory hearing is that an adjudicatory  
21 hearing is a hearing that is conducted in accordance with  
22 sections 5, 7, and 8 of the APA, which means the decision  
23 is made only on the record, and there is the right to cross-  
24 examination, present your evidence, rebuttal, that type of  
25 thing.

1           COMMISSIONER BRADFORD: If you held a legislative  
2 hearing, called it a legislative hearing, is there anything  
3 that then prevents you from setting it up on the same scaffold  
4 as an adjudicatory hearing?

5           MR. SHAPAR: There are two parts to the answer to  
6 that. Legislative type hearing is not a term of art. It  
7 is a popular colloquialism. Usually it is meant to refer  
8 to the kind of a hearing that you get before a Congressional  
9 Committee, where witnesses appear and present written and-or  
10 oral statements, and are subject to questioning by the Congress-  
11 men who are present. That is the usual conception of a legis-  
12 lative type hearing.

13           There are no legal constraints as such when an  
14 administrative agency like NRC chooses to use that kind of a  
15 concept in its own proceedings. They are free to conduct  
16 any kind of a quote legislative hearing that they want to,  
17 and add as many of the adjudicatory facets as they choose to  
18 the proceeding. There is no legal constraint as such in that  
19 regard.

20           If you ask what the typical differences are  
21 between a legislative type hearing and an adjudicatory  
22 proceeding, I think I have described it.

23           COMMISSIONER BRADFORD: Okay. So part of the  
24 problem may come from the use of the word "legislative" to  
25 describe everything that is less than fully adjudicatory?

1 MR. SHAPAR: Part of the problem, yes. Another  
2 word we used in the past to describe that particular animal  
3 is an informal hearing.

4 COMMISSIONER GLINSKY: Can't you have an adjudicatory  
5 hearing under the APA -- and I am getting out of my depth  
6 here -- and use the foreign affairs exemption to basically  
7 run it back to what is in effect a legislative hearing?

8 MR. SHAPAR: We think we have authority under the  
9 law to have a basically legislative type hearing, as I just  
10 described it, for export matters.

11 What I think Commissioner Bradford's question was  
12 do we have authority under the law to go further. As a  
13 legal proposition, the answer is yes.

14 So that leaves a policy question to be decided.

15 CHAIRMAN HENDRIE: There was another facet to that  
16 also. It seemed to me part of the question also was in  
17 using the word "legislative" hearing, had you then ruled out  
18 the possibility of including some of the other facets of  
19 an adjudicatory proceeding that you might want to put in.  
20 There have been hybrid structures here. I didn't follow your  
21 thrust.

22 COMMISSIONER GLINSKY: The point is there are  
23 formal and informal hearings. You have sort of a formal hearing  
24 which doesn't have all of the trappings of the adjudicatory  
25 hearing.

1 MR. SHAPAR: Something more than a legislative type  
2 hearing, and yet less than an adjudicatory hearing?

3 COMMISSIONER GLINSKY: You wouldn't have to grant all  
4 of the rights of cross-examination and so on that would  
5 accompany a normal adjudicatory hearing.

6 MR. SHAPAR: Yes, you have that discretion as a matter  
7 of law.

8 I should point out that the rules as written  
9 don't explicitly rule it out, but these rules were intended  
10 to be responsive to directions that we got from the Commission  
11 when the staff undertook to prepare these rules. The specific  
12 instruction from the Commission was as follows: "Cross-  
13 examination between participants in an oral hearing will not  
14 be authorized."

15 COMMISSIONER BRADFORD: I would have some reluctance,  
16 with due deference to that Commission, to rule out at this  
17 point once and for all cross-examination or other tools that  
18 might -- I suppose they are trappings of adjudicatory hearings.  
19 But I would think the Commission would be unwise simply to  
20 say at this point there are no circumstances under which it  
21 would permit, say cross-examination. I think you could say  
22 the same thing about almost any of the other tools one might or  
23 might not want to allow in particular circumstances.

24 COMMISSIONER GLINSKY: Wait a minute. Are we not  
25 free still, if we wanted to -- can you have an informal hearing

1 with cross-examination?

2 MR. SHAPAR: An informal hearing is not a term of art  
3 either. The answer to the question is yes, you can. At  
4 some point, though, if you added too many tra-pings of an  
5 adjudicatory process, then nobody in the world would call it  
6 an informal hearing.

7 COMMISSIONER GLINSKY: What I am getting at is we  
8 leave it to our discretion and decide what kind of hearing  
9 we might have.

10 MR. SHAPAR: You have that discretion.

11 CHAIRMAN HENDRIE: Does the language here preserve  
12 that discretion?

13 MR. SHAPAR: I don't think well enough.

14 COMMISSIONER BRADFORD: Howard, I think, is reading  
15 that instruction, and if anyone wanted to contest the  
16 Commission's power to extend cross-examination under this  
17 language, and wanted to show what the intent of the Commission  
18 was in adopting these regulations, they would say these  
19 regulations were based on an instruction from the Commission to  
20 the staff to be darn sure the regulations didn't allow cross-  
21 examination.

22 MR. SHAPAR: I would say if it is your intent to allow  
23 yourselves the flexibility to permit cross-examination and we  
24 shouldn't rely on the present wording of the regulations, we  
25 should change it to reflect your intent, if indeed that is

1 your intent. And you are certainly not bound by the prior  
2 instructions of the Commission in terms of making up your minds  
3 now.

4 COMMISSIONER BRADFORD: That is true. But if we  
5 didn't make it explicit, then that is the kind of thing that  
6 would happen, an indication that it meant no cross-examination.

7 MR. SHAPAR: At a minimum you would have confusion.

8 COMMISSIONER KENNEDY: Before we decide what our  
9 intent is in this regard, if this is what is required, I guess  
10 we ought to have a through-going examination on the part  
11 of the staff, which maybe they are prepared to do right this  
12 minute, as to what the effects would be of changing the regul-  
13 ations in that regard.

14 MR. SHAPAR: As I understand the change suggested  
15 by Commissioner Bradford, it is merely to allow you to  
16 permit cross-examination in the event you wished to make that  
17 decision in an individual proceeding, and not to exclude it  
18 inferentially as the norm.

19 COMMISSIONER KENNEDY: The reason it was excluded  
20 inferentially as the norm -- beautifully phrased, apropos  
21 of that article I was reading in the paper --

22 MR. SHAPAR: Which article?

23 COMMISSIONER KENNEDY: I will send you a copy.

24 CHAIRMAN HENDRIE: The one on plain language in  
25 regulations.

1           COMMISSIONER KENNEDY: And as to lawyers.

2           Anyway, the question is not whether we would make  
3 that obvious, or change the language of the regulation, but  
4 if we were to make it, if we were to authorize this at some  
5 point, what would the effect be in this proceeding vis a vis  
6 the foreign affairs exemption questions and all of the  
7 questions which we went into when the instruction was drafted  
8 by the Commission in the first instance?

9           MR. SHAPAR: I think all you can say is if you  
10 decide to exercise the flexibility that would be put into  
11 the rule, the proceedings would take longer. In some cases  
12 those would impinge, in others they would not. I don't know  
13 what else you could say.

14          COMMISSIONER KENNEDY: What about the question of  
15 foreign policy exemption?

16          MR. SHAPAR: That is permissive. You don't have  
17 to use it. You can, if you choose. As of now the premise  
18 has been that you wished to, and that was specifically  
19 articulated as one of the bases for not using an adjudicatory  
20 kind of proceeding.

21          COMMISSIONER KENNEDY: If we now choose to redraft  
22 the regulation in this way, would it not be appropriate to  
23 seek the further comment of the agencies who would be  
24 affected?

25          MR. SHAPAR: I think that would be appropriate.

1 MR. STROIBER: As you have structured the proces now in  
2 these rules, the Commission has broad discretion to frame  
3 its procedures as theywant to. It is at the stage that  
4 the notice of the oral hearing is given under subsection  
5 110.85 that the nature of the hearing which is granted is  
6 delineated. It would be a simple matter to include an  
7 additional statement in that subsection preserving the right  
8 to tailor the process by the addition of limited cross-examination  
9 or anything else the Commission would want. But then that  
10 would defer the decision about what you wanted the  
11 hearing to look like at the point at which you issue your  
12 hearing notice.

13 I think it is clear that there would be some diffi-  
14 culties with implying as a routine matter that cross-  
15 examination is going to be involved, for example, of State  
16 Department witnesses. We have no means of compelling the  
17 attendance of witnesses from the Executive Branch. It might  
18 be difficult to convince those people to present themselves  
19 if they expected to be subjected to cross-examination by  
20 intervenors' attorneys.

21 On the otehr hand, in other instances, it might be  
22 appropriate. I am not sure.

23 MR. SHAPARA: That is right. And something else that  
24 is germane, although it is only a matter of history and  
25 doesn't decrease your flexibility, the Commission articulated

1 two reasons in the proposed rule that went out, in the  
2 Statement of Considerations, for not having cross-examination, and  
3 they were both legal reasons. One was that as the Commission  
4 construed Section 189 of the Act, which guarantees a hearing  
5 upon the request of any person whose interest may be affected,  
6 it read that section as not requiring an adjudicatory hearing  
7 in connection with exports.

8 The other reason which was given in the Statement  
9 of Considerations that at-ended the publication of the proposed  
10 rule was the foreign policy exemption we just discussed.

11 COMMISSIOENR KENNEDY: Well, that sort of comes back  
12 to the point I was making, that if indeed we were now going  
13 to suggest in whatever way to change this rule, with the  
14 intention of authorizing possible cross-examinatino, whereas the  
15 commenters previously assumed we were not, we ought to go  
16 back and tell them and give them an opportunity to coment  
17 on that point.

18 MR. SHAPAR: I think that is fair. to fill out the  
19 picture one could also say the reason you go out with a  
20 proposed rule is to get comments.

21 As I recall some of the comments that came from  
22 intervenor groups, they commented they would like to see cross-  
23 examination. So I guess one, as a counter argument, could say  
24 since you went through the exercise, and it was not just an  
25 exercise of soliciting public comment, and you got public

1 comments urging this kind of extended proceeding, that  
2 following the normal course of rule-making, you are now  
3 being responsive to those comments you chose to accept, if in  
4 fact that is your decision.

5           COMMISSIONER KENNEDY: In the interest of even-  
6 handedness, which requires two hands, it would seem to me that if  
7 one party is informed that the intention of the rule is to  
8 do X, and that conforms to his views given his own concerns,  
9 rightful concerns, it would seem highly unlikely that he would  
10 wish to comment on it, unless, for other reasons he had  
11 nothing else to do and wanted to spend some time saying that is  
12 a grand rule, we are certainly glad to see you did all of that.

