

ORIGINAL

NUCLEAR REGULATORY COMMISSION

IN THE MATTER OF:

PUBLIC MEETING

DISCUSSION OF SECY-78-219 - EXPORT-

IMPORT REGULATIONS PART 110

Place - Washington, D. C.

Date - Monday, 8 May 1978

Pages 1 - 19

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UNITED STATES OF AMERICA
NUCLEAR REGULATORY COMMISSION

PUBLIC MEETING

DISCUSSION OF SECY-78-219 - EXPORT-
IMPORT REGULATIONS PART 110

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

Monday, 8 May 1978

The Commission met, pursuant to notice, at 2:00 p.m.

BEFORE:

DR. JOSEPH M. HENDRIE, Chairman

PETER A. BRADFORD, Commissioner

RICHARD T. KENNEDY, Commissioner

PRESENT:

SAMUEL CHILK, Secretary

HOWARD SHAPAR, General Counsel

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1 CHAIRMAN HENDRIE: I regret to say that Commissioner
2 Gilinsky can't be here for this part of the meeting. He may
3 or may not be here during the rest of the afternoon. He was
4 in an automobile accident and his wife was injured over the
5 weekend. And he is, I think, completely, appropriately tied
6 up with all of those matters.

7 So I am sorry he can't be here, but we will go ahead.

8 Now before we settle down to business, I need to ask
9 you to vote on some things. This seems to be the way we open
10 our meetings. It may eliminate a lot of debate.

11 In particular, when we scheduled the discussion of
12 testimony on the licensing legislation previously, we had voted
13 at an earlier time to close the whole sequence of those meet-
14 ings and those discussions and there was some discussion about
15 whether they should be open or not. I understand we have a
16 recommendation from the General Counsel's Office that we ought
17 to open those.

18 MR. OSTRACH: Yes, Mr. Chairman, the recommendation
19 is to open the meetings. The meetings dealing specifically
20 with the general discussion of the bill, not subsequent meet-
21 ings dealing specifically with preparation of testimony, which
22 I don't believe is the subject of today's meeting, which I think
23 you can choose to close or open, depending on how you perceive
24 the matter at that time.

25 CHAIRMAN HENDRIE: I think today we will not be

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1 discussing so much the specific testimony, but we are to do
2 the thing that we were going to do once before and had to
3 cancel a meeting on, where Howard in effect will lead us in
4 the reading, scanning through the bill, with discussion of the
5 features of the bill. So I think in the circumstances, it seems
6 to me perfectly appropriate to have discussion opn.

7 I am told that if that is our pleasure, since we
8 previously voted to close this sequence of meetings, we have
9 to vote to open it.

10 COMMISSIONER BRADFORD: I would be glad to vote to
11 open it. I wonder, since there is still no testimony date
12 set, wouldn't it be well to not open yet.

13 COMMISSIONER KENNEDY: I would think in any event
14 it would be useful to go through this general educational
15 sort of exercise, I don't think it would hurt, and Vic can
16 get that independently later if he wants to. I would have no
17 objection. It is your pleasure.

18 CHAIRMAN HENDRIE: I think if you wanted to have
19 some discussion, he could have it with the Counsel's Office
20 separately.

21 What I am concerned about is that this week is the
22 only week -- I am not going to have a full Commission to act
23 after this week for what, two weeks, Sam?

24 MR. CHILK: Yes.

25 COMMISSIONER HENDRIE: Will I have a full Commission

1 before we have to go on the Hill? I think we are now headed
2 for some testimony, yes, the 6th of June.

3 COMMISSIONER BRADFORD: Is that a firm schedule?

4 CHAIRMAN HENDRIE: It is on the Senate side. I
5 can't verify how firm it is, but they asked us to hold the day.

6 Let's see, will we have Commissions together, when?

7 MR. CHILK: It looks like we have a quorum on the
8 week of the 29th, and it would appear we have a quorum the
9 week of June -- well, Monday, June 5, before the hearing.

10 CHAIRMAN HENDRIE: That is a little late to okay
11 testimony. We would have to do it -- well, it is just a ques-
12 tion of when we can get our act together, as it were, and if a
13 discussion this afternoon would be useful in moving at least
14 the three of us on to bringing the bill back up in our thoughts --

15 COMMISSIONER BRADFORD: No, the point is Vic, if he
16 wants to be here. We have what, two more meetings on testimony?

17 CHAIRMAN HENDRIE: See, I was worried about us
18 having to testify during perhaps one of the last two weeks in
19 May, in which case this week was it. But which apparently we
20 do have time.

