

UNITED STATES OF AMERICA
U.S. NUCLEAR REGULATORY COMMISSION

BRIEFING ON SOURCE SECURITY - PART 37
RULEMAKING - PHYSICAL PROTECTION OF
BYPRODUCT MATERIAL

APRIL 19, 2011

9:00 A.M.

TRANSCRIPT OF PROCEEDINGS

Public Meeting

Before the U.S. Nuclear Regulatory Commission:

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Kristine L. Svinicki, Commissioner

George Apostolakis, Commissioner

William D. Magwood, IV, Commissioner

William C. Ostendorff, Commissioner

APPEARANCES

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1 PROCEEDINGS

2 CHAIRMAN JACZKO: Good morning everyone, the Commission
3 meets today to discuss the Part 37 proposed rule, which concerns the physical
4 protection of Category 1 and 2 quantities of radioactive material. This is a very
5 significant issue for the agency. Given that it's often the areas in which we deal
6 with materials in which we actually see the potential for overexposures, and
7 actually do sometimes see overexposures in these areas, so anything we do with
8 sources, while it doesn't always dominate the news and the focus of the agency,
9 it's certainly, when it comes to the true protection of public health and safety, it
10 plays an extremely important role. So we have a rule in front of us now which is
11 building on our past experience, and ultimately was an attempt to codify, or to put
12 into regulation, the security orders that were in place after September 11, in that
13 it includes certain enhancements that were based on lessons learned from the
14 implementation of these orders.

15 As I'm sure all of you know, the public comment period closed last
16 January, and I look forward to today's discussion of the comments that we
17 received, so we'll try to focus this on -- keep this focused on the comments that,
18 for those of you who are external stakeholders, made, in your comments as part
19 of the rule. Although I think we'll hear from folks today that there's a fairly narrow
20 set of issues in which we have some disagreement, I just want to say that I think
21 this has generally been a very good rule, and I think the set of issues is very
22 small relative to, really, everything that's in this rule. And I hope we'll have a
23 better understanding of those issues after we hear from the stakeholders, and
24 then from the staff. And ultimately, I'd encourage the Commission to move
25 quickly on putting this issue behind us. I think it's been a very good process and

1 I think it will lend itself to, I think, a very good product in the end, and a rule that I
2 think we can all come to some agreement on, and support. So, with that, I would
3 offer my colleagues any comments that they'd like to make. No? Okay, great.
4 Well, we'll start with Dave Walter, then, who's going to speak on behalf of the
5 Organization of Agreement States and the CRCPD.

6 DAVID WALTER: Yes, sir.

7 CHAIRMAN JACZKO: Okay, great.

8 DAVID WALTER: Thank you, Chairman. And, as you said, I am
9 representing both the OAS and the CRCP today. And I'm pleased to be able to
10 represent your partner regulators from the states at this meeting. Next slide,
11 please. There are some ideas in the proposed rule with which the states
12 generally agree. The states were involved early and often in this rulemaking
13 process, and had many representatives on the various working groups in the
14 steering committee. At this time, I'd also like to particularly give thanks to Merri
15 Horn of your staff, who has been very helpful during this process. The states
16 agree that security of Category 1 and 2 sources -- next slide, please -- are very
17 important to protect the health and safety of U.S. citizens, and we believe
18 regulations are the proper methods for implementing these measures. Next
19 slide.

20 We appreciate the revision of the table of applicable isotopes to
21 show an additional significant figure for the curie equivalents. This closes a
22 loophole in the application of the increased controls. And we also agree with the
23 requirement for periodic testing of security systems. Next slide. But we still have
24 some concerns regarding the proposed rulemaking. These concerns are quite
25 evident in the comment letters staff has received from the OAS, and CRCPD,

1 and the various agreement states. While I cannot discuss all of these areas of
2 concern raised by my state colleagues, I will touch on a few. The first is the
3 access authorization program requirements found in 37.23. The proposed rule
4 would place the burden of approval for the reviewing official on a regulating
5 agency who bases their decision only on the results of the fingerprints for a
6 criminal history records check. Some states do not have the authority to
7 adjudicate fingerprints for approval. In the CRCPD survey of the agreement
8 states, 69 percent of the respondents indicated that they do not have the
9 necessary authority to conduct such reviews of the nominated individual's
10 criminal history record. In addition, these reviewing officials are often in the
11 human resources department, or not involved in production, and have no need
12 for unescorted access to radioactive materials in quantities of concern. Persons
13 who must have unescorted access to the areas where RAMQC is being used,
14 must often receive additional plant safety training, and undergo and pass specific
15 medical and physical tests.

16 Such training and tests are expensive, and an employee who is
17 otherwise fully qualified to be a reviewing official may not be able to pass the
18 sometimes rigorous physical requirements. Requiring them to have unescorted
19 access as part of their job duties seems excessive and does not enhance or
20 improve security or radiation safety. Turning now to background checks in 37.25,
21 the orders required a licensee to evaluate a number of items to determine
22 trustworthiness and reliability, or T&R. The proposed rule would add, among
23 other things, credit history checks as part of background checks. 70 percent of
24 the states responding in the CRCPD poll indicated that they do not have the
25 authority to require a credit history check as part of the background checks. We

1 feel the credit history checks are overly burdensome, and an unreliable and
2 ineffective means of determining an individual's T&R. Errors are often made by
3 credit history services. This unreliability underscores the ineffectiveness of using
4 credit histories as a means of determining the T&R of an employee. Especially in
5 these economic times, a person's credit score is not likely to be a true reflection
6 of their trustworthiness and reliability.

7 And now, turning to local law enforcement agency coordination and
8 notification, in 37.45 -- the proposed rule would require the licensee to provide
9 advanced written notification to the appropriate LLEA at least three business
10 days prior to beginning work at temporary job sites where work will exceed seven
11 consecutive days. There's no practical means for a licensee to be aware of
12 every potential law enforcement agency in every location in which they may
13 work. There may be multiple jurisdictions, where the licensee may be constantly
14 moving from one jurisdiction to another, perhaps performing pipeline
15 radiography. Expecting the licensee to be able to give three business days
16 notice to the LLEA is unrealistic in many cases, because often a licensee is
17 notified of the necessity of the work the same day it's required. Sixty-two percent
18 of the CRCPD poll respondents disagreed with adding this requirement to the
19 rule. In addition, the proposed requirement that local law enforcement be
20 requested to notify the licensee if their response capability is degraded, seems
21 impractical, and unenforceable. It's highly unlikely that any law enforcement
22 agency would tell someone that their response capability has been lessened.
23 And if they don't, what can any regulator do about it? Seventy percent of the
24 CRCPD survey respondents disagreed with this idea. In closing, we believe the
25 radiation safety provided by the orders has proven adequate, and that the

1 implementation issues have been addressed through inspections and the use of
2 frequently asked questions posted on the increased controls and security
3 toolbox. Certainly, inclusion of these implementation issues in the new rule
4 would make sense. Thank you.

5 CHAIRMAN JACZKO: Thank you. I will next turn to Kate
6 Roughan, who is with International Source Suppliers and Producers Association,
7 and works at QSA Global -- runs QSA Global.

8 KATE ROUGHAN: QSA Global, yeah. Thank you for the
9 opportunity to participate in this briefing on the comments for the proposed Part
10 37. This was a significant undertaking for both the regulators and the license
11 community, as evidenced by the large representation at the workshops, and the
12 large number of comments received. I'll be speaking on behalf of ISSPA, which
13 is the International Source Suppliers and Producers Associates, which
14 represents many of the manufacturing distribution licensees in the United States.
15 The mission of ISSPA -- next slide, please -- the mission of ISSPA is to ensure
16 that the beneficial use of radioactive sources continues to be regarded by the
17 public as a safe, secure, viable, technology for medical, industrial, and research
18 applications. Next slide, please.

19 We strongly support moving to security requirements associated
20 with Category 1 and 2 quantities of radioactive material from NRC orders-based
21 into regulations-based. We currently -- QSA Global is operating under six
22 different orders, so it would be nice to have everything in one place to know that
23 we're compliant across the board. It also provides an opportunity for
24 stakeholders to engage in the rulemaking process, which has not really
25 happened with the orders. It achieves the desired level of transparency, having

1 specific comments reviewed and adjudicated by the NRC. We strongly
2 recommend that NRC conduct two separate rulemakings: First, put the orders
3 into rulemaking, second, do the second-tier of the enhancements that came
4 through with proposed Part 37, involving stakeholders along the way. We
5 appreciate the development of the very thorough and easy to read
6 implementation guidance in parallel with this rule. This will help ease with the
7 implementation, and help prevent misinterpretation of the rule. Next slide,
8 please.

9 Basically, under the current controls, the licensee has -- have all
10 embraced and incorporated the existing orders with minimum complaints. The
11 current controls in place have been demonstrated to be robust and effective.
12 The increased controls, along with other NRC initiatives, such as the NSCS,
13 LVS, and the forthcoming WBL, provide a multilayered, comprehensive approach
14 to security. There are no indications that current controls are not adequate to
15 prevent a malevolent act. NRC has stated during the cesium chloride
16 discussions, that current security measures are strong and effective, and
17 adequate to protect public health and safety. This should apply to other types of
18 licensees, also. Many inspections have been done to date, and have found
19 existing security practices to be sufficient and effective. Next slide, please.

20 The additional economic and resource burden on licensees is
21 significantly underestimated in the regulatory analysis, and the rule will have a
22 substantial impact on both large and small businesses. Already, industry has
23 spent more than 500 million -- stated in the NRC regulatory analysis. My
24 company alone has spent more than \$1 million to implement the orders. There's
25 not sufficient justification to impose additional and more stringent security

1 measures when the perceived benefits are only described as qualitative, and
2 there are no identified quantitative benefits. This will cost another \$500 million,
3 but what are we getting with that \$500 million? It's going to be very difficult for
4 licensee safety and security staff to ask their management for additional funding
5 resources to implement a rule that has no tangible safety and security benefit to
6 the company or to society in general. It still has not been proven what the threat
7 or risk is we are trying to prevent with the additional proposed requirements that
8 go over and above the existing orders. It is likely that many companies will
9 choose to terminate their licenses instead of incurring this additional cost. Next
10 slide, please.

11 Actually, that should probably say, "One size does not fit all." The
12 security orders were developed and issued to licensees using a graded approach
13 to conserve the nature of the business and the quantity of material they were
14 authorized to possess, and as a result those orders have actually been very
15 effective. The proposed rule attempts to envelope the byproduct community, and
16 other communities, as a whole, and this is not going to be an effective method.
17 Even the existing safety regulations, such as Part 20, recognize the different
18 types of licensees and needs. Next slide, please. We would recommend using a
19 graded approach that requires or appropriates a license type. Something like
20 NUREG-1556, with its various volumes specific to the various types of licenses
21 may be the appropriate type of tactic to take on this, where the security
22 requirements are specific to the type of license, such as radiography, oil well
23 logging, or medical. Next slide, please.

24 The proposed changes are very prescriptive and not easily
25 implemented. It deviates from NRC's normal policy of risk-informed and

1 performance-based regulation. The security requirements should be handled in
2 the same approach as the safety requirements. For example, the annual
3 radiation safety protection program that we're required to do, that is a very -- it's
4 just an audit that you have to do on an annual basis. It's not as detailed as the
5 security audit that's prescribed in the regulation. Next slide, please. The
6 trustworthy and reliability determinations are a critical security aspect, yet the
7 current orders and proposed rule fail to provide to definitive criteria that would
8 qualify or disqualify an individual from obtaining unescorted access to materials.
9 Lack of criteria makes the T&R assessment arbitrary, and especially against
10 requirements, will be subjective and inconsistent. NRC should look into other
11 federal background check programs that are in place, such as the CDC program.
12 Next slide, please.

13 We're concerned with the unrealistic expectations regarding
14 planning and coordination of shipments. This will require huge administrative
15 support when the current system that we use now for tracking, the rad control
16 shipments and received, has proven to be very effective. Next slide, please.
17 Credit history -- as David mentioned, this is going to be very difficult. Most
18 licensees do not know how to assess a credit report. Notification of local law
19 enforcement agencies at temporary job sites -- again, this is going to be difficult;
20 you don't know who the local law enforcement is in many cases. Weekly
21 verification of sources -- this will be pretty much impractical and impossible for
22 large licensees, where sources are moving on an hourly and daily basis, doing
23 physical inventory on hundreds, and perhaps thousands of sources. It's not a
24 lariat and it's just impractical. Implementation of the LVS -- this may not be
25 implemented by the time the rule goes through, and will require many contact the

1 regulator to get approval for shipment. This will be a huge burden on both the
2 regulators and the licensees before they can do a shipment, and will delay
3 shipment to the users.

4 So, in conclusion, we would recommend that NRC reassess the
5 needs verses the real risk versus the cost and benefits. You need to balance the
6 real risk of not performing even inspections of our infrastructure, such as pipeline
7 radiography, the continuation of searching for oil, and the life-saving medical
8 treatments, versus the potential undefined risk of malevolent acts. We need to
9 be sure we can actually implement the rule, otherwise it will just not be effective.
10 Continue to maintain an open dialogue with the stakeholders during the
11 rulemaking process. Thank you.

12 CHAIRMAN JACZKO: Thank you for that. I will now turn to Scott
13 Cargill, who's with Valley Industrial X-Ray & Inspection Services.