13           I suspect he wouldn't say anything, would he?  
14 Only if he objected to it would he comment, right? Therefore,  
15 one would have to assume, having stated the premises as we  
16 stated them, one would hear only from the side which felt  
17 that that was inappropriate.

18           Now if you are going to change it the other way,  
19 the other guy hasn't had an opportunity to comment on that  
20 proposition. That is not even-handed, is it?

21           MR. SHAPAR: I would say your logic is unassailable.

22           COMMISSIONER KENNEDY: Thank you. Since our watchword  
23 here is even-handedness, my object becomes almost compelling as  
24 well as unassailable.

25           MR. SHAPAR: Irrefutable as well.

1                   COMMISSIONER BRADFORD: Let me suggest an alternative  
2  
3 It seems to me if we include something in the regulations to  
4 the effect that the Commission will determine the procedures  
5 to be used at the hearings as it sees fit consistent with  
6 the subject of those individual hearings, then anyone who might  
7 feel that cross-examination, for example, was inappropriate in  
8 the context of a particular subject matter, would have ample  
9 time to object to it then and there.

10                   I wouldn't think it would be worth anybody's  
11 time to spend a lot of time objecting to a provision in the  
12 Commission's regulations providing that the hearing procedures  
13 for any given matter will be those set by the Commission  
14 for that matter.

15                   I suppose they could get up and say for God's sake  
16 don't let it be cross-examination but it would be a pretty  
17 nebulous exercise. The place where the objection would come  
18 with a lot more focus would be at the time the hearing were  
19 being set.

20                   MR. GUHIN: If I may add one thing here, it seems  
21 under 110, 113, 120, 121 (e) it says at the end of the  
22 section: "The Commission may defer any hearings, consolidate  
23 applications for hearings, narrow or broaden the hearing  
24 issues or take other actions as appropriate." It seems that  
25 formulation itself is giving the Commission a fair amount  
of discretion. Would you agree?

1 MR. SHAPAR: I would not agree. I think reading the  
2 Statement of Considerations, although you can milk the  
3 language to extract some flexibility, I think the clear  
4 message this Commission has- given the outside as of this  
5 point in time is there would be no cross-examination. If the  
6 Commission wishes to provide an opportunity for cross-examination,  
7 my recommendation would be we don't keep it quiet, we  
8 articulate it.

9 COMMISSIONER KENNEDY: And if we do, I think we  
10 should do that in fairly unequivocal terms, (a), and (b)  
11 I think then we should give everyone an opportunity to know we  
12 have now changed our minds, and ask if they have any comment  
13 on that.

14 Having changed our minds once, who is to say that  
15 we might wish to change it even again?

16 MR. SHAPAR: That is the genius of the administrative  
17 process.

18 COMMISSIONER KENNEDY: You taught me well, counsel.

19 MR. MALSCH: On page 117, paragraph (f) says:  
20 "Participants and witnesses will be questioned orally or  
21 in writing only by the presiding officer."

22 COMMISSIONER GLINSKY: By the presiding officer?

23 MR. SHAPAR: The Commission, if they conducted the  
24 hearing, or any board the Commission appoints. That is all  
25 the more reason why I think you would need to change the rule

1 if you wished to go in that direction.

2 COMMISSIONER GLINSKY: By the way, are the  
3 informational requirements in the applications spelled out  
4 here? There was one point here that I wondered about. Someone  
5 suggested that that either waste management or fuel storage plans  
6 of foreign customers ought to be indicated on the application.  
7 I can't find the place.

8 I think you responded by saying that was inappropriate  
9 and unnecessary.

10 MR. GUHIN: It is page 85 of the rules.

11 VOICE: Or 89, really.

12 COMMISSIONER GLINSKY: There is an earlier place  
13 where you dealt with that comment.

14 MR. GUHIN: In the statement, page 21.

15 COMMISSIONER GLINSKY: Why do you think it would be  
16 inappropriate to request the customer to indicate or the  
17 applicant to indicate the fuel storage plans?

18 MR. GUHIN: I think the first view here, the initial  
19 view, is that the staff drafted this on page 21, is that  
20 this was not a requirement as such that should be laid on the  
21 applicants, but if we wanted the information, it should come  
22 through our governmental channels, or through actually the  
23 governmental context, rather than putting this information  
24 requirement on the applicant himself.

25 COMMISSIONER GLINSKY: But there is no suggestion then

1 that this is not appropriate information to be included?

2 MR. GUHIN: Absolutely not, no, that is not the  
3 suggestion. I think when we want that information, the Commission  
4 wants it, in terms of the processing, that we can gather that  
5 information -- in fact, in some of our applications we do  
6 have statements on end-use requirements, or if it is known  
7 to the applicant, he will say it is planned to be reprocessed  
8 after four or six years, what-have-we. that is about the most  
9 they know, however, and as we noted in our Commission papers  
10 in that regard, there are no specific plans identified as such,  
11 but that is just a reflection of their over-all intentions of  
12 what they plan to do with the fuel.

13 COMMISSIONER GLINSKY: I would think we would routinely  
14 want to know this kind of information, would want to include  
15 it in any of our standard inquiries. You are saying this  
16 doesn't preclude that?

17 MR. GUHIN: Not at all, no. I think, as I read it,  
18 it doesn't preclude it, and in fact, the regulations also say  
19 we can request other information as we deem appropriate,  
20 either from the applicant or from the Executive Branch as a  
21 matter of course.

22 COMMISSIONER BRADFORD: Okay, I guess I understand  
23 what you are saying. The last sentence says "It is  
24 unnecessary and inappropriate to request the license applicant to  
25 provide such information." What you really mean there is

1 presumably if we ask it of the State Department, the license  
2 applicant, or somebody is going to have to provide it?

3 MR. GUHIN: Right. I guess what we are saying  
4 here is that really should be reformulated on page 21, that  
5 it is inappropriate to put this as an information requirement  
6 on him in the initial process of the application, although  
7 as requested, or as deemed desirable, it would be made available  
8 through the government channels, or something like that.

9 You know, we also would have no qualms in asking  
10 an applicant, if known, to let us know, advise us, or  
11 something like this. In cases where he does know, I don't  
12 think he would feel any reservation at all about providing  
13 that.

14 COMMISSIONER KENNEDY: The applicant in this case  
15 being generally a freight forwarder?

16 MR. GUHIN: That's right. He only knows, for  
17 example, if the other fellow tells him, say a particular reactor  
18 operator overseas says yes, I am going to use it in this  
19 reactor, and I plan to have it reprocessed afterwards. That  
20 is about the extent of it. Then the applicant knows. Otherwise  
21 the applicant would really be guessing.

22 COMMISSIONER GLINSKY: But if we thought it  
23 important that this information be supplied, the applicant  
24 could obtain it from the user of the fuel, or whatever.

25 COMMISSIONER KENNEDY: Or alternatively stop being the

1 applicant, since his customers would say why don't you go  
2 peddle newspapers or some other junk for a living, don't  
3 bother me with your irrelevancies; I asked you if you would  
4 ship me this material, if you can't get me a license, go  
5 somewhere else and do your business.

6 COMMISSIONER GLINSKY: Well, it turns out we have  
7 certain requirements.

8 COMMISSIONER KENNEDY: There is no question about  
9 the requirement. The question is is it unreasonable to be  
10 lacing this requirement on a guy who is essentially a shipper,  
11 you know. He is not involved in what they do with the  
12 material; all he does is pick it up here and deliver it to  
13 them, and having delivered it, he has no further responsibility  
14 for it at all.

15 COMMISSIONER GLINSKY: Okay. You are saying this  
16 is the wrong person to do it.

17 COMMISSIONER KENNEDY: Yes, that is all I am saying.  
18 I am not suggesting that maybe the customer may feel  
19 he is the wrong guy to be asking for that information. The  
20 customer may be fully prepared to give it, through their  
21 embassy, as they do; end-use statements are not usually provided  
22 directly by the freight forwarders, they come from the embassy.

23 MR. GUHIN: No, we have eliminated those requirements  
24 in here that the applicant provide an end-use statement from  
25 the reactor operator, because you get those same assurances

1 as to the authority of the reactor to have this material,  
2 the fact it will be under agreement, from the embassy  
3 itself.

4 COMMISSIONER KENNEDY: Through government channels.

5 MR. GUHIN: So in the case where we wish it, we  
6 could request it through the Executive Branch, government  
7 channels, and get it. In other cases, in some reactor  
8 reviews we have asked the spent fuel capacity, if the applicant  
9 knows it, or through the Executive Branch, whichever one.  
10 The applicant in that case, for example, would not know if  
11 he is not in charge of that part of the reactor construction  
12 abroad.

13 COMMISSIONER GLINSKY: I would think the Executive  
14 Branch would want to know this, too.

15 MR. GUHIN: Yes, that's right. Of course there  
16 will be time, if the legislation passes, you have time of  
17 both the international fuel cycle evaluation and the renegot-  
18 iation effort and I guess in some cases the plans would be  
19 heavily dependent upon the outcome of those efforts.

20 COMMISSIONER BRADFORD: There is another reason,  
21 which is if you got mis-information or there was a pattern of  
22 mis-information, you would have to deal with the applicant  
23 and straighten it out at that point. It is cleaner if  
24 the mis-information has come directly to you, you then know  
25 who you have to go talk to.

1 MR. GUHIN: I guess there is a tactical question  
2 involved here, even in our specific reviews, that if one  
3 is indeed dealing with "X" country on the question of in  
4 effect whether reprocessing, under what controls, what  
5 conditions, whether one would want a conscious reaffirmation  
6 that they plan to reprocess this stuff, when that very issue  
7 is indeed part of a broader dialogue as to where we are going.

8 But again, as I say, I think the government channel  
9 is the way to get that information.

10 CHAIRMAN HENDRIE: Could I ask about 110.90? I  
11 have a recent filing, January 10, from you, Jim, on this.  
12 What was the issue here?

13 MR. SHAPAR: Whether or not the filings by the  
14 staff and the Executive Branch with respect to the question  
15 of holding a discretionary hearing should be a formal  
16 filing served on all parties or be handled informally. There  
17 was a split among the staff, which has been resolved in  
18 accordance with the discussion in the piece of paper you  
19 just referred to.

20 CHAIRMAN HENDRIE: "The views of the staff and the  
21 Executive Branch on discretionary hearings be public except  
22 to the extent that there is classified material involved, or  
23 it involves information which the Commission staff or the  
24 Executive Branch has determined would adversely affect the  
25 common defense and security or the conduct of U.S. foreign

1 policy if released. " The Commission will review that  
2 decision or that finding.

3 MR. GUHIN: That is just in the discretionary  
4 hearing. 90 refers to a hearing as a matter of right. This  
5 is an addition to 110.90.

6 CHAIRMAN HENDRIE: So it doesn't overlap or require  
7 other changes in (b)?

8 MR. GUHIN: No.

9 CHAIRMAN HENDRIE: I take it the staff recommendation  
10 then is that paragraph (c) of 110.90 on the separate sheet  
11 is part of the proposal before us at this time?