21 Anne, did you get through to Vic? Is he still going
22 to try to come in.

23 MS. HODGDON: I am not sure; he is going to try to.

24 CHAIRMAN HENDRIE: I would kind of like to tackle it
25 this afternoon. One thing I am afraid of is Howard will forget

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1 what he is supposed to say.

2 MR. SHAPAR: I have already forgotten. Mr. Malsch
3 will do the detailed briefing.

4 COMMISSIONER BRADFORD: Let me suggest it might
5 be worth contacting Vic, if I were in his shoes, I guess I
6 would want at least to be asked when -- in that situation,
7 if he doesn't care, let's go ahead. But if he would just as
8 soon be here, I don't think we should go ahead without him.

9 CHAIRMAN HENDRIE: That is fine with me.

10 Will you do that, Anne?

11 MS. HODGDON: Yes.

12 CHAIRMAN HENDRIE: What do I do about the vote?

13 I suggest you vote, because if the meeting isn't
14 held this afternoon, it will be held at the next meeting.
15 So I suggest you go forward with the vote.

16 COMMISSIONER KENNEDY: As I understand it, we were
17 not planning today to discuss testimony. This was the meeting
18 that we had planned a couple of weeks ago, which was canceled,
19 in which we were only going to have Howard go through the bill,
20 explaining its provisions, answering any questions as to tech-
21 nical aspects of it, substance, not with any intention at this
22 point of formulating our own views; right?

23 MS. OSTRACH: That is right.

24 CHAIRMAN HENDRIE: Let us vote on it.

25 (All three raised hands.)

1 CHAIRMAN HENDRIE: It is so ordered.

2 While I am also on the subject of votes, may I have
3 a vote to close a meeting on personnel matters under Exemptions
4 2 and 6? This was scheduled after we had done the voting on
5 the agenda last time.

6 (All three raised their hands.)

7 CHAIRMAN HENDRIE: It is so ordered.

8 COMMISSIONER KENNEDY: Which day is that going to be?

9 CHAIRMAN HENDRIE: Tuesday at 2:00 p.m.

10 Okay. Let us turn to part 110, the subject of
11 export-import regulations, namely conforming the same to the
12 Non-proliferation Act of 1978. I had held this item over from
13 Thursday afternoon, thinking it would give an opportunity for
14 four of us to deal with it rather than three.

15 However, the unfortunate accident has made it
16 impossible for Commissioner Gilinsky to be here, so we are here,
17 and in the circumstances he just hasn't been able to focus on it,
18 or think anything further about it. I think we can no longer
19 postpone, and he says go ahead and do with it. But he hasn't
20 been able to think further about it, give any further instruc-
21 tions as to his view or whatever...

22 I think rather than breach further on the due date,
23 that we ought to go ahead and the three of us deal with it this
24 afternoon.

25 It seems to me that we carried the discussion along

1 fairly well last Thursday. Let me ask first if there are
2 comments or questions or anything either of you would like to
3 say on the subject, then I will ask the Staff the same thing
4 and I'll see if we are prepared to go forward, go ahead and
5 deal with it.

6 Dick?

7 COMMISSIONER KENNEDY: I don't have anything.

8 COMMISSIONER BRADFORD: Not yet.

9 CHAIRMAN HENDIRE: Would the Staff like to over some
10 word one way or the other on this subject?

11 MR. PAGE: It would be helpful, Mr. Chairman, if
12 the Commission does favor Alternative 1, if they could indicate
13 back to the Staff, if they support the Staff's continued use of
14 those criteria, the guidelines that we have in Alternative 2,
15 to be used, even though they are not specified in the regulations.

16 We are using them at the present time, and we would
17 plan to use them in the future. And if there is any differ-
18 ence in guidance that the Commission would like to give, we
19 would appreciate receiving that.

20 CHAIRMAN HENDRIE: How long have you been, in effect,
21 working down this checklist on the security evaluation?

22 MR. PAGE: We have been using that for about a year-
23 and-a-half.

24 COMMISSIONER KENNEDY: You have been making an
25 evaluation of the threats to nuclear activities within

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1 recipient countries?

2 MR. PAGE: Yes, sir.

3 COMMISSIONER KENNEDY: How do you do that?

4 MR. PAGE: Where we have information that there are
5 particular threats in a country, we have gone back to the
6 Executive Branch asking for additional information on the
7 physical security program.

8 COMMISSIONER KENNEDY: What I am getting at is how
9 do you evaluate the risks to security associated with these
10 threats?

11 MR. PAGE: We make judgments of the threats that
12 are involved, and determine whether or not the standards that
13 we have in this 110.43 need to be changed in any respects and
14 whether or not additional protection should be provided.