14 SCOTT CARGILL: Thank you, sir. I'd like to take a moment to
15 thank the Commission for inviting me to attend today's meeting, and allow myself
16 to represent the industrial radiography industry. Some of what I have to say will
17 be repeated by those attending today representing other sectors, with all of us
18 presenting the general belief and positions of licensees across all sectors. I
19 believe all of us here today wholeheartedly support the move to place the IC
20 orders into regulation. But I'm here today to ask the Commission, with respect,
21 to return the proposed regulation 10CFR Part 37 to the working groups. Again,
22 with respect, we find that the unsubstantiated enhancements placed within what
23 were the IC orders, are burdensome in labor, time, and expense, with little
24 tangible return. I personally tried to keep a close watch on the comments
25 submitted to this matter, and in according to my own official review, I noted

1 numerous comments, all of which we opposed to many, if not all, of Part 37.
2 Commenters included many agreement state representatives, as well as
3 licensees from all sectors, again, all of which appear to object to the changes.
4 Objections noted touched on the reviewing official, the credit history report, local
5 criminal history report, notification to local law enforcement, license verification,
6 weekly inventories, shipment verifications, and even the five-year documentation
7 portension [spelled phonetically], all opposed by the stakeholders and other
8 interested parties. We feel that the proposed additions to the IC orders, as
9 outlined in Part 37, seem to have been drafted from the nuclear power industry,
10 are being pushed on the other industries as a template without latitude for the
11 various unique needs of the other industries. For example, this would be my own
12 industry. We represent a crucial part of our nation's infrastructure, as we are part
13 of the inspection process that allows for safe construction across many fields,
14 from the petrochemical plants to the multi-storey building we are sitting in today.
15 The fields we support are fast-paced, and it is critical that we respond to their
16 needs in a timely manner, and efficiency is a must.

17 The proposed changes being incorporated into Part 37 will most
18 certainly impact our operations and our ability to support our customers. It
19 should be made clear that in respect to industrial radiography, as an industry, we
20 feel that IC orders, as given and implemented, have made a difference and are
21 wholly adequate for the task outlined. No further need exists for changing the
22 existing orders as proposed in 10CFR Part 37. It is my personal and
23 professional opinion that we, as an industry, need no further regulatory burden,
24 and are capable of carrying out operations in a safe and responsible manner. It
25 is my belief and opinion that we, as an industry, strive to meet or exceed

1 regulatory requirements routinely. As such, again, we need no further
2 restrictions or burdens placed on us. It is my hope that the Commission will
3 agree that the proposed 10CFR Part 37 should be returned to the working
4 groups, and those working groups actively seek out input from stakeholders
5 during the process of drafting, by direct means.

6 Summarized, we feel the IC orders were a necessary and
7 reasonable result of the events that occurred on 9/11, and that future
8 enhancements to our security should be explored with direct and close
9 involvement of the various sectors affected. This subject will be far-reaching,
10 and too important to rely solely on the regulatory agencies, though they would
11 certainly be directly involved. Licensees themselves must be forefront in this
12 effort, as they have the working knowledge and daily experience needed to
13 create effective and realistically achievable results. We feel that, as written,
14 10CFR Part 37 is a one-size fits all approach to enhancing security for all
15 sectors, based on an overly restrictive template, that the cost and efforts will be
16 substantially impacting every sector negatively, and are guaranteed to cause
17 severe hardship and confusion to the licensees, setting many up for failure. I
18 would like to make it clear that I do support the efforts made by those involved
19 here, but I believe very strongly that industry must be involved, and that honest
20 effort and consideration be made to industry's input in this matter. Thank you
21 very much.

22 CHAIRMAN JACZKO: Thank you. We'll turn to Eric -- say your
23 last name for me.

24 ERIC BOELDT: Boeldt.

25 CHAIRMAN JACZKO: Boeldt -- with the -- who's the radiation

1 safety officer at Pennsylvania State University.

2 MALE SPEAKER: Where you're going.

3 MALE SPEAKER: Penn State?

4 COMMISSIONER APOSTOLAKIS: Thursday. [inaudible]

5 [laughter]

6 ERIC BOELDT: Thank you for this opportunity to present my
7 opinions on this topic. These opinions are based on 35-odd years of working
8 with radioactive material, mostly at universities. These opinions are also based
9 on the feedback from my colleagues. But let me hasten to add, these are my
10 opinions, not those of my employer, nor of other university and radiation safety
11 officers. First I have some general comments, and then I have some specific
12 comments. Next slide, please. I like the concept of Part 37. Putting all the
13 requirements in one place makes sense to me; it keeps the process simple. And
14 that's one of the things, based on my history with radioactive material, I really
15 like: keeping it simple. Next slide, please.

16 There's a typo on your handout. Credit checks are not mentioned
17 in the Atomic Energy Act. The slide has been updated, but your notes haven't
18 been. Who would you rather trust: an investment banker or someone who's had
19 poor medical luck? If my partner had huge medical bills because he didn't have
20 insurance, I might default on my mortgage to pay for his drugs. There goes my
21 credit rating.

22 No matter what my slide says, credit checks are not part of the
23 Atomic Energy Act. Including them goes beyond the law, and I submit, is
24 contrary to the purpose of the Atomic Energy Act, which is fostering research and
25 development. Credit checks do not check morality, and they certainly do not

1 measure the amount of greed a person has. The analysis of the results of a
2 credit check will also not be simple and, I restate, we want to keep things simple.
3 Next slide, please.

4 I submit that it would be very rare for a licensee to have true
5 professionals performing the background checks. A university may have a billion
6 dollar budget, but the person doing these checks may only do a background
7 check every couple years. My staff have not changed in the last seven years; I
8 have not had to do any new background checks. So, when I hire someone in a
9 few months, I hope, it will be for the first time, in effect. Because, five years ago,
10 who can remember how they did it? I have the forms, I have the procedure, but
11 that doesn't mean I am able to do it.

12 How would you do a credit check if you only did it once every
13 couple of years? Would you put as much work into it, as a HR professional?
14 These things need to be discussed, and I submit that I would rather have the
15 NRC have all the background checks performed and have them do it, something
16 that is uniform and across the board. This would simplify it for the licensees, and
17 I think it would simplify it for you, because you'd have a standard to which you
18 can apply. Now, that standard would include appeals based on that information,
19 as all credit checks should be. Again, this would simplify things if the NRC did all
20 of that, for a fee. Next slide, please.

21 Let's get real. Paperwork does not improve security. We can't do
22 much to prevent an authorized user, such as myself, who has gone through the
23 background checks, to sneak in and blow up a source. We can set up things so
24 that I can't steal the sources. My system is set up so that no one person is able
25 to defeat all the alarms. The National Nuclear Security Administration Global

1 Threat Reduction Initiative installed radiation detection devices and other alarms
2 for me that even I cannot bypass.

3 Okay. This was not simple, I assure you, but it is very complicated,
4 it is good because I cannot circumvent the alarms. The alarms and the police
5 response are where the real security lies, in my opinion, not in with the
6 paperwork. Next slide, please. The NRC requested comments concerning the
7 plain language requirement. Maybe I should just skip onto the next slide on this
8 one. There's --

9 CHAIRMAN JACZKO: Maybe your language there could have
10 been more plain --

11 [laughter]

12 ERIC BOELDT: There was one sentence that contained 381
13 words. Okay. This does not really make it simple. You understand that. Is this
14 a do as we say but don't do as we do moment? Anyhow. Next slide, please.
15 Wording changes. These are to some more specific comments that I had. If
16 you're not going to completely rewrite to a plain language, at least consider and
17 implement the many detailed wording changes that were suggested by a number
18 of commenters. I think I made about a dozen. Next slide, please.

19 Do not be unnecessarily picky with requirements. Radiation
20 protection program reviews are performed annually. I try to finish mine by April
21 15, on tax day. I didn't finish it this year, partly because I was preparing for this
22 meeting. Precise requirements are important in their place, but they aren't
23 important here. If -- as an example, if there are three of the five people in an
24 office who have gotten sick or who have had major family problems, why is it
25 important to do this sort of paperwork? This sort of thing can be delayed for a

1 couple months without impacting security, letting people get on with their real job
2 of radiation safety and security of materials. Again, let me submit: to improve
3 real security, it's not just the paperwork. So we must keep the paperwork simple.
4 I was once cited for not having a meter calibrated, 365 days. That makes me
5 very leery about the annual requirement that is very specific. I was not pleased
6 with that. Next slide, please.

7 Testing too often can cause problems. I have about a dozen
8 people that I must notify ahead of time. I've had to cancel testing operations
9 because the police said, "No, not today, I'm busy." And then I was sort of hung
10 up on, which was fine, that's part of the arrangement. These checks need to be
11 coordinated with police, security, vendors, computer analysis researchers, and
12 other individuals. I need to notify bunches of people because they get automatic
13 alarms.

14 Okay. Other alarms have no known mechanical failure
15 mechanisms. They should only need to be checked every 10 years. If you have
16 a cover on a motion detector that has a tamper switch on it, if you take that on
17 and off every month, you increase the probability of breaking it significantly. And
18 you won't find out for another quarter.

19 The cycling of mechanical switches as to the probability of failure,
20 particularly if that cycling really doesn't happen other than when you test it. I
21 submit that you should only require documentation on testing of devices that
22 need to be tested. For example, if I install extra motion detectors, more than are
23 needed, do those need to be tested? Or should I just take them out now so that I
24 don't have to test them in the future? Again, simplifying the requirements
25 simplifies the process and lets us keep going on what is really necessary. Next

1 slide, please.

2 I have reported suspicious activities. I was once 10 minutes away
3 from calling Homeland Security. That's an interesting story for another day. I
4 have not reported some things that appeared suspicious but were quickly
5 cleaned up. What is the benefit of reporting false alarms? Think of the media
6 impact of me calling up the NRC and saying we had a backpack that was
7 abandoned by the reactor building, we had the bomb squad out, but we found
8 that it had two six packs of beer. That just isn't the sort of message that should
9 be reported to the NRC, although that is what the requirement is at the moment,
10 because we had contacted local law enforcement.

11 Non-events happen many times. I'm not sure how many non-
12 events we've had, let's see. Another example is I got a security alarm at 7:45
13 two days in a row. Turned out to be a non-event, but I was talking to the police
14 about it, and they knew what caused it. But I should have notified the NRC if
15 these rules were in effect. Reporting non-events will just complicate things for all
16 licensees and make us less likely to document minor issues. Let's keep things
17 simple. Next slide, please.

18 In conclusion, I think the NRC should do all background checks.
19 Credit checks by amateurs are just a bad idea. Even as part of an overall
20 picture, I don't believe they will be useful. Let's focus on the security, not the
21 paperwork. Picky paperwork and testing does not equate to improved security or
22 safety. Minimize the paperwork and let the safety and security people focus on
23 safety and security. Consider strongly the media impact of multiple suspicious
24 activities reported to the NRC.

25 Plain language is another thing. Okay. I understand that it is hard

1 for regulators to write in plain language, but I think you could do a better job of it.
2 For a long time, I have regulated professors and graduate students. I have found
3 that the best way to keep people safe and to obtain compliance with regulations
4 is to minimize paperwork and focus on safety. We all want the same thing, so
5 let's try to keep things simple. Thank you for your time.

6 CHAIRMAN JACZKO: Thank you. We will start with
7 Commissioner Apostolakis' questions.

8 COMMISSIONER APOSTOLAKIS: Thank you, Mr. Chairman.
9 Thank you for being here and providing these comments. Literally what I get
10 from all this, and correct me if I'm wrong, you seem to like, well, like or, be willing
11 to live with the current orders. You like the idea of rulemaking but you don't like
12 the rule. Is that correct? Because it's one size fits all, that's the complaint, the
13 main complaint? I mean, Ms. Roughan.

14 KATE ROUGHAN: Yeah. I see two issues. Number one, current
15 orders -- I think were all -- they were put out to specific types of licensees --
16 irradiators, M&D [spelled phonetically], increased controls for radiographers. And
17 those were fit to those programs in the infrastructure for those type of licensees.
18 So, that worked. The proposed rule has a lot of enhancements above those
19 orders, which is really what's causing the difficulty, because the enhancements
20 are very prescriptive and most licensees don't have the infrastructure or the
21 resources to implement those type of things. It's -- that's another whole tier,
22 another whole I don't know the right word -- but, you're just going over and above
23 what's in the orders. The orders will be implemented. They appear to be
24 effective. And if that just goes into rule-making, I think we're all comfortable with
25 that. It's the enhancements that are causing the difficulty.

1 COMMISSIONER APOSTOLAKIS: Thank you. Now, in your
2 conclusions, you recommended that the agency reassess the needs versus
3 [unintelligible] costs versus benefits. Has that been done for the orders? I mean,
4 is this something unique to the rule -- you think the orders satisfy those --

5 KATE ROUGHAN: I think it was done. I don't think it's clearly
6 documented anywhere.

7 COMMISSIONER APOSTOLAKIS: Okay, but you don't --
8 [speaking simultaneously]

9 KATE ROUGHAN: [inaudible]

10 COMMISSIONER APOSTOLAKIS: -- have any problem with risks
11 versus benefits and costs, when it comes to the orders?

12 KATE ROUGHAN: Right.

13 COMMISSIONER APOSTOLAKIS: You don't [inaudible] --

14 KATE ROUGHAN: It's the -- it's the enhancements that are causing
15 difficulty.

16 COMMISSIONER APOSTOLAKIS: Okay. Now, Mr. Walter.
17 Regarding the review in official, what -- you don't like the proposal in the rule that
18 they be qualified for an unescorted access to the reactor, I guess. What would
19 you propose?

20 DAVID WALTER: I don't believe that it would be necessary to have
21 unescorted access to be a very appropriate reviewing official or what is currently
22 known as a T&R official. Take for instance, most of the larger companies that are
23 on a nation-wide basis are going to have their own HR individuals who would be
24 in the best position to be able to do such reviews. But for instance, if one of them
25 is in a wheelchair, unable to go into a production line or unable to physically be

1 able to meet the criteria to be given full access he can no longer be a reviewing
2 official. I think that we're really opening up a can of worms we really don't want to
3 open up.

4 COMMISSIONER APOSTOLAKIS: Okay. And I like your
5 comments on the trustworthiness and reliability. What kind of criteria -- first of all,
6 is it a business of the rule to provide definitive criteria? Should we issue a
7 regulatory guide to give guidance as to when one is trustworthy? I mean, we
8 may make the rule too prescriptive if we put everything there.