12 MR. GUHIN: Yes.

13 CHAIRMAN HENDRIE: Peter, you had some other  
14 questions?

15 COMMISSIONER BRADFORD: On page 29, paragraph 37,  
16 those are the criteria for holding a hearing?

17 MR. GUHIN: No, for a license.

18 COMMISSIONER BRADFORD: Is that then an accurate  
19 statement? For example, I guess it is true the Commission  
20 as a whole does. It seems to me there has been some dissent  
21 on this.

22 CHAIRMAN HENDRIE: Can somebody elaborate a little  
23 bit?

24 COMMISSIONER GLINSKY: The criteria being what?

25 MR. ROTHCHILD: Criteria for acting on a hearing  
request.

1           One of the criteria that was suggested by the  
2 intervenors, such as the non-proliferation impact and other  
3 things, they wanted us to spell out in the particular export  
4 license. We just felt the criteria we had set forth were  
5 detailed enough to consider all factors, including non-pro-  
6 liferation aspects of the various licenses before the  
7 Commission and the significance of that particular license,  
8 that that additional criteria was not necessary, the  
9 Commission had enough flexibility.

10           MR. SHAPAR: I think a counterpart of the question  
11 would be health and safety in domestic licensing.

12           COMMISSIONER BRADFORD: You say the present criteria  
13 are adequate. You mean adequate to encompass the concerns  
14 expressed?

15           MR. ROTHCHILD: Yes.

16           COMMISSIONER BRADFORD: On that same page, talking  
17 about the ability of one Commissioner to bring a matter to  
18 the Commission's attention, there seemed to be a feeling if one  
19 Commissioner wanted to bring something to the Commission's  
20 attention, that could certainly be done.

21           On this question of whether or not there should be  
22 a hearing, it would have to be a vote of the majority.  
23 It would be possible, with 5 Commissioners, 2 could want a  
24 hearing, but there would still be no hearing.

25           MR. ROTHCHILD: No. It says right here, we used  
the phrase "by consensus." The way that is generally used

1 does not necessarily mean a pure vote, generally you are  
2 able to discuss things and come up with a --

3 COMMISSIONER BRADFORD: I understand that. But  
4 failing that, you could have a 3 to 2 vote and not have a  
5 hearing.

6 COMMISSIONER KENNEDY: Yes, that is what it says  
7 now.

8 CHAIRMAN HENDRIE: What page is this?

9 COMMISSIONER BRADFORD: Page 29, next to last  
10 paragraph. That procedure, I gather, is somewhat more  
11 rigorous than the U.S. Supreme Court, which provides one less  
12 than a majority can have a hearing.

13 MR. MALSCH: It also parallels our domestic  
14 practice, where the Commission, in deciding to hold a hearing  
15 also acts on the basis of a majority.

16 COMMISSIONER BRADFORD: Wait a minute. In an  
17 intervention petition, that wouldn't normally come to the  
18 Commission. You would be talking about the licensing  
19 board.

20 MR. MALSCH: Well, it would be, since it is delegated  
21 generally, it would be a majority decision by a licensing  
22 board, specifically appointed to rule on the intervention  
23 petition. If there was an appeal, it would be a Commission  
24 majority decision.

25 MR. BRADFORD: That is different. If you are deciding

1 whether or not to admit an intervenor, I don't think one  
2 would argue that one Commissioner's vote or one board member's  
3 vote should be sufficient to get an intervenor in if the  
4 other two didn't want him.

5 MR. MALSCH: the same holds true in a Commission  
6 decision in the domestic area to grant the hearing as a matter  
7 of its discretion, or rule-making or licensing matters. That  
8 would also require a majority vote, although it has not happened  
9 very often.

10 COMMISSIONER BRADFORD: I am inclined to think that  
11 if  
12 it is unlikely that/a substantial group of commissioners  
13 wanted a hearing, the Commission as a whole wouldn't go along  
14 with it. But I think that the rejected procedure here is marginally  
15 sounder than the one that is suggested.

16 MR. GUHIN: The one that was rejected, another  
17 aspect of that, it could allow, when 4 commissioners did not  
18 want a hearing, one commissioner could have a hearing.

19 COMMISSIONER BRADFORD: No, 3 to 2.

20 MR. GUHIN: Excuse me, you are right. If you had  
21 3 commissioners, then it could be 1. That is right. So  
22 it could be 2 to 1. I see.

23 COMMISSIONER GLINSKY: Five person Commission, you  
24 mean.

25 CHAIRMAN HENDRIE: I have become lost in the discussion  
I am sorry to say. Can somebody recap it and re-acquaint me

1 with what it is?

2           COMMISSIONER BRADFORD: I don't know that it is a matter  
3 of high importance in the real world, because I think in  
4 terms of the way we have worked thus far, if two commissioners  
5 wanted a hearing out of 4, you would be likely to have one  
6 and probably the same would be true of five.

7           COMMISSIONER GLINSKY: You are talking about 3,  
8 aren't you, that is a majority.

9           COMMISSIONER BRADFORD: In the recommendation I am  
10 talking about. But it seems to me on the question of whether  
11 or not something should be heard, that there should be a  
12 slightly lower threshold for that than is required to actually  
13 make the decision.

14           COMMISSIONER KENNEDY: I would have no objection  
15 to this. But I would like to have Mr. Shapar's thoughts about  
16 what effect this might have on the rest of our rules.

17           MR. SHAPAR: I don't think it need have any  
18 effect on the rest of your rules, except that I would assume  
19 you will be getting a suggestion for a counterpart rule  
20 in the domestic area, and you could reasonably anticipate  
21 that. I suppose following that path, you would say well,  
22 number one, it would be a good idea there, too, or the  
23 other alternative would be some way of distinguishing between  
24 the domestic and foreign policy area.

25           COMMISSIONER BRADFORD: My off-the-top-of-my-head

1 feeling is there probably is not. The same argument here  
2 would hold there.

3 COMMISSIONER KENNEDY: So what we are doing then,  
4 in effect, if we change this, the effect is we are changing our  
5 rules generally.

6 MR. SHAPAR: It would turn out that way.

7 COMMISSIONER KENNEDY: That is a fairly important  
8 decision we ought to make.

9 COMMISSIONER BRADFORD: Would it make a lot of  
10 substantive difference? I can't recall a time since I have  
11 been here where we decided whether or not to have a hearing  
12 on the basis of a vote. These things are generally done by  
13 consensus.

14 COMMISSIONER KENNEDY: It wouldn't make any sub-  
15 stantive difference unless one questions why change our  
16 existing rule.

17 CHAIRMAN HENDRIE: I guess there could come  
18 circumstances in which the decision to hold the hearing  
19 would involve such an extended and substantive piece of business  
20 that it would be a significant decision, not just a matter of  
21 developing more information to lead to a decision, but it in  
22 itself could be a significant step.

23 In that circumstance, I would think a majority of  
24 the Commission ought to believe it should be done. That is,  
25 I don't for myself see a utility in going to a reduced number.

1 Furthermore, I am having trouble finding the  
2 language. This is 110.83?

3 MR. SHAPAR: Page 29.

4 CHAIRMAN HENDRIE: Page 29 of the commentary?

5 COMMISSIONER KENNEDY: The paragraph is 83.

6 COMMISSIONER BRADFORD: I won't hold you to what you  
7 just said after you read the language.

8 CHAIRMAN HENDRIE: 83 simply says the Commission  
9 will do this and the Commission will do that, right? And that  
10 is understood pretty clearly to be a majority.

11 COMMISSIONER BRADFORD: There are certainly bigger  
12 fish to fry than this. I guess I would prefer the one less  
13 than a majority, but certainly we could leave it and pass  
14 on.

15 COMMISSIONER GLINSKY: Are you talking about a  
16 hearing as a matter of right or discretionary?

17 COMMISSIONER BRADFORD: As a matter of right.

18 COMMISSIONER GLINSKY: The point is that is still  
19 determined by the Commission.

20 COMMISSIONER BRADFORD: YXs, whether or not someone  
21 has standing, yes, I think that really is not the drift  
22 here.

23 COMMISSIONER GLINSKY: That has to be a Commission  
24 decision.

25 COMMISSIONER BRADFORD: I keep having difficulty with

1 whether standing -- I guess it is something you either have  
2 or you don't. The Commission makes a decision either rightly  
3 or wrongly. But there isn't any point in trying to deal with  
4 standing in a regulation, you can't grant it or withhold it, apart  
5 from what the Act does for you.

6 MR. SHAPAR: What you do is list the factors you  
7 are going to consider.

8 COMMISSIONER GLINSKY: It has to be the Commission.

9 MR. SHAPAR: It is the Commission that is granting  
10 or denying.

11 COMMISSIONER BRADFORD: Granting or denying a  
12 hearing, but can the Commission grant or deny standing, or is  
13 that done by the statute?

14 MR. SHAPAR: It is done by the Commission.

15 COMMISSIONER KENNEDY: The Commission decides whether  
16 under the statutes it concludes that they have standing.

17 COMMISSIONER BRADFORD: But it is not discretionary.  
18 In other words, you don't have standing because the Commission  
19 says you have standing, it is because --

20 MR. SHAPAR: You are entitled to as a matter of  
21 law. But the Commission has to decide the matter of law.

22 COMMISSIONER BRADFORD: If the court felt the  
23 Commission had decided that wrongly, the fact the Commission  
24 decided it doesn't weight with the court.

25 MR. SHAPAR: Except the unusual deference or lack

1 thereof the courts give to Commission decisions.

2           COMMISSIONER GLINSKY: So we are really talking about  
3 discretionary hearings, whether or not to grant discretionary  
4 hearings, how many commissioners it takes to do that.

5           CHAIRMAN HENDRIE: I would certainly opt for -- I  
6 think we do try to see where the consensus of the group lies.  
7 And I expect that is what we will always continue to do.

8           But barring that, I would think a majority decision  
9 is the appropriate way for the Commission to decide its  
10 business.

11           COMMISSIONER BRADFORD: What is the rationale -- I  
12 think I know it in general terms -- for something like the  
13 Supreme court doing it differently? I take it their  
14 feeling is on a decision as to whether or not somebody should  
15 be heard, it is barely possible after you have actually heard  
16 them, they will have said something that made a real  
17 difference, so the threshold for hearing them ought to be a  
18 little lower than the threshold for actually upholding  
19 their contentions.

20           You do more damage if you refuse to hear them at  
21 all than you do if you reject their contentions.

22           MR. STROIBER: If you have a decision in place by  
23 a lower court, that has come up through several layers of  
24 review, first by the trial court and then by an appellate  
25 court, and I would think the rationale is because of the

1 press of business, since the court can't hear everything, it  
2 ought to only consider matters of great significance. And  
3 therefore you have to have some device for winnowing the wheat  
4 from the chaff and the idea is if four members of the court  
5 think this is a significant enough legal issue, then it  
6 probably warrants taking the time out of your schedule to do  
7 that.