15 COMMISSIONER KENNEDY: To what extent does that
16 involve the views of the country concerned?

17 MR. PAGE: We do go back and ask for information
18 from the country, yes, sir, on what they -- as a practical
19 matter, when the physical security teams visit other countries
20 to receive information on the physical security programs, some
21 of the first questions that are asked is what kind of threats
22 do you see against nuclear materials. And that information is
23 gathered within the physical security team visits.

24 COMMISSIONER KENNEDY: It is within that context?

25 MR. PAGE: Yes, sir, in that context.

1 COMMISSIONER KENNEDY: Okay.

2 MR. SHAPAR: This has been labeled as a Staff guide-
3 line or Staff criteria and not by the Commission. Is that
4 clear?

5 MR. PAGE: It has not been approved by the Commis-
6 sion thus far and I think it would be helpful if we could get
7 either approval of the Commission of the guidelines or some
8 direction to do it differently.

9 MR. SHAPAR: I think that leaves a question. If
10 the Commission wishes to make this a criteria, it has to do
11 so by rulemaking, and not by simply instructing the Staff that
12 they think it is a good idea.

13 If the Commission thinks it is a good idea, then it
14 ought to be incorporated in a rule. If the Commission publishes
15 this Part 110 and these guidelines that you are talking about
16 are not incorporated in the rule, it is like any other Staff
17 guidelines, the Applicant is free to comply with them or not,
18 and the Commission is perfectly free to act on that application
19 on the basis of the written rule.

20 It is a point that I think needs some -- we need
21 to be clear about.

22 CHAIRMAN HENDRIE: It is also true that there are
23 an assortment of Staff guidance documents, Howard, that are
24 published by the Staff, with sometimes explicit but generally
25 implicit agreement of the Commission. That is, the Commission

1 doesn't act formally.

2 MR. SHAPAR: I think they all bear some prefatory
3 language that says, in effect, if you follow these Staff cri-
4 teria, you can be assured that this will be satisfactory to the
5 Staff. If you other ways of doing it that are satisfactory in
6 meeting the rules, you are free to do that also. But it is not
7 binding on the Applicant. And it is certainly not binding on
8 the Commission. Nor would these, as I see it.

9 MR. STOIBER: I think that is true. There is
10 another species of animal, though, called the "policy statement"
11 which we have used on occasion in this area.

12 MR. SHAPAR: A policy statement, I think, in the
13 context here would be the equivalent of a rule if the Commission
14 chooses to adopt a policy statement.

15 CHAIRMAN HENDRIE: When you were talking about these
16 provisions last Thursday, you noted that the intend wasn't
17 to be totally inflexible.

18 MR. PAGE: Certainly. We would expect that where
19 programs do not contain each and every element, if there
20 were such a program, the total program would provide those
21 kinds of protections encompassed by all nine criteria. We
22 would certainly would be willing to accept that. We have not
23 had a program description yet where one of these elements was
24 not contained, but it is conceivable that that could happen.

25 COMMISSIONER KENNEDY: Well, Mr. Chairman, couldn't

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1 the Commission note that the Staff intends, as the basis for
2 its analysis, to consider the matters outlined in whatever
3 specific subparagraphs are, without comment beyond that? I
4 would think this says to the Staff, go ahead and use those
5 things, but at the same time, it does not commit the Commission
6 to an inflexible position if the Staff says our judgment is
7 this, The Commission's judgment may still be brought to bear.

8 But it would recognize that this is the general out-
9 line of conditions which the Staff will be looking to to
10 satisfy itself that physical security needs are met.

11 COMMISSIONER BRADFORD: Am I right in thinking that
12 that is the situation anyway, that in fact the Commission could
13 adopt as a regulation something even more strongly worded than
14 Alternative 2; that is, something which made no mention of
15 "equivalent" at all, but simply took the ten criteria and said
16 you have to have these.

17 The statute still contains the word "equivalent,"
18 consequently I suppose someone could come in and quite legiti-
19 mately say, "As long as the statute provides for an equivalency
20 test, no matter what the regulations purport to say, does
21 that argument still hang?"

22 MR. SHAPAR: It would depend on the reasonableness
23 of the Commission's decision to discard the "equivalent."

24 CHAIRMAN HENDRIE: The only way you could carry a
25 case on that basis, it seems to me, in a Commission proceeding

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1 would be on the basis of a petition to consider the rule;
2 wouldn't it? That is, if the Commission writes a rule that
3 says, "Thou shalt consider the following nine without exception,"
4 then under the Commission -- then I don't see any way for the
5 Staff to say, "Well, the statute says 'equivalents,' so we
6 don't have to."