9 DAVID WALTER: I believe it would be best to give general basics.
10 But to put in guidance --

11 COMMISSIONER APOSTOLAKIS: Guidance [unintelligible] --

12 DAVID WALTER: -- because there are so many different variations
13 comparing -- depending on the type of licensee, depending on the type of work
14 that's going on.

15 COMMISSIONER APOSTOLAKIS: Okay. That's it, Mr. Chairman.

16 CHAIRMAN JACZKO: Mr. Magwood.

17 COMMISSIONER MAGWOOD: Good morning. I appreciate all of
18 you coming in and giving us your views today. It's been very -- I can't say it's
19 informative, because this seems like there's been a pretty unified primal scream
20 coming from the community on this rule.

21 [laughter]

22 And it's been pretty consistent almost from the very beginning.

23 Yeah, security is obviously, since 9/11, it's been something that all of us had to
24 make changes and adapt to, and anyone who flies frequently from airports has
25 gotten used to taking his shoes off, and being scanned by the x-ray, and all that

1 sort of thing. It certainly is something where as you go through it, you wonder,
2 you know, "Why am I doing this again? Is this really worth it? Does this really
3 protect anybody?" And one hopes that there's some smart person some place
4 that's an expert in airport security that has determined that I do have to take my
5 shoes off. I do have to throw my Coke away before going through the x-ray. I
6 hope that's true, anyway.

7 So, this -- so, these things -- security is never an absolute. It's
8 always a judgment call as to where the balance is between the burden on the
9 public and on licensees and the need to enhance the securitization of nuclear
10 materials. That's always the balancing act. And, since it's a judgment, it's not the
11 sort of thing that lends itself to easy analysis. So, the question as to whether
12 security checks or -- excuse me, credit checks are the right thing to do, or
13 whether changing how we -- changing the number of tests, and how often we test
14 the systems, and what reports are made. But these sorts of things are always
15 done in balance.

16 So as we go through this, I just hope you understand that we are
17 trying to find that balance, and you know, I personally will be looking forward and
18 I hope it's something we can do in a way that makes sense, but it is a difficult
19 balance to strike in any cases, because you never know what, you know -- you're
20 always trying to plan against scenarios that very imaginative people come up
21 with that, you know, you can think of ways around the systems that exist today.
22 I'm sure that -- and we'll talk to the staff in a few minutes. But I'm sure that there
23 are scenarios that one could project that the current system would not protect
24 against. And that's why we're having this conversation.

25 Now, all that said, you know, I am interested in one aspect of Ms.

1 Roughan's comment about having -- and several of you have mentioned -- the
2 idea of having a graded approach to this. I wonder if you could explore that a
3 little bit, either Mr. Walter or Ms. Roughan. Perhaps you give us some examples
4 where you think above and beyond the current orders, where a graded approach
5 would be used. And give us some -- just, you know, an example in your mind
6 that you've -- I mean, as you've thought about this.

7 KATE ROUGHAN: I'm not sure what to say in terms of "over and
8 above the orders," because the orders were issued specific to a licensee and
9 what type of licensee. So we have, you know, for an M&D I have to do certain
10 things. The Radiography industry has the increased controls, and they have to
11 do other requirements under the orders. The irradiators have specific
12 requirements. So, I guess I think my approach would be just to stay with those
13 orders with a different type of licensees and don't go to the enhancements.

14 COMMISSIONER MAGWOOD: That's --

15 KATE ROUGHAN: If you do go to the enhancements -- again, if
16 you do need to go there, looked at the graded approach. Look at -- from how the
17 materials are handled, the quantities, the infrastructure, and the programs that
18 are already in place under the orders -- and see what else may need to be
19 enhanced.

20 Right now, I mean, most of the licensees have been inspected at
21 least once or twice under the existing orders and programs have been found to
22 be satisfactory. Though I think -- again, one of the things I recommend is we do
23 a two-pronged approach -- is we implement the existing orders and then look at
24 the enhancements based on the different types of licensees and see what --
25 where there may be gaps or where there could be -- again, there could be

1 improvements.

2 COMMISSIONER MAGWOOD: All right. Mr. Walters?

3 DAVID WALTER: I actually believe that we have been doing
4 enhancements. We have 220 some odd questions and answers from the orders
5 that came out. The orders weren't perfect. If they were, there wouldn't be any
6 questions and answers. But the very fact that we've been able to fine tune those
7 to meet certain specified situations that have been found during inspection or
8 brought up by the regulated individuals -- because they are having problems
9 implementing a certain part of the order, they ask questions. That fine tuning, to
10 me, I think has really given us that graded approach to a great extent.

11 COMMISSIONER MAGWOOD: Question for Mr. Walter. The --
12 you've talked about the authorities -- that the states don't have to deal with the
13 credit checks and deal with fingerprinting, that sort of thing. What -- could you
14 give us some thoughts about what -- how difficult it would be for the states to
15 require the authority to adapt to this rule? How -- for most states -- I mean, I
16 know it's -- most states, it's kind of hard to talk in those terms. Perhaps, an
17 example you can give us -- maybe from Alabama. How difficult would it be to
18 make the changes?

19 DAVID WALTER: I would have to discuss that with our legal
20 individuals. We were one of the few states that they thought did have the ability
21 to do that. I was in the minority. But, there are so many different implementing
22 resolution or possible changes in law that might have to be done based on each
23 individual state's way of handling these things. It would be very difficult for me to
24 tell you one way.

25 COMMISSIONER MAGWOOD: I appreciate that. Mr. Cargill, as a

1 -- I appreciate you coming in and giving a small business voice to this. Can you -
2 - maybe you could give us -- you've talked about how this would have a big
3 impact on business. Could you give us a view as to what -- if this rule would be
4 implemented as it's currently drafted -- what impacts it would have on your
5 operation? And I mean, would it have employment impacts? What would
6 happen?

7 SCOTT CARGILL: Well, it wouldn't just be my operation. I'd be a
8 typical example of -- somewhere in the neighborhood of 4 -- 500 licensees. The
9 local law enforcement notification alone -- I can give you a scenario where I
10 would have a crew working at a job site for five days. Day five rolls around, the
11 customer runs into a tie end [spelled phonetically] situation, they work past
12 midnight. We're now into Day six, 2 a.m. rolls around. They decide to call it a
13 day. Everybody comes back tomorrow. By the time we turn around -- look, we're
14 into Day seven, and I'm in violation, strictly because the way events rolled out.

15 My radiographer is certainly not going to tell the customers, "Sorry I
16 can't come back tomorrow, because I have to call the local sheriff." Before this
17 got too far, I had contacted the current County Sheriff's Department, ask them if
18 they knew anything about this Part 37. I ended up with -- the response was,
19 "Huh?" They had no idea what I was talking about. It took me two days to come
20 find a guy that understood what I was even talking about.

21 The local law enforcement agencies themselves are going to have
22 massive difficulties dealing with this. The license verification -- I've got numbers
23 to half a dozen representatives in the state of California. It's a good trick to get
24 one on the phone when I call. They're busy people. They don't have the time to
25 answer my phone call. So, to call up and get a verification that I&C [spelled

1 phonetically] or QSA or Spec do indeed still have a current license, is certain to
2 be problematic.

3 Overall, the enhancements across the board would be problematic.
4 I've run about 300 plus employees, about 200 badged employees. It would just
5 add one more layer on top of my day -- that I'm not able to get out there and
6 perform field audits, because I'm busy working paperwork. The credit history --
7 my sector -- probably more than most -- we're not dealing with college graduates,
8 here. We're not talking Ivy League people out there in the dirt at midnight,
9 raining, cranking a shot out. Their histories are not very appropriate for this
10 discussion. Essentially, across the board, it's going to create a massive load on
11 us. I won't sit here and I honestly cannot tell you that we would not be able to
12 meet these enhancements, but it would be completely horrendous in time and
13 effort, and a gob of money.

14 COMMISSIONER MAGWOOD: I really appreciate your comments,
15 and let me assure you -- I think there are many people with degrees that also
16 have pretty ugly credit histories -- so it doesn't just go to the people in your
17 industry. Thank you, Mr. Chairman.

18 CHAIRMAN JACZKO: Commissioner Ostendorff?

19 COMMISSIONER OSTENDORFF: Thank you, Mr. Chairman, and
20 thank you all for being here today. I think this is very helpful for us to hear, from
21 the stakeholders that would be directly impacted if the proposed rule became
22 final. I also have to tell you, I think this is a good example of the NRC staff's
23 outreach to fully communicate with the affected communities in a way that allows
24 -- prior to coming into a final rule decision -- for us to hear directly from you and
25 your colleagues through your representation.

1 Heard from Commissioner Apostolakis' and Commissioner
2 Magwood's questions -- kind of again, a recurring thing that's already been
3 pointed out but -- that there is support for the existing increased controls in the
4 current orders to be turned into rule. And we've heard from others some
5 concerns on a lot of different places. But let me ask each of you just kind of
6 down the line -- starting with Mr. Walter -- are there proposed enhancements that
7 are not currently in the existing orders that you believe your individual
8 communities support?

9 DAVID WALTER: I'm thinking. As I said, I believe -- for instance,
10 there are some -- some of the checks of the systems -- regular checks -- and I'm
11 not going to specify how often. I believe that those would be good. I believe that
12 the states have indicated in their comment letters that that is something that they
13 agreed with. We did also -- as we said before, as I said early on -- that there
14 were a couple of other things that we did agree with in putting it -- you know, for
15 instance, we had a couple of situations where the table -- a one table did not do a
16 clear differentiation between Curie and Becquerel Equivalents. That's being
17 taken care of for that.

18 But from a standpoint of directly -- again, I'd have to go back to the
19 fact that we have been doing so much enhancing over the years through the
20 inspections. The inspection process, for us, has been an eye opener. We go
21 and we would do an inspection of the facility -- a pre-cursory inspection of the
22 facility -- before they go completely underneath the increased control rule -- not
23 rules, increased control orders. And then coming back and going through at
24 least one -- most -- I think every one of ours has been through two inspections.
25 And those have been learning situations. The curve has really exponentially

1 already gone up, and we're at the plateau range.

2 I think, for us, it's a law of diminishing returns. I believe that the
3 increased control orders may have taken care of -- perhaps, not in my own
4 personal belief -- maybe 95 percent. You're never going to reach 100 percent.
5 It's one of those situations that's just not going to happen. So, how much more
6 can we go, as you look at each additional implementation costing more and
7 giving you less of a return?

8 COMMISSIONER OSTENDORFF: Thank you. Ms. Roughan.

9 KATE ROUGHAN: I think I'd have to echo most of David's
10 comments. I mean, looking at the enhancements, I think the checking the
11 security system makes sense. The words right now say, "A calibration of the
12 system," which is really not what we're going to do. We're going to do a physical,
13 functional check of the system to make sure it's operational. Calibration of a
14 security system is going to be very difficult and we need to make that distinction.

15 Another -- something they put in the rules. They're not going to
16 require fingerprinting for the carriers. That was something that had been
17 discussed at one point, and it put a lot of onus on the licensees to make sure that
18 the carriers themselves had background checks, and were trustworthy, and
19 reliable. But we had to rely on the carrier company to carry that out and do some
20 type of checking on that. That seems to come out on the proposed rule, which is
21 beneficial.

22 And I agree with the fine tuning over the last few years, since no
23 words have been in place. Initially, when they first come out, no one really knew
24 how to implement them. We all kind of struggled with how we were going to do
25 it. None of us had any infrastructure at all to deal with security issues, in a

1 sense. So it was kind of a whole new mindset for the companies to deal with and
2 implement the processes for fingerprinting, for safeguards, modified information
3 for all the things that we had to put in place. And I think by the fine tuning that
4 we've done over the years -- if we implement those with the existing orders -- that
5 does cover the enhancements that I think will make the rule effective, and not go
6 -- any of the other enhancements, I can't see that it improves anything in addition
7 to where we already are.

8 I just don't see how much more benefit we're going to get by implementing the
9 enhancements that are recommended -- proposed Part 37 at this point.

10 COMMISSIONER OSTENDORFF: Thank you. Mr. Cargill?

11 SCOTT CARGILL: Thank you. Any of my support -- as written --
12 none, sorry. What I did like though -- the shipment verification side of it. It's not
13 that I would support it as it's written, but it was one of those things that I hadn't
14 ever personally thought of. When I receive a shipment from the manufacturer, I
15 have obviously initiated that shipment by making the order. But I never actually
16 alerted them that I had received it when it came in. And that's just something that
17 I thought, "We can do better."

18 A lot of the enhancements -- I would prefer not to see it in
19 regulation, as prescriptive as it is. I would prefer more of an approach where we
20 have the opportunity to work with local enforcement on a voluntary basis, some
21 kind of a program that puts us all in the same room kind of thing versus "You will
22 do this. You will do this annually," et cetera. That's about as close as I can get
23 to an answer for you.

24 COMMISSIONER OSTENDORFF: Thank you. Mr. Boeldt?

25 ERIC BOELDT: Since the initial implementation, as Kate has said ,

1 there's been a huge increase in the level of security. We had -- before that, we
2 had locks. We had things like that, but no background checks. Since then, of
3 course the background checks, as part of the orders, are implemented and we
4 have all sorts of bells and whistles. I think that's a good thing. It makes me feel
5 better about going into those places to check out an alarm, knowing that there's
6 nobody there with a gun. I don't want to be the step-over. That said, I don't the
7 credit check will do anything. There's been a lot of talk about that. So many
8 examples on how it wouldn't do any good and I can't see how it would help in a
9 background check.

10 COMMISSIONER OSTENDORFF: Thank you. You made a
11 comment during your presentation that I wanted to see how others felt about --
12 that I think -- as I understood, it proposed that the NRC take the responsibility for
13 all background checks. Was that your position? I wanted to see if your
14 colleagues had any views on that, one way or the other. Mr. Walter?