8 Here, in these kinds of cases, you don't have a  
9 decision of any body below, you are considering whether or not  
10 you will grant a hearing.

11 COMMISSIONER GLINSKY: The question is why 5  
12 justices instead of 4? Probably because at that level they  
13 get just the right number of cases.

14 MR. STRIBER: I am informed that four members  
15 can grant certiorari, but my informant notes, and it is  
16 well taken, that it takes 5 to declare certiorari has been  
17 improvidently granted, and they take a majority vote before  
18 they can toss it out again.

19 COMMISSIONER BRADFORD: But it would also take 5 to  
20 turn it down -- I see. It would take 6 to turn them down in  
21 the first place.

22 CHAIRMAN HENDRIE: If it takes a majority of the court  
23 to get an item before the court, then presumably a bare majority  
24 of the court, if that were the case, a bare majority of the  
25 court could exclude from consideration by the court a whole

1 class of petitions for review. You haven't got the same  
2 proposition here. The request for a hearing on a subject comes  
3 and it gets considered by the Commission, should the request  
4 be granted or should it not. And there isn't any mechanism  
5 for denying the consideration of that request, indeed the  
6 Commission has to make an answer to the petition.

7 Now in making the answer there is a very substantial  
8 difference in the course of events for that particular piece  
9 of business, whether there is a hearing held or not held.  
10 There may also be a very substantial difference for the  
11 petitioner's conduct of business in that area, whether a  
12 hearing is held or a hearing is not held.

13 It seems to me appropriate that it is a  
14 serious policy decision or may be one, particularly in the  
15 export area, and it is appropriate that that decision to go  
16 to hearing or not go to a hearing should be made by a  
17 majority of the Commission rather than a majority less one.

18 COMMISSIONER BRADFORD: I think I agree with most  
19 of what you said, but would come out differently, again,  
20 because it is possible that those seeking a hearing might  
21 have an impact on the Commission's decision, the decision  
22 to hear them ought to allow, if you will, a slightly greater  
23 margin for error than the decision to turn them down after hearing  
24 them.

25 The decision not to hear them is really a decision

1 that there is no possibility that what they say will  
2 make any difference to you.

3 It is something to me that doesn't respond well to  
4 the proposition that they should be turned off just as easily  
5 as turned down.

6 COMMISSIONER GLINSKY: You are saying there ought to  
7 be a lower threshold for hearing people.

8 I think that is certainly right. I think it is  
9 also probably right that individual commissioners would  
10 themselves apply a lower threshold to that.

11 COMMISSIONER BRADFORD: If we could write that into  
12 the regulations, I would relax.

13 COMMISSIONER KENNEDY: As a matter of fact, history  
14 suggests that they have.

15 COMMISSIONER GLINSKY: I think that is true.

16 COMMISSIONER KENNEDY: I think on precisely the  
17 grounds you are citing.

18 COMMISSIONER BRADFORD: What we are talking about  
19 here is the question of what happens if what we regard as  
20 an unlikely contingency should actually occur, then what  
21 is the right way to handle it.

22 MR. SHAPAR: That is usually why you have rules.

23 CHAIRMAN HENDRIE: Let me note this as another point  
24 of difference here. Do you have other points?

25 COMMISSIONER BRADFORD: If anyone else has one, why

1 don't you take it up while I fumble around for it here.

2 CHAIRMAN HENDRIE: I have run down at the moment.

3 Let's see. While Peter is looking, I would note that  
4 110.40 (b) now says we are going to tell people the  
5 reason for delays.

6 MR. SHAPAR: This was in response to a comment, I  
7 believe.

8 COMMISSIONER KENNEDY: If it hadn't been, I would  
9 have suggested it myself. I think it is a grand idea,  
10 in the interest of responsibility to the public, which includes  
11 the applicants for licenses.

12 MR. GUHIN: Something along this line should be  
13 included in non-proliferation as well.

14 MR. SHEA: A possible time limit on NRC reviews  
15 or something, that's right.

16 CHAIRMAN HENDRIE: I guess I don't have a particular  
17 problem with it, I would just note that I expect it will give  
18 rise to a need for creative draftsmanship.

19 MR. SHAPAR: You mean put the word "truthfully"  
20 before --

21 CHAIRMAN HENDRIE: No, that's no problem.

22 COMMISSIONER KENNEDY: In total candor, I think  
23 it should give us no difficulty at all.

24 MR. GUHIN: I think in most instances if we  
25 have sought information from the Executive Branch, or what-have-  
you, they can be informed of this. They know it anyway.

1 MR. SHAPAR: It is either you or the Executive  
2 Branch.

3 COMMISSIONER KENNEDY: We can give them an envelope  
4 in which they can put their next request for information.

5 MR. SHAPAR: A form with two boxes, and they just  
6 check it.

7 CHAIRMAN HENDRIE: The public notice requirements  
8 are changed. You now are noticing receipt of an application  
9 for a utilization facility --

10 MR. SHEA: We have always done that.

11 MR. SHAPAR: What is new is the nuclear material.

12 CHAIRMAN HENDRIE: One can go for more?

13 MR. SHAPAR: Yes. And 10,000 kg or more of  
14 source material.

15 COMMISSIONER KENNEDY: In that connection, Mr.  
16 Chairman, that leads to that part which deals with the public  
17 notice and procedure, and w note 110.80 helps Commissioner  
18 Bradford in his concern about hearing from the public who may  
19 have something significant to say on the matter that we would  
20 certainly wish to have before us in our decision, because it  
21 encourages public comment on all license applications, and such  
22 licence applications in the preceding section, in 110.70,  
23 will be noticed in the public document room. And they are  
24 encouraged to comment to the extent they wish to do so  
25 within 30 days. And it duly notes, as is appropriate indeed,

1 that we would take these comments into account. And if  
2 appropriate, also request the applicants to respond to them,  
3 which would give us a fuller background and understanding of  
4 any issues that may be raised, a hearing notwithstanding.

5 COMMISSIONER BRADFORD: These are fine as far as  
6 they go, no problem with that.

7 CHAIRMAN HENDRIE: Did you find some more?

8 COMMISSIONER BRADFORD: Just one. Is there out-  
9 standing still a paper of some sort on the cost of exemptions or  
10 non-exemptions for source materials?

11 MR. SHEA: That's right, we do have a staff paper  
12 in preparation on the issue of whether we should continue to  
13 exempt those exports from an agreement about cooperation  
14 requirements and the associated safeguards. That is a paper  
15 we have in process that I believe I mentioned last week at the  
16 briefing.

17 COMMISSIONER BRADFORD: And these regulations would do  
18 what on that subject? They would continue the exemption?

19 MR. SHEA: Continue the exemption.

20 MR. GUHIN: As I recall it, under the standards  
21 source material may be exported upon a finding that it is not  
22 inimical, which in effect every time we do exempt it, we would  
23 not have to make a specific exemption, which we do now, which  
24 is standard for source material to non-nuclear end uses.

25 So the regulations as such I don't think call for  
the agreement of cooperation requirement for source

1 material. The agreement comes only in effect for special  
2 nuclear material, or for a utilization facility, and not for  
3 the 100 grams or so of contaminant in the material.

4 So under the regulations if you had source material  
5 that was not to go under an agreement, you would have no  
6 exemption to make.

7 On the other hand, you could still determine, as  
8 we have in our Security Branch reviews, that certain source  
9 material will go under agreement, and we would want those  
10 assurances, the most obvious being the source material going  
11 into fuel, whether that be uranium or thorium.

12 That doesn't preclude that; in fact, that is the  
13 working relationship we have with the Executive Branch.

14 So you are right, at this stage at any rate, under  
15 these, we would continue to work the way we have been working.

16 COMMISSIONER BRADFORD: We would be doing it under  
17 a regulation which said that they were exempt. So it would  
18 be just a sort of working agreement we have with the Executive  
19 Branch that would prevent them from being exempt?

20 MR. GUHIN: Yes, as I read this on page 93, it  
21 says we have to make the non-inimical determination, and, two,  
22 that the proposed export of utilization facility or S and M  
23 would be under the terms of an agreement for cooperation.

24 COMMISSIONER BRADFORD: That is in terms of issuing a  
25 license. It doesn't have anything to do with granting an

1 exemption, does it?

2 VOICE: No, but the question raised here is  
3 how about the applicability of the agreement for cooperation  
4 for source material for nuclear uses. Isn't that the  
5 question? Why doesn't it say under (a)(2) the proposed export  
6 utilization facility or S and M or source material for  
7 nuclear end uses would be under an agreement for cooperation?

8 MR. GUHIN: I think you get into definition problems  
9 by adding that. Under our procedures it would be subject  
10 to an agreement. The question came with DOE and otehrs  
11 if you say source material for nuclear uses, how do you  
12 really start defining that in a regulatory framework. I  
13 think we ran into a lot of difficulties in that sense, because  
14 then you can start talking about gram quantities for nuclear  
15 uses, too. Then you have to go through the exemption  
16 process for them each time.

17 COMMISSIONER BRADFORD: Is that paper coming along  
18 pretty soon?

19 MR. SHEA: I would say a few weeks yet.

20 MR. GUHIN: Yes, it is in very rough draft form now.

21 MR. SHEA: I think your sense of urgency could  
22 affect the timing.

23 COMMISSIONER KENNEDY: That would be novel.

24 COMMISSIONER BRADFORD: It does seem to me to be  
25 somewhat relevant in deciding whether or not to put this  
out.

1           MT. SHEA: The preliminary staff work does indicate  
2 that it appears reasonable to continue to exempt it. So  
3 we felt comfortable that this was consistent.

4           MR. GUHIN: The roughness in the analysis is  
5 sort of the backdrop to that, the information which supports  
6 one conclusion or another, depending on what it is. When  
7 I say very rough, I think that is where it is rough. But  
8 there has been nothing in the research thus far that has  
9 led the staff to conclude, even tentatively, that the way to  
10 go is to try to put all source material for non-nuclear end  
11 uses under an agreement.

12           They found, for example, you would have to take  
13 so many 747s apart, it would be a very uneconomical source  
14 of source material if one wanted to do that, you know. And  
15 shielding in doctors' offices, and so on.

16           CHAIRMAN HENDRIE: Now where does that leave us?  
17 There have been two matters identified on which there is  
18 some difference of opinion. One of them is legislative type  
19 hearings, and the second whether it should be two commissioners  
20 or three to grant a hearing, where that is a matter of  
21 Commission discretion.

22           This last matter is or is not in your view a  
23 difference which needs to be settled?

24           COMMISSIONER BRADFORD: I guess I don't feel that I  
25 have enough grasp of it to really make an issue out of it at this  
point.