7 COMMISSIONER BRADFORD: That is right. At that point
8 you get into a situation where perhaps even the Commission, I
9 suppose, could so tie itself up by its own regulations that it
10 would go to court and have the court tell the Commission it has
11 done it wrong.

12 MR. SHAPAR: The Commission would grant exceptions,
13 though, to its own rules.

14 COMMISSIONER BRADFORD: Or the Commission would
15 have to grant exceptions to its own rules.

16 The only point I was trying to make, though, is
17 that there is an alternative to it as it is written, coupled
18 with the "equivalent" language in the statute, it seems to me
19 to come out at about the points you are suggesting.

20 CHAIRMAN HENDRIE: That is a difference -- I don't
21 agree that it does. I think in order to get at the point that
22 I would prefer to see it, the nine criteria and item 3, I don't
23 know whether "evaluation" is the right word, but consideration
24 of the threat level as a means of seeing whether you want to do
25 more or less in a given country.

1 My feeling would be that that material ought to be
2 in a Regulatory Guide, which says, "Here are the things the
3 Staff is going to consider in the implementing of 110.43," which
4 has in it the language, you don't have to do it that way, but
5 you are assured if you do it that way, it will be recognized by
6 the Staff.

7 If you think you have an equivalent way to do it,
8 the Staff will consider it. It would seem to me you would have
9 to back this language down into a Regulatory Guide format before
10 you would have that condition.

11 If it goes in the regulations with language, "Each
12 physical security program should include the following
13 essential elements," then they become, in fact, the enumerated
14 standards.

15 COMMISSIONER BRADFORD: Well, except that there is
16 nothing in that formulation that to prevent someone from coming
17 in and showing they have the equivalents.

18 CHAIRMAN HENDRIE: If you write the rule this way,
19 I don't think the Staff has flexibility to consider that. It
20 says, "The essential elements of a physical security program
21 are as follows: one through nine.

22 COMMISSIONER BRADFORD: Jerry just said he thought
23 that they did, though.

24 MR. PAGE: Thus far every physical security program
25 we have found acceptable has contained each of these nine items.

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1 COMMISSIONER BRADFORD: But is it your view that
2 under Alternative 2, as it is presently worded, you could
3 consider a program that had eight of them and the equivalent
4 of the ninth?

5 MR. PAGE: I think the points the Commission brought
6 up on Thursday, that perhaps some word of equivalency, as the
7 General Counsel's Staff indicated would be probably be called
8 for. I think that those were points that were well made.

9 Of course, that is a legal decision. But we could
10 conceive of physical protection programs that might conceivably
11 contain eight of the nine, rather than nine. I am not sure
12 that a practical physical protection program ever will, but it
13 is certainly possible that it could.

14 COMMISSIONER BRADFORD: You have been reading the
15 distinction between "should contain" and "shall contain" as
16 being the basis for reading in equivalency.

17 MR. PAGE: Prior to the meeting of last Thursday,
18 yes, sir.

19 COMMISSIONER BRADFORD: So you wouldn't be at all
20 disturbed if a equivalency test were written in?

21 MR. PAGE: No, no. That would be perfectly accept-
22 able.

23 As I indicated last week, Commissioner Bradford,
24 we believe that we can perform the kind of review that is
25 called for in Alternative 2, even if the Alternative 1 language

1 is there. We simply felt that by putting the Alternative 2
2 language in there, it would be clearer to Applicants and to other
3 countries what is there.

4 COMMISSIONER KENNEDY: But that could be served by
5 a Guide.

6 MR. PAGE: It can be served by a Guide. It could be
7 served by any number of ways in putting it in the regulations.

8 COMMISSIONER BRADFORD: We don't presently use
9 guides, as I understand it, in the export context.

10 MR. SHEA: That is correct, we have not used it to
11 date.

12 MR. SHAPAR: You are, in effect, using it as a Guide,
13 in fact, you have been using it and applying it in the past,
14 even though it has been articulated as a Guide. I mean the
15 Applicants must know this.

16 MR. PAGE: Yes, they do.

17 CHAIRMAN HENDRIE: It is an unenumerated branch
18 technical position.

19 COMMISSIONER BRADFORD: Do they know it is a result
20 of insert 295, or do they know it as a result of their dealings
21 back and forth?

22 MR. PAGE: As a practical matter, we deal with the
23 Executive Branch on the information we get on physical
24 security programs. But our people participate in those physi-
25 cal security reviews anyhow. So at time we have gone back to

1 the Executive Branch for information, appeared needing to be
2 supplemented, and I think it is clear now to the Executive
3 Branch all of the criteria that we have.