15 DAVID WALTER: Currently what we're looking at is that all the
16 fingerprinting would have to go through the NRC and the background checks
17 otherwise being done through the FBI -- I think it is -- and notification to the
18 licensee. I haven't seen a problem with that. I would like to know if there is a
19 problem -- if there is another way to address it, rather than having to place the
20 responsibility off of the regulating agency of the licensee and onto the NRC? We
21 prefer, as states, to maintain the responsibility over our licensees as much as
22 possible.

23 COMMISSIONER OSTENDORFF: Other comments?

24 KATE ROUGHAN: I think that the background checks -- and one, I
25 would like to see it go the NRC or something similar, so we don't have

1 responsibility. But obviously, that's very prescriptive and we don't have any
2 flexibility on that.

3 If we kept it with the licensees, I think there does need to be a lot of
4 guidance in the document as to what the acceptance criteria is, because the
5 licensees are, in a sense, hanging out there to make the final decision based on
6 all this information: credit checks, character references, you know, military,
7 educational background, and things as to whether or not that person's
8 appropriate. If that person's not appropriate and something happens, but we said
9 they're trustworthy and reliable, where does that leave the licensee? Or if you do
10 the opposite, it just has no criteria for us to feel comfortable that we're making the
11 right decision. If that individual can go either way, that's what happens in the
12 end.

13 COMMISSIONER OSTENDORFF: Cargill, anything?

14 SCOTT CARGILL: I actually believe T&R duties should fall to the
15 licensee, at the end of the day. The licensee is the responsible party. It's my
16 decision to allow the individual to work with a mine [spelled phonetically] material
17 in a supervised or unsupervised fashion. If this goes to the NRC or to the
18 agreement states -- you don't know this man. You don't work with this individual
19 for months and years at a time. What you'll have is a report that may or may not
20 show him in a favorable light.

21 The story I like to say is my dispatcher. He just recently gone
22 through a divorce and child custody. At that particular moment in time, he
23 probably wouldn't present a strong candidate. I have to ask, at that point, the
24 NRC takes the responsibility or the agreement takes those responsibilities, then
25 you're going to end up in a fight over what is an appropriate individual. Would it

1 make my life easy? Yes. It would be much easier if I could just send you a
2 fingerprint card and say, "Can I have him or not?" But I believe in this day and
3 age, that would be a mess to work with.

4 COMMISSIONER OSTENDORFF: Thank you. Thank you, Mr.
5 Chairman.

6 COMMISSIONER SVINICKI: I want to join in thanking all of you for
7 being here today. And in addition to the points you covered in brief, of course,
8 you and organizations you represent have submitted very substantive written set
9 of comments, and we have those available. The NRC staff will be going through
10 and proposing responses to those, but in preparation for the meeting today, I've
11 looked what each of you submitted and I just want to note that I think, with time
12 constraints, you hit the high points. But there is a significant amount of work that
13 each of you and your organizations have done in the written comments, and I
14 don't want you to think that your presentations are meant, in any way, to take the
15 place of that. So, I thank you for the substantive work that's reflected there.

16 It's a little bit unusual for me in that, in at least one of the comments
17 that I was reviewing in preparation for the meeting, my own concerns about the
18 ability to implement some of these requirements that were in my vote on the
19 proposed rule made it into the comment records. So in a way, I feel that I've now
20 been incorporated into the comment record, but I did express those concerns
21 because, again, sitting on my side of the table, I could see some real practical
22 challenges to the ability to implement some of these requirements. And Mr.
23 Cargill, I think in response to Commissioner Magwood you already mentioned the
24 fact that you contacted local law enforcement. And you talked a little about the
25 puzzled response you got there, so I'll look forward to seeing what the NRC staff

1 proposes in response to some of your comments. But in looking at the proposed
2 rule, I had shared some of these, I think, kind of pretty practical and real-world
3 concerns about things.

4 You know, it was interesting, Commissioner Magwood talked about,
5 we go through airport security and we think to ourselves, "I'm not certain that
6 some of these steps are enhancing security." But in that instance, we're able to
7 say, "Well I hope somebody smart, somewhere, is convinced themselves." I
8 think the case of Part 37 we're supposed to be the smart people somewhere. So
9 we're the ones that have to look at and assess whether or not -- and I think really,
10 what we're talking about here are the enhancements, the things that go beyond
11 the orders that were issued. We're going to have to use our judgment, and that's
12 the other difficult thing I think Commissioner Magwood and others have referred
13 to, is the fact that when it comes to security, it oftentimes doesn't really lend itself
14 to a dollar and cents kind of analysis. So, we're going to have to weigh some
15 public policy objectives in enhancing security and also, of course, look at the
16 ability to implement the actions that are contemplated.

17 We've covered a lot of ground in response to my colleagues'
18 questions, so I think I'll just close with one other comment and then I'll -- if any of
19 you would like to comment on my little soliloquy here, I'll give you an opportunity
20 to do that with my remaining time. But it was interesting to me to hear that I think
21 almost everyone of you said that you are in support of the fact that we need to
22 take -- Kate, in your case, I think you said six orders that you operate under --
23 and put them into the regulations so that you're going to have better scrutability
24 and traceability of complying there.

25 I have to report to you, in case you don't know, and I'm not sure

1 why you would. If you were to talk to your counterparts in the nuclear power
2 reactor community, you'd find out that the incorporation of their post-9/11 orders
3 into the regulation occurred, I think, two years ago. Not a single order, to my
4 knowledge, has been sunsetted or rescinded. So, I guess when I got to that part
5 of the comments you all submitted, I made a note in the margin. It said, "Not so
6 fast," meaning that now, it's not for failure to keep -- the NRC staff can attest that
7 they get nagged rather frequently on this point by at least one member of this
8 Commission.

9 But I hope -- in this case, I do think that we incorporate and codify things into
10 regulation for the purpose of then going through those orders, making sure that
11 we have mapped everything over to the regulation, and then doing what I call the
12 "basic housekeeping step" of looking at the orders -- if it's in the regs, it doesn't
13 need to be out there in orders, in my personal opinion.

14 So, I think the NRC needs to be a better job of carrying through
15 with that step. And I hope that I will. With that, I'd offer an opportunity for any of
16 you to comment on any of that. I'm not really getting -- Oh, Mr. Cargill.

17 SCOTT CARGILL: I like to make it clear. I do not know of any
18 licensee that objected to the IC orders. None of us fought on it. It came down,
19 we all agreed --

20 CHAIRMAN JACZKO: That's not my recollection of events.

21 [laughter]

22 I mean, that's a completely different --

23 SCOTT CARGILL: I have no doubt.

24 GREGORY B. JACZKO: -- different recollection of the events from

25 --

1 SCOTT CARGILL: We put those --

2 CHAIRMAN JACZKO: --having been there when we did the
3 increase orders. There was tremendous opposition --

4 SCOTT CARGILL: I have no doubt.

5 CHAIRMAN JACZKO: -- to the increased orders.

6 SCOTT CARGILL: On my side of the fence, we did not object to
7 them. They came down. Obviously, we would rather not spend of the money if
8 we don't have to on something. But in this case, we went out and put a security
9 system, enhanced it, beefed it up, changed some things around. We were more
10 than happy to do so. Nobody at this table will deny that security of our material is
11 an important piece. We're not very cavalier in this. I think material -- we run
12 around, fill it in the back of a pickup truck, drive it all over -- well, you know, back,
13 and do our job, bring it home every day. But the enhancements here, I really
14 can't stress it enough. The impact on at least my sector and probably all the
15 sectors will be substantial. Not just in monetary but mainly in manpower. I'm
16 going to need at least three more assistants to help me run what I have, if these
17 go into play. That's a lot of time on sitting behind a desk and not out in the field
18 watching my guys.

19 KATE ROUGHAN: I'd like to make a comment. I support the
20 making sure the regulations can be implemented. Again, if they can't be
21 implemented, they're not effective, so we need to make sure whatever does go
22 through can be implemented on the day-to-day level. And just a couple of
23 examples there; Scott had mentioned the receipts. Under the current orders,
24 we're required -- which was safeguarded information at one point, but it changed
25 -- we insist on a place in FedEx, where we check daily that the shipments arrive

1 at the customer's facility. So we know when the shipments arrive or not. Under
2 the proposed rule, that's not going to be an option, it's going to be a preplanning
3 where someone actually has to monitor each of the shipments when it ships, and
4 when it's received, and make proper notifications. That's going to be a huge
5 administrative burden for some of us making 30 to 40 to 50 shipments a day and
6 receiving packages.

7 So that's a real consideration that we place checks on the inventory
8 for licensees that maintain hundreds of sources that move on a daily, hourly
9 basis that are CAT2. That's just impractical to do an inventory. We have a
10 method in place with a state authority of how we can monitor, if a source is
11 removed, and that should be allowed to be acceptable, and that can be
12 implemented. So again, I stress the fact that we be able to implement the regs
13 on a daily basis.

14 COMMISSIONER SVINICKI: Walter, did you --?

15 DAVID WALTER: I'll have to say, I also recall there being a little bit
16 of a backlash, the order. And it mainly comes down to the expenses involved in
17 placing them. I'm not going to say that all the orders -- that every one of the
18 orders was perfect, but at the same time, I believe what happens is that in the
19 beginning, when the orders were being put together, a lot of these items that are
20 now coming up, that are being attacked now, came up then, and they were
21 attacked at that point in the working-group side. And yeah, I guess for no other
22 reason but for the sake of expediency, those items were dropped so that the
23 orders could get out and be effective. Maybe I'm wrong on that, but for one
24 reason or another, these items didn't get placed in there.

1 Things such as the background checks including credit histories
2 and so forth, and a local law-enforcement notifications, the way they are looking
3 here in the proposed rule. So we're re-living the past again, and for some
4 people, especially those who are in the early phases of this, we're re-living that
5 past again and trying to go back through it, and it still hasn't been cutting the
6 mustard as far as we can see, as far as whether or not it's going to be effective.
7 It's important to us to have both an effective and an enforceable rule. If it's not,
8 it's really not worth having.

9 ERIC BOELDT: Thank you for the warning about the orders not
10 being immediately revoked, Part 37, where implemented. My plan had been to
11 shred that whole stack of paper, because obviously when applied, once Part 37 -
12 - I see that I'm wrong in that one. I do remember me complaining about
13 enhancements, and I also remember, after whining to my staff and to my
14 colleagues for a day or three, just upset about doing it because we saw the
15 rationale. The credit check, and a few other things -- we really don't see the
16 rationale for.

17 COMMISSIONER SVINICKI: Thank you, and I will just note that I
18 don't know for sure what will happen with your orders. I'm just pointing out an
19 analogy on the power-reactor side, and I'm sure that the staff will seek to outdo
20 their reactor colleagues and perhaps do a much better job in your case. So
21 anyway, with that, thank you Mr. Chairman.

22 CHAIRMAN JACZKO: Well thank you. I appreciate all of you
23 coming and sharing your thoughts. I think it's very valuable for us to hear. I
24 always never quite know what to say by these kinds of situations. I had the

1 opportunity -- now, I wasn't here on the commission when the original orders
2 were actually developed. I was here, I believe, during the implementation and
3 the rollout of some of the orders. A lot of work went into them, and the orders
4 were done, I think, around the initial round from kind of a risk-ranking. Then we
5 followed with the increased controls. I think maybe I was here when we did the
6 increased controls.

7 But I think as you said, Mr. Walter, a lot of the same arguments that
8 we heard then are kind of being repeated now. So yeah, I'm not sure what truth
9 is here. I think that's the biggest problem, is to try and understand what's the
10 truth and what is the reality, or what's not. We -- a lot has been made about a lot
11 of concern about the credit-history check, but under the orders, you're required
12 right now to do a series of checks, and there's been some discussion by the NRC
13 during these, and I think what I've heard is not necessarily my understanding of
14 how it works. I mean, right now, all of these things are adjudicated by the
15 licensees, and the trustworthiness and reliability determination. We process the
16 fingerprints as a pass-through. We get them, you fax them to us, you send them
17 to us electronically. We then send them to the FBI. The reports go back to you.

18 We don't actually adjudicate the trustworthiness and reliability.
19 That's not changing. What we're doing is we're just adding in an element to
20 those things that you look at for background. It's not just the fingerprints right
21 now. There's other elements that go into the background, so there's probably
22 value in having an initial set of data. I mean, you're hearing the arguments about
23 not having criteria are not new to this rule. Those have been there since the
24 beginning, because we didn't specify trustworthiness and reliability, because that

1 is ultimately a determination for you all to make. So I hear these concerns, but I
2 come at it from a very different perspective, which is that these are not new
3 issues to the rule, to some extent. Adding in the credit-history checks is a new
4 element. I'm not personally convinced that that's that much of a burden.

5 I don't see that -- I went to get a new cell phone the other day, and
6 they asked me for my Social Security number. I said, "Why do you need my
7 Social Security number?" Because I wanted them to give me a cell phone right
8 away, and switch carriers or whatever. Well they run an instant credit check to
9 buy a cell phone, because they want to make sure that I'm going to pay my bills
10 or whatever. I'm not sure that these things -- and again, this is a big multinational
11 telecommunications company, so I appreciate that that's different from what you
12 all do, but the issue with the reviewing official. And Ms. Roughan, I think you
13 make a good point that we're trying to impose on your -- almost like we're playing
14 regulatory Twister here to do this.

15 But the point here is, it's a common-sense issue, that the person
16 who's deciding if other people are acceptable, the person who's reviewing, and
17 whatever we wind up deciding is going to be in the background investigation,
18 whether it's fingerprinting, whether it's a criminal-history check, whether it's
19 educational background, whether it's employment records, which I think
20 employment records is currently in the requirements -- whether we add to that a
21 credit-history check, the person who's making that decision probably should have
22 those same checks imposed on them. I mean, that's the purpose of that
23 requirement.

24 It's not to make them have unescorted access to the site. It's to

1 make sure that the person who's doing all that is trustworthy and reliable. But
2 the only way we have under statutory authority right now, as I understand it, to do
3 that is somebody who has unescorted access to the site. And we all know that if
4 we went to go to Congress and get that changed, and this is no offense at all to
5 people in Congress who might be listening, that's not going to happen overnight.