1           If we were going to take action right now, I  
2 wouldn't say anything one way or another. If we are not  
3 going to take action right away --

4           CHAIRMAN HENDRIE: Then it would come up naturally.  
5 Would you tell us again, there is some desirability, you were  
6 telling us last week, to get on with these rules.

7           MR. STROIBER: The real difficulty, I think, and  
8 Tom can perhaps fill us in on this, we have some statutory  
9 obligations to meet in terms of publishing the rule and  
10 making it available to GAO, is that correct, before we can  
11 actually put it in place.

12           Mr. Dorian. Once we make the Federal Register  
13 announcement, we would like these rules in place because there  
14 has to be a review by GAO. That review takes 45 days.

15           COMMISSIONER KENNEDY: Would you refresh our memory  
16 as to why that is true? What is the nature of that requirement?

17           MR. DORIAN: GAO looks at any record-keeping or  
18 reporting requirements, and also at the content of any  
19 application made by an export licensee. In this case we have  
20 said that we are not changing in any substantial way our  
21 record-keeping, or reporting requirements, or the information  
22 that we request from applicants.

23           In fact, we may be reducing that load. Now there  
24 is a question as to whether or not the GAO review is  
25 necessary. We will find out the answer to that question very

1 soon. But if a GAO review is necessary, it takes 45 days  
2 under the current procedures worked out between GAO and  
3 this Commission, and added to that 45 days is another requirement  
4 of 30 days under the APA for publication of a rule.

5 So in fact it would take 75 days from the time you  
6 initially announced in the Federal Register to publish the  
7 rule.

8 We have informally contacted GAO and they said that  
9 they would be looking at it, and as soon as they have reviewed  
10 it, we could make our Federal Register announcement and come out  
11 and say in the announcement that they have reviewed it, so  
12 now from this date it will take 30 days. It will take  
13 less than 75 days totally.

14 The second thing is if you want to you could  
15 probably divorce the procedural part of the regulations from  
16 the substantive part, that is, the content of the  
17 applications, the forms required, the exemption procedure,  
18 other procedures, in sub parts 8 A through F, you could divorce  
19 from the other parts, G through L, those concerning hearing  
20 requirements, rule-making and so on, and those need not be  
21 reviewed by GAO.

22 So the ones the court is concerned about you could  
23 say, assuming you agree, that 30 days from the time of  
24 publication in the Federal Register they can become effective.

25 COMMISSIONER GLINSKY: What is the importance of the

1 effective date? Doesn't the court simply want to take a  
2 look at the rules?

3 MR. STROIBER: I think that is probably true,  
4 Commissioner. I think, however, depending on what additional  
5 interventions we may get, and it looks like there are some  
6 interesting questions coming up that might provoke that sort  
7 of thing, we would want to have them in place as early as  
8 possible.

9 I think in terms of the court's view, the date is  
10 irrelevant. They want to see what it says at the earliest  
11 possible date.

12 COMMISSIONER GLINSKY: You could show it to the  
13 court at the same time you show it to GAO. After all,  
14 reporting requirements are not going to affect it.

15 MR. DORIAN: You show it to GAO at the time you  
16 have agreed to these rules. At that point you can go to the  
17 court and say you have agreed now, you can look at it.

18 COMMISSIONER GLINSKY: So what is the relevance of  
19 the effective date?

20 MR. DORIAN: To the extent you might want to have  
21 procedures in place in connection with any other proceeding.

22 MR. SHAPAR: It is a question of how much urgency  
23 Carl feels in the matter of the court.

24 MR. STROIBER: And potential other interventions.

25 MR. ROTHCHILD: In dealing recently with LAU and HEU

1 intervention petitions, we ran into several snags and much  
2 discussion on how we go about soliciting public comments.. I  
3 think those kinds of problems are resolved by these regulations  
4 and the sooner we get them into force the better off we are  
5 as far as dealing with future interventions and eliminating  
6 the number of Commission meetings on this kind of subject.

7 COMMISSIONER KENNEDY: Could we look at the other side  
8 of that coin?

9 Suppose there was a delay, what would be the bad  
10 things that would result?

11 MR. STROIBER: I think that depends on what  
12 posture the Tarapur matter arrives at. We expect to receive  
13 the Executive Branch views on that in short order. I don't  
14 know whether Jim can shed any light on that or not.

15 COMMISSIONER GLINSKY: Let me understand, Carl.  
16 That will then be the license which is before the court?

17 MR. STROIBER: That is absolutely correct.

18 COMMISSIONER KENNEDY: The one which we will be  
19 receiving for review?

20 MR. STROIBER: Yes. And therefore in the absence  
21 of any procedures, you know, if the intervenors are so  
22 inclined to challenge any licensing action of this Commission,  
23 the court has previously indicated on the occasion when we  
24 issued the earlier license that they were disturbed by the  
25 absence of Commission regulations here, and I think that could

1 have an adverse impact on our litigation posture and the ability  
2 of the Commission to act.

3 COMMISSIONER KENNEDY: Would a further consolidation  
4 process, such as that taken in the past, help?

5 MR. STROIBER: Well, I think legally that would  
6 perhaps remove the mootness issue as a legal matter. However,  
7 I think it is also possible -- well, in the first place,  
8 the intervenors have not sought any sort of consolidation  
9 of the follow-on license with the present license.

10 COMMISSIONER GLINSKY: Is there a follow-on license?

11 MR. STROIBER: Yes, there is. There are two  
12 license applications now.

13 COMMISSIONER GLINSKY: There are two more applications  
14 in-house, in effect. Have they been sent to the Executive  
15 Branch?

16 MR. STROIBER: They have both been sent to the  
17 Executive Branch and we have not received views on either  
18 one of those at present.

19 However, we have President Carter's statements in  
20 New Delhi --

21 COMMISSIONER GLINSKY: Wait a minute. Are those  
22 two plus one?

23 MR. STROIBER: No, just two.

24 COMMISSIONER GLINSKY: So there are two, one of  
25 which we have heard about.

MR. STROIBER: One of which we haven't heard about.

1 Well, we have heard about, but not officially.

2 CHAIRMAN HENDRIE: It seems to me there is some  
3 utility in being able to put this body of material together --

4 COMMISSIONER GLINSKY: Certainly.

5 CHAIRMAN HENDRIE: Peter, what shall we do with the  
6 two where we have differences?

7 COMMISSIONER BRADFORD: I don't know, we never really  
8 focused on the question of who felt how about the proper  
9 hearing format.

10 For myself, I would be inclined to reserve the  
11 question of specific procedures to be used in individual  
12 hearings for decision at the time that those hearings are  
13 set up. And that would, as Howard indicated, require some  
14 rewriting.

15 COMMISSIONER KENNEDY: And it raises the question  
16 that I raised, and I feel and I think Howard -- I won't  
17 speak for Howard in this regard --

18 MR. SHAPAR: This is policy, you don't need my  
19 views on this.

20 COMMISSIONER KENNEDY: I know that, I appreciate  
21 your discerning that as well as stating it.

22 COMMISSIONER BRADFORD: You are not saying it is  
23 legally necessary to put them out again?

24 MR. SHAPAR: Right.

25 COMMISSIONER KENNEDY: I am not suggesting it is

1 legally necessary. I am suggesting our basic doctrine of  
2 fairness imposes that obligation upon us.

3 CHAIRMAN HENDRIE: I would hate to have to go  
4 around again. It would take some time.

5 COMMISSIONER KENNEDY: Not necessarily.

6 COMMISSIONER BRADFORD: If everybody agrees with  
7 me, then that is not an area of difference. But assuming  
8 they don't --

9 COMMISSIONER KENNEDY: You are, I think, saying it  
10 would take some time. I don't think that is necessary at  
11 all. How long would it take? The language could be written  
12 this afternoon. A letter would be drafted to the parties  
13 who commented on the matter, in particular, because in this  
14 case, surely the parties who commented and who now would be  
15 satisfied would hardly need too much time to come back and  
16 say what a commendable act this was. I could help them do  
17 that in minutes.

18 MR. SHAPAR: But there is a step that hasn't been  
19 mentioned.

20 COMMISSIONER KENNEDY: And then there are those who had  
21 a misapprehension which we gave them, and which we are now  
22 correcting, and they will probably take a little longer. But  
23 I daresay they would respond fairly rapidly, too, and  
24 then we would have before us a set of views on both sides  
25 of that question, whereas now we have them on only one side and  
by our own action, having foreclosed the question, you see.

1 MR. SHAPAR: I think the comments could be  
2 solicited and received fairly promptly. I think that the time-  
3 consuming part of the problem would be resolving the  
4 controversy that I think we all predict with the result from  
5 receiving antithetical comments.

6 COMMISSIONER KENNEDY: But at least the record would  
7 be clear that all parties had an opportunity to comment on  
8 matters directly affecting them, whereas up until now only  
9 one set of parties has had that opportunity, since the others  
10 thought it wasn't going to affect them. By our own statements  
11 they concluded that.

12 MR. STROIBER: I think there is an extent to which  
13 we are probably on fairly sound constructive notice of the  
14 views of those other parties, however, because we have litigated  
15 this very question before the court of Appeals, and we have  
16 the brief of the U.S. Government on those questions of  
17 cross-examination and the like.

18 So I wouldn't expect that anything we would hear would  
19 be a surprise to us.

20 I think the basic issue is whether or not the  
21 Commission really feels it wants to expressly reserve the  
22 possibility of these procedural devices in the rule. And I  
23 guess I feel that that issue could be addressed fairly quickly,  
24 whether or not we wanted to seek additional comments.

25 MR. SHAPAR: There is another possibility I would

1 suggest that might involve the time problem and that is  
2 to put out the rules as written, and very shortly thereafter  
3 go out with a proposed amendment to those rules to make  
4 the express provision which you have in mind. And solicit  
5 public comments on that.

6 That would allow the rules to go out, meet OGC's  
7 time schedule, and then throw out for public consideration  
8 this possible amendment.

9 COMMISSIONER KENNEDY: That seems to me to be a  
10 fair proposition.

11 COMMISSIONER GLINSKY: This applies to both formal  
12 hearing and informal hearings, is that correct?

13 MR. SHAPAR: There aren't any formal hearings under  
14 the structure envisaged in these rules. They are all informal  
15 hearings.

16 COMMISSIONER GLINSKY: But I mean it does allow for  
17 a determination of standing?

18 MR. SHAPAR: Yes.

19 COMMISSIONER GLINSKY: So in both cases you would  
20 have a hearing.

21 MR. SHAPAR: Yes. That was just a suggestion to try  
22 to accomodate all points of view.

23 CHAIRMAN HENDRIE: Let me see if I understand the  
24 proposition you have in mind. This is not an initiative to  
25 specify these as formal proceedings under one of the appropriate

1 sections of the Administrative Procedure Act, but rather  
2 sort of the reverse of that, to not rule out the possibility  
3 that in connection with the informal hearing structure  
4 established for these things, the Commission, in any particular  
5 one of these, might want to incorporate other features?