4 I think most countries that are interested in getting
5 nuclear materials from the United States will probably know of
6 these criteria, but it would strictly be by way of mouth at the
7 present time.

8 CHAIRMAN HENDRIE: Let's see. I think -- it seems to
9 me, I can see where the position is. Let me try and see if I
10 can spell out where the position stands.

11 Let me start with myself, because that one I can
12 speak fairly confidently about.

13 I would propose to vote for Alternative 1 in Section
14 110.43. And because the question has been raised specifically
15 by NMSS about the nine criteria, I think the Commission ought to
16 go ahead and note the elements that NMSS thinks ought to be in
17 the physical security programs, and upon which they have been
18 and propose to continue basing the reviews of physical security
19 programs. And that these elements were covered in the additions
20 which represented the difference of Alternative 2 from Alterna-
21 tive 1.

22 I would be inclined to go ahead and add to the
23 Commission's comment that we thought it would be useful for
24 these elements to be published and that NMSS might want to con-
25 sider a Regulatory Guide on the subject as a suitable format for

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1 publishing them.

2 Okay. That would be my position.

3 COMMISSIONER KENNEDY: That is exactly my position.

4 CHAIRMAN HENDRIE: That seemed the way you would --
5 I expect, Peter, you would prefer Alternative 2 with an "or
6 equivalents" statement at the end of that sentence in here to
7 catch the essence of not making making these -- not casting these
8 too deeply in concrete.

9 COMMISSIONER BRADFORD: Yes, I would make clear that
10 an equivalent was a possibility in determining -- I would
11 certainly want to make it clear if there was any feeling that
12 it wasn't, that the 9-plus were not the sole criteria but if there
13 were circumstances, additional factors might have to be consi-
14 dered.

15 CHAIRMAN HENDRIE: Now I suspect we are getting
16 ready to vote you down 2 to 1, I am afraid.

17 COMMISSIONER BRADFORD: So I have noticed.

18 CHAIRMAN HENDRIE: Would you join us in the part of
19 the comments taking note of the fact that NMSS -- the additional
20 comment of the Commission that the Commission notes that NMSS
21 has been and will continue to use these elements in its review
22 of plans, showing that we do not object to them, and indeed
23 recommend that they be published in a suitable format.

24 COMMISSIONER BRADFORD: Yes.

25 CHAIRMAN HENDRIE: So I assume we would vote two --

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1 if I may presume -- we would be 2 to 1 on Alternative 1 versus
2 Alternative 2, but in agreement in the additional comment
3 recognizing the use of these elements in judging the physical
4 security in a country.

5 COMMISSIONER BRADFORD: Yes.

6 COMMISSIONER KENNEDY: Aye.

7 CHAIRMAN HENDRIE: I think with no disagreement,
8 let us write that down as the outcome of the discussion. Okay.

9 And I hope that the transcript will be clear enough
10 on the additional language to allow a quick and effective
11 drafting job. I don't know where that will fall. Same, will
12 you do it?

13 MR. CHILK: We will do it in conjunction with OGD^c
14 and OP.

15 MR. SHEA: Would you want a statement of considerations?

16 MR. STOIBER: Yes, we should make it clear to the
17 public that that is the direction we are going.

18 CHAIRMAN HENDRIE: Okay. That gives it somewhat
19 more dignity than it might otherwise have had.

20 I think it would be helpful. Good. Let us do that.

21 Are there other pieces of this package that need to
22 be picked up and put in place?

23 Does anyone know?

24 MR. SHEA: I think that is the only thing.

25 CHAIRMAN HENDRIE: I would note for the benefit of

1 those who keep tabs on Commission votes, in answer to a query
2 by a reporter, the Secretary put together a tabulation of all
3 of the Commission votes since we got the quorum back on the 9th
4 of August And you would be interested to know that just prior
5 to the one we have taken, there were 184 formal Commission votes
6 recorded.

7 Now, let's see if I can remember. There were two of
8 them that were 2-2. There were a couple of, 2 or 3, 2-0's,
9 which I think may have dated, I am not sure from when. I am
10 not sure how we would get down to a 2-0. I suppose three people
11 could be here, two would vote and one abstain.

12 COMMISSIONER BRADFORD: I think that is what
13 happened. And the circumstances under which it would matter
14 would be in a situation where it would take a majority to
15 take some action. So as soon as two people didn't want to do
16 it, that would be the result.

17 CHAIRMAN HENDRIE: Okay. Then there have been a
18 couple of 2-1's. We have just added another 2-1.

19 Thank you very much.

20 (Whereupon, at 2:25 p.m., the hearing was adjourned.)
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