6 So we're stuck, right? We can put in place a system in which we
7 require all these things which are under the orders, that all these people have to
8 be trustworthy and reliable, and yet the person who makes that decision has no
9 requirements that they have to have any background check on them at all. So
10 we tried to come up with a way to do that. I mean, that's what's in the rule, and I
11 appreciate your concerns about, "It would say that people -- who would be
12 required to have unescorted access?" because right now, that's where we have
13 the authority to require the fingerprint checks. So that's why we did it that way.
14 So it's not an attempt to require people to have unescorted access who can't.

15 It's a common-sense thing that the person doing the checking,
16 should be checked. I'd love a better answer, I'd love a way to do that, because I
17 don't think anybody disagrees that that's the right thing to do. I mean, I don't
18 think -- maybe you do. Maybe you believe that those people who are doing that,
19 your HR professionals, they already are trustworthy and reliable. And so that is,
20 we're just trying to figure out a way to verify that. So that one, I don't think is as -
21 - I look at these things from a very different perspective. I see the credit-check
22 as an additional item in the background, which is already fairly extensive, which
23 already does not have criteria. I see the first one as just a common-sense thing
24 that I too would love a better answer for. But I don't know what one is right now,

1 with what we have.

2 And I know, Mr. Walter, you know, we went through the same issue
3 with fingerprinting. Many states, initially with the increased controls, said, "We
4 don't have the ability to do fingerprints," and we went around and around and
5 around, and all the states came up with a way to do it. Now, if they can come up
6 with a way to do fingerprints, I have to think that they can come up with a way to
7 do credit-history checks.

8 DAVID WALTER: There is a considerable difference between
9 implementing orders, and trying to implement a rule or even place a rule in there,
10 such as different states would have different options and capabilities.

11 CHAIRMAN JACZKO: Absolutely. And that's part of being in the
12 agreement state program, is you have those different approaches. All of these
13 rules give you at least three years to put in place the comparable state
14 agreements, state requirements, and that's generally the period which we look at
15 for compliance. So there's an opportunity to do that and to move forward. Again,
16 part of this -- I'm not trying to lecture here anybody -- I just have a very different
17 background from a lot of this, and a lot of this goes back, again, to there was a
18 fundamental decision the commission made, to make all of these orders be done
19 under public health and safety requirements so that it would be able to be done
20 at the agreement state level.

21 But as we get into these situations then, where we run into statutory
22 challenges at the state level, that just reminds me of that decision, and had we
23 gone with an approach of this being done out of common defense and security,
24 and the NRC having done it, again, we would create then a situation in which

1 people would be getting regulated by two different regulators, but then we
2 wouldn't have the issues with state authorities to issue fingerprints or to require
3 fingerprinting or to require background checks or these kinds of things. We
4 would eliminate those hurdles, so what I try and look at is, what is the best thing
5 to do for safety and security?

6 And in that case, if it means doing the credit checks, then we figure
7 out a way to do that. And I think we did that with the fingerprinting. We figured
8 out for states that didn't think they had the authority, to eventually be able to
9 figure out they did, or to pass whatever requirements they had to do to do that.
10 And all the states, in the end, did. Everybody's right now imposing or doing the
11 fingerprinting, and kind of came up with ways to do it.

12 So I don't know that I have a point, but I think that these are good
13 concerns to hear from you. What I hope we can do is come up with common-
14 sense solutions to them. Because I don't disagree with your concerns, but I'm
15 not sure that the staff proposal is as radical as it appears to be from what we
16 heard from the comments. I think they are much more common-sense things
17 that make sense -- the local law-enforcement, I agree. I don't know how we
18 would ever enforce that, quite honestly. I don't know how you can do that. It's a
19 very, very difficult thing. But I'll tell you from having visited sites, it's probably one
20 of the most important elements in any security program is that there's good
21 communication and coordination with local law enforcement. Absolutely,
22 because they're the folks who are going to have to deal with a lot of the
23 response.

24 So I don't think we disagree, and Kate, you're kind of nodding your

1 head. The problem is coming up with a solution that works, and I think that's
2 what hopefully we'll continue to work through and work on. And these may not
3 be solvable. I mean, it may just be ultimately impossible to figure out a way to
4 have that local law-enforcement coordination, so I appreciate you being here. I
5 think it's very helpful. I wish we would sometimes, that the commission would
6 just sit in a room and we'd all just talk about these and come up with an answer
7 with all of you, and just work through it, because I don't think there's as big of a
8 divide as there appears to be. These are common-sense approaches, I think, to
9 dealing with these things, and I think there's ways to do them that minimize the
10 burden on you but still accomplish the obvious that I think needs to be
11 accomplished. With that, Commissioner Apostolakis, do you have other
12 comments or questions?

13 COMMISSIONER APOSTOLAKIS: One last point. The message
14 I'm getting from all this discussion is that you would rather stay with the existing
15 orders than move to R57 as it exists now. Is that correct?

16 SCOTT CARGILL: Yes.

17 KATE ROUGHAN: We'll put the orders into rulemaking.

18 COMMISSIONER APOSTOLAKIS: I'm sorry?

19 KATE ROUGHAN: Put the orders into rulemaking, into Part 37.
20 But don't implement the enhanced --

21 COMMISSIONER APOSTOLAKIS: Do not enhance anything. Is
22 that what you're saying?

23 KATE ROUGHAN: I mean, even in the background check, we are
24 required to do that under the orders, but in the proposed Part 37, there's many,

1 many other things we need to check that can be very difficult. We have to get a
2 character reference on the employee, talk to someone that the employee hasn't
3 given us a name -- we've got to go out and seek out a person to get information.
4 It's just not -- you just can't implement that. So those are the type of things. Yes,
5 we have to do background checks, but what's required in the background checks
6 under the orders is much less than the proposed Part 37. And that's where we
7 need to make the line, I think.

8 COMMISSIONER APOSTOLAKIS: You have any comment?

9 DAVID WALTER: I think it's safe to say that the states, if you were
10 to implement it as it is proposed now compared to what the orders are now, we
11 would prefer the orders.

12 COMMISSIONER APOSTOLAKIS: Yes. Thank you.

13 CHAIRMAN JACZKO: Okay. Any other comments or questions?
14 Well thank you very much. Appreciate you being here.

15 [break]

16 CHAIRMAN JACZKO: Okay, well now we'll hear from ACMUI and
17 the staff. We'll start with Susan Langhorst, who is with the Advisory Committee
18 on Medical Uses of Isotopes. Are you -- is that how we're starting?

19 MALE SPEAKER: That's fine. Okay, great. I think we had a little
20 thing, I was going to turn to Mike and Mike was going to turn to you, but we just
21 cut straight to the chase.

22 SUSAN LANGHORST: That's okay. Good morning. Thank you
23 very much for this opportunity to speak with you concerning the proposed Part 37

1 rule and on behalf of the Advisory Committee on the Medical Uses of Isotopes.
2 Next slide, please. Radioactive materials in medicine and research have
3 benefitted society and are essential for disease diagnosis, cancer therapy,
4 hematology research, and sterilization of blood and blood products needed for
5 transplant procedures. The costs to implement and manage the current
6 increased controls license orders have been substantial, especially in regard to
7 personnel resources. The ACMUI supports the NRC's efforts in establishing
8 reasonable security requirements for Category 1 and 2 sources. Next slide,
9 please.

10 The ACMUI is concerned that the proposed Part 37 rule adds
11 confusing requirements which may diminish security of Category 1 and 2
12 sources. For instance, the change from trustworthiness and reliability official to
13 reviewing official, and those associated requirements we discussed in the
14 stakeholders' panel. The requirements for judging a person's trustworthiness
15 and reliability have been greatly expanded with little justification provided on why
16 the expansion is needed, or how it results in the establishment of reasonable
17 security measures.

18 Medical licensees who have not previously been impacted by the
19 increased controls license orders will now be required to implement additional
20 security measures based on their license limits rather than their possession of
21 single Category 1 or 2 sources. Educating and inspecting these new licensees
22 will also impact the NRC staff resources, and may diminish their focus on
23 ensuring other security and safety compliance issues. It's unclear how licensees
24 will be held accountable in making sure their local law-enforcement agency

1 becomes and then remains involved in the licensee-security program. Next slide,
2 please.

3 The ACMUI is concerned that costs of the proposed Part 37 rule
4 have not been adequately considered in determining reasonable security costs.
5 It's not clear whether real licensee costs to date for implementing the increased
6 controls license orders were considered in these cost calculations. Category 1
7 and 2 sources associated with medical use vary in their source accessibility
8 within different devices, and accessibility to each device can differ between
9 licensees. Perhaps these differences can be used to move from the one-size-
10 fits-all to a more risk-based security model. Next slide.

11 The ACMUI is concerned that the ultimate impact of the proposed
12 Part 37 rule on medical licensees will be to increase the cost of diagnostic and
13 therapeutic procedures and further impede research and development of new
14 medical procedures that rely upon the use of Category 1 and 2 sources,
15 ultimately denying patients access to essential medical care. The proposed Part
16 37 rule does nothing to improve the security of radioactive sources that could be
17 introduced into the U.S. from foreign origins. The ACMUI believes the
18 requirements in the proposed Part 37 rule will impact most on legitimate medical
19 users of radioactive materials but provide little protection against actual external
20 threats. Next slide, please.

21 The ACMUI recommends NRC consider the following actions: If the
22 change from license orders to regulations is needed now, implement the existing
23 license-order requirements to minimize confusion and to maintain the already-
24 established and effective security levels for Category 1 and 2 sources during this

1 change. Next slide, please. Then begin work on developing strategic rule-
2 making, which may need changes in legislative authority, to develop the security
3 rule with a more risk-informed and performance-based security model. Next
4 slide, please. Again, I thank you for the opportunity to speak with you today. I'd
5 also like to recognize Ms. Debbie Gilley [spelled phonetically] and Dr. Daryl
6 Fisher [spelled phonetically], and their efforts in developing the ACMUI
7 comments on the proposed Part 37 rule.

8 CHAIRMAN JACZKO: I'll turn it over to you for a staff report.

9 MIKE WEBER: Okay, thanks. Good morning chairman,
10 commissioners. It's our pleasure to appear before the commission this morning
11 to talk about the current status of the Part 37 rule. As has been already pointed
12 out, of course, the comment period is closed and we're now in the process of
13 analyzing the comments that we've gotten. That will then lead to the working-
14 group review and ultimately steering-committee review, and that should all be
15 wrapped up so we can provide a draft final rule back to the commission by
16 December this year. I note that the discussion that took place in the question-
17 and-answer session sounds a lot like the discussions that have taken place in
18 working-group meetings, both on developing the interim compensatory
19 requirements as well as the interim controls, and will probably take place in
20 considering the comments as we go about developing the final rule.

21 Our briefing this morning will be led by Dr. Piccone, who will begin,
22 and then we'll hear from Merri Horn and Gary Purdy, and Merri is from the Office
23 of Federal State Materials and Environmental Management Programs, and Gary
24 is from the Office of Nuclear Security and Incident Response. And Terry Reese

1 is here to answer the questions.

2 [laughter]

3 So take it to Dr. Piccone.

4 JOSEPHINE PICCONE: Good morning chairman and
5 commissioners. I would like to start the staff's presentation by noting that the
6 staff considered the findings and recommendations of the independent, external
7 review panel. The Materials Program Working Group inspection findings and
8 lessons learned during implementation of the orders in the development of the
9 proposed rule. The staff also considered the findings of a retrospective review
10 on the implementation of the increased controls. Consequently, the proposed
11 rule language addressed not only the order provisions, but also the
12 recommendations of these working groups. Next slide three, please.

13 The staff will provide a summary of the major public comments
14 received on the proposed Part 37 rule, and then we'll discuss the rationale as to
15 why these provisions were included in the proposed rule. At this time, we are not
16 able to share the resolution of these comments, as the working group and the
17 steering committee are continuing their efforts on addressing the comments
18 received on the rule. The staff will then close with a quick look at the schedule
19 for providing the draft final rule to the commission. Before turning the
20 presentation over to Merri, I would like to recognize and thank the agreement
21 states for their active role and significant input on both the rule working group
22 and the steering committee. With that, I turn the presentation over to Merri, the
23 project manager for the rule.

24 MERRI HORN: Thank you. Slide five, please. The NRC received

1 a number of comments on the proposed rule. We had over 1900 individual
2 comments that the staff has thinned and summarized into approximately 320
3 comments that the working group is currently working on, evaluating, and
4 deciding what changes will be made into the rule. Some of them will result in rule
5 changes, some of them may not. But we are looking at all of those comments.

6 Slide six, please.

7 I'm going to cover some of the comments received on the proposed
8 rule. First, I plan to touch on some of the major issues, many of which you've
9 already heard about this morning, where many commenters raised a concern.
10 And then I'll touch on some of what I call the medium issues, where maybe we
11 had 12 to 20 commenters on a specific issue. Gary then will discuss the
12 rationale for the major issues. The major issues raised by the commenters were
13 not a surprise to the staff. In many cases, these were areas where the working
14 group or the steering committee were not able to reach agreement, and the
15 decision was, "Let's invite specific comment on those," and that is what we did in
16 many of these areas. And we got a lot of comment on these areas. We now
17 believe that we are positioned to go forward with the final rule. The first major
18 issue was the fingerprinting of the reviewing official. This is one of those areas
19 where we did specifically invite public comment, and we did receive it. Two
20 areas of concern here: one is who approves -- who actually does the review of
21 the fingerprinting, the reviewing official's fingerprints, and then how -- the manner
22 in which we had to require them to be fingerprinted, which was to allow them to
23 have unescorted access to either the material or to safeguards information.