6 COMMISSIONER BRADFORD: Yes, features that are in  
7 some cases expressly and in other cases perhaps impliedly ruled  
8 out by the present wording.

9 It doesn't promise anything to anybody, other than  
10 that we are keeping the question open.

11 CHAIRMAN HENDRIE: The language at hand here, could  
12 somebody point out to me where in the regulation itself it  
13 specifies this, and what precisely does it say?

14 MR. GUHIN: Page 117, paragraph (f).

15 MR. SHAPAR: It says: "Witnesses will be questioned  
16 orally or in writing and only by the presiding officer."  
17 There is not only this express language, but of course the  
18 whole tenor and thrust of this.

19 COMMISSIONER BRADFORD: Yes. It is true that that  
20 is one of the sections. I guess I would have to go through  
21 and make a laundry list of others that seem to rule out  
22 procedures that we might want to grant. I had intended to  
23 use cross-examination only illustratively as one of the  
24 procedures.

25 MR. ROTHCHILD: It goes into detail as to whether

1 you are talking about legislative type hearings.

2 CHAIRMAN HENDRIE: The whole sub part J is sort  
3 of embedded in this. So extensive rewriting would be  
4 involved.

5 MR. SHAPAR: No, it wouldn't be extensive. The  
6 rewrite would be rather simple, as a matter of fact. It would  
7 not be difficult to draft the language if this is the direction  
8 you want to go.

9 CHAIRMAN HENDRIE: What would you do?

10 MR. SHAPAR: Just say in the general section that  
11 the Commissionrs reserve the authority to provide further  
12 rights and then maybe give a couple of examples, under unusual  
13 circumstances or certain circumstances as a matter of  
14 discretion.

15 CHAIRMAN HENDRIE: Would you leave the bulk of  
16 this still in place, and just add that?

17 MR. SHAPAR: I would, as I understand the discussion  
18 at this table, reserve authority to be used under unusual  
19 circumstnces or whatever standard suits you.

20 I am merely making the point that the drafting  
21 is simple.

22 MR. MALSCH: Some of the language in here on the  
23 policy aspects of formal versus informal hearings resembles  
24 the discussion of it in the brief filed with the court  
25 in the Terapur case.

1 MR. SHAPAR: You have to take that into consideration,  
2 for sure.

3 COMMISSIONER KENNEDY: Where does that leave us with  
4 the brief before the court? Undercutting it?

5 MR. SHAPAR: I think we can handle it in a way that  
6 would not undercut it. We could put some disclaimers on  
7 that, that we are doing this purely as a matter of discretion,  
8 we think the circumstances would be unusual, something like  
9 that.

10 COMMISSIONER BRADFORD: As long as it is being done,  
11 I am not all that familiar with the Terapur case, but the  
12 contention there must be you are compelled to do it. I don't  
13 think you undercut that by saying we are not compelled to do  
14 it, but we are doing it just because we want to.

15 MR. SHAPAR: I agree.

16 CHAIRMAN HENDRIE: What is your feeling?

17 COMMISSIONER GLINSKY: (inaudible)

18 COMMISSIONER KENNEDY: What did you say?

19 CHAIRMAN HENDRIE: He is not sure he has a  
20 strong feeling about it.

21 COMMISSIONER GLINSKY: It cuts both ways. It also  
22 means that applicants who are concerned with licenses will  
23 not have certain rights.

24 COMMISSIONER KENNEDY: I think the Statement of  
25 Considerations might wish to point that out.

1           COMMISSIONER BRADFORD: I am not sure that is  
2 true. They along of all people have standing.

3           VOICE: But they didn't raise this question in  
4 their comments.

5           COMMISSIONER BRADFORD: No. But they could request  
6 and get a hearing. I suppose under the foreign policy exemption  
7 it might turn out to be --

8           MR. SHAPAR: It would be the same hearing everybody  
9 else would get.

10          COMMISSIONER GLINSKY: But they are not going to  
11 get an adjudicatory hearing under these rules.

12          MR. SHAPAR: And they didn't object to this in  
13 their comments.

14          COMMISSIONER BRADFORD: They can compel a hearing  
15 of some sort, but it need not be an adjudicatory hearing.

16          COMMISSIONER GLINSKY: It won't be, under these  
17 rules.

18          COMMISSIONER KENNEDY: That is right.

19          CHAIRMAN HENDRIE: Dick, what is your feeling  
20 on this question?

21          COMMISSIONER KENNEDY: I would prefer to leave it the  
22 way it is. However, if we wish to change it, I do think  
23 that we are, in fairness to all of the parties who did go  
24 through this -- I just noticed one comment, and I quote:

25 "On the whole we applaud the very carefully structured

1 handling of the question of public participation in the  
2 proposed licensing process. The insistence on the legislative  
3 type hearing as stated in the preamble of the rules is indeed  
4 in the public interest."

5           There is somebody who looked at it and commented  
6 favorably on it. And we are looking to one other set of  
7 comments which suggest the other, adopting that, and these other  
8 parties who thought that they were commenting on one rule are  
9 suddenly going to be faced with a conclusion that they didn't  
10 expect at all, and therefore never had an opportunity to  
11 comment on.

12           I think that is a bit unfair in the process. That  
13 is what concerns me.

14           COMMISSIONER BRADFORD: I don't necessarily disagree  
15 with that. I would ask in that context whether there aren't  
16 other sections of this that have been changed, which received  
17 one set of public comments? I mean this can go on forever.

18           COMMISSIONER KENNEDY: I realize that. But I did look  
19 at nearly all of the changes that were made and all of the  
20 comments made, public comments that were made, and for the  
21 most part they were rather technical in character.

22           This is a fundamental policy question, and I think  
23 there is a difference there.

24           Don't misunderstand me. I am not saying no, we  
25 shouldn't do it. I am saying only I would prefer not to,

1 because I don't think it is necessary. But if we are, then  
2 I believe, for my own part, I feel obligated to go out and give  
3 people a chance to put on the record what they feel about  
4 it, just in a sense of fairness.

5 Had we posed the option or indicated some tendency  
6 in this direction, or even been silent on the question, then  
7 I think I could say well, you know, they had their chance. But  
8 we weren't, we were affirmative in our statements to the  
9 public saying we were not going to do this. And you know that  
10 is the difference between saying we would like you to comment  
11 on how you like red automobiles and then when we get their  
12 comments, we think red automobiles are nice, we say well,  
13 what you didn't understand is we are not going to build red  
14 automobiles, we are going to build black airplanes, and here is  
15 our rule on black airplanes.

16 I think that is not quite fair.

17 CHAIRMAN HENDRIE: What sort of a circulation would  
18 one contemplate? The full list, I suppose.

19 MR. ROTHCHILD: It would go in the Federal Register,  
20 just like the rules.

21 COMMISSIONER KENNEDY: How long would you suggest  
22 a matter that restricted would require?

23 MR. SHAPAR: Fifteen days at a minimum. Maybe  
24 you would want to give 30 days.

25 COMMISSIONER KENNEDY: I would think 15 days would

1 be all right, if people really thought it was an important  
2 enough matter. After all, some of them have already commented.

3 MR. SHAPAR: I think maybe a mail solicitation  
4 of all those who commented.

5 MR. STROIBER: We have some foreign commenters also  
6 who would need more time.

7 COMMISSIONER KENNEDY: Some of them commented by  
8 cable, didn't they?

9 MR. GUHIN: As a practice, as with this rule, if  
10 someone came in and said they needed more time, of course  
11 it would be extended too, to give them an opportunity, if there  
12 was a basis for doing so.

13 MR. SHAPAR: You could also, if you wished to follow  
14 the thought I threw out before of doing this by amendment,  
15 you could cross-reference that in the Statement of Consideration,  
16 that the Commission is giving further consideration to this  
17 point.

18 COMMISSIONER KENNEDY: And will propose for public  
19 comment a suggested amendment? I would find that a wholly  
20 feasible way to address the question.

21 COMMISSIONER BRADFORD: I guess I wouldn't mind doing  
22 that if the regulation that went out -- if this regulation  
23 went out with the thing deleted that posed the question.

24 MR. SHAPAR: Like taking out the word "only".

25 COMMISSIONER BRADFORD: I would have to look at it

1 again. It seems to me that we are going from a posture in which  
2 the Commission does have these choices into one in which it  
3 doesn't.

4 I guess I wouldn't want to concur in that, and  
5 then turn around and discover later on that that was in fact  
6 going to be the regulation that stayed in place.

7 MR. SHAPAR: If you took out the word "only",  
8 plus an explicit reference to that point in the Statement of  
9 Considerations, it might accommodate your view.

10 COMMISSIONER KENNEDY: But it would seem to me that  
11 has the same effect as revising the rule, you know, as a  
12 practical matter.

13 My concern goes to the way this Commission put the  
14 question to the public. And some segments of the public have  
15 been, if we proceed in this way, in my view, been misled.  
16 I don't think that we wish to do that as a matter of public  
17 policy. I don't think we wish to conduct our affairs that  
18 way, that is all.

19 I, for one, would not wish to be put in a position  
20 of acting in that way vis a vis part of the public, which  
21 includes, by the way, the Executive Branch of our own government.

22 CHAIRMAN HENDRIE: There may be some views there.

23 COMMISSIONER KENNEDY: I am sure there will be.  
24 They have never offered them, because they weren't asked.

25 Their own previous researches were those clearly stated as the

1 intention of the rule, you see. So I just think it has  
2 left them in a very very difficult position, and I don't think  
3 we want to do that.

4 As a Commission, I think that is not treating  
5 the public fairly in the way that we by and large do. I think  
6 we treat the public fairly, and I think here is a case in which  
7 we could be, I think, severely criticized, and I don't think  
8 we want to be in that position.

9 MR. SHAPAR: I don't think it is by and large,  
10 I think it is invariably.

11 COMMISSIONER KENNEDY: Invariably, I agree, a splendid  
12 change, and improvement.

13 CHAIRMAN HENDRIE: It strikes me there may be some  
14 maneuver room. Your aim, after all, was not to institute  
15 a new and more formal hearing regime, but rather to preserve  
16 some flexibility for the Commission which it might choose to  
17 exercise in say the exceptional case, rather than in every  
18 case, to allow these hybrid formats, what-have-you.

19 COMMISSIONER BRADFORD: Yes. I think this case --  
20 clearly in most export cases you don't even have the request,  
21 never mind the serious question. So, yes, everything you say  
22 is correct.