24 Commenters objected to the NRC conducting the evaluation of the

1 reviewing officials. Some thought the licensee should do it; some just didn't think
2 we should be involved at all. Majority of agreement states, as Dave mentioned,
3 were opposed to approving the reviewing official. Some states did indicate that
4 they did not have the authority. Commenters objected to basing the approval
5 solely on the fingerprint record results because that's what was submitted to the
6 regulatory agency for approval. Commenters objected to the manner of which
7 requiring reviewing officials be fingerprinted. Many of the licensees do use our
8 HR departments to conduct the background investigation. Those usually seldom
9 include a need to have access to the material. Several of the commenters have
10 indicated that the NRC should obtain authority from Congress to avoid the work
11 around that was in the rule.

12 The next major issue, which you did hear this morning, which has
13 elements of the background investigation, another area where we specifically
14 invited comment. Most of the commenters focused on the requirement for a
15 credit history check and the local criminal history records check. The
16 requirement for a credit history check was the number one issue with
17 commenters across the board: that's the number one issue.

18 Commenters expressed concern with that with the current economy
19 many individuals had experienced credit difficulties. The commenters did not see
20 a correlation with bad credit and the likelihood to conduct malevolent acts.

21 Commenters expressed concern over the difficulty in conducting and the cost of
22 conducting the credit history, particularly for some of the individuals such as
23 foreign nationals and students.

24 Commenters expressed concern over the quality of the credit
25 reports and identity theft issues. They also viewed the credit history as an

1 invasion of privacy. Commenters did indicate that some states have laws that
2 prohibit employers from discriminating against employees on the basis of credit
3 history and that some states prohibit employers from inquiring about credit
4 history. Some states indicated they do not have or didn't know if they had the
5 authority to require credit history as part of a background investigation.

6 As for the local criminal history check, commenters addressed the
7 difficulty obtaining the information from other countries, in the case of a foreign
8 national, or for individuals that have moved around the country a lot prior to
9 where they're now working. Commenters requested -- questioned the value in
10 light of the FBI criminal history records check. They also requested guidance on
11 how to conduct the investigation and how to evaluate the information. Next slide,
12 please?

13 We also received a large number of comments on the LLEA
14 coordination requirements for permanent locations. These comments weren't
15 necessarily focused on any one particular area as they were with the temporary
16 jobsite. Basically they didn't see any value. Some noted that it was extremely
17 difficult to coordinate with the LLEA. Some questioned why an agreement was
18 necessary. Some commenters objected to the specific items to be addressed in
19 the coordination, specifically the requests that the LLEA notified a licensee is a
20 degradation of response capability. Some commenters expressed concern over
21 the LLEA's ability for protecting the information, and several commenters
22 indicated the NRC should train the LLEA.

23 We also received a very large number of comments on the
24 requirement to notify the LLEA for work at temporary jobsites, and this was for
25 work that would last more than seven days. Again, this was an area where we

1 specifically saws public comment. Commenters felt that the requirement was too
2 burdensome, unnecessary, that the 9/11 system was adequate for emergencies.
3 They noted that it can be difficult to determine who the LLEA is in some
4 jurisdictions, and many commenters did not think that the LLEA wanted the
5 information. Commenters noted that they frequently do not know three days in
6 advance of the need to work at a particular location. We did have one
7 commenter who actually who actually supported reporting work at all temporary
8 jobsites, not just those that were greater than seven days.

9 The last major issue that we got a lot of comments on was just -- it
10 was a generic issue. Basically they felt that the rule was too burdensome, that
11 we should just place the order requirements in the regulations. Commenters
12 expressed the review that the requirements were not commensurate with risk, did
13 not add to the security of the materials, that the new requirements should be
14 based on a documented deficiency. Some commenters expressed concern over
15 cumulative impact associated with the rule, the orders, the National Source
16 Tracking System, and the upcoming License Verification System. Some
17 commenters expressed concern that the rule would put some companies out of
18 business and could result in increased costs of diagnostic and therapeutic
19 procedures. Slide eight, please?

20 This slide contains some of the other issues that were raised by a
21 smaller number of the commenters. Commenters have requested relief or an
22 exemption for certain types of material that are potentially covered by the rule.
23 Primarily among these types of material would be decommissioning waste or
24 other types of waste that's stored at a facility like protective clothing, booties, that
25 might in the aggregate be a Category 2, and some materials that just very heavy

1 so it requires special equipment to move.

2 Commenters objected to the need to submit compliance information
3 that would indicate that a licensee is or is not implementing the Part 37
4 requirements, as most of them felt we already knew if the licensee was
5 implementing the orders. Commenters objected to the need for a training
6 requirement. Some commenters felt the requirements were too prescriptive,
7 some objected to the periodicity of the refresher training, and some simply asked
8 for clarification on who should receive the training. We also received a number
9 of comments related to the license verification system. In general, the
10 commenters were not so much opposed to the system, but they wanted to make
11 sure that it was tested and fully operational before they were required to use it.
12 Other commenters objected to the requirements to establish a no later than
13 arrival time for shipments of radioactive material. I believe Kate mentioned that
14 one this morning. And most thought this would be too burdensome and require
15 additional staffing. Gary will now cover some of the rationale for the major
16 issues.

17 GARY PURDY: I'm not sure which slide number we're on, 11, I
18 think?

19 MERRI HORN: You should be on slide number nine, I believe.

20 GARY PURDY: Nine?

21 MERRI HORN: Yes, slide 10, actually.

22 GARY PURDY: Slide 10, okay. Good morning, as Merri indicated,
23 I will be providing a description of the reasoning behind including the major
24 issues in the proposed rule. The proposed Part 37 will require licensees to
25 implement a comprehensive security program for the protection of Category 1

1 and Category 2 quantities of radioactive material. Part 37 uses a multilayered
2 approach that includes access control, detection assessment response, and it
3 includes transportation security requirements.

4 One of the issues was reviewing official fingerprinting. As the
5 chairman had stated before, purpose of this was that the reviewing official would
6 be making the determination of the trustworthy and reliability requirements for
7 individuals that would require unescorted access and, therefore, we felt that the
8 reviewing official should at least have the same background investigation as
9 those individuals. By not fingerprinting this individual, this may allow individuals
10 with criminal or terrorist ties to actually have unescorted access to radioactive
11 material because we won't have that information about the reviewing official he
12 would allow -- could allow other individuals to have that access.

13 Another part would be the regulator reviewing the reviewing official
14 criminal history records. The intent of this was to provide an independent review
15 of the reviewing official's criminal history with a goal of eliminating the good faith
16 assumption that the licensee has chosen a reviewing official that doesn't have an
17 adverse criminal history or known terrorist ties. Some of the orders that we have
18 currently under NRC orders have this requirement already. The ICs don't.

19 The credit history, this provides a -- the purpose of this was to
20 provide an indication of the individual's susceptibility to bribery and becoming a
21 passive or active insider. However, poor credit history should not be used as an
22 automatic disqualification. If an individual does have a poor credit history, they
23 should be investigated during the interview process. This should be brought out,
24 and maybe as it was discussed earlier maybe this individual just has a poor
25 credit history because he's just trying to feed his family. It may not mean that

1 he's not trustworthy or reliable. The information from the credit history should be
2 used just as another data point for making that trustworthy and reliability
3 determination. Also if the individual believes that their credit history is incorrect,
4 they will be given the opportunity to correct to that -- their history.

5 The local criminal history check was put in there because the local
6 criminal history report contains all crimes that occurred in the jurisdiction. The
7 FBI record may only -- contains federal crimes or major crimes, so this may admit
8 [spelled phonetically] information that's important for the TNR [spelled
9 phonetically] determination. For example, the local criminal history record may
10 indicate that an individual has a substance abuse problem. This person may be
11 trustworthy but are they really reliable to implement the security requirements of
12 the licensee's program?

13 Additional, there's often a delay -- or not often -- but there can be a
14 delay in the information getting from the LLEA to the FBI. In that case, someone
15 may be committed a crime and it not show up in the criminal history of record.
16 Also there is often a case where the disposition of the offense is not always
17 provided to the FBI. And the section 149, the Atomic Energy Act, does not allow
18 offenses that are over one year old without a disposition to be considered in the
19 TNR determination.

20 LLEA coordination, the purpose of this is establishing a liaison with
21 the LLEAs to obtain a fast response. A fast response is -- by law enforcement is
22 an integral part of the Part 37 protective strategy. During the coordination, this
23 provides the LLEA with an understanding of the potential consequences and so
24 that the LLEA can appropriately determine the priority of its response. Specific
25 requirements for the coordination were added to 37 to improve the coordination

1 effort. It is important to note that all the requirements -- all the items are requests
2 from the LLEA, they are not requirements. Obviously we have no authority over
3 the LLEA.

4 The final item was the LLEA notification of temporary jobsites.
5 Again, the purpose here was to inform the LLEA of the presence and location of
6 radioactive material with the goal of obtaining a fast response from the LLEA.
7 The ICs do require coordination at fixed locations, but not at temporary jobsites,
8 and a retrospective review of the ICs found that this could be a potential gap in
9 security, so...

10 MERRI HORN: Slide 11, please? The final rule is currently due to
11 the Commission in December of this year, and which I don't anticipate having any
12 problems with meeting that. And hopefully we can get it up there a little earlier
13 than that. As part of the package we will also be providing an implementation
14 plan. That implementation plan will specifically address how we plan to withdraw
15 [spelled phonetically] or withdraw the orders that currently exist. So it is our plan
16 to do that, and we will address it in the package.

17 We also plan to publish the implementation guidance around the
18 time that the final rule is published. We had it out for public comment at the
19 same time with the rule, and I know the stakeholders really appreciated that
20 because it did have some additional information in there. And the idea is that it
21 will be published within a month or so. The publication hoops that you have to go
22 through are a little bit different. So while it will be ready, it may not actually be
23 published yet. And with that, the staff concludes our presentation and are
24 available to answer questions.

25 MIKE WEBER: Terry's [spelled phonetically] ready for your

1 questions.

2 [laughter]

3 COMMISSIONER APOSTOLAKIS: Thank you. The message I got
4 from the previous panel is that they would rather stay with the existing orders
5 than move to the rule as it is now. Why don't we do that? Why do you think we
6 ought to move to the rule? Stay with our orders. Everybody's happy except you,
7 maybe.

8 MERRI HORN: Yes, everyone would be happy except the staff.
9 We have identified lessons learned. I mean, there were things during the
10 implementation that were issues. The independent review panel had some
11 recommendations. The materials working group had some specific
12 recommendations where they identified what they felt were potential gaps, and
13 what we're trying to do in the -- what we tried to do in the proposed rule was to
14 address those things and close those gaps. Now, you could disagree on the
15 level of detail in some of the areas, but we thought those were the things that we
16 thought were necessary. In some cases, we included them because we couldn't
17 reach that agreement, and that's why we sought specific input from the public on
18 some of those areas, to help us make those final decisions.

19 MIKE WEBER: I would only add that what you're seeing is the
20 difference between the rulemaking process and the order process. You know,
21 when we developed the orders, while they were developed in coordination with
22 key stakeholders like the agreement states, we were in a hurry to get those
23 security controls in place. Now we're in a more thoughtful, reflective approach
24 where we're seeking comment from a broader range of stakeholders. And so
25 we're getting feedback from licensees, we're getting feedback from grievance

1 states, we're getting feedback from the venders, so it represents a more robust
2 discussion about the pros and cons. And I think beyond that, as Mary pointed
3 out, and I think Josie [spelled phonetically] pointed out, you know, we did look
4 back at the lessons learned from the implementation of the inner measures. And
5 our security experts tell us that there are certain vulnerabilities that we currently
6 have that we would like to resolve and resolve in a way that provides for a
7 durable regulatory framework, and the best way to do that is through rulemaking.

8 TERRY REIS: If I may, I think the Chairman was the only
9 commissioner here back in 2007 when all this started. We had the action plan in
10 response to the GAO [spelled phonetically] activities, and one of the primary
11 directions out of that was to commission an independent external review panel,
12 and we did that in the winter of 2007, spring of 2008. They finished in spring of
13 2008, and that board was a program director -- former program director from the
14 State of Georgia, an individual from the ACNW, Dr. Michael Ryan, and then
15 somebody from -- I forget the military -- Benjamin Nerude [spelled phonetically] --

16 MALE SPEAKER: Ditra [inaudible].

17 TERRY REIS: Ditra, thank you. And they came up with eight
18 multipart recommendations, but all those recommendations surrounded three key
19 themes. And that was, number one, wherever you can, suspend the good faith
20 presumption; number two, the answer to counterfeiting is an electronic solution,
21 so build the license verification system; and then number three was to take all
22 your infrastructure documents and integrate security, as Michael Ryan said
23 repeatedly, as the third leg of the three-legged stool, public health and safety, the
24 environment, and now security. So largely, in response to number one and
25 number three, that is the direction we took upon this rule, because that was the

1 commission direction in response to that independent, external review panel
2 report. Thank you.

3 COMMISSIONER APOSTOLAKIS: But do you think -- I mean,
4 there was a complaint that the present rule is, you know, one size fits all, and
5 that's bad, as opposed to the orders that were, you know, maybe risk informed
6 and so on, do you think that's true?

7 GARY PURDY: I'll take that one. No, I don't think that they are one
8 size fits all. What the rule requires, as did the orders, were the fundamental
9 security requirements of access control, detect assess, respond, and some
10 transportation requirements. All the rule -- all the orders had those same
11 requirements. We used those same fundamental requirements from the ICs all
12 the way through reactors. It's how the licensees implement those requirements
13 that are different, and that's how the graded approach comes in. During -- with
14 the current rule, licensees are able to tailor their security program for their
15 specific facility, and that's how the ICs were designed.

16 COMMISSIONER APOSTOLAKIS: And they would be able to do
17 this even after the rule becomes --

18 GARY PURDY: Yes, they should be able to take their documented
19 program, and say that's their security plan, and move forward, and make
20 adjustments that -- from the differences in the programs, but they should pretty
21 much be there already. They don't have to start from scratch.

22 MERRI HORN: In many of the requirements for detect and assess,
23 there are options. It's -- you can do this, you can do that, you can have
24 equipment, you can do direct surveillance, there's a number of different ways,
25 and we're not dictating the particular method that any given licensee chooses.

1 So in most cases, the method that they're using now will still work under the
2 proposed rule. I can't say that's 100 percent across the board. There might be
3 an exception somewhere, but for the most part the basic measures that you're
4 using to detect and delay, those things would still be the same.

5 Now, we do have additional requirements. We do have a training
6 program requirement that wasn't included in the orders. We do require a
7 maintenance and testing of the equipment. We'd actually like it to be operable if
8 you're going to be using it. There was no requirement that addressed that in the
9 orders.

10 There are some things that are a little more controversial like the
11 reviewing official fingerprinting and the credit history. But the other things are
12 more -- we're requiring procedures in a number of areas. The orders require
13 procedures in some areas, but not across the board. We're requiring to actually
14 have a security plan. That wasn't a requirement, it was you had to have a
15 documented, written program, but now we're saying we want you to have
16 procedures and an actual plan. In many cases, what they had may very well
17 meet the requirements. In some cases maybe they'll have to do a little bit more,
18 slap a label on it, as Gary says.

19 But many of those requirements, we think are necessary. There's
20 more nuance ones like we -- the signed consent versus a verbal consent for
21 conducting the background investigations, so there's a few things like that, that
22 we've added that are new. But we also think that they're a good idea.

23 COMMISSIONER APOSTOLAKIS: So final rule comes before us,
24 the disagreements will still be there. I mean, why are they complaining? They
25 don't understand these things, or there is miscommunication, or we just have to

1 accept the fact that, you know, the regulated and the regulators disagree?

2 MERRI HORN: There's always some disagreement. In some
3 cases I think that there -- there is not a clear understanding of what a particular
4 requirement meant, and in that case, we will clarify the language a little bit, add a
5 little more guidance. In some cases, there's just new things, and when they
6 increase control orders came out there was resistance against those too so it's
7 that same type of process. Anytime you're changing something there's some
8 resistance.

9 COMMISSIONER APOSTOLAKIS: Okay, thank you.

10 CHAIRMAN JACZKO: Commissioner Magwood?

11 COMMISSIONER MAGWOOD: Thank you, and thank all of you for
12 your work on this I know must have been an interesting experience going through
13 this the last few years. I don't have a lot of questions for you I'm just looking
14 forward to getting the final rule and working with you once we have that. I would
15 like to sort of score one issue. The issue of reviewing officials seems to be a
16 very emotional one because I sort of have this picture in my mind that there's,
17 you know, some nice lady who has been doing this for the last several years and
18 looking at files or whatever they use to check these backgrounds now, seeing the
19 information on NRC or their local law or whatever happens. And now this
20 person, this nice lady would have to now go through the fingerprinting and the
21 background check and have the same kind of access control as the people who
22 we're handing materials. One could see how that would be a very big change for
23 small organizations and I appreciate your comments, Gary, and also the
24 chairman's comments earlier that it simply makes sense that the person that is
25 making those checks would have the same kind of vetting.

1 When I was listening to you speak I thought of course that makes
2 sense, but then I thought well wait a minute does it really make sense because I
3 just want to challenge this I don't -- I'm not taking this particular point of view I
4 just want to hear you talk about it. I mean if the process is implemented correctly
5 and you know the fingerprints and whatever else is going to the appropriate
6 authorities and is checked, and vetted appropriately and all the paper is tracked
7 correctly, what is the vulnerability that's presented by this person who's actually
8 handling this paperwork?

9 GARY PURDY: Well, yes, currently there is a process for the
10 individual to go through somewhat of a background check but they don't have to
11 do the fingerprinting portion. And what you're getting from the fingerprinting
12 portion is the major crimes, the federal crimes, and it's a terrorist background
13 check also is involved with that check. So by not having that piece of a check
14 you're not sure if this person has major criminal ties or terrorist ties, and since
15 they are facilitating access or granting unescorted access to an individual they
16 could be taking a look at somebody who's background history doesn't measure
17 up and they could allow that person to have unescorted access and therefore
18 defeating the security program.

19 COMMISSIONER MAGWOOD: But wouldn't information on those
20 individuals still go -- are you suggesting they would find a way of circumventing
21 the process, I mean, exactly where would the vulnerability take place? That's
22 what I'm trying to pin down. Is it in, perhaps, submitting information as false
23 information. Is that the concern?

24 GARY PURDY: They could be -- pieces of the background check
25 that they have, but they are not getting the criminal history or the terrorist watch

1 list portion. They could be here in this country for a while and have employment
2 history, have educational history, all the other requirements, but they still may
3 have ties, they may be on a watch list somewhere that the licensee would not be
4 aware.

5 COMMISSIONER MAGWOOD: Right, no I understood that. I
6 mean, in the case of let's say this person did not go through a background check.
7 Let's say this person, I don't know --

8 GARY PURDY: The reviewing official?

9 COMMISSIONER MAGWOOD: The reviewing official, you know,
10 had links to Al Qaeda or something. I say that, but I don't think this nice lady
11 would do that but let's say we found this out. What would this person do in the
12 reviewing official capacity that would circumvent the process, where would the --

13 GARY PURDY: This person, the ones that's reviewing -- if I want
14 unescorted access to this material I'm putting in all my background investigation
15 and the fingerprint results and all that will go to you. It would be your job to look
16 at my background and make sure that I'm okay. Well, if I have terrorist ties of
17 course I'm probably going to pick somebody that has a clean background but I
18 know this so I'm going to have my friends say that it's okay for this individual to
19 have unescorted access and therefore they will be able to circumvent some of
20 our security requirements because they will be allow to enter that room, turn off,
21 at least some of the security requirements, depending on what system you have,
22 but it gets them one step closer to the material.

23 COMMISSIONER MAGWOOD: This is very helpful, so what you're
24 saying is you could send the fingerprints off to the FBI, have it come back and
25 say, you know, Joe Peterson is an Al Qaeda operative?

1 GARY PURDY: If the records come back for that individual that
2 they actually hit a terrorist watch list then that may go down a different road.

3 MIKE WEBER: They'll trip other flags.

4 GARY PURDY: They'll trip other flags, but if they're going to
5 choose someone who's affiliated with them, perhaps someone from this country
6 who has no ties, does not have known ties and they know that that this individual
7 may want to give them unescorted access.

8 COMMISSIONER MAGWOOD: Okay, so that's really -- the point
9 isn't so much that it's the handling of the information it's the intent of an
10 organization of approach. It's a conspiracy theory.

11 GARY PURDY: Right, this individual could potentially allow
12 individuals with criminal ties or terrorist ties to have unescorted access.

13 COMMISSIONER MAGWOOD: But since the kind of ties you're
14 talking about would not show up on a background check otherwise it would be
15 flagged.

16 GARY PURDY: That's possible, yes.

17 COMMISSIONER MAGWOOD: So you could still go through this
18 and have people in place who have these things?

19 GARY PURDY: That is possible but this is another -- this would be
20 one method of closing one potential gap. At least you're taking this piece away
21 that you know your reviewing official is trustworthy and reliable. He's been
22 determined that through the federal --

23 COMMISSIONER MAGWOOD: You think that.

24 GARY PURDY: You think that.

25 COMMISSIONER MAGWOOD: You have evidence that they're

1 not.

2 GARY PURDY: But you know that at least they don't have any
3 known terrorist ties, they may have that in their heart and you won't be able to
4 detect that yet.

5 TERRY RIES: Commissioner if I may. Gary said everything but it
6 goes back to this direction that we receive to remove the good faith presumption.
7 That's what it boils down to.

8 COMMISSIONER MAGWOOD: Thank you. Thank you.

9 CHAIRMAN JACZKO: Commissioner Ostendorff.

10 COMMISSIONER OSTENDORFF: Thank you Mr. Chairman. I
11 also want to thank your presentations today, I realize there is some, perhaps,
12 some disagreements between this group and the previous panel but I do
13 commend each and every one of you for your outreach to stakeholders. I think
14 as Commissioner Svinicki indicated the background materials there has been a
15 fulsome opportunity for stakeholders to comment and I commend you for
16 providing that opportunity.

17 Let me ask Dr. Piccone a question, I think Commissioner
18 Apostolakis got maybe part A of this and maybe he's also getting part B but it
19 dealt with the suggestion that has the staff considered leaving the existing orders
20 in place as opposed to moving into a rule. And I wanted, maybe, just a
21 modification of that, has the staff considered, as we heard from the first panel
22 pros and cons of taking the existing orders, rolling those into regulation, in a part
23 one effort? While looking at a part two effort for these enhanced controls, has
24 that been evaluated or thought about?

25 JOSEPHINE PICCONE: Commissioner that has just come up in

1 the comments to the proposed rule so I do not believe that that was a
2 consideration in the development of the proposed rule.

3 MERRI HORN: No, it wasn't and I'd like to add there's really not a
4 lot of benefit to doing that. The orders are in place now so you basically you're
5 just keeping the current system. So if all you're going to do is place the exact
6 requirements from the orders into the rules you wouldn't need that one step.
7 What we've done is gone directly to step two, we're evaluating those
8 enhancements that we think are necessary based on the lessons learned,
9 problems with implementation, the retrospective look, and other issues and
10 potential gaps that have come up as we've been evaluating things. So we really
11 are already at step that step two if you will, we just went directly there.

12 COMMISSIONER OSTENDORFF: I understand that, I'm just
13 saying we heard a lot of conversation from the first panel on this topic so I was
14 just curious to what extent there had been dialogue on that. Dr. Langhorst on her
15 slide four and I refer to your slide then ask a question to the staff here. I had
16 some questions concerning cost estimates and did not believe necessarily that
17 the NRC staff's cost estimates reflected the actual experiences of the licensees
18 to date in implementing the existing orders. Can somebody here, and I defer to
19 Dr. Piccone as to who might address this question, but discuss perhaps the
20 methodology that was used to look at cost and try to help educate us on how that
21 was looked at.

22 MERRI HORN: The cost of the regulatory analysis, but basically
23 based on staff judgment our understanding of what licensees did. It does not
24 reflect every single licensee because it is not a one size fits all; you have very
25 large licensees, you have very small. We did also get a few comments based on

1 what their estimated costs for implementing the orders, and we were right on the
2 money. We're very, very close, within 1,000 or so. So it depends on who the
3 commenter is. We will certainly be looking at all of the cost estimates that we
4 were given, and when we finalize your regulatory analysis, we'll be factoring
5 those things into it.

6 COMMISSIONER OSTENDORFF: Mr. Weber had commented on
7 vulnerabilities under the current framework. I think, Mike, that was what I
8 understood from your comment. And it's my understanding, and correct me if I'm
9 wrong in this, that when the original post 9/11 increased controls were put in
10 place, those were done so pursuant to formal vulnerability assessments. Am I
11 correct in that understanding?

12 GARY PURDY: Well, yes, we did have -- Sandia National Labs did
13 perform some vulnerability assessments. And the requirements -- we did take
14 those into consideration when we developed the increased controls, so -- yes.

15 COMMISSIONER OSTENDORFF: So can you talk about the role
16 of vulnerability assessments in the current proposed enhancements?

17 GARY PURDY: Of the -- because of as we said that the imposed
18 enhancements were not necessarily a part of the vulnerability assessments,
19 they've come after, we have learned -- lessons learned from after we -- the initial
20 development of the increased controls, the vulnerability assessments went out,
21 looked at several -- a variety of licensees, and had different scenarios for
22 different types of adversaries. And if we implemented this type of security, this
23 was our -- you know, [unintelligible] percentage of that -- they'd be interdicted and
24 it gave us a cost estimate for certain security measures, and those were
25 incorporated into the increased controls and carried forward into the Part 37 rule.

1 COMMISSIONER OSTENDORFF: Okay, but I'm trying to
2 understand for some of the -- and I'll get to two specific examples here -- let's just
3 take credit history and the local law enforcement agency notification piece, I'll just
4 use those as two examples; can you help me understand how those two
5 enhancements were analyzed under some methodology to see what's the value
6 added from a security perspective to those changes if they did become
7 regulation.

8 GARY PURDY: [unintelligible] as stated, local law enforcement --
9 fast response from local law enforcement is integral for this to work. If they don't
10 -- you can have all the security in the world and if nobody responds, it's not any
11 good. And originally when we developed the increased controls, we've looked at
12 it just from a physical site standpoint, that the coordination, you can do that,
13 which was -- there is a bit to coordination, showing LLEA your site, discussing
14 the security plan, those sorts of issues, at that time we thought it was too
15 burdensome to require coordination efforts for jobsites away from a fixed facility.
16 You don't know that much and you may not know anything about the site that
17 you're going to. You'll have a generic plan but you don't -- you won't know
18 specifically where you're going and how long you're going to be there, various
19 sorts of things.

20 In the retrospective review of the ICs, it was considered that this
21 was a potential vulnerability for temporary jobsites that we may not get the fast
22 LLEA response that we need in order for this to work, and so the idea, "Well, how
23 do we do this without going through all the burden of trying to coordinate?" And
24 so we came up with the idea of notification where basically we inform the LLEA,
25 whoever that may be, which again we understood from the beginning that this

1 may be difficult and that's why we had very -- quite a few questions on this
2 particular subject, let them know where you are, what you have, and that you'll be
3 requesting a response -- an armed response if I need it. And that was just
4 basically the point of that so that the LLEA can then have enough information
5 where they can prioritize their response, their requests.

6 COMMISSIONER OSTENDORFF: Can you comment very briefly
7 on what kind of reaction you've gotten, staff's outreach, NSR's [spelled
8 phonetically] outreach to LLEA activities, to see did they agree that this advance
9 notification would enhance their ability to respond?