23 COMMISSIONER KENNEDY: The difficulty with that,  
24 if I may note, however, just so we think it through a little,  
25 the difficulty with that is that every case which is

1 intervened in will be exceptional. It is precisely for that  
2 reason, I am sure, that the intervenors propose to intervene.  
3 Why would they waste their time on matters that are routine  
4 and not exceptional?

5 The only thing on which they intervene is exceptional  
6 things, so you have already defined the result.

7 Again, I don't want to argue that question here,  
8 because I think it is premature until we have had an  
9 opportunity to review the other side of the question. We have  
10 not had that opportunity on the otehr side, because we  
11 particularly by our own action foreclosed it. That is all I  
12 am concerned about.

13 I am not concerned about the substance of the  
14 question, because I am not prepared to even think about that  
15 yet, because I have only heard one side of it.

16 CHAIRMAN HENDRIE: I am just trying to map out what  
17 I think might be some possible other language for comment,  
18 to see whther I understand what would suffice.

19 Howard suggested one could accomplish this  
20 flexibility by going into the section on the yearings, leaving  
21 -- with some adjustment to take accoubt of the exception --  
22 leaving the bulk of that in place as the normal process, and  
23 then noting at an appropriate place or places that the  
24 Commission does reserve the right to add additional featrures  
25 in an exceptional case or special case, at its discretion,  
whatever.

1 MR. SHAPAR: That is not really what I suggested,  
2 Mr. Chairman, although that is an option that can be  
3 considered.

4 What I suggested was leave the rule as it is,  
5 but with a statement in the Statement of Consideration that  
6 the Commission is reconsidering whether or not --

7 CHAIRMAN HENDRIE: That is an alterante procedure;  
8 that is another point. I am saying suppose we attempted to  
9 do some rewriting, which we would then circulate to the  
10 full list for comment. What might that look like?

11 MR. SHAPAR: Just the way you described it.

12 CHAIRMAN HENDRIE: I think that is right. Now  
13 does that fit what you are looking for, or is that too narrow?

14 COMMISSIONER BRADFORD: No, I think that is all  
15 right. Obviously we will all review what has been written.

16 But if what you are talking about is essentially  
17 putting together something that does preserve to the  
18 Commission discretions on a case-by-case basis, and circulating it  
19 for comments, that is all right with me.

20 I think the Commission would want to be leery about  
21 getting into a situation where every time it changed a  
22 regulation, it had to go back out for comments. But that  
23 aside, I don't mind doing that on a short timetable.

24 I do think that the comments we will get will all  
25 be comments that could also be made by those affected in the

1 individual proceedings with the same force. But so be it.

2 CHAIRMAN HENDRIE: If we decided to try to map some  
3 language like this and go out for comments, I think, if I  
4 accept your view we ought to explore this further and so on,  
5 there is a strongly held view that we ought to go for comments,  
6 when you talk about retaining the Commission's prerogative  
7 to do it on a case-by-case basis, are we really then in  
8 essence saying that subpart J here, all of the details laid  
9 out for a so-called legislative type hearing, it may say that,  
10 but that is not what we mean, what we mean is every time we  
11 get a request for a hearing or want to consider one on our  
12 own motion, that we will sit down and sort of decide the  
13 procedures for that hearing at that time?

14 That is one way of looking at it. Another way of  
15 looking at it is saying, Gee, in such cases, 8 or 9 times out  
16 of 10 we ought to do like it says in subpart J, but we recognize  
17 there may be the exceptional case presented where you would  
18 want some additional proceedings.

19 COMMISSIONER BRADFORD: I guess I haven't been  
20 here long enough to know whether 8 or 9 times out of 10 is  
21 right. I certainly am not saying in every case we would want  
22 to go the full panoply of procedures. I just don't know  
23 how to formulate what the right fraction would be for cases  
24 that you might go a little beyond bare legislative type  
25 hearings would be, or what I take is also oral argument type

1 of proceedings. But that is certainly what I had in my  
2 mind contemplates some showing that any given procedure  
3 would make an important contribution and the basic test  
4 for a hearing itself seems to me to be a fair test of the  
5 procedures in it, do they detract from the common security,  
6 do they add to the proceeding. I guess that is what I would  
7 ask in each instance.

8 MR. STROIBER: I would only add in the Statement  
9 of Considerations on page 12 we state explicitly "The Commission  
10 has endeavored to provide a structure for public partici-  
11 pation that is sufficiently comprehensive so as to eliminate  
12 or substantially decrease the need for time-consuming case-  
13 by-case development of procedures for export or import license  
14 applications."

15 I feel that very strongly, because that is what  
16 we have been doing for the past two years is improvising.  
17 And I think the court will feel that also. If you make the  
18 process too open, they will say --

19 CHAIRMAN HENDRIE: I agree with that thrust, and  
20 that is the direction I would like to see us go. But Peter, I  
21 think it is fair then to ask, with what you have in mind,  
22 don't we have to strike that paragraph and that thrust in  
23 the regulation?

24 COMMISSIONER BRADFORD: I don't think so. Let me  
25 look at the paragraph again.

1           CHAIRMAN HENDRIE: Because what you suggest is  
2 that as each occasion where a hearing is requested and we  
3 consider the request or on our own motion think we should  
4 have a hearing on this matter, we are to decide what special  
5 proceedings or procedures ought to be a part of the procedural  
6 framework of that hearing.

7           We will once again be doing it ad hoc, on a case-  
8 by-case basis the whole procedural structure.

9           COMMISSIONER BRADFORD: In that relative minority of  
10 cases where public participation is of a type that requests  
11 hearings, or where we feel it is necessary, yes, then  
12 that last sentence would be of limited applicability.

13           I still wouldn't say non. I am not sure I understand  
14 exactly what you are expecting from the court. If the court  
15 is worried about anything in the Tarapur case, it is not that  
16 we decide these things case-by-case, it is we are too  
17 restrictive.

18           What you are suggesting is if we come out with a  
19 policy consistently very restrictive, the court would be more  
20 comfortable than if we go on deciding them case-by-case.

21           There is everything to be said for having a  
22 systematic policy, but that isn't what the court is going to  
23 get the Commission for in Tarapur.

24           MR. STROIBER: I think the court is looking for as  
25 definitive a statement of the Commission's intentions with

1 regard to its procedures as possible. We stated what we were  
2 going to do in one specific case, and that was the Tarapur  
3 proceeding, and we said that was frankly an experimental mode,  
4 we were seeing how things looked and whether they would work,  
5 and we would promulgate regulations based upon our experience,  
6 and we would state what we expected to do in the export  
7 licensing process.

8           You are certainly correct that the main issue is  
9 the substantive issue of whether or not the intervenors got  
10 what they were entitled to under the statute. But I think even  
11 more important than that to the court, and why it is looking  
12 for these regulations, is being able to tell whether or not  
13 what the Commission is going to typically grant people  
14 meets the legal standard.

15           And if you promulgate a rule which is still open  
16 ended, then the court is just not going to be able to rule on  
17 that issue, it will have to take every case as it arises on  
18 an ad hoc basis, and you have to start from zero again.

19           COMMISSIONER BRADFORD: But the court has got to  
20 decide in Tarapur whether they think what was granted to  
21 those petitioners was sufficient.

22           MR. STROIBER: Yes, that is true.

23           COMMISSIONER BRADFORD: And nothing this rule says will  
24 help the court one way or another on that issue.

25           MR. STROIBER: Well, except that the courts, I

1 think, tend to look ahead at what agencies are doing also.  
2 If they are satisfied with the procedures that we put in  
3 place, they might say --

4           COMMISSIONER BRADFORD: Carl, if they like what  
5 the Commission did in Tarapur, they will like these regulations.  
6 If they disapprove of what the Commission did in Tarapur, they  
7 can't like these regulations.

8           COMMISSIONER KENNEDY: I am not sure that necessarily  
9 follows. These regulations do things that certainly were  
10 not in place in the case of Tarapur. These regulations call  
11 for and indeed suggest the Commission is anxious for --  
12 and I think the word is encourages -- public comment on every  
13 license, and further notices those licenses which has not  
14 been the case except in the case of reactors up until now.

15           There is a substantial panoply of new actions  
16 encouraging and facilitating public participation in these  
17 regulations that did not exist in the Commission's regulations  
18 at the time of Tarapur. And certainly go beyond, it seems to me,  
19 in a variety of ways, anything that we did in the Tarapur  
20 matter. Is that not correct, Carl?

21           MR. STROIBER: That is right.

22           MR. SHAPAR: I would have to raise a caviat about  
23 that.

24           COMMISSIONER KENNEDY: Please.

25           MR. SHAPAR: I would read the regulations, or a

1 reasonable interpretation of the regulations as they now exist  
2 is that the full adjudicatory procedures of subpart (g)  
3 apply to exports.

4 Now the Commission has not chosen to follow that  
5 interpretation in the Tarapur proceedings, but a reasonable  
6 interpretation of the part 2 as it now exists is the full  
7 adjudicatory procedures in subpart (g) do in fact apply to  
8 export licensing.

9 VOICE: Are you saying we get a hearing as a  
10 matter of right in any case?

11 MR. SHAPAR: When you have standing.

12 COMMISSIONER GLINSKY: Then you have a hearing  
13 as a matter of right.

14 MR. SHAPAR: Yes. I don't think that viciates your  
15 main point, but I think it should be said.

16 COMMISSIONER KENNEDY: I understand.

17 CHAIRMAN HENDRIE: I am not sure where to go.  
18 Vic, are things clarifying?

19 COMMISSIONER GLINSKY: I don't have any other  
20 questions.

21 CHAIRMAN HENDRIE: Are you inclined to go with  
22 them as they are, or to try to recirculate and move forward the  
23 more flexible posture?

24 I am obviously trying to see if there is any  
25 possibility I can fabricate a 3-1 here. Then he could maybe

1 supply his views in a separate memorandum.

2 COMMISSIONER KENNEDY: I am trying to support  
3 Peter. I am trying to make it possible for Peter to at least  
4 get the public's view.

5 CHAIRMAN HENDRIE: Let me see, first, if there  
6 is any way in which I can bring the Commission to an action  
7 this afternoon. I think that would be my first choice. If  
8 not, then let's see where we go from there.

9 COMMISSIONER GLINSKY: Well, perhaps we can follow  
10 Howard's suggestion and this point in the last comment, at  
11 least in one area, the case may be better for discretionary  
12 hearings, and we could go and ask for a comments on that  
13 specific point.

14 COMMISSIONER KENNEDY: I would be for that.

15 CHAIRMAN HENDRIE: This would be along the line of  
16 noting that we are contemplating an increased flexibility, and  
17 will be circulating further language for comment. Is that it?

18 COMMISSIONER GLINSKY: That was my suggestion.

19 COMMISSIONER KENNEDY: That seems to me to be  
20 reasonable.

21 COMMISSIONER GLINSKY: I don't think at this time I  
22 would propose a change for myself, but I think I would  
23 certainly be interested in putting it out for comment.