10 GARY PURDY: As part of the rulemaking process, we haven't
11 done outreach to LLEA. We did have an LLEA -- we had a conference with the
12 Western Board of Governors, and we did a webinar with the regulators, and I
13 believe that there was one LLEA who just asked, "What do you mean by 'local'?"
14 And that was about the only response. He wanted to make sure, "Is it us that
15 you will be looking for us to respond on this issue?" But, you know, we hadn't
16 done outreach [unintelligible].

17 COMMISSIONER OSTENDORFF: [unintelligible] it makes sense
18 that an agency would be better able to respond if they have full knowledge of the
19 activities that are being carried on at a site, but that's just something you might
20 want to think about. Last question I'll ask, and I guess I'll ask this of both either
21 Merri or Gary, however you want to handle this one, with respect to the credit
22 history piece, I know a lot of discussion on that, are there anecdotal or is --
23 examples or is there empirical evidence that any changes in that particular area
24 would in fact enhance the assessment of who is trustworthy or not?

25 GARY PURDY: Well, this -- the purpose of the credit history was to

1 provide a more comprehensive view of the individual's background. And I'll throw
2 this out, but it's not to applied by materials licensees in the way that we do it in
3 the federal side. When I was going for my Q clearance and I had a discussion
4 with the investigator from the Office of Personnel Management, and from the
5 federal side the credit history is the number one reason why you don't get a
6 clearance. And so it is an important factor. Now, again, I'll reiterate that the
7 licensees should not use this as something that -- a go-no-go. They need to take
8 into account all the mitigating factors in the interview process with the individual
9 who's applying for unescorted access. It needs to be just one piece of the puzzle
10 for them.

11 COMMISSIONER OSTENDORFF: Thank you. Thank you, Mr.
12 Chairman. [unintelligible]

13 COMMISSIONER SVINICKI: I want to thank all of you for your
14 presentations. And, Merri that was really a wonderful piece of news to hear that
15 the implementation plan that will be developed would include a proposal to
16 rescind the orders. Having said that, though, then I feel like I need to give a
17 different perspective on something else that you said I think in response to
18 Commissioner Ostendorff, you said there's no value in putting the orders into our
19 regulations if you're just taking exactly what's in the orders and putting it into the
20 regulation. I disagree with that because I think if the regulator has decided that
21 the enduring requirements on this class of licensees is going to be X, whatever X
22 is, that I don't think that it is recommended to regulate through the form of orders
23 for long periods of time. I think that orders are there in order to do something
24 quickly.

25 But I also take your point that it's very unlikely that the outgrowth of

1 a rulemaking process when you look at the underlying requirements for doing
2 rulemaking, which is to have an open process where we are open to the
3 comment rooms, we -- it has to be some sincerity about willing to look at what we
4 put in a proposed rule. That's why the Administrative Procedures Act exists, so
5 that this can be an informed process. So given that the openness of that
6 process, it's unlikely that you would end up with a final rule that would look
7 exactly like what you started with. And if you do, I think a lot of the stakeholders
8 are going to be scratching their heads about how sincere you were in the APA
9 process that you were legally required to do.

10 But I just thought that, you know, I wanted to add my two cents to
11 that. I understand that you're saying it would be a very rote exercise, but I don't
12 think we want to regulate through orders over the long term. So I just wanted to
13 add my two cents on that.

14 I was curious about something that David Walter had mentioned on
15 the first panel, and I realize that it's a bit -- I don't like forming general views
16 based on anecdotes, but I thought it was interesting in that it was something I
17 hadn't considered. We've been talking about the fingerprinting of the reviewing
18 official -- as I think the chairman's term was a "work around," I think the staff used
19 that term as well -- given the fact that if NRC were to try to go and get legislative
20 relief, that's not something we're going to be able to do quickly. But what Mr.
21 Walter mentioned was a circumstance and maybe I'll return to Commissioner
22 Magwood's nice lady, although he kept kind of pointing at me. I'm not called that
23 very often, so --

24 [laughter]

25 -- but then he said, "The nice lady has ties to al-Qaeda," and I wanted [inaudible]

1 --

2 [laughter]

3 -- my chair over towards the Chairman, but -- so the nice lady in HR who's been
4 doing this function for some time then we would, through this work around, then
5 enshrine the need that the individual that does this has to have unescorted
6 access. If the nice old lady -- oh, she wasn't old in your example, I'm sorry.

7 [laughter]

8 I'm really internalizing this. But if the nice lady has some sort of covered
9 disability under the Americans with Disability Act -- now that law requires
10 employers to make reasonable accommodation -- if to fulfill her duties she
11 doesn't really need escorted access and yet that would disqualify her from
12 performing this function, so the employer has a legal obligation to make an
13 accommodation, the employer knows she doesn't need it: unescorted access
14 and yet would have to eliminate her consideration for doing these duties. And
15 again, so this is highly anecdotal. But I'm just curious if that would be a form of
16 kind of "We are enshrining in regulations an illegal discrimination against
17 individuals with physical disabilities?" Is that something that OGC has analyzed?

18 [laughter]

19 STEPHEN BURNS: I haven't analyzed that.

20 MALE SPEAKER: Nor have we asked.

21 MERRI HORN: No. Well, we actually have -- there are some
22 issues in the public comments that have addressed these sorts of issues. And
23 many of those comments have been referred to, as you see, we don't have
24 responses back yet, so they're in the process of developing some of those. But it
25 is a concern. I mean, this is not the ideal situation. If we could do it any other

1 way, we would, but --

2 COMMISSIONER SVINICKI: Well, again, our regulation cannot
3 encompass statutory obligations, so if there's a fundamental irreconcilable
4 problem there, then, but it sounds like you've already received that comment and
5 you're working it through the legal review, so I'll look forward to whatever analysis
6 you put forward, ultimately. Another thing that was in your presentation, Merri, or
7 Gary, and Terri [spelled phonetically], I'm not sure --

8 [laughter]

9 Is there a requirement to have a rhyming name to work on this, but
10 --

11 [laughter]

12 GARY PURDY: It was just to confuse you.

13 COMMISSIONER SVINICKI: Okay, but your commenters --

14 CHAIRMAN JACZKO: Josie, too, so you get Josie --

15 FEMALE SPEAKER: Josie.

16 CHAIRMAN JACZKO: Josie, Terri, Merri, Gary. Have we got, if we
17 can call you Josie?

18 JOSEPHINE PICCONE: Yes.

19 [laughter]

20 COMMISSIONER SVINICKI: Commenters requested guidance on
21 evaluating information, so this gets a little bit -- it's my take on an issue that other
22 commissioners have raised with you, which is, we talked a lot about the credit
23 history and, again, you know, we all know, and Gary, I appreciate you mentioned
24 that it is something for federal employees, we all know, it's well-established that
25 there is some level of relevance between trustworthiness and credit histories.

1 And again -- but you -- I appreciate you mentioning that we're not suggesting that
2 this be implemented in the same way that it is on the federal side, but I just
3 thought it was interesting. So I think, in terms of kind of looking at investigatory
4 expertise and that body of knowledge, I think that that's pretty well-established.

5 But what I do think is interesting is that if we're, as the regulator,
6 going to put in place a requirement to look at credit histories, I think it is fair, and
7 we heard from the other panel, they want to know -- and it was so bluntly put in
8 somebody's written comments that they didn't cover today, but it said, "What is
9 the FICO score, what is NRC's expert guidance on the FICO score below which
10 someone is no longer trustworthy?" And so, I think that it will be hard to put in
11 place a requirement saying look at credit histories, they're relevant, and yet it's a
12 jump ball, and we're going to leave it entirely up to you. Now we heard from Mr.
13 Cargill, I think it was, that they prefer to have the ability, because they know
14 these individuals and it's their employees, they want to be able to look at it. But
15 how will the staff approach developing guidance on how to make these
16 adjudications and evaluations? What level of detail, is the FICO score numbers
17 that ridiculous as a level of guidance that we would provide?

18 GARY PURDY: Again, we won't put in a score. We won't say,
19 what is, what's the number below which you cannot have unescorted access?
20 And this goes back to another issue that we've heard many times, that people
21 essentially want criteria, they want a check box. And, in our opinion, that's not
22 the appropriate way of doing a background investigation. There are mitigating
23 circumstances where an individual may have poor credit history and be perfectly
24 trustworthy and reliable. If we put it as a check box, then it becomes a no-go
25 situation, as, maybe, we do in the federal side.

1 It's a data point that needs to be worked together when we get a
2 complete history of the individual and you need to make a determination based
3 on that. We do have guidance developed that gives them ideas -- licensees
4 ideas of what to look at when you're doing a background investigation. But we
5 do not have any plans, at this time, to provide any check box to the licensees.
6 We think that, one, that would leave a lot of individuals perhaps to be determined
7 not to be trustworthy and reliable. You have different industries that have
8 different people that are involved in those. In some industries, you may have
9 people with criminal histories, minor criminal histories, in other industries, people
10 have no criminal history whatsoever.

11 COMMISSIONER SVINICKI: Well --

12 GARY PURDY: But to the, it's up to the judgment of the licensee to
13 make that determination.

14 COMMISSIONER SVINICKI: And I understand the desire on the
15 part of those who might want a check box to have NRC provide that. I also
16 understand our reluctance to do that. But I would suggest to you, if it, if I'm in
17 agreement state, and at some point I'm going to come out, NRC will come out
18 and do an IMPEP review of me, and they'll find out that in my state, in general, I
19 have allowed the reviewers to consider, you know, this kind of a credit history's
20 acceptable, and in other states, people have a higher standard, and I somehow
21 have findings that my program is not as adequate.

22 So on the one hand, if we want to enshrine a requirement, I think
23 that we will ultimately assess the programs, whether it be through an IMPEP or
24 something else. And I think that anytime I'm being assessed, I kind of like to
25 know what I'm ultimately going to be assessed against. So I think that their

1 comment in asking for that type of guidance is fair, and I think something
2 between nothing and a check box is probably going to end up being the right
3 answer. But I think, to impose it and not want to give them a clear sense of what
4 we're going to find adequate is, I think, not really fair to them, in my view.

5 GARY PURDY: Well, what we're doing currently, under the orders
6 that are now issued, we're not making any determination whether we think your
7 steps, and your routine, and our process are adequate. We're making sure that
8 licensees are following their program, and documenting appropriately, and
9 making their decisions based on the program that they have developed.

10 COMMISSIONER SVINICKI: Well, but my sense of that, though, is
11 that, you know, this new proposed rule would add some level of specificity and
12 add some additional details. And I think that's why we're getting the comment
13 we're getting, is, with the orders, they were able to come in with something more
14 general or stylized from what they wanted to do. But we're moving through a
15 rulemaking process now where we're adding some levels of specificity. And I
16 think if they have to do a specific step, they need to know what is an adequate
17 implementation of that step. And, again, I don't think I'm disagreeing with
18 anything you're saying. I think it's a level of detail question.

19 GARY PURDY: Verify that in the guidance.

20 COMMISSIONER SVINICKI: Okay. Thank you. And I think, I think
21 that was all I had. Thank you all very much.

22 CHAIRMAN JACZKO: Well thank you. I, just note, I don't, I
23 appreciate Commissioner Svinicki's point. I don't think this isn't any different than
24 what we do with the fingerprints. It's the same issue. Your fingerprint check, you
25 may run, you know, is it three misdemeanors and two felonies, or is it one

1 misdemeanor and no felonies? It's exactly the same issue. There's no
2 difference with the background check, I think this is a red herring, we're getting
3 caught up in an issue that is a long-standing issue. Licensees, when they got the
4 increased controls, complained that they did not get criteria for the adjudication of
5 the trustworthiness and reliability. It's not a new issue.

6 It's simply coming up again because we're putting in a new modality
7 for information collection. But it continues to be the same problem, and licensees
8 have learned to do it under the increased controls. But we cannot impose a
9 standard in the regulation to do this, and nor, I think, have we found that IMPEP
10 programs have suffered because there is not a clear guidance under the criteria
11 for the trustworthiness and reliability. It is, invariably, a subjective determination.
12 It will always be a subjective determination, and is a challenging one because of
13 that.

14 But, again, I want to thank everybody. I think this has been, this
15 has been a long effort. I think if we look from 2001 it was really the precipitating
16 event for all of this effort. There has been a tremendous amount of work that's
17 gone in. My colleague, Commissioner Ostendorff, asked about the issue of
18 vulnerability assessments, and there's a lot of things that, you know, at this point,
19 we take for granted that's built in, we're only talking about categories one and
20 two, that was fundamentally a vulnerability assessment that determined that
21 those were the two categories of sources for which we should impose any type of
22 order. Three, four, and five don't currently have any control.

23 So that's almost an assumption that we've glossed over, but that
24 came out of the initial vulnerability assessments that got us to this particular
25 stage. So there's a lot that's in there. Terri talked about the results that we got

1 back from the independent review panel, which was a post-event analysis we
2 based on a GAO Sting that I'm not sure -- if all of you haven't looked at, it's
3 probably worthwhile reading. And it was very easy for people to obtain material,
4 albeit it was material at a very low level. But they were able to obtain material
5 very easily under fraudulent purposes, or under fraudulent names. And it was an
6 embarrassment for the agency; it was a good day for the agreement [spelled
7 phonetically] state of Maryland.

8 And, you know, that was not something that we found acceptable.
9 And that led to a lot of what we're seeing today. So there's a long history, here,
10 this isn't something that just materialized yesterday. And so, I think you've all
11 done a very nice job putting together, I think, a very good rule. There's been
12 tremendous communication, I know communication will continue with the working
13 groups. And hopefully we can come to some good consensus on these issues.

14 I think they're important issues, these enhancements. I don't think
15 the answer is as simple as just saying, "Let's stick with the orders." If we did that,
16 we probably wouldn't have the orders, because I think at the time of the orders,
17 people said, "Don't do the orders." So, you know, somewhere in there, there's
18 probably some reasonable ways to deal with these issues. But I appreciate your
19 presentations and look forward to the final rule of the commission. Thank you
20 very much, appreciate it. We're adjourned.

21 [Whereupon, the proceedings were concluded]