24 CHAIRMAN HENDRIE: That would be a way of  
25 sort of doing both things at once.

1 COMMISSIONER GLINSKY: Yes.

2 COMMISSIONER BRADFORD: I have a purely practical  
3 objection to that. As I see it, the present situation is better  
4 than the situation in the rule. Therefore, if I can persuade  
5 only one of you to agree with me, I am better off than I  
6 would be under the rule. Once the rule is in place, and the  
7 public is commenting, then if I persuade only one of you to  
8 agree with me, it doesn't do me any good at all.

9 So I am better off under these circumstances.

10 COMMISSIONER KENNEDY: Here's thought Howard had  
11 generated the generally Solomonic conclusion.

12 CHAIRMAN HENDRIE: You would prefer to get from here  
13 to wherever you are going either by only going this far,  
14 if that is all that is necessary, rather than going like this.  
15 (Indicating)

16 COMMISSIONER BRADFORD: I have no objection to  
17 getting like this, but I am afraid the accordion gets stuck  
18 out there and never plays a note.

19 CHAIRMAN HENDRIE: Clearly a possibility. And it  
20 does have the aspect that if you are immediately going to  
21 change something, perhaps we ought to recognize that.

22 COMMISSIONER GLINSKY: Would it be an effective  
23 change in one less than majority?

24 COMMISSIONER KENNEDY: That would require a change  
25 in the Commission's rules, wouldn't it? And that would have

1 to go out for public comment.

2 CHAIRMAN HENDRIE: Carl, what sort of deterioration,  
3 if that is the right word, of the Commission's position,  
4 posture, and so on, accrues for another month and a half  
5 of delay on this?

6 MR. STROIBER: I think that is in large measure  
7 dependent on when we receive the Executive Branch views on  
8 the follow-on license and how urgently they request action,  
9 and a lot of imponderables.

10 I just can't speculate on that. I would guess that  
11 two weeks is not crucial, a month and a half might be a  
12 problem.

13 COMMISSIONER GLINSKY: Carl, is there any possi-  
14 bility of a hearing on this application that is about to  
15 reach us? Or was that hearing already held in July of '76?

16 MR. STROIBER: I think you can hold a hearing on  
17 this matter if you decide you want to hear it.

18 COMMISSIONER GLINSKY: Would somebody have to come  
19 in and ask for it, or is it too late, or what?

20 MR. STROIBER: The Commission can always, as I  
21 understand it, and correct me if I am wrong, call for a hearing  
22 on its own motion.

23 MR. SHAPAR: That is correct.

24 MR. STROIBER: I think there would be at least a  
25 logical burden for you to show that there were at least

1 new circumstances that you wanted to consider in that context.  
2 But I don't see any legal barrier to doing that.

3 COMMISSIONER GLINSKY: That would be on the  
4 Commission's motion. But what about intervenors? Can they  
5 request another hearing, or is this material basically  
6 standing-in for the material they have already had a hearing  
7 on?

8 MR. STROIBER: I hadn't thought about that, but I  
9 would think there is no reason why they couldn't request a  
10 hearing on this license and the Commission would have to  
11 consider under the rules whether or not it thought that the  
12 fact that this was a different license number raised sufficient  
13 issues that it wanted to hear it.

14 COMMISSIONER KENNEDY: If for no other reason, I  
15 suppose they could argue the passage of time has maybe  
16 introduced new factors which ought to be reviewed.

17 MR. STROIBER: And new political developments. We  
18 have a new President, there are a lot of things you might  
19 use as reasons for a further hearing.

20 But those are all factors the Commission would have  
21 to weigh in deciding to hear them in either written or  
22 oral form.

23 MR. ROTHCHILD: Perhaps the worst possible scenario  
24 would be the Commission say consolidate the application, it  
25 would moot the court case, we promise everyone we won't act

1 in such a fashion as to moot it out. We then act on the  
2 license, if the Commission denied the license, the intervenors  
3 would be enthralled and the litigation would be over.

4 MR. STROIBER: No, I think we would be sued  
5 immediately by the applicant.

6 MR. ROTHCHILD: That would be new litigation.

7 COMMISSIONER KENNEDY: Also somebody would move  
8 to work through GSA to cancel our lease on the building.

9 MR. ROTHCHILD: If we were to act favorably upon the  
10 license, there might be an application to enjoin, like  
11 what happened last time, and the court might be reluctant to  
12 let us keep this procedure of consolidating and moving the  
13 issue along that way, and might say hold it a minute, we will  
14 wait for your regulations.

15 COMMISSIONER GLINSKY: If this license is about  
16 to come over to us, and these regulations, even if adopted  
17 today, wouldn't become effective for at least 75 days, the  
18 chances are they would not apply to this case anyway.

19 MR. STROIBER: Unless the Commission chose to make  
20 them effective on an interim basis.

21 MR. SHAPAR: The Commission could make them immediately  
22 effective. They have to find a cause for doing so.

23 COMMISSIONER GLINSKY: What about GAO and all that?

24 MR. SHAPAR: We would have to talk to GAO. It has  
25 been done before.

1           COMMISSIONER KENNEDY: In any event, those aspects  
2 of the regulations that would apply to the hearing process,  
3 as has already been pointed out, could be separated out and  
4 made immediately effective without GAO review. So it would  
5 be possible to do that.

6           Or, alternatively, I suppose, the Commission could  
7 say although the rules are not yet effective, it will follow  
8 the outlines of those rules in the instant case.

9           MR. STROIBER: Since you have announced you are  
10 going to be dealing with these export matters on an ad hoc  
11 basis, you can say we are going to continue to do so on an ad  
12 hoc basis, but we think the rules provide superb guidance.

13           COMMISSIONER KENNEDY: On the other hand, the mails  
14 could be slowed up so the thing wouldn't get here.

15           MR. SHAPAR: If the court eventually decides  
16 adjudicatory treatment is required, this discussion is somewhat  
17 academic.

18           COMMISSIONER KENNEDY: That is one of the things  
19 I suppose we would wish to consider, whether we wish to pre-empt  
20 the court in this regard.

21           COMMISSIONER BRADFORD: How would the court possibly  
22 make that decision? even if they granted there was  
23 standing, then there is the question of a foreign exemption.  
24 Is there a way they could find that didn't apply?

25           MR. SHAPAR: That is probably the strongest part of

1 our -- I really don't like to discuss litigation strategy  
2 in an open meeting. I will, if Carl wouldn't object.

3 COMMISSIONER KENNEDY: If he doesn't, I will.

4 CHAIRMAN HENDRIE: I think it would be useful for  
5 the draftsmen to once more set ingenious pen to paper and  
6 see what this flexibility might look like. It seems to me  
7 that as you get draft materials in hand, please get it  
8 back here rapidly, and I wouldn't think it need be shrouded  
9 in the whole splendor of the proposed rule. What would it be,  
10 subpart J?

11 MR. SHAPAR: I don't know where I would put it,  
12 but it would be one self-contained paragraph.

13 CHAIRMAN HENDRIE: And the Statement of Considerations.  
14 I think it would be useful for the Commissioners to see what  
15 that language might look like and the we will have to  
16 decide.

17 Now with regard to the less than the majority  
18 required to make the decision, could I allow you some  
19 additional comments on that, and see if I can talk you out  
20 of pressing that?

21 COMMISSIONER BRADFORD: If the rest of the Commission  
22 is against that, I won't press it.

23 COMMISSIONER KENNEDY: My sensing of that one is  
24 not against it at all. I am only concerned that we not do it in  
25 such a restricted format, but rather since, as we said earlier,

1 it applies to all of our regulations, we just change them  
2 all.

3 CHAIRMAN HENDRIE: The mind boggles.

4 COMMISSIONER KENNEDY: But as eminent counsel on both  
5 ends of the table have already told us, that will be the  
6 precedental effect.

7 CHAIRMAN HENDRIE: That is the trouble with getting  
8 counsel to the left and counsel to the right.

9 MR. SHAPAR: Yes, you listen to counsel too much;  
10 I think you ought to disregard us a bit.

11 COMMISSIONER BRADFORD: Wht I was about to say on  
12 that was assuming that in fact it was going to go out,  
13 I have said all I would say on that. I don't even really feel  
14 a need to write any comments on it.

15 CHAIRMAN HENDRIE: Let us then see the additional  
16 language, the change and supplemented language on the  
17 flexibility issue. And I went around once more along the  
18 line -- we are unable to agree on a fraction of cases which  
19 would be the particular ones which the Commission might want  
20 to do this on. Certainly one wouldn't want to try to specify  
21 any such fraction in the regulations. But do I have the  
22 sense fairly that in the run of such cases for which hearings  
23 might be considered, the laguage now in proposed subpart J is  
24 probably all right? And all one would want is to preserve  
25 flxibility to amplify those procedures in special cases?

1           COMMISSIONER BRADFORD: Yes. I guess instead of  
2 special cases, I would say in a case where the Commission  
3 thought it would help more than it would hurt. I would assume  
4 that is not a big part of the cases.

5           COMMISSIONER KENNEDY: A- I not correct that you  
6 said at the very outset that that flexibility now exists?

7           MR. SHAPAR: I wasn't aware of that.

8           MR. STROIBER: There is no specific language in the  
9 rules which precludes the Commission doing that.

10          MR. SHAPAR: I think the word "only" might do it.

11          CHAIRMAN HENDRIE: But there is a very strong set of  
12 preconditioning set up by the Statement of Considerations.  
13 If you want the flexibility, I think it is in fact there,  
14 but do something with the language.

15          COMMISSIONER KENNEDY: For thinking purposes is your  
16 proposal as the first step in implementing the concept as  
17 outlined by Howard or not?

18                 In other words, you would or would not contemplate  
19 any comment on the part of those who have not had an opportunity  
20 to do so?

21          CHAIRMAN HENDRIE: What I am contemplating is we  
22 look at some draft language and when we think it is a fair  
23 thing to try on people, we will circulate this thing.

24          COMMISSIONER KENNEDY: All right.

25          CHAIRMAN HENDRIE: And Carl will have to contempalte

1 where -- at my PhD final, my thesis adviser asked me if there  
2 were anything he could do for me, and I told him to be  
3 prepared to set the wastebasket on fire when I got into  
4 trouble. Well, I got into trouble, and he didn't do it. But  
5 that is about all I can recommend to you by way of helping  
6 the litigation posture.

7 MR. STROIBER: A statement about arguing cases is  
8 that when the facts are on your side, pound the facts; when  
9 they are on the other side, pound the table.

10 MR. SHAPAR: That is all right, Carl, we will  
11 get better counsel next time.

12 CHAIRMAN HENDRIE: Okay. I declare this meeting  
13 long overdue at an end.

14 (Thereupon, at 4:40 p.m. the meeting was  
15 concluded.)  